



नईदिल्ली
NEW DELHI

याचिकासंख्या./ Petition No.: 73/MP/2020 alongwith
IA No. 21 of 2021

कोरम/ Coram:

श्री पी. के. पुजारी, अध्यक्ष/ Shri P. K. Pujari, Chairperson
श्री आई. एस. झा, सदस्य/ Shri I. S. Jha, Member
श्री अरुण गोयल, सदस्य/ Shri Arun Goyal, Member
श्री पी. के. सिंह, सदस्य / Shri P. K. Singh, Member

आदेशदिनांक/ Date of Order: 13th of May, 2021

IN THE MATTER OF:

Petition under Section 79(1)(b) read with Section 79(1)(f) of the Electricity Act, 2003 for (i) approval of 'Change in Law'; and (ii) consequential relief to compensate for the increase in capital cost due to introduction of the Central Goods and Services Tax Act, 2017, the Integrated Goods and Services Tax Act, 2017 and the State Goods and Services Tax Acts enacted by respective states, and (b) imposition and introduction of Safe Guard Duty on the import of solar cells (whether or not assembled in modules or panels) by way of Notification No.01/2018- Customs SG dated 30.07.2018 issued by the Department of Revenue, Ministry of Finance, in terms of Article 12 read with Article 16.3.1 of the Power Purchase Agreements dated 06.10.2017 between SB Energy One Private Limited and Solar Energy Corporation of India Limited.

AND IN THE MATTER OF:

SB Energy One Private Limited
1st Floor, Worldmark – 2, Asset Area – 8,

Hospitality District, Aerocity, NH – 8,
Delhi - 110037

...Petitioner

VERSUS

1. Solar Energy Corporation of India Limited
Represented Through Director (Finance),
D-3, First Floor, A wing, District Centre,
Saket, New Delhi - 110017
2. Rajasthan Urja Vikas Nigam Limited
Through its Chairman,
Vidyut Bhavan, Janpath,
Jyoti Nagar,
Jaipur - 302005

...Respondents

Parties Present: Shri Basava Prabhu Patil, Sr. Advocate, SBEOPL
Ms. Molshree Bhatnagar, Advocate, SBEOPL
Shri Samarth Kashyap, Advocate, SBEOPL
Shri M. G. Ramachandran, Sr. Advocate, SECI
Ms. Tanya Sareen, Advocate, SECI
Ms. Poorva Saigal, Advocate, SECI
Shri Anand Ganesan, Advocate, RUVNL
Ms. Swapna Seshardri, Advocate, RUVNL
Shri Ashwin Ramanath, Advocate, RUVNL
Shri Sidhartha Mahapatra, SBEOPL
Shri Ajay Kumar Nayak, SECI
Shri Abhinav Kumar, SECI
Shri Uday Pavan Kumar Kruthiventi, SECI

आदेश/ ORDER

The Petitioner, SB Energy One Private Limited is a generating company and is a Special Purpose Vehicle (SPV) formed by SBG Cleantech One Limited for development of solar power project, generation and sale of solar power under the National Solar Mission (NSM). The Petitioner is seeking approval of ‘Change in Law’ and consequential relief to compensate for the increase in capital cost due to introduction of the Central Goods and Services Tax Act, 2017, the Integrated Goods and Services Tax Act, 2017 and the State Goods and Services

Tax Acts enacted by respective States, and imposition and introduction of Safe Guard Duty on the import of solar cells (whether or not assembled in modules or panels) by way of Notification No.01/2018- Customs SG dated 30.07.2018 issued by the Department of Revenue, Ministry of Finance, in terms of the Power Purchase Agreements (PPAs) dated 06.10.2017.

2. The Respondent No.1, Solar Energy Corporation of India Limited (SECI) is a Central Public Sector Undertaking under the administrative control of Ministry of New and Renewable Energy (MNRE), set up to facilitate the implementation of Jawaharlal Nehru National Solar Mission (NSM) for development, promotion and commercialization of solar energy technologies in the country and to achieve targets set out in the NSM. SECI is off-taking the entire 300 MW generated by the Petitioner's projects for sale to buying utilities on a back to back basis.
3. The Respondent No.2, Rajasthan Urja Vikas Nigam Limited (RUVNL) is the buying utility in the State of Rajasthan, purchasing power from SECI.
4. The Petitioner has made the following prayers:

In Petition No. 73/MP/2020

- a) *Declare and hold that the introduction of the GST Laws qualifies as 'Change in Law' in terms of Article 12 of the PPAs executed between the Petitioner and the SECI and that the Petitioner is entitled to relief thereunder;*
- b) *Declare and hold that the imposition of Safeguard Duty is a 'Change in Law' event in terms of Article 12 of the PPAs executed between the Petitioner and the SECI and that the Petitioner is entitled to relief thereunder;*
- c) *Direct the Respondent No. 1 – SECI to restitute the Petitioner by paying the additional non-recurring/ recurring capital cost incurred by it, to the tune of INR 68,18,25,850 on account of introduction of GST Law and INR 98,39,78,082 due to imposition of Safeguard Duty in terms of Article 12 of the PPAs by way of upfront lumpsum payment;*

In the alternate,

- d) *Direct the Respondent No. 1 – SECI to reconstitute the Petitioner by paying the additional non-recurring/ recurring capital cost incurred by it, to the tune of INR 68,18,25,850 on account of introduction of GST Law and INR 98,39,78,082 due to imposition of Safeguard Duty in terms of Article 12 of the PPAs by way of adjustment in quoted tariff;*
- e) *Direct SECI to reconstitute the Petitioner for the Operation & Maintenance costs as claimed by the Petitioner on account of the ‘Change in Law’ events.*
- f) *Direct SECI to pay to the Petitioner, the associated carrying cost for the payments made in terms of Prayers (c) and (d) hereinabove from the date the Petitioner incurred the additional cost on account of introduction of GST Law and SGD Notification till the approval of Change in Law by this (the date on which the order of the is published/pronounced); and from the date of the Order of the Commission approving Change in Law till the actual payments are received in entirety by the Petitioner;*

In IA No. 21/2021

- a) *Allow the present Application;*
- b) *Direct the Respondent No. 1 – Solar Energy Corporation of India Limited to immediately release the payments towards the safeguard duty claims as reconciled and agreed with the Petitioner – M/s SB Energy One Private Limited herein in terms of the interim arrangement agreed and recorded in letters dated 21.12.2020 and 24.12.2020; and/or*
- c) *Pass such other and further order(s) and direction(s) that this Commission may deem fit in the interest of equity and circumstances of the present case.*

Background

- 5. The chronological date of events may be appreciated in the following manner.
- 6. 14.03.2016 vide notification No. 32/3/2014-15/GSP, the Government of India issued ‘NSM Guidelines for selection of 5000 MW Grid Connected Solar PV Power Projects under Phase – II Batch IV’.

7. SECI was designated as the nodal agency for the implementation of MNRE scheme for developing grid connected solar power capacity including Phase- II, Batch-IV of the National Solar Mission of the Government of India through VGF mode
8. On 08.11.2016, SECI issued Request for Selection (RfS) No. SECI/NSM/P-2/B-4/RfS/RJ/112016/Bhadla-III vide which it invited proposals for setting up grid connected solar PV projects under the NSM Scheme at Bhadla Phase III Solar Park, Rajasthan on 'Build Own Operate' basis for an aggregate capacity of 500 MW in line with the Bhadla Phase III Solar Park which is being developed by Saurya Urja Company of Rajasthan Limited.
9. On 19.04.2017, SBG Cleantech One Limited submitted bid after taking into consideration, inter alia, the prevailing taxes, duties and exemptions and quoted a competitive tariff of Rs. 2.45/kWh which was lower than the maximum tariff of Rs. 3.93/kWh payable to the generator in terms of Clause 1.3.2 of the RFS.
10. On 12.05.2017, the reverse auction process was carried out by SECI and SBG Cleantech One Limited emerged as the successful bidder and was awarded three projects of 100 MW each (Project 1, Project 2 and Project 3).
11. On 01.07.2017, the Central Goods and Services Tax Act, 2017; the Integrated Goods and Services Tax Act, 2017 for levy and collection of tax on inter-State supply of goods or services or both by the Central Government were enacted. The Uttar Pradesh Goods and Services Tax Act, 2017 was enacted for levy and collection of tax on intra-State supply of goods or services or both by the respective States. The above taxes are hereinafter referred to as the 'GST Laws' collectively.
12. On 10.07.2017 and 08.08.2017, SBG Cleantech One Limited (parent company of the Petitioner) and one of its affiliates i.e. SBG Cleantech Three Limited, on behalf of its SPVs, requested SECI to inter alia, acknowledge the enactment of GST Law as a 'Change in Law' event within the terms of Article 12 of the PPAs.

13. On 16.08.2017, SECI issued three Letters of Intent (LOI) in favour of SBG Cleantech One Limited. Pursuant to the issuance of the LOI, SBG Cleantech One Limited formed SB Energy One Private Limited (the Petitioner) Special Purpose Vehicle for development of the 300 MW (100 MW each) Projects in terms of the RfS.
14. On 21.08.2017, the Petitioner informed SECI highlighting the issues raised earlier with regard to GST Laws. It also sought an amendment/ revision in the LOI with regard to Effective Date of signing the PPAs which, in terms of Para 1.3 of the LOI, was mentioned as one month from the date of issuance of LOI irrespective of the date of signing of the PPAs.
15. On 04.09.2017, SECI informed the Petitioner regarding queries relating to ‘Change in Law’ on account of introduction of GST Law, the same was covered under the provisions of Article 12 of the PPAs, and thus the Petitioner ought to approach the Commission and seek appropriate relief as provided therein after entering into the PPAs.
16. On 06.10.2017, the Petitioner executed three PPAs with SECI for sale and procurement of the contracted capacity of 100 MW from each Project. As per the PPAs, the effective date of PPAs was 16.09.2017 and the scheduled date of commissioning of the Projects was 16.09.2018.
17. On 30.07.2018, vide Notification No. 1/2018 (SG) (Safeguard Duty Notification), the Central Government imposed safeguard duty on the import of “Solar Cells whether or not assembled in modules or panels”.
18. On 20.12.2018, the Ministry of Power and the MNRE considered safeguard duty, being a domestic duty, to be treated as a pass through and thereby recognised it as a change in law.
19. On 22.04.2020 the Petitioner, furnished all documents, necessary for exhibiting clear and one on one correlation between the project and supply of goods & services, duly supported by the invoices raised by the supplier for goods and service and Auditor’s Certificate.

