



नई दिल्ली  
NEW DELHI

याचिका संख्या /Petition No.: 67/MP/2019 &  
68/MP/2019

कोरम/Coram:

श्री पी. के. पुजारी, अध्यक्ष/Shri P. K. Pujari, Chairperson  
डॉ. एम. के. अय्यर, सदस्य/ Dr. M.K. Iyer, Member  
श्री आई. एस. झा, सदस्य/ Shri. I.S. Jha, Member

आदेश दिनांक /Date of Order: 28<sup>th</sup> of January, 2020

**IN THE MATTER OF:**

Petition under Section 79 the Electricity Act, 2003 read with Article 12 of the Power Purchase Agreements executed between Petitioners and the Respondent No.1 for seeking declaration and relief for 'Change in Law'.

**AND IN THE MATTER OF:**

**1. Petition No. 67/MP/2019**

Clean Sustainable Energy Private Limited  
406, Hubtown Solaris,  
N.S. Phadke Marg,  
Andheri East, Mumbai,  
Maharashtra

...Petitioner

**VERSUS**

1. Solar Energy Corporation of India Limited  
1st Floor, A-Wing, D-3,

District Center - Saket,  
New Delhi-110017

2. Jaipur Vidyut Vitran Nigam Ltd.  
Vidyut Bhawan, Jyoti Nagar,  
Jaipur – 302005, Rajasthan
3. Ajmer Vidyut Vitran Nigam Ltd.  
Vidyut Bhawan, Panchsheel Nagar Makarwali Road,  
Ajmer – 305004, Rajasthan
4. Jodhpur Vidyut Vitran Nigam Ltd.  
New Power House, Industrial Area  
Jodhpur – 342003, Rajasthan

**...Respondents**

**AND IN THE MATTER OF:**

**2. Petition No. 68/MP/2019**

Fermi Solarfarms Private Limited  
M-4, Ground & Level 1,  
South Extension Part – II,  
New Delhi – 110049

**...Petitioner**

**VERSUS**

1. Solar Energy Corporation of India Limited  
1st Floor, A-Wing, D-3,  
District Center - Saket,  
New Delhi-110017
2. Maharashtra State Electricity Distribution Company Limited  
Hongkong Bank Building,  
M.G. Road, Fort, Mumbai-400001

**...Respondents**

**Parties Present:** Shri Ashish Bhardwaj, Advocate, CSEPL and FSPL  
Shri Amit Ojha, Advocate, CSEPL and FSPL

Shri Ankur Sood, Advocate, CSEPL and FSPL  
Ms. Romila Mandal, Advocate, CSEPL and FSPL  
Shri M. G. Ramachandran, Sr. Advocate, SECI  
Ms. Poorva Saigal, Advocate, SECI  
Ms. Tanya Saigal, Advocate, SECI

### **आदेश /ORDER**

The petitioner, Clean Sustainable Energy Private Limited in Petition No. 67/MP/2019 is a solar generating project company of M/s. Avaada Power Private Ltd. whereas the petitioner, Fermi Solarfarms Private Limited in petition No. 68/MP/2019 is a solar generating project company of Canadian Solar Energy Holding Singapore 2 Pte. Ltd.

2. The Respondent No.1, Solar Energy Corporation of India Limited (hereinafter referred to as 'SECI') is a company under the administrative control of the Ministry of New and Renewable Energy, Government of India (hereinafter referred to as 'MNRE') established to facilitate the implementation of Jawaharlal Nehru National Solar Mission (hereinafter referred to as 'JNNSM'). SECI is responsible for the implementation of a number of schemes of MNRE, the major one being the VGF schemes for large scale grid connected projects under JNNSM, solar park scheme and grid connected solar rooftop scheme. SECI also has a power trading license and is active in this domain through trading of solar power from projects set up under the schemes being implemented by it.
3. The Respondent No. 2, Jaipur Vidyut Vitran Nigam Ltd.; Respondent No.3, Ajmer Vidyut Vitran Nigam Ltd. and Respondent No. 4, Jodhpur Vidyut Vitran Nigam Ltd. in petition No. 67/MP/2019 are the distribution companies in the State of Rajasthan (hereinafter referred to as 'Rajasthan Discoms') whereas Respondent No. 2, Maharashtra State Electricity Distribution Company Limited in petition No. 68/MP/2019 is the distribution companies in the State of Maharashtra (hereinafter referred to as 'MSEDCL/ Maharashtra Discom').
4. The Petitioners have made the following prayers:

**In Petition No. 67/MP/2019**

- (a) *Hold and declare that the imposition of the Integrated Goods and Services Tax, 2017, Central Goods and Services Tax, 2017 and Rajasthan Goods and Services Tax, 2017 is an event under 'Change in Law' under Article 12 of the PPA;*
- (b) *Restore the Petitioner to the same economic condition prior to occurrence of the Change in Law by way of adjustment in tariff in terms of Article 12 of the PPA by increasing the tariff through a suitable mechanism;*
- (c) *In the alternative, direct a lump sum compensation of Rs. 19,26,04,780/- to be paid to the petitioner in lieu of the additional tax burden on the Engineering, Procurement and Construction Cost and an appropriate payment towards the additional tax burden on operation and maintenance expenses incurred by the petitioner due to promulgation of the Integrated Goods and Services Tax Act, 2017, the central Goods and Services Tax Act, 2017 and the Rajasthan Goods and Services Tax Act, 2017 plus interest/carrying cost from the date of impact till reimbursement by the Respondent;*
- (d) *Grant interest/carrying cost for any delay in reimbursement by the Respondents; and*
- (e) *Pass such other orders that the Commission deems fit in the interest of justice.*

**In Petition No. 68/MP/2019**

- (a) *Hold and declare that the imposition of the Integrated Goods and Services Tax, 2017, Central Goods and Services Tax, 2017 and Maharashtra Goods and Services Tax, 2017 is an event under 'Change in Law' under Article 12 of the PPA;*
- (b) *Restore the petitioner to the same economic condition prior to occurrence of the Change in Law by way of adjustment in tariff in terms of Article 12 of the PPA by increasing the tariff through a suitable mechanism ;*
- (c) *In the alternative, direct a lump sum compensation of Rs. 22,17,35,677/- to be paid to the petitioner in lieu of the additional tax burden on the Engineering, Procurement and Construction Cost and an appropriate payment towards the additional tax burden on operation and maintenance expenses incurred by the petitioner due to promulgation of the Integrated Goods and Services Tax Act, 2017, the central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017; plus interest/carrying cost from the date of impact till reimbursement by the Respondent;*

- (d) Grant interest/carrying cost for any delay in reimbursement by the Respondents;
- (e) Pass such other orders that the Commission deems fit in the interest of justice.

**Background:**

5. The Jawaharlal Nehru National Solar Mission was launched in 2010 with the target of deploying 20,000 MW of grid connected solar power by 2022.
6. On 08.11.2016, SECI issued 'Request for Selection' (hereinafter referred to as 'RfS') for selection of Solar Power Developers (hereinafter referred to as 'SPDs') for development of cumulative capacity of 250 MW in the State of Rajasthan vide RFS No. SECI/NSM/P-2/B-4/RfS/RJ/112016/Bhadla-IV under Phase-II, Batch-IV of the National Solar Mission (hereinafter referred to as 'NSM') of Government of India (hereinafter referred to as 'GoI') through VGF mode. M/s. Avaada Power Private Ltd. (hereinafter referred to as 'Avaada') participated in the bid on 19.04.2017. On 09.05.2017 Avaada was declared as one of the successful bidders. Avaada formed a Project company M/s Clean Sustainable Energy Private Limited within the provisions of the RfS for development of Solar Power Project, generation and sale of solar power under the above Mission. Pursuant to the issuance of Letter of intent (hereinafter referred to as 'LOI') by the petitioner (M/s Clean Sustainable Energy Private Limited) had agreed to set up the Solar Power Project based on Photo Voltaic technology of 50 MW capacity in the Solar Park in the State of Rajasthan. The petitioner entered into the Power Purchase Agreements (hereinafter referred to as 'PPAs') with the Respondent No.1 dated 26.09.2017 for implementing  $2 \times 50$  MW (100 MW) solar projects.
7. On 14.06.2016, SECI auctioned 450 MW solar power capacity under Phase II and Batch IV of the JNNSM Scheme in the State of Maharashtra. RfS No. SECI/NSM/P-2/B-4/RfS/MH/062016/B was issued by SECI for selection of SPDs for development of cumulative capacity of 450 MW in the State of Maharashtra. Canadian Solar Energy Holding Singapore Pte. Ltd. was declared as the successful bidder for 4 blocks of 20MW each on 20.09.2016. Canadian Solar Energy Holding Singapore Pte. Ltd. formed a Project company M/s Fermi Solarfarms Private Limited within the provisions of the RfS for development of Solar Power Project, generation and sale of solar power under the above Mission. The

petitioner in petition No. 68/MP/2019 has entered into the PPAs with the Respondent No.1 dated 10.02.2017 for implementing 4 × 20 MW (80 MW) solar projects.

8. On 01.07.2017, the Central Goods and Services Tax Act, 2017; The Integrated Goods and Services Tax Act, 2017 for levy and collection of tax on inter-State supply of goods or services or both by the Central Government were enacted. The Rajasthan Goods and Services Tax Act, 2017 and The Maharashtra Goods and Services Tax Act, 2017 also levied GST on various items required for the construction and operation of solar power projects in the State of Rajasthan and Maharashtra. The Central Goods and Services Tax Act, 2017; The Integrated Goods and Services Tax Act, 2017; The Rajasthan Goods and Services Tax Act, 2017 and The Maharashtra Goods and Services Tax Act, 2017 are collectively herein after referred to as “GST Laws”.
9. Hence the petitions.

#### **Submissions of the Petitioners**

10. The Petitioners have submitted that they have entered into the following PPAs with the Respondent No.1 for the construction of a solar power project in the State of Rajasthan and State of Maharashtra for the sale of power to the Respondent No.1:

##### **In Petition No. 67/MP/2019**

- i) Power Purchase Agreement dated 26.09.2017 for 50 MW (PPA 1); and
- ii) Power Purchase Agreement dated 26.09.2017 for 50 MW (PPA 2).

##### **In Petition No. 68/MP/2019**

- i) Power Purchase Agreement dated 10.02.2017 for 20 MW (PPA-1);
- ii) Power Purchase Agreement dated 10.02.2017 for 20 MW (PPA-2);
- iii) Power Purchase Agreement dated 10.02.2017 for 20 MW (PPA-3); and
- iv) Power Purchase Agreement dated 10.02.2017 for 20 MW (PPA-4).

11. The Petitioners have submitted that Article 12 of the PPAs stipulates as under:

#### ***“ARTICLE 12: ‘CHANGE IN LAW’***

### *12.1. Definitions*

*In this Article 12, the following terms shall have the following meanings;*

*12.1.1. "Change in Law" means the occurrence of any of the following events after the effective date resulting into any additional recurring/ non - recurring expenditure by the SPD or any income to the SPD:*

- the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re - enactment or consolidation) in India, of any law, including rules and regulations framed pursuant to such law;*
- a change in the interpretation or application of any law by any Indian Governmental Instrumentality having the legal power to interpret or apply such law or any Competent Court of Law;*
- the imposition of a requirement for obtaining any Consents, Clearances and ;*
- Permits which was not required earlier;*
- a change in the terms and conditions prescribed for obtaining any consents, clearances and permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits, except due to any default of the SPD;*
- Any statutory change in tax structure or introduction of any new tax made applicable for setting up of Solar Power Project and supply of power from the Project by the SPD, shall be treated as per the terms of this Agreement. For the purpose of considering the effect of this change in Tax structure due to change in law after the date of submission of Bid, the date such law comes into existence shall be considered as effective date for the same;*

*but shall not include (1) any change in any withholding tax on income or dividends distributed to the shareholders of the SPD, or (2) any change on account of regulatory measures by the Appropriate Commission.*

### ***12.2. Relief for 'Change in Law'***

*12.2.1. The aggrieved party shall be required to approach the central commission for seeking approval of 'Change in Law'.*

*12.2.2. The decision of the central commission to acknowledge a 'Change in Law' and the date from which it will become effective, provide relief for the same, shall be final and governing on both the parties."*

12. The Petitioners have submitted that GST Laws came into force on 01.07.2017. The bidding under the respective RfS was well before the date of coming into effect of the GST Laws. Further, the Scheduled Date of Commissioning (hereinafter referred to as 'SCoD') of all the Projects related to the Petitioners is after the promulgation of the GST Laws. The enactment of GST Laws had resulted in additional recurring and non-recurring expenditure.

Accordingly, relief on account of introduction of GST Laws as a change in law event is being sought.

13. The Petitioners have submitted that any tax levied through an Act of Parliament after the cut-off date which results in additional expenditure by the Petitioners is covered as “Change in Law”. The cut-off date in this context means the bidding date when the tariff is fixed (without factoring in the GST). This position finds support from the last bullet of Article 12.1.1 of the PPAs since it makes provision for changes in law affecting tariff after the date of bid submission.
14. The Petitioners have submitted that the GST Laws have been enacted by the Indian Government Instrumentalities i.e., by the Act of Parliament and the State Legislative Assemblies. The change in duties/ tax imposed by various Government Instrumentalities at Centre and State level had resulted in the change in cost of the inputs required for generation after the cut-off date and hence the same is to be considered as “Change in Law”.
15. The Petitioners have submitted that they have incurred adverse financial consequences due to introduction of GST Laws, which have resulted in additional financial burden on the petitioner on account of:
  - (a) Increase in the construction cost; and
  - (b) Increase in the operation and maintenance cost.
16. The Petitioners have submitted that the imposition of GST Laws have resulted in additional cost for the petitioner because this cost was not contemplated by the Petitioners at the time of the bid submission. The GST Laws were implemented subsequently leaving the Petitioners with no choice but to bear the additional burden. Hence, there is a need for adjustment/recovery in tariff for the generation of solar power by the Petitioners .
17. The Petitioners have submitted they are also incurring carrying or interest cost since the compensation has not been received by it till date. The Petitioners are entitled to



compensation for the carrying cost/ interest calculated at the rate of 15% per annum from the date of the impact till reimbursement by the Respondents.

