

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 05 of 2022

Petition of M/s. Tata Power Renewable Energy Limited for approval of the cost incurred due to change in the rate of Basic Custom Duty from 5% to 20% under Article 9 of the Power Purchase Agreement dated 03 January 2020 signed with The Tata Power Company Limited – Distribution.

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Case No.21 of 2022

Petition of M/s. Tata Power Renewable Energy Limited for approval of the cost incurred due to imposition of safeguard duty for the period of 30 July 2020 to 29 July 2021 on the import of solar cells under Article 9 of the Power Purchase Agreement dated 03 January 2020 signed with The Tata Power Company Limited – Distribution.

M/s. Tata Power Renewable Energy Limited (TPREL) : Petitioner
M/s. The Tata Power Company Limited - Distribution (TPC-D) : Respondent

Coram

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

Appearance:

For the Petitioner : Shri. Anand Srivastava (Adv.)
For the Respondent : Shri. Prashant Kumar

ORDER

Date: 17 May 2022

1. Tata Power Renewable Energy Limited (TPREL) has filed two Petitions registered as Case No. 5 of 2022 and Case No.21 of 2022 on 22 December 2021 and 6 January 2022 respectively. Both the Petitions have been filed under Section 86 (1) (b), (e) and (f) of Electricity Act, 2003 read with Article 9 of the Power Purchase Agreement dated 03 January 2020 signed with The Tata Power Company Limited - Distribution (TPC-D). Both these Petition are for compensation for increased expenses on account of Change in Law event under the same PPA. Hence, the Commission is deciding these two cases through this common order.

2. **TPREL's main prayers are as follows:**

Case No.5 of 2022

- a) *Allow the present Petition;*

- b) *Declare the Notification dated 01.02.2021 an event of change of law under Article 9.1 of the PPA resulting in change of Basic custom duty from 5% to 20% after executing the PPA;*

- c) *Allow TPREL to claim additional cost of Rs. 2,20,52,290.84 (Rupees two crores twenty lakhs fifty two thousand two hundred and ninety and eighty four paise) (including GST of 8.9%) along-with an estimated carrying cost of Rs. 15,51,998/- (Rupees Fifteen Lakhs Fifty One Thousand Nine Hundred and Ninety Eight only) calculated at 8.25% (SBI 1 year MCLR rate plus 1.25%) on account of the Change in Law event, i.e. increase in rate of Basic Custom Duty by the Ministry of Finance vide its notification dated 01.02.2021 and direct the Respondent to pay increased tariff in terms of 9.2.2. of PPA;*

Case No.21 of 2022

- a) *Admit the captioned Petition;*

- b) *Allow the Petitioner to claim additional cost of Rs. 38,49,83,628 (Rupees thirty eight crores forty nine lakhs eighty three thousand six hundred and twenty eight only) (including GST of 8.9%) along with an estimated carrying cost of Rs. 2,80,42,781 (Rupees Two Crores eighty Lakhs forty two thousand seven hundred and eighty one only) as on 06.01.2022 on account of the Change in Law event, i.e. imposition of Safeguard Duty by*

the Ministry of Finance vide its notification dated 29.07.2020 and direct the Respondent to pay increased tariff in terms of 9.2.1. of PPA;

OR

Alternatively, allow recovery as per the Methodology approved by the Hon'ble Commission in Case No 166 of 2019 dated 13th November, 2019 to claim compensation on account of the Change in Law event, i.e. imposition of Safeguard Duty by the Ministry of Finance vide its notification dated 29.07.2020;

3. TPREL in its respective Cases has stated as follows:

Common Facts

3.1. TPC-D initiated a competitive bidding process (followed by reverse auction) for procurement of up to 150 MW power from Solar Power Projects, for supply of solar power for 25 years.

3.2. Major events in this procurement process are as below:

Date	Event
21.08.2019	TPC-D issued a Request for Selection (RfS) inviting bids for selecting solar power producers for procurement of up to 150 MW power from solar power projects.
20.09.2019	TPREL submitted its bid on offering a total capacity of 150 MW (AC).
31.10.2019	After being selected, TPC-D issued Letter of Award (LoA) dated 31 October 2019 in favour of TPREL for developing Solar PV Project located at Village: Chhayan, Taluka: Pokhran, District: Jaisalmer, State: Rajasthan.
04.12.2019	The Commission adopted the Tariff through its Order in Case No. 292 of 2019.
01.01.2020	In Compliance with conditionalities in LoA, TPREL submitted Performance Bank Guarantee amounting to Rs.30 Crores in favour of TPC-D.
03.01.2020	TPREL entered into a PPA with TPC-D for supply of 150 MW (AC) solar power to TPC-D at a tariff of Rs.2.83/kWh generated from the Solar PV Project.
23.01.2020	TPREL entered into a Supply contract with Tata Power Solar System Limited (TPSSL) with effective date on 23 January 2020, whereby TPSSL was responsible for all EPC works for the Solar PV Power Plant.
14.05.2020	In order to perform all EPC functions/work TPSSL entered into an supply contract with Sungrow Power Supply Co. Ltd.

