IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO.163 OF 2020

AND

APPEAL NO. 171 OF 2020

Dated: **16th November 2021**

Present: **Hon'ble Mr. Justice R.K. Gauba, Judicial Member**
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member

APPEAL NO.163 OF 2020

In the matter of:

NISAGRA RENEWABLE ENERGY PRIVATE LIMITED
[Through its Authorized Signatory]
F-9, First Floor, Manish Plaza 1, Plot No. 7,
MLU, Sector-10, Dwarka
New Delhi – 110 075 .... Appellant(s)

VERSUS

1. **MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**
[Through its Secretary]
World Trade Centre, Centre No.1,
13th Floor, Cuffe Parade, Colaba,
Mumbai 400 005
Email: *secretary@merc.gov.in*

2. **MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LIMITED**
[Through its CMD]
4th Floor, Prakashgadh, Plot No. G-9,
Anant Kanekar Marg, Bandra (East)
Mumbai – 400 051
Email: ceremsedcl@gmail.com …. Respondents

APPEAL NO. 171 OF 2020

In the matter of:

JUNIPER GREEN ENERGY PRIVATE LIMITED

F-9, First Floor, Manish Plaza 1, Plot No. 7,
MLU, Sector-10, Dwarka
New Delhi – 110 075
Email: *vikas.aggarwal@atcapital.co.in* .... Appellant(s)

VERSUS

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[Through its Secretary]
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Email: *ceremsedcl@gmail.com* …. Respondents

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J U D G M E N T

PER HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER

Introductory

1. These two appeals challenge the Order dated 23.07.2020 passed by the first respondent, *Maharashtra Electricity Regulatory Commission* (for short, "*MERC*" or "*State Commission*" or "*Commission*") in case nos. 61

and 62 of 2020 whereby the appellants herein had claimed compensation for imposition of *Safeguard Duty*. The appellants are aggrieved because, by the impugned decision, the State commission has restricted the compensation in their favor for a limited capacity of solar modules/panels as against the total installed Direct Current (DC) capacity. It is pleaded that MERC has calculated the maximum DC capacity for the purposes of *Change in Law* ("CIL") compensation by adopting a formula which is arbitrary and contrary to the provisions of the *Power Purchase Agreements* ("PPAs") that bind the contesting parties herein i.e. appellants (generators), on the one hand, and the second respondent (procurer) in each appeal viz. *Maharashtra State Electricity Distribution Company Limited* (*"MSEDCL"*), on the other. The impugned order also holds that the appellants are entitled to carrying cost @ 1.25% in excess of *Marginal Cost of Lending Rate* ("MCLR") of the State Bank of India ("SBI") as against the contention of the appellants that they are entitled to the actual cost of capital or the actual cost of borrowing from *Indian Renewable Energy Development Agency* ("IREDA") which, it is alleged, is contrary to the principle of restitution, as incorporated in the PPAs.

The Parties

2. The appellant in second captioned appeal (Appeal no. 171 of 2020), *Juniper Green Energy Private Limited* (for short, "*Juniper*") describes itself

as a company incorporated under the Companies Act, 2013 involved in the business of generation of renewable energy, it having originally been incorporated as *M/s AT Capital Advisory India Private Limited*, but having undergone a change of name, such change having been accepted by issuance of a fresh certificate of incorporation dated 08.12.2018. The main objective of Juniper is stated to be executing PPA for 3x10 (30 MW) project capacity under *Mukhyamantri Solar Ag Feeder Scheme* (hereinafter referred to as "*the Scheme*"). Similarly, the appellant in the first captioned appeal (Appeal no. 163 of 2020), *Nisagra Renewable Energy Private Limited* (for short, "*Nisagra*") is a company incorporated on 22.03.2018 under the Companies Act, 2013 it being a 100% subsidiary/special purpose vehicle of Juniper, its main objective also being to execute PPA for 7x10 (70 MW) project capacity under the aforementioned *Scheme*.

The Factual Background

3. The factual matrix of both the appeals is virtually common. It is stated, and there is no dispute in that regard, that the Government of Maharashtra had appointed MSEDCL as the implementing agency for the *Scheme* for giving daytime power to agricultural consumers. Under the said *Scheme*, MSEDCL intended to undertake development of 1000 MW(AC) Solar PV Ground mount power plants in Maharashtra to be implemented in

218 *talukas* in order to fulfil its renewable power purchase obligation and to meet its future power requirements. These projects were to be connected to 11/22KV bus bar at MSEDCL substation. The bid was to be submitted *taluka*-wise in Maharashtra and projects set up in the concerned *taluka* only. List of *talukas* was provided by MSEDCL, this having put locational and technical restrictions while submitting the bid.

4. On 27.04.2018, in furtherance of the *Scheme*, MSEDCL issued the Request for Selection ("RfS") inviting bids for development of solar PV ground mount power plants in the State of Maharashtra. Subsequently, MSEDCL replied to bid queries raised by prospective bidders in the meeting held on 09.05.2018. On 19.05.2018 and 21.05.2018, MSEDCL issued four addendums to the RfS. The last date of bid submission was 21.06.2018. The relevant clauses of the RfS may be quoted as under:

> "*1.1.2 The Government of Maharashtra vide GR dated 17.03.2018 has appointed MSEDCL as a implementing agency for 'Mukhyamantri Solar Ag feeder Scheme' for giving day time power to Agricultural consumers. Being the Distributed generation of solar power projects under this scheme, the power will be consumed for agriculture load at local level*
>
> *…*
>
> *1.1.4 The developer (hereinafter referred to as "Developer") shall be responsible for design, finance, procurement of land, engineering, procurement, construction, operation and maintenance of the Project(s) under and in accordance with the provisions of the PPA to be entered into between the Developer and MSEDCL.*
>
> *…*

1.2.1 The bidders selected by MSEDCL based on this RfS, shall set up Solar Power Projects in accordance with the provisions of this RfS document and Draft Power Purchase Agreement (PPA).

…

1.3.2 The Successful bidders shall develop ground mounted solar PV power projects of capacity as quoted by the bidder in the bidding process subject to the conditions specified in Section 3.2 of this RfS.

…

"Contracted Capacity" shall mean the capacity (in MW AC) contracted with MSEDCL for supply by the successful bidder at the Delivery Point from the Solar Power Project.

"Project Capacity" means the AC capacity of the project at the generating terminal(s) and to be contracted with MSEDCL for supply from the Solar Power Project.

