



नई दिल्ली
NEW DELHI

याचिका संख्या./ Petition No. 168/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: 02nd of June, 2023

IN THE MATTER OF:

A petition under section 79 of the Electricity Act 2003 before the Central Electricity Regulatory Commission for (i) approval of “Change in Law” and (ii) seeking an appropriate mechanism for grant of an appropriate adjustment/ compensation to offset financial/ commercial impact of change in law events on account of imposition of safeguard duty on solar cells/modules and rescission of Notification No. 1/2011 - Customs dated 06.01.2011 vide Notification No. 7/2021 - Customs dated 01.02.2021, which has resulted in increase in rate of basic customs duty on import of solar inverters, in terms of Article 12 of the Power Purchase Agreement dated 18.11.2019 between M/s ReNew Solar Energy (Jharkhand Three) Private Limited and Solar Energy Corporation of India Limited.

AND IN THE MATTER OF:

M/s ReNew Solar Energy (Jharkhand Three) Private Limited,
138, Ansal Chambers II,
Bhikaji Cama Place, Delhi – 110066

...Petitioner

Versus

Solar Energy Corporation of India Limited
1st Floor, A Wing, D-3, District Centre,
Saket, New Delhi – 110017

M.P. Power Management Co. Limited,
Block No. 11, 1st Floor, Shakti Bhawan,
Rampur Jabalpur,
Jabalpur, Madhya Pradesh – 482008

...Respondents

Parties Present: Shri Sujit Ghosh, Advocate, RSEJPL
Ms. Mannat Waraich, Advocate, RSEJPL
Shri Mridul Gupta, Advocate, RSEJPL
Shri M. G. Ramachandran, Sr. Advocate, SECI
Ms. Tanya Sareen, Advocate, SECI
Ms. Anushree Bardhan, Advocate, SECI
Shri Shubham Mishra, SECI
Ms. Neha Singh, SECI
Ms. Aditee Nitnavare, SECI

आदेश/ ORDER

The Petitioner i.e. M/s ReNew Solar Energy (Jharkhand Three) Private Limited is engaged in the business of development, building, owning, operating and maintaining utility scale grid connected solar power projects, for generation of solar power. The Petitioner has filed the present Petition under Section 79 of the Electricity Act, 2003 read with article 12 of the Power Purchase Agreement dated 18.11.2019 seeking relief on account of imposition of Safeguard Duty on solar cells/modules which has resulted in increase in rate of basic customs duty on import of solar inverters.

2. The Respondent No. 1, Solar Energy Corporation of India Limited (SECI) is a Government of India enterprise under the administrative control of the Ministry of New and Renewable Energy (MNRE). The Respondent has been designated as the nodal agency for implementation of MNRE schemes for developing grid connected solar power capacity through VGF mode in India.
3. The Respondent No.2, Madhya Pradesh Power Management Company Limited (MPPMCL), is a company created with the principal object of engaging in the business of distribution and

supply of electricity and is the holding company of the three Discoms in the State of Madhya Pradesh.

4. The Petitioner has made the following prayers:

- a) *Declare the imposition of safeguard duty via Safeguard Duty Notification dated 29.07.2020 as Change in Law in terms of the PPA which have led to an increase in the expenditure for the Project;*
- b) *Declare the imposition of increased rate of basic customs duty and subsequent increase in quantum of social welfare surcharge and IGST on account of rescission of Notification No. 1/2011-Customs dated 06.01.2011 vide Notification No. 07/2021-Customs dated 01.02.2021 issued by Central Government as Change in Law in terms of the PPA which have led to an increase in the expenditure for the Project;*
- c) *Evolve a suitable mechanism to compensate the Petitioner for the increase in expenditure incurred by the Petitioner on account of Change in Law;*
- d) *Direct Respondent to compensate the Petitioner towards Safeguard duty as one-time lump sum amount or mechanism devised by this commission in prayer (c)*
- e) *Direct Respondent to compensate the Petitioner towards Customs duty and consequent increase in social welfare surcharge and IGST as one time lump sum amount or mechanism devised by this commission in prayer (c)*
- f) *Grant interest/carrying cost at as mentioned in para 55 from the date of incurring of the cost by the Petitioner till the date of order by this Commission;*
- g) *If the event this Hon'ble Commission is not inclined to grant the relief prayed at (f) then in the alternate it is prayed, that this Hon'ble Commission grants interest/ carrying cost from the date of the cost by the Petitioner till the date of order by this Commission restoring the Petitioner to the same economic position as before the occurrence of the Change in Law events;*
- h) *Allow legal and administrative costs incurred by the Petitioner in pursuing the instant petition; and*
- i) *Pass any such other and further reliefs as this Hon'ble Commission deems just and proper in the nature and circumstances of the present case.*

