



नई दिल्ली
NEW DELHI

याचिका संख्या./ Petition No. 204/MP/2023

कोरम/ Coram:

श्री जिष्णु बरुआ, अध्यक्ष/Shri Jishnu Barua, Chairperson
श्री रमेश बाबू वी., सदस्य/Shri Ramesh Babu V., Member
श्री हरीश दुदानी, सदस्य/Shri Harish Dudani, Member

आदेश दिनांक/ Date of Order: 3rd of January, 2025

IN THE MATTER OF:

Petition under Section 79 of the Electricity Act, 2003 for approval of 'Change in Law' on account of financial/ commercial impact of the 'Change in Law' event i.e., increase in the rate of Goods and Services Tax from 5% to 12 % by way of Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021 issued by Ministry of Finance, Government of India, in terms of Article 12 of the Power Purchase Agreement executed with Solar Energy Corporation of India Limited.

AND IN THE MATTER OF:

M/s. Morjar Windfarm Development Private Limited
402 & 404, Delphi, C Wing, Hiranandani Business Park,
Orchard Avenue, Powai, Mumbai – 400076.

...Petitioner

Versus

- M/s Solar Energy Corporation of India Limited,**
1st Floor, D-3, A-Wing, Religare Building,
District Centre, Saket, New Delhi-110 017

2. Government of Goa

Electricity Department, Vidyut Bhavan,
3rd Floor, Panaji, Goa.403001

**3. North Bihar Power Distribution Company Limited &
South Bihar Power Distribution Company Limited**

3rd Floor and 2nd Floor
Vidyut Bhawan, Bailey Road
Patna- 800001

4. BSES Rajdhani Power Limited (BRPL)

BSES Bhawan, Nehru Place
New Delhi- 110019

...Respondents

Parties Present:

Shri Ashish Singh, Advocate, MWDPL
Shri Arijit Maitra, Advocate, BRPL
Ms. Pallavi Maitra, Advocate, BRPL
Ms. Shikha Ohri, Advocate, SECI
Ms. Jaya, Advocate, BSES

आदेश/ ORDER

The Petitioner, M/s. Morjar Windfarm Development Private Limited (MWDPL) is a generating company that has set up its ISTS-connected wind power project in the State of Gujarat. Solar Energy Corporation of India (SECI) undertook a competitive bidding process for the procurement of 1200 MW wind power and invited proposals for setting up ISTS-connected Wind Power Projects of aggregate capacity of 1200 MW on a Build Own Operate (BOO) basis by way of Request for Selection No. SECI/C&P/WPD/1200MW/T6/RfS/122018 dated 31.12.2018. M/s. Srijan Energy Systems Private Limited (SESPL) (of which the Petitioner is a Project Company) participated in the bid process and placed its bid on 05.02.2019 (vide bid acknowledgement receipt dated 05.02.2019). The e-Reverse auction was conducted on 15.02.2019. The Letter of Award (LoA) was issued on 17.06.2019. Pursuant to the LoA, SECI executed a Power Purchase Agreement (PPA) on 29.10.2019 with the Petitioner and a back-to-back Power Sale Agreement with the buying utilities for the onward supply of power procured from the Wind Project (PSA). The Petitioner is seeking approval of a change in the rates of Goods & Services Tax (GST) from 5% to 12% qua Ministry of Finance Notification dated

30.09.2021 as a Change in Law event in terms of Article 12 of the Power Purchase Agreement (PPA) dated 29.10.2019 and sought compensation accordingly.

2. Respondent No. 1, Solar Energy Corporation of India Limited (SECI), has been set up under the administrative control of the Ministry of New and Renewable Energy (MNRE) to facilitate the implementation of various schemes of MNRE and the achievement of targets set therein. SECI is acting as an intermediary procurer and holds a power trading license in terms of Section 12 of the Electricity Act, 2003.
3. Respondent Nos 2, 3, and 4 are the buying utilities in Goa, Bihar, and Delhi and have executed PSAs with SECI.
4. The Petitioner has made the following prayers:
 - (a) *Admit the present petition;*
 - (b) *Hold and declare that issuance of Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021 qualifies as 'Change in Law' in terms of the Power Purchase Agreement executed between the Petitioner and Respondent No. 1;*
 - (c) *Direct Respondent No. 1 to compensate the Petitioner for the additional non-recurring capital cost incurred/ to be incurred by it to the tune of INR 42,49,66,160 on account of issuance of Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021 by way of adjustment in the quoted tariff along with the carrying cost from the date of actual payment of additional GST till the date of order of this Commission;*
 - (d) *Pursuant to grant of prayers above, approve the necessary consequential amendments to the PPA and LoA;*
 - (e) *Pass such order (s), further relief(s) in the facts and circumstances of the case as this Ld. Commission may deem just and equitable in favour of the Petitioner.*

