केन्द्रीय विद्युत विनियामक आयोग
CENTRAL ELECTRICITY REGULATORY COMMISSION

नई दिल्ली
NEW DELHI

याचिका संख्या./ Petition No. 381/MP/2023

कोरम/ Coram:

श्री जिष्णु बरुआ, अध्यक्ष/Shri Jishnu Barua, Chairperson
श्री अरुण गोयल, सदस्य/ Shri Arun Goyal, Member
श्री पी. के. सिंह, सदस्य / Shri P. K. Singh, Member

आदेश दिनांक/ Date of Order: 11th of May, 2024

IN THE MATTER OF:

A petition under section 79 of the Electricity Act 2003 before this Hon'ble Central Electricity Regulatory Commission for declaration of certain events as "Change in Law" and subsequent reimbursement in terms of Article 12 of the Power Purchase Agreement dated 31.08.2020 executed between Altra Xergi Power Private Limited and NHPC Limited along with carrying cost and interest on carrying cost

AND IN THE MATTER OF:

Altra Xergi Power Private Limited,
2nd Floor, Square One Mall,
Saket Business District, Court Chowk,
Pushp Vihar, New Delhi – 110017

...Petitioner

Versus

1. **NHPC Limited,**
   NHPC Office Complex, Sector-33,
   Faridabad, Haryana-121003

2. **Madhya Pradesh Power Management Company Limited,**
Shakti Bhawan, Rampur,
Jabalpur, Madhya Pradesh-482008

…Respondents

Parties Present: Shri Sujit Ghosh, Senior Advocate, AXPPL
Ms. Ananya Goswami, Advocate, AXPPL
Shri Dharmendra Gupta, Advocate, AXPPL
Shri Rajiv Shankar Dwivedi, Advocate, NHPC
Shri Rishabh Jain, Advocate, NHPC
Shri Rajesh Joshi, Advocate, NHPC
Shri Nitin Gaur, Advocate, MPPMCL
Shri Sagar Parashar, MPPMCL

आदेश/ ORDER

The Petitioner, M/s Altra Xergi Power Private Limited (AXPPL), is a generating company and is setting up a 380 MW Solar power project located in District Jaisalmer, State of Rajasthan. NHPC Limited (NHPC) issued a Request for Selection (RfS) dated 03.09.2019 of Solar Power Developers (SPDs) for procurement of a 2000 MW Solar Power Project with ISTS connectivity being developed by Solar Power Developers (SPDs) anywhere in India. M/s O2 Power SG PTE Limited (M/s O2 Power) submitted its bid on 31.01.2020, and the e-reverse auction was conducted on 16.04.2020. M/s O2 Power was selected by NHPC as a Solar Power Developer for the development of the 380 MW Solar Power Project. Accordingly, NHPC issued a Letter of Award (LoA) dated 01.06.2020. M/s O2 Power SG PTE Limited incorporated a special purpose vehicle (SPV) viz. M/s Altra Xergi Power Private Limited (AXPPL, the Petitioner) for developing and commissioning a 380 MW Solar Power Project. NHPC executed a Power Sale Agreement (PSA) with Madhya Pradesh Power Management Company Limited on 28.08.2020. The Petitioner executed a Power Purchase Agreement (PPA) dated 31.08.2020 with NHPC for setting up a Solar Power Project of 380 MW. Thereafter, NHPC filed Petition No. 721/AT/2020 before this Commission on 03.12.2020 for adoption of tariff. The Commission adopted the tariff vide order dated 02.06.2021. The Petitioner executed Supplementary PPA on 16.07.2021 as per directions of the Commission contained in Order dated 02.06.2021. The Scheduled Commissioning Date (SCoD) of the project in terms of the PPA was 28.02.2022, which was

further extended to 30.01.2024 on account of Force Majeure events. The Petitioner is seeking a declaration of certain events as Change in Law and subsequent reimbursement in terms of Article 12 of the Power Purchase Agreement dated 31.08.2020, along with carrying cost and interest on carrying cost. The Petitioner achieved COD on 07.02.2024.

2. Respondent No. 1, NHPC Limited (NHPC) is a Government of India undertaking engaged in facilitating the development of ISTS-connected Solar Power Projects in India for the sale of solar power generated to the distribution licensees in the States to enable them to procure solar power including for due fulfilment of the Renewable Purchase Obligations specified under the Electricity Act, 2003.

3. Respondent No. 2, Madhya Pradesh Power Management Company Limited (MPPMCL) is a holding company for all the DISCOMS of the State of Madhya Pradesh and is engaged in overseeing the distribution activities in Madhya Pradesh.

4. The Petitioner has made the following prayers:

   a) *Declare the Order dated 19.04.2021 passed by Hon'ble Supreme Court in Writ Petition (Civil) No. 838 of 2019 titled M.K. Ranjitsinh & Ors. v. Union of India & Ors as Change in Law in terms of the PPA which has led to an increase in the expenditure for the Project;*
   b) *Declare the increased rate of CGST / IGST on renewable energy devices and parts for their manufacture imposed vide Notification No. 8/2021-Central Tax (Rate) and Notification No. 8/2021- Integrated Tax (Rate) dated September 30, 2021 (effective October 1, 2021) as Change in Law in terms of the PPA which has led to an increase in the expenditure for the Project;*
   c) *Declare the imposition of increased rate of Basic Customs Duty on Solar Modules and consequent increase in quantum of social welfare surcharge and IGST on account of rescission of Notification No. 24/2005- Customs dated 01.03.2005 vide Notification No. 15/2022 - Customs dated 01.02.2022 and amendment in the Customs Tariff Act as Change in Law in terms of the PPA which has led to an increase in the expenditure for the Project;*
   d) *Declare that interest/carrying cost along with interest on carrying cost shall be paid from the date of incurring of the cost by the Petitioner till the date of payment of the claim;*

e) Evolve a suitable mechanism to compensate the Petitioner for the increase in expenditure incurred by the Petitioner on account of the events of Change in Law; and

f) Pass any such other and further reliefs as this Hon'ble Commission deems just and proper in the nature and circumstances of the present case.

Factual Matrix:

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

Guidelines	*"Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects"* dated 03.08.2017 as amended from time to time issued by Ministry of Power, Government of India.
Location	Village Nimba, Magre ki Dhani, Tehsil-Fatehgarh, District-Jaisalmer, State of Rajasthan
Nodal agency	NHPC
Tariff	*Rs.2.55/kWh*
Capacity (MW)	380 MW
Power	Solar PV
Date of Notification of Custom Tariff Act, 1975	18.08.1975
Date of notification of Basic Custom Duty Notification No. 24/2005-Customs	01.03.2005
Date of Notification No.1/2017-Central Tax (Rate)/Integrated Tax (Rate) (2017 GST Notification)	28.06.2017
Hon'ble Supreme Court order in the matter of M.K. Ranjitsinh v. Union of India *(SC GIB Order)*	19.04.2021
RfS issued on	03.09.2019
Bid submitted on	31.01.2020
E-Reverse auction held on	16.04.2020
LOA issued on	01.06.2020
Power Sale Agreement (PSA) executed on	28.08.2020
PPA executed on	31.08.2020
Tariff was adopted by the Commission vide Order in Petition No. 721/AT/2020	02.06.2021
Supplementary PPA was executed pursuant to the Commission order in Petition No. 721/AT/2020 dated 02.06.2021.	16.07.2021
SCoD of the project	28.02.2022
Extended SCoD • On account of Covid-19 Pandemic and delay in Adoption of Tariff	10.08.2022

• On account of request of Petitioner seeking extension of SCoD based on *SC GIB Order*	30.01.2024
Date of Notification of 8/2021- Central Tax (Rate)/Integrated Tax Rate *(2021 GST Notification)*	30.09.2021
Date of notification of *Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 (CIL Rules)*	22.10.2021
Date of Notification of Basic Custom Duty Notification No. 15/2022-Customs	01.02.2022
Date of notification of the Finance Act, 2022	30.03.2022
COD of the project	***259.6 MW- 30.01.2024; 120.40W- 07.02.2024***

6. The present petition was filed on 16.11.2023 and listed for hearing on 19.01.2024. The Commission, after hearing the submissions of the Petitioner, admitted the Petition and directed the Petitioner to serve a copy of the Petition to the Respondents. The hearing was further conducted on 15.03.2024, wherein the Commission permitted the Respondents to file their Reply. During the course of the hearing, MPPCL sought time to file its reply whereas NHPC endorsed the view of the Petitioner and prayed that the parties may be permitted to reconcile the amount claimed in the matter as per the CIL Rules. Upon hearing the submissions of the parties, the Commission reserved the matter for orders and directed the parties to file their respective written submissions. Pursuant to the directions of the Commission, the parties filed their respective submissions.

