



नई दिल्ली  
NEW DELHI

याचिका संख्या/ Petition No.: 216/MP/2022

कोरम/ Coram:

श्री आई. एस. झा, सदस्य/ Shri I. S. Jha, Member  
श्री अरुण गोयल, सदस्य/ Shri Arun Goyal, Member  
श्री पी. के. सिंह, सदस्य / Shri P. K. Singh, Member

आदेश दिनांक/ Date of Order: 05<sup>th</sup> of April, 2023

**IN THE MATTER OF:**

Petition under Section 79(1)(b) and 79(1)(f) of the Electricity Act, 2003 read with Article 12 of the Power Purchase Agreement dated 13.06.2020 executed between ABC Renewable Energy (RJ- 01) Pvt. Ltd. And NTPC Ltd. seeking declaration that change in rate of Goods and Services Tax from 5% to 12% w.e.f. 1.10.2021 on account of amendment to Notification Nos. 1/2017-Central Tax (Rate), 01/2017-Intergrated Tax (Rate) dated 28.06.2017 and Finance Department (Govt. of Rajasthan) Notification No. F.12(56)FD/Tax/2017-Pt-I-40 dated 29.6.2017 by way of Notification No. 8/2021-Central Tax (Rate), Notification No. 8/2021- Integrated Tax (Rate) dated 30.9.2021 and Finance Department (Govt. of Rajasthan) Notification No. F.12(1)FD/Tax/2021-60 dated 30.9.2021 as a 'change in law' event under Article 12 of the PPA and to further direct NTPC Ltd. to pay the compensation along with applicable carrying cost towards additional expenditure incurred on account of increase in rate of Goods and Services Tax and paid by the Petitioner, in order to restitute the Petitioner to the same economic position as it would have been prior to the Notifications dated 30.9.2021.

**AND IN THE MATTER OF:**

**ABC Renewable Energy (RJ-01) Private Limited.**

Through its Authorized Signatory  
Having its registered office at  
Plot No. 47,48,49, Street No. 1, 2nd Avenue  
Patrika Nagar, Madhapur  
Hyderabad-500081

**... Petitioner**

**Versus**

**1. NTPC Limited,**

Scope Complex, Core-6, VIth Floor  
7, Institutional Area, Lodhi Road,  
Delhi-110023

**2. Electricity Department, Government of Puducherry,**

137, NSC Bose Salai,  
Puducherry-605001

**3. Madhya Pradesh Power Management Company Limited,**

Regional Office, MPPMCL  
Bhopal, Madhya Pradesh

**... Respondents**

**Parties Present:**

Shri Sujit Ghosh, Advocate, AREPL  
Shri Nishant Kumar, Advocate, AREPL  
Shri Animesh Kumar, Advocate, AREPL  
Shri Mohm Munis Siddique, AREPL  
Shri Mridul Gupta, AREPL  
Shri Adarsh Tripathi, Advocate, NTPC  
Shri Vikram Singh, Advocate, NTPC  
Shri Ajitesh Garg, Advocate, NTPC  
Shri Nitin Gaur, Advocate, MPPMCL

## आदेश/ ORDER

The Petitioner, M/s ABC Renewable Energy (RJ-01) Private Limited a wholly owned subsidiary of ABC Solar (India) Pvt. Ltd. (formerly known as TBEA Solar (India) Private Limited), is setting up and operating 300 MW solar power project located at Village Badi Sid, Tehsil Bap, Dist. Jodhpur, Rajasthan (hereinafter referred to as Power Project/ Project). The Petitioner has filed petition under Section 79(1)(b) and 79(1)(f) of the Electricity Act, 2003 read with Article 12 of the Power Purchase Agreement (PPA) dated 13.06.2020 and is seeking declaration that change in rate of Goods and Services Tax from 5% to 12% w.e.f. 01.10.2021 amounts to 'change in law' event under Article 12 of the PPA and to pay the compensation in order to reconstitute the Petitioner to the same economic position.

2. The Respondent No. 1, NTPC is a Trading Licensee under the provisions of the Electricity Act, 2003 and has been designated/ appointed to act as an intermediary to facilitate the development of ISTS connected solar power projects for purposes of procuring solar power from the SPDs and supply the said power to the Discoms on back to back basis.
3. The Respondent No. 2, Electricity Department, Government of Puducherry (PED), is a distribution licensee having its distribution network in the Union Territory of Puducherry.
4. The Respondent No. 3, Madhya Pradesh Power Management Company Ltd. (MPPMCL), is a holding company of Discoms of the State of Madhya Pradesh.
5. The Petitioner has made the following prayers:
  - a) *Admit the Petition;*
  - b) *Acknowledge and approve the introduction of Notification No. 8/2021-Central Tax (Rate), Notification No. 8/2021- Intergrated Tax (Rate) dated 30.09.2021 issued by Ministry of Finance, Government of India and Notification No. F.12(1)FD/Tax/2021-60 dated 30.09.2021 issued by Finance Department, Government of Rajasthan, as a change in law event under Article 12 of the PPA;*

- c) *Hold and Declare that the Petitioner is entitled to claim relief under Article 12.2 of the PPA for the additional expenditure attracted on account of the change in law event, i.e. introduction of Notifications dated 30.09.2021 issued by the Ministry of Finance, Government of India and Finance Department, Government of Rajasthan [Annexure P-9 (Colly.)];*
- d) *Direct the Respondents to pay a one time compensation of Rs. 83,43,36,856 (Indian Rupees Eighty-Three Crores Forty-Three Lakhs Thirty – Six Thousand Eight Hundred and Fifty Six Only), with applicable interest, to the Petitioner in lieu of the additional expenditure attracted on account of the aforesaid change in law event;*
- e) *Direct the Respondents to reimburse the carrying costs incurred by the Petitioner from the period of payment of additional expenditure attracted on account of the aforesaid change in law event, upto the date of reimbursement by the Respondents;*
- f) *In the alternative to prayer d) above, direct the Respondent to make payment of Rs.83,43,36,856 (Indian Rupees Eighty-Three Crores Forty-Three Lakhs Thirty – Six Thousand Eight Hundred and Fifty Six Only), towards Change in Law Compensation by way of annuity method by considering discounting factor at SBI–MCLR one year interest rate + 200 bps;*
- g) *In the alternative to prayer f) above, devise a methodology for recovery of the Change in Law Compensation along with applicable carrying cost and interest thereof, in a time bound manner;*
- h) *Direct the Respondent to reimburse the legal and administrative costs incurred by the Petitioner in pursuing the instant petition; and*
- i) *Pass such other orders that this Hon'ble Commission deems fit in the facts of this case.*

**Brief Background:**

6. In pursuance to the Guidelines issued by Ministry of Power dated 03.08.2017, NTPC invited proposals for setting up of ISTS-connected solar power projects pan-India, on “Build, Own, and Operate” basis for an aggregate capacity of 2000 MW (subsequently amended to 1200 MW). On 10.08.2019, NTPC issued a request for selection (RfS) document for setting up of 1200 MW ISTS – connected solar PV power projects.

