

**Before the**  
**MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**  
**World Trade Centre, Centre No.1, 13th Floor, Cuffe Parade, Mumbai 400005**  
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**Case No. 149 of 2023**

**Petition of M/s Azure Power Thirty-Four Private Limited (APTFPL) seeking an appropriate compensation for the Change in Law event, on account of Hon'ble the Supreme Court of India's Order dated 19 April, 2021 in Writ Petition (Civil) No. 838 of 2019, in terms of Article 9 of the Power Purchase Agreement dated 30 July, 2018.**

M/s Azure Power Thirty-Four Private Limited (APTFPL) ... Petitioner

Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL) ... Respondent

**Coram**

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

**Appearance in the Cases:**

For the Petitioner: : Mr. Mridul Gupta (Adv.)

For the Respondent: : Mr. Anup Jain (Adv.)

**ORDER**

**Date: 24 July, 2024**

1. M/s. Azure Power Thirty- Four Private Limited (APTFPL) has filed the present Petition on 14 June 2023 under Section 86 of the Electricity Act, 2003 read with Article 9 of the Power Purchase Agreement (PPA) dated 30 July 2018 executed between APTFPL and MSEDCL. APTFPL is seeking an appropriate compensation for the Change in Law event, on account of Hon'ble the Supreme Court of India's Order dated 19 April, 2021 in Writ Petition (Civil) No. 838 of 2019 whereby it has issued certain directions in terms of which all existing and

future overhead low and high voltage power lines in the priority and potential habitats of Great-Indian Bustard are necessarily required to be laid under-ground.

**2. Major Prayers of APTFPL are as follows:**

- “ ....
- a) *Declare the Order dated 19.04.2021 passed by Hon'ble Supreme Court in Writ Petition (Civil) No. 838 of 2019 titled M.K. Ranjitsinh & Ors. v. Union of India & Ors as Change in Law in terms of the respective PPA which have led to an increase in the expenditure for the respective Project;*
  - b) *Evolve a suitable mechanism to compensate the Petitioner for the increase in expenditure incurred/to be incurred by the Petitioner on account of Change in Law;*
  - c) *Direct Respondent to compensate the Petitioner towards the installation of bird diverters, as a one-time lump sum amount or mechanism devised by this commission in prayer (b)*
  - d) *Grant carrying cost along with interest on carrying cost from the date of incurring of the cost by the Petitioner due to the occurrence of Change in Law event i.e., incurring the cost of installation of bird diverters till the date on which the full and final payment is made to the Petitioner, thereby, restoring the Petitioner to the same economic position as before the occurrence of the Change in Law event(s);*
- ....”

**3. APTFPL in its Petition has stated as follows:**

- 3.1. APTFPL has set up a Solar Power Project of 130 MW (AC) in village of Taluka- Bap, District- Jodhpur, State- Rajasthan. APTFPL has entered into Power Purchase Agreement (PPA) dated 30 July 2018 for supply of 130 MW (AC) Solar power to Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL).
- 3.2. Major events in bidding process and subsequent development are presented as below:

<b>Date</b>	<b>Event</b>
09.04.2018	MSEDCL issued its Request for Selection (RfS) of Solar Power Producers (SPPs) for procurement of 1000 MW of the power.
27.04.2018	M/s. Azure Power India Pvt. Ltd. (APIPL) submitted its Bid.
02.07.2018	APIPL was selected as a successful bidder/Solar Power
19.08.2019	Developer for the development of 130 MW (AC) capacity

Date	Event
	("Project Capacity") of Solar Power Project in the State of Rajasthan. MSEDCL issued its Letter of Award dated 02.07.2018 to APIPL.
30.07.2018	M/s. Azure Power Thirty-Four Private Limited was incorporated by APIPL. Azure Power Thirty-Four Private Limited entered into Power Purchase Agreement dated 30.07.2018 with MSEDCL for setting up of a Solar Power Project of 130 MW (AC) located at Village Noore ki Bhurj, Taluka Bap District Jodhpur, Rajasthan.
06.09.2019	M/s. Azure Power Thirty-Four Private Limited has Commissioned the entire 130 MW (AC) capacity.
2019-20	A Writ Petition (WP No.838 of 2019) was filed before the Hon'ble Supreme Court of India seeking to protect (2) species of birds namely Great Indian Bustard (GIB) and Florican. The Writ Petitioner sought certain directions regarding the installation of overhead power lines, etc. by the power generating companies.
19.04.2021	Hon'ble Supreme Court of India passed Order in GIB matter and imposed certain conditionalities for laying powerlines. Further, for existing overhead lines steps like installation of bird diverters were suggested. (SC GIB Order)

