



नई दिल्ली
NEW DELHI

याचिका संख्या./ Petition No. 67/MP/2022

कोरम/ Coram:

श्री आई. एस. झा, सदस्य/ Shri I. S. Jha, Member
श्री अरुण गोयल, सदस्य/ Shri Arun Goyal, Member
श्री पी. के. सिंह, सदस्य / Shri P. K. Singh, Member

आदेश दिनांक/ Date of Order: 30th of November, 2022

IN THE MATTER OF:

Petition under Section 142 read with Section 79(1)(f) and Section 79(1)(k) of the Electricity Act, 2003 for seeking urgent direction(s) and action against Respondent No.1 – Madhya Pradesh Power Management Company Limited for being in non-compliance of the specific and express directions/orders of this Hon'ble Commission dated 20.08.2021 in Petition No. 373/MP/2020 and the provisions of the Electricity Act, 2003, and seeking issuance of directions against the Respondent No. 1 to comply with the unequivocal directions of this Hon'ble Commission by virtue of the said Order.

AND IN THE MATTER OF:

ACME Jaipur Solar Power Pvt Limited
(Presently known as Athena Jaipur Solar Power Pvt. Limited)
Plot No, 152, Sector-44,
Gurugram-122003
Haryana

...Petitioner

Versus

1. Madhya Pradesh Power Management Company Limited

Shakti Bhawan, Rampur,
Jabalpur, Madhya Pradesh - 482008

2. Delhi Metro Rail Corporation

Metro Bhawan, Fire Brigade Lane,
Barakhamba Road, New Delhi – 11001

3. Rewa Ultra Mega Solar Limited

Urja Bhawan, Link Road No. 2,
Shivaji Nagar, Bhopal, Madhya Pradesh – 462003

...Respondents

Parties Present:

Shri Sujit Ghosh, Advocate, AJSPPL
Ms. Mannat Waraich, Advocate, AJSPPL
Shri Mohd. Munis Siddique, Advocate, AJSPPL
Shri Tushar Goyal, AJSPPL
Shri Tarun Johri, Advocate, DMRC
Shri Ankur Gupta, Advocate, DMRC
Shri Sanjay V Kute, DMRC
Shri Harsh Arya, DMRC
Shri Vijay Kumar, DMRC
Shri Ashish Anand Bernard, Advocate, MPPMCL
Shri Paramhans Sahani, Advocate, MPPMCL

आदेश/ ORDER

The Petitioner, ACME Jaipur Solar Power Private Limited (now Athena Jaipur Solar Power Private Limited), is a generating company and is *inter alia* engaged in the business of generation and sale of solar energy. The Petitioner has filed the petition under Section 142 read with Section 79(1)(f) and Section 79(1)(k) of the Electricity Act, 2003 for seeking directions against Respondents for being in non-compliance of the specific and express directions/orders of the Commission dated 20.08.2021 in Petition No. 373/MP/2020.

2. The Respondent No.1, Madhya Pradesh Power Management Company Limited (MPPMCL), is a company created with the principal object of engaging in the business of distribution and

supply of electricity and is the holding company of the three Discoms in the State of Madhya Pradesh.

3. The Respondent No.2, Delhi Metro Rail Corporation (DMRC), is a company for implementation of the construction and operation of a metro rapid transport system in Delhi.
4. The Respondent No.3, Rewa Ultra Mega Solar Limited (RUMSL) is a joint venture company between Solar Energy Corporation of India (SECI) and Madhya Pradesh Urja Vikas Nigam Limited (MPUVNL) with the stated objective to develop and facilitate the development of large scale solar projects.
5. The Petitioner has made the following prayers:
 - a) *Allow the instant Petition and declare that the MPPMCL is in violation of Order dated 20.08.2021 passed by this Hon'ble Commission in Petition No. 373/MP/2020 and Batch;*
 - b) *Direct the MPPMCL to implement and fully comply with the Order dated 20.08.2021 passed by this Hon'ble Commission including timely and complete payments of Tariff and Late Payment Surcharge;*
 - c) *Initiate appropriate proceedings and impose penalty on MPPMCL under Section 142 of the Electricity Act, 2003 for their wilful misconduct in defying / disobeying the directions as issued by this Hon'ble Commission in Order dated 20.08.2021;*
 - d) *Pass such order(s), further relief(s) in the facts and circumstances of the case as this Hon'ble Commission may deem just and equitable in favour of the Petitioner.*

Brief Background:

6. The Petitioner filed Petition No. 19/MP/2019 and sought for declaration of “Change in Law” event and grant of consequential relief to compensate for the increase in capital cost due to introduction and imposition of Safe Guard Duty by way of notification no. 01/2018- Customs-SG dated 30.07.2018, in terms of Article 17 of the PPA. The Commission vide Order dated 15.10.2019, held that imposition of Safeguard Duty vide Notification No. 1/2018 (SG) dated 30.07.2018 is squarely covered as an event classified as Change in Law under Article 17 of the PPAs. The Commission further directed the Petitioner to make available to the Respondents all relevant documents exhibiting clear and one to one correlation between the projects and the supply of imported goods, duly supported by relevant invoices and Auditor’s Certificate. The