7. On 30.09.2019, *M/s TBEA Solar (India) Private Limited* (the Petitioner's parent company), submitted its bid with the intention of developing, generating and sale of 300 MW solar power from its Power Project. On 25.10.2019, e-reverse auction was conducted and *M/s TBEA Solar (India) Private Limited* the Petitioner was declared as the successful bidder with the levelized tariff of Rs. 2.63 per kWh with allocated capacity of 300 MW. On 20.11.2019, a Letter of Award (LOA) was issued by NTPC in favour of *M/s TBEA Solar (India) Private Limited*. *M/s TBEA Solar (India) Private Limited* created the Project Company/SPV *M/s ABC Renewable Energy (RJ-01) Private Limited* (the Petitioner) to set up the Solar Power Project based on Photo Voltaic technology of 300 MW capacity in the State of Rajasthan as per the terms and conditions of the RfS. On 13.06.2020, the Petitioner and NTPC, executed a PPA for supply of 300 MW solar power from the Power Project of the Petitioner on back to back basis. On 05.01.2021, NTPC entered into a back to back Power Supply Agreement (PSA) with Respondent No. 2 for supply of 100 MW solar power on long term basis. On 30.04.2021, NTPC executed another back to back PSA with Respondent No. 3/ MPPMCL for supply of the remaining 200 MW solar power on long term basis out of the 300 MW solar power capacity. On 05.05.2021, a Supplementary PPA was executed between the Petitioner and NTPC. The Petitioner was required to achieve financial closure by 13.06.2022. The Scheduled Commissioning Date of the project is six months from the date of completing the Financial Closure. As such, the SCoD was 12.12.2022 as per PPA. On 30.09.2021, the Department of Revenue under the Ministry of Finance, Government of India issued notifications vide which the rate of Goods and Services Tax on certain items and objects was raised from 5% to 12% w.e.f. 01.10.2021.

**Submissions of the Petitioner:**

8. The Petitioner has submitted as under:
- a) While the Power Project was under construction, the Department of Revenue under the Ministry of Finance, Government of India, on 30.09.2021, issued notifications bearing Notification No. 8/2021-Central Tax (Rate), Notification No. 8/2021- Intergrated Tax (Rate) and Government of Rajasthan, Finance Department (Tax Division) issued Notification No. F.12(1)FD/Tax/2021-60 dated 30.09.2021 vide which the rate of Goods and Services Tax on certain items and objects was raised from 5% to 12% w.e.f. 01.10.2021.

- b) The Notifications dated 30.09.2021 amended the notification of the Ministry of Finance, Government of India, bearing Notification Nos. 1/2017-Central Tax (Rate), 01/2017-Intergrated Tax (Rate) dated 28.06.2017 and Finance Department (Govt. of Rajasthan) Notification No. F.12(56)FD/Tax/2017-Pt-I-40 dated 29.06.2017. As a result of the Notifications dated 30.09.2021, GST at the rate of 12% became payable on the solar cells and modules instead of 5% on the taxable value of the solar modules for setting up the solar Power Project. As a result, the solar cells and modules procured by the Petitioner for setting up of the Project attracted GST of 12% instead of 5% as envisaged by the Petitioner at the time of bidding.
- c) As a result, the Notifications dated 30.09.2021 have adversely affected the cost of the Project envisaged by the Petitioner at the time of submitting the bid. The change in GST rates from 5% to 12% introduced vide Notifications dated 30.09.2021 led to increase in cost of the Project. The Petitioner is entitled under the PPA to claim such amounts paid towards inflated GST rate along with the applicable carrying cost from the date of their payment under the change in law clause.

**Re. Change in Law under the PPA**

- d) The bid was submitted on 02.09.2019 and the Notifications were issued on 30.09.2021 which resulted in occurrence of change in law event. Since the aforementioned Change in Law event came in force after the Cut-Off Date, the Petitioner is squarely covered under Article 12 (Change in Law) of the PPA. The introduction of Notifications dated 30.09.2021 amounts to increase/ change in the rates of taxes and qualifies as 'change in law' under the PPA. Such change in GST rates was not contemplated and could not have been factored in at the time of submission of bid or the cut-off date. Therefore, the additional cost levied on the Petitioner due to occurrence of 'change in law' events after the last date of bidding is liable to be reimbursed to the Petitioner.
- e) Once an item of expenditure is established as an event of Change in Law, the said expenditure has to be allowed as a change in law compensation. The Change in Law event has contributed towards the increase in cost for setting up of the Power Project for generating electricity to be supplied to the PED and MPPMCL. The Petitioner is entitled

to claim reimbursement of the such increased costs in terms of the PPA read with the PSA.

- f) As per Article 12 of the PPA, the object of “Change in Law” is to ensure compensation to the generator/ supplier so that the supplier is restored to the same financial position as if such Change in Law had not occurred. This principle envisages that the actual impact of change in law has to be allowed to the Petitioner in the form of compensation. The principle of restitution applies to the Petitioner as well in the event of reduction in cost due to any change in law event as provided under Article 12 of the PPA.
- g) The introduction of Notifications dated 30.09.2021, during the construction phase has considerably increased the cost of Solar Project of the Petitioner. In addition to the solar modules, the Change in Law event has substantially increased the cost of goods supplied by the EPC contractors along with their services. The mechanism for compensation payment be determined by this Commission in order to allow appropriate relief to the Petitioner to recover the additional financial impact of change in GST rate from 5% to 12% w.e.f. 01.10.2021 introduced vide Notifications dated 30.09.2021.
- h) There is a clear and one to one correlation between the construction of the Project, the supplier of goods or services and the invoices raised by the supplier of goods and services to establish that the additional cost was attracted on account of the change in law events.
- i) The tariff quoted by the Petitioner at the time of submitting the bid was quoted on the basis of the existing tax regime at that time. At the time of submitting the bid could not have contemplated the occurrence of the change in law events. The Petitioner is legally as well as contractually entitled to recover the non-recurring additional expenditure amounting to Rs. 83,43,36,856 (Indian Rupees Eighty-Three Crores Forty-Three Lakhs Thirty – Six Thousand Eight Hundred and Fifty Six Only) on account of the change in law event apart from the quantum of carrying cost as applicable to be determined by this Commission.
- j) The Project is situated in the State of Rajasthan and is selling power to more than one state inasmuch as it has PPA/ PSA with the Respondent Nos. NTPC, PED and MPPMCL for generating and sale of power to the Electricity Department, Govt. of Puducherry and to the State of Madhya Pradesh, through Respondent No. 1. Therefore, the Petitioner in terms of Section 79 (1)(b) has a composite scheme for generation and sale of electricity

