



नई दिल्ली  
NEW DELHI

याचिका संख्या./ Petition No. 207/MP/2021 along with I.A. No. 47 of 2022

कोरम/ Coram:

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

आदेश दिनांक/ Date of Order: 15<sup>th</sup> of December, 2023

**IN THE MATTER OF:**

Petition under Section 79(1)(b), Section 79(1)(f) and Section 79(1)(k) of the Electricity Act, 2003 read with Article 12 of the Power Purchase Agreement(s) dated 25.06.2019 seeking issuance of appropriate order(s) / direction(s) / declaration from this Hon'ble Commission that the imposition of safeguard duty on the import of solar cells, whether or not assembled in modules or panels, vide Notification No. 2/2020-Customs (SG) dated 29.07.2020 issued by the Department of Revenue, Ministry of Finance (Government of India) is an event of Change in Law and for seeking approval to the quantum and mechanism of compensation (along with interest) as submitted along with the present Petition in line with the methodology as settled by this Hon'ble Commission vide its order dated 20.08.2021 in Petition No. 536/MP/2020.

**AND IN THE MATTER OF:**

**M/s Eden Renewable Cite Private Limited,**  
Unit No. 236 B&C,  
1st Floor, DLF South Court,  
Saket, New Delhi - 110017

**...Petitioner**

## Versus

1. **M/s Solar Energy Corporation of India Limited,**

06th Floor, Plate B NBCC Office,  
Block Tower-2, East Kidwai Nagar,  
New Delhi – 110023

2. **BSES Rajdhani Power Limited**

BSES Bhawan, Nehru Place,  
New Delhi 110019

3. **BSES Yamuna Power Limited**

Shakti Kiran Building,  
Karkardooma,  
Delhi 110032

...Respondents

**Parties Present :**

Shri Nitish Gupta, Advocate, ERCPL  
Ms. Parichita Chowdhury, Advocate, ERCPL  
Shri Nishant Talwar, Advocate, ERCPL  
Shri Arijit Maitra, Advocate, BYPL & BRPL  
Shri Sameer Singh, BYPL  
Shri Nishant Grover, BYPL  
Ms. Anushree Bardhan, Advocate, SECI  
Ms. Tanya Sareen, Advocate, SECI  
Ms. Surbhi Kapoor, Advocate, SECI

## आदेश/ ORDER

The Petitioner, M/s Eden Renewable Cite Pvt. Ltd., has developed a 300 MW (AC) capacity Solar PV ground mount project in the State of Rajasthan. The Petitioner has executed a Power Purchase Agreement (PPA) with Solar Energy Corporation of India Limited (as an intermediary procurer) for the sale of 250 MW of solar power to BSES Rajdhani Power Limited (BRPL) and 50 MW of power to BSES Yamuna Power Limited (BYPL) under the back-to-back Power Sale Agreements (PSAs). The Petitioner is seeking declaration that the imposition of safeguard duty on the import of solar cells, whether or not assembled in modules or panels, vide Notification No. 2/2020-Customs (SG) dated 29.07.2020 issued by the Department of Revenue, Ministry of

Finance (Government of India) is an event of Change in Law and mechanism of compensation (along with interest) in line with the methodology as settled by this Commission vide its order dated 20.08.2021 in Petition No. 536/MP/2020.

2. Respondent No. 1, Solar Energy Corporation of India Limited (SECI), under the administrative control of the Ministry of New and Renewable Energy (MNRE), was made the nodal agency to facilitate the implementation of the Jawaharlal Nehru National Solar Mission (NSM) for the development, promotion, and commercialization of solar energy technologies in the country and to achieve targets set out in the NSM.
3. Respondents No. 2 & 3 are distribution companies (DISCOMs) engaged in power distribution activities in the southern/western/eastern/central parts of Delhi.
4. The Petitioner has made the following prayers:
  - a) *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 of the PPA;*
  - b) *Declare and allow the Petitioner to claim an additional cost of Rs. 1,20,69,08,084 (along with carrying cost at 10.41%) on account of the change in law event, i.e. imposition of safeguard duty by the Ministry of Finance vide its notification dated 29.07.2020;*
  - c) *Direct the Respondent to pay total lump sum of Rs. 4,24,39,836 (assuming date of actual payment as 13.11.2021) or as calculated based on the date of actual payment, and to pay the remaining amount through an equal monthly annuity of Rs. 1,41,46,612 spread throughout the remaining period of 13 years from the date of COD, as per the methodology prescribed by this Hon'ble Commission vide its order dated 20.08.2021 in Petition No. 536/MP/2020. The directions sought from this Hon'ble Commission is subject to assumption that the date of actual payment is 13.11.2021 and the claim shall stand revised/modified subject to the date of actual payment to be made by the Respondent.*
  - d) *Pass such other orders that this Hon'ble Commission deems fit in the facts of this case.*

