



THE UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION

LUCKNOW

Petition No. 1954 of 2023

QUORUM:

Hon'ble Shri Arvind Kumar, Chairman

Hon'ble Shri Vinod Kumar Srivastava, Member (Law)

Hon'ble Shri Sanjay Kumar Singh, Member

IN THE MATTER OF:

Petition under Section 86(1)(b), 86(1)(e) and 86(1)(f) of the Electricity Act, 2003 read with Article 12 of the Power Purchase Agreement dated 13.02.2019 filed on behalf of M/s. Tata Power Renewable Energy Limited, seeking: (i) declaration of event of Change in Law due to change in the rate of Basic Custom Duty (BCD) from 5% to 20% effective from 02.02.2021 on the Import of Solar Inverters vide Notification No. 07/2021-Customs dated 01.02.2021 issued by the Ministry of Finance (ii) declaration of event of change in law due to change in the rate of GST on the Solar Invertors vide Ministry of Finance's Notification No. 8/2021-Central Tax (Rate) dated 30.09.2021 (iii) approval of the cost incurred due to change in the rate of BCD and (iv) approval of the cost incurred due to change in the rate of GST.

AND

IN THE MATTER OF

Tata Power Renewable Energy Ltd. (TPREL),

Corporate Centre, A Block, 34, Sant Tukaram Road, Carnac Sunder, Mumbai- 400009

..... **Petitioner**

VERSUS

1. Noida Power Company Ltd. (NPCL),

(Through Its Chairman),

Commercial Complex H Block, Alpha-II sector, Greater Noida City-201308

2. U.P. New & Renewable Development Agency (UPNEDA),

(Through its Senior Project Officer)

by



[Signature]

[Signature]



Vibhuti Khand, Gomti Nagar, Lucknow-226010

.....Respondent(s)

Following were present:

1. Sh. Abhishek Anand, A.M, Legal, NPCL
2. Sh. A.K. Arora, Resident Manager, NPCL
3. Sh. Md. Altaf Mansoor, Advocate, NPCL
4. Sh. Tanay Chaudhary, Advocate, NPCL
5. Sh. Anand Shrivastava, Advocate, TPREL
6. Sh. Shivam Sinha, Advocate, TPREL
7. Ms. Priya Goyal, Advocate, TPREL
8. Sh. Shantanu Singh, TPREL

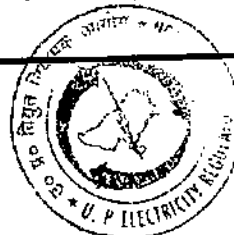
ORDER

(Date of Hearing 30.11.2023)

1. The Petitioner, TPREL has filed this Petition seeking declaration of Change in Law event on account of imposition of Basic Custom Duty (BCD) from 5% to 20% on the import of Solar Inverters vide Ministry of Finance (MoF) Notification dated 01.02.2021 and GST notification dated 30.09.2021 and consequential relief for the same.
2. TPREL is a generating company within the meaning of Section 2(28) of the Electricity Act, 2003 and is a wholly owned subsidiary of Tata Power Company Ltd. Pursuant to bid submission on 16.11.2018, TPREL was issued Letter of Intent on 14.12.2018 (project ID: UPNEDA RS0000339) upon being selected as one of the successful bidders under RfP issued by UPNEDA on 12.10.2018 for procurement of 550MW Solar Power. TPREL and NPCL have entered "PPA" on 13.02.2019 for the supply of 25MW Solar PV based power from the Bunda Project at a levelized tariff of Rs. 3.08 /kWh for a period of 25 years.

Prayer(s):

3. The Petitioner has made the following prayer(s):
 - a) Allow the present Petition.
 - b) Declare the Notification dated 30.09.2021 as an event of change in law under Article 12 of the PPA resulting in the change of the GST rate from 8.9% to 13.8% on the gross value of the Civil & Supply Works).





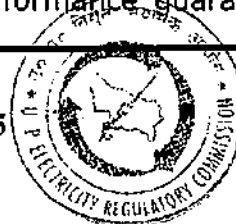
- c) Allow the Petitioner to claim an additional cost of Rs.29,91,541 (Rupees twenty-nine lakhs ninety-one thousand five hundred forty-one only) along-with an estimated carrying cost of Rs. 62,696/- (Rupees sixty-two thousand six hundred ninety-six only) up to 31.01.2023 calculated at the rate of SBI 1-Year MCLR rate plus 1.25% on account of the change in law event, i.e., increase in applicable GST on the Civil & Supply Works including installation and commission work under the contract and direct the Respondent to pay the same.
- d) Condone any inadvertent omission/errors and permit the Petitioner to add/alter this filing and make further submissions as may be required in future.
- e) Pass such other orders that this Commission deems fit in the facts of this case.

Brief Facts of the Case:

4. The Petitioner has mainly submitted as under:

- a) As per the provisions of the PPA dated 13.02.2019, the Scheduled Commercial Operation Date (SCOD) of the project was 21-months from the effective date i.e. 13.02.2019. Thus, the SCOD as per the PPA was 12.11.2020.
- b) The Petitioner in light of the MNRE Notification dated 13.08.2020 (i.e., lockdown due to Covid-19) invoked the extension of 5 (five) months in SCOD vide its letter dated 27.08.2020. On 29.01.2021, NPCL granted the SCOD extension up to 12.04.2021. Further, on 30.03.2021, NPCL conditionally (subject to the Commission approval) granted SCOD extension up to 12.09.2021. In addition to the same, NPCL granted conditional extension of 6-months to TPREL for achievement of SCOD through its letter dated 27.07.2021 and thus SCOD was extended to 27.11.2021. Pertinently, there exists various reasons for the delay of SCOD which was adjudicated by the Commission's Order dated 01.02.2023 in Petition No. 1711/2021. Accordingly, the Plant was commissioned on 03.12.2021.
- c) In order to carry out process of setting up of the Solar Project, the Petitioner entered into an EPC Contract dated 13.11.2019 with Tata Power Solar System (TPSSL) whereby TPSSL was responsible for designing, detailed engineering, commissioning, performance testing and performance guarantee for the complete

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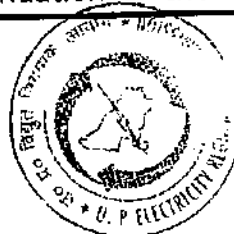


system for the Solar PV Power Plant. TPSSL, in turn entered into an arrangement with Kehua Hengsheng Co. Ltd (Vendors) for supply of Solar Inverters.

