



नई दिल्ली
NEW DELHI

याचिका संख्या./ Petition No. 30/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: 20th of February, 2025

IN THE MATTER OF:

Petition under Section 79 of the Electricity Act, 2003 read with Article 12 of the Power Purchase Agreement dated 29.01.2019 entered between Sitac Kabini Renewables Private Limited and the Solar Energy Corporation of India Limited seeking compensation/ revision in tariff due to a Change in Law event.

AND IN THE MATTER OF:

Sitac Kabini Renewables Private Limited

1st Floor, Eastern Wing,
Thapar House, 124 Janpath,
New Delhi- 110001

...Petitioner

Versus

1. Solar Energy Corporation of India Limited

1st Floor, A-Wing, D-3,
District Center, Saket,
New Delhi – 110017

2. BSES Yamuna Power Limited

Shakti Kiran Building,
Karkardooma,
New Delhi-110032

3. BSES Rajdhani Power Limited

BSES Bhawan,
Nehru Place,
New Delhi - 110019

4. Electricity Department, Government of Puducherry

The Superintending Engineer-cum-HOD
No. 137, NSC Bose Salai,
Puducherry-605001
Puducherry

...Respondents

Parties Present: Shri Sitesh Mukherjee, Sr. Advocate, SKRPL
Ms. Shikha Sood, Advocate, SKRPL
Shri Arijit Maitra, Advocate, BRPL & BYPL
Ms. Anushree Bardhan, Advocate, SECI
Ms. Surbhi Kapoor, Advocate, SECI
Ms. Shirsa Saraswati, Advocate, SECI
Shri Utsav Mukherjee, Advocate, ARPOL

आदेश/ ORDER

The Petitioner, i.e., Sitac Kabini Renewables Private Limited, is a generating company and *inter alia* engaged in the business of generation, transmission, and sale of electricity. The Petitioner is currently setting up a 300 MW wind power project located at various villages in Taluk Lakhpat, District Kutch, in the State of Gujarat. On 08.12.2017, the Ministry of Power issued Guidelines for the Competitive Bidding Process for the Procurement of Power from Grid Connected Wind Power Projects under Section 63 of the Electricity Act, 2003 (Competitive Bidding Guidelines). Pursuant to these Guidelines, Solar Energy Corporation of India (SECI) issued a Request for Selection (RfS) dated 30.06.2018. The Petitioner submitted its bid on 29.08.2018. The e-Reverse auction was conducted on 25.09.2018, and SECI issued a Letter of Award (LoA) on 24.10.2018. SECI has agreed to purchase wind power from the

Petitioner as an intermediary Seller and sell it to Buying Utilities on a back-to-back basis as per provisions of the scheme. Accordingly, SECI executed Power Sale Agreements (PSAs) as under:

- (i) with BSES Rajdhani Power Limited (BRPL) on 20.12.2018 for 100MW
- (ii) with BSES Yamuna Power Limited (BYPL) on 16.01.2019 for 100MW
- (iii) with the Electricity Department, Government of Puducherry on 05.02.2019 for 100MW.

Subsequently, the Power Purchase Agreement (PPA) was executed on 29.01.2019 between the Petitioner and SECI. The effective date of the PPA was 22.01.2019. On 18.10.2019, the Petitioner entered into a Supply Contract with GE India Industrial Private Limited (Supplier) wherein the terms and conditions were for the purchase of 112 (One Hundred Twelve) Wind Turbines of 2.7 MW of GE2.7 132 RD/HH 130 made at the contracted price by the Petitioner. The Scheduled Commissioning date (SCoD) as per the PPA was 22.07.2020 which was subsequently extended by SECI up to 31.05.2021 due to the occurrence of the Covid-19 lockdown. The SCoD was subsequently extended to 28.02.2022 due to a change in the land policy of the State of Gujarat and finally to 05.09.2022 due to a delay in the grant of permission for the allotment of land by the Gujarat Energy Development Agency (GEDA). The maximum time period allowed for commissioning the Project with a levy of liquidated damages was till 05.07.2023. The Petitioner has filed the instant petition seeking a declaration of issuance of Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021 by the Ministry of Finance, Government of India as Change in Law events and compensation thereof. The Petitioner has also claimed the impact of the change in the rate of GST in respect of the Supply Contract dated 18.10.2019 executed between the Petitioner and GE India Industrial Private Limited.

2. Respondent No. 1, Solar Energy Corporation of India Limited (SECI), has been set up under the administrative control of the Ministry of New and Renewable Energy (MNRE) and has been designated as the nodal agency for the implementation of MNRE schemes for developing grid connected solar power capacity in India.
3. Respondent No. 2 to 4 are the distribution companies in the UTs of Delhi and Puducherry and are engaged in overseeing the distribution activities in the respective areas.

4. The Petitioner has made the following prayers:

- (a) *Allow the present Petition;*
- (b) *Hold and declare that the change in rate of GST applicable to the Supply Contract for setting up of Petitioner's wind power project notified by the Ministry of Finance, Department of Revenue vide its Notifications No.8/2021 dated 30.09.2021, effective from 01.10.2021, amounts to a Change in Law event under Article 12 of the Power Purchase Agreement dated 29.01.2019;*
- (c) *Hold and declare that the Petitioner is entitled to a sum of INR 13,17,62,614/- (Rupees Thirteen Crores Seventeen Lakh Sixty-Two Thousand Six Hundred Fourteen Only) along with the carrying cost at the rate prescribed in the PPA under Clause 10.3.3. (Late Payment Surcharge) towards the impact of such Change in Law event on the Petitioner;*

In the alternate,

- Direct the Respondent, Solar Energy Corporation of India Limited to allow an increase of INR 0.0155 / kWh i.e., from INR 2.77 / kWh to INR 2.786 / kWh (or such amount as may be assessed by the Hon'ble Commission on account of the impact on Petitioner due to the aforesaid Change in Law event) in the quoted tariff payable by the Respondent to the Petitioner and suitably amend the Power Purchase Agreement dated 29.01.2019 to reflect the aforesaid revision in the quoted tariff;*
- (d) *Hold and declare that claiming the above stated relief will not be construed as bar under Order II Rule 2 with respect to other Change in Law events that may have occurred till the time of the commissioning of the Project; and*
 - (e) *Pass such other order(s) which the Ld. Commission deems fit in the facts and circumstances of the instant case.*

Factual Matrix:

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

Location	Various villages in Taluk Lakhpat, District Kutch, in the State of Gujarat
Guidelines for Competitive Bidding Process for Procurement of Power from Grid Connected Wind Power Projects under Section 63 of the Electricity Act, 2003	08.12.2017
Nodal agency	SECI
Tariff	2.77 per kWh
Capacity (MW)	300 MW