**Prayers in IA. No. 47 of 2022:**

- a) *Take additional / subsequent facts as detailed in the present Application on record of the case;*

- b) *Grant pendente lite interest and other interest to the Applicant / Petitioner in order to restore it to same financial position as it would have been in 'Change in Law' event had not occurred; and*
- c) *Pass such order(s), further relief(s) in the facts and circumstances of the case as this Hon'ble Commission may deem just and equitable in favour of the Applicant / Petitioner.*

**Factual Matrix:**

5. The brief facts of the case are as under:

Location	Village Mandhopura, Tehsil Fatehgarh, District Jaisalmer, Rajasthan
Nodal agency	SECI
Date of notification of Safeguard Duty Notification No. 01/2018 Custom (SG) (2018 SGD Notification)	30.07.2018
RfS issued on	10.01.2019
RfS was amended on	06.02.2019
Bid submitted on	15.02.2019
E-Reverse auction held on	25.02.2019
LOA issued on	05.03.2019
Capacity (MW)	300 MW
Power	Solar
Effective date of the PPA	24.06.2019
PPA executed on	25.06.2019
Tariff	Rs.2.60/kWh
Date of implementation of Safeguard Duty Notification No. 2/2020-Custom (SG) dated 29.07.2020 (2020 SGD Notification)	30.07.2020
Tariff was adopted on	25.01.2021
SCOD of the project	24.12.2020
Extended SCOD	26.05.2021
COD of the project	13.08.2021
LTA was operationalized on	14.11.2022

6. The present petition was filed on 22.09.2021. The Commission, vide order dated 16.12.2021, disposed of the Petition in line with the *Electricity (Timely Recovery of Costs due to Change in Law) Rules 2021* dated 22.10.2021. However, pursuant to the directions of APTEL vide order dated 05.04.2022 in O.P No. 1 of 2022 and Appeal Nos. 116, 74, 75 & 76 of 2022, the matter was again listed on 09.05.2022 wherein the Commission directed the parties to file their respective written submissions. The Commission vide order dated 14.06.2022 in Petition No. 8/SM/2022, in the exercise of its suo-motu powers of review, restored the present petition to the same stage as existed prior to the disposal of the petition and directed the parties to complete

their pleadings within one month. The Petition was initially reserved for orders on 07.03.2023. Respondents No.2 &3 were aggrieved by the order dated 07.03.2023 as allegedly they were not provided an opportunity to put forward their submissions, and accordingly, they preferred an appeal before APTEL challenging the order dated 07.03.2023 of this Commission. As per the directions of APTEL vide order dated 17.04.2023 in I.A. No. 552 of 2023 in A. No. 343 of 2023, the Petition was again listed for hearing. Upon hearing the submissions of the parties, the matter was finally reserved for orders on 02.05.2023 and the parties were directed to file their respective submissions.

7. The Petitioner has filed I.A. No. 47 of 2022 on 28.06.2022 to bring on record subsequent events that have transpired after filing the instant Petition. Several communications were exchanged between Petitioner, SECI and BSES Discoms. SECI sought specific documents from the Petitioner (exhibiting clear and one-to-one correlation) supported by an auditor certificate and requested them to furnish the same to BSES Discoms. The Petitioner averred that it had submitted all documents and discussed the pertinent issues with the concerned officials of SECI. The BSES Discoms disagreed with the averments of the Petitioner for declaring the *2020 SGD Notification* as a change in law event.
8. The Petitioner further submitted that as it assumed that the first instalment of the claimed amount would begin from 13.11.2021, it claimed a total lumpsum of Rs. 4,24,39,836 payable from the date of COD till the date of actual payment and the remaining amount in annuity amounting to Rs. 1,41,46,612. Further, the Petitioner vide the said I.A. submitted the revised calculation as the deadline of making the first instalment expired and sought a total lumpsum of Rs. 16,97,59,344 (i.e. total of 12 months annuity by assuming that the date of actual payment is 13.09.2022) payable from the date of COD till the date of actual payment, and remaining amount through equal monthly annuity of Rs. 1,41,46,612 spread throughout the remaining period of 13 years (at interest rate of 10.41%).

