



नई दिल्ली
NEW DELHI

याचिका संख्या./ Petition No. 31/MP/2023 & 40/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:

Petition under Section 79 of the Electricity Act, 2003 read with Article 12.2 and Article 16.3.1 of the Power Purchase Agreements dated 21.01.2020 for the development of 300 MW ISTS connected Wind-Solar Hybrid power project, entered between the Petitioners and Solar Energy Corporation of India Limited seeking reliefs for the additional expenditure incurred due to occurrence of Change in Law events.

AND IN THE MATTER OF:

1) Petition No. 31/MP/2023:

Adani Hybrid Energy Jaisalmer Three Limited,
Adani Corporate House, 4th Floor - South Wing,
Shantigram, Near Vaishno Devi Circle,
S. G. Highway, Khodiyar,
Ahmedabad 382421, Gujarat, India

.....Petitioner

Versus

1. Solar Energy Corporation of India Limited,
6th Floor, Plate-B, NBCC Office Block Tower-2,
East Kidwai Nagar, New Delhi-110023.

2. **Punjab State Power Corporation Limited,**
The Mall Road, Patiala – 147001

3. **India Power Corporation Limited,**
Plot No. X1- 2 & 3, Block- EP,
Sector- V, Salt Lake City, Kolkata- 700091

...Respondents

AND IN THE MATTER OF:

2) **Petition No. 40/MP/2023**

Adani Hybrid Energy Jaisalmer Two Limited,
Adani Corporate House, 4th Floor - South Wing,
Shantigram, Near Vaishno Devi Circle,
S. G. Highway, Khodiyar,
Ahmedabad 382421, Gujarat, India

...Petitioner

Versus

1. **Solar Energy Corporation of India Limited,**
06th Floor, Plate-B, NBCC Office Block Tower-2,
East Kidwai Nagar, New Delhi-110023.
2. **Punjab State Power Corporation Limited,**
The Mall Road, Patiala – 147001,

Parties Present:

Shri Amit Kapoor, Advocate, AHEJTL
Ms. Priyakshi Bhatnagar, Advocate, AHEJTL
Shri Subham Bhat, Advocate, AHEJTL
Shri Krishan S. Rana, Advocate, AHEJTL
Shri Rajeev Lochan, AHEJTL
Shri Ravi Sinha, AHEJTL
Shri M.G. Ramachandran, Senior Advocate, SECI & PSPCL
Shri Anand K. Ganesan, Advocate, PSPCL
Ms. Kritika Khanna, Advocate, PSPCL
Shri Ritesh Malhotra, PSPCL
Ms. Surbhi Kapoor, Advocate, SECI

आदेश/ ORDER

The Petitioners, M/s. Adani Hybrid Energy Jaisalmer Three Limited (in Petition No. 31/MP/2023) and M/s Adani Hybrid Energy Jaisalmer Two Limited (in Petition No. 40/MP/2023) are generating companies and are engaged in the business of generation of electricity. Solar Energy Corporation of India Limited (SECI) has been designated as the implementing agency for the implementation of the scheme for “*Setting-up of 1200 MW ISTS-connected Wind-Solar Hybrid Power Projects*” under the Guidelines issued by the Ministry of New & Renewable Energy (MNRE) vide F.No. 238/78/2017-Wind dated 25.05.2018, under the National Wind-Solar Hybrid Policy issued by MNRE dated 14.05.2018. SECI floated a Request for Selection (RfS) vide RfS No. SECI/C&P/HPD/1200MW/HYB/T2/RfS/032019 dated 08.03.2019 for selection of hybrid power developers (HPDs) for development of the cumulative capacity of 1200 MW subsequently, amended on 15.04.2019. On 14.05.2019, Adani Renewable Energy Park (Gujarat) Limited (parent company of the Petitioners) submitted its bids for setting up the Project. On 27.05.2019, the e-Reverse auction took place, and Adani Renewable Energy Park (Gujarat) Limited was declared as a successful bidder for the projects. The Letter of Award (LoA) was issued on 18.06.2019. Subsequently, Adani Renewable Energy Park (Gujarat) Limited (Adani Renewable) formed a project company, i.e., Adani Green Energy Nine Limited (in Petition No. 31/MP/2023) and Adani Green Energy Seven Limited (in Petition No. 40/MP/2023), within the provisions of the RfS, for implementation of the Project. The PPAs were executed on 21.01.2020. On 04.11.2020, the Registrar of Companies (RoC) issued the certificates for the change of name from Adani Green Energy Nine Limited to Adani Hybrid Energy Jaisalmer Three Limited (the Petitioner in Petition No. 31/MP/2023) and Adani Green Energy Seven Limited to Adani Hybrid Energy Jaisalmer Two Limited (the Petitioner in Petition No. 40/MP/2023). Accordingly, the PPAs were amended on 01.03.2021 to this effect. On 03.01.2020, SECI entered into Power Sale Agreements (PSA) with PSPCL for the sale of 200 MW (out of a total of 500MW). On 15.01.2020 SECI entered into a PSA with IPCL for the sale of 100 MW Wind-Solar Hybrid power (in Petition No. 31/MP/2023) and on 03.01.2020, SECI entered into a PSA with PSPCL for the sale of 300 MW Wind-Solar Hybrid Power (in Petition No. 40/MP/2023). The Petitioners are seeking change in law compensation along with carrying cost.

2. Respondent No. 1(in both the Petitions), Solar Energy Corporation of India Limited (SECI), is a central public sector undertaking under the administrative control of the Ministry of New & Renewable Energy (MNRE). SECI is responsible for the implementation of various schemes of MNRE. SECI is the Intermediary Procurer of power from renewable generators for further sale to buying entities.
3. Respondents, Punjab State Power State Corporation Limited (PSPCL) and India Power Corporation Limited (IPCL) are the distribution licensees engaged in the business of distribution and supply of electricity within the State of Punjab and West Bengal.
4. The Petitioners have made the following prayers:

In Petition No. 31/MP/2023:

- a) *Admit the present Petition;*
- b) *Hold and declare that the following are Change in Law events under Article 12.1 of the PPA dated 21.01.2020:-*
 - (i) *Department of Revenue, Ministry of Finance, (Government of India)'s Notification No. 02/2020-Customs (SG) dated 29.07.2020 issued under the Customs Tariff Act, 1975 imposing Safeguard Duty at the rate of 14.5%;*
 - (ii) *Department of Revenue, Ministry of Finance, (Government of India)'s Notification No. 07/2021-Customs dated 01.02.2021; Notification No. 03/2021-Customs dated 01.02.2021 read with Ministry of Finance's letter No. D.O.F No. 334/02/2020-TRU dated 01.02.2021 increasing the rate of Basic Custom Duty (BCD) to 20%;*
 - (iii) *Department of Revenue, Ministry of Finance, (Government of India)'s Notification No. 07/2021-Customs dated 01.02.2021; read with MNRE's Office Memorandum dated 25.02.2021 increasing the rate of Basic Custom Duty (BCD) to 7.5%;*
 - (iv) *Department of Revenue, Ministry of Finance, (Government of India)'s Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021 read with Ministry of Finance's (State of Rajasthan) Notification dated 30.09.2021 increasing the rate of GST to 12%;*
 - (v) *Hon'ble Supreme Court's Order dated 19.04.2021 in I.A. No. 85618 of 2020 in M.K. Ranjitsinh v. Union of India, Writ Petition (Civil) No. 838 of 2019*

directing installation of bird diverters and undergrounding of the transmission lines.

- c) Direct Respondent No.1 i.e., SECI to compensate Adani Hybrid Three for the additional expenditure incurred due to the above Change in Law events.*
- d) Allow Carrying Costs at the applicable Late payment surcharge (LPS) rate computed on compounding basis for each Change in Law event from respective date of occurrence of Change in Law events till the date of actual realisation of compensation.*
- e) Pass such further order(s) as this Ld. Commission may deem just and proper in the facts and circumstances of the case and in interest of justice.*

In Petition No. 40/MP/2023:

- a) Admit the present Petition;*
- b) Hold and declare that the following are Change in Law events under Article 12.1 of the PPA dated 21.01.2020:-*
 - (i) Department of Revenue, Ministry of Finance, (Government of India)'s Notification No. 07/2021-Customs dated 01.02.2021; Notification No. 03/2021-Customs dated 01.02.2021 read with Ministry of Finance's letter No. D.O.F No. 334/02/2020-TRU dated 01.02.2021 increasing the rate of Basic Custom Duty (BCD) to 20%;*
 - (ii) Department of Revenue, Ministry of Finance, (Government of India)'s Notification No. 07/2021-Customs dated 01.02.2021; read with MNRE's Office Memorandum dated 25.02.2021 increasing the rate of Basic Custom Duty (BCD) to 7.5%;*
 - (iii) Department of Revenue, Ministry of Finance, (Government of India)'s Notification No. 8/2021-Central Tax (Rate) dated 30.09.2021 read with Ministry of Finance's (State of Rajasthan) Notification dated 30.09.2021 increasing the rate of GST to 12%;*
 - (iv) Hon'ble Supreme Court's Order dated 19.04.2021 in I.A. No. 85618 of 2020 in M.K. Ranjitsinh v. Union of India, Writ Petition (Civil) No. 838 of 2019 directing installation of bird diverters on transmission lines;*
- c) Allow Carrying Costs at the applicable Late payment surcharge (LPS) rate computed on compounding basis for each Change in Law event from respective date of*

occurrence of Change in Law events till the date of actual realisation of compensation.

d) Pass such further order(s) as this Ld. Commission may deem just and proper in the facts and circumstances of the case and in interest of justice.