- 3.3. A Writ Petition (Civil) No. 838 of 2019 had been filed before Hon'ble the Supreme Court of India aimed at the conservation of two species of birds, the Great Indian Bustard (GIB) and the Lesser Florican, which are endangered species majorly existing in the states of Rajasthan and Gujarat. The Petitioners therein contended that the existence of overhead power lines have become a hazard due to which the said species of birds on collision are getting killed and are at the verge of extinction.
- 3.4. Hon'ble the Supreme Court of India vide Order dated 19 April 2021, issued certain directions for the preservation of the said bird species. The directions included i.) installation of bird diverters on the overhead lines; ii.) undergrounding of power lines etc. Further, Hon'ble the Supreme Court envisaged in case, such cost of installation/undergrounding has to be incurred by Solar Power Developers, then such cost ought to be mitigated in accordance with the terms of the PPA. The relevant paragraph from the said Order is as under:

*“... In the above background, there cannot be disagreement whatsoever that appropriate steps are required to be taken to protect the said species of birds. In that view, insofar as the existing overhead powerlines are concerned the respondents shall take steps forthwith to install divertors and in respect of existing overhead powerlines all future cases of installing the transmission lines a study shall be conducted with regard to the feasibility for the lines to be laid underground. In all such cases where it is feasible, steps shall be taken to lay the transmission line underground. For the lines to be laid in future if as per the technical report the overhead line alone is feasible and the same is ratified by the Committee, in such event the installation of the divertors shall also be a condition attached in the contract to be entered with generating companies. Insofar as, the cost incurred in the said process, the concerned respondents No. 5 to 8 and 9 to 11 shall work out and provide for the same and the respondents No.1 to 4 aid in this regard. It would be open to them to muster the resources in accordance with law. In cases where the power generators are required to bear the additional amount adding to the cost of production, it would be open to regulate the manner in which the cost would be mitigated in accordance with contractual terms. Irrespective of the cost factor the priority shall be to save the near extinct birds...”*

- 3.5. APTFPL was not a party to the above said proceedings before Hon’ble the Supreme Court. However, aggrieved by the said Order, Solar Power Developers Association representing solar power generators in India including the Petitioner, filed an application seeking the some modifications/directions.
- 3.6. Further, the Ministry of Renewable Energy, Ministry of Environment, Forest and Climate Change and Ministry of Power have also filed applications in the aforesaid Writ Petition seeking modification of the Order dated 19 April, 2021 to the extent that medium voltage, high voltage and extra high voltage lines i.e. respectively 33 kV, 66 kV and above power lines in Potential and Priority GIB habitat area are to be laid as overhead with installation of appropriate mitigation measures like bird diverters, etc. since the implementation of the aforesaid Order poses several challenges and concerns like safety, feasibility, international commitments, renewable energy targets and energy security amongst others.
- 3.7. Accordingly, abiding by the directions as issued by Hon’ble the Supreme Court vide Order dated 19 April, 2021, in as much as the Project as being set up by Azure Power Thirty-Four Private Limited was within the GIB Potential Area, Azure Power Thirty-Four Private Limited proceeded to install the bird diverters as a mitigation measure.

- 3.8. Combined reading of the terms ‘Law’ in the PPA, which is defined to mean Orders, ‘Governmental Instrumentality’ which includes Authorities and ‘Competent Court’, it is clear that Courts including the Hon’ble Supreme Court and High Courts would be treated as Authorities and as such Orders passed by such Courts would be covered under the term Law. Thus, the Order dated 19 April, 2021 which has mandated the installation of bird diverters on the existing overhead power lines, having been passed by Hon’ble the Supreme Court which is covered under the definition of Governmental Instrumentality would qualify under ‘*enactment of new law*’ and thus qualify as a change in law event under the PPA. The change of law event has occurred after the last date of the bid submission, i.e., 27 April, 2018.
- 3.9. In any case, the Order dated 19 April, 2021 as passed by Hon’ble the Supreme Court qualifies as Law under Article 141 of the Constitution of India which provides that law declared by the Hon’ble Supreme Court of India shall be binding on all Courts within the territory of India. Accordingly, the Order dated 19 April, 2021 which mandates the preservation of GIB and the Lesser Florican by undertaking the measures as provided in the said Order would qualify as a Law for the purposes of the present PPA.
- 3.10. That apart, as per the Order dated 19 April, 2021 of Hon’ble the Supreme Court, Azure Power Thirty-Four Private Limited had to install the bird diverters in order to protect these birds from colliding with the wires/lines and such installation was not envisaged at the time of bid submission. Accordingly, the said Order enacted a new condition for the Project which led to an increase in the cost of setting up of a Solar Power Project and supply of power. Also, the installation of bird diverters for existing and future projects is akin to obtaining a new consent for setting up of the Project in as much as non-compliance with the said direction of Hon’ble the Supreme Court could threaten the existence of such Projects. Thus, the Order dated 19 April, 2021 would also qualify as a change in law event under Article 9.1 (iii) of the PPA.
- 3.11. Additionally, APTFPL places its reliance on the order of the Central Electricity Regulatory Commission dated 08 January, 2020 in 126/MP/2019, Fatehgarh-Bhadla Transmission Limited v Adani Renewable Energy Park Rajasthan Limited & Anr. whereby, it was held that imposition of condition to reroute the transmission lines by the forest authorities (along with savings on account of non-implementation of bird diverters/ reflectors and other associated cost thereof) is an event of a change in law. CERC has declared the measures undertaken on account of the preservation of GIB as a change in law much prior to the order dated 19 April, 2021 by Hon’ble the Supreme Court.
- 3.12. The procurement and installation of bird diverters at the Project site can be demonstrated vide the purchase orders placed by the Petitioner for the procurement, the material receipt

note at the project site and installation of the bird diverters along with the work completion certificate issued by the contractor responsible for such installation. The Copies of the purchase orders, material receipt note along with the work completion certificate are attached with the Petition.

