



नई दिल्ली
NEW DELHI

याचिका संख्या./ Petition No. 206/MP/2021

कोरम/ Coram:

श्री जिष्णु बरुआ, अध्यक्ष/Shri Jishnu Barua, Chairperson
श्री आई. एस. झा, सदस्य/ Shri I. S. Jha, Member
श्री अरुण गोयल, सदस्य/ Shri Arun Goyal, Member
श्री पी. के. सिंह, सदस्य / Shri P. K. Singh, Member

आदेश दिनांक/ Date of Order: 07th of January, 2024

IN THE MATTER OF:

Petition under Section 79 (1) (a) of the Electricity Act, 2003 read with Article 12.1.1 of the PPA dated 25.10.2019.

AND IN THE MATTER OF:

NTPC Limited,
(Also known as NTPC Green Energy Limited)
NTPC Bhawan Core-7, Scope Complex
7, Institutional Area, Lodhi Road
New Delhi – 110003

...Petitioner

Versus

- M/s Solar Energy Corporation of India Limited,**
NBCC Office Block Tower-2,
East Kidwai Nagar,
New Delhi-110023
- Jaipur Vidyut Vitran Nigam Limited,**
Janpath, Vidhayak Nagar
Lalkothi, Jaipur, Rajasthan- 302005

3. **Ajmer Vidyut Vitran Nigam Limited,**
Vidyut Bhawan, Makarwali Rd,
Panchsheel Nagar
Ajmer, Rajasthan- 305004
4. **Jodhpur Vidyut Vitran Nigam Limited,**
2nd Floor, Vidyut Bhawan
Gali Number 4, Opp. E.S.I. Hospital,
Kamla Nehru Nagar, Ist Pulia,
Jodhpur, Rajasthan- 342001
5. **Rajasthan Urja Vikas Nigam Limited,**
Vidyut Bhawan, Janpath, Jyoti Nagar,
Jaipur, Rajasthan- 302005

...**Respondents**

Parties Present: Shri Venkatesh, Advocate, NTPC
Shri Ashutosh Srivastava, Advocate, NTPC
Shri Kartikay Trivedi, Advocate, NTPC
Shri Anand K Ganesan, Advocate, RUVNL
Shri Amal Nair, Advocate, RUVNL
Ms. Shivani Verma, Advocate, RUVNL

आदेश/ ORDER

The Present petition has been filed by NTPC Limited. The Petitioner, vide additional affidavit dated 09.10.2023, has informed that in order to achieve the monetisation target given to NTPC Limited under the National Monetization Pipeline (NMP), NTPC Limited decided to consolidate its Renewable Energy (RE) portfolio under one company i.e. NTPC Green Energy Limited (“NGEL”), a wholly owned subsidiary, incorporated on 07.04.2022 by transfer of its operating/ near operational RE units (15 in number) and equity stake of NTPC in NGEL. Further, in order to transfer its 15 RE assets and equity stake to NGEL, a scheme was framed by NTPC Limited. This scheme was approved by the Ministry of Power, DIPAM, NITI Aayog and subsequently, the Ministry of Finance. To give effect to the scheme, NTPC Limited and NGEL entered into a Business Transfer Agreement (BTA) for the transfer of 15 RE assets. As per the BTA, these assets were transferred to NGEL on their Book Value in the Financial Statements of NTPC Limited. Pursuant to BTA, 15 RE assets, including the present Jetsar

generating station, were transferred by NTPC Limited to NGEL on 28.02.2023. Accordingly, the amended memo of parties was filed to bring on record NGEL as the Petitioner. The Petitioner, NGEL, is a generating company and is developing a 160 MW Solar Project in the State of Rajasthan. NGEL is seeking the declaration of Department of Revenue, Ministry of Finance who issued *Notification No. 02/2020-Customs (SG) dated 29.07.2020* (2020 SGD Notification) as a change in law event and seeking additional cost in terms of Article 12 of the PPA.

