



नई दिल्ली
NEW DELHI

याचिका संख्या./ Petition No. 267/MP/2022
268/MP/2022
269/MP/2022

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: 21st of December, 2023

IN THE MATTER OF:

A petition under section 79 of the Electricity Act, 2003 for seeking an appropriate adjustment/ compensation to offset financial/ commercial impact of Change in Law events on account of increase in the rate of goods and services tax from 5% to 12 % by way of Notification No. 8/2021- central tax (rate) dated 30.09.2021, in terms of Article 12 of the Power Purchase Agreements executed between the Petitioners and Solar Energy Corporation of India Limited.

AND IN THE MATTER OF:

1) Petition No. 267/MP/2022

M/s Azure Power Forty-One Private Limited
5th Floor, Southern Park, D-II, Saket Place,
Saket, New Delhi – 110017

...Petitioner

VERSUS

1. Solar Energy Corporation of India Limited (SECI)
1st Floor, A-Wing, D-3, District Centre,
Saket, New Delhi-110017

2. Grid Corporation of Odisha Limited (GRIDCO),
Janpath, Bhubaneswar,
Odisha - 751022

3. BSES Rajdhani Power Limited (BRPL)
BSES Bhawan, Nehru Place,
New Delhi -110019

...Respondents

AND IN THE MATTER OF:

2) Petition No. 268/MP/2022

M/s Azure Power Forty Three Private Limited
5th Floor, Southern Park, D-II, Saket Place,
Saket, New Delhi – 110017

...Petitioner

VERSUS

1. Solar Energy Corporation of India Limited (SECI),
1st Floor, A-Wing, 0-3, District Centre, Saket,
New Delhi- 110017

2. Grid Corporation of Odisha Limited (GRIDCO Odisha),
Janpath, Bhubaneswar,
Odisha - 751022

3. Jharkhand Bijli Vitran Nigam Limited (JBVNL),
Engineering Building, H.E.C, Dhurwa
Ranchi- 834004

...Respondents

AND IN THE MATTER OF:

3) Petition No. 269/MP/2022

M/s Azure Power Maple Private Limited
5th Floor, Southern Park, D-II, Saket Place,
Saket, New Delhi – 110017

VERSUS

1. Solar Energy Corporation of India Limited (SECI),
1st Floor, A-Wing, 0-3, District Centre, Saket,
New Delhi- 110017

2. Madhya Pradesh Power Management Company Limited (MPPMCL)
Shakti Bhawan, Block No.11
Rampur, Jabalpur-482008

...Respondents

Parties Present: Ms. Mannat Waraich, Advocate, Azure Power
Shri Mridul Gupta, Advocate, Azure Power
Ms. Anushree Bardhan, Advocate, SECI
Shri Aneesh Bajaj, Advocate, SECI
Ms. Srishti Khindaria, Advocate, SECI
Ms. Surbhi Kapoor, Advocate, SECI

आदेश/ ORDER

The Petitioners, M/s Azure Power Forty One Private Limited, M/s Azure Power Forty Three Private Limited, and M/s Azure Power Maple Private Limited, are generating companies engaged in the business of development, building, owning, operating and maintaining utility scale grid connected solar power projects. The Petitioners are seeking an appropriate adjustment/ compensation to offset the financial/ commercial impact of change in law events on account of an increase in the rate of goods and services tax from 5% to 12 % by way of Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021, in terms of Article 12 of the Power Purchase Agreement.