…

3.12.1 Criteria for generation:

The power producer will declare the CUF of their project at the time of PPA and will be allowed to revise the same once within first year of COD. The declared CUF shall in no case be less than 19% over a year. They shall maintain generation so as to achieve CUF in the range of ±10 % of their declared value during PPA duration. The lower limit will, however, be relaxed by MSEDCL to the extent of grid non-availability for evacuation which is beyond the control of the developer.

3.12.2 Shortfall in minimum generation:

During PPA, if for any year, it is found that the developer has not been able to generate minimum energy corresponding to the lower limit of CUF declared by the developer, such shortfall in performance shall make developer liable to pay the compensation provided in the PPA as payable to MSEDCL. This will, however be relaxable by MSEDCL to the extent of grid non-availability for evacuation, which is beyond the control of the developer. The amount of such penalty will be in accordance with the terms of the PPA under Clause 5.5.2, This compensation shall be applied to the amount of shortfall in generation during the year. However, this compensation shall not be applicable in events of Force Majeure identified under PPA with successful bidder affecting supply of solar power by seller/power producer."

(Emphasis supplied)

5. On 21.06.2018, AT Capital (i.e. appellant Juniper, as it was then named) submitted its bid for 120 MW at a tariff of Rs. 3.30/kWh for 8 locations and Rs. 3.29 for 4 locations. The bids were considered to be high and MSEDCL engaged the bidders – including AT Capital (later renamed as *Juniper*) – for lowering of the tariff, it having met the successful bidders on 23.07.2018 and 23.08.2018 seeking discount.

6. On 30.07.2018, the Ministry of Finance (MoF) in the Government of India issued a notification imposing *Safeguard Duty* on import of solar cells, irrespective of the fact whether assembled or not in modules or panels, for two years at the rates specified as under:

(a) 25 % *ad valorem*, minus anti-dumping duty payable, if any, when imported during the period from 30.07.2018 to 29.01.2020 (both days inclusive)

(b) 20 % *ad valorem*, minus anti-dumping duty payable, if any, when imported during the period from 30.07.2019 to 29.07.2019 (both days inclusive)

(c) 15 % *ad valorem*, minus anti-dumping duty payable, if any, when imported during the period from 30.01.2020 to 29.07.2020 (both days inclusive).

7. As would be noted a little later, the above notification dated 30.07.2018 has been accepted by the Commission as *change in law* event on which the claim for compensation is founded.

8. On 06.09.2018 and 07.09.2018, AT Capital addressed communications to MSEDCL, *inter alia,* stating that pursuant to the meetings held by MSEDCL regarding renegotiation of tariff, discount for the project had been offered by it (AT capital) excluding the imposition of Safeguard Duty imposed by the Notification dated 30.07.2018 and without prejudice to its rights, request being made to MSEDCL to issue the Letter of Award (LOA) at the earliest, making it clear that in case Safeguard Duty was applied, such burden would be over and above the tariff under the PPAs and claimed as *pass through* to MSEDCL in terms of RfS.

9. On 05.10.2018, MSEDCL declared AT Capital as one of the successful bidders for 100 MW capacity with 10 MW of capacity awarded for 10 locations at a tariff of Rs. 3.15/kWh for a term of 25 years from the Commercial Operation Date (COD) of the Project. On 27.11.2018, the first respondent/State Commission passed Order in Case no. 277 of 2018 granting approval for procurement of power from the selected bidders (including AT Capital) at rates discovered through competitive bidding (and subsequent negotiation) and for signing of PPAs in such regard.

10. As noted earlier, the name of AT Capital was changed to Juniper w.e.f. 08.12.2018. Thus, the further process was taken care of by the company now known as Juniper (the appellant). On 14.12.2018, Juniper addressed a communication to MSEDCL informing it, *inter-alia,* of the change of name, submitting the requisite documents for signing of the PPAs, indicating that the execution of the requisite project capacity to the extent of 7x10 (70 MW) would be done through *Nisagra* (the other appellant), a 100% subsidiary, the balance of 30 MW project capacity to be completed by Juniper itself, reiterating its earlier position that in case Safeguard Duty was applicable, the same would be over and above the tariff under the PPAs and liable to be claimed as *pass through* in terms of RfS, MSEDCL also being informed of the Capacity Utilization Factor (CUF) – approximately 25% - being considered for projects by each of the two entities, requesting the PPAs to be executed in such light on 26.12.2018.

11. On 21.12.2018, Performance Bank Guarantees (PBGs) were furnished in terms of the contractual obligation by Juniper to MSEDCL. Eventually, on 27.12.2018, the PPAs were executed by the parties. Juniper entered into three PPAs for development of 10 MW solar power plants each at different locations viz. *Nandgaon*, *Yeola* and *Deola*. Similarly, Nisagra entered into seven PPAs for development of 10 MW

solar power plants at seven different locations viz. *Baglan*, *Malegaon*, *Sindkheda*, *Shirpur*, *Parola*, *Sakri* and *Dhule*.

12. All the above-mentioned ten PPAs are almost identical, the difference being essentially in the names of the project developers and the locations or the description of the power projects in question. Some of the stipulations in the PPAs are relevant for the present discussion and may be quoted as under:

> "*5.5. Capacity Utilisation Factor (CUF):*
>
> *5.5.1 Criteria for generation:*
>
> *The power producer will declare the CUF of their project at the time of PPA and will be allowed to revise the same once within first year of COD. The declared CUF shall in no case be less than 19% over a year. They shall maintain generation so as to achieve CUF in the range of ±10 % of their declared value during the entire PPA duration of 25 years from the Commercial Operation Date of proposed / new solar power projects. The lower limit will, however, be relaxed by MSEDCL to the extent of grid non-availability for evacuation which is beyond the control of the power producer.*
>
> *5.5.2 Shortfall in minimum generation:*
>
> *During PPA, if for any year, it is found that the power producer has not been able to generate minimum energy corresponding to the lower limit of CUF declared by the power producer, such shortfall in performance shall make power producer liable to pay the compensation provided in the PPA as payable to MSEDCL. This will, however be relaxable by MSEDCL to the extent of grid non-availability for evacuation, which is beyond the control of the power producer. The amount of such penalty will be 25% (twenty-five per cent) of the cost of this shortfall in energy terms, calculated at PPA tariff. This compensation shall be applied to the amount of shortfall in generation during the year.*

However, this compensation shall not be applicable in events of Force Majeure identified under PPA with trading company affecting supply of solar power by seller/power producer.

