



नई दिल्ली
NEW DELHI

याचिका संख्या./ Petition No. 310/MP/2022 &
362/MP/2022

कोरम/ Coram:

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

आदेश दिनांक/ Date of Order: 11th of January 2024

IN THE MATTER OF:

A petition under Section 79 (1) (b), 79 (1) (f) and Section 79 (1) (f) (k) of the Electricity Act, 2003 before the Central Electricity Regulatory Commission for seeking compensation against additional cost incurred on account of implementation of the Goods and Services Tax Law vide Notification No. 12/2017 as a “Change in Law Event” in terms of Article 12 of the Power Purchase Agreements dated 05.10.2016 executed between Indigrd Solar-I (AP) Private Limited and Solar Energy Corporation of India Limited.

AND IN THE MATTER OF:

1) In Petition No. 310/MP/2022

Indigrd Solar-I (AP) Private Limited,
(Formerly known as FRV Andhra Pradesh Solar Farm-I Pvt. Ltd.)
Unit No. 1, First Floor, Windsor,
Village KoleKalyan, Off. CST Road,
Vidyanagari Marg, Kalina, Santacruz (East),
Mumbai- 400 098.

.....Petitioner

Versus

1. M/s Solar Energy Corporation of India Limited,
6th Floor, Plate-B, NBCC Office Block, Tower-2,
East Kidwai Nagar, New Delhi- 110 023

2. **Southern Power Distribution Company of Andhra Pradesh Limited,**
Kesavayanagunta, Tiruchanoor Road,
Tirupati, Andhra Pradesh- - 517501
3. **Eastern Power Distribution Company of Andhra Pradesh Limited,**
P&T Colony, Seethammadhara, Visakhapatnam,
4. **Andhra Pradesh Central Power Distribution Corporation Limited,**
Beside Government Polytechnic College
ITI Road Vijayawada 520008
5. **Andhra Pradesh Power Coordination Committee,**
Vidyut Soudha, Hyderabad-500082

....Respondents

2) **In Petition No. 362/MP/2022**

Indigrid Solar-II (AP) Private Limited,
(Formerly known as FRV Andhra Pradesh Solar Farm-II Pvt. Ltd.)
Unit No. 1, First Floor, Windsor,
Village KoleKalyan, Off. CST Road,
Vidyanagari Marg, Kalina, Santacruz (East),
Mumbai- 400 098.

.....Petitioner

Versus

1. **M/s Solar Energy Corporation of India Limited,**
6th Floor, Plate-B, NBCC Office Block, Tower-2,
East Kidwai Nagar, New Delhi- 110 023
2. **Southern Power Distribution Company of Andhra Pradesh Limited,**
Kesavayanagunta, Tiruchanoor Road,
Tirupati, Andhra Pradesh- - 517501
3. **Eastern Power Distribution Company of Andhra Pradesh Limited,**
P&T Colony, Seethammadhara, Visakhapatnam,
4. **Andhra Pradesh Central Power Distribution Corporation Limited,**
Beside Government Polytechnic College,
ITI Road Vijayawada 520008
5. **Andhra Pradesh Power Coordination Committee,**
Vidyut Soudha, Hyderabad-500082

...Respondents

Parties Present: Shri Sanjay Sen, Sr. Advocate, ISAPPL
Ms. Roberta Elwin, Advocate, ISAPPL
Ms. Aparajita Upadhyay, Advocate, ISAPPL

Ms. Anukriti Jain, Advocate, ISAPPL
Shri Vinit Kumar, Advocate, ISAPPL
Shri Saurav Kr Jha, ISAPPL
Ms. Anushree Bardhan, Advocate, SECI
Ms. Tanya Sareen, Advocate, SECI
Ms. Surbhi Kapoor, Advocate, SECI

आदेश/ ORDER

The Petitioners, i.e., M/s Indigrd Solar-I (AP) Private Limited and M/s Indigrd Solar-II (AP) Private Limited, are generating companies and engaged in the business of generation and sale of electricity. Solar Energy Corporation of India Limited (SECI) issued a tender for procurement of 500 MW of power generated from the grid-connected

solar projects to be set up by Solar Powers Developers on a Build-Own-Operate (BOO) basis under the viability gap funding scheme in Phase-II, Batch-III, of Jawahar Nehru National Solar Mission (JNNSM) on the terms and conditions contained in the Request for Selection (RfS) dated 02.01.2016. Pursuant to RfS, *M/s FRV Solar Holdings XI BV* (parent company) submitted its bids on 05.04.2016 and was declared as the successful bidder on 04.05.2016. SECI issued a Letter of Intent (LOI) dated 16.08.2016 for a Project Capacity of 50 MW (each) to be set up at Plot P2 (Petition No. 310/MP/2022) and Plot P8 (Petition No. 362/MP/2022), Ananthapuramu Solar Park, Andhra Pradesh. *FRV Solar Holdings XI BV* incorporated *FRV Andhra Pradesh Solar Farm-I Private Limited* (in Petition No. 310/MP/2022) and *FRV Andhra Pradesh Solar Farm-II Private Limited* (in Petition No. 362/MP/2022) within the provisions of RfS for execution of the Project. Thereafter, Power Purchase Agreements dated 05.10.2016 (PPAs) were executed between the *FRV Andhra Pradesh Solar Farm-I Private Limited* (in Petition No. 310/MP/2022) and *FRV Andhra Pradesh Solar Farm-II Private Limited* (in Petition No. 362/MP/2022) and SECI on 05.10.2016 for a project capacity of 50 MW. Further, *FRV Andhra Pradesh Solar Farm-I Private Limited* (in Petition No. 310/MP/2022) changed its name to Indigrd Solar-I (AP) Private Limited and *FRV Andhra Pradesh Solar Farm-II Private Limited* (in Petition No. 362/MP/2022) changed its name to Indigrd Solar-II (AP) Private Limited and on 08.11.2021 the Petitioners executed the amended PPAs. The Petitioners are seeking compensation for additional costs incurred on account of the implementation of the Goods and Services Tax

Law vide Notification No. 12/2017 as a 'Change in Law Event' in terms of Article 12 of the PPAs.

2. Respondent No. 1, Solar Energy Corporation of India Limited (SECI), has been set up under the administrative control of the Ministry of New and Renewable Energy (MNRE). SECI has been designated as the nodal agency for the implementation of MNRE schemes for developing grid-connected solar and wind power projects in India.
3. Respondents No.2 to 4 are the distribution companies (DISCOMs) engaged in power distribution activities in the State of Andhra Pradesh.
4. Respondent No. 5, Andhra Pradesh Power Coordination Committee (APPCC) has been set up to ensure coordination between the four distribution companies in the State of Andhra Pradesh.
5. The Petitioners have made the following prayers in Petition No. 310/MP/2022 & 362/MP/2022:
 - a) *Declare the introduction of Central Goods and Services Tax vide Notification No. 12/2017 by the Central Government as a Change in Law event for the Petitioner;*
 - b) *Declare the introduction of Integrated Goods and Services Tax vide Notification No. 13/2017 by the Central Government as a Change in Law event for the Petitioner;*
 - c) *Declare the introduction of Andhra Pradesh Goods and Services Tax vide Notification No. 16/2017 by states of Andhra Pradesh as a Change in Law event;*
 - d) *Direct a compensation for an amount of Rs. 8,12,32,694 (Rupees Eight Crores, Twelve Lakhs, Thirty-Two Thousand, Six Hundred and Ninety-Four Only) on account of additional expenditure incurred due to introduction of aforementioned Laws as per the provisions of the Power Purchase Agreement;*
 - e) *Allow us, a compensation of 3% due to increased tax rates on operating expenses including but not limited to O&M charges, Water Charges and Land Lease Charges Payable after introduction of GST.*
 - f) *Grant interest/carrying cost from the date of incurring of the cost by the Petitioners till the date of actual payment being made by the Solar Energy Corporation of India;*

g) Allow Petitioners to make addition/alterations/modifications/changes to the Petition, if required at a future date along with any additional documents pertaining to the matter

