



केन्द्रीय विद्युत विनियामक आयोग  
CENTRAL ELECTRICITY REGULATORY COMMISSION



नई दिल्ली  
NEW DELHI

याचिका संख्या /Petition No.: 356/MP/2018 &  
51/MP/2019

कोरम/Coram:

श्री पी. के. पुजारी, अध्यक्ष/Shri P. K. Pujari, Chairperson

डॉ. एम. के. अय्यर, सदस्य/ Dr. M.K. Iyer, Member

श्री आई. एस. झा, सदस्य/ Shri. I.S. Jha, Member

आदेश दिनांक /Date of Order: 03<sup>rd</sup> of February, 2020

**IN THE MATTER OF:**

Petition under Section 79(1)(b) read with section 79(1)(f) 9 of the Electricity Act, 2003 for the Declaration of 'Change in Law' event due to introduction and imposition of Safeguard Duty by way of notification No.01 / 2018 - Customs (SG) dated 30.07.2018 issued by the Department of Revenue, Ministry of Finance, Government of India, in terms of Article 12 of the Power Purchase Agreements Dated 31.10.2018 executed between the Petitioner and the Respondent.

**AND IN THE MATTER OF:**

**1) Petition No. 356/MP/2018**

Azure Power India Private Limited  
Regd.Office: 3rd Floor, Asset 301-304 and 307,  
Worldmark 3, Aerocity, New Delhi – 110 037

.....Petitioner

**VERSUS**

1. Solar Energy Corporation Of India Limited  
1<sup>st</sup> Floor, A-Wing,  
D-3 District Centre Saket, New Delhi – 110 017
  
2. Uttar Pradesh Power Corporation Limited,  
Shakti Bhawan, 14, Ashok Marg,  
Lucknow – 226001

**...Respondents**

**AND IN THE MATTER OF:**

**2) Petition No. 51/MP/2019**

Azure Power Forty Three Private Limited  
3rd Floor, Asset 301-304 and 307  
World Mark 3, Aerocity  
New Delhi -110037

**...Petitioner**

**VERSUS**

1. Solar Energy Corporation of India Limited  
1st Floor, A-Wing  
D-3, District Centre  
Saket, New Delhi, 110017
  
2. Jharkhand Bijli Vitran Nigam Limited  
Engineers Building, Dhurwa,  
Ranchi, Jharkhand
  
3. Grid Corporation of Odisha,  
Janpath, Bhoi Nagar,  
Bhubaneswar,  
Odisha 751022
  
4. Haryana Power Purchase Centre,  
Sakti bhawan, Sector-6,  
Panchkula,  
Haryana 134112

**...Respondents**

**Parties Present:** Shri Buddy A Ranganadhan, Advocate, APIPL and AP(43)PL  
Shri Rahul Chouhan, Advocate, AP(43)PL  
Shri Raunak Jain, Advocate, APIPL  
Shri Sachin Dubey, Advocate, APIPL  
Shri Dinesh Pardasani, Advocate, AP(43)PL  
Shri Shantanu Singh, Advocate, AP(43)PL  
Ms. Poorva Saigal, Advocate, SECI  
Ms. Anushree Bardhan, Advocate, SECI  
Ms. Tanya Sareen, Advocate, SECI

### आदेश /ORDER

The Petitioner, Azure Power India Private Limited in Petition No. 356/MP/2018 is engaged in the business of generation and sale of electrical power. The Petitioner has set up grid connected Solar PV Projects of 200 MW capacity (4 x 50 MW) in Bhadla Phase-IV Solar Park, Rajasthan. The Petitioner, Azure Power Forty Three Private Limited, in Petition No. 51/MP/2019 is a special purpose company of Azure Power India Private Limited has set up 600 MW (2 x 300 MW) solar power project at village Jagdev wala and Daudsar, Tehsil and District Bikaner, Rajasthan.

2. The Respondent No.1, Solar Energy Corporation of India Limited (hereinafter referred to as 'SECI') in Petition No. 356/MP/2018 & 51/MP/2019) is a company under the administrative control of the Ministry of New and Renewable Energy, Government of India (hereinafter referred to as 'MNRE') which is established to facilitate the implementation of Jawaharlal Nehru National Solar Mission (hereinafter referred to as 'JNNSM'). SECI is responsible for the implementation of a number of schemes of MNRE, the major one being the VGF schemes for large scale grid connected projects under JNNSM, solar park scheme and grid connected solar rooftop scheme. SECI also has a power trading license and is active in this domain through trading of solar power from projects set up under the schemes being implemented by it.
3. The Petitioners have made the following prayers:

#### **In Petition No. 356/MP/2018**

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- (a) *Declare that the imposition of Safeguard Duty by the Government of India for the project is a change in law event under the terms of Article 12 of the PPA dated 27.04.2018 and therefore, the Petitioner is entitled for reimbursement for corresponding increase in the project cost;*
- (b) *Direct the Respondent to reimburse the additional cost of safeguard duty imposed on the project cost on lumpsum basis;*
- (c) *Pass any such further or other orders as this Hon'ble Commission may deem fit and proper in the facts and circumstances of the present case.*

**In Petition No. 51/MP/2019**

- (a) *Admit the Petition;*
- (b) *Hold and declare the imposition of Safeguard Duty on the import of solar panels/modules through the Safeguard Notification by the Government of India as a 'Change in Law' event as under the Article 12 of the PPAs;*
- (c) *Specify and declare 30.07.2018, i.e. the date of coming into force of the SGD Notification, as the date from which the Change in Law is effective for the purposes of the PPAs;*
- (d) *Direct the Respondent to reimburse the Petitioner for the corresponding increase in the Project cost on account of Safeguard Duty as and when paid by the Petitioner no later than seven (7) days of claim(s) submitted by the Petitioner on the basis of each consignment of solar panel/modules;*
- (e) *Allow legal and administrative costs incurred by the Petitioner in pursuing the instant Petition; and*
- (f) *Allow carrying cost to the Petitioner on reimbursement of Safeguard Duty.*
- (g) *To pass such other and further order or orders as the Commission deems appropriate under the facts and circumstances of the present case.*

**Background**

4. The Government of India launched the National Solar Mission on 11.01.2010.

5. On 21.06.2017, in Petition No. 356/MP/2018, the Respondent No.1, SECI issued the Request for Selection (hereinafter referred to as 'RfS') document RfS. No. SECI/NSM/P2-B4-T12/RfS/RJ/062017/Bhadla-IV for Selection of Solar Power Developers (hereinafter referred to as 'SPD') under Phase-II, Batch-IV of the NSM through VGF mode under "*NSM Guidelines for selection of 5000 MW Grid Connected Solar PV Power Projects under Phase-II Batch IV*" notified vide No. 3213/2014-1S/GSP dated 14.03.2016 (hereinafter referred to as 'NSM Guidelines') including its subsequent amendments and clarifications, and "*Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects*" issued by the Ministry of Power on 03.08.2017 (hereinafter referred to as 'Tariff Guidelines'). Azure Power India Private Ltd., submitted the bid on 05.12.2017 and was declared as a successful bidder at a levelled tariff of Rs. 2.48/kWh for development of cumulative capacity of 250 MW in the Bhadla Phase-IV Solar Park being developed by SPIAI Solar Park Project Developer (hereinafter referred to as 'SPPD') in the State of Rajasthan. The Letter of Intent (hereinafter referred to as 'LOI') was issued on 28.03.2018 for development of a Solar Power Project, generation and sale of solar power to Uttar Pradesh Power Corporation Limited under the above Mission. The Petitioner accordingly entered into the four (4) Power Purchase Agreements (hereinafter referred to as 'PPAs') with SECI dated 27.04.2018. Pursuant to the execution of the PPAs dated the Petitioner took various steps to procure the solar PV modules from various manufacturers in countries such as Singapore and Hong Kong. The Petitioner executed a Sales Agreement with M/s Zhongli New Energy (Hong Kong) Investment Limited, Hong Kong on dated 02.07.2018 for purchase of solar PV modules of 35.36 MWp (8.25 MW approx.) for the Project being developed by the Petitioner in the State of Rajasthan. Vide Letter of Award dated 06.07.2018 Petitioner awarded the contract for supply of 330/335 Wp PV solar modules for setting up Petitioner's solar plant in Rajasthan, including another solar PV plant being set up by the Petitioner in the State of Karnataka to M/s GCL System Integration Technology Pte Limited, Singapore for approx. 325 MW (DC), including 261.5 MW (DC) for Petitioner's Project in State of Rajasthan. The Sale Agreement was executed on 25.10.2018, which was amended on 26.10.2018 and 26.12.2018. Further, The Letter of Award dated 06.07.2018 was awarded in favour of M/s Risen Energy Hong Kong Co. for purchase of solar modules of 53.5 MWp for execution 53.50 MW solar PV Project and Sale Agreement was executed on 26.12.2018.

6. On 30.01.2018, in Petition No. 51/MP/2019, the Respondent No.1, SECI issued the RfS No. SECI/C&P/SPD/RfS/2000MW/012018 for selection of SPDs for setting up of 2000 MW (8 x 250 MW) ISTS-Connected Solar Power Projects under 'Tariff Guidelines' issued by the Ministry of Power on 03.08.2017. Azure Power India Private Ltd. submitted its bid on 15.06.2018 and the final e-reverse auction was held on 02.07.2018. Azure Power India Private Ltd. was declared as a successful bidder at a tariff of INR 2.53 per kWh. Pursuant to the issuance of the LOI, Azure Power India Private Limited placed an order with M/s Risen Energy Company Limited (a company incorporated under the laws of the People's Republic of China) to purchase solar modules for a total capacity of 1450 MW through 'letter of Award' (hereinafter referred to as 'LOA') No. AZI/1450MW/KREDL/Module/015 dated 29.07.2018. The LOA for Module Supply included procurement of solar modules for project capacities awarded to Azure Power India Private Limited including 900 MW for projects awarded by SECI. The 600 MW (2 x 300MW) being developed by the Petitioner is out of such 900 MW mentioned in the LOA for Module Supply. Subsequently, Azure Power India Private Ltd. formed the project company Azure Power Forty Three Private Limited (the Petitioner) within the provisions of the RfS for development of cumulative capacity of 2 x 300 MW ISTS-connected Solar Power Projects(s), generation and sale of solar power in the State of Rajasthan. The Petitioner entered into two (2) PPAs with SECI dated 31.10.2018.
  