3.3. As per the provisions of the PPA, the Scheduled Commercial Operation Date (SCOD) of the Solar PV Project, was 15 months from the date of execution of the PPA for project being set up in solar park, and within a period of 18 months for projects being set up outside solar park. Since the present project was outside the Solar Park, the effective SCOD as per the PPA was

03 July 2021 which is 18 months from the date of execution of the PPA.

- 3.4. TPREL commissioned the Solar Project on 20 August 2021 and is supplying regular electricity to TPC-D from its COD date of 24 August 2021.
- 3.5. Paragraph 6.2(4) of the Tariff Policy, 2016 clearly states that any change in taxes imposed by the Central Government after the award of bids has to be treated as 'change in law'. Guidance is also taken from Ministry of Power's (MoP) letter dated 27 August 2018, wherein MoP issued directions to the Central Commission for allowing pass through of domestic levies, duties, cess and taxes imposed by Central/State Governments (leading to corresponding changes in cost) under 'Change in Law', if not otherwise provided under the power purchase agreement. Further, the 'Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees' (Guidelines for Tariff Determination) as amended from time to time, provide for relief if there is any 'change in law' event.
- 3.6. The Commission has jurisdiction to adjudicate upon the present Petition and grant the reliefs sought herein as per Section 86 of the Electricity Act, 2003 and specifically in light of Article 9.2 of the PPA.

Submissions Case No.5 of 2022

- 3.7. The Ministry of Finance vide its Notification No. 07/2021-Customs dated 01 February 2021 changed the rate of applicable Basic Custom Duty of 5% [as per the Notification No 1/2011 dated 06 January 2011 to 20% from 01 February 2021. All the applicable changes in Custom Duty have been issued through a separate Letter D.O.F. No. 334/02/2020-TRU dated 01 February 2021. The relevant extract of the Letter is given as below:
“
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].”
- 3.8. In view of the above, Basic Custom Duty of 20% was made applicable from 02 February 2021 on import of Solar Inverters. Such change was not contemplated and could not have been factored in at the time of submission of bid or the cut-off date. Therefore, this event qualifies as a change in law.
- 3.9. TPREL vide its letter dated 08 February 2021, informed the TPC-D about the Change in Law

on account of Notification dated 01 February 2021.

- 3.10. Solar Inverters were planned to be purchased during the last phase of the procurement plan and hence, as per the schedule the same were purchased during the month of February, 2021 for which the Basic Custom Duty and additional Social Welfare Surcharge were paid amounting to Rs.2,20,52,290.84/- (Rupees two crores twenty lakhs fifty two thousand two hundred and ninety and eighty four paise) (including GST of 8.9%) in compliance with the Ministry of Finance vide Notification dated 01 February 2021.
- 3.11. For sufficing claim, TPREL submitted the invoices raised by TPSSL and Sungrow with respect to the purchase of solar Inverters along with the bill of entry, challans, bills of landing, LRs and invoices raised by TPSSL against Basic Custom Duty paid. Further, the Auditor's Certificate regarding increase in Basic Customs Duty has been furnished.
- 3.12. Solar modules were released by the Customs Authority on the basis of challans for the duty paid by TPSSL through various Bank transfers. TPREL submitted Bank statement showing release of payment towards Custom duties from TPSSL to Customs and TPREL to TPSSL.
- 3.13. TPREL in its submission relied upon provisions with respect to Change in Law in PPA dated 03 January 2020. A Change in Law event includes enactment of a new law, change in any tax rates as well as amendment, modification, or repeal of an existing law. Such Change in Law event must occur after the date of bid submission.
- 3.14. If the event of Change in Law results in any adverse financial loss/ gain to the Power Producer / Procurer, then the Power Producer / Procurer, shall be entitled to compensation by the other party who shall ensure that the Power Producer is placed in the same financial position as it would have been if the occurrence of the Change in Law does not take place. The quantum and mechanism of compensation payment shall be determined and shall be effective from such date as may be decided by the Commission.
- 3.15. TPREL has already submitted its quote for tariff through e-reverse auction held on 10 October 2019 for developing Solar PV Project. Considering, that the change in Basic Customs duty has resulted in additional cost only after the Notification dated 01 February 2021, which was not required to be contemplated by TPREL at the time of quoting, TPREL is entitled to seek appropriate relief as per Article 9 of the PPA.
- 3.16. TPREL proposes that TPC-D can pay the compensation as a one-time payment of impact of Basic Customs duty & additional Social Welfare Surcharge along with the carrying cost from the actual payment date till the actual recovery of the amount. This is a simple approach and will avoid the future carrying cost.

