

Rajasthan Electricity Regulatory Commission

Petition No. RERC-1914/21, 1922/21 and 1941/21

In the matter of Petition filed for declaration of Change in Law Events, viz., the imposition of Safeguard Duty and increase in Basic Custom Duty, and grant of consequential reliefs.

Coram:

Dr.B.N. Sharma,	Chairman
Sh. S. C. Dinkar,	Member
Sh. Prithvi Raj,	Member

Petitioner : 1. Fortum Solar Plus Private Limited (1914/21)
2. ReNew Solar Energy (Jharkhand Five) Pvt. Ltd. (1922/21)
3. Sitara Solar Energy Pvt Ltd. (1941/21)

Respondents : 1. Solar Energy Corporation of India
2. Rajasthan Urja Vikas Nigam Ltd.

Date of hearings: 09.12.2021, 01.12.2021, 28.10.2021, 29.09.2021 and 10.08.2021

Present : 1. Sh. Sh. M.G. Ramachandran, Sr. Advocate for SECI
2. Sh. Sakya Chaudhuri, Advocate for Fortum Solar
3. Sh. Sujit Ghosh, Advocate for Renew Solar
4. Ms. Mannat Waraich, Advocate for Renew Solar
5. Sh. Aniket Prasoon, Advocate for Sitara Solar
6. Sh. Bipin Gupta, Advocate for RUVNL

Order Date:

30.12.2021

ORDER

1. The Petitioners referred to in the cause title have filed these petitions for declaration of Change in Law Events, viz., the imposition of Safeguard Duty, increase in Basic Custom Duty, and grant of consequential reliefs.
2. Petitions bearing No. 1914/21 and 1922/21 were listed for hearing on 10.08.2021 and 29.09.2021, wherein the Commission directed the Petitioners to implead RUVN as Respondent. Accordingly RUVN was impleaded as Respondent in the said petitions through online portal and amended memo of parties was also filed by the respective Petitioners.
3. Notices were issued to the Respondents through online portal to file the reply on the petitions. Accordingly replies and rejoinder were filed by the respective parties.
4. Matter was listed for hearing on 09.12.2021 Sh. M.G. Ramachandran, Sr. Advocate appeared for SECI, Sh. Sakya Chaudhuri, Advocate appeared for Fortum Solar, Sh. Sujit Ghosh, Advocate appeared for Renew Solar, Sh. Aniket Prasoon, Advocate appeared for Sitara Solar and Sh. Bipin Gupta, Advocate appeared for RUVNL. Petitioner M/s Fortum Solar Plus Private Limited, M/s Sitara Solar Energy Pvt Ltd. and Respondent Solar Energy Corporation of India also filed the written submissions.
5. M/s Fortum Solar Plus Private Limited in its petition, rejoinder, written submissions and during the hearing has submitted as under:
 - 5.1 The Ministry of Finance vide Notification dated 30.07.2018 (First Notification) imposed Safeguard Duty on the import of solar cells whether or not assembled in modules or panels. The Notification stipulated that any person importing solar cells into India is required to pay Safeguard Duty at the following rates:

- (i) Twenty five percent ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30.07.2018 to 29.07.2019 (both days inclusive);
- (ii) Twenty percent ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30.07.2019 to 29.01.2020 (both days inclusive); and
- (iii) Fifteen percent ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30.01.2020 to 29.07.2020 (both days inclusive).

5.2 The Petitioner entered into a Power Purchase Agreement with the Respondent on 03.06.2019 for supply of 250 MW solar power to Respondent at a tariff of Rs. 2.48/kWh for 25 years ("PPA") w.e.f. the scheduled commissioning date ("SCD") of the Project. The PPA came into effect on 02.06.2019.

5.3 As per PPA, the Scheduled Commissioning Date ("SCOD") of the Project was 02.12.2020. However, on account of COVID-19 pandemic there was a nationwide blanket lockdown which resulted in shutdown of commercial operations, and thus the Petitioner was not able to achieve the financial closure by 02.06.2020. The Petitioner had duly notified the Respondent about the force majeure events vide various letters issued from time to time.

5.4 The MNRE issued OM dated 17.04.2020, 30.06.2020 and 13.08.2020 regarding extension in the timeline for various milestones. In view of the above extensions, the final position w.r.t. the scheduled date for Commissioning of the Project was on or before 04.05.2021.

5.5 Thus, as per the PPA, the Petitioner was required to commission the Solar Project on or before 04.05.2021 ("SCOD"). The Petitioner has

successfully commissioned the 250 MW Solar Project in the District-Jaisalmer, Rajasthan on 03.05.2021.

- 5.6 In the meantime, the Department of Revenue under the Ministry of Finance, on 29.07.2020, issued a notification imposing Safeguard Duty on the import of solar cells and modules to India starting 30.07.2020 and upto 29.07.2021. The Ministry announced a Safeguard Duty of 14.90% from 30.07.2020 to 29.01.2021, and 14.50% from 30.01.2021 to 29.07.2021, for all solar cells and modules imported from the China PR, Thailand, and Vietnam, whether or not assembled in modules or panels.
- 5.7 The Petitioner has procured solar PV modules from Jinko Solar Co. Ltd. and Wuxi Suntech Power Co. Ltd., companies situated in China.
- 5.8 The solar modules were imported into India during the months of October 2020 to February 2021 after duly paying 14.9% - 14.5% Safeguard Duty and 5% Integrated Goods and Services Tax ("IGST") on the Safeguard Duty amount in terms of above-stated notification. The Petitioner in compliance of the Notification dated 29.07.2020 issued by Ministry of Finance paid the Safeguard Duty and IGST amounting to Rs. 74,17,48,865/- (Rupees Seventy-Four crores Seventeen Lakhs Forty-Eight Thousand Eight Hundred Sixty-Five Only) on such import.
- 5.9 The Petitioner is entitled under the PPA to claim such amounts paid towards Safeguard Duty along with the carrying cost from the date of their payment under the Change in Law clause.
- 5.10 Article 12 of the PPA provides a list of events that qualify as 'Change in Law' events and the relief for such "Change in Law".
- 5.11 The Safeguard Duty (SGD) applicable at the time of bidding was upto 29.07.2020. At the time of bidding, no Safeguard Duty was supposed to have been applicable w.e.f. 30.07.2020. The Notification dated 29.07.2020 was issued subsequent to the date of bidding and even

after signing of the PPA and introduced Safeguard Duty from 30.07.2020. Accordingly, 14.50% of Safeguard Duty was imposed on the import of solar cells and modules imported by the Petitioner as the same were imported after 29.07.2020. The imposition of Safeguard Duty w.e.f. 30.07.2020 amounts to a new imposition and qualifies as 'Change in Law' under the PPA.

- 5.12 It is clear from a combined reading of Article 12.1 and 12.2 that the PPA allows the party affected by any 'Change in Law' to approach the Commission for appropriate relief. The tariff for the present Project was worked out on the basis of Notification dated 30.07.2018 that was prevailing on the date of bidding, wherein Safeguard Duty was payable on imports upto 29.07.2020. The additional cost incurred by the Petitioner due to occurrence of 'Change in Law' events (namely, imposition of Safeguard Duty w.e.f. 30.07.2020) after the last date of bidding is liable to be reimbursed to the Petitioner.
- 5.13 Considering the provisions of the PPA and the submissions made above, the imposition of Safeguard Duty w.e.f. 30.07.2020 would constitute 'Change in Law' event under the PPA and the Commission may accordingly grant relief to the Petitioner in terms of the PPA. In this regard, the Petitioner has issued a letter informing the Respondent that the imposition of Safeguard Duty vide Ministry of Finance (Department of Revenue) notification dated 29.07.2020 amounts to a "Change in Law" event in terms of the PPA.
- 5.14 Respondent, SECI has not denied the facts constituting 'Change in Law'. However, Respondent No.2/ RUVNL who has a back to back Power Sale Agreement ("PSA") with the Respondent No.1/ SECI for the same power has challenged the claim of the Petitioner on the ground that the Petitioner has to be deemed to have considered the SGD rate prevailing on the date of the bid in its bid price.

- 5.15 The Petitioner has privity of contract with Respondent SECI, who has carried out the bidding process and entered into PPA with the Petitioner. Respondent No.1/ SECI has not challenged the facts of applicability of 'Change in Law' for imposition of SGD beyond 29.07.2020. The Respondent No.2/ RUVNL has been made party as it is the ultimate procurer of power and the amount of compensation payable to Petitioner will be passed on to the Respondent No.2/ RUVNL. It is an outsider to the PPA and cannot raise objections on the facts of the claim where the same has not been denied by Respondent No.1/ SECI.
- 5.16 The SGD notification is not in the nature of regular tax imposition. It is notified for a specific time and for a specific purpose which is in the realm of legislative function, therefore, cannot be pre-empted by anybody, let alone the bidder.
- 5.17 The very fact that the Notification dated 29.07.2020 was issued for imposing SGD from 30.07.2020 is evidence of the fact that the imposition under the First Notification could not have continued beyond 29.07.2020. In fact, the wholesome reading of the Notification dated 29.07.2020 shows that it is not mere extension but an imposition of SGD.
- 5.18 The original clause of the draft PPA along with RFS containing 'Change in Law' provision excluded from its purview, the extension of applicable rate of tax at the same rate, which was subsequently removed during the pre-bidding process. This exclusion was subsequently deleted in the pre-bid clarification dated 07.02.2019. The amendment in the 'Change in Law' provision demonstrate that in terms of the present PPA, even an extension of an applicable tax at the same rate will also qualify as a 'Change in Law' event. It is respectfully submitted that Respondent No.1/ SECI clarified that the entry-I of the Amendment No.4 to the RFS stipulated that the maximum tariff payable to the Project Developer

shall be inclusive of all statutory taxes, duties, levies, cess applicable as on the last date of bid submission. The Amendment further clarified that any change in the rates of any Taxes after the last day of submission of the bid, including any duties and cess or introduction of any new tax made applicable for setting up the solar power project and supply of power from the Solar Power project by the SPD which have a direct effect on the Project, shall only be considered as 'Change in Law'. Therefore, it is evident that the bidders were not supposed to pre-suppose extension of SGD.

