

NOW, THEREFORE, IN CONSIDERATION OF THE PROMISES AND MUTUAL AGREEMENTS, COVENANTS AND CONDITIONS SET FORTH HEREIN, IT IS HEREBY AGREED BY AND BETWEEN THE PARTIES AS FOLLOWS:

XI. The parties agree that the various terms contained in the SECI-SPD PPA such as Scope of Project, Terms of the Agreement, Performance Guarantee, Conditions Subsequent, Obligations of the respective Parties, Construction of the Power Generation Capacity, Synchronization, Commissioning and Commercial Operation, Operation and Maintenance, Purchase and Sale of Solar Power, Measuring and Metering and Dispatch of Power, Billing and Power Accounting and payments, Liabilities, Force Majeure, Events of Default, Termination, Transfer, Change in Law, Indemnity, Insurance, Assignment and Changes, Financing and Bankability, Representations and Warranties, Governing Law, Notices and all other Miscellaneous Terms provided in the SECI-SPD PPA shall mutatis mutandi apply to this agreement between SECI and Buying Entity

[Emphasis Supplied]

9.11. The quantum of compensation payment on account of Change in Law falling within the scope of Article 12 of PPAs shall be provided as per Article 12.2.2 of the PPAs. The above will be consistent with Article 12 of PPAs.

9.12. In terms of Article 12.1.3 of the PPAs, the recognition is regarding the methodology for computation for the impact of change in law, without providing any event to be recognized as constituting a change in law. The scope of Change in Law dealt with in the PPA read with the PSA is as per Article 12.1.1 of the PPAs. However, during the hearing dated 25.08.2022, the Project Developers sought for recognition regarding the levy of GST vide Notification dated 30.09.2021 of the Central Government as constituting the Change in Law event under Article 12 of the respective PPAs. During the hearing held on 25.08.2022, the project developer relied upon the Judgment dated 12.10.2021 of the Hon'ble Appellate Tribunal in Appeal No.251 of 2021. In the said decision, the Appellate Tribunal was primarily considering Article 12.1.3 of the relevant PPA, which read as under:

12.1.3 *However, in case of change in rates of safeguard duty, GST and basic customs duty after 28.10.2020 and resulting in change in*

Project Cost, then such change will be treated as Change in Law and the quantum of compensation payment on account of change in rates of such duties and shall be provided to the affected party by the other party as per Article 12.2.3, subject to the provision that Appropriate Commission recognizes such provisions at the time of adoption of tariff by the Appropriate Commission and any decision in this regard shall be governing on SPD and Buying Entity.

9.13. The operative portion of the Order passed by Hon'ble Tribunal, inter-alia, reads as under:

16. *During the hearing, we pointedly asked but no regulation or contractual clause or, for that matter, any other provision was shown as could reflect an inhibition or prohibition against consideration of claim of change in law compensation at the stage of adoption of the tariff discovered by the bid process under Section 63 of the Electricity Act, 2003. We agree with the appellant that deferring such claim for later date creates a whole lot of confusion and, what is of utmost concern to the project developers, regulatory uncertainty and consequent difficulties in attaining financial closure. It cannot be ignored that the impact on the cost of the development of the project of such change in law events that have occurred after the submission of the bid and closure of the bid process but before the adoption of the bid discovered price renders the bid price unrealistic and in terms of Section 86 (1) (b) of the Electricity Act, it is the duty of the State Commission to inquire into such claim at the first opportune time and bring in suitable corrections, may be first by declaration and followed up by detailed tariff orders. If the event referred to actually constitutes change in law within the four corners of its definition under the PPA, there is no reason why it cannot be duly recognized as a change in law at the stage of tariff adoption, the actual impact and extent of the relief admissible to be determined at the appropriate stage.*

9.14. GST Notification dated 30.09.2021 has been issued by Central Government after the bid submission date and prior to the adoption of tariff and approval of procurement of power. The Commission, In view of the above Order passed by the Appellate Tribunal, may recognize GST notification dated 30.09.2021 as Change in Law within the scope of Article 12 of the PPAs read with

Clause XI of PSA in the present case and may appropriately decide on the claim made by project developers.

9.15. It is further submitted that the actual impact and extent of the relief admissible can be determined at the appropriate stage in terms of the formula provided in Article 12.2.2 of the PPAs subject to recognition of the same by the Hon'ble Commission in the present proceedings.

9.16. Further, Articles 2.1.3, and 2.1.4 of the PPAs and Clause II of PSA provide for the Adoption of Tariff by the Hon'ble Commission within 120 days of the effective date (16.04.2022 as per Article 2.1.1 of the PPA). If the tariff adoption order is issued by the Commission after 120 days of the effective date (16.04.2022), there shall be a corresponding extension in Scheduled Financial Closure and Scheduled Commissioning Date for the equal number of days for which the Order has been delayed beyond the said prescribed period.

10. It is observed from the submissions of the successful bidders, that they are not disputing/challenging the tariff adoption petition as filed by the petitioner. However, rather at this stage of tariff adoption, they are placing their limited replies on certain aspects pertaining to change in law event which has already taken place pursuant to submission of bids, which the Petitioner has not pleaded. Hence, they seek to plead the same praying for the indulgence of the Commission to approve and recognize the specific provisions of the PPA as also the aspect of Change in law. With this background, the submissions of the successful bidders have been covered in the succeeding paras.

Sprng Natural Power Source Private Limited submission

11. Respondent Sprng Natural Power Source Private Limited ('SNPSPL') in their reply and during the hearing, mainly submitted as under:

11.1. In terms of Section 63 of the Act, read with the competitive Bidding Guidelines, SECI issued the present RFS for procurement of 1785 MW solar power

generated from solar photovoltaic projects in the State of Rajasthan. As per the terms of the RFS, the power generated by the selected developers was to be sold to the petitioner.