7. On 16.07.2018, the DGTR recommended to the Government of India the imposition of Safeguard Duty on solar panels/modules imported from certain countries which included the People's Republic of China and Malaysia. Consequent to the issuance of the DGTR Recommendations to the Government of India, the Ministry of Finance, Government of India, issued Notification No. 01/2018-Customs (SG) dated 30.07.2018 (hereinafter referred to as 'SGD Notification') imposing Safeguard Duty on the import of solar panels/modules for a period of two (2) years at the rate specified therein. The import of such solar panels / modules from developing countries (notified under Notification No. 19/2016-Customs except China PR and Malaysia has been exempted from the imposition of Safeguard Duty. The Ministry of Finance (Department of Revenue) vide 'SGD Notification' notified the imposition of 'Safeguard Duty' in the Official Gazettes under:-

- “(a) twenty five per cent. ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30th July, 2018 to 29th July, 2019 (both days inclusive);*
- (b) twenty per cent. ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30th July, 2019 to 29th January, 2020 (both days inclusive); and*
- (c) fifteen per cent. ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30th January, 2020 to 29th July, 2020 (both days inclusive)...*
- 2. Nothing contained in this notification shall apply to imports of subject goods from countries notified as developing countries vide notification No. 19/2016-Customs (N.T.) dated 5th February, 2016, except China PR, and Malaysia.”*

8. Due to the imposition of the Safeguard Duty through the SGD Notification, the Petitioners are now required to incur additional expenditure in the procurement of Solar Panels required for its Projects.

### **Submissions of the Petitioners**

9. The Petitioners have submitted that the petitions are filed for the purpose of seeking approval and relief under Article 12 of the PPAs in order to offset the adverse financial consequences of the ‘Change in Law’ event that have occurred subsequent to the last date for submission of the bid / bid deadline.
10. The Petitioners have submitted that the additional cost/burden that is required to be borne by the Petitioner is further required to be reimbursed in lumpsum on account of ‘Change in Law’ pertaining to the introduction of ‘Safeguard Duty’ which is a statutory levy brought into force by the Indian Governmental Instrumentality subsequent to the last date for submission of the bid / bid deadline. The additional cost, which has resulted pursuant to changes in statutory taxes, duties, impositions and levies as aforesaid is required to be approved by the Commission and reimbursed to the Petitioner as “Change in law” defined under Article 12 of the PPAs.
11. The Petitioners have submitted that the costs being claimed through the present Petition are sufficiently recognised under the terms of the applicable PPAs and the terms therein and resultantly are capable of adjustments thereunder. As per the provisions of the Electricity Act,

2003, the Commission has the power to recognise and give effect to the above mentioned claim through instructions for reimbursements of the said additional cost in lumpsum to the Petitioner.

12. The Petitioners have submitted that as generating companies they have acquired the status of a Composite Scheme of Generation by entering into PPAs with the Respondent No.1 SECI. SECI in turn supplies the said power from the Petitioner, onwards to the Buying Utilities that are Discoms of various states. Hence the Petitioner has invoked the jurisdiction of the Commission under Section 79 (1) (b) and (f) of the Act read with Article 12 of the PPAs.
13. The Petitioners have submitted that with the introduction and levy of 'Safeguard Duty' at the rate of 25% on solar cells whether or not assembled in modules or panels into India from China PR and Malaysia, imported during the period from 30.07.2018 to 29.07.2019, the Petitioners shall now be potentially liable to pay such 'Safeguard Duty' on the solar cells imported after 30.07.2018. However, no such Safeguard Duty was levied prior to the last date for submission of the bid i.e. 18.12.2017. This introduction of Safeguard Duty could not be foreseen by the Petitioner at the time of making the bid and as such, the same has been imposed subsequently after the bid deadline date i.e. 18.12.2017 and hence squarely falls within the 'Change in Law' provisions of the PPA. Since the solar PV modules constitute more than 60% of the project cost and are therefore extremely crucial to the solar power developers, the levy of Safeguard Duty on the Petitioner would greatly increase the Petitioner's costs, which are required to be offset by the Commission by way of providing pass through of this additional Safeguard Duty burden as a reimbursement of the said cost in lumpsum. The Petitioner in Petition No. 356/MP/2018 has submitted that vide letter dated 10.08.2018 it has written to the Respondent SECI, requesting confirmation on the relief for imposition of Safeguard Duty after signing of the PPA, as per Article 12 of the said PPA. However, no response has been received by the Petitioner to the said request made to the Respondent.
14. The Petitioner in Petition No. 356/MP/2018 has submitted that to execute the project and provide the requisite PLF under the PPAs pertaining to capacity of 200 MW energy, it is required to import solar modules having capacity of around 300 MW and in furtherance of



the same, it is in process of importing solar modules having capacity of around 297 MW. It has imported few modules for approx. capacity of 8.25 MW for the project and has therefore become liable to pay the safeguard duty corresponding thereto. It shall import modules having capacity of 288.75MW for execution of the project and would be paying safeguard duty on such import of modules. It has signed ‘Sales Agreement’ in the form of letter of award/ sale agreement with M/s GCL System Integration Technology Pte Limited, Singapore; Zonghli New Energy (Hong Kong) Investment Limited and M/s Risen Energy Hong Kong Co. Further, the Petitioner in Petition No. 51/MP/2019 has executed LOA with M/s Risen Energy Hong Kong Co.

15. The Petitioners have submitted that the issuance of the SGD Notification is squarely covered by the definition of ‘Change in Law’ under Article 12 read with Article 1.1 of the PPAs. The relevant Articles of the PPAs stipulates as under:

*“1.1 Definitions*

*The terms used in this Agreement, unless as defined below or repugnant to the context, shall have the same meaning as assigned to them by the Electricity Act, 2003 and the rules or regulations framed there under, including those issued / framed by the Appropriate Commission (as defined hereunder), as amended or re-enacted from time to time.*

<i>Indian Governmental Instrumentality</i>	<i>shall mean the Government of India, Governments of State(s), where the Power Projects, SECI and Buying Utility are located and any ministry, department, board, authority, agency, corporation, commission under the direct or indirect control of Government of India or any of the above state Government(s) or both, any political sub-division of any of them including any court or Appropriate Commission(s) or tribunal or judicial or quasi-judicial body in India;</i>
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<i>Law</i>	<i>shall mean in relation to this Agreement, all laws including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and shall further include without limitation all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or</i>
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*under any of them and shall include without limitation all rules, regulations, decisions and orders of the Appropriate Commission;”*

*“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 last date of bid submission, 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, i.e. change in rates of taxes, duties and cess, 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 and has direct effect on the Project, shall be treated as per the terms of this Agreement.*

*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 Appropriate Commission for seeking approval of Change in Law.*

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

16. The Petitioners have submitted that the ‘SGD Notification’ was issued by the Department of Revenue, Ministry of Finance which is a Ministry under the Central Government and therefore, satisfies the definition of ‘Indian Government Instrumentality’ as provided under

the PPAs. Further, the 'SGD Notification' was published in Extraordinary Part II-Section 3-Sub-section-I No. 519 New Delhi, Monday, July 30, 2018/Shravana 8, 1940. Hence, the SGD Notification satisfies the conditions prescribed in the definition of 'Law' under Article 1.1 of the PPAs.

17. The Petitioners have submitted that the Article 12 of the PPAs clearly provides for a mechanism to deal with the 'Change in Law' event. The three items to be determined by the Commission under Article 12 are (a) declaration of the change in law event; (b) the date from which such change in law event has occurred; and (c) provide relief to the solar power developer for the increase in costs caused due to the change in law event.
18. The Petitioner in Petition No. 51/MP/2019, has submitted that the term 'Appropriate Commission' has been defined in Article 1.1 of the PPAs to mean the Central Electricity Regulatory Commission. The definition of 'Appropriate Commission' as provided in the PPAs has been extracted below for ready reference:

*“Unless otherwise stated, Appropriate Commission shall mean the Central Electricity Regulatory Commission referred to in sub-section (1) of section 76.”*

19. The Petitioners have submitted that the Commission has the jurisdiction and the power to determine suitable mechanism to compensate the Petitioner, for the additional cost incurred for the Project as a result of the imposition of the Safeguard Duty, in order to bring it back to the same economical position as if such 'Change in Law' has not occurred.
20. The Petitioners have submitted that the MNRE, through Office Memorandum dated 02.04.2018 (hereinafter referred to as "MNRE Clarification"), issued a clarification to Solar Power Procurement Guidelines that the term taxes includes duties and cess. The relevant portion of the clarification is reproduced as under:

*“2. As per clause 5.7.2 of the said Guidelines, the term change in law includes change in the rates of any taxes which have a direct effect on the Project.*

*3. In order to bring more clarity and remove uncertainty, it is hereby clarified that the term 'change in the rates of any taxes' as mentioned in clause 5.7.2 of "Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects" notified on 03.08.2017, includes, "change in*

*rates of taxes, duties and cess.”*

21. The Petitioners have submitted that the Ministry of Power, Government of India, through its Notification No. 23/43/2013-R&R dated 27.08.2018 (hereinafter referred to as “MOP Directions”) issued directions to the Central Electricity Regulatory Commission under Section 107 of the Electricity Act, 2003 for allowing pass-through of 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 corresponding changes in the cost, after the award of bids, under ‘Change in Law’ unless otherwise provided in the PPAs. The relevant extracts of the MOP Directions are provided below:

*“3. Now, in order to address the above issue and ensure sustainability of the electricity market in the larger public interest, the Central Government, in exercise of the powers conferred under section 107 of the Act, hereby issues this direction to the Central Electricity Regulatory Commission:*

- a) 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, may be treated as "Change in Law" and may unless provided otherwise in the PPA, be allowed as pass through.*
- b) Central Commission will only determine the per unit impact of such change in domestic duties, levies, cess and taxes, which will be passed on.*
- c) A draft Order for determination of per unit impact under change in law shall be circulated by Central Commission to all the States/Beneficiary on 14th Day of filing of petition. Any objection/ representation shall be submitted by them within 21 days of filing of petition.*
- d) The order for pass through giving the calculation for per unit impact will be issued within 30 days of filing of petition.*
- e) The impact of such Change in law shall be effective from the date of change in law.*
- f) Where CERC has already passed an order to allow pass through of changes in domestic duties, levies, cess and taxes in any case under Change-in-Law, this will apply to all cases ipso facto and no additional petition would need to be filed in this regard."*

22. The Petitioners have submitted that even in the DGTR Recommendations, the DGTR has observed as below:

*“67.The power developers who would be presently affected are those that have*

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*entered into PPAs with DISCOMS and quoted the tariff based on prevailing import prices of product under consideration but have not yet imported the product under consideration. However, as Central Government has already taken steps to balance the interests of such affected power developers with the Ministry of New and Renewable Energy having notified a pass-through facility through a clarification on “change in law” clause of the agreements and therefore, I feel that the imposition of safeguard duty is covered under the ‘change in law’ clause and the impact of duty will be passed on to the DISCOMs.”*

23. The Petitioners have submitted that it is evident from the above that they are to be compensated by way of adjusted tariff or any other mechanism as the Commission may determine due to additional capital expenditure to be incurred due to a ‘Change in Law’ event. It is settled law that a generating company must be compensated by way of adjusted tariff to compensate for such expenditure incurred due to changes in law, if provided for in the PPA. In addition, the Respondent is bound to compensate the Petitioner by the general law of contract and the prevalent industry practice.
24. The Petitioners have submitted that in terms of Article 12.1.1 of the PPAs, all events as specified therein, including any statutory change in tax structure or coming into effect of a Law (as defined under the PPAs), which result 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 Bid Submission Date of the PPAs. The Bid Submission Date was 05.12.2017 in Petition No. 356/MP/2018 and 15.06.2018 in Petition No. 51/MP/2019 i.e. substantially before the coming into force of the SGD Notification.
25. The Petitioners have submitted that they are now compelled to incur additional capital expenditure on procurement of solar panels / modules required for its Projects as a result of introduction of SGD Notification which would lead to an increase in capital cost of the Projects and if not compensated and would impact the viability of the Projects. Such additional capital expenditure would not have been required but for the issuance of the SGD Notification by the Government of India. The aforesaid additional capital expenditure could not have been factored in by the Petitioner at the time of submission of bid and as such has to be allowed to the Petitioner by way of an adjustment in the tariff, in terms of Article 12 of the PPAs.

