

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 25 of 2020

Implementation of the Appellate Tribunal for Electricity (ATE)'s Judgment dated 20 September 2021 in Appeal No. 215 of 2021 filed by Tata Power Renewable Energy Ltd (TPREL)

Tata Power Renewable Energy Ltd (TPREL) Petitioner

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

Coram
Sanjay Kumar, Chairperson
I.M. Bohari, Member
Mukesh Khullar, Member

Appearance:

For the Petitioner : Shri Abhishek Munot (Adv)

For the Respondent : Shri Ravi Prakash, (Adv)
Shri. Rahul Sinha (Adv)

ORDER

Date: 30 December 2021

1. This proceeding is consequent to Judgment dated 20 September, 2021 of the Hon'ble Appellate Tribunal for Electricity (APTEL) in Appeal No. 215 of 2021 wherein the APTEL has allowed the Appeal filed by Tata Power Renewable Energy Ltd (TPREL) and remanded the matter back to the Commission. For sake of completeness, background to this APTEL judgment is summarized below:

- a. On 27 July 2018 TPREL has executed PPA with Maharashtra Electricity Distribution Co. Ltd (MSEDCL) for supply of 150 MW of AC power from TPREL's Solar Energy based Power Plant to MSEDCL at Tariff of Rs. 2.72/unit.
- b. TPREL had filed a Petition registered as Case No. 25 of 2020 before this Commission seeking compensation due to increase in costs on account of change in rate of Goods & Services Tax (GST) in Notification dated 31 December 2018 under Change in Law provisions of the PPA dated 27 July 2018.
- c. The Commission in its Order dated 30 April 2021 in Case No. 25 of 2020 observed that although said notification dated 31 December 2018 could be considered as Change in Law event, but implication of such notification could have been avoided if TPREL had entered into proper contracts and hence rejected the relief sought by the TPREL. Aggrieved by the Order of the Commission, TPREL filed Appeal No. 215 of 2021 before the APTEL.
- d. The APTEL vide its judgment dated 20 September 2021 has allowed the Appeal and remanded the matter to the Commission with following observations and directions:

“16. If in terms of Article 9.2 of the PPA the Change in Law event has resulted in adverse financial loss to TPREL, on which issue the Commission has concluded in the affirmative, the relief must be granted such that TPREL ‘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 contractual provision being based on restitutionary principle. Further, in view of the settled law on the subject, TPREL is entitled to the compensation claim along with carrying cost. The issue of Carrying Cost for Change in Law compensation is no longer res integra. Hon'ble Supreme Court in UHBVNL & Anr. v. Adani Power Ltd. & Ors. (2019) 5 SCC 325 held that Carrying Cost is an integral part of the restitutionary principle and is inbuilt in Change in Law provisions of the PPA.

17. In above facts and circumstances, we do not uphold the decision, the denial of compensation on the perceived imprudence for reasons stated above having been found to be unfair and unjust.

18. For the above reasons, we set aside and vacate the impugned order and remit the matter to the State Commission for passing a fresh order after determining the amount of compensation payable due to changes in the GST regime and the carrying cost in such respect.

19. The parties are directed to appear before the State Commission for further proceedings in above light on 04.10.2021. The Commission shall make all endeavor to pass a fresh order in accordance with law at an early date, preferably within two months of the date of first appearance fixed by us.”

2. As directed by the APTEL, the Petitioner and Respondent in Case No. 25 of 2020 appeared before the Commission on 4 October 2021. Considering timeline specified by the APTEL and for expediting the matter, the Commission directed TPREL to file its submission on quantification of updated claims, if any, within 15 days and MSEDCL to respond it within 10 days thereafter. TPREL was allowed to file Rejoinder, if any, within 3 days thereafter.

3. **TPREL in its submission dated 22 October 2021 stated as below:**

- 3.1. In terms of the APTEL’s Judgment dated 20 September 2021, TPREL is entitled to compensation (entire restitution) along with carrying cost. TPREL furnished following details of compensation:

[Amount in Rs. Crore]

Sr. No.	Particulars	GST rate applicable after notification	GST rate applicable prior to notification	Base Value on which Rate is applicable	GST after notification @8.9%	GST prior to notification @ 5%	Differential Amount
	a	b	c	d	e=b*d	f=c*d	g=e-f
1	Supply	8.90%	5%	665.57	59.24	33.28	25.96
2	Civil	8.90%	18%	14.74	1.31	2.65	-1.34
3	Safeguard	8.90%	5%	89.27	7.95	4.46	3.48
Total		8.90%	5.25%	769.58	68.49	40.40	28.10

