



नई दिल्ली  
NEW DELHI

याचिका संख्या./ Petition No. 214/MP/2021 along with IA. No. 50 of 2023

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: 30<sup>th</sup> of November , 2023

**IN THE MATTER OF:**

A petition under section 79 of the Electricity Act 2003 before the Central Electricity Regulatory Commission for (i) approval of “Change in Law” and (ii) seeking an appropriate mechanism for grant of an appropriate adjustment/ compensation to offset financial/ commercial impact of change in law event on account of rescission of Notification No. 1/2011 – Customs dated 06.01.2011 vide Notification No. 7/2021 – Customs dated 01.02.2021, which has resulted in increase in rate of basic customs duty on import of solar inverters, increase in quantum of social welfare surcharge and IGST in terms of Article 12 of the Power Purchase Agreement dated 10.08.2020 between M/s ReNew Solar Urja Private Limited and Solar Energy Corporation of India Limited

**AND IN THE MATTER OF:**

**M/s ReNew Solar Urja Private Limited,**  
138, Ansal Chambers II,  
Bhikaji Cama Place, Delhi – 110066

.....Petitioner

**Versus**

1. **M/s Solar Energy Corporation of India Limited,**  
1<sup>st</sup> Floor, A Wing, D-3, District Centre,  
Saket, New Delhi – 110017, Delhi
2. **Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO),**  
NPKRR Maligai, 6<sup>th</sup> Floor,  
Eastern Wing, 144, Anna Salai,  
Chennai- 600002
3. **Southern Power Distribution Company of Telengana Limited,**  
Corporate Office- #6-1-50, Mint Compound,  
Hyderabad- 500063
4. **Northern Power Distribution Company of Telengana Limited,**  
House No. 2-5-31/2, Corporate Office,  
Vidyut Bhawan,  
Nakkallgutta, Hanamkonda  
Warangal-506001

**....Respondents**

**Parties Present:** Ms. Mannat Waraich, Advocate, RSUPL  
Shri Mridul Gupta, Advocate, RSUPL  
Ms. Tanya Sareen, Advocate, SECI  
Ms. Aneesh Bajaj, Advocate, SECI  
Ms. Anusha Nagarajan, Advocate, TANGEDCO  
Shri Rahul Ranjan, Advocate, TANGEDCO

**आदेश/ ORDER**

The Petitioner, i.e., M/s ReNew Solar Urja Private Limited (RSUPL), is a generating company and is engaged in the business of developing, building, owning, operating, and maintaining utility scale grid-connected solar power projects for the generation of solar power. The Petitioner is setting up a 300MW Solar Power Project in the State of Rajasthan. The Petitioner is seeking a declaration that the rescission of Notification No. 1/2011 – Customs dated 06.01.2011 vide Notification No. 7/2021 – Customs dated 01.02.2021 is an event of ‘Change in Law’ and is seeking an appropriate mechanism for grant of an appropriate adjustment/ compensation to offset

financial/ commercial impact viz. increase in the rate of basic customs duty on import of solar inverters, increase in quantum of social welfare surcharge and Goods & Services Tax (GST) in terms of Article 12 of the Power Purchase Agreement (PPA) dated 10.08.2020.

2. Respondent No. 1, Solar Energy Corporation of India Limited (SECI), has been set up under the administrative control of the Ministry of New and Renewable Energy (MNRE) 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. SECI has been designated as the nodal agency for the implementation of MNRE schemes for developing grid-connected solar power capacity through VGF mode in India.
3. Respondent No. 2, Tamil Nadu Generation and Distribution Corporation Limited i.e. TANGEDCO, is a power generation and distribution company owned by the Government of Tamil Nadu and is engaged in the activities of promoting the coordinated development of Generation and Distribution of electricity within the state in most efficient and economical manner.
4. Respondents No. 3 & 4 are distribution companies (DISCOMs) engaged in power distribution activities in the State of Telangana.
5. The Petitioner has made the following prayers:
  - a) *Declare the imposition of increased rate of basic customs duty and subsequent increase in quantum of social welfare surcharge and IGST on account of rescission of Notification No. 1/2011-Customs dated 06.01.2011 vide Notification No. 07/2021-Customs dated 01.02.2021 issued by Central Government as Change in Law in terms of the PPA which have led to an increase in the expenditure for the Project;*
  - b) *Evolve a suitable mechanism to compensate the Petitioner for the increase in expenditure incurred by the Petitioner on account of Change in Law;*
  - c) *Direct Respondent to compensate the Petitioner towards Customs duty and consequent increase in social welfare surcharge and IGST as onetime lump sum amount or mechanism devised by this commission in prayer (b)*