Power	Wind power project
Date of Notification No.1/2017-Central Tax (Rate) (2017 CGST Notification)	28.06.2017
RfS issued on	30.06.2018
Bid submitted on	29.08.2018
E-Reverse auction held on	25.09.2018
LOA issued on	24.10.2018
PSA executed on	
(i) BRPL for 100MW	20.12.2018
(ii) BYPL for 100MW	16.01.2019
(iii)ED, Government of Puducherry on for 100MW	05.02.2019
Effective date of the PPA	22.01.2019
PPA executed on	29.01.2019
Supply Contract was entered between the Petitioner and GE India Industrial Private Limited for supply of Wind Turbines	18.10.2019
SCoD of the project	22.07.2020
Notification No.8/2021- Central Tax (Rate) and Notification No. [F.12(1)FD/Tax/2021-60] (2021 GST Notifications)	30.09.2021
Extended SCoD	
• Vide letter dated 08.09.2020, SECI granted an extension on account of Covid-19	31.05.2021
• Vide letter dated 12.03.2021, SECI granted an extension on account of change in land policy by the State government of Gujarat	28.02.2022
• Vide letter dated 15.09.2021, SECI granted an extension on account of delay in issuance of necessary developer Permission by GEDA	05.09.2022
Commissioning of the project	94.5 MW 10.08.2022 21.6 MW 18.08.2022 18.9 MW 23.08.2022 13.5 MW 24.08.2022 10.8 MW 01.09.2022 13.5 MW 05.09.2022 35.1 MW 20.09.2022 10.8 MW 23.09.2022 10.8 MW 10.10.2022 13.5 MW 21.11.2022 13.5 MW 05.12.2022 29.7 MW 29.05.2023 13.8 MW 30.05.2023 Total of: 300 MW as of 30.05.2023
As per Article 4.6.2 long stop date is 27 months from the effective date of the PPA	21.04.2021

6. The instant petition was filed on 23.01.2023. The hearing was conducted on 24.04.2023, wherein the Commission, after hearing the Petitioner, admitted the Petition. The hearing was

thereafter held on 19.07.2023, wherein BYPL and BRPL sought time for filing their replies in the matter. Pursuant to the request of Respondents, the Commission adjourned the matter to 28.11.2023. On 28.11.2023, BYPL & BRPL circulated their replies and sought liberty to upload the same on the e-filing portal of the Commission. SECI, upon perusing the reply of BYPL & BRPL, submitted that in the said reply, BYPL & BRPL have alleged that they were not consulted by SECI while giving an extension in SCoD to the Petitioner and SECI may thus be permitted to file its response to such submissions/averments. The matter was again adjourned to 20.05.2024, and finally, the Commission upon hearing the submissions of the parties, reserved the matter for orders and directed the parties to file their respective written submissions. Pursuant to the directions of the Commission, the parties filed their respective submissions.

Analysis and decision:

7. We have heard the learned counsels for the Petitioners and Respondents, carefully perused the records, and considered the submissions of the parties.
8. Before proceeding to the main issues, we feel it is imperative to mention here that Article 4.6.2 of the PPA dated 20.01.2019 stipulates as under:

4.6 Liquidated Damages not amounting to penalty for delay in Commissioning of supply of power to Buyer

4.6.1

...

Delay beyond the Scheduled Commissioning Date upto (& including) the date as on 27 months from the Effective Date: Buyer will encash total Performance Bank Guarantee on per day basis and proportionate to the balance capacity not commissioned

...

4.6.2 *The Maximum time period allowed for commissioning of the full Project Capacity with encashment of Performance Bank Guarantee shall be limited to 27 months from the Effective Date of this Agreement, the PPA capacity shall stand reduced/ amended to the Project Capacity Commissioned, provided that the commissioned Capacity is not below 50MW or 50% of the allocated Project capacity, whichever is lower, and the PPA for the balance Capacity will stand terminated and shall be reduced from the selected Project Capacity.*

We observe in the instant petition that the PPA (effective date being 22.01.2019) was executed on 29.01.2019, and the SCoD of the project was 22.07.2020. The SCoD was extended first up to 31.05.2021 on account of the occurrence of the Covid-19 lockdown and then subsequently

extended to 28.02.2022 due to a change in the land policy of the State of Gujarat and finally to 05.09.2022 due to a delay in the grant of permission for the allotment of land by GEDA. The project was fully commissioned on 30.05.2023. We note that vide letter No. SECI/Wind Tranche-5/OD-XIII/SK/SKRPL-P1 dated 30.05.2023, SECI issued a Commissioning Certificate and has certified that *with the present part commissioning of 13.8MW, the cumulative capacity commissioned stands at 300 MW*. We further note that neither of the contracting parties has prayed before the Commission to take cognizance of Article 4.6. Nevertheless, the instant order of the Commission shall be applicable to the mutually agreed project capacity under PPA, which is valid.

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

Issue No. I: *Whether the notification as notified by the Ministry of Finance, Department of Revenue vide its Notifications No.8/2021 dated 30.09.2021, effective from 01.10.2021, amounts to a Change in Law event under Article 12 of the Power Purchase Agreement dated 29.01.2019 and Whether the change in rate of GST as above is applicable to the Supply Contract for setting up of Petitioner's wind power project? AND Whether the Petitioner is entitled to compensation in terms of Article 12 of the PPA towards additional expenditure on account of the Change in Law event qua the Notification No. 8/2021 dated 30.09.2021?*

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

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

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

Re: Issue No. I

Whether the notification as notified by the Ministry of Finance, Department of Revenue vide its Notifications No.8/2021 dated 30.09.2021, effective from 01.10.2021, amounts to a Change in Law event under Article 12 of the Power Purchase Agreement dated 29.01.2019 and Whether the change in rate of GST as above is applicable to the Supply Contract for setting up of Petitioner's wind power project? AND Whether the Petitioner is entitled to compensation in terms of Article 12 of the PPA towards additional expenditure on account of the Change in Law event qua the Notification No. 8/2021 dated 30.09.2021?

11. Briefly, the Petitioner has submitted that:

- a) Vide Notification No. 8/2021-Central Tax (Rate) dated 30.09.2021 of the Government of India in the Ministry of Finance (Department of Revenue), the Entry No. 234 was removed from Schedule I and placed in Schedule II as entry 201A, thereby attracting a higher GST rate on the “*Wind mills, Wind Operated Electricity Generator (WOEG)*”. There is an increase in the Goods and Services Tax (GST) rate from 5% to 12%. This increase has caused an impact of INR 13,17,62,614/- (Rupees Thirteen Crores Seventeen Lakh Sixty Two Thousand Six Hundred Fourteen Only) on the costs of the Project.
- b) Notification No. 8/2021-Central Tax (Rate) dated 30.09.2021 was issued after the last date of bid submission of the project, i.e., 29.08.2018, and hence constitutes a Change in Law event in terms of Article 12 of the PPA dated 29.01.2019.
- c) On 18.10.2019, the Petitioner entered into a Supply Contract with *GE India Industrial Private Limited* containing the terms and conditions for the purchase of 112 (One Hundred Twelve) Wind Turbines of 2.7 MW of GE2.7 132 RD/HH 130 made in and around Kutch district in the State of Gujrat, India.
- d) On 30.09.2021, the Ministry of Finance, Department of Revenue vide its Notification No. 8/2021, notified an amendment to Notification No. 1/2017 dated 28.06.2017, attracting a higher GST rate on “*Wind mills, Wind Operated Electricity Generator (WOEG)*,” i.e., an increase from 5% to 12% (including Central Tax and State Tax components). On 01.10.2021, the Notification No. 8/2021 dated 30.09.2021 came into force.
- e) On 11.03.2022, an Amendment Agreement No. 3 to the Supply Contract dated 18.10.2019 with Supplier was executed wherein it was noted that in view of the above change, the renewable energy devices and parts for their manufacture and components of the Wind Turbines shall now be subject to a higher GST rate effective from 01.10.2021. Therefore, any invoices raised thereafter will attract an increased GST rate of 12%.
- f) On 27.10.2022, a letter was issued by the Petitioner to the Respondent intimating them about the occurrence of this Change in Law Event and its direct impact on the Project on account of the increase in the cost of the wind turbine generators.
- g) Subsequent to the effective date of the change in GST rates and pursuant to Amendment Agreement No. 3 dated 11.03.2022 to the Supply Contract, several invoices were raised by the Supplier. As many as 145 (one hundred and forty-five) invoices were impacted by the

increased GST rates, thereby causing the Petitioner to pay the GST at 12% instead of 5%. Therefore, the difference of 7% on such invoices totals INR 13,17,62,614/- (Rupees Thirteen Crores Seventeen Lakh Sixty-Two Thousand Six Hundred Fourteen Only).

h) Hence, the petition.

