



नईदिल्ली
NEW DELHI

याचिका संख्या./ Petition No. 174/MP/2022

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

आदेशदिनांक/ Date of Order: 17th of May, 2023

IN THE MATTER OF:

Petition under Section 79 of the Electricity Act, 2003 and Article 12 of the Power Purchase Agreement (PPA) dated 15.11.2018 filed on behalf of M/s. Clean Solar Power (Jodhpur) Private Limited seeking declaration that change in rate of Goods and Services Tax from 5% to 12% on solar cells and modules w.e.f. 01.10.2021 on account of amendment to Notification No. 01/2017-Central Tax (Rate) and Notification No. 01/2017-Integrated Tax (Rate) dated 28.06.2017 vide Notification No. 6/2021-Central Tax (Rate) and Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021 as a 'change in law' event under Article 12.1 of the PPA and to further direct the Respondent (Solar Energy Corporation of India Limited) to pay compensation along with carrying cost towards additional amount incurred on account of increment in Goods and Services Tax paid by the Petitioner pursuant to notifications dated 30.09.2021 and to restitute the Petitioner to the same financial position as it would have been before the notification dated 30.09.2021.

AND IN THE MATTER OF:

M/s. Clean Solar Power (Jodhpur) Private Limited,

First Floor, Okhla Industrial Estate,

Phase III, New Delhi- 110020

...Petitioner

VERSUS

1. Solar Energy Corporation of India Limited,

6th Floor, Plate-B, NBCC Office,

Block Tower-2, East Kidwai Nagar,

Kidwai Nagar, New Delhi,

Delhi-110023

2. Jharkhand Bijli Vitran Nigam Limited,

Engineering Building, HEC, Dhurwa,

Ranchi-834004, Jharkhand

3. Central Transmission Utility of India Limited,

First Floor, Saudamini, Plot No.- 2,

Sector- 29, Near IFFCO Chowk Metro Station,

Gurgaon - 122001 Haryana

...Respondents

Parties Present:

Shri Sanjay Sen, Senior Advocate, CSPJIL

Shri. MG Ramachandran, Senior Advocate for SECI

Ms. Mandakini Ghosh, Advocate, CSPJPL

Shri Avijeet Lala, Advocate, CSPJPL

Ms. Shreya Dubey, Advocate, CSPJPL

Shri Ravish Kumar, Advocate, CSPJPL

Ms. Tanha Sareen, Advocate, SECI

Ms. Surbhi Kapoor Advocate, SECI

Ms. Srishti Khindaria, Advocate, SECI

Shri Kumar Anurag Singh Advocate, JBVNL

Shri Servesh Singh, CSPJPL

Ms. Anachal, CSPJPL

Ms. Neha Singh, SECI
Shri Mr Abhinav Kumar, SECI
Shri. Uday Pavan Kumar Kruthiventi
Shri Swapnil Verma, CTUIL
Shri Siddharth Sharma, CTUIL
Shri Ranjeet Singh Rajput, CTUIL
Ms. Kavya Bhardwaj, CTUIL

आदेश/ ORDER

The Petitioner, Clean Solar Power (Jodhpur) Private Limited (CSPJPL) is a special purpose vehicle (SPV) power generating company promoted and incorporated by Hero Solar Energy Private Limited (Hero Solar) for the purpose of developing and managing a 250 MW solar power project (SPP) in the State of Rajasthan. The Petitioner is seeking declaration that change in rate of Goods and Services Tax from 5% to 12% on solar cells and modules w.e.f. 01.10.2021 on account of amendment to Notification No. 01/2017-Central Tax (Rate) and Notification No. 01/2017-Integrated Tax (Rate) dated 28.06.2017 vide Notification No. 6/2021-Central Tax (Rate) and Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021 as a ‘change in law’ event under Article 12.1 of the Power Purchase Agreement and to pay compensation along with carrying cost.

2. The Respondent No.1, Solar Energy Corporation of India (SECI) is a Central Public Sector Undertaking, set up on 20.09.2011, and is under the administrative control of the Ministry of New and Renewable Energy (MNRE) and has been designated as the nodal agency for implementation of MNRE scheme for developing grid connected solar power capacity.
3. The Respondent No.2, Jharkhand Bijli Vitran Nigam Limited (JBVNL), is the DISCOM utility of Jharkhand State, incorporated primarily to carry out distribution of electricity to retail and bulk consumers in the State of Jharkhand.

4. The Respondent No.3, Central Transmission Utility of India Limited (CTU), is a wholly Government owned Company under Ministry of Power to carry out CTU functions. As a 100 % subsidiary of PGCIL, it has been established as separate company to undertake function of CTU vide OM dated 09.03.2021.

