Petition No. 1741 of 2021
BEFORE
THE UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION
LUCKNOW

(Date of Order: 02.01.2023)

PRESENT:
Hon'ble Shri Raj Pratap Singh, Chairman
Hon'ble Shri Vinod Kumar Srivastava, Member (Law)

IN THE MATTER OF: Petition under Section 86 of the Electricity Act, 2003 read with Articles 12 and 17 of the Power Purchase Agreement dated 14.02.2019 between Adani Solar Energy Chitrakoot One Limited (formerly Adani Wind Energy (TN) Limited) and Noida Power Company Limited claiming imposition of Safeguard Duty on import of Solar Cells vide Notification dated 29.07.2020 as Change in Law.

Adani Solar Energy Chitrakoot One Limited (ASECOL)
Adani Corporate House, 4th Floor - South Wing, Shantigram,
Near Vaishno Devi Circle, S. G. Highway, Khodiyar, Ahmedabad, Gujarat - 382421.

.....Petitioner

Versus

Noida Power Company Limited (NPCL)
Commercial Complex, H Block, Alpha-II Sector, Greater NOIDA City-2013018

.....Respondent

The following were present:
1. Shri Sourav Roy, Advocate, ASECOL
2. Shri Vishal Gupta, Advocate, NPCL
3. Shri Alok Sharma, Head-Legal, NPCL

ORDER
(Date of Hearing - 22.11.2022)

1. The Commission vide Order dated 28.10.2022 had adjudicated the issue of Change in Law and held that the imposition of Safeguard Duty on the Solar Cells, falling under tariff items 8541 40 11 or 8541 40 12 of the First Schedule to the Customs Tariff Act, 1975 *vide* 2020 Safeguard Duty Notification is a Change in

Law event as per Article 9 of the PPA. The relevant part of the Order dated 28.10.202 is reproduced below:

"Commission's View

38. *In the instant case, the bid deadline was 27th November 2018 and the cut-off date for claiming Change in Law relief as per Article 12 of the PPA was 27th November 2018. However, the Gazette Notification for "Initiation of Review Investigation for continued imposition of Safeguard Duty on imports of "Solar Cells whether or not assembled in modules or panels" into India" was published only on 3rd March 2020, which means that the Director General had initiated its investigation only on 3rd March 2020 and the final findings of the Director General were published only on 18th July 2020 i.e. eleven (11) days before the 2018 Safeguard Duty Notification was coming to an end. Therefore, the Petitioner while placing bid in November 2018 in no way could have possibly factored the investigation that were to commence after a period of one and a half (1.5) years.*

39. *The 2018 Safeguard Duty Notification had a specific provision which imposed the levy only for a period of two (2) years, i.e. up to 29th July 2020, it ceased to have effect after the expiry of the said two (2) year period in terms of section 8B (8) of the Customs Tariff Act and Rule 16 of the Customs Tariff Rules, since it was specifically made applicable for a period of two (2) years. Therefore, as per the said notification no Safeguard Duty was to be paid on the import of Solar Cells from 30th July 2020 onwards.*

40. *Hence, the imposition of Safeguard Duty on the Solar Cells, falling under tariff items 8541 40 11 or 8541 40 12 of the First Schedule to the Customs Tariff Act, 1975 vide 2020 Safeguard Duty Notification is a Change in Law event as per Article 9 of the PPA."*

2. Subsequently, the Commission during the hearing on 03.11.2022, after hearing the parties on the issue of claimed amount and carrying cost, granted NPCL two weeks' time to file their response on ROE & carrying cost claim along with quantification and any other relevant document required for quantification of claim with a copy to ASECOL to respond, if any. The Commission vide order dated 05.12.2022, NPCL sought one month time to verify the claim of Rs. 8.77 Crs expended on account of SGD and argued the issue of carrying cost. The Commission reserved the order with direction to NPCL to file its submission on carrying cost.

Petitioner's argument on carrying cost

3. Sh. Sourav Roy, Counsel of ASECOL referred to Hon'ble APTEL's judgements in the case(s) of (i) Parampujya Solar Energy Pvt. Ltd. and (ii) Rattan India Power Ltd. regarding its claim of Carrying Cost on the Change in Law event-imposition of Safeguard Duty. Sh. Roy has further submitted that they had already filed the calculation of total expenditure (tax component) in the matter. Further, that in reference to the Hon'ble APTEL's judgment, they are not pressing for RoE rate for claiming 'Carrying Cost' but at the rate of LPS to compensate the affected party for time value of funds deployed.

