

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 143 of 2023

Petition of M/s. ACME Heergarh Powertech Private Limited (AHPPL) seeking relief on account of Change in Law due to increase in Goods and Service Tax (GST) rates vide Notification dated 30 September 2021 in terms of the Power Purchase Agreement (PPA) dated 21 August 2019.

M/s. ACME Heergarh Powertech Private Limited (AHPPL) Petitioner
..... Respondent
Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL)

Coram

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

Appearance:

For the Petitioner : Mr. Sujit Ghosh (Adv.)
For the Respondent : Mr. Anup Jain (Adv)

ORDER

Date: 6 March, 2024

1. M/s. ACME Heergarh Powertech Private Limited (AHPPL) has filed the present Petition on 29 May 2023 seeking approval of 'Change in Law' under Article 9 of the Power Purchase Agreement (PPA) dated 21 August 2019 and an appropriate mechanism for grant of an adjustment/ compensation to offset financial/ commercial impact of Change in Law event.

2. Main Prayers of AHPPL are as follows:

- a) *Declare the increased rate of CGST / IGST on renewable energy devices and parts for their manufacture imposed vide Notification No. 8/2021-Central Tax (Rate) and Notification No. 8/2021- Integrated Tax (Rate) dated September 30, 2021 (effective October 1, 2021) as Change in Law in terms of the PPA which have led to an increase in the expenditure for the Project;*
- b) *Evolve a suitable mechanism to compensate the Petitioner for the increase in expenditure incurred by the Petitioner on account of Change in Law;*
- c) *Direct Respondent to compensate the Petitioner towards CGST/IGST as one-time lump sum amount or mechanism devised by this commission in prayer (b)*
- d) *Grant interest/carrying cost from the date of incurring of the cost by the Petitioner till the date of order by this Commission at a rate calculated in terms of para 31, restoring the Petitioner to the same economic position as before the occurrence of the Change in Law events.... ”*

3. AHPPL in its Petition stated as below:

3.1 Major events in bidding process and subsequent development are presented as below:

| Date | Event |
|------------|---|
| 05.12.2018 | MSEDCL issued its Request for Selection (RfS) of Solar Power Producers (SPPs) for procurement of 1000 MW of the power. |
| 03.01.2019 | Last date of the Bid Submission (Initial) |
| 22.01.2019 | Last date of the Bid submission (Extended) |
| 22.01.2019 | M/s. ACME Solar Holdings Limited submitted its Bid. |
| 19.03.2019 | MSEDCL accepted the bid of M/s. ACME Solar Holdings Limited for development and establishment of 300 MW of Solar Power Project in the State of Rajasthan and issued its Letter of Award dated 19 March, 2019. |
| 21.08.2019 | M/s. ACME Solar Holdings Limited has formed an SPV company i.e., the Petitioner (AHPPL) within the provisions of the RfS. Accordingly, MSEDCL entered into a Power Purchase Agreement dated 21 August, 2019 with the AHPPL for development of 300 MW of Solar Power Project at Village: Bhadla, Tehsil: Bap, District: Jodhpur, Rajasthan and the consequent supply of solar power to MSEDCL. |
| 30.09.2021 | The Central Government vide Notification dated 30 September, 2021 (effective from 1 October, 2021) amended the rate of CGST/IGST for renewable energy devices and their parts. As per the said Notifications, Entry 234 and the entries related thereto (with effective CGST / IGST rate |

| Date | Event |
|------------|---|
| | of 5%) were omitted from Schedule I and Entry 201 A has been inserted to Schedule II wherein the rate of CGST/IGST is 6% (effective 12%). On the basis of the said entry, renewable energy devices, i.e., modules and solar power generators and their parts for manufacture will be leviable to CGST/IGST at 12%, instead of 5%, thereby leading to an incremental CGST & SGST/IGST of 7%/13%. |
| 13.10.2021 | AHPPL has issued a notice of Change in Law highlighting impact of change in rates of GST to MSEDCL in line with the provisions of the PPA to consider the said event as Change in Law. |

3.2 Impact of Notification dated 30 September 2021:

3.2.1 In exercise of the powers conferred inter alia under Section 9 of the CGST Act, the Central Government issued Notification No. 8/2021- Central Tax (Rate) on 30 September 2021 which has increased the rate of GST from 5% to 12% on renewable energy devices and their parts for manufacture.

3.2.2 Increase in rate of GST qualifies as a Change in Law event under Article 9 of the PPA dated 21 August 2019.

3.2.3 As per Article 9 of the PPA dated 21 August 2019, once a Change in Law has occurred, the aggrieved party (AHPPL) is required to give a Notice to MSEDCL within 7 days of becoming aware of such Change in Law. In the present case, AHPPL has issued the Notice on 13 October 2021 and the increase in rate of GST came into effect from 01 October 2021. Thus, as soon as AHPPL became aware of such a Change in Law, it proceeded to issue a Notice to MSEDCL.

3.2.4 As per the provisions of Article 9 of the PPA, AHPPL is required to approach the Commission for seeking approval of Change in Law. Accordingly, AHPPL has approached the Commission seeking relief on account of the Change in Law.

3.3 AHPPL is entitled to the carrying costs on account of an increase in Capital Expenditure which has thereby led to an increase in the Debt and Equity Requirement of AHPPL.

3.4 The increase in costs due to the Change in Law events have a direct bearing on debt and equity required for setting up of the Project. These components are integral to the all-inclusive Tariff Bid. At the time of the submissions of the Bid, AHPPL had factored in 'interest on working capital' and return on equity based on the costs prevalent at the time of Bid. With the increase in the costs due to the Change in Law events, the working capital

requirement, and consequently, the interest on working capital have also increased as compared to the requirement and rate prevalent at the time of bid. Thus, AHPPL is entitled to interest on incremental working capital at normative interest rate to put AHPPL to the same economic position as if change in law had not occurred.

3.5 AHPPL has funded the additional CGST/IGST upfront from its equity as the same was not envisaged at the time of bidding and was not a part of project cost. Therefore, AHPPL is also entitled for reimbursement of carrying cost from the date of actual payment of CGST/IGST till the order of the Commission so that AHPPL is put to the same economic position as if Change in Law had not occurred.

3.6 Further, in terms of Article 9.2 of the PPA dated 21 August, 2019, 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 Commission. Thus, basis Article 9.2 of the PPA, it is imperative that AHPPL is granted an interest on working capital at normative interest rate on equity, in addition to reimbursement towards payment of additional GST as well as the carrying cost in order to put AHPPL to the same economic position as if change in law has not occurred.

