



नई दिल्ली
NEW DELHI

याचिका संख्या./ Petition No. 373/MP/2019

कोरम/ Coram:

श्री आई. एस. झा, सदस्य/ Shri I. S. Jha, Member
श्री अरुण गोयल, सदस्य/ Shri Arun Goyal, Member
श्री पी. के. सिंह, सदस्य / Shri P. K. Singh, Member

आदेश दिनांक/ Date of Order: 23rd of August, 2022

IN THE MATTER OF:

A petition under section 79 (1)(f) of the Electricity Act 2003 before the Central Electricity Regulatory Commission for (i) approval of “Change in Law” and (ii) seeking an appropriate mechanism for grant of an appropriate adjustment/ compensation to offset financial/ commercial impact of change in law events on account of imposition of safeguard duty on solar cells/modules in terms of Article 12 read with Article 16.3.1 of the Power Purchase Agreements dated 27.04.2018 between SB Energy Four Private Limited and Solar Energy Corporation of India Limited

AND IN THE MATTER OF:

SB Energy Four Private Limited
435 Regus Centre, 4th Floor,
Rectangle 1 Building,
Saket District Centre, New Delhi – 110017

...Petitioner

Versus

1. Solar Energy Corporation of India Limited
1st Floor, D-3, A Wing, Religare Building,
District Centre- Saket, 110017

2. Uttar Pradesh Power Corporation Limited,
Shakti Bhavan, 14, Ashok Marg,
Lucknow, UP, India.

...Respondents

Parties Present: Shri Sujit Ghosh, Advocate, SEPEPL
Ms. Mannat Waraich, Advocate, SEPEPL
Shri Mohd Munis, Advocate, SEPEPL
Shri Mridul Gupta, Advocate SEPEPL
Shri M. G. Ramachandran, Sr. Advocate, SECI
Ms. Shikha Sood, Advocate, SECI
Ms. Tanya Sareen, Advocate, SECI
Ms. Neha Singh, SECI

आदेश/ ORDER

1. The Petitioner, SB Energy Four Private Limited is a generating company engaged in the development of 200 MW (100 MW x 2) solar power project in Bhadla Phase-III Solar Park, Rajasthan on 'Build Own Operate' basis. The Petitioner has filed the instant petition seeking approval of Change in Law and seeking an appropriate mechanism for grant of an appropriate adjustment/compensation to offset financial/commercial impact of change in law events on account of imposition of safeguard duty on solar cells/modules in terms of Article 12 read with Article 16.3.1 of the Power Purchase Agreements dated 27.04.2018.
2. The Respondent No. 1, Solar Energy Corporation of India Limited (SECI) is a Government of India enterprise under the administrative control of the Ministry of New and Renewable Energy (MNRE). The Respondent has been designated as the nodal agency for implementation of MNRE schemes for developing grid connected solar power capacity through VGF mode in India.
3. The Respondent No. 2, Uttar Pradesh Power Corporation Limited (UPPCL) is a distribution licensee which is engaged in the business of distribution and supply of electricity across the State of Uttar Pradesh.
4. The Petitioner has made the following prayers:

- (a) Declare the imposition of safeguard duty via Safeguard Duty Notification as Change in Law in terms of the PPA(s) which have led to an increase in the non-recurring expenditure for the Project;*
- (b) Evolve a suitable mechanism to compensate the Petitioner for the increase in non-recurring expenditure incurred by the Petitioner on account of Change in Law;*
- (c) Grant interest/carrying cost from the date of incurring of the cost by the Petitioner till the date of disbursal of the compensation; and*
- (d) Allow legal and administrative costs incurred by the Petitioner in pursuing the instant petition*
- (e) Pass any such other and further reliefs as this Hon'ble Commission deems just and proper in the nature and circumstances of the present case.*

Brief factual background:

5. On 21.06.2017, SECI issued Request for Selection (RfS) of Solar Power Developers (SPDs) for 500 MW Grid Connected Solar PV Projects in Bhadla Phase III Solar Park, Rajasthan under National Solar Mission (NSM) Phase – II Batch IV, Tranche XI. Pursuant to the RfS, the Petitioner submitted its bid on 05.12.2017 taking into considering the prevailing taxes, duties and exemptions. The Petitioner was selected by SECI through e-Reverse Auction which was held on 21.12.2017, for the development of 200 MW (100 MW x 2) solar power project in Bhadla Phase-III Solar Park, Rajasthan on “Build Own Operate” basis. Letters of Intent (LoIs) were issued on 28.03.2018 (LOIs). The Petitioner entered into two (2) separate Power Purchase Agreements (PPAs) dated 27.04.2018 with SECI for setting up solar power projects of 100MW each, both PPAs forming part of a single bid for solar power projects at two different plots with a cumulative installed capacity of 200MW located in the State of Rajasthan. As per the PPAs, the Scheduled Commissioning Date (SCoD) of the projects was 27.04.2019.
6. Thereafter, vide Notification No. 1/2018 (SG) dated 30.07.2018, 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):
 - a) 25% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th July 2018 to 29th July 2019;
 - b) 20% ad valorem, minus anti-dumping duty, if any, when imported during the period

from 30th July 2019 to 29th January 2020;

- c) 15% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th January 2020 to 29th July 2020

7. As per the Petitioner, the implementation of safeguard duty on solar cells and modules has resulted in an increase in the recurring and non-recurring expenditure for the Petitioner after the Effective Date of the PPAs, and consequently, has adversely impacted the business of the Petitioner.
8. The present Petition was filed on 18.10.2019 and admitted by this Commission on 25.11.2019, whereby the Respondents were directed to file their replies by 10.12.2019 with an advance copy to the Petitioner who could file its rejoinders, if any, by 20.12.2019.
9. Accordingly, SECI filed its reply on 07.01.2020, followed by the Petitioner filing its rejoinder to the same on 24.03.2020.

Hearing dated 07.07.2020:

10. The case was called out for virtual hearing again on 07.07.2020 and it was submitted by the Petitioner that in terms of Ministry of New and Renewable Energy's letters dated 12.03.2020 and 23.03.2020, the Petitioner is already engaged with SECI for reconciliation of its claims and accordingly, requested that the matter be adjourned till the outcome of reconciliation. SECI submitted that the issue involved in the Petition stands covered by the Commission's earlier Orders relating to Change in Law event arising out of imposition of safeguard duty. Accordingly, the Commission may dispose of the present Petition in line with its earlier Orders. SECI further added that it has no objection to the Petitioner's request for adjournment pending the reconciliation of the claims. In light of this, Commission observed that since the Petitioner and the Respondent, SECI are already in discussion for reconciliation of the Petitioner's claims arising out of the Change in Law event, based on the request of the Petitioner, the Commission adjourned the matter sine die, subject to the Petition being revived based on the outcome of the discussion or settlement reached, if any, amongst the parties.

Hearing dated 21.12.2021:

11. The matter was called out for virtual hearing on 21.12.2021 and the learned counsel for the Petitioner submitted that the Change in Law claims of the Petitioner arising out of the imposition of Safeguard duty on solar cells/modules have already been reconciled between the Petitioner and SECI and that SECI has already started making payment of such reconciled amounts. Accordingly, the Commission may pass an appropriate Order in the matter.
12. The learned senior counsel and the learned counsel for the Respondent, SECI also confirmed that SECI has reconciled the claims of the Petitioner and started making payments to the Petitioner in terms of the direction of the Appellate Tribunal for Electricity vide Order dated 23.11.2020 in OP No. 12/2020. However, the buying entity, Uttar Pradesh Power Corporation Limited is yet to reconcile the said amounts. The matter was thereafter reserved for Orders.
13. **Subsequent proceedings:**
 - a) After being reserved for Orders on 21.12.2021, the Petition was re-listed for hearing before this Commission on 11.01.2022, in view of the issuance of Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 (*Change in Law Rules*) by the Ministry of Power, Government of India which provided for a procedure dealing with the Change in Law cases. The Petitioner submitted that their Change in Law claims arising out of the imposition of safeguard duty on solar cells/ modules have already been reconciled between the Petitioner and SECI and that SECI has already started making payment of such reconciled amounts. Accordingly, the Commission may pass an appropriate Order in the matter as the present case is covered by the decision of the Commission dated 20.08.2021 in Petition No. 536/MP/2020. SECI also confirmed that it has reconciled the claims of the Petitioner and started making payments to the Petitioner in terms of the direction of the Appellate Tribunal for Electricity vide Order dated 23.11.2020 in OP No. 12/2020. However, the distribution licensee, Uttar Pradesh Power Corporation Limited is yet to reconcile the said amounts. In rebuttal, the learned counsel for the Petitioner submitted that despite being party to the Petition, UPPCL has failed to appear or even to file its reply and such conduct of UPPCL ought not to be the basis for delaying the matter. In terms of the Change in Law Rules, the affected party i.e. the Petitioner is required to raise the claims only on the other party to the agreement i.e. SECI under the PPA and not the buying utility, UPPCL. In response, SECI submitted that they cannot be left in lurch with no consequent

