



नई दिल्ली
NEW DELHI

याचिका संख्या./ Petition No. 171/MP/2021

कोरम/ Coram:

श्री जिष्णु बरुआ, अध्यक्ष/Shri Jishnu Barua, Chairperson
श्री आई. एस. झा, सदस्य/ Shri I. S. Jha, Member
श्री अरुण गोयल, सदस्य/ Shri Arun Goyal, Member
श्री पी. के. सिंह, सदस्य / Shri P. K. Singh, Member

आदेश दिनांक/ Date of Order: 19th of December, 2023

IN THE MATTER OF:

A petition under section 79 of the Electricity Act 2003 before the Central Electricity Regulatory Commission for (i) approval of “Change in Law” and (ii) seeking an appropriate mechanism for grant of an appropriate adjustment/ compensation to offset financial/ commercial impact of change in law events on account of imposition of safeguard duty on solar cells/modules and rescission of Notification No. 1/2011 - Customs dated 06.01.2011 vide Notification No. 7/2021 - Customs dated 01.02.2021, which has resulted in increase in rate of basic customs duty on import of solar inverters, in terms of Article 12 of the Power Purchase Agreements dated 13.08.2019 between M/s ReNew Sun Waves Private Limited. and Solar Energy Corporation of India Limited

AND IN THE MATTER OF:

M/s ReNew Sun Waves Private Limited
138, Ansal Chambers II,
Bikaji Cama Place, Delhi – 110066

.....Petitioner

Versus

1. M/s Solar Energy Corporation of India Limited

1st Floor, D-3, A Wing,
Prius Platinum Religare Building District Centre,
Saket, New Delhi – 110017, Delhi

2. Bihar State Power Holding Company Limited

1st Floor, Vidyut Bhawan,
Jawahar Lal Nehru Marg, Patna -800001

3. North Bihar Power Distribution Company Limited

3rd Floor, Vidyut Bhawan
Bailey Road, Patna 800 001

4. South Bihar Power Distribution Company Limited

2nd Floor, Vidyut Bhawan
Bailey Road, Patna 800 001

....Respondents

Parties Present:

Ms. Mannat Waraich, Advocate, RSWPL
Shri Mridul Gupta, Advocate, RSWPL
Ms. Tanya Sareen, Advocate, SECI
Shri Aneesh Bajaj, Advocate, SECI

आदेश/ ORDER

The Petitioner, M/s ReNew Sun Waves Private Limited (RSWPL), a generating company is engaged in the business of development, building, owning, operating, and maintaining utility scale grid connected solar power projects for the generation of solar power. The Petitioner (RSWPL) is a project company of M/s ReNew Solar Energy (Jharkhand Four) Limited. RSWPL is setting up a 300 MW Solar Power Project based on Photo Voltaic technology.

2. Respondent No. 1, Solar Energy Corporation of India Limited (SECI), has been set up under the administrative control of the Ministry of New and Renewable Energy (MNRE) to facilitate the implementation of the Jawaharlal Nehru National Solar Mission (NSM) for the development, promotion, and commercialization of solar energy technologies in the country and to achieve targets set out in the NSM. SECI has been designated as the nodal agency for the implementation of MNRE schemes for developing grid-connected solar power capacity

through VGF mode in India.

3. Respondent No. 2, Bihar State Power Holding Company Limited (BSPHCL), formerly Bihar State Electricity Board (BSEB), is a State-owned electricity board operating within the State of Bihar.
4. Respondents No. 3 & 4 are distribution companies (DISCOMs) engaged in power distribution activities in the State of Bihar.
5. The Petitioner has made following prayers:
 - a) *Declare the imposition of safeguard duty via **Safeguard Duty Notification dated 29.07.2020** as Change in Law in terms of the PPA which have led to an increase in the expenditure for the Project;*
 - b) *Declare the imposition of increased rate of basic customs duty and subsequent increase in quantum of social welfare surcharge and IGST on account of **rescission of Notification No. 1/2011-Customs dated 06.01.2011** vide **Notification No. 07/2021-Customs dated 01.02.2021** issued by Central Government as Change in Law in terms of the PPA which have led to an increase in the expenditure for the Project;*
 - c) *Evolve a **suitable mechanism** to compensate the Petitioner for the increase in expenditure incurred by the Petitioner on account of Change in Law;*
 - d) *Direct Respondent to compensate the Petitioner towards Safeguard duty as one time lump sum amount or mechanism devised by this commission in prayer (c)*
 - e) *Direct Respondent to compensate the Petitioner towards Customs duty and consequent increase in **social welfare surcharge and IGST** as one time lump sum amount or mechanism devised by this commission in prayer (c)*
 - f) *Grant **interest/carrying cost** as mentioned in para 55 from the date of incurring of the cost by the Petitioner till the date of order by this Commission;*
 - g) *If the event this Hon'ble Commission is not inclined to grant the relief prayed at (f) then in the alternate it is prayed, that this Hon'ble Commission grants interest/ carrying cost from the date of the cost by the Petitioner till the date of order by this Commission restoring the Petitioner to the same economic position as before the occurrence of the Change in Law events. ;*
 - h) *Allow legal and administrative costs incurred by the Petitioner in pursuing the instant petition; and*

i) *Pass any such other and further reliefs as this Hon'ble Commission deems just and proper in the nature and circumstances of the present case.*

6. The Petitioner vide additional affidavit on 22.07.2022 also brought on record that as GST rates increased from 5% to 12% vide Notification No. 8/2021 dated 30.09.2021 and sought that since Notification No. 8/2021 dated 30.09.2021 was issued after the Bid-cut-off date, hence it also qualifies as change in law under Article 12 of the PPA.

