

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

Tel. 022 22163964/65/69

Email: mercindia@merc.gov.in

Website: www.merc.gov.in

Case No. 150 of 2023

Case of Energy Efficiency Services Ltd. against Maharashtra State Electricity Distribution Co. Ltd. seeking approval of Change in Law and appropriate mechanism for grant of and appropriate adjustment / compensation to offset financial / commercial impact of Change in Law event on account of increase in rate of CGST / IGST on Solar Power Generating System.

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Interlocutory Application No. 06 of 2024

Interlocutory Application filed by Energy Efficiency Services Ltd. seeking amendment in petition/application in Case No 150 of 2023.

Coram

Sanjay Kumar, Chairperson

Anand M. Limaye, Member

Surendra J. Biyani, Member

Energy Efficiency Services Ltd. (EESL) : Petitioner

V/s

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

Appearance

For the Petitioner : Adv. Dipali Sheth

For the Respondent : Adv. Udit Gupta

ORDER

Date :23 September 2024

1. The Petitioner, Energy Efficiency Services Ltd. (EESL), has filed petition on 27 June 2023, under Section 86(1)(b) and Section 86(1)(e) of the Electricity Act, 2003 (EA, 2003) being a Case No. 150 of 2023 against Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL) seeking approval of Change in Law and appropriate mechanism for grant of and appropriate adjustment / compensation to offset financial / commercial impact of Change in Law event on account of increase in rate of CGST / IGST on Solar Energy Devices. Subsequently EESL has also filed an application dated 22 January 2024 seeking certain amendments in the main petition and requested declaration that the increase in GST

rates on Solar Power Generating Systems (effective from 01 October 2021) constitutes a 'Change in Law' under the Power Purchase Agreement (PPA) dated 20 January 2018.

2. Prayers of EESL are as follows:

Prayers in main petition:

a) Hold and declare that the increase in GST rates on Solar Energy Devices and Parts for SPGS Project from 5% to 12% by virtue of Ministry of Finance Notifications dated 30.09.2021 bearing No. 8/2021- Central Tax (Rate) and No. 8/2021 – Integrated Tax (Rate) is a 'Change in Law' event under Article 15.1 of the PPA dated 20.01.2018 and that the Petitioner is entitled to consequent relief thereunder;

b) Direct the Respondent to restitute the Petitioner by paying a onetime compensation of Rs. 32,65,22,728.73 (Rupees Thirty Two Crore Sixty Five Lakh Twenty Two Thousand Seven Hundred Twenty Eight and Seventy Three Paise Only) on account of issuance of GST Notification dated 30.09.2021 in terms of the details of computation of the compensation provided in Annexure "L" Colly hereto;

c) Direct the Respondent to restitute the Petitioner by paying compensation on account of issuance of the GST Notification dated 30.09.2021 for any future procurement of Solar Energy Devices and parts, upon prudence check in view of the principle being declared as per prayer (a) that the subject GST Notification dated 30.09.2021 amounts to Change in Law, without recourse to adopting any further proceedings;

d) Accordingly, provide a suitable mechanism to compensate the Petitioner for the adverse financial loss incurred by the Petitioner on account of said Change in Law event through a lumpsum payment or incremental tariff;

e) Grant carrying cost @ 15% p.a. from the date of incurring of the additional costs by the Petitioner on account of the said Change in Law event from the date of incurring of such cost till the date of receipt of the compensation;

Prayers as made under I.A. No. 06 of 2024 (for amendment of petition):

a) Hold and declare that the increase in effective CGST/IGST rates on supply of Solar Power Generating System from 5% to 8.9% and further to 13.8% by virtue of Ministry of Finance Notifications dated December 31, 2018 bearing No. 24/2018-Central Taxes and bearing No. 25/2018 - Integrated Taxes and Notification dated: September 30, 2021 bearing No. 8/2021- Central Tax (Rate) and No. 8/2021 – Integrated Tax (Rate) respectively is a 'Change in Law' event under Article 15.1 of the PPA dated January 20, 2018 and that the Petitioner is entitled to consequent relief thereunder;

b) Direct the Respondent to restitute the Petitioner by paying a onetime compensation of Rs. 27,65,79,539/- (Rupees Twenty-Seven Crore Sixty-Five Lakhs Seventy-Nine Thousand Five Hundred and Thirty Nine Only) on account of issuance of GST Notification dated 30.09.2021 in terms of the details of computation of the compensation provided in Annexure “L” Colly hereto;

c) Direct the Respondent to restitute the Petitioner by paying compensation on account of issuance of the GST Notification dated 30.09.2021 for any future procurement of solar power generating systems and parts, upon prudence check in view of the principle being declared as per prayer (a) that the subject GST Notification dated 30.09.2021 amounts to Change in Law, without recourse to adopting any further proceedings;

d) Accordingly, provide a suitable mechanism to compensate the Petitioner for the adverse financial loss incurred by the Petitioner on account of said Change in Law event through a lumpsum payment or incremental tariff;

e) Grant carrying cost @1.25% % plus SBI MCLR p.a. from the date of incurring of the additional costs by the Petitioner on account of the said Change in Law event from the date of incurring of such cost till the date of receipt of the compensation;

