

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 241 of 2022

Petition of M/s. T. P. Saurya Limited (TPSL) seeking relief on account of Change in Law due to increase in Goods and Service Tax (GST) rates vide Notification dated 30 September 2021 in terms of the Power Purchase Agreement (PPA) dated 22 July 2022 signed on 3 August 2022.

M/s. T. P. Saurya Limited (TPSL) Petitioner
..... Respondent
Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL)

Coram
Sanjay Kumar, Chairperson
Anand M. Limaye, Member
Surendra J. Biyani, Member

Appearance:

For the Petitioner : Adv. Venkatesh
For the Respondent : Adv. Udit Gupta

ORDER

Date: 20 June, 2024

1. M/s. T. P. Saurya Limited (TPSL) has filed the present Petition on 27 December 2022 seeking declaration of compensation of 'Change in Law' due to increase in Goods and Service Tax (GST) rates vide Notification dated 30 September 2021 under Article 9 of the Power Purchase Agreement (PPA) dated 22 July 2022 signed on 3 August 2022.
2. **Main Prayers of TPSL are as follows:**

- a) *Declare the Notification No. 8/2021 dated 30.09.2021 issued by the MoF as Change in Law event in terms of Clause 9.2.1 and 9.2.2 of the PPA;*
- b) *Declare that Petitioner is entitled to the quantum of compensation against the increase in cost as per the mechanism envisaged under Article 9.2.5 of the PPA at the appropriate stage.*
- c) *Pass any other order(s) as it deems fit in the interest of justice..... ”*

3. TPSL in its Petition stated as below:

3.1 MSEDCL issued Request for Selection for procurement of 500 MW Wind-Solar Hybrid power on long terms basis through competitive bidding process (followed by reverse e-Auction) from grid connected inter-State and intra-State Projects on 07 May 2021. The last date of bid submission was 8 June 2021 which was further extended to 23 June 2021.

3.2 After opening the Bids, the e-Reverse Auction was conducted on 9 July,2021 wherein TPSL, along with M/s Azure Power India Pvt. Ltd., emerged as the successful bidders for development of the 500 MW Wind-Solar Hybrid Power Projects at a Tariff of Rs. 2.62 per unit.

3.3 At the time of submission of bid and e-Reverse Auction, the Notification Nos. 24 and 27 of 2018 dated 31 December 2018 were in force for GST. Thereafter, on 30 September 2021, MoF GoI issued the GST Notification, thereby omitting S. No. 234 from Schedule 1 and inserted S. No. 201A in Schedule-II which attracts GST of 12% upon the RE devices and parts for their manufacture.

3.4 The letter of Award (LOA) was issued by MSEDCL to TPSL for development of the Hybrid project on 14 December 2021. Thereafter, MSEDCL filed Case No. 15 of 2022 on 29 December 2021 under Section 63 of the Electricity Act, 2003 before the Commission seeking adoption of the Tariff discovered through a Competitive Bidding process.

3.5 TPSL had filed its Reply in Case No. 15 of 2022 on 4 February 2022, supporting MSEDCL's Petition and stated that as per Article 9.2.2 of the draft PPA, the Change in Law events need to be recognized by the Commission at the adoption stage. However, on account of non-execution of the PPA, TPSL had sought the following:

- (a) To expedite the process of adoption of tariff in order to enable Petitioner to fulfil its obligations under the PPA.
- (b) Sought liberty to claim Change in Law reliefs in accordance with the PPA as and when the PPA is executed between the parties.

3.6 The Commission vide its Order dated 11 March 2022, refused to adopt the Tariff at Rs. 2.62 and proposed the Tariff of Rs. 2.49 per unit to the Successful Bidders (including TPSL).

Therefore, the liberty as sought by TPSL to claim the Change in Law reliefs at the later stage was not considered by the Commission.

3.7 Being aggrieved by the Order dated 11 March 2022 in Case No. 15 of 2022, TPSL filed a Review Petition (i.e., Case No. 59 of 2022), on 4 April 2022 seeking review of the Adoption Order and requested to revise the Tariff to Rs 2.56 per unit in view of the change in cost of the steel which plays a vital role in development of the Hybrid Project.

3.8 The Commission vide its Order dated 7 July 2022 disposed of the Review Petition, thereby adopting the Tariff at Rs. 2.56 per unit and directing the Parties to execute PPA within a period of 15 days from the date of Order.