2. Respondent, M/s Solar Energy Corporation of India Limited (SECI) is a Central Public Sector Undertaking and has been designated by the Government of India as the nodal agency for the implementation of Ministry of New and Renewable Energy (MNRE) Schemes for developing grid connected solar power capacity in India.
3. Respondent, Grid Corporation of Odisha (GRIDCO Odisha) is a wholly owned undertaking of the State government of Odisha and is engaged in the bulk purchase and sale of power to the distribution companies of Odisha. The rest of the Respondents are the distribution companies (Discoms) in the respective States of Delhi, Jharkhand and Madhya Pradesh.
4. Petitioners have made the following prayers:
 - a) *Declare the increased rate of CGST and SGST/IGST on renewable energy devices and parts for their manufacture imposed vide **Notification No. 8/2021-Central Tax (Rate)** and **Notification No. 8/2021- Integrated Tax (Rate)** dated September 30, 2021 (effective October 1, 2021) as Change in Law in terms of the PPA which have led to an increase in the expenditure for the Project.;*

- b) *Evolve a suitable mechanism to compensate the Petitioner for the increase in expenditure incurred by the Petitioner on account of Change in Law;*
- c) *Direct Respondent to compensate the Petitioner towards CGST and SGST/IGST, as a one-time lump sum amount or mechanism devised by this commission in prayer (b);*
- d) *Grant carrying cost along with interest on carrying cost from the date of occurrence of Change in Law event i.e., increase in the rates of CGST and SGST/IGST till the date on which the full and final payment is made to the Petitioner, thereby, restoring the Petitioner to the same economic position as before the occurrence of the Change in Law event(s);*
- e) *Allow legal and administrative costs incurred by the Petitioner in pursuing the instant petition; and*
- f) *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.*

Factual Matrix:

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

Particulars	Petition No.267/MP/2022	Petition No. 268/MP/2022	Petition No. 269/MP/2022
Guidelines	Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar Power Projects dated 03.08.2017.		
Capacity	300 MW	2 X 300 MW	300 MW
Location of the Project	Village Noore ki Bhurj, Khakuri Dedasari, Kushla ram ki basti, Ismail Ki Dhani, Tehsil; Bap, District; Jodhpur, Rajasthan	Village Jagdev wala and Daudsar, Tehsil Bikaner, District Bikaner, Rajasthan	Village Sonanda, Shelkhasar, Bandhari & Kesarapura, Tehsil: Bap, District: Jodhpur, Rajasthan
GST Notification No.1/2017-Central Tax (Rate) (2017 GST Notification) notified on	28.06.2017		
Request for Selection (RfS) was floated on	10.01.2019	30.01.2018	13.03.2019
Submission of Bid by Azure Power India Pvt. Ltd. (APIPL)	15.02.2019	15.06.2018	30.05.2019
E-Reverse auction was conducted on	25.02.2019	02.07.2018	12.06.2019
Letter of Award/Intent (LoA/LoI) issued on	05.03.2019	27.07.2018	25.07.2019

Tariff Adoption Order passed on	20.11.2019	28.02.2020	25.02.2021
PSA executed on	<u>22.08.2019</u> - with GRIDCO Odisha; <u>17.06.2019</u> - with BRPL	<u>07.08.2018</u> - with JBVNL; <u>27.11.2018</u> - with Haryana Power Purchase Center (HPPC)	<u>16.10.2019</u> - with MPPMCL
PPA executed on	17.09.2019	31.10.2018	27.11.2019
Tariff	Rs.2.58/kWh	Rs.2.53/kWh	Rs.2.54/kWh
GST Notification No. 8/2021-Central Tax (Rate) (2021 GST Notification) notified on	30.09.2021		
SCoD of the projects	As per PPA 01.03.2021 Revised by SECI 01.08.2021 31.10.2022 07.03.2022	As per PPA 25.10.2020 Revised by SECI 27.03.2021	As per PPA 23.04.2021 Revised by SECI 23.09.2021 08.12.2021 06.10.2022
Actual Commissioning date of the projects	<i>13.10.2021- 50 MW</i> <i>02.11.2021- 50 MW</i> <i>30.11.2021- 50 MW</i> <i>27.12.2021- 50 MW</i> <i>31.01.2022- 50 MW</i> <i>07.03.2022- 50 MW</i>	<i>15.12.2020- 150 MW</i> <i>31.01.2021- 100 MW</i> <i>09.02.2021- 50 MW</i> <i>25.06.2021- 50 MW</i> <i>09.08.2021- 50 MW</i> <i>23.09.2021- 100 MW</i> <i>31.12.2021- 100 MW</i>	<i>14.02.2022- 53 MW</i> <i>30.03.2022- 204 MW</i> <i>31.03.2023- 43 MW</i>

