



नई दिल्ली  
NEW DELHI

याचिका संख्या./ Petition No.:

536/MP/2020 along with IA No. 71/2020, IA No. 73/2020 and IA No. 2/2021

158/MP/2020 along with IA No. 35/2020  
373/MP/2020

454/MP/2019 along with IA No. 19/2020

457/MP/2019 along with IA No. 18/2020

500/MP/2019 along with IA No. 20/2020

कोरम/ Coram:

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

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

श्री अरुण गोयल, सदस्य/ Shri Arun Goyal, Member

श्री पी. के. सिंह, सदस्य / Shri P. K. Singh, Member

आदेश दिनांक/ Date of Order: 20<sup>th</sup> of August, 2021

**IN THE MATTER OF:**

Petition under Section 79(1) of the Electricity Act, 2003 read with Regulation 111 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 for clarification and modification of the GST/ Safeguard Duty Orders, issuance of directions to the Buying utilities/ Distribution Utilities for immediate payment and application of the orders commonly to all the similar placed project developers and Buying Utilities/ Distribution Companies.

**And in the matter of Petition No. 536/MP/2020**

Solar Energy Corporation of India Limited,

D-3, 1st Floor, Wing-A, Prius Platinum Building,  
District Centre, Saket,  
New Delhi-110017

**...Petitioner**

**VERSUS**

1. M/s Azure Power Venus Private Limited,  
Through its Managing Director,  
Asset No. 301 -4, World Park 3,  
Aerocity, New Delhi-110017  
[Petitioner in Petition No. 52/MP/2018]
2. ACME Bhiwadi Solar Power Private Limited,  
Through its Managing Director,  
Plot No. - 152, Sector - 4,  
Gurugram – 122022, Haryana  
[Petitioner in Petition No. 188/MP/2017 along with I.A. No. 30/2018]
3. ACME Karnal Solar Power Private Limited,  
Through its Managing Director,  
Plot No. - 152, Sector - 44,  
Gurugram – 122022, Haryana  
[Petitioner in Petition No. 189/MP/2017 alongwith I.A. No. 31/2018]
4. ACME Hisar Solar Power Private Limited,  
Through its Managing Director,  
Plot No. - 152, Sector - 44,  
Gurugram – 122022, Haryana  
[Petitioner in Petition No. 190/MP/2017 alongwith I.A. No. 32/2018]
5. ACME Kaithal Solar Power Private limited,  
Through its Managing Director,  
Plot No. - 152, Sector - 44,  
Gurugram – 122022, Haryana  
[Petitioner in Petition No. 201/MP/2017 alongwith I.A. No. 33/2018]
6. ACME Koppal Solar Power Private limited,  
Through its Managing Director,  
Plot No. - 152, Sector - 44,  
Gurugram – 122022, Haryana  
[Petitioner in Petition No. 202/MP/2017 alongwith I.A. No. 35/2018]
7. ACME Vijayapura Solar Power Private Limited,  
Through its Managing Director,  
Plot No. - 152, Sector - 44,  
Gurugram – 122022, Haryana

[Petitioner in Petition No.203/MP/2017 alongwith I.A. No. 36/2018]

8. ACME Babadham Solar Power Private Limited,  
Through its Managing Director,  
Plot No. - 152, Sector - 44,  
Gurugram – 122022, Haryana  
[Petitioner in Petition No. 204/MP/2017 alongwith I.A. No. 37/2018]
9. Azure Power Thirty-Six Private Limited,  
Through its Managing Director,  
Asset No. 301-4, World Mark 3,  
Aerocity, New Delhi -110017  
[Petitioner in Petition No. 47/MP/2018]
10. Phelan Energy India RJ Pvt. Limited,  
Through its Managing Director,  
1st Floor, A3/12, Sultanpuri  
[Petitioner in Petition No. 192/MP/2018]
11. ACME Rewa Solar Energy Private Limited,  
Through its Managing Director,  
Plot No.152, Sector - 44,  
Gurugram - 122002, Haryana (India)  
[Petitioner in Petition No.189/MP/2018; Petition No. 342/MP/2018]
12. ACME Jodhpur Solar Power Private Limited,  
Through its authorized signatory,  
Plot No.152, Sector - 44,  
Gurugram - 122002, Haryana (India)  
[Petitioner in Petition No.178/MP/2018 and Petition No. 343/MP/2018]
13. Parampujya Solar Energy Pvt. Ltd. (PSEPL),  
Through its Managing Director,  
5B, Sambhav House, Judges,  
Bungalow Road, Bodakdev,  
Ahmedabad - 380015, Gujarat  
[Petitioner in Petition No. 212/MP/2018 along with I.A. 8 of 2019; 165/MP/2018 along with I.A. 6 of 2019; 4/MP/2019]
14. Wardha Solar (Maharashtra) Private Ltd. (WSMPL),  
Through its Managing Director,  
Adani House, Nr. Mithakhali Six Roads Navrangpura,  
Ahmedabad 380 009, Gujarat, India  
[Petitioner in Petition No. 207/MP/2018 along with I.A. 1 of 2019; 210/MP/2018 along with I.A. 3 of 2019; 352/MP/2018, 355/MP/2018; 358/MP/2018; 359/MP/2018; 388 /MP/2018]
15. Renew Solar Power Private Limited,

Through its Managing Director,  
138, Ansal Chambers II, Bhikaji Cama Place,  
New Delhi - 110066  
[Petitioner in Petition No. 14/MP/2019]

16. Phelan Energy India RJ Pvt. Limited,  
Through its Managing Director,  
435 Regus Centre, 4th floor, Rectangle 1 Building,  
Saket District Centre, New Delhi - 110017  
[Petitioner in Petition No. 192/MP/2018; 69/MP/2019]
17. Clean Sustainable Energy Private Limited,  
Through its Managing Director,  
Hubtown Solaris, 4th Floor, 406 N.S. Phadke Marg,  
Mumbai-400069  
[Petitioner in Petition No. 27/MP/2019; 67/MP/2019]
18. Fermi Solar farms Private Limited,  
Through its Managing Director,  
M-4, Ground II level-1, South Extension Part-II,  
New Delhi - 110019  
[Petitioner in 68/MP/2019]
19. Mahoba Solar (UP) Private Limited Adani House,  
Through its Managing Director,  
Near Mithakhali, Six Roads, Navrangpura,  
Ahmedabad - 380009  
[Petitioner in Petition No. 13/MP/2019]
20. Azure Power India Private Limited,  
Through its Managing Director,  
3rd Floor, Asset 301, 304 and 307,  
World mark 3, Aerocity,  
New Delhi - 110037  
[Petitioner in Petition No. 356/MP/2018]
21. Azure Power Forty-Three Private Limited,  
Through its Managing Director,  
3rd Floor, Asset 301, 304 and 307, World Mark 3, Aerocity,  
New Delhi - 110037  
[Petitioner in Petition No. 51/MP/2019]
22. Clean Solar Power (Gulbarga) Private Limited,  
Through its Managing Director,  
201, Third Floor, Okhla Industrial Estate, Phase III,  
New Delhi - 110020

[Petitioner in Petition No. 127/MP/2019, 129/MP/2019, 130/MP/2019, 134/MP/2019 & 135/MP/2019]

23. Sadipali Solar Private Limited,  
Through its Managing Director,  
614, B Wing, 215 Atrium,  
Andheri Kurla Road, Andheri East,  
Mumbai - 400069  
[Petitioner in Petition No. 299/MP/2019]
24. Jyoti Solar Solutions Private Limited,  
Through its Managing Director,  
Represented by its Authorized Signatory,  
N-V 25, Nayapalli, Bhubaneswar,  
Odisha - 751015  
[Petitioner in Petition No. 360/MP/2019]
25. Solar Edge Power and Energy Private Limited,  
Through Authorized Representatives,  
SP Center, 41/44 Minoo Desai Marg, Colaba,  
Mumbai - 400005  
[Petitioner in Petition No.70/MP/2019]
26. Rattan India Solar 2 Private Limited,  
Through its Managing Director,  
101, 1st Floor, Naurang Bhawan,  
21, Kasturba Gandhi Marg,  
New Delhi - 110001  
[Petitioner in Petition No.70/MP/2019]
27. Talettutayi Solar Projects One Pvt. Limited,  
Represented by its Authorized Signatory,  
Unit No. 001, DF, Tower-C, Ultra tech Cyber Park,  
Sector 39, Gurugram,  
Haryana - 122001  
[Petitioner in Petition No.45/MP/2019]
28. JBM Solar Energy Maharashtra Private Limited,  
Through its Managing Director,  
Neel House, Lado Sarai,  
Khasra No. 172, Opp. Qutub Minar,  
New Delhi - 110017  
[Petitioner in Petition No.177/MP/2019 and 178/MP/2019]
29. Solitaire Powertech Private Limited,  
Through its Managing Director,  
616 A, 16A, 6th Floor Devika Tower, Nehru Place,  
New Delhi- 11 0019

[Petitioner in Petition No.52/MP/2019]

30. SB Energy Four Private Limited,  
Through its Authorized Signatory,  
435 Regus Centre, 4th Floor,  
Rectangle 1 Building, Saket District Centre,  
New Delhi-110017  
[Petitioner in Petition No.373/MP/2019]
31. SB Energy Three Private Limited,  
Through its Managing Director,  
1st Floor, Worldmark-2, Asset Area-B,  
Hospitality District, Aerocity, NH - 8,  
New Delhi - 110037  
[Petitioner in Petition No.72/MP/2020]
32. SB Energy One Private Limited,  
Through its Managing Director,  
1st Floor, Worldmark-2, Asset Area-S,  
Hospitality District, Aerocity, NH - 8,  
New Delhi - 110037  
[Petitioner in Petition No. 73/MP/2020]
33. Clean Solar Power (Bhadla) Private Limited,  
Through Managing Director,  
Plot No.Z01, First Floor,  
Okhla Industrial Estate, Phase - III,  
New Delhi - 110020  
[Petitioner in Petition No.181/MP/2020]
34. Tata Power Renewable Energy Private Limited,  
Through Managing Director,  
Corporate Centre A,  
34 Sant Tukaram Road, Carnac 6under, Mumbai,  
Maharashtra 400009  
[Petitioner in Petition No.179/MP/2020]
35. Southern Power Distribution Company of Andhra Pradesh Limited,  
Through its Managing Director,  
Kesavayanagunta, Tiruchanoor Road, Tirupati,  
Andhra Pradesh 517 501
36. Eastern Power Distribution Company of Andhra Pradesh Limited,  
Through its Managing Director,  
P & T Colony, Seetamma Dhara  
Vishakhapatnam - 503 013

[Respondents in Petition No.188/MP/2017 alongwith I.A. No.30/2018; 189/MP/2017 alongwith I.A. No. 31/2018; 190/MP/2017 alongwith I.A. No. 32/2018, 47/MP/2018; 179/MP/2020]

37. Bangalore Electricity Company Limited,  
Through its Managing Director,  
Pardigm Plaza, A.B. Shetty Circle,  
Pandeshwar, Mangalore - 575 001
38. Mangalore Electricity Supply Company Limited,  
Through its Managing Director,  
Corporate Office, Krishna Rajendra Nagar,  
Bangalore - 560 001
39. Chamundeshwari Electricity Supply Corporation Limited,  
Through its Managing Director,  
No. 29, CESC Corporate Office,  
Hinkal, Vijaynagar, 2nd Stage,  
Mysuru - 570 017
40. Gulbarga Electricity Supply Company Limited,  
Through its Managing Director,  
Main Road, Gulbarga,  
Karnataka - 585102
41. Hubli Electricity Supply Company Ltd,  
Through its Managing Director,  
PB Road, Navanagar, Hubballi, Hubli,  
Karnataka - 580025  
[Respondents in Petition No. 201/MP/2017 along with I.A. No. 33/2018; 202/MP/2017 along with I.A. No. 35/2018; 203/MP/2017 along with I.A. No. 36/2018; Respondent in Petition No. 204/MP/2017 along with I.A. No. 37/2018; 207/MP/2018 along with I.A. 1 of 2019; 210/MP/2018 along with I.A. 3 of 2019; 352/MP/2018; 355/MP/2018, 358/MP/2018; 359/MP/2018, 388/MP/2018; 45/MP/2019; 52/MP/2019]
42. Maharashtra State Electricity Distribution Company Limited,  
Through its Managing Director,  
Hudco, Ekanth Nagar, N 11, Cidco, Aurangabad,  
Maharashtra - 431003  
[Respondent in Petition No. 212/MP/2018 along with I.A. 8 of 2019; 68/MP/2019; 70/MP/2019; 177/MP/2019; 178/MP/2019; Petition No.179/MP/2020]
43. Chhattisgarh State Power Distribution Company Limited,  
Through its Managing Director,  
Near Water Tank, Mowa Road,  
Dubey Colony, Mowa, Raipur,  
Chhattisgarh - 492001

[Respondent in Petition No.165/MP/2018 alongwith I.A. 6 of 2019]

44. Haryana Power Purchase Centre (HPPC),  
Through its Managing Director,  
Shakti Bhawan, Sector – 6  
Panchkula -134 108  
[Respondent in Petition No.185/MP/2018, 190/MP/2018, 51/MP/2019]
45. Rajasthan Urja Vikas Nigam Limited (RUVNL),  
Through its Managing Director,  
Vidyut Bhawan, Janpath,  
Jaipur-302005  
[Respondent in Petition No. 178/MP/2018; 189/MP/2018; 72/MP/2020, 73/MP/2020]
46. Jaipur Vidyut Vitran Nigam Limited,  
Through its Managing Director,  
Vidyut Bhawan, Jyoti Nagar,  
Jaipur - 302005, Rajasthan  
[Respondent in Petition No. 192/MP/2018; 67/MP/2019; 69/MP/2019; 27/MP/2019;  
342/MP/2018, 343/MP/2018]
47. Ajmer Vidyut Vitran Nigam Limited,  
Through Additional Chief Engineer (IT),  
Vidyut Bhawan, Panchsheel Nagar Makarwali Road,  
Ajmer - 305004, Rajasthan  
[Respondent in Petition No.192/MP/2018; 67/MP/2019; 69/MP/2019; 27/MP/2019;  
342/MP/2018; 343/MP/2018]
48. Jodhpur Vidyut Vitran Nigam Limited,  
Represented through Nodal officer, Superintending Engineer (IT),  
New Power House, Industrial Area,  
Jodhpur - 342003, Rajasthan  
[Respondent in Petition No.192/MP/2018; 67/MP/2019; 69/MP/2019, 27/MP/2019,  
342/MP/2018, 343/MP/2018]
49. Uttar Pradesh Power Corporation Limited,  
Shakti Bhawan, 14, Ashok Marg,  
Lucknow - 226001  
[Respondent in Petition No. 52/MP/2018; Petition No.14/MP/2019; Petition No.  
356/MP/2018; 211/MP/2019; 373/MP/2019; 181/MP/2020]
50. Jharkhand Bijli Vitran Nigam Limited,  
Through its Managing Director,  
Engineers Building, Dhurwa, Ranchi,  
Jharkhand  
[Petition No. 51/MP/2019]



51. Grid Corporation of Odisha,  
Through its Managing Director,  
Janpath, Bhoi Nagar, Bhubaneswar,  
Odisha - 751022  
[Respondent in Petition No. 51/MP/2019, 360/MP/2019 & 299/MP/2019]
52. BSES Yamuna Power Limited,  
Through its Managing Director,  
Shakti Kiran Building, Karkardooma,  
New Delhi -11 0017  
[Respondent in Petition No. 13/MP/2019]
53. Gujarat Urja Vikas Nigam Limited,  
Through its Managing Director,  
Sardar Patel Vidyut Bhawan,  
Race Course Circle,  
Vadodara - 390007  
[Respondent in Petition No. 179/MP/2020]

...Respondents

**IN THE MATTER OF:**

Clarification Petition under Section 79(1)(f) and Section 94 of the Electricity Act, 2003 and Regulation 111 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 read with Section 151 of Code of Civil Procedure seeking clarification of Order dated 05.02.2019 passed by this Commission in Petition No. 178/MP/2019 and Petition No. 189/MP/2018

**And in the matter of Petition No. 158/MP/2020**

1. ACME Jodhpur Solar Power Private Limited,  
Through its authorized signatory,  
Plot No. 152, Sector - 44,  
Gurgaon - 122002, Haryana
2. ACME Rewa Solar Energy Private Limited,  
Through its authorized signatory,  
Plot No. 152, Sector - 44,  
Gurgaon - 122002, Haryana

...Petitioners

**VERSUS**

1. Solar Energy Corporation of India Limited,  
Represented Through Director (Finance),  
D-3, First Floor, A wing, District Centre, Saket,

- New Delhi - 110017
2. M/s Rajasthan Urja Vikas Nigam Limited,  
Vidyut Bhawan, Janpath, Jyoti Nagar,  
Jaipur- 302005, Rajasthan

... Respondents

**IN THE MATTER OF:**

Petition filed under Section 79(1)(f) of the Electricity Act, 2003 seeking approval of Annuity model in terms of Central Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2017 for recovering Safeguard Duty Claim on account of Change in Law from M.P Power Management Company Limited and Delhi Metro Rail Corporation as per the Order dated 15.10.2019 passed by this Hon'ble Commission in Petition No. 19/MP/2019.

**And in the matter of Petition No. 373/MP/2020**

ACME Jaipur Solar Power Private Limited,  
Through its authorized signatory,  
B 4, Plot No. 12, Basement – 2,  
Gopi Nath Marg, Purohit ji ka Bagh, MI Road,  
Jaipur – 302001,  
Rajasthan, India.

...Petitioner

**VERSUS**

1. M.P Power Management Company Limited,  
Represented Through Chairman,  
Shakti Bhawan, Rampur,  
Jabalpur, Madhya Pradesh - 482008
2. Delhi Metro Rail Corporation,  
Represented Through Managing Director,  
Metro Bhawan, Fire Brigade Lane, Barakhamba Road,  
New Delhi – 11001
3. Rewa Ultra Mega Solar Limited,  
Represented through Chairman,  
Urja Bhawan, Link Road No. 2, Shivaji Nagar,  
Bhopal, Madhya Pradesh - 462003

...Respondents

**IN THE MATTER OF:**

Petition filed under Section 142 of the Electricity Act, 2003 for non-compliance of the Commission`s directions contained in Orders dated 09.10.2018.

**And in the matter of Petition No. 454/MP/2019**

1. ACME Kaithal Solar Power Private Limited,  
Registered office at Plot No. 152, Sector- 44,  
Gurgaon-122002, Haryana
2. ACME Koppal Solar Energy Private Limited,  
Registered office at Plot no. 152, Sector- 44,  
Gurgaon-122002, Haryana
3. ACME Vijayapura Solar Energy Private Limited,  
Registered office at Plot no. 152, Sector- 44,  
Gurgaon-122002, Haryana
4. ACME Babadham Solar Power Private Limited,  
Registered office at Plot no. 152, Sector- 44,  
Gurgaon-122002, Haryana

**...Petitioners**

**VERSUS**

1. Solar Energy Corporation of India,  
Through Managing Director,  
1st Floor, D-3, A Wing,  
Prius Platinum Building District Centre, Saket,  
New Delhi – 110017
2. Bangalore Electricity Company Limited,  
Pardigm Plaza, A.B. Shetty Circle, Pandeshwar,  
Mangalore- 575001
3. Mangalore Electricity Supply Company Limited,  
Corporate Office, Krishna Rajendra Nagar,  
Bangalore- 560001
4. Chamundeshwari Electricity Supply Corporation Limited,  
No. 29, CESC Corporate Office, Hinkal, Vijaynagar, 2<sup>nd</sup> Stage,  
Mysuru- 570017
5. Gulbarga Electricity Supply Company Limited,  
Main Road, Gulbarga- 585102
6. Hubli Electricity Supply Company Limited,

PB Road, Navnagar, Hubballi, Hubli,  
Karnataka- 580025

...Respondents

**And in the matter of Petition No. 457/MP/2019**

1. ACME Bhiwadi Solar Power Private Limited,  
Registered office at Plot no. 152, Sector- 44,  
Gurgaon-122002, Haryana
2. ACME Karnal Solar Power Private Limited,  
Registered office at Plot no. 152, Sector- 44,  
Gurgaon-122002, Haryana
3. ACME Hisar Solar Power Private Limited,  
Registered office at Plot no. 152, Sector- 44,  
Gurgaon-122002, Haryana

...Petitioners

**VERSUS**

1. Solar Energy Corporation of India,  
Through Managing Director,  
1st Floor, D-3, A Wing,  
Prius Platinum Building District Centre, Saket,  
New Delhi – 110017
2. Eastern Power Distribution Company of Andhra Pradesh Limited,  
P & T Colony, Seetamma Dhara,  
Vishakhapatnam-503 013
3. Southern Power Distribution Company of Andhra Pradesh Limited,  
Kesavayanagunta, Tiruchanoor Road, Tirupati,  
Andhra Pradesh- 517 501

...Respondents

**IN THE MATTER OF:**

Petition filed under Section 142 of the Electricity Act, 2003 for non-compliance of the Commission's directions contained in Order dated 02.05.2019.