- d) The MoF vide its Notification No. 07/2021-Customs dated 01.02.2021 changed the rate of applicable Basic Custom Duty (BCD) of 5% (i.e., as per the Notification No 1/2011 dated 06.01.2011) to 20%. Further, all the applicable changes in Custom Duty have been issued through a separate Letter D.O.F. No. 334/02/2020-TRU dated 01.02.2021. Accordingly, BCD of 20% was made applicable from 02.02.2021 on Import of Solar Invertors i.e., post bid submission date of 16.11.2018. Thus, the same being a subsequent change which falls under the category of change in law event as described in Article 12 of the PPA.
- e) Such change could not be contemplated at the time of bidding and could not have been factored in at the time of submission of bid or the cut-off date. Therefore, this event qualifies as a Change in Law. The Petitioner vide its letter dated 10.02.2021 had informed the Respondent about the Change in Law event as per Article 12.1 of the PPA on account of the BCD Notification.
- f) Solar Inverters were planned to purchase during the last phase of the procurement plan for which the Basic Custom Duty and additional Social Welfare Surcharge were paid amounting to Rs. 46.31 lakh (including GST) in compliance with the BCD Notification.
- g) Solar inverters were released by the customs authority on the basis of challans for the duty paid by TPSSL through various Bank transfers. The Bank statement showing release of payment towards Custom duties from TPSSL to Customs and TPREL to TPSSL is annexed. The detailed mapping showing the invoice raised against the Basic Customs Duty payment along with the bill of entry, challans and the difference of payment due to change in the custom duty rate is also annexed.
- h) The GST Council (a constitutional body under the GST Act, for making recommendations to the Union and State Government on issues related to GST) made certain recommendations in the meeting held on 17.09.2021 for making changes in GST rates applicable on Solar PV Module and other Renewable Energy equipment. Based on the aforesaid recommendation of the GST Council, the MoF

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issued Notification No. 8/2021-Central Tax (Rate) on 30.09.2021, thereby omitting S. No. 234 of Schedule I and Inserting S. No. 201A under Schedule II of Ministry of Finance's Notification No. 1/2017-Central Tax (Rate) dated 28.06.2017.

i) S. No. 201A was added in MoF Notification dated 30.09.2021 which provides that, "Following renewable energy devices and parts for their manufacture shall be taxed at the rate of 6%:

- (a) Bio-gas plant;
- (b) Solar power based devices;
- (c) Solar power generator;
- (d) Wind mills, Wind Operated Electricity Generator (WOEG);
- (e) Waste to energy plants / devices;
- (f) Solar lantern / solar lamp;
- (g) Ocean waves/tidal waves energy devices/plants
- (h) Photo voltaic cells, whether or not assembled in modules or made up into panels."

j) The MoF vide its notification dated 31.12.2018 clarified that 70% of the taxable value would be treated as supply and the remaining 30% would be considered as taxable service. All State Governments Issued Notifications corresponding/ similar to the aforesaid Notification No. 8/2021-Central Tax (Rate), thereby imposing a corresponding rate of tax under the SGST. Thereafter, all the State Governments in the Notifications dealing with taxability of goods and services supplied for Solar power generating systems, both supply of goods as well as services for setting up of solar power projects are compositely taxing at 13.8% (i.e. 12% of 70% + 18% of 30%) of the gross value of such supplies/ services taken together for setting up of the Solar Power Plant.

k) According to the GST Notification dated 30.09.2021, rates applicable for supply of renewable energy devices used in Solar power generators are revised from 5% to 12% with effect from 01.10.2021. Further, as per explanation provided in the notification, contracts in which supply and services both are involved, 70% of the purchase consideration is to be treated as Supply and the remaining 30% is considered as 'Civil/Service'. Hence, the effective GST rate (70% of Supply @ 12%

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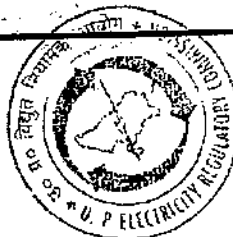


+ 30% of Service @ 18%) works out to 13.8% from the present GST rate of 8.9% (70% of Supply @ 5% + 30% of Service @18%) from 01.10.2021. Therefore, the GST Notification causing upward revision of the GST for solar power generation project is clearly covered within the folds of 'Change in law' clause as defined under Rule 2(1)(c)(ii) of the Change in Law Rules.

- l) As per Article 12 & Article 1.1 (i.e., definition of Law and Government Instrumentality) of the PPA, it is clear that the BCD Notification dated 01.02.2021 and the GST Notification dated 30.09.2021, changing the BCD rate on imported Solar Invertor from 5% to 20% and the GST rate to 13.8% clearly falls under the ambit of the 'Change in Law event' as it amounts in modification of an existing law which has a direct bearing on the Solar PV Project.
- m) In the present case, the Petitioner has already submitted its quote for tariff through e-reverse auction held on 16.11.2018 for developing Solar PV Project. Considering that the change in BCD has resulted in additional cost only after the BCD Notification dated 01.02.2021 and the GST Notification dated 30.09.2021, which was not required to be contemplated by the Petitioner at the time of quoting the tariff in the bidding, the Petitioner is entitled to seek for appropriate relief as per Article 12 of the PPA.
- n) The Respondent can pay the compensation as a one-time payment of impact of Basic Customs duty & additional Social Welfare Surcharge along with the carrying cost from the actual payment date till the actual recovery of the amount. The Petitioner has considered SBI 1-year Marginal Cost of fund plus 1.25% for computing carrying cost.
- o) The impact of Basic Customs Duty works out to be Rs.46.31 lakh (including GST @ 13.8% on it), therefore, considering the provisions of the PPA, the Petitioner may be allowed to claim Rs.46.31 lakh (including GST @ 13.8%) along-with an estimated carrying cost of Rs. 6.89 lakh calculated at 8.25% for the FY 2021-22 and 8.84% till 31.12.2022 considering the SBI 1-year MCLR rate plus 1.25%, incurred due to Change in BCD & additional Social Welfare Surcharge along with the change in the rate of GST.

