

**Before the**  
**MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**  
**World Trade Centre, Centre No.1, 13th Floor, Cuffe Parade, Mumbai 400005**  
**Tel. 022 22163964/65/69 Fax 22163976**  
**Email: mercindia@merc.gov.in**  
**Website: [www.merc.gov.in](http://www.merc.gov.in)**

**Case No. 174 of 2022**

**Petition of M/s Juniper Green Field Private Limited seeking compensation on account of Change in Law events.**

M/s Juniper Green Field Private Limited (JGFPL)..... : Petitioner

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

**Coram**

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

**Appearance:**

For the Petitioner : Mr. Vishrov Mukerjee (Adv.)

For the Respondent : Mr. Ravi Prakash (Adv.)

**ORDER**

**Date: 27 May, 2023**

1. M/s. Juniper Green Field Private Limited (JGFPL) has filed the present Petition on 8 September 2022 seeking approval for 'Change in Law' under Article 9 of the Power Purchase Agreement (PPA) dated 8 January 2020 and an appropriate mechanism for grant of an adjustment/ compensation to offset financial/ commercial impact of change in law event(s).

**2. Prayers of JGFPL are as follows:**

- “
- a) *Hold and declare that change and increase of Basic Customs Duty on Solar Inverters pursuant to Ministry of Finance, Government of India’s notification dated 01.02.2021, bearing No. 7/2021-Customs amounts to Change in Law event under Article 9 of the PPA;*
  - b) *Hold and declare that change and increase in rate of GST applicable on solar panels/ modules and other solar operated devices pursuant to Ministry of Finance, Government of India’s notification dated 30.09.2021 bearing Notification No. 8/2021-Integrated Tax (Rate) amounts to Change in Law event under Article 9 of the PPA;*
  - c) *Direct MSEDCL to reimburse the Petitioner for the corresponding increase in the Project cost on account of increase in GST rates and Basic Customs Duty along with Carrying Cost;*
  - d) *Pass such further order as the Hon’ble Commission may deem just in the facts of the present case.*
- ....”

**3. JGFPL in its Petition stated as follows:**

- 3.1. MSEDCL issued Request for Selection (RfS) for procurement of 500 MW Solar power from Intra-State Solar Power Projects through Competitive Bidding on 06 November 2019. The last date for submission of bid to RfS was 30 November 2019.
- 3.2. MSEDCL issued a letter of Award (LOA) to Juniper Green Energy Pvt. Ltd. on 8 January, 2020 for development of the solar power project of 150 MW capacity located in Maharashtra.
- 3.3. The details of the solar power projects as mentioned in the LOA are given below:

<b>Capacity Awarded</b>	<b>Project Location</b>
80 MW	Shirur Arni District- Yavatmal , State: Maharashtra
70 MW	Tighra Malkapur District- Buldhana , State: Maharashtra

- 3.4. MSEDCL and JGFPL executed the Power Purchase Agreement (PPA) for supply of power from Project on 10 February 2020. The effective Date under the PPA was 10 February, 2020 and the Scheduled Date of Commercial Operations (SCOD) was 9 August, 2021. However, due to the first and second wave of Covid-19 and imposition of subsequent lockdowns, the timelines under the PPA were extended:

- i. By way of first amendment agreement dated 01 September, 2021, the Effective Date under the PPA was extended to 18 September, 2020 (considering actual date of handover of PPA by MSEDCL to JGFPL) and the SCOD of the Project was extended to 17 March, 2022.
  - ii. By way of letter dated 22 September, 2021, the SCOD of the Project was again revised to 1 June, 2022.
- 3.5. JGFPL has filed the present Petition seeking approval for 'Change in Law' under Article 9 of the Power Purchase Agreement (PPA) dated 8 January 2020 and an appropriate mechanism for grant of an adjustment/ compensation to offset financial/ commercial impact of following change in law event(s).
- 3.6. **Increase in expenditure on import of inverters on account of rescission of Notification No. 1/2011-Customs dated 06 January 2011**
- a) The Central Government vide its Notification No. 1/2011- Customs dated 06 January 2011 had exempted all items of machinery, including prime movers, instruments, apparatus and appliances, control gear and transmission equipment and auxiliary equipment (including those required for testing and quality control) and components, required for the initial setting up of a solar power generation project or facility, when imported into India, from so much of the duty of customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), as is in excess of 5% ad valorem, and from the whole of the Additional Duty of Customs leviable thereon under section 3 of the said Customs Tariff Act subject to certain conditions.
  - b) However, the Central Government vide Notification No. 7/2021 - Customs dated 01 February 2021 rescinded an earlier Notification 1/2011. Consequently, the exemption provided for by Notification 1/2011, which levied a basic customs duty of 5% ad valorem on import of solar inverters, was no longer available to RSBPL and hence, the basic customs duty imposed on solar inverters increased to 20% ad valorem upon operation of Chapter 85 of the First Schedule to the Customs Tariff Act, 1975.
  - c) The Ministry of New and Renewable Energy (MNRE), vide its Office Memorandum dated 25 February 2021 stopped processing of applications in relation to concessional customs duty certificates consequent to the rescission of Notification No. 1/2011.
  - d) Additionally, the increase in rate of Basic Customs Duty levied on import of machinery and auxiliary equipment for the initial setting up of solar power generation project has

directly increased the quantum of Social Welfare Surcharge, payable under Section 110 of the Finance Act, 2018, on such import, which is fixed at a rate of 10% on aggregate duties and taxes which are levied and collected by the Central Government under Section 12 of the Customs Act, 1962.

- e) Lastly, the increase in rate of Basic Customs Duty and the quantum of Social Welfare Surcharge imposed thereon has led to an increase in the quantum of integrated goods and Services Tax (IGST) payable under Section 5 of the Integrated Goods and Services Tax Act, 2017 (IGST Act) on such import by JGFPL, which is fixed at 5% of the Basic Customs Duty coupled with the social welfare surcharge.
- f) The following table illustrates the impact of increase in total duty on the import of solar inverter:

Duty, surcharge, and Tax imposed	Regime when Notification No. 1/2011-Customs dated 06.01.2011 was in operation. (06.01.2011– 01.02.2021)	Regime when Notification No. 7/2021-Customs dated 01.02.2021 rescinded Notification 01/2011 (02.02.2021 – till date)	Net increase in rate of tax
Basic customs duty (BCD)	5.00%	20.00%	15.00%
Social welfare surcharge (SWS) on BCD	0.50%	2.00%	1.50%
IGST (on BCD + SWS)	0.28%	1.10%	0.83%
<b>Total Duty</b>	<b>5.78%</b>	<b>23.10%</b>	<b>17.33%</b>

- g) On 17 February 2021, JGFPL issued Notice for Change in Law to MSEDCL notifying the increase in rate of BCD being levied on import of Solar Inverters in reference to MoF Notification dated 01 February, 2021, in accordance with Article 9 of PPA dated 10 February, 2020.

- h) The total impact on the Project account of increase in BCD to 20% is Rs.3,28,08,868.

**3.7. Introduction of Notification No. 8/2021- Central Tax (Rate) dated 30 September, 2021 which has increased the rate of GST from 5% to 12% on Renewable Energy devices and parts for their manufacture qualifies as a Change in Law under Article 9.1:**

- a) The power to levy Goods and Service Tax vests with the Central Government in terms of Section 9 of the Central Goods and Services Tax Act, 2017 (CGST Act). 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) dated 30 September 2021 which has increased the rate of GST from 5% to 12% on renewable energy parts. Thus, with effect from 01 October 2021, supply of all renewable energy devices and parts for their manufacture, including modules and solar power generators would be leviable to 12% GST vis-à-vis the earlier lower rate of 5% GST.

