

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 34 of 2023

Petition of Tata Power Green Energy Limited seeking relief on account of Change in Law due to the increase in Goods and Service Tax rates in terms of the Power Purchase Agreements dated 4 December 2020.

Tata Power Green Energy Ltd (TPGEL).....Petitioner

The Tata Power Company Limited – Distribution (TPC-D)Respondent

Coram

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

Appearance in the Case:

For the Petitioner: : Mr. Kunal Kaul (Adv.)

For the Respondent : Ms. Hawwa Inamdar (Rep.)

ORDER

Date: 28 November, 2023

1. Tata Power Green Energy Ltd (TPGEL) has filed this Petition on 04 January 2023 under Section 86 of the Electricity Act, 2003 seeking compensation on account of Change in Law as provided under Power Purchase Agreement (PPA) dated 04 December 2020 signed with the Tata Power Company Limited– Distribution business (TPC-D) due to the increase in Goods and Service Tax (GST) applicable to Supply and Service Contracts.

2. Prayers of TPGEL are as follows:

- a) *Hold and declare that the change in rate of GST applicable to Supply and Service Contracts pursuant to the Notifications mentioned hereinabove, for setting up of TPGEL's Wind-Solar Hybrid Power Plants, amounts to Change in Law events under the PPA;*
- b) *Hold and declare that the Petitioner (TPGEL) is entitled to a sum of Rs. 49.12 crores along with the carrying cost of Rs. 4.68 Crores towards restriction on account of the impact of such Change in Law events on the Petitioner's Wind-Solar Hybrid Power Plant from the Respondent;*
- c) *Pass any such other and further reliefs as this Hon'ble Commission deems just and proper in the nature and circumstances of the present case.*

....”

3. TPGEL in its Petition stated as follows:

- 3.1. Tata Power Green Energy Limited (TPGEL) is a Renewable Energy Generating company incorporated under the Companies Act, 2013 and wholly owned subsidiary of Tata Power Renewable Energy Limited.
- 3.2. TPGEL has filed the present Petition under Section 86 of the Electricity Act, 2003 read with Article 12 of the Power Purchase Agreement (PPA) dated 04 December, 2020, executed between TPGEL and The Tata Power Company Limited (TPC-D), for seeking a Change in Law compensation on account of increase in the rate of Goods & Service Tax (GST) on setting up of a Hybrid Power Project for supplying power to it.
- 3.3. Major events in bidding process and subsequent development are presented as below:

Date	Event
01.06.2020	The Commission, vide an Order in Case No. 88 of 2020, accorded approval to the bid documents (i.e., RFS and PPA) to be issued by Tata Power and allowed certain deviations for initiation of bidding process for the long-term procurement of power from grid connected Wind-Solar Hybrid Power Projects for meeting its RPO.
03.06.2020	TPC-D issued a Request for Selection (RfS) inviting bids for procurement of 225 MW grid connected Wind-Solar Hybrid Power Projects. Solar (225 MW AC) at Village Noorsar, Taluka – Bikaner, District – Bikaner, Rajasthan and Wind (98.05 MW AC) in State of Maharashtra,
16.06.2020	A pre-bid meeting was conducted
23.06.2020	The replies to pre-bid queries were uploaded

