



नई दिल्ली
NEW DELHI

याचिका संख्या/ Petition No.: 268/MP/2021

कोरम/ Coram:

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: 05th of April, 2023

IN THE MATTER OF:

Petition under Sections 79(1)(b) and 79(1)(f) of the Electricity Act, 2003 read with Article 12 of the long-term Power Purchase Agreement dated 17.10.2019 entered into between M/s Powerica Limited and Solar Energy Corporation of India Limited for approval of Change in Law events and consequential compensation.

AND

IN THE MATTER OF:

M/s Powerica Limited,
9th Floor, Bakhtawar,
Nariman Point,
Mumbai – 400 021

...Petitioner

VERSUS

1. **Solar Energy Corporation of India Limited,**
1st Floor, A-Wing,
D-3, District Centre,
Saket, New Delhi-110 017
2. **Uttar Pradesh Power Corporation Limited,**
Shakti Bhawan, 14 Ashok Marg,
Lucknow, Uttar Pradesh – 226 001

...Respondents

Parties Present:

Ms. Divya Chaturvedi, Advocate, Powerica
Shri Saransh Shaw, Advocate, Powerica
Ms. Anju Thomas, Advocate, Powerica
Shri Parveen Arora, Advocate, Powerica
Ms. Suruchi Kotoky, Advocate, Powerica
Shri M. G. Ramachandran, Sr. Advocate, SECI
Ms. Tanya Sareen, Advocate, SECI
Shri Shubham Mishra, SECI
Ms. Neha Singh, SECI
Ms. Aditee Nitnavare, SECI

आदेश/ ORDER

The Petitioner, M/s Powerica Limited is a generating company which is setting up its 50.6 MW Wind Power Project located at Villages: Kalavad Simani, Chudeshwar, Samor, Kota Visotri, Charbara, Vadatra, Goinj, Hansthal, Zakasiya, Tehsil: Jam-Khambhaliya, District: Devbhoomi Dwarka, in the State of Gujarat and has entered into the Power Purchase Agreement (PPA) with Solar Energy Corporation of India on 17.10.2019. The Petitioner has filed the petition for approval of Change in Law events and consequential compensation.

2. The Respondent No.1, Solar Energy Corporation of India (SECI) is a Government of India Enterprise under the administrative control of the Ministry of New & Renewable Energy

(MNRE). SECI is the nodal agency of MNRE for implementation of renewable energy schemes including for setting up of wind power projects in the country.

3. The Respondent No. 2, Uttar Pradesh Power Corporation Limited (UPPCL) is a distribution Licensee and has executed a back-to-back Power Sale Agreement (PSA) with SECI on 18.06.2019 for purchase of power from SECI as an intermediary procurer.

4. The Petitioner has made the following prayers:

a) *Admit the present Petition;*

b) *Hold and declare that the change in rate of Goods and Service Tax applicable to Supply Contracts for setting up of Petitioner's wind power project notified by the Ministry of Finance, Department of Revenue vide its Notifications No.8/2021 dated 30.09.2021 amounts to a Change in Law event under Article 12 of the Power Purchase Agreement dated 17.10.2019;*

c) *Hold and declare that the Petitioner is entitled to a sum of INR 11,86,38,449 (INR Eleven Crore Eighty Six Lakh Thirty Eight Thousand Four Hundred and Forty Nine) along with carrying cost on account of the impact of such Change in Law event on the Petitioner's Wind Power Project;*

d) *Direct the Respondent No.1, Solar Energy Corporation of India Limited to make payment of the sum of INR 11,86,38,449 (INR Eleven Crore Eighty Six Lakh Thirty Eight Thousand Four Hundred and Forty Nine) (or such amount as may be payable pursuant to the commissioning of the Project of the Petitioner) along with carrying cost towards compensation for such Change in Law event to the Petitioner;*

In the alternate,

e) *direct the Respondent No.1, Solar Energy Corporation of India Limited to allow an increase of 9.31 paise/kWh (or such amount as may be payable pursuant to the commissioning of the Project of the Petitioner due to the aforesaid Change in Law event) in the quoted tariff payable by the Respondent to the Petitioner for a period of initial 180 months and suitably amend the Power Purchase Agreement dated 17.10.2019 to reflect the aforesaid revision in quoted tariff; and*

f) *Pass such other order(s) which the Hon'ble Commission deems fit in the facts and circumstances of the instant case.*

Brief facts of the Petition:

5. On 08.12.2017 the Ministry of Power issued *Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Wind Power Projects*. On 31.12.2018 Request for Selection was issued by SECI for selection of wind power developers (WPDs) for development of 50.6 MW wind power plant (WPP). On 21.12.2018, the Petitioner emerged as a successful bidder under the request for selection (ISTS Tranche-VI Solar Scheme). On 17.06.2019, SECI accordingly issued a letter of award to the Petitioner for development of the 50.6 MW WPP in terms of the RfS. The Petitioner, executed the PPA dated 17.10.2019 (effective date being 15.09.2019) with SECI for the supply of 50.6 MW power generated from the WPP of the Petitioner. The Petitioner is required to commission the Project within 18 (eighteen) months from the effective date of the PPA, i.e. before 15.03.2021. The tariff payable by SECI to the Petitioner for the supply of power from the Project is INR 2.82/kWh for the entire term of the PPA. On 15.09.2021, SECI through its letter extended the scheduled date for achievement of conditions subsequent and financial closure of the Project under the PPA upto 05.10.2021 and Scheduled Commissioning Date of the Project under the PPA upto 05.09.2022, considering the land allotment issues faced by various bid winners in Gujarat due to change in land policy by the Government of Gujarat. The Petitioner informed the SECI that it is planning to commission the first phase of its Project by 31.01.2022 and the second phase by 31.03.2022.
6. On 24.09.2019, the Petitioner has entered into the Supply Agreement with its Supplier i.e. GE India Industrial Private Limited. Subsequently, the Petitioner has entered into amendments to the Supply Agreement dated 28.02.2020, 17.03.2021 and 26.10.2021. In terms of the Supply Agreements read with the Amended Supply Agreements, the Supplier has agreed to supply a total of 19 (nineteen) WTGs of 2.7 MW each with varying dimensions to the Petitioner. In terms of Article 7.2 of the Supply Agreement, the Petitioner shall be liable to pay for any increase in

taxes and/ or duties relating to the performance of the Supplier's obligations under this Agreement.