- 3.2. In support of its claim, TPREL submitted following documents:

- (a) A copy of the Chartered Accountant’s Certificate dated 14 January 2020, certifying the GST paid by TPREL to Tata Power Solar System Ltd (TPSSL) on the bills raised by TPSSL after 31 December 2018 (i.e., after the Change in Law event). Copies of the Invoices demonstrating the rate of tax were also annexed by TPREL.
- (b) A copy of the Chartered Accountant’s Certificate dated 03 October 2020, certifying the differential GST of Rs. 3.48 Crores paid by TPREL to TPSSL on the Debit Notes raised by TPSSL. Copies of the Debit Notes issued by TPSSL were also filed.

- 3.3. The Commission in its Order dated 13 November 2019 in Case No.166 of 2019 had stated that TPREL is entitled to carrying cost from date it paid such amount and the carrying cost is to be computed at the rate of 1.25% in excess of 1-year MCLR of SBI.

3.4. Following amounts towards the Change in Law event has been paid by TPREL:

- (a) The amount towards change in rate of GST on Supply and Service Contracts were made on various dates from June 2019 to October 2020;
- (b) The differential amount of GST payable at rate of 3.9% (which translates into Rs. 3.48 Crores) on the amount of Safeguard Duty was paid in the month of October 2020.

3.5. TPREL has computed the amount of carrying cost payable to it, from the date on which it has made payment. The rate of interest considered by TPREL is as under:

- (a) For the year ended on 31 March 2020, carrying cost is computed at the rate of 9.33% [i.e. 8.08% + 1.25];
- (b) For the year ended on 31 March 2021, carrying cost is computed at the rate of 8.32% [i.e. 7.07% + 1.25];
- (c) For the year ended upto 22 October 2022, carrying cost is computed at the rate of 8.25% [i.e. 7% + 1.25].

3.6. The total amount of carrying cost, calculated upto 22 October 2021 is Rs. 5.14 Crores. TPREL is entitled to a total compensation of Rs. 33.25 Crores (including the carrying cost of Rs. 5.14 Crores calculated upto 22 October 2021) as follows:

[Amount in Rs. Cr]

Sr No	Particulars	Rate applicable after notification	Rate applicable prior to notification	Base Value on which Rate is applicable	GST after notification @ 8.9%	GST prior to notification @ 5%	Differential Amt	Carrying Cost upto 22.10.2021	Total with CC
	A	b	c	D	e=b*d	f=c*d	g=e-f	h	i=g+h
1	Supply	8.90%	5%	665.57*	59.24	33.28	25.96	5.09	31.05
2	Civil	8.90%	18%	14.74*	1.31	2.65	-1.34	-0.25	-1.59
3	Safeguard	8.90%	5%	89.27	7.95	4.46	3.48	0.31	3.79
4	Total	8.90%		769.58	68.50	40.39	28.10	5.14	33.25

3.7. MSEDCL is further liable to pay carrying cost from 22 October 2021 upto the date of realisation of the entire amount as per the applicable rate. Amount payable to TPREL be paid as a lump sum amount at one go. This would reduce the carrying cost obligation of MSEDCL and would further reduce the liability of MSEDCL's consumer.