6. The instant Petitions were filed on 06.09.2022 and were listed for hearing on 07.03.2023, wherein the Commission admitted the Petitions and issued notice to the Respondents. The Commission directed the Petitioners to submit the details pertaining to the SCoD and the CoD of the projects. Pursuant to the directions of the Commission, the Petitioners vide the Additional Affidavit dated 07.03.2023, submitted the details as sought by the Commission. The Petitions were further listed for hearing on 13.06.2023, wherein the Commission, after hearing the submissions of the parties, reserved the matters for orders.

Analysis & Decision:

7. We have heard the learned counsels for the Petitioners and Respondents and have carefully perused the records and considered the submissions of the parties.
8. 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.8/2021- GST issued by Ministry of Finance, Government of India issued by Ministry of Finance, Government of India amounts to Change in Law events under Article 12 of the Power Purchase Agreement dated 18.01.2019? AND Whether the Petitioner is entitled to compensation towards additional expenditure on account of a 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 a Change in Law?

Issue No.III: Whether the Petitioners are entitled to carrying cost/interest on carrying cost towards compensation for Change in Law?

9. Now, we proceed to discuss the above issues

Re: Issue No. I

10. Briefly, the Petitioners have submitted that the increase in the rate of GST pursuant to Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021 (*2021 GST Notification*) would qualify as a change in law event in terms of the PPA. The increase in rate from 5% to 12% on renewable energy devices and parts leads to incremental CGST and SGST/IGST of 7%. This increase in GST rates is in the nature of enactment of a new law as the same has been imposed by the Ministry of Finance and will also be covered by phrase any in rates of taxes, duties and cess which have a direct effect on the project. Since, the *2021 GST Notification* has come into effect after the date of submission of bids i.e. 15.02.2019 (in Petition No. 267/MP/2022), 15.06.2018 (in Petition No. 268/MP/2022) and 30.05.2018 (in Petition No. 269/MP/2022), hence, it would also qualify as a change in law under Article 12 of the PPAs dated 17.09.2019/31.10.2018/27.11.2019 in the respective Petitions.
11. *Per Contra*, SECI has submitted that the extent of relief admissible to the Petitioner on account of *2021 GST Notification* (if any) is subject to examination and verification of documents by SECI (and Discoms) to be submitted by the Petitioners. Further, the onus is on the Petitioners to demonstrate that the *2021 GST Notification* has resulted in the Petitioner incurring additional expenditure as against the envisaged expenditure prior to the Bid Submission Date. If the *2021 GST Notification* is considered a Change in Law, the Petitioners be directed to furnish the relevant details, including the date of delivery of goods, invoices, the date on which invoices were raised, Statutory Auditor's Certificate etc., to substantiate the impact of the change in the rate of GST on the procurement of solar-based power devices,

Solar Modules for the solar power project. The Petitioners are to establish the one-to-one correlation between the project, the supply of goods and/or services, the invoices and other relevant documents for proof of the payment of GST in terms of the above Notifications.

12. We observe that Article 12 of the PPA (in Petition No. 267/MP/2022 & 269/MP/2022) stipulates as under:

ARTICLE 12: CHANGE IN LAW

12.1 Definitions

In this Article, 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.