7. On 30.09.2021 the Ministry of Finance, Department of Revenue, vide its Notifications No.8/2021, notified the revision of the Goods and Services Tax applicable on renewable energy devices and manufacturing parts for wind mills and wind operated electricity generators. Hence the petition.

Submissions of the Petitioner:

8. The Petitioner has submitted as under:
 - a) On 01.07.2017, Ministry of Finance issued its Notification No.1/2017 (GST Notification) vide which effective GST applicable on wind-mills and Wind Operated Electricity Generator (WOEG) and parts for their manufacturing was 5% (i.e. Integrated tax of 5% or State GST and Central GST of 2.5% each). The Petitioner at the time of submission of its bid therefore had relied upon the aforesaid percentage of GST being applicable to its Project.
 - b) On 30.09.2021, the MoF issued Notifications No.8/2021 in terms of which the effective GST applicable on wind mills and WOEG and parts for their manufacturing has been revised to 12% (i.e. Integrated tax of 12% or State GST and Central GST of 6% each).
 - c) On 07.10.2021, the Supplier of the Petitioner sent a Notice for Change in Law under the Supply Agreement in view of the notification of the GST Amendment.
 - d) On 29.10.2021, the Petitioner issued its Change in Law Notice to SECI wherein it noted that on 30.09.2021, the Ministry of Finance has issued GST Amendment Notifications No.8/2021 in terms of which the effective GST applicable on wind-mills and WOEG and parts for their manufacturing have been revised to 12 since the applicable goods have now been specified under Schedule-II.
 - e) SECI was informed that the aforesaid GST Amendment is a Change in Law event in terms of Article 12.1.1 of the PPA on account of which it is liable to incur an additional expenditure of Rs. 11,86,38,449. Such an additional expenditure will translate into an approximate increase of 9.31 paise/kWh in the tariff quoted by the Petitioner. The

Petitioner has till date not received any response from SECI to its Change in Law Notice dated 29.10.2021.

- f) In view of the GST Amendment, the Petitioner is liable to incur an additional expenditure of Rs. 11,86,38,449 in setting-up its Project, which is payable under the Supply Agreement signed by the Petitioner with its Supplier. In view of the GST Amendment, the total contract value inclusive of taxes payable by the Petitioner to its Supplier under the Supply Agreement has increased from Rs. 214,48,58,591 to Rs. 226,34,97,040.
- g) This Commission, while dealing with a similar claim for Change in Law due to the introduction of the GST laws, has allowed the same under a PPA executed under SECI tranche-V bid and has held that “*the invoices raised up to COD pertaining to supply of goods can be claimed under Change in Law on account of the GST Laws since the liability of SECI/ Respondent Discom for payment of purchase of the power from the Petitioner starts from the Commercial Operation Date (COD).*” In this regard reliance is placed on the Order dated 10.08.2021 passed in ***Petition No.45/MP/2019: Talettutayi Solar Projects One Pvt. Limited vs. Solar Energy Corporation of India Limited.*** Appellate Tribunal for Electricity in its recent Judgment dated 20.09.2021 passed in ***Appeal No.215 of 2021: Tata Power Renewable Energy Limited vs. Maharashtra Electricity Regulatory Commission & Ors.*** has allowed a similar revision in the GST structure notified by MoF vide Notification No.24/2018 dated 31.12.2018 as a Change in Law event.

Carrying Cost

- h) The Appellate Tribunal of Electricity (APTEL) in its Judgment dated 13.04.2018 in ***Appeal No.210 of 2017: Adani Power Ltd. vs Central Electricity Regulatory Commission & Ors.*** has allowed carrying cost on Change in Law claims by holding that the principle of carrying cost is the compensation for time value of money or the monies denied at the appropriate time and paid after a lapse of time. The aforesaid Judgment has further been upheld by the Hon’ble Supreme Court vide its judgment dated 25.02.2019 in ***Civil Appeal No.5865 of 2018 & Civil Appeal No. 6190 of 2018: Uttar Haryana Bijli Vitran Nigam Limited & Anr. vs. Adani Power Ltd. & Ors.*** Accordingly, it is no longer *res integra* that

the Petitioner is entitled to the payment of carrying cost along with the compensation for Change in Law.

- i) Therefore, this Commission is fully within its powers to not just grant compensation to the Petitioner for the aforesaid Change in Law event, but also to allow carrying cost on the said compensation to restore the Petitioner to its previous economic position.

Hearing proceedings:

9. The case was called out for virtual hearing on 24.01.2022. After hearing the learned counsels for the parties, the Commission reserved the order on admissibility of the matter. Meanwhile, on 22.10.2022, the Ministry of Power, Government of India notified, *Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021* and the matter was again listed for hearing on 14.02.2023. After hearing the parties, the Commission disposed of the Petition on 14.02.2022 holding that:

“12. We note that the compensation for Change in Law shall be computed in terms of Rule 3(5) of the Change in Law Rules, which provides that where the agreement lays down any formula, the same shall be in accordance with such formula; or where the agreement does not lay down any formula, it would be in accordance with the formula given in the Schedule to the Rules on Change in Law.

13. In view of the above, the Petitioner may approach SECI for settlement of Change in Law claims in terms of the Change in Law Rules.

14. The Commission also directs the Petitioner to approach the Commission in terms of Rule 3(8) of the Change in Law Rules and that the filing fees paid by the Petitioner be adjusted against the Petition to be filed under the said Rules.

15. Accordingly, the Petition No. 268/MP/2021 is disposed of in terms of the above.”

10. **Subsequent Proceedings:**

- a) **Order of Appellate Tribunal dated 05.04.2022:** The Appellate Tribunal passed its judgment, setting aside the Orders of this Commission challenged in O.P No. 1 of 2022 and Appeal Nos. 116, 74, 75 & 76 of 2022, which originally sought compensation on account of Change in Law events, and were disposed by this Commission. Appellate Tribunal passed the following decision in the aforementioned appeals:

“72. For the foregoing reasons, we find the impugned orders of the Central Commission applying the CIL Rules to matters pending before it for adjudication under Section 79(1)(f) of Electricity Act on the date of coming into force of said rules wholly erroneous, improper and bad in law. The said orders are thus set aside. In the

result, the proceedings in claim cases (in which impugned orders were passed – and that includes the orders dated 04.02.2022 in the Original Petitions) remain inchoate. The Central Commission is duty-bound to consider each of them on the merits of the claims and adjudicate in accordance with law on the dispute(s) in proper exercise of its jurisdiction under Section 79 of the Electricity Act. It is directed to proceed to do so expeditiously.