4. **MSEDCL in its submission dated 8 November 2021 stated as below:**

- 4.1 TPREL submitted the hard copies of invoices and other associated documents for verification of Change in Law claims on 22 October 2021. Considering voluminous data, it was decided between the parties to carry out the joint verification of the said submitted documents.
- 4.2 The said joint verification was carried out on 26 October 2021 and prima facie MSEDCL observed that certain documents had not been furnished along with the claim statement. The same was intimated to the TPREL vide email dated 28 October 2021. TPREL vide email dated 08 November 2021 pointed out that the documents were not essential for claim scrutiny.
- 4.3 Since, the principal cost is yet to be ascertained between the parties, it would be incumbent at this stage to defer the decision, or any dispensation as regards the carrying cost till the finalisation of the principal cost between the parties.
- 4.4 As regards the onetime payment sought by TPREL, it is pertinent to note that bare perusal of the Article 9.2.2 of the PPA suggests that the additional compensation, if any, due to occurrence of change in law has to be compensated through the tariff payment only. Further, Article 9.2.4 of PPA, provides that once the additional compensation, due to change in law is approved by the Commission, an agreement has to be executed between the parties with reference to the revised tariff. Therefore, in view of the above compensation, if any, for Change in Law event has to be made through tariff component only and not upfront i.e. onetime payment as submitted by TPREL.
- 4.5 MSEDCL has also preferred a Civil Appeal before the Hon'ble Supreme Court against the Tribunal's Judgement dated 20 September 2021 passed in Appeal No. 215 of 2021 and the same is pending consideration.
5. The Commission heard the matter in e-hearing dated 9 November 2021. Advocate of TPREL submitted that MSEDCL asked for certain new set of documents, which were not at all relevant for claim scrutiny. Advocate of MSEDCL sought three (3) days' time for gauging relevancy of documents sought for filing additional submission in the matter. The Commission granted liberty to the parties to file submissions.
6. **MSEDCL in its additional submission dated 11 November 2021 stated as below:**
- 6.1 After careful evaluation of the documents submitted by TPREL, GST claim payable works out as under:

[Amount in Rs. Crores]

Sr. No.	Particulars	As per M/s TPREL				As per MSEDCL			
		Base Value	GST after notification @ 8.9%	GST prior to notification @ 5%	Differential Amt	Base Value	GST after notification @ 8.9%	GST prior to notification @ 5%	Differential Amt
	a	b	c=b*8.9%	d=b*5%	e=c-d	f	g	h	i=g-h
1	Supply	665.57	59.24	33.28	25.96	511.20	45.50	25.56	19.94
2	Civil	14.74	1.31	2.65	-1.34	14.74	1.31	2.65	-1.34
3	Safeguard	89.27	7.95	4.46	3.48	89.27	7.95	4.46	3.48
Total			68.50	40.39	28.10		54.75	32.67	22.08

6.2 The evaluation of the differentials claim of Rs.6.02 Crores (i.e. Rs.28.10 Crores. [As per M/s TPREL] minus Rs. 22.08 Crores [As per MSEDCL]) is pending, as the clarification for tax rate prior to Notification dated 31 December 2018 on 'BOS supply and I&C' is not received from TPREL.

6.3 MSEDCL vide its email dated 28 October 2021 had requested TPREL to submit the required documents for the evaluation of the claims. However, TPREL vide its Reply dated 08 November 2021 provided only partial set of documents. MSEDCL vide its email dated 9 November again requested following documents from TPREL:

- a. Date of payments of GST by TPSSL for which following details are required: - (a) Details of GST payment challan and (b) GSTR 1 return for invoice wise details; (c) GSTR 2b of TPREL

Reasons for Document-

In terms of the PPA provisions, TPREL is required to show the invoices to demonstrate the additional tax is being levied and its payment thereof, but also at the same time it is also important to verify that the payment made by M/s TPREL to M/s TPSSL is remitted to the government authorities or not or adjusted against other expenditures.

- b. Certified Material utilisation and Closing stock report from CA or CMA is required.

Reasons for Document-

Material Receipt Notes (MRN) are attached with the invoices but the material utilization of the same is not submitted. Hence, the material issue notes and closing stock report on the date of commission is required to verify whether material received are utilized for the said project or not or was lying in the closing stock.

6.4 In absence of the above documents, MSEDCL would not be in a position to finalise the differential amount of Rs. 6.02 Crores.

- 6.5 TPREL is also seeking the additional carrying cost of Rs. 0.31 Crores on the safeguard duty component as a change in law due to GST notification dated 31 December 2018. However, the said issue of carrying cost on the safeguard duty component has already been decided by the Commission vide its Order dated 13 November 2019 in Case No.166 of 2019 and thus, is barred by the concept of constructive Res judicata.
- 6.6 The said GST notification dated 31 December 2018 is prior to the Order dated 13 November 2019 of the Commission and thus, should have been claimed by TPREL at the proceedings in Case No.166 of 2019. Accordingly, today the same cannot be agitated.