3. The petitioner, EESL, in its petition has stated as follows:

- 3.1 EESL has undertaken the development and implementation of solar power projects at MSEDCL sub-stations. MSEDCL buys the power generated from these solar projects. Vide GST Notification dated 28 June 2017, the Ministry of Finance announced a 5% GST rate for solar energy devices and their parts.
- 3.2 Memorandum of Understanding (MoU) between EESL and MSEDCL (14 July 2017): A non-binding MoU was signed outlining the intention to develop 200 MW of solar PV projects on MSEDCL's land. EESL agreed to build the plants and supply power at a tariff of Rs. 3/kWh for 25 years.
- 3.3 MSEDCL's Petition (27 November 2017): MSEDCL had filed a petition seeking regulatory approval to procure 200 MW of solar power from EESL's projects on its sub-station land. On 09 January 2018, the Commission approved MSEDCL's proposal to procure 200 MW of solar power from EESL under a 25-year agreement at Rs. 3/kWh and approved the draft Power Purchase Agreement (PPA) with deviations.
- 3.4 Thereafter, PPA dated 20 January 2018 was signed between EESL and MSEDCL for 25 years for 200 MW of solar power. EESL has commissioned 168 MW of this capacity across Maharashtra between 31 August 2018 and 8 November 2022.
- 3.5 The Ministry of Power vide notification dated 27 August 2018 directed that changes in domestic duties, taxes, or levies affecting costs should be treated as a change in law,

allowing adjustments in contracts. This includes GST changes impacting renewable energy projects.

- 3.6 On 31 December 2018, the Ministry of Finance issued a notification amending the tax rate structure for certain invoices. Specifically, 70% of the invoice value is taxed at 5%, while 30% is taxed at 18%, resulting in an effective composite tax rate of 8.9%.
- 3.7 On 30 September 2021, Ministry of Finance (Department of Revenue) issued Notifications amending the rate of GST for solar energy-based devices and their parts as 12%.
- 3.8 On 15 June 2022, the PPA between EESL and MSEDCL was amended to retrospectively adjust the clause regarding the sale and purchase of solar energy for calculating deemed generation. Thereafter, on 27 September 2022, MNRE requested its renewable energy implementing agencies to consider the GST rate hike from 5% to 12% for RE Power Projects where the bid submission was on or before 13 September 2021 and the commissioning date was on or after 01 October 2021 as a 'Change in Law,' unless contract provisions disallow it.
- 3.9 Central Government notifications on 31 December 2018 and 30 September 2021 (effective from 01 October 2021) amended CGST/IGST rates for Renewable Energy (RE) devices and parts from 5% to 12%, leading to increased CGST/IGST on Solar Power Generation Projects.
- 3.10 The Notification dated 30 September 2021, increasing GST from 5% to 12% on RE devices constitutes a 'Change in Law' event under the PPA dated 20 January 2018. GST is levied by the Central Government under Section 9 of the CGST Act, 2017.
- 3.11 Exercising powers under Section 9 of the CGST Act, the Central Government issued a notification on 30 September 2021 raising GST on renewable energy devices and parts to 12% effective from 01 October 2021.
- 3.12 EESL claims that the GST rate increase from the 30 September 2021 notification qualifies as a 'Change in Law' event per Article 15 of the PPA, leading to additional expenses of Rs. 32,65,22,728/-. EESL is entitled to compensation from MSEDCL, including carrying costs at 15% per annum.
- 3.13 The Commission may grant appropriate reliefs to EESL under the PPA, considering the GST notifications as a 'Change in Law' event. The Commission has jurisdiction to adjudicate and grant the requested reliefs under Section 86 of the Act and Article 15.2 of the PPA.

3.14 The Commission may consider the costs incurred by EESL, including carrying costs from when they were incurred until GST reimbursement, to restore EESL to the same economic position as if the change in law had not occurred.

4. MSEDCL in its reply dated 08 December 2023 has stated as follows:

4.1 EESL has commissioned 148 solar projects(locations) out of 157 proposed/planned locations, with a cumulative capacity of 173 MW at various sites across Maharashtra from the period from 31 August 2018 to till date.

4.2 As per PPA, EESL was obligated to commission the project within the period of 13 months, but the project at 59 locations were delayed by more than the said stipulated period.