20. On 15.05.2020, SECI acknowledged the submission of documents by the Petitioner and communicated that the same will be reconciled as per the prevailing directions of MNRE and Orders of CERC for approval of annuity calculation methodology.
21. On 08.06.2020, SECI approached the Commission vide its Petition No. 536/MP/2020, seeking inter alia, the Commission to adjudicate and approve the annuity calculation methodology proposed by SECI for payments to be made towards the SGD and GST.
22. On 21.12.2020 SECI, has reconciled, accepted and acknowledged the amount of Rs. 64,68,82,473/- & Rs. 31,40,91,568/- being the SGD payments and the Petitioner is required to submit certain undertakings.
23. On 24.12.2020, the Petitioner has provided the undertakings to SECI.
24. On 08.01.2021, SECI provided RUVNL the commissioning certificates and connectivity reports of the projects of the Petitioner.
25. On 08.02.2021 and 09.03.2021 SECI requested RUVNL to make payment of the reconciled Safeguard Duty claims of the Petitioner.
26. The Petitioner has claimed that introduction of GST laws and imposition of Safeguard duty both qualify as 'Change in Law' under Article 12 of the PPAs and they should be compensated accordingly. Further, in spite of reconciliation of claims, SECI has not released any amount towards compensation.
27. Hence the petition.

Submissions of the Petitioner

28. The Petitioner has submitted that on 01.07.2017, GST Laws were enacted for levy and collection of tax on intra-State supply of goods or services or both by the respective States.

On 10.07.2017 and 08.08.2017, SBG Cleantech One Limited on behalf of its SPVs, requested SECI to inter alia, acknowledge the enactment of GST Law as a ‘Change in Law’ event within the terms of Article 12 of the PPAs. On 04.09.2017, SECI informed the Petitioner that the queries relating to ‘Change in Law’ on account of introduction of GST Law, were covered under the provisions of Article 12 of the PPAs, and the Petitioner ought to approach the Commission and seek appropriate relief as provided therein after entering into the PPAs.

29. The Petitioner has submitted that it has executed three PPAs with SECI on 06.10.2017 for sale and procurement of the contracted capacity of 100 MW from each project. Article 12 of the PPAs is reproduced herein below:

“12 ARTICLE 12: CHANGE IN LAW

12.1 Definitions

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

12.1.1 “Change in Law” means the occurrence of any of the following events after the Effective Date resulting into any additional recurring/ non-recurring expenditure by the SPD or any income to the SPD:

- the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;*
- a change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;*
- the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;*
- a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the SPD;*
- any statutory change in tax structure or introduction of any new tax made applicable for setting up of Solar Power Project and supply of power from the Project by the SPD, shall be treated as per the terms of this Agreement. For the purpose of considering the effect of this change in Tax structure due to change in law after the date of submission of Bid, the date such law comes in to existence shall be considered as effective date for the same;*

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

12.2 Relief for Change in Law

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

12.2.2 The decision of the Central 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.”

30. The Petitioner has submitted that with a view to set up its projects within the timeline specified in the PPAs, it has entered into contracts with suppliers and contractors. It followed a fair and transparent process for selection of potential contractors, consultants, suppliers and vendors for meeting its requirements and awards business on the basis of detailed evaluation and price negotiations. It has entered into the following contracts:

- (i) Contracts for engineering, procurement and construction (“EPC Contracts”):
 - a) Supply, Erection and Commissioning Contract dated 12.03.2018 with Sterling & Wilson Private Limited;
 - b) Contract for Supply of Solar Power Generating System dated 12.03.2018 with Mahindra Susten Private Limited;
 - c) Supply Contract dated 15.03.2018 with Larsen & Toubro Limited;
 - d) Erection and Commissioning Contract dated 15.03.2018 with Larsen & Toubro Limited;
 - e) Civil Works Contract dated 12.03.2018 with Mahindra Susten Private Limited; and
 - f) Civil Works Contract dated 15.03.2018 with Larsen & Toubro Limited;

- (ii) Contracts for Operations and Maintenance (“O&M Contracts”):
 - a) Operation and Maintenance Contract dated 08.01.2019 with Sterling and Wilson Solar Private Limited.
 - b) Robotic System Supply, Erection and Commissioning Contract dated 17.05.2018 with Ecoppia Scientific LLP.
 - c) Robotic System Operation and Maintenance Contract dated 17.05.2018 with Ecoppia Scientific LLP.

31. The Petitioner has submitted that subsequently, vide Notification No. 1/2018 (SG) dated 30.07.2018 (hereinafter referred to as ‘Safeguard Duty Notification’), the Central Government imposed safeguard duty as per the following rates on the import of “Solar Cells whether or not assembled in modules or panels”:
- a) 25% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th July 2018 to 29th July 2019;
 - b) 20% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th July 2019 to 29th January 2020;
 - c) 15% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th January 2020 to 29th July 2020.
32. The Petitioner has submitted that enactment of the GST Law and SGD Notification is squarely covered by the definition of ‘Change in Law’ under Article 12 of the PPAs. Perusal of the ‘Change in Law’ clause makes it clear that for an event to qualify as ‘Change in Law’, the following ingredients are required:
- i. it should be an event as specified in Bullets 1-5 of Article 12;
 - ii. the event should have taken place after the Effective Date, as defined in the PPAs; and
 - iii. the event should result in an additional recurring/non-recurring expenditure by the Petitioner or any income to the Petitioner.

Petitioner has made submissions on following counts.

33. The GST Law was enacted by the Parliament, pursuant to the Constitution (One Hundred and First Amendment) Act, 2016 which confers concurrent powers on both Union and States to make laws with respect to goods & services and enables both the Union and State Governments to levy and collect Goods and Services Tax on a single taxable event. GST Law, therefore, is an event as specified in Bullet 1 of Article 12 of the PPAs. Further, the SGD Notification has been notified by the Department of Revenue, Ministry of Finance and as such is within the ambit of the definition of ‘Law’ as provided in the PPA. The GST Law and SGD Notification, are therefore, events as specified in Bullets 1 & 5 of Article 12 of the

PPAs. As regards the requirement of the event to have taken place after the effective date, the Petitioner submits that the SGD Notification was promulgated on 30.07.2018 i.e. after the effective date as set out in the PPA. The GST Law came into force before the effective date specified in the PPAs.

34. Since it could not have factored the significant impact of GST Law into its quoted tariff at the time of bid submission on 19.04.2017, relevant provisions of PPAs ought to be interpreted in terms of the rule of contra proferentem, to mean that the event should have occurred after the bid submission date so as to enable the Petitioner to claim relief for the impact of GST Law, being a 'Change in Law' event. Interpretation of Article 12 that an event will only qualify as a 'Change in Law' event if it has occurred after the effective date specified in the PPAs will render the remedy provided under Article 12 otiose. The enactment of GST Law has resulted in an additional recurring and non-recurring expenditure by the Petitioner, which has not been factored into the quoted tariff by the Petitioner. In view thereof, the enactment of GST Law clearly qualifies as 'Change in Law' under the PPAs and entitles the Petitioner to relief under Article 12 of the PPAs.
35. It was incumbent upon SECI to incorporate a separate effective date or change in tax structure from what was otherwise provided in the PPAs. This is because, the Petitioner at the time of submitting the bid, could not have factored in the impact of GST Law on the cost of equipment and could not have quoted a tariff which could cater to such a change in tax structure of the country.
36. Article 12.1.1, bullet 5 provides that a statutory change in tax structure after the bid submission date resulting in an additional non-recurring and recurring expenditure for the Petitioner, will qualify as 'Change in Law' and the Effective Date of the PPAs in such a scenario will be the date on which such law came into existence. The Petitioner submits that the enactment of GST Law is a statutory change in tax structure which has taken place after bid submission and has resulted in an additional non-recurring and recurring expenditure for the Petitioner. Therefore, the enactment of GST Law qualifies as 'Change in Law' in terms of Article 12.1.1, bullet 5.

37. The Petitioner is now compelled to incur additional capital expenditure on procurement of solar cells, modules/ other equipment etc., as a result of enactment of GST Law. Such additional expenditure on procurement of equipment for setting up the projects would lead to an increase in their capital costs and if not compensated, would impact the viability of the projects. Such additional capital expenditure would not have been required but for the enactment of GST Law by the Government. It could not have factored the impact of GST Law in the quoted tariff at the time of bid submission. The same could only have been done as and when the Government rolled out the rate of taxation on each category of goods and services. As such, the tariff quoted by the Petitioner and captured in the PPAs is no more viable and it is incumbent on the Commission to acknowledge the enactment of GST Law as a 'Change in Law' event and provide relief to the Petitioner.
38. The Petitioner will also have to incur additional O&M cost due to the introduction of GST Law and SGD Notification. Such additional O&M cost would not have been required but for the introduction of GST Law. Since the NSM Scheme or the RFS or the PPAs do not prohibit outsourcing of O&M and Good Utility Practices warrant appointment of experienced agencies/ contractors for execution of the projects/ O&M, the Petitioner outsourced all of the afore-stated activities to the O&M Contractor i.e. Sterling and Wilson Solar Private Limited, which is experienced in providing the said services in the most effective and cost-efficient manner. The decision to appoint experienced O&M contractors to undertake O&M work was driven by Good Utility Practices and not by any commercial advantage that might accrue to the Petitioner on account of outsourcing of O&M.
39. 'Return on equity' and 'interest on working capital' are integral to an all-inclusive tariff bid. At the time of the submissions of bid(s), the Petitioner has factored in 'interest on working capital' and return on equity based on the taxes and duties prevalent at the time of bid. With the increase in the tax liability on account of the imposition of the Safeguard Duty, the working capital requirement, and consequently, the interest on working capital have also increased as compared to requirement and rate prevalent at the time of submission of the bid for the project. Thus, the Petitioner is entitled to interest on incremental working capital at

normative interest rate to put Petitioner to the same economic position as if change in law has not occurred.

40. The Petitioner has duly served notices on SECI regarding the occurrence of the 'Change in Law' event i.e. introduction of GST Law by way of various letters/ correspondences and has therefore kept SECI informed at every stage regarding the issues being faced by the Petitioner on account of introduction of GST Law. Moreover, SECI by way of its letter dated 04.09.2017 has also acknowledged that the promulgation and implementation of GST Law is covered under Article 12 of the PPAs and therefore for any relief/compensation on account of the said 'Change in Law' event, the Petitioner ought to approach the Commission in terms of the PPAs.

41. In terms of Section 79(4) of the Electricity Act, 2003 (the Act), the Commission while discharging its functions under the Act has to be guided by the provisions of the Tariff Policy, 2016. Clause 6.2(4) of the Tariff Policy clearly states that any change in taxes imposed by the Central Government after the award of bids has to be treated as 'Change in Law' unless otherwise provided for in the power purchase agreement. The relevant provisions of the Tariff Policy, 2016 are reproduced herein below:

“6.2 Tariff structuring and associated issues

...

(4) After the award of bids, if there is any change in domestic duties, levies, cess and taxes imposed by Central Government, State Governments/Union Territories or by any Government instrumentality leading to corresponding changes in the cost, the same may be treated as “Change in Law” and may unless provided otherwise in the PPA, be allowed as pass through subject to approval of Appropriate Commission.”

42. The Tariff Policy, 2016 also envisages that introduction of a new tax post submission of the bid has to be treated as 'Change in Law' event unless otherwise provided for in the PPAs.

43. The 'Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects' issued by Ministry of Power on 03.08.2017 under Section 63 of the Electricity Act, 2003 for long term procurement of electricity through

competitive bidding (“Bidding Guidelines”) provide that ‘in the event a Change in Law results in any adverse financial loss/ gain to the solar power generator , 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’. The Bidding Guidelines are binding on procurers/ intermediary procurers/ end procurers.