Brief Background:

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

| | |
|---|---|
| Location | Village Mandhopura, Tehsil Fatehgarh, District Jaisalmer, Rajasthan |
| Nodal agency | SECI |
| RfS issued on | 13.03.2019 |
| Bid submitted on | 30.05.2019 |
| E-Reverse auction held on | 12.06.2019 |
| LOA awarded on | 25.07.2019 |
| Capacity (MW) | 300 MW |
| Power | Solar |
| PPA executed on | 18.11.2019 |
| Tariff | Rs.2.54/kWh |
| Date of implementation of Safeguard Duty Notification No. 2/2020-Custom (SG) dated 29.07.2020 | 30.07.2020 |
| Tariff was adopted on | 25.01.2021 |
| Date of implementation of rescission of Notification No. 1/2011-Customs dated 06.01.2011 vide Notification No. 07/2021-Customs dated 01.02.2021 | 02.02.2021 |
| SCOD of the project | 23.04.2021 |
| Date of implementation of Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021 | 01.10.2021 |
| COD of the project | 09.12.2021 |

6. The Commission vide Order dated 23.12.2021 disposed of the Petition in terms of the *Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021*. However, pursuant to direction of the APTEL vide order dated 05.04.2022 in O.P. No. 1 of 2022 & Ors., the Petition was again listed for hearing on 17.05.2022 wherein the Commission directed the parties to file their respective submissions. The Commission vide Order dated 14.06.2022 in Petition No. 8/SM/2022, in exercise of its suo-motu powers of review, restored the Petition at same stage, as were existing prior to the disposal of petition and directed the parties to file the information/subsequent development if any within 15 days. Hence, the present Petition.

Submissions of the Petitioner:

7. Briefly, the Petitioner has submitted as under:

- a) The Safeguard Duty Notification No. 1/2018 – Customs (SG) dated 30.07.2018 (*2018 SGD Notification*), vide which the safeguard duty was imposed was valid only for a period of two years i.e., till 29.07.2020.
- b) A fresh Safeguard Duty Notification No. 2/2020-Custom (SG) dated 29.07.2020 (*2020 SGD Notification*) was issued imposing safeguard duty on the import of solar cells and modules at the prescribed rates. Safeguard Duty Notification dated 29.07.2020 is an event of Change in Law in terms of the PPA dated 18.11.2019, which have led to an increase in the expenditure for the Project and accordingly the Petitioner should be compensated.
- c) MNRE through its letters, dated 12.03.2020 and 23.03.2020 (to SECI and others) decided that once the principles to be followed regarding such change in law claims have been decided by this Commission in one case, every developer need not be asked to go before the Commission for seeking orders individually in similar cases as the same principles would apply to all. Furthermore, the claims on this account are to be paid within 60 days or alternatively, on annuity basis spread over the duration of the PPA.
- d) Further, the increase in rate of basic customs duty imposed on import of machinery and auxiliary equipment for the initial setting up of solar power generation project has directly increased the quantum of social welfare surcharge, payable under section 110 of the Finance Act, 2018, on such import, which is fixed at a rate of 10% on aggregate duties and taxes which are levied and collected by the Central Government under Section 12 of the Customs Act, 1962 which had a bearing on the increase in the quantum of integrated goods and services tax and Services Tax Act, 2017 ('IGST Act') on such import by the Petitioner. The following table illustrates the increase in total duty imposed on the import of solar inverter:

| Duty, surcharge and Tax imposed | Regime when Notification No. 1/2011-Customs dated 06.01.2011 was in operation (06.01.2011 – 01.02.2021) | Regime when Notification No. 7/2021-Customs dated 01.02.2021 rescinded Notification 01/2011 (02.02.2021 – till date) | Net increase in rate of tax |
|---------------------------------|---|--|-----------------------------|
| Basic customs duty (BCD) | 5.00% | 20.00% | 15.00% |
| Social welfare surcharge | 0.50% | 2.00% | 1.50% |

| | | | |
|---------------------|-------|--------|--------|
| (SWS) on BCD | | | |
| IGST (on BCD + SWS) | 0.28% | 1.10% | 0.83% |
| Total Duty | 5.78% | 23.10% | 17.33% |

