

Rajasthan Electricity Regulatory Commission, Jaipur

Petition No. RERC/2044/2022

Petition under Section 86(1)(b) and (f) of the Electricity Act, 2003 before the Rajasthan Electricity Regulatory Commission for approval of change in law and seeking an appropriate mechanism for grant of appropriate adjustment /compensation to offset financial commercial impact of change in law events on account of amendment to Notification No. 01/2017- Integrated Tax (Rate) dated 28.06.2017 vide Notification No.08/2021- Central Tax (Rate) and Notification No. 8/2021- Integrated Tax (Rate) dated 30.09.2021 (effective 01.10.2021) respectively, which has resulted in an increase in the rate of CGST/IGST on Renewable Energy Devices from 5% to 12%/18% in terms of Article 12 of Power Purchase Agreement dated 08.01.2020 between Clean Solar Power (Bhainsada) Private Limited and Solar Energy Corporation of India Limited and appropriate directions thereof.

Coram:

Dr. B.N. Sharma, Chairman

Shri Hemant Kumar Jain, Member

Dr. Rajesh Sharma, Member

Petitioner : Clean Solar Power (Bhainsada) Private Limited

Respondents : Solar Energy Corporation of India Ltd,
Rajasthan Urja Vikas Nigam Ltd

Date of hearing : 27.03.2023, 17.03.2023, 12.01.2023, 29.11.2022,
18.10.2022

Present : Sh. Sujit Ghosh, Advocate for Petitioner
Ms. Tanya Sareen , Advocate for Respondent , SECI
Sh. Shashwat Purohit , Advocate for Respondent, RUVNL

Order Date : 29.03.2023

Order

1. M/s Clean Solar Power Bhainsada Pvt Ltd (hereinafter also referred as "Petitioner") is a generating company in terms of section 2(28) of the Electricity Act, 2003 and has been incorporated under the provisions of the Companies Act, 2013. The Petitioner is a special purpose vehicle (SPV) set up by Hero Solar Energy Private Limited for setting up 250 MW solar power project in the state of Rajasthan.
2. Solar Energy Corporation of India (hereinafter also referred as "Respondent-1" or "SECI") is a Government of India enterprise under the administrative control of the Ministry of New and Renewable Energy ("MNRE"). The Respondent No. 1 has been designated as the nodal agency for implementation of MNRE scheme for developing grid connected Renewable Power Projects in India.
3. Rajasthan Urja Vikas Nigam Limited (hereinafter being referred to as "Respondent No. 2" or "RUVNL") is a company formed by the State of Rajasthan and is an authorized representative of Rajasthan DISCOMS (Distribution Licensees), to carry out Power trading activities.
4. The Petitioner in its petition and during hearing(s) has mainly submitted as under:
 - 4.1 The Government of India announced the Policy for promotion of the Solar Power and the target to achieve an aggregate installed capacity of 100 GW by 2022. In pursuance thereof, vide Resolution dated 03.08.2017 (hereinafter referred to as 'Tariff Guidelines'), the Ministry of Power, issued Guidelines for the Tariff Based competitive Bidding Process for procurement of power generated from the Grid connected Solar Power Project. SECI, which has been designated as a Nodal Agency for developing and facilitating the establishment of the Grid connected solar power capacity issued its request for selection vide No. SECI/C&P/SPD/RfS/RJ-11/032019 dated 22.03.2019 (hereinafter referred to as 'RfS') for procurement of 750 MW of the power generated from the grid connected Solar Power Project from Solar Power Developers (hereinafter referred to as 'SPDs') on the terms and conditions contained in the RfS. In furtherance to the RfS , Hero

Solar Energy Pvt Ltd participated in the bids invited by SECI and submitted its bid on 04.06.2019 for 250 MW. On 16.09.2019, SECI declared Hero Solar Energy Private Limited as successful bidder and issued the Letter of Award vide No. SECI/C&P/SPD/RJ750/T-II/Lol/HSEPL/33214 dated 16.09.2019 for development and establishment of 250 MW (AC) capacity of Solar Power Project in the State of Rajasthan.

- 4.2 Pursuant thereto, on 08.1.2020, SECI entered into a PPA with the Petitioner for setting up 250 MW (AC) capacity of Solar Power Project at the rate of Rs. 2.50/kWh fixed tariff for 25 years. However, the Central Government vide Notification No. 8/2021- Central Tax (Rate) and Notification No. 8/2021-Integrated Tax (Rate) dated 30.09.2021 (effective 01.10.2021) amended the rate of CGST/IGST for renewable energy devices and their parts. As per the said Notifications, Entry 234 and the entries related thereto (with effective CGST / IGST rate of 5%) were omitted from the Schedule I and Entry 201A has been inserted to Schedule II wherein the rate of CGST/IGST is 6% (effective 12%). On the basis of the amendment made, the renewable energy devices i.e., modules and solar power generators and their parts for manufacture were leviable to CGST/IGST at 12% / 18%, instead of 5%, thereby leading to an incremental CGST / IGST of 7%/13%.
- 4.3 Article 12 of the PPA provides for Change in law and the relevant portion is reproduced hereunder:-

"12. ARTICLE 12: CHANGE IN LAW

12.1 Definitions

In this Article 12, the following terms shall have the following meanings:

In this Article 12, the term Change in Law shall refer to the occurrence of any of the following events pertaining to this project only after the last date of the bid submission, including:

- (i) the enactment of any new law ;or*
- (ii) an amendment, modification, or repeal of an existing law; or*
- (iii) the requirement to obtain a new consent, permit or license; or*
- (iv) any modification to the prevailing conditions prescribed for obtaining consent, permit or license, not owing to any default of the Solar Power Generator; or*

(v) any change in the rates of any Taxes including any duties and cess or introduction of any new tax made applicable for setting up the solar power project and supply of power from the Solar Power project by the SPD which have a direct effect on the Project.,

However, Change in Law shall not include (i) any change in taxes on corporate income or (ii) any change in any withholding tax on income or dividends distributed to the shareholders of the SPD, or (iii) any change on account of regulatory measures by the Appropriate Commission.

In the event a Change in law results in any adverse financial loss/ gain to the Solar Power Generator then, in order to ensure that the Solar Power Generator is placed in the same financial position as it would have been had it not been for the occurrence of the Change in law, the Solar Power Generator/ Procurer shall be entitled to compensation by the other party, as the case may be, subject to the condition that the quantum and mechanism of compensation payment shall be determined and shall be effective from such date as may be decided by the appropriate Commission.

12.2 Relief for Change in Law

12.2.1 The aggrieved Party shall be required to approach the Appropriate Commission for seeking approval of Change in Law.

12.2.2 The decision of the Appropriate Commission to acknowledge a Change in Law and the date from which it will become effective, provide relief for the same, shall be final and governing on both the Parties. “

4.4 on the bare perusal of the Article 12 of the PPA that pertains to Change in law, it is clear that Article 12.1 specifically and unambiguously stipulates that in case of any change in the rates of any Taxes including any duties and cess made applicable for setting up the solar power project and supply of power from the Solar Power project by the SPD which have a direct effect on the Project, then such change will be treated as "Change in Law" and the quantum of compensation payment on account of change in rates of such duties tax and taxes shall be provided to the affected party by the other party as per Article 12.1.2, provide such provisions are recognised by the Appropriate Commissions at the time of adoption of the tariff by the Appropriate Commission.

4.5 As submitted above, Notification No. 8/2021- Central Tax (Rate) and Notification No. 8/2021-Integrated Tax (Rate) dated 30.09.2021

(effective 01.10.2021) has amended the rate of CGST / IGST for renewable energy devices and their parts. As per the said notification, Entry 234 and the entries related thereto (with effective CGST / IGST rate of 5%) were omitted from the existing Notification and leads to change in rate of Taxes for setting up of a Solar Power Project and supply of power.

4.6 Accordingly, it is submitted that the increase in the rate of CGST/IGST on the renewable energy devices and their parts, qualifies as a 'Change in Law' event under the PPA in as much as:-

- a) The increase in rate of CGST/IGST would be covered by the phrase "any change in the rates of any Taxes including duties and cess made applicable for setting up the solar power project and supply of power from the Solar power project". Thus, the increase in the rate of CGST/IGST would qualify as a Change in Law event under the fifth bullet of Article 12.1 of the PPA.
- b) Alternatively, the amendment of Notification No. 01/2017-Central Tax (Rate) and Notification No. 01/2017-Integrated Tax (Rate) dated 28.06.2017, would be covered by the phrase "amendment, modification of an existing law"
- c) The change of law event has occurred after the last date of the bid submission, i.e., 04.06.2019

Rejoinder on behalf of petitioner dated 11.01.2023 to the reply filed by SECI:

4.7 Along with the change in rate of GST, there was also a change in the entry itself such that the only goods which fall under the ambit of Solar Power Generators (i.e. goods which are responsible for generating DC power i.e. modules, inverters and DC cables) are leviable to GST at 12%. Remaining goods, which earlier formed a part of solar power generating system, but now stand excluded (as they would not be a part of a generator) were leviable to GST at the tariff rate i.e. 18%. In this regard, the Petitioner also craves leave to rely upon the CA Certificate and tabular details enclosed as Annexure 8 to the Petition which specifically details the actual rate of GST paid on each of the goods and the incremental GST impact suffered therein which would be covered under the GST Notification.