7. TPREL in its Rejoinder dated 15 November 2021 stated as below:

- 7.1 MSEDCL has admitted claim of Rs. 22.08 Crores out of TPREL's original claim of Rs. 28.10 Crores (i.e. without carrying cost). Remaining sum of Rs. 6.02 Crores is not denied by MSEDCL but the same is only pending confirmation qua GST rate payable on 'BOS Supply' and 'I&C' prior to the Change in Law event, which was sought from TPREL on 11 November 2021.
- 7.2 MSEDCL has not raised any dispute qua the principles on which carrying cost was computed by TPREL.
- 7.3 On the issue of MSEDCL's opposition to onetime payment of Change in Law and insistence of such payment through tariff, by relying upon article 9.2 of the PPA, TPREL stated as follows:
- a. Relief for Change in Law is to be granted if the change in law event leads to adverse financial loss/ gain to the Power Producer/ Procurer;
 - b. The party affected by the change in law event is to be restituted to the same economic position as if such Change in Law event had not occurred;
 - c. Article 9.2.1 relates to the Construction Period while Article 9.2.2 to 9.2.4 relates to Operation Period (i.e. post commissioning of the project). In the present case, the Change in Law event has taken place prior to the Operating period, i.e., the Construction Phase. In case a change in law event occurs during the construction phase, the Commission has the liberty to decide the manner in which restitutive relief is to be granted to the affected party. In other words, there is no prohibition in granting one-time compensation to the party affected by a Change in Law event during the Construction Period.
 - d. The aforesaid submissions of TPREL is also reflected in the findings of by the

Commission in its Order dated 13 November 2019 in Case No. 166 of 2019.

- e. Granting a one-time payment would be in the interest of the consumers.

7.4 While rebutting MSEDCL's contentions that payment of carrying cost on additional GST amount payable on Safeguard Duty is barred by Res-Judicata/ Constructive Res-Judicata, TPREL stated as follows:

- a. MSEDCL is not disputing the additional GST payable by TPREL on Safeguard Duty but seems to dispute only the Carrying Cost amount payable on the said amount.
- b. On 22 June 2019, TPREL had filed Case No. 166 of 2019 before the Commission for seeking compensation on account of increase in Safeguard Duty and tax payable thereon. In said Petition, the TPREL had claimed a compensation of Safeguard Duty at the rate of 25% and GST at the rate of 5% on the amount of Safeguard Duty payment. Since the said Petition did not deal with Change in Law relief on account of increase in rate of GST from 5% to 8.9%, the additional amount of GST payable on Safeguard Duty was neither raised nor claimed by TPREL.
- c. Subsequently, on 23 January 2020, TPREL had filed the captioned Petition, inter-alia, seeking a Change in Law relief on account of change in rate of GST, payable on Supply and Service contracts executed between TPREL and TPSSL. In the Original Petition, TPREL had made a claim of Rs. 24.62 Crores.
- d. On 15 October 2020, an amendment application was filed by TPREL. In the said Amendment Application, TPREL had categorically stated that GST at the rate of 5% on the Safeguard Duty amount has been claimed by TPREL in Case No. 166 of 2019, which has been approved by the Commission. Hence, TPREL is also claiming the differential amount of 3.9% in the present matter.
- e. No dispute was ever raised by MSEDCL, either in the Reply filed by it in December 2020 or in November 2021, regarding the applicability and payment of additional GST on the Safeguard Duty amount
- f. The principles of res-judicata or constructive res-judicata cannot be applied since the said claim was never part of Case No. 166 of 2019.

7.5 MSEDCL in its submissions sought clarification regarding rate of GST payable prior to the cut-off date on 'BOS Supply' and 'I&C'. TPREL clarified that, the reference of 'BOS Supply' denotes equipment other than Modules required for setting up a solar power plant, such as transformers, cables, inverters etc), whereas the 'I&C' denotes installation and

commissioning. GST at the rate of 5% was payable on 'BOS Supply' and 'I&C' before the Change in Law event took place. This is evident from Entry No. 243 of Notification No. 1/2017-Central Tax (Rate) dated 28 June 2017.

7.6 MSEDCL in its submission raised issue of non-submission of data by TPREL for claim scrutiny. Relevant information required for the purpose of computation of Change in Law relief has been provided by TPREL vide its Affidavit dated 22 October 2021. Further, additional information sought by MSEDCL was also handed over during the meetings with MSEDCL. TPREL in its submission referred to email dated 28 October 2021, 8 November 2021, and 9 November 2021 providing details of information.

