

II) Demand of Additional Amount of Rs. 71.70 Cr. was raised on 3.3.2020 after completion of the Bidding process:

- 10.8 While informing acquisition price of Rs. 152.65 Crore, MSETCL has considered pre-development expenses of Rs. 135.44 Crore and Rs. 17.21 Crore as Bid Process cost of BPC. Thereafter, TSA was signed on 14.8.2019 and after completion of bidding process LOI to ATL, being a successful bidder, was issued on 12.12.2019.
- 10.9 However, vide e-mail dated 03.03.2020, for the first time Godrej communicated a demand for payment of additional consideration for Vikhroli land parcel "A" as per the Ready Reckoner Rate of Rs. 85,900/ sq.mtr. Subsequently, on 05.03.2020, Godrej sent an email thereby enclosing the draft tripartite agreement to be executed by and between ATL, Godrej and the Petitioner. The agreement, inter alia, provided that NoC would be given by Godrej, for transfer of land to SPV on payment of an additional amount of Rs. 71.70 Crore towards difference in the prevalent Circle rate and the Circle rate existing on the date of transfer of land to TPC in the year 2011.
- 10.10 Accordingly, on 07.07.2020, the Petitioner executed tripartite Agreement with Godrej, KVTL and ATL and also made an additional payment of Rs. 71.70 Crore to Godrej. As a result of the said additional expenditure, the Acquisition Price increased from Rs. 152.65 Crore to Rs. 224.35 Crore.
- 10.11 Though Acquisition Price was informed to the Bidders included cost of Vikhroli Land, the Petitioner was constrained to make an additional payment of Rs. 71.70 Crore after the cut-off date of 14.08.2019 thereby increasing the Acquisition Price after cut-off date.
- 10.12 Therefore, the Petitioner is entitled to compensation for the said Change in Law event.

III) Increase in 'Acquisition Price' constitutes Change in Law:

- 10.13 In terms of Article 12 of the TSA, deviation in Acquisition Price after cut-off date i.e. seven days prior to the bid deadline resulting into any additional recurring and non-recurring expenditure/income to the Petitioner and affects the cost or revenue of the Petitioner, shall qualify as a Change in Law.
- 10.14 As per the provisions of the TSA, the Petitioner is required to be compensated in order to put it to the same economic position as if such Change in Law has not occurred.
- 10.15 As per the TSA following conditions have been satisfied to claim event as CIL:
- a. ***Change in the Acquisition Price*** is an event covered under Article 12.1.1 of the TSA.
 - b. Change in Acquisition Price took place on 03.03.2020 which is later to the Cut-off date of 14.08.2019. The change in Acquisition Price has resulted in increase of non-recurring expenditure by Rs. 71.70 Crore on the Petitioner.

10.16 Therefore, increase in Acquisition Price of Rs. 71.70 Crore is Change in Law as per the provisions of the TSA and the Petitioner is entitled to recover the same under Change in Law provisions.

IV) Positive Assertion by BPC/MSETCL:

10.17 ATL had carried out its due diligence of the information and documents available with it at the time of submission of the bid. However, there was no information or document available at the time of submission of the bid since demand of additional Rs.71.70 Crore was raised by Godrej for the first time on 03.03.2020.

10.18 It was understanding of BPC that Vikhroli Land was available and was in possession and no further payment was required to be made for obtaining NOC from Godrej for transfer of Vikhroli Land to SPV.

10.19 At the Pre-bid clarification meeting dated 18.07.2019, there were specific queries from the bidders on the status of Vikhroli land and cost implication for the land for sub-stations. In response to the queries, BPC provided 'the status of the land, permits and clearances for the Project' obtained by TPC. BPC had informed the bidders that the land was available and was in possession. Already acquired land will be transferred to SPV and successful bidder will be required to acquire additional land, if required, after acquisition of SPV.

V) Conduct of MSETCL/BPC advising the Petitioner to make additional payment to Godrej:

10.20 Additional demand of Rs. 71.70 Crore was raised by Godrej for issuance of NOC for transfer of Vikhroli Land to the Petitioner. Thereafter, MSETCL vide letter dated 04.05.2020 asked ATL, to make the payment of 'Acquisition Price declared earlier' (Rs. 152.65 Crore) and to execute Share Purchase Agreement first and then make payment of Rs. 71.70 Crore to Godrej. MSETCL also suggested to approach the Commission for considering the said amount as Change in Law. Therefore, the Petitioner paid this amount of Rs. 71.70 Crore for getting possession of Vikhroli land after execution of Share Purchase Agreement because of advice of BPC in the interest of the Project. Further, MSETCL informed that EC has recommended to refer the issue of claim for additional payment to the Commission.

10.21 The conduct of the parties makes it clear that additional payment of Rs.71.70 Crore paid to Godrej constitutes Change in Law being increase in Acquisition Cost. Therefore, the Respondents are now estopped from contending that the said amount of Rs. 71.70 Crore paid by the Petitioner does not constitute Change in Law.