26. The Petitioners have 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. Accordingly, the additional capital cost incurred/ to be incurred by the Petitioner due to the SGD Notification imposing Safeguard Duty on solar panels / modules has disturbed the fundamental assumptions / cost estimates based upon which the bids were submitted.
27. The Petitioners have submitted that the Commission has itself held on earlier occasions that introduction of a new tax which was not in existence at the time of submission of bid would be covered within the definition of 'Change in Law'. The Petitioners have placed their reliance on Order dated 30.03.2015 issued by the Commission in Petition No. 06/MP/2013.
28. The Petitioners have submitted that at the time of submission of bids, the bidders are only required to factor in taxes/ levies prevailing under the extant laws and submit their bid accordingly. A bidder cannot be expected to factor in the impact of a tax which was not even in existence at the time when it submitted its bid.
29. The Petitioners have submitted that in terms of Section 79 (4) of the Electricity Act, 2003 the Commission while discharging its functions under the Electricity Act has to be guided by the provisions of Tariff Policy, 2016 (hereinafter referred to as 'Tariff Policy 2016'). Para 6.2(4) of the Tariff Policy, 2016 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 Tariff Policy, 2016 also envisages that introduction of a new tax / duty / cess etc. post submission of the bid has to be treated as 'Change in Law' event unless otherwise provided for in the power purchase agreement.
30. The Petitioners have submitted that the coming into force of the SGD Notification is (a) in the nature of a statutory change in tax structure, and (b) it is coming into effect of a new 'Law' as has been provided for under Article 12.1.1 of the PPAs, and that the same will result in an additional non-recurring and recurring expenditure for the Petitioner in the form of escalation of capital cost of the Projects. The resultant additional non-recurring expenditure due to the coming into force of the SGD Notification has not been factored into the tariff bid at the time

of bid submission, and the petitioners have only taken into consideration the extant tax regime prevailing at the time of Bid Submission Date.

31. The Petitioner in Petition No. 51/MP/2019 has submitted that it will be incurring additional expenses in the form of arranging for working capital to cater the requirement of impact of Change in Law event in addition to the expenses made due to Change in Law. It should, therefore, also be compensated for such carrying cost from the date of the Change in Law event till the time it is paid to the Petitioner. The Petitioners have placed their reliance on APTEL's Judgment dated 13.04.2018 in Appeal No. 210 of 2017 that carrying cost is payable on the compensation for Change in Law events.
32. The Petitioners have submitted that the provisions of the PPAs provided at Articles 1 and 12 read with (a) Solar Power Procurement Guidelines (Para **Error! Reference source not found.** herein); (b) MNRE Clarifications (Para 19 herein); (c) MOP Directions (Para 21 herein); (d) Para 67 of DGTR Recommendations (Para 21 herein); and (e) Tariff Policy 2016 (Para 28 herein), it is apparent that the imposition of Safeguard Duty will amount to Change in Law in so far as it amounts to an introduction of a duty, subsequent to the submission of the bid by the Petitioner, which directly affects the Project since the cost of the solar modules constitutes a major component of the total Project cost. The imposition of Safeguard Duty thereby satisfies all the ingredients that constitute a Change in Law under the provisions of the PPA.

#### **Submissions of the Respondent No. 1 (SECI)**

33. The Respondent No.1 has submitted that it has been acting as an Intermediary Nodal Agency and facilitator to promote Non-conventional Energy Development including the solar power in terms of the policy decisions of the Government of India. It has further submitted that:

#### ***Re: Nature and scope of application of safeguard duty***

34. The Respondent No.1 has submitted that the safeguard duty under the SGD Notification has been imposed on the import of solar cells whether or not assembled in modules or panels when the import is from certain specific countries, namely, China PR, Malaysia and from



developed countries. The safeguard duty has not been imposed on the import of solar cells from other developing countries as provided in Notification No.19/2016- Customs (N.T) dated 05.02.2016. The Notification dated 30.07.2018 imposing the safeguard duty is prospective in its operation. If the solar modules had been or ought to have been imported before 30.07.2018 in the normal course, there was no incidence of any safeguard duty, even if such import is from the specified countries, namely, China PR, Malaysia and developed countries. Further, in the event the Solar Modules have been imported by the SPD from China and/or Malaysia etc., where orders are placed closer to or after the imposition of the safeguard duty, namely, that the orders for the solar modules were placed closer to the imposition or after the imposition of the safeguard duty, it was an imprudent utility practice. This is particularly if the cost of procurement of solar modules from China and/or Malaysia etc. inclusive of the cost of the safeguard duty is more than the cost of procurement of solar modules from those countries where the import of solar modules is not subject to imposition of the safeguard duty. In this situation, having the knowledge of safeguard levy, SPD had an option to decide on the import of Solar PV Module either from the countries from where the import of solar modules was subjected to Safeguard Duty (like China etc.) or countries from where the import would not be subjected to Safeguard Duty or use domestic manufactured equipment, considering the price implications to the power project being established.

35. The Respondent No.1 has submitted that the SPD had the obligation to mitigate and procure the solar modules from such countries where it is cost effective. It is not open to the SPD to continue to procure the solar modules from countries subject to levy of safeguard duty as per Notification dated 30.07.2018 even after the imposition of the safeguard duty where the landed cost of the equipments is more as compared to the import of equipments from countries which are not subject to levy of the safeguard duty.
  36. The Respondent No.1 has submitted that the Petitioners have so far not completed the construction and commissioning of the Solar Power Project. The Scheduled Commissioning Date (hereinafter referred to as 'SCoD') under the PPAs is on 27.04.2019 in Petition No. 356/MP/2018 & 25.10.2020 in Petition No. 51/MP/2019. The Petitioners have not furnished relevant documents to support the claim for change in law with regard to imposition of safeguard duty. Therefore, the petitions filed are pre-mature and are liable to be dismissed.
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37. The Respondent No.1 has submitted that in petition no. 356/MP/2018 the Petitioner had entered into three Sales Agreement for import of Solar Modules/Cells as detailed herein:

- (a) Sales Agreement dated 02.07.2018 was entered into with M/s. Zhongli New Energy (Hong kong) Investments Limited for purchase of 35.36 MWP (8.24 MWS). In terms of the said agreement the last date of shipment with expected date of arrival of the shipment in India was stipulated to be not later than July 2018 i.e. the last week of July 2018. The Sales Agreement, inter alia, also provides for the Liquidated Damages payable by the Seller to the Petitioner in case of delay.
- (b) Sales Agreement dated 25.10.2018 was entered into with M/s. GCL System Integration Technology PTE Limited, Singapore for procurement of 161.5 MWP for the project. The Delivery Schedule states that the delivery is to be during the month from November 2018 to January 2019. This Sales Agreement was entered into after coming into effect of the Safeguard Duty on 30.07.2018;
- (c) The amendment agreement dated 26.10.2018 to the Sales Agreement dated 25.10.2018 was entered with M/s. GCL System Integration Technology PTE Limited, Singapore whereby the quantum of solar Modules to be imported was increased from 161.5 MWp to 207 MWp. The Delivery Schedule was kept the same, namely, November 2018 to January 2019.

38. The Respondent No.1 has submitted that in terms of the above, the Petitioner had a Sales Agreement with M/s. Zhongli New Energy (Hong kong) Investments Limited wherein the Delivery Schedule was prior to the coming into force of the Safeguard Duty vide Notification dated 20.07.2018 for 35.36 MWp with Liquidated Damages remedy against the supplier for delay. As regards the Sales Agreement entered into with the GCL System, namely, dated 25.10.2018 and 26.10.2018 are concerned, the same are after coming into force of the Safeguard Duty and, therefore, the Petitioner had the ability to consider the cost

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competitiveness of importing Solar PV Modules from countries which are subject to the imposition of the Safeguard Duty and countries which are not subject to importation of the Safeguard Duty or to procure the same from domestic market.

***Re: Requirement to furnish relevant documents and thereby establish one to one correlation***

39. The Respondent No.1 has submitted that the Petitioner in case of 51/MP/2019 has not placed on record the relevant supply agreement if any entered into by the Petitioner for the supply of Solar PV modules.
40. The Respondent No.1 has submitted that the Petitioners needs to provide details of the actual data of importation of modules into India, the date on which the modules were taken delivery of, Bills of entry etc. to substantiate the impact of safeguard duty on the procurement of modules required for the solar power project. It is incumbent on the Petitioners to place on record transparently the entire details relating to the payment of safeguard duty in regard to the solar Modules, cells and further establish the one to one correlation between the project, the importation of solar Modules, cells etc. and the invoices and other relevant documents for proof of the payment of safeguard duty.
41. The Respondent No.1 has submitted that it crave reference to the Order dated 09.10.2018 passed by the Commission in Petition No.188/MP/2017 and Batch in the case of *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors. and Batch*; Order dated 05.02.2019 in Petition no.187/MP/2018 and Batch in the case of *M/s. Renew Wind Energy (TN2) Private Limited –v- NTPC Limited Batch*; and Order dated 18.04.2019 in Petition No.164/MP/2018 and Petition No.165/MP/2018 in the case of *Parampujya Solar Energy Private Limited –v- NTPC Limited*. In the absence of the requisite details as mentioned above, and particularly satisfaction of the one to one co-relation, it is not possible to consider any such claim and the petition filed should to be rejected. If the Petitioners does not establish to the satisfaction of the Commission that there has been an actual expenditure and outflow of the money on account of payment of safeguard duty to the revenue authorities, no relief can be granted.

***Re: Claims, if any allowed to Petitioner, should be recovered on back to back basis from the Respondent Discoms***

42. The Respondent No. 1 has submitted that without prejudice to the rights and contentions mentioned hereinabove, the PPAs has been entered into by SECI in its capacity as an intermediary company for the bulk purchase of electricity from the Petitioners for bulk supply of electricity to the Respondent Discoms/Buying Entity under the Power Sale Agreement (hereinafter referred to as 'PSA'). Such purchase and resale of electricity is under a scheme envisaged in Government of India Guidelines. SECI is in a position to discharge its obligations under the PPAs including the payment for any change in Law implication etc. only upon the distribution licensee remitting the amount to the SECI in terms of the respective PSA. The obligation of the distribution licensee under the PSA is therefore on a back to back basis with the obligation of the SECI to the Petitioner. In this regard, SECI craves reference to the Order dated 09.10.2018 in case of *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors. Batch.* and Order dated 05.02.2019 in Petition No.187/MP/2018 and Batch in the matter of *M/s. Renew Wind Energy (TN2) Private Limited –v- NTPC Limited Batch.*
43. The Respondent No. 1 has submitted that it is appropriate that the Commission may give directions to Respondent Discoms, determining the amount payable to the Petitioners keeping in view the intermediary status and role of the SECI as a nodal agency to facilitate the Solar Power Project and for the Distribution Licensee/Buying Entity to have an arrangement for procurement of solar power to fulfill Renewable Purchase Obligation. The objective is to promote the solar power development in the country, as per the policy decisions of the Government of India. Any enforcement of the claim by the Petitioners against the SECI without the Respondent Discoms /Buying Entity being obligated to pay and discharge the corresponding claim under the PSA in advance of the discharge of the obligation of the SECI will result in serious financial issues to the SECI and thereby, effect the implementation of the scheme.