Respondents were directed to reconcile the claim related documents within 15 days of submission of claim by the Petitioner. The Commission also gave option to the parties to mutually agree to a mechanism for the payment of compensation on annuity basis spread over the period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPA. Pursuant to the Order dated 15.10.2019, the Petitioner filed another petition No. 373/MP/2020 seeking redressal of a dispute between the parties qua the annuity payment model. The Commission vide its order dated 03.06.2020 in IA No. 27 of 2020 (in the Petition 373/MP/2020) directed the payment be made at interest rate of 6 months average SBI MCLR (one-year tenure) plus 250 basis point as interim measure. Petition No. 373/MP/2020 was finally disposed of vide Order dated 20.08.2021 in which it was decided that the discount rate of annuity payments shall be 10.41% towards the expenditure incurred by SPDs on account of Change in Law. The Petitioner also filed Review Petition 24/RP/2021 which was disposed of vide Order dated 07.02.2022 wherein it was held that there was no ground for review and as such the Review Petition is not allowed. The Petitioner raised several invoices on the Respondent MPPMCL for payment of safeguard duty claims. Being aggrieved by the conduct of the MPPMCL regarding non-payment of the Petitioner's dues, the Petitioner approached this Commission vide instant Petition No. 67/MP/2022 invoking Section 142 read with Section 79(1)(f) and 79(1)(k) of the Electricity Act, 2003 for appropriate directions to the Respondents.

Hearing dated 22.08.2022:

7. During the course of hearing held on 22.08.2022, Learned counsel for DMRC submitted that it is already making regular payment to the Petitioner and the allegation of non-compliance of this Commission's Order dated 20.8.2021 in Petition No. 373/MP/2020 is only against MPPMCL. After hearing the learned counsel for the parties, the Commission directed the Petitioner to furnish on affidavit within a week, the exact details of its total claim, invoices raised by the Petitioner, payments made by MPPMCL against such invoices and the outstanding dues as per the Order dated 20.08.2021. MPPMCL was directed to furnish the details of payments made by it as per the said Order against the invoices raised by Petitioner and the outstanding dues according to the Respondent. Subject to the above, the Commission reserved the matter for Order.

Affidavit of the Petitioner

8. The Petitioner has filed an affidavit dated 31.08.2022 vide which it has submitted as under:
- a) The Petitioner has a total claim to the tune of Rs. 88.79 Crores. The bifurcation of the said claim is as follows:
 - i. An amount of Rs. 29.76 Crores against payment made/actual cash outflow for Bills of Entries (BOEs) which were initially cleared through bonds but were paid later by the Petitioner to Customs Mundra, Customs Kanpur and Customs Nagpur;
 - ii. An amount of Rs. 47.10 Crores which has already been reconciled and confirmed by the Respondents.
 - iii. The remaining amount of Rs. 11.92 Crores is under discussion and not agitated in this petition.

Re: The claim of the Petitioner towards payment made/actual cash outflow for BOE's which were initially cleared through bonds but were paid later by the Petitioner for an amount totalling to Rs. 29.76 crores

- b) A sum of Rs. 29.76 Crores was payable to the Petitioner by MPPMCL, once, the Petitioner was able to show that there was an actual cash outflow in accordance with the Orders dated 20.08.2021.
- c) The aforementioned amount of Rs. 29.76 crores pertained to SGD liability which was secured by the Petitioner in the form of Bonds executed with the Customs Authorities. The requirement for submission of such Bonds arose since the Petitioner had challenged the legality of the imposition of SGD before the High Courts. The High Courts while granting interim relief directed that the Petitioner could clear the goods provisionally provided the interest of the customs authority is secured on furnishing of such bonds.
- d) Subsequently, the Petitioner paid the sum of Rs. 29.76 crores to the Customs Authorities (Customs Mundra, Kanpur and Nagpur). However, since the *lis* with respect to the legality of SGD continued to be pending before the said High Courts, the procedural formalities such as final assessment of BOEs and payment of interest etc. remained to be completed.
- e) Accordingly, the Petitioner had actually paid the amount of Rs. 29.76 crores, in discharge of its obligations under the bonds, and there was an actual cash outflow to this extent. MPPMCL was also duty bound to reimburse such amounts to the Petitioner

in view of the express Orders passed by this Commission. However, MPPMCL has failed to honour the same.

Re: Alleged discrepancy between the actual amount paid by the petitioner in discharge of its obligations under bonds as against the amount verified by the Customs Authorities

- f) The first defence of MPPMCL is that apparently on the basis of an independent verification carried out by MPPMCL with the relevant Customs Authorities, the amount of SGD claimed to have been paid by the Petitioner is not the same as has been indicated by the Customs Authorities. In this regard, reference is made to the letter dated 12.07.2022 issued by MPPMCL.
- g) It is imperative to provide a break-up of the claim of the Petitioner which stands at Rs. 9.76 Crores.
- i. Safeguard Duty paid by the Petitioner in discharge of its obligations against Bonds at Customs, Mundra – Rs. 7,00,66,912/-
 - ii. Safeguard Duty paid by the Petitioner in discharge of its obligations against at Customs, Kanpur – Rs. 7,06,23,268/-
 - iii. Safeguard Duty paid by the Petitioner in discharge of its obligations against at Customs, Nagpur – Rs. 15,69,45,791/-
- h) Thereafter, even in relation to the amount of Rs. 7.60 Crores which remains unreconciled, the same was also accepted by the Customs Authorities, the details of which are provided hereinunder:
- i. **Customs Mundra** – The custom authority of Mundra vide its letter dated 06.05.2022 addressed to MPPMCL confirmed the payment of Rs. 7,00,66,912 towards Safeguard duty and IGST payment of Rs. 1,33,46,078. However, MPPMCL mis-interpreted the letter and communicated to the Petitioner that only Rs. 1,33,46,078 is paid as Safeguard duty. Later, Customs Mundra vide its email dated 21.07.2022 addressed to MPPMCL clarified that Rs. 7,00,66,912 was paid by the Petitioner towards Safeguard duty.
 - ii. **Customs Kanpur** – The custom authority at Kanpur vide its letter dated 05.07.2022 confirmed the receipt of Rs. 5,13,03,653 towards Safeguard duty and again vide its letter dated 19.07.2022 confirmed the receipt of Rs. 1,83,99,633 towards Safeguard duty and Rs. 45,99,908.40 towards IGST. MPPMCL is ignoring the second letter of Customs Kanpur dated 19.07.2022.