Factual Matrix:

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

Location	Villages Amara, Charakhada, Dhamay, Gadani, Jatavira, Jinjay, Nadapa, Ratadiya, Umrapar, Valka Mota, and Valka Nana in Kutch District in the State of Gujarat.
Scheme	Setting up of 1200 MW ISTS-Connected Wind Power Projects (Tranche VI)

Nodal agency	SECI
Tariff	<i>Rs.2.82/kWh</i>
Capacity (MW)	150 MW (reduced to 148.50 MW)
Power	Wind
Date of Notification No.1/2017-Central Tax (Rate) (2017 GST Notification)	28.06.2017
RfS issued on	31.12.2018
Bid submitted by SESPL on	05.02.2019
E-Reverse auction held on	15.02.2019
LOA issued on	17.06.2019
Power Sale Agreement (PSA) executed on	With Government of GOA- 16.08.2019 With Bihar Discoms- 13.06.2019 With BRPL- 17.06.2019
Effective date of the PPA	15.09.2019
PPA executed on	29.10.2019
SCOD of the project as per PPA	15.03.2021
M/s GE India Industrial Private Limited (Supply Contract)	20.04.2021
Extended SCoDs	15.08.2021; 28.02.2022; 15.05.2022; 01.09.2022; 01.12.2022
Date of Notification of 8/2021- Central Tax (Rate) (2021 GST Notification)	30.09.2021
The Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 (2021 CIL Rules)	22.10.2021
COD of the project	<i>Capacity commissioned within SCoD</i> <i>67.50MW - 10.08.2022</i> <i>13.50MW - 08.09.2022</i> <i>Capacity commissioned beyond SCoD</i> <i>10.80MW - 10.12.2022</i> <i>24.30MW - 02.06.2023</i> <i>16.20MW - 03.06.2023</i> <i>13.50MW - 09.06.2023</i> <i>2.70MW - 17.06.2023</i>

The present petition was filed on 08.05.2023. The petition was listed for hearing on 20.09.2023, wherein the Commission, after hearing the submissions of parties, admitted the Petition. Further hearing was conducted on 08.12.2023, where the Commission permitted the parties to file their replies. On 20.03.2024, the Commission, upon the request of the Petitioner, granted time to file its Rejoinder. Pursuant to the directions of this Commission, the parties filed their respective submissions. During the hearing held on 17.09.2024, the parties made detailed submissions and concluded their respective arguments in the matter. Based on the request of the parties, the Commission permitted the parties to file the respective written submissions, if

any, within two weeks, and the matter was reserved for orders.

Analysis and Decision:

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

Issue No. I: Whether the introduction Notification No.8/2021- GST issued by the Ministry of Finance, Government of India amounts to Change in Law events under Article 12 of the Power Purchase Agreement dated 29.10.2019? AND Whether the Petitioner is entitled to compensation towards additional expenditure on account of the Change in Law event in terms of Article 12.2 of the PPA?

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

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

8. Before proceeding to the main issues, we feel it is imperative to mention here that Article 4.6.2 of the PPA dated 29.10.2019 stipulates as under:

4.6.1

...

*Delay beyond the Scheduled Commissioning Date upto (& including) the date as on **27 months from the Effective Date**; Buyer will encash total Performance Bank Guarantee on per day basis and proportionate to the balance Capacity not commissioned.*

...

4.6.2 The Maximum time period allowed for commissioning of the full Project Capacity with encashment of Performance Bank Guarantee shall be limited to 27 months from the Effective Date of this Agreement.

In the instant petition, the PPA (effective date being 15.09.2019) was executed on 29.10.2019, and the SCoD of the project was 15.03.2021. The SCoD was extended first up to 15.08.2021 (Covid-19); 28.02.2022 (change in land policy by Government of Gujarat); 15.05.2022 (2nd

surge of Covid-19); 01.09.2022 (delay in issuance of developer permission by GEDA); 01.12.2022 (disruption in supply chain post Covid). However, the project was commissioned on 17.06.2023. We note that vide letter No. SECI/Wind Tranche- 6/COD- VII/MWDPL-P1 dated 16.06.2023, SECI issued Commissioning Certificate and has certified that *With the present part commissioning of 2.7 MW, cumulative capacity commissioned stands at 148.5 MW (67.5 MW+ 13.5 MW+ 10.8 MW+ 24.3 MW+ 16.2 MW+13.5 MW+ 2.7 MW) against awarded capacity of 150 MW*. 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 or further agreed project capacity under PPA, which is valid.