- b) Thus, basis the above, the increase in rate of GST, pursuant to the Notification No. 8/2021- Central Tax (Rate) dated 30 September 2021 would qualify as a Change in Law event in terms of the PPA in as much as such increase in rate of GST by virtue of the recent Notification would be covered by the phrase any in rates of taxes, duties and cess which have direct effect on the Project. Thus, the increase in rate of GST would qualify as a change in law event under the fifth bullet of Article 9.1 of the PPA.
- c) Alternatively, it is submitted that the increase in rate of GST, pursuant to the Notification No. 8/2021- Central Tax (Rate) dated 30 September 2021 is in the nature of an enactment of a new law in as much as the same has been imposed by a notification of the Ministry of Finance. Thus, the increase in rate of GST would also qualify as a change in law event under the first bullet of Article 9 of the PPA.
- d) On 04 October 2021, JGFPL issued GST Change in Law Notice under Article 9.3 of the PPA notifying MSEDCL that the GST Notification dated 30 September 2021 qualifies as Change in Law in terms of Article 9 of the PPA.
- e) The total impact on the Project on account of increase in GST from 5% to 12% is Rs. 37,36,29,243/-.

3.8. On 25 November, 2021, JGFPL intimated MSEDCL financial closure of the Project had been achieved and submitted the documents as per Clause 3.13. of the RfS and Article 3.1.(ii) of the PPA.

3.9. On 23 February, 2022, Second Amendment Agreement was executed between Juniper Green Field Pvt. Ltd. and MSEDCL wherein the PPA was amended with respect to the location details as set out in Schedule 6. The location detail in Schedule 6 was revised as follows:

S. No.	Location	Capacity (MW)	Voltage Level	Name of Substation
1.	Shirpur, Arni, Dist. Yavatmal	80	132 KV	132 kV Arni
2.	Tighra, Malkapur, Dist. Buldhana	70	132 KV	132 kV Malkapur

- 3.10. On 01 June 2022, JGFPL successfully commissioned 80 MW of the Project located at village Shirpur, Taluka Arni, District Yavatmal and was issued a commissioning certificate by MSEDCL for the same.
- 3.11. Thereafter, on 08 August, 2022, JGFPL successfully commissioned the remaining 70 MW of the Project located at Village – Tighra, Taluka- Malkapur, District Buldhana, thereby achieving complete commissioning of the Project and was issued a commissioning certificate by MSEDCL for the same.
- 3.12. If the increase in rate of CGST/IGST, and rescission of Notification 01/2011 qualifies as an event of change in law under Article 9.3 of the PPA, JGFPL is entitled to relief under Article 9.3 of the PPA. Article 9.3 provides that the aggrieved party shall be required to approach the Commission for seeking approval of Change in Law.
- 3.13. Relief for Change in Law & Carrying Cost:**
- a) As per Article 9.2.1 of the PPA, in the event that a Change in Law results in any adverse financial loss to JGFPL, then in order to ensure that JGFPL is placed in the same financial position as it would have been had it not been for the occurrence of the Change in Law events, then JGFPL shall be entitled to compensation. The quantum and mechanism of such compensation shall be determined by the Commission.
  - b) Underlying principle of Article 9.2.1 of the PPA is to compensate a party affected by a Change in Law such that the party is restored to the same economic position as if such change in law had not occurred. Therefore, in addition to the compensation for actual amounts incurred by JGFPL on account of the change in law events, JGFPL is also entitled to carrying cost.
  - c) It is settled position of law that whenever payments are deferred or delayed, then carrying cost is payable along with such deferred payments. Carrying Cost is nothing but compensation for time value of money or monies denied at the appropriate time. Further, it is submitted that Article 9 of the PPA itself provides that to mitigate the impact of Change in Law, a party is to be restituted to the same economic position as if such Change in Law event had not occurred.
- 3.14. In accordance with Article 9.2 of the PPA, JGFPL ought to be compensated for the Change in Law events along with Carrying Cost.

**4. MSEDCL, in its submission dated 24 November 2022 has stated the following:**

- 4.1. The 150 MW solar project was commissioned for 80 MW (1 June, 2022) & 70 MW (8 August, 2022).
- 4.2. The Notice in respect of reimbursement of increase in Safe Guard Duty (SGD) and Basic Custom Duty (BCD), being the Change in Law event due to the Notification dated 01 February 2021, was given on 17 February 2021 i.e., after 10 days, which substantially exceeds beyond the reasonable time contemplated under provisions of PPA.
- 4.3. JGFPL was delayed by 10 days in issuing a Change in Law Notice whereas the PPA specifically provides that the notice has to be issued within 7 days and thus, the claim of JGFPL with respect of BCD ought not to be considered by the Commission and may be dismissed.
- 4.4. Further, it is submitted that Hon'ble the Appellate Tribunal for Electricity in the case of *Maruti Clean Coal and Power Limited v. Power Grid Corporation of India Limited and Anr [2017 SCC On-Line APTEL 70]*{paragraph 12 to 15}, has categorically held that a party claiming relaxation/compensation, citing an event under an agreement, is mandatorily required to fulfil such pre-requisite as mentioned in the corresponding Article of the respective agreement.
- 4.5. The claim of JGFPL regarding the increase in GST was effectuated vide Government of India Notification dated 30 September 2021. JGFPL gave notice regarding the same, i.e., Change in Law event, vide its Notice dated 04 October 2021 which falls within the time limit/ parameters as stipulated under Clause 9.3.1 of the PPA. On verification of documents submitted along with the Petition seeking benefits under above change in law event, MSEDCL observed that following documents are yet to be submitted by JGFPL:
  - (a) Chartered Accountant (CA) certificate for evaluation of financial impact due to Change in Law,
  - (b) The Contracts and Purchase orders with importer and other vendors for procurement of Modules and Material,
  - (c) Packing List with invoice,
  - (d) Bill of lading in case of imports,
  - (e) Goods receipt notes & LRs copies,
  - (f) The documents required are as follows to verify GST payment
    - i. GST payment challans.
    - ii. GSTR-1, GSTR-2B
  - (g) CA/CMA Certified material utilization certificate and closing stock report as on COD to verify whether all material procured are utilized for said project or not.

- 4.6. MSEDCL communicated JGFPL regarding the requirement of these documents on 22 November, 2022.
- 4.7. It is submitted that on the last day of bid submission, Safeguard duty as per notification no. 01/2018 dated 30 July, 2018, on the import of solar module was applicable. As per said notification the safeguard duty at following rate was applicable.

<b>Period</b>	<b>Rate</b>
30/07/2018 to 29/07/2019	25%
30/07/2019 to 29/01/2020	20%
30/01/2020 to 29/07/2020	15%

- 4.8. Furthermore, the imposition of safeguard was further extended by GOI vide notification no. 02/2020 dated 29 July, 2020 till 29 July, 2021. As per said Notification the rate are as follows:

<b>Period</b>	<b>Rate</b>
30 July, 2020 to 29 January, 2021	14.9%
30 January, 2021 to 29 July, 2021	14.5%

- 4.9. From the data provided by JGFPL, the Solar Modules were imported in period from January, 2022 to March 2022. i.e., after repeal of Safeguard Duty. Hence as per article 9.2.1, gain arising due to non-applicability of Safeguard Duty, the same ought to be passed by JGFPL to MSEDCL. It is submitted that considering safeguard duty at the rated of 15%, i.e., rate applicable at the time of bid submission, then gain of Rs. 69.07 crores ought to be passed on by JGFPL to MSEDCL.
- 4.10. Without prejudice to its submission, MSEDCL stated that the Commission has already come out with a mechanism and modality for compensation of change in law through its recent Orders. JGFPL in its Petition is seeking to be placed in same financial position as it would have been, had it not been for the occurrence of the Change in law event. JGFPL is conveniently hiding the details of financial model used by it to arrive at the bid Tariff and further with respect to carrying cost has also not furnished any actual details. The same cannot be the case.
- 4.11. JGFPL has submitted that the carrying cost is the compensation for the time value of money. MSEDCL submits that the PPA is a sacrosanct document which provides for “Late Payment Charge” @ 1.25% in case of delay in payment of bills. There cannot be any other penalty in the form of additional interest which is not provided in the PPA. In the present case, no delay is there in payment of “Change in Law” bills as the same still needs to be approved by the Commission and raised by JGFPL on MSEDCL. Hence a claim of interest is not only fallacious but farcical as well.