iii. **Customs Nagpur** –Customs Nagpur verified and confirmed the payment of entire claim of the Petitioner to MPPMCL. The same was communicated to Petitioner by MPPMCL by way of letter dated 12.07.2022.

i) Thus, in view of the above confirmation from Customs Mundra, Kanpur and Nagpur, the present status as on date of the amount paid by the Petitioner in discharge of its obligations under the Bonds is given below:

Custom Authority	Total Claim of the Petitioner against the BOEs for which payment was made against Bonds	Amount verified and confirmed by the relevant Customs Authority to MPPMCL	Differential Amount	Present Status of the Reconciliation (with respect to Bonds)
Mundra	7,00,66,912	7,00,66,912 towards Safeguard duty and Rs. 1,33,46,078 towards IGST vide letter dated 06.05.2022 and email dated 21.07.2022	Nil	Entire Amount Paid (Again clarified by Customs Mundra vide its email dated 21.07.2022)
Kanpur	7,06,23,268	7,06,23,268 (Rs. 5,13,03,653 was confirmed vide letter dated 05.07.2022 and Rs. 1,93,19,615 was confirmed vide letter dated 19.07.2022	Nil	Entire Amount paid (confirmed by Customs Kanpur vide its letter dated 05.07.2022 and 19.07.2022)
Nagpur	15,69,45,791	15,69,45,791	NIL	Entire Amount reconciled
Total	29,76,35,971	29,76,35,971	Nil	Entire amount reconciled

j) In view of the above, it is well established that the Petitioner has incurred additional expenditure on account of Change in Law amounting to Rs. 29.76 Crores towards discharge of its obligations under the Bonds against which the Petitioner has also proved actual cash outflow.

Re.: The MPPMCL or the Customs Authority cannot impose any extraneous conditions on the payment of monthly annuity viz., the amount already paid by the petitioner in discharge of its obligations against the bonds

- k) MPPMCL has also adopted a reasoning that it is not in a position to make such reimbursement until the Petitioner finalizes his BOEs which have remained provisional and were covered by the Bonds against which Petitioner had made the payment. According to the MPPMCL, this position is being adopted by them in view of the advisory issued by Custom Mundra, which was brought to the notice of the Petitioner vide MPPMCL's letter dated 12.07.2022.
- l) Both the defences are untenable and amounts to nothing short of being a violation of the Order of the Commission on the following grounds:
- i. The insistence of finalization of the BOEs was never directed by this Commission in its Order dated 20.08.2021 and therefore is an extraneous condition.
 - ii. Furthermore, the reimbursement of SGD being a contractual issue and is being governed by the express terms of the PPA as adjudicated by this Commission, the Customs Authorities are a *persona non grata* and cannot have any influence and interference in the matter.
 - iii. In any case, no authority howsoever high can force the Petitioner to convert the provisional assessment into final assessment since the Customs Act nowhere confers any power on anybody including the Commissioner of Customs. This aspect can be inferred from perusal of section 18 of the Customs Act more particularly clause (iii) thereof which deals with conversion of provisional assessment to final assessment.
 - iv. Accordingly, the action of the Respondent of insisting on finalization of BOE as a condition precedent for reimbursement of the SGD covered by the CIL claim is *ex facie* illegal and so is the advisory of the Customs in this respect.
- m) Thus, in view of the above submissions, the Petitioner reiterates that the entire amount paid by the Petitioner towards the safeguard duty in discharge of its obligations against the bonds stands justified and the Petitioner's entitlement towards monthly annuity payment cannot be abdicated by imposing an extraneous condition such as forcing the Petitioner to undergo final assessment.

Re: Payments received by the Petitioner against the reconciled amount of Rs. 47.10 crores

- n) Furthermore, MPPMCL has paid the monthly annuity amount calculated at SBI MCLR + 250 basis points in complete contravention to the order of this Commission which had directed an annuity rate of 10.41%.
- o) The details of payment made by Respondents, in relation to the amount already reconciled with the MPPMCL is provided in the table hereinbelow:

Month	Payment Received at SBI MCLR+250 bps	Payment ought to be made as per CERC order dated 20.08.2021 i.e. 10.41%	Differential amount to be paid by Respondents
June'20	42,62,722	43,14,074	51,352
July'20	42,39,264	43,14,074	74,810
Aug'20	42,15,982	43,14,074	98,092
Sep'20	41,94,652	43,14,074	1,19,422
Oct'20	41,77,066	43,14,074	1,37,068
Nov'20	41,71,746	43,14,074	1,42,328
Dec'20	41,71,746	43,14,074	1,42,328
Jan'21	41,71,746	43,14,074	1,42,328
Feb'21	41,71,746	43,14,074	1,42,328
Mar'21	41,71,746	43,14,074	1,42,328
Apr'21	41,18,945	43,14,074	1,95,129
May'21	41,18,945	43,14,074	1,95,129
June'21	41,18,945	43,14,074	1,95,129
July'21	41,18,945	43,14,074	1,95,129
Aug'21	41,18,945	43,14,074	1,95,129
Sep'21	41,18,945	43,14,074	1,95,129
Oct'21	41,18,945	43,14,074	1,95,129
Nov'21	41,18,945	43,14,074	1,95,129
Dec'21	41,18,945	43,14,074	1,95,129
Jan'22	41,18,945	43,14,074	1,95,129

Feb'22	41,18,945	43,14,074	1,95,129
Mar'22	41,18,945	43,14,074	1,95,129
Apr'22	41,18,945	43,14,074	1,95,129
May'22	41,22,101	43,14,074	1,91,973
June'22	41,28,378	43,14,074	1,85,696

- p) The above amounts including outstanding Bond amounts must be paid by Respondents along with late payment surcharge.