Factual Matrix:

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

Details	Petition No. 31/MP/2023	Petition No. 40/MP/2023
Scheme	Setting-up of 2500 MW ISTS-connected Wind-Solar Hybrid Power Projects dated 25.05.2018	
Date of notification of Basic Custom Duty Notification No. 1/2011 (2011 BCD Notification)	06.01.2011	
Date of Notification of GST Notification No.1/2017-Central Tax (Rate) (2017 GST Notification)	28.06.2017	
Date of Notification No. F.12 (56) FD/Tax/2017-Pt-I-40 issued by Finance Department, Government of Rajasthan	29.06.2017	
Date of Notification of Safeguard Duty Notification No. 1/2018 (SG) (2018 SGD Notification)	30.07.2018	
RfS was floated on	08.03.2019	
Bid was submitted on	14.05.2019	
E-Reverse auction held on	27.05.2019	
Capacity	300MW	300MW
Power	Solar PV	
LoA was issued on	18.06.2019	
Nodal Agency	SECI	
PSA was executed	with PSPCL (for 200 MW)- 03.01.2020 with IPCL (for 100 MW)- 15.01.2020	with PSPCL (for 300 MW) on 03.01.2020
Effective date of the PPA	15.01.2020	
PPA was executed on	21.01.2020	
Tariff was adopted on	21.05.2020	
Date of Notification of Safeguard Duty Notification No. 2/2020-Custom (SG) dated 29.07.2020 (2020 SGD Notification)	30.07.2020	
Tariff	Rs.2.69/kWh	
Date of implementation of rescission of Notification No. 1/2011-Customs dated 06.01.2011 vide Notification No. 07/2021-Customs dated 01.02.2021; Notification No.	02.02.2021	

03/2021-Customs dated 01.02.2021 (2021 BCD Notifications)													
Hon'ble Supreme Court order in the matter of M.K. Ranjitsinh v. Union of India (SC GIB Order)	19.04.2021												
SCoD of the projects	15.07.2021												
Date of Notification No. 8/2021- Central Tax (Rate) and Notification No. F.12 (1)FD/Tax/2021-60 (2021 GST Notifications)	30.09.2021												
Revised SCoD	15.12.2021 vide SECI's letter dated 14.10.2020 01.03.2022 vide SECI's letter dated 23.08.2021 29.09.2022 vide SECI's letter dated 26.08.2022												
Actual CoD	<table border="0"> <tr> <td>50.62 MW - 27.10.2021;</td> <td>50.56 MW - 09.11.2021;</td> </tr> <tr> <td>50.35 MW - 08.04.2022;</td> <td>63.84 MW - 18.04.2022;</td> </tr> <tr> <td>68.8 MW - 26.05.2022;</td> <td>52.4 MW - 18.05.2022;</td> </tr> <tr> <td>130.23 MW - 27.09.2022</td> <td>96 MW - 14.07.2022;</td> </tr> <tr> <td></td> <td>37.2 MW - 27.09.2022</td> </tr> </table> <table border="0"> <tr> <td>(CoD was declared on 29.09.2022)</td> <td>(CoD was declared on 29.09.2022)</td> </tr> </table>	50.62 MW - 27.10.2021;	50.56 MW - 09.11.2021;	50.35 MW - 08.04.2022;	63.84 MW - 18.04.2022;	68.8 MW - 26.05.2022;	52.4 MW - 18.05.2022;	130.23 MW - 27.09.2022	96 MW - 14.07.2022;		37.2 MW - 27.09.2022	(CoD was declared on 29.09.2022)	(CoD was declared on 29.09.2022)
50.62 MW - 27.10.2021;	50.56 MW - 09.11.2021;												
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130.23 MW - 27.09.2022	96 MW - 14.07.2022;												
	37.2 MW - 27.09.2022												
(CoD was declared on 29.09.2022)	(CoD was declared on 29.09.2022)												

6. The Petition No. 31/MP/2023 & Petition No. 40/MP/2023 were filed on 22.12.2022 & 21.12.2022 respectively. Petition No. 31/MP/2023 was listed for hearing on 28.03.2023, wherein the Commission, upon hearing the submissions of the parties, admitted the Petition and directed the Petitioner to serve a copy of the Petition to the Respondents and also submit a Route-map of the Petitioner's dedicated transmission line(s) clearly depicting the overhead segment, underground segment and the GIB habitat areas, etc; Recommendations of the Committee constituted by the Hon'ble Supreme Court by GIB Order in respect of the Petitioner's dedicated transmission lines; COD of the Petitioner's dedicated transmission line. Petition No. 40/MP/2023 was listed for hearing on 16.05.2023, wherein the Commission admitted the Petition and directed the Petitioner to serve a copy of the Petition to the respondents. During the course of the hearing dated 28.06.2023 in Petition No. 31/MP/2023, upon hearing the submissions of SECI, the Commission directed the Petitioner to submit the

required details and directed the respondents to file their replies. The hearing was further held on 12.09.2023 in Petition No. 31/MP/2023, wherein the Commission, upon the request of the Petitioner, permitted them to file their Rejoinder. The hearing was conducted on 20.09.2023 in Petition No. 40/MP/2023, wherein the Petitioner sought time to file its Rejoinder and requested the Commission to list the matter with Petition No. 31/MP/2023. SECI was directed to upload its reply on the portal, and the Commission listed Petition No. 40/MP/2023 & 31/MP/2023 for further hearing on 10.11.2023. During the course of the hearing on 10.11.2023, the Petitioners submitted that they had already filed the additional affidavit furnishing the information required by the Commission. The Petitioners further submitted the detailed map demarcating the GIB areas and the routes of the transmission lines for the Projects involved in Petition No. 31/MP/2023 and Petition No. 40/MP/2023 along with the placement of bird diverters, etc. Further, SECI submitted that the Petitioners may be asked to furnish such map on an affidavit along with certain additional details, viz. *dedicated transmission lines already in existence as on 19th April 2021 in WP (Civil) 838 of 2019; Confirmation that the Petitioners have installed the requisite bird diverters as per the directions of the Hon'ble Supreme Court in GIB Order; commissioning date of its dedicated transmission lines.* Pursuant to this, the Petitioners submitted that they will file the Additional Affidavit specifying the said details. The Commission, accordingly, directed the Petitioners to file their Additional Affidavit. During the course of the hearing dated 24.01.2024, IPCL sought time to file its reply in Petition No. 31/MP/2023. The Commission permitted IPCL to file its Reply and listed the matters for further hearing on 20.03.2024. The hearing was held on 20.03.2024, wherein the Commission, after hearing the submissions of the parties, reserved the matters for orders and directed the parties to file their written submissions. Pursuant to the directions of the Commission, the parties filed their respective written submissions.

Analysis and Decision

7. We have heard the learned counsels for the Petitioner and Respondents and have carefully perused the records and considered the submissions of the parties.
8. Before proceeding to the main issues, we feel it is imperative to mention here that Article 4.6.2 of the PPAs dated 21.01.2020 stipulates as under:

4.6 Liquidated Damages 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 6 months after the SCD: Buyer will encash total Performance Bank Guarantee on per day basis and proportionate to the balance capacity not commissioned.

....
4.6.2 *In case of delay in commissioning of the Project beyond the above mentioned 6 months after SCD, the Applicable Tariff for the Project shall be reduced at the rate of 0.50 paise/kWh per day of delay for the delay in such remaining capacity which is not commissioned. **The maximum time period allowed for commissioning of the full Project Capacity with encashment of Performance Bank Guarantee and reduction in Applicable Tariff shall be limited to 27 months from the date of issuance of LOA. In case, the Commissioning of the Project is delayed beyond 27 months from the Effective Date, the PPA capacity shall stand reduced I 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 higher, and the PPA for the balance Capacity will stand terminated and shall be reduced from the selected Project Capacity.***

9. We observe that in the instant petition, the PPAs (effective date being 15.01.2020) were executed on 21.01.2020, and the SCoD of the projects was 15.07.2021. The SCoD was extended first up to 15.12.2021 vide SECI's letter dated 14.10.2020; thereafter, it was further extended up to 01.03.2022 vide SECI's letter dated 23.08.2021. Further, the SCoD was subsequently extended up to 29.09.2022 vide SECI's letter dated 26.08.2022 on account of supply chain disruptions. The projects were fully commissioned on 29.09.2022. We note that vide letter No. SECI/PSD/Hybrid/T2/51489 dated 30.09.2022 (in petition No. 31/MP/2023) & letter No. SECI/PSD/Hybrid/T2/51488 dated 30.09.2022 (in petition No. 40/MP/2023) SECI issued a Commissioning Certificate and has certified that "*the CTU has operationalized the long-term access (LTOA) of the Project from 29.09.2022. Considering the LTOA and the expiry date of the PPA (Twenty-five years from the date of commercial operation date), the COD of the project is declared as 29.09.2022.*" We further note that neither of the contracting parties has prayed before the Commission to take cognizance of Article 4.6. Nevertheless, the instant order of the Commission shall be applicable for the mutually agreed project capacity under PPA, which is valid.