VI) Purpose of Change in Law Clause which specifically includes 'change in Acquisition Price':

10.22 Term 'Acquisition Price' in Article 12 of the TSA is required to be understood in the context of Article 12.1.1 and conduct of the parties. The inclusion of sixth bullet in Article 12.1.1. specifically provides that increase in Acquisition Price constitutes

Change in Law. Therefore, considering that Acquisition Price has been fixed and any increase in the said amount due to any liability cannot be termed as increase in Acquisition Price is wrong and misconceived by the Respondents as it renders the sixth bullet of Article 12.1.1 of TSA redundant and otiose.

- 10.23 If the Acquisition Price is considered to have been fixed, then there cannot be any question of change in the same. Therefore, the 'change in Acquisition Price' ought to be interpreted purposively in a manner to give effect to intentions of the parties which is to compensate the Bidder for any additional cost incurred towards obtaining the assets (land, permission and licenses which were part of Acquisition price) which as per BPC were available at the time of Cut-Off Date. Therefore, originally declared Acquisition Price is provided in the Share Purchase Agreement. However, any additional expenditure towards land, clearances and permissions which were part of Acquisition Price and as per BPC were already available/obtained constitutes Change in Law.
- 10.24 To understand the intent behind Sixth Bullet of Article 12.1.1 of the TSA, it is important to note that the Project being awarded to the Petitioner was an existing Project where TPC had already incurred certain cost for the purpose of establishing the Project. Therefore, in the tender documents, the Successful Bidder was required to pay Acquisition Price towards cost of land, license and permits already arranged by TPC.
- 10.25 In the tender documents, bidders were invited to quote/bid tariff on the basis of a particular Acquisition Cost against which the Successful Bidder was to receive assured land, permits and licenses. To safeguard the Successful Bidder against variation/increase in this Acquisition Price, Article 12 has been included in the TSA. Article 12 is a risk allocation clause provided in the TSA which fastens risk of increase in Acquisition Price/Predevelopment Charges due to change in law on the Respondent Nos. 2 to 9. Therefore, at the time of the submission of bid, ATL like any other bidder was required to submit bid on the basis of then informed Acquisition Price. Hence, the Petitioner ought to have received the Project along with land, permits and clearances as informed at the time of bidding through pre-bid clarification.
- 10.26 Definition of Acquisition Price in TSA cannot be restricted to by definition of Acquisition Price in SPA. For TSA to incorporate definition of 'Acquisition Price' from SPA then SPA ought to have been in existence as on date of execution of TSA. It is admitted fact that as on date of execution of TSA dated 14.08.2019, there was no Share Purchase Agreement between Successful Bidder/ATL and BPC/MSETCL. The SPA was executed between the parties on 25.06.2020 i.e., more than 10 months after execution of TSA. It is trite law that for incorporation by reference of a term/definition of one contract in another contract, the contract from which the term/definition is sought to be incorporated ought to be in existence. In this context, judgment of Hon'ble Supreme Court in 'Anil Kak Vs. Kumari Sharada Raje & Ors.' reported as (2008) 7 SCC 695 is noteworthy wherein Hon'ble Supreme Court observed as under:

"31.The rule of incorporation by reference is well-known. One document is incorporated by reference in another when it is referred to, as if it would form an

integral part thereof. [See Sarabjit Rick Singh v. Union of India MANU/SC/0041/2008 : (2008)2SCC417].

32. Principle of incorporation by reference was evolved so as to avoid unnecessary repetition of the same documents again and again in different parts of the original document. For invoking the said principle, a document must be in existence. It cannot be brought into existence later on.”

10.27 It was informed at the stage of bidding that Vikhroli land is available and in possession, therefore, price paid towards asset i.e., Vikhroli Land is part of Acquisition Price.

B) MSETCL /STU Submission:

10.28 On enquiry by MSETCL regarding the documents of Project, TPC-T vide letter dated 15.06.2019 informed MSETCL that TPC-T has appealed against the MERC Order before the Hon'ble APTEL. TPC-T also informed that the cost incurred by it on the project is @ Rs.135.44 Crore till 31.05.2019. TPC-T is willing to provide the desired documents / information subject to MSETCL reimbursing the expenses incurred by TPC-T so far on development of the Project. NOC will be provided by TPC-T subject to the final outcome of the appeal pending for adjudication before APTEL. Further, there would be some additional expenditure during the process of transferring the approvals / clearances / land etc. in favour of SPV and the same would also be accounted for and reimbursed in favour of TPC-T. In the Annexure of TPC-T letter it is mentioned that 400kV Vikhroli land is "Available and in Possession",

10.29 The Commission vide its letter dated 20.06.2019 has clarified that any deviation in the predevelopment expenses of Rs. 135.44 Crore by TPC-T on account of expenses required on transfer of approval/clearances/land etc. in favour of SPV, viz. KVTPL, TPC-T shall incorporate the same as a part of its regulated business in it is upcoming Tariff Petition. TPC-T shall provide its NOC to transfer the land acquired for the project and clearances/ permissions obtained from the various Authorities in the name of SPV(KVTPL).