- 4.8 The Petitioner has entered into separate contracts for supply of goods and supply of services. Accordingly, the incremental rate of GST on account of change in law from 5% to 12%/ 18% is being claimed on the goods which are being supplied pursuant to the contract for supply of goods and no such claim is being raised in relation to the contract for supply of services as the rate of GST for services has remained unchanged at 18%. Accordingly, as indicated by the Respondents themselves at Para 8 of the Counter Affidavit, as the Petitioner has entered into a contract separately for procurement of goods, the first contract will be taxed at 12%/ 18%. That apart, it is also pertinent to note that the said contracts were entered into by the Petitioner on 29.06.2021 which is much prior to the change in law event i.e. increase in rate of GST, which took place on 30.09.2021. Thereafter, the Petitioner also proceeded to amend the contracts so as to reflect the change in rate of GST.
- 4.9 It is well settled principle of law that commercial decisions of adoption of tax for implementation of the project including the mode of procurement of goods and services taken by a solar power developer (the Petitioner in the present case) cannot be questioned by the power procurer (the Respondents in the present case).
- 4.10 The Respondent is also bound by the recent instructions issued by Ministry of New and Renewable Energy wherein implementing agencies (SECI in the present case) have been directed to treat the increase in the rate of GST from 5% to 12% as a Change in Law Event. The relevant extract of the said letter is reproduced herein below:

"4. The matter has been examined in MNRE and MNRE's Renewable Energy Implementing Agencies (SECI/NTPC Ltd/NHPC Ltd.) are hereby requested that:

...

b) Hike in GST rate as Change in Law: w.r.t. RE power projects, wherein the last date of bid submission was on or before September 30, 2021, i.e., on or before the issuance of notification regarding increase in GST rate for specified renewable energy devices and parts for their manufacture from 5% to 12%, and wherein the Scheduled Commissioning Date (SCD), including time extensions granted, if any, was on or after October 1, 2021, REIAs may consider this hike in GST rate from 5% to 12% under 'Change in Law' unless the same is disallowed by specific provisions in the tender documents/contracts."

4.11 The Petitioner undertakes to provide any other document, if this Hon'ble Commission deems it necessary to establish one-to-one correlation of the additional financial impact incurred by the Petitioner on account of Change in Law. Petitioner also submits that all relevant documents as required for reconciliation of the claim by the Respondents shall be provided at the appropriate stage.

4.12 The Respondent No. 1, vide its Reply, sought to restrict the relief the

Petitioner is entitled to, on the ground that the Petitioner is entitled to relief under the Change in Law only till the date of Commercial Operation Date ("COD"). In this regard, it is submitted that the PPA prescribes compensation payable to the Petitioner without limiting the scope of such Change in Law compensation till COD.

4.13 Introduction of an extraneous condition into the PPA is impermissible. The Hon'ble Tribunal has vide its Judgment dated 15.09.2022 in the case of Parampuja v. CERC and Ors, has held that the Change in Law relief is not complete unless the affected party is restored to the same financial position as it would have been, had the Change in Law Event not occurred. The relevant extracts of the said judgment are reproduced herein below:

"97. It bears repetition to note that change-in-law clauses in the PPAs (Article 12) assure relief to be provided in relation to "any additional recurring/non-recurring expenditure" arising out change-in-law. There is no restriction in the contracts as to application of this clause for period prior to the COD. The activities of generation of electricity and its supply, post COD, are bound to include non-recurring expenditure, O&M expenses being one such area. In fact, the use of the word "any" in relation to the consequent "recurring or non-recurring expenditure" signifies the wide ambit of the contractual clause, no exclusion of such nature as understood by the Commission deserving to be read there into. The extraneous qualification that such expenditure must relate to period prior to COD cannot be approved of."

4.14 Furthermore, the Petitioner also places its reliance on the decision of Hon'ble Supreme Court in State of West Bengal v. B.K. Mondal and Sons, (AIR 1962 SC 779), where the Hon'ble Supreme Court explore the contours of Section 70 of the Indian Contract Act, 1872. Section 70 of the Indian Contract Act, 1872 deals with the scenario where person lawfully does anything for another person, or delivers anything

to him, not intending to do so gratuitously. As per the said section a person who is a recipient of goods or services which were delivered to him without an intension of doing so gratuitously has to make compensation to the former in respect of, or to restore, the thing so done or delivered. For ready reference the relevant paragraphs are being extracted herein below:

"14..... All that Section 70 provides is that if the goods delivered are accepted or the work done is voluntarily enjoyed then the liability to pay compensation for the enjoyment of the said goods or the acceptance of the said work arises. Thus, where a claim for compensation is made by one person against another under Section 70, it is not on the basis of any subsisting contract between the parties, it is on the basis of the fact that something was done by the party for another, and the said work so done has been voluntarily accepted by the other party. That broadly stated is the effect of the conditions prescribed by Section 70."

4.15 Respondent No. 1 has submitted that if this Hon'ble Commission upholds that the imposition of GST is an event of change in law and thereby proceeds to direct payment of compensation, then, it may adopt the methodology similar to the one adopted in Petition No. 1914/2021, 1922/2021 & 1941/2021 i.e., annuity payments in form of monthly instalments, with discounting factor as 9% commencing from 60th day from the date of order or from the date of reconciliation of the claims by the Respondent, whichever is later. These monthly instalments shall continue for a period of 15 years. However, in the present case, the additional GST has been funded both through debt and equity in the proportion of 77.7: 22.3 and accordingly the discounting factor in the annuity payments ought to be based on said ration. Hence the discounting factor of 9 % is insufficient and does not restore the petitioner to the same economic position as envisaged under the change in law provision.

4.16 It is submitted that this Hon'ble Commission may consider the debt equity ratio of 70:30 while applying the rate of return on equity on 70% of the total compensation while applying rate of return on debt on the remaining 30%, so as to restore the Petitioner to the same economic position as it would have been, had the Change in Law Event not occurred.

4.17 The Petitioner places its reliance on the Order dated 26.03.2020 passed by the Hon'ble Central Electricity Regulatory Commission in 127/MP/2019 & batch. Vide the said Order the Hon'ble Central Commission while interpreting the provisions of the PPA and PSA related to billing and payment held that payment of compensation on account of Change in Law, to the Petitioner by Respondent SECI is not conditional upon the payment to be made by the Respondent Discoms to Respondent SECI. For ready reference relevant paragraphs are extracted herein below:

*"... 94. From the above, the Commission observes that the billing and payment between the Petitioner and Respondent SECI are not conditional upon billing and payment between Respondent SECI and the Respondent Discoms. Although, the above provisions (Article 10 of PPA and Article 6 of PSA) deal with regular monthly tariffs, the underlying philosophy that the billing and payment of one leg is not conditional upon the billing and payment of the other leg can be applied to the payment towards incremental impact on account of GST being a change in law, as well. It holds that the Power Purchase Agreement and Power Sale Agreement being back to back in nature are interconnected implying thereby that the Respondent Discoms are liable to pay to the Respondent SECI all that Respondent SECI has to pay to the Petitioner. However, payment to the Petitioner by Respondent SECI is not conditional upon the payment to be made by the Respondent Discoms to Respondent SECI. The Commission having held that GST is a change in law, Respondent SECI is liable to pay to the Petitioner as per discussion above. Respondent SECI is eligible to claim the same from the Respondent Discoms on back to back basis.
..."*

4.18 From the above extract it becomes abundantly clear that despite PPA and PSA being arranged on a back-to-back basis, the same does not make the payment of compensation to the Petitioner on account of Change in Law by Respondent No. 1 conditional upon payment received by it from Respondent No. 2.

4.19 The Petitioner places its reliance on the Order of Hon'ble Tribunal dated 16.11.2021 in Appeal No. 163 of 2020 and Appeal No. 171 of 2020, in Nisagra Renewable Energy Private Limited v Maharashtra State Electricity Distribution Co. Ltd. & Anr. and Juniper Green Energy Private Limited v Maharashtra State Electricity Distribution Co. Ltd & Anr. respectively (collectively referred to as "Order in Nisagra dated 16.11.2021"). Vide the said Order the Hon'ble Tribunal has held that

carrying cost is compensation towards time value of money for the time gaps between date on which affected party incurred such additional expenses. Further, in order to restore the affected party in the same economic position as if the change in law event has not occurred, the carrying cost has to be allowed at "actuals".