5. The Petitioner has made the following prayers:

- a. *Acknowledge and approve the introduction of Notifications dated 30.09.2021 issued by the Department of Revenue, as a change in law event under Article 12.1 of the PPA;*
- b. *Declare that the Petitioner is entitled to claim relief under Article 12.2 of the PPA for the additional expenditure incurred on account of the change in law events, i.e. introduction of Notifications dated 30.09.2021 issued by the Department of Revenue;*
- c. *Direct the Respondent to pay compensation of Rs. 57,71,37,285/- with interest, as applicable, to the Petitioner in lieu of the additional expenditure incurred on account of the aforesaid change in law events;*
- d. *Direct the Respondent to reimburse the carrying costs incurred by the Petitioner from the period of payment of additional expenditure incurred on account of the aforesaid change in law events, to the date of reimbursement by the Respondent;*
- e. *Direct the Respondent to make payment towards change in law compensation by way of annuity method by considering discounting factor at 10.41%*
- f. *Direct the Respondent to reimburse the legal and administrative costs incurred by the Petitioners in pursuing the instant petition; and*
- g. *Pass such other orders that this Hon'ble Commission deems fit in the facts of this case.*

6. A brief detail of the petition is as under:

Location	Tehsil - Baap, District – Jodhpur, Rajasthan
Nodal agency	SECI
RfS issued on	30.01.2018
Bid submitted on	15.06.2018
E-reverse auction conducted on	02.07.2018
LOA awarded on	27.07.2018
Capacity (MW)	250

Power	Solar
PSA executed on	07.08.2018
PPA executed on	15.11.2018
Effective date of PPA	25.10.2018
Tariff	Rs.2.53/kWh
Date of implementation of GST Laws	01.10.2021
Scheduled Date of Commissioning	25.10.2020 (as per PPA) 17.01.2021 (extension due to Covid-19) 21.04.2022 (as per SECI letter dated 29.04.2022 SCoD to be extended in case of delay in operationalization of LTA)
Date of Operationalization of LTA	06.10.2022
Actual CoD	21.04.2022

Submissions of the Petitioner:

7. Briefly, the Petitioner has submitted that:

- a. The financial closure of the Project was achieved by the Petitioner within the timeline allowed by SECI i.e. on 25.05.2019. However, the development of the Project was hampered on account of COVID-19 pandemic and associated lockdown impositions which resulted in shutdown of commercial operations and the SCoD was extended to 17.01.2021. On 29.04.2022, SECI informed the Petitioner that LTA related to the project has not been operationalised by the CTU. Since the SCoD of the Project was dependent upon operationalization of the LTA, such delay in operationalization, delayed the SCoD of the Project which was to be achieved by 25.10.2020. Therefore, SECI vide letter dated 29.04.2022 extended the SCoD of the Project upto the LTA operationalisation date. SECI further informed that the expiry date of the PPA will be counted as twenty-five (25) years from the extended SCoD date i.e., LTA operationalisation date.
- b. The Notification dated 30.09.2021 amended the notification of the Ministry of Finance, Government of India bearing No.1/2017-Central Tax (Rate), dated 28.06.2017. As a result, the solar cells and modules procured by the Petitioner for setting up the Project attracted Goods & Services Tax (GST) of 12% instead of 5% as envisaged by the Petitioner at the time of bidding.
- c. The rate of GST applicable at the time of bidding was 5%. The Notification dated

30.09.2021 was issued subsequent to the date of bidding and after signing of the PPA. Accordingly, 12% of GST was imposed on the procurement of solar cells and modules imported / procured by the Petitioner as the same were imported after 01.10.2021. The Petitioner at the time of execution of the PPA could not have foreseen such increment in GST rates. The introduction of Notifications dated 30.09.2021 issued by the Department of Revenue, Ministry of Finance amounts to a new imposition and qualifies as 'change in law' under the PPA. Therefore, the additional cost incurred by the Petitioner due to occurrence of 'change in law' events after the last date of bidding is liable to be reimbursed to the Petitioner.

- d. As per Ministry of Power's direction to this Commission dated 27.08.2019, any change in domestic duties, levies, cess and taxes imposed by Central Government, State Government /Union Territories or by any Government instrumentality leading to corresponding changes in the cost, may be treated as 'change in law' and may unless provided otherwise in the PPA be allowed as pass through. In order to ensure that the Petitioner is duly restituted for the cost incurred by it on account of introduction of Notifications dated 30.09.2021, this Commission is required to determine the quantum of compensation and the date from which the change in law event will become effective in order to determine the appropriate quantum of compensation.

Hearing dated 22.08.2022:

8. The matter was listed for hearing through video conferencing. After hearing the learned counsels for the parties, the Commission admitted the Petition and directed the Petitioner to implead Jharkhand Bijli Vitran Nigam Limited (JBVNL) and Central Transmission Utility of India Limited as party to the Petition and to file revised memo of parties. Further, the Commission directed the parties to file their respective Replies and Rejoinders accordingly.
9. In compliance with the directions of this Commission vide ROP dated 22.08.2022, the Petitioner filed the Amended Memo of Parties on 26.08.2022.