***Re: Claim for carrying cost***

44. The Respondent No.1 has submitted that there is no provision in the PPAs which permits the carrying cost or interest for the period till the amount of the claim is determined by the Commission in pursuance to a petition filed by the Petitioner. In the absence of any specific provision providing for carrying cost in the PPAs, there cannot be any claim for the same. In terms of Article 12 of the PPAs entered into between the parties, the relief for Change in Law provided is for the Petitioners to approach the Commission for seeking approval of the Change in Law and the Commission has to decide on the admissibility of the claim in the first instance. Accordingly, the amount due from SECI/Buying Entity to the Petitioners under change in law gets crystallized only upon the decision being made by the Commission allowing change in law and therefore, there cannot be any carrying cost for the period prior to the decision of the Commission. After the decision of the Commission, the Petitioners are required to include the amount determined in the supplementary bills raised thereafter. The amount is then becomes payable on the due date applicable for payment of such supplementary bills in terms of Article 10 of the PPAs. The present case is not a case of amounts being denied at appropriate time or any deprivation of amount due to actions of the procurers. The Procurers cannot make the payment for change in law until the amount is determined by the Commission. The Procurers cannot make the payment for change in law until the amount is determined by the Commission.
45. The Respondent No.1 has submitted that the decision by the Commission can only be after the Petitioners have submitted complete information and not before. Thus, any delay in the determination of the impact of change in law is on account of the Petitioners. Accordingly, the carrying cost admissible (if any) to the Petitioners shall be from the date of furnishing of the complete prescribed information. Any adverse consequences for not approaching the Commission with the full documentation/information at the first instance ought to be borne by the defaulting party i.e. the Petitioners themselves.

***Re: Claim for interest on working capital***

46. The Respondent No.1 has submitted that there cannot be any consideration for individual tariff elements such as interest on working capital or return on equity or any other in a competitive bid process under Section 63 of the Electricity Act, 2003 and there cannot be any

computation of the same. There is no concept of interest on working capital or other individual tariff elements including return on equity in competitively bid process and bidders are required to give the bid based on all-inclusive tariff. Further, there cannot be any issue of return on equity on incremental working capital and margin. These aspects are no longer a res integra and has been decided in the following judgment: *Judgment dated 19.04.2017 in Appeal No. 161 of 2015- Sasan Power Limited –v- Central Electricity Regulatory Commission.*

### **Submissions by the Petitioners in the Rejoinder**

47. The Petitioners vide the Rejoinders have reiterated the submissions already made in the petitions as such the same have not been reproduced for the sake of brevity. Additionally, the following have been submitted:
  
48. The Petitioner in petition No. 356/MP/2018 has submitted that pursuant to the competitive bid issued by SECI (RfS), the last date for submission of the bid was 18.12.2017. Hence the bid cut-off date was 18.12.2017 and that point of time, the Petitioner had no knowledge whatsoever, and rather could not have even remotely anticipated that the Government of India would be imposing the Safeguard Duty vide SGD Notification. Hence the ‘Change in Law’ under Article 12, if any, has to be necessarily reckoned vis-à-vis the ‘Effective Date’ i.e. 27.04.2018. Considering the SCoD of the Petitioner within the short span of one year from the ‘Effective Date’, i.e. latest by 27.04.2019, Petitioner took immediate steps to procure the solar PV modules from various manufacturers in countries such as Singapore, Hong Kong and China. Vide Letter of Award dated 06.07.2018, the Petitioner awarded the contract for supply of 330/335 Wp PV solar modules for setting up solar plant in Rajasthan, including another solar PV plant being set up by the Petitioner in the State of Karnataka to M/s GCL System Integration Technology Pte Limited, Singapore for approx. 325 MW (DC), including 261.5 MW (DC) for Petitioner’s Project in State of Rajasthan. The Petitioner further executed a Sales Agreement (“SA”) with M/s Zhongli New Energy (Hong Kong) Investment Limited, Hong Kong on dated 02.07.2018 for purchase of solar PV modules of 35.36 MWp (8.25 MW approx.) for the Project being developed by the Petitioner in the State of Rajasthan. Therefore, the orders for the solar PV modules for setting up the project of the

Petitioner in Rajasthan have been placed prior to the SGD Notification dated 30.07.2018 which admittedly as per SECI is 'Law' under the PPAs executed. It is relevant to note that it takes several rounds of negotiations and considerable time to book such large number of orders for solar modules of such capacity at manufacturers end and to procure the same within the limited period of time, as also to commission the project within the short span of one year. Therefore, it is natural for any procurer to book the solar modules well in advance, so as to achieve the SCoD within the limited time frame. Article 12 makes it quite clear that the relief available on account of 'Change in Law' is to be reckoned from the 'Effective Date' of the PPA i.e. 27.04.2018, hence the contention raised by SECI is wrong and frivolous. Further, the Petitioner has a vast installed solar capacity and the crystalline modules for all its projects are being procured from China since long, majorly because modules procured from China are cost effective and are as per Petitioner's approved vendor list.

49. The Petitioner in petition No. 356/MP/2018 has submitted that it is not open for Respondent No.1 to comment on the business operations and prudent business decisions of the Petitioner. Respondent No.1 cannot direct the Petitioner as to whom it should procure the solar PV modules from and from whom it should not. The Petitioner has only continued to procure the solar PV modules from the same manufacturers that it had executed binding contract with on 02.07.2018 and 06.07.2018 i.e. even prior to the SGD notification on 30.07.2018. It was found unviable to procure large quantities at comparable prices with comparable characteristics from domestic suppliers.
50. The Petitioner in petition No. 356/MP/2018 has submitted that Sales Agreement dated 25.10.2018 was only formalising a pre-existing contractual obligation that Petitioner already had in law with GCL Singapore as per LoA dated 06.07.2018. In the circumstances, since the liability to procure the panels from GCL Singapore was already concluded on 06.07.2018 under an irrevocable LoA, the Petitioner did not have any choice of choosing a seller from a non-safeguard duty country after the coming in of the SD notification on 30.07.2018.
51. The Petitioner in petition No. 51/MP/2019 has submitted that the Commission in its Order dated 02.05.2019 in Petition No. 342/MP/2018 and 343/MP/2019 titled *ACME Rewa Solar Energy Private Limited vs Solar Energy Corporation of India Limited* has observed that the

imposition of Safeguard Duty under the SGD Notification issued by the Ministry of Finance, Government of India is 'law' in terms of the definitions under the PPAs and that the implication thereof would be a 'Change in Law' event, the relief for which may accordingly be sought. Without prejudice to the above, Respondent No.1 in its Reply has also categorically admitted that the safeguard duty imposed by the Government of India is a Law as defined and covered under the PPAs. Therefore, the Commission may for the limited purpose of declaring the introduction and imposition of safeguard duty without further delving into contents of Response of the Respondent No. 1, may declare that the introduction and imposition of safeguard duty by way of 'SGD Notification', as a 'Change in Law' event in terms of Article 12 of the PPA's dated 31.10.2018 executed between the Petitioner and the Respondent No. 1. Once it is admitted by Respondent No. 1 that the safeguard duty imposed by the Government of India is a Law as defined and covered under the PPA, the only question that follows is whether such 'Change in Law' has occurred after the last date of submission of the bid and whether such 'Change in Law' will result in any additional recurring/non-recurring expenditure or income. The Petitioner has submitted that the Commission in the Order dated 02.05.2019 in Petition No. 342/MP/2018 and 343/MP/2019 titled *ACME Rewa Solar Energy Private Limited vs Solar Energy Corporation of India Limited* has categorically dealt with this issue and has stated the following:

*"...136. The Commission is of the view that 'Safeguard Duty' became effective from 30.07.2018 and hence the date of notification becomes the 'cut-off date' for imposing the same. Meaning thereby, the notification/imposition of 'Safeguard Duty' will directly affect the projects where "Solar Cells whether or not assembled in modules or panels" were imported on or after 30.07.2018 where:-*

*a) the bids have been accepted and crystalized before 30.07.2018 or the Power Purchase Agreements have been executed before 30.07.2018 and the Scheduled Date of Commissioning of the project is after 30.07.2018..."*

52. The Petitioner in petition No. 51/MP/2019 has submitted that the framework under which Respondent No. 1 has conducted the bid process, clearly provides for granting relief to the Solar Power Developer in case of occurrence of a 'Change in Law' event. The said framework has been outlined below for ease of reference:

*(a)The Revised Tariff Policy, 2016: Categorically provides that any change in taxes*

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*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;*

(b) Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects (“Solar Power Procurement Guidelines”): *Inter alia, provides for compensation to the Solar Power Developer in case of occurrence of a 'Change in Law' event in order to ensure that the Solar Power Developer is placed in the same financial position as it would have been had it not been for the occurrence of the 'Change in Law'. Further, any change in taxes is also considered as a 'Change in Law' event;*

(c) Ministry of New and Renewable Energy clarifications to the Solar Power Procurement Guidelines: Ministry of New and Renewable Energy ("MNRE"), through Office Memorandum dated 02.04.2018 ("MNRE Clarification"), *issued a clarification to Solar Power Procurement Guidelines and clarified that that the term taxes includes duties and cess;*

(d) Directions by the Ministry of Power: *The Ministry of Power, Government of India, through its Notification No. 23/43/2013-R&R dated 27.08.2018 ("MOP Directions") issued directions to the Central Electricity Regulatory Commission under Section 107 of the Electricity Act for allowing pass-through of 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 corresponding changes in the cost, after the award of bids, under 'Change in Law' unless otherwise provided in the PPA.*

53. The Petitioners have submitted that the whole intent of the Change in Law clause has been highlighted in the Solar Power Procurement Guidelines i.e. Solar Power Developer is to be placed in the same financial position as it would have been had it not been for the occurrence of the ‘Change in Law’. For the Petitioners to be placed in the same financial position, it is imperative that additional cost incurred on account of Working Capital and Carrying Cost is granted to the Petitioners.

54. The Petitioners have submitted that event the Director General Safeguard in its Recommendations dated 16.07.2018 (“DGTR Recommendations”), while recommending the imposition of safeguard duty on the import of solar cells and modules, has itself held that the imposition of safeguard duty would be covered as an event of ‘Change in Law’ under the PPAs of the Solar Power Developers and would be a pass through to the Distribution Companies.