12. *Per contra*, SECI has submitted as under:

Re. GST Notification Dated 30.09.2021

- a) In order to qualify for any relief under Article 12 of the PPA dealing with Change in Law, the claims raised by the Petitioner should fall within the scope and ambit of the said provision.
- b) The Commission may decide with regard to the admissibility of GST Notification dated 30.09.2021 as an event of Change in Law within the scope of Article 12 of the PPA read with provisions of PSA.
- c) The Explanation contained in the Table with reference to Serial No.201A, Chapter 84, 85 or 94 in Notification No.8/2021- Central Tax (Rate) provides that if there is the supply of services in addition to the supply of goods, the supply Contract entered will fall under composite supply of works contract. In such a case,
 - (i) The value of goods is to be taken as 70% of the gross consideration
 - (ii) The value of services is to be taken as 30% of the gross consideration.
- d) The tax incidence on goods is at 12%, and the services are at 18%. Accordingly, 12% will be applicable only on 70% of the gross consideration charged and 18% on the remaining 30% of the gross consideration. The above explanation (*contained in Table with reference to Serial No.201A*) providing for 12% for 70% and 18% for 30% will apply only if it is a composite works contract and not otherwise. If, however, there are two separate contracts, one for the supply of goods and one for the erection of services, etc, the supply of goods will attract a GST of 12%, and the supply of services will attract a GST of 18%. In the case of composite works contract, subject to the admissibility of Notification dated 30.09.2021 as Change in Law, any increase in the rate of GST which the Petitioner can claim as per Notification dated 30.09.2021 is only for the increase of GST from 5% to 12% on goods (which constitutes 70% of the gross consideration) there being no increase in tax on service part of 30% as per the said Notification.

- e) The extent to which relief admissible to the Petitioner on account of Notification dated 30.09.2021 of GST (if any) is subject to examination and verification of documents by SECI (and the Buying Entities) to be submitted by the Petitioner.

Re. Requirement to furnish relevant documents and thereby establish one-to-one correlation

- f) The Petitioner be directed to furnish the relevant details, including the date of delivery of goods, invoices, the date on which invoices were raised, Statutory Auditor's Certificate, etc., to substantiate the impact of the change in the rate of GST in terms of the above Notification on the specified renewable energy devices and parts for their manufacture. It is for the Petitioner to establish the one-to-one correlation between the project, the supply of goods against which the change in law is claimed, the invoices, and other relevant documents for proof of the payment of the claimed amount on account of the change in law.

Re. Cut-off date for payment of claim amount on account of GST

- g) The aspect of the Cut-Off date for payment of compensation on account of Change in law needs to be considered based on the decision dated 20.08.2021 of this Commission in Petition No. 536/MP/2020 with regard to the admissibility of the events claimed by Petitioner as Change in Law within the scope of Article 12 of the PPA.
- h) The commercial supply of power from the power project under the PPAs is from the Commercial Operation Date of the power plant. In such cases, the extent to which the impact of the change in law is to be considered is only on the equipment duly installed and commissioned by the date of commercial operation of the power plant. The equipments installed after the commercial operation date of the project are not to be considered for the impact of Change in Law. It is therefore submitted that this Hon'ble Commission may be pleased to clarify the cut-off date for considering a change in law impact as the actual Commercial Operation Date of the power project.

Re. Methodology for payment of claim amount (if any) on account of change in law

- i) If the Commission declares the event claimed by the Petitioner as a Change in Law and the impact claimed is allowed to the Petitioner, then this Commission may take into consideration the following aspects for determining the methodology for making payment:

- (a) The decision dated 20.08.2021 of the Commission approving the discounting factor at 10.41% was based on the interest rate specified in the Renewable Tariff Regulations, 2017 read with RE Tariff Order dated 19.03.2019 notified by the Commission at the relevant time when the said annuity methodology was considered by MNRE and implemented by SECI.
- (b) Subsequently, there has been a fall in the interest rate of loan and the Commission has notified the *Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020* and passed the *RE Tariff Order dated 07.11.2022* in Petition No.14/SM/2022 for the FY 2022-2023.
- (c) The Commission vide Order dated 27.03.2023 in 3/SM/2023 inter-alia stated that *'Therefore, Order dated 07.11.2022 in Petition No. 14/SM/2022 shall also continue to be in force until further Orders.'*
- (d) Vide above regulations read with RE tariff Orders, the Commission has considered the interest rate of 9.12% and the term of the Loan repayment as 15 years.
- (e) Accordingly, the Commission may decide on the impact of the alleged Change in Law event if held to be admissible to the Petitioner.

Re. Directions to buying entities to make payment to SECI towards the reconciled change in law claims

- j) If the event claimed by the Petitioner is considered as Change in Law and the impact is allowed to the Petitioner, the Commission may issue directions to BYPL, BRPL and the Government of Pondicherry (i.e. the power procurers under the respective PSAs), to make payment towards the evaluated change in law claims payable by SECI to Petitioner, on a back to back basis under the respective PSA in a time bound manner.

Re. Carrying cost

- k) The Petitioner's claim for Carrying Cost is to be considered after the decision of the Commission on the admissibility of Notification dated 30.09.2021 as Change in Law within the scope of Article 12 of the PPA read with PSA.
- l) Once the PPA stands executed, the provisions of the PPA have become final and binding on the parties. The PPA, therefore, governs the contractual rights and obligations.
- m) In view of the above, the claim for carrying cost made by the Petitioner in the present case referring to the Guidelines dated 08.12.2017 is not correct.

Re: Appellate Tribunal's decision in Parampujya Case

- n) The Appellate Tribunal, in a decision dated 15.09.2022 passed in Appeal No.256 of 2019 and connected Appeals in the case of Parampujya Solar Energy Pvt. Ltd. vs Central Electricity Regulatory Commission (Parampujya Case), has dealt with the impact of Change in Law beyond Commercial Operation Date of the project and Carrying Cost.
- o) The Judgment dated 15.09.2022 of the Hon'ble Tribunal in the Parampujya Case has also been challenged by SECI before the Hon'ble Supreme Court in Civil Appeal No.000505-000510 of 2023. The Hon'ble Supreme Court vide Order dated 23.01.2023 in Civil Appeal No. 000505-000510 of 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.

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Tag with Civil Appeal No 8880 of 2022.

- p) Thus, in terms of the Orders dated 12.12.2022 and 23.01.2022 of the Hon'ble Supreme Court, the enforceability of the Commission's order to be passed in pursuance of the Tribunal's decision dated 15.09.2021 in 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.