…

6.2. Payment:
MSEDCL shall make payment of the amounts due in Indian Rupees within thirty (30) days from the date of receipt of the Tariff Invoice by the designated office of the MSEDCL.

6.3. Late Payment:

For payment of Monthly bill by MSEDCL thirty (30) days beyond its due date, if paid after Due date of Payment, a <u>late Payment charge shall be payable by MSEDCL to the Power Producer at the rate of 1.25% (percent) in excess of the SBI, 1-year Marginal Cost of Funds Based Lending Rate (MCLR) per annum / any replacement thereof by SBI</u>.

6.6 … Upon resolution of the dispute, <u>in case the Power Producer is subsequently found to have overcharged</u>, then it shall return the overcharged, then it shall return the <u>overcharged amount with an interest of SBI 1 year Marginal Cost of Funds Based Lending Rate (MCLR) per annum plus 1.25% for the period it retained the additional amount</u>.

…

Article 9: Change in Law

9.1. Definitions In this Article 9, the following terms shall have the following meanings:

"Change in Law" shall refer to the occurrence of any of the following events after the last date of the bid submission, including (i) the enactment of 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 power producer; or (v) any change in the rates of any Taxes, Duties and Cess which have a direct effect on the Project. However, Change in Law shall not include any change in taxes on corporate

income or any change in any withholding tax on income or dividends.

9.2. Relief for Change in Law

9.2.1 In the event a Change in Law results in any adverse financial loss/ gain to the Power Producer then, in order to ensure that the Power Producer 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 Power Producer/ 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 MERC.

9.2.2 If a Change in Law results in the Power Producer's costs directly attributable to the Project being decreased or increased by one percent (1%), of the estimated revenue from the Electricity for the Contract Year for which such adjustment becomes applicable or more, during Operation Period, the Tariff Payment to the Power Producer shall be appropriately increased or decreased with due approval of MERC.

9.2.3 The Power Procurer / MSEDCL or the Power Producer, as the case may be, shall provide the other Party with a certificate stating that the adjustment in the Tariff Payment is directly as a result of the Change in Law and shall provide supporting documents to substantiate the same and such certificate shall correctly reflect the increase or decrease in costs.

9.2.4 The revised tariff shall be effective from the date of such Change in Law as approved by MERC, the Parties hereto have caused this Agreement to be executed by their fully authorized officers, and copies delivered to each Party, as of the day and year first above stated."

(Emphasis supplied)

13. Noticeably, clause 5.5.1 of PPA, as quoted above, is reiteration of the mutual understanding of the parties of the stipulation in clause 3.12.01 of the RfS quoted earlier.

14. On 24.01.2019, each appellant served on MSEDCL separate notices claiming *CIL* compensation referring in this context to the Notification dated 30.07.2018 of MoF of the Government of India imposing Safeguard Duty on import of solar cells whether or not assembled in modules or panels. The CIL notices, *inter-alia,* stated that the Notification dated 30.07.2018 having been issued subsequent to the last date of the bid submission – 21.06.2018, the same constitutes a CIL event in terms of Article 9 of the PPAs, it having a material impact on the project cost for supply of power to MSEDCL, request being made by the project developers for acknowledgement of CIL notice and for the process to be adopted for determination of the quantum and mechanism of compensation in terms of CIL clause under the PPAs.

15. Though the CIL notices were duly acknowledged by MSEDCL, by its communications dated 22.03.2019, it took the position that relief will have to be in terms of Article 9.2 of the PPA after approval from MERC.

16. It is against the above backdrop that, on 27.05.2019, the petitions were filed by the appellants before the MERC – case no. 123/2019 by Juniper and case no. 124/2019 by Nisagra – seeking declaration that the imposition of Safeguard Duty on import of solar cells vide Notification dated

30.07.2018 was a CIL event from 30.07.2018; praying for approval and determination of mechanism and quantum of compensation along with interest for the said CIL event; and direction to MSEDCL to compensate the appellants herein in accordance with the mechanism determined by MERC for imposition of Safeguard Duty.

17. Indisputably, on 18.07.2019, MERC passed a common order in the two aforementioned petitions, granting the relief as prayed for, the operative part of the order reading thus:

> *"1. The Case Nos. 123 and 124 of 2019 are partly allowed.*
> *2. Ministry of Finance's Notification dated 30 July 2018 imposing Safeguard Duty qualifies as Change in Law event.*
> *3. Additional expenditure and other consequential impact shall be considered on actual basis for reimbursement under Change in Law subject to prudent check after the Petitioners approach the Commission afresh with all the details in accordance with the provisions of Power Purchase Agreement."*
>
> (Emphasis supplied)

18. In the wake of the aforementioned *in-principle* approval of the claim of compensation with reference to CIL event, the appellants herein filed fresh petitions on 14.02.2020 – case no. 61 of 2020 of Juniper and case no. 62 of 2020 of Nisagra – giving details of the expenditure incurred on account of imposition of Safeguard Duty, also claiming compensation for GST of 5% imposed on Safeguard Duty. The claim of Juniper was to the

extent of Rs. 14,73,84,043/- while claim of Nisagra was for an amount of Rs. 34,49,14,006/-, each represented as expenditure incurred (on actuals) for the respective power projects along with carrying cost/interest till payment by MSEDCL.

19. By the impugned decision, MERC has granted compensation for an amount of Rs. 13,40,32,493/- against Rs. 14,73,84,043/- in favour of Juniper and Rs. 31,62,49,171/- against Rs. 34,49,14,006/- in favour of Nisagra, clearly denying part of the relief claimed. The Commission has granted carrying cost but at the rate of 1.25% in excess of 1-year MCLR of State Bank of India, adopting the rate at which late payment surcharge can be levied under the PPA for defaults in timely payments.