in more than one State. As such, the present petition can only be adjudicated by this Commission using its powers under Section 79(1)(b) and 79(1)(f) of the Electricity Act, 2003 read with Article 12.2 of the PPA.

**Hearing Dated: 22.09.2022**

9. The matter was listed for hearing on 22.09.2022. After hearing the learned counsel of the parties, the Commission admitted the Petition with the direction to the Respondents and Petitioner to file their respective Replies and Rejoinders.

**Hearing Dated: 13.12.2022**

10. The matter was again listed for hearing on 13.12.2022. During the course of hearing, the Commission held as follows:

*The learned counsel for the Petitioner submitted that the present Petition has been filed, inter-alia, seeking a declaration that change/increase in rate of the Goods and Service Tax (GST) from 5% to 12% w.e.f. 1.10.2021 on account of amendment to the Notification Nos. 1/2017-Central Tax (Rate), 1/2017-Integrated Tax (Rate) dated 28.6.2017 and Finance Department (Govt. of Rajasthan) Notification No. F.12(56)FD /Tax/2017-Pt-I-40 dated 29.6.2017 by way of Notification No.8/2021-Central Tax (Rate), Notification No. 8/2021-Integrated Tax (Rate) dated 30.9.2021 and Finance Department (Govt. of Rajasthan) Notification No.F.12(1)FD/Tax/2021 -60 dated 30.9.2021 as Change in Law event under Article 12 of the Power purchase Agreement dated 13.6.2020 read with Supplementary Power Purchase Agreement dated 5.5.2021 entered into between the Petitioner and NTPC and further direction to NTPC to pay the compensation along with applicable carrying cost towards the additional expenditure incurred by the Petitioner on account of the aforesaid Change in Law event.*

*2. The learned counsel further submitted that increase in the rate of GST by way of the aforesaid Notifications dated 30.9.2021, after the cut-off date i.e.30.9.2019, has led to increase in the Project cost to tune of approximately Rs. 83.43 crore. The learned counsel further submitted that the Petitioner has also prayed for direction to the Respondent to pay the aforesaid amount as one time compensation and alternative on annuity method by considering the discounting factor at SBI MCRL one year interest rate + 200 bps. **The learned counsel further added that the Petitioner has prayed for carrying cost and said issue is now covered by the judgment of Appellate Tribunal for Electricity dated 15.9.2022 in the case of Paramapuja Solar Energy Pvt. Ltd. and Anr. v. CERC& Ors. The learned counsel, however, fairly stated that the said judgment is under challenge before the Hon'ble Supreme Court and Hon'ble Supreme Court vide its interim order has directed to implement the direction of the APTEL subject to outcome of the decision of Hon'ble Supreme court in the matter. The learned counsel further requested that NTPC ought to be directed to at least start the reconciliation process with regard to the Petitioner's Change in Law claims.***



3. Learned counsel for the Respondent, NTPC submitted that NTPC has already filed its reply in the matter. The learned counsel submitted that the Respondent is only an intermediary/facilitator between the Petitioner and the Respondent Nos. 2 & 3, distribution licensees for the purpose of sale of electricity. The learned counsel submitted that in terms of the contractual arrangement between the parties, any liability arising out of Change in Law has to be passed on to these ultimate beneficiaries and therefore, while passing the order, the Commission may also specify the timeline for Respondent Nos. 2 & 3 to make such payments to NTPC.

4. Learned counsel for the Respondent No.3, MPPMCL sought additional time to file reply to the Petition.

5. After hearing the learned counsels for the parties, the Commission directed as under:

(a) Parties to carry out the reconciliation process with regard to the Petitioner's Change in Law claims;

(b) Respondent No. 3 to file its reply, if any, within a week with copy to the Petitioner, who may file its rejoinder thereof, within a week thereafter.

(c) The parties to file written submissions within two weeks with copy to other side.

6. Subject to the above, the matter was reserved for order.”

**Reply by NTPC (Respondent No. 1):**

11. NTPC has briefly submitted as under:

**Re. Respondent DISCOMs failed to act in terms of the respective PSAs executed with the Respondent No. 1**

- a) Both the Power Sale Agreements executed between the NTPC as well as the PED & MPPMCL clearly state that the DISCOMs acknowledge and accept that NTPC is only an Intermediary Company and is facilitating the onward sale of electricity generated by the Petitioner and hence cannot assume independently, any obligation, financial or otherwise, either to the Petitioner or to the DISCOMs.
- b) The Petitioner issued notice dated 12.07.2022 purportedly seeking compensation on account of increase in rates of Goods and Services Tax. In pursuance thereto, the NTPC in accordance with the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 issued by the Ministry of Power, intimated the PED and MPPMCL vide letters dated 02.08.2022 thereby stating that any implication with regard to the Change in Law shall be borne by the PED and MPPMCL, subject to reconciliation, in proportion to allocated power under the respective PSAs executed between the NTPC as well as the DISCOMs. However, the DISCOMs have till date not submitted any response in terms of the said notices as well as the present Petition either to the Petitioner or to the NTPC. The

intent of the PSAs is crystal clear that in case any obligation is enforced by the Petitioner under the PPA against NTPC, the DISCOMs shall be bound to fulfil the obligation on a back to back basis.