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

8. Before proceeding to the main issues, we feel it is imperative to mention here that Article 4.6.2 of the PPA dated 31.08.2020 stipulates as under:

> ***4.6 Liquidated Damages for delay in commencement of supply of power to NHPC***
> ***4.6.1***
> …
> ***b) For Delay in commissioning beyond 6 (six) months from the Scheduled Commissioning Date(SCD):***
> *Event of Default shall be considered to have occurred and the contracted capacity shall stand reduced to the project capacity commissioned upto* ***SCD + 6 (six) months.*** *The PPA for the balance capacity not commissioned shall be terminated.*
> …
> ***4.6.2*** *The Maximum time period allowed for commissioning of the full Project Capacity with encashment of Performance Bank Guarantee shall be limited to Twenty four* ***(24) months*** *(as per RFS) from the Effective Date of this Agreement.*

We observe that in the instant petition, the PPA (as well as the effective date) was executed on 31.08.2020 and the SCoD of the project was 27.02.2022. The SCoD was extended first up to 10.08.2022 and subsequently up to 30.01.2024. However, the project was commissioned on 07.02.2024. We note that vide letter No. NH/RE&GH /ISTS 2000 MW/380MW/2024/ 341 dated 07.02.2024, NHPC issued a Commissioning Certificate and has certified that *With the present part commissioning of 120.40 MW, Full Capacity of 380 MW stands commissioned*. We further note that neither of the contracting parties has prayed before the Commission to take cognizance of Article 4.6. Nevertheless, the instant order of the Commission shall be applicable for the mutually agreed project capacity under PPA, which is valid.

9. Further, on the basis of the submissions of the contracting parties, the issues which arise for adjudication are as under:

Issue No. I: *Whether Hon'ble Supreme Court's order dated 19.04.2021 in IA. No. 85618 of 2020 (in Writ Petition (Civil) No. 838 of 2019) in the matter of M.K. Ranjitsinh v. Union of India directing the installation of bird diverters on transmission lines; increase in the rate of CGST / IGST on renewable energy devices and parts for their manufacture imposed vide Notification No. 8/2021-Central Tax (Rate) and Notification No. 8/2021-Integrated Tax (Rate) dated 30.9.2021; increase in the rate of Basic Customs Duty on Solar Modules and consequent increase in quantum of social welfare surcharge and IGST on account of rescission of Notification No. 24/2005- Customs dated 1.3.2005 vide Notification No. 15/2022 - Customs dated 01.02.2022 issued by Ministry of Finance, Government of India issued by Government of India amount to Change in Law events under Article 12 of the Power Purchase Agreement dated 31.08.2020? AND Whether the Petitioner is entitled to compensation towards additional expenditure on account of the Change in Law event in terms of Article 12.2 of the PPA?*

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

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

10. Now, we proceed to discuss the above issue.

<u>Issue No. I</u>:
Whether Hon'ble Supreme Court's order dated 19.04.2021 in IA. No. 85618 of 2020 (in Writ Petition (Civil) No. 838 of 2019) in the matter of M.K. Ranjitsinh v. Union of India directing the installation of bird diverters on transmission lines; increase in the rate of CGST / IGST on renewable energy devices and parts for their manufacture imposed vide Notification No. 8/2021-Central Tax (Rate) and Notification No. 8/2021- Integrated Tax (Rate) dated 30.9.2021; increase in the rate of Basic Customs Duty on Solar Modules and consequent increase in quantum of social welfare surcharge and IGST on account of rescission of Notification No. 24/2005- Customs dated 1.3.2005 vide Notification No. 15/2022 - Customs dated 01.02.2022 issued by Ministry of Finance, Government of India issued by Government of India amount to Change in Law events under Article 12 of the Power Purchase Agreement dated 31.08.2020? AND Whether the Petitioner is entitled to compensation towards additional expenditure on account of a Change in Law event in terms of Article 12.2 of the PPA?

11. Briefly, the Petitioner has submitted as under:

<u>SC GIB Order</u>:

a) Hon'ble Supreme Court's order dated 19.04.2021 in IA. No. 85618 of 2020 (in Writ Petition (Civil) No. 838 of 2019) in the matter of *M.K. Ranjitsinh v. Union of India* (*SC GIB Order*) which has mandated the installation of bird diverters on the existing overhead power lines, having been passed by the Hon'ble Supreme Court which is covered under the definition of Indian Governmental Instrumentality would qualify under '*enactment of new law'* and thus qualify as a change in law event under the PPA. Further, it is effectively undisputed that the notifications issued by Governmental Authorities would also fall under the ambit of 'law.' In any case, the *SC GIB Order,* as passed by the Hon'ble Supreme Court, qualifies as 'Law' under Article 141 of the Constitution of India. Article 141 of the Constitution of India, provides that law declared by the Hon'ble Supreme Court of India shall be binding on all Courts within the territory of India.

b) As per the *SC GIB Order,* the Petitioner had to install the bird diverters in order to protect the birds from colliding with the wires/lines, and such installation was not envisaged at the time of bid submission. Accordingly, the said Order enacted a new condition for the Project which led to an increase in the cost of setting up of Solar Power Project and supply of power. Also, the condition of the tower design of horizontal towers, the GIB Committee's approval, installation, and commissioning of 'Bird Flight Diverters' and its accessories, pursuant to the *SC GIB Order,* is in the nature of the imposition of a requirement for obtaining consents, clearances and permits which were not required earlier. The Petitioner could not factor in the same at the time of bid submission, i.e., on 31.01.2020.

Introduction of 2021 GST Notifications:

c) The Central Government vide Notification No. 8/2021- Central Tax (Rate) and Notification No. 8/2021-Integrated Tax (Rate) dated 30.09.2021 (effective October 1, 2021) *(2021 GST Notifications)* amended Notification No. 01/2017-Central Tax (Rate) and Notification No. 01/2017-Integrated Tax (Rate) dated 28.06.2017 *(2017 GST Notification)* thereby increasing the rate of CGST/IGST for renewable energy devices and their parts. As per the *2021 GST Notifications*, Entry 234 and the entries related thereto (with an effective CGST / IGST rate of 5%) were omitted from Schedule I, and Entry 201A has been inserted into Schedule II, wherein the rate of CGST/IGST is 6% (effective 12%). Basis the said entry, renewable energy devices, i.e., modules and solar power generators and their parts for manufacture, will be leviable to CGST/IGST at 12%, and other goods would be leviable to CGST and IGST at 18% instead of the earlier rate of 5%, thereby leading to an incremental CGST and IGST of 7% and 13% respectively.

d) Along with the change in the rate of GST, there was also a change in the entry itself such that the only goods that fall under the ambit of 'Solar Power Generators' (i.e., goods that are responsible for generating DC power, i.e., modules, inverters, and DC cables) are liable to GST at 12%. Remaining goods, which earlier formed a part of the broader term, i.e., 'solar power generating system,' but now stand excluded (as they would not be a part of a generator), were liable to GST at the tariff rate, i.e., 18% Thus, with effect from 01.10.2021, supply of modules and solar power generators and their parts for manufacture would be liable to 12% GST *vis-à-vis* the earlier lower rate of 5% GST and the remaining goods would be liable to 18% GST instead of 5%.

Recession of Notification No. 24 of 2005 qua Notification No.15 of 2022

e) Vide the Notification bearing No. 24/2005-Customs dated 01.03.2005, the Central Government had exempted goods falling under CTH 8541 from the whole of the duty of customs leviable under the First Schedule. However, vide Notification No. 15/2022 - Customs dated 01.02.2022 (*2022 BCD Notification*), it proceeded to amend Notification No. 24/2005 such that Entry 23 of the earlier notification excluded 85414200 and 85414300, with effect from 01.04.2022. Thus, the effect of such amendment was that solar cells and modules (under CTH 85414200 and 85414300) were no longer covered under the ambit of the exemption Notification No. 24/2005 and thereby liable to basic customs duty (BCD) at the rates specified in the Customs Tariff, with effect from 01.04.2022.

f) Also, under the Customs Tariff Act, 2022, the tariff rate under the Customs Tariff was increased for solar cells from 20% to 25% and for solar modules from 20% to 40%. Thus, the cumulative effect of the *2022 BCD Notification* and amendment in the Customs Tariff Act was that imports of solar cells and modules were now leviable to customs duty at 25% and 40% respectively.

g) The Petitioner will place on record the CA Certificate, purchase orders, invoices, etc., to specifically substantiate the financial impact on its project due to the events of Change in Law at an appropriate stage in the adjudication of the present petition.