20. The appellants are aggrieved on both above counts.

CIL Compensation

21. The part of the impugned decision wherein the Commission has set out its reasons, relevant for the present appellate scrutiny on the captioned issue, may be quoted as under:

> *"24. With regard to issue of compensation under the Change in Law, the Commission notes that as stated in para 18 above, intent of the PPA provisions is to restore the affected party to the same economic position as if Change in Law had not occurred. For this, <u>the affected party has to be compensated for actual cost incurred on account of such Change in Law</u>*

plus carrying cost on such amount as affected party has to arrange financing of such cost from date of incurring such cost till approval of the Commission. In the present case, impact of Change in Law has increased the expenses on account of imposition of SGD on solar panel. It is an admitted fact that the PPA does not stipulate DC capacity of modules / panels to be installed to deliver contracted AC capacity. Also, competitive bidding guidelines stipulated by the Government of India under Section 63 of the EA, 2003 do not provide any guidance on this issue. Hence, as per findings of the Hon'ble Supreme Court in Energy Watchdog judgment, the Commission has to use its general regulatory powers to decide this issue. As per provisions of the PPA, project developers have to adopt prudent utility practices while executing and operating its project. As admitted by the Petitioners itself, as per current industrial practice, projects are being commissioned by oversizing DC capacity upto 150% of required AC output. Hence, it is incorrect to state that Change in Law compensation shall be paid for actual installed capacity irrespective of scrutinizing prudence of such oversizing.

25. In view of the above background and in absence of any clear provision in PPA or Guidelines, the Commission, by using its Regulatory Powers, has stipulated a formula for arriving at DC capacity which can be considered for compensation under Change in Law. However, the Petitioners in their submission have elaborated some distinctive factors such as locations of the projects, GHI, connectivity at LT level and CUF etc to contend that their case can not be directly compared with earlier cases of Azure and others as proposed by MSEDCL. They have requested that these factors shall be considered for finalizing the DC capacity of the modules for determining the compensation towards SGD. In this regard, the Commission notes that while distinguishing the distinctive factors as stated above, Petitioners have ignored comparison of the tariff between the projects of Azure and others with that of Petitioners' Projects developed in Maharashtra. The Commission by its Order dated 27 November 2018 in Case No 277 of 2018 had adopted tariff for 235 MW with weighted average tariff rate of Rs. 3.13 per unit in which tariff of Rs.3.15 per unit for the Petitioners' projects of 100 MW has been approved. While approving the tariff the Commission ruled as under:

> *"9. The Commission notes that due process for procurement of solar power has been followed by*

MSEDCL. It further notes that the discovered tariff rates are within the vicinity of the rates earlier approved by Commission if one considers the transmission and distribution losses, plant size and the geographic spread. Rates were competitively obtained and were twice negotiated to lower those rates further. The Commission is satisfied that MSEDCL has made prudent efforts for seeking approval for adoption of the weighted average tariff rate of Rs. 3.13 per unit.

Prior to adoption of the above tariff, the Commission by its Order dated 29 June 2018 in Case No 164 of 2018 had adopted tariff for 1000 MW (<u>for Azure and others developers</u>) at tariff rate of Rs. 2.71 to 2.72 per unit. Subsequently on the basis of this adopted tariff of Rs. 2.72 per unit, the Commission in its RE Tariff Order in Case No 204 of 2018 dated 18 August 2018 has considered same tariff applicable for Solar PV projects commissioned in FY 2018-19. <u>While adopting the tariff for projects under 'Mukhyamantri Saur Krishi Vahini Yojana' the Commission has already taken into consideration the distinctive factors of the projects such as transmission and distribution losses, plant size and the geographic spread etc. and allowed higher tariff of about Rs. 0.43 per unit compared to large project developed at Rajasthan. Hence, in the opinion of the Commission, Petitioners at this stage cannot claim any extra benefit by showing some distinguishing factors. Similarly, at this belated stage post signing of PPA based on approval of the Commission and commissioning of the project, Petitioners now cannot contend or seek any relief by citing negotiation of discovered tariff post bidding process which was done at the request of MSEDCL</u>.

26. The Commission also notes that <u>Petitioners in their submissions have mixed up two different issues viz the DC capacity required to meet contractual obligations of AC capacity and achievement of declared CUF in the range +10%, and has accordingly requested to allow -10% variation in 19% minimum CUF while calculating allowable DC module capacity for Change in Law compensation</u>. The Commission notes that <u>flexibility band of +10% is provided for factoring uncertainty in solar radiations or environmental variations during the tenure of the PPA. It does not in any way suggest that project's installed capacity may vary between +10% of DC Module capacity required to achieve AC capacity with minimum CUF of 19%</u>. If such interpretation is accepted, then project

developer would only require to install PV modules/panel to achieve CUF of 17.10% (lower band of 19%) and then it would be difficult to always achieve CUF in the range of +10% of minimum required CUF of 19% i.e. between 17.10% to 20.9%. Hence, the Commission cannot accept Petitioners' request considering +10% band for arriving at DC module capacity which as per PPA is intended to accommodate variation in actual CUF over the tenure of PPA.

27. The Commission also notes that Petitioners have submitted Energy Yield Assessment Reports from TUV India Private Limited which state that expected CUF at P50 confidence level would be 17.12% for the projects located at Nashik. Therefore, Petitioners have contended that to achieve stipulated 19% CUF in RfS or PPA, minimum 1.11 times DC overloading capacity is required in Maharashtra and that 19% CUF is not achievable with DC:AC ratio of 1:1 which is possible for the project located at Rajasthan. Hence, Petitioners have requested that considering environmental conditions in Maharashtra, minimum CUF should be considered as 17.12% while computing allowable DC module capacity for Change in Law compensation. In this regard, the Commission notes that while projecting 17.12% achievable CUF, TUV India Pvt. Ltd. in its report has mentioned that 2% loss is on account of grid unavailability. However, as per following provisions of PPA, reduction in CUF on account of grid unavailability is to be relaxed:

> *5.5.1Criteria for generation: The power producer will declare the CUF of their project at the time of PPA and will be allowed to revise the same once within first year of COD. The declared CUF shall in no case be less than 19% over a year. They shall maintain generation so as to achive CUF in the range of + 10% of their declared value during the entire PPA duration of 25 years from the Commercial Operation Date of proposed/ new solar power project. The lower limit will, however, be relaxed by MSEDCL to the extent of grid non-availability for evacuation which is beyond the control of the Power Producer.*

Thus, as per above provision, 2% loss considered on account of non-availability of grid can be considered in the CUF. Further, said study has considered solar module capacity of 330 Wp. The Commission notes that higher capacity and efficient modules are already available in market which will improve the CUF of the plant. Hence, if all these factors are

considered collectively, then in the opinion of the Commission it is not correct to state that 19% CUF cannot be achieved in Maharashtra with DC:AC ratio of 1:1. Therefore, Petitioners' request of considering minimum CUF of 17.12% while computing allowable DC module capacity cannot be accepted.