**And in the matter of Petition No. 500/MP/2019**

1. ACME Rewa Solar Energy Private Limited,  
Registered office at Plot no. 152, Sector- 44,  
Gurugram-122002, Haryana
2. ACME Jodhpur Solar Power Private Limited,

Registered office at Plot no. 152, Sector- 44,  
Gurgaon-122002, Haryana

...Petitioners

**VERSUS**

1. Solar Energy Corporation of India,  
Through Managing Director,  
1st Floor, D-3, A Wing,  
Prius Platinum Building District Centre, Saket,  
New Delhi – 110017
2. Jaipur Vidyut Vitran Nigam Limited,  
Represented through Suprintending Engineer (IT),  
Vidyut Bhawan, Jyoti Nagar,  
Jaipur-302005
3. Ajmer Vidyut Vitran Nigam Limited,  
Represented through Additional Chief Engineer (IT),  
Vidyut Bhawan, Panchsheel Nagar Makarwali Road,  
Ajmer- 305004, Rajasthan
4. Jodhpur Vidyut Vitran Nigam Limited,  
Represented through Nodal Officer,  
Superintending Engineer (IT)  
New Power House, Industrial Area.  
Jodhpur- 342003, Rajasthan

...Respondents

**Parties Present:** Shri M. G. Ramachandran, Sr. Advocate, SECI  
Ms. Tanya Sareen, Advocate, SECI  
Ms. Poorva Saigal, Advocate, SECI  
Ms. Shrishti Khindaria, Advocate, SECI  
Shri Hemant Sahai, Advocate, ACME, Clean Solar, Solitaire, SB  
Energy Three & Four, SBG Cleantech  
Shri Shreshth Sharma, Advocate, ACME, Clean Solar, Solitaire, SB  
Energy Three & Four, SBG Cleantech  
Ms. Jyotsna Khatri, Advocate, ACME, Clean Solar, Solitaire, SB  
Energy Three & Four, SBG Cleantech  
Shri Rahul Jajoo, Advocate, Tata Power Renewable  
Shri Anand Ganesan, Advocate, Rajasthan Discoms  
Ms. Swapna Seshadri, Advocate, Rajasthan Discoms  
Shri Ashwin Ramanathan, Advocate, Rajasthan Discoms  
Shri Shashwat Kumar, Advocate, Azure Power Venus  
Shri Rahul Chouhan, Advocate, Azure Power Venus

Shri Naman Mittal, Advocate, Azure Power Venus  
Shri Sujit Ghosh, Advocate, SBEFPL  
Ms. Mannat Waraich, Advocate, SBEFPL  
Ms. Pratiksha Chaturvedi, Advocate, SBEFPL  
Shri Sumant Nayak, Advocate, CSEPL  
Shri Samiron Borkataky, Advocate, CSEPL  
Ms. Shradhha Chaudhri, Advocate, CSEPL  
Shri Paramhans Sahani, Advocate, MPPMCL  
Shri V. Bhardwaj, Advocate, MPPMCL  
Shri Tarun Johri, Advocate, DMRC  
Shri Ajay Kumar Sinha, SECI  
Shri Uday Pavan Kumar Kruthiventi, SECI  
Shri Abhinav Kumar, SECI  
Shri Amit Gupta, ACME  
Ms. Meghna Chandra, ACME  
Shri Sanjay V Kute, DMRC  
Shri Harsh Arya, DMRC

### **आदेश/ ORDER**

Solar Energy Corporation of India Limited (SECI), the Petitioner in Petition No. 536/MP/2020 is designated as the nodal agency for implementation of Ministry of New and Renewable Energy (MNRE) schemes for developing grid connected solar power capacity in the country. SECI has been functioning as the implementing agency for the Jawaharlal Nehru National Solar mission (JNNSM) for development, promotion and commercialization of the solar energy technology in the country. The Petitioner has sought clarification and modification of the GST/ Safeguard Duty Orders and issuance of directions to the Buying utilities/ Distribution Utilities for immediate payment and application of the order commonly to all the similarly placed project developers and Buying utilities/ Distribution Companies. Further, the Petitioners in Petition No. 158/MP/2020 have filed clarification petition seeking clarification of Order dated 05.02.2019 passed by this Commission in Petition No. 178/MP/2019 and Petition No. 189/MP/2018. The Petitioner in Petition No. 373/MP/2020 has prayed for recovering Safeguard Duty on account of 'Change in Law' from the Respondents (M.P Power Management Company Limited and Delhi Metro Rail Corporation) as per the Commission's Order dated 15.10.2019 in Petition No. 19/MP/2019. Since all the above petitions are similar in nature/ cross-petitions, they have been tagged together.

2. Further, the Petitioners in Petition No. 454/MP/2019, Petition No. 457/MP/2019 and Petition No. 500/MP/2019 have filed for initiation of proceedings under Section 142 of the Act for non-compliance of the Commission`s directions in its various Orders dated 09.10.2018 and 02.05.2019. These petitions were also tagged along with the instant petitions on the request of the parties during the hearing held on 07.07.2020.
3. The Respondents 1 to 34 in Petition No. 536/MP/2020 are the Solar Power Developers (SPDs) who have agreed to establish solar power projects and generate and supply electricity to SECI under the Power Purchase Agreements (‘PPAs’) for SECI to resell the same to the Buying utilities/ Distribution companies on a back-to-back basis under the respective Power Sale Agreements (‘PSAs’).
4. The Respondents 35 to 53 in Petition No. 536/MP/2020 are the Buying utilities/ Distribution companies who have agreed to purchase solar power from SECI under their respective PSAs as procured by SECI from the SPDs under the PPAs.
5. In Petition No. 373/MP/2020, the Respondent No. 1, MP Power Management Company Limited (MPPMCL) is the holding company of the three Discoms in Madhya Pradesh whereas the Respondent No. 2, Delhi Metro Rail Corporation (DMRC) is a company implementing construction and operation of a mass metro rapid transport system in the NCT of Delhi. The Respondent No. 3, Rewa Ultra Mega Solar Limited (RUMSL) is a joint venture company between SECI and Madhya Pradesh Urja Vikas Nigam Limited to facilitate the development of large scale solar projects.
6. The Petitioners have made the following prayers in different petitions:

**In Petition No. 536/MP/2020[SECI]**

- a) *Approve the annuity methodology provided in the present Petition.*
- b) *Direct payment of the amount determined and evaluated as impact of Change in Law by SECI on account of GST and Safeguard Duty on the annuity basis as per the*

*methodology provided in the present Petition to obviate hardship of SECI and the Buying utilities/Distribution Companies for making payment on one time lumpsum basis;*

- c) Direct Buying Utilities / Distribution Companies to comply with the order passed by this Commission and forthwith release the amount towards the evaluated and reconciled claims of SPDs pertaining the GST and Safeguard Duty as communicated by SECI and provided in Annexure D on annuity basis or lump sum basis along with the applicable late payment surcharge in terms of the orders passed by the Commission;*
- d) Clarify the cut-off date for payment of GST/Safeguard Duty claims in respect of orders passed by this Commission as set out in Table-1 hereinabove and in case of Petitions which are pending before this Commission;*
- e) Apply the principles decided in this Petition to all the current Petitions pertaining to GST and Safeguard Duty pending before this Commission;*
- f) Pass such further order or orders as this Commission may deem just and proper in the circumstances of the case.*

***I.A. No. 71 of 2020 [SECI]***

- a) Allow the present Application and direct the Petitioner SECI to forthwith release the payments towards the safeguard duty claims as reconciled and agreed with the Applicant herein in terms of the interim arrangement agreed and recorded in SECI's letter dated 07.10.2020, 09.10.2020 and Applicant's letter dated 14.10.2010 as an interim measure during the pendency of the present Petition; and/or*
- b) Pass any such other and further reliefs as this Commission deems just and proper in the nature and circumstances of the present case*

***I.A. No. 73 of 2020 [SECI]***

- a) Allow the present application;*
- b) Issue appropriate order(s)/direction(s) to allow Applicant – M/s SBG Cleantech Projectco Five Private Limited, as a party respondent in the array of respondents and accordingly direct Solar Energy Corporation of India to amend the Memo of Parties;*
- c) Allow the Applicant - M/s SBG Cleantech Projectco Five Private Limited, to file its reply / response to the Petition on merits;*
- d) Direct the Petitioner Solar Energy Corporation of India Limited, to forthwith release the payments towards the safeguard duty claims as reconciled and agreed with the*



*Applicant herein in terms of the interim arrangement agreed and recorded in SECI's letter dated 09.10.2020 and Applicant's letter dated 14.10.2010 as an interim measure during the pendency of the present Petition;*

*e) Pass such further Order(s) as the Commission may deem just and proper.*

***I.A. No. 2 of 2021 [SECI]***

*a) Allow the present application;*

*b) Direct the Petitioner - Solar Energy Corporation of India Limited, to forthwith release the payments towards the safeguard duty claims as reconciled and agreed with SB Energy in terms of the interim arrangement agreed and recorded in SECI's letters dated 21.12.2020 and SB Energy's letter dated 24.12.2020, subject to final outcome of the present proceedings; and/or*

*c) Pass such other and further orders that this Commission may deem fit in the interest of justice and equity and factual background of the present proceedings.*

***In Petition No. 158/MP/2020 [ACME Jodhpur Solar Power Private Limited & ACME Rewa Solar Energy Private Limited]***

*a) Allow the present clarification Petition;*

*b) Allow Order dated 05.02.2019 to allow for compensation on account of introduction of GST laws for goods and services at actuals de hors the reference to the parameters provided in para number 182 of Order dated 05.02.2019 and also for those which are procured beyond the commissioning and after COD of the project;*

*c) Pass any such other and further reliefs as this Commission deems just and proper in the nature and circumstances of the present case.*

***I.A. No. 35 of 2020 [ACME Jodhpur Solar Power Private Limited & ACME Rewa Solar Energy Private Limited]***

*The Commission may be pleased to take submissions made in the present Application on record and dispose of the Petition expeditiously with payment directions to SECI and pass such other orders in favour of the Petitioner as this Commission may deem fit.*

***In Petition No. 373/MP/2020 [ACME Jaipur Solar Power Private Limited]***

*a) Approve and instruct the MPPMCL and DMRC to make the due payments to Petitioner as per the payment methodology as submitted by the Petitioner in the present Petition;*

*b) Approve and direct MPPMCL and DMRC to make upfront payment to the Petitioner on*

*lump-sum basis for the period being from COD to the date of first Monthly Annuity Payment along with Late Payment Surcharge;*

- c) Approve and direct MPPMCL and DMRC to pay Safeguard duty amounts towards Bonds on lumpsum basis along with interest as levied by the concerned customs authority;*
- d) Allow legal and administrative costs incurred by the Petitioner in pursuing the instant petition;*
- e) Grant exemption from filing duly affirmed affidavit in view of the extension of the countrywide lockdown due to the outbreak of COVID-19 with an undertaking that the duly affirmed affidavit will be submitted once the regular functioning of the Courts resume;*
- f) Pass such other/further Order(s)/directions(s) as this Commission may deem fit in the facts and circumstances in the present case.*

**In Petition No. 454/MP/2019 [ACME Kaithal Solar Power Private Limited, ACME Koppal Solar Energy Private Limited, ACME Vijayapura Solar Energy Private Limited, ACME Babadham Solar Power Private Limited]**

- a) Allow the instant Petition and declare that the Respondents are in violation of Order dated 09.10.2018 in Petition Nos. 201/MP/2017, 202/MP/2017, 203/MP/2017, 204/MP/2017.*
- b) Direct the Respondents to implement and fully comply with the Order dated 09.10.2018 issued by this Commission;*
- c) Direct the Respondents to pay Late Payment Surcharge as per PPA i.e after the expiry of 60 days from the date of submission of claim, applicable as per CERC order dated 09.10.2018.*
- d) Issue such other/further order(s) as this Commission may consider appropriate in the facts and circumstances of the present case.*

**I.A. No. 19 of 2020 [ACME Kaithal Solar Power Private Limited, ACME Koppal Solar Energy Private Limited, ACME Vijayapura Solar Energy Private Limited, ACME Babadham Solar Power Private Limited]**

*Allow early listing and disposal of Petition filed under Section 142 of the Electricity Act, 2003*

**In Petition No. 457/MP/2019 [ACME Bhiwadi Solar Power Private Limited, ACME Karnal Solar Power Private Limited, ACME Hisar Solar Power Private Limited]**

- (a) Allow the instant Petition and declare that the Respondents are in violation of Order dated 09.10.2018 in Petition Nos. 188/MP/2017, 189/MP/2017, 190/MP/2017.
- (b) Direct the Respondents to implement and fully comply with the Orders dated 09.10.2018 issued by this Commission.
- (c) Direct the Respondents to pay Late Payment Surcharge as per PPA i.e. after the expiry of 60 days from the date of submission of the claims, applicable as per the CERC Order dated 09.10.2018.
- (d) Issue such other/further order(s) as this Commission may consider appropriate in the facts and circumstances of the present case.

**I.A. No. 18 of 2020[ACME Bhiwadi Solar Power Private Limited, ACME Karnal Solar Power Private Limited, ACME Hisar Solar Power Private Limited]**

Allow early listing and disposal of Petition filed under Section 142 of the Electricity Act, 2003

**In Petition No. 500/MP/2019[ACME Rewa Solar Energy Private Limited, ACME Jodhpur Solar Power Private Limited]**

- (a) Allow the instant Petition and declare that the Respondent No. 1 is in violation of Order dated 02.05.2019 in Petition Nos. 342/MP/2018 and 343/MP/2018.
- (b) Direct the Respondent No.1 to implement and fully comply with the Orders dated 02.05.2019 issued by this Commission.
- (c) Direct the Respondent No. 1 to pay Late Payment Surcharge as per PPA i.e. after the expiry of 60 days from the date of submission of the claims, applicable as per the CERC Order dated 02.05.2019
- (d) Issue such other/further order(s) as this Commission may consider appropriate in the facts and circumstances of the present case.

**I.A. No. 20 of 2020 [ACME Rewa Solar Energy Private Limited, ACME Jodhpur Solar Power Private Limited]**

Allow early listing and disposal of Petition filed under Section 142 of the Electricity Act, 2003

**Submissions of the Petitioner Petition No. 536/MP/2020 and applicants in IA IA No. 71/2020, IA No. 73/2020 and IA No. 2/2021 [SECI]**

7. The Petitioner in Petition No. 536/MP/2020 and I.A. have submitted the following:
- a) The Commission has decided on the introduction of the Central Goods and Services Tax Act, 2017; the Integrated Goods and Services Tax Act, 2017; and the State(s) Goods and Services Tax Act, 2017 (hereinafter collectively referred to as ‘GST Laws’) effective from 01.07.2017 and imposition of Safeguard Duty by Government of India’s Notification No.01/2018- Customs (SG) dated 30.07.2018 as Changes in Law under the Change in Law provision of various PPAs and PSAs. Impact of Change in Law events are to be considered subject to fulfilment of the conditions prescribed in the respective orders of the Commission.
  - b) With regard to payment of compensation due to coming into force of GST Laws, by Order dated 19.09.2018 and 09.10.2018 in Petition No.52/MP/2019 and Petition No. 188/MP/2017, the Commission has, inter-alia, held as under:

*“Also, in view of the fact that the quantum of payments are not large, the relief, if any, for “Change in Law” should be allowed as a separate element on one time basis in a time bound manner. The Petitioners shall raise its claim based on discussions in paragraph 146 of this Order and the same shall be paid by the Respondents within sixty days of the date of this Order failing which it will attract late payment surcharge as provided under PPA”*
  - c) However, the Commission, by its Order dated 05.02.2019 in Petition No. 192/MP/2018 and connected Petitions as well as in subsequent Orders, it was held as under:

*“183. ... Accordingly, it is directed that the GST bills shall be paid within 60 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 PPA. Alternatively, the petitioners and the Respondents may mutually agree to 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 onetime payment.”*
  - d) On 12.03.2020 and 23.03.2020, MNRE directed the Central Agencies implementing the schemes of MNRE, to proceed with payment of the Change in Law claims on the basis of annuity model. MNRE has also clarified that once the principles regarding Change in Law have been decided by the Commission, there is no need to ask every developer to

go before the Commission for seeking Orders in similar cases. The extract of letter of 12.03.2020 is as under:

*“2. CERC, in its Orders regarding Compensation for the "Change in Law" event of "Imposition of GST" and "Imposition of Safeguard Duty on import of solar PV cells and modules" has ordered that:*

*The Claim based on CERC Orders to be paid within sixty days of the date of the CERC Order or from the date of submission of claims by the Petitioners whichever is later, failing which it will attract late payment surcharge as provided under Power Purchase Agreements (PPAs)/ Power Sale Agreements (PSAs).*

*OR*

*Alternatively, the parties may mutually agree to mechanism for the 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*

*.....*

*6. After carefully examining the matter, the Ministry have decided as follows:*

*a) In order to ensure that RE developers are paid their dues on account of 'Change- in-Law' events of imposition of GST/ enhancement of effective rates of GST & levy of Safeguard Duty, which are eligible for pass through, the financial impact thereof will be recovered in annuity mode. The rates for this shall be worked out by SECI/NTPC and realised along with tariff forthwith. This shall begin at once. The rates of recovery shall be as per the norms of Central Electricity Regulatory Commission (CERC).”*

The extract of letter of 23.03.2020 is as under:

- (i) Orders passed by the Central Electricity Regulatory Commission (CERC) on 'Change in Law' compensation on account of a imposition/enhancement of effective rates of Goods & Services Tax (GST) and levy of Safeguard Duty on import of solar PV cells & models are very clear, such sums be paid within 60 days failing which late payment surcharge (LPS) might be attracted or alternatively the payment on this account be made on annuity basis spread over the duration of the PPA. Since the orders of CERC are very clear, there is no need to go to CERC again in the matter.*
- (ii) It is also clarified that once the principles to be followed regarding change in law have been decided by the CERC in one case, there is no need to ask every Developer to go before CERC for seeking orders individually in similar cases. The same principle would apply to all.”*

- e) It is not in a position to agree to a lump-sum one-time payment, in the absence of the Buying Utility(ies)/ Distribution Companies agreeing to make such lump-sum payment

and remitting the same. The alternative is the annuity payment made over a period of time considering the GST claims/ Safeguard Duty claims being an addition to the capital cost of the power project and not an operating and maintenance expense of a recurring nature to be incurred on year on year basis.

- f) Increased costs are claimed to have been incurred for the purpose of supply of power for which the costs should be recovered only if SPDs supply the power. If SPDs do not supply power, it should not be entitled to recover the cost proportionate to such non-supply, similar to any other capital cost. On the other hand, if SPDs are allowed to recover the same in lump-sum, then SECI (and consequentially the buying utilities/ distribution companies) would have paid for capital cost even without actual supply of power. Further, if for any reason SPDs abandon the project and discontinue the supply of power, there is no methodology for adjustment of the lump sum one-time payments already made. These implications will be contrary to the fundamental principle of recovery of capital cost through tariff.
- g) If the Change in Law event had occurred prior to the cut-off date, SPDs would have factored the higher cost to be incurred by it in establishing the solar power project in the per unit tariff quoted. Accordingly, the treatment of the impact of Change in Law event occurring after the cut-off date cannot be different. The same methodology should be adopted for servicing the impact of Change in Law as in the case of servicing other capital expenditure incurred in establishing the project.
- h) Lump-sum one-time payment in respect of SPDs would result in substantial amount being paid to them upfront by the Buying utilities/ Distribution Companies through SECI on a back to back basis which will cause serious financial prejudice to SECI and the Buying utilities/ Distribution Companies. On the other hand, payment of such amount on annuity basis is consistent with the principles governing the servicing of capital cost over the duration of the PPA and, therefore, ought to be the principal basis for settlement of the claims unless in a given case, the Buying utilities/ Distribution companies voluntarily agree to make a one-time payment of the amount determined as impact of GST Laws/ Safeguard Duty subject to necessary adjustment by way of determination of the net present value.

- i) In the above context and inability of the parties to reach a mutual agreement on the methodology for payment, the Commission may decide on a uniform methodology for compensating SPDs for Change in Law claims on account of GST and Safeguard Duty.
- j) Methodology for making payment on monthly basis (annuity) is proposed considering the following parameters:
  - a) The GST/Safeguard Duty claims have been provisionally evaluated/ re-evaluated upto Commercial Operation Date (COD) based on the Commission's Order dated 28.01.2020 in Petition No. 67/MP/2019 and Petition No. 68/MP/2019;
  - b) The discounting factor has been considered as 10.41% which is the rate of interest for the loan component of the capital cost as provided in the RE Tariff Order dated 19.03.2019 issued by the Commission (providing for determination of levelized generic tariff for the financial year 2019-2020);
  - c) The period for payment of compensation on account of GST/ Safeguard Duty has been considered as 13 years from COD. The same is consistent with Regulation 14 of the Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2017 providing that "For the purpose of determination of tariff, loan tenure of 13 years shall be considered";
  - d) In cases where the projects of the SPDs have already achieved COD, the amount of monthly annuity payment for the number of months elapsed till the date of payment i.e. 30.04.2020 or as the case may be, has been made on lumpsum basis from the Payment Security Fund.
- k) The Commission in Order dated 09.10.2018 in Petition No. 188/MP/2017 has recognized the 'intermediary nodal agency' status of SECI. Further, in the Order dated 28.01.2020 passed in Petition No.67/MP/2019 and 68/MP/2019 and in subsequent Orders, the Commission has directed the concerned Buying Utilities/ Distribution Companies to pay the amount to SECI under the respective PSAs which is payable by SECI to SPDs under the respective PPAs on account of the impact of GST/ Safeguard Duty.



- l) To claim relief on account of Change in Law due to GST/ Safeguard Duty, through various orders of the Commission, SPDs were directed to make available to SECI and the Buying utilities/ Distribution Companies, all the relevant documents exhibiting clear and one to one correlation between the projects and the supply of goods or services, duly supported by relevant invoices and Auditor's Certificate. SECI and the Buying Utilities/ Distribution Companies were directed to reconcile the claims for Change in Law on receipt of the relevant documents. The reconciled claims were to be paid within sixty (60) days of the date of the Order or from the date of submission of claims by SPDs, whichever was later, failing which late payment surcharge as provided under PPAs/ PSAs is payable. Based on the documents submitted by SPDs to SECI, SECI has undertaken due reconciliation/ evaluation of the claims pertaining to GST/ Safeguard Duty and has communicated the same to the SPDs and the Buying Utilities. However, till the date of filing the petition, only Rajasthan Distribution Companies released certain sum of money towards GST claims of Acme Jodhpur Solar Power Private limited, Acme Rewa Solar Energy Private limited and Phelan India RJ Private Limited in pursuance of orders in Petition No. 178/MP/2019, Petition No. 189/MP/2019 and Petition No. 192/MP/2019 respectively. The payments from other Buying Utilities/ Distribution Companies were not forthcoming despite the steps and efforts of SECI to settle the claim under the provisions of PPAs and PSAs.
- m) SECI earns limited trading margin as a consideration for undertaking all the activities under the schemes of Government of India for facilitating solar power development in the country. SECI cannot bear the financial burden of making payment to SPDs on account of GST Laws/ Safeguard Duty without receiving the corresponding amount from the concerned Buying Utilities/ Distribution Companies under the PSAs. SECI's liability should be commensurate to the consideration to be received by SECI under the PPAs and PSAs namely the trading margin. In view of non-receipt of the amount from the Buying utilities/ Distribution Companies towards evaluated claims of GST/ Safeguard Duty, SECI has proposed to pay such amount on annuity basis through Payment Security Fund in view of undertaking furnished by the SPD.