2. Respondent No. 1, Solar Energy Corporation of India Limited (SECI), has been set up under the administrative control of the Ministry of New and Renewable Energy (MNRE) and has been designated as the nodal agency for the implementation of MNRE schemes for developing grid-connected solar power capacity through VGF mode in India.
3. Respondents No. 2 to 4 are the distribution licensees defined under Section 2(17) of the Electricity Act, 2003 and are operating in the state of Rajasthan.
4. Respondent No.5, i.e. Rajasthan Urja Vikas Nigam Limited (RUVNL), is a company incorporated under the Companies Act, 2003 and has been established to carry out power trading business for the distribution licensees within the state of Rajasthan.
5. The Petitioner has made the following prayers:
 - a) *Admit and allow the present Petition;*
 - b) *Hold and declare that the imposition of safeguard duty by the Ministry of Finance vide its SGD Notification dated 29.07.2020 as a 'change in law' event under Article 12 of the PPA with effect from 30.07.2020;*
 - c) *Hold and declare that the Petitioner shall be entitled to recover the additional cost incurred, if any, in terms of the Article 12 of the PPA;*
 - d) *Grant liberty to the Petitioner to file a separate Petition subsequently and approach this Hon'ble Commission for seeking reimbursement of the cost incurred along with carrying cost due to the imposition of safeguard duty on account of SGD Notification 2020 and restore the Petitioner to the same economic position as if such 'change in law' event had not occurred; and*
 - e) *Pass any such further order (s) or direction (s) as deemed fit and proper in the facts and circumstances of the present case.*

6. We observe that vide prayer (d) above, the Petitioner has submitted that liberty may be granted to the Petitioner to file a separate Petition subsequently and approach this Commission for seeking reimbursement of the cost incurred along with carrying cost due to the imposition of safeguard duty on account of *SGD Notification 2020* and restore the Petitioner to the same economic position as if such ‘change in law’ event had not occurred. Further, in the Rejoinder dated 27.10.2023, the Petitioner has submitted that the instant Petition was filed by the Petitioner on 14.09.2021, i.e., before the commissioning of the Project. However, the Petitioner has commissioned the entire project on 25.03.2022. Therefore, in the changed circumstances, the Petitioner has submitted that, in order to avoid multiplicity of proceedings, the Respondents may be directed to pass on the effect in regard to the costs incurred by the Petitioner.

Factual Matrix:

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

Location	Village Jetsar, Sri Ganganagar, district Rajasthan
Nodal agency	SECI
Tariff	Rs.2.50/kWh
Capacity (MW)	160 MW
Power	Solar
Date of notification of Safeguard Duty Notification No. 01/2018 Custom (SG) (2018 SGD Notification)	30.07.2018
RfS issued on	22.03.2019
Bid submitted on	04.06.2019
E-Reverse auction held on	19.06.2019
Letter of Intent (LoI) issued on	16.09.2019
Power Sale Agreement (PSA) executed on	12.09.2019
Effective date of the PPA	16.10.2019
PPA executed on	25.10.2019
Date of implementation of Safeguard Duty Notification No. 2/2020-Custom (SG) dated 29.07.2020 (2020 SGD Notification)	30.07.2020
SCOD of the project as per PPA	16.04.2021
Revised SCODs as per SECI	16.09.2021; 01.12.2021; 25.03.2022
Commercial Operation date (COD) of the project	80 MW- 22.10.2021 80 MW- 25.03.2022

8. The present petition was filed on 21.09.2021. The Commission, vide order dated 15.02.2022, disposed of the Petition in line with the *Electricity (Timely Recovery of Costs due to Change in*

Law), Rules 2021 dated 22.10.2021. However, pursuant to the directions of the Appellate Tribunal for Electricity (APTEL) vide order dated 05.04.2022 in in O.P No. 1 of 2022 and Appeal Nos. 116, 74, 75 & 76 of 2022, the matter was again listed on 17.05.2022, wherein the Commission directed the parties to file their respective written submissions. The Commission vide order dated 14.06.2022 in Petition No. 8/SM/2022, in the exercise of its suo-motu powers of review, restored the present petition to the same stage as existed prior to the disposal of the petition and directed the parties to complete their pleadings within one month. The matter was again listed for hearing on 23.08.2023, where the Commission upon hearing the submission of parties, reserved the matters for orders and directed the parties to file their respective submissions. Pursuant to the directions of the Commission, RUVNL and SECI filed their reply in the Petition on 14.09.2023 and 20.10.2023, respectively. Further, NGEL filed respective rejoinders on 18.09.2022 and 29.10.2023.

