

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

APL-104/2021 & IA-764/2021

APL-105/2021 & IA-766/2021

APL-108/2021 & IA-768/2021

APL-111/2021 & IA-770/2021

and

APL-112/2021 & IA-772/2021

Dated: 21st May, 2021

**Present: Hon'ble Mr. Ravindra Kumar Verma, Technical Member
Hon'ble Mr. Justice R.K. Gauba, Judicial Member**

APL-104/2021 & IA-764/2021

In the matter of:

**M/s Fortum Solar India Private Limited Appellant(s)
1A, Vandana Building,
11, Tolstoy Marg,
New Delhi – 110 001**

Versus

- 1. Karnataka Electricity Regulatory
Commission
Through its Secretary
No. 16, Millers Tank Bed Area,
Vasanth Nagar,
Bengaluru – 560 052 Respondent No.1**

- 2. Chamundeshwari Electricity Supply
Corporation Limited
Through its Managing Director
Having its registered office at**

**Corporate Mysuru – 570 017 Office, #29,
Vijayanagara 2nd Stage,
Mysuru – 570 017**

.... Respondent No.2

**Counsel on record for the Appellant(s): Mr. Basava Prabhu Patil, Sr. Adv.
Ms. Puja Priyadarshini
Mr. Geet Ahuja
Mr. Nived Veerapaneni**

**Counsel on record for the Respondent(s): Mr. Darpan KM
Ms. Amrita Sharma
Mr. Rajat Shaw for R-1**

APL-105/2021 & IA-766/2021

In the matter of:

**M/s Fortum Solar India Private Limited Appellant(s)
1A, Vandana Building,
11, Tolstoy Marg,
New Delhi – 110 001**

Versus

- 1. Karnataka Electricity Regulatory
Commission
Through its Secretary
No. 16, Millers Tank Bed Area,
Vasanth Nagar,
Bengaluru – 560 052 Respondent No.1**
- 2. Bangalore Electricity Supply Company
Limited
Through its Managing Director
Having its registered office at**

K.R. Circle,
Bengaluru – 560 001

.... Respondent No.2

Counsel on record for the Appellant(s): Mr. Basava Prabhu Patil, Sr. Adv.
Ms. Puja Priyadarshini
Mr. Geet Ahuja
Mr. Nived Veerapaneni

Counsel on record for the Respondent(s): Mr. Darpan KM
Ms. Amrita Sharma
Mr. Rajat Shaw for R-1

Mr. Sriranga S.
Ms. Sumana Naganand
Ms. Medha M Puranik
Ms. Deepthi CR for R-2

APL-108/2021 & IA-768/2021

In the matter of:

M/s Fortum Solar India Private Limited Appellant(s)
1A, Vandana Building,
11, Tolstoy Marg,
New Delhi – 110 001

Versus

1. Karnataka Electricity Regulatory
Commission
Through its Secretary
No. 16, Millers Tank Bed Area,
Vasanth Nagar,
Bengaluru – 560 052

.... Respondent No.1

2. Bangalore Electricity Supply Company
Limited

Through its Managing Director
Having its registered office at
K.R. Circle,
Bengaluru – 560 001

.... Respondent No.2

Counsel on record for the Appellant(s): Mr. Basava Prabhu Patil, Sr. Adv.
Ms. Puja Priyadarshini
Mr. Geet Ahuja
Mr. Nived Veerapaneni

Counsel on record for the Respondent(s): Mr. Darpan KM
Ms. Amrita Sharma
Mr. Rajat Shaw for R-1

Mr. Sriranga S.
Ms. Sumana Naganand
Ms. Medha M Puranik
Ms. Deepthi CR for R-2

APL-111/2021 & IA-770/2021

In the matter of:

M/s Fortum Solar India Private Limited Appellant(s)
1A, Vandana Building,
11, Tolstoy Marg,
New Delhi – 110 001

Versus

1. Karnataka Electricity Regulatory
Commission
Through its Secretary
No. 16, Millers Tank Bed Area,
Vasanth Nagar,
Bengaluru – 560 052

.... Respondent No.1

**2. Hubli Electricity Supply Company Limited
Through its Managing Director
Having its registered office at
Corporate Office, Navanagar
P.B. Road, Hubballi – 580 025**

.... **Respondent No.2**

Counsel on record for the Appellant(s):

**Mr. Basava Prabhu Patil, Sr. Adv.
Ms. Puja Priyadarshini
Mr. Geet Ahuja
Mr. Nived Veerapaneni**

Counsel on record for the Respondent(s):