18. The Petitioners have submitted that the Operations and Maintenance (hereinafter referred to as 'O & M') activities have been outsourced to agencies that are experienced in providing the said services in the most effective and cost-efficient manner. The concept of the "O & M" expenses are implicitly covered under Article 12 of the PPAs. As per the PPAs, Clause 12.1.1 stipulates that Change in Law means the occurrence of any of the following events after the effective date resulting into any additional recurring/ non-recurring expenditure by the SPD or any income to the SPD. As "O & M" expenses are recurring in nature, therefore the same are squarely covered under Article 12 of the PPAs and the same may be allowed. The Petitioners are claiming O&M expenses on the principles of normative parameters as specified by the Commission in the CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012 dated 06.02.2012 as amended on 31.03.2016.
19. The Petitioners have submitted that the introduction of GST Laws to solar power projects by the government is an event beyond the control of the Petitioners and the same has been declared as a 'Change in Law' event in a recent order dated 19.09.2018 passed by the Commission in the matter of *M/s. Prayatna Developer Private Limited and M/s Azure Power Venus Private Limited v NTPC and SECI*.
20. The Petitioners have submitted that on 09.10.2018, another order was passed by the Commission in petition No.188/MP/2017, which recognized the introduction of GST as a "Change in Law" event under Article 12 and 17 of the PPAs therein. This order also supports the relief sought by the petitioner. Similar findings have been rendered by the Commission in judgment dated 05.02.2019 in petition Nos. 187, 192, 193, 178, 189 of 2018.
21. The Petitioners have submitted that the increase in costs is duly backed-up by the invoices showing the correlation between the solar power project and the supply of goods for the solar power project. The calculation and determination of the increase in project cost due to introduction and application of GST Laws is duly confirmed by an auditor's certificate.

22. The Petitioners have submitted that it will incur adverse financial consequences due to introduction of GST Laws on account of increase in the cost of setting up of solar power plant. The additional cost paid by the EPC contractor will be passed onto the Petitioners in terms of the EPC agreement between the Petitioners and its EPC Contractor. On 09.11.2018, the Petitioners received a notice from its EPC Contractor - *M/s. Giriraj Renewables Private Limited (now known as Avaada Energy Private Limited) (EPC Contractor)* regarding the additional charges/impact on account of GST laws. In view of the notice, the additional cost is payable by the Petitioners .
23. The Petitioners have submitted that despite there being no requirement in the PPAs for issuance of notice or any prescribed time limit for claiming the benefit on account of a “change in law” event, on 25.01.2019, the Petitioners , by way of abundant caution, sent a notice of Change in Law under the PPAs to the Respondent No.1 explaining the impact on the cost of the project and the increase in the total project cost on account of the GST Laws.
24. The Petitioners have submitted that the GST Laws constitute a “change in law” under Article 12 of the PPAs and the Petitioners are entitled to compensation on account of the additional financial burden suffered by it on account of the same, *inter alia*, for the following reasons:
- (a) Enactment and implementation of GST laws from 01.07.2017 is an event that clearly falls under the definition of ‘Change in Law’ set out in Article 12 of the PPAs.
- (b) The orders dated 19.09.2018, 09.10.2018 & 05.02.2019 passed by the Commission have held and declared enactment of GST laws as an event under ‘Change in Law’ for construction of a solar power project. The petitioner’s case is at par with the cases dealt with in the aforementioned order. Hence, the petitioner is entitled to parity of treatment.
- (c) In terms of the direction dated 27.08.2018 issued by the Government of India under Section 107 of the Act, the benefit of the increased cost due to the GST Laws has to be allowed on pass through basis.

(d) Insofar as the additional costs for O&M is concerned, the Petitioners submits that even these costs should be allowed since the PPAs does not restrict or prevent the petitioner from engaging third party service providers for O&M. Moreover, O&M can be construed to be 'post-construction stage' which is covered under 'Services' under GST Laws.

For the aforementioned reasons, the entire additional financial burden incurred by the Petitioners in connection with both construction cost as well as O&M cost is on account of a "Change in Law" and should be duly compensated on pass-through basis.

### **Submissions of the Respondent No. 1 (SECI)**

25. The Respondent No.1 has submitted that it is acting as an intermediary (as appointed by the Central Government) utilizing its trading license to facilitate such purchase and resale of electricity. SECI is not acting as a merchant trader or otherwise independently purchasing the electricity from the SPD having the option to sell electricity to any person at such time and on such terms and conditions as SECI can decide from time to time. SECI is also not retaining the powers to trade electricity so purchased in the open market or through the platform of Power Exchange or through another trader on a long term basis to earn a trading margin, without being constrained to the fixed trading margin of 7 Paisa/kWh decided by the MNRE.

### ***Re: SECI's Obligations are on back to back basis***

26. The Respondent No.1 has submitted that it's obligations and liabilities to the Petitioners is on a 'back to back' basis to the obligation to be performed and liabilities to be discharged by relevant Respondents as the Buying Entities.

27. The Respondent No.1 has submitted that the NSM Phase-II, Guidelines for implementation of scheme for setting up of over 5000 MW Grid Connected Solar PV Power Project under Batch-IV, State specific VGF Scheme (hereinafter referred to as 'Guidelines') notified by the MNRE, GoI on 14.03.2016, in pursuance to which the above transaction involving SECI is being undertaken with the Petitioners , inter alia, provides as under:

### 3.2. Mechanism of Operation of the VGF Scheme

*This scheme envisages providing Viability Gap Funding through SECI to the bidders selected through a transparent bidding process to procure solar power at a pre-determined fixed tariff. The salient feature of the overall mechanism would be as follows:*

.....

*iv. Sale of solar power: SECI will sign Power Purchase Agreement with developers with pre-determined or discounted tariff (as applicable) fixed by MNRE and back-to-back Power Sale Agreement with buying DISCOMs/State Utilities/bulk consumers. SECI will be entitled to charge a trading margin of Rs. 0.07 per kWh. The solar power tariff as to be paid by SECI to developers will be fixed by MNRE depending on market conditions. MNRE will constitute an Empowered Committee to determine the tariff for purchase of solar power by SECI. This Committee will give recommendations based on which MNRE will, with the approval of Minister in-charge, fix tariff for purchase of solar power by SECI every year before tendering process is started or as and when required. Tariff for sale of solar power by SECI will be determined based on the tariff for purchase of solar power by adding trading margin of Rs. 0.07 per kWh.*

#### 3.11 Power Purchase Agreement

*3.11.1 A copy of Standard Power Purchase Agreement to be executed between SECI and the Project Developer shall be provided by SECI along with Invitation for Submission of response to RfS. Within one month of the date of issue of Letter of Intent (LoI), the Power Purchase Agreement (PPA) between SECI and the Project Developer for Purchase of Power from the project will be executed. The PPA shall be for a period of 25 years from the date of CoD.*

*3.11.2 The developers will be free to reconfigure and repower their plants from time to time during the PPA duration. However, SECI will be obliged to buy power only within the Capacity Utilization Factor (CUF) range laid down in Power Purchase Agreement (PPA) as per guidelines. Excess power generated will be purchased at a notional Support Price of Rs.3 per kWh only. The developers are free to operate their plants after expiry of the 25 years' PPA period if other conditions like land lease etc., permits. However, any extension of the PPA period beyond 25 years shall be through agreements between the Solar Power Developer, SECI and the Buying Utilities.*

*3.11.3 SECI will execute a Power Sale Agreement (PSA) with the State Utilities/DISCOMs/Bulk Consumers of the buying States for sale of power to them valid for 25 years. Further, State Utilities/DISCOMs will have to maintain LC and Escrow Arrangement as may be defined in the PSA.*

28. The Respondent No.1 has submitted that being a State Specific VGF Scheme, from the very beginning, the ultimate beneficiaries had been identified, namely the Distribution Licensees

of the State in which the Solar Power project is being set up. Thus, the Petitioners were aware from the beginning that ultimate beneficiaries of the power generated at their Project shall be the respective Distribution Licensees of the State in which the project is being set up. In pursuance to the above, upon the selection of the SPD/petitioner, the PPAs were entered into between the SPD and SECI. Thus, the provisions of the PPAs specifically deal with the back to back PSA between SECI and the Distribution Companies/Buying Entities namely DISCOM Respondents herein.

29. The Respondent No.1 has submitted that the PSAs were executed by SECI with the Rajasthan Discoms and Maharashtra Discoms. The PPAs were entered after due execution of the PSA. Accordingly, the PPAs with the SPD were executed on a back to back basis after the PSA had been executed with the Distribution Companies including Respondents.
30. The Respondent No.1 has submitted that it is evident from the provisions of the PPAs and the PSA, both the documents are inextricable and intertwined with one another. The various clauses and provisions of the bidding documents, PPAs and the PSA are sufficient indication of the back to back arrangement under the entire scheme. The provisions have been made in the PPAs and the PSAs recognizing that SECI, as an intermediary nodal agency cannot be required to pay the amounts becoming due to SPD out of its own resources, till such time the amount can be recovered by SECI from the distribution licensees.
31. The Respondent No.1 has submitted that the Order issued by the Commission dated 09.10.2018 clearly recognizes 'back to back' arrangement of the PPAs and PSAs. The Commission had considered the intermediary role of SECI/NTPC as a nodal agency to facilitate the purchase and sale of electricity from the solar power projects to the Distribution Companies in the context of the submissions made by SECI/NTPC and had concluded that the amount determined as payable shall be on a 'back to back' basis and paid by the Discoms to the intermediary nodal agency under the respective PSAs, to be remitted to the SPD under the PPAs.
32. The Respondent No.1 has submitted that the tariff payable by the Discoms under the PSA is the tariff under the PPAs. There is no separate purchase price under the PPAs and the PSA

except that the PSA envisages payment of trading margin to SECI. The PPAs and PSA being 'back to back' contracts and mirror images to each other are inextricably linked to each other. The various provisions show that the PPAs are inextricably linked to the PSA. The said two transactions being under two separate agreements, it has been held that the two agreements are inextricably linked to each other and the rights and obligations arising out of one agreement are also reflected in the other agreement. It is on the above basis only that the Commission has decided on the jurisdiction to entertain the petition filed by a generating company involving the Distribution Licensee on a sale of power through a trading company to grant the necessary relief for matters such as Penalties for shortfall in availability of contracted capacity, effect of change in law etc.

33. The Respondent No.1 has submitted that it is in a position to and is also required to discharge its obligations under the PPAs including the payment for any change in Law implication etc. only upon the distribution licensee remitting the amount to the SECI in terms of the respective PSA. The obligation of the distribution licensee under the PSA is therefore on a back to back basis with the obligation of the SECI to the SPD. It is therefore appropriate that directions are issued to Buying Entities/ Distribution Companies namely Respondents, to pay the amount that may be determined as payable to the Petitioners in the petition, keeping in view the intermediary status and role of the SECI as a nodal agency to facilitate the Solar Power Project and for the Distribution Licensees/Buying Entities to have an arrangement for procurement of solar power to fulfill their Renewable Purchase Obligation. Any enforcement of the claim by the Petitioners against the SECI without the distribution licensees/Buying Entities namely Respondents being obligated to pay and discharge the corresponding claim under the PSA in advance of the discharge of the obligation of the SECI will result in serious financial issues to the SECI and thereby, effect the implementation of the scheme.

***Re: GST laws are covered under the Scope "LAW"***

34. The Respondent No.1 has submitted that the fact that the GST Laws are 'law', as defined in the PPAs is not disputed. However, in order to qualify for relief under the change in law provision contained in the PPAs, the conditions mentioned in Article 12 therein dealing with

‘Change in Law’ need to be satisfied, namely, each of the claim should fall within the scope of the said provision.

***Re: Outsourcing of Operation and Maintenance***

35. The Respondent No.1 has submitted that the provision of the PPAs or the bid documents did not mandate or prescribe or specifically provide for the outsourcing of O&M. Outsourcing of O&M is an internal commercial decision of the Petitioners . SECI does not have any financial burden if the Petitioners undertake the O&M by itself or outsources the O&M. If, for commercial expediency or benefit, the petitioner outsources the O&M, the saving or additional expenditure is to the account of the SPD and SPD has a full right to take a decision on the above at its risk or reward. The Petitioners are responsible for undertaking generation and supply of electricity. In terms of Article 4.1.1 of the PPAs the Petitioners have undertaken to be responsible, at its own cost and risk for fulfilling all obligations undertaken under this Agreement.
36. The Respondent No.1 has submitted that the change in law under the last bullet is admissible only if the transaction which is assessed as tax is mandated or required to be performed in terms of the PPAs and not when it is undertaken as a discretionary commercial decision.
37. The Respondent No.1 has submitted that the O&M is the responsibility of the petitioner and in the event of the petitioner choses to employ the services of other agencies cannot increase the liability of SECI (and consequentially the distribution licensee/buying entity) in terms of tariff. The outsourcing of the O&M to a third party is not a requirement of the PPAs and is a commercial decision of the petitioner for its own advantage and any increase in cost including on account of taxes etc. is entirely to the account of the petitioner.
38. The Respondent No.1 has submitted that the Commission vide Order dated 16.03.2018 in petition No. 1/MP/2017 in *GMR Warora Energy Limited -v- Maharashtra State Electricity Distribution Company Limited and Ors* has held that any increase in cost of O&M expenditure on account of increase in service tax cannot be considered as Change in Law. The same view was re-iterated by the Commission in its Order dated 18.04.2019 in petition

No. 164/MP/2018 and 165/MP/2018 in the case of *Parampujya Solar Energy Pvt. Limited v NTPC and Others and Batch*. In these circumstances, the Petitioners are not entitled to any increase on account of the implications of the GST on the O&M Services that have been outsourced.

