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 reliefs.

AND

IA No. 21 of 2021 in Petition No. 2010 of 2021.

In the Matter of:

Interlocutory Application on behalf of the Petitioner seeking urgent listing of the accompanying Petition.

Petitioner/Applicant	:	Electro Solaire Pvt. Limited Office No. 203, Pentagon P -3, Level -2, Magarpatta City, Hadapsar, Pune – 411013, Maharashtra.
Represented By	:	Ld. Advocates Mr. Aniket Prasoon alongwith Ms. Priya Dhankhar, and Mr. Shubham Mudgil.

V/s.

Respondent	:	Gujarat Urja Vikas Nigam Limited Sardar Patel Vidyut Bhavan, Race Course Circle, Vadodara – 390007.
Represented By	:	Ld. Adv. Ms. Harsha Manav alongwith Parthik Joshi.

CORAM:

Anil Mukim, Chairman
Mehul M. Gandhi, Member
S. R. Pandey, Member

Date: 09/06/2022.

DAILY ORDER

1. The above matter was heard on 08.03.2022.

2. Ld. Adv. Mr. Aniket Prasoon, appearing on behalf of the Petitioner, at the outset submitted that the issue in the present Petition is similar to Petition No. 1966 of 2021 in which arguments are advanced by the Ld. counsel for the Petitioner therein and accordingly, without reiterating the same, the Petitioner herein, while adopting them will address on certain other submissions that are required including information related to the present matter. Moreover, since the reliefs claimed by the Petitioner in the present matter is pertaining to 'Change in Law' and submissions / arguments to be advanced will be more or less same except for the facts, which are different, the Petitioner may be permitted to address the same.

2.1. It is submitted that present Petition is filed under Section 86 (1) (f) of the Electricity Act, 2003 read with Article 9 of the Power Purchase Agreement 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 Ministry of Finance, Government of India.

2.2. It is argued that at the time of bidding and execution of the PPA, the Petitioner had planned the procurement of Solar PV modules by importing after 30.07.2020 i.e., after the expiry of SGD notification since the Petitioner had enough time to complete the project till date of SCOD of the project being 25.11.2020 as per PPA but the Respondent GUVNL is disputing the same on basis that Solar PV modules can be installed at the rate of 3-4 MW per day. It is submitted that the Petitioner could undertake the installation of the solar PV modules in a maximum time period of 2-2.5 months while completing the project and achieving commissioning within time limit. It is submitted that there is no stipulation in the PPA with respect to the timelines for procurement of Solar PV modules. In fact, the Petitioner had the obligation to plan the procurement of Solar PV modules as a Prudent Utility

Practise. After referring the para 67 & 68 of the judgement dated 27.04.2021 in Appeals No. 172 of 2017 & 154 of 2018 in case of Coastal Gujarat Power Limited V/s. CERC, it is submitted that the generating companies cannot be expected to know any amendment or change in the existing law which may take place subsequently over the long term of the PPA. Therefore, the Petitioner's module procurement plan was based on the bonafide belief that safeguard duty would not be applicable on the import of Solar PV modules post 29.07.2020.

2.3. Referring to the para 19, 24, & 25 of the judgement dated 12.09.2014 in Appeal No. 288 of 2013 in case of M/s Wardha Power Company Limited V/s. Reliance Infrastructure Limited & Ors., it is submitted that the Hon'ble APTEL held that the Commission is not expected to look into assumptions by the bidder at the time of the bid while granting relief under 'Change in Law'. It is also submitted that the Petitioner has provided copies of Module Supply Agreement with the original delivery schedule for supply of modules to the Respondent GUVNL and also filed with the present Petition. Also referring the Order dated 28.01.2020 in Petition No. 67/MP/2019 in the case of Clean Sustainable Energy Pvt. Limited and Ors. V/s. Solar Energy Corporation of India Limited and Ors., wherein; CERC has observed that, in said Petition, the tariff has been discovered under transparent e-bidding process in accordance with the NSM guidelines issued by the Central Government and in the Competitive Bidding Scenario, the Solar Power Developers (SPDs) bid levelised tariff without disclosing the details of the calculations of the project cost including capital expenditure. The component wise details of the capital employed are not required to be declared by the bidders. The design of the bid levellised tariff is solely a decision of the SPDs.