10.30 Principal Secretary (Energy), GoM convened a meeting on 12.07.2019 and emphasized that, if TPC-T has any issue regarding the Commission's direction vide letter dated 20.06.2019, TPC-T can approach the Commission.

10.31 To comply with the RFP documents, MSETCL (BPC) shared the acquisition price of Rs. 152.65 Crore, which includes reimbursement of Rs.135.44 Crore to TPC-T as directed by the Commission to all the qualified bidders on 22.07.2019.

10.32 Subsequent to the completion of TBCB process, MSETCL (BPC) issued LOI to ATL dated 12.12.2019.

10.33 The amount of Rs.71.70 Crore was not raised by any stakeholder neither before issuing of acquisition price on 22.07.2019 to bidders, nor after declaration of successful bidder on 12.12.2019. Hence, cost of land purchase for Vikhroli plot was included in tender

document. Also all the conditions regarding the cost of land as mentioned by TPC-T in its letters were shared with all the bidders on “as is where basis” from time to time.

10.34 The issue of Rs.71.70 Crore towards land cost came into picture vide ATL letter dated 08.04.2020 after placing the LOI on 12.12.2019, reproduced as "...to provide NoC, for transfer of land to KVTL is to pay them an additional amount of Rs. 71.70 Crore towards difference in the prevalent Circle rate and the Circle rate existing on the date of transfer of land to TPC-T.

C) TPC-D's Submission:

1) No Change in Acquisition Price and therefore, no Change in Law:

10.35 TPC-D referred to the various provisions of the RFQ, RFP, TSA and SPA denying the claims of the Petitioner.

10.36 Acquisition Price of the Project is defined under Article 1.1.1 of the TSA dated 14.08.2019 and shall have the same meaning as defined under the SPA.

10.37 Article 1.2 (i) of the SPA dated 25.06.2020 defines acquisition price as Rs. 152.65 Crore. Acquisition price is the aggregate consideration payable by the Selected Bidder towards purchase of the Sale Shares at par and for taking over all assets and liabilities of the Company as on the Closing Date subject to adjustment as per the audited accounts of the Company as on the Closing date.

10.38 Article 1.2 (v) of the SPA mandates that ‘Closing Date’ shall mean a mutually agreed date between the Parties falling within the period as mentioned in Clause 2.4 of RFP or on failure of such mutual agreement between parties shall be the date falling on the last date of such period. Further, Article 3 of the SPA prescribes the manner of Closing Share Purchase as per Article 3.2 of the SPA. Upon closing date Sale Shares are handed over to the Selected Bidder. Therefore, in the present case closing date shall be the date of share and acquisition of the SPV by the selected bidder i.e.,25.06.2020.

10.39 From the perusal of provisions of the TSA and SPA the following is relevant: -

- a) Increase in Acquisition Price of the Project is an event of Change in Law in case the price increase takes place between 7 days prior to Bid Deadline up to the date when the Acquisition Price is paid by the Selected Bidder (i.e. up to Closing date as per SPA).
- b) In the present case the Acquisition Price as notified to the bidder on 22.7.2019 by BPC as part of RFP and as paid by ATL on 25.06.2020 (date of execution of SPA) have remained the same i.e., Rs. 152.65 Crore. Hence, there has been no increase in Acquisition Price as is evident from the executed SPA.
- c) Acquisition Price is payable by ATL for acquiring the assets and liabilities of the KVTPL as per the audited accounts of the company on the closing date. However, in the present case neither the Petitioner nor the BPC has established the fact that additional liability exists on the closing date in the books of accounts of KVTPL to

claim change in law. Also BPC and ATL both were aware of the fact on the closing date (date of acquisition of share) that there was additional demand by Godrej for handing over the possession of land parcel as Godrej had intimated to the Petitioner vide its email dated 3.3.2020.

d) Further, Clause 5 of the SPA clearly provides the obligation of the selected bidder that any responsibility or liability in respect of the business activities of the company arising after the closing date to any person or any authority, central, state, local or municipal or otherwise shall be the sole responsibility of the selected bidder.

10.40 Hence, amount paid by ATL to Godrej does not form part of the Acquisition Price as specifically defined under the TSA and/ or SPA. Therefore, the claim of the Petitioner that the amount paid to Godrej amounts to Change in Law as per TSA is without merit and the same is liable to be rejected.

10.41 Article 1.6 of the RFP provides that it is responsibility of the successful bidder to complete all the activities for the Project, including survey, detailed project report formulation, arranging finance, project management, necessary Consents, Clearances and Permits (way leave, environment & forest, civil aviation, railway/ road/river/canal/power crossing/PTCC, etc.), land compensation, design, engineering, equipment, material, construction, erection, testing & commissioning.