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

Re: Issue No. I

Whether the introduction Notification No.8/2021- GST issued by the Ministry of Finance, Government of India amounts to Change in Law events under Article 12 of the Power Purchase Agreement dated 29.10.2019? AND Whether the Petitioner is entitled to compensation towards additional expenditure on account of the Change in Law event in terms of Article 12.2 of the PPA?

10. Briefly, the Petitioner has submitted that the introduction of Notification No.8/2021- GST (2021 GST Notification) issued by the Ministry of Finance, Government of India, may be declared as a Change in Law event under Article 12 of the Power Purchase Agreement, which has led to an increase in the expenditure for the project. Further, the GST Amendment dated 30.09.2021 has resulted in an increase in the total contract value of the supply contract executed between the Petitioner and its contractors wherein the GST payable on the supply of equipment for setting up the project has increased substantially, i.e., from 5% to 12%. The Petitioner could not have factored in the impact of the 2021 GST Notification in the quoted tariff at the time of bid submission, as it was notified after the bid submission date. As such, the tariff quoted by the Petitioner and captured in the PPA is no longer viable, and it is incumbent on this Commission to acknowledge the 2021 GST Notification as a 'Change in Law' and provide relief to the Petitioner. A steep increase of 7% in GST has increased the capital cost of the Petitioner significantly, making the tariff discovered through Reverse Auction unviable. The Petitioner has submitted that it has calculated the impact of the change in law as per *the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021* dated 22.10.2021

issued by the MoP as the PPA does not specify the formula for recovery impact due to change in law event. SECI is liable to compensate the Petitioner by way of an adjustment in tariff and/or upfront lump sum payment to the extent of additional capital expenditure that the Petitioner is compelled to incur as a result of the *2021 GST Notification*.

11. *Per Contra*, SECI submitted that if 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 GST of 12%, and the supply of services will attract GST of 18%. In the case of composite works contract, subject to the admissibility of Notification dated 30.09.2021 as Change in Law, any increase in the rate of GST which the Petitioner can claim as per Notification dated 30.09.2021 is only for the increase of GST from 5% to 12% on goods (which constitutes 70% of the gross consideration) there being no increase in tax on service part of 30% as per the said Notification. The extent to which relief is admissible to the Petitioner on account of Notification dated 30.09.2021 of GST (if any) is subject to examination and verification of documents by SECI (and the buying entities) to be submitted by the Petitioner.

12. Further, BRPL submitted that the Original SCoD of the project was 15.03.2021. However, SECI unilaterally revised SCoD to 01.12.2022. This is an unhealthy practice whereby the ultimate beneficiary, i.e., the DISCOM, is denied an opportunity to provide its consent to an extension of the commissioning of a power project, thereby depriving the DISCOM of the power generated at a competitively bid rate. The unilateral extension of commissioning of the power project undertaken bilaterally between SECI and the Petitioner has resulted in an inequitable and harsh situation where the answering Respondent DISCOM has been forced to purchase power at expensive rates owing to the supply deficit because the Petitioner's project did not come up in time as originally envisaged. Such an action on the part of SECI, along with the Petitioner, has disturbed the very foundation of the contract and the competitive bidding whereby the Petitioner was selected. Change in GST rate does not qualify as per the definition of change in Law because there is no statutory change in tax structure or introduction of new tax made applicable for setting up of wind project and supply of power from the project by the WPD. The impact on BRPL due to the delay in commissioning is 217 MUs, which has resulted in a shortfall in RPO and higher power purchase costs.

Rejoinder filed by the Petitioner against SECI's reply:

13. The Petitioner has filed its Rejoinder on 21.03.2024 against SECI's reply dated 16.01.2024 wherein it has reiterated the submissions made in the plaint. Additionally, the Petitioner has submitted as under:
- a) A bare perusal of the contract dated 20.04.2021 executed between the Petitioner and *GE India Industrial Private Limited (Supply Contract)* makes it abundantly clear that it is a contract only for the supply of equipment.
 - b) Article 2 of the Supply Contract (Scope of Services) provides that ***“the Seller shall manufacture or procure and supply the Equipment described in Attachment 1, in accordance with the Project Schedule set forth in Section 3 of Appendix B, and subject to the terms and conditions set forth in this Contract.”***
 - c) Attachment 1 (Scope of Seller) provides that the *“Equipment is a WTG model 2.7- 132, 50 Hz including 130m towers each”*. Annexure 14 of the Supply Contract (Contract Price Break-Up) makes it clear the consideration under the Supply Contract is only for goods.
 - d) Further, the amended Payment Schedule in Change Order 2 to the Supply Contract evidences that the payments are to be made on the achievement of milestones.
 - e) There is no doubt that the Supply Contract is for the Supply of Goods only. Hence, the impact of the change in the rate of GST from 5% to 12% pursuant to Notification No. 8/2021 is on the equipment supplied under the Supply Contract after notification No. 8/2021 dated 30.09.2021 issued by the Ministry of Finance.

