

केंद्रीय विद्युत नियामक आयोग
CENTRAL ELECTRICITY REGULATORY COMMISSION

नई दिल्ली
NEW DELHI

- याचिका संख्या. /Petition No.: 1) Petition No. 188/MP/2017 alongwith I.A. No. 30/2018;
2) Petition No. 189/MP/2017 alongwith I.A. No. 31/2018;
3) Petition No. 190/MP/2017 alongwith I.A. No. 32/2018;
4) Petition No. 201/MP/2017 alongwith I.A. No. 33/2018;
5) Petition No. 202/MP/2017 alongwith I.A. No. 35/2018;
6) Petition No. 203/MP/2017 alongwith I.A. No. 36/2018;
7) Petition No. 204/MP/2017 alongwith I.A. No. 37/2018;
8) Petition No. 230/MP/2017 alongwith I.A. No. 34/2018;
9) Petition No. 231/MP/2017 alongwith I.A. No. 38/2018;
10) Petition No. 232/MP/2017 alongwith I.A. No. 39/2018;
11) Petition No. 233/MP/2017 alongwith I.A. No. 40/2018;
12) Petition No. 13/MP/2018;
13) Petition No. 33/MP/2018 alongwith I.A. No. 50/2018;
14) Petition No. 34/MP/2018 and
15) Petition No. 47/MP/2018

कोरम/Coram:

श्री पी के पुजारी, अध्यक्ष/Shri P. K. Pujari, Chairperson
श्री ए के सिंघल, सदस्य/ Shri A.K. Singhal, Member
डॉ. एम के अय्यर, सदस्य/ Dr. M.K. Iyer, Member

आदेश दिनांक /Date of Order: 9th of October, 2018

IN THE MATTER OF:

Petition under Section 79 of the Electricity Act, 2003 read with Article 12 of the Power Purchase Agreements executed between the Petitioners and Respondents, for seeking approval of 'Change in Law' events due to enactment of the 'GST Laws'.

AND IN THE MATTER OF:

1) Petition No. 188/MP/2017 alongwith I.A. No. 30/2018

ACME Bhiwadi Solar Power Private Limited
Plot No. 152, Sector - 44,
Gurugram - 122002,
Haryana.

... Petitioner

VERSUS

Solar Energy Corporation of India Limited
1st Floor, A - Wing, D-3,
District Centre, Saket,
New Delhi - 110017

Eastern Power Distribution Company of Andhra Pradesh Ltd
P & T Colony, Seetamma Dhara
Vishakhapatnam-503 013

Southern Power Distribution Company of Andhra Pradesh Ltd
Kesavayanagunta, Tiruchanoor Road,
Tirupati,
Andhra Pradesh- 517 501

... Respondents

2) Petition No. 189/MP/2017 alongwith I.A. No. 31/2018

ACME Karnal Solar Power Private Limited
Plot No. 152, Sector - 44,
Gurugram – 122 002,
Haryana.

... Petitioner

VERSUS

Solar Energy Corporation of India Limited
1st Floor, A - Wing, D-3,
District Centre, Saket,
New Delhi – 110 017

Eastern Power Distribution Company of Andhra Pradesh Ltd
P & T Colony, Seetamma Dhara
Vishakhapatnam-503 013

Southern Power Distribution Company of Andhra Pradesh Ltd
Kesavayanagunta, Tiruchanoor Road,
Tirupati,
Andhra Pradesh- 517 501

... Respondents

3) Petition No. 190/MP/2017 alongwith I.A. No. 32/2018

ACME Hisar Solar Power Private Limited
Plot No. 152, Sector - 44,
Gurugram – 122 002
Haryana.

... Petitioner

VERSUS

Solar Energy Corporation of India Limited
1st Floor, A - Wing, D-3,
District Centre, Saket,
New Delhi – 110 017

Eastern Power Distribution Company of Andhra Pradesh Ltd
P & T Colony, Seetamma Dhara
Vishakhapatnam-503 013

Southern Power Distribution Company of Andhra Pradesh Ltd
Kesavayanagunta, Tiruchanoor Road,
Tirupati,
Andhra Pradesh- 517 501

... Respondents

4) Petition No. 201/MP/2017 alongwith I.A. No. 33/2018

ACME Kaithal Solar Power Private Limited
Plot No. 152, Sector - 44,

Gurugram – 122 002
Haryana.

... **Petitioner**

VERSUS

Solar Energy Corporation of India Limited
1st Floor, A - Wing, D-3,
District Centre, Saket,
New Delhi – 110 017

Bangalore Electricity Company Limited
Pardigm Plaza, A.B. Shetty Circle,
Pandeshwar, Mangalore- 575 001

Mangalore Electricity Supply Company Limited
Corporate Office, Krishna Rajendra Nagar,
Bangalore- 560 001

Chamundeshwari Electricity Supply Corporation Limited
No. 29, CESC Corporate Office,
Hinkal, Vijaynagar,
2nd Stage,
Mysuru- 570 017

Gulbarga Electricity Supply Company Limited
Main Road Gulbarga - 585102

Hubli Electricity Supply Company Ltd
PB Road. Navanagar Hubballi,
Hubli,
KARNATAKA – 580 025

... **Respondents**

5) Petition No. 202/MP/2017 alongwith I.A. No. 35/2018

ACME Koppal Solar Power Private Limited
Plot No. 152, Sector - 44,
Gurugram – 122 002
Haryana.

... **Petitioner**

VERSUS

Solar Energy Corporation of India Limited
1st Floor, A - Wing, D-3,
District Centre, Saket,
New Delhi – 110 017

Bangalore Electricity Company Limited
Pardigm Plaza, A.B. Shetty Circle,
Pandeshwar, Mangalore- 575 001

Mangalore Electricity Supply Company Limited
Corporate Office, Krishna Rajendra Nagar,
Bangalore- 560 001

Chamundeshwari Electricity Supply Corporation Limited
No. 29, CESC Corporate Office,
Hinkal, Vijaynagar,
2nd Stage,
Mysuru- 570 017

Gulbarga Electricity Supply Company Limited
Main Road Gulbarga - 585102

Hubli Electricity Supply Company Ltd
PB Road. Navanagar Hubballi,
Hubli,
KARNATAKA – 580 025

... Respondents

6) Petition No. 203/MP/2017 alongwith I.A. No. 36/2018

ACME Vijaypura Solar Power Private Limited
Plot No. 152, Sector - 44,
Gurugram – 122 002
Haryana.

... Petitioner

VERSUS

Solar Energy Corporation of India Limited
1st Floor, A - Wing, D-3,
District Centre, Saket,
New Delhi – 110 017

Bangalore Electricity Company Limited
Pardigm Plaza, A.B. Shetty Circle,
Pandeshwar, Mangalore- 575 001

Mangalore Electricity Supply Company Limited
Corporate Office, Krishna Rajendra Nagar,
Bangalore- 560 001

Chamundeshwari Electricity Supply Corporation Limited
No. 29, CESC Corporate Office,
Hinkal, Vijaynagar,
2nd Stage,
Mysuru- 570 017

Gulbarga Electricity Supply Company Limited
Main Road Gulbarga - 585102

Hubli Electricity Supply Company Ltd
PB Road. Navanagar Hubballi,
Hubli,
KARNATAKA – 580 025

... Respondents

7) Petition No. 204/MP/2017 alongwith I.A. No. 37/2018

ACME Babadham Solar Power Private Limited
Plot No. 152, Sector - 44,
Gurugram – 122 002
Haryana.

... Petitioner

VERSUS

Solar Energy Corporation of India Limited
1st Floor, A - Wing, D-3,
District Centre, Saket,
New Delhi – 110 017

Bangalore Electricity Company Limited
Pardigm Plaza, A.B. Shetty Circle,
Pandeshwar, Mangalore- 575 001

Mangalore Electricity Supply Company Limited
Corporate Office, Krishna Rajendra Nagar,
Bangalore- 560 001

Chamundeshwari Electricity Supply Corporation Limited
No. 29, CESC Corporate Office,
Hinkal, Vijaynagar,
2nd Stage,
Mysuru- 570 017

Gulbarga Electricity Supply Company Limited
Main Road Gulbarga - 585102

... Respondents

8) Petition No. 230/MP/2017 alongwith I.A. No. 34/2018

ACME Kurukshetra Solar Energy Private Limited
Plot No. 152, Sector - 44,
Gurugram - 122002,
Haryana.

... Petitioner

VERSUS

NTPC Limited
Core - 7, SCOPE Complex,
7, Institutional Area,
Lodi Road, New Delhi – 110 003.

NTPC Vidyut Vyapar Nigam Limited
Core - 7, SCOPE Complex,
7, Institutional Area,
Lodi Road, New Delhi – 110 003.

Bangalore Electricity Company Limited
Pardigm Plaza, A.B. Shetty Circle,
Pandeshwar, Mangalore- 575 001

Mangalore Electricity Supply Company Limited
Corporate Office, Krishna Rajendra Nagar,
Bangalore- 560 001

Chamundeshwari Electricity Supply Corporation Limited
No. 29, CESC Corporate Office,
Hinkal, Vijaynagar,
2nd Stage,
Mysuru- 570 017

Gulbarga Electricity Supply Company Limited
Main Road Gulbarga - 585102

Hubli Electricity Supply Company Ltd
PB Road. Navanagar Hubballi,
Hubli,
KARNATAKA – 580 025

... Respondents

9) Petition No. 231/MP/2017 alongwith I.A. No. 38/2018

ACME Rewari Solar Power Private Limited
Plot No. 152, Sector - 44,
Gurugram – 122 002
Haryana.

... Petitioner

VERSUS

NTPC Limited
Core - 7, SCOPE Complex,
7, Institutional Area,
Lodi Road, New Delhi – 110 003.

NTPC Vidyut Vyapar Nigam Limited
Core - 7, SCOPE Complex,
7, Institutional Area,
Lodi Road, New Delhi – 110 003.

Bangalore Electricity Company Limited
Pardigm Plaza, A.B. Shetty Circle,
Pandeshwar, Mangalore- 575 001

Mangalore Electricity Supply Company Limited
Corporate Office, Krishna Rajendra Nagar,
Bangalore- 560 001

Chamundeshwari Electricity Supply Corporation Limited
No. 29, CESC Corporate Office,
Hinkal, Vijaynagar,
2nd Stage,
Mysuru- 570 017

Gulbarga Electricity Supply Company Limited
Main Road Gulbarga - 585102

Hubli Electricity Supply Company Ltd
PB Road. Navanagar Hubballi,
Hubli,
KARNATAKA – 580 025

... Respondents

10) Petition No. 232/MP/2017 alongwith I.A. No. 39/2018

ACME Mahabubnagar Solar Energy Private Limited
Plot No. 152, Sector - 44,
Gurugram - 122002,
Haryana.

... Petitioner

VERSUS

NTPC Limited
Core - 7, SCOPE Complex,
7, Institutional Area,
Lodi Road, New Delhi - 110003.

NTPC Vidyut Vyapar Nigam Limited
Core - 7, SCOPE Complex,
7, Institutional Area,
Lodi Road, New Delhi - 110003.

Southern Power Distribution Company of Telangana Limited
6-1-50, Corporate Office, Mint Compound,
Hyderabad 500063,
TELANGANA – 500063

Northern Power Distribution Company of Telangana Limited
H. No. 2-5-31/2, Corporate Office,
Vidyut Bhavan,
Nakkalgutta, Hanamkonda,
Warangal-506001

... Respondents

11) Petition No. 233/MP/2017 alongwith I.A. No. 40/2018

ACME Yamunanagar Solar Power Private Limited
Plot No. 152, Sector - 44,
Gurugram – 122 002,
Haryana.

... Petitioner

VERSUS

NTPC Limited
Core - 7, SCOPE Complex,
7, Institutional Area,
Lodi Road, New Delhi – 110 003.

NTPC Vidyut Vyapar Nigam Limited
Core - 7, SCOPE Complex,
7, Institutional Area,
Lodi Road, New Delhi – 110 003.

Southern Power Distribution Company of Telangana Limited
6-1-50, Corporate Office, Mint Compound,
Hyderabad 500063,
TELANGANA – 500063

Northern Power Distribution Company of Telangana Limited
H. No. 2-5-31/2, Corporate Office,
Vidyut Bhavan,
Nakkalgutta, Hanamkonda,
Warangal-506001

... Respondents

12) Petition No. 13/MP/2018

ACME Yamunanagar Solar Power Private Limited
Plot No. 152, Sector - 44,
Gurugram – 122 002
Haryana.

... Petitioner

VERSUS

NTPC Limited
Core - 7, SCOPE Complex,
7, Institutional Area,
Lodi Road, New Delhi – 110 003.

NTPC Vidyut Vyapar Nigam Limited
Core - 7, SCOPE Complex,
7, Institutional Area,
Lodi Road, New Delhi – 110 003.