Factual Matrix:

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

Location	Plot P2, Ananthapuramu Solar Park, Andhra Pradesh (Petition No. 310/MP/2022) Plot P8, Ananthapuramu Solar Park, Andhra Pradesh (Petition No. 362/MP/2022)
Scheme	500 MW Grid connected Solar photo voltaic power projects under JNNSM Phase II Batch III Tranche IV
Nodal agency	SECI
Tariff	Rs.4.43/kWh
Capacity (MW)	50 MW
Power	Solar
Government of India introduced Notification No. 12/2017 (2017 CGST Act) and Government of India introduced Notification No. 13/2017 (2017 IGST Act)	28.06.2017
Andhra Pradesh Goods and Services Tax Act, 2017 (2017 AP GST Act) was notified on	07.06.2017
Date of Notification No.1/2017-Central Tax (Rate) (2017 GST Notification)	28.06.2017
RfS issued on	02.01.2016
Bid submitted by FRV Solar Holdings XI BV on	05.04.2016
E-Reverse auction held on	04.05.2016
Letter of Intent (LoI) issued on	16.08.2016
Effective date of the PPAs	16.09.2016
PPA executed on	05.10.2016
SCOD of the project	16.10.2017
Power Sale Agreement (PSA) executed on	27.10.2016
COD of the project	<ul style="list-style-type: none"> • 22.07.2018 (Petition No. 310/MP/2022) • 31.01.2018 (Petition No. 362/MP/2022)
Indi Grid Trust and its affiliates acquired 100% shareholdings of the Petitioners from FRV Solar Holdings XI B.V. Pursuant to which name of the Petitioner's Company was changed to IndiGrid Solar-I (AP) Private Limited and IndiGrid Solar-II (AP) Private Limited	13.07.2021
Amended PPA was executed on	08.11.2021

7. The present petitions were filed on 28.09.2022 (Petition No. 310/MP/2022) and on 22.11.2022 (Petition No. 362/MP/2022). During the course of the hearing dated 06.03.2023, the Commission raised a pertinent issue on the aspect of the limitation period of filing the instant Petitions, against which the parties filed their respective submissions. However, during the course of the hearing on 16.05.2023, the parties agreed on the point that the Petition falls within the ambit of the limitation period. Accordingly, the Commission admitted the Petitions. Relevant extracts of the Record of Proceedings (RoP) dated 16.05.2023 are as under:

2. Learned senior counsel for the Respondent, SECI fairly submitted that the right of the developer/generator to receive the compensation due to any Change in Law event during the construction period would commence only upon the commissioning of the Project and keeping in view that the period from 15.3.2020 till 28.2.2022 has been excluded by the Hon'ble Supreme Court for the purposes of limitation, the present Petitions would fall within the period of 3 years from the commissioning of the Projects. Learned senior counsel also pointed out that the Petitioners have, however, also prayed for certain declaratory reliefs and in respect of such declaratory reliefs, the period of limitation begins to run when the right to sue first accrues. Learned senior counsel expressed certain reservations on the invoices raised by the EPC Contractors being well past the commissioning of the Projects and submitted that the GST Laws and Rules specified thereunder provide for cut-off date for raising the invoices in respect of taxable supply of goods or services. In response to this averment, learned senior counsel for the Petitioners submitted that the said contention concerns with the merits of the case and will be dealt with while addressing the merits of the cases.

3. After hearing the learned senior counsels for the Petitioner and SECI, the Commission admitted the Petitions and directed to issue notice to the Respondents including distribution licensees on merits of these cases. Accordingly, the Respondents were directed to file their reply within four weeks with copy to the Petitioners, who may file their rejoinder(s), if any, within three weeks thereafter.

8. The Petitions were further listed for hearing on 10.08.2023. The Commission, after hearing the submissions of the parties reserved the matters for orders and directed the parties to file their respective submissions in this respect. Pursuant to the directions of the Commission, the parties filed their respective submissions.

Submissions of the Petitioners:

9. Briefly, the Petitioners have submitted as under:

- a) After the implementation of CGST and IGST from 01.07.2017, various exemptions cease to exist. Solar Power Generation equipment was placed under the 5% to 18% tax bracket as per the GST rate schedule for goods on 18.05.2017. This change of tax up to 18% from zero rates has escalated the capital cost as well as operational cost (O&M Charges, Water Charges and Land Lease Charges) of the Petitioners, making the quoted tariff at the time of bid unviable for the project.
- b) The GST Laws were introduced after the effective date of the PPA, i.e. 16.09.2016 and by way of notifications, and hence, the same will qualify as enactment of law under Article 12.1.1 of the PPA. Recognizing the importance of solar power for clean and green sources of power and wider adoption, the Government of India had earlier granted various exemptions. However, after the implementation of CGST and IGST from 01.07.2017, these exemptions cease to exist. The solar power project's capital equipment supply and services were placed under a 5% to 18% tax bracket as per the GST rate schedule for goods on 18.05.2017. This change of tax up to 18% from zero rate has escalated the capital cost of the Petitioners, making the tariff quoted at the time of bid for allocation of the project under tender unviable.
- c) The implementation of GST Laws has increased the capital cost as well as the operational cost of the project. Since the increase in capital cost and operational cost (O&M Charges, Water Charges and Land Lease Charges) on account of implementation of the GST laws was not contemplated at the time of bidding, the same has to be factored in the tariff to enable the Petitioners to retain the economic value that was worked out/ considered at the time of bid and, also to ensure that the project is both viable and sustainable in the long term. Since solar power has single part tariff structure and there is no variable charge, any increase in capital cost or operational cost (O&M Charges, Water Charges and Land Lease Charges) directly impacts the overall economic viability of the project as the tariff is fixed for the life on the basis of capital cost and operating expenses estimated at the time of bidding. The above-said events have impacted the capital cost and operating expenses of the Petitioner's project and, hence, are covered under a change in law event under Article 12 of the PPA.
- d) The instant Petitions are filed under Section 79(1)(b) and (f) of the Electricity Act, 2003, read with Article 12.2 of the PPA executed by the Petitioner, which provides

for the exclusive jurisdiction of this Commission to decide a change in law claims of the Petitioner.

- e) The issue of jurisdiction of this Commission to adjudicate change in law claims of solar power developers who have set up their project under the Jawaharlal Nehru National Solar Mission (JNNSM Guidelines) has already been decided by APTEL in its judgment dated 15.09.2022 in Appeal Nos. 256/2019 and Batch titled *Parampujya Solar Energy Pvt. Ltd. vs. CERC & Ors (Parampujya judgement)*, and the same is no longer res integra.
- f) The JNNSM Guidelines notified by the Central Government, in pursuance of which PPA and PSAs have been executed in the present case, envisage a composite scheme. Further, the provisions of PPA and PSAs enable the sale of power to third parties in certain eventualities, which could be outside the State of Andhra Pradesh as well. In this regard, in terms of Article 6.5 of the PSAs, SECI has the right to divert the solar power or part thereof and sell it to any third party, including a licensee under the Electricity Act, 2003. Thus, the arrangement falls within the scope of Section 79(1)(b) of the Electricity Act, 2003, and the jurisdiction is of the Central Commission as Article 12 of the PPA provides for the jurisdiction of the Central Commission.