- 5.19 The modules are generally ordered a few months before commissioning after completing other project work. This enables the Developer to reduce the interest cost on loan considering that major part of the project cost is incurred on the modules.
- 5.20 Prolong storage of solar PV modules and allied equipment may lead to a large number of technical challenges such as moisture ingress and may further cause technical degradation of the solar panels (ref paragraph 13 of the judgment dated 13.12.2016 passed by Hon'ble Appellate Tribunal in Subhash Infraengineers Pvt. Ltd vs. Haryana Electricity Regulatory Commission & Anr. - Appeal No. 307 of 2016).
- 5.21 Petitioner planned and actually imported goods after 29.07.2020 to avoid payment of SGD under the First Notification.
- 5.22 The purchase orders were placed on 10.02.2020, the date of the modules for delivery was set for 09.08.2020. The date of the purchase order and the loading date of modules is clear evidence of the Petitioner's plan/ intention to avoid the imposition of SGD rate on the modules.
- 5.23 It was a commercial decision taken by the bidder to import modules after the expiry of the term of the First Notification to make its price

more competitive. This low price would have ensured the benefit of the procurer had there not been fresh imposition of SGD.

- 5.24 In view of above, the real intention of the Petitioner is to be seen which was to avoid the implication of the First Notification while importing the modules from China.
- 5.25 The Notification dated 29.07.2020 (Second Notification) had a financial impact on the capital cost of the development Project and thus, amounts to 'Change in Law' in terms of the PPA. As evident from the Purchase Orders and Invoices, it is submitted that the Petitioner planned the project development structure in such a manner that the modules were to be imported from China after 29.07.2020 so as to avoid any implication of SGD. At the time of the bidding based on the sunset clause provided under the First Notification, the Petitioner proceeded on the assumption that there will be no implication of SGD post 29.07.2020. Therefore, the project cost computation for the project did not include the expenditure towards SGD. However, at the time of importing the solar cells during the months of October 2020 to February 2021, the Petitioner had to pay 14.9% - 14.5% Safeguard Duty and 5% Integrated Goods and Services Tax ("IGST") on the SGD amount in terms of Second Notification.
- 5.26 Therefore, the imposition of Safeguard Duty w.e.f. 30.07.2020 is covered as a 'Change in Law' event under the PPA.
- 5.27 It is pertinent to mention that the parties are conducting the reconciliation process to exhibit clear one to one correlation between the project and the supply of imported goods. The reconciliation process is at the stage of completion. Therefore, the Petitioner respectfully prays that the Commission may pass an order approving/ determining the quantum and mechanism of compensation payment along with the effective date from which such compensation is payable by the Respondent.

- 5.28 It is now a well-established position that the imposition of Safeguard Duty amounts to Change in Law. The Commission is required to determine the quantum of compensation that would reconstitute the Petitioner to the same financial position as it would have been had such Change in Law event not occurred. The mechanism to be adopted for making payment for 'Change in Law' is also to be determined by the Commission. Further, in order to ensure that the Petitioner is duly reconstituted for the cost incurred by it towards Safeguard Duty, the Commission is required to determine the date from which the 'Change in Law' event will become effective in order to determine the appropriate quantum of compensation. In the present case, the relevant dates for the Petitioner are the date on which, Safeguard Duty was paid on the imports.
- 5.29 SECI has provided two methodologies for payment of Safeguard Duty, i.e., either on lumpsum basis or on annuity basis. In this regard, it is submitted that the payment should be made in lumpsum, instead of annuity basis, as payment in lumpsum avoids further and additional carrying cost to the distribution licensee and ultimately the consumers, over the term of the PPA.
- 5.30 Further, in the event that the Commission provides for payment of compensation on annuity basis, any outstanding amounts after monthly payments would bear late payment surcharge at the rate of 1.25% per month calculated on day to day basis as per Article 10.3.3 of the PPA. Once, the Commission holds that the Notification dated 29.07.2020 is a 'Change in Law' event, the Petitioner becomes entitled to the amount of compensation so that it is placed in the same financial position as it would have been in but for the occurrence of the 'Change in Law' event. That where the rate of interest payable on outstanding amounts has been provided in the PPA/ contract, the Commission cannot substitute the same with any other rate of interest as the same would amount to altering the terms of the

contract. At best, the contractual rate can be reduced to 11.66% as claimed by the Petitioner based on its cost of funds, if Respondent no. SECI is also agreeable to such alternate rate proposed by the Petitioner.

5.31 In view of above Petitioner has prayed as under:

- (i) Declare imposition of Safeguard Duty by the Ministry of Finance vide its Notification dated 29.07.2020 as a 'Change in Law' event under Article 12.1 of the PPA with effect from 30.07.2020
- (ii) Direct the Respondent (SECI) to pay an amount of Rs. 74,17,48,865/- along-with the carrying cost @ 11.66% (worked out from the date of respective payments till the date of filing of the petition) to compensate the Petitioner towards Safeguard Duty paid by it pursuant to the Ministry of Finance Notification dated 29.07.2020;
- (iii) Direct the Respondent (SECI) to pay (i) carrying cost @ 11.66% for the period of adjudication of the present petition from the date of filing of petition till date of final order; and (ii) further carrying cost @11.66% from the date of order till date of final payment;

6. M/s Renew Solar Energy Jharkhand Five Pvt. Ltd. in its petition, rejoinder, written submissions and during the hearing have submitted as under:

6.1 The Petitioner has filed the instant petition for approval of "Change in Law" and seeking an appropriate mechanism for grant of an appropriate compensation to offset financial/ commercial impact of Change in Law events on account of imposition of Safeguard Duty on solar cells/modules in terms of Article 12 of the Power Purchase Agreements dated 04.06.2019 between Petitioner and Solar Energy Corporation of India Limited.

- 6.2 The Petitioner submitted its bid on 19.02.2019 taking into consideration the prevailing taxes, duties and exemptions. The Petitioner entered into Power Purchase Agreement dated 04.06.2019 ("PPA") with SECI for setting up of a solar power project of 110 MW.
- 6.3 In the meanwhile, vide Notification No. 02/2020-Customs (SG) dated 29.07.2020 ("Safeguard Duty Notification"), the Central Government imposed Safeguard Duty as per the following rates on the import of Solar Cells whether or not assembled in modules or panels.
- (i) Fourteen point nine percent ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30th July 2020 to 29th January 2021; and
 - (ii) Fourteen point five per cent ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30th January 2021 to 29th July 2021.
- 6.4 Even though Safeguard Duty was earlier imposed in the year 2018 vide Notification No. 1/2018 Customs (SG) dated 30.07.2018, however, the said notification was valid for a period of two years i.e., till 29.07.2020. Hence, on 30.07.2020 a fresh notification was issued imposing Safeguard Duty on the import of solar cells and modules at the prescribed rates.
- 6.5 As per the provision dealing with Change in Law under the PPA (a) A Change in Law event includes enactment of a new Law and any statutory change in tax structure or introduction of any tax made applicable for setting up of a Solar Power Project and supply of power. (b) Such Change in Law event must have occurred after the last date of bid submission.
- 6.6 It is also relevant to determine the 'last date of bid submission' as any of the aforementioned events would qualify as 'Change in Law' only if

it occurs after the last date of bid submission. As per the letter of award, the last date of bid submission is 19.02.2019.

- 6.7 The Petitioner had planned the procurement of solar PV modules post 30.07.2020 keeping in mind the repercussions of the imposition of the Safeguard Duty on the tariff. Thus, in order to keep the tariff low and competitive, the Petitioner planned the procurement of the solar PV modules post 30.07.2020. Further, even as per the prevalent industry practices, the supply of solar PV modules is planned closer to the date of commissioning of the project to avoid storage and degradation risk.
- 6.8 In order to submit that the imposition of Safeguard Duty on the import of solar modules would constitute a Change in Law event in terms of the PPA, it is relevant to understand the statutory framework in relation to the levy of Safeguard Duty.
- 6.9 The power to levy Safeguard Duty vests with the Central Government in terms of Section 8B of the Customs Tariff Act, 1975 ("Customs Tariff Act"). Section 88 of the Customs Tariff Act provides that the Central Government may impose Safeguard Duty by way of a notification on the import of an article into India, if it is satisfied that the said article is being imported in such increased quantities and under such circumstances so as to cause or threaten to cause serious injury to the domestic industry.
- 6.10 Further, Rule 12 of the Customs Tariff (Identification and Assessment of Safeguard Duty Rules) 1997 provides that the Central government may impose Safeguard Duty on the product covered under the final finding and which duty shall not exceed the amount found adequate to remedy the serious injury to the domestic industry.
- 6.11 In this context and in exercise of the powers conferred inter alia under Rule 12 of the Safeguard Duty Rules, the Central Government issued

the Safeguard Duty Notification on 29.07.2020 imposing Safeguard Duty on the import of solar cells and modules at the rates prescribed thereunder the said notification.

6.12 Such imposition of Safeguard Duty would be in the nature of a tax imposed on the import of solar cells and modules. Thus, with effect from 30.07.2020, the import of solar cells and modules into India would be leviable to a Safeguard Duty (in the nature of a tax) at the rate of 14.9% ad valorem during the period from 30th July 2020 to 29th January 2021 and at the rate of 14.5% ad valorem during the period from 30th January 2021 to 29th July 2021, whereafter, the Safeguard Duty will be progressively liberalized.

6.13 Thus, basis the above, the imposition of Safeguard Duty on the import of solar cells and modules, pursuant to the Safeguard Duty Notification would qualify as a Change in Law event in terms of the PPA in as much as:

(a) Such imposition of Safeguard Duty by virtue of the Safeguard Duty Notification would be covered by the phrase introduction of a new tax on the setting up of solar power project on account of the fact that Safeguard Duty qualifies as a tax imposed on the solar cells and modules which are the primary component in the setting up of a solar power project. Thus, the imposition of Safeguard Duty would qualify as a Change in Law event under the fifth bullet of Article 12.1 of the PPA.

(b) Alternatively, it is submitted that the imposition of Safeguard Duty is in the nature of an enactment of a new law in as much as the same has been imposed by a notification of the Ministry of Finance. Thus, the imposition of Safeguard Duty vide Safeguard Duty Notification would also qualify as a Change in Law event under the first bullet of Article 12 of the PPA.

(c) Further, even though Safeguard Duty was imposed in the year 2018 by way of Notification No. 1/2018 Customs (SG) dated 30.07.2018, however, the same was only valid till 29.07.2020. The Safeguard Duty Notification has sought to impose Safeguard Duty again with effect from 30.07.2020 a levy that was not contemplated to exist after 29.07.2020 at the time of last date of bid submission.