Factual Matrix:

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

Location	Village Mandhopura, Tehsil Fatehgarh, District Jaisalmer, Rajasthan
Nodal agency	SECI
Tariff	Rs.2.55/kWh
Capacity (MW)	300 MW
Power	Solar
Date of notification of Basic Custom Duty Notification No. 1/2011 (2011 BCD Notification)	06.01.2011
Date of Notification No.1/2017-Central Tax (Rate) (2017 GST Notification)	28.06.2017
Date of notification of Safeguard Duty Notification No. 01/2018 Custom (SG) (2018 SGD Notification)	30.07.2018
RfS issued on	10.01.2019
Bid submitted on	15.02.2019
E-Reverse auction held on	25.02.2019
LOA issued on	05.03.2019
Power Sale Agreement (PSA) executed on	13.06.2019
Effective date of the PPA	20.06.2019
PPA executed on	13.08.2019
Tariff was adopted on	20.11.2019
Date of implementation of Safeguard Duty Notification No. 2/2020-Custom (SG) dated 29.07.2020 (2020 SGD Notification)	30.07.2020
SCOD of the project	20.12.2020
Date of notification of Basic Custom Duty Notification No. 7/2021 (2021 BCD Notification)	01.02.2021
Extended SCOD	22.05.2021
Date of Notification of 8/2021- Central Tax (Rate) (2021 GST Notification)	30.09.2021
COD of the project	05.10.2021

8. The present petition was filed on 13.08.2021. The Commission, vide order dated 23.12.2021,

disposed the Petition in line with the Electricity (Timely Recovery of Costs due to Change in Law) Rules 2021 dated 22.10.2021. However, pursuant to the directions of APTEL vide order dated 05.04.2022 in in O.P No. 1 of 2022 and Appeal Nos. 116, 74, 75 & 76 of 2022, the matter was again listed on 17.05.2022, wherein the Commission directed the parties to file their respective written submissions. The Commission vide order dated 14.06.2022 in Petition No. 8/SM/2022, in the exercise of its suo-motu powers of review, restored the present petition at the same stage as existed prior to the disposal of the petition and directed the parties to complete their pleadings within one month. Subsequent to the suo-motu order passed by the Commission, the Petitioner filed an additional affidavit on 22.07.2022 to bring on record that as GST rates increased from 5% to 12% vide Notification No. 8/2021 dated 30.09.2021 and were issued after the Bid-cut-off date. Hence, it would also qualify as a change in law under Article 12 of the PPA. SECI filed its reply against the additional submissions of the Petitioner on 25.01.2023. Upon hearing the submissions of the parties, the matter was reserved for orders on 11.04.2023 and the parties were directed to file their respective submissions. Pursuant to the directions of the Commission, Petitioner and Respondents filed their respective submissions.

Analysis and Decision:

9. We have heard the learned counsels for the Petitioner and Respondents and have carefully perused the records and considered the submissions of the parties.
10. On the basis of the submissions of the contracting parties, the following issues arise for adjudication:

Issue No. I: *Whether the introduction of Notification No.02/2020- Custom (SG)dated 29.07.2020 issued by the Department of Revenue, Ministry of Finance, Government of India, the introduction of Notification No.8/2021- GST issued by Ministry of Finance, Government of India and the imposition of the increased rate of basic customs duty and subsequent increase in quantum of social welfare surcharge and IGST on account of rescission of Notification No. 1/2011-Customs dated 06.01.2011 vide Notification No. 07/2021-Customs dated 01.02.2021 issued by Ministry of Finance, Government of India amounts to Change in Law events under Article 12 of the Power Purchase Agreement dated 13.08.2019? AND Whether the Petitioner is entitled to compensation towards additional expenditure on account of the Change in Law event in terms of Article 12.2 of the PPA?*

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

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

11. Now, we proceed to discuss the above issues

Re: Issue No. I

12. Briefly, the Petitioner has submitted that the imposition of the following events may be declared as a Change in Law events under Article 12 of the Power Purchase Agreement dated 13.08.2019, which has led to an increase in the expenditure for the project:

- *Introduction of Notification No.02/2020- Custom (SG)dated 29.07.2020 issued by the Department of Revenue, Ministry of Finance, Government of India,*
- *imposition of the increased rate of basic customs duty and subsequent increase in quantum of social welfare surcharge and IGST on account of rescission of Notification No. 1/2011-Customs dated 06.01.2011 vide Notification No. 07/2021-Customs dated 01.02.2021 issued by Ministry of Finance, Government of India and*
- *Introduction of Notification No.8/2021- GST issued by Ministry of Finance, Government of India and imposition of increased rate of basic customs duty*

13. The Petitioner has submitted that the 2018 SGD Notification dated 30.07.2018 was valid only for a period of two years i.e., till 29.07.2020. A fresh Safeguard Duty Notification No. 2/2020-Custom (SG) dated 29.07.2020 (2020 SGD Notification) was issued imposing safeguard duty on the import of solar cells and modules at the prescribed rates. 2020 SGD Notification is an event of Change in Law in terms of the PPA dated 13.08.2019 as the rate of safeguard duty has not decreased from 15% to 14.9% but has rather increased from 0% to 14.9%.

14. Further, the Petitioner has submitted that the increase in rate of basic customs duty imposed on import of machinery and auxiliary equipment for the initial setting up of solar power generation project has directly increased the quantum of social welfare surcharge, payable under Section 110 of the Finance Act, 2018, on such import, which is fixed at a rate of 10% on aggregate duties and taxes which are levied and collected by the Central Government under Section 12 of the Customs Act, 1962. Also, the increase in the rate of basic customs duty and the quantum of social welfare surcharge imposed thereon has had a bearing on the increase in the quantum of integrated goods and services tax (IGST) payable under Section 5 of the Integrated Goods and Services Tax Act, 2017 (IGST Act) on such import by the Petitioner. Upon the rescission of Notification 1/2011, there has been an increase in basic customs duty payable on the import of solar inverters from 5% to 20%, which has set into motion an increase

in the quantum of social welfare surcharge imposed, which now amounts to 2% ad valorem and an increase in the IGST on import of solar inverters which now amounts to 1.1% ad valorem. The total duty payable has increased from 5.78% ad valorem to 23.10% ad valorem.