Rejoinder filed by the Petitioner against BRPL's reply:

14. The Petitioner has filed its Rejoinder on 21.03.2024 against BRPL's reply dated 07.11.2023 reiterating the submissions of the plaint. Additionally, the Petitioner has submitted as under:
- a) The Petitioner has a valid and subsisting PPA with SECI and the extension in SCoD was granted by SECI on valid grounds and on directions of the Ministry of New and Renewable Energy (MNRE).
 - b) BRPL, till date, has neither challenged the extension in SCoD granted nor the notification issued by the MNRE. The Petitioner reserves its right to respond to and deal with BRPL's contentions in appropriate proceedings.
 - c) In Reply to this Petition, SECI has set out in detail the extensions in SCoD granted to the Petitioner's Project.

- d) The extensions in SCoD were granted for circumstances that impacted the Project and were beyond the control and contemplation of the Petitioner, viz: Impact of Covid, Delay in issuance of Developer Permission by Gujarat Energy Development Agency, Frequent changes in land policy by the Government of Gujarat.
- e) In terms of Article 4.5 of the PPA, the SCoD of the Project can be extended on account of any Force Majeure event affecting the WPD. As is clear from the above, the SCoD of the Project had to be extended for reasons beyond the Petitioner's control. Hence, the Petitioner cannot be faulted for the extensions in SCoD granted by SECI and MNRE.
- f) The revised SCoD of the Project was 01.12.2022, and the Petitioner was accorded 9 months from the SCoD to commission the entire Project, i.e., by 01.09.2023. As is evident from the commissioning dates set out by SECI in its Reply, the Petitioner has commissioned its entire Project by 16.06.2023 (pertinently, the commissioning dates provided by BRPL in its Reply for Phase 5, 6, and 7 are incorrect). Till date, BRPL has not challenged the extensions in SCoD granted by SECI and MNRE. Further, the Petitioner has also incurred Liquidated Damages for the delay in commissioning of its Project.
- g) Hence, BRPL's contentions in this regard are meritless and an attempt to evade its contractual obligation to compensate the Petitioner for its change in law claim.
- h) Out of the total project capacity of 148.5 MW, the Petitioner had commissioned 81 MW prior to 01.12.2022. The remaining capacity of 67.5 MW would also have been commissioned much prior to the present COD (i.e.16.06.2023) of the project. However, the same has been delayed mainly due to the introduction of new conditions, including the procedure for First Time Charging (FTC), which was made mandatory for compliance. The delay in commissioning of the 67.5 MW capacity was mainly due to the Petitioner having to follow the procedures to comply with FTC – pertinently, FTC was made mandatory only after the Report issued by the Working Group in respect of Data Submission Procedure and Verification of Compliance to CEA Regulation on Technical Standard for Connectivity to the Grid by Renewable Energy Generators ("Report of Working Group") was made effective on 22.10.2022.
- i) Pertinently, as soon as conditional FTC was granted to the Petitioner around May/ June 2023, the remaining capacity of the Project was also commissioned on 16.06.2023.

- j) Hence, the delay in commissioning of the Project is not attributable to the Petitioner.
- k) Hence, BRPL's contentions are wholly untenable and have no relevance to the dispute at hand. Once it is clear that Notification No. 8/2021 dated 30.09.2021 meets the test of Article 12 of the PPA and qualifies as a change in law event impacting the Petitioner, compensation must necessarily follow.

15. Before going to the main issue, we feel it is pertinent to deal with the preliminary issue raised by the Respondent BRPL. BRPL has submitted that SECI unilaterally revised SCoD from 15.03.2021 to 01.12.2022 due to which BRPL has been forced to purchase power at expensive rates. Such an action on the part of SECI, along with the Petitioner, has disturbed the very foundation of the contract and the competitive bidding whereby the Petitioner was selected.