12. *Per contra*, MPPMCL has submitted that the change in law claims are contingent upon the reconciliation of the claims by MPPMCL and not just by NHPC. Any order for payment based on the change in law can be made only after the bills have been reconciled and verified by MPPMCL. NHPC, before the verification and reconciliation of the bills by MPPMCL, cannot make any unconditional payments to the Petitioner. The claims of the Petitioner for awarding carrying cost incurred as additional expenditure on account of change in law in accordance with Article 12 of the PPA dated 30.08.2020 and APTEL order dated 15.09.2022 can be taken up by this Commission, but the final order by this Commission, in this matter shall not be enforced till further orders are passed by the Hon'ble Supreme Court in Civil Appeal no. 8880/2022. Therefore, MPPMCL cannot be directed to pay one-time compensation, carrying cost, etc., till the issues attain finality before the Hon'ble Supreme Court.

13. Briefly, NHPC has submitted that the Petitioner vide letter dated 21.02.2024 has provided details of financial impact in relation to the change in law claim for "Change in rate of Basic Customs duty (BCD)" and along with the levy of Social Welfare surcharge (SWS) and Integrated Goods and Services Tax(IGST) and has claimed additional expenditure of Rs 377,93,89,016. The Petitioner may be directed to submit full details of additional expenditure incurred on account of change in law events. The Petitioner may be directed to reconcile the additional impact on account of change in law with both the Respondents before raising bills on this account. Recovery of additional impact as decided by the Commission shall be effected on back to back basis.

Common Rejoinder dated 09.04.2024 against submissions of NHPC and MPPMCL

14. The Petitioner has submitted as under:

a) **Details of expenditure incurred by the Petitioner are as under:**

i. The claim of Rs. 14,00,54,767/- (Rupees Fourteen Crores Fifty Four Thousand Seven Hundred Sixty Seven Only) towards compensation on account of *Supreme Court's Order dated 19.04.2021*

ii. The claim of Rs. *77,57,87,124/-* (Rupees Seventy Seven Crores Fifty Seven Lakhs Eighty Seven Thousand One Hundred and Twenty Four Only) towards compensation on account of the Change in Law event arising due to the *issuance of the Notification No. 8/2021- Central Tax (Rate) and Notification No. 8/2021- Integrated Tax (Rate) dated 30.09.2021.*

b) The details of the Change in Law impact of Rs. 377,93,89,016/- due to the imposition of BCD on import of Solar Modules and PV Cells along with the proposed impact of the same on tariff vide a Change in Law Notice dated 21.02.2024 as per Rule 3(3) of the CIL Rules, 2021.

c) Even though the recovery of additional expenditures incurred on account of the events of change in law may be effected on a back-to-back basis, the obligation of NHPC to pay the additional expenditure incurred by the Petitioner on account of the events of change in law is not conditional upon the payment of the said amount to NHPC by MPPMCL.

d) Petitioner is merely seeking a declaration that the directions of the Hon'ble Supreme Court vide its Order dated 19.04.2021, increase in rate of GST from 5% to 12%/18% vide the Notifications dated 30.09.2021, and the imposition of BCD on import of Solar Modules and PV Cells vide the Notification dated 01.02.2022 are events of Change in Law. The Petitioner is further seeking a determination of the methodology to be adopted for reimbursement of its Change in Law claims pertaining to the Hon'ble Supreme Court vide its Order dated 19.04.2021 and increase in rate of GST from 5% to 12%/18% vide the Notifications dated 30.09.2021. The Petitioner is nowhere praying before this Commission for determination of the quantum of the amount to be reimbursed by the Respondents and the same shall be as per the conclusion of the reconciliation between the parties herein with respect to the change in law claims.

e) The Petitioner's claim of Change in Law pertaining to the imposition of BCD on the import of Solar Modules and PV Cells vide Notification dated 01.02.2022 is covered under the CIL Rules, 2021, and therefore, the procedure as prescribed has been followed by the Petitioner for the grant of compensation on account of the said event of Change in Law. Since the CIL Rules 2021 squarely apply to the said claim of the Petitioner, the

Petitioner has duly followed the procedure as laid down under Rule 3 of the CIL Rules 2021. However, NHPC has not responded in any manner to the above-mentioned Change in Law Notices issued by the Petitioner.

f) Vide the Change in Law Notice dated 21.02.2021, as per Rule 3(3) of the CIL Rules, 2021, the Petitioner had indicated that due to the imposition of BCD on the import of Solar Modules and PV Cells, *the increase in expenditure has resulted in increase in tariff from Rs. 2.55/unit to Rs. 3.04/unit*. However, the impact/ amount has not been reconciled or verified to date as per the procedure prescribed under the CIL Rules, 2021 by NHPC. Further, the Petitioner has raised invoices for the BCD amount in terms of the CIL Rules, 2021, and PPA. Therefore, the Petitioner requests this Commission to direct the Respondents to verify and reconcile the claim of the said claim of the Petitioner and, pending reconciliation, immediately commence the payment of the increased tariff as per the procedure laid down in the CIL Rules, 2021 and PPA.

g) Even though an appeal has been filed before the Hon'ble Supreme Court assailing the Order dated 15.09.2022, the operation of the same has not been stayed and accordingly, the same continues to be good law as on the date of filing of the present Rejoinder.

15. We observe that Article 12 of the PPA dated 31.08.2020 stipulates as under:

*"**ARTICLE 12: CHANGE IN LAW***

12.1 Definitions

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:

*a. **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;*

*b. 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;***

*c. **the imposition of a requirement for obtaining any Consents, Clearances, Permits and/or licenses which was not required earlier**;*

d. 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;

e. any statutory change in tax structure or introduction of any new tax made applicable for setting up of Solar Power Project and supply of power by the SPD after the date of submission of Bid, shall be treated as per the terms of this Agreement. For the purpose of considering the effect of this change in Tax structure due to change in law after the date of submission of Bid under this part,

the date of the submission of the bid' shall be considered as effective date and not the date of the signing of the PPA as applicable to other changes dealt in other parts of this Article 12.1. ***The change in rates of any taxes includes change in rates of taxes, duties & cess****.*

....

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 all the Parties."

Re: SC GIB Order

16. We note that vide *SC GIB Order* it was held as under:

5. The State as well as the Central Government therefore, have a duty cast to preserve the endangered species and as such the expenses incurred will have to be provided by them either under the schemes available or by earmarking the same in such manner. ***Needless to mention that in the instant case the preservation is by undergrounding the powerlines and in that context if cost is incurred, it would also be permissible to pass on a portion of such expenses to the ultimate consumer subject to approval of the Competent Regulatory Authority****.*

...

11. In the above background, there cannot be disagreement whatsoever that appropriate steps are required to be taken to protect the said species of birds. In that view, insofar as the existing overhead powerlines are concerned the respondents shall take steps forthwith to install divertors and in respect of existing overhead powerlines all future cases of installing the transmission lines a study shall be conducted with regard to the feasibility for the lines to be laid underground. In all such cases where it is feasible, steps shall be taken to lay the transmission line underground. For the lines to be laid in future if as per the technical report the overhead line alone is feasible and the same is ratified by the Committee, in such event the installation of the divertors shall also be a condition attached in the contract to be entered with generating companies. Insofar as, the cost incurred in the said process, the concerned respondents No. 5 to 8 and 9 to 11 shall work out and provide for the same and the respondents No. I to 4 aid in this regard. ***It would be open to them to muster the resources in accordance with law. In cases where the power generators are required to bear the additional amount adding to the cost of production, it would be open to regulate the manner in which the cost would be mitigated in accordance with contractual terms. Irrespective of the cost factor the priority shall be to save the near extinct birds****."*

...

14. In the light of the contentions urged on this aspect of the matter, ***we are conscious that the laying of the underground power line more particularly of high-voltage though not impossible, would require technical evaluation on case-to-case basis and an omnibus conclusion cannot be reached laying down a uniform method and directions cannot be issued unmindful of the fact situation****. Though that be the position the consensus shall be that all low voltage powerlines to be laid in the priority and potential habitats of GIB shall in all cases be laid underground in future. In respect of low voltage*

*overhead powerlines existing presently in the priority and potential habitats of GIB, the same shall be converted into underground powerlines**. In respect of high-voltage powerlines in the priority and potential habitats of GIB, more particularly the powerlines referred in the prayer column of I.A. No.85618/2020 and indicated in the operative portion of this order shall be converted into underground power line**. ...*

...

16. ... The details of the powerlines for installation of divertors from Rajasthan are as follows:

b) List of powerlines for installation of divertors from Rajasthan	*Capacity*
1) Jaisalmer - Ramgarh - 1 (40 Km)	*132 kv*
2) Jaisalmer - Ramgarh - 2 (40 Km)	*132 kv*

...