- 4.12. The very purpose of imposing the Basic Custom Duty is to promote the domestic industry and discourage the import from foreign nations. However, this very purpose is defeated when the impact of Basic Custom Duty is allowed to pass through in the tariff or directions being passed to compensate the generator to that extent.
- 4.13. Therefore, the Commission shall seek strict proofs from JGFPL to show that it has done due diligence while coming to the conclusion on going for procurement from China in case supplied by Indian manufactures were not competitive for it.
- 4.14. In view of these submissions, it is evident that the claim of JGFPL in respect of Basic Custom Duty is not maintainable and ought to be dismissed. It is further humbly submitted that considering that due Notice as per the provisions of the PPA was given by JGFPL with regard to Change in Law event due to increment in GST, MSEDCL will complete prudence check once JGFPL responds to the queries raised by MSEDCL during the evaluation of claims submitted by JGFPL in the Petition.

**5. JGFPL in its Rejoinder dated 30 November 2022 stated as below:**

- 5.1. JGFPL submits that the MoF Notification dated 01 February, 2021 levying Basic Custom Duty on the import of Solar Inverters existed in public domain.
- 5.2. Regarding the contention of MSEDCL that Change in Law notice has to be issued within 7 days, it is submitted that the requirement of PPA is to notify within 7 days after becoming aware of the Change in Law event or should have reasonably known of Change in Law event and not within 7 days from notification of Change in Law. It is submitted that notice was served in reasonable time. JGFPL is not expected to become aware on date of notification withdrawing the exemption in this case, as this has been done as part of overall budgetary exercise where there were several notifications issued simultaneously. It takes time to get information, analyse the same and its implications. Once JGFPL became aware of withdrawal of the exemption and after carefully understanding implications, JGFPL duly notified MSEDCL within short time. It is further submitted that notice requirement for claiming a change in law is directory and not mandatory. Delay in providing a Notice for change in law does not disqualify JGFPL from claiming change in law.
- 5.3. Admittedly, MSEDCL responded to JGFPL's Change in Law notice dated 17 February 2021 on 22 November, 2022 seeking additional documents. Therefore, MSEDCL sought to proceed on the merits of JGFPL's claim. This procedural requirement of Notice not having been served within 7 days was not raised contemporaneously and at the first instance. Therefore, the contention raised by MSEDCL in the reply is clearly an afterthought and the same cannot be countenanced.

5.4. Without prejudice to the foregoing, it is submitted that the purpose of the notice is to apprise the other party about the occurrence of an event in reasonable time. It is pertinent to note that Courts have accepted the theory of ‘empty formality’ holding that requirement of notices, may be done away with if it would not have served any purpose and not prejudiced either party:

(a) *Haryana Financial Corporation v. Kailash Chandra Ahuja*, (2008) 9 SCC 31 (Para 40)

(b) *DLF Universal Ltd. v. Atul Ltd.*, (2010) 51 GLR 762 (Para 24) 10.

5.5. Even otherwise, the requirement of sending a notice of Change in Law event under the PPA is a procedural requirement to intimate the other party of the occurrence of the Change in Law event. MoF Notification dated 01.02.2021 was issued by Government of India and therefore, was available in public domain. The alleged non-fulfilment of the said procedural requirement in 7 days from the date on which the notification was issued cannot take away the substantive rights of JGFPL under the PPA for claiming relief on account of Change in Law events. In any case reasonable notice was admittedly served on MSEDCL after JGFPL became aware of the Change in Law event. JGFPL relied on: [Sambhaji vs. Gangabai: (2008) 17 SCC 117 (Paras 10, 13, 14); Mahadev Govind Gharge v. Land Acquisition Officer: (2011) 6 SCC 321 (Para 37)]. The alleged minor delay in issuing the notice does not act as bar for claiming change in law.

5.6. Reliance is placed by MSEDCL on *Maruti Clean Coal and Power Limited v. Power Corporation of India Limited and Anr.* (2017) SCC On-Line APTEL 70, which relied upon the Order dated 31 January, 2013 passed by Hon’ble the APTEL in *Himachal Sorang Power Ltd. v. CERC & Ors.*, is incorrect and differentiable on facts. In the aforesaid Judgment, the Appellant therein claimed relief on account of force majeure event.

5.7. In a similar case in *Parampujya Solar Energy Pvt. Ltd. v. Central Electricity Regulatory Commission*, Appeal No. 256 of 2019 (Judgment dated 15 September, 2022) Hon’ble the APTEL upheld the decision of the Central Electricity Regulatory Commission in allowing imposition of GST as a change in law. For a similarly worded PPA (requiring 7 days’ notice to be given for claiming change in law), the generating company gave a change in law notice on 15 July, 2017 when the GST Act was notified on 01 July, 2017 i.e., after delay of 7 days. In spite of this, both the CERC and Hon’ble the APTEL decided the change in law claims on merits. Therefore, in the past also courts have considered change in law claims if notices have been given beyond the contractually provided period of 7 days.

- 5.8. **Computation for increase in GST to be computed by the Commission:** MSEDCL has contended that it is in the process of verification of Juniper's claims towards increase in GST. It is submitted that the issue is now before the Commission and all documents / computations have already been placed on record by JGFPL. Therefore, now it is for the Commission to compute the compensation payable by MSEDCL to JGFPL in terms of Article 9 of the PPA.
- 5.9. The computation of claims cannot be left to mutual resolution of parties and the Commission is required to compute and decide the amounts due to the generating company in light of the judgments of the Hon'ble the APTEL in the matter of *D.B. Power Ltd. V. Central Electricity Regulatory Commission and Anr. Appeal No. 56 of 2020 (Judgment dated 04.02.2021)*
- 5.10. Therefore, based on the documents supplied by JGFPL, it is prayed that the Commission may be pleased to compute the compensation payable to JGFPL on account of increase in GST as a change in law event. JGFPL undertakes to file any additional documents that may be required / called for by the Commission for computation of compensation.
- 5.11. JGFPL has already supplied following documents to establish its claim as well as the computation of compensation:
- a) Bills of Entry for import of solar inverters for domestic consumption dated 10 March, 2022
  - b) Bill of lading for import of solar modules, where actual import was after January 2022.
  - c) Bills of entries as certified by Indian Customs.
  - d) Invoices for import of other Project equipment.
- 5.12. All the aforesaid invoices and bills have already been placed on record by JGFPL along with the Petition as Annexures.
- 5.13. Therefore, it is stated that no further documents are required to be provided by JGFPL to establish its claims. Further, MSEDCL's request for supplying additional documents is merely a dilatory tactic by MSEDCL to delay payment of compensation to JGFPL.
- 5.14. **Late payment surcharge cannot be equated with carrying cost:** . MSEDCL has wrongly construed that Late Payment Surcharge (LPS) is synonymous with carrying cost. LPS is payable when payment against monthly bills is delayed and not otherwise (being envisaged for short period delays). Whereas carrying cost is compensation for time value of money.

