

of the PPA, made a request for approval of change of location of the project. The said request was granted by the MSEDCL and copy of the PPA amendment was provided to the Petitioner on 24 March 2021. Hence, MSEDCL has denied that delay in execution of the amended PPA led to delay of the project

- 13.5. In this regard, the Commission notes that RfS has following provisions related to FC, SCOD and change in location of the project:

“SCOD” or “Scheduled Commercial Operation Date” shall mean the date as declared by the Successful Bidder in the PPA which shall not exceed 12 (Twelve) months from the date of issuance of LoA.”

“3.3

The Bidder shall identify 100% land required for the project at the time of submission of bid in Format 6.1. However the Bidder shall be allowed to change the location within the same district/circle once before signing of PPA also in addition to change of location once till the time of achievement of Financial Closure i.e. within 6 (Six) months from the date of issuance of LoA. ”

“ 3.13 Financial Closure or Project Financing Arrangements:

The Project Developer shall report tie-up of Financing Arrangements for the projects within 6 (Six) months from the date of issuance of LoA. Accordingly, the successful bidder shall furnish the following documents at the time of reporting Financial Closure i.e. tie-up of Financing Arrangements:

Thus, as per RfS, Financial Closure is to be achieved within 6 months from LoA and SCOD is to be achieved within 12 months from LoA. RfS has not specifically stipulated any interlinking between these two timelines. Hence, it is not always necessary that if timeline for one activity (FC) is extended then same needs to be extended for others also (SCOD). In fact there are some PPAs which enable extension of Financial Closure without extension in SCOD. If Petitioners are aggrieved by MSEDCL’s action of non-extension of SCOD while granting extension of FC, they should have approached the Commission at that point of time. Raising this issue now is neither appropriate nor as per the legal provisions.

- 13.6. Regarding request for change in location, RfS enabled Petitioner to make such request twice i.e. once before signing of PPA and once before FC. Petitioners have availed such option on 19 January 2021 after signing of PPA but before the FC. Hence, Petitioners cannot be faulted with for not availing such option earlier as same is permissible as per RfS. Further, as same is permissible under the RfS and accordingly MSEDCL approved it on 15 April 2021. MSEDCL has taken 87 days for granting such permission. Project activities cannot be proceeded without approval for change in location. As delay in project execution led to

levy of penalty on the Petitioners, the Commission is of the opinion that such delay on behalf of MSEDCL needs to be factored in while computing delay in project execution. As stated earlier, actual commissioning of project is delayed by 54 days from final extended SCOD. Such delay of 54 days is lower than MSEDCL's delay of 87 days in approving change in project location. Therefore, such delay needs to be condoned and accordingly, the Commission allows extension of SCoD upto actual date of commissioning i.e. 30 December 2021 without any penalty.

14. Issue B: Whether Petitioners are eligible for Change in Law compensation in view of undertaking dated 4 September 2021?

14.1. The Commission notes that the Petitioners have claimed Change in Law compensation on account of increased Basic Custom Duty and increased rate of GST. However, MSEDCL has opposed such claim on the ground that Petitioners have given undertaking dated 4 September 2021 stating that they will not claim any increase in cost of project.

14.2. While opposing MSEDCL's contentions, Petitioners stated that undertaking dated 4 September 2021 was given only in compliance with the directions contained in MNRE Notification dated 12 May 2021. When subsequent MNRE notification dated 3 November 2021 clarified that change in law shall be governed by the PPA, undertaking given under earlier MNRE notification cannot be held against the Petitioners.

14.3. In view of above submissions, the Commission has perused the provisions of MNRE notification dated 12 May 2021 and reproduced relevant part below:

“Sub: Time-extension in Scheduled Commissioning Date of Renewable Energy (RE) Projects considering disruption due to the second surge of COVID-19

.....

5. In view of above, the undersigned is directed to state that:

a) RE projects, being implemented through Implementing Agencies designed by the MNRE or under various schemes of the MNRE, having their Scheduled Commissioning Date (SCD) on or after 1st April 2021 after considering the time extension mentioned at Para-3 above, can apply to the concerned implementing agency for claiming time extension in project commissioning.

b) While applying for such time-extension, RE developers shall undertake that the time-extension shall not be used as a ground for claiming termination of Power

Purchase Agreement (PPA) or for claiming any increase in the project cost, including Interest During Construction (IDC) or upward revision of tariff.

c) *If the conditions above are satisfied, then no other supporting documents will be required for granting time-extension.*

.....”

