BEFORE THE GUJARAT ELECTRICITY REGULATORY COMMISSION GANDHINAGAR

Petition No. 2022 of 2021.

In the Matter of:

Petition under Section 86 of the Electricity Act, 2003 readwith Article 9 of the Power Purchase Agreement (PPA) dated 30.01.2021 executed between the parties.

Petitioner	:	AEW India West One Private Limited
Represented By	:	Ld. Adv. Mr. Sujit Ghosh alongwith Ld. Advocates Mr. M. N. Marfatia, Ms. Mannat Waraich and Ms. Pratiksha Chaturvedi.

V/s.

Respondent	:	Gujarat Urja Vikas Nigam Limited
Represented By	:	Ld. Adv. Ms. Harsha Manav alongwith Parthik Joshi.

AND

IA No. 32 of 2021 in Petition No. 2022 of 2021.

In the Matter of:

IA for urgent listing of the Petition.

Applicant	:	AEW India West One Private Limited
Represented By	:	Ld. Adv. Mr. Sujit Ghosh alongwith Ld. Advocates Mr. M. N. Marfatia, Ms. Mannat Waraich and Ms. Pratiksha Chaturvedi.

V/s.

Respondent	:	Gujarat Urja Vikas Nigam Limited
Represented By	:	Ld. Adv. Ms. Harsha Manav alongwith Parthik Joshi.

CORAM:

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

Date: 07/04/2022.

DAILY ORDER

1. Above matters were heard on 08.03.2022.

2. Ld. Adv. Mr. Sujit Ghosh, appearing on behalf of the Petitioner, submitted that the Respondent Gujarat Urja Vikas Nigam Limited (GUVNL) had invited bids under Competitive Bidding Process (followed by reverse e-auction) vide Request for Selection (Rfs) No. GUVNL/500 MW/Solar (Phase XI) dated 28.09.2020 for 500 MW grid connected Solar Photovoltaic Power Projects to be setup in Gujarat, wherein, bid submitted by M/s Aljomaih Energy and Water Limited (AEW) was accepted by the Respondent GUVNL for development of 80 MW capacity of Solar Power Project and consequently Letter of Award dated 01.01.2021 was issued to the Petitioner. Subsequently, Power Purchase Agreement dated 30.01.2021 is executed between the Petitioner M/s AEW West One Private Limited and the Respondent GUVNL.

2.1. It is submitted that present Petition is filed under Section 86 of the Electricity Act, 2003 readwith Article 9 of aforesaid PPA seeking declaration by this Commission that imposition of Basic Customs Duty on Solar Invertors and increase in rate of GST slabs for renewable energy devices & their parts as 'Change in Law' event in terms of the PPA.

2.2. It is submitted that the Central Government vide Notification No. 7/2021 - Customs dated 01.02.2021 ('Notification 7/2021') rescinded an earlier Notification bearing No. 1/2011 - Customs dated 06.01.2011 ('Notification 1/2011') vide which all items of machinery and auxiliary equipment required for the initial setting up of solar power project were exempted from duty of customs leviable thereon to the extent it was in excess of 5% ad valorem. However, subsequently, the exemption under Notification 1/2011 dated 06.01.2011, which imposed a basic customs duty of 5% ad valorem on import of solar inverters and other equipment was rescinded vide Notification dated 01.02.2021 and hence, after 02.02.2021, the same is now not available to the Petitioner. Accordingly, the basic customs duty imposed on solar inverters and other equipment increased to 20% ad valorem basis. Further, with consideration of change in Social Welfare Surcharge and IGST, there is increase from 5.78% to 23.10% resulting in net impact of 17.33% to the Petitioner.

2.3. It is further submitted that the Central Government vide Notification No. 8/2021-Central Tax (Rate) dated 30.09.2021 has also amended the rate of GST for renewable energy devices and their parts resulting in an increase of GST rate from 5% to 12% which has also impacted the Petitioner.

2.4. It is submitted that relevant provisions of Customs Tariff Act were pointed out during submissions in other Petition and which are also mentioned in the Petition alongwith provisions of GST. Also, since above Notifications dated 01.02.2021 and 30.09.2021 issued by the Central Government are after bid deadline whereby there is increase in tax and accordingly, qualify as 'Change in Law' under Article 9 of the PPA.

2.5. It is submitted that at present the Petitioner is only seeking 'In-principle' approval of this Commission that above Notifications of Central Government regarding Basic Customs Duty and increase in rate of GST slabs qualify as 'Change in Law' event in terms of the PPA because the Petitioner has not incurred any expenses towards same and the Petitioner will approach as and when such additional expenditure is incurred for actual restitution at later stage.

2.6. It is also submitted that Hon'ble APTEL in its recent judgment dated 12.10.2021 in matter of *Green Infra Renewables Energy Ltd. vs. RERC & Ors.* has acknowledged that where any event qualifies as a 'Change in Law' the same can be recognised and declared as 'Change in Law'.

3. Ld. Adv. Ms. Harsha Manav appearing for the Respondent GUVNL submitted that the definition of 'Change in Law' under Article 9 of the PPA is applicable to limited items of generation and therefore, the present Petition filed by the Petitioner seeking declaration of change in BCD on solar invertors and change in GST slabs for renewable energy devices & their parts does not qualify as 'Change in Law' event as per the provisions of the PPA.