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Records of Proceedings:

5. During the hearing dated 16.05.2023, the Commission directed the parties to file their respective reply & rejoinder in the matter. On 27.07.2023, NPCL filed its reply. On the hearing dated 01.08.2023, the Commission allowed the TPREL to file its rejoinder within two weeks' time. On 29.08.2023, TPREL filed its rejoinder.
6. Further, the Commission adjourned the hearing dated 12.09.2023 & 10.10.2023 on the request of the Petitioner. Thereafter, On the hearing dated 30.11.2023, the parties concluded their arguments in the matter. The Commission directed both parties to file their written submissions and accepted the request of the parties to share each other's written submissions.

NPCL's Reply

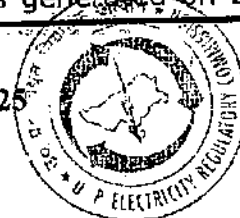
7. On 27.07.2023, NPCL filed its reply and has mainly submitted as under:
 - a) As per Article 12 of the PPA, the Bid Deadline was 27.11.2018 and accordingly the Cut-off date for claiming Change in Law relief was 27.11.2018. Accordingly, the Petitioner is entitled for compensation on account of any Change in Law that occurs after the Cut-off date.
 - b) On the request of the Petitioner, NPCL granted SCOD time extensions on many occasions. After considering several MNRE's Office Memorandums and the unconditional undertaking of the Petitioner (letter dated 16.07.2021), NPCL in-principally accepted the request of the SCOD extension till 27.11.2021 subject to the Commission's approval. Thus, any Change in Law and/or Force Majeure event, will be attributable to the Petitioner in view of the Unconditional Undertaking dated 16.07.2021 in accordance with MNRE O.M. dated 12.05.2021 rendered by the Petitioner stating that extension in SCOD will not be treated as a ground for claiming termination of PPA or for claiming any increase in the project cost, including Interest during Construction (IDC) or upward revision of tariff.
 - c) Ministry of Finance vide its Notification No. 1/2011 - Customs dated 06.01.2011 exempted all items of machinery required for the initial setting up of a solar power generation project or facility, when Imported into India, from so much of the duty of customs leviable thereon which is specified in the First Schedule to the Customs





Tariff Act, 1975 (51 of 1975), as is in excess of 5% ad valorem, subject to fulfilling certain conditions. The Petitioner in the Captioned Petition sought approval of Notification No. 07/2021-Customs dated 01.02.2021 as Change in Law Event. However, the Petitioner has failed to suffice with any documentary proof that said Notification dated 01.02.2021 has led to an increase in BCD from 5% to 20%.

- d) The Petitioner has stated that changes in the Custom Duty has been issued through the MoF's letter dated 01.02.2021. However, upon perusal of the said letter dated 01.02.2021, though it is apparent that the Solar Inverters were covered under Chapter 85 and sub-heading 8504 40 of the Custom Tariff Act, 1972, however, the said letter cannot be relied upon in the instant proceedings before this Commission.
- e) Furthermore, as per Letter D.O.F. No. 334/02/2020-TRU dated 01.02.2021 of Ministry of Finance, it has been advised to refer the Finance Bill, 2021, Clause 95 (i) of which seeks to amend the First Schedule to the Customs Tariff Act, 1975 so as to increase the tariff rate of BCD on certain goods. However, upon perusal of Finance Bill, 2021 and Finance Act, 2021, it cannot be concluded that the BCD on import of Solar Inverter has been increased from 5% to 20%. Thus, the Petitioner may be directed to satisfy along with supporting documents to prove that the Notification No. 3/2021-Customs and Notification No. 7/2021- Customs dated 01.02.2021 are a Change in Law event and has increased the BCD on Import of Solar Inverters from 5% to 20%.
- f) When the PPA was signed on 13.02.2019 with the SCOD on 13.11.2020, then in that event the Petitioner had to necessarily import the inverters prior to 13.11.2020 if they wanted to commission the project before the SCOD. Even if it is considered that the extended SCOD as accepted by the NPCL vide its letter dated 29.01.2021 was till 12.04.2021, the inverters were required to be purchased well before April 2021 (since the inverters were procured from China). The Petitioner could not have known prior to 12.04.2021 that its further request for SCOD extension would be accepted and that they could have waited post 12.04.2021 to import their inverters.
- g) BCD Impact is actually to be borne by the Petitioner itself as the same happened due to delay in procurement of Solar Inverter. The Solar Inverters were procured in the Month of March 2021 to which Challan was generated on 22.03.2021, whereas at





that time the revised SCOD was 12.04.2021, had the procurement of solar inverters were done as per the provisions of the PPA i.e. prior to 02.02.2021, no revised BCD would have been levied on the Petitioner.

- h) The Ministry of Finance, Government of India vide Notification No. 1/2017-Integrated Tax (Rate) dated 28.06.2017 notified the rate of the integrated tax of 5 % levied in respect of goods specified in Schedule I. Therefore, It is clear that GST on Renewable Energy Devices and Parts as mentioned in S. No. 234 of Schedule - I comes out to 5%. Thus, 5% GST is leviable on the BCD on Import of Solar Inverters, if applicable. It becomes clearer from the Bills of Entries and Duty Challans annexed by the Petitioner in the Petition. Any claim over and above 5% is not permissible and beyond legal provisions.
- i) The Ministry of Finance vide Notification No. 1/2017-Central Tax (Rate) dated 28.06.2017 ("Goods Rate Notification") lays down the rate for renewable energy devices as 5% (i.e., CGST 2.5%; SGST 2.5%), while Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017 ("Services Rate Notification") lays down the GST rate of 18%. (i.e., CGST 9%, SGST 9%) for services by way of construction or engineering or installation or other technical services, provided in relation to the setting up of renewable energy devices. However, It gave rise to the ambiguity about the rate which should be applicable in cases wherein the person is undertaking the complete contract of providing the renewable energy devices along with the services of their installation and setting up.
- j) Therefore, to bring clarity on this issue, an explanation was inserted in the Goods Rate Notification vide Notification No. 24/2018- Central Tax (Rate) dated 31.12.2018 w.e.f. 01.01.2019. Since the above explanation was effective w.e.f. 01.01.2019, there was no clarity w.r.t. the applicable rates for the period up to 31.12.2018. Again, to bring clarity in this matter, GST Council in its 45th meeting stated that for the period before 01.01.2019, GST on the renewable energy projects shall be paid on 70:30 mechanism only i.e. the explanation has a retrospective effect.
- k) Therefore, it is evident that in case of complete contract of supply and installation of renewable energy devices, the service portion would constitute of 30% of the gross

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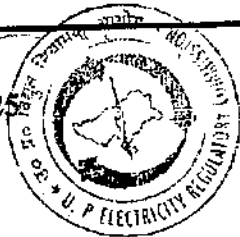


value and the goods portion would constitute for 70% of the gross value which gives the effective rate of 8.9% $[(5\%*70\%) + (18\%*30\%)]$. It is pertinent to note that the above position was very well known to the Petitioner prior to the signing of the PPA i.e. 13.02.2019.