44. The Ministry of Power, Government of India, issued a direction dated 27.08.2018 to the Commission, under Section 107 of the Electricity Act, to treat any change in domestic duties, levies, cess and taxes imposed by the Central Government, State Governments/Union Territories or by any government instrumentality, leading to any corresponding change in cost, as “Change in Law” event. The Commission has further been directed by the Ministry of Power to expeditiously hear the petitions filed for seeking relief on account of a Change in Law event and pass the order for pass through within 30 days of filing of the petition. The wording of the said notification thus demonstrates the clear intent to declare the imposition/introduction of taxes, duties and levies as a Change in Law event. In view thereof and since GST Law and Safeguard Duty have been levied subsequent to the bid submission, the same should be treated as a Change in Law events as defined in the PPA.
45. The Ministry of Power and MNRE vide its letter dated 20.12.2018 has considered that safeguard duty being a domestic duty, ought to be treated as a pass through and thereby allowed as a change in law.
46. In addition to compensation for the increase in capital cost it is also entitled to carrying cost on the additional cost incurred by it as a result of introduction of the GST Law and the same will have to be paid for the following two periods:
 - a) Period 1 - from when the Petitioner incurred the additional cost on account of introduction of GST Law and SGD Notification till the approval of Change in Law by

the Commission (the date on which the order of the Commission is published/pronounced); and

b) Period 2 - from the date of the Order of the Commission approving Change in Law till the actual payments are received in entirety by the Petitioner.

47. The invoices raised on the Petitioner by the EPC Contractors for supply of goods and services post GST Law under the EPC Contracts have been submitted to SECI along with the Auditor's certificate.
48. Introduction of GST laws and imposition of Safeguard duty both qualify as 'Change in Law' under Article 12 of the PPAs and they should be compensated accordingly.

Submission by the Petitioner in IA No. 21 of 2021

49. The Petitioner has submitted that MNRE vide directive in its letters dated 12.03.2020 and 23.03.2020 dispensed with the need for approaching the Commission to seek declaration of imposition of SGD by the Central Government as a "Change in Law Event", and also considering various orders issued by the Commission declaring SGD as a "Change in Law Event" under the PPAs which are pari-materia to the PPA executed with Petitioner. SECI and Petitioner through mutually agreeable process, progressed to reconcile the SGD claims made by Petitioner.
50. The Petitioner has pointed out that SECI has reconciled Rs. 64,68,82,473/- & Rs. 31,40,91,568/- in terms of the methodology proposed through the interim arrangement, a one-time lump sum amount along with the first monthly instalment under the annuity payment method followed by a monthly instalment for a period of 13 years.
51. The Petitioner has submitted that owing to the non-payment of the above amounts, it is losing Rs. 1.03 crores per month being the interest cost lost over additional capital @ 12.9% p.a.

(14% x 70% + 10.41% x 30%). It has spent huge amounts and is still awaiting the recovery of such amounts.

52. The Petitioner has submitted that the payment obligation on SECI is independent and foremost. SECI is obligated to release SGD payments in favour of the Petitioner, without linking the back to back payment to be made by the distribution companies. Further, in terms of the interim arrangement agreed as per the letters dated 21.12.2020 and 24.12.2020, such payments from SECI are required to be released immediately.
53. The Petitioner has submitted that while the SECI's Annuity petition is pending, it has been releasing the payments as per the interim arrangement to the other developers. Considering the financial difficulty being faced by the Petitioner, SECI and the Petitioner agreed to an interim arrangement, whereby, it was agreed that for release of the immediate annuity payments, the Petitioner is required to submit certain undertakings. The Petitioner has already submitted the required undertakings.

Submission by Respondent No.1 (SECI)

54. Respondent No.1 (SECI) made submissions mainly on following counts.
55. PPAs with the Petitioner are executed entirely on back-to-back basis of the Power Sale Agreement (PSA) dated 12.05.2017 between SECI and the distribution company/Buying Utility viz. RUVNL for sale of the power procured under the PPAs dated 06.10.2017.
56. The impact of Change in Law is to be considered for Safeguard Duty on the solar modules, plant and equipment imported for the solar power projects of the Petitioner. The safeguard duty paid is to be included in the capital cost and amounts to additional capitalization. The additional capitalization has to be served over life of the PPA, as in the case of servicing the capital cost on plant, machinery etc.

57. By letter dated 21.12.2020 to the Petitioner and by letter dated 22.12.2020 to RUVNL, SECI has communicated the provisional reconciliation of the Safeguard Duty claims of the Petitioner till Commercial Operation Date in respect of Petitioner's 2 X 100 MW projects established in Bhadla Phase-IV Solar Park, Rajasthan. Vide email dated 08.01.2021, SECI has also provided RUVNL the commissioning certificates and connectivity reports of the projects of the Petitioner.
58. SECI has requested RUVNL to respond to the statement of reconciliation forwarded vide letter dated 22.12.2020. SECI has also written letters dated 08.02.2021 and 09.03.2021 to the RUVNL, inter-alia, requesting RUVNL to make payment of the reconciled Safeguard Duty claims of the Petitioner.
59. The Commission vide its order dated 03.02.2020 in Petition No.356/MP/2018 and Petition No.51/MP/2019 in the matter of *Azure Power India Limited –v- Solar Energy Corporation of India Limited* and connected petition, inter-alia, has already decided on the payment in respect of the claim of Safeguard Duty.
60. The amount as evaluated and reconciled by SECI and to the extent confirmed by RUVNL or the amount duly adjudicated by the Commission in regard to safeguard duty claims of the Petitioner is payable 'within sixty days of the date of the Order or from the date of submission of claims by the Petitioner whichever is later'. SECI is also entitled to claim the receipt of the said amount from RUVNL on back-to-back basis.

Reply of Respondent No. 2 (RUVNL)

61. The reply of the Respondent is mainly on following counts.

Re: Scope of Change in Law provisions under the PPA

62. The Petitioner has proceeded on a complete misunderstanding of the scope of the 'Change in Law' provisions and thus, the contentions of the Petitioner in so far as interpreting the scope of 'Change in Law' provisions contained in the PPAs are misconceived.

63. The Petitioner has to establish that its claims fall under specific entries of Article 12 containing the 'Change in Law' provisions under the PPAs.

Re: Impact of GST

64. The Petitioner in the present case has claimed enactment of GST laws on 01.07.2017 as a Change in Law event under Article 12 of the PPA. The claim of the Petitioner fails to satisfy the very first requirement under Article 12 i.e. the event occurred must be after the effective date. In the present case, the effective date as defined under Article 2.2.1 is 16.09.2017 when the PPA was entered into, which is after the enactment of GST laws i.e. 01.07.2017. The provision under Article 12 does not relate to the bid submission date at all, but relates to the effective date, which is defined under the PPA at Article 2.2.1 to be 16.09.2017. Therefore, the Petitioner has clearly sought to mislead the Commission on this issue.

65. While the bid may be prior to the enactment of GST Laws, the LOI itself was issued on 16.08.2017, and the PPA was signed much later on 06.10.2017. Therefore, at the time of signing the PPA, the Petitioner was aware that GST Laws have been enacted on 01.07.2017 and that the provision under Article 12 only applies to Change in Law events that have occurred after the effective date of the PPA i.e. 16.09.2017.

66. The Petitioner has sought to rely on the sixth bullet, to contend that for a Change in Tax, the effective date must be the bid submission date. The date of submission of Bid under the sixth bullet is however only relevant for considering the effect of Change in Law. The same should not be confused with the pre-requisite/condition that the proposed event should occur after the effective date of the PPAs.

67. While the enactment of GST may be "law" as defined under the PPA, however, Article 12 does not allow relief for any change in law. The Change in Law definition in Article 12.1.1 is exhaustive in nature and not inclusive, on account of use of the expression 'means'. Therefore, only change in law events covered under the six bullets under Article 12.1.1 can be admissible for relief under the PPA. Taxes also cannot form part of any other entry in the

said 'Change in Law' clause. This is based on the basic and well settled principles of interpretation of deeds and documents, statutes and contracts.

68. The idea of carving out a separate bullet for dealing with taxes and thereafter restricting its ambit by specific stipulation therein, unequivocally establishes that any tax needs to be considered under the sixth bullet only and not otherwise. The claims which are to be considered on account of statutory taxes etc. should squarely fall within the scope of the sixth bullet. The said sixth bullet is the entire repository of dealing with taxes. When there is a specific clause relating to taxes, the general clauses dealing with laws in general have to be interpreted as necessarily excluding taxes.
69. The sixth bullet on the taxes in Article 12 containing the 'Change in Law' clause clearly and specifically restricts the applicability of change in law to taxes on only two events namely:
 - a. "setting up of Solar Power Project"; and
 - b. "supply of power".
70. Every change in tax or introduction of tax was not intended to be covered by the 'Change in Law' provisions of the PPAs. It cannot, therefore, be said that the "tax made applicable for setting up of Solar Power Project and supply of power" be extended to other aspects. The said sixth bullet does not deal with any and every tax as applicable which affects the cost or revenue of the Petitioner. Therefore, what is covered in the PPAs for 'Change in Law' in respect of taxes is only the tax for "setting up a Solar Power Plant" and "supply" (sale) of electricity and not taxes for anything else or any other transactions preceding them. The enactment of the GST Laws is not an admissible change in tax under Article 12, since GST was not made applicable on the setting up of a Solar Power Project or on supply/sale of power.

Re: Increase in Operation and Maintenance (O&M) expenses

71. The incidence of GST on O&M of the Petitioners' plant is only for the reason that the Petitioner has outsourced the O&M to third parties. In this regard, it is submitted that:

- a. Provisions in the PPAs or the bid documents did not mandate or prescribe or specifically provide for outsourcing O&M;
 - b. Outsourcing O&M is an internal commercial decision of the Petitioner;
 - c. If, for commercial expediency or benefit, the Petitioner outsources the O&M, the saving or additional expenditure is to the account of the Petitioner; and
 - d. The Petitioner has a full right to take a decision on the above at its risk or reward.
72. The Petitioner is responsible for undertaking generation and supply of electricity. In terms of Article 4.1.1(g), the Petitioner has undertaken to be responsible, at its own cost and risk for fulfilling all obligations undertaken by the Petitioner under this Agreement. The change in law under the sixth bullet is admissible only if the transaction which is assessed as tax, is mandated or required to be performed in terms of the PPAs and not when it is undertaken as a discretionary commercial decision.
73. O&M is the responsibility of the Petitioner and in the event of the Petitioner choosing to outsource this activity, consequence of such outsourcing decision cannot be passed on in the tariff. The outsourcing of O&M to a third party is not a requirement of the PPAs and is a commercial decision of the Petitioner for its own advantage and any increase in cost including on account of taxes etc. is entirely to the account of the Petitioner.
74. When the PPAs do not provide for any provision relating to outsourcing of operation and maintenance services, the outsourcing of the operation and maintenance services becomes a pure commercial decision of the Petitioner, taken for its own advantage and any increase in cost including on account of taxes etc. is entirely to the account of the Petitioner. It cannot be passed on by way of increase in tariff or otherwise.