13. The Respondent No. 2 (BYPL) and Respondent No.3 (BRPL) has submitted as under:

- a) The Respondents cannot be fastened with any financial liability arising due to the extension of the SCOD unilaterally and bilaterally between SECI and the Petitioner without obtaining consent from the Respondents, which has been ultimately fastened with the financial liability as purportedly and allegedly claimed by the Petitioner.

Re. 30.09.2021 notification of dept of revenue changing the rate of tax to 12% is not attracted

- b) On the date of the bid, i.e. 29.08.2018, the Petitioner was aware that the Central Govt applied a CGST rate of 6% in respect of goods specified in Schedule II, i.e., “(d) Wind mills, Wind Operated Electricity Generator (WOEG)”.
- c) It is inconceivable that when on 18.10.2019, the Supply Contract was signed by Petitioner with GE India for wind turbines, the Petitioner did not receive the

goods/wind turbines for nearly two (2) years and seeks to contend that notification of Dept of Revenue issued Notification dated 30.9.2021, changing the rate of tax to 12% is attracted. This is wholly untenable.

d) Since the Petitioner was mandated to commission its project by 22.07.2020, and has on 18.10.2019, placed a Supply Contract with GE India for wind turbines.

Re. Change in law under the PPA is not attracted

e) As per Clause 12 of the PPA, Change in Law claimed by the Petitioner is due to “*any statutory change in tax structure or introduction of any new tax..*”

f) The 30.09.2021 notification of Dept of Revenue changing the rate of tax from 5% to 12% is neither *any statutory change in tax structure nor introduction of any new tax..*”. It is a change in the rate of tax which is not covered in Clause 12 of the PPA. Clause 12 of the PPA does not state “*any statutory change in tax structure, i.e. change in rates of taxes, duties and cess, or introduction of any new tax ..*”.

g) An instance of “*statutory change in tax structure nor introduction of any new tax..*” is a change in its indirect tax system with the introduction of the Goods and Services Tax. Another instance of “*statutory change in tax structure nor introduction of any new tax..*” is the change in indirect taxation structure with the Modified Value Added Tax (‘MODVAT’) in 1986 and later, Central Value Added Tax (‘CENVAT’) in 2002-03. Subsequent to an amendment to the Constitution allowing the Centre to levy taxes on services, the CENVAT also subsumed service taxes within its ambit in 2004-05.

h) The 30.09.2021 notification of Dept of Revenue changing the rate of tax from 5% to 12% is (a) not in nature of a statutory change in tax structure, and (b) it is not coming into effect of a new ‘Law’ as has been provided for under Article 12 of the PPA, and that the claim that will result in additional expenditure for the Petitioner is wholly unacceptable since the Petitioner was mandated to commission its project by 22.07.2020, and has on 18.10.2019, placed Supply Contract with GE India for wind turbines 30.09.2021 when 5% tax was applicable. Default on the part of the Supplier cannot be a ground to seek enhanced rate of tax.

i) The project commissioning is delayed by 1043 days with respect to the original SCoD. The energy loss due to the delay in the commissioning of the Petitioner is 564 MUs.

j) SECI ought to enforce the encashment of PBG for the delayed commissioning.

14. In addition, BRPL vide its response dated 05.01.2024 and Notes of Argument dated 16.09.2024 reiterated its submissions already filed in its reply as above.

15. Vide Rejoinders dated 06.7.2023, 14.12.2023, and submissions dated 31.01.2024, the Petitioner has reiterated its submissions made in the plaint, and hence that same are not reproduced herewith for the sake of brevity. Additionally, the Petitioner has submitted as under:

Re. The GST Notification dated 30.09.2021 is a 'Change in Law' event.

- a) This Commission need not decide with regard to the admissibility of GST Notification dated 30.09.2021 as an event of a change in law as the said issue is no longer *res integra*. Further, it is reiterated that on 27.09.2022, the Ministry of New and Renewable Energy, Government of India, addressed a letter to the Respondent and others approving that as per Notification No. 8/2021 dated 30.09.2021, the GST rate for specified renewable energy devices and parts for their manufacture has increased from 5% to 12% and such a hike in the GST is to be treated as a change in law.
- b) Regarding the applicability of the Explanation contained in the Table with reference to Serial No. 201A, Chapter 84, 85 or 94 in Notification No. 8/2021- Central Tax (Rate), it is evident from a perusal of the documents on record of the Petition that the invoices forming the quantum of the impact due to change in law event were issued on account of the supply of goods only. The contract with the supplier to the Petitioner did not involve a gross consideration for the composite supply of goods and services.
- c) The Petitioner has limited its claim to the supply of goods comprising renewable energy devices and parts for their manufacture and components of the Wind Turbines. As such, only 146 invoices have been impacted and the same are annexed accordingly. In other words, the affected invoices, as annexed, correspond only to the supply component. Therefore, the Explanation contained in the Table with reference to Serial No. 201A, Chapter 84, 85 or 94 in Notification No. 8/2021- Central Tax (Rate) does not apply.
- d) The GST Notification dated 30.09.2021, qualifies as a Change in Law event as it satisfies the aforementioned conditions for the reasons set forth below:
 - (a) The GST Notification dated 30.09.2021 has been issued by the Ministry of Finance which is an 'Indian Government Instrumentality';
 - (b) The enabling provision for such amendment is sub-section (1) of Section 9 and Sub-Section (5) of Section 15 of the Central Goods and Services Tax Act, 2017, which is a statute enacted by the Central Government and thus, the rates are mandatory in nature, having the force of law;

- (c) The enhanced GST rates were effective from 01.10.2021 and, therefore, imposed subsequent to the last date of bid submission of the project, i.e., 29.08.2018; and
- (d) Due to the said imposition and amendment rates, the Petitioner has incurred an additional cost of INR 13,17,62,614/- (Rupees Thirteen Crores Seventeen Lakh Sixty-Two Thousand Six Hundred Fourteen Only) along with carrying cost.
- e) Further, it is a settled position that an increase in GST from 5% to 12% is a Change in Law. In this regard, reliance is placed on the Order passed by this Commission in Petition No. 174 of 2022 on 17.05.2023.

Re. Petitioner is furnishing all relevant documents for the adjudication of the matter

- f) The copies of the impacted invoices are already furnished with the Petition as ‘Annexure P-8 (Colly.)’, and the same reflects the details such as the date of invoice, nomenclature of goods, amount, GST levied, etc. However, in further substantiation of the impact due to the change in law, a table showing the date of the delivery of the goods, along with the supporting invoices and delivery challans are also annexed. Further, the statutory auditor’s certificate, along with the requisite annexures and details of payment are annexed
- g) One-to-one correlation is well exhibited by the fact that all instances of impact due to change in law, as claimed by the Petitioner, fall within the cut-off date. The same is corroborated by the documents evidencing the actual costs incurred by the Petitioner due to the increase in the rates of the GST, such as copies of the relevant invoices, date of supply, the auditor’s certificate, and details of payment.

Re. The Cut-Off date for payment of the claim amount is the Commercial Operation Date of the Project, i.e., 30.05.2023.

- h) Commissioning cum COD Certificates affirm that the Petitioner has commissioned the entire 300 MW as on 30.05.2023.
- i) As many as 145 (one hundred and forty-five) invoices were impacted by the increased GST rates, thereby causing the Petitioner to pay the GST at 12% instead of 5%. All equipments, as detailed in such invoices, were duly installed and commissioned before the commercial operation date, i.e., 30.05.2023, and therefore, the impact of change in law ought to be considered to the extent of such invoices.

