

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 152 of 2023

Petition of M/s Reddy Construction seeking relief on account of Change in Law due to the increase in Goods and Service Tax (GST) rates on Solar Panels/ Modules.

M/s Reddy Construction (RC)...	Petitioner
Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL)...	Respondent

Coram

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

Appearance in the Case:

For the Petitioner	: Mr. Aditya Singh (Adv.)
For the Respondent	: Mr. Anup Jain (Adv.)

ORDER

Date: 20 February, 2024

1. M/s. Reddy Construction (RC) has filed the present Petition on 26 June 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 February 2022 signed with the MSEDCL due to the increase in Goods and Service Tax (GST) on procurement of solar modules and other solar equipment.
2. **Prayers of Petitioner are as follows:**

“

- a) *Declare the increase in rate of GST slabs vide Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021, Notification issued in relation thereto by the State of Maharashtra read with Notification No. 08/2021 -Integrated Tax (Rate) dated 30.09.2021 issued by the Ministry of Finance as a Change in Law event in terms of the PPA;*
- b) *Direct MSEDCL to reimburse a total amount of Rs. 61,15,766.30/- to the Petitioner for the corresponding increase in the Project cost on account of increase in Goods and Services Tax no later than within forty-five (45) days of claim(s) submitted by the Petitioner;*
- c) *Grant interest/carrying cost from the date of actual payment of the goods and services tax by the Petitioner till the date of reimbursement made by MSEDCL;”*

3. RC in its Petition has stated as follows:

3.1. It has filed the instant Petition seeking declaration of Change in Law on account of increase in rate of Goods and Services Tax (GST) on procurement of solar modules and other solar power generator equipment. Ministry of Finance vide its Notifications dated 30 September 2021 (Notification No. 8/2021- Central Tax (Rate) and Notification No. 8/2021 – Integrated Tax (Rate)) increased the GST rates on Solar modules and other solar ancillary systems (For sake of brevity in this Order, aforementioned MoF notifications will be referred as GST Notifications). Change in Law claim has been made in terms of Article 9 of the PPA dated 04 February 2022 executed between RC and MSEDCL.

3.2. Major Chronology of events:

Sr. No.	Date	Event
1	17.03.2018	The Government of Maharashtra (GoM) vide Government Resolution (G.R) dated 17.03.2018 has promulgated ‘Mukhyamantri Saur Krishi Vahini Yojana’ (MSKVY) scheme for supplying power to Agricultural (AG) Consumers during daytime by installation of solar projects.
2	22.04.2021	MSEDCL issued a Tender (MSEDCL/CE/RE/2021/Solar/Decentralised/T-23) on 22 April 2021 to procure 50 MW (AC) from projects to be developed in Latur District.
3	31.05.2021	Last date of bid submission.
4	09.12.2021	The letter of Award (LOA) was issued by MSEDCL to M/s. Reddy Construction for development of the solar power project of 3 MW capacity.

Sr. No.	Date	Event
		Project Location- Village Harangul, Taluka Latur District- Latur, State – Maharashtra
5	04.02.2022	Power Purchase Agreement is executed.
6	29.03.2022	RC vide its letter dated 29.03.2022 had request for change in location and subsequently the parties executed 1 st amendment of PPA to modify the location of the Solar Project to Village – Gondri, Lodga, Taluka– Ausa, District – Latur.
7	05.08.2022	RC achieved its full commissioning of 3 MW (AC) solar project on at relocated location.

3.3. **Increase in the rate of CGST and SGST/ IGST on Renewable Energy Devices from 5% to 12%**

3.3.1. The Ministry of Finance, vide Notification No. 8/2021- Central Tax (Rate) dated 30 September 2021 amended the rate of GST for renewable energy devices and their parts. As per the said notification, entry 234 and the entries related thereto were omitted from the Schedule I and entry 201A has been inserted to Schedule II wherein the rate of Central GST is 6%.

3.3.2. Pursuant to the Notification issued by Ministry of Finance whereby GST rates were amended, the State of Maharashtra also issued the related Notification amending the rates of GST.

3.3.3. Pursuant to the Notification No. 08/2021 – Central Tax (Rate), and the Notification issued by the State of Maharashtra, the Ministry of Finance vide Notification No. 8/2021- Integrated Tax (Rate) dated 30 September 2021 also amended the rate of GST for renewable energy devices and their parts. As per the said notification, entry 201A has been inserted to Schedule II wherein the rate of Integrated GST is 12%.

3.3.4. As per Article 9 of the PPA provides for the relief available to the affected Party against the consequences of a Change in Law event. Further, the change in rates of GST on import of solar modules and procurement of other solar equipment increased from 5% (which was applicable till the last date of the bid submission) to 12%.