2.4. With regard to DC:AC ratio of the project, Ld. counsel for the Petitioner submitted that reliance is placed on Nisagra decision of the Hon'ble APTEL. It is also submitted that the Respondent GUVNL has extended the SCoD till 24.04.2021 due to COVID-19 in terms of MNRE Notification and the Petitioner vide its notice dated 30.04.2021 has intimated about occurrence of Change in Law event.

2.5. Referring to the Notification No. 01/2018-Customs (SG) dated 30.07.2018, it is submitted that the safeguard duty was imposed at following prescribed rates in

said notification on the import of Solar Cells, whether assembled or not in modules or panels:

"..... hereby imposes on subject goods falling under heading 8541 or tariff item 8541 40 11 of the First Schedule to the Customs Tariff Act, when imported into India, a safeguard duty at the following rate,
namely:-

(a) 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);

(b) 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

(c) 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).

……."

2.6. It is submitted that at time of bid submission the above Notification was only available and from the said Notification, it is also clear that there was there no safeguard duty payable after 29.07.2020. Therefore, effectively from 30.07.2020, there was no safeguard duty or safeguard duty as per Notification 30.07.2018 was zero.

2.7. However, the Central Government vide Notification No. 02/2020-Customs (SG) dated 29.07.2020 imposed safeguard duty and referring to said Notification submitted that the applicable rate of safeguard duty reads as follows:

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

(b) fourteen point five per cent, ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30th January, 2021 (both days inclusive).
……."

2.8. It is also submitted that the Petitioner is entitled to interest from the date of payment till release of amount by the Respondent apart from compensating the Petitioner for additional costs incurred towards Safeguard duty alongwith 5% IGST

being 'Change in Law' event in terms of Notification imposing safeguard Duty after 30.07.2020.

2.9. It is submitted that the Scheduled Commercial Operation Date (SCoD) for 200 MW contracted capacity as per PPA dated 26.08.2019 was 25.11.2020 and the same was extended till 24.04.2021 by the Respondent GUVNL due to COVID-19, out of which 150 MW was commissioned on 10.08.2021 and balance 50 MW was commissioned on 13.08.2021. It is also submitted that the commissioning certificate issued by GEDA is not received by the Petitioner which will be filed after receipt.

3. Ld. Adv. Ms. Harsha Manav on behalf of the Respondent GUVNL submitted that the Scheduled Commercial Operation Date for entire 200 MW contracted capacity in terms of the PPA dated 26.08.2019 executed between the parties was 25.11.2020 in the present matter. Thus, assuming that the Petitioner had proceeded with consideration of non-levy of safeguard duty from 30.07.2018 & onwards as per Notification No. 01/2018-Customs (SG) dated 30.07.2020, the Petitioner had only 4 months after 30.07.2020 for importing solar modules, unloading, transportation to project site, installation, testing etc. and commissioning all the solar modules required for the contracted capacity of 200 MW under the PPA. It is argued that by no stretch of imagination, it is possible to complete the aforesaid tasks within the given time period with consideration of various activities involved and obviously, the Petitioner at the time of bid submission ought to have taken into consideration the aforesaid Notification. Hence, there is no reason to believe that the Petitioner had not factored the safeguard duty in quoted tariff as per the applicate rates of Notification No. 01/2018-Customs (SG) dated 30.07.2018 because safeguard duty was applicable till 29.07.2020. Hence, the question of any change in law does not arise.

3.1. It is submitted that, in any case, since the said Notification dated 30.07.2018 was the law prevailing at time of bid submission in the Petition, the Petitioner was required to consider financial impact for safeguard duty & GST, while quoting tariff in the bidding processes undertaken by the Respondent GUVNL. Hence, the relief prayed cannot be granted to the Petitioner.

3.2. It is further submitted that as per the provisions of the PPA, the relief, if any, for 'Change in Law' is already stipulated in Article 9 of the PPA, wherein, there is no provision of restitution as claimed by the Petitioner.

3.3. It is also submitted that since the Petition is filed by the Petitioner under Article 9 of the PPA, it is necessary for the Petitioner to provide all relevant details including documentary evidence to the Respondent GUVNL. However, the Petitioner has not provided all the requisite details & information in the present Petition so as to enable filing further submissions by the Respondent in the matter.

4. In response to the contentions raised by the Respondent GUVNL, Ld. Adv. for the Petitioner submitted that all documents required have been filed in this matter.