15. The Petitioner has submitted that it is entitled to claim compensation for payment towards increased Social Welfare Surcharge. Reliance is placed on the Rajasthan Electricity Regulatory Commission (RERC) order dated 30.12.2021 in Petition No. RERC-1914/21 & batch, in *Fortum Solar Plus Private Limited & Ors. V. Solar Energy Corporation of India & Anr.*
16. The Petitioner vide additional affidavit on 22.07.2022 has submitted that as GST rates increased from 5% to 12% vide Notification No. 8/2021 dated 30.09.2021, it also qualifies as a change in law under Article 12 of the PPA.
17. *Per-contra*, SECI has submitted that Safeguard Duty was applicable under the Notification dated 30.07.2018, which existed at the time of the bid deadline, i.e. 15.02.2019 and the Petitioner was required to factor the impact of the same in the tariff quoted by it in the bidding process. The Petitioner will not be entitled to any relief in respect of such goods imported by 29.07.2020. Social Welfare Surcharge may not be considered as a cost for setting up the project as it does not form part of the profit and loss account related to the Business of setting up the Solar Power Project and supply of solar power under the PPA. If such an obligation to contribute to Social Welfare measures is allowed as pass through, the very purpose of contribution to be made for the public interest is frustrated. It will amount to the public at large contributing to its own interest instead of the obligation being discharged by the person engaged in business activities. In case of composite work contracts, subject to the admissibility of Notification dated 30.09.2021 as Change in Law, any increase in the tax rate of GST which the Petitioner can claim as per Notification dated 30.09.2021 of Government of India is only for the increase of GST from 5% to 12% on goods there being no increase in tax on service part of 30% as per the said Notifications.
18. BSPHCL and Bihar Discoms have submitted that the imposition of Safeguard Duty is not a Change in Law in terms of Article 12.1 of the PPA and provisions, and, if at all, is a change in the rate of duty that has resulted in a decrease in the expenditure by the SPD and gain by it. Hence, no compensation or relief is liable to be granted to it on this account. The submission of

the Petitioner that the 2020 SGD Notification amounts to a change in law event is erroneous, misconceived and liable to be rejected. The Petitioner ought to demonstrate that the belated import after 02.02.2021 was not attributable to it and also to show the impact and direct effect the rescission of Notification had on the Project, in the absence of which it cannot claim any relief on this account. The Petitioner ought to give details regarding the import of solar inverters like the date of contract or placing of order, the reason for placing the order after 02.02.2021 and not prior to the said date etc., so that it may be assessed if at all such rescission had an impact on the Project and also that the failure to import the inverters prior to the said rescission was not attributable to the Petitioner. The applicable rate of social welfare surcharge and IGST was the same as it existed before the last date of bid submission. Further, in the absence of any direct effect on the Project, as stated in Article 12.1, no benefit under these heads is admissible to the Petitioner.

19. We observe that Article 12 of the PPA stipulates as under:

“12. ARTICLE 12: CHANGE IN LAW

12.1 Definitions

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

*In this Article 12, the term Change in Law shall refer to the occurrence of any of the following events pertaining to this project only **after the last date of the bid submission**, including (i) the enactment of any new law ;or (ii) **an amendment, modification or repeal of an existing law**; or (iii) the requirement to obtain a new consent, permit or license; or (iv) any modification to the prevailing conditions prescribed for obtaining an consent, permit or license, not owing to any default of the Solar Power Generator; or (v) **any change in the rates of any Taxes including any duties and cess or introduction of any new tax made applicable for setting up the solar power project and supply of power from the Solar Power project by the SPD which have a direct effect on the Project.***

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

In the event a Change in Law results in any adverse financial loss/ gain to the Solar Power Generator then, in order to ensure that the Solar Power Generator is placed in the same financial position as it would have been had it not been for the occurrence of the Change in Law, the Solar Power Generator/ Procurer shall be entitled to compensation by the other party, as the case may be, subject to the condition that the quantum and mechanism of compensation payment shall be determined and shall be effective from such date as may be decided by the Appropriate Commission.

In the event of any decrease in the recurring/ nonrecurring expenditure by the SPD or any income to the SPD on account of any of the events as indicated above, SPD shall file an application to the appropriate commission no later than sixty (60) days from the occurrence of such event, for seeking approval of Change in Law. In the event of the

SPD failing to comply with the above requirement, in case of any gain to the SPD, SECI shall withhold the monthly tariff payments on immediate basis, until compliance of the above requirement by the SPD.