4.20 It is further submitted that State Commissions in the absence of any actual loan disbursement and its rate of interest which was used for paying increased expenses on account of Change in Law compensation, have relied on Tariff Regulations to determine the rate of Carrying Cost, on the equity component. In this regard reliance is placed on Order date 17.02.2022, passed by Hon'ble Maharashtra Electricity Regulatory Commission (Hon'ble Maharashtra Commission) in Case No. 61 and 62 of 2020, in M/s. Nisagra Renewable Energy Private Limited (NREPL) v Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL) and M/s. Juniper Green Energy Private Limited (JGEPL) v Maharashtra State Electricity Distribution Co. Ltd (MSEDCL) respectively (collectively referred to as "Order in Nisagra dated 17.02.2022"). Vide the said Order the Hon'ble Maharashtra Commission held as follows:

"... 10.7 APTEL in its remand judgment dated 16 November 2021 at para 44 (which is reproduced at para 1.6 above) has observed that carrying cost on Change in Law compensation should have been on actuals. To demonstrate actual carrying cost in present proceeding, JGEPL and NREPL has submitted loan agreements with IREDA. On perusal of such loan agreements, it is observed that these agreements are for loan against complete project and not limited to additional expenses on account of Change in Law compensation. Further loan agreement provides for interest reset clause. Therefore, submitting just loan agreement does not demonstrate actual carrying cost incurred by Petitioners on additional expenses on account of Change in Law compensation. In case, Petitioners wish to claim actual interest rate as a rate of carrying cost, they need to demonstrate to MSEDCL actual loan disbursement and its rate of interest which is used for paying increased expenses on account of Change in Law compensation.

...10.9 Accordingly, carrying cost at the rate of actual interest rate (if JGEPL and NREPL are able to demonstrate the same to MSEDCL as ruled in para 10.7 above) or at the interest rate applicable for Working Capital Loan under MERC RE Tariff Regulations 2019 shall be allowed for the period from the date they paid such amount of safeguard duty to Government Authorities till the date of this Order."..."

4.21 Furthermore, Hon'ble Tribunal has vide its Judgment dated 15.09.2022 has held that as under:

"49. The issue of compensation for additional expenditure incurred by the SPPDs on account of CIL, consequent upon enforcement of the GST laws, as indeed the safeguard duty on import of solar cells (in the case of Mahoba), and the incidental relief of carrying cost, is common to all the appeals at hand.

....

66. To put it simply, the controversy at hand requires to be addressed on the basis of interpretation to be put on the key words "provide relief" consequent to change in law appearing in Article 12.1.1. It may be noted at this very stage that the language employed in the PPAs at hand, using the above noted expression, is materially distinct from the one seen in corresponding Article 13 on change in law in Gujarat Bid-01 PPA which was subject matter of denial of carrying cost in the cases of Adani Power Ltd and GMR Warora Ltd . Concededly, however, the words "the purpose of compensating the party affected by such change in law is to restore ... the affected party to the same economic position as if such change in law had not occurred", as appearing in the Haryana PPA are missing here. The question that arises is as to whether this renders the PPAs at hand one which do not at all contain the restitutionary provision. The answer to this question, in our considered view, depends on the construction that is to be placed on the words "provide relief".

...

71. Restitution is a principle of equity which is generally invoked by the adjudicatory authorities – Courts and Tribunals – to render substantial justice and, in this context, we may quote the following observations of Supreme Court in judgment reported as South Eastern Coalfields Ltd v. State of Madhya Pradesh & Ors. (2003) 8 SCC 648:

...

72. As ruled in above mentioned case, absence of prohibition in law or contract against award of interest to recompense for delay in payment is also significant. As already quoted earlier, in the case of Uttar Haryana Bijli Vitran Nigam Ltd(supra), the Supreme Court has upheld the view that in terms of restitutionary principle, the affected party is to be given the benefit of restitution "as understood in civil law".

73. The claim arising out of change in law provisions, across all kinds of PPAs under bidding route, is essentially a claim for compensation, the objective being to relieve the affected party of the impact of change in law on its revenues or cost or by way of additional expenditure. The word "compensation" simply means anything given

to make things equal in value, anything given as an equivalent, to make amends for loss or damage.

...

94. For the foregoing reasons, we cannot approve of the view taken by the Central Commission on the subject of carrying cost. We hold that the appellant SPPDs are entitled to grant of relief in the nature of carrying cost over and above the compensation already allowed by the Central Commission."

- 4.22 Hence, in light of the same, the Petitioner is entitled to carrying costs as per actuals and this Hon'ble Commission is duty bound to protect the contractual interest of the Petitioner inasmuch as the Petitioner is restored to the same economic position which shall not be complete unless the Petitioner is granted carrying costs as per actual.

Rejoinder on behalf of petitioner dated 30.01.2023 to the reply filed by RUVNL:

- 4.23 The change in rate from 5-12% in certain cases and 5-18% in other cases is also predicated on the difference in the entries i.e., Entry 234 of Schedule I (levying GST at 5%) and Entry 201A of Schedule II (levying GST at 12%). Entry 234 of Schedule I (when the effective rate of GST was 5%) read as follows:

"Following renewable energy devices and parts for their manufacture"

- (a) Bio-gas plant*
- (b) Solar Power based devices*
- (c) Solar Power Generating System*

.....

(h) Photo voltaic cells, whether or not assembled in modules or made up into panels "

- 4.24 Accordingly, prior to the amendment, the rate of GST on supply of solar modules as well as solar power generating system was 5%. Solar power generating system was broadly interpreted to include all goods which when put together would be capable to generate solar power.

4.25 However, with the introduction of the 2021 Notification, Entry 201A was inserted in Schedule II (where GST is levied at 12%) which read as follows:

""Following renewable energy devices and parts for their manufacture"

(a) Bio-gas plant

(b) Solar Power based devices

(c) Solar Power Generators

.....

(h) Photo voltaic cells, whether or not assembled in modules or made up into panels "

4.26 Accordingly, along with the change in rate of GST, there was also a change in the entry itself such that the only goods which fall under the ambit of Solar Power Generators (i.e. goods which are responsible for generating DC power i.e. modules, inverters and DC cables) are leviable to GST at 12%. Remaining goods, which earlier formed a part of solar power generating system, but now stand excluded (as they would not be a part of a generator) would be leviable to GST at the tariff rate i.e., 18%. In this regard, the Petitioner also craves leave to rely upon the CA Certificate which specifically details the actual rate of GST paid on each of the goods and the incremental GST impact suffered therein which would be covered under the GST Notification.

4.27 Therefore, it is submitted that with the introduction of 2021 Notification, the rate of GST for goods required for setting up of a solar power project increased from 5% to 12% or 18%, depending upon whether the goods qualified as a part of the solar power generator or not.

4.28 The Petitioner in its petition has prayed for:

- a) Hold and declare that the increased rate of CGST / IGST on renewable Energy devices and parts for their manufacture imposed vides Notification No. 8/2021-Central Tax (Rate) and Notification No. 8/2021- Integrated Tax{Rate) dated 30.09.2021 (effective 1.10.2021) as Change in Law in terms of Article 12 of

the PPA which have led to an increase in the expenditure for the Project;

- b) Evolve a suitable mechanism to compensate the Petitioner for the increase in expenditure incurred by the Petitioner on account of Change in Law;
- c) Approve and direct Respondent to compensate the Petitioner towards the increased CGST and IGST as one-time lump sum amount or mechanism devised by this Ld. Commission in prayer (b)
- d) Approve and grant interest from the date of incurring of the cost by the Petitioner till the date of order by this Commission;
- e) Restore the Petitioner to the same economic position prior to occurrence of the Change in law by directing SECI to pay to the Petitioner carrying cost on actual in terms of Article 12 of the PPA;
- f) Allow legal and administrative costs incurred by the instant petition.
- g) 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.
- h) Reply received from SECI in written submissions and during hearing(s) is summarized as below:

GST NOTIFICATION DATED 30.09.2021

4.29 The Petitioner has claimed that Government of India issued Notification No.8/2021- Central Tax (Rate) [Pages 207-209, Petition] and Notification No.8/2021- Integrated Tax (Rate) [Pages 210-212, Petition] dated 30.09.2021 whereby entries relating to renewable energy devices (i.e. modules, Solar Power generators) and parts for their manufacture as specified therein have been inserted in Schedule-II prescribing rate of GST at 12%. Prior to the said Notification dated 30.09.2021, the said entry was under Scheduled-I prescribing rate of GST at 5%.

4.30 In order to qualify for any relief under Article 12 of the PPA dealing with Change in Law, the claims raised by the Petitioner should fall

within the scope and ambit of the said provision. The Commission decide whether the Notifications dated 30.09.2021 constitute as an event of Change in Law within the scope of Article 12 of the PPA read with provisions of PSA.

- 4.31 As per the Notification dated 30.09.2021 of Government of India, IGST shall be applicable at the rate of 12% from the effective date of such Notification. Prior to such notification IGST was applicable at the rate of 5%.