Thus, as per above MNRE guidelines, in order to get time extension on account of second wave of COVID-19, RE project developer has to give undertaking that time-extension shall not be used for claiming any increase in the project cost, including IDC or upward revision of tariff.

14.4. Accordingly, Petitioners have submitted their undertaking dated 4 September 2021 to MSEDCL. The Commission has perused the said undertaking and reproduced relevant clauses as under for one of the Petitioners:

*“7. I on behalf of M/s. Sunfree Paschim Renewable Energy Private Limited undertake that M/s. Sunfree Paschim Renewable Energy Private Limited shall not claim any increase in the Project Cost, including Interest During Construction (IDC), **impact of Basic Custom Duty (BCD)** or upward revision in Tariff **for the period of extension provided by MSEDCL.***

9. I on behalf of M/s. Sunfree Paschim Renewable Energy Private Limited give my unconditional acceptance to the Clauses mentioned above & undertake to bear any implications/consequences arising out of the occurrence of conditions mentioned hereinabove voluntarily & not under any constrain on pressure etc. and such resolution will be passed in the Board of the Company, in addition to this undertaking”

[emphasis added]

It is important to note that in the above undertaking in addition to provisions stated in MNRE notification dated 12 May 2021, Petitioners have added that impact of Basic Customs Duty (BCD) will not be claimed for the period of extension provided by MSEDCL.

14.5. After receipt of above undertaking, MSEDCL has extended SCOD of the Petitioners by 2.5 months on account of second wave of COVID-19 as provided in MNRE notification. Relevant part of MSEDCL’s letter dated 6 August 2021 [there seems to be some mistake in date as letter issued in August 2021 has referred undertaking given in September 2021] is reproduced below:

“.....”

Ref: 1.....

4. MNRE Office memorandum dated 12.05.2021 & 29.06.2021

5. Y.O. undertaking dated 04.09.2021

.....

Considering the MNRE directives in Office Memorandum under reference (4), MSEDCL hereby grant the extension to Financial Closure (FC) and Schedule Commercial Operation date (SCoD) for a period from 01.04.2021 to 15.06.2021. Therefore, considering the LoA date i.e. 12.06.2020 as effective date, extension for 76 days is approved. Thus the FC (23.05.2021) and SCoD (23.08.2021) for your project is revised to 07.08.2021 and 07.11.2021, respectively, along with the conditions as undertaken by you vide your undertaking under ref. (5)''

14.6. Thus, the Commission notes that both parties have relied upon MNRE notification dated 12 May 2021 and 29 June 2021 for seeking and granting extension in SCOD on account of second wave of COVID-19. Therefore, it is important to refer to subsequent clarifications issued by MNRE on the aspect of undertaking mentioned in above said notifications. The Commission notes that MNRE vide notification dated 15 September 2021 has clarified this aspect as follows:

*“Subj: Time Extension in Scheduled Commissioning Date of Renewable Energy (RE) Projects considering disruption due to second surge of COVID-19: Clarification
-reg*

Ref: (i) MNRE’s O.M. of even no. dated 12.05.2021

(ii) MNRE’s O.M. of even no. dated 29.06.2021

.....

3. Subsequently, it was pointed out to MNRE that many RE Project Developer are in dilemma that on submission of aforesaid undertaking, they will have to relinquish their right to claim reimbursement under change-in-law provision under the PPA and MNRE was requested to provide clarity on this issue.

4. The aforesaid request has been examined in MNRE and following is hereby clarified:

a) *The time-extension given vide MNRE’s OMs dated 12.05.2021 and 29.06.2021, referred at (i) and (ii) above respectively, is an out-of-contract concession extended by MNRE to facilitate Renewable Energy projects. This time extension is optional and can be claimed by Renewable Energy project Developers / EPC contractors provided they do not claim any increase in project cost on account of this time extension of 2.5 months. This increase in project cost includes any possible impact*

due to any change-in-law event which would not have been there has this optional time-extension was not claimed.

- b) RE developers shall have the option of not claiming the time-extension as per MNRE's as per MNRE's O.M.s dated 12.05.2021 and 29.06.2021 referred at (i) and (ii) above respectively, but approaching the appropriate forum as per their respective PPAs, for claiming appropriate time-extension as may be admissible”*

Therefore, as per above clarification issued by MNRE, it was voluntary act of the generator to give undertaking and seek blanket extension of 2.5 months. Further undertaking not to claim any increase in project cost includes any possible impact due to any change-in-law event which would not have been there had this optional time-extension would not have been claimed.