- d) Grant interest/carrying cost from the date of incurring of the cost by the Petitioner till the date of the order by this Commission;
- e) If the event this Hon'ble Commission is not inclined to grant the relief prayed at (d) then in the alternate it is prayed, that this Hon'ble Commission grants interest/ carrying cost from the date of the cost by the Petitioner till the date of order by this Commission restoring the Petitioner to the same economic position as before the occurrence of the Change in Law events;
- f) Allow legal and administrative costs incurred by the Petitioner in pursuing the instant petition; and
- g) Pass any such other and further reliefs as this Hon'ble Commission deems just and proper in the nature and circumstances of the present case.

**Prayers in IA.No. 50 of 2023:**

- a) Allow the present Application and take on record the amended Petition; and
- b) Pass any such order as the Hon'ble Commission deems fit in light of the facts and circumstances of the present Petition.

**Factual Matrix:**

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

Location	Village Mandhopura, Tehsil Fatehgarh, District Jaisalmer, Rajasthan
Nodal agency	SECI
Tariff	Rs.2.71/kWh
Date of notification of Basic Custom Duty Notification No. 1/2011 (2011 BCD Notification)	06.01.2011
Date of Notification No.1/2017-Central Tax (Rate) (2017 GST Notification)	28.06.2017
RfS issued on	28.06.2019
Bid submitted by Renew Solar Power Pvt. Ltd (Renew Power) on	18.10.2019
E-Reverse auction held on	31.10.2019
LOA issued on	25.11.2019
Capacity (MW)	300 MW
Power	Solar
Effective date of the PPA	11.05.2020
PPA executed on	10.08.2020
SCOD of the project	11.11.2021

Date of notification of Basic Custom Duty Notification No. 7/2021 (2021 BCD Notification)	01.02.2021
Date of Notification of 8/2021- Central Tax (Rate) (2021 GST Notification)	30.09.2021
Extended SCOD	25.02.2022
COD of the project	150 MW- 01.12.2021 50 MW- 07.12.2021 50 MW- 23.12.2021 50 MW- 16.12.2021

7. The present petition was filed on 27.09.2021. The Commission, vide order dated 17.12.2021, 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 the Appellate Tribunal for Electricity (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 17.05.2022 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 exercise of its suo-motu powers of review restored the present petition at the same stage as existed prior to the disposal of the petition and directed the parties to complete their pleadings within one month. Subsequent to the suo-motu order passed by the Commission, the Petitioner filed an additional affidavit on 22.07.2022 to bring on record subsequent change in law events that occurred after the filing of the Petition. Upon hearing the submissions of the parties, the matter was reserved for orders on 11.04.2023 and the parties were directed to file their respective submissions. Pursuant to the directions of the Commission, SECI filed its Reply on 06.03.2023, and the Petitioner filed its Rejoinder on 04.05.2023.
8. The Petitioner filed I.A. No. 50 of 2023 on 08.04.2023 to bring on record subsequent events that have transpired after filing the instant Petition. The Petitioner submitted that during the pendency of the proceedings in this Petition, GST rates increased from 5% to 12% vide Notification No. 8/2021 dated 30.09.2021, and since the aforesaid GST Notifications were issued after the Bid-cut-off date i.e. 18.10.2019, it would also qualify as change in law under Article 12 of the PPA. Therefore, vide the said IA, the Petitioner sought modification of the pleadings thereby also seeking change in law relief qua increase in GST rates from 5% to 12 %.

