



नई दिल्ली
NEW DELHI

याचिका संख्या./ Petition No. 162/MP/2023

कोरम/ Coram:

श्री जिष्णु बरुआ, अध्यक्ष/Shri Jishnu Barua, Chairperson
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 May, 2024

IN THE MATTER OF:

A Petition under Section 79 of the Electricity Act, 2003 before the Central Electricity Regulatory Commission 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 Agreement dated 30.10.2019 between M/s Ostro Kannada Power Private Limited and Solar Energy Corporation of India Limited.

AND IN THE MATTER OF:

M/s Ostro Kannada Power Private Limited,
138, Ansal Chambers II,
Bhikaji Cama Place, Delhi – 110 066

...Petitioner

Versus

- M/s Solar Energy Corporation of India Limited,**
6th Floor, Plate-B, NBCC Office Block Tower-2,
East Kidwai Nagar, New Delhi-110 023
- North Bihar Power Distribution Company Limited,**
Third Floor, Vidyut Bhawan

Bailey Road, Patna 800 001,

3. **South Bihar Power Distribution Company Limited,**
Second Floor, Vidyut Bhawan
Bailey Road, Patna 800 001

...Respondents

Parties Present: Ms. Mannat Waraich, Advocate, ACEPL
Shri Mridul Gupta, Advocate, ACEPL
Ms. Shikha Ohri, Advocate, SECI
Shri Kartik Sharma, Advocate, SECI

आदेश/ ORDER

The Petitioner, M/s Ostro Kannada Power Private Limited (OKPPL), is a generating company and is engaged in the business of development, building, owning, operating, and maintaining utility-scale grid-connected wind power projects, for the generation of wind power. On 08.12.2017, the Ministry of Power issued Guidelines for Tariff Based Competitive Bidding Process for the Procurement of Power from Grid Connected Wind Power Projects (Competitive Bidding Guidelines). Pursuant to the Competitive Bidding Guidelines, Solar Energy Corporation of India (SECI) issued a Request for Selection (RfS) dated 31.12.2018. As per the RfS, the last date for submission of the bid was 05.02.2019, and M/s Ostro Energy Private Limited (OEPL) submitted its bid on 05.02.2019. The E-Reverse auction was conducted on 15.02.2019, and SECI issued a Letter of Award (LoA) on 17.06.2019. M/s Ostro Energy Private Limited (OEPL) formed a project company, M/s Ostro Kannada Power Private Limited (OKPPL/the Petitioner) within the provisions of RfS for the development of wind power project (WPP), generation and sale of wind power. On 13.06.2019, SECI executed a Power Sale Agreement (PSA) with North Bihar Power Distribution Company Limited and South Bihar Power Distribution Company Limited. The Power Purchase Agreement (PPA) was executed by the Petitioner on 30.10.2019 with an effective date of 15.09.2021. The Scheduled Commissioning date (SCoD) as per the PPA is 15.03.2021, which was subsequently extended by SECI up to 03.01.2022 on account of Force-Majeure events. The project was commissioned partly, i.e., 199.5 MW out of 300 MW was commissioned on 09.09.2022. The Petitioner vide email dated 09.11.2022 intimated SECI that it will not be able to commission the remaining capacity of the project and submitted that by operation of Article 4.6.2 of the PPA dated 30.10.2019, the remaining capacity of 100.5 MW as on 30.10.2022 stood terminated and the

project capacity is now reduced to 199.5 MW. The Petitioner paid the liquidated damages of Rs.18,68,69,700/- on 16.12.2022 for the remaining capacity to SECI and also requested SECI for closure of PPA and reduction of Bank Guarantee from the deposited amount. The amended PPA was executed between the Petitioner and SECI on 03.08.2023. The Petitioner has filed the instant Petition seeking compensation to offset the financial/ commercial impact of Change in Law events on account of the introduction of Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021, which has resulted in an increase in the rate of goods and services tax from 5% to 12%.