Re: Impact of Safeguard Duty Imposition

75. The imposition of Safeguard Duty falls outside the scope and purview of the Change in Law provisions of the PPA. In the case of GST, Article 12 only allows change in taxes with respect to tax on “setting up of Solar Power Project” and “supply of power”. Therefore, tax

on any other event other than setting up Solar Power Project and supply of power is not covered by the Change in Law clause. The imposition of SGD is not on “setting up of Solar Power Project” and “supply of power”. The imposition of Safeguard Duty in terms of the Statutory Notification is admittedly only on the event of “import of Solar Cells/modules”. The change in price of Solar Cells/Modules is firstly a change in input price, which is not covered under the Change in Law clause.

76. The decision to import Solar Cells/Modules from China is a commercial decision, and not a mandate by SECI. Had the Petitioner procured Solar modules from the domestic market, there would have been no increase in costs.
77. The bidding documents do not in any manner prescribe the source from which the solar panels are to be procured. It is for the bidders to select the source. It cannot be that the safeguard duty would be a change in law for persons sourcing the solar panels from select countries, but would not be for persons sourcing domestically. Therefore the said imposition in any case cannot be covered under the Change in Law clause of the PPA. All contentions and averments of the Petitioner to the contrary are wrong and denied.

Re: Carrying Cost

78. The contention of the Petitioner with regard to the issue of carrying cost is wrong and misconceived. While much emphasis has been made by the Petitioner on the principle of restoring the affected party to the same economic position as if such change in law had not taken place, there is no provision in the PPAs regarding carrying cost or interest for the period till the decision of the Commission acknowledging the change in law and deciding on the amount to be paid for such change in law namely ‘provide for relief for the same’, as specified in Article 12.2.2 of the PPAs. The Change in Law claim of the Petitioner is yet to be adjudicated and the amount if any, due to the Petitioner has to be determined/computed first.

79. It is an admitted position that there can be no payment until the Commission decides on 'Change in Law'. Therefore, amounts do not become due until the decision of the Commission is pronounced. The present case is not where amounts are being deprived at the appropriate time or any deprivation of amounts due to the actions of the procurers. This being the position, the claim of carrying cost does not get attracted in the present petition.
80. The PPAs in the present case do not have a provision dealing with restitution principles to restore the Petitioner to the same economic position as if no change in law event had occurred. Therefore, the Petitioner is not entitled to claim relief which is not provided in the PPAs.

Re: Reconciliation of Claims

81. Reconciliation between SECI and the Petitioner does not ipso facto bind the answering Respondent to make payments to SECI. In fact, the Commission has already upheld this principle, that the payment obligation of SECI is not dependant on the distribution licensees making payments to it.
82. It was communicated vide letter dated 22.12.2020, and email dated 08.01.2021 regarding the reconciled amounts. It may be relevant to note, that while the Petitioner has claimed relief qua three projects of cumulative 300 MW in the present Petition, the claims raised by SECI on the answering Respondents are only qua two projects.
83. The Petitioner has made claims for a period even after the commissioning of the project. The change in law claims for any extra module that the Petitioner has purchased over and above what is required to supply to the answering Respondent cannot be expected to be paid for by the answering Respondent. In this regard, the SPD can certainly not be entitled to claim any amounts for the period after commissioning of the Project.

84. In one of the projects i.e. Project 2D, with regard to 330W modules, the modules installed at the site as per the commissioning report are less than the modules which have been stated to be received at the site as per the Petitioners' claims. In such cases, the Respondent cannot reconcile amounts without proper physical verification. The Respondents can certainly not be expected to make payments merely because the Petitioner has imported certain solar modules, even if they are not being used at the site. The Commission may kindly decide on the issue of whether an SPD is entitled to raise claims for modules which are not installed at the project site as per the commissioning report.
85. Similarly, for the same project, with regard to 325 W modules, the number of solar modules as per the commissioning report, are more than what has been stated to be received by the Petitioner at the project as per its claim. The Petitioner is yet to even produce all the invoices in these cases, while the safeguard duty is claimed for the solar modules. In such cases the claims can only be considered for the modules against which proper invoices are provided, and not merely on the basis of number of modules installed at the site. Even in terms of the orders passed by the Commission in other cases, the SPD needs to submit relevant documents to exhibit clear one to one correlation between the project and the supply of imported goods, duly supported by relevant invoices and Auditor's Certificate.

Reply to the submission of SECI by the Petitioner

86. SECI has chosen to follow the recommendation of MNRE and has decided that the Petitioner is to be paid the compensation on account of SGD, on annuity basis. The same has been accepted by the Petitioner vide letter dated 24.12.2020.
87. As contemplated in the MNRE letters dated 12.03.2020 and 23.03.2020 and as has been provided by the Commission in various orders, where the payments are being made as a lumpsum, only in such circumstances, SECI was given 60 days to release such payments. Such time period is not applicable for payments being made on annuity. It is clear from the various orders of the Commission that the period of 60 days is only mentioned in

correspondence to a situation where the claim is being paid for in lumpsum. However, the said stipulation is not found if the alternative i.e., payment by way of annuity is opted for by the parties. Therefore, reliance placed by SECI on the Order dated 03.02.2020 with regard to the timelines for payment within 60 days from date of order for the safeguard duty claims payable is flawed.

88. SECI has mutually agreed to a mechanism for payment of safeguard duty compensation on annuity basis. However, the rate at which such payment is required to be made by SECI i.e., the annuity rate, is a matter pending adjudication before CERC. In the said petition (Annuity Petition) it was agreed that for release of the immediate annuity payments, the Petitioner is required to submit certain undertakings. The said undertakings have been provided by the Petitioner vide its letter dated 24.12.2020. The annuity payments ultimately will have to reconstitute the Petitioner to the same economic position, as if the change in law event has not occurred.
89. The reconciliation of the compensatory payments between SECI and the Petitioner, has been currently computed based on an annuity rate of 10.41 per cent and with the payment spread over for a period of 13 years. The Petitioner has reserved its rights to contest the annuity methodology suggested by SECI in the Annuity Petition filed by SECI before the Commission, and the suitable reply/submissions on behalf of the Petitioner are already placed on record in those proceedings.
90. While agreeing on the undisputed amount of claim on the safeguard duty vide its letter dated 24.12.2020 , it has reserved its rights to claim Rs. 2,20,43,805/- which has been paid by the Petitioner to the port authorities. Further, it had duly imported the modules as per the schedule of the project. However for the delay in the assessment by the Custom authorities due to the introduction of the SGD notification, the Petitioner had to pay Rs. 2,20,43,805/- as interest at the time of depositing the Safeguard Duty and related IGST on safeguard duty.

91. It had part commissioned its Project on 21.09.2018 and fully commissioned the same on 24.09.2018. In the PPAs, the SCOD has been originally specified as 16.09.2018. However, the said SCOD was extended by SECI vide its letter dated 13.06.2019 on account of delay in commissioning of the grid sub-station, which is a reason not attributable to the Petitioner. Accordingly, SECI acknowledging the delay being not attributable to the Petitioner has accepted the commissioning and commercial operation date as indicated in the table below:

PROJECT DETAIL	CAPACITY	EXTENDED SCD	COMMISSIONING	ACTUAL COD
Project 1D	100 MW	21.09.2018	21.09.2018	21.10.2018
Project 2D	100 MW	24.09.2018	24.09.2018	24.10.2018
Project 3D	100 MW	24.09.2018	24.09.2018	24.10.2018

92. The Petitioner may be allowed to raise two invoices, one each for the two Project IDs (2D & 3D), for the entire amount claimed and payable for SGD, which then may be paid based on the ‘annuity model’ as agreed between the Petitioner and SECI. Such payments shall be subject to adjustments based on the outcome of the Annuity Petition filed by SECI. For abundant clarity, the Petitioner shall not be required to unnecessarily raise invoices for monthly instalments payable in accordance with the aforementioned ‘annuity model’. The above may be applicable for the amount claimed, reconciled & payable for GST for all the three project IDs (1D, 2D & 3D). This is without prejudice to all the rights and remedies available to the Petitioner and SECI in law.

93. The Commission in its earlier Order dated 30.12.2019 in 4/MP/2018 and batch, has already noted the rationale for allowing change in law claims (GST) until the Commercial Operation Date. The Commission has held that the liability of the Respondents for payment of purchase of the power from the SPDs starts from the Commercial Operation Date (COD). Accordingly, the liability of the payment for change in law event (GST) shall lie with the Respondents till the Commercial Operation Date. Therefore, the impact of the GST till the COD, should be

considered while reconciling claims between the developer and the intermediary procurer/procurer.

94. In terms of the letters dated 21.12.2020 and 24.12.2020, both the parties have agreed for immediate release of payments in terms of the SGD claims, subject to submission of undertakings that have been suitably submitted by the Petitioner vide letter dated 24.12.2020 and accepted by SECI. Therefore, SECI is independently liable to pay the compensation amount to the Petitioner as per the above stated agreement. Confirmation on amount by RUVNL, as evaluated & reconciled by SECI, is a part of the separate leg of billing and payment between SECI and RUVNL, therefore, the same shall not be a condition for payment by SECI to the petitioner. The independent liability of SECI to make such payments has been already decided by the Commission.

Rejoinder to the reply of RUVNL by the Petitioner

95. It had submitted its bid on 19.04.2017 and the reverse auction process was carried out on 12.05.2017. Thereafter, the GST Law came into force on 01.07.2017 and brought about fundamental structural changes in the prevailing tax regime in the country and severely affected various parameters on which the Petitioner had submitted its bid.
96. Subsequent to the issuance of LOI, it wrote to SECI highlighting the issues raised earlier with regard to GST Law. It also sought an amendment/ revision in the LOI with regard to Effective Date of signing the PPAs which, in terms of Para 1.3 of the LOI, was mentioned as one month from the date of issuance of LOI irrespective of the date of signing of the PPAs. The Petitioner stated that there was no such condition prescribed under the RFS and that such a condition was contrary to the scheme prescribed in the RFS. SECI responded to the afore-stated letter by way of its communication dated 04.09.2017. As regards queries relating to 'Change in Law' on account of introduction of the GST Law, SECI informed the Petitioner that the same was covered under the provisions of Article 12 of the PPAs, and thus the Petitioner ought to approach the Commission and seek appropriate relief as provided therein after entering into the PPAs. Therefore, by way of the present Petition, the Petitioner herein

has approached the Commission, seeking relief and issuance of necessary directions on account of Change in Law event. RUVNL, in complete ignorance of the above facts has sought to challenge the Petitioner's claim without any basis whatsoever. All such contentions made by RUVNL are wrong and denied, and liable to be rejected.