Southern Power Distribution Company of Telangana Limited
6-1-50, Corporate Office, Mint Compound,
Hyderabad
TELANGANA – 500 063

Northern Power Distribution Company of Telangana Limited
H. No. 2-5-31/2, Corporate Office,
Vidyut Bhavan,
Nakkalgutta, Hanamkonda,
Warangal-506 001

... Respondents

13) Petition No. 33/MP/2018 alongwith I.A. No. 50/2018

ACME Jaipur Solar Power Private Limited
Plot No. 152, Sector – 44,
Gurugram,
Haryana 122 002

... Petitioner

VERSUS

M.P. Power Management Co. Ltd. (MPPMCL)
Block No. 11, 1st Floor,
Shakti Bhawan, Rampur,
Jabalpur,
MADHYA PRADESH – 482 008

Delhi Metro Rail Corporation
Metro Bhawan, Fire Brigade Lane,
Barakhamba Road,
New Delhi – 110 001

Madhya Pradesh Poorv Kshetra Vidyut Vitran Company Limited
Registered Office: Block No. 7, Shakti Bhavan,
Rampur, Jabalpur (M.P.) - 482 008

Madhya Pradesh Poorv Kshetra Vidyut Vitran Company Limited
Registered Office: Nisbtha Parisar Bijli Nagar Colony,
Govindpura, Bhopal (M.P.) - 462 023

Madhya Pradesh Poorv Kshetra Vidyut Vitran Company Limited
Registered Office: G.P.H. Compound,
Polo Ground,
Indore (M.P.) - 452 015

... Respondents

14) Petition No. 34/MP/2018

Azure Power Jupiter Private Limited
Asset No.301-4,
World Mark 3, Aerocity
New Delhi -110 017

... Petitioner

VERSUS

NTPC Limited
Core - 7, SCOPE Complex,
7, Institutional Area,
Lodi Road, New Delhi – 110 003.

NTPC Vidyut Vyapar Nigam Limited
Core - 7, SCOPE Complex,
7, Institutional Area,
Lodi Road, New Delhi – 110 003.

... Respondents

15) Petition No. 47/MP/2018

Azure Power Thirty Six Private Limited
Asset No.301-4
World Mark 3
Aerocity, New Delhi - 110 017

...Petitioner

VERSUS

Solar Energy Corporation of India Limited
1st Floor, A - Wing, D-3,
District Centre, Saket,
New Delhi – 110 017

Eastern Power Distribution Company of Andhra Pradesh Ltd
P & T Colony, Seetamma Dhara
Vishakhapatnam-503 013

Southern Power Distribution Company of Andhra Pradesh Ltd
Kesavayanagunta, Tiruchanoor Road,
Tirupati,
Andhra Pradesh- 517 501

... Respondents

Parties Present:

Shri Hemant Sahai, Advocate, ACME
Shri Abhishek Kumar, Advocate, ACME
Ms. Meghana Aggarwal, Advocate, ACME
Shri Sitiesh Mukherjee, Advocate, Azure Power
Shri Vishal Binod, Advocate, Azure Power
Ms. Ranjitha Ramachandran, Advocate, NTPC, SECI and MPPMCL
Ms. Poorva Saigal , Advocate, NTPC, SECI and MPPMCL
Shri Shubham Arya, Advocate, NTPC, SECI and MPPMCL
Shri Nishant Gupta, NTPC
Shri Basav Prabhu S.Patil, Senior Advocate, Telangana Discoms
Shri Ashish Tiwari, Advocate, Telangana Discoms
Shri Sriharsha Peechara, Advocate, Telangana Discoms
Shri Geet Ahuja, Advocate, Telangana Discoms
Shri S. Vallinayagam, Advocate, AP Discoms
Shri Tarun Johri, Advocate, DMRC
Shri Ankur Gupta, Advocate, DMRC

आदेश/ ORDER

1. The Petitioners, M/s ACME Bhiwadi Solar Power Private Ltd., M/s ACME Karnal Solar Power Private Ltd., M/s ACME Hisar Solar Power Private Ltd., M/s ACME Kaithal Solar Power Private Ltd., M/s ACME Koppal Solar Power Private Ltd., M/s ACME Vijaypura Solar Power Private Ltd., M/s ACME Babadham Solar Power Private Ltd., M/s ACME Kurukshetra Solar Power Private Ltd., M/s ACME Rewari Solar Power Private Ltd., M/s ACME Mahabubnagar Solar Power Private Ltd., M/s ACME Yamunanagar Solar Power Private Ltd., M/s Azure Power Thirty Seven Private Ltd., M/s ACME Jaipur Solar Power Private Ltd., M/s Azure Power Jupiter Private Ltd. and M/s Azure Power Thirty Six Private Ltd. (hereinafter collectively referred to as “Petitioners”) are generating companies primarily engaged in the business of setting up of solar power plants and generation of electricity.
2. The Respondent No.1, M/s Solar Energy Corporation of India Limited (SECI) is a Central Public Sector Undertaking under the administrative control of the Ministry of New and Renewable Energy set up on 20.09.2011 to facilitate the implementation of Jawaharlal Nehru National Solar Mission. SECI was appointed to purchase and sell solar photo-voltaic power through the Viability Gap Funding mode under the Government of India’s National Solar Mission, Phase II, Batch III Bidding Guidelines (NSM Guidelines).
3. The Respondent No. 2, M/s NTPC Limited was appointed as nodal agency by MNRE for implementation of Scheme for selection of 3000 MW Grid Connected Solar PV Power Projects under Phase-II, Batch-II, Tranche-I for “State Specific Bundling Scheme”. Under the “State Specific Bundling Scheme”, NSM provides for bundling of relatively expensive solar power with cheaper power from Respondent No. 2, NTPC coal based stations out of the unallocated quota of the Government of India (Ministry of Power) in the ratio of 2:1 basis (2 MW of Solar Power with 1 MW of Thermal Power).
4. The Respondent No. 3, M/s M.P. Power Management Co. Ltd. is the holding company for all the distribution licensees in the State of Madhya Pradesh. Respondent No. 3 acts as a single source in the State from which the three distribution companies within the State purchase

power in terms of their requirements. The Respondent No. 4, Delhi Metro Rail Corporation is a company incorporated under the Companies Act, 1956. Respondent No. 4 was established with equal equity participation of the Government of the National Capital Territory of Delhi and the Central Government for the construction and operation of a world class Mass Rapid Transport System.

5. The Respondent No. 5, M/s Eastern Power Distribution Company of Andhra Pradesh Ltd and the Respondent No. 6, M/s Southern Power Distribution Company of Andhra Pradesh Ltd. are the DISCOMS of the State of Andhra Pradesh. The DISCOMS were impleaded as Respondents on the directions of the Commission as per 'Record of Proceedings' dated 03.04.2018.
6. The Respondent No. 7, M/s Northern Power Distribution Company Of Telangana Limited, and the Respondent No. 8, M/s Southern Power Distribution Company Of Telangana Limited are the DISCOMS of the State of Telangana. The DISCOMS were impleaded as Respondents on the directions of the Commission as per 'Record of Proceedings' dated 03.04.2018.
7. The Petitioners has made the following prayers:

IN

1) Petition No. 188/MP/2017 alongwith I.A. No. 30/2018; 2) Petition No. 189/MP/2017 alongwith I.A. No. 31/2018; 3) Petition No. 190/MP/2017 alongwith I.A. No. 32/2018; 4) Petition No. 201/MP/2017 alongwith I.A. No. 33/2018; 5) Petition No. 202/MP/2017 alongwith I.A. No. 35/2018; 6) Petition No. 203/MP/2017 alongwith I.A. No. 36/2018; 7) Petition No. 204/MP/2017 alongwith I.A. No. 37/2018; 8) Petition No. 230/MP/2017 alongwith I.A. No. 34/2018; 9) Petition No. 231/MP/2017 alongwith I.A. No. 38/2018; 10) Petition No. 232/MP/2017 alongwith I.A. No. 39/2018; 11) Petition No. 233/MP/2017 alongwith I.A. No. 40/2018; 12) Petition No. 13/MP/2018:

- a. *direct the Respondent to adopt the Change in Law in terms of Article 12 of the PPA dated 14.10.2016 on account of:*
 - i. *imposition of Central Goods and Services Tax, 2017;*

- ii. *imposition of Integrated Goods and Service Tax, 2017 as described in Paragraph Nos. 1 to 9 of the present petition; and*
 - iii. *issuance of Notification No. 50/2017-Customs dated 30.06.2017, issued by Custom Department, Central Government as described in Paragraph Nos. 10 and 11 of the present petition.*
- b. *direct the Respondent to make payments on account of Change in Law in terms of Article 12 of the PPA dated 14.10.2016 of amounts specified/ provided at Annexure - P/2 and P/4 respectively; and*
 - c. *to pass such other and further order or orders as this Hon'ble Commission deems appropriate under the facts and circumstances of the present case.*

Connected I.A's

- a. *Permit the Petitioner to amend prayer (b) of the instant petition in terms stated in the instant application; and*
- b. *Pass any other order or direction that this Ld. Commission may deem fit in the eyes of equity, justice and good conscience.*

13) IN Petition No. 33/MP/2018 alongwith I.A. No. 50/2018

- a. *Declare that the introduction of the GST Law is a 'Change in Law' event in accordance with Article 17 of the PPAs dated 17.04.2017 executed between the Petitioner and Respondent Nos. 1 & 2 and that the Petitioner is entitled to relief thereunder;*
- b. *Direct the Respondent No. 1 & 2 to compensate the Petitioner for the additional capital/ operational cost incurred/ to be incurred by it due to introduction of GST Law by way of adjustment in the quoted tariff as well as an upfront lumpsum payment, as the case may be, in terms of Article 17.1(e) of the PPAs;*

- c. Pursuant to grant of prayer (a) and (b) above, approve the necessary consequential amendments to the PPAs and LoIs;
- d. Allow legal and administrative costs incurred by the Petitioner in pursuing the instant petition; and
- e. Grant such order, further relief(s) in the facts and circumstances of the case as this Ld. Commission may deem just and equitable in favour of the Petitioner.

Connected I.A No. 50/2018

- a. Permit the Petitioner to amend prayer (b) of the instant petition in terms stated in the instant application; and
- b. Pass any other order or direction that this Ld. Commission may deem fit in the eyes of equity, justice and good conscience.

14) IN Petition No. 34/MP/2018

- a) Declare that the promulgation of the Integrated Goods and Services Tax, 2017, the Central Goods and Services Tax, 2017 and the Uttar Pradesh Goods and Services Tax, 2017 with effect from 01.07.2017 are each a Change in Law under Article 12 of the Power Purchase Agreements dated 29.04.2016 executed between the Petitioner and Respondent No. 1;
- b) Direct a lump sum compensation of Rs. 69,61,382/- (Rupees sixty-nine lakh sixty-one thousand three hundred and eighty-two only) to be paid to the Petitioner by the Respondents in lieu of the additional tax burden on the Engineering, Procurement and Construction Cost, as elaborated in the instant Petition, and a monthly levellised tariff payment of Rs. 0.02/kWh towards the additional tax burden on operation and maintenance expenses incurred by the Petitioner, as elaborated in the instant Petition, due to promulgation of the Integrated Goods and Services Tax, 2017, the Central Goods and Services

Tax, 2017 and the Uttar Pradesh Goods and Services Tax, 2017;

- c) *Without prejudice to and in the alternate to prayer b) above, direct the Respondent to pay the Petitioner an additional tariff of Rs. 0.05/kWh with effect from the Commercial Operation Date of the Petitioner's Solar Power Generating Systems as compensation for the additional tax burden incurred by the Petitioner on establishing and running the said Solar Power Generating Systems, as elaborated in the instant Petition, due to promulgation of the Integrated Goods and Services Tax, 2017, the Central Goods and Services Tax, 2017 and the Uttar Pradesh Goods and Services Tax, 2017, along with carrying costs, subject to any adjustments based on the final additional expenditure incurred by the Petitioner as on the Commercial Operations Date of the Petitioner's Solar Power Generating Systems as duly audited and certified by the Petitioner's statutory auditor at the end of the relevant financial year;*
- d) *Direct the Respondents to reimburse the legal and administrative costs incurred by the Petitioner in pursuing the instant Petition; and*
- e) *Pass such other orders that this Hon'ble Commission deems fit in the interest of justice.*

15) IN Petition No. 47/MP/2018

- a) *Declare that the promulgation of the Integrated Goods and Services Tax, 2017, the Central Goods and Services Tax, 2017 and the Andhra Pradesh Goods and Services Tax, 2017 with effect from 01.07.2017 are each a Change in Law under Article 12 of the Power Purchase Agreement dated 26.09.2016 executed between the Petitioner and the Respondent;*
- b) *Direct a lump sum compensation of Rs. 8,32,90,635/- (Rupees eight crore thirty-two lakh ninety thousand six hundred thirty-five only) to be paid to the*

Petitioner by the Respondent in lieu of the additional tax burden on the Engineering, Procurement and Construction Cost, as elaborated in the instant Petition, and a monthly levellised tariff payment of Rs. 0.02/kWh towards the additional tax burden on operation and maintenance expenses incurred by the Petitioner, as elaborated in the instant Petition, due to promulgation of the Integrated Goods and Services Tax, 2017, the Central Goods and Services Tax, 2017 and the Andhra Pradesh Goods and Services Tax, 2017;

- c) *Without prejudice to and in the alternate to prayer b) above, direct the Respondent to accordingly pay the Petitioner an additional tariff of Rs. 0.24/kWh with effect from the Commercial Operation Date of the Petitioner's Solar Power Generating Systems as compensation for the additional tax burden incurred by the Petitioner on establishing and running the said Solar Power Generating Systems, as elaborated in the instant Petition, due to promulgation of the Integrated Goods and Services Tax, 2017, the Central Goods and Services Tax, 2017 and the Andhra Pradesh Goods and Services Tax, 2017, along with carrying costs, subject to any adjustments based on the final additional expenditure incurred by the Petitioner as on the Commercial Operations Date of the Petitioner's Solar Power Generating Systems as duly audited and certified by the Petitioner's statutory auditor at the end of the relevant financial year;*
- d) *Direct the Respondent to reimburse the legal and administrative costs incurred by the Petitioner in pursuing the instant Petition; and*
- e) *Pass such other orders that this Hon'ble Commission deems fit in the interest of justice.*

Brief facts of the case:

8. On 10.03.2015, MNRE issued guidelines for implementation of Scheme for selection of 3000 MW Grid Connected Solar PV Power Projects under Phase-II, Batch-II, Tranche-I for "State

Specific Bundling Scheme”. Under the said State Specific Bundling Scheme, NTPC was made responsible for implementation. NTPC implemented the said scheme through its subsidiary NTPC Vidyut Vyapar Nigam Ltd., a trading licensee for inter-State trading in electricity in whole of India.