7.7 Summary of MSEDCL's queries and TPREL's response is provided in the table below:

MSEDCL Query	TPREL Reply
Payment of GST by TPSSL to the Government of India	<ul style="list-style-type: none">- TPSSL is a separate legal entity and TPREL does not have a control over the tax filings made by it or have access to such filings.- TPREL is providing the GSTR-2 (as downloaded from GST portal) filed with GST authorities.- Copies of Fresh Debit Notes issued by TPSSL towards increase in GST from 5% to 8.9% on the Safeguard Duty amount have been provided.
Certified Material utilisation and Closing stock report from CA or CMA is required.	TPREL is providing Material Issue Slip and Stock Register.

7.8 As regards MSEDCL's submissions that it has filed a Civil Appeal challenging APTEL's Judgement dated 20 September 2021, it is submitted that MSEDCL has merely filed the Civil Appeal and the same is neither admitted nor there is an order directing that the compensation ought not be paid to TPREL.

8. At the e-hearing dated 16 November 2021 held through video conferencing:

8.1 Advocate of TPREL submitted that it has furnished all the relevant documents to MSEDCL for scrutiny of its claim.

8.2 Advocate of MSEDCL mentioned that it received the documents as well as Rejoinder of TPREL only on 15 November 2021 and being voluminous running into 3000 odd pages, he has not been able to study the same. He pointed out that evaluation of differential claim amount of Rs.6.02 Crores is still pending

8.3 Considering late submission of voluminous information by TPREL, the Commission granted a short adjournment of 7 days for MSEDCL to complete its scrutiny and submit its response to Commission.

8.4 For expediting the process of scrutiny for meeting the time limit set by Tribunal, Commission directed MSEDCL and TPREL to file their respective submission, if any within 7 days with copy served to each other.

9. TPREL in its additional submission dated 23 November 2021 stated as below:

9.1 On 17 November 2021 and 18 November 2021, meetings were held between the representatives of MSEDCL and TPREL, wherein all the relevant documents and explanations, as sought by MSEDCL, were provided by TPREL.

9.2 TPREL reiterated its earlier submission with regards to furnishing data/information to MSEDCL for claim scrutiny. The same is not repeated for sake of brevity.

10. MSEDCL in its additional submission dated 24 November 2021 stated as below:

10.1 After careful evaluation of the documents, MSEDCL has evaluated GST claim payable to TPREL, which worked out as under:

[Amount in Rs. Crores]

Sr No.	Particulars	As per M/s TPREL				As per MSEDCL			
		Base Value	GST after notification @ 8.9%	GST prior to notification @ 5%	Differential Amt	Base Value	GST after notification @ 8.9%	GST prior to notification @ 5%	Differential Amt
	a	b	c=b*8.9%	d=b*5%	e=c-d	f	g	h	i=g-h
1	Supply	665.57	59.24	33.28	25.96	665.57	59.24	33.28	25.96
2	Civil	14.74	1.31	2.65	-1.34	14.74	1.31	2.65	-1.34
3	Safeguard	89.27	7.95	4.46	3.48	89.27	7.95	4.46	3.48
Total			68.50	40.39	28.10		68.50	40.39	28.10

10.2 MSEDCL has verified jointly with TPREL representatives tax rate prior to Notification dated 31 December 2018 on BOS supply and I&C components and found Rs. 6.02 Crores matched with their excel sheet.

10.3 TPREL has further provided copy of 'GSTR2A of TPREL' vide its mail on 17 November 2021. MSEDCL has further verified from the report that GST amount as per invoices submitted by TPREL is tallied with the report and the GST payment made by M/s TPREL to M/s TPSSL is remitted to the government authorities.

- 10.4 MSEDCL has received CA certificate for utilization of stock in respect of 150 MW solar project at Chhayana, Pokaran, Rajasthan. As per certificate, stock at the end of the year is nil.
- 10.5 TPREL in its Affidavit dated 22 October 2021 is seeking the additional carrying cost of Rs. 0.31 Crores on the safeguard duty component as a change in law due to GST notification dated 31 December 2018. However, the said issue of carrying cost on the safeguard duty component has already been decided by the Commission vide its Order dated 13 November 2019 passed in Case No. 166 of 2019 and thus, is barred by the concept of constructive *Res judicata*. Said GST notification dated 31 December 2018 is prior to the said order dated 13 November 2019 of the Commission and thus, should have been claimed by TPREL at the proceedings in Case No.166 of 2019. It is worthwhile to mention here that the said Case No. 166 of 2019 was filed by the Petitioner in June 2019 i.e. after the date of GST Notification dated 31 December 2019. Accordingly, now the same cannot be agitated by TPREL in the present proceedings.
11. At the e-hearing held on 25 November 2021 through video conferencing, Advocates of both parties reiterated their submissions. Advocate of TPREL requested 3 days' time to file additional submission. While remanding the parties timelines had been stipulated by the APTEL for issuance of Order in this matter, the Commission allowed request of Petitioner to file additional submission.
- 12. TPREL in its additional submission dated 29 November 2021 stated as below:**
- 12.1. Based on the various pleadings filed by the parties, the following are the admitted positions:
- a. The amount of Rs. 28.10 Crore (being claimed by TPREL as Change in Law claim) is verified and payable by MSSEDCL.
 - b. Rate on which carrying cost is computed by TPREL.
 - c. All the relevant documents have been filed by TPREL, verification process is complete, and all the documents are in order.
- 12.2. Now, the scope of dispute/ disagreement between the parties is restricted only to whether compensation is to be paid as onetime payment or through revision in tariff and whether TPREL is entitled to carrying cost on additional tax payable on Safeguard Duty Amount. TPREL has relied upon its earlier submissions in the present matter to defend these claims.