06.07.2020	Last date of Bid Submission
11.07.2020	The TPGL was declared as the successful bidder for procurement of 225 MW capacity at a tariff of Rs 2.59/kWh.
13.07.2020	Conditional LoA was issued to TPGL with a condition that signing of PPA is subject to approval of the Commission.
21.07.2020	TPC-D preferred a Petition being Case No. 152 of 2020 under Section 63 of the Act seeking approval for adoption of Tariff
10.08.2020	The Commission adopted the discovered tariff of Rs.2.59/kWh. in Case No. 152 of 2020
20.08.2020	Letter of Award (LOA) was issued in favour of TPGL for 225 MW wind-solar hybrid project setup at Sharah, Borla, Bikaner, Rajasthan (Solar) and few sites in Maharashtra (Wind), for a period of 25 years.
04.12.2020	TPGL and TPC – D entered into a PPA
31.12.2020	TPGEL issued a Letter of Intent (“LOI”) (effective from 22.10.2020) to TPSSL accepting TPSSL’s offer for 225 MW AC (330MWp) Solar PV Crystalline Power Plant complete with all Accessories, Civil, Structural, Electricals, Controls & Instrumentation including Balance of Systems at Kawani, Bikaner, Rajasthan. The LOI clarified that a separate contract shall be entered into between the parties for the scope of work detailed in the LOI.
16.09.2021	Two separate contracts (viz. Supply Contract and Civil Works/ Service Contract) were executed between TPGEL and TPSSL : (i) Supply Contract (“Supply Contract”) for supply/ construction and installation/ commissioning of 225 MW AC the Solar Power Generation System at Ex-Works which includes Central Inverters, Solar PV Crystalline Modules, Solar module mounting structures, Cables, Invertor Transformers, etc. amounting to Rs. 842,24,03,830/- for the entire Power Plant (excluding GST at the rate of 8.9%). (ii) Civil, Installation and Commissioning Works Contract for 225 MW AC Solar PV Crystalline Power Plant (“Civil Works/ Service Contract”). The said contract provides that TPSSL shall design, engineer, manufacture, inspect, supply, erect, test and commission the Power Plant for a sum of Rs. 58,40,61,400/- [i.e., Rs. 38,08,93,700 for Civil works and Rs. 20,31,67,700 for Services] (excluding GST at the rate of 8.9%).
30.09.2021	Ministry of Finance, vide Notification dated 30 September 2021 increased GST on the supply and Civil Works/ service Contracts from (8.9%) to (13.8%).
06.10.2021	TPGEL has served Notice on TPC-D intimating the Change in Law on account of revision in the GST.

06.07.2022	The Scheduled Commercial Operation Date of the Hybrid Power Plant was 06.07.2022 (after considering the extension of 76 days as per the notifications issued by MNRE from time to time). However, the Hybrid Power Plant was commissioned only on 02.08.2022.
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Increase in the rate of GST:

- 3.4. On or before the Cut-Off date, TPGEL had considered the applicable GST rates prevalent at that point in time on Supply and Civil Works/ Service Contracts. At the time of Bid, in terms of various notifications issued under the CGST Act and SGST Act, a composite GST at the rate of 8.9% [i.e., 5% on 70% (i.e. 3.5%) of the consolidate taxable value of the Contracts and 18% on the remaining 30% (i.e. 5.4%) of the consolidated taxable value of the Contracts] was applicable on Supply and Civil Works/ Service Contracts for setting up of Solar Hybrid Power Plants.
- 3.5. Accordingly, TPGEL, while submitting its Bid for the Project, had considered 8.9% GST on Supply and Civil Works/ Service Contracts.
- 3.6. The GST Council (a constitutional body under the GST Act, for making recommendations to the Union and State Government on issues related to GST) made certain recommendations in the meeting held on 17 September, 2021 for making changes in GST rates applicable on Solar PV Module and other Renewable Energy equipment.
- 3.7. Based on the aforesaid recommendation of the GST Council, the Ministry of Finance, Government of India, issued Notification No. 8/2021-Central Tax (Rate) on 30 September, 2021, thereby omitting S. No. 234 of Schedule I and inserting S. No. 201A under Schedule II of Ministry of Finance's Notification No. 1/2017-Central Tax (Rate) dated 28.06.2017.
- 3.8. All State Governments (including the State of Maharashtra) issued Notifications corresponding/ similar to the aforesaid Notification No. 8/2021-Central Tax (Rate), thereby imposing a corresponding rate of tax under the SGST.
- 3.9. Pursuant to the aforesaid amendments made by the Ministry of Finance and all the State Governments in the Notifications dealing with taxability of goods and services supplied for Solar Power Generating Systems, both supply of goods as well as services for setting up of Wind-Solar Hybrid Power Projects are compositely taxed at 13.8% of the gross value of such supplies/ services taken together for setting up of the Solar Power Plant. It is pertinent to note that the aforesaid Change in Law Events was beyond TPGEL's control.
- 3.10. The aforesaid Change in Law events the impact on TPGEL's project is as under:

TPGEL-Hybrid-225 MW-Solar	Base Price	GST @8.9%	GST 13.8%	GST Impact
	a	b= a*8.9%	c=a*13.8%	d= b-c
Supply	9,23,34,36,657.86	10,05,52,12,520.41	10507650917	45,24,38,396.59
Civil	38,30,71,700.00	41,71,65,081.30	435935594.6	1,87,70,513.32
I & C	40,93,41,470.00	44,57,72,860.83	465830592.9	20057732
Total	10,02,58,49,827.86	10,91,81,50,462.54	11,40,94,17,104.48	49,12,66,641.94

3.11. Aforesaid Notifications dated 30 September 2021 for increase in GST amounts to Change in Law in terms of the PPA, whereby Tata Power is required to compensate TPGEL to the tune of a total amount of Rs. 49.12 Crores with the appropriate Carrying Cost till such recovery.