***Re: Inadmissibility of Carrying Cost***

39. The Respondent No.1 has submitted there is no provision in the PPAs regarding carrying cost or interest for the period till the decision of the Commission acknowledging the change in law and deciding on the amount to be paid for such change in law namely ‘provide for relief for the same’, as specified in Article 12.2.2 of the PPAs. The Change in Law claim of the petitioner is yet to be adjudicated and the amount if any, due to the petitioner has to be determined/computed first. Thereafter, only after the amount is determined, is the petitioner required to raise a Supplementary invoice for the amount so computed as per Article 10.7 of the PPAs. It is only in case of default on the part of the SECI in not making the payment by the due date as per supplementary invoices, does the issue of Late Payment Surcharge would arise i.e. for the period after the due date. The reference in Article 12.2.2 of the Commission deciding on the date from which the change in law will be effective, refers to the principal amount to be computed from the date on which change in law comes into force and not to the payment of interest and carrying cost.
40. The Respondent No.1 has submitted that the provision of Article 10.3.3 of the PPAs dealing with late Payment Surcharge and definition of the ‘Due Date’ in Article 1 read with Article 10.3.1 of the PPAs are relevant. The due date is forty-fifth (45th) day after a Monthly Bill or Supplementary Bill is received and duly accepted by SECI and if such a day is not a Business Day, the due date will be the immediately succeeding Business Day. The supplementary bill needs to be raised by the Solar Power Developer for the adjustment of the Change in Law after the Change in Law claim is approved by the Commission. There cannot be any claim for late payment surcharge for the period prior to the due date.



41. The Respondent No.1 has submitted that the PPAs does not have a provision dealing with restitution principles of restoration to same economic position. Therefore, the petitioner is not entitled to claim relief which is not provided for in the PPAs.
42. The Respondent No.1 has submitted that in the Judgment of the Hon'ble Appellate Tribunal dated 13.04.2018 in Appeal No. 210 of 2017 in *Adani Power Limited –v- Central Electricity Regulatory Commission and Ors*, it was held that since the Gujarat Bid-01 PPA has no provision for restoration to the same economic position, therefore, the carrying cost will not be applicable. The relevant extract of the Judgment dated 13.04.2018 reads as under:

*“ISSUE NO.3: DENIAL OF CARRYING COST*

.....  
*x. Further, the provisions of Article 13.2 i.e. restoring the Appellant to the same economic position as if Change in Law has not occurred is in consonance with the principle of ‘restitution’ i.e. restoration of some specific thing to its rightful status. Hence, in view of the provisions of the PPA, the principle of restitution and judgement of the Hon’ble Supreme Court in case of Indian Council for Enviro-Legal Action vs. Union of India &Ors., we are of the considered opinion that the Appellant is eligible for Carrying Cost arising out of approval of the Change in Law events from the effective date of Change in Law till the approval of the said event by appropriate authority. It is also observed that the Gujarat Bid-01 PPA have no provision for restoration to the same economic position as if Change in Law has not occurred. Accordingly, this decision of allowing Carrying Cost will not be applicable to the Gujarat Bid-01 PPA.”*

43. The Respondent No.1 has submitted that that the present case is not a case of amounts being denied at appropriate time or any deprivation of amount due to actions of the procurers. The Procurers cannot make the payment for change in law until the amount is determined by the Commission. The decision on the admissibility of the monetary claim can only be after the petitioner has submitted complete information and not before. Thus, any delay in the determination of the impact of change in law is on account of the petitioner. Any adverse consequences for not approaching the Commission with the full documentation/information at the first instance ought to be borne by the defaulting party i.e. the petitioner itself.

***Re: Absence of Necessary Particulars***

44. The Respondent No.1 has submitted that the Petitioners are required to place before the Commission the extent to which the petitioner's project are subject to such taxes etc. existing prior to 01.07.2017 which have been subsumed in the GST Laws. In the GST decisions passed by the Commission, the Commission has taken note of the implications of the various taxes which were in existence prior to 1.07.2017 and were subsumed/reduced/remitted. These have to be taken into account to determine the net effect of GST Laws. It is incumbent on the Petitioners to place before the Commission in a transparent manner to the increase or decrease in the taxes on net basis. For instance, if pre-GST, the petitioner was subjected to 4% Excise Rate and post-GST, the same became a cumulative 5%, then the petitioner would be entitled to claim only the difference i.e. 1% as a change in law and not the entire 5%. Before the amount is computed, the petitioner should be directed to give the following particulars/documents in respect of each claim under GST Laws:

- a. Name of the goods/equipment
- b. Date of the purchase order (PO)
- c. Date of the goods/custom clearance
- d. Date of the Goods being handed over to the Common Carrier.
- e. Date on which the goods were received at site
- f. Date on which the goods were installed at site
- g. The name of the manufacturer of the Goods
- h. The name of the intermediary between the Original Equipment Manufacturer and the SPD
- i. The EPC Agreement(s) /Agreement for Supply
- j. The GST/Tax Invoice raised
- k. The supporting documents in respect of each of the above

45. The Respondent No.1 has submitted that the above particulars/ documents are required to be given in respect of each item of goods/equipment/services. The Auditor Certificate in respect of the above is also to be provided in terms of the directions of the Commission in its Order dated 09.10.2018.

**Submissions of the Respondents No. 2 to 4 in Petition No. 67/MP/2019**

46. The Respondents have submitted that the first requirement of the provisions of the ‘change in law’ as contained in Article 12 of the PPAs had not been met and therefore, the said Article 12 does not even get invoked. The scheme of Article 12 of the PPAs is that the Article 12.1 12.1.1 provides for the definition of “Change in Law” and Clause 12.2 provides for the reliefs. The sub-Clause 12.1.1 provides for two pre-requisites/conditions to be fulfilled by the proposed change in law event to be considered as a ‘change in law’ event, followed by six bullet points detailing the nature of the events. The pre-requisites/conditions are that:
- a. The events must occur after the effective date of the PPAs; and
  - b. The events must result in additional recurring or non-recurring expenditure by the SPD or any income to the SPD.
47. The Respondents have submitted that that both of the above requirements need to be satisfied mandatorily. It is only after these pre-requisites are satisfied that the subsequent bullet points follow can be gone into. The proposed events have to fall into any one or more of the bullets provided.
48. The Respondents have submitted that since, in the present case, the ‘Effective Date’ of the PPAs are 16.09.2017 and the GST Laws were implemented with effect from 01.07.2017, way before the ‘effective date’, the event of the implementation of the GST Laws would not fall under ‘Change in Law’ as defined under Article 12 and therefore, the petitioner would not be entitled to any relief thereof.
49. The Respondents have submitted that the Petitioners have not only tried to suppress the above-stated material information, but has also tried to mislead the Commission by stating that the requirement under Article 12 is that the ‘Change in Law’ event must occur after the bid is submitted.
50. The Respondents have submitted that the approach to be adopted is to see whether there is a specific provision in the PPAs which permits the additional cost claimed by the petitioner to

be passed on in the tariff. Each claim of the petitioner has to satisfy a particular provision of the PPA. It is for the petitioner to establish that its claims fall under specific entries of Article 12 containing the 'Change in Law' provisions under the PPAs. On the other hand, the claim of the petitioner, though sought to be claimed under the 'Change in Law' provision, is on the basis that merely because the additional cost is incurred by the petitioner, the same ought to be reimbursed by the Respondents.

51. The Respondents have submitted that only those events which are covered under the bullets mentioned in Article 12.1.1 can be termed 'Change in Law' events and be admissible for relief under the PPAs. For any taxes, duties etc., the relevant entry is the last bullet under Article 12, and the GST Laws being taxing statutes, have to go through the scrutiny of the last bullet. The intention behind incorporating a specific clause on taxes is to carve out a separate clause to restrict the nature of taxes which would be considered as change in law, unlike other bullets dealing with matters other than taxes. The basic aspect is that if the taxes are said to be dealt under clauses other than the last bullet, the incorporation of the last bullet is rendered redundant as all taxes can be covered under the First or the Second bullet. Further, the last bullet on the taxes in Article 12 containing the 'Change in Law' clause clearly and specifically restricts the applicability of change in law to taxes on only two events namely: "setting up of Solar Power Project"; and "supply of power".
52. The Respondents have submitted that every change in tax or introduction of tax was not intended to be covered by the 'Change in Law' provision of the PPAs. It cannot, therefore, be said that the "tax made applicable for setting up of Solar Power Project and supply of power" be extended to other aspects. The said last bullet does not deal with any and every tax as applicable which affects the cost or revenue of the petitioner. What are covered in the PPAs for 'Change in Law' in respect of taxes, are only taxes for "setting up a Solar Power Plant" and "supply (sale) of electricity" and not taxes for anything else or any other transactions preceding them. The enactment of the GST Laws is not an admissible 'Change in Law' under Article 12, since GST was not made applicable on the setting up of a Solar Power Project or on supply (sale) of power. Further, the first event i.e. "setting up of the solar plant" relates to the construction period, whereas the second event "supply (sale) of power" relates to the operation period.

53. The Respondents have submitted that the incidence of GST is not even on the petitioner, and the additional costs being incurred by it is only on account of the commercial transaction with the EPC Contractor, which is subject to negotiation. It is only in terms of the EPC Contract, that the petitioner is impacted by the GST Laws. It is submitted that any increase in cost on account of commercial decisions of the petitioner cannot be passed on in the tariff, let alone as being a Change in Law event.
54. The Respondents have submitted that the incidence of GST on O&M of the petitioner's plant is only for the reason that the Petitioners have outsourced the O&M to third parties. Also PPAs provision or the bid documents did not mandate or prescribe or specifically provide for the outsourcing of O&M. Outsourcing of O&M is an internal commercial decision of the petitioner and if, for commercial expediency or benefit, the Petitioners outsources the O&M, the saving or additional expenditure is to the account of the Petitioners and the Petitioners have a full right to take a decision on the above at its risk or reward.
55. The Respondents have submitted that the O&M is the responsibility of the Petitioners and in the event the Petitioners chooses to outsource this activity, and consequence of such outsourcing decision cannot be passed on in the tariff. The outsourcing of the O&M to a third party is not a requirement of the PPAs, but is a commercial decision of the petitioner for its own advantage and thus, any increase in cost including on account of taxes etc. is entirely to the account of the petitioner.
56. The Respondents have submitted that the alternate contention of the petitioner is that even if O&M was not outsourced, the petitioner would still have resulted in higher tariff. The contention of the petitioner is misconceived, as the petitioner certainly cannot seek a relief on some notional loss that the petitioner might have incurred had it internalized O&M. The relief under Change in Law can only be for actual expenditure. All contentions and averments to the contrary are stated to be wrong and are denied.
57. The Respondents have submitted that there is no provision in the PPAs regarding carrying cost or interest for the period till the decision of the Commission acknowledging the change in law and deciding on the amount to be paid for such change in law namely 'provide for

relief for the same', as specified in Article 12.2.2 of the PPAs. The Change in Law claim of the petitioner is yet to be adjudicated and the amount if any, due to the petitioner has to be determined/computed first.

58. The Respondents have submitted that the PPAs in the present case do not have a provision dealing with restitution principles to restore the petitioner to the same economic position as if no change in law event had occurred. Therefore, the petitioner is not entitled to claim relief which is not provided in the PPAs.
59. Further, the decision on the admissibility of the monetary claim can only be after the petitioner has submitted complete information and not before. Thus, any delay in the determination of the impact of change in law is on account of the petitioner. Any adverse consequences for not approaching the Commission with the full documentation/information at the first instance ought to be borne by the defaulting party i.e. the petitioner itself.

#### **Hearing on 15.10.2019**

60. In the hearing held on 15.10.2019 the petitioner submitted that the present petitions have been filed seeking, inter alia, declaration that the enactment of GST Laws is Change in Law event and sought compensation on account of additional tax burden on construction as well as operation and maintenance expenses. Learned counsel further submitted that the issues raised in these petitions are already covered by the earlier orders of the Commission.
61. The Respondent, SECI also submitted that the issues involved in the present matters are covered by the earlier orders of the Commission. The Respondents further submitted that in these orders, for the purpose of determining 'weightage of the components of capital cost' and the percentage impact of the taxation due to the enactment of 'GST Laws' on the various components, the Commission has given a table in the orders. However, a clarification is required to the effect that the said table is merely indicative and the weightage of components of capital cost and rate of taxes should be at actuals.
62. Further, Respondents 2 to 4 submitted that since the effective date of PPAs in the instant petitions are after the enactment of GST Laws, the claims of the Petitioners are not

admissible as Change in Law event. The Petitioners submitted that though the PPAs were executed later, the bids were submitted and accepted on an earlier date. Based on the request of the parties the Commission permitted the petitioner and the Respondents to file their respective written submissions, if any, by 31.10.2019 with copy to each other.

**Written Submissions of the Petitioners**

63. The Petitioners have reiterated their submissions given in pleadings and as such the same have not been reproduced herewith for the sake of brevity. Additionally, the Petitioners have submitted that the relevant dates for the Project involved in the present case are set out below:

S. No.	Event	Petition No. 67/MP/2019	Petition No. 68/MP/2019
1.	Date of Bidding	19.04.2017	05.08.2016
2.	Date of acceptance of Bid	09.05.2017	20.09.2016
3.	Date of GST Notification	01.07.2017	01.07.2017
4.	Date of execution of PPA	26.09.2017	10.02.2017
5.	SCoD	16.09.2018	23.12.2017
6.	Actual COD	16.09.2018/ 16.10.2018	14.05.2018

64. The Petitioners have submitted that from the aforesaid table it is evident that they have submitted their bid with the final pricing on 19.04.2017 and 05.08.2016 in petition No. 67/MP/2019 and 68/MP/2019 respectively and the same were accepted before the enactment of the GST Laws on 01.07.2017. Moreover, the Project commissioning/ completion was after the introduction of GST Laws and solar cells/ modules were imported after the introduction of GST Laws. Hence, the case of the Petitioners falls squarely under the ambit of ‘Change in Law’.