Commission's Analysis and Rulings:

13. The Commission notes that in original proceeding of Case No. 25 of 2020, TPREL had approached the Commission seeking compensation due to increase in costs on account of change in rate of GST in Notification dated 31 December 2018 under Change in Law provisions of the PPA dated 27 July 2018. The Commission in its Order dated 30 April 2021 in that matter had although observed that issuance of said notification dated 31 December 2021 was a Change in Law event under the PPA, but compensation was not allowed for the reasons stated therein.
14. Aggrieved by the above said Order, TPREL filed Appeal No. 215 of 2021 before the APTEL. Said appeal has been allowed by the APTEL vide its judgment dated 20 September 2021 remanding the matter to this Commission. The Commission notes that Hon'ble APTEL in its remand Order dated 20 September 2021 has directed this Commission to determine amount of compensation payable to TPREL due to changes in GST regime and the carrying cost in such respect.
15. During this remand proceeding, based on documents submitted during the proceedings, both parties have agreed on following amount of compensation payable to TPREL on account of Change in Law event i.e. increased in GST rate vide notification dated 31 December 2018:

[Amount in Rs Crore]

Sr. No.	Particulars	GST rate applicable after notification	GST rate applicable prior to notification	Base Value on which Rate is applicable	GST after notification @8.9%	GST prior to notification @ 5% or 18%	Differential Amount
	a	b	c	d	e=b*d	f=c*d	g=e-f
1	Supply	8.90%	5%	665.57	59.24	33.28	25.96
2	Civil	8.90%	18%	14.74	1.31	2.65	-1.34
3	Safeguard	8.90%	5%	89.27	7.95	4.46	3.48
Total		8.90%	5.25%	769.58	68.49	40.40	28.10

16. The Commission has noted above computations and finds no reasons to interfere with it. Further, parties have agreed for compensation amount of Rs. 28.10 Crore payable to TPREL under Change in Law provisions of PPA dated 27 July 2018. Hence, the Commission accords its approval for such amount of compensation on account of Change in Law event.
17. Further, the Commission notes that there is no dispute between parties as regards carrying cost payable on such compensation amount. 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. Accordingly, the Commission allows levy of carrying cost at the rate of 1.25% in excess of 1-year MCLR of SBI on above compensation amount from the date of actual payment of increased GST rate by TPREL till date of this order.

18. Having allowed principal amount and carrying cost towards Change in Law compensation as above, the Commission notes that parties have dispute about payment method (onetime or over the period of PPA) and allowing carrying cost on additional GST payable on Safeguard Duty amount. Therefore, the Commission has framed following issues for its considerations:

(A) Whether carrying cost on additional GST amount payable on Safeguard Duty can be allowed?

(B) What should be frequency of payment of compensation amount?

The Commission is addressing above issues in the following paragraphs.

19. Issue A: Whether carrying cost on additional GST amount payable on Safeguard Duty can be allowed?

19.1 The Commission notes that in original proceedings in Case No. 25 of 2020, TPREL had initially claimed compensation amount of Rs. 24.62 Crore [25.96 (Sr. No. 1 in table at para 15 above) —1.34 (Sr. No. 2 in table at para 15 above)]. Subsequently, through amendment application in that matter, TPREL had added claim of Rs. 3.48 Crore (Sr. No. 1 in table at para 15 above) towards differential amount (3.9%) of GST on Safeguard Duty amount.