Submissions of SECI vide Reply dated 18.11.2022 and Additional Submissions dated 07.02.2023:

10. The Respondent has submitted as under:

- a) In order to qualify for any relief under Article 12 of the PPA dealing with Change in Law, the claims raised by the Petitioner should fall within the scope and ambit of the said provision. The extent of relief admissible to the Petitioner on account of Notification dated 30.09.2021 of GST (if any) is subject to examination and verification of documents by SECI (and JBVNL) to be submitted by the Petitioner.
- b) The onus is on the Petitioner to demonstrate that the Notification dated 30.09.2021 has resulted in the Petitioner incurring additional expenditure as against the envisaged expenditure prior to the Bid Submission Date (15.06.2018).
- c) If Notification dated 30.09.2021 issued by Government of India is considered as Change in Law, the Petitioner be directed to furnish the relevant details including date of delivery of goods, invoices, date on which invoices were raised, Statutory Auditor's Certificate etc. to substantiate the impact of the change in rate of GST on the procurement of Solar Modules for the solar power project. The Petitioner has to establish one to one correlation between the project(s), the supply of modules and cells, the invoices and other relevant documents for proof of payment of GST.
- d) This Commission to clarify the Cut-off Date for considering the impact of change in rate of GST on account of Notification dated 30.09.2021 as the actual Commercial Operation Date.
- e) The increased costs have been claimed to have been incurred for the purpose of supply of power. The costs should be recovered only if the Petitioner continues to maintain supply of the power. If the Petitioner does not supply the requisite power, it should not be entitled to recover the cost proportionate to such non-supply, similar to any other capital cost. If the Petitioner is allowed to recover the Change in Law impact in lump-sum, then SECI (and consequentially JBVNL) would have paid for capital cost even without there being actual supply of power in future. If for any reason the Petitioner abandons the project and discontinues the supply of power, there is no methodology for adjustments of the lump

sum payments already made. The payment on annuity basis is consistent with the fact that the claims towards change in rate of GST are an addition to the capital cost of the power project and not an operating and maintenance expense of a recurring nature to be incurred on year on year basis.

- f) The decision dated 20.08.2021 of the Commission approving the discounting factor at 10.41% was based on the interest rate specified in the Renewable Tariff Regulations, 2017 read with RE Tariff Order dated 19.03.2019 notified by the Commission at the relevant time when the said annuity methodology was considered by MNRE and implemented by SECI. Subsequently, there has been a fall in the interest rate of loan and the Commission has notified the *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 Commission has considered only the interest rate of 9% and the term of the loan repayment as 15 years instead of 13 years earlier considered.
- g) If the change in rate of GST vide Notification dated 30.09.2021 on Solar Modules is considered as Change in Law and the impact is allowed to the Petitioner, the Commission may issue directions to JBVNL to make payment towards the evaluated claims of the change in rate of GST payable by SECI to Petitioner, on a back to back basis under the PSA in a time bound manner.
- h) In terms of Article 12 of the PPA, it is for the Petitioner to approach the Commission for seeking approval of the Change in Law and the Commission decides on the admissibility of the claim. Accordingly, the amount due from SECI/JBVNL to the Petitioner under change in law gets crystallized only upon the decision being passed by the Commission allowing change in law and therefore, there cannot be any carrying cost for the period prior to the decision of the Hon'ble Commission.
- i) It is only in case of delay in making the payment as per the Order dated 20.08.2021 of Central Commission in Petition No.536/MP/2020 that the issue of Late Payment Surcharge in terms of Article 10.3.3 of the PPA would arise.
- j) Hon'ble Supreme Court gave its order dated 12.12.2022 in Civil Appeal No.8880 of 2022

filed by Telangana Discoms challenging the judgement dated 15.09.2022 of APTEL in A.No. 256 of 2019 & Batch case titled *Parampujya Solar Energy Pvt. vs. CERC & Ors.* (Parampujya Case) vide which APTEL allowed compensation for the period post Commercial Operation Date of the projects in question as also towards O&M and carrying cost.

- k) Considering the decision of the Hon'ble Supreme Court, APTEL in A.No. 432 of 2020 in the matter of *Adani Solar Energy Jodhpur Three Private Limited v. CERC* and others dated 19.01.2023 held as under:

“Suffice it, therefore, to dispose of this appeal in terms of the Order passed by this Tribunal in Appeal No. 256 of 2019 dated 15.09.2022, making it clear that, consequent on remand, it shall be open to the parties to the dispute to raise all such contentions as are available to them in law, and the same shall be considered by the CERC while passing an order afresh. Needless to state that, in terms of the Order of the Supreme Court, the order to be passed by the CERC shall not be enforced till the aforesaid Order is either varied or the appeal itself is disposed of by the Supreme Court. The instant Appeal is, accordingly, disposed of.”

- l) The Commission may consider the above decisions of the Hon'ble Supreme Court and the APTEL and maintain parity between the cases pending before the Commission wherein the Judgment dated 15.09.2022 of APTEL in *Parampujya Case* is being relied on by the parties. This Commission may direct that enforcement of any order of the Commission passed on the aspects covered in *Parampujya Case* will take effect after the decision of the Hon'ble Supreme Court to maintain such parity.

Hearing dated 15.11.2022:

11. Physical hearing took place. After hearing the learned counsel for the parties, the Commission directed SECI to upload its reply on the portal and further directed the Petitioner to file its Rejoinder.