Analysis and Decision:

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

10. On the basis of the submissions of the contracting parties, the following issues arise for adjudication:

Issue No. I: *Whether the introduction of Notification No.02/2020- Custom (SG) dated 29.07.2020 issued by the Department of Revenue, Ministry of Finance, Government of India, amount to Change in Law events under Article 12 of the Power Purchase Agreement dated 25.10.2019? AND Whether the Petitioner is entitled to compensation towards additional expenditure on account of the Change in Law event in terms of Article 12.2 of the PPA?*

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

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

11. Now, we proceed to discuss the above issues.

Re: Issue No. I:

Whether the introduction of Notification No.02/2020- Custom (SG) dated 29.07.2020 issued by the Department of Revenue, Ministry of Finance, Government of India, amount to Change in Law events under Article 12 of the Power Purchase Agreement dated 25.10.2019? AND Whether the Petitioner is entitled to compensation towards additional expenditure on account of the Change in Law event in terms of Article 12.2 of the PPA?

12. Briefly, NGEL has submitted that the *2020 SGD Notification* may be declared as a Change in Law event under Article 12 of the Power Purchase Agreement dated 25.10.2019, which has led to an increase in the expenditure for the project. NGEL has submitted that the *2018 SGD Notification* dated 30.07.2018 was valid only for a period of two years i.e., till 29.07.2020. A fresh *2020 SGD Notification* was issued imposing safeguard duty on the import of solar cells and modules at the prescribed rates. The *2020 SGD Notification* is an event of Change in Law in terms of the PPA dated 25.10.2019 as it has imposed SGD after the bid submission date, i.e. 04.06.2019 and such imposition was not factored by NGEL at the time of bid submission. Although the imposition of SGD on the import of solar cells has been continuous, the same has occurred by virtue of the issuance of two separate notifications, i.e. on 30.07.2018 and 29.07.2020, respectively. Further, NGEL has only sought relief towards adverse impact which has occurred due to subsequent changes in the structure of taxes including duties which clearly fall within the purview of Article 12 of the PPA.
13. ***Per-contra***, SECI has submitted that the onus is on the Petitioner to demonstrate that the *2020 SGD Notification* has resulted in the Petitioner incurring additional expenditure as against the envisaged expenditure as on the bid submission date. Safeguard Duty was applicable under the Notification dated 30.07.2018, which existed at the time of the bid deadline, i.e. 15.02.2019, and the Petitioner was required to factor the impact of the same in the tariff quoted by it in the bidding process. The Petitioner will not be entitled to any relief in respect of such goods. Further, RUVNL has submitted that there was no provision in the RfS which states at what time the power developer will procure the solar panels. The Petitioner was supposed to quote the rates based on the taxes and duties as applicable on the last date of the bid. On the last date of submission of the bid, the SGD was 25% *ad valorem*, and the Petitioner was to take into account the same at the time of bidding. The bidding documents do not require or mandate the import of equipments from any particular country. The date by which to procure the solar panels was solely a commercial decision taken by the Petitioner while being fully aware of the existence of the *2018 SGD Notification*. Further, the *2020 SGD Notification* cannot be termed

as a change in law event as the same is in continuation of the 2018 SGD Notification. Vide the 2020 SGD Notification, the SGD has, in fact, been reduced to 14.9% *ad valorem* minus anti-dumping duty for the period of import of solar panels between the period from 30.07.2020 to 29.01.2021 and 14.5% *ad valorem* minus anti-dumping duty between the period from 30.01.2020 to 29.07.2021 and Petitioner ought to reimburse the difference in the SGD on account of the downward revision of the SGD as applicable as on date of bid submission.

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

“12. ARTICLE 12: CHANGE IN LAW

12.1 Definitions

In this Article 12, the term Change in Law shall refer to the occurrence of any of the following events pertaining to this project only after the last date of the bid submission, including

- (i) the enactment of any new law; or*
- (ii) an amendment, modification or repeal of an existing law; or*
- (iii) the requirement to obtain a new consent, permit or license; or*
- (iv) any modification to the prevailing conditions prescribed for obtaining an consent, permit or license, not owing to any default of the Solar Power Generator; or*
- (v) any change in the rates of any Taxes including any duties and cess or Introduction of any new tax made applicable for setting up the Solar power project and supply of power from the Solar Power project by the SPD Which have a direct effect on the Project.*

