



**THE UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION  
LUCKNOW**

**Petition No. 2006 of 2023**

**QUORUM**

Hon'ble Shri Arvind Kumar, Chairman

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

Hon'ble Shri Sanjay Kumar Singh, Member

**IN THE MATTER OF**

Petition, under Section 86(1)(e), (f) and (k) of the Electricity Act, 2003 for seeking appropriate relief on account of the change in law as provided under the Power Purchase Agreement (PPA) dated 27.02.2020 due to the increase in rates of the Goods and Services Tax on Solar Panels/Modules and invertors.

**AND**

**IN THE MATTER OF**

**M/s SAEL Limited,**

Faridkot Road, Guruharsahai, District Ferozepur, Punjab- 152022

..... Petitioner

**Versus**

- 1. U.P. Power Corporation Ltd. (UPPCL),** (Through its Managing Director), 14<sup>th</sup> Floor, Shakti Bhawan Extn., 14-Ashok Marg, Lucknow-226001
- 2. U.P. New & Renewable Energy Development Agency (UPNEDA),** (Through its Director), Vibhuti Khand, Gomti Nagar, Lucknow.
- 3. U.P. Power Transmission Corporation Limited, (UPPTCL)** (Through its chairman), 7<sup>th</sup> Floor, Shakti Bhawan, 14-Ashok Marg, Lucknow

..... Respondent(s)

**THE FOLLOWING WERE PRESENT**

1. Shri Putan Prasad, Manager, SAEL.
2. Shri Aditya Kumar Singh, Advocate, UPPCL
3. Shri Apoorva Tewari, Advocate, SAEL
4. Shri Paavan Awasthi, Advocate, SAEL



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**ORDER**

**(Date of hearing 21.11.2023)**

1. The Petitioner had earlier approached this Commission by means of Petition No. 1865/2022 inter alia for seeking appropriate relief on account of the change in law due to the increase in rates of the Goods and Services Tax on Solar Panels/Modules. The case was disposed of by the Commission vide Order dated 15.03.2023 holding SCOD extension to actual COD 01.07.2022 without levy of liquidated damages and granting liberty to the Petitioner to approach the Commission afresh regarding the claimed change in law event and its impact. Accordingly, the Petitioner has filed instant Petition with following prayers:
  - i. Declare and hold that the change in rates of GST applicable on solar panel/solar modules and other solar operated devices pursuant to the notification dated 30.09.2021 issued by the Ministry of Finance, Government of India, amounts to Change in Law as per Article 12 of the PPA.
  - ii. Direct UPPCL to reimburse the Petitioner for the corresponding increase in the project cost of the Petitioner on account of the increase in GST rates amounting to Rs. 5,73,90,627/- (Rupees Five Crore Seventy-Three Lacs Ninety Thousand Six Hundred and Twenty-Seven) approximately through lumpsum reimbursement.  
OR
  - iii. Increase/enhance the Tariff payable by the UPPCL to the Petitioner under the PPA to restore the Petitioner in same economic position pursuant to the corresponding increase in the project cost of the Petitioner on account of the increase in GST rates amounting to Rs. 5,73,90,627/- (Rupees Five Crore Seventy-Three Lacs Ninety Thousand Six Hundred and Twenty-Six) approximately plus the carrying cost.
  - iv. To grant ad-interim reliefs sought in terms of prayers (a) & (b) above and confirm the same after notice to the Respondents.
  - v. To award cost in favor of the Petitioner.



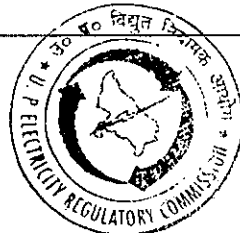


**Background as submitted by Petitioner:**

2. The Petitioner submitted its bid online on 25.06.2019 and was selected as a successful bidder by the UPNEDA for the construction, operation, maintenance, and supply of power from the solar power project of 32 MW capacity to the UPPCL. A PPA was executed between the Petitioner and UPPCL on 27.02.2020 and the petitioner was required to commission the project within 18 months from the date of execution of PPA i.e., SCOD was 26.8.2021. On 29.10.2021, an amended PPA was executed between the Petitioner and UPPCL on account of the change of name of the Sukhbir Agro Energy Limited to SAEL Limited with effect from 07.07.2021.
3. Vide letter dated 13.8.2020 and 4.12.2021, Petitioner requested for grant of extension in SCOD till 10.4.2022 without any penalty, which was accepted by UPPCL on 24.12.2021. The petitioner further requested for COD extension till 31.05.2022 without any penalty. UPPCL vide letter dated 31.03.2022, rejected the request and informed that the scheduled completion date of the project stood at 10.04.2022. The 32 MW project of the Petitioner was finally commissioned on 01.07.2022 after the completion of the Bay Construction Work at 132 kV sub-station at Konch.
4. During the execution of the project, vide notification number 8/2021-integrated tax (rate) dated 30.09.2021 issued by the Ministry of Finance, Government of India increased the rate of goods and services tax (GST) from 5% to 12% on solar modules and invertors. A total of 75,002 solar modules were utilized in the construction of the instant solar power projects.
5. On account of the aforesaid sudden increase in the rate of GST on solar modules and solar invertors, the cost of the solar power project of the petitioner was directly affected and Petitioner incurred an additional expense of Rs. 5.73 Cr. The Petitioner vide letter dated 02.02.2022 informed the UPPCL that on account of the change in rate of the GST by the Government of India, the cost of the solar power project of the petitioner has been directly affected and the same is covered by change in law as provided under Article 12 of the PPA.
6. The increase in the rate of GST vide notification dated 30.09.2021 is a change in law event as per article 12 of the PPA and as such the Petitioner is entitled to be

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restored to the same position by way of grant of enhancement in the agreed tariff of Rs. 3.05 per kWh or lumpsum reimbursement of additional liability of additional GST.