direction to UPPCL for making payment to SECI as the entire arrangement is on back-to-back basis and for supply of power to distribution licensee. The learned senior counsel submitted that the agreement defined in the Change in Law Rules includes the entire gamut of purchase and resale therein. After hearing the learned counsel for the Petitioner and the learned senior counsel for the Respondent, SECI, the Commission reserved the matter for Orders.

- b) **Commission's Order dated 14.02.2022:** The Commission disposed of the Petition vide its Order dated 14.02.2022, on the following grounds:

"9. We have considered the submissions of the Petitioner. It is apparent from a plain reading of the Change in Law Rules that it provides for quantification of claims and a process and methodology for early recovery of mutually agreed claims relating to impact of change in law. The Change in Law Rules also provide that if there is a formula in the agreement for adjusting and recovering the amount of the impact of change in law, it shall be applied, otherwise the formula as prescribed in the Change in Law Rules is to be applied. We also find that the Change in Law Rules provide a time bound mechanism for settlement of such claims.

10. We consider the process and methodology as prescribed in the Change in Law Rules as a mechanism for time bound settlement of claims in a deterministic manner and the Petitioner is not going to be prejudiced by adopting the said mechanism. We have already held in our earlier Orders (e.g. Order dated 06.12.2021 in Petition No. 228/MP/2021) that since the Change in Law Rules is in the nature of procedural law and under the Change in Law Rules any substantive rights are not being taken away, it is to be applied retrospectively in all pending proceedings.

11. In view of the foregoing discussions, the Petitioner may approach the procurer 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(7) of the Change in Law Rules.

12. Accordingly, the Petition No. 373/MP/2019 is disposed of in terms of the above discussions and findings."

- c) The Commission disposed of several Petitions seeking similar reliefs under Change in Law events, taking the view that the concerned entities must have recourse to the Change in Law Rules, 2021. Several of these decisions were appealed against, before the Hon'ble Appellate Tribunal in O.P No. 1 of 2022 and Appeal Nos. 116, 74, 75 & 76 of 2022.
- d) **Order of Appellate Tribunal dated 05.04.2022:** The Appellate Tribunal passed its judgment, setting aside the Orders of this Commission challenged in O.P No. 1 of 2022 and Appeal Nos. 116, 74, 75 & 76 of 2022, which originally sought compensation on account

of Change in Law events, and were disposed by this Commission. Appellate Tribunal passed the following decision in the aforementioned appeals:

“72. For the foregoing reasons, we find the impugned orders of the Central Commission applying the CIL Rules to matters pending before it for adjudication under Section 79(1)(f) of Electricity Act on the date of coming into force of said rules wholly erroneous, improper and bad in law. The said orders are thus set aside. In the result, the proceedings in claim cases (in which impugned orders were passed – and that includes the orders dated 04.02.2022 in the Original Petitions) remain inchoate. The Central Commission is duty-bound to consider each of them on the merits of the claims and adjudicate in accordance with law on the dispute(s) in proper exercise of its jurisdiction under Section 79 of the Electricity Act. It is directed to proceed to do so expeditiously.

