नईदिल्ली
NEW DELHI

याचिकासंख्या./ Petition No.179/MP/2020

कोरम/ Coram:

श्रीआई. एस. झा, सदस्य/ Shri I. S. Jha, Member
श्रीअरुणगोयल, सदस्य/ Shri Arun Goyal, Member
श्रीपी. के. सिंह, सदस्य / Shri P. K. Singh, Member

आदेशदिनांक/ Date of Order: 9th of January, 2023

IN THE MATTER OF:

Petition under Section 79 of the Electricity Act, 2003 read with Article 12 of the Power Purchase Agreements dated 19.7.2016, 21.10.2016, 21.10.2016 and 13.1.2017 executed between Tata Power Renewable Energy Limited and Solar Energy Corporation of India Limited for seeking compensation on account of Change in Law events due to enactment of GST Laws.

AND IN THE MATTER OF:

Tata Power Renewable Energy Limited
Corporate Centre A,
34 SantTukaram Road,
Carnac Bunder, Mumbai 400 009,
Maharashtra, India

…Petitioner

VERSUS

1. **Solar Energy Corporation of India Ltd.,**
   1st Floor, A-Wing, 0-3,
   District Centre, Saket,
   New Delhi- 110017

2. **Maharashtra State Electricity Distribution Company Limited**
   Prakashgad, Plot No. G-9,
   Anant Kanekar Marg,
   Bandra East,
   Mumbai – 400 051

3. **Southern Power Distribution Company of Andhra Pradesh Limited**
   #19-13-65/A, Srinivasapuram Tiruchanoor Road,
   Tirupati – 517503, Chittoor District,
   Andhra Pradesh

4. **Eastern Power Distribution Company of Andhra Pradesh Limited**
   Corporate Office,
   P&T Colony, Seethammadhara,
   Visakhapatnam.

5. **Gujarat Urja Vikas Nigam Limited**
   Sardar Patel VidyutBhavan, Race Course,
   Vadodara – 390 007, Gujarat

…Respondents

Parties Present: Shri Kunal Kaul, Advocate, TPREL
Shri Rahul M Ranade, TPREL
Shri Anup Jain, Advocate, MSEDCL
Shri Udit Gupta, Advocate, MSEDCL
Shri Vyom Chaturvedi, Advocate, MSEDCL
Shri M. G. Ramachandran, Sr. Advocate, SECI
Ms. Tanya Sareen, Advocate, SECI
Ms. Anushree Bardhan, Advocate, SECI

आदेश/ ORDER

The Petitioner, Tata Power Renewable Energy Limited (TPREL) is a generating company which is primarily engaged in the business of setting up power projects based on renewable energy sources. The Petitioner has filed the present petition under Section 79

of the Electricity Act read with Article 12 of the Power Purchase Agreements (PPAs) dated 19.07.2016, 21.10.2016, 21.10.2016 and 13.01.2017 executed between TPREL and Solar Energy Corporation of India (SECI). The Petitioner is seeking a declaration that introduction/enactment of Goods and Services Tax(GST) amounts to Change in Law, which has resulted in additional expenditure to be incurred by TPREL and seeking compensation/restitution on account of such Change in Law along with carrying cost.

2. The Respondent No.1, Solar Energy Corporation of India (SECI) is a nodal agency forimplementing various schemes of MNRE, including Phase-II, Batch-IV of National Solar Mission of Government of India through VGF mode.

3. The Respondent No.2 to Respondent No.5 are the Distribution Companies in the State of Maharashtra, Andhra Pradesh and Gujarat.

4. The Petitioner has made the following prayers:

a. Hold and declare that introduction/ enactment of GST Laws, as specified in Paras 13 to 18 above, amounts to Change in Law, which has resulted in/ increased additional recurring/non-recurring expenditure of TPREL;

b. Hold and declare that the Petitioner is entitled to a sum of Rs. 48,88,44,968 along with the carrying cost towards compensation for Change in Law during the construction period;

c. Direct/ Permit the Procurers to make payment the sum of Rs. 3.06 Crores along with the carrying cost towards compensation for Change in Law during the Operating Period; and

d. Pass any such other and further reliefs as theCommission deems just and proper in the nature and circumstances of the present case.

5. A brief detail of the petition is as under:

Location	Palaswadi Maharashtra	**Plot No.4 & 5, Ananthapuramu Solar Park Andhra Pradesh**	**Gujarat Solar Park, Charanka**
Nodal agency	SECI	SECI	SECI
RfS issued on	24.02.2016	02.01.2016	22.04.2016
Bid submitted on	18.03.2016	05.04.2016	28.06.2016 and 14.09.2016
E-reverse auction Conducted on	12.04.2016	04.05.2016	25.10.2016
LOI issued on	16.06.2016	16.08.2016	18.11.2016
Capacity (MW)	30 MW	2X50 MW	25MW
Power	Solar	Solar	Solar
PPA executed on	19.07.2016	21.10.2016	13.01.2017
Tariff	4.43/kWh	4.43/kWh	4.43/kWh
Date of implementation of GST Laws	01.07.2017	01.07.2017	01.07.2017
Date of Commissioning	28.10.2017	22.06.2018 (Both Units)	16.08.2017

Submissions of the Petitioner:

6. The Petitioner has submitted that:

   a. PPAs, being long-term contracts (i.e. for a period of 25 years), it was contemplated that adjustment will be made to offset the impact of certain events beyond the control of the parties, such as change in applicable legal framework, which ***results in additional recurring/ non-recurring expenditure by the project developer and/ or revenue to the project developer***. Accordingly, the Change in Law provision was incorporated in the PPAs.

   b. The purpose of a Change in Law provision is to insulate the parties from the financial impact arising out of events which were not within the control of the project developer, that take place after the Effective Date of the PPAs.

   c. The underlying principle of having the Change in Law provision in the PPAs is to restore/ restitute the affected party to the same economic position as if the Change

in Law had not occurred. The Petitioner has placed its reliance on Appellate Tribunal's Judgment dated 20.11.2018 in *Sasan Power Limited v. CERC &Ors.* Thus, if any additional recurring/ non-recurring expenditure is incurred by the project developer, the same ought to be refunded to the project developer and in case any additional income is earned by the project developer, the same sought to be refunded by the project developer.

d. Introduction of GST Laws has led to increase in indirect taxes leading to overall increase in the project cost. The change of tax regime has escalated the Petitioner's Solar Power Projects, hence making the tariff quoted at the time of bid for allocation of projects unviable. There is overall increase of Rs. 48,88,44,968/-in the Project Cost due to enactment of GST Laws.

e. Introduction of GST Laws has also impacted the O&M of the project. The bidding for the project is after considering such O&M expenditure offer by the contractor and the escalation rates over 25 year period. Such service contracts attracted a service tax of 15% at the time of bidding. Subsequently, after the introduction of GST regime, the rate was increased to 18%, thereby increasing the tax liability by 3%.

f. The Petitioner is also entitled to Carrying Cost on the compensation for Change in Law, in view of the law laid down by the Hon'ble Supreme Court by its Judgment dated 25.02.2019 in Civil Appeal No. 5865 of 2018 titled as *Uttar Haryana Bijli Vitran Nigam Ltd. & Anr. v. Adani Power Limited & Ors.* The Hon'ble Supreme Court has also held that its Judgment in *Energy Watchdog v. CERC &Ors. (2017) 14 SCC 80* makes it clear that this Commission has to bear in mind the restitutive principle contained in the Change in Law provision of the PPA while determining the compensation for increase/decrease in cost.