19.2 In the present proceeding, MSEDCL has not objected to payment of principal amount of Rs. 3.48 Crore towards compensation of differential GST of 3.9% (8.90% - 3%) paid on Safeguard duty but has objected to allowing the carrying cost on such amount by stating that TPREL should have claimed such amount in the proceedings when compensation for Safeguard duty was allowed in proceedings of Case No. 166 of 2019. MSEDCL has contended that as issue of carrying cost on the safeguard duty component has already been decided by the Commission vide its Order dated 13 November 2019 passed in Case No. 166 of 2019, therefore now it is barred by the concept of constructive *Res judicata*. MSEDCL has further contended that said GST notification dated 31 December 2018 was prior to filing of petition (June 2019) in Case No. 166 of 2019, therefore TPREL should have claimed such relief in that proceeding only. Now the same cannot be agitated by TPREL in the present proceedings

19.3 While rebutting above contentions of MSEDCL, TPREL stated that in Case No. 166 of 2019 it had claimed a compensation on account of imposition of Safeguard Duty at the rate of 25% and GST at the rate of 5% on the amount of Safeguard Duty payment. Since the said Petition did not deal with Change in Law relief on account of increase in rate of GST from 5% to 8.9%, the additional amount of GST payable on Safeguard Duty was neither

raised nor claimed by TPREL. The principles of res-judicata or constructive res-judicata cannot be applied since the said claim was never part of Case No. 166 of 2019.

- 19.4 In this regard, after perusal of the Order in Case No.166 of 2019 dated 13 November 2019 and related proceedings, the Commission notes that on 22 June 2019, TPREL had filed Case No. 166 of 2019 before the Commission for seeking compensation on account of imposition of Safeguard Duty and tax payable thereon. In that Petition, TPREL had claimed GST at the rate of 5% on that Safeguard Duty payment. Since the said Petition did not deal with Change in Law relief on account of increase in GST rate (5% to 8.9%), the additional amount on account of increased GST rate on Safeguard Duty was not part of that proceeding. As the said issue was never part of that Petition nor dealt with by the Commission in its Order on that Petition in Case No. 166 of 2019, MSEDCL's contention relating to res-judicata cannot be upheld in present matter.
- 19.5 Further, regarding MSEDCL's contention that as such GST notification dated 31 December 2018 was prior to filing of Case No. 166 of 2019 and hence TPREL should have raised such claims in that Petition itself, the Commission notes that although said notification was of 2018, but TPREL received claim for additional GST on safeguard duty amount only in July 2020. This is evident from TPREL's submission in Case No. 25 of 2020 which is also summarised as below by the Commission in its Order dated 30 April 2020:

"3.12. On 31 July 2020 (i.e. after filing of the initial Petition), TPSSL issued a letter to TPREL stating that, recently an internal audit was conducted for TPSSL where it was highlighted that GST of 8.9% is payable on base contract value which is to be computed after including the payment of applicable taxes (i.e. Safeguard Duty paid by TPSSL in the instant case). Further, TPSSL had also sought a legal opinion on the said issue. On 22 May 2020, TPSSL's legal advisor issued a legal opinion, stating that TPSSL is required to discharge its GST liability (in terms of the Notifications dated 31 December 2018) after including the amount of taxes paid/ payable on the base value of the goods and/ services. The amount of Safeguard Duty (SGD) paid by TPSSL would have to be added to the base value before computing the amount of GST (at the rate of 8.9%) payable by TPREL.

3.13. On 15 October 2020, the Amendment Application was filed by TPREL, seeking amendment of the present petition. TPREL through its amendment application has requested to include differential between 5% GST earlier considered on Safeguard duty and 8.9% GST which should have been considered as per 2018 GST amendment in Change in Law claims. Said application is registered as MA No. 55 of 2020."

Thus, as claim for increased GST rate on safeguard duty amount was received only in July 2020, TPREL raised the claim for the same in the then ongoing Petition i.e. Case No. 25 of

2020 through an amendment application. Hence, TPREL cannot be held responsible for not raising such claim in Case No. 166 of 2019, as it had not received such claim from its supplier (TPSSL) at that point of time.