- 3.13. The incremental expenditure which has been incurred by APTFPL on account of the installation of Bird Diverters can be demonstrated from the invoices of the contractor providing the goods and services for the said installation. Total of 4200 bird diverters have been installed having a cumulative cost of Rs. 86,27,511/- at the Project site.
- 3.14. The economic position of APTFPL will be significantly affected due to the implementation of the Order dated 19 April, 2021, and therefore by virtue of the relevant provisions of the PPA, APTFPL ought to be restored to the same economic position as if such change had not occurred.
- 3.15. Further, Hon'ble the APTEL in various decisions including M/s. GMR Warora Energy Limited v. Central Electricity Regulatory Commission and Ors. (Appeal No. 111 of 2017 before the Appellate Tribunal for Electricity) and Adani Power Limited v. Central Electricity Regulatory Commission and Ors. (Appeal No. 210 of 2017) has held that claims regarding separate 'carrying costs' would be granted only if there is a provision in the PPA for restoration of the party to the same economic position as if no Change in Law event has occurred. Thus, in the present case, as the PPA has a specific clause directing the 'restoration to the same economic position' the carrying costs ought to be allowed.
- 3.16. APTFPL also places its reliance on the Order dated 24 August, 2022 of Hon'ble the Supreme Court in Civil Appeal No. 7129 of 2021 titled as "***Uttar Haryana Bijli Vitran Nigam Ltd. and Another vs. Adani Power (Mundra) Limited and Another***" wherein the Hon'ble Apex Court was pleased to allow interest on carrying cost.
- 3.17. Furthermore, Hon'ble the Supreme Court in the order dated 20 April, 2023 whilst reiterating its finding in Civil Appeal No. 7129 of 2021 titled "***Uttar Haryana Bijli Vitran Nigam Ltd. and Another vs. Adani Power (Mundra) Limited and Another***" also held that interest on carrying cost should be calculated on compound interest basis irrespective of the fact whether a PPA has such a provision or not.
- 3.18. It is further submitted that the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 (CIL Rules) do not apply to the present Petition. It is pertinent to highlight that Hon'ble the APTEL vide its Order dated 05 April, 2021 in Original Petition No.1 of 2022 & batch has held that CIL Rules will apply to Change in Law events which occur on or after 22 October, 2021.

3.19. Since, APTFPL is claiming compensation for the Change in Law event which has occurred on 19 April, 2021, which is prior in time to 22 October, 2021, therefore, the CIL Rules are wholly inapplicable in the present case and the claims of APTFPL ought to be dealt with in accordance with the laws and rules prevalent before the notification of the CIL Rules.

**4. MSEDCL in its submission dated 8 December 2023 stated:**

4.1. Hon'ble the Supreme Court of India by its Judgment dated 19 April, 2021 in Writ Petition (Civil) No. 838 of 2019 titled M.K. Ranjitsinh Ors. Vs. Union of India & Ors., issued certain directions for the preservation of the Great Indian Bustard and the Lesser Florican bird species. The directions included i) installation of bird diverters on the overhead lines; ii) undergrounding of power lines. These directions are limited only to the Government of State of Gujarat and Rajasthan and not to any private generator of the said States.

4.2. There was no mandate/obligation upon the Petitioner specifically to take the steps pursuant to the directions of Hon'ble the Supreme Court, rather it was the sovereign responsibility and obligation of the concerned States for compliance. Nothing has been brought on record by Petitioner as to what triggered for them to discharge the liability.

4.3. Any interference in the present Petition would be tantamount to absorbing the liability of State of Rajasthan by the PSU of State of Maharashtra i.e., MSEDCL in the present case and in turn by the end users of the State of Maharashtra.

4.4. Therefore, the Petition is not maintainable in its present form and manner, as APTFPL cannot be regarded as an 'aggrieved person' to claim any entitlement of any relief under the guise of Change in Law event in the present PPA.

4.5. A Change in Law event as described in the present PPA does not contemplate any orders passed by any competent court as a Change in Law event. The definition of law has been couched in such a manner whereby the orders/directions issued only by a Governmental Instrumentality and not by a Competent Court. Thus, when there is a specific exclusion of considering the order/directions passed by a competent court as a 'law' under the PPA, then an event of passing of the judgment in question by the Hon'ble Supreme Court of India cannot be regarded as an event of Change in Law within the meaning of the PPA, as the same was specifically intended by the parties of having been excluded from the PPA.