55. The Petitioners have submitted that in view of the provision of the PPA, the Regulatory framework and the Order dated 02.05.2019 in Petition No. 342/MP/2018 and 343/MP/2019 titled *ACME Rewa Solar Energy Private Limited vs Solar Energy Corporation of India Limited*, the Petitioners are to be compensated by way of adjusted tariff or any other mechanism as the Commission may determine due to additional capital expenditure to be incurred due to a 'Change in Law' event. It is settled law that a generating company must be compensated by way of adjusted tariff to compensate for such expenditure incurred due to 'Change in Law', if provided for in the PPAs. In addition, the Respondent is bound to compensate the Petitioner by the general law of contract and the prevalent industry practice.
56. The Petitioners have submitted that the provisions of the PPAs nowhere specify or prescribe that the goods required for setting up of the Project are required to be imported from a specific location or sourced domestically and it is therefore up to the Petitioner to make specific sourcing decisions on various commercial factors. The commercial decision of the Petitioner cannot have a bearing or rather disentitle the Petitioner from claiming relief under Article 12 of the PPA.
57. The Petitioners have submitted that the petitions cannot be dismissed on the ground that they are not supported by actual details and documents evidencing payment of safeguard duty and showing a co-relation between the import of the modules and the present Project as the imposition of safeguard duty has resulted in severe and formidable incremental costs for the Petitioner's Project.
58. The Petitioners have submitted that in petition no. 356/MP/2018 they have provided the details of solar PV modules imported by the Petitioner on which the Safeguard Duty has been levied and has already paid the actual duty challans as provided by the Govt of India, coupled with Bill of Entry whereas in petition 51/MP/2019 they have already submitted the LOA for the solar modules dated 29.07.2018 with Risen Energy Company and that the Petitioner will submit the agreement, invoices and computation of actual costs incurred as and when available.
59. The Petitioners have submitted that the back-to-back arrangements only means that Respondent No. 1 may be allowed to recover the moneys it has paid to the generators from

the beneficiaries that SECI has contracted power with, however, SECI's liability qua the Petitioner under the PPAs is not at all extinguished from the other PSAs with the beneficiaries. SECI's obligation to pay the Petitioner under PPAs executed with the Petitioner is sacrosanct which is clearly evident from Articles of the PPAs according to which SECI shall make the payment of the bills and supplementary bills to the Petitioner. The fact that PPA & PSA are back-to-back arrangements only enables SECI to recover from the beneficiary any amount but does not limit SECI's liability under the PPAs to make the payments to the Petitioner. Furthermore, the PPS's under Article 14.5.1 explicitly provide that payments of money becoming due from Respondent No. 1 to the Petitioner for the supply of power shall not be on back to back basis.

60. The Petitioners have submitted that the orders referred and relied upon by SECI do not limit the liability of SECI to pay the generators under separate PPAs executed with the generators. Hence, doctrine of privity of contracts would apply in the present case. The Petitioners have placed their reliance on the judgment of Hon'ble Supreme Court in '*Zonal General Manager, IRCON International Limited v. Vinay Heavy Equipments*' (2015) 13 SCC 680.

#### **Hearing on 12.12.2019**

61. In the hearing held on 12.12.2019 the Petitioners have submitted that the present Petitions have been filed by the Petitioners, inter-alia, seeking declaration that the imposition of the Safeguard Duty on the import of solar panels/modules through Notification No. 1/2018-Customs (SG) dated 30.7.2018 issued by the Department of Revenue, Ministry of Finance, Government of India as 'Change in Law' event under the Article 12 of the PPAs and the consequent reliefs thereto. It is submitted that the issues involved in the Petitions, apart from the carrying cost, are covered by the earlier orders of the Commission. As regards carrying cost, it is relied upon the clauses 5, 5.7 and 18 of the 'Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects' ('Guidelines') and mainly submitted as under:

- (a) Clause 5 of the 'Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects' ('Guidelines') as

Notified by Ministry of Power on 3.8.2017, which is also the relevant Guidelines for the PPAs, provide that the standard provisions as provided in the Guidelines shall be incorporated in the PPAs and also in the PSAs on back-to-back basis.

- (b) In terms of Clause 18 of the Guidelines, in case there is any deviation from these Guidelines, the same is to be approved by the Appropriate Commission. In the present case, apparently, there is no such approval of the Commission for the deviation.
- (c) Based on the doctrine of Contra-Proferentem, when there is a lacuna/possibility of two different interpretation of the provision of the contract, such an interpretation should be preferred by the Court, which is against the party who drafted the contract. Admittedly, in the present case, PPAs have been drafted by SECI.

- 62. The Respondent, Solar Energy Corporation of India Limited (SECI) has submitted that all the issues involved in the Petitions including the submissions of learned counsel for the Petitioners on the carrying cost have been considered and dealt with by the Commission in Order dated 04.10.2019 in Petition No. 14/MP/2019 and the batch matter. Further the Respondent has submitted that the PPAs have been willingly executed by the Petitioners and the doctrine of Contra- Proferentem does not apply in the present case.
- 63. Based on the request of the parties, time to file written submissions was granted to the parties, till 20.12.2019, with copy to each other.
- 64. The Respondent No. 1 has filed the written submissions on 20.12.2019 and the Petitioner in Petition No. 51/MP/2019 has filed the written submissions on 23.12.2019. The written submissions have been taken on records by the Commission.

**Written Submissions By the Petitioner in Petition No. 51/MP/2019**

- 65. The Petitioner has submitted that the key dates in the matter i.e. the date of submission of the bid, the date of issuance of the SGD Notification are as follows:

	<b>EVENT UNDER THE BID</b>	<b>DATE</b>
1.	Date of submission of the bid by the Petitioner	15.06.2018
2.	Last date of submission of the bid	15.06.2018

3.	Date of the e-reverse auction	02.07.2018
4.	Letter of Award in favor of the Petitioner	27.07.2018
5.	Letter of Award for supply of Solar Modules	29.07.2018
6.	Issuance of the SGD Notification	30.07.2018

66. The Petitioner has submitted that the limited issue which is yet to be decided by the Commission is whether in view of the Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects dated 03.08.2017 the Petitioners may be restored to the same economic condition prior to occurrence of the Change in Law through suitable mechanism.

67. The Petitioner has submitted that for the limited issue, the following may be considered by the Commission:

***Re: Counter to the Order dated 04.10.2019 issued by CERC in Petition No. 14/MP/2019***

68. The Petitioner has submitted that the Order dated 04.10.2019 does not mention or deal with important provisions of the Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects dated 03.08.2017 such as:

- (a) Clause 2.1.1 which provide that the Guidelines have been issued under Section 63 of the Electricity Act, 2003 and that they are statutory guidelines.
- (b) Clause 2.1.2 which provide that the Guideline are binding on the Procurer / Intermediary Procurer / End Procurer.
- (c) Clause 5 which explicitly states that the standard provisions to be incorporated as part of the draft PPA shall include the provisions provided therein which also includes a Change in Law provision which provides for restitution to the same financial position.
- (d) Clause 18 which provides for the process to be followed in case deviation is to be sought from the Guidelines.

69. The Petitioner has submitted that combined reading of the provisions of the Guidelines would illustrate that the clauses, terms and conditions of the Guidelines are deemed to be a part of

the draft Power Purchase Agreement unless there has been an express deviation sought as per the procedure outlined under the said Guidelines.

***Re: Binding Nature of the Guidelines***

70. The Petitioner has submitted that the Guidelines are binding and have force of law due to the following reasons:
- a. The said Guidelines have been issued under Section 63 of the Electricity Act, 2003 and therefore are statutory in nature. It is worthwhile to note that the said section stipulates that the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government. Therefore, the said Guidelines flow out of a legislation and are statutory and binding.
  - b. The Guidelines have been duly notified / published in the Official Gazette. The Petitioner has placed its reliance upon the recent judgment of the Delhi High Court in *Amway India Enterprises Pvt. Ltd. v. IMG Technologies Pvt. Ltd. & Anr. dated 8.07.2019*, in which the Court while dealing with binding nature of the Direct Selling Guidelines, 2016, held that even though the said Guidelines were issued as advisory instructions, once gazette notifications were issued and implemented by various State Governments, they became binding executive instructions and have force of law.
  - c. The Hon'ble Supreme Court in *NDMC v. Tanvi Trading and Credit (P) Ltd. ((2008) 8 SCC 765)*, upheld the binding nature of the of LBZ ('Lutyens Bungalow Zone') guidelines, which were being used by the NDMC for sanctioning of plans in the LBZ zone. It is pertinent to note that these guidelines were not notified either under the DDA Act or the NDMC Act, yet they were adjudicated to have force of law.
  - d. In *Gulf Goans Hotels Co. Ltd. v. Union of India ((2014) 10 SCC 673)*, the Supreme Court in the context of Article 77 of the Constitution, observed that if the law is not duly authenticated and promulgated, then it would not be binding. In the said case, since the subordinate legislation was not published in the manner it was to be customarily recognised in the official channels, and since the guidelines were not gazetted, it was held that the same was not valid law. However, this case can be distinguished because in the situation before us, the Guidelines are duly published in the Official Gazette.
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**Re: Contra Proferentum**

71. The Petitioner has submitted that since the guidelines are binding in nature, the PPA must be read with the guidelines. Further, as per the principle of construction of contract known as 'Contra Proferentum ', if the terms of the contract are unclear, an interpretation against the party who is responsible for the formulation of terms is preferred. The Petitioner has placed its reliance on *Bank of India and Another v. K. Mohandas and Others* ((2009) 5 SCC 313).

**Written Submissions By the Respondent No. 1**

72. The Respondent No. 1 has reiterated the facts already submitted in the pleadings as such the same are not being reproduced herewith for the sake of brevity. Additionally, the Respondent No. 1 has submitted that:

***Re: Back to Back obligations of SECI under the PPAs and the PSA:***

73. The Respondent No. 1 has submitted that it is acting as an intermediary utilizing its trading license to facilitate such purchase and resale of electricity. SECI is not acting as a merchant trader or otherwise independently purchasing the electricity from the SPD having the option to sell electricity to any person at such time and on such terms and conditions including the price as SECI may decide from time to time. SECI is also not retaining the powers to trade electricity so purchased in the open market or through the platform of Power Exchange or otherwise on a long term basis to earn a trading margin, without being constrained to the fixed trading margin of 7 Paisa/kWh decided by the MNRE, Government of India. The obligations and liabilities of SECI to the SPD, in the facts and circumstances pertaining to such dealing, are on a back to back basis to the obligation to be performed and liabilities to be discharged by Buying Entity/ Distribution Company to SECI.
74. The Respondent No. 1 has submitted that various provisions of NSM Guidelines, the Tariff Guidelines, RfS, PPAs and PSA, inter-alia, provides that both the documents are inextricable

and intertwined with one another and indicates that there is back to back arrangement under the entire scheme.

***Re: Applicability of Clause 5 of the MNRE Guidelines dated 03.08.2017***

75. The Respondent No. 1 has submitted the Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid connected Solar PV Power Projects dated 03.08.2017 issues by MNRE in regard to the Change in Law provides that the SPD shall be placed in the same financial position as if it would have been, had it not been for the occurrence of the Change in Law. This is a guiding factor to be followed by the parties in the execution of the PPAs.
  