6.14 Additionally, Ministry of Power vide Letter dated 27.08.2018 issued directions under section 107 of the Electricity Act to the CERC that, any change in domestic duties, levies, cesses and taxes imposed by the Central Government, State Government or Union territories or any Governmental Instrumentality which leads to corresponding changes in cost may be treated as Change in Law and be allowed as pass through.

6.15 Petitioner is entitled to carrying costs on account of increase in Capital Expenditure which has thereby led to an increase in the Debt and Equity Requirement of the Petitioner. These components are integral to the all-inclusive tariff bid. At the time of the submissions of bid, the Petitioner had factored in 'interest on working capital' and 'return on equity' based on the costs prevalent at the time of bid. With the increase in the costs due to the Change in Law events explained above, the working capital requirement, and consequently, the interest on working capital have also increased as compared to requirement at the time of bid. Thus, the Petitioner is entitled to interest on incremental working capital at normative interest rate to put Petitioner to the same economic position as if Change in Law had not occurred.

6.16 The Petitioner has placed reliance on order dated 05.03.2021 issued by the Maharashtra Electricity Regulatory Commission in Case No. 218 of 2020 titled as Tata Power Renewable Energy Ltd. v. Tata Power

Company Ltd. wherein MERC has allowed the Notification dated 29.07.2021 imposing Safeguard Duty as a Change in Law.

6.17 The submissions made by SECI regarding the methodology for payment of compensation (if any) on account of safeguard duty is accepted by the Petitioner except the averment of the Respondent wherein Respondent SECI has considered a discounting factor of 9% which is the rate of interest for the loan component of capital cost as provided in the Central Commission's RE Tariff Order dated 31.03.2021. Since the additional cost due to imposition of Safeguard duty is in the nature of capital expenditure, therefore, the rate of interest while calculating annuity should reflect both the components of funding i.e. debt and equity. Hence the discounting factor cannot be arrived at solely by considered the rate of interest for loan component. This is also substantiated by the fact that the principle of restitution is engrained in the Change in Law clause under the present PPA which specifically provides that the Solar Power Generator is required to be placed in the same financial position, as if the Change in Law had not occurred. The Petitioner has paid the entire Safeguard Duty from its equity as it was never envisaged during bidding and hence was not a part of project cost. Once such expenditure is approved under Change in Law by the commission, such additional cost would qualify for financing by project lenders on the basis of financial principles i.e. only upto 70% of the total cost and remaining 30% of the additional cost still needs to be infused by the Petitioner as equity. The Commission in its RERC (Terms and Conditions for determination of Tariff),

6.18 Regulations, 2019 has considered the similar financial principle which states as follows:

"19. Debt-equity ratio

For the purpose of determination of tariff, debt-equity ratio as on date of commercial operation in case of a new Generating Station, transmission line and distribution line or substation commissioned or capacity expanded on and/or after 01.04.2019, shall be 70:30.

20 Return on Equity

(2) Return on equity shall be computed at the rate of 14% for Transmission Licensees and SLDC, 15% for Generating Companies and 16% for Distribution Licensees."

- 6.19 As per clause 19 of the RERC Regulations mentioned above, for determination of generic tariff and project specific tariff, the debt-equity ratio shall be considered as 70:30. Further the return on equity (post tax) is 15% which comes to a pre-tax rate of 20.05% after grossing up with effective corporate tax @25.17%. Further, the rate of interest for the loan component, i.e., 9% as averred by the Respondents can only be applied to 70% of the capital cost incurred by the Respondents. For the remaining 30%, being the equity component, the return on Equity (pre tax) of 20.05% is required to be applied. Therefore, the weighted average rate of interest after considering 70% debt and 30% of equity comes to 12.31% which should be allowed to the Petitioner.
- 6.20 On the issue of carrying cost the it is submitted that Article 12 of the PPA specifically provides that party affected by Change in Law is to be placed to the same financial position as if Change in Law has not occurred and reliance is placed on decision of Hon'ble APTEL in case of 'GMR Warora Energy Limited versus CERC and Others' in Appeal No. 111 of 2017. The rate of interest of carrying cost should be equal to the weighted average rate mentioned above.
- 6.21 Petitioner, Renew Solar Energy Jharkhand Five Pvt. Ltd. in view of above has prayed as under:

- (i) Declare the imposition of Safeguard Duty via Notification dated 29.07.2020 as Change in Law in terms of the PPA which have led to an increase in the expenditure for the Project;
- (ii) Evolve a suitable mechanism to compensate the Petitioner for the increase in expenditure incurred by the Petitioner on account of Change in Law;
- (iii) Grant interest/carrying cost at 14% per annum from the date of incurring of the cost by the Petitioner till the date of order by this commission;

7. M/s Sitara Solar Energy Pvt Ltd. in its petition, rejoinder and written submissions has submitted as under:

7.1 The Petition is filed under Section 86(1)(f) of the Electricity Act read with Article 12 of the Power Purchase Agreement dated 10.06.2019 ("PPA") entered into between the Petitioner and the Respondent No. 1, i.e., Solar Energy Corporation of India ("SECI"), seeking the following reliefs:

- a) Declaration that the levy of Safeguard Duty as per Notification dated 29.07.2020 issued by the Department of Revenue, Ministry of Finance, Government of India ("*2020 SGD Notification*"), on the import of solar PV modules for the Project, is a 'Change in Law' Event under Article 12.1(v) of the PPA read with Clause 5.7 of the Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar Power Projects dated 03.08.2017 issued by the Ministry of Power, Government of India ("*Competitive Bidding Guidelines*");
- b) Consequently, direction to SECI to compensate the Petitioner for the additional expenditure incurred by the Petitioner towards Safeguard Duty along with 5% Integrated Goods and Service Tax amounting to Rs. 47,29,74,283/- (Rupees Forty-Seven Crore

Twenty Nine Lakhs Seventy Four Thousand Two Hundred Eighty Three Only) in terms of Article 12 of the PPA, along with carrying costs @ 1.25% per month from the date of payment of the Safeguard Duty by the Petitioner till the date of release of compensation by SECI;

- c) Declaration that the increase in Basic Customs Duty from 5% to 20% for import of solar inverters for the Project by way of Notification No. 07/2021-Customs dated 01.02.2021 ("2021 BCD Notification") is a 'Change in Law' Event under Article 12.1(v) of the PPA read with Clause 5.7 of the Competitive Bidding Guidelines;
- d) Consequently, direction to SECI to compensate the Petitioner for the additional expenditure incurred by the Petitioner towards Basic Customs Duty along with 5% Integrated Goods and Service Tax and Social Welfare Surcharge, amounting to Rs. 2,88,25,542/- (Rupees Two Crore Eighty Eight Lakhs Twenty Five Thousand Five Hundred Forty Two Only), in terms of Article 12 of the PPA, along with carrying costs @ 1.25% per month from the date of payment of Basic Customs Duty by the Petitioner till the date of release of compensation by SECI.

7.2 As per notification dated 30.07.2018 issued by the Department of Revenue, Ministry of Finance, Government of India, Safeguard Duty was leviable on the import of solar PV modules for a clearly defined period of two years, i.e., upto 29.07.2020. Meaning thereby, in terms of the 2018 SGD Notification, no Safeguard Duty was leviable on import of solar PV modules post 30.07.2020.

7.3 The Scheduled Date of Commissioning ("SCOD") of the Project in terms of the PPA was 02.12.2020, which was well beyond the original term of levy of Safeguard Duty under the 2018 SGD Notification, i.e.,

upto 29.07.2020. Accordingly, at the time of bidding as well as execution of the PPA, the Petitioner had planned the procurement of solar PV modules post 30.07.2020, i.e., after the expiry of the 2018 SGD Notification and by importing solar PV modules thereafter, the Petitioner had enough time till 02.12.2020 to complete the Project.

7.4 The Petitioner had planned the procurement of solar PV modules post 30.07.2020 keeping in mind the repercussions of the imposition of the Safeguard Duty on the tariff and the consequent burden on the end consumers of energy generated by the Petitioner's Project. Thus, in order to keep the tariff low and competitive, the Petitioner planned the procurement of the solar PV modules beyond the operative period of the 2018 SGD Notification. Further, even as per the prevalent industry practices, the supply of solar PV modules is planned closer to the date of commissioning of the project, post completion of land acquisition and major project works including construction of other basic infrastructure. Petitioner relies upon the Hon'ble Supreme Court's judgment titled Nabha Power Limited v. Punjab State Power Corporation of India Ltd. &Anr., reported as (2018) 11 SCC 508.

7.5 As per the definition of 'Change in Law' in Article 12 of the PPA, the occurrence of any of events specified therein after the bid deadline qualifies as 'Change in Law' and the bid deadline being 19.02.2019. Further, as per Article 12.1(v) of the PPA, a Change in Law event specifically includes introduction of any new tax made applicable for setting up the solar power project, after the last date of submission of bid, which has a direct effect on the Project.

7.6 The Amendment No. 4 dated 07.02.2019 was effectuated by SECI and by virtue of the same, Section II, Clause 6 of the Request for Selection document being SECI/C&P/SPD/RfS/RJ/082018 dated 03.08.2018 ("RfS") was amended. It is clear that imposition of changed Safeguard Duty rate by way of a new notification (which eventually

happened by virtue of issuance of the 2020 SGD Notification in the instant scenario) was always meant to be covered under the Change in Law provision under the PPA.

- 7.7 The Petitioner has placed reliance on order dated 05.03.2021 issued by the Maharashtra Electricity Regulatory Commission in Case No. 218 of 2020 titled as Tata Power Renewable Energy Ltd. v. Tata Power Company Ltd.
- 7.8 As regards the contentions of RUVNL, that the Petitioner should have assumed the continuation of the imposition of the Safeguard Duty, it is stated that continuation/extension of the 2020 SGD Notification involves the following steps under the Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997 ("Customs Tariff SGD Rules"):
- i. The Domestic industry makes an application seeking extension of imposition of the Safeguard Duty or the review of such imposition under Rule 5 of the Customs Tariff SGD Rules.
 - ii. After the successful filing of such application, the Director General of Trade Remedies ("DGTR") on application of mind and law considering the prevailing situation is required to formulate a prima facie opinion that a review of the said imposition is necessary.
 - iii. The DGTR issues a public notice on formation of the opinion re the extension of imposition of Safeguard Duty ("*Initiation Notification*") under Rule 6 of the Customs Tariff SGD Rules.
 - iv. On issuance of the Initiation Notification, interested parties are invited to make their submissions by way of a public hearing wherein a clear finding as to whether continuation of the imposition is required or not, is given by way of a recommendation under Rules 11 of the Customs Tariff SGD Rules.

v. Thereafter, the Central Government in exercise of its quasi-legislative function accepts or rejects the recommendation so made in the public hearing. In case, the recommendation is accepted, the concerned Ministry is directed to issue a notification stipulating the continuation of imposition of the Safeguard Duty under Rule 16 of the Customs Tariff SGD Rules, which provides that levy of duty under Rule 12 for such period necessary to prevent or remedy serious injury and to facilitate positive adjustment.