4.6. PPA is a sacrosanct document and has to be strictly read within the four corners of its terms as it stands and there are catena of judgments wherein it has been held that courts cannot



expand the terms of the contract so as to include scenarios which are not even contemplated/intended under the contract.

- 4.7. In absence of any pleading the prayer with respect to devising a methodology for computation of compensation cannot be considered by this Commission for its grant on suo-moto basis. It is settled law that merely by making a prayer without substantiating it through pleadings, a party is not entitled for such relief.
- 4.8. Petitioner has claimed one-time lump sum amount towards compensation in respect of the alleged Change in Law Claim incurred without any supporting documentary evidence to substantiate the alleged claim.
- 4.9. MSEDCL was not made aware regarding the same before installation of bird divertors. Hence, the claim submitted by the Petitioner needs to be rejected since there is no one to one co-relation of the locations wherein the bird divertors are installed. Also, before installation of the same there is no justification provided by the Petitioner about the locations of bird divertors. In absence of any documentary proof, it is very difficult for MSEDCL to verify the claim.
- 4.10. The Commissions through various orders on Change in Law claim have directed computation of carrying cost is to be limited to the lower amount of either Interest on Working Capital as per the MYT Regulations, actual rate of interest, PPA rate, base rate/MCLR. As such in absence of submissions to the contrary from Azure Power Thirty-Four Private Limited in this regard, the claim of carrying cost is devoid of any merit and should not be considered.
5. During the first hearing held on 12 December 2023 Petitioner sought time for filing its rejoinder as MSEDCL filed its reply on 8 December 2023. Considering this request, the Commission adjourned the hearing and allowed Petitioner to file Rejoinder within two weeks.
6. **APTFPL in its Rejoinder dated 22 December 2023 stated as below:**
  - 6.1. The installation of the bird divertors at the project site and undergrounding of power lines would be duty of the developer as the lines belongs to the developer hence the Government or Government machinery cannot be treating such power lines as the property of the States.
  - 6.2. The project of APTFPL falls in the potential Area as outlined in the GIB Order and hence the Petitioner was duty bound under the law to install the bird diverters.



- 6.3. Hon'ble the Supreme Court in its Order dated 21 April, 2022 has stated that the direction shall govern all the State owned as well as private power producers.
- 6.4. It is submitted that on a combined reading of the terms "Law" which is defined to mean Orders, "Government Instrumentality" which includes Authorities and competent Court , it is clear that Courts including the Hon'ble the Supreme Court and High Courts would be treated as Authorities and as such Orders passed by such Courts would be covered under the term "Law". Thus the SC GIB Order is covered under the definition of Government Instrumentality would qualify under "enactment of new Law" and thus qualify as a Change in Law event under the PPA.
- 6.5. In any case, the SC GIB Order qualifies as Law under Article 141 of the Constitution of India which provides that the law declared by Hon'ble the Supreme Court of India shall be binding on all Courts. Accordingly, the SC GIB Order which mandates the preservation of GIB and the Lesser Florican by undertaking the measures as provided in the GIB Order would qualify as a Law for the purposes of present PPA.
- 6.6. The GIB Order which has mandated the installation of bird diverters passed by Hon'ble the Supreme Court would qualify as Change in Law.
- 6.7. The Commission has the power to determine the quantum and mechanics of compensation. Same has been also provided in the PPA dated 30 July 2018 in the Article 9.2.
- 6.8. The Petitioner has provided purchase Orders, material receipt note, invoices evidencing the incremental expenditure to the tune of Rs. 86,27,511.
- 6.9. The Petitioner may be granted carrying cost at the rate which ensures the it is placed in the same economic position as if the change in Law has not occurred.
7. During the hearing held on 7 May 2024, the Commission heard both the parties. The Parties are allowed to make their submissions within 15 days, if any.
8. **APTFPL in its additional submission dated 21 May 2024 stated as below:**

APTFPL has reiterated its earlier submission and further stated as follows:

- 8.1. APTFPL also places reliance on the Final Order dated 3 May, 2024, passed in Case No. 197/MP/2023 and 206/MP/2023 by the Central Electricity Regulatory Commission in the case titled as *M/s Azure Power Maple Private Limited v Solar Energy Corporation of India Limited & Anr. and Azure Power Forty One Private Limited v Solar Energy Corporation*

*of India Limited & Ors.* wherein the Central Electricity Regulatory Commission has declared the said GIB Order of Hon'ble the Supreme Court of India as a Change in Law.