- n) Considering the substantial amount payable by SECI to SPDs on account of GST Laws and Safeguard Duty, effective directions by the Commission may be issued to the Buying utilities/ Distribution companies to comply with the Orders passed by the Commission and to make payment towards the evaluated claims of the GST Laws/ Safeguard Duty payable by SECI to SPDs, on a back to back basis under the PSAs in a time bound manner. Further, the Buying utilities/ Distribution companies may also be directed to pay the admissible late payment surcharge (if any) in terms of the Orders passed by the Commission.
- o) The Commission in the Order dated 30.12.2019 in Petition No. 4/MP/2019 and connected Petitions in the matter of Parampujya Solar Energy Private Limited vs. Solar Energy Corporation of India Limited & and Ors has dealt with the cut-off date. The Commission has held *“that liability of payment on account of impact of GST on procuring of Solar PV panels and associated equipment by the Petitioners shall lie with the Respondents till the Commercial Operation Date (COD) only.”* Similar position has been taken by the Commission in Order dated 28.01.2020 in Petition No. 67/MP/2019 and Petition No. 68/MP/2019. However, in the Order dated 04.10.2019 in Petition No. 14/MP/2019 and connected Petitions with regard to cut-off date for payment of Safeguard Duty, the Commission approved claims up to the scheduled commissioning date. The Commission may clarify the cut-off date in respect of all other Orders also and in case of Petitions which are pending before the Commission.

8. Vide I.A. No. 71/2020 in Petition No. 536/MP/2020, Respondent No. 30, SB Energy 4 Private Limited has filed an application in furtherance to the agreement reached between SB Energy 4 Private Limited and SECI. Both the contracting parties have agreed to effectuate payment of the SGD claims made by SB Energy 4 Private Limited under Petition No. 373/MP/2019 which stands scrutinized and reconciled by SECI and the crystalized liability has been communicated by SECI to SB Energy 4 Private Limited. SB Energy 4 Private Limited is seeking directions for disbursal of safeguard duty as per the annuity model proposed as an interim measure.

9. Vide I.A. No. 73/2020 in Petition No. 536/MP/2020, M/s SBG Cleantech Projecto Five Private Limited (in short, “SBG Five”) sought to allow it as a party respondent. It has submitted that MNRE vide letters dated 12.03.2020 and 23.03.2020 dispensed with the need for approaching the Commission to seek declaration of imposition of SGD (Safeguard Duty) by the Central Government as a “Change in Law Event”. Considering various Orders issued by the Commission declaring SGD as a “Change in Law Event” under the PPAs which are pari-materia to the PPA executed with SBG Five, SECI and SBG Five through mutually agreeable process, progressed to reconcile SGD claims made by SBG Five.
10. Vide I.A. No. 2/2021 in Petition No. 536/MP/2020, the Respondent No. 32, M/s SB Energy One Private Limited (in short, “SB Energy”) has sought to direct SECI to release the payments towards the safeguard duty claims in terms of the interim arrangement agreed and recorded in SECI’s letters dated 21.12.2020 and SB Energy’s letter dated 24.12.2020, subject to final outcome of Petition No. 536/MP/2020.

**Submissions of the Petitioners (ACME Jodhpur Solar Energy Private Limited and ACME Rewa Solar Energy Private Limited) in Petition No. 158/MP/2020 and IA No. 35/2020**

11. The Petitioners have filed the Petition seeking clarification of the Commission’s common Order dated 05.02.2019 in Petition Nos. 178/MP/2018 and Petition No. 189/MP/2018 wherein the Petitioners had sought declaration that implementation of GST Laws qualify as a Change in Law event and sought compensation with effect from 01.07.2017. Vide common Order dated 05.02.2019, the Commission held that the introduction of GST Laws w.e.f. 01.07.2017 was an event of change in law under Article 12 of the PPA.
12. The Petitioners have submitted that in accordance with the Order dated 05.02.2019, they submitted their claims along with documentary evidence clearly depicting the actual GST paid. However, the claims of the Petitioners were partly rejected by SECI, vide letter dated 01.08.2019 on the following counts:-
- a. The weighted average of tax implications as declared by CERC in paragraph 182 of the order is 5.55% and thus any amount claimed in excess of that would not be allowed.
  - b. GST on civil works was considered as 9% instead of statutory tax rate of 18% on a

misplaced and wrong ground that the Commission has considered it as 9%.

- c. Claims with respect to invoices which were raised/ procurements made post commissioning.

- 13. The Petitioners vide I.A. No. 35/2020 have sought early hearing and disposal of the Petition with directions to SECI to pay either as lump sum or through annuity at the rate proposed in this application and also to bring on record certain additional evidence arising on account of the communications exchanged between the Petitioners and SECI.

**Submissions of the Petitioner (ACME Jaipur Solar Power Private Limited) in Petition No. 373/MP/2020**

- 14. The Petitioner has submitted that it was selected by RUMSL as the successful bidder to develop one (1) unit comprising 250 MW of the Rewa Solar Power Project in Madhya Pradesh and for consequent sale of solar power to MPPMCL and DMRC. Accordingly, the Petitioner entered into two separate PPAs dated 17.04.2017 with MPPMCL and DMRC.
- 15. The Petitioner has submitted that it had filed Petition No. 19/MP/2019 before the Commission, inter-alia, seeking declaration that introduction and imposition of Safeguard Duty by the Government of India is Change in Law event and sought consequential reliefs. The Commission in its Order dated 15.10.2019 directed the Respondents to pay the claims of the Petitioner within sixty days from the date of issue of Order or from date of submission of claims by the Petitioner as one time lump sum amount. Alternatively, the Commission also allowed the parties to mutually agree to a mechanism for payment of such compensation on annuity basis. Pursuant to the said Order dated 15.10.2019, the parties have mutually agreed 'in-principle' for payment of compensation on annuity basis. However, there is no agreement in respect of annuity rate. The floating annuity rate of SBI MCLR (1 year tenure) average of the last 6 months plus 560 basis points is claimed by the Petitioner. However, in order to facilitate an agreement, the Petitioner is willing to accept the annuity rate of SBI MCLR (1 year tenure) average of the last 6 months plus 450 basis points (instead of 560 basis points) based on normative principles of return on debt-equity ratio of 70:30 as prescribed under the Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020 (in short, "RE Tariff Regulations").

MPPMCL and DMRC have proposed floating annuity rate of SBI MCLR (1 year tenure) average of the last 6 months plus 250 basis points. On account of the above disagreement and due to non-release of payment by the Respondents, the Petitioner had 'under protest' agreed to the proposal of the Respondents. While DMRC has released the payment as per the above-mentioned annuity rate {SBI MCLR (1 year tenure) average of the last 6 months plus 250 basis points}, MPPMCL has failed to pay any compensation to the Petitioner despite admitted claim of approximately Rs. 36.80 crore. MPPMCL vide its letter dated 07.04.2020 sought unconditional acceptance of the Petitioner to annuity rate of SBI MCLR (1 year tenure) average of the last 6 months plus 250 basis point for processing its claims and, thus, coercing the Petitioner to accept its proposal contrary to the Order dated 15.10.2019 wherein the parties are required to mutually agree on the mechanism for compensation on annuity basis. Further it had also filed an IA No. 27/2020 vide which it prayed to "*a. Declare and direct MPPMCL and DMRC to make payments of admitted amounts to the Petitioner at the annuity rate proposed by the said Respondents as communicated in Letters dated 07.04.2020 and 14.04.2020 respectively till the final disposal of the matter; b. Declare, direct and restrain MPPMCL and DMRC from initiating any coercive action against the Petitioner owing to the pendency of the accompanied Petition; c. Grant exemption from filing duly affirmed affidavit in view of the extension of the countrywide lockdown due to the outbreak of COVID-19 with an undertaking that the duly affirmed affidavit will be submitted once the regular functioning of the Courts resume.*" The Commission vide its Order dated 03.06.2020 disposed of the I.A. 27 of 2020 and held as under:

*"51. In view of the above, we are not agreeable to the contention of the Respondents that they may be allowed to make payment from July 2020 or when the lockdown is lifted. They are directed to release payments to the Petitioner immediately.*

*52. The Commission notes that the Petitioner has prayed to "restrain MPPMCL and DMRC from initiating any coercive action against the Petitioner owing to the pendency of the accompanied Petition;" Now, since the Respondents have agreed to pay as per the interim measure, this prayer becomes redundant.*

*53. The Petitioner has also requested to be granted exemption from filing duly affirmed affidavit in view of the extension of the countrywide lockdown due to the outbreak of COVID-19 and has undertaken to submit the duly affirmed affidavit once regular functioning of the Courts resume. The Commission observes that this is in accordance to our Notice dated 03.04.2020 and hence the prayer qua filing of duly affirmed affidavit once the regular functioning of the Courts resume, is allowed.*

*54. With the above directions, I.A. 27 of 2020 stands disposed of. The parties are directed to complete the pleadings in Petition No. 373/MP/2020 which shall be listed for hearing in due course of time for which separate notice will be issued."*

**Submissions of the Petitioners in Petition No. 454/MP/2019 [ACME Kaithal Solar Power Private Limited, ACME Koppal Solar Energy Private Limited, ACME Vijayapura Solar Energy Private Limited, ACME Babadham Solar Power Private Limited], Petition No. 457/MP/2019 [ACME Bhiwadi Solar Power Private Limited, ACME Karnal Solar Power Private Limited, ACME Hisar Solar Power Private Limited] and Petition No. 500/MP/2019 [ACME Rewa Solar Energy Private Limited, ACME Jodhpur Solar Power Private Limited]**

16. There are three sets of petitioners in these three petitions.
17. The Petitioners in Petition No. 454/MP/2019 have submitted that they are seeking to initiate appropriate action under Section 142 of the Electricity Act, 2003 against the Respondents for non-compliance of directions issued by the Commission in its Order dated 09.10.2018 in Petition No. 201/MP/2017, Petition No. 202/MP/2017, Petition No. 203/MP/2017 and Petition No. 204/MP/2017.
18. The Petitioners in Petition No. 457/MP/2019 have submitted that they are seeking to initiate appropriate action under Section 142 of the Electricity Act, 2003 against the Respondents for non-compliance of directions issued by the Commission in its Order dated 09.10.2018 in Petition No. 188/MP/2017, Petition No. 189/MP/2017 and Petition No. 190/MP/2017.
19. The Petitioners in Petition No. 500/MP/2019 have submitted that they are seeking to initiate appropriate action under Section 142 of the Electricity Act, 2003 against the Respondents for non-compliance of directions issued by the Commission in its Order dated 02.05.2019 in Petition No. 342/MP/2018 and Petition No. 343/MP/2018.
20. The Petitioners in all these three petitions have submitted that they had filed Petitions before the Commission for (i) approval of Change in Law; and (ii) consequential relief to compensate for the increase in capital cost due to introduction of the GST Laws. The Commission, duly considering the submissions of the Petitioners and rival contentions of Respondents, issued its Orders vide which it:
  - i. declared introduction of GST Laws as a Change in Law event under the PPAs;

- ii. directed the Petitioner SPVs to exhibit clear and one to one correlation between the projects, the supply of goods or services and the invoices raised by the supplier of goods and services backed by an auditor certificate;
  - iii. directed the Respondents to reconcile the claim amount to be paid to the Petitioner SPVs and pay the same within 60 days from the date of issue of the Change in Law Order;
  - iv. directed that in case the Respondents fail to make the aforesaid payments, they would attract late payment surcharge in terms of the PPAs.
21. The Petitioners have submitted that they had given all the required documents for compensation under the Change in Law claims and SECI had acknowledged the communications and documents submitted by the Petitioners vide its letter dated 03.12.2018 and intimated that the same had been forwarded to the DISCOMs for verification of the claims and for seeking advice, allegedly claiming it to be consistent with the back-to-back stipulation contained in the Order dated 09.10.2018. However, more than 60 days have passed from the date of submission of invoices (including the subsequent clarifications submitted by the Petitioners) and till the filing of the Petitions, no payments have been received by the Petitioners including the ones admitted by SECI. Non-payment of the compensation is in direct contravention/ violation of the Commission's directions and, therefore, necessitates action under Section 142 of the Electricity Act, 2003.
22. The Petitioners have filed I.A. No. 18/2021 (in Petition No. 457/MP/2019), I.A. No. 19/2021 (in Petition No. 454/MP/2019) and I.A. No. 20/2021 (in Petition No. 500/MP/2019) for early hearing and disposal of the Petitions. They have submitted that the facts, circumstances and legal issues of the Petitions are akin to various Orders decided earlier and are no more res integra.

**Reply on behalf of Respondent No. 15 [Phelan its Energy India RJ Pvt. Limited], 16 [Renew Solar Power Private Limited], 10 [Phelan Energy India RJ Pvt. Limited], 25 [Solar Edge Power and Energy Private Limited] and 30 SB Energy Four Private Limited in Petition No. 536/MP/2020 [SECI]**

23. These Respondents have submitted as under:

- a) In order to make payments for safeguard duty/ GST Laws incurred by the Respondents, SECI has proposed a methodology considering discounting factor as 10.41% which is the rate of interest for the loan component of the capital cost as provided in RE Tariff Order dated 19.03.2020 issued by the Commission. However, the discounting factor of 10.41% as considered by SECI (which is equivalent to the rate of interest for the loan component) is incorrect and a wrong application of the RE Tariff Regulations.
- b) As per the RE Tariff Regulations,
- i. for determination of generic tariff and project specific tariff, the debt-equity ratio shall be considered as 70:30. Accordingly, the discounting factor considered by SECI being 10.41% (which is equivalent to the rate of interest for the loan component) can only be applied to 70% of the additional capital cost incurred by the Respondents and cannot be made applicable to the remaining 30% being the equity component.
  - ii. the Return on Equity (post tax) is 14%, which is to be grossed up by the latest notified Minimum Alternate Tax for the first 20 years of the tariff period and corporate tax for the remaining tariff period.
- c) In terms of the RE Tariff Regulations, given that the effective tax rate is 25.17%, the pre-tax Return on Equity will be 18.71% which would be applicable on 30% of the capital cost (being the equity component). Accordingly, while the discounting factor of 10.41% can be applicable on 70% of the additional cost (being the debt component), the discounting factor of 18.71% (pre-tax) is applicable on 30% of the additional cost (being the equity component), thereby leading to an effective discounting factor of 12.9%. Accordingly, the proposed annuity rate of 10.41% cannot be made applicable on the entire 100% of the additional capital cost incurred by the Respondent.
- d) SECI has also submitted that where the COD has lapsed, the monthly annuity payment shall be made on a lump-sum basis from COD till the date of annuity payments. However, such lump-sum payment has been proposed to be made by SECI without providing any carrying cost for the same. However, since it is admitted by SECI that the annuity payments would be spread over a period of 13 years from COD, the liability of SECI to make the annuity payments begins from COD. Since the payments were not



made from COD and are presently being made through a lump-sum payment, SECI is liable to pay Late Payment Surcharge at the rate of 1.25% per month on the outstanding amount under Article 10.3.3 of the PPA.

- e) SECI has relied on the Commission's Order dated 20.12.2019 in *Parampujya Solar Energy Private Limited v. SECI and Ors* wherein it held that the liability of payment on account of impact of GST Laws on procurement of Solar PV Panel and associated equipment by the SPD Petitioner shall lie with SECI only till the Commercial Operation Date (COD). the Commission in its Order dated 04.10.2019, held that SPDs are liable to make available documents exhibiting direct correlation between the Project and supply of goods till the scheduled commissioning date. Accordingly, the Commission considered the cut-off date as the scheduled commissioning date. SECI, aggrieved by the said Order of the Commission, has filed a petition seeking review of the Order dated 04.10.2019. The petition is pending before the Commission and the Respondents have relied on the submissions made by SECI in the Review Petition.

**Submissions of the Respondents 1[Azure Power Venus Private Limited], 9 [Azure Power Thirty-Six Private Limited], 20 [Azure Power India Private Limited], 21-22[Azure Power Forty-Three Private Limited, Clean Solar Power (Gulbarga) Private Limited], 2-8 [ACME Bhiwadi Solar Power Private Limited, ACME Karnal Solar Power Private Limited, ACME Hisar Solar Power Private Limited, ACME Kaithal Solar Power Private limited, ACME Koppal Solar Power Private limited, ACME Vijayapura Solar Power Private Limited, ACME Babadham Solar Power Private Limited] , 11 [ACME Rewa Solar Energy Private Limited], 12 [ACME Jodhpur Solar Power Private Limited], 22[Clean Solar Power (Gulbarga) Private Limited], 29[Solitaire Powertech Private Limited], 31[SB Energy Three Private Limited] , 32 [SB Energy One Private Limited], 33 [Clean Solar Power (Bhadla) Private Limited]in Petition No. 536/MP/2020 [SECI] - They are also parties in Petition No. 158/MP/2020 [ACME Jodhpur Solar Power Private Limited, ACME Rewa Solar Energy Private Limited], Petition No. 454/MP/2019 [ACME Kaithal Solar Power Private Limited, ACME Koppal Solar Energy Private Limited, ACME Vijayapura Solar Energy Private Limited, ACME Babadham Solar Power Private Limited], Petition No. 457/MP/2019 [ACME Bhiwadi Solar Power Private Limited, ACME Karnal Solar Power Private Limited, ACME Hisar Solar Power Private Limited] and Petition No. 500/MP/2019 [ACME Rewa Solar Energy Private Limited, ACME Jodhpur Solar Power Private Limited]**

24. These Respondents have submitted as under:



- (a) They are contesting the Petition No. 536/MP/2020 filed by SECI with respect to the discounting factor of 10.41% as considered by SECI and the cut-off date for the payment of compensation on account of GST Laws and Safeguard Duty.
- (b) SECI has allegedly claimed that it is merely acting as an intermediary agency which is utilizing its trading licence to facilitate purchase and resale of electricity. SECI claims that it is not acting as a merchant trader and supplying power with Rs. 0.07/kWh as trading margin. However, this issue is no more open or res integra. The said issue has been contractually and legally settled by the Commission in its Order dated 03.02.2020 in Petition No. 356/MP/2018 and Petition No. 51/MP/2019 whereby the Commission held that the SGD claims have to be paid on 'back to back' basis by DISCOMs to SPDs under their respective Power Sale Agreements.
- (c) The Commission in its Orders in Petition No. 138/MP/2019, Petition No. 67/MP/2019 and Petition No. 68/MP/2019 held that the intermediary procurer (SECI) is responsible to pay the Change in Law compensation to SPDs which can be recovered by SECI from DISCOM/ Buying Utilities as PPAs and PSAs are interlinked and back to back in nature. The Respondents are concerned with timely payment towards GST/SGD claims by SECI which cannot be conditional upon the billing, payments and adjustments between SECI and DISCOMs. The Respondents are not in the business of offering a credit facility and do not earn their revenue from interest on delayed payments. The Respondents are solar power generators and they require a continuous and regular inflow of funds to operate and manage their projects. SECI has failed to appreciate that in the absence of the much needed pending payments towards GST/SGD claims, the Respondents are facing severe financial crunch and are unable to service their financial and contractual obligations towards its lenders and vendors due to such delay in payments by SECI.
- (d) SECI has arbitrarily and unjustly sought issuance of directions from the Commission to the Buying Utilities/ DISCOMs to make payments towards the evaluated claims of the GST/SGD payable by SECI to SPDs, on a back to back basis under the respective PSAs in a time bound manner. The back to back nature of PPAs and PSAs and the liability of

payment by DISCOMs to SECI on account of GST/SGD claims of SPDs being recoverable from SECI is a fact which is a matter of record and the Respondents are neither in a position to either verify or confirm the same. Moreover, the back to back arrangement of PPA and PSA is the contractual construct that has been clearly upheld by the Commission.

- (e) The Commission in its various GST Laws/Safeguard Duty Orders including the Orders dated 09.10.2018 has provided for lumpsum payment and/or payment through annuity as a compensation mechanism and held that the relief/ compensation towards the Change in Law claims should be allowed in a time-bound manner. Subsequently, in its Order dated 05.02.2019, the Commission suggested an alternative mechanism for payment of such compensation i.e. on annuity basis spread over such period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs, in order to obviate the hardship of SECI/ NTPC/ Discoms for one-time payment. The said mechanism was reiterated in the Commission's order dated 02.05.2019. The two methods of payments have been further confirmed by MNRE vide its letter dated 12.03.2020.
- (f) The Respondents were in the process of re-financing the projects along with SGD/ GST claims on the basis of annuity receivables. Accordingly, the Respondents had sought for a detailed payment methodology to be adopted for payment of reconciled amount. In response thereto, SECI had issued a letter proposing an illustrative calculation of annuity whereby it incorrectly identified 10.41% as the discounting factor. However, SECI has specified that such reconciliation and release of payment will be subject to observations from Government of India, the Buying Utilities or any modifications/ clarifications/ orders by this Commission/ Tribunal/ Court in the respective petitions.
- (g) Reliance placed by SECI on the CERC (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2017 (the 2017 RE Tariff Regulations) is flawed and the proposed annuity rate of 10.41% cannot be made applicable for the following reasons:
- 10.41% is applied only for the debt part (70%) of the additional capex incurred;

- 10.41 % is not/ cannot be applied on the equity part (30%) of the additional capex.
  - the debt-equity ratio is 70:30 and the post-tax Return on Equity (RoE) allowed is 14% (pre-tax RoE will be 18.71%, if grossed up with the current effective tax rate @ 25.17%);
  - Resultantly, RoE for the Respondent should be 18.71 % (pre-tax) return on 30% value of project cost i.e. 18.71 % (pre-tax).
  - Therefore, the effective discounting factor of 12.9% needs to be considered and the proposed annuity rate of 10.41% cannot be made applicable for the entire 100% of additional capex incurred.
- (h) They are in the process of reconciling the claims under GST Laws and SGD with SECI. However, they object to the discounting factor proposed by SECI as 10.41%. Since the reconciled amount has not been finalised, the Respondents are not proposing the illustrative calculation of annuity payment that is required to be paid by SECI. The effective discounting factor of 12.9% needs to be considered in terms of the 2017 RE Tariff Regulations.
- (i) In order to resolve the issue, following options are proposed:
- Option 1:** Payment of the entire principal amount as a lumpsum amount paid upfront, together with applicable Late Payment Surcharge (LPS) in terms of the PPA.
- OR
- Option 2:** Payment of the entire principal amount through equated monthly instalments (EMIs), spread over a pre-determined period of time, starting from COD.
- (j) The applicable annuity rate for calculating EMIs should be, on the basis of:
- An aggregated weighted average rate between cost of debt and cost of equity that reflects the cost of this incremental investment towards capex.
  - The cost of debt should be considered as 10.41% while the cost of equity should be 14% post-tax (18.71% pre-tax when grossed up with Corporate tax which is 25.17%) both being as per RE Tariff Order dated 19.03.2019 based on the 2017 RE Tariff Regulations.

➤ Accordingly, the annuity rate works out to 12.90%  $[(10.41\% \times 70\%) + (18.71\% \times 30\%) = 12.90\%]$  per annum.