**Analysis and Decision:**

9. We have heard the learned counsels for the Petitioner and Respondents and have carefully perused the records and considered the submissions of the parties.

10. On the basis of the submissions of the contracting parties, the following issues arise for adjudication:

**Issue No. I:** *Whether the introduction of Notification No.02/2020- Custom (SG)dated 29.07.2020 issued by the Department of Revenue, Ministry of Finance, Government of India amounts to Change in Law events under Article 12 of the Power Purchase Agreement dated 25.06.2019?*

**Issue No. II:** *Whether the Petitioner is entitled to compensation towards additional expenditure on account of the Change in Law event in terms of Article 12.2 of the PPA dated 25.06.2019?*

**Issue No. III:** *What should be the discount rate for the calculation of Annuity for payment of compensation (if any) on account of Change in Law?*

**Issue No. IV:** *Whether the Petitioner is entitled to carrying cost towards compensation for Change in Law?*

11. Now, we proceed to discuss the above issues.

**Re: Issue No. I and Issue No. II:**

12. Briefly, the Petitioner has submitted that the 2018 SGD Notification was originally applicable till 29.07.2020. Therefore, extension of SGD beyond 29.07.2020 vide 2020 SGD Notification is a fresh change in law and has resulted in an increased additional capital expenditure for the Petitioner and has adversely impacted the business of the Petitioner and will make the whole project unviable. At the time of submitting the bid, the petitioner could not have anticipated that the impact of safeguard duty would get extended beyond 29.07.2020. Since the 2018 SGD Notification categorically provided for the sunset date of safeguard duty being 29.07.2020, the period mentioned under the Customs Tariff Act, 1975 has no relevance as the government at the time of imposing safeguard duty had consciously decided to revoke safeguard duty on solar cells and modules imported from China after 29.07.2020. The bid was submitted by the Petitioner before the imposition of safeguard duty vide 2020 SGD Notification and at the time of bid

submission, 'zero' safeguard duty was applicable for the period after 29.07.2020. The original SCOD of the Solar Project was 24.12.2020. However, the same was legitimately extended by SECI till 60 days after the operationalization of LTA. Thus, the safeguard duty imposed vide SGD Notification 2020 has not been reduced but has, in fact, increased from '0%' to '14.9%' and '14.5%', respectively. The Petitioner successfully commissioned its Solar Project on 13.08.2021. Resultantly, the accompanying Petition deserves to be allowed to declare the levy of safeguard duty vide *2020 SGD Notification* as a Change in Law event under the PPA and appropriate directions against the Respondents should be passed in order to reconstitute the Petitioner to the same economic position as if no Change in Law event has occurred. Further, the Petitioner has also placed reliance on the UPERC order dated 28.10.2022 in Petition No. 1741 of 2021 titled *Adani Solar Energy Chitrakoot One Limited v. Noida Power Company Limited*. Further, the mechanism as already settled by this Commission in Petition No. 536/MP/2020 should be followed and appropriate relief should be allowed to the Petitioner. The contention raised by BRPL to this extent is self-defeating since Section 2A of the Customs Tariff Act, 1975 clearly provides that "*the duty imposed under this section shall, unless revoked earlier, cease to have effect on the expiry of four years from the date of such imposition*".

13. *Per-contra*, SECI has 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. At the time of submission of the bid, the Petitioner ought to have factored in the impact of Safeguard Duty (rates being in the range 25% to 15%) imposed vide Notification dated 30.07.2018. The Safeguard Duty imposed vide notification dated 29.07.2020 is in the range of 14.9% to 14.5% i.e. at a lesser rate. The Petitioner has wrongly alleged that SECI has accepted the impact of the Change in Law. SECI vide letter dated 19.05.2021 has specifically stated that "*this communication shall not be treated as recognition of claim as the same is contingent upon the acceptance by the buying entities & approval of annuity calculation methodology by CERC*". If the imposition of Safeguard Duty vide Notification dated 29.07.2020 is considered a Change in Law, then the Petitioner be directed to furnish the relevant details of the actual date of importation of modules into India, the date on which the modules were taken delivery of, Statutory Auditor's Certificate, the documents as per the indicative checklist of SECI etc. to substantiate the impact of safeguard duty on the procurement of modules required for the solar power project.