**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 imposition of increased rate of basic customs duty and subsequent increase in quantum of social welfare surcharge and IGST on account of rescission of Notification No. 1/2011-Customs dated 06.01.2011 vide Notification No. 07/2021-Customs dated 01.02.2021 and the introduction of Notification No.8/2021- GST issued by Ministry of Finance, Government of India issued by Ministry of Finance, Government of India amounts to Change in Law events under Article 12 of the Power Purchase Agreement dated 18.01.2019? AND 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?***

***Issue No.II: 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.III: Is the Petitioner entitled to carrying cost towards compensation for Change in Law?***

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

***Re: Issue No. I***

12. Briefly, the Petitioner has submitted that the imposition of the following notifications may be declared as a Change in Law in terms of the PPA, which has led to an increase in the expenditure for the Project:

- (a) imposition of the increased rate of basic customs duty and subsequent increase in the quantum of social welfare surcharge and IGST on account of rescission of Notification No. 1/2011-Customs dated 06.01.2011 vide Notification No. 07/2021-Customs dated 01.02.2021 (2021 BCD Notification) issued by the Central Government.
- (b) Imposition of Notification No. 8/2021 dated 30.09.2021 (2021 GST Notification) vide which the GST rates increased from 5% to 12%

**Increase in BCD from 5% to 20% on import of inverters qua rescission of 2011 BCD Notification:**

- a) The issuance of the 2021 BCD Notification by the Central Government and the consequent imposition of basic customs duty at 20% ad valorem, increase in quantum of social welfare surcharge and increase in quantum of IGST on import of Solar inverters has resulted in an increase in expenditure for the Petitioner and has thus, adversely impacted the business of the Petitioner. Upon the rescission of Notification 1/2011, there has been an increase in basic customs duty payable on the import of solar inverters from 5% to 20% which has set into motion an increase in the quantum of social welfare surcharge imposed, which now amounts to 2% ad valorem and an increase in the IGST on import of solar inverters which now amounts to 1.1% ad valorem. The total duty payable has increased from **5.78% ad valorem to 23.10% ad valorem**.
- b) The increase in the basic customs duty imposed on the import of solar inverters from 5% ad valorem to 20% ad valorem has had a consequential and direct bearing on the increase of the quantum of social welfare surcharge and IGST imposed on such import.
- c) Prior to the rescission of Notification 1/2011, the total duty payable by the Petitioner on the import of solar inverter was 5.78% ad valorem which has, on account of rescission of said Notification from 02.02.2021, increased the total duty payable by the Petitioner on import of solar inverter to 23.10% ad valorem.
- d) Under the regime wherein Notification 1/2011 was in operation from 06.02.2011 up until 02.02.2021, the social welfare surcharge imposed on the import of solar inverters amounted to 0.5% ad valorem. However, the rescission of Notification 1/2011 has increased the quantum of social welfare surcharge imposed, which amounts to 2% ad valorem, from 02.02.2021 onwards.
- e) On the basis of the Ministry of Power letter dated 27.08.2018, the imposition of safeguard duty on the import of solar modules, the change in basic customs duty and consequent increase in social welfare surcharge and IGST on import of solar inverters ought to be treated as a pass through and thereby allowed as a change in the law.
- f) Rajasthan Electricity Regulatory Commission (RERC) vide Order dated 30.12.2021 in Petition Nos.1914/2021 & Batch has held that Imposition of BCD vide Notification dated 01.02.2021 is a change in Law in terms of Article 12 of PPAs (Change in Law provision).

g) The Petitioner has entered into two separate contracts, one for the supply of goods and the other one for the supply of services. Accordingly, the claim as raised by the Petitioner, which has been duly certified by the Chartered Accountant, is limited to the goods supplied under the Supply Contract, which have incurred an additional GST of 7% (as GST increased from 5-12%). Further, in certain cases under the same Supply Contract, the rate of GST has also increased from 5% to 18%, since the amended entry has changed from ‘Solar Power Generating System’ to ‘Solar Power Generator’. For the sake of clarity, the Petitioner reiterates that the Petitioner has not entered into any composite contract but rather entered into two separate contracts and hence the split of 70:30 would not be applicable in the present case. On this basis, the averments of the Respondent are specifically denied and disputed as being incorrect, misleading and misconceived.

**Change in GST rates from 5% to 12% on renewable energy devices and parts:**

- h) The increase in the rate of GST from 5% to 12% on renewable energy devices and parts leads to incremental CGST and SGST/IGST of 7%. This increase in GST rates is in the nature of enactment of a new law as the same has been imposed by the Ministry of Finance and will also be covered by changes in the rates of taxes, duties and cess, which have a direct effect on the project.
- i) Since the 2021 GST Notification has come into effect after the date of submission of bids, i.e. 18.10.201, hence, it would also qualify as a change in law under Article 12 of the PPA dated 10.08.2020.
- j) At the time of the submissions of the bid, the Petitioner had factored in ‘interest on working capital’ and return on equity based on the costs prevalent at the time of the bid. With the increase in the costs due to the change in law events explained above, the working capital requirement, and consequently, the interest on working capital, has also increased as compared to the requirement and rate prevalent at the time of the bid. Thus, the Petitioner is entitled to interest on incremental working capital at a normative interest rate to put the Petitioner in the same economic position as if a change in law had not occurred.

