



नई दिल्ली
NEW DELHI

याचिका संख्या./ Petition No. 377/MP/2023

कोरम/ Coram:

श्री जिष्णु बरुआ, अध्यक्ष/Shri Jishnu Barua, Chairperson
श्री रमेश बाबू वी., सदस्य/Shri Ramesh Babu V., Member
श्री हरीश दुदानी, सदस्य/Shri Harish Dudani, Member

आदेश दिनांक/ Date of Order: 24th of March, 2025

IN THE MATTER OF:

Petition under section 79(1)(b) & 79(1)(f) of the Electricity Act, 2003, seeking carrying cost on the additional capital expenditure incurred by the Petitioner due to the introduction of the Central Goods and Services Act, 2017, the Integrated Goods and Services Tax Act, 2017 & State Goods and Services Act, 2017, pursuant to the orders dated 23.08.2022 & 25.11.2022 passed by this Hon'ble Commission in Petition No. 52/MP/2019 and order dated 20.08.2021 passed by this Hon'ble Commission in Petition no. 536/MP/2020.

AND IN THE MATTER OF:

Solitaire Powertech Private Limited

239, Okhla Industrial Estate,
Phase III, New Delhi - 110020

... Petitioner

Versus

1. Solar Energy Corporation of India Limited

6th Floor, Plate B, NBCC Office,
Block Tower-2, East Kidwai Nagar,
New Delhi – 110023

2. Bangalore Electricity Supply Company Limited

Bescom K.R. Circle
BANGALORE-560001

3. Mangalore Electricity Supply Company Limited

Mescom Bhavan, Kavoor Cross Road, Bejai,
Mangaluru-575004, Karnataka

4. Chamundeshwari Electricity Supply Corporation Limited

No.29, Vijaynagar 2nd Stage, Hnkal,
Mysore- 570017

5. Gulbarga Electricity Supply Company Limited

Corporate Office, Station Road,
Kalaburagi- 585102, Karnataka

6. Hubli Electricity Supply Company Limited

Tabib Land, Mantur Road, Near CBT, APMC,
Hubali-Dharwad, Karnataka- 580020

... Respondents

Parties Present:

Shri Hemant Sahai, Advocate, SPPL
Shri Nitish Gupta, Advocate, SPPL
Shri Nimesh Jha, Advocate, SPPL
Ms. Shikha Ohri, Advocate, SECI
Shri Kartik Sharma, Advocate, SECI
Ms. Ritika Singh, Advocate, SECI

आदेश/ ORDER

The Petitioner, Solitaire Powertech Private Limited, is a generating company and has set up a 30 MW capacity solar power plant in District Chitradurga, Karnataka. Solar Energy Corporation of India Limited (SECI) issued a Request for Selection (RfS) dated 15.02.2016, inviting proposals for 1000 MW grid-connected solar photo voltaic power projects under NSM Phase II, Batch III Tranche-V in Karnataka. The Petitioner submitted its bid on 23.05.2016. The reverse auction process was carried out on 09.06.2016, and the Petitioner was declared as the successful bidder after quoting Viability Gap Fund (VGF) support of Rs 73.49 Lakhs/MW for the 30 MW Project at an applicable tariff of Rs. 4.43/ kWh. Thereafter, SECI issued a Letter of Intent dated 02.07.2016 in favour of the Petitioner for the development of the Project for the generation and onward sale of solar power to SECI. The Power Purchase Agreement (PPA) was executed on 02.08.2016 for the purchase of 30 MW solar power capacity from the Project at a tariff of Rs. 4.43/ kWh. As per the PPA, the scheduled date of commissioning of the Projects was 02.09.2017. The Petitioner is seeking a declaration that it shall be entitled to receive the monthly annuity

payments with the applicable discounting factor of 10.41% for 13 years starting from the Commercial Operation Date (COD) of the Project, i.e., 07.04.2018 on the principal amount of GST on both capital cost and O&M cost along with interest/LPSC on the late payment.

2. The Respondent No. 1, Solar Energy Corporation of India Limited (SECI) is a Central Public Sector Undertaking under the administrative control of the Ministry of New and Renewable Energy (MNRE), set up on 20.09.2011 to facilitate the implementation of Jawaharlal Nehru National Solar Mission (JNNSM) for development, promotion and commercialization of solar energy technologies in the country and to achieve targets set out in the JNNSM.
3. Respondent Nos 2 to No. 6 are the distribution licensees engaged in the business of distribution and supply of electricity across the State of Karnataka.
4. The Petitioner has made the following prayers:
 - a) *Allow the present Petition;*
 - b) *Hold and declare that the Petitioner is entitled to receive carrying cost / interest / discounting factor at the rate of 10.41% for the entire tenure of annuity payments starting from COD of the Project on the principle amount of GST on both capital cost and O&M cost;*
 - c) *Hold and declare that Petitioner is entitled to payment of interest / LPSC on delayed payment by SECI as claimed in the present Petition, keeping in view the principles of time value of money and restitutive nature of change in law claims.*
 - d) *Direct that the Review Petitioner will be entitled to receive the differential amount i.e., the difference between monthly annuity calculated by SECI and monthly annuity payable after taking into consideration the discounting factor on the principal claim from COD till the date of payment by SECI, either in lumpsum or in the alternative devise an appropriate methodology for compensating Review Petitioner towards the claim of carrying cost / discounting factor on the principal claim as on COD.*
 - e) *Direct SECI to pay future monthly annuities at Rs. 8,16,880/- per month, taking into account the carrying cost / discounting factor payable at 10.41% per annum from the COD of the Project; and*
 - f) *Pass such other and further order or orders as this Hon'ble Commission may deem fit and proper under the facts and circumstances of the present case and in the interest of justice.*

Factual Matrix:

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

Location	Village Kanajanahalli, Tehsil Hiriyur, District Chitradurga, Karnataka
<i>JNNSM Guidelines for Selection of 2000 MW Grid-connected Solar PV Power Projects under Batch-III</i>	04.08.2015
Nodal agency	SECI
Tariff	4.43/kWh
Capacity (MW)	30 MW
Power	Solar Power Project
RfS issued on	15.02.2016
Bid submitted by SESPL on	23.05.2016
E-Reverse auction held on	09.06.2016
LOA issued on	02.07.2016
Contracts for engineering, procurement, and construction (EPC Contracts) with <i>Hindustan EPC-CO. Private Limited</i> for: i. Civil Services; ii. Civil Supply Agreement; iii. Onshore Service Agreement	04.07.2016
The effective date of the PPA	02.08.2016
PPA executed on	02.08.2016
<i>Date of Notification No.1/2017-Central Tax (Rate) (2017 GST Notification)</i>	01.07.2017
Contracts for engineering, procurement, and construction (EPC Contracts) with <i>Hindustan EPC-CO. Private Limited</i> for: i. Services for balance supply/services; and ii. Supply of Solar Power Generating System	01.07.2017
Contract for Operations and Maintenance (O&M Contract) with <i>Hindustan EPC-CO. Private Limited</i> : i. Operation and Maintenance Services Agreement	15.05.2017
SCoD of the project as per PPA	02.09.2017
COD of the project accepted on 23.02.2022	07.04.2018

6. The present petition was filed on 05.12.2023 and listed for hearing on 13.03.2024, wherein the Commission, after hearing the submissions of the parties, admitted the Petition. Subsequent to the hearings conducted on 22.08.2024 and 10.10.2024, the detailed submissions were made by the parties on 14.11.2024. Based on the request of the parties, the Commission permitted both sides to file their respective written submission, and thereafter, the matter was reserved for orders.

