

**Before the**  
**MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**  
**World Trade Centre, Centre No.1, 13th Floor, Cuffe Parade, Mumbai 400005**  
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**Case No. 154 of 2023**

**Petition of Adani Hybrid Energy Jaisalmer Four Limited (formerly known as RSEPL Hybrid Power One Limited) seeking reliefs for the additional expenditure incurred due to occurrence of Change in Law events.**

M/s Adani Hybrid Energy Jaisalmer Four Limited (AHEJ4L)...

Petitioner

M/s. Adani Electricity Mumbai Limited (AEML)...

Respondent

**Coram**

**Sanjay Kumar, Chairperson**

**Anand M. Limaye, Member**

**Surendra J. Biyani, Member**

**Appearance in the Cases:**

For the Petitioner:

: Ms. Sakshi Kapoor (Adv.)

For the Respondent:

: Mr. Lakshyajit Singh Bagdwal (Adv.)

**ORDER**

**Date: 22 May 2024**

1. M/s. Adani Hybrid Energy Jaisalmer Four Limited (AHEJ4L) has filed the present Petition on 27 June 2023 under Section 86 of the Electricity Act, 2003 read with Article 12 of the Power Purchase Agreement (PPA) dated 7 July 2020 executed between AHEJ4L and AEML. AHEJ4L is seeking reliefs for the additional expenditure incurred due to occurrence of Change in Law events.
2. **Major Prayers of AHEJ4L are as follows:**

“ ....

b) *Hold and declare that the following are the Change in Law events under Article 12.1 of the PPA dated 20.07.2020: -*

(i) *Hon'ble Supreme Court's Order dated 19.04.2021 in I.A. No. 85618 of 2020 in M.K. Ranjitsinh v. Union of India, Writ Petition (Civil) No. 838 of 2019 directing installation of bird diverters on transmission lines;*

(ii) *Department of Revenue, Ministry of Finance, (Government of India)'s Notification No. 8/2021-Central Tax (Rate) dated 30.09.2021 read with Ministry of Finance's (State of Rajasthan) Notification dated 30.09.2021 increasing the rate of GST to 12%;*

(iii) *Department of Revenue, Ministry of Finance, (Government of India)'s Notification No. 07/2021-Customs dated 01.02.2021; Notification No. 03/2021-Customs dated 01.02.2021 read with Ministry of Finance's letter No. D.O.F No. 334/02/2020-TRU dated 01.02.2021 increasing the rate of Basic Custom Duty (BCD) from 5% to 20% on import of Solar Inverter; and*

(iv) *Department of Revenue, Ministry of Finance, (Government of India)'s Notification No. 07/2021-Customs dated 01.02.2021; read with MNRE's Office Memorandum dated 25.02.2021 increasing the rate of Basic Custom Duty (BCD) from 5% to 7.5% on import of Solar Tracker;*

c) *Direct Respondent No.1 i.e., AEML to compensate Adani Hybrid for the additional expenditure incurred due to the above Change in Law events.*

d) *Allow Carrying Costs at the applicable Late payment surcharge (LPS) rate computed on compounding basis for each Change in Law event from respective date of occurrence of Change in Law events till the date of actual realisation of compensation.*

....”

**3. AHEJ4L in its Petition has stated as follows:**

3.1. AHEJ4L has set up a Wind-Solar Hybrid Project of 700 MW at village - Fatehgarh, District-Jaisalmer, State- Rajasthan. AHEJ4L has entered into Power Purchase Agreement (PPA) dated 07 July 2020 for supply of 700 MW wind-solar hybrid power to Adani Electricity Mumbai Limited - Distribution (AEML).

3.2. Major events in bidding process and subsequent development are presented as below:

Date	Event
14.05.2018	Ministry of New and Renewable Energy (MNRE) issued National Wind-Solar Hybrid Policy which provided a framework for promotion of large grid connected wind-solar PV Hybrid systems.
18.07.2019	AEML issued Request for Selection (RfS) document (including Draft Power Purchase Agreement i.e. PPA). Subsequently amended vide Amendment No. 1 dated 25.07.2019, Amendment No. 2 dated 12.08.2019, Clarification No 1 dated 12.08.2019. RfS documents were uploaded and hosted on ETS Portal.
17.08.2019	Rosepetal Solar submitted its bids for setting up the 700 MW project on 17.08.2019 (via online mode) and on 19.08.2019 (via offline mode).
19.08.2019	
06.09.2019	AEML awarded LoA for development of 700 MW Hybrid Project to Rosepetal Solar @ tariff of Rs. 3.35/kWh.
08.01.2020	The Commission vide its Order in Case No.281 of 2019 granted AEML in-principal approval for purchase of 700 MW Wind-Solar Hybrid power. The Commission suggested AEML to renegotiate the tariff.
14.01.2020	AEML requested Rosepetal Solar to quote the revised tariff.
15.01.2020	Rosepetal Solar offered its revised tariff of Rs. 3.24/kWh and agreed to the modified terms of the PPA as per the directions of the Commission.
07.07.2020	PPA executed between AEML and RSEPL Hybrid (now known as AHEJ4L) for procurement of power from 700 MW grid connected wind solar hybrid power project on long -term basis. Tariff decided @ Rs. 3.24/kWh.
29.08.2020	AEML granted (5) months extension of Scheduled Commissioning Date (SCD) and financial closure to RSEPL Hybrid. This extension was given on account of Force Majeure events i.e., disruptions due to Covid-19 and in view of MNRE Office Memorandum dated 13 August 2020.
20.10.2020	The name of the project Company got changed from Rosepetal to AHEJ4L.
2019-20	A Writ Petition (WP No.838 of 2019) was filed before the Hon'ble Supreme Court of India seeking to protect (2) species of birds namely Great Indian Bustard (GIB) and Florican. The Writ Petitioner sought certain directions regarding the installation of overhead power lines, etc. by the power generating companies.
01.02.2021	<ul style="list-style-type: none"> <li>o The Ministry of Finance wrote a letter to Principal Chief Commissioner, clarifying the impact of Basic Custom Duty (BCD) notification that resulted in a levy of BCD at the rate of 20% for the purchase of inverters.</li> </ul>

	<ul style="list-style-type: none"> <li>○ The Ministry of Finance Notification 07/2021-Customs is issued whereby Ministry of Finance's Notification dated 06.01.2011 providing exemption from levy of the BCD in excess of 5% ad valorem was rescinded. This notification also led to a levy of BCD at the rate of 7.5% for purchase of solar trackers.</li> <li>○ Ministry of Finance's Notification No. 03/2021-Customs dated 01.02.2021, amended the S. No. 13 of the Notification No. 57/2017-Customs dated 30.06.2017.</li> <li>○ Both notifications dated 01.02.2021 read with Ministry of Finance's letter led to levy of BCD at the rate of 20%.</li> </ul>
10.02.2021	AHEJ4L issued a Change in Law notice under Article 12 of the PPAs to AEML intimating that the levy of additional BCD by Ministry of Finance amounts to a Change in Law event.
25.02.2021	MNRE issued an Office Memorandum clarifying the impact of Ministry of Finance's notification No.07/2021-Customs dated 01.02.2021.
19.04.2021	Hon'ble Supreme Court of India passed Order in GIB matter and imposed certain conditionalities for laying powerlines. Further, for existing overhead lines steps like installation of bird diverters were suggested. (SC GIB Order)
23.05.2021	AHEJ4L wrote to AEML notifying that the aforesaid SC Great Indian Bustard (GIB) Order amounts to a Change in Law event as per Article 12 of the PPA.
10.08.2021	Scheduled Commercial Operation Date as per PPA
30.09.2021	The Ministry of Finance revised the rate of GST from 5% to 12% <i>vide</i> the GST Notifications on various items with effect from 01.10.2021.
18.10.2021	AHEJ4L issued a Change in Law notice under Article 12 of the PPAs to AEML intimating that the levy of additional GST by Ministry of Finance amounts to a Change in Law event.
09.12.2021	AHEJ4L commissioned 117.77 MW (out of 700 MW) associated with Solar Park.
10.12.2021	AEML granted extension of SCD to AHEJ4L up to 27.03.2022. This extension was given on account of disruptions due to Covid-19 and in view of MNRE's Office Memorandum dated 29.06.2021.
29.01.2022	AHEJ4L commissioned 57.22 MW.
19.02.2022	AHEJ4L commissioned 50.80 MW.
07.03.2022	AHEJ4L has commissioned 63.43 MW (out of 700 MW associated with Solar Park).
22.07.2022	AHEJ4L has commissioned 102.35 MW (out of 700 MW associated with Solar Park).
26.03.2022	AEML granted extension of SCD to AHEJ4L up to 10.05.2022. This extension was given on account of operation of status quo orders passed by Hon'ble High Court of Rajasthan and Covid-19
09.05.2022	AEML granted extension of SCD up to the date of operationalization of the LTA or 10.08.2022 whichever is earlier. This extension was given on