11.2. The Commission is the appropriate Commission for the adoption of tariff discovered pursuant to a competitive bidding process carried out for the selection of solar power developers to generate and sell power within the State to RUVNL.

11.3. The Ministry of Finance, Government of India, on 30.09.2021, issued Notification No. 8/2021 Central Tax (Rate) and Notification No. 8/2021 Integrated Tax (Rate), and Notification No. 8/2021 State Tax (Rate) was issued by the Department of Finance, Government of Rajasthan, amending the Goods and Services Tax rates ("GST Amendment Notifications") relating to setting up of SPGS with effect from 01.10.2021.

11.4. With the issuance of the GST Amendment Notifications, the Answering Respondent would be required to bear additional non-recurring expenditure in the form of the additional tax burden on the setting up of the SPGS. Prior to the issuance of the GST Amendment Notifications, under the then prevalent notifications issued under the GST Laws, the specified renewable energy devices and parts for their manufacture, including SPGS, were taxed at the rate of 5% in terms of Schedule -I, Entry 234.

11.5. By the GST Amendment Notifications, Entry 234 provided in the erstwhile CGST and SGST rate schedules has been deleted. Instead, Entry 201A has now been inserted in Schedule II of the CGST and SGST rate schedules, which prescribe a total rate of 12% for specified renewable energy devices and their parts for manufacture, including SPGS. The CGST at 6% and SGST at 6% together comprise the GST payable for the intra-state supply of SPGS.

11.6. From the provisions of change in law in terms of Article 12 of the PPA, it is evident that the GST Amendment Notifications are a modification and amendment of the GST Laws as well as a change in the tax structure and the introduction of a new tax that has a direct effect on the setting up of the SPGS and supply of power from the Project.

11.7. Further, the GST Amendment Notifications have been issued after the cut-off date specified under the PPA, i.e., 01.07.2021. Therefore, the GST Amendment Notifications are Change in Law events in the meaning of Article 12.1.1 (i) and (v) of the PPA, entitling the respondent to suitable relief under Article 12 of the PPA.

11.8. SECI has been notified vide letter dated 29.08.2022 about the occurrence of the above Change in Law event stating that the impact of the same shall be communicated at a later stage.

11.9. Commission's declaration that the issuance of the GST Amendment Notifications amounts to a Change in Law event under the PPA and recognition of the said Change in Law event at the earliest possible opportunity is critical to maintain regulatory certainty and for the Answering Respondent to tie up adequate additional financial arrangements to ensure timely availability of funds for the Project.

11.10. The approach suggested above is in line with the observations of the Hon'ble APTEL in Judgment dated 12.10.2021 in Appeal No. 251 of 2021 titled *Green Infra Renewable Energy Limited v. Rajasthan Electricity Regulatory Commission & Ors.*, wherein the Hon'ble APTEL, inter-alia, held that regulatory certainty is of utmost significance to the power developers. Thus, it is essential that clarity in relation to the revised tariff on account of Change in Law events may be given at the earliest.

11.11. Moreover, while dealing with similarly worded Change in Law provisions, the Commission has in the past adjudicated on Change in Law claims of developers at the tariff adoption stage itself in its order dated 13.12.2021 in Petition No. 1905 of 2021 and 1933 of 2021.

11.12. Hon'ble APTEL has, in a catena of judgments, held that the introduction or change in the rates of taxes and duties is a Change in Law event under similarly worded Change in Law clauses. In this regard, reference may be had to Judgment dated 14.08.2018 passed by the Hon'ble Appellate Tribunal for Electricity in Appeal No. 119 of 2016 and batch titled *Adani Power Rajasthan Limited v. Rajasthan Electricity Regulatory Commission & Ors.* The Commission may recognise the issuance of the GST Amendment Notifications as a Change in Law event at the stage of tariff adoption itself.

11.13. Article 12.1.3 of the PPA expressly states that the quantum of compensation payable on account of a Change in Law event shall be in accordance with Article 12.2.2 of the PPA, subject to the condition that the Commission recognises such provisions at the time of tariff adoption.

11.14. The quantum of compensation payable to the Answering Respondent under the PPA is to be as per the mechanism stipulated under Article 12.2.2 of the PPA. However, to claim such compensation under the PPA, the prior approval of the Commission at the stage of adoption of tariff is a prerequisite.

11.15. Accordingly, it is prayed that the issuance of the GST Amendment Notifications may be recognised as a Change in Law event under Article 12 of the PPA and the compensation mechanism provided under Article 12.1.3 read with Article 12.2.2 are recognised by the Commission at the stage of tariff adoption itself.

11.16. The prayer of the answering Respondent is in furtherance of the objectives sought to be achieved under the Electricity Act, 2003 as provided in its preamble i.e., financial viability /sustainability and consumer interest. This is also in line with the provisions of the National Tariff Policy issued by the Central Government under Section 3 of the Act.

11.17. Article 2.1.4 of the PPA contemplates an extension in the timeline for Financial Closure and the Scheduled Commissioning Date for each day's delay in adoption of tariff beyond 120 days from the Effective Date under the PPA i.e., 16.04.2022. Accordingly, any additional time consumed in the adoption of tariff will entail a corresponding delay for the Petitioner in obtaining the benefit of the power generated from the projects set up by selected bidders under the RfS. Thus, it is in the interest of all stakeholders that the tariff discovered under the present bid process be adopted at the earliest by the Commission.

11.18. In light of the above submissions, it is prayed that the Commission may adopt the tariff under the present PPA for the reasons stated in the present reply and further pass necessary declaratory orders in terms of Article 12.1.3 as stated above.