Submissions of the Petitioner:

7. Briefly, the Petitioner has submitted as under:

- a) The Project was commissioned by the Petitioner on 08.03.2018 and the COD was achieved on 07.04.2018, i.e., 30 days after the commissioning of the Project.
- b) The Petitioner is seeking carrying cost/interest/discounting factor on the additional capital expenditure incurred by the Petitioner due to introduction of the CGST Act, 2017, the IGST Act, 2017 & SGST Act, 2017 (collectively referred to as '*the GST Laws*'), pursuant to the Orders dated 23.08.2022 & 25.11.2022 passed by this Commission in Petition No. 52/MP/2019 and Order dated 20.08.2021 passed by this Commission in Petition No. 536/MP/2020.
- c) The Petitioner, by way of Petition No. 52/MP/2019, approached this Commission seeking *inter alia* (i) approval of 'Change in Law'; (ii) consequential relief to compensate for the increase in capital cost and O&M cost due to introduction of the GST Laws in terms of Article 12 of the PPA dated 02.08.2016 and (iii) for grant of carrying cost/interest/discounting factor on the principal claim from the date of incidence till the COD of the project.
- d) This Commission, vide its Order dated 23.08.2022 in Petition No. 52/MP/2019, approved the introduction of GST Law as a change in law event under the PPA and directed SECI to compensate the Petitioner, the additional capital cost incurred on account of such change in law event, as per the methodology provided by this Commission vide its order dated 20.08.2021 in Petition No. 536/MP/2020.
- e) Additionally, this Commission vide the Order dated 25.11.2022 in Petition No. 52/MP/2019 has also allowed the Petitioner to recover the compensation on account of incremental impact due to change in law event even after occurrence of COD of the Project (over and above the change in law claim allowed by this Commission vide Order dated 23.08.2022) including additional O&M expenditure which Petitioner has incurred/will incur due to introduction of GST Law. Such claims are also to be compensated by SECI in terms of the methodology devised in the order dated 20.08.2021 in Petition No. 536/MP/2020.
- f) Vide Order dated 20.08.2021 passed in Petition No. 536/MP/2020, this Commission has held that the payment *qua* the additional expenditure incurred on account of the introduction of GST is to be made through monthly annuity payments of 13 years at a discounting rate/ interest rate of 10.41%.

- g) SECI has admittedly calculated the period of annuity in the present case as 13 years from COD. Therefore, the Petitioner shall be entitled to carrying cost/interest/discounting factor to be calculated on the principal amount for a period of 13 years starting from COD of the Project, i.e., 07.04.2018.
- h) However, the monthly annuity paid by SECI does not take into account, the carrying cost/interest/discounting factor from the date of COD till the date of the first payment by SECI.
- i) In view of the aforesaid erroneous calculation of monthly annuity by SECI, the Petitioner approached this Commission by way of a Review Petition i.e., Review Petition No. 8/RP/2023 along with I.A. No. 55 of 2023 seeking to claim carrying cost/interest/discounting factor for the entire tenure of annuity payments starting from COD in terms of the Order dated 20.08.2021 in Petition No. 536/MP/2020. However, the Petitioner advisably withdrew the Review Petition along with I.A. No. 55 of 2023 in so far as the relief being claimed is flowing from the principles settled by this Commission vide its order dated 20.08.2021 passed in Petition No. 536/MP/2020 and other orders passed by APTEL and Hon'ble Supreme Court.
- j) The present Petition has been filed in terms of the withdrawal of the Review Petition aforesaid and liberty being granted by this Commission, vide its order dated 31.08.2023 in Review Petition No. 8/RP/2023 along with I.A. No. 55 of 2023.

Re. Increase in Capital Cost of the Project

- k) The total capital expenditure incurred by the Petitioner is Rs. 1,60,73,67,462 (including GST levied). Under the pre-GST regime, the total taxes that would have been levied on the Petitioner (as considered at the time of bid submission) was Rs. 2,39,08,843. However, after the introduction of the GST Law, the total tax incurred by the Petitioner is Rs. 9,66,95,091. As the introduction of GST Law is a change in law event under the PPA, the Petitioner claimed Rs. 7,27,86,245 (i.e., the difference between the taxes applicable pre-GST and taxes levied post-GST) from SECI.

Re. Increase in Operations and Maintenance (O&M) Cost

- l) The GST Law had an incremental impact on the O&M Cost. The Petitioner at the time of submitting its bid, factored in the projected O&M Cost to be incurred during the life of the Project. However, the increase in taxes applicable to various O&M activities on account of the introduction of GST Law increased the O&M Cost of the Petitioner to Rs. 68,80,435/-.

- m) As per the methodology settled by this Commission, vide its order dated 20.08.2021 in Petition No. 536/MP/2020, the Petitioner is entitled to receive a monthly annuity of Rs. 8,16,880/- per month (which also includes carrying cost/interest/discounting factor at 10.41% per annum) for the period of 13 years from the date of COD. However, the monthly annuity paid by SECI (after removing the benefit of carrying cost/interest/ discounting factor from the date of COD till the date of first payment by SECI) is Rs. 6,77,474/- per month. Such conduct of SECI is contrary to the directions passed by this Commission in Petition No. 536/MP/2020 to the extent this Commission has allowed the developers to claim compensation through annuity payments spread throughout the period of 13 years, i.e., tenure of annuity payments.
- n) Therefore, as per the methodology settled by this Commission in Petition No. 536/MP/2020, the Petitioner is entitled to receive a monthly annuity of Rs. 8,16,880/- payable from COD of the project (i.e., 07.04.2018). Considering that the SECI paid the first annuity payment to the Petitioner in August 2022, the Petitioner was short-paid by SECI to the extent of Rs. 3,83,71,907/- (calculated till October 2023) accruing from COD of the Project. Additionally, the Petitioner is also entitled to receive a monthly annuity of Rs. 8,16,880/- for the remaining tenure of annuity payments as against the monthly annuity of Rs. 6,77,474/- being paid by SECI. The short amount of Rs. 3,83,71,907/- is calculated only till September 2023, and the same will undergo change based on the actual date of payment of the differential claim by SECI. Further, the Petitioner will be entitled to receive a monthly annuity of Rs. 8,16,880/- for the remaining tenure of annuity payments. The Petitioner will also be entitled to claim the carrying cost/interest/discounting factor on the delayed payments from SECI as per settled principles of the time value of money.
- o) This Commission has followed the judgment dated 15.09.2022 of APTEL in Appeal No. 256 of 2019 and Batch, which granted relief of carrying cost to similarly placed generators in Petition No. 293/MP/2018 vide its order dated 30.11.2022. Since the Petitioner was not a party to the said proceeding, it came to know of the passing of such order only on 27.01.2023.
- p) In view of the aforesaid principle of law and Orders of this Commission as well as of the Judgment passed by the APTEL, the Petitioner, by way of a Review Petition No. 8/RP/2023 along with I.A. No. 55 of 2023, approached this Commission seeking claim with respect to the carrying cost/interest /discounting factor from the COD of the Project. However, the said Review Petition was withdrawn by the Petitioner on 30.08.2023 with the liberty to approach this Commission again with a fresh Petition to claim carrying cost/interest/ discounting

factor from the date of COD. Thus, the present Petition is being filed before this Commission seeking carrying cost/interest /discounting factor from the date of COD of the Project while placing reliance upon the Orders of this Commission and the Judgments of the APTEL.

- q) Considering that the terms and conditions of the Change in Law clause in the aforesaid order passed by this Commission is similar to the change in law clause mentioned in the PPA signed between the Petitioner and SECI, the present Petition is being filed before this Commission only in conformity with the liberty granted by this Commission vide Order dated 31.08.2023.