3.7 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 time and again held that claims regarding separate 'carrying costs' would be granted 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.

3.8 AHPPL has funded the entire amount of excess expenditure incurred on account of Change in Law events paid till date through its own equity and would only be funded by the lenders to the extent of 70% of total cost once the approval of Change in law is received from the Commission.

3.9 AHPPL in a just, fair and equitable manner proposes carrying costs to be calculated on the basis of the normative debt equity ratio of 70:30, wherein, the average of the one-year Marginal Cost of Funds-based Lending Rate (MCLR) as declared by the State Bank of India for the previous year plus 200 basis points, shall be considered as the normative interest

applicable in relation to the debt component and Return on Equity shall be computed at the base rate of 14%, to be grossed up as per the Minimum Alternate Tax (MAT) rate applicable as on 1st April of the previous Financial Year. This is line with Maharashtra Electricity Regulatory Commission (Terms and Conditions for Determination of Renewable Energy Tariff) Regulations, 2019.

- 3.10 AHPPL also states that presently, it has availed the benefit of duty deferment at the time of import of solar modules in terms of the MOOWR Scheme issued under Notification No. 69/2019-Customs (NT) dated 01.10.2019. Under the said Scheme, AHPPL is permitted to import from outside the country, inputs and capital goods (which are used to manufacture finished goods) without payment of customs duty in a private bonded warehouse under Section 58 read with Section 65 of the Customs Act, 1962. Furthermore, whenever the goods (solar modules in the present case) are cleared from the said private bonded warehouse, customs duty at the prescribed rate will be paid by AHPPL on the goods which are cleared in accordance with law. AHPPL craves leave to file a separate change in law claim if AHPPL incurs customs duty or GST etc, at the time of clearance of modules from the bonded warehouse.
- 3.11 It is submitted that on account of the documents being extremely voluminous in nature, the entire documentary evidence is not enclosed herewith with the present petition and instead sample documents with each of the tax invoices have been enclosed. However, it is prayed that MS&EDCL can inspect the documents at the office premises of AHPPL and AHPPL can also submit a copy in CD format, if required.
- 3.12 AHPPL also submits that on account of certain amendments to the Regulations issued in relation to the MOOWR Scheme, AHPPL approached Hon'ble the Delhi High Court challenging the amendment vide Writ Petition No. 10537 of 2022. In this regard, Hon'ble the Delhi High Court was pleased to grant interim relief by restraining the Customs Authorities from taking any coercive steps. The matter is presently sub judice before Hon'ble the Delhi High Court.
- 3.13 This Commission vide Order dated 07.07.2022 in Case No. 07 of 2022, upheld that Project was impacted by Force Majeure events being disruption in supply chain and granted extension for commissioning of the project. AHPPL has commissioned its Project in tranches: 50 MW- 30 March, 2022, 50 MW- 14 April, 2022, 100 MW- 02 May, 2022 and 100 MW- 23 May, 2022.
- 3.14 Issuance of GST notification would qualify as a Change in Law as per Article 9 of the PPA dated 21 August, 2019. The impact due to increase in taxes, for the project is summarized in the table below:

| Sr. No. | Bill No. | Bill Date | Bill Amount (Without GST) | GST applicable at the time of bidding @5% | GST on account of amendment to GST rates (effective from 1 st October 2021) @12% | GST claim on account of Change in GST rates (12% - 5%) |
|---------|--------------|-----------|---------------------------|---|---|--|
| 1 | DR3821000454 | 15-Feb-22 | 34,78,92,890 | 1,73,92,890 | 4,17,42,937 | 2,43,50,046 |
| 2 | DR3821000456 | 15-Feb-22 | 45,23,37,002 | 2,26,16,850 | 5,42,80,440 | 3,16,63,590 |
| 3 | DR3821000457 | 16-Feb-22 | 38,76,33,123 | 1,93,81,656 | 4,65,15,975 | 2,71,34,319 |
| 4 | DR3821000459 | 15-Feb-22 | 30,53,79,370 | 1,52,68,969 | 3,66,15,975 | 2,13,76,556 |
| 5 | DR3821000473 | 7-Mar-22 | 3,36,04,977 | 16,80,249 | 3,66,45,524 | 23,65,348 |
| 6 | DR3821000475 | 7-Mar-22 | 2,98,35,241 | 14,91,762 | 40,32,597 | 20,88,467 |
| 7 | DR3821000476 | 7-Mar-22 | 3,54,46,993 | 17,72,350 | 35,80,229 | 24,81,290 |
| 8 | DR3821000477 | 7-Mar-22 | 3,88,26,300 | 19,41,315 | 42,53,639 | 27,17,841 |
| 9 | DR3821000479 | 8-Mar-22 | 3,90,310 | 19,516 | 46,837 | 27,322 |
| 10 | DR3821000481 | 8-Mar-22 | 3,78,222 | 18,911 | 45,387 | 26,476 |
| 11 | DR3821000483 | 8-Mar-22 | 15,83,364 | 79,168 | 1,90,004 | 1,10,835 |
| 12 | DR3821000484 | 8-Mar-22 | 2,35,82,393 | 11,79,120 | 28,29,887 | 16,50,768 |
| 13 | DR3821000487 | 12-Mar-22 | 27,41,43,281 | 1,37,07,164 | 3,28,97,194 | 1,91,90,030 |
| 14 | DR3821000488 | 12-Mar-22 | 7,54,79,656 | 37,73,983 | 90,57,559 | 52,83,576 |
| | | | 2,00,64,78,037 | 10,03,23,902 | 24,07,77,364 | 14,04,53,463 |

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

4.1 The original Scheduled Commercial Operation Date (SCOD) was 26 June, 2021 which was extended to 28 December, 2021 and further extended up to 14 March, 2022.

4.2 Thereafter, AHPPL had filed a Petition before the Commission seeking further extension of the Scheduled Commercial Operation Date (SCOD) from 28 December 2021 to 14 September, 2022 on account of certain Force Majeure events, which the Commission vide its Order dated 07 July, 2022 extended to 19 April, 2022. 300 MW solar project is commissioned in phases and final commissioning date is 23 May 2022.

4.3 AHPPL has filed an Appeal on 28 July, 2022, vide DFR No. 309 of 2022 before Hon'ble the APTEL requesting to extend SCOD from 19 April, 2022 to 23 May, 2022 which is presently subjudice before Hon'ble the APTEL.