9. SECI was also appointed by the Government of India to purchase and sell solar photo-voltaic power through the Viability Gap Funding (“VGF”) mode under the Government of India’s National Solar Mission, Phase II, Batch III Bidding Guidelines (NSM Guidelines). The NSM Guidelines envisage providing VGF from the National Clean Energy Fund through SECI to the bidders selected through a transparent bidding process to procure solar power. The NSM Guidelines contemplate the sale of 90% of power generated by a solar power developer to buying utilities within the State and the remaining 10% power outside the State.
10. M/s M.P. Power Management Company Ltd. is the holding company for all the distribution licensees in the State of Madhya Pradesh. It was formed pursuant to the notification dated 03.06.2006 issued by the Government of Madhya Pradesh, bringing into effect the MP Electricity Reforms Transfer Scheme Rules, 2006 by way of which the functions, properties, interest rights and obligations of the residual Madhya Pradesh State Electricity Board, relating to Bulk Purchase and Bulk Supply of Electricity, along with the related agreements and arrangements, were transferred and vested in it. Accordingly, it acts as a single source in the State from which the three distribution companies within the State purchase power in terms of their requirements.
11. M/s Delhi Metro Rail Corporation is a company incorporated under the Companies Act, 1956, having its registered office at Metro Bhawan Fire Brigade Lane, Barakhamba Road, New Delhi - 110001. It was established with equal equity participation of the Government of the National Capital Territory of Delhi and the Central Government for the construction and operation of a world class Mass Rapid Transport System.
12. Respondents invited proposals by a Request for Selection (hereinafter referred to as “RfS”) for setting up Grid Connected Solar-PV Power Projects in various States of India. The Petitioners participated and after following the process of Reverse Auction conducted by Respondents, they were selected for setting up Solar PV ground mount Projects.

13. The Petitioners entered into Power Purchase Agreements (hereinafter referred to as “PPAs”) with the Respondent for setting up Solar PV ground mount Projects for supply of power at a discovered tariff on long term basis.
14. On 12.04.2017, Government of India (hereinafter referred to as “GOI”) introduced the Goods and Services Tax, replacing multiple taxes levied by the Central and State Governments.
15. 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 for levy and collection of tax on intra-State supply of goods or services or both by the State of Rajasthan was enacted.
16. The Petitioners sent notice to the Respondents regarding the Change in Law event that took place after applicability of Goods and Services Tax (hereinafter referred as “GST”) w.e.f. 01.07.2017. However, no response was received from the Respondents. Hence the Petitions.

Submissions of Petitioners in Petition No. 188/MP/2017; 189/MP/2017; 190/MP/2017; 201/MP/2017; 202/MP/2017; 203/MP/2017; 204/MP/2017; 230/MP/2017; 231/MP/2017; 232/MP/2017; 233/MP/2017 and Petition No. 13/MP/2018:

17. The Petitioners have submitted that the Central Government vide Notification No. 12/2017 introduced the Central Goods and Services Tax Act, 2017 (hereinafter referred to as “CGST”) of 5% to 28% on goods required for execution, construction and operation of Solar Projects which were previously exempted or were under lower tax slabs w.e.f. 01.07.2017. Further, the Central Government vide Notification No. 13/2017 introduced the Integrated Goods and Service Tax (hereinafter referred to as ‘IGST’) of 5% to 28% on goods required for execution, construction and operation of Solar which were previously exempted or were under lower tax slabs w.e.f. 01.07.2017. Also, vide Notification No. 50/2017-Customs dated 30.06.2017, issued by Custom Department, Central Government has waived certain exemptions that were earlier granted to the Petitioner (which were considered at the time of

the bidding).

18. The Petitioners have submitted that they were getting certain exemptions on payment of Basic Custom Duty. Before the Notification 50/2017 being issued, the Basic Custom Duty on Mounting Structures and inverters was 5.15% (including Cess) as per the concessional certificate issued by MNRE and, therefore, the Petitioners were getting custom duty exemption of 50% on Basic Custom Duty for Mounting Structures and Inverters. Pursuant to the issuance of Notification No. 50/2017 dated 30.06.2017 issued by Custom Department the Petitioners are currently paying 10.30% (including Cess). After the implementation of CGST and IGST from 01.07.2017, various exemptions cease to exist. Solar Power was placed under 5% to 28% tax bracket as per GST rate schedule for goods on 18.05.2017. This change of tax upto 28% from zero rates has escalated the capital cost of the Petitioners making the tariff quoted at the time of bid for allocation of project under various government tenders unviable.
19. The Petitioners have submitted that implementation of 'Goods and Services Tax' (hereinafter referred to as 'GST') has increased the capital cost of the project. Since the increase in capital cost was not contemplated at the time of bidding, the same has to be factored in the tariff, to enable the Petitioners to retain the economic value that was worked out/ considered at the time of bid and also to ensure that the project is both viable and sustainable in the long term. Since solar power has single part tariff structure and there is no variable charge, any increase in capital cost directly impacts the overall economic viability of project as the tariff is fixed for the life on the basis of capital cost estimated at the time of bidding. As per the industry standards, the cost contribution of three (3) major items being Modules, Inverters and Structures is 70%. It is of relevance to point out the list of items which have an impact due to GST coming into force from 01.07.2017. The relevant items along with the rate of impact are provided herein below:-

Items	Impact in %
PV Modules	5%
Land Cost	0%
Civil and General Works	9%
Mounting Structures	18%
Power Conditioning Unit	28%

Evacuation Cost up to Inter-connection Point (Cables and Transformers)	18%
Preliminary and Pre-Operative Expenses including IDC and Contingency	18%

20. The Petitioners have further submitted that before the Notification 50/2017, the Basic Custom Duty on Mounting Structures and inverters was 5.15% (including Cess) as per the concessional certificate issued by MNRE and therefore the Petitioners were getting custom duty exemption of 50% on Basic Custom Duty for Mounting Structures and Inverters. The exemptions which were granted by MNRE in form of concessional certificate have now been discontinued pursuant to the issuance of Notification No. 50/2017 dated 30.06.2017, issued by Custom Department and therefore Petitioner is currently paying 10.30 % (including Cess) after the withdrawal of concessional certificate by MNRE due to Notification No. 50/2017 dated 30.06.2017. The withdrawal of issuance of concessional Certificate for Basic Custom Duty by MNRE has impacted the capital cost of the Petitioner project and hence, covered under Change in Law event under Article 12 of the PPA. The relevant items along with the rate of impact are as under:-

Items	Impact of BCD (excluding Cess) (in %)
Mounting Structures	10%
Power Conditioning Unit	10%

21. The Petitioners have submitted that their financials have been severely impacted. The impact of around 11.4% of the cost over and above the initial envisaged project cost has imposed severe hardship to the Petitioner and loss of economic value. The increased cost can be recovered through tariff, which is allowable to be recovered from the Respondent under Article 12 of the PPA.
22. The Petitioners have submitted that Article 12 of the PPAs is as under:

12. 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 Seller;*
- *any change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of this Agreement.*

but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the SPD, or (ii) 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.”*

23. The Petitioners have submitted that on account of the above notifications, they have given notice to the Respondents mentioning about the occurrence of ‘Change in Law’ event as per

Article 12 of the PPA due to implementation of GST by the Government of India on 01.07.2017. Further, the Petitioners vide another letter notified the Respondents about additional financial impact that the Petitioners are forced to incur in terms with respect to the components pursuant to the notice dated 05.07.2017. The Respondents have not replied to the above notices.

24. The Petitioners have submitted that it is the duty of the Respondents to compensate for the amount going to accrue to the Petitioners on account of the Change in Law as per the Article 12 of the PPA dated 14.10.2016. The notifications issued by the Central and State Governments amounts to 'Change in Law', as per PPAs. The Change in law envisages occurrence of any change in tax if an introduction of any tax made applicable for supply of power by the seller results in additional recurring/ non-recurring expenditure by the seller. The caveat that is provided is that such occurrence should have taken place after the Effective date. From a close reading of the terms of the PPAs, it is clear that any additional expenditure (recurring or non-recurring) incurred by the seller, which qualifies within the occurrences described in Article 12.1.1 will be allowed, on account of change-in-law. Therefore, the only litmus test for purposes of application of change-in-law should only be limited to incurring of additional recurring/ non-recurring expenditure by the seller, which expenditure falls within various categories provided in Article 12.1.1. Change in tax or introduction of any tax made applicable for supply of power by the seller is a change in law. Once the computation of such change in tax which qualifies under the change in law definition is made, the Petitioners become entitled for reimbursement.
25. The Petitioners have further submitted that they are only claiming the additional expense due to increase in taxes/ duties which occurred pursuant to the execution of the PPAs. A bid strategy to lock charges at a particular level is based upon an assessment of the overall returns the supplier (Petitioner) will make. However, the same cannot mean that any unexpected (recurring or non-recurring) increase in the duties/ taxes will not be paid by the Respondents. The same will lead to an absurd interpretation, of the change in law provisions of the PPA, wherein the Petitioners could be subjected to costs which they did not at all contemplate/ risked at the time of bidding. The whole intent of Article 12 of the PPA is to restore the Petitioners to the same economic position as such event could not have happened and

therefore the effective date shall be meaningless in the event the Petitioners are denied additional financial impact due to rise in costs as contemplated under Article 12 of the PPA. The Petitioners submitted that the Respondents are required to comply with the following requirement of Article 12.1.1 of the PPA, wherein it is stated that the “change in law” means, among other things, *“any change in tax or introduction of any tax made applicable for supply of power by the SPD as per the terms of this Agreement”*.

26. The Petitioners have submitted that the Commission has jurisdiction to entertain the present Petition. It is submitted that in terms of Article 12.2 of the PPAs the Commission has jurisdiction to adjudicate upon the present petition and to resolve the issues that have arisen between the Petitioners and the Respondents.

Submissions of Petitioner in Petition No. 33/MP/2018:

27. ACME Jaipur Solar Power Private Limited (Petitioner) is a company incorporated under the Companies Act, 2013, having its registered office at B-4, Plot No. 12, Basement -2, Gopi Nath Marg, Purohit Ji ka Bagh, MI Road, Jaipur, 302001, Rajasthan, India and is a Special Purpose Vehicle incorporated by ACME Solar Holdings Private Limited (“ACME Solar”).
28. The Petitioner has submitted that with a view to provide a further boost to renewable energy development in the State of Madhya Pradesh, the Government of Madhya Pradesh and the Government of India decided to set up a 750MW solar project in Rewa District in the State of Madhya Pradesh. The Rewa Solar Project is supported by the Ministry of New & Renewable Energy in accordance with the Scheme for Development of Solar Parks and Ultra Mega Units issued by MNRE on 12.12.2014. To give effect to the above objective, Madhya Pradesh Urja Vikas Nigam Limited and Solar Energy Corporation of India incorporated Rewa Ultra Mega Solar Limited (‘RUMSL’). The Ministry of New & Renewable Energy has designated RUMSL as the solar park developer/ bid process coordinator for the Rewa Solar Project.
29. The Rewa Solar Project consists of three units (i.e. Unit 1, Unit 2 and Unit 3) of ground mounted grid-connected solar photovoltaic power plants of 250 MW capacity each. RUMSL has acquired a total of 486.30 hectares of land for the Project, as on the date of execution of the PPA i.e. 17.04.2017. The Rewa Solar Project intends to supply energy generated from the

three units to Respondent No. 1 & 2. RUMSL in its capacity as the bidding authority for the Rewa Solar Project, invited proposals from the prospective bidders by launching a single stage two-envelope competitive bidding process followed by a reverse auction process, pursuant to issuance of a Request for Proposal dated 16.03.2016 for the development of one number of Unit comprising 250 MW capacity in the Rewa Solar Project.