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 implement MNRE schemes for developing grid-connected solar/wind power capacity in India and plays the role of Intermediary Procurer.
3. Respondent No. 2 & Respondent No.3, i.e., North Bihar Power Distribution Company Limited and South Bihar Power Distribution Company Limited, are the distribution companies engaged in the business of distribution and supply of electricity in the State of Bihar.
4. The Petitioner has 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 a sum of INR 21,19,92,479 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;*

- 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 tabulated as under:

Location	Dist: Karur, Dindigul, Tirrupur, Tiruchirapalli, in the State of Tamil Nadu
Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Wind Power Projects	08.12.2017
Nodal agency	SECI
Tariff	Rs.2.82/kWh
Capacity (MW)	300 MW
Power	Wind Power
Date of Notification No.1/2017-Central Tax (Rate)/Integrated Tax (Rate) (2017 GST Notification)	28.06.2017
Date of Notification No. 24/2018- Central Tax (Rate) (2018 GST Notifications)	31.12.2018
RfS issued on	31.12.2018
Bid submitted on	05.02.2019
E-Reverse auction held on	15.02.2019
LOA issued on	17.06.2019
PSA executed on	13.06.2019
Effective date of the PPA	15.09.2019
PPA executed on	30.10.2019
SCOD of the project	15.03.2021
Date of Notification of 2021 GST Notification	30.09.2021
Extended SCOD	15.08.2021 (SECI letter dated 10.09.2020) 30.10.2021 (SECI letter dated 13.09.2021) 30.01.2022 (SECI letter dated 18.07.2022)
COD of the project	63 MW- 24.09.2021 10.5 MW- 11.10.2021 10.5 MW- 19.10.2021 16.8 MW- 26.10.2021 14.7 MW- 12.11.2021 10.5 MW- 30.11.2021 10.5 MW- 17.12.2021 37.8 MW- 26.07.2022 14.7 MW- 02.08.2022 10.5 MW- 09.09.2022 Total- 199.5 MW (09.09.2022)

Long-stop date as per the PPA	14.12.2021 (27 months from the effective date of PPA as per Article 4.6.2)
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6. The instant petition was filed on 27.04.2023. Hearing was conducted on 19.07.2023, wherein the Commission, after hearing the submissions of the Petitioner, admitted the Petition and directed the Petitioner to serve a copy of the Petition to the Respondents. The hearing was further conducted on 09.11.2023, wherein upon the request of SECI, the Commission permitted SECI to file its Reply, and accordingly, the Petitioner was directed to file its Rejoinder. During the course of the hearing dated 06.03.2024, the Commission, upon hearing the submissions of the parties, reserved the matter for orders and directed the parties to file their written submissions within two weeks.
7. We have heard the learned counsels for the Petitioners and Respondents, carefully perused the records, and considered the parties' submissions.
8. Before proceeding to the main issues, we feel it is imperative to mention here that Article 4.6.2 of the PPA dated 30.10.2019 stipulates as under:

4.6 Liquidated Damage not amounting to penalty for delay in commencement of supply of power to Buyer

*4.6.1 The Project shall be fully commissioned within **18 months from the Effective Date of this Agreement.** In case of failure to achieve this milestone. SECI shall encash the Performance Bank Guarantee (PBG) in the following manner: **Delay beyond the Scheduled Commissioning Date upto (& including) the date as on 27 months from the Effective Date:** Buyer will encash total Performance Bank Guarantee on per day basis and proportionate to the balance Capacity not commissioned.*

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

We observe that in the instant petition, the PPA was executed on 30.10.2019 with an effective date of 15.09.2019. The SCoD of the project was 15.03.2021. In terms of the extended SCoD, the Project was required to be commissioned on or before 30.01.2022. However, the project was commissioned on 09.09.2022. We note that vide letter No. SECI/Wind Tranche-6/COD-

X/OKPPL-P1 dated 09.09.2022, SECI issued a Commissioning Certificate and has certified that *With the present part commissioning of 10.50MW, the cumulative capacity commissioned stands at 199.50MW against the awarded capacity of 300 MW.* The Petitioner also paid the liquidated damages of Rs.18,68,69,700/- on 16.12.2022 for the un-commissioned capacity to SECI. We further note that none of the contracting parties has prayed before the Commission to take cognizance of Article 4.6. Nevertheless, the instant order of the Commission shall be applicable for the mutually agreed project capacity under PPA, which is valid

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

Issue No. I: *Whether the introduction of Notification No. 08/2021– Central Tax (Rate)/Integrated Tax (Rate) issued by the Ministry of Finance, Government of India, amounts to Change in Law event under Article 12 of the Power Purchase Agreement dated 30.10.2019? AND Whether the Petitioner is entitled to compensation in terms of Article 12 of the PPA towards additional expenditure on account of the Change in Law event?*

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

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

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

Re: Issue No. I

Whether the introduction of Notification No. 08/2021–Central Tax (Rate)/Integrated Tax (Rate) issued by the Ministry of Finance, Government of India amounts to a Change in Law event under Article 12 of the Power Purchase Agreement dated 30.10.2019? AND Whether the Petitioner is entitled to compensation in terms of Article 12 of the PPA towards additional expenditure on account of the Change in Law event?