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

Issue No. I: *Whether (i) the Department of Revenue, Ministry of Finance, (Government of India)'s Notification No. 02/2020-Customs (SG) dated 29.07.2020 issued under the Customs Tariff Act, 1975 imposing Safeguard Duty at the rate of 14.5%; (ii) the Department of Revenue, Ministry of Finance, (Government of India)'s Notification No. 07/2021-Customs dated 01.02.2021; Notification No. 03/2021-Customs dated 01.02.2021 read with Ministry of Finance's letter No. D.O.F No. 334/02/2020-TRU dated 01.02.2021 increasing the rate of Basic Customs Duty (BCD) to 20%;(iii) the Department of Revenue, Ministry of Finance, (Government of India)'s Notification No. 07/2021-Customs dated 01.02.2021; read with MNRE's Office Memorandum dated 25.02.2021 increasing the rate of Basic Customs Duty (BCD) to 7.5%; (iv) the Department of Revenue, Ministry of Finance, (Government of India)'s Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021 read with Ministry of Finance's (State of Rajasthan) Notification dated 30.09.2021 increasing the rate of GST to 12% and (v) Hon'ble Supreme Court's Order dated 19.04.2021 in I.A. No. 85618 of 2020 in M.K. Ranjitsinh v. Union of India, Writ Petition (Civil) No. 838 of 2019 directing installation of bird diverters and undergrounding of the transmission lines amounts to Change in Law events under Article 12 of the Power Purchase Agreements dated 21.01.2020? AND Whether the Petitioners are 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 payment of compensation (if any) on account of a Change in Law?*

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

11. Now, we proceed to discuss the aforesaid issues:

Re: Issue No. I

Whether (i) the Department of Revenue, Ministry of Finance, (Government of India)'s Notification No. 02/2020-Customs (SG) dated 29.07.2020 issued under the Customs Tariff Act, 1975 imposing Safeguard Duty at the rate of 14.5%; (ii) the Department of Revenue,

Ministry of Finance, (Government of India)'s Notification No. 07/2021-Customs dated 01.02.2021; Notification No. 03/2021-Customs dated 01.02.2021 read with Ministry of Finance's letter No. D.O.F No. 334/02/2020-TRU dated 01.02.2021 increasing the rate of Basic Customs Duty (BCD) to 20%;(iii) the Department of Revenue, Ministry of Finance, (Government of India)'s Notification No. 07/2021-Customs dated 01.02.2021; read with MNRE's Office Memorandum dated 25.02.2021 increasing the rate of Basic Customs Duty (BCD) to 7.5%; (iv) the Department of Revenue, Ministry of Finance, (Government of India)'s Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021 read with Ministry of Finance's (State of Rajasthan) Notification dated 30.09.2021 increasing the rate of GST to 12% and (v) Hon'ble Supreme Court's Order dated 19.04.2021 in I.A. No. 85618 of 2020 in M.K. Ranjitsinh v. Union of India, Writ Petition (Civil) No. 838 of 2019 directing installation of bird diverters and undergrounding of the transmission lines amounts to Change in Law events under Article 12 of the Power Purchase Agreements dated 21.01.2020? AND Whether the Petitioners are entitled to compensation towards additional expenditure on account of a Change in Law event in terms of Article 12.2 of the PPA?

12. Briefly, the Petitioners have submitted as under:

2020 SGD Notification (only in Petition No. 31/MP/2023)

- a) The Notification of Safeguard Duty Notification No. 1/2018 (SG) (2018 SGD Notification) specifically stated that the imposition of the Safeguard Duty was only for two years. The Notification No. 2/2020-Custom (SG) dated 29.07.2020 (2020 SGD Notification) was issued after the date of submission of the bid and does not contain any provision regarding the extension of the applicability of Safeguard Duty post the expiry of two years. Therefore, given a 'sunset clause,' no Safeguard Duty was applicable on the import of solar cells after 29.07.2020.
- b) The Petitioner had safely assumed 'NIL' safeguard duty (SGD) in view of the fact that the import of solar modules could be done after 30.07.2020 without any SGD impact. There was no reason to factor in any implication of the 2018 SGD Notification while bidding for the project. The 2020 SGD Notification increased the SGD rate from '0%' to 14.9% since the 2018 SGD Notification expired on 29.07.2020, and beyond that no SGD was applicable. Thus, the levy of SGD under the 2020 SGD Notification, being a 'fresh' levy, led to additional expenses on the part of Adani Hybrid to the tune of Rs. 6.88 Crores approximately.

2021 BCD Notifications

- c) At the time of bidding, the Petitioners were exempted from levy of BCD in excess of 5% as per the Ministry of Finance Notification No. 1/2011 dated 06.01.2011. However, vide the Ministry of Finance Notification No. 07/2021 dated 01.02.2021, the exemption

granted vide Notification dated 06.01.2011 was rescinded, which led to the levy of BCD upon import of solar inverters/trackers. The Ministry of Finance issued the *Notification No. 03/2021-Customs* dated 01.02.2021, which amended the S. No. 13 of the *Notification No. 57/2017-Customs* dated 30.06.2017. This led to the levy of BCD at the rate of 20%. The rescission of the Notification dated 06.01.2011 qualifies to be a Change in Law as per Article 12 of the PPAs, while the increase in BCD is a consequence of this Change in Law event. Since the said exemption was operating for a period of over 8 years since 06.01.2011, at the time of bid submission, it was not possible for the Petitioners to envision or apprehend the sudden withdrawal of the exemption granted under Notification dated 06.01.2011 in order to factor the same while bidding for the project. Additionally, since the Petitioner was not required to pay BCD in excess of 5% at the time of bid submission, the change in applicable rates of BCD (over 5%) had no relevance for the Petitioners at such time. Prior to the rescission of Notification dated 06.01.2011, the total duty payable by the Petitioners was 5%, which has, on account of rescission of said Notification from 02.02.2021, increased the total duty payable by the Petitioners on import of solar inverter to 20%.

- d) As on the cut-off date (14.05.2019), BCD at the rate of 5% was applicable for the purchase of solar trackers. This was due to the exemption provided by the Ministry of Finance's Notification dated 06.01.2011. On 01.02.2021, the Ministry of Finance's Notification dated 06.01.2011 was rescinded by virtue of Ministry of Finance's Notification No. 07/2021-Customs dated 01.02.2021. *This led to a levy of BCD at the rate of 7.5% for the purchase of solar trackers.*
- e) The rescission of the Notification dated 06.01.2011 qualifies to be a Change in Law as per Article 12 of the PPAs, which led to the consequent increase in BCD. Thus, the increase in BCD is a mere consequence of the Change in Law event and has not been sought as a separate Change in Law event. Social Welfare Surcharge and IGST levied upon the Petitioners under Section 110 of the Finance Act, 2018 and Section 5 of the IGST Act, 2017, respectively, ought to be allowed as a pass through/Change in Law compensation payable by SECI to the Petitioners.
- f) SECI is bound to pay compensation for the levy of Social Welfare Surcharge and IGST as this Commission on previous occasions has allowed pass through of Social Welfare Surcharge and IGST as part of Change in Law compensation to solar power developers.

2021 GST Notification

- g) Ministry of Finance's Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021 (*2021 GST Notification*) increased the GST from 2.5% to 6% for purchase of other devices/equipment required for setting up the Project. Since the increase in CGST parallelly increases the SGST, the cumulative increase in CGST + SGST for the Petitioners is 12%.
- h) The Petitioners have executed separate and independent agreements for the supply of goods and services with its vendors. The Change in Law claim filed by the Petitioners arises out of the supply agreements whereunder initially, the GST on solar power generators, windmills, wind-operated electricity generators, etc., was levied at 5% as on the cut-off date and subsequently increased to 12%. The imposition of a changed rate of tax on the Petitioners qualifies to be a Change in Law event. Hence Petitioners are claiming the differential GST from 5% to 12% on the supply of goods under its supply agreements. In view of the same, Petitioners are entitled to receive Change in Law compensation from this Commission.

SC GIB Order

- i) Prior to the Cut-off date i.e., 14.05.2019, there was no requirement to install bird diverters on the transmission lines. The SC GIB Order dated 19.04.2021 has resulted in additional expenditure towards installing bird diverters, and thus, it qualifies as a Change in Law event.

Submissions with respect to directions of the Commission in ROP dated 28.03.2023 & 28.06.2023 (only in Petition No. 31/MP/2023)

- j) Vide the Record of Proceedings dated 28.03.2023 and 28.06.2023 passed by this Commission, the Petitioners were directed to furnish certain details regarding Petitioner's dedicated transmission lines passing through the Great Indian Bustard (*GIB*) habitat areas. The Commission directed the Petitioner (in Petition No. 31/MP/2023) to submit the following documents:
- i. Route-map of the Petitioner's dedicated transmission line(s) clearly depicting the overhead segment, underground segment and GIB habitat areas, etc.; and*
 - ii. Recommendations of Committee constituted by Hon'ble Supreme Court by GIB Order in respect of the Petitioner's dedicated transmission lines.*

iii. COD of the Petitioner's dedicated transmission line.