Hearing dated 17.01.2023

12. The matter was called up for hearing through video conferencing on 17.01.2023 and reserved for orders.

Reply dated 31.01.2023 filed by JBVNL:

13. JBVNL has submitted as under:

- a) Article 4 of the PPA outlines the obligations of the Petitioner wherein the Petitioner, at its own risk and cost, was responsible for obtaining Long Term Access, connectivity with the Grid and executing transmission service agreement with the CTU/STU as the case may be, for evacuation of Contracted Capacity. It was entirely the responsibility of the Petitioner for making arrangement for connectivity with the transmission system. However, owing to the failure of the Petitioner in operationalization of the LTA by 25.10.2020 i.e. the Original SCoD, SCoD was extended by 60 days by SECI. Such extension was not in consonance with the terms of PSA and hence liability could not be passed to JBVNL.
- b) Since the commissioning date was extended to 17.01.2021, the Petitioner should have procured the solar panel. However, the Petitioner did not perform its obligations and duties. It is pertinent to mention here that further extension in SCoD of the project, vide letter dated 29.04.2022, has no reference to any letter of the Petitioner as such extension was given suo-motu by the SECI.
- c) The original SCoD of 25.10.2020 had been extended by SECI to 17.01.2021 owing to the initial request of the Petitioner and the subsequent onset of COVID-19, whereas the change in GST rate came into effect on 01.10.2021. Even after the SCoD had been fixed for 17.01.2021, the Petitioner herein procured the solar cells and modules for the commissioning of the Project during the months of October 2021 to March, 2022 for unexplained reasons.
- d) Neither any extension of the said SCoD was ever sought by the Petitioner nor any extension had been granted by SECI during the said interval until 29.04.2022 (i.e., much after the procurement). Thus, when the SCoD of 17.01.2021 was still subsisting and no extension of the same had been granted, it was incumbent upon the Petitioner to have commissioned the power plant prior to the change in GST.
- e) When the Petitioner by its own fault failed to procure and commission the project within the SCoD, it cannot claim any restitution of additional costs incurred by it after the SCoD on the basis of 'Change in Law' within Article 12 of PPA, given that the procurement was not done

within the timelines of the PPA.

- f) The SCoD stipulated in the PPA was never dependent on the approval of the PSA, and none of the obligations mentioned in the PPA [Article 3 or 4] are conditional on the approval of the PSA.
- g) The Petitioner has failed to place the cogent materials/documents such as date when order was placed, the date on which invoices were raised with respect to each order placed, date on which the solar cell or modules were imported with respect to each order placed and invoices raised, the date on which payment was made with respect to each order placed and that GST at the rate of 18% was paid by the Petitioner.
- h) The decision of the Petitioner as to when to import solar panel is a commercial decision taken by it for its own advantage and any increase in cost including on account of taxes and duties, cannot increase the liability of JBVNL which was never a part to the entire communication between the Petitioner and Respondent.
- i) Actions of the Petitioner clearly establish that once it is learnt that the GST change will be applicable from 01.10.2021, it has deliberately delayed the procurement of such items.
- j) The Petitioner has not produced any document showing that it has incurred the carrying cost and paid additional interest on working capital used for the completion of solar projects. Without quantifying the costs, seeking reimbursement from the Respondents is not justifiable.
- k) When the PPA/PSA does not envisage restitution to the same economic position unlike other PPAs, there can be no question of providing relief under a general notion of business efficacy.
- l) The development of the project was not dependent on the availability of LTA and the same finds support from Clause 6.10 of the PSA wherein scenarios has been contemplated when the Grid is unavailable or there is transmission constraint or due to lockdown. However all such eventualities provided that the Project is ready.
- m) The power sale agreement provides that if any liability arises on account of change in law, it is SECI which will raise supplementary Bill and hence JBVNL does not have any responsibilities towards the Petitioner.

Submissions of the Petitioner vide Rejoinders dated 28.01.2023 and 31.01.2023 and Written Submissions dated 08.02.2023:

14. The Petitioner has reiterated the submissions already made in the plaint and as such the same are not reiterated for the sake of brevity. Additionally, the Petitioner has submitted as under:
- a) The Petitioner is only liable to carry out one to one correlation of the invoice with SECI with whom it has privity of contract. The reconciliation between the Petitioner and SECI are distinct and separate from the reconciliation of SECI and JBVNL. Therefore, the Petitioner is not liable to carry out one-to-one correlation with JBVNL.
 - b) The Commission in its recent orders in Petition No. 52/MP/2019 and Petition No. 188/MP/2018 dated 23.08.2022 and 25.11.2022, respectively, has directed the contracting parties to follow the directions given in the Petition No. 536/MP/2020 meticulously. The objections taken by the Respondent No.1 are misplaced and not in accordance with the law settled by the Commission in Petition No. 536/MP/2020.
 - c) The law on “carrying cost” has been settled by APTEL in *Parampujya Solar Energy Pvt. Ltd and Anr. V. CERC & Ors.* The Petitioner may be restored to the same economic position prior to the occurrence of the change in law event.
 - d) Any disputes between SECI and JBVNL under the PSA may be dealt with and between the said parties under the PSA and the said issue cannot be deliberated under the present petition confined to the PPA between Petitioner and SECI.
 - e) While the PSA was pending approval, the State Commission’s panel was dissolved due to non-availability of a Member. Aggrieved by the same, the Petitioner proactively approached Hon’ble High Court of Jharkhand, seeking a direction for constitution of the State Commission for timely approval of the PSA and the said initiative by the Petitioner indeed led to re-constitution of the State Commission. Given the said facts, the Petitioner has acted diligently as well as responsibly to ensure that the timelines under the PPA are met. It thus does not lie in the mouth of the JBVNL to question the actions of the Petitioner in any manner. The contention that SECI granted extension without intimating JBVNL is an issue *inter-se* Respondents and the same cannot be deliberated under the present petition.