Respondent's argument on carrying cost

4. Shri Vishal Gupta, Counsel of NPCL argued that ASECOL has claimed rate of Carrying cost to be either RoE or LPS rate, however, RoE is applicable to investment on equity portion and therefore the expenditure towards Change in Law event cannot be considered as an investment. Further, the Counsel has submitted that LPS is a penalty on non-payment of raised bill on account of default in payment by procurer and rate of Carrying cost may be allowed by the Commission considering the burden on end consumer.

Commission's analysis and decision

5. The Petitioner has installed 87,120 total modules aggregating to total installed DC capacity of 37.81 MW (141% times overloading) as against the minimum CUF of 17% and declared CUF of 24.50% as per PPA dated 14.02.2019. The Petitioner, in terms of RfS and PPA, has designed its project in a manner that can deliver the Contracted Capacity and achieve declared CUF. The Petitioner has also submitted details of invoices with numbers thereof, Bill of Entry number and date, details of challans for SGD paid and GST details @5% along with payment dates. The Petitioner has also submitted Auditor's Certificate that the materials as per the said invoice details were procured and utilized for its 25MW Solar power Plant developed at Village Chibbon, Tehsil Rajapur, District Chitrakoot, in the state of Uttar Pradesh. The total amount of SGD paid is Rs. 8.36 Crs and GST paid is Rs.

0.42 Crs, thus the total claimed amount on account of SGD is Rs. 8.77 Crs. These details need to be verified by the Respondent within a reasonable time and the payment on account of Change in law shall not exceed Rs. 8.77 Crs.

6. Now coming to the issue of carrying cost on verified amount, the Commission has noted that although the PPA does not specifically provide for carrying cost, but it notes that Relief for Change in law is to be decided by the Commission. The Hon'ble Appellate Tribunal for Electricity in Parampujya Solar Energy Pvt. Ltd vide its judgment dated 15.09.2022 has interpreted the word "Relief" as below:

"The use of the word "relief" in the context of adjudicatory process, simply means the remedy which the adjudicatory forum may afford "in regard to some actual or apprehended wrong or injury" or something which a party may claim as of right, or making the affected party "feel like easing out of ... hardship".

7. **The Commission is also of the view that the very purpose of the change in law clause in the PPAs is to relieve the SPPDs of the additional burden. Therefore, the relief intended to be afforded under the contracts cannot be complete unless the said burden is allowed from the date of commissioning of the Project till the date of this Order.**

8. Regarding the rate of interest for computation, the Petitioner, itself is not processing for the Return on Equity rate but for the LPS rate as per PPA. The Respondent has argued that LPS is a penalty on non-payment of raised bill on account of default in payment. We are convinced that LPS mechanism is a deterrent in the form of rate of interest higher than the yearly MCLR rate so that the payments are made in time and levy of LPS is avoided. The yearly SBI MCLR rate is fairly the cost of money available in the market.

9. Therefore, the Commission is of the view that the Petitioner shall be entitled to carrying cost @ yearly SBI MCLR rate on the verified amount from the date of commissioning of the Project till the date of this Order i.e., 31.12.2022.

Commission's View

10. The decisions of the Commission are summarized as below:

(a) The Petitioner shall be entitled to raise bill for claimed amount of Change in law along with all the documents and details as submitted during the proceedings. The documents and details shall be verified by the Respondent within a period of one month from the date of this and the payment on principal amount on account of Change in law shall not exceed Rs. 8.77 Crs. The LPS provision of the PPA shall be applicable after the Petitioner has raised the bill for Claimed amount of Change in law.

(b) The Petitioner shall be entitled to carrying cost @ yearly SBI MCLR rate on the verified amount from the date of commissioning of the Project till the date of this Order i.e., 31.12.2022.

The Petition is disposed of in terms of the above.

(Vinod Kumar Srivastava)
Member (Law)

(Raj Pratap Singh)
Chairman

Place: Lucknow
Dated: 02.01.2023