16. We observe that SECI has placed on record the following letters written to BRPL regarding the extension of SCoD:

- a. Letter no. SECI/PT/BRPL/SCD-Extn./2020/38942 dated 11.09.2020:

"In this regard, it is further informed that, the Scheduled Commissioning Date (SCD) for the Wind Power Project awarded to M/s Morjar Windfarm Developers Private limited under ISTS Wind Tranche VI Scheme, has been extended due to lockdown being considered as Force Majeure event:

The revised SCD of the following project is as follows:

<i>Sl. No.</i>	<i>Name of the Project Developer with Project ID</i>	<i>Original SCD</i>	<i>Revised SCD</i>
<i>1</i>	<i>M/s Morjar Windfarm Developers Private limited (WPD-ISTS-T6-SESPL-P1-150GJ)</i>	<i>15.03.2021</i>	<i>15.08.2021</i>

- b. Letter no. SECI/PT/BRPL/SCD-Extn./2020/43932 dated 09.08.2021:

"With reference to the above, it is hereby conveyed that the Scheduled Commissioning Date (SCD) for above Wind Power Project mapped to supply 50MW Wind Power to BRPL under Wind Tranche VI Scheme has been revised as 15.05.2022.

- c. Letter no. SECI/PT/BRPL/SCD-Extn./2020/46393 dated 13.12.2021:

"With reference to the above, it is to inform that the Scheduled Commissioning Date (SCD) for the following wind power project under ISTS Wind Tranche VI scheme has been further extended on account of delay in issuance of necessary Developer Permission (DP) by Gujarat Energy Development Agency (GEDA), GoG/ frequent change in land policy by GoG.

<i>Sl. No.</i>	<i>Name of the WPD</i>	<i>Original SCD</i>	<i>Last Revised SCD</i>	<i>Current Revised SCD</i>
1	<i>M/s Morjar Windfarm Developers Private limited</i>	<i>15.03.2021</i>	<i>15.05.2022</i>	<i>01.09.2022</i>

d. Letter no. SECI/PT/BRPL/SCD-Extn./2020/51376 dated 21.09.2022:

“With reference to subject cited above, the intimation regarding time extension granted to WPD from SECI is hereby enclosed for your kind information.

Letter no. SECI/PT/BRPL/SCD-Extn./2020/51366

Date 19.09.2022:

*To,
Sh. Soumya Ranjan Panda,
M/s Morjar Windfarm Developers Private limited (MWDPL)*

*....
....*

Sub: Intimation regarding time extension in Scheduled Commissioning Date (SCD) for 150MW Wind Power Project (under Wind Tranche VI) being executed by M/s Sirjan Energy Systems Private Limited through SPV named M/s Morjar Windfarm Developers Private ltd. considering disruption due to the post-COVIS supply chain and monsoon related disruptions-reg.

....

“In compliance to MNRE OM No. 117/32/2019-Wind-Part(I) dated 17.03.2022 and subsequent correspondence referred above, it is hereby conveyed that Scheduled Commissioning Date (SCD) for the Project stated in subject matter has been revised as under:

<i>Original SCD as per PPA</i>	<i>Current Revised SCD as per SECI letter dated 13.09.2021</i>	<i>Revised SCD as per MNRE OM dated 17.09.2022</i>
<i>15.03.2021</i>	<i>01.09.2022</i>	<i>01.12.2022</i>

Further, M/s MWDPL has additional nine (09) Months from the revised SCD, i.e., 01.12.2022, to commission the Project with applicable LD as per provisions of PPA.”

17. From the above, we observe that SECI has already timely informed BRPL about the extension of time in SCoD under different circumstances. We observe that the present petition is limited to seeking a declaration of change in law and consequential reliefs. In view of the above we are of the opinion the objections raised by BRPL are beyond the scope of the instant petition. BRPL may approach the proper forum if so advised in accordance with law.

18. Now, coming to the main issue, 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 date, which is the last date of bid submission, resulting into any additional recurring/ nonrecurring expenditure by the WPD or any income to the WPD:

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

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

12.2 Relief for Change in Law

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

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

19. We observe that the extract of the 2021 GST Notification is as under:

(b) in Schedule II – 12%, -

...

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

201	84,	Following renewable energy devices & parts for their manufacture:
A	85 or	-
	94	(a) Bio-gas plant
		(b) Solar power-based devices
		(c) Solar power generating system

		<p>(d) Wind mills, Wind Operated Electricity Generator (WOGG)</p> <p>(e) Waste to energy plants / devices</p> <p>(f) Solar lantern / solar lamp</p> <p>(g) Ocean waves/tidal waves energy devices/plants</p> <p>(h) Photo voltaic cells, whether or not assembled in modules or made up into panels.</p> <p><i>Explanation: - If the goods specified in this entry are supplied, by a supplier, along with supplies of other goods and services, one of which being a taxable service specified in the entry at S. No. 38 of the Table mentioned in the notification No. 11/2017-Central Tax (Rate), dated 28th June, 2017 [G.S.R. 690(E)], the value of supply of goods for the purposes of this entry shall be deemed as seventy per cent. of the gross consideration charged for all such supplies, and the remaining thirty per cent. of the gross consideration charged shall be deemed as value of the said taxable service.”</i></p>
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20. Before examining the question as to whether the 2021 GST Notification amounts to a Change in law event, it is pertinent to mention that the Petitioner has submitted that the contract executed between the Petitioner and *M/s. GE India Industrial Private Limited* is only for the sale of equipment, and it is not a **composite contract**. The relevant provision of the contract dated 20.04.2021 is stipulated as under:

CONTRACT FOR THE SALE OF EQUIPMENT

THIS Contract for Sale of Equipment (“CONTRACT”) is entered into at New Delhi into as of 20 April 2021

.....