73. We would be failing in our duty if we do not also note here (as also indicated earlier in this judgment) that prior to the decisions which were challenged by the captioned petitions/appeals, as indeed subsequently, the Central Commission has been taking the impugned approach on pending claims which has and would have resulted in a large number of such claims being unduly scuttled, non-suiting the parties similarly placed as the petitioners/appellants herein. If the factual back-ground is same as in the cases at hand, such decisions would also constitute want of performance of statutory function by the Central Commission meriting an appropriate direction by this tribunal. This would be constrained to seek remedy against such order, if it thereby feels aggrieved. The remedies available in law include approaching the Central Commission for review or this tribunal ordinarily by an appeal.

74. Such that the affected parties do not suffer on account of faulty approach of adjudicatory authority, and this tribunal is not flooded by appeals raising identical issues against such other decisions as above, rendered in similar fact-situation by the Central Commission, it would be appropriate that it be asked to properly and fully perform its statutory function by exercise of its review jurisdiction, suo motu, in all similarly-placed claims for compensation founded on change in law events where similar decisions have been taken by the Central Commission after coming into force of CIL Rules on 22.10.2021 and, if such decisions are found running afoul of the view taken by this tribunal by this judgment, to vacate the same and restore the concerned Claim cases to its file and complete the process of adjudication thereupon in accordance with law. Needful action in above nature shall be initiated by the Central Commission within four weeks of this judgment. Of course, review can be undertaken even at the instance of the parties in question should they approach the Commission on their own. We may add that these directions are without prejudice to the remedy, if any, already pursued or intended to be pursued by the concerned parties vis-à-vis other such cases.”

- e) Pursuant to the decision of the Appellate Tribunal, the present Petition, along with several others were re-listed before this Commission where it passed the following Order on 14.05.2022 in 8/SM/2022:

“3. After hearing the suggestions put forth by the learned senior counsels and the learned counsels for the parties, the Commission is of the view that as per the directions of the APTEL in judgment dated 5.4.2022 in OP No. 1 of 2022 and Ors., in particular

at paragraph 74, suo-motu order(s) are required to be issued to restore the petitions which were disposed by the Commission by applying the Change in Law Rules but which were not challenged before the APTEL. However, for the Petitions where the orders of the Commission have been set aside by the APTEL in terms of para 72 of the judgment, the petitions shall be restored on the records of the Commission for further necessary action.

4. Accordingly, as per the direction of the APTEL, in exercise of our suo-motu power of review, we hereby restore the Petitions mentioned in paragraph 1 above, on the record of the Commission at same stages, as were existing prior to the disposal of petitions.”

- f) The present Petition was re-listed for hearing before this Commission on 14.07.2022, where it made the following observations:

“2. Learned counsel for the Petitioner submitted that the Safeguard Duty claims of the Petitioner have already been reconciled and the payments are being made by the Respondent, SECI. Learned counsel, accordingly, requested to pass an appropriate order in the matter.

3. Learned senior counsel for the Respondent, SECI submitted that SECI has already reconciled the Safeguard Duty claims of the Petitioner and the relevant details have already been furnished by SECI vide affidavit dated 13.7.2022. Learned senior counsel further submitted that while SECI has considered the Safeguard Duty claims of the Petitioner upto the commercial operation date in accordance with the Commission's order dated 20.8.2021 in Petition No. 536/MP/2020, the distribution licensee, Uttar Pradesh Power Corporation Limited (UPPCL), in its reconciliation, has limited the consideration of claims till the scheduled commissioning date only. Learned senior counsel added that UPPCL is yet to make payment to SECI and hence, the Commission may issue direction to UPPCL to make payment towards reconciled and evaluated claims of Safeguard Duty payable by SECI to the Petitioner on a back-to-back basis under the Power Supply Agreement.”

