



- h) As per Article 4.1 & 4.3 of the PPA, it was the responsibility of TPREL to (a) obtain all consents, clearances and permits required for the construction and development of the Projects, and (b) to get the connectivity with the transmission system owned by State Transmission Utility(STU)/DISCOM. Further, TPREL was under an obligation to construct the dedicated transmission line at its own expense for the purpose of connecting the Projects with the STU/DISCOM transmission line at the Delivery Point.
- i) TPREL was required to first identify the sub-stations and thereafter construct the transmission line. However, TPREL struggled to identify and finalize the sub-station for the Projects and delayed the finalization of the same, which ultimately delayed the completion of the transmission lines as well as the Projects. TPREL was aware that the transmission line was not ready even after two-months from the sunset period of the said notification, and in the absence of the transmission line, the project cannot be commissioned. Thus, if TPREL wanted, the delivery of modules could have been postponed in such a way that the liability of 2020 SGD Notification was not there.
- j) Had TPREL been prudent enough it could have avoided the applicability of the Second SGD Notification on its Bunda Project and may have escaped the SGD liability by placing the order for solar modules near the commissioning date of the Project. However, TPREL chose to import the solar modules during the operating period of the Second SGD Notification for the reasons best known to itself.
- k) Pertinently, the sunset period of the 2020 SGD Notification was 29.07.2021 and from 30.07.2021 onwards till 03.12.2021 (i.e. COD), TPREL had 126 days to place the order for import of modules from China and commission the project. It is noted that, as per the industry practice, with proper man force on an average of around 5 MW to 7 MW of modules can be installed on a given day at the project site and TPREL had 126 days after the sunset date of the 2020 SGD Notification to commission the Bunda Project. TPREL was well aware that it will not be able to commission the project before 03.12.2021 and if it would have acted diligently, the impact of SGD could have been mitigated/ avoided, and TPREL could have saved the burden of additional costs which will now be passed on to the UPPCL and its consumers. Pertinently, from 29.07.2021 (i.e. sunset date) to 27.11.2021 (i.e. date intended for full commissioning), TPREL had clearly approx. 121 days

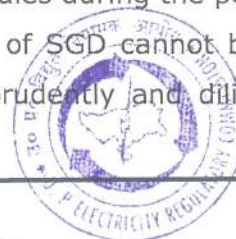
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to import the solar modules, install them at the site and commission the project. As per industry practice, a period of 121 days (i.e., 4 months) is more than sufficient time period to procure the solar modules prior to the commissioning for a typical 50 MW project.

- l) Moreover, it is an admitted case of TPREL that it did not consider the impact of 2020 SGD Notification while submitting its bid since it had planned to import, install and commission the Bunda Project within 105 days period between the sunset date of the 2018 SGD Notification (i.e. 29.07.2020) and Original SCOD of the Project (i.e. 11.11.2020). Thus, it must be noted that TPREL had 126 days after sunset date of the Second SGD Notification (i.e. 29.07.2021) till COD of the Bunda Project (i.e. 03.12.2021) to import, install and commission the said project. Therefore, it could have also imported, installed the modules and commission the project within 126 days available after sunset period of 2020 SGD Notification. It is unfathomable and cannot be argued by TPREL that it did not consider the impact of 2018 SGD Notification while submitting its bid as it planned to import/install the modules and commission the Project within 105 days available between sunset of First SGD Notification and Original SCOD. Whereas TPREL imported solar modules within the period covered by 2020 SGD Notification knowing that it is in no position to commission the project before December 2021 to January 2022.
- m) Therefore, 2020 SGD Notification may be a change in law event, however, in the facts and circumstances of TPREL's case before this Commission, TPREL had means to avoid / delay delivery of modules under the Module Supply Agreements dated 10.11.2020, 08.01.2021 & 26.01.2021 to avoid the costs incurred on account of 2020 SGD Notification and therefore, the burden of this additional cost cannot be transferred to UPPCL.
- n) Moreover, TPREL has sought extension of financial closure from UPNEDA on four occasions, which was granted to it by UPNEDA up to 05.02.2021. This shows that TPREL was well aware that the commissioning of the project will be delayed and thus, TPREL had enough time to place the order for import of modules. Even if it is assumed that TPREL imported the modules during the period when the 2020 SGD Notification was in force, the impact of SGD cannot be passed on to the consumers because TPREL hasn't acted prudently and diligently to avoid the impact of the 2020 SGD Notification.