Article 2. Scope of Supply

The Seller shall manufacture or procure and supply the Equipment described in Attachment 1, in accordance with the Project Schedule set forth in Section 3 of Appendix B, and subject to the terms and conditions as set forth in this Contract.

Article 3. Price and Payment

In consideration for the supply of the Equipment, the Buyer will pay to the Seller the Contract Price as specified in Attachment 3

....

Attachment 1

Scope of the Seller

General Description

The Equipment is wind turbine generator model 2.7-132, 50 Hz including 130 m towers, each (as more fully defined in the Technical Specification which is a part of the Technical Contract) a Unit

....

21. We note in the instant case the contract was only for the sale of equipment. As such, the *2021 GST Notification* is only applicable, and thereby, Notification No. 27/2018 and Notification No. 24/2018 shall not be applicable.
22. Further, BRPL has submitted that the PPA stipulates that change in law includes “*any statutory change in tax structure*” or “introduction of any new tax,” whereas notification dated 30.09.2021 neither amounts to “any statutory change in tax structure” nor “introduction of any new tax.” We observe that Article 12 of the PPA, ‘Change in Law,’ means the enactment/coming into effect/ adoption/ promulgation/ amendment/ modification or repeal of any Law in India; change in the interpretation of any law in India; imposition of a requirement for obtaining any consents or change in tax or introduction of any tax made applicable for supply of power by the WPD as per the terms of this Agreement, resulting into any additional recurring/ non-recurring expenditure or any income to the WPD. The last indent in the seriatim stipulates explicitly that any statutory change in tax structure or introduction of any new tax made applicable for setting up of Wind Power Project and supply of power from the Project by the WPD has a direct effect on the Project *shall be treated as per the terms of this Agreement*. We observe that the *2021 GST Notification* has been issued by the Ministry of Finance, Government of India, which is covered under the definition of ‘*Indian Governmental Instrumentality*’ in Article 1.1 of the PPA. The bid was submitted on 05.02.2019, and the Notification No. 8/2021 was issued on 30.09.2021, i.e., almost 2 years after the bid submission date. The change in rate of Goods and Services Tax from 5% to 12% w.e.f. 01.10.2021 has resulted in a change in the cost of the inputs required for generation, and the same is considered a ‘Change in Law.’ Hence, we hold that the impugned *2021 GST notification* viz. Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021 is a Change in Law event as per Article 12 of the PPA dated 29.01.2019. It is pertinent to mention here that the view taken herein is consistent with similar orders issued by the Commission, viz. *order dated 19.05.2024 in Petition No. 138/MP/2023; order dated 14.03.2024 in Petition No. 65/MP/2023; order dated 16.01.2024 in Petition No. 308/MP/2022 order dated 05.04.2023 in Petition No. 268/MP/2021; order dated 05.04.2023 in Petition No. 216/MP/2022 and order dated 21.04.2023 in Petition No. 219/MP/2022; order dated 17.05.2023 in Petition No. 174/MP/2022; order dated 20.07.2023 in Petition No. 273/MP/2021.*

23. In the instant petition, the bid was submitted by the Petitioner on 05.02.2019. The PPA was executed between the Petitioner and the SECI on 29.10.2019, and the SCoD of the project was 15.03.2021. In terms of the extended SCoD, the project was required to be commissioned on or before 01.12.2022. The project was commissioned on 16.06.2023. We observe that the GST rates were amended vide *2021 GST Notification*. As such, we find that the Petitioner's project was affected by the impugned *2021 GST Notification*. Therefore, the Petitioner is entitled to compensation on account of a Change in Law as per the terms of Article 12 of the PPA due to the impugned *2021 GST Notification*, viz. Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021 w.e.f. 01.10.2021.
24. Accordingly, the Commission directs the contracting parties to carry out reconciliation of additional expenditure as per Article 12 of the PPA by exhibiting clear and one-to-one correlation with the projects and the invoices raised supported with auditor certificate corresponding to the mutually agreed or further agreed project capacity under PPA, which is valid, between the Petitioner and SECI on account of *2021 GST Notification* in terms of PPA dated 29.10.2019.
25. The issue is decided accordingly.