3.12. TPGEL is entitled to the Carrying Cost of Rs. 4,68,24,265 on its Change in Law claim of increase in rate of GST. TPGEL states that it has computed Carrying Cost in accordance with the methodology approved by the Commission in its Order dated 17 May, 2022 passed in Case No. 05 of 2022.

4. TPC-D, in its submission dated 31 August, 2023 has stated as following:

4.1. TPC-D initiated the reconciliation process with the TPGL and sought the following details from the TPGEL:

- i. Excel sheet having invoice wise details and change in law impact.
- ii. GST Returns filed by TPSSL and the Petitioner; and
- iii. Soft copies of the invoices and other documents, such that the same can be verified simultaneously.

4.2. On 24 August, 2023 and 25 August, 2023, TPGL sent email providing the Excel sheet having invoice wise details and change in law impact along with the soft copies of the invoices and CA certificate issued for the Power Plant, certifying the Change in Law impact & GST R2 return form which demonstrates that the total amount of GST paid at the rate of 13.8% respectively.

4.3. On 28 August 2023, TPC-D sent an email requesting invoices which were inadvertently not sent by the TPGEL. Further, TPGEL provided these invoices on the same day.

- 4.4. On 28 August, 2023, TPC-D has duly verified all the aforesaid documents provided by TPGEL and found the same to be in order. The additional GST payable has been reconciled and no discrepancies are observed.
- 4.5. In view of the above, the event of change in law claimed by the TPGEL is entirely on account of change in the GST rate post the last date of submission of the bid. Therefore, in accordance with the PPA, specifically Clause 12.2, TPC-D will accept and abide by the decision of the Commission to acknowledge the Change in Law and the date from which it shall become effective.
5. During the e-hearing held on 05 September 2023 in the present matter, parties reiterated their respective submissions. The TPGEL sought liberty to file its additional submission. The Commission allowed TPGEL to submit the additional submission within seven days from the date of hearing.
6. **TPGEL in its additional submission dated 11 September, 2023 (TPGEL has repeated its submission to a large extent and for sake of brevity not repeated herein) has stated the following:**
- 6.1. The TPGEL has claimed the entitlement for change in GST rates and carrying cost in line with the Article 12 of the power purchase agreement executed between TPGEL and Tata Power-D. Article 12.1 and 12.2 of the PPA provides for a Change in Law provision, which grants a restitutory relief in case a change in law event has occurred after the bid submission date, which has an adverse financial impact on the project developer.
- 6.2. As per Article 12.3.1 of the PPA, if the Hybrid Power Developer is affected by a Change in law in India in accordance with Clause 12.1, it shall give notice to TPC-D of such change in law in India within 7 days after becoming aware of the same or should reasonably have known of the change in law in India.
- 6.3. On 06 October, 2021, TPGEL had issued a Change in Law notice to TPC--D intimating the upward revision in effective rate of GST payable from 8.9% to 13.8%, which will lead to an additional tax liability on the supply and services required for construction of Solar Plant.
- 6.4. The event of change in law claimed by the Petitioner is entirely on account of the change in the GST rate post the last date of submission of the bid. Therefore, in accordance with the PPA, specifically Clause 12.2, the TPC-D will accept and abide by the decision of the Commission to acknowledge the Change in Law and the date from which it shall become effective.

Commission's Analysis and Rulings:

7. The Commission notes that pursuant to competitive bidding process under Section 63 of the Electricity Act 2003 conducted by TPC-D, TPGEL has become a successful bidder and signed PPA for supply of 225 MW RE Wind-Solar Hybrid Power at tariff of Rs. 2.59/ kWh. The Commission vide its Order dated 10 August 2020 has adopted such discovered tariff. TPGEL has filed the present Petition seeking compensation for the increase in Goods and Service Tax (GST) on account of a Change in Law due to the increase in Supply and Service Contracts. TPC-D has not objected to such claims of Change in Law on the grounds that TPGEL has complied with requirement under the PPA.
8. Considering the material placed on record and arguments made during hearing, the Commission frames following issues for its considerations:
 - A. **Issue A:** whether Notification dated 30 September 2021 resulting in Change in GST rate qualifies as Change in Law Event?
 - B. **Issue B:** Ascertainment of principal claim amount change in GST (if A is affirmative).
 - C. **Issue C:** What are the modalities for carrying cost (if applicable)?
 - D. **Issue D:** What should be frequency for payment of compensation amount (if applicable)?