- k) The Petitioner submitted that it was required to develop interconnecting facilities by way of 220kV and 33kV dedicated transmission lines. Both the transmission lines pass through the potential area of Great Indian Bustard. As of the date of SC GIB Order, i.e., 19.04.2021, Adani Hybrid Energy had already erected both the 220kV line and 33kV line. Upon passing the SC GIB Order, the Petitioner took necessary action and immediately installed the bird diverters on 220kV and 33kV lines. The invoices for the expenditure incurred in installation of bird diverter on the transmission lines have already been placed on record with the Petition.

13. Briefly, SECI has submitted as under:

Re.2020 SGD Notification (only in Petition No. 31/MP/2023)

- a) The Safeguard Duty falls within the scope of “Custom Duty on imported equipment,” and therefore, the Petitioner is not entitled to any relief for imposition and payment of Safeguard Duty vide Notification dated 29.07.2020 on Solar Cells whether or not assembled in modules or panels under Article 12 of the PPA dealing with Change in Law.

Re: 2021 BCD Notifications

- b) The Basic Customs Duty on Solar Inverters/Solar Trackers and consequential Social Welfare Surcharge and IGST fall within the scope of “Custom Duty on imported equipment” which has been expressly excluded from the scope of change in law. Accordingly, the Petitioners cannot claim Ministry of Finance’s Notification No.07/2021-Customs dated 01.02.2021, Notification No.03/2021- Customs dated 01.02.2021, and letter no. D.O.F. No. 334/02/2020-TRU dated 01.02.2021 as Change in Law as per Article 12 of the PPA. The Petitioners are not entitled to claim relief in respect of the increase in the rate of Basic Customs Duty on Solar Trackers and the consequential increase in Social Welfare Surcharge and IGST under Article 12 of the PPA.

Re: 2021 GST Notification

- c) Tax incidence on goods is at 12% and services is at 18%. The explanation providing for 12% on 70% for the goods and 18% for 30% on services will apply only if it is a

composite works contract and not otherwise. If, however, there are two separate contracts, one for the supply of goods and one for the erection of services, etc., the supply of goods will attract a GST of 12%, and the supply of services will attract a GST of 18%. The extent to which the relief may be admissible to the Petitioners on account of Notifications dated 30.09.2021 is subject to examination and verification of documents by SECI and the buying entities, i.e., PSPCL/IPCL.

Re: SC GIB Order

- d) The Petitioners are required to provide the following details to ascertain the implications of the Hon'ble Supreme Court's GIB Order vis a vis the Project of the Petitioners:
- i. Whether the project and transmission infrastructure for the project of the Petitioner lies wholly or partly in the priority or potential area of Great Indian Bustard;
 - ii. Whether, on the date of Hon'ble Supreme Court's GIB Order (19.04.2021), the overhead powerlines of the Petitioner existed in the priority/potential area of Great Indian Bustard;
 - iii. Outcome of the study conducted by the Petitioner with regard to the feasibility of the lines to be laid underground and
 - iv. Recommendations and decisions of the Committee (constituted as Hon'ble Supreme Court's GIB Order) with regard to the project of the Petitioner.
- e) The entitlement of the Petitioners to any relief and, if so, the extent of such relief is to be considered on the basis of the Petitioners providing the requisite documents and information.

14. Briefly, PSPCL has submitted as under:

Re:2020 SGD Notification (only in Petition No. 31/MP/2023)

- a) The date by when to procure the solar panels was solely a commercial decision taken by the Petitioner while being fully aware of the RfS and the existence of the first SGD Notification dated 30.07.2018. The Petitioner, while submitting its bid, would have factored the SGD into the tariff and has benefitted from the considerable reduction in the SGD by way of the second SGD Notification.

- b) The second SGD Notification clearly mentions that it is in the nature of continued imposition of the first SGD Notification. Thus, it cannot be the case of the Petitioner that the second SGD Notification is the imposition of a new duty.

Re:2021 BCD Notifications

- c) When the PPAs specifically exclude the impact of customs duty revisions from the purview of the change in law clause, the same binds the parties. It is not open to the Petitioners to claim customs duty revisions as change in law. Parties are bound by the terms of the PPAs as executed and there cannot be any claim for change in law or compensation on vague grounds of equity.

Re: 2021 GST Notifications/ Ministry of Finance's (State of Rajasthan) Notification dated 30.09.2021

- d) While SECI had granted an extension of time due to the supply chain disruptions caused by the Covid-19 surge, followed by disruptions related to the monsoon and non-availability of Long-Term Access (LTA), and the COD was achieved by 29.09.2022, it cannot be that all the equipment was procured by the Petitioners only after 01.10.2021 when the increase in GST was affected. Considering the extension granted on account of Force Majeure events/transmission constraints, the impact of the change in law resulting from such extensions should not be passed on to the procurer.
- e) The Petitioners have also not given any breakup of the equipment procured, how the increase in GST has affected the Petitioners and the details of the GST payment. The details of the GST credit that the Petitioners have availed due to the higher GST paid have also not been provided. In case the entire or part of the higher GST paid has been availed as input GST credit by the Petitioners, the same cannot thereafter be passed on to the procurers as a change in law. No such details have been provided by the Petitioners. Payment of higher GST on inputs may not result in higher expenditure, as it would depend on the quantum of input credit available to be taken and the total GST that is available to the assessee. The PPAs require higher expenditure to be incurred for the purpose of change in law. The same has to be established by the Petitioners, and in the case of GST, the higher GST payment has not been able to be absorbed in the input credit availed of by the Petitioners. The same having not been established, the present claim of the Petitioners cannot, therefore, be considered at this stage.
- f) GST is payable only on Inverters and Modules which are Installed/required corresponding to 300 MW of Hybrid Project and no GST is payable on extra Inverters

and Modules procured by HPDs for inventory etc. The details of the principal price as provided in DPR or otherwise on which basis tariff was quoted are required for ascertaining the impact of GST as change in law. The Petitioners have not submitted the details.

Re: SC GIB Order

- g) The claims for Change in Law cannot be decided in an abstract manner on the contention that the decision of the Hon'ble Supreme Court is a Change in Law event. The Change in Law event has to be necessarily decided based on the terms of the PPAs between the parties, the nature of the bidding process undertaken, and, the factual position of the parties.
- h) The Petitioners purchased Bird Diverters from its sister company i.e., Adani Green Energy Six Limited. The Petitioners have not provided any details with regard to the amount of money spent on installing bird diverters. Further, whether the amounts claimed to be spent are reasonable, on an arm's length basis, etc., have to be established, which is not evident from the present petition. Moreover, as the supplier is a company within the Adani Group, claiming GST on profits earned by the supplier is unjustifiable.
- i) Payment proofs as provided by the Petitioners also do not match with the invoice amount. Therefore, the claims cannot be considered based on the claims of the Petitioners at present.

Petitioner's submissions vide Additional Affidavit dated 06.12.2023 with respect to queries raised by SECI

15. The Petitioners have submitted as under:

- a) The dedicated transmission lines (both 220 kV and 33 kV) connected to Petitioner's project were already in existence as on 19.04.2021, i.e., the date of issuance of the GIB Order. Once the construction and erection activities were completed, the Petitioner sought energization approval from the Central Electricity Authority (CEA) under Regulation 43 of the *CEA (Measures relating to Safety and Electrical Supply) Regulations, 2010* vide application dated 31.07.2021. Such energization approval was granted to the Petitioners on 06.09.2021 based upon the inspection carried out on 31.07.2021.

- b) Unlike interstate transmission lines, dedicated transmission lines are not commissioned by the generator (here, the Petitioners) on a standalone basis but as part of the overall development of the project. Therefore, no specific date could be assigned or accorded to the commissioning of such lines.
- c) Pursuant to the Hon'ble Supreme Court's directions in the GIB Order, the Petitioners have installed BFDs as per the technical specifications and design parameters specified by CEA in "*Technical Specifications for Bird Flight Diverters*" guidelines as amended on 28.04.2022. The no. of BFDs installed are viz:
 - (i) On 220 kV dedicated transmission lines: 3579 (in Petition No. 31/MP/2023) and 1682 (in Petition No. 40/MP/2023)
 - (ii) On 33 kV dedicated transmission lines: 42,985 (in Petition No. 31/MP/2023) and 36,610 (in Petition No. 40/MP/2023)

16. Briefly, IPCL (in Petition No. 31/MP/2023) has submitted as under:

Re: 2020 SGD Notification

- a) The date by which procurement of the Solar Cells, whether or not assembled in modules or panels, to be carried out was solely a commercial decision taken by the Petitioner while being fully aware of the RfS and the existence of the first SGD Notification dated 30.07.2018. Petitioner, while submitting its bid, would have factored the SGD prevailing at that point of time into the tariff, and therefore, the Petitioner has benefitted from the considerable reduction in the SGD by way of the second SGD Notification.
- b) Such drop in the Safeguard Duty by way of the second Safeguard Duty Notification to 14.50% *ad valorem* minus anti-dumping duty from 30.01.2021 to 29.07.2021 would have resulted in financial savings for the Petitioner. The Petitioner ought to pass on such monetary benefit to IPCL.
- c) The Petitioner's claims could compromise the integrity of the bidding process, citing two reasons:
 - i. The Petitioner's commercial decisions to import equipment from specific countries will put a higher burden on consumers and;
 - ii. The Petitioner's commercial decision to import the equipment after 30.07.2020 will burden on consumers.