However, Change in Law shall not include (i) any change in taxes on corporate income or (ii) any change in any withholding tax on income or dividends distributed to the shareholders of the SPD, or (iii) any change on account of regulatory measures by the Appropriate Commission

In the event a Change in Law results in any adverse financial loss/ gain to the Solar Power Generator then, in order to ensure that the Solar Power Generator 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 Solar Power Generator/ Procurer shall be entitled to compensation by the other party, as the case may be, subject to the condition that the quantum and mechanism of compensation payment shall be determined and shall be effective from such date as may be decided by the Appropriate Commission. In the event of any decrease in the recurring/ nonrecurring expenditure by the SPD or any income to the SPD on account of any of the events as indicated above, SPD shall file an application to the appropriate commission no later than sixty (60) days from the occurrence of such event, for seeking approval of Change in Law. In the event of the SPD failing to comply with the above requirement, in case of any gain to the SPD, SECI shall withhold the monthly tariff payments on immediate basis, until compliance of the above requirement by the SPD.

12.2 Relief for Change in Law

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

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

15. As per the 2018 SGD Notification, the Central Government imposed safeguard duty as per the following rates on the import of “Solar Cells whether or not assembled in modules or panels”:

- a) 25% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th July 2018 to 29th July 2019;
- b) 20% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th July 2019 to 29th January 2020;
- c) 15% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th January 2020 to 29th July 2020.

16. The extract of the 2020 SGD Notification is as under:

- ...
- (a) *fourteen point nine per cent. ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30th July, 2020 to 29th January, 2021 (both days inclusive); and*
 - (b) *fourteen point five per cent. ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30th January, 2021 to 29th July, 2021 (both days inclusive).*

17. From the above, we note that any application of a new tax or an amendment, modification or repeal of an existing law is covered as a ‘Change in Law’. We observe that the 2020 SGD Notification stipulated fourteen point nine per cent (14.9%) ad valorem minus anti-dumping duty payable on subject goods when imported during the period from 30.07.2020 to 29.01.2021 (both days inclusive); and fourteen point five per cent (14.5%) ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30.01.2021 to 29.07.2021 (both days inclusive). The impact of the ‘Safeguard Duty’ notification is on any portion of import whose point of taxation is on or after implementation of the Notification dated 29.07.2020, and the same will be subjected to the purview of ‘Safeguard Duty’. The Commission is of the view that a fresh ‘Safeguard Duty’ became effective from 30.07.2020, and hence, the notification/imposition of ‘Safeguard Duty’ will directly affect the projects where “solar cells, whether or not assembled in modules or panels” were imported on or after 30.07.2020. In the present instance, the 2020 SGD Notification has imposed a fresh Safeguard Duty till 29.07.2021 and has thereby increased the rate of the Safeguard Duty from ‘zero’ to 14.9% & 14.5% for the period- 30.07.2020 to 29.01.2021 and 30.01.2021 to 29.07.2021, respectively.

18. The Commission further observes that clause (v) of Article 12 of the PPA, in seriatim, specifically stipulates that *any change in rates of taxes, duties and cess, or introduction of any new tax made applicable for setting up of Solar Power Project and supply of power from the Solar Power Project by the SPD which have a direct effect on the Project*. The *2020 SGD Notification* dated 29.07.2020 has been issued by the Ministry of Finance, Government of India. The impugned notification has been enacted by an Act of Parliament. The change in the rate of safeguard duty has resulted in a change in the cost of the inputs required for generation, and the same is considered a 'Change in Law'. Hence, we are of the view that the impugned notifications, viz. *2020 SGD Notification* is a Change in Law event as per Article 12 of the PPA dated 13.08.2019. It is pertinent to mention here that the view taken is consistent with similar orders taken up by the Commission, viz. *Order dated 20.01.2023 in Petition No. 722/MP/2020 & 723/MP/2020; Order dated 21.04.2023 in Petition No. 219/MP/2020; Order dated 02.06.2023 in Petition No. 168/MP/2020, Order dated 16.10.2023 in Petition No. 228/MP/2021 and Order dated 15.12.2023 in Petition No. 207/MP/2021*.
19. In view of the discussion in the preceding paras, we hold that the introduction of Notification No.02/2020- Custom (SG) dated 29.07.2020 issued by the Department of Revenue, Ministry of Finance, Government of India, amounts to a Change in Law event under Article 12 of the Power Purchase Agreement dated 25.10.2019.
20. In the instant petition, the bid was submitted by the Petitioner on 04.06.2019. PPA was executed between the Petitioner and the SECI on 25.10.2019, and the SCoD of the project was 10.04.2021. In terms of the extended SCoD, the Project was required to be commissioned on or before 25.03.2022. The project was commissioned in parts, i.e. the first 80 MW was commissioned on 22.10.2021, and the remaining 80 MW was commissioned on 25.03.2022. We observe that a fresh safeguard duty was imposed vide Safeguard Duty Notification No. 2/2020-Custom (SG) dated 29.07.2020 w.e.f. 30.07.2020. As such, we hold that the Petitioner's project was affected by the said notification. Therefore, the Petitioner is entitled to compensation on account of Change in Law as per the terms of Article 12 of the PPA due to impugned notification viz. *2020 SGD Notification*.
21. The issue is decided accordingly.