**Written Submissions of Respondent No.1 (SECI)**

65. The Respondent No. 1 has reiterated the submissions already made in the pleadings therefore the same have not reproduced herewith for the sake of brevity. Additionally, the Respondent has submitted as under:



***Re: Back to back Obligations of SECI under the PPAs and the PSA***

66. The Respondent No. 1 has submitted that as per JNNSM Guidelines the Petitioners were aware from the beginning that ultimate beneficiaries of the power generated at their Project shall be the respective Distribution Licensees of the State in which the project is being set up. The Petitioners were to generate and supply solar power to SECI to enable SECI supply the same to other Respondents. The RfS document, inter-alia, stipulated as under:

*“3.14.4 Back-to-Back Power Sale Agreement (PSA) will be executed by SECI with the State Buying Utilities for sale of power to them”*

67. The Respondent No. 1 has submitted that the relevant clauses of the PPAs executed between petitioner and SECI are reproduced as under:

*“G. SECI has agreed to purchase such Solar Power from SPD as an intermediary Seller and sell it to Buying Utilities back to back basis as per the provisions of the JNNSM.*

*H. SECI has agreed to sign a Power Sale Agreement with the Buying Utilities to sell such power as per the provisions of the JNNSM.”*

68. The Respondent No. 1 has submitted that the PPAs and the PSA have sufficient indication that there of the back to back arrangement under the entire scheme. The stipulations of the back to back scheme have been made in the PPAs and the PSA recognizing that SECI, as an intermediary nodal agency cannot be required to pay the amounts becoming due to petitioners out of its own resources, till such time the amount can be recovered by SECI from the concerned distribution licensees. The role of an intermediary Trader vis-à-vis a Merchant Trader has also been considered by the APTEL in its Judgment dated 04.11.2011 in Appeal No. 15 of 2011 in the case of *Lanco Power Limited v Haryana Electricity Regulatory Commission and Ors.* In the present petitions, the tariff payable by the Discoms under the PSA is the tariff under the PPAs. There is no separate purchase price under the PPAs and the PSA except that the PSA envisages payment of trading margin to SECI. The PPAs and PSA being back to back contracts and mirror images to each other are inextricably linked to each other. The aforesaid relevant provisions show that the PPAs are inextricably linked to the PSA.



69. The Respondent No. 1 has submitted that the role of an Intermediary Trader as a ‘conduit’ has also been considered by this Commission in the following cases: Order dated 18.04.2016 in petition No. 319/MP/2013 in the case of *Tata Power Delhi Distribution Company Limited v Jhajjar Power Limited and Ors*; Order dated 18.01.2019 in petition No. 224/MP/2018 in the case of *M B Power (Madhya Pradesh) Limited v Uttar Pradesh Power Corporation Limited and Ors.*; Order dated 30.04.2019 in petition No. 255/MP/2017 in the case of *Adhunik Power and Natural Resources Limited v West Bengal State Electricity Distribution Company Limited and Ors.*

***Re: GST laws are covered under the scope “LAW”***

70. The Respondent No. 1 has submitted that in order to facilitate the implementation of the amount, SECI has evolved a process along checklist of documents for determination of the GST claims as per ‘**Appendix B**’. The relevant extract of the calculation methodology has been reproduced as under:

**Calculation Methodology**

2.1 *The verification of each individual invoices shall be done and the Verified Project Cost (VPC) shall be arrived. The VPC (excluding Tax) of the Product is to be distributed in 7 (seven) heads as per CERC order and Pre-GST amount. Safeguard Duty amount, Late Payment Surcharge (LPS), etc. shall be subtracted if any for respective heads of the Project.*

2.2 *The VPC based on invoices for supplies shall be bifurcated into two periods i.e. Pre & Past commissioning of the project for each head as per the **Format-A**.*

2.3 *The invoices towards services upto the date of certificate issued by CA shall be construed as upto the date of commissioning given the assumption that the services bill may be raised after commissioning of project.*

2.4 *The TPC (excluding tax) of the project is to be distributed 7 (seven) heads as per CERC weightage mentioned in CERC order and Pre-GST amount. Safeguard Duty amount, Late Payment Surcharge (LPS), etc. shall be subtracted if any for respective heads of the Project.*

2.5 *For GST impact calculation, the lower of the value between distributed VPC and TPC shall be considered for different tax slab if any for each head.*

2.6 *If Pre GST rate is mentioned in CERC order then higher of Pre GST rate shall be taken between CERC Pre GST rate & Petitioner(s) Pre GST rate is mentioned by Petitioner(s) Auditor Certificate.*

2.7 *The lower of Post GST rate shall be taken between CERC Post GST rate & Petitioner(s) Post GST rate as mentioned by Petitioner(s) Auditor Certificate.*

2.8 *In some of cases it is observed that SPD has provided a particular element of supply/service cost in more than 1 (one) Pre & Post tax Slab for a particular head of the Project. In such cases CERC weightage shall be modified for a particular head in*

*different tax slab in proportion to the weightage as given by the Petitioner and GST impact calculation shall be derives through above mentioned methodology i.e. the TPC shall be distributed as per the Modified CERC Weightage.*

71. The Respondent No. 1 has submitted that this Commission may direct the petitioner to provide the details in terms of the methodology given in Appendix B to enable SECI to expeditiously compute the amount.

***Re: Relief claimed for outsourcing of O & M not admissible***

72. The Respondent No. 1 has submitted that:
- a. PPAs provision or the bid documents did not mandate or prescribe or specifically provide for the outsourcing of O&M;
  - b. Outsourcing of O&M is an internal commercial decision of the Petitioners . SECI does not have any implication if the Petitioners undertakes the O&M by itself or outsources the O&M;
  - c. If, for commercial expediency or benefit, the petitioner outsources the O&M, the saving or additional expenditure is to the account of the Petitioners ; and
  - d. The Petitioners has a full right to take a decision on the above at its risk or reward.
73. The Respondent No.1 has submitted that in terms of Article 4.1.1(g) – the Petitioners have undertaken to be responsible, at its own cost and risk for fulfilling all obligations undertaken by the SPD under this Agreement.

***Re: Inadmissibility of ‘Carrying Cost’***

74. The Respondent No.1 has submitted that there is no provision in the PPAs regarding carrying cost or interest for the period till the decision of the Commission acknowledging the change in law and deciding on the amount to be paid for such change in law namely ‘*provide for relief for the same*’, as specified in Article 12.2.2 of the PPAs. Further, the decision on the admissibility of the monetary claim can only be after the Petitioners have submitted complete information and not before. Thus, any delay in the determination of the impact of change in law is on account of the Petitioners . Any adverse consequences for not approaching this
-

Commission with the full documentation/information at the first instance, ought to be borne by the defaulting party i.e. the petitioner itself.

***Re: Weightage of components of Capital Cost***

75. The Respondent No.1 has submitted that in the Order dated 09.10.2018 passed in petition No.187/MP/2017 and connected petitions and other Orders dated 10.09.2018, 11.04.2019 and 18.04.2019 passed in petition Nos.50/MP/2018 & Anr., 206/MP/2018 & connected petitions, 164/MP/2018 & connected petitions respectively, the Petition has given the Table dealing with components of capital cost.
76. The Respondent No.1 has submitted that in the table the Commission has dealt with the calculation for escalation as based on the decision dated 23.03.2016 passed by Commission in petition No.17/SM/2015. An issue is sought to be raised by some of the Buying Utilities on the interpretation and application of the rate and weightage given in the said paragraph to be applied uniformly to all the other cases coming up for consideration. In the subsequent order dated 18.04.2019 passed in petition No.164/MP/2018 and petition No.165/MP/2018, the Commission provided the table with certain observation on commercial decision, inter-alia, reading as under:
- “86... It has been brought to our notice that in some cases, the Respondent Procurers are questioning the rationale of the commercial decisions taken by the SPDs in cases where the rates of GST are on the higher side. Since, the decision for project implementation including the mode of procurement of goods and services were taken by SPDs prior to the implementation of GST, it would not be appropriate to question such commercial decisions on the basis of the differential rates of GST on certain goods and services, and payments should be made based on the invoices raised and supported by Auditor’s Certificate.”*
77. The Respondent No.1 has submitted that this Commission may be pleased to clarify that the table and the weightage of the components given in the earlier orders are indicative and illustrative related to the particular case and that the cases of the solar power developer have to considered on actual weightage of the component provided by them as supported by

audited certificate with applicable rates related thereto and that the same should be accepted as commercial decision of the Solar Power Developers.

**Written Submissions of Respondent No. 2 to 4 in Petition No. 67/MP/2019**

78. The Respondents have reiterated the submissions already made in the pleadings as such the same are not reproduced herewith for the sake of brevity. Briefly, the Respondents have submitted that:
- a) The petitioner cannot invoke Article 12 of the PPA since the alleged change in law event has occurred prior to the effective date.
  - b) The PPAs being binding contract between the parties, the validity of the claims of the petitioner are required to be considered strictly in terms of the provisions of the PPAs, and not de hors thereof. It is not even the petitioner's case that any relief can be claimed de hors the provisions of the PPA.
  - c) The incidence of GST is not even on the petitioner, and the additional costs being incurred by it is only on account of the commercial transaction with the EPC Contractor, which is subject to negotiation. It is only in terms of the EPC Contract, that the petitioner is impacted by the GST Laws. Any increase in cost on account of commercial decisions of the petitioner cannot be passed on in the tariff, let alone as being a Change in Law event.
  - d) The incidence of GST on O&M of the petitioner's plant is only for the reason that the petitioner has outsourced the O&M to third parties. In view thereof, the petitioner's claim of reimbursement on account of additional tax burden on 'Operation and Maintenance Expenses' (if any), is not maintainable.
  - e) There is no provision in the PPAs regarding carrying cost or interest for the period till the decision of the Commission acknowledging the change in law and deciding on the amount to be paid for such change in law namely 'provide for relief for the same', as

specified in Article 12.2.2 of the PPAs. The Change in Law claim of the petitioner is yet to be adjudicated and the amount if any, due to the petitioner has to be determined/computed first.

**Analysis and Decision:**

79. The Petitions were filed on 14.03.2019 and were admitted on 04.06.2019. The Petition was reserved for hearing on 15.10.2019. We have heard the learned counsels for the Petitioners and the Respondents and have carefully perused the records. Since, Petitions are likely worded and contain similar issues to be adjudicated, the same are clubbed together.
80. The brief facts of the petitions are that the Petitioners are generating companies engaged in the business of development, building, owning, operating and maintaining utility scale grid connected solar power projects, for generation of solar power. The facts are summarized as under:

	<b>67/MP/2019</b>	<b>68/MP/2019</b>
Scheme	JNNSM	
Phase	II	II
Batch	IV	IV
Nodal agency	SECI	SECI
RfS	08.11.2016	14.06.2016
Capacity MW	100 (2X50)	80 (4X20)
Power	Solar	Solar
Location	Solar Park, Bhadla, Rajasthan	Maharashtra
Bidding Date	19.04.2017	05.08.2016
Bid of accepted on	09.05.2017	20.09.2016
GST	01.07.2017	
PPA	26.09.2017	10.02.2017
Effective date	16.09.2017	23.12.2016
SCoD	16.09.2018	23.12.2017
Tariff	2.62	4.43
VGF	Yes	Yes
Change in Law	Art. 12	Art. 12
Incremental impact (Rs.) on account of construction cost and O & M as claimed by the Petitioners .	19,26,04,780	22,17,35,677

81. The Solar Power Plants were to be developed on long term basis at a discovered tariff. As per the PPAs executed with SECI, the Solar PV power was to be purchased from the Petitioners and sold to the Distribution Companies in the State of Rajasthan and Maharashtra. On 01.07.2017, the GST Laws were enacted for levy and collection of tax on supply of goods or services or both.
82. The Petitioners have submitted that it participated in the bids and pursuant thereto, they entered into PPAs for setting up of solar power plant at different rates of fixed tariff for 25 years. Subsequent to the 'Effective Date' as per the PPAs, the 'GST Laws' were enacted. Introduction of 'GST Laws' made a huge impact on the actual cost of the project *vis-a-vis* budgeted cost, which was beyond their control and therefore, notice regarding the 'Change in Law' as per PPAs was sent to the Respondents. The PPAs entered into between the parties provide for a specific provision *qua* the concept of "Change in Law". The concept of 'Change in Law' has been introduced in the PPAs to ensure that the parameters/ contours based on which the Petitioners have bid for supplying power do not change in times to come and that no detriment to either Petitioners or Respondents is caused due to such 'Change in Law' events. The Petitioners have submitted that in terms of Article 12 of the PPAs, they are entitled to claim the impact of GST being an event of 'Change in Law'. *Per Contra*, the Respondents have submitted that the PPAs do not contain any Clause providing specific relief during the construction period. The Commission has already held that claim of the Petitioners on account of additional tax burden on O&M expenses (if any), is not maintainable. In terms of Article 4.1.1 (b) of the PPAs, the SPDs are responsible at their own cost and risk for designing, constructing, erecting, commissioning, completing and testing the Power Project in accordance with the Prudent Utility Practices. Further, regarding the amount payable to the Petitioners (if any) on account of 'GST Laws' the liability will be back to back because of inter winding nature of PPAs and PSAs.
83. From the submissions of the parties, the following issues arise before this Commission:

*Issue No. 1: Whether the promulgation of the IGST Act, 2017, the CGST Act, 2017, the Rajasthan GST Act, 2017, the Maharashtra GST Act, 2017 and the State(s) GST Act, 2017*

*with effect from 01.07.2017 are covered under the scope of “Change in Law” under Article 12 of the Power Purchase Agreements?*

***Issue No. 2:*** *Whether there will be incremental impact on the cost of construction due to additional tax burden on the Engineering, Procurement and Construction (EPC) Cost on account of promulgation of the GST Laws?*

***Issue No. 3:*** *Whether there will be incremental impact on the cost of project due to additional tax burden on operation and maintenance expenses on account of promulgation of the GST Laws, since the PPAs are for 25 years?*

***Issue No. 4:*** *Whether the claim of “Carrying Cost” for delay in reimbursement by the Respondent is sustainable?*

84. No other issue was pressed or claimed. We now discuss the issues one by one.

***Issue No. 1:*** *Whether the promulgation of the IGST Act, 2017, the CGST Act, 2017, the Rajasthan GST Act, 2017, the Maharashtra GST Act, 2017 and the State(s) GST Act, 2017 with effect from 01.07.2017 are covered under the scope of “Change in Law” under Article 12 of the Power Purchase Agreements?*

85. The Petitioners have submitted that Article 12 of the PPAs provides for ‘Change in Law’. It includes *inter alia* the enactment, promulgation, adoption in India of any Law, as well as, any change in tax or introduction of any tax made applicable for supply of power. The event of enactment of ‘GST Laws’ has occurred after the execution of PPAs and has resulted in additional recurring and non-recurring expenditure. In terms of Article 12.2.1 of the PPAs, an aggrieved party who has incurred additional recurring/ non-recurring expenditure is required to approach the Commission for seeking approval of such change in law event and thereby, claim relief for the same upon approval by the Commission. Accordingly, the Petitioners have approached this Commission for seeking relief on account of introduction of GST as a change in law event, as per the first and last bullet of Article 12.1.1 of the PPAs. ***Per Contra***, Respondent No. 1 has submitted that the fact that the GST Laws are ‘law’, as defined in the PPAs is not disputed. However, in order to qualify for relief under the change in law

provision contained in the PPAs, the conditions mentioned in Article 12 therein dealing with 'Change in Law' need to be satisfied, namely, each of the claims should fall within the scope of the said provision. The Respondents 2 to 4 in Petition No. 67/MP/2019 have submitted that since, in the present case, the 'Effective Date' of the PPAs is 16.09.2017 and the GST Laws were implemented with effect from 01.07.2017, before the 'effective date', the event of the implementation of the GST Laws would not fall under 'Change in Law' as defined under Article 12 and therefore, the Petitioner would not be entitled to any relief thereof.