- e) The increase in basic customs duty imposed on import of solar inverters from 5% ad valorem to 20% ad valorem has had a consequential and direct bearing on the increase of quantum of social welfare surcharge and IGST on imposed on such import.
- f) Prior to the rescission of Notification 1/2011, the total duty payable by the Petitioner on the import of solar inverter was 5.78% ad valorem which has, on account of rescission of said Notification from 02.02.2021, increased the total duty payable by the Petitioner on import of solar inverter to 23.10% ad valorem.
- g) Under the regime wherein Notification 1/2011 was in operation, that is from 06.02.2011 up until 02.02.2021, social welfare surcharge imposed on import of solar inverters amounted to 0.5% ad valorem. However, the rescission of Notification 1/2011 has increased the quantum of social welfare surcharge imposed, which amounts to 2% ad valorem, from 02.02.2021 onwards. In this regard, reliance is placed on Rajasthan Electricity Regulatory Commission (RERC) order dated 30.12.2021 in Petition No. RERC-1914/21 & batch, in *Fortum Solar Plus Private Limited & Ors. V Solar Energy Corporation of India & Anr.* RERC, while declaring the increase in the rate of BCD vide Notification No. 7/2021-Custom., dated 01.2.2021 as Change in Law, also held that claim for additional cost on account of levy of IGST and Social Welfare Surcharge on the increase in the rate of Basic Customs Duty is required to be considered as Change in Law, since, the BCD has been considered and approved as a Change in Law in terms of Change in Law clause of the PPA.
- h) On the basis of the Ministry of Power letter dated 27.08.2018, the imposition of safeguard duty on import of solar modules, the change in basic customs duty and consequent increase in social welfare surcharge and IGST on import of solar inverters ought to be treated as a pass through and thereby allowed as a change in law.
- i) With the increase in the costs due to the change in law events, the working capital requirement, and consequently, the interest on working capital have also increased as compared to requirement and rate prevalent at the time of bid. Thus, the Petitioner is

entitled to interest on incremental working capital at normative interest rate to put Petitioner to the same economic position as if change in law had not occurred.

- j) The Petitioner has funded the entire safeguard duty and additional customs duty upfront from its equity as the same was not envisaged at the time of bidding and was not a part of project cost. Therefore, Petitioner is also entitled for reimbursement of carrying cost from the date of actual payment of safeguard duty and additional customs duty till the Order from this Commission so that Petitioner is put to the same economic position as if change in law had not occurred. In order to restore the affected party in the same economic position as if the change in law event has not occurred, the carrying cost has to be allowed at “actuals”. In this regard, reliance is placed on APTEL order dated 16.11.2021 in Appeal No. 163 of 2020 and Appeal No. 171 of 2020, in *Nisagra Renewable Energy Private Limited v Maharashtra State Electricity Distribution Co. Ltd. & Anr.* and *Juniper Green Energy Private Limited v Maharashtra State Electricity Distribution Co. Ltd & Anr.*
- k) The Commission ought to apply the principles laid down in the RE Tariff Regulations, 2020 in its entirety and thereby, arrive at the discounting factor considering the debt equity ratio of 70:30, if it adopts annuity payment method.
- l) The interest rate of such carrying cost should be equal to the return on equity as allowed by this Commission in its Regulation for *Terms and Conditions for Tariff determination from Renewable Energy Sources, 2020* which is 14% per annum. Alternatively, Petitioner be allowed an interest rate of carrying cost equal to the rate of interest allowed under Late Payment surcharge clause of PPA.
- m) PPA and PSA have a back to back arrangement, however, payment to the Petitioner by SECI should not be conditional upon the payment to be made by the MMPCL to SECI.
- n) If the Petitioner is not allowed to claim the said percentage as carrying cost, the Petitioner would have to bear huge losses which would not lead to restitution to the same financial position. The Petitioner cannot be made to suffer for acting bona fide.
- o) The Petitioner vide additional affidavit dated 22.07.2022 submitted that at the time of filing of the present Petition, the GST Notification dated 30.09.2021 was not in existence, so, the specific prayers seeking declaration of this GST Notification as Change in Law and reimbursement/compensation for the same could not be made. Vide Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021 (*2021 IGST*

Notification) the rate of GST applicable on renewable energy devices and parts for their manufacture have increased from 5% to 12%. Since, 2021 IGST Notification has come into effect after the date for submission of bids i.e., 30.05.2019, it would also qualify as a Change in law under Article 12 of the PPA dated 18.11.2019.