- c) The DISCOMs' failure to take any steps towards reconciliation/consideration of the purported claims sought by the Petitioner, as stated in the letter dated 02.08.2022 issued by NTPC is evident of the non-compliance with the terms of the PSA executed with the NTPC as well as their attempts towards shying away from their respective contractual obligations.
- d) The Appellate Tribunal for Electricity (APTEL) in its judgment dated 15.09.2022 in Appeal No. 275 of 2022 and other connected Appeals has approved the principle of passing on the liability of an intermediary under such back to back arrangement, to the ultimate beneficiary.
- e) Therefore, while adjudicating the purported claims of the Petitioner, this Commission has to consider the said view taken by the APTEL and compensation if any, to be paid to the Petitioner has to be duly passed on/borne by the ultimate beneficiary and the Respondent No.1 cannot be solely held liable for any such liabilities.

**Re. NTPC is merely acting as an intermediary/facilitator between the Petitioner as well as the Respondent No.2 and No. 3 for the purpose of sale of electricity.**

- f) The PSAs clearly mandate that in case any obligation enforced by the Petitioner under the PPA against the Respondent No.1, the DISCOMs shall be bound to fulfil the obligation on back to back basis towards the NTPC. By way of the said PSAs the parties agree that the terms of the PPA executed between the Petitioner as well as the NTPC shall *Mutatis Mutandis* apply to this agreement between the Petitioner and the NTPC, in furtherance of which the supplementary PPA was duly signed between the parties therein. The agreed terms between the respective parties under the PPAs as well as the PSAs make it clear that the in-principle arrangement is back to back and NTPC being merely a facilitator for the onward sale of electricity from the Petitioner to the DISCOMs cannot be solely saddled with the burden of any liability arising thereof.

- g) Despite being aware of the said back to back arrangement between the parties herein, from the very inception of the project, the Petitioner has not taken any steps seeking its purported claims from the DISCOMs.

**Rejoinder by the Petitioner:**

12. The Petitioner has reiterated its submission given in the plaint as such the same are not reproduced herewith for the sake of brevity. Additionally, Petitioner has submitted as under:

***Re: The argument of NTPC LTD. that the DISCOMS have failed to act in terms of the respective PSAs.***

- a) Even though the sale of power by the Petitioner to the DISCOMS through NTPC is on a back to back basis, NTPC cannot be allowed to contend that the change in law claim raised by the Petitioner are contingent on the DISCOMS agreeing to reconcile the said change in law claims. NTPC has executed PPAs with the Petitioner in addition to PSAs with the DISCOMs as separate contractual arrangements. Hence, NTPC is duty bound to give effect to the terms and conditions of the said PPAs and PSAs in its entirety.
- b) The failure on part of the DISCOMS to respond to the letters dated 02.08.2022 issued by NTPC in furtherance to the claim raised by the Petitioner, cannot in any manner allow NTPC to renege on its contractual obligations towards the Petitioner.
- c) NTPC had issued letters on 02.08.2022 to the DISCOMS in accordance with the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021. However, the reliance placed on Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 is completely misplaced and misconceived because the change in law events claimed in the present proceedings occurred on 30.09.2021 prior to the promulgation of the said rules. As per the judgment dated 05.04.2022 in O.P. No. 01 of 2022 & Ors. passed by APTEL read with the clarification issued by Ministry of Power on 21.02.2022, the said rules cannot apply retrospectively.
- d) The reliance placed by NTPC upon the judgment dated 15.09.2022 in Appeal No. 275 of 2022 passed by APTEL is misplaced and misconceived since the APTEL has merely held that the liability of an intermediary (SECI in the said case) has to ultimately reach the

door of the ultimate beneficiary. The said judgment passed by APTEL nowhere observes that the payment to the generator by an intermediary is conditional upon payment being received by such intermediary from the DISCOMS. As such, NTPC cannot contend that payment towards the claim of the Petitioner cannot be processed unless the DISCOMS agree to it. Rather, NTPC is duty bound to ensure that cost of power including but not limited to claims on account of change in law events are duly paid to the Petitioner.

***RE: The argument of NTPC that NTPC is acting merely as an Intermediary/ Facilitator between the Petitioner and the Respondent No. 2 & No. 3***

- e) By contending that the sale of power to the DISCOMS is on a back-to back-basis, NTPC cannot shy away from its obligation towards the Petitioner including but not limited to honouring the change in law claims raised in the present petition in accordance with the terms of the PPA. It is not in dispute that the PPAs and PSAs are executed on a back-to-back basis, however, this fact does not exempt NTPC from complying with the terms and conditions of the PPAs.
- f) Without prejudice to its claims against NTPC under the PPA, the Petitioner through the letter dated 12.07.2022, had duly intimated the DISCOMS and NTPC regarding the change in law event. The Petitioner has duly impleaded the DISCOMS in the present proceedings. However, NTPC is simply trying to shift the onus on the Petitioner instead of processing the claims raised by the Petitioner.
- g) From the Order dated 30.11.2022 in Petition No. 293/MP/2018 & Ors. passed by this Commission and Judgment dated 15.09.2022 passed by APTEL, it is apparent that the APTEL did not interfere with the observations made by this Commission wherein this Commission has already held that payment by the intermediary to the generator is not conditional upon such intermediary receiving payment from the DISCOMS. Hence, NTPC cannot contend that the claim raised by the Petitioner can only be processed after the DISCOMS agree to it or after the payment is made by the DISCOMS to NTPC.
- h) Further, from the Order dated 30.11.2022 in Petition No. 293/MP/2018 & Ors., it is evident that this Commission has granted carrying costs to the solar power developers. As such, the submissions made by NTPC vide its reply does not warrant any consideration of this Commission and the same are liable to be rejected.

- i) The Petitioner vide emails dated 04.11.2022 along with relevant supporting documents requested the Respondents to carry out reconciliation towards the change in law claim. In response to the said emails, NTPC vide its email dated 04.11.2022 intimated the Petitioner that since the matter is sub-judice before this Commission, the originals may be submitted after a direction is issued by this Commission in this regard.
- j) NTPC and the DISCOMS may kindly be directed to carry out reconciliation of the change in law claims raised by the Petitioner with immediate effect, so as to avoid any further delay in reimbursement of the expenses incurred by the Petitioner on account of occurrence of change in law event. Also, any delay in reconciliation and payment towards the change in law claim will ultimately result in additional carrying cost/ interest. In this context, reference can be made to the order passed in Petition No. 471/MP/2019 for the hearing held on 14.07.2022.