- f) The submission of JBVNL that it cannot be called to pay the tariff is wrongly conceived as the PSA itself allows passing through of change in law.
- g) The contention of JBVNL that tariff discovered through competitive bidding has been already adopted by CERC vide order dated 28.02.2020 in I.A. No. 86 of 2019 and Petition No.187/AT/2019 and that any change in tariff cannot be imposed on JBVNL is misconceived. The Commission is vested with wide regulatory and adjudicatory powers to determine the quantum and manner of relief in a Change in law Petition.
- h) The RfS for Selection of SPDs was amended on 22.05.2018, as per which the Petitioner was not required to submit any document except certificate from all financing agencies regarding 100% tie-up of the funds indicated for the Project within seven months.
- i) The Petitioner is a solar project developer and its scope of work and operations is limited to that contained under the PPA. The operationalization of LTA is not within the domain of the Petitioner. It is the responsibility of the CTU for ensuring the timely operationalization of the LTA. The LTA for the Petitioner's project was effective w.e.f. 06.10.2022 and the same was intimated to the Petitioner by CTU vide letter dated 04.10.2022. Owing to this reason, the SCoD of the present PPA was extended as the Petitioner was not at fault.
- j) The letter dated 29.04.2022 was issued to inform the Petitioner that the LTA was not yet operationalized and therefore the SCoD of the project is extended upto the LTA operationalization. The extension provided by SECI on 29.04.2022 is of similar period as that provided by SECI earlier on 28.05.2020. Therefore, there is no lapse or gap between the last two extensions granted by SECI and the Petitioner's action of procuring modules and cells was within the timeline of the project.
- k) The SCoD of the project was extended till the operationalization of the LTA or actual date of commissioning. The project was commissioned on 21.04.2022. Therefore the procurement of the solar cells and modules in the months of October 2021 to March 2022 is within the timeline of the PPA.
- l) APTEL in the case of *Parampujya Solar Energy Pvt. Ltd. and Anr. versus CERC and Ors.*, has duly considered its observations made in its judgement in *Adani Power* and has reversed its own findings on carrying cost vide order dated 15.09.2022 passed in Appeal No.256 of

2019 and other batch matters. APTEL in the abovementioned matter directed the Commission to grant the relief of carrying cost on the compensation on account of incremental impact of change in law. The *Parampujya Order* stands challenged before the Hon'ble Supreme Court in Civil Appeal No. 8880/2022 and Ors., and as such, the final order of the Commission shall be subject to the order passed in the Civil Appeal. Thus, only the enforcement of the Order has been stayed qua the parties and not the principles in law on which the said judgement has been passed.

- m) In various petitions, the discount factor of 10.41% considered for annuity payment has been considered by the Commission irrespective of the commissioning date of the project, which differs in each case. In the alternative and if this Commission is not inclined to allow the discount factor at 10.41%, then the discount factor of 10.30% may be allowed in accordance with the RE Tariff Regulations 2020.

Analysis and Decision:

15. We have heard the learned counsels for the Petitioner and Respondents and have carefully perused the records and considered the submissions of the parties.
16. The issues that arise for our consideration are as follows:

Issue No.1: Whether the introduction of GST Notification dated 30.09.2021 qualifies as Change in Law event in terms of the PPA?

Issue No.2: Whether Petitioner is entitled for additional expenditure on account of Change in Law event in terms of Article 12.2 of the PPA and whether discount rate @ 10.41% in calculation of Annuity methodology should be considered for payment of compensation (if any) on account of Change in Law?

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

17. We now proceed to discuss the above issues.
18. Since Issue No.1, Issue No.2 and Issue No.3 are interlinked, they are being taken together for consideration. The Petitioner has submitted that Article 12 of the PPAs provides for ‘Change in Law’. The Notifications dated 30.09.2021 were issued subsequent to the signing of PPA and such change in GST rates could not have been factored at the time of submission of the bid or the cut-off date as such the Notifications dated 30.09.2021 qualifies as change in law under the PPA. ***Per contra***, SECI has submitted that the onus is on the Petitioner to demonstrate that the Notification dated 30.09.2021 has resulted in the Petitioner incurring additional expenditure as against the envisaged expenditure prior to the Bid Submission Date (15.06.2018). The Commission may consider only the interest rate of 9% and the term of the Loan repayment as 15 years instead of 13 years earlier considered for the compensation on account of Change in law (if any) along with the cut-off date. Further, the Commission may direct that any order of the Commission passed on the aspects covered in *Parampujya Case* will be enforced after the decision of the Hon’ble Supreme Court to maintain such parity. JBVNL has further submitted that even after the SCoD had been fixed for 17.01.2021, the Petitioner procured the solar cells and modules for the commissioning of the Project during the months of October 2021 to March, 2022 for unexplained reasons. The development of the project was not dependent on the availability of LTA and the same finds support from Clause 6.10 of the PSA wherein scenarios have been contemplated when the Grid is unavailable or there is transmission constraint or due to lockdown. However all such eventualities provided that the Project is ready.
19. We observe that Article 12 of the PPAs provides the definition of Change in Law provision and the relief on account of occurrence of Change in Law event. Article 12 read as under:
- “12. ARTICLE 12: CHANGE IN LAW**
- 12.1 Definitions**
- In this Article 12, the following terms shall have the following meanings:*

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

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

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

12.2 Relief for Change in Law

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

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

20. During the course of hearing on 17.01.2023, Learned counsel for SECI admitted the revision in the rate of GST from 5% to 12% is to be a ‘Change in Law’ event. The Commission vide RoP dated 17.01.2023 observed as under:

“

.....