11. Briefly, the Petitioner has submitted that:

- a) The introduction of Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021 (2021 GST Notification) has increased the rate of GST from 5% to 12% on renewable energy parts would constitute a change in law event in terms of the PPA. Similarly, in cases where

the party was availing the benefit of Explanation in Entry No. 234 of Notification No. 01/2017-Central Tax (Rate), which was amended to Entry 201A, the rate of GST increased from 8.9% to 13.8%, thereby leading to an impact of 4.9% for such WPDs. The incremental expenditure which has been incurred by the Petitioner on account of the increase in the rate of CGST and SGST/IGST vide Notification No. 08/2021- Central Tax (Rate) dated 30.09.2021 (effective October 1, 2021), has also been certified by a Chartered Accountant.

- b) Since this GST Notification came into effect after the date for submission of the bid, 05.02.2019, it would also qualify as a Change in law under Article 12 of the PPA dated 30.10.2019. The Change in Law event and Notification No. 08/21—Central Tax (Rate) dated 30.09.2021, thereby increasing the rate of GST from 5% to 12%, have resulted in adverse financial loss to the WPD.

12. *Per-contra*, SECI has submitted that in order to qualify for any relief under Article 12 of the PPA dealing with Change in Law, the claims raised by the Petitioner should fall within the scope and ambit of the said provision. For composite contracts, the tax incidence on goods is at 12%, and the services are at 18%. Accordingly, 12% will be applicable only on 70% of the gross consideration charged and 18% on the remaining 30% of the gross consideration. In the case of composite works contract, subject to the admissibility of Notification dated 30.09.2021 as Change in Law, any increase in the rate of GST which the Petitioner can claim as per Notification dated 30.09.2021 is only for the increase of GST from 5% to 12% on goods (which constitutes 70% of the gross consideration) there being no increase in tax on service part of 30% as per the said Notification. The Petitioner is required to furnish relevant documents and thereby establish one to one correlation.

13. The Petitioner has filed its Rejoinder against the reply filed by SECI on 23.01.2024, wherein it has reiterated the submissions already made in the plaint. Additionally, the Petitioner has submitted as under:

- a) Once this Commission allows the increase in the rate of GST from 5-12% as a change in law, the Petitioner shall submit the appropriate documents before the Respondent to establish its claims on actuals.
- b) SECI has sought relevant documents to establish a one-to-one correlation between Change in Law events, i.e., an increase in the rate of GST from 5% to 12%, and its

financial impact on the recurring and non-recurring expenditure for the Project. The Petitioner, along with the Petition, has already submitted a detailed certificate by a Chartered Accountant, which clearly establishes the requisite one-to-one correlation of the impact of the increase in the rate of GST on the recurring and non-recurring expenditure for the Project.

14. We observe that Article 12 of the PPA dated 30.10.2019 stipulates as under:

“ARTICLE 12: CHANGE IN LAW

12.1 Definitions

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 date, which is the last date of bid submission, resulting into any additional recurring/nonrecurring expenditure by the WPD or any income to the WPD:

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

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

12.2 Relief for Change in Law

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

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

Notifications regarding rates qua Goods:

15. We observe that the Notification No. 1/2017- Central Tax (Rate), Notification No. 1/2017- Integrated Tax (Rate) both dated 28.06.2017 and Notification No. F.12 (56) FD/Tax/2017-Pt-I-140, dated 29.06.2018, stipulate as under:

Schedule I- 2.5%

Sr. No.	Chapter/ Heading/ /Sub-heading/ Tariff-item	Description of Goods
234	84, 85 or 94	<p><u>Following renewable energy devices & parts for their manufacture:</u></p> <p>(a) Bio-gas plant;</p> <p>(b) Solar power based devices;</p> <p>(c) <u>Solar power generating system;</u></p> <p>(d) Wind mills, Wind Operated Electricity Generator (WOEG);</p> <p>(e) Waste to energy plants / devices;</p> <p>(f) Solar lantern / solar lamp;</p> <p>(g) Ocean waves/tidal waves energy devices/plants;</p> <p>(h) Photo voltaic cells, whether or not assembled in modules or made up into panels;</p>

16. We observe that the 2021 GST Notifications stipulate as under:

(b) in Schedule II – 6%, -

...