**Mr. Darpan KM
Ms. Amrita Sharma
Mr. Rajat Shaw for R-1**

**Mr. Shahbaaz Husain
Mr. Fahad Khan for R-2.**

APL-112/2021 & IA-772/2021

In the matter of:

**M/s Fortum Solar India Private Limited
1A, Vandana Building,
11, Tolstoy Marg,
New Delhi – 110 001**

.... **Appellant(s)**

Versus

**1. Karnataka Electricity Regulatory
Commission
Through its Secretary
No. 16, Millers Tank Bed Area,
Vasanth Nagar,
Bengaluru – 560 052**

.... **Respondent No.1**

**2. Mangalore Electricity Supply Company
Limited
Through its Managing Director
MESCOM Bhavana,
Kavoor Cross Road,
Bejai, Mangalore – 575 004**

.... **Respondent No.2**

Counsel on record for the Appellant(s): **Mr. Basava Prabhu Patil, Sr. Adv.
Ms. Puja Priyadarshini
Mr. Geet Ahuja
Mr. Nived Veerapaneni**

Counsel on record for the Respondent(s): **Mr. Darpan KM
Ms. Amrita Sharma
Mr. Rajat Shaw for R-1

Mr. Shahbaaz Husain
Mr. Fahad Khan for R-2.**

JUDGMENT (ORAL)

PER HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER

1. These matters have been taken up by video conference mode on account of pandemic conditions, it being not advisable to hold physical hearing.
2. This batch of appeals challenges the common order dated 31.12.2020 passed by Karnataka Electricity Regulatory Commission (*KERC* or *State Commission*) in OP Nos. 48 to 52 of 2019 taken out by the Appellant (Generator) claiming the benefit of Change in Law (*CIL*)

event referring to the imposition of Safeguard Duty (SGD) and Integrated Goods and Services Tax (IGST) leviable on SGD and carrying cost in such context, *vis-a-vis* the additional burden borne on account of import of solar modules from Peoples' Republic of China. It appears that in terms of Article 15.2.1 of the Power Purchase Agreement (PPA) entered upon by the generator with the Distribution Licensees (*Respondents*) the Appellant, being the supplier, is entitled to the benefit of CIL, the consequent amount to be determined and for compensation to be arranged by determination of incremental tariff by the State Commission.

3. By the impugned order, the State Commission agreed with the Appellant, principally, on the claim of CIL event referred to above. It, also determined the amount payable consequently *albeit* by a computation lower than what is claimed by the Appellant. The relevant part of the impugned order may be quoted, it reading thus:

“48. Keeping the above facts in view, the Commission is of the opinion that the decision of petitioners of importing additional solar module form China with the intention of optimize performance of the solar PV plant by achieving higher CUF of 30% as against minimum threshold of CUF of 18% as mentioned in bidding document. Such optimization of CUF allowed the petitioners to offer a competitive rate to the Respondents. Hence, the additional quantity of solar

modules imported by the petitioners from China without notice to the respondents as it was required under provisions of RfP document dated 23.04.2018, such additional financial burden cannot be allowed to pass on to the respondents. Therefore, we are of the considered opinion that reimbursement of safeguard duty on additional quantity of solar modules against the minimum contracted capacity of supply of energy, which are sought by the petitioners cannot be considered. Hence, we reject the claims made for excess modules imported and safeguard duty mentioned in para 26 of the petition. Therefore, there are entitled to the reimbursement of safe guard duty and corresponding IGST as indicated in the following table:

(Amount in Rupees)

| <i>For the contracted capacity (50MW)</i> | | | |
|---|--|---|--|
| <i>OP No.</i> | <i>Total Quantity of Solar Modules</i> | <i>Total Watts that can be produced</i> | <i>Safeguard Duty + GST on SGD claimed</i> |
| <i>48/2019</i> | <i>1,49,254</i> | <i>5,00,00,000</i> | <i>20,82,06,371.00</i> |
| <i>49/2019</i> | <i>1,49,254</i> | <i>5,00,00,000</i> | <i>20,64,71,037.15</i> |
| <i>50/2019</i> | <i>1,49,254</i> | <i>5,00,00,000</i> | <i>20,82,06,371.00</i> |
| <i>51/2019</i> | <i>1,49,254</i> | <i>5,00,00,000</i> | <i>20,82,06,371.00</i> |
| <i>52/2019</i> | <i>1,49,438</i> | <i>5,00,00,000</i> | <i>21,34,77,393.69</i> |

...

