

**BEFORE THE GUJARAT ELECTRICITY REGULATORY COMMISSION  
GANDHINAGAR**

**Petition No. 2010 of 2021.**

**In the matter of:**

**Petition under Section 86(1)(f) of the Electricity Act, 2003 read with Article 9 of the Power Purchase Agreement dated 26.08.2019 executed between the Petitioner and the Respondent seeking declaration of Change in Law Event, viz., the imposition of Safeguard Duty by Notification No. 02/2020-Customs (SG) dated 29.07.2020 issued by the Department of Revenue, Ministry of Finance, Government of India, and grant of consequential relief**

Petitioner : Electro Solaire Pvt. Limited

Represented by : Ld. Adv. Saunak Kumar Rajguru along with Mr. Pradyumn Amit Sharma.

Vs.

Respondent : Gujarat Urja Vikas Nigam Ltd.

Represented by : Ld. Adv. Ms. Ranjitha Ramchandran along with Mrs. G. Bhavani and Mr. A. H. Chavda.

**CORAM:**

**Anil Mukim, Chairman**

**Mehul M. Gandhi, Member**

**S.R. Pandey, Member**

**Date: 31.12.2024.**

**DAILY ORDER**

1. The matter was kept for hearing on 26.07.2024.

2. Ld. Adv. Saunak Kumar Rajguru appearing on behalf of the Petitioner submitted that the present Petition has been filed by the Petitioner under Section 86 (1) (f) of the Electricity Act, 2003 read with Article 9 of the Power Purchase Agreement (PPA) dated 26.08.2019 entered between the Petitioner Electro Solaire Pvt. Limited and the Respondent GUVNL. The Petitioner is claiming relief under 'Change in Law' provisions under the PPA pursuant to imposition of Safeguard Duty imposed on import of Solar Cells vide Notification dated 29.07.2020 issued by the Department of Revenue, Ministry of Finance, Government of India.
- 2.1. It is submitted that in terms of Article 9.1.1(b) of the PPA, a Change in Law includes the Introduction/modification/changes in rates of safeguard duty and/or anti-dumping duty which has direct effect on the Project cost after the Bid Deadline. In the present case, Ministry of Finance's Notification dated 29.07.2020 imposing SGD was after the Bid Deadline i.e., 30.04.2019 and has resulted in incremental cost to the Petitioner.
- 2.2. It is submitted that there are two primary issues in the present Petition. The Principle Approval for the event of Change in Law, where the Commission has already passed an Order on 12.10.2023 in Petition No. 1941 of 2021 in Juniper Green Sigma Pvt. Ltd. V/s GUVNL, while considering the identical issue about

issue of carrying cost. The other issue is with regard to the carrying cost is payable as per provisions of the PPA to compensate the affected party.

2.3. It is submitted that the provision for Late Payment Surcharge at Article 6.3 of the PPA is relates for compensation towards time value of money on account of delayed payments. The rate prescribed for Late Payment Surcharge in Articles 6.3 of the PPA (7%+ SBI MCLR's per annum rate) required to be considered for recovery of carrying cost. He referred the Judgements for the rate of compensation for "Change in Law" to be granted to the Petitioner which are as under:

- a. Hon. APTEL's Judgement dated 22.03.2022 in APML Vs. MSEDCL Appeal No. 40 of 2022.
- b. Hon. SC Judgement GMR Warora Vs. CERC & Ors. SCC Online SC 464.
- c. UHBVNL Vs. Adani Power Ltd. (2023) 2 SCC 624.
- d. Coastal Gujarat Power ltd. Vs. CERC & Ors. 2021 SCC OnLine APTEL 10

Referring to the above Judgements, he submitted that the Carrying Cost for Change in Law event on account of SGD Notifications to be considered by the Commission in accordance with the law as declared by Hon'ble Supreme Court and Hon'ble APTEL in accordance with PPA/law and therefore, the Petitioner is entitled for carrying cost.

2.4. He further referred the Article 6.3 and Article 6.6 of the PPA on the issue of the rate of interest to be paid on carrying cost. Ld. Adv. of the Petitioner submitted that under Article 6 of the PPA wherein it is mentioned about the billing and payment. The Article 6.3 clearly defines the provisions of the late payment surcharge which defines that for payment of monthly bill by the Respondent GUVNL, if it is paid after the due date of payment, a late payment charge is made applicable on such delayed payments by the Respondent GUVNL to the Power producer at the rate of seven percent in excess of the SBI 1 year Marginal Cost of Funds Based Lending Rate (MCLR) per annum/ any replacement thereof by SBI, on the amount of outstanding payment, which would be calculated on the basis of formula provided in the said Article. On the date of filing of the Petition, MCLR was around 7% and now it is 8.7%, hence the Petitioner is entitled to receive the amount which would be  $8.7\% + 7\% = 15.7\%$ . It is requested to consider the said rate by the Commission at the time of passing the final Order.