14. BSES Discoms have submitted that it is unacceptable that at the time of bid submission, Petitioner was unaware of the Customs Tariff Act, 1975, 2018 SGD Notification and thereafter the SGD imposition, which was already in existence as on the bid cut-off date and was only continued vide notification dated 29.07.2020. Therefore, as on the bid cut-off date, safeguard duty was very much in existence and hence is not a change in law. When PPA was signed on 25.06.2019 with the SCOD of 24.12.2020, the Petitioner could have imported the panels prior to 29.07.2020. The Petitioner could not have known prior to 29.07.2020 that SCOD would be extended by SECI. The Petitioner is deemed to know the imposition of the 2018 SGD Notification. Hence, their claim of compensation is a complete afterthought and false and is contrary to the 1975 Act. Even if it is assumed that the 2020 SGD Notification is a change in law event, then there is actually a reduction in the rate of the safeguard duty by the 2020 SGD Notification and the SPD is actually in a position of financial gain and not adverse financial loss and hence BSES needs to be suitably compensated.

15. Article 12 of the PPAs deals with Change in Law, inter-alia, as under:

**ARTICLE 12: CHANGE IN LAW**

***“12.1 Definitions***

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

*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; or (iii) the requirement to obtain a new consent, permit or license; or (iv) any modification to the prevailing conditions prescribed for obtaining an consent, permit or license, not owing to any default of the Solar Power Generator; or (v) any change in the rates of any Taxes 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.*

*It 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.”***

16. Vide *2018 SGD Notification*, the Central Government imposed safeguard duty as per the following rates on the import of “*Solar Cells whether or not assembled in modules or panels*”:

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

17. The *2020 SGD Notification 2020*, stipulates as under:

....

- (a) *fourteen point nine per cent. ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30th July, 2020 to 29th January, 2021 (both days inclusive); and*
- (b) *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 (both days inclusive).*

18. From the above, we note that any application of a new tax or an amendment, modification or repeal of an existing law is covered as a ‘Change in Law’. The *2018 SGD Notification* stipulated that “*a safeguard duty at twenty-five per cent to fifteen per cent ad valorem minus anti-dumping duty payable*” has been levied on *Solar Cells whether or not assembled in modules or panels*” when imported into India “*during the period from 30th July, 2018 to 29th July, 2020 (both days inclusive)*”. The notification provides for a diminishing ‘Safeguard Duty’ slab in the range of 25% to 15% applicable ad valorem on the imports from 30.07.2018 till 29.07.2020. The impact of the ‘Safeguard Duty’ notification is on/any portion of import whose point of taxation is on or after implementation of the Notification dated 30.07.2018, and the same will be subjected to the purview of ‘Safeguard Duty’. However, the Commission is of the view that there is a sunset date

in the 2018 SGD Notification i.e., it was valid only up to 29.07.2020. Hence, no safeguard duty was applicable after 29.07.2020 as per the *2018 SGD Notification*. Further, from the perusal of the *2018 SGD Notification*, it is observed that it is nowhere mentioned that the safeguard duty so imposed through the impugned notification is subject to extension/revision after two years viz. 29.07.2020. In the present instance, the *2020 SGD Notification* has imposed a fresh Safeguard Duty till 29.07.2021 and has thereby increased the rate of the Safeguard Duty from ‘zero’ to 14.9% & 14.5% for the period- 30.07.2020 to 29.01.2021 and 30.01.2021 to 29.07.2021, respectively.

19. The Commission further observes that clause (v) of Article 12 of the PPA, in seriatim specifically stipulates that *any change in rates of taxes, duties and cess, or introduction of any new tax made applicable for setting up of Solar Power Project and supply of power from the Solar Power Project by the SPD which have a direct effect on the Project*. The introduction of the *2020 SGD Notification* dated 29.07.2020 has been issued by the Ministry of Finance, Government of India. As such, the introduction of the impugned notification has been enacted by the Act of Parliament. The change in the rate of safeguard duty (as highlighted in aforesaid paras) has resulted in a change in the cost of the inputs required for generation, and the same is considered as a ‘Change in Law’. Hence, we are of the view that the impugned notification viz. *2020 SGD Notification* is a Change in Law event as per Article 12 of the PPA dated 25.06.2019. It is pertinent to mention here that the view taken is consistent with similar orders taken by the Commission, viz. Order dated 20.01.2023 in Petition No. 722/MP/2020 & 723/MP/2020; Order dated 21.04.2023 in Petition No. 219/MP/2020; Order dated 02.06.2023 in Petition No. 168/MP/2020 and Order dated 16.10.2023 in Petition No. 228/MP/2021.
20. In the instant petition, we observe that the Petitioner submitted the bid on 15.02.2019, and the same was accepted and crystallised after the e-reverse auction, which was held on 25.02.2019. PPA was executed on 25.06.2019 and LoA was issued on 05.03.2019. As per the PPA, the SCoD of the Project was 01.03.2021. The Safeguard Duty Notification was promulgated on 29.07.2020 i.e. after the acceptance of the bid submitted by the Petitioner. We find and hold that the imposition of Safeguard Duty on the import of solar panels/modules through the Notification No. 2/2020-CUSTOMS (SG) Dated 29.07.2020 issued by the Department of Revenue, Ministry of Finance, Government of India is a ‘Change in Law’ event under the Article 12 of the PPA since the Petitioner has submitted the bid before the imposition of safeguard duty vide *2020 SGD*