	account of Force Majeure events i.e., disruptions due to Covid-19 and resurgence of Covid -19.
09.08.2022	AEML granted extension of SCD up to the date of operationalization of the LTA or 31.10.2022, whichever is earlier. This extension was given on account of Force Majeure events i.e., disruptions due to Covid-19 and resurgence of Covid -19 and delay in operationalization of LTA due to delay in completion of CTU-STU strengthening projects.
10.08.2022	AHEJ4L commissioned 110.81 MW.
30.08.2022	AHEJ4L commissioned 61.21 MW.
27.09.2022	AHEJ4L commissioned 64.38 MW.
01.10.2022	AHEJ4L commissioned 72.03 MW.

3.3. On 14 March 2023, M/s Hemangi & Associates (Chartered Accountant) issued a certificate certifying incurrence of additional expenditure on account of SC GIB Order, GST Notifications and BCD Notifications. Details of the same are as follows:

Sr. No.	Category	Amount claimed under Change in Law (In Rs. Crores)
1	Bird Diverters installed for the project	26.53
2	Change in Goods & Service Tax Rate – Solar	140
3	Change in Goods & Service Tax Rate - Wind	112.68
4	Basic Custom Duty on Inverters	8.89
5	Basic Custom Duty on trackers	4.62
<b>TOTAL</b>		<b>292.73</b>

3.4. On 14 March 2023, AHEJ4L wrote to AEML submitting its claim for reimbursement of additional cost incurred on account of following Change in Law events along with Carrying Cost in accordance with Article 12 of the PPAs:

- (a) Imposition of the requirement to install bird diverters as per the directives of SC GIB Order.
- (b) Increase in GST on renewable energy devices and parts to 12 % (from 5%).
- (c) Increase in the rate of BCD on solar inverters to 20% (from 5%) in view of BCD notifications.
- (d) Increase in the rate of BCD on solar trackers to 7.5% (from 5%) in view of BCD notifications.

AHEJ4L furnished supporting documentation along with CA certificate certifying the impact of Change in Law (along with Carrying Cost computed up to 31.03.2023) as ~Rs. 340.34 Crores.

- 3.5. On 29 March 2023, AEML requested AHEJ4L to resubmit all the supporting documents to ascertain its Change in Law claim namely - Supply contracts, vendor bills w.r.t. each Change in Law claim, proof of payment of GST payment by vendor to Government authorities.
- 3.6. On 05 April 2023 and 21 April 2023, AHEJ4L submitted the supporting documents to AEML in response to AEML's email dated 29 March 2023.
- 3.7. AHEJ4L's Change in Law claims are in conformity with the provisions of the PPA. Article 12 of PPA defines the Change in Law. The following are the pre-conditions for an event to qualify as a Change in Law event: -
- (a) The issuing authority in question must fall under the ambit of the definition of 'Indian Governmental Instrumentality'.
  - (b) The instrument in question must qualify as one having 'force of law'.
  - (c) The instrument in question must occur after the cut-off date i.e., 19 August 2019.
  - (d) The instrument in question must result in any additional recurring/ nonrecurring expenditure by the developer.
- 3.8. The underlying principle of Change in Law provisions under the PPA is to determine the consequence of Change in Law and to compensate a party affected by Change in Law such that the party is restored to the same economic position as if such Change in Law had not occurred. In this regard, reliance is placed on the Hon'ble Supreme Court's Judgment in *Energy Watchdog & Ors. vs. CERC & Ors. (2017) 14 SCC 80, Parampujya Solar Energy (P) Ltd. v. CERC, 2022 SCC OnLine APTEL 80 and Sasan Power Limited vs CERC & Ors., 2017 ELR (APTEL) 0508.*
- 3.9. In light of aforesaid, AHEJ4L is entitled to be compensated for the additional expenditure incurred on account of Change in Law events so as to restore AHEJ4L to the same economic position. Details of Change in Law events are as below:
- 3.10. SC GIB Order mandating the installation of bird diverters:
- 3.10.1. As on the Cut-Off date i.e., 19 August 2019, there was no requirement to install bird diverters. The Supreme Court GIB Order dated 19 April 2021 results in the introduction of additional requirements to install bird diverters and lay transmission lines under the ground.
- 3.10.2. The above Order applies to AHEJ4L's Project and the Project's location (i.e. Rajasthan) is falling within the potential habitat of GIB. Hence, in compliance with the Supreme Court GIB Order, AHEJ4L had to install bird diverters.

- 3.10.3. AHEJ4L's obligations were not only confined to the construction of the power plant but it was also obligated to lay dedicated transmission lines and arrange interconnection facilities to ensure evacuation of power from the Project. Therefore, in view of the Supreme Court GIB Order, Adani Solar installed bird diverters on 220kV line interconnecting at 33/220 kV PSS to Fatehgarh-II 220/400 kV (new) PS. In addition, there is also a 33kV overhead transmission line (under Adani Hybrid's scope) that connects the generation end of the plant to 33/220 kV PSS.
- 3.10.4. The Commission ought to grant Change in Law reliefs to AHEJ4L on the ground that SC GIB Order has recognised that payment of compensation for the expenditure incurred due to compliance with the directives.
- 3.10.5. For sufficing arguments, AHEJ4L referred to the Hon'ble APTEL's Judgment in *GMR Kamalanga Energy Limited v. Central Electricity Regulatory Commission, 2018 SCC OnLine APTEL 151* and Central Commission for Electricity Regulatory Commission's (CERC) Order dated 08 March 2023 in Petition No. 245/AT/2022 [SECI vs. AMP Energy Green Private Limited & Ors.].
- 3.10.6. Supreme Court GIB Order has resulted in additional expenditure of Rs. 26.53 Crores including the Carrying Costs (Rs. 4.34 Crores) up to 31 March 2023 as AHEJ4L has installed bird diverters for the Project.
- 3.11. GST Notifications increasing the rate of GST from 5% to 12% qualify as Change in Law event:
- 3.11.1 As on the cut-off date i.e., 19 August 2019, GST on solar power generator, windmills, wind-operated electricity generators, etc. was levied at the rate of 5%. However, on 30 September 2021, the Ministry of Finance issued GST Notifications which led to an increase in the rate of GST from 5% to 12%.
- 3.11.2 For recognising increase in GST as Change in Law event, AHEJ4L relied upon the Commission's Order dated 4 August 2022 in Case No.39 of 2022 (*M/s Sunfree Paschim Renewable Energy Private Limited (SPREPL) v. MSEDCL & Ors*), Order dated 24 May 2023 in Case No. 124 of 2022 (*M/s ReNew Sun Bright Private Ltd. Vs. MSEDCL*) and Order dated 27 May 2023 in Case No. 174 of 2022 (*M/s Juniper Green Field Private Limited vs. MSEDCL*).
- 3.11.3 Similarly, CERC in following Orders has held that increase in the applicable rate of GST on solar modules, cells and other solar power generation equipment from 5% to 12% as a result of the Notification No. 8/2021- Integrated Tax dated 30 September 2021 issued by the Department of Revenue, Ministry of Finance, Government of India would qualify as Change in Law event under the PPA:

- (a) Order dated 08 March 2023 in Petition No. 245/AT/2022 [ *SECI vs. AMP Energy Green Private Limited & Ors.*].
- (b) Order dated 05 April 2023 in Petition No. 268/MP/2021 [ *M/s Powerica Limited vs. SECI & Anr.*].
- (c) Order dated 17 May 2023 in Petition No. 174/MP/2022 [ *M/s. Clean Solar Power (Jodhpur) Private Limited vs. SECI & Ors.*].
- (d) Order dated 02 June 2023 in Petition No. 168/MP/2021 [ *M/s ReNew Solar Energy (Jharkhand Three) Private Limited vs. SECI & Anr.*].
- 3.11.4 APTEL *vide* its Judgment dated 20 September 2021 in *TATA Power Renewable Energy Limited v. MERC*, 2021 SCC OnLine APTEL 58 also held that changes in the rate of GST amount to Change in Law. Hon'ble APTEL's Judgment in *GMR Warora Judgment (Supra)* has already recognised that imposition/change in taxes/duty/cess qualify as Change in Law event and the generator is required to be compensated for same.
- 3.11.5 MNRE has also recognised an increase in GST rate from 5% to 12% *vide* the GST Notifications as a Change in Law event. It is pertinent to mention that MNRE's Office Memorandum refers to the same notifications which are under consideration in the instant Petition.
- 3.11.6 The said GST notifications have resulted in the additional expenditure of Rs. 292 Crores including Carrying Costs (Rs.39.32 Crores) till 31 March 2023. The invoices raised on AHEJ4L for supply of solar power generating system show that GST at the increased rate of 12% has been charged.
- 3.12. Notifications increasing the rate of BCD from 5% to 20% on import of solar inverters qualify as Change in Law event:
- 3.12.1 As on the cut-off date i.e., 19 August 2019, BCD was levied at the rate of 5% on the purchase of solar inverters. Ministry of Finance issued the Notification No. 07/2021-Customs dated 01 February 2021 wherein BCD increased from 5% to 20% on the solar inverters being imported into India from 02 February 2021.
- 3.12.2 Prior to the cut-off date, Ministry of Finance's Notification dated 06 January 2011 relating to custom duty was in operation. By virtue of this notification, there was a benefit of concessional Customs Duty in respect of items imported for initial setting up of solar power plant.
- 3.12.3 Ministry of Finance issued the *Notification No. 07/2021-Customs* dated 01 February 2021, which rescinded the notification dated 06 January 2011. The rescindment of the exemptions granted by MOF of its earlier notification dated 06 January 2011, has led to the levy of BCD at the rate of 20%.



- 3.12.4 Ministry of Finance issued the *Notification No. 03/2021-Customs* dated 01 February 2021, which amended the S. No. 13 of the *Notification No. 57/2017-Customs* dated 30 June 2017.
- 3.12.5 On 01 February 2021, Ministry of Finance wrote a letter to the Principal Chief Commissioner, clarifying the impact of the BCD Notifications, and bringing into effect the duties revised by the Ministry of Finance's Notifications dated 01 February 2021. The letter clarifies that the BCD for solar inverters is being raised to 20% by virtue of the BCD Notifications.
- 3.12.6 AHEJ4L relied upon the Commission's Order dated 26 August 2022 in Case No. 28 of 2022 (*M/s Gro Solar Energy Pvt. Ltd. vs. MSPGCL & Anr.*), Order dated 17 May 2022 in Case No. 5 of 2022 & Case No. 21 of 2022 (*Tata Power Renewable Energy Limited v. Tata Power Company Limited*), Order dated 27 May 2023 in Case No. 174 of 2022 (*M/s Juniper Green Field Private Limited vs. MSEDCL*) and Order dated 24 May 2023 in Case No. 124 of 2022 (*M/s ReNew Sun Bright Private Ltd. Vs. MSEDCL*).
- 3.12.7 Similarly, CERC in following Orders has held that increase in the applicable rate of BCD on import of the solar inverter vide Notifications bearing No. 3/2021 and 7/2021 dated 01 February 2021 issued by the Department of Revenue, Ministry of Finance, Government of India would qualify as Change in Law event under the PPA.:
- (a) Order dated 08 March 2023 in Petition No. 245/AT/2022 [*SECI vs. AMP Energy Green Private Limited & Ors.*]
  - (b) Order dated 02 June 2023 in Petition No. 168/MP/2021 [*M/s ReNew Solar Energy (Jharkhand Three) Private Limited vs. SECI & Anr.*].
- 3.12.8 The levy of BCD vide BCD Notifications is squarely covered by the Orders of the Commission, APTEL, and MNRE's Office Memorandum dated 27 September 2022.
- 3.12.9 The said notifications have resulted in the additional expenditure of Rs. 11.24 Crores including Carrying Costs (Rs.2.35 Crores) till 31 March 2023.
- 3.13. Notifications increasing the rate of BCD from 5% to 7.5% on import of solar trackers qualify as Change in Law event:
- 3.13.1 The issuance of Ministry of Finance's Notification No. 07/2021-Customs dated 01 February 2021 (same Notification under consideration for increase in BCD to 20% for solar inverters) has also led to the increase in BCD at the rate of 7.5 % on purchase of trackers.
- 3.13.2 As on the cut-off date (19 August 2019), BCD at the rate of 5% was levied for purchase of solar trackers. This was due to the exemption provided by Ministry of Finance's Notification dated 06 January 2011 (No. 1/2011-Customs). On 01 February 2021, the

Ministry of Finance's Notification dated 06 January 2011 was rescinded by virtue of Ministry of Finance's Notification No. 07/2021-Customs. The rescindment of the exemptions granted by Ministry of Finance of its earlier notification dated 06 January 2011 has led to a levy of BCD at the rate of 7.5% for purchase of solar trackers.

3.13.3 On 25 February 2021, MNRE issued an Office Memorandum clarifying the impact of Ministry of Finance's Notification No. 07/2021-Customs. MNRE clarified that Ministry of Finance's Notification No. 07/2021-Customs dated 01 February 2021 has withdrawn the benefit of concessional customs duty on the items imported for initial setting up of the solar power projects with effect from 02 February 2021.

3.13.4 The said notification (read with MNRE's Office Memorandum) has resulted in the additional expenditure of Rs. 6.21 Crores including Carrying Costs (Rs. 1.59 Crores) till 31 March 2023. The invoice raised on AHEJ4L for supply of trackers show that BCD at the rate of 7.5% along with Social Welfare Surcharge at the rate of 10% and IGST at the rate of 18% on the BCD has been charged.

3.14. AHEJ4L is entitled to Carrying Costs for each Change in Law event:

3.14.1 It is a settled law that restitution is an integral part of the compensation granted for Change in Law and hence the affected party must be paid Carrying Costs. Hon'ble APTEL in *Parampujya Solar Energy (P) Ltd. v. CERC, 2022 SCC OnLine APTEL 80* (Parampujya Judgment) has allowed Carrying Costs to the renewable generators.

3.14.2 Principle of restitution is now part of the regime on Change in Law reflecting public policy, as introduced by the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 i.e. CIL Rules. The relevant extracts of the said Rules are as below:

*"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."*

3.14.3 Restitution is a principle of equity that is generally invoked by the adjudicatory authorities to render substantial justice. Reference is made to the Hon'ble Supreme Court's decision in *South-Eastern Coalfields Ltd. v. State of Madhya Pradesh, (2003) 8 SCC 648*.

3.14.4 Absence of prohibition in law or contract against award of interest to recompense for delay in payment is also significant. In the case of *2019 SC Uttar Haryana*, the Hon'ble Supreme Court has upheld the view that in terms of restitutionary principle, the affected party is to be given the benefit of restitution 'as understood in civil law'.

3.14.5 AHEJ4L is entitled to Carrying Costs on a compounding basis to reconstitute it back to its original economic position. It is no longer *res integra* that an affected party must be paid Carrying Costs on a compounding basis for restitution. In this regard, reliance is placed on the Hon'ble Supreme Court's judgment dated 24.08.2022 in *Uttar Haryana Bijli Vitran Nigam Ltd. v. Adani Power (Mundra) Ltd.*, 2022 SCC OnLine SC 1068.