12. One of the Successful bidders in their written submissions has submitted that ReNew Power Private Limited has acquired ACME Photovoltaic Solar Pvt. Ltd and subsequently vide order dated 13.04.2022 passed by the Office of Registrar of Companies certified that the name of Company stands changed from ACME Photovoltaic Solar Pvt. Ltd, to ReNew Solar Photovoltaic Pvt. Ltd,.

RHUPL, ACME Photovoltaic Solar Pvt. Ltd.,(presently known as 'Renew Solar Photovoltaic Pvt. Ltd.') and HSSPL submissions

13. The submissions of RHUPL, ACME Photovoltaic Solar Pvt. Ltd.,(presently known as "ReNew Solar Photovoltaic Pvt. Ltd.,') and HSSPL are similar and they have mainly submitted as under:

13.1. Article 9.2.2 of the Draft PPA specifically provides for relief to the affected party against the consequences of a Change in Law event at the time of adoption of tariff. Accordingly, the change in rates of GST on import of solar modules and other solar equipment from 5% to 12% clearly qualifies as a Change in Law event. It will approach the Commission seeking quantified relief at the appropriate stage.

13.2. Regulatory certainty is essential for a project developer for sanction/approval of funds by investors/lenders for timely execution of the Project. Unless the Commission gives approval of Change in law, project lenders would not consider it as a part of the project cost and would not sanction the additional loan towards this Change in law events.

13.3. In terms of Section 63 of the Electricity Act, the appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines. Further in terms of Article 1 and definition contained at Article 1.1 of PPA, the Commission is the Appropriate Commission having jurisdiction for the adoption of Tariff

13.4. To substantiate the submissions made in the subsequent paragraphs, it is imperative to highlight herein, the relevant clauses/provisions of the PPA and the same are reproduced herein below:

*“**Indian Governmental Instrumentality** shall mean the Government of India, Governments of state(s) Rajasthan, NCT New Delhi and any ministry, department, board, authority, agency, corporation, commission under the direct or indirect control of Government of India or the above state Government(s) or both, any political sub-division of any of them; including any court or Appropriate Commission(s) or tribunal or judicial or quasi-judicial body in India;”*

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

Governmental Instrumentality pursuant to or under any of them and shall include without limitation all rules, regulations, decisions and orders of the Appropriate Commissions;"

13.5. Ministry of Finance ("MoF") vide its Notification Nos 8/2021 – Integrated Tax (Rate) dated 30.09.2021 and Notification No. 8/2021 – Central Tax (Rate) ("2021 GST Notifications" has increased the rate of GST applicable on the Renewable Energy Devices from 5 % (at the time of bid submission) to 12%.

a. Issuance of the 2021 GST notification is a change in law event in terms of Article 12.2.2 of the PPA. SECI have been notified and sought relief under the PPA. At the time of bid submission, the renewable energy devices were subject to GST at the rate of 5% . However, with effect from 01.10.2021, the GST rate increased from 5% to 12%. As a result, there has been an increase in the Project Cost and supply of Power from the Project. Hence, in view of the same, the increase in rate of GST qualifies as a Change in Law Event, and Respondents are entitled to relief in terms of the PPA.

13.6. Thus, in as much as the Notifications would qualify as 'enactment of a new Law' as also fall under 'change in rate of taxes' after 01.10.2021, under the definition of the Change in Law in terms of Article 12.1.1 of the PPA, the same would qualify as a Change in Law Event under the PPA and Commission is requested to approve the 2021 GST Notifications as a Change in Law Event.

13.7. Commission has the power to grant in-principle approval for an event as Change in Law under the PPA at the first available instance according to the Order dated 12.10.2021 passed by the Hon'ble APTEL in Appeal No. 251 of 2021 and Commission's Order dated 13.12.2021 in Petition No. 1905 of 2021 & 1933 of 2021, where change in Law event was approved at the stage of Tariff Adoption itself.

13.8. Article 12.1.3 of the PPA unequivocally states that the quantum of compensation payment on account of Change in Law shall be in accordance

with Article 12.2.2 of the PPA, subject to the condition that this Hon'ble Commission recognizes such provisions at the time of adoption of Tariff. The quantum of compensation as payable to the SPD shall be as per the mechanism stipulated under 12.2.2 of the PPA.

13.9. However, for such compensation to be payable to the Answering Respondent, the only precondition as stipulated under the PPA is that the provision, i.e., Articles 12.1.3 and 12.2.2 are recognized by this Hon'ble Commission at the time of adoption of Tariff.

13.10. Regulatory certainty is essential for a project developer, as indeed for the other stakeholders which is in consonance with the principle of providing regulatory certainty enshrined in the Electricity Act, Tariff Policy 2016 and National Electricity Policy issued in terms of the Electricity Act. It is submitted that the Commission may recognize Article 12.1.3 and Article 12.2.2 of the PPA in order to ensure regulatory certainty for the Power Developers and other stakeholders.

13.11. It is prayed to:

- a. *Recognize and approve Article 12.1.3 and 12.2.2 of the PPA which deals with the compensation payment on account of Change in Law;*
- b. *Hold and declare the levy of incremental GST in light of the Ministry of Finance Notifications dated 30.09.2021 as a Change in Law Event under the PPA and that the HSPPL is entitled to compensation as per Article 12.2.2 of the PPA;*
- c. *Pass any other such order or order(s) as this Hon'ble Commission may deem fit and proper.*

Calpine Subsico Solar Energy Pvt. Ltd., submissions

14. Respondent Calpine Subsico Solar Energy Pvt. Ltd.. in their reply and during the hearing has mainly submitted as under:

14.1. The bid was submitted by Calpine, on the last date of bid submission being 01.07.2021 ("Cut-Off Date"). Thereafter, e-reverse auction was conducted on 24.12.2021, and Calpine was selected as one of the successful bidders and was issued the Letter of Award on 15.02.2022 by SECI.