7.9 Therefore, the entire process of effectuating the continuation of imposition of Safeguard Duty could not have been foreseen or envisaged by the Petitioner, in any case, at the time of submission of the bid, i.e., on 19.02.2019. Petitioner has referred to Appeal No. 172 of 2017 titled as Coastal Gujarat Power Ltd. v. Central Electricity Regulatory Commission and Ors.

7.10 It is a well-established industry practice to install DC capacity in excess of the contracted AC capacity and the same is to be construed in terms of the PPA. Accordingly, the Petitioner submitted that the installed DC capacity of the Project ought to be considered at the time of compensating the Petitioner for the occurrence of a Change in Law Event in terms of Article 12 of the PPA and Clause 5.7 of the Competitive Bidding Guidelines.

7.11 The Department of Revenue, Ministry of Finance, Government of India issued Notification No. 07 /2021-Customs dated 01.02.2021 ("2021 BCD Notification"), which rescinded Notification No. 1/2011-Customs dated 06.01.2011 ("2011 BCD Notification") providing exemption from levy of the Basic Customs Duty in excess of 5% ad valorem, and from the whole of the additional duty of customs leviable thereon under Section 3 of the Customs Tariff Act, 1975. As a result of the issuance of the 2021

BCD Notification, Basic Custom Duty on solar Inverters was raised to 20% from the earlier applicable rate of 5%.

- 7.12 From a bare perusal of Article 12.1 (v) of the PPA, it is evident that any change in the rates of any Taxes including any duties and cess applicable for setting up the solar power project, after the last date of submission of bid, which has a direct effect on the Project is a Change in Law event.
- 7.13 In the present case, the issuance of the 2021 BCD Notification, rescinding the 2011 BCD Notification, issued after the last date of submission of the bids, i.e., 19.02.2019, resulted in increase in the rate of Basic Customs Duty payable on the import of solar inverters from 5% to 20%. Further, the issuance of the 2021 BCD Notification has a direct effect on the Project insofar as it results in the Petitioner incurring additional expenditure to the tune of Rs. 2,88,49,234/- (Rupees Two Crores Eighty-Eight Lacs Forty Nine Thousand Two Hundred Thirty Four Only). Accordingly, in terms of Article 12.1 of the PPA, the Petitioner is entitled to be placed in the same financial position as it would have been had it not been for the occurrence of the Change in Law event. Therefore, the Petitioner is entitled to compensation in terms of Article 12.2 of the PPA.
- 7.14 SECI has accepted in its Reply dated 30.11.2021 that the issuance of the 2021 BCD Notification as a Change in Law event; however, SECI has contended that the Social Welfare Surcharge is levied as a social responsibility and thus, the Petitioner cannot be compensated for the same.
- 7.15 In this regard, it is submitted that as per Section 110 of the Finance Act, 2018 Social Welfare Surcharge is levied as a duty of Customs, on the goods specified in the First Schedule to the Customs Tariff Act, 1975, being the goods imported into India, to fulfil the commitment of the

Government to provide and finance education, health and social security.

- 7.16 In view of the above, SECI's contention that payment of Social Welfare Surcharge is not a tax/duty but rather a social responsibility obligation is wrong and denied.
- 7.17 The Petitioner by way of the Petition is claiming as compensation the additional Social Welfare Surcharge and IGST paid by the Petitioner on account of the increase in the Basic Custom Duty. Meaning thereby, the additional Social Welfare Surcharge claimed by the Petitioner is a direct consequence of the Change in Law event, i.e., the 2021 BCD Notification. Accordingly, in terms of Article 12 of the PPA, the Petitioner is entitled to reimbursement of the additional Social Welfare Surcharge.
- 7.18 The purpose or intent behind levy of Social Welfare Surcharge is irrelevant to the issues at hand in the present Petition. This is particularly so, since no such restriction or consideration forms part of Article 12 of the PPA, whereunder the only test for grant of relief on account of occurrence of a Change in Law event is whether the said event has caused an adverse financial loss or not. Clearly, SECI cannot be permitted to interpolate/imply extraneous terms into the otherwise unambiguous Change in Law provision of the PPA in an attempt to evade its legitimate liability towards the Petitioner. In this regard, the Petitioner has relied upon the Hon'ble Supreme Court's judgment in Nabha Power Limited (*supra*).
- 7.19 In view of the above, SECI's contentions against its liability towards payment of IGST paid by the Petitioner on Safeguard Duty and additional Social Welfare Surcharge and IGST paid by the Petitioner on the additional Basic Custom Duty are entirely misplaced, erroneous, and untenable.

- 7.20 As per Article 11 of the PPA, any event or circumstance that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under the PPA is a Force Majeure event, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices.
- 7.21 In the present case, the second wave of the COVID-19 pandemic unavoidably delayed the Petitioner from performing its obligations under the PPA qua commissioning the Project by the SCOD in view of the various restrictions placed on account of the various orders issued by the Govt. of Rajasthan to control the devastating impact caused on account of the said second wave. The Petitioner craves leave to refer to the relevant orders in this regard. Further, it is apparent that the second wave of the COVID-19 pandemic was not within the reasonable control of the Petitioner and could not in any manner have been avoided by the Petitioner.
- 7.22 The Petitioner's ability to perform its obligations under the PPA inter alia qua commissioning of the Project has been adversely affected due to the Force Majeure events pertaining to the second wave of the COVID-19 pandemic.
- 7.23 The Commission may be pleased to allow the present Petition and extend the SCOD of the Project till the COD of the Project, i.e., 28.05.2021. The Petitioner is only effectively claiming an extension of around 24 days in comparison to the general extension of around 2.5 months granted by the MNRE which in itself shows that the present Petitioner took necessary the mitigating steps to counter the adverse implications to a very great extent.

- 7.24 The Petitioner's undertaking dated 05.08.2021 ought to be read along with MNRE's office memorandums dated 12.05.2021 and 29.06.2021, which have been clarified by MNRE by way of its office memorandums dated 15.09.2021 and 03.11.2021.
- 7.25 Further, MNRE by way of the office memorandum dated 03.11.2021 has clarified that the undertaking submitted by generating companies in order to seek extension of time in terms of its office memorandums dated 12.05.2021 and 29.06.2021 cannot preclude such generating companies from claiming reliefs on account of Change in Law as per the terms of their respective power purchase agreements.
- 7.26 In view of the above, the Petitioner's alternative claim regarding extension of time on account of the second wave of COVID-19 pandemic has lost relevance in the present scenario, as the declaration sought by the Petitioner vide the Petition (i.e., the Petitioner is not precluded from claiming reliefs under prayers (a) to (e) or any portion thereof by virtue of Clause 4(a) of MNRE's office memorandum dated 15.09.2021 read with the Petitioner's Undertaking dated 05.08.2021) has effectively been settled by MNRE vide its office memorandum dated 03.11.2021 which obviously has been issued after the filing of the present Petition and as explained above has clarified the confusion caused by MNRE's earlier clarification dated 15.09.2021.
- 7.27 Therefore, even in the event SECI would not have granted extension of time to the Petitioner beyond 04.05.2021, the Petitioner would still have been impacted by the Change in Law Events detailed hereinabove, i.e., the issuance of the 2020 SGD Notification and the 2021 BCD Notification. The above is clearly evident from the fact that all payments on account of the occurrence of the aforesaid Change in Law Events, i.e., all payments towards Safeguard Duty and Basic Customs Duty, had already been made by the Petitioner prior to the SCOD of 04.05.2021. The same is evident from the Chartered Account's

Certificates dated 06.10.2021 issued in context of imposition of SGD on modules and BCD on the inverters respectively. Thus, there is no additional liability which has been incurred on account of Change in Law Events for the extension granted beyond 04.05.2021.

7.28 Petitioner is ready to comply with the requirement produce relevant documents in order to establish one on one correlation between the Project, importation of solar modules, cells, and invertors, the invoices and other relevant documents for proof of payment of the Safeguard Duty and the Basic Custom Duty.

7.29 The Petitioner does not dispute SECI's contentions regarding directions to be given to RUVNL for timely making payment to SECI of the amount towards the evaluated claims of the Safeguard Duty and Basic Custom Duty payable by SECI to the Petitioner. However, in this regard, it is most humbly submitted that SECI's payment obligations under the PPA towards the Petitioner are independent and foremost and thus, SECI is liable to compensate the Petitioner upon occurrence of a Change in Law event irrespective of whether such compensation has been received by SECI from RUVNL or not. The said view has also been taken by the Hon'ble CERC in a plethora of judgments, including specifically order dated 28.01.2020 in Petition No. 67/MP/2019 titled as *Clean Sustainable Energy Private Limited v. Solar Energy Corporation of India and Ors.*

7.30 On the issue of methodology for payment of compensation on account of Safeguard Duty and Basic Custom Duty it is submitted that SECI's reliance upon the Hon'ble CERC's RE Tariff Regulations, 2020 or RE Tariff Order 2021 in an attempt to evade its liability and reduce the discounting factor from 10.41% to 9% is entirely misplaced, misconceived, and liable to be rejected.

7.31 In addition to the above, even the annuity rate of 10.41% towards the

Petitioner's claim is flawed and cannot be made applicable for the following reasons:

- (i) 10.41 % is not / cannot be applied on the equity part (100%) of the additional capex.
- (ii) The post-tax Return on Equity (hereinafter referred to as "RoE") allowed is 14% (pre-tax RoE will be 18.71%, if grossed up with the current effective tax rate @ 25.17%);
- (iii) Since the Petitioner has funded the Project by way of debt and equity, RoE on the equity component should be 14% (pre-tax RoE will be 18.71%, if grossed up with the current effective tax rate @ 25.17%);
- (iv) Therefore, the effective RoE of 14% needs to be considered and the proposed annuity rate cannot be made applicable for the entire 100% of additional capex incurred.