Lines from Rajasthan

b)	*List of powerlines from Rajasthan for undergrounding*	*Capacity*
1)	*Kanoi-Salkha (21 Km)*	*33 kv*
2)	*Sam-Dhanana (45Km)*	*33 kv*
3)	*Tejuva-Kuchr (17 Km)*	*33 kv*
4)	*Khuchri horizontal-parallel (21 Km)*	*33 kv*

17. The respondents No.5, 6 and 9 to 11 while arranging to lay the powerlines underground in respect of the powerlines, the feasibility of which is not in doubt shall proceed with the work right away. However, in cases where the respondents find that there are issues relating to feasibility, the matter shall be referred to the committee with all relevant material and particulars. The committee shall assess the matter and arrive at a conclusion as to whether the underground powerline is feasible or not. Based on the report to be rendered by the committee the further action shall be taken by the respondent.

*18. **In all cases where the overhead powerlines exist as on today in the priority and potential GIB area the respondents shall take steps forthwith to install divertors pending consideration of the conversion of the overhead cables into underground powerlines. In all such cases where it is found feasible to convert the overhead cables into underground powerlines the same shall be undertaken and completed within a period of one year and till such time the divertors shall be hung from the existing powerlines**.*"

17. From the above, we observe that the Order dated 19.04.2021 of the Hon'ble Supreme Court in I.A. No. 85618 of 2020 in *M.K. Ranjitsinh v. Union of India, Writ Petition (Civil) No. 838 of 2019 (SC GIB Order),* mandates that the additional actions/measures are to be adopted by the developers located in the potential and priority habitat of GIB. We observe that additional expenditure after the cut-off date would qualify as a Change in Law under Article 12 of the PPA. We note that as on the date of submission of the bid, i.e., 31.01.2020, the Petitioner would not

have been in a position to anticipate the additional expenditure required to be incurred in adopting the measures in terms of the *SC GIB Order* dated 19.04.2021.

18. We note that Article 141 in the Constitution of India stipulates as under:

> *141. Law declared by Supreme Court to be binding on all courts*
> *The law declared by the Supreme Court shall be binding on all courts within the territory of India.*

19. Hon'ble Supreme Court of India, in its judgment dated 21.09.1995 in a case titled *Nand Kishore vs State of Punjab,* has held as under:

> *Putting aside for the moment the course above-adopted, let us otherwise examine the view of the Hon'ble Judges of the Full Bench of Punjab and Haryana High Court on the question formulated. It is well known that the general principle underlying the doctrine of res-judicate is ultimately based on considerations of public policy. One important consideration of public policy is that the decisions pronounced by courts of competent jurisdiction should be final, unless they are modified or reversed by appellate authorities, and the other principle is that no one should be made to face the same kind of litigation twice over, because such a process would be contrary to considerations of fairplay and justice. These principles stand enunciated in Daryao and others v. The State of U.P. & Others [1962(1) SCR 574]. This court in The Amalgamated Coalfields Ltd. & Anr. v. The Janapada Sabha, Chhindwara [1963 (Supp.)(1) SCR 172] opined that constructive res-judicata was an artificial form of res-judicata enacted by Section 11 of the Code of Civil Procedure and it should not be generally applied to writ petitions filed under Article 32 and Article 226 of the Constitution. The court then had the occasion to point out that when a matter related to taxation and assessment levied for a different year, the doctrine of res-judicata was itself inapplicable.* ***This Court still spelled out the binding effect of a decision made under Article 141 of the Constitution as follows****:*
>
> > *"If for instance, the validity of a taxing statute is impeached by an assessee who is called upon to pay a tax for a particular year and the matter is taken to the High Court or brought before this Court and it is held that the taxing statute is valid, it may not be easy to hold that the decision on this basic and material issue would not operate as res judicata against the assessee for a subsequent year. That, however, is a matter on which it is unnecessary for us to pronounce a definite opinion in the present case. In this connection, it would be relevant to add that even if a direct decision of this Court on a point of law does not operate as res judicata in a dispute for a subsequent year, such a decision would,* ***under Art.141, have a binding effect not only on the parties to it, but also on all courts in India as a precedent in which the law is declared by this Court.*** *The question about the applicability of res judicata to such a decision would thus be a matter of merely academic significance."*

20. From the above, we observe that in terms of Article 141 of the Constitution of India and the provisions of the PPA, the *SC GIB Order* amounts to a Change in Law event as the law laid

down by the Hon'ble Supreme Court of India has a binding effect, enshrined in the Constitution of India.

21. We note that the Respondents NHPC/MPPMCL sought certain details/documents from the Petitioner to establish a change in law claims of the Petitioner. The Petitioner, vide Rejoinder dated 09.04.2024, submitted the required documents. We note that the Petitioner has submitted the relevant documents to establish a change in law claims. We have gone through the documents submitted by the Petitioner and the Respondents and hold that the *SC GIB Order* dated 19.04.2021 post the bid submission date, i.e., 31.01.2020, is a Change in Law event under Article 12 of the PPA. Accordingly, the Petitioner is entitled to the additional expenditure that it had to incur on account of the *SC GIB Order* dated 19.04.2021. It is pertinent to mention here that the view taken is consistent with a similar order issued by the Commission in the Order dated 08.03.2023 in Petition No. 245/AT/2022.

22. Before proceeding further, it is pertinent to mention here that the *SC GIB Order* dated 19.04.2021 was amended on 21.03.2024 as under:

> *62. **We are accordingly of the view that the order passed by this Court on 19 April 2021 needs to be suitably modified**. A blanket direction for undergrounding high voltage and low voltage power lines of the nature that was directed by this Court would need recalibration for the reasons discussed above. **This task is best left to domain experts instead of an a priori adjudication by the Court.** Experts can assess the feasibility of undergrounding power lines in specific areas, considering factors such as terrain, population density, and infrastructure requirements. This approach allows for more nuanced decision-making tailored to the unique circumstances of each location, ensuring that conservation objectives are met in a sustainable manner.*
>
> ***67. The Committee shall be at liberty to assess the efficacy of bird diverters and subject to its own findings on efficacy, to lay down specifications for bird diverters with due regard to the parameters specified by the Central Electricity Authority.** It shall also identify the number of bird diverters required for the successful implementation of conservation efforts. In this regard, the Committee may also consider the recommendations of the technical expert committee constituted by the Ministry of Power by OM No 25–7/42/2019 – PG dated 27 May 2022.*
>
> ***68. The injunction which has been imposed in the order dated 19 April 2021 in respect of the area described as the priority and potential areas shall accordingly stand recalled** subject to the condition that the Expert Committee appointed by this Court may lay down suitable parameters covering both the priority and potential areas.*
>
> *69. In the event that the Committee considers it appropriate and necessary to do so, it would be at liberty to recommend to this Court any further measures that are required to*

enhance the protection of the GIB. This may include identifying and adding suitable areas beyond the designated priority zones outlined above, if deemed crucial for the conservation of the species. Such additional areas could serve as vital habitats, corridors, or breeding grounds for the GIB, contributing significantly to its long-term survival.

70. We request the Committee to complete its task and submit a report to this Court through the Union Government on or before 31 July 2024.

…

72. The Union of India and the concerned ministries are directed to implement the measures described in the preceding paragraph, which it has undertaken to implement. Further, they are directed to continue implementing the measures detailed in paragraph 8(d) of this judgment. The directions contained in the order dated 19 April 2021 shall accordingly stand substituted by those contained in the present judgment. ***The project clearances which have been granted pursuant to the recommendations of the earlier committee appointed in terms of the order dated 19 April 2021 shall not be affected by the present judgment.***

23. The Hon'ble Supreme Court vide judgment dated 17.03.2023 in the matter of Govt. of NCT of *Delhi through the Secretary, Land and Building Department and Another v. K.L. Rathi Steels Limited and others [2023 SCC Online SC 288]* has held as under:

> *66. Although, the expression "for any other sufficient reason" in Order XLVII Rule 1CPC is wide enough to take within its scope and ambit many circumstances or situations which do not fall in the earlier part of the Order XLVII Rule 1 CPC which are the two grounds (i) and (ii) referred to above, in my view, the Explanation to the said provision carves out an exception to the expression "for any other sufficient reason" as a ground for review of a judgment in ground (iii). The Explanation being in the nature of an exception is to be read outside the scope of the expression "for any other sufficient reason" in Order XLVII Rule 1 CPC. In other words, if, on a question of law, a decision of a Court is reversed by a subsequent decision of a superior Court (Larger Bench in the instant case) and the same is reopened on the basis of the said subsequent decision there would be no finality of judgments of the Court even between the parties thereto.* ***It is, hence, observed that even an erroneous judgment or order is binding on the parties thereto even if subsequently that very judgment is reversed in a decision of a superior Court.*** *Otherwise, there would be chaos and no finality of any decision of a Court which is against public policy. Judgments rendered by a Court of competent jurisdiction as per the prevailing law are binding on the parties to the said judgment. Merely because that judgment is subsequently overruled by a subsequent decision of a superior Court in any other case, the same shall not be a ground for review of such judgment.*

24. From the above, we observe that the *SC GIB Order* dated 19.04.2021 stands modified on 21.03.2024, and the injunction imposed vide Order dated 19.04.2021 stands recalled. It was also held that the Expert Committee appointed may lay down suitable parameters covering both the priority and potential areas on or before 31.07.2024. Further, the project clearances which have

been granted pursuant to the recommendations of the earlier committee appointed in terms of the order dated 19.04.2021 shall not be affected by the present judgment. We observe that the Petitioner has already incurred the additional expenditure qua *SC GIB Order* dated 19.04.2021 (post the bid submission date, i.e., 20.11.2018). Accordingly, we hold that the Petitioner is entitled to the additional expenditure made in accordance with *SC GIB Order* dated 19.04.2021 as a Change in Law event under Article 12 of the PPA.