*Notification* and therefore, the Petitioner is entitled to seek relief under Article 12 of the PPA. As such, the Petitioner's project was affected by the said notification. Therefore, the Petitioner is entitled to compensation *qua* additional costs on account of the Change in Law event as per the terms of Article 12 of the PPA due to the impugned notification viz. *2020 SGD Notification*.

21. The issues are decided accordingly.

**Re: Issue No. III : What should be the discount rate for the calculation of Annuity for payment of compensation (if any) on account of a Change in Law?**

22. Briefly, the Petitioner has submitted that the Petitioner in compliance with the 2020 SGD Notification has claimed total compensation of Rs. 1,20,69,08,084 (i.e. sum of Rs. 1,13,89,48,197 paid as safeguard duty to the government plus the carrying cost at 10.41% considered from the date of payment to the date of COD) incurred due to imposition of safeguard duty by Government of India vide SGD Notification 2020. In line with the methodology settled by this Commission in Petition No. 536/MP/2020.

23. *Per-contra*, SECI has submitted that this Commission may clarify the cut-off date for considering the safeguard duty impact as the actual commercial operation date. After the Commission's order dated 20.08.2021 in Petition No. 536/MP/2020, there has been a fall in the interest rate of loan and the Commission has notified the *Central Electricity Regulatory Commission (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 Commission has considered the interest rate of 9% and the term of the Loan repayment as 15 years instead of 13 years earlier considered. The same parameters for making payment on an annuity basis may be considered by the Commission in case compensation is allowed. Delhi Discoms may be directed to make payment towards the evaluated claims of the Safeguard Duty and Customs Duty payable by SECI to the Petitioner on a back-to-back basis under the PSA in a time-bound manner.

24. We observe that this Commission, in its earlier order dated 20.08.2021 in Petition No. 536/MP/2020, has already decided on the methodology of compensation due to Change in Law events as under:

*65. We find that in Petition No. 536/MP/2020, SECI and the Respondents (SPDs as well as the Discoms) are on the same page in so far as the rate of interest on loan is*

considered. This is evident from the computation of the weighted average cost of capital advanced by the contending parties. Majority of the parties have used 10.41% (as mentioned in the CERC RE Tariff Order dated 19.03.2019) as the reference rate of interest for building their arguments for the rate of annuity payment. In other words, the parties have accepted this rate as the appropriate normative rate of interest for any debt that they might have taken. Given the fact that it is not possible in case of competitive bidding projects to ascertain either the capital structuring (extent of debt and equity) of the projects, or the actual rate of interest of the debt component or the expected rate of return on equity, we consider it appropriate to use the normative rate of 10.41% as reference for the purpose of annuity payment. As the actual deployment of capital by way of debt or equity and their cost in terms of rate of interest or return, respectively, is unknown, the rate 10.41% can be taken as the uniform rate of compensation for the entire expenditure incurred on account of GST Laws or Safeguard Duty. The Commission is of the view that the compensation for change in law cannot be a source for earning profit, and therefore, there cannot be any higher rate of return than the prevailing normative cost of debt. Accordingly, we hold that 10.41% shall be the discount rate of annuity payments towards the expenditure incurred on GST or Safeguard Duty (as the case may be) by the Respondent SPDs on account of 'Change in Law'.