➤ The period of annuity payment could be 13 years, starting from COD, as has been accepted in principle vide its letter dated 04.06.2020. Also, the accrued amounts corresponding to the period from the date of commissioning till the date of commencement of the actual monthly payment, to be paid in lumpsum to the Respondents by SECI along with LPS as specified in the PPAs;

- (k) As per Regulation 24 of the 2017 RE Tariff Regulations, any taxes and duties levied by appropriate Government shall be pass through on actual basis. Therefore, any incidence of Tax/ Duty/ Cess liability presently applicable or resulting from any imposition, modification, alteration, adoption, amendment, variation, introduction, enactment or repeal of any laws related to Taxes/ levies/ Duties/ Cesses on the “Monthly Annuity Payments” at any time going forward for the complete PPA period, shall be borne and paid by SECI in its entirety within seven days from the date of such demand notice, along with penalties/ interest (if any) to the respective government authorities.

**Submissions by Respondents 2-8 [ACME Bhiwadi Solar Power Private Limited, ACME Karnal Solar Power Private Limited, ACME Hisar Solar Power Private Limited, ACME Kaithal Solar Power Private limited, ACME Koppal Solar Power Private limited, ACME Vijaypura Solar Power Private Limited, ACME Babadham Solar Power Private Limited], 11 [ACME Rewa Solar Energy Private Limited], 12 [ACME Jodhpur Solar Power Private Limited]**

25. In addition to the common replies as mentioned in the above paragraph, these Respondents have submitted as under:

- a) SECI has revised/ re-evaluated its claims based on the Commission’s Order dated 30.12.2019 in Petition No. 4/MP/2019 and connected matters wherein it was held that SECI is liable to pay Change in Law claims till COD as procurer’s liability to off-take power starts from COD.
- b) Most of the Renewable energy projects are funded by PFC, REC or IREDA whose rate of interest is in the range of 10.75%.

- c) Certain communications have been exchanged between the Respondents 2-8 and SECI pursuant to the filing of Petition No. 454/MP/2019 and Petition No. 457/MP/2019 and after the issuance of MNRE letter dated 12.03.2020 whereby it is stated that it is not in a position to agree to a lump-sum one-time payment. While referring to the Commission's subsequent Order dated 05.02.2019 in Petition No. 187/MP/2018 and MNRE's letter dated 12.03.2020, SECI proposed payments by way of annuity for compliance of Commissions' Order towards payment of the Petitioners' GST claims. The said letter further re-evaluated and calculated the Monthly Annuity Payment based on the claims upto COD and the interest for the calculation of annuity used by SECI was 10.41%.
- d) SECI has revised annuity payments by considering the annuity period of 13 years instead of 25 years as proposed earlier. Further, SECI stated that the payment shall be provisional and subject to final decision of the Commission in respective petitions.
- e) The Respondents without prejudice to their rights, responded to the above letter on 11.04.2020 and stated that SECI has not factored in all parameters including the CERC RE Regulations and accepted the in- principle annuity payments under protest.
- f) SECI has sought clarification from the Commission in terms of cut-off date for the payments to be made by it for GST and Safeguard Duty claims. While the Respondents have no objection to the clarification sought by SECI with respect to cut-off date for GST claims, the Respondents deny the approach adopted by SECI limited to the extent of cut-off date considered for payment of compensation on account of Safeguard Duty. The Respondents have made all earnest efforts including making payments well before COD and they should not be punished for the reasons not directly attributable to them, viz. accidents while transportation, inordinate delay in delivery.
- g) They are not cognizant of the appeal filed against Respondents challenging the Order passed by the Commission as the same is not yet listed before the Appellate Tribunal for Electricity.

**Submissions of Respondents 1[Azure Power Venus Private Limited], 9 [Azure Power Thirty-Six Private Limited], 20 [Azure Power India Private Limited], 21 [Azure Power Forty-Three Private Limited]**

26. In addition to the joint reply, these Respondents have submitted as under:

- a) Nowhere under the PPAs is there a restriction that compensation due to Change in Law is to be for costs incurred up to the commercial operations date of the project or upto a certain cut-off date. On the contrary, the PPAs typically state that "*any additional recurring / non-recurring expenditure by the SPD (...)*" is to be compensated by the procurer as per the relief granted by the Appropriate Commission. Accordingly, the concept of cut-off date as being sought by SECI is against the contractual provisions of the PPAs. Further, in the Orders issued by CERC for the Respondents, there is no cut-off date mentioned therein.
- b) SECI has considered the claims of the Respondents 20 and 21 for the solar modules reaching on site as on the cut-off date and not in terms of the date when the procurement of such solar modules was done, i.e., the date on which payment of Safeguard Duty was effectuated for release of such solar modules from the port. It took time for the modules to reach from the port to the project site however the payment for Safeguard duty was already made.

**Reply of Respondent 17 (Clean Sustainable Energy Private Limited) in Petition No. 536/MP/2020 [SECI]**

27. The reply of the Respondent is as under (only those submissions are mentioned that are not covered in submissions of other Respondents):

- a) It has no objection to the submissions made by SECI pertaining to the clarification sought for payment of compensation on account of GST Laws and SGD on annuity basis. It agrees to mechanism for payment of the said compensation towards GST and SGD. In this regard, the Respondent had also issued undertakings vide its letters dated 15.05.2020, 15.07.2020 and 28.09.2020 wherein the Respondent affirmed the payment mechanism proposed by the Petitioner.

- b) It has no objection with the submissions made by SECI in terms of the directions to be issued to Buying utilities/ Distribution Companies to comply with the Orders passed by the Commission and make payment to SECI towards the evaluated GST/ Safeguard Duty claims. However, this submission is without prejudice to the settled legal position that the liability of SECI to make payments to the Respondent is not conditional on payments to be received by SECI from the Buying Utilities/ Distribution Companies.
- c) Since the Order dated 04.10.2019 in Petition No. 14/MP/2019 puts the cut-off date for payment of SGD claims up to the scheduled commissioning date, the Commission may clarify the cut-off date in respect of all other Orders that have been set out by the Petitioner in its petition and also in case of Petitions which are pending before the Commission.
- d) The Order dated 24.08.2020 passed by the Commission in a petition filed by one of the group companies of the Respondent (i.e., *M/s Avaada Clean Energy Pvt. Ltd*) in Petition No. 47/MP/2019, has not defined any cut-off date for claim of SGD. Accordingly, there ought not to be any cut off date.
- e) It had procured the entire set of modules of 140 MW DC as per the PPAs, which have already been installed and commissioned before COD. Accordingly, SECI must make payment for the entire amount of safeguard duty incurred by the Respondent.
- f) PPAs define COD to be 30 days subsequent to the actual date of commissioning. Out of the total capacity of 100 MW, the Respondent has installed and commissioned 60 MW DC by SCOD. However, commissioning of the remaining 40 MW DC was achieved by the Respondent by COD. In view of the Order of the Commission in 14/MP/2019, the cut-off date for payment of compensation towards SGD would be SCoD. Therefore, applying this analogy, the Respondent would only be allowed compensation towards commissioning 60 MW capacity. Accordingly, the Respondent would be unable to claim the remaining 80 MW (40 MW + additional 40 MW) capacity commissioned by it. Compensation on account of SGD claims ought to be payable towards the entire SGD

amount paid for procurement of solar modules for the project, without there being any cut-off date.

- g) The clarification/ advisory dated 06.11.2019 issued by MNRE categorically states that as long as the solar PV power plant is in accordance with the contracted AC capacity and meets the range of energy supply based on Capacity Utilisation Factor (CUF) requirements, the design and installation of solar capacity on the DC side should be left to the generator/ developer. Hence, the project developer has the liberty to install DC capacity to the extent required to ensure that the contracted capacity of supply in alternate current as per the PPA is met.
- h) As per the PPAs, the actual date of commissioning of the full capacity is 06.10.2018 and hence the COD is 05.11.2018. Accordingly, the Respondent would be entitled to the GST compensation for the entire capacity commissioned till date. SECI has approved the claims of the Respondents towards compensation of GST and that SECI and the Respondent are in agreement with the method of payment towards the compensation of GST claims. In case the Commission is of the view that there ought to be a cut-off date, then it should be COD and the observations made by the Commission in 4/MP/2019 should continue to prevail.

**Submissions of Respondent 18 [Fermi Solar farms Private Limited] in Petition No. 536/MP/2020 [SECI]**

- 28. The Respondent has submitted that as per the PPAs, the actual date of commissioning of the full capacity was 23.02.2018 and hence, COD was 25.03.2018. Accordingly, the Respondent would be entitled to the GST compensation for the entire capacity commissioned till date.

**Reply of SECI in Petition No. 158/MP/2020**

- 29. SECI has submitted as under:
  - a) Based on the documents submitted by the Petitioners to SECI till 16.07.2019, SECI has reconciled and evaluated the claims pertaining to GST implications. Also, SECI, in its letter dated 06.08.2019 has provided to RUVNL, the above reconciliation and evaluation.



- b) Vide Order dated 28.01.2020 in Petition No.67/MP/2019 and Petition No. 68/MP/2019, the Commission has already clarified that the table providing for weightage of the components of capital cost and the component wise GST percentage impact (as given in its earlier Orders dealing with GST Laws) is only illustrative in nature and the computation shall be on the basis of the actual weightage.
- c) There is no provision in the PPAs for payment of any additional capital cost for undertaking any capital investment done by the Petitioners at any time after the commercial operation date irrespective of any upgradation or improvement or repair or changes that are undertaken by the Petitioners at any time throughout the term of the operation period i.e. after the date of commercial operation. All such costs are entirely to the account of the Petitioners with no liability on SECI/Rajasthan Discoms.
- d) Clause 3.9 of the RfS dated 08.11.2016 and Clause 4.4.2 of the PPAs are essentially an enabling provision to allow the Petitioners to upgrade and install new machines/ panels etc. to reach the specified level of performance provided in the said documents and the same is entirely at the cost of the Petitioners and without any financial liability to SECI/ Rajasthan Discoms.
- e) In terms of Clause 3.9 of the RfS, the Capacity Utilisation Factor (CUF) stipulated to be achieved by the Petitioners is 17% (as quoted by the Petitioner in the bid submitted). The Petitioner is required to achieve the said CUF on an annual basis within range of +10% and -15% till the end of 10 years from the COD with reference to the contracted capacity i.e. 100 MW as per the respective PPAs. The band of +10% and -15% for CUF is basically for the purpose of and is designed to cater for weather fluctuations and any unforeseen circumstances, implying that the Petitioners should have designed the full capacity of project, in a manner, where at the time of commercial operation date, all modules were installed and functional.
- f) Clause 3.9 of the RfS and Article 4.4 of the PPA deal with the quantum of the power to be generated (in Million Units) on an annual basis for any contract year. Further, if the Petitioners generate and supply less than the required quantum of the power, the Petitioners need to pay a compensatory charge for shortfall in generation, subject to the

terms as specified therein. In this context and in order to enable the Petitioners to mitigate the shortfall in generation for the future period and reach the stipulated CUF, Clause 3.9 of the RfS and Article 4.4.2 of the PPA allows the Petitioners to install DC Solar field to achieve the required output and to reconfigure and repower the project from time to time during the term of the PPAs. Thus, the above is an accommodation and an option given to the Petitioners under Clause 3.9(C) of the RfS and Article 4.4.2 of the PPA to mitigate the circumstances by raising the required output. This is entirely at the cost and expense of the Petitioner. The Petitioner is not being given any additional tariff or compensation for incurring such costs. The advantage which the Petitioners have is that they avoid the penalty for shortfall in generation and the extra units of generation being paid for within the range mentioned in Article 4.4.1. This is clear from the use of the expression 'allowed', 'free to' used in the said provisions. The achievement of CUF to the extent of having an output of required quantum of the power is also necessary to qualify for the Viability Gap Funding (VGF) support from the Government of India as specified in Clause 3.9 of the RfS. It is wrong on part of the Petitioners to proceed on the basis that SECI is required to consider any installation whenever made even after the commercial operation date to be admissible till the extent of mentioned quantum of the power [DC capacity]. The Petitioner is mixing up the aspect of commercial operation date being the cut-off date and the difference between the AC capacity and the DC capacity. So long the capacity of the power plant is installed by the commercial operation date, the same will be considered subject to the maximum MUs specified under Article 4.4.1 of the PPA.

- g) During evaluation and reconciliation, it has provisionally considered the GST claims of the Petitioners with regard to such modules which have been installed by the COD and whose corresponding invoices have been furnished by the Petitioners in support of the same to establish the requisite one to one correlation in terms of Commission's Order dated 05.02.2019.
- h) Reliance placed by the Petitioners on the decision dated 13.11.2019 passed by the Maharashtra Electricity Regulatory Commission in Case No.259 of 2019 is a decision in a different context.

- i) Anomaly in the claim made by the Petitioners is clear from the fact that the Petitioners are not claiming any basic capital cost or the taxes etc. which were applicable before the GST came into force on 01.07.2017 but only the impact of GST Laws. If the basic capital cost and the basic duties prior to the impact of GST Laws are not admissible as an additional cost to be recovered from Respondents the same being after the commercial operation date, there cannot be any question of further impact of the GST to be considered. SECI has also stated that even the goods procured before the commercial operation date have to be necessarily supported with a taxable invoice of a date prior to the commercial operation date and not after such date and further the same is subject to verification and prudence check.

**Reply of MPPMCL in Petition No. 373/MP/2020 [ACME Jaipur Solar Power Private Limited]**

30. MPPMCL has submitted the following:

- a) The instant dispute is not covered under section 79(1)(f) of the Electricity Act, 2003 and, therefore, the Commission does not have the jurisdiction to adjudicate the matter. The Commission in its Order dated 15.10.2019 gave directions for evolving a suitable mechanism for compensation. In this regard, it gave the parties an option of lump-sum payment and also an option for the parties to arrive at an annuity method of payment of monies. The Petitioner exercised the option of annuity method of payment and entered into discussions with the Respondents. Therefore, there is no dispute involving a generating company regarding acceptance of claims towards SGD under Change in Law as part of tariff with respect to matters mentioned in clauses a-d of section 79(1) of the Electricity Act, 2003.
- b) The petition is not maintainable and is also liable to be rejected on merits for the simple fact that the Petitioner approached the Respondent with its letter dated 17.2.2020, wherein it requested that the annuity payment be made over a period of 25 years and the interest rate shall be SBI MCLR+300 basis points. As per MoM dated 16.03.2020, it was agreed by the Petitioner that the rate of interest shall be SBI MCLR+300 basis points. This was further deliberated by the Respondent who informed the Petitioner that while

settlement of claim in 13 years is acceptable, the interest rate shall be floating at the rate of SBI MCLR+250 basis points. The Petitioner vide letter dated 19.3.2020 refused its own offers and admitted positions when it wrote that it has not offered interest rate of SBI MCLR+300 basis points.

- c) The Petitioner has not filed the letter dated 17.2.2020 (as also agreed by it in the MoM dated 16.3.2020) before the Commission wherein the Petitioner agreed to an interest rate of SBI MCLR+300 basis points. The Petitioner vide its letter dated 17.2.2020 proposed payment through annuity mode over a period of 25 years and a rate of interest of SBI MCLR+300 basis points. In mutual discussions, the period of payment was reduced from 25 to 13 years and, therefore, it is only logical that if the period of payment by annuity mode is being reduced from 25 years to 13 years, the rate of interest which is offered by the Petitioner i.e. SBI MCLR+300 basis points be also reduced to SBI MCLR+250 basis points.
- d) There is no justification for the Petitioner to seek SBI MCLR+560 basis points as the interest rate on loans taken by the Petitioner are in the range of 9.25-9.75% as per the information with the Respondent. Therefore, the entire claim of the Petitioner seeking SBI MCLR+560 basis points in the petition and in the instant application is without any basis. As per domestic loan agreement dated 09.10.2018 signed between the Petitioner and lender, the interest rate was 9.75% per annum until Commercial Operation Date (COD) and, thereafter, interest rate is reduced to 9.25% per annum.
- e) The Petitioner had proposed the interest rate of SBI MCLR + 300 basis points for 25 years. However, the floating interest rate of SBI MCLR + 250 basis points for 13 years was proposed by DMRC and MPPMCL during negotiation with the Petitioner, which was 10.408% and higher than the Petitioner's domestic loan interest rate of 9.25%.
- f) The Petitioner filed an additional affidavit dated 11.04.2019 during the pleadings of Petition No. 19/MP/2019 and prayed for payments as per similar annuity model based on the parameters as specified by the Commission's Order dated 11.01.2019 passed for determination of levelized generic tariff for FY 2019-20 under Regulation 8 of the 2017

RE Tariff Regulations and the Commission did not allow annuity payment model based on the 2017 RE Tariff Regulations.

- g) The RE Tariff Regulations shall not be applicable to the Petitioner's case as the tariff offered by the Petitioner is through competitive bidding and the same has been adopted under section 63 of the Act. As per paragraph 83 of the Order dated 15.10.2019, 2017 RE Tariff Regulations cannot be made applicable for calculation of interest rate or compensation as the Commission has itself held that the tariff has been discovered through competitive bids.
- h) The Interest Act, 1978 is applicable in the instant case and as per the provisions of the Interest Act, 1978, no court can award interest which is higher than the current rate. The Order dated 15.10.2019 passed by the Commission permitted the parties to mutually decide on the annuity model of payment and the Commission, therefore, left it to parties without giving any observations on the payment of interest.
- i) Another developer, namely, Arinsun Clean Energy Pvt Ltd which is also selling power from the Rewa solar park as that of the Petitioner was also selected under the same bid and operating in the same environment as that of the Petitioner, has agreed to annuity payment over 13 years period at SBI MCLR+250 basis points.

**Reply of DMRC in Petition No. 373/MP/2020**

- 31. DMRC has submitted as under (only submissions not recorded earlier as submitted by others is being mentioned):
  - a) Tariff of the project was not determined by the Commission, rather the same was arrived at and agreed to between the parties through the process of competitive bidding. Thus, the Commission has no jurisdiction to try and adjudicate in this Petition.
  - b) For determination of tariff for the renewable energy projects as fixed or provided for under the 2017 RE Tariff Regulations, the same is applicable only for determination of levellised tariff/ preferential tariff for the projects and the said components cannot legally be adopted or universally applied by the Commission for determination of one

component of tariff i.e. carrying cost of the funds, of a renewable project, whose tariff was arrived through the competitive bidding process.

- c) DMRC has submitted that the Petitioner had raised supplementary bill for Change in Law claims under SGD that was paid through bonds (Rs. 34.01 crores) which is legally not acceptable. The main purpose of a Customs Bond is to guarantee the payment of import duties and taxes. However, the amount under Change in Law on account of Safeguard Duty against bond is not actually paid by the Petitioner till date and they are entitled to raise supplementary bills for the amount which was actually paid by them.
- d) The Petitioner had instructed its bank to encash DMRC's standby Letter of Credit (SBLC) No. 0007SB00006420 dated 30.08.2019 for Rs. 5,69,25,000/- on account of supplementary bill raised by them for the SGD claim despite the fact that the matter was under deliberations with MPPMCL and DMRC. DMRC has started to release the provisional amount to avoid SBLC encashment. Further, the payments released by DMRC till the commencement of annuity payments by MPPMCL shall be treated as partial down payment against the reconciled amount and the balance reconciled amount shall be considered for payment under annuity model.

**Rejoinder of SB Energy Four Private Limited in Petition No. 373/MP/2020 (Respondent SPD 30 in Petition No. 536/MP/2020)**

32. The Petitioner SB Energy Four Private Limited has submitted as follows:

- a) Petition 19/MP/2019 was filed before the Commission and by way of Order dated 15.10.2019, the Commission granted relief to it for Change in Law on account of SGD.
- b) SECI cannot impose a unilateral annuity rate of SBI MCLR (one year tenure) prevalent for the last 6 months + 250 basis points split in monthly instalments for a period of 13 years under the terms of the Order dated 15.10.2019 and when objected, SECI has contended lack of jurisdiction of this Commission.

- c) SECI has ignored to convey that its proposed annuity rate i.e. SBI MCLR + 250 basis points split in monthly instalments for a period of 13 years is not acceptable to the Petitioner and hence does not qualify as a mutually agreeable mechanism. Therefore, the same cannot be thrust upon the Petitioner.
- d) MPPMCL has raised an unsustainable objection based on the application of the Interest Act, 1978 and that the present Petition is not maintainable. Through its reply, MPPMCL has failed to establish as to how the Interest Act, 1978 is applicable and why on such applicability, the jurisdiction of this Commission is ousted.
- e) MPPMCL and DMRC have relied on the absence of letter dated 17.02.2020. In fact, the Petitioner is aggrieved by the act of SECI and has rightfully approached the Commission which has evidently resorted to obtaining a coercive “unconditional acceptance” through its letters dated 07.04.2020 and 24.04.2020. It is submitted that the issue of SBI MCLR + 300 basis points finds its due mention through the MoM dated 16.03.2020 and the letter dated 19.03.2020 including the reasons as to why the same is not acceptable to the Petitioner.
- f) It had to make arrangements to pay Safeguard duty by availing loan from NBFC whose rate of interest is in the range of 15 to 16% per annum. Accordingly, it had sought SBI MCLR average of last 6 months + 560 basis points on the basis of parameters considered in the RE Tariff Regulations.
- g) Rate of 10.41% as proposed by MPPMCL cannot be made applicable as it is only applicable to the debt part (70%) of the additional capex incurred and cannot be applied on the equity part (30%) of the additional capex. The post-tax RoE allowed is 14% (pre-tax RoE will be 18.71%, if grossed up with the current effective tax rate @ 25.17%) and accordingly the RoE for the Petitioners should be 18.71 % (pre-tax).
- h) The following options are proposed to resolve the issue:
  - (i) Option 1 or Option 2 (as proposed by the Respondents 1, 9, 20-22, 2-8, 11, 12, 22, 29, 31, 32, 33 in Petition No. 536/MP/2020 as stated above).

OR

- (ii) Option 3: Payment of the entire aggregate principal in the form of annual revenue streams which can be determined as per the RE Tariff Order dated 19.03.2019 issued by the Commission based on the 2017 RE Tariff Regulations since:
- The said aggregate principal is in the nature of additional capex in the project;
  - The principal amount being a determinate amount, the Commission may calculate the annual revenue streams specific to this determinate amount by applying the normative financial principles set out in the CERC RE Tariff Order dated 19.03.2019;
  - This annual revenue stream can be paid against supplementary monthly invoices and should be paid w.e.f. COD for the Project for duration of PPA.
  - Also, the accrued amounts corresponding to the period from the date of commissioning till the date of commencement of the payment is to be paid in lumpsum by MPPMCL along with the LPS specified in the PPA.
- i) The bond submitted to the Customs department attracts interest to the tune of 15-16% per annum from the date of execution of the bond. Therefore, the liability of payment has already accrued in the books of the Petitioner along with interest. DMRC has itself admitted that the bonds are guarantee towards the payment of import duties and taxes. Therefore, for the modules against which the Petitioner has submitted bonds to the Customs department, Respondents must be directed to pay all such bond amounts (including the appropriate interest rate as applied by the customs department) immediately to the Petitioner on one time lumpsum basis.
- j) It has submitted the claims to SECI vide its letter dated 18.10.2019 along with all the requisite documents. Thereafter, DMRC vide its letter dated 25.10.2019 informed the Petitioner to submit the relevant documents to MPPMCL for reconciliation of the claim. After taking almost 2 months in responding to the claims submitted, on 18.10.2019, MPPMCL issued requisition list on 17.12.2019.