- 8.2. Last date of bid submission was 27 April, 2018 and the Project was Commissioned on 06 September, 2019. The GIB Order was passed on 19 April, 2021 which is much later than the last date of bid submission and the date of Commissioning, hence, APTFPL could not have envisaged the incremental expenditure due to the installation of the Bird Diverters at the time of bid submission. Therefore, in light of the aforementioned, APTFPL is entitled to a compensation towards the installation of bird diverters on account of the Change in Law.
- 8.3. It is relevant to submit that Hon'ble the Supreme Court has passed the Final Order dated 21 March, 2024 in Writ Petition (Civil) No. 838 of 2019 titled *M.K. Ranjitsinh & Ors. v. Union of India & Ors.* Further, it is pertinent to submit that Hon'ble the Supreme Court in the Final Order dated 21 March, 2024 has particularly directed that the project clearances which have been granted pursuant to the recommendations of the earlier committee appointed in terms of the Order dated 19 April, 2021 shall not be affected.
- 8.4. Since APTFPL has already incurred the additional expenditure qua SC GIB Order dated 19 April, 2021 (*post the bid submission date, i.e., 27 April, 2018 as well as post the Commissioning of the Project on 06 September, 2019*). Therefore, APTFPL is entitled to the additional expenditure in compliance with the SC GIB Order dated 19 April, 2021 as a Change in Law event under Article 9 of the PPA.
- 8.5. MSEDCL has failed to understand the implications of the GIB Order in its entirety. Ultimately it is the Developer whose duty it was to convert the overhead power lines into underground power lines (pursuant to the GIB Order which requires mandatory undergrounding of overhead power lines and in the interim installation of the bird diverters). This is for the simple reason that the installation of bird diverters at the project site and undergrounding of power lines would be the duty of a Developer and such power lines belong to the Developer as they are private asset of the Developer, hence, the Government or the machinery of a particular State cannot treat such power lines as the property of the State unless it expropriates the same and do whatever it wishes with such power lines.
- 8.6. The following excerpt from the GIB Order would make it amply clear that the compliance under GIB Order is to be undertaken by generators (i.e. the Petitioner herein) only:  
“...  
*11. In the above background, there cannot be disagreement whatsoever that appropriate steps are required to be taken to protect the said species of birds. In that*

view, insofar as the existing overhead powerlines are concerned the respondents shall take steps forthwith to install divertors and in respect of existing overhead powerlines all future cases of installing the transmission lines a study shall be conducted with regard to the feasibility for the lines to be laid underground. In all such cases where it is feasible, steps shall be taken to lay the transmission line underground. **For the lines to be laid in future if as per the technical report the overhead line alone is feasible and the same is ratified by the Committee, in such event the installation of the divertors shall also be a condition attached in the contract to be entered with generating companies.** Insofar as, the cost incurred in the said process, the concerned respondents No. 5 to 8 and 9 to 11 shall work out and provide for the same and the respondents No.1 to 4 aid in this regard. It would be open to them to muster the resources in accordance with law. **In cases where the power generators are required to bear the additional amount adding to the cost of production, it would be open to regulate the manner in which the cost would be mitigated in accordance with contractual terms. Irrespective of the cost factor the priority shall be to save the near extinct birds.**

[**“Emphasis Supplied”**]

- 8.7. Hon’ble the Supreme Court vide the GIB Order has directed that in all cases where the overhead powerlines exist as of today in the “Priority” and “Potential” GIB areas, steps shall be taken forthwith to install the divertors pending consideration of the conversion of the overhead cables into underground powerlines. It is pertinent to highlight that the Project of the Petitioner falls in the “Potential Area” as outlined in the GIB Order, hence, the Petitioner was duty-bound under the law to install the bird diverters.
- 8.8. The compensation towards Change in Law along with Carrying Cost ought not be limited to Commercial Operation Date of the Project. The PPA does not restrict compensation on account of Change in Law event up to Commercial Operation Date. From a perusal of Article 9 in its entirety, it follows that as long as the event qualifies as a ‘change in law’ and results in any adverse financial loss to the Petitioner then, the Petitioner will be entitled to compensation from the Respondent. The only trigger for invoking change in law clause is whether the Change in Law event has occurred after the last date of bid submission.
- 8.9. APTFPL also places its reliance on the decision of Hon’ble the Appellate Tribunal for Electricity vide its Order dated 15 September, 2022 in *Parampujya Solar Energy Private Limited & Anr. v. Central Electricity Regulatory Commission & Ors., Appeal 256 of 2019 and batch* whereby, Hon’ble the APTEL has explicitly held that restriction on the claim for compensation to the invoices raised till COD are extraneous conditions which cannot be approved.

- 8.10. APTFPL, in the present case has incurred all the incremental expenditure towards change in law i.e., installation of bird diverters only after the final Commissioning of the Project. This is for the reason that the final commissioning of the project took place on 06 September, 2019 and the GIB Order was passed on 19 April, 2021 which is much later than the date of final Commissioning of the Project. Further, the directions to install Bird Diverters in the interim were particularly given by Hon'ble the Supreme Court for the existing overhead lines. Since, the Project of APTFPL had already achieved final Commissioning prior to the date of the GIB Order, all its power lines were overhead. In compliance to the directions in GIB Order, APTFPL had to install the Bird Diverters on the overhead power lines of the fully Commissioned Project.
- 8.11. The additional expenditure incurred by APTFPL on account of Change in Law are in the nature of one time and not recurring in nature like taxes on O&M and hence, APTFPL prays that the Commission ought to allow the compensation towards the same as a lumpsum payment without any bifurcation between pre-COD and post-COD.
- 8.12. Further, it is extremely pertinent to submit that Hon'ble the Supreme Court itself in the GIB Order has particularly held that a Developer (i.e., the Petitioner in the present case) can pass on the incremental/additional expenditure incurred due compliance of the directions given in the GIB Order in terms of the respective agreements.