30. In furtherance of the RFP, ACME Solar on 23.01.2017, after taking into consideration, inter alia, the prevailing taxes, duties and exemptions, submitted a competitive escalable bid tariff of Rs. 2.97/kwh for the first contract year, with an annual escalation of 5 paisa at the start of each contract year for a total of 15 contract years under both PPAs. Accordingly, the maximum tariff escalation during the term of the two PPAs was 75 paise from the tariff of the first contract year. ACME Solar was declared as one of the successful bidders by RUMSL for the development of one number of Unit comprising 250 MW capacity in the Rewa Solar Project. Letters of Intent dated 21.02.2017 was issued to ACME Solar appointing it as the Solar Power Developer in terms of the RFP to implement the Project. Pursuant to the issuance of the above LoI, ACME Solar formed the Petitioner SPV for development of the said Project. Further, by way of communications dated 16.03.2017, ACME Solar informed Respondents and RUMSL that the said project would be implemented by the Petitioner and that the said Petitioner shall carry out all its obligations qua development of the Project, including but not limited to the obligation to enter into a PPA with the Respondent. In view thereof, the Petitioner executed PPAs for a Guaranteed Energy Off-take of at least 411 MUs & 115 MUs of solar energy, in terms of Article 8.2(a) and Article 8.1 (a) of the PPAs respectively.
31. The Petitioner has submitted that the Central Goods & Services Tax Act, 2017 came into force on 01.07.2017 by way of Notifications No. 9/2017, 12/2017 & 13/2017. The enactment of 'GST Law' brought about fundamental structural changes in the prevailing tax regime in the country and has severely affected various parameters upon which the parent company of the Petitioner had submitted its bid. The change in the taxation regime has adversely affected the capital cost of the Project as the rate of taxation on the equipment i.e. the solar cells, modules etc., required for setting up the Project has increased substantially, thereby resulting in escalation in the capital cost of the Project to the extent of impact of GST Law on such

equipment. The GST Law has also adversely affected the operational costs of the Project on account of increase in costs related to availing of various services by the Petitioner. The GST Law subsumes multiple taxes and duties which were levied by the Central and State Governments on goods and services. Further, recognizing the importance of solar power as a clean and green source of energy and to promote wider adoption of generation of power from such source, the Government of India had earlier granted various exemptions to the solar power industry. However, pursuant to the introduction of GST Law, the aforesaid exemptions were rescinded and solar power was placed under the 5% to 28% tax bracket as per the GST rate schedule for goods on 18.05.2017. It may be noted that such a steep increase in taxes from zero upto 28% has increased the capital cost of the Petitioner significantly, making the tariff quoted at the time of submission of the bid unviable.

32. The Petitioner has submitted that as per industry standards, the cost contribution of three major items, being modules, inverters and structures comprises majority of the project cost. In view of the same, it is necessary to point out the list of items which have been and will be impacted by the introduction of GST Law. The impact of GST Law on the capital cost of the equipment for setting up the Project, which the Petitioner has to import/ procure from domestic sources has been tabulated below:

Sr. No	Items	Impact in %
1.	PV Modules	5%
2.	Land Cost	0%
3.	Civil and General Works	9%
4.	Mounting Structures	18%
5.	Power Conditioning Unit	28%
6.	Evacuation Cost up to Inter-Connection Point (Cables and Transformers)	18%
7.	Preliminary and Pre-Operative Expenses including IDC and Contingency	18%

33. The Petitioner has submitted that in view of the introduction of GST Law, the Petitioner by way of communication dated 05.07.2017 furnished a 'Change in Law' notice upon Respondents in terms of Article 17.1(a) of the PPAs. The Petitioner apprised Respondents of the increase in the cost of components in solar generation industry as well as extra burden on account of costs for purchase of raw materials and of availing services. The Respondents

have failed to respond to the notice of the petitioner. Hence the present petition.

34. The Petitioner has submitted that the issuance of the GST Law is squarely covered by the definition of ‘Change in Law’ under Article 17 read with Article 1.1 of the PPAs. ‘Change in Law’ as defined under the PPAs, is an inclusive definition and, inter alia, includes introduction of any tax, subsequent to the Proposal Due Date (as defined in the RfP), which results in a change in the incidence of tax liability upon the Petitioner. The relevant excerpts of Article 1.1 of the said PPAs (similar provisions in both PPAs) are set out below:

“1. **DEFINITIONS**

1.1 **Definitions**

...

Change in Law means the occurrence of any of the following events in India, subsequent to the Proposal Due Date (as defined in the RFP), and such event(s) has/ have an impact on the Unit or on any of the rights and obligations of the Parties under any of the Project Agreements:

- (a) The modification, amendment, variation, alteration or repeal of any existing Applicable Laws;
- (b) The enactment of any new Applicable Law or the imposition, adoption or issuance of any new Applicable Laws by any Government Authority;
- (c) Changes in the interpretation, application or enforcement of any Applicable Laws or judgment by any Government Authority;
- (d) The introduction of a requirement for the SPD to obtain any new applicable permit; or
- (e) The modification, amendment, variation, introduction, enactment or repeal of any Tax, resulting in a change in the incidence of Tax liability, including pursuant to any Applicable Laws promulgated or to be promulgated in furtherance of the Constitution (122nd Amendment) Bill, 2014.

It is clarified that for the purposes of Change in Law, Taxes shall not include taxes on corporate income, any withholding tax on dividends distributed to the shareholders of the SPD or income tax.”

35. The Petitioner has submitted that the Proposal Due Date in terms of the RFP is 30.05.2016. The introduction of ‘GST Laws’ by the Department of Revenue, Ministry of Finance was on 01.07.2017 i.e. subsequent to the aforementioned Proposal Due Date. As such, GST Law clearly falls under category (e) mentioned above since it amounts to an enactment of a tax

resulting in a change in the incidence of tax liability for the Petitioner.

36. The Petitioner has submitted that Article 17 of the PPAs envisage a compensation to be made to the Petitioner, either by way of adjustment in tariff or an upfront lump sum payment, due to any increase in the cost to the Petitioner. The approval for such Change in Law has to be obtained by the Petitioner from the Commission, in terms of Article 17.1(c) of the PPA. The compensation is aimed at putting the affected party i.e. the Petitioner in the present case, in the same economic position as if the ‘Change in Law’ had never occurred. In other words, the Respondents in the present case are liable in terms of the PPAs, to compensate the Petitioner by way of an upfront lump sum payment, to the extent of additional capital expenditure that the Petitioner is compelled to incur as a result of introduction of GST Law. Further, the Respondents are also liable to compensate the Petitioner, by way of adjustment in the quoted tariff, on account of the additional operating/ recurring expenditure that the Petitioner would be compelled to incur for the entire term of the Project. The relevant provisions of the PPAs are being reproduced herein below:

PPA 1

“17. CHANGE IN LAW

17.1 Consequences of Change in Law

- (a) *If a Change in Law occurs or is shortly to occur, then a Party shall notify the other Parties expressing its opinion on its likely effects and giving details of its opinion of whether:*
- (i) *any changes are required to the scope of work to be performed by the SPD under this Agreement;*
 - (ii) *any changes are required to the terms of this Agreement to deal with such Change in Law;*
 - (iii) *relief from compliance with any obligations is required, including the obligation of the SPD to achieve the Unit SCOD;*
 - (iv) *any increase or decrease in costs (other than incurring additional capital expenditure), or any increase in Taxes or delay is likely to result from the Change in Law; and*
 - (v) *any capital expenditure is required or no longer required as a result of a Change in Law.*
- (b) *As soon as practicable but no later than 15 (fifteen) Days after receipt of any notice from a Party under Article 17.1 (a), the Parties shall discuss the issues referred to therein and any ways in which the Parties can mitigate the effect of the Change in Law, including;*
- (i) *demonstrating that the SPD has used reasonable endeavours (including, where practicable, the use of competitive quotes) to minimise any increase in costs and maximise any reduction in costs;*

- (ii) *demonstrating how any capital expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred or would have been incurred, foreseeable Changes in Law at that time have been taken into account by the SPD;*
 - (iii) *demonstrating as to how the Change in Law has affected prices charged by similar businesses to the Unit, including similar businesses in which the shareholders or their associates carry on business;*
 - (iv) *demonstrating to the Procurer that the Change in Law is the direct cause of the increase or decrease in costs and/or loss or gain of revenue or delay and the estimated increase or decrease in costs or loss or gain in net profits after Tax could not reasonably be expected to be mitigated or recovered by the SPD acting in accordance with Good Industry Practice; and*
 - (v) *demonstrating that any expenditure, which was anticipated to be incurred to replace or maintain assets that have been affected by the Change in Law, has been taken into account in the amount stated in its opinion presented under Article 17.1(a).*
- (c) *If the Parties have complied with Article 17.1(b) or upon elapse of the time specified in the Article 17.1 (b) and if the SPD is required to incur any additional costs, including additional capital expenditure due to a Change in Law the aggregate financial effect of which, over the remaining Term of the PPA, is up to INR 20,000,000 (twenty million) (**Threshold Limit**), then the SPD shall obtain funding for such additional costs, including capital expenditure, at its cost and expense. The SPD shall bear all additional capital expenditure and/or interest and additional costs incurred to obtain any funding to the extent of the Threshold Limit.*
- For the avoidance of doubt, it is clarified that the Threshold Limit shall apply to each event constituting a Change in Law and shall not be applied on a cumulative basis.*
- If the additional capital expenditure, interest and associated costs that the SPD may incur as a result of the Change in Law exceeds the Threshold Limit, then the Procurer or the SPD shall approach the Appropriate Commission to seek approval of such Change in Law and the consequent impact on the Applicable Tariff.*
- (d) *If the Parties have complied with Article 17.1(b) or upon elapse of the time specified in the Article 17.1 (b) and if as a result of the Change in Law, there is a decrease in costs, or decrease in Taxes and/or gain in revenue or net profits after Tax, then any financial benefit accruing to the SPD on account of such decrease in costs, or decrease in Taxes and/or gain in revenue or net profits after Tax shall be passed through to the Procurer in its entirety.*
- (e) *The amount determined in accordance with Article 17.1(c) and Article 17.1(d) in the eventuality of any increase or decrease in cost (or decrease or increase in revenues or net profits after Tax) of the SPD on account of a Change in Law shall be adjusted either in the Tariff Payment or through a lump sum payment, and shall be paid through a Supplementary Bill to be raised by*

either the SPD or the Procurer in terms of Article 10. In case of any change in the Applicable Tariff by reason of Change in Law, as determined in accordance with this Agreement, the Monthly Bill to be raised by the SPD after such change in Applicable Tariff shall appropriately reflect the changed Applicable Tariff and the Procurer agrees to pay the revised Applicable Tariff accordingly.”

[Emphasis supplied]

PPA 2

“17. CHANGE IN LAW

17.1 Consequences of Change in Law

(a) *If a Change in Law occurs or is shortly to occur, then a Party shall notify the other Parties expressing its opinion on its likely effects and giving details of its opinion of whether:*

- (i) *any changes are required to the scope of work to be performed by the SPD under this Agreement;*
- (ii) *any changes are required to the terms of this Agreement to deal with such Change in Law;*
- (iii) *relief from compliance with any obligations is required, including the obligation of the SPD to achieve the Unit SCOD;*
- (iv) *any increase or decrease in costs (other than incurring additional capital expenditure), or any increase in Taxes or delay is likely to result from the Change in Law; and*
- (v) *any capital expenditure is required or no longer required as a result of a Change in Law.*

(b) *As soon as practicable but no later than 15 (fifteen) Days after receipt of any notice from a Party under Article 17.1(a), the Parties shall discuss the issues referred to therein and any ways in which the Parties can mitigate the effect of the Change in Law, including:*

- (i) *demonstrating through evidence that the SPD has used reasonable endeavours (including where practicable, the use of competitive quotes) to minimise any increase in costs and maximise any reduction in costs;*
- (ii) *demonstrating through evidence how any capital expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred or would have been incurred, foreseeable Changes in Law at that time have been taken into account by the SPD;*
- (iii) *demonstrating through evidence as to how the Change in Law has affected prices charged by similar businesses to the Unit, including similar businesses in which the shareholders or their associates carry on business;*
- (iv) *demonstrating through evidence to the Procurer that the Change in Law is the direct cause of the increase or decrease in costs and/or loss or gain of revenue or delay and the estimated increase or decrease in costs or loss or gain in net profits after Tax could not reasonably be*

expected to be mitigated or recovered by the SPD acting in accordance with Good Industry Practice; and

- (v) *demonstrating through evidence that any expenditure, which was anticipated to be incurred to replace or maintain assets that have been affected by the Change in Law, has been taken into account in the amount stated in its opinion presented under Article 17.1(a).*
- (c) *If the Parties have complied with Article 17.1(b) or upon elapse of the time specified in the Article 17.1 (b) and if the SPD is required to incur any additional costs, including additional capital expenditure due to a Change in Law the aggregate financial effect of which, over the remaining Term of the PPA, is up to INR 20,000,000 (twenty million) (**Threshold Limit**), then the SPD shall obtain funding for such additional costs, including capital expenditure, at its cost and expense. The SPD shall bear all additional capital expenditure and/or interest and additional costs incurred to obtain any funding to the extent of the Threshold Limit.*

For the avoidance of doubt, it is clarified that the Threshold Limit shall apply to each event constituting a Change in Law and shall not be applied on a cumulative basis.

If the additional capital expenditure, interest and associated costs that the SPD may incur as a result of the Change in Law exceeds the Threshold Limit, then the Parties agree and confirm that the decision of the Appropriate Commission applicable to the SPD and MPPMCL for such Change in Law event under the MPPMCL PPA shall be applicable on DMRC and the SPD, under this Agreement. The SPD shall immediately forthwith inform the Procurer of the decision of the Appropriate Commission or the appellate authority, as the case may be.