7. Learned senior counsel for SECI referring to its reply submitted that revision in the rate of GST from 5% to 12% is in terms of Ministry of Finance, Department of Revenue, Notification No. 8/2021 dated 30.9.2021 qualifies to be a ‘Change in Law’ event. However, SECI has objected to the methodology of computation of compensation on account of change in law and has submitted that the discounting factor has been considered as 9 % (which is rate of interest for the loan component of the capital cost) and tenure of payment as 15 years as provided for determination of tariff under

Regulation 14 (2) (b) of the Renewable Tariff Regulations, 2020. Learned senior counsel submitted that as regards the claim of carrying cost on the basis of the Parampujya Judgment, it will be subject to the order(s) passed by the Hon'ble Supreme Court in Civil Appeal No. 8880/2022 and Ors. challenging the Parampujya judgment. Thus, the Commission may determine the claim of carrying cost. However, its enforcement may be kept pending till adjudication of the said matter before the Hon'ble Supreme Court. SECI has no issue on the cut-off date."

21. We note that the contracting parties to the PPA have already agreed to the fact that the revision in GST rates from 5% to 12 % qualifies as 'Change in Law event' in terms of the PPAs. Therefore, nothing remains to be adjudicated in this regard.

22. The next issue raised by the Respondents is that the original SCoD of 25.10.2020 had been extended by SECI to 17.01.2021 whereas the change in GST rate came in effect on 01.10.2021. Even after the SCoD was fixed as 17.01.2021, the Petitioner procured the solar cells and modules for commissioning the Project during the months from October 2021 to March, 2022 for unexplained reasons. Neither any extension of the said SCoD was sought by the Petitioner nor any extension had been granted by SECI until 29.04.2022. The development of the project was not dependent on the availability of LTA.

23. The Commission observes, the relevant provisions of the PPA dated 15.11.2018 as under:

4.5 Extensions of Time

4.5.1 In the event that the SPD is prevented from performing its obligations under Article 4.1 by the Scheduled Commissioning Date due to:

a) any Buyer Event of Default; or

b) Force Majeure Events affecting Buyer/ Buying Entity(ies) , or

c) Force Majeure Events affecting the SPD,

the Scheduled Commissioning Date and the Expiry Date shall be deferred, subject to Article 4.5.6, for a reasonable period but not less than 'day for day' basis, to permit the SPD or SECI/ Buying Entity(ies) through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the SPD or SECI/Buying Entity(ies), or till such time such Event of Default is rectified by Buyer.

24. Relevant provisions of the PSA dated 07.08.2018 is as under:

6.10 Offtake constraints due to Transmission Infrastructure /Grid Unavailability & Backdown

6.10.1 Generation Compensation in offtake constraint due to Transmission Infrastructure not complete/ ready (Transmission constraint): After the Scheduled Commissioning Date, if the plant is ready but the necessary power evacuation/ transmission infrastructure is not ready, for reasons not attributable to the SPD, leading to offtake constraint, the provision for generation compensation is as follows

Transmission Constraint	Provision for Generation Compensation
<i>If the Project is ready but the necessary power evacuation/transmission infrastructure is not ready, leading to offtake constraint</i>	<i>a. The normative CUF of 19% (nineteen per cent) or committed CUF, whichever is lower, for the period of grid unavailability, shall be taken for the purpose of calculation of generation loss. Corresponding to this generation loss, the excess generation by the SPD in the succeeding 3 (three) Contract Years, shall be procured by the Buying Entity at the PSA tariff so as to offset this loss.</i>

However, it is clarified that if the project is ready for commissioning prior to the Scheduled Commissioning Date, but the offtake is constrained because of inadequate/incomplete power evacuation infrastructure, no compensation shall be permissible.

25. We observe that vide letter dated 05.03.2020, the Petitioner informed SECI as under:

“B) Delay in operationalization of LTA

*With regards to connectivity, as per the terms and conditions of the RfS and PPA, we had secured ISTS connectivity at CTU level by applying for connectivity at 765/400/220 kV Bhadla PGCIL Substation. Further, with respect to our LTA, **Transmission Service Agreements (“TSA”) were executed with the Transmission Service Providers (“TSP”), viz. Bikaner Khetri Transmission Ltd. (BKTL), Ajmer Phagi Transco Ltd. (APTL) and Powergrid Khetri Transmission System Ltd. (PKTSL) who are thus responsible for the construction and augmentation of the associated transmission system, as needed for operationalization of our LTA with PGCIL.***

Our LTA is scheduled on 02nd September 2020 in accordance with our project commissioning timelines i.e. 25th October 2020. However, as per the TSA(s) signed by the TSP(s) the scheduled commissioning dates of the transmission infrastructure associated with the said LTA is 31st December 2020.