**4. AEML in its submission dated 27 November 2023 stated:**

4.1. AEML has partially scrutinized the documents related to Change in Law Claims and noted following:

4.2. Bird Diverter installed for project: Rs 30.87 Crores (Rs 26.53 Crores + Carrying cost Rs 4.34 Crores):

4.2.1. AHEJ4L is required to demonstrate with relevant documents the impact of imposition of the requirement to install bird diverters as per directives of Hon'ble Supreme Court in the order dated 19 April 2021 i.e. the alleged Change in Law. Without any substantiation and supporting documents, AHEJ4L is not entitled to any relief.

4.2.2. AEML observed that invoicing of Bird Diverter is based on Purchase Order and is not on the basis of actual invoices raised by the respective vendor. AHEJ4L is required to submit actual invoices and other details for claiming compensation under Change in Law event.

4.2.3. AHEJ4L should have been aware about the installation of Bird diverter in the breeding ground for the GIB and the cost of the Bird Diverters should have been factored by the it while submitting the Bid in the AEML Hybrid Tender.

4.2.4. In view of the above, claim on account of bird diverter arising from the Change in Law is unacceptable and not admitted.

4.3. Change in GST rate (under SPGS and WTGS) -Rs 292 Crores (Rs 252.68 Crores + Carrying cost Rs 39.32 Crores):

4.3.1. The extent of relief admissible to AHEJ4L on account of Notification dated 30 September 2021 of GST (if any) is subject to examination and verification of documents by AEML.

4.3.2. The onus is on AHEJ4L to demonstrate that the Notification dated 30 September 2021 has resulted in AHEJ4L incurring additional expenditure as against the envisaged expenditure prior to the Bid Submission Date, which is not demonstrated in the Petition.

4.3.3. AHEJ4L has also failed to prove the co-relation between the equipment installed on site as part of the project and also not submitted relevant documentary evidence.

4.3.4. The notification for Change in Law is applicable w.e.f. 1 October 2021 and as per supply contract submitted by AHEJ4L to AEML, the delivery schedule specified under the contract is well before the applicability of this notification. AHEJ4L has also not submitted any evidence and justification showing the amendment regarding to change in delivery schedule of SPGS and WTGS.

4.3.5. In view of the above, AHEJ4L's claim on account of increase in GST rates as Change in Law is not admissible and liable for rejection.

4.4. BCD Claim Inverter and Tracker: Rs 17.45 Crores (Rs 13.51 Crores + Carrying cost Rs 3.94 Crores):

4.4.1. There is clear provision in the PPA dated 07 July 2020 that Change in Law does not include 'Custom duty on imported equipment' and hence agreed terms of the PPA are required to be adhere by both parties. The relevant provision is reproduced below:

*"12.1.2 But the above shall not however include (i) any change in taxes on corporate income or any withholding tax on income or dividends distributed to the shareholders of the HPD or (ii) Custom duty on imported equipment, or (iii) any change on account of regulatory measures by the Appropriate Commission"*

4.4.2. In view of the above, the Change in Law claim related to custom duty is not permissible and is liable to be rejected.

4.5. Carrying Cost: Rs 47.61 Crores:

4.5.1 There is no provision in the PPA regarding calculating carrying cost or interest from the impact period till the approval / admission of Change in Law by the Commission and deciding on the amount to be paid for such Change in Law.

4.5.2 The Change in Law claim of AHEJ4L is yet to be adjudicated and the amount, if any, due to AHEJ4L has to be determined/ computed first. Thereafter, AHEJ4L is required to raise a supplementary invoice for the amount so computed.

4.5.3 In the instant Petition AHEJ4L has computed carrying cost at the LPS rate of 1.25% month on compounding basis for each Change in Law event which is not correct. It is important to note that that APTEL in its Judgment dated 16 November 2021 in Appeal No.163 of 2020 & 171 of 2020 ruled following:

“44. It needs to be borne in mind that carrying cost is the value for money denied at the appropriate time and is different from LPS which is payable on non-payment or default in payment of invoices by the Due Date. Payment of carrying cost is a part of the Change in Law clause which is an in-built restitution clause [see *Uttar Haryana Bijli Vitran Nigam Ltd. Vs. Adani Power Ltd. (2019) 5 SCC 325*]. **We are satisfied that carrying costs on the CIL amount should have been on actuals and not the Late Payment Surcharge (“LPS”) rate specified in the PPAs i.e., 1.25% in excess of 1-year MCLR of SBI for the period of 25 years.**”

- 4.5.4 Therefore, AHEJ4L is required to furnish details regarding actual interest incurred on account of Change in Law.
- 4.5.5 In case AHEJ4L is unable to submit details, then interest on Working Capital Loan (average of one-year MCLR of SBI plus 150 basis point) allowed in MREC RE Tariff Regulations, 2019 shall be allowed as rate of interest for working out the carrying cost. The said dispensation has been followed by the Commission in its Order dated 24 May 2023 in Case No. 124 of 2022.
- 4.5.6 In view of the above, the carrying cost as claimed by AHEJ4L is not admissible at this stage. AHEJ4L can claim the carrying cost only on the claims admitted by the Commission which shall be calculated only from the date of actual payments to vendors.

**5. Adani Hybrid Energy Jaisalmer Four Limited (AHEJ4L) in its Rejoinder dated 7 January 2024 stated as below:**

**5.1. Entitlement of claim of Change in Law relief on account of SC GIB Order mandating the installation of bird diverters:**

- 5.1.1 In terms of Article 4.1 of the PPA, AHEJ4L is, *inter alia*, responsible for connecting the Project switchyard with the Interconnection Facilities at the Delivery Point. Therefore, the establishment of the transmission facilities (which includes laying of above 220 kV and 33 kV dedicated transmission lines) for connecting the Project switchyard with the Interconnection Facilities was carried out by AHEJ4L.
- 5.1.2 Subsequently, on 19 April 2021, the Hon’ble Supreme Court passed the SC GIB Order imposing the requirement to install bird diverters on the transmission lines passing through the GIB potential area and priority area.
- 5.1.3 Upon passing of the SC GIB Order, AHEJ4L took necessary actions and immediately installed the bird diverters on 220kV and the portion of 33kV lines which were already constructed by that time since both the lines were falling under the GIB Potential area.

5.1.4 Additionally, AHEJ4L has also written a letter dated 06 January 2024 to AEML providing requisite information/documents as sought by it.

5.2. Submission of proofs for supporting Change in Law claims *qua* increase GST rate:

5.2.1 AHEJ4L has already submitted sufficient/adequate proof of its Change in Law claims to AEML vide its claims submission Letter dated 14 March 2023. The said Letter/ email provides a weblink of an e-folder containing the entire set of documents/ invoices in support of AHEJ4L's claim, which have already been submitted to AEML for the purpose of reconciliation.

5.2.2 Since the entire record of supporting documents are voluminous in nature therefore AHEJ4L has furnished sample invoices before the Commission.

5.2.3 On 05 April 2023 and 21 April 2023 AHEJ4L submitted the supporting documents to AEML in response to AEML's email dated 29 March 2023. No subsequent query has been raised by AEML.

5.2.4 In addition, AHEJ4L has also placed on record certificate issued by M/s Hemangi & Associates (Chartered Accountant) to AHEJ4L certifying, inter alia, the fact that AHEJ4L has complied with the BCD Notifications, GST Notifications and SC GIB Order and incurred additional expenditure on account of such compliance.

5.2.5 In view of the above, it is submitted that AEML's contention regarding furnishing of proof is erroneous in view of AHEJ4L's letter/ email dated 14 March 2023 and letters dated 05 April 2023 & 21 April 2023; whereby all documents have already been submitted to AEML.

5.2.6 As regards AEML's contention *qua* delivery schedule for Solar Power Generator System (SPGS) and Wind Turbine Generator System (WTGS) being prior to date of GST notification, it is pertinent to submit that:

- a) Due to various reasons viz. imposition of lockdown due to Covid-19, status quo order on project land by Rajasthan High Court, GIB related issues at Rajasthan, delay in LTA readiness etc. the project construction activities were hampered/ delayed. Therefore, AEML extended SCD of the project multiple times due to said reasons.
- b) Accordingly, project construction activities were planned in such a manner to match with the project completion schedule as extended by AEML and as a result – the delivery schedules for SPGS and WTGS were also revised accordingly. The details of the same have already been provided to AEML.