4.3 Such delay on the part of EESL which ultimately resulted in attracting the present claim of GST impact, would have been not there otherwise, at the first instance itself, had the SCOD been achieved within time.

4.4 Since the scheduled SCOD for all locations were much before the enactment of the impugned GST Notifications dated 30 September 2021, MSEDCL argues that for the delay in commissioning of the project, the liability thereof towards the present claim of GST, would entirely rest upon EESL. This mean that the financial burden should not be shifted to MSEDCL or the consumers. Consequently, MSEDCL denies occurrence of Change in Law in the present case.

4.5 EESL has claimed Rs. 32,65,22,728/- for the GST impact but only provided certified copies from a Chartered Accountant, lacking detailed supporting documentation. MSEDCL requests detailed substantiation, including contracts, invoices, import documents, material utilization certificates, and bank statements to verify the claim.

4.6 In absence of any documentary proof, it is very difficult for MSEDCL to verify the said figures. As such based on vague and unsubstantiated figures the claims are not possible to be verified. Furthermore, EESL's claim as raised in prayer 'b' is also not clear on the aspect of period of computation as well as whether it includes the components of non-commissioned project as well.

4.7 MSEDCL requested that EESL may be asked to provide following documents:

(a) Contract or Agreement for Module and other material

(b) Commercial invoices of Vendors.

(c) If the Modules and other equipment are imported the following documents to be submitted.

i. Bill of entry.

ii. Packing List

iii. Bill of lading

- (d) Lorry receipts, E-way Bills and material receipt Note.
- (e) CA/CMA certified material utilisation certificates and closing stock report as on CoD to verify whether all material procured are utilised for the said project or not.
- (f) Bank Account Statement reflecting the payments made to contractor/ Vendors.
- (g) To verify GST payment.
 - i. GST payment challans
 - ii. GSTR-1, GSTR-2B

4.8 The claim in the current petition is deemed unmaintainable due to several issues:

- (a) The invoices listed in the CA Certificate are unclear about whether they relate to Solar Energy Devices or outsourced O&M services, which affects their eligibility for compensation.
- (b) The invoices do not specify purchase dates, making it impossible to verify GST applicability, leading to vague and unsupported claims.
- (c) Claims for periods before the GST Act's effective date (30 September 2021) are invalid.
- (d) It is unclear if GST impacts were claimed for periods post-commercial operation date, which should have been accounted for under the tax regime in effect at that time.

4.9 As regards to the Additional Prayers:

- (a) For prayer 'c', EESL must provide appropriate documentation for Change in Law claims; blanket claims without such documentation are not justified.
- (b) For prayer 'd', the request for a specific methodology for GST impact determination is unfounded as it conflicts with the PPA terms that allow for re-negotiation rather than pre-determined methodologies.

4.10 There is no provision for carrying costs in the PPA regarding Change in Law. Despite APTEL's ruling to allow carrying costs, the Supreme Court has not yet finalized this decision. Thus, claims for carrying costs should be rejected pending Supreme Court's final order.

4.11 As regards to the claim of Carrying Costs:

- (a) The claim for carrying costs at 15% per annum is unsupported due to the lack of a relevant PPA provision.
- (b) Without substantial proof of the principal claim related to GST impacts, the carrying cost claim is not valid.
- (c) Even if considered, the carrying cost claim lacks merit due to the absence of a detailed computation methodology. The Commission's prior orders limit carrying cost computation to specific interest rates, which have not been provided by EESL.

4.12 Accordingly, MSEDCL requests the dismissal of EESL's petition.

5. **At the 1st E-hearing held on 12 December 2023: -**

5.1 Petitioner sought time for filing its Rejoinder and accordingly requested for adjournment of the hearing. Considering the request, the Commission adjourned the hearing and allowed Petitioner to file Rejoinder within two weeks.

6. **EESL in its IA No 06 of 2024 (in Case No 150 of 2023) filed on 22 January 2024 has stated as follows:**

6.1 EESL requests permission to amend the present petition to include recent developments and to correct certain inaccuracies in the facts and claims presented.

6.2 EESL replaced sub-para 2 of Para 8 of the petition and stated that out of 200MW EESL has phase-wise commissioned Solar Power projects of 173 MW at various sites across Maharashtra from the period 31 August 2018 to 17 March 2023.