- d) The imposition of the Safeguard Duty Notification does not qualify as a Change in Law event in terms of the PPA.

Re: 2021 BCD Notification

- e) The Basic Customs Duty on Solar Trackers/ Invertors and consequential Social Welfare Surcharge and IGST fall within the scope of “Custom Duty on imported equipment” which has been expressly excluded from the scope of change in law.
- f) The Petitioner is not entitled to claim relief in respect of increase in rate of the Basic Custom Duty on solar tracker and inverters and consequential increase in Social Welfare Surcharge and IGST under Article 12 of the PPA as alleged.

Re: 2021 GST Notification/ Ministry of Finance’s (State of Rajasthan) Notification dated 30.09.2021

- g) The Commission may decide whether the Notifications dated 30.09.2021 constitute an event of Change in Law within the scope of Article 12 of the PPA read with provisions of the PSAs.
- h) The Petitioner has not furnished a breakdown of the procured equipment, the impact of increased GST, or specifics regarding GST payments. Additionally, details regarding GST credits, if availed by the Petitioner, and the implications for passing on increased GST as a change in law to the procurers are absent in the provided information.
- i) Payment of higher GST on inputs may not result in higher expenditure, as it would depend on the quantum of input credit available to be taken and the total GST that is available to the assessee. The PPA requires higher expenditure to be incurred for the purpose of change in law. The same has to be established by the Petitioner, and in the case of GST, that the higher GST payment has not been absorbed in the input credit availed of by the Petitioner. The same having not been established, the present claim of the Petitioner cannot, therefore, be considered at this stage.

Re: SC GIB judgement

- j) The Petitioner is required to provide the following details to ascertain the implications of the Hon’ble Supreme Court’s GIB Order vis-a-vis the Project of the Petitioner:

- i. Whether the project and transmission infrastructure for the project of the Petitioner lies wholly or partly in the priority or potential area of Great Indian Bustard;
 - ii. Whether, on the date of Hon'ble Supreme Court's GIB Order (19.04.2021), the overhead power lines of the Petitioner existed in the priority/potential area of Great Indian Bustard;
 - iii. Outcome of the study conducted by the Petitioner with regard to the feasibility of the lines to be laid underground and
 - iv. Recommendations and decisions of the Committee (constituted as Hon'ble Supreme Court's GIB Order) with regard to the project of the Petitioner.
- k) The Petitioner is obligated to furnish details about the installed bird diverters, including the proper justification for the amount specified in the service order. This requirement extends to providing copies of invoices and purchase orders related to the procurement of bird diverters.

Re. 2020 SGD Notification (only in Petition No. 31/MP/2023) and 2021 BCD Notifications

17. We observe that Article 12 of the PPAs dated 21.01.2020 stipulates as under:

ARTICLE 12: CHANGE IN LAW

Definitions

...

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 HPD or any income to the HPD:

- 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 HPD;
- any statutory change in tax structure (including changes in taxes, duties or cess-applicable only for the solar project component) or introduction of any new tax made applicable for setting up of Wind-Solar Hybrid Power Project and supply

of power from the Project by the HPD 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 HPD, or **(ii) Custom duty on imported equipment,** 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 HPD, then, in order to ensure that the HPD 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 HPD/ Buyer 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 HPD or any income to the HPD on account of any of the events as indicated above, HPD 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 HPD failing to comply with the above requirement, in case of any gain to the HPD, SECI shall withhold the monthly tariff payments on immediate basis, until compliance of the above requirement by the HPD.”

12.2 **Relief for Change in Law**

12.2.1 The aggrieved Party shall be required to approach the Central 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 all the Parties.

18. Relevant sections of the Customs Act 1962, inter-alia, provide as under:

2. Definitions-In this Act, unless the context otherwise requires,-

(15) “duty” means a duty of customs leviable under this Act;

(25) “imported goods” means any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption;

CHAPTER V

LEVY OF, AND EXEMPTION FROM, CUSTOMS DUTIES

12. Dutiable goods.—(1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the [Customs Tariff Act, 1975 (51 of 1975)], or any other law for the time being in force, on goods imported into, or exported from, India.

2) The provisions of sub-section (1) shall apply in respect of all goods belonging to Government as they apply in respect of goods not belonging to Government.

.....

19. Relevant sections of the Customs Tariff Act 1975, inter-alia, provide as under:

2. Duties specified in the Schedules to be levied-The rates at which **duties of customs** shall be levied under the Customs Act, 1962 (52 of 1962), are specified in the First and Second Schedules.

8B. Power of Central Government to apply safeguard measures-

(1) If the Central Government, after conducting such enquiry as it deems fit, is satisfied that any article is imported into India in such increased quantity and under such conditions so as to cause or threaten to cause serious injury to domestic industry, it may, by notification in the Official Gazette, apply such safeguard measures on that article, as it deems appropriate.

(2) The safeguard measures referred to in sub-section (1) shall include imposition of safeguard duty, application of tariff-rate quota or such other measure, as the Central Government may consider appropriate, to curb the increased quantity of imports of an article to prevent serious injury to domestic industry:

.....
(7) The safeguard duty imposed under this section **shall be in addition to any other duty imposed under this Act** or under any other law for the time being in force.

(9) **The provisions of the Customs Act, 1962 (52 of 1962) and the rules and regulations made thereunder, including those relating to the date for determination of rate of duty, assessment, non-levy, short-levy, refunds, interest, appeals, offences and penalties shall, as far as may be, apply to the duty chargeable under this section as they apply in relation to duties leviable under that Act.**

20. From the above, it is evident that the customs duty is levied on the import of 'Goods' and the same are primarily governed by the Customs Act, 1962 and the Customs Tariff Act 1975. We observe that to protect the domestic industry, the Central Government, may, by notification in the Official Gazette, apply such safeguard measures on that article, as it deems appropriate. Accordingly, vide Notification No.02/2020- Customs (SG) dated 29.07.2020, the Government of India in the exercise of powers conferred under Section 8B of Customs Tariff Act 1975 has provided for the levy of Safeguard Duty. Further, by virtue of Section 8B(9) of the Customs Tariff Act 1975, the provisions of the Customs Act, 1962 including the rules and regulations made thereunder are applicable to Safeguard Duty. In view of the above, we are of the view that the Safeguard Duty is nothing but an additional customs duty imposed to safeguard the domestic industry.

21. We observe that Article 12.1.1 of the PPAs dated 21.02.2020 specifically stipulates that in a change in "Custom Duty on imported equipment" resulting in any additional recurring/nonrecurring expenditure by the HPD is not included as a Change in Law.

22. We observe that the Hon'ble Supreme Court judgement dated 06.04.2023 in in Civil Appeal No. 11826 of 2018 titled as *Haryana Power Purchase Centre v. Sasan Power Ltd. and other (Sasan judgment)* [2023 SCC OnLine SC 577] has held as under:

90. *We are not dealing with a case where the exercise of the power of the Commission under Section 63 is under review. In a case where, however, the rates are approved under Section 63 and PPA is entered into, the question would undoubtedly arise as to whether there is a power that can be described in a manner of speaking to be plenary power with the Commission under Section 79? Can there be a power which can be christened as omnibus? Can the Tribunal, in other words, disregard the express words of the contract? Can it discover a new change in law the the parties have not contemplated as a change in law? **In short, can the Tribunal rewrite the contract and create a new bargain?***

91. **We are of the view that the Tribunal cannot indeed make a new bargain for the parties. The Tribunal cannot rewrite a contract solemnly entered into. It cannot ink a new agreement. Such residuary powers to act which varies the written contract cannot be located in the power to regulate. The power cannot, at any rate, be exercised in the teeth of express provisions of the contract.**

.....
92. **...In a matter where the parties have entered into a contract with express provisions, we are unable to agree with the first respondent that the Tribunal would have power to disregard the express provisions of the contract on the score that as it turns out that with the passage of time and even change in the circumstances, it is found that the contract cannot be worked except at a loss for the contractor.**

.....
95. **.....All that we are holding is that in a case where the matter is governed by express terms of the contract, it may not be open to the Commission even donning the garb of a regulatory body to go beyond the express terms of the contract.**

.....
96. *While it may be open as indicated therein for a regulation to extricate a party from its contractual obligations, **in the course of its adjudicatory power it may not be open to the Commission by using the nomenclature regulation to usurp this power to disregard the terms of the contract.***

23. From the above, we find that the Commission cannot exercise its regulatory powers in a situation that is covered by the express provisions of the contract. Article 12.1.1 of the PPAs dated 21.02.2020 stipulates that the change in “*Custom Duty on imported equipment*” resulting in any additional recurring/ nonrecurring expenditure by the Petitioner is not included as a Change in Law. Hence, we hold that the Petitioner (in Petition No. 31/MP/2023) is not entitled to any compensation qua 2020 SGD Notification. Similarly, we hold that the Petitioners (in Petition No. 31/MP/2023 and Petition No.