- l) Further, vide Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021, the Goods rate Notification was amended and the rate on renewable energy devices was increased to 12% (CGST 6% and SGST 6%) from 5% w.e.f. 01.10.2021. Therefore, now the effective rate on renewable energy projects is 13.8% $[(12\%*70\%) + (18\%*30\%)]$. The Petitioner in the instant Petition is seeking approval of Change in Law to the effect of coming into force of Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021. The claim of the Petitioner towards the GST is not permissible as per the terms of the PPA.
- m) The claim of the Petitioner towards increased GST is based on the Invoices of Vendor of the Petitioner i.e. TPSSL. Upon perusal of the attached Invoices towards BCD on import of Solar Inverters, it becomes clear that the Invoice No. 9131121735 was raised on 27.04.2021 (prior to 30.09.2021 GST Notification) and Invoice No. 91311221444 was raised on 29.11.2021 (after 30.09.2021 GST Notification). Pertinently the Solar Inverters, on which the Basic Customs Duties was levied, were imported in India in the Month of March 2021 and the Duty was paid in the Month of April 2021. Therefore, TPSSL has raised the Invoice to the Petitioner at a very belated stage after almost 7 Months when the rates of GST got changed. This action of the TPSSL and the Petitioner is not a prudent practice and NPCL cannot in any manner be burdened owing to the fault of others.
- n) The purported increase in rate of BCD imposed on Import of goods specified in the First Schedule to the Customs Tariff Act, 1975 has led to the Increased 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. 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

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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 the public at large contributing for its own.

- o) The PPA does not have a provision dealing with restitution principles for restoring the affected party to the same economic position. Therefore, the Petitioner is not entitled to claim relief, which is not provided for, in the PPA. It is a well settled proposition of law that when the terms of the PPA do not contain any restitution provisions, the claim for carrying cost is not tenable in view of the terms of the PPA. In this regard, the Hon'ble Appellate Tribunal for Electricity and Hon'ble Supreme Court (in Adani power Vs. CERC and ors. 2018 SCC online) held that in the event, the contract between the parties did not provide for restitution explicitly, the concept of restitution cannot be read into the contract. Furthermore, it is a settled position of law that courts cannot re-write the contracts.

Rejoinder of TPREL

8. On 29.08.2023, TPREL filed its rejoinder and has mainly submitted as under:
- a) Pertinently, the Order passed in Petition No. 1711/2021 dated 01.02.2023 has not been challenged and has therefore attained finality. In terms of the said Order dated 01.02.2023, the delay in achieving the SCOD was not on Petitioner's own volition and therefore any liability arising out of the same cannot be attributed or fastened to the Petitioner in terms of Article 12 of the PPA. Therefore, the reliance placed by NPCL to highlight the extensions sought by the Petitioner is completely unwarranted and is liable to be rejected.
- b) On 28.06.2017, Ministry of Finance vide Notification No. 1/2017-Central Tax (Rate), levying CGST at the rate of 2.5% on 'Supply Contracts' (contracts for Supply of Solar Power Generation System such as Solar Modules, Solar Inverter, Cables, 33 kV Switchgear System, Transformers, Auxilliary Power System). Subsequently, on 29.06.2017, the State had issued Notification No. 1/2017, wherein SGST was imposed at the rate of 2.5%. Accordingly, the effective rate of GST payable was 5% (2.5% CGST and 2.5% SGST) on supply of solar modules/ generating system. Further, the Ministry of Finance issued similar notification under the IGST Act levying IGST at the rate of 5% on 'Supply Contracts'.

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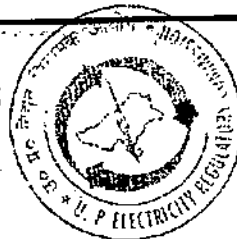


- c) Subsequently, on 28.06.2017, the MoF issued Notification No. 11/2017-Central Tax (Rate) levying CGST at the rate of 9% on Contract for Civil Works for construction of Civil foundation, Construction of Transformer foundation, installation etc. On 29.06.2017, a similar Notification was also issued by the states whereunder SGST at the rate of 9% was made applicable under Heading 9954 (Construction services). Accordingly, the effective rate of GST was applicable at the rate of 18% (9% CGST and 9% SGST) on civil works or construction of solar power plants. Further, on 28.06.2017, Ministry of Finance issued similar notification under the IGST Act, levying IGST at the rate of 18% on Contract for Civil Works for construction of Civil foundation, Construction of Transformer foundation, installation etc.
- d) On 31.12.2018, to resolve various issues being raised qua the applicable GST rates for Composite Contracts providing for supply and services, the MoF, on the recommendations of the GST Council, issued Notification No. 27/2018-Central Tax (Rate) adding S. No. 38 to the list provided in Notification No. 11/2017. S. No. 38 reads as follows:

(1)	(2)	(3)
"38.	9954 or 9983 or 9987	Service by way of construction or engineering or installation or other technical services, provided in relation of setting up of following, - (a) Bio-gas plant (b) Solar power-based devices (c) Solar power generating system (d) Windmills, Wind Operated Electricity Generator (e) Waste to energy plants / devices (f) Ocean waves/tidal waves energy devices/plants Explanation: This entry shall be read in conjunction with serial number 234 of Schedule I of the notification No. 1/2017- Central Tax (Rate), published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) dated 28th June, 2017 vide GSR number 673(E) dated 28th June, 2017.

- e) In addition, Notification No. 24/2018-Central Tax (Rate) was also issued by the Central Government, which clarified that 70% of the taxable value would be treated as supply and the remaining 30% would be considered as taxable service. In other

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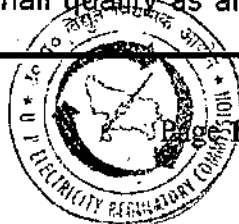




words, GST at the rate of 5% would be levied on 70% of the taxable value and GST at the rate of 18% would be levied on the remaining 30% of the taxable value.