3.9 On 22 July 2022, TPSL issued a letter to MSEDCL informing that the Commission, while disposing off the Review Petition, has not accorded any finding in respect of Change in Law. Therefore, TPSL sought liberty from MSEDCL to claim Change in Law relief in accordance with the terms of the PPA.

3.10 Thereafter, on 1 August 2022, TPSL issued another letter to MSEDCL highlighting its inability to commence work towards the Hybrid Project due to non-execution of PPA by MSEDCL and requested MSEDCL to take steps for expeditious execution of the PPA.

3.11 MSEDCL and TPSL signed the PPA for supply of power from Project on 3 August 2022.

3.12 On 12 August 2022, TPSL issued a Change in Law Notice to MSEDCL intimating the change in rate of GST from 5% to 12% on supply of RE devices on account of the GST Notification which will result in additional tax liability upon TPSL (effective GST rate becomes 13.8% from existing 8.90% for Solar and 8% from existing 5% for Wind where Supply Contract has been awarded) for construction of the Hybrid Project.

3.13 In accordance with Article 9.2.1 and Article 9.2.2 of the PPA, TPSL has filed the present Petition seeking a declaration that the GST Notification is a Change in Law event and TPSL is entitled for the compensation to bring it to the same economic position.

4. MSEDCL in its submission dated 08 August 2023 stated as below:

4.1 The Commission vide its Order dated 11 March 2022 in Case No. 15 of 2022 refused to adopt the tariff at the TPSL's quoted rate of Rs. 2.62/kWh and provided the option to TPSL to match the tariff of Rs. 2.49/kWh. (landed cost at Maharashtra STU periphery for procurement from SECI), if they so desire.

- 4.2 Thereafter, TPSL filed Review Petition No. 59 of 2022 on 4 April 2022 whereby proposed the revised tariff of Rs. 2.56/kWh instead of earlier quoted Rs. 2.62/kWh.
- 4.3 The voluntarily offered revised Tariff of Rs. 2.56/kWh was inclusive in nature owing to prevalence of GST Notification dated 30 September, 2021 prior in time.
- 4.4 TPSL is estopped from segregating such claim/factors which otherwise since was duly in their knowledge while placing the revised tariff for consideration/approval, under the guise of Change in Law claim.
- 4.5 In the case, where the seller is desirous of claiming a Change in Law, then mandatory Notice has to be issued within 7 days of becoming aware of the same. TPSL has issued the Notice on 12 August 2022 for the Notification dated 30 September 2021 after considerable delayed time.
- 4.6 The Commission recently vide its Order dated 4 August, 2022 passed in Case No. 39 and 41 of 2022, in the case of M/s. Sunfree Paschim Renewable Energy Private Limited & M/s. Nature International Private Limited respectively, has disallowed the impact of Change in Law on account of increased Basic Custom Duty on inverters vide Notification dated 1 February 2021, stating that the same cannot be allowed as mandatory condition of Notice for Change in Law event has not been fulfilled.
- 4.7 The computation of the quantum of compensation before the commercial operation date appears to be a premature claim of TPSL, requesting compensation without proper evaluation of the project's status may lead to inaccurate assessments and unfair outcomes. Hence, it is essential to await the appropriate time for such claims to be considered in a just and equitable manner.

5. TPSL in its Rejoinder submission dated 19 January 2024 stated as below:

- 5.1 The Commission in its Review Order dated 7 July 2022 in Case No. 59 of 2022 has not calibrated/redetermined the competitively bid Tariff under Section 63 of the Electricity Act, 2003 and has only applied a test of market reflectiveness. Therefore, the Commission did not analyse factors which impact Tariff quoted by successful bidders.
- 5.2 In the Review Order, none of the factors such as rise in price of steel or increase in GST was considered by the Commission while adopting the revised Tariff as quoted by TPSL.
- 5.3 The only factor basis which the Commission was pleased to consider and adopt the revised Tariff of Rs 2.56/kWh was on account of the position that RE Hybrid power to be procured by MSEDCL from Solar Energy Corporation of India's tranche IV has exhausted and a

revised Tariff of Rs 2.53-2.54/kWh has been discovered in latest e-reverse auction conducted by SECI for Tranche V and the landed cost of such power at Maharashtra STU periphery would result in Tariff of Rs. 2.69- 2.70/kWh.