97. Bare perusal of Article 12 of the PPAs, shows that all events, other than statutory change in tax structure or introduction of any new tax, which results in any additional recurring/non-recurring expenditure by the Petitioner will fall within the ambit of 'Change in Law' so long as the events occur after the Effective Date of the PPAs i.e., after 16.09.2017. However, so far as any statutory change in tax structure or introduction of any new tax is concerned, the PPAs provide that the change in tax structure will qualify as 'Change in Law' so long as the event has occurred after the bid submission and the effective date in such a scenario will be the date on which such law came into existence. Therefore, the contentions made by RUVNL alleging the contrary falls flat on its face as being completely without any merit.
98. It is evident from Order dated 05.02.2019 of the Commission in Petition No. 187/MP/2018 and batch, that for the Projects/PPAs related to Petition nos. 178/MP/2018 and 187/MP/2018, the event of Change in Law i.e., enactment of GST on 30.07.2017 came into effect after the date of bid i.e., 19.04.2017 and, before the Effective Dates of the respective PPAs i.e., 16.09.2017. This is similar to the circumstances of the Petitioner, wherein the event of Change in Law i.e., enactment of GST came into effect on 30.07.2017, which is after the date of Bid i.e., 19.04.2017, however, before the Effective Date as per the PPA i.e., 16.09.2017.

Re: Impact of GST law

99. The Appellate Tribunal for Electricity (the Tribunal) in its judgment dated 14.08.2018 passed in Appeal No. 111 of 2017 and 290 of 2017 has specifically held that any tax or application of new tax on sale / supply of power also covers the taxes on inputs required for such generation and supply of power to the distribution licensee.

100. When it has clearly been held that any tax or application of a new tax on supply of power also covers the taxes on inputs required for such generation and supply of power to the beneficiary, then there is no basis for RUVNL to lay a different interpretation to the said finding of the Commission in the Order dated 05.02.2019 passed in Petition No. 187/MP/2018 & batch, and the Appellate Tribunal in its judgment dated 14.08.2018 passed in Appeal No. 111 of 2017 and 290 of 2017. The term 'supply of power' must be considered to include all activities such as purchase and import of material and generating equipment, which enable a solar/ wind developer to ultimately generate power from its generating station. As such, the interpretation of the provision of the PPAs by RUVNL is incorrect and liable to be rejected.
101. Contracts have to be interpreted to give effect to the intent of the parties and not to frustrate it which is known as the purposive interpretation. The purpose of PPAs is to develop project and supply electricity at a fixed tariff rate, which is a factor of capital cost. The process of bidding is based on the known capital cost, therefore while submitting the bid, the developer takes risk to manage and mitigate capital cost as it is under control of the developer. However, if the capital cost increases for the reasons beyond the control of the developer, as in the present case, then the developer cannot be held accountable to bear the risk as the same was not foreseeable at the time of computing the capital cost. It is therefore, proper and justifiable to submit that the Petitioner cannot be subjected to risks unknown and hence it is only essential that while interpreting the PPA, a common sense and business efficacy test is applied.
102. The present contractual arrangement is not gratuitous and thus the Petitioner in any case is to be compensated under Section 70 of the Indian Contract Act, 1872 (Contract Act). It is a settled proposition of law that when the parties indulge in commerce, there are no gratuitous acts. It is entitled for any amount that has been spent for the benefit of the other party. Moreover, if the contract does not provide for a particular eventuality, the parties shall be governed by the provisions of the Contract Act in respect of that eventuality. Therefore, it is well within its rights under law to claim reimbursement of the additional cost incurred for

non-gratuitous act. The objections of RUVNL are in the teeth of the abovementioned settled position of law.

103. None of the provisions of the PPAs seek to distinguish between the expenditure incurred on account of activities carried out by the Petitioner in its own capacity and the activities which have been outsourced by the Petitioner to third parties. The O&M expenses being a recurring expenditure has to be inferred by necessary implication having regard to the quality and quantity of power to be supplied in terms of the PPAs. To supply the contracted capacity of power, the Petitioners are required to engage third party vendors, possessing requisite expertise, to efficiently operate and maintain the project so as to ensure international perspective of the best practices in plant inspection procedures, quality assessment plans and checklists for maintenance. Accordingly, such a specialized function cannot be undertaken by the Petitioners i.e., the generator themselves and has to be necessarily outsourced to specialized agencies for delivering the contracted capacity of power to the Respondents. Outsourcing of O&M is a prudent industrial practice to ensure international perspective of the best practices in plant inspection procedures, assessment plans and checklists for maintenance. Accordingly, merely because O&M activities have been outsourced as a prudent industrial practice, the benefit of change in law cannot be denied especially when such rationale has not been adopted in respect of the construction of the power project being outsourced to an EPC Contractor. In the present case, the additional expenditure as incurred by the Petitioners on account of O&M expenses ought to be allowed as change in law.
104. The Petitioner is and will be paying additional cost to the abovementioned agencies due to the increase in taxes on account of GST Law for the life of the project. Such increase in taxes was not factored in at the time of bid submission since, at the time of bidding, the GST Laws were not in existence, and there was no reason for the Petitioner to factor in the imposition of the same. Therefore, it is only fair that the Petitioner be compensated for the same.

Re: Impact of SGD imposition

105. The said issue is no more *res- integra*. It has already been settled by the Appellate Tribunal that any tax or application of a new tax on supply of power also covers the taxes on inputs required for such generation and supply of power to the beneficiary. The Commission also has considered the same. Accordingly, the Commission, in its Order dated 02.05.2019 in Petition Nos. 342/MP/2018 and 343/MP/2018, has already decided that imposition of SGD is covered under first, second and sixth bullet of Article 12 of the PPAs. There is no basis for RUVNL to lay a different interpretation to the above-mentioned finding of the Appellate Tribunal and the Commission.
106. As per RUVNL's own contention, under Article 12 of the PPAs, events as described therein, if occurs after the Effective Date (16.09.2017), the same will be considered as Change in Law Event. Imposition of SGD by the Central Government was notified on 30.07.2018 i.e., after passage of more than 10 months from the Effective Date.
107. The imposition of SGD has been imposed by virtue of the notification dated 30.07.2018, which is subsequent to the 16.09.2017 i.e., the Effective Date as per the PPAs. Therefore, there cannot be any assumption whatsoever, that the Petitioner could have factored in the imposition of SGD in its bid tariff which was submitted on 19.04.2017. It is not in dispute that the Petitioner as a matter of fact has incurred payments towards SGD and has submitted it before the relevant authority. The Petitioner has the contractual right to undertake such procurement of modules and related equipment in a manner that is best suited and in the interest of the project (aligned to its bid tariff). The Commission in its Order dated 15.10.2019 in Petition No. 19/MP/2019 and 46/MP/2019 has held that the procurers cannot question the commercial decisions of the solar power developers for project implementation including mode of procurement of goods and services taken by the solar power developer prior to the Change in Law event. Further, all necessary reconciliation as mandated within the contractual construct of the PPAs has occurred between the Petitioner and SECI viz. the claims and the documents submitted towards imposition of SGD and necessary payment made by the Petitioner. After the reconciliation between the Petitioner and SECI having occurred to the satisfaction of SECI, RUVNL has no right / basis to object on such payments to be made in favour of the Petitioner by SECI. Therefore, there is no occasion for RUVNL

to dispute application of Article 12 of the PPA in the present facts. RUVNL cannot keep switching positions merely to deny the rightful claims of the Petitioner.

108. RUVNL, despite directions of the Tribunal in the Order dated 22.01.2021 to reconcile the SGD claims with SECI and despite SECI providing all SGD claims documents to RUVNL by emails dated 18.05.2020, 22.12.2020 and 22.01.2021, has not yet reviewed the SGD claim documents thoroughly.
109. The Petitioner has claimed SGD amounts only for 2 Projects. The Petitioner did not claim SGD for Project 1D because modules were delivered before imposition of SGD on 30.07.2018. Further, it is stated the Petitioner has not claimed SGD for certain modules capacities of Project 2D and 3D, respectively because these modules were delivered before SGD imposition on 30.07.2018. SECI has considered all of the above details while reconciling the SGD claims of the Petitioner. Further, SECI has provided RUVNL with the EPC contracts on 28.01.2021 and without examining the same, RUVNL is attempting to raise vexatious allegations against the Petitioner.

Re: Increase in working capital and decrease in “Return on Equity”

110. ‘Return on equity’ and ‘interest on working capital’ are integral to an all-inclusive tariff bid. At the time of the submissions of bid(s), the Petitioner has factored in ‘interest on working capital’ and return on equity based on the taxes and duties prevalent at the time of bid. With the increase in the tax liability on account of the imposition of the Safeguard Duty, the working capital requirement, and consequently, the interest on working capital have also increased as compared to requirement and rate prevalent at the time of submission of the bid for the Project. Thus, it is entitled to interest on incremental working capital at normative interest rate to put the Petitioner to the same economic position as if change in law has not occurred.

Re: Carrying Cost

111. The essence of 'Change in Law' clause under Article 12 of the PPAs is to restore the affected party to the same economic position as if the said 'Change in Law' event had not happened. Therefore, restitution is an integral part of the compensation granted under Change in Law. As such, carrying cost is inherent to any compensation that may be granted under the ambit of the Change in Law provision.
112. The Petitioner is entitled to claim carrying cost on the amount due and payable by the Respondents. It is settled position of law that whenever payments are deferred or delayed, the carrying cost is payable along with such deferred payments. Carrying cost is nothing but compensation for time value of money or monies denied at the appropriate time. The reference herein is to be made to the Supreme Court's judgment dated 13.10.2003 in *South Eastern Coalfields Ltd. v. State of Madhya Pradesh and Ors.*, (2003) 8 SCC 648 whereby the Supreme Court has held that interest is payable in equity in certain circumstances.

Re: Reconciliation of Claims

113. SECI, after having considered and verified the documents and claims towards imposition of SGD, has approved and confirmed the claim of the Petitioner. Within the terms of the PPA, SECI has the obligation to check / verify / confirm the claims qua Change in Law as claimed by the Petitioner. SECI has satisfied itself within the contractual construct and supporting documents/evidence submitted by the Petitioner and the claims of the Petitioner are liable to be honoured by SECI. SECI is liable to pay to the Petitioner such amounts towards GST and SGD having satisfied itself qua such claims and such payment towards "change in law" claims are not dependent upon the payments by RUVNL to SECI. It is a matter of fact that the Petitioner has incurred the amounts as claimed within the terms of the documents/current petition towards the claims of GST and SGD. Hence, there cannot be any dispute either on the issue of these payments not having been incurred or on the contractual construct and the decisions of the Commission.

114. It is argued that even if there is any justifiable downward revision in the claims reconciled between SECI and the Petitioner, as per the undertakings given by the Petitioner on 24.12.2020, the said amount shall be adjusted immediately in future annuity and the excess amount shall be paid by the Petitioner to SECI at an interest rate of 10.41 per cent per annum. Therefore, the equity and the balance of convenience rest with the Petitioner, who shall suffer irreparable injury and financial prejudice, if the present petition and the accompanying IA is not allowed.