Written submissions of MPPMCL:

9. MPPCL has filed the reply (dated 07.09.2022) to the affidavit of the Petitioner. MPPMCL has submitted as under:

- a) The Petitioner had submitted claim amounting to Rs. 88,79,38,552/- against safeguard duty in Nov. 2019. CA and practicing tax lawyer/consultant was engaged for reconciliation of claim. Also, a committee was formed comprising of officers of Commercial and Finance section of MPPMCL along with representative of DMRC. After deliberations of the committee with the representatives of M/s ACME in meeting dated 16.03.2020, the details of claim found reconciled and admissible are as under:

Particulars	Total Claim Amount (Rs.)	MPPMCL Share (Rs.)	DMRC Share (Rs.)
Claim submitted	88,79,38,552/-	69,38,07,500/-	19,41,31,052/-
Claim against disputed debit not admissible	(-) 7,58,55,491/-	(-)5,92,71,116/-	(-)1,65,84,375/-
Claim against unpaid Bonds not admissible.	(-) 34,10,47,950/-	(-) 26,64,84,235/-	(-)7,45,63,715/-
Claim reconciled as admissible	47,10,35,111/-	36,80,52,150/-	10,29,82,961/-

- b) From the above chart and the details mentioned therein it becomes clear that against claim amount of Rs. 88.79 Crores submitted by the Petitioner, only Rs. 47.10 Crores was found admissible. Claim of Rs. 34.10 Crores against unpaid bonds could not be admitted. Also, an amount of Rs. 7.59 Crores was against disputed debit and therefore could not be admitted. The Petitioner therefore resubmitted claim of Safeguard Duty against Bonds amounting to Rs. 34.10 Crores on 30.09.2021. After several discussions for reconciliation of claim of safeguard duty against bonds, the Petitioner has submitted final claim of Rs. 29.76 Crores instead of Rs. 34.10 Crores against the bonds vide letter dated 19.07.2022. For amount of Rs. 7.58 Crores not admitted against disputed debit, one to one correlation could not be established between claim and supporting documents as the order of this Commission dated 15.10.2019. Therefore, the Petitioner was informed by the Respondent vide its letter dated 24.09.2021 that the claim of Rs. 7.58 Crore is not admissible.
- c) During reconciliation of the claim submitted by the Petitioner on 30.09.2021, it was observed that the BOE numbers on bonds, non-disclosure of numbers and details of item imported were not matching with actual amount due on account of Safe Guard Duty (as per BOE) on the bond issued and therefore the claim could not be reconciled. MPPMCL had made queries to the Petitioner vide its letter dated 10.12.2021 and 11.02.2022 and the Petitioner vide its letter dated 11.03.2022 had requested for in-person meeting to clarify the issues and close the reconciliation. On this request of the Petitioner, a meeting was convened on 24.03.2022 and in this meeting the Petitioner requested that reconciliation be done with respect to challans and BOEs only stating that the bonds were issued for lump-sum amount and are therefore irrelevant.
- d) As per above request of the Petitioner to do reconciliation with respect to challans, the details of Bill of Entries and amount paid (claimed) by the Petitioner were conveyed to Commissioner Customs Mundra, Nagpur and Kanpur by the Respondent vide its letters dated 21.04.2022 for verification and in reply the amount conveyed by custom offices are as under:-

Custom Office	Amount informed to Customs office for verification	Amount mentioned in reply of Customs	Remarks
Mundra	7,00,66,912	1,33,46,078	As per Customs it is provisional payment
Kanpur	7,06,23,268	5,13,03,653	BOE wise payment shown by Customs
Nagpur	15,69,45,791	15,69,45,791	BOE wise payment not provided by Customs.
Total	29,76,35,971	22,15,95,522	

- e) From the above it is evident that against claim of Rs. 29,76,35,971/- payment of amount of Rs. 22,15,95,522/- has been informed by the Customs Department and therefore the Petitioner was advised by the Respondent vide its letter dated 12.07.2022 to obtain the following from the respective offices of the Commissioner Customs Mundra, Nagpur & Kanpur (Lucknow):
- a. To get the above bill of entry assessed on final basis and submit finally assessed Bill of Entries.
 - b. To get certificate that full liability of safeguard duty and IGST thereon on the referred BOE is fully discharged.
 - c. To get that amount paid was only for payment of safeguard duty and not against interests, penalty etc.
- f) The Petitioner through its letter dated 19.07.2022 submitted the following reply:
- a. **Customs Mundra:** The amount of Rs. 1,33,46,078/- was paid against 5% IGST on the assessed value and in addition to 5% IGST they paid 25% safeguard duty and 5% IGST on safe guard duty which amounts to Rs. 7,00,66,912/-.
 - b. **Customs Kanpur:** Custom has confirmed amount of Rs. 4,13,03,653/- was deposited in custom's account whereas Rs. 1,93,19,615/- was paid by way of cash against BOE 7688955 in 2018.
 - c. **Customs Nagpur:** The entire amount of Rs. 15,69,45,791/- is confirmed by Custom Nagpur.
- g) Thus, through its letter dated 19.07.2022, the Petitioner has submitted that they have paid principal amount of BOEs which is equal to the safeguard duty amount while interest component is not paid and the same is pending before court for appropriate

relief. Therefore, these BOE are assessed provisionally as it cannot be assessed finally till the time court decides the pending litigation. Also, the Petitioner vide e-Mail dated 20.07.2022 addressed to Customs Mundra and copy endorsed to MPPMCL has submitted the details of amount deposited in Customs Mundra against BOE no. 7435821, 7435854 & 7435820 date 30.08.2018.

