



**THE UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION
LUCKNOW**

Petition No. 1941 of 2022

QUORUM:

Hon'ble Shri Arvind Kumar, Chairman
Hon'ble Shri Vinod Kumar Srivastava, Member (Law)
Hon'ble Shri Sanjay Kumar Singh, Member

IN THE MATTER OF:

Petition under Section 86(1)(b), Section 86(1)(e) and Section 86(1)(f) of the Electricity Act, 2003 read with Article 12 of the PPA dated 12.02.2019 filed on behalf of M/s Tata Power Renewable Energy Limited, seeking approval of the cost incurred on account of imposition of Safeguard Duty for the period of 30.07.2020 to 29.07.2021 on the import of solar cells vide Notification No. 02/2020-Customs (SG) dated 29.07.2020 issued by the Ministry of Finance.

AND

IN THE MATTER OF

Tata Power Renewable Energy Ltd. (TPREL),

Corporate Centre, A Block, 34, Sant Tukaram Road, Carnac Sunder, Mumbai- 400009

..... **Petitioner**

VERSUS

1. U.P. Power Corporation Ltd., (UPPCL)

(Through its Managing Director),
Shakti Bhawan, 14 – Ashok Marg, Lucknow-226001

2. U.P. New & Renewable Energy Development Agency (UPNEDA),

(Through its Senior Project Officer),
Vibhuti Khand, Gomti Nagar, Lucknow- 226010.

..... **Respondent(s)**

The following were present:

1. Sh. Deepak Raizada, CE-PPA, UPPCL
2. Sh. C.P. Maurya, A.E, UPPCL
3. Sh. Hemant Sahai, Advocate, UPPCL
4. Sh. Nipun Sharma, Advocate, UPPCL
5. Ms. Kavya Sharma, Advocate, UPPCL



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6. Sh. Sajjan Poovayya, Advocate, TPREL
7. Sh. Anand Shrivastava, Advocate, TPREL
8. Sh. Shriram Sinha, Advocate, TPREL
9. Ms. Priya Goyal, Advocate, TPREL
10. Sh. Abhishek Kakkar, Advocate, TPREL
11. Sh. Shantanu Singh, TPREL

ORDER
(Date of Hearing 30.11.2023)

1. The Petitioner, TPREL has filed this Petition seeking approval of the cost incurred on account of imposition of Safeguard Duty (SGD) during the period of 30.07.2020 to 29.07.2021 on the import of solar cells vide Ministry of Finance (MoF) Notification No. 02/2020- Customs (SG) dated 29.07.2020.
2. TPREL is a generating company within the meaning of Section 2 of the Electricity Act, 2003 and is a wholly owned subsidiary of Tata Power Company Ltd. Pursuant to bid submission on 16.11.2018, TPREL was issued Letter of Intent on 14.12.2018 (project ID: UPNEDA RS0000339) upon being selected as one of the successful bidders under RfP issued by UPNEDA on 12.10.2018 for procurement of 550MW Solar Power. TPREL and UPPCL have entered "PPA" on 12.02.2019 for the supply of 25MW Solar PV based power from the Bunda Project at a levelized tariff of Rs. 3.08 /kWh for a period of 25 years.

Prayer(s):

3. The Petitioner has made the following prayer(s):
 - a) Allow the present Petition.
 - b) Allow the Petitioner the claim of Rs.9,54,79,095.99 (Rupees nine crores fifty-four lakhs seventy-nine thousand ninety-five and ninety-nine paise) (including GST) on account of imposition of SGD under the New Notification along with the carrying cost of Rs. 1,25,17,836/- (Rupees one crores twenty-five lakhs seventeen thousand eight hundred thirty-six only) 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 Article 12.2. of PPA.



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- c) Determine and allow the Petitioner to claim increased tariff of around Rs. 0.20/kWh 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.
- d) Direct the Respondent to reimburse the legal and administrative costs incurred by the Petitioner in pursuing the instant Petition.
- e) Condone any inadvertent omissions/errors and permit the Petitioner to add/alter this filing and make further submissions as may be required in future.
- f) Pass such other orders that this Commission deems fit in the facts of this case.

Brief Facts of the Case as per Petitioner:

4. The Petitioner has mainly submitted as under:
 - a) At the time of submission of its bid on 16.11.18, Ministry of Finance (MoF) notification dated 30.7.2018 on Safeguard Duty was applicable which provided for gradual reduction in SGD from 25 % to 20% to 15% and provided for a sun set date of 29.7.2020.
 - b) As per the PPA, Scheduled Commercial Operation Date (SCOD) of the Solar PV Project was 12.11.2020 i.e. 21 months from the date of signing of PPA, however, due to various reasons SCOD was not achieved and the Plant was commissioned on 03.12.2021.
 - c) Pursuant to the PPA, the Ministry of Finance (MoF) vide notification dated 29.07.2020 (hereafter referred to as 2020 SGD Notification) extended the applicability of the Safeguard Duty (SGD) for the period of 30.07.2020 to 29.07.2021 at the following rates:
 - i) 14.9% ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30.07.2020 to 29.01.2021 (both days inclusive); and
 - ii) 14.5% ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30.01.2021 to 29.07.2021 (both days inclusive).