Submissions of SECI:

10. Briefly, SECI has submitted as under:

- a) In order to qualify for any relief under Article 12 of the PPA dealing with change in law claims raised by the Petitioners, the same should fall within the scope and ambit of the said provisions.
- b) The extent to which relief is admissible to the Petitioners on account of GST Notifications is subject to examination and verification of documents by SECI and AP Discoms to be submitted by the Petitioners. The Petitioners are to establish the one-to-one correlation between the project, the supply of goods against which the change in law is claimed, the invoices and other relevant documents for proof of payment of the claimed amount on account of the change in law.

Submissions of APDISCOMS & APPCC dated 03.10.2023:

11. Briefly, APDISCOMS & APPCC have submitted as under:

- a) Article 12 of the PSA confers exclusive jurisdiction upon APERC for adjudication of all disputes concerning the answering respondents including the claims arising from a change in law event.
- b) The liability of the Respondents can be invoked only in terms of the PSA. For disputes concerning any change in tariff, Article 12 of the PSA designates APERC alone as the Appropriate Commission. Thus, the Petitioner's claim for additional tariff owing to GST would be subject to the jurisdiction of APERC.
- c) The generation units set up by the Petitioners are located in Andhra Pradesh, and the procured power is supplied to the Respondents within the same State. The generation and supply of power in the same State is a matter squarely covered under the State Commission or APERC. Reliance is placed on the *Hon'ble Supreme Court judgement in Energy Watchdog v. CERC & Ors (2017) 14 SCC 80*.
- d) The Petitioners have approached the Central Commission after the period of limitation has lapsed. The Petitions were instituted on 07.10.2022 seeking a declaration in respect of a change in law event that occurred on 01.07.2017. Therefore, any claim for a change in law could only be instituted on or before 01.06.2022 in terms of Article 113 of the Limitation Act.

Analysis & Decision

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

Issue No. I: *Whether this Commission has the jurisdiction under Section 79 of the Electricity Act, 2003, to adjudicate the present matter?*

Issue No. II: *Whether the introduction of Notification No.12/2017 and 13/2017-Central Tax issued by the Department of Revenue, Ministry of Finance, Government of India, and the introduction of Notification No. 16/2017 i.e. enactment of Andhra Pradesh Goods and Services Tax Act, 2017 (GST Laws) amounts to Change in Law events under Article 12 of the Power Purchase Agreement dated 05.10.2016? AND*

Whether the Petitioners are entitled to compensation towards additional expenditure on account of the Change in Law event in terms of Article 12.2 of the PPA? AND Whether compensation towards operational expenses on account of the implementation of GST ?

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

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

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

Re: Issue No. I

Whether this Commission has the jurisdiction under Section 79 of the Electricity Act, 2003 to adjudicate the present matter?

15. APDISCOMs/APPCC have submitted that this Commission lacks jurisdiction to entertain the present case as the purchase and sale of electricity are in the same State, and Andhra Pradesh Electricity Regulatory Commission (APEREC) is the appropriate forum to adjudicate the instant Petitions. *Per Contra*, the Petitioners have submitted that as the scheme involved in the present case is the composite scheme, this Commission has the jurisdiction to adjudicate the present case in terms of Section 79 of the Electricity Act, 2003.

16. Clause 2.3 (5) of the National Solar Mission Guidelines 2015 states as under:

2.3. Mechanism of Operation

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*NVVN will purchase the Solar Power generated from the selected Solar PV plants at the quoted tariffs and Thermal Power at the Tariff as determined by CERC as per Regulations from time to time for power from the respective Thermal Power Plant from which power is allocated. **NVVN will bundle the Solar Power with unallocated Thermal Power from Coal based stations of NTPC on 2:1 basis (2 MW of Solar with 1 MW of Thermal), and sell the Bundled Power to willing State Utilities under 25 years Power Sale Agreements (PSAs), at Weighted Average Tariff of the Solar and Thermal components plus Trading Margin of Paisa Seven (7) per kWh.***

3.4. Solar Parks:

Solar Parks are being developed under MNRE scheme for development of 25 solar parks. The bidder will approach the solar park implementation agency for allotment of land and connectivity. The implementation agency will indicate the cost of land, annual charges etc. which the developers must take into account while bidding.

The first choice will be to locate all projects in solar parks coming up in the state for which bids are issued. NVVN will indicate the name of the park and the plot sizes as well as other details in the tender document. If the total capacity of solar power projects in the bid is higher than the capacity available in the park, the developers will be given choice to locate the project in the park or out-side on the basis the bid price i.e. the lowest bidder gets first choice followed by the next and so on & till such time as park capacity is exhausted or all remaining can be located in the park.

After the PPA is signed, it will be the duty of solar park implementation agency to provide land and connectivity as promised in writing. SPDs shall enter into an Implementation Support Agreement with SPIA / State Agency for Land & associated infrastructure for development of the Project inside the Solar Park, Connectivity with the STU / CTU System and all clearances related thereto shall be the responsibility of the SPIA / State Agency / SPD. SPIA will hand over land to developer within 3 months of signing of PPA. The developers will be given extra time if there is any delay in giving possession of land and connectivity equivalent to delay. There will however, be no compensation or L.D or deemed generation for any delay in Solar park. NVVN will have freedom to extend time by up to 3 months in case of delay in land allotment, transmission facility, Infrastructure facilities etc. Extension shall be subject to certification from Solar Park Implementing Agency (SPIA) or respective State Implementing Agency justifying reasons for delay. If extension is required to be given beyond 3 months due to delay in park development or evacuation, NVVN will approach MNRE, who will be authorized to decide on further extension with the approval of Secretary, MNRE

17. MNRE vide notification dated 12.12.2014, floated the scheme for the development of Solar Parks and Ultra Mega Solar Power Projects in the country commencing from 2014-15 and onwards. Relevant excerpts of the aforesaid notification are reproduced below:

“Scheme for development of Solar Parks and Ultra Mega Solar Power Projects:

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.*

2. Proposal

MNRE through this scheme plans to set up 25 solar parks, each with a capacity of 500 MW and above; thereby targeting around 20000 MW of solar power installed capacity. These solar parks will be set up within in a span of 5 years commencing from 2014-15 and the solar projects may then come up as per demand and interest shown by developers.

At the State level, the solar parks will enable the States to bring in significant investment from project developers, meet its Solar Renewable Purchase Obligation (RPO) mandate and provide employment opportunities to local population. The State

will also reduce its carbon footprint by avoiding emissions equivalent to the solar park's installed capacity and generation. Further, the State will also avoid procuring expensive fossil fuels to power conventional power plants.

The solar park will provide a huge impetus to solar energy generation by acting as a flagship demonstration facility to encourage project developers and investors, prompting additional projects of similar nature, triggering economies of scale for cost-reductions, technical improvements and achieving large scale reductions in GHG emissions. Some Ultra Mega Solar Power Projects may be set up in these Parks or the entire park may individually be an Ultra Mega Solar Power Project.