Submissions of SECI:

8. Briefly, SECI has stated as under:

- a) The Safeguard Duty imposed vide Notification dated 29.07.2020 of the Government of India is a “Law” in terms of PPA. However, the onus is on the Petitioner to demonstrate that the 2020 SGD Notification dated 29.07.2020 has resulted in the Petitioner incurring additional expenditure as against the envisaged expenditure as on the Bid Submission Date. At time of submission of bid, the Petitioner ought to have factored the impact of Safeguard Duty (rates being in the range of 25% to 15%).
- b) RERC vide Order dated 30.12.2021 in Petition Nos.1914/2021, 1922/2021 and 1941/2021 has held that Imposition of Safeguard Duty vide Notification dated 29.07.2020 is not a change in Law in terms of Article 12 of PPAs (Change in Law provision).
- c) The safeguard duty has not been imposed on the import of solar cells from other developing countries as provided in Notification No.19/2016- Customs (N.T.) dated 05.02.2016 issued by the Ministry of Finance.
- d) SECI has submitted that compensation if any qua the said Notification can be only allowed after examination and verification of documents by SECI and MPPMCL.
- e) In case of composite works contract, subject to admissibility of the 2021 IGST Notification dated 30.09.2021 as Change in Law, any increase in tax rate of GST which the Petitioner can claim as per the 2021 IGST Notification dated 30.09.2021 of the Government of India is only for the increase of GST from 5% to 12% on goods there being no increase in tax on service part of 30% as per the said Notifications.
- f) Social Welfare Surcharge may not be considered as a cost for setting up of the project as it does not form part of the profit and loss account related to the business of setting up of the solar power project and supply of solar power under the PPA. If such an obligation is allowed as pass through, the very purpose of contribution to be made for public interest is frustrated. It will amount to public at large contributing for its own

interest instead of the obligation being discharged by the person engaged in business activities.

- g) There has been a fall in the interest rate of loan and there has been notification of *Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020* (RE Tariff Regulations, 2020) and RE Tariff Order dated 31.03.2021. In the said regulations read with RE tariff Order, the Central Commission has considered interest rate of 9% and the term of the Loan repayment as 15 years instead of 13 years earlier considered. The same parameters for making payment on annuity basis may be considered by Commission in case compensation is allowed.
- h) MPPMCL may be directed to make payment towards the evaluated claims of the Safeguard Duty and Customs Duty payable by SECI to the Petitioner, on a back to back basis under the PSA in a time bound manner.
- i) APTEL in its decision dated 15.09.2022 passed in Appeal No.256 of 2019 and connected Appeals in the case of *Parampujya Solar Energy Pvt. Ltd. vs. Central Electricity Regulatory Commission* (Parampujya Case) has dealt with the impact of Change in Law beyond Commercial Operation Date of the project along with carrying cost. In this regard, it is submitted 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 above judgement dated 15.09.2022 of APTEL 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 Hon'ble Supreme Court vide Order dated 23.01.2023 in in Civil Appeal being Diary No.135 of 2022 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.

.....
Tag with Civil Appeal No 8880 of 2022.

Analysis and Decision:

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

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

Issue No. I: *Whether the introduction of Notification No.02/2020- Custom (SG)dated 29.07.2020 issued by the Department of Revenue, Ministry of Finance, Government of India, the introduction of Notification No.8/202- GST issued by Ministry of Finance, Government of India and the imposition of increased rate of basic customs duty and subsequent increase in quantum of social welfare surcharge and IGST on account of rescission of Notification No. 1/2011-Customs dated 06.01.2011 vide Notification No. 07/2021-Customs dated 01.02.2021 issued by Ministry of Finance, Government of India amounts to Change in Law events under Article 12 of the Power Purchase Agreement dated 18.01.2019?*

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

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

11. Now we proceed to discuss the above issues.

RE:- Issue I and II

12. The Issue No. I and the Issue No. II are interlinked and hence are taken together for consideration. The Petitioner has submitted that the 2020 SGD Notification was issued after the sunset clause of the 2018 SGD Notification and resulted in introduction of Safeguard Duty beyond 30.07.2020 which had a direct impact on the project as it resulted in the