28. In view of the above stated reasons, the Commission is not inclined to grant any deviation in the formula adopted in its earlier judgments for computing allowable DC capacity for compensation on account of Change in Law.

…

35. The Commission in preceding para 28 of this Order has given the justification for not considering various options proposed by the Petitioners for determining eligible DC capacity for payment of SGD compensation. In view of the above ruling of the Commission, for fulfilling the contractual obligation of supplying total 100 MW (AC) capacity from 10 projects to MSEDCL, the Petitioners are entitled to compensation under Change in law for maximum DC capacity of 133 MW. Project wise maximum DC capacity entitled for compensation under change in law is as under:

For JGEPL's projects:

Sl. No.	*Project Location*	*Project AC Capacity (MW)*	*Installed DC Capacity (MW)*	*Declared CUF (%)*	*Maximum DC Capacity entitled for change in law (MW)*
1.	*Nandgaon*	*10*	*14.59*	*25.16*	*(25.16/19 x10) =13.24*
2.	*Yeola*	*10*	*14.54*	*24.92*	*(24.92/19 x10) =13.12*
3.	*Deola*	*10*	*14.59*	*25.29*	*(25.29/19 x 10) =13.31*

For NREPL's projects:

Sl.	*Project*	*Project*	*Installed*	*Declared*	*Maximum*

No.	Location	AC Capacity (MW)	DC Capacity (MW)	CUF (%)	DC Capacity entitled for change in law (MW)
1.	Baglaon	10	14.54	25.40	(25.40/19 x 10) =13.37
2.	Malegaon	10	14.54	25.00	(25.00/19 x10) =13.16
3.	Sindkheda	10	14.54	25.66	(25.66/19 x 10) =13.51
4.	Shirpur	10	14.49	25.37	(25.37/19 x 10) =13.35
5.	Parola	10	14.54	25.15	(25.15/19 x 10) =13.24
6.	Sakri	10	14.54	25.69	(25.69/19 x 10) =13.52
7.	Dhule	10	14.60	25.05	(25.05/19 x 10) =13.18

The Commission also notes that the PPAs also provides option to Generator to revise CUF within one year from date of commissioning of the project. Petitioners may exercise its choice to finalize its declared CUF and the DC installed capacity. No further claims of change in law would be admissible for any additional modules in case DC installed capacity is upwardly revised."

(Emphasis supplied)

22. The respondents defend the impugned order contending that MERC has rightly computed the formula for Compensation for Change in Law and

the same is not arbitrary or contrary to the provisions of the PPA, exercising its regulatory powers. Conceding that the PPA and the Competitive Bidding Guidelines do not stipulate DC capacity of modules/panels to be installed to deliver the contracted AC capacity reliance is placed on the decision reported as *Energy Watchdog* Vs. *Central Electricity Regulatory Commission and Ors.*, (2017) 14 SCC 80, particularly on the following observations:

> *"19. … It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commissions general regulatory powers under Section 79(1)(b) can then be used."*

23. The respondent justifies the impugned view also referring to the appellants' submissions that the oversizing DC capacity up to 150% of the required AC output is a prevalent industrial practice arguing that the formula adopted for arriving at the DC capacity which, in turn, is used for calculating the compensation creates a balance between the interests of the solar power developers and the power consumers by laying down the benchmark for DC capacity.

24. Reference is made to Article 5.5.1 of the PPA and Clause 3.12.1 of RfS stipulating the minimum declared capacity utilization factor ("CUF") to

be 19%. It is argued that the appellants' decision to install higher DC capacity and subsequently declare a higher CUF is purely a commercial decision which, it is urged, ought not be allowed to be used "*to escape the formula adopted*" by the Commission.

25. It has been argued that the appellants have mixed up two different issues of DC capacity required to meet the contractual obligations of supply of AC capacity, and the achievement of the declared CUF in the range of ± 10% of the declared CUF. The flexibility band of ± 10% is provided for factoring uncertainty in solar radiations or environmental variations during the tenure of the PPA. This, it is argued, does not in any way suggest that project's installed capacity may vary between ±10% of DC Module capacity required to achieve AC capacity with minimum CUF of 19%. The submission is that if such interpretation were to be accepted, the project developer would be required to install PV modules/panels only to the extent of achieving CUF of 17.10% (lower band of 19%) which, in turn, may make it difficult to achieve CUF in the range of +10% of minimum required CUF of 19% i.e., between 17.10% to 20.9%.

26. The learned Counsel for MERC also argued that the contention of the appellants for considering minimum CUF as 17.12% instead of 19% while computing allowable DC module capacity for Change in Law

compensation, is contrary to the PPA which casts an obligation upon the appellants to ensure achieving 19% CUF. It was submitted that the appellants under the garb of CIL compensation are trying to amend the PPA which is not permissible. It was also argued that adoption of the impugned formula was necessary to comply with the prudence and due diligence provisions as specified in Article 3.1.8 of the PPA to ensure and allow only prudent oversizing of DC capacities under CIL and avoid burden of inefficiencies of generator to be passed on to procurer and consumers.

27. The respondents contest the argument of the appellants that MSEDCL has accepted and taken benefit of lower tariff reiterating that the decision to install higher DC capacity and subsequently declare a higher CUF was purely a commercial decision based on which the bid was submitted by the appellants. The appellants, it is submitted, are getting compensated for units of energy supplied as per the PPA tariff as well as for the impact of SGD.

28. We have already taken note of Clause 3.12.1 of the RfS which gave to the developer the right to declare CUF at the time of entering into the PPA, subject only to the condition that the Declared CUF could not be less than 19%, the developer also being given the liberty to "*revise the same once within first year of COD*". This was

incorporated in Clause 5.5.1 of the PPA, both documents - RfS and PPA – having been approved by the MERC vide Order dated 12.06.2018 in Case No. 131 of 2018.