**Commission's Analysis and Rulings:**

9. APTFPL has filed present Petition under Section 86 of the Electricity Act, 2003 seeking an appropriate compensation for the Change in Law event, on account of Hon'ble the Supreme Court of India's Order dated 19 April, 2021 in Writ Petition (Civil) No. 838 of 2019 [M.K. Ranjitsinh v. Union of India]., in terms of Article 9 of the Power Purchase Agreement dated 30 July, 2018 (for supply of 130 MW Solar power) signed with MSEDCL.
10. MSEDCL has opposed such claim of APTFPL on the ground that PPA provisions does not recognised Supreme Court's Order as Change in Law and also contended that in the said Order, Supreme Court has directed the State Governments to undertake works of installing bird diverters on overhead lines & undergrounding of overhead lines for preservation of bird species of Great Indian Bustard and not to the project developers.
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 Supreme Court's GIB Order qualify as Change in Law?

- b. Ascertainment of principal claim amount on account of Change in Law (Based on outcome in Issue A) and modalities for computation of carrying cost (if applicable)?
- c. What should be the frequency for payment of the compensation amount (if applicable)?

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

**12. Issue A: Whether the Supreme Court’s GIB Order qualifies as Change in Law?**

- 12.1. The Commission notes that MSEDCL contended that the directions for compliance were issued by Hon’ble the Supreme Court in its Judgment dated 19 April, 2021, are limited only to the Government of State of Gujarat and Rajasthan and not to any private generator. Allowing present Petition would tantamount to absorbing the liability of State of Rajasthan by the MSEDCL and in turn by the end users of the State of Maharashtra.
- 12.2. While opposing such contentions, APTFPL stated that installation of the bird diverters at the project site and undergrounding of power lines is duty of the developer as the lines belongs to the developer. Hon’ble the Supreme Court in its Order dated 21 April, 2022 has stated that the direction shall govern all the State owned as well as private power producers. The project of APTFPL falls in the potential Area as outlined in the GIB Order and hence the Petitioner was duty bound under the law to install the bird diverters.
- 12.3. In this regard, the Commission notes that Hon’ble Supreme Court in its GIB Judgment dated 19 April 2021 has ruled as follows:

“

5. ....*The State as well as the Central Government therefore, have a duty cast to preserve the endangered species and as such the expenses incurred will have to be provided by them either under the schemes available or by earmarking the same in such manner. Needless to mention that in the instant case the preservation is by undergrounding the powerlines and in that context if cost is incurred, it would also be permissible to pass on a portion of such expenses to the ultimate consumer subject to approval of the Competent Regulatory Authority.*

.....

11. *In the above background, there cannot be disagreement whatsoever that appropriate steps are required to be taken to protect the said species of birds. In that view, insofar as the existing overhead powerlines are concerned the respondents shall take steps forthwith to install divertors and in respect of existing overhead powerlines all future cases of installing the transmission lines a study shall be conducted with regard to the feasibility for the lines to be laid underground. In all*

such cases where it is feasible, steps shall be taken to lay the transmission line underground. For the lines to be laid in future **if as per the technical report the overhead line alone is feasible and the same is ratified by the Committee, in such event the installation of the divertors shall also be a condition attached in the contract to be entered with generating companies.** Insofar as, the cost incurred in the said process, the concerned respondents No. 5 to 8 and 9 to 11 shall work out and provide for the same and the respondents No.1 to 4 aid in this regard. It would be open to them to muster the resources in accordance with law. **In cases where the power generators are required to bear the additional amount adding to the cost of production, it would be open to regulate the manner in which the cost would be mitigated in accordance with contractual terms.** Irrespective of the cost factor the priority shall be to save the near extinct birds. ...

.....  
14. In the light of the contentions urged on this aspect of the matter, **we are conscious that the laying of the underground power line more particularly of high-voltage though not impossible, would require technical evaluation on case-to-case basis and an omnibus conclusion cannot be reached laying down a uniform method and directions cannot be issued unmindful of the fact situation.** Though that be the position the consensus shall be that all low voltage powerlines to be laid in the priority and potential habitats of GIB shall in all cases be laid underground in future. In respect of low voltage overhead powerlines existing presently in the priority and potential habitats of GIB, the same shall be converted into underground powerlines. **In respect of high-voltage powerlines in the priority and potential habitats of GIB, more particularly the powerlines referred in the prayer column of I.A. No.85618/2020 and indicated in the operative portion of this order shall be converted into underground power line.** ...