Explanation:- If the goods specified in this entry are supplied, by a supplier, along with supplies of other goods and services, one of which being a taxable service specified in the entry at S. No. 38 of the Table mentioned in the notification No. 8/2017-Integrated Tax (Rate), dated 28th June, 2017 [G.S.R. 683(E)], the value of supply of goods for the purposes of this entry shall be deemed as seventy percent of the gross consideration charged for all such supplies, and the remaining thirty per cent. of the gross consideration charged shall be deemed as value of the said taxable service.

- 4.32 Accordingly if there are supply of services in addition to supply of goods namely solar power based devices and systems in terms of the explanation, the Rajasthan Appellate Authority for Advance Ruling in the case M/s. Utsav Corporation has clarified that if the supply Contract entered into by the Petitioner involves supply of Solar power based devices including carrying out the activity of erection, installation commissioning of solar generating system it will fall under works contract. In such a case, 12% will be applicable only on 70% of total contract value and 18% on remaining 30% value. In other words, tax incidence on goods is at 12% and services is at 18%. It is the obligation of Petitioner to establish to the satisfaction of SECI, RUVNL and Commission on the nature of services involved in the procurement of solar based devices and systems.

- 4.33 The above Explanation providing for 12% on 70% for the goods and 18% for 30% on services will apply only if it is a composite works contract and not otherwise. If the contract entered into by the Petitioner is separately for procurement of goods including solar based power devices and systems without there being any services and another independent contract for services, the first contract will be taxed at 12% and second contract will be taxed at the rate

applicable to services without splitting the value of contracts into 70% of goods and 30% as services. It is also for the Petitioner to establish to the satisfaction of the Hon'ble Commission that Petitioner has acted diligently and has adopted a prudent utility practice of minimizing the impact of GST by entering into separate service contract, wherein value of such services is significantly less than 30% of the cumulative value of both goods and services procured. Subject to admissibility of Notification dated 30.09.2021 as Change in Law, Any increase in tax rate of GST which the Petitioner can claim as per Notification dated 30.09.2021 of Government of India is only for the increase of GST from 5% to 12% on goods there being no increase in tax on service part of 30% as per the said Notifications. In other words, the Petitioner cannot re-arrange contract after change in law events to claim it as a composite contract when earlier it was a divisible contract or vice versa where it was divisible contract to now as a composite contract if the same results in higher tariff payment to SECI/buying entities on account of change in nature of contract.

REQUIREMENT TO FURNISH RELEVANT DOCUMENTS AND THEREBY ESTABLISH ONE TO ONE CORRELATION

- 4.34 If the change in rate of GST for the specified renewable energy devices (i.e. modules, Solar Power generators) and parts for their manufacture vide Notification dated 30.09.2021 of the Government of India is considered as Change in Law, the Petitioner be directed to furnish the relevant details including invoices, date of delivery of goods, date on which invoices were raised, Statutory Auditor's Certificate, etc. to substantiate the impact of the change in rate of GST on the procurement of specified renewable energy devices (i.e. modules, Solar Power generators) and parts for their manufacture required for Petitioner's Solar Power Project.
- 4.35 In this regard, the Hon'ble Commission vide Order dated 30.12.2021 in Petition Nos.1914/2021, 1922/2021 and 1941/2021 in the matter of Fortum Solar Plus Private Limited –v- Solar Energy Corporation of India Limited & Another and Batch, inter-alia, held as under:

"57. The Commission directs SPDs to make available to SECI and Discoms all relevant documents exhibiting clear and one to one correlation between the projects and the supply of goods or services, duly supported by the relevant invoices and Auditor's Certificate...."

CUT-OFF DATE FOR PAYMENT OF COMPENSATION ON ACCOUNT OF CHANGE IN LAW EVENT AS CLAIMED BY THE PETITIONER

4.36 The aspect of the Cut-Off date for payment of compensation on account of Change in law need to be considered based on the decision of this Hon'ble Commission in regard to admissibility of the said event as Change in Law within the scope of Article 12 of the PPA.

4.37 The Commission vide Order dated 30.12.2021 in Petition Nos.1914/2021, 1922/2021 and 1941/2021 in the matter of Fortum Solar Plus Private Limited –v- Solar Energy Corporation of India Limited & Another and Batch, inter-alia, held as under:

"56. The Commission regarding Cut-off date for claims for Change in Law events clarifies that the invoices related to supply of the goods can be raised only up to COD for all the equipment as per the rated project capacity and energy as per PPA that has been installed and through which energy has flown into the grid, since the liability of the SECI/Respondent Discom for payment of purchase of the power from the Respondent SPDs starts from the Commercial Operation Date (COD)."

4.38 The Scheduled Commissioning date was revised to 16.09.2021 vide letter dated 07.09.2020 of SECI in terms of Office Memorandum dated 13.08.2020 of MNRE dealing with extension of time on account of Covid-19. The Scheduled Commissioning date was further revised to 01.12.2021 vide letter dated 02.09.2021 of SECI in terms of Office Memorandum dated 12.05.2021 and 29.06.2021 of MNRE dealing with extension of time on account of second wave Covid-19. As per letter dated 10.03.2022 of SECI, the Scheduled Commissioning Date is further extended to a date which is 30 days after the date of Judgment by Hon'ble Supreme Court in IA filed by MNRE {contesting order dated 19.04.2021 of Hon'ble Supreme Court (GIB Case)} consistent with the terms of Office Memorandum dated 03.02.2022 of MNRE relating to Great Indian Bustard (GIB) Case.

- 4.39 Commission may be pleased to clarify the cut-off date for considering change in law impact on account of notification dated 30.09.2021 as the actual Commercial Operation Date of power project.

METHODOLOGY FOR PAYMENT OF COMPENSATION (IF ANY) ON ACCOUNT OF CHANGE IN LAW

- 4.40 Ministry of New and Renewable Energy (hereinafter 'MNRE'), Government of India with regard to the aspect of Change in Law compensation ordered by the Hon'ble Commission on account of imposition of GST vide notification dated 01.07.2017 and Safeguard Duty vide notification dated 30.07.2018 inter-alia stated that impact of GST/Safeguard Duty shall be recovered in annuity basis, the rates for this shall be worked out by SECI/NTPC and that the rates of recovery shall be as per the norms of the Central Commission.
- 4.41 In cases other than those where the Buying Entity /Distribution Licensee namely RUVNL specifically agree to make one time lump-sum payment and further duly make such payment in discharge of their obligations, the annuity payment will be appropriate. This is particularly as the one-time payment will be burdensome.
- 4.42 There is a clear rationale for annuity payment methodology. The increased costs have been claimed to have been incurred for the purpose of supply of power, the costs should be recovered only if the Petitioner continue to maintain the supply of the power. If the Petitioner does not supply the requisite power, it should not be entitled to recover the cost proportionate to such non-supply, similar to any other capital cost. If the Petitioner is allowed to recover the Change in Law impact in lump-sum, then SECI [and consequentially RUVNL] would have paid for capital cost even without there being actual supply of power in future. If for any reason the Petitioner abandons the project and discontinues the supply of power, there is no methodology for adjustments of the lump sum payments already made.
- 4.43 For the present case, the following parameters for making payment on annuity basis may be considered by the Hon'ble Commission, if the Notification dated 30.09.2021 is construed as a Change in Law event:

- a) The change in law claims upto the cut-off date (commercial operation date) as may be decided by the Hon'ble Commission in its order will be evaluated by SECI;
- b) The discounting factor may be considered as 9% which is the rate of interest for the loan component of the capital cost as provided in the Central Commission's RE Tariff order dated 31.03.2021 providing for determination of levelised generic tariff for the Financial Year 2021-22 (Para 2.F. of the Order) read with Regulation 14 (2) (b) of Renewable Tariff Regulations, 2020;
- c) The period for payment of the compensation on account of Change in rate of GST on annuity basis may be taken to be as 15 years from the date of Commercial Operation Date. The same is consistent with Regulation 14 (1) of the RE Tariff Regulations 2020 providing that "For the determination of generic tariff and project specific tariff, loan tenure of 15 years shall be considered";
- d) In cases, where the projects of the Power Developers have already achieved COD, the amount of monthly annuity payment for the number of months elapsed since the COD till the date of payment may be paid on lump-sum basis; and
- e) The remaining amount of the change in law compensation (Total change in law claims payable minus change in law claims paid on upfront basis) will be payable to solar power generator with the monthly annuity rate.

4.44 The aspect relating to payment of lump-sum amount from COD till date of payment which is also a part of 15 years has not been incorporated in the concluding part in said order dated 30.12.2021 of the Hon'ble Commission. Some of the distribution licensees in other states have raised the issue regarding commencement of annuity period of 15 years from date of COD or from '60th (sixtieth) day from the date of this order or from the date of reconciliation of claims by the Respondents (SPDs), whichever is later.' To avoid any issue being raised, the Hon'ble Commission may be pleased to clarify the following, in regard to annuity methodology, in the Order to be passed in the present case:

- a) where the projects of the Power Developers have already achieved COD, the amount of monthly annuity payment for the number of months elapsed since the COD till the date of payment may be paid on lump-sum basis; and
- b) The remaining amount of the change in law compensation (Total change in law claims payable minus change in law claims paid on upfront basis) will be payable to solar power generator with the monthly annuity rate.