Submissions of SECI:

8. By way of Reply dated 28.08.2024, SECI has submitted as under:

- a) SECI has taken action as per this Commission's Order in Petition No. 536/MP/2020, wherein the Commission has categorically held that the liability of SECI/Discoms for 'Monthly Annuity Payments' starts only from 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.
- b) The Petitioner is not entitled to carrying cost/interest/discounting factor on the principal amount for a period of 13 years starting from the COD of the Project i.e., 07.04.2018.
- c) The Petitioner itself acknowledged in its Review Petition that this Commission, while passing the original orders in Petition no. 52/MP/2019 did not allow any carrying cost from the date of incidence/payment of GST till the date of 1st payment by SECI.
- d) SECI is making payments to the Petitioner in terms of the directives of this Commission in Petition No. 52/MP/2019 dated 22.08.2022. The Petitioner had approached this Commission one year after its COD for the change in law claims. Furthermore, the Petitioner chose not to challenge the findings of this Commission in Petition Nos. 52/MP/2019 and 536/MP/2020. Therefore, it is not open to the Petitioner to now claim carrying cost from the COD of the Project. The present petition is barred by the principles of *res judicata*.
- e) The Petitioner accepted the reconciled amounts vide its Letter/Undertaking dated 23.02.2022 and 25.08.2022.

Re: Inadmissibility of the carrying cost

- f) The PPA does not have a provision dealing with the restitution principles of restoration to the same economic position as is the case in some PPAs.
- g) The Commission, in its Order dated 05.12.2019 in Petition No. 187/MP/2018 and Batch captioned as *M/s. Renew Wind Energy (TN2) Private Limited v. NTPC Limited & Batch*,

held 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.*

- h) In the absence of express provisions in the PPA, it is not open for the Petitioner to claim relief under principles of equity.

Re: APTEL's decision in the Parampujya case:

- i) APTEL, in its decision dated 15.09.2022 passed in Appeal No. 256 of 2019 and connected Appeals in the case of *Parampujya Solar Energy Pvt. Ltd. v. Central Electricity Regulatory Commission* (Parampujya Case), has dealt with the aspects of the impact of Change in Law beyond Commercial Operation Date of the project and Carrying Cost. However, in terms of the Orders dated 12.12.2022 and 23.01.2023 of the Hon'ble Supreme Court, the enforceability of the Commission's order to be passed in pursuance of the Tribunal's decision dated 15.09.2022 in the Parampujya Case has been stayed with regard to the issues of carrying cost, compensation on account of impact of Change in Law for the period post Commercial Operation Date of the projects and towards O&M expenses.

Re: Directions to buying entities to make payments to SECI

- j) The Commission has held that PPA and PSA are interconnected and are of a back-to-back nature, implying that the distribution licensees are liable to pay to SECI all that SECI has to pay to the Power Developer on account of GST/Safeguard Duty. The Commission may issue directions to Respondents (i.e., the power procurers under the respective PSAs) to make payments towards the claims payable, if any, by the SECI to the Petitioner on a back-to-back basis under the respective PSAs on a time-bound manner.
- k) The Petitioner has not been short-paid by SECI for Rs. 3,83,71,907/- (calculated till October 2023) accruing from COD of the Project, and it is not entitled to receive a monthly annuity of Rs. 8,16,880/- for the remaining tenure of annuity payments as against the monthly annuity of Rs. 6,77,474/-.
- l) A perusal of Ground 36(A) read with para 6 of Petition No. 52/MP/2019 clearly demonstrated beyond doubt that the present petition is a review petition in disguise, which admittedly stands withdrawn by the Petitioner. Thus, the present claim of the petitioner is barred by the principles of *res judicata*.

Written Submissions of SECI:

9. Vide written submissions dated 27.11.2024, SECI has reiterated the submissions made in its plaint, and as such, the same is not reiterated herewith for the sake of brevity. Additionally, SECI has submitted that:

Re: Res-judicata

- a) The present petition is barred by the principles of *res-judicata*. The Petitioner, by the present petition, is abusing the process of the court and is attempting to re-agitate issues already decided by this Commission in Petition No. 52/MP/2019. A bare perusal of Ground 36(A) read with para 6 of Petition No. 52/MP/clearly demonstrates beyond doubt that the Petitioner, by the present petition, is re-agitating issues already decided by this Commission vide order dated 23.08.2022 passed in Petition No. 52/MP/2019. A comparison of Ground 36(A) with Para 6 is reproduced hereunder:

<i>Petition No. 377 of 2023</i>	<i>Petition 52/MP/2019</i>
<p><i>Notably, in law, the Petitioner is entitled to receive “Carrying Cost” for the following two periods:</i></p> <p><i>Period 1: From when the Petitioner incurred the additional cost (or the COD of the Project) till the date of approval by this Hon’ble Commission and</i></p> <p><i>Period 2: From the date of approval of Change in Law over the period of amortization</i></p>	<p><i>6. The Petitioner respectfully submits that in addition to compensation for the increase in capital cost, it is also entitled to carrying cost on the additional cost incurred by it as a result of the introduction of GST Law, and the same will have to be paid for the following two periods:</i></p> <ul style="list-style-type: none"><i>• <u>Period 1</u>- from when the Petitioner incurred the additional cost on account of the introduction of GST Law till the approval of Change in Law by this Ld. Commission; and</i><i>• <u>Period 2</u>- from the date of approval of Change in Law over the period of amortisation, in the scenario this Ld. The commission does not allow compensation by way of a one-time upfront lumpsum payment</i>

- b) This Commission has already passed its order dated 23.08.2022 in Petition No. 52/MP/2019 after hearing the parties at length.
- c) The reconciliation of the Change in Law claims on account of the introduction of GST Laws was carried out by the parties strictly in line with the directions passed by this Commission

in its order dated 20.08.2021 in Petition No. 536/MP/2020. As per the letter dated 07.02.2022 issued by SECI, the reconciliation of claims was accepted by the Petitioner *vide* its letter/Undertaking dated 23.02.2022 and 25.08.2022. The present belated claim for monthly annuity @ Rs. 8,16,880/- in the present petition, after voluntarily seeking payments @ Rs. 6,92,552/-, is not permissible.

- d) No carrying cost is payable to the Petitioner from the date of incidence/payment of GST till the date of the 1st payment by SECI, in terms of the orders dated 23.08.2022 and 25.11.2022. In fact, as held by this Commission in its Order dated 20.08.2021 in Petition No. 536/MP/2020, the liability of SECI/ Discoms for 'Monthly Annuity Payments' starts only from 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.
- e) The Petitioner, by the present petition, is abusing the process of the law and is attempting to re-agitate issues already decided by this Commission in Petition No. 52/MP/2019 and Petition No. 536/MP/2020.
- f) The liberty granted by this Commission to file a fresh petition was only in accordance with law. However, the present petition is clearly barred by the principles of *res judicata*. *Res judicata* debars the Court from exercising jurisdiction to determine the *lis* if it has attained finality between the parties. In the present case, admittedly, the findings of this Commission in the order dated 23.08.2022 have not been challenged by the Petitioner before any forum and have, thus, attained finality. Thus, the present petition is a veiled attempt to only re-agitate issues settled by this Commission in Petition No. 52/MP/2019 and Petition No. 536/MP/2020, which cannot be permitted.

Re: Estoppel

- g) The Petitioner is estopped from raising any issues regarding the correctness of the reconciliation agreed between the parties. The reconciliation of claims was accepted by the Petitioner *vide* its letter/Undertaking dated 23.02.2022 and 25.08.2022.