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

66. Further, SPDs have submitted that the 'Monthly Annuity Payment' of GST claims ought to start from COD taking into consideration the provisions of applicable 'Late Payment Surcharge' in the PPAs in case of delayed payments

67. We observe that in the Petitions filed by the SPDs where claims under Change in Law were adjudicated, the Commission has directed SPDs to make available to SECI/ Discoms all relevant documents exhibiting clear and one to one correlation between the projects and the supply of goods or services, duly supported by the relevant invoices and Auditor's Certificate. SECI/ Discoms were further directed to reconcile the claims for Change in Law on receipt of the relevant documents and pay the amount so claimed to SPDs. It was also held that SECI is liable to pay to SPDs which is not conditional upon the payment to be made by the Discoms to SECI. However, SECI is eligible to claim the same from the Discoms on 'back to back' basis. The claim was directed to be paid within sixty days of the date of respective orders or from the date of submission of claims by SPDs whichever was later failing which it will attract late payment surcharge as provided under PPAs/PSAs. Alternatively, SPDs and the SECI/ Discoms may mutually agree to a mechanism for the payment of such compensation on annuity basis spread over the period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs.

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

**Tenure of 'Annuity Period'**

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

*“14. Loan and Finance Charges*

*Loan Tenure*

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

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

25. From the above, it is apparent that this Commission has taken a view that in the case of competitive bidding projects, it is not possible to ascertain either the capital structuring (extent of debt and equity) of the projects or the actual rate of interest of the debt component or the expected rate of return on equity. 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 normative rate can be taken as the uniform rate of compensation for the entire expenditure incurred on account of Change in Law. 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, which in the instant case, would be the rate of interest as stipulated by the Commission in the RE Tariff Order for the financial year in which the project has achieved COD.
26. We note that the Petitioner’s project achieved actual commercial operation on 13.08.2021, i.e. during FY 2021-22. The Commission notified the RE Tariff Order dated 31.03.2021 for FY 2021-22 in pursuance of the CERC (*Terms and Conditions for Tariff Determination from Renewable Energy Sources*) Regulations, 2020. In the said RE tariff Order, the Commission considered the interest rate of 9% and the term of the loan repayment as 15 years. Thus, we hold that the discount rate of 9% and annuity period of 15 years shall be the appropriate methodology towards change in law compensation.
27. Further, the Commission holds that the liability of SECI/ Discoms for ‘*Monthly Annuity Payment*’ starts from the 60th (sixtieth) day from the date of this order or from the date of submission of claims by the Petitioner, whichever is later. In case of delay in the Monthly

Annuity Payment beyond the 60th (sixtieth) day from the date of this order or from the date of submission of claims by the Respondent, whichever is later, a late payment surcharge shall be payable for the delayed period corresponding to each such delayed Monthly Annuity Payment(s), as per respective PPAs/PSAs.

28. The issue is decided accordingly.

***Re: Issue No. IV : Whether the Petitioner is entitled to carrying cost towards compensation for Change in Law?***

29. The Petitioner has submitted that it is also entitled to claim carrying costs in line with restitutive provisions specifically contained in Article 12.1. of the PPA. They are only claiming carrying cost @10.41% p.a. despite the actual cost incurred being higher. as the claim raised is in conformity with the methodology already settled by the Commission in Petition No. 536/MP/2020. Therefore, carrying costs @10.41% p.a. is reasonable and ought to be allowed. Reliance is placed on the Hon'ble Supreme Court's judgement dated 25.02.2019 in the matter of *Uttar Haryana Bijili Vitran Nigam Limited v. Adani Power Limited and Ors.*

30. *Per-contra*, SECI has submitted that 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. The judgment of the APTEL dated 15.09.2022 has been assailed before the Supreme Court in Civil Appeal no. 8880/2022 in the case of "*Telangana Northern Power Distribution Co. Ltd. & Anr. Vs. Parampujya Solar Energy Pvt. Ltd. & Ors.*". SECI has further submitted that the final order by this Commission in this matter shall not be enforced till further orders are passed by the Hon'ble Supreme Court.

31. Article 12 of the PPAs deals with Change in Law, inter-alia, as under:

***ARTICLE 12: CHANGE IN LAW***

***"12.1 Definitions***

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

*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; or (iii) the requirement to obtain a new consent, permit or license; or (iv) any modification to the prevailing conditions prescribed for obtaining an consent,*

permit or license, not owing to any default of the Solar Power Generator; or (v) any change in the rates of any Taxes 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. It 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.”**

32. Hon’ble Supreme Court vide *Uttar Haryana judgement* dated 25.02.2019 has held as under:

**Article 13.2 is an in-built restitutionary principle which compensates the party affected by such change in law and which must restore, through monthly tariff payments, the affected party to the same economic position as if such change in law has not occurred.**

*This would mean that by this clause a fiction is created, and the party has to be put in the same economic position as if such change in law has not occurred, i.e., the party must be given the benefit of restitution as understood in civil law...*

...