ROP Dated 26.03.2021

115. As per the ROP dated 26.03.2021, the Commission observed that:

“2. Learned senior counsel for the Petitioner submitted that vide Record of Proceedings for the hearing dated 4.6.2020, the matter was adjourned sine die by the Commission as the Petitioner and SECI were already in discussion for reconciliation of the Petitioner’s claims in terms of the directions of Ministry of New and Renewable Energy dated 12.3.2020 and 23.3.2020 and the Petitioner was further directed to revive the Petition based on the outcome of the discussion or settlement reached, if any, amongst the parties. Learned senior counsel submitted that pursuant thereto, the Petitioner and SECI have reconciled the claims of the Petitioner towards imposition of Safeguard Duty and that the Petitioner has also agreed to interim arrangement as proposed by SECI for the payment subject to outcome in Petition No. 536/MP/2020 filed by SECI. Accordingly, the IA No. 21/2021 has been filed by the Petitioner seeking revival of the Petition.

3. Learned senior counsel for the Respondent, SECI confirmed that the claims of the Petitioner towards safeguard duty have been reconciled between the Petitioner and SECI. It was further submitted that the reconciled claims had also been sent to the buying entity, namely. Rajasthan Urja Vikas Nigam Limited (‘RUVNL’) and unless RUVNL has any comments thereon, the Commission may pass an appropriate order in the matter subject to outcome in Petition No. 536/MP/2020 filed by SECI, whereby SECI has sought approval of annuity methodology including annuity rate. Learned senior counsel further sought liberty to file short submissions of SECI in the matter.

4. Learned counsel for the Respondent, RUVNL submitted that as per his instructions, the Respondent, due to not being mapped by the Petitioner, is yet to receive the copy of the Petition. Accordingly, the learned counsel requested for 10 days’ time to file reply to the Petition including its comments on the reconciled claims.

5. The Commission observed that the Respondent, RUVNL has already been mapped on the e-filing portal of the Commission (on 19.2.2021) and consequently is in receipt

of the copy of the Petition. The Commission directed SECI to file its submission within a week and the Respondent, RUVNL to file its reply including the comments on reconciled claims within ten days with advance copy to the Petitioner, who may file its response thereon, if any, within one week thereafter.

6. Subject to the above, the Commission reserved the order in the matter.”

Analysis & Decision

116. We have heard the learned counsels for the Petitioner and the Respondent and have carefully perused the records.
117. We observe that the Petitioner has submitted that enactment of the GST Laws and imposition of Safeguard Duty is a Change in Law event under Article 12 of the PPA and it should be restored to the same economic condition prior to occurrence of the Change in Law event by directing SECI to pay the amount claimed in terms of Article 12 of the PPA along with carrying cost. Subsequently, the Petitioner also filed an IA vide which it has submitted that SECI may be directed to immediately release the payments towards the safeguard duty claims as reconciled as an interim arrangement subject to outcome in Petition No. 536/MP/2020 filed by SECI. The Petitioner has further submitted that it has already furnished all documents necessary for exhibiting clear and one to one correlation between the project and supply of goods & services, duly supported by invoices raised by the supplier for goods and service and the Auditor's Certificate and the required undertakings to SECI. ***Per Contra***, SECI has confirmed that the claims of the Petitioner towards safeguard duty have been reconciled between the Petitioner and SECI. It was further submitted that the reconciled claims had also been sent to the buying entity RUVNL. Further, SECI has submitted that the Commission may take on record the letters sent by SECI to RUVNL informing about the reconciliation of Safeguard Duty claims of the Petitioner in respect of its 100 MW x 3 Power Projects and whereby SECI sought for payment of the reconciled claims. SECI has further submitted that the Commission may pass an appropriate order in the matter subject to outcome in Petition No. 536/MP/2020 filed by SECI, whereby SECI has sought approval of annuity methodology including annuity rate. Further, RUVNL has submitted that the

enactment of GST laws and the imposition of Safeguard Duty fall outside the scope and purview of the Change in Law provisions of the PPA.

118. Accordingly, the following issues arise before us for adjudication:

Issue No. 1: Whether the enactment of the GST Laws and imposition of Safeguard Duty are Change in Law events under Article 12 of the PPA and whether the Petitioner is entitled to relief thereunder?

Issue No. 2: Whether the claim of GST on operation and maintenance expenses as prayed by the Petitioner is sustainable?

Issue No. 3: Whether the claim of Petitioner regarding interest on Working Capital, Return of Equity and Carrying Cost for delay in reimbursement by the Respondent is sustainable?

119. No other issue was pressed or claimed.

Issue No. 1: Whether the enactment of the GST Laws and imposition of Safeguard Duty are Change in Law events under Article 12 of the PPA and whether the Petitioner is entitled to relief thereunder?

120. The Petitioner has submitted that the enactment of the ‘GST laws’ and imposition of Safeguard Duty constitute ‘Change in law’ in terms of Article 12 of the PPA. *Per contra*, RUVNL has submitted that as per Article 12 the event must occur after the effective date i.e. 16.09.2017. However, in the present case, the enactment of GST laws is before the effective date of the PPAs and hence the enactment of GST laws is outside the purview of PPAs. Further, Article 12 only allows change in taxes with respect to tax on “setting up of Solar Power Project” and “supply of power”. Therefore, tax on any other event other than setting up of Solar Power Project and supply of power is not covered by the Change in Law clause. Hence, the imposition of SGD falls outside the scope and purview of the Change in Law provisions of the PPA.

121. The Commission observe that Article 12 of the PPA which stipulates as below:

“12 ARTICLE 12: CHANGE IN LAW

12.1 Definitions

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

12.1.1 “Change in Law” means the occurrence of any of the following events after the Effective Date resulting into any additional recurring/ non-recurring expenditure by the SPD or any income to the SPD:

- the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;*
- a change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;*
- the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;*
- a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the SPD;*
- any statutory change in tax structure or introduction of any new tax made applicable for setting up of Solar Power Project and supply of power from the Project by the SPD, shall be treated as per the terms of this Agreement. For the purpose of considering the effect of this change in Tax structure due to change in law after the date of submission of Bid, the date such law comes in to existence shall be considered as effective date for the same;*

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

12.2 Relief for Change in Law

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

12.2.2 The decision of the Central 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.”

122. The Commission observes that as per Article 12, “Change in Law” means the enactment/ coming into effect/ adoption/ promulgation/ amendment/ modification or repeal of any Law in India; Change in the interpretation of any Law in India; Imposition of a requirement for obtaining any consents or Change in tax or introduction of any tax made applicable for

supply of power by the SPD as per the terms of this Agreement, resulting into any additional recurring/ non-recurring expenditure or any income to the SPD. The Commission is of the view that harmonious construction of the bullet points under Article 12 makes it clear that bullet point one is wider in scope and refers to the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal of any Law in India, including rules and regulations framed pursuant to such Law whereas bullet point last in seriatim refers specifically to any change in tax or introduction of any tax made applicable for “supply of power” by the SPD as per the terms of Agreement. It implies that bullet point last in seriatim would be applicable as “Change in Law” to the cases where the change in tax or introduction of any tax directly impacts “supply of power” only. Thus, the ambit of the last bullet point is limited in that if any change in Tax is made or any tax is introduced having its impact specifically on the “supply of power”, in that case the remedy of “Change in Law” is available to the Petitioners under bullet point number five only. Clearly, the “GST laws” enacted are not in the nature of a mere change in the tax having limited applicability on supply of power. Rather, it is in the nature of an enactment having wide ranging implication on the entire indirect taxation regime in India. Various laws were subsumed and repealed. The Commission has further observed that the Appellate Tribunal for Electricity by the Judgment dated 14.08.2018 in Appeal No. 111 of 2017 in *M/s. GMR Warora Energy Limited v. Central Electricity Regulatory Commission and Ors.* has decided on interpretation of “Change in Law” provision similar to the present PPAs. It was held as under:

“This Tribunal has decided that any tax or application of new tax on supply of power also covers the taxes on inputs required for such generation and supply of power to the Distribution Licensees”.

123. From the above, it is apparent that any tax or application of new tax on “supply of power” covers the taxes on inputs required for such generation and supply of power to the distribution licensees. The change in duties/ tax imposed by the Central Government has resulted in the change in cost of the inputs required for generation.

124. The Commission observes that vide Notification No. 1/2018 (SG) dated 30.07.2018, the Central Government imposed safeguard duty as per the following rates on the import of ‘Solar Cells whether or not assembled in modules or panels’:

- (a) 25% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th July 2018 to 29th July 2019;
- (b) 20% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th July 2019 to 29th January 2020;
- (c) 15% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th January 2020 to 29th July 2020.

125. The Commission observes that SECI issued RfS for setting up grid connected solar PV projects for an aggregate capacity of 500 MW. SBG Cleantech One Limited submitted the bid on 19.04.2017 and the reverse auction process was carried out on 12.05.2017. SBG Cleantech One Limited emerged as the successful bidder and was awarded three projects of 100 MW each. Meanwhile, GST Law came into force on 01.07.2017 and brought about fundamental structural changes in the prevailing tax regime in the country and has affected the various parameters upon which the Petitioner had submitted its bid. SECI issued three Letters of Intent dated 16.08.2017 to SBG Cleantech One Limited. Pursuant to the issuance of the LOI, SBG Cleantech One Limited formed an SPV namely, SBG Energy One Private Limited (the Petitioner) for development of the Projects in terms of the RFS. In view of the introduction of GST Law and its impact on the quoted tariff, SBG Cleantech One Limited and one of its affiliates i.e. SBG Cleantech Three Limited, on behalf of its SPVs requested SECI to inter alia, acknowledge enactment of the GST Law as a 'Change in Law' event within the terms of Article 12 of the PPAs. Vide letter dated 04.09.2017, SECI informed the Petitioner that queries relating to 'Change in Law' on account of introduction of GST Law was covered under the provisions of Article 12 of the PPAs, and thus the Petitioner ought to approach the Commission and seek appropriate relief as provided therein after entering into the PPAs. The Petitioner executed the PPAs with SECI on 06.10.2017 for sale and procurement of the contracted capacity of 100 MW from each Project. As per the PPAs, the scheduled date of commissioning of the Projects is 16.09.2018 which was latter extended to 21.09.2018 (Project ID) and 24.09.2018 (Project 2D & 3D) by SECI vide its letter dated 13.06.2019 on account of delay in commissioning of the grid sub-station, which is a reason not attributable to the Petitioner. The Projects were commissioned within the extended time.