3.4. The Commission its Order (Case No. 141 of 2021- Tariff Adoption proceedings under MSKVY) dated 03 December 2021, has accorded the Tariff of Rs. 3.05/kWh quoted by RC. Furthermore, during the process of adoption of tariff, the Commission held that the increase in GST rate is a Change in Law event. In said Order, the Commission further

directed the parties to approach when they actually incur such additional expenses relating to increase in GST rate. Clearly, the Commission has already acknowledged in its own Order that any change in rate of GST shall be qualified as a Change in Law event.

- 3.5. RC issued Change in Law Notice dated 28 April 2023 to intimate event of change in rates of GST. In said Notice, RC requested MSEDCL to provide its affirmative consent to enable it to submit final invoice for reimbursement.
- 3.6. The increase in rate of GST slab will lead to increase in capital cost of the Project of RC in view of the fact that input tax credit is not available for set off as electricity is not under GST. This Petition has been filed to seek reimbursement of additional expenditure incurred due to Change in Law.
- 3.7. The definition of Government Instrumentality includes the Government of India as well the Government of Maharashtra where solar project is located. Further, it also includes any ministry/department, authority, agency etc. under Government of India and Government of Maharashtra and rightfully covers Ministry of Finance.
- 3.8. The increase in rate of GST on renewable energy devices and their parts (from 5% to 12%) has been introduced vide GST Notifications. The afore-mentioned Notifications were introduced after the last date of submission of bid i.e. after 31 May 2021.
- 3.9. Further, as the increase in rate of GST has been introduced by way of Notifications, the same will qualify as enactment of 'law' under Article 9.1(i) of the PPA. Furthermore, since such notifications results in change in the GST rates for renewable energy devices, the same would also be covered under any change in rates of any Taxes including any duties and cess which have a direct effect on the Project under Article 9.1 (v) of the PPA.
- 3.10. Further, RC is entitled to compensation in terms of Article 9.2.1 of the PPA read with Article 9.2.3 of the PPA.
- 3.11. RC is seeking a compensation of Rs. 61,15,766/- from MSEDCL which has been incurred on the procurement of solar modules and inverters for the Project of RC. The impact due to increase in taxes, for the Project is summarised in the table hereunder:

Sr No	Name Of Supplier	Invoice No & Date	Qty	Rate	Amount	GST @ 12%	GST @ 5%	Excess GST Paid
1	Waaree Energies Ltd	5123012734 & 03.02.2022	8440	9,767.75	8,24,39,810	98,92,777.20	41,21,990.50	57,70,786.70
2	Ginlong Solis	10032022CRNIND INV &	14	3,52,020	49,28,280	5,91,393.60	2,46,414.00	3,44,979.60

		16032022CRNIND INV & 16.04.2022						
							Total Excess GST Paid	61,15,766.30

The computations as mentioned above is based on the additional taxes and costs thereon incurred by RC. RC also reserves its right to submit the final computation of the additional cost.

3.12. **Carrying Costs:**

3.12.1 Article 9.2.1 of the PPA states that in the event a Change in Law results in any adverse financial loss/gain to the Developer, then in order to ensure that the Developer is placed in the same financial position as it would have been if Change in Law event has not occurred, the Developer shall be entitled for the compensation by the other party.

3.12.2 The Hon'ble Appellate Tribunal for Electricity (APTEL) in plethora of cases having similar issues such as Appeal No. 210 of 2017, Appeal No. 193 of 2017 and Appeal No. 111 of 2017 allowed carrying cost upon the amount allowed as compensation for 'Change in Law' events.

3.12.3 carrying cost is the compensation for time value of the money. Any compensation for Change in Law is incomplete if it does not come with carrying cost that is inherent in the very provision. The mandate of Change in Law provisions across all PPAs is restitution i.e. relief be granted in a manner so as to place an affected party in the same economic position as if a Change in Law had not occurred.

4. **MSEDCL in its submission dated 7 December 2023 stated as below:**

4.1 In terms of Article 9.3.1 of the PPA, RC was well aware of mandatory contractual obligation to issue Change in Law Notice upon MSEDCL within 7 days after becoming aware of the same.

4.2 In the present case the GST Notification was issued on 30 September 2021 and the Commission vide its Order dated 03 December 2021 had granted liberty to RC for approaching the Commission in respect of the present claim once it actually affected and incurred such additional expenses.