6.3 EESL substituted the para 10 of the petition and submitted the details of GST notifications & amendment as follows:

GST Rate (as per Notification No. 1/2017) dated 28 June 2017	GST Rate (as per Notification No. 24/2018 and 25/2018) dated 31 December 2018
5% of 100% of Invoice value = 5%	5% of 70% of Invoice value = 3.5%
Effective Tax Rate = 5%	18% of 30% of Invoice value = 5.4%
	Effective Tax Rate = 8.9%

6.4 Similarly, EESL substituted table at para 11 of the main petition, with the following table. Accordingly, the revised rate of GST on the Solar PV Power Project is shown below:

GST Rate (as per Notification No. 24/2018 and 25/2018) dated 31 December 2018	GST Rate (as per Notification No. 8/2021) dated 30 September 2021
5% of 70% of Invoice value = 3.5%	12% of 70% of Invoice value = 8.4%
18% of 30% of Invoice value = 5.4%	18% of 30% of Invoice value = 5.4%
Effective Tax Rate = 8.9%	Effective Tax Rate = 13.8%

6.5 EESL invokes Order VI Rule 17 of the CPC and Section 94 of the EA, 2003, asserting that the Commission has the authority to allow amendments to address the real issues in the case.

6.6 EESL stated that it had inadvertently calculated the claim amount in the petition i.e., Rs. 32,65,22,728.73. EESL reduces the claim amount in the Petition along with interest rate. EESL substitutes paragraph No. 21 of the Petition with the following:

“21. As a result of Change in Law events, the Petitioner has incurred additional expenses of Rs. 27,65,79,539/- which was incurred on account of increment of GST rates on Solar

Power Generating System. Accordingly, the Petitioner is rightfully entitled to receive payment of compensation by the Respondent under Article 15.2 as a lumpsum amount, along with carrying cost @1.25% plus SBI MCLR of 8.65% (for tenor of one year) p.a. as on filing of this Application, from date of incurring of such expenses till reimbursement thereof by MSEDCL to the Petitioner.”

6.7 EESL amended the amount mentioned in the paragraph No. 26 of the Petition from “Rs. 32,65,22,728.73 (Rupees Thirty Two Crore Sixty Five Lakh Twenty Two Thousand Seven Hundred Twenty Eight and Seventy Three Paise Only)” to “Rs. 27,65,79,539/- (Rupees Twenty Seven Crore Sixty Five Lakhs Seventy Nine Thousand Five Hundred and Thirty Nine Only)” and amended prayer ‘a’ of the petition as follows;

“a. Hold and declare that the increase in effective CGST/IGST rates on supply of Solar Power Generating System from 5% to 8.9% and further to 13.8% by virtue of Ministry of Finance Notifications dated December 31, 2018 bearing No. 24/2018-Central Taxes and bearing No. 25/2018 - Integrated Taxes and Notification dated: September 30, 2021 bearing No. 8/2021- Central Tax (Rate) and No. 8/2021 – Integrated Tax (Rate) respectively is a ‘Change in Law’ event under Article 15.1 of the PPA dated January 20, 2018 and that the Petitioner is entitled to consequent relief thereunder;”

6.8 In view of the above changes, EESL amended the amount mentioned in the prayer No. “b” of the Petition from “Rs. 32,65,22,728.73 (Rupees Thirty Two Crore Sixty Five Lakh Twenty Two Thousand Seven Hundred Twenty Eight and Seventy Three Paise Only)” to “Rs. 27,65,79,539/- (Rupees Twenty Seven Crore Sixty Five Lakhs Seventy Nine Thousand Five Hundred and Thirty Nine Only)”. EESL also amended the percentage of carrying cost mentioned in the prayer No. “e” of the Petition from “15% p.a.” to “1.25% plus SBI MCLR p.a.”

6.9 EESL seeks to correct the term "Solar Energy Devices" to "Solar Power Generating Systems" to accurately reflect the subject of their claim. EESL outlines the changes in GST rates due to Notifications No. 24/2018 and No. 25/2018 (31 December 2018) with effective tax rate 8.9%, and further changes by Notification No. 8/2021(30 September 2021) with effective tax rate 13.8%, demonstrating the increased tax burden on solar power systems.

6.10 EESL seeks several specific amendments, including:

- Updating the details of commissioned projects and changes in GST rates.
- Correcting a table comparing effective GST rates before and after the amendments.
- Revising the introduction and details related to GST rate changes.

6.11 Revised Claim Amount: EESL requests to reduce the claim amount from Rs. 32,65,22,728 to Rs. 27,65,79,539 due to an error in the initial calculation, including updated interest rates. EESL will provide a Chartered Accountant’s certification for the revised incremental expenditure and supporting documents.

6.12 Relying on the Hon'ble Supreme Court in *Life Insurance Corporation of India V. Sanjeev Builders Private Limited & Anr. 2022 SCC OnLine SC 1128* EESL seeks to amend its petition. EESL argues that these amendments are necessary for proper adjudication of the case and cites legal precedent to support its request. EESL requests the Commission to:

- Approve the current application.
- Permit amendments to the petition and prayers.
- Issue any additional orders deemed appropriate by the Commission.

6.13 In summary, EESL seeks to adjust its petition and claims due to changes in GST rates affecting their solar projects, requesting corrections and updates to accurately reflect the impact and obtain appropriate relief.