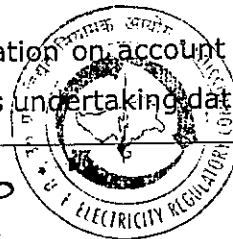
**Record of Proceedings:**

7. The Commission admitted the Petition during the hearing on 22.08.2023 with direction to the parties to file their reply and rejoinder. During the hearing on 17.10.2023, the Commission allowed further two weeks' time for each party to file their respective reply and rejoinder. UPPCL filed its reply on 03.11.2023 and SAEL filed its rejoinder on 20.11.2023. The Commission, during the hearing on 21.11.2023, heard the arguments of the parties and reserved the order. The Commission also allowed request of the parties to file their written submissions including the details of warranty of Solar Modules. The Petitioner and Respondent have filed their written submissions dated 01.12.2023 and 10.12.2023.

**UPPCL's reply dated 03.11.2023.**

8. UPPCL, vide its reply dated 03.11.2023 have submitted the following:
- The allowance of claim of the Petitioners would be contrary to statutory scheme of Section 63 of Electricity Act, 2003 and may lead to multiple revisions in tariff throughout the 25-year terms of the PPA. The Hon'ble Supreme Court of India in Haryana Power Purchase Centre v. Sasan Power Ltd and Ors, (2023) SCC Online SC 577, upheld the supremacy of the contractual understanding between the parties, holding that Commission/Tribunal is not entitled to rewrite the terms of the PPA. Thus, the claim of the Petitioner may be rejected.
  - The Petitioner has failed to provide the contract for supply of modules, EPC contract etc. to substantiate the claim for change in GST rate and the details of applicable taxes (Central and State) in 2020 (i.e. at the time of signing of the PPA) and in 2022.
  - The Petitioner has claimed compensation for a capacity of 35.23 MW of modules supplied, instead of the PPA quantum, which is 32 MW.
  - The Petitioner is claiming compensation on account of additional cost incurred due to Change in Law, contrary to its undertaking dated 22.12.2021. It is settled

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law that a right provided by a contract once waived, cannot be claimed as a matter of right. This argument has been supported by various judgment, viz; P. Dasa Muni Reddy Vs. P. Appa rao, (1974)2 SCC 725, Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P., (1979) 2 SCC 409.

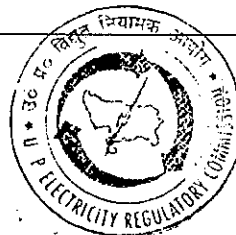
- (e) The Petitioner had placed order for Solar Modules and Invertors at the GST rate of 12% in the month of January 2022 despite the project deadline being only a few months away and the project being in final stages of completion when such equipment should have been already installed. Therefore, such delayed order for the relevant material reflects mala fide intention on the part of Petitioner to recover unnecessary costs from Respondent.
- (f) PPA in the present case does not have any provision dealing with principles of restoration to same economic position. Therefore, the Petitioner is not entitled to claim relief of carrying cost.

**SAEL rejoinder dated 20.11.2023.**

9. SAEL, vide its rejoinder dated 20.11.2023 has submitted the following:
- (a) The clause 12.1.1 (v) categorically provides that 'change in law' includes any change in the rates of any taxes, duties and cess which have a direct effect on the project. During the execution of the project, the Ministry of Finance, Government of India vide notification number 8/2021-integrated tax (rate) dated 30.09.2021 increased the rate of goods and services tax (GST) from 5% to 12% on solar modules and inverters directly affecting the cost of the project.
- (b) The intention of the parties is evident from Article 12 of the PPA that the parties to the PPA are to be restored to the same economic position if a party to the PPA is adversely impacted by any change in law event as contained in Article 12 of the PPA based on the restitutionary principle.
- (c) The Hon'ble Appellate Tribunal for Electricity vide judgment and order dated 20.09.2021 passed in appeal no. 215 of 2021; *Tata Power Renewable Energy Ltd. V. Maharashtra Electricity Commission*, held that the change in rate of GST would amount to a 'change in law' event. The Hon'ble Supreme Court in the case of ***Uttar Haryana Bijli Vitran Nigam Limited vs. Adani Power Limited***,

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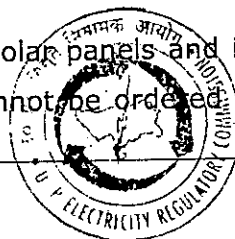


reported in **(2019) 5 SCC 325**, and **Jaipur Vidyut Vitaran Nigam Ltd. vs. Adani Power Rajasthan Limited**, reported in **2020 SCC Online SC 697**, has held that the change in law clause is an inbuilt restitutionary principle which compensates the party affected by such change in law, i.e., the party must be given the benefit of restitution as understood in civil law.