Re: Order dated 20.08.2021 passed in Petition No. 536/MP/2020

- h) This Commission, after considering the submissions of all stakeholders, while deciding Petition No. 536/MP/2020, categorically held that the liability to pay Monthly Annuity Payment' of GST claims shall start only from 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.

- i) The Petitioner approached this Commission about a year after its COD, claiming relief for change in law (Petition No. 52/MP/2022), along with carrying costs. The Petitioner's project achieved COD on 07.04.2018. Thereafter, the Petitioner filed petition No. 52/MP/2019 (Original Petition) on 01.03.2019. However, by the present petition, the Petitioner is claiming carrying cost/interest/discounting factor at the rate of 10.41% for the entire tenure of annuity payments starting from COD.

Written Submissions of the Petitioner:

10. Vide written submissions dated 03.12.2024, the Petitioner has reiterated its stand taken in the plaint, and as such, the same has not been reproduced herewith for the sake of brevity. Additionally, the Petitioner has submitted as under:

Re. Admissions are not conclusive and can be withdrawn by a party by proving they are mistaken or untrue or contrary to law, & Admissions contrary to law do not qualify as an admission under Section 115 of the Evidence Act

- a) SECI has contended that the Petitioner has accepted the reconciled amount, vide its letter/undertaking dated 23.02.2022 and 25.08.2022, and as such, the Petitioner now cannot be allowed to resile from an admitted position.
- b) It is a settled position of law that an admission being declaration, is not conclusive, and a party is always at liberty to withdraw admission. While estoppel creates an absolute bar, the admission based on a point of law or a mistake of fact will not create a bar against the Petitioner to claim its right in terms of the methodology espoused by this Commission in Petition No. 536/MP/2020 qua applicability of discounting factor of 10.41% for the annuity period of 13 Years starting from COD of the Project. It is settled that admission on the point of law is not an admission of a "thing" so as to make the admission matter of estoppel within the meaning of S. 115 of the Evidence Act. Therefore, any admission, if at all, which is contrary to the law laid down by this Commission in its Order dated 20.08.2021 passed in 536/MP/2020, will not qualify as an admission to estop the Petitioner from claiming rights flowing from the said order of the Commission as the same has attained finality. It cannot be a case where the "Letter of Undertaking" shall be construed against the Petitioner while there exists no express waiver to the applicability of the discounting factor in the principal claim of the Petitioner. The "Letter of Undertaking" being relied upon by SECI was issued "Without Prejudice" and the Petitioner had reserved the right to adjust future annuity in case of any observation(s)/direction(s) and decision of any Tribunal/Commission/Court/GoI.

Re. There is no estoppel against law.

- c) The order dated 20.08.2021 passed in Petition No. 536/MP/2020 has attained finality and, therefore, has the force of law. The aforesaid order passed by this Commission and the principle espoused therein *qua* the mode of restitution on account of a change-in-law event has been followed by SECI in multiple cases. The Hon'ble Supreme Court in *Tamil Nadu Generation and Distribution Corporation Limited vs. PPN Power Generating Company Private Limited (2014) 11 SCC 53* has categorically held that while deciding a *lis*, the decisions of the State Commission not only have far-reaching consequences but are also final and binding between the parties, subject of course to judicial review.

Re. Principles of res judicata are not applicable to the issues in the present petition.

- d) The principles of *res judicata* are not applicable to the issues raised in the present petition, as contended by SECI. It is a specific case of the Petitioner in the present petition that the Petitioner is entitled to the payment of monthly annuity from the COD of the Project with the applicable discounting factor of 10.41% on the entire admissible principal claim of Rs. 6,96,91,565/-. In addition to the said entitlement, the Petitioner is claiming a late payment surcharge/carrying cost on the differential amount, i.e., the amount short-paid by SECI from COD of the Project till the date of payment.
- e) The Petitioner had sought review of the order(s) 23.08.2022 and 25.11.2022 seeking carrying cost on the principal sum from the date of incidence, where after, the Petitioner preferred an amendment vide IA No. 55 of 2023 seeking differential amount, i.e., the difference between the monthly annuity computed by SECI and the monthly annuity payable after taking into consideration the “discounting factor” on the admissible principal claim of the Petitioner from the date of COD of the Project till the date of payment along with carrying cost thereon. However, pursuant to the filing of the aforesaid IA seeking amendment, the Petitioner had advisedly withdrawn its Review Petition seeking liberty to file a substantive petition. A bare perusal of the relief sought in Petition No. 52/MP/2019 and instant Petition elucidates that the issues raised in the present Petition, in terms of the liberty granted vide order dated 30.08.2023, are substantive in nature. As such, the issues in the present petition are yet to be adjudicated upon by the Commission and the principles of *res judicata* are not applicable herein, as wrongly contended by SECI.

Analysis and decision:

11. We have heard the learned counsels for the Petitioner and the Respondents and have carefully perused the records and considered the submissions of the parties.
12. Before discussing the issues on merits, we consider it appropriate to deal with the preliminary issue raised by SECI. SECI has submitted that the present petition is barred by the principles of *res judicata*. Also, the claims have been reconciled between the contracting parties and accepted by the Petitioner vide its letter/Undertaking dated 23.02.2022 and 25.08.2022; the Petitioner is *estopped* from raising any issues regarding the correctness of the reconciliation agreed between the parties.
13. We observe that Section 11 of the Civil Procedure Code, 1908 stipulates as under:

Section 11. Res judicata.

No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I.-- The expression former suit shall denote a suit which has been decided prior to a suit in question whether or not it was instituted prior thereto.

Explanation II.-- For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III.--The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV.-- Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.-- Any relief claimed in the plaint, which is not expressly granted by the decree, shall for the purposes of this section, be deemed to have been refused.

Explanation VI.-- Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating .

Explanation VII.-- The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII.-- An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.

14. We observe that Order II Rule 2 of the Code of Civil Procedure, 1908 stipulates as under:

“ORDER II- FRAME OF SUIT

...

2. Suit to include the whole claim—

(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim—Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs—A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.”

15. From the above, the Commission observes that Section 11 of the Code of Civil Procedure, 1908 mandates that any suit or issue in which matter directly and substantially in issue has been heard and finally decided on merits by the competent Court cannot be tried again by any Court provided the matter directly and substantially in issue is same between the same parties to the suit whereas Order II Rule 2 of the Code of Civil Procedure, 1908 mandates that the suit filed should include the whole claim. The Commission observes that the object underlying Section 11 of the Code of Civil Procedure, 1908, is that if the proceeding originally instituted is proper, the decision given therein is binding on all the persons on whom the right or interest may devolve. The doctrine of res-judicata is conceived in the larger public interest that all the litigation must, sooner than later, come to an end. Similarly, the object of Order 2 Rule 2 of the Code of Civil Procedure, 1908 is to ensure that no defendant is sued or vexed twice with regard to the same cause of action and second to prevent a plaintiff from splitting claims and remedies based on the same cause of action. The effect of Order 2 Rule 2 of CPC, 1908 is to bar a plaintiff who had earlier claimed certain remedies in regard to a cause of action from filing a second suit in regard to other reliefs based on the same cause of action. The Commission observes that Section 11, read with Order II Rule 2 of the Code of Civil Procedure, 1908, bars the subsequent suit on the same cause of action but does not, however, bar a subsequent suit based on a different and distinct cause of action.