Further, to add to our woes, vide their various letters (progress reports, also uploaded in CEA website) TSP(s) are further citing Force Majeure reasons for seeking further extension of SCD from 31st December 2020 till as late as 28th February 2021.

Based on the above, to safeguard the interest of the project and also based on the fact that the above reasons of delay have all been beyond the scope of the SPD, your good office is requested to grant us extension for scheduled project commissioning timelines until the later of the following dates:

- 1. 90 days from the date of actual LTA operationalization by PGCIL and it may please be noted that the revised SCD may also be linked with date of LTA operationalization*
- 2. Date which is 17 months from-the date of Approval of PSA for Procurement of Contracted Capacity.”*

26. We observe that vide letter No. 37185 dated 28.05.2020, SECI informed the Petitioner as under:

“It is informed that scheduled commissioning of the project is being extended for a period equal to 60 days subsequent to the operationalization of LTA or the actual date of commissioning, whichever is earlier.

Please keep us informed about the progress of your project and readiness of ISTS transmission infrastructure /LTA Operationalization.”

27. We observe that vide letter No. 48779 dated 29.04.2022, SECI has again informed the Petitioner as under:

Sub.: Revision of SCD due to early commissioning and delay in LTA operationalization-reg.

Ref:

- i. PPA signed for 250 MW Solar PV Power Project (Project ID: SPD-ISTS-T1 - HSEPL-P1 - 250RJ) under ISTS Tranche-III scheme with Effective Date of 25.10.2018.*
- ii. Minutes of 21st Joint Co-ordination Committee meeting for Generation Projects in Northern Region, issued by CTU.*

Dear Sir,

With reference to the subject mentioned above, it is informed that LTA related to the project has not been operationalized yet by the CTU.

Therefore, in view of this, Scheduled Commissioning Date (SCD) of the Project (ref. i) is being extended upto the LTA operationalization date and expiry date of PPA be counted as 25 Years from extended SCD date i.e. LTA operationalization date.

28. From the above, we observe that as per PPA dated 15.11.2018, the SCoD of the project was 25.10.2020. Considering the request of the Petitioner, SECI vide letter No. 37185 dated

28.05.2020 also extended the SCoD of the project *for a period equal to 60 days subsequent to the operationalization of LTA or the actual date of commissioning, whichever is earlier*. Further, SECI vide letter no. 37186 dated 28.05.2020 extended Project's timelines on account COVID-19 pandemic & associated lockdown to 17.01.2021. We observe that the Petitioner achieved the COD on 21.04.2022 and subsequently, vide letter No. 48779 dated 29.04.2022, SECI relying on the Minutes of 21st Joint Co-ordination Committee meeting for Generation Projects in Northern Region, issued by CTU informed the Petitioner that SCoD of the Project is being extended upto the LTA operationalization date i.e. 06.10.2022 and expiry date of PPA be counted as 25 Years from extended SCoD date i.e. LTA operationalization date. We are of the view that SCoD extension granted by SECI is well within the scheme as envisaged in Article 4.5.1 (b) (*Extension of Time- Force Majeure events effecting Respondents*) of PPA dated 15.11.2018. It is pertinent to mention here that the LTA became operational on 06.10.2022 whereas the Petitioner achieved the COD (21.04.2022) before operationalization of LTA. Since the change in GST rate came into effect on 01.10.2021 i.e. after the execution of PPA viz. 15.11.2018 and before achieving the COD viz. 21.04.2022, as such the Petitioner's project was affected by the Amendment Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021. Therefore, the Petitioner is entitled for relief under the GST Laws as per the terms of Article 12 of the PPA. Further, Article 6.10 of the PSA dated 07.08.2018 stipulates regarding *Offtake constraints due to transmission infrastructure/ Grid unavailability & backdown*. Clause 'a.' of Article 6.10 of the PSA stipulates regarding Generation Compensation in offtake constraint due to Transmission Infrastructure not complete/ ready (Transmission constraint). Hence, reliance of JBVNL on Article 6.10 of the PSA is not material since in the instant case the SCoD of the Project was extended due to delay in operationalization of LTA, whereas the Art. 6.10 of the PSA stipulates about the circumstances of offtake constraints after SCoD, where the Project is ready but the necessary power evacuation/ transmission infrastructure is not ready.

29. The next issue raised by the Respondents is about the annuity payment methodology. The Respondents have submitted that there has been a fall in the interest rate of loan and the Commission has notified the *RE Tariff Regulations 2020* and *RE Tariff Order dated 31.03.2021*.

Accordingly, the Commission may consider only the interest rate of 9% and the term of the Loan repayment as 15 years. *Per contra*, the Petitioner has submitted that in various petitions the discount factor of 10.41% has been considered for annuity payment by the Commission irrespective of the commissioning date of the project. In the alternative, and if this Commission is not inclined to allow the discount factor at 10.41%, then a discount factor of 10.30% may be allowed in accordance with the *RE Tariff Regulations 2020*. Further, the Petitioner has submitted that RE Tariff Order dated 31.03.2021 applicable for FY 2021-22 was applicable only for the control period of 31.03.2021 to 31.03.2022 and as the Petitioner's project was commissioned after the end of the control period on 21.04.2022, the RE Tariff Order dated 31.03.2021 will not be applicable.