DIRECTIONS TO RUVNL TO MAKE PAYMENT TO SECI TOWARDS THE RECONCILED GST CLAIMS:

- 4.45 If the change in rate of GST on the specified renewable energy devices issued vide Notification dated 30.09.2021 is considered as Change in Law and the impact is allowed to the Petitioner, the Hon'ble Commission may be pleased to issue directions to the RUVNL (i.e. the power procurers under the PSA) to make payment towards the evaluated claims of GST payable by SECI to Petitioner on a back to back basis under the PSA in a time bound manner.
- 4.46 In regard to the above, in the decision dated 13.05.2021 passed in Petition No. 73/MP/2020 along with I.A. No. 21 of 2021 in SB Energy One Private Limited –v- Solar Energy Corporation of India Limited and Another, the Central Commission has held that PPA and PSA are interconnected and are of back to back nature implying that the distribution licensee, RUVNL in the said case is liable to pay to SECI all that SECI has to pay to the Power Developer on account of GST/Safeguard Duty.

CARRYING COST

- 4.47 The Appellant's claim for Carrying Cost is to be considered as per the decision of the Hon'ble Commission on the admissibility of Notification dated 30.09.2021 in regard to Change in rate of GST as Change in Law within the scope of Article 12 of PPA.
- 4.48 As per Article 12 of the PPA, the Change in Law event claimed by the Petitioner, the date from which it will be effective and the aspect of applicability of Carrying Cost has to be determined and approved by the Hon'ble Commission after hearing the parties.

4.49 With regard to the claim Interest on Working Capital or Return on Equity, it is submitted that in case of tariff determined through a competitive bidding process under Section 63 of the Electricity Act 2003, the individual tariff elements, such as capital cost etc. are not known. Similarly, the expected return of equity is also unknown. Only the quoted tariff is available and the same cannot be dissected into various tariff elements. Various judgement in this regard are as under:

- a) The Judgment dated 19.04.2017 of the Hon'ble Appellate Tribunal in Appeal No. 161 of 2015 in the matter of Sasan Power Limited –v- Central Electricity Regulatory Commission.
- b) Judgment dated 14.08.2018 of the Hon'ble Appellate Tribunal for Electricity in Appeal No.111of 2017 and connected Appeal in the matter of M/s. GMR Warora Energy Private Limited –v- Central Electricity Regulatory Commission &Ors.,
- c) The Judgment dated 21.12.2018 passed by Hon'ble Appellate Tribunal of Electricity in Appeal No. 193 of 2018- GMR Kamalanga Energy Limited and Anr. –v- Central Electricity Regulatory Commission and Ors.
- d) Decision dated 20.08.2021 of the Central Commission in Petition No.536/MP/2020 in the matter of Solar Energy Corporation of India Limited -v- M/s Azure Power Venus Private Limited & Others.

4.50 It is reiterated that in the event, the Commission holds Notification dated 30.09.2021 of Government of India as Change in Law, (a) the same is required to be paid on Annuity basis unless RUVNL specifically agree to make lump-sum payment and further duly make such payment in discharge of its obligation; (b) RUVNL may be directed to carry out reconciliation of change in law claims and make payment to SECI.

4.51 It is denied that the Petitioner is entitled to reimbursement of legal and administrative cost.

Additional submissions on behalf of SECI dated 28.03.2023:

4.52 In the Rejoinder to the reply of SECI, the Petitioner has stated as under:

“11. Accordingly, along with the change in rate of GST, there was also a change in the entry itself such that the only goods which fall under the

ambit of Solar Power Generators (i.e. goods which are responsible for generating DC power i.e. modules, inverters and DC cables) are leviable to GST at 12%. Remaining goods, which earlier formed a part of solar power generating system, but now stand excluded (as they would not be a part of a generator) were leviable to GST at the tariff rate i.e. 18%. In this regard, the Petitioner also craves leave to rely upon the CA Certificate and tabular details enclosed as Annexure 8 to the Petition which specifically details the actual rate of GST paid on each of the goods and the incremental GST impact suffered therein which would be covered under the GST Notification.

12. Therefore, it is submitted that with the introduction of 2021 Notification, the rate of GST for goods required for setting up of a solar power project increased from 5% to 12% or 18%, depending upon whether the good qualified as a part of the solar power generator or not."

4.53 In regard to the above, SECI submits that subject to admissibility of Notification dated 30.09.2021 as Change in Law, as per the Notification dated 30.09.2021 of Government of India, GST on specified renewable energy devices and parts for their manufacture namely solar power based devices and solar power generator shall be applicable at the rate of 12% from the effective date of such Notification. Prior to such notification GST was applicable at the rate of 5% .

4.54 The letter dated 27.09.2022 of Ministry of New and Renewable Energy, Government of India as referred to in Paragraph 15 of Petitioner's Rejoinder (to SECI's Reply) also states that the change in GST rate for specified renewable energy devices and parts from their manufacture as per Notification dated 30.09.2021 of Government of India is from 5% to 12%. The letter dated 27.09.2022, inter-alia, provides as under:

"4. The matter has been examined in MNRE and MNRE's Renewable Energy Implementing Agencies (SECI/NTPC Ltd/NHPC Ltd.) are hereby requested that:

...

b) Hike in GST rate as Change in Law: w.r.t. RE power projects, wherein the last date of bid submission was on or before September 30, 2021, i.e., on or before the issuance of notification regarding increase in GST rate for specified renewable energy devices and parts for their manufacture from 5% to 12%, and wherein the Scheduled Commissioning Date (SCD), including time extensions granted, if any, was on or after October 1, 2021, REIAs may consider this hike in GST rate from 5% to 12% under 'Change in Law' unless the same is disallowed by specific provisions in the tender documents/contracts."

4.55 The Petitioner's claim that remaining goods, which earlier formed part of 'solar power generating system' as per Notification dated 28.06.2017, but now stand excluded as they would not be a part of 'Solar Power generator' occurring in Notification dated 30.09.2021 of Government are leviable to GST at 18% is baseless. The Petitioner has not provided any document of the Government of India specifying items excluded on account of alleged change in description from 'solar power generating system' occurring in 28.06.2017 to 'solar power generator' occurring in Notification dated 30.09.2021 and further providing for levy of GST at 18% on such goods as alleged by the Petitioner. In regard to the above, the Gujarat Appellate Authority for Advance Ruling vide decision dated 12.07.2022 in the Appeal filed by M/s. Apar Industries Limited, has inter-alia, held as under:

"15. Further we find that the Entry No. 234 appearing under Schedule-I to the Notification No.01/2017-IT (Rate) dated 28.06.2017 which provides applicable rate of GST at 5% on supplies of renewable energy devices & parts for their manufacture viz. Solar power generating system, falling under Chapter 84,85 or 94, was omitted vide Notification No. 8/2021-IT (Rate) dated 30.09.2021. The description of goods covered under Entry No.234 now appears at Entry No. 201A under Schedule-II to the Notification No. 01/2017-IT(Rate) dated 28.06.2017, amended vide Notification No. 8/2021-IT (Rate) dated 30.09.2021 w.e.f. 1.10.2021, which provides for applicable rate of GST at 12%. The description of renewable energy devices & parts for their manufacture viz. 'Solar power generating system' appearing at entry No. 234 of schedule-I now stands amended as 'Solar power generator' under Entry No. 201A of schedule-II.

15.1 Therefore we find that the product in question viz. Solar LT/HT XLPE Cables supplied for Solar Power Generating System, classified under Chapter 5, forms integral part of Solar Power Generating System is eligible for benefit of entry at Sr. No. 234 appearing under Schedule-I to Notification No.01/2017- Integrated Tax (Rate) dated 28.06.2017 and liable to be taxed @ 5% GST upto 30.09.2021. Thereafter the same will be covered under entry Sr.No. 201A appearing under Schedule-II to the Notification No.01/2017-IT (Rate) dated 28.06.2017 amended vide Notification No. 08/2021-IT (Rate) dated 30.09.2021 and liable to be taxed @12% GST w.e.f. 01.10.2021."

4.56 With regard to the documents at Pages 341-348 of the Petition as referred to by the Petitioner during hearing dated 27.03.2023, it is submitted that the same vaguely mentions GST rate @12%/18% with reference to BOS (Balance of Supply other than modules and inverters). However, it does not provide details regarding the specific items on which GST @18% has been levied as alleged by the Petitioner. Further, as mentioned above, no document has been placed on record demonstrating increase in rate of

GST from 12% to 18% with reference to renewable solar items on account of the Notification dated 30.09.2021 of Government of India.