10.42 Clause 1.6.2 of the RFQ also provides for the expenditure to be incurred by the BPC for arranging the approval or consent including acquisition of land to be recovered from the TSP. Also, RFQ provides that the details and documents as may be obtained by the BPC in relation to the Project shall be handed over to the TSP on as-is-where-is basis, so that it may take further actions to obtain Consents, Clearances and Permits.

10.43 The Clause 2.14.2 of the RFP dated 20.6.2019 provides that bidders were to inform themselves fully and Bidders shall make independent enquiry and satisfy themselves with respect to all the required information, inputs, conditions and circumstances and factors that may have any effect on his Bid.

10.44 BPC, in the RFP has categorically informed about the status of land, clearances and permissions from statutory authorities vide letters dated 15.06.2019 and 21.06.2019. Further, Godrej Letter dated 30.07.2011 wherein Godrej had stipulated the relevant terms and conditions for Transfer of land to TPC-T was also categorically disclosed to all prospective bidders.

10.45 BPC issued a clarification [Annexure 1 to Replies on Queries Received on RFP Documents: Note on Project Development Related Activities] to the prospective bidders of the TBCB process wherein all approvals/clearances given by TPC-T were highlighted/informed to all the Bidders.

10.46 As per the RFP, Annexure 6, the prospective bidder is required to execute a Bidder's Undertaking and TPC-D assumes that ATL in its undertaking to BPC has provided its unconditional acceptance to the RFP especially Clause 2.14.2 (bidders to inform themselves fully) as well as the clarifications issued by BPC.

- 10.47 At the hearing the Commission has enquired whether any bidder had raised the issue of encumbrance on the Vikhroli land proposed for the Project. It is observed that from the pre-bid clarification issued by the BPC that no such query was raised by any of the bidders regarding encumbrances on the land for the Project.
- 10.48 The submission of the Petitioner that Rs. 26 Crore paid towards purchase of Vikhroli land by TPC-T is already part of Acquisition Cost and therefore this qualifies for the change in Acquisition Price for the Petitioner is against the spirit of competitiveness as envisaged under section 63 of the EA. There were other clearances also available at the time of tendering process and some of these clearances may have also got expired due to delay in other activities related to the project, then in all such cases Petitioner will come before this Commission with a prayer that these clearances were part of Acquisition Price and therefore it should also be allowed change in law. There are already other notices issued by the Petitioner regarding the change in law and force majeure for either extension for scheduled commissioning date or increase in cost of the project. It is submitted that no bidder has raised any issue regarding any encumbrance on the land parcels which were part of this project.
- 10.49 Hence, Subsequent to completion of the tendering process and after awarding the project to selected bidder, the prayers for change in Acquisition Price as change in law may be summarily rejected as it may amount to favouring the selected bidder. Further this fact would have been disclosed to the other bidders during bidding process, this would have had an impact on the financial bid of the other bidders who participated in the bidding process
- 10.50 TPC-T had made available the Agreement between M/s Godrej and TPC dated 30.07.2011 as part of the documents furnished to the Bidders. The said agreement categorically stated that NOC shall be obtained from M/s Godrej for transfer of Vikhroli Land to the SPV. Therefore, the Petitioner while making the bid should have taken into account any additional amount payable towards obtaining the NOC from M/s Godrej and that the said amount cannot be included in the acquisition price, which is a defined term under the SPA. Hence, the claim of Change in Law is vehemently denied and accordingly the Petition deserves to be dismissed.
- 10.51 Therefore, additional payment of Rs. 71.70 Crores made by ATL to Godrej does not qualify as an increase in the Acquisition Price and falls within the obligation of the Petitioner under Article 4.1 of the TSA.

D) MSEDCL's Submission:

- 10.52 RFP defines the RFP documents mean TSA, SPA and any other agreement as required.
- 10.53 As per the RFP it is the responsibility of the TSP to obtain authorization, licenses, approvals, registrations, permits, waivers, privileges, acknowledgments, grants or concessions from the concerned authorities for the development, execution and performance of the project etc.