2.1 Applicability: All the States and Union Territories are eligible for benefits under the scheme.

.8. Transmission and evacuation of power from solar park: Interconnection of each plot with pooling stations through 66 KV lother suitable voltage underground or overhead cable will be the responsibility of the solar project developer. The designated nodal agency will set up the pooling stations (with 400/220. 220/66 KV or as may be suitable switchyard and respective transformers) inside the solar park and will also draw transmission to transmit power to 220 KV/400 KV substation. The responsibility of setting up a sub-station nearby the solar park to take power from one or more pooling stations will lie with the Central Transmission Utility (CTU) or the State Transmission Utility (STU). After following necessary technical and commercial procedures as stipulated in the various regulations notified by the Central/State Commission.

If the State Government is willing to buy over 50% of the power generated in the solar park. preference will be given to STU. which will ensure setting up of substation and development of necessary infrastructure for transmission of power from substation to load centres. The designated implementing agency will intimate POWERGRID and CEA at least 6 months before so that the planning and execution can be carried out in time.

If the state is not willing to buy at least 50% of the power generated in the solar park. then CTU may be entrusted with the responsibility of setting up 400 KV or bigger substation right next to the solar park and its connectivity with the CTU. For setting up of this transmission & evacuation infrastructure. Power Grid may prepare a separate project to be funded from NCEF I external funds I Green Corridor project. if the cost is very high. The system would be planned in such a manner so that there is no wheeling charge applicable on solar power in accordance with the CERC Regulation or reduce the wheeling charges to affordable level.

To build this infrastructure using the highest possible standards, the whole solar power evacuation network scheme may be designed using latest technologies like SCADA, GIS, Bay controller, online monitoring equipment for dissolved gas analysis, OPGW, PLCC etc.

9. Power Sale Arrangement:

Acceptance for development of solar park under the Scheme does not guarantee power purchase agreement (PPA) or tariff for the power to be produced. The project developers need to have their own arrangement for a PPA or get selected in any

Government of India or State Government Scheme. The developer will be free to set up projects under any scheme or for third party sale.”

18. We observe that as per the above provisions of the “*Scheme for development of Solar Parks and Ultra Mega Solar Power Projects*”, MNRE planned to set up 25 solar parks, each with a capacity of 500 MW and above. Interconnection of each plot with pooling stations through 66 KV/ other suitable voltage underground or overhead cable was the responsibility of the solar project developer. The designated nodal agency was to set up the pooling stations (with 400/220. 220/66 KV or as may be suitable switchyard and respective transformers) inside the solar park. The responsibility of setting up a substation near the solar park to take power from one or more pooling stations was with the Central Transmission Utility (CTU) or the State Transmission Utility (STU). If the State Government was willing to buy over 50% of the power generated, preference was to be given to STU. However, in case the State was not willing to buy at least 50% of the power generated in the solar park, then CTU was entrusted with the responsibility of setting up 400 KV or a bigger substation right next to the solar park and its connectivity with the CTU.

19. Section 79 (1)(b) of the Electricity Act, 2003 stipulates as under:

Section 79. (Functions of Central Commission): --- (1) The Central Commission shall discharge the following functions, namely:-

....

(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;

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20. We note that Section 79(1)(b) of the Electricity Act, 2003 fastens jurisdiction on this Commission to adjudicate upon matters having a composite scheme for the purchase and sale of electricity. The Hon’ble Supreme Court vide judgement dated 11.04.2017 in the matter of *Energy Watchdog v. CERC & Ors. (2017) 14 SCC 80* has already clarified the expression *composite scheme* and jurisdiction of this Commission. Hon’ble Supreme Court qua the aforesaid judgment held as under:

“24. The scheme that emerges from these sections is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79(1) itself in clauses (c), (d)

and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression “within the State” in clauses (a), (b) and (d), and “intra-State” in clause (c). This being the case, **it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission. The State Commission's jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act.** What is important to remember is that if we were to accept the argument on behalf of the appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. **This being the case, we are constrained to observe that the expression “composite scheme” does not mean anything more than a scheme for generation and sale of electricity in more than one State.**

...
26. Even otherwise, the expression used in Section 79(1)(b) is that generating companies must enter into or otherwise have a “composite scheme”. This makes it clear that **the expression “composite scheme” does not have some special meaning — it is enough that generating companies have, in any manner, a scheme for generation and sale of electricity which must be in more than one State.**

21. We observe that the Hon’ble Supreme Court has held that the expression “composite scheme” does not mean anything more than a scheme for the generation and sale of electricity in more than one State. The expression used in Section 79(1)(b) is that generating companies must enter into or otherwise have a “composite scheme”. This makes it clear that it is enough that generating companies have, in any manner, a scheme for the generation and sale of electricity which must be in more than one State.

22. Clause 1.2.5 of the RfS stipulates as under:

1.2.5. JNNSM Phase-II, Batch-III: The proposed 2000 MW Solar PV Projects to be selected under Batch-III of JNNSM Phase-II, will be implemented by SECI either in Solar Parks to be developed through association of Central and/ or State Agencies with Land provided by State Governments or in Land identified and arranged by Solar Power Developers in the respective States. MNRE is facilitating development of 25 Solar Parks to accelerate the Solar Capacity Addition in various States.

23. Article 6.5.5 of the PSAs states as under:

6.5.5. SECI shall have the right to divert the Solar Power or part thereof and sell it to any third party namely;

- i) Any consumer, subject to applicable Law; or*
- ii) Any licensee under the Act;*

SECI shall request the concerned SLDC/RLDC to divert such power to third party as it may consider appropriate.

24. From the above, we observe that Projects to be selected under Batch-III of JNNSM Phase-II will be implemented by SECI either in Solar Parks to be developed through the association of Central and/ or State Agencies with Land provided by State Governments or in Land identified and arranged by Solar Power Developers in the respective States. SECI has the right to divert the Solar Power or part thereof and sell it to any third party. Further, the provisions of the “Scheme for development of Solar Parks and Ultra Mega Solar Power Projects” also envisage a situation when a State might not be willing to buy at least 50% of the power generated in the solar park, and in such an event the CTU shall set up a substation to facilitate interstate sale of power. Therefore, the JNNSM Scheme has an inherent element of a Composite Scheme. Accordingly, we hold that the Commission has the jurisdiction to adjudicate in the matter. It is pertinent to mention here that the view taken in the instant Petition is consistent with the view taken in Order dated 09.10.2018 in Petition No. 188/MP/2017 & Ors.