126. The Commission observes that the Petitioner submitted the bid on 19.04.2017 and the reverse auction process was conducted on 12.05.2017. Subsequently, the GST laws were enacted on 01.07.2017. The Petitioner gave notice regarding 'Change in Law' to SECI on 10.07.2017 and 08.08.2017. It is pertinent to mention here that even though the PPA was executed on 06.10.2017, the bids were crystallised on 12.05.2017. The SCoD of the Projects were extended to 21.09.2018 and 24.09.2018 and the projects were commissioned within the extended time. Thus, the Petitioner in the instant petition is covered under 'Change in Law' in terms of Article 12 of the respective PPAs. Hence, the Commission holds that the enactment of the "GST laws" is squarely covered as "Change in Law" under the first and last bullets in seriatim of Article 12 of the PPA and entitles the Petitioner to relief under Article 12 of the PPAs. The Commission also observes that since SGD Notification was promulgated on 30.07.2018 i.e. after the Effective Date as provided in the PPAs, the imposition of Safeguard Duty qualifies as 'Change in Law' under the PPAs and entitles the Petitioner to relief under Article 12 of the PPAs.
127. RUVNL has also raised the issue that the Petitioner has made claims for a period even after the commissioning of the project. The Change in Law claims for any extra modules that the Petitioner has purchased over and above what is required to supply to the Respondents cannot be expected to be paid for by the Respondents. RUVNL has submitted that in this regard, the SPDs can certainly not be entitled to claim any amounts for the period after commissioning of the Project.
128. The Commission observes that Article 1 of the PPA stipulates as under: In terms of the PPA, the terms "commissioning", "commercial operation date" and "scheduled commissioning date" have been defined as under:

"Commissioning": Shall have the meaning ascribed thereto in Article 12 of this Agreement;

"Commercial Operation Date (COD)": Shall be the date 30 days subsequent to the actual date of commissioning of full capacity (i.e the full capacity of the Power Project has been commissioned and the SPD starts scheduling and injecting power

from the Power Project to the Delivery Point) of the Project as declared by the SNA/SECI, and the SPD not availing any VGD shall be required to demonstrate/infuse cumulative capital in the form of Equity for an amount of at least Rs. 1.0 Cr./MW prior to declaration of COD.

....

“ARTICLE 4

4.4. Right to Contracted Capacity & Energy

4.4.1 SECI, at any time during a Contract Year, shall not be obliged to purchase any additional energy from the SPD beyond _____ Million kWh (MU). If for any Contract Year, it is found that the SPD has not been able to generate minimum energy of _____ Million kWh (MU) till the end of 10 years from the COD and _____ Million kWh (MU) for the rest of the term of the Agreement, on account of reasons solely attributable to the SPD, the non-compliance by SPD shall make SPD liable to pay the compensation provided in the PSA as payable to Buying Utilities and shall duly pay such compensation to SECI to enable SECI to remit the amount to Buying Utilities. This will, however be relaxable by SECI to the extent of grid non-availability for evacuation, which is beyond the control of the developer. This compensation shall be applied to the amount of shortfall in generation during the Contract Year. The amount of compensation shall be equal to the compensation payable (including RECs) by the Buying Utilities towards non-meeting of RPOs, if such compensation is ordered by the State Commission. However, this compensation shall not be applicable in events of Force Majeure identified under PPA with SECI affecting supply of solar power by SPD.

4.4.2 Notwithstanding Article 4.4.1, any excess generation over and above 10% of declared annual CUF will be purchased by SECI at a tariff as per Article 9.4, provided SECI is able to get any buyer for sale of such excess generation. While the SPD would be free to install DC solar field as per its design of required output, including its requirement of auxiliary consumption and to reconfigure and repower the Project from time to time during the term of the PPA, it will not be allowed to sell any excess power to any other entity other than SECI (unless refused by SECI). However, in case at any point of time, the peak of capacity reached is higher than the contracted capacity and causes disturbance in the system at the point where power is injected, the SPD will have to forego the excess generation and reduce the output to the rated capacity and shall also have to pay the penalty/charges (if applicable) as per applicable regulations / requirements / guidelines of CERC / SERC /SLDC or any other competent agency.

Any energy produced and flowing into the grid before CoD shall not be at the cost of SECI under this scheme and the SPD will be free to make short-term sale to any organisation or individual. SECI may agree to buy this power as a trader if they find it viable outside this scheme.”

129. The Commission notes that the liability of the Respondents for payment for purchase of the power from the SPDs starts from the Commercial Operation Date (COD). Further, as per the definition of Commercial Operation Date (COD) provided in Article 1 of the PPA, COD will be thirty days subsequent to the actual date of Commissioning of the full capacity. Accordingly, the Commission holds that the liability of payment on account of GST Laws and imposition of Safeguard duty on procuring of Solar PV panels and associated equipment by the Petitioners shall lie with the Respondents till the Commercial Operation Date (COD) for the contracted capacity and energy as per Article 4.4 of the PPAs.

130. RUVNL has also raised the objection that reconciliation done between SECI and the Petitioner does not ipso facto bind the answering Respondent to make payments to SECI.

131. The Commission observes that as per Recitals in the PPAs executed between the Petitioner and SECI:

“E. The SPD has agreed to sign this Power Purchase Agreement with SECI to sell Solar Power to SECI as per the terms and conditions of this agreement.

F. SECI has agreed to purchase such Solar Power from SPD as an intermediary Seller and sell it to Buying Utilities back to back basis as per the provisions of the NSM.”

132. Thus, the Commission is of the view that the provisions of the PPAs specifically deal with the back to back PSA between SECI and the RUVNL. SECI is not functioning as merchant trader but as an intermediary trader. There is as a clear link between the ultimate distribution company and the generator with trader acting as only an intermediary linking company.

133. Further, the Commission observes that APTEL in its Judgment dated 04.11.2011 in Appeal No. 15 of 2011 in the case of *Lanco Power Limited v Haryana Electricity Regulatory Commission and Ors.*, has, inter alia, held as under:

“18. The trading activity has been recognized as a distinct activity under the Act. The statement of objects and reasons of the Act provides as under:

“(ix) Trading as a distinct activity is being recognized with the safeguard of the Regulatory Commissions being authorized to fix ceilings on trading margins, if necessary”.

19. *The term trading has been defined in Section 2 (71) of the Act as under:*

“(71) “trading” means purchase of electricity for resale thereof and the expression “trade” shall be construed accordingly;

20. *Unlike the generation, transmission, wheeling and retail sale, there is no tariff determination for trading. The trading is based on margin only. Thus, the trading being a purchase of electricity for re-sale, the trader would get a margin to be determined by the Central Commission under Section 79(1)(j) of the Act or by the State Commission under Section 86(1) (j) of the Act. Section 66 of the Electricity Act provides for the development of the market. The same reads as below:*

“66. Development of market. The Appropriate Commission shall endeavour to promote the development of a market (including trading) in power in such manner as may be specified and shall be guided by the National Electricity Policy referred to in Section 3 in this regard”

21. *So, the combined reading of the above provisions brings out the scheme of the Act. A trader is treated as an intermediary. When the trader deals with the distribution company for re-sale of electricity, he is doing so as a conduit between generating company and distribution licensee. When the trader is not functioning as merchant trader, i.e. without taking upon itself the financial and commercial risks but passing on all the risks to the Purchaser under re-sale, there is clearly a link between the ultimate distribution company and the generator with trader acting as only an intermediary linking company.*

.....

24. *In other words, even though the Haryana Power (R-2) was not the party to the PPA dated 19.10.2005 and the Amended Agreement dated 18.9.2006, the parties to the PPA have intended that the power sold under the PPA to be further sold to Haryana Power (R-2), the ultimate beneficiary for the purpose of distribution to the consumers of the State of Haryana. As such the Haryana Power (R-2) is entitled to enforce the terms of PPA. To put it in a nut shell, the sale of entire contracted capacity of 300 MW by the Appellant, is intended for re-sale by PTC (R-3) to Haryana Power (R-2) and as such, the ultimate sale of entire 300 MW to Haryana Power (R2) was under the PSA.*

25. *According to the Respondents in this Appeal, the PPA and PSA are back to back arrangements. On the other hand, the Appellant has contended that there is no nexus or privity in respect of the PPA dated 19.10.2005 entered into between Lanco Power, the Appellant, PTC (R-3) and the PSA dated 21.9.2006 entered into between the PTC (R-3) and Haryana Power (R-2).*

26. Now let us see as to whether there has been nexus between the PPA and PSA.

.....

38. In this context, it would be proper to refer to the relevant clauses of the recitals of the PPA dated 19.10.2005 which go to show that that PPA is linked to the PSA. Those clauses are reproduced herein:

“(C) The Company has requested PTC to purchase the Contracted Capacity and Power Output from the Project (273 MW net power) at the Delivery Point for a period of twenty five (25) years from the Commercial Operation Date of the Project and PTC has agreed to purchase such power at the Delivery Point for a period of twenty five (25) years from the Commercial Operation Date of the Project for onward sale by PTC.

(E) PTC will enter into a Sale Agreement (PSA) with one or more Purchasers, for sale of such power from the Project.

(F) A Petition for approval of tariff for sale of the above power shall be filed before the Appropriate Commission and the tariff as approved by such Appropriate Commission will be applicable for purchase and sale of the above power by PTC based on the CERC norms, subject to the ceilings as agreed upon by the Parties in this Agreement”. {emphasis added}

39. These factors would categorically indicate that both the PSA and PPA are back to back agreements as the PPA between the Appellant and PTC(R-3) got firmed up with the execution of PSA entered into between R-2 Haryana Power and PTC(R-3).

.....

42. Thus, it is clear that the PPA and PSA are interconnected and inextricably linked to each other and as such there is privity between the Appellant which is the power generator and the Haryana Power (R-2) which is a deemed licensee who is the ultimate beneficiary of the PPA as well as the party to the PSA.

.....

50. As per the terms of the PPA entered into between the Lanco Power, the Appellant and PTC (R-3), the PTC was required to enter into power sale agreement with the purchaser for onward sale of power from the Appellant’s project. Thus the requirement to execute the PSA was an intrinsic and material provision of the PPA since the performance of the PPA was completely dependent upon the execution of the PSA. Thus, the PPA and PSA are the two documents which are heavily inter-dependent on one another for their sustenance. In order to refer to this aspect, it would be proper to quote the relevant provisions of the PPA.

.....

55. It may be pointed out that on 21.9.2006, PTC (R-3) executed the PSA with the Haryana Power (R-2) as per its inexorable obligations under the PPA. This PSA was in fact veritable reproduction of the PPA. This is borne out from not only the findings

of the State Commission while passing the impugned order but also from the very clauses of the PSA. Some of the relevant clauses of the PSA demonstrating that the said PPA and PSA were entwined and that the sustenance on one was dependent on the other which are reproduced below:

“Recital C-

PTC has entered into a Power Purchase Agreement (hereinafter referred to as “PPA) on 19th October, 2005 as amended further vide an amendment agreement dated 18th September, 2006 with M/s. Lanco Amarkantak Power Private Ltd., (the “Company”), a Generating Company as defined under the Electricity Act, 2003 and which the implementing a coal based thermal power station at Pathadi Village, Korba District, Chhattisgarh, India, to purchase the power and energy output from its unit with an installed capacity of 300 MW, Phase II proposed to be set up (the “Project”), for a period of twenty five (25) years from the Commercial Operation Date of the Project”.

56. In fact, Clause 3.1 (i) states that the PSA will not be effective until the conditions precedent as laid down in the PPA are duly satisfied. In terms of the clause 4.1 (v) of the PSA, it was explicitly agreed that PTC could not terminate the PPA except with prior consent of the Purchaser. As per clause 4.1 (ix), it was PTC’s obligation to participate and require the Company to participate in the Tariff Determination process as required by the Appropriate Commission.

57. As per clause 4.2 (i), it was the purchaser’s obligation to make available any information required by the PTC in order to assist the Company to achieve Financial Close. Clause 15.1.2 (iii) of the PSA, is a provision which has been introduced specifically keeping in mind the clause 16.6.5 introduced into the PPA through the amendment dated 18.9.2006. The reading of the said clause of the PSA will conclusively demonstrate that the same has been drafted in consonance with the amended PPA for the benefit of Haryana Power (R-2).”