Re: <u>2021 GST Notifications</u>

25. Relevant provisions of 2017 GST Notification are reproduced below:

"Schedule I – 2.5%

S. No.	*Chapter / Heading / Sub-heading / Tariff item*	*Description of Goods*
234	*84 or 85*	*Following renewable energy devices & parts for their manufacture* *(a) Bio-gas plant* *(b) Solar power based devices* *(c) Solar power generating system* *(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*

26. We note that Notification No. 8/2021- Integrated Tax (Rate)/Central Tax (Rate) dated 30.09.2021 *(2021 GST Notification)* stipulates as under:

*(b**) <u>in Schedule II – 6%, -</u>*

...

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

201 A	*84, 85 or 94*	*Following renewable energy devices & parts for their manufacture: -* *(a) Bio-gas plant* *(b) Solar power-based devices* *(c) Solar power generating system* *(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. *[Explanation: If the goods specified in this entry are supplied, by a supplier, along with supplies of other goods and services, one of which being a taxable service specified in the entry at S. No. 38 of the Table mentioned in the notification No. 11/2017-Central Tax (Rate), dated 28th June, 2017 [G.S.R. 690(E)], the value of supply of goods for the purposes of this entry shall be deemed as seventy per cent. of the gross consideration charged for all such supplies, and the remaining thirty per cent. of the gross consideration charged shall be deemed as value of the said taxable service.*

27. From the above, we observe that Clause (v) of Article 12 of the PPA, in seriatim, specifically stipulates that *any change in rates of taxes, duties and cess, or introduction of any new tax made applicable for setting up of Solar Power Project and supply of power from the Solar Power Project by the SPD which have a direct effect on the Project,* is a Change in Law event. The Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021 has been issued by the Ministry of Finance, Government of India. The change in rate of Goods and Services Tax from 5% to 12% w.e.f. 01.10.2021 has resulted in the change in the cost of the inputs required for generation, and the same is considered a 'Change in Law.' Hence, we hold that the impugned notification viz *the 2021 GST Notification is a* Change in Law event as per Article 12 of the PPA dated 31.08.2020. It is pertinent to mention here that the view taken is consistent with similar orders issued by the Commission, viz. *order dated 05.04.2023 in Petition No. 268/MP/2021; order dated 05.04.2023 in Petition No. 216/MP/2022 and order dated 21.04.2023 in Petition No. 219/MP/2022; order dated 17.05.2023 in Petition No. 174/MP/2022; order dated 20.07.2023 in Petition No. 273/MP/2021; Order dated 16.01.2024 in Petition No. 308/MP/2022 and Order dated 14.03.2024 in Petition No. 65/MP/2023.*

Re: <u>Recession of Notification No. 24 of 2005 qua Notification No.15 of 2022</u>

28. The Petitioner has submitted that on 22.10.2021, the Ministry of Power (MoP) notified the *Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021* (*CIL Rules, 2021*). The claim with respect to Notification No. 15 of 2022 dated 01.02.2022 shall be governed by the provisions of the *CIL Rules, 2021,* as the said event took place after the date of notification of the CIL Rules, 2021, i.e., 22.10.2021.

29. The relevant extract of Notification No. 24 of 2005 is as under:

G.S.R. (E).- In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, ***hereby exempts the following goods, falling under the heading, sub-heading or tariff-item of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and specified in column (2) of the Table below, when imported into India, from the whole of the duty of customs leviable thereon under the said First Schedule****, namely:-*

Table

S.No.	*Goods falling under Heading, Sub-heading or Tariff item*
(1)	*(2)*
1.	*3818 00*
2.	*8456 91 00, 8469 11 00, 8470, 8471, 8473 21 00, 8473 29 00, 8473 30, 8473 50 00*
3.	*8517, 8520 20 00, 8523 (other than those falling under tariff item 8523 30 00), 8524 31, 8524 40, 8524 91, 8525 20, 8531 20 00, 8532, 8533, 8534 00 00,* ***8541****, 8542, 8543 11 00, 8543 81 00, 8544 70*
4.	*9009 11 00, 9009 21 00, 9009 91 00, 9009 92 00, 9009 93 00, 9009 99 00, 9010 41 00, 9010 42 00, 9010 49 00, 9013 80 10, 9013 90 10, 9026, 9027 20 00, 9027 30, 9027 50, 9027 80, 9030 40*
5.	*All goods for the manufacture of goods covered by S.Nos. 1 to 4 above, provided that the importer follows the procedure set out in the Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996.*

30. Relevant extract of Notification No. 15/2022 dated 01.02.2022 is as under:

…

In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby makes ***further amendments*** *in the following notifications of the Government of India in the Ministry of Finance (Department of Revenue), specified in column (2) of the Table below to the extent specified in the corresponding entry in column (3) of the said Table, namely:*

Sl. No.	***Notification and date***	***Amendments***
(1)	***(2)***	***(3)***
2	*Notification No. 24/2005- Customs, dated the 1st March, 2005, vide*	*In the said notification, in the TABLE, -* *(i) against Sr. No. 13S, in column (3), after item (j), the following item shall be inserted with effect from the 1st day of April, 2022, namely : -*

	No. G.S.R. 122 (E), dated the 1st March, 2005	*(k) Wrist wearable devices (commonly known as smart watches)* *(ii) for Sr. No. 23 and the entries relating thereto, the following Sr. No. and entries shall be substituted with effect from the 1st day of April 2022* *"23. 8541 (except 8541 42 00 or 8541 43 00) All goods other than Photovoltaic cells whether or not assembled in modules or made up into panels.";* ***(iii) after S.No. 38, the following Sr.No. and entities shall be inserted with effect from the 1st day of April, 2022, namely :-*** *"38A. 8541 42 00 or 8541 43 00 All goods for use solely and exclusively with goods covered under S. Nos. 1 to 38.".*

31. Relevant extracts of the Finance Act, 2022, No. 6 of 2022 Notification dated 30.03.2022:

...

(4) in Chapter 85,—

(i) for the entry in column (4) occurring against tariff items 8518 21 00, 8518 22 00, 8518 29 00, and 8518 30 00, the entry "20%" shall be substituted;

(ii) for tariff item 8524 11 00 and the entries relating thereto, the following shall be substituted, namely:—

"8524 11 00 - - Of liquid crystals 15% - ";

(iii) for the entry in column (4) occurring against tariff item 8541 42 00, the entry "25%" shall be substituted;

(iv) for the entry in column (4) occurring against tariff item 8541 43 00, the entry "40%" shall be substituted;

(v) for the entry in column (4) occurring against tariff item 8541 49 00, the entry "40%" shall be substituted;

(1)	*(2)*		*(3)*	*(4)*	*(5)*
8541 42 00	***-***	***Photovoltaic cells not assembled in modules or made up into panels***	***u***	***25%***	***-***
8541 43 00	***-***	***Photovoltaic cells assembled in modules or made up into panels***	***u***	***40%***	***-***

32. Section 110 of the Finance Act 2018 stipulates as under:

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

33. We observe that the Directorate General of Taxpayer Services, Central Board of Excise & Customs, on its official website *www.cbic.gov.in*, has clarified as under:

Import of Goods
The import of goods has been defined in the IGST Act, 2017 as bringing goods into India from a place outside India. All imports shall be deemed as inter-State supplies and accordingly Integrated tax shall be levied in addition to the applicable Custom duties. The IGST Act, 2017 provides that ***the integrated tax on goods imported into India shall be levied and collected in accordance with the provisions of the Customs Tariff Act, 1975 on the value as determined under the said Act at the point when duties of customs are levied on the said goods under the Customs Act, 1962. The integrated tax on goods shall be in addition to the applicable Basic Customs Duty (BCD) which is levied as per the Customs Tariff Act. In addition, GST compensation cess, may also be leviable on certain luxury and de-merit goods under the Goods and Services Tax (Compensation to States) Cess Act, 2017.***
The Customs Tariff Act, 1975 has accordingly been amended to provide for levy of integrated tax and the compensation cess on imported goods. Accordingly, any goods which are imported into India shall, in addition to the Basic Customs duty, be liable to integrated tax at such rate as is leviable under the IGST Act, 2017 on a like article on its supply in India. Further, ***the value of the goods for the purpose of levying Integrated tax shall be assessable value plus Customs Duty levied under the Act, and any other duty chargeable on the said goods under any law for the time being in force as an addition to, and in the same manner as, a duty of customs.***
The value of the imported article for the purpose of levying cess shall be assessable value plus Basic Customs Duty levied under the Act, and any sum chargeable on that goods under any law for the time being in force as an addition to, and in the same manner as, a duty of customs. The integrated tax paid shall not be added to the value for the purpose of calculating cess.