86. The Commission observes that Article 12 of the PPAs stipulates as under:-

***“ARTICLE 12: ‘CHANGE IN LAW’***

***12.1. Definitions***

*In this Article 12, the following terms shall have the following meanings;*

*12.1.1. "Change in Law" means the occurrence of any of the following events after the effective date resulting into any additional recurring/ non - recurring expenditure by the SPD or any income to the SPD:*

- the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re - enactment or consolidation) in India, of any law, including rules and regulations framed pursuant to such law;*
- a change in the interpretation or application of any law by any Indian Governmental Instrumentality having the legal power to interpret or apply such law or any Competent Court of Law;*
- the imposition of a requirement for obtaining any Consents, Clearances and ;*
- Permits which was not required earlier;*
- a change in the terms and conditions prescribed for obtaining any consents, clearances and permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits, except due to any default of the SPD;*
- Any statutory change in tax structure or introduction of any new tax made applicable for setting up of Solar Power Project and supply of power from the Project by the SPD, shall be treated as per the terms of this Agreement. For the purpose of considering the effect of this change in Tax structure due to change in law after the date of submission of Bid, the date such law comes into existence shall be considered as effective date for the same;*

*but shall not include (1) any change in any withholding tax on income or dividends distributed to the shareholders of the SPD, or (2) any change on account of regulatory measures by the Appropriate Commission.*

***12.2. Relief for ‘Change in Law’***



*12.2.1. The aggrieved party shall be required to approach the central commission for seeking approval of 'Change in Law'.*

*12.2.2. The decision of the central commission to acknowledge a 'Change in Law' and the date from which it will become effective, provide relief for the same, shall be final and governing on both the parties."*

87. The Commission observes that as per Article 12, 'Change in Law' means the enactment/ coming into effect/ adoption/ promulgation/ amendment/ modification or repeal of any Law in India; change in the interpretation of any law in India; imposition of a requirement for obtaining any consents or change in tax or introduction of any tax made applicable for supply of power by the SPD as per the terms of this Agreement, resulting into any additional recurring/ non-recurring expenditure or any income to the SPD. The Commission is of the view that harmonious construction of the bullet points under Article 12 makes it clear that bullet point one is wider in scope and refers to the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal of any law in India, including rules and regulations framed pursuant to such law whereas bullet point last in seriatim refers specifically to any change in tax or introduction of any tax made applicable for 'supply of power' by the SPD as per the terms of Agreement. Clearly, the 'GST laws' enacted are not in the nature of a mere change in the tax having limited applicability on supply of power. Rather, it is in the nature of an enactment having wide ranging implication on the entire indirect taxation regime in India. In the instant case, the 'GST Laws' have been enacted by the Act of Parliament and the State Legislative Assemblies. The change in duties/ tax imposed by the Central Government and State Government(s) has resulted in the change in cost of the inputs required for generation and the same is to be considered as 'Change in Law'. Hence, the Commission holds that the enactment of 'GST laws' is squarely covered as 'Change in Law' under the first, and last bullet in seriatim of Article 12.1.1 of the PPA. This view is in consonance with the view taken by the Commission in Order dated 09.10.2018 in Petition No. 188/MP/2017 & Ors. titled *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors.*

88. The Commission notes that the Petitioners have placed their bids on 19.04.2017 & 05.08.2016 in Petitions No. 67/MP/2019 & 68/MP/2019 respectively. It is observed that the

bids were accepted before the introduction of GST Laws i.e. 01.07.2017 and the SCoD was after 01.07.2017. Therefore, the Petitioners are entitled for relief under ‘GST laws’.

***Issue No. 2: Whether there will be incremental impact on the cost of construction due to additional tax burden on the Engineering, Procurement and Construction (EPC) Cost on account of promulgation of the GST Laws?***

***And***

***Issue No. 3: Whether there will be incremental impact on the cost of project due to additional tax burden on operation and maintenance expenses on account of promulgation of the GST Laws, since the PPAs are for 25 years?***

89. Since Issue no. 2 and Issue no. 3 are interrelated, they are being taken together for discussion. The Petitioners have submitted that they have incurred adverse financial consequences due to introduction of GST Laws, which have resulted in additional financial burden on the Petitioners on account of increase in the construction cost and increase in operation & maintenance cost and these costs were not contemplated by the Petitioners at the time of bid submission. ***Per Contra***, the Respondents have submitted that the claim may be denied.
90. The Commission observes that the ‘GST Laws’ became effective from 01.07.2017. ‘GST Laws’ provide for a tax slab (previously exempted) of 5% to 28% with respect to Goods & Services required for execution, construction and operation of Solar Projects w.e.f. 01.07.2017. The ‘Goods and Services’ in the context of the present petitions can be broadly categorized under the following two heads:
- a) EPC Stage i.e. Construction Stage which is covered under ‘Goods’ and
  - b) O & M Stage i.e. Post Construction Stage which is covered under ‘Services’.
91. We will first discuss the impact of ‘GST laws’ on the Engineering, Procurement and Construction (hereinafter referred to as ‘EPC’) Stage. EPC stage can be also construed broadly to be ‘Construction Stage’ which is covered under Goods under ‘GST Laws’. ‘GST Laws’ came into effect from 01.07.2017 and accordingly, the Commission is of the view that the GST in the context of the present petitions is applicable on all cases except in case of the

generating company where ‘Scheduled date of Commissioning’ or ‘the actual date of Commissioning’ as per the respective PPA is prior to 01.07.2017. It is pertinent to note that under ‘GST Laws’ it has been provided that *“If point of taxation of Goods/Services before the GST implementation then it will be taxed under earlier law. GST will not be applicable. Any portion of any supply whose point of taxation is after GST implementation will be taxed under GST. The time of goods/supply of services shall be the earlier of the:- (a) the date of issuing invoice (or the last day by which invoice should have been issued) OR (b) the date of receipt of payment - whichever is earlier.”* A plain reading of the above implies that according to ‘GST Laws’, in cases where the invoice is raised or consideration for the goods/supply of services have been received before 01.07.2017 and the tax has already been paid under the earlier law, the GST will not be applicable in such cases. It is immaterial whether the consideration for supply has been paid fully or partly.

92. The Commission observes that the various provisions of PPAs dated 02.08.2016 stipulate as under:

“ARTICLE 1

*“Commissioning” shall have the meaning ascribed thereto in Article 5 of this Agreement;*

*“Commercial Operation Date (COD)” shall be the date 30 days subsequent to the actual date of commissioning of full capacity (i.e. the full capacity of the Power Project has been commissioned and the SPD starts scheduling and injecting power from the Power Project to the Delivery Point) of the Project as declared by the SNA/SECI and the developer has paid to SECI, a Performance Guarantee Deposit (PGD) @Rs. 10 lakhs/MW for the entire Contracted Capacity and the SPD not availing any VGF shall be required to demonstrate / infuse cumulative capital in the form of Equity for an amount of at least Rs. 1.20 Cr./MW before the COD.*

**ARTICLE 5: SYNCHRONISATION, COMMISSIONING AND COMMERCIAL OPERATION**

**5.1 Synchronization, Commissioning and Commercial Operation**

5.1.1 *The SPD shall give the concerned RLDC/SLDC, SECI and Solar Park Implementing Agency (if applicable) at least sixty (60) days advanced preliminary written notice and at least thirty (30) days advanced final written notice, of the date on which it intends to synchronize the Power Project to the Grid System.*

5.1.2 *Subject to Article 5.1.1, the Power Project may be synchronized by the SPD to*

*the Grid System when it meets all the connection conditions prescribed in applicable Grid Code then in effect and otherwise meets all I other Indian legal requirements for synchronization to the Grid System.*

- 5.1.3 *The synchronization equipment and all necessary arrangements / equipment including RTU for scheduling of power generated from the Project and transmission of data to the concerned authority as per applicable regulation shall be installed by the SPD at its generation facility of the Power Project at its own cost. The SPD shall synchronize its system with the Grid System only after the approval of synchronization scheme is granted by the head of the concerned sub-station/Grid System and checking/verification is made by the concerned authorities of the Grid System.*
- 5.1.4 *The SPD shall immediately after each synchronization/tripping of generator, inform the sub-station of the Grid System to which the Power Project is electrically connected and all other concerned authorities in accordance with applicable Grid Code under intimation to SECI. In- Addition the SPD will inject in-firm power to grid time to time to carry out operational/ functional test prior to commercial operation.*
- 5.1.5 *The SPD shall commission the Project as detailed in “**Schedule 6: Commissioning Procedure**” within thirteen (13) Months of the date of signing of PPA*

#### **ARTICLE 4**

##### **4.4. Right to Contracted Capacity & Energy**

- 4.4.1 *SECI, at any time during a Contract Year, shall not be obliged to purchase any additional energy from the SPD beyond 45.867 Million kWh (MU). If for any Contract Year, it is found that the SPD has not been able to generate minimum energy of 35.443 Million kWh (MU) till the end of 10 years from the COD and 33.358 Million kWh (MU) for the rest of the term of the Agreement, on account of reasons solely attributable to the SPD, the non-compliance by SPD shall make SPD liable to pay the compensation provided in the PSA as payable to Buying Utilities and shall duly pay such compensation to SECI to enable SECI to remit the amount to Buying Utilities. This will, however be relaxable by SECI to the extent of grid non-availability for evacuation, which is beyond the control of the developer. This compensation shall be applied to the amount of shortfall in generation during the Contract Year. The amount of compensation shall be equal to the compensation payable (including RECs) by the Buying Utilities towards non-meeting of RPOs, if such compensation is ordered by the State Commission. However, this compensation shall not be applicable in events of Force Majeure identified under PPA with SECI affecting supply of solar power by SPD.*
- 4.4.2 *Notwithstanding Article 4.4.1, any excess generation over and above 10% of declared annual CUF will be purchased by SECI at a tariff as per Article 9.4, provided SECI is able to get any buyer for sale of such excess generation. While the SPD would be free to install DC solar field as per its design of required output, including its requirement of auxiliary consumption and to reconfigure and repower the Project from time to time during the term of the PPA, it will not*

*be allowed to sell any excess power to any other entity other than SECI (unless refused by SECI). However, in case at any point of time, the peak of capacity reached is higher than the contracted capacity and causes disturbance in the system at the point where power is injected, the SPD will have to forego the excess generation and reduce the output to the rated capacity and shall also have to pay the penalty/charges (if applicable) as per applicable regulations / requirements / guidelines of CERC / SERC /SLDC or any other competent agency*

*Any energy produced and flowing into the grid before CoD shall not be at the cost of SECI under this scheme and the SPD will be free to make short-term sale to any organisation or individual. SECI may agree to buy this power as a trader if they find it viable outside this scheme.”*

**SCHEDULE 6: COMMISSIONING PROCEDURE:**

*\* Capacity of Solar PV Projects:*

*i) maximum AC Capacity at the delivery point as described below:*

<i>Sr. No.</i>	<i>Solar PV Project Capacity Bid</i>	<i>Minimum DC Arrays Capacity to be installed</i>	<i>Minimum Rated Inverter Capacity*</i>	<i>Maximum AC Capacity Limit at Delivery point</i>
<i>1</i>	<i>10 MW</i>	<i>10 MW</i>	<i>10 MW</i>	<i>10 MW</i>
<i>2</i>	<i>20 MW</i>	<i>20 MW</i>	<i>20 MW</i>	<i>20 MW</i>
<i>3</i>	<i>30 MW</i>	<i>30 MW</i>	<i>30 MW</i>	<i>30 MW</i>
<i>4</i>	<i>40 MW</i>	<i>40 MW</i>	<i>40 MW</i>	<i>40 MW</i>
<i>5</i>	<i>50 MW</i>	<i>50 MW</i>	<i>50 MW</i>	<i>50 MW</i>

*\*In case the rated capacity is mentioned in kVA, the IEC test certificate declaring the power factor of the Inverter/PCU at rated power has to be submitted and the power factor shall be multiplied by the kVA rating to calculate the rated capacity of the inverter in kW.*

- ii) Higher DC capacity arrays so as to achieve AC capacity limit as mentioned above for scheduling at the delivery point in compliance to Article 4.4 “Right to Contracted Capacity & Energy” of the PPA is allowed.*
- iii) For commissioning of the Project, capacity of DC arrays installed shall be considered. In case of part commissioning of Project, it shall be required to have the DC Arrays Capacity be installed not less than the proposed part commissioning capacity.*
- iv) Provisions of Article 4.6.1 of the PPA with SPD shall apply for the capacity not commissioned by the scheduled commissioning date.*
- v) If generation at any time exceeds the maximum permissible AC capacity at delivery point, the excess generation during that period shall not be considered under PPA.*

**Appendix-A-1**

**Commissioning Procedure**

- i) At the time of commissioning, the Commissioning Committee shall verify compliance of technical parameter of the Project as per Annexure A of the RFS document.*
- ii) SPDs shall give to the concerned RLDC/SLDC, State Nodal Agency (SNA) and SECI at least sixty (60) days advance preliminary written notice and at least thirty (30) days advance final written notice, of the date on which it intends to synchronize the Power Project to the Grid System. The SPD shall be solely responsible for any delay or non receipt of the notice by the concerned agencies, which may in turn affect the Commissioning Schedule of the Project.*
- iii) A Solar PV Project will be considered as commissioned if all equipment as per rated project capacity has been installed and energy has flown into the grid*

93. The Commission notes that commissioning of the projects as defined in Article 1 read with Article 5 and Schedule 6 of the PPAs implies that all the equipment as per rated project capacity has been installed and energy has flown into the grid. Further, the liability of the Respondents for payment of purchase of the power from the petitioner starts from the Commercial Operation Date (COD). As per definition of Commercial Operation Date (COD) provided in Article 1 of the PPAs, COD will be the date 30 days subsequent to the actual date of commissioning of full capacity. Accordingly, the Commission holds that the liability of payment on account of impact of GST on procurement of Solar PV panels and associated equipment by the Petitioners shall lie with the Respondents till the Commercial Operation Date (COD) only. The Commission is also of the view that there has to be a clear and one to one correlation between the projects, the supply of goods or services and the invoices raised by the supplier of goods and services.