12.2 Relief for Change in Law

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

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

20. As per 2018 SGD Notification, the Central Government imposed safeguard duty as per the following rates on the import of “Solar Cells whether or not assembled in modules or panels”:

- a) 25% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th July 2018 to 29th July 2019;*
- b) 20% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th July 2019 to 29th January 2020;*
- c) 15% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th January 2020 to 29th July 2020.*

21. The extract of the 2020 SGD Notification, is as under:

- ...
- (a) fourteen point nine per cent. ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30th July, 2020 to 29th January, 2021 (both days inclusive); and*
 - (b) fourteen point five per cent. ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30th January, 2021 to 29th July, 2021 (both days inclusive).*

22. From the above, we note that any application of a new tax or an amendment, modification or repeal of an existing law is covered as a ‘Change in Law’. We observe that the 2020 SGD Notification stipulated fourteen point nine per cent (14.9%) ad valorem minus anti-dumping duty payable, on subject goods when imported during the period from 30.07.2020 to 29.01.2021 (both days inclusive); and fourteen point five per cent (14.5%) ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30.01.2021 to 29.07.2021 (both days inclusive). The notification provides for a diminishing ‘Safeguard Duty’ slab in the range of 14.9% to 14.5% applicable ad valorem on the imports from 30.07.2020 till 29.07.2021. The impact of the ‘Safeguard Duty’ notification is on any portion of import whose point of taxation is on or after implementation of the Notification dated 29.07.2020, and the same will be subjected to the purview of ‘Safeguard Duty’. The Commission is of the view that a fresh ‘Safeguard Duty’ became effective from 30.07.2020, and hence, the notification/imposition of ‘Safeguard Duty’ will directly affect the projects where “solar cells,

whether or not assembled in modules or panels” were imported on or after 30.07.2020. In the present instance, the 2020 SGD Notification has imposed a fresh Safeguard Duty till 29.07.2021 and has thereby increased the rate of the Safeguard Duty from ‘zero’ to 14.9% & 14.5% for the period- 30.07.2020 to 29.01.2021 and 30.01.2021 to 29.07.2021, respectively.

23. The Commission further observes that clause (v) of Article 12 of the PPA, in seriatim, specifically stipulates that *any change in rates of taxes, duties and cess, or introduction of any new tax made applicable for setting up of Solar Power Project and supply of power from the Solar Power Project by the SPD which have a direct effect on the Project*. The introduction of the 2020 SGD Notification dated 29.07.2020 has been issued by the Ministry of Finance, Government of India. As such the introduction of the impugned notification has been enacted by the Act of Parliament. The change in the rate of safeguard duty (as highlighted in aforesaid paras) has resulted in a change in the cost of the inputs required for generation, and the same is considered as a ‘Change in Law’. Hence, we are of the view that the impugned notifications viz. 2020 SGD Notification is a Change in Law event as per Article 12 of the PPA dated 13.08.2019. It is pertinent to mention here that the view taken is consistent with similar orders taken by the Commission, viz. Order dated 20.01.2023 in Petition No. 722/MP/2020 & 723/MP/2020; Order dated 21.04.2023 in Petition No. 219/MP/2020; Order dated 02.06.2023 in Petition No. 168/MP/2020 and Order dated 16.10.2023 in Petition No. 228/MP/2021.

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

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

25. We observe that the increase in rate of basic customs duty imposed on import of machinery and auxiliary equipment for the initial setting up of solar power generation project has increased the quantum of social welfare surcharge, payable under Section 110 of the Finance Act, 2018, on such import, fixed at a rate of 10% on aggregate duties and taxes which are levied and collected by the Central Government under Section 12 of the Customs Act, 1962, having a bearing on the increase in the quantum of integrated goods and services tax and Services Tax

Act, 2017 (IGST Act) on such import by the Petitioner. The increase in customs duty due to the rescission of the Basic Customs Duty (BCD) Notification No. 1/2011-Customs dated 06.01.2011 by the BCD Notification No. 7/2021 (2021 BCD Notification) is resulting from Indian Governmental Instrumentality in terms of the PPA dated 18.11.2019 any financial implications cast upon the SPD on account of Change in Law shall be compensated. Hence, we hold that the 2021 BCD Notification is an event of Change in Law as per Article 12 of the PPA dated 13.08.2020. We also note that there is an increase in the quantum of social welfare surcharge, payable under Section 110 of the Finance Act 2018, on the import of goods. Hence, we hold that an increase in social welfare surcharge levied by the Indian Government Instrumentality on the import of machinery and auxiliary equipment is also an event of Change in Law as per Article 12 of the PPA dated 13.08.2020.

26. We observe that the Directorate General of Taxpayer Services, Central Board of Excise & Customs, on its official website, www.cbic.gov.in, has clarified as under:

“In cases where imported goods are liable to Anti-Dumping Duty or Safeguard Duty, calculation of Anti-Dumping Duty or Safeguard duty would be as per the respective notification issued for levy of such duty. It is also clarified that value for calculation of IGST as well as Compensation Cess shall also include Anti-Dumping Duty amount and Safeguard duty amount.”

27. We observe that IGST has been levied by the competent authority in compliance with directions issued by the Government of India. In view of the above, in cases where imported goods are liable to Safeguard Duty, the value of IGST levied on the Safeguard duty is also to be allowed.

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

(b) in Schedule II – 12%, -

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

201 A	84, 85 or 94	<i>Following renewable energy devices & parts for their manufacture: - (a) Bio-gas plant (b) Solar power-based devices (c) Solar power generating system (d) Wind mills, Wind Operated Electricity Generator (WOEG) (e) Waste to energy plants / devices (f) Solar lantern / solar lamp (g) Ocean waves/tidal waves energy devices/plants</i>
----------	--------------------	--

		(h) <i>Photo voltaic cells, whether or not assembled in modules or made up into panels.</i>
--	--	---