73. We would be failing in our duty if we do not also note here (as also indicated earlier in this judgment) that prior to the decisions which were challenged by the captioned petitions/appeals, as indeed subsequently, the Central Commission has been taking the impugned approach on pending claims which has and would have resulted in a large number of such claims being unduly scuttled, non-suited the parties similarly placed as the petitioners/appellants herein. If the factual back-ground is same as in the cases at hand, such decisions would also constitute want of performance of statutory function by the Central Commission meriting an appropriate direction by this tribunal. This would be constrained to seek remedy against such order, if it thereby feels aggrieved. The remedies available in law include approaching the Central Commission for review or this tribunal ordinarily by an appeal.

74. Such that the affected parties do not suffer on account of faulty approach of adjudicatory authority, and this tribunal is not flooded by appeals raising identical issues against such other decisions as above, rendered in similar fact-situation by the Central Commission, it would be appropriate that it be asked to properly and fully perform its statutory function by exercise of its review jurisdiction, suomotu, in all similarly-placed claims for compensation founded on change in law events where similar decisions have been taken by the Central Commission after coming into force of CIL Rules on 22.10.2021 and, if such decisions are found running afoul of the view taken by this tribunal by this judgment, to vacate the same and restore the concerned Claim cases to its file and complete the process of adjudication thereupon in accordance with law. Needful action in above nature shall be initiated by the Central Commission within four weeks of this judgment. Of course, review can be undertaken even at the instance of the parties in question should they approach the Commission on their own. We may add that these directions are without prejudice to the remedy, if any, already pursued or intended to be pursued by the concerned parties vis-à-vis other such cases.”

- b) **Hearing dated 17.05.2022:** The matter was listed for hearing on 17.05.2022. The Commission made the following observations:

“7. In Petition No. 268/MP/2021, Petition No. 206/MP/2021 and Petition No. 273/MP/2021, learned counsels for the parties submitted that the said Petitions were disposed of by the Commission by applying the Change in Law Rules at the admission stage itself and accordingly, the matters may be restored and the parties may be permitted to complete the pleadings in the matter. Learned counsel for the Petitioner in Petition No. 273/MP/2021 sought liberty to file an additional affidavit in the matter.

8. Keeping in view the submissions made by the learned senior counsel and the

learned counsels for the parties and their agreement to the observations of the Commission expressed in the Record of Proceedings dated 9.5.2022 in the similarly placed matters with regard to the methodology for implementation of APTEL's directions in judgment dated 5.4.2022 as contained in paragraph 74, the Commission indicated that it will proceed for passing appropriate orders in these matters as per directions and further observed that with regard to the various requests of the learned counsels for the parties, inter alia, permission to file additional affidavit, reply and/or rejoinder etc., the necessary direction or liberty in this regard will be granted in the suo motu order(s) to be issued by the Commission in these matters."

- c) **Order on 14.06.2022 in 8/SM/2022:** Pursuant to the decision of the Appellate Tribunal, the present Petition, along with several others were re-listed before this Commission on 09.05.2022 and 17.05.2022 where it passed the following Order:

"3. After hearing the suggestions put forth by the learned senior counsels and the learned counsels for the parties, the Commission is of the view that as per the directions of the APTEL in judgment dated 5.4.2022 in OP No. 1 of 2022 and Ors., in particular at paragraph 74, suo-motu order(s) are required to be issued to restore the petitions which were disposed by the Commission by applying the Change in Law Rules but which were not challenged before the APTEL. However, for the Petitions where the orders of the Commission have been set aside by the APTEL in terms of para 72 of the judgment, the petitions shall be restored on the records of the Commission for further necessary action.

4. Accordingly, as per the direction of The APTEL, in exercise of our suo-motu power of review, we hereby restore the Petitions mentioned in paragraph 1 above, on the record of the Commission at same stages, as were existing prior to the disposal of petitions. The parties are directed to complete the pleading in the Petitions which have been admitted, within one month. The parties are also directed to file the information/subsequent development (within 15 days) if any."

- d) **Submission of the Petitioner vide Additional Affidavit dated 12.08.2022:** The Petitioner vide the Additional Affidavit dated 12.08.2022 placed on record certain additional documents.
- e) **Hearing Dated: 22.08.2022:** After hearing the learned counsel for the parties, the Commission admitted the Petition and directed the Petitioner to serve a copy of the Petition to the Respondent who may file Reply within two weeks and the Petitioner to file the Rejoinder within a week. The Commission directed the parties to comply with the directions.

11. **Compliance of the directions of the Commission:** SECI filed its reply on 24.11.2022 in which it opposed to the claims of the the Petitioner. The Petitioner filed the Rejoinder on 14.12.2022. The Petitioner has reiterated the submissions already made in the plaint and also placed few documents on record.