94. The Commission observes that in the instant petitions, the tariff has been discovered under transparent e-bidding process in accordance with the NSM guidelines issued by the Central Government. In the Competitive Bidding Scenario, the SPDs bid levelled tariff without disclosing the details of the calculations of the project cost including capital expenditure. The component wise details of the capital employed are not required to be declared by the bidders. The design of the bid levelled tariff is solely a decision of the SPDs.

95. The Petitioner is directed to make available to the Respondents all relevant documents exhibiting clear and one to one correlation between the projects and the supply of goods or services, duly supported by relevant invoices and Auditor's Certificate. The Respondents are

further directed to reconcile the claims for Change in Law on receipt of the relevant documents and pay the amount so claimed to the SPDs as per paras 91 & 93 above. The Commission is of the view that since the quantum of compensation on account of introduction of GST w.e.f. 01.07.2017 is not large, it should be discharged by the Respondent-Procurement as one-time payment in a time bound manner. Accordingly, it is directed that the GST bills shall be paid within 60 days from the date of issue of this Order or from the date of submission of claims by the Petitioner, whichever is later, failing which it shall attract late payment surcharge in terms of the PPA. Alternatively, the Petitioners and the Respondents may mutually agree to a mechanism for the payment of such compensation on annuity basis spread over such period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs. This will obviate the hardship of the Respondents for one-time payment. It is pertinent to mention here that the Petitioners will submit the required documentation to the Respondent No.1 which will satisfy itself and submit the same along with its recommendations to the Respondent Discoms.

96. The Commission notes that during the hearing dated 15.10.2019 and vide the written submissions, the Respondent No. 1 has submitted that in the Order dated 09.10.2018 passed in Petition No.188/MP/2017 and connected Petitions and other Orders dated 19.09.2018, 18.04.2019 and 12.04.2019 passed in petition Nos. 50/MP/2018 & connected petitions, 164/MP/2018 & connected petitions, 206/MP/2018 & connected petitions respectively, the Commission has given the Table dealing with components of capital cost. In the table as contained in Para 348 of the Order dated 09.10.2018 passed in Petition No.188/MP/2017, the Commission dealt with the calculation for escalation as based on the decision dated 23.03.2016 passed by Commission in Petition No.17/SM/2015.
97. The Respondent No.1 has submitted that the Commission may clarify that the table and the weightage of the components given in the earlier orders are indicative and illustrative related to the particular case and that the cases of the solar power developer have to be considered on actual weightage of the component provided by them as supported by audited certificate with applicable rates related thereto and that the same should be accepted as commercial decision of the Solar Power Developers.

98. The Commission observes that in the Order dated 09.10.2018 passed in Petition No.188/MP/2017 and connected Petitions, the Commission, inter alia, stated as under:

“

339. *The Commission observes that in the instant petitions, the tariff has been discovered under transparent e-bidding process in accordance with the NSM guidelines issued by the Central Government. In the Competitive Bidding Scenario, the SPDs bid levellised tariff without disclosing the details of the calculations of the project cost including capital expenditure. The component wise details of the capital employed are not required to be declared by the bidders. The design of the bid levellised tariff is solely a decision of the SPDs.*

...

...

348. *With the above facts in mind, the Commission now proceeds to determine the impact of GST on the projects under consideration in the present petitions. As regards the component wise details of the project and respective percentage share of each such component in the overall capital cost, the Commission observes that in the absence of any related references in the projects selected through bidding, reliance could be placed on the Commission’s Order dated 23.03.2016 passed in Petition No. 17/SM/2015 for the purpose of determining ‘weightage of the Components of Capital cost’ and the percentage impact of the taxation due to enactment of ‘GST Laws’ on the various components may be calculated accordingly. It is pertinent to mention here that in respect of PV Modules VAT (pre-GST regime) of 0-5% was charged on intra state procurement. Further, in case of input by SPV or high sea sale by EPC, the effective rate also was 0%. Whereas post enactment of ‘GST Laws’ 5% will be applicable on intra state procurement as well as import by EPC or SPV. The calculations for the escalation as based on Petition no. 17/SM/2015 are tabulated as below:-*

Particulars	Weightage of Component of Capital Cost As taken in Petition No. 17/SM/2015	GST		Comments
		As claimed by the Petitioners	As per ‘GST Laws’ post 01.07.17	
PV Modules	61.95%	5%	5%	
Land Cost	4.72%	0%	0%	
Civil and General Works (Balance of Plant-Civil; EPC-Civil; Roads & Drainage Fencing Work)	6.60%	9%	9%	GST at 18%; However, in Petitions the Petitioner has claimed 9%.
Mounting Structures (Mounting Structure & Nut-Bolts; Clamp & Fasteners; Mounting Structure Foundation)	6.60%	18%	5%	The GST rate GST at 18% (SGST9% + CGST-9%) in case of direct purchase. In case the structures are sold as part of Solar power



				generating system then 5% GST is applicable
Power Conditioning Unit (Inverter Transformer; DC Battery & Battery Charger)	6.60%	28%	5%	The GST rate GST at 18% (SGST9% + CGST-9%) in case of direct purchase. In case the structures are sold as part of Solar power generating system then 5% GST is applicable
Evacuation Cost up to Interconnection Point (AC/DC Cables; Switchgears; PLC, SCADA; Connectors; Transmission line; AC/DC-Electrical Materials; Combiner Box;; Misc. Electricals)	8.30%	18%	5%	Post GST sold as part of Solar power generating system hence 5% GST
Preliminary and Pre-Operative Expenses including IDC and Contingency (Transmission & Logistic Services; Erection of MMS and Module; Electrical Erection; Pre-Op & other indirects; Safety; Security and IT services; EPC-Services)	5.21%	18%	5%	GST at 18%; However, in Petition No. the Petitioner has claimed 5%.
	<b>Weighted Avg. of Tax/GST</b>	9.16%	5.55%	

349. Therefore, the Commission directs that the Petitioners have to exhibit clear and one to one correlation between the projects, the supply of goods or services and the invoices raised by the supplier of goods and services backed by auditor certificate. The certification should include 'Certified that all the norms as per 'GST Laws' have been complied with by the Petitioner and the claim of the amount being made by the Petitioner are correct as per the effective taxes in pre and post 'GST regime'. The Petitioners should then make available to the Respondents, the relevant documents along with the auditor certification who may reconcile the claim and then pay the amount so claimed to the SPD w.e.f. 01.07.2017 qua EPC cost on the basis of the auditor's certificate as per the methodology discussed in para no. 338 & 348 above. Further, as Government of India has appointed 'Nodal agencies' under JNNSM scheme to act as an intermediary to facilitate the purchase and sale of electricity from solar power developer to DISCOMS. Accordingly, the amount determined as payable above by Petitioners shall on 'back to back' basis be paid by DISCOMS to intermediary nodal agency under the respective 'Power Sale Agreements.'"

99. From the above, the Commission notes that in the Competitive Bidding Scenario, the SPDs bid levellised tariff without disclosing the details of the calculations of the project cost including capital expenditure. The component wise details of the capital employed are not required to be declared by the bidders. The design of the bid levellised tariff is solely a

decision of the SPDs. The Commission noted that neither the component wise details of the project and respective percentage share (of each such component in the overall capital cost) nor any related reference of the projects selected through bidding was available on records. Therefore, to understand the impact of GST Laws the Commission placed its reliance on its Order dated 23.03.2016 passed in Petition No. 17/SM/2015 for the purpose of determining ‘weightage of the Components of Capital cost’ and the percentage impact of the taxation due to enactment of ‘GST Laws’ on the various components. It is pertinent to mention here that the purpose of the table, in the various Orders referred above, was purely illustrative in nature to assess that there will be an incremental impact of the GST laws on the project cost. This observation is self-evident from the fact that the Commission instead of insisting the contracting parties on the implementation of the table for the claims rather directed as follows: *“the Petitioners have to exhibit clear and one to one correlation between the projects, the supply of goods or services and the invoices raised by the supplier of goods and services backed by auditor certificate. ... The Petitioners should then make available to the Respondents, the relevant documents along with the auditor certification who may reconcile the claim and then pay the amount so claimed to the SPD.”*

100. The Commission, therefore reiterates that the table as contained in para 348 of the Order dated 09.10.2018 referred in Petition No. 188/MP/2017 & Ors. and other similar Orders, is only illustrative in nature and computation on account of GST being a Change in Law, shall be paid on exhibiting clear and one to one correlation between the projects and the supply of goods or services, duly supported by relevant invoices and Auditor’s Certificate by the Petitioners as discussed in para no. 95 above.
101. Now, the next point raised in the petitions is that ‘the obligations and liabilities of SECI to the Petitioners are on a ‘back to back’ basis vis-à-vis the obligation to be performed and liabilities to be discharged by the relevant Respondents as the Buying Entities’.
102. The Commission observes that the NSM ‘Guidelines’, inter alia, provides as under:

*“3.2. Mechanism of Operation of the VGF Scheme*

*This scheme envisages providing Viability Gap Funding through SECI to the bidders*

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*selected through a transparent bidding process to procure solar power at a pre-determined fixed tariff. The salient feature of the overall mechanism would be as follows:*

.....

*iv. Sale of solar power: SECI will sign Power Purchase Agreement with developers with pre-determined or discounted tariff (as applicable) fixed by MNRE and back-to-back Power Sale Agreement with buying DISCOMs/State Utilities/bulk consumers. SECI will be entitled to charge a trading margin of Rs. 0.07 per kWh. The solar power tariff as to be paid by SECI to developers will be fixed by MNRE depending on market conditions. MNRE will constitute an Empowered Committee to determine the tariff for purchase of solar power by SECI. This Committee will give recommendations based on which MNRE will, with the approval of Minister in-charge, fix tariff for purchase of solar power by SECI every year before tendering process is started or as and when required. Tariff for sale of solar power by SECI will be determined based on the tariff for purchase of solar power by adding trading margin of Rs. 0.07 per kWh.*

### *3.11 Power Purchase Agreement*

*3.11.1 A copy of Standard Power Purchase Agreement to be executed between SECI and the Project Developer shall be provided by SECI along with Invitation for Submission of response to RfS. Within one month of the date of issue of Letter of Intent (LoI), the Power Purchase Agreement (PPA) between SECI and the Project Developer for Purchase of Power from the project will be executed. The PPA shall be for a period of 25 years from the date of CoD.*

*3.11.2 The developers will be free to reconfigure and repower their plants from time to time during the PPA duration. However, SECI will be obliged to buy power only within the Capacity Utilization Factor (CUF) range laid down in Power Purchase Agreement (PPA) as per guidelines. Excess power generated will be purchased at a notional Support Price of Rs.3 per kWh only. The developers are free to operate their plants after expiry of the 25 years' PPA period if other conditions like land lease etc., permits. However, any extension of the PPA period beyond 25 years shall be through agreements between the Solar Power Developer, SECI and the Buying Utilities.*

*3.11.3 SECI will execute a Power Sale Agreement (PSA) with the State Utilities/DISCOMs/Bulk Consumers of the buying States for sale of power to them valid for 25 years. Further, State Utilities/DISCOMs will have to maintain LC and Escrow Arrangement as may be defined in the PSA.*

103. The Commission observes that the PPAs, inter alia, provide as under:

*“G. SECI has agreed to purchase such Solar Power from SPD as an intermediary Seller and sell it to Buying Utilities back to back basis as per the provisions of the JNNSM.*

*H. SECI has agreed to sign a Power Sale Agreement with the Buying Utilities to sell*

*such power as per the provisions of the JNNSM.”*

104. The Commission observes that APTEL in its Judgment dated 04.11.2011 in Appeal No. 15 of 2011 in the case of *Lanco Power Limited v Haryana Electricity Regulatory Commission and Ors*, has, inter alia, held as under:

*“18. The trading activity has been recognized as a distinct activity under the Act. The statement of objects and reasons of the Act provides as under:*

*“(ix) Trading as a distinct activity is being recognized with the safeguard of the Regulatory Commissions being authorized to fix ceilings on trading margins, if necessary”.*

*19. The term trading has been defined in Section 2 (71) of the Act as under:*

*“(71) “trading” means purchase of electricity for resale thereof and the expression “trade” shall be construed accordingly;*

*20. Unlike the generation, transmission, wheeling and retail sale, there is no tariff determination for trading. The trading is based on margin only. Thus, the trading being a purchase of electricity for re-sale, the trader would get a margin to be determined by the Central Commission under Section 79(1)(j) of the Act or by the State Commission under Section 86(1) (j) of the Act. Section 66 of the Electricity Act provides for the development of the market. The same reads as below:*

*“66. Development of market. The Appropriate Commission shall endeavour to promote the development of a market (including trading) in power in such manner as may be specified and shall be guided by the National Electricity Policy referred to in Section 3 in this regard”*

*21. So, the combined reading of the above provisions brings out the scheme of the Act. A trader is treated as an intermediary. When the trader deals with the distribution company for re-sale of electricity, he is doing so as a conduit between generating company and distribution licensee. When the trader is not functioning as merchant trader, i.e. without taking upon itself the financial and commercial risks but passing on the all the risks to the Purchaser under re-sale, there is clearly a link between the ultimate distribution company and the generator with trader acting as only an intermediary linking company.*

.....