Provided however that:

- (i) *upon occurrence of any Change in Law that exclusively impacts this Agreement and is not a Change in Law event under the MPPMCL PPA; or*
 - (ii) *if complying with the Appropriate Commission's decision under the MPPMCL PPA results in an additional financial liability on DMRC or the SPD or results in a change to the Applicable Tariff under this Agreement, and such decision of the Appropriate Commission is not acceptable to DMRC or the SPD under this Agreement;*
- then DMRC and the SPD agree to mutually determine the consequences of such Change in Law under this Agreement. Such mutual determination of the consequences of Change in Law shall be done by a director-level officer of each of the SPD and DMRC. If pursuant to the mutual discussions, DMRC and the SPD fail to agree on the consequences of Change in Law, within 30 (thirty) Days from the issuance of notice under Article 17.1(a), then the matter shall be referred for resolution in accordance with Article 21.4.*
- (d) *If the Parties have complied with Article 17.1(b) or upon elapse of the time specified in the Article 17.1 (b) and if as a result of the Change in Law, there is a decrease in costs, or decrease in Taxes and/or gain in revenue or net profits after Tax, then any financial benefit accruing to the SPD on account of*

such decrease in costs, or decrease in Taxes and/or gain in revenue or net profits after Tax shall be passed through to the Procurer in its entirety.

The amount determined in accordance with Article 17.1(c) and Article 17.1(d) in the eventuality of any increase or decrease in cost (or decrease and increase in revenues or net profits after Tax) of the SPD on account of a Change in Law shall be adjusted either in the Tariff Payment or through a lump sum payment, and shall be paid through a Supplementary Bill to be raised by either the SPD or the Procurer in terms of Article 10. In case of any change in the Applicable Tariff by reason of Change in Law, as determined in accordance with this Agreement, the Monthly Bill to be raised by the SPD after such change in Applicable Tariff shall appropriately reflect the changed Applicable Tariff and the Procurer agrees to pay the revised Applicable Tariff accordingly”

37. The Petitioner has submitted that from the above, it is evident that the threshold limit for claiming the benefit of Change in Law prescribed under the PPAs is Rs. 2.00 crore. In other words, the Petitioner is only entitled to a benefit under ‘Change in Law’ if the aggregate financial effect of the additional recurring/ non-recurring costs, including additional capital expenditure is more than the threshold limit prescribed under the PPAs i.e. Rs. 2.00 Crore.
38. The Petitioner has submitted that in terms of the data furnished at para 3.9 of the present petition, it is clear that the financial impact due to the introduction of GST Law is beyond the threshold prescribed under the PPAs and as such the Petitioner is entitled to claim ‘Change in Law’ in terms of Article 17 of the PPAs.
39. The Petitioner has submitted that in terms of Article 1.1 read with Article 17 of the PPAs, any introduction of a tax which results in a change in the incidence of tax liability for the Petitioner will fall within the ambit of ‘Change in Law’ so long as the financial impact of the said impact is beyond the threshold prescribed under Article 17.1(c) of the PPAs. Further, the GST Law has been introduced on 01.07.2017 i.e. subsequent to the Proposal Due Date of 30.05.2016 (as defined in the RFP). The introduction of GST Law will have an adverse impact on the capital cost of the Project on the one hand for which the Petitioner seeks an upfront lump sum payment, while on the other hand, it will have an adverse impact on the cost of various services (i.e. operating costs) that will be availed by the Petitioner for the entire term of the Project. With reference to the operating costs, the Petitioner seeks an adjustment in the quoted tariff to the extent of impact of GST Law on the operating costs of the Project, in terms of Article 17.1(e) of the PPAs. As such, the said event clearly falls

within the ambit of 'Change in Law' under the PPAs.

40. The Petitioner has submitted that it is now compelled to incur additional capital expenditure on procurement of solar cells, modules/ other equipment etc., as a result of introduction of GST Law. It will also have to incur additional operational expenditure in the form of increase in the cost of availing various services. Such additional expenditure on procurement of equipment for setting up the Project would lead to an increase in capital cost of the Project and if not compensated, would impact the viability of the Project. Such additional capital/ operating expenditure would not have been required but for the introduction of GST Law by the Government. As elaborated above, the aforesaid additional capital expenditure could not have been factored in by the Petitioner at the time of submission of bid and as such has to be allowed to the Petitioner by way of an adjustment in the tariff as well as an upfront lumpsum payment, in terms of Article 17 of the PPAs.
41. The Petitioner has submitted that the Commission has itself held on earlier occasions that introduction of a new tax which was not in existence at the time of submission of bid would be covered within the definition of 'Change in Law'. The Petitioner has placed its reliance on Order dated 30.03.2015 issued by the Ld. Commission in Petition No. 06/MP/2013, wherein the Ld. Commission while dealing with the introduction of clean energy cess held as follows:

“33. We have considered the submissions made by both petitioner and the respondents on the clean energy cess. The clean energy cess on coal was introduced by the Government of India through the Finance Act, 2010 for the first time which is after the due date i.e. seven days prior to the bid deadline. Since there was no clean energy cess on the date of submission of the bid, the petitioner could not be expected to factor in the impact of such cess in the bid. Moreover, clean energy cess adds to the input cost of production of electricity. Therefore, the claim is covered under Article 13.1.1(i) of the PPA and consequently the liabilities shall be borne by the procurers.”

42. The Petitioner has submitted that the above judgment was challenged before the Hon'ble Appellate Tribunal for Electricity. However, the findings of the Commission qua clean energy cess have not been challenged and accordingly the same have attained finality. In fact, the Hon'ble Tribunal in the above order dated 19.04.2017 issued in Appeal Nos. 161 & 205 of 2015 has further held that Value Added Tax, being levied on procurement of materials by the seller, affects the cost of business of generation and sale of electricity and has to be

treated as ‘Change in Law’ in terms of the power purchase agreement.

43. The Petitioner has submitted that in terms of Section 79(4) of the Electricity Act, 2003, the Commission while discharging its functions under the Act has to be guided by the provisions of Tariff Policy, 2016. Clause 6.2(4) of the Tariff Policy clearly states that any change in taxes imposed by the Central Government after the award of bids has to be treated as ‘Change in Law’ unless otherwise provided for in the power purchase agreement. The relevant provisions of the Tariff Policy, 2016 are reproduced herein below:

“6.2 Tariff structuring and associated issues

...
(4) *After the award of bids, if there is any change in domestic duties, levies, cess and taxes imposed by Central Government, State Governments/Union Territories or by any Government instrumentality leading to corresponding changes in the cost, the same may be treated as “Change in Law” and may unless provided otherwise in the PPA, be allowed as pass through subject to approval of Appropriate Commission.”*

44. The Petitioner has submitted that the Commission has the jurisdiction to entertain and decide the instant petition in terms Section 79(1)(b) of the Electricity Act, 2003 read with Article 17.1(c) of the PPAs. The Petition involves issues relating to regulation of tariff of a generating company being the Petitioner, which has a composite scheme of generation of electricity in more than one State and therefore the Commission has jurisdiction.

Submissions of the Petitioners in Petition No. 34/MP/2018 & 47/MP/2018:

45. M/s Azure Power Jupiter Private Limited (Petitioner in Petition No. 34/MP/2018) is a generating company and is developing 5 Solar Power Generating Systems (hereinafter referred to as ‘SPGS’) of 10 MWs each in Village Supa in Tehsil Charkhari, Dist. Mahoba, Uttar Pradesh pursuant to 5 identical Power Purchase Agreements each for a capacity of 10 MWs executed with NTPC Limited. M/s Azure Power Thirty Six Private Limited (Petitioner in Petition No. 47/MP/2018), is a generating company and is developing a 50 MW SPGS based on Photo Voltaic technology in the state of Andhra Pradesh pursuant to a PPA executed with the Solar Energy Corporation of India Limited.
46. The Petitioners have submitted that with the enactment of the GST laws with effect from

01.07.2017, the Petitioners are required to bear additional recurring and non-recurring expenditure after the effective date under the PPAs in the form of an additional tax burden on various components of setting up, operating and maintaining the SPGS. The changes that took place in the effective applicable rates on the promulgation of the GST Laws include:

- a. increase in the effective rate of applicable Central Sales Tax on supply of materials ranging from 0% - 2% originally to 5% now;
- b. increase in the effective rate of service tax on operations and maintenance services from 15% originally to 18% now;
- c. reduction in service tax on provision of installation services for Solar Power Generating Systems changed from 15% originally to 5% now;
- d. reduction in the tax on civil works for Solar Power Generating Systems changed from an aggregate of 11% of Value Added Tax and Service Tax originally to 5% now.

47. A tabular representation comparing the old tax laws and rates applicable to the Petitioner as on the Effective Date of the PPA with the GST Laws and revised rates is as under:

S. No.	Old Tax Law Applicable as on Effective Date of PPAs	Old Tax Rate Applicable as on Effective Date of PPAs	New GST Law after Effective Date of PPAs	New GST Rate after Effective Date of PPAs
1.	The Central Sales Tax Act, 1956 on inter-state sale of goods	0% - 2%	The Integrated Goods and Services Tax, 2017	5% on Goods required for the Solar Power Generating Systems
2.	The Finance Act, 1994 levying Service Tax	15%	The Central Goods and Services Tax, 2017	5% on Services for Solar Power Generating Systems 18% on Operation and Maintenance Services
3.	The Uttar Pradesh Value Added Tax Act, 2008 levying tax on intra-state sale of goods at a rate of 5% on total civil contract value and The Finance Act, 1994 levying Service Tax at a rate	11% aggregate	The Uttar Pradesh Goods and Services Tax, 2017	5% on Supply of Solar Power Generation System

	of 15% on 40% of the civil contract value			
4.	The Andhra Pradesh Value Added Tax Act, 2005 levying tax on intra-state sale of goods at a rate of 5% on total civil contract value and The Finance Act, 1994 levying Service Tax at a rate of 15% on 40% of the civil contract value	11% aggregate	The Andhra Pradesh Goods and Services Tax, 2017	5% on Supply of Solar Power Generation System

48. The Petitioners have submitted that as per the Certificate from a Chartered Accountant dated 31.08.2017 the net amount additionally incurred and to be incurred by the Petitioners in developing the SPGS on account of the promulgation of the ‘GST Laws’ are approximately:

	Petition No. 34/MP/2018	Petition No. 47/MP/2018
Net amount additionally incurred and to be incurred on the Engineering, Procurement and Construction Cost (“EPC Cost”)	Rs. 69,61,382/- (Rupees sixty-nine lakh sixty-one thousand three hundred and eighty-two only)	Rs. 8,32,90,635/- (Rupees eight crore thirty-two lakh ninety thousand six hundred thirty-five only)
Additional amount (approx.) to be incurred on the Operation and Maintenance costs (O&M Cost) of the SPGS, assuming that the GST rate for services remains constant for the entire period of the PPA.	Rs. 4,11,64,621/- (Rupees four crore eleven lakh sixty-four thousand six hundred twenty-one only)	Rs. 6,58,53,651/- (Rupees six crore fifty-eight lakh fifty-three thousand six hundred and fifty-one only)

49. The Petitioners have submitted that SPGS are in the process of procuring the remaining capital goods in accordance with their construction schedule. The Petitioners are also procuring services required on an on-going basis in order to install the said capital goods and for the purpose of installing and commissioning the SPGS. Moreover, they will also avail of operation and maintenance services in the operations phase of the SPGS, which will be a recurring expenditure throughout the term of the PPAs. Thus, the additional tax burden on account of the promulgation of the ‘GST Laws’ are being incurred by the Petitioners. Further, they will also incur various legal and administrative costs in pursuing the instant Petition, which it humbly submits should also be compensated through tariff as Change in Law.

50. The Petitioners have submitted that the promulgation of the GST Laws after the Effective Date of the PPAs resulting in additional recurring and non-recurring expenditure to be incurred by the Petitioners squarely attracts Article 12 of the PPAs thereby entitling the Petitioner to Change in Law relief stipulated thereunder.
51. Article 12 of the PPAs along with the definition of ‘Law’ thereunder is excerpted below for convenient perusal:

“Law” shall mean in relation to this Agreement, all laws including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian Government Instrumentality and having force of law and shall further include without limitation all applicable rules, regulations, orders, notifications by an Indian Government Instrumentality pursuant to or under any of them and shall include without limitation all rules, regulations, decisions and orders of the Appropriate Commissions;”

“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 change in tax or introduction of any tax made applicable for supply of power by the SPD as per the terms of this Agreement.*

but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the SPD, or (ii) 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.”

52. The Petitioners have submitted that Article 12 above is squarely attracted as the GST Laws are Central and State statutes in the meaning contemplated under the PPAs. Accordingly, the Petitioners are entitled to compensatory relief for the aforesaid ‘Change in Law’. It is also an established industry practice in the Indian power sector, particularly in respect of ‘Change in Law’ events.
53. The Petitioners have submitted that while Article 12 of the PPAs do not require a ‘Change in Law’ notice to be sent, in accordance with prudent utility practice and in good faith, the Petitioners have promptly notified the Respondents of the promulgation of the GST Laws vide their letter dated 30.08.2017. However, the Petitioners have not received any response from the Respondents to their said letter.
54. The Petitioner has submitted that under Article 9 of the PPAs, the Petitioner was originally entitled to receive a tariff of Rs. 4.78/kWh in Petition no. 34/MP/2018 and Rs. 4.43/kWh + VGF in Petition No. 47/MP/2018 from the Commercial Operation Date of the SPGS respectively. However, such tariff was fixed prior to the promulgation of the GST Laws. Therefore, the aforesaid tariff would need to be revised upwards to account for and reflect the additional tax burden incurred/ to be incurred by the Petitioners on account of the promulgation of the GST Laws. Such revised tariff ought to account for the carrying costs incurred by the Petitioners in discharging the additional tax burden. The principal objective of

Article 12 of the PPA is to grant relief in a manner so as to place affected parties in the same economic position as if a change in law had not occurred.