40/MP/2023) are not entitled to any compensation qua the 2021 BCD Notification, including social welfare surcharge, payable under Section 110 of the Finance Act 2018 and the integrated goods and services tax and Services Tax Act, 2017 (IGST Act) on import of goods.

Re: 2021 GST Notification

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

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

Schedule I - 2.5%

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

- b) Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021 (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	<u>Following renewable energy devices & parts for their manufacture: -</u> (a) Bio-gas plant (b) Solar power-based devices (c) Solar power generating system (d) Wind mills, Wind Operated Electricity Generator (WOEG) (e) Waste to energy plants/devices
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		<p>(f) Solar lantern / solar lamp (g) Ocean waves/tidal waves energy devices/plants (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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(Similar provisions were inserted by Government of Rajasthan, Finance Department vide Notification No. F.12(1)FD/Tax/2021-60 dated 30.09.2021)

33. From the above, we observe that fifth bullet of Article 12 of the PPAs, in seriatim, specifically stipulates that *any statutory change in tax structure (including changes in taxes, duties or cess-applicable only for the solar project component) or introduction of any new tax made applicable for setting up of Wind-Solar Hybrid Power Project and supply of power from the Project by the HPD and has direct effect on the Project, shall be treated as per the terms of this Agreement.* The Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021 has been issued by the Ministry of Finance, Government of India. Hence, we hold that the impugned notifications viz *the 2021 GST Notification* resulting in an increase in GST from 5% to 12% is a Change in Law event as per Article 12 of the PPAs dated 21.01.2020. It is pertinent to mention here that the view taken is consistent with similar orders issued by the Commission, viz. *order dated 08.03.2023 in Petition No. 245/AT/2022; order dated 02.06.2023 in Petition No. 168/MP/2021; order dated 14.03.2024 in Petition No. 65/MP/2023 and order dated 01.05.2024 in Petition No. 109/MP/2023.*

34. In the instant petitions, we observe that the bids were submitted by the Petitioner on 14.05.2019. The PPAs were executed between the Petitioner and the SECI on 21.01.2020, and the SCoD projects were 15.07.2021. In terms of the extended SCoD, the projects were required to be commissioned on or before 29.09.2022. The projects were commissioned on 29.09.2022. We observe that since the Notification No. 8/2021- Central Tax (Rate) and Notification No. F.12 (1)FD/Tax/2021-60 dated 30.09.2021 (*2021 GST Notifications*) – have occurred after the

submission of the bids (i.e., 14.05.2019) and before commissioning of the projects (i.e., 29.09.2022), the Petitioner is entitled to compensation towards additional expenditure on account of the aforesaid events of Change in Law.

Re: SC GIB Order:

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

ARTICLE 12: CHANGE IN LAW

Definitions

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 HPD or any income to the HPD:

- **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 HPD;**
- **any statutory change in tax structure (including changes in taxes, duties or cess- applicable only for the solar project component) or introduction of any new tax made applicable for setting up of Wind-Solar Hybrid Power Project and supply of power from the Project by the HPD 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 HPD, or (ii) Custom duty on imported equipment, 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 HPD, then, in order to ensure that the HPD 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 HPD/ Buyer 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 HPD or any income to the HPD on account of any of the events as indicated above, HPD 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 HPD failing to comply with the above requirement, in case of any gain to the HPD, SECI shall withhold the monthly tariff payments on immediate basis, until compliance of the above requirement by the HPD.”

12.2 Relief for Change in Law

12.2.1 *The aggrieved Party shall be required to approach the Central 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 all the Parties.*

35. We note that vide SC GIB Order it was held as under:

5. The State as well as the Central Government therefore, have a duty cast to preserve the endangered species and as such the expenses incurred will have to be provided by them either under the schemes available or by earmarking the same in such manner. Needless to mention that in the instant case the preservation is by undergrounding the powerlines and in that context if cost is incurred, it would also be permissible to pass on a portion of such expenses to the ultimate consumer subject to approval of the Competent Regulatory Authority.

...
11. In the above background, there cannot be disagreement whatsoever that appropriate steps are required to be taken to protect the said species of birds. In that view, insofar as the existing overhead powerlines are concerned the respondents shall take steps forthwith to install divertors and in respect of existing overhead powerlines all future cases of installing the transmission lines a study shall be conducted with regard to the feasibility for the lines to be laid underground. In all such cases where it is feasible, steps shall be taken to lay the transmission line underground. For the lines to be laid in future if as per the technical report the overhead line alone is feasible and the same is ratified by the Committee, in such event the installation of the divertors shall also be a condition attached in the contract to be entered with generating companies. Insofar as, the cost incurred in the said process, the concerned respondents No. 5 to 8 and 9 to 11 shall work out and provide for the same and the respondents No. 1 to 4 aid in this regard. It would be open to them to muster the resources in accordance with law. In cases where the power generators are required to bear the additional amount adding to the cost of production, it would be open to regulate the manner in which the cost would be mitigated in accordance with contractual terms. Irrespective of the cost factor the priority shall be to save the near extinct birds.”

...
14. In the light of the contentions urged on this aspect of the matter, we are conscious that the laying of the underground power line more particularly of high-voltage though not impossible, would require technical evaluation on case-to-case basis and an omnibus conclusion cannot be reached laying down a uniform method and directions cannot be issued unmindful of the fact situation. Though that be the position the consensus shall be that all low voltage powerlines to be laid in the priority and potential habitats of GIB shall in all cases be laid underground in future. In respect of low voltage overhead powerlines existing presently in the priority and potential

habitats of GIB, the same shall be converted into underground powerlines. ***In respect of high-voltage powerlines in the priority and potential habitats of GIB, more particularly the powerlines referred in the prayer column of I.A. No.85618/2020 and indicated in the operative portion of this order shall be converted into underground power line. ...***

...
16. ... The details of the powerlines for installation of divertors from Rajasthan are as follows:

<i>b) List of powerlines for installation of divertors from Rajasthan</i>	<i>Capacity</i>
<i>1) Jaisalmer - Ramgarh - 1 (40 Km)</i>	<i>132 kv</i>
<i>2) Jaisalmer - Ramgarh - 2 (40 Km)</i>	<i>132 kv</i>

...
Lines from Rajasthan

<i>b)</i>	<i>List of powerlines from Rajasthan for undergrounding</i>	<i>Capacity</i>
<i>1)</i>	<i>Kanoi-Salkha (21 Km)</i>	<i>33 kv</i>
<i>2)</i>	<i>Sam-Dhanana (45Km)</i>	<i>33 kv</i>
<i>3)</i>	<i>Tejuva-Kuchr (17 Km)</i>	<i>33 kv</i>
<i>4)</i>	<i>Khuchri horizontal-parallel (21 Km)</i>	<i>33 kv</i>

17. The respondents No.5, 6 and 9 to 11 while arranging to lay the powerlines underground in respect of the powerlines, the feasibility of which is not in doubt shall proceed with the work right away. However, in cases where the respondents find that there are issues relating to feasibility, the matter shall be referred to the committee with all relevant material and particulars. The committee shall assess the matter and arrive at a conclusion as to whether the underground powerline is feasible or not. Based on the report to be rendered by the committee the further action shall be taken by the respondent.

18. In all cases where the overhead powerlines exist as on today in the priority and potential GIB area the respondents shall take steps forthwith to install divertors pending consideration of the conversion of the overhead cables into underground powerlines. In all such cases where it is found feasible to convert the overhead cables into underground powerlines the same shall be undertaken and completed within a period of one year and till such time the divertors shall be hung from the existing powerlines.”

36. From the above, we observe that Order dated 19.04.2021 of the Hon’ble Supreme Court in I.A. No. 85618 of 2020 in *M.K. Ranjitsinh v. Union of India, Writ Petition (Civil) No. 838 of 2019 (SC GIB Order)*, mandates that the additional actions/measures are to be adopted by the developers located in the potential and priority habitat of GIB. We observe that additional expenditure after the bid submission date would qualify as a Change in Law under Article 12 of the PPAs. We note that as on the date of submission of bids, i.e., 14.05.2019, the Petitioners

would not have been in a position to anticipate the additional expenditure required to be incurred in adopting the measures in terms of the *SC GIB Order* dated 19.04.2021.