7.32 The Ministry of Power vide its Notification dated 22.10.2021 being G.S.R. 751(E), issued the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 ("Change in Law Rules, 2021").

7.33 The Change in Law Rules, 2021 are predicated upon the occurrence of a Change in Law event. However, in the present case, since, RUVNL is disputing the occurrence of a Change in Law event, any direction to the Petitioner to comply with the said Rules would not be an effective remedy as firstly the determination of Change in Law event(s) in the present facts and circumstances is required to be done.

7.34 In any case, as per Rule 3(8) of the Change in Law Rules, 2021, the Appropriate Commission is empowered to verify the calculation and adjust the amount of the impact of the Change in Law event in the monthly tariff or charges within sixty days from the date of receipt of the relevant documents. Therefore, even as per the Change in Law Rules, 2021 the present Petition is not barred.

7.35 The Change in Law events canvassed herein, i.e., the 2020 SGD Notification and the 2021 BCD Notification, have occurred prior to the notification of the aforesaid Rules, which are substantive in nature as they specifically provide for a formula for compensation under Schedule 1.

7.36 In View of above the Petitioner has prayed to

- (i) Hold and declare that the levy of Safeguard Duty as per Notification No. 02/2020-Customs (SG) dated 29.07.2020, on the import of solar PV modules for the Project, is a 'Change in Law' Event under Article 12.1(v) of the Power Purchase Agreement dated 10.06.2019;
- (ii) Consequently, direct the Respondent No. 1 to compensate the Petitioner for the additional expenditure incurred by the Petitioner towards Safeguard Duty along with 5% Integrated Goods and Service Tax amounting to Rs. 47,29,74,283/- (Rupees Forty Seven Crore Twenty Nine Lakhs Seventy Four Thousand Two Hundred Eighty Three Only) in terms of Article 12 of the Power Purchase Agreement dated 10.06.2019, along with carrying costs @ 1.25% per month from the date of payment of the Safeguard Duty by the Petitioner till the date of release of compensation by the Respondent No. 1;
- (iii) Hold and declare that the increase in Basic Customs Duty from 5% to 20% for import of solar inverters for the Project by way of Notification No. 07/2021-Customs dated 01.02.2021 is a 'Change in Law' Event under Article 12.1(v) of the Power Purchase Agreement dated 10.06.2019;
- (iv) Consequently, direct the Respondent No. 1 to compensate the Petitioner for the additional expenditure incurred by the Petitioner towards Basic Customs Duty along with 5% Integrated Goods and Service Tax and Social Welfare Surcharge, amounting to Rs. 2,88,25,542/- (Rupees Two Crore Eighty Eight Lakhs Twenty Five Thousand Five Hundred Forty Two Only), in terms of Article 12 of the

Power Purchase Agreement dated 10.06.2019, along with carrying costs @ 1.25% per month from the date of payment of Basic Customs Duty by the Petitioner till the date of release of compensation by the Respondent No. 1;

(v) Hold and declare that the Petitioner is not precluded from claiming reliefs under prayers made above or any portion thereof by virtue of Clause 4(a) of the office memorandum dated 15.09.2021 issued by the Ministry of New and Renewable Energy read with the Undertaking issued by the Petitioner to the Respondent No. 1 on 05.08.2021;

(vi) In the alternative to prayer above, hold and declare that the second wave of COVID-19 pandemic details of which are as set out in the present Petition is a Force Majeure event under Article 11 of the Power Purchase Agreement dated 10.06.2019;

(vii) Consequent to prayer above, grant an extension in the Scheduled Commissioning Date of the Project from 04.05.2021 till the actual date of commercial operation, i.e., 28.05.2021, without any adverse consequences (including imposition of liquidated damages) in terms of Article 4.5 of the Power Purchase Agreement dated 10.06.2019;

8. Respondent SECI in its reply, written submission and during hearing has submitted as under:

8.1 The petitions have been filed by the Solar Power Developers (SPDs) in regard to declaration of the events of Change in Law and for consequential reliefs. The Change in Law events claimed relate to:

- i. Imposition of Safeguard Duty vide notification No. 2/2020 dated 29.07.2020 of the Ministry of Finance, Government of India.
- ii. Carrying Cost for the period from the date of incurring expenditure till the allowance of the claim and its recovery.

- iii. Additional expenditure incurred by the Petitioner on account of levy of Integrated Goods and Service Tax on the computation of the Safeguard Duty.
- iv. Increase in the rate of Basic Customs Duty (BCD) on import of solar inverters including increased impact on the above on account of Social Welfare Surcharge and IGST with reference to Custom Notification No. 07/2021 dated 01.02.2021.
- v. Hold and declare that the second wave of COVID-19 pandemic a Force Majeure event under Article 11 of the Power Purchase Agreement dated 10.06.2019 and grant an extension in the Scheduled Commissioning Date of the Project from 04.05.2021 till the actual date of commercial operation, i.e., 28.05.2021, without any adverse consequences (including imposition of liquidated damages) in terms of Article 4.5 of the said PPA;

Items iv and v are restricted to petition No. 1941 OF 2021.

- 8.2 Subsequent to the filing of the above three petitions, the Central Government (Ministry of Power) vide Notification dated 22.10.2021, has notified the Electricity (Timely Recovery of Cost due to Change in Law) Rules, 2021 [hereinafter 'Rules']. These Rules, inter-alia, deal with the process to be adopted for affecting the adjustment in tariff on account of Change in Law events, including a Schedule specifying the formula for determination of impact in tariff or charges due to Change in Law.
- 8.3 Rule 3(6),(7),(8) and (9) of the Rules provides for the process for consideration of the impact of Change in Law, including the time and the manner in which a generating company shall approach the appropriate Commission.

- 8.4 SECI has referred to CERC order dated 06.12.2021 in Petition No. 228/MP/2021 in the matter of Mahindra Renewable Private Limited-v-Solar Energy Corporation of India Limited.
- 8.5 The Commission may also consider adopting the same process as provided by the Central Commission, which would ensure uniformity in approach, particularly in the context of there being a number of generators who are having Composite Scheme of arrangement within the Scope of the Section 79(1)(b) of the Electricity Act, 2003 as interpreted and decided by the Hon'ble Supreme Court in Energy Watchdog Vs. CERC, 2017 (14) SCC 80.
- 8.6 In view of the above, the present petitions filed by the Petitioners/SPDs seeking various orders on account of impact of Change in Law have to be considered as per the scheme provided under the Rules notified by the Central Government.
- 8.7 In the present proceedings, certain issues have been raised on the aspect of the validity of the claim for Change in Law in regard to (a) Basic Custom Duty (b) imposition of the Safeguard Duty vide Notification No. 29.07.2020 and (c) the Social Welfare Surcharge as well as IGST to be considered in the increased rate of Basic Custom Duty.
- 8.8 Safeguard Duty imposed on 29.07.2020 needs to be considered with reference to the Amendment No. 4 to the RfS document wherein the position earlier contained in the RfS to the effect *'It is further clarified that any extension of taxes, cess or levies at the same rate on the expiry of the current period shall not be considered as Change in Law'* was specifically excluded. Further, the Notification dated 29.07.2020 is a fresh notification and not a Safeguard Duty which was envisaged at the time of the bidding.
- 8.9 The SPDs were allowed to complete the project by the Scheduled Commercial Operation Date and therefore they are entitled to import

the goods at any time as per their commercial decision to comply with the obligations under the PPA. Further, the decision to import the goods from countries which are being subjected to Safeguard Duty and not from countries which are not subjected to Safeguard Duty is again a commercial decision of the SPDs.

- 8.10 With regard to goods which were imported prior to 30.07.2020, the Safeguard Duty was applicable under the Notification dated 30.07.2018 which was existing at the time of Bid Deadline date i.e.19.02.2019 and the Petitioner was required to factor the impact of the same in the tariff quoted by it in the bidding process. The Petitioner will not be entitled to any relief in respect of such goods imported by prior to 30.07.2020.
- 8.11 In order to qualify for relief under Article 12 of the PPA dealing with Change in Law, the claim raised by the Petitioner should fall within the scope and ambit of the said provision. As regard the Basic Custom Duty, the notification issued by the Ministry of Finance, constitutes a Change in Law for the purposes of the PPA and PSA.
- 8.12 The IGST forming part of the Safeguard Duty and/or the BCD are also the effect of Change in Law.
- 8.13 Insofar as the Social Welfare Surcharge is concerned, the aspect to be considered is that it relates to the corporate responsibility of the SPD to undertake social welfare measures and therefore the Social Welfare Surcharge should also come out of the profit of the SPD. The impact of the same is not to be considered as *'any change in the rates of any Taxes including any duties and cess or introduction of any new tax made applicable for setting up the solar power project and supply of power from the Solar Power Project by the SPD which have a direct effect on the Project'* within the scope of Article 12.1 of the PPA.

- 8.14 In order to qualify for relief under Article 12 of the PPA dealing with Change in Law, the claim raised by the Petitioner should fall within the scope and ambit of the said provision. The extent of relief admissible to the Petitioner on account of Safeguard duty (if any) is subject to examination and verification of documents to be submitted by the Petitioner in accordance with Article 12 of the PPA.
- 8.15 It is incumbent on the Petitioner to establish the one to one correlation between the project, the importation of solar Modules, cells and Solar inverters, the invoices and other relevant documents for proof of the payment of Safeguard Duty and Custom Duty respectively. SECI submitted that the onus is on the Petitioner to demonstrate that the Notification dated 29.07.2020 has resulted in the Petitioner incurring additional expenditure as against the envisaged expenditure as on the Bid Submission Date. The same is for the reason that at the time of Bid Submission (19.02.2019), the Notification dated 30.07.2018 was in force providing for Safeguard Duty.
- 8.16 On the prayer of Petitioner M/s Sitara Solar to hold and declare the second wave of COVID-19 pandemic a Force Majeure event and grant an extension in the Scheduled Commissioning Date of the Project from 04.05.2021 till the actual date of commercial operation, i.e., 28.05.2021, it is submitted that SECI vide its letter dated 26.08.2021, granted extension upto the actual commissioning date i.e. 20.05.2021 on account of the second wave of the COVID 19 in accordance with Office Memorandum dated 12.05.2021 and 29.06.2021 of MNRE and based on the Undertaking dated 05.08.2021.
- 8.17 The alternative claim made by the Petitioner on ground of Second Surge of Covid-19 as alleged force majeure event under Article 11 of the PPA is not admissible. The undertaking dated 05.08.2021 given by the Petitioner and electing to opt for the extension allowed under the Office Memorandum dated 12.05.2021 and 29.06.2021 is valid and

enforceable as against any claim in regard to Covid-19 as force majeure event including in respect of the period for which the force majeure (covid-19) is being claimed. It is not open to the Petitioner first to elect to avail the extension of time granted by the Office Memorandums dated 12.05.2021, 29.06.2021 of MNRE, seek the remedies thereunder and subsequently abandon the extension under the said MNRE Office Memorandums or raise an alternative plea to consider the force majeure provisions under Article 11 of the PPA. The contents of Office Memorandum dated 03.11.2021 deals with only the aspect of Change in Law.