29. The appellants point out, and the respondents do not contest, that the MNRE had issued a Clarification dated 05.11.2019 which, to the extent relevant, may be quoted as under:

> *"(4) …*
> *i. As long as the solar PV power plant is in accordance with the contracted AC capacity and meets the range of energy supply based <u>on Capacity Utilisation Factor (CUF) requirements, the design and installation of solar capacity on the DC side should be left to the generator / developer</u>.*
>
> *ii. <u>Even if the installed DC capacity</u> (MWp) [expressed as the sum of the nominal DC rating (Wp) of all the individual solar PV modules installed] in a solar PV power plant, <u>is in excess of the value of the contracted AC capacity (MW), it is not in violation of PPA or PSA, as long as the AC capacity of the solar PV power plant set up by the developer corresponds with the contracted AC capacity</u> and that, at no point, the power (MW) scheduled from the solar PV power plant is on excess of the contracted AC capacity, unless there is any specific clause in the PPA restricting such D.C. capacity."*
>
> (Emphasis supplied)

30. It appears that the compensation for Change in Law has been limited based on the ratio of the declared CUF under the PPA to the minimum CUF of 19% by applying a simplistic linear formula based on normative parameters to arbitrarily calculate the DC capacity it having been

overlooked that it is the prerogative of the developer to finalize the optimal DC capacity for its Project.

31. Since the parties in question are not before us, we do not wish to make any comment on the merits of the Order dated 13.11.2019 in case No. 259 of 2019 titled *Azure Power Thirty-Four Private Limited vs. MSEDCL* ("Azure Order") and Order dated 22.06.2020 in case No. 8 of 2020 titled *ReNew Solar Power Private Limited vs. MSEDCL* ("ReNew Order") – both projects set up in Rajasthan - which have been followed by the Commission in the cases of the present appellants. Suffice it to say that the said earlier dispensation by *Azure Order* and *ReNew* Order cannot be applied to the case of Juniper and Nisagra, due to locational and technical differences, the projects of the appellants being situate in Maharashtra, the distinguishing features being inclusive of the higher irradiation or solar energy potential in Rajasthan. As pointed out by the appellants there is no finding returned that the higher DC capacity or higher CUF in relation to the projects in hand is imprudent.

32. The contractual understanding, relevant for present purposes, as articulated in Clause 5.5.1 of PPA (as approved by the Commission) read with Clause 9.12.1 of RfS (both quoted earlier) concerns two stages. The first pertains to declaration of CUF at the time of entering into the PPA

whereunder it (CUF) could be of any percentage higher than 19% at the option or choice of the generator. The second kicks in during operation of the project after *Commercial Operation Date* (COD) wherein the actual CUF achieved and maintained has to be within ±10% of the Declared CUF. The appellants are right in contending that aside from minimum 19% there is no restriction on the project developer, it being free to provide for and declare a higher CUF at the time of PPA and may even revise it upwards, *albeit* only once, within the first year of COD. The discipline of maintaining CUF in generation, post COD, within the specified range (±10%) comes up later for the duration of PPA, not with reference to minimum of 19% *specified for declaration* but in relation to the *declared CUF*. We agree with the appellants and adopt the illustration given wherein if the Declared CUF is 20%, the permitted range will be 18-22% and if the Declared CUF is 30%, the permitted range will be 27-33%, during the period of PPA post COD. If the *carte blanche* given by Clause 5.5.1 of PPA in the matter of declaration of CUF is perceived in hindsight by the Commission to be cause of undue burden on the consumer, it would be within its power and jurisdiction to introduce better controls, but for future, by framing regulations.

33. Juniper has installed DC capacity of 43.72 MW (146%- or 1.457-times overloading) and Nisagra set up its projects with DC capacity of

101.79 MW (145%- or 1.454-times overloading). As against the minimum CUF of 19%, declared CUF is 25.16%, 24.92% and 25.29% in the case of Juniper and at 25.40%, 25.00%, 25.66%, 25.37%, 25.15%, 25.69% and 25.05% in the case of Nisagra. The appellants have only exercised the right given by RfS and PPA to design their projects in a manner that can deliver the Contracted Capacity and achieve declared CUF. In this view, we find nothing remiss when it is asserted by the appellants that the projects were accordingly set up and it was declared that CUF in the range of 24.9%-25.7% would be offered.

34. The State Commission had approved the procurement and adopted tariff by Order dated 27.11.2018 in case No. 277 of 2018. The Tariff Order further records the submissions whereby MSEDCL acknowledged that these projects were differently placed due to the geographic spread and smaller size of Solar Power units and included distribution losses up to 11kV level. It is not disputed that the appellants had declared their CUF in terms of PPA, the said Declared CUF for the respective projects having been accepted by MSEDCL. We hold, on the given facts, that once the RfS and PPA have been approved by the Commission and the declared CUF has been accepted by the parties and the Commission, it (the Declared CUF) cannot be questioned.

35. There can be no quarrel with the proposition that Article 9.2.1 of the PPAs dealing with Change in Law envisages restoration of the affected party to the same financial position. Accordingly, Change in Law impact ought to be computed on *actuals*. While granting *in-principle* approval for change in law, the MERC, by its Order dated 18.07.2019, unequivocally held that compensation is to be determined on actuals. The said order having attained finality, the MERC was expected to consider determination of compensation on actual DC installed capacity. By the impugned order, the Commission has limited the compensation by restricting the project DC capacity to 39.67 MW as against the total DC capacity of 43.72 MW for Juniper and to 93.33 MW as against the total DC capacity of 101.79 MW for Nisagra. Such an approach is contrary to the terms of the PPAs as well as settled law on the subject, particularly because it is based on normative/arbitrary formula different from the actuals. Juniper and Nisagra have already incurred the full cost for the Project and additional cost on account of imposition of Safeguard Duty, which is a part of the project cost. The claim for compensation under change in law provision is limited to the additional burden of taxes and duties. There is no basis for the assumption at the stage of scrutiny of such claim that the projects have been designed sub-

optimally. Relief sought pertains to reimbursement of additional cost on account of Change in Law and not the full cost for the modules.

36. In our view, under the PPAs, there is no restriction on the DC capacity to be set up or the maximum declared CUF. The CUF as declared by the appellants has been accepted by MSEDCL. The higher installed DC capacity results in higher generation from the Project while using the same AC infrastructure, thereby optimizing the utilization of the AC infrastructure, leading to a lower cost of energy, benefits of which have statedly been passed on to MSEDCL as lower tariff in terms of the PPAs. DC overloading is accepted as an industry practice for Solar Projects. MSEDCL has already taken the benefit of higher generation at a lower tariff. MSEDCL cannot claim that DC overloading is high. Accordingly, there is no escape from the full DC capacity of the Projects being considered while computing the Change in Law compensation.