- 10.54 RFP defines that survey report means report containing initial information regarding the project and other details as provided in the Clause 1.5(a) of the RFP. Clause 1.5(a) of the RFP stipulates that the bidder would be given the survey report of the project at least 45 days prior to the bid deadline. Further, BPC, LTTCs etc. are not responsible or liable in respect of any statements or omission, accuracy, completeness, reliability of information made in the survey report and that they shall not incur any liability under any law, statutes, Rules or Regulations even if any loss or damage is caused to the bidder by any act or omission on their part.
- 10.55 In the Clause 1.4 of RFP, it is clearly mentioned that the BPC could intimate the Acquisition Price to the bidders 30 days prior to bid deadline along with all the related assets and liabilities as per the provision of the SPA for the purpose of acquisition of 100% equity shares of SPV. Responsibility of the BPC is to facilitate transfer of land for the SPV in terms of Clause 1.5(c). As per Clause 1.8 of the RFP once a successful bidder is selected then the details and documents as may be obtained by BPC in relation to the project shall be handed over to the successful bidder on “as is where is basis” so that it may take further actions to obtain all necessary consents, clearances and permits etc.
- 10.56 It was the responsibility of ATL as a successful bidder to familiarize itself in all aspects of the project including ownership, possession, consents, NOCs or any other such requisition for successful implementation of the project.
- 10.57 BPC in its reply to the pre-bid queries, had asked ATL to refer to project development related activity enclosed at **Annexure “I”**. In the Annexure I, in respect of Vikhroli substation, it is clearly mentioned that land was available and in possession. Similarly, the land at Kharghar AIS was also shown as available and in possession.
- 10.58 In the clarification issued by the BPC it was clearly mentioned that bidders are required to take note of all the documents related to land etc. and the documents provided are exclusively for perusal of qualified bidders to participate in RFP stage.
- 10.59 The various exchange of letters between BPC, Petitioner, TPC and MoM between them shows that ATL was fully aware of all the facts. Once the BPC had given the Acquisition Price for transfer of 100% shares of SPV then it cannot claim any additional cost for acquisition of SPV. Further, TSA was entered into on 14.8.2019 with all LTTCs and KVTPL. In the recitals of the TSA, more particularly recital C, it is given that selected bidder will acquire 100% equity shareholding of KVTPL along with all its related assets and liabilities in terms of provisions of SPA.
- 10.60 Prior to entering into the TSA, letter was issued by TPC to MSETCL dated 22.7.2019, wherein it is clearly mentioned that as per letter of allotment by Godrej and its acceptance by TPC-T, prior written approval is required from Godrej before any such transfer of land. Further, in terms of Clause 1.4 (RFP), ATL was informed by letter dated 22.7.2019 that the indicative acquisition price of SPV as Rs.152.65 Crore.

- 10.61 In terms of the Clause 3.1.1 of TSA, being a condition subsequent, the successful bidder, within 10 days of issuance of LOI, shall provide on behalf of TSP (SPV) a contract performance guarantee, acquire by payment of acquisition price, 100% equity shareholding of KVTPL from MSETCL. MSETCL shall sell to the selected bidder the said equity shareholding along with all its assets and liabilities and the SPV will apply to appropriate Commission for grant of Transmission Licence.
- 10.62 The LOI was issued on 12.12.2019 and therefore, 100% shareholding was to be purchased within 10 days thereafter i.e., on 22.12.2019. The actual SPA was entered into between MSETCL, KVTPL (SPV) and ATL on 25.6.2020 much beyond the 10 days stipulation (i.e., clause 3.1.1 of TSA).
- 10.63 The amount paid by the Petitioner to ATL is difference between circle rates in terms of ready reckoner, as on date of issuance of NOC and date of transfer of land to TPL. The said amount cannot be change in law, as there is no new law or interpretation that has come into play after bid date.
- 10.64 SPA was signed on 25.6.2020 which is closing date in terms of provisions of the TSA. Therefore, the acquisition price for taking over all assets and liabilities along with 100% shareholding of the SPV was to be done as on 25.6.2020. The change in law in the TSA which includes Acquisition Cost (**Article 12**) also includes change in Acquisition Price. The Acquisition Price gets fixed on the closing date of the SPA, which was 25.6.2020. Therefore, any change after 25.6.2020 cannot be change in Acquisition Price. Any consideration paid after closing date towards meeting any liability for securing any asset as otherwise is a regular expenditure on the running of the company and can in no way be connected to the aggregate consideration for purchase of share.
- 10.65 As per Article 5.1.4 of the TSA, it is the Petitioner's responsibility to acquire the land for construction of substation. There is no change in the acquisition price as notified to the bidders in the RFP and that mentioned in the Share Purchase Agreement. Hence, as such there is no increase in Acquisition Price. The increase amount of the project due to any liability of the Petitioner cannot be termed as increase in Acquisition Price.
- 10.66 The Petitioner has submitted that it requires additional expenditure for timely completion of the scheme. However, the progress report of the scheme submitted by the Petitioner for October 2021 reveals that the project is way behind its scheduled completion date.

E) BEST Submission:

- 10.67 After scrutiny of the letter of BPC i.e MSETCL dated 11.06.2020, it is revealed that State Empowered Committee for TBCB has not considered the additional cost of Rs. 71.70 Crores and recommended to approach the Commission. Therefore, Rs. 71.70 Crores paid to Godrej for transfer of land does not fulfil the condition of Change in Law.