- 5.15. The issue of carrying cost is no longer res-integra as Hon'ble the Supreme Court in Uttar Haryana Bijli Vitran Nigam Limited & Anr. v. Adani Power (Mundra) Limited & Ors. (2019) 5 SCC 325 (Para 9-10, 13, 19) ("SC Carrying Cost Judgment") has already held that the compensation for Change in Law is a restitutionary principle in terms of which carrying cost is to be included in the compensation for Change in Law. Further, Hon'ble the Supreme Court in Uttar Haryana Bijli Vitran Nigam Limited & Anr. v. Adani Power (Mundra) Limited & Anr.: (2022) SCC OnLine SC 1068 (Para 15-17, 19) reiterated the SC Carrying Cost Judgment and further held that rate of carrying cost must be on compound basis as the provision is aimed at restituting a party and has to be read in the correct perspective. The said principle governs compensating a party for the time value for money and the only manner in which a party can be afforded the benefit of restitution in every which way is the very same principle that would be invoked and applied for grant of interest on carrying cost on account of a Change in Law event.
- 5.16. Article 9 of the PPA itself provides that to mitigate the impact of Change in Law, a party is to be restituted to the same economic position as if such Change in Law event had not occurred. It is further submitted that 'economic position' does not limit itself to a simple correlation of increased expenditure and a corresponding compensation amount. Relief under the Change in Law has to take into consideration the actual economic impact of such a Change in Law event.
- 5.17. LPS cannot be equated with carrying cost as LPS has no bearing on Tariff whereas restitution principle as envisaged in Change in Law provisions of the PPA is attracted in respect of Tariff. Hon'ble the Supreme Court in Maharashtra State Electricity Distribution Company Limited vs. Maharashtra Electricity Regulatory Commission & Ors. (2022) 4 SCC 657 has held as under:

*"174. As argued by the Respondent- Power Generating Companies appearing through Mr. Rohatagi, Mr. Singhvi, Mr. Mukherjee and Ms. Anand respectively, LPS is only payable when payment against monthly bills is delayed and not otherwise.*

*175. The object of LPS is to enforce and/or encourage timely payment of charges by the procurer, i.e. the Appellant. In other words, LPS dissuades the procurer from delaying payment of charges. The rate of LPS has no bearing or impact on tariff. Changes in the basis of the rates of LPS do not affect the rate at which power was agreed to be sold and purchased under the Power Purchase Agreements. The principle of restitution under the*

*Change in Law provisions of the Power Purchase Agreements are attracted in respect of tariff.*

*176. LPS cannot be equated with carrying cost or actual cost incurred for the supply of power. ...”*

- 5.18. The claim arising out of Change in Law provisions, is essentially a claim for compensation, the objective being to relieve the affected party of the impact of change in law on its revenues or cost or by way of additional expenditure, as held by the Hon’ble the APTEL in Judgement dated 15 September, 2022, in the matter of Parampujya Solar Energy Private Limited & Anr. vs. Central Electricity Regulatory Commission.
- 5.19. In view of the above, it is submitted that MSEDCL has erroneously construed that LPS is synonymous with carrying cost and the same contention is misplaced as it is a settled law that LPS cannot be equated with carrying cost as LPS has no bearing on tariff whereas restitution principle as envisaged in Change in Law provisions of the PPA is attracted in respect of Tariff.
- 5.20. **Impact of Safeguard Duty:** MSEDCL has raised the issue that JGFPL shall refund an amount of Rs. 69.07 Crores since it has imported the Solar Modules after January 2022 i.e., after the SGD of 14.5% was withdrawn. Therefore, gains made by JGFPL ought to be passed on to MSEDCL. It is submitted that the present Petition is limited to two claims made by JGFPL i.e., change on rate of BCD and change in rate of GST. The issue of refund of SGD is not a cause of action in the present Petition and ought not be considered by the Commission.
- 5.21. Even otherwise, without prejudice, it is submitted that MSEDCL’s claim is misplaced since it is based on wrong interpretation of law. As per the prevalent industry practices, the supply of solar modules is usually planned closer to the date of commissioning of the project, post completion of land acquisition and major project works. Since the scheduled commissioning date of the project was much later, the supply of modules was planned near the original SCOD i.e., 09 August, 2021. MSEDCL cannot claim any undue benefit in view of SGD notification on the bid deadline date since said notification also provide for last date till which SGD applies, i.e., 29 July, 2020 and so, SGD was not applicable thereafter even on the bid deadline date.
- 5.22. The bid deadline date (the date from which the change in law event has to be reckoned) in the present case was 12 December, 2019. As on the bid deadline, the SGD was to be

effective only for imports up to 29 July, 2020. It is submitted that the SCOD as envisaged at the time of the execution of the PPA was 09 August, 2021 i.e., more than one year after the original SGD applicability date (i.e., 29 July, 2020). Therefore, having adequate time to import modules after 29 July, 2020, JGFPL did not factor any SGD. Now when the solar modules have been imported after January 2022, in the present dispensation, no SGD is applicable and accordingly the same was not considered. Therefore, there is no effect on the economic position since at the time of execution of the PPA and at the time of actual commissioning, SGD considered was nil in view of imports being envisaged after the date when SGD became inapplicable. This is based on commercial prudence. Hence, JGFPL is not liable to return any amounts as claimed by MSEDCL.

5.23. MSEDCL contentions regarding JGFPL to show that it has done due diligence while coming to the conclusion on going for procurement from China in case supplied by Indian manufactures were not competitive for it are misplaced and erroneous. It is pertinent to mention that the claims raised by JGFPL for the Change in Law events are in accordance with Article 9 of the PPA. The decision to import from China is based on commercial prudence. Therefore, once a contractual right has been established, JGFPL cannot be denied on the basis of equity.

5.24. Hon'ble the APTEL in Appeal No. 215 of 2021 in the matter of Tata Power Renewable Energy Limited v. Maharashtra Electricity Regulatory Commission & Anr., has held that relief for change in law cannot be denied merely because another business model commends itself better.

## **6. During the hearing held on dated 02 December 2022:**

6.1. The advocate of Respondent, MSEDCL submitted that though there was little delay from Petitioner JGFPL in giving Notice of the Change in Law on account of Basic Custom Duty, he is not pressing the issue of delay and was leaving it to the Commission to decide the same as ultimately the Notice of Change in Law was received by MSEDCL. He further submitted that the documents received from the Petitioner need to be scrutinized for computation of compensation amount. On carrying cost, Law was well settled and hence he would not make any contrary argument.

6.2. The Advocate of the Petitioner appreciated the constructive approach of MSEDCL, however, he submitted that MSEDCL should be directed to complete the reconciliation in time bound manner.

6.3. After having heard both the parties, the Commission granted fifteen (15) days' time to MSEDCL for scrutiny of the claims. The Petitioner was directed to assist MSEDCL in scrutiny/reconciliation process by providing all supporting documents to satisfy the relevant queries of MSEDCL. Post such scrutiny, MSEDCL was directed to submit the Reconciliation Report indicating the details of the agreed amount and disputed amount (if any) with copy to the Petitioner. Both parties were required to submit detailed justification and computation in excel sheets (with formulae etc.,) for disputed amount so that the same can be adjudicated by the Commission.

**7. JGFPL in its Rejoinder dated 17 February 2023 stated as below:**

7.1. On 28 December, 2022, MSEDCL through its email evaluated JGFPL's Change in Law claims and came out with the following Computations:

<b>Particular</b>		<b>As Juniper Green Field Pvt. Ltd.</b>	<b>As per MSEDCL</b>	<b>Difference</b>
Basic Custom Duty Impact (Note-1)	A	3,28,08,930	--	3,28,08,930
GST Impact	B	37,36,29,275	37,36,29,275	
<b>Less: Credit Note (Note-2)</b>	C	--	41,97,000	41,97,000
<b>Less: Post COD Claim Disallowed (Note-3)</b>	D	--	50,42,908	50,42,908
Net GST Impact	E=B-C-D	37,36,29,275	36,43,89,367	92,39,908
<b>Total CIL</b>	<b>F=A+E</b>	<b>40,64,38,205</b>	<b>36,43,89,367</b>	<b>4,20,48,838</b>

7.2. MSEDCL has allegedly made deductions in JGFPL's claims for the following reasons:

- (a) MSEDCL rejected the claim in respect of increase in BCD on the basis that JGFPL had failed to give notice within 7 days after becoming aware of the same or should reasonably have known of the Change in Law, as per Clause 9.3.1 of PPA.
- (b) MSEDCL disallowed GST impact amounting to Rs. 41,97,000/- basis that there is ambiguity in understanding that against which invoices Credit notes of Rs. 41,97,000/- has been issued to JGFPL's vendors namely Shilchar Technologies Ltd. and Schneider Electric Infrastructure Ltd.
- (c) MSEDCL disallowed the GST impact amounting to Rs. 50,42,908/- raised in relation to robotic systems purchased from Boson Robotics Ltd. on the basis that these robotic systems were imported after commissioning of the project.