Hearing dated 04.06.2020:

7. The matter was listed for hearing through video conferencing on 04.06.2020. After hearing the learned counsels for the parties, the Commission admitted the Petition and

observed that the Petitioner and SECI have already initiated discussions for reconciliation of the Petitioner`s claims arising out of Change in Law event, namely, introduction of GST as per MNRE's letters dated 12.03.2020 and 23.03.2020. Accordingly, the Commission directed the Petitioner to place on record the settlement reached between the parties.

Hearing dated 11.01.2022:

8. The matter was again listed for virtual hearing on 11.01.2022. During the course of hearing, the learned counsel for the Petitioner submitted that pursuant to the reconciliation of its Change in Law claims arising out of enactment of GST Law with SECI, the Petitioner has received a letter from SECI whereby a certain quantum of its claims has not been approved by SECI. However, it has to file submissions on the disputed quantum. The learned seniorcounsel for the Respondent, SECI confirmed that the reconciliation for the amount has been carried out between the Petitioner and SECI, which was also forwarded to the distribution licensees. However, so far, the distribution licensees have not confirmed the said claims.

Subsequent proceedings:

9. After having heard the matter on 11.01.2022, petition No. 179/MP/2020 was disposed of on 11.02.2022 holding that:

> *"The Commission further observes that as per the above quoted provisions, on occurrence of an event of Change in Law, the affected party, in the present case the Petitioner, and other parties, in the present case the Respondents/procurers, are to settle the Change in Law claims among themselves and approach the Commission only in terms of Rule 3(8) of the Change in Law Rules.*
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> *In view of the above, the Commission holds that the Petitioner may approach the Respondents/ procurers for settlement of Change in Law claims amongst themselves in terms of the Change in Law Rules and thereafter approach the Commission in terms of Rule 3(8) of the said Rules."*

10. **Order of Appellate Tribunal dated 05.04.2022:** The Appellate Tribunal passed its judgment, setting aside the Orders of this Commission challenged in O.P No. 1 of 2022

and Appeal Nos. 116, 74, 75 & 76 of 2022, which originally sought compensation on account of Change in Law events, and were disposed by this Commission. Appellate Tribunal passed the following decision in the aforementioned appeals:

> *"72. For the foregoing reasons, we find the impugned orders of the Central Commission applying the CIL Rules to matters pending before it for adjudication under Section 79(1)(f) of Electricity Act on the date of coming into force of said rules wholly erroneous, improper and bad in law. The said orders are thus set aside. In the result, the proceedings in claim cases (in which impugned orders were passed – and that includes the orders dated 04.02.2022 in the Original Petitions) remain inchoate. The Central Commission is duty-bound to consider each of them on the merits of the claims and adjudicate in accordance with law on the dispute(s) in proper exercise of its jurisdiction under Section 79 of the Electricity Act. It is directed to proceed to do so expeditiously.*
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> *73. We would be failing in our duty if we do not also note here (as also indicated earlier in this judgment) that prior to the decisions which were challenged by the captioned petitions/appeals, as indeed subsequently, the Central Commission has been taking the impugned approach on pending claims which has and would have resulted in a large number of such claims being unduly scuttled, non-suiting the parties similarly placed as the petitioners/appellants herein. If the factual back-ground is same as in the cases at hand, such decisions would also constitute want of performance of statutory function by the Central Commission meriting an appropriate direction by this tribunal. This would be constrained to seek remedy against such order, if it thereby feels aggrieved. The remedies available in law include approaching the Central Commission for review or this tribunal ordinarily by an appeal.*
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> *74. Such that the affected parties do not suffer on account of faulty approach of adjudicatory authority, and this tribunal is not flooded by appeals raising identical issues against such other decisions as above, rendered in similar fact-situation by the Central Commission, it would be appropriate that it be asked to properly and fully perform its statutory function by exercise of its review jurisdiction, suomotu, in all similarly-placed claims for compensation founded on change in law events where similar decisions have been taken by the Central Commission after coming into force of CIL Rules on 22.10.2021 and, if such decisions are found running afoul of the view taken by this tribunal by this judgment, to vacate the same and restore the concerned Claim cases to its file and complete the process of adjudication thereupon in accordance with law. Needful action in above nature shall be initiated by the Central Commission within four weeks of this judgment. Of course, review can be undertaken even at the instance of the parties in question should they approach the Commission on their own. We may add that these*

directions are without prejudice to the remedy, if any, already pursued or intended to be pursued by the concerned parties vis-à-vis other such cases."

Hearing dated 09.05.2022:

11. The matter was listed for hearing on 09.05.2022 where the Commission made the following observations:

> *4. After hearing the suggestions put forth by the learned senior counsels and the learned counsels for the parties, the Commission noted that the as per the directions of the APTEL in judgment dated 5.4.2022 in OP No. 1 of 2022 and Ors., in particular at paragraph 74, it would be apt to pass suo-motu order(s) in the Petitions which were disposed by the Commission by applying the Change in Law Rules. However, for the Petitions where the dismissal orders of the Commission have already been set aside by the APTEL in paragraph 72 of the judgment, there would be no need to pass any suo-motu order(s). Accordingly, the Commission indicated that it will proceed to take the appropriate course of action in this regard, as to the various request of the learned counsel for the parties, inter alia, permission to file additional affidavit and impleadment of distribution licensees, etc., the Commission observed that similar matters are listed for hearing on 17.5.2022, the Commission will take a view in this regard thereafter after proper bunching of the Petitions or independently.*

Order on 14.06.2022 in 8/SM/2022

12. Pursuant to the decision of the Appellate Tribunal, the present Petition, along with several others were re-listed before this Commission where it passed the following Order:

> *"3. After hearing the suggestions put forth by the learned senior counsels and the learned counsels for the parties, the Commission is of the view that as per the directions of the APTEL in judgment dated 5.4.2022 in OP No. 1 of 2022 and Ors., in particular at paragraph 74, suo-motu order(s) are required to be issued to restore the petitions which were disposed by the Commission by applying the Change in Law Rules but which were not challenged before the APTEL. However, for the Petitions where the orders of the Commission have been set aside by the APTEL in terms of para 72 of the judgment, the petitions shall be restored on the records of the Commission for further necessary action.*
>
> *4.Accordingly, as per the direction of the APTEL, in exercise of our suo-motu power of review, we hereby restore the Petitions mentioned in paragraph 1 above, on the record of the Commission at same stages, as were existing prior to the disposal of petitions."*

Hearing on 20.10.2022:

13. The matter was listed for hearing on 20.10.2022 where the Commission made the following observations:

> *The learned counsel for the Petitioner submitted that the present Petition has been filed seeking declaration that introduction/enactment of Goods and Services Tax amounts to a Change in Law, which has resulted in additional expenditure to be incurred by the Petitioner and to compensate/restitute the Petitioner on account of such Change in Law along with carrying cost. The learned counsel submitted that while there cannot be any dispute as to the enactment of GST is a Change in Law and the Petitioner's entitlement to compensation,* ***the remaining outstanding issues, namely, GST on O&M, cut-off date for GST compensation and carrying cost, have now been settled in terms of the judgment of Appellate Tribunal*** *for Electricity (APTEL) vide judgment dated 15.9.2022 in Appeal Nos. 256 of 2019 and Ors. in the matter of Parampujya Solar Energy Pvt. Ltd. v. CERC and Ors. ('Parampujya Judgment').*
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> *2. Learned senior counsel for the Respondent, SECI submitted that insofar as the issue of the cut-off date for GST compensation is concerned, in the Parampujya Judgment, the APTEL has directed the Commission to examine the prudence of such expenditure. The learned senior counsel further submitted that in case of 'supply of goods', the date of issue of invoice cannot be after the date of supply of goods as per the Section 12, Section 14 and Section 31 of the CGST Act, 2017.* ***The learned senior counsel further submitted that while the Petitioner has agreed to the annuity mode of payment at discount rate of 10.41% as approved by the Commission vide order dated 20.8.2021 in Petition No. 536/MP/2020 filed by SECI, the Respondent, MSEDCL has computed the annuity by considering the discount rate of 9-9.35% and a period of 25 years instead of 13 years****.*
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> *3. In rebuttal, the learned counsel for the Petitioner submitted that the Petitioner in its rejoinder has already provided the justification in the raising of invoices after the COD of its project. The learned counsel submitted that neither any review petition nor any appeal has been filed by MSEDCL against the Commission's order dated 20.8.2021 in the Petition No. 536/MP/2020 and therefore, the principle laid down in the said order ought to be applied in the case of the Petitioner.*
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> *4. Based on the request of the learned senior counsel and learned counsel for the parties, the Commission permitted the parties to file their respective written submissions, if any, within two weeks with copy to the other side.*
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> *5. Subject to the above, the Commission reserved the matter for order.*

Reply dated 12.09.2022 filed by SECI:

14. The Respondent has submitted as under:

a) The claims raised by the Petitioner are covered by decisions dated 27.03.2020 in Petition No.388/MP/2018 and 395/MP/2018 and decision dated 20.08.2021 in Petition No. 536/MP/2020 of the Commission.

b) PPAs in the present case do not have any provision dealing with restitutionary principles of restoration to same economic position as alleged or otherwise.

c) The Petitioner will be entitled to relief on account of GST as Change in Law subject to satisfaction of the conditions mentioned in Article 12 of the PPA.

d) The Petitioner is not entitled to sum of Rs. 48,88,44,968 (for construction period) as prayed for or otherwise. SECI has reconciled and evaluated the GST claims submitted by the Petitioner till Commercial Operation Date as Rs. 47,53,73,665 (in aggregate of 4 projects of the Petitioner) subject to evaluation by the Buying Entities.

e) In terms of Article 9 of the PPAs, the commercial supply of power from the generation station under the PPAs is from the date of Commercial Operation of the power plant. This Commission may be pleased to clarify the Cut-off Date for considering the GST impact as the actual Commercial Operation Date.

f) The Commission may issue directions to the Buying Entities/ Discoms, to make payment towards the reconciled and evaluated claims of the GST payable by SECI to Petitioner, on a back to back basis under the PSA in a time bound manner. In this regard, SECI has placed its reliance on the decision dated 13.05.2021 passed by the Commission in Petition No.73/MP/2020 along with I.A. No.21 of 2021 in the matter of *SB Energy One Private Limited –v- Solar Energy Corporation of India Limited and Another.*

Reply dated 21.09.2022 of MSEDCL (Respondent No. 2)

15. MSEDCL has submitted as under:

Annuity Model & Discounting Rate:

a) In the order dated 24.01.2021 (in Petition No. 212/MP/2018 (*M/s. Parampujya Solar Energy Pvt. Ltd* (PSEPL)), Petition No. 67/MP/2019 (*M/s Fermi Solar farms Pvt Ltd* (FSPV)), Petition No. 177/MP/2019 (*M/s JBM Solar Power Maharashtra Pvt Ltd*),

& Petition No. 70/MP/2019 (*M/s Solar Edge Power and Energy Pvt Ltd*)), this Commission had though directed for payment of compensation on account of introduction of GST within 60 days, at the same time had also directed that alternatively, the Petitioners and the Respondents may mutually agree to a mechanism for the payment of such compensation on annuity basis spread over a period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs.

b) Pursuant to the said order, SECI vide letter dated 05.03.2020, had intimated MSEDCL to attend the meeting on 13.03.2020 in respect to compliance of Orders of this Commission and jointly devise the payment methodology and to take up the doubts and clarifications of buying entities to settle out the GST claims of the Solar Power Developers.

c) In the aforementioned meeting, "Annuity Model" has been discussed by SECI for the payment of GST and vide email dated 04.04.2020, SECI shared the Annuity Model, spreading the Annuity over a period of 13 years. However, MSEDCL decided to spread the impact of Change in Law over the period of Power Purchase Agreement i.e., 25 years on Annuity basis and the same has been communicated to SECI in the aforementioned meeting as well.

d) While calculating Annuity amount, SECI has considered the discounting rate of 10.41% (8.41%+2%) for entire period of 13 years as per CERC order dated 19.03.2019 i.e. Average of 6 months SBI MCLR rate plus 200 basis points. However, since April 2019, MCLR is continuously declining on monthly basis from 8.55% to 7% and hence, MSEDCL has calculated the interest rate as per the methodology given in CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2017 i.e., average of last six months of SBI MCLR plus 200 basis points on the date of order and accordingly MSEDCL discounting rate comes to 9 or 9.53% as applicable.

e) Instead of accepting annuity model of SECI, annuity is to be calculated considering the fixed discounting rate of 9.53% for PSEPL & FSPV and discounting rate 9% for

JSPMPL & SEPEPL for remaining PPA period and the same should be reconciled at year end with actual MCLR for any under recovery and over recovery.

f) Due to the differences in the methodologies adopted by the DISCOMS, SECI has filed a Petition No. 536/MP/2020 before this Commission, to determine the methodology for the payment of Annuity and to clarify the cut-off date for payment of GST claims.

g) MSEDCL be permitted/ allowed to spread the impact of Change in Law over the period of Power Purchase Agreement i.e., 25 years on Annuity.

h) The annuity may be calculated according to the methodology given in CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2017 i.e. average of last six months of SBI MCLR plus 200 basis points on the date order which reflects the actual market trend of interest rate.

i) Furthermore, the liability of payment on account of impact of GST on procurement of Solar PV panels and associated equipment including related services by the Petitioners shall lie with the Respondents till the Commercial Operation Date (COD) only.

Rejoinder filed by the Petitioner on 24.09.2022 & 14.10.2022

16. The Petitioner filed its Rejoinder against the reply submitted by SECI & MSEDCL. As some of the averments raised by the Petitioner in its Rejoinder has already been stated in the Petition, the same is not being reiterated for the sake of brevity. Additionally, the Petitioner submitted as follows:

Re. GST on goods and services (including on O&M) as Change in Law and allowance of carrying cost on Change in Law claims

a) The Tribunal in its recent Judgment dated 15.09.2022 in A. No. 256 of 2019 titled *Parampujya Solar Energy Pvt. Ltd. & Anr. v. CERC & Ors.* (Judgment dated 15.09.2022) has held that GST compensation must be paid for O&M expenses.

b) The Tribunal had also held that conditions not expressed in Change in Law cannot be

read into/ added by this Commission. Further, the Commissions cannot whittle down the scope of Change in Law provisions [The Tribunal's Judgment dated 27.04.2021 titled *CGPL v. CERC & Ors.* in Appeal Nos. 182 of 2017 and 154 of 2018]. Furthermore, the business decisions of the claimant cannot be looked into by a regulator for denying Change in Law relief [The Tribunal's Judgment dated 20.09.2021 titled TPREL v. MERC &Anr. in Appeal No. 215 of 2021] In view of the Judgments of the Tribunal, the relief for O&M ought to be allowed on actuals.