Petitioner incurring additional expenditure. Vide 2021 IGST Notification, the GST rates were increased from 5% to 12%. Further, rescission of Notification No. 1/2011-Customs dated 06.01.2011 vide Notification No. 07/2021-Customs dated 01.02.2021 (2021 BCD Notifications) has led to an increase in expenditure on import of inverters. As such all notifications qualify as change in law under Article 12 of the PPA and the Petitioner should be compensated accordingly. *Per Contra*, SECI has submitted that the onus is on the Petitioner to demonstrate that the 2020 SGD Notification has resulted in incurring additional expenditure against the anticipated expenditure on the bid submission date. On the issue of admissibility of the 2021 BCD Notification as a change in law event, SECI submitted that Social Welfare Surcharge should not be declared as change in law as it relates to corporate social responsibility of the Petitioner. The Petitioner is also required to place on record the relevant Notifications/documents of the Competent Authority demonstrating the applicability of Social Welfare Surcharge and the 2021 BCD Notification and the rates claimed with regard to the Social Welfare Surcharge and IGST.

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

“ARTICLE 12: CHANGE IN LAW

12.1 Definitions

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

In this Article 12, the term Change in Law shall refer to the occurrence of any of the following events pertaining to this project only after the last date of the bid submission, including (i) the enactment of any new law; or (ii) an amendment, modification or repeal of an existing law; or (iii) the requirement to obtain a new consent, permit or license; or (iv) any modification to the prevailing conditions prescribed for obtaining an consent, permit or license, not owing to any default of the Solar Power Generator; or (v) any change in the rates of any Taxes including any duties and cess or introduction of any new tax made applicable for setting up the solar power project and supply of power from the Solar Power project by the SPD which have a direct effect on the Project.

However, Change in Law shall not include (i) any change in taxes on corporate income or (ii) any change in any withholding tax on income or dividends distributed to the shareholders of the SPD, or (iii) any change on account of regulatory measures by the Appropriate Commission.”

In the event a Change in Law results in any adverse financial loss/ gain to the Solar Power Generator then, in order to ensure that the Solar Power Generator is placed in the same financial position as it would have been had it not been for the occurrence of the Change in Law, the Solar Power Generator/ Procurer shall be entitled to compensation by the other party, as the case may be, subject to the condition that the quantum and mechanism of compensation payment shall be determined and shall be effective from such date as may be decided by the Appropriate Commission.

It the event of any decrease in the recurring/ nonrecurring expenditure by the SPD or any income to the SPD on account of any of the events as indicated above, SPD shall file an application to the appropriate commission no later than sixty (60) days from the occurrence of such event, for seeking approval of Change in Law. In the event of the SPD failing to comply with the above requirement, in case of any gain to the SPD, SECI shall withhold the monthly tariff payments on immediate basis, until compliance of the above requirement by the SPD.

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.”

14. As per the Safeguard Duty Notification No. 1/2018 (SG) dated 30.07.2018 (2018 SGD Notification), the Central Government imposed safeguard duty as per the following rates on the import of “Solar Cells whether or not assembled in modules or panels”:

- a) 25% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th July 2018 to 29th July 2019;*
- b) 20% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th July 2019 to 29th January 2020;*
- c) 15% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th January 2020 to 29th July 2020.*

15. The extract of the 2020 SGD Notification, is as under:

- ...
- (a) fourteen point nine per cent. ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30th July, 2020 to 29th January, 2021 (both days inclusive); and*
 - (b) fourteen point five per cent. ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30th January, 2021 to 29th July, 2021 (both days inclusive).*

16. The extract of 2021 IGST 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 A | 84, 85 or 94 | <i>Following renewable energy devices & parts for their manufacture: - (a) Bio-gas plant (b) Solar power-based devices</i> |
|----------|--------------------|--|

| | | |
|--|--|---|
| | | <p>(c) <i>Solar power generating system</i> (d) <i>Wind mills, Wind Operated Electricity Generator (WOEG)</i> (e) <i>Waste to energy plants / devices</i> (f) <i>Solar lantern / solar lamp</i> (g) <i>Ocean waves/tidal waves energy devices/plants</i> (h) <i>Photo voltaic cells, whether or not assembled in modules or made up into panels.</i></p> |
|--|--|---|