- (d) The petitioner has duly furnished all the necessary documents required for determining the impact of the change in rate of GST and no further documents are necessary or required for the said determination.
- (e) The petitioner was already having extension up to 27.01.2022 and UPPCL granted extension till 10.04.22 vide its letter dated 24.12.21. Thus, the GST notification dated 30.09.2021, happened even prior to the grant of 2<sup>nd</sup> extension of time and the commencement of the extended period. The petitioner placed the purchase order for the solar modules and inverters on 31.12.2021 and 13.01.2022 respectively. Thus, even assuming for the sake of argument although not accepting that the undertaking given by the petitioner was applicable even in respect of a change in law event, even then the said undertaking would be applicable only for the period extended after 27.01.2022. The extension communication dated 24.12.2021 issued by UPPCL granting the second extension of time itself stipulates that the said extension shall be in addition to the previously granted extensions vide UPPCL letter dated 21.11.2020.
- (f) The undertaking in respect of not claiming increase in project cost, in no manner, takes away the legitimate right of the petitioner to claim benefit on account of a change in law event. It is further apparent from the letter dated 24.12.2021 issued by the respondent no. 1 itself, that the said undertaking does not relate to the Change in Law event contemplated under Article 12 of the PPA. The rights of the parties under Article 12 of the PPA, i.e., under the Change in Law clause, are entirely distinctive from the grant of extension of time and increase in project costs.
- (g) The petitioner placed order of the solar panels and inverters 3 months before the SCOD, as the said products cannot be ordered much prior to the date of

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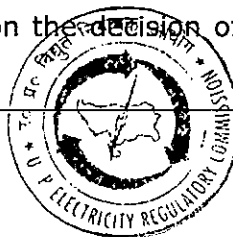
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commissioning to ensure the safety of the said products and to maximise the available guarantee/warranty period of the said products. If the said products are ordered much prior to their installation and use, their warranty period may expire even prior to the installation, which would ultimately be detrimental to the interest of the project.

- (h) The applicable GST rate on solar modules and inverters at the time of submission of bid on 25.06.2019 was 5% as provided vide notification no. 1/2017-Integrated Tax (Rate) dated 28.06.2017. Thereafter, the applicable GST on solar modules and inverters was changed from 5% to 12% vide notification no. 8/2021-Integrated Tax (Rate) dated 30.09.2021, which is already on record.
- (i) As per the terms of the PPA the contracted capacity i.e., 32 MW means 32MW (AC) of solar PV power contracted with the procurer(s) for sale of such power by the seller (32 MW AC capacity means 32 MW output at the delivery point i.e., at the grid sub-section where the project would be connected to). Thus, the petitioner is required to procure and set up solar panels/modules of reasonably higher combined wattage than 32 MW to maintain the required efficiency of 32 MW. Accordingly, the petitioner has procured and utilized the number of solar modules having total combined wattage of 35.23 MW to maintain the contracted capacity of 32 MW and the same was the requirement of construction of the project and has been duly considered and approved by the respondent at the time of fixation of the tariff and approval of the PPA.
- (j) The petitioner has never waived its rights under Clause 12 of the PPA on account of Change in Law event. The communication between the parties does not amount to any amendment of the PPA nor amounts to any waiver of rights on behalf of the petitioner.
- (k) The issue of Carrying Cost for Change in Law compensation is no longer res integra. Hon'ble Supreme Court in ***UHBVNL & Anr. v. Adani Power Ltd. & Ors.*** reported in **(2019) 5 SCC 325** held that Carrying Cost is an integral part of the restitutionary principle and is inbuilt in Change in Law provisions of the PPA. Reliance in this regard is placed on the decision of the Hon'ble Appellate

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Tribunal for Electricity vide judgment and order dated 20.09.2021 passed in appeal no. 215 of 2021; *Tata Power Renewable Energy Ltd. V. Maharashtra Electricity Commission*.

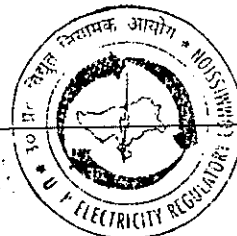
- (I) Further, Hon'ble Supreme Court in the case of ***Uttar Haryana Bijli Vitran Nigam Limited vs. Adani Power Limited***, reported in **(2019) 5 SCC 325**, and Jaipur Vidyut Vitaran Nigam Ltd. vs. Adani Power Rajasthan Limited, reported in 2020 SCC Online SC 697, has held that the change in law clause is an inbuilt restitutionary principle which compensates the party affected by such change in law, i.e., the party must be given the benefit of restitution as understood in civil law. Change in rates of GST on solar panels and modules squarely fall under the ambit of change in law for which the petitioner should be resituated. Further, the petitioner has duly made prudent and bona fide effort to minimize the cost.

#### **Commission's analysis and decision**

10. The Petitioner was selected as a successful bidder for the construction, operation, maintenance, and supply of power from the solar power project of 32 MW capacity to the UPPCL and executed PPA dated 27.02.2020 with SCOD of the Project as 26.08.2021 at tariff of Rs. 3.05 per kWh. The SCOD of the project was extended by UPPCL up to 10.04.22 against request of the Petitioner on account of Covid '19, 1<sup>st</sup> and 2<sup>nd</sup> wave. The 32 MW project of the Petitioner was finally commissioned on 01.07.2022 after the completion of the Bay Construction Work at 132 kV sub-station at Konch.
11. During the execution of the project, vide notification number 8/2021-integrated tax (rate) dated 30.09.2021 issued by the Ministry of Finance, Government of India increased the rate of goods and services tax (GST) from 5% to 12% on solar modules and invertors, which impacted the cost of the solar power project and Petitioner incurred an additional expense of Rs. 5.73 Cr. The Petitioner vide letter dated 02.02.2022 informed the UPPCL about the same and that the petitioner was directly affected and is covered by change in law as provided under Article 12 of the PPA.