- h) The Petitioner vide letter dated 29.07.2022 submitted that it shall not claim any amount other than the verified amount paid by the Petitioner on account of safeguard duty. In view of above MPPMCL, vide letter no. 1009 dated 12.08.2022 issued notice to all concerned for convening a meeting of representatives of MPPMCL, DMRC, CA and representatives of the Petitioner at MPPMCL RO Bhopal on 24.08.2022 for deciding further course of action in the matter of settlement of balance claim of safeguard duty of the Petitioner. However, since the Petitioner referred the matter before this Commission in the instant petition, the proposed meeting was postponed as conveyed to all vide email dated 23.08.2022.
- i) From the above, it becomes evident that MPPMCL has made all efforts for reconciliation of claim put forth by the Petitioner in furtherance of the direction issued by this Commission through its order dated 20.08.2021. The payment demanded by the Petitioner despite best efforts made by the Respondent would remain subject to the following:
- i) Pending litigation before the Hon'ble High Court, as mentioned by the petitioner in para 5 of affidavit dated 31.08.2022 regarding the issue of legality of the imposition of safeguard duty is pending before Hon'ble High Court. As the BOEs will be finally assessed after the decision of Hon'ble Court.
 - ii) Customs Office Mundra has advised that in the interest of safeguarding Govt. Revenue, reimbursement of claim be made only after the Bill of Entries are assessed on final basis.
 - iii) There is difference in amount of safeguard duty paid against bonds informed by Customs Mundra and Customs Kanpur from the amount claimed by M/s ACME.
 - iv) None of the Customs Offices (Mundra, Kanpur and Nagpur) have confirmed that the Bills of Entries have been assessed finally.
- j) This Commission vide Order dated 15.10.2019 in petition no. 19/MP/2019 had specifically directed the Petitioner to make available to the answering Respondent all

relevant documents exhibiting clear and one to one correlation between the project and the supply of imported goods till the commissioning certificate is issued, duly supported by relevant invoices and auditor's certificate. However, the amount of Rs. 29.76 Crores being claimed by the Petitioner is not reconciled due to absence of one to one for relation between the claim and supporting documents. Thus, the Petitioner has itself failed to comply with the direction of the Commission contained in the Order dated 15.10.2019 and it is because of the inability of the Petitioner to supply documents to demonstrate one to one correlation between the project and the supply of imported goods that the Respondent has been prevented from making the payment in question.

- k) As far as the Monthly annuity payment of previously reconciled amount of Rs. 47,10,35,111/-, as per order of this Commission dated 03.06.2020 in IA 27/2020 in Petition 373/MP/2020, the monthly annuity payment commenced from June 2020. All monthly invoices from June 2020 to August 2022 are passed for payment and payment of invoices up to June 2022 has been made. It is relevant to mention here that the Respondent has made payment of monthly annuity amount as claimed by them, at discount rate SBI MCLR (one year tenure) six month average plus 250 basis point, therefore there is no default of the answering Respondent regarding non-compliance of this Commission's order pertaining to discount rate of annuity.
- l) Also, Minutes of Meeting dated 24.03.2022 clearly show that the Petitioner had submitted that after SGD amount against bonds is reconciled and cleared by the MPPMCL and DMRC (within a period of 60 days from 24th March 2022), they shall submit their consent for floating rate of interest of SBI MCLR (one year tenure) six month average plus 250 basis point, which is in line with interest already consented by other two SPDs namely M/s Mahindra and M/s Arinsun of RUMSL project, for annuity payment of SGD claim and shall also submit undertaking that they will not claim any benefit against order of CERC dated 20.08.2021 and order dated 07.02.2022.
- m) Therefore, MPPMCL has acted in compliance of the Order dated 20.08.2021 passed in Petition No. 373/MP/2020. Also, the assertions made by the Petitioner in the execution petition and the affidavit filed on 31.08.2022 regarding non-compliance of the order passed by this Commission is not borne out of record and thus the present

execution proceedings instituted by the Petitioner is entirely misconceived and deserve to be dismissed in the interest of justice.

Additional Affidavit of DMRC:

10. DMRC vide Additional Affidavit dated 13.09.2022 has submitted as under:

- a) The Commission vide Order dated 20.08.2021 in Petition No. 373/MP/2020 has directed that the discount rate of annuity payments shall be 10.41% for settlement of Petitioner's Safeguard Duty ("SGD") Claim.
- b) The instant Petition has been filed against MPPMCL for non-compliance of the Order dated 20.08.2021 i.e. SGD Annuity Rate @ 10.41%.
- c) After acceptance of Petitioner's letter dated 18.04.2020, DMRC started monthly SGD annuity payment against admissible claim amount w.e.f. June-2020, based on floating interest rate of 250 basis points above the State Bank of India Marginal Cost of Funds based Lending Rate (MCLR) (one-year tenure) for a period of 13 years.
- d) The Petitioner vide letter dated 28.09.2021 submitted invoice of Rs.6,78,273/- for the difference amount between annuity rate of 10.41% (as directed by the Commission) and actual annuity rate paid to M/s ACME Jaipur Solar Power by DMRC (based on SBI MCLR + 250 Base Points), till Aug-2021 (For Annuity No. 1 to 15 Out of 156).
- e) However, DMRC has not released the payment of Rs. 6,78,273/- (against differential annuity rate) since, MPPMCL had filed a Review Petition in the Commission seeking review of the order dated 20.08.2021 in Petition No. 373/MP/2020. Further, an Appeal/DFR No. 164 of 2022 challenging the Order dated 20.08.2021 challenging the annuity rate of interest @ 10.41%, wherein, MPPMCL is also arrayed as party is pending adjudication before APTEL. Therefore, direction/order to be issued by APTEL would be complied by DMRC.
- f) M/s ATHENA Jaipur Solar Power (present SPD) has raised supplementary invoices against monthly SGD annuity payments with interest rate @ 250 points above SBI MCLR in spite of 10.41%, therefore, DMRC has released annuity payments based on 250 points above SBI MCLR, till date.

Analysis and Decision:

11. We have heard the learned counsels for the Petitioner and the Respondents and have carefully perused the records.

12. We note that the Petitioner has claimed following amounts which are yet to be repaid by the Respondents:

- (i) The differential amount between annuity rate of 10.41% (as directed by the Commission) and annuity rate paid by MPPMCL & DMRC based on SBI MCLR + 250 Base Points
- (ii) Amount of Rs. 29.76 Crores (actual cash outflow for BOEs)
- (iii) The remaining amount of Rs. 11.92 Crores is under discussion and the Petitioner has preferred not to agitate the same in this petition.

Re.: The differential amount between annuity rate of 10.41% (as directed by the Commission) and actual annuity rate paid by MPPMCL & DMRC based on SBI MCLR + 250 Base Points

13. The Petitioner has submitted that the Respondents have paid the monthly annuity amount calculated at SBI MCLR + 250 basis points in complete contravention to the order of the Commission which had directed an annuity rate of 10.41%. The differential amount must be paid by Respondents along with late payment surcharge.

14. **Per contra**, MPPMCL has submitted that all monthly invoices from June 2020 to August 2022 are passed for payment and payment of invoices up to June 2022 has been made. MPPMCL has made payment of monthly annuity amount as claimed by them, at discount rate SBI MCLR (one-year tenure) six months average plus 250 basis point, therefore, there is no default of MPPMCL regarding non-compliance of this Commission's order pertaining to discount rate of annuity. Also, Minutes of Meeting dated 24.03.2022 show that the Petitioner had submitted that after SGD amount against bonds is reconciled and cleared by the MPPMCL and DMRC (within a period of 60 days from 24th March 2022), they shall submit their consent for floating rate of interest of SBI MCLR (one-year tenure) six months average plus 250 basis point and shall also submit undertaking that they will not claim any benefit against Order of CERC dated 20.08.2021 and Order dated 07.02.2022.

15. Further, DMRC has submitted that the Petitioner vide letter dated 28.09.2021 submitted invoice of Rs.6,78,273/- for the difference amount between annuity rate of 10.41% (as directed by Commission) and annuity rate paid (based on SBI MCLR + 250 Base Points), till Aug-2021.

However, DMRC has not released the payment since, MPPMCL had filed a Review Petition in the Commission seeking review of the order dated 20.08.2021 in Petition No. 373/MP/2020. Also, an Appeal/DFR No. 164 of 2022 challenging the Order dated 20.08.2021 challenging the annuity rate of interest @ 10.41%, is pending adjudication before APTEL. The Petitioner has raised supplementary invoices against monthly SGD annuity payments with interest rate @ 250 points above SBI MCLR inspite of 10.41%, therefore, DMRC has released annuity payments based on 250 points above SBI MCLR, till date.

16. We observe that vide Order dated 03.06.2020 in I.A. 27 of 2020 in Petition No. 373/MP/2020 it was held as under:

49. The Commission observes that vide Order dated 15.10.2019 (read with Corrigendum dated 19.02.2020) in Petition No. 19/MP/2019, it was clearly held that the claim was to be paid in lump sum or alternatively, the contracting parties were to mutually agree to a mechanism for the payment of such compensation on annuity basis. Vide letters dated 07.04.2020 and 14.04.2020, MPPMCL and DMRC have proposed that they agree to make the payment of admitted amounts at the annuity rate as proposed by them provided an unconditional acceptance is given by the Petitioner. Vide I.A. No. 27 of 2020, the Petitioner is seeking direction that MPPMCL and DMRC should make the payment of admitted amounts to the Petitioner at the annuity rate as communicated vide letters dated 07.04.2020 and 14.04.2020 respectively till final disposal of the matter. Learned Counsel for DMRC has submitted that subject to the outcome of the main Petition, it has already started paying the compensation to the Petitioner. Learned counsel for MPPMCL has submitted that MPPMCL in its letter dated 07.04.2020 has already informed that it is ready to pay the compensation for admitted amount at 250 basis point above average SBI MCLR (one-year tenure). Since the contracting parties have mutually agreed for paying the reconciled amount of Rs. 47,10,35,111/- as per deferred annuity payment based on interest rate of 6 months average SBI MCLR (one-year tenure) plus 250 basis points (floating) as an 'interim measure' subject to final outcome of the Petition 373/MP/2020 on merits of the case, the Commission directs that the payment be made by the respondents on these terms as an 'interim measure', subject to the final decision in the main Petition No. 373/MP/2020.