25. Further, APDISCOMs, in their submissions, have stated that the PSA has contemplated a situation where, in the event that the sale and supply of the energy is entirely within the State, then the State Commission and not Central Commission shall have jurisdiction. We note that it is a well-settled principle of law that the parties, by their agreement, can neither confer jurisdiction upon a Forum which does not have the jurisdiction under the law nor can the parties, by their agreement, oust the jurisdiction of the Forum vested under the law. In this context, reliance is placed on the following judgments of the Hon’ble Supreme Court:

a) *A.B.C Laminart Pvt. Ltd. & Anr. vs. A.P. Agencies, (1989) 2 SCC 163* has held as under:

“...where the parties to a contract agreed to submit the disputes arising from it to a particular jurisdiction which would otherwise also be a proper jurisdiction under the law their agreement to the extent they agreed not to submit to other jurisdictions cannot be said to be void as against public policy. If on the other hand the jurisdiction they agreed to submit to would not otherwise be proper jurisdiction to decide disputes arising out of the contract it must be declared void being against public policy.”

b) *New Moga Transport Co. vs. United India Insurance Co. Ltd. & Ors. (2004) 4 SCC 677* has held as under:

*“By a long series of decisions it has been held that where two Courts or more have under the CPC jurisdiction to try a suit or proceeding an agreement between the parties that the dispute between them shall be tried in any one of such Courts is not contrary to public policy and in no way contravenes Section 28 of the Indian Contract Act, 1872. Therefore, if on the facts of a given case more than one Court has jurisdiction, parties by their consent may limit the jurisdiction to one of the two Courts. **But by an agreement parties cannot confer jurisdiction to a Court which otherwise does not have jurisdiction to deal with a matter.**”*

26. In terms of the above, the stated statutory provisions and the judicial precedents, we observe that even if the parties have agreed to the adjudication of disputes by a particular Forum, this does not oust the jurisdiction of this Commission, which flows from the provisions of the Electricity Act, 2003.
27. From the discussions in the preceding paragraphs, we hold that this Commission has the jurisdiction under the Electricity Act, 2003 to adjudicate the instant matter.
28. The next issue raised by APDISCOMs/APPCC vide their reply dated 03.10.2023 is that the instant Petitions are barred by limitation.
29. We note that Petitioners have submitted that this Commission has already adjudicated upon the issue of limitation vide RoP dated 16.05.2023 and so APDISCOMs cannot re-agitate the already settled issue. The issue is decided accordingly.

Re: Issue No. II

Whether the introduction of Notification No.12/2017 and 13/2017-Central Tax issued by the Department of Revenue, Ministry of Finance, Government of India, and the introduction of Notification No. 16/2017 i.e. enactment of Andhra Pradesh Goods and Services Tax Act, 2017 (GST Laws) amounts to Change in Law events under Article 12 of the Power Purchase Agreement dated 05.10.2016? AND Whether the Petitioners are entitled to compensation towards additional expenditure on account of the Change in Law event in terms of Article 12.2 of the PPA? AND Whether compensation towards operational expenses on account of implementation of GST?

30. The Petitioners have submitted that as GST Laws were introduced after the effective date of the PPA, i.e. 16.09.2016, and have resulted in a change in the tax regime, the same would qualify as a Change in Law event in terms of Article 12.1.1 of the PPA. The Change in tax structure from 0 to 18% has escalated the capital costs of the Petitioner project and has rendered the project unviable. *Per Contra*, SECI has submitted that the Petitioners' claims are

subject to verification of documents by SECI as well as APDISCOMs upon submission of documents by the Petitioners.

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

“12. ARTICLE 12: CHANGE IN LAW

12.1 Definitions

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

12.1.1 “Change in Law” means the occurrence of any of the following events after the Effective Date resulting into any additional recurring/non-recurring expenditure by the SPD or income to the SPD:

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

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

12.2 Relief for Change in Law

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

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

32. The Commission observes that as per Article 12, Change in Law means enactment/ adoption/ promulgation/ amendment/ modification or repeal of any law in India; change in the interpretation of any law in India; imposition of the requirement for obtaining any consent or change in tax or introduction of any tax made applicable for supply of power by the SPD as per the terms of this Agreement, resulting into any additional recurring/non-recurring expenditure or any income to the SPD. The Commission is of the opinion that a harmonious construction of the bullet points under Article 12 makes it clear that bullet point one is wider in scope and refers to the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal of any law in India, including the rules and regulations framed

pursuant to such law whereas the last bullet in seriatim refers specifically to any change in tax or introduction of any tax made applicable for supply of power by the SPD as per the terms of Agreement. It implies that the last bullet in the seriatim would be applicable as a Change in Law to the cases where the change in tax or introduction of any tax directly impacts the supply of power only. Thus, the ambit of the last bullet is limited in that if any change in Tax is made or any tax is introduced having its impact specifically on the supply of power, in that case, the remedy of Change in Law is available to the Petitioners under bullet point number six only. Clearly, the GST laws enacted are not in the nature of a mere change in the tax having limited applicability on the supply of power. Rather, it is in the nature of an enactment having wide-ranging implications on the entire indirect taxation regime in India. We are of the view that any tax levied through an Act of Parliament after the cut-off date which results in additional expenditure by the Petitioner, is covered as Change in Law. Further, any tax or application of new tax on the supply of power covers the taxes on the inputs required for such generation and supply of power to the distribution licensees. In the instant Petitions, the GST Laws have been enacted by the Indian government instrumentalities i.e. by the Act of Parliament and the state government. The change in duties/ tax imposed by various government instrumentalities at the centre and the state level has resulted in a change in the cost of the inputs required for generation, and hence, the same is to be considered as a Change in Law. Hence, the Commission holds that the enactment of GST laws is squarely covered as Change in Law under the first, second and sixth bullet in seriatim of Article 12 of the PPA. It is pertinent to mention here that the view taken in the instant Petition is consistent with the view taken in Order dated 09.10.2018 in Petition No. 188/MP/2017 & Ors.

33. In the instant petitions, the bids were submitted by the Petitioners on 05.04.2016. PPAs were executed between the Petitioners and SECI on 05.10.2016, and the SCoD of the projects were 16.10.2017. The projects were commissioned on 22.06.2018 (Petition No. 310/MP/2022) and on 08.10.2018 (Petition No. 362/MP/2022). We observe that a fresh GST was levied qua Notifications No. 12/2017, 13/2017, and AP GST Notification No. 16/2017 (GST Laws) levied from 01.07.2017, which is after the submission of a bid. Therefore, the Petitioners are entitled to compensation on account of a Change in Law in terms of Article 12 of the PPA due to the impugned GST Laws.

34. The next issue under consideration is *whether compensation towards operational charges on account of the implementation of GST be payable ?*

35. We observe that APTEL vide its judgement dated 27.04.2021 in A. No. 172 of 2017 and A.No.154 of 2018 (***Coastal Gujarat Judgement***) has held as under:

67. It is argued that the operation and maintenance of the plant is the responsibility of the appellant and if the appellant seeks to employ services of other agencies, the same cannot increase the liability of the Procurers; this was a commercial decision and choice of the appellant; and that if the appellant had not employed services of outside agencies, there would have been no impact of the alleged changes of tax rates.

68. We find no substance in the above submissions. The work contractors are engaged by the appellant within its discretion and there is no inhibition in PPA in such regard. In fact, it is pointed out by the appellant, and rightly so, that Article 7 of the Model PPA which was a part of the RFQ documents had envisaged that the generator (Seller) alone shall be liable to operate and maintain the power station at its own cost but, in the final PPA that was executed between the parties, the clause to such effect was removed, this clearly indicative of the common understanding of the parties that the generator (CGPL) would not be solely responsible for O&M, the definition of 'Project Documents' read with 'O&M contracts' contemplating that a third-party O&M contractor might be appointed by it (CGPL).

69. It is wrong to argue that because the appellant stands in the capacity of the Principal in relation to the work contractors engaged by it, it is responsible for the action (or inaction) on their part in such matters as have financial implication for the Procurers because the option exercised by the contractor is not a change in law but part of the commercial and business decision and has to be dealt inter se the former two. We reject this plea against claim under consideration here for the simple reason the doctrine of agency cannot be invoked in this context. It is not shown that in matters of State revenue, the choices made by the contractors could have been controlled by the appellant.