29. From the above, we observe that Clause (v) of Article 12 of the PPA, in seriatim, specifically stipulates that *any change in rates of taxes, duties and cess, or introduction of any new tax made applicable for setting up of Solar Power Project and supply of power from the Solar Power Project by the SPD which have a direct effect on the Project.* The introduction of Notification No. 8/2021- Integrated Tax (Rate) dated 30.09.2021 has been issued by the Ministry of Finance, Government of India. As such the introduction of the impugned notifications has been enacted by the Act of Parliament. The change in rate of Goods and Services Tax from 5% to 12% w.e.f. 01.10.2021 has resulted in a change in the cost of the inputs required for generation, and the same is considered as a 'Change in Law'. We are of the view that *2021 IGST Notification* is also an event of Change in Law as per Article 12 of the PPA dated 13.08.2019.
30. In view of the discussions in the preceding paras, we hold that the introduction of Notification No.02/2020- Custom (SG) dated 29.07.2020 issued by the Department of Revenue, Ministry of Finance, Government of India, the introduction of Notification No.8/2021- GST issued by Ministry of Finance, Government of India and the imposition of increased rate of basic customs duty and subsequent increase in quantum of social welfare surcharge and IGST on account of rescission of Notification No. 1/2011-Customs dated 06.01.2011 vide Notification No. 07/2021-Customs dated 01.02.2021 issued by Ministry of Finance, Government of India amounts to Change in Law events under Article 12 of the Power Purchase Agreement dated 13.08.2019.
31. In the instant petition, the bid was submitted by the Petitioner on 15.02.2019. PPA was executed between the Petitioner and the SECI on 13.08.2019 and the SCoD the project was 20.12.2020. In terms of the extended SCoD, the Project was required to be commissioned on or before 22.05.2021. The project was commissioned on 05.10.2021. We observe that a fresh safeguard duty was imposed vide Safeguard Duty Notification No. 2/2020-Custom (SG) dated 29.07.2020 w.e.f. 30.07.2020. Notification No. 1/2011-Customs dated 06.01.2011 was rescinded vide Notification No. 07/2021-Customs dated 01.02.2021 w.e.f. 02.02.2021 and GST rates were amended vide Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021 w.e.f. 01.10.2021. As such, we find a hold that the Petitioner's project was affected by the said

notifications. Therefore, the Petitioner is entitled to compensation on account of Change in Law as per the terms of Article 12 of the PPA due to impugned notifications viz. *2020 SGD Notification; rescission of the BCD Notification No. 1/2011-Customs dated 06.01.2011 by the BCD Notification No. 7/2021* increase of quantum of *social welfare surcharge* on the imports, and increase in quantum of *IGST levied on the Safeguard duty* on the imports and *2021 IGST Notification*.

32. 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 a Change in Law?

33. The Petitioner has submitted that at the time of the submission of the bid, the Petitioner had factored in 'interest on working capital' and 'return on equity' based on the costs prevalent at the time of the bid. With the increase in the costs due to the change in law events, the working capital requirement, and consequently, the interest on working capital also increased as compared to the requirement and rate prevalent at the time of the bid. Thus, the Petitioner is entitled to interest on incremental working capital at a normative interest rate to put the Petitioner in the same economic position as if a change in law had not occurred. The Petitioner has funded the entire safeguard duty and additional customs duty upfront from its equity, as the same was not envisaged at the time of bidding and was not a part of the project cost. Therefore, Petitioner is also entitled to reimbursement of carrying cost from the date of actual payment of safeguard duty and additional customs duty till the order from this Commission so that Petitioner is put in the same economic position as if a change in the law had not occurred. The interest rate of such carrying cost should be equal to the return on equity as allowed by this Commission in its Regulation for *Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020* (RE Tariff Regulations, 2020) which is 14% per annum. Alternatively, Petitioner be allowed an interest rate of carrying cost equal to the rate of interest allowed under the Late Payment surcharge clause of PPA.

34. *Per-contra*, SECI has submitted that if the Change in Law event had occurred prior to the cut-off date, the Petitioner would have factored the higher cost to be incurred in establishing the

solar power project in the per unit tariff to be quoted. Accordingly, the impact of Change in Law occurring after the cut-off date can be serviced through an annuity. There has been a fall in the interest rate of loans, and there has been notification of RE Tariff Regulations, 2020 and RE Tariff Order dated 31.03.2021. In the said regulations read with RE tariff Order, the Central Commission has considered an interest rate of 9% and the term of the Loan repayment as 15 years instead of 13 years earlier considered. The same parameters for making payment on an annuity basis may be considered by the Commission in case compensation is allowed. Further, the Bihar Discoms may be directed to make a payment towards the evaluated claims of the Safeguard Duty and Customs Duty payable by SECI to Petitioner on a back-to-back basis under the PSA in a time-bound manner. BSPHCL/Bihar Discoms have submitted that the claim of interest on working capital is liable to be rejected as the quoted tariff is an all-inclusive one discovered through a tariff-based competitive bidding process. The claim of interest rate equal to the rate of interest allowed under the Late Payment surcharge clause of the PPA may also not be considered in as much it is in the event of delay in payment of monthly bill as stated in Article 10.3.3 that the Late Payment Surcharge becomes payable.

35. It was placed before us that this Commission, in the earlier order dated 20.08.2021 in Petition No. 536/MP/2020, has already decided on the methodology of compensation due to a Change in Law event as under:

65. We find that in Petition No. 536/MP/2020, SECI and the Respondents (SPDs as well as the Discoms) are on the same page in so far as the rate of interest on loan is considered. This is evident from the computation of the weighted average cost of capital advanced by the contending parties. Majority of the parties have used 10.41% (as mentioned in the CERC RE Tariff Order dated 19.03.2019) as the reference rate of interest for building their arguments for the rate of annuity payment. In other words, the parties have accepted this rate as the appropriate normative rate of interest for any debt that they might have taken. Given the fact that it is not possible in case of competitive bidding projects to ascertain either the capital structuring (extent of debt and equity) of the projects, or the actual rate of interest of the debt component or the expected rate of return on equity, we consider it appropriate to use the normative rate of 10.41% as reference for the purpose of annuity payment. As the actual deployment of capital by way of debt or equity and their cost in terms of rate of interest or return, respectively, is unknown, the rate 10.41% can be taken as the uniform rate of compensation for the entire expenditure incurred on account of GST Laws or Safeguard Duty. The Commission is of the view that the compensation for change in law cannot be a source for earning profit, and therefore, there cannot be any higher rate of return than the prevailing normative cost of debt. Accordingly, we hold that 10.41% shall be the discount rate of annuity payments towards the expenditure

incurred on GST or Safeguard Duty (as the case may be) by the Respondent SPDs on account of 'Change in Law'.