- 5.4 As per Article 9.1.1 of the PPA, the pre-requisite for an event to qualify as a Change in Law event is that such an event must have occurred post the last date of bid submission i.e., 23 June 2022. It is an admitted position that GST Notification was issued on 30 September 2021 which is after the last date of bid submission.
- 5.5 After adoption of revised Tariff by the Commission, TPSL has issued letters to MSEDCL informing that as the PPA was yet to be executed, therefore, TPSL was not in a position to place on record Change in Law events such as GST, Basic Custom Duty and Safeguard Duty which has transpired and affected the cost of the Project.
- 5.6 After the execution of PPA, on 12 August 2022, TPSL has duly complied with Article 9.3.1 of the PPA and has issued a Change in Law Notice to MSEDCL on account of GST Notification.
- 5.7 The Commission's Order dated 04 August, 2022 in Case No. 39 and 41 of 2022, in matter of Sunfree Paschim Renewable Energy Private Limited & M/s Nature International Private Limited is not applicable to the instant case as the Petitioners there in those cases were failed to issue a Change in Law Notice under the PPA, whereas, in the instant case, TPSL has duly complied with terms of Article 9.3.1 of the PPA and has issued a Notice within 7 working days from the date of execution of the PPA.
- 5.8 TPSL by way of present Petition, is only seeking a declaration that the GST Notification issued by MoF constitutes a Change in Law event in terms of the PPA and that TPSL will be entitled to the additional cost incurred towards the development of Project in the form of compensation which will be determined as per the mechanism as envisaged under Article 9.2.5 of the PPA at the appropriate stage.
6. At the hearing held on 23 February, 2024, TPSL and MSEDCL have reiterated their submissions filed in Petition / Replies. The Commission directed both the parties to make their written submissions within seven days.
7. MSEDCL in its additional submission dated 12 March 2024 reiterated earlier submissions and hence, not repeated here.
8. **TPSL in its Submission dated 13 March 2024 has repeated its earlier submissions and makes following additional submission:**

8.1 The Original last date of submission of bids under the RfS was 8 June, 2021 which was subsequently revised to 23 June, 2021.

8.2 GST Notification issued by MoF, GoI squarely qualifies as a Change in Law event within the meaning of Article 9 of the PPA and that TPSL has fulfilled all the conditions as laid down thereunder:

- (a) Admittedly, the GST Notification was issued after the bid deadline date as envisaged under the RfS, i.e., 23.06.2021.
- (b) Change in rate of GST to be applied over RE devices is a statutory change in the tax structure and is recognized as a Change in Law event under Article 9.1.1(v) of the PPA.
- (c) The event under question has been specifically recognized as a Change in Law event under Article 9.2.2 of the PPA.
- (d) In compliance of Article 9.3.1 of the PPA, TPSL, by way of Notice dated 12 August 2022, has duly notified the Change in Law event and its implication over the cost of the Hybrid Project.

8.3 Pertinently, the event in question has already been recognized as a Change in Law event by various State Commissions and in this regard, the following Orders are relevant:

- (a) The Central Electricity Regulatory Commission in matter titled SECI vs AMP Energy Green Private Limited, Petition No. 245/AT/2022 has held that GST Notification will result in change in the project cost, therefore, be treated as a Change in Law event.
- (b) The Rajasthan Electricity Regulatory Commission in matter titled GUVNL vs SECI & Ors. Case No. 1905 of 2021 has hold that GST Notification shall be treated as a Change in Law event.

8.4 GST Notification has direct cost implication upon TPSL qua the development of the Hybrid Project. As on date of the submission of bid, GST at the rate of 8.9% [70% of 5% (goods component) + 30% of 18% (service component)] was payable by TPSL on supply and services contract for setting up of the Solar component and on supply contract for setting up of the Wind component in terms of the Notification Nos. 24/2018 and 27/2018 dated 31 December 2018 issued by MoF, GoI. However, the GST Notification was issued after the bid submission date which resulted in imposition of 12% GST upon the RE devices which was earlier considered at 5%. The tentative quantum of financial impact of change of GST rate under the GST Notification (without carrying cost) is around 69.64 Crores.

8.5 TPSL, by way of present Petition, is only seeking in-principle approval for declaration that the GST Notification issued by MoF, GoI constitutes a Change in Law event in terms of the PPA and that TPSL will be entitled to the additional cost incurred towards the development of Project in the form of compensation which will be determined as per the mechanism as envisaged under Article 9.2.5 of the PPA at the appropriate stage.

8.6 The issue of recognition of the GST Notification as an event of Change in Law is no more res integra, in the light of various decisions passed by the Commission as well as the Central Electricity Regulatory Commission.