Reply dated 24.11.2022 of SECI:

12. 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, the claims raised by the Petitioner should fall within the scope and ambit of the said provision.
 - b) The extent of compensation 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 UPPCL) to be submitted by the Petitioner.
 - c) If Notification dated 30.09.2021 is considered as Change in Law, the Petitioner be directed to furnish the relevant details including invoices, date of delivery of goods, date on which invoices were raised, Statutory Auditor's Certificate to substantiate the impact of the change in rate of GST on the procurement of Wind mills, Wind Operated Electricity Generator required for the Wind power project.
 - d) It is incumbent on the Petitioner to establish the one to one correlation between the project, the supply of goods, the invoices and other relevant documents for proof of the payment of GST respectively.
 - e) The Commission in the decision dated 20.08.2021 passed in Petition No.536/MP/2020 in the matter of *Solar Energy Corporation of India Limited -v- M/s Azure Power Venus Private Limited & Others* has dealt with the Cut-Off Date for payment on account of GST Laws.
 - f) The Scheduled Commissioning Date (SCoD) was revised to 05.09.2022 vide letters dated 15.03.2021 and 15.09.2021 of SECI. However, Project (full capacity of 50.6 MW) achieved commissioning and commercial operation on 18.08.2022.
 - g) The commercial supply of power from the power project under the PPA is from the Commercial Operation Date of the power plant. In such case, the extent to which the

impact of GST on procuring of Wind mills, Wind Operated Electricity Generator is to be considered is only on such Wind mills, Wind Operated Electricity Generator that are duly installed and commissioned by the date of commercial operation of the power plant. Any such Wind mills, Wind Operated Electricity Generator installed after the commercial operation are not to be considered for the impact of GST. This Commission may clarify the Cut-off Date for considering the GST impact on account of Notification dated 30.09.2021 as the actual Commercial Operation Date.

- h) The payment on annuity basis is consistent with the fact that the GST claims are an addition to the capital cost of the power project and not an operating and maintenance expense of a recurring nature to be incurred on year on year basis. If the Change in Law event had occurred prior to the cut-off date, the Petitioner would have factored the higher cost to be incurred in establishing the solar power project in the per unit tariff to be quoted. Accordingly, the impact of Change in Law occurring after the cut-off date can be serviced through annuity.
- i) In the proceedings before the Hon'ble Commission in Petition No. 536/MP/2020 filed by SECI, the annuity scheme had been submitted for making payment of compensation on account of Change in Law events of Safeguard Duty (imposed vide notification dated 30.07.2018) and GST Laws (imposed vide Notification dated 01.07.2017).
- j) The Commission has considered only the interest rate of 9% and the term of the Loan repayment as 15 years instead of 13 years earlier considered in case of the Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020 and RE Tariff Order dated 31.03.2021. Accordingly, the Commission may be pleased to consider the above aspects in regard to the payment mechanism to be decided for the impact of GST in the present case, if held to be admissible to the Petitioner.
- k) If Notification dated 30.09.2021 is considered as Change in Law and the impact is allowed to the Petitioner, the Commission may be pleased to issue directions to the UPPCL (i.e. the power procurers under the PSA), to make payment towards the evaluated claims of the GST payable by SECI to Petitioner, on a back to back basis under the PSA in a time bound manner.

- l) PPA in the present case does not have any provision dealing with restitutionary principles of restoration to same economic position. Therefore, the Petitioner is not entitled to claim relief of carrying cost.
- m) In regard to the above, the Hon'ble Appellate Tribunal in the Judgment dated 13.04.2018 in Appeal No. 210 of 2017 in Adani Power Limited –v- Central Electricity Regulatory Commission and Ors., has considered two scenarios of the provisions incorporated in the two PPAs, namely, dated 02.02.2007 (Gujarat Bid-02 PPA) and 06.02.2007 (Gujarat Bid-01 PPA) both entered into between Adani Power and Gujarat Urja Vikas Nigam Limited ('GUVNL'). In case of the Gujarat Bid-02 PPA, the Hon'ble Appellate Tribunal while referring to the specific provisions of restitution contained in the PPA, decided that the carrying cost is admissible. However, while referring to the Gujarat Bid-01 PPA, which did not contain the restitution clause, the Hon'ble Appellate Tribunal held that no carrying cost shall be admissible in terms of the same. As in the case of Gujarat Bid-01 PPA, in the present matter also the PPA does not contain restitutionary provision.
- n) It is only in case of delay in making the payment as per the Order dated 20.08.2021 of the Hon'ble Commission in Petition No.536/MP/2020, the issue of Late Payment Surcharge in terms of Article 10.3.3 of the PPA would arise.
- o) Reliance placed by the Petitioner on Electricity (Timely Recovery of Cost due to Change in Law) Rules 2021 notified on 22.10.2021 by Ministry of Power is misplaced.

13. **Hearing Dated: 29.11.2022:** The case was called out for hearing on 29.11.2022. The learned counsel for SECI submitted that SECI and the Petitioner are simultaneously reconciling the Petitioner's Change in Law claims. This was also confirmed by the learned counsel for the Petitioner. After hearing the learned counsel for the parties, the Commission adjourned the matter and permitted the Petitioner to file its rejoinder within two weeks.

Rejoinder dated 14.12.2022 of the Petitioner:

14. The Petitioner has reiterated the submissions already made in the plaint and are as such not reproduced here for the sake of brevity. Additionally, the Petitioner has submitted as under:
- a) In compliance with the Order dated 14.02.2022, the Petitioner had submitted all relevant documents required for pass-through of the present Change in Law claim.

- b) SECI vide its letter dated 15.09.2021, extended the scheduled date for achievement of conditions subsequent and financial closure of the Project under the PPA upto 05.10.2021 and SCoD of the Project under the PPA upto 05.09.2022, *inter alia* considering the land allotment issues faced by various bid winners in Gujarat due to change in land policy by the Government of Gujarat.
- c) Therefore, in terms of the extended SCoD, the Project of the Petitioner was required to be commissioned on or before 05.09.2022. The Petitioner has commissioned the full capacity of its WPP, well in advance, *i.e.*, as on 19.08.2022. Subsequently, on 18.08.2022 SECI issued the commissioning certificate for full commissioning of the Petitioner's WPP of 50.6 MW and the CoD for the aforesaid balance 26.3 MW is to be considered from 00:00 hrs of 19.08.2022. The Petitioner achieved full commissioning of the WPP on 18.08.2022. Therefore, the "additional expenditure" incurred on the WTGs on account of GST amendment was incurred within the SCoD of the WPP.
- d) APTEL in *Appeal No. 256 of 2019: Parampujaya Solar Energy Limited vs Central Electricity Regulatory Commission* ("*Parampujaya Judgment*") has held that "*provide relief*" has a wide connotation and therefore, does not encumber the Power Procurer from granting carrying cost along with the "Change in Law" Claim. In addition, APTEL has held that this Commission while exercising regulatory powers under Section 79(1)(b) of the Act, was liable to examine the claim and allow carrying cost alongwith the principal amount that had been incurred on account of 'Change in Law' Claim.
- e) Time value of money issue was not analyzed by the Hon'ble Supreme Court or the APTEL, therefore it incorrect to state that the issue *qua* carrying cost stands settled when rather the Hon'ble Supreme Court and the Hon'ble Tribunal, both remained silent on the said issue.
- f) The Hon'ble Supreme Court in *South Eastern Coalfield Ltd vs. State of Madhya Pradesh and Ors. (2003) 8 SCC 648*, has had held that unless there is a categorical prohibition either in law or in the contract entered into between the two parties, there is no reason why the aggrieved party should not be compensated by payment of interest.