Commencement of 'Monthly Annuity Payments' and "Late Payment Surcharge"

66. *Further, SPDs have submitted that the 'Monthly Annuity Payment' of GST claims ought to start from COD taking into consideration the provisions of applicable 'Late Payment Surcharge' in the PPAs in case of delayed payments*
67. *We observe that in the Petitions filed by the SPDs where claims under Change in Law were adjudicated, the Commission has directed SPDs to make available to SECI/ Discoms all relevant documents exhibiting clear and one to one correlation between the projects and the supply of goods or services, duly supported by the relevant invoices and Auditor's Certificate. SECI/ Discoms were further directed to reconcile the claims for Change in Law on receipt of the relevant documents and pay the amount so claimed to SPDs. It was also held that SECI is liable to pay to SPDs which is not conditional upon the payment to be made by the Discoms to SECI. However, SECI is eligible to claim the same from the Discoms on 'back to back' basis. The claim was directed to be paid within sixty days of the date of respective orders or from the date of submission of claims by SPDs whichever was later failing which it will attract late payment surcharge as provided under PPAs/PSAs. Alternatively, SPDs and the SECI/ Discoms may mutually agree to a mechanism for the payment of such compensation on annuity basis spread over the period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs.*
68. *In view of the above, the liability of SECI/ Discoms for 'Monthly Annuity Payment' starts from 60th (sixtieth) day from the date of orders in respective petitions or from the date of submission of claims by the Respondent (SPDs), whichever is later. In case of delay in the Monthly Annuity Payment beyond the 60th (sixtieth) day from the date of orders in respective petitions or from the date of submission of claims by the Respondent (SPDs), whichever is later, late payment surcharge shall be payable for the delayed period corresponding to each such delayed Monthly Annuity Payment(s), as per respective PPAs/PSAs.*

Tenure of 'Annuity Period'

69. *SPDs have submitted that the annuity period should be 13 years. It is observed that SECI has revised the proposal of annuity payments by considering the annuity period of 13 years instead of 25 years as proposed earlier. Further, SECI has stated that the payment shall be provisional and subject to final decision of this Commission in respective petitions. The period of 13 years is consistent with Regulation 14 of the RE Tariff Regulations, 2017 which stipulates as under:*

"14. Loan and Finance Charges

Loan Tenure

For the purpose of determination of tariff, loan tenure of 13 years shall be considered."

70. *We observe that as there seems to a general acceptance amongst SECI and the Respondent SPDs that the Annuity Period could be of 13 years, as such the same is approved by the Commission.*

36. We note that we have taken a consistent view that the determination of the appropriate methodology for payment of compensation on account of the Change in Law event has already been decided by us in earlier orders. We have considered that in the case of competitive bidding projects, it is not possible to ascertain either the capital structuring (extent of debt and equity) of the projects, the actual rate of interest of the debt component or the expected rate of return on equity. As the actual deployment of capital by way of debt or equity and their cost in terms of rate of interest or return, respectively, is unknown, the rate can be taken as the uniform rate of compensation for the entire expenditure incurred on account of Change in Law. *The compensation for change in law cannot be a source for earning profit, and therefore, there cannot be any higher rate of return than the prevailing normative cost of debt.*
37. We note that the Petitioner's project achieved actual commercial operation on 05.10.2021, which is during FY 2021-22. The Commission notified the RE Tariff Order dated 31.03.2021 for FY 2021-22 in pursuance of the CERC (*Terms and Conditions for Tariff determination from Renewable Energy Sources*) Regulations, 2020. In the said RE tariff Order the Commission considered the interest rate of 9% and the term of the loan repayment as 15 years. Thus, we hold that the discount rate of 9% and annuity period of 15 years shall be the appropriate methodology towards change in law compensation.
38. 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. In case of delay in the Monthly Annuity Payment beyond the 60th (sixtieth) day from the date of this order or from the date of submission of claims by the Respondent, whichever is later, a late payment surcharge shall be payable for the delayed period corresponding to each such delayed Monthly Annuity Payment(s), as per respective PPAs/PSAs.
39. The issue is decided accordingly.

Re: Issue No. III

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

40. The Petitioner has submitted that it is entitled to claim carrying costs as Article 12.1 of the PPA specifically contains a restitutive provision. Carrying Cost is compensation towards the time value of money for the time gaps between the date on which the affected party incurred additional expenses on account of the Change in Law and the date when it received the compensation for the same, so, that the affected party may be restored in the same financial position as if the change in law event has not occurred in the first place. In order to restore the affected party to the same economic position as if a change in law event has not occurred, the carrying cost has to be allowed at actuals. (Reliance is placed on APTEL judgement dated 16.11.2021 in A.No. 163 of 2020 and in A.No. 171 of 2020 in the matter of *Nisagra Renewable Energy Private Limited v. Maharashtra State Electricity Distribution Co. Ltd. & Anr* and *Juniper Green Energy Private Limited v. Maharashtra State Electricity Distribution Co. Ltd. & Anr.*) (*Nisagra judgement*). If the Petitioner is not allowed to claim Carrying Cost, then it would have to bear huge losses, which would lead to restitution to the same financial position. The Petitioner cannot be made to suffer for acting bona fide. *Per-contra*, SECI has submitted that carrying cost is to be restricted to the cost of financing of a prudent and efficient utility i.e. the interest rate at which such utility can borrow money from the lenders and financial institutions after due and sincere efforts to minimize the interest cost. The judgment of the APTEL dated 15.09.2022 has been assailed before the Supreme Court in Civil Appeal no. 8880/2022 in the case of “*Telangana Northern Power Distribution Co. Ltd. & Anr. Vs. Parampujya Solar Energy Pvt. Ltd. & Ors.*”. SECI has further submitted that the final order by this Commission in this matter shall not be enforced till further orders are passed by the Hon’ble Supreme Court. BSPHCL/Bihar Discoms have submitted that the claim with respect to change in law may be considered only in terms of the provisions of the PPA and relevant legal provisions. Relief beyond what is contemplated by the PPA is not admissible, and no windfall in the garb of the Change in Law clause can be claimed by the Petitioner.