4.3 Undisputedly, the claim of RC rests upon the invoices dated 03 February 2022 and 16 April 2022. The said date would be the trigger date to compute the period of (7) days in terms of Article 9.3.1 of the PPA to issue a Change in Law notice upon MSEDCL. RC

issued Change in Law Notice belatedly for the first time on 28 April 2023 i.e. much beyond the contractually restricted (7) days' timeline.

- 4.4 However, belatedly and without any justification RC slept over its right to claim the GST notification impact under the category of Change in Law event within the stipulated time frame.
- 4.5 Furthermore, any interference by the Commission in favour of RC would also negate and render Article 9.3.1 as redundant.
- 4.6 It is well settled principle of law that if a party was not vigilant and had slept over its right and had failed to take steps at appropriate time, then it has to be blamed itself, if it had suffered any prejudice on account of its action. Reference is made to *Tarun Bharat Sangh vs. Union of India, 1994 Supp (2) SCC 342*. It is also equally settled principle of law that any case suffering from delay and laches can be interfered, and indulgence can be shown only if there is no statutory/contractual bar, which clearly is not in the present case.
- 4.7 Since the Change in Law impact is a pass-through component for MSEDCL. The end consumers should not be made suffer, on account of the inaction on the part of RC.
- 4.8 MSEDCL relied upon Hon'ble APTEL Judgement in the case of *Maruti Clean Coal and Power Limited Vs. Power Grid Corporation of India Limited and Anr (2017 SCC Online APTEL 70)*, wherein it has categorically held that an issuance of notice is not an idle formality and mandatorily pre-requisite are required to fulfil.
- 4.9 MSEDCL also referred to the Commission's Order dated 04 August 2022 in Case No. 39 and 41 of 2022, in the case of *M/s. Sunfree Paschim Renewable Energy Private Limited & M/s. Nature International Private Limited*. In said matter, the Commission has disallowed the impact of Change in Law on account of increased Basic Custom Duty on inverters vide notification dated 01 February 2021, stating that the same cannot be allowed as mandatory condition of Notice for Change in Law event has not been fulfilled.
- 4.10 The Impugned Change in Law notice so issued had substantially exceeded beyond the time contemplated under the PPA. Furthermore, RC has failed to substantially or otherwise, establish or elaborate regarding the delay in sending a notice to MSEDCL for Change in Law event, in the notice or even in the present Petition.
- 4.11 RC has not provided the following additional documents which are required, for appropriate verification of the claims :

- a. EPC Contract and Purchase order for procurement of Module
- b. In case of Imported Modules : 1) Packing List 2) Bill of Lading
- c. Lorry receipt, E waybills and Material receipt Note.
- d. CA/CMA Certified material utilisation certificate and closing stock report as on COD to verify whether all material procured are utilised for said project or not.
- e. Bank Account statement reflecting the payments made to EPC contractor.
- f. GST returns namely GSTR-1, GSTR-2/2B

In absence of any documentary proof, it is very difficult for MSEDCL to verify the said figures.

- 4.12 The Judgment dated 15 September 2022 passed by Hon'ble APTEL in Appeal No.256 of 2019 on the issue of GST Notification as a Change in Law and computation of Change in Law impact including the grant of carrying cost component has been challenged by MSEDCL before Hon'ble Supreme Court of India in Civil Appeal No. 4010 of 2023. The same is pending for consideration.
- 4.13 The Commission through various orders on Change in Law claims have directed computation of carrying cost is to be limited to the lower amount of either Interest on Working Capital as per MERC MYT Regulations, actual rate of interest, PPA rate, base rate/MCLR. As such in absence of any submissions from the Petitioner in this regard, the claim of carrying cost is devoid of any merit and should not be considered.
5. During the e-hearing held on 02 January 2024, parties reiterated their respective submissions.
6. **RC in its Written Submission dated 3 January 2024 stated as below:**
 - 6.1 It is a settled principle of law by the Commission that GST Notifications dated 30 September 2021 is a Change in Law event. The Commission has on earlier occasion declared these notifications as a Change in Law and observed that the issuance of notice under Change in Law event shall be calculated from the date of notification. RC referred to following Orders of the Commission:
 - a. Tata Power Green Energy Ltd. v. The Tata Power Company Limited – Distribution (Case no. 34 of 2023 dated 28 November 2023)
 - b. M/s Juniper Green Field Private Limited v. Maharashtra State Electricity Distribution Co. Ltd. (Case no. 174 of 2022 dated 27 May 2023)