13. Article 12 of the PPA in Petition No. 268/MP/2022 stipulates as under:

ARTICLE 12: CHANGE IN LAW

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

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

- the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;
- a change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;
- the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;
- a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the SPD;
- **any statutory change in tax structure, i.e. 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 Project by the SPD and has direct effect on the Project, shall be treated as per the terms of this Agreement.**

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

12.2 Relief for Change in Law

12.2.1 The aggrieved Party shall be required to approach the 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.

14. Relevant extract of 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	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)
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		<p>(e) Waste to energy plants / devices</p> <p>(f) Solar lantern / solar lamp</p> <p>(g) Ocean waves/tidal waves energy devices/plants</p> <p>(h) Photo voltaic cells, whether or not assembled in modules or made up into panels.</p>
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15. 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 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 the change in the cost of the inputs required for generation and the same is considered as a ‘Change in Law’. Hence, we hold that Notification No. 8/2021- Integrated Tax (Rate) dated 30.09.2021 (*2021 GST Notification*) is the Change in Law event as per Article 12 of the PPAs. It is pertinent to mention here that the view taken is consistent with similar orders issued by the Commission, viz. Order dated 05.12.2023 in Petition No. 283/MP/2022 & 286/MP/2022; Order dated 05.04.2023 in Petition No. 216/MP/2022.
16. In the instant petition, the bid was submitted by the Petitioners on 15.02.2019 (in Petition No. 267/MP/2022), 15.06.2018 (in Petition No. 268/MP/2022), 30.05.2019 (in Petition No. 269/MP/2022). The e-Reverse auction was conducted on 25.02.2019, 02.07.2018 and 12.06.2019 in Petition(s) No. 267/MP/2022, 268/MP/2022 and 269/MP/2022, respectively. PPA was executed between the Petitioners and SECI on 17.09.2019, 31.12.2018 and 27.11.2019, and the SCoD the projects were 07.03.2022, 27.03.2021 and 06.10.2022 in Petition (s) No. 267/MP/2022, 268/MP/2022 and 269/MP/2022 respectively. Further, the Petitioners had commissioned the projects on 07.03.2022 in Petition No. 267/MP/2022; on 31.12.2021 in Petition No. 268/MP/2022 and on 31.03.2023 in Petition No. 269/MP/2022. The *2021 GST Notification* was notified on 30.09.2021. We observe that the Petitioner’s projects were affected by the *2021 GST Notification*. Therefore, we hold that the Petitioners are entitled to compensation on account of a Change in Law as per the terms of Article 12 of the PPA dated 25.10.2019 due to the impugned notification, viz. the *2021 GST Notification*.
17. The issue is decided accordingly.

Re: Issue No. II

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

18. SECI has submitted that the Commission, while approving the annuity methodology as proposed by SECI for making payments in respect of GST and/or Safeguard Duty vide order dated 20.08.2021 in Petition No. 536/MP/2020, has approved the discounting factor at 10.41% based on the interest rate specified in the Renewable Tariff Regulations, 2017 read with Renewable Tariff order dated 11.01.2019. However, subsequently, there has been a fall in the interest rate and in the Renewable Tariff Regulations, 2020 read with Renewable Tariff order dated 31.3.2021, the Commission has considered the interest rate of 9% and the term of loan repayment as 15 years instead of 13 years as considered earlier. *Per Contra*, the Petitioner submitted that SECI's suggestion of considering the discounting factor as 9% and monthly instalments as 15 years may be considered insufficient, inappropriate and unsustainable. The Commission may arrive at the discounting factor considering the debt-equity ratio of 70:30.
19. This Commission, in its earlier order dated 20.08.2021 in Petition No. 536/MP/2020, has already decided on the methodology of compensation due to Change in Law events 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.