7.3. On 04 January, 2023, Juniper responded to MSEDCL's Email dated 28 December, 2022 stating that deductions made by MSEDCL were erroneous and submitted following justifications:

- (a) At hearing dated 2 December, 2022, MSEDCL itself conceded that it is not pressing the issue of delay in issuing Change in Law Notice on account of increase in BCD. Moreover, the requirement of Change in law Notice is directory and not mandatory and delay in providing notice for change in law does not disqualify JGFPL from claiming relief for the same.
- (b) As regards Shilchar, it was clarified that through invoices no. 1769, 1772, 1773, 1774, 1775, 38, 39 and 40, Shilchar had incorrectly computed the GST at 18%. Subsequently, Shilchar rectified their mistake and computed GST at 12% (in line with the extant Notification of Ministry of Finance) and issued Credit Notes. The GST applicable on Solar equipment as levied by Ministry of Finance Notification No. 8/2021- Integrated Tax (Rate) dated 30 September, 2021 is 12% and the same is claimed by JGFPL as impact of increase in GST as evident from the CA Certificate dated 01 December, 2022.
- (c) It was clarified that Schneider had raised an Invoice No. BA2420002834, computing GST at 18% for commissioning support services but the same was not received by JGFPL. Subsequently, the invoice was cancelled by Schneider. GST reversal of Rs. 16,200/- was on account of cancellation of the invoice. Since the invoice was cancelled by Schneider itself, JGFPL did not consider the same while computing the Change in Law claim, therefore, there is no question of deducting Rs. 16,200/- by MSEDCL. The same is evident from the CA Certificate, wherein compensation claimed by JGFPL from MSEDCL for Change in law event on account of change in GST is computed at 12% GST and not at 18% GST.
- (d) As regards, the robotic systems of Boson, it was clarified that once increase in rate of GST applicable on Solar Modules has been recognised as Change in law event, change in rate of GST of robotic systems cannot be denied. Moreover, the Invoices for purchase of robotic systems were raised on 23 June, 2022, 24 June, 2022, 29 July, 2022 and 05 August, 2022, as evident from the CA Certificate. The Project achieved commissioning on 08 August, 2022. Therefore, MSEDCL has wrongly disallowed GST impact amounting to Rs. 50,42,908/- in relation to robotic systems purchased from Boson.

7.4. On 13 January, 2023, MSEDCL vide its email, made the following response with respect to Juniper's e-mail dated 04 January, 2023:

- (a) MSEDCL in its written reply had categorically objected to the delay in issuance of notice by JGFPL. Therefore, MSEDCL's advocate's submission that MSEDCL



will not press the point of delay will not have any effect over the stand taken by MSEDCL in its reply.

- (b) As per provisions of the IGST Act, 2017 and Customs Act, 1962, the IGST on the import of goods is applicable when Bill of entry in respect of such goods are filed with Customs. The Invoices for purchase of robotic systems were raised on 23 June, 2022, 24 June, 2022, 29 July, 2022 and 05 August, 2022; goods were imported into India on 01 August, 2022 & 24 August, 2022 but all these goods reached the site after the commissioning of the projects. All the robotic systems are imported after the commissioning of the project, hence the claim of Rs.50,42,908/- is disallowed.

7.5. From the contents of MSEDCL's email dated 13 January, 2023, it is evident that the present dispute now pertains only on two issues viz. issue of notice of change in law and increase in GST on robotic arms as a change in law event.

7.6. These above mentioned two issues have not been reconciled. The computation of these claims cannot be left to mutual resolution of parties and the Commission is required to compute and decide the amounts due to JGFPL.

**8. MSEDCL vide its Replay dated 20 April 2023 stated as follows:**

8.1. After the verification of documents and details provided vide mail dated 04 January, 2023 and submission made vide affidavit dated 17 February, 2023, following are the revised computations and summary of claims evaluated by MSEDCL:

<b>Particular</b>		<b>As Juniper Green Field Pvt. Ltd.</b>	<b>As per MSEDCL</b>	<b>Difference</b>
Basic Custom Duty Impact	A	3,28,08,930	--	3,28,08,930
GST Impact	B	37,36,29,275	37,36,29,275	
<b>Less: Credit Note</b>	C	--	--	--
<b>Less: Post COD Claim Disallowed</b>	D	--	50,42,908	50,42,908
Net GST Impact	<b>E=B-C-D</b>	<b>37,36,29,275</b>	<b>36,85,86,367</b>	<b>50,42,908</b>
<b>Total CIL</b>	<b>F=A+E</b>	<b>40,64,38,205</b>	<b>36,85,86,367</b>	<b>3,78,51,838</b>

8.2. MSEDCL submits that issuance of notice within the stipulated time is one of the pre-conditions for claiming change in law. Further MSEDCL in its reply dated 24 November,

2022 and subsequent correspondences exchanged had categorically taken the stand of delay of 7 days which specifies concrete stand taken by the MSEDCL.

8.3. Regarding the compensation claimed on account of increase in rate of GST applicable on the equipment of robotic systems, MSEDCL submits JGFPL had raised invoices before the COD and had taken commercial decision to import the robotic arms after the project achieved COD on 08 August, 2022. The Commissioning of the projects as defined in Article 1 read with Article 4 of the PPAs implies that all the equipment as per rated project capacity has been installed and energy has flown into the grid. Further, the liability of MSEDCL for payment of purchase of the power starts from the date of commissioning. When plant is commissioned it is assumed that all the material & services has been procured and installed at site. If that is not the case then generator at the time of Commission should have disclosed that the certain material or services are yet to be procured or installed at site.

8.4. Following is the summary in relation to robotic systems purchased from Boson:

Project	Invoice No	Invoice Date	Bill of Entry date	Goods receipt date
80 MW	BBS-JP-12205	23.06.2022	01.08.2022	13.08.2022/14.08.2022
70 MW	BBS-JP-12206	24.06.2022	01.08.2022	11.08.2022
80 MW	BBS-JP-12207	29.07.2022	24.08.2022	06.09.2022
70 MW	BBS-JP-C12208	05.08.2022	24.08.2022	10.09.2022

8.5. Therefore Juniper is not entitled to claim compensation in relation to robotic systems purchased from Boson.

9. JGFPL vide its Replay dated 15 May 2023 has reiterated earlier submission and requested the Commission to direct MSEDCL to pay change in law compensation as claimed by it forthwith along with carrying cost.

### **Commission's Analysis and Rulings**

10. JGFPL has filed the present Petition seeking approval for Change in Law and an appropriate mechanism for grant of adjustment/ compensation to offset financial impact of change in law event on account of increase in rate of Basic Custom Duty (BCD) vide Notification No. 7/2021- Customs dated 01 February 2021 on import of inverters and increase in the rate of CGST and SGST/IGST on Renewable Energy Devices from 5% to 12% vide Notification dated 30 September 2021.

11. MSEDCL has objected to BCD claims of Change in Law on the grounds that JGFPL has not complied with the requirement of giving change in law notice within 7 days from date of

Change in Law. With regards to claims of GST, MSEDCL has partly agreed on claims amounts.