Re: Issue No.II

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

26. The Petitioner submitted that the cut-off date for payment of change in law compensation shall be CoD of the Project. Since the PPA does not provide any methodology for computing the impact of change in law, the Petitioner has calculated the impact of change in law as per the Electricity (*Timely Recovery of Costs due to Change in Law*) Rules, 2021. The Petitioner has taken an annuity period of 15 Years as per the aforesaid rule. The annual rate of interest on the loan component (in %) shall need to be 9.12%.
27. *Per-contra*, SECI has submitted that the decision dated 20.08.2021 of this Commission approving the discounting factor at 10.41% was based on the interest rate specified in the Renewable Tariff Regulations, 2017 read with RE Tariff Order dated 19.03.2019 notified by this Commission at the relevant time when the said annuity methodology was considered by the MNRE and implemented by SECI. There has been a fall in the interest rate of loans, and

the Commission has notified the *Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020* (Renewable Tariff Regulations 2020) and passed the RE Tariff Order dated 07.11.2022 in Petition No.14/SM/2022 for the FY 2022-2023. The Hon'ble Commission vide Order dated 27.03.2023 in 3/SM/2023, inter-alia, stated that '*Therefore, Order dated 07.11.2022 in Petition No. 14/SM/2022 shall also continue to be in force until further Orders.*'. In the above regulations read with RE tariff Orders, 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 payments on an annuity basis may be considered by the Commission. SECI submitted that the Respondents may be directed to make a payment towards the evaluated change in law claims payable by SECI to Petitioner on a back-to-back basis under the respective PSAs in a time-bound manner.

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

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

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

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

Tenure of 'Annuity Period'

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

"14. Loan and Finance Charges

Loan Tenure

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

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

29. 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.

30. We note that the *Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020* (RE Tariff Regulations, 2020) which were applicable for the period 01.07.2020 to 31.03.2023 were extended up to 30.06.2024 vide Notification No. RA-14026(11)/4/2020-CERC dated 28.03.2024.
31. 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.
32. We note that the Petitioner's project was commissioned in parts i.e. 67.50 MW on 10.08.2022; 13.50 MW on 08.09.2022, 10.80 MW on 10.12.2022; 24.3 MW on 02.06.2023 which is during FY 2022-23 and 16.2 MW on 03.06.2023; 13.5 MW on 09.06.2023; 2.7 MW on 17.06.2023 which is during FY 2023-24. The Commission notified the RE Tariff Order dated 31.03.2021 for FY 2021-22 and the RE Tariff Order dated 07.11.2022 for FY-2022-2023. The Commission vide order dated 27.03.2023 stated that the Order dated 07.11.2022 in Petition No. 14/SM/2022 shall continue to be in force until further orders. In the RE tariff Order dated 07.11.2022 issued in pursuance of the *CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020*, the Commission considered the interest rate of 9.12% and the term of the loan repayment as 15 years. In view of the above, since the interest rate (9.12%) has remained constant for FY 2022-2023 & 2023-2024 (covering the period of commissioning of the project) and the compensation has to be commensurate with the prevailing normative cost of debt, we hold that for Change in Law events of *Notification No.8/2021- GST dated 30.09.2021 issued by the Ministry of Finance, Government of India*, the discount rate of 9.12%

and *annuity payment of 15 years* as the appropriate methodology towards change in law compensation.

33. 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.
34. The issue is decided accordingly.

Re: Issue No. III

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

35. The Petitioner has submitted that in addition to the compensation for the increase in the capital cost, it is entitled to Carrying Cost. Further, the Petitioner has submitted that it has already incurred additional costs on account of the increase in GST, and accordingly, it is also entitled to the carrying cost from the date of actual payment of additional GST till the approval of ‘Change in Law’ by this Commission to put the Petitioner in the same economic position as if ‘Change in Law’ had not occurred. The provision for change in law is incorporated in long-term contracts as a risk allocation measure to protect parties from the adverse impact of any changes in law that may occur after the cut-off date. Therefore, irrespective of how the change in law provision is worded, it essentially seeks to restore the affected party to the same position as if the change in law had not occurred. The Petitioner has placed its reliance on APTEL judgement dated 15.09.2022 in A. No. 256 of 2019 titled *Parampujaya Solar Energy Limited v. CERC & Ors (Parampujaya judgement)*. The judgment emphasizes that intrinsic to such restoration is compensation for the time value of money, i.e., carrying cost. The burden of carrying cost flows direction from the change in law event, and hence, relief for change in law must include compensation for carrying cost. Further, the *Parampujaya Judgment* is pending before the Hon’ble Supreme Court in Civil Appeal No. 8880 of 2022 and in Civil Appeal No. 505-510 of 2023. However, the *Parampujaya Judgment* is neither stayed nor set aside. Since *the Parampujaya Judgment has not been set aside, this Commission is duty-bound to follow the principles laid down in the said judgment, subject to the outcome of the Civil Appeals pending before the Hon’ble Supreme Court.* Further, in terms of Section 70 of the Indian Contract Act,