14.2. In pursuance of the above, SECI entered into a Power Sale Agreement ('PSA') dated 11.02.2022 for the supply of 1785 MW power, including 90MW of solar power from the answering Respondent's solar power project as per the terms of the RfS. Accordingly, a Power Purchase Agreement dated 13.04.2022 ("PPA") was entered into between Calpine and SECI for the development, generation, and supply of electricity from the 90MW Solar Power project to be set up in the State of Rajasthan ("Project"), at the competitively discovered tariff of Rs. 2.17/- per unit for a period of 25 years from the commercial operation date of the Project.

14.3. Government of India had issued Notification No. 1/2017-Integrated Tax (Rate) dated 28.06.2017 ("2017 IGST Notification") under sub-section (1) of Section 5 of the Integrated Goods and Services Tax, Act 2017 ("IGST Act"), whereby the Central Government, notified the rate of Integrated Goods and Services Tax ("IGST") in respect of goods specified inter alia in Schedule I of the 2017 IGST Notification. By way of the 2017 IGST Notification, 5% IGST was applicable on solar power-based devices, including solar PV modules, on account of falling under Entry 234 of Schedule I.

14.4. The 2017 IGST Notification (applicable at the time of bid submission) stipulated that 5% IGST would be applicable on import of solar power-based devices, including solar PV modules, and therefore, Calpine had factored in the same while submitting its bid as on the last date of bid submission/Cut-Off Date of 01.07.2021

14.5. However, the Department of Revenue, Ministry of Finance, Government of India issued the Notification No. 08/2021-Integrated Tax (Rate) dated 30.09.2021 ("2021 IGST Notification") w.e.f. 01.10.2021, whereby the Central Government amended the 2017 IGST Notification by omitting entry number 234 pertaining to solar based power devices from Schedule I and inserting entry number 201A after serial number 201 for However, the Department of Revenue, Ministry of Finance, Government of India issued the Notification No. 08/2021-Integrated Tax (Rate) dated 30.09.2021 ("2021 IGST Notification") w.e.f. 01.10.2021, whereby the Central Government amended the 2017 IGST Notification by omitting entry number 234 pertaining to solar based power devices from Schedule I and inserting entry number 201A after serial number 201 for solar based power devices under Schedule-II. Therefore, additional expenditure is required to be incurred in form of increase of 7% in IGST (I.E., $12\% - 5\% = 7\%$).

14.6. The following conditions must be fulfilled for an event to qualify as a Change in Law event in terms of Article 12 of the PPA:

- (i) The event in question must have pan-India impact, including the States of the buying entities;
- (ii) The event must have taken place only after 01.07.2021, i.e., the Cut-off Date;
- (iii) It must be in the form of the enactment modification/Amendment/repeal of an existing law; OR a new requirement/modification to the prevailing conditions prescribed for obtaining any consent/permission/license not owing to the generators default; OR any change in the rates of any taxes including any duties/cess or the introduction of any new tax made applicable for the setting up of the Project and supply of power from the Project.

14.7. The issuance of the 2021 IGST Notification imposing additional IGST to the tune of 7% on import of solar PV modules amounts to amendment in the existing law, i.e., 2017 IGST Notification, and change in the rates of taxes applicable for setting up the solar power project, having a direct financial impact on the Project. Additionally, the 2021 IGST Notification was issued after the Cut-Off Date and imposes additional 7% IGST upon import of solar PV modules which are required for setting up the Project.

14.8. The 2021 IGST Notification has pan- India impact across all States. Therefore, the imposition of additional IGST by way of the 2021 IGST Notification qualifies as a Change in Law Event as per Article 12 of the PPA.

14.9. Therefore, the increase in GST rate due to the 2021 IGST Notification being a Change in Law event in the absolutely unambiguous and unequivocal terms of the PPA, answering respondent is entitled to claim relief for the same under the PPA.

14.10. Further, it is settled law that the courts ought not to imply terms into a contract, particularly when the language of such contract is unambiguous. The said principle of law has also been upheld by:

(i) Hon'ble Supreme Court of India vide its Judgment dated 05.10.2017 in Nabha Power Limited v. Punjab State Power Corporation Limited and Anr., reported as (2018) 11 SCC 508, whereby it was held that:

*"49. Needless to say that the application of these principles would not be to substitute this Court's own view of the presumed understanding of commercial terms by the parties if the terms are explicit in their expression. **The explicit terms of a contract are always the final word with regard to the intention of the parties. The multi-clause contract inter se the parties has, thus, to be understood and interpreted in a manner that any view, on a particular clause of the contract, should not do violence to another part of the contract.***

.....

72. We may, however, in the end, extend a word of caution. **It should certainly not be an endeavour of commercial courts to look to implied terms of contract. In the current day and age, making of contracts is a matter of high technical expertise with legal brains from all sides involved in the process of drafting a contract. It is even preceded by opportunities of seeking clarifications and doubts so that the parties know what they are getting into. Thus, normally a contract should be read as it reads, as per its express terms. The implied terms is a concept, which is necessitated only when the Penta-test referred to aforesaid comes into play. There has to be a strict necessity for it. In the present case, we have really only read the contract in the manner it reads. We have not really read into it any 'implied term' but from the collection of clauses, come to a conclusion as to what the contract says.** The formula for energy charges, to our mind, was quite clear. We have only expounded it in accordance to its natural grammatical contour, keeping in mind the nature of the contract."