55. The Petitioners have submitted that in alternate, fixed lump sum compensation in respect of the additional taxes on the EPC Cost may be allowed to the Petitioners to avoid any carrying costs in respect of the EPC Cost of the SPGS. The Petitioners have submitted that approaching the Commission each year for allowance of compensation for such 'Change in Law' events is a time-consuming process, which would result in a time lag between the amount paid by the Petitioner and actual reimbursement by Respondents necessitating the payment of interest and carrying costs by Respondents. The Petitioners have submitted that to compensate for the monetary impact of the promulgation of the GST Laws:

- (i) a sum incurred/ to be incurred by the Petitioners as additional tax burden may be granted to the Petitioners as lump sum compensation in respect of the EPC component of the total cost; and
- (ii) a monthly levelled tariff payment of Rs. 0.02/kWh be allowed towards the additional tax burden on O&M Cost incurred by the Petitioner.

56. The Petitioners have submitted that in alternate, an additional tariff including carrying costs, payable on a monthly basis, may be approved by the Commission, which may later be reconciled with the actual additional tax paid by the Petitioner on the basis of its annual audited books of account certified by its statutory auditor. The Petitioner has submitted that as per calculation of the additional tax burden to be incurred, the levelled tariff increase of Rs. 0.05/ kWh in petition no. 34/MP/2018 & Rs. 0.24/kWh in petition no. 47/MP/2018 would compensate the Petitioner for the aforesaid Change in Law. Such levelled tariff increase would also include the impact of additional tax burden on the O&M Costs of the SPGS. The Petitioner has suggested that the proposed levelled tariff increase may be allowed by the Commission, subject to reconciliation with the actual expenditure incurred as per the Petitioners final audited books of account certified by the Petitioners statutory auditor at the end of the relevant financial year.

Submissions of Respondent No. 1 (SECI) dated 16.03.2018 in Petition No. 188/MP/2017, 189/MP/2017, 190/MP/2017, 201/MP/2017, 202/MP/2017, 203/MP/2017, 204/MP/2017 & dated 06.05.2018 in 47/MP/2018

57. The Respondent has submitted that the DISCOMS who have entered into 'Power Sale Agreement' (hereinafter referred to as 'PSA') with the Respondent for purchase of solar power are necessary parties to the present proceedings.
58. The Respondent has submitted that the relief for Change in Law in the case of PPA in regard to any tax is available only if it is '*for supply of power*' by the SPDs as per the terms of PPA. If the tax is not in respect of supply of power but in respect of any purchase of inputs goods, equipment, plant, machinery etc. (input material for construction of the power plant), i.e. taxes etc. related to the setting up of the Power Project as distinguished from the sale of power generated, the same is not covered within the scope of Article 12.1 of the PPA and, therefore, the relief provided for in Article 12.2 of the PPA will have no application.
59. The Bidding Documents and the Agreements reached between the Petitioner and the Respondent did not envisage covering the tax on activities leading to the construction and commissioning of the power plant.
60. The Respondent has submitted that the Petitioner cannot seek any relief in regard to the change in taxes related to the setting up of the solar power project in comparison to the sale of power from the solar power project. The entire claim made by the Petitioner is in respect of the tax on the setting up of the power project and not on the sale of power from the power project. The petition filed, in so far as Petitioner is claiming relief in regard to change in taxes related to setting up of the solar power project, is therefore, liable to be dismissed as not maintainable.
61. The Respondent has submitted that with regard to the goods which were to be imported prior to 01.07.2017, there is no implication of payment of taxes under the GST.
62. The Respondent has submitted that the PPA, inter alia, provides for the SCoD. The Petitioner was required to complete and commission the solar power project in all respects by the SCoD. The Petitioner was, therefore, required to import the necessary plant and equipment for installation at the site much prior to the SCoD. The Petitioner was also required to get the

clearance of the goods imported from the port of importation and from the Custom Authorities and the same could be prior to the SCoD.

63. The Respondent has submitted that the Petitioner has not given: i) the details of the date on which the Purchase Order was placed; ii) the date on which such goods were loaded for transshipment to India; iii) the date of arrival of goods in India; iv) the date on which the Petitioner were required to clear the goods from the Custom Authorities and v) the date on which the Petitioner did obtain the goods after custom clearance.
64. The Respondent has submitted that one of the Petitioner has filed the documents relating to the payment of basic custom duty of M/s Acme Cleantech Solutions Private Ltd. which is not the payment made by the Petitioner in regard to the importation of the solar panels and other plant and machinery. The custom duty as per the documents filed by the Petitioner has been paid by M/s Acme Cleantech Solutions Pvt. Ltd. The Petitioner has not given any particulars regarding the plant and machinery imported by M/s Acme Cleantech Solutions Pvt. Ltd.
65. The Respondent has submitted that the Petitioner has also not placed before the Commission the taxes, duties and levies which stands withdrawn and no longer payable and/or subsumed by reason of the introduction of the GST.
66. The Respondent has submitted that the documents filed by the Petitioner are not sufficient to place on record the details of the import of various items used in the construction of the power project. The Petitioner itself has referred to the following items as being affected by the imposition of the GST:

<i>“Items</i>	<i>Impact in %</i>
<i>PV Modules</i>	<i>5%</i>
<i>Land Cost</i>	<i>0%</i>
<i>Civil and General Works</i>	<i>9%</i>
<i>Mounting Structures</i>	<i>18%</i>
<i>Power Conditioning Unit</i>	<i>28%</i>
<i>Evacuation Cost up to Inter-</i>	<i>18%</i>

Connection Point (cables and transformers)

Preliminary and Pre-operative expenses 18%

Including IDC and Contingency”

67. The Respondent has submitted that the above requires verification by the SPD and an affidavit confirming that there was no excise duty or any other tax payable prior to 01.07.2017.
68. The Respondent has submitted that perusal of the revision of the capital cost (after GST Regime effective 01.07.2017) shows that the module mounting structure continued to be an Inter State purchase and was not imported. There is no claim of basic custom duty on the mounting structure. There is, however, a claim of IGST at the rate of 18%. Based on the above, it is not correct on the part of the Petitioner to claim imposition of the GST on all other products or that the custom duty imposed on module mounting structure has been withdrawn.
69. The Respondent has submitted that the pleadings made by the Petitioner are not only inconsistent but there is an attempt to mix up imported goods with domestic procurement of goods.
70. The Respondent has submitted that in so far as domestic procurement of goods is concerned, it is incumbent on the Petitioner to disclose in a transparent manner with regard to the increase or decrease in the taxes on net basis.
71. The Respondent has submitted that the Petitioner is proceeding on the basis that there exist an exemption from payment of the custom duty on the plant, machinery and equipment imported for solar project till 30.06.2017. This has been disputed by the Custom Authorities who have proceeded to levy custom duty on such imports and some of the Solar Power Developers have challenged the imposition of the custom duty in the Hon'ble High Court of Madras. If the imposition of custom duty by the Custom Authorities is held to be in accordance with law, then the Petitioner cannot proceed on the basis that there existed an exemption for payment of custom duty till 30.6.2017.

Submission of Respondent No. 2 (NTPC) dated 01.03.2018 in Petition No. 230/MP/2017, 231/MP/2017, 232/MP/2017, 233/MP/2017 13/MP/2018 and 34/MP/2018

72. The Respondent has submitted that the DISCOMS who have entered into 'Power Sale Agreement' (hereinafter referred to as 'PSA') with the Respondent for purchase of solar power are necessary parties to the present proceedings.
73. The Respondent has submitted that the Petition filed by the Petitioners are not maintainable and are liable to be dismissed in limine, inter alia, for the following reasons:
- a. The Respondent has submitted that the petitions, as filed does not set out the cause of action based on which the Petitioners have claimed the relief. The Petitioners have not placed on record, the specific changes in law which have occurred and the extent to which 'Change in Law' has impacted the project. The Petitioners have also not disclosed or referred to the nexus of GST Laws change to the impact on the specific procurement of goods and services by the Petitioner.
 - b. The Respondent has submitted that Annexures relating to recurring and non-recurring expenditures incurred/to be incurred along with the Chartered Accountant's Certificate are entirely inadequate to consider the issues of Change in Law. The Petitioners have not disclosed:
 - (i) the date on which the Purchase order was placed either for procurement of goods or for procurement of services;
 - (ii) the date on which the goods were delivered to the Petitioner or the services were rendered and;
 - (iii) the date on which the invoices were raised; and
 - (iv) the date on which the payment for the goods or services were made by the Petitioner.
 - (v) in case of imported goods, it is necessary for the Petitioner to place the date on which the goods were custom cleared either for own consumption or to be stored in the custom warehouse.
79. The Respondent has submitted that mere production of the Chartered Accountant's Certificate without material particulars and basic relevant documents in support cannot be

considered as sufficient to entertain the present petition and to analyse and decide the entitlement of any relief under the Change in Law. The relief for change in law is restricted to the impact of such Change in Law. The Petitioners cannot claim a lump-sum compensation, additional amounts etc. on adhoc basis.

80. The Respondent has submitted that the Petitioners are not entitled to claim any recurring or non-recurring expenditure as prayed by the Petitioners. The outsourcing of the operation and maintenance to a third party was not a requirement of the PPA and has been 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 Petitioners.
81. The Respondent has submitted that the Petitioners cannot claim reimbursement of legal or administrative cost incurred by the Petitioner in pursuing the proceedings before the Commission. The Petitioners are obligated to place on record the correct computation of the impact of the Change in Law, establishing the exact nature of law which would constitute a change in law within the meaning of Article 12, its nexus to the supply of power from the power project.
82. The Respondent has submitted that the Petitioners have defaulted and the Projects were not commissioned in time. Had the projects been commissioned by the SCoD, there would have been no impact on account of promulgation of GST Laws w.e.f. 1.07.2017. The delay in the commissioning of the Project is entirely attributable to the Petitioner and the Petitioner has paid the liquidated damages for the period of delay.
83. The Respondent has submitted that the relief for Change in Law in regard to any tax is available only if it is '*for supply of power by the SPDs as per the terms of this Agreement (PPA)*'. Sub clause of 12.1.1 providing for '*any change in tax or introduction of any tax*' is specifically circumscribed by the above qualification. Every change in tax or introduction of tax is not intended to be covered by the Change in Law provisions of the PPA. There is a specific and additional condition that the impact of change in law should be on the supply of power by the Seller. Merely because the statutory levies or taxes may affect the financials of the project developer, it does not get covered under the Change in Law within the meaning of the PPA or entitle the Petitioner to a revision in tariff.

84. The Respondent has submitted that the claim of the Petitioner that taxes which do not fall under the fifth bullet under Article 12.1.1 are to be considered as admissible by virtue of first bullet under Article 12.1.1, is wrong. If such claims are considered, then the fifth bullet is rendered redundant. There was no need to have a specific provision for tax on supply of power since taxes would be covered under 'law' in the first bullet. The harmonious construction of the provisions would require some meaning and purpose to be given to the fifth bullet of Article 12.1.1 and the claims which are to be considered on account of statutory taxes etc. should fall within the scope of fifth bullet.
85. The Respondent has submitted that if the tax is not in respect of supply of power but in respect of any purchase of inputs goods, equipment, plant, machinery etc. (input material for construction of the power plant), i.e. taxes etc. related to the setting up of the Power Project as distinguished from the sale of power generated, the same is not covered within the scope of Article 12.1 of the PPA and, therefore, the relief provided for in Article 12.2 of the PPA will have no application.
86. The Bidding Documents and the Agreements reached between the Petitioners and the Respondents did not envisage covering the tax on activities leading to the construction and commissioning of the power plant.
87. The Respondent has submitted that the GST came into force on 01.07.2017. Accordingly, for the goods which were to be imported prior to 01.07.2017, there would be no implication of payment of taxes under the 'GST Laws'.
88. The Respondent has submitted that the Petitioner has not given: i) the details of the date on which the Purchase Order was placed; ii) the date on which such goods were loaded for transshipment to India; iii) the date of arrival of goods in India; iv) the date on which the Petitioner were required to clear the goods from the Custom Authorities and v) the date on which the Petitioner did obtain the goods after custom clearance. Further, no details have been furnished as regards the original vendor/original equipment manufacturer. A bare perusal of the select few invoices furnished by the Petitioner indicate that the goods have been supplied through wholly owned subsidiary of the Petitioner's company.

89. The Petitioners have also not placed before the Commission, the taxes, duties and levies which stands withdrawn and no longer payable and/or subsumed by reason of the introduction of the GST.
90. The Respondent has submitted that the Petitioners are also 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 absence of proper particulars being placed by the Petitioners on the extent of taxes, levies, duties and cess etc. subsumed in the GST, the Commission should dismiss the petition filed by the Petitioners.
- a. In terms of the PPA (in Petition no. 34/MP/2018) the SCoD is 28.05.2017 i.e. before the promulgation of the 'GST Laws' w.e.f. 1.07.2017. The actual commercial operation took place on 1.06.2017 (for 20 MW), 19.09.2017 (20 MW) and 22.09.2017 (10 MW) for the reasons entirely attributable to the Petitioner. There was no extension of time admissible or otherwise given in terms of Article 4.5 of the PPA and the liquidated damages have been paid by the Petitioner under Article 4.6, for the delay in commissioning beyond 28.05.2017.
- b. The Commissioning of 20 MW project being on 01.06.2017 is not entitled to claim any impact of GST Laws which came subsequent to the Commissioning Date. The invoices produced along with the Petition are after the SCoD of 28.05.2017. Thus, if the Petitioners have adhered to the original timelines, all of the aforementioned goods would have been bought before the enactment of the GST Laws and there would have been no impact. In any event, no reason or justification has been given by the Petitioner as to what caused the delay in the procurement of plant, machinery and other goods before 01.07.2017 when the SCoD was 28.05.2017.