**Reply of MPPMCL (Respondent No. 3) dated 17.01.2023**

13. MPPMCL has briefly submitted as under:

- a) APTEL in Appeal no. 256 of 2019 and other 7 appeals vide its judgment dated 15.09.2022 while upholding the CIL issue determined by this Commission in the Judgment in the case of Parampujya Solar Energy (Supra) further allowed the carrying cost.
- b) The Judgment dated 15.09.2022 has been assailed before the Hon'ble Supreme Court of India in Civil Appeal no. 8880/2022 in the case of "*Telengana Northern Power Distribution Co. Ltd. & Anr. Vs. Parampujya Solar Energy Pvt. Ltd. & Ors.*". The Hon'ble Supreme Court vide its order dated 12.12 .2022 while issuing notice ordered as below:-

*"1. issue Notice.*

*2. 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.*

*3.....*

*4....."*

- c) This Commission while hearing the petition on 13.12.2022 vide its order dated 13.12.2022 has directed the parties to carry out the reconciliation process with regard to the Petitioner's Change in Law Claims and reserved for orders.
- d) As directed by the Hon'ble Supreme Court the claims of the Petitioner for change in law compensation on account of GST laws from the date of enforcement of the new taxes for the entire period of its impact, including the period post commercial operation date of the projects towards operation & maintenance (O&M) expenses along with carrying cost can be taken up this Commission but the final order by this Commission in this behalf shall not be enforced till further orders are passed by the Hon'ble Supreme Court in Civil Appeal no. 8880/2022. Therefore, MPPMCL cannot be directed to pay one time compensation, carrying cost etc. at this time i.e., till the issues attain finality before the Hon'ble Supreme Court.

**Written Submission of NTPC (Respondent No. 1) dated 17.01.2023:**

14. The NTPC has briefly submitted as under:

- a) The PSAs were executed between the NTPC as well as the PED and MPPMCL for the purpose of onward sale of the electricity to be procured from the Petitioner, and the NTPC is only an Intermediary Company, facilitating the onward sale of electricity generated by the Petitioner. Hence, the NTPC cannot assume independently, any obligation, financial or otherwise, either to the Petitioner or to the DISCOMs.
- b) The intent of the PSAs executed between the NTPC as well as the DISCOMs is crystal clear that in case any obligation is enforced by the Petitioner under the PPA against NTPC, the DISCOMs shall be bound to fulfil the obligation on a back to back basis.
- c) The DISCOMs' failure to take any steps towards reconciliation/consideration of the purported claims sought by the Petitioner, as stated in the letter dated 02.08.2022 issued by the NTPC is evident of the non-compliance with the terms of the PSA executed with the NTPC as well as their attempts towards shying away from their respective contractual obligations.
- d) The APTEL in its judgment dated 15.09.2022 in Appeal No. 275 of 2022 and other connected Appeals has approved the principle of passing on the liability of an intermediary under such back to back arrangement, to the ultimate beneficiary. Therefore,

while adjudicating the purported claims of the Petitioner, this Commission has to consider the said view taken by the APTEL and compensation if any, to be paid to the Petitioner has to be duly passed on/borne by the ultimate beneficiary and the NTPC cannot be solely held liable for any such liabilities.

**Analysis and Decision:**

15. We have heard the learned counsels for the Petitioner and Respondents and have carefully perused the records.
16. On the basis of the submissions of the contracting parties the following issues arises for adjudication:

**Issue No.1:** *Whether the introduction of Notification No. 8/2021-Central Tax (Rate), Notification No. 8/2021- Intergrated Tax (Rate) dated 30.09.2021 issued by Ministry of Finance, Government of India and Notification No. F.12(1)FD/Tax/2021-60 dated 30.09.2021 issued by Finance Department, Government of Rajasthan amounts to Change in Law events?*

**Issue No.2:** *Whether the Petitioner is entitled for compensation towards additional expenditure on account of Change in Law event in terms of Article 12.2 of the PPA? AND*

**Issue No.3:** *Whether the Petitioner is entitled to carrying cost towards compensation for Change in Law?*

17. We now proceed to discuss the above issues.
18. Since Issue No. 1, Issue No. 2 and Issue No. 3 are interlinked, they are being taken up together for discussion. The Petitioner has submitted that Article 12 of the PPAs provides for 'Change in Law'. The introduction of Notification No. 8/2021-Central Tax (Rate), Notification No. 8/2021- Intergrated Tax (Rate) dated 30.09.2021 issued by Ministry of Finance, Government of India and Notification No. F.12(1)FD/Tax/2021-60 dated 30.09.2021 issued by Finance Department,

Government of Rajasthan were issued subsequent to the signing of PPA and such change in GST rates could not have been factored at the time of submission of the bid or the cut-off date. Hence, the enactment of above notifications dated 30.09.2021 amounts to Change in Law as per Article 12.2 of the PPA. *Per contra*, NTPC has contended that change in law claim raised by the Petitioner is contingent on Discoms agreeing to reconcile the change in law claims. MPPMCL has submitted that as per the Hon'ble Supreme Court the claims of the petitioner for change in law compensation on account of GST laws from the date of enforcement of the new taxes for the entire period of its impact, including the period post commercial operation date of the projects towards operation & maintenance (O&M) expenses along with carrying cost can be taken up by this Commission but the final order by this Commission in this behalf shall not be enforced till further orders are passed by the Hon'ble Supreme Court in Civil Appeal no. 8880/2022. Therefore, MPPMCL cannot be directed to pay one time compensation, carrying cost etc. at this time i.e. till the issues attain finality before the Hon'ble Supreme Court.

19. We observe that Article 12 of the PPAs stipulates as under:

“ .....

**“ARTICLE 12: CHANGE IN LAW**

**12.1 Definitions**

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

- a) The enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;
- b) A change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such law or any Competent Court of Law;
- c) The imposition of a requirement for obtaining any Consents, Clearances and Permits and/or licenses which was not required earlier;
- d) A change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the SPD;
- e) any 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 by the SPD after the date of submission of Bid, shall be treated as per the terms of this Agreement. For the purpose of considering the effect of this change in rate of taxes, duties and cess due to change in law after the date of submission of Bid under this part, the date of the



*submission of bid shall be considered as effective date and not the date of the signing of the PPA as applicable to other changes dealt in other parts of this Article 12.1.*

f) *but the above shall not however include*

*(i) any change in taxes on corporate income or any withholding tax on income or dividends distributed to the shareholders of the SPD, or*

*(ii) any change on account of regulatory measures by the Central Commission.*

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

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

*12.2.2 The Decision of the Central Commission to acknowledge a Change in Law and the date from which it will become effective, provide relief for the same, shall be final and governing on all the parties.*