3.17. TPREL has considered SBI one (1) year Marginal Cost of fund plus 1.25% for computing carrying cost.

Claim of BCD and SWS as per Notification dated 1/02/2021

Particulars		Unit	Invoice Date		Total
			9 Feb 2021	17 Feb 2021	
Supplier Name			SUNGROW POWER SUPPLY CO. LTD	SUNGROW POWER SUPPLY CO. LTD	
Supplier Invoice No.			100020201010004-1	100020201010004-2	
Invoice Quantity	a	Nos.	16.00	22.00	38.00
Unit Price	b	USD	43750	43750	43750
Invoice Value	C=a*b	USD	700000	962500	1662500
Avg. Exchange Rate	d	Ratio (USD:INR)	73.85	73.8	73:82
Invoice Value (INR)	e=c*d	Rs.	51695000	71032500	122727500
Claim after 01/02/2021					
Basic Custom Duty	f	%	20.00%	20.00%	20.00%
Custom Duty	g=e*f/10^7	Rs. Crores	1.03	1.42	2.45
SWS amount as per BOE	h	%	10%	10%	10%
SWS amount as per BOE	i=g*h	Rs. Crores	0.10	0.14	0.25
Total Claim	j=g+i	Rs. Crores	1.14	1.56	2.70
Claim before 01/02/2021					
Basic Custom Duty	k	%	5.00%	5.00%	5.00%
Custom Duty	l=e*k/10^7	Rs. Crores	0.26	0.36	0.61
SWS amount as per BOE	m	%	10%	10%	10%
SWS amount as per BOE	n=l*m	Rs. Crores	0.03	0.04	00.06
Total Claim	o=l+n	Rs. Crores	0.28	0.39	0.668
Change in Law Impact					
Change in Custom Duty post 1st February, 2021	p=j-o		0.85	1.17	2.03
GST@8.9%	q	%	8.90%	8.90%	8.90%
GST Amount on Custom Duty	r=p*q		0.08	0.10	0.18
Total Impact of Change in Law	s=p+r		0.93	1.28	2.21
Petition Date			13- Dec-21	13- Dec-21	
Number of Days considered for carrying Cost	t		307	299	
SBI 1 year Marginal Cost of fund +1.25%	u		8.25%	8.25%	
Carrying Cost	V=s*u*t/365		0.06	0.09	0.15
Total Impact of Change in Law including Carrying Cost	w=s+v		0.99	1.36	2.36

Note: Carrying cost will be revised based on actual date of recovery.

3.18. Change in Law Impact:

Impact of Basic Customs Duty & additional Social Welfare Surcharge (including GST@8.9%)	Rs.2,20,52,290.84 /-
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Estimated carrying cost (SBI 1-year MCLR rate plus 1.25%)	Rs. 15,51,998/-
Total Impact	Rs.2,36,04,289/-

- 3.19. Further, regarding GST of 8.9% claimed on total amount, TPREL submitted that post 31 December 2018, the Central/ State Government has issued various notifications stating that, for supply and service availed for setting up of a solar power plant, 70% of the total contract value is deemed to be considered as a supply component and the remaining 30% of the total contract value is deemed to be considered as a service component. Consequently, effective GST is payable at the rate of 8.9% [i.e. 5% of 70% + 18% of 30% = 8.9%, i.e. 3.5%+5.4%] on the entire consideration for supply and services availed by it for setting up of a solar power plant.
- 3.20. Accordingly, TPREL has paid GST of 8.9% to TPSSL on the entire consideration. For sufficing claim, TPREL reproduced extracts and provisions of the notification dated 31 December 2018. The Hon'ble Tribunal has also in its Judgment dated 20 September 2021 in Appeal No. 215 of 2021 held that the applicable GST rate post 31 December 2018 will be 8.9%. However, GST applicable only for procurement of Solar Invertors is 5% and hence, in the Bill of entry 5% GST is reflected.
- 3.21. TPSSL invoiced to TPREL GST @ 8.9% on the BCD and additional Social Welfare Surcharge duty paid and has also paid the balance differential GST amount recovered from TPREL to the tax authority.

Submission in Case No.21 of 2022

- 3.22. The Ministry of Finance vide Notification dated 30 July 2018 (Old Notification) imposed safeguard duty on the import of solar cells whether or not assembled in modules or panels. The Old Notification provides that any person importing solar cells into India is required to pay safeguard duty at the following rates:
- twenty five percent ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30 July 2018 to 29 July 2019 (both days inclusive);
 - twenty percent ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30 July 2019 to 29 January 2020 (both days inclusive); and
 - fifteen percent ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30 January 2020 to 29 July 2020 (both days inclusive);
 - No safeguard duty was payable for any import of solar cells into India from 30 July 2020 onwards.

Accordingly, in terms of the Old Notification, the projects commissioning post 30 July 2020 and importing modules after such date would have not been subject to safeguard duty.