Carrying Cost Rate

37. The respondents seek to defend the award of the carrying cost at the LPS rate submitting that since the PPA does not stipulate rate of interest for carrying cost, the LPS stipulated in the PPA has been rightly used for computing carrying costs in order to balance the financial interests of both

the parties. The rationale for adoption of LPS, it is pointed out, is set out correctly in the impugned order reading thus:

> "*31. The Commission notes that issues raised by present Petitioners are similar to those that were raised during earlier Case No. 8 of 2020 by M/s ReNew Solar Power Private Limited (RSPPL). This Commission vide its Order dated 22 June 2020 has ruled on the issue of carrying cost in that matter as follows:*
>
> > *"15.3 In this regard, the Commission notes that carrying cost is allowed as per restitution principle of the Change in Law stipulated under the PPA. Thus, carrying cost needs to reflect time value of money and cannot be used as a tool to earn additional compensation. Use of weighted average cost of capital or rate of Return on Equity would provide higher compensation than time value of money and hence is not appropriate for use as interest rate for carrying cost.*
> >
> > *15.4 <u>In normal course, for time gap between date of spending and realising the said amount, utility takes Working Capital loan and as per tariff principle such utility is allowed to claim interest on such Working Capital loan</u>. Similarly, when higher expenses are incurred on account of Change in Law which is to be reimbursed at later date, entity may fund such expenses through Working Capital Loan or through other means available with it. <u>However, under Section 63 bidding, Commission is not expected to go into all such financial details as bidder is not expected to disclose fundamental basis of the bid tariff. PPA does not stipulate rate of interest for carrying cost. Hence, as an alternative, rate of interest on working capital stipulated in RE Tariff Regulations is being referred as rate for carrying cost to work out the financing cost.</u>*
> >
> > *15.5 MREC RE Tariff Regulations, 2015 stipulates rate of interest on Working Capital as Base Rate (varies from 7.40% to 10% over the period) of the State Bank of India plus 350 basis point. However, at the same*

time it is important to note that late payment surcharge/delayed payment charges stipulated in the PPA is one year MCLR (varies from 7% to 9.20% over the period) of SBI plus 1.25% (125 basis point) which is lower than the rate of interest on Working Capital stipulated in Regulations. <u>Delayed Payment charges is to cover cost of working capital which utility has to raise in view of non-availability of fund due to delayed payment plus some punitive charges so as to create deterrent and ensure payment by the due date. Therefore, delayed payment charges are always more than the interest rate for working capital.</u> Same can be seen from MERC RE Tariff Regulations 2015 which stipulate interest on Working Capital as SBI Base Rate+350 basis point (effective max rate 13.50%) and delayed payment charges 15%. However, in case of RSPPL's PPA, if SBI Base Rate + 350 basis point stipulated in Regulations is adopted as interest rate for working capital, then financial principle of having delayed payment charges (SBI MCLR + 125 basis point) higher than interest on working capital would not be fulfilled. <u>Thus only conclusion that could be drawn is that present PPA which has been signed after following due competitive bidding process under Section 63 of the EA, 2003, presumes interest rate for working capital at much lower rate than that stipulated in MERC RE Tariff Regulations. However, as there is no other reference rate stipulated in Regulations, and in order to balance the interest of both parties, the Commission in its earlier Order dated 13 November 2019 has ruled that late payment surcharge/delayed payment charge stipulated in the PPA is to be used as a proxy for carrying cost.</u> In view of factual situation explained above, in the opinion of the Commission it is the best option to continue with this dispensation.

15.6 Accordingly, the Commission rules that as in its earlier Order dated 13 November 2019 in Case No. 259 of 2019, in present matter also, carrying cost will be equal to 1.25% in excess of 1 year MCLR of State Bank of India. Further, as such rate is linked to 1 year MCLR of SBI, it is not a fixed rate, but will reflect cost of borrowing for different time span for which compensation is to be paid."

> *32. Above ruling is squarely applicable in the present matter and hence the carrying cost needs to be allowed at the rate of 1.25% in excess of 1 year MCLR of State Bank of India. As far as, Petitioners' reference to actual borrowing from IREDA is concerned, under competitive bidding process, it is not expected to go into any thing beyond what was stipulated in the bid document and the scrutiny of compensation under Change in Law is to be limited to actual taxes paid to the Government Authority. If Petitioners' request for considering actual cost of borrowing is to be accepted then other actual parameters such as decreasing cost of solar panel, changes in other bid assumption etc. vis-à-vis bid date would also need to be gone into to compute actual impact of Change in Law. However, this is not expected as per the settled principles of law.*"
>
> *(Emphasis supplied)*

38. In defending the above views of the State Commission, the respondent MSEDCL also relies upon Section 62 of Electricity Act which reads thus:

> "*62. Determination of tariff.–(1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for–*
> *(a) supply of electricity by a generating company to a distribution licensee:*
> *Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;*
> *(b) transmission of electricity;*
> *(c) wheeling of electricity;*
> *(d) retail sale of electricity:*

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.
(2) The Appropriate Commission may require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff.
(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.
(4) No tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.
(5) The Commission may require a licensee or a generating company to comply with such procedures as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.
(6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee."

39. The focus of the submission was on sub-section (6) as quoted above, the argument being that interest equivalent to the bank rate is considered even by the legislature to be sufficient recompense for the loss suffered due to non-payment of money due.

40. We agree with the appellants that Section 62(6) of the Electricity Act, 2003 has no applicability for the case at hand. The said provision is in the nature of a penalty or interest for deliberate excess or under recovery of cost. Similar provision has been incorporated (Clause 6.6 quoted earlier) in the PPA for refund or return of excess amounts. It covers amounts which fall under the category of "Interest" (similar to LPS) but does not envisage restoration of a party to the same economic position as is the objective of carrying cost – i.e. recompense for the money denied at the appropriate time. Unlike Carrying Cost which becomes part of the tariff, interest or LPS, as contemplated under Section 62(6), is over and above the tariff.

41. The State Commission has failed to bear in mind that Late Payment Charge or Late Payment Surcharge ("LPS") is for limited purposes i.e. delay in payment under the PPA. This cannot be read into provision of 'Change in Law' which provides for *full restitution of actual costs*. The difference in payment of LPS and payment of Carrying Cost has been highlighted by the Supreme Court in *Maharashtra State Electricity Distribution Company Ltd. v. Maharashtra Electricity Regulatory Commission & Ors.* 2021 SCC Online SC 913, as under:

> "*174. This Court is unable to accept Mr. Singh's submission that the conclusion of APTEL that LPS is not tariff is erroneous. The meaning of the expression tariff has to be considered and has rightly been considered by APTEL in the context of the relevant provision of the Power Purchase Agreements. The dictionary meaning of tariff may be*

charge. However, in Article 13 of the Stage 1 and Article 10 of the Stage 2 Power Purchase Agreements, tariff means monthly tariff and tariff adjustment consequential to change in law, is of monthly tariff in respect of supply of electricity.