34. We note that Ministry of Finance Notification No. 24/2005- Customs dated 01.03.2005 exempted goods falling under category CTH 8541 from the whole of customs duty leviable under the First Schedule. However, Notification No. 15/2022 - Customs dated 01.02.2022 amended Notification No. 24/2005, i.e., it rescinded Notification No. 24/2005- Customs. Vide the Finance Act, 2022, dated 30.03.2022, the BCD rates of photovoltaic cells not assembled were increased to 25%, and the rates of photovoltaic cells assembled into modules were increased to 40% w.e.f. 01.04.2022. We observe that the increase in the rate of basic customs duty imposed on the import of machinery and auxiliary equipment for the initial setting up of solar power generation projects has increased the quantum of social welfare surcharge, payable under section 110 of the Finance

Act, 2018, on such import, which is fixed at a rate of 10% on aggregate duties and taxes which are levied and collected by the Central Government under section 12 of the Customs Act, 1962 which had a bearing on the increase in the quantum of integrated goods and services tax and Services Tax Act, 2017 (IGST Act) on such import by the Petitioner. In the case of imported goods, the value of IGST is levied in addition to the basic customs duty and is also to be allowed. Hence, we hold that the increase of the basic customs duty on import of the solar modules to 40% qua the Finance Act, 2022, No. 6 of 2022 Notification dated 30.03.2022 is an event of Change in Law as per Article 12 of the PPA dated 31.08.2020. We note that there is an increase in the quantum of social welfare surcharge, payable under Section 110 of the Finance Act 2018, on the import of goods. Hence, we hold that an increase in social welfare surcharge levied by the Indian Government Instrumentality on the import of machinery and auxiliary equipment is also an event of Change in Law as per Article 12 of the PPA dated 31.08.2020. We note that there is an increase in the quantum of IGST levied in addition to the basic customs duty. Hence, we hold that the increase in the quantum of IGST levied in addition to the basic customs duty on the import of machinery and auxiliary equipment is also an event of Change in Law as per Article 12 of the PPA dated 31.08.2020.

35. The Ministry of Power, Government of India, has notified *the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021*, the relevant provisions of which are extracted as under:

MINISTRY OF POWER NOTIFICATION
New Delhi,
the 22nd October, 2021

G.S.R. 751(E).—In exercise of the power conferred by ***sub-section (1), read with clause (z) of sub-section (2), of section 176 of the Electricity Act, 2003 (36 of 2003)****, the Central Government hereby makes the following rules, namely:—*

1. Short title, commencement and application.—(1) These rules may be called the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021.

(2) They shall come into force on the date of their publication in the Official Gazette.

(3) These rules shall apply to a generating company and transmission licensee.

….

*2(c) "****change in law", in relation to tariff, unless otherwise defined in the agreement, means any enactment or amendment or repeal of any law, made after the determination of tariff under section 62 or section 63 of the Act, leading to corresponding changes in the cost requiring change in tariff, and includes*** *—*

(i) -------

(ii) -------
(iii) ---------

3. Adjustment in tariff on change in law—

(1) On the occurrence of a change in law, the monthly tariff or charges shall be adjusted and be recovered in accordance with these rules to compensate the affected party so as to restore such affected party to the same economic position as if such change in law had not occurred.

(2) For the purposes of sub-rule (1), the generating company or transmission licensee, being the affected party, which intends to adjust and recover the costs due to change in law, shall give a three weeks prior notice to the other party about the proposed impact in the tariff or charges, positive or negative, to be recovered from such other party.

*(3) **The affected party shall furnish to the other party, the computation of impact in tariff or charges to be adjusted and recovered, within thirty days of the occurrence of the change in law or on the expiry of three weeks from the date of the notice referred to in sub-rule (2), whichever is later, and the recovery of the proposed impact in tariff or charges shall start from the next billing cycle of the tariff.***

(4) The impact of change in law to be adjusted and recovered may be computed as one time or monthly charges or per unit basis or a combination thereof and shall be recovered in the monthly bill as the part of tariff.

(5) The amount of the impact of change in law to be adjusted and recovered, shall be calculated -

*(a) **where the agreement lays down any formula, in accordance with such formula; or***

(b) where the agreement does not lay down any formula, in accordance with the formula given in the Schedule to these rules;

(6) The recovery of the impacted amount, in case of the fixed amount shall be —

(a) in case of generation project, within a period of one-hundred eighty months; or

(b) in case of recurring impact, until the impact persists.

(7) The generating company or transmission licensee shall, within thirty days of the coming into effect of the recovery of impact of change in law, furnish all relevant documents along with the details of calculation to the Appropriate Commission for adjustment of the amount of the impact in the monthly tariff or charges.

(8) The Appropriate Commission shall verify the calculation and adjust the amount of the impact in the monthly tariff or charges within sixty days from the date of receipt of the relevant documents under sub-rule (7).

(9) After the adjustment of the amount of the impact in the monthly tariff or charges under sub-rule (8), the generating company or transmission licensee, as the case may be, shall adjust the monthly tariff or charges annually based on actual amount recovered, to ensure that the payment to the affected party is not more than the yearly annuity amount."

36. The Ministry of Power vide its Office Memorandum (OM) dated 21.02.2022 clarified as under:

2. The matter has been examined in this Ministry and the following is clarified with respect to the applicability of the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021:

i. The Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021

were notified by Ministry of Power, vide notification dated 22nd October, 2021 in Gazette of India. As per sub-rule (2) of Rule 1, these Rules ***shall come into force on the date of their publication in the Official Gazette. These Rules have not stated to have been given any retrospective operation.***

ii. ***The aforesaid Rules are applicable on the change in law events occurred on or after the date of notification of these Rules in the Official Gazette i.e. 22nd October, 2021. The change in law events occurred prior to the notification of these Rules shall be dealt in accordance with the prevalent dispensation/rule position at the time of occurrence of the event.***

iii. The proceedings in the petitions, related to change in law matters, pending before the Appropriate Commissions, shall be dealt in accordance with stipulations made in para (ii) above.

3. This issue with the approval of Competent Authority.

37. We note that the CIL Rules, 2021, were notified on 22.10.2021. The CIL Rules 2021 are applicable to the change in law events that occurred on or after 22.10.2021. The change in law events which occurred prior to the notification of CIL Rules 2021 shall be dealt with in accordance with the prevalent dispensation/rule position at the time of occurrence of the event. In the instant petition, the *SC GIB Order, 2021 GST Notification* was notified after the submission of the bid, i.e., 31.01.2020 and before notification of CIL Rules, 2021, whereas Notification No. 15/*2022-Customs dated 01.02.2022 along with the Finance Act 2022 dated 30.03.2022* were notified after the submission of bid, i.e., 31.01.2020 and CIL Rules, 2021 dated 22.10.2021. Further, the PPA was executed between the Petitioner and the NHPC on 31.08.2020, and the SCoD project was on 27.02.2022. In terms of the extended SCoD, the Project was required to be commissioned on or before 30.01.2024. The project was commissioned on 07.02.2024. We observe that the *SC GIB Order* was pronounced on 19.04.2021, and the *2021 GST Notification* was notified on 30.09.2021. As such the Petitioner's project was affected by the said order/notification. Therefore, the Petitioner is entitled to compensation on account of Change in Law as per the terms of Article 12 of the PPA dated 31.08.2020. Further, since *Notification No. 15/2022-Customs dated 01.02.2022 alongwith the Finance Act 2022 dated 30.03.2022* were notified after the CIL Rules, 2021 dated 22.10.202, the Petitioner is entitled to compensation on account of *Notification No. 15/2022-Customs dated 01.02.2022 alongwith the Finance Act 2022 dated 30.03.2022,* increase of quantum of social welfare surcharge on the imports, and increase in quantum of IGST levied on the imports as per the terms of CIL Rules, 2021.