- 14.7. The Commission notes that Petitioners have relied upon subsequent MNRE Notification dated 3 November 2021 to state that Change in Law will be governed as per provisions of PPA. Relevant part of MNRE Notification is reproduced below:

“Sub: Time Extension in Scheduled Commissioning Date of Renewable Energy (RE) Projects considering disruption due to second surge of COVID-19: Clarification – reg.

*Ref: (i) MNRE's O.M. No. 283/18/2020-GRID SOLAR dated 12.05.2021
(ii) MNRE's O.M. No. 283/18/2020 – GRID SOLAR dated 29.06.2021
(iii) MNRE's O.M. No. 283/18/2020-GRID SOLAR dated 15.09.2021*

.....

2. Representation have been received in MNRE for further clarification on the issue of Change-in-law in the context of the above OMs. The requests have been examined and it is hereby clarified that the change-in-law shall continue to be governed by the provisions of Power Purchase Agreement (PPA) and to be decided by the Appropriate Commission ”

Thus, in view of above clarification of MNRE, undertaking given by the RE project developers for extension of SCOD on account of second wave of COVID-19 is restricted to not claiming termination of PPA or increase in project cost on account of reasons other than Change in Law. RE project developers are allowed to claim impact of Change in Law as per provision of PPA by approaching appropriate Commission.

- 14.8. Both parties have relied and acted upon MNRE notifications for extension of SCOD on account of second wave of COVID-19. Issue of applicability of MNRE notifications to State agency like MSEDCL was dealt with in Order dated 20 June 2020 in Case No. 78 of

2020 relating to extension of SCOD on account of first wave of COVID-19. In the said Order, the Commission has made following observations:

16.10

As stated in the above OM, these directives are mandatory for the agencies of MNRE and optional for State Agencies like MSEDCL. However, in order to have consistency of relief available to the RE generators, the Commission deems it fit to use this OM dated 17 April 2020 as guiding document for deciding on time extension to be allowed on account of Covid-19.

In view of above observations, MNRE Notifications relating to extension of SCOD needs to be made applicable and accordingly MSEDCL has been providing extension of SCOD on account of COVID-19.

14.9. In view of above, applicability of MNRE notification dated 3 November 2021 cannot be denied and needs to be given effect to.

14.10. Therefore, the Commission rules that Petitioners are eligible to claim impact of increased BCD on inverters and increased rate of GST, if they fulfil conditions stipulated under the PPA.

15. Issue C: Whether Notification dated 1 February 2021 resulting in change in Basic Custom Duty from 5% to 20% qualifies as Change in Law Event?

15.1. 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. Relevant part of PPA dealing with provisions of Change in Law are reproduced below:

“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 modifications 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 a direct effect on the Project.

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 Solar Power Producer then, in order to ensure that the Solar 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 Solar 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 Solar 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 Solar Power Producer shall be approximately increased or decreased with due approval of MERC;

9.2.3. The Power Procurer/ MSEDCL or the Solar Power Producer as the case may shall provide the other party with a certificate stating that the adjustment in the Tariff Payment is directly as a result of 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;

9.2.5 For the excess amount to be recovered against the approved change in Law events, shall not attract any carrying costs or any other interest on such amount.

9.3 Notification of Change in Law:

9.3.1 If the Seller is affected by a Change in Law in accordance with Article 9.1 and wishes to claim change in Law under this Article, it shall give notice to MSEDCL of such

Change in Law within 7 days after becoming aware of the same or should reasonably have known of the Change in Law. ”