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

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

17. We note that relevant notifications are as under:

a) Notification No. 11/2017 inter-alia, stipulates as under:

<i>S. No.</i>	<i>Chapter, Section or Heading</i>	<i>Description of Service</i>	<i>Rate (per cent.)</i>	<i>Condition</i>
<i>(1)</i>	<i>(2)</i>	<i>(3)</i>	<i>(4)</i>	<i>(5)</i>
....
3	Heading 9954 (Construction services)	(i) Construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier. (Provisions of paragraph 2 of this notification shall apply for valuation of this service.)	9	-
		(ii) composite supply of works contract as defined in clause 119 of section 2 of Central Goods and Services Tax Act, 2017.	9	-
		(iii) construction services other than (i) and (ii) above.	9	-

b) The 31st GST Council Meeting was convened on 22.01.2018. The recommendations made in the GST Council are as under:

“....

- ***III. GST on solar power generating plant and other renewable energy plants***
- *GST rate of 5% rate has been prescribed on renewable energy devices & parts for their manufacture (bio-gas plant/solar power based devices, solar power generating system (SGPS) etc) [falling under chapter 84, 85 or 94 of the Tariff]. Other goods or services used in these plants attract applicable GST*
- ***Certain disputes have arisen regarding GST rates where specified goods attracting 5% GST are supplied along with services of construction etc. and other goods for solar power plant.***
- ***To resolve the dispute the Council has recommended that in all such cases, the 70% of the gross value shall be deemed as the value of supply of said goods attracting 5% rate and the remaining portion (30%) of the aggregate value of such EPC contract shall be deemed as the value of supply of taxable***

service attracting standard GST rate.”

c) Notification No. 27/2018:

(1)	(2)	(3)	(4)	(5)
“38.	9954 or 9983 or 9987	<i>Service by way of construction or engineering or installation or other technical services, provided in relation of setting up of following, -</i> <i>(a) Bio-gas plant</i> <i>(b) Solar power based devices</i> <i>(c) Solar power generating system</i> <i>(d) Wind mills, Wind Operated Electricity Generator (WOG)</i> <i>(e) Waste to energy plants / devices</i> <i>(f) Ocean waves/tidal waves energy devices/plants</i> <i>Explanation:- This entry shall be read in conjunction with serial number 234 of Schedule I of the notification No. 1/2017- Central Tax (Rate), published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) dated 28th June, 2017 vide GSR number 673(E) dated 28th June, 2017.</i>	9	-”;

d) Notification No. 24/2018:

“

against S. No. 234, in the entry in column (3), the following Explanation shall be inserted in the end, namely: -“**Explanation: If the goods specified in this entry are supplied, by a supplier, along with supplies of other goods and services, one of which being a taxable service specified in the entry at S. No. 38 of the Table mentioned in the notification No. 11/2017-Central Tax (Rate), dated 28th June, 2017 [G.S.R. 690(E)], the value of supply of goods for the purposes of this entry shall be deemed as seventy per cent. of the gross consideration charged for all such supplies, and the remaining thirty per cent. of the gross consideration charged shall be deemed as value of the said taxable service.**”

e) The Rajasthan Appellate Authority for Advance Ruling vide its decision dated 11.01.2022 in the case of *M/s. Utsav Corporation Gurjar ki Thadi, Jaipur*, has held as under:

In drawing our conclusions as above, we have based our findings upon the ruling dated 15.05.2019 given by the Rajasthan Appellate Authority for Advance Ruling in the case of Kailash Chandra (Proprietor of Mali Construction) involving similar situation. The Advance Ruling Authority in the instant case had held that the instant supply comprising supply of goods in the form of solar energy based bore well water pumping system along with installation and commissioning of such Water pumping

system is a composite supply of works contract attracting GST @ 18% in terms of entry Sl. No. 3 of Notification No. 11/2017-Central Tax (Rate), dated 28.06.2017. However, the ruling that the composite supply of goods and services in the instant case deserves to be classified as works contract service is not supported by legal position which has been correctly interpreted by the Authority for Advance Ruling for the State of Uttarakhand in the case of M/s Premier Solar Systems Pvt. Limited as reported at 2019-T10L-79-AAR-GST by holding that the supply of solar irrigation water pumping system along with design, erection, commissioning and installation would constitute a composite supply attracting GST @ 5% on goods portion and GST @ 18% on services portion as prescribed in the relevant entry of the notification.

Thus, we observed that the effective rate of GST on supply of Goods and Services in relation to the Solar Power Based Devices upto 30.09.2021 is as follows:-

(a) 5% on value of goods where the value of goods is to be taken as 70% of the gross consideration and

(b) 18% on the value of services where the value of services is to be taken as 30% of the gross consideration.

Hence, the effective rate of GST for the composite supply will work out to 8.9% [(5% x 70%) plus (18% x 30%)]. However, with the amendments effected vide Notification No. 06/2021-Central Tax(rate) dated 30.09.2021 and Notification No. 08/2021-Central Tax (rate) dated 30.09.2021, the rate of tax on goods portion stands increased from 5% to 12% and accordingly, the effective rate of GST for the period post 30.09.2021 will stand increased to that extent.