13. *Per contra*, briefly, SECI has submitted as under:

**Custom Duty on Solar Inverters**



- a) Social Welfare Surcharge may not be considered as a cost for setting up the project as it does not form part of the profit and loss account related to the business of setting up the Solar Power Project and supply of solar power under the PPA.
- b) If such an obligation to contribute to Social Welfare measures is allowed as pass through, the very purpose of contribution to be made for public interest is frustrated. It will amount to the public at large contributing to its own interest instead of the obligation being discharged by the person engaged in business activities.
- c) The admissibility and extent of compensation admissible to the Petitioner on account of levy of Custom Duty as per Notification dated 01.02.2021 of Government of India on solar inverters (if any) is subject to examination and verification of documents by SECI (and TANGEDCO, Telangana Discoms) to be furnished by the Petitioner.

**GST Notification as Change in Law**

- d) If there are two separate contracts, one for the supply of goods and one for the erection of services, etc., the supply of goods will attract a GST of 12%, and the supply of services will attract a GST of 18%. In the case of composite work contracts, subject to the admissibility of Notification dated 30.09.2021 as Change in Law, any increase in the tax rate of GST which the Petitioner can claim as per Notification dated 30.09.2021 of Government of India is only for the increase of GST from 5% to 12% on goods there being no increase in tax on service part of 30% as per the said Notifications.

14. We observe that the Petitioner has admitted on record that it has not entered into any composite contract and has entered into two separate contracts, one for the supply of goods and the other one for the supply of services. Accordingly, the claim (duly certified by the Chartered Accountant) raised is limited to the goods supplied under the Supply Contract which have incurred an additional GST of 7% (as GST increased from 5-12%).

15. We observe that Article 12 of the PPA dated 10.08.2020 stipulates 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.***

*In the event of any decrease in the recurring/ nonrecurring expenditure by the SPD or any income to the SPD on account of any of the events as indicated above, SPD shall file an application to the appropriate commission no later than sixty (60) days from the occurrence of such event, for seeking approval of Change in Law. In the event of the SPD failing to comply with the above requirement, in case of any gain to the SPD, SECI shall withhold the monthly tariff payments on immediate basis, until compliance of the above requirement by the SPD.*

## **12.2 Relief for Change in Law**

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

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

16. We observe that Section 110 of the Finance Act, 2018 mandates as follows:

.....  
*There shall be levied and collected, in accordance with the provisions of this Chapter, for the purposes of the Union, a duty of Customs, to be called a Social Welfare Surcharge, on the goods specified in the First Schedule to the Customs Tariff Act, 1975 (hereinafter referred to as the Customs Tariff Act), being the goods imported into India, to fulfil the commitment of the Government to provide and finance education, health and social security.*

...

17. We observe that the increase in the rate of basic customs duty imposed on the import of machinery and auxiliary equipment for the initial setting up of solar power generation project has increased the quantum of social welfare surcharge, payable under Section 110 of the Finance Act, 2018, on such import, which is fixed at a rate of 10% on aggregate duties and taxes which are levied and collected by the Central Government under Section 12 of the Customs Act, 1962 which had a bearing on the increase in the quantum of integrated goods and services tax and Services Tax Act, 2017 (IGST Act) on such import by the Petitioner. As the increase in customs duty due to the rescission of the Basic Customs Duty (BCD) Notification No. 1/2011-Customs dated 06.01.2011 by the BCD Notification No. 7/2021 (*2021 BCD Notification*) is resulting from Indian Governmental Instrumentality in terms of the PPA dated 10.08.2020 any financial implications cast upon the SPD on account of Change in Law shall be compensated. Hence, we hold that the 2021 BCD Notification is an event of Change in Law as per Article 12 of the PPA dated 10.08.2020. We also note that there is an increase in the quantum of social welfare surcharge, payable under Section 110 of the Finance Act 2018, on the import of goods. Hence, we hold that an increase in social welfare surcharge levied by the Indian Government Instrumentality on the import of machinery and auxiliary equipment is also an event of Change in Law as per Article 12 of the PPA dated 10.08.2020.