- 6.2 MSEDCL is not disputing the GST Notifications. RC relied upon the Hon'ble Supreme Court of India Judgement in "*Mahendra v. Sushila*", AIR 1965 SC 364 (371) and urged the Commission to declare GST Notifications as a Change in Law.
- 6.3 The Commission has declared GST as a Change in Law in the tariff adoption Order dated 03 December 2021. Hence, issuance of a Change in Law notice, within the period of (7) days, is not applicable to the present Case.
- 6.4 The PPA was executed between the parties on 04 February 2022. Article 9.3.1 of the PPA provides that solar power developer to issue notice to MSEDCL of such Change in Law within 7 days after becoming aware of the same or being affected by such Change in Law. In this regard, considering the timeline of (7) days for issuance of notice, the Change in Law notice should have been issued by 07 October 2021. However, it is submitted that the occasion of compliance of Article 9.3.1 of the PPA does not arise in the present case as the PPA was executed between the parties after issuance of GST notification i.e. after 30 September 2021.
- 6.5 Even if RC was not under an obligation to notify MSEDCL prior to signing of the PPA, it informed MSEDCL and the Commission vide its submission in the tariff adoption process about occurrence of the Change in Law event. Therefore, MSEDCL was aware about occurrence of the Change in Law even in the month of November, 2021 only. It is a matter of the record that tariff adoption hearing was the first available opportunity for RC to inform MSEDCL about occurrence of Change in Law. RC could not have relied on terms of the draft PPA to issue Change in Law claim notice prior to execution of the power purchase agreement.
- 6.6 It is settled law that purpose of notice is served, if it can be demonstrated that the other side has been informed. For said purpose, RC referred to the Judgement of Hon'ble Supreme Court of India in *CST v. Subhash & Co.*, (2003) 3 SCC 454 and *Parasramka Commercial Co. v. Union of India*, (1969) 2 SCC 694.
- 6.7 Notice denotes an intimation to the party concerned of a particular fact/ event by which knowledge is conveyed, or by which one is charged with knowledge. In the present case, RC intimated MSEDCL after actually incurring cost for increase of GST.

Commission's Analysis and Rulings

7. RC has filed the present Petition seeking approval of 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 Goods and Service Tax (GST) rates on Solar Modules and other solar power generating equipment's.

8. Due to GST Notifications, GST rates are increased from 5% (which was applicable till the last date of the bid submission) to 12%.
9. MSEDCL has not disputed the GST notifications issued by the Ministry of Finance as the Change in Law event. It has objected to incremental GST claims on the ground that RC has not complied with the requirement of giving Change in Law notice within (7) days from the trigger date i.e. date of invoices for procurement of solar generating system equipment's.
10. The Commission notes that PPA dated 4 February 2022 signed between parties has following provision related to Change in Law:

“

Article 1 DEFINITIONS

‘Change in Law’ shall have the meaning ascribed thereto in Article 9 of this Agreement.

Article 9: CHANGE IN LAW

9.1 Definitions

In this Article 9, the following terms shall have the following meanings:

“Change in Law” means the occurrence of any of the following events after the last date of 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. The imposition of Basic Custom Duty (BCD) shall not be considered as change-in-law, in any case.

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 Solar Power Producer then, in order to ensure that the Solar 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 Solar 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 Solar 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 Solar Power Producer shall be appropriately increased or decreased with due approval of MERC.*

9.2.3. *In case of approval of Change in Law by MERC and the same results in any increase or decrease in the cost of generation, the said increase/decrease in cost shall be passed on in tariff in the following manner;*

9.2.4. *Formula to calculate adjustment in the monthly tariff due to the impact of Change in Law,*

Allowable Change in Law Compensation (P) Actual per MW variation in expenses on account of Change in Law event x Allowable DC capacity for Change in Law compensation;

Then, the modification in PPA tariff (M.T.) for compensating the financial impact is given by M.T. Y/X

Where X estimated monthly electricity generation (in kWh) = (1/12) X [contracted capacity of the RE power plant as per PPA (in MW) x Annual CUF declared in PPA (in %) x 8760 hour x 10];

and $Y = [(PxMr)((1+Mr)^n)] + \{((1+Mr)^n) - 1\}$

where,

n=no. of months over which the financial impact has to be paid, and

Mr= monthly rate of interest =; where R = annual rate of interest equal to 125 basis points above the average State Bank of India Marginal Cost of Funds based leading rate (MCLR of one year tenor) prevalent during the last available six months for such period.

Further, the M.T. shall be tried up annually based on actual generation of the year so as to ensure that the payment to the Solar Power Producer is capped at the yearly Change in Law amount.

9.2.5. The Power Procurer/ MSEDCL or the Solar Power Producer, as the case may be, shall provide the other Party with a certificate stating that the adjustment in the Tariff Payment is directly as a result of the Change in Law and shall provide supporting documents to substantiate the same and such certificate shall correctly reflect the increase or decrease in costs.