Re: Issue No.II:

What should be the discount rate for the calculation of Annuity for payment of compensation (if any) on account of a Change in Law?

22. NGEL has submitted that the PPA signed between the Petitioner and the Respondent especially Article 12.2.1, does not devise a specific mechanism for recovery of Change in Law compensation, and for such compensation, the parties have been relegated to this Commission. Therefore, in the absence of an agreed mechanism for restitution, the Petitioner invoked the Regulatory Power of the Commission as vested by the Act under Section 79 (1)(a). The period for payment of the compensation on account of the *2020 SGD Notification* has to be 13 years from the date of the COD/cut-off date. Further, NGEL submitted that:
- a) The debt-equity ratio is 70:30, and the post-tax Return on Equity (hereinafter referred to as RoE) allowed is 14% (pretax RoE will be 18.71% if grossed up with the current effective tax rate @25.17%);
 - b) The RoE for the Petitioner should be 18.71 % (pre-tax) return on 30% value of project cost i.e. 18.71 % (pretax).
 - c) Therefore, the effective annuity rate should be a weighted average between the cost of debt and the cost of equity ($10.41\% \times 70\% + 30\% \times 18.71\% = 12.90\%$) needs to be considered.
23. *Per-contra*, SECI has submitted that the reconciled claim is to be paid on a Monthly Annuity basis unless the buying entities specifically agree to make a lump-sum payment and further duly make such payment in discharge of its obligation. Accordingly, the impact of Change in Law occurring after the cut-off date can be serviced through an annuity. There has been a fall in the interest rate of loans, and there has been notification of RE Tariff Regulations, 2020 and RE Tariff Order dated 31.03.2021. In the said regulations read with the RE tariff Order, the Central Commission has considered an interest rate of 9% and the term of the Loan repayment as 15 years instead of 13 years considered earlier. The same parameters for making payment on an annuity basis may be considered by the Commission in case compensation is allowed. Further, the Rajasthan Discoms may be directed to make a payment towards the evaluated claims of the Safeguard Duty and Customs Duty payable by SECI to the Petitioner on a back-to-back basis under the PSA in a time-bound manner.

24. It was placed before us that this Commission, in its order dated 20.08.2021 in Petition No. 536/MP/2020, has already decided on the methodology of compensation due to a Change in Law event as under:

65. *We find that in Petition No. 536/MP/2020, SECI and the Respondents (SPDs as well as the Discoms) are on the same page in so far as the rate of interest on loan is considered. This is evident from the computation of the weighted average cost of capital advanced by the contending parties. Majority of the parties have used 10.41% (as mentioned in the CERC RE Tariff Order dated 19.03.2019) as the reference rate of interest for building their arguments for the rate of annuity payment. In other words, the parties have accepted this rate as the appropriate normative rate of interest for any debt that they might have taken. Given the fact that it is not possible in case of competitive bidding projects to ascertain either the capital structuring (extent of debt and equity) of the projects, or the actual rate of interest of the debt component or the expected rate of return on equity, we consider it appropriate to use the normative rate of 10.41% as reference for the purpose of annuity payment. As the actual deployment of capital by way of debt or equity and their cost in terms of rate of interest or return, respectively, is unknown, the rate 10.41% can be taken as the uniform rate of compensation for the entire expenditure incurred on account of GST Laws or Safeguard Duty. The Commission is of the view that the compensation for change in law cannot be a source for earning profit, and therefore, there cannot be any higher rate of return than the prevailing normative cost of debt. Accordingly, we hold that 10.41% shall be the discount rate of annuity payments towards the expenditure incurred on GST or Safeguard Duty (as the case may be) by the Respondent SPDs on account of 'Change in Law'.*