18. From the above, we observe that Clause (v) of Article 12 of the PPA, in seriatim, specifically stipulates that *any statutory change in tax structure or introduction of any new tax made applicable for setting up of Wind Power Project and supply of power from the Project by the WPD and has direct effect on the Project, shall be treated as per the terms of this Agreement*, is a Change in Law event. The Notification No. 8/2021- Central Tax (Rate) and Notification No. 8/2021- Integrated Tax (Rate) dated 30.09.2021 have been issued by the Ministry of Finance, Government of India. The change in rate of Goods and Services Tax from 5% to 12% w.e.f. 01.10.2021 has resulted in a change in the cost of inputs required for generation, and the same is considered as 'Change in Law'. Hence, we hold that the impugned notifications viz the *2021 GST Notification* is Change in Law events as per Article 12 of the PPA dated 30.10.2019. It is pertinent to mention here that the view taken is consistent with similar orders issued by the Commission, viz. *order dated 16.01.2024 in Petition No. 308/MP/2022; order dated 05.04.2023 in Petition No. 268/MP/2021; order dated 05.04.2023 in Petition No.216/MP/2022 and order dated 21.04.2023 in Petition No. 219/MP/2022; order dated 17.05.2023 in Petition*

No. 174/MP/2022; order dated 20.07.2023 in Petition No. 273/MP/2021; order dated 01.05.2024 in Petition No. 109/MP/2023.

19. We further note that GST at the rate of 18% was levied (i.e., 9% of CGST and 9% of SGST) on service contracts, in terms of Ministry of Finance's Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017. Subsequently (on or about 29.06.2017), all the State Governments issued corresponding notifications (Notification No. 11/2017) through which SGST at the rate of 9% was made applicable on such Service Contracts. After the enactment of GST laws, various issues were raised qua the applicable GST rates for contracts providing for supply and services (Composite Contracts) for setting up solar power plants. In order to resolve these issues, the Ministry of Finance, on the recommendations of the Goods and Services Tax Council (GST Council), issued: (a) Notification bearing No. 27/2018-Central Tax (Rate) adding S. No. 38 to the list provided in Notification No. 11/2017 and hence providing that GST at the rate of 18% will also be levied on, inter-alia, that Solar power based devices, Solar power generating system etc. (b) Notification bearing No. 24/2018-Central Tax (Rate), clarifying that for composite contracts, 70% of the taxable value would be treated as the supply component of the contract (to be taxed at 5% - CGST + SGST), and the remaining 30% would be considered as service component of the contract (to be taxed at 18% - CGST + SGST). We note that vide Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021, the applicable rate of GST on the contract for the supply of goods has changed from 5% to 12% thereby 70% of the gross consideration of the contract value under the Contract for Supply and Services (Composite Supply Works Contract) is to be taxed at 12% in terms of entry 201A read with Explanation provided in Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021. 30% of the gross consideration of the contract value under the contract for supply and services will be taxed at 18% (i.e., the GST rate applicable on the supply of construction, engineering, installation, commissioning, or other technical services in relation to renewable energy devices). Hence, the effective increase in GST in the above case is 4.9 %, i.e., from 8.9% to 13.8%.

20. SECI has submitted that if there is a composite works contract, then the rate of GST of 12% would only be applicable on 70% of the value of the contract. *Per Contra*, the Petitioner submitted that once the Commission allows an increase in GST rates from 5% to 12% as a change in law, then the Petitioner will submit the requisite documents before SECI. The Petitioner is accordingly directed to submit the requisite documents to the concerned parties for

one-to-one reconciliation of the additional expenditure incurred corresponding to the mutually agreed project capacity under PPA, which is valid.

21. In the instant petition, the bid was submitted by the Petitioner on 05.02.2019. The e-Reverse auction was conducted on 15.02.2019. The PPA was executed between the Petitioner and SECI on 30.10.2019, and the SCoD of the project was 15.03.2021. In terms of the extended SCoD, the Project was required to be commissioned on or before 30.01.2022. The Petitioner commissioned the projects in parts, i.e., 199.5 MW out of 300 MW was commissioned on 09.09.2022. Vide email dated 09.11.2022, the Petitioner intimated to SECI that it would not be able to commission the remaining capacity of the project and submitted that it is ready to pay the liquidated damages for the un-commissioned capacity. Upon the request of SECI vide email dated 25.11.2022, the Petitioner paid Rs. 18,68,69,700 on 16.12.2022. From the above, we note that Petitioner's project was affected by the *2021 GST Notification* and is therefore entitled to relief under the GST Laws as per the terms of Article 12 of the PPA. Accordingly, the Commission hereby directs the contracting parties to carry out reconciliation of additional expenditure on account of change in law events, viz. introduction of *2021 GST Notification*, by exhibiting clear and one-to-one correlation with the projects and the invoices raised supported with auditor certificate corresponding to the mutually agreed project capacity under PPA, which is valid, between the Petitioner and SECI.