(Emphasis Supplied)

(ii) The Hon'ble Appellate Tribunal for Electricity ("APTEL") vide its Judgment dated 27.04.2021 in Coastal Gujarat Power Limited v. Central Electricity Regulatory Commission & Ors., reported as 2021 SCC Online APTEL 10 ("Coastal Gujarat Judgment"), whereby it was held that:

"92. We agree with the submission that **CERC erred to introduce an extraneous qualification or filter which is not borne out from the PPA.** The qualifying factor under Article 13 of the PPA is whether or not a CIL event has an impact on the cost of, or revenue from, the business of generation and sale of electricity by the seller (CGPL). In this view, the test applied by CERC that taxable service should have a "direct relation to the input cost of generation" is extraneous to the provisions of the PPA and must be rejected. **It is trite that explicit terms of a contract (PPA) bind and it is not open for the adjudicating forums to substitute their own view on the presumed understanding of the commercial terms by the parties [Nabha Power Limited v. PSPCL (2018) 11 SCC 508]. Once it is established that levy of a tax on services availed by CGPL has an impact on the cost of or revenue from business of generation and**

sale of electricity - whether directly or indirectly – compensation must follow.

(Emphasis supplied)

14.11. Applying the aforesaid principle of law to the facts of the present case, and considering the submissions made hereinabove, it is apparent that the answering respondent has a right to claim compensation for the Change in Law event on account of the increase in GST rate due to the 2021 IGST Notification, as the same fits squarely within the definition of Change in Law event in the unambiguous terms of the PPA.

14.12. The rate of GST as applicable vide the 2017 IGST Notification had been factored by the answering respondent while submitting its bid and had no way of predicting the increase in GST rates as effectuated by the 2021 IGST Notification. The Hon'ble APTEL vide the Coastal Gujarat judgement has also held that generating companies cannot be expected to know or foresee any amendment or change in law which may take place over the term of the PPA, especially when the PPA itself provides for relief on account of the occurrence of Change in Law events. The relevant excerpts of the Coastal Gujarat Judgement are reproduced hereinbelow for ease of reference:

*“154. The underlying assumption of argument to the contrary raised by the Procurers is **that generating companies are expected to know or foresee any amendment or change in the existing law (i.e. law existing on the Cut-Off Date), which may take place over the long term of the PPA (25 years). That such assumption is misplaced and impermissible is clear merely from the fact that the PPA gives express right to an affected party to claim compensation if the event qualifies as a CIL event in terms of Article 13 of the PPA deserving restitution.** But for the agreed need for such possibility to be covered, there was no occasion to include Article 13 in the PPA.”*

(Emphasis Supplied)

14.13. Further, in addition and without prejudice to the above, the Commission is unequivocally vested with the power to grant in-principle approval for a Change in Law event under the PPA at the first instance for which the Hon'ble APTEL's order dated 12.10.2021 in Appeal No. 251 of 2021 titled Green Infra Renewable Energy Limited vs. RERC & Ors. ("Order dated 12.10.2021") are relied.

14.14. Further, it is submitted that the Hon'ble APTEL vide its order dated 12.10.2021, while holding as above, remanded the matter to this Hon'ble Commission for passing further orders in relation to the Change in Law events therein. In this regard, it is submitted that this Hon'ble Commission vide its common order dated 13.12.2021 in Petition No. 1905 of 2021 and Petition No. 1933 of 2021, in compliance with the Hon'ble APTEL's judgement dated 12.10.2021 has adjudicated upon the Change in Law claims at the stage of Tariff Adoption.

14.15. Thus, the issue in regard to the grant of in-principle approval to Change in Law claim(s) at the stage of adoption of tariff is no longer res Integra as the same has been settled by the Hon'ble APTEL and upheld & implemented by the Commission as stated hereinabove.

14.16. Moreover, such direction as is being sought in the present petition is also in consonance with the principle of providing regulatory certainty to private players enshrined in the Electricity Act, Tariff Policy 2016, and National Electricity Policy etc., issued in terms of the Electricity Act.

14.17. Accordingly, it is respectfully submitted that in as much as the increase in GST rate due to the 2021 IGST Notification falls squarely within the Change in Law provisions of the PPA, the same must be approved by this Hon'ble Commission at the present stage of tariff adoption itself.

14.18. Further, it is submitted that neither the quoted tariff of Rs. 2.17/- per unit discovered through competitive bidding can be said to be inclusive of the impact of the increase in GST rate as has been alluded by RUVNL at paragraph 12 of the Petition, nor can the right of respondent to claim relief for a Change in Law event be curtailed in any manner.

14.19. It is Prayed to:

- (i) *declare that Articles 12.1.3 and 12.2.2 of the PPA which deal with the compensation payable on account of Change in Law event are applicable in the facts and circumstances of the present case as set out above;*
- (ii) *consequently, in-principle hold and direct that the increase in GST on account of the 2021 GST Notification is a Change in Law event under the PPA and accordingly, Calpine is entitled to requisite compensation under Article 12.2.2 of the PPA; and*
- (iii) *Pass any other or further order(s) as this Hon'ble Commission may deem fit and proper in the facts and circumstances of the present case.*

Commission's view:

15. Commission has considered the submissions of the Petitioner and Respondents in light of Section 63 and 86(1 (b)) of the Act.

16. After going through submissions of the parties the issues for consideration before the Commission are as under:

- I. Tariff Adoption under Section 63 of the Electricity Act,2003.
- II. Approval of power procurement under Section 86 (1)(b) of the Electricity Act,2003.
- III. Recognize and approve Article 12.1.3 and 12.2.2 of the PPA which deals with the compensation payment on account of Change in Law and consequently hold and declare the levy of incremental GST in light of the Ministry of Finance Notifications dated 30.09.2021

as a Change in Law Event under the PPA and that the SPDs are entitled to compensation as per Article 12.2.2 of the PPA;

IV. Consequential relief on account of delay in tariff adoption under article 2.1.4.

17. In subsequent paragraphs, the Commission has looked into the above aspects with reference to the present Petition filed by RUVNL for Tariff adoption.