c) TPREL is entitled to "*Carrying Costs*" for the cost incurred by it due to the Change in Law events. Carrying cost is the compensation for time value of the money. Any compensation for Change in Law is incomplete if it does not come with carrying cost, which is inherent to the very provision and the concept of 'relief' to be granted to a generating company. The purpose of relief for a Change in Law provision is to ensure that the affected party is restored to the same economic position as if such Change in Law had not occurred. Restitution is therefore inherent to compensation on account of Change in Law.

d) The Change in Law provisions in the present case is pari-materia the change in law provision in the PPAs before the Tribunal. In any case, carrying cost is simply in the nature of compensation for money denied at the appropriate time, as held by various fora in *Irrigation Department, Govt. of Orissa Vs. G.C. Roy*, *South Eastern Coalfields Ltd. Vs. State of M.P. & Ors.*, *Adani Power Limited* vs. *Gujarat Electricity Regulatory Commission & Ors*. *North Delhi Power Ltd* vs. *DERC* 2010 ELR (APTEL) 0891, *Tata Power Company Ltd* vs. *Maharashtra Electricity Regulatory Commission*, *CGPL v. CERC & Ors.*

e) SECI's reliance on the Tribunal's Judgment dated 13.04.2018 in Appeal No. 210 of 2017 titled *Adani Power Limited v. CERC &Ors.*, is sub-silentio qua carrying cost for the PPAs in the present case. This has also been clarified by the Tribunal in its Judgment dated 15.09.2022.

f) In view of the aforesaid, TPREL is entitled to carrying cost for the period from the date of the effect of the Change in Law event.

Re. TPREL's response regarding disallowance by SECI

g) The issue of Change in Law compensation for invoices raised after COD of a project is no longer res integra. The Tribunal vide its Judgment dated 15.09.2022 categorically held that restriction of non-grant of relief post-COD of the project cannot be read into the Change in Law provision of the PPAs.

h) As such, TPREL ought to be granted compensation for Change in Law qua invoices raised post COD as well. Without prejudice to the same, TPREL submits that while the invoices were raised post-COD, the material was received prior to COD.

i) It is a settled principle of law that once an event is held to be Change in Law, relief must follow on actuals to restitute parties and that Regulatory Commissions are not empowered to add conditions to/ whittle down scope of Change in Law provisions in PPAs [*Energy Watchdog v. CERC*: (2017) 14 SCC 80 (para 57); *Uttar Haryana Bijli Vitaran Nigam Limited v. Adani Power Limited* (2019) 5 SCC 325 (9, 10 & 13); and The Tribunal's Judgment dated 27.04.2021 titled *CGPL v. CERC & Ors.* in Appeal Nos. 182 of 2017 and 154 of 2018.

Re. SECI's obligation to restitute TPREL is not contingent on beneficiaries compensating SECI for the same

j) SECI has not passed on all the financial and commercial risks to the distribution licensees and the same vests with SECI and SECI continues to be contractually liable for all its obligations under the PPA. In any case, whether the intermediaries are liable to make payment to the project developer is no longer res-integra. This Commission has held that payment obligation of an intermediary is not dependent upon the payment received by it from the beneficiary distribution licensee. Thus, SECI continues to be obligated to make the necessary payment on account of Change in Law.

k) As such, it is submitted that while SECI may claim TPREL's compensation from the beneficiaries on a back to back basis, the same is not a precondition for SECI to

compensate TPREL under the present PPAs.

Annuity payment

l) This Commission passed a detailed order in Petition 536/MP/2020 providing the mechanism for payment of compensation to solar power developers. The principles laid down by this Commission in its Order dated 20.08.2021 in Petition No. 536/MP/2020 ought to be applied in the present case as well.

Written Submissions by the Petitioner dated 03.11.2022

17. The Petitioner has reiterated their submissions made already in their Petition and Rejoinder. So, it is not being reiterated for the sake of brevity. Additionally, the Petitioner has submitted as under:

a) During the course of the hearing, a statement was made by the counsel appearing on behalf of SECI that, stay has been granted by the Supreme Court in a connected matter, being *Coastal Gujarat Power Limited's case*. On 14.10.2022, the Hon'ble Supreme Court passed an Order staying the Tribunal's Judgment dated 28.04.2021 in Appeal No. 172 of 2017 & Batch on a condition that the distribution licensees are requested to deposit the balance amount with the Registry within a period of 4 weeks.

b) The stay has not become operational as to the best of TPREL's knowledge and the balance amount has not been deposited with the Supreme Court's registry. Even otherwise, it is submitted that:-

(i) The said directions are issued by the Hon'ble Supreme Court in terms of Order 41 Rule 1 of CPC which state that if an appeal is preferred against a money decree, the appellant is required to deposit the disputed amount or furnish a security, as the court may deem fit.

(ii) In the interim Order dated 14.10.2022, the Hon'ble Supreme Court has not returned any finding on the merits of the Tribunal's findings or merits of the

appeal preferred by the appellant therein.

(iii) In any case, it is settled law that a stay does not wipe out the Judgment from existence and the principles held therein are still applicable (*Shree Chamundi Mopeds Limited* v. *Church of South India Trust Association*, (1992) 3 SCC 1 – Para 10).

(iv) Furthermore, to the best of TPREL's knowledge no appeal has been filed against the *Parampujaya Case*.

c) This Commission has considered the interest rate for long term loan (i.e. 10.41%) in its Order dated 20.08.2021 in Petition No. 536/MP/2020, which may be considered for computing the carrying cost. Alternatively, the Commission may consider the normative rate of interest provided in the CERC Tariff Regulations, 2019, which is one-year marginal cost of lending rate (MCLR) of the State Bank of India issued from time to time plus 350 basis points, for computing the carrying cost.

Reconciliation of the amount claimed and payment of compensation on invoices issued after COD

d) In terms of this Commission's directions, TPREL and SECI have reconciled the amount payable as under:

S. No.	Amount Claimed	Amount Allowed	Amount Disallowed	Reason for disallowance
Ananthapuramu Plot No. 4				
1.	23,15,19,604	22,68,81,114	46,38,490	Out of Rs. 46.38 Lacs for an amount of Rs. 43.57 Lacs, the material was delivered before COD while the invoices were raised after the COD. The balance invoicing of amounting to Rs 2.80 lacs (i.e. out of invoices raised post COD) pertains to civil and general Work.
Ananthapuramu Plot No. 5				
2.	16,44,20,933	15,92,03,894	52,17,039	Out of Rs. 52.17 Lacs for an amount of Rs. 50.54 Lacs, the material was delivered before COD while the

S. No.	Amount Claimed	Amount Allowed	Amount Disallowed	Reason for disallowance
				invoices were raised after the COD. The balance invoicing amounting to Rs 1.59 Lacs pertains to civil and general works for which services have been provided post COD.
Palaswadi				
3.	9,00,35,711	8,92,88,657	7,47,054	Out of Rs. 7.47 Lacs, the material for Rs. 6.02 Lacs was delivered before COD while the invoices were raised after the COD. The balance invoicing pertains to civil work.
Charanka				
4.	28,08,720	0	28,08,720	Invoices issued after COD
Total	**48,87,84,968**	**47,53,73,665**	**1,34,11,303**	

e) Further, out of total amount of Rs. 1.34 Crore which has been disallowed by SECI, for a sum of Rs. 1.04 Crore, the supply was completed before COD but invoices were issued after COD, whereas the remaining amount of Rs. 20 lacs are towards civil work.

f) As regards the issue that the invoices cannot be raised after 30 days from the date of supply in accordance with Section 12, 14 and 31 of CGST Act, 2017 read with the rules and regulations made thereunder, it is submitted that these provisions provide for the time within which the invoices ought to be issued. In case of delay in issuing the invoices, at best, a penalty is payable in terms of Sections 122 and 125 of the CGST Act, 2017. Mere delay in issuing the invoices under the GST Laws does not invalidate the supplies or that the GST becomes unpayable. Further, in the facts of the instant case, the GST amount has been deposited with the tax authority and no penalty has been levied. Hence, as long as the additional tax has been paid by TPREL, the same ought to be paid to TPREL.

g) In any case, the issue of Change in Law compensation for invoices raised after COD of a project is no longer res integra. The Tribunal vide its Judgment dated 15.09.2022 in *Parampujaya's case* categorically held that restriction of non-grant of relief post-

COD of the project cannot be read into the Change in Law provision of the PPAs. If SECI's submissions are accepted, then the Tribunal's findings in *Parampujaya's case* would become otiose. In any case, TPREL has demonstrated that the material was delivered prior to COD. In view of the above, it is submitted that TPREL is entitled to payment of compensation for all the invoices which were raised after COD.