- g) On a combined reading of Article 12 of the PPA along with judgments of the Hon'ble Supreme Court and APTEL, it is clear that Article 12 of the PPA does not impose any impediment/restriction on the Petitioner, from being granted the relief of carrying cost.
- h) The Commission in Petition No. 293/MP/2018 in case titled *Azure Power India Private Limited vs. NTPC Limited & Ors.* has already held that the Generating Company is not only entitled to the compensation on account of 'Change in Law' claim, but is also liable to be compensated with carrying cost/interest on account of compensation.
- i) No additional equipment was installed by the Petitioner after the COD, however there can be no bar on the Petitioner to recover GST on any equipment pertaining to the WPP which may have to be installed by it in future for effective operation and maintenance of the WPP.
- j) This Commission in its Order dated 20.08.2021 passed in Petition No.536/MP/2020, which SECI in its Reply has also relied upon, held that while calculating the compensation for Change in Law, an interest rate higher than the prevailing normative cost of debt cannot be considered. Notably, the aforesaid order where 10.41% has been held to be the discount rate of annuity payments has also been upheld similarly in 2022 by this Commission in its order dated 07.02.2022 in Petition No.24/RP/2021. In light of the aforesaid, SECI's reliance on Renewable Tariff Regulations, 2020 and RE Tariff order is misplaced.

15. **Hearing dated 10.01.2023:** The case was called out for hearing on 10.01.2023. After hearing the parties, the Commission reserved the matter for orders and held as follows:

“Learned counsel for the Petitioner submitted that the present Petition has been filed, inter-alia, for approval of Change in Law and consequential relief to compensate the Petitioner for increase in Project cost due to revision of GST applicable on renewable energy devices and manufacturing parts for wind mills and wind operated electricity generators, notified by the Ministry of Finance, Department of Revenue, vide its Notification No. 8/2021 dated 30.9.2021. Learned counsel submitted that in terms of the said notification, the applicable rate of GST has been revised from 5% to 12% and it squarely amounts to a Change in Law event under Article 12 of the Power Purchase Agreement (PPA) dated 17.10.2019. Learned counsel submitted as the per the Petitioner's computation, the total impact of the aforesaid Change in Law event has been Rs. 11.78 crore and the said impact is already restricted to the Commercial Operation Date of its Project. Learned counsel further added that as to the modalities of the payment i.e. one time lumpsum payment or annuity mode of payment, the Commission

may decide as deemed fit. Learned counsel submitted that in terms of the judgment of Appellate Tribunal for Electricity dated 15.9.2022 in Appeal N o. 256 of 2019 and Ors. in the matter of Parampujya Solar Energy Pvt. Ltd. and Anr. v. CERC and Ors. ('Parampujya Judgment'), the Petitioner is also claiming for carrying cost as the Change in Law clause in its PPA is similar to one in the Parampujya Case.

2. Learned counsel for the Petitioner submitted that the Discom, UPPCL has not filed reply despite notice.

3. Learned senior counsel for the Respondent, SECI stated that the revision in the rate of GST from 5% to 12% in terms of Ministry of Finance, Department of Revenue, Notification No. 8/2021 dated 30.9.2021 squarely qualifies to be a Change in Law event. Learned senior counsel further submitted that SECI may be permitted to make the payment of compensation as per the annuity methodology as approved by the Commission vide order dated 20.8.2021 in Petition No. 536/MP/2020 and as per the said methodology, the discount factor, as present, works out to 9%. Learned senior counsel submitted that as regard the claim of carrying cost on the basis of the Parampujya Judgment, it will be subject to the order(s) passed by the Hon'ble Supreme Court in Civil Appeal No.8880/2022 and Ors. filed challenging the Parampujya judgment. He added that SECI has inadvertently filed incorrect PSA along with its reply and it may be permitted to file the correct PSA and that in the meantime, SECI will proceed with reconciliation of the Petitioner's Change in Law claims.

4. Based on the request of the learned senior counsel and learned counsel for the parties, the Commission permitted the Petitioner to file its brief submission on the carrying cost based on the Parampujya Judgment and SECI to file a correct PSA within a week.

5. Subject to the above, the Commission reserved the matter for order."

Written Submission dated 18.01.2023 filed by SECI:

16. SECI has submitted as under:

a) With regard to reliance placed by the Hon'ble Appellate Tribunal in decision dated 15.09.2022 passed in Appeal No.256 of 2019 and connected Appeals in the case of *Parampujya Solar Energy Pvt. Ltd. –v- Central Electricity Regulatory Commission* to claim Carrying Cost, SECI submits as under:

i. The Hon'ble Supreme Court vide order dated 12.12.2022 in Civil Appeal No.8880 of 2022 filed by Telangana Discoms challenging the judgement dated 15.09.2022 of Hon'ble Tribunal in Parampujya Case, has inter-alia held as under:

2 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.

- ii. The Judgment dated 15.09.2022 of the APTEL in *Parampujya Case* has also been challenged by SECI before the Hon'ble Supreme Court in Civil Appeal bearing Diary No.135 of 2023. The Civil Appeal of SECI is presently pending before the Hon'ble Supreme Court.
- b) The Commission may consider the above decision of the Hon'ble Supreme Court and maintain parity between the cases pending before the Commission wherein the Judgment dated 15.09.2022 of the APTEL in *Parampujya Case* is being relied on by the parties. This Commission may direct that enforcement of any order of the Commission passed on the aspects covered in *Parampujya Case* will take place after the decision of the Hon'ble Supreme Court to maintain such parity.