Re. Petitioner has no objection to the payment of claim amount on a ‘monthly annuity’ basis if Buying Entities disagree to make a lump sum payment.

- j) The Petitioner is agreeable to the payment of the claim amount on a monthly annuity basis unless the Distribution Licensees / Buying Entities expressly agree to a make lump sum payment.

Re. Petitioner has no objection in the issuance of directions to Buying Entities to make payment to SECI towards the claims on account of 'Change in Law'

- k) The Petitioner does not have any objection to the same in so far as it does not prejudice the entitlement of the Petitioner to the claims due to the impact of the change in law event.

Re. The Petitioner is entitled to grant of Carrying Cost

- l) The present issue is covered by the judgment dated 15.9.2022 in *Parampujya judgment* wherein the APTEL (despite there being no express clause in the PPA regarding carrying cost) has granted the same to the Solar Power Developers.
- m) The Change in Law clauses in both *Parampujya judgment* as well as the present case are very wide and open ended. Further, there is no bar on granting carrying costs under the PPA. Therefore, the Commission may be pleased to grant carrying costs to the Petitioner while exercising its Regulatory Powers under Section 79(1)(b) of the Act to maintain parity.

Re. Petitioner has no claims post Commercial Operation Date of the Project

- n) The Petitioner has no claims post the Commercial Operation Date of the Project. The commercial operation date, i.e. 30.05.2023, may be accepted to be the cut-off date for the Project, and the same would not impact the claim of the Petitioner. As many as 145 (one hundred and forty-five) invoices were impacted by the increased GST rates, thereby causing the Petitioner to pay the GST at 12% instead of 5%. Therefore, the difference of 7% on such invoices totals INR 13,17,62,614/- (Rupees Thirteen Crores Seventeen Lakh Sixty-Two Thousand Six Hundred Fourteen Only). All equipments, as detailed in such invoices, were duly installed and commissioned before the commercial operation date, i.e. 30.05.2023, and therefore, even as per Respondent No. 1, the impact of change in law ought to be considered only to the extent of such invoices.
- o) BRPL seeks to raise extraneous grounds that cannot be adjudicated in the present proceedings filed under Section 79 of the Electricity Act read with Article 12 of the PPA. Further, if BRPL was affected by the extensions of SCoD as granted by SECI, BRPL ought to have challenged such extensions before the appropriate forum and in appropriate

proceedings. However, BRPL has failed to object to such extensions granted by SECI. Hence, the said extensions granted by SECI have attained finality.

- p) It is an attempt by BRPL to avoid its obligations to compensate the Petitioner for the increase in GST rates which has been claimed in accordance with the PPA and pursuant to the settled law vide Order passed by this Commission in Petition No. 174 of 2022 on 17.05.2023.
- q) Even otherwise, the extensions of SCoD were granted on account of reasons beyond the control of the Petitioner, due to events such as (a) change in land policy by the State Government of Gujarat, delay in operationalization of LTA (b) Nationwide Lockdown due to COVID-19 which was declared to be a force majeure event by Ministry of New and Renewable Energy; and (c) on account of delay in issuance of necessary Develop Permission (DP) by Gujarat Energy Development Agency (GEDA), GoG/ frequent change in land policy by GoG.
- r) As on the bid submission date i.e., 29.08.2018, there existed no prior awareness nor foreseeable knowledge with respect to the change in law i.e., the GST Notification dated 30.09.2021. Hence, any insinuation indicating the Petitioner's pre-existing knowledge or anticipation of the GST levy before the specified dates is unfounded and lacks factual basis. The actions taken by the Petitioner in connection with the bid were executed in strict adherence to the prevailing legal landscape.
- s) The Petitioner has attached all the invoices along with the delivery date of the Wind Turbines at Annexure P-10 to the Rejoinder to the Reply filed by SECI. The Petitioner has limited its claim to the supply of goods comprising of the renewable energy devices and parts for their manufacture and components of the Wind Turbines. As such, only 146 invoices have been found to be impacted and the same are annexed accordingly.
- t) Neither the PPA, nor the RfS or the Guidelines stipulate any timeline for installation of the wind turbines. Needless to say, it is a settled law that the commercial decision of the Petitioner to install wind turbines at a particular point in time cannot be called into question in as much as the same is the internal business affairs of the Petitioner and is its sole prerogative and can be exercised at its sole discretion.
- u) The Petitioner was mandated to commission the project by 22.07.2020. However, the Petitioner was granted extension by SECI till 05.09.2022. In view of the extensions granted by SECI, it is denied that there was a delay of 1043 days in commissioning of the project.

- v) The Petitioner has duly paid the liquidated damages as computed under the PPA of Rs. 10,29,67,374/- on 17.07.2023 to SECI, for the delayed capacity commissioned beyond the SCoD but within the timelines as permitted under the PPA with payment of liquidated damages. Upon due payment of the liquidated damages of Rs. 10,29,67,374/- the Performance Bank Guarantee as submitted by the Petitioner has been returned by SECI. Further, in terms of the PPA, the Petitioner is liable to pay the liquidated damages to SECI.
- w) The SCoD of the Project, as extended by SECI, is 05.09.2022, and the Commissioning Date of the Project is 30.05.2023. However, till date, the Respondent No. 2 & Respondent No. 3 have not raised this issue in any forum. Instead, Respondents now want to raise these issues in the present Petition filed by the Petitioner, which is limited to the Change in Law events.
- x) Respondents are trying to introduce extraneous grounds, which fall beyond the purview of adjudication in the current proceedings filed under Section 79 of the Electricity Act, 2003, read with Article 12 of the PPA dated 29.01.2019 with the sole intention of delaying the process and wasting the time of this Commission. The extensions granted by SECI have attained finality. Further, the increase in delay period by the Respondents will lead to increased tariffs due to an increase in Carrying Cost which is required to be borne by the consumers of Respondents.
- y) Any submissions or grounds raised beyond the scope of the present Petition by the Respondents ought to be dismissed and ought not to be considered for the purposes of present proceedings.

16. Vide Submissions dated 18.12.2023, SECI has filed a reply to the submissions forwarded by BRPL & BYPL, as under:

- a) BRPL & BYPL have claimed that they were not informed/consulted about the extensions granted by SECI to the Petitioner up to 05.09.2022 and, therefore, no financial liability should be fastened onto them on account of any change in law implications.
- b) Vide letters dated 29.05.2020, BRPL was informed that due to the lockdown on account of COVID 19 being treated as Force Majeure Event, the SCoD is extended for the Petitioner for the period of lockdown plus 30 (thirty) days.