I. Tariff Adoption under Section 63 of the Electricity Act,2003

18. Section 63 of the Act provides as under:

“Determination of tariff by bidding process: Notwithstanding anything contained in section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.”

19. In contrast to tariff determination under Section 62 of the Act, role of the Commission in case of tariff discovery through the competitive bidding process undertaken under Section 63 of the Act is essentially confined to adoption of tariff, on being satisfied that transparent process of bidding in accordance with the guidelines have been followed in determination of such tariff.

20. Petitioner submitted that the Tariff discovered through this competitive bidding of Rs. 2.17/unit & Rs. 2.18/unit is higher to some extent than that of discovered through Competitive Bidding of 1070 MW i.e. Rs. 2.00/unit & Rs. 2.01/unit. Further, considering the impact of Basic Custom Duty and GST, the rates are quite reasonable and discovered tariff is beneficial and cost effective for the petitioner and for the entire State.

21. According to the Petitioner, tariff in the present matter has been discovered through a transparent bidding process as per the Guidelines of the

Central Government. Therefore, adoption of tariff above as claimed in PSA may be allowed by the Commission.

22. As per the provisions of Section 63 of the Electricity Act, 2003, Petitioner has prayed for adoption of tariff as provided in PSA which has been discovered through a transparent competitive bidding process as per the Guidelines of the Central Government and therefore, tariff for 1785 MW solar power purchase may be adopted by the Commission as mentioned in PSA.

23. Petitioner vide its affidavit has submitted that the process of competitive bidding is in conformity with the Guidelines issued by Ministry of Power, GOI.

24. In the light of the above, it emerges that selection of the successful bidders and the tariff of the Project has been carried out by SECI through a transparent process of competitive bidding in accordance with Guidelines issued by Ministry of Power, GOI under Section 63 of the Act.

25. Accordingly, in terms of Section 63 of the Act, the Commission adopts the following tariff for the projects as agreed by the successful bidders for 1785 MW solar power as mentioned in the PSA dated 11.02.2022 between SECI and RUVNL.

Bidders	Special purpose Vehicle (SPV) of Bidder for Establishing the Project and signing of PPA (SPDs)	Applicable Tariff (Rs/kWh)	Capacity (MW)
ACME Solar Holdings Private Limited	ACME Photovoltaic Solar Private Limited	2.18	375
Calpine Subsico Solar Energy Pvt Ltd	Calpine Subsico Solar Energy Private Limited	2.17	90
ReNew Solar Power Private Limited	Renew Hans Urja Private Limited	2.18	300
ReNew Solar Power Private Limited	Renew Hans Urja Private Limited	2.18	300
Sprng Natural Power Source Private Limited	Sprng Natural Power Source Private Limited	2.17	200
METKA EGN METKA EGN	Hera Sun Power Private	2.17	20

	Limited		
NTPC Renewable Energy Limited	NTPC Renewable Energy Limited	2.17	500

26. Further, it has been submitted that MNRE guidelines (as amended) are having provision of 07 paise per unit as trading margin. The Commission, therefore, approves trading margin of 07 paise per unit in view of MNRE guidelines and as agreed by the parties.

II. Approval of power procurement under Section 86 (1)(b) of the Electricity Act,2003.

27. Commission vide its Fifth Amendment in the principal Regulations i.e. RERC(Renewable Energy Obligation) Regulations 2007. The Achievement vis-à-vis RPO targets specified by the Commission with reference to S.86(1)(e) of the Electricity Act 2003 is as under:

YEAR	Total Energy(MU) excluding Hydel Energy from 2017-18	Wind			Biomass			Solar			Total		
		Target	Achievement		Target	Achievement		Target	Achievement		Target	Achievement	
		%	MU	%	%	MU	%	%	MU	%	%	MU	%
2017-18	67915.42	8.20	4903.34	7.22	1.30	350.92	0.52	4.75	1960.85	2.89	14.25	7215.11	10.62
2018-19	74422.91	8.00	5508.02	7.40	0.60	354.96	0.48	4.75	3257.90	4.38	13.35	9120.87	12.26
2019-20	73096.19	8.30	5421.88	7.42	0.70	391.29	0.54	6.00	4415.47	6.04	15.00	10228.64	13.99
2020-21	78369.93	8.60	4920.68	6.28	0.80	413.34	0.53	7.25	4726.10	6.03	16.65	10060.12	12.84
2021-22 prov.	84051.11	8.90	5584.49	6.64	0.90	387.72	0.46	8.50	5898.10	7.02	18.30	11870.32	14.12

28. As per the status of solar RPO compliance, as submitted by the petitioner for 2021-22, against the solar RPO target of 8.50%, the achievement of the Discoms is as 7.02%. Further, from the status of RPO Compliance in respect of the earlier years received from the RREC as above, it is observed that there is a

consistent shortfall in meeting solar RPO of the earlier years by the Discoms, and RPO targets for FY 2022-23 and 2023-24 are even higher.

29. Energy Department, GoR vide letter dated 21.07.2020 granted approval for procurement of 3385 MW Solar Power.

30. Petitioner in its 28th BoD Meeting held on 28.02.2019 approved year-wise trajectory for addition of Solar Capacity to meet RPO upto FY 2023-24, as under :

FY	FY2021-22	FY 2022-23	Total
Solar Capacity	1600	1785	3385

31. It is noted that earlier Discoms have filed the Petition No. 1979/2021 regarding RPO compliance where Commission issued the order on 23.12.2021 in the matter directing the Discoms to make all efforts to meet their total RPO and backlog accumulated till date along with the respective year targets given to them.

32. The role of the Commission under Section 86(1)(b) of the Electricity Act,2003 is to regulate the electricity purchase and procurement process of distribution licensee including the price at which electricity shall be procured from the generating companies and licensees or from the sources other sources through agreements for the purchase of power for distribution and supply within the State.