Submission of Respondent No. 3 dated 03.05.2018 (M/s M.P. Power Management Company) in Petition No. 33/MP/2017

78. The Respondent has submitted that the petition filed by the Petitioners suffers from non-joinder of necessary party. The petitioner is required to implead Rewa Ultra Mega Solar limited ('RUMSL') as a party before proceeding in the present matter. RUMSL is a joint

venture company of Madhya Pradesh Urja Vikas Nigam Limited and Solar Energy Corporation of India Limited, wherein, both the organisations hold equal shareholding. Rewa Solar Project consisting of three units namely Unit 1, Unit 2 and Unit 3 of 250 MW each intending to supply power generated from the three units to the Respondents.

79. The Respondent has submitted that PPA dated 17.04.2017 was executed in pursuance of a competitive bid process and the tariff was discovered through the said process. The quoted tariff is binding and cannot be varied on any equitable ground or otherwise except as provided in the PPA.
80. The Respondent has placed its reliance on the Order of Hon'ble Supreme Court in '*Energy Watch Dog -v- Central Electricity Regulatory Commission (2017) 14 SCC 80*' in which it was held that the Tariff determined under section 63 of the Electricity Act, 2003 cannot be subject to any variations except as specifically provided in the PPA.
81. The Respondent has submitted that in the relief under Art. 17 of the PPA for 'Change in Law' with regard to any tax is available to the Petitioner only '*If the additional capital expenditure, interest and associated costs that the SPD incur as a result of the Change in Law exceeds the Threshold Limit (INR 20,000,000).*' In view of Article 17.1 (c) of the PPA, the threshold Limit criterion should be satisfied and needs to be substantiated by the petitioner. Even otherwise, the Petitioner is required to produce all the relevant documents to substantiate its claim for seeking the relief for change in law. In absence of the documents showing additional capital expenditure, interest and associated cost incurred as a result of change in law by the petitioner etc., the claim for change in law does not survive.
82. The Respondent has submitted that Article 17 of the PPA provides for either lump sum compensation or adjustment in tariff and not both.
83. The Respondent has submitted that the Petitioner should be directed to file the submissions for the various taxes and duties as existing on 30.06.2017 (Pre-GST) including the rate at which such levies were imposed, the list of taxes and duties with the rates which got changed with effect from 01.07.2017 (Post-GST) and the implication of each of them, both in regard

to the reduction or increase in the overall taxes in a tabular form so that the same may be verified by the Respondent and the Commission.

84. The Respondent has submitted that the Petitioner has not placed before the Commission the details of taxes, duties and levies which stands withdrawn & subsumed and no longer payable by reason of the introduction of the GST. The list of such taxes, duties, cess and levies etc. include the following:

- i. Central Excise Duty
- ii. Stowing Excise Duty
- iii. Additional Duties of Excise
- iv. Additional Duties of Customs – Countervailing Duty (CVD)
- v. Special Additional Duty of Customs (SAD)
- vi. Service Tax
- vii. Value Added Tax
- viii. Central Sales Tax
- ix. Purchase Tax
- x. Entry Tax, Octroi etc.
- xi. Terminal Tax
- xii. Works Contract Tax
- xiii. Forest Tax/Cess
- xiv. Nirayat Kar
- xv. Education Cess and Secondary and Higher Education Cess
- xvi. Clean Energy Cess
- xvii. Swachh Bharat Cess and Krishi Kalyan Cess
- xviii. Environment Cess and Infrastructure Development Cess
- xix. Electricity Duty

85. The Respondent has submitted that with regard to the applicability of the GST tax rate for solar power generating system, MNRE vide letter dated 3rd April, 2018 provided the following information:

“1. Reference is invited to the issue of applicability of GST tax rate for solar power generating systems and the issue of refund of input tax credit.

2. MNRE had taken up the matter with Ministry of Finance, and as per the understanding given to this Ministry.

a) 5% concessional rate has been prescribed for the specified renewable energy devices and parts for their manufacture, falling under chapters 84, 85 or 94. Hence, the goods falling under chapters 84, 85 or 94 and supplied for the manufacture of Solar Power Generating System would attract 5% concessional GST rate. Goods other than those under Chapters 84, 85 or 94 and goods supplied other than for the manufacture of the specified renewable energy plants / devices would attract applicable GST rates. The supplier of such goods will be eligible for input tax credit of GST paid on inputs, and will also be eligible for refund of unutilized input tax credit on account of tax inversion.

b) Structural, as such, do not qualify as immovable property and, hence, are outside the domain of ‘works contract service’. Whether the EPC contracts qualify as composite supply (u/s 2 (30) of the CGST Act) as supply of goods or services or both, naturally bundled or supplied in conjunction with each other in the ordinary course of business will depend on the facts of the case. If such (EPC contracts) supplies could be treated as ‘composite supply’ with supply of solar power generating systems as the principal supply, then such supplies may be eligible for 5% GST rate as a whole. This aspect may, however, require examination of contracts.

c) As regards the issue of refund of input tax credit being faced by the EPC contractors, it is to state that Section 54 of the Central Goods and Services Tax (CGST) Act, 2017 provides for refund of unutilized input tax credit in cases where the credit accumulates on account of rate of tax on inputs being higher than the rate of tax on output supplies (other than ‘nil’ rated or fully exempt supplies) and the law also prescribes a time limit of 60 days for such refunds.

d) As far as the issue of inputs to renewable energy plants/ devices being charged at the concessional GST rate of 5% is concerned, the same is under examination in consultation with Ministry of Finance.

3. The above information, however, is intended only to provide a general understating of GST treatment for solar sector and is not intended to be treated as legal advice or opinion.

This issues with the approval of Secretary, MNRE.”

86. The Respondent has submitted that it is important that the net effect of the same needs to be placed before the Commission. It is incumbent on the Petitioner to place before the Commission on affidavit in support of the above together with a clear representation that the overall impact of taxes on the Procurer of goods and services i.e. the generator after the

introduction of Goods and Service Taxes or related taxes or any other tax with effect from 01.07.2017 has not reduced and has rather increased.

87. The Respondent has submitted that it is only when the Petitioner have placed on record the entire particulars, it is possible to undertake the prudence check and accordingly, true and faithful disclosure of existing taxes which have been subsumed by the GST needs to be furnished by the Petitioner. If the Petitioner is not furnishing the necessary details and documents, the Petition should be dismissed.
88. The Respondent has submitted that the Petitioner has not disclosed:
- (i) the date on which the Purchase order was placed either for procurement of goods or for procurement of services;
 - (ii) the date on which the goods were delivered to the Petitioner or the services were rendered and;
 - (iii) the date on which the invoices were raised; and
 - (iv) the date on which the payment for the goods or services were made by the Petitioner.
 - (v) In case of imported goods, it is necessary for the Petitioner to place the date on which the goods were custom cleared either for own consumption or to be stored in the custom warehouse.
89. The Respondent no. 1 has submitted that there has to be a clear and one to one correlation between the projects, the supplier of goods or services and the invoices raised by the supplier of goods and services.
90. The only impact which the Petitioner has given is in the form of percentage impact of GST Laws in terms of the items referred to in the Paragraph 3.9 of the Petition which is vague in nature.
91. The Respondent no. 1 has submitted that the Petitioner is not entitled to claim any compensation/tariff payment for change in law prior to commercial operation of the relevant generating unit. The Petitioner intimated for likely part commissioning of 5 MW capacity of 250 MW Solar Project-2, RUMSL Solar plant at Gurh, Rewa, MP. Accordingly, the claim for change in law, if any, in regard to the GST Laws can at present be implemented only in

respect of 5 MW capacity of the solar power project and not in respect of remaining 245 MW capacity which is yet to be commissioned.

Submissions of Respondents No. 5 & 6 dated 18.06.2018 (M/s Eastern Power Distribution Company of Andhra Pradesh Limited and M/s Southern Power Distribution Company of Andhra Pradesh Limited) in Petition No. 188/MP/2017, 189/MP/2017 & 47/MP/2018 and dated 16.07.2018 in 190/MP/2017

92. The Respondents have submitted that since the generation and supply of power takes place within the State of Andhra Pradesh, therefore as per the Hon'ble Supreme Court judgment dated 11.04.2017 in CA No.5399-5400 of 2016 (Energy Watchdog vs. CERC and others), the jurisdiction will be with the State Commission i.e. Andhra Pradesh State Regulatory Commission. The proposal for procurement and adoption of tariff under section 63 of Electricity Act 2003 for 400MW solar power to be set up by Ananthapuram Ultra Mega Solar Park at Ananthapuram is pending before Andhra Pradesh State Electricity Regulatory Commission (hereinafter referred to as 'APERC'). APERC has already taken into consideration of 400MW solar power availability in the ARR (Annual Revenue Requirement) for the FY 2018-19. The Central Commission has not adopted the tariff discovered under section 63 of Electricity Act 2003. It is specifically agreed in the agreement that if any effect due to change of law is suffered by either of the parties to the agreement, the aggrieved party shall approach the APERC for appropriate orders. The Central Commission lacks jurisdiction in terms of the provisions of Electricity Act 2003 provisions (under Section 79) and also as per the Law settled by the Hon'ble Supreme Court in the judgment cited above.
93. As per the Article 9 of the PPA entered by the Petitioners and Respondents, the Petitioners shall be entitled to receive the tariff of Rs.4.43 per kWh fixed for the entire term of this Agreement. The extract of the Article 17.9 of the PPA is as follows:

" 17.9 Taxes and Duties

17.9.1 the SPD shall bear and promptly pay all statutory taxes, duties, levies and cess, assessed/levied on the SPD, contractors or their employees that are required to be paid by the SPD as per the Law in relation to the execution of the Agreement and for supplying power as per the terms of this Agreement."

94. Evidently, the tariff is fixed and the same is payable for entire duration of the PPA and Petitioner shall bear all the statutory taxes, duties levies etc. In view of the unambiguous provision, the provision for Relief under Change in law becomes redundant and hence inoperative.
95. The Respondents have submitted that as per the provisions in the PPA, the Petitioners are required to complete and commission the project by 16.10.2017. The Petitioners were, therefore required to import the necessary plant and equipment for installation at the site of the power project in Andhra Pradesh much prior to the SCoD and similarly the Petitioner is required to get the clearance of the goods imported from the port of importation and from the custom authorities.
96. The Respondents have submitted that the Petitioner was aware of the introduction of new tax GST which was under consultation process for the last several years and therefore they were required either to import the necessary plant and equipment for installation at site of power project in Andhra Pradesh before implementation of GST fixed on 16.10.2017 or the Petitioner is expected to factor in all the possible future levies while quoting (as the tariff bided was fixed levelled tariff for the entire PPA tenure). The Respondents are not liable to bear the adverse effect of GST which came into effect subsequent to the PSA entered into by these Respondents with the SECI which is with a fixed tariff of Rs.4.s/kwh for entire PSA tenure. The SPD has agreed to indemnify SECI in the Agreement between SECI and the SPD as under Article L7.
97. The Respondents have submitted that the above clause in the agreement makes it very clear as to what are the liabilities SECI shall call the Buying Utilities to indemnify the SPD. There is no mention of any taxes, levies or duties in the said clause. In view of the terms agreed between SECI and the SPD there is no liability to pay any revised tax or duty or cess for the term of agreement between SECI and the Buying Utility. The present petition is filed by the petitioner under Article L2 of the PPA between SPD and SECI. The said article does not open with a non-obstante clause so as to nullify the effect of order applicable on Article 4.1.2 and Article 17.9 of the said agreement. It is pertinent to note that contract between parties are to be read and understood in their plain language to know the intention of the parties to the

contract.

98. The Respondents have placed its reliance on the judgment of three Judge bench of Hon'ble Supreme Court in Bharat Aluminum Company Vs. Kaiser Aluminum Technical Services Inc. [(2016) 4 SCC L261 in which it was held that:

“Applying the above law settled by the Hon'ble Supreme Court to the facts of the present case, Article 12, Article L4.1.2 and L7.9 of the PPA should be read straight, plain, cohesively and logically; giving meaning and effect to both the Articles of the PPA. If the SPD claims relief under Article L2 of the PPA then it is bound to give effect to the provisions contained in Article 4.1.2 and 7.9 of the PPA and cannot absolve itself from the obligation cast under Article 4.1.2 and 7.9 of the PPA.

99. The Respondents have submitted that they have already not entered PSA with higher tariff of Rs.4.50 (Rs.4.43 + Rs. 0.07 trading margin) compared to the lower tariffs realized during recent biddings. Any excess tariff beyond the agreed tariff under the PSA with the SECI would cause unjustified burden on the Respondents which would ultimately be passed on to the end consumers of the State.