3.23. However, Ministry of Finance vide New Notification dated 29 July 2020 Notification No. 02/2020-Customs (SG) extended the applicability of the safeguard duty for the period of 30 July 2020 to 29 July 2021 at the following rates:

- fourteen point nine per cent ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30 July 2020 to 29 January 2021 (both days inclusive); and
- fourteen point five per cent ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30 January 2021 to 29 July 2021 (both days inclusive).

3.24. As per Supply contract dated 23 January 2020; TPSSL was responsible for designing detailed engineering, layout preparation, material selection, manufacturing supply, inspection, testing at work, packing, transportation from place of manufacture to site, erection, testing at site, pre-commissioning and commissioning, performance testing and performance guarantee for the complete system for the Solar PV Power Plant complete with all accessories, civil works, foundations, structural, electrical, controls and instrumentation. In order to perform the abovementioned functions/work TPSSL entered into a back-to-back arrangement with various suppliers for supply of Solar Modules.

3.25. TPREL in view of the Old Notification providing the sunset date of 29 July 2020 for imposition of safeguard duty had planned the procurement of solar PV modules with the bonafide belief based upon the said Notification that the safeguard duty would not be applicable on the import of solar PV modules 30 July 2020 onwards given the sunset clause. TPREL had accordingly planned to import the solar PV modules after July 2020 by which date the effective safeguard duty would not be applicable. Therefore, it can be seen that as per original schedule the modules were planned to reach at the site during the 0% Safeguard duty (SGD) window i.e. after 29 July 2020. However, since SGD applicability was introduced on 29 July 2020, for the period between 30 July 2020 and 29 July 2021, the module import was subjected to SGD. Such change was not contemplated and could not have been factored in at the time of submission of bid or the cut-off date.

3.26. Therefore, this event qualifies as a 'Change in law'. TPREL vide its letter dated 05 August 2020 has informed TPC-D about the New Notification and stated that the same shall qualify as a 'change in law' event as per Article 9.1 of the PPA.

- 3.27. Considering the extension of imposing safeguard duty on the import of solar cells TPREL filed a Petition in Case No. 218 of 2020 before the Commission praying for a declaration from the Commission to consider imposition of safeguard duty on solar cells for the period of 30 July 2020 to 29 July 2021 as 'change in law' event.
- 3.28. The Commission vide its Order dated 05 March 2021 ruled that the Ministry of Finance Notification dated 29 July 2020 extending the imposition of SGD is an event of Change in Law. The Commission further ruled that the additional expenditure and other consequential impact shall be considered on actual basis for reimbursement under Change in Law subject to prudent check after the TPREL files its petition with all the details in accordance with the provisions of PPA.
- 3.29. As per Article 9.2 of the PPA, TPREL for claiming any relief on account of 'change in law' event is required to approach the Commission. Therefore, considering the provisions of the PPA, TPREL has filed the present Petition before the Commission.

Methodology of Compensation

- 3.30. TPREL suggested methodology of compensation in line with the Commission's earlier dispensation in its Order dated 13 November 2019 in Case No.166 of 2019.

Approach 1: Lumpsum Payment of Impact of Change in Law

- 3.31. TPC-D can either pay the compensation as a onetime payment of impact of safeguard duty along with the carrying cost from the actual payment date of SGD payment. This is a simple approach and will avoid the future carrying cost.
- 3.32. Further, in line with Commission's earlier dispensation it has considered the interest rate for carrying cost based on provisions of late payment surcharge as considered in the PPA (i.e. SBI 1-year Marginal Cost of fund plus 1.25%) for computing carrying cost.
- 3.33. The working of the Change in Law compensation is as given below:

Claim of SGD under New Notification

Particulars	Unit	Period		Total
		30.7.20- 29.1.21	30.1.21- 29.7.21	
Invoice Quantity	MWp	38.85	127.78	166.63
Invoice Value	USD	6988205	25788849	32754853
Ave. Exchange Rate	USD: INR	74.69	73.81	73.99
Assessable value (INR)	Rs.	521931518	1901741541	2423673059
Assessable value	Rs Crores	52.19	190.17	242.37
Safeguard Duty @	%	14.90%	14.50%	

Safeguard Duty	Rs Crores	7.78	27.58	35.35
GST @ 8.9%	Rs Crores	0.69	2.45	3.15
Total Claim Value	Rs Crores	8.47	30.03	38.50
Carrying Cost on total Claim	Rs Crores			2.80
Total including carrying Cost				41.30

As seen from the above, the impact of SGD along with carrying cost works out to Rs 41.30 Crores.

APPROACH II: Payment of Compensation on per unit basis through the tariff along with the carrying cost over the PPA period.

3.34. TPC-D may pay the compensation on per unit basis considering the generation at PLF of 27.47% on the basis of Methodology approved by the Commission in its Order in Case 166 of 2019 dated 13 November 2019 over the PPA period to TPREL. The same will be yearly reconciled based on the actual parameters.