- c) Vide letter dated 10.09.2020, BRPL was informed that the SCoD of the Petitioner has been extended to 31.05.2021 due to the lockdown being considered a Force Majeure event
- d) Vide letter dated 16.03.2021, BRPL was informed that due to a change in land policy by the State Government of Gujrat, the SCoD of the Petitioner was revised as 28.02.2022.
- e) Vide letter dated 13.12.2021, BRPL was informed that on account of the delay in issuance of necessary developer Permission (DP) by GEDA, GoG/frequent change in land policy by GoG, the SCoD of the Petitioner is revised to 05.09.2022.
- f) Similar letters were written by SECI to BYPL and the Electricity Department, Govt. of Puducherry informing them about the extensions.
- g) The contentions and arguments raised by Respondents against SECI are baseless and a clear afterthought on the part of the Respondents
- h) The extensions granted to the Petitioner through various letters are in line with the recommendations/notifications of MNRE.
- i) The PPA provisions duly authorize SECI, as a party to the PPA and further as a nodal agency of the MNRE, Government of India, to consider and decide such grants of extension of time in the interest of establishment and development of wind projects and making available the quantum of wind generated electricity to BRPL & BYPL to fulfil their respective Renewables Purchase Obligations (RPO). BRPL & BYPL have duly signed the Power Sale Agreement (PSA) with SECI, which refers to their binding obligation of the terms & conditions contained in the PPA with the project developer. Further, BRPL & BYPL are on a back-to-back basis and are bound by the rights and obligations arising under the PPA.
- j) In terms of the PPA and PSA finalized in pursuance to the tariff based competitive bidding process, the Petitioner had agreed to generate and supply electricity at a tariff of Rs. 2.77/kWh. With the trading margin of Rs.0.07/kWh, the wind power is available to Respondent Nos 2 and 3 at Rs. 2.84/kWh. The quantum of power available in aggregate to BRPL & BYPL is 200 MW. The quantum of such power is being supplied to BRPL & BYPL, and the same is being taken by BRPL & BYPL towards the fulfilment of their RPO Obligations. The initial SCoD of the project was on 22.07.2020. The extension of time from 22.07.2020 to 05.09.2022 was given for the reasons (a) Non operationalization of LTA (b) lockdown due to COVID-2019 (c) delay in developer

permission by Gujarat Energy Development Agency (GEDA), Government of Gujarat and change in land policy by the State Government of Gujarat.

- k) The extensions for non- operationalization of LTA, as well as for COVID, land policy have been decided by the MNRE, Government of India. The parties are bound by the same. The Government of India has considered such extensions to be in public interest and in the interest of promoting renewable energy generation.
- l) BRPL & BYPL are fully aware of the same and did not raise any objections at the relevant time.
- m) BRPL & BYPL cannot claim against SECI with regard to delay in the commissioning of the Power Project or otherwise any consequence thereof in the fulfilment of RPO Obligations etc.

17. Before going to the main issue, we feel it is pertinent to deal with the preliminary issue raised by the Respondents BRPL/BYPL. The Respondents have argued that they cannot be fastened with any financial liability arising owing to the extension of the SCoD unilaterally and bilaterally between SECI and the Petitioner without obtaining consent from the Respondents. The project commissioning is delayed by 1043 days with reference to the original SCoD. The energy loss due to the delay in commissioning of the Petitioner is 564 MUs. SECI ought to enforce the encashment of PBG for the delayed commissioning. The Commission ought to direct SECI to defray the monetary losses caused to the answering Respondents from the proceeds of the bank guarantee. *Per-contra*, SECI has placed on records letters dated 29.05.2020, 10.09.2020, 16.03.2021 & 13.12.2021 vide which BRPL/BYPL was informed regarding extension of SCoD qua lockdown being considered as Force Majeure event; change in land policy by the State Government of Gujarat and delay in issuance of necessary developer Permission (DP) by GEDA, GoG/frequent change in land policy by GoG. SECI has specifically mentioned that similar letters were written by SECI to the Electricity Department, Govt. of Puducherry informing about the extensions. Further, SECI has specifically mentioned that the extensions granted to the Petitioner through various letters are in line with the recommendations/notifications of MNRE.

18. We observe that SECI has placed on record the following letters written to Respondents regarding the extension of SCoD:

- a) Letter dated 29.05.2020 informing about the *Time Extension in Scheduled Commissioning Date of various Wind Power Projects under SECI Wind Tranche – III, V and VI* as under:

“With reference to the above, the extension in SCD granted to M/s Alfanar Energy Private Limited (Project ID: WPD-ISTS-T3-AC-P1-300GJ) was Intimated to BYPL vide letter dated 26.11.2019.

It is informed that, on account of delay due to change in land policy by the State Government of Gujarat, delay in operationalization of LTA, Scheduled Commissioning Date (SCD) for the project awarded to M/s Sitac Kabini Renewables Private Limited (Project ID: WPD-ISTS-T5-SKRPL-PI-300GJ), has been revised to proposed date of commissioning of Bhuj - II PS (tentatively 31.12.2020) or actual date of commissioning whichever is earlier.

In this regard, it is also informed that, due to the lockdown on account of COVID 19 being treated as Force Majeure Event, the Scheduled Commissioning Dates (SCDs) for the following Wind Power Projects are extended for the period of lockdown plus 30 (thirty) days.

.....
(2) 300 Mw Wind Power Project excluded by M/s Sitac Kabini Renewables Private Limited under Wind ISTS Tranche - V (ID: WPD-ISTS-T5-SKRPL-P1-300GJ)

The letters to Wind Power Developers for extension of SCDs are enclosed for your reference.”

- b) Letter dated 10.09.2020 informing about the *Time Extension of Scheduled Commissioning Date (‘SCD’) of the Wind Power Project under SECI Wind Tranche – V* as under:

“With reference to the SI. No. 2 and 3, the extension in SCD granted to various Wind Power Projects mapped with BYPL was intimated.

In this regard, it is further informed that, the Scheduled Commissioning Date (SCD) for Wind Power Project awarded to M/s. Sitac Kabini Renewables Private Limited (Project ID: WPD ISTS T5 SKRPL P1 300CJ) under ISTS Wind Tranche V Scheme, has been extended due to lockdown being considered as Force Majeure event.

The revised SCD of the project is as follows:

SI No.	Name of the Project Developer with Project ID	Original SCD	Revised SCD
1.	<i>Sitac kabini Renewables Private Limited (WPD-ISTS-T5-SKRPL-P1-300GJ)</i>	<i>22.07.2020</i>	<i>31.05.2021</i>

The letter to Wind Power Developer for extension of SCD is enclosed for your reference.”

- c) Letter dated 16.03.2021 informing about the *Time Extension in Scheduled Commissioning Date ('SCD')* of Wind Power Project under SECI Wind tranche - V as under:

“With reference to the above, it is to inform that due to change in land policy by the State Government of Gujrat, the Scheduled Commissioning Date (SCD) for Wind Power Project awarded to M/s. Sitac Kabini renewables private Limited under ISTS Wind Tranche V Scheme, has been revised as 28.02.2022.”

- d) Letter dated 13.12.2021 informing about the *Extension in Scheduled Commissioning Date (SCD) for 300MW Wind Power Project under SECI ISTS Wind Tranche – V Scheme being executed by M/s Sitac Kabini Renewables Pvt. Ltd* as under:

“With reference to the above, it is to inform that the Scheduled Commissioning Date (SCD) for the following wind power project under ISTS Wind Tranche V scheme has been further extended on account of delay in issuance of necessary developer Permission (DP) by Gujrat Energy Development Agency (GEDA), GoG/frequent change in land policy by GoG.

<i>SI No.</i>	<i>Name of the Project Developer with Project ID</i>	<i>Original SCD as per PPA</i>	<i>Last revised SCD</i>	<i>Current Revised SCD</i>
<i>1.</i>	<i>Sitac kabini Renewables Pvt. Ltd.</i>	<i>22.07.2020</i>	<i>28.02.2022</i>	<i>05.09.2022</i>

19. We observe that SECI has already informed BRPL/BYPL in a timely manner about the extension of time in SCoD under different circumstances. We observe that the present petition is limited to seeking a declaration of change in law and consequential reliefs. In view of the above, we are of the opinion that the objections raised by BRPL/BYPL are beyond the scope of the instant petition. BRPL/BYPL may file a substantive petition in accordance with law, if so advised.