- k) SECI was not only required to reconcile the claim but also initiate the payments towards SGD claims as per the directions passed by this Commission. It was only after 60 days that SECI initiated the reconciliation process. The Petitioner promptly responded to MPPMCL's e-mail dated 17.12.2019 by issuing letter on the same date i.e. 17.12.2019 stating that almost all the documents being sought by MPPMCL have already been provided earlier vide its letter dated 18.10.2019. The documents submitted thereafter are in pursuance to the clarifications sought by SECI.
- l) DMRC admitted that the Petitioner was in financial distress on account of delay in the settlement of SGD claim. Its decision to encash the BG was well within its rights under the PPA which provides encashment of LC in absence of payment of supplementary invoices. However, it is also a matter of fact that the said LC was not encashed.

#### **Rejoinders by SECI**

33. SECI has filed Rejoinders to various replies filed by the Respondent SPDs vide which it has reiterated its submissions and as such, the same has not been reproduced for the sake of brevity.

#### **Submissions in compliance with Record of Proceedings**

34. In compliance to the directions contained in Record of Proceedings dated 22.04.2021, the parties have filed their written submissions. It is observed that the SECI and Respondents (1 to 12, 15, 17, 18, 20, 21, 22, 25 and 29 to 33) in Petition No. 536/MP/2020 have reiterated the submissions already filed in the pleadings and they are not repeated for the sake of brevity. It is observed that the Respondents 34, 45 to 49 & 53 (DISCOMS) in Petition No. 536/MP/2020 have also filed their written statements.

#### ***Submissions by SECI***

35. SECI has filed the written statement as per directions of the Commission during the hearing held on 22.04.2021, for comprehensive consideration of the aspects concerning the implication of the Change in Law events under the PPAs entered into by SECI with SPDs and

corresponding PSAs entered into by SECI with the Buying Entities/ Distribution Licensees. The following has been submitted by SECI as the Petitioner in Petition No. 536/MP/2020 and as Respondent in Petition No. 454/MP/2019, Petition No. 457/MP/2019 and Petition No. 500/MP/2019:

a) The issues for consideration are as under:

- (i) The cut-off date for consideration of the Change in Law namely (i) whether it should be up to the date of the commissioning of the power plant; or (ii) upto the COD of the power plant in the event the COD in terms of the PPA is at a later date than commissioning; or (iii) without any time limit and/or to be considered even after the COD.
- (ii) The rate at which the discounting factor for monthly annuity payments to be considered namely whether it should be (i) 10.41% as proposed by SECI; or (ii) a lower rate such as 9.67% proposed by some of the Buying Entities/ Distribution Licensees; or (iii) higher rate such as 12.9%, 13.14 %, 14% etc. as proposed by the SPDs.
- (iii) Carrying cost claimed for the period till the time period of 60 days from the date of direction by the Commission towards payment of amount reconciled under Annuity Mode in the Orders passed/ pending by the Commission.
- (iv) Directions to be issued to the Buying Entities/Distribution Licensees to ensure payments to SECI within the time period of 60 days as stipulated in the Orders of the Commission (principal amount with late payment surcharge for the past outstanding forthwith).

b) As regards cut-off date for payment of compensation on account of GST Laws and Safeguard Duty, the following is submitted:

- (i) The Commission has clearly held that the computation of the relief for Change in Law will be restricted to the taxes/ duties paid on goods brought in and installed up to the actual COD and not during the period post-COD. The settled legal position is that the incidence of tax i.e. the levy of tax as a taxable event is distinct and separate from the collection of tax. The incidence of tax has to be considered in the light of the provisions of GST Laws with regard to the taxable

event irrespective of the fact that the collection of tax or the reference point of collecting the tax is any later date. This principle has already been laid down by the Hon'ble Supreme Court in number of cases and is well settled. Reference in this regard is placed on *Union of India–v-Bombay Tyre International Limited and Ors*(1984) 1 SCC 467 and upheld by the Constitution Bench of the Hon'ble Supreme Court in the case of *CCE–v-Grasim Industries Ltd.* (2018) 7 SCC 233.

- (ii) The incidence of tax is as per Section 9(1) of the CGST Act, 2017 which states that there shall be a levy of GST on all intra-State supply of goods or services or both. Therefore, no invoices for GST for modules, equipment raised after the date of commercial operation is admissible as:- no capital cost after the commercial operation date for procurement of goods etc. can be considered; and the tax invoices in respect of the goods procured prior to the commercial operation date have to be necessarily raised in terms of the GST Laws by the delivery date.
- (iii) Even the goods procured before COD have to be necessarily supported with a taxable invoice of a date prior to COD (and not after COD) of projects. Any claim for GST after COD would mean that the Petitioner had declared COD before the power project was ready, which is not permissible. SECI has placed its reliance on the Commission's Order dated 24.01.2021 in Petition No.157/MP/2018 along with I.A. No.2 of 2019 in the matter of *Prayatna Developers Private Limited –v- NTPC Limited & Ors.* The same principle laid down would also apply to Safeguard Duty as the basic principle is that the goods which have been used for commissioning/ COD can only be considered.
- (iv) The Respondents 20 and 21 have claimed that SECI has considered the safeguard duty claims on the basis of the date when the modules reached on site and not on the basis of the date when payment of safeguard duty was effectuated. In this regard, as per the methodology formulated by SECI for evaluation of Safeguard Duty claims and as provided in the written submissions filed in Petition No. 356/MP/2018 and Petition No. 51/MP/2019 respectively, SECI has set out certain documents including copy of the lorry receipts against each Bill of Entry (to

ascertain date of receipt of goods at project site) to be furnished by these Respondents. This is consistent with requirement of exhibiting clear and one to one correlation between the projects and the supply of imported goods in terms of Commission's Order dated 03.02.2020 in aforesaid petitions.

c) As regards annuity, the following is submitted:

- (i) SECI has proposed discounting factor as 10.41% for making payment on monthly basis (annuity).
- (ii) Some SPDs have submitted that SECI has considered 100% amount due under the Change in Law events at the interest rate applicable to debt to compute the annuity whereas the amount should be considered as 70% debt and 30% equity or 100% equity and that in such a case, the Discounting Factor to be considered would be 12.9% or 13.14% or 14% and not 10.1%. SPDs are proceeding on a wrong assumption that any impact of Change in Law on account of GST or Safeguard Duty is legally required to be paid in one go in terms of the provisions of the PPA.
- (iii) GST and Safeguard Duty are on the capital goods or the services related to installation of the capital goods and, therefore, should form part of additional capitalization. The taxes and duties of similar nature (as GST) which were in existence on bid submission date (before GST came into effect), SPDs would have factored the same as part of the capital cost to be incurred which will be serviced only through the quoted tariff over the duration of the PPA. Such taxes and duties (already factored in while submitting the bid) would not have been paid to SPDs in lump-sum on the first month or first year of COD. The uniform quoted tariff spread over 25 years would be towards the recovery of the capital cost including the taxes and duties paid in equated monthly tariff payments based on the quoted tariff. In the context of the above, if there is any increase in the capital cost on account of the change in law events, there can be no differential

treatment to such additional capitalization. The same has to be recovered again through additional monthly tariff payment through the entire 25 years.

- (iv) If the Tariff Regulations notified by the Commission under section 62 of the Electricity Act, 2003 on capital cost based tariff determination are to be adopted, the impact of such change in law events have to be considered for 25 years. Further, in the Tariff Regulations, there is no concept of servicing the repayment of loan. Only depreciation over a period of 25 years (accelerated for 13 years) is considered. Both repayment of loan and depreciation as claimed by some of the SPDs cannot be considered.
- (v) In the tariff determined under a competitive bidding process under Section 63 of the Electricity Act, 2003, the individual tariff elements are not known. Only the quoted tariff is available and the same cannot be dissected into various tariff elements. Reliance is placed on the Appellate Tribunal judgment dated 19.04.2017 in Appeal No. 161 of 2015 in the matter of *Sasan Power Limited –v- Central Electricity Regulatory Commission*; decision dated 14.08.2018 of the Appellate Tribunal for Electricity in Appeal No.111 of 2017 and connected Appeal in the matter of *M/s. GMR Warora Energy Private Limited –v- Central Electricity Regulatory Commission & Ors.*; Judgment dated 21.12.2018 passed by the Tribunal of Electricity in Appeal No. 193 of 2018 - *GMR Kamalanga Energy Limited and Anr. –v- Central Electricity Regulatory Commission and Ors.* and Order dated 09.10.2018 passed by the Commission in Petition No.188/MP/2017 and Batch in the matter of *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India Limited and Batch.*
- (vi) It is also not possible to assume that the debt-equity ratio for the purpose of relief under the Change in Law is to be 70:30 or any other Ratio. SPDs were free to fund the entire project through debt only or by borrowing from group companies or through equity only which is again funding by Group Companies or promoters.

- (vii) The claim of some of the SPDs with respect to interest on loan as per rates of PFC, REC, IREDA is also not to be considered. The discounting factor has been considered uniformly for all based on the amount considered as debt irrespective of whether the payment of GST/ Safeguard Duty has been claimed to be made by borrowing or by using equity. Whether SPD has borrowed money or used their own funds for the purpose of paying the GST/Safeguard Duty are not relevant. The annuity has been appropriately determined giving relief to the SPDs for meeting the impact of change in law effect instead of the entire cost being capitalized and spread over during the entire duration of the PPA.
- (viii) The Change in Law claims on account of GST Laws and Safeguard Duty were only to be considered as debt and not as equity. If 30% of the amount was to be considered as equity, there could have been no such suggestion as to the lump-sum payment as equity invested in the business is a risk capital and cannot be serviced in a lump-sum manner. If so, the treatment for payment on annuity basis cannot be different.
- (ix) Considering the above, the annuity payment has been designed for the entire amount to be paid over a period of 13 years even though the impact of Change in Law events will continue even after 13 years. The payment is front-loaded in the first 13 years considering the effect of change in law being funded by debt. This also assumes a risk of making payment in advance when the SPDs may not continue to operate their generating station after 13 years till the entire duration of the PPA. If the contention of SPDs is to be accepted, the Annuity Model should be spread over for entire duration of the PPA as when the tariff is levelised as per unit uniform amount throughout the duration of the PPA (25 years), the entire funding of capital is being serviced on the basis of recovery during 25 years.
- (x) SPDs are selectively referring to certain aspects without considering the fact that the annuity computation has been made for payment of the Change in Law amount in 13 years. The Commission in its decisions passed in GST Laws and Safeguard Duty matters has provided that such Annuity payment can extend upto

a period of 25 years. Further, the Safeguard Duty/ GST amount itself is being paid without servicing the debt borrowed to fund the amount. In normal course, only the interest on debt is allowed and the repayment of the debt is to be met through depreciation. The Annuity Payment spread over 25 years would result in reduction in the monthly payment to the Respondents substantially.

d) Implications of taxes, duties, levies on monthly annuity payment cannot be borne by SECI and the following is submitted:

- (i) The PPAs provide that tax on income will not be covered under the scope of Change in Law. In this regard, Article 17.9 of the PPAs expressly bars such claims. SECI has placed its reliance on the Judgment of APTEL dated 19.04.2017 in Appeal No. 161 of 2015 in the matter of *Sasan Power Limited –v- Central Electricity Regulatory Commission*, where the APTEL held that in case of tariff under Section 63 of the Electricity Act, 2003, there is no provision for pass through of tax on Income.
- (ii) Reliance placed by the Respondents on Regulation 24 of the 2017 RE Tariff Regulations is misplaced. The said Regulations have no applicability in case of Competitive bidding process under Section 63 of the Electricity Act, 2003.
- (iii) The amount payable by SECI to the SPDs on account of the change in law compensation for the additional capital cost incurred due to GST Laws/Safeguard Duty will not form part of the actual cost of the asset to the taxpayer in terms of Section 43 of the Income Tax Act, 1961.

e) Late payment surcharge on lump-sum payment from COD till the date of payment is not admissible and following is submitted:

- (i) SECI has already benefitted the SPDs by agreeing to make payment of the monthly annuity amount for the number of months elapsed since COD till the date of payment in one lump-sum instead of re-working the annuity payment. The Commission in its Orders passed on Safeguard Duty and GST matters has

provided for two alternatives (to be decided by the parties) to make payment. There is no provision in the PPAs stipulating restitution from the day the change in Law occurs. The release of change in law amount is based on the final determination of the amount and the manner of its payment in terms of orders of the Commission dealing with GST/Safeguard Duty. In view of the above, no late payment surcharge is payable. Further, any late payment surcharge received from the Buying Entities under the PSA will be remitted to the Project Developers on back to back basis in terms of Article 10.3.3 of the PPAs.

- f) The Commission may direct buying entities/ distribution companies to make payment to SECI towards reconciled GST/ Safeguard Duty claims in terms of the Orders of the Commission and following is submitted in this regard:
- (i) The Commission in its Order dated 09.10.2018 in Petition No.188/MP/2017 has already recognized the ‘intermediary nodal agency’ status of SECI.
  - (ii) In terms of various Orders of the Commission, SPDs were directed to make available to SECI and the Buying Entities/ Distribution Companies, all relevant documents exhibiting clear and one to one correlation between the projects and the supply of goods or services, duly supported by relevant invoices and Auditor’s Certificate. SECI and the Buying Entities/ Distribution Companies were directed to reconcile the claims for Change in Law on receipt of the relevant documents. The reconciled claims were to be paid within sixty (60) days of the date of the Order or from the date of submission of claims by the SPDs whichever is later failing which late payment surcharge as provided under PPAs/PSAs is payable. The concerned Buying Entities/ Distribution Companies are to pay the amount to SECI under the respective PSAs which is payable by SECI to SPDs under the respective PPAs on account of the impact of GST/ Safeguard Duty.
  - (iii) Based on the documents submitted by SPDs, SECI has undertaken due reconciliation/ evaluation of the claims pertaining to GST/ Safeguard Duty and has communicated the same to SPDs and the Buying Entities.



- (iv) In Orders related to compensation on account of GST Laws passed by the Commission till date, the total amount evaluated by SECI to be payable by the Buying Entities is Rs.1,04,83,70,560/-. The total amount remitted by SECI to SPDs on annuity basis is Rs. 80,31,17,285/-. The total Payment released by the Buying Entities/Distribution Companies to SECI is Rs. 48,59,90,4689/- and the amount outstanding as on 20.04.2021, payable by the Buying Entities/ Distribution Companies towards evaluated and communicated claims of GST is Rs. 56,23,80,092/-.
- (v) In orders related to compensation on account of Safeguard Duty passed by the Commission till date, the total amount evaluated by SECI to be payable by the Buying Entities is Rs. 8,15,99,10,927/-. The total amount remitted by SECI to SPDs on annuity basis is Rs. 80,31,17,285/-. The total Payment released by the Buying Entities/ Distribution Companies to SECI is only Rs. 27,43,63,069/-.
- (vi) In view of non-receipt of the amount from the Buying Entities/ Distribution Companies towards evaluated claims of GST/ Safeguard Duty, SECI has proposed to pay such amounts on annuity basis through Payment Security Fund in view of the undertakings furnished by the Solar Power Developers. The extract of the undertaking is as under:

*“With reference to the above-mentioned letters, we hereby undertake that:  
"In case of any observations directions and decisions of any tribunal /commission/court/GOI which is contrary to the above reconciliation, the SPD shall return the amount paid by SECI along with interest (if any) at the rate 10.41% p.a. In case, SPD fails to reimburse the same within 30 days of written communication by SECI to SPD, SECI shall recover such amount from power sale proceeds with interest, to be transferred by SECI to SPD under the PPA.”*

- (vii) SECI has submitted that while it is making payment to SPDs on annuity basis on account of GST and/or Safeguard Duty in terms of the Orders passed by the Commission, the Buying Entities/ Distribution Licensees (the ultimate procurer of the power) are not making payment to SECI despite Commission's Orders. Non-payment by the Buying Entities/ Distribution licensees is causing financial prejudice to SECI. SECI seeks issuance of effective directions by the

Commission to the Buying entities/ Distribution licensees to comply with the Commission's Orders and to make payment towards the evaluated claims of the GST/Safeguard Duty payable by SECI to SPDs, on a back to back basis under the PSAs in a time bound manner. Further, the Commission may also direct the Buying Entities/ distribution Licensees to pay the admissible late payment surcharge (if any) in terms of the Commission's Orders.

- g) The Commission has allowed the cut-off date to be considered as actual COD even where the actual COD is delayed and the project is commissioned, with payment of liquidated damages. It is therefore not correct for the Buying Entities/ Distribution Licensees to claim SCOD as the cut-off date.
- h) As submitted by the Rajasthan Utilities, the Commission may clarify that the cut-off date will be COD both for GST and Safeguard Duty, wherever COD specified in the PPA is one month after the commissioning date. In cases of those PPAs where power supply (including obligation to pay tariff) is stipulated to commence from the commissioning date, the cut-off date will be the commissioning date.
- i) The issue of verification of the modules installed was raised by Rajasthan Utilities in respect of those equipments which are installed between the commissioning date and COD where COD is one month after the Commissioning date. SECI has participated in the Committee appointed for the purpose for such verification. The verification may also identify as to whether any equipment was placed after COD. Subject to the above, if the cut-off date is decided as COD, the various issues raised on equipment installed between the commissioning and the COD will no longer survive.

***Additional submissions by Respondents 17[Clean Sustainable Energy Private Limited] and 18 [Fermi Solar farms Private Limited] (in Petition No. 536/MP/2020 [SECI])***

36. These Respondents vide their additional submissions have submitted as under:

- a) The Commission may uniformly specify COD as the cut-off date in so far as the goods are concerned where COD is 30 days subsequent to SCOD or actual date of

commissioning of full capacity of the project, whichever is later. In such cases, there is no reason for extending the cut-off date beyond COD.

- b) The commercial supply of power from the generating station under certain PPAs is from the commissioning of the power plant itself and, therefore, it is not postponed for any period after the commissioning. In such cases, the cut-off date is to be considered as the date of commissioning of the power plant.
- c) In view of the principle decided by the Commission with regard to cut-off date for payment of GST and Safeguard Duty claims up to COD/scheduled commissioning date, depending upon the date stipulated for the commencement of supply of power from the power project in the PPAs, as the case may be, the Commission may clarify the cut-off date in respect of all other Orders relating to GST Laws and Safeguard Duty.
- d) *Prima facie*, the PPAs entered into by the parties nowhere state that compensation due to Change in Law is to be for the costs incurred upto a certain cut-off date.
- e) The PPAs fasten a liability to pay late payment surcharge if there is a delay in payment of monthly bills. Therefore, such late payment surcharge ought to be fastened in case there is a delay in payment of the compensation every month under the annuity model as well.
- f) The Respondents agree with SECI's contention that, since the Commission has considered even the delayed COD (*where liquidated damages have been paid*) as actual COD, the buying entities and Discoms cannot claim otherwise and contend that the cut-off date should be SCoD.

***Written submissions by the Respondent No. 34 (TPREPL) in Petition No. 536/MP/2020***

37. The Respondent has submitted as under:

- a) SECI has requested for the issuance of directions to the Buying Utilities/ DISCOMs to make timely payments towards the evaluated claims of the GST/SGD payable by SECI

to the SPDs, on a 'back to back' basis under their respective PSAs. It is a settled principle that the 'back to back' nature of the payment obligation under the respective PPAs and PSAs are in the nature of independent contractual obligations of the parties. The obligation of SECI to pay the SPDs under the PPA is independent of the obligation to receive payment from the Buying Utilities/ DISCOMs under the respective PSAs. SECI, by raising the issue of 'back to back' recovery again is trying to mislead the Commission by raising issues already settled by the Commission. Once an issue has attained finality, the same should not be re-agitated. Reliance is placed on the Commission's Order dated 03.02.2020 in Petition No. 356/MP/2018 and Petition No. 51/MP/2019.

- b) Payment of compensation by SECI to SPDs is not conditional on the timely payments being made by the Buying Utilities/ DISCOMs under the respective PSAs. TPREPL is facing severe financial stress due to delayed payments which has been further affected due to the ongoing COVID-19 pandemic. SECI has failed to appreciate that SPD requires continuous flow of capital to service its obligations towards its customers, vendors as well as its lenders and due to such delay, SPD is undergoing extreme financial stress.
- c) The Commission may allow the payment for certain invoices which have been raised after COD in relation to services related to construction work undertaken for the project before COD by the Respondent considering that such work was undertaken for all the activities which led to the project attaining COD and, therefore, the legitimate cost incurred for the same by the Respondent cannot be withheld merely premised on the fact that the invoices for the same were raised post-COD.
- d) There are certain discrepancies in computation by SECI enclosed as Annexure C of its petition on the basis of which SECI is seeking annuity payment mechanism. SECI has wrongly calculated the annuity amount from date of the order of the Commission whereas it has to be done from CoD of the project. Also, upfront payment of annuity amount for the period elapsed must include carrying cost which has not been included by SECI in its calculations.