Commission's Analysis and Rulings:

9. The Present Petition has been filed by TPSL seeking declaration that the GST Notification dated 30 September 2021 issued by MoF, GoI constitutes a Change in Law event in terms of the Power Purchase Agreement dated 22 July 2022 which was signed on 3 August 2022 and that TPSL will be entitled to the additional cost incurred towards the development of Project in the form of compensation which will be determined as per the mechanism as envisaged under Article 9.2.5 of the PPA at the appropriate stage.

10. The letter of Award (LOA) was issued by MSEDCL to TPSL for development of the 300 MW Wind Solar Hybrid Power Project on 14 December 2021. TPSL has signed the PPA with MSEDCL on 3 August 2022 for development of 300 MW of Wind Solar Hybrid Power Project. On 12 August 2022, TPSL issued a Change in Law Notice to MSEDCL intimating the change in rate of GST from 5% to 12% on supply of RE devices on account of the GST Notification which will result in additional tax liability upon TPSL (effective GST rate becomes 13.8% from existing 8.90% for Solar and 8% from existing 5% for Wind where Supply Contract has been awarded) for construction of the Hybrid Project. MSEDCL in its reply is opposing such claim of TPSL on the ground that TPSL while giving revised tariff Offer must have included impact of such increased GST and notice for Change in Law was not issued within 7 days from date of notification.

11. Considering above factual position, material placed on record and arguments made during hearing, the Commission frames following issues for its considerations in present matter:

- a. Whether the Notification dated 30 September 2021 resulting increase in GST on Wind - Solar Power Generating Systems qualifies as Change in Law?
- b. Whether TPSL has given Notice of the Change in Law event within reasonable time to MSEDCL?

The Commission is addressing the above issues in the following paragraphs.

12. Issue A: Whether the Notification dated 30 September 2021 resulting increase in GST on Wind Solar Hybrid Power Generating Systems qualifies as Change in Law?

- 12.1 The Commission notes that while opposing TPSL's claim of Change in Law, MSEDCL by relying on Review Petition in Case No. 59 of 2022 filed by TPSL on 4 April 2022 wherein TPSL had proposed the revised Tariff of Rs. 2.56/kWh instead of earlier quoted Rs. 2.62/kWh. As per MSEDCL, on the date of filing the Review Petition, TPSL was aware of the GST Notification dated 30 September 2021 and its impact. Therefore, TPSL while voluntarily quoting the revised Tariff of Rs. 2.56/kWh by way of Review Petition, has factored in the implication of GST Notification, dated 30 September 2021 and hence TPSL is estopped from segregating the claim on account of GST Notification.
- 12.2 While rebutting above contentions of MSEDCL, TPSL stated that the Commission in its Review Order dated 7 July 2022 in Case No. 59 of 2022 has not calibrated/redetermined the competitively bid Tariff under Section 63 of the Act and has only applied a test of market reflectiveness. TPSL submitted that the Commission did not analyse factors which impact Tariff quoted by successful bidders. None of the factors such rise in price of steel or increase in GST was considered by the Commission while adopting the revised Tariff as quoted by TPSL. Hence, TPSL has requested that such contention of MSEDCL be rejected and provisions of PPA be considered for deciding issue of Change in Law.
- 12.3 In this regard, the Commission notes that in its review Order dated 7 July 2022, reproduced below, it has explained background for adopting TPSL's tariff offer of Rs. 2.56/kWh:

“9. TPSL in present Petition is proposing to re-consider the Impugned Order on the ground that there has been steep increase in the price of steel. Further, TPSL has proposed revised tariff of Rs. 2.56 per unit for 300 MW RE Hybrid power. The Commission notes that during the bidding exercise the discovered tariff is Rs. 2.62 per unit and now TPSL is proposing discounted tariff of Rs.2.56 per unit.

10. It is pertinent to note that the Commission in Impugned Order has no way calibrated/redetermined the discovered tariff rather it has only applied a test of market reflectiveness. During the said exercise the discovered tariff (Rs.2.62 per unit) was found to be on higher side and accordingly the Petition of MSEDCL for tariff adoption was rejected. Approaching SECI was one of the suggested options. The Commission in Impugned Order noted following:

“ 16.10. In view of above analysis, and after considering the fact that MSEDCL has option to procure Hybrid RE power from SECI at much lower tariff than the tariff proposed for adoption in present proceeding, the Commission finds that the

discovered tariff is not reflective of market and accordingly MSEDCL's prayer for adoption of tariff of Rs. 2.62 P.U. for 500 MW Wind-Solar Hybrid can not be accepted.