Submissions by SECI:

14. SECI had filed a short submission on 13.07.2022, which outlined the details of the reconciliation of the Petitioner's safeguard duty claims, which are given as under:

- a) SECI vide its letters dated 07.10.2020 and 09.10.2020 to the Petitioner and by letters dated 09.10.2020 to UPPCL had communicated the provisional reconciliation of the Safeguard Duty claims of the Petitioner till Commercial Operation Date as under:

SPD	Project ID	Plant capacity (in MW)	COD	SGD Claims verified by SECI (incl. of GST@ 5%) (in Rs.)
SB Energy Four Pvt. Ltd.	P2B4T11-BBEFL-B-10RJ-1D	100	09.07.2019	60,67,67,692
	P2B4T11-BBEFL-B-10RJ-2D	100	03.05.2019	57,42,98,588
Total.		200		118,10,66,280

- b) During the pendency of the present Petition, the Petitioner had filed an Original Petition being OP No. 12 of 2020 before the Appellate Tribunal for directions to SECI to release payment towards the safeguard duty claims in terms of the letters 07.10.2020 & 09.10.2020 from SECI to the Petitioner. However, in the proceedings before the Appellate Tribunal, UPPCL has disputed the claims of SECI on the following grounds:
- i. the cut-off date namely consideration of Commercial Operation Date and has taken the scheduled commissioning date in terms of the order dated 04.10.2019 passed by the Commission in Petition No. 14/MP/2019 and connected Petitions; and
 - ii. The discounting factor of 10.41% as proposed by SECI for the annuity payment.
- c) UPPCL has agreed on the amount due as Rs. 80,66,65,926/- in the proceedings in Original Petition No.12 of 2020 filed by Petitioner before the Tribunal only on the ground that the plant and machinery installed till scheduled commissioning date i.e. 27.04.2019 is only to be considered.
- d) The argument relied upon by UPPCL of limiting the consideration till the scheduled commissioning date and not till the actual commercial operation date is contrary to settled position as per the decision of this Commission as set out in 536/MP/2020. If the above issue, as raised by UPPCL is decided against UPPCL, there is no other difference in the reconciliation undertaken by SECI of Rs. 118,10,66,280 as stated in the Table mentioned above.
- e) As per the Order dated 20.08.2021 passed by this Commission in Petition No. 536/MP/2020, it is necessary to consider the change in law claim in respect to Safeguard Duty upto the commercial operation date. The Petitioner and UPPCL being parties to the said Petition No.536/MP/2020, the said Order dated 20.08.2021 shall be binding on all the parties and if the Commercial Operation Date is considered as the cut-off date, the amount worked out will be Rs. 118,10,66,280 as reconciled by SECI.
- f) The payments being made by SECI to the Petitioner in terms of the Order dated 23.11.2020 in OP No.12 of 2020 of the Tribunal are in accordance with the annuity payment mechanism approved by this Commission vide the above Order dated 20.08.2021 in Petition No. 536/MP/2020.
- g) The Commercial Operation Dates of the Petitioner's power projects (2 in number) were on 09.07.2019 and 03.05.2019 respectively.
- h) SECI is continuing to make payments as per this approved methodology and has, as on

24.06.2022 released payments of Rs. 37,03,65,185/-. UPPCL has, however, not paid any part of the above amount. UPPCL is required to pay the above amount with Late Payment surcharge for the overdue period.

- i) Since the commercial supply of power from the power projects under the PPAs is from the Commercial Operation Date of the power plant, SECI prays that this Commission may clarify the Cut-off Date for considering the Safeguard Duty impact as the actual Commercial Operation Date.