17. From the above we note that any application of new tax or an amendment, modification or repeal of an existing law is covered as ‘Change in Law’. We observe that the 2020 SGD Notification stipulated fourteen point nine per cent (14.9%) ad valorem minus anti-dumping duty payable, on subject goods when imported during the period from 30.07.2020 to 29.01.2021 (both days inclusive); and fourteen point five per cent (14.5%) ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30.01.2021 to 29.07.2021 (both days inclusive). The notification provides for a diminishing ‘Safeguard Duty’ slab in the range of 14.9% to 14.5% applicable ad valorem on the imports from 30.07.2020 till 29.07.2021. The impact of ‘Safeguard Duty’ notification is on any portion of import whose point of taxation is on or after implementation of the Notification dated 29.07.2020 and the same will be subjected to the purview of ‘Safeguard Duty’. The Commission is of the view that a fresh ‘Safeguard Duty’ became effective from 30.07.2020 and hence the notification/imposition of ‘Safeguard Duty’ will directly affect the projects where “solar cells whether or not assembled in modules or panels” were imported on or after 30.07.2020. In the present instance, the 2020 SGD Notification has imposed a fresh Safeguard Duty till 29.07.2021 and has thereby increased the rate of the Safeguard Duty from ‘zero’ to 14.9% & 14.5% for the period- 30.07.2020 to 29.01.2021 and 30.01.2021 to 29.07.2021, respectively.

18. The Commission further observes that Clause (v) of Article 12 of the PPA, 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 from the Solar Power Project by the SPD which have a direct effect on the Project.* The introduction of Notification No. 8/2021- Integrated Tax (Rate) dated 30.09.2021 has been issued by the Ministry of Finance, Government of India. As such the introduction of the impugned notifications have been enacted by the 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’. Hence,

we hold that the impugned notifications viz. 2020 SGD Notification and 2021 IGST Notification are Change in Law events as per Article 12 of the PPA dated 18.11.2019.

19. The Petitioner has further submitted that as a result of the *rescission of the Basic Custom Duty (BCD) Notification No. 1/2011-Customs dated 06.01.2011 by the BCD Notification No. 7/2021*, Custom Duty on solar Inverters was raised to 20% from the earlier applicable rate of 5%. The Petitioner has submitted that rescission of the BCD Notification dated 06.01.2011 has led to increase in the taxes as under:

| Duty, surcharge and Tax imposed | Regime when Notification No. 1/2011-Customs dated 06.01.2011 was in operation (06.01.2011 – 01.02.2021) | Regime when Notification No. 7/2021-Customs dated 01.02.2021 rescinded Notification 01/2011 (02.02.2021 – till date) | Net increase in rate of tax |
|---------------------------------------|---|--|-----------------------------|
| Basic customs duty (BCD) | 5.00% | 20.00% | 15.00% |
| Social welfare surcharge (SWS) on BCD | 0.50% | 2.00% | 1.50% |
| IGST (on BCD + SWS) | 0.28% | 1.10% | 0.83% |
| Total Duty | 5.78% | 23.10% | 17.33% |

20. We observe that Section 110 of the Finance Act, 2018 mandates as follows:

.....
There shall be levied and collected, in accordance with the provisions of this Chapter, for the purposes of the Union, a duty of Customs, to be called a Social Welfare Surcharge, on the goods specified in the First Schedule to the Customs Tariff Act, 1975 (hereinafter referred to as the Customs Tariff Act), being the goods imported into India, to fulfil the commitment of the Government to provide and finance education, health and social security.
 ...

21. We observe that APTEL vide the judgement dated 07.06.2021 in A.No. 158 of 2017 & in A.No. 316 of 2017 in the matter of *Adani Power (Mundra) Limited v. Central Electricity Regulatory Commission & Ors.* has held as follows:

“73. It is noticed that there was no customs duty imposed as on cut-off date. The customs duty was imposed on electrical energy removed from SEZ to DTA with effect from 26.09.2009 i.e., after cut-off date. By notification No. 91 of 2010 dated 06.09.2010, the

customs duty on electricity removal from SEZ to DTA was reduced to Rs. 0.10 per unit for plants using imported coal and Rs. 0/nil for plants using domestic coal.

74. By Notification 12 of 2012, the customs duty specified in the above said notification dated 06.09.2010 was reinstated with revised rates. Since the Ministry of Finance (Department of Expenditure) and the Customs Department both being Indian Governmental Instrumentalities in terms of PPA, issued the above notifications, it qualifies as law having force of law and change in law in terms of the PPA.