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

9. **Issue A: Whether Notification dated 30 September 2021 resulting in Change in GST rate qualifies as Change in Law Event?**
 - 9.1. Ministry of Finance, vide Notification dated 30 September 2021 increased GST on the supply and Civil Works/ service Contracts from (8.9%) to (13.8%).
 - 9.2. On the basis of above GST Notification, Petitioner vide its letter dated 6 October, 2021 informed TPC-D that increase in the GST rates on the supply and Civil Works/ service Contracts from (8.9%) to (13.8%) will directly affect the cost of Project and the same amounts to Change in Law as per provisions of PPA.
 - 9.3. The Commission notes that PPA dated 04 December 2020 signed between parties have following provision related to Change in Law:

“12.1 Definitions

In this Article 12, 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 in India;*
- (ii) an amendment, modification or repeal of an existing law in India; or*
- (iii) the requirement to obtain a new consent, permit or license in India; or*
- (iv) any modification to the prevailing conditions prescribed for obtaining a consent, permit or license not owing to any default of the Hybrid Power Developer in India; or*
- (v) any change in the rates of any Taxes including any duties and cess or introduction of any new tax made applicable for setting up the power project and supply of power from the Project by the HPD which have a direct effect on the Project in India. 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.*

However, Change in Law in India shall not include (i) any change in taxes on corporate income or (ii) any change in any withholding tax on income or dividends distributed to the shareholders of the HPD.

12.2. Relief for Change in law:

12.2.1 The aggrieved Party shall be required to approach the Appropriate Commission for seeking approval of Change in Law in India.

12.2.2 The decision of the Appropriate Commission to acknowledge a Change in Law in India and the date from which it will become effective, provide relief for the same, shall be final and governing on both the Parties.

12.3 Notification of Change in Law:

12.3.1 If the HPD is affected by a Change in Law in accordance with Article 12.1 and wishes to claim change in Law in India under this Article, it shall give notice to Tata Power -D of such Change in Law within 7 days after becoming aware of the same or should reasonably have known of the Change in Law.

12.3.2 Notwithstanding Article 12.3.1, the HPD shall be obliged to serve a notice to Tata Power -D if it is beneficially affected by a Change in Law. Without prejudice to the factor of materiality or other provisions contained in this Agreement, the obligation to inform Tata Power –D contained herein shall be material. Provided that in case Tata Power -D has not provided such notice, the HPD shall have the right to issue such notice to Tata Power -D.

12.3.3 Any notice served pursuant to this Article 12.3.2 shall provide, amongst other things precise details of:

- a) The Change in Law in India; and
- b) The effect on Tata Power -D of the matters referred to in Article 12.2

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

9.4. Further, as per clause 12.1 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.

9.5. Admittedly, Notification dated 30 September 2021 (which is subsequent to Bid Submission and after the LOA was issued on 20 August 2020) which has led to change in the rate of GST from 8.9% to 13.8% on the supply and Civil Works/ service Contracts. Hence, the Commission rules that this Notification dated 30 September 2021 qualifies as Change in Law event under the PPA.

9.6. The Commission notes that as required under the PPA, TPGEL had served the Change in Law notice within 7 days from above said Notification.

9.7. In view of the above, the Commission rules that the TPGEL is eligible to claim Change in Law compensation on this account.

10. Issue B: Ascertainment of principal claim amount change in GST (if A is affirmative).

10.1. The Commission notes that TPGEL in its submission has claimed following amount as a compensation on account of Change in Law event:

TPGEL-Hybrid-225MW-Solar	Base Price	GST @8.9%	GST 13.8%	GST Impact
	a	b= a*8.9%	c=a*13.8%	d= b-c

Supply	9,23,34,36,657.86	10,05,52,12,520.41	10507650917	45,24,38,396.59
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Total	10,02,58,49,827.86	10,91,81,50,462.54	11,40,94,17,104.48	49,12,66,641.94

10.2. The Commission notes the submission of TPC-D that on 28 August 2023, TPGEL submitted the Excel sheet having invoice wise details and change in law impact along with the soft copies of the invoices and CA certificate dated 18 January, 2023 issued for the Power Plant, certifying the Change in Law impact & GST R2 return form which demonstrates that the total amount of GST paid at the rate of 13.8% respectively. On 28 August 2023 TPC-D has duly verified all the aforesaid documents provided by TPGEL and found the same to be in order. The additional GST payable has been reconciled and no discrepancies are observed by TPC-D.