- d) Such change was not contemplated and could not have been perceived or factored at the time of bid submission or the cut-off date. Therefore, this event qualifies as a change in law. The Petitioner through its letter dated 14.08.2020 had informed the Respondent about the 2020 SGD Notification and stated that the same shall qualify as a 'change in law' event as per Article 12.1.1(v) of the PPA. Further, it was clarified by UPNEDA that the imposition of the safeguard duty shall qualify as a 'change in law' event by way of Response to the queries/suggestions received from bidders to the RFP.
- e) In order to carry out process of setting up of the Project, the Petitioner entered into an EPC Contract dated 13.11.2019 with Tata Power Solar System Ltd. (TPSSL) whereby 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.
- f) In order, to perform the abovementioned EPC work, TPSSL entered into an arrangement with Jinneng Photovoltaic Technology Ltd, Wuxi Suntech Power Co., Ltd. and JA Solar International Limited (i.e., Vendors) for supply of Solar Modules vide its Purchase Orders dated 22.12.2020, 30.01.2021 and 10.02.2021 keeping in mind the revised SCOD as 12.09.2021.
- g) The aforementioned EPC contract clearly states that the Safeguard Duty (SGD) is not considered in the supply contract and will be payable at actuals by TPREL in case the Safeguard duty becoming applicable after 30.07.2020. This means the Module Supply was planned only after 30.07.2020 without considering SGD. As per the procurement plan and arrangement with TPSSL, Solar modules were imported into India from March 2021 to April 2021 and the Safeguard Duty amounting to approx. Rs.9.54 Cr. including GST was paid in compliance with the 2020 SGD notification.
- h) As per the provisions of the PPA, for claiming any relief on account of 'Change in Law' event, the Petitioner is required to approach this Commission. Accordingly, Petition No. 1664/2021 filed before the Commission. However, in order to seek appropriate relief under Article 12.2 of the PPA, Petitioner has

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filed the instant Petition seeking appropriate directions from this Commission to approve the amount of Safeguard Duty paid on the import of solar modules and allow the Petitioner to claim appropriate relief from Respondent.

- i) Since, the Petitioner in the present case has paid Rs. 9.54 Cr. (including GST) as SGD on the import of Solar modules, therefore, considering the provisions of the PPA and the law settled by this Commission, the Petitioner may be allowed to claim Rs.9.54 Cr. incurred along with carrying cost of Rs. 1.25 Cr. and direct the Respondent to pay such increased tariff of Rs.0.20/kWh (levelized tariff).
- j) Regarding GST, post 31.12.2018, 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%] on the entire consideration for supply and services availed by it for setting up of a solar power plant. Accordingly, TPREL has paid GST of 8.9% on the entire consideration.
- k) The Hon'ble Tribunal in Appeal No 215 of 2021 vide judgment dated 20.09.2021 held that the applicable GST rate post 31.12.2018 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. The Vendor invoiced to the Petitioner, GST @ 8.9% on the SGD paid and has paid the balance differential GST amount recovered from the Petitioner to the tax authority.
- l) Considering the MoP's notification dated 22.10.2021, para 6.2(4) of the Tariff Policy 2016, and MoP's letter dated 27.08.2018 to the CERC, this Commission may allow the Petitioner to seek appropriate relief from the Respondent under Article 12.2 of the PPA.

Records of Proceedings:

5. During the hearing dated 16.05.2023, the Counsel of TPREL submitted that the Commission had already decided the imposition of Safeguard Duty to be Change in Law event for the project of the Petitioner and instant Petition has been filed

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for approval of cost incurred on account of the same. The Commission directed the parties to file their respective reply & rejoinder in the matter.

6. On the hearing dated 01.08.2023, Advocate of UPPCL stated that they had preferred an appeal against the Commission's Order dated 05.04.2023 in Petition No. 1664/2021 (i.e., declaration of Change in Law event on account of Safeguard Duty) and expected a stay on the operation of the impugned Order, however, Hon'ble APTEL vide its judgment dated 25.07.2023 has dismissed the said appeal and kept the issue open till the final decision on the impact of Change in Law event as a consequential relief. The Commission allowed more time to the parties to file their respective reply & rejoinder in the matter. UPPCL filed its reply on 22.08.2023.
7. On the hearing dated 12.09.2023, on the request of TPREL, the Commission allowed two weeks' time to file its rejoinder. TPREL filed its rejoinder on 21.09.2023. Further, the Commission adjourned the hearing dated 10.10.2023 on the request of the Petitioner.
8. On the hearing dated 30.11.2023, the parties concluded their arguments in the matter. The Commission directed both parties to file their written submissions including details of lead time required to install solar module of comparable capacity project, date of import order, date of delivery of solar modules, date of their installation and scheduled/actual COD of the project. Further, the Commission accepted the request of the parties to share each other's written submissions.