- 15.2. The Commission notes that PPAs between parties were executed on 30 September, 2020. The LOA was issued on 12 June, 2020. The Notification relating to change in custom duty on inverters was introduced on 01 February 2021, which falls after the last date of bid submission.
- 15.3. The Commission also notes that PPA provisions mandate that if Petitioner wishes to claim Change in Law under the PPA, it shall give notice to MSEDCL within 7 days after becoming aware of the same or should reasonably have known of the Change in Law. Change in Basic Custom Duty on inverters was introduced on 1 February 2021, but Petitioners have contended that they got aware of the same once supplier raised the bill on 5 November 2021 and due to partial working of office on account of pandemic, inadvertently it has not issued Change in Law notice to MSEDCL. Such excuse cannot be allowed as during the same pandemic period, Petitioners have sent Change in Law notice for increased in GST rate to MSEDCL on 7 October 2021, thus they are well aware of mandate of issuing notice for claiming Change in Law compensation. Further, undertaking dated 4 September 2021 (relevant part reproduced at para 14.4 above) clearly mentioned that Petitioners shall not claim any increase in BCD which means Petitioners were aware of increase in BCD on inverter on 4 September 2021 itself and consciously have decided to forego such claim and hence not issued Change in Law notice on this account. Even if it is accepted that Petitioners became aware about increased in BCD on inverters only after receipt of invoice from supplier on 5 November 2021, as they are aware of process of issuing notice, they should have complied with mandate under the PPA. But Petitioners have not issued any Change in Law notice for increased BCD on inverters. Instead, they have directly raised invoice dated 25 November 2021 for the same. This clearly indicates afterthought on behalf of Petitioners to claim compensation for increased in BCD on inverters after knowingly forfeiting such claim in undertaking dated 4 September 2021 and hence not issuing mandatory Change in Law notice for such event.
- 15.4. By not issuing Change in Law notice, Petitioners have failed to fulfill mandatory condition for claiming Change in Law impact under the PPA. Hence, Petitioners are not entitled for claiming any impact on this account. Therefore, since the preliminary, important and mandatory condition has not been complied by the petitioner, the Commission is not inclined to take up any further analysis of whether increase in BCD on solar inverters can be considered as Change in Law event under the PPA.

16. Issue D: Whether Notification dated 30 September, 2021 resulting in Change in GST rate qualifies as Change in Law Event?

16.1. Ministry of Finance, vide Notification dated 30 September 2021 increased GST on the solar power devices from five percent (5%) to twelve percent (12%).

16.2. On the basis of above GST Notification, Petitioners vide its letter dated 7 October, 2021 informed MSEDCL that increase in the GST rates on solar modules and other solar operated devices from five percent (5%) to twelve percent (12%) will directly affect the cost of Project and the same amounts to Change in Law as per provisions of PPA.

16.3. The Commission notes that notification dated 30 September 2021 is subsequent to the last date of Bid Submission. 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’. Further, as required under the PPA, Petitioners have issued Change in Law notice within 7 days of said notification. Hence, condition of giving notice for claiming Change in Law impact has been complied with.

16.4. ‘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.

16.5. Further, as per clause 9.1 of the PPA, notification of new law or amendment of existing law or introduction / change in tax, duty or cess subsequent to Bid Submission date qualifies as Change in Law.

16.6. Admittedly, Notification dated 30 September 2021 (which is subsequent to Bid Submission and after the LOA was issued on 12 June, 2020) which has led to change in the rate of GST from 5% to 12% on solar modules and inverters. Hence, the Commission rules that this Notification dated 30 September 2021 qualifies as Change in Law event under the PPA.

17. Issue E: Ascertainment of principal claim of Custom Duty in both the cases.

17.1. The Commission notes that the Petitioners in their Petition provided following claims regarding the Change in Law event:

Particulate	Case No. 39 of 2022 (SPREPL)	Case No. 41 of 2022 (NIPL)
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Impact of increased GST rate (Rs)	3,27,46,179/-	1,64,40,790/-
Impact of additional Custom Duty (Rs)	29,95,978/-	22,46,983/-

17.2. The Petitioners have supported their claim with CA Certificate. MSEDCL in its reply has not submitted any comments on computation of Change in Law compensation but stated that to ascertain the actual impact of the change in law events on the tariff, it is necessary for the Petitioner to submit the actual computation exercised by it to arrive at the bid amount of Rs.3.30 per unit to ascertain computation of the bidding amount as the same would have undoubtedly factored in, as a risk some margin qua additional cost which may be incurred.

17.3. With reference to MSEDCL contention that Petitioners needs to submit details of computation to arrive at bid tariff, the Commission notes that it is settled legal principle that generator who had participated in the tariff bidding process under Section 63 of the EA 2003 cannot be asked to provide details of their bid assumption and Change in Law relief is limited to restitution and compensating increased expenses vis-à-vis laws/taxes applicable at the time of bid submission. Hence, such request of MSEDCL cannot be considered.

17.4. MSEDCL has further submitted that if the Commission were to allow the Change in Law impact, then the same should be subjected to proof of co-relation between the equipment installed on site as part of the project and the solar equipment imported by the Petitioner and all other relevant documentary proof.

17.5. The Commission notes that Petitioners have supported their Change in Law claim by producing CA Certificates. Further considering ongoing nature of PPA, the Commission deems it fit to allow following Change in Law compensation on account of increase in GST rate subject to condition that one-to-one correlation exercise be completed within 2 months from the date of this Order and any adjustment in claim, if any, be carried out with associated carrying cost/ holding cost:

Particulate	Case No. 39 of 2022 (SPREPL)	Case No. 41 of 2022 (NIPL)
Impact of increased GST rate (Rs)	3,27,46,179/-	1,64,40,790/-

During the above said process of ascertaining one-to-one correlation, the Petitioners shall also submit details of taxes, duties and levies which stand withdrawn and are no longer payable or have been reduced, to MSEDCL and include its impact, if any, in reconciliation process.