3.35. Impact of SGD Notification:

Particulars	Amount
SGD Paid along with GST of 8.9%	Rs. 38,49,83,628
Estimated carrying cost (at the rate of 8.25% based on SBI MCLR Rate plus 1.25%)	Rs. 2,80,42,781

4. TPC-D in its submission stated as follows:

Common Submission:

- 4.1. TPREL has not placed on record the above supporting documents to substantiate the claim. TPREL has also not placed on record the Supply contract for the import of the Solar modules. It is pertinent to note that the above documents are imperative for the purpose of deciding the applicability of the safeguard duty and to determine whether the quantification provided by TPREL is correct to ascertain the claim under Article 9 of the PPA.
- 4.2. TPC-D intends to verify the claim of TPREL on the aspect of one-to-one correlation of modules by undertaking necessary physical inspection so as to ascertain that the same modules are installed at the project site on which increased rate of custom duty and safeguard duty are claimed.
- 4.3. In case the Commission holds that there is a Change in Law, TPREL is to be compensated by way of increase in tariff in terms of the formula specified under Article 9.2.2. of the PPA. In terms of the same the payment towards the Change in Law is to be made through out the

terms of the PPA by way of the increase in tariff.

- 4.4. In both cases, TPREL is required to demonstrate with relevant documents the impact of the change in the rate of the Custom Duty and Safeguard Duty, i.e. the alleged change in law. Without any substantiation and supporting documents, TPREL cannot be entitled to any relief.

Reply specific to Case No.5 of 2022:

- 4.5. Though the claim for additional amount has been made but same has not been substantiated by proper documentation such as the following:
- a) Capacity in DC of the Solar Modules on which such change of the rate of custom duty paid by the Petitioner.
 - b) Whether the Petitioner has benefitted due to reduction in other applicable taxes/duties/cess etc. or not.
- 4.6. In the present stage where TPREL has failed to place on record all the relevant documents to ascertain the event of Change in Law on account of the increase in the rate of the Custom Duty, there cannot be any allowance of claim until TPREL submits all the relevant documents.
- 4.7. The PPA between the parties were executed on 03 January 2020 with the SCOD of 18 months i.e. 03 July 2021. It is pertinent to note that the notification with the change in the custom duty rate was introduced on 01 February 2021 which was just five months before the SCOD.

Reply specific to Case No. 21 of 2022 dated 10 March 2022:

- 4.8. The present Petition has been filed by TPREL seeking approval of the cost incurred due to imposition of safeguard duty for the period of 30 July 2020 to 29 July 2021 on the import of solar cells *vide* Notification No. 02/2020- Customs (SG) dated 29 July 2020 of the Ministry of Finance, being declared as an event of ‘change in law’ by the Commission *vide* Order dated 05 March 2021 in Case No. 218 of 2020 in terms of Article 9 of the Power Purchase Agreement (PPA) entered into between TPREL and TPC-D.
- 4.9. Though the claim for additional amount has been made but the same has not been substantiated by proper documentation such as the following:

- a) Capacity in DC of the Solar Modules on which such change of the rate of custom duty paid by the Petitioner.
- b) Statement of account showing the actual expenses made towards the safeguard duty/GST.
- c) Bill of lading and transportation.
- d) Whether the Petitioner has benefitted due to reduction in other applicable taxes/duties/cess etc. or not.
- e) TPREL should reconcile the claim amount of Safeguard Duty and establish one to one correlation

4.10. The approval of the Commission is necessary in terms of Article 9.2.1, 9.2.2 and 9.2.4. Particularly, under article 9.2.2 the approval of the Commission is required.

5. At the e-hearing through video conferencing held on 28 January 2022, the Commission heard these matters:

5.1. Advocate of TPREL narrated background of the Petitions. He apprised the Commission that the parties have reconciled the claims. The Scope of Petition in Case No.5 of 2022 is twofold, firstly it seeks declaration of the Notification No.7/2021- Customs (Change in rate of Basic Custom Duty from 5% to 20%) dated 01 February 2021 as 'Change in Law'. Secondly ascertainment of claims along with carrying cost. As far as Case No.21 of 2022 is concerned, he informed that the Commission in its earlier Order in Cas No.218 of 202 dated 5 March 2021 has already recognized Notification No.2/2020-Customs (SG) dated 29 July 2020 as Change in Law. The Petition is limited to ascertainment of claims along with carrying cost. He emphasized on one time settlement options for avoiding carrying cost.

5.2. Representative of TPC-D submitted that qualification for considering event as Change in Law has been explicitly provided in PPA. TPREL has not substantiated its claim in the Petition. He vehemently opposed the option of onetime payment settlement.