.....  
17. The respondents No.5, 6 and 9 to 11 while arranging to lay the powerlines underground in respect of the powerlines, the feasibility of which is not in doubt shall proceed with the work right away. However, in cases where the respondents find that there are issues relating to feasibility, the matter shall be referred to the committee with all relevant material and particulars. The committee shall assess the matter and arrive at a conclusion as to whether the underground powerline is feasible or not. Based on the report to be rendered by the committee the further action shall be taken by the respondent.

18. **In all cases where the overhead powerlines exist as on today in the priority and potential GIB area the respondents shall take steps forthwith to install divertors pending consideration of the conversion of the overhead cables into underground powerlines. In all such cases where it is found feasible to convert the overhead cables**



*into underground powerlines the same shall be undertaken and completed within a period of one year and till such time the divertors shall be hung from the existing powerlines.”*

As can be seen from above Order, in para 11, Supreme Court has referred to power generator requiring to bear additional expenses. Further, in subsequent judgment dated 21 April 2022 in the same matter, Hon’ble Supreme Court has noted as follows:

*“7. During the course of the hearing, it has emerged that none of the parties before the Court or the intervenors have any objection to the installation of bird divertors. Though in the IA which has been filed before the Court by the State of Rajasthan an attempt has been made to indicate the steps which have been taken, the progress has been deficient in all respects. **The installation of bird divertors at least in the priority areas of the States of Gujarat and Rajasthan must be taken up with the utmost expedition. The installation of bird divertors in the priority areas shall be completed before 20 July 2022, when these proceedings shall be taken up for further direction. This direction shall govern all State owned as well as private power producers.”***

In above quoted judgment, Hon’ble Supreme Court has clearly held that its directions are equally applicable to private power producers.

- 12.4. In view of above quoted provisions of Hon’ble Supreme Court’s judgment, the Commission rejects MSEDCL’s contention that Supreme Court’s directives are limited to State Government and hence notes that APTFPL has rightly installed bird diverters to comply with judgment of the Supreme Court.
- 12.5. MSEDCL has also contended that PPA provisions does not recognised Supreme Court’s Order as Change in Law. In reply APTFPL has relied upon various provisions of PPA and stated that Supreme Court order directing installation of bird divertor is Change in Law event under the PPA. APTFPL has also contended that Supreme Court in its judgment itself has recognised that additional expenses can be allowed under contractual provisions and under Article 141 of the Constitution of India, Supreme Court’s judgment is the Law for all subordinate courts.
- 12.6. In this regard, the Commission notes that PPA dated 30 July 2018 signed between parties has following provision related to Change in Law:

“

**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 Solar Power Producer; or (v) any change in the rates of any Taxes, Duties and Cess which have direct effect on the Project. However, Change in Law shall not include any changes 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 added)**

The Commission notes that requirement to obtain new consent or modification in prevailing conditions to obtain consent has been recognised as Change in Law event under the above quoted PPA provisions.

12.7. The Commission notes that in present case, bid submission date was 27 April 2018 and project was commissioned on 6 September 2019. Supreme Court has issued GIB Order on 19 April 2021 i.e. post commissioning of the project. GIB order mandates APTFPL to install bird diverters on overhead lines. Such requirement of installation of bird diverters is modification of prevailing conditions in which APTFPL was operating. Hence, Supreme Court's GIB Order mandating installation of Bird Diverters on overhead lines qualifies as Change in Law event under the present PPA.

**13. Issue B: Ascertainment of principal claim amount on account of Change in Law (Based on outcome in Issue A) and modalities for computation of carrying cost (if applicable)?**

13.1. In Para above, the Commission has recognized SC GIB Order as Change in Law event. Accordingly, the Commission analyzed the claims on account of SC GIB Order as below.

13.2. APTFPL submitted that, total of 4200 bird diverters have been installed having a cumulative cost of Rs. 86,27,511/- at the Project site. APTFPL has submitted the invoices of the contractor/ supplier providing the goods and services for the bird diverter installation for the purpose of computation of the incremental cost.

13.3. While opposing above submissions, MSEDCL contended that there is no one to one correlation of the locations wherein the bird divertors are installed. Also, before installation of the same there is no justification provided by APTFPL about the locations of bird divertors. In absence of any documentary proof, it is very difficult for MSEDCL to verify the claim. As such, since the claims are not possible to be verified, the same cannot be made as a basis for the grant of relief to APTFPL.