....

*90. The respondents defend the impugned decision arguing that the Commission has duly allowed the claim of change in law in respect of the levy of Swatch Bharat Cess and Krishi Kalyan Cess in respect of such services as are linked to the business of generation and sale of electricity, such relief being not admissible in respect of other services since under Articles 13.1.1 and Article 13.2(b) read with Clause 4.7 of the Guidelines any change in law impact is confined to change in revenues and costs from the business of selling electricity by the Seller to the Procurers. Reference is made to the judgment dated 19.04.2017 of this tribunal in Appeal No. 161 of 2015 in *Sasan Power Limited v. Central Electricity Regulatory Commission and Others*. The respondents submit that there may be various activities carried out by the appellant as a commercial decision but which are neither necessary nor concerned with the business of selling electricity. It is argued that the appellant had failed to demonstrate as to how the other services claimed have an impact on the cost of or revenue from the business of selling electricity by it to the Procurers. At the same time, it is stated that the services claimed by CGPL, except in relation to transportation of goods (coal), are not related*

to the business of selling electricity. The submission also is that there has to be some benefit to the procurers or necessity for such services. The respondents further aver that the operation and maintenance of the power plant is the responsibility of Appellant and the fact that the appellant chose to employ services of other agencies cannot increase the liability of the Procurers.

91. It is not disputed that the appellant (CGPL) is a project specific Special Purpose Vehicle (SPV) set up solely for the purpose of generating and supplying electricity exclusively to the Procurers in accordance with the PPA. It engages in no other business undertaking. All services availed by CGPL are undoubtedly used for its sole objective of generating electricity for supply to the Procurers under the PPA. The increased cost towards Krishi Kalyan Cess and Swachh Bharat Cess affects the cost of the business of the appellant for generation and sale of electricity. The twenty services left out by CERC also are connected to the commercial activities of the appellant adding to its cost of production and supply. In this view, there was no justification for disallowance of the claim for additional financial burden on other services covered under Swachh Bharat Cess and Krishi Kalyan Cess contrary to Article 13 of the PPA.

92. We agree with the submission that CERC erred to introduce an extraneous qualification or filter which is not borne out from the PPA. The qualifying factor under Article 13 of the PPA is whether or not a CIL event has an impact on the cost of, or revenue from, the business of generation and sale of electricity by the seller (CGPL). In this view, the test applied by CERC that taxable service should have a “direct relation to the input cost of generation” is extraneous to the provisions of the PPA and must be rejected. It is trite that explicit terms of a contract (PPA) bind and it is not open for the adjudicating forums to substitute their own view on the presumed understanding of the commercial terms by the parties [Nabha Power Limited v. PSPCL &Anr. (2018) 11 SCC 508]. Once it is established that levy of a tax on services availed by CGPL has an impact on the cost of or revenue from business of generation and sale of electricity - whether directly or indirectly - compensation must follow.

93. We are not impressed with the plea of the respondents that the qualifying requirement under Article 13 is that the Change in Law event must have an impact on the cost of, or revenue from, the activity of generation of electricity. This argument is based on selective reading of the text of the clause. The contract (PPA), by Article 13, refers to the “business of selling electricity”. The compensation envisaged here cannot be restricted to the activity of “generating electricity”. The expression “business” has a very wide connotation. It is defined as an activity carried on continuously and systematically by a person by the application of his labour or skill with a view to earning an income [see Mitra’s Legal & Commercial Dictionary (Sixth Edition)]. Entire gamut of activities connected to the generation, wheeling etc of electricity will have to be treated as covered by the expression “business of supply of electricity”.

36. APTEL vide its judgement *Parampujaya Judgement* dated 15.09.2022 reviewed its observations in the *Adani Power Ltd. case* and *GMR Warora case* and has held as under:

65. It is the argument of the contesting respondents that the claim for compensation under the PPAs at hand is contingent upon the decision in the first instance of the

Central Commission on the admissibility and once such claim has crystallized upon approval of the claim of change in law, compensation from the date of such approval only can be granted, there being no provision for carrying cost being claimed for the anterior period. Referring to the expression “provide relief”, as appearing in Article 12.2.2 of the PPAs, the respondents submit that the same cannot be interpreted to mean restitution of the kind claimed in the present appeals.

66. To put it simply, the controversy at hand requires to be addressed on the basis of interpretation to be put on the key words “provide relief” consequent to change in law appearing in Article 12.1.1. It may be noted at this very stage that the language employed in the PPAs at hand, using the above noted expression, is materially distinct from the one seen in corresponding Article 13 on change in law in Gujarat Bid-01 PPA which was subject matter of denial of carrying cost in the cases of Adani Power Ltd.(supra) and GMR Warora Ltd.(supra). Concededly, however, the words “the purpose of compensating the party affected by such change in law is to restore ... the affected party to the same economic position as if such change in law had not occurred”, as appearing in the Haryana PPA are missing here. **The question that arises is as to whether this renders the PPAs at hand one which do not at all contain the restitutionary provision. The answer to this question, in our considered view, depends on the construction that is to be placed on the words “provide relief”.**

...
...

69. This principle has been reiterated and consistently applied in subsequent decisions by the Supreme Court, illustratively in judgments reported as *Torrent Power Limited v. GERC &Ors.*, 2019 SCC OnLine APTEL 110; *Uttar Haryana Bijli Vitran Nigam Ltd. &Anr. v. Adani Power (Mundra) Ltd. &Anr.* 2022 SCC OnLine SC 1068; and *Vidarbha Industries Power Limited v. Axis Bank Limited* 2022 SCC OnLine SC 841. Pertinently, in *Vidarbha Industries (supra)*, the court held that **“the law must ensure that time value of money is preserved, and that delaying tactics in these negotiations will not extend the time set for negotiations at the start”.**

70. The appellants SPPDs rightly point out that principle of time value of money has been recognized as an inherent attribute of “financial debt” by the provision contained in Section 5(8) of the Insolvency Bankruptcy Code, 2016. **Further, it needs to be noted here that principle of restitution is now part of the regime on change in law reflecting public policy, as introduced by the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 providing as under:**

“3. Adjustment in tariff on change in law.

(1) On the occurrence of a change in law, the monthly tariff or charges shall be adjusted and be recovered in accordance with these rules to compensate the affected party so as to restore such affected party to the same economic position as if such change in law had not occurred.”

71. **Restitution is a principle of equity which is generally invoked by the adjudicatory authorities – Courts and Tribunals – to render substantial justice** and, in this context, we may quote the following observations of Supreme Court in judgment reported as *South Eastern Coalfields Ltd v. State of Madhya Pradesh &Ors.* (2003) 8 SCC 648:

....