7. EESL, in its Rejoinder dated 26 February 2024 (uploaded on 06 March 2024) has stated that:

7.1 EESL denies all statements and allegations made by MSEDCL in its reply dated 8 December 2023, and requests that no further replies or additional documents be allowed. EESL refutes MSEDCL's claim that SCOD (Scheduled Commissioning Date) was not met at 59 locations as per the PPA, asserting that the allegations are false and without merit.

7.2 EESL contended that the GST Notifications dated 31 December 2018, and 30 September 2021, qualify as Change in Law events affecting its project. EESL states that MSEDCL only provided encumbrance-free land at 17 out of 59 locations before the 31 December 2018, GST Notification. Due to delays in LDPE (Land Development and Power Evacuation) work by MSEDCL, the SCOD should be extended by three months, making it 16 months from land handover.

7.3 Since MSEDCL failed to complete LDPE work, EESL undertook it for additional sites, with revised SCODs considering both the original 13 months and an additional 6 months for LDPE work. EESL cites Covid-19 lockdowns as a Force Majeure event, which impacted project timelines, justifying extensions and adjustments in SCOD. Due to delayed LDPE work and Covid-19 impacts, SCOD revisions for affected locations go beyond the GST Notifications, making these Notifications relevant as Change in Law events.

7.4 EESL defends the validity of its financial claims, asserting that certified documents from Chartered Accountants should be considered valid evidence, and submits supporting invoices and utilization certificates. EESL seeks compensation for Rs. 27,65,79,539/- incurred due to increased GST rates on solar devices, claiming compensation under Article 15.2 of the PPA, including carrying costs.

7.5 EESL argues that any rejection of its claim based on misunderstanding or typographical errors would be unfair. It emphasizes that GST rate changes post-PPA execution qualify as Change in Law. EESL references various judgments and orders from APTEL and the Supreme Court, supporting the principle.

7.6 EESL has provided a CA certificate as proof of additional expenses amounting to Rs. 27,65,79,539 due to increased GST rates on solar energy devices for the SPGS project. EESL is ready to offer all necessary documentation to MSEDCL, making MSEDCL's claim that EESL hasn't demonstrated these extra costs, unreasonable and unacceptable.

7.7 In a similar case, the Commission approved additional expenses due to GST increases, as seen in Case No. 34 of 2023. EESL requests the Commission to grant the reliefs sought in their petition and any other reliefs deemed appropriate.

8. MSEDCL in its additional submission dated 26 April 2024 has stated as follows:

8.1 MSEDCL has verified the documents provided by EESL vide its Rejoinder dated 06 March 2024 and after the due verification the summary of claim evaluated by MSEDCL and submissions qua the same are given below:

Particulars		Amount
Total Change in Law Amount Claimed by Petitioner (i.e., EESL)		27,65,79,525
Less:	Claim Barred by law of Limitation as per the Limitation Act 1963.	17,79,83,168
Less:	Claim disallowed in respect of MSPVL.	33,99,831
Balance Change in Law Claim		9,51,96,525

8.2 EESL's claim includes invoices prior to 23 June 2020, which are barred by the three-year limitation period from the filing date of 23 June 2023. The Supreme Court's judgment in "Andhra Pradesh Power Coordination Committee vs. Lanco Kondapalli Power Ltd." confirms that the Limitation Act applies to State Commissions. EESL has not addressed the limitation principles in its petition, rendering its claim barred if not justified under Sections 5 and 14 of the Limitation Act.

8.3 Prior to the 2018 Notifications, GST rates for renewable energy devices were 5% for goods and 18% for installation services. The 2018 Notifications only adjusted tariff entries without changing GST rates. MSEDCL secured necessary approvals for claims before the land handover (13 months prior), indicating no delay on their part.

8.4 The 2018 Notifications revised GST rates for goods and services related to setting up Solar Power Generating Systems, but the effective GST rates remained unchanged at 5% for goods and 18% for services.

8.5 Examination of invoices from Mundra Solar PV Ltd (MSPVL) reveals that GST rates were consistent with earlier notifications (5% for goods and 18% for services) and not subject to the revised rates from the 2018 Notifications. Hence, no additional GST impact applies to and admissible to MSEDCL.

8.6 The balance Change in Law claim of Rs. 9,51,96,525 is similar to cases involving Tata Power Renewable Energy Ltd and Azure Power Thirty-Four Pvt Ltd, currently under MSEDCL's Supreme Court review (Civil Appeal No 7127 of 2021 & 4584 of 2022, respectively).

8.7 In respect of balance claim, the necessary invoices and documents are not available for verifying the balance claim, hindering further submissions. MSEDCL reserves the right to submit additional documents and data provided by EESL. Without such data, MSEDCL argues that the petition lacks merit and should be dismissed.