Written Submission dated: 19.01.2023 of Petitioner:

17. The Petitioner has reiterated some of the submissions made in the plaint. Additionally, the Petitioner has submitted as under:

Re: Scope of the Hon'ble Supreme Court-Parampujya order

- a) The Hon'ble Supreme Court in the *Parampujya Order* dated 03.01.2023 in Civil Appeal No. 9079 of 2022: *Mangalore Electricity Supply Company Limited & Ors. vs Parampujya Solar Energy Private Limited* has *inter-alia* passed the following directions:

“3 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.”

- b) In Paragraph 109 of the *Parampujya Judgment* which has been referred to in the aforesaid order is reproduced as under:

“109. The other captioned appeals – Appeal no. 256 of 2019 (Parampujya Solar Energy Pvt. Ltd & Anr. v. CERC & Ors.), Appeal no. 299 of 2019 (Parampujya Solar Energy Pvt. Ltd. v. CERC & Ors.), Appeal no. 427 of 2019 (Mahoba Solar (UP) Private Limited v. CERC & Ors.), Appeal no. 23 of 2022 (Prayatna Developers Pvt. Ltd. v. CERC & Ors.) Appeal no. 131 of 2022 (Wardha Solar (Maharashtra) Private Ltd. & Anr. v. CERC & Ors.) and Appeal no. 275 of 2022 (Parampujya Solar Energy Pvt. Ltd. & Anr. v. CERC & Ors.) - deserve to be

allowed. We order accordingly directing the Central Electricity Regulatory Commission to take up the claim cases of the Solar Power Project Developers herein for further proceedings and for passing necessary orders consequent to the findings recorded by us in the preceding parts of this judgment, allowing Change in Law (CIL) compensation (on account of GST laws and Safeguard Duty on Imports, as the case may be) from the date(s) of enforcement of the new taxes for the entire period of its impact, including the period post Commercial Operation Date of the projects in question, as indeed towards Operation & Maintenance (O&M) expenses, along with carrying cost subject, however, to necessary prudence check.”

- c) By way of the aforesaid direction, the Hon’ble Supreme Court has only directed that while this Commission is to adjudicate upon the claims that have been allowed by the APTEL in the *Parampujya Judgment*, the final orders to be passed in the petitions that have been remanded to this Commission are not to be enforced. In view of the aforesaid extracts, it is clear that the aforesaid order has only been passed in the context of the Appeals referred to in Para 109 of the *Parampujya Judgment* and the said directions have not been passed *in rem*.
- d) The Hon’ble Supreme Court has not issued any blanket stay on the operation of the *Parampujaya Judgment* and therefore, this Commission ought to grant carrying cost to the Petitioner in terms of the *Parampujya Judgment*.

Re: This Commission has wide regulatory powers to allow the claim of carrying cost

- e) 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 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 same are not gratuitous act. The aforesaid principle was reiterated by the Hon’ble Supreme Court in *State of West Bengal vs. B.K. Mondal, AIR 1962 SC 779*.
- f) Pertinently, even the *Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021* notified by the Ministry of Power on 22.10.2021 provides for the affected party to

be compensated for a Change in Law event in such a manner that it is restored to the same economic position as if such a change in law had not occurred. While the aforesaid rules are not applicable to the present dispute, nevertheless, the aforesaid rules expressly recognize the principle of restitution and clarify the intent of MoP that the affected party should be restored to the same economic position by payment of carrying cost.

Analysis and Decision:

18. We have heard the learned counsels for the Petitioner and Respondents and have carefully perused the records and considered the submissions of the parties:

19. On the basis of the submissions of the contracting parties the following issues arises for adjudication:

Issue No.1: Whether the introduction of Notification No. 8/2021-Central Tax (Rate), Notification No. 8/2021- Intergrated Tax (Rate) dated 30.09.2021 issued by Ministry of Finance, Government of India amounts to Change in Law events under Article 12 of the Power Purchase Agreement dated 17.10.2019?

Issue No.2: Whether the Petitioner is entitled for compensation towards additional expenditure on account of Change in Law event in terms of Article 12.2 of the PPA?

Issue No.3: Whether the Petitioner is entitled to carrying cost towards compensation for Change in Law?

Issue No.4: Whether discount rate @ 10.40% decided by this Commission vide order dated 20.08.2021 in Petition No.536/MP/2020 be considered in calculation of Annuity methodology for payment of compensation (if any) on account of Change in Law?

20. We now proceed to discuss the above issues.

21. Since Issue No. 1, Issue No. 2, Issue No. 3 and Issue No. 4 are interlinked, they are being taken up together for discussion. The Petitioner has submitted that Article 12 of the PPAs provide for 'Change in Law'. The introduction of Notification No. 8/2021-Central Tax (Rate), Notification No. 8/2021- Intergrated Tax (Rate) dated 30.09.2021 issued by Ministry of Finance, Government of India was issued subsequent to the signing of PPA and such change in GST rates could not have been factored at the time of submission of the bid or the cut-off date. Hence, the enactment of above notification dated 30.09.2021 amounts to Change in Law as per Article 12.2 of the PPA. The Petitioner further submitted that the UPPCL has not filed reply despite notice. *Per-contra*, SECI during the hearing held on 10.01.2023, stated that the revision in the rate of GST from 5% to 12% in terms of Ministry of Finance, Department of Revenue, Notification No. 8/2021 dated 30.9.2021 squarely qualifies to be a Change in Law event. Further, SECI may be permitted to make the payment of compensation as per the annuity methodology as approved by the Commission vide order dated 20.8.2021 in Petition No. 536/MP/2020 and as per the said methodology, the discount factor, as present, works out to 9%. As regard the claim of carrying cost on the basis of the Parampujya Judgment, it will be subject to the order(s) passed by the Hon'ble Supreme Court in Civil Appeal No.8880/2022 and Ors. filed challenging the *Parampujya judgment*. SECI has further submitted that the relief available on account of change in law claim raised by the Petitioner is subject to examination and verification of documents by SECI and UPPCL to be submitted by the Petitioner.

22. We observe that Article 12 of the PPAs 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 last date of bid submission, resulting into any additional recurring/ non-recurring expenditure by the SPD or any income to the SPD:

- the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;*

- *a change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such law or any Competent Court of Law;*
- *the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;*
- *a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the 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 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.”