72. As ruled in above mentioned case, absence of prohibition in law or contract against award of interest to recompense for delay in payment is also significant. As already quoted earlier, **in the case of Uttar Haryana Bijli Vitran Nigam Ltd(supra), the Supreme Court has upheld the view that in terms of restitutionary principle, the affected party is to be given the benefit of restitution “as understood in civil law”.**

73. The claim arising out of change in law provisions, across all kinds of PPAs under bidding route, is essentially a claim for compensation, the objective being to relieve the affected party of the impact of change in law on its revenues or cost or by way of additional expenditure. **The word “compensation” simply means anything given to make things equal in value, anything given as an equivalent, to make amends for loss or damage.**

...
75. The cardinal rule of interpretation is that words have to be read and understood in ordinary, natural and grammatical meaning. [S. Ganapathraj Surana v. State of T.N. 1993 Supp (2) SCC 565]. **The crucial words are “provide relief”.** The word relief is defined by Black’s Law Dictionary as under:

...
78. **The use of the word “relief” in the context of adjudicatory process, simply means the remedy which the adjudicatory forum may afford “in regard to some actual or apprehended wrong or injury”** or something which a party may claim as of right, or making the affected party “feel like easing out of ... hardship”. [Sarsuti v. Kunj Behari Lal, 1883 SCC OnLine All 85; Santhammav. Kerala State 2019 SCC OnLine Ker 1265; Commissioner of Income-Tax v. R.B. JodhamalKuthiala, 1963 SCC OnLinePunj 403; Dipti Aggarwal v. Ashish Chandra, 2017 SCC OnLine Cal 8835; Mewar Sugar Mills Ltd. v. Chairman Central Board of Direct Taxes and Ors. (09.10.1998 - DELHC)]. In Kavita Trehen v. Balsara Hygiene Products Ltd AIR (1995) SC 441, it was held by the Supreme court that jurisdiction to make restitution is inherent in every court and can be exercised whenever justice of the case demands.

...
81. It is in this light that Hon’ble Supreme Court in the case of Energy Watchdog (supra) ruled, albeit in the context of Section 63, that the Regulatory Commission must exercise its functions in accordance with law and guidelines and in situations where no such guidelines exist, it may avail of its “general regulatory powers” under Section 79(1)(b).

82. We have already noted that the PPAs which were subject matter of decisions in the case of Adani Power Ltd (supra) and GMR Warora Ltd (supra) contained change in law clauses structured differently from the shape in which they occur in the present PPAs, the words “provide relief” not having been used in the former. The judgment dated 13.04.2018 of this tribunal in Adani Power Ltd.(supra) did not even consider the question as to whether the principle of time value of money would apply in examining the impact of change in law once change in law had been approved. The said decision for present purpose is, thus, sub silentio. When the judgment in the said case was carried in appeal to the Hon’ble Supreme Court leading to decision reported as Uttar Haryana Bijli Vitran Nigam Ltd (UHBVNL) (supra), the challenge was not in relation to what had been denied by this tribunal as the first appellate forum and, therefore, it is not correct to say that the issue stands settled by the said judgment. We are, at the same time, conscious of the fact that while upholding the relief to the extent

granted in the case of Adani Power Ltd (supra), the Supreme Court by judgment reported as UHBVNL (supra) had observed that it would be fallacious to say that the claim of restitution was being put forward “on some general principle of equity”, the amount of carrying cost in that case being “relatable to Article 13 of the PPA” (the change in law clause).

83. In the present cases, the claim for compensation of SPPDs is primarily founded not on principles of equity but on the contractual clause stating that the affected party is entitled to approach the Commission which shall “provide relief” in relation to the impact of the change in law event if it has resulted in “any additional recurring /non-recurring expenditure”. The purpose of the change in law clause in the PPAs is to relieve the SPPDs of the additional burden. Since the impact of the new tax (GST or Safeguard Duty on Imports, as the case may be) would come from the date of enforcement of the new laws, the relief intended to be afforded under the contracts cannot be complete unless the said burden is allowed to be given a pass through from the date of imposition of the levy. Unlike the PPA in UHBVNL (supra) wherein the phraseology of change-in-law provision was exhaustive, the words “provide relief” in present PPAs are open ended, not qualified in any manner so as to be given a restrictive meaning in order to treat the date of adjudication of the claim by the regulatory authority as the effective date or to justify denial of carrying cost **of widest amplitude and cannot be read to limit its scope the way the contesting respondents seek to propagate or the way the Central Commission has determined.**

...
85. There is one more justification for the view we are taking in the matter and that stems from the provision contained in Section 70 of Indian Contract Act, 1872 which relates to the obligation of person enjoying benefit of a non- gratuitous act.

...
87. As pointed out by learned counsel for Mahoba, under the PPA there is an obligation on the part of SPPDs to ensure “continuance of supply of power throughout the term of Agreement”. It is inherent in this that SPD, in order to continue to supply, must reconfigure or repower the plant, if so required, by installing additional modules after the COD since the contractual clause does not create any distinction as to expenditure pre or post COD, for purposes of change-in-law compensation. The plea for relief concerning post COD cannot be rejected, the expenditure incurred being not meant to be gratuitous, the intent instead being to discharge contractual responsibilities. We may quote the following passage from judgment of Hon’ble Supreme Court in State of West Bengal v. BK Mondal, AIR 1962 SC 779, in the context of Section 70 of the Indian Contract Act, 1872:

.....
“94. For the foregoing reasons, we cannot approve of the view taken by the Central Commission on the subject of carrying cost. **We hold that the appellant SPPDs are entitled to grant of relief in the nature of carrying cost over and above the compensation already allowed by the Central Commission.**”

...
CLAIM OF COMPENSATION FOR PERIOD POST-COD

95. The appellant SPPDs had also claimed compensation (on account of change in law events) for the consequent additional expenditure incurred or invoices raised after the Commercial Operation Date (COD) of the SPPs. The Central Commission, by the

*impugned decisions, **has held that liability towards additional expenditure is to be borne by the respondent beneficiaries only till the date of corresponding COD of the project.***

...

97. It bears repetition to note that change-in-law clauses in the PPAs (Article 12) assure relief to be provided in relation to “any additional recurring/non-recurring expenditure” arising out change-in-law. There is no restriction in the contracts as to application of this clause for period prior to the COD. The activities of generation of electricity and its supply, post COD, are bound to include non-recurring expenditure, O&M expenses being one such area. In fact, the use of the word “any” in relation to the consequent “recurring or non-recurring expenditure” signifies the wide ambit of the contractual clause, no exclusion of such nature as understood by the Commission deserving to be read there into. **The extraneous qualification that such expenditure must relate to period prior to COD cannot be approved of.**

...

O&M EXPENSES

107. The above decision applies on all fours. **We adopt the view taken in case of Costal Gujarat Power Limited (supra) and disapprove the decision of the Central Commission on the subject as quoted above and hold that the appellant SPPDs are entitled to compensation for additional expenditure (recurring /non-recurring) towards O&M activities as well, notwithstanding the fact that they were outsourced.**

...

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.”**

...

37. From the *ratio-decidendi* as decided by APTEL in *Coastal Gujarat Judgment & A.No. 256 of 2019 & Batch* and *Parampujaya Judgement dated 15.09.2022*, it can be inferred that the contractors can be engaged by the generating company if there is no inhibition in the agreement in such regard and once it is established that levy of a tax on services has an impact on the cost of or revenue from business of generation and sale of electricity - whether directly or indirectly, compensation must follow. Hence, we are of the view that the

Petitioners are entitled to compensation for additional tax burden towards the operational cost (O&M charges, Water Charges and Land Lease Charges), if incurred on account of imposition of GST.

38. Accordingly, the Commission hereby directs the contracting parties to carry out the reconciliation to demonstrate the impact account of the imposition of GST by exhibiting clear and one-to-one correlation with the projects and the invoices raised supported with an auditor certificate. The Commission further directs that the responding discoms are liable to pay SECI all the above-reconciled claims that SECI has to pay to the Petitioners. However, payment to the Petitioners by SECI is not conditional upon the payment to be made by the responding Discoms to SECI.