33. Considering above, we are of the view that that the instant procurement of 1785 MW of solar power will not only help the Discoms in meeting their statutory obligation of RPO but will also make supply more affordable to the general consumers. Thus, Commission approves the instant

procurement of 1785 MW of solar power to be purchased by the Discoms under the provision of Section 86(1)(b) of the Electricity Act,2003.

III. Recognition of change in law qua increase in GST rate due to Notification of MOF dated 30.09.2021.

34. We have also looked into the submissions of the respondents regarding change in law in terms of relevant provisions of the PPAs.

35. According to them as per Article 12.1.3 of the PPA, the quantum of compensation payment on account of change in law shall be in accordance with Article 12.2.2 of the PPA, subject to the condition that the Commission recognizes such provisions at the time of adoption of tariff. According to them for such compensation to be payable to them, the only pre-condition as stipulated under the PPA is that the provision, i.e., 12.1.3 and 12.2.2, are recognized by the Commission at the time of adoption of tariff.

36. Respondents have prayed to recognize the Articles 12.1.3 & 12.2.2 of the PPAs and change in the rates of GST after the cut-off date qualifies as Change in Law event subject to the fulfillment of the conditions contained therein. It is also their submission that grant of in-principle approval of the change in law claims at the stage of adoption of tariff is no longer res integra as the same has been settled by Hon'ble APTEL and already implemented by the Commission. It is also submitted by the Respondents that Commission may recognize Article 12.1.3 and Article 12.2.2 of the PPA in order to ensure regulatory certainty for the Power Developers and other stakeholders

36.1. It is the submission of SECI that the Commission may recognize GST notification dated 30.09.2021 as Change in Law within the scope of Article 12 of the PPAs read with Clause XI of PSA in the present case appropriately decide on the claim made by project developers. It is further submitted that the actual impact and extent of the relief admissible can be determined at the appropriate stage in terms of the formula provided in Article 12.2.2 of the PPAs

subject to recognition of the same by the Hon'ble Commission in the present proceedings.

37. We have a look at Article 12 of the PPAs and Article XII of the PSA, which are reproduced in subsequent paras.

38. 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 following terms shall have the following meanings:

12.1.1 *In this Article 12, the term Change in Law shall refer to the occurrence of any of the following events (which has pan-India impact including State of Buying Entities) pertaining to this project only after 01.07.2021 including (i) the enactment of any new law; or (ii) an amendment, modification or repeal of an existing law; or (iii) the requirement to obtain a new consent, permit or license; or (iv) any modification to the prevailing conditions prescribed for obtaining an consent, permit or license, not owing to any default of the Solar Power Developer; 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 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.

For avoidance of any doubt in case Project as well as Buying Entities are located in the different States, it is clarified that any aforementioned Events is the result of action/ inaction/ omission/ commission by the Government of the State wherein Project is located, such event shall not qualify for the compensation under this Clause.

OM issued by MNRE dated 09.03.2021 (No. 283/3/2018- GRID SOLAR) and its associated orders issued by the Ministry of Finance will be applicable on the RfS and imposition of taxes/duties as laid out in the above OM, will not be considered under Change in Law under this PPA.

12.1.2 In the event of occurrence of any of events as provided under Article 12.1.1 which results in any increase/decrease in the Project Cost (i.e. cost incurred by the SPD towards supply and services only for the Project concerned, upto the Actual Commissioning Date of the last part capacity or Scheduled Commissioning Date or extended Scheduled Commissioning Date, whichever is earlier, for reasons other than those wherein such extension is on account of payment of liquidated damages, penalty or any other charges, as the case may be), then, in order to ensure that the SPD/SECI/Buying Utility(ies) 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 SPD/SECI/Buying Utility(ies) shall be entitled to compensation by the other party, as the case may be, as per following methodology as per Article 12.2.1. For example, in case the Actual Commissioning Date of the last part capacity is 15.04.2022, Scheduled Commissioning Date is 15.03.2022 and extended Scheduled Commissioning Date is 01.04.2022, the Project Cost shall be determined as the cost incurred by the SPD upto 01.04.2022.

12.1.3 The quantum of compensation payment on account of Change in Law shall be provided to the affected party by the other party as per Article 12.2.2, subject to the provision that Appropriate Commission recognizes such provisions at the time of adoption of tariff by the Appropriate Commission and any decision in this regard shall be governing on SPD and Buying Entity. It is clarified that, any introduction of new tax/duty/cess 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, resulting in change in Project Cost, will also qualify under Change in Law as per timeline and procedure indicated under Article-12. It is further clarified that, applicability of Safeguard Duty on Solar Cells whether or not assembled in modules or panels which is till 29.07.2021, if gets extended and has a direct effect on the Project, resulting in change in Project Cost, such extension will also qualify under Change in Law as per timeline and procedure indicated under Article-12.

12.2 Relief for Change in Law

....

12.2.1 On the occurrence of a Change in Law event, the monthly tariff shall be adjusted in accordance with the principle that the affected party is compensated so as to restore it to the same economic position as if such Change in Law had not occurred.

12.2.2 Every net increase/decrease of Rs.1 lakh per MW in the Project Cost shall be liable for corresponding increase/decrease of an amount equal to Rs 0.005/kWh. Any such change, shall be

considered upto three digits after the decimal point, and remaining digits, if any, shallm be ignored.

For e.g. in case the change in tariff payable is calculated as Rs. 0.14678/kWh, it shall be modified as Rs. 0.146/kWh.

...