9.2.6. 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.

9.2.7 For the excess amount to be recovered against the approved change in Law events, shall not attract any carrying costs or any other interest on such amount.

9.3 Notification of Change in Law

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

9.3.2. Notwithstanding Article 9.3.1, the Solar Power Producer shall be obliged to serve a notice to MSEDCL if it is beneficially affected by a Change in Law. Without prejudice to the factor of materiality or other provisions contained in this Agreement, the obligation to inform the Procurer contained herein shall be material. Provided that in case MSEDCL has not provided such notice, the Solar Power Producer shall have the right to issue such notice to MSEDCL.

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

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

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

- A. Whether Notifications 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?

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

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

12. Issue A: Whether Notifications dated 30 September 2021 resulting in Change in GST rate qualifies as Change in Law Event?

- 12.1. Ministry of Finance, vide Notifications dated 30 September 2021 increased GST on the solar power generating systems from five percent (5%) to twelve percent (12%).
- 12.2. RC vide its Notice dated 28 April 2023 informed MSEDCL that about increase in the GST rates on solar modules and other solar operated devices. RC in said Notice provided the details of excess GST paid by it. In said Notice, RC highlighted the Commission's Order dated 03 December 2021 in Case No. 141 of 2021.
- 12.3. Under the provisions of PPA, an event of any change in the taxation structure which have a direct effect on the project would satisfy the requirement of 'Change in Law'.
- 12.4. Further, as per Article 9.1 of the PPA, notification of new law or amendment of existing law or introduction / change in tax, duty or cess subsequent to Bid Submission date qualifies as Change in Law.
- 12.5. Admittedly, Notifications dated 30 September 2021 (which is subsequent to Bid Submission on 31 May 2021) which has led to change in the rate of GST from 5% to 12% on solar modules and inverters. Hence, the Commission rules that GST Notifications qualifies as Change in Law event under the PPA.

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

- 13.1. MSEDCL contended that Change in Law Notice regarding the impact of GST Notifications was given only on 28 April 2023 by RC to MSEDCL. The invoices dated 03 February 2022

and 16 April 2022, which form the basis of RC's claim, would be the trigger date to compute the period of (7) days in terms of Article 9.3.1 of the PPA to issue a Change in Law notice upon MSEDCL. RC has delayed serving of the mandatory Change in Law Notice. The delay on part of RC to make its claim barred by the Doctrine of Delay and Latches.

13.2. RC rebutted the arguments of MSEDCL stating that considering the timeline of (7) days for issuance of Notice, the Change in Law notice should have been issued by 7 October 2021. The occasion of compliance of Article 9.3.1 of the PPA does not arise in present case as the PPA was executed on 4 February 2022. RC pointed out that during the proceedings in Case No.141 of 2021, it has intimated MSEDCL and the Commission about occurrence of Change in Law event. It is settled law that purpose of notice is served, if it can be demonstrated that the other side has been informed.

13.3. Before dealing with the issues, the Commission deems it appropriate to first tabulate the chronology of events that happened in the present matter:

Sr. No.	Date	Event
1	22.04.2021	MSEDCL issued a competitive Bidding Process for Request for Selection.
2	31.05.2021	Last Date of Bid Submission.
3	30.09.2021	MoF Notification No.8/2021- Central Tax (Rate) and Notification No.8/2021-Integrated Tax (Rate).
4	29.10.2021	Petition in Case No.141 of 2021 for adoption of Tariff is filed by MSEDCL.
5	15.11.2021	RC along with other Respondents in Case No. 141 of 2021 filed submission requesting the Commission to declare increase in GST rate as Change in Law event
6	03.12.2021	The Commission issued Order.
7	09.12.2021	LOA issued by MSEDCL to RC.
8	04.02.2022	PPA was executed between MSEDCL and RC.
9	03.02.2022 & 16.04.2022	Receipt of invoice from Supplier to Petitioner.
10	05.08.2022	Commissioning of the project.
11	28.04.2023	Change in Law notice is issued by RC.

13.4. The Commission notes that as per Article 9.3.1 of the PPA provides that if the Seller is affected by a Change in Law then 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.

13.5. The Commission further notes that RC was aware of Change in Law event during the proceedings in Case No.141 of 2021. During the said proceedings RC informed that Change

in Law events on account of GST notifications have occurred after the bid deadline and before adoption of tariff and sought consideration of the same in tariff adoption proceedings. Relevant part of submission of RC and other Respondent in Case No. 141 of 2021 summarized in Order dated 3 December 2021 is reproduced below:

“5.4 Ministry of Finance on 30 September 2021 vide Notification No. 08/2021 increased Goods and Service Tax (GST) on import of Solar Modules and Solar Inverter from 5% to 12% (“MoF Notification”). Last date of the bid submission was 11 June 2021, and MoF Notification is increasing Goods and Service Tax (GST) from 5% to 12%, therefore MoF Notification will be considered as a Change in Law Event.