*13. A reading of Article 13 as a whole, therefore, leads to the position that subject to restitutionary principles contained in Article 13.2, the adjustment in monthly tariff payment, in the facts of the present case, has to be from the date of the withdrawal of exemption which was done by administrative orders dated 06.04.2015 and 16.02.2016. The present case, therefore, falls within Article 13.4.1(i). This being the case, it is clear that the adjustment in monthly tariff payment has to be effected from the date on which the exemptions given were withdrawn. This being the case, monthly invoices to be raised by the seller after such change in tariff are to appropriately reflect the changed tariff. On the facts of the present case, it is clear that the respondents were entitled to adjustment in their monthly tariff payment from the date on which the exemption notifications*

became effective. *This being the case, the restitutionary principle contained in Article 13.2 would kick in for the simple reason that it is only after the order dated 04.05.2017 that the CERC held that the respondents were entitled to claim added costs on account of change in law w.e.f. 01.04.2015. This being the case, it would be fallacious to say that the respondents would be claiming this restitutionary amount on some general principle of equity outside the PPA. Since it is clear that this amount of carrying cost is only relatable to Article 13 of the PPA, we find no reason to interfere with the judgment of the Appellate Tribunal.*

33. From the above, we observe that Article 12.1 of the PPA dated 25.06.2019 specifically stipulates 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. We further observe that the Hon'ble Supreme Court vide *Uttar Haryana judgement* dated 25.02.2019 has held that in case there is an in-built restitutionary principle in the PPA, then the affected party has to be put in the same economic position if such change in law has not occurred, i.e., the party must be given the benefit of restitution as understood in civil law.
34. In the instant case, we observe that the Petitioner submitted the bid on 15.02.2019, and the same was accepted and crystallised after the e-reverse auction held on 25.02.2019. PPA was executed on 25.06.2019, and LoA was issued on 05.03.2019. As per the PPA, the SCoD of the Project was 01.03.2021. The Safeguard Duty Notification was promulgated on 29.07.2020 i.e. after the acceptance of the bid submitted by the Petitioner. In the preceding paragraphs, we have already held that the impugned notifications, viz. *2020 SGD Notification* is a Change in Law event as per Article 12 of the PPA dated 25.06.2019 and, as such, the Petitioner is entitled to the compensation towards additional capital expenditure on account of Change in Law event in terms of Article 12 of the PPA. We further note that the Petitioner's project achieved actual commercial operation on 13.08.2021.
35. In view of the above, this Commission holds that the Petitioner shall be entitled to the compensation (pre-COD & post-COD) towards additional expenditure on account of the Change in Law event in terms of Article 12 of the PPA. The Petitioner, in the instant petition, shall be eligible for carrying cost starting from the date when the actual payments were made to the Authorities till the date of issuance of this Order, at the actual rate of interest paid by Petitioner for arranging funds (supported by Auditor's Certificate) or the rate of interest on working capital



as per the applicable RE Tariff Regulations prevailing at that time or the late payment surcharge rate as per the PPA, whichever is the lowest. Once a supplementary bill is raised by the Petitioner in terms of this order, the provision of a Late Payment Surcharge in the PPA would kick in if the payment is not made by the Respondents within the due date.

36. The Commission further directs that the responding Delhi Discoms are liable to pay to SECI all the above-reconciled claims that SECI has to pay to Petitioner. However, payment to Petitioner by SECI is not conditional upon the payment to be made by the responding Delhi Discoms to SECI.

37. Further, APTEL, vide judgment dated 15.09.2022 in A.No. 256 of 2019 & Batch titled as *Parampujya Solar Energy Private Limited &Ors. vs. CERC &Ors.* held as under:

.....  
*109. The other captioned appeals – Appeal no. 256 of 2019 (Parampujya Solar Energy Pvt. Ltd &Anr. v. CERC &Ors.), Appeal no. 299 of 2019 (Parampujya Solar Energy Pvt. Ltd. v. CERC &Ors.), Appeal no. 427 of 2019 (Mahoba Solar (UP) Private Limited v. CERC &Ors.), Appeal no. 23 of 2022 (Prayatna Developers Pvt. Ltd. v. CERC &Ors.) Appeal no. 131 of 2022 (Wardha Solar (Maharashtra) Private Ltd. &Anr. v. CERC &Ors.) and Appeal no. 275 of 2022 (Parampujya Solar Energy Pvt. Ltd. &Anr. v. CERC &Ors.) - deserve to be allowed. **We order accordingly directing the Central Electricity Regulatory Commission to take up the claim cases of the Solar Power Project Developers herein for further proceedings and for passing necessary orders consequent to the findings recorded by us in the preceding parts of this judgment, allowing Change in Law (CIL) compensation (on account of GST laws and Safeguard Duty on Imports, as the case may be) from the date(s) of enforcement of the new taxes for the entire period of its impact, including the period post Commercial Operation Date of the projects in question, as indeed towards Operation & Maintenance (O&M) expenses, along with carrying cost subject, however, to necessary prudence check.**”*

38. The Hon’ble Supreme Court, in its Order dated 12.12.2022, in Civil Appeal no. 8880/2022 in the case of “*Telangana Northern Power Distribution Co. Limited & Anr. Vs. Parampujya Solar Energy Pvt. Limited & Ors.*” (and in similar Orders dated 03.01.2023 and 23.01.2023) has held as under:

*“Pending further orders, the Central Electricity Regulatory Commission (CERC) shall comply with the directions issued in paragraph 109 of the impugned order dated 15 September 2022 of the Appellate Tribunal for Electricity. However, the final order of the CERC shall not be enforced pending further orders.”*

39. Therefore, the directions issued in this Order so far as they relate to additional compensation for the period pre-COD claims only (as all the modules were procured before the COD of the project i.e. 13.08.2021) shall be enforced and the directions issued in this Order so far as they relate to additional compensation for the period post-Commercial Operation Date of the project in question as also towards post-COD (carrying cost) shall not be enforced and shall be subject to further orders of the Hon'ble Supreme Court in Civil Appeal No. 8880/2022 in *Telangana Northern Power Distribution Company Limited & Anr. V. Parampujya Solar Energy Pvt. Limited & Ors*, and connected matters.

40. The issue is decided accordingly.

41. The summary of our findings is as follows:

- a) The 2020 SGD Notification is a Change in Law event in terms of Article 12 of the PPA dated 25.06.2019
- b) The Petitioner is entitled to compensation (pre-COD & post-COD) on account of Change in Law as per the terms of Article 12 of the PPA due to the impugned notifications viz. Safeguard duty Notification No. 2/2020-Custom (SG) dated 29.07.2020.
- c) Compensation is to be paid at the discount rate of 9% and an annuity period of 15 years. The liability of SECI/ Discoms for '*Monthly Annuity Payment*' shall start from the 60th (sixtieth) day from the date of this order or from the date of submission of claims by the Petitioner whichever is later. Late payment surcharge shall be payable for the delayed period corresponding to each such delayed Monthly Annuity Payment(s), as per respective PPAs/PSAs.
- d) The Petitioner shall also be eligible for carrying cost starting from the date when the actual payments were made to the Authorities till the date of issuance of this Order, at the actual rate of interest paid by the Petitioner for arranging funds (supported by Auditor's Certificate) or the rate of interest on working capital as per applicable RE Tariff Regulations prevailing at that time or the late payment surcharge rate as per the PPA, whichever is the lowest. Once a supplementary bill is raised by the Petitioner in terms of this order, the provision of a Late Payment Surcharge in the PPA would kick in if the payment is not made by the Respondents within the due date.

e) The directions issued in this Order in so far as they relate to additional compensation for the period pre-COD claims only (as all the modules were procured before the COD of the project i.e. 13.08.2021) shall be enforced, and the directions issued in this Order in so far as they relate to additional compensation for the period post-Commercial Operation Date of the project in question as also towards post-COD (carrying cost) shall not be enforced and shall be subject to further orders of the Hon'ble Supreme Court in Civil Appeal No. 8880/2022 in *Telangana Northern Power Distribution Company Limited & Anr. V. Parampujya Solar Energy Pvt. Limited & Ors*, and connected matters.

42. The Petition No. 207/MP/2021 along with IA.No. 47 of 2022 is disposed of in terms of the above.

Sd/-  
पी. के. सिंह  
सदस्य

Sd/-  
अरुण गोयल  
सदस्य

Sd/-  
आई. एस. झा  
सदस्य

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जिष्णु बरुआ  
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