51. The learned counsel for the petitioners has made submission to this Commission to evolve the mechanism to reimburse the safeguard duty and IGST on import of solar

modules from the China to compensate the additional expenditure by way of increasing in tariff in lumpsum, from the date on which the additional expenditure incurred by the petitioners to the date of actual reimbursement by the respondents. The learned counsels for respondents submitted that the Commission may take an appropriate decision in this regard. The Commission notes that as per Article 15.2.1 deals with the relief for Change in Law which envisages that the agreed party shall be required to approach the KERC for seeking approval for Change in Law. Further Article 15.2.2 of PPA states that, the decision of KERC to acknowledge a Change in law and date from which it will become effective, provide relief for the same, shall be final and governing on both the parties. The Commission has acknowledged the Change in Law event in the instant cases. The Commission is of the opinion that the petitioners are entitled to get reimbursement of safeguard duty including IGST thereon, on import of solar modules from China, on proportionate quantity as indicated in table of para 48, by way of additional tariff.

...

54. *The petitioners are required to submit the relevant documents as produced with these petitions for claiming the reimbursement of safeguard duty and IGST project basis.*

- (a) Purchase contract of import of solar modules entered between the Supplier of Solar Modules:
(Description of SPV model in Wp (Watt peak), number of modules in pieces, quantity in watts, rate per Watt in US Dollar and total amount of amount in US Dollar)
- (b) Bill of Entries of import of solar modules:
(Name of port, name of importer with detail address of specific solar project for which modules imported, name of suppliers, date, unit price of assessment value, amount of safeguard duty and IGST payable)
- (c) Commercial Invoices details:
(Description of solar photovoltaic modules, Quantity, total power in Watts, Unit Price per Watt in US Dollar /Watt, Unit price in US Dollar /Per Piece and Amount taxable in US Dollar)
- (d) Challans for having paid the Customs Duty:
(Name of Bank, Name of Importer, Challan No, Document No. and Amount in Rs.)
- (e) Documents to evidence for having paid the Safeguard Duty and IGST

55. While making payment of the above said amount as in indicated in the table at para 48, for reimbursement of safeguard duty and IGST thereon, incurred by the petitioners and arrive an additional tariff per unit on the

basis of minimum contracted energy agreed in the PPA, to be paid spread over for the remaining period of the PPAs from the date of this Order.

For the above reasons, we proceed to pass the following:

ORDER

- a) The petitions are partly allowed.*
- b) The petitioner and the respondent in each of the cases shall verify the amount payable to the Petitioner in the respective cases after examining the documents and other directions given in para 48 & 54 above. This process shall be completed within a period of two months from date of this order. If the above process is not completed within the stipulated time stated above due to the fault of the respondent, the defaulting respondent shall be liable to pay interest at the rate of 8% per annum from the date of default to the date of completion of the process of verification, on the amount payable to the concerned Petitioner.*
- c) The amount found to be due and payable to the petitioners shall be spread over for the remaining period of the PPA from the date of this order and shall be reimbursed by appropriate increase in tariff per unit taking into*

consideration the minimum contracted energy as per provisions of the PPA for the respective Solar Power Projects.

- d) The petitioners are not entitled to any of the carrying cost.*
- e) The petitioners shall abide by the undertaking as per the Affidavit dated 19.09.2020 to reimburse the amount received from the Respondents, if any, in the event of the Hon'ble Supreme Court of India, in SLP No.24009-24010/2018 setting aside the Safeguard Duty Notification No:01/2018 Custom (SG) dated 30.07.2018, issued by Ministry of Finance, Government of India. In case, the Petitioners failed to repay the amount received from the Respondents, then the Respondents are at liberty to adjust the amount due to them in the monthly tariff bills.*
- f) Accordingly, the petitioners and respondents shall submit the Supplementary Power Purchase Agreements for the approval of the Commission.*
- g) The original Order shall be kept in OP No.48/2019 and copies, thereof, in OP Nos.49/2019,50/2019, 51/2019 and 52/2019.”*

(emphasis supplied)

4. We are unable to comprehend as to what is the meaning of the language used in para 55 quoted above (underlined by us).

5. In our reading, the above highlighted sentence does not make any sense. It appears from the submissions of the appellant, and the distribution licensees (respondents), that the parties have understood the above-quoted order to the effect that the Commission expected them to sit together and after verifying the documents relating to the additional expenditure also arrive at the additional tariff that has to be levied consequent to the CIL event in question. Noting our difficulty to comprehend the meaning, import and effect of the above quoted observations of the State Commission, while issuing notice by order dated 07.05.2021, we had directed the Commission to explain it to us at the hearing today through counsel. The learned counsel for the State Commission was at pains to explain it on the same lines as the above quoted observations seem to have been understood by the parties as well.
6. The appeals at hand were presented before us with several grievances including the issue of substantial part of the claim of the Appellant for compensation as a CIL event having been denied; the rejection of claim towards carrying cost; the verification exercise as directed having been undertaken, the relevant documents having been shared but there being no consensus; the actual compensation not having inured to the benefit of the Appellant till date.
7. Having gone through the impugned order with the assistance of the learned counsel on all sides, we are of the considered view that the

State Commission has miserably failed to discharge its responsibilities for several reasons. We elaborate this conclusion hereinafter.