39. We observe that 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."

40. In view of the above, the directions issued in this Order so far as they relate to compensation for the period post Commercial Operation Date of the projects in question as well as operational expenses (pre-COD & Post COD) of the projects in question shall not be enforced and shall be subject to further orders of the Hon'ble Supreme Court in Civil Appeal No. 8880/2022 in *Telangana Northern Power Distribution Company Ltd. & Anr. V. Parampujya Solar Energy Pvt. Ltd. & Ors*, and connected matters.

41. The issue is decided accordingly.

Re. Issue No. III:

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

42. SECI has submitted that the methodology for payment of compensation should allow the

discounting factor as 9.12% (which is the rate of interest for the loan component of the capital cost) and tenure of payment as 15 years as provided in the RE Tariff order dated 07.11.2022 providing for determination of tariff under Regulation 14 (2) (b) of the Renewable Tariff Regulations, 2020. *Per contra*, the Petitioners have submitted that the decision of the Commission in Petition No. 536/MP/2020 dated 20.08.2021 holds good as on date. So, the annuity decided by this Commission should be applicable in the present case.

43. This Commission, in its 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."

44. It is apparent that this Commission has taken a 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.*

45. We note that the Commission notified the *Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2017* (RE Tariff Regulations, 2017) were applicable for 3 financial years. In the RE Tariff Order dated 28.03.2018, read with the RE Tariff Regulations 2017, the Central Commission has considered the interest rate of 9.97% and the term of the Loan repayment as 13 years. It is noted that the impugned GST Laws were promulgated after the submission of the bid by the

Petitioners, viz. 04.05.2016. The Petitioners achieved actual commercial operation on 22.06.2018 (in Petition No. 310/MP/2022) and on 08.10.2018 (in Petition No. 362/MP/2022), i.e. during FY-2018-2019. In the RE tariff Order dated 28.03.2018, which was applicable for FY 2018-19, the Commission considered the interest rate of the loan @ 9.97% and the term of the loan repayment as 13 years. Therefore, applying the principle decided by this Commission in the Order dated 20.08.2021 in Petition No. 536/MP/2020, 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*, we hold that the discount rate of 9.97% and annuity period of 13 years shall be the appropriate methodology towards change in law compensation.

46. Further, the Commission holds that the liability of SECI/ Discoms for 'Monthly Annuity Payment' starts from the 60th (sixtieth) day from the date of orders in the respective petitions or from the date of submission of claims by the Petitioners, whichever is later. In case of delay in the Monthly Annuity Payment beyond the 60th (sixtieth) day from the date of orders in respective petitions or from the date of submission of claims by the Petitioners, whichever is later, a late payment surcharge shall be payable for the delayed period corresponding to each such delayed Monthly Annuity Payment(s), as per respective PPAs/PSAs.
47. The issue is decided accordingly.

Issue No. IV:

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

48. The Petitioners have submitted that they are entitled to carrying costs on account of the Change in Law event in terms of Article 12 of the PPA and as per the Parampujya judgement dated 15.09.2022. *Per contra*, SECI has submitted that the judgment of the APTEL dated 15.09.2022 has been assailed before the Supreme Court in Civil Appeal no. 8880/2022 in the case of "Telangana Northern Power Distribution Co. Ltd. & Anr. Vs. Parampujya Solar Energy Pvt. Ltd. & Ors." SECI has further submitted that the final order by this Commission in this matter shall not be enforced till further orders are passed by the Hon'ble Supreme Court.
49. APTEL, vide judgment dated 15.09.2022 in A.No. 256 of 2019 & Batch titled as *Parampujya*

Solar Energy Private Limited &Ors. vs. CERC & Ors. held as under:

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*109. The other captioned appeals – Appeal no. 256 of 2019 (Parampujya Solar Energy Pvt. Ltd &Anr. v. CERC &Ors.), Appeal no. 299 of 2019 (Parampujya Solar Energy Pvt. Ltd. v. CERC &Ors.), Appeal no. 427 of 2019 (Mahoba Solar (UP) Private Limited v. CERC &Ors.), Appeal no. 23 of 2022 (Prayatna Developers Pvt. Ltd. v. CERC &Ors.) Appeal no. 131 of 2022 (Wardha Solar (Maharashtra) Private Ltd. &Anr. v. CERC &Ors.) and Appeal no. 275 of 2022 (Parampujya Solar Energy Pvt. Ltd. &Anr. v. CERC &Ors.) - deserve to be allowed. **We order accordingly directing the Central Electricity Regulatory Commission to take up the claim cases of the Solar Power 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.**”*

50. In view of the above, this Commission holds that the Petitioners, in the instant petitions, shall be eligible for carrying costs starting from the date when the actual payments were made to the authorities until the date of issuance of this Order, at the actual rate of interest paid by Petitioners for arranging funds (supported by Auditor’s Certificate) or the rate of interest on working capital as per the applicable RE Tariff Regulations prevailing at that time or the late payment surcharge rate as per the PPA, whichever is the lowest. Once a supplementary bill is raised by Petitioners in terms of this order, the provision of Late Payment Surcharge in the PPA would kick in if the payment is not made by the Respondents within the due date.
51. The Commission further directs that the responding AP Discoms are liable to pay to SECI all the above-reconciled claims that SECI has to pay to the Petitioners. However, payment to the Petitioners by SECI is not conditional upon the payment to be made by the responding AP Discoms to SECI.
52. 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.”

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

54. The summary of our findings is as follows:

- a) Notifications No. 12/2017, 13/2017 and AP GST Notification No. 16/2017 (GST Laws) levied from 01.07.2017 are Change in Law events as per Article 12 of the PPAs.
- b) The Petitioners are entitled to compensation (pre-COD & post-COD) on account of a Change in Law as per the terms of Article 12 of the PPAs. The Petitioners are entitled to compensation for additional tax burden towards operational costs (O&M charges, Water Charges and Land Lease Charges), if incurred on account of imposition of GST.
- c) Compensation at the discount rate of 9.97% and annuity period of 13 years shall be the appropriate methodology towards change in law compensation. The liability of SECI/ Discoms for ‘Monthly Annuity Payment’ shall start from the 60th (sixtieth) day from the date of this order or from the date of submission of claims by the Petitioners, whichever is later. Late payment surcharge shall be payable for the delayed period corresponding to each such delayed Monthly Annuity Payment(s), as per respective PPAs/PSAs.
- d) The Petitioners shall also be eligible for carrying cost starting from the date when the actual payments were made to the Authorities till the date of issuance of this Order, at the actual rate of interest paid by the Petitioners for arranging funds (supported by Auditor’s Certificate) or the rate of interest on working capital as per applicable RE Tariff Regulations prevailing at that time or the late payment surcharge rate as per the PPA, whichever is the lowest. Once a supplementary bill is raised by the Petitioners in terms of this order, the provision of a Late Payment Surcharge in the PPA would kick in if the payment is not made by the Respondents within the due date.

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

55. The Petition No. 310/MP/2022 and the Petition No. 362/MP/2022 are disposed of in terms of the above.

Sd/-
पी. के. सिंह
सदस्य

Sd/-
अरुण गोयल
सदस्य

Sd/-
आई. एस. झा
सदस्य

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