….

176. The object of LPS is to enforce and/or encourage timely payment of charges by the procurer, i.e. the Appellant. In other words, LPS dissuades the procurer from delaying payment of charges. The rate of LPS has no bearing or impact on tariff. Changes in the basis of the rates of LPS do not affect the rate at which power was agreed to be sold and purchased under the Power Purchase Agreements. The principle of restitution under the Change in Law provisions of the Power Purchase Agreements are attracted in respect of tariff.

177. LPS cannot be equated with carrying cost or actual cost incurred for the supply of power. The Appellant has a contractual obligation to make timely payment of the invoices raised by the Power Generating Companies, subject, of course, to scrutiny and verification of the same. Mr. Mukul Rohatgi has a point that if the funding cost was so much lesser than the rate of LPS, as contended by the Appellant, the Appellant could have raised funds at a lower rate of interest, made timely payment of the invoices raised by the Power Generating Companies, and avoided LPS.

…"

(Emphasis supplied)

42. The learned Counsel for MSEDCL drew our attention to the following passage from same judgment as referred to above:

"***193.*** *It would perhaps be pertinent to note that stereotype Power Purchase Agreements containing identical terms and conditions are executed by the Appellant with different Power Generating Companies. It is patently obvious that the Power Generating Companies only agree to terms and conditions of an agreement prepared by the Appellant. It is difficult to accept that the Appellant should incorporate in their stereotype Power Purchase Agreements, a provision for payment of LPS at a rate 2% higher than the SBAR, in case of late payment of invoices/bills, without any pre estimation of the loss likely to be suffered by a*

> *Power Generating Company, by reason of non payment of bills in time, more so when the Late Payment Surcharge is linked to the rate of interest in respect of specific types of loan, charged by a leading nationalised bank with the largest numbers of branches spread all over the country including in mofussil and rural areas.*"

43. We do not think the above observations of Supreme Court in (para 193 of) the decision in *Maharashtra State Electricity Distribution Company Ltd. v. Maharashtra Electricity Regulatory Commission & Ors* (supra) in any way detract from the conclusions drawn in preceding parts (paras 176 – 177) of the judgment quoted earlier as to the distinction between LPS and the carrying cost claim under change in law provision of PPA.

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

45. The view taken by the State Commission on the subject being erroneous cannot be upheld.

46. It was initially argued before us by the appellants that Juniper ought to have been compensated for the actual cost of funds for restitution, which at the minimum shall be 11.64%, based upon cost of long-term debt at the rate of 10.85% and cost of equity at the rate of 14% and project being funded through a 75:25 *debt:equity* Structure. Similarly, it was pressed that the appellant Nisagra ought to have been compensated for the actual cost of funds for restitution, which at the minimum shall be 11.30%, based upon cost of long term debt at the rate of 10.40% and cost of equity at the rate of 14% and project being funded through a 75:25 *debt:equity* Structure.

47. It was also argued that in the case of competitive bidding, cost of equity may not be known, as per MERC Tariff Regulations, the same being 14%, Juniper and Nisagra are ready to accept the same to avoid any dispute. In the alternative, it was urged that the appellants may be paid by MSEDCL full compensation in lumpsum or within 15 years, statedly the tenure of the long-term debt, with carrying cost at 10.85% and 10.40% respectively, i.e., the interest rate payable on long-term debt.

48. By additional written submissions presented on 01.11.2021, while also invoking *Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021* the appellants have urged that carrying cost be granted as under:

> "*(a) Actual interest rate on loans as on COD i.e 10.40% for JGEPL/10.85% for NREPL for the loan tenor of 16 years, which can be verified from the sanction letter of the lenders already on record.*
>
> *(b) Interest rate notified by Ld. MERC in Maharashtra Electricity Regulatory Commission (Terms and Conditions for Determination of Renewable Energy Tariff) Regulations, 2019 which provides a rate linked to 1 year average MCLR for 2019-20 plus 200bps for a loan tenor of 12 years; or*
>
> *(c) Interest rate in terms of Ld. MERC vide Order dated 30.04.2019 in Case No. 52 of 2019 in the matter of Determination of Generic Tariffs for Renewable Energy for FY 2019-20 which provides 1 Year MCLR + 300 bps (11.31% at that time) for the loan tenor of 12 years.*"

49. We note that the submissions on above lines were not earlier made before, or considered by, the State Commission. Since we are setting aside the decision of the Commission to apply the rate of LPS on the subject at hand, it would be proper to remit the matter to it (the Commission) for considering the above-noted alternative pleas of the appellants and decide afresh on the issue appropriately after hearing the parties.

Conclusion

50. For the foregoing reasons, the impugned order dated 23.07.2020 passed by Maharashtra Electricity Regulatory Commission in case nos. 61 of 2020 and 62 of 2020 to the extent thereby the claims of the appellants for compensation on account of imposition of *Safeguard Duty* were restricted for a limited capacity of solar modules/panels as against the total installed Direct Current (DC) capacity and the carrying cost was awarded at rate of late payment surcharge under the power purchase agreements is set aside. The denial of full compensation of additional expenditure and other consequential impact suffered consequent upon aforementioned change in law event on actual basis in terms of earlier order dated 18.07.2019 being arbitrary, unjust and bad in law, the State Commission shall be obliged to pass a fresh consequent order on the subject bearing in mind the observations recorded and conclusions reached above. The Commission shall hear the parties afresh on the subject of carrying cost and decide on the appropriate rate for full recompense on that account after considering the above-noted alternative pleas of the appellants.

51. The issue having persisted for long, we would expect the State Commission to pass the fresh order in terms of above directions expeditiously, not later than six weeks from the date of this judgment. The Commission shall also ensure that the order it passes pursuant to our directions is scrupulously complied with expeditiously and in a time-bound

manner and for this purpose shall have recourse to all enabling powers available to it under the law.

52. The appeals are disposed of in above terms.

PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO CONFERENCING ON THIS 16th DAY OF NOVEMBER, 2021.

(Sandesh Kumar Sharma)
Technical Member

(Justice R.K. Gauba)
Judicial Member