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12. Before proceeding further, the objections and responses of the respondent and the petitioner based on the pleadings and arguments during the hearing are collated below:

**A. UPPCL's Objections**

- a. SAEL cannot be allowed to claim compensation for expenses incurred towards capital cost of the power plant in the present PPA. The PPA is a culmination of the bidding (fixed price) process carried out under Section 63 of the Electricity Act. Thus, GST Notification dated 30.09.2021 is not a Change in Law event.
- b. SAEL is required to furnish all the relevant details such as date of delivery of goods, invoices, Auditor certificate, contract for supply of modules etc. to substantiate the impact of Change in rate of GST. Petitioner is required to furnish relevant documents and establish one on one correlation.
- c. On 22.12.2021, SAEL provided an undertaking in compliance to the MNRE O.M dated 12.05.2021 that time extension allowed shall not be used as a ground for termination of PPA or for claiming any increase in the project cost including IDC or upwards revision of tariff. Accordingly, UPPCL granted extension in SCOD till 10.04.2022. Thus, right to claim compensation has been waived by the Petitioner
- d. The PPA does not have any provision dealing with restitutionary principles. Therefore, SAEL is not entitled to claim relief of Carrying Cost. Thus, Petitioner is not entitled to Carrying Cost.
- e. There is discrepancy in the compensation amount claimed by the Petitioner

**B. SAEL's response**

- (a) The clause 12.1.1(v) categorically provides that 'change in law' includes any change in the rates of any taxes, duties and cess which have direct effect on project. Hon'ble APTEL vide judgement dated 20.9.21 in Appeal 2015/21 held that the change in rate of GST would amount to a change in law event.

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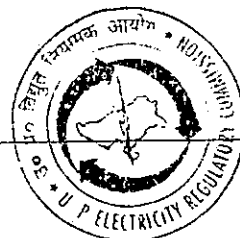


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- (b) The Hon'ble Supreme Court in UHBVNL and Anr Vs. Adani Power Ltd. & Ors. held that the carrying cost is an integral part of restitution principle and is in in-built in change in law provisions of PPA.
- (c) The petitioner has furnished all necessary documents required for determining of impact of change in GST and has also established one to one correlation between the project and supply of goods against which change in law is claimed and the invoices.
- (d) The petitioner has procured and utilized no. of solar modules having total combined wattage of 35.23 MW so as to maintain the contracted capacity of 32 MW.
- (e) The issue of increase in project cost and change in law are completely distinct issues and the undertaking in respect of not claiming increase in project cost in no manner takes it away the legitimate right of the petitioner to claim benefit of a change in law event and even if the undertaking is made applicable for change in law event, the said undertaking would be applicable for the period extended after 27.1.22, i.e., the first time extension. Also, the communication between the parties do not amount to any amendment of PPA or waiver of rights on behalf of petitioner.
- (f) The petitioner cannot place orders for solar modules and inverters much prior to their estimated time of installation as these products need to be stored and handled with care within their warranty period.

13. Before proceeding to decide the relief to the Petitioner on account of GST notification dated 30.09.2021, few crucial dates need to be juxtaposed to examine the communication exchanged between the Petitioner and respondent in the process of construction of this project. The sequence of events along with dates for the Solar Power Project are summarized as under before reverting to the issue wise discussion in succeeding paragraphs:



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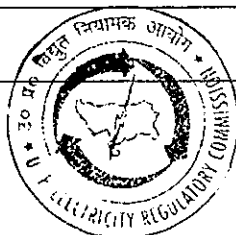
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S. No.	Date	Events
1	27.02.2020	PPA was executed between the Petitioner and Respondent
2	26.08.2021	SCOD as per the PPA
3	March, 2020	Outbreak of COVID-19
4	13.08.2020	MNRE issued an Office Memorandum which stated that due to COVID-19 all the renewable energy projects under implementation as on 25.03.2020 shall be given an extension of 5 months
5	13.08.2020	Petitioner requested the Respondent for extension of SCOD from 26.08.2021 to 31.03.2022
6	21.11.2020	Respondent granted extension to the Petitioner for 5 months i.e., 27.01.22.
7	12.05.2021	MNRE issued another OM whereby it stated that any renewable energy project having its scheduled date of commissioning on or after 01.04.2021 may apply to the concerned agency for claiming extension on account of pandemic. It also stated that while applying for such time extension, RE developers shall undertake that the time extension will not be used as a ground for claiming termination of PPA or for claiming any increase in the project cost
8	29.06.2021	Another OM was issued by MNRE whereby it was decided that period of disruption (two and half months) on account of second wave of COVID- 19 can be allowed as per the procedure stated in OM dated 12.05.2021
9	30.06.2021	Petitioner requested for extension in SCOD.
10	13.09.2021	Request of the Petitioner for extension was rejected on account of being premature.
11	03.11.2021	MNRE vide it's OM clarified that the issue of change-in law shall continue to be governed by the provisions of the PPA and to be decided by the appropriate Commission.

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12	04.12.2021	Petitioner requested for grant of extension in SCOD up to 10.04.2022 as per the OM dated 12.05.2021 and 29.06.2021.
13	21.12.2021	Respondent sought an undertaking from the Petitioner in terms of the MNRE OM dated 12.05.2021.
14	22.12.2021	The Petitioner provided an undertaking to the Respondent No. 1 that it shall not use time-extension as a ground of termination of PPA or for claiming any increase in project cost.
15	24.12.2021	Basis the undertaking provided by the Petitioner in terms of the MNRE OM dated 12.05.2021 and 29.06.2021, Respondent No. 1 granted extension in the SCOD for the 32 MW project till 10.04.2022.