- f) On 31.12.2018, similar Notification No. 25 / 2018 – (Integrated Tax) were issued by the other State Governments, including the State clarifying that 70% of the taxable value would be treated as supply and the remaining 30% would be considered as taxable service. It is noteworthy that, the similar notifications were also issued by the Ministry of Finance under the IGST Act clarifying that 70% of the taxable value would be treated as supply and the remaining 30% would be considered as taxable service.
- g) Accordingly, the effective rate of GST [i.e., CGST + SGST and IGST] for such composite contracts increased to 8.9% [i.e., 70% x 5% + 30% x 18%] of the total contract value (for the entire setting up of Solar fields) instead of the earlier applicable 5% on the supply of solar modules/ generating system and 18% on Civil Works/ Service Contract.
- h) Subsequently, on 30.09.2021, the MoF, on the recommendations of the GST Council, issued Notification No. 8/2021 – Central Tax (Rate) under the CGST Act. In terms of the said notification, following is relevant:
- (i). S. No. 234 under **Schedule I** of Ministry of Finance's Notification No. 1/2017-Central Tax (Rate) dated 28.06.2017 has been **omitted**; and
- (ii). S. No. 201A under **Schedule II** of Ministry of Finance's Notification No. 1/2017-Central Tax (Rate) dated 28.06.2017 has been **inserted**.
- i) In line with the aforesaid Notification, on and after 30.09.2021, all State Governments issued corresponding notifications regarding the applicable SGST. It is noteworthy that, the Central Government also issued similar notifications under the IGST Act. Consequently, the effective rate of GST for Supply Contracts for erection and installation of Solar Power Projects has increased to 13.8% [i.e., 70% *12% + 30% *18%] of the total contract value (for the entire setting up of Solar fields) instead of the earlier applicable 8.9% (70% *5% + 30%*18%).
- j) On 27.09.2022 MNRE vide O.M. categorically stated that the increase in applicable GST from 5% to 12% shall qualify as an event of change in law event. Further, the

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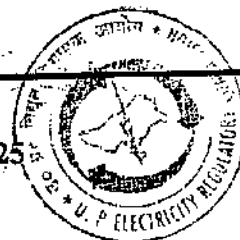




O.M. also noted that such change in law shall be considered for RE projects wherein the last date of submission of bid was on or before 30.09.2021 and the SCOD was on or after 01.10.2021. Therefore, considering the facts and circumstances of the present case, it is evident that in terms of the aforementioned O.M. the increase of GST from 5% to 12% qualifies as an event of change in law. Pertinently, the Petitioner vide its letter dated 10.02.2021 and 06.10.2021 intimated NPCL regarding the increase in BCD and GST respectively and further apprised that such events qualify as an event of change in law.

- k) MNRE O.M. dated 12.05.2021 and 29.06.2021 which required the generators to issue an unconditional undertaking for seeking extension of SCOD stating that such extension shall not lead to an increase in the project cost and further any upward revision in tariff merely due to such extension. In such a case, if change in law event would have not occurred, and all other factors would have remained constant, then the Petitioner would have not raised a claim merely due to change in timelines. However, the undertaking dated 16.07.2021 in no manner can be interpreted to infer that the PPA stands amended and / or altered by way of such undertaking.
- l) Pursuant to MNRE O.M. dated 12.05.2021 stands further clarified vide MNRE O.M. dated 03.11.2021 wherein MNRE had categorically confirmed that the change in law will be in terms of the PPA and the O.M. and all undertakings issued thereunder cannot be interpreted to exclude the applicability of change in law in terms of the PPA.
- m) The Petitioner has provided all relevant documents proving implication of additional cost borne by the Petitioner on account of imposition of additional BCD and GST. The Petitioner has categorically placed on record all invoices raised by TPSSL against which the applicable BCD and GST was paid by the Petitioner. The invoices raised by TPSSL are already annexed with the Petition as Annexure P13. Further, the Petitioner has also provided the copies of the bill of entry, challans, bank statements and auditor certificate highlighting the imposition of BCD and GST on import of solar invertors and subsequent payments made in relation to the same.

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- n) Article 12.2 of the PPA grants the appropriate commission with the powers to grant relief on the occurrence of any change in law event in terms of Article 12.1.1 of the PPA. NPCL relied on several cases to state that where there is no provision for restitution under the PPA, relief for change in law cannot be granted. On the contrary, cases relied, do not apply in the instant case since the change in law clauses under the aforesaid cases were completely different. Further, the clauses therein were exhaustive in nature and provided specific reliefs for change in law, unlike the one in the present case, which gives discretionary power to the Commission to grant relief under change in law.
- o) TPREL started procurement of the goods/items considering the achievement of SCOD within the prescribed time limit. Therefore, the purchase orders for solar inverters were placed in the month of January 2021 and the material was received subsequently in the month of March 2021. It is submitted that SCOD extension was based on Covid -19 pandemic, and the restrictions as provided under the MNRE O.M. for which no conditional approval was required.
- p) Contrary to NPCL allegation, Petitioner has placed on record the relevant notifications pertaining to the change in the BCD which are annexed as Annexure P8 (Notification No. 1/2011 - Customs) and Annexure P9 (Notification No. 07/2021- Customs) of the present petition. Therefore, the letter D.O.F. No. 334/02/2020-TRU dated 01.02.2021 read with the aforementioned notifications makes it clear that there was a change in the applicable BCD in terms of the solar inverters which was changed from 5% to 20%. It is pertinent to note that the CERC in a similar proposition in the case of *SECI Limited vs. AMP Energy Green Pvt. Ltd. And Ors.*, Petition No. 245/AT/2022 observed that in terms of the notification issued by the Ministry of Finance dated 01.02.2021, the imposition of BCD has been increased from 5% to 20% and the same is to be considered as an event of change in law.
- q) Therefore, it is evident that pursuant to the issuance of Notifications bearing No. 3/2021 and 7/2021 dated 01.02.2021, there is a change in the rate of applicable BCD on solar invertors. Further, since such a change in applicable rates of BCD occurred after the last date of bidding, the same qualifies as an event of change in law in terms of Article 12.1 of the PPA.