22. The issue is answered 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?

23. Briefly, SECI submitted that the reconciled claim is to be paid on a Monthly Annuity basis unless the Distribution Licensees/Buying Entities specifically agree to make a lump-sum payment and further duly make such payment in discharge of its obligation. The decision dated 20.08.2021 of this Commission approving the discounting factor at 10.41% was based on the interest rate specified in the Renewable Tariff Regulations, 2017, read with RE Tariff Order dated 19.03.2019 notified by this Commission at the relevant time when the said annuity methodology was considered by the MNRE and implemented by SECI. Subsequently, there has been a fall in the interest rate of loans, and this Commission has notified the *Central*

Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020 and passed the RE Tariff Order dated 07.11.2022 in Petition No.14/SM/2022 for the FY 2022-2023. This Commission vide Order dated 27.03.2023 in 3/SM/2023, *inter-alia*, stated that *'Therefore, Order dated 07.11.2022 in Petition No. 14/SM/2022 shall also continue to be in force until further Orders.'* Accordingly, the annuity rate may be considered as 9.12%, and the period for payment of the claim amount on account of a Change in Law on an annuity basis may be considered as 15 years from the date of the Commercial Operation Date. The buying entities may be directed to make payments to SECI towards the reconciled change in law claims

24. *Per Contra*, the Petitioner has submitted that the expenditure incurred by the Petitioner due to an increase in the rate of GST from 5% to 12%, which increased recurring and non-recurring expenditure of the Petitioner for the Project, is a part of the capital cost and such additional capital expenditure has a direct bearing on debt and equity required for setting up of the Project. The cost of debt (for 70% of the Project cost) shall be considered as the average of the one-year Marginal Cost of Funds-based Lending Rate (MCLR) as declared by the State Bank of India for the previous year plus 200 basis points, while the cost of equity shall be 14% post-tax (18.71% pre-tax when grossed up with Corporate tax which is 25.17%) (for 30% of the Project cost) i.e. as per CERC RE Tariff Order dated 31.03.2021 based on RE Regulations 2020. Accordingly, the annuity rate calculated is 13.14% [(10.75% x 70%) + (18.71% x 30%) = 13.14%] per annum.

25. It was placed before us that this Commission, in its earlier order dated 20.08.2021 in Petition No. 536/MP/2020, has decided on the methodology of compensation due to Change in Law in the following manner: -

65.Given the fact that it is not possible in case of competitive bidding projects to ascertain either the capital structuring (extent of debt and equity) of the projects, or the actual rate of interest of the debt component or the expected rate of return on equity, we consider it appropriate to use the normative rate of 10.41% as reference for the purpose of annuity payment. As the actual deployment of capital by way of debt or equity and their cost in terms of rate of interest or return, respectively, is unknown, the rate 10.41% can be taken as the uniform rate of compensation for the entire expenditure incurred on account of GST Laws or Safeguard Duty. The Commission is of the view that the compensation for change in law cannot be a source for earning profit, and therefore, there cannot be any higher rate of return than the prevailing normative cost of debt. Accordingly, we hold that 10.41% shall be the discount rate of annuity payments towards the expenditure incurred on GST or Safeguard Duty (as the

case may be) by the Respondent SPDs on account of 'Change in Law'.

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

66. Further, SPDs have submitted that the 'Monthly Annuity Payment' of GST claims ought to start from COD taking into consideration the provisions of applicable 'Late Payment Surcharge' in the PPAs in case of delayed payments

67. We observe that in the Petitions filed by the SPDs where claims under Change in Law were adjudicated, the Commission has directed SPDs to make available to SECI/ Discoms all relevant documents exhibiting clear and one to one correlation between the projects and the supply of goods or services, duly supported by the relevant invoices and Auditor's Certificate. SECI/ Discoms were further directed to reconcile the claims for Change in Law on receipt of the relevant documents and pay the amount so claimed to SPDs. It was also held that SECI is liable to pay to SPDs which is not conditional upon the payment to be made by the Discoms to SECI. However, SECI is eligible to claim the same from the Discoms on 'back to back' basis. The claim was directed to be paid within sixty days of the date of respective orders or from the date of submission of claims by SPDs whichever was later failing which it will attract late payment surcharge as provided under PPAs/PSAs. Alternatively, SPDs and the SECI/ Discoms may mutually agree to a mechanism for the payment of such compensation on annuity basis spread over the period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs.