41. We observe that Article 12 of the PPAs deals with Change in Law, inter-alia, as under:

ARTICLE 12: CHANGE IN LAW

“12.1 Definitions

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

In this Article 12, the term Change in Law shall refer to the occurrence of any of the following events pertaining to this project only after the last date of the bid submission, including (i) the enactment of any new law; or (ii) an amendment, modification or repeal of an existing law; or (iii) the requirement to obtain a new consent, permit or license; or (iv) any modification to the prevailing conditions prescribed for obtaining

an consent, permit or license, not owing to any default of the Solar Power Generator; or (v) any change in the rates of any Taxes including any duties and cess or introduction of any new tax made applicable for setting up the solar power project and supply of power from the Solar Power project by the SPD which have a direct effect on the Project.

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

In the event a Change in Law results in any adverse financial loss/ gain to the Solar Power Generator then, in order to ensure that the Solar Power Generator is placed in the same financial position as it would have been had it not been for the occurrence of the Change in Law, the Solar Power Generator/ Procurer shall be entitled to compensation by the other party, as the case may be, subject to the condition that the quantum and mechanism of compensation payment shall be determined and shall be effective from such date as may be decided by the Appropriate Commission. It the event of any decrease in the recurring/ nonrecurring expenditure by the SPD or any income to the SPD on account of any of the events as indicated above, SPD shall file an application to the appropriate commission no later than sixty (60) days from the occurrence of such event, for seeking approval of Change in Law. In the event of the SPD failing to comply with the above requirement, in case of any gain to the SPD, SECI shall withhold the monthly tariff payments on immediate basis, until compliance of the above requirement by the SPD.

12.2 Relief for Change in Law

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

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

42. We observe that Hon’ble Supreme Court vide *Uttar Haryana judgement* dated 25.02.2019 has held as under:

Article 13.2 is an in-built restitutionary principle which compensates the party affected by such change in law and which must restore, through monthly tariff payments, the affected party to the same economic position as if such change in law has not occurred. This would mean that by this clause a fiction is created, and the party has to be put in the same economic position is if such change in law has not occurred, i.e., the party must be given the benefit of restitution as understood in civil law...

...
13. A reading of Article 13 as a whole, therefore, leads to the position that subject to restitutionary principles contained in Article 13.2, the adjustment in monthly tariff payment, in the facts of the present case, has to be from the date of the withdrawal of exemption which was done by administrative orders dated 06.04.2015 and 16.02.2016. The present case, therefore, falls within Article 13.4.1(i). This being the case, it is clear that the adjustment in monthly tariff payment has to be effected from the date on which

*the exemptions given were withdrawn. This being the case, monthly invoices to be raised by the seller after such change in tariff are to appropriately reflect the changed tariff. On the facts of the present case, it is clear that the respondents were entitled to adjustment in their monthly tariff payment from the date on which the exemption notifications became effective. **This being the case, the restitutionary principle contained in Article 13.2 would kick in for the simple reason that it is only after the order dated 04.05.2017 that the CERC held that the respondents were entitled to claim added costs on account of change in law w.e.f. 01.04.2015. This being the case, it would be fallacious to say that the respondents would be claiming this restitutionary amount on some general principle of equity outside the PPA. Since it is clear that this amount of carrying cost is only relatable to Article 13 of the PPA, we find no reason to interfere with the judgment of the Appellate Tribunal.***

43. From the above, we observe that Article 12.1 of the PPA dated 25.06.2019 specifically stipulates that in the event a Change in Law results in any adverse financial loss/ gain to the Solar Power Generator, then, in order to ensure that the Solar Power Generator is placed in the same financial position as it would have been had it not been for the occurrence of the Change in Law, the Solar Power Generator/ Procurer shall be entitled to compensation. We further observe that the Hon'ble Supreme Court vide *Uttar Haryana judgement* dated 25.02.2019 has held that in case there is an in-built restitutionary principle in the PPA, then the affected party has to be put in the same economic position if such change in law has not occurred, i.e., the party must be given the benefit of restitution as understood in civil law.

44. In the instant case, we observe that the bid was submitted by the Petitioner on 15.02.2019. PPA was executed between the Petitioner and the SECI on 13.08.2019 and the SCoD the project was 20.12.2020. In terms of the extended SCoD, the Project was required to be commissioned on or before 22.05.2021. We observe that a fresh safeguard duty was imposed vide Safeguard Duty Notification No. 2/2020-Custom (SG) dated 29.07.2020 w.e.f. 30.07.2020. Notification No. 1/2011-Customs dated 06.01.2011 was rescinded vide Notification No. 07/2021-Customs dated 01.02.2021 w.e.f. 02.02.2021 and GST rates were amended vide Notification No. 8/2021-Central Tax (Rate) dated 30.09.2021 w.e.f. 01.10.2021. As such, the Petitioner's project was affected by the said notifications. In the preceding paragraphs, we have already held that the Petitioner is affected by the impugned notifications, viz. *2020 SGD Notification; rescission of the BCD Notification No. 1/2011-Customs dated 06.01.2011 by the BCD Notification No. 7/2021* increase of quantum of *social welfare surcharge* on the imports, and increase in quantum of *IGST levied on the Safeguard duty* on the imports and the *2021 IGST Notification*, as such the Petitioner is entitled to compensation towards additional capital expenditure on

account of Change in Law event in terms of Article 12 of the PPAs. The project was commissioned on 05.10.2021.