F) Submission of GEPL, MBPPL and NUPLLP:

- 10.68 As per Article 5.1.4 of the TSA, TSP is responsible for the acquisition of land for location specific substations.
- 10.69 Further, Article 4.1 of the TSA provides TSP's obligation in development of the project.
- 10.70 Acquisition Price has been fixed in Share Purchase Agreement itself, and both BPC and ATL have agreed for same amount as the Acquisition Price under the agreement. Further, Acquisition Price is payable for taking over all the assets and liabilities of the KVTPL as on Closing Date. However, in the present case, additional amount paid by ATL to Godrej vide Agreement dated 7.7.2020 is for the cost of acquiring a piece of land which was neither part of the assets or liabilities of KVTPL. Hence, such price paid by ATL does not form part of the Acquisition Price as per TSA and/or SPA.
- 10.71 Intimation of additional Acquisition Price of Rs. 71.7 Crore by Godrej was later than the cut-off date i.e., 14.8.2018. However, the Petitioner instead of making such payment of additional Acquisition Price could have sought the Commission's views immediately after such intimation.

Commission's Analysis and Rulings:

- 11** The Commission notes that vide its Order dated 23.01.2021 in Case No. 141 of 2020 it has granted the Transmission Licence No. 1 of 2021 to the Petitioner which has been selected under TBCB due process for Vikhroli Project based on Build, Own, Operate and Maintain (BOOM) terms. Also, the Commission vide its Order dated 23.01.2021 in Case No. 142 of 2020 has adopted the Tariff discovered for Vikhroli project through TBCB process under Section 63 of the EA, 2003. The Petitioner has filed the present Petition seeking compensation/ relief for increased cost of project during Construction Period on account of 'Change in Law' event being increase in Acquisition Price of the SPV by Rs. 71.70 Crore due to transfer of Vikhroli land cost as per the provisions of the TSA.
- 12** The Petitioner's reliance on justification of its claim is summarised as under:
- 12.1 The Commission's letter dated 20.6.2019 has specified that any deviation in the predevelopment expenses of Rs.135.44 Crore, on account of expenses required on transfer of approval/clearances/land etc. in favour of SPV, TPC-T shall recover such expenses from its regulated business.
- 12.2 As per the provisions of the TSA, deviation in Acquisition Price after cut-off date 14.08.2019 is considered to be Change in Law event.
- 12.3 The Acquisition Price of Rs.152.65 Crore informed by BPC includes cost of Vikhroli Land Parcel "A". The Petitioner has paid additional amount Rs. 71.70 Crore to Godrej in obtaining NOC for Vikhroli Land Parcel "A". Hence, the Acquisition Price has changed and increased. Godrej has raised the demand of Rs. 71.70 Crore first time on 3.3.2020 after completion of bidding process and cut-off date of 14.08.2019 as per provisions of the TSA.

- 12.4 It was understanding of BPC that Vikhroli Land is available and in possession of TPC and no further payment is required to be made for obtaining NOC from Godrej for transfer of Vikhroli Land to SPV. In the Pre-Bid Clarification dated 18.07.2019, BPC has intimated that the Land required for the Project is available and is in possession of TPC-T which will be transferred to TSP.
- 12.5 As per the advice of the BPC, the Petitioner first signed the SPA on 25.06.2020 to acquire the SPV and then paid additional amount of Rs.71.70 Crore to Godrej on 07.07.2020.
- 12.6 It was the responsibility of the BPC/ TPC to obtain the NOC of the Godrej to transfer the land required for substations to the successful bidder.
- 12.7 The Petitioner also referred to the Hon'ble SC Judgment in the matter of *Anil Kak V.s Kumari Shradhha Raje and ors* in support of its claim under Change in Law provisions. The said Judgment states that for referring the definition from one document in another document, the document from which definition is sought to be incorporated must be in existence and cannot be brought into existence later. Hence, definition of Acquisition Price in TSA cannot be restricted to the definition of Acquisition Price in SPA as SPA was not in existence at the time of TSA.
- 13** The Respondents while opposing the claims of the Petitioner have stated that:
- 13.1 SPA dated 25.06.2020 defines the Acquisition Price of the SPV as Rs. 152.65 Crore. TSA defines the Acquisition Price as defined in the SPA i.e., Rs. 152.65 Crore. Hence, there is no change in Acquisition Price as per the SPA and hence no Change in Law.
- 13.2 BPC has transferred the documents to the Petitioner on as-is-where-is basis so that the Petitioner may take further actions to obtain Consents, Clearances and Permits. The acquisition of the land for the Project is liability of the Petitioner. Hence, amount paid to the Godrej by the Petitioner is not justified as Acquisition Price and has not resulted into Change in Law.
- 13.3 Increase in Acquisition Price of the Project is an event of Change in Law in case the price increase takes place between 7 days prior to Bid Deadline up to the date when the Acquisition Price is paid by the Selected Bidder i.e., up to Closing date i.e., 25.06.2020 as per SPA. SPV has been acquired by the Petitioner on 25.6.2020. The Petitioner has paid Rs. 71.70 Crore to Godrej on 7.7.2020 post acquisition of SPV and hence it is not a Change in Law.
- 13.4 The amount paid by the Petitioner to the Godrej to obtain the NOC of the Vikhroli land is difference in the old circle ready reckoner rate and the latest rate at the time of obtaining the NOC of Godrej by the Petitioner. The payment to the Godrej cannot be a Change in Law as there is no new law after the bid date.
- 13.5 Acquisition Price is payable by ATL for acquiring the assets and liabilities of KVTPL as on closing date. However, the amount of Rs.71.70 Crore paid to the Godrej was neither assets nor liability of the Petitioner.