1872, when a person under a contract lawfully does anything for another person or delivers anything to another person without an intention to do a gratuitous act, then such other person who enjoys the benefit thereof is bound to compensate the former for the work carried out or goods delivered and to restore the party to its original position. The aforesaid provision is strictly applicable in the present case as the obligation carried out by the Petitioner is bound by the contractual terms of the PPA and the same cannot be termed as a gratuitous act.

36. *Per Contra*, SECI has submitted that PPA in the present case does not have any provision dealing with restitutionary principles of restoration to the same economic position. Therefore, the Petitioner is not entitled to claim relief of carrying cost. The provisions of the PPA are clear and binding and are the final expression of the intent and objective sought to be achieved by the parties. In terms of the PPA between SPD and SECI, there is no provision for payment of carrying cost for the period from the date the Change in Law events came into force till the date of approval of the Change in Law events by the Central Commission. Moreover, the liability for payment of compensation for Change in Law events gets crystallised only after approval by the Commission. The relief admissible to Petitioner, if any, has to be considered within the confines of the PPA and is not permissible to fashion any relief contrary to the terms of the PPA. 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 until further orders are passed by the Hon’ble Supreme Court. BRPL has submitted that if the WPD has commissioned the project as per the original schedule, no cost impact would be there on Buying Utility. The delay in commissioning is due to WPD delay and, hence, carrying costs should not be allowed.

37. We note that APTEL, vide Parampujya judgement dated 15.09.2022, 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.”

38. In view of the above, this Commission holds that the Petitioner, in the instant petition, shall be eligible for carrying costs starting from the date when the actual payments were made to the authorities until the date of issuance of this Order, at the actual rate of interest paid by Petitioner for arranging funds (supported by Auditor’s Certificate) or the rate of interest on working capital as per the applicable RE Tariff Regulations prevailing at that time or the late payment surcharge rate as per the PPA, whichever is the lowest. Once a supplementary bill is raised by the Petitioner in terms of this order, the provision of a Late Payment Surcharge in the PPA would kick in if the payment is not made by the Respondents within the due date.
39. Accordingly, the Commission hereby directs the contracting parties to carry out the reconciliation of additional expenditure along with carrying cost by exhibiting clear and one-to-one correlation with the projects and the invoices raised supported with an auditor certificate. The Commission further directs that the responding Discoms are liable to pay SECI all the above-reconciled claims that SECI has to pay to the Petitioner. However, payment to the Petitioner by SECI is not conditional upon the payment to be made by the responding Discoms to SECI.
40. 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.”

41. Therefore, 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 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 Limited & Anr. V. Parampujya Solar Energy Pvt. Limited & Ors, and connected matters.*

42. The issue is decided accordingly.

43. The summary of our findings is as follows:

- a) The *Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021 by the Ministry of Finance, Government of India*, is a Change in Law event in terms of Article 12 of the PPA dated 29.01.2019.
- b) The Petitioner is entitled to compensation on account of a Change in Law corresponding to the mutually agreed project capacity under PPA, which is valid, as per the terms of Article 12 of the PPA due to the *Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021*. The contracting parties are to carry out reconciliation corresponding to the mutually agreed project capacity under PPA, which is valid between the Petitioner and SECI on account 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 *Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021*.
- c) Compensation is to be paid at the discount rate of 9.12% and an annuity period of 15 years. The liability of SECI/Discoms for 'Monthly Annuity Payment' 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.
- d) The Petitioner shall also be eligible for carrying cost starting from the date when the actual payments were made to the Authorities till the date of issuance of this Order, at the actual rate of interest paid by the Petitioner for arranging funds (supported by Auditor's Certificate) or the rate of interest on working capital as per applicable RE Tariff Regulations prevailing at that time or the late payment surcharge rate as per the PPA, whichever is the lowest. Once a supplementary bill is raised by the Petitioner in

terms of this order, the provision of a Late Payment Surcharge in the PPA if the payment is not made by the Respondents within the due date.

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

44. The Petition No. 204/MP/2023 is disposed of in terms of the above.

Sd/
हरीश दुदानी
सदस्य

Sd/
रमेश बाबू वी.
सदस्य

Sd/
जिष्णु बरुआ
अध्यक्ष