16. We observe that the prayers in Petition No. 52/MP/2019 were as under:

- a. Declare that enactment of GST Law qualifies as ‘Change in Law’ in terms of Article 12 of the PPA executed between the Petitioner and the Respondent and that the Petitioner is entitled to relief thereunder;*
- b. Direct the Respondent to compensate the Petitioner in terms of Article 12 of the PPA for the additional non-recurring/ recurring capital cost incurred/ to be incurred by it to the*

tune of Rs. 7,96,66,680/- due to introduction of GST Law by way of upfront lumpsum payment/ adjustment in the quoted tariff along with the carrying cost;

- c. Pursuant to grant of prayer (a) and (b) above, approve the necessary consequential amendments to the PPA and LOI;
- d. Grant such order, further relief(s) in the facts and circumstances of the case as this Ld. Commission may deem just and equitable in favour of the Petitioner.

In I.A. No. 78 of 2021

- a. Allow the present Application to be listed before this Hon'ble Commission on urgent basis at the earliest possible date as per the convenience of this Hon'ble Commission;
- b. Hold and direct the Respondent No. 1 to pay upfront lump-sum payment of Rs. 2,11,27,380/- (or any other amount payable on the date of final order passed by this Hon'ble Commission) within the period of 10 days from the date of order and to release the remaining annuity monthly payment of Rs. 7,20,673/- per month (as proposed by Respondent No. 1 vide its letter dated 22.03.2021) within period of 60 days from the date of order, as minimum obligated payments which the Petitioner is entitled to receive.

17. Whereas, the prayers of the Petitioner in Petition No. 377/MP/2023 are as under:

- a) Allow the present Petition;
- b) Hold and declare that the Petitioner is entitled to receive carrying cost / interest / discounting factor at the rate of 10.41% for the entire tenure of annuity payments starting from COD of the Project on the principle amount of GST on both capital cost and O&M cost;
- c) Hold and declare that Petitioner is entitled to payment of interest / LPSC on delayed payment by SECI as claimed in the present Petition, keeping in view the principles of time value of money and restitutive nature of change in law claims.
- d) Direct that the Review Petitioner will be entitled to receive the differential amount i.e., the difference between monthly annuity calculated by SECI and monthly annuity payable after taking into consideration the discounting factor on the principal claim from COD till the date of payment by SECI, either in lumpsum or in the alternative devise an appropriate methodology for compensating Review Petitioner towards the claim of carrying cost / discounting factor on the principal claim as on COD.
- e) Direct SECI to pay future monthly annuities at Rs. 8,16,880/- per month, taking into account the carrying cost / discounting factor payable at 10.41% per annum from the COD of the Project; and
- f) Pass such other and further order or orders as this Hon'ble Commission may deem fit and proper under the facts and circumstances of the present case and in the interest of justice.

18. Vide Order dated 23.08.2022 in Petition No. 52/MP/2019, it was held as under:

18. We observe that SECI vide its letter dated 07.02.2022 proposed to pay lumpsum of Rs. 2,09,96,818 and remaining amount in monthly annuity of Rs. 6,92,552 spread throughout the remaining period of 13 years from COD, which was accepted by the Petitioner vide letter dated 23.02.2022. The Petitioner and SECI have also admitted on record that the GST claims stand reconciled between themselves. The said proposal was also sent by SECI to the distribution utilities of the State of Karnataka vide letter dated 08.02.2022. The Petitioner has submitted that now SECI may be directed to release the lumpsum payment within one week from the date of Order.

...

20. In view of the above discussions, the Commission holds that regarding GST claims, the reconciled claims may be released by the Respondent SECI at the earliest. The Contracting parties are directed to follow the directions given in Order dated 20.08.2021 in Petition No. 536/MP/2020 meticulously. The Commission further directs that the Karnataka DISCOMS are liable to pay to the SECI all the above reconciled claims that SECI has to pay to the Petitioner. However, payment to the Petitioner by SECI is not conditional upon the payment to be made by the Karnataka DISCOMS to SECI.

21. In view of the above I.A. 78 of 2021 is disposed of.

22. In view of the above the Petition No. 52/MP/2019 is also partially disposed of except for prayers (b) (qua recurring cost).

23. The Commission observes that the issue regarding O&M cost has been remanded by the Appellate Tribunal of Electricity in Appeal Numbers 61, 62, 63, 64 and 65 of 2021. Therefore, the Commission holds that the issues as contained in prayer (b) (qua recurring cost) of the instant petition shall be dealt along with the remanded matters and to that extent the petition is tagged with Petition Nos. 184/MP/2018 & batch.

19. Vide Order dated 25.11.2022 in Petition No. 188/MP/2018 & batch (including petition no. 184/MP/2018), it was held as under:

23. Before discussing the issue on merits, we consider it appropriate to deal with other issues raised by the Petitioner in Petition No. 52/MP/2019. The Petitioner has submitted that the Hon'ble Supreme Court vide its judgment dated 24.08.2022 in Civil Appeal No. 7129 of 2021 has held that the entire concept of restitutionary principles engrained in the PPAs has to be read in the correct perspective. The said principle that governs compensating a party for the time value for money, is the very same principle that would be invoked and applied for grant of interest on carrying cost on account of a Change in Law event.

24. We have considered the submissions made by the Petitioner. Pertinently, the scope of the present proceedings is limited to the implementation of the directions of the APTEL in its judgment dated 03.02.2022 in Appeal Numbers 61, 62, 63, 64 and 65 of 2021 of 2019 and 58 of 2019. It is a well settled principle that the scope of the remand proceedings is limited and the court is bound to act within the scope of remand. In this regard, we refer to the judgment of the APTEL dated 10.5.2010 in Appeal No. 146 of 2009 (Damodar Valley Corp. v. Central Electricity Regulatory Commission and Ors.), wherein APTEL has summarized the principles governing the scope of remand proceedings as laid down in terms of the various decisions of the Hon'ble Supreme Court as under:

...
25. In view of the settled principles governing remand proceedings, the prayer of the Petitioner for **grant of interest on carrying cost cannot be considered in the present proceedings, as it is beyond the scope of the present remand proceedings initiated in terms of the judgment of APTEL dated 03.02.2022.** In the said judgment, APTEL has directed the Commission that the matter deserves to be remitted for reconsideration of the issue of O&M expenses in light of rulings of this tribunal in Coastal Gujarat case & Azure Power Eris Private Limited Vs. Bihar Electricity Regulatory Commission & Others. The Appellants were also granted liberty to challenge the view already taken by the Central Commission vis-à-vis carrying cost, before APTEL, after decision on O&M expenses is rendered afresh by the Central Commission.
...

...

33. In view of the above, **the Petitioners shall be entitled to recover the compensation on account of incremental impact due to 'Change in Law' even after the occurrence of COD of the project including for O&M expenses due to promulgation of the GST Laws.** Accordingly, the Commission directs **the contracting parties to carry out reconciliation, on account of incremental impact in O&M expenses due to promulgation of the GST Laws, by exhibiting clear and one to one correlation with the projects and the invoices raised backed by auditor certificate. The Contracting parties are to also follow the directions given in Order dated 20.08.2021 in Petition No. 536/MP/2020 meticulously. The Commission further directs that the responding DISCOMS are liable to pay to the NTPC/NVVN/SECI all the above reconciled claims that NTPC/NVVN/SECI has to pay to the Petitioner.** However, payment to the Petitioners by NTPC/NVVN/SECI is not conditional upon the payment to be made by the responding DISCOMS to NTPC/NVVN/SECI.

34. Petition no. 188/MP/2018; Petition No. 185/MP/2018; Petition No. 190/MP/2018; Petition No. 191/MP/2018; Petition No. 184/MP/2018; 52/MP/2019 and 70/MP/2019 stands disposed of.