18. We further observe that the extract of the *2021 GST Notification*, is as under:

*(b) in Schedule II – 12%, -*

...

*(iv) after S. No. 201 and the entries relating thereto, the following S. No. and entries shall be inserted, namely: -*

A	85 or 94	<i>lowing renewable energy devices &amp; parts for their manufacture: -            Bio-gas plant            Solar power-based devices            Solar power generating system            Wind mills, Wind Operated Electricity Generator (WOEG)            Waste to energy plants / devices            Solar lantern / solar lamp            Ocean waves/tidal waves energy devices/plants            Photo voltaic cells, whether or not assembled in modules or made up into panels.</i>
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19. From the above, we observe 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 Notification No. 8/2021- Integrated Tax (Rate) dated 30.09.2021 has been issued by the Ministry of Finance, Government of India. As such the introduction of the impugned notifications has been enacted by the Act of Parliament. The change in rate of Goods and Services Tax from 5% to 12% w.e.f. 01.10.2021 has resulted in the change in the cost of the inputs required for generation, and the same is considered as 'Change in Law'. Hence, we hold that the impugned notification viz *2021 IGST Notification* is also a Change in Law event as per Article 12 of the PPA dated 10.08.2020.

20. In the instant petition the bid was submitted by the Petitioner on 18.10.2019. The e-Reverse auction was conducted on 31.10.2019. PPA was executed between the Petitioner and SECI on 10.08.2020 and the SCoD of the project was 11.01.2021. In terms of the extended SCoD, the Project was required to be commissioned on or before 25.02.2022. The Petitioner has commissioned the full capacity of its project, well in advance, *i.e.*, as on 16.12.2021, whereas the *2021 BCD Notification* was notified on 01.02.2021 and the *2021 GST Notification* was notified on 30.09.2021. As such, the Petitioner project was affected by the said BCD and GST Notifications and is entitled to relief under the GST Laws as per the terms of Article 12 of the PPA.

**Re: Issue No. II**

***What should be the discount rate for the calculation of Annuity for payment of compensation (if any) on account of Change in Law?***

21. The Petitioner has submitted that the expenditure incurred by the Petitioner due to an increase in the rate of BCD towards the import of modules necessary for the construction of the project and the increase in the rate of GST which is a part of capital cost and such additional expenditure has a direct bearing on debt and equity required for setting up the project. The entire additional expenditure has been incurred by the Petitioner through its own equity. They have further added that the Commission ought to apply the principles laid down in the *RE Tariff Regulations, 2020* in its entirety and, thereby, arrive at the discounting factor considering the debt-equity ratio of 70:30 if it adopts an annuity payment method. The interest rate of carrying cost should be equal to the return on equity as allowed by this Commission in its Regulation for *Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020*, which is 14% per annum. Alternatively, Petitioner be allowed an

interest rate of carrying cost equal to the rate of interest allowed under the Late Payment surcharge clause of PPA dated 10.08.2020.

22. *Per contra*, SECI has submitted that this Commission may clarify the cut-off date for considering the change in law impact as the actual commercial operation date of the project. After CERC'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. Telangana Discoms may be directed to make a payment towards the evaluated claims of the Customs Duty and GST payable by SECI to the Petitioner on a back-to-back basis under the PSA in a time-bound manner.

25. We observe that this Commission in its earlier order dated 20.08.2021 in the 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.*

26. We note that the issue of the determination of the appropriate methodology for payment of compensation on account of the Change in Law event has already been decided by us in earlier orders, which have attained finality. We have taken the 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, 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 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.*
27. We note that the Petitioner's project achieved actual commercial operation on 16.12.2021, which is 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.
28. Further, the Commission holds that 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 Respondent, 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.
29. The issue is decided accordingly.