Commencement of 'Monthly Annuity Payments' and "Late Payment Surcharge"

66. *Further, SPDs have submitted that the 'Monthly Annuity Payment' of GST claims ought to start from COD taking into consideration the provisions of applicable 'Late Payment Surcharge' in the PPAs in case of delayed payments*
67. *We observe that in the Petitions filed by the SPDs where claims under Change in Law were adjudicated, the Commission has directed SPDs to make available to SECI/ Discoms all relevant documents exhibiting clear and one to one correlation between the projects and the supply of goods or services, duly supported by the relevant invoices and Auditor's Certificate. SECI/ Discoms were further directed to reconcile the claims for Change in Law on receipt of the relevant documents and pay the amount so claimed to SPDs. It was also held that SECI is liable to pay to SPDs which is not conditional upon the payment to be made by the Discoms to SECI. However, SECI is eligible to claim the same from the Discoms on 'back to back' basis. The claim was directed to be paid within sixty days of the date of respective orders or from the date of submission of claims by SPDs whichever was later failing which it will attract late payment surcharge as provided under PPAs/PSAs. Alternatively, SPDs and the SECI/ Discoms may mutually agree to a mechanism for the payment of such compensation on annuity basis spread over the period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs.*

68. *In view of the above, the liability of SECI/ Discoms for ‘Monthly Annuity Payment’ starts from 60th (sixtieth) day from the date of orders in respective petitions or from the date of submission of claims by the Respondent (SPDs), whichever is later. In case of delay in the Monthly Annuity Payment beyond the 60th (sixtieth) day from the date of orders in respective petitions or from the date of submission of claims by the Respondent (SPDs), whichever is later, late payment surcharge shall be payable for the delayed period corresponding to each such delayed Monthly Annuity Payment(s), as per respective PPAs/PSAs.*

Tenure of ‘Annuity Period’

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

“14. Loan and Finance Charges

Loan Tenure

For the purpose of determination of tariff, loan tenure of 13 years shall be considered.”

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

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

26. We note that NGEL’s project achieved actual commercial operation in two parts, i.e. the first 80 MW achieved commercial operation on 22.10.2021, and the remaining 80 MW achieved commercial operation on 25.03.2022, which is during FY 2021-22. The Commission notified the RE Tariff Order dated 31.03.2021 for FY 2021-22 in pursuance of the CERC (*Terms and*

Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020. In the said RE tariff Order, the Commission considered the interest rate of 9% and the term of the loan repayment as 15 years. Thus, we hold that the discount rate of 9% and annuity period of 15 years shall be the appropriate methodology towards change in law compensation.

27. Further, the Commission holds that the liability of SECI/ Discoms for 'Monthly Annuity Payment' starts from the 60th (sixtieth) day from the date of this order or from the date of submission of claims by the Petitioner, whichever is later. In case of delay in the Monthly Annuity Payment beyond the 60th (sixtieth) day from the date of this order or from the date of submission of claims by the Petitioner, whichever is later, a late payment surcharge shall be payable for the delayed period corresponding to each such delayed Monthly Annuity Payment(s), as per respective PPAs/PSAs.
28. The issue is decided accordingly.

Re: Issue No. III

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

29. NGEL has submitted that it is entitled to claim carrying costs as Article 12.1 of the PPA specifically contains a restitutive provision. Reliance is placed on the Hon'ble Supreme Court judgement dated 25.02.2019 in the matter of Uttar Haryana Bijili Vitran Nigam Ltd. And Anr v. Adani Power Ltd. And Ors (*Uttar Haryana judgement*) Petitioner is required to be compensated for the time value of money lost due to occurrence of change in law events. Carrying cost is payable to offset the deprivation and to give time value of money. *Per-contra*, RUVNL has submitted that NGEL is not entitled to claim carrying costs on the alleged Change in Law event. SECI has submitted that carrying cost is to be restricted to the cost of financing of a prudent and efficient utility i.e. the interest rate at which such utility can borrow money from the lenders and financial institutions after due and sincere efforts to minimize the interest cost. The judgment of the APTEL dated 15.09.2022 has been assailed before the Supreme Court in Civil Appeal no. 8880/2022 in the case of "*Telangana Northern Power Distribution Co. Ltd. & Anr. Vs. Parampujya Solar Energy Pvt. Ltd. & Ors.*". SECI has further submitted that the final order by this Commission in this matter shall not be enforced till further orders are passed by the Hon'ble Supreme Court.
30. We observe that Article 12 of the PPA deals with Change in Law, inter-alia, as under:

ARTICLE 12: CHANGE IN LAW

12.1 Definitions

In this Article 12, the term Change in Law shall refer to the occurrence of any of the following events pertaining to this project only after the last date of the bid submission, including

- (i) the enactment of any new law; or*
- (ii) an amendment, modification or repeal of an existing law; or*
- (iii) the requirement to obtain a new consent, permit or license; or*
- (iv) any modification to the prevailing conditions prescribed for obtaining an consent, permit or license, not owing to any default of the Solar Power Generator; or*
- (v) any change in the rates of any Taxes including any duties and cess or Introduction of any new tax made applicable for setting up the Solar power project and supply of power from the Solar Power project by the SPD Which have a direct effect on the Project.*

However, Change in Law shall not include (i) any change in taxes on corporate income or (ii) any change in any withholding tax on income or dividends distributed to the shareholders of the SPD, or (iii) any change on account of regulatory measures by the Appropriate Commission

In the event a Change in Law results in any adverse financial loss/ gain to the Solar Power Generator then, in order to ensure that the Solar Power Generator 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 Solar Power Generator/ Procurer shall be entitled to compensation by the other party, as the case may be, subject to the condition that the quantum and mechanism of compensation payment shall be determined and shall be effective from such date as may be decided by the Appropriate Commission. *In the event of any decrease in the recurring/ nonrecurring expenditure by the SPD or any income to the SPD on account of any of the events as indicated above, SPD shall file an application to the appropriate commission no later than sixty (60) days from the occurrence of such event, for seeking approval of Change in Law. In the event of the SPD failing to comply with the above requirement, in case of any gain to the SPD, SECI shall withhold the monthly tariff payments on immediate basis, until compliance of the above requirement by the SPD.*

12.2 Relief for Change in Law

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

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

31. We observe that the Hon’ble Supreme Court vide *Uttar Haryana judgement* dated 25.02.2019 has held as under:

Article 13.2 is an in-built restitutionary principle which compensates the party affected by such change in law and which must restore, through monthly tariff

payments, the affected party to the same economic position as if such change in law has not occurred. This would mean that by this clause a fiction is created, and the party has to be put in the same economic position as if such change in law has not occurred, i.e., the party must be given the benefit of restitution as understood in civil law...

...

13. A reading of Article 13 as a whole, therefore, leads to the position that subject to restitutionary principles contained in Article 13.2, the adjustment in monthly tariff payment, in the facts of the present case, has to be from the date of the withdrawal of exemption which was done by administrative orders dated 06.04.2015 and 16.02.2016. The present case, therefore, falls within Article 13.4.1(i). This being the case, it is clear that the adjustment in monthly tariff payment has to be effected from the date on which the exemptions given were withdrawn. This being the case, monthly invoices to be raised by the seller after such change in tariff are to appropriately reflect the changed tariff. On the facts of the present case, it is clear that the respondents were entitled to adjustment in their monthly tariff payment from the date on which the exemption notifications became effective. **This being the case, the restitutionary principle contained in Article 13.2 would kick in for the simple reason that it is only after the order dated 04.05.2017 that the CERC held that the respondents were entitled to claim added costs on account of change in law w.e.f. 01.04.2015. This being the case, it would be fallacious to say that the respondents would be claiming this restitutionary amount on some general principle of equity outside the PPA. Since it is clear that this amount of carrying cost is only relatable to Article 13 of the PPA, we find no reason to interfere with the judgment of the Appellate Tribunal.**

32. From the above, we observe that Article 12.1 of the PPA dated 25.10.2019 specifically stipulates that in the event a Change in Law results in any adverse financial loss/ gain to the solar power generator, in order to ensure that the solar power generator 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 solar power generator shall be entitled to compensation. We further observe that the Hon'ble Supreme Court vide *Uttar Haryana judgement* dated 25.02.2019 has held that in case there is an in-built restitutionary principle in the PPA, the affected party has to be put in the same economic position if such change in law has not occurred, i.e., the party must be given the benefit of restitution as understood in civil law.