20. Vide Order dated 31.08.2023 in Petition No. 8/RP/2023, it was held as under:

2. The matter was called out for the hearing on 30.8.2023. During the course of the hearing, learned counsel **for the Petitioner sought permission to withdraw the present Petition with the liberty to file a substantive Petition in the matter.** The learned counsel for the Petitioner prayed to adjust the filing fees paid in the present Review Petition against the substantive Petition to be filed in future.

3. Learned counsel for the Respondent, SECI, submitted **that SECI has no objection in this regard.**

4. Considering the submissions of the learned counsel for the parties, the Petitioner is permitted to withdraw the present Review Petition. At the submission of the learned counsel for a liberty to file a substantive Petition, if required, **we observe that the Petitioner is always at liberty to bring a Petition, in accordance with law.** However, the prayer for the **adjustment of filing fees paid in Petition No. 8/RP/2023 is not allowed.**

5. Accordingly, **Petition No. 8/RP/2023 is disposed of as withdrawn.**

21. From the above, we observe that the Petitioner, by way of Petition No. 52/MP/2019, approached this Commission seeking, *inter alia*, approval of 'Change in Law' due to the introduction of the GST Laws in terms of Article 12 of the PPA dated 02.08.2016 along with consequential reliefs. The Commission, vide Order dated 23.08.2022, held that the reconciled claims are to be released by the SECI at the earliest and also the directions given in Order dated 20.08.2021 in Petition No. 536/MP/2020 should be followed meticulously. The Commission also held that the issues as contained in prayer qua recurring cost of the instant petition shall be dealt along with the Petition Nos. 184/MP/2018 & batch. It is pertinent to mention here that, vide Order dated 20.08.2021 passed in Petition No. 536/MP/2020, this Commission has held that the

compensation may be paid through monthly annuity payments, which will attract a discounting rate/interest rate of 10.41% for the tenure of 13 years.

22. We observe that vide Order dated 25.11.2022 in Petition No. 188/MP/2018 & batch (including Petition no. 184/MP/2018), the Commission specifically declined the prayer of the Petitioner for grant of interest on carrying cost, as the same was beyond the scope of the remand proceedings initiated in terms of the judgment of APTEL dated 03.02.2022. Further, the Commission observed that APTEL had granted liberty to challenge the view already taken by the Commission vis-à-vis carrying cost after the decision on O&M expenses in Petition No. 188/MP/2018 & batch. The Commission also allowed the compensation (subject to reconciliation) due to 'Change in Law' even after the occurrence of COD of the project, including for O&M expenses. It is pertinent to mention here that subsequently, in another judgment dated 15.09.2022 in a case titled '*Parampujya Solar Energy Pvt. Ltd. & Anr. v. Central Electricity Regulatory Commission & Ors.* (Parampujya Judgment), APTEL granted the carrying cost in case of Change in Law claims.
23. We observe that the Petitioner filed Review Petition No. 8/RP/2023 along with I.A. No. 55 of 2023 seeking a differential amount, i.e., the difference between the monthly annuity computed by SECI and the monthly annuity payable from the date of COD of the Project till the date of payment along with carrying cost thereon. However, the Petitioner withdrew its Review Petition seeking liberty to file a substantive petition. Vide Order dated 31.08.2023 in Petition No. 8/RP/2023, the Commission allowed the Petitioner to withdraw the review petition along with IA and also provided the liberty to the Petitioner to file a substantive petition, in accordance with law.
24. We observe that in the instant petition No. 377/MP/2023, the Petitioner is, *inter alia*, seeking a declaration regarding carrying cost and also payment of the differential amount (i.e., the difference between monthly annuity calculated by SECI and monthly annuity payable from COD till the date of payment by SECI) along with payment of future monthly annuities at Rs. 8,16,880/-.
25. Ostensibly, the Petitioner, by way of Petition No. 52/MP/2019, sought *inter alia* approval of 'Change in Law' and consequential relief thereof, whereas, in the instant petition, the Petitioner is claiming erroneous calculation of monthly annuity made by SECI and is seeking the difference between the monthly annuity calculated by SECI and the monthly annuity payable from COD

till the date of payment by SECI along with declaration of carrying cost. Hence, we are of the view that the matter involved in the instant petition was not directly and substantially involved in Petition No. 52/MP/2029. The Petitioner has now filed a different and distinct cause of action. In light of the above, the present petition cannot be said to be barred by the *principles of res judicata*.

26. On the issue of estoppel raised by SECI, SECI has submitted that the reconciliation of claims was accepted by the Petitioner vide its letter/Undertaking dated 23.02.2022 and 25.08.2022 and as such, the Petitioner is estopped from raising any issues regarding the correctness of the reconciliation agreed between the parties. *Per contra*, the Petitioner has submitted that the Letter of Undertaking being relied upon by SECI was issued “*Without Prejudice*,” and the Petitioner had reserved the right to adjust future annuity in case of any observations/directions and decision of any Commission/Court.
27. We observe that vide letter no. SPPL/SECI/2021-22/23022022 dated 23.02.2022, the Petitioner has given the undertaking as under:

...
This is in reference to your letter dated 07.02.2022 regarding the revised reconciliation of claims for compensation in respect of GST laws up to COD.

We confirm and accept the revised reconciliation done by SECI as per their letter dated 07.02.2022. We also undertake, in order to enable processing of annuity payment on Provisional basis, that

- a. In case of any observation's directions and decision of any tribunal/commission/court/Gol which is contrary to the reconciliation as stated in SECIs letter no. SD/CERC/GST_Claims/SPPL/47335 dated 07.02.2022, subsequent notification (if any), accordingly, future annuity shall be adjusted immediately. Excess amount (if any) shall be returned by M/s Solitaire Powertech Pvt Ltd, to SECI along with the interest at the rate of 10.41% per annum.*
- b. In case, SPD fails to reimburse the same within 30 days of written communication by SECI to M/s Solitaire Powertech Pvt Ltd, SECI shall recover such amount along with the interest from Power sale proceeds less repayment due to lender ("REC Ltd"), to be transferred by SECI to M/s Solitaire Powertech Pvt Ltd, under the PPA. Such recovery by SECI, shall be under intimation to aforementioned lender.*

*Kindly note that the present letter has been issued **without prejudice** to the rights and remedies available to Solitaire in law.*

28. Further, vide letter no. SPPL/SECI/2022-23/25082022 dated 25.08.2022, the Petitioner has given the undertaking as under:

This is in reference to our letter dated 23.02.2022 regarding the revised reconciliation of claims for compensation in respect of GST laws up to COD. In this regard, we would like to modify and again submit the below undertaking, in order to enable processing of annuity payment on Provisional basis:

a. In case of any observation's directions and decision of any tribunal/commission/court/Gol which is contrary to the reconciliation as stated in SECI's letter no. SD/CERC/GST_Claims/SPPL/47335 dated 07.02.2022, subsequent modification (if any), accordingly, future annuity shall be adjusted immediately. Excess amount (if any) shall be returned by M/s Solitaire Powertech Pvt Ltd, to SECI along with the interest at the rate of 10.41% per annum.

b. In case, SPD fails to reimburse the same within 30 days of written communication by SECI to M/s Solitaire Powertech Pvt Ltd, SECI shall recover.