9. At the 2nd E-hearing held on 07 May 2024:

EESL sought time for filing its Rejoinder and accordingly requested an adjournment. Considering the request, the Commission adjourned the hearing and allowed EESL to file Rejoinder within next 15 days.

10. EESL, in its Rejoinder dated 15 May 2024 (to MSEDCL's additional submission dated 26 April 2024) has stated as follows:

10.1 EESL asserts that its claims are not time-barred and that MSEDCL should promptly pay the admitted claim of Rs. 9,51,96,525. EESL cites the Supreme Court's Judgment exempting certain periods (15 March 2020 to 28 February 2022) from the limitation calculation due to the COVID-19 pandemic.

10.2 EESL's petition, filed on 27 June 2023, is within the three-year limitation period (1095 Days) from the cause of action arising from the 31 December 2018, notification. EESL's claim complies with the Limitation Act and relevant Supreme Court judgments, making MSEDCL's objections unfounded. A table detailing that the present petition is not barred by limitation is reproduced below:

Date of cause of action	Date of filing of Petition	Period calculated from the date of cause of action till the date of petition filed.	Period exempted by the Supreme Court of India	Net calculated
31 December 2018	27 June 2023	(639 days.	15 March 2020, to 28 February 2022 i.e., 715 days	924 days.

- 10.3 EESL disputes MSEDCL's claim that GST rates on solar power systems haven't changed. The 2018 notifications altered GST rates for composite contracts (goods and services combined), resulting in an effective rate of 8.9% for such contracts, which constitutes a legal change affecting EESL's claims.
- 10.4 EESL argues that MSEDCL's delay in providing encumbrance-free land led to project delays and extended timelines. MSEDCL's assertion that all approvals were in place well before the land handover is incorrect, impacting EESL's change-in-law claims.
- 10.5 Following the 2018 GST notifications, Mundra Solar PV Limited issued invoices reflecting the new GST rates (5% for goods and 18% for services) in a 70:30 ratio. This supports EESL's claim that the GST impact was effectively 8.9% for composite contracts.
- 10.6 EESL contends that the Rs. 9,51,96,525 claim is valid despite MSEDCL's appeal, as no stay has been granted by the Hon. Supreme Court, on previous APTEL's Judgment dated 20 September 2021 & 08 November 2021. Thus, MSEDCL should settle this amount immediately as per the APTEL orders.
- 10.7 EESL has resubmitted all relevant invoices for verification and asserts that MSEDCL has not provided any valid reasons for dismissing the petition. EESL opposes granting additional time for pleadings due to the delays already incurred.
11. At the 3rd E-hearing held on 02 August 2024, the Commission heard the Advocates of the EESL and MSEDCL and reserved the matter for final Orders.

Commission's Analysis and Ruling:

12. EESL has filed the present petition and IA for amendment of its petition, seeking declaration that the increase in CGST/IGST rates (effective tax rate) on solar power generating systems—from 5% to 8.9% and then to 13.8%—as per the Ministry of Finance Notifications dated 31 December 2018, and 30 September 2021, constitutes a 'Change in Law' under Article 15.1 of its PPA with MSEDCL dated 20 January 2018. Initially EESL had claimed Rs. 32,65,22,728 as the Change in Law claim amount, however it has revised the amount to Rs. 27,65,79,539 due to an error in the initial calculation, including updated interest rates. Initially EESL has claimed carrying cost on Change in Law compensation at the rate of 15 % p.a. which it further revised as 1.25% plus SBI MCLR. The Commission has allowed EESL's application for amendment of Petition. MSEDCL has also filed reply considering amendment in the Petition.
13. MSEDCL has opposed EESL's claim of Change in Law compensation, citing that the commissioning of the project has been delayed and had the projects been commissioned on time, it would be prior to such Notifications and hence Change in Law would not become applicable. MSEDCL also stated that EESL's revised claim of Rs. 27,65,79,539 includes invoices prior to 23 June 2020, which are barred by the three-year limitation

period from the filing date of 23 June 2023. MSEDCL also submits that the balance Change in Law claim of Rs. 9,51,96,525 (after deducting claim barred by Limitation period and claim disallowed in respect of Mundra Solar Pvt Ltd.) is similar to cases involving Tata Power Renewable Energy Ltd and Azure Power Thirty-Four Pvt Ltd, currently under MSEDCL's Supreme Court review, Civil Appeal No 7127 of 2021 & 4584 of 2022, respectively. Moreover, in respect of balance claim, the necessary invoices and documents are not available from EESL. In nutshell MSEDCL argues that EESL's present petition lacks merit and should be dismissed.