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

of additional expenditure on account of change in law events, viz. the *SC GIB Order* dated 19.04.2021, introduction of *2021 GST Notification;* and imposition of the increased rate of Basic Customs Duty on Solar Modules and consequent increase in quantum of social welfare surcharge and IGST on account of rescission of Notification No. 24/2005- Customs dated 01.03.2005 vide *Notification No. 15/2022 - Customs dated 01.02.2022 alongwith the Finance Act 2022 dated 30.03.2022* by exhibiting clear and one to one correlation with the projects and the invoices raised supported with auditor certificate corresponding to the mutually agreed project capacity under PPA, which is valid .

39. The issue is decided accordingly.

Issue No. II:

What should be the methodology for calculation of payment of compensation (if any) on account of Change in Law?

40. The Petitioner has submitted that it is seeking a determination of the methodology to be adopted for reimbursement of its Change in Law claims pertaining to *SC GIB Order*, *2021 GST Notification* and *Notification No. 15/2022-Customs dated 01.02.2022 alongwith the Finance Act 2022 dated 30.03.2022.* The Petitioner has further submitted that it has followed the procedure as laid down under the CIL Rules, 2021 qua *Notification No. 15/2022-Customs dated 01.02.2022 alongwith the Finance Act 2022 dated 30.03.2022*. As per Rule 2(3) of the CIL Rules, 2021, the Petitioner had issued a Change in Law Notice to NHPC on 15.12.2023 intimating NHPC about the imposition of BCD on import of Solar Modules and PV Cells vide Notification dated 01.02.2022 which is an event of Change in Law as per Rule 2(c) of the CIL Rules, 2021 so that the Petitioner could be restored to the same economic position as if the said event had not occurred as per Rule 2(1) of the CIL Rules, 2021. On 09.04.2024, the Petitioner issued proforma invoices to NHPC for the months of February 2024 and March 2024, including the impact due to the imposition of BCD. However, the said invoices were rejected by NHPC vide an email dated 10.04.2024 citing the pendency of the present petition. *Per Contra,* NHPC has submitted that the Petitioner may be directed to submit full details of additional expenditure incurred on account of change in law events. Against NHPC's reply, the Petitioner qua its Rejoinder and Written Submissions submitted the required documents.

41. We note that the Petitioner is claiming compensation, viz. Rs. 14,054,767/- qua *SC GIB Order*, Rs. 77,57,87,124/- qua *2021 GST Notification,* and Rs. 419,33,663.07 through the proforma invoice dated 09.04.2024 qua BCD.

Re: Compensation qua SC GIB Order dated 19.04.2021 and 2021 GST Notification

42. This Commission, in the earlier order dated 20.08.2021 in Petition No. 536/MP/2020, has decided on the methodology of compensation due to a Change in Law in the following manner:-

> *65. ……Given the fact that it is not possible in case of competitive bidding projects to ascertain either the capital structuring (extent of debt and equity) of the projects, or the actual rate of interest of the debt component or the expected rate of return on equity, we consider it appropriate to use the normative rate of 10.41% as reference for the purpose of annuity payment. As the actual deployment of capital by way of debt or equity and their cost in terms of rate of interest or return, respectively, is unknown, the rate 10.41% can be taken as the uniform rate of compensation for the entire expenditure incurred on account of GST Laws or Safeguard Duty. The Commission is of the view that the compensation for change in law cannot be a source for earning profit, and therefore, there cannot be any higher rate of return than the prevailing normative cost of debt. Accordingly, we hold that 10.41% shall be the discount rate of annuity payments towards the expenditure incurred on GST or Safeguard Duty (as the case may be) by the Respondent SPDs on account of 'Change in Law'.*
>
> *Commencement of 'Monthly Annuity Payments' and "Late Payment Surcharge"*
> *66. Further, SPDs have submitted that the 'Monthly Annuity Payment' of GST claims ought to start from COD taking into consideration the provisions of applicable 'Late Payment Surcharge' in the PPAs in case of delayed payments*
> *67. We observe that in the Petitions filed by the SPDs where claims under Change in Law were adjudicated, the Commission has directed SPDs to make available to SECI/ Discoms all relevant documents exhibiting clear and one to one correlation between the projects and the supply of goods or services, duly supported by the relevant invoices and Auditor's Certificate. SECI/ Discoms were further directed to reconcile the claims for Change in Law on receipt of the relevant documents and pay the amount so claimed to SPDs. It was also held that SECI is liable to pay to SPDs which is not conditional upon the payment to be made by the Discoms to SECI. However, SECI is eligible to claim the same from the Discoms on 'back to back' basis. The claim was directed to be paid within sixty days of the date of respective orders or from the date of submission of claims by SPDs whichever was later failing which it will attract late payment surcharge as provided under PPAs/PSAs. Alternatively, SPDs and the SECI/ Discoms may mutually agree to a mechanism for the payment of such compensation on annuity basis spread over the period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs.*
> *68. In view of the above, the liability of SECI/ Discoms for 'Monthly Annuity Payment' starts from 60th (sixtieth) day from the date of orders in respective petitions or from the date of submission of claims by the Respondent (SPDs), whichever is later. In case of delay in the Monthly Annuity Payment beyond the 60th (sixtieth) day from the date of orders in respective petitions or from the date of submission of claims by the Respondent (SPDs), whichever is later, late payment surcharge shall be payable for the delayed*

period corresponding to each such delayed Monthly Annuity Payment(s), as per respective PPAs/PSAs.

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

"14. Loan and Finance Charges
Loan Tenure
For the purpose of determination of tariff, loan tenure of 13 years shall be considered."

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

43. This Commission has taken the view that in the case of competitive bidding projects, it is not possible to ascertain either the capital structuring (extent of debt and equity) of the projects or the actual rate of interest of the debt component or the expected rate of return on equity. As the actual deployment of capital by way of debt or equity and their cost in terms of rate of interest or return, respectively, is unknown, the rate can be taken as the uniform rate of compensation for the entire expenditure incurred on account of Change in Law. *The compensation for change in law cannot be a source for earning profit, and therefore, there cannot be any higher rate of return than the prevailing normative cost of debt.*

44. We note that the Petitioner's project achieved actual commercial operation on 07.02.2024 (i.e. during FY 2023-24). The Commission notified the RE Tariff Order dated 07.11.2022 for FY 2022-23 in pursuance of the *CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020*. In the *RE Tariff order dated 07.11.2022*, the Commission considered the interest rate of 9.12% and the term of loan payment as 15 years. The Commission vide order dated 08.09.2023 in 10/SM/2023 extended the applicability of the order dated 07.11.2022 in Petition No. 14/SM/2022 until further Orders. Thus, we hold that for Change in Law events of SC GIB Order dated 19.04.2021 and 2021 GST Notification, the *discount rate of 9.12%* and *annuity payment of 15 years* as the appropriate methodology towards change in law compensation.

45. Further, the Commission holds that the liability of NHPC/ Discoms for 'Monthly Annuity Payment' starts from the 60th (sixtieth) day from the date of this order or from the date of submission of claims by the Petitioner, whichever is later. The provision of late payment surcharge in the respective PPA/PSA shall kick in if the monthly annuity payment is not made by the Respondents within the due date.

Re: Compensation qua rescission of Notification No. 24/2005- Customs dated 1.3.2005 vide Notification No. 15/2022 - Customs dated 01.02.2022

46. We noted during the course of the hearing dated 15.03.2024 that NHPC has endorsed the submissions of the learned counsel for the Petitioner and prayed that the parties may be permitted to reconcile the amount claimed in the matter as per the CIL Rules, 2021. Accordingly, we direct the contracting parties to reconcile the BCD claims in terms of the CIL Rules, 2021.

Re: Issue No.III:

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

47. The Petitioner has submitted that Clause 5.7 of the Guidelines for Tariff Based Competitive Bidding Process dated 03.08.2017 provides for relief under a change in law. As such the Petitioner ought to be restored to the "same economic position". Rule 3(1) of the CIL Rules, 2021 envisages that on the occurrence of an event of a change in law, the monthly tariff shall be adjusted so as to restore the affected party to the same economic position as if such Change in Law had not occurred. Therefore, the Petitioner is entitled to carrying cost as well as interest on carrying cost towards its Change in Law claim due to the imposition of BCD on the import of Solar Modules and PV Cells vide Notification dated 01.02.2022 so that it can be restored back to the same economic position as it would have been in had such imposition not occurred. Even though an appeal has been filed before the Hon'ble Supreme Court assailing the Order dated 15.09.2022, the operation of the same has not been stayed, and accordingly, the same continues to be good law. *Per contra*, MPPMCL has submitted that the Judgment dated 15.09.2022 passed by APTEL has been assailed before the Hon'ble Supreme Court of India in Civil Appeal no. 8880/2022 in the case of "*Telengana Northern Power Distribution Co. Ltd. & Anr. Vs. Parampujya Solar Energy Pvt. Ltd. & Ors.".* The Hon'ble Supreme Court, vide its order dated 24.03.2023, has directed that the final order by this Commission shall not be enforced till further orders. Therefore, MPPMCL cannot be directed to pay one-time compensation, carrying costs,

etc., till the issues attain finality before the Hon'ble Supreme Court.