2.5. He further referred the Article 6.6 of the PPA which deals with the disputes between the parties, which has not been resolved amicably, the payment made by the GUVNL to the power producer shall be made under protest. Upon resolution of the disputes, if it is found that the power producer has overcharged GUVNL, then the said overcharged payment shall be returned to

GUVNL with an interest of 7 % plus SBI 1 year MCLR for the period it retained the said additional amount. Hence, parity should be apply, and the same rate of interest should be applied when GUVNL is held liable to pay Change in Law compensation along with carrying cost. He further submitted that Article 6.6 shall be read with Article 6.3 of the PPA. As there is no dispute on the principle sum of Safeguard Duty being “Change in Law”, hence it is required to be paid.

2.6. He further referred Article 6.6 of the PPA and submitted that as the Respondent has the right to impose penalty, hence considering the same parity should be applied and the Petitioner should also be given the penalty amount. He further submitted that whenever the parties pay under protest then the penalty also applies and therefore, the Petitioner is also entitled for the same. He further submitted that there is no dispute on the entitlement of the Petitioner for the principle sum in the Petition under the provisions of “Change in Law”, as the Commission has already held that such event is ‘Change in Law’.

2.7. He further submitted that there should be parity between the payment to be paid and the payment to be recovered by the Respondent GUVNL.

2.8. He further submitted that the documents directed by the Commission are being filed in the Petition. He further submitted that the Petitioner has addressed all the queries of the Respondent also. The table submitted in the Petition showing (ROP) for the details of the documents with page Nos. is already duly filed on record.

3. Ld. Adv. Ranjitha Ramchandran appearing on behalf Respondent GUVNL submitted that whether the Petitioner can claim the relief under the said Notification dated 29.07.2020 issued by the Department of Revenue, Ministry of Finance, Government of India as an event of "Change in Law" for imposition of Safeguard Duty, to claim the entire 14.9% as "Change in law" for adjustment of tariff. It is further submitted that the Petitioner was asked to file certain documents in the Petition to verify its claim, which are not submitted by the Petitioner.

3.1. She submitted that there are two aspects in the present Petition. First is the principle of "Change in Law", which is to be decided by the Commission. Other issue is that the requirement of documents and the detailed list is already provided to the Petitioner. The Commission had also recorded in the Daily Order dated 03.04.2024 for the documents which they have not provided. She raised the issues that the Safeguard Duty claimed by the Petitioner can only

be on the modules which are actually installed at the project site and not for spares and not otherwise and only modules related to the capacity. She further submitted that there is mismatch in the number of solar modules when compared to the Gujarat Energy Development Agency (GEDA) certificate, Chartered Accountant (CA) certificate and Chief Electrical Inspector (CEI) Certificate, it also does not match with the Chartered Engineer (CE) certificate wherein, the Chartered Engineer has certified that the number of solar modules duly installed at the project site.

3.2. She further submitted that CA certificate is showing totally different figures. The GEDA certificate and CEI certificate, if considered than they are showing least number of modules which mismatches the claim of the Petitioner. The cost can be considered is only of the solar modules installed at the project site. In Juniper case also the Commission has considered only actual installation modules and not the spares, etc. while determining the claim.

3.3. She further submitted that the Chartered Engineer certificate is normally required because the Chartered Engineer verifies the module wise detail which are imported and the same modules are actually installed on the project site. so, it clarifies that the actual number of modules which are imported and installed at the project site. She further submitted that there is

discrepancy in the said Chartered Engineer certificate as compared to GEDA certificate and other certificate as produced by the Petitioner. If the Commission comes to the conclusion that there is discrepancy in the certificates than the said certification comes in question.

3.4. She further submitted that the Chief Electrical Inspector (CEI) certificate is not duly signed which the Petitioner has produced before the Commission. It was already raised as the query from the Respondent but however, the Petitioner has not filed the said signed certificate, hence the Commission may decide on the same.

3.5. She further submitted that the basic issue is one to one correlation of the modules costing, installation and all other certificates, if Commission considers than it can be done by both the parties.

3.6. She further referred to the CA certificate produced before the Commission by the Petitioner and submitted that it needs to have the requirement under the “Change in Law” event and details of the Clause 9.2.3 which defines that the CA shall certify about the adjustment in the tariff.

3.7. It is further submitted that it needs to be proved that whether the imported modules were installed at the project site or not. There is mismatch in the

number of modules shown in the GEDA certificate as well as the CEI certificates and also it does not match with the certificate issued by the Chartered Engineer. The CA certificate is providing different cost. The Chartered Engineer's certificate was asked for solar modules installed as if it is not possible for the Respondent to verify each and every modules installed at the project site of the Petitioner.