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54. With the above directions, I.A. 27 of 2020 stands disposed of. The parties are directed to complete the pleadings in Petition No. 373/MP/2020 which shall be listed for hearing in due course of time for which separate notice will be issued.

17. We observe that vide Order dated 20.08.2021 in Petition No. 373/MP/2020 it was held as under:

"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.*

Issue No. 2:

- *The prayer of SPDs that the interest on Customs Bond should be covered under Change in Law and should be paid in lumpsum as separate element is disallowed. Actual cash outflow (due to levy of safeguard duty) for which bonds have been executed will be payable and claims for Change in Law towards Safeguard Duty will be governed by orders in the petitions where the matter has been adjudicated.*

Issue No. 3:

- ***Cut-off date for Safeguard Duty Claims:*** *The invoices related to supply of the goods can be raised only up to the COD for all the equipment as per rated project capacity that has been installed and through which energy has flown into the grid.*
- ***Cut-off date for GST Claims:*** *The invoices related to supply of the goods can be raised only up to COD for all the equipment as per the rated project capacity that has been installed and through which energy has flown into the grid. in case of supply of services related to goods procured up to COD, the invoices are to be raised within 30 days of supply of such services, which cannot be later than 30 day of COD.*

Issue No. 4:

- *The SPDs shall have to pay all statutory taxes, duties, levies and cess etc. on Monthly Annuity Payments that may be required to be paid as per the terms of PPAs.*

Issue No. 5:

- *Since the pending petitions were not tagged along with the current Petitions, no general Order can be passed.”*

18. We observe that vide Order dated 07.02.2022 in Petition No. 24/RP/2021 (review petition in Petition No. 373/MP/2020 Order dated 20.08.2021) it was held as under:

“12. Furthermore, the Commission has also taken a conscious decision that principles decided in the impugned Order dated 20.08.2021 were applicable to the tagged Petitions pertaining to GST and Safeguard Duty pending before this Commission and no general Order can be passed for the pending petitions which were not tagged along since the Commission is not empowered to pass any Order in rem. Ostensibly, Petition No. 373/MP/2020 was tagged along with Petition No. 536/MP/2020 and hence the

principles decided in the impugned Order dated 20.08.2021 are squarely applicable to the tagged Petitions including Petition No. 373/MP/2020.

13. The Review Petitioner has failed to point out any clerical or arithmetical mistakes in the Orders or errors arising therein from any accidental slip or omission which may at any time be corrected by the Commission either of its own motion or on the application of any of the parties. The Review Petitioner has also failed to point out any reasons for invocation of Regulation 103A of the CERC (Conduct of Business) Regulations, 1999. The prayer of the Review Petitioner is not covered under any of the grounds of review as provided in Order 47 Rule 1 of Code of Civil Procedure, 1908. It is a settled principle of law that a Review petition cannot be allowed as an appeal in disguise. Hence, there is no ground for review of the impugned Order and as such the Review Petition is not allowed.

14. The Review Petition No.24/RP/2021 in Petition No. 373/MP/2020 is disposed of in terms of the above.”

19. From the above, we observe that the Commission vide Order dated 03.06.2020 in I.A. 27 of 2020 in Petition No. 373/MP/2020 has already held that the reconciled amount of Rs. 47,10,35,111/- shall be paid as per deferred annuity payment based on interest rate of 6 months average SBI MCLR (one-year tenure) plus 250 basis points (floating) as an ‘interim measure’ subject to final outcome of the Petition 373/MP/2020 on merits of the case. However, the Petition No. 373/MP/2020 was finally disposed of on 20.08.2021 and it was held that the discount rate of annuity payments shall be 10.41% towards the expenditure incurred by the Petitioner on account of Change in Law. Further, vide Order dated 07.02.2022 in Petition No. 24/RP/2021 (review petition in Petition No. 373/MP/2020 Order dated 20.08.2021) it was made clear that the Commission has taken a conscious decision and that the principles decided in the impugned Order dated 20.08.2021 were applicable to Petition No. 373/MP/2020. It is pertinent to mention here that the Respondents have submitted that they have preferred an Appeal/DFR No. 164 of 2022 challenging the Commission’s Order dated 20.08.2021 challenging the annuity rate of interest @ 10.41% before APTEL and the same is pending for adjudication. However, there is nothing on the record that the Order dated 20.08.2021 of the Commission has been stayed. In view of above we observe that the Respondents are to pay the due claim to Petitioner as per the discount rate of annuity payments @10.41%. Accordingly, the Respondents are directed to pay the differential claims to Petitioner along with late payment surcharge as per PPA through supplementary invoices within 30 days date of the Order.

Re.: Amount of Rs. 29.76 Crores (actual cash outflow for BOEs)

20. The Petitioner has submitted that it had paid the sum of Rs. 29.76 Crores to the Customs Authorities (Customs Mundra, Kanpur and Nagpur). However, since the *lis* with respect to the legality of SGD continued to be pending before the said High Courts, the procedural formalities such as final assessment of BOEs and payment of interest etc. remained to be completed. Since, there was an actual cash outflow of Rs. 29.76 Crores, MPPMCL is duty bound to reimburse such amounts to the Petitioner in view of the express orders passed by this Commission. *Per contra*, MPPMCL has submitted that the Petitioner through its letter dated 19.07.2022 had informed that they have paid principal amount of BOEs which is equal to the safeguard duty amount while interest component is not paid and the same is pending before court for appropriate relief. Therefore, these BOE are assessed provisionally as it cannot be assessed finally till the time court decides the pending litigation. MPPMCL submitted that the payment demanded by the Petitioner, despite best efforts remained subject to *firstly*, pending litigation before the Hon'ble High Court. *Secondly*, Custom Office Mundra has advised that in the interest of safeguarding Govt. Revenue reimbursement of claim be made only after the Bill of Entries are assessed on final basis. *Thirdly*, there is difference in amount of safeguard duty paid against bonds informed by Custom Mundra and Custom Kanpur from the amount claimed by M/s ACME and *finally*, none of the Custom Offices (Mundra, Kanpur and Nagpur) have confirmed that the Bills of Entries have been assessed finally. Hence, the Petitioner has itself failed to comply with the direction of the Commission contained in the Order dated 15.10.2019 i.e. to demonstrate one to one correlation between the project and the supply of imported goods and hence the Respondent has been prevented from making the payment in question.