16.11. The Commission notes that post e-reverse auction in the present bidding process on 9 July 2021, MSEDCL has submitted present Petition for adoption of tariff after the delay of 5 months. While justifying such delay MSEDCL submitted that they were analyzing discovered tariff with tariff discovered by other agencies. Prima facie this seems a good practice, as it is followed with the intention to reduce its power purchase expenses. But the same should be completed within reasonable period and should not take such long period of 5 months. MSEDCL needs to note and appreciate the concerns of the bidders also who have expressed their grievance about the delay in this tender. Further after undertaking such analysis, details of the same should be submitted along with tariff adoption process so that the Commission is aware of Distribution's Licensees efforts to reduce its power purchase expenses. In the present case, after taking such long period of 5 months and also after considering the fact that SECI has discovered much lower tariff, still MSEDCL has proposed adoption of such higher tariff. The Commission has already rejected adoption of such tariff in above paragraph. Therefore, in order to meet its RPO at lower tariff, the Commission is of the view that **MSEDCL could still approach SECI for signing of PSA for 500 MW (or any other quantum) of Wind-Solar Hybrid Power discovered under Tranche-IV (Rs. 2.34/2.35 P.U.)**. This would reduce the power purchase expenses of MSEDCL and would also be in the consumer interest. This is subject to MSEDCL's own due diligence. ”

11. Further, tariff matching option is provided to successful bidders in the impugned Order which reads as follows:

“ 17. Having ruled as above and rejecting the adoption of tariff proposed in the present Petition, the Commission would like to provide option to the selected bidders to match the tariff of Rs. 2.49 P.U. (landed cost at Maharashtra STU periphery for procurement from SECI), if they so desire. **This is completely voluntary for successful bidders** and if they do not wish to do so MSEDCL shall return their EMD as per process. However, in case, successful bidders agree to match tariff of Rs. 2.49 P.U., the same should be communicated to MSEDCL within a week from date of this Order and within two weeks from receipt of such communication, MSEDCL shall sign PPA with such bidder, and submit copy of the PPA to the Commission for record purpose. This option given to the successful bidder should not be considered as direction to negotiate the tariff discovered under Section 63 of the EA, 2003 as the Commission has clearly stated that

successful bidders are free to opt out without any implications and then MSEDCL may consider to procure such power from SECI at the same effective tariff at Maharashtra periphery. ”

Thus, Tariff matching option was just a suggestion for successful bidders and was completely voluntary. It is also important to note that the Commission in impugned Order did not analyse factors which impacts tariff quoted by successful bidders and only compares other cheaper options available for MSEDCL to procure such power. Hence, in the impugned Order, the Commission was not required to look into increase in steel prices, which otherwise also is not permissible under Section 63 bidding process, and hence review on this aspect as sought by TPSL cannot be allowed.

12. However, during the present review proceeding, MSEDCL in its submission has stated that as suggested by the Commission, vide letter dated 8 April 2022, it had approached SECI for procurement of 500 MW RE Hybrid power under tranche IV, but no response has been received from SECI. MSEDCL has further stated that SECI has orally communicated that the RE hybrid power capacity under SECI's tranche IV has been exhausted. Further, tariff of Rs. 2.53-2.54 per unit has been discovered in SECI's latest e- reverse auction for Tranche V (1200 MW RE Hybrid) and landed cost of such power at Maharashtra STU periphery would be Rs. 2.69-2.70 per unit.

13. The Commission notes that its decision to reject adoption of tariff in impugned Order is based on premise that option of procuring same power from SECI at tariff lower than discovered tariff was available to MSEDCL. But, as stated by MSEDCL during present proceeding, said cheaper power capacity has been exhausted and SECI has discovered higher tariff in new bidding process. Considering this fact, the Commission notes that premise for impugned Order has completely altered which qualifies 'any other sufficient reasons' criteria for review of Order. Hence, the Commission is inclined to review its impugned Order.