- o) TPREL's act of placing order for supply of solar modules vide Purchase Orders dated 22.12.2020, 30.01.2021 and 10.02.2021 on Jinneng Photovoltaic Technology Ltd., Wuxi Suntech Power Co. Ltd and JA Solar International Limited ("Vendors") was contrary to Prudent Utility Practices since TPREL was under the process of completing the construction of dedicated transmission line until 14.09.2021, which is an important pre-requisite for completion / commissioning of the project and without completion of the same, the project could not be commissioned.
- p) It is an admitted case of TPREL that it was planning to achieve full commissioning of the project on 27.11.2021 since on 28.09.2021, TPREL issued an advance preliminary synchronization notice in terms of the Article 5.1.1 of the PPA to the UPPCL & UPNEDA on readiness of the Project by 27.11.2021, for synchronization/ commissioning.
- q) Moreover, since extensions were granted, TPREL had sufficient time to plan the import of Modules after the sunset period of the 2020 SGD Notification i.e., on 29.07.2021 to avoid its impact. Even assuming that TPREL scheduled the delivery for Modules during the 2020 SGD Notification, then in that scenario also, if TPREL had acted prudently, the delivery of Modules could have been planned/postponed in such a way that the Modules arrive in India when the 2020 SGD Notification is not in force. However, knowing that the Original SCOD of the project is extended and the impact of SGD vide 2020 SGD Notification can be avoided, TPREL failed to act prudently.
- r) There is no provision in the PPA which provides for relief of carrying cost nor there is any provision which deals with the principle of restitution i.e. restoration of a party to the same economic position as if no Change in Law event may have never occurred. Therefore, it is deducible that the Petitioner cannot seek any relief, to which he is not entitled to claim in terms of the provisions of the PPA.
- s) TPREL did not claim carrying cost specifically by way of its Petition No. 1664/2021, neither this Commission made any observation relating to carrying cost in its Order dated 05.04.2023, thus, the Petitioner is now prohibited from seeking carrying cost by way of the present Petition. The Petitioner cannot claim directly or indirectly by way of the present Petition what it had failed to claim at the relevant time of filing Petition No. 1664/2021. Further, in terms of the Order

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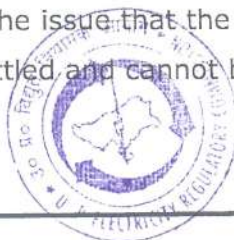




dated 24.03.2023 passed by the Hon'ble Supreme Court in Civil Appeal No. 8880/2022, it is quite clear that TPREL is not entitled towards its claim of carrying cost.