SECI's obligation to restitute TPREL is not contingent on beneficiaries compensating SECI for the same

h) SECI has submitted that its payment obligation to TPREL is dependent upon SECI receiving the payment for the same from the beneficiary discoms. Any payment from SECI to TPREL is not contingent on SECI receiving payment from beneficiary discoms. This is evident from the reading of Recitals, Articles 2 (Term of the Agreement), 4.3 (Purchase and Sale of Contracted Capacity), 4.4 (Right to Contracted Capacity and Energy), 10 (Billing and Payment) and 13 (Event of Default and Termination).

i) In any case, whether the intermediaries are liable to make payment to the project developer is no longer res-integra. As stated above, Judgment dated 15.09.2022 in *Parampujaya's case*, the Tribunal has held that any payment from SECI to TPREL is not contingent upon SECI receiving the same from beneficiaries.

Payment on Annuity Basis

j) SECI and the Petitioner agree that the payment of compensation to TPREL would be made on annuity basis in accordance with the Commission's order dated 20.08.2021 in Petition No. 536/MP/2020. While MSEDCL had sought a different methodology of computing the annuity payment, during the hearing on 20.10.2022, MSEDCL had orally agreed that the annuity payment would be made in accordance with the Commission's Order dated 20.08.2021 in Petition No. 536/MP/2020.

Written Submissions by SECI (Respondent No. 1)

18. SECI has filed its Written Submissions on 04.11.2022. Major portion of Respondents submission has been already covered in their Reply so it is not being reiterated here for the sake of brevity. Additionally, SECI has submitted as under:

Impact of GST on Operation and Maintenance ('O&M') expenses

a) Unlike the *CGPL case*, the PPAs in the present case do not recognize O&M contracts. There is no prescription under the PPAs or the bidding documents regarding the appointment of contractors or sub-contractors including O&M Contractors for fulfilling obligations of the Petitioner under the PPAs.

b) Article 12 of the PPA deals with Change in Law. Article 12 does not deal with the relationship between the Petitioner and its Contractors, particularly, those contractors who render O&M services. The services, which the Petitioner may avail from various agencies appointed by the Petitioner or such agencies may in turn secure from others are not to be considered for the purpose of Change in Law claims against SECI or on a back to back basis against DISCOMs.

c) In terms of the provisions of the PPA, even dealing with Force Majeure, the affected party recognized is only the Petitioner and not its contractors, sub-contractors etc. In this regard, Article 11.2 of the PPA defines an 'Affected Party' to only include the SPD and SECI whereas in the *CGPL case*, the affected party under the Force Majeure provision covers not only *CGPL case* but also includes contractors etc.

d) Another important distinguishing feature of the present case in comparison to *CGPL case* is the scope of the change in law provision. The Change in Law provision (Article 13) in the CGPL PPA is different from Change in Law provision contained in the PPA executed with the Petitioner. Article 13 of the CGPL PPA provides for both 'Construction Period' and 'Operation Period' unlike the present case.

e) There is no provision in the PPA for servicing of any additional capital cost for capital investments done by the Petitioner at any time after the COD of the power projects i.e. after the construction period is over. Any up-gradation or improvement

or repair or changes that are undertaken by the Petitioner at any time after the COD and during the Operation period are entirely to the account of the Petitioner to be undertaken at the cost and expense of the Petitioner with no liability on SECI or the Buying Entities.

f) Any additional cost that may be allowed on account of Operation and Maintenance expenses would ultimately be passed onto the distribution licensee/Buying Entity on account of the back to back transactions under the PPA and PSA.

g) It is only in case of delay in making the payment as per the Order dated 20.08.2021 of the Commission in Petition No.536/MP/2020, the issue of Late Payment Surcharge in terms of Article 10.3.3 of the PPA read with PSA would arise.

Analysis and Decision:

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

20. The issues that arise for our consideration are as follows:

Issue No.1: *Whether enactment of the GST Laws is an event under Change in Law under Article 12 of the PPA?*

Issue No.2: *Whether compensation (during construction period and Operating period) on account of implementation of GST be payable for the invoices issued after the Commercial Operation Date?*

Issue No. 3: *What should be the discount rate for calculation of Annuity methodology should be considered for payment of compensation (if any) on account of Change in Law?*

Issue No. 4: *Whether 'Carrying Cost' can be granted to the Petitioner towards compensation for Change in Law during the Operating Period?*

21. Now we discuss and analyse the issues one by one.

Issue No.1: Whether enactment of the GST Laws is an event under Change in Law under Article 12 of the PPA?

22. The Petitioner has submitted that the enactment of the GST laws constitutes Change in law in terms of Article 12 of the PPA.

23. Article 12 of the PPA stipulates as under:

"12. ARTICLE 12: CHANGE IN LAW

12.1 Definitions

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

12.1.1 "Change in Law" means the occurrence of any of the following events after the ***Effective Date*** *resulting into any additional recurring/ non-recurring expenditure by the SPD or any income to the SPD:*

- *The enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of* ***any Law****, including rules and regulations framed pursuant to such Law;*
- *A change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such law or any Competent Court of Law;*
- *The imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;*
- *A change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the SPD;*
- *Any change in tax or introduction of any tax made applicable for supply of power by the SPD as per the terms of this Agreement.*

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

12.2 Relief for Change in Law

12.2.1 The aggrieved Party shall be required to approach the Central

Commission for seeking approval of Change in Law.

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

24. We observe that during hearing dated 04.06.2020, the Learned senior counsel of SECI has submitted that the issue involved in the Petition stands covered by the Commission's earlier Order dated 27.03.2020 in Petition Nos. 388/MP/2018 and 395/MP/2018 titled *Wardha Solar (Maharashtra) Private Limited v. Solar Energy Corporation of India Limited & Ors.* relating to Change in Law arising out of imposition of GST/ Safeguard Duty. SECI also submitted that in terms of MNRE letters, the parties will carry out reconciliation of the Petitioner`s claims in accordance with the Commission's earlier Order on the subject matter. Subsequently, MSEDCL also joined the meeting on 13.03.2020 to jointly devise the payment methodology and to take up the doubts and clarifications of buying entities to settle out the GST claims. We note that contracting parties have already agreed to the fact that the enactment of the GST laws is 'Change in Law event' in terms of the PPAs, as also already decided by the Commission in various previous Orders. Therefore, nothing remains to be adjudicated in this regard.