5.3. AHEJ4L is entitled to Change in Law relief on account of withdrawal of exemptions qua applicability of BCD by MoF on imported items:

- 5.3.1 As regards AEML's contention qua AHEJ4L's claim being outside the purview of Article 12 of the PPA, it is submitted that Article 12 ought to be considered in its entirety (rather than on individual interpretation of last para 12.1 of PPA) to garner the understanding of the contracting parties and their intention to rely on specific terms thereunder. Such interpretation of Article 12 ought to be based on the settled principles of 'restitution' which is the cornerstone of any Change in Law relief.
- 5.3.2 Article 12.1 of PPA states that Change in law definition 'shall' not include 'custom duty on imported equipment'. It is a settled legal position that the word 'shall' normally is considered mandatory but it is the function of the court to ascertain the real intention of the legislature by a careful examination of the whole scope of the statute, the purpose it seeks to serve and the consequences that would flow from the construction to be placed thereon. To supplement arguments reliance is placed on Judgments of Hon'ble Supreme Court in *State Of Haryana vs Raghubir Dayal reported as 1995 (1) SCC 133* and *Vidarbha Industries Power Ltd. Vs. Axis Bank ltd. (2022) 8 SCC 352*.
- 5.3.3 Article 12.2 (Relief for Change in Law) provides for Change in Law relief of restitution of the affected party i.e., to place the affected party to the same economic position as he was before the event. It is imperative to interpret the contractual provisions (i.e., Article 12.1 and 12.2 together) in a manner to give effect to the intent of the parties and not to frustrate it which is known as the purposive interpretation [ref. to *Nabha Power Limited vs. Punjab State Power Corporation Limited & Anr. (2018) 11 SCC 508*]. The purpose of PPA is to develop project and supply electricity at a fixed tariff rate, a factor of capital cost. Since the process of bidding is based on the known capital cost, while submitting the bid, developer takes risk to manage and mitigate capital cost as it is under control of the developer. However, if the capital cost increases for the reasons beyond the control of the developer such as an increase in BCD rate, then the developer cannot be held accountable to bear the risk as the same was not foreseeable at the time of computing the capital cost.
- 5.3.4 The object of the Change in Law clause is to provide comprehensive relief to an affected party to redress injury. The purpose of a contract is the interests, objectives, values, policy that the contract is designed to actualize. In this view, purposive interpretation must be given to Article 12.2 in order to fully achieve the object of 'restitution' and to do complete justice to the affected party. Reliance in this regard is placed on *Sumitomo Heavy Industries Ltd. v. ONGC Ltd., (2010) 11 SCC 296*.

5.3.5 The procurers cannot derive undue benefit at the cost of the developer. Developers discharged the tax burden upon enactment of Change in Law when the projects were under construction. This tax implication was originally not envisaged by the developers at the time of submitting their bids for the projects. Since procurers are liable to pay developers for the cost of supply of power (Tariff), in essence, the developers discharged the tax burden on behalf of the procurers. This was not a gratuitous act. Section 70 of the Contract Act, 1872 states that in the case of enjoyment of the benefit of a non-gratuitous act, the recipient has to compensate the entity performing the said non-gratuitous act.

5.4. Entitlement of Carrying Cost at LPS rate as per principle settled by Hon'ble Courts

5.4.1 The issue of entitlement of Carrying Cost as consequential relief on account of approved Change in Law events (from the entire impact period i.e., starting from date of incurring such additional expenditure) is already settled. AHEJ4L referred to Judgements referred in main Petition.

5.4.2 The very purpose of a Change in Law clause is to restore the affected parties to the same economic position as it was prior to such occurrence of Change in Law Event. A developer/ affected party cannot be 'restituted' in true sense for the time value of money unless he is compensated for the entire period i.e., date of incurring such expense till the date of payment by AEML.

5.4.3 AHEJ4L is entitled to Carrying Costs at LPS rate to restitute it back to its original economic position.

6. During the e-hearing held on 9 January 2024, an Advocate appearing on behalf of AHEJ4L elaborated on Change in Law events and associated impact on capital cost structure of the project. The Commission directed AEML to file additional submission on claims along with reconciliation statement.

7. **AEML in its additional submission dated 03 February 2024 stated as below:**

7.1. Bird Diverter installed for project Rs 30.87 Crores (Rs 26.53 Crores+ Carrying cost Rs 4.34 Crores):

7.1.1 AHEJ4L has submitted actual invoices and supporting documents regarding installation of Bird Diverter.

7.1.2 AEML examined the documentation submitted. The claim of Bird Diverter may be admissible only after the approval of the Commission in terms of Article 12.2.1 and 12.2.2 of PPA dated 07 July 2020.



7.2. Change in GST rate (under SPGS and WTGS) - Rs 292 Crores (Rs 252.68 Crores + Carrying cost Rs 39.32 Crores):

7.2.1 AHEJ4L has submitted that due to Force Majeure events like imposition of lockdown due to Covid-19, status quo order on project land by Rajasthan High Court, GIB related issues at Rajasthan, delay in LTA readiness etc. the project construction activities were hampered/ delayed, and project construction activities were planned considering the extension granted and accordingly the delivery schedules for SPGS and WTGS were also revised. The details of the same have been provided.

7.2.2 AEML reserved right to verify the claim of AHEJ4L on the aspect of one-to-one correlation between equipment's installed on site as a part of Project. AHEJ4L vide its response dated 06 January 2024 has furnished copies of Electrical Inspectorate Report certifying the equipment installed for the entire Hybrid Project of 700MW to AEML and the same have been verified.

7.3. BCD Claim Inverter and Tracker Rs. 17.45 Crores (Rs. 13.51 Crores + Carrying cost Rs. 3.94 Crores):

7.3.1 There is clear provision in the PPA dated 07 July 2020 that Change in Law does not include 'Custom duty on imported equipment' and hence agreed terms of the PPA are required to be adhered to both parties. It is a settled legal principle that courts cannot rewrite the contract between the parties.

7.3.2 For sufficing the argument, AEML referred to the Commission's Order dated 04 August 2022 in Case No 41 of 2022. Considering the same, the Change in Law claim related to custom duty is not permissible and is liable to be rejected.

7.4. Carrying Cost Rs 47.61 Crores:

7.4.1 There is no provision in the PPA regarding calculating carrying cost or interest from the impact period till the approval / admission of Change in Law by the Commission. The Change in Law claim of AHEJ4L is yet to be adjudicated and approved by the Commission.

7.4.2 In view of the above, the carrying cost as claimed by AHEJ4L is not admissible at this stage. AHEJ4L can claim the carrying cost only on the claims admitted by the Commission at the rate as determined by the Commission.

**Commission's Analysis and Rulings:**

8. AHEJ4L has filed present Petition claiming restitution for Change in Law relief in terms of Article 12 of the Power Purchase Agreement dated 07 July 2020 (for supply of 700 MW hybrid power) signed with AEML-D on account of following (4) Change in Law events (occurring after cut-off date i.e., 19 August 2019):
- a) 1st Change in Law event: Imposition of the requirement to install bird diverters as per the directives of the Hon'ble Supreme Court in the Order dated 19 April 2021 in I.A. No. 85618 of 2020 in Writ Petition (Civil) No. 838 of 2019 [*M.K. Ranjitsinh v. Union of India*].
  - b) 2nd Change in Law event: Increase in GST Tax on renewable energy devices and parts from 5 % to 12% by Ministry of Finance.
  - c) 3rd and 4th Change in Law event: Increase in the rate of Basic Customs Duty due to withdrawal of exemptions by Ministry of Finance [consequently increased Social Welfare Surcharge and IGST levied on BCD]
    - (i) BCD rate on solar invertors increased from 5% to 20%; and
    - (ii) BCD rate on solar trackers increased from 5% to 7.5%.
9. Considering above factual position, material placed on record and arguments made during hearing, the Commission frames following issues for its considerations in present matter:
- a. Whether the MoF Notification dated 30 September 2021 resulting in increase in GST, SC GIB Order and BCD Notifications dated 01 February 2021 qualify as Change in Law?
  - b. Ascertainment of principal claim amount on account of Change in Law (Based on outcome in Issue A) and modalities for computation of carrying cost (if applicable)?
  - c. What should be the frequency for payment of the compensation amount (if applicable)?
  - d. Way Forward.