14. The Commission in its impugned Order dated 11 March 2022 has noted that MSEDCL has conducted bidding process for 500 MW RE Hybrid power as per Government of India's guidelines stipulated under Section 63 of the Electricity Act, 2003 in transparent manner and has discovered tariff of Rs. 2.62 per unit. Said tariff was not adopted only because option of procuring same power at cheaper tariff (Rs. 2.49 per unit landed tariff at Maharashtra periphery) was available with MSEDCL. But now MSEDCL has stated that such option is not available as SECI has exhausted such capacity at lower tariff. Under such circumstance, obvious option is to direct MSEDCL to conduct fresh bidding process, but this will take some time and will delay the availability of RE power for MSEDCL which will further increase RPO shortfall of MSEDCL. Therefore, considering the fact that TSPL in present petition has voluntarily

offered tariff of Rs. 2.56 per unit which is lower than discovered tariff of Rs. 2.62 per unit, the Commission is inclined to adopt such tariff of Rs. 2.56 per unit. 15. In view of above, the Commission adopts the discounted tariff of Rs. 2.56 per unit for supply of 300 MW RE Wind Solar Hybrid power by TPSL to MSEDCL. Parties are directed to sign PPA within 15 days from date of this Order and submit the copy of the same for records of the Commission.”

Thus, as stated in above quoted order, the Commission in its Order dated 11 March 2022 has refused to adopt tariff of Rs 2.62/kWh for RE Hybrid power as option of procuring same power at cheaper rate (Rs 2.49/kWh) from SECI was available with MSEDCL. However, in review proceeding, MSEDCL has stated that such option is not available as SECI has exhausted capacity at said cheaper tariff and new bid of SECI has discovered higher tariff. Considering such changed circumstances, the Commission in its Order dated 7 July 2022 has allowed review and adopted discounted tariff of Rs 2.56/kWh (voluntarily offer by TPSL) as it is lower than discovered tariff of Rs. 2.62/kWh. In the above Order, the Commission has categorically stated that it has not analyzed factors which impacts discovered tariff including increase in steel prices and has just test market reflectiveness of the discovered tariff.

12.4 Considering above factual position, the Commission notes that in its review Order dated 7 July 2022, it has adopted discounted tariff of Rs. 2.56/kWh because it was lower than earlier quoted tariff of Rs. 2.62/kWh. Nowhere in its review Petition, TPSL has stated that said revised tariff was inclusive of revised GST rates as on date of filing of review Petition. Further, the Commission also notes that to get cheaper tariff, Distribution Licensee indulge into negotiation with bidders' post discovery of tariff through bidding process. In such a case, only quoted tariff gets revised, all bidding conditions remains unaltered. Same principles need to be adopted in the present case also. In fact, accepting MSEDCL's argument will led to change in cut of date under the PPA and amounts to changing PPA conditions post bidding process which will vitiate bidding process itself. Hence, the Commission rejects MSEDCL's contention that impact of increased GST rate is included in discounted tariff of Rs. 2.56/kWh.

12.5 Accordingly, the Commission is analysing TPSL's claim of Change in Law as per provisions of the PPA. The Commission notes that GST rates have been revised after the last date of bid submission. On the last date of the bid submission (23 June 2021), GST on Solar Power Generating Systems was 5%. The MoF Notification dated 30 September 2021 notified increase in GST rate on procurement of Modules and other SPGS materials from 5% to 12%. Due to which GST composite rates on EPC Contracts increased from 8.9% to 13.8%. GST on components for Wind Power Generating Systems was 5%. The MoF Notification dated 30 September 2021 notified increase in GST rate on components for wind power projects from 5% to 12%.

12.6 The Commission notes that any event can be said to be a ‘Change in Law Event’, only if it satisfies the provisions stipulated under the PPA. Relevant part of PPA dealing with provisions of Change in Law is reproduced as under:

“ARTICLE 9: CHANGE IN LAW

9.1.1 "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 HPD or any income to the HPD:

- i) 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;*
- ii) 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;*
- iii) the imposition of a requirement for obtaining any Consents, Clearances, Permits and/or licenses which was not required earlier;*
- iv) 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 HPD;*
- v) any statutory change in tax structure i.e., change in rates of taxes, duties and cess, or introduction of any new tax made applicable for setting up of Hybrid Power Project and supply of power by the HPD and has direct effect on the Project, shall be treated as per the terms of this Agreement.*

.....

9.2 Relief for Change in Law

9.2.1 In the event of occurrence of any of events as provided in Article 9.1 which result in any increase in the Project Cost (i.e. the cost incurred by the HPD towards the supply and services only for the Project concerned, upto the Actual Commissioning Date of the last part capacity or Scheduled Commissioning Date/extended Scheduled Commissioning Date, whichever is earlier), the HPD/MSEDCL shall be entitled for compensation by the other party, as the case may be, subject to the condition that the such ‘Change in Law’ is recognized by the Appropriate Commission. Compensation payment on account of such ‘Change in Law’ shall be determined and shall be effective from such date as may be decided by the Appropriate Commission.”