5.5 Adoption of tariff, declaration of Force Majeure and approval of change in law are responsibilities of the Commission in exercise of its Regulatory Powers under Section 86(1)(b) of the Electricity Act, 2003.

5.6 Above said events having occurred after the bid deadline and before adoption of tariff, the proper stage for their consideration is in the same proceedings wherein the bid discovered price is being adopted.”

MSEDCL in its submission dated 18 November 2021 in that matter has responded to above submission which is summarized in Order dated 3 December 2021 as follows:

“6.8 Section 86(1)(b) of the Electricity Act, 2003 stipulates that the Commission has powers to regulate electricity purchase and procurement process through agreements and at this stage no agreement is in existence with the Respondent.

6.9 The Commission may declare the Change in law after the execution of PPA as per the provisions stipulated under the PPA.”

With regards to Change in Law issue, the Commission in its Order dated 3 December 2021 ruled following:

*“9.6. The Commission notes that main thrust of the APTEL Judgment dated 12 October 2021 quoted in para 9.3 above is to provide regulatory certainty about Change in Law claims to the project developers. In present case, Respondents are claiming increase in GST rate as Change in Law event. Hon’ble APTEL in recent judgment dated 20 September 2021 in Appeal No. 215 of 2021 (Tata Renewable Energy Ltd. Vs MSEDCL) has already held that increase in GST rate is Change in Law event. **Hence, there is precedence based on which Respondents in present matter after considering factual aspects of their respective case would also be eligible to claim Change in Law compensation for increased in GST rate once it actually affected and incurred such additional expenses. Therefore, Respondents shall approach at appropriate time with all relevant documents for such Change in Law claims.**” (Emphasis added)*

13.6. Notice denotes a formal intimation to the party concerned of a particular fact. RC has flagged the issue of increase in GST during tariff adoption proceedings itself. MSEDCL has responded to that submission of RC in that proceeding. The Commission has recognized the issue and directed the parties therein to approach the Commission post incurrence of additional expenditure on GST. Hence, it can be concluded that the formal intimation of occurrence of Change in Law events have been made/served during proceedings in Case No.141 of 2021 and purpose of notice has been served.

14. Issue C: Ascertainment of principal GST claim amount and modalities for computation of carrying cost (if applicable)?

14.1. As per prayer clauses, RC is seeking sum of Rs.61,15,766.30/- towards increase in rates of GST. The amount prayed is for complete 1 X 3 MW project. RC in its Petition submitted a CA certificate dated 23 June 2023 to supplement the claim. CA certificate provided GST paid out by RC @ 12% and reads as below:

Sr. No	Product Description	Name of Supplier	Invoice No. & Date	Product Type	Qty	Rate	Amount	GST @ 12%
1	WSMD-445 SOLAR DOUBLE ET MODULE 445 WP (MONO)	Waaree Energies Limited. GST No. 24AAACA4 043J2Z1	5123012734 & 03.02.2022	Solar PV Module	8440	Rs. 9,767.75	Rs.8,24,39,810	Rs.98,92,777.20
2	SOLIS 255 K-EHV-5G-PLUS GRID TIE SOLAR PV INVERTER	Ginlong Soils	10032022CRNI NDINV & 16032022CR NINDINV & 16.04.2022	Solar Inverter	14	Rs. 3,52,020	Rs. 49,28,280	Rs. 5,91,393.60
Total GST Paid								Rs.1,04,84,170.8

14.2. As per RC, excess GST paid on account of Change in Law is tabulated below:

Sr No	Name Of Supplier	Invoice No & Date	Qty	Rate	Amount	GST @ 12%	GST @ 5%	Excess GST Paid
1	Waaree Energies Limited	5123012734 & 03.02.2022	8440	9,767.75	8,24,39,810	98,92,777.20	41,21,990.50	57,70,786.70
2	Ginlong Solis	10032022CRNIND INV & 16032022CRNIND INV & 16.04.2022	14	3,52,020	49,28,280	5,91,393.60	2,46,414.00	3,44,979.60
Total Excess GST Paid								61,15,766.30

- 14.3. MSEDCL highlighted that in order to establish one-to-one correlation it require additional set of documents. The list of documents is provided in Para (4.11) of the Order and not repeated for the sake of brevity.
- 14.4. The Commission notes that in adjudicatory proceedings under Section 86 (1)(f) of the Electricity Act, 2003, it is expected that the contesting parties will highlight specific area of disputes in claim ascertainment on which adjudication is required. But in present case, reconciliation exercise has not been done. Admittedly certain set of record have been submitted as a part of the Petition and pleadings.
- 14.5. While dealing with GST claims it is noteworthy to mention Section 12, 13, 14 and 31 of CGST Act, 2017, which reads as below:

“

TIME AND VALUE OF SUPPLY

12. (1) The liability to pay tax on goods shall arise at the time of supply, as determined in accordance with the provisions of this section.