23. The Commission observes that as per 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 SPD as per the terms of this Agreement, resulting into any additional recurring/ non-recurring expenditure or any income to the SPD. Clause (e) in seriatim specifically stipulates that *any change in rates of taxes, duties and cess, or introduction of any new tax made applicable for setting up of Solar Power Project and supply of power by the SPD after the date of submission of Bid, shall be treated as per the terms of PPA.* The introduction of Notification No. 8/2021-Central Tax (Rate), Notification No. 8/2021- Intergrated Tax (Rate) dated 30.09.2021 has been issued by Ministry of Finance, Government of India. As such the introduction of the impugned notifications have been enacted by an Act of Parliament. The change in rate of Goods and Services Tax from 5% to 12% w.e.f. 01.10.2021 has resulted in the

change in cost of the inputs required for generation and the same is considered as ‘Change in Law’. Further, SECI during the hearing held on 10.01.2023, has also agreed that the revision in the rate of GST from 5% to 12% in terms of Ministry of Finance, Department of Revenue, Notification No. 8/2021 dated 30.9.2021 squarely qualifies to be a Change in Law event. Hence, the Commission holds that the introduction of Notification No. 8/2021-Central Tax (Rate), Notification No. 8/2021- Intergrated Tax (Rate) dated 30.09.2021 by Ministry of Finance, Government of India is covered as ‘Change in Law’ under Article 12.1.1 of the PPA.

24. In the instant petition the bid was submitted by the Petitioner on 05.02.2019. E-Reverse auction was conducted on 15.02.2019. PPA was executed between the Petitioner and SECI on 17.10.2019 and the SCoD the project was 15.03.2021. In terms of the extended SCoD, the Project was required to be commissioned on or before 05.09.2022. The Petitioner has commissioned the full capacity of its WPP, well in advance, *i.e.*, as on 18.08.2022. The GST Notification was notified on 30.09.2021. As such the Petitioner project was affected by the said GST Notification. Therefore, the Petitioner is entitled for relief under the GST Laws as per the terms of Article 12 of the PPA.
25. The *next issue* raised by SECI is that the methodology for payment of compensation should allow the discounting factor as 9 % (which is rate of interest for the loan component of the capital cost) and tenure of payment as 15 years as provided in RE Tariff order dated 31.03.2021 providing for determination of tariff under Regulation 14 (2) (b) of the Renewable Tariff Regulations, 2020. It is pertinent to mention here that the Petitioner during the course of hearing dated 10.01.2023 has submitted that as to the modalities of the payment *i.e.* one time lump sum payment or annuity mode of payment, the Commission may decide as it may deem fit.
26. As far as the methodology of payment is concerned, it is placed before us that this Commission in the earlier order dated 20.08.2021 in the Petition No. 536/MP/2020 has considered such issue , and decided as under:

“65. We find that in Petition No. 536/MP/2020, SECI and the Respondents (SPDs as well as the Discoms) are on the same page in so far as the rate of interest on loan is considered. This is evident from the computation of the weighted average cost of capital advanced by the contending parties. Majority of the parties have used 10.41% (as

mentioned in the CERC RE Tariff Order dated 19.03.2019) as the reference rate of interest for building their arguments for the rate of annuity payment. In other words, the parties have accepted this rate as the appropriate normative rate of interest for any debt that they might have taken. Given the fact that it is not possible in case of competitive bidding projects to ascertain either the capital structuring (extent of debt and equity) of the projects, or the actual rate of interest of the debt component or the expected rate of return on equity, we consider it appropriate to use the normative rate of 10.41% as reference for the purpose of annuity payment. As the actual deployment of capital by way of debt or equity and their cost in terms of rate of interest or return, respectively, is unknown, the rate 10.41% can be taken as the uniform rate of compensation for the entire expenditure incurred on account of GST Laws or Safeguard Duty. The Commission is of the view that the compensation for change in law cannot be a source for earning profit, and therefore, there cannot be any higher rate of return than the prevailing normative cost of debt. Accordingly, we hold that 10.41% shall be the discount rate of annuity payments towards the expenditure incurred on GST or Safeguard Duty (as the case may be) by the Respondent SPDs on account of 'Change in Law'.

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

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

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

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

Tenure of ‘Annuity Period’

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

“14. Loan and Finance Charges

Loan Tenure For the purpose of determination of tariff, loan tenure of 13 years shall be considered.”

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

27. Qua the aforesaid order, this Commission has taken a view that in 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.*

28. We note that the Commission has notified the CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020 and RE Tariff Order dated 31.03.2021. In the RE tariff Order issued in pursuance of the said regulations, the Central Commission has considered the interest rate of 9% and the term of the Loan repayment as 15 years. It is noted that the GST Notification dated 30.09.2021 was promulgated after submission of the bid by the Petitioner and has achieved actual commercial operation on 18.08.2022 i.e. much after the imposition of GST Notification dated 30.09.2021 and notification of CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020 and RE Tariff Order dated 31.03.2021. We are of opinion that the approach held 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, is fair and reasonable. Thus, we hold that the discount rate of 9% and annuity period of 15 years shall be the appropriate methodology towards change in law compensation.

29. Further, the Commission holds that 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 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 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.
30. The *next issue* raised by the Petitioner is that, the Petitioner is entitled for compensation towards additional expenditure on account of Change in Law event in terms of Article 12.2 of the PPA along with carrying cost on account of Change in Law event upto the date of reimbursement by the Respondents.
31. We observe that in APTEL judgement dated 27.04.2021 in A.No. 172 of 2017 and A.No.154 of 2018 (*Coastal Gujarat vs. CERC & Ors.*) it was held as under:

“ ...
34. *Generally speaking, change in tax or change in rate of taxes etc. is treated as CIL, as envisaged by the Revised Tariff Policy dated 28.01.2016 which was held to be a statutory document having the force of law in Energy Watchdog (supra). Similarly, it is fairly conceded as a settled proposition of law that the claim for Carrying Cost is an integral part of admissible CIL compensation under the restitutionary principle and is in-built in Article 13 of the PPA [UHBVNL &Anr. v. Adani Power Ltd. (supra)]. In above view of the matter, there can be no quarrel with the proposition that the regulatory authority cannot introduce any extraneous words or qualifications to limit or whittle down the scope of Article 13 with respect to what constitutes CIL and how the relief has to be computed. Its role is limited to (i) determining whether a CIL event has occurred i.e. whether the qualifications provided under Article 13.1 are met; (ii) determining whether such a CIL event has an impact on the business of generation and sale of electricity; and (iii) if the answers to the first two questions be in the affirmative, to provide restitutive compensation (i.e. on actuals) to the affected party.*
... ”

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”.