3.8. It is further submitted that the Petitioner has to submit various documents and the Commission vide Daily Order dated 09.06.2022 and 10.08.2023 has also directed for submission of various documents sought specifically in the Daily Order dated 10.08.2023. She further submitted with regard to the one to one co-relation the Petitioner has purported to file the documents.

3.9. It is further submitted that the Respondent has filed its reply on 27.12.2023 to the additional affidavit and pointed out that the compensation for "Change in Law" is only to the extent of the plant and machines which are installed and commissioned by the date of commissioning with which the Petitioner commences the supply of power. The Compensation for change in Law has to be restricted to plant and machines certified by GEDA. Further the CEIG certificate provided by the Petitioner with details of such installation is without any sign.

3.10. On the issue of carrying cost, she submitted that the relief admissible to the Petitioner has to be considered within the confines of the PPA and the relief cannot be made in contrary of PPA as in the present case, there is no provision entitling the Petitioner for any carrying cost due to the implications of the imposition of Safeguard Duty. She referred Article 9.2.2 of the PPA and submitted that the methodology of compensation and there is no provision for restitutionary principle or carrying cost in the PPA. Any interest factor is already included in the said formula. The terms of the PPA are clear and unambiguous and there cannot be any assumptions and implied terms. Hence, the claim of the Petitioner is beyond the terms of the PPA and it is inadmissible.

3.11. She further submitted that the Petitioner has relied on the aspect of carrying cost on the Judgement dated 15.09.2022 in Appeal No. 256 of 2019 passed by the Hon. APTEL in the matter of Parampujya Solar Energy Pvt. Ltd. and Anr Vs. CERC and Ors., the said Judgement is not applicable in the present matter. She further submitted that their PPA is similar to the case of Adani which was decided by Judgement dated 13.04.2018 by the Hon. APTEL in Appeal No. 210 of 2017. She further submitted that the PPA had open ended provision in the Parampujya case, hence Hon. APTEL decided the carrying cost to be allowed.

3.12. She referred the PPA and submitted that Article 9.1.1 is the Change in Law, 9.2 is relief of change in law, 9.2.1 is for in case the Change in Law results directly attributable, this is for the operation period. The present case is of Article 9.2.2, wherein it defines that in case of Change in Law results in 9.1.1 (b) above, the power producer shall be allowed for increase or decrease in tariff 1 paise per Unit for every increase or decrease for Rs. 2 lakh per MW of project capacity in the project cost which shall be allowed upon submission of proof of payment made by the power producer towards Safeguard Duty or Anti-Dumping Duty to the concerned Authority and also upon the approval of the Commission.

3.13. She further submitted that if the Commission allows the claim of the Change in Law then there is fix formula given which says for every Rs. 2 lakhs, 1 paise will be increase in tariff. If it comes to less than Rs. 2 lakhs then no relief could be provided. If more then Rs. 2 lakhs but less than Rs. 4 lakhs than only 1 paise could be granted. There is formula given in the PPA and there is no other provisions in the PPA. Also. there is neither any relief for carrying cost nor principle of restitution would apply as the formula is being given. The formula defines the terms of payment which would be subject to approval of the Commission. The time value of money argument is being made by the Petitioner but the PPA has no such provision for `payment. In the case of

Paramapuja they have applied the provision of “ relief ” which is not applicable in the present case.

3.14. She further referred para 95,98,102,103, and 104 of the Hon. Supreme Court's Judgement in case of Haryana Power Purchase Centre V/s Sasan Power Limited & others (2024) 1 Supreme court cases 247. Referring to the said Judgement, she submitted that it is well settle principle of law that PPA is meticulously thought through contract and there cannot be any departure from the specific formula provided in the PPA and express provision cannot be disregarded. There is no basis for the carrying cost to be awarded de hors the PPA , since the PPA does not provide for carrying cost, when the formula is laid down in the PPA, then it cannot be said its unjust and unfair. The Courts cannot re-write the contract between the parties.

3.15. She further submitted that even assuming that the carrying cost is payable, then it should be calculated from the date of filing the Petition and not the period thereafter. The Petitioner has filed its documents in 2022, 2023 and 2024, can the said Petition decided without those documents. Can the period for which they have filed the documents afterwards can be claimed by the Petitioner. The said principle is laid down in the Judgements.

3.16. On the aspect of rate and on the Judgements referred by the Petitioner for delayed payment surcharge, she submitted that on the aspect of delayed payment surcharge be applicable that there are two distinctions, firstly the PPA in the present case the late payment surcharge applies when there is delay in the monthly bill payment and in the present case the Respondent has neither delayed nor there are any bills. Secondly, about the disputed amount, the issue is not disputed here and there can't be any dispute over here until the Commission decides that it is "Change in Law" the Respondent cannot make the payments. Such payment is not by choice but is depending upon the decision of the Commission. There is no restitutionary principle and hence, it can't be applied. There is no issue of any violation of contractual obligation for timely payment.