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

*"**ARTICLE 12: CHANGE IN LAW***

12.1 Definitions

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:

*a. **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;*

*b. 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;***

*c. **the imposition of a requirement for obtaining any Consents, Clearances, Permits and/or licenses which was not required earlier**;*

d. 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;

*e. any statutory change in tax structure or introduction of any new tax made applicable for setting up of Solar Power Project and supply of power by the SPD after the date of submission of Bid, shall be treated as per the terms of this Agreement. For the purpose of considering the effect of this change in Tax structure due to change in law after the date of submission of Bid under this part, the date of the submission of the bid' shall be considered as effective date and not the date of the signing of the PPA as applicable to other changes dealt in other parts of this Article 12.1. **The change in rates of any taxes includes change in rates of taxes, duties & cess**.*

....

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 all the Parties."*

49. APTEL, vide judgment *Parampujya judgement* dated 15.09.2022 held as under:

*109.The other captioned appeals – Appeal no. 256 of 2019 (Parampujya Solar Energy Pvt. Ltd &Anr. v. CERC &Ors.), Appeal no. 299 of 2019 (Parampujya Solar Energy Pvt. Ltd. v. CERC &Ors.), Appeal no. 427 of 2019 (Mahoba Solar (UP) Private Limited v. CERC &Ors.), Appeal no. 23 of 2022 (Prayatna Developers Pvt. Ltd. v. CERC &Ors.) Appeal no. 131 of 2022 (Wardha Solar (Maharashtra) Private Ltd. &Anr. v. CERC &Ors.) and Appeal no. 275 of 2022 (Parampujya Solar Energy Pvt. Ltd. &Anr. v. CERC &Ors.) - deserve to be allowed. **We order accordingly directing the Central Electricity Regulatory Commission to take up the claim cases of the Solar Power Project Developers herein for further***

proceedings and for passing necessary orders consequent to the findings recorded by us in the preceding parts of this judgment, allowing Change in Law (CIL) compensation (on account of GST laws and Safeguard Duty on Imports, as the case may be) from the date(s) of enforcement of the new taxes for the entire period of its impact, including the period post Commercial Operation Date of the projects in question, as indeed towards Operation & Maintenance (O&M) expenses, along with carrying cost subject, however, to necessary prudence check.*"*

50. In view of the above, this Commission holds that the Petitioner, in the instant petition, shall be eligible for carrying costs starting from the date when the actual payments were made to the Authorities until the date of issuance of this Order, at the actual rate of interest paid by the Petitioner for arranging funds (supported by Auditor's Certificate) or the rate of interest on working capital as per the applicable RE Tariff Regulations prevailing at that time or the late payment surcharge rate as per the PPA, whichever is the lowest. Once a supplementary bill is raised by the Petitioner in terms of this order, the provision of a Late Payment Surcharge in the PPA would kick in if the payment is not made by the Respondents within the due date. However, it is pertinent to mention that the Petitioner, in its submissions, stated that it is entitled to carrying cost along with interest on carrying cost. We hold that carrying cost in the instant case already factors in the interest on the Petitioner's liability towards payment of CIL claims, and as such, the prayer for 'interest on carrying cost' as a separate component does not sustain.

51. The Commission further directs that the MPPMCL is liable to pay NHPC all the above-reconciled claims that NHPC has to pay to the Petitioner. However, payment to the Petitioner by NHPC is not conditional upon the payment to be made by the MPPMCL to NHPC.

52. 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. Limited & Anr. Vs. Parampujya Solar Energy Pvt. Limited & Ors."* (and in similar Orders dated 03.01.2023 and 23.01.2023) has held as under:

> *"Pending further orders, the Central Electricity Regulatory Commission (CERC) shall comply with the directions issued in paragraph 109 of the impugned order dated 15 September 2022 of the Appellate Tribunal for Electricity. However, the final order of the CERC shall not be enforced pending further orders."*

53. Therefore, the directions issued in this Order so far as they relate to compensation for the period post Commercial Operation Date of the project in question as also towards carrying cost (pre-COD & post-COD) shall not be enforced and shall be subject to further orders of the Hon'ble Supreme Court in Civil Appeal No. 8880/2022 in *Telangana Northern Power Distribution Company Limited & Anr. V. Parampujya Solar Energy Pvt. Limited & Ors*, and connected matters. It is pertinent to mention that the view taken is consistent with the views taken in *Order dated 21.12.2023 in Petition No. 267/MP/2022 & batch* and *Order dated 09.01.2024 in Petition No. 255/MP/2022.*

54. The summary of our findings is as follows:

a) Hon'ble Supreme Court's GIB Order dated 19.04.2021 in IA. No. 85618 of 2020 (in Writ Petition (Civil) No. 838 of 2019) in the matter of *M.K. Ranjitsinh v. Union of India*; introduction Notification No. 8/2021 issued by the Department of Revenue, Ministry of Finance, Government of India and rescission of Notification No. 24/2005- Customs dated 01.03.2005 vide Notification No. 15/2022 - Customs dated 01.02.2022 along with the Finance Act 2022 dated 30.03.2022 amount to Change in Law events under Article 12 of the PPA dated 31.08.2020.

b) The Petitioner is entitled to compensation on account of a Change in Law corresponding to the mutually agreed project capacity under PPA, which is valid,

c) as per the terms of Article 12 of the PPA due to the *SC GIB Order, 2021 GST Notification.* The Petitioner is entitled to compensation on account of Change in Law qua *rescission of Notification No. 24/2005*- Customs dated 01.03.2005 along with the Finance Act 2022 dated 30.03.2022, *increase of quantum of social welfare surcharge on the imports, and increase in quantum of IGST levied on the imports* in terms of CIL Rules, 2021.

d) The contracting parties are to carry out reconciliation of additional expenditure as per Article 12 of the PPAs by exhibiting clear and one-to-one correlation with the projects and the invoices raised supported with auditor certificate corresponding to the mutually agreed project capacity under PPA, which is valid, on account of *SC GIB Order, 2021 GST Notification in terms of PPA dated 31.08.2020* and qua *rescission of Notification No. 24/2005*- Customs dated 01.03.2005 along with the Finance Act 2022 dated 30.03.2022, *an increase of quantum of social welfare surcharge on the imports, and increase in quantum of IGST levied on the imports.*

e) For compensation qua *SC GIB Order* and *2021 GST Notification,* compensation at the discount rate of 9.12% and annuity payment of 15 years shall be the appropriate methodology towards change in law compensation. The provision of late payment surcharge in the respective PPA/PSA shall kick in if the monthly annuity payment is not made by the Respondents within the due date. The liability of NHPC/ MPPMCL for 'Monthly Annuity Payment' shall start from the 60th (sixtieth) day from the date of this order or from the date of submission of claims by the Petitioners, whichever is later. The provision of late payment surcharge in the respective PPA/PSA shall kick in if the monthly annuity payment is not made by the Respondents within the due date.

f) Compensation qua *rescission of Notification No. 24/2005- Customs dated 01.03.2005 alongwith the Finance Act 2022 dated 30.03.2022, increase of quantum of social welfare surcharge on the imports, and increase in quantum of IGST levied on the imports* shall be as per CIL Rules, 2021.

g) The Petitioner shall also be eligible for carrying cost starting from the date when the actual payments were made to the Authorities till the date of issuance of this Order, at the actual rate of interest paid by the Petitioners for arranging funds (supported by Auditor's Certificate) or the rate of interest on working capital as per applicable RE Tariff Regulations prevailing at that time or the late payment surcharge rate as per the PPA, whichever is the lowest. Once a supplementary bill is raised by the Petitioners in terms of this order, the provision of Late Payment Surcharge in the PPA would kick in if the payment is not made by the Respondents within the due date. Carrying cost in the instant case already factors in the interest on the Petitioner's liability towards payment of CIL claims, and as such, the prayer for 'interest on carrying cost' as a separate component does not sustain.

h) MPPMCL is liable to pay NHPC all the above-reconciled claims that NHPC has to pay to the Petitioner. However, payment to the Petitioner by NHPC is not conditional upon the payment to be made by the MPPMCL to NHPC.

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

55. Petition No. 381/MP/2023 is disposed of in terms of the above.

Sd/-	Sd/-	Sd/-
पी. के. सिंह	**अरुण गोयल**	**जिष्णु बरुआ**
सदस्य	**सदस्य**	**अध्यक्ष**