- e) Order of the Commission on this issue should be applied to the matters related to bids conducted through National Thermal Power Corporation Limited (NTPC) on the same issue since under the State Specific Bundling Scheme of the National Solar Mission, NTPC is responsible for the implementation of scheme of MNRE for setting up solar power plants. Both NTPC and SECI have been acting as nodal agencies (appointed by the Central Government) for the development and distribution of solar power. Since there are solar power project developers and buying utilities/ distribution companies in 'back to back' arrangements with NTPC and SECI, both have been equally affected by the introduction of GST Laws/ SGD and have filed various petitions for payment of compensation on account of GST Laws and SGD.
- f) O&M Expenses can be said to be recurring expenses under the provisions of the PPAs entered into between the contracting parties and includes activities like salary, estimated maintenance costs and monthly income from leases etc. Furthermore, as a matter of prudent industrial practice, SPDs have outsourced maintenance of the plants in line with the laid down guidelines for quality and maintenance standards of the projects to the third parties. On the other hand, role of in-house staff of SPD is limited to routine and minor maintenance work required for the up-keep of the power project. Pursuant to introduction of the GST Laws, the O&M contract with third party now entails a rate of 18% on the same project which has resulted in an additional tax liability of 3% and has resulted in increase in its recurring expenditure.
- g) SECI has failed to raise the issue that SPDs are also entitled to carrying cost on account of events for compensation for Change in Law. Reliance has been placed on judgment of the Hon'ble Supreme Court dated 25.02.2019 in Civil Appeal no. 5865 of 2018 titled as *Uttar Haryana Bijli Vitran Nigam Ltd. & Anr. v. Adani Power Limited & Ors.* It is a settled law that the dictionary meaning of "compensation" is that anything given to make things equal in value i.e. anything given as an equivalent, to make amends for loss or damage. The rationale behind the same can be said to mean that the allowance of carrying cost is to compensate the affected party for the time value of money or the monies denied at the appropriate time and paid after a lapse of time. The Hon'ble Supreme Court while arriving at the aforementioned findings reiterated the principle

laid down by it in its judgment in the case of *Energy Watchdog v. CERC & Ors.* that the Commission must bear in mind the restitutive principle contained in the Change in Law provision of the PPA while determining the compensation for increase/ decrease in cost.

- h) In the light of orders of the Commission and directive of MNRE vide letter dated 12.03.2020, SPDs are required to be compensated for the time value of money on the Change in Law claims from the date the payment was made by SPD till COD (i.e. the cut-off date) essentially allowing carrying costs to SPD on the Change in Law claims. Hence, the Respondent is entitled to Carrying Cost on its claim for compensation with regards to introduction of GST including the claims for compensation incurred by the Respondent in lieu of the expenses incurred by it for running the solar power projects from the date of payment of additional cost incurred by the developer.
- i) The Commission may also direct SECI to create a Payment Security Mechanism (PSM) for payment of the annuity payments. This can be either in the form a separate PSM being established by the Petitioner or modifying the existing PSM which has been already established under the PPA to provision the annuity payment.
- j) In light of the submissions made by it, this Commission may adjudicate on the following:
  - i. Timely payment of the amount towards GST claims by SECI irrespective of the payment by the distribution utilities;
  - ii. Allowing Carrying Cost on the amount due towards Change in Law;
  - iii. Allowing payment of invoices which have been raised after COD in relation to the services related to construction work undertaken for the Project before COD;
  - iv. Make NTPC a respondent and to pass a similar Order in the batch of petitions filed by NTPC.
  - v. Hold and declare that the Respondent is entitled to a sum of Rs. 48.88 crores (as more particularly detailed in Petition No. 179/MP/2020) excluding carrying cost as compensation for Change in Law during the operating period.

- vi. Hold and declare that the Respondent is entitled to Late Payment Surcharge in case of Annuity Payment mechanism as suggested by the Petitioner in this Petition.

***Written submissions by Respondent No. 49 (UPPCL) in Petition No. 536/MP/2020***

38. Respondent No. 49 (UPPCL) has submitted as under:

- a) SGD claims as evaluated by SECI are inappropriate as such claims are admissible till the Scheduled Commissioning date (SCoD) as against COD admitted by SECI.
- b) The discounting factor considered by the Commission in its RE Tariff Order dated 19.03.2019 in the matter of Determination of levelised generic tariff for FY 2019-20 under Regulation 8 of the 2017 RE Tariff Regulations is 9.36% comprising of loan with rate of interest @10.41% and equity with rate of return @14%. Pertinently, the Commission has derived the rate of interest by considering the average of last 6 months SBI MCLR (July 2018 to December 2018) which was increased by 200 basis points for its working model in accordance with Regulation 14 of the RE Tariff Regulations, 2017. Such rates were considered keeping in mind the period for which the tariff was determined. It would not be appropriate to consider the same MCLR rates now since the prevailing MCLR rates have dropped to lower levels. Accordingly, the interest rate for computation of discounting factor must be considered on the basis of average of MCLR rates of the 6 months prior to the period when the bill is issued by SECI on UPPCL. For instance, the claim made by SECI towards SGD claim pertaining to SB Energy Four Private Limited was raised on 09.10.2020 vide letter No. 39360 and 39361. Therefore, MCLR has to be computed as per the average of past 6 months (i.e. April 2020 to September 2020). Accordingly, the interest rate/ discounting factor works out to be 9.11% as against 10.41% claimed by SECI.
- c) SECI has proposed that the period for payment of compensation on account of GST Laws/ SGD be taken as 13 years as per Regulation 14 of the RE Tariff Regulations. Having the period of payment as only 13 years is devoid of any logic and this should be in line with the terms of the PPA. Regulation 14 of the RE Tariff Regulations pertains

to a scenario under Section 62 of the Electricity Act, 2003 where the debt repayment falls in the first 13 years and the tariff is determined in a front-loaded manner. However, in case of projects under Section 63 of the Electricity Act, 2003, the bidders do these computations by themselves. Therefore, annuity should be spread over the period of supply of electricity.

- d) SECI has stated that it is not in a position to agree to a lump-sum payment, and has proposed to make payment on annuity basis, primarily for the reason that the increased costs on account of GST Laws and SGD have been incurred for the purpose of supply of power and should, therefore, only be allowed to be recovered if the supply is actually made. A lump-sum payment without any supply having actually been made would leave SECI and the Distribution Licensees without any remedy if SPD abandons the project or discontinues supply or supplies electricity only for part of the year/ month. The Respondent agrees with SECI on this issue.
- e) UPPCL agrees with the proposal for payment on annuity basis and that the same can be implemented wherever payments have not been made so far by the Distribution Companies. If the Commission decides to direct payment on annuity basis in all cases, the lumpsum payments made by the distribution companies should be refunded with interest/ reconciled before the annuity is directed to be paid. Further, such payments can only be released after due verification and reconciliation of the claims in terms of the Orders of the Commission. In various instances, SPDs have not provided requisite details, and therefore no payment can be released in such cases.
- f) The billing and payment between SPD and SECI is not conditional upon billing and payment between SECI and UPPCL/ Buying utilities/Distribution Utilities. The Respondents have placed their reliance on Commission's Order dated 03.02.2020 in Petition No.356/MP/2018 and Petition No.51/MP/2019.
- g) The Commission may also consider that the payments to SPDs ought to be made only after physical verification of whether the modules are actually being used at the plant site for supply or not. By exhibiting one to one correlation between the projects and the



invoices, the payments are currently being claimed by the SPDs against procurement of modules. However, there is no way for the licensees to ensure that the said modules are actually being used at the plant site for supply. In order to match the AC capacity of the plant, SPDs are installing extra modules, for which there is no physical verification.

- h) SECI's assumption that claims will be allowed up to COD are bad in law and ought to be rejected by the Commission. Even if as per the terms of the PPA, the Commission permits an extension in the commissioning date, by no means it entails that the financial implication arising out of the same can be burdened/ passed onto the consumers. Any delay claimed to be attributable to reasons beyond the control of SPD, has to be exhibited by way of documentary evidence and the same needs to be approved the Commission for admitting the additional claims beyond SCoD. Accordingly, as a matter of principle, the SGD and GST claims may be admitted upto SCoD only as per the Order dated 04.10.2019 and no claim beyond SCoD should be admissible.

***Submissions by Respondent No. 45, 46, 47, 48 and 53 (Rajasthan Discoms and Gujarat Discoms) in Petition No. 536/MP/2020***

39. These Respondents have submitted as under:

- a) The Respondents have already made payments to SPDs on account of their claims on account of GST Laws and Safeguard Duty. However, there are various instances where certain discrepancies have been noticed in the claims, and therefore the reconciliation has not been possible. Consequently, certain amounts have not been released to the SPDs due to lack of requisite details furnished by the SPDs.
- b) In certain instances, SPDs have not even furnished any proof of actual payment but have claimed compensation for Safeguard Duty on the basis of bonds furnished by the importer of the panels, with an undertaking to pay. Clearly, when no actual payment has been made for the panels, no compensation can be paid. Similarly, the issue of cut-off date as stated above does not arise in every Order of the Commission. It cannot be that if a particular developer is granted some dispensation in view of its particular facts, all other developers also be allowed to claim on the basis of that order.

### **Analysis and decisions**

40. We have heard the learned counsels for the Petitioner and the Respondents and have carefully perused the records.
41. Several SPDs (Respondents 1 to 34 in Petition No. 536/MP/2020) had filed petitions before the Commission for approval of 'Change in Law' and consequential relief to compensate for the increase in capital cost due to introduction of the GST Laws and imposition of Safeguard Duty. The Commission has issued various Orders in this context as under:

| <b>Sr. No.</b> | <b>Petition No.</b>   | <b>Date of Order</b> |
|----------------|---|----------------------|
| 1.             | 52/MP/2018 [GST Laws]   | 19.09.2018           |
| 2.             | 188/MP/2017; 189/MP/2017; 190/MP/2017; 201/MP/2017; 202/MP/2017; 203/MP/2017; 204/MP/2017; 47/MP/2018; [GST Laws] | 09.10.2018           |
| 3.             | 192/MP/2018; 178/MP/2018; 189/MP/2018 [GST Laws]  | 05.02.2019           |
| 4.             | 212/MP/2018; 207/MP/2018; 210/MP/2018 [GST Laws]  | 12.04.2019           |
| 5.             | 165/MP/2018 [GST Laws]  | 18.04.2019           |
| 6.             | 342/MP/2018; 343/MP/2018 [Safeguard Duty]   | 02.05.2019           |
| 7.             | 14/MP/2019; 69/MP/2019; 27/MP/2019; 13/MP/2019 [Safeguard Duty]   | 04.10.2019           |
| 8.             | 4/MP/2019; 352/MP/2018; 355/MP/2018; 358/MP/2019; 359/MP/2019 [GST Laws]  | 30.12.2019           |
| 9.             | 67/MP/2019; 68/MP/2019 [GST Laws]   | 28.01.2020           |
| 10.            | 356/MP/2018; 51/MP/2019 [Safeguard Duty]  | 03.02.2020           |
| 11.            | 127/MP/2019; 135/MP/2019; 129/MP/2019; 130/MP/2019; 134/MP/2019 [GST Laws]  | 26.03.2020           |
| 12.            | 388/MP/2018; 395/MP/2018 [GST Laws]   | 27.03.2020           |
| 13.            | 299/MP/2019; 360/MP/2019 [GST Laws]   | 02.04.2020           |
| 14.            | 177/MP/2019; 178/MP/2019 [GST Laws]   | 24.01.2021           |
| 15.            | 211/MP/2019 [GST Laws]  | 25.01.2021           |
| 16.            | 81/MP/2021 [Safeguard Duty]   | 04.05.2021           |
| 17.            | 73/MP/2020 [GST & Safeguard Duty]   | 13.05.2021           |
| 18.            | 181/MP/2020 [Safeguard Duty]  | 17.06.2021           |
| 19.            | 45/MP/2019 [GST Laws]   | 10.08.2021           |

42. In addition, the following petitions involving similar issues are pending with the Commission for Orders:

| <b>Sr. No.</b> | <b>Petition No.</b>                    | <b>Date of Order</b> |
|----------------|--|----------------------|
| 1.             | 70/MP/2019 [GST Laws]                  | Pending              |
| 2.             | 52/MP/2019 [GST Laws]                  | Pending              |
| 3.             | 72/MP/2020 [GST Laws & Safeguard Duty] | Pending              |

|    |                        |         |
|----|------------------------|---------|
| 4. | 179/MP/2020 [GST Laws] | Pending |
|----|------------------------|---------|

43. The Commission by way of aforesaid Orders has, *inter alia*, held that introduction of the GST Laws w.e.f. 01.07.2017 is covered under Change in Law in terms of the respective PPAs and imposition of the Safeguard Duty vide Notification No. 1/2018 (SG) dated 30.07.2018 is an event of Change in Law in terms of the respective PPAs. The Commission also, in some orders, directed that claim shall be paid within sixty days of the date of Order or from the date of submission of claims by SPDs, whichever is later, failing which it will attract late payment surcharge as provided under PPAs/PSAs. In some orders, the Commission directed that SPDs and intermediary agency/Discoms may mutually agree to the mechanism for the 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.
44. SECI has submitted that the Respondents 1 to 34 (in Petition No. 536/MP/2020) have submitted documents along with supplementary invoices, tax invoices along with auditor's certificates to SECI in their respective petitions. SECI reconciled the claims and forwarded the same to the concerned DISCOMs for verification of the claims allegedly on the ground of back-to-back nature of the PPAs and PSAs. The SPDs have submitted that even after more than 60 days from the date of submission of invoices, payments from SECI are still outstanding in several cases, either in full or in part.
45. SECI has filed the instant petition for clarifications on the aspects of (i) annuity model viz. discounting factor, period of payment; (ii) cut-off date for payment of compensation; (iii) late payment surcharge/ interest on lump-sum payment; (iv) implication of taxes, duties, levies on monthly annuity payment; and (v) direction to the buying utilities/ distribution licensees to make payments for the reconciled amounts.
46. Meanwhile, MNRE vide letters dated 12.03.2020 and 23.03.2020 directed the Central Agencies (such as SECI) implementing the schemes under the guidelines issued by MNRE, to proceed with payment of the change in law claims including the safeguard duty claims on the basis of annuity model. MNRE further clarified that once the principles to be followed regarding change in law have been decided by the Commission, there is no need to ask every

developer to go before the Commission for seeking Orders in similar cases.

47. MNRE recommended two options for making payments towards change in law compensation i.e., (A) as a lumpsum or (B) on annuity basis. In case of Option (A) where lumpsum compensation is paid, the Central agencies were directed to pay the same within 60 days from the date of the Order or date of submission of the claims, whichever is later. However, in case of Option (B) where compensation is paid on annuity basis, the same will have to be started forthwith.
48. SECI has confirmed that it has started making Monthly Annuity Payments with the proposed annuity rate of 10.41% as an interim measure.
49. We observe that Article 12.2 of the PPAs of all the Petitions [Safeguard Duty and GST Laws] that have been adjudicated by the Commission is pari-materia except for the PPAs in Petition No. 373/MP/2019 (Safeguard Duty). Article 12.2 of these Petitions stipulates as under:

*“12.2 Relief for Change in Law*

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

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

50. Article 17 (C) of the PPA of the Petition No. 373/MP/2019 [Safeguard Duty] stipulates as under:

*“Article 17*

*(C)...*

*If the additional capital expenditure, interest and associated costs that the SPD may incur as a result of the Change in Law exceeds the Threshold Limit, then the Procurer or the SPD shall approach the Appropriate Commission to seek approval of such Change in Law and the consequent impact on the Applicable Tariff.”*

We observe that as per the aforesaid provisions, Change in law requires that *firstly*, the quantum and mechanism of compensation payment has to be determined, and *secondly*, the date from which the quantum and mechanism of compensation payment shall be effective,

has to be declared. The Commission has already decided the principles for determining the quantum and mechanism of compensation payment in the petitions that were filed for this purpose. Accordingly, the contracting parties have either reconciled or are in the process of reconciling the compensation claims and hence the quantum of compensation either stands determined or is in the process of being determined. Further, the Respondents in general Discoms as well as SPDs have agreed in-principle to the annuity model and as such, the mechanism of the compensation payment also stands settled. However, there remains a main dispute around the discounting factor/rate of annuity.

51. We observe that in their replies, some of the Respondents have raised the preliminary issue of jurisdiction of the Commission to adjudicate the dispute. A few Respondents have submitted that the instant dispute is not covered under section 79(1)(f) of the Electricity Act, 2003 and, therefore, the Commission does not have the jurisdiction to adjudicate the matter.
52. We observe that the Article of PPAs (e.g Article 16.3) relating to Dispute Resolution stipulates as under:

*“16.3 Dispute Resolution*

*16.3.1 Dispute Resolution by the Appropriate Commission*

*(i) Where any Dispute*

*(a) arises from a claim made by any Party for any change in or determination of the Tariff or any matter related to Tariff or claims made by any Party which partly or wholly relate to any change in the Tariff or determination of any of such claims could result in change in the Tariff, or*

*(b) relates to any matter agreed to be referred to the Appropriate Commission, such Dispute shall be submitted to adjudication by the Central Commission.*

*(ii) SECI shall be entitled to co-opt the Buying Utilities and/or the lenders (if any) as a supporting party in such proceedings before the Central Commission.”*

53. From the above, we are of the view that the matters involving the discounting factor/ rate of annuity are related to tariff. Moreover, this Commission has already adjudicated the dispute in petitions where approval of Change in Law was granted and compensation on account of such Change in Law was decided. Issues related to jurisdiction, if any, had to be raised in those petitions and not now. Therefore, this Commission has the jurisdiction to adjudicate in the matters raised in the instant petitions.

54. Apart from the issue regarding jurisdiction, we would also like to deal with the question of non-compliance/violation of the Orders passed by the Commission as raised by the SPDs. During the hearing held on 07.07.2020, the Petitioners in Petition No. 454/MP/2019 and Petition No. 457/MP/2019 (for claims under GST Laws) and Petition No. 500/MP/2019 (for claims under SGD) have submitted that the reconciliation process of their claims has been completed with SECI. During the hearing, SECI submitted that it has started paying the reconciled claims to the Petitioners *lis pendis* adjudication in Petition No. 536/MP/2020. Since SECI has started paying the reconciled claims, the prayer of the Petitioners in these petitions to declare that the Respondent No. 1 in these petitions (SECI) is in violation of Order has become redundant to that extent.
55. M/s SBG Cleantech Projectco Five Private Limited in I.A. 73 of 2020 in Petition No. 536/MP/2020 has submitted that it may be allowed to be impleaded as a party. Though no order as to impleading M/s SBG Cleantech Projectco Five Private Limited was made, its counsel was allowed to make submissions, which have been taken on the record.
56. From the submissions of the parties in Petition No. 536/MP/2020 along with IA No. 71/2020, IA No. 73/2020 and IA No. 2/2021; in Petition No. 158/MP/2020 along with IA No. 35/2020; in Petition No. 373/MP/2020; in Petition No. 454/MP/2019 along with IA No. 19/2020; in Petition No. 457/MP/2019 along with IA No. 18/2020; and in Petition No. 500/MP/2019 along with IA No. 20/2020, the following issues arise for adjudication:

**Issue No. 1:** *Whether the annuity methodology proposed by SECI is just and equitable and can be approved?*

**Issue No. 2:** *Whether interest cost on Customs Bonds executed by some SPDs is covered under Change in Law and whether it should be allowed to be recovered in lumpsum as a separate element?*

**Issue No. 3:** *Whether the cut-off date for payment of GST/Safeguard Duty claims in respect of orders passed by this Commission needs clarification?*

**Issue No. 4:** *Whether there is implication of taxes and duties levied by the appropriate Government on monthly annuity payment and whether the same should be allowed as pass through on actual basis?*

***Issue No. 5: Whether the principles decided in this Petition can be made applicable to all the current petitions pertaining to GST and Safeguard Duty pending before this Commission?***

57. We now discuss and analyse the issues one by one.

***Issue No. 1: Whether the annuity methodology proposed by SECI is just and equitable and can be approved?***

58. SECI, the Petitioner in Petition No. 536/MP/2020, has submitted that the increased costs on account of compensation for Change in Law due to GST Laws/ SGD should be recovered only if SPDs supply the power. If SPDs are allowed to recover the increased cost in lump-sum, this would imply payment of compensation even without the actual supply of power. If, for any reason, the project developers abandon the project and discontinue the supply of power, there is no methodology for adjustment of the lump sum payments already made. These implications will be contrary to the fundamental principle of recovery of capital cost through tariff. SECI has submitted that if the Change in Law event had occurred prior to the cut-off date, SPDs would have factored the higher cost to be incurred by them in establishing the solar power project in the per unit tariff to be quoted. Accordingly, the same methodology should be adopted for servicing the impact of Change in Law. Further, the payment of the amount as one-time in respect of the renewable power developers would result in substantial amount being paid to them upfront by the Buying utilities/ Distribution Companies through SECI on a back to back basis which will cause serious financial prejudice to SECI and the Buying utilities/ Distribution Companies. On the other hand, payment of such amount on annuity basis is consistent with the principles governing the servicing of the capital cost over the duration of the PPAs and, therefore, ought to be the principal basis for settlement of the claims unless in a given case the Buying utilities/ Distribution companies voluntarily agree to make a one-time payment of the amount determined as impact of GST Laws/ Safeguard Duty subject to necessary adjustment by way of determination of the net present value. SECI has proposed the methodology for making payment on monthly basis (annuity) considering the following parameters:

- a) The GST Laws/ Safeguard Duty claims have been provisionally evaluated/ re-evaluated up to Commercial Operation Date (COD) based on the Order dated 28.01.2020 passed by the Commission in Petition No.67/MP/2019 and 68/MP/2019;

- b) The discounting factor has been considered as 10.41% which is the rate of interest for the loan component of the capital cost as provided in CERC RE Tariff order dated 19.03.2020 providing for determination of levelized generic tariff for the financial year 2019-2020;
- c) The period for payment of the compensation on account of GST/ Safeguard Duty has been taken to be as 13 years from COD;
- d) In cases where the projects of SPDs have already achieved COD, the amount of monthly annuity payment for the number of months elapsed till the date of payment i.e. 30.04.2020 or as the case may be, has been made on lumpsum basis from the Payment Security Fund.

59. ***Per Contra***, various SPDs have proposed as under:

**Option 1:** Payment of the entire aggregate principal amount as a lump sum amount paid upfront, together with applicable Late Payment Surcharge (LPS) in terms of the PPA.

OR

**Option 2:** Payment of the entire aggregate principal amount through equated monthly instalments (EMIs), spread over a pre-determined period of time, starting from COD. The applicable annuity rate for calculating EMIs should be on the basis of:

- An aggregated weighted average rate between the cost of debt and the cost of equity that reflects the cost of this incremental investment towards capex.
- The cost of debt should be considered as 10.41% while the cost of equity should be 14% post tax (18.71% pre-tax when grossed up with Corporate tax which is 25.17%) both being as per CERC RE Tariff Order dated 19.03.2019 based on the 2017 RE Tariff Regulations.
- Accordingly, the annuity rate calculated is 12.90%  $[(10.41\% \times 70\%) + (18.71\% \times 30\%) = 12.90\%]$  per annum.
- The period of annuity payment could be 13 years, starting from COD, as has been accepted in principle by SECI in respect of the diverse PPAs executed by it. Also, the accrued amounts corresponding to the period



from the date of commissioning till the date of commencement of the actual monthly payment, to be paid in lumpsum as specified in the PPA;

OR

**Option 3:** Payment of the entire principal amount in the form of annual revenue streams which can be determined as per the CERC RE Tariff Order dated 19.03.2019 based on 2017 RE Tariff Regulations since:

- The said aggregate principal amount is in the nature of additional capex in the project.
- The principal amount being a determinate amount, the Commission may calculate the annual revenue streams specific to this determinate amount by applying the normative financial principles set out in the CERC RE Tariff Order dated 19.03.2019.
- This annual revenue stream can be paid against supplementary monthly invoices. These revenue streams so determined should be paid w.e.f. COD for the projects.
- The period of this annual revenue stream should be PPA period i.e. 25 years, starting from COD. Also, the accrued amounts corresponding to the period from the date of commissioning till the date of commencement of the payment along with LPS as specified in the PPA.