3.17. She further submitted that Article 6.3 refers to late payment - payment of monthly bill by the Respondent after due date of payment. There is no bill raised on change in law and therefore there is no delay in payment by the Respondent. She further submitted that article 6.6 is with regard to disputes on bills. The present case is not a case of dispute under Article 6.6 of the PPA. She submitted that even otherwise, the PPA does not provide for compounding even for late payment surcharge.

4. Ld. Adv. in response to the contentions of the Respondent referred and submitted that the Article heading itself says that it is relief for “Change in Law” so there is no question that it cannot provide the said relief. On the aspect of restitutionary principle, restitution is bounded in equity and not under the contract. The moment the Court decides for the payment than itself the interest becomes inherent part of the contract which needs to be decided for time value of money. It is not only time value of money but also it is the opportunity cost which one could have invested in some other income sources. He referred the Hon. APTEL Judgement in the Paramapujya case, wherein it was held that the phrase ‘ provide relief ‘ is wide enough to entail "restitution" of the generator through adequate compensation for the losses or expenses suffered on account of Change in Law and submitted that in the present PPA, the Article 9.2 states about “Relief for change in Law” and therefore the said judgement squarely applied in the present case. He further submitted that entire clause is relief for Change in Law as it uses the words in Article 9.2 as Change in Law. He referred findings at para 70, wherein it mentions that the time value of money as well as restitution on the same position where in the contract it is mentioned or not. There is no distinguish between renewable or thermal PPAs. Para 72. The said case law referred also does not have any clause for the restitution provision but the Courts have considered as an inherent part of the contract and provided the said relief.

- 4.1. On the issue on the delay in filing the documents, he submitted that the said documents are filed on time as provided in the Daily Order so, it cannot be contended. He referred the case of South India Coalfields Ltd. v/s State of M.P. (2003) 8 SCC wherein at para 27, it was decided that the Court has the inherent power to impose the restitution, as it was even before the enactment of the CPC.
- 4.2. He further referred to the Judgement of Hon. Supreme Court of India on the aspect that once the superior courts have taken a stand on the same issue as in the Parampujya Judgement how the close chapters are being reopened.
5. Ld. Adv. of the Respondent submitted that as the Petitioner has relied and filed the new Judgements hence the Respondent needs time to study and file its response in the matter. She further submitted that said heading of Clause for Relief for "Change in Law" cannot override the formula provided for calculation of the relief. In Sasan power Judgement where the principle established it was defined that the principle is for restitution, it was held that even the said principle cannot override the formula. The heading cannot override the formula that is the clear distinction. In Parampujya vis-à-vis she submitted that it has decided to provide the relief in case of "Change in Law" not just due to heading, it said the Commission shall provide the relief. On the issue of the reference to the Electricity Rules, 2021, she

submitted that the said rules were not applicable prior to the Notification of Change in Law, it can be relied as assistance that the Hon. Tribunal has also done.

- 5.1. She further submitted on the case law referred by the Petitioner SECL, the cases were completely totally different. In both cases SECL and Nabha, the payments were not made, where they were required to make the payments. Hence these two cases of SECL and Nabha relied by the Petitioner are completely different. In the present case the monthly bills were paid to the Petitioner. In case where the Court has decided the case and payment has to be made and if the Respondent does not pay then it is liable for the interest to be paid. In SECL case where the Court granted a stay for payment and then decides that in any case the party was supposed to pay hence there the case was totally different.
- 5.2. On the delay aspect for filing the documents, the Commission needs to decide and take the view for the same contention.
- 5.3. She further submitted that as during the hearing the Petitioner has filed the new Judgements for carrying cost as well as other issues, hence the Counsel of the Respondent needs time to study and file its reply to the said referred Judgement and hence, it is requested for three weeks' time to file its reply.

6. Heard the parties. We note that the Petitioner has filed the Judgements in support of its claim during the hearing and Respondent has sought time to file its submissions on the said Judgements, hence we allow three weeks' time to file the submissions with a copy to the Petitioner. The Petitioner is at liberty to file its further submissions, if any, within two weeks' from the receipt of the submissions, with a copy to the Respondent.

7. The next date of hearing will be intimated separately.

8. Order accordingly.

**Sd/-**  
**[S. R. Pandey]**  
**Member**

**Sd/-**  
**[Mehul M. Gandhi]**  
**Member**

**Sd/-**  
**[Anil Mukim]**  
**Chairman**

Place: Gandhinagar.

Date: 31.12.2024.