4.4 In terms of Article 9.3.1 of the PPA, AHPPL was aware of its mandatory contractual obligation to issue Change in Law Notice upon MSEDCL within 7 days after becoming aware of the same. In the present case the GST Notification was issued on 30 September 2021 and AHPPL had belatedly given Notice to MSEDCL on 13 October, 2021 which was issued after a delay of 6 days.

4.5 It is well settled principle of law that if a party was not vigilant and had slept over its right and had failed to take steps at the appropriate time, then it has to be blamed itself. Reference is made to Tarun Bharat Sangh Vs. Union of India, 1994 Supp (2) SCC 342.

4.6 Even otherwise, it is also an equally well settled principle of law that any case suffering from delay and laches can be interfered and an indulgence can be shown, only if there is no statutory/contractual bar, which clearly is not the present case. As Article 9.3.1 of the PPA mandates the notice for Change in Law to be issued only and only within 7 days from the date of knowledge of the Change in Law event and not beyond that, thereby equally granting the benefit/beneficial right thereof to the other party which in the present case is MSEDCL. Reference is made to Union of India v. N. Murugesan, (2022) 2 SCC 25.

4.7 Since in the present case, AHPPL was contractually bound to issue notice of the GST Change in Law impact within 7 days from the invoices relied upon, thereby failure to do so within the stipulated time frame, clearly bars them of being entitle to any benefit of the GST Change in Law impact.

4.8 Without prejudice to the above submissions and without admitting the entitlement of AHPPL of the Change in Law impact as the same having been lapsed on account of non-compliance of Article 9.3.1, the summary of GST claim evaluated by MSEDCL based on documents provided by AHPPL along with Petition is as below:

| Particular | As Per AHPPL | As per MSEDCL | Difference |
|--|---------------------|----------------------|---------------------|
| GST Impact | 14,04,53,463 | 14,04,53,463 | -- |
| Less: - Invoices before GST Notification | - | 10,23,37,986 | 10,23,37,986 |
| Net GST impact | 14,04,53,463 | 3,81,15,477 | 10,22,37,986 |

4.9 Few invoices of vendors are issued before the GST Notification dated 30 September, 2021. Further, on the verification of Lorry receipts and E-Way bill, it is observed that the material against the said invoices was also received prior to the date of notification. But the invoices raised by ACME Holdings Pvt. Ltd (EPC contractor) to the Petitioner (AHPPL) are after GST notification, the impact of which is Rs. 10,23,37,986/-. The GST impact due to delay in issue of invoices by EPC contractor to AHPPL is not acceptable to MSEDCL.

4.10 AHPPL has not provided the following additional documents which are required, for appropriate verification of the claims:

- a) EPC Contract and Purchase order for procurement of Module and other associated equipment etc.
- b) Material receipt Note.
- c) CA/CMA Certified material utilisation certificate and closing stock report as on COD to verify whether all material procured are utilized for said project or not.
- d) Bank Account statement reflecting the payments made to EPC contractor.

e) GST returns namely GSTR-1, GSTR-2/2B.

- 4.11 MSEDCL pointed out that the judgment dated 15 September, 2022 passed by Hon'ble the APTEL in Appeal No. 256 of 2019, on the issue of GST Notification as a Change in Law and computation of Change in Law impact including the grant of carrying cost component, is challenged by MSEDCL before Hon'ble the Supreme Court of India in Civil Appeal No. 4010 of 2023 and the same is pending consideration.
- 4.12 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 AHPPL in this regard, the claim of carrying cost is devoid of any merit and should not be considered.
- 4.13 In the absence of complete data from AHPPL the claim of change in Law cannot be ascertained.
- 4.14 Without prejudice to the MSEDCL's submission, it is suggested that with regards to devising a mechanism for compensation, the approach taken by the Commission in its Order dated 13 November 2019 in Case No. 259 of 2019 needs to be followed.

5. AHPPL in its Rejoinder submission dated 11 December 2023 stated as below:

- 5.1 MSEDCL is challenging the maintainability of the claim as raised by AHPPL, on the ground that AHPPL has failed to issue notice with 7 days as per Article 9.3.1 of the PPA dated 21 August, 2019.
- 5.2 On a bare reading of the Article 9.3.1 of the PPA, it envisages that Notice is to be issued within 7 days of becoming aware or within 7 days of have reasonably known of such Change in Law.
- 5.3 In the present case, admittedly, the Notification was issued on 30 September, 2021 and was made effective from 01 October, 2021. Subsequently after a week or so, AHPPL become aware of such increase in the rate of GST. AHPPL took immediate steps to comply with Article 9.3.1 of the PPA and proceeded to issue the Notice regarding such Change in Law on 13 October, 2021. This, indicating the bona fide conduct of AHPPL to inform MSEDCL at the first possible instance, on becoming aware that such supply would suffer a higher rate of GST which would be covered under Change in Law envisaged under Article 9.1 of the PPA. Accordingly, AHPPL has duly followed the mechanism for issuing Notice under Article 9.3.1 of the PPA.

- 5.4 Without prejudice to the aforementioned, it is submitted that MSEDCL has proceeded to rely upon Article 9.3.1 of the PPA in an isolated manner and in complete ignorance of Article 13.4 of the PPA, without adopting a harmonious construction of various clauses of the PPA.
- 5.5 Article 13.4 of the PPA provides for waiver of any Right under the PPA, in case the said right is not exercised within a period of three years. Thus, it is abundantly clear that a right of a party to claim Change in Law under the PPA does not stand waived until 3 years have lapsed from the date of said failure to exercise the right. In the present case, and without prejudice to the aforementioned submissions, since the right to claim change in law has been exercised well within three years, such right does not stand waived and accordingly, AHPPL is rightfully entitled to its claim for Change in Law under Article 9 of the PPA.
- 5.6 Decisions relied upon by MSEDCL in relation to issuance of Notice are not applicable to the set of facts and circumstances of the present case.
- 5.7 Purpose of Article 9.3.1 is to make the other Party aware of the change in law claim which would be filed by the claimant so as to enable the other side to take reasonable steps as would be required to be taken. It is submitted that vide its Notice dated 13 October, 2021, AHPPL has duly met such purpose by informing MSEDCL regarding such change in law claim, which was thereafter filed by AHPPL.
- 5.8 Additionally, it is undisputed that no prejudice has been caused to MSEDCL, by virtue of the said delay in issuing the Notice. AHPPL, vide the said Notice duly intimated MSEDCL about the Change in Law event and its desire to claim compensation for the same. Further, MSEDCL had sufficient time to assess the scenario and accordingly was aware well in time regarding the filing of the present Petition before the Commission for approval of such Change in Law, and the claim thereof. It is not the case that AHPPL immediately upon issuance of Notice for Change in Law started raising invoices upon MSEDCL claiming payment for the same. Additionally, despite the occurrence of the Change in Law event, AHPPL duly achieved the Commissioning of the Project on 22 May, 2022 and the power is being supplied to MSEDCL regularly since the Commissioning of the Project.
- 5.9 To enunciate the aforementioned principle, AHPPL craves leave to place reliance upon the decision of Hon'ble the Supreme Court in the case of *Dharampal Satyapal Limited v. Deputy Commissioner of Central Excise, Guahati and Ors, (2015) 8 SCC 519*, where Hon'ble the Supreme Court has held that the ultimate test of striking down an action is the test of "prejudice" or "fair hearing".
- 5.10 Further, the Commission had considered and allowed the Change in Law claim of the Petitioner despite there being a substantial gap in the occurrence of the Change in Law event and issuance of Notice for the same by the Petitioner in the Case, vide its order dated