32. In APTEL judgement dated 15.09.2022 in A.No. 256 of 2019 & Batch (*Parampujya Solar Energy Pvt. vs. CERC & Ors.*), it was held as under:

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 burden for the period anterior thereto. In our reading, the expression “provide relief” is 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.*

.....

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.”*

...

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.

...

...

100. Having bestowed our anxious consideration to the above arguments, we find no substance in the contentions raised. Chhattisgarh Discom was not a party before the Central Commission in the proceedings initially taken out by petition of the SPPD (registered as Case no. 165/MP/2018). But it is an admitted fact that Central Commission by its Order dated 20.09.2018, had impleaded Chhattisgarh Discom as necessary party thereby putting it to notice. It is not correct to contend that this was an arbitrary decision of the Central Commission. In this context, we would only recall the view already taken by us in earlier part of this judgment on the objection to the jurisdiction exercised by the Central Commission. **The PPA and PSA, executed on back-to-back basis, are intertwined and have to be read together. The liability of SECI has to ultimately reach the door of the ultimate beneficiary** i.e. Chhattisgarh Discom.

101. In the proceedings before the Central Commission, questions had also arisen as to whether it is the obligation of SECI to pay the consequential compensation to the SPPDs under the PPAs or the ultimate beneficiaries would be obliged to do so in terms of the corresponding PSA. The views of the Commission on this issue find articulation as under (quoted from order dated 27.03.2020, subject matter of Appeal no. 131 of 2022):

“111. From the above, the Commission is of the view that the PPAs and PSAs are interconnected and inextricably linked to each other and as such there is privity between the Petitioners which are the power generators and the Respondents which are the Discoms and the ultimate beneficiaries of the PPAs as well as parties to the PSAs. The back to back nature of the PPAs and PSAs implies that the Respondent Discoms are liable to pay to the Respondents SECI and NTPC all that the said Respondents have to pay to the Petitioners. However, in so far as payment mechanism is considered, the issue raised for decision of the Commission is whether in view of the back to back nature of PPAs and PSAs, the Respondents SECI and NTPC are liable to pay to the Petitioners only when and if the Respondent Discoms make payment to the said Respondents. In this context, the Commission notes the Provisions of Article 10 of PPAs and Article 6 of PSAs (It is pertinent to note that Articles under reference are similarly worded in both the instant petitions).

...

114. From the above, the Commission observes that the billing and payment between the Petitioner and the Respondents SECI and NTPC are not conditional upon billing and payment between the Respondents SECI and NTPC and the Respondent Discoms. Although, the above provisions, namely, Article 10 of PPA

and Article 6 of PSA, deal with regular monthly tariffs, the underlying philosophy that the billing and payment of one leg is not conditional upon the billing and payment of the other leg, can be equally applicable to the payment towards incremental impact on account of GST being a change in law, as well. In view of the above, the Commission holds that the Power Purchase Agreement and Power Sale Agreement being back to back in nature are interconnected implying thereby that the Respondent Discoms are liable to pay to the Respondents SECI and NTPC all that the said Respondents have to pay to the Petitioner. However, payment to the Petitioners by Respondents SECI and NTPC is not conditional upon the payment to be made by the Respondent Discoms to Respondents SECI and NTPC in view of the provisions of Article 10 of PPA and Article 6 of the PSA. The Commission having held that GST is a change in law, the Respondents SECI and NTPC are liable to pay to the Petitioners as per discussion above. However, the Respondents SECI and NTPC are eligible to claim the same from the Respondent Discoms on back to back basis.”

[Emphasis supplied]

102. In above view of the matter, the contentions in the above nature are repelled.

...

...

104. There can be no two views as to the fact that O&M expenses form part of the recurring expenditure within the meaning of change in law clause contained in Article 12. Concededly, the appellant SPPDs have availed of O&M services by outsourcing them, statedly following standard industry practice.

...

...

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.

CONCLUSION

108. For the foregoing reasons, Appeal no. 35 of 2022 (Chhattisgarh State Power Distribution Company Ltd. v. Central Electricity Regulatory Commission & Ors.) must fail. It is accordingly dismissed.

*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.

...

APTEL in both the *Judgements cited above* observed that the purpose of the change in law clause in the PPAs is to relieve the developer of additional burden.

33. In view of the above discussions, we are of opinion that the Petitioner is entitled for compensation towards additional expenditure on account of Change in Law event in terms of Article 12.2 of the PPA along with carrying cost on account of Change in Law event. The Petitioner, in the instant petition 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 CERC Tariff Regulations or the late payment surcharge rate as per the PPA, whichever is the lower. It is further clarified that once a supplementary bill is raised by the Petitioner 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.
34. Accordingly, considering the main prayers of the Petitioner, the Commission hereby directs the contracting parties to carry out reconciliation of additional expenditure on account of introduction of Notification No. 8/2021-Central Tax (Rate), Notification No. 8/2021- Intergrated Tax (Rate) dated 30.09.2021 by Ministry of Finance, Government of India along with carrying cost by exhibiting clear and one to one correlation with the projects and the invoices raised supported with auditor certificate. The Commission further directs that the responding UPPCL is 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 UPPCL to SECI.

35. Further, 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 behalf shall not be enforced till further orders are passed by the Hon’ble Supreme Court.

36. 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. Ltd. & Anr. Vs. Parampujya Solar Energy Pvt. Ltd. & 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.”

37. Thus, 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 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.

38. The Petition No. 268/MP/2021 is disposed of in terms of above.

Sd/-
पी. के. सिंह
(सदस्य)

Sd/-
अरुण गोयल
(सदस्य)

Sd/-
आई. एस. झा
(सदस्य)