8. That the CIL event will result in compensation in additional tariff is a crucial binding term of the Power Purchase Agreements executed by the parties with the approval of the Commission. In terms of the PPAs, and the relevant law on the subject, it is the responsibility of the State Commission to sit in judgment over the claim of CIL. And if the answer be in favour of such claim, it is again the duty (*adjudicatory function*) of the State Commission to determine the consequential compensation that is to be granted while specifying the date from which such compensation would be payable, also considering the additional burden of carrying cost, if any, leading eventually to determination of the additional tariff (by the Commission), that being the mode agreed upon by the parties for recompense.

9. The Commission seems to have forgotten the provision contained in Section 97 of the Electricity Act, 2003 which reads thus:

*“Section 97. (Delegation):
The Appropriate Commission may, by general or special order in writing, delegate to any Member, Secretary, officer of the Appropriate Commission or any other person subject to such conditions, if any, as may be specified in the order,*

such of its powers and functions under this Act (except the powers to adjudicate disputes under Section 79 and Section 86 and the powers to make regulations under section 178 or section 181) as it may deem necessary.”

10. It is clear that the adjudicatory power cannot be delegated.

11. In the matter at hand, the Commission in discharge of its adjudicatory function did undertake the exercise of considering the claim of CIL event and reached a definite affirmative finding. It then applied its mind to the material presented and reached a decision about the amount to which the Appellant is entitled as CIL compensation. Having reached such conclusion, there was no occasion for the parties thereafter to be called upon to exchange documents and verify the actual amount payable. The parties could not have been given such liberty after the determination by the Commission. This would amount to asking them virtually to sit in review of what had been decided by the Commission itself. If the intent behind such exercise was to bring about amicable resolution to the dispute, it should have preceded the determination of the claim by the Commission. Once the Commission had reached a conclusion, there was no occasion for the parties to be thrown back into another such round – a vicious circle - or being asked to decide again, now on their own. The impugned directions in effect amount to delegation of adjudicatory function which is impermissible. For these reasons, we do not give any

credence or significance to the parleys that the parties may have engaged themselves in post the determination of the claim by the Commission. All such exercise would be treated as inconsequential.

12. The Commission, in our view, has abdicated its responsibility also by expecting the parties to reach a decision, by consensus, on the incremental tariff that is to be levied post the CIL event. No doubt, if the parties could reach a consensus and present it to the Commission for approval it would be an ideal way. But then, again, such opportunity has to precede determination of the matter by the Commission, not afterwards.
13. In our view, the impugned order not only amounts to abdication of the jurisdiction by the Commission but also comes across as an exercise at adjudication which remains inchoate. The proceedings before the Commission could not have been terminated till the stage the incremental tariff had been determined. That not having been done, we are unable to uphold the operative part of the impugned order treating the proceedings to have come to an end.
14. For the foregoing reasons, we set aside the operative part of the impugned order. We also set aside and vacate the observations in para 55 of the impugned order quoted as above, they conveying virtually no meaning. We direct the Commission to take up further the exercise of the determination of incremental tariff consequent to

the determination already done by it on the quantum of compensation to which the Appellant is entitled as a result of CIL event. Having regard to time that has been wasted, such exercise must be completed within two months of this judgment.

15. We are conscious that Appellant is not satisfied with the determination of the quantum of compensation to which it is entitled. We are also conscious that the Appellant is also aggrieved by denial of carrying cost. Since we are remitting the matter for completion of the proceedings in accordance with law by the Commission, it would be appropriate to preserve and protect such contentions of the Appellant for the same to be agitated, if so desired, in appropriate forum after the fresh final order has been passed by the Commission pursuant to compliance with above directions.
16. We allow the appeals in above terms. The pending applications are rendered infructuous and they stand disposed of accordingly.

**PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO
CONFERENCING ON THIS 21st DAY OF MAY, 2021.**

(Justice R.K. Gauba)
Judicial Member

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(Ravindra Kumar Verma)
Technical Member

REPORTABLE/NON-REPORTABLE