134. From the above, the Commission is of the view that the PPA and PSA are interconnected and inextricably linked to each other and as such there is privity between the Petitioners which are the power generator and the RUVNL which are the Discoms and the ultimate beneficiary of the PPA as well as the party to the PSA. Therefore, the Petitioner is bound to raise the audited claims and the amount so determined is to be paid by SECI to the Petitioner and RUVNL is to pay the same to SECI in the instant petition.

135. The Commission observes that the billing and payment between the Petitioner and the SECI is not conditional upon billing and payment between the SECI and the RUVNL. Relevant Articles of PPA and PSA, dealing with regular monthly tariffs, holds 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 equally applicable to the payment towards incremental impact on account of GST being a change in law, as well. In view of the above, the Commission holds that the Power Purchase Agreement and Power Sale Agreement being back to back in nature are interconnected implying thereby that the RUVNL is liable to pay to SECI all that SECI has to pay to the Petitioner. However, payment to the Petitioner by SECI is not conditional upon the payment to be made by the RUVNL to SECI. However, RUVNL has to expeditiously settle such back to back claims in term of the PSA.

136. The Commission further observes that as per Record of Proceedings dated 26.03.2021, SECI has admitted that there is no dispute over the claimed amount and SECI also confirmed that the claims of the Petitioner towards safeguard duty have been reconciled between the Petitioner and SECI. Further, the Petitioner has conveyed its acceptance to the annuity rate of 10.41% as suggested by SECI as an interim measure subject to the outcome of Petition No. 536/MP/2020. SECI has also submitted that the Commission may pass an appropriate order in the matter subject to the outcome of Petition No. 536/MP/2020 filed by SECI whereby SECI has sought approval of annuity methodology including annuity rate.
137. Accordingly, the Commission directs SECI to pay the Petitioner as per mutually agreed mechanism of payment of such compensation on annuity basis spread over the period not exceeding the duration of the PPAs, subject to the outcome of Petition No. 536/MP/2020 filed by SECI for approval of annuity methodology including annuity rate. It is clarified here that the compensation paid to the Petitioners is not conditional upon the payment to be made by the Respondent RUVNL to Respondent SECI. However, the Respondent SECI is eligible to claim the same from the Respondent RUVNL on 'back to back' basis. Further, RUVNL has to expeditiously settle such claims in term of the PSA. The first instalment of the claim shall be paid within sixty days of the date of this Order or from the date of submission of claims by the Petitioner whichever is later failing which it will attract late payment surcharge as provided under PPA/PSA.
138. The issue is decided accordingly.

Issue No. 2: Whether the claim of “operation and maintenance” expenses as prayed by the Petitioner is sustainable?

139. The Petitioner has submitted that it will also have to incur additional O&M Cost due to the introduction of GST Law and SGD Notification. Such additional O&M Cost would not have been required but for the introduction of GST Law. Since the NSM Scheme or the RFS or the PPAs do not prohibit outsourcing of O&M and Good Utility Practices warrant appointment of experienced agencies/ contractors for execution of the Projects/ O&M, the Petitioner outsourced all of the afore-stated activities to the O&M Contractor i.e. Sterling and Wilson Solar Private Limited, which is experienced in providing the said services in the most effective and cost-efficient manner. The decision to appoint experienced O&M contractors to undertake O&M work was driven by Good Utility Practices and not by any commercial advantage that might accrue to the Petitioner on account of outsourcing of O&M. Per Contra, RUVNL has submitted that the incidence of GST on O&M is only for the reason that the Petitioner has outsourced the O&M to third parties. Provisions of PPAs or the bid documents did not mandate or prescribe or specifically provide for the outsourcing of O&M. Outsourcing of O&M is an internal commercial decision of the Petitioner. If, for commercial expediency or benefit, the Petitioner outsources the O&M, the saving or additional expenditure is to the account of the Petitioner.
140. The Commission is of the view that outsourcing of the O&M services is not the requirement of the PPAs/ bidding documents. The concept of the outsourcing is neither included expressly in the PPAs nor is it included implicitly in Article 12 of the PPAs. The Commission is of the view that in the competitive bidding, the SPDs bid levelled tariff without disclosing the details of the calculations of the project cost. Outsourcing of the O&M services is a pure commercial decision of the Petitioner taken for its own advantage and any increase in cost including on account of taxes etc. in the event the Petitioner chooses to employ the services of other agencies, cannot increase the liability for the Respondents. Therefore, the Commission holds that the claim of the Petitioners on account of additional tax burden on O&M is not maintainable.

141. This issue is decided accordingly against the petitioner.

Issue No. 3: Whether the claim of Petitioner regarding interest on Working Capital, Return of Equity and Carrying Cost for delay in reimbursement by the Respondent is sustainable?

142. The Petitioner has submitted that the essence of ‘Change in Law’ clause under Article 12 of the PPAs is to restore the affected party to the same economic position as if the said ‘Change in Law’ event had not happened. Therefore, restitution is an integral part of the compensation granted under Change in Law. As such, carrying cost is inherent to any compensation that may be granted under the ambit of the Change in Law provision. ***Per contra***, RUVNL has submitted that there is no provision in the PPA regarding carrying cost or interest for the period till the decision of the Commission acknowledging occurrence of any event as ‘Change in Law’ as per Article 12 of the PPA and deciding on the amount to be paid for such change in law as specified in Article 12.2.2 of the PPAs.

143. The Commission observes that the issue of carrying cost has been dealt by APTEL vide judgement dated 13.04.2018 in Appeal No. 210 of 2017 in *Adani Power Limited v. Central Electricity Regulatory Commission and Ors.*, wherein it was held that since Gujarat Bid-01 PPA had no provision for restoration to the same economic position, the decision of allowing carrying cost will not be applicable. The relevant extract of the Judgment dated 13.04.2018 reads as under:

“ISSUE NO.3: DENIAL OF CARRYING COST

x. Further, the provisions of Article 13.2 i.e. restoring the Appellant to the same economic position as if Change in Law has not occurred is in consonance with the principle of ‘restitution’ i.e. restoration of some specific thing to its rightful status. Hence, in view of the provisions of the PPA, the principle of restitution and judgement of the Hon'ble Supreme Court in case of Indian Council for Enviro-Legal Action vs. Union of India &Ors., we are of the considered opinion that the Appellant is eligible for Carrying Cost arising out of approval of the Change in Law events from the effective date of Change in Law till the approval of the said event by appropriate authority. It is also observed that the Gujarat Bid-01 PPA have no provision for restoration to the same economic position as if Change in Law has not occurred.

Accordingly, this decision of allowing Carrying Cost will not be applicable to the Gujarat Bid-01 PPA.”

144. The judgment of the Tribunal dated 13.04.2018 in Appeal No. 210 of 2017 in *Adani Power Limited v. Central Electricity Regulatory Commission and Ors.*, was challenged before the Hon'ble Supreme Court wherein the Hon'ble Supreme Court vide its judgment dated 25.2.2019 in Civil Appeal No.5865 of 2018 with Civil Appeal No. 6190 of 2018 (*Uttar Haryana Bijili Vitran Nigam Limited & Anr. Vs. Adani Power Ltd. & Ors.*) held as under:

“10. A reading of Article 13 as a whole, therefore, leads to the position that subject to restitutionary principles contained in Article 13.2, the adjustment in monthly tariff payment, in the facts of the present case, has to be from the date of the withdrawal of exemption which was done by administrative orders dated 06.04.2015 and 16.02.2016. The present case, therefore, falls within Article 13.4.1(i). This being the case, it is clear that the adjustment in monthly tariff payment has to be effected from the date on which the exemptions given were withdrawn. This being the case, monthly invoices to be raised by the seller after such change in tariff are to appropriately reflect the changed tariff. On the facts of the present case, it is clear that the respondents were entitled to adjustment in their monthly tariff payment from the date on which the exemption notifications became effective. This being the case, the restitutionary principle contained in Article 13.2 would kick in for the simple reason that it is only after the order dated 04.05.2017 that the CERC held that the respondents were entitled to claim added costs on account of change in law w.e.f. 01.04.2015. This being the case, it would be fallacious to say that the respondents would be claiming this restitutionary amount on some general principle of equity outside the PPA. Since it is clear that this amount of carrying cost is only relatable to Article 13 of the PPA, we find no reason to interfere with the judgment of the Appellate Tribunal.”

....

16.....There can be no doubt from this judgment that the restitutionary principle contained in Clause 13.2 must always be kept in mind even when compensation for increase/decrease in cost is determined by the CERC.”

145. We note that the PPAs in the instant matter do not have restitution provisions. Therefore, in view of the above judgements of APTEL and the Hon'ble Supreme Court, the claim regarding 'carrying cost' is not admissible. The Commission further observes that since the PPAs do not have a provision dealing with restitution principles of restoration to same

economic position, the claim regarding separate 'Interest on Working Capital'/ 'Return of Equity' is also not admissible.

146. This issue is decided accordingly against the petitioner.

147. Our findings in this Order are summed up as under:

a) **Issue No.1:**

(i) The enactment of the 'GST laws' is squarely covered as "Change in Law" under the first and last bullet in seriatim of Article 12 of the PPA and entitles the Petitioner to relief under Article 12 of the PPAs.

(ii) The imposition of Safeguard Duty qualifies as 'Change in Law' under the PPAs and entitles the Petitioner to relief under Article 12 of the PPAs.

(iii) The liability of payment on account of GST Laws and imposition of Safeguard duty on procurement of Solar PV panels and associated equipment by the Petitioners shall lie with the Respondents till the Commercial Operation Date (COD) for the contracted capacity and energy as per Article 4.4 of the PPAs.

(iv) SECI is directed to pay to the Petitioner as per mutually agreed mechanism for payment of such compensation on annuity basis spread over the period not exceeding the duration of the PPAs, subject to the outcome of Petition No. 536/MP/2020 filed by SECI for approval of annuity methodology including annuity rate.

(v) The compensation to be paid to the Petitioners is not conditional upon the payment to be made by the Respondent RUVNL to Respondent SECI. However, the Respondent SECI is eligible to claim the same from the Respondent RUVNL on 'back to back' basis. The Commission also directs the Respondent RUVNL to expeditiously settle such claims in term of the PSA.

(vi) The first instalment of the claim shall be paid within sixty days of the date of this Order or from the date of submission of claims by the Petitioner whichever is later failing which it will attract late payment surcharge as provided under PPA/PSA.

b) **Issue No.2:** The claim on account of additional tax burden on O&M is not maintainable.

- c) **Issue No.3:** The claims on account of ‘Carrying cost’, ‘Interest on Working Capital’ and ‘Return of Equity’ are not admissible.

148. Accordingly, the Petition No. 73/MP/2020 stands disposed of in terms of the above discussion and findings.

Sd/-

पी. के. सिंह
सदस्य

Sd/-

अरुण गोयल
सदस्य

Sd/-

आई. एस. झा
सदस्य

Sd/-

पी. के. पुजारी
अध्यक्ष