3.1. Referring to definition of 'Change in Law' under Article 9.1.1, it is submitted that clause (a) of said Article clearly provides on generation of electricity leviable on the final output in form of energy or sale of electricity. It is further submitted that since the Central Government Notifications based on which the Petitioner is seeking

'Change in Law' are not regarding any levy on generation of electricity or on final output in form of energy or sale of electricity.

3.2. Moreover, clause (b) provides that any introduction / modification /changes in rates of safeguard duty and/or anti-dumping duty and/or custom duty which have direct effect on the cost of solar PV modules qualify as 'Change in Law'. Therefore, change in Basic Customs Duty is restricted to Solar PV modules as per said clause and cannot be allowed on invertors as claimed by the Petitioner.

3.3. It is submitted that in terms of above two clause (a) and (b) of Article 9.1.1 having limited applicability as specified therein is not applicable in case of Petitioner and therefore, none of the claim of Petitioner regarding BCD on invertors and GST on other items is covered under said Article. Accordingly, 'Change in Law' declaration sought by the Petitioner is not admissible and cannot be allowed.

4. Responding to above submissions of Ld. counsel for the Petitioner referring to judgment dated 14.08.2018 of Hon'ble APTEL in Appeal No. 119 of 2016 and allied matters it is submitted that considering its earlier judgments it is opined by Hon'ble APTEL that any change in tax/levies/duties etc. or application of new tax/levies/duties etc. on supply of power covers the taxes on inputs required for such generation and supply of power to the distribution licensees. It is further submitted that definition of 'Change in Law' in above case was under Article 10.1 of the PPA in that case which is also wide enough. Thus, as a sequitur, the Petitioner is also entitled to 'Change in Law' as per the definition under Article 9.1.1.

4.1. Referring to clause (a) of Article 9.1.1. of the PPA, it is submitted that construction of said definition clause is having wide import and it needs to be read in such a manner that it is not myopic or restrictive. The said definition mentions 'any change in tax or surcharge' and thereby everything is subsumed. Therefore, while interpreting the said clause it can be seen that first part clause (a) states regarding '*enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any statute*' and then word 'or' is used. Thus, first part which relates to any parliamentary aspect is wide enough whereas; second part pertains to adjudicatory declaration, after which 'or' is used followed by '*any of the above regulations, taxes, duties charges, levies etc. that results in any change with*

respect to any tax or surcharge or cess levied', where word 'taxes' is used and as per Article 265 of the 'Constitution of India' no tax can be levied or collected except by authority of law. The purported mention in last limb '*or similar charges by the Competent Government*' is in relation to previous parts.

4.2. It is also submitted that clause (b) of Article 9.1.1. of the PPA does not use 'non-obstante' clause and referring to para 16 of Hon'ble APTEL judgment dated 12.10.2021 in matter of *Green Infra Renewables Energy Ltd. vs. RERC & Ors*. wherein it is mentioned that impact of 'Change in Law' on cost of development of project that occur after bid submission renders the bid price unrealistic.

4.3. Ld. counsel for the Petitioner accordingly submitted that the Commission may admit the present Petition.

5. Heard the Ld. counsels appearing for both the parties in present matter coming up for admission hearing. We note that the Petitioner and the Respondent GUVNL have entered into Power Purchase Agreement dated 30.01.2021 for generation and supply of 80 MW power from Solar PV project to be developed by the Petitioner.

5.1. The Petitioner has filed present Petition under Section 86 of the Electricity Act, 2003 readwith Article 9 of aforesaid PPA seeking declaration that imposition of Basic Customs Duty on Solar Invertors and increase in rate of GST slabs for renewable energy devices & their parts as 'Change in Law' event in terms of the PPA.

5.2. We note that in the present matter, the Petitioner M/s AEW West One Private Limited is a developer for setting up 80 MW Solar PV based Power Project after being selected as successful bidder by the Respondent GUVNL under Competitive Bidding Process and the Petitioner has entered in to Power Purchase Agreement (PPA) dated 30.01.2021 with the Respondent GUVNL. Accordingly, the Petitioner is a generating company under Section 2 (28) of the Electricity Act, 2003. We also note that the Respondent GUVNL is a licensee which is to procure power from the aforesaid 80 MW Solar PV Power Project of the Petitioner in terms of PPA executed between the parties. Thus, the issue involved in the present matter between the Petitioner and the Respondent pertains to the terms & conditions of the PPA executed between them pertaining to 'Change in Law' events. Thus, the issue

involved in present matter is between a Generating Company and licensee and hence, this Commission has jurisdiction to decide the same under Section 86 of the Electricity Act, 2003.

6. The matter is admitted. The prayer in IA No. 32 of 2021 in Petition No. 2022 of 2021 regarding listing the said Petition is satisfied, IA No. 32 of 2021 stands disposed of.

7. Next date of hearing will be intimated separately.

8. Order accordingly.

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

Place: Gandhinagar.
Date: 07/04/2022.