5. The Respondent No. 2 (RUVNL) in its written submissions and during hearing(s) has submitted as below :

5.1 It is submitted that as per the Notification dated 30.09.2021, IGST shall be applicable at the rate of 12 % from the effective date of such notification. Prior to such notification IGST was applicable at the rate of 5%. The explanation contained in the table with reference to Serial No. 210A, Chapter 84, 85 or 94 provides as under-

Explanation:- If the goods specified in this entry are supplied, by a supplier along with supplies of other goods and services, one of which being a taxable service specified in the entry at S. No. 38 of the table mentioned in the notification no. 8/2017- Integrated Tax (Rate), dated 28th June, 2017 [G.S.R. 638 (E)], the value of supply of goods for the purposes of this entry shall be deemed as seventy percent of the gross consideration charged for all such supplies, and the remaining thirty per cent of the gross consideration charged shall be deemed as value of the said taxable service.

5.2 Accordingly, if there are supply of services in addition to supply of goods namely solar power based devices and systems in terms of the explanation, the Rajasthan Appellate Authority for Advance Ruling in the case of M/s Utsav Corporation has clarified that if the supply contract entered into by the Petitioner involves supply of Solar power based devices including carrying out the activity of erection, installation, commissioning of solar generating system, it will fall under work contract. In such a case, 12% will be applicable only on 70% of total contract value and 18% on remaining 30% value. In other words, tax incidence on goods is at 12% and service is at 18%. It is the obligation of the Petitioner to establish the satisfaction of the Respondents and this Hon'ble Commission on the nature of services involved in the procurement of solar based devices and systems. The above Explanation (contained in table with reference to Serial No. 201A) providing for 12% on 70% for the goods and 18% for 30% on services will apply only if it is a composite works contract and not otherwise. If the contract entered into by the Petitioner is separately for procurement of goods including solar based power devices and system

without there being any services and another independent contract for services, the first contract will be taxed at 12% and second contract will be taxed at the rate applicable to services without splitting the value of contracts into 70% of goods and 30% as services. It is also for the Petitioner to establish to the satisfaction of the Hon'ble Commission that the Petitioner has acted diligently and has adopted a prudent utility practice of minimizing impact of GST by entering into separate service contract, wherein value of such services is significantly less than 30% of the cumulative value of both goods and services procured. Subject to admissibility of Notification dated 30.09.2021 as Change in Law, any increase in tax rate of GST which the Petitioner can claim as per Notification dated 30.09.2021 of Government of India is only for the increase of GST from 5% to 12% on goods there being no increase in tax on service part of 30% as per the said Notification. In other words, the Petitioner cannot re-arrange contract after change in law events to claim it as a composite contract when earlier it was a divisible contract or vice versa where it was divisible contract to now as a composite contract if the same result in higher tariff payment to buying entity on account of change in nature of contract.

- 5.3 If the Change in Law claim held to be admissible, the Hon'ble Commission may please to consider the order dated 30.12.2021 passed in Petition No. 1914/2021 wherein the discount rate of 9% and annuity period of 15 years was allowed.
- 5.4 The Hon'ble Commission vide the Order dated 30.12.2021 in Petition Nos. 1914/2021, 1922/2021 and 1941/2021 in the matter of Fortum Solar Plus Private Limited v. Solar Energy Corporation of India Limited & Another and the batch, inter alia, held as under:

"56. The Commission regarding Cut-off date for claims for Change in Law events clarifies that the invoices related to supply of the goods can be raised only up to COD for all the equipment as per the rated project capacity and energy as per PPA that has been installed and through which energy has flown into the grid, since the liability of the SECI/Respondent Discom for payment of purchase of the power from the Respondent SPDs starts from the Commercial Operation Date(COD)."

- 5.5 The solar based plant of the Petitioner was commissioned on 04.04.2022 (150 MW out of 250 MW) and the remaining 100 MW plant was commissioned on 05.05.2022. Thus, the Commercial Operation date of

250 MW power plant was declared as 05.05.2022. The commercial supply of power from the power project under the PPA is from Commercial Operation dated of the power plant. In such case, the extent to which the impact of change in law is to be considered is only on the specific renewable energy devices that are duly installed and commissioned by the dated of commercial operation of the power plant. The renewable energy devices (as specified in Notification dated 30.09.2021) installed after the commercial operation date of project is not to be considered for the impact of change in law. It is therefore, submitted that this Hon'ble Commission may be pleased to clarify the cut-off date for considering change in law on account of notification dated 30.09.2021 as the actual Commercial Operation date of power project.

5.6 The Petitioner is not entitled any carrying cost whatsoever. The PPA entered into between the Petitioner and the Respondent No. 1 does not provide any provision related to payment of carrying cost. Thus, the Petitioner is not entitled any carrying cost.

5.7 That as far as the claim of the interest on working capital or return on equity, it is submitted that in case of tariff determined through a competitive bidding process under Section 63 of the Electricity Act, 2003, the individual tariff elements, such as capital cost etc. are not known. Similarly, the expected return of equity is also unknown. Only the quoted tariff is available and the same cannot be dissected into various tariff elements. The above is consistent with the following decision of the Hon'ble Court:

a) The judgment dated 19.04.2017 of the Hon'ble Appellate Tribunal in Appeal No. 161 of 2015 in the matter of Sasan Power Limited v. Central Electricity Regulatory Commission wherein the Hon'ble Tribunal has held as under:

"34. We must also bear in mind that we are concerned here with competitive bidding process under Section 63 of the said Act. We appreciate the submission of Mr. Ramachandran, learned counsel appearing for HPCC that tax on income cannot be considered as pass through in the competitive bidding process under Section 63 of the said Act. The tariff is a per unit tariff allowed on the electricity generated and supplied and such a bid submitted by bidder is inclusive of all elements. There is no separate return on equity or reasonable return. The quantum of return revenue/profit is not

identified in the bid price nor assured by the procurers. Income Tax including MAT being on profit, there is no identification of tax payable at the time of cutoff date. It is, therefore, not possible at all to factor in the increase or decrease in the Income Tax - including MAT. The Commission cannot therefore speculate what return the company had assumed for submission of the bid. Therefore, it will not be possible to compute the tax to be allowed.

35. As against this, in case of determination of tariff under Section 62 of the said Act, there is an assured return on equity of a specified percentage. The tariff regulations framed by the Central Commission / State Commissions provide for one of the components as tax on income. Regulation 25 of the CERC (Terms and Conditions of Tariff) Regulations, 2014 is cited as an example. It is rightly contended that this requires the procurers/beneficiaries of the generating company to bear the tax on income at the hand of the generating company. In case of competitive bidding scheme, there is no assured return and no provision for pass through of Income Tax."

- b) Judgment dated 14.08.2018 of the Hon'ble Appellate Tribunal for Electricity in Appeal No. 111 of 2017 and connected Appeal in the matter of M/s GMR Warora Energy Private Limited v. Central Electricity Regulatory Commission &Ors. has held as under:

"xxvii. Now we take the next issue i.e. increase in working capital requirement due to Change in Law events. Let us examine the findings of the Central Commission in the Impugned Order. The relevant extract is reproduced below:

"(L) Increase in working capital requirement due to higher cost of imported coal.

109. The Petitioner has submitted that change in law events will have an impact on the interest on working capital due to increase in investment in value of coal stock including alternate coal, imported coal sourced at significantly higher cost. This will have an impact on interest on working capital resulting from Change in Law event and the Petitioner is eligible for tariff relief on account of increase in working capital in such a manner that it is restored to the same economic position as before such change. In this connection it is clarified that there is no concept of interest on working capital in competitively bid tariff and the bidders are required to quote all inclusive tariff. The claim on this account is rejected under Change in Law.

The Central Commission has held that there is no concept of IWC in competitively bid projects and the bidders are required to quote all-inclusive tariff under Section 63 of the Act and rejected the claim of GWEL.

xxviii. After perusal of the RFP/PPA, we also observe that the tariff to be quoted was all-inclusive tariff and there is no provision for separately allowing IWC arising out of Change in Law events. GWEL has contended that it has to be restored to the same economic position and hence it is entitled for compensation on account of increase in IWC. We observe that the Change in Law provision is to restore GWEL to same economic position as if the Change in law event has not occurred by way of increase/decrease in tariff. This does not mean that the differential tariff (if any) is to be determined component wise as done for Section 62 based PPAs as the bidder was required to quote an all inclusive tariff for a period of 25 years considering all relevant aspects. Hence, the contention of GWEL is unsustainable."

- c) Judgment dated 21.12.2018 passed by Hon'ble Appellate Tribunal for Electricity in Appeal No. 193 of 2017 GMR Kamalanga Energy Limited and Anr. V. Central Electricity Regulatory Commission and Ors. wherein it was held as under:

"81. Impact on interest on working capital and return on equity on incremental working capital and margin money for such working capital resulting from the aforesaid change in law events.