*24. In other words, even though the Haryana Power (R-2) was not the party to the PPA dated 19.10.2005 and the Amended Agreement dated 18.9.2006, the parties to the PPA have intended that the power sold under the PPA to be further sold to Haryana Power (R-2), the ultimate beneficiary for the purpose of distribution to the consumers of the State of Haryana. As such the Haryana Power (R-2) is entitled to*

*enforce the terms of PPA. To put it in a nut shell, the sale of entire contracted capacity of 300 MW by the Appellant, is intended for re-sale by PTC (R-3) to Haryana Power (R-2) and as such, the ultimate sale of entire 300 MW to Haryana Power (R2) was under the PSA.*

*25. According to the Respondents in this Appeal, the PPA and PSA are back to back arrangements. On the other hand, the Appellant has contended that there is no nexus or privity in respect of the PPA dated 19.10.2005 entered into between Lanco Power, the Appellant, PTC (R-3) and the PSA dated 21.9.2006 entered into between the PTC (R-3) and Haryana Power (R-2).*

*26. Now let us see as to whether there has been nexus between the PPA and PSA.*

.....

*38. In this context, it would be proper to refer to the relevant clauses of the recitals of the PPA dated 19.10.2005 which go to show that that PPA is linked to the PSA. Those clauses are reproduced herein:*

*“(C) The Company has requested PTC to purchase the Contracted Capacity and Power Output from the Project (273 MW net power) at the Delivery Point for a period of twenty five (25) years from the Commercial Operation Date of the Project and PTC has agreed to purchase such power at the Delivery Point for a period of twenty five (25) years from the Commercial Operation Date of the Project for onward sale by PTC.*

*(E) PTC will enter into a Sale Agreement (PSA) with one or more Purchasers, for sale of such power from the Project.*

*(F) A Petition for approval of tariff for sale of the above power shall be filed before the Appropriate Commission and the tariff as approved by such Appropriate Commission will be applicable for purchase and sale of the above power by PTC based on the CERC norms, subject to the ceilings as agreed upon by the Parties in this Agreement”. {emphasis added}*

*39. These factors would categorically indicate that both the PSA and PPA are back to back agreements as the PPA between the Appellant and PTC(R-3) got firmed up with the execution of PSA entered into between R-2 Haryana Power and PTC(R-3).*

.....

*42. Thus, it is clear that the PPA and PSA are interconnected and inextricably linked to each other and as such there is privity between the Appellant which is the power generator and the Haryana Power (R-2) which is a deemed licensee who is the ultimate beneficiary of the PPA as well as the party to the PSA.*

.....

*50. As per the terms of the PPA entered into between the Lanco Power, the Appellant and PTC (R-3), the PTC was required to enter into power sale agreement with the*

*purchaser for onward sale of power from the Appellant's project. Thus the requirement to execute the PSA was an intrinsic and material provision of the PPA since the performance of the PPA was completely dependent upon the execution of the PSA. Thus, the PPA and PSA are the two documents which are heavily inter-dependent on one another for their sustenance. In order to refer to this aspect, it would be proper to quote the relevant provisions of the PPA.*

.....

*55. It may be pointed out that on 21.9.2006, PTC (R-3) executed the PSA with the Haryana Power (R-2) as per its inexorable obligations under the PPA. This PSA was in fact veritable reproduction of the PPA. This is borne out from not only the findings of the State Commission while passing the impugned order but also from the very clauses of the PSA. Some of the relevant clauses of the PSA demonstrating that the said PPA and PSA were entwined and that the sustenance on one was dependent on the other which are reproduced below:*

*“Recital C-*

*PTC has entered into a Power Purchase Agreement (hereinafter referred to as “PPA) on 19th October, 2005 as amended further vide an amendment agreement dated 18th September, 2006 with M/s. Lanco Amarkantak Power Private Ltd., (the “Company”), a Generating Company as defined under the Electricity Act, 2003 and which the implementing a coal based thermal power station at Pathadi Village, Korba District, Chhattisgarh, India, to purchase the power and energy output from its unit with an installed capacity of 300 MW, Phase II proposed to be set up (the “Project”), for a period of twenty five (25) years from the Commercial Operation Date of the Project”.*

*56. In fact, Clause 3.1 (i) states that the PSA will not be effective until the conditions precedent as laid down in the PPA are duly satisfied. In terms of the clause 4.1 (v) of the PSA, it was explicitly agreed that PTC could not terminate the PPA except with prior consent of the Purchaser. As per clause 4.1 (ix), it was PTC's obligation to participate and require the Company to participate in the Tariff Determination process as required by the Appropriate Commission.*

*57. As per clause 4.2 (i), it was the purchaser's obligation to make available any information required by the PTC in order to assist the Company to achieve Financial Close. Clause 15.1.2 (iii) of the PSA, is a provision which has been introduced specifically keeping in mind the clause 16.6.5 introduced into the PPA through the amendment dated 18.9.2006. The reading of the said clause of the PSA will conclusively demonstrate that the same has been drafted in consonance with the amended PPA for the benefit of Haryana Power (R-2).”*

105. From the above, the Commission is of the view that the PPA and PSA are interconnected and inextricably linked to each other and as such there is privity between the Petitioners which are the power generators and the Respondents which are the Discoms and the ultimate

beneficiaries of the PPA as well as parties to the PSA. The back to back nature of the PPA and PSA implies that the Respondent Discoms are liable to pay to the Respondent SECI all that the said Respondent SECI has to pay to the Petitioners. However, in so far as payment mechanism is considered, the issue raised for decision of the Commission is as to whether in view of the back to back nature of PPA and PSA, SECI was liable to pay to the Petitioners only when/if the Respondent Discoms make payment to the Respondent SECI. In this context, the Commission notes the Provisions of Article 10 of PPA and Article 6 of PSA.

106. Article 10 of the PPAs stipulates that:

*“10 ARTICLE 10: BILLING AND PAYMENT*

*10.1 General*

*10.1.1 Subject to the funds being made available by MNRE, SECI shall set up a payment security mechanism in order to ensure timely payment to the developers. This fund will have a corpus to cover 3 months payment.*

*10.1.2 From the commencement of supply of power, SECI shall pay to the SPD the monthly Tariff Payments subject to the adjustments as per provisions of this Agreement including Article 6, in accordance with this Article and Article 9. All Tariff Payments by SECI shall be in Indian Rupees.*

*10.2 Delivery and Content of Monthly Bills/Supplementary Bills*

*10.2.1 The SPD shall issue to SECI a signed Monthly Bill/Supplementary Bill for the immediately preceding Month. Each Monthly Bill shall include all charges as per this Agreement for the energy supplied for the relevant Month based on Energy Accounts issued by RLDC/SLDC or any other competent authority which shall be binding on both the Parties. The Monthly Bill amount shall be the product of the energy as per the Energy Account and the applicable Tariff.*

*10.3 Payment of Monthly Bills*

*10.3.1 SECI shall pay the amount payable under the Monthly Bill/Supplementary Bill by the Due Date to such account of the SPD, as shall have been previously notified by the SPD in accordance with Article 10.3.2 (iii) below.*

*10.3.2 All payments required to be made under this Agreement shall also include any deduction or set off for:*

- i) deductions required by the Law; and*
- ii) amounts claimed by SECI, if any, from the SPD, through an invoice to be payable by the SPD, and not disputed by the SPD within fifteen (15) days of receipt of the said Invoice and such deduction or set-off shall be made to the extent of the amounts not disputed. It is clarified that SECI shall be entitled to claim any set off or deduction under this Article, after expiry of the said fifteen (15) Days period.*
- iii) The SPD shall open a bank account at Gurgaon/ Gurugram (the*

*"SPD's Designated Account") for all Tariff Payments (including Supplementary Bills) to be made by SECI to the SPD, and notify SECI of the details of such account at least ninety (90) Days before the dispatch of the first Monthly Bill. SECI shall also designate a bank account at New Delhi for payments to be made by the SPD to SECI, if any, and notify the SPD of the details of such account ninety (90) Days before the Scheduled Commissioning Date. SECI and the SPD shall instruct their respective bankers to make all payments under this Agreement to the SPD' Designated Account or SECI's Designated Account, as the case may be, and shall notify either Party of such instructions on the same day.*

**10.3.3 Late Payment Surcharge**

*In the event of delay in payment of a Monthly Bill by SECI beyond thirty (30) days of its Due Date, a Late Payment Surcharge shall be payable to the SPD at the rate of 1.25% per month on the outstanding amount calculated on a day to day basis subject to such late payment is duly received by SECI under the PSA. The Late Payment Surcharge shall be claimed by the SPD through the Supplementary Bill.*

**10.3.4** *In the event of early Commissioning of the Project subject to acceptance by SECI, the payment for the power fed to the grid will be accounted from the date of COD, but SPD would be allowed to raise Bills against such power only from the date not earlier than two months prior to Scheduled Commissioning Date."*

107. Further, Article 6 of the PSA stipulates as under: -

**"ARTICLE 6: BILLING AND PA YMENT**

**6.1. General**

**6.1.1** From the commencement of supply of power by SECI, the Buying Utility shall pay to SECI the monthly Tariff Payments after net of energy drawl from grid, on or before the Due Date, in accordance with Tariff as specified in Article 5. All Tariff Payments by the Buying Utility shall be in Indian Rupees.

**6.2. Delivery and Content of Monthly Bills**

**6.2.1** SECI shall issue to the Buying Utility a signed Monthly Bill on the 1st Business Day of the next Month.

**6.2.2** The Monthly Bill prepared as detailed in Schedule-3 of the PSA, shall include the following;

- i) Provisional Bill for Solar Power Supplied in the immediately preceding Month;
- ii) (a) Adjustments against the Provisional Bill(s) based on Energy Accounts for the Solar Power Supplied in the Month(s) preceding to the previous month(s);
- ii) (b) Any other adjustments to cover open access related charges and any other prior-period adjustments;



- iii) Late Payment Surcharge, if any; and
- iv) Taxes, Duties, Levies etc. as applicable.

6.3. Payment of Monthly Bills

6.3.1 *The Buying Utility shall pay the amount payable under the Monthly Bill on the Due Date to such account of SECI, as shall have been previously notified to the Buying Utility in accordance with Article 6.3.2 below.*

6.3.2 *SECI shall open a bank account at New Delhi (“SECI’s Designated Account”) for all Tariff Payments to be made by the Buying Utility to SECI, and notify the Buying Utility of the details of such account at least ninety (90) Days before the dispatch of the first Monthly Bill. The Buying Utility shall also designate a bank account at [insert the place] (the “Buying Utility’s Designated Account”) for payments to be made by SECI to the Buying Utility, if any, and notify SECI of the details of such account ninety (90) Days before the dispatch of the first Monthly Bill. SECI and the Buying Utility shall instruct their respective bankers to make all payments under this Agreement to the Buying Utility’s Designated Account or SECI’s Designated Account, as the case may be, and shall notify either Party of such instructions on the same day.”*

108. From the above, the Commission observes that the billing and payment between the Petitioner and the Respondent SECI are not conditional upon billing and payment between the Respondent SECI and the Respondent Discoms. Although, the above provisions (Article 10 of PPA and Article 6 of PSA) deal with regular monthly tariffs, the underlying philosophy that the billing and payment of one leg is not conditional upon the billing and payment of the other leg can be applied to the payment towards incremental impact on account of GST being a change in law, as well. In view of the above, Commission holds that the Power Purchase Agreement and Power Sale Agreement being back to back in nature are interconnected implying thereby that the Respondent Discoms are liable to pay to the Respondent SECI all that the said Respondent SECI has to pay to the Petitioner. However, payment to the Petitioner by Respondent SECI is not conditional upon the payment to be made by the Respondent Discoms to Respondent SECI. The Commission having held that GST is a change in law, the Respondent SECI is liable to pay to the Petitioners as per discussion above. The Respondent SECI is eligible to claim the same from the Respondent Discoms on back to back basis. The above decision may also be followed in all similar cases in which the

Commission has already allowed “GST laws” as ‘Change in law’ under Article 12 of the PPAs.

109. The next issue is that of the impact of “GST laws” on the “Operations and Maintenance” stage. The Petitioners have submitted that O&M activities have been outsourced to agencies that are experienced in providing the said services in the most effective and cost-efficient manner. The concept of the O&M expenses is implicitly covered under Article 12 of the PPAs. As per the PPAs, Clause 12.1.1 stipulates that Change in Law means the occurrence of any of the following events after the Effective Date resulting into any additional recurring/non-recurring expenditure by the SPD or any income to the SPD. As O&M expenses are recurring in nature, therefore the same are squarely covered under Article 12 of the PPAs and the same may be allowed. O&M expenses on the principles of normative parameters as specified by the Commission in the CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012 dated 06.02.2012 as amended on 31.03.2016 may be allowed. *Per Contra*, the Respondents have submitted that PPAs provisions or the bid documents did not mandate or prescribe or specifically provide for the outsourcing of O&M. Outsourcing of O&M is an internal commercial decision of the Petitioners. SECI is not concerned whether the Petitioners undertake the O&M by themselves or outsource the O&M. If, for commercial expediency or benefit, the Petitioner outsources the O&M, the saving or additional expenditure is to the account of the Petitioners.