8.18 The Petitioner having elected to avail the relief (i.e. extension of SCD upto the 20.05.2021) in terms of the Office Memorandums dated 12.05.2021 and 29.06.2021 of MNRE by giving the undertaking required, cannot now claim relief for the same period on account of same event (second surge of covid-19) by invoking Article 11 of the PPA dealing with force majeure. On the aspect of doctrine of election, the following decisions of the Hon'ble Supreme Court are relevant: (a) State of Rajasthan –v- Union of India, (2018) 12 SCC 83 [Paras 2, 3], (b) State of Punjab –v- Dhanjit Singh Sandhu, (2014) 15 SCC 144 153 [Paras 2, 24 to 26], (c) National Insurance Co. Ltd –v- Mastan (2006) 2 SCC 641, (d) C.Beepathumma –v- VelasariShankaranarayanaKadambolithaya, (1964) 5 SCR 836 : AIR 1965 SC 241 [Paras 17 to 19].

8.19 The aspects of the Cut-Off date for payment of compensation on account of Safeguard Duty and Customs Duty and matters related thereto need to be considered based on the decision of the Commission in regard to the time extension on account of Second Surge of Covid-19 as well as to the cost implications.

8.20 The Central Commission in the decision dated 20.08.2021 passed in Petition No.536/MP/2020 in the matter of Solar Energy Corporation of

India Limited -v- M/s Azure Power Venus Private Limited & Others has dealt with the Cut-Off Date for payment on account of Safeguard Duty as under:

"Cut-off date for Safeguard Duty Claims

.....

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)."

- 8.21 The commercial supply of power from the power project under the PPA is from the Commercial Operation Date of the power plant. In such case, the extent to which the impact of Safeguard Duty on procuring of Solar Modules and cells and Custom Duty on Solar Inverters is to be considered is only on such Solar Modules, cells and Solar Inverters that are duly installed and commissioned by the date of commercial operation of the power plant. Any such Solar Modules, cells and Solar Inverters installed after the commercial operation are not to be considered for the impact of Safeguard Duty and Basic Customs Duty. Therefore the Commission may clarify the Cut-off Date for considering the Safeguard Duty and Customs Duty impact as the actual Commercial Operation Date, i.e., date stipulated for commencement of power supply under the PPA with the Petitioner.
- 8.22 If the Commission upholds the imposition of Safeguard Duty vide Notification dated 29.07.2020 and increase in Custom Duty vide Notification dated 01.02.2021 as Change in Law, then the Commission may take into consideration the lump-sum or annuity for determining the methodology for making payment.
- 8.23 Vide Letter dated 12.03.2020, the MNRE, Government of India with regard to the aspect of Change in Law compensation ordered by the

Central Commission on account of imposition of GST and Safeguard Duty has, inter-alia, stated 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)."

8.24 In cases other than those where the Buying Entity /Distribution Licensee namely RUVNL specifically agrees to make one time lump-sum payment and further duly make such payment in discharge of their obligations, the annuity payment will be appropriate. This is particularly as the one-time payment will be burdensome.

8.25 There is a clear rationale for annuity payment methodology. The increased costs have been claimed to have been incurred for the purpose of supply of power, the costs should be recovered only if the Petitioner continues to maintain the supply of the power. If the Petitioner does not supply the requisite power, it should not be entitled to recover the cost proportionate to such non-supply, similar to any

other capital cost. If the Petitioner is allowed to recover the Change in Law impact in lump-sum, then SECI [and consequentially RUVNL] would have paid for capital cost even without there being actual supply of power in future. If for any reason the Petitioner abandons the project and discontinues the supply of power, there is no methodology for adjustments of the lump sum payments already made.

- 8.26 The payment on annuity basis is consistent with the fact that the Safeguard Duty and Custom Duty claims are 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. If the Change in Law event had occurred prior to the cut-off date, the Petitioner would have factored the higher cost to be incurred in establishing the solar power project in the per unit tariff to be quoted. Accordingly, the impact of Change in Law occurring after the cut-off date can be serviced through annuity.
- 8.27 In the proceedings before the Central Commission in Petition No.536/MP/2020 filed by SECI, the annuity scheme had been proposed for making account of Change in Law events of Safeguard Duty (imposed vide notification dated 30.07.2018) and GST Laws. In the said proceedings, SECI had made the Distribution Licensees in various states as well as the Solar Power Developers as parties.
- 8.28 On 20.08.2021, the Central Commission has passed order in Petition No.536/MP/2020 approving the annuity methodology proposed by SECI for making payments in respect GST and/or Safeguard Duty compensation.
- 8.29 However, the decision of the Central Commission approving the discounting factor at 10.41% was based on the interest rate specified in the Renewable Tariff Regulations, 2017 read with RE Tariff Order dated 11.01.2019 notified by the Central Commission at the relevant time

when the said annuity methodology was considered by the MNRE and implemented by SECI. Subsequently, there has been a fall in the interest rate of loan and the Central Commission has notified the Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020 [hereinafter 'Renewable Tariff Regulations 2020'] and RE Tariff Order dated 31.03.2021. In the said regulations read with RE tariff Order, the Central Commission has considered only the interest rate of 9% and the term of the Loan repayment as 15 years instead of 13 years earlier considered.

8.30 Accordingly, for the present case, following parameters for making payment on annuity basis may be considered by the Hon'ble Commission:

- a) The Safeguard Duty and Customs Duty claims upto the cut-off date as may be decided by the Commission in its order will be evaluated by SECI;
- b) The discounting factor has been considered as 9% which is the rate of interest for the loan component of the capital cost as provided in the Central Commission's RE Tariff order dated 31.03.2021 providing for determination of levelised generic tariff for the Financial Year 2021-22 read with Regulation 14 (2) (b) of Renewable Tariff Regulations, 2020;
- c) The period for payment of the compensation on account of Safeguard Duty and Customs Duty on annuity basis has been taken to be as 15 years from the date of Commercial Operation Date. The same is consistent with Regulation 14 (1) of the RE Tariff Regulations 2020 providing that *"For the determination of generic tariff and project specific tariff, loan tenure of 15 years shall be considered"*;
- d) In cases, where the projects of the Power Developers have already achieved COD, the amount of monthly annuity payment for the

number of months elapsed since the COD till the date of payment will be paid on lump-sum basis; and

- e) The remaining amount of the Safeguard Duty compensation (Total Safeguard Duty claims payable minus Safeguard Duty claims paid on upfront basis) and Customs Duty compensation (Total Customs Duty claims payable minus Customs Duty claims paid on upfront basis) is paid to the SPD with the monthly discounting rate.

8.31 The Commission may consider the above aspects in regard to the mechanism to be decided for the impact of Safeguard Duty and Customs Duty in the present case, if held to be admissible to the Petitioners.

8.32 If the imposition of Safeguard Duty vide Notification dated 29.07.2020 and Customs Duty on Solar Inverters vide Notification dated 01.02.2021 is considered as Change in Law and the impact is allowed to the Petitioner, the Commission may issue directions to RUVNL (i.e. the power procurer under the PSA), to make payment towards the evaluated claims of the Safeguard Duty and Customs Duty payable by SECI to Petitioner, on a back to back basis under the PSA in a time bound manner.

8.33 In the decision dated 13.05.2021 passed by the Central Commission in Petition No.73/MP/2020 alongwith I.A. No.21 of 2021 in the matter of SB Energy One Private Limited –v- Solar Energy Corporation of India Limited and Another, the Central Commission has held that PPA and PSA are interconnected and are of back to back nature implying that the distribution licensee, RUVNL is liable to pay to SECI all that SECI has to pay to the Power Developer on account of GST/Safeguard Duty.

8.34 As per Article 12 of the PPA, the Change in Law events claimed by the Petitioners, the date from which it will be effective and the aspect of

applicability of Carrying Cost has to be determined and approved by the Commission, after hearing SECI and RUVNL, the Buying Entity.

- 8.35 With reference to the contention of admissibility of Carrying Cost, it is submitted that in any event the Carrying Cost is to be restricted to the cost of financing of a prudent and efficient utility i.e. the interest rate at which such utility can borrow money from the lenders and financial institutions after due and sincere efforts to minimize the interest cost.
- 8.36 It is settled principle that in the matters of restitution the courts should adopt pragmatic view and grant relief in a manner as may be reasonable, fair and practicable. It has been held that the Court should not be oblivious of any unmerited hardship to be suffered by the party against whom action by way of restitution is taken. [Reference: Citibank N.A. –v- Hiten P. Dalal Ors. (2016) 1 SCC 411 and Kerala State Electricity Board Through its Special Officer (Revenue) and Another –v- M.R.F Limited and Others, (1996) 1 SCC 597]
- 8.37 The claim of carrying cost is based on principle of restitution and is completely different than penal rate of interest which is Late Payment Surcharge. It would be unreasonable to pay carrying cost computed at the rate of Late Payment Surcharge which is penal in nature.
- 8.38 In any event the Carrying Cost is to be restricted to the cost of financing of a prudent and efficient utility, i.e., the interest rate at which such utility can borrow money from the lenders and financial institutions after due and sincere efforts to minimize the interest cost.
9. Respondent RUVNL in its reply has submitted as under:
- 9.1 On 03.08.2018, RFP was called upon by the SECI for selection of solar power developers for setting up 750 MW Grid Connected Solar PV Power Projects in Rajasthan.