14. Before dealing with the main issues the Commission notes that MSEDCL has objected the claim on the issue of limitation which needs to be dealt with. The Commission notes that Hon'ble the Supreme Court in its Judgement dated 10 January 2022 excluded the period between 15 March 2020 till 28 February 2022 for the purpose of limitation. Relevant part of the said Supreme Court Judgment is reproduced below:

"I. The order dated 23.03.2020 is restored and in continuation of the subsequent orders dated 08.03.2021, 27.04.2021 and 23.09.2021, it is directed that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi judicial proceedings.

II. Consequently, the balance period of limitation remaining as on 03.10.2021, if any, shall become available with effect from 01.03.2022.

III. In cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01.03.2022. In the event the actual balance period of limitation remaining, with effect from 01.03.2022 is greater than 90 days, that longer period shall apply."

Thus, in the above Order, the Supreme Court has excluded period from 15 March 2020 till 28 February 2022 for the purpose of limitation in respect of all judicial or quasi-judicial proceedings. Consequent to such exclusion, balance period of limitation remaining as on 15 March 2020 (although above order stated that balance period as on 3 October 2021, it needs to be read as 15 March 2020 as Supreme Court vide Order dated 29 September 2021 has ruled that balance period as on 15 March 2020 shall be available from 3 October 2021), if any, shall be available from 1 March 2022. However, in para III above, Supreme Court have further ruled that irrespective of such balance period, if period of limitation would have expired between 15 March 2020 to 28 February 2022, then such persons have limitation period of only 90 days from 1 March 2022 i.e. till 30 May 2022.

15. In present Cases, dispute is regarding Change in Law claims for increased GST rate. Such claim can be raised on commissioning of project as exact expenditure incurred and corresponding expenses on GST can be ascertain post commissioning of the project. As

per location wise date of commissioning submitted by MSEDCL for 59 locations, cumulative capacity of 173 MW has been commissioned during the period of 18 November 2019 to 30 November 2022. Therefore, the limitation period for project commissioned on 18 November 2019 would have expired on 17 November 2022. However, in view of the above quoted Supreme Court Order, period from 15 March 2020 till 28 February 2022 has been excluded from 3 years limitation period and said period is available from 1 March 2022. Considering the same, by adding excluded period, the Commission notes that EESL's petition, filed on 27 June 2023, is within the three-year limitation period.

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

Issue (1): Whether the Notification dated 31 December 2018 (GST rate increase from 5% to 8.9%) and 30 September 2021 (GST rate increase from 8.9% to 13.8%) resulting increase in GST on Solar power generating systems, qualifies as Change in Law?

Issue (2): Ascertainment of principal GST claim amount (if above issue 1 is positive) and modalities for computation of carrying cost (if applicable) and at what rate? & what should be the mechanism for payment of compensation amount (if applicable)?

The Commission's ruling on above issues is given in subsequent paragraphs.

17. **Issue (1): Whether the Notification dated 31 December 2018 (from 5% to 8.9%) and 30 September 2021 (from 8.9% to 13.8%) resulting increase in GST rates on Solar power generating systems, qualifies as Change in Law?**

17.1 The Commission notes that EESL has undertaken the development and implementation of solar power projects at MSEDCL sub-stations. MSEDCL buys the power generated from these solar projects under the modality of MoU based PPA with EESL. MoU was signed between EESL and MSEDCL on 14 July 2017 outlining the intention to develop 200 MW of solar PV projects on MSEDCL's land. EESL agreed to build the plants and supply power at a tariff of Rs. 3/kWh for 25 years. Subsequently after the Commission's Order dated 09 January 2018 in Case No 164 of 2017, PPA dated 20 January 2018 was signed between EESL and MSEDCL for 25 years for 200 MW of solar power.

17.2 Vide GST Notification dated 28 June 2017, the Ministry of Finance announced a 5% GST rate for solar energy devices and their parts. Thus, as on the date of MoU & PPA these 5% GST rates were applicable. Thereafter the Ministry of Finance Notifications vide its Notifications dated 31 December 2018, and 30 September 2021 increased the CGST/IGST rates (effective tax rate) on solar power generating systems from 5% to 8.9% and then to 13.8%. Thus, under the present case the CGST/IGST rates have been revised after the date of MoU & PPA.

17.3 Under the provisions of PPAs, 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 PPAs.

17.4 The Commission notes that any event can be said to be “Change in Law Event” only if it satisfies the provisions stipulated under the PPA. In present matter the relevant provision of the PPA dated 20 January 2018, with respect to the Change in Law is reproduced as under:

ARTICLE 15: CHANGE IN LAW

15.1 Definitions

In this Article 15, the following terms shall have the following meaning.

15.1.1 Change in Law means the occurrence of any of the following events after the Effective Date resulting into any additional recurring/ non-recurring expenditure by the SELLER or any income to the SELLER.