- 13.6 No bidder has raised issue regarding any encumbrance on the land parcels in the pre-bid meeting and clarifications thereof which was their responsibility.
- 13.7 BPC had shared agreement between Godrej and TPC-T dated 30.07.2011 in respect of Godrej land as part of the documents furnished to the bidders. The said agreement categorically mentions that NOC shall be obtained from Godrej for transfer of Vikhroli land to the SPV. The Petitioner was well aware of this fact.
- 13.8 State Empowered Committee for TBCB has not considered the additional cost of Rs. 71.70 Crore and merely recommended Petitioner to approach the Commission for claiming the same under Change in Law. The Petitioner has delayed approaching the Commission. Hence, Rs. 71.70 Crores paid to M/s Godrej for transfer of land does not fulfil the condition of Change in Law.
- 14 The Commission notes that the claims and counter claims of the Parties in the Petition are based on the provisions of the RFQ, RFP, TSA, SPA and various correspondences between the Parties. Hence, it is imperative to summarize the relevant contentious provisions of the bidding documents kept on the record by the parties.

A) Provisions of the RFQ dated 20.04.2019 issued by BPC:

- 14.1 Clause 1.6 of the RFQ dated 20.04.2019 provides the brief scope of work to be executed by TSP, activities to be completed such as arranging finance, project management, obtaining consents, clearances including land compensation.
- 14.2 The Clause 1.6.2 of the RFQ provides for the expenditure to be incurred by the BPC for arranging the approvals or consent including acquisition of land to be recovered from TSP, which is KVTPL in the present case. The relevant provisions are as follows:

“1.6.2 Scope of Bid Process Coordinator (BPC)

1.6.2.1 To obtain approval for laying of overhead transmission lines under section 68 of Electricity Act, from Appropriate Government.

1.6.2.2 BPC or its authorized representative may arrange to carry out the following activities to expedite the Project.

a) To initiate acquisition of land for location specific substations and/or switching stations b) To initiate process of seeking forest clearance, if required.

*1.6.2.3 The details and documents as may be obtained by the BPC in relation to the Project shall be **handed over to the TSP on as-is-where-is basis, so that it may take further actions to obtain Consents, Clearances and Permits. ---***

1.7 All costs (including direct and indirect) incurred by the BPC in connection with the activities concerning the Project shall be recovered from the TSP, details of which will be provided during the RFP stage.”

14.3 From the above provisions it is clear that the cost incurred by BPC towards the project are recoverable from the TSP. Further, as the 400 kV Vikhroli Scheme being a brown field project, the documents related to the project, be handed over by BPC to TSP were on as-is-where-is basis, based on which TSP may take further action in obtaining consents, clearances and permits.

B) Provisions of the RFP dated 22.06.2019 issued by BPC:

14.4 Clause 1.8 of the RFP dated 22.06.2019 provides that the documents obtained by BPC in relation to the project shall be handed over to the Successful Bidder on ‘as is where basis, so that to obtain all necessary Consents, Clearances and Permits.

“ 1.8 Once the Successful Bidder is selected, the details and documents as may be obtained by the BPC in relation to the Project, shall be handed over to the Successful Bidder on as is where basis, so that it may take further actions to obtain all necessary Consents, Clearances and Permits and the TSP shall not be entitled for any extensions in the Scheduled COD of the Project except as provided for in the TSA.”

14.5 Clause 2.14.2 of the RFP provides that it was the bidders responsibility to make independent enquiry and satisfy themselves with respect to all the required information, inputs, conditions and circumstances and factors that may have any effect on his Bid .

“2.14.2 Bidders to inform themselves fully

2.14.2.1 The Bidders shall make independent enquiry and satisfy themselves with respect to all the required information, inputs, conditions and circumstances and factors that may have any effect on his Bid. Once the Bidders have submitted their Bids, the Bidders shall be deemed to have inspected and examined the site conditions (including but not limited to its surroundings, its geological condition and the adequacy of transport facilities to the site), the laws and regulations in force in India, the transportation facilities available in India, the grid conditions, the adequacy and conditions of roads, bridges, railway sidings, ports, etc. for unloading and/or transporting heavy pieces of material and has based its design, equipment size and fixed its price taking into account all such relevant conditions and also the risks, contingencies and other circumstances which may influence or affect the transmission of power. Accordingly, each Bidder acknowledges that, on being selected as Successful Bidder and on acquisition of one hundred percent (100%) of the equity shares of the Kharghar Vikhroli Transmission Private Limited, the TSP shall not be relieved from any of its obligations under the RFP Project Documents nor shall the TSP be entitled to any extension in Scheduled COD mentioned in this RFP or financial compensation for any reason whatsoever.