- 9.2 On the date of RFP the financial notification dated 30.07.2018 was existing and wherein different rates of Safeguard Duty were levied on import of solar cells.
- 9.3 The Petitioners submitted bid on 19.02.2019, thus on the date of the submission of financial bid 25% ad valorem of Safeguard Duty- anti dumping duty was leviable on import of solar cells and as per RFP, the developer was supposed to quote the prices inclusive of all type of taxes.
- 9.4 There is no provision in RFS which states that at what time the power developer will procure the solar panels. A procurer was supposed to quote the rates based on the taxes applicable on the last date of bid. In the present case on the last date of bid, the Safeguard Duty was 25% - Antidumping duty applicable. By virtue of notification dated 29.07.2020 the Safeguard Duty has been reduced at rate of 14.9% - Anti dumping duty for the period of import of solar panels between the period of 30.07.20 to 29.01.2021 and 14.5% -Antidumping duty between the period of 30.01.2021 to 29.07.2021.
- 9.5 Thus by notification dated 29.07.2020 no new tax was imposed but rather the earlier existing tax was reviewed and thus it cannot fall under the definition of Change in Law as being claimed by the Petitioner.
- 9.6 Further, earlier the existing rates were higher than the present ones notified vide notification dated 29.07.2020 and the Petitioner had gained by payment of lesser Safeguard Duty and therefore, no amount is payable to the Petitioner.
- 9.7 The Petitioner may be asked to pass on the benefits of the Safeguard Duty to the buying entities as per provision of clause 12.1 para 4 of the PPA and terms and conditions of PSA.

- 9.8 The Notification dated 1/2/2021 is concerned it is submitted that the Custom Duty on solar inverter was applicable on the last date of submission of the Bid and vide notification dated 1/2/2021, the exemption has been withdrawn which cannot be treated as Change in Law.

Commission's view

10. Commission has considered the submissions of the Petitioners and Respondents in light of the Change in Law clause in the PPAs.
11. As the issues that arise in these petitions for consideration and decision of the Commission are similar, these petitions referred to in cause title are clubbed and are being disposed of by this common order.
12. Based on the submissions of the Petitioners and Respondents the issues that arise for decision of this Commission are:
- (i) Whether imposition of Safeguard Duty via Notification dated 29.07.2020 along with integrated GST is a Change in Law event.
 - (ii) Whether increase in rates of Basic Customs Duty on import of Solar Inverters pursuant to Ministry of Finance Notification dated 01.02.2021 along with Integrated Goods and Service Tax and Social Welfare Surcharge is a Change in Law event.
 - (iii) Whether Carrying Cost is admissible.
 - (iv) Methodology for payment of compensation on account of these Change in Law events and further directions thereof.
13. Before considering the above issues it is necessary to look into the 'Change in Law' clause of the PPA. The Article 12 of the PPA pertaining to 'Change in Law' reads as under:

ARTICLE 12: CHANGE IN LAW

12.1 Definitions

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

- (i) the enactment of any new law; or*
- (ii) an amendment, modification or repeal of an existing law;*
- (iii) the requirement to obtain a new consent, permit or license; or*
- (iv) any modification to the prevailing conditions prescribed for obtaining an consent, permit or license, not owing to any default of the Solar Power Generator; or*
- (v) any change in the rates of any Taxes including any duties and cess or introduction of any new tax made applicable for setting up the solar power project and supply of power from the Solar Power project by the SPD which have a direct effect on the Project.*

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

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

In the event of any decrease in the recurring/ nonrecurring expenditure by the SPD or any income to the SPD on account of any of the events as indicated above, SPD shall file an application to the appropriate commission no later than sixty (60) days from the occurrence of such event, for seeking approval of Change in Law. In the event of the SPD

failing to comply with the above requirement, in case of any gain to the SPD, SECI shall withhold the monthly tariff payments on immediate basis, until compliance of the above requirement by the SPD.

12.2 Relief for Change in Law

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

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

14. In light of above provisions of PPA we may now discuss each issue to decide the same.
 - (i) Whether imposition of Safeguard Duty via Notification dated 29.07.2020 along with integrated GST is a Change in Law event.
15. The Solar Power Developers (SPDs) have prayed to declare the imposition of Safeguard Duty via Notification dated 29.07.2020 as Change in Law in terms of the PPA which has led to an increase in the expenditure for the Project. The SPDs have further prayed to direct the Respondents to compensate the petitioner for additional expenditure towards Safeguard Duty alongwith 5% integrated GST.
16. SECI has mainly submitted that the Change in Law claim alongwith claims for additional expenditure relating to Safeguard Duty (SGD) vide Notification dated 29.07.2020 is subject to the satisfaction of the conditions prescribed in Article 12 of the PPA. SGD needs to be considered as per amendment no. 4 of RFS document. The time and country of import of good by SPDs is their commercial decision.
17. RUVN submitted that the last date of bid submission was 19.02.2019 and on that date 25% ad valorem Safeguard Duty- Anti dumping duty

was leviable on import of solar cells and as per RFP, the developer was supposed to quote the prices inclusive of all type of taxes.

18. RUVN further submitted that by virtue of notification dated 29.07.2020 the Safeguard Duty has been reduced at the rate of 14.9% - Antidumping duty for the period of 30.07.2020 to 29.01.2021 and 14.5% - Antidumping duty between the period of 30.01.2021 to 29.07.2021. Thus by notification dated 29.07.2020 no new tax was imposed but rather the earlier existing tax was reviewed and reduced thus it cannot fall under the definition of Change in Law as being claimed by the Petitioner. The rates were higher than the present ones notified vide notification dated 29.07.2020 and the Petitioner had gained by payment of lesser Safeguard Duty and therefore, no amount is payable to the Petitioner.
19. Commission on perusal of RfS Document initially issued on 03.08.2018 read with Amendment No.04 dated 07.02.2019 finds that the maximum tariff payable to the project developer is fixed at INR 2.68/kWh for 25 years. Further, it is also mentioned this shall be inclusive of all statutory taxes, duties, levies, cess applicable on the last date of bid submission. The relevant portion of the RFP reads as under:

"Section II, Clause 6

SECI shall enter into PPA with successful SPDs for a period of 25 years from the date as per the provisions of PPA. The maximum tariff payable to the Project Developer is fixed at INR 2.68/ kWh for 25 years. This shall be inclusive of all statutory taxes, duties, levies, cess applicable as on the last date of bid submission. (emphasis added)

It is clarified that any change in the rates of any Taxes after the last day of submission of the bid, including any duties and cess or introduction of any new tax made applicable for setting up the solar power project and supply of power from the Solar Power project by the SPD which have a direct effect on the Project, shall only be considered as change in law. However, Change in Law shall not include (i) any change in taxes on corporate income; or (ii) any change in any withholding tax on income or dividends."

20. We observe that prior to the Notification dated 29.07.2020 of the Ministry of Finance dealing with Safeguard Duty, the Safeguard Duty was already in force under the Notification dated 30.07.2018 issued by the Ministry of Finance. Thus, on the last date of the submission of financial bid, i.e., 19.02.2019, 25% ad valorem of Safeguard Duty- anti dumping duty was leviable on import of solar cells in terms of notification dated 30.07.2018 and as per RFP the SPDs were required to factor in the impact of the same in the tariff quoted by them.
21. It is observed that vide notification dated 29.07.2020 the safeguard duty has been reduced at the rate of 14.9% ad valorem minus anti-dumping duty for the period of import of solar panels between the period of 30.07.20 to 29.01.2021 and 14.5% ad valorem minus anti-dumping duty between the period of 30.01.2021 to 29.07.2021. Thus Safeguard Duty has actually been reduced from the rate that was applicable on the last day of bid and has no adverse financial impact on the project cost.
22. The Commission on perusal of Article 12.1(v) of the PPA has observed that introduction of any new tax after the last date of submission of bid, which has a direct effect on the Project cost, is a Change in Law Event. In the present case since the notification dated 29.07.2020 only reduced the rate of Safeguard Duty from the rate which was already applicable on the last date of bid submission. Therefore, Commission is of the considered view that the issuance of the SGD Notification dated 29.07.2020 has not affected the Project cost adversely.
23. In view of above, the Commission holds that imposition of Safeguard Duty via Notification dated 29.07.2020 is not a Change in Law in terms of Article 12 of the PPAs.
24. The Commission further observes that the claim for additional cost on account of levy of IGST on the Safeguard Duty not admissible since the

Safeguard Duty notified vide Notification dated 29.07.2020 is not a Change in Law in terms of Article 12 of the PPA. The Commission therefore deems it appropriate not to allow levy of IGST on the Safeguard Duty as Change in Law in terms of PPA.

- (ii) Whether increase in rates of Basic Customs Duty on import of Solar Inverters pursuant to Ministry of Finance Notification dated 01.02.2021 along with Integrated Goods and Service Tax and Social Welfare Surcharge is a Change in Law event.
25. The SPDs have submitted that the Department of Revenue, Ministry of Finance, Government of India issued Notification No. 07 /2021-Customs dated 01.02.2021 ("2021 BCD Notification"), which rescinded Notification No. 1/2011-Customs dated 06.01.2011 ("2011 BCD Notification") providing exemption from levy of the Basic Customs Duty in excess of 5% ad valorem, and from the whole of the additional duty of customs leviable thereon under Section 3 of the Customs Tariff Act, 1975. As a result of the issuance of the 2021 BCD Notification, Basic Custom Duty on solar Inverters was raised to 20% from the earlier applicable rate of 5%.
26. SPDs further submitted that the issuance of the 2021 BCD Notification has a direct effect on the Project cost. Accordingly, in terms of Article 12.1 of the PPA, they are entitled to be placed in the same financial position as it would have been had it not been for the occurrence of the Change in Law Event. Therefore, the Petitioners are entitled to compensation in terms of Article 12.2 of the PPA.
27. SECI has submitted that the notification issued by the Ministry of Finance, constitutes a Change in Law for the purposes of the PPA and PSA. The IGST forming part of the Safeguard Duty and/or the BCD are also the effect of Change in Law.