14. Let's first examine the event of GST notification dated 30.09.2021. As regards the contention of the respondent that Change in law claim would be contrary to statutory scheme of Section 63 of Electricity Act, 2003, the Article 12 of the PPA is being reproduced hereunder:

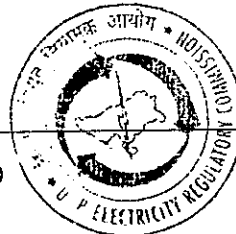
**12.1.1.** *The term change in Law shall refer to the occurrence of any of the following events after the last date of the bid submission, including*

- (i) the enactment of new law, or*
- (ii) an amendment, modification or repeal of an existing law, or*
- (iii) the requirement to obtain a new consent, permit or license, or*
- (iv) any change in the rates of any taxes, duties and cess, which have a direct effect on the project.*

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

**12.2 Relief for Change in Law**

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





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

15. The Petitioner submitted its bid on 25.06.2019 and GST notification is issued subsequently on 30.09.2021. Article 12.1.1 (v) of the PPA, as enumerated above, categorically provides that any change in the rates of taxes which have a direct effect on the project shall amount to an event of change in law.

16. The Commission has also noted that at the time of GST notification dated 30.09.21, the petitioner was already having extension of five months up to 27.01.22 under MNRE O.M. dated 13.08.2020, wherein, there was no stipulation of giving any undertaking.

**17. Therefore, it is evident from the aforesaid that the increase in the rate of GST vide notification dated 30.09.2021 is a change in law event as per article 12 of the PPA.**

18. As regards the contention of the Petitioner that there is discrepancy in the compensation amount claimed for 35.23 MW instead of 32 MW Project, the Commission has noted that as per the terms of the PPA the contracted capacity i.e., 32 MW means 32MW (AC) of solar PV power contracted with the procurer(s) for sale of such power by the seller (32 MW AC capacity means 32 MW output at the delivery point i.e., at the grid sub-section where the project would be connected to).

**19. Thus, the petitioner is required to procure and set up solar panels/modules of reasonably higher combined wattage than 32 MW to maintain the required efficiency of 32 MW. Accordingly, the petitioner has procured and utilized the number of solar modules having total combined wattage of 35.23 MW to maintain the contracted capacity of 32 MW approved by the respondent at the time of fixation of the tariff and approval of the PPA. Therefore, the plea of the respondent does not hold any ground in this respect.**



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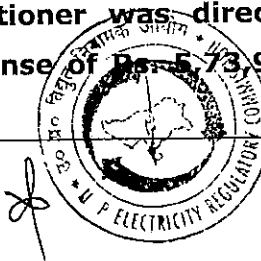
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20.Regarding the contention of the respondent about the documents required for verification, the Commission, upon perusal of the documents placed on record, notes that:

- (a) A total of 75,002 solar modules were utilized in the construction of instant solar power projects. The petitioner placed the order for the aforesaid solar modules, which were supplied to it by means of three orders/invoices dated 31.12.2021 amounting to a total of Rs. 76,76,46,049/- (Rupees Seventy-Six Crores Seventy-Six Lacs Forty-Six Thousand and Forty-Nine).
- (b) The petitioner paid Rs. 9,21,17,526/- (Rupees Nine Crores Twenty-One Lacs Seventeen Thousand Five Hundred Twenty-Six) towards GST at the rate of 12% on the aforesaid value. In case, the GST rate had not increased from 5% to 12%, the petitioner would have incurred a cost of Rs. 3,83,82,302/- only towards GST at the rate of 5% in respect of the solar modules/panels.
- (c) Further, a total of 173 solar inverters were procured in the construction of the instant solar power projects. The petitioner placed the order for the aforesaid solar inverters, which were supplied to it by means of three orders/invoices dated 13.01.2022 amounting to Rs. 5,22,20,050/- (Rupees Five Crores Twenty-Two Lacs Twenty Thousand and Fifty).
- (d) The petitioner paid Rs. 62,66,406/- (Rupees Nine Sixty-Two Lacs Sixty-Six Thousand Four Hundred Six) towards GST at the rate of 12% on the aforesaid value. In case, the GST rate had not increased from 5% to 12%, the petitioner would have incurred a cost of Rs. 26,11,003/- only towards GST at the rate of 5% in respect of solar inverters.

21. Thus, it is clear that on account of the notification dated 30.09.2021 issued by the Government of India, the petitioner incurred an additional Cost of Rs. 5,37,35,223/- towards solar modules & Rs. 36,55,404/- towards solar inverters. Therefore, on account of the aforesaid sudden increase in the rate of GST on solar modules and solar investors, the cost of the solar power project of the petitioner was directly affected and petitioner incurred an additional expense of Rs. 5,73,90,626/- (Rupees Five Crore





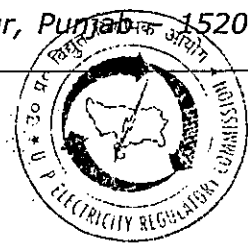
**Seventy-Three Lacs Ninety Thousand Six Hundred and Twenty-Six) approximately.**

22. As regards the argument of the respondent that the Petitioner vide its undertaking dated 22.12.2021 has waived its right to claim increase in project cost and the Petitioner's argument that PPA amendment can't be made through exchange of communication between parties and change in law relief is distinct from the issue of increase in project cost and that the undertaking would be applicable to change in law event after 27.01.2022, i.e., the first extension, the Commission has critically examined this issue in succeeding paragraphs.
23. On 12.05.2021 MNRE issued OM whereby it stated that any renewable energy project having its scheduled date of commissioning on or after 01.04.2021 may apply to the concerned agency for claiming extension on account of pandemic. It also stated that while applying for such time-extension, RE developers shall undertake that the time-extension shall not be used as a ground for claiming termination of Power Purchase Agreement (PPA) or for claiming any increase in the project cost, including Interest During Construction (IDC) or *upward revision of tariff*.
24. On 03.11.2021, MNRE vide its OM clarified that the issue of change-in law shall continue to be governed by the provisions of the PPA and is to be decided by the appropriate Commission. On 04.12.2021, the Petitioner requested for grant of extension in SCOD up to 10.04.2022 as per the OM dated 12.05.2021 and 29.06.2021. On 21.12.2021, UPPCL sought an undertaking from the Petitioner in terms of the MNRE OM dated 12.05.2021. On 22.12.2021, the Petitioner provided an undertaking to the Respondent that it shall not use time-extension as a ground of termination of PPA or for claiming any increase in project cost.
25. Relevant excerpt from the undertaking dated 22.12.2021, provided by the Petitioner is reproduced below:

*"We, M/s SAEL Limited (Formerly known as M/s Sukhbir Agro Energy Ltd.) having our registered office address at Faridkot Road, Guruhsahai, Dist. Ferozepur, Punjab-152022 and corporate office*

by

*[Faint signature and stamp]*



*[Handwritten mark]*



address at A-4, Green Park Main, New Delhi – 110016 vide our letter no. SAEL/UPPCL/32MW/041221-01 dated 04.12.2021 have requested UPPCL to allow SCOD extension as per MNRE circular for 2.5 months i.e. till 10<sup>th</sup> April, 2022 without any penalty on account of 2<sup>nd</sup> surge of Covid-19 Pandemic for our 32MW Solar Project.

In this regard, with reference to UPPCL letter no. 1010/CE/PPA-R dated 21.12.2021 and in accordance with MNRE OM no. 283/18/2020-Grid Solar dated 12.05.2021, **we hereby undertake that the time extension allowed to us shall not be used as a ground for termination of Power Purchase Agreement (PPA) or for claiming any increase in the project cost, including Interest During Construction (IDC) or upward revision of tariff. "**

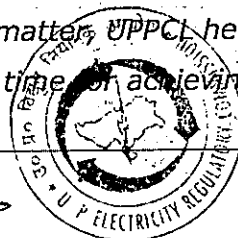
26. On 24.12.2021, basis the undertaking provided by the Petitioner in terms of the MNRE OM dated 12.05.2021 and 29.06.2021, UPPCL granted extension in the SCOD for the 32 MW project till 10.04.2022. Relevant excerpts from the letter dated 24.12.2021 are reproduced below:

**"24.12.2021 – Letter by UPPCL**

UPPCL vide letter no. 1010/CE/PPA-R dated 21.12.2021 have requested M/s SAEL to provide undertaking in accordance with MNRE OM no. 283/18/2020-GRID SOLAR dated 12.05.2021 that RE Developers shall undertake that the time extension shall not be used as a ground for claiming termination of Power Purchase Agreement (PPA) or for claiming any increase in the project cost, including Interest During Construction (IDC) or upward revision of tariff.

M/s SAEL vide undertaking dated 22.12.2021 have provided the undertaking in accordance with MNRE OM no. 283/18/2020-GRID SOLAR dated 12.05.2021, for the subject project.

Therefore, in accordance with the undertaking provided by M/s SAEL and after due consideration in the matter, UPPCL hereby conveys its consent and allows M/s SAEL extension of time for achieving SCOD of the 32 MW Solar







*Projects till 10th April 2022 as requested by M/s SAEL vide letter no. SAEL/UPPCL/32MW/041221-01 dated 04.12.2021. This extension shall be in addition to previously granted extensions vide UPPCL letter no. 640/CE/PPA-R dated 21.11.2020."*

27. The Commission has noticed that the Petitioner while seeking extension vide its letter dated 04.12.2021 for grant of extension in SCOD up to 10.04.2022 as per the OM dated 12.05.2021 and 29.06.2021, has also updated the project status as under:

*"We have acquired complete land for the development of the solar project and already received the intimation letter for achievement of condition subsequent as per Article 3 of the PPA related to land, financial closure, and connectivity agreement from the UPNEDA dated 2th Oct 2021.*

***Further, civil work and other land development work has already been started at the site and we have placed the purchase orders for all the major equipment's for the development of 32 MW solar project.***

***However, since there is very little time left in the SCOD date of 26<sup>th</sup> Jan'22, so our lenders are not willing to disburse the funds for the project and had asked us to get the extension in SCOD date as per MNRE circular for 2.5 months. ...."***

28. Since the first extension granted to the Petitioner was up to 27.01.2022 only, due to first covid'19 wave, it is evident that from the content of the letter dated 04.12.2021, the Petitioner had placed the order for all major equipment (there is no other major equipment other than solar modules and inverter in a solar project), and had sought extension of time of 2.5 months, in terms of MNRE OM dated 29.06.21 for reason none other than disbursement of funds by lenders so that the material could reach at the site of the petitioner and it could complete the project within already extended SCOD up to 27<sup>th</sup> Jan'22. It may be noted that contrary to its undertaking, the petitioner placed the purchase order for the solar modules and inverters on 31.12.2021 and 13.01.2022 and is now claiming compensation on

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account of additional cost incurred under Article 12 of the PPA, namely Change in Law. However, it must be kept in mind that whether the petitioner placed the purchase order for solar modules or invertors in January 2022 or it had placed the purchase order say in October 2021 (as per contents of letter dated 04.12.2021), it would have hardly altered the status of imposition of GST rate as the new GST rates were effective from 30<sup>th</sup> September 2021. Accordingly, this inconsistency in the stand of the petitioner cannot be interpreted to debar it from the benefit of change in law on account of imposition of new GST rates.