24 May, 2023 passed in Case No. 124 of 2022 titled as “*M/s ReNew Sun Bright Private Ltd. v. Maharashtra State Electricity Distribution Company Limited*”. It is pertinent to mention that the Change in Law clause of the PPA in the said case was identical to the one in the present case.

- 5.11 In addition to the above, AHPPL emphasizes on the well-established principle of law that procedural law is meant to regulate effectively, assist, and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights. Hence, the procedure as laid down in the present case, i.e. issuance of notice is to assist and aid the object of informing the other party to the contract regarding the occurrence of the event that would impact the tariff agreed under the Contract. Accordingly, the said object has been duly fulfilled by AHPPL.
- 5.12 AHPPL provided documentary evidence towards the expenses incurred on account of the Change in Law through the Certificate issued by a Chartered Accountant which includes all the details of the invoices and additional expenses relevant to the present case. Therefore, the averment of MSEDCL that AHPPL has not provided any documentary evidence to support its claim is false and baseless. MSEDCL itself in its reply at para 21 categorically stated that it has evaluated the documents provided by AHPPL.
- 5.13 MSEDCL in its submission has contended that the invoices of EPC Contractor to the tune of Rs. 10,23,37,986/- for which the vendors have issued invoices to the EPC Contractor prior to the GST Notification have been issued to AHPPL by the EPC Contractor after the said Notification became effective, accordingly, the claim of AHPPL to the of Rs. 10,23,37,986/- ought to be rejected. In this regard it is submitted that such reasoning is wholly erroneous and in disregard to Rule 55(4) of the CGST Rules which also allows the supplier (which is the EPC Contractor in the present case for AHPPL) to issue an invoice(s) after delivery of goods in certain circumstances. Thus, the GST Laws clearly envisage a situation where invoice can be issued after the delivery of Goods. Hence, the aforementioned assumption that where the Goods are procured by the EPC Contractor prior to the GST Notification, the invoice has to necessarily be issued by the EPC Contractor to AHPPL prior to the GST Notification, is erroneous, as such invoice could be issued even after the delivery of the Goods and the same is permissible under the GST Laws.
- 5.14 The date of delivery of Goods is subject to contractual understanding between the Supplier and Recipient of the Goods. The parties to a contract can contractually agree that the delivery of the Goods would be at a future date i.e., a date much after the receipt of the Goods or utilization of the Goods for a specific purpose. Accordingly, in such cases, even the invoice can be issued at a later date, with no co-relation to the actual receipt of Goods or payment of Tax.

- 5.15 AHPPL places its reliance on the decision of Hon'ble the Supreme Court in *State of West Bengal v. B.K. Mondal and Sons*, (AIR 1962 SC 779), where Hon'ble the Supreme Court explored the contours of Section 70 of the Indian Contract Act, 1872. Section 70 of the Indian Contract Act, 1872 deals with the scenario where person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously. As per the said Section a person who is a recipient of Goods or Service which were delivered to him without an intension of doing so gratuitously has to make compensation to the former in respect of, or to restore, the thing so done or delivered.
- 5.16 In the present case, the prayer for relief for the total amount as mentioned in the CA certificate cannot be reduced by an amount of Rs. 10,23,37,986/-, as the said expenditure incurred was not meant to be gratuitous. MSEDCL has enjoyed the benefits i.e., procurement of power at a competitive tariff, hence, it is bound to compensate AHPPL for the delivery of Goods and Services.
- 5.17 Without prejudice to the above, AHPPL undertakes to provide additional documents/certificates as directed by the Commission at the time of reconciliation.
- 5.18 It is submitted that MSEDCL has contended that it has preferred an Appeal against the Final Order dated 15 September, 2022 passed by Hon'ble the Appellate Tribunal for Electricity (APTEL) in Appel No. 256 of 2019 before Hon'ble the Supreme Court bearing Civil Appeal No. 4010 of 2023 and is pending consideration. In this regard, it is submitted that Hon'ble the Supreme Court in the said Appeal has not passed any Stay on the operation of the Final Order dated 15 September, 2022. Accordingly, the Commission is bound by the directions of Hon'ble the APTEL in the said Final Order.
- 5.19 AHPPL has made detailed submissions towards its claim for Carrying Cost in the Petition. In terms of Article 9.2 of the PPA, AHPPL shall be allowed the carrying cost at a rate which ensures that AHPPL is placed in the same economic position as if the change in law has not occurred.
- 5.20 The Commission is empowered to determine the quantum and mechanism of compensation payment. The PPA nowhere mandates that a mechanism of compensation ought to be provided by a party while seeking approval of Change in Law and compensation thereof.
- 5.21 MSEDCL in its reply has suggested a mechanism while granting carrying cost, as similar mechanism was adopted by the Commission in its Order dated 13 November, 2019 in Case No. 259 of 2019. In this regard it is submitted that the said mechanism as suggested by MSEDCL will not restore AHPPL to the same financial position it was prior to the occurrence of the change in law which is necessary under the Change in Law clause of the PPA.