29. A settled position of estoppel is an equitable remedy whereby a court can estop the party from reneging on certain promises. We observe that the order dated 20.08.2021 passed in 536/MP/2020 has attained finality. In the instant case, the Petitioner has given two undertakings dated 23.02.2022 & 25.08.2022. In both the undertakings, the Petitioner has, *inter-alia*, accepted the reconciled/verified claims of Rs. 6,96,91,565/- as indicated in SECI's letter no. SD/CERC/GST_Claims/SPPL/47335 dated 07.02.2022. We further note that in the instant petition, the Petitioner is only challenging the applicability of the methodology by SECI, as dictated by the Commission in petition no. 536/MP/2020 and is seeking relief on account of an error in calculating monthly annuity by SECI. In light of the above, the present petition cannot be said to be barred by the *principles of estoppel*.

30. On the basis of the submission of the parties, the following issues arise for adjudication:

Issue No. 1: *Whether the Petitioner is entitled to receive carrying cost/interest/discounting factor at the rate of 10.41% for the entire tenure of annuity payments starting from COD of the Project on the principal amount of GST on both capital cost and O&M cost?*

Issue No. 2: *Whether the Petitioner is entitled to payment of interest/LPSC on delayed payment by SECI as claimed in the present Petition, keeping in view the principles of the time value of money and the restitutive nature of change in law claims?*

Issue No. 3: *Whether the Petitioner will be entitled to receive the differential amount, i.e., the difference between monthly annuity calculated by SECI and monthly annuity payable after taking into consideration the discounting factor on the principal claim from COD till the date of payment by SECI, either in lumpsum or in the alternative devise an appropriate*

methodology for compensating Review Petitioner towards the claim of carrying cost / discounting factor on the principal claim as on COD?

Issue No. 4: Whether SECI should be directed to pay future monthly annuities at Rs. 8,16,880/- per month, taking into account the carrying cost / discounting factor payable at 10.41% per annum from the COD of the Project?

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

Re. Issue No. 1

Whether the Petitioner is entitled to receive carrying cost/interest / discounting factor at the rate of 10.41% for the entire tenure of annuity payments starting from COD of the Project on the principal amount of GST on both capital cost and O&M cost? AND

Re. Issue No. 2

Whether the Petitioner is entitled to payment of interest/LPSC on delayed payment by SECI as claimed in the present Petition, keeping in view the principles of time value of money and restitutive nature of change in law claims?

32. Since the Issue No. 1 & Issue No. 2 are related, the same are taken together for discussion. Briefly, the Petitioner has submitted that Article 12 of the PPA dated 02.08.2016 provides for change-in-law and does not impose any fetters on the power of this Commission to provide relief on account of the occurrence of any of the events resulting into any additional recurring/non-recurring expenditure by the Petitioner. Further, the Hon'ble Supreme Court, in a catena of judgments, has held that the award of interest is an integral part of the implementing concepts of the time value of money. As such, the Petitioner is entitled to receive carrying cost/interest/ discounting factor at the rate of 10.41% for the entire tenure of annuity payments starting from COD of the Project on the principal amount of GST on both capital cost and O&M cost along with interest/LPSC on delayed payments.

33. *Per Contra*, SECI has submitted that the PPA dated 02.08.2016 does not have a provision dealing with the restitution principles of restoration to the same economic position as is the case in some PPAs. The Petitioner is placing heavy reliance on the decision dated 15.09.2022 passed in Appeal No. 256 of 2019 and connected Appeals to the case of *Parampujya Solar Energy Pvt. Ltd. v. Central Electricity Regulatory Commission (Parampujya Case)*, wherein the APTEL has dealt with the aspects of the impact of Change in Law beyond Commercial Operation Date of the project and Carrying Cost. However, in terms of the Orders dated 12.12.2022 and 23.01.2023 of the Hon'ble Supreme Court in Civil Appeal No. 8880 of 2022 and in Civil Appeal No.000505-

000510 of 2023, the enforceability of this Commission's order to be passed in pursuance of APTEL decision dated 15.09.2022 in Parampujya Case has been stayed.

34. We note that APTEL, vide Parampujya judgement dated 15.09.2022, 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.”

35. In view of the above, this Commission holds that the Petitioner, in the instant petition, shall be eligible for carrying costs starting from the date when the actual payments were made to the authorities until the date of issuance of the Order dated 23.08.2022 in Petition No. 52/MP/2019, at the actual rate of interest paid by Petitioner for arranging funds (supported by Auditor's Certificate) or the rate of interest on working capital as per the applicable RE Tariff Regulations prevailing at that time or the late payment surcharge rate as per the PPA, whichever is the lowest. Once a supplementary bill is raised by the Petitioner in terms of this order, the provision of a Late Payment Surcharge in the PPA would kick in if the payment is not made by the Respondents within the due date.

36. 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 to SECI all the above-reconciled claims that SECI has to pay to the Petitioner. However, payment to the Petitioner by SECI is not conditional upon the payment to be made by the responding Discoms to SECI.

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

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

38. Therefore, in view of the Hon'ble Supreme Court Order dated 12.12.2022, as quoted above, the directions issued in this Order so far as they relate to compensation for the period post Commercial Operation Date of the projects in question as also towards carrying cost (pre-COD & post-COD) 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.*

39. The issues are decided accordingly.

Re: Issue No. 3

Whether the Petitioner will be entitled to receive the differential amount, i.e., the difference between the monthly annuity calculated by SECI and the monthly annuity payable after taking into consideration the discounting factor on the principal claim from COD till the date of payment by SECI, either in lumpsum or in the alternative devise an appropriate methodology for compensating Review Petitioner towards the claim of carrying cost / discounting factor on the principal claim as on COD? AND

Re: Issue No. 4

Whether SECI should be directed to pay future monthly annuities at Rs. 8,16,880/- per month, taking into account the carrying cost / discounting factor payable at 10.41% per annum from the COD of the Project?

40. Since Issue No. 3 & Issue No. 4 are related, the same are taken together for discussion. Briefly, the Petitioner has submitted that if the discounting factor of 10.41% is applied on the entire admissible principal claim of Rs. 6,96,91,565/- for the entire period of 13 Years, the monthly annuity payable by SECI would be Rs. 8,16,880/-. However, SECI is making payment of the monthly annuity of Rs. 6,77,474/- by applying the discounting factor of 10.41% for a period of 109 Months on a reduced claim of Rs. 4,60,14,303/- [difference between the total admissible principal claim of Rs. 6,96,91,565/- and the lumpsum payment made upfront on 29.08.2022, i.e., Rs. 2,36,77,262/-] leading to an under-recovery by the Petitioner for the following period:

- (a) **07.04.2018 – 28.02.2022**, for which SECI computed lumpsum payment of Rs. 2,09,96,818/- without the application of discounting factor leading to an under-recovery of Rs. 1,73,96,542/-; **and**
- (b) **March 2022 – 31.03.2031**, for which SECI has computed a monthly annuity of Rs. 6,92,552/-, with the application of discounting factor, on the reduced GST claim of Rs. 4,86,94,747/- for 109 months only, leading to an under-recovery of Rs. 1,35,51,752/-.