- 19.6 In view of above analysis, the Commission does not find any merits in MSEDCL's contentions. Further, MSEDCL did not object to allowing principal amount of compensation for increased GST rate on safeguard duty. Hence, carrying cost on such increased amount of GST on safeguard duty i.e Rs. 3.48 Crore needs to be allowed under the principle of restitution so as to restore TPREL to same economic position as if such Change in Law event has not occurred.
- 19.7 Accordingly, the Commission allows carrying cost on Rs. 3.48 Crore at the rate of 1.25% in excess of 1-year MCLR of SBI from the date of actual payment of such increased GST rate by TPREL till date of this order.

20. Issue B: What should be the frequency of payment of compensation amount?

- 20.1 TPREL contended that the compensation amount be paid as a lump sum amount at one go. This would reduce the carrying cost obligation of MSEDCL and would further reduce the liability of the end consumers.
- 20.2 MSEDCL objected to onetime claim settlement and by referring to Article 9.2.2 of the PPA stated that the additional compensation, if any, due to occurrence of Change in Law event has to be compensated through the tariff payment only.
- 20.3 The Commission notes that this issue has already been decided by this Commission in its Order dated 13 November 2019 in Case No. 166 of 2019 wherein provisions of same PPA between present parties for payment of compensation amount was in question. In that Order, the Commission has ruled as follows:

"26. Such amount determined as per methodology specified in above paragraph can be paid in lumpsum or can be converted into per unit rate over the tenure of the PPA. MSEDCL has opposed lumpsum payment as it will affects tariff of end consumers. However, the Commission is of the opinion that lumpsum payment would avoid further carrying cost which MSEDCL has to pay to TPREL on account of deferred payment. Further, Generator may willingly offer some discount on lumpsum payment. Considering all these aspects, MSEDCL has to decide whether it opts to pay the compensation on lumpsum basis or per unit basis over the PPA period. MSEDCL shall communicate its option of payment to TPREL within a week from ascertaining amount of compensation to be paid as per para 18 above."

Thus, the Commission has left it to MSEDCL to evaluate implication of payment of carrying cost in case of deferred payment and then decide whether it would like to opt to pay the compensation on lumpsum basis or per unit basis over the PPA period.

- 20.4 Above quoted order of the Commission is squarely applicable to the present matter. Accordingly, MSEDCL shall communicate its option of compensation payment to TPREL within two weeks from date of this Order.
- 20.5 In case option of paying compensation amount over the PPA period is selected then per unit rate of compensation shall be computed based on following methodology which is approved in Order dated 13 November 2019 in Case No. 166 of 2019 against the same PPA:
- a. Total amount of compensation to be paid in Rs. 28.10 Crores plus carrying cost at the rate of 1.25% in excess of 1-year MCLR of SBI from date TPREL paid such amount till date of this Order. 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% in excess of One year MCLR of SBI.
 - 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 TPREL 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 of 150 MW at CUF of 27.9%. 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. 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 27.9%. 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.

21. Having ruled on the issues that had arisen during this proceeding as above, the Commission likes to note that Hon'ble APTEL in its remand Order directed this Commission to issue Order preferably within two months from first appearance of parties in the matter. Parties have recorded their first appearance on 4 October 2021 and hence this Order should have been issued by 3 December 2021. However, parties in the matter including petitioner repeatedly sought additional time for filing their submissions and hence there is slight delay in issuance of this Order. However, such additional time has also helped in resolving point of differences between the parties and reduce number of issues on which this Commission had to adjudicate.

22. Hence, the following Order:


ORDER

1. **The Commission's Order dated 30 April 2021 in Case No. 25 of 2020 & MA No. 55 of 2020 stands modified to the extent as ruled in the foregoing paragraphs relating to analysis and ruling on the issues framed consequent to APTEL Judgment dated 20 September 2020 in Appeal No 215 of 2021.**
2. **Compensation of Rs. 28.10 Crore plus carrying cost at the rate of 1.25% in excess of 1-year MCLR of SBI from date it paid such amount till date of this Order is payable to Tata Power Renewable Energy Ltd on account of Change in Law event i.e. increased in GST rate vide notification dated 31 December 2018.**
3. **Maharashtra Electricity Distribution Co. Ltd shall convey its decision on payment option to Tata Power Renewable Energy Ltd within two weeks from date of this Order.**
4. **In case of payment over PPA tenure is selected then methodology stipulated in para 20.5 shall be adopted.**

Sd/-
(Mukesh Khullar)
Member

Sd/-
(I.M. Bohari)
Member

Sd/-
(Sanjay Kumar)
Chairperson


(Dr. Rajendra Ambekar)
I/c Secretary