21. We note the extract of the letter dated 19.07.2022 as under:

*“We humbly reiterate that we had already submitted the proof of payment/actual outflow of cash towards payment of safeguard duty for the modules which were initially cleared through bonds and were later paid by us, vide our letter dated 30.09.2021. Further, in terms of our meeting dated 24.03.2022 and our subsequent letter dated 21.06.2022 wherein we undertook that **the Safeguard duty claims submitted by us with respect to those BOEs are final and we will not claim any further amount from your office towards any kind of penalty, interest etc in the future.**”*

22. From the above we observe that the Petitioner has categorically undertaken that it has paid the principal amount of Safeguard duty mentioned in the BOE and is solely restricting its claim to the said amount as paid. The Petitioner has undertaken that the claim submitted against those

BOEs is final and that it shall not claim any further amount from MPPMCL for any kind of penalty, interest, etc. in the future against such BOEs i.e. which were cleared through bonds and were paid subsequently. The Petitioner vide letter dated 29.07.2022 has submitted the claims along with proof of payments/actual cash outflow including challan receipts, invoices, BOEs and certificate by CA.

23. We further observe that vide Order dated 20.08.2021 in Petition No. 373/MP/2020 it was held as under:

75. We observe that the Bill of Entry is filed by importers on or before the arrival of the imported goods for the customs clearance. For clearing the shipment from customs, the importer or the exporter has to pay the customs duties, IGST, CESS etc., as applicable. The importer can be allowed to clear the imported goods on payment of the custom duties or/and securing through execution of bond. Generally, the importer executes bonds to defer the immediate payments of custom duties and get the goods released from the Indian Customs. Bills of Entry which are cleared against bonds are to be settled with the Indian Customs for duties in due course.

76. In the instant petitions, a few SPDs have claimed that they have executed bonds to get the solar panels released from the Indian Customs and the Bills of Entry will be settled with the Indian Customs for safeguard duty in due course. The Commission is of the view that execution of the bonds by SPDs with the Indian Customs for the import of solar modules was their commercial decision (for deferring immediate payment of customs duty and getting goods released from the Indian Customs) and the financial liability towards the said decision should also be borne by them and cannot be allowed as a pass through to SECI/ Discoms. Hence, the prayer of SPDs that the interest on Customs Bond should be covered under Change in Law and should be paid in lumpsum as separate element is disallowed. We have expressed our view only as regards interest payment on Customs Bond. Needless to mention, actual cash outflow (due to levy of safeguard duty) for which bonds have been executed will be payable and claims for Change in Law towards Safeguard Duty will be governed by orders in the petitions where the matter has been adjudicated.

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105. The summary of our findings are as follows:

....

Issue No. 2:

- *The prayer of SPDs that the interest on Customs Bond should be covered under Change in Law and should be paid in lumpsum as separate element is disallowed. Actual cash outflow (due to levy of safeguard duty) for which bonds have been executed will be payable and claims for Change in Law towards Safeguard Duty will be governed by orders in the petitions where the matter has been adjudicated.*

24. From the above we observe that vide Order dated 20.08.2021 it has already been adjudicated that the actual cash outflow (due to levy of safeguard duty) for which bonds have been executed will be payable whereas the interest on Customs Bond is disallowed. In the instant case, the Petitioner vide its letter dated 19.07.2022 had informed that they have already paid the principal amount of BOEs which is equal to the safeguard duty amount while only the interest component is not paid and the same is pending.
25. We are of the view that the Respondents are liable to pay the safeguard duty claims w.r.t BOEs since the Petitioner is only claiming the actual cash outflow (due to levy of safeguard duty) for which bonds have been executed. Accordingly, the Respondents are directed to carry out reconciliation by exhibiting clear and one to one correlation as per Order dated 20.08.2021 along with late payment surcharge as per PPA through supplementary invoices within 30 days date of the Order. Needless to say, that the above decision shall be subject to outcome of the case pending before the Hon'ble High Court for adjudication.
26. MPPMCL vide reply dated 07.09.2022 has specifically submitted that as per the Minutes of the Meeting dated 24.03.2022, the Monthly annuity payment of Rs. 47,10,35,111/- has been reconciled and further, all monthly invoices from June 2020 to August 2022 are passed for payment and payment of invoices up to June 2022 have been made. Even DMRC has submitted on affidavit dated 13.09.2022 that only the invoices related to differential annuity rate are pending. The said claims have not been denied by the Petitioner. The Commission notes that none of the Respondents have refused payments to the Petitioners. As such, no case under section 142 of the Electricity Act, 2003 is made out.
27. The Respondents are directed to pay the due claim to petitioner along with late payment surcharge through supplementary invoices within 30 days date of this Order.
28. The Petition no. 67/MP/2022 is disposed of in terms of the above.

Sd/-
पी. के. सिंह
(सदस्य)

Sd/-
अरुण गोयल
(सदस्य)

Sd/-
आई. एस. झा
(सदस्य)