12. The Commission notes that PPA dated 10 February, 2020 and first amended PPA dated 1 September, 2021 signed between parties has following provision related to Change in Law:  
“

*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 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 a direct effect on the Project.*

*However, Change in Law shall not include any change 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.*

....

***9.3 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.*

...

**9.4. *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 Indian Governmental 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 ,*

9.4.4 *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 Solar Power Developer  
....”*

Claims made in this Petition need to be tested against above provisions of the PPA signed between the parties.

13. Considering the material placed on record and arguments made during hearing, the Commission frames following issues for its considerations:

- a. Whether Notification dated 1 February 2021 resulting in change in Basic Custom Duty from 5% to 20% and Notification dated 30 September 2021 resulting in Change in GST rate qualifies as Change in Law Event?
- b. Whether modalities stipulated under Article 9.3.1 (Service of Notice of Change in Law) have been followed?

- c. Whether claim of MSEDCL on Safeguard Duty is maintainable?

If the above issue gets answered in affirmative then, below mentioned issues will also be required to be addressed.

- d. Ascertainment of principal claim amount.
- e. What are the modalities for computing carrying cost?
- f. What should be the methodology and the frequency of payment of compensation amount?

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

**14. Issue A: Whether Notification dated 1 February 2021 resulting in change in Basic Custom Duty from 5% to 20% and Notification dated 30 September 2021 resulting in Change in GST rate qualifies as Change in Law Event?**

- 14.1. The Commission notes that any event can be said to be ‘Change in Law Event’, only if it satisfies the provisions stipulated under Article 9 of the PPA. For ease of reference, Article 9 of the PPA is reproduced at Para (12) above.

**(A) Notification dated 1 February 2021 resulting in change in Basic Custom Duty**

- 14.2. The Commission notes that MSEDCL floated a Tender on 06 November 2019 to procure 500 MW from Intra State Solar Power projects through competitive bidding process. As per the RFS, the ‘last date of bid submission’ is 30 November 2019. Juniper Green Energy Private Limited submitted its bid and got the LOA on 8 January 2020.

- 14.3. The Commission notes that as on bid submission date, following notification related to Basic Custom Duty was applicable:

Notification No. 1/2011 – Customs dated 6 January 2011 relating to Custom Duty:

*“G.S.R. (E).-In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), and in supersession of the notification of the government of India in the Ministry of Finance ( Department of Revenue ) No. 30/2010 - Customs, dated 27th Feb. 2010, the Central Government on being satisfied that it is necessary in the public*

*interest so to do, hereby exempts all items of machinery, including prime movers, instruments, apparatus and appliances, control gear and transmission equipment and auxiliary equipment (including those required for testing and quality control) and components, required for the initial setting up of a solar power generation project or facility, when imported into India, from so much of the duty of customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), as is in excess of 5% ad valorem, and from the whole of the Additional Duty of Customs leviable thereon under section 3 of the said Customs Tariff Act, subject to the following conditions, namely:-*  
....”

In addition to above, Social Welfare Surcharge (SWS) is levied and collected, as a duty of customs, vide Section 110 of the Finance Act, 2018 (13 of 2018). Section 110 of the Finance Act, 2018 reads as below:

“110.

*(1) There shall be levied and collected, in accordance with the provisions of this Chapter, for the purposes of the Union, a duty of Customs, to be called a Social Welfare Surcharge, on the goods specified in the First Schedule to the Customs Tariff Act, 1975 (hereinafter referred to as the Customs Tariff Act), being the goods imported into India, to fulfil the commitment of the Government to provide and finance education, health and social security.*

...

*(3) **The Social Welfare Surcharge levied under sub-section (1), shall be calculated at the rate of ten per cent. on the aggregate of duties, taxes and cesses which are levied and collected by the Central Government in the Ministry of Finance (Department of Revenue) under section 12 of the Customs Act, 1962 and any sum chargeable on the goods specified in sub-section (1) under any other law for the time being in force, as an addition to, and in the same manner as, a duty of customs, but not including—***

- (a) the safeguard duty referred to in sections 8B and 8C of the Customs Tariff Act;*
- (b) the countervailing duty referred to in section 9 of the Customs Tariff Act;*
- (c) the anti-dumping duty referred to in section 9A of the Customs Tariff Act;*
- (d) the Social Welfare Surcharge on imported goods levied under sub-section (1).”*

Accordingly, as per above notifications, as on bid submission date, Basic Custom Duty of 5% and Social Welfare Surcharge of 10% on custom duty was applicable. Over and above, IGST on import of solar inverters was fixed at 5% of the basic custom duty and Social Welfare Surcharge. Subsequently, the Department of Revenue, Ministry of Finance, Government of India issued Notification No. 07 /2021-Customs dated 01 February 2021,

which rescinded Notification No. 1/2011-Customs dated 06 January 2011 providing exemption from levy of the Basic Customs Duty in excess of 5% ad valorem, and from the whole of the additional duty of customs leviable thereon under Section 3 of the Customs Tariff Act, 1975. The Notification dated 1 February 2021 reads as below:

*“G.S.R..... (E).- In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962) and section 3 of the Customs Tariff Act, 1975 (51 of 1975), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby rescinds the notifications of the Government of India in the Ministry of Finance (Department of Revenue), published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) specified in column (2), vide corresponding G.S.R. number specified in column (3), of the Table, except as respects things done or omitted to be done before such rescission, namely:-*

<i>Sr. No</i>	<i>Notification No.</i>	<i>G.S.R. No.</i>
<i>(1)</i>	<i>(2)</i>	<i>(3)</i>
<i>1.</i>	<i>1/2011-Customs, dated the 6th January, 2011</i>	<i>6 (E), dated the 6th January, 2011</i>
<i>2.</i>	<i>34/2017-Customs, dated the 30th June, 2017</i>	<i>769 (E), dated the 30th June, 2017</i>
<i>3.</i>	<i>75/2017-Customs, dated the 13th September, 2017</i>	<i>1153 (E), dated the 13th September, 2017</i>

”

Further, letter dated 1 February 2021 highlighting budgetary provisions in Finance Bill, 2021 stipulated following:

**“Chapter 85**

...

*(2) Basic customs duty on Solar Inverters (sub-heading 8504 40) is being raised to 20%. For this purpose, S. No. 13 of the notification No. 57/2017-Customs is being amended. Simultaneously, notification No. 1/2011-Customs, dated 6th January, 2011 is being rescinded. [S. No. (ix) of the notification No. 03/2021-Customs dated 1st February, 2021 and, notification No. 07/2021-Customs, dated 1st February, 2021 refer].*

*(3) Notification No. 1/2011-Customs, dated 6th January, 2011 is being rescinded. Consequently, all items of machinery, including prime movers, instruments, apparatus and appliances, control gear and transmission equipment and auxiliary equipment (including those required for testing and quality control) and components, required for the initial setting up of a solar power generation project or facility will attract applicable BCD. [Notification No. 07/2021-Customs, dated 1st February, 2021 refers].”*

Accordingly, the Basic Custom Duty has increased to 20% with effect from 2 February 2021. Increase in Basic Custom Duty translated in to increase in Social Welfare Surcharge and IGST.

14.4. The Notification dated 01 February 2021 is subsequent to the last date of Bid Submission. Said notification has been issued by the Ministry of Finance, Government of India which is satisfying the requirement of ‘an Indian Government Instrumentality’ under the PPA. Under the provisions of PPA, 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’. Hence, the Commission rules that this Notification dated 01 February 2021 is a Change in Law event under the PPA.

**(B) Notification dated 30 September, 2021 resulting in Change in GST rate**

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

14.6. The Commission notes that said notification dated 30 September 2021 is subsequent to the last date of Bid Submission.