110. The Commission is of the view that O & M stage can be construed broadly to be Post-Construction Stage which is covered under Services under GST Laws. The following activities constitute O&M for a solar plant: Site Security; Consumables and breakdown spares; Annual Maintenance Contract; and Module cleaning - labour and water supply. The Commission observes that as per the GST Act, 2017, the supply of services includes:

*“5. Supply of services*

*The following shall be treated as supply of services, namely:-*

*(a) renting of immovable property;*

*(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the*

*entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier.*

*Explanation.-*

*For the purposes of this clause-*

*(1) the expression “competent authority” means the Government or any authority authorised to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely:-*

*(i) an architect registered with the Council of Architecture constituted under the Architects Act, 1972 (Central Act No. 20 of 1972); or*

*(ii) a chartered engineer registered with the Institution of Engineers (India); or*

*(iii) a licensed surveyor of the respective local body of the city or town or village or development or planning authority;*

*(2) the expression “construction” includes additions, alterations, replacements or remodeling of any existing civil structure;*

*(c) temporary transfer or permitting the use or enjoyment of any intellectual property right;*

*(d) development, design, programming, customization, adaptation, up gradation, enhancement, implementation of information technology software;*

*(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act; and*

*(f) transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration.”*

111. The Commission is of the view that the recurring expenses referred to in Article 12 of the PPAs includes activities like salary, tax expenses, estimated maintenance costs, and monthly income from leases etc. The Commission notes, based on the records submitted in the context of the petitions, that outsourcing of ‘Operation and Maintenance’ services is not the requirement of the PPAs/ bidding documents. The concept of outsourcing is neither included expressly in the PPAs nor is it included implicitly in Article 12 of the PPAs. The Commission is of the view that in the Competitive Bidding Scenario, the SPDs bid levelled tariff without disclosing the details of the calculations of the project cost. It has already been held by the Commission in the earlier Orders and also appreciated above that it is a pure commercial decision of the Petitioners taken for its own advantage and any increase in cost including on account of taxes etc. In the event the Petitioners choose to employ the services of other agencies, it cannot increase the liability for the Respondents. Therefore, the Commission holds that claim of the Petitioners on account of additional tax burden on operation and maintenance expenses (if any), is not maintainable. This view is in consonance
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with the view taken by the Commission in Order dated 09.10.2018 in Petition No. 188/MP/2017 & Ors. case titled *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors.* The Commission does not find merit in the argument of the Petitioners that compensation on O&M expenses should be allowed on lines of the Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012. The present Petition relates to section 63 of the Electricity Act, 2003 and as such drawing reference to cost plus tariff fixation principles, is misplaced.

***Issue No. 4: Whether the claim of “Carrying Cost” for delay in reimbursement by the Respondent is sustainable?***

112. The Petitioners have submitted that the underlying purpose of Article 12 of the PPAs is to provide compensation and restore a party affected by Change in Law events to a position as if such Change in Law had not taken place. Further, for the Petitioner to effectively perform its obligations under the PPAs, it is imperative that tariff under the present PPAs be suitably revised so as to bring the Petitioner to a position as if the introduction of GST Law never occurred. The Petitioners can be brought to the position existing prior to the occurrence of the Change in Law event only if the Petitioner is also compensated in the amount of the financial cost of the additional expenditure incurred as a result of the Change in Law by paying it carrying cost. The Petitioner could not have raised supplementary invoices claiming the additional recurring expenditure incurred by the Petitioners due to introduction of GST Law under Article 10.3.3 of the PPA, as Article 12.2 of the PPA makes it obligatory upon the Petitioner to approach this Hon’ble Commission to seek relief for a Change in Law event before raising any supplementary invoices claiming such amount.
113. **Per Contra**, the Respondents have submitted that there is no provision in the PPAs regarding carrying cost or interest for the period till the decision of the Commission acknowledging the ‘change in law’ and deciding on the amount to be paid for such change in law namely ‘provide for relief for the same’, as specified in Article 12.2.2 of the PPAs. The ‘Change in Law’ claim of the Petitioners is yet to be adjudicated and the amount if any, due to the Petitioners have to be determined/computed first. Thereafter, only after the amount is determined, are the Petitioners required to raise a Supplementary invoice for the amount so

computed as per Article 10.7 of the PPA. It is only in case of default on the part of the Respondents in not making the payment by the due date as per supplementary invoices does the issue of Late Payment Surcharge arise i.e. for the period after the due date. The reference in Article 12.2.2 of the Commission deciding on the date from which the 'change in law' will be effective, refers to the principal amount to be computed from the date on which change in law comes into force and not to the payment of interest and carrying cost.

114. The Respondents have submitted that the provision of Article 10.3.3 of the PPAs dealing with late Payment Surcharge and definition of the 'Due Date' in Article 1 read with Article 10.3.1 of the PPA are relevant. The due date is forty-fifth (45<sup>th</sup>) day after a Monthly Bill or a Supplementary bill received and duly accepted by Respondents. If such day is not a Business day, the immediately succeeding Business day, by which date such Monthly Bill or Supplementary Bill is payable by the Respondents. The supplementary bill needs to be raised by the Petitioners for the adjustment of the 'Change in Law' after the Change in Law claim is approved by the Commission. There cannot be any claim for late payment surcharge for the period prior to the due date. The Respondents have relied upon the decision of the Hon'ble Appellate Tribunal in *SLS Power Limited -v- Andhra Pradesh Electricity Regulatory Commission and Others (Appeal No. 150 of 2011)* and Batch that recognizes that the interest will be due from the date the payment is due. In the present case, the payment is due only after issuance of the Supplementary Bill after the decision of the Commission.
115. The Respondents have submitted that the PPAs do not have a provision dealing with restitution principles of restoration to same economic position. Therefore, the Petitioners are not entitled to claim relief which is not provided for in the PPAs. The Respondents have submitted that in the Judgment of the Hon'ble Appellate Tribunal dated 13.04.2018 in Appeal No. 210 of 2017 in *Adani Power Limited -v- Central Electricity Regulatory Commission and Ors*, it was held that since the Gujarat Bid-01 PPA has no provision for restoration to the same economic position, therefore, the carrying cost will not be applicable.
116. The Respondents have submitted that the issue regarding Carrying Cost has been decided by the Judgment of the Hon'ble Tribunal dated 14.08.2018 in *Appeal No. 111 of 2017 in M/s.*

*GMR Warora Energy Limited –v- Central Electricity Regulatory Commission and Ors.* The Hon’ble Tribunal vide the above judgment has decided that if there is a provision in the PPAs for restoration of the Seller to the same economic position as if no Change in Law event has occurred, the Seller is eligible for carrying cost for such allowed Change in Law event(s) from the effective date of Change in Law event until the same is allowed by the appropriate authority by an order/ judgment. In the present case also, there is no provision in the PPAs for carrying cost or restitution and therefore the same, will not be applicable in the case of the Petitioner. In its Order dated 09.10.2018 in *Petition No. 188/MP/2017 and Batch in Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors. Batch*, the Commission has also reiterated the aforementioned findings of the Hon’ble Tribunal.

117. The Respondents have submitted that in the absence of the express provision in the PPAs, it is not open for the Petitioners to claim relief under principles of equity. Reference in this regard may be made to the judgment – *Alopi Parshad and Sons Ltd. v. Union of India, (1960) 2 SCR 793 : AIR 1960 SC 588*.
118. The Respondents have submitted that in view of the above, the Petitioners are not entitled to interest on incremental working capital at normative interest rate or otherwise to put the Petitioners to the same economic position as if the change in law has not occurred.
119. The Commission observes that in the judgment of the Appellate Tribunal for Electricity dated 13.04.2018 in Appeal No. 210 of 2017 in *Adani Power Limited v. Central Electricity Regulatory Commission and Ors.*, it was held that since Gujarat Bid-01 PPA has no provision for restoration to the same economic position, the decision of allowing carrying cost will not be applicable. The relevant extract of the Judgment dated 13.04.2018 reads as under:

*“ISSUE NO.3: DENIAL OF CARRYING COST*

*x. Further, the provisions of Article 13.2 i.e. restoring the Appellant to the same economic position as if Change in Law has not occurred is in consonance with the principle of ‘restitution’ i.e. restoration of some specific thing to its rightful status. Hence, in view of the provisions of the PPA, the principle of restitution and judgement of the Hon'ble Supreme Court in case of Indian Council for Enviro-Legal Action vs. Union of India &Ors., we are of the considered opinion that the Appellant is eligible for Carrying Cost arising out of approval of the Change in Law events*

*from the effective date of Change in Law till the approval of the said event by appropriate authority. It is also observed that the Gujarat Bid-01 PPA have no provision for restoration to the same economic position as if Change in Law has not occurred. Accordingly, this decision of allowing Carrying Cost will not be applicable to the Gujarat Bid-01 PPA.”*

120. Relevant extracts of the Judgment of the Hon'ble Tribunal dated 14.08.2018 in Appeal No. 111 of 2017 in *M/s. GMR Warora Energy Limited v. Central Electricity Regulatory Commission and Ors.* on the aspect of carrying cost reads as under:

*“ix. In the present case we observe that from the effective date of Change in Law the Appellant is subjected to incur additional expenses in the form of arranging for working capital to cater the requirement of impact of Change in Law event in addition to the expenses made due to Change in Law. As per the provisions of the PPA the Appellant is required to make application before the Central Commission for approval of the Change in Law and its consequences. There is always time lag between the happening of Change in Law event till its approval by the Central Commission and this time lag may be substantial. As pointed out by the Central Commission that the Appellant is only eligible for surcharge if the payment is not made in time by the Respondents Nos. 2 to 4 after raising of the supplementary bill arising out of approved Change in Law event and in PPA there is no compensation mechanism for payment of interest or carrying cost for the period from when Change in Law becomes operational till the date of its approval by the Central Commission. We also observe that this Tribunal in SLS case after considering time value of the money has held that in case of redetermination of tariff the interest by a way of compensation is payable for the period for which tariff is re-determined till the date of such re-determination of the tariff. In the present case after perusal of the PPAs we find that the impact of Change in Law event is to be passed on to the Respondents Nos. 2 to 4 by way of tariff adjustment payment as per Article 13.4 of the PPA. The relevant extract is reproduced below:*

*13.4 Tariff Adjustment Payment on account of Change in Law 13.4.1 Subject to Article 13.2 the adjustment in Monthly Tariff Payment shall be effective from:*

*the date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law; or*

*the date of order/ judgment of the Competent Court or tribunal or Indian Government instrumentality, if the Change in Law is on account of a change in interpretation of Law. (c) the date of impact resulting from the occurrence of Article 13.1.1.*

*From the above it can be seen that the impact of Change in Law is to be done in the*

*form of adjustment to the tariff. To our mind such adjustment in the tariff is nothing less than re-determination of the existing tariff.*

*x. Further, the provisions of Article 13.2 i.e. restoring the Appellant to the same economic position as if Change in Law has not occurred is in consonance with the principle of 'restitution' i.e. restoration of some specific thing to its rightful status. Hence, in view of the provisions of the PPA, the principle of restitution and judgment of the Hon'ble Supreme Court in case of Indian Council for Enviro Legal Action vs. Union of India &Ors., we are of the considered opinion that the Appellant is eligible for Carrying Cost arising out of approval of the Change in Law events from the effective date of Change in Law till the approval of the said event by appropriate authority.*

*This Tribunal vide above judgement has decided that if there is a provision in the PPA for restoration of the Seller to the same economic position as if no Change in Law event has occurred, the Seller is eligible for carrying cost for such allowed Change in Law event (s) from the effective date of Change in Law event until the same is allowed by the appropriate authority by an order/ judgment.”*

121. From the above judgment, the Commission observes that if there is a provision in the PPAs for restoration of the Petitioners to the same economic position as if no Change in Law event has occurred, the Petitioners are eligible for 'Carrying Cost' for such allowed 'Change in Law' event(s) from the effective date of Change in Law event until the same is allowed by the Commission. The Commission observes that the PPAs do not have a provision dealing with restitution principles of restoration to same economic position. Therefore, the Commission is of the view that the claim regarding separate carrying cost is not admissible.

**Summary of decisions:**

122. Our decisions in this Order are summed up as under:

- a. *Issue No. 1:* The introduction of 'GST laws' w.e.f. 01.07.2017 is covered under 'Change in Law' in terms of Article 12 of the respective PPAs.
- b. *Issue No. 2 & 3:* As regards the claims during construction period, the Petitioner has to exhibit clear and one to one correlation between the projects and the supply of goods and services duly supported by the Invoices raised by the supplier of goods and services and



auditors certificate as discussed in para 95 above. The Respondent SECI is liable to pay to the Petitioners which is not conditional upon the payment to be made by the Respondent Discoms to Respondent SECI. However, the Respondent SECI is eligible to claim the same from the Respondent Discoms on 'back to back' basis as discussed in para 108 above. The Claim based on discussions in para 95 above of this Order shall be paid within sixty days of the date of this Order or from the date of submission of claims by the Petitioner whichever is later failing which it will attract late payment surcharge as provided under PPAs/PSAs. Alternatively, the Petitioner and the Respondents may mutually agree to mechanism for the payment of such compensation on annuity basis spread over the period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs. The claim of the Petitioners on account of additional tax burden on "O&M" expenses (if any), is not maintainable.

bb. Based on submissions of Respondent No.1 SECI, the Commission clarifies that the tables referred to in para 348 of the Order dated 09.10.2018 in Petition No. 188/MP/2017 & connected Petitions, in Para 145 of the Order dated 19.09.2018 in Petition No. 50/MP/2018 and connected Petitions, in Para 85 of the Order dated 18.04.2019 in Petition No. 164/MP/2018 and connected Petitions and in Para 94 of the Order dated 12.04.2019 in Petition No. 206/MP/2018 and connected Petitions are only illustrative in nature and computation on account of GST, being change in law, shall be paid on exhibiting clear and one to one correlation between projects and supply of goods & services, duly supported by relevant invoices and Auditor's Certificate by the Petitioners.

c. *Issue No. 4:* The claim regarding separate 'Carrying Cost' and 'interest on working capital' in the instant petitions is not allowed.

123. With the above directions, Petition No. 67/MP/2019 and Petition No. 68/MP/2019 stand disposed of.

Sd/-  
आई. एस. झा  
सदस्य

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डॉ एम. के. अय्यर  
सदस्य

Sd/-  
पी. के. पुजारी  
अध्यक्ष