**Re: Issue No. III**

***Is the Petitioner entitled to carrying cost towards compensation for Change in Law?***

30. The Petitioner has submitted that it is entitled to claim carrying costs as the PPA specifically contains a restitutive provision. The Petitioner is entitled to reimbursement of carrying cost from

the date of actual payment of the taxes till the date of the order from this Commission so that the Petitioner is put into the same economic position as if a change in the law had not occurred. The economic position which is sought to be restored in terms of the change in law clause would be meaningless if the same is not awarded along with interest as the time value of money. In order to restore the affected party to the same economic position as if a change in law event has not occurred, the carrying cost has to be allowed at actuals. (Reliance is placed on APTEL judgement dated 16.11.2021 in A.No. 163 of 2020 and in A.No. 171 of 2020 in the matter of *Nisagra Renewable Energy Private Limited v. Maharashtra State Electricity Distribution Co. Ltd. & Anr* and *Juniper Green Energy Private Limited v. Maharashtra State Electricity Distribution Co. Ltd. & Anr.*) (*Nisagra judgement*). If the Petitioner is not allowed to claim Carrying Cost, then it would have to bear huge losses which would not lead to restitution to the same financial position. The Petitioner cannot be made to suffer for acting in a bona fide manner.

32. *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 Commission may consider the decision of the Hon'ble Supreme Court (dated 12.12.2022 in Civil Appeal No. 8880 of 2022 and Civil Appeal bearing Diary No. 135 of 2023 dated 23.01.2023) to maintain parity between the cases pending before the Commission. The Commission may direct that enforcement of any order of the Commission passed on the aspects covered in the APTEL's judgment dated 15.09.2022 in A.No. 256 of 2019 & Batch titled as *Parampujya Solar Energy Private Limited & Ors. vs. CERC & Ors. (Parampujya case)* will take place after the decision of the Hon'ble Supreme Court to maintain such parity.

33. We observe that 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.**

34. We observe that the 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.***

35. From the above, we observe that Article 12.1 of the PPA dated 10.08.2020 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 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.
36. In the instant case we observe that the bid was submitted by the Petitioner on 18.10.2019. The e-Reverse auction was conducted on 31.10.2019. PPA was executed between the Petitioner and SECI on 10.08.2020, and the SCoD of the project was on 11.01.2021. In terms of the extended SCoD, the Project was required to be commissioned on or before 25.02.2022. The Petitioner has commissioned the full capacity of its project well in advance, i.e., as on 16.12.2021. The 2021 BCD Notification was notified on 01.02.2021 and the 2021 GST Notification was notified on 30.09.2021. As such, the Petitioner project was affected by the said BCD and GST Notifications and is entitled to relief under the GST Laws as per the terms of Article 12 of the PPA. As such the Petitioner's project was affected by the said notifications. The project was commissioned on 16.12.2021.
37. In view of the above, this Commission holds that the Petitioner shall be entitled to compensation (pre-COD & post-COD) towards additional expenditure on account of Change in Law event in terms of Article 12 of the PPAs up to date of reimbursement by the Respondents. The Petitioner, in the instant petitions, 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 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.

38. Accordingly, the Commission hereby directs the contracting parties to carry out the reconciliation of additional expenditure along with carrying cost by exhibiting clear and one-to-one correlation with the projects and the invoices raised supported with an auditor certificate. The Commission further directs that the responding Discoms are liable to pay SECI all the above-reconciled claims that SECI has to pay to the Petitioners. However, payment to the Petitioners by SECI is not conditional upon the payment to be made by the responding Discoms to SECI.
39. 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.***

40. The Hon'ble Supreme Court in its Order dated 12.12.2022, in Civil Appeal no. 8880/2022 in the case of "*Telengana 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.”*

41. 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. 15.10.2021) 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.
42. The issue is decided accordingly.
43. The summary of our findings is as follows:
  - (a) *2021 BCD Notification* is an event of Change in Law as per Article 12 of the PPA dated 10.08.2020.
  - (b) An increase in social welfare surcharge on the import of machinery and auxiliary equipment is also an event of Change in Law as per Article 12 of the PPA dated 10.08.2020.
  - (c) *2021 GST Notification* is also a Change in Law event as per Article 12 of the PPA dated 10.08.2020.
  - (d) 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 Respondent 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.
  - (e) The Petitioner shall be entitled to compensation (pre-COD & post-COD) towards additional expenditure on account of the Change in Law event in terms of Article 12 of the PPAs up to the date of reimbursement by the Respondents. The Petitioner 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 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.

- (f) 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. 15.10.2021) 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.

44. The Petition No. 214/MP/2021 along with IA.No. 50 of 2023 is disposed of in terms of the above.

Sd/-  
पी. के. सिंह  
सदस्य

Sd/-  
अरुण गोयल  
सदस्य

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आई. एस. झा  
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