The Commission is addressing the above issues in the following paragraphs.

10. **Issue A: Whether the MoF Notification dated 30 September 2021 resulting in increase in GST, SC GIB Order and BCD Notifications dated 01 February 2021 qualifies as Change in Law?**
- 10.1. The Commission notes that PPA dated 7 July 2020 signed between parties has following provision related to Change in Law:

“

***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 HPD or any income to the HPD;*

- 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. 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. 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 HPD;*
- e. **any statutory change in tax structure i.e. change in rates of taxes, duties and cess**, or introduction of any new tax made applicable for setting up of Hybrid Power Project and supply of power by the HPD and has direct effect on the Project, shall be treated as per terms of this Agreement.*

*12.1.2 **But the above shall not however include** (i) any change in taxes or corporate income or any withholding tax on income or dividends distributed to the shareholders of the HPD or (ii) **Custom duty on imported equipment**, or (iii) any change on account of regulatory measures by Appropriate Commission.*

## **12.2 Relief for Change in Law**

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

*12.3 The decision of the MERC 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.” (Emphasis added)*

- 10.2. The Commission notes that AEML has not objected to claims on account of increase in GST and SC GIB Order. But has categorically opposed to recognise the impact of increase

in BCD on Solar Inverters and Trackers, as a Change in Law. As per AEML, PPA dated 7 July 2020 categorically exclude custom duty on imported equipments from ambit of Change in Law.

**Increase in BCD on account of MoF Notifications dated 01 February 2021:**

- 10.3. The Commission noted the contentions of AEML and has perused the provisions of PPA and notes that Article 12.1.2 of the PPA (reproduced above at Para 10.1) categorically provides that Change in Law compensation do not cover custom duty on imported equipments.
- 10.4. Hon'ble Supreme Court of India in *Maharashtra State Electricity Distribution Company Limited v. Maharashtra ERC*, 2021 SCC OnLine SC 913, has reiterated the settled position of law regarding rewriting the contract. The relevant extract of the said Judgement reads as below:

“

*177. The proposition that Courts cannot rewrite a contract mutually executed between the parties, is well settled. The Court cannot, through its interpretative process, rewrite or create a new contract between the parties. The Court has to simply apply the terms and conditions of the agreement as agreed between the parties, as observed by this Court in Shree Ambica Medical Stores and Ors. v. Surat People's Co-operative Bank (supra), cited by Ms. Divya Anand. This appeal is an attempt to renegotiate the terms of the PPA, as argued by Ms. Divya Anand as also other Counsel. It is well settled that Courts cannot substitute their own view of the presumed understanding of commercial terms by the parties, if the terms are explicitly expressed. The explicit terms of a contract are always the final word with regard to the intention of the parties, as held by this Court in Nabha Power Ltd. (NPL) vs. Punjab State Power Corporation Ltd. (supra) cited by Ms. Anand.” (Emphasis added)*

- 10.5. In view of explicit provision in PPA (Article 12.1.2), the Commission cannot deviate from the agreed terms of the contract. Reliance on APTEL Judgement will also not help in present case as parties have specifically agreed not to claim any increase in custom duty. Accordingly, the Commission rejects the plea to recognise increase in BCD on Solar Inverters and trackers as a Change in Law event.

**Increase in GST on account of MoF Notification dated 30 September 2021:**

- 10.6. The Commission notes that GST rates have been revised after last date of bid submission. On the last date of the bid submission, GST on Solar Power generator, windmills, wind-operated electricity generators, etc. was 5%. MoF vide its Notification dated 30 September 2021 led to an increase in the rate of GST from 5% to 12%.

- 10.7. The Commission notes that any event can be said to be a ‘Change in Law Event’, only if it satisfies the provisions stipulated under the PPA. Under the provisions of PPA, an event arising from any statutory change in tax structure would satisfy the requirement of ‘Change in Law’. Admittedly, MoF’s Notification dated 30 September 2021 have been occurred subsequent to Bid Submission date of 19 August 2019. Hence, the Commission rules that Notification dated 30 September 2021 leading to increase in GST is a Change in Law events under the PPA.

**Supreme Court Order dated 19 April 2021 in GIB matter:**

- 10.8. The Commission notes that, Supreme Court in GIB Order dated 19 April 2021 has passed directives with regards to laying of overhead lines in the priority and potential habitats of GIB. The relevant portion of the GIB Order is reproduced as below:

“

*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.1 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. ...*

*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.”*

10.9. It is pertinent to note that Supreme Court in above referred Order has categorically allowed pass-through of the costs incurred by the generators due to the installation of bird diverters. The relevant portion of the Order reads 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. 1 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.**”

10.10. The Commission notes that the Article 12.1.1 of the PPA covers proclamation by any Competent Court of Law as a Change in Law event. As on date of submission bid, the developers would not have been in position to anticipate or factor into the additional expenditure required to be incurred in the adopting the measures/actions in terms of the Supreme Court’s GIB Order which came to be issued subsequently. Considering the same, the Commission rules that the Order of the Supreme Court dated 19 April 2021 in IA No. 85618 of 2020 in WP (Civil) No. 838 of 2019 requiring the additional actions/measures to be adopted by the developers located in the potential and priority habitat of GIB, after the cut-off date, would certainly qualify as the Change in Law under Article 12 of the PPAs.

11. **Issue B: Ascertainment of principal claim amount on account of Change in Law (Based on outcome in Issue A) and modalities for computation of carrying cost (if applicable)?**

11.1 Claims raised by AHEJ4L and reconciliation as per AEML are depicted in table below:

Sr. No.	Category	Amount claimed under Change in Law (Rs. Cr.)	Carrying cost as on 31 Mar 2023 (Rs. Cr.)	Total (Rs. Cr.)	Principle Amount claimed verified by AEML (Rs. Cr.)
1	Bird Diverters installed for the project	26.53	4.34	30.87	26.53
2	Change in Goods & Service Tax Rate – Solar	140	27.59	167.59	139.99
3	Change in Goods & Service Tax Rate - Wind	112.68	11.73	124.41	112.68
4	Basic Custom Duty on Inverters	8.89	2.35	11.24	Change in law claim qua BCD is not permissible as Article 12 of PPA excludes from its
5	Basic Custom Duty on trackers	4.62	1.59	6.21	

Sr. No.	Category	Amount claimed under Change in Law (Rs. Cr.)	Carrying cost as on 31 Mar 2023 (Rs. Cr.)	Total (Rs. Cr.)	Principle Amount claimed verified by AEML (Rs. Cr.)
					purview Custom Duty on imported equipment.
<b>TOTAL</b>		<b>292.73</b>	<b>47.61</b>	<b>340.34</b>	<b>279.20</b>

11.2 In Para (10) above, the Commission has recognized SC GIB Order and notification dated 30 September 2021 resulting in increase in GST as Change in Law events, and rejected increase in BCD on Solar inverters and Trackers as a Change in Law. Accordingly, the Commission analyzed the claims on account of SC GIB Order and increase in GST as below:

**11.3 Claims on account of SC GIB Order:**

11.3.1 AHEJ4L submitted that, as per Article 4.1 of the PPA it is responsible for connecting the project switchyard with the interconnection facilities at the delivery point. As per SC GIB Order it has installed bird diverters on 220 kV line interconnecting 33/220 kV PSS to Fatehgarh-II 220/400 kV (New) PS. In addition there is also a 33 kV overhead line that connects the generation end of the plant to 33/220 kV PSS.

11.3.2 Total principal amount claimed is Rs. 26.53 Crores, which is reconciled and agreed by AEML subject to approval of the Commission. The amount claimed is also certified by the Chartered Account.