30. We note that this Commission in the earlier order dated 20.08.2021 in the Petition No. 536/MP/2020 has already, inter-alia, decided on the methodology of compensation due to Change in Law events as under:

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."

31. Qua the aforesaid order, this Commission has taken a view that in case of competitive bidding projects it is not possible to ascertain either the capital structuring (extent of debt and equity) of the projects, or the actual rate of interest of the debt component or the expected rate of return on

equity. As the actual deployment of capital by way of debt or equity and their cost in terms of rate of interest or return, respectively, is unknown, the rate can be taken as the uniform rate of compensation for the entire expenditure incurred on account of Change in Law. The compensation for change in law cannot be a source for earning profit, and therefore, there cannot be any higher rate of return than the prevailing normative cost of debt.

32. The Petitioner achieved actual commercial operation on 21.04.2022, when the *RE Tariff Order* for the financial year 2022-23 issued by the Commission (vide Order dated 07.11.2022) in pursuance of the Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020 (in short “RE Tariff Regulations, 2020”) was in operation. In the said *RE Tariff Order dated 07.11.2022* the interest rate was determined as 9.12% and the term of the loan repayment as 15 years. Therefore, applying the principle decided by this Commission in the Order dated 20.08.2021 in Petition No. 536/MP/2020, that the *compensation for change in law cannot be a source for earning profit, and therefore, there cannot be any higher rate of return than the prevailing normative cost of debt*, we hold that the discount rate of 9.12% and annuity period of 15 years will be the appropriate methodology towards change in law compensation.
33. Further, the Commission holds that the liability of SECI/ Discoms for ‘*Monthly Annuity Payment*’ starts from 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.
34. The next issue raised by the Petitioner is that it is entitled for Carrying Costs on account of Change in Law event in terms of Article 12 of the PPA.

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

CONCLUSION

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

109. The other captioned appeals – Appeal no. 256 of 2019 (Parampujya Solar Energy Pvt. Ltd & Anr. v. CERC & Ors.), Appeal no. 299 of 2019 (Parampujya Solar Energy Pvt. Ltd. v. CERC & Ors.), Appeal no. 427 of 2019 (Mahoba Solar (UP) Private Limited v. CERC & Ors.), Appeal no. 23 of 2022 (Prayatna Developers Pvt. Ltd. v. CERC & Ors.) Appeal no. 131 of 2022 (Wardha Solar (Maharashtra) Private Ltd. & Anr. v. CERC & Ors.) and Appeal no. 275 of 2022 (Parampujya Solar Energy Pvt. Ltd. & Anr. v. CERC & Ors.) - deserve to be allowed. We order accordingly directing the Central Electricity Regulatory Commission to take up the claim cases of the Solar Power Project Developers herein for further proceedings and for passing necessary orders consequent to the findings recorded by us in the preceding parts of this judgment, allowing Change in Law (CIL) compensation (on account of GST laws and Safeguard Duty on Imports, as the case may be) from the date(s) of enforcement of the new taxes for the entire period of its impact, including the period post Commercial Operation Date of the projects in question, as indeed towards Operation & Maintenance (O&M) expenses, along with carrying cost subject, however, to necessary prudence check.”

...

36. In view of the above, the Petitioner shall be entitled for compensation towards additional expenditure on account of Change in Law event in terms of Article 12.2 of the PPA along with carrying cost on account of Change in Law event upto the date of reimbursement by the Respondents. The Petitioner, in the instant petition 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 Petitioner for arranging funds (supported by Auditor’s Certificate) or the rate of interest on working capital as per applicable RE Tariff Regulations, 2017 or the late payment surcharge rate as per the PPA, whichever is the lowest. Once a supplementary bill is raised by the Petitioner in terms of this order, the provision of 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 on account of introduction of Amendment Notification No. 8/2021-Integrated Tax (Rate) dated 30.09.2021 by the Ministry of Finance, Government of India along with carrying cost by exhibiting clear and one to one correlation with the projects and the invoices raised supported with auditor certificate. The Commission further directs that the Respondent JBVNL is liable to pay to 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 JBVNL to SECI.
38. 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.
39. The Hon’ble Supreme Court in its Order dated 12.12.2022, in Civil Appeal no. 8880/2022 in the case of *“Telengana 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.”*
40. 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.

41. The summary of our findings is as follows:

Issue No.1:

- The Petitioner is entitled for relief under the GST Laws as per the terms of Article 12 of the PPA.

Issue No.2:

- Discount rate of 9.12% and annuity period of 15 years will 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 will be payable if the payment is not made within the due date.

Issue No.3:

- 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 36, 37 & 40 above.

42. The Petition No. 174/MP/2022 is disposed of accordingly.

Sd/-
पी. के. सिंह
(सदस्य)

Sd/-
अरुण गोयल
(सदस्य)

Sd/-
आई. एस. झा
(सदस्य)