- 5.22 Suggested mechanism for payment of compensation to the Petitioner is linked to the energy generated during the year at the declared CUF and reconciliation between the amount paid and the amount recoverable is adjusted in a manner such that any over-recovery is to be adjusted at the end of every financial year and under recovery is adjusted at the end of 25 years without taking into account any interest or time value of money. Such a mechanism is detrimental to the interests of AHPPL.
- 5.23 It is submitted that carrying cost is value for money, denied at the appropriate time and if the aforementioned mechanism is followed, value of the amount due to AHPPL will keep on diminishing. Therefore, the purpose of allowing carrying cost will be defeated, particularly, in the absence of any interest being allowed on the recoverable amount at the end of PPA tenure. Thus, there will be no restitution of AHPPL in the present case.
- 5.24 It is further submitted that the concept of Late Payment Surcharge (LPS) is completely different from carrying cost. LPS is given if any amount under the monthly energy invoice is delayed beyond the due date as under such situations the developer would be required to arrange funds from the working capital loan.
- 5.25 However, an increase in GST is in the nature of capital cost and not working capital, therefore, lenders fund such additional capital cost in the ratio of 70:30 (debt: equity). The RE Tariff Regulations provide interest on debt as 200 basis points above SBI MCLR while return on equity has been provided as 14% post-tax at debt equity ratio of 70:30. Therefore, AHPPL should be allowed a carrying cost calculated as weighted average rate of interest between the interest rate of loan for 70% and return on equity at 14% post-tax for 30% part of such additional cost.
6. At the hearing held on 12 December 2023, Petitioner and Respondent have reiterated their submission filed in Petition / Reply. The Commission has directed the Petitioner to file written submission on applicability of GST rate for material supplied before date of revision on GST rate.
7. **AHPPL in its Additional Submission dated 26 December 2023 stated as below:**
- 7.1 MSEDCL vide its Reply dated 07 December, 2023 has raised objections towards the Change in Law claim of AHPPL with regard to certain invoices of vendors which were issued before the issuance of the Notification No. 8/2021-Central Tax (Rate) and Notification No. 8/2021-Integrated Tax (Rate) dated 30 September, 2021. It was further submitted vide the said para of the Reply that a part of the material was received prior to the event of Change in Law against certain invoices, lorry receipts and E-way bills but the invoices were raised by the

Petitioner's EPC Contractor/Supplier i.e., ACME Holdings Pvt. Ltd. to the Petitioner after the occurrence of the event of Change in Law which is not acceptable to MSEDCL.

7.2 AHPPL denies the contentions of MSEDCL as being vague, misleading and unsustainable under the law. MSEDCL has made the averments in complete disregard to the provisions and erroneous reading of the GST Laws. In this regard, reliance is placed on Section 12 read with Section 14 of the Central Goods and Services Tax Act, 2017 (CGST Act) which determines the rate of tax applicable for goods and services where there is a change in rate of tax. From a combined reading of the provisions of CGST Act, it is clear that the liability to pay tax arises at the time of supply. Specifically, Section 14 determines the rate of tax which would be applicable when there is a change in the rate of tax in respect of supply of goods or services.

7.3 In the present case, the rate of GST on supply of specified Goods had increased from 5% to 12%, therefore, Section 14 is of relevance in the present case. According to Section 14, the time of supply of Goods where the Goods have been supplied before the change in rate of tax shall be determined as follows:

- i.) Where the Invoice for the said supply has been issued and the payment has been received after the change in rate of tax- the time of supply shall be the date of issuance of invoice or receipt of payment whichever is earlier
- ii.) Where the invoice has been issued prior to change in rate but the payment is received after the change in rate- the time of supply shall be the date of issuance of invoice
- iii.) Where the invoice has been issued after the change in rate of tax but the payment is received before the change in rate- The time of supply shall be the date of receipt of payment

7.4 In the present case, in relation to the disputed claim of Rs. 10,23,37,986/- while the goods were supplied to EPC Contractor/Supplier by its vendors prior to the change in the rate of GST but the invoices by the EPC Contractor/Supplier were issued post the revision in rate of GST and the payment towards the same was also done post revision in the rate of GST. Thus, in accordance with Section 14 (i) of the CGST Act, the time of supply shall be the date on which invoices were issued or the date on which the payment was received, whichever is earlier. In the present case, in relation to the disputed claim, since both the invoices and payment are issued and received post the revision in rate of GST i.e., increase from 5% to 12%, therefore, the applicable rate of tax shall be 12% and not 5%, even though the goods were supposedly received prior to change in rate of GST. Accordingly, AHPPL is entitled to claim a reimbursement of Rs. 14,04,53,463/- (including the disputed claim of Rs. 10,23,37,986/-).

7.5 AHPPL is submitting certain material documents to place on record which are essential for verification of the Change in Law claim of AHPPL:

- a. Copy of the EPC Contract executed between the AHPPL's EPC contractor and the AHPPL.
- b. Copy of Material Receipt Note of the goods delivered/supplied at the site by the EPC Contractor.
- c. Copy of Bank Account statement indicating that the payments have been made to the EPC contractor for the goods supplied by it to the tune of Rs. 14,04,53,463/-;
- d. Copy of GSTR 2/2 B.
- e. Copy of Certificate highlighting that the material to the tune of Rs. 14,04,53,463/- has been utilised at the project site; and
- f. Copy of table containing details of the invoices issued by AHPPL's EPC contractor to AHPPL which have all been issued prior to the change in rate of GST to the tune of Rs. 10,23,37,986/-.

7.6 AHPPL undertakes that it will provide any additional documents to the Commission or MSEDCL as required during reconciliation or directed by the Commission.

Commission's Analysis and Rulings:

8. The Present Petition has been filed by AHPPL seeking approval of 'Change in Law' under Article 9 of the Power Purchase Agreement (PPA) dated 21 August, 2019 and an appropriate mechanism for grant of an adjustment/ compensation to offset financial/ commercial impact of Change in Law event.
9. AHPPL has signed the PPA with MSEDCL on 21 August 2019 for development of 300 MW of Solar Power Project. AHPPL has commissioned the project in phases and final phase is commissioned on 23 May 2022. The Commission vide its Order dated 07 July 2022 extended the SCOD to only upto 19 April 2022. Aggrieved by the said Order, AHPPL has filed an appeal before the APTEL requesting extension of SCOD to actual commissioning date i.e. 23 May 2022. Said appeal is pending before the Hon'ble APTEL.
10. Considering above factual position, material placed on record and arguments made during hearing, the Commission frames following issues for its considerations in present matter:

- a. Whether the Notification dated 30 September 2021 resulting increase in GST on Solar Power Generating Systems executed through an EPC Contract qualifies as Change in Law?
- b. Whether AHPPL has given Notice of the Change in Law event within reasonable time to MSEDCL?
- c. Ascertainment of principal GST claim amount (if A & B above are positive) and modalities for computation of carrying cost (if applicable)?
- d. Whether carrying cost on Change in Law compensation is to be allowed and at what rate?
- e. What should be the mechanism for payment of the compensation amount (if applicable)?