60. A few SPDs have proposed as under:

- a) An aggregated weighted average rate between the cost of debt and the cost of equity that reflects the cost of this incremental investment towards capex.
- b) The cost of debt should be considered as 10.75% i.e. applicable interest rate on debt by PFC/REC/IREDA while the cost of equity should be 14% post tax (18.71% pre-tax when grossed up with Corporate tax which is 25.17%) i.e. as per CERC RE Tariff Order dated 19.03.2019 based on the 2017 RE Tariff Regulations.
- c) Accordingly, the annuity rate calculated should be 13.14%  $[(10.75\% \times 70\%) + (18.71\% \times 30\%) = 13.14\%]$  per annum.
- d) The period of annuity payment could be 13 years, starting from the COD. Also, the accrued amounts corresponding to the period from the date of commissioning till the

date of commencement of the actual monthly payment, be paid in lump sum by SECI along with the LPS as specified in the PPA;

61. We observe that SECI has proposed the annuity mode with discounting factor as 10.41% whereas SPDs have submitted that the discounting factor should be higher. Some SPDs have suggested the discounting factor as 12.90%  $[(10.41\% \times 70\%) + (18.71\% \times 30\%) = 12.90\%]$  per annum by factoring in the interest on loan @10.41% and the return on equity of 14% grossed by the Corporate Tax rate and applying the debt equity ratio of 70:30 as per the 2017 RE Tariff Regulations. Some other SPDs have submitted that the discounting factor should be 13.14%  $[(10.75\% \times 70\%) + (18.71\% \times 30\%) = 13.14\%]$  per annum. Still other SPDs have suggested even a higher discounting factor. On the other hand, the Respondent Discoms (in Petition No. 536/MP/2020) have proposed that the discounting factor of 9.36% as determined by the Commission in its RE Tariff Order dated 19.03.2019 in the matter of Determination of levelized generic tariff for FY 2019-20 under Regulation 8 of the 2017 RE Tariff Regulations, should be considered.
62. We would like to clarify at the outset that the present petitions are not a tariff determination exercise under section 62 of the Electricity Act, 2003. As such, reliance on the 2017 RE Tariff Regulations or any Order issued in pursuance of the said regulations can at best have a reference value for the purpose of resolving the issue of discount rate for annuity payments. The relevant extract of the 2017 RE Tariff Regulations which have been referred in the petitions is quoted below (emphasis supplied):

“

*10. Tariff Design*

*(1) The generic tariff shall be determined considering the year of commissioning of the project, on levellised basis for the Tariff Period.*

*Provided that for renewable energy technologies having single part tariff with two components, tariff shall be determined on levellised basis considering the year of commissioning of the project for fixed cost component while the fuel cost component shall be specified on year of operation basis.*

*(2) For the purpose of levellised tariff computation, **the discount factor equivalent to Post Tax weighted average cost of capital shall be considered.***

*(3) Levellisation shall be carried out for the 'useful life' of the Renewable Energy project.*

*(4) The above principles shall also apply for project specific tariff.*

...

13. Debt Equity Ratio

(1) For generic tariff to be determined based on suo-motu petition, **the debt equity ratio shall be 70:30.**

(2) For Project specific tariff, the following provisions shall apply:-

If the equity actually deployed is more than 30% of the capital cost, equity in excess of 30% shall be treated as normative loan.

Provided that where equity actually deployed is less than 30% of the capital cost, the actual equity shall be considered for determination of tariff:

Provided further that the equity invested in foreign currency shall be designated in Indian rupees on the date of each investment.

14. Loan and Finance Charges

(1) Loan Tenure For the purpose of determination of tariff, **loan tenure of 13 years shall be considered.**

(2) Interest Rate

(a) The loans arrived at in the manner indicated in Regulation 13 shall be considered as gross normative loan for calculation for interest on loan. The normative loan outstanding as on April 1 st of every year shall be worked out by deducting the cumulative repayment up to March 31st of previous year from the gross normative loan.

(b) For the purpose of computation of tariff, normative **interest rate of two hundred (200) basis points above the average State Bank of India Marginal Cost of Funds based Lending Rate (MCLR) (one year tenor) prevalent during the last available six months** shall be considered.

(c) Notwithstanding any moratorium period availed by the generating company, the repayment of loan shall be considered from the first year of commercial operation of the project and shall be equal to the annual depreciation allowed.

...

16. Return on Equity

(1) The value base for the equity shall be 30% of the capital cost or actual equity (in case of project specific tariff determination) as determined under Regulation 13.

(2) The normative Return on Equity shall be **14%, to be grossed up by prevailing Minimum Alternate Tax (MAT) as on 1st April of previous year** for the entire useful life of the project.

...

24. Taxes and Duties

Tariff determined under these regulations shall be exclusive of taxes and duties as may be levied by the appropriate Government:

Provided that the taxes and duties levied by the appropriate Government shall be allowed as **pass through on actual incurred basis.**”

63. We observe that Regulation 10(2) of the 2017 RE Tariff Regulations provides for the discount factor equivalent to the post tax weighted average cost of capital (WACC). The discount factor is calculated by considering the normative debt equity ratio (70:30) and the weighted average of the post-tax rates for debt and equity component. As against this, SPDs have proposed the discount factor equivalent to pre-tax weighted average cost of capital. They have contended that the cost of debt should be considered as 10.41% while the cost of equity should be 18.71% pre-tax (by grossing up post tax ROE of 14% by Corporate tax rate of 25.17%), which when applied to the debt equity ratio of 70:30 would yield the discounting factor of 12.90%. Similar is the argument of a few other SPDs who have also computed the WACC at 13.14% based on pre-tax interest on loan and return on equity  $[(10.75\% \times 70\%) + (18.71\% \times 30\%) = 13.14\%]$  per annum. Therefore, the Commission finds that these methodologies of calculations of WACC on pre-tax rates of debt and equity are not consistent with the methodology the Commission follows for determining the WACC, which is on post-tax basis.
64. Further, in the tariff determined through a competitive bidding process under Section 63 of the Electricity Act, 2003, the individual tariff elements, such as capital cost, cost of capital etc. are not known. Similarly, the expected return of equity is also unknown. In the absence of such details, it is neither possible nor appropriate to engage in detailed computation of the weighted average cost of capital based on the 2017 RE Tariff Regulations. Therefore, we are not inclined to consider the contention of the SPDs for discount factor of 12.9% or 13.14% or that of Respondent Discoms for a discount factor of 9.36%.
65. We find that in Petition No. 536/MP/2020, SECI and the Respondents (SPDs as well as the Discoms) are on the same page in so far as the rate of interest on loan is considered. This is evident from the computation of the weighted average cost of capital advanced by the contending parties. Majority of the parties have used 10.41% (as mentioned in the CERC RE Tariff Order dated 19.03.2019) as the reference rate of interest for building their arguments for the rate of annuity payment. In other words, the parties have accepted this rate as the appropriate normative rate of interest for any debt that they might have taken. Given the fact that it is not possible in case of competitive bidding projects to ascertain either the capital structuring (extent of debt and equity) of the projects, or the actual rate of interest of the debt

component or the expected rate of return on equity, we consider it appropriate to use the normative rate of 10.41% as reference for the purpose of annuity payment. As the actual deployment of capital by way of debt or equity and their cost in terms of rate of interest or return, respectively, is unknown, the rate 10.41% can be taken as the uniform rate of compensation for the entire expenditure incurred on account of GST Laws or Safeguard Duty. The Commission is of the view that the compensation for change in law cannot be a source for earning profit, and therefore, there cannot be any higher rate of return than the prevailing normative cost of debt. Accordingly, we hold that 10.41% shall be the discount rate of annuity payments towards the expenditure incurred on GST or Safeguard Duty (as the case may be) by the Respondent SPDs on account of 'Change in Law'.

***Commencement of 'Monthly Annuity Payments' and "Late Payment Surcharge"***

66. Further, SPDs have submitted that the 'Monthly Annuity Payment' of GST claims ought to start from COD taking into consideration the provisions of applicable 'Late Payment Surcharge' in the PPAs in case of delayed payments
67. We observe that in the Petitions filed by the SPDs where claims under Change in Law were adjudicated, the Commission has directed SPDs to make available to SECI/ Discoms all relevant documents exhibiting clear and one to one correlation between the projects and the supply of goods or services, duly supported by the relevant invoices and Auditor's Certificate. SECI/ Discoms were further directed to reconcile the claims for Change in Law on receipt of the relevant documents and pay the amount so claimed to SPDs. It was also held that SECI is liable to pay to SPDs which is not conditional upon the payment to be made by the Discoms to SECI. However, SECI is eligible to claim the same from the Discoms on 'back to back' basis. The claim was directed to be paid within sixty days of the date of respective orders or from the date of submission of claims by SPDs whichever was later failing which it will attract late payment surcharge as provided under PPAs/PSAs. Alternatively, SPDs and the SECI/ Discoms may mutually agree to a mechanism for the 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.

68. In view of the above, the liability of SECI/ Discoms for ‘Monthly Annuity Payment’ starts from 60th (sixtieth) day from the date of orders in respective petitions or from the date of submission of claims by the Respondent (SPDs), whichever is later. In case of delay in the Monthly Annuity Payment beyond the 60th (sixtieth) day from the date of orders in respective petitions or from the date of submission of claims by the Respondent (SPDs), whichever is later, late payment surcharge shall be payable for the delayed period corresponding to each such delayed Monthly Annuity Payment(s), as per respective PPAs/PSAs.

### **Tenure of ‘Annuity Period’**

69. SPDs have submitted that the annuity period should be 13 years. It is observed that SECI has revised the proposal of annuity payments by considering the annuity period of 13 years instead of 25 years as proposed earlier. Further, SECI has stated that the payment shall be provisional and subject to final decision of this Commission in respective petitions. The period of 13 years is consistent with Regulation 14 of the RE Tariff Regulations, 2017 which stipulates as under:

*“14. Loan and Finance Charges*

*(1) Loan Tenure*

*For the purpose of determination of tariff, loan tenure of 13 years shall be considered.”*

70. We observe that as there seems to a general acceptance amongst SECI and the Respondent SPDs that the Annuity Period could be of 13 years, as such the same is approved by the Commission.

### **Payment Security Mechanism**

71. SPDs have submitted that the Commission may also direct SECI to create a Payment Security Mechanism (PSM) for payment of the annuity payments. This can be either in the form a separate PSM being established by SECI or modifying the existing PSM which has been already established under the PPAs to provision for the annuity payment.

We observe that PPAs in various Petitions do stipulate 'payment security mechanism'. We are of the view that the payment security mechanism stipulated in the respective PPAs should also cover the annuity payments. Accordingly, we direct that the annuity payment liability shall be a part of the existing payment security mechanism as stipulated in the PPAs and already established under the PPAs by making suitable provision for the annuity payments.

72. The issue stands decided accordingly.

***Issue No. 2: Whether interest cost on Customs Bond executed by some SPDs is covered under Change in Law and whether it should be allowed to be recovered in lumpsum as a separate element?***

73. Some SPDs have submitted that a few Bills of Entry were cleared against the bonds and as such no Safeguard duty has been levied till the liquidation of bonds. Further, the same would be settled with the Indian Customs in due course. The bonds submitted to the Indian Customs attract interest to the tune of 15-16% per annum from the date of execution of the bonds. Therefore, the liability for payment has already accrued in the books of SPDs along with interest. SPDs have requested that SECI may be directed to pay bond amount along with appropriate interest amount as one time lumpsum basis to them for the bonds submitted by them to the Indian Customs Department.

74. Section 143 of the Customs Act, 1962 stipulates as under:

*"143. Power to Allow Import or Export on Execution of Bonds in Certain Cases. –*  
*(1) Where this Act or any other **law requires anything to be done before a person can import** or export any goods or clear any goods from the control of officers of customs and the Assistant Commissioner of Customs is satisfied that having regard to the circumstances of the case, **such thing cannot be done before such import, export or clearance without detriment to that person**, the Assistant Commissioner of Customs may, notwithstanding anything contained in this Act or such other law, **grant leave for such import, export or clearance on the person executing a bond in such amount**, with such surety or security and subject to such conditions as the Assistant Commissioner of Customs approves, for the doing of that thing within such time after the import, export or clearance as may be specified in the bond.*  
*(2) If the thing is done within the time specified in the bond, the Assistant Commissioner of Customs shall cancel the bond as discharged in full and shall, on demand, deliver it, so cancelled, to the person who has executed or who is entitled to receive it; and in such a case that person shall not be liable to any penalty provided*



*in this Act or, as the case may be, in such other law for the contravention of the provisions thereof relating to the doing of that thing.*

*(3) If the thing is not done within the time specified in the bond, the Assistant Commissioner of Customs shall, without prejudice to any other action that may be taken under this Act or any other law for the time being in force, be entitled to proceed upon the bond in accordance with law.”*

75. We observe that the Bill of Entry is filed by importers on or before the arrival of the imported goods for the customs clearance. For clearing the shipment from customs, the importer or the exporter has to pay the customs duties, IGST, CESS etc., as applicable. The importer can be allowed to clear the imported goods on payment of the custom duties or/and securing through execution of bond. Generally, the importer executes bonds to defer the immediate payments of custom duties and get the goods released from the Indian Customs. Bills of Entry which are cleared against bonds are to be settled with the Indian Customs for duties in due course.
76. In the instant petitions, a few SPDs have claimed that they have executed bonds to get the solar panels released from the Indian Customs and the Bills of Entry will be settled with the Indian Customs for safeguard duty in due course. The Commission is of the view that execution of the bonds by SPDs with the Indian Customs for the import of solar modules was their commercial decision (for deferring immediate payment of customs duty and getting goods released from the Indian Customs) and the financial liability towards the said decision should also be borne by them and cannot be allowed as a pass through to SECI/ Discoms. Hence, the prayer of SPDs that the interest on Customs Bond should be covered under Change in Law and should be paid in lumpsum as separate element is disallowed. We have expressed our view only as regards interest payment on Customs Bond. Needless to mention, actual cash outflow (due to levy of safeguard duty) for which bonds have been executed will be payable and claims for Change in Law towards Safeguard Duty will be governed by orders in the petitions where the matter has been adjudicated.

***Issue No. 3: Whether the cut-off date for payment of GST/Safeguard Duty claims in respect of orders passed by this Commission needs clarification?***

77. SECI has submitted that the Commission in its Order dated 30.12.2019 in Petition No. 4/MP/2019 and connected Petitions in the matter of Parampuiya Solar Energy Private Limited vs. Solar Energy Corporation of India Limited & and Ors. has dealt with the issue of



cut-off date. The Commission held that liability of payment on account of impact of GST on procuring of Solar PV panels and associated equipment by the Petitioners shall lie with the Respondents till the Commercial Operation Date (COD) only.

78. ***Per Contra***, SPDs have submitted that the PPAs typically state that “*any additional recurring/ non-recurring expenditure by the SPD (...)*” is to be compensated. Accordingly, there can be no cut-off date as is being sought by SECI. It has been submitted that in one of the projects, SECI has considered the date of lorry receipts for two Invoices which were two days after COD for evaluating the claim as “*beyond COD*” and has denied change in law compensation towards the modules received through those lorries. A few SPDs have submitted that the liability of payment by the SECI/ Discoms lies till COD.
79. We have considered the submission. *Commercial Operation Date (COD)* has been defined in various PPAs as under:

***In Petition No. 13/MP/2019; 14/MP/2019; 356/MP/2018; 51/MP/2019; 81MP/2021;181/MP/2020:***

*“Commercial Operation date (COD) shall mean the date on which the commissioning certificate is issued upon successful commissioning of the full capacity of the Project or the last part capacity of the Project as the case may be;”*

***In Petition No. 68/MP/2019 ; 177/MP/2019; 189/MP/2019; 192/MP/2018; 299/MP/2019; 342/MP/2018; 343/MP/2018; 360/MP/2019:***

*“Commercial Operation date (COD) shall be the date 30 days subsequent to the actual date of commissioning of full capacity (i.e. the full capacity of the Power Project has been commissioned and the SPD starts scheduling and injecting power from the Power Project to the Delivery Point) of the Project as declared by the SNA/SECI, and the SPD not availing any VGF shall be required to demonstrate / infuse”*

***In Petition No. 395/MP/2018***

*“COD shall mean the 30 days from the actual commissioning date of the capacity where upon the SPD starts injecting power from the part Commissioned capacity to the interconnection point/ delivery point/ meeting point. COD is intended to match a location and availability of thermal power for bundling;”*

***In Petition No. 373/MP/2020***

*“4.4 (g) : ... “the date on which the SPD has commissioned 200 MW capacity shall be the Deemed COD”*

***In rest of the petitions***

*“Commercial Operation Date (COD)” shall be the date 30 days subsequent to the actual date of commissioning of full capacity (i.e. the full capacity of the Power Project has been commissioned and the SPD starts scheduling and injecting power from the Power Project to the Delivery Point) of the Project as declared by the SNA/SECI and the developer has paid to SECI, a Performance Guarantee Deposit (PGD) @Rs. 10 lakhs/MW for the entire Contracted Capacity and the SPD not availing any VGF shall be required to demonstrate / infuse cumulative capital in the form of Equity for an amount of at least Rs. 1.20 Cr./MW before the COD.*

80. We further observe the following provisions in the PPAs:

***“ARTICLE 1***

*“Commissioning” shall have the meaning ascribed thereto in Article 5 of this Agreement;*

***ARTICLE 5: SYNCHRONISATION, COMMISSIONING AND COMMERCIAL OPERATION***

***5.1 Synchronization, Commissioning and Commercial Operation***

***5.1.1*** *The SPD shall give the concerned RLDC/SLDC, SECI and Solar Park Implementing Agency (if applicable) at least sixty (60) days advanced preliminary written notice and at least thirty (30) days advanced final written notice, of the date on which it intends to synchronize the Power Project to the Grid System.*

***5.1.2*** *Subject to Article 5.1.1, the Power Project may be synchronized by the SPD to the Grid System when it meets all the connection conditions prescribed in applicable Grid Code then in effect and otherwise meets all other Indian legal requirements for synchronization to the Grid System.*

***5.1.3*** *The synchronization equipment and all necessary arrangements / equipment including RTU for scheduling of power generated from the Project and transmission of data to the concerned authority as per applicable regulation shall be installed by the SPD at its generation facility of the Power Project at its own cost. The SPD shall synchronize its system with the Grid System only after the approval of synchronization scheme is granted by the head of the concerned sub-station/Grid System and checking/verification is made by the concerned authorities of the Grid System.*

***5.1.4*** *The SPD shall immediately after each synchronization/tripping of generator, inform the sub-station of the Grid System to which the Power Project is electrically connected and all other concerned authorities in accordance with applicable Grid Code under intimation to SECI. In- Addition the SPD will inject in-firm power to grid time to time to carry out operational/ functional test prior to commercial operation.*

***5.1.5*** *The SPD shall commission the Project as detailed in “Schedule 6:*

*Commissioning Procedure” within thirteen (13) Months of the date of signing of PPA*

#### **ARTICLE 4**

##### **4.4. Right to Contracted Capacity & Energy**

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

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

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

#### **SCHEDULE 6: COMMISSIONING PROCEDURE:**

**\* Capacity of Solar PV Projects:**

*i) maximum AC Capacity at the delivery point as described below:*

| <i>Sr. No.</i> | <i>Solar PV Project Capacity Bid</i> | <i>Minimum DC Arrays Capacity to be installed</i> | <i>Minimum Rated Inverter Capacity*</i> | <i>Maximum AC Capacity Limit at Delivery point</i> |
|----------------|--------------------------------------|---|---|--|
| <i>1</i>       | <i>10 MW</i>                         | <i>10 MW</i>                                      | <i>10 MW</i>                            | <i>10 MW</i>                                       |
| <i>2</i>       | <i>20 MW</i>                         | <i>20 MW</i>                                      | <i>20 MW</i>                            | <i>20 MW</i>                                       |
| <i>3</i>       | <i>30 MW</i>                         | <i>30 MW</i>                                      | <i>30 MW</i>                            | <i>30 MW</i>                                       |
| <i>4</i>       | <i>40 MW</i>                         | <i>40 MW</i>                                      | <i>40 MW</i>                            | <i>40 MW</i>                                       |
| <i>5</i>       | <i>50 MW</i>                         | <i>50 MW</i>                                      | <i>50 MW</i>                            | <i>50 MW</i>                                       |

*\*In case the rated capacity is mentioned in kVA, the IEC test certificate declaring the power factor of the Inverter/PCU at rated power has to be submitted and the power factor shall be multiplied by the kVA rating to calculate the rated capacity of the inverter in kW.*

*ii) Higher DC capacity arrays so as to achieve AC capacity limit as mentioned above for scheduling at the delivery point in compliance to Article 4.4 “Right to Contracted Capacity & Energy” of the PPA is allowed.*

*iii) For commissioning of the Project, capacity of DC arrays installed shall be considered. In case of part commissioning of Project, it shall be required to have the DC Arrays Capacity be installed not less than the proposed part commissioning capacity.*

*iv) Provisions of Article 4.6.1 of the PPA with SPD shall apply for the capacity not commissioned by the scheduled commissioning date.*

*v) If generation at any time exceeds the maximum permissible AC capacity at delivery point, the excess generation during that period shall not be considered under PPA.*

#### *Appendix-A-1*

##### *Commissioning Procedure*

*i) At the time of commissioning, the Commissioning Committee shall verify compliance of technical parameter of the Project as per Annexure A of the RFS document.*

*ii) SPDs shall give to the concerned RLDC/SLDC, State Nodal Agency (SNA) and SECI at least sixty (60) days advance preliminary written notice and at least thirty (30) days advance final written notice, of the date on which it intends to synchronize the Power Project to the Grid System. The SPD shall be solely responsible for any delay or non receipt of the notice by the concerned agencies, which may in turn affect the Commissioning Schedule of the Project.*

*iii) A Solar PV Project will be considered as commissioned if all equipment as per rated project capacity has been installed and energy has flown into the grid*

81. We note that as per the PPAs (e.g. Article 1 read with Article 5 and Schedule 6 quoted above) the commissioning of the project implies that all the equipment as per rated project capacity has been installed and the energy has flown into the grid. The Commission also notes that the liability of the SECI/ Discoms for payment for purchase of power from the Respondent SPDs

starts from the Commercial Operation Date (COD) as defined in Article 1 of the respective PPAs. .