20. Now, coming to the main issue, we observe that Article 12 of the PPA dated 29.01.2019 stipulates as under:

ARTICLE 12: CHANGE IN LAW

“Change in Law” means the occurrence of any of the following events after the date, which is the last date of bid submission, resulting into any additional recurring/nonrecurring expenditure by the WPD or any income to the WPD:

- 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 WPD;
- any statutory change in tax structure or introduction of any new tax made applicable for setting up of Wind Power Project and supply of power from the Project by the WPD and has direct effect on the Project, shall be treated 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 WPD, 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 Appropriate Commission for seeking approval of Change in Law.

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

Notifications regarding rates qua Goods:

21. We observe that the relevant notifications are as under:

a) Notification No.1/2017-Central Tax (Rate) dated 28.06.2017 (2017 CGST Notification):

Schedule I - 2.5%

Sr. No.	Chapter/ Heading/ /Sub-heading/ Tariff-item	Description of Goods
234	84 or 85	<u>Following renewable energy devices & parts for their manufacture:</u> (a) Bio-gas plant; (b) Solar powerbased devices; (c) Solar power generating system; (d) <u>Wind mills, Wind Operated Electricity Generator (WOEG);</u> (e) Waste to energy plants / devices; (f) Solar lantern / solar lamp; (g) Ocean waves/tidal waves energy devices/plants;

(The 2017 SGST Notification has similar provision. For the sake of brevity, same is not reiterated here.)

b) Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021 i.e. 2021 CGST Notifications stipulate as under:

(b) in Schedule II – 6%, -

...

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

201 A	84, 85 or 94	<p>Following renewable energy devices & parts for their manufacture: -</p> <p>(a) Bio-gas plant</p> <p>(b) Solar power-based devices</p> <p>(c) Solar power generating system</p> <p>(d) <u>Wind mills, Wind Operated Electricity Generator (WOEG)</u></p> <p>(e) Waste to energy plants / devices</p> <p>(f) Solar lantern / solar lamp</p> <p>(g) Ocean waves/tidal waves energy devices/plants</p> <p>(h) Photo voltaic cells, whether or not assembled in modules or made up into panels.</p> <p>[Explanation: If the goods specified in this entry are supplied, by a supplier, along with supplies of other goods and services, one of which being a taxable service specified in the entry at S. No. 38 of the Table mentioned in the notification No. 11/2017-Central Tax (Rate), dated 28th June, 2017 [G.S.R. 690(E)], the value of supply of goods for the purposes of this entry shall be deemed as seventy per cent. of the gross consideration charged for all such supplies, and the remaining thirty per cent. of the gross consideration charged shall be deemed as value of the said taxable service.</p>
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(The Notification No. [F.12(1) FD/Tax/2021-60] has similar provision. The same is not being reiterated here.)

- c) On 27.09.2022, the Ministry of New and Renewable Energy, Government of India, addressed a letter titled “Covering of imposition of Basic Customs Duty on import of solar PV cells and modules and hike in rates of GST, under ‘Change-in-Law’- reg.” to SECI and noted the following:

“...b) Hike in GST rate as Change-in-Law: w.r.t. RE power projects, wherein the last date of bid submission was on or before September 30, 2021, i.e., on or before the issuance of notification regarding increase in GST rate for specified renewable energy devices and parts for their manufacture from 5% to 12%, and wherein the Scheduled Commissioning Date (SCD), including time extensions granted, if any, was on or after October 1, 2021, REIAs may consider this hike in GST rate from 5% to 12% under ‘Change-in-Law’ unless the same is disallowed by specific provisions in the tender documents/ contracts.”

The Commission has noted the submission of the Petitioner that it had executed a Supply contract with M/s GE India Industrial Private Limited for the purchase of goods viz. Wind

Turbines 112 (One Hundred Twelve) Wind Turbines of 2.7 MW of GE2.7 132 RD/HH 130 make in and around Kutch district in the State of Gujrat, India. The Petitioner has sought compensation accordingly. The Petitioner has submitted that the invoices forming the quantum of the impact due to the change in law event were issued on account of the supply of goods only. The contract with the supplier to the Petition did not involve a gross consideration for the composite supply of goods and services. The Petitioner has limited its claim to the supply of goods comprising 145 (one hundred and forty-five) invoices. The Petitioner has certified that all equipments, as detailed in such invoices, were duly installed and commissioned before the commercial operation date, i.e., 30.05.2023.

22. We observe that Clause (v) of Article 12 of the PPA, in seriatim, stipulates explicitly that *any statutory change in tax structure or introduction of any new tax made applicable for setting up of Wind Power Project and supply of power from the Project by the WPD and has direct effect on the Project, shall be treated as per the terms of this Agreement* is a Change in Law event. *The Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021* has been issued by the Ministry of Finance, Government of India. The change in rate of Goods and Services Tax from 5% to 12% w.e.f. 01.10.2021 has resulted in a change in the cost of the inputs required for generation, and the same is considered a 'Change in Law'. Hence, we hold that the impugned notifications, viz. *Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021* is a Change in Law event as per Article 12 of the PPA dated 29.01.2019. It is pertinent to mention here that the view taken is consistent with similar orders issued by the Commission, viz. *order dated 19.05.2024 in Petition No. 138/MP/2023; order dated 14.03.2024 in Petition No. 65/MP/2023; order dated 16.01.2024 in Petition No. 308/MP/2022 order dated 05.04.2023 in Petition No. 268/MP/2021; order dated 05.04.2023 in Petition No. 216/MP/2022 and order dated 21.04.2023 in Petition No. 219/MP/2022; order dated 17.05.2023 in Petition No. 174/MP/2022; order dated 20.07.2023 in Petition No. 273/MP/2021.*

23. In the instant petition, the bid was submitted by the Petitioner on 29.08.2018. The e-Reverse auction was conducted on 25.09.2018. PPA was executed between the Petitioner and SECI on 29.01.2019, and the SCoD of the project was on 22.07.2020. The Supply Contract with *M/s GE India Industrial Private Limited* was executed on 18.10.2019 and was later amended on 11.03.2022. In terms of the extended SCoD, the Project was required to be commissioned on 05.09.2022. The Petitioner commissioned the full capacity of its project on 30.05.2023,

whereas *Notification No. 8/2021- Central Tax (Rate)* was notified on 30.09.2021. As such, Petitioner's project was affected by the impugned Notifications and is entitled to relief under the GST Laws as per the terms of Article 12 of the PPA dated 29.01.2019. In view of the above discussion, we hold that Petitioner is entitled to compensation towards additional expenditure on account of *Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021* as per Article 12 of the PPA.

24. Accordingly, the Commission hereby directs the contracting parties to carry out reconciliation of additional expenditure on account of change in law events, viz. the introduction of *Notification No.8/2021- GST dated 30.09.2021 issued by the Ministry of Finance, Government of India* by exhibiting clear and one to one correlation with the projects and the invoices raised supported with auditor certificate corresponding to the mutually agreed project capacity under PPA, which is valid, between the Petitioner and SECI.
25. The issue is decided accordingly.