25. The issue stands decided accordingly.

Issue No. 2: Whether compensation (during construction period and Operating period) on account of implementation of GST be payable for the invoices issued after the Commercial Operation Date?

AND

Issue No. 3: What should be the discount rate for calculation of Annuity methodology should be considered for payment of compensation (if any) on account of Change in Law?

AND

Issue No. 4: Whether 'Carrying Cost' can be granted to the Petitioner towards compensation for Change in Law during the Operating Period?

Since Issue No. 2, Issue No. 3 and Issue No. 4 are interlinked; they are being taken up together for discussion. The Petitioner has submitted that it is entitled to a sum of Rs. 48,88,44,968/- along with the carrying cost towards compensation for Change in Law

during the construction period and sum of Rs. 3.06 Crores along with the carrying cost towards compensation for Change in Law during the Operating Period. ***Per Contra,*** SECI has submitted that the Petitioner is not entitled to sum of Rs. 48,88,44,968/- (for construction period). SECI has reconciled and evaluated the GST claims submitted by the Petitioner till Commercial Operation Date as Rs. 47,53,73,665/- (in aggregate of 4 projects of the Petitioner) subject to evaluation by the Buying Entities.

26. As regards the discount rate for annuity payment, the Petitioner has submitted that while it has agreed to the annuity mode of payment at discount rate of 10.41% as approved by the Commission vide order dated 20.8.2021 in Petition No. 536/MP/2020 filed by SECI, the Respondent, MSEDCL has computed the annuity by considering the discount rate of 9-9.35% and a period of 25 years instead of 13 years. *Per Contra*, MSEDCL has submitted that while calculating annuity amount, SECI has considered the discounting rate of 10.41% (8.41%+2%) for the entire period of 13 years as per CERC Order dated 19.03.2019 i.e. Average of 6 months SBI MCLR rate plus 200 basis points. However, since April 2019, MCLR is continuously declining on monthly basis from 8.55% to 7% and hence, MSEDCL has calculated the interest rate as per the methodology given in the CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2017 i.e., average of last six months of SBI MCLR plus 200 basis points on the date of order and accordingly MSEDCL discounting rate comes to 9 or 9.53% as applicable.

27. During the course of hearing on 20.10.2020, the Petitioner submitted that outstanding issues, namely, GST on O&M, cut-off date for GST compensation and carrying cost, have been settled in terms of the judgment dated 15.09.2022 in the matter of *Parampujya Solar Energy Pvt. Ltd. v. CERC and Ors.* ***Per Contra,*** SECI submitted that on the cut-off date for GST compensation, APTEL in the *Parampujya Judgment*, has directed the Commission to examine the prudence of such expenditure. Further SECI submitted that in case of 'supply of goods', the date of issue of invoice cannot be after the date of supply of goods as per the Section 12, Section 14 and Section 31 of the CGST Act, 2017.

28. We observe that APTEL vide itsjudgement dated 27.04.2021 in A. No. 172 of 2017 and A.No.154 of 2018 (***Coastal Gujarat Judgement***) has held as under:

> *67.**It is argued that the operation and maintenance of the plant is the responsibility of the appellant and if the appellant seeks to employ services of other agencies, the same cannot increase the liability of the Procurers; this was a commercial decision and choice of the appellant; and that if the appellant had not employed services of outside agencies, there would have been no impact of the alleged changes of tax rates.***
>
> *68.**We find no substance in the above submissions**. The work contractors are engaged by the appellant within its discretion and there is no inhibition in PPA in such regard. In fact, it is pointed out by the appellant, and rightly so, that Article 7 of the Model PPA which was a part of the RFQ documents had envisaged that the generator (Seller) alone shall be liable to operate and maintain the power station at its own cost but, in the final PPA that was executed between the parties, the clause to such effect was removed, this clearly indicative of the common understanding of the parties that the generator (CGPL) would not be solely responsible for O&M, the definition of 'Project Documents' read with 'O&M contracts' contemplating that a third-party O&M contractor might be appointed by it (CGPL).*
>
> *69. It is wrong to argue that because the appellant stands in the capacity of the Principal in relation to the work contractors engaged by it, it is responsible for the action (or inaction) on their part in such matters as have financial implication for the Procurers because the option exercised by the contractor is not a change in law but part of the commercial and business decision and has to be dealt inter se the former two**. We reject this plea against claim under consideration here for the simple reason the doctrine of agency cannot be invoked in this context. It is not shown that in matters of State revenue, the choices made by the contractors could have been controlled by the appellant.***
>
> *....*
> *....*
>
> *90. The respondents defend the impugned decision arguing that the Commission has duly allowed the claim of change in law in respect of the levy of Swatch Bharat Cess and Krishi Kalyan Cess in respect of such services as are linked to the business of generation and sale of electricity, such relief being not admissible in respect of other services since under Articles 13.1.1 and Article 13.2(b) read with Clause 4.7 of the Guidelines any change in law impact is confined to change in revenues and costs from the business of selling electricity by the Seller to the Procurers. Reference is made to the judgment dated 19.04.2017 of this tribunal in*

Appeal No. 161 of 2015 in Sasan Power Limited v. Central Electricity Regulatory Commission and Others. The respondents submit that there may be various activities carried out by the appellant as a commercial decision but which are neither necessary nor concerned with the business of selling electricity. It is argued that the appellant had failed to demonstrate as to how the other services claimed have an impact on the cost of or revenue from the business of selling electricity by it to the Procurers. At the same time, it is stated that the services claimed by CGPL, except in relation to transportation of goods (coal), are not related to the business of selling electricity. The submission also is that there has to be some benefit to the procurers or necessity for such services. The respondents further aver that the operation and maintenance of the power plant is the responsibility of Appellant and the fact that the appellant chose to employ services of other agencies cannot increase the liability of the Procurers.

91. It is not disputed that the appellant (CGPL) is a project specific Special Purpose Vehicle (SPV) set up solely for the purpose of generating and supplying electricity exclusively to the Procurers in accordance with the PPA. It engages in no other business undertaking. ***All services availed by CGPL are undoubtedly used for its sole objective of generating electricity for supply to the Procurers under the PPA. The increased cost towards Krishi Kalyan Cess and Swachh Bharat Cess affects the cost of the business of the appellant for generation and sale of electricity. The twenty services left out by CERC also are connected to the commercial activities of the appellant adding to its cost of production and supply. In this view, there was no justification for disallowance of the claim for additional financial burden on other services covered under Swachh Bharat Cess and Krishi Kalyan Cess contrary to Article 13 of the PPA.***

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

*93.****We are not impressed with the plea of the respondents that the qualifying requirement under Article 13 is that the Change in Law event must have an impact on the cost of, or revenue from, the activity of generation of electricity.***

This argument is based on selective reading of the text of the clause. The contract (PPA), by Article 13, refers to the "business of selling electricity". The compensation envisaged here cannot be restricted to the activity of "generating electricity". *The expression "business" has a very wide connotation. It is defined as an activity carried on continuously and systematically by a person by the application of his labour or skill with a view to earning an income [see Mitra's Legal & Commercial Dictionary (Sixth Edition)]. Entire gamut of activities connected to the generation, wheeling etc of electricity will have to be treated as covered by the expression "business of supply of electricity".*

29. We observe that APTEL vide its judgement dated 15.09.2022 in the ***Parampujaya Judgement*** reviewed its observations in the *Adani Power Ltd. case* and *GMR Warora case* and has held as under:

> *65. It is the argument of the contesting respondents that the claim for compensation under the PPAs at hand is contingent upon the decision in the first instance of the Central Commission on the admissibility and once such claim has crystallized upon approval of the claim of change in law, compensation from the date of such approval only can be granted, there being no provision for carrying cost being claimed for the anterior period. Referring to the expression "provide relief", as appearing in Article 12.2.2 of the PPAs, the respondents submit that the same cannot be interpreted to mean restitution of the kind claimed in the present appeals.*
>
> *66. To put it simply, the controversy at hand requires to be addressed on the basis of interpretation to be put on the key words "provide relief" consequent to change in law appearing in Article 12.1.1. It may be noted at this very stage that the language employed in the PPAs at hand, using the above noted expression, is materially distinct from the one seen in corresponding Article 13 on change in law in Gujarat Bid-01 PPA which was subject matter of denial of carrying cost in the cases of Adani Power Ltd(supra) and GMR Warora Ltd.(supra). Concededly, however, the words "the purpose of compensating the party affected by such change in law is to restore … the affected party to the same economic position as if such change in law had not occurred", as appearing in the Haryana PPA are missing here.* ***The question that arises is as to whether this renders the PPAs at hand one which do not at all contain the restitutionary provision. The answer to this question, in our considered view, depends on the construction that is to be placed on the words "provide relief".***
>
> *…*
>
> *…*
>
> *69. This principle has been reiterated and consistently applied in subsequent decisions by the Supreme Court, illustratively in judgments reported as Torrent Power Limited v. GERC &Ors., 2019 SCC OnLine APTEL 110; Uttar Haryana*

Bijli Vitran Nigam Ltd. &Anr. v. Adani Power (Mundra) Ltd. &Anr. 2022 SCC OnLine SC 1068; and Vidarbha Industries Power Limited v. Axis Bank Limited 2022 SCC OnLine SC 841. Pertinently, in Vidarbha Industries (supra), the court held that ***"the law must ensure that time value of money is preserved, and that delaying tactics in these negotiations will not extend the time set for negotiations at the start"****.*

70. The appellants SPPDs rightly point out that principle of time value of money has been recognized as an inherent attribute of "financial debt" by the provision contained in Section 5(8) of the Insolvency Bankruptcy Code, 2016. ***Further, it needs to be noted here that principle of restitution is now part of the regime on change in law reflecting public policy, as introduced by the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 providing as under****:*

> "3. Adjustment in tariff on change in law.
> (1) On the occurrence of a change in law, the monthly tariff or charges shall be adjusted and be recovered in accordance with these rules to compensate the affected party so as to restore such affected party to the same economic position as if such change in law had not occurred."

71. ***Restitution is a principle of equity which is generally invoked by the adjudicatory authorities – Courts and Tribunals – to render substantial justice*** *and, in this context, we may quote the following observations of Supreme Court in judgment reported as South Eastern Coalfields Ltd v. State of Madhya Pradesh &Ors. (2003) 8 SCC 648:*

....

72. As ruled in above mentioned case, absence of prohibition in law or contract against award of interest to recompense for delay in payment is also significant. As already quoted earlier, ***in the case of Uttar Haryana Bijli Vitran Nigam Ltd(supra), the Supreme Court has upheld the view that in terms of restitutionary principle, the affected party is to be given the benefit of restitution "as understood in civil law".***

73.The claim arising out of change in law provisions, across all kinds of PPAs under bidding route, is essentially a claim for compensation, the objective being to relieve the affected party of the impact of change in law on its revenues or cost or by way of additional expenditure. ***The word "compensation" simply means anything given to make things equal in value, anything given as an equivalent, to make amends for loss or damage****.*

...
...

75. The cardinal rule of interpretation is that words have to be read and understood in ordinary, natural and grammatical meaning. [S. Ganapathraj Surana v. State of T.N. 1993 Supp (2) SCC 565]. ***The crucial words are "provide relief".*** *The word relief is defined by Black's Law Dictionary as under:*

…

…

78. ***The use of the word "relief" in the context of adjudicatory process, simply means the remedy which the adjudicatory forum may afford "in regard to some actual or apprehended wrong or injury"*** *or something which a party may claim as of right, or making the affected party "feel like easing out of … hardship". [Sarsuti v. Kunj Behari Lal, 1883 SCC OnLine All 85; Santhammav. Kerala State 2019 SCC OnLine Ker 1265; Commissioner of Income-Tax v. R.B. JodhamalKuthiala, 1963 SCC OnLinePunj 403; Dipti Aggarwal v. Ashish Chandra,2017 SCC OnLine Cal 8835; Mewar Sugar Mills Ltd. v. Chairman Central Board of Direct Taxes and Ors. (09.10.1998 - DELHC)]. In Kavita Trehen v. Balsara Hygiene Products Ltd AIR (1995) SC 441, it was held by the Supreme court that jurisdiction to make restitution is inherent in every court and can be exercised whenever justice of the case demands.*

…

…

81. It is in this light that Hon'ble Supreme Court in the case of Energy Watchdog (supra) ruled, albeit in the context of Section 63, that the Regulatory Commission must exercise its functions in accordance with law and guidelines and in situations where no such guidelines exist, it may avail of its "general regulatory powers" under Section 79(1)(b).

82. We have already noted that the PPAs which were subject matter of decisions in the case of Adani Power Ltd (supra) and GMR Warora Ltd (supra) contained change in law clauses structured differently from the shape in which they occur in the present PPAs, the words "provide relief" not having been used in the former. *The judgment dated 13.04.2018 of this tribunal in Adani Power Ltd.(supra) did not even consider the question as to whether the principle of time value of money would apply in examining the impact of change in law once change in law had been approved. The said decision for present purpose is, thus, sub silentio. When the judgment in the said case was carried in appeal to the Hon'ble Supreme Court leading to decision reported as Uttar Haryana Bijli Vitran Nigam Ltd (UHBVNL) (supra), the challenge was not in relation to what had been denied by this tribunal as the first appellate forum and, therefore, it is not correct to say that the issue stands settled by the said judgment. We are, at the same time, conscious of the fact that while upholding the relief to the extent granted in the case of Adani Power Ltd (supra), the Supreme Court by judgment reported as UHBVNL (supra) had observed that it would be fallacious to say that the claim of restitution was being put forward "on some general principle of*

equity", the amount of carrying cost in that case being "relatable to Article 13 of the PPA" (the change in law clause).

83. ***In the present cases, the claim for compensation of SPPDs is primarily founded not on principles of equity but on the contractual clause stating that the affected party is entitled to approach the Commission which shall "provide relief" in relation to the impact of the change in law event i f it has resulted in "any additional recurring /non-recurring expenditure".*** *The purpose of the change in law clause in the PPAs is to relieve the SPPDs of the additional burden. Since the impact of the new tax (GST or Safeguard Duty on Imports, as the case may be) would come from the date of enforcement of the new laws, the relief intended to be afforded under the contracts cannot be complete unless the said burden is allowed to be given a pass through from the date of imposition of the levy. Unlike the PPA in UHBVNL (supra) wherein the phraseology of change-in-law provision was exhaustive, the words "provide relief" in present PPAs are open ended, not qualified in any manner so as to be given a restrictive meaning in order to treat the date of adjudication of the claim by the regulatory authority as the effective date or to justify denial of carrying cost* ***of widest amplitude and cannot be read to limit its scope the way the contesting respondents seek to propagate or the way the Central Commission has determined.***

…

…

85. ***There is one more justification for the view we are taking in the matter and that stems from the provision contained in Section 70 of Indian Contract Act, 1872 which relates to the obligation of person enjoying benefit of a non-gratuitous act.***

…

…

87. As pointed out by learned counsel for Mahoba, under the PPA there is an obligation on the part of SPPDs to ensure "continuance of supply of power throughout the term of Agreement". It is inherent in this that SPD, in order to continue to supply, must reconfigure or repower the plant, if so required, by installing additional modules after the COD since the contractual clause does not create any distinction as to expenditure pre or post COD, for purposes of change-in-law compensation. The plea for relief concerning post COD cannot be rejected, the expenditure incurred being not meant to be gratuitous, the intent instead being to discharge contractual responsibilities. We may quote the following passage from judgment of Hon'ble Supreme Court in State of West Bengal v. BK Mondal, AIR 1962 SC 779, in the context of Section 70 of the Indian Contract Act, 1872:

……

"94. For the foregoing reasons, we cannot approve of the view taken by the Central Commission on the subject of carrying cost. ***We hold that the appellant SPPDs are***

entitled to grant of relief in the nature of carrying cost over and above the compensation already allowed by the Central Commission.*"*

...