20. It is clear that this Commission has taken the view that in the case of competitive bidding projects, it is not possible to ascertain either the capital structuring (extent of debt and equity) of the projects or the actual rate of interest of the debt component or the expected rate of return on equity. As the actual deployment of capital by way of debt or equity and their cost in terms of rate of interest or return, respectively, is unknown, the rate can be taken as the uniform rate of compensation for the entire expenditure incurred on account of Change in Law. *The compensation for change in law cannot be a source for earning profit, and therefore, there cannot be any higher rate of return than the prevailing normative cost of debt.*
21. The *Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020* (RE Tariff Regulations, 2020) which were applicable for the period 01.07.2020 to 31.03.2013 now stand extended to 30.09.2023 vide Notification No. RA-14026(11)/4/2020-CERC dated: 27.03.2023.
22. The Commission has notified the *CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020* and *RE Tariff Order dated 31.03.2021* and *RE Tariff Order dated 07.11.2022*. In the said regulations read with the RE tariff Order, we have considered the interest rate of 9% for FY-21-22 and 9.12% for FY-22-23 and the term of the Loan repayment as 15 years.
23. We note that the Petitioner's project achieved actual commercial operation on 07.03.2022 (i.e. during FY 2021-22) in Petition No. 267/MP/2022; on 31.12.2021 (i.e. during FY 2021-22) in Petition No. 268/MP/2022 and on 31.03.2023 (i.e. during FY 2022-23) in Petition No. 269/MP/2022. The Commission notified the RE Tariff Order dated 31.03.2021 for FY 2021-22 and RE Tariff Order dated 07.11.2022 for FY 2022-23 in pursuance of the *CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020*. In the RE tariff Order dated 31.03.2021, the Commission considered the interest rate of 9% and the term of the loan repayment as 15 years and in the RE Tariff order dated 07.11.2022, the Commission considered the interest rate of 9.12% and the term of loan payment 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 in Petition No. 267/MP/2022 and 268/MP/2022 and a discount rate of 9.12% and annuity payment of 15 years as the appropriate methodology towards change in law compensation in Petition No. 269/MP/2022.

24. 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 Petitioners, 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 Petitioners, 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.
25. The issue is decided accordingly.

Re: Issue No. III

Whether the Petitioners are entitled to carrying cost/interest on carrying cost towards compensation for Change in Law?

26. The Petitioners have submitted that they are entitled to claim carrying costs as the PPAs in Petition No. 267/MP/2022 & 269/MP/2022 specifically contain restitutive provisions. The Petitioners have submitted that they are entitled to reimbursement of carrying cost as per actual expenses along with interest on carrying cost incurred for financing the incremental GST incurred in order to put the Petitioner in the same economic position as if a change in the law had not occurred.
27. *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. Further, PPA in Petition No. 268/MP/2022 does not have any provision dealing with restitutionary principles of restoration to the same economic position. Therefore, the Petitioner in Petition No. 268/MP/2022 is not entitled to claim relief of carrying cost. Further, the Commission may consider the decision of the Hon'ble Supreme Court (dated 12.12.2022 in Civil Appeal No. 8880 of 2022 and Civil Appeal bearing Diary No. 135 of 2023 dated 23.01.2023) to maintain parity between the cases pending before the Commission. The Commission may direct that enforcement of any order of the Commission passed on the aspects covered in the Parampujya case will take place after the decision of the Hon'ble Supreme Court to maintain such parity.

28. We observe that Article 12 of the PPA (in Petition No. 267/MP/2022 & 269/MP/2022) stipulates as under:

ARTICLE 12: CHANGE IN LAW

12.1 Definitions

In this Article, 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.*

29. Article 12 of the PPA dated 31.10.2018 (in Petition No. 268/MP/2022) stipulates as under:

ARTICLE 12: CHANGE IN LAW

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

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

- the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;
- a change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;
- the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;
- a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the SPD;
- **any statutory change in tax structure, i.e. 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 Project by the SPD and has direct effect on the Project, shall be treated as per the terms of this Agreement.**

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

12.2 Relief for Change in Law

12.2.2 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.