(2) The time of supply of goods shall be the earlier of the following dates, namely: -

(a) the date of issue of invoice by the supplier or the last date on which he is required, under sub-section (1) of section 31, to issue the invoice with respect to the supply; or

(b) the date on which the supplier receives the payment with respect to the supply:

Provided that where the supplier of taxable goods receives an amount up to one thousand rupees in excess of the amount indicated in the tax invoice, the time of supply to the extent of such excess amount shall, at the option of the said supplier, be the date of issue of invoice in respect of such excess amount.

Explanation 1. — For the purposes of clauses (a) and (b), “supply” shall be deemed to have been made to the extent it is covered by the invoice or, as the case may be, the payment.

Explanation 2. — For the purposes of clause (b), “the date on which the supplier receives the payment” shall be the date on which the payment is entered in his books of

account or the date on which the payment is credited to his bank account, whichever is earlier.

13. (1) The liability to pay tax on services shall arise at the time of supply, as determined in accordance with the provisions of this section.

(2) The time of supply of services shall be the earliest of the following dates, namely:—

(a) the date of issue of invoice by the supplier, if the invoice is issued within the period prescribed under sub-section (2) of section 31 or the date of receipt of payment, whichever is earlier; or

(b) the date of provision of service, if the invoice is not issued within the period prescribed under sub-section (2) of section 31 or the date of receipt of payment, whichever is earlier; or

(c) the date on which the recipient shows the receipt of services in his books of account, in a case where the provisions of clause (a) or clause (b) do not apply:

Provided that where the supplier of taxable service receives an amount up to one thousand rupees in excess of the amount indicated in the tax invoice, the time of supply to the extent of such excess amount shall, at the option of the said supplier, be the date of issue of invoice relating to such excess amount.

Explanation. — For the purposes of clauses (a) and (b)—

(i) the supply shall be deemed to have been made to the extent it is covered by the invoice or, as the case may be, the payment;

(ii) “the date of receipt of payment” shall be the date on which the payment is entered in the books of account of the supplier or the date on which the payment is credited to his bank account, whichever is earlier.

....

14. Notwithstanding anything contained in section 12 or section 13, the time of supply, where there is a change in the rate of tax in respect of goods or services or both, shall be determined in the following manner, namely:—

(a) in case the goods or services or both have been supplied before the change in rate of tax,—

- (i) where the invoice for the same has been issued and the payment is also received after the change in rate of tax, the time of supply shall be the date of receipt of payment or the date of issue of invoice, whichever is earlier; or
 - (ii) where the invoice has been issued prior to the change in rate of tax but payment is received after the change in rate of tax, the time of supply shall be the date of issue of invoice; or
 - (iii) where the payment has been received before the change in rate of tax, but the invoice for the same is issued after the change in rate of tax, the time of supply shall be the date of receipt of payment;
- (b) in case the goods or services or both have been supplied after the change in rate of tax,—
- (i) where the payment is received after the change in rate of tax but the invoice has been issued prior to the change in rate of tax, the time of supply shall be the date of receipt of payment; or
 - (ii) where the invoice has been issued and payment is received before the change in rate of tax, the time of supply shall be the date of receipt of payment or date of issue of invoice, whichever is earlier; or
 - (iii) where the invoice has been issued after the change in rate of tax but the payment is received before the change in rate of tax, the time of supply shall be the date of issue of invoice:

Provided that the date of receipt of payment shall be the date of credit in the bank account if such credit in the bank account is after four working days from the date of change in the rate of tax.

Explanation. —For the purposes of this section, “the date of receipt of payment” shall be the date on which the payment is entered in the books of account of the supplier or the date on which the payment is credited to his bank account, whichever is earlier.

....

CHAPTER VII

TAX INVOICE, CREDIT AND DEBIT NOTES

31. (1) A registered person supplying taxable goods shall, before or at the time of,—

(a) removal of goods for supply to the recipient, where the supply involves movement of goods; or

(b) delivery of goods or making available thereof to the recipient, in any other case, issue a tax invoice showing the description, quantity and value of goods, the tax charged thereon and such other particulars as may be prescribed:

Provided that the Government may, on the recommendations of the Council, by notification, specify the categories of goods or supplies in respect of which a tax invoice shall be issued, within such time and in such manner as may be prescribed.