CLAIM OF COMPENSATION FOR PERIOD POST-COD

95. The appellant SPPDs had also claimed compensation (on account of change in law events) for the consequent additional expenditure incurred or invoices raised after the Commercial Operation Date (COD) of the SPPs. The Central Commission, by the impugned decisions, ***has held that liability towards additional expenditure is to be borne by the respondent beneficiaries only till the date of corresponding COD of the project.***

...

97. It bears repetition to note that change-in-law clauses in the PPAs (Article 12) assure relief to be provided in relation to "any additional recurring/non-recurring expenditure" arising out change-in-law. There is no restriction in the contracts as to application of this clause for period prior to the COD. The activities of generation of electricity and its supply, post COD, are bound to include non-recurring expenditure, O&M expenses being one such area. In fact, the use of the word "any" in relation to the consequent "recurring or non-recurring expenditure" signifies the wide ambit of the contractual clause, no exclusion of such nature as understood by the Commission deserving to be read there into. ***The extraneous qualification that such expenditure must relate to period prior to COD cannot be approved of.***

...

...

O&M EXPENSES

107. The above decision applies on all fours. ***We adopt the view taken in case of Costal Gujarat Power Limited (supra) and disapprove the decision of the Central Commission on the subject as quoted above and hold that the appellant SPPDs are entitled to compensation for additional expenditure (recurring /non-recurring) towards O&M activities as well, notwithstanding the fact that they were outsourced.***

30. From the *ratio-decidendi* as decided by the APTEL in *Coastal Gujarat Judgment &A.No. 256 of 2019 & Batch* and *Parampujaya Judgement dated 15.09.2022* (quoted above), it can be inferred that the contractors can be engaged by the generating company if there is no inhibition in the agreement in such regard and once it is established that levy of a tax on services has an impact on the cost of or revenue from business of generation and sale of electricity - whether directly or indirectly, compensation must follow. Hence, we are of

the view that the Petitioners are entitled to compensation for additional tax burden towards O&M activities, if incurred on account of imposition of GST.

31. We further observe that in order dated 12.04.2019 in the Petitions 2016/MP/2018 & Batch, based on APTEL judgments *(dated 13.04.2018 in Appeal No. 210 of 2017 in Adani Power Limited v. Central Electricity Regulatory Commission and Ors. and dated 14.08.2018 in Appeal No.111 of 2017 in M/s. GMR Warora Energy Limited v. Central Electricity Regulatory Commission and Ors.),* we had held that "*if there is a provision in the PPA for restoration of the Petitioners to the same economic position as if no Change in Law event has occurred, the Petitioners are eligible for "Carrying Cost" for such allowed "Change in Law" event(s) from the effective date of Change in Law event until the same is allowed by the Commission. The Commission observes that the PPAs do not have a provision dealing with restitution principles of restoration to same economic position. Therefore, the Commission is of the view that the claim regarding separate carrying cost is not admissible."* We observe that from the *ratio-decidendi* as decided by the APTEL in its judgement dated 15.09.2022 in the ***Parampujaya Judgement,*** it can be inferred that the burden of Carrying Cost flows directly from the Change in Law event, so the relief will be incomplete unless the part of additional expenditure is also allowed as pass through.

32. APTEL in both the ***above Judgements*** observed that the purpose of the change in law clause in the PPAs is to relieve the developer of additional burden. Since the impact of GST notification would come from the date of enforcement of the new laws, relief to be provided under the contracts cannot be complete unless the said burden is allowed to be given a pass through from the date of imposition of the levy. In light of the above judgments, the following principles may be derived:

    a. All services availed by the Petitioner are undoubtedly used for the sole objective of generating electricity for supply to the Procurers under the PPA. The increased cost towards Change in Law affects the cost of the

business of the appellant for generation and sale of electricity. The claims are covered under Article 12 of the PPAs.

b. The contractors can be engaged by the generating company, if there is no inhibition in the agreement in such regard.
c. Once it is established that levy of a tax on services has an impact on the cost of or revenue from business of generation and sale of electricity - whether directly or indirectly - compensation must follow.
d. The PPAs by Article 12, refer to the business of selling electricity. The compensation envisaged here cannot be restricted to the activity of generating electricity.
e. The Petitioner can claim compensation on account of GST even after the occurrence of COD of the project.
f. The Petitioner is entitled to grant of relief in the nature of carrying cost over and above the compensation already allowed by the Central Commission.
g. The Petitioner is entitled to compensation for additional expenditure towards O&M activities notwithstanding the fact that they were outsourced.

In view of the above, we find and hold that the Petitioner is entitled to recover the compensation on account of incremental impact due to 'Change in Law' even after the occurrence of COD of the project. Further, the Petitioner is also entitled to grant of relief in the nature of carrying cost on the compensation on account of incremental impact due to 'Change in Law'. As has been held by the Commission in earlier Orders, the Petitioner, in the instant case 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 CERC Tariff Regulations 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 Late Payment Surcharge in the PPA would kick in if the payment is not made by the Respondents within the due date.

33. As regards the issue of discount rate for the purpose of annuity payment, it is pertinent to mention that the Commission vide Order dated 20.08.2021 in Petition No. 536/MP/2020 and the other connected matters had decided 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'.*

34. We observe that MSEDCL was impleaded as Respondent No. 42 in Petition No. 536/MP/2020 [on account of Respondent in Petition No. 179/MP/2020]. The points raised by the contracting parties in various petitions were considered and the Commission took a conscious decision (in Para 65 of the said Order dated 20.08.2021) that 10.41% shall be the discount rate of annuity payments towards the expenditure incurred on account of 'Change in Law'. Therefore, the Order dated 20.08.2021 stipulating inter alia the discount rate of 10.41% for annuity payment is binding on all the parties including

MSEDCL.

35. Accordingly, the Commission directs that the contracting parties may carry out reconciliation on account of incremental impact including O&M expenses due to promulgation of the GST Laws along with carrying cost by exhibiting clear and one to one correlation with the projects and the invoices raised backed by auditor certificate. The Commission further directs that the responding DISCOMS are liable to pay SECI (as the case may be) all the above reconciled claims that SECI has to pay to the Petitioner. However, payment to the Petitioners by SECI is not conditional upon the payment to be made by the responding DISCOMS to SECI since both are independent contracts.

36. The Petition no. 179/MP/2020 is disposed of in terms of the above.

Sd/-	**Sd/-**	**Sd/-**
पी. के. सिंह	**अरुण गोयल**	**आई. एस. झा**
(सदस्य)	**(सदस्य)**	**(सदस्य)**