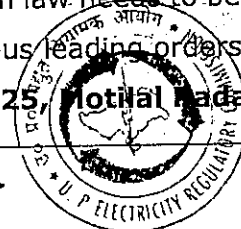
29.Regarding contention of the Petitioner that the Undertaking was only a communication and exchange of communication can't amend the PPA, the Commission is of the view that when communication of SCOD extension till 27.01.22, vide its letter dated 21.11.2020 by the respondent to the Petitioner is a **written agreement** so as to amend the PPA which stipulates SCOD as 27.01.2022, then it is also obvious that the undertaking dated 22.12.21, made after MNRE OM dated 03.11.2021 that the change in law relief would be governed by relevant provisions of the PPA, waiving petitioner's right to claim any increase in tariff, would certainly be termed as **written agreement** to amend the PPA under Article 18 of the PPA providing that agreement may only be amended or supplemented by a written agreement between the parties.

30.Although, the Petitioner's communication (undertaking dated 22.12.21) of waiving its right to claim any increase of tariff is a subsequent event to the issuance of MNRE O.M. dated 03.11.21, which stated that Change in Law would continue to be governed as per PPA, still it cannot be interpreted to mean that the petitioner has waived its right viz-a-viz change in law thus rendering the express provision of "change in law" under its PPA as a nullity that too in the glaring presence of MNRE O.M. dated 03.11.21.

31. Arguendo even if it is considered that when the Petitioner waived its right of tariff increase, he was in full knowledge of MNRE O.M. dated 03.11.21 thus it has to be taken as a waiver, the fact that it was an over-arching, all embracing waiver, which negated his right to claim change in law needs to be scrutinised further. On waiver, Hon'ble Supreme Court in its various leading orders such as **P. Dasa Muni Reddy v. P. Appa Rao, (1974) 2 SCC 725**, **Motilal Madampat Sugar Mills Co. Ltd. v.**

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**State of U.P., (1979) 2 SCC 409** and **A.P. SRTC v. S. Jayaram, (2004) 13 SCC 792** has set out the contours of the legal requirements and the implications resulting thereof. Before culling out the essential ingredients of a legally valid waiver, it would be in order to reproduce the relevant portions of above orders-

a. **P. Dasa Muni Reddy v. P. Appa Rao, (1974) 2 SCC 725**, has held as under:

*"13. Abandonment of right is much more than mere waiver, acquiescence or laches. The decision of the High Court in the present case is that the appellant has waived the right to evict the respondent. **Waiver is an intentional relinquishment of a known right or advantage, benefit, claim or privilege which except for such waiver the party would have enjoyed. Waiver can also be a voluntary surrender of a right.** The doctrine of waiver has been applied in cases where landlords claimed forfeiture of lease or tenancy because of breach of some condition in the contract of tenancy. **The doctrine which the courts of law will recognize is a rule of judicial policy that a person will not be allowed to take inconsistent position to gain advantage through the aid of courts.** Waiver sometimes partakes of the nature of an election. **Waiver is consensual in nature. It implies a meeting of the minds. It is a matter of mutual intention.** The doctrine does not depend on misrepresentation. **Waiver actually requires two parties, one party waiving and another receiving the benefit of waiver. There can be waiver so intended by one party and so understood by the other. The essential element of waiver is that there must be a voluntary and intentional relinquishment of a right. The voluntary choice is the essence of waiver. There should exist an opportunity for choice between the relinquishment and an enforcement of the right in question.** It cannot be held that there has been a waiver of valuable rights where the circumstances show that what was done was involuntary. There can be no waiver of a non-existent right. Similarly, one cannot waive that which is not one's as a right at the time of waiver. Some mistake or misapprehension as to some facts which constitute the underlying assumption without which parties would not have made the*

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contract may be sufficient to justify the court in saying that there was no consent."

b. **Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P., (1979) 2 SCC 409:**

6. Secondly, it is difficult to see how, on the facts, the plea of waiver could be said to have been made out by the State Government. **Waiver means abandonment of a right and it may be either express or implied from conduct, but its basic requirement is that it must be "an intentional act with knowledge"**. Per Lord Chelmsford, L.C. in *Earl of Darnley v. London, Chatham and Dover Rly. Co.* [(1867) LR 3 HL 43, 57 : 16 LT 217] **There can be no waiver unless the person who is said to have waived is fully informed as to his right and with full knowledge of such right, he intentionally abandons it.** It is pointed out in *Halsbury's Laws of England (4th Edn.) Volume 16 in para 1472 at p. 994* that for a **"waiver to be effectual it is essential that the person granting it should be fully informed as to his rights"** and Isaacs, J. delivering the judgment of the High Court of Australia in *Craine v. Colonial Mutual Fire Insurance Co. Ltd.* [(1920) 28 CLR 305 (Aus)] has also emphasised that waiver "must be with knowledge, an essential supported by many authorities"....."

c. **A.P. SRTC v. S. Jayaram, (2004) 13 SCC 792 :**

"5. It was next submitted that the respondent should be deemed to have waived his rights under Circular No. 45/81 by submitting tender in response to the notice inviting tenders in the year 1984 and he must be held bound by the terms of the contract which he entered into pursuant to the tender submitted by him. The High Court has formed an opinion that the respondent cannot be deemed to have waived the right or the benefit available to him under Circular No. 45/81 because he was not even aware of the existence of the circular. **To constitute waiver there must be an intentional relinquishment of a known right or the voluntary relinquishment or abandonment of a known existing legal right or conduct such as**

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**warrants an inference of the relinquishment of a known right or privilege (Basheshar Nath v. CIT [AIR 1959 SC 149] ). Moreover, the circular itself stipulates the Corporation making an offer to the contractors for taking benefit of the policy decision and it is undisputed that the Corporation never made such an offer to the respondent. Inasmuch as there is a failure on the part of the Corporation to extend the benefit of the circular to the respondent, the Corporation cannot be permitted to take shelter behind its own wrong."**

32. Based on above judgments and other literature available, it can be concluded that any waiver shall necessarily include the following essential elements:

- a. An abandonment or relinquishment of any right;
- b. A party abandoning or relinquishing is fully informed and possess full knowledge of its right intended to be waived;
- c. Such right must be existing at the time of waiver;
- d. Abandonment or relinquishment is intentional;
- e. Abandonment or relinquishment is voluntary;
- f. The benefit of Waiver is enjoyed by the other party.
- g. It should not be against public interest. (as laid down in All India Power Engineer Federation vs Sasan Power Ltd. & Ors Civil Appeal Nos.5881-5882 OF 2016)

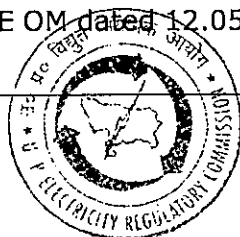
While juxtaposing these conditions against the petitioner's undertaking dated 22.12.2021, it can be safely concluded that relinquishment of right of tariff hike cannot be termed as voluntary as the same was furnished in terms of MNRE OM no. 283/18/2020-Grid Solar dated 12.05.2021 and UPPCL letter no. 1010/CE/PPA-R dated 21.12.2021 for the stated objective of getting SCOD extension.

33. Therefore, the petitioner's undertaking, which is alleged as a waiver by the respondents, is not a voluntary act but is contingent upon a requirement laid down by MNRE for getting SCOD extension in difficult times of COVID, basis which UPPCL urged the petitioner to give such an undertaking. The letter of UPPCL dated 24.12.2021 is demonstrative of the fact that had the petitioner not submitted an unqualified undertaking in terms of MNRE OM dated 12.05.2021, then UPPCL might

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not have considered the case of SCOD extension for the petitioner. **Hence, it can be concluded that the undertaking was not voluntary and thus, fails on the requirements of being classified as waiver.**

34. Further, as far as the issue of giving undertaking subsequent to MNRE OM dated 03.11.2021 is concerned, it needs to be underlined that the petitioner was constrained to give his undertaking in a certain language with reference to MNRE OM dated 12.05.2021 and there was no occasion for him to mention MNRE OM dated 03.11.2021 in his undertaking. Lo and behold, non-mention of MNRE OM dated 03.11.2021 does not dissolve its existence to enable the respondent to argue that subsequent undertaking dated 22.12.2021 takes away the right of the petitioner to claim change in law.

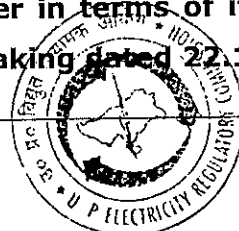
35. It is an established legal maxim "*generalia specialibus non derogant*" meaning thereby that the special provisions prevail over the general provisions. If MNRE OMs are examined in this light, MNRE OM dated 12.05.2021 is a general provision which gives that the time extension cannot be used a ground for termination of PPA or for claiming any increase in the project cost including IDC or upward revision of tariff whereas, MNRE OM dated 03.11.2021 clarifying that issue of change in law shall continue to be governed by the provisions of PPA is a special provision dealing with only change in law circumstances.

36. Therefore, in accordance with legal maxim of "*generalia specialibus non derogant*" or in accordance with Samanjasya & Gun Pradhan Principles of Mimansa Interpretation, the MNRE OM dated 03.11.2021 will have an overriding effect on MNRE OM dated 12.05.2021. It also needs to be noted here that MNRE OM dated 03.11.2021 is the last word of MNRE on this issue and hence, its sanctimony must be respected and the same cannot be brought to nullity by application of an undertaking under MNRE OM dated 12.05.2021.

**37. In view of the above, the Commission holds that the consequential relief to the petitioner emanating from above GST notification has to essentially devolve down to the petitioner in terms of its PPA and MNRE OM dated 03.11.2021 despite its undertaking dated 22.12.2021.**

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38. In view of the above, Respondent-UPPCL is directed to reconcile and map each invoice with respect to the claim of impact of change in GST rate for procurement of solar modules of the SAEL solar power project of 32 MW capacity within a reasonable time and make payment to petitioner on account of same which shall not exceed Rs. 5.739 crore.

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

**"12.2 Relief for Change in Law**

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

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

40. The Commission has noted that although PPA dated 27.02.2020 does not specifically provide for the carrying cost, it notes that relief for Change in Law is to be decided by the Commission. Hon'ble APTEL in Parampujya Solar Energy Pvt. Ltd. vide its judgement dated 15.09.2022 has interpreted the work "Relief" as below:

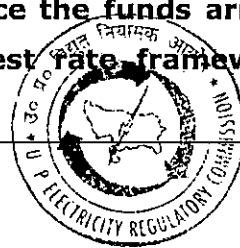
*"The use of the word "relief" in the context of adjudicatory process, simply means the remedy which the adjudicatory forum may afford "in regard to some actual or apprehended wrong or injury" or something which a party may claim as of right, or making the affected party "feel like easing out of.....hardship".*

41. The Commission is of the view that the very purpose of change in law clause in PPAs is to relieve the affected party of additional burden. Therefore, the relief intended to be afforded under contracts cannot be complete unless the said burden is allowed from the date of commissioning of project till date of this order.

42. Regarding the rate of interest for computation of carrying cost, the Commission is of the view that since the funds arranged by the project developer are based on the interest rate framework followed by the

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scheduled commercial bank, therefore, the Petitioner shall be entitled to carrying cost @ yearly SBI MCLR on verified amount from the actual COD/commissioning of SAEL project till the date of this Order.

The Petition stands disposed of in terms of the above.

(Sanjay Kumar Singh)  
Member

(Vinod Kumar Srivastava)  
Member (Law)

(Arvind Kumar)  
Chairman

Place: Lucknow

Dated: 16.05.2024