### **Rejoinder of TPREL**

10. On 21.09.2023, TPREL filed its rejoinder and has mainly submitted as under:
- a) The Petitioner submitted its bids on 16.11.2018 based 2018 SGD Notification, which provided sunset date as 30.07.2020. Therefore, as per the original schedule, the Petitioner planned to import the solar modules to India after 29.07.2020 with 0% safeguard duty. However, the MoF vide 2020 SGD Notification extended the applicability of the safeguard duty for the period between 30.07.2020 to 29.07.2021.
  - b) As on the date of 2020 SGD Notification, the SCOD was 12.11.2020, which was within the operation of 2020 SGD Notification. Due to the introduction of the 2020 SGD Notification, the rate of safeguard duty was changed from 0% to 14.9% as on 30.07.2020. As a result, the Petitioner was bound to pay the safeguard duty in order to import the solar modules even after 30.07.2020, which could not have been contemplated at the time of submission of the bid.
  - c) In the present case, a pre-bid meeting was held on 12.10.2018 whereby clarification was issued by UPNEDA that the imposition of the safeguard duty shall qualify as a 'Change in Law' event by way of Response to the queries/ suggestions received from the bidders to the RFP. In view of the same the Bid was submitted by the Petitioner on 16.11.2018 keeping in mind that the 2018 SGD Notification expires on 29.07.2020 and no safeguard duty would be paid post such sunset date.
  - d) 2020 SGD Notification qualifies as 'Change in Law' event' has been duly adjudicated by this Commission in its Order dated 05.04.2023 in Petition No. 1664/2021. Pertinently, UPPCL filed an appeal against the said Order via Appeal No. 559 of 2023 before the Hon'ble APTFI which was dismissed vide Order dated 25.07.2023. Thus, the issue that the 2020 SGD Notification amounts to 'Change in Law' has been settled and cannot be re-adjudicated at the behest of UPPCL.





- e) UPPCL has also admitted that the 2020 SGD Notification amounts to 'Change in Law', which is evident from the letter dated 15.09.2022 issued by UPPCL to the Petitioner herein. The UPPCL through its letter dated 15.09.2022 called upon the Petitioner to pass on the benefits/ savings to the UPPCL on account of reduction in the safeguard duty vide 2020 SGD Notification. In this regard, TPREL has not made any savings/ benefit on account of the New Notification and has in fact incurred an additional amount of Rs. 9.54 Cr. due to an increase in safeguard duty from 0% to 14.5%.
- f) At the time of 2020 SGD Notification, the extended SCOD was 20.02.2021, which is within the applicability of the New Notification i.e., between 30.07.2020 to 29.07.2021. Thereafter, on 23.11.2020 UPPCL granted blanket extension of five-months in terms of the MNRE's Office Memorandum dated 13.08.2020, which included the earlier extension given by the UPPCL, thereby extending the SCOD to 12.04.2021, which was also within the tenure of the 2020 SGD Notification.
- g) In the meanwhile, on 27.08.2020 & 28.09.2020, the Petitioner had requested for extension in SCOD up to 12.09.2021, which was also granted by UPNEDA. As the extension was under active consideration and since the extension had also been approved by UPNEDA, the date of commissioning of the Project was being considered 12.09.2021. In this regard, 12.09.2021 is only 45 days away from the sunset date of the New Notification, without even considering the holidays. Safeguard duty is calculated in the Bills of Entry at the time when the shipment reaches from China at the Indian border. Therefore, 45 days (even without considering holidays) for the modules to be imported into India, clearance at the customs and the port, and then transported to the site and installed thereafter is not enough.
- h) Purchase Orders dated 22.12.2020, 30.01.2021 and 10.02.2021 were placed on the Vendors keeping in mind the extended SCOD as 12.09.2021. The Modules were imported in the month of March 2021 to May 2021, when the SGD had been reduced from 14.9% to 14.5%. For illustrative purposes, in the present case, one of the Vendors issued Invoice No. CI-20210310-03 dated 10.03.2021 for 17,050 pcs of modules (550 pallets; 25 containers). Thereafter, Bill of Landing for the said shipment bearing No. 256330003 was issued at the Chinese port. For the said Shipment, the Bill of Entry (BOE) bearing No. 3/13933 was issued on 26.04.2021 by the Indian Customs, which contains quantification of the SGD applicable on the

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goods imported. The duty amount as per the BOE was paid on 27.04.2021 and a challan was issued for the same. After the shipment was cleared from the Indian Port, it was then transferred by way of Lorry Receipts, which also takes significant amount of time.