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

11. Issue A: Whether the Notification dated 30 September 2021 resulting increase in GST on Solar Power Generating Systems executed through an EPC Contract qualifies as Change in Law?

11.1 The Commission notes that GST rates have been revised after last date of bid submission. On the last date of the bid submission (22 January, 2019), GST on Solar Power Generating Systems was 5%. The MoF Notification dated 30 September 2021 notified increase in GST rate on procurement of Modules and other SPGS materials from 5% to 12%. Due to which GST composite rates on EPC Contracts increased from 8.9% to 13.8%.

11.2 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 is reproduced as under:

“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 pertaining to this project only 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.

9.3 Notification of Change in Law:

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

9.3.2 Notwithstanding Article 9.3.1, the Power Producer shall be obliged to serve a notice to MSEDCL if it is beneficially affected by a Change in Law. Without prejudice to the

factor of materiality or other provisions contained in this Agreement, the obligation to inform the Procurer contained herein shall be material. Provided shall have the right to issue such notice to MSEDCL.

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

- a) The Change in Law; and*
- b) The effect on MSEDCL of the matters referred to in Article 9.2.”*

[Emphasis supplied]

11.3 The Commission notes that the Notification of MoF is subsequent to the last date of Bid submission (i.e., 22 January 2019). 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.

11.4 Further, as per Article 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. Admittedly, MoF’s Notification dated 30 September 2021 issued subsequent to Bid Submission date of 22 January 2019. Hence, the Notification dated 30 September 2021 is qualifies as a Change in Law events under the PPA.

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

12.1 MSEDCL contended that Change in Law Notice regarding the impact of Notification No. 8 of 2021 dated 30 September 2021 was given only on 13 October 2021 by AHPPL i.e. after a delay of 6 days. The delay on part of AHPPL to make its claim under Change in Law and Article 9 of the PPA would be barred by the Doctrine of Delay and latches.

12.2 While opposing above contentions, AHPPL stated that Article 9.3.1 of the PPA envisages that the Notice is to be issued within 7 days of becoming aware or within 7 days of have reasonably known of such Change in Law. In the present case, admittedly, the Notification No. 8/2021 was issued on 30 September, 2021 and was made effective from 01 October, 2021. Subsequently after a week or so, AHPPL became aware of such increase in the rate of GST and take immediate steps to issue the Notice regarding such Change in Law on 13 October 2021. This, indicating the bona fide conduct of AHPPL to inform MSEDCL at the first possible instance. Accordingly, AHPPL has duly followed the mechanism for issuing Notice under Article 9.3.1 of the PPA and there is no delay in giving Notice to MSEDCL.

AHPPL has also relied upon Article 13.4 of the PPA provides for waiver of any Right under the PPA, in case the said right is not exercised within a period of three years. AHPPL contended that since the right to claim change in law has been exercised well within three years, such right does not stand waived and accordingly, AHPPL is rightfully entitled to its claim for Change in Law under Article 9 of the PPA.

12.3 The Commission notes that Article 9.3.1 of the PPA reproduced below mandates issuance of Change in Law notice:

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

Above provision of PPA do not compute stipulated period of 7 days for giving Change in Law notice from date of notification of Circular which has been considered as Change of Law event. It actually allows 7 days period from date on which affected party become aware of the same or should reasonable have known of such Change in Law event.

12.4 In present case, the Commission notes that AHPPL has contended that it has become aware of GST rate increase notification dated 30 September 2023 in a week period and thereafter it has immediately taken steps to issue Change in Law notice dated 13 October 2022 to MSEDCL. Although there is no document to establish exact date on which AHPPL becomes aware of GST notification dated 30 September 2023, a week period as claimed by AHPPL cannot be considered as unreasonable period for becoming aware of such notification issued by the Government Authority. If such period of a week is considered as reasonable period for becoming aware of GST rate change, then Change in Law notice dated 13 October 2022 issued within 13 days (7 days for becoming aware of increase in GST rate + 7 days for issuance of Change in Law notice from date of becoming aware of increase in GST rate) from GST notification can be considered as issued within 7 days of becoming aware of such rate change.

12.5 Therefore, the Commission is of the view that AHPPL has followed the due process as expected in the Article 19.3.1 notifying the Change in Law event to MSEDCL within stipulated period and hence eligible for claiming compensation for increased expenses on account of Change in Law event.

13. Issue C: Ascertainment of principal GST claim amount (if A & B above are positive) and modalities for computation of carrying cost (if applicable).

13.1AHPPL has submitted the following claim of principle amount of increased expenses on account of increased GST rate, supported by certificate from Chartered Accountant:

| Sr. No. | Bill No. | Bill Date | Bill Amount (Without GST) | GST applicable at the time of bidding @5% | GST on account of amendment to GST rates (effective from 1 st October 2021) @12% | GST claim on account of Change in GST rates (12% - 5%) |
|---------|--------------|-----------|---------------------------|---|---|--|
| 1 | DR3821000454 | 15-Feb-22 | 34,78,92,890 | 1,73,92,890 | 4,17,42,937 | 2,43,50,046 |
| 2 | DR3821000456 | 15-Feb-22 | 45,23,37,002 | 2,26,16,850 | 5,42,80,440 | 3,16,63,590 |
| 3 | DR3821000457 | 16-Feb-22 | 38,76,33,123 | 1,93,81,656 | 4,65,15,975 | 2,71,34,319 |
| 4 | DR3821000459 | 15-Feb-22 | 30,53,79,370 | 1,52,68,969 | 3,66,15,975 | 2,13,76,556 |
| 5 | DR3821000473 | 7-Mar-22 | 3,36,04,977 | 16,80,249 | 3,66,45,524 | 23,65,348 |
| 6 | DR3821000475 | 7-Mar-22 | 2,98,35,241 | 14,91,762 | 40,32,597 | 20,88,467 |
| 7 | DR3821000476 | 7-Mar-22 | 3,54,46,993 | 17,72,350 | 35,80,229 | 24,81,290 |
| 8 | DR3821000477 | 7-Mar-22 | 3,88,26,300 | 19,41,315 | 42,53,639 | 27,17,841 |
| 9 | DR3821000479 | 8-Mar-22 | 3,90,310 | 19,516 | 46,837 | 27,322 |
| 10 | DR3821000481 | 8-Mar-22 | 3,78,222 | 18,911 | 45,387 | 26,476 |
| 11 | DR3821000483 | 8-Mar-22 | 15,83,364 | 79,168 | 1,90,004 | 1,10,835 |
| 12 | DR3821000484 | 8-Mar-22 | 2,35,82,393 | 11,79,120 | 28,29,887 | 16,50,768 |
| 13 | DR3821000487 | 12-Mar-22 | 27,41,43,281 | 1,37,07,164 | 3,28,97,194 | 1,91,90,030 |
| 14 | DR3821000488 | 12-Mar-22 | 7,54,79,656 | 37,73,983 | 90,57,559 | 52,83,576 |
| | | | 2,00,64,78,037 | 10,03,23,902 | 24,07,77,364 | 14,04,53,463 |