10.3. The Commission also notes the submission of TPC-D wherein it has stated that the event of change in law claimed by the Petitioner is entirely on account of the change in the GST rate post the last date of submission of the bid. Therefore, in accordance with the PPA, specifically Clause 12.2, the TPC-D accept the Change in Law.

10.4. In view of the submission of both the parties, the Commission deems it fit to allow following compensation on account of Change in Law event:

TPGEL-Hybrid-225MW-Solar	Base Price	GST @8.9%	GST 13.8%	GST Impact
	a	b= a*8.9%	c=a*13.8%	d= b-c
Supply	9,23,34,36,657.86	10,05,52,12,520.41	10507650917	45,24,38,396.59
Civil	38,30,71,700.00	41,71,65,081.30	435935594.6	1,87,70,513.32
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Total	10,02,58,49,827.86	10,91,81,50,462.54	11,40,94,17,104.48	49,12,66,641.94

11. Issue C: What are the modalities for carrying cost?

11.1. It is a 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 the same economic position as if such a Change in Law event had not occurred.

- 11.2. The Commission notes that TPGEL has claimed the Carrying Cost of Rs. 4,68,24,265 on its Change in Law claim of increase in rate of GST. TPGEL states that it has computed Carrying Cost in accordance with the methodology approved by the Commission in its Order dated 17 May 2022 passed in Case No. 05 of 2022.
- 11.3. The Commission notes that TPGEL in the matter has claimed carrying cost @ 1.25% plus SBI Marginal Cost of Fund based Lending Rate per annum.
- 11.4. The Commission finds that in its earlier Order dated 31 December 2021 in Case No.25 of 2020 (TPREL vs MSEDCL- Implementation of the Appellate Tribunal for Electricity (ATE)'s Judgment dated 20 September 2021 in Appeal No. 215 of 2021), and Case No. 5 of 2022 (TPREL vs TPC-D), it has provided the carrying cost @ 1.25% plus SBI MCLR per annum.
- 11.5. Accordingly, the Commission allows a levy of carrying cost at the rate of 1.25% plus SBI MCLR per annum on the above compensation amount from the date of actual payment till date of this order.

12. Issue D: What should be the frequency for payment of compensation amount (if applicable)?

- 12.1. The Commission notes that in similar matters of Change in Law compensation settlement including Order dated 17 May 2022 (Case No 5 of 2022) relied upon by TPGEL, the Commission has 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 has provided liberty to TPGEL/ TPC-D to decide whether it intends to opt payment of the compensation on lumpsum basis or per unit basis over the PPA period. Accordingly, TPC-D shall communicate its option of compensation payment to TPGEL within two weeks of the date of this Order.
- 12.2. If 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, the total amount of compensation to be paid plus carrying cost at the rate of 1.25% in excess of MCLR per annum of SBI from date TPGEL paid such amount till date of this Order 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 TPGEL during the particular year.
- d) Per unit cost for a particular year shall be computed by dividing the 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, TPGEL/ TPC-D shall reconcile total amount paid through per unit charge as against total amount which is recoverable in that year as per 'c' above. Any over-recovery shall be adjusted in the payment for the month of March. Any under-recovery on account of lower generation shall be carried forward to next year and shall be payable without any additional carrying cost and only from the excess generation above declared CUF. Such unrecovered compensation, if any, at the end of PPA tenure shall be reconciled and paid in the last month of PPA tenure at no additional carrying cost.

13. Hence, the following Order:

ORDER

1. **The Petition in Case No. 34 of 2023 is allowed.**
2. **Impact of Change in Law on account of increase in Goods and Service Tax (GST) on Supply and Service Contracts vide GST notification dated 30 September 2021 is allowed.**
3. **TPC-D shall communicate its option of payment of Change in Law compensation to Petitioner as stated in para 12 above within two weeks from date of this Order.**

Sd/-
(Surendra J. Biyani)
Member

Sd/-
(Anand M. Limaye)
Member

Sd/-
(Sanjay Kumar)
Chairperson


(Dr. Rajendra G. Ambekar)
Secretary