In the very same judgment of M/s GMR Warora Energy Ltd.(GWEL) VS CERC &Ors., this Tribunal has opined as under:

"xxviii. After perusal of the RFP/PPA, we also observe that the tariff to be quoted was all-inclusive tariff and there is no provision for separately allowing IWC arising out of Change in Law events. GWEL has contended that it has to be restored to the same economic position and hence it is entitled for compensation on account of increase in IWC. We observe that the Change in Law provision is to restore GWEL to same economic position as if the Change in law event has not occurred by way of increase/decrease in tariff. This does not mean that the differential tariff (if any) is to be determined component wise as done for Section 62 based PPAs as the bidder was required to quote an all inclusive tariff for a period of 25 years considering all relevant aspects. Hence, the contention of GWEL is unsustainable."

- d) Decision dated 20.08.2021 of the Central Commission in Petition No. 536/MP/2020 in the matter of Solar Energy Corporation of India Limited v. M/s Azure Power Venus Private Limited &Ors. wherein it was held as under-

"64. Further, in the tariff determined through a competitive bidding process under Section 63 of the Electricity Act, 2003, the individual tariff elements, such as capital cost, cost of capital etc. are not known. Similarly, the expected return of equity is also unknown. In

the absence of such details, it is neither possible nor appropriate to engage in detailed computation of the weighted average cost of capital based on the 2017 RE Tariff Regulations. Therefore, we are not inclined to consider the contention of the SPDs for discount factor of 12.9% or 13.14% or that of Respondent Discoms for a discount factor of 9.36%."

- 5.8 Without prejudice to the above submission on admissibility of Carrying Cost, it is submitted that in any event the Carrying Cost is to be restricted to the cost of financing of a prudent and efficient utility i.e. the interest rate at which such utility can borrow money from lenders and financial institutions after due and sincere efforts to minimize the interest cost. The Hon'ble Commission having fixed Annuity at the rate of 9% in its Order dated 30.12.2021 in Petition No. 1914/2021.
- 5.9 That the Petitioner must require to establish to the satisfaction of the Hon'ble Commission that it has made prudent and bonafide effort to minimize the interest cost.

Commission's View

6. The Commission has considered the submissions made by the Petitioner/Respondents in petition, written submissions and oral arguments during hearing(s).
7. The Petitioner has mainly prayed to :
- a) Hold and declare that the increased rate of CGST / IGST on renewable Energy devices and parts for their manufacture imposed vide Notification No. 8/2021-Central Tax (Rate) and Notification No. 8/2021- Integrated Tax{Rate) dated 30.09.2021 (effective 1.10.2021) as Change in Law in terms of Article 12 of the PPA which have led to an increase in the expenditure for the Project;
 - b) Evolve a suitable mechanism to compensate the Petitioner for the increase in expenditure incurred by the Petitioner on account of Change in Law;

- c) Approve and direct Respondent to compensate the Petitioner towards the increased CGST and IGST as one-time lump sum amount or mechanism devised by this Ld. Commission in prayer (b).
 - d) Approve and grant interest from the date of incurring of the cost by the Petitioner till the date of order by this Commission;
 - e) Restore the Petitioner to the same economic position prior to occurrence of the Change in law by directing SECI to pay to the Petitioner carrying cost on actual in terms of Article 12 of the PPA;
 - f) Allow legal and administrative costs incurred by the instant petition.
8. The Petitioner in its petition and during hearing(s) mainly submitted that the Central Government vide Notification No. 8/2021- Central Tax (Rate) and Notification No. 8/2021-Integrated Tax (Rate) dated 30.09.2021 (effective 01.10.2021) amended the rate of CGST/IGST for renewable energy devices and their parts. As per the said Notifications, Entry 234 and the entries related thereto (with effective CGST / IGST rate of 5%) were omitted from the Schedule I and Entry 201A has been inserted to Schedule II wherein the rate of CGST/IGST is 6% (effective 12%). On the basis of the amendment made, the renewable energy devices i.e., modules and solar power generators and their parts for manufacture were leviable to CGST/IGST at 12% / 18%, instead of 5%, thereby leading to an incremental CGST / IGST of 7%/13%.
9. The petitioner, further, submitted that clause 12 of the PPA provides for change in law and relief thereunder. As per this clause a change in law event includes any amendment or modification of the existing law, change in the rates of any taxes including duties and cess made applicable for setting up the solar power project and supply of power and such change in law event must occurred after the last date of bid submission. As per the RfS, the last date of bid submission was 04.06.2019. Basis the above, it is submitted that the increase in the rate of CGST/IGST on the renewable energy devices and their parts, qualifies as a change in law event under clause 12 of the PPA.

10. The Petitioner also submitted that the Petitioner is entitled to carrying costs as per actuals and this Hon'ble Commission is duty bound to protect the contractual interest of the Petitioner in as much as the Petitioner is restored to the same economic position which shall not be complete unless the Petitioner is granted carrying costs as per actual. Further, Hon'ble Commission may consider the debt equity ratio of 70:30 while applying the rate of return on equity on 70% of the total compensation while applying rate of return on debt on the remaining 30%, so as to restore the Petitioner to the same economic position as it would have been, had the Change in Law Event not occurred.
11. The Petitioner also submitted that with the introduction of 2021 Notification, the rate of GST for goods required for setting up of a solar power project increased from 5% to 12% or 18%, depending upon whether the goods qualified as a part of the solar power generator or not.
12. Per contra, the Respondent No. 1 (SECI) in its written submissions and during hearing(s) mainly submitted that if there are supply of services in addition to supply of goods namely solar power based devices and systems in terms of the explanation, the Rajasthan Appellate Authority for Advance Ruling in the case M/s. Utsav Corporation has clarified that if the supply Contract entered into by the Petitioner involves supply of Solar power based devices including carrying out the activity of erection, installation commissioning of solar generating system it will fall under works contract. In such a case, 12% will be applicable only on 70% of total contract value and 18% on remaining 30% value. In other words, tax incidence on goods is at 12% and services is at 18%. It is the obligation of Petitioner to establish to the satisfaction of SECI, RUVNL and Commission on the nature of services involved in the procurement of solar based devices and systems.
13. SECI also submitted that it is incumbent on the Petitioner to establish the one to one correlation between the project, the supply of goods, the invoices and other relevant documents.
14. SECI also submitted that the Petitioner commissioned 150 MW (out of 250 MW) on 04.04.2022. The Petitioner commissioned remaining 100 MW on 05.05.2022. The commercial operation date of the 250 MW solar project

was declared as 05.05.2022. The commercial supply of power from the power project under the PPA is from the COD of the power plant. In such case, the extent to which the impact of change in law is to be considered is only on the specified RE devices, that are duly installed and commissioned by the COD of the power plant. The RE devices installed after the COD of the project are not to be considered for the impact of change in law.

15. SECI also submitted that there is a clear rationale for annuity payment methodology. The increased costs have been claimed to have been incurred for the purpose of supply of power, the costs should be recovered only if the Petitioner continue to maintain the supply of the power. If the Petitioner does not supply the requisite power, it should not be entitled to recover the cost proportionate to such non-supply, similar to any other capital cost. If the Petitioner is allowed to recover the Change in Law impact in lump-sum, then SECI [and consequentially RUVNL] would have paid for capital cost even without there being actual supply of power in future. If for any reason the Petitioner abandons the project and discontinues the supply of power, there is no methodology for adjustments of the lump sum payments already made.
16. SECI also submitted that If the change in rate of GST on the specified renewable energy devices issued vide Notification dated 30.09.2021 is considered as Change in Law and the impact is allowed to the Petitioner, the Hon'ble Commission may be pleased to issue directions to the RUVNL (i.e. the power procurers under the PSA) to make payment towards the evaluated claims of GST payable by SECI to Petitioner on a back to back basis under the PSA in a time bound manner.
17. SECI further submitted that the carrying cost is to be restricted to the cost of financing of a prudent and efficient utility i.e. the interest rate at which such utility can borrow money from the lenders and financial institutions after due and sincere efforts to minimize the interest cost.
18. The Respondent No. 2 (RUVNL) in its written submissions and during hearing(s) mainly submitted that If the contract entered into by the Petitioner is separately for procurement of goods including solar based power devices and system without there being any services and another independent contract for services, the first contract will be taxed at 12% and second contract will be taxed at the rate applicable to services

without splitting the value of contracts into 70% of goods and 30% as services. It is also for the Petitioner to establish to the satisfaction of the Hon'ble Commission that the Petitioner has acted diligently and has adopted a prudent utility practice of minimizing impact of GST by entering into separate service contract, wherein value of such services is significantly less than 30% of the cumulative value of both goods and services procured. Subject to admissibility of Notification dated 30.09.2021 as Change in Law, any increase in tax rate of GST which the Petitioner can claim as per Notification dated 30.09.2021 of Government of India is only for the increase of GST from 5% to 12% on goods there being no increase in tax on service part of 30% as per the said Notification. In other words, the Petitioner cannot re-arrange contract after change in law events to claim it as a composite contract when earlier it was a divisible contract or vice versa where it was divisible contract to now as a composite contract if the same result in higher tariff payment to buying entity on account of change in nature of contract.