4.1. It is submitted that considering the present Petition preferred on account of Change in Law event pursuant to imposition of Safeguard Duty through Notification dated 29.07.2020 by the Ministry of Finance, Government of India, the Commission may admit the matter.

5. Heard the Ld. counsels appearing for both the parties in the matter. We note that the Petitioner and the Respondent GUVNL have entered into Power Purchase Agreement dated 26.08.2019 for generation and supply of 200 MW AC contracted capacity from Solar PV based project of the Petitioner.

5.1. The aforesaid Petition is filed under Section 86 of the Electricity Act, 2003 readwith Article 9 of aforesaid PPA, seeking declaration that imposition of safeguard duty vide Notification dated 29.07.2020 on the import of Solar modules as 'Change in Law' in terms of the PPA.

5.2. We note that in the present Petition, pursuant to competitive bidding process followed by e-reverse auction initiated by the Respondent GUVNL vide RfS No. GUVNL/700 MW/Solar (Phase-III-R) dated 06.03.2019, the Petitioner Electro Solaire Pvt. Limited had submitted its bid and thereafter, selected as the successful bidder for developing the project and accordingly, Letter of Award dated 28.05.2019 was issued by the Respondent GUVNL. Subsequently, PPA dated 26.08.2019 was executed between the Petitioner Electro Solaire Pvt. Limited and the Respondent GUVNL for above contracted capacity at tariff of Rs. 2.65 per unit.

In terms of the PPA dated 26.08.2019 executed with the Respondent GUVNL pursuant to Competitive Bidding Process, the Petitioner is a developer for setting up 200 MW Solar PV based Power Project. Accordingly, the Petitioner is a generating company under Section 2 (28) of the Electricity Act, 2003. We also note that the Respondent GUVNL is a licensee which is to procure power from the aforesaid 200 MW Solar PV based Power Project of the Petitioner in terms of PPA executed between the parties.

5.3. Thus, the issue involved in the Petition between the Petitioner and the Respondent GUVNL pertains to the terms & conditions of the PPA executed between them pertaining to 'Change in Law' events. Thus, the issue involved in the matter is between a Generating Company and licensee and hence, this Commission has jurisdiction to decide the same under Section 86 of the Electricity Act, 2003. Hence, we decide to admit the present Petition being Petition No. 2010 of 2021.

5.4. We also note that the Petitioner has filed IA being IA No. 21 of 2021 in the present Petition for seeking urgent of listing of Petition No. 2010 of 2021. Since, the Commission has taken up the main matter, the prayer in I.A. No. 21 of 2021 filed for seeking urgent listing of Petition No. 2010 of 2021 is satisfied. Accordingly, I.A. No. 21 of 2021 stands disposed of.

5.5. We also note that the Respondent has sought certain details but according to the submissions made by the Petitioner, relevant details are already filed. However, any details that are not filed needs to be filed by the Petitioner alongwith relevant details agreed to be filed by the Ld. counsel for the Petitioner. Moreover, while filing the same, the Petitioner is also required to submit the following documents / evidence for verification of the claim of the Petitioner, if not already filed:

(i) RFID Details
(ii) CEIG certificate
(iii) Commissioning Certificate
(iv) Project specific documents;
(v) Detailed breakup of the project cost incurred with item-wise break-up for the project;
(vi) Detailed Calculations sheet with Safeguard duty and GST calculations;
(vii) Details of interest cost with (a) Details of debt, (b) Details of Equity, (c) Details of Debt sanctioned along with the terms and conditions of Debt

approval, (d) Release of Debt/Debt availed, (e) Original documents of the assumption while bidding carried out by the Petitioner with consideration of different items considered including Solar Module cost, Inverter cost, balance of plant cost etc. and the same was approved by Board or Management of the Petitioner company and it is part of loan documents etc.

(viii) Capacity in DC of Solar Modules actually installed and commissioned for Solar generation on which safeguard duty is paid including GST paid thereon,

(ix) Entire copy of the Original Contracts consisting of different clauses including Performance guarantees, delivery schedule, liquidated damages etc. and any amendments made thereto between (a) the Petitioner company and EPC Contractor & (b) EPC contractor with Equipment suppliers;

6. Next date of hearing will be intimated separately.

7. Order accordingly.

Sd/-	**Sd/-**	**Sd/-**
[S. R. Pandey]	**[Mehul M. Gandhi]**	**[Anil Mukim]**
Member	**Member**	**Chairman**

Place: Gandhinagar.
Date: 09/06/2022.