20. The Commission observes that as per Article 12 of the PPA, ‘Change in Law’ means the enactment/coming into effect/ adoption/ promulgation/ amendment/ modification or repeal of any Law in India; change in the interpretation of any law in India; imposition of a requirement for obtaining any consents or change in tax or introduction of any tax made applicable for supply of power by the SPD as per the terms of this Agreement, resulting into any additional recurring/ non-recurring expenditure or any income to the SPD. Clause (e) 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 by the SPD after the date of submission of Bid, shall be treated as per the terms of PPA. The introduction of Notification No. 8/2021-Central Tax (Rate), Notification No. 8/2021- Intergrated Tax (Rate) dated 30.09.2021 has been issued by Ministry of Finance, Government of India whereas Notification No. F.12(1)FD/Tax/2021-60 dated 30.09.2021 has been issued by Finance Department, Government of Rajasthan. As such the introduction of the impugned notifications have been enacted by the Act of Parliament and the State Legislative Assemblies. The change in rate of Goods and Services Tax from 5% to 12% w.e.f. 01.10.2021 imposed by the Central Government and State Government(s) have resulted in the change in cost of the inputs required for generation and the same is considered as ‘Change in Law’. Hence, the Commission holds that the introduction of Notification No. 8/2021-Central Tax (Rate), Notification No. 8/2021- Intergrated Tax (Rate) dated 30.09.2021 by Ministry of Finance, Government of India and Notification No. F.12(1)FD/Tax/2021-60 dated 30.09.2021 issued by Finance Department, Government of Rajasthan is covered as ‘Change in Law’ under Article 12.1.1 of the PPA.

21. In the instant petition the bid was submitted by the Petitioner on 30.09.2019. E-Reverse auction was conducted on 25.10.2019. PPA was executed between the Petitioner and NTPC on 13.06.2020 and supplementary PPA was executed on 05.05.2021. As per the terms of the PPA, the Scheduled date of commissioning the project was 12.12.2022 which is after the introduction of impugned GST Notifications dated 30.09.2021. As such the Petitioner project was affected by the said GST Notification. Therefore, the Petitioner is entitled for relief under the GST Laws as per the terms of Article 12 of the PPA.
22. The next issue raised by the Petitioner is that, the Petitioner is entitled for compensation towards additional expenditure on account of Change in Law event in terms of Article 12.2 of the PPA along with carrying cost on account of Change in Law event upto the date of reimbursement by the Respondents. The Petitioner has further submitted that this Commission is required to determine the quantum of compensation so that it is restituted to the same financial position as it would have been had such change in law event not occurred. The Petitioner has placed its reliance on APTEL judgement dated 27.04.2021 in A.No. 172 of 2017 and A.No.154 of 2018 (*Coastal Gujarat Pvt. Ltd. vs. CERC & Ors.*). **Per Contra**, the NTPC has averred that the intent of the PSAs executed between the NTPC and the Discoms is crystal clear that in case obligation is enforced by the Petitioner on the NTPC, then the Discoms are duty bound to fulfil the obligations on back to back basis. NTPC has placed its reliance on APTEL judgement dated 15.09.2022 in Appeal No. 256 of 2019 (*Parampujya Solar Energy Pvt. Ltd. vs. CERC & Ors.*).
23. In APTEL judgement dated 27.04.2021 in A.No. 172 of 2017 and A.No.154 of 2018 (*Coastal Gujarat vs. CERC & Ors.*) it was held as under:

“...  
34. Generally speaking, change in tax or change in rate of taxes etc. is treated as CIL, as envisaged by the Revised Tariff Policy dated 28.01.2016 which was held to be a statutory document having the force of law in *Energy Watchdog (supra)*. Similarly, it is fairly conceded as a settled proposition of law that the claim for Carrying Cost is an integral part of admissible CIL compensation under the restitutionary principle and is in-built in Article 13 of the PPA [*UHBVNL &Anr. v. Adani Power Ltd. (supra)*]. In above view of the matter, there can be no quarrel with the proposition that the regulatory authority cannot introduce any extraneous words or qualifications to limit or whittle down the scope of Article 13 with respect to what constitutes CIL and how the relief has to be

computed. Its role is limited to (i) determining whether a CIL event has occurred i.e. whether the qualifications provided under Article 13.1 are met; (ii) determining whether such a CIL event has an impact on the business of generation and sale of electricity; and (iii) if the answers to the first two questions be in the affirmative, to provide restitutive compensation (i.e. on actuals) to the affected party.

...

**67. It is argued that the operation and maintenance of the plant is the responsibility of the appellant and if the appellant seeks to employ services of other agencies, the same cannot increase the liability of the Procurers; this was a commercial decision and choice of the appellant; and that if the appellant had not employed services of outside agencies, there would have been no impact of the alleged changes of tax rates.**

**68. We find no substance in the above submissions. The work contractors are engaged by the appellant within its discretion and there is no inhibition in PPA in such regard.** In fact, it is pointed out by the appellant, and rightly so, that Article 7 of the Model PPA which was a part of the RFQ documents had envisaged that the generator (Seller) alone shall be liable to operate and maintain the power station at its own cost but, in the final PPA that was executed between the parties, the clause to such effect was removed, this clearly indicative of the common understanding of the parties that the generator (CGPL) would not be solely responsible for O&M, the definition of 'Project Documents' read with 'O&M contracts' contemplating that a third-party O&M contractor might be appointed by it (CGPL).

69. It is wrong to argue that because the appellant stands in the capacity of the Principal in relation to the work contractors engaged by it, it is responsible for the action (or inaction) on their part in such matters as have financial implication for the Procurers because the option exercised by the contractor is not a change in law but part of the commercial and business decision and has to be dealt inter se the former two. **We reject this plea against claim under consideration here for the simple reason the doctrine of agency cannot be invoked in this context. It is not shown that in matters of State revenue, the choices made by the contractors could have been controlled by the appellant.**

....

....