11.3.3 The Commission notes that AHEJ4L has provided following information with regards to commissioning of the project:

Capacity	COD	Remark
117.77 MW	09.12.2021	Associated with Solar Park
57.22 MW	29.01.2022	
50.80 MW	19.02.2022	
63.43 MW	07.03.2022	Associated with Solar Park
102.35 MW	22.07.2022	Associated with Solar Park
110.81 MW	10.08.2022	
61.21 MW	30.08.2022	
64.38 MW	27.09.2022	
72.03 MW	01.10.2022	



From above table, it is evident that 283.55 MW project component is associated with Solar Park and for remaining capacity no details have been furnished. Further, the Commission has not been able to ascertain whether Wind and Solar components are co-located or commissioned at different locations.

- 11.3.4 The Commission notes that Guidelines for development of Solar Parks have been amended from time to time. Further, AHEJ4L has not provided details about Solar Park and the Mode under which it has been developed. After perusal of the administrative sanction for implementation of the Scheme for enhancement of capacity from 20,000 MW to 40,000 MW for ‘Development of Solar Park and Ultra Mega Solar Power Projects’ dated 21 March 2017, it is evident that following roles and responsibilities for Solar Project developer and Solar Power Park Developer (SPPD) have been identified:

*“8. Transmission and evacuation of power from solar park*

*Interconnection of each plot with pooling station through 66 kV/other suitable voltage underground or overhead cable will be the responsibility of the solar project developer.*

*The SPPD will set up the pooling station (with 220/66 kV or suitable voltage level) inside the solar park and will also draw transmission line to transmit power to sub-station (220 kV/400 kV or suitable voltage). This is termed as internal transmission system.*

*..”*

- 11.3.5 In view of above, if project is being developed in Solar Park then responsibility of setting up of 33 kV line connecting generator to pooling substation and 220 kV transmission line connecting pooling substation to interconnection facility is the responsibility of SPPD and hence, fixing bird diverters on such lines become responsibility of SPPD only. Post incurrence of expenditure, if permissible under their contracts, SPPD may recover it from all participating Solar Project Developers in the Park.

- 11.3.6 In present case, SPPD is not a party and requisite details are not on record. Hence, the Commission is not able to ascertain responsibility of fixing bird diverters and contribution of such expenses on AHEJ4L. Hence, AHEJ4L is allowed to file separate Petition on this aspect providing detailed submission with necessary supporting document on the issue of Change in Law compensation on account of SC GIB order.

**11.4 Claims on account of increase in GST vide Notification dated 30 September 2021:**

- 11.4.1 As per AHEJ4L the project timelines have been extended due to Force Majeure events like imposition of lockdown due to Covid-19, Status quo Order on project land by Rajasthan High Court, SC GIB Order, delay in LTA readiness etc. Due to revision in

project schedule, AHEJ4L has carried out change in delivery schedule of SPGS and WTGS.

11.4.2 It is evident that AEML in its reconciliation has agreed to principal claim amounting Rs. 139.99 Crores for solar component and Rs.112.68 Crores for wind component. While agreeing with claims, AEML made disclaimer that it is reserving the right to verify the claim of AHEJ4L on aspect of one-to-one correlation between equipments installed on site as a part of the project.

11.4.3 As far as invoicing is concerned, it is relevant to mention Section 12, 13, 14 and 31 of CGST Act, 2017, which reads as below:

“

*TIME AND VALUE OF SUPPLY*

*12. (1) The liability to pay tax on goods shall arise at the time of supply, as determined in accordance with the provisions of this section.*

*(2) The time of supply of goods shall be the earlier of the following dates, namely: -*

*(a) the date of issue of invoice by the supplier or the last date on which he is required, under sub-section (1) of section 31, to issue the invoice with respect to the supply; or*

*(b) the date on which the supplier receives the payment with respect to the supply:*

*Provided that where the supplier of taxable goods receives an amount up to one thousand rupees in excess of the amount indicated in the tax invoice, the time of supply to the extent of such excess amount shall, at the option of the said supplier, be the date of issue of invoice in respect of such excess amount.*

*Explanation 1. — For the purposes of clauses (a) and (b), “supply” shall be deemed to have been made to the extent it is covered by the invoice or, as the case may be, the payment.*

*Explanation 2. — For the purposes of clause (b), “the date on which the supplier receives the payment” shall be the date on which the payment is entered in his books of account or the date on which the payment is credited to his bank account, whichever is earlier.*

*13. (1) The liability to pay tax on services shall arise at the time of supply, as determined in accordance with the provisions of this section.*

(2) *The time of supply of services shall be the earliest of the following dates, namely:—*

- (a) *the date of issue of invoice by the supplier, if the invoice is issued within the period prescribed under sub-section (2) of section 31 or the date of receipt of payment, whichever is earlier; or*
- (b) *the date of provision of service, if the invoice is not issued within the period prescribed under sub-section (2) of section 31 or the date of receipt of payment, whichever is earlier; or*
- (c) *the date on which the recipient shows the receipt of services in his books of account, in a case where the provisions of clause (a) or clause (b) do not apply:*

*Provided that where the supplier of taxable service receives an amount up to one thousand rupees in excess of the amount indicated in the tax invoice, the time of supply to the extent of such excess amount shall, at the option of the said supplier, be the date of issue of invoice relating to such excess amount.*

*Explanation. — For the purposes of clauses (a) and (b)—*

- (i) *the supply shall be deemed to have been made to the extent it is covered by the invoice or, as the case may be, the payment;*
- (ii) *“the date of receipt of payment” shall be the date on which the payment is entered in the books of account of the supplier or the date on which the payment is credited to his bank account, whichever is earlier.*

....

*14. Notwithstanding anything contained in section 12 or section 13, the time of supply, where there is a change in the rate of tax in respect of goods or services or both, shall be determined in the following manner, namely:—*

- (a) *in case the goods or services or both have been supplied before the change in rate of tax,—*
  - (i) *where the invoice for the same has been issued and the payment is also received after the change in rate of tax, the time of supply shall be the date of receipt of payment or the date of issue of invoice, whichever is earlier; or*
  - (ii) *where the invoice has been issued prior to the change in rate of tax but payment is received after the change in rate of tax, the time of supply shall be the date of issue of invoice; or*

(iii) where the payment has been received before the change in rate of tax, but the invoice for the same is issued after the change in rate of tax, the time of supply shall be the date of receipt of payment;

(b) in case the goods or services or both have been supplied after the change in rate of tax,—

(i) where the payment is received after the change in rate of tax but the invoice has been issued prior to the change in rate of tax, the time of supply shall be the date of receipt of payment; or

(ii) where the invoice has been issued and payment is received before the change in rate of tax, the time of supply shall be the date of receipt of payment or date of issue of invoice, whichever is earlier; or

(iii) where the invoice has been issued after the change in rate of tax but the payment is received before the change in rate of tax, the time of supply shall be the date of issue of invoice:

Provided that the date of receipt of payment shall be the date of credit in the bank account if such credit in the bank account is after four working days from the date of change in the rate of tax.

Explanation. —For the purposes of this section, “the date of receipt of payment” shall be the date on which the payment is entered in the books of account of the supplier or the date on which the payment is credited to his bank account, whichever is earlier.

....