37. We note that Article 141 in the Constitution of India stipulates as under:

*141. Law declared by Supreme Court to be binding on all courts
The law declared by the Supreme Court shall be binding on all courts within the territory of India.*

38. Hon'ble Supreme Court of India in its judgment dated 21.09.1995 in a case titled *Nand Kishore vs State of Punjab (1995) 6 SCC 614*, has held as under:

*Putting aside for the moment the course above-adopted, let us otherwise examine the view of the Hon'ble Judges of the Full Bench of Punjab and Haryana High Court on the question formulated. It is well known that the general principle underlying the doctrine of res-judicate is ultimately based on considerations of public policy. One important consideration of public policy is that the decisions pronounced by courts of competent jurisdiction should be final, unless they are modified or reversed by appellate authorities, and the other principle is that no one should be made to face the same kind of litigation twice over, because such a process would be contrary to considerations of fairplay and justice. These principles stand enunciated in *Daryao and others v. The State of U.P. & Others [1962(1) SCR 574]*. This court in *The Amalgamated Coalfields Ltd. & Anr. v. The Janapada Sabha, Chhindwara [1963 (Supp.)(1) SCR 172]* opined that constructive res-judicata was an artificial form of res-judicata enacted by Section 11 of the Code of Civil Procedure and it should not be generally applied to writ petitions filed under Article 32 and Article 226 of the Constitution. The court then had the occasion to point out that when a matter related to taxation and assessment levied for a different year, the doctrine of res-judicata was itself inapplicable. **This Court still spelled out the binding effect of a decision made under Article 141 of the Constitution as follows:***

*“If for instance, the validity of a taxing statute is impeached by an assessee who is called upon to pay a tax for a particular year and the matter is taken to the High Court or brought before this Court and it is held that the taxing statute is valid, it may not be easy to hold that the decision on this basic and material issue would not operate as res judicata against the assessee for a subsequent year. That, however, is a matter on which it is unnecessary for us to pronounce a definite opinion in the present case. In this connection, it would be relevant to add that even if a direct decision of this Court on a point of law does not operate as res judicata in a dispute for a subsequent year, such a decision would, **under Art.141, have a binding effect not only on the parties to it, but also on all courts in India as a precedent in which the law is declared by this Court.** The question about the applicability of res judicata to such a decision would thus be a matter of merely academic significance.”*

39. From the above, we observe that in terms of Article 141 of the Constitution of India and the provisions of the PPAs, the *SC GIB Order* amounts to a Change in Law event as the law laid

down by the Hon'ble Supreme Court of India has a binding effect, enshrined in the Constitution of India. It is pertinent to mention here that the view taken is consistent with a similar order issued by the Commission in the *Order dated 08.03.2023 in Petition No. 245/AT/2022; Order dated 01.05.2024 in Petition No. 109/MP/2023 and Order dated 03.05.2024 in Petition No. 197/MP/2023 & 206/MP/2023.*

40. Before proceeding further, it is pertinent to mention here that the *SC GIB Order* dated 19.04.2021 was amended on 21.03.2024 as under:

62. We are accordingly of the view that the order passed by this Court on 19 April 2021 needs to be suitably modified. A blanket direction for undergrounding high voltage and low voltage power lines of the nature that was directed by this Court would need recalibration for the reasons discussed above. This task is best left to domain experts instead of an a priori adjudication by the Court. Experts can assess the feasibility of undergrounding power lines in specific areas, considering factors such as terrain, population density, and infrastructure requirements. This approach allows for more nuanced decision-making tailored to the unique circumstances of each location, ensuring that conservation objectives are met in a sustainable manner.

67. The Committee shall be at liberty to assess the efficacy of bird diverters and subject to its own findings on efficacy, to lay down specifications for bird diverters with due regard to the parameters specified by the Central Electricity Authority. It shall also identify the number of bird diverters required for the successful implementation of conservation efforts. In this regard, the Committee may also consider the recommendations of the technical expert committee constituted by the Ministry of Power by OM No 25–7/42/2019 – PG dated 27 May 2022.

68. The injunction which has been imposed in the order dated 19 April 2021 in respect of the area described as the priority and potential areas shall accordingly stand recalled subject to the condition that the Expert Committee appointed by this Court may lay down suitable parameters covering both the priority and potential areas.

69. In the event that the Committee considers it appropriate and necessary to do so, it would be at liberty to recommend to this Court any further measures that are required to enhance the protection of the GIB. This may include identifying and adding suitable areas beyond the designated priority zones outlined above, if deemed crucial for the conservation of the species. Such additional areas could serve as vital habitats, corridors, or breeding grounds for the GIB, contributing significantly to its long-term survival.

70. We request the Committee to complete its task and submit a report to this Court through the Union Government on or before 31 July 2024.

...
72. The Union of India and the concerned ministries are directed to implement the measures described in the preceding paragraph, which it has undertaken to implement. Further, they are directed to continue implementing the measures detailed in

*paragraph 8(d) of this judgment. The directions contained in the order dated 19 April 2021 shall accordingly stand substituted by those contained in the present judgment. **The project clearances which have been granted pursuant to the recommendations of the earlier committee appointed in terms of the order dated 19 April 2021 shall not be affected by the present judgment.***

41. The Hon'ble Supreme Court, vide judgment dated 17.03.2023 in the matter of Govt. of NCT of Delhi through the Secretary, Land and Building Department and Another v. K.L. Rathi Steels Limited and others [2023 SCC Online SC 288] has held as under:

*66. Although, the expression “for any other sufficient reason” in Order XLVII Rule 1CPC is wide enough to take within its scope and ambit many circumstances or situations which do not fall in the earlier part of the Order XLVII Rule 1 CPC which are the two grounds (i) and (ii) referred to above, in my view, the Explanation to the said provision carves out an exception to the expression “for any other sufficient reason” as a ground for review of a judgment in ground (iii). The Explanation being in the nature of an exception is to be read outside the scope of the expression “for any other sufficient reason” in Order XLVII Rule 1 CPC. In other words, if, on a question of law, a decision of a Court is reversed by a subsequent decision of a superior Court (Larger Bench in the instant case) and the same is reopened on the basis of the said subsequent decision there would be no finality of judgments of the Court even between the parties thereto. **It is, hence, observed that even an erroneous judgment or order is binding on the parties thereto even if subsequently that very judgment is reversed in a decision of a superior Court.** Otherwise, there would be chaos and no finality of any decision of a Court which is against public policy. Judgments rendered by a Court of competent jurisdiction as per the prevailing law are binding on the parties to the said judgment. Merely because that judgment is subsequently overruled by a subsequent decision of a superior Court in any other case, the same shall not be a ground for review of such judgment.*

42. From the above, we observe that the SC GIB Order dated 19.04.2021 stands modified on 21.03.2024, and the injunction imposed vide Order dated 19.04.2021 stands recalled. It was also held that the Expert Committee appointed may lay down suitable parameters covering both the priority and potential areas on or before 31.07.2024. Further, the project clearances which have been granted pursuant to the recommendations of the earlier committee appointed in terms of the order dated 19.04.2021 shall not be affected by the present judgment. Accordingly, we are of the view that the additional expenditure incurred between 19.04.2021 and 21.03.2024 will only qualify for compensation under Change in Law *qua the SC GIB Order* as per Article 12 of the PPAs. We observe that in the present petitions, the Petitioner has already incurred the additional expenditure between the aforesaid dates (viz., between 19.04.2021 and 21.03.2024) and, as such, shall be entitled to Change in Law compensation *qua the SC GIB Order*.

43. In view of the findings in the preceding paras, we hold that Notification No. 8/2021- Central Tax (Rate) and Notification No. F.12 (1)FD/Tax/2021-60 dated 30.09.2021 (*2021 GST Notifications*); and the Hon'ble Supreme Court Order dated 19.04.2021 in the matter of *M.K. Ranjitsinh v. Union of India (SC GIB Order)* are the events of Change in Law as per Article 12 of the PPAs dated 21.01.2020. We also hold that the Petitioners are entitled to compensation towards additional expenditure on account of the aforesaid Change in Law events. We also direct the contracting parties to carry out reconciliation of additional expenditure on account of aforesaid change in law events 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.

Re: Issue No.II

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

44. The Petitioner has submitted that SECI is bound to pay to Adani Hybrid Energy the entire quantum of Change in Law compensation as raised by Adani Hybrid Energy in the form of Supplementary Bills within 45 days of receipt and acknowledgment of such receipt of the Supplementary Bill, in terms of the PPA. There is no such provision of annuity payment under CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations ("*RE Tariff Regulations*"), 2020 or the Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects, 2017 issued by Ministry of Power *vide* Notification No: 23/27/2017-R&R dated 03.08.2017, (including its amendments) based on which RFS was invited for bidding and respective PPAs were executed. The proposed annuity rate of 9% cannot be made applicable for the entire additional capital expenditure incurred by Adani Hybrid Energy as the present project vis-à-vis the amount pertaining to the change in law has been funded through both debt and equity components. This Commission, in its Order dated 20.08.2021 in 536/MP/2020, allowed Change in Law compensation based on annuity methodology only upon mutual agreement between SECI and solar power developers. The annuity methodology, as proposed by SECI, including the annuity rate of 9% and annuity term of 15 years, is arbitrary and contrary to the settled principles of Change in Law compensation and restitution.