- i) The contention of UPPCL that the Petitioner had 126 days after the sunset date of the 2020 SGD Notification is nothing but an afterthought and an attempt to gain benefit from its own wrongdoing. While ordering the Solar modules, it was the understanding of the parties that the project will be commissioned by 12.09.2021. UPPCL had not even approved the extension of SCOD until November 2021. In such a situation there was no clarity regarding the SCOD, and the Petitioner was implementing the project in utmost bona fide to ensure earliest commissioning.
- j) The delay caused in the commissioning of the Project is not attributable to the Petitioner. This Commission has duly adjudicated the issue of the delay in commissioning of the Project in Petition No. 1709/2021 vide its Order dated 01.02.2023. Whether or not the delay was attributable to the Petitioner cannot be re-adjudicated by this Commission in the present Petition. Further, there is no stay granted by the Hon'ble APTEL in DFR No. 238 of 2023.
- k) At the time of placing the order for the modules, the Petitioner had no reason to believe that the commissioning of the Project will be delayed beyond 12.09.2021. However, due to the second wave of covid-19, the MNRE granted extension of 2.5 months (76 days) vide its Notification dated 29.06.2021. The Petitioner vide letter dated 16.07.2021 requested UPPCL to grant extension of 2.5 months in terms of the MNRE Notification dated 29.06.2021, in addition to the extension sought earlier up to 12.09.2021. Thus, after considering the extension being granted on account of second wave of covid-19, the SCOD was revised to 27.11.2021.
- l) On 28.09.2021, the Petitioner issued an advance preliminary notice to UPNEDA and UPPCL on readiness of the Project by 27.11.2021, for synchronization/ commissioning as per Article 5.1.1 of the PPA. UPPCL approved the extension in SCOD only on 22.11.2021. Therefore, it is apparent that right up to the completion of the project, the Petitioner had no clarity regarding the SCOD.





- m) The Petitioner with a view to complete the project by 12.09.2021 carried out its project activities and accordingly, placed the Purchase Orders to procure solar panels from China. As per the procurement plan, in order to complete the project by 12.09.2021, solar panels had to be procured from March 2021 to May 2021, i.e., prior to the sunset date of the New Notification. At the time of placing the order for the modules, the Petitioner could not predict the 2<sup>nd</sup> wave of covid-19 or other reasons which caused delay and hence at no reason believe that the commissioning of the project would be delayed beyond 12.09.2021.
- n) UPPCL at no point of time before the commissioning of the Project directed the Petitioner to wait until the sunset date of the New Notification to import the modules, despite being duly given the notice of 'Change in Law' event. After the commissioning completed, UPPCL by way of afterthought raised issues with respect to the import of the modules.
- o) Even when the achievement in financial closure was delayed, due to reasons beyond the control of the Petitioner, the same does not have any impact on the SCOD. Therefore, it was considered that the extended SCOD is 12.09.2021 and accordingly, the modules were procured by the Petitioner. Furthermore, the Petitioner duly obtained approvals for the delay in implementation of conditions subsequent, which occurred due to reasons beyond the control of the Petitioner. UPNEDA not only approved the delay occurred in fulfilment of condition subsequent but also requested UPPCL to grant further extension to the Petitioner.
- p) The Commission vide its Order dated 05.04.2023 in Petition No. 1664/2021 has duly provided the reasons for its findings at Para 19 to 29. of the Order. This Commission has noted the delivery schedule as well as the BOEs and has further noted that the delivery date of modules in India was for the dates much later than the date on which the 2018 SGD Notification ended.
- q) Quantification of claims of the Petitioner was not the subject matter of the Petition No. 1664/2021. Therefore, Hon'ble APTEL held that the contentions of the UPPCL may be rendered academic, depending on the outcome of the present Petition. Therefore, the Hon'ble APTEL disposed of the appeal filed by the UPPCL without granting any relief. It is denied that this Commission must adjudicate the case set up by UPPCL in Petition No 1664/2021 as the case has already been adjudicated and cannot be re-adjudicated.