75. It is pertinent to note that the Appellant Generator was required to include all tax, duties, cess etc. in the bid. Apparently, there was no such customs duty at the time of bid. Therefore, the said customs duty was absent as on the cut-off date and the same was introduced by Indian Governmental Instrumentality as stated above, they amount to change in law. Therefore, any financial burden added to the shoulders of the generator deserves to be compensated in terms of PPA. Therefore, we are of the opinion that the Central Commission was justified in allowing Customs Duty as change in law event in the impugned order.”

22. We observe that the increase in rate of basic customs duty imposed on import of machinery and auxiliary equipment for the initial setting up of solar power generation project has increased the quantum of social welfare surcharge, payable under Section 110 of the Finance Act, 2018, on such import, which is fixed at a rate of 10% on aggregate duties and taxes which are levied and collected by the Central Government under Section 12 of the Customs Act, 1962 which had a bearing on the increase in the quantum of integrated goods and services tax and Services Tax Act, 2017 (IGST Act) on such import by the Petitioner. As per APTEL judgement dated 07.06.2021 if at the time of submission of the bid (Bid Cut-off date) there was no applicability of the custom duty, it will amount to Change in Law if it is introduced by Indian Governmental Instrumentality in terms of the PPA and any financial implications cast upon the SPD on account of Change in Law shall be compensated. Hence, we hold that rescission of the Basic Custom Duty (BCD) Notification No. 1/2011-Customs dated 06.01.2011 by the BCD Notification No. 7/2021 is an event of Change in Law as per Article 12 of the PPA dated 18.11.2019. We also note that there is an increase in the quantum of social welfare surcharge, payable under Section 110 of the Finance Act, 2018, on import of goods. Hence, we hold that increase in social welfare surcharge on the import of machinery and auxiliary equipment is also an event of Change in Law as per Article 12 of the PPA dated 18.11.2019.

23. We observe that the Directorate General of Taxpayer Services, Central Board of Excise & Customs in its official web-site www.cbic.gov.in has clarified as under:

“In cases where imported goods are liable to Anti-Dumping Duty or Safeguard Duty, calculation of Anti-Dumping Duty or Safeguard duty would be as per the respective notification issued for levy of such duty. It is also clarified that value for calculation of IGST as well as Compensation Cess shall also include Anti-Dumping Duty amount and Safeguard duty amount.”

24. We observe that IGST has been levied by the competent authority in compliance with directions issued by the Government of India. In view of the above we are of the view that that in cases where imported goods are liable to Safeguard Duty, the value of IGST levied on the Safeguard duty is also to be allowed. Hence, we hold that increase of quantum of IGST levied on the Safeguard duty on the import of machinery and auxiliary equipment is also an event of Change in Law as per Article 12 of the PPA dated 18.11.2019.
25. In the instant petition, the bid was submitted by the Petitioner on 30.05.2019. PPA was executed between the Petitioner and the SECI on 18.11.2019 and the SCoD the project was 23.04.2021. In terms of the extended SCoD, the Project was required to be commissioned on or before 23.09.2021. The project was commissioned on 09.12.2021. We observe that a fresh safeguard duty was imposed vide Safeguard Duty Notification No. 2/2020-Custom (SG) dated 29.07.2020 w.e.f. 30.07.2020. GST rates were amended vide Notification No. 8/2021-Central Tax (Rate) dated 30.09.2021 w.e.f. 01.10.2021 and Notification No. 1/2011-Customs dated 06.01.2011 was rescinded vide Notification No. 07/2021-Customs dated 01.02.2021 w.e.f. 02.02.2021. As such the Petitioner’s project was affected by the said notifications. Therefore, the Petitioner is entitled for compensation on account of Change in Law as per the terms of Article 12 of the PPA due impugned notifications viz. *2020 SGD Notification; 2021 IGST Notification, rescission of the BCD Notification No. 1/2011-Customs dated 06.01.2011 by the BCD Notification No. 7/2021*, increase of quantum of *social welfare surcharge* on the imports, and increase in quantum of *IGST levied on the Safeguard duty* on the imports.
26. The issues are decided accordingly.

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

27. SECI has submitted 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. *Per contra*, the Petitioner has submitted that the interest rate of 14% should be considered.

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

65.