Accordingly, AHPPL has claimed principal amount of Rs.14,04,53,463/- towards increased expenses on account of increase in rates of GST. AHPPL has also claimed carrying cost on said principal amount for restoring to same economic position as if Change in Law has not occurred.

13.2 In reply, although MSEDCL has contended that all necessary documents have not been provided by AHPPL for scrutiny of the claim, it has scrutinised the claim based on available documents and found that few invoices of vendors are issued before the GST Notification dated 30 September, 2021. MSEDCL has observed that the material against the said invoices were also received prior to the date of notification. But the invoices raised by ACME Holdings Pvt. Ltd (EPC contractor) to the Petitioner (AHPPL) are after GST notification. The impact of which is Rs. 10,23,37,986/-. The summary of GST claim evaluated by MSEDCL on the basis of documents provided by AHPPL along with Petition is as below:

| Particular | As Per AHPPL | As per MSEDCL | Difference |
|---|---------------------|--------------------|---------------------|
| GST Impact | 14,04,53,463 | 14,04,53,463 | -- |
| Less: - Invoices before GST Notification. | - | 10,23,37,986 | 10,23,37,986 |
| Net GST impact | 14,04,53,463 | 3,81,15,477 | 10,22,37,986 |

MSEDCL requested that such an impact on account on invoices before the date of notification should not be allowed.

13.3 In reply, AHPPL submitted that the GST Laws clearly envisage a situation where invoice can be issued after the delivery of Goods. Hence, assumption that where the Goods are procured by the EPC Contractor prior to the GST Notification, the invoice has to necessarily be issued by the EPC Contractor to AHPPL prior to the GST Notification, is erroneous, as such invoice could be issued even after the delivery of the Goods and the same is permissible under the GST Laws.

13.4 The Commission notes that issue of contention in present case is that EPC Contractor has supplied some material on project site before the issuance of notification increasing GST rate and hence if EPC Contractor would have raised invoices in timely manner, then impact of increased GST could have been avoided. In this regard the Commission notes that AHPPL has appointed ACME Holdings Pvt. Ltd as an EPC contractor. Role of EPC contractor is not just supply of materials for project but to construct complete project till successful commissioning. As per industrial practice, billing under such EPC Contract is linked to various milestones (such as completion of civil works, erection of supporting structure, laying of electrical cable & substation works, erection of evacuation lines, installation of solar module, commissioning of project etc) in construction of Solar project. EPC contractor is expected to raise its invoice only after achieving such milestone and not on supply of material which is required to undertake these activities. Therefore, MSEDCL's contention that EPC contractor should have raise the invoice after receipt of material on site cannot be considered.

13.5 The Commission notes that as per provisions of GST Act, rate of GST as applicable on date of issuance of invoice is payable. As EPC Contractor has raised the invoice after issuance of GST notification, increased rate of GST becomes applicable and accordingly AHPPL has paid the same. Hence, MSEDCL's request of disallowing impact of Rs.10,23,37,986/- cannot be allowed. Accordingly, the Commission rules that AHPPL is eligible for Change in Law compensation of Rs. 14,04,53,463/- on account of increased rate of GST.

13.6 Having ruled as above, the Commission also notes that MSEDCL has contended that AHPPL has not provide all documents necessary for scrutiny of the claims. AHPPL in its subsequent submission has agreed to provide documents necessary of verification of its claim. Therefore, the Commission directs both parties to reconcile the claim amount within a month period from date of this Order after scrutiny of documents. AHPPL shall provide all support to MSEDCL for completing such scrutiny within a month. Post such scrutiny, if compensation amount founds to be different than that approved in above para, then differential amount shall be adjusted in subsequent bills along with holding / carrying cost.

14. Issue D: Whether carrying cost on Change in Law compensation is to be allowed and at what rate?

14.1 AHPPL has requested for carrying cost on Change in Law compensation. In this regard, the Commission notes that it is 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 economic position as if such Change in Law event has not occurred.

14.2 AHPPL proposed carrying costs to be calculated on the basis of the normative debt equity ratio of 70:30, wherein, the average of the one-year Marginal Cost of Funds-based Lending Rate ('MCLR') as declared by the State Bank of India for the previous year plus 200 basis points, shall be considered as the normative interest applicable in relation to the debt component and Return on Equity shall be computed at the base rate of 14%, to be grossed up as per the Minimum Alternate Tax ('MAT') rate applicable as on 1st April of the previous Financial Year.

14.3 In reply, MSEDCL submitted that the Commissions through various orders on Change in Law claim had 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. In absence of submissions to the contrary from AHPPL in this regard, the claim of carrying cost is devoid of any merit.

14.4 The Commission notes that with regards to rate of Carrying Cost, APTEL in its Judgment dated 16 November 2021 in Appeal No.163 of 2020 & 171 of 2020 observed as follows:

*“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 BijliVitrans Nigam Ltd. Vs. Adani Power Ltd. (2019) 5 SCC 325]. **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.”***

Thus, APTEL has observed that carrying cost on Change in Law compensation needs to be allowed on actuals.