- *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.*
- *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;*
-
- *Taxes/ duties /cess shall be as applicable, during the contract period*

15.2 Relief for Change in Law:

15.2.1 SELLER and PROCURER may re-negotiate on the tariff whenever there is a change in the Goods and Services Tax (GST) slabs for the different services and equipment/material used for the commissioning and Operation of the small power plants, imposition of Anti-Dumping Duty (ADD) on the raw material / any equipment used or the small power plants during the project period.

15.2.2 The aggrieved Party shall be required to approach the State Commission for seeking approval of Change in Law.

5.2.3 The decision of the Appropriate (State) Commission to acknowledge a Change in Law and provide relief for the same shall be final and governing on both the Parties.

17.5 The PPA also provides Effective Date as follows:

ARTICLE 2: TERM OF AGREEMENT

2.1 Effective Date:

*This Agreement shall be deemed to have come into force with effect from the date of signing of this agreement and **shall remain in full force from the date of commissioning of last unit of the Project from which solar power is committed to be generated under this Agreement and such date shall be referred to as the Effective Date.***

17.6 The PPA further provides definition of COD, SCOD & Commissioning, as follows:

Commercial Operation Date (CoD): *shall mean the actual date of commencement of supply of respective Solar Power projects at various substations and such date as specified in a written notice given at least ten days in advance by the Seller to Procurer.*

Commissioning: *A solar PV project will be considered commissioned if all equipment as per rated project capacity has been installed and energy has flown into the Grid.*

Scheduled Commercial Operation Date (SCoD): *shall be a date, 13 months from the date of handover of an encumbrance free area/land within substation premises with all approvals or an additional period of 3 months shall be considered. If required, when the respective Solar PV Project is required to be commissioned as per the terms and conditions of the PPA. [Emphasis Added]*

17.7 The Commission notes that, PPA provides that any event stipulated under Clause 15.1.1 of the PPA can be considered as Change in Law event if it occurred after 'Effective Date'. ESSL in its submission has referred to date of PPA as Effective Date. But the Commission notes that PPA provides the definition of term "Effective Date" which is reproduced in above para. From plain reading of said definition in Clause 2.1 it is observed that it covers two aspects viz 1) Agreement (PPA) shall come into effect from date of signing of the PPA and 2) PPA shall remain in full force from date of commissioning of last solar project / unit and such date (i.e. date of commissioning of last solar project/unit) shall be referred as 'Effective Date'.

17.8 In the present matter, the PPA dated 20 January 2018 has been signed between EESL and MSEDCL for 25 years for contracted AC Capacity of 200 MW of solar PV Power generations at various location. As per EESL's own submission out of 200 MW, cumulative capacity of 173 MW of Solar Generation has been commissioned across Maharashtra with latest being 17 March 2023. Admittedly total contracted capacity of 200 MW is not yet commissioned.

17.9 The Commission notes that as per the definition of SCoD under PPA, EESL was obligated to commission the project within the period of 13 months, but the project at few locations were delayed by more than the said stipulated period due to various reasons attributable to both the parties. MSEDCL could have invoked Clause 16.1 "Seller event of Default" of the PPA since there was failure on the part of EESL to commence supply of power to the

contracted capacity, relevant to the SCoD. However, MSEDCL did not proceed for early termination of Agreement under Clause 2.3 of the PPA, either. On the other hand, EESL has also not invoked PPA clause 16.2 “procurer event of default”, when there was MSEDCL’s delay in providing encumbrance-free land to EESL which led to project delays and extended timelines. The Commission notes that both the parties are silent on this aspect.

17.10 Above circumstances resulted into a situation that the commissioning of the project in phased manner is still going on. Since as per the PPA, the contracted capacity is 200 MW and commissioned capacity is only 173 MW, as on date, last unit of the project is yet to be commissioned. Therefore, the Commission is of the view that the “Effective Date” as mentioned in the clause 2.1 of the PPA, cannot be decided/determined as of now.

17.11 The combined reading of the PPA clauses 2.1 & 15.1.1 (as cited above) makes it clear that notification of new law or amendment of existing law or introduction / change in tax, duty or cess after the “Effective Date” qualifies as Change in Law. However, the Commission observes that in this particular case, both the Notification dated 31 December 2018 (GST rate increase from 5% to 8.9%) and 30 September 2021(GST rate increase from 8.9% to 13.8%) resulting increase in GST rates on Solar power generating systems, are occurred much prior to the “Effective Date” (i.e. the date of commissioning of last unit of the Project) which is yet not achieved and therefore those MoF Notifications does not qualify as a Change in Law events.

18. As events claimed in the Petition does not find to be change in law event as per provisions of the PPA, Issue (2) framed above need not be addressed.

19. Hence, the following Order:

ORDER

The Petition in Case No. 150 of 2023 is rejected.

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

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

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