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

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

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

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

68. *In view of the above, the liability of SECI/ Discoms for 'Monthly Annuity Payment' starts from 60th (sixtieth) day from the date of orders in respective petitions or from the date of submission of claims by the Respondent (SPDs), whichever is later. In case of delay in the Monthly Annuity Payment beyond the 60th*

(sixtieth) day from the date of orders in respective petitions or from the date of submission of claims by the Respondent (SPDs), whichever is later, late payment surcharge shall be payable for the delayed period corresponding to each such delayed Monthly Annuity

Payment(s), as per respective PPAs/PSAs.

Tenure of 'Annuity Period'

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

"14. Loan and Finance Charges

Loan Tenure

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

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

29. It is apparent that , 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.*
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) were applicable for the period 01.07.2020 to 31.03.2013 now stands extended to 30.09.2023 vide Notification No. RA-14026(11)/4/2020-CERC dated: 27.03.2023.

31. 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 said regulations read with RE tariff Order, 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 impugned Notifications were promulgated after submission of the bid by the Petitioner viz. 30.05.2019. The Petitioner has achieved actual commercial operation on 09.12.2021 i.e. much after the imposition of impugned Notifications and notification of *CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020* and *RE Tariff Order dated 07.11.2021*. Therefore, applying the principle decided by this Commission in the Order dated 20.08.2021 in Petition No. 536/MP/2020, that *the compensation for change in law cannot be a source for earning profit, and therefore, there cannot be any higher rate of return than the prevailing normative cost of debt*, we hold that the discount rate of 9% and annuity period of 15 years will be the appropriate methodology towards change in law compensation.
32. 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 (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.
33. The issue is decided accordingly.

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

34. The Petitioner has submitted that it is entitled for carrying costs on account of Change in Law event in terms of Article 12 of the PPA as per APTEL judgement dated 15.09.2022 in A.No. 256 of 2019 & Batch (*Parampujya Solar Energy Pvt. vs. CERC & Ors.*). *Per contra*, 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 "*Telengana 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.

35. We observe that 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:

CONCLUSION

...

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.”

...

36. In view of above, this Commission holds that the Petitioners shall be entitled for the compensation (pre-COD & post-COD) towards additional expenditure on account of Change in Law event in terms of Article 12 of the PPAs upto the date of reimbursement by the Respondents. The Petitioners, in the instant petitions shall be eligible for carrying cost starting from the date when the actual payments were made to the Authorities till the date of issuance of this Order, at the actual rate of interest paid by the Petitioners for arranging funds (supported by Auditor's Certificate) or the rate of interest on working capital as per applicable RE Tariff Regulations prevailing at that time or the late payment surcharge rate as per the PPA, whichever is the lowest. Once a supplementary bill is raised by the Petitioners in terms of this order, the provision of Late Payment Surcharge in the PPA would kick in if the payment is not made by the Respondents within the due date.

37. Accordingly, the Commission hereby directs the contracting parties to carry out

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 auditor certificate. The Commission further directs that the responding MPPMCL 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 MPPMCL to SECI.

38. We observe that the Hon'ble Supreme Court in its Order dated 12.12.2022, in Civil Appeal no. 8880/2022 in the case of "*Telangana Northern Power Distribution Co. 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."

39. Therefore, the directions issued in this Order so far as they relate to compensation for the period post Commercial Operation Date of the projects in question as also towards carrying cost 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.

Summary

40. The summary of our findings is as follows:

Issue No. I & Issue No. II: The Petitioner is entitled for compensation on account of Change in Law as per the terms of Article 12 of the PPA due to the impugned notifications viz. Safe guard duty Notification No. 2/2020-Custom (SG) dated 29.07.2020; IGST Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021, rescission of the BCD Notification No. 1/2011- Customs dated 06.01.2011 by the BCD Notification No. 7/2021, increase in quantum of social welfare surcharge on the imports, and increase in quantum of IGST levied on the Safeguard duty on the imports of machinery and auxiliary equipment.

Issue No. III: Discount rate of 9% and annuity period of 15 years shall be applicable. The liability of 'Monthly Annuity Payment' will start from 60th (sixtieth) day from the date of the order or from the date of submission of claims, whichever is later. Late Payment

Surcharge shall be payable if the payment is not made within the due date.

Issue No. IV: Compensation for the period post Commercial Operation Date of the projects in question as also towards carrying cost shall be governed in terms of Paras 34, 35, 37 & 39 above.

41. The Petition No. 168/MP/2021 is disposed of in terms of above.

Sd/-
पी. के. सिंह
(सदस्य)

Sd/-
अरुण गोयल
(सदस्य)

Sd/-
आई. एस. झा
(सदस्य)