14.5 In present case, AHPPL has not submitted actual carrying cost incurred by it and instead stated that it has funded additional expenses on account increased GST rate through equity and accordingly proposed that carrying cost be derived based on weighted average rate of interest on loan and return on equity. In this regard, the Commission notes that such proposed rate of interest has been linked by Petitioners to long term loan and equity, whereas compensation under Change in Law provisions envisages only compensation for increased expenses. The issue of carrying cost arises only when there is time gap between spending

and realizing the amount. In normal course, for time gap between date of spending and realizing 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. Similarly, when higher expenses are incurred on account of a Change in Law which is to be reimbursed at a later date, the entity may fund such expenses through Working Capital Loan. Hence, in the opinion of the Commission, AHPPL 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 MREC RE Tariff Regulations, 2019 shall be allowed as rate of interest for working out the carrying cost.

14.6 Accordingly, the Commission rules that carrying cost at the interest rate applicable for Working Capital Loan under MERC RE Tariff Regulations 2019 shall be allowed for the period from the date they paid such amount of increased GST rate till the date of this Order. As the Petitioner have not submitted computation of carrying cost in its Petition, the Commission cannot quantify the same.

14.7 The Commission also notes that in addition of principle amount and carrying cost, AHPPL has also claimed compensation for increased working capital requirement as increased expenses on account of increased GST rate is funded through additional working capital. The Commission does not find any merits in this submission as the Commission has already allowed carrying cost on compensation amount at interest rate of Working Capital by considering that increased expenses on account of Change in Law has been funded through increased Working Capital. Hence, there is no case for allowing additional interest on increased Working Capital after allowing principal amount and carrying cost on the same.

15. Issue E: What should be the mechanism for payment of compensation amount (if applicable)?

15.1 AHPPL in its Petitions have prayed to evolve a suitable mechanism for compensation or allow one-time lump sum amount of compensation on account of the Change in Law event. In reply to MSEDCL's suggestion to adopt mechanism approved by the Commission in Order dated 13 November 2019 (Case No 259 of 2019), AHPPL contended that such mechanism of monthly payment will not restored it to same economical position as said mechanism has linked payment of compensation with generation of electricity at declared CUF and any under compensation due to lower generation of electricity is carried forward to end of PPA period without any carrying cost. Further carrying cost allowed for differed payment is at rate of LPS, which needs to be allowed at weighted average of rate of interest between the interest rate of loan for 70% and return on equity at 14% post-tax for 30% part of such additional cost. In alternatively, AHPPL has suggested that Change in Law compensation amount be adjusted in month of March of every year.

15.2 In this regard, the Commission notes that PPA dated 21 August 2019 has following provision related to payment of Change in Law compensation:

“9.4 Tariff Adjustment Payment on account of Change in Law:

9.4.1 Subject to the application and Principles for computing impact of Change in Law mentioned in this Article 9, the adjustment in Monthly Tariff Payment shall be effective from:

9.4.2 The date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law; or

9.4.3 The date of order/Judgment of the Competent Court or Tribunal or India Government Instrumentality, if the Change in Law is on account of a change in interpretation of Law.

9.4.4 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.

9.4.5 The payment for Change in Law shall be through Supplementary Bill. However, in case of any change in Tariff by reason of change in Law, as determined in accordance with this Agreement, the Monthly Invoice to be raised by the Power Producer after such Change in Tariff shall appropriately reflected the changed Tariff.”

15.3 As can be seen from the above quoted provisions of PPA, parties are agreed for monthly payment of Change in Law compensation and hence issue of lump sum payment of compensation does not arises. At the same time, the mechanism or formula for determining such monthly payment is not stipulated in the PPA. Hence, the Commission has to determine the same using its Regulatory powers.

15.4 In the past on similar issue of Change in Law compensation to renewable energy generators, the Commission has laid down procedure for monthly payment of compensation through respective Order. MSEDCL has suggested to adopt said methodology in the present matter also. AHPPL has objected to two aspects of that methodology viz. under recovery of compensation due to lower generation that declared CUF is carried forward till end of PPA tenure without any interest and carrying cost for deferred payment is allowed at LPS rate which does not compensate for time value of money.

15.5 In this regard, the Commission notes that in above said methodology under recovery is not directly carried forward to end of PPA tenure but it is carried forward to next year and

generator can recover the same by ensuring excess generation than declared CUF. Further, variation of $\pm 10\%$ of declared CUF is also factored in the said methodology. Hence, sufficient safeguards are provided for protecting the interests of the generator. Hence, the Commission does not find any reasons to deviate from such methodology. With regards to carrying cost for deferred payment, the Commission notes that in its recent Order dated 7 November 2023 in Case No. 175 of 2023, carrying cost at the rate of interest applicable for Working Capital loan is allowed for such deferred payment. The Commission also notes that when recovery of expenses which are already incurred is to be made at a future date, the entity funds such expenses through a Working Capital Loan. Hence, interest on Working Capital Loan (average of one-year MCLR of SBI plus 150 basis point) allowed in MREC RE Tariff Regulations, 2019 shall be allowed as rate of interest for working out the carrying cost on deferred payment.

15.6 Accordingly, parties shall adopt the following methodology for monthly payment of Change in Law compensation:

- a) Firstly, total amount of compensation to be paid is to be determined. Such total amount of compensation includes principal amount (as per para 13 above) and carrying cost computed from date of incurring such additional expenses till date of this Order (as per para 14 above). 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 interest on Working Capital Loan (average of one-year MCLR of SBI plus 150 basis point) allowed in MREC RE Tariff Regulations, 2019 on simple interest basis.
- 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 Petitioner 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 the 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 the last month of PPA tenure at no additional carrying cost.

16. Hence, the following Order:

ORDER

1. **The Petition in Case No. 143 of 2023 is partly allowed.**
2. **Impact of Change in Law on account of increased GST rate vide notification dated 30 September 2021 is allowed.**
3. **Change in Law compensation is mentioned in para 13.5 above (Rs. 14,04,53,463/-) which is subject to scrutiny of all documents as mentioned in para 13.6 above.**
4. **Based on the above quantification of principal amount and carrying cost, monthly Change in Law compensation shall be arrived at based on methodology stipulated in para 15.6 above.**
5. **Parties shall complete the above-said scrutiny and computation within a month from date of this Order. Thereafter, the Petitioner shall raise the invoice for monthly Change in Law compensation as per the provisions of the PPA.**

Sd/-
(Surendra J. Biyani)
Member

Sd/-
(Anand M. Limaye)
Member

Sd/-
(Sanjay Kumar)
Chairperson


(Dr. Rajendra G. Ambekar)
Secretary