14.7. ‘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. 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. Hence, the Commission rules that this Notification dated 30 September 2021 qualifies as Change in Law event under the PPA.

**15. Issue B: Whether modalities stipulated under Article 9.3.1 (Service of Notice of Change in Law) have been followed?**

15.1. Article 9.3.1 of the PPA, which provides for issuance of a Notice prior to claiming change in law reads as below:

*“9.3.1 If the Seller is affected by a Change in Law in accordance with Article 9.1 and wishes to claim 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.”*



Thus, above Change in Law provisions of PPA requires that if JGFPL wishes to claim Change in Law it shall give notice to MSEDCL of such Change in Law event within 7 days after becoming aware of the same or should reasonably have known of such event of Change in Law.

- 15.2. MSEDCL has contended that JGFPL issued notices for reimbursement of BCD on 17 February 2021 whereas BCD was increased by the Notification dated 01 February 2021. Hence, JGFPL has failed to issue notice within 7 days for increase in BCD and hence its claim for compensation on account of such Change in Law event needs to be rejected. With respect of increase in GST vide Government Notification dated 30 September 2021, JGFPL has issued Notice on 04 October 2021 and hence within time period given in the PPA executed between the parties.
- 15.3. JGFPL in reply submitted that the rescission of Notification 1/2011 was issued on 01 February 2021. The requirement of sending a notice of Change in Law event under the PPA is a procedural requirement to intimate the other party of the occurrence of the Change in Law event. It is not expected to become aware on date of notification withdrawing the exemption in this case, as this has been done as part of overall budgetary exercise where there were several notifications issued simultaneously. It takes time to get the information, analyse the same and its implications. Once JGFPL became aware of withdrawal of the exemption and after carefully understanding its implications, JGFPL duly notified MSEDCL within a short time on 17 February, 2021. The alleged non-fulfilment of the said procedural requirement in 7 days cannot take away the substantive rights of Juniper under the PPA for claiming relief on account of Change in Law events.
- 15.4. The Commission notes that PPA used the term ‘within 7 days from the date it reasonably should have known of the Change in Law’. As there is no document on record to show that JGFPL was aware of such Change in Law event before, the Commission considers the submission of JGFPL that after it became aware of Change in Law, it has immediately served the Notice on 17 February 2022. Hence, the Commission rules that by issuing notice dated 17 February 2021 for Change in Law related to BCD, JGFPL has complied with mandatory requirement of issuance of notice under the PPA.
- 15.5. Notice for Change in Law on account of increased GST rate has been issued within 7 days from date of notification of Change in Law event and MSEDCL has not disputed the same.
- 15.6. In view of above, as mandatory requirement of notice has been fulfilled, JGFPL is eligible for claiming change in law compensation on account of BCD and GST.

**16. Issue C: Whether claim of MSEDCL on Safeguard Duty is maintainable?**

16.1. MSEDCL has contended that on the last day of bid submission, Safeguard duty @ 20% was applicable as per Notification No. 01/2018 dated 30 July 2018. Solar Modules have been imported January, 2022 to March 2022, i.e. after repeal of Safeguard duty. As per Article 9.2.1 of PPA, gain arising due to non-applicability of safeguard duty ought to be passed by JGFPL to MSEDCL. MSEDCL computed the gain on this account as Rs.69.07 Crore.

16.2. While opposing such claim of MSEDCL, JGFPL stated that it averted the impact of safeguard duty by following up prudent utility practice. JGFPL submitted that the SCOD as envisaged at the time of the execution of the PPA was 9 August 2021 i.e., more than one year after the original SGD applicability date (i.e., 29 July, 2020). Therefore, having adequate time to import modules after 29 July 2020, JGFPL did not factor any SGD. Now when the solar modules have been imported after January 2022, in the present dispensation, no SGD is applicable and accordingly the same was not considered. Therefore, there is no effect on the economic position since at the time of execution of the PPA and at the time of actual commissioning. This is based on commercial prudence. Hence, JGFPL is not liable to pay any amounts as claimed by MSEDCL.

16.3. The Commission notes that Article 9.2 of the PPA provides for passing on financial gain on account of Change in Law. Admittedly, on last date of bid submission, SGD Notification No. 01/2018 dated 30 July 2018 was in force which has clearly stated trajectory for reduction of safeguard duty over the period starting from 25% on 30 July 2018 to 15% on 29 July 2020. Thus, as per said notification, which was in force on date of bid submission, there is no safeguard duty after 29 July 2020. As per RFS/PPA conditions, project is to be commissioned within 15 months if within Solar Park or within 18 months if outside solar parks. The last date of Bid submission was 30 November, 2019 and hence at that point of time, commissioning of project (15/18 months) would have been envisaged beyond 29 July 2020 for which no SGD was applicable at that point of time. Hence, it is incorrect to state that non levy of SGD has led to financial gain to JGFPL. Therefore, the Commission rejects MSEDCL contention on Change in Law on account of SGD.

**17. Issue D: Ascertainment of principal claim:**

(A) Basic Custom Duty:

17.1. For supplementing the claim, JGFPL has furnished Chartered Accountant's certificate dated 1 December, 2022. As per certification impact of BCD is as below:

Particulars	Unit	Value
Incremental BCD on account of change in BCD for 5% to 20%	Rs.	28,406,000.13
Incremental SWS on account of changes in BCD from 5% to 20%	Rs.	2,840,600.02
Incremental IGST @5% on account of changes in BCD from 5% to 20%	Rs.	1,562,330.01
Claim under Change in Law (BCD Impact)	Rs.	32,808,930.16

17.2. MSEDCL in its reply has not commented on BCD impact. Further, claims have not been scrutinised by MSEDCL.

17.3. After perusal of Chartered Accountant's certificate, it is evident that the CA (Sandeep Ramnivas Gupta & Co.) has certified the computations of the BCD impact of Rs. 3,28,08,930. JGFPL has contended that all necessary documents for verification of said claim amount has been submitted along with the Petition. As MSEDCL is yet to scrutinise said document, the Commission is not aware about any disputed claim on which it has to adjudicate. At the same time, the Commission cannot delay process of granting relief on account of Change in Law event. Therefore, for purpose of this Order, the Commission is relying on CA Certificate submitted by JGFPL and accordingly considered BCD impact as Rs. 3,28,08,930. However, MSEDCL is free to scrutinise all necessary documents and JGFPL has to support MSEDCL in that process. Any variation in claim amount on account of such scrutiny process shall be adjusted in subsequent bill with carrying cost.

(B) GST rate:

17.4. As per Chartered Accountant's certificate furnished by JGFPL impact of GST is as below:

Particulars	Unit	Value
Impact of additional IGST on import of Solar Panels (Modules)	Rs.	322,340,368.00
Impact of additional IGST on import of Solar Inverters	Rs.	16,172,482.74
Impact of additional GST on purchase of the other projects related items	Rs.	35,116,424.59
Claim under change in law (GST impact)	Rs.	373,629,275.33

17.5. MSEDCL in its Reply has contended that it has scrutinised the claim statement. As per MSEDCL net impact is Rs. 36.85 Crores as against Rs.37.36 Crores claimed by JGFPL. Summary statement is as follows:

Particular		As per JGFPL	As per MSEDCL	Difference
GST Impact	A	37,36,29,275	37,36,29,275	
Less: Credit Note	B	--	--	--

<b>Less: Post COD Claim Disallowed</b>	<b>C</b>	<b>--</b>	<b>50,42,908</b>	<b>50,42,908</b>
<b>Net GST Impact</b>	<b>D=A-B-C</b>	<b>37,36,29,275</b>	<b>36,85,86,367</b>	<b>50,42,908</b>