68. In view of the above, the liability of SECI/ Discoms for 'Monthly Annuity Payment' starts from 60th (sixtieth) day from the date of orders in respective petitions or from the date of submission of claims by the Respondent (SPDs), whichever is later. In case of delay in the Monthly Annuity Payment beyond the 60th (sixtieth) day from the date of orders in respective petitions or from the date of submission of claims by the Respondent (SPDs), whichever is later, late payment surcharge shall be payable for the delayed period corresponding to each such delayed Monthly Annuity Payment(s), as per respective PPAs/PSAs.

Tenure of 'Annuity Period'

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

"14. Loan and Finance Charges

Loan Tenure

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

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

26. 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.*

27. The *Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020* (RE Tariff Regulations, 2020) were applicable for the period 01.07.2020 to 31.03.2023 now stand extended to 30.06.2024 vide Notification No. RA-14026(11)/4/2020-CERC dated 28.03.2024.
28. The Commission has notified the CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020 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 9.12% for FY-22-23 and the term of the Loan repayment as 15 years. The Commission vide order dated 08.09.2023 in 10/SM/2023 extended the applicability of the order dated 07.11.2022 in Petition No. 14/SM/2022 until further Orders.
29. We note that the Petitioner's projects achieved actual commercial operation on 09.09.2022 (i.e. during FY 2022-23). The Commission notified the 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 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 9.12% and annuity payment of 15 years* shall be the appropriate methodology for change in law compensation.
30. Further, the Commission holds that the liability of SECI/ Discoms for 'Monthly Annuity Payment' starts from the 60th (sixtieth) day from the date of this order or from the date of submission of claims by the Petitioner, whichever is later. The provision of late payment surcharge in the respective PPA/PSA shall kick in if the monthly annuity payment is not made by the Respondents within the due date.

31. The issue is decided accordingly.

Re: Issue No. III

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

32. The Petitioner submitted that the increase in costs due to Change in Law events has a direct bearing on the debt and equity required for setting up the Project. 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 bid submission. With the increase in the costs due to the change in law events explained above, the working capital requirement, and consequently, the interest on working capital has also increased as compared to the requirement and rate prevalent at the time of bid. Thus, the Petitioner is entitled to interest on incremental working capital at a normative interest rate to put the Petitioner into the same economic position as if a change in law had not occurred. Petitioner has funded the additional GST 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, the Petitioner is also entitled to reimbursement of carrying cost from the date of actual payment of additional GST till the order from this Commission so that the Petitioner is put in the same economic position as if the said event of Change in Law had not occurred. *Restoration to the same economic position* is meshed within the concept of Change in Law and hence, a separate provision over and above the change in law in relation to the same is not required. The interest rate of such carrying cost should be equal to the return on equity as allowed by this Commission in its Regulations for Terms and Conditions for Tariff determination from the Renewable Energy Sources, 2022, which is 14% per annum. The very purpose of a Change in Law clause is to restore the affected party to the same economic position as if the Change in Law had not occurred i.e., based on the principles of restitution. The 'economic position' that is sought to be restored in terms of the Change in Law clause would be meaningless if the same is not awarded along with interest as the time value of the money must be considered.

33. *Per contra*, SECI has submitted that the PPA in the present case does not have any provision dealing with restitutionary principles of restoration to the same economic position. Therefore, the Petitioner is not entitled to claim relief of carrying cost. The Parampujya judgement dated 15.09.2022 of APTEL has also been challenged by SECI before the Hon'ble Supreme Court in

Civil Appeal No.000505-000510 of 2023. Hence, this Commission should not pass any order in this respect in order to maintain parity.