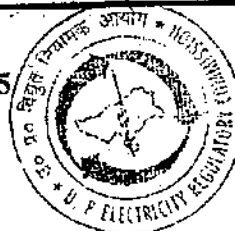
- r) Further, NPCL alleged that the Invoice No. 91311221444 was raised on 29.11.2021, which was issued much after BCD and GST were levied and solar inverters were imported to India in March 2021. In this regard, the present case involves an EPC contract between the Petitioner and TPSSL which involves continuous supply of goods and services. Pertinently, the CERC, in the case of Prayatna Developers Private Limited vs. NTPC Limited (Petition No. 157/MP/2018) on a similar issue involving the applicability of the rate of GST basis the date of invoice, observed that in case of continuous supply of services related to Engineering, Procurement and Construction, the invoices can be raised till 30 days after achieving the COD and that the party is entitled to be compensated in terms of the PPA for the event of change in law.
- s) In terms of Section 110 of the Finance Act, 2018, a social welfare charge is payable on BCD paid for import of goods to India. Pertinently, any impact or change in the rate of BCD affects the surcharge paid in terms of the social welfare under Section 110 of the Finance Act, 2018. Therefore, any additional social welfare surcharge required to be paid by the Petitioner on account of change in rates of the BCD shall qualify as an event of change in law.
- t) The imposition of social welfare charge in terms of the BCD paid by Petitioner on import of RE equipment's amounts to the applicability of tax on tax. Therefore, the very basic reason for consideration of such social welfare charge as an event of change in law arises from the fact that such increase in payment of social welfare surcharge is on account of an event of change in law itself i.e., increase in rates of BCD.

Written Submissions by NPCL

9. On 05.03.2024, NPCL filed its Written submission and has mainly reiterated its earlier submissions.
- a) Any claim of GST on Basic Custom Duty cannot be levied more than 5% as the same has been paid by TPSSL to the Government of India. The GST paid on custom duty has been incorporated by TPSSL in its invoices, thereafter GST has been charged on the entire amount. This amounts to an event of double taxation of GST. It is also

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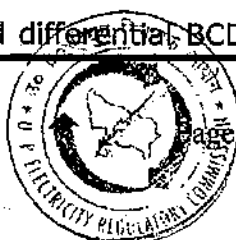
pertinent to mention that in case TPSSL has raised its Invoices In time, the impact of the charge of rate of GST could have been avoided. TPSSL is nothing but a sister concern of the Petitioner and for the delay and lapses on the part of the Petitioner and its sister concern, the additional liability could not be fastened on the consumers of the retail area of supply of the NPCL.

- b) This Commission must balance the equities of the retail consumers along with the loss of the Petitioner. In the present matter, the Petitioner has also given an unconditional undertaking regarding the extension and therefore at this stage cannot set out a case of losses due to the GST notification.
- c) Even If it is assumed without admitting that revision of GST is a Change in Law event, the differential impact of GST (i.e. 13.8%-8.90%), should be allowed as solar Inverters were purchased prior to 30.09.2021 i.e., the period when the 2017 GST Notification was in force and hence there be no question of payment of GST @ 13.80%.
- d) The idea and thought behind the Social Welfare Surcharge is the taxation of corporate entities to benefit the society at large. In case the petitioner's claim regarding Change in Law vis-à-vis Social Welfare Surcharge is allowed, the same would amount to passing on the Social Welfare Surcharge which is to be paid by the corporate entity to the retail consumers for whom the said Social Welfare Surcharge is charged from the corporate entities thus, defeating the entire purpose of the Social Welfare Surcharge altogether.

Written Submissions by TPREL

10. On 20.02.2024, TPREL filed its Written submission wherein TPREL has mostly reiterated its earlier submissions, however, has mainly added the following:
- a) Considering para 6.2(4) of the Tariff Policy 2016, and MoP's letter dated 27.08.2018 to the CERC, the BCD notification as well as the GST notification qualifies for the event of Change in Law and therefore, the Petitioner is liable to be compensated.
- b) The Petitioner has claimed a sum of Rs. 46.31 lakh towards BCD including GST. The Petitioner has claimed differential BCD i.e., difference between 20% BCD paid and

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5% BCD, which the Petitioner expected to pay at the time of submission of the bid.

The Petitioner has submitted the following documents in support of its claim:

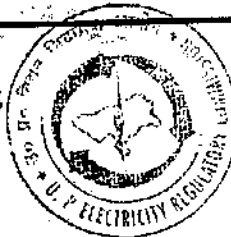
- i) Certificate of BCD and Social Welfare Surcharge dated 01.06.2022 issued by Chartered Accountants.
 - ii) Invoice dated 29.11.2021 issued by the EPC Contractor.
 - iii) Invoice raised by the Vendor, Bill of Entry, Insurance Policy, E-way Bill, Lorry Receipts etc.
 - iv) Bank Statement.
 - v) Detailed Mapping.
- c) The claimed amount is liable to be reimbursed along with carrying cost at the SBI MCLR Rate (for 1 Year) plus 125 basis points. It is a settled position of law that any party which is prevented from the use of money duly owed to them must be compensated for deprivation of such money. Article 12.2.2 of the PPA provides that the decision of this Commission to acknowledge the 'Change in Law' and provide relief for the same shall be final and governing on both parties. In this regard, the term relief will not only include the actual amount paid by the Petitioner but also the carrying cost on the said amount.
- d) The Petitioner filed another Petition No. 1962/2023 before this Commission, wherein the Petitioner has claimed the increased burden of GST of 13.8% on the civil and supply work executed under the EPC Agreement. The present Petition has been filed for an increase in BCD along with GST applicable on the said BCD, paid for import of Solar Invertors. Whereas Petition No. 1962/2023 does not contain any issue relating to BCD as a 'Change in Law' or for import of solar invertors etc. Further, both have been filed for completely different invoices as well as different works performed by the EPC Contractor.

Commission's Analysis & Decision

11. We have considered the submissions of the Petitioner and Respondent and the documents placed on record.
12. In the present case, the Petitioner has submitted that MoF's Notification No. 07/2021- Customs dated 01.02.2021 wherein Basic Custom Duty on the import of

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Solar Inverters was increased from 5% to 20% and consequential Impact of change in the GST rate vide MoF notification dated 30.09.2021 was a Change in Law event as per the Article 12 of the PPA. NPCL has submitted that TPREL must satisfy along with the supporting documents to prove that BCD notification dated 01.02.2021 is a Change in Law event and has increased the BCD on import of Solar inverters from 5% to 20%. Regarding Imposition of GST, NPCL has submitted that as the procurement of Solar inverters was done well before the GST notification dated 30.09.2021, therefore, impact of change in the GST rate (i.e., 13.8% from 8.9%) on the BCD cannot be made payable by NPCL. Further, NPCL contended that in view of TPREL's unconditional undertaking dated 16.07.2021, any change in law/force majeure event was attributable to the TPREL. Based on the submissions of the parties in the matter the following issues arise for consideration before the Commission:

Issue No.1: (a) Whether MoF Notification No. 07/2021- Custom dated 01.02.2021 amounts to Change in Law event under the PPA?