45. Thus, considering the constituents of Pre-Tax WACC, the annuity rate is to be considered as

13.84% as computed hereunder:

$$\begin{aligned} \text{Annuity Rate} &= \text{Pre Tax Weighted Average Cost of Capital} \\ &= \text{Cost of Debt} + \text{Cost of Equity} \\ &= (\text{Loan RoI} \times \text{Debt \%}) + (\text{Pre-Tax RoE} \times \text{Equity \%}) \\ &= (10.55\% \times 70\%) + (21.52\% \times 30\%) \\ &= \mathbf{13.84\%} \end{aligned}$$

46. 13.84% is the appropriate annuity rate that will truly compensate and restore the Petitioners for the loss of benefit, which could have been derived from the capital invested as additional expenditure resulting from the Change in Law events and additionally due to deferred payment by SECI through annuity mode. This is the only way that can enable the Petitioners to reconstitute and recover the true time value of its capital expenditure in the project.

47. *Per contra*, SECI has submitted that the payment should be made on an annuity basis. There has been a fall in the interest rate of the loan, and the Commission has notified the *Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020*, and passed the *RE Tariff Order* dated 07.11.2022. In the said regulations read with the RE tariff Order, the Commission has considered the interest rate of 9.12% and the term of the Loan repayment as 15 years. The same parameters for making payment on an annuity basis may be considered by the Commission in case compensation is allowed. HPPC and CSPDCL may be directed to make a payment towards the reconciled change in law claims. Discoms should be directed to make payment to SECI towards the reconciled change in law claims.

48. This Commission, in the 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."

49. The Commission has taken the view that in the case of competitive bidding projects, it is not

possible to ascertain either the capital structuring (extent of debt and equity) of the projects or the actual rate of interest of the debt component or the expected rate of return on equity. As the actual deployment of capital by way of debt or equity and their cost in terms of rate of interest or return, respectively, is unknown, the rate can be taken as the uniform rate of compensation for the entire expenditure incurred on account of Change in Law. *The compensation for change in law cannot be a source for earning profit, and therefore, there cannot be any higher rate of return than the prevailing normative cost of debt.*

50. We note that 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 stands extended to 30.06.2024 vide Notification No. RA-14026(11)/4/2020-CERC dated 28.03.2024.
51. The Commission has notified the *CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020*, and the RE Tariff Order dated 07.11.2022. In the said regulations read with the RE tariff Order; we have considered the interest rate of 9.12% for FY-22-23 and the term of the Loan repayment as 15 years. The Commission vide order dated 08.09.2023 in 10/SM/2023 extended the applicability of the order dated 07.11.2022 in Petition No. 14/SM/2022 until further Orders.
52. We note that the COD of the Petitioner's projects as per the COD Certificate issued by SECI dated 30.09.2022 was 29.09.2022 (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 for Change in Law events of *2021 GST Notifications*; and the *SC GIB Order* dated 19.04.2021 as per Article 12 of the PPAs dated 21.01.2020, the discount rate of 9.12% and annuity payment of 15 years are the appropriate methodology for change in law compensation.
53. 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.

54. The issue is decided accordingly.

Re: Issue No. III:

Whether the Petitioners are entitled to carrying cost towards compensation for a Change in Law?

55. The Petitioners have submitted that Carrying Cost is payable as per the provisions of the PPA to compensate the affected party for the time value of funds deployed on account of Change in Law events. The Petitioners are entitled to Carrying Costs on a compounding basis to reconstitute it back to its original economic position. It is no longer *res integra* that an affected party must be paid Carrying Costs on a compounding basis for restitution. [Reliance placed on *Uttar Haryana & Anr. vs. CERC & Ors. (2019) 5 SCC 325*]. The LPS provision in the PPA is also meant for compensation towards time value of money on account of delayed payments. Accordingly, the rate prescribed for LPS in Article 10.3.3 of the PPA (i.e., SBI PLR plus 2%) ought to be considered for the recovery of Carrying Cost.

56. *Per Contra*, SECI/PSPCL has submitted that Carrying Cost is to be restricted to the cost of financing a prudent and efficient utility, i.e., the interest rate at which such utility can borrow money from the lenders and financial institutions after due and sincere efforts to minimize the interest cost. The carrying cost is different from the late payment surcharge, which is payable in terms of Article 10.3.3 of PPA and not otherwise. The claim of carrying cost is based on the principle of restitution and is completely different from the penal rate of interest, which is a late payment surcharge payable on non-payment or default in payment of invoices by the Due Date. In terms of the Orders dated 12.12.2022 and 23.01.2022 of the Hon'ble Supreme Court, the enforceability of the Commission's order to be passed in pursuance of APTEL's decision dated 15.09.2021 in Parampujya Case has been stayed with regard to the issues of carrying cost, compensation on account of impact of Change in Law for the period post Commercial Operation Date of the projects and towards O&M expenses. The Commission may direct that enforcement of any order of the Commission passed on the aspects covered in Judgment dated 15.09.2021 of the APTEL will take place after the decision of the Hon'ble Supreme Court to maintain such parity. IPCL has submitted that the Petitioner's claim for carrying costs at the rate of Late Payment Surcharge is fundamentally flawed and should be dismissed. The Late

Payment Surcharge, according to the statement, is meant to be paid under the Power Purchase Agreement (PPA) for defaults in payments due to unpaid invoices. It is characterized as a penal provision and is explicitly outlined in the PPA for specific circumstances.

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

ARTICLE 12: CHANGE IN LAW

Definitions

...
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 HPD or any income to the HPD:

- ***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 HPD;***
- ***any statutory change in tax structure (including changes in taxes, duties or cess- applicable only for the solar project component) or introduction of any new tax made applicable for setting up of Wind-Solar Hybrid Power Project and supply of power from the Project by the HPD 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 HPD, or (ii) Custom duty on imported equipment, 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 HPD, then, in order to ensure that the HPD 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 HPD/ Buyer 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 HPD or any income to the HPD on account of any of the events as indicated above, HPD 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 HPD failing to comply with the above

requirement, in case of any gain to the HPD, SECI shall withhold the monthly tariff payments on immediate basis, until compliance of the above requirement by the HPD.”

12.2 Relief for Change in Law

12.2.1 *The aggrieved Party shall be required to approach the Central 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 all the Parties.*

58. 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* (Uttar Haryana judgment) 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.

59. From the above, we observe that Article 12.1 of the PPAs 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, the affected party has to be put in the same economic position as if such a change in law had not occurred, i.e., the party must be given the benefit of restitution as understood in civil law.

60. 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/vendors until the date of issuance of this Order at the actual rate of interest paid by the Petitioners for arranging funds (supported by the 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 PPAs, 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 PPAs would kick in if the payment is not made by the Respondents within the due date.
61. The Commission further directs that the responding Discoms are liable to pay SECI all the above-reconciled claims that SECI has to pay to the Petitioners. However, SECI's payment to the Petitioners is not conditional upon the payment to be made by the responding Discoms to SECI.
62. APTTEL, 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.

63. 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."

64. Therefore, given the restitution clause in the PPAs, the directions issued in this Order so far as they relate to additional compensation for the period pre-COD (including carrying cost) claims only shall be enforced. However, in view of the Hon'ble Supreme Court Order dated 12.12.2022, as quoted above, the directions issued in this Order so far as they relate to additional compensation (including carrying cost) for the period post-Commercial Operation Date of the projects 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 31.01.2024 in Petition No. 226/MP/2021 & 227/MP/2021; Order dated 03.05.2024 in Petition No. 197/MP/2023 & 206/MP/2023*.

65. The issue is decided accordingly.

66. The summary of our findings is as follows:

- a) The notifications *2020 SGD Notification* (only in Petition No. 31/MP/2023); and *2021 BCD Notifications* (for both Petition No. 31/MP/2023 and Petition No. 40/MP/2023) along with increase in the quantum of social welfare surcharge and increase in the quantum of IGST Act on import of goods are not Change in Law events under Article 12 of the PPAs dated 21.01.2020.

- b) The *2021 GST Notifications* and the *SC GIB Order* dated 19.04.2021 amount to Change in Law events under Article 12 of the PPAs dated 21.01.2020.
- c) The Petitioners are entitled to compensation on account of a Change in Law corresponding to the mutually agreed project capacity under the PPA, which is valid as per the terms of Article 12 of the PPAs due to the *2021 GST Notifications* and the *SC GIB Order* dated 19.04.2021.
- d) The contracting parties are to carry out 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 the *2021 GST Notifications* and the *SC GIB Order* dated 19.04.2021.
- e) Compensation at the discount rate of 9.12% and annuity payment of 15 years shall be the appropriate methodology towards change in law compensation. The liability of SECI/PSPCL/IPCL 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 Petitioners, 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.
- f) The Petitioners shall also be eligible for carrying cost starting from the date when the actual payments were made to the Authorities/vendors 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 PPAs, 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 PPAs would kick in if the payment is not made by the Respondents within the due date.
- g) Given the restitution clause in the PPAs, the directions issued in this Order, so far as they relate to additional compensation for the period pre-COD (including carrying cost) claims only shall be enforced. However, in view of the Hon'ble Supreme Court Order dated 12.12.2022, as quoted above, the directions issued in this Order so far as they relate to additional compensation (including carrying cost) for the period post-Commercial Operation Date of the projects 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.

67. Petition No. 31/MP/2023 and Petition No. 40/MP/2023 are disposed of in terms of the above.

Sd/-
पी. के. सिंह
सदस्य

Sd/-
अरुण गोयल
सदस्य

Sd/-
जिष्णु बरुआ
अध्यक्ष