***Cut-off date for Safeguard Duty Claims***

82. We observe that, 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.
83. Hence, the Commission has already held that the invoices related to supply of the goods can be raised only up to the COD, for all the equipment as per rated project capacity that has been installed and through which energy has flown into the grid, since the liability of the SECI/Respondent Discoms for payment of purchase of power from the Respondent SPDs starts from the Commercial Operation Date (COD).

***Cut-off date for GST Claims***

84. Various Sections of CGST Act, 2017 stipulate as under:

***“TIME AND VALUE OF SUPPLY***

*12. (1) The liability to pay tax on goods shall arise at the time of supply, as determined in accordance with the provisions of this section.*

*(2) The time of supply of goods shall be the earlier of the following dates, namely:—*

- (a) the date of issue of invoice by the supplier or the last date on which he is required, under sub-section (1) of section 31, to issue the invoice with respect to the supply; or*
- (b) the date on which the supplier receives the payment with respect to the supply:*

*Provided that where the supplier of taxable goods receives an amount up to one thousand rupees in excess of the amount indicated in the tax invoice, the time of*

*supply to the extent of such excess amount shall, at the option of the said supplier, be the date of issue of invoice in respect of such excess amount.*

*Explanation 1.—For the purposes of clauses (a) and (b), “supply” shall be deemed to have been made to the extent it is covered by the invoice or, as the case may be, the payment.*

*Explanation 2.—For the purposes of clause (b), “the date on which the supplier receives the payment” shall be the date on which the payment is entered in his books of account or the date on which the payment is credited to his bank account, whichever is earlier.*

*(3) In case of supplies in respect of which tax is paid or liable to be paid on reverse charge basis, the time of supply shall be the earliest of the following dates, namely:—*

- (a) the date of the receipt of goods; or*
- (b) the date of payment as entered in the books of account of the recipient or the date on which the payment is debited in his bank account, whichever is earlier; or*
- (c) the date immediately following thirty days from the date of issue of invoice or any other document, by whatever name called, in lieu thereof by the supplier: Provided that where it is not possible to determine the time of supply under clause (a) or clause (b) or clause (c), the time of supply shall be the date of entry in the books of account of the recipient of supply.*

*(4) In case of supply of vouchers by a supplier, the time of supply shall be—*

- (a) the date of issue of voucher, if the supply is identifiable at that point; or*
- (b) the date of redemption of voucher, in all other cases*

*(5) Where it is not possible to determine the time of supply under the provisions of sub-section (2) or sub-section (3) or sub-section (4), the time of supply shall—*

- (a) in a case where a periodical return has to be filed, be the date on which such return is to be filed; or*
- (b) in any other case, be the date on which the tax is paid.*

*(6) The time of supply to the extent it relates to an addition in the value of supply by way of interest, late fee or penalty for delayed payment of any consideration shall be the date on which the supplier receives such addition in value.”*

*13. (1) The liability to pay tax on services shall arise at the time of supply, as determined in accordance with the provisions of this section.*

*(2) The time of supply of services shall be the earliest of the following dates, namely:—*



- (a) *the date of issue of invoice by the supplier, if the invoice is issued within the period prescribed under sub-section (2) of section 31 or the date of receipt of payment, whichever is earlier; or*
- (b) *the date of provision of service, if the invoice is not issued within the period prescribed under sub-section (2) of section 31 or the date of receipt of payment, whichever is earlier; or*
- (c) *the date on which the recipient shows the receipt of services in his books of account, in a case where the provisions of clause (a) or clause (b) do not apply:*

*Provided that where the supplier of taxable service receives an amount up to one thousand rupees in excess of the amount indicated in the tax invoice, the time of supply to the extent of such excess amount shall, at the option of the said supplier, be the date of issue of invoice relating to such excess amount.*

*Explanation.—For the purposes of clauses (a) and (b)—*

- (i) *the supply shall be deemed to have been made to the extent it is covered by the invoice or, as the case may be, the payment;*
- (ii) *“the date of receipt of payment” shall be the date on which the payment is entered in the books of account of the supplier or the date on which the payment is credited to his bank account, whichever is earlier.*

*(3) In case of supplies in respect of which tax is paid or liable to be paid on reverse charge basis, the time of supply shall be the earlier of the following dates, namely:—*

- (a) *the date of payment as entered in the books of account of the recipient or the date on which the payment is debited in his bank account, whichever is earlier; or*
- (b) *the date immediately following sixty days from the date of issue of invoice or any other document, by whatever name called, in lieu thereof by the supplier:*

*Provided that where it is not possible to determine the time of supply under clause (a) or clause (b), the time of supply shall be the date of entry in the books of account of the recipient of supply:*

*Provided further that in case of supply by associated enterprises, where the supplier of service is located outside India, the time of supply shall be the date of entry in the books of account of the recipient of supply or the date of payment, whichever is earlier*

*(4) In case of supply of vouchers by a supplier, the time of supply shall be—*

- (a) *the date of issue of voucher, if the supply is identifiable at that point; or*
- (b) *the date of redemption of voucher, in all other cases.*

*(5) Where it is not possible to determine the time of supply under the provisions of sub-section (2) or sub-section (3) or sub-section (4), the time of supply shall—*

- (a) in a case where a periodical return has to be filed, be the date on which such return is to be filed; or*
- (b) in any other case, be the date on which the tax is paid.*

*(6) The time of supply to the extent it relates to an addition in the value of supply byway of interest, late fee or penalty for delayed payment of any consideration shall be the date on which the supplier receives such addition in value.*

*14. Notwithstanding anything contained in section 12 or section 13, the time of supply, where there is a change in the rate of tax in respect of goods or services or both, shall be determined in the following manner, namely:—*

*(a) in case the goods or services or both have been supplied before the change in rate of tax,—*

- (i) where the invoice for the same has been issued and the payment is also received after the change in rate of tax, the time of supply shall be the date of receipt of payment or the date of issue of invoice, whichever is earlier; or*
- (ii) where the invoice has been issued prior to the change in rate of tax but payment is received after the change in rate of tax, the time of supply shall be the date of issue of invoice; or*
- (iii) where the payment has been received before the change in rate of tax, but the invoice for the same is issued after the change in rate of tax, the time of supply shall be the date of receipt of payment;*

*(b) in case the goods or services or both have been supplied after the change in rate of tax,—*

- (i) where the payment is received after the change in rate of tax but the invoice has been issued prior to the change in rate of tax, the time of supply shall be the date of receipt of payment; or*
- (ii) where the invoice has been issued and payment is received before the change in rate of tax, the time of supply shall be the date of receipt of payment or date of issue of invoice, whichever is earlier; or*
- (iii) where the invoice has been issued after the change in rate of tax but the payment is received before the change in rate of tax, the time of supply shall be the date of issue of invoice;*

*Provided that the date of receipt of payment shall be the date of credit in the bank account if such credit in the bank account is after four working days from the date of change in the rate of tax.*

*Explanation.—For the purposes of this section, “the date of receipt of payment” shall be the date on which the payment is entered in the books*



*of account of the supplier or the date on which the payment is credited to his bank account, whichever is earlier.*

## **CHAPTER VII**

### **TAX INVOICE, CREDIT AND DEBIT NOTES**

*31. (1) A registered person supplying taxable goods shall, before or at the time of,—*

- (a) removal of goods for supply to the recipient, where the supply involves movement of goods; or*
- (b) delivery of goods or making available thereof to the recipient, in any other case,*

*issue a tax invoice showing the description, quantity and value of goods, the tax charged thereon and such other particulars as may be prescribed:*

*Provided that the Government may, on the recommendations of the Council, by notification, specify the categories of goods or supplies in respect of which a tax invoice shall be issued, within such time and in such manner as may be prescribed.*

*(2) A registered person supplying taxable services shall, before or after the provision of service but within a prescribed period, issue a tax invoice, showing the description, value, tax charged thereon and such other particulars as may be prescribed:*

*Provided that the Government may, on the recommendations of the Council, by notification and subject to such conditions as may be mentioned therein, specify the categories of services in respect of which—*

- (a) any other document issued in relation to the supply shall be deemed to be a tax invoice; or*
- (b) tax invoice may not be issued.*

*(3) Notwithstanding anything contained in sub-sections (1) and (2)—*

- (a) a registered person may, within one month from the date of issuance of certificate of registration and in such manner as may be prescribed, issue a revised invoice against the invoice already issued during the period beginning with the effective date of registration till the date of issuance of certificate of registration to him;*
- (b) a registered person may not issue a tax invoice if the value of the goods or services or both supplied is less than two hundred rupees subject to such conditions and in such manner as may be prescribed;*
- (c) a registered person supplying exempted goods or services or both or paying tax under the provisions of section 10 shall issue, instead of a tax invoice, a bill of supply containing such particulars and in such manner as may be prescribed: Provided that the registered person may not issue a bill of supply*

*if the value of the goods or services or both supplied is less than two hundred rupees subject to such conditions and in such manner as may be prescribed;*

- (d) a registered person shall, on receipt of advance payment with respect to any supply of goods or services or both, issue a receipt voucher or any other document, containing such particulars as may be prescribed, evidencing receipt of such payment;*
- (e) where, on receipt of advance payment with respect to any supply of goods or services or both the registered person issues a receipt voucher, but subsequently no supply is made and no tax invoice is issued in pursuance thereof, the said registered person may issue to the person who had made the payment, a refund voucher against such payment;*
- (f) a registered person who is liable to pay tax under sub-section (3) or sub-section (4) of section 9 shall issue an invoice in respect of goods or services or both received by him from the supplier who is not registered on the date of receipt of goods or services or both;*
- (g) a registered person who is liable to pay tax under sub-section (3) or sub-section (4) of section 9 shall issue a payment voucher at the time of making payment to the supplier.*

*(4) In case of continuous supply of goods, where successive statements of accounts or successive payments are involved, the invoice shall be issued before or at the time each such statement is issued or, as the case may be, each such payment is received.*

*(5) Subject to the provisions of clause (d) of sub-section (3), in case of continuous supply of services,—*

- (a) where the due date of payment is ascertainable from the contract, the invoice shall be issued on or before the due date of payment;*
- (b) where the due date of payment is not ascertainable from the contract, the invoice shall be issued before or at the time when the supplier of service receives the payment;*
- (c) where the payment is linked to the completion of an event, the invoice shall be issued on or before the date of completion of that event.*

*(6) In a case where the supply of services ceases under a contract before the completion of the supply, the invoice shall be issued at the time when the supply ceases and such invoice shall be issued to the extent of the supply made before such cessation.*

*(7) Notwithstanding anything contained in sub-section (1), where the goods being sent or taken on approval for sale or return are removed before the supply takes place, the invoice shall be issued before or at the time of supply or six months from the date of removal, whichever is earlier.*

*Explanation.—For the purposes of this section, the expression “tax invoice” shall include any revised invoice issued by the supplier in respect of a supply made earlier.”*

85. As per Rule 47 of the CGST Rules, 2017, the invoices in respect of taxable supply of services have to be issued within 30 days:

*“47. Time limit for issuing tax invoice.- The invoice referred to in rule 46, in the case of the taxable supply of services, shall be issued within a period of thirty days from the date of the supply of service.”*

86. Rule 55 of the CGST Rules, 2017 stipulates as under:

*“55. Transportation of goods without issue of invoice.-*

*(1)For the purposes of-*

*(a) supply of liquid gas where the quantity at the time of removal from the place of business of the supplier is not known,*

*(b) transportation of goods for job work,*

*(c) Transportation of goods for reasons other than by way of supply*

*(d) Such other supplies as may be notified by the Board*

*the consigner may issue a delivery challan, serially numbered not exceeding sixteen characters, in one or multiple series, in lieu of invoice at the time of removal of goods for transportation, containing the following details, namely....*

*...*

*(3)Where goods are being transported on a delivery challan in lieu of invoice, the same shall be declared as specified in rule 138.”*

87. We observe that the philosophy behind the ‘Point of taxation’ and ‘raising of invoice’ is enshrined in Sections 12, 13 & 14 read with Section 31 of the CGST Act, 2007 and Rule 47 and 55 of the CGST Act, 2007. It is observed that Section 12 governs the determination of ‘time of supply of goods’, Section 13 governs the determination of ‘time of supply of services’ whereas Section 14 determines the ‘time of supply for goods and services in case there is a change in the rate of tax’.
88. Section 12 stipulates ‘time of supply of goods’ as the date of issue of invoice or the last date specified under section 31 (1) to issue the invoice, whichever is earlier. Therefore, in the instant petition the date of invoice of goods cannot be after the date of delivery of goods.
89. Section 13 stipulates that ‘time of supply of services’ is the date of issue of invoice which is to be issued within the period prescribed under section 31 (2) or the date of receipt of payment, whichever is earlier.

90. Section 14 of the CGST Act 2017 prescribes the time of supply in case there is a change in the rate of tax. In one supply transaction, the following dates assume relevance: (i) Date of supply; (ii) Date of issue of invoice and (iii) Date of receipt of payment. Two scenarios that emerge are as follows:
- (a) Supply is completed before change in the rate of tax; and
  - (b) Supply is completed after change in the rate of tax.
91. Section 31 stipulates that a registered person supplying taxable goods shall issue a tax invoice before or at the time of delivery of goods. Further, as per Section 31 read with Rule 47 of the CGST Rules, 2017, the invoices in respect of taxable supply of services have to be issued within 30 days and as per Rule 55 of the CGST Rules, 2017, the delivery of a few goods is specifically allowed to be transported on a delivery challan in lieu of invoice at the time of removal of goods for transportation.
92. Thus, in case of 'supply of goods', the date of issue of invoice cannot be after the date of supply of goods as per sections 12, 14 and 31 of the CGST Act, 2017 whereas in case of 'supply of services' related to the goods procured up to the COD, the date of issue of invoice can be thirty days after the supply of services as per sections 13, 14 and 31 of the CGST Act, 2017 along with the Rule 47 of the CGST Rules, 2017.
93. Accordingly, there cannot be any invoice under law, post supply of goods as the goods are not exempted under Rule 55 of the CGST Rules, 2017. Further, in case the invoices are not raised, the point of taxation for supply of goods is deemed to be the date of delivery of goods.
94. Hence, the Commission has already held that the invoices related to supply of the goods can be raised only up to COD for all the equipment as per the rated project capacity that has been installed and through which energy has flown into the grid, since the liability of the SECI/Respondent Discom for payment of purchase of the power from the Respondent SPDs starts from the Commercial Operation Date (COD).
95. The Commission has further held that there is a possibility of a few services related to goods procured up to COD, to be completed on the last date of COD. Hence, in case of 'supply of services' related to goods procured up to COD completed on the last day of COD, the

invoices can be raised within 30 days after COD. Thus, in case of supply of services related to goods procured up to COD, the invoices are to be raised within 30 days of supply of such services, which cannot be later than 30 day of COD and the Petitioner is entitled to be compensated accordingly.

96. In view of the position as stated in paragraph 83 and paragraph 95 above, the Commission is of the view that no further clarifications are required. The issue is decided accordingly.

***Issue No. 4: Whether there is implication of taxes and duties levied by appropriate Government on monthly annuity payment and whether the same should be allowed as pass through on actual basis?***

97. SPDs have submitted that as per Regulation 24 of the 2017 RE Tariff Regulations, any taxes and duties levied by the appropriate Government shall be pass through on actual basis. Therefore, any incidence of tax/ duty/ cess liability presently applicable or resulting from any imposition, modification, alteration, adoption, amendment, variation, introduction, enactment or repeal of any laws related to taxes/ levies/ duties/ cesses on the “Monthly Annuity Payments” at any time going forward for the complete PPA period, shall be borne and paid by SECI in its entirety within seven days from the date of such demand notice, along with penalties/ interest (if any) to the respective government authorities.
98. ***Per contra***, SECI has submitted that Article 17.9 of the PPAs provides that tax on income is not covered under the scope of Change in Law. Furthermore, on account of the change in law compensation for the additional capital cost incurred due to GST Laws/ Safeguard Duty will not form part of the actual cost of the asset to the tax payer in terms of Section 43 of the Income Tax Act, 1961. SECI has placed its reliance on the Judgment dated 19.04.2017 of the Appellate Tribunal in Appeal No. 161 of 2015- *Sasan Power Limited –v- Central Electricity Regulatory Commission* wherein the Appellate Tribunal has held that in case of tariff under Section 63 of the Electricity Act, 2003, there is no provision for pass through of tax on Income.
99. We observe that Article 17.9 of the PPAs stipulates as under:

***“17.9 Taxes and Duties***

*17.9.1 The SPD shall bear and promptly pay all statutory taxes, duties, levies and cess levied on the SPD, contractors or their employees that are required to be paid by the SPD as per the Law in relation to the execution of the Agreement and for supplying power as per the terms of this Agreement.*

*17.9.2 SECI shall be indemnified and held harmless by the SPD against any claims that may be made against SECI in relation to the matters set out in Article 17.9.1.*

*17.9.3 SECI shall not be liable for any payment of taxes, duties, levies, cess etc. for discharging any obligation of the SPD by SECI on behalf of SPD.”*

100. We observe that the Order dated 19.04.2017 of the Appellate Tribunal in Appeal No. 161 of 2015- *Sasan Power Limited –v- Central Electricity Regulatory Commission*, inter-alia held as under:

*“34. We must also bear in mind that we are concerned here with competitive bidding process under Section 63 of the said Act. We appreciate the submission of Mr. Ramachandran, learned counsel appearing for HPCC that tax on income cannot be considered as pass through in the competitive bidding process under Section 63 of the said Act. The tariff is a per unit tariff allowed on the electricity generated and supplied and such a bid submitted by bidder is inclusive of all elements. There is no separate return on equity or reasonable return. The quantum of return revenue/profit is not identified in the bid price nor assured by the procurers. Income Tax including MAT being on profit, there is no identification of tax payable at the time of cut-off date. It is, therefore, not possible at all to factor in the increase or decrease in the Income Tax - including MAT. The Commission cannot therefore speculate what return the company had assumed for submission of the bid. Therefore, it will not be possible to compute the tax to be allowed.*

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

101. Tax on income cannot be considered as pass through in the competitive bidding process under Section 63 of the Electricity Act, 2003. Further, a bid submitted by the bidder is inclusive of all elements (including taxes). We do not find any rationale behind referring to the RE Tariff Regulations for claiming pass-through of tax liability by the Respondent SPDs as this is not a tariff determination exercise under section 62 of the Act. When the PPAs have

clear provision that the taxes/duties shall be to the account of the SPDs, they are bound by the said provision. Accordingly, we hold that SPDs shall have to pay all statutory taxes, duties, levies and cess etc. on Monthly Annuity Payments that may be required to be paid as per the terms of PPAs.

102. The issue is decided accordingly.

**Issue No. 5: Whether the principles decided in this Petition can be made applicable to all the current Petitions pertaining to GST and Safeguard Duty pending before this Commission?**

103. SECI has submitted that the principles decided in this Petition should be made applicable to all the current Petitions pertaining to GST and Safeguard Duty pending before this Commission. Also, SPDs have submitted that since SPDs and Discoms are in 'back to back' arrangements with NTPC and SECI in the similar matters, the Commission may pass a similar order in the batch of petitions filed by NTPC also.

104. We are of the view that since the pending petitions were not tagged along with the current Petitions, no such general order can be passed. Also, since NTPC was not an impleaded party in any of the current Petitions, such general order cannot be passed. Needless to say that this commission is not empowered to pass any order *in –rem*.

105. The summary of our findings are as follows:

**Issue No. 1:**

- The discount rate of annuity payments shall be 10.41% towards the expenditure incurred by SPDs on account of Change in Law (GST Laws or Safeguard Duty, as the case may be).
- The liability of SECI/ Discoms for 'Monthly Annuity Payments' starts from 60th (sixtieth) day from the date of orders in respective petitions or from the date of submission of claims by the Respondent (SPDs), whichever is later. In case of delay in the Monthly Annuity Payment beyond the 60th (sixtieth) day from the date of orders in respective petitions or from the date of submission of claims by the Respondent (SPDs), whichever is later, late payment surcharge for the delayed period



corresponding to each such delayed Monthly Annuity Payment(s) shall be payable as per respective PPAs/PSAs.

- The “Tenure of Annuity Payments” shall be for 13 years.
- The annuity payment liability shall be a part of the existing payment security mechanism as stipulated in the PPAs and already established under the PPAs by making suitable provision for the annuity payments.

**Issue No. 2:**

- The prayer of SPDs that the interest on Customs Bond should be covered under Change in Law and should be paid in lumpsum as separate element is disallowed. Actual cash outflow (due to levy of safeguard duty) for which bonds have been executed will be payable and claims for Change in Law towards Safeguard Duty will be governed by orders in the petitions where the matter has been adjudicated.

**Issue No. 3:**

- ***Cut-off date for Safeguard Duty Claims:*** The invoices related to supply of the goods can be raised only up to the COD for all the equipment as per rated project capacity that has been installed and through which energy has flown into the grid.
- ***Cut-off date for GST Claims:*** The invoices related to supply of the goods can be raised only up to COD for all the equipment as per the rated project capacity that has been installed and through which energy has flown into the grid. in case of supply of services related to goods procured up to COD, the invoices are to be raised within 30 days of supply of such services, which cannot be later than 30 day of COD.

**Issue No. 4:**

- The SPDs shall have to pay all statutory taxes, duties, levies and cess etc. on Monthly Annuity Payments that may be required to be paid as per the terms of PPAs.

**Issue No. 5:**

- Since the pending petitions were not tagged along with the current Petitions, no general Order can be passed.

106. No order as to costs.



107. Accordingly, the Petition No. 536/MP/2020 along with I.A. No. 71/2020, IA No. 73/2020 and IA No. 2/2021; Petition No. 158/MP/2020 along with I.A. No. 35/2020; Petition No. 373/MP/2020; Petition No. 454/MP/2019 along with I.A. No. 19/2020; Petition No. 457/MP/2019 along with I.A. No. 18/2020; Petition No. 500/MP/2019 along with I.A. No. 20/2020 are disposed of in terms of the above discussions and findings.

Sd/-  
पी. के. सिंह  
(सदस्य)

Sd/-  
अरुण गोयल  
(सदस्य)

Sd/-  
आई. एस. झा  
(सदस्य)

Sd/-  
पी. के. पुजारी  
(अध्यक्ष)