9.2.2 However, in case of change in rates of safeguard duty, GST and basic customs duty after [Insert last date of bid submission] and resulting in change in Project Cost, then `such change will be treated as „Change in Law“ and the

quantum of compensation payment on account of change in rates of such duties and shall be provided to the affected party by the other party as per Article 9, subject to the provision that Appropriate Commission recognizes such provisions at the time of adoption of tariff by the Appropriate Commission and any decision in this regard shall be governing on Power producer and MSEDCL. It is clarified that, any introduction of new tax/duty/cess made applicable for setting up the Hybrid power project and supply of power from the Hybrid Power project by the Power producer which have a direct effect on the Project, resulting in change in Project Cost, will also qualify under “Change in Law” as per timeline and procedure indicated under Article-9 of PPA.

9.3 Notification of Change in Law

9.3.1 If the Seller is affected by a Change in Law in accordance with Article 9.1 and wishes to claim change in Law under this Article, it shall give notice to MSEDCL of such Change in Law within 7 days after becoming aware of the same or should reasonably have known of the Change in Law.

.....

9.3.3 Any notice served pursuant to this Article 9.3.2 shall provide, amongst other thing, precise details of:

a) The Change in Law: and

b) The effect on MSEDCL of the matters referred to in Article 9.2”

[Emphasis added]

12.7 The Commission notes that the Notification of MoF is subsequent to the last date of Bid submission (i.e., 23 June 2021). Under the provisions of PPA, an event arising from the actions of an authority covered within the definition of ‘Indian Governmental Instrumentality’ would satisfy the requirement of ‘Change in Law’. ‘Indian Government Instrumentality’ as defined under the PPA includes any Ministry of the Government of India. The Ministry of Finance being Ministry under the Government of India is satisfying the requirement of ‘an Indian Government Instrumentality’ under the PPA.

12.8 Further, as per Article 9.1.1 (v) of the PPA, notification of new law or amendment of existing law or introduction / change in tax, duty or cess subsequent to Bid Submission date qualifies as Change in Law. Admittedly, MoF’s Notification dated 30 September 2021 issued after Bid Submission date of 23 June 2021.

12.9 Therefore, the Commission is of the view that the Notification dated 30 September 2021 qualifies as a Change in Law event under the PPA.

13. Issue B: Whether TPSL has given Notice of the Change in Law event within reasonable time to MSEDCL?

13.1 MSEDCL contended that Change in Law Notice regarding the impact of GST Notification dated 30 September 2021 was given only on 12 August 2022 by TPSL i.e. beyond the stipulated period in the PPA. Furthermore, TPSL has failed to establish or elaborate regarding the delay in sending a Notice.

13.2 While opposing above contentions, TPSL has submitted the chronological events as under:

- a) On 22 July 2022, TPSL issued a letter to MSEDCL informing that while disposing the adopting proceedings, the Commission has not accorded any finding in respect of Change in Law claims, therefore, TPSL sought liberty of MSEDCL to claim Change in Law relief in accordance with terms of PPA.
- b) As MSEDCL did not come forward to execute the PPA, therefore, on 1 August 2022, TPSL issued another letter to MSEDCL highlighting its inability to commence work towards Hybrid Project in absence of execution of PPA by MSEDCL and requested it to take steps to expedite the execution of the PPA.
- c) Thereafter, on 03 August 2022, MSEDCL signed/ executed the PPA with TPSL.
- d) After the execution of PPA, on 12 August 2022, TPSL has duly complied with Article 9.3.1 of the PPA and has issued a Change in Law notice to MSEDCL on account of GST Notification issued by MoF, GoI which has resulted in upward revision in effective GST rate on supply and services required for construction of Hybrid Project.