34. We observe that Article 12 of the PPA dated 30.10.2019 stipulates as under:

“ARTICLE 12: CHANGE IN LAW

12.1 Definitions

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 date, which is the last date of bid submission, resulting into any additional recurring/nonrecurring expenditure by the WPD or any income to the WPD:

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

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

12.2 Relief for Change in Law

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

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

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

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109.The other captioned appeals – Appeal no. 256 of 2019 (*Parampujya Solar Energy Pvt. Ltd &Anr. v. CERC &Ors.*), Appeal no. 299 of 2019 (*Parampujya Solar Energy*

Pvt. Ltd. v. CERC &Ors.), Appeal no. 427 of 2019 (Mahoba Solar (UP) Private Limited v. CERC &Ors.), Appeal no. 23 of 2022 (Prayatna Developers Pvt. Ltd. v. CERC &Ors.) Appeal no. 131 of 2022 (Wardha Solar (Maharashtra) Private Ltd. &Anr. v. CERC &Ors.) and Appeal no. 275 of 2022 (Parampujya Solar Energy Pvt. Ltd. &Anr. v. CERC &Ors.) - deserve to be allowed. We order accordingly directing the Central Electricity Regulatory Commission to take up the claim cases of the Solar Power Projects Developers herein for further proceedings and for passing necessary orders consequent to the findings recorded by us in the preceding parts of this judgment, allowing Change in Law (CIL) compensation (on account of GST laws and Safeguard Duty on Imports, as the case may be) from the date(s) of enforcement of the new taxes for the entire period of its impact, including the period post Commercial Operation Date of the projects in question, as indeed towards Operation & Maintenance (O&M) expenses, along with carrying cost subject, however, to necessary prudence check.”

36. In view of the above, this Commission holds that the Petitioner, in the instant 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 the Petitioner for arranging funds (supported by Auditor’s Certificate) or the rate of interest on working capital as per the applicable RE Tariff Regulations prevailing at that time or the late payment surcharge rate as per the PPA, whichever is the lowest. Once a supplementary bill is raised by the Petitioner in terms of this order, the provision of a Late Payment Surcharge in the PPA would kick in if the payment is not made by the Respondents within the due date.
37. The Commission further directs that Respondent Bihar Discoms are liable to pay to SECI all the above reconciled claims that SECI has to pay to the Petitioner. However, payment to the Petitioner by SECI is not conditional upon Bihar Discoms’ payment to SECI.
38. The Hon’ble Supreme Court, in its Order dated 12.12.2022, in Civil Appeal no. 8880/2022 in the case of “*Telangana Northern Power Distribution Co. Limited & Anr. Vs. Parampujya Solar Energy Pvt. Limited & Ors.*” (and in similar Orders dated 03.01.2023 and 23.01.2023) has held as under:
- “Pending further orders, the Central Electricity Regulatory Commission (CERC) shall comply with the directions issued in paragraph 109 of the impugned order dated 15 September 2022 of the Appellate Tribunal for Electricity. However, the final order of the CERC shall not be enforced pending further orders.”*
39. Therefore, the directions issued in this Order so far as they relate to compensation for the period post Commercial Operation Date of the project in question as also towards carrying cost

(pre-COD & post-COD) shall not be enforced and shall be subject to further orders of the Hon'ble Supreme Court in Civil Appeal No. 8880/2022 in *Telangana Northern Power Distribution Company Limited & Anr. V. Parampujya Solar Energy Pvt. Limited & Ors*, and connected matters. It is pertinent to mention that the view taken is consistent with the views taken in *Order dated 21.12.2023 in Petition No. 268/MP/2022 & Batch*, *Order dated 16.01.2024 in Petition No. 308/MP/2022 & Batch* and *Order dated 09.01.2024 in Petition No. 255/MP/2022*.

40. The issue is decided accordingly.

41. The summary of our findings is as follows:

- a) The *2021 GST Notification* is a Change in Law event in terms of Article 12 of the PPA dated 30.10.2019.
- b) The Petitioner is entitled to compensation on account of Change in Law as per the terms of Article 12 of the PPA due to the *2021 GST Notification* corresponding to the mutually agreed project capacity under PPA, which is valid, between the Petitioner and SECI. The contracting parties are to carry out the reconciliation of additional expenditure as per Article 12 of the PPAs by exhibiting clear and one-to-one correlation with the projects and the invoices raised supported with auditor certificate on account of *2021 GST Notification* corresponding to the mutually agreed project capacity under PPA, which is valid, between the Petitioner and SECI.
- c) Compensation is to be paid at the discount rate of 9.12% and an annuity period of 15 years. The liability of SECI/ Discoms for '*Monthly Annuity Payment*' 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. Provision of a late payment surcharge in the respective PPA/PSA shall kick in if the monthly annuity payment is not made by the Respondents within the due date.
- d) The Petitioner shall also be eligible for carrying cost starting from the date when the actual payments were made to the Authorities till the date of issuance of this Order, at the actual rate of interest paid by the 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) 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.

42. The Petition No. 162/MP/2023 is disposed of in terms of the above.

Sd/-
पी. के. सिंह
सदस्य

Sd/-
अरुण गोयल
सदस्य

Sd/-
जिष्णु बरुआ
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