## CHAPTER VII

### TAX INVOICE, CREDIT AND DEBIT NOTES

31. (1) A registered person supplying taxable goods shall, before or at the time of,—

(a) removal of goods for supply to the recipient, where the supply involves movement of goods; or

(b) delivery of goods or making available thereof to the recipient, in any other case, issue a tax invoice showing the description, quantity and value of goods, the tax charged thereon and such other particulars as may be prescribed:

*Provided that the Government may, on the recommendations of the Council, by notification, specify the categories of goods or supplies in respect of which a tax invoice shall be issued, within such time and in such manner as may be prescribed.*

***(2) A registered person supplying taxable services shall, before or after the provision of service but within a prescribed period, issue a tax invoice, showing the description, value, tax charged thereon and such other particulars as may be prescribed:***

*Provided that the Government may, on the recommendations of the Council, by notification and subject to such conditions as may be mentioned therein, specify the categories of services in respect of which—*

*(a) any other document issued in relation to the supply shall be deemed to be a tax invoice;*

*or*

*(b) tax invoice may not be issued.”*

11.4.4 As per the provisions of GST Law quoted above, invoice for goods has to be issued at the time of supply of goods which invariably has to be before date of commissioning as without such supply of goods commissioning of the plant would have not been possible. With regards to supply of services, the Commission notes that as per Rule 47 of the CGST Rules, 2017, the invoices in respect of taxable supply of services have to be issued within 30 days:

“

*47. Time limit for issuing tax invoice.- The invoice referred to in rule 46, in the case of the taxable supply of services, shall be issued within a period of thirty days from the date of the supply of service:”*

11.4.5 As per Section 12 and 13 of CGST Act, 2017, the liability to pay tax on goods shall arise at the time of supply of good/services. The exercise of establishing one-to-one correlation between the projects, the supply of goods or services and the invoices raised by the supplier of goods and services is pre-requisite for claim settlement. It is expected that parties will carry out the exercise of establishment of one-to-one correlation. Considering legal position explained above, GST invoices for supply of goods can be considered till date of commissioning and for supply of services, invoices which have been issued within 30 days from date of commissioning can be considered. For passing on impact on tariff, it is necessary to verify all relevant documents. AHEJ4L in its submission itself agreed that it is sharing the documents with the Commission on sample basis and not a complete

set of things. Hence, the Commission is also not been able to carry out the exercise of GST claim ascertainment.

- 11.4.6 Considering implications on project viability and possible carrying cost, at this stage the Commission is according its approval to reconciled claims on account of increase in GST subject to detailed scrutiny of one to one correlation by AEML.

Sr.No.	GST Claim	Amount in Rs. Crores
1	Solar Component	Rs.139.99 Crores
2	Wind Component	Rs.112.68 Crores

AEML should undertake one to one correlation exercise on priority and should complete the same within 3 months. AHEJ4L shall provide all necessary details for the same. Any variation in compensation amount post such one to one correlation exercise should be adjusted in subsequent bill with interest.

- 11.4.7 Having ruled on principal amount of compensation, the Commission notes that it is a well settled principle that compensation on account of Change in Law provisions has to be granted along with carrying cost so as to restore the affected party to same financial position as if such Change in Law event has not occurred. AHEJ4L proposed carrying costs at the applicable Late Payment Surcharge (LPS) rate computed on compounding basis till actual realisation of compensation. The Commission notes that PPA provides LPS rate as 1.25% per month calculated on day-to-day basis.

- 11.4.8 With regards to rate of Carrying Cost, APTEL in its Judgement dated 16 November 2021 in Appeal No. 163 of 2020 and 171 of 2020 observed following:

*“44. It needs to be borne in mind that carrying cost is the value for money denied at the appropriate time and is different from LPS which is payable on non-payment or default in payment of invoices by the Due Date. Payment of carrying cost is a part of the Change in Law clause which is an in-built restitution clause [see Uttar Haryana Bijli Vitran Nigam Ltd. Vs. Adani Power Ltd. (2019) 5 SCC 325]. **We are satisfied that carrying costs on the CIL amount should have been on actuals and not the Late Payment Surcharge (“LPS”) rate specified in the PPAs i.e., 1.25% in excess of 1-year MCLR of SBI for the period of 25 years.**” (Emphasis added)*

In view of above, if AHEJ4L wish to claim actual interest rate as a rate of carrying cost, they need to demonstrate actual loan disbursement and its rate of interest which is used for paying increased expenses on account of Change in Law compensation, supported by auditors certificate. However, AHEJ4L has failed to demonstrate the same.

- 11.4.9 Further, it is admitted fact that PPA does not provide rate of interest for carrying cost on Change in Law compensation. As PPA does not have specific provision, reference needs

to be drawn from prevailing regulations on this subject. In normal course, for time gap between date of spending and realising the said amount, utility takes Working Capital loan and as per tariff principle such utility is allowed to claim interest on such Working Capital loan. Said interest computation is always on simple interest basis. Similarly, when higher expenses are incurred on account of Change in Law which is to be reimbursed at later date, entity may fund such expenses through Working Capital Loan. Hence, in the opinion of the Commission, AHEJ4L having failed to demonstrate actual rate of interest incurred on additional expenses on account of Change in Law, interest on Working Capital Loan (average of one-year MCLR of SBI plus 150 basis point) allowed in MREC RE Tariff Regulations, 2019 shall be allowed as rate of interest for working out the carrying cost. This carrying cost shall be worked out on simple interest basis.

11.4.10 Accordingly, the Commission hereby directs the contracting parties to carry out reconciliation of additional expenditure on account of increase in GST vide notification dated 30 September 2021 by MoF, 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. Said exercise shall be completed within three months from date of this Order. Post completion of exercise, appropriate adjustment with interest may be carried out in passing on the claim benefit. In case of dispute in quantification of claim, aggrieved party may file appropriate Petition before this Commission for adjudication of dispute.

**12. Issue C: What should be the frequency for payment of the compensation amount (if applicable)?**

12.1 AHEJ4L in its Petition has not prayed that compensation for Change in Law event be paid on lumpsum basis or otherwise.

12.2 In this regard, the Commission notes that in similar matters of payment of compensation on account of Change in Law, the Commission had opined that lumpsum payment would avoid further carrying cost on account of deferred payment. Further, Generator may willingly offer some discount on lumpsum payment. Considering all these aspects, the Commission had provided liberty to AEML to decide whether it intends to opt for payment of the compensation on lumpsum basis or per unit basis over the PPA tenure. Accordingly, AEML shall communicate its option of paying Change in Law compensation to AHEJ4L within a month from date of this Order.

12.3 In case option of paying compensation amount over the PPA period is selected then per unit rate of compensation shall be computed based on the following methodology:

- a) Firstly, total amount of compensation (principal plus carrying cost till date of this Order) is to be determined. Such total amount shall be equally divided over each year of PPA tenure.
- b) Thereafter, carrying cost towards deferred payment shall be computed on the unrecovered part (average of opening and closing balance) of total compensation at the simple interest rate of @ 1.25% per month [LPS rate in the PPA as payment of quantified amount is being deferred].
- c) Summation of installment of compensation computed at 'a' above and carrying cost towards deferred payment computed at 'b' above will be the amount which is to be paid to AHEJ4L during that particular year.
- d) Per unit cost for a particular year shall be computed by dividing amount determined in 'c' above by energy to be supplied during that year from the project capacity at declared CUF. However, during the year of commissioning, availability of project only for the part of year shall be appropriately factored while computing energy to be supplied from the project.
- e) At the end of the Financial Year, AEML shall reconcile total amount paid through per unit charge as against total amount which is recoverable in that year as per 'c' above. Any over-recovery shall be adjusted in the payment for the month of March.
- f) Although per unit charge at the start of each financial year needs to be decided based on declared CUF, year-end reconciliation at end of each financial year shall be undertaken as per actual CUF within range  $\pm 10\%$  of declared CUF.
- g) Any under-recovery on account of lower generation shall be carried forward to next year and shall be payable without any additional carrying cost and only from the excess generation above declared CUF. Such unrecovered compensation, if any, at the end of PPA tenure shall be reconciled and paid in the last month of PPA tenure at no additional carrying cost.

Hence, the following Order:

### **ORDER**

- 1. Petition in Case No. 154 of 2023 is partly allowed.**
- 2. Impact of Change in Law on account of increased GST vide notification dated 30 September 2021 is allowed in principle.**
- 3. AHEJ4L and AEML shall jointly scrutinize the Change in Law claims in detail as directed in para (11.4.10) within a period of three months from the date of this Order.**




4. AEML shall communicate its option of payment of Change in Law compensation to AHEJ4L as stated in para (12) above within a month from the date of this Order.
5. On the issue of Change in Law compensation on account of SC GIB order, AHEJ4L is at liberty to file a separate Petition as mentioned in Para (11.3.6).

Sd/-  
**(Surendra J. Biyani)**  
Member

Sd/-  
**(Anand M. Limaye)**  
Member

Sd/-  
**(Sanjay Kumar)**  
Chairperson

  
**(Dr. Rajendra G. Ambekar)**  
Secretary