19. The Commission observes that as per the RfS, the last date of bid submission was 04.06.2019. As per article 12.1 of the PPA, any change in the rates of any Taxes including any duties and cess or introduction of any new tax made applicable after the last date of the bid submission shall qualify as Change in Law event. Further, the changed rates of CGST/IGST for RE devices and their parts are primarily imposed by Notifications of Ministry of Finance, Govt of India dated 30.09.2021 (effective 01.10.2021), which qualifies to be an Indian Govt Instrumentality under PPA/PSA.
20. On conjoint reading of the PPA and the Notifications of Gol, the Commission is of the considered view that the subjected notifications of the Government of India have been notified after the last date of the bid submission. Hence, the same are qualified to be recognized as Change in Law event for the project as per the PPA.
21. The Commission also observes that the Petitioner commissioned 150 MW capacity (out of 250 MW) on 04.04.2022 and the remaining capacity of 100 MW commissioned on 05.05.2022. The commercial operation date of the 250 MW solar project was declared as 05.05.2022.
22. In light of the above, after considering all the submissions, the Commission deems it appropriate that in terms of Article 12 of the PPA, the Change in

rate of CGST / IGST on renewable Energy devices and parts for their manufacture imposed vide Notification No. 8/2021-Central Tax (Rate) and Notification No. 8/2021- Integrated Tax (Rate) dated 30.09.2021 (effective 1.10.2021) are recognized as the 'change in law' event.

23. The Commission, regarding Cut-off date for claims for Change in Law events, clarifies that the invoices related to supply of the goods can be raised only up to COD for all the equipment as per the rated project capacity and energy as per PPA that has been installed and through which energy has flown into the grid, since the liability of the SECI/RUVNL for payment of purchase of the power from the Petitioner (SPD) starts from the Commercial Operation Date (COD). Further, the Petitioner commissioned 150 MW capacity (out of 250 MW) on 04.04.2022 and the remaining capacity of 100 MW commissioned on 05.05.2022. The commercial operation date of the 250 MW solar project was declared as 05.05.2022. Accordingly, the cut-off date for the claim of change in law shall be considered as 05.05.2022.
24. The Commission is having considered view that the Petitioner are entitled to grant of relief in the nature of carrying cost on the compensation on account of impact due to 'Change in Law'. As has been held by the Commission in earlier Orders, the Petitioner, in the instant petition shall be eligible for carrying cost starting from the date when the actual payments were made to the Authorities till the date of issuance of this Order, at the actual rate of interest paid by the Petitioner for arranging funds (supported by Auditor's Certificate) or the rate of interest on working capital as per applicable RERC Tariff Regulations or the late payment surcharge rate as per the PPA, whichever is the lowest. Once a supplementary bill is raised by the Petitioner in terms of this order, the provision of Late Payment Surcharge in the PPA would kick in if the payment is not made by the Respondents within the due date.
25. The Commission (RERC) vide its Order dated 30.12.2021 in Petition No. 1914/2021 (Fortum Solar Plus Pvt Ltd Vs SECI) while dealing with a similar PPA executed between SECI and a Renewable Power Developer, has taken a balanced and justified view regarding discount rate and annuity period. Relevant extracts of the order is reproduced below :

"52. It is further noted that the Central Commission has notified the CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020 and RE Tariff Order dated 31.03.2021. In the said regulations read with RE tariff Order, the Central Commission has considered only the interest rate of 9% and the term of the Loan repayment as 15 years.

53. As the actual deployment of capital by way of debt or equity and their cost in terms of rate of interest or return, respectively, is unknown, the rate of 9% can be taken as the uniform rate of compensation for the entire expenditure incurred on account of Change in Law events. Further, the Commission is of the view that the compensation for Change in Law cannot be a source for earning profit, and therefore, there cannot be any higher rate of return than the prevailing normative cost of debt.

54. Commission after considering all the submissions and facts, deems it appropriate to allow the discount rate of 9% and annuity period of 15 years."

Thus, the Commission deems it appropriate to allow the discount rate of 9% and annuity period of 15 years in the present petition.

26. We would like to clarify that the present petitions are not a tariff determination exercise under section 62 of the Electricity Act, 2003. As such, reliance on the RE Tariff Regulations, 2017 or 2020 or any Order issued in pursuance of the said regulations can at best have a reference value for the purpose of resolving the issue of discount rate for annuity payments. In the tariff determined through a competitive bidding process under Section 63 of the Electricity Act, 2003, the individual tariff elements, such as capital cost, cost of capital, RoE etc are irrelevant for the purpose of adoption of tariff as well as assessing the impact of change in law. Therefore, any submissions by the Petitioner on this account is not acceptable.
27. Further, the Commission holds that the liability of SECI/ RUVNL for 'Monthly Annuity Payment' starts from 60th (sixtieth) day from the date of this order or from the date of submission of claims by the Petitioner (SPD), whichever is later. In case of delay in the Monthly Annuity Payment beyond the 60th (sixtieth) day from the date of this order or from the date of submission of claims by the Petitioner (SPD), whichever is later, late payment surcharge shall be payable for the delayed period corresponding to each such delayed Monthly Annuity Payment(s), as per respective PPAs/PSAs. Further, as the COD of the project has

already been achieved, the amount of monthly annuity payment for the number of months elapsed since the COD till the date of the payment may be paid on lump-sum basis. The remaining amount of the change in law compensation (total change in law claims payable minus change in law claims paid on upfront basis) will be payable to the Petitioner with the monthly annuity rate.

28. Commission also observed the submission of the petitioner that with the introduction of 2021 Notification, the rate of GST for goods required for setting up of a solar power project increased from 5% to 12% or 18%, depending upon whether the goods qualified as a part of the solar power generator or not. Per contra, SECI submitted that The Petitioner's claim that remaining goods, which earlier formed part of 'solar power generating system' as per Notification dated 28.06.2017, but now stand excluded as they would not be a part of 'Solar Power generator' occurring in Notification dated 30.09.2021 of Government are leviable to GST at 18% is baseless. The Petitioner has not provided any document of the Government of India specifying items excluded on account of alleged change in description from 'solar power generating system' occurring in 28.06.2017 to 'solar power generator' occurring in Notification dated 30.09.2021 and further providing for levy of GST at 18% on such goods as alleged by the Petitioner. Regarding this issue, the Commission is having considered view that the Petitioner and the Respondents should reconcile the claims made towards the impact of change in law on the project. In case of any dispute in reconciliation, the parties are at liberty to approach the Commission.
29. Accordingly, we hereby direct that the contracting parties to carry out reconciliation on account of impact due to imposition of the GST Notification 2021 along with carrying cost. Also, it will be the responsibility of the Petitioner to place documentary evidences to this effect clearly demonstrating net additional cash outflow so as to establish clear one to one correlation and its impact on the Project Cost. We further direct that the respondent no 2 (RUVNL) are liable to pay SECI all the above reconciled claims that SECI has to pay to the Petitioner.
30. The summary of our findings are as follows:

- (a) Change in rate of CGST / IGST on renewable Energy devices and parts for their manufacture imposed vide Notification No. 8/2021- Central Tax (Rate) and Notification No. 8/2021- Integrated Tax (Rate) dated 30.09.2021 (effective 1.10.2021) is a Change in Law event in terms of Article 12 of the PPAs.
- (b) Carrying cost on such amounts paid towards Change in Law is payable at the rate at which the Petitioner have actually taken long term capital loan for financing the project from the lenders and financial institutions or the rate of interest on working capital as per applicable RERC Tariff Regulations , whichever is the lower.
- (c) The discount rate of annuity payments shall be 9% towards the expenditure incurred by the Petitioner on account of Change in Law. The tenure of Annuity Payments shall be for 15 years.
- (d) The liability of SECI/RUVNL for "Monthly Annuity Payments" starts from 60th (sixtieth) day from the date of this order or from the date of reconciliation of claims by the Petitioner, whichever is later. In case of delay in the Monthly Annuity Payment beyond the 60th (sixtieth) day, late payment surcharge for the delayed period corresponding to each such delayed Monthly Annuity Payment(s) shall be payable as per respective PPAs/PSAs.
- (e) As the COD of the project has already been achieved, the amount of monthly annuity payment for the number of months elapsed since the COD till the date of the payment may be paid on lump-sum basis.
- (f) The invoices related to supply of the goods can be raised only up to the Commercial Operation Date (COD) only for the contracted capacity and energy as per the respective PPAs.

31. We order accordingly. No order to cost.

(Dr. Rajesh Sharma)
Member

(Sh. Hemant Kumar Jain)
Member

(Dr. B. N. Sharma)
Chairman