5.3. Based on material placed on record, the Commission notes that in Petitions, TPREL for ascertaining compensation amount has considered average exchange rates (USD/INR) instead of actuals based on billing. Hence, TPREL was directed to provide clarification on this aspect.

6. TPREL in its clarification dated 11 March 2022 in both Cases stated that it has considered

foreign exchange rate at actuals on each transaction basis and the same can also be seen from the computation chart provided as Annexure-P10 of Petition in Case No. 5 of 2022 and Annexure-P 6 of Petition in Case No. 21 of 2022.

Commission's Analysis and Rulings

7. The Present Petitions are filed by TPREL. TPC-D floated the tender in August 2019 for procurement of 150 MW Solar power to meet its RPO and TPREL had participated in the bid and had emerged as the successful bidder in the E-reverse auction carried out on 10 October 2019.
8. Tariff discovered through bidding process for the said tender of 150 MW of Solar power was Rs. 2.83/unit which was adopted by the Commission by its Order dated 4 December 2019 in Case No. 292 of 2019. Subsequently, PPA was signed between the Parties on 3 January 2020. As per the PPA, the Financial Closure and SCOD were 3 January 2021 and 3 July 2021 respectively.
9. In Case No.5 of 2022; TPREL contended that it has submitted its quote for tariff through e-reverse auction held on 10 October 2019 for developing Solar PV Project. The change in Basic Customs duty has resulted in additional cost only after the Notification dated 01 February 2021. TPREL has further submitted that Notification dated 01 February 2021 was not perceived at the time of bidding and was not factored in at the time of bid submission. Therefore, it has prayed the Commission to declare said Notification as 'Change in Law'. Further, it is entitled to seek for appropriate relief as per Article 9 of the PPA.
10. In Case No. 21 of 2022, TPREL pointed out that the Commission vide its Order dated 05 March 2021 in Case No.218 of 2020 ruled that the Ministry of Finance Notification dated 29 July 2020 extending the imposition of SGD is an event of Change in Law. The Commission further specified that the additional expenditure and other consequential impact shall be considered on actual basis for reimbursement under Change in Law subject to prudent check after the TPREL files its petition with all the details in accordance with the provisions of PPA.
11. The Commission finds that ambit of Case No.5 of 2022 is wider as the Commission is required to determine as to whether Notification dated 1 February 2021 is Change in Law or not. If the answer to above aspect is affirmative then both the cases will follow same course of ascertainment of claim, carrying cost and mode of payment.
12. Considering above factual position, 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% qualifies as Change in Law Event?

If above issue answers in affirmative then, below mentioned issues will be also contemplated for Case No.5 of 2022 along with Case No.21 of 2022.

(B) Ascertainment of principal claim amount along with GST in both the cases.

(C) What are the modalities for carrying cost?

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

The Commission is addressing above issues in the following paragraphs.

13. Issue A: Whether Notification dated 1 February 2021 resulting in change in Basic Custom duty from 5% to 20% qualifies as Change in Law?

13.1. The Commission notes that any event can be said to be ‘Change in Law Event’, only if it satisfies the provisions stipulated under the PPA. Relevant part of PPA dealing with provisions of Change in Law are reproduced below:

“Law” shall mean any valid legislation, statute, rule, regulation, notification, directive or order, issued or promulgated by any Governmental Instrumentality.”

“Governmental Instrumentality” shall mean the Government of India, Governments of state(s) Rajasthan, Maharashtra and ministry, department, board, authority, agency, corporation, commission under the direct or indirect control of Government of India or the above state Government or both, any political sub-division of any of them; including any court or Appropriate Commission(s) or tribunal or judicial or quasi-judicial body in India;”

ARTICLE 9: CHANGE IN LAW

9.1 Definitions in this Article 9, the following terms shall have the following meanings:

This clause will be restricted to any “Change in Law” in India. “Change in Law” in India 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; or;*
- ii. *an amendment, modification or repeal of an existing law in India, or;*
- iii. *the requirement to obtain a new consent, permit or licence in India; or*
- iv. *any modification to the prevailing conditions prescribed in India for obtaining a consent, permit or licence; not owing to any default of the Solar Power Producer; or*
- v. *any change in the rates of any Taxes, Duties and Cess in India which have a direct effect on the Project.*

However, Change in Law in India 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 maybe decided by the MERC.

.....

9.2.4. The revised tariff shall be effective from the date of such Change in Law as approved byMERC, 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 abovestated.”

13.2. The Commission notes that TPC-D has contended that PPA between parties were executed on 03 January 2020 with SCOD of 18 months i.e. by 03 July 2021. The Notification with change in custom duty was introduced on 01 February 2021, which is just five months before the SCOD. TPC-D seems to point out that TPREL could have acted swiftly and then the possible impact could have been saved. TPREL in its submission has clarified that it had planned to procure Solar inverters at the last phase of the procurement plan. In this regard the Commission notes that in Solar Industry it is general practice to procure Module and inverters at last leg of project procurement plan unless any disruption in supply chain is in knowledge. Developer do tie up procurement, but such procurement contract is executed in last phases of project roll out. Even otherwise, there is nothing on record to substantiate that TPREL has been in knowledge of such change. Hence, contentions of TPC-D cannot be allowed.