(b) Whether MoF Notification No. 08/2021- Central Tax (Rate) dated 30.09.2021 amounts to Change in Law event under the PPA?

Issue No.2: If Yes, What is the Consequential relief available to the affected party?

13. We now proceed to discuss above issues and examine the claims of the Petitioner in the following paragraphs.

Issue No.1: (a) Whether MoF Notification No. 07/2021- Custom dated 01.02.2021 amounts to Change in Law event under the PPA?

(b) Whether MoF Notification No. 08/2021- Central Tax (Rate) dated 30.09.2021 amounts to Change in Law event under the PPA?

14. TPREL through its unconditional undertaking letter dated 16.07.2021 wherein TPREL stated that TPREL undertake not to claim the extension in time as a ground for claiming termination of PPA or for claiming any increase in the project cost including IDC or upward revision of tariff. On the contrary, TPREL has submitted that MNRE

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vide O.M dated 03.11.2021 had categorically confirmed that all undertaking issued cannot be interpreted to exclude the applicability of Change in Law in terms of the PPA. The relevant extract of the said TPREL's unconditional undertaking letter dated 16.07.2021 are as under:

"8. Furthermore, with reference to your letter dated 13.07.2021, we hereby also provide our unconditional undertaking not to claim the extension in time sought in our letter dated 25.05.2021 as a ground for claiming termination of Power Purchase Agreement or for claiming any increase in the project cost, including Interest During Construction (IDC) or upward revision of tariff.

9. As per clause 5(d) of the O.M. dated 12.05.2021, you are also requested not to initiate any coercive action for recovery of penalty if the commissioning of the project is delayed due to the resurgence of the Covid-19 virus.

10. We reiterate our commitment in completing the Project and to work for the development of the State of Uttar Pradesh.

11. This letter is without prejudice to the rights and remedies available to TPREL in law."

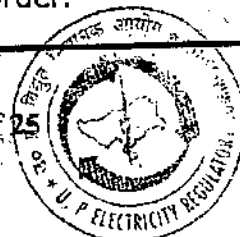
15. Relevant extract of the MNRE's O.M dated 03.11.2021 are as under:

"Reference is invited to MNRE's O.M dated 12.05.2021 referred at (i) above and MNRE's O.M dated 29.06.2021 referred at (ii) above, vide which a time-extension of 2.5 months (corresponding to the period from 1st April, 2021 to 15th June, 2021) was granted to RE projects on account of 2nd wave of COVID-19, and the clarification dated 15.09.2021 referred at (iii) above.

2. Representations have been received in MNRE for further clarification on the issue of change-in-law in the context of the above OMs. The requests have been examined and **it is hereby clarified that the change-in-law shall continue to be governed by the provisions of Power Purchase Agreement (PPA) and to be decided by the Appropriate Commission."**

16. In view of the above, It is evident that provisions of the PPA for applicability of Change in Law shall continue to apply even though the project developer had Issued undertaking Incompliance to the MNRE's OM dated 12.05.2021. Accordingly, the Commission rejects the NPCL plea in this regard. Therefore, the Commission proceed to examine the issue no. 1 of this Order.

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17. Article 12.1.1(v) of the PPA provides that any change in the rates of taxes, duties and cess qualify as 'Change in Law' event. The relevant extract of Article 12 has been reproduced hereinbelow for ease of reference:

"ARTICLE 12: CHANGE IN LAW

12.1 Definitions

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

12.1.1 The term Change in Law shall refer to the occurrence of any of the following events after the last date of the bid submission, including:

- i. 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 licence; or*
- iv. any modification to the prevailing conditions prescribed for obtaining consent, permit or licence; not owing to any default of the Solar Power Generator; or*
- v. any change in the rates of any taxes, duties and cess which have a direct effect on the Project.***

However, Change in Law shall not include any change in taxes on corporate income or any change in any withholding tax on income or dividends or (ii) any change in local taxes (iii) any change on account of regulatory measures by the Appropriate Commission including calculation of Availability."

18. The term 'Law' has been defined under Article 1.1. of the PPA and which reads as under:

"Law" shall mean any valid legislation, statute, rule, regulation, notification, directive or order, issued or promulgated by any Governmental Instrumentality."

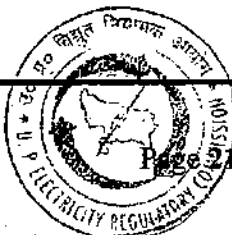
19. Further, Governmental Instrumentality has been defined under the PPA as reproduced hereunder:

"Government Instrumentality" shall mean the Government of India, Governments of state(s) Rajasthan, Maharashtra and any ministry, department, board, authority, agency, corporation, commission under the direct or indirect control of Government of India or the above state Government or both, any political sub-division of any of them; including any court or Appropriate Commission(s) or tribunal or judicial or quasi-judicial body in India;"

20. The Ministry of Finance vide notification dated 01.02.2021 has increased the BCD to 20% from existing 5%. The same is also clarified vide D.O.F No. 334/02/2020-TRU dated 01.02.2021 The relevant extract are reproduced as under:

"Chapter 85

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(2) Basic customs duty on Solar Inverters (sub-heading 8504 40) is being raised to 20%. For this purpose, S. No. 13 of the notification No. 57/2017-Customs is being amended.

Simultaneously, notification No. 1/2011-Customs, dated 6th January 2011 is being rescinded. [S. No. (ix) of the notification No. 03/2021-Customs dated 1st February 2021 and, notification No. 07/2021-Customs, dated 1st February 2021 refer]."