90. The respondents defend the impugned decision arguing that the Commission has duly allowed the claim of change in law in respect of the levy of Swatch Bharat Cess and Krishi Kalyan Cess in respect of such services as are linked to the business of generation and sale of electricity, such relief being not admissible in respect of other services since under Articles 13.1.1 and Article 13.2(b) read with Clause 4.7 of the Guidelines any change in law impact is confined to change in revenues and costs from the business of selling electricity by the Seller to the Procurers. Reference is made to the judgment dated 19.04.2017 of this tribunal in Appeal No. 161 of 2015 in Sasan Power Limited v. Central Electricity Regulatory Commission and Others. The respondents submit that there may be various activities carried out by the appellant as a commercial decision but which are neither necessary nor concerned with the business of selling electricity. It is argued that

the appellant had failed to demonstrate as to how the other services claimed have an impact on the cost of or revenue from the business of selling electricity by it to the Procurers. At the same time, it is stated that the services claimed by CGPL, except in relation to transportation of goods (coal), are not related to the business of selling electricity. The submission also is that there has to be some benefit to the procurers or necessity for such services. The respondents further aver that the operation and maintenance of the power plant is the responsibility of Appellant and the fact that the appellant chose to employ services of other agencies cannot increase the liability of the Procurers.

91. It is not disputed that the appellant (CGPL) is a project specific Special Purpose Vehicle (SPV) set up solely for the purpose of generating and supplying electricity exclusively to the Procurers in accordance with the PPA. It engages in no other business undertaking. **All services availed by CGPL are undoubtedly used for its sole objective of generating electricity for supply to the Procurers under the PPA. The increased cost towards Krishi Kalyan Cess and Swachh Bharat Cess affects the cost of the business of the appellant for generation and sale of electricity. The twenty services left out by CERC also are connected to the commercial activities of the appellant adding to its cost of production and supply. In this view, there was no justification for disallowance of the claim for additional financial burden on other services covered under Swachh Bharat Cess and Krishi Kalyan Cess contrary to Article 13 of the PPA.**

92. We agree with the submission that CERC erred to introduce an extraneous qualification or filter which is not borne out from the PPA. The qualifying factor under Article 13 of the PPA is whether or not a CIL event has an impact on the cost of, or revenue from, the business of generation and sale of electricity by the seller (CGPL). In this view, the test applied by CERC that taxable service should have a “direct relation to the input cost of generation” is extraneous to the provisions of the PPA and must be rejected. It is trite that explicit terms of a contract (PPA) bind and it is not open for the adjudicating forums to substitute their own view on the presumed understanding of the commercial terms by the parties [Nabha Power Limited v. PSPCL & Anr. (2018) 11 SCC 508]. **Once it is established that levy of a tax on services availed by CGPL has an impact on the cost of or revenue from business of generation and sale of electricity - whether directly or indirectly - compensation must follow.**

93. **We are not impressed with the plea of the respondents that the qualifying requirement under Article 13 is that the Change in Law event must have an impact on the cost of, or revenue from, the activity of generation of electricity. This argument is based on selective reading of the text of the clause. The contract (PPA), by Article 13, refers to the “business of selling electricity”. The compensation envisaged here cannot be restricted to the activity of “generating electricity”. The expression “business” has a very wide connotation. It is defined as an activity carried on continuously and systematically by a person by the application of his labour or skill with a view to earning an income [see Mitra’s Legal & Commercial Dictionary (Sixth Edition)]. Entire gamut of activities connected to the generation, wheeling etc of electricity will have to be treated as covered by the expression “business of supply of electricity”.**

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

*83. In the present cases, the claim for compensation of SPPDs is primarily founded not on principles of equity but on the contractual clause stating that the affected party is entitled to approach the Commission which shall “provide relief” in relation to the impact of the change in law event if it has resulted in “any additional recurring /non-recurring expenditure”. The purpose of the change in law clause in the PPAs is to relieve the SPPDs of the additional burden. Since the impact of the new tax (GST or Safeguard Duty on Imports, as the case may be) would come from the date of enforcement of the new laws, the relief intended to be afforded under the contracts cannot be complete unless the said burden is allowed to be given a pass through from the date of imposition of the levy. Unlike the PPA in UHBVNL (supra) wherein the phraseology of change-in-law provision was exhaustive, the words “provide relief” in present PPAs are open ended, not qualified in any manner so as to be given a restrictive meaning in order to treat the date of adjudication of the claim by the regulatory authority as the effective date or to justify denial of carrying cost burden for the period anterior thereto. In our reading, the expression “provide relief” is of widest amplitude and cannot be read to limit its scope the way the contesting respondents seek to propagate or the way the Central Commission has determined.*

.....  
*87. As pointed out by learned counsel for Mahoba, under the PPA there is an obligation on the part of SPPDs to ensure “continuance of supply of power throughout the term of Agreement”. It is inherent in this that SPD, in order to continue to supply, must reconfigure or repower the plant, if so required, by installing additional modules after the COD since the contractual clause does not create any distinction as to expenditure pre or post COD, for purposes of change-in-law compensation. The plea for relief concerning post COD cannot be rejected, the expenditure incurred being not meant to be gratuitous, the intent instead being to discharge contractual responsibilities. We may quote the following passage from judgment of Hon’ble Supreme Court in State of West Bengal v. BK Mondal, AIR 1962 SC 779, in the context of Section 70 of the Indian Contract Act, 1872:*

.....  
*94. For the foregoing reasons, we cannot approve of the view taken by the Central Commission on the subject of carrying cost. We hold that the appellant SPPDs are entitled to grant of relief in the nature of carrying cost over and above the compensation already allowed by the Central Commission.”*

...  
*95. The appellant SPPDs had also claimed compensation (on account of change in law events) for the consequent additional expenditure incurred or invoices raised after the Commercial Operation Date (COD) of the SPPs. The Central Commission, by the impugned decisions, has held that liability towards additional expenditure is to be borne by the respondent beneficiaries only till the date of corresponding COD of the project.*

...

97. It bears repetition to note that change-in-law clauses in the PPAs (Article 12) assure relief to be provided in relation to “any additional recurring/non-recurring expenditure” arising out change-in-law. There is no restriction in the contracts as to application of this clause for period prior to the COD. The activities of generation of electricity and its supply, post COD, are bound to include non-recurring expenditure, O&M expenses being one such area. In fact, the use of the word “any” in relation to the consequent “recurring or non-recurring expenditure” signifies the wide ambit of the contractual clause, no exclusion of such nature as understood by the Commission deserving to be read there into. The extraneous qualification that such expenditure must relate to period prior to COD cannot be approved of.

...

...

100. Having bestowed our anxious consideration to the above arguments, we find no substance in the contentions raised. Chhattisgarh Discom was not a party before the Central Commission in the proceedings initially taken out by petition of the SPPD (registered as Case no. 165/MP/2018). But it is an admitted fact that Central Commission by its Order dated 20.09.2018, had impleaded Chhattisgarh Discom as necessary party thereby putting it to notice. It is not correct to contend that this was an arbitrary decision of the Central Commission. In this context, we would only recall the view already taken by us in earlier part of this judgment on the objection to the jurisdiction exercised by the Central Commission. **The PPA and PSA, executed on back-to-back basis, are intertwined and have to be read together. The liability of SECI has to ultimately reach the door of the ultimate beneficiary** i.e. Chhattisgarh Discom.