UPPCL's Reply

9. On 22.08.2023, UPPCL filed its reply and has mainly submitted as under:

- a) The MoF vide Notification dated 30.07.2018 (i.e., 2018 SGD Notification) imposed SGD on the import of solar cells whether or not assembled in modules or panels from 30.07.2018 onwards until 29.07.2020. The said Notification stipulated that any person importing solar cells (whether or not assembled in modules or panels) into India is required to pay Safeguard Duty at the following rates:

- i) 25% ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30.07.2018 to 29.07.2019 (both days inclusive);





- ii) 20% ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30.07.2019 to 29.01.2020 (both days inclusive); and
- iii) 15% ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30.01.2020 to 29.07.2020 (both days inclusive).
- b) Thereafter, MoF vide Notification dated 29.07.2020 (i.e., 2020 SGD Notification) continued the imposition of SGD as laid down by the First SGD Notification. The Second SGD Notification stipulated that any person importing solar cells into India (whether or not assembled in modules or panels) is required to pay Safeguard Duty at the following rates from 30.07.2020 to 29.07.2021:
- i) 14.9% ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30.07.2020 to 29.01.2021 (both days inclusive); and
- ii) 14.5% ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30.01.2021 to 29.07.2021 (both days inclusive).
- c) The Petition No. 1664/2021 was earlier filed by TPREL seeking declaration that imposition of SGD vide 2020 SGD Notification as an event of 'Change in Law' in terms of the PPA with effect from 30.07.2020. Accordingly, TPREL had prayed the following in the said Petition:
- i) Admit the present Petition;
- ii) Hold and declare that the imposition of SGD by the Ministry of Finance vide its Notification dated 29.07.2020 as a 'change in law' event under Article 12 of the PPA with effect from 30.07.2020;
- iii) Hold and declare that the Petitioner shall be entitled to recover the additional cost incurred, if any, in terms of Article 12 of the PPA;
- iv) Grant liberty to the Petitioner to file a separate petition subsequently and approach this Commission for seeking approval of the cost incurred due to the imposition of safeguard duty by the Ministry of Finance vide its Notification dated 29.07.2020 and restitute the Petitioner to the same economic position as if such 'change in law' event had not occurred;

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- v) Condone any inadvertent omissions/errors and permit the Petitioner to add/alter this filing and make further submissions as may be required in future;
- vi) Pass any such orders as this Commission deems fit.
- d) Finally, the Commission vide its Order dated 05.04.2023 in Petition No. 1664/2021 allowed the Petitioner's prayers only to the extent of declaring that 2020 SGD Notification is a change in law event and did not deliver any decision/findings on the aspect of the Petitioner's entitlement towards recovery of additional cost incurred on account of the same. Feeling aggrieved by the aforesaid Order dated 05.04.2023, UPPCL filed an Appeal No. 559 of 2023 before the Hon'ble Appellate Tribunal for Electricity (APTEL).
- e) Appeal No. 559 of 2023 was finally decided by the Hon'ble APTEL on 25.07.2023 whereby Hon'ble APTEL categorically held that the question as to whether any compensation is payable or not to TPREL by UPPCL is an open question and this Commission must decide first whether TPREL is entitled for payment of compensation on account of the Second SGD Notification. Thus, UPPCL was permitted by the Hon'ble APTEL to contest TPREL's claim towards additional cost incurred on account of the Second SGD Notification.
- f) Thus, in view of the Hon'ble APTEL's judgement dated 25.07.2023, all the questions relating to whether Second SGD Notification is a change in law event are open and in this regard, this Commission must adjudicate the case set up by UPPCL in Petition No. 1664/2021, in Appeal No. 559 of 2023 before Hon'ble APTEL and also in the present reply.
- g) TPREL has commissioned its Bunda Project on 03.12.2021 and for this reason they had sought time extension of Original SCOD of Bunda Project from 11.11.2020 to 03.12.2021 by way of the separate Petition No. 1709/2021. Therefore, TPREL already knew that commissioning of the project would be delayed. The Commission vide its order dated 01.02.2023 in Petition No. 1709/2021 had allowed TPREL's prayer and granted extension of the Original SCOD for the Bunda Project on account of the various alleged Force Majeure events. Notably, UPPCL has challenged the said Order before Hon'ble Tribunal by way of DFR No. 238 of 2023 and the same is pending adjudication.

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