Analysis and Decision

15. The Petitioner entered into two separate Power Purchase Agreements (PPAs) with SECI on 27.04.2018 for the construction of solar power projects with a combined installed capacity of 200 MW. These PPAs were a component of a single bid for solar power projects at two distinct plots in the State of Rajasthan. As per the PPAs, the SCoD for the projects was 27.04.2019. On 03.07.2018, Safeguard duty was levied on solar cells and modules. The Petitioner achieved Commercial Operation on 09.07.2019 and 03.05.2019 respectively. The Notification No. 1/2018 (SG) dated 30.07.2018 and levy of such duty is squarely covered as 'Change in Law'.
16. The Petitioner and SECI have admitted on record that the Safeguard Duty claims of the Petitioner stand reconciled. Further, SECI has submitted that it has considered the Safeguard Duty claims of the Petitioner upto the commercial operation date in accordance with the Commission's Order dated 20.8.2021 in Petition No. 536/MP/2020 whereas UPPCL, in its reconciliation, has limited the consideration of claims till the SCoD only. SECI has submitted that UPPCL is yet to make payment to them and hence, the Commission may issue direction to UPPCL to make payment under the Power Supply Agreement on a back-to-back basis towards reconciled and evaluated claims of Safeguard Duty payable by SECI to the Petitioner .
17. We observe that SECI in its submissions, filed on 13.07.2022, has mentioned that the Petitioner had also filed an Original Petition being OP No. 12 of 2020 before the APTEL in which UPPCL has disputed the claims. It is observed that the Petition OP No. 12 of 2020 already stands disposed by APTEL vide Order dated 23.11.2020 as under:

....
“

There seems to be triangular dispute between the Petitioner, SECI & UPPCL so far as reconciliation itself with regard to quantum of amount is concerned. The Petitioner

should get either on lump sum or annuity basis in terms of CERC's opinion. The fact remains that the Petitioner is not objecting for receiving the money on annuity basis. It is also not in dispute that irrespective of UPPCL paying to SECI, SECI's obligation to pay the Appellant's payment is independent of UPPCL payment as per the procedure adopted today. In that view of the matter, since SECI stand in terms of reconciliation process, they have to pay a sum of Rs. 118 crores on annuity basis.

It is not in dispute that how much exact amount is payable, has to be determined by the CERC and the said proceedings are pending. Meanwhile, since Petitioner is facing extreme financial constraint, as submitted by learned counsel for the Petitioner, we direct Respondent SECI to pay annuity to be worked out on Rs.118 crores. If CERC, in future, opines the amount payable is less than Rs.118 crores, then the excess amount that would be paid can be adjusted in the next annuity amount payable.

We direct SECI to make payments within four weeks' from today. Mr. M.G. Ramachandaran, learned senior for SECI says that they need two months' time which is usual order of the CERC. This is seriously opposed by the Petitioner's counsel, Mr. Basava Prabhu Patil. Since lump sum amount is not being paid and so also the amount now paid is not the final determination of the sum to be paid, we are of the opinion that the practice followed by CERC is not binding on us. Therefore, we grant one month time to pay the above amount to the Petitioner by SECI.

*Mr. M.G. Ramachandran, learned senior counsel arguing for SECI submits that in terms of practice, the SECI must get this amount of annuity payable to the Petitioner from UPPCL which is seriously objected by Mr. Suresh Mukherjee, learned counsel arguing for UPPCL/R-3. **We make it clear whatever is the practice that is being followed will be applicable so far as payments inter se between SECI & UPPCL.***

With these observations, the Petition is disposed of."

18. We observe that vide Order dated 20.08.2021 in Petition No. 536/MP/2020, the Commission has already held as under:

*"...
105. The summary of our findings are as follows:*

*....
Issue No. 3: • Cut-off date for Safeguard Duty Claims: The invoices related to supply of the goods can be raised only up to the COD for all the equipment as per rated project capacity that has been installed and through which energy has flown into the grid.
....
"*

19. In view of the above discussions, the Commission holds that regarding Safeguard duty claims, the invoices related to supply of the goods can be raised till the COD for all the equipment as per the rated project capacity that has been installed and through which energy has flown into the grid. The contracting parties are directed to follow the directions given in Order dated 20.08.2021 in Petition No. 536/MP/2020 meticulously. The Commission further directs that

the UPPCL is liable to pay to the SECI all the above reconciled claims that SECI has to pay to the Petitioner. However, payment to the Petitioner by SECI is not conditional upon the payment to be made by the UPPCL to SECI.

20. Accordingly, Petition No. 373/MP/2019 is disposed of.

Sd/-

पी. के. सिंह
(सदस्य)

Sd/-

अरुण गोयल
(सदस्य)

Sd/-

आई. एस. झा
(सदस्य)