- 17.6. MSEDCL has referred to CERC Order date 28 January 2020 passed in Case No. 67/MP/2019 and 68/MP/2019 wherein it has categorically held that the liability of payment on account of impact of GST on procurement of Solar PV panels and associated equipment by the Petitioners shall lie with the Respondents till the commercial operation date (COD) only. By applying the said rationale, Robotics System received at project site after SCOD (8 August, 2022), the total GST impact of such invoices are Rs.50,42,908/- which need not be considered. Further, the liability of MSEDCL for payment of purchase of the power starts from the date of commissioning. When plant is commissioned it is assumed that all the material & services has been procured and installed at site. If that is not the case then generator at the time of Commission should have disclosed that the certain material or services are yet to be procured or installed at site.
- 17.7. JGFPL refuted MSEDCL's contentions and submitted that the invoices in respect of goods were raised by the Juniper on 23 June, 2022, 24 June, 2022, 29 July, 2022 and 05 August, 2022 well before the commissioning of the full capacity of the Project, on 08 August 2022. Further, while calculating the tariff, JGFPL had factored in the cost of robotic systems. In the present case, it was not the cost of equipment that had increased but there was an increase in the rate of GST applicable on such equipment. The compensation claimed in the present case is on account of increase in rate of GST applicable on the equipment.
- 17.8. JGFPL submitted that MSEDCL's reliance on CERC's Order dated 28 January, 2020 in Petition No. 67/MP/2019 and 68/MP/2019 to contend that compensation for Change in law cannot be granted after commissioning is misplaced. Hon'ble the APTEL by way of Judgment dated 15 September, 2022 in Appeal No. 256 of 2019, in the matter of Parampujya Solar Energy Private Limited vs. Central Electricity Regulatory Commission & Ors. has held that compensation for Change in Law claims is permitted even after date of commissioning.
- 17.9. The Commission notes that Hon'ble APTEL in above said judgment dated 15 September 2022 has set aside CERC's Order restricting impact of Change in Law till date of CoD of Solar plant and further ruled that compensation for increased expenses on account of Change in Law event can be granted post CoD subject to prudence of such increased expenses. Therefore, the Commission is of the opinion that delivery of items post CoD is not sufficient reason for denying benefit of Change in Law compensation. In present case, it is important to note that the invoices in respect of Robotics Systems were raised by the Juniper on 23 June, 2022, 24 June, 2022, 29 July, 2022 and 05 August, 2022 well before

the commissioning of the Project, on 08 August, 2022. Therefore, such robotic system was part of solar project, however it has been received after CoD. Therefore, the Commission is inclined to accept the submission of JGFPL for Change in Law compensation on the robotic system.

17.10. Accordingly, summary of Change in Law compensation allowed by the Commission is as under:

Particular		As per JGFPL	As per MSEDCL	Allowed by the Commission
Basic Custom Duty Impact	A	3,28,08,930	--	3,28,08,930*
GST Impact	B	37,36,29,275	37,36,29,275	37,36,29,275
Less: Credit Note	C	--	--	--
Less: Post COD Claim	D	--	50,42,908	--
Net GST Impact	<b>E=B-C-D</b>	<b>37,36,29,275</b>	<b>36,85,86,367</b>	<b>37,36,29,275</b>
<b>Total CIL</b>	<b>F=A+E</b>	<b>40,64,38,205</b>	<b>36,85,86,367</b>	<b>40,64,38,205</b>

\*Subject to scrutiny by MSEDCL as stated in para 17.3 above.

#### 18. Issue E: What are the modalities for computing carrying cost?

18.1. JGFPL has requested for carrying cost on compensation amount so as to restore it to same economic position as if Change in Law event has not occurred. Although JGFPL has not stated rate at which such carrying cost be allowed, it has requested the Commission to allow the carrying cost on compounding basis.

18.2. 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.

18.3. 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 following:

*“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.”*

- 18.4. JGFPL has not furnished any details regarding actual interest incurred on account of change in law.
- 18.5. 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 realising 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 Change in Law which is to be reimbursed at later date, entity may fund such expenses through Working Capital Loan. Hence, in the opinion of the Commission, JGFPL 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.
- 18.6. On the issue of allowing carrying cost on compounding basis, JGFPL has relied upon Supreme Court Judgment dated 24 August 2022 in the matter of *Uttar Haryana Bijli Vitran Nigam Limited & Anr. v. Adani Power (Mundra) Limited & Anr.* In this regard, the Commission notes that in said judgment, Hon’ble Supreme Court has relied upon two aspect while granting carrying cost on compounding basis viz a) various provisions of PPA related to billing and b) generator has raised fund from the bank and paid interest on monthly compounding basis to the banks. Whereas in the present case, JGFPL has not submitted details of actual interest incurred by it. Also, as against compounding basis of LPS stipulated in PPA of Adani power (Mundra) Ltd, in present case, PPA JGFPL has not recognized compounding interest for payment of LPS. Hence, in the opinion of the Commission, above quoted Supreme Court judgment cannot be made applicable to present case.
- 18.7. In view of the above, as PPA between the parties does not recognize compounding interest for any payment, the Commission cannot allow the same for carrying cost on change in law compensation. Accordingly, carrying cost on change in law compensation needs to be allowed at rate of 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 from date of actually incurring such increased expenses till date of this Order.
- 18.8. As JGFPL has not quantified such carrying cost in its Petition, MSEDCL has not got any opportunity to scrutinize the computation and raise dispute, if any, for adjudication before this Commission. Therefore, after ruling on rate of carrying cost as above, the Commission

directs parties to compute carrying cost after identifying date of actual incurring of such increased expenses.

**19. Issue F: What should be frequency of payment of compensation amount? What should be the methodology and the frequency of payment of compensation amount?**

19.1. JGFPL in its Petition has prayed that compensation for the Change in Law needs to be reimbursed.

19.2. In this regard, the Commission notes that in similar matters of payment of compensation on account of Change in Law, the Commission had opined that lumpsum payment would avoid further carrying cost on account of deferred payment. Further, Generator may willingly offer some discount on lumpsum payment. Considering all these aspects, the Commission had provided liberty to MSEDCL to decide whether it intends to opt for payment of the compensation on lumpsum basis or per unit basis over the PPA tenure. Accordingly, MSEDCL shall communicate its option of paying Change in Law compensation to Petitioners within a month from the date of this Order.

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

- a) Firstly, total amount of compensation (along with carrying cost till date of this Order) to be paid is to be determined. Such total amount shall be equally divided over each year of PPA tenure.
- b) Thereafter, carrying cost towards deferred payment shall be computed on the unrecovered part (average of opening and closing balance) of total compensation at the simple interest rate of @ 1.25% plus SBI MCLR per annum.
- c) Summation of installment of compensation computed at 'a' above and carrying cost towards deferred payment computed at 'b' above will be the amount which is to be paid to the Petitioners during that particular year.
- d) Per unit cost for a particular year shall be computed by dividing amount determined in 'c' above by energy to be supplied during that year from the project capacity at declared CUF. However, during the year of commissioning, availability of project only for the part of year shall be appropriately factored while computing energy to be supplied from the project.

- e) At the end of 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 last month of PPA tenure at no additional carrying cost.

20. Hence, the following Order:


**ORDER**

1. **Case No.174 of 2022 is partly allowed.**
2. **Impact of Change in Law on account of increased Basic Custom Duty on inverters vide notification dated 1 February 2021 and increased GST vide notification dated 30 September 2021 is allowed.**
3. **Change in Law compensation is mentioned in para 17.10 above. Parties to compute carrying cost on simple interest basis as directed in para 18.7 above.**
4. **MSEDCL shall communicate its option of payment of Change in Law compensation to Petitioners as stated in para 19 above within a month from date of this Order.**

Sd/-  
(Mukesh Khullar)  
Member

Sd/-  
(I.M. Bohari)  
Member

Sd/-  
(Sanjay Kumar)  
Chairperson

  
(Dr. Rajendra Ambekar)  
I/c Secretary