101. In the proceedings before the Central Commission, questions had also arisen as to whether it is the obligation of SECI to pay the consequential compensation to the SPPDs under the PPAs or the ultimate beneficiaries would be obliged to do so in terms of the corresponding PSA. The views of the Commission on this issue find articulation as under (quoted from order dated 27.03.2020, subject matter of Appeal no. 131 of 2022):

“111. From the above, the Commission is of the view that the PPAs and PSAs are interconnected and inextricably linked to each other and as such there is privity between the Petitioners which are the power generators and the Respondents which are the Discoms and the ultimate beneficiaries of the PPAs as well as parties to the PSAs. The back to back nature of the PPAs and PSAs implies that the Respondent Discoms are liable to pay to the Respondents SECI and NTPC all that the said Respondents have to pay to the Petitioners. However, in so far as payment mechanism is considered, the issue raised for decision of the Commission is whether in view of the back to back nature of PPAs and PSAs, the Respondents SECI and NTPC are liable to pay to the Petitioners only when and if the Respondent Discoms make payment to the said Respondents. In this context, the Commission notes the Provisions of Article 10 of PPAs and Article 6 of PSAs (It is pertinent to note that Articles under reference are similarly worded in both the instant petitions).

...

114. From the above, the Commission observes that the billing and payment between the Petitioner and the Respondents SECI and NTPC are not conditional upon billing and

*payment between the Respondents SECI and NTPC and the Respondent Discoms. Although, the above provisions, namely, Article 10 of PPA and Article 6 of PSA, deal with regular monthly tariffs, the underlying philosophy that the billing and payment of one leg is not conditional upon the billing and payment of the other leg, can be equally applicable to the payment towards incremental impact on account of GST being a change in law, as well. In view of the above, the Commission holds that the Power Purchase Agreement and Power Sale Agreement being back to back in nature are interconnected implying thereby that the Respondent Discoms are liable to pay to the Respondents SECI and NTPC all that the said Respondents have to pay to the Petitioner. However, payment to the Petitioners by Respondents SECI and NTPC is not conditional upon the payment to be made by the Respondent Discoms to Respondents SECI and NTPC in view of the provisions of Article 10 of PPA and Article 6 of the PSA. The Commission having held that GST is a change in law, the Respondents SECI and NTPC are liable to pay to the Petitioners as per discussion above. However, the Respondents SECI and NTPC are eligible to claim the same from the Respondent Discoms on back to back basis.”*

*[Emphasis supplied]*

*102. In above view of the matter, the contentions in the above nature are repelled.*

...

...

*104. There can be no two views as to the fact that O&M expenses form part of the recurring expenditure within the meaning of change in law clause contained in Article 12. Concededly, the appellant SPPDs have availed of O&M services by outsourcing them, statedly following standard industry practice.*

...

...

*107. The above decision applies on all fours. We adopt the view taken in case of Costal Gujarat Power Limited (supra) and disapprove the decision of the Central Commission on the subject as quoted above and hold that the appellant SPPDs are entitled to compensation for additional expenditure (recurring /non-recurring) towards O&M activities as well, notwithstanding the fact that they were outsourced.*

### **CONCLUSION**

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

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

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

...

APTEL in both the *Judgements cited above* observed that the purpose of the change in law clause in the PPAs is to relieve the developer of additional burden.

25. In view of the above, the Petitioner shall be entitled to compensation towards additional expenditure on account of Change in Law event in terms of Article 12.2 of the PPA along with carrying cost on account of Change in Law event. The Petitioners, in the instant petitions shall be eligible for carrying cost starting from the date when the actual payments were made to the Authorities till the date of issuance of this Order, at the actual rate of interest paid by the Petitioner for arranging funds (supported by Auditor's Certificate) or the rate of interest on working capital as per applicable CERC Tariff Regulations or the late payment surcharge rate as per the PPA, whichever is the lowest. Once a supplementary bill is raised by the Petitioner in terms of this order, the provision of Late Payment Surcharge in the PPA would kick in if the payment is not made by the Respondents within the due date.
26. Accordingly, the Commission hereby directs the contracting parties to carry out reconciliation of additional expenditure on account of introduction of Notification No. 8/2021-Central Tax (Rate), Notification No. 8/2021- Intergrated Tax (Rate) dated 30.09.2021 by Ministry of Finance, Government of India and Notification No. F.12(1)FD/Tax/2021-60 dated 30.09.2021 issued by Finance Department, Government of Rajasthan, along with carrying cost by exhibiting clear and one to one correlation with the projects and the invoices raised supported with auditor certificate.
27. We further observe that NTPC has submitted that in terms of the PSA, if any obligation is enforced by the Petitioner against NTPC under the PPA, then the DISCOMs shall be bound to fulfil the obligation on a back to back basis. The arrangement between the parties being back to back in nature, and NTPC is just a facilitator/intermediary for the sale of electricity from the Petitioner to the DISCOMs. As such, it should not be solely fastened with the liability. Any



burden arising out of Change in Law event has to be passed to the ultimate beneficiaries. The Commission recognises the back to back nature of the PPA and the PSA and accordingly directs that the responding DISCOMs are liable to pay NTPC all the above reconciled claims that NTPC has to pay to the Petitioner. However, payment to the Petitioner by NTPC is not conditional upon the payment to be made by the responding DISCOMs to NTPC.

28. Further, MPPMCL has submitted that the Judgment of the APTEL dated 15.09.2022 has been assailed before the Supreme Court in Civil Appeal no. 8880/2022 in the case of “*Telangana Northern Power Distribution Co. Ltd. & Anr. Vs. Parampujya Solar Energy Pvt. Ltd. & Ors.*”. MPPMCL has further submitted that the final order by this Commission in this behalf shall not be enforced till further orders are passed by the Hon’ble Supreme Court.

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

“

....

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

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

31. The Petition No. 216/MP/2022 is disposed of in terms of above.

Sd/-  
पी. के. सिंह  
(सदस्य)

Sd/-  
अरुण गोयल  
(सदस्य)

Sd/-  
आई. एस. झा  
(सदस्य)