21. It is evident from the Bill of Entry dated 30.03.2021 issued by Indian Customs for the imported Solar Inverters that BCD was imposed @20% and the same was paid on 22.04.2021. On 10.02.2021, the Petitioner has issued Change in Law event notice to the NPCL on account of the BCD. Therefore, as the BCD notification dated 01.02.2021 is subsequent to the bid submission date 16.11.2018, and also, the last date of bid submission was 27.11.2018. **Accordingly, we hold that increase of BCD to 20% imposed on the import of Solar Inverter is a Change in Law event under the Article 12 of the PPA.**
22. With respect to the declaration of GST notification dated 30.09.2021 amounting to a change in Law event, it is crystal clear that the said notification dated 30.09.2021 has been issued subsequent to the last date of bid deadline i.e., 27.11.2018. **Accordingly, the Commission holds that the GST notification dated 30.09.2021, issued by Ministry of Finance, is a Change in Law event under Article 12 of the PPA.** The Commission has, however, also noted that the Solar Inverters were imported to India before the issuance of GST notification dated 30.09.2021 as evident from the Bill of Entry dated 30.03.2021. The impact of both these notifications i.e. BCD and GST notifications, has been dealt in the below paragraphs along with the that of carrying cost, while examining the consequential relief.

Issue No.2: If Yes, What is the Consequential relief available to the affected party?

23. The impact of the Change in Law event i.e., increase of BCD on Solar Inverters for Bunda project as claimed by the Petitioner is being supported by the Auditor Certificate. The details of the said claim by the Petitioner are as follows:

Particulars	Sl. No./ formula	1	2	Total
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BOE No.	1	3363195	3363195	
BOE date	2	30.03.2021	30.03.2021	
Challan No.	3	2034428239	2034428239	
Challan Date	4	22.04.2021	22.04.2021	
Supplier Name	5	KEHUA HENGSHENG CO. LTD	KEHUA HENGSHENG CO. LTD	
Supplier Invoice No.	6	T031-210126	T031-210126	
Supplier Invoice date	7	02.03.2021	02.03.2021	
Unit Price (USD)	8	42031.3	42031.3	
Qty.	9	9	7	
Invoice Value in USD	10	378281.7	294219.1	
Conversion rate in Rs. as per BOE	11	73.35	73.35	
Invoice value in INR as per BOE	12=10*11	27746962	21580970.99	
BCD Amount as per New rate	13=12*20%	5549392.539	4316194.197	9865587
SWS Amount as per BOE	14=13*10%	554939.2539	431619.4197	986559
Total Actual Amount Paid	15=13+14	6104331.793	4747813.617	10852145
BCD Amount as per Old rate	16=12*5%	1387348.135	1079048.549	
SWS Amount	17=16*10%	138734.8135	107904.8549	
Total with Old rate	18=16+17	1526082.948	1186953.404	
Impact due to Change in Law in Rs.	19=15-18	4578249	3560860	81,39,109
GST @ 13.80%	20			11,23,197
Total Impact for 50 MW Bunda	21=19+20			92,62,306
Bunda NPCL 25MW	22=21/2			46,31,153

24. We also note that there is an increase in the quantum of Social Welfare Surcharge (SWS) levied on BCD @10% in terms of Section 110 of the Finance Act, 2018 on the import of goods. Since the BCD rate has increased from 02.02.2021, there would be consequential impact on payable amount of SWS and GST. Further, regarding claimed GST @13.8% (i.e., 12% of 70% + 18% of 30%), it is evident from the Bill of Entry that IGST @ 5% was paid and not @12% as the Solar Inverters were imported in the month of March 2021 which is prior to the GST notification dated 30.09.2021. Accordingly, CGST & SGST @2.5% each would be applicable for the supply portion of Solar Inverters. Therefore, the Commission

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opines that prevailing GST @8.9% (i.e., 5% of 70% + 18% of 30%) is payable by the NPCL and the Petitioner claim @ 13.8% is not tenable because the burden of late raising of invoices by TPSSL (i.e., on 29.11.2021) cannot be made to pass on to the beneficiaries/consumers. Accordingly, the prayers (c) of the Petitioner becomes infructuous and the consequential relief on account of GST notification dated 30.09.2021 is denied for the same.

25. In view of the above, Respondent-NPCL is directed to reconcile and map each invoice with respect to the claim of impact of the BCD for the Bunda project of 25MW capacity within a reasonable time and payment on account of Change in Law shall not exceed Rs. 44.31 lakh (i.e., considering GST @8.9% & NPCL share of 50% = $[8139109+8139109 \times 8.9/100])/2$.

26. Regarding the Respondent's contention that GST is being charges twice, once at the time of import of Solar Invertors in the present Petition and secondly by way of raising claim for civil & supply works in Petition No. 1962/2023, the Commission would examine the issue of doubling effect of GST in the concerned Petition(i.e., in 1962/2023) as in the present case, the Commission has approved the claimed amount (@para no. 25 above) based on the difference of BCD value from 5% to 20% vide MoF Notification No. 07/2021 dated 01.02.2021 and the Petitioner's claim of GST under EPC contract.

27. Article 12.2 of the PPA regarding relief on account of declaration of Change of Law event stipulates as under:

"12.2 Relief for Change in Law

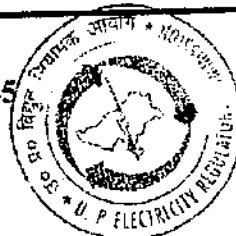
12.2.1 The aggrieved Party shall be required to approach the State Commission for seeking approval of Change in Law.

12.2.2 The decision of the Appropriate (State) Commission to acknowledge a Change in Law and provide relief for the same shall be final and governing on both the Parties"

28. The Commission has noted that although PPA dated 13.02.2019 does not specifically provide for the carrying cost, but it notes that relief for Change in Law is to be decided by the Commission. Hon'ble APTEL in Parampujya Solar Energy Pvt.

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Ltd. vide its judgement dated 15.09.2022 has interpreted the work "Relief" as below:

"The use of the word "relief" in the context of adjudicatory process, simply means the remedy which the adjudicatory forum may afford "in regard to some actual or apprehended wrong or injury" or something which a party may claim as of right, or making the affected party "feel like easing out of.....hardship".

29. The Commission is of the view that the very purpose of change in law clause in PPAs is to relieve the affected party of additional burden. Therefore, the relief intended to be afforded under contracts cannot be complete unless the said burden is allowed from the date of commissioning of project till date of this order.
30. **Regarding the rate of interest for computation of carrying cost, the Commission opines that since the funds arranged by the project developer are based on the interest rate framework followed by the scheduled commercial bank, therefore, the Petitioner shall be entitled to carrying cost @ yearly SBI MCLR on verified amount from the actual COD/commissioning of Bunda project till the date of this Order.**

The Petition stands disposed of in terms of the above.

(Sanjay Kumar Singh)
Member

(Vinod Kumar Srivastava)
Member (Law)

(Arvind Kumar)
Chairman

Place: Lucknow

Dated: 29.04.2024