13.4. The Invoices submitted by APTFPL are depicted in table below:

Sr. No.	Particulars	Date of Invoices	Description of material	Quantity (In nos.)	Principle Amount claimed (Rs. Cr.)
1	Karnimata Construction Co. Rajasthan	17.05.2022	Bird Diverters installed for the project	1.0000 EA	16,70,261
2	Karnimata Construction Co. Rajasthan	17.02.2022	Bird Diverters	1350 EA 1 EA	18,25,537

Sr. No.	Particulars	Date of Invoices	Description of material	Quantity (In nos.)	Principle Amount claimed (Rs. Cr.)
			Freight Charges		
3	Karnimata Construction Co. Rajasthan	18.04.2022	Bird Diverters	1275 EA	43,05,919
4	Karnimata Construction Co. Rajasthan	23.06.2022	Civil works/ Erection works	-	5,59,939
5	Karnimata Construction Co. Rajasthan	23.06.2022	Installation charges	0.37 EA	4,88,761
<b>TOTAL</b>					<b>88,50,417</b>

As against above total of Rs. 8850417/-, APTFPL in its Petition has stated that it has incurred additional expenses of Rs. 8627511/-. The Commission also notes that the amount claimed is not certified by any Chartered Accountant.

- 13.5. In absence of Chartered Accountant Certificate on additional expenditure and difference in amount as highlighted in above paragraph, the Commission cannot quantify compensation amount in present proceeding. Further, one-to-one correlation of installed bird diverters is also important to scrutinising actual expenses incurred. Hence, the Commission directs both parties to reconcile the claim amount within a month period from date of this Order after scrutiny of documents. APTFPL shall provide all support to MSEDCL for completing such scrutiny within a month.
- 13.6. Having ruled on principal amount of compensation, the Commission notes that it is a well settled principle that compensation on account of Change in Law provisions has to be granted along with carrying cost so as to restore the affected party to same financial position as if such Change in Law event has not occurred. APTFPL proposed carrying costs at the applicable Late Payment Surcharge (LPS) rate computed on compounding basis till actual realization of compensation. The Commission notes that PPA provides LPS rate as 1.25% in excess of the SBI, 1-year Marginal Cost of Funds Based Lending Rate (MCLR) per annum.
- 13.7. With regards to rate of Carrying Cost, APTEL in its Judgement dated 16 November 2021 in Appeal No. 163 of 2020 and 171 of 2020 observed following:

*“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 325J. 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.” (Emphasis added)*

In above Order, APTFPL has rejected levying of LPS rate for carrying cost and directed that carrying cost be allowed on actuals. However, in present case, APTFPL has not claimed actual carrying cost.

13.8. It is admitted fact that PPA does not provide rate of interest for carrying cost on Change in Law compensation. As PPA does not have specific provisions, reference needs to be drawn from prevailing regulations on this subject. 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. Said interest computation is always on simple interest basis. 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. Hence, in the opinion of the Commission, APTFPL having failed to demonstrate actual rate of interest incurred on additional expenses on account of Change in Law, interest on Working Capital Loan (average of one-year MCLR of SBI plus 150 basis point) allowed in MERC RE Tariff Regulations, 2019 shall be allowed as rate of interest for working out the carrying cost. This carrying cost shall be worked out on a simple interest basis.

13.9. It is also important to note that APTFPL in its Case No. 147 of 2020 (in remand proceeding post APTEL Order) has claimed carrying cost at rate applicable for working capital loan under MERC RE Tariff Regulations, 2019 which was allowed by the Commission vide Order dated 4 May 2022. The Commission’s above ruling in present matter is consistent with its earlier ruling and provide consistency in application of interest rate for carrying cost.

**14. Issue C: What should be the frequency for payment of the compensation amount (if applicable)?**

14.1. APTFPL in its Petition has prayed that compensation for Change in Law event be paid on lumpsum basis.

14.2. In this regard, the Commission notes that in similar matters of payment of compensation on account of Change in Law, the Commission had opined that lumpsum payment would avoid further carrying cost on account of deferred payment. Further, Generator may willingly offer some discount on lumpsum payment. Considering all these aspects, the

Commission had provided liberty to MSEDCL to decide whether it intends to opt for payment of the compensation on lumpsum basis or per unit basis over the PPA tenure. Accordingly, MSEDCL shall communicate its option of paying Change in Law compensation to APTFPL within a month from date of this Order.

14.3. In case option of paying compensation amount over the PPA period is selected then per unit rate of compensation needs to be computed. In that case, the Commission has already specified methodology for computation of per unit rate in its Order dated 4 May 2022 in respect of APTFPL. Same methodology be adopted in present case also for payment of additional expenditure on account of installation of Bird Diverters.

15. Hence, the following Order:


**ORDER**

- 1. Petition in Case No. 149 of 2023 is partly allowed.**
- 2. Supreme Court's GIB Order qualifies as Change in Law event under the PPA.**
- 3. APTFPL and MSEDCL shall jointly scrutinize the Change in Law claims in detail as directed in para (13.5) within a month from the date of this Order.**
- 4. MSEDCL shall communicate its option of payment of Change in Law compensation to APTFPL as stated in para (14.2) above within a month from the date of this Order.**

Sd/-  
**(Surendra J. Biyani)**  
Member

Sd/-  
**(Anand M. Limaye)**  
Member

Sd/-  
**(Sanjay Kumar)**  
Chairperson

  
**(Dr. Rajendra G. Ambekar)**  
Secretary