76. The Respondent No. 1 has submitted that the PPAs have been duly executed between the Petitioners and Respondents. The Petitioner did not raise any objection to the scope of the provisions contained in the PPAs being not consistent with the Guidelines prior to or at the time of execution of the PPAs. Had such an issue been raised, the matter could have been referred to MNRE for clarification as provided in amended Clause 1.5.1 of the RfS document and a decision would have been taken by MNRE as to the scope of the provision. The above was not done at the relevant time. In view of the above, the PPAs provisions have become final and binding on the Petitioners and Respondents. The Respondent No. 1 has placed its reliance on the Order dated 04.10.2019 passed in Petition No.14/MP/2019 and connected Petitions in the matter of *Renew Solar Power Private Limited –v- Solar Energy Corporation of India Limited & Anr. and connected matters* and the Order dated 15.10.2019 passed in Petition No.19/MP/2019 and connected Petition in the matter of *Acme Jaipur Solar Power Private Limited –v- M.P. Power Management Company Limited & Ors. and connected matters* wherein it has been held that once the PPA stands executed, the provisions of the PPA have become final and binding on the parties, the PPA. therefore, governs the contractual rights and obligations.

***Re: The Rule of Contra Proferentum is not applicable***

77. The Respondent No. 1 has submitted that the PPA being a bilateral commercial document mutually executed between the parties, the rule of Contra-Proferentum is not attracted in the present case. The Respondent No. 1 has placed its reliance on the decision of Hon'ble Supreme Court in is relevant *Export Credit Guarantee Corpn. of India Ltd. -v- Garg Sons International*, (2014) 1 SCC 686; *Vikram Greentech (I) Ltd. v. New India Assurance Co. Ltd.* [(2009) 5 SCC 599 : (2009) 2 SCC (Civ) 590].

***Re: Documents to be provided as per the orders of the Commission***

78. The Respondent No. 1 has submitted that along with the Petition, the Petitioner has given certain details and documents in regard to claim with respect to Safeguard Duty.
79. The Respondent No. 1 has submitted that it is attaching the process along with checklist of documents for evaluation of Safeguard Duty claims of the Petitioners. The details and documents, along with further details that may be furnished by the Petitioners in accordance with the orders of the Commission (order dated 02.05.2019 in Petition No. 342/MP/2018 and another connected Petition, order dated 04.10.2019 in Petition No.14/MP/2019 & connected Petitions and order to be passed in the present matter) and as per the above checklist (Annexure E) shall be examined by SECI at appropriate stage for verification.
80. The Respondent No. 1 has submitted that the Commission may direct the Petitioners to provide the details in terms of the methodology given in 'Annexure E' and in accordance with the orders of the Commission to enable Respondent No.1 to expeditiously compute the amount payable (if any).

**Analysis and Decision**

81. The Petition No. 356/MP/2018 was admitted on 07.02.2019 and Petition No. 51/MP/2019 was admitted on 16.04.2019. The Petitions came up for hearing on 17.07.2019 and



17.10.2019. After hearing, both the Petitions were reserved for Orders on 12.12.2019. We have heard the learned counsels for the Petitioners and the Respondents and have carefully perused the records. Since, the petitions are likely worded and contain similar issues to be adjudicated, the same are clubbed together.

82. The brief background of the case is that the Respondent No.1 (SECI) issued Request for Selection (RFS) for Selection of Solar Power Developers for Setting up Solar Power Projects. The Petitioners submitted their bids and entered into PPAs. Vide ‘SGD Notification’ dated 30.07.2018. The brief facts of the Petitions are as under:

	<b>356/MP/2018</b>	<b>51/MP/2019</b>
Scheme	NSM	NSM
Guidelines	NSM Guidelines for selection of 5000 MW Grid Connected Solar PV Power Projects under Phase-II Batch IV” notified vide No. 3213/2014-1S/GSP dated 14.03.2016 including its subsequent amendments and clarifications.  and  Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects” issued by the Ministry of Power on 03.08.2017	Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects” issued by the Ministry of Power on 03.08.2017
Nodal agency	SECI	SECI
RfS	21.06.2017	30.01.2018
Capacity MW	200 (4 x 50 MW)	600 ( 2 x 300 MW)
Power	Solar	Solar
Location	Solar Park, Bhadla, Rajasthan	Village Jagdev wala and Daudsar, Bikaner, Rajasthan
Bid submitted on	05.12.2017	15.06.2018
Bid accepted on	22.12.2017	02.07.2018
PPA	27.04.2018	31.10.2018
Effective date	27.04.2018	25.10.2018
SCoD	27.04.2019	25.10.2020
Tariff	2.48/kWh	2.53/kWh

VGF	Yes	No
Change in Law	Art. 12	Art. 12
PSA (Discoms)	Uttar Pradesh	Jharkhand, Odisha, Haryana
Sale Agreement for Modules	<p>On 02.07.2018 Sale Agreement was executed with M/s Zhongli New Energy (Hong Kong) Investment Limited, Hong Kong</p> <p>On 06.07.2018 letter of award was executed with M/s GCL System Integration Technology Pte Limited, Singapore, however, Sale Agreement was executed on 25.10.2018, which was amended on 26.10.2018 and 26.12.2018.</p> <p>The Letter of Award dated 06.07.2018 was awarded and Sale Agreement was executed On 26.12.2018 with M/s Risen Energy Hong Kong Co.</p>	On 29.07.2018 the letter of award was executed with M/s Risen Energy Hong Kong Co.
Safe guard duty notification	30.07.2018	

83. The Petitioners have submitted that issuance of ‘Safeguard Duty Notification’ has resulted in an increase in recurring and non-recurring expenditure for the Petitioners and has adversely impacted the business of the Petitioners. The Petitioners have submitted that imposition of safeguard duty is covered under Article 12 of the PPAs which provide for ‘Change in law’ and the relief for such ‘Change in Law’ may be allowed. The Petitioners have submitted that ‘Tariff Guidelines’ provide for restitution to the same financial position and in case there is any deviation from these Guidelines, the same is to be approved by the Appropriate Commission. In the present case there is no such approval of the Commission for deviation. Further, they are also entitled to interest on incremental ‘working capital’ and ‘Return on Equity’ to put Petitioners in the same economic position as if change in law has not occurred. The Petitioners have also claimed ‘carrying cost’ from the date of impact of ‘Change in law’ till reimbursement by the Respondent. *Per Contra*, the Respondent No.1 has submitted that it is not disputed that the safeguard duty imposed by the Government of India is a ‘Law’ as defined and covered under the PPAs, however, whether the same qualifies as a ‘Change in

Law' within the scope of Article 12 of the PPAs has to be decided after taking into consideration the submissions made in the pleadings and during hearings. Further, the 'SGD Notification' dated 30.07.2018 imposing the safeguard duty is prospective in its operation and has not been given effect to any period prior to 30.07.2018. Further, the obligations and liabilities of SECI to the SPD, in the facts and circumstances pertaining to such dealing, are on a back to back basis to the obligation to be performed and liabilities to be discharged by Buying Entity/ Distribution Company to SECI. Further, the Respondent No. 1 has submitted that the provisions of the PPAs have become final and binding on the parties, the PPAs therefore govern the contractual rights and obligations. The PPAs do not have any clause regarding restitution to the same financial position. Further, the Commission and the APTEL have repeatedly held in various cases that there is no concept of interest on 'Working Capital and 'Return on Equity' in a competitive bidding process. Also, there is no merit in the principal claim of the Petitioner and therefore the question of payment of 'Carrying Cost' does not arise.

84. From the submissions of the parties, the following issues arise before this Commission:

*Issue No.1: Whether the imposition of safeguard duty on the import of solar modules can be considered an event covered under 'Change in Law' in terms of the Article 12 of the PPAs?*

*Issue No.2: Whether there is a need to evolve a suitable mechanism to compensate the Petitioners for the increase in recurring and non-recurring expenditure incurred by the Petitioners on account of 'Change in Law'?*

*Issue No. 3: Whether in view of the "Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects" dated 03.08.2017 the Petitioners may be restored to the same economic condition prior to occurrence of the Change in Law through suitable mechanism as prayed for in the present Petitions? AND*

*Issue No. 4: Whether the claim of Petitioners regarding interest on Working Capital, Return of Equity and 'Carrying Cost' for delay in reimbursement by the Respondents is sustainable?*

85. No other issue was pressed or claimed.

86. We now discuss the issues one by one:

*Issue No.1: Whether the imposition of safeguard duty on the import of solar modules can be considered an event covered under 'Change in Law' in terms of the Article 12 of the PPAs?*

**AND**

*Issue No.2: Whether there is a need to evolve a suitable mechanism to compensate the Petitioners for the increase in recurring and non-recurring expenditure incurred by the Petitioners on account of 'Change in Law'?*

87. Since Issue No. 1 and Issue No. 2 are interrelated, the same are taken for discussion together. The Petitioners have submitted that vide Safeguard Duty Notification dated 30.07.2018, the Central Government imposed 'Safeguard Duty'. The imposition of safeguard duty has resulted in an increase in recurring and non-recurring expenditure for the Petitioners and thus adversely impacted the business of the Petitioners. The imposition of safeguard duty is covered under Article 12 of the PPAs which provides for 'Change in law' and the relief for such 'Change in Law' and requested that the same may be allowed. **Per Contra**, the Respondents have submitted that it is not disputed that the safeguard duty imposed by the Government of India is a Law as defined and covered under the PPAs. However, whether the same qualifies as a 'Change in Law' within the scope of Article 12 of the PPAs has to be decided after taking into consideration the submissions made in the pleadings and during hearings. Further, the impugned notification is prospective in its operation and cannot be given effect to any period prior to 30.07.2018.

88. The Commission observes that various provisions of the PPAs provides for 'Change in Law' which stipulates as under:-

*"1.1 Definitions*

*The terms used in this Agreement, unless as defined below or repugnant to the context, shall have the same meaning as assigned to them by the Electricity Act, 2003*

*and the rules or regulations framed there under, including those issued / framed by the Appropriate Commission (as defined hereunder), as amended or re-enacted from time to time.*

*Indian Governmental Instrumentality shall mean the Government of India, Governments of State(s), where the Power Projects, SECI and Buying Utility are located and any ministry, department, board, authority, agency, corporation, commission under the direct or indirect control of Government of India or any of the above state Government(s) or both, any political sub-division of any of them including any court or Appropriate Commission(s) or tribunal or judicial or quasi-judicial body in India;*

*Law shall mean in relation to this Agreement, all laws including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and shall further include without limitation all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include without limitation all rules, regulations, decisions and orders of the Appropriate Commission;”*

*“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 last date of bid submission, 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, i.e. change in rates of taxes, duties and cess,*

*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 and has direct effect on the Project, shall be treated as per the terms of this Agreement.*

*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 Appropriate Commission for seeking approval of Change in Law.*

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

89. 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.