30. We observe that the Hon’ble Supreme Court vide judgement dated 25.02.2019 in the matter of *Uttar Haryana Bijli Vitran Nigam Ltd & Anr. v. Adani power Ltd. & Ors.* 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 as 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.***

31. From the above, we observe that Article 12.1 of the PPAs dated 17.09.2019 and 27.11.2019 specifically stipulates that in the event a Change in Law results in any adverse financial loss/gain to the Solar Power Generator, 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 as if such change in law has not occurred, i.e., the party must be given the benefit of restitution as understood in civil law. We also note that Article 12.1. of the PPA dated 31.10.2018 in Petition No. 268/MP/2022 does not contain restitutionary principles.
32. The Petitioners, in the instant petitions, shall be eligible for carrying costs starting from the date when the actual payments were made to the authorities until the date of issuance of this Order, at the actual rate of interest paid by Petitioners 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 Petitioners 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. It is pertinent to mention here that the carrying cost in the instant case already factors in the interest on the Petitioner's liability towards payment of GST, and as such, the prayer for 'interest on carrying cost' as a separate component does not sustain.
33. The Commission further directs that the responding Discoms are liable to pay to SECI all the above-reconciled claims that SECI has to pay to the Petitioners. However, payment to

Petitioners by SECI is not conditional upon the payment to be made by the responding Discoms to SECI.

34. 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.**”*

35. 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.”

36. Therefore,
- (i) With respect to petition no(s). 267/MP/2022 and 269/MP/2022: the directions issued in this Order so far as they relate to additional compensation for the period pre-COD claims only shall be enforced and the directions issued in this Order so far as they relate to additional compensation (including carrying cost) for the period post-Commercial Operation Date of the project 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; and

- (ii) In respect of Petition No. 268/MP/2022: the directions issued in this Order so far as they relate to compensation for the period post Commercial Operation Date of the projects in question as also towards carrying cost (pre-COD & post-COD) shall not be enforced and shall be subject to further orders of the Hon'ble Supreme Court in Civil Appeal No. 8880/2022 in *Telangana Northern Power Distribution Company Ltd. & Anr. V. Parampujya Solar Energy Pvt. Ltd. & Ors*, and connected matters.

37. The issue is decided accordingly.

38. The summary of our findings is as follows:

- a) *2021 GST Notification* is the Change in Law events as per Article 12 of the PPAs.
- b) The Petitioner is entitled to compensation (pre-COD & post-COD) on account of a Change in Law as per the terms of Article 12 of the PPAs due to the *2021 GST Notification*.
- c) Compensation at the discount rate of 9% and annuity period of 15 years shall be the appropriate methodology towards change in law compensation in Petition No. 267/MP/2022 and 268/MP/2022 and discount rate of 9.12% and annuity payment of 15 years as the appropriate methodology towards change in law compensation in Petition No. 269/MP/2022. 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 Petitioners 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 Petitioners 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 Petitioners 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.
- e) 'Interest on carrying cost' as a separate component is not allowed.
- f) In respect to petition no(s). 267/MP/2022 and 269/MP/2022: the directions issued in this Order so far as they relate to additional compensation for the period pre-COD

claims only shall be enforced and the directions issued in this Order so far as they relate to additional compensation (including carrying cost) for the period post-Commercial Operation Date of the project 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; and

g) In respect of Petition No. 268/MP/2022: the directions issued in this Order so far as they relate to compensation for the period post Commercial Operation Date of the projects in question as also towards carrying cost (pre-COD & post-COD) shall not be enforced and shall be subject to further orders of the Hon'ble Supreme Court in Civil Appeal No. 8880/2022 in *Telangana Northern Power Distribution Company Ltd. & Anr. V. Parampujya Solar Energy Pvt. Ltd. & Ors*, and connected matters.

39. Petition No. 267/MP/2022, Petition No. 268/MP/2022 and Petition No. 269/MP/2022 are disposed of in terms of the above.

Sd/-
पी. के. सिंह
सदस्य

Sd/-
अरुण गोयल
सदस्य

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आई. एस. झा
सदस्य

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