45. In view of the above, this Commission holds that the Petitioner shall be entitled to compensation (pre-COD & post-COD) towards additional expenditure on account of the Change in Law event in terms of Article 12 of the PPAs. The Petitioner, in the instant petition, shall be eligible for carrying costs starting from the date when the actual payments were made to the authorities until the date of issuance of this Order, at the actual rate of interest paid by RSWPL 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 RSWPL 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.
46. Accordingly, the Commission hereby directs the contracting parties to carry out the reconciliation of additional expenditure along with carrying cost by exhibiting clear and one-to-one correlation with the projects and the invoices raised supported with an auditor certificate. The Commission further directs that the responding Discoms are liable to pay SECI all the above-reconciled claims that SECI has to pay to the Petitioners. However, payment to the Petitioners by SECI is not conditional upon the payment to be made by the responding Discoms to SECI.
47. Further, APTEL, vide judgment dated 15.09.2022 in A.No. 256 of 2019 & Batch titled as *Parampujya Solar Energy Private Limited &Ors. vs. CERC &Ors.* held as under:

...
*109. The other captioned appeals – Appeal no. 256 of 2019 (Parampujya Solar Energy Pvt. Ltd &Anr. v. CERC &Ors.), Appeal no. 299 of 2019 (Parampujya Solar Energy Pvt. Ltd. v. CERC &Ors.), Appeal no. 427 of 2019 (Mahoba Solar (UP) Private Limited v. CERC &Ors.), Appeal no. 23 of 2022 (Prayatna Developers Pvt. Ltd. v. CERC &Ors.) Appeal no. 131 of 2022 (Wardha Solar (Maharashtra) Private Ltd. &Anr. v. CERC &Ors.) and Appeal no. 275 of 2022 (Parampujya Solar Energy Pvt. Ltd. &Anr. v. CERC &Ors.) - deserve to be allowed. **We order accordingly directing the Central Electricity Regulatory Commission to take up the claim cases of the Solar Power Project Developers herein for further proceedings and for passing necessary orders consequent to the findings recorded by us in the preceding parts of this judgment, allowing Change in Law (CIL) compensation (on account of GST laws and Safeguard Duty on Imports, as the case may be) from the date(s) of enforcement of***

the new taxes for the entire period of its impact, including the period post Commercial Operation Date of the projects in question, as indeed towards Operation & Maintenance (O&M) expenses, along with carrying cost subject, however, to necessary prudence check.

48. 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."

49. Therefore, the directions issued in this Order so far as they relate to additional compensation for the period pre-COD claims only (as all the modules were procured before the COD of the project i.e. 15.10.2021) shall be enforced and the directions issued in this Order so far as they relate to additional compensation for the period post-Commercial Operation Date of the project in question as also towards post-COD (carrying cost) shall not be enforced and shall be subject to further orders of the Hon'ble Supreme Court in Civil Appeal No. 8880/2022 in *Telangana Northern Power Distribution Company Limited & Anr. V. Parampujya Solar Energy Pvt. Limited & Ors*, and connected matters.

50. The issue is decided accordingly.

51. The summary of our findings is as follows:

- a) The 2020 SGD Notification; rescission of the BCD Notification No. 1/2011-Customs dated 06.01.2011 by the BCD Notification No. 7/2021 along with increase of quantum of social welfare surcharge on the imports, and increase in quantum of IGST levied on the Safeguard duty on the imports and 2021 IGST Notification 2020 are a Change in Law event in terms of Article 12 of the PPA dated 13.08.2019.
- b) The Petitioner is entitled to compensation (pre-COD & post-COD) on account of Change in Law as per the terms of Article 12 of the PPA due to the impugned notifications viz. 2020 SGD Notification; rescission of the BCD Notification No. 1/2011-Customs dated 06.01.2011 by the BCD Notification No. 7/2021 along with increase of quantum of social welfare surcharge on the imports, and increase in

quantum of *IGST levied on the Safeguard duty* on the imports and *2021 IGST Notification 2020*.

- c) Compensation is to be paid at the discount rate of 9% and an annuity period of 15 years. The liability of SECI/ Discoms for '*Monthly Annuity Payment*' shall start from the 60th (sixtieth) day from the date of this order or from the date of submission of claims by the Petitioner, 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.
- 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 in so far as they relate to additional compensation for the period pre-COD claims only (as all the modules were procured before the COD of the project i.e. 05.10.2021) shall be enforced, and the directions issued in this Order in so far as they relate to additional compensation for the period post-Commercial Operation Date of the project in question as also towards post-COD (carrying cost) shall not be enforced and shall be subject to further orders of the Hon'ble Supreme Court in Civil Appeal No. 8880/2022 in *Telangana Northern Power Distribution Company Limited & Anr. V. Parampujya Solar Energy Pvt. Limited & Ors*, and connected matters.

52. The Petition No. 171/MP/2021 is disposed of in terms of the above.

Sd/-
पी. के. सिंह
सदस्य

Sd/-
अरुण गोयल
सदस्य

Sd/-
आई. एस. झा
सदस्य

Sd/-
जिष्णु बरुआ
अध्यक्ष