Re: Issue No. II

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

26. Briefly, SECI submitted that the reconciled claim is to be paid on a monthly annuity basis unless the buying entities specifically agree to make a lump-sum payment and further duly make such payment in discharge of its obligation. The discounting factor may be considered as 9.12%, and the period for payment of the compensation on account of change in the rate of GST on an annuity basis may be taken to be 15 years. The Petitioner has submitted that it is agreeable to the payment of the claim amount on a monthly annuity basis unless the Distribution Licensees / Buying Entities expressly agree to make a lump sum payment.
27. It was placed before us that this Commission, in its earlier order dated 20.08.2021 in Petition No. 536/MP/2020, has decided on the methodology of compensation due to Change in Law in the following manner:

65.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.”

28. The Commission has taken the view that in the case of competitive bidding projects, it is not possible to ascertain either the capital structuring (extent of debt and equity) of the projects or the actual rate of interest of the debt component or the expected rate of return on equity. As the actual deployment of capital by way of debt or equity and their cost in terms of rate of interest or return, respectively, is unknown, the rate can be taken as the uniform rate of compensation for the entire expenditure incurred on account of Change in Law. *The compensation for change in law cannot be a source for earning profit, and therefore, there cannot be any higher rate of return than the prevailing normative cost of debt.*
29. We note that the *Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020* (RE Tariff Regulations, 2020), which were applicable for the period 01.07.2020 to 31.03.2023 now stands extended to 30.06.2024 vide Notification No. RA-14026(11)/4/2020-CERC dated 28.03.2024.
30. The Commission has notified the *CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020* and the *RE Tariff Order dated 07.11.2022*. In the said regulations read with the RE tariff Order, we have considered the interest rate of 9.12% for FY-22-23 and the term of the Loan repayment as 15 years. The Commission vide order dated 08.09.2023 in 10/SM/2023 extended the applicability of the order dated 07.11.2022 in Petition No. 14/SM/2022 until further Orders.
31. We note that the Petitioner’s projects achieved actual commercial operation on 30.05.2023 (i.e., during FY 2023-24). The Commission notified the *RE Tariff Order dated 08.09.2023* for FY 2021-22 in pursuance of the *CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020*. In the *RE Tariff order dated 08.09.2023*, the Commission considered the interest rate of 9.12% and the term of loan payment as 15 years. In view of the above, since the interest rate (9.12%) has remained constant for FY 2022-2023 & 2023-2024 (covering the period of commissioning of the project) and the compensation has to be commensurate with the prevailing normative cost of debt, we hold that for Change in Law

events of *Notification No.8/2021- GST dated 30.09.2021 issued by the Ministry of Finance, Government of India*, the discount rate of 9.12% and annuity payment of 15 years as the appropriate methodology towards change in law compensation.

32. Further, the Commission holds that the liability of SECI/Discoms for ‘Monthly Annuity Payment’ starts from the 60th (sixtieth) day from the date of this order or from the date of submission of claims by the Petitioner, whichever is later. The provision of late payment surcharge in the respective PPA/PSA shall kick in if the monthly annuity payment is not made by the Respondents within the due date.
33. The issue is decided accordingly.

Re: Issue No. III

Whether the Petitioner is entitled to carrying cost towards compensation for the Change in Law?

34. The Petitioner submitted that the present issue is covered by the judgment dated 15.9.2022 in the *Parampujya judgment* wherein the APTEL (despite there being no express clause in the PPA regarding carrying cost) has granted the same to the Solar Power Developers. Further, there is no bar on granting carrying costs under the PPA. Therefore, the Commission may grant carrying costs to the Petitioner while exercising its Regulatory Powers under Section 79(1)(b) of the Act to maintain parity. *Per contra*, SECI has submitted that the Petitioner’s claim for Carrying Cost is to be considered after the decision of the Commission on the admissibility of Notification dated 30.09.2021 as Change in Law within the scope of Article 12 of the PPA read with PSA. Once the PPA stands executed, the provisions of the PPA become final and binding on the parties, the PPA, therefore, governs the contractual rights and obligations. *Parampujya Judgment* was also challenged by SECI before the Hon’ble Supreme Court in Civil Appeal No.000505-000510 of 2023. In terms of the Orders dated 12.12.2022 and 23.01.2022 of the Hon’ble Supreme Court, the enforceability of the Commission’s order to be passed in pursuance of the Tribunal’s decision dated 15.09.2021 in *Parampujya Judgment* 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.

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

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*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 Projects 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.***

36. In view of the above, this Commission holds that the Petitioner, in the instant petitions, 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 this Order, at the actual rate of interest paid by Petitioner for arranging funds (supported by Auditor's Certificate) or the rate of interest on working capital as per the applicable RE Tariff Regulations prevailing at that time or the late payment surcharge rate as per the PPA, whichever is the lowest. Once a supplementary bill is raised by 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.
37. Accordingly, the Commission hereby directs the contracting parties to carry out the reconciliation of additional expenditure along with carrying cost by exhibiting clear and one-to-one correlation with the projects and the invoices raised supported with an auditor certificate. The Commission further directs that the responding Discoms are liable to pay SECI all the above-reconciled claims that SECI has to pay to the Petitioner. However, payment to the Petitioner by SECI is not conditional upon the payment to be made by the responding Discoms to SECI.
38. The Hon'ble Supreme Court, in its Order dated 12.12.2022, in Civil Appeal no. 8880/2022 in

the case of “*Telangana Northern Power Distribution Co. Limited & Anr. Vs. Parampujya Solar Energy Pvt. Limited & Ors.*” (and in similar Orders dated 03.01.2023 and 23.01.2023) has held as under:

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

39. Therefore, 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.*

40. The issue is decided accordingly.

41. The summary of our findings is as follows:

- a) The *Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021 by the Ministry of Finance, Government of India* is a Change in Law event in terms of Article 12 of the PPA dated 29.01.2019.
- b) The Petitioner is entitled to compensation on account of Change in Law corresponding to the mutually agreed project capacity under PPA, which is valid, as per the terms of Article 12 of the PPA due to the *Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021*. The contracting parties to carry out reconciliation corresponding to the mutually agreed project capacity under PPA, which is valid between the Petitioner and SECI on account of additional expenditure as per Article 12 of the PPAs by exhibiting clear and one to one correlation with the projects and the invoices raised supported with auditor certificate on account of *Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021*.
- c) Compensation is to be paid at the discount rate of 9.12% and an annuity period of 15 years. The liability of SECI/Discoms for ‘*Monthly Annuity Payment*’ starts from the 60th (sixtieth) day from the date of this order or from the date of submission of claims

by the Petitioner, whichever is later. The provision of late payment surcharge in the respective PPA/PSA shall kick in if the monthly annuity payment is not made by the Respondents within the due date.

- d) The Petitioner shall also be eligible for carrying cost starting from the date when the actual payments were made to the Authorities till the date of issuance of this Order, at the actual rate of interest paid by the Petitioner for arranging funds (supported by Auditor's Certificate) or the rate of interest on working capital as per applicable RE Tariff Regulations prevailing at that time or the late payment surcharge rate as per the PPA, whichever is the lowest. Once a supplementary bill is raised by the Petitioner in terms of this order, the provision of a Late Payment Surcharge in the PPA would kick in if the payment is not made by the Respondents within the due date.
- e) The directions issued in this Order 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.*

42. Petition No. 30/MP/2023 is disposed of in terms of the above.

Sd/-
हरीश दुदानी
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रमेश बाबू वी.
सदस्य

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जिष्णु बरुआ
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