13.3. The Commission notes that as on bid submission date, following notifications 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. 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 is increased to 20% with effect from 2 February 2021.

- 13.4. The Notification dated 01 February 2021 is subsequent to the last date of Bid Submission. Under the provisions of PPAs, 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’.
- 13.5. ‘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.
- 13.6. Further, as per clause 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.
- 13.7. Admittedly, Notification dated 01 February 2021 (which is subsequent to Bid Submission date of 25 September 2019 and e-RA date 10 October 2019) has led to change in the rate of basic custom Duty from 5% to 20% effective from 2 February 2021. Hence, the Commission rules that this Notification dated 01 February 2021 is Change in Law event under the PPA.
- 13.8. Regarding, notification for extending applicability of Safeguard Duty (claim made in Case No. 21 of 2022), the Commission in its Order dated 5 March 2021 in Case No. 218 of 2020 filed by TPREL has already ruled as follows:

“2. Ministry of Finance’s Notification dated 29 July 2020 extending imposition of Safeguard Duty qualifies as Change in Law event.

3. The additional expenditure and other consequential impact shall be considered on actual basis for reimbursement under Change in Law subject to prudent check after Tata Power Renewable Energy Ltd. files its Petition with all the details in accordance with the provisions of Power Purchase Agreement.”

Hence, no fresh ruling is required on this aspect of extension of applicability of Safeguard Duty as Change in Law event.

14. Issue B: Ascertainment of principal claim amount along with GST in both cases.

- 14.1. The Commission notes that TPREL in its submission provided following claim statement:

(Rs. Crores)

Case No.5 of 2022		
Change in Custom Duty post 1 February 2021 and additional social welfare surcharge along with GST @8.9%	(a)	2.21
Carrying Cost	(b)	0.15
Impact of Change in Law including carrying cost	(c)=(a)+(b)	2.36
Case No.21 of 2022		
Safeguard Duty Paid along with GST @8.9%	(a)	38.50
Carrying Cost	(d)	2.80
Impact of Change in Law including carrying cost	(c)=(a)+(b)	41.30

14.2. During the course of hearing, Advocate appearing on behalf of TPREL submitted that exercise of reconciliation of claims has been done. However, TPC-D's Replies in both the matter is silent on claim statement, rather it has contended that TPREL has not placed on record the supporting documents to substantiate the claim. TPC-D highlighted that documents with reference to capacity in DC of the Solar Modules on which such change of the rate of custom duty paid and any accrued benefit on account of reduction in applicable taxes/duties/cess etc are not submitted. TPC-D further mentioned that it reserves its right to verify the claim of TPREL on the aspect of one-to-one correlation of modules by undertaking physical verification.

14.3. With regards to claim in Case No. 5 of 2022, the Commission notes that Chartered Accountant's certificate dated 15 November 2021 categorically records that TPREL has paid out additional amount to the tune of Rs.2,20,52,290.84/-. Further, the applicable GST rate for project cost is 8.9%. The relevant extract of certification is reproduced as below:

“

We have examined the invoices, other relevant records, and documents for the above project. Based on our verification of the same, we certify that the BCD and SWS paid by Tata Power Renewable Energy Limited (“Company”) for the imports of the Solar Inverters and GST on account of the BCD and SWS is as given in the table below :

Table: BCD, SWS and GST paid for 150 MW (AC) capacity Solar Plant at Loharki (Chhayan II) Rajasthan

Sr. No.	BOE No.	Invoice value in INR as per BOE	BCD paid @ 20% as per new law			BCD @5% if MNRE exemption was available			Additional Amount Paid
			BCD Amount as per BOE	SWS Amount as per BOE	Total (A)	BCD Amount	SWS Amount @10% of BCD	Total (B)	
			20%	10%		5%	10%		
1	2594635	5,16,95,000	1,03,39,000	10,33,900	1,13,72,900	25,84,750.00	2,58,475.00	28,43,225.00	85,29,675.00

2	2754551	7,10,32,500	1,42,06,500	14,20,650	1,56,27,150	35,51,625.00	3,55,162.50	39,06,787.50	1,17,20,362.50
					2,70,00,050			67,50,012.50	2,02,50,037.50
								GST @ 8.90%	18,02,253.34
								Total additional amount paid	2,20,52,290.84

”

14.4. With regards to claim in Case No. 21 of 2022, the Commission notes that Chartered Accountant’s certificate dated 6 January 2022 categorially records that TPREL has paid out additional amount to the tune of Rs.38,49,83,628/-. Further, the applicable GST rate for project cost is 8.9%. The relevant extract of certification is reproduced as below:

“

We have examined the invoices, other relevant records, and documents for the above project. Based on verification of the same, we certify that the safeguard duty paid by Tata Power Renewable Energy Limited (“Company”) for the imports of the modules and additional GST on account of the safeguard duty is as given in the table below :

Table: Safeguard Duty and GST paid for 150MW Solar PV Plant at Loharki (Chhayan III) Rajasthan

Sr. No.	Particulars	Unit	Value
1	No. of invoices raised by Module Supplier	No.	49
2	No. of BOE	No.	48
3	Assessable Value (AV)	INR	242,36,73,059
4	Safeguard Duty (SGD) paid on AV	INR	35,35,20,320
5	GST @ 8.9% of SGD	INR	3,14,63,308
	Total of SGD and GST (4+5)	INR	38,49,83,628

”

14.5. With regards to foreign exchange rate considerations, it is evident that certain supplier along with M/s. Sungrow Power Supply Co. Ltd. has raised the invoices in US Dollars. While clarifying the Commission’s query, TPREL submitted that it has considered actual foreign exchange rates and not average exchange rate. Upon scrutiny of invoices and its corresponding Custom’s Bill of Entry for Home Consumption, it is evident that the exchange rates considered by TPREL in Petition matches with Custom’s Bill of Entry.

14.6. The Commission also notes that said Custom Duty and Safeguard Duty has been paid by TPREL along with GST at rate of 8.9%. Further, TPREL has confirmed that said GST amount has been deposited with the tax authorities. As such taxes have actually been paid on duty amount, same is allowed as Change in Law compensation.

14.7. The Commission also finds merit in argument of TPC-D that TPREL has not placed before the Commission in a transparent manner the taxes, duties and levies which stand withdrawn and no longer payable or reduced by whatsoever be the reason. TPREL in its submission has not provided anything on that account.

14.8. At the same time, it is also important to note that any delay in such exercise will only increase the carrying cost component of the Change in Law compensation. As TPREL has backed its claim by CA Certificates, the Commission is of the opinion that there is no point in delaying Change in Law compensation which will increase carrying cost burden on the consumers. Further, TPREL has 25 years long PPA with TPC-D and hence adjustment in claim amount, if any, can easily be made subsequently. Hence, the Commission deems it appropriate to allow the claim as mentioned in Para 13.1 above towards Change in Law compensation with the condition that one-to-one correlation exercise be completed within 3 months from the date of this Order and any adjustment in claim, if any, be carried out with associated carrying cost/ holding cost. During this process, TPREL shall also submit details of taxes, duties and levies which stand withdrawn and no longer payable or reduced to TPC-D and include its impact, if any, in reconciliation process.

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

15.1. 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.

15.2. The Commission notes that TPREL in both the matters has claimed carrying cost @ 1.25% plus SBI Marginal Cost of Fund based Lending Rate per annum. The Commission notes that TPREL has adopted this rate based on interest rate applicable in the event of late payment and the same is stipulated in PPA.

15.3. 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), it has provided the carrying cost @ 1.25% plus SBI MCLR per annum.

15.4. Accordingly, the Commission allows levy of carrying cost at the rate of 1.25% plus SBI MCLR per annum on above compensation amount from the date of actual payment till date of this order.

16. Issue D: What should be frequency of payment of compensation amount?

16.1. TPREL has contended that the compensation amount be paid as a lump sum amount at one go. During hearing, TPC-D has opposed one time settlement of compensation and emphasized that it should be spread uniformly over the lifetime of PPA.

- 16.2. The Commission notes that in similar such matters of compensation settlement, 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 TPC-D to again 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 TPREL within two weeks from the date of this Order.
- 16.3. 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 to be paid plus carrying cost at the rate of 1.25% in excess of MCLR per annum of SBI from date TPREL 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 TPREL during that particular year.
 - d. Per unit cost for a particular year shall be computed by dividing amount determined in 'c' above by energy to be supplied during that year from the project capacity of 150 MW at 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 Financial Year, 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 last month of PPA tenure at no additional carrying cost.

17. Hence, the following Order:

ORDER

1. The Case No. 5 of 2022 and 21 of 2022 are allowed.
2. Change in Law Compensation be worked out as per dispensation provided in Para (14) plus carrying cost @ 1.25% plus SBI MCLR per annum from date it paid such amount till date of this Order.
3. The Tata Power Company Limited - Distribution shall convey its decision on payment option to Tata Power Renewable Energy Limited within two weeks from date of this Order.
4. In case of payment over PPA tenure is selected then methodology stipulated in para 16.3 shall be adopted.

Sd/-
(Mukesh Khullar)
Member

Sd/-
(I.M. Bohari)
Member

Sd/-
(Sanjay Kumar)
Chairperson


(Abhijit Deshpande)
Secretary


MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
॥ अदित्यं हृदयम् ॥