2.14.2.3 Bidders may visit the route of the Transmission Lines associated with the Project and the surrounding areas and obtain / verify all information which they deem fit and necessary for the preparation of their Bid.

2.14.2.5 Failure to investigate the route of the Transmission Lines associated with the Project and to examine, inspect site or subsurface conditions fully shall not be grounds for a Bidder to alter its Bid after the Bid Deadline nor shall it relieve a Bidder from any

responsibility for appropriately eliminating the difficulty or costs of successfully completing the Project.

2.14.2.6 The Selected Bidder shall obtain all necessary Consents, Clearances and Permits as required. The Bidders shall familiarize itself with the procedures and time frame required to obtain such Consents, Clearances and Permits.

C) Provisions of the TSA signed between the Petitioner/SPV and LTTCs:

14.6 TSA dated 14.08.2019 between KVTL and LTTCs defines the Site and Obligation of TSP in development of the project as follows:

“ 4.1 TSP's obligations in development of the Project Subject to the terms and conditions of this Agreement, the TSP at its own cost and expense shall observe, comply with, perform, undertake and be responsible:

a. for procuring and maintaining in full force and effect all Consents, Clearances and Permits, required in accordance with Law for development of the Project;---

5.1.4 The TSP shall be responsible for:

(a) acquisition of land for location specific substations, switching stations or HVDC terminal or inverter stations (if required);----

(d) seeking access to the Site and other places where the Project is being executed, at its own costs, including payment of any crop compensation or any other compensation as may be required.

14.7 The provisions of the TSA categorically provide that acquisition of the land, obtaining the consents and clearances etc. is the responsibility of the selected bidder (the Petitioner).

D) Provisions of the SPA dated 25.06.2020:

14.8 Clause 5 of the SPA provides the obligations of the Petitioner as follows:

“ The Selected Bidder agrees that the Shares Seller shall not be liable in any manner, nor shall it assume any responsibility or liability whatsoever, in respect of the business of the Company and its operations or activities arising after the closing date , to any Person or any authority ,central ,state , local or municipal or otherwise and the same shall be the sole responsibility of the Selected Bidder. ”

14.9 The above provisions of the RFQ and RFP, TSA, SPA clarify and define the responsibilities of the TSP (Petitioner) and BPC which includes:

- i. Acquisition of location specific land, to obtain permit, consents, clearance and approvals for laying overhead line , payment of land compensation ,finance, project management, etc.
- ii. To visit and inspect the site and be aware of the facts.

- iii. The documents related to the Project provided by BPC to TSP were ‘as is where basis’ to obtain further necessary Consents, Clearances and Permits and payment of land and crop compensation at its own cost.
- iv. Further, any expenditure incurred by BPC for acquisition of land and clearances etc. is recoverable from the TSP.

15 The Commission notes that before awarding the project under TBCB to the Petitioner, it was being executed by TPC-T under Section 62 of the EA,2003. Also, the scheme was duly approved by the STU and the Commission. However, because of inordinate delay in execution by TPC-T, the scheme was deemed closed and it was decided to execute it through TBCB route. Meanwhile, TPC-T had incurred certain expenses towards land procurement, various approvals, statutory charges etc. against Vikhroli Project. Hence, Vikhroli project was a brown field project where part expenses towards some expense head were incurred by TPC-T. As a consequence, during correspondences between Petitioner, MSETCL, TPC-T, Commission, Godrej it was revealed that TPC-T had incurred Rs. 135.44 Crore for various works of the project. The detailed bifurcation of the expenses incurred by TPC-T is as follows:

A	400kV Kharghar Vikhroli Line Project	
SN	Item	Rs. Cr
1	Purchase of Land at Kharghar	44.68
2	Statutory Payment for Stage-I Forest clearance	9.84
3	Payment to CIDCO for CC of Kharghar Building	0.73
4	All type of survey related expenses	2.15
5	Engineering Consultancy	0.44
6	Site Development Expenses	1.56
7	IDC, Interest, Staff Cost, Preliminary Expenses, Security & other Misc	14.35
	Total	73.75
B	400kV Vikhroli Receiving Station Project	
SN	Item	Rs. Cr
1	Expenditure incurred for Ghatkopar (Package Substation, Statutory Payment to MCGM (for CC & others) CRZ application expenses etc),	1.77
2	Expenditure incurred for Vikhroli (Statutory payment to MCGM for CC & others etc.)	3.47
3	Expenditure incurred for 400kV Cable job permission (Statutory payment towards Reinstatement charges, Ground Rent, Security Deposit & Bank Guarantee charges)	5.05
4	Purchase of Land (excluding stamp duty & registration costs) (Land Parcel "A")	26.00
5	Engineering Consultancy	3.00
6	Site Development Expenses	2.80