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- r) Prudent Utility Practice is related to operation and maintenance of the plant and is not related to the procurement planning or 'Change in Law' provision of the PPA. The Hon'ble APTEL in *Tata Power Renewable Energy Limited v. Maharashtra Electricity Regulatory Commission & Anr. (in Appeal No. 215 of 2021)* held that prudence check cannot be extended to arranging business affairs on the basis of law which will come in future. This would make the 'Change in Law' provision otiose since prudence would get tested in the context of law to come in future.
- s) The understanding of UPPCL that conditions subsequent could not have been performed after 12 months is wholly incorrect. Clause 3.1.1 of the PPA provides that TPREL is required to complete the requisite activities within 12 months from the date of signing of PPA, unless such completion is affected by any Force Majeure event or if any of the activities is specifically waived in writing by UPNEDA. In the present case, the time specified for conditions subsequent was extended by UPNEDA from time to time. Therefore, the same having been condoned, cannot be reagitated by UPPCL. The delay in competition of conditions subsequent was on account of covid-19, which has been duly condoned by UPNEDA and this Commission in Petition No. 1709/2021.
- t) Article 4.8.1 provides for imposition of liquidated damages in case the project is delayed for reasons other than those specified in Article 4.7.1. Article 4.7.1 (i.e., Force Majeure events) does not provide for a maximum time for completion of the project as alleged by UPPCL. Admittedly, the present project was delayed due to force majeure events and events beyond the control of the Petitioner, which has been duly adjudicated by this Commission and the delay has been condoned in execution of the project without levy of liquidated damages.
- u) The Petitioner made all reasonable efforts to minimize the impact of delays caused inter alia on account of land ceiling delays, stamp duty waiver, covid-19 etc., in order to complete the project at the earliest. Transmission line commissioning and procurement of solar modules are parallel activities in the project. It cannot be alleged that till the time of completion of transmission lines, solar modules cannot be procured. The delay in the commissioning of the Plant was also due to non-availability of the evacuation facility which was to be provided by UPTCL.







- v) It is denied that the Petitioner had 126 days after the sunset date of the New Notification. The said argument of UPPCL assumes that the Petitioner could have predicted the 2<sup>nd</sup> wave of covid-19. Furthermore, even MNRE has acknowledged the 2<sup>nd</sup> wave of covid-19 as force majeure event and accordingly granted extension for the same.
- w) The reliance placed by UPPCL on the judgment of the Hon'ble APTEL dated 13.12.2016 in Appeal No. 307 of 2016 in the matter of *Subhash Infraengineers Pvt. Ltd. & Anr. Vs. Haryana Electricity Regulatory Commission & Anr.* is misconceived in as much as the Hon'ble APTEL in the said judgment was discussing the solar modules being left idle after the completion of the project on account of disputes relating to tariff. The Hon'ble APTEL noted that once the modules are installed on the site, a prolonged outage may disrupt the normal operation & maintenance of Solar PV plant as generation is reduced to zero due to no schedule and as such, all auxiliaries and systems of solar PV stations are switched off. In such a situation moisture ingress in transformers may cause failure of transformer, failure of UPS batteries due to lack of charging hence loss of control, protection and communication system as well as theft of un-energized solar panels.
- x) In the present case, the modules were not left idle for prolonged period of time. They were in a controlled warehouse environment and the Petitioner did not anticipate the delay in commissioning of the Project. Furthermore, it is not the case that there is any defect in the modules installed at the site. In fact, UPNEDA duly issued a commissioning certificate to the Petitioner for the same.
- y) It is a settled position of law that once the claim of 'Change in Law' is allowed, the party claiming such 'Change in Law' is entitled to the carrying cost as part of the restitution principle, which forms the basis of the 'Change in Law' provision. Thus, UPPCL is obligated to pay carrying costs along with the increased amount incurred by the Petitioner due to the New Notification. Principle of restitution has been evenly followed by all courts including the Hon'ble Supreme Court of India to award carrying cost.
- z) The reliance placed by UPPCL on the Interim Order dated 24.03.2023 passed by the Hon'ble Supreme Court in Civil Appeal No. 8880/2022 is wholly misdirected in as much as the final order has not yet been issued by the Hon'ble Supreme

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