28. On Social Welfare Surcharge, SECI submitted that it relates to the corporate responsibility of the SPD to undertake social welfare measures and therefore the Social Welfare Surcharge should also come out of the profit of the SPD and it should not be declared as Change in Law.
29. Per Contra RUVN has submitted that Notification dated 01.02.2021 is regarding the Basic Custom Duty on solar inverter and was applicable on the last date of submission of the Bid. By notification dated 01.02.2021, the exemption has been withdrawn which cannot be treated as Change in Law.
30. Commission observes that vide BCD Notification dated 01.02.2021, Basic Customs Duty payable on the import of solar inverters has been effectively increased from 5% to 20%. It is also noted that the BCD Notification dated 01.02.2021 has been issued after the last date of submission of the bids, i.e., 19.02.2019.
31. Commission further observes that there is clear provision in the PPA that if there are changes in the rates of any Taxes including any duties or cess applicable for setting up the solar power project, after the last date of submission of bid, which has a direct effect on the Project cost, then it is a Change in Law Event.
32. The Commission, therefore, is of the considered view that increase in rates of Basic Customs Duty ("BCD") on import of Solar Inverters pursuant to Ministry of Finance ("MoF") Notification dated 01.02.2021 is a 'Change in Law' in terms of provisions of the PPAs.
33. The Commission further observes that the claim for additional cost on account of levy of IGST and Social Welfare Surcharge on the increase in the rate of Basic Customs Duty ("BCD") on import of Solar Inverters pursuant to Ministry of Finance Notification dated 01.02.2021 is required to be considered as Change in Law since the BCD has been

considered and approved as a Change in Law in terms of Article 12 of the PPA. The Commission therefore allows levy of IGST and Social Welfare Surcharge on the increase in the rate of BCD as Change in Law in terms of PPA.

(iii) Whether Carrying Cost is admissible.

34. The Petitioners have submitted that they are entitled under the PPA to claim such amounts paid towards Safeguard Duty and Basic Custom Duty along with the carrying cost from the date of their payment under the Change in Law clause.
35. SECI has submitted that the claim of carrying cost is based on principle of restitution and is completely different than penal rate of interest which is Late Payment Surcharge. It would be unreasonable to pay carrying cost computed at the rate of Late Payment Surcharge which is penal in nature.
36. SECI further submitted that the Carrying Cost is to be restricted to the cost of financing of a prudent and efficient utility, i.e., the interest rate at which such utility can borrow money from the lenders and financial institutions after due and sincere efforts to minimize the interest cost.
37. We observe that the PPA provide that in the event a Change in Law results in any adverse financial loss/ gain to the Solar Power Generator then, in order to ensure that the Solar Power Generator is placed in the same financial position as it would have been had it not been for the occurrence of the Change in Law, the Solar Power Generator/ Procurer shall be entitled to compensation by the other party. Therefore, the Petitioners are entitled for the Carrying Cost.
38. The Commission finds the contention of SECI just and proper that the claim of carrying cost should be based on principle of restitution and is

completely different than penal rate of interest which is Late Payment Surcharge.

39. The Commission, therefore, deems it appropriate to allow the actual interest rate paid by the Petitioners for raising the funds as certified by Statutory Auditor based on audited accounts as the Carrying Cost for the payment of the claims under Change in Law. The Carrying Cost shall cover the period starting from the date when the actual payments were made to the authorities till the date of issue of this order.
- (iv) Methodology for payment of compensation on account of these 'Change in Law' events and further directions thereof.
40. Petitioners have prayed to evolve a suitable methodology for payment of compensation on account of Safeguard Duty and customs duty. Petitioners on the issue of methodology for payment of compensation submitted that SECI's reliance upon the CERC's RE Tariff Regulations, 2020 or RE Tariff Order 2021 in an attempt to evade its liability. SECI's submissions regarding reduction in the discounting factor from 10.41% to 9% is entirely misplaced, misconceived, and liable to be rejected.
41. In addition to the above, even the annuity rate of 10.41% towards the Petitioner's claim is flawed and cannot be made applicable for the following reasons:
- (i) 10.41% is not / cannot be applied on the equity part (100%) of the additional capex.
 - (ii) The post-tax Return on Equity (hereinafter referred to as "RoE") allowed is 14% (pre-tax RoE will be 18.71%, if grossed up with the current effective tax rate @ 25.17%);
 - (iii) Since the Petitioner has funded the Project by way of debt and equity, RoE on the equity component should be 14% (pre-tax RoE will be 18.71%, if grossed up with the current effective tax

rate @ 25.17%);

- (iv) Therefore, the effective RoE of 14% needs to be considered and the proposed annuity rate cannot be made applicable for the entire 100% of additional capex incurred.
42. SECI has submitted that in the event the Commission holds Notification dated 29.07.2020 and dated 01.02.2021 of Ministry of Finance as Change in Law, the same is required to be paid on Annuity basis unless RUVNL specifically agrees to make lump-sum payment and make such payment in discharge of its obligation.
43. SECI has submitted that in the proceedings before the Central Commission in Petition No.536/MP/2020 filed by SECI, the annuity scheme was proposed for making account of Change in Law events of Safeguard Duty (imposed vide notification dated 30.07.2018) and GST Laws. In the said proceedings, SECI had made the Distribution Licensees in various states as well as the Solar Power Developers as parties. On 20.08.2021, the Central Commission has passed order in Petition No.536/MP/2020 approving the annuity methodology proposed by SECI for making payments in respect GST and/or Safeguard Duty compensation.
44. However, the decision of the Central Commission approving the discounting factor at 10.41% was based on the interest rate specified in the Renewable Tariff Regulations, 2017 read with RE Tariff Order dated 11.01.2019 notified by the Central Commission at the relevant time when the said annuity methodology was considered by the MNRE and implemented by SECI. Subsequently, there has been a fall in the interest rate of loan and the Central Commission has notified the CERC(Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020 and RE Tariff Order dated 31.03.2021. In the said regulations read with RE tariff Order, the Central Commission

has considered only the interest rate of 9% and the term of the Loan repayment as 15 years instead of 13 years earlier considered.

45. Accordingly, for the present case, following parameters for making payment on annuity basis may be considered by the Commission:

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

46. SECI in view of above has submitted that the Commission may consider the above aspects in regard to the mechanism to be decided for the

impact of Safeguard Duty and Customs Duty in the present case, if held to be admissible to the Petitioner.

47. We observe that as per PPA the mechanism of compensation payment shall be determined and shall be effective from such date as may be decided by the Appropriate Commission. Therefore, we are proceeding with determination of Methodology for payment of compensation on account of Change in Law and Cut Off date etc.
48. Commission observe that SECI has proposed the annuity mode with discounting factor as 9% whereas SPDs have submitted that the discounting factor should be higher.
49. We would like to clarify that the present petitions are not a tariff determination exercise under section 62 of the Electricity Act, 2003. As such, reliance on the RE Tariff Regulations, 2017 or 2020 or any Order issued in pursuance of the said regulations can at best have a reference value for the purpose of resolving the issue of discount rate for annuity payments.
50. 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 RE Tariff Regulations to arrive at annuity rate and period.
51. Central Commission in Petition No.536/MP/2020 filed by SECI, has approved the annuity scheme as proposed by SECI for accounting of Change in Law events of Safeguard Duty (imposed vide notification dated 30.07.2018) and GST Laws.

52. It is further noted that the Central Commission has notified the CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020 and RE Tariff Order dated 31.03.2021. In the said regulations read with RE tariff Order, the Central Commission has considered only the interest rate of 9% and the term of the Loan repayment as 15 years.
53. As the actual deployment of capital by way of debt or equity and their cost in terms of rate of interest or return, respectively, is unknown, the rate of 9% can be taken as the uniform rate of compensation for the entire expenditure incurred on account of Change in Law events. Further, the Commission is of the view that the compensation for Change in Law cannot be a source for earning profit, and therefore, there cannot be any higher rate of return than the prevailing normative cost of debt.
54. Commission after considering all the submissions and facts, deems it appropriate to allow the discount rate of 9% and annuity period of 15 years.
55. Petitioner, M/s Sitara Solar in its prayer requested for extension in the Scheduled Commissioning Date of the Project from 04.05.2021 till the actual date of commercial operation, i.e., 28.05.2021. Later it has submitted that in view of MNRE's office memorandum dated 03.11.2021, alternative claim for extension of time has lost relevance in the present scenario. The Commission therefore has not considered the said prayer.
56. The Commission regarding Cut-off date for claims for Change in Law events clarifies that the invoices related to supply of the goods can be raised only up to COD for all the equipment as per the rated project capacity and energy as per PPA that has been installed and through which energy has flown into the grid, since the liability of the

SECI/Respondent Discom for payment of purchase of the power from the Respondent SPDs starts from the Commercial Operation Date (COD).

57. The Commission directs SPDs to make available to SECI and Discoms all relevant documents exhibiting clear and one to one correlation between the projects and the supply of goods or services, duly supported by the relevant invoices and Auditor's Certificate. SECI and Discoms are further directed to reconcile the claims for Change in Law on receipt of the relevant documents and pay the amount so claimed to SPDs.
58. In view of the above, the liability of SECI/ Discoms for 'Monthly Annuity Payment' starts from 60th (sixtieth) day from the date of this order or from the date of reconciliation of claims by the Respondent (SPDs), whichever is later. In case of delay in the Monthly Annuity Payment beyond the 60th (sixtieth) day, late payment surcharge shall be payable for the delayed period corresponding to each such delayed Monthly Annuity Payment(s), as per respective PPAs/PSAs.
59. The summary of our findings are as follows:
 - (a) Imposition of Safeguard Duty via Notification dated 29.07.2020 along with integrated GST is not a Change in Law in terms of Article 12 of the PPAs.
 - (b) Basic Custom Duty Notification dated 01.02.2021, which rescinded Notification No. 1/2011-Customs dated 06.01.2011 and thereby resulted increase in rates of Basic Customs Duty ("BCD") on import of Solar Inverters along with integrated GST and Social Welfare Surcharge is a Change in Law in terms of Article 12 of the PPAs.
 - (c) Carrying cost on such amounts paid towards Basic Custom Duty is payable at the rate at which such SPDs have actually taken long

term capital loan for financing the project from the lenders and financial institutions.

(d) The discount rate of annuity payments shall be 9% towards the expenditure incurred by SPDs on account of Change in Law. The "Tenure of Annuity Payments" shall be for 15 years.

(e) The liability of SECI/ Discoms for 'Monthly Annuity Payments' starts from 60th (sixtieth) day from the date of this order or from the date of reconciliation of claims by the Respondents (SPDs), whichever is later. In case of delay in the Monthly Annuity Payment beyond the 60th (sixtieth) day, late payment surcharge for the delayed period corresponding to each such delayed Monthly Annuity Payment(s) shall be payable as per respective PPAs/PSAs.

(f) The invoices related to supply of the goods can be raised only up to the Commercial Operation Date (COD) only for the contracted capacity and energy as per the respective PPAs.

60. In view of above, the Petitions bearing no. 1914/21, 1922/21 and 1941/21 along with all the IAs are disposed of, accordingly.

(Prithvi Raj)
Member

(S. C. Dinkar)
Member

(Dr. B.N. Sharma)
Chairman