17.6. The Commission has already ruled at para 15.4 above, that impact of Change in Law on account of increased BCD on inverter cannot be allowed as Petitioners have not complied with mandatory condition of giving notice under provisions of PPA.

18. Issue F: What are the modalities for carrying cost?

18.1. The Commission notes that the Petitioners in both the matters have claimed carrying cost @ 15% per annum. The Commission notes that the Petitioners have cited the principle of economic restitution and time value of money for the justification of the Carrying cost. Petitioners have also relied upon various APTEL Judgment for claiming carrying cost.

18.2. While opposing such request, MSEDCL has contended that there is no provision under the PPA which stipulates the carrying cost needs to be allowed on Change in Law compensation.

18.3. In view of above submission, the Commission has perused the provisions of PPA and notes that clause 9.2.5 of the PPA categorially states that Change in Law compensation shall not attract carrying cost. Relevant clause of PPA is reproduced below:

9.2.5 For the excess amount to be recovered against the approved change in Law events, shall not attract any carrying costs or any other interest on such amount.”

In view of above clear provision of the PPA, the Commission cannot deviate from the agreed terms of the Contract. It is settled legal principle that courts cannot rewrite the contract between the parties. Reliance on APTEL judgment will also not help in present case as parties have specifically agreed not to claim carrying cost.

18.4. Accordingly, the Commission rejects the claim of carrying cost on the approved Change in Law claim.

19. Issue G: What should be frequency of payment of compensation amount?

19.1. Petitioners have prayed that compensation for Change in Law event be either paid on lumpsum basis or through increase in PPA tariff.

19.2. 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 Petitioners within two weeks from the date of this Order.

19.3. In case option of paying compensation amount over the PPA period is selected then per unit rate of compensation shall be computed based on the following methodology:

- a) Firstly, total amount of compensation to be paid (as stated in para 17.5 above) is to be determined. Such total amount shall be equally divided over each year of PPA tenure.
- b) Thereafter, carrying cost towards deferred payment shall be computed on the unrecovered part (average of opening and closing balance) of total compensation at the simple interest rate of @ 1.25% plus SBI MCLR per annum.
- c) Summation of installment of compensation computed at 'a' above and carrying cost towards deferred payment computed at 'b' above will be the amount which is to be paid to the Petitioners during that particular year.
- d) Per unit cost for a particular year shall be computed by dividing amount determined in 'c' above by energy to be supplied during that year from the project capacity at declared CUF. However, during the year of commissioning, availability of project only for the part of year shall be appropriately factored while computing energy to be supplied from the project.
- e) At the end of Financial Year, MSEDCL shall reconcile total amount paid through per unit charge as against total amount which is recoverable in that year as per 'c' above. Any over-recovery shall be adjusted in the payment for the month of March.
- f) Although per unit charge at the start of each financial year needs to be decided based on declared CUF, year-end reconciliation at end of each financial year shall be undertaken as per actual CUF within range $\pm 10\%$ of declared CUF
- g) Any under-recovery on account of lower generation shall be carried forward to next year and shall be payable without any additional carrying cost and only from the excess generation above declared CUF. Such unrecovered compensation, if any, at the end of PPA tenure shall be reconciled and paid in last month of PPA tenure at no additional carrying cost.

20. Hence, the following Order:

ORDER

1. Case No. 39 of 2022 and Case No. 41 of 2022 are partly allowed.
2. Extension of SCoD to actual date of commissioning i.e. 30 December 2021 is allowed without any penalty.
3. Impact of Change in Law on account of increased Basic Custom Duty on inverters vide notification dated 1 February 2021 cannot be allowed as mandatory condition of Notice for Change in Law event has not been fulfilled.
4. Impact of Change in Law event on account of increased GST vide notification dated 30 September 2021 is allowed as per para 16 and 17 above.
5. Maharashtra State Electricity Distribution Co. Ltd. shall communicate its option of payment of Change in Law compensation to Petitioners as stated in para 19 above within 2 months from date of this Order

Sd/-
(Mukesh Khullar)
Member

Sd/-
(I.M. Bohari)
Member

Sd/-
(Sanjay Kumar)
Chairperson