41. Further, SECI has made the lumpsum payment of Rs. 2,36,77,262/- on 29.08.2022 i.e. for period of 53 months starting from the COD of the Project, without applying the discounting factor of 10.41% and has been continuing to pay monthly annuity of Rs. 6,77,462/- since September 2022, with the application of discounting factor on the reduced GST claim. The computation of change-in-law compensation claims is as below-

- (a) **07.04.2018 – August 2022**, the period for which SPPL was short-paid by an amount of Rs. 1,96,17,378/- on account of upfront lumpsum payment by SECI without the application of discounting factor of 10.41% [53 Months]; **and**
- (b) **September 2022 – 31.03.2031**, the period for which SECI has been continuing to pay a monthly annuity of Rs. 6,77,462/- on the reduced GST claim leading to an under-recovery of the change-in-law claim, on a recurring basis [103 Months]

42. Further, the Petitioner has submitted that SECI is required to compensate the Petitioner:

- (a) for the differential amount of Rs. 1,96,17,378/- short-paid by SECI for the period 07.04.2018 – August 2022 (53 Months) along with the applicable LPS @ 1.25% per month.
- (b) for the differential amount [Rs. 8,16,880 – Rs. 6,77,462] being paid by SECI for the period elapsed from the date of lumpsum payment, i.e., from September 2022 till the date of payment of a monthly annuity of Rs. 6,77,462/- on the reduced GST claim, along with LPS @ 1.25% per month.
- (c) with Rs. 8,16,880/- as the future monthly annuity towards the change-in-law claim of the Petitioner for the balance period of 13 years, from the date of final adjudication of the Petitioner's claim in the present petition.

43. **Per-Contra**, SECI has submitted that the reconciliation of the Change in Law claims was carried out by the parties strictly in line with the directions passed by this Commission by its order dated 20.08.2021 passed in Petition No. 536/MP/2020 & Ors. As per the letter dated 07.02.2022 issued by SECI, the reconciliation of claims was accepted by the Petitioner vide its letter/Undertaking dated 23.02.2022 and 25.08.2022. The present belated claim for monthly annuity @ Rs. 8,16,880/- in the present petition, after voluntarily seeking payments @ Rs. 6,92,552/-, is not permissible. No carrying cost is payable to the Petitioner from the date of incidence/payment of GST till the date of 1st payment by SECI, in terms of the orders dated 23.08.2022 and 25.11.2022. The Commission, in its Order dated 20.08.2021 in Petition No. 536/MP/2020, has held that the liability of SECI/Discoms for 'Monthly Annuity Payments' starts only from 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.

44. It was placed before us that this Commission, in its order dated 20.08.2021 in *Petition No. 536/MP/2020 & Ors.*, has already decided on the methodology of compensation due to a Change in Law event as highlighted 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.”*

...

...

105. *The summary of our findings are as follows:*

Issue No. 1:

- *The discount rate of annuity payments shall be 10.41% towards the expenditure incurred by SPDs on account of Change in Law (GST Laws or Safeguard Duty, as the case may be).*
- *The liability of SECI/ Discoms for ‘Monthly Annuity Payments’ 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 for the delayed period corresponding to each such delayed Monthly Annuity Payment(s) shall be payable as per respective PPAs/PSAs.*
- *The “Tenure of Annuity Payments” shall be for 13 years.*
- *The annuity payment liability shall be a part of the existing payment security mechanism as stipulated in the PPAs and already established under the PPAs by making suitable provision for the annuity payments.*

45. *Vide Order dated 23.08.2022 in Petition No. 52/MP/2019, it was held as under:*

18. We observe that SECI vide its letter dated 07.02.2022 proposed to pay lumpsum of Rs. 2,09,96,818 and remaining amount in monthly annuity of Rs. 6,92,552 spread throughout the remaining period of 13 years from COD, which was accepted by the

Petitioner vide letter dated 23.02.2022. The Petitioner and SECI have also admitted on record that the GST claims stand reconciled between themselves. The said proposal was also sent by SECI to the distribution utilities of the State of Karnataka vide letter dated 08.02.2022. The Petitioner has submitted that now SECI may be directed to release the lumpsum payment within one week from the date of Order.

...

20. In view of the above discussions, the Commission holds that regarding GST claims, the reconciled claims may be released by the Respondent SECI at the earliest. The Contracting parties are directed to follow the directions given in Order dated 20.08.2021 in Petition No. 536/MP/2020 meticulously. The Commission further directs that the Karnataka DISCOMS are liable to pay to the SECI all the above reconciled claims that SECI has to pay to the Petitioner. However, payment to the Petitioner by SECI is not conditional upon the payment to be made by the Karnataka DISCOMS to SECI.

21. In view of the above I.A. 78 of 2021 is disposed of.

22. In view of the above the Petition No. 52/MP/2019 is also partially disposed of except for prayers (b) (qua recurring cost).

23. The Commission observes that the issue regarding O&M cost has been remanded by the Appellate Tribunal of Electricity in Appeal Numbers 61, 62, 63, 64 and 65 of 2021. Therefore, the Commission holds that the issues as contained in prayer (b) (qua recurring cost) of the instant petition shall be dealt along with the remanded matters and to that extent the petition is tagged with Petition Nos. 184/MP/2018 & batch.

46. In light of the above judgments, the following ratio-decidenti emerges:

- a) The discount rate of annuity payments shall be **10.41% towards the expenditure incurred on GST** on account of 'Change in Law.'
- b) Tenure of Annuity Payments shall be for 13 years.
- c) The 'Monthly Annuity Payments' will start from the 60th (sixtieth) day from the date of orders or from the date of submission of claims by the Respondent (SPDs), whichever is later.
- d) Late payment surcharge for the delayed period corresponding to each such delayed Monthly Annuity Payment(s) shall be payable as per respective PPAs/PSAs 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.

47. We observe that the Petitioner has calculated the monthly annuity payments on the principal amount of Rs. 6,96,91,565/- as on 07.04.2018 (COD) considering the discounting factor as 10.41% for the entire period of 13 years (i.e., 156 months) and the annuity comes to Rs. 8,16,880/- per month. **Whereas**, SECI has considered the principal balance of Rs. 4,86,94,747/- (i.e., Rs. 6,96,91,565/- minus Rs. 2,09,96,818/- (upfront lumpsum payment as per Order dated 23.08.2022). SECI has calculated monthly annuity payments on the remaining principal amount

of Rs. 4,86,94,747/- as on 07.02.2022 (i.e., the date on which the Petitioner accepted the claim), considering the discounting factor as 10.41% for the remaining period (i.e., 109 months) and the annuity comes to Rs. 6,92,552/- per month. Subsequently, since the revised reconciliation was accepted by the Petitioner vide its letter/Undertaking dated 25.08.2022, SECI made the lump sum payment of Rs. 2,44,59,578 (upfront of Rs. 2,09,96,818/- as per Order dated 23.08.2022 plus an annuity of 5 months (i.e., Rs. 34,62,760/- (5 months X Rs. 6,92,552/-) for the time lapsed from February 2022 to July 2022).

48. In the instant petition, the PPA was executed on 02.08.2016. The SCoD as per PPA was 02.09.2017. The Unit/project was commissioned on 07.04.2018. **The claims of Rs. 6,96,91,565/- were reconciled between the contracting parties, as per the expenditure incurred on GST.** Therefore, the annuity on the entire expenditure incurred, i.e., on Rs. 6,96,91,565/-, is to be calculated based on the discounting factor of 10.41% for 13 years. Once the annuity is so calculated, the liability of SECI/Discoms for '*monthly annuity payments*,' as decided in Petition No. 52/MP/2019 on 23.08.2022, starts from the 60th (sixtieth) day (22.10.2022) of the date of order, i.e., 23.08.2022, for a period of 13 years. Accordingly, the lumpsum payment and other payments made by the Petitioner so far are to be adjusted accordingly. In view of the discussion above, the parties are advised to revise the calculations.

49. The issue is decided accordingly.

50. The Petition No. 377/MP/2023 is disposed of in terms of the above.

Sd/-
हरीश दुदानी
सदस्य

Sd/-
रमेश बाबू वी.
सदस्य

Sd/-
जिष्णु बरुआ
अध्यक्ष