39. Further, Clause XI of PSAs is reproduced as under:

CLAUSE XI OF PSAs:

NOW, THEREFORE, IN CONSIDERATION OF THE PROMISES AND MUTUAL AGREEMENTS, COVENANTS AND CONDITIONS SET FORTH HEREIN, IT IS HEREBY AGREED BY AND BETWEEN THE PARTIES AS FOLLOWS:

XI. The parties agree that the various terms contained in the SECI-SPD PPA such as Scope of Project, Terms of the Agreement, Performance Guarantee, Conditions Subsequent, Obligations of the respective Parties, Construction of the Power Generation Capacity, Synchronization, Commissioning and Commercial Operation, Operation and Maintenance, Purchase and Sale of Solar Power, Measuring and Metering and Dispatch of Power, Billing and Power Accounting and payments, Liabilities, Force Majeure, Events of Default, Termination, Transfer, Change in Law, Indemnity, Insurance, Assignment and Changes, Financing and Bankability, Representations and Warranties, Governing Law, Notices and all other Miscellaneous Terms provided in the SECI- SPD PPA shall mutatis mutandi apply to this agreement between SECI and Buying Entity.

40. Perusal of the above Articles of the PPAs/PSA reveals that the parties have agreed that change in law shall refer to any of the following events (which have pan-India impact, including state of buying entities) pertaining to the project only after 01.07.2021 and resulting in Change in project cost, such change will be treated as 'Change in Law' and the quantum of compensation payment on account of change in rates of such duties shall be provided to the affected party as per Article 12.2.2 subject to the provision that Appropriate Commission recognizes such provisions at the time of adoption of tariff and any decision in this regard shall be governing on SPD and buying entity.

41. It is noted that the changes in rates GST are primarily affected by the notifications of the Ministry of Finance, Government of India which qualifies to

be an Indian Government Instrumentality under the PPAs/PSA. Further, changes in the rates of taxes and duties after the bid deadline have been treated as Change in Law events in the recent order of the Commission dated 31.08.2022.

42. Since the parties have incorporated specific provisions for change in law events taking place after 01.07.2021, which have a direct effect on the Project, we deem it appropriate to recognise the article 12.1.3 of the PPA and consequently said event, i.e., Change in GST rate after the cut-off date, as Change in Law event at the stage of adoption of tariff.

43. Further, the quantum of compensation payable on account of the above change in law event shall be provided to the affected party by the other party at the appropriate stage in terms of the formula provided in Article 12.2.2 of the respective PPAs.

IV. Consequential relief on account of delay in tariff adoption under article 2.1.4 of PPA.

The Article 2 of the PPA reads as under:

"ARTICLE 2: TERM OF AGREEMENT

2.1 Effective Date

2.1.1 This Agreement shall come into effect from 16 April 2022 and such date shall be referred to as the Effective Date.

2.1.2 The Parties agree that decisions pertaining to adoption of the Tariff and approval of the same, for procurement of contracted capacity, shall be binding on all Parties concerned, as contained in the Electricity Act 2003 and any amendments thereof.

2.1.3 Notwithstanding the Effective Date, the condition precedent for the enforcement of the obligations of either Party against the other under this Agreement shall be that, within 120 days after the Effective Date of this Agreement, SECI and/or the Buying Entity shall obtain adoption of tariff from its State Electricity Regulatory Commission and/or CERC (as applicable), on the terms and conditions contained in this Agreement read with the terms and conditions contained in the Power Sale Agreement entered into

between SECI and the Buying Entity. The Parties agree that in the event the Order of adoption of tariff as mentioned above is not issued by the SERC and/or CERC (as applicable) within the time specified above, the provisions of Article 2.1.4 shall apply.

2.1.4 If parties have mutually extended the time period as stipulated under Article 2.1.1 and order from the SERC is issued within the timeline as per Article 2.1.3, no extension for Financial Closure or Scheduled Commissioning Date shall be given. However, if the requisite SERC order is issued after the timeline as per Article 2.1.3, this shall entail a corresponding extension in, Scheduled Financial Closure and the Scheduled Commissioning Date for equal number of days for the SERC order has been delayed beyond such period as specified in Article 2.1.3.

44. In Commission's view it is clear from the above provisions that in case of delay in adoption of tariff order, such delay will entail a corresponding extension in the Financial Closure and Scheduled Commissioning Date for equal number of days for which the Tariff Adoption Order has been delayed. Thus, in our view SPDs will be entitled to the consequential relief on account of delay in tariff adoption under Article 2.1.4 of the PPA.

45. In light of the foregoing, we order as follows:

(a) Commission adopts the Tariff under Section 63 of the Electricity Act,2003 for the projects as agreed by the successful bidders for 1785 MW solar power as mentioned in the PSA and additional 07 paise per unit towards the trading margin payable to SECI.

(b) Commission approves the instant procurement of 1785 MW of solar power to be purchased by the Discoms under the provision of Section 86(1)(b) of the Electricity Act,2003.

(c) Commission recognizes the article 12.1.3 of the PPA and consequently Change in GST rate after the cut-off date 01.07.2021 as Change in Law event at the stage of adoption of tariff.

(d) The quantum of compensation payable on account of the above change in law event shall be provided to the affected party by the other party at the appropriate stage in terms of the formula provided in Article 12.2.2 of the respective PPAs.

(e) SPDs will be entitled to the consequential relief on account of delay in tariff adoption in terms of article 2.1.3 and 2.1.4 of the PPA.

46. Before parting with the matter the Commission would like to note that during these proceedings substantial time has been lost on making the successful bidders as parties. We, therefore, direct the RUVNL to make all successful bidders a party along with SECI at the time of filling the petition itself, so as to expedite the future tariff adoption proceedings.

47. The Petition and pending IA are disposed of accordingly.

(Dr. Rajesh Sharma)
Member

(Sh. Hemant Kumar Jain)
Member

(Dr. B.N. Sharma)
Chairman