33. NGEL, in the instant petition, shall be eligible for carrying costs starting from the date when the actual payments were made to the authorities until the date of issuance of this Order at the actual rate of interest paid by NGEL for arranging funds (supported by Auditor's Certificate) or the rate of interest on working capital as per the applicable RE Tariff Regulations prevailing at that time or the late payment surcharge rate as per the PPA, whichever is the lowest. Once a supplementary bill is raised by NGEL in terms of this order, the provision of Late Payment

Surcharge in the PPA would kick in if the payment is not made by the Respondents within the due date.

34. Accordingly, the Commission hereby directs the contracting parties to carry out the reconciliation of additional expenditure along with carrying cost by exhibiting clear and one-to-one correlation with the projects and the invoices raised supported with an auditor certificate. The Commission further directs that the responding discoms are liable to pay SECI all the above-reconciled claims that SECI has to pay to NGEL. However, payment to the Petitioners by SECI is not conditional upon the payment to be made by the responding Discoms to SECI.
35. Further, APTEL, vide judgment dated 15.09.2022 in A.No. 256 of 2019 & Batch titled as *Parampujya Solar Energy Private Limited &Ors. vs. CERC &Ors (Parampujya judgement)*. held as under:

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

36. The Hon'ble Supreme Court, in its Order dated 12.12.2022, in Civil Appeal no. 8880/2022 in the case of "*Telangana Northern Power Distribution Co. Limited & Anr. Vs. Parampujya Solar Energy Pvt. Limited & Ors.*" (and in similar Orders dated 03.01.2023 and 23.01.2023) has held as under:

"Pending further orders, the Central Electricity Regulatory Commission (CERC) shall comply with the directions issued in paragraph 109 of the impugned order dated 15

September 2022 of the Appellate Tribunal for Electricity. However, the final order of the CERC shall not be enforced pending further orders.”

37. Therefore, the directions issued in this Order so far as they relate to additional compensation for the period pre-COD claims only shall be enforced, and the directions issued in this Order so far as they relate to additional compensation (including carrying cost) for the period post-Commercial Operation Date of the project shall not be enforced and shall be subject to further orders of the Hon'ble Supreme Court in Civil Appeal No. 8880/2022 in *Telangana Northern Power Distribution Company Limited & Anr. V. Parampujya Solar Energy Pvt. Limited & Ors*, and connected matters.
38. The issue is decided accordingly.
39. The summary of our findings is as follows:
- a) The *2020 SGD Notification* is a Change in Law event in terms of Article 12 of the PPA dated 25.10.2019.
 - b) NGEL is entitled to compensation on account of Change in Law as per the terms of Article 12 of the PPA due to the impugned notifications viz. *2020 SGD Notification*. The contracting parties shall carry out the reconciliation of additional expenditure along with carrying cost by exhibiting clear and one-to-one correlation with the projects and the invoices raised supported with an auditor certificate.
 - c) Compensation is to be paid at the discount rate of 9% and an annuity period of 15 years. The liability of SECI/ Discoms for '*Monthly Annuity Payment*' shall start from the 60th (sixtieth) day from the date of this order or from the date of submission of claims by the Petitioner, whichever is later. Late payment surcharge shall be payable for the delayed period corresponding to each such delayed Monthly Annuity Payment(s), as per respective PPA/PSA.
 - d) NGEL shall also be eligible for carrying cost starting from the date when the actual payments were made to the Authorities till the date of issuance of this Order, at the actual rate of interest paid by the Petitioner for arranging funds (supported by Auditor's Certificate) or the rate of interest on working capital as per applicable RE Tariff Regulations prevailing at that time or the late payment surcharge rate as per the PPA, whichever is the lowest. Once a supplementary bill is raised by the Petitioner in terms

of this order, the provision of a Late Payment Surcharge in the PPA would kick in if the payment is not made by the Respondents within the due date.

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

40. The Petition No. 206/MP/2021 is disposed of in terms of the above.

Sd/-
पी. के. सिंह
सदस्य

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अरुण गोयल
सदस्य

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आई. एस. झा
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