(2) A registered person supplying taxable services shall, before or after the provision of service but within a prescribed period, issue a tax invoice, showing the description, value, tax charged thereon and such other particulars as may be prescribed:

Provided that the Government may, on the recommendations of the Council, by notification and subject to such conditions as may be mentioned therein, specify the categories of services in respect of which—

- (a) any other document issued in relation to the supply shall be deemed to be a tax invoice;*
- or*
- (b) tax invoice may not be issued.”*

14.6. As per provisions of GST Law quoted above, invoice for goods has to be issued at the time of supply of goods which invariably has to be before date of commissioning as without such supply of goods commissioning of the plant would have not been possible.

14.7. With regards to supply of services, the Commission notes that as per Rule 47 of the CGST Rules, 2017, the invoices in respect of taxable supply of services have to be issued within 30 days:

“47. Time limit for issuing tax invoice.- The invoice referred to in rule 46, in the case of the taxable supply of services, shall be issued within a period of thirty days from the date of the supply of service.”

14.8. As per Section 12 and 13 of CGST Act, 2017, the liability to pay tax on goods shall arise at the time of supply of good/services. The exercise of establishing one-to-one correlation between the projects, the supply of goods or services and the invoices raised by the

supplier of goods and services is pre-requisite for claim settlement. It is expected that parties will carry out the exercise of establishment of one-to-one correlation and point out areas of disagreement. As already held in the earlier part of the order, GST invoices for supply of goods can be considered till date of commissioning and for supply of services, invoices which have been issued within 30 days from date of commissioning can be considered. With limited data set provided with the Petition, the Commission cannot carry out one-to-one correlation exercise and hence, the Commission cannot go into exact computation of Change in Law compensation.

- 14.9. Further, although RC has submitted CA certificate providing actual excess expenditure incurred on account of increase in GST Rate, RC has not submitted details of DC oversizing of its solar plant. Details of DC oversizing is required because Article 5.6 of the PPA, reproduced below, restrict the numbers of DC modules eligible for Change in Law compensation:

“5.6 DC Oversizing:

The DC oversizing shall be commercial decision of bidder to optimize his solar project. However for the purpose of compensation towards change in law, if any, the DC installed capacity shall be considered as the formula as follows or actual installed DC capacity whichever is lower.

DC Capacity for Change in Law = AC Contracted Capacity x (Declared CUF / Minimum CUF stipulated in RFS)”

- 14.10. During the course of hearing RC agreed to furnish the additional details if required. Accordingly, Parties are directed to sit together and scrutinize invoices a fresh, keeping in mind the Commission’s observations. Said exercise shall be completed within a month from date of this Order. Amounts so scrutinized shall be eligible as compensation for Change in Law event of increased GST. In case of dispute in quantification of claim, aggrieved party may file appropriate Petition before this Commission for adjudication of dispute.

- 14.11. RC has also claimed carrying costs but not provided any computed amount or proposed any rate of interest for carrying cost. The Commission notes that Article 9.2.7 of the PPA categorially states that Change in Law compensation shall not attract carrying cost. Relevant clause of PPA is reproduced below:

“9.2.7 For the excess amount to be recovered against the approved change in Law events, shall not attract any carrying costs or any other interest on such amount.”

In view of above clear provision of the PPA, the Commission cannot deviate from the agreed terms of the Contract. It is settled legal principle that courts cannot rewrite the contract between the parties. Accordingly, the Commission rejects the claim of carrying cost on the approved Change in Law claim.

15. As regards to frequency for payment of Change in Law compensation, the Commission notes that Article 9.2.4 of the PPA clearly stipulated mechanism for monthly payment of compensation. Same shall be adhered to by the parties.

16. Hence, the following Order:

ORDER

1. **Case No. 152 of 2023 is partly allowed.**
2. **Impact of Change in Law on account of increased GST rate vide notification dated 30 September 2021 is in-principally allowed.**
3. **Parties shall jointly scrutinize Changes in Law claims in detail as directed in para (14) within a period of a one month from date of this Order.**
4. **Methodology for payment of Change in Law compensation on monthly basis as stipulated in Article 9.2.4 of the PPA shall be followed.**

Sd/-
(Surendra J. Biyani)
Member

Sd/-
(Anand M. Limaye)
Member

Sd/-
(Sanjay Kumar)
Chairperson


(Dr. Rajendra G. Ambekar)
Secretary