13.3 The Commission notes that although MSEDCL is relying upon Article 9.3.1 of the PPA to state that Change in Law notice needs to be issued within 7 days, there is separate clause under PPA which deals with Change in Law on account of GST rate. Relevant Article 9.2.2 of the PPA is reproduced below:

“9.2.2 However, in case of change in rates of safeguard duty, GST and basic customs duty after [Insert last date of bid submission] and resulting in change in Project Cost, then 'such change will be treated as 'Change in Law' and the quantum of compensation payment on account of change in rates of such duties and shall be provided to the affected party by the other party as per Article 9, subject to the provision that Appropriate Commission recognizes such provisions at the time of adoption of tariff by the Appropriate Commission and any decision in this regard shall be governing on Power producer and MSEDCL. It is clarified that, any introduction of new tax/duty/cess made applicable for setting up the Hybrid power project and supply of power from the Hybrid Power project by the Power producer which have a direct effect on the Project, resulting in change in Project Cost, will also qualify under "Change in Law" as per timeline and procedure indicated under Article-9 of PPA. It is further clarified that, applicability of

Safeguard Duty on "Solar Cells whether or not assembled in modules or panels" which is till 29.07.2021, if gets extended and has a direct effect on the Project, resulting in change in Project Cost, such extension will also qualify under "Change in Law" as per timeline and procedure indicated under Article-9 of PPA”

In terms of the above Article of the PPA, Change in Law related to GST is to be approved by the Commission at the time of adoption of tariff. The Commission notes that TPSL in its submission in the matter of adoption of tariff has highlighted this provision of draft PPA and stated as follows:

“8.4 As per Article 9.2.2 of the Draft PPA the Change in Law events need to be recognized by the Commission before the developer can be granted any relief. However, the following is worth noting:

(a) As on date, the PPA has not been executed between TPSL and MSEDCL. Therefore, TPSL cannot at this stage place the Change in Law events before the Commission for its consideration.

(b) Therefore, liberty may be granted by the Commission to the TPSL to claim Change in Law relief in accordance with the PPA as and when the PPA is executed and TPSL is affected by Change in law.”

As the Commission vide its Order dated 11 March 2022 in above proceeding has rejected adoption of tariff, the Commission has not ruled on above request of TPSL. Further in subsequent review proceeding culminated into Order dated 7 July 2022, as this issue of Change in Law was not raised, the Commission has not addressed the same. Hence, although there are provisions in the PPA, as parties have not raised this issue of Change in Law of increased GST rate at the time of adoption of tariff, the Commission has not dealt with the same.

13.4 Having not opted for the above provisions of seeking Change in Law approval at the time of adoption of tariff, now relief for Change in Law has to be claimed based on other provisions of the PPA. The Commission notes that Article 9.3.1 of the PPA reproduced below mandates issuance of Change in Law notice:

“9.3.1 If the Seller is affected by a Change in Law in accordance with Article 9.1 and wishes to claim change in law under this Article, it shall give notice to MSEDCL of such Change in Law within 7 days after becoming aware of the same or should reasonably have known of the Change in Law.”

Above provision of PPA requires issuance of Change in Law notice within 7 days from date on which affected party become aware of such Change in Law event.

13.5 MSEDCL is objecting that for Change in Law event of 30 September 2021 (GST Notification), TPSL has issued Change in Law notice on 12 August 2022 which is beyond stipulated period of 7 days. In this regard, the Commission notes that PPA itself was signed by MSEDCL only on 3 August 2022. Without PPA, there is no basis for issuing Change in Law notice and hence, TPSL cannot be faulted for not issuing Change in Law notice till 3 August 2022. Post such period, TPSL has issued Change in Law notice within 9 days. The Commission notes that if the period of public holidays and weekly off is excluded, then such Notice has been issued within stipulated period of 7 days.

13.6 Therefore, the Commission is of the view that TPSL has followed the due process as expected in the Article 9.3.1 notifying the Change in Law event to MSEDCL within stipulated period and hence eligible for claiming compensation for increased expenses on account of Change in Law event.

14. In view of above, as TPSL has complied with provision of notice under Article 9.3.1 and as GST notification dated 30 September 2021 complies with conditions stipulated under the PPA for considering it as Change in Law events, the Commission allows TPSL request to declare that GST notification dated 30 September 2021 is Change in Law event under the PPA and TPSL shall be eligible to seek compensation for increased expenses. TPSL shall file separate Petition for the same, post commissioning of the project.

15. Hence, the following Order:


ORDER

- 1. The Petition in Case No. 241 of 2022 is allowed.**
- 2. Increased GST rate vide notification dated 30 September 2021 is considered as Change in Law event under the PPA and the Petitioner shall be eligible for compensation on account of the same.**

Sd/-
(Surendra J. Biyani)
Member

Sd/-
(Anand M. Limaye)
Member

Sd/-
(Sanjay Kumar)
Chairperson


(Dr. Rajendra G. Ambekar)
Secretary