90. From the above, the Commission notes that any application of new tax is covered as ‘Change in Law’. The Safeguard Duty Notification stipulates that “a safeguard duty at twenty five per cent to fifteen per cent ad valorem minus anti-dumping duty payable” has been levied on Solar Cells whether or not assembled in modules or panels” when imported into India “during the period from 30th July, 2018 to 29th July, 2020 (both days inclusive)”. The notification provides for a diminishing ‘Safeguard Duty’ slab in the range of 25% to 15% applicable ad valorem on the imports from 30.07.2018 till 29.07.2020. The impact of ‘Safeguard Duty’ notification is on/any portion of import whose point of taxation is on or after implementation

of the Notification dated 30.07.2018 and the same will be subjected to purview of ‘Safeguard Duty’.

91. The Commission is of the view that ‘Safeguard Duty’ became effective from 30.07.2018 and hence the date of notification becomes the reference date for imposing the same; meaning thereby that the notification/imposition of ‘Safeguard Duty’ will directly affect the projects where “Solar Cells whether or not assembled in modules or panels” were imported on or after 30.07.2018 where:-

- a) the bids have been accepted and crystalized before 30.07.2018 or the Power Purchase Agreements have been executed before 30.07.2018 and the Scheduled Date of Commissioning of the project is after 30.07.2018; OR
- b) the bids have been accepted and crystalized before 30.07.2018 or the Power Purchase Agreements have been executed before 30.07.2018 and the Scheduled Date of Commissioning of the project is before 30.07.2018 but the same stands extended after the cut-off date i.e. 30.07.2018 due to the circumstances permitted under provisions of the executed PPAs;

92. The Commission observes that in the Petition No. 356/MP/2018 the Petitioner has executed the following three Sales Agreements for import of Solar Modules/Cells:

- a. The Sales Agreement dated 02.07.2018 was executed with M/s Zhongli New Energy (Hong Kong) Investment Limited, Hong Kong for purchase of solar PV modules of 35.36 MWp (8.25 MW approx.) for the Project being developed by the Petitioner in the State of Rajasthan.
- b. The Letter of Award dated 06.07.2018 was awarded in favour of M/s GCL System Integration Technology Pte Limited, Singapore for the contract for supply of 330/335 Wp PV solar modules for setting up Petitioner’s solar plant in Rajasthan, including another solar PV plant being set up by the Petitioner in the State of Karnataka to for approx. 325 MW (DC) including 261.5 MW (DC) for Petitioner’s Project in State of

Rajasthan. The Sale Agreement was executed on 25.10.2018, which was subsequently, amended on 26.10.2018 and 26.12.2018.

c. The Letter of Award dated 06.07.2018 was awarded in favour of M/s Risen Energy Hong Kong Co. for purchase of solar modules of 53.5 MWp for execution 53.50 MW solar PV Project. The Sale Agreement was executed on 26.12.2018.

93. The Commission observes that in Petition No. 51/MP/2019, the Petitioner has executed 'letter of Award' No. AZI/1450MW/KREDL/Module/015 dated 29.07.2018 in favour of M/s Risen Energy Company Limited (a company incorporated under the laws of the People's Republic of China) to purchase solar modules for a total capacity of 1450 MW.

94. The Commission observes that the Petitioners have already placed Orders through Letter of Award/ Sale Agreement before 30.07.2018. Hence the protection under clause of 'Change in Law' as contained in Article 12 of the PPAs is available to the Petitioners.

95. Now we deal with the issue of *'the need to evolve a suitable mechanism for compensation'*. As per discussion above, the Commission has already held that the imposition of the 'Safeguard Duty' is an event covered as 'Change in law' as contained under Article 12 of the PPAs. The immediate question before the Commission is what should be the basis of the calculation of the compensation? The Commission observes that as per the Notification No. 01/2018-Customs (SG) New Delhi dated 30.07.2018, safeguard duty is payable on Solar Cells whether or not assembled in modules or panels. The Petitioners have claimed increase of the project cost due to increase in cost of modules in the range of 7.12~9.58%. However, the Commission observes that in the instant petitions, the tariff has been discovered under transparent bidding process in accordance with the NSM guidelines issued by the Central Government. In the Competitive Bidding Scenario, the SPDs bid levellised tariff without disclosing the details of the calculations of the project cost including capital expenditure. The design of the bid levellised tariff is solely a decision of the SPDs. Therefore, the Commission cannot rely on the figures provided by the Petitioners in the Petitions. As such the actual amount of the 'Safeguard Duty' imposed by the competent authority and paid by the Petitioners needs to be compensated.



96. Accordingly, the Commission directs the Petitioners to make available to the Respondents all relevant documents exhibiting clear and one to one correlation between the projects and the supply of imported goods, duly supported by relevant invoices and Auditor's Certificate. The Respondents are further directed to reconcile the claims for 'Change in Law' on receipt of the relevant documents and pay the amount so claimed to the Petitioners. The Commission is of the view that the compensation on account of imposition of 'Safeguard Duty' w.e.f. 30.07.2018 should be discharged by the Petitioners and the Respondents as one-time payment in a time bound manner within sixty days from the date of issue of this Order or from the date of submission of claims by the Petitioners, whichever is later, failing which it shall attract late payment surcharge in terms of the PPAs. Alternatively, the parties may mutually agree to a mechanism for the payment of such compensation on annuity basis spread over such period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs. This will obviate the hardship of the Respondents for one-time payment. It is pertinent to mention here that the Petitioners will submit the required documentation to the Respondent No.1 which will satisfy itself and submit the same along with its recommendations to the Respondent Discoms.
97. Now, the next point raised in the petitions is that 'the obligations and liabilities of SECI to the Petitioners are on a 'back to back' basis vis-à-vis the obligation to be performed and liabilities to be discharged by the relevant Respondents as the Buying Entities'.
98. The Commission observes that the PPAs, inter alia, provide as under:

*In Petition No. 356/MP/2018:*

*"F. SECI has agreed to purchase such Solar Power from SPD as an Intermediary Procurer and sell it to Buying Utilities on back to back basis as per the provisions of the NSM."*

*In Petition No. 51/MP/2019:*

*"F. SECI has agreed to purchase such Solar Power from SPD as an Intermediary Procurer and sell it to Buying Utilities on back to back basis as per the provisions of the above state scheme, accordingly, SECI has agreed sign/has signed a Power Sale*

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*Agreement with the Buying Entity(ies) to sell such power as per the provisions of the above said scheme.”*

99. 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 the 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 is 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).”

100. 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 generators and the Respondents which are the Discoms and the ultimate beneficiaries of the PPA as well as parties to the PSA. The back to back nature of the PPA and PSA implies that the Respondent Discoms are liable to pay to the Respondent SECI all that the said Respondent SECI has to pay to the Petitioners. However, in so far as payment mechanism is considered, the issue raised for decision of the Commission is as to whether in view of the back to back nature of PPA and PSA, SECI was liable to pay to the Petitioners only when/if the Respondent Discoms make payment to the Respondent SECI. In this context, the Commission notes the Provisions of Article 10 of PPA and Article 6 of PSA.

101. Article 10 of the PPAs stipulates that:

- “
- 10 ARTICLE 10: BILLING AND PAYMENT*
- 10.1 General*
- 10.1.1 Subject to the funds being made available by MNRE, SECI shall set up a payment security mechanism in order to ensure timely payment to the developers. This fund will have a corpus to cover 3 months payment.*
- 10.1.2 From the commencement of supply of power, SECI shall pay to the SPD the monthly Tariff Payments subject to the adjustments as per provisions of this Agreement including Article 6, in accordance with this Article and Article 9. All Tariff Payments by SECI shall be in Indian Rupees.*
- 10.1.3 For the purpose of payment of the bills raised by the SPD(s), in case Energy Account is published on cumulative basis, payment to the SPD(s) for the energy delivered shall be apportioned based on JMR taken for the SPD's Project at the Solar Park substation.*
- 10.1.3 The SPD shall be required to make arrangements and payments for import of energy (if any) as per applicable regulations.*
- 10.2 Delivery and Content of Monthly Bills/Supplementary Bills*
- 10.2.1 The SPD shall issue to SECI a signed Monthly Bill/Supplementary Bill for the immediately preceding Month, along with all relevant documents (Payments made by SPD for drawl of power, payment of reactive energy charges, Metering charges or any other charges as per guidelines of SERC/CERC, if any. Each Monthly Bill shall include all charges as per this Agreement for the energy supplied for the relevant Month based on Energy Accounts issued by RLDC/SLDC or any other competent authority which shall be binding on both the Parties. The Monthly Bill amount shall be the product of the energy as per the Energy Account and the applicable Tariff.*
- 10.3 Payment of Monthly Bills*
- 10.3.1 SECI shall pay the amount payable under the Monthly Bill/Supplementary Bill*
-

by the Due Date to such account of the SPD, as shall have been previously notified by the SPD in accordance with Article 10.3.2 (iii) below.

10.3.2 All payments required to be made under this Agreement shall also include any deduction or set off for:

- i) deductions required by the Law; and
- ii) amounts claimed by SECI, if any, on account of amounts payable by SECI under applicable regulations, and/or damages/additional dues payable to the Buying Utility, on account of non-fulfilment of generation obligation by the SPD in terms of Article 4.4.1, shall be recovered from the SPD, through deductions in the payments made by SECI against the invoice raised by the SPD
- iii) The SPD shall open a bank account (the "SPD's Designated Account") for all Tariff Payments (including Supplementary Bills) to be made by SECI to the SPD, and notify SECI of the details of such account at least ninety (90) Days before the dispatch of the first Monthly Bill. SECI shall also designate a bank account at New Delhi for payments to be made by the SPD to SECI, if any, and notify the SPD of the details of such account ninety (90) Days before the Scheduled Commissioning Date. SECI and the SPD shall instruct their respective bankers to make all payments under this Agreement to the SPD's Designated Account or SECI's Designated Account, as the case may be, and shall notify either Party of such instructions on the same day.

#### 10.3.3 Late Payment Surcharge

In the event of delay in payment of a Monthly Bill by SECI beyond thirty (30) days of its Due Date, a Late Payment Surcharge shall be payable to the SPD at the rate of 1.25% per month on the outstanding amount calculated on a day to day basis subject to such late payment is duly received by SECI under the PSA from its Buying Utilities. The Late Payment Surcharge shall be claimed by the SPD through the Supplementary Bill.

10.3.4 In the event of early Commissioning of the Project subject to acceptance by SECI, the payment for the power fed to the grid will be accounted from the date of UCOD, but SPD would be allowed to raise Bills against such power only from the Scheduled Commissioning Date or UCOD whichever is later subject to the conditions as stipulated in Article 9.

10.3.5 For payment of any Bill on or before Due Date, the following Rebate shall be paid by the SPD to SECI in the following manner.

- a. A rebate of 2% shall be payable to the SECI for the payments made within a period of 10 days of the presentation of hard copy of Bill along with required supporting documents at SECI office.
- b. Any payments made beyond a period of 10 days of the date of presentation of hard copy of Bill along with required supporting documents at SECI office up to the due date shall be allowed a rebate of 1%.



- c. *For the above purpose, the date of presentation of Bill shall be the next Business Day of delivery of the physical copy of the Bill at SECI.*
- d. *No rebate shall be payable on the Bills raised on account of taxes, duties, cess etc.”*

102. Further, Article 6 of the PSA stipulates as under: -

**“ARTICLE 6: BILLING AND PAYMENT**

**6.1 General**

6.1.1 *From the commencement of supply of power by SECI, the Buying Utility shall pay to SECI the monthly Tariff Payments, on or before the Due Date, in accordance with Tariff as specified in Article 5. All Tariff Payments by the Buying Utility shall be in Indian Rupees.*

**6.2 Delivery and Content of Monthly Bills**

6.2.1 *SECI shall issue to the Buying Utility a signed Monthly Bill on the 1<sup>st</sup> Business Day of the next Month.*

6.2.2 *The Monthly Bill prepared as detailed in Schedule-3 of the PSA. shall include the following;*

- (i) *Provisional Bill for Solar Power Supplied in the immediately preceding Month;*
- (ii) *Adjustments against the Provisional Bill(s) based on Energy Accounts for the Solar Power Supplied in the Month(s) preceding to the previous month(s);*
- (iii) *Any other adjustments to cover open access related charges and any other prior-period adjustments;*
- (iv) *Late Payment Surcharge, if any; and*
- (v) *Taxes, Duties, Levies etc. as applicable.*

**6.3 Payment of Monthly Bills**

6.3.1 *The Buying Utility shall pay the amount payable under the Monthly Bill on the Due Date to such account of SECI, as shall have been previously notified to the Buying Utility in accordance with Article 6.3.2 below.*

6.3.2 *SECI shall open a bank account at New Delhi (“SECI’s Designated Account”) for all Tariff Payments to be made by the Buying Utility to SECI. and notify the Buying Utility of the details of such account at least ninety (90) Days before the dispatch of the first Monthly Bill. The Buying Utility shall also designate a bank account at (insert the place] (the “Buying Utility’s Designated Account”) for payments to be made by SECI to the Buying Utility, if any, and notify SECI of the details of such account ninety (90) Days before the dispatch of the first Monthly Bill. SECI and the Buying Utility shall instruct their respective bankers to make all payments under this Agreement to the Buying Utility’s Designated Account or SECI’s Designated Account, as the case may be and shall notify either Party of such instructions on the same day.*

### **6.3.3 Late Payment Surcharge**

*In the event of delay in payment of a Monthly Bill by the Buying Utility, beyond its Due Date, a Late Payment Surcharge shall be payable by the Buying Utility to SECI at the rate of 1.25% per month on the outstanding amount calculated on a day to day basis. The Late Payment Surcharge shall be claimed by SECI through the next Monthly Bill.”*

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



similar cases in which the Commission has already allowed “Safeguard Duty Notification” as ‘Change in law’ under Article 12 of the PPAs.

104. The issue is decided accordingly.

***Issue No. 3: Whether in view of the “Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects” dated 03.08.2017 the Petitioners may be restored to the same economic condition prior to occurrence of the Change in Law through suitable mechanism as prayed for in the present Petitions***

***AND***

***Issue No. 4: Whether the claim of Petitioners regarding interest on Working Capital, Return of Equity and ‘Carrying Cost’ for delay in reimbursement by the Respondents is sustainable?***

105. Since Issue No. 3 and Issue No. 4 are interrelated, the same are taken for discussion together. The Petitioners have submitted that ‘Tariff Guidelines’ provide for restitution to the same financial position and in case there is any deviation from these Guidelines, the same is to be approved by the Appropriate Commission. ***Per Contra***, the Respondent No. 1 has submitted that the provisions of the PPAs have become final and binding on the parties, the PPA therefore governs the contractual rights and obligations. The PPAs do not have any clause regarding restitution to the same financial position.

106. The Commission observes that the amended Clause 11.0 of the RfS stipulates as under:

*“Guidelines for implementation of the RfS*

*11.0 This RfS document has been prepared based on the “Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects” issued by Ministry of Power vide Gazette Resolution dated 03.08.2017. These guidelines and their elaborations/ clarifications form the basis for selection of new Projects under this RfS. In case of any difference in interpretation between this tender document and said guidelines, the matter shall be referred to MNRE and the decision of MNRE shall be final and binding on Bidder/ SPD and SECI.”*

107. The Commission observes that ‘The Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid connected Solar PV Power Projects’ dated 03.08.2017 issued by MNRE in regard to the Change in Law provides, inter alia, as under:

*“5.7. CHANGE IN LAW*

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

*5.7.2. In these Guidelines, the term Change in Law shall refer to the occurrence of any of the following events after the last date of the bid submission, including (i) the enactment of any new law; or (ii) an amendment, modification or repeal of an existing law; or (iii) the requirement to obtain a new consent, permit or license; or (iv) any modification to the prevailing conditions prescribed for obtaining an consent, permit or license, not owing to any default of the Solar Power Generator; or (v) any change in the rates of any Taxes which have a direct effect on the Project. However, Change in Law shall not include any change in taxes on corporate income or any change in any withholding tax on income or dividends.”*

*18. DEVIATION FROM PROCESS DEFINED IN THE GUIDELINES*

*In case there is any deviation from these Guidelines and/or the SBDs, the same shall be subject to approval by the Appropriate Commission. The Appropriate Commission shall approve or require modification to the bid documents within a reasonable time not exceeding 90 (ninety) days.”*

108. From the above the Commission observes that the Tariff Guidelines provide for placing the SPD in the same financial position as if it would have been, had it not been for the occurrence of the Change in Law. Further, in case there is any deviation from these Guidelines and/or the Standard bid documents (SBDs), the same shall be subject to approval by the Appropriate Commission. The Commission notes that the draft PPAs were uploaded with the respective RfS on 21.06.2017 and 30.01.2018 in Petition No. 356/MP/2018 and 51/MP/2019 respectively whereas the PPAs were executed on 27.04.2018 and 31.10.2018 in Petition No. 356/MP/2018 and 51/MP/2019 respectively. In case of any difference in interpretation or discrepancy the matter could be referred to MNRE and resolved before executing of PPAs. Even the matter could have resolved at the time of adoption of PPAs or thereafter by undertaking judicial recourse. Further, the Petitioners have neither approached the

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Commission for the alignment of the PPAs with the ‘Tariff Guidelines’ nor there is a prayer in the petitions to this effect. However, the Petitioners executed the PPAs with the Respondent No.1 (SECI). The Petitioners did not raise any objection to the scope of the provisions contained in the PPAs being not consistent with the Guidelines prior to or at the time of execution of the PPA. In view of the above, the provisions of the PPAs have become final and binding the contracting parties. The PPAs do not contain any provisions relating to economic restitution. In view of the above, the Commission does not consider it appropriate to consider the issue of restitution. Hence, the Commission decides to proceed with the matter taking into consideration only the PPAs as presented before it.

109. The Commission observes that in the judgment of the APTEL dated 13.04.2018 in Appeal No. 210 of 2017 in Adani Power Limited v. Central Electricity Regulatory Commission and Ors., it was held that since Gujarat Bid-01 PPA has 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.”*

110. The Commission further observes that in the Judgment of APTEL dated 14.08.2018 in Appeal No. 111 of 2017 in M/s. GMR Warora Energy Limited v. Central Electricity Regulatory Commission and Ors., it was held that if there is a provision in the PPAs for restoration of the Sellers to the same economic position as if no Change in Law event has occurred, the Sellers are eligible for carrying cost for such allowed Change in Law event(s)

from the effective date of Change in Law event until the same is allowed by the appropriate authority by an order/ judgment. In the present case, there is no provision in the PPAs either for carrying cost or restitution. The relevant extract from the decision in GMR Warora case on the aspect of carrying cost reads as under:

*“ix. In the present case we observe that from the effective date of Change in Law the Appellant is subjected to incur additional expenses in the form of arranging for working capital to cater the requirement of impact of Change in Law event in addition to the expenses made due to Change in Law. As per the provisions of the PPA the Appellant is required to make application before the Central Commission for approval of the Change in Law and its consequences. There is always time lag between the happening of Change in Law event till its approval by the Central Commission and this time lag may be substantial. As pointed out by the Central Commission that the Appellant is only eligible for surcharge if the payment is not made in time by the Respondents Nos. 2 to 4 after raising of the supplementary bill arising out of approved Change in Law event and in PPA there is no compensation mechanism for payment of interest or carrying cost for the period from when Change in Law becomes operational till the date of its approval by the Central Commission. We also observe that this Tribunal in SLS case after considering time value of the money has held that in case of re-determination of tariff the interest by a way of compensation is payable for the period for which tariff is re-determined till the date of such re-determination of the tariff. In the present case after perusal of the PPAs we find that the impact of Change in Law event is to be passed on to the Respondents Nos. 2 to 4 by way of tariff adjustment payment as per Article 13.4 of the PPA. The relevant extract is reproduced below:*

*13.4 Tariff Adjustment Payment on account of Change in Law 13.4.1 Subject to Article 13.2 the adjustment in Monthly Tariff Payment shall be effective from:  
the date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law; or  
the date of order/ judgment of the Competent Court or tribunal or Indian Government instrumentality, if the Change in Law is on account of a change in interpretation of Law. (c) the date of impact resulting from the occurrence of Article 13.1.1.*

*From the above it can be seen that the impact of Change in Law is to be done in the form of adjustment to the tariff. To our mind such adjustment in the tariff is nothing less than re-determination of the existing tariff.*

*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 judgment*

*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.*

*This Tribunal vide above judgment has decided that if there is a provision in the PPA for restoration of the Seller to the same economic position as if no Change in Law event has occurred, the Seller is eligible for carrying cost for such allowed Change in Law event (s) from the effective date of Change in Law event until the same is allowed by the appropriate authority by an order/ judgment.”*

111. The Commission observes that since the PPAs do not have a provision dealing with restitution principles of restoration to same economic position therefore, the claim regarding separate ‘Interest on Working Capital/ Return of Equity’/Carrying Cost’ is not admissible.

112. Our decisions in this Order are summed up as under:

- a. **Issue No. 1 and Issue No.2 :** The imposition of the ‘Safeguard Duty’ vide Notification No. 1/2018 (SG) dated 30.07.2018 is squarely covered as the event classified as ‘Change in Law’ under Article 17 of the PPAs. The Commission directs the Petitioners to make available to the Respondents all relevant documents exhibiting clear and one to one correlation between the projects and the supply of imported goods, duly supported by relevant invoices and Auditor’s Certificate as discussed in para 96 above. The Respondent SECI is liable to pay to the Petitioners which is not conditional upon the payment to be made by the Respondent Discoms to Respondent SECI. However, the Respondent SECI is eligible to claim the same from the Respondent Discoms on ‘back to back’ basis as discussed in para 103 above. The Claim based on discussions in para 96 above of this Order 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 PPAs/PSAs. Alternatively, the Petitioner and the Respondents may mutually agree to a mechanism for payment of such compensation on annuity basis spread over the period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs.

b. **Issue No. 3 and Issue No. 4** : The claim regarding separate 'Interest on Working Capital/Return of Equity'/'Carrying Cost' is not admissible.

113. Accordingly, the Petition No. 356/MP/2018 and Petition No. 51/MP/2019 are disposed of.

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