Submissions of Respondents No. 7 & 8 (M/s Northern Power Distribution Company of Telangana Limited and M/s Southern Power Distribution Company of Telangana Limited) dated 22.05.2018 in Petition No. 232/MP/2017, 233/MP/2017 and 13/MP/2018

100. The Respondents have submitted that the Commission has given directions to the Petitioner to implead the Distribution Companies as parties to the Petition, vide Record of Proceedings dated 03.04.2018, as ultimate beneficiaries of the power being supplied by the Petitioner.
101. The Respondents have submitted that any dispute can be raised by the Petitioner based on the provisions of the PPA subsisting between the Petitioner & NTPC only. The Petitioner is ought to confine its arguments/claims within the scope of the PPA but may not be permitted to justify its claims under the Bundling scheme so as to bring it within the jurisdiction of the Commission, (where the scheme is governed by the provisions of PSA between NTPC and DISCOMs). Since, the procurement of Solar Power by NTPC relates to the Scheme which is State Specific, the Petitioner's Project cannot be termed as a Composite Scheme as it is not supplying power to any State and it has to be treated as a State dedicated Project and the cause of action under the PPA has arisen within the territorial jurisdiction of the State. In all

such cases, State Regulatory Commission will alone have the jurisdiction to adjudicate this Petition, under Section 86 (1)(f) of the Electricity Act, 2003.

102. The Respondents have placed its reliance on the judgment of Hon'ble APTEL in *Appeal No. 200 of 2009 between M/s PUNE Power Development Private Limited (Inter-State Trading Licensee) and Karnataka DISCOMs*, wherein a similar dispute had arisen on the issue of jurisdiction of appropriate Commission, whether it is the Central Commission or State Commission, since the Appellant in this case, is an Inter-State Licensee, undertaking trading of power transaction from Karnataka DISCOMs. The findings of Hon'ble APTEL in this judgment is as extracted below:

“37. (I) The present case involves a dispute between the Distribution Licensee of Karnataka, the Respondent and the Appellant which is an inter-State licensee. The Appellant is selling power to the Distribution Licensee Respondent in the State of Karnataka, thereby having a nexus to the State. Since the procurement of power by the Distribution Licensee from the Trading Licensee is being done in the State of Karnataka, the Appellant falls within the jurisdiction of the State Commission under Section 86(1)(b) of the Act. The procurement of power has a direct nexus with the State of Karnataka as the supply is to the Karnataka Distribution Licensee. There is no restriction on the location of the Trading Licensees to determine the jurisdiction of the State Commission. The supply of electricity, namely, the Appellant being at a different place does not oust the jurisdiction of the State Commission under Section 86(1)(f) to adjudicate upon the dispute between the licensees. Therefore, we hold that so long as the Distribution Licensees are involved in procurement of power in the State, the State Commission alone will have the jurisdiction under Section 86(1)(f) to adjudicate upon the dispute. The 1 point is answered accordingly.

II. In the present case, the Appellant has entered into a contract with Respondent No.2 for procuring power for a trading margin. Therefore, the Appellant cannot be construed to be an agent or a broker of the disclosed principal. As held by the State Commission, the perusal of the documents produced by the Respondent prima facie indicate that the agreement of the Respondent was with the Appellant which is undertaking the responsibility of taking power from the Respondent to supply to M/s BSBS Rajdhani Power Limited. This is not a gratuitous act undertaken by the Appellant. The Appellant had two separate and distinct agreements, one agreement between the Appellant the Respondent, and another agreement was entered into between Appellant and the M/s BSES Rajdhani Power Limited. As such, there is no privity of contract between Respondent No.2 and BSES Rajdhani Power Limited.

Hence, BSES Rajdhani Power Limited cannot be construed to be a necessary party. As such the petition filed before the State Commission is maintainable”.

103. Further, in a similar issue, the Hon'ble APTEL, in *Appeal No. 31 of 2012 between PTC India Limited and Gujarat Urja Vikas Limited* passed judgment, held as follows:

“In view of the above reasons, we are to conclude that merely because the PTC, the Appellant is an inter-state Trading licensee and the licence was granted by the Central Commission it would not oust the jurisdiction of the State Commission especially when we find that cause of action had taken place within the jurisdiction of the Gujarat State Commission.

“112. Summary of our Findings

ii) The, State Commission has the jurisdiction under Section 86(l)(f) of the Act to adjudicate upon the dispute between two licensees. In this case as the PPA has a nexus with the distribution licensees of Gujarat, the State Commission has the Jurisdiction to adjudicate upon the dispute between the two licensees.

7. The Respondents (3) & (4) humbly submit that the ratio decidendi passed in the Ld. APTEL's judgments squarely apply to the instant Petition.”

104. The Respondents have submitted that in view of the above, it is submitted that the Commission does not have jurisdiction in the instant Petition.

Submissions of Petitioners through Rejoinder dated 23.04.2018 in Petition No. 203/MP/2017 and dated 25.04.2018 in Petition No. 188/MP/2017; 189/MP/2017; 190/MP/2017; 201/MP/2017; 202/MP/2017; 204/MP/2017 and dated 13.04.2018 in Petition No. 230/MP/2017 and dated 20.04.2018 in Petition No. 231/MP/2017; 232/MP/2017 & 233/MP/2017 and dated 25.05.2018 in Petition No. 33/MP/2018

105. The Petitioners have reiterated its submission filed in the petition. The same is not reproduced herewith for the sake of brevity.

106. The Petitioners have further submitted that the Commission, while recognizing the introduction of GST Law as a Change in Law event, has already initiated Suo-Moto proceedings to grant relief to affected parties, including but not limited to generating stations, distribution licensees and Transmission Service Providers. The Petitioner has placed its reliance on Petition No. 13/SM/2017 & Petition No. 01/SM/2018.

107. The Petitioners have submitted that the Petition does not suffer from non-joinder of necessary parties. The Petitioner has a contractual relationship and therefore, privity of contract only with Respondent No. 1 under the PPA. As regards the Power Sale Agreement entered into between Respondent No. 1 and the distribution licensees, the same has not been shared with the Petitioner till date and no disclosure as to the eventual off-taker/ DISCOM had been made to the Petitioner until the filing of the reply. As such, at the time of filing the instant petition, the Petitioner had no way of knowing the ultimate beneficiaries and could not have made such beneficiaries party to the present proceedings.
108. The Petitioners have submitted that Article 12 of the PPA only envisages relief to the Petitioner against Respondent No. 1 and no other party and therefore, there is no need for the Petitioner to include the DISCOMs as Respondents in the instant Change in Law petition.
109. The Petitioner has submitted that a bare perusal of Article 12 of the PPA makes it abundantly clear that the ‘enactment, coming into effect, adoption, promulgation, amendment, modification or repeal in India of any Law, including rules and regulations framed pursuant to such Law’ (“Bullet 1”) qualifies as a Change in Law event so long as such Change in Law has occurred after the Effective Date and has resulted in additional recurring/ non-recurring expenditure. Reliance placed by Respondent No. 1 on selective sub clauses of Article 12 is misplaced. Article 12.1, which specifies multiple events that would together or independently qualify as Change in Law, has to be read and given effect to holistically. Bullet 5 by itself will be applicable only if a particular tax applicable for supply of power has been introduced or taken away by the legislature. The Petitioner has placed its reliance on certain judgments passed by the Commission viz. *EMCO Energy Limited v. Maharashtra State Electricity Distribution Company Limited* – [Petition No. 8/MP/2014 | Decided on 01.02.2017]; *GMR-Kamalanga Energy Limited &Anr. v. Bihar State Power (Holding) Company Limited* [Petition No. 112/MP/2015 | Decided on 07.04.2017]; the Hon’ble Supreme Court in the matter of *Energy Watchdog v. CERC &Ors.* [Civil Appeal Nos. 5399-5400 of 2016] has clearly held that any change in domestic law that has an impact on the cost of the business of selling electricity will qualify as ‘Change in Law’
110. The Petitioners have submitted that in view of the afore-quoted judgments, the term “supply of power” has to be considered holistically to include all activities, such as purchase and

import of material and generating equipment, which enable a solar/ wind developer to ultimately generate power from its generating station. As such, the interpretation of Respondent No. 1 as regards the term 'supply of power' is incorrect.

111. The Petitioners are therefore of the view that the deletion of the phrase "setting up of solar power project" from the definition of Change in Law, as existing in the standard power purchase agreement issued by the Ministry of New & Renewable Energy, was done merely to avoid repetition, redundancy and confusion. The removal of the said phrase from the definition of "Change in Law" cannot be interpreted to mean that any adverse impact as a result of additional taxation on the activities relating to setting up of the solar power project, is to be excluded from the definition of Change in Law.
112. The Petitioner has submitted that owing to certain unforeseeable events not attributable to the Petitioner herein, the SCOD of the Petitioner's project was delayed. The said delay was caused due to delay in providing the necessary evacuation infrastructure in the solar power park by the Solar Park Implementation Agency. The aforesaid delay has been acknowledged in the fortnightly Joint Working Group meeting.
113. The Petitioners have submitted that in view of the delay in commissioning of the project for reasons completely attributable to APSPCPL, the import of solar modules and mounting structures, and procurement of balance of plant was undertaken after the introduction of GST Law. The Petitioner submits that it is not commercially viable and logical to import equipment much before the anticipated commissioning date as the equipment loses its efficiency and productivity and the developer has to bear loss due to interest payable to lenders for early procurement of the equipment, which results in an increase in the project cost. The Petitioner has placed its reliance on the judgment given by Hon'ble Appellate Tribunal for Electricity in Appeal No. 307 of 2016 by way of Judgment dated 13.12.2016 wherein it has been held that:

"13. It is fact that the solar panels cannot be allowed to be left idle, as it would result in technical degradation which would result in irreparable loss to the generators who have invested in the project.

14. Under the circumstances as discussed above, we direct that as an interim measure, the Appellants' generators shall supply electricity to the Respondent No.2 at the tariff of Rs.5.68 per Kwh, being the tariff determined by the Central Commission

for the year 2016-2017. This interim arrangement shall be without prejudice to the rights and obligations of the parties and subject to the outcome of this Appeal. We make it clear that we have not expressed any opinion on the merits of the case.”

114. The Petitioners have submitted that the information sought by Respondent No. 1 is irrelevant to the instant cause of action. The only date relevant and necessary to ascertain the applicable taxes is the date of importation of the said equipment into India. The Petitioner has submitted the Copies of Bills of Entry of the equipment imported by the EPC Contractor for the Petitioner Post GST Law, demonstrating the date of importation and the applicable taxes.

115. The Petitioners have submitted that it has engaged ACME Cleantech Solution Private Limited (“ACME Cleantech”) as its EPC Contractor for engineering, procurement and construction of its solar power project. In this regard, the Petitioner and ACME Cleantech have executed Engineering, Procurement & Construction contract dated 20.01.2017 (“EPC Contract”). The EPC Contract is split into two separate contracts comprising:

- a. **Agreement of Supply of Goods** – Under this agreement, the EPC Contractor is providing services for design, engineering, manufacture/ procurement and supply of all required materials i.e. photovoltaic modules, inverters, power and distribution transformers, junction boxes, etc. (“Supplies”) for the Project; and
- b. **Agreement of Supply of Services** – Under this agreement, the EPC Contractor is providing services in relation to installations, testing and commissioning of all the equipment i.e. photovoltaic modules, inverters, power and distribution transformers, junction boxes, transmission lines including civil works (“Works”) for the Project.

116. The Petitioners have submitted that the aforesaid contracts expressly provide that any increase in the taxes/ duties on the equipment sold or services rendered under the said contracts shall be passed on to the Petitioner. The procurements made by ACME Cleantech under the Agreement of Supply of Goods for the purpose of setting up the Project, can be classified as under:

- a. Import - typically comprising solar modules / panels, mounting structures and inverters; and

b. Domestic procurements - Balance of Plant (“BOP”) from vendors, predominantly inter-state supplies.

117. The Petitioners have submitted that in order to establish the impact of GST Law on the Petitioner’s Project, it is imperative to distinguish the envisaged procurement process from the process of procurement actually undertaken by the Petitioner pursuant to introduction of GST Law.

118. **Envisaged procurement process/ Pre GST Law** – ACME Cleantech would procure solar modules, mounting structures and inverters from sellers situated outside India. Before the entry of the goods into the territorial waters of India, the same would be sold to the Petitioner in the high seas after loading the said goods with the mandatory high sea sale margin. The said goods would thereafter be imported into India by the Petitioner in its own name. As such, upon import, the Bill of Entry for such goods would be filed by the Petitioner with the Customs department. The BOP would be procured by ACME Cleantech from various local vendors and then sold to the Petitioner, constituting an inter-state sale transaction between ACME Cleantech and the Petitioner. As regards services other than the services provided by ACME Cleantech, these would be procured by the Petitioner domestically.

119. **Actual process undertaken/ Post GST Law** – The Petitioners modified their procurement process pursuant to the introduction of GST Law with an intention to minimize its tax burden. Further to the modified procurement process, M/s ACME Cleantech imported the solar modules and inverters and procured the BOP domestically for manufacturing the solar power generating systems. Solar power generating systems manufactured by ACME Cleantech are then sold to the Petitioner. The position in regard to services continues to be the same.

120. The Petitioner has submitted that the taxes applicable on the procurements made by the Petitioner Pre and Post GST Law are as follows:

A. Duties/Taxes applicable on import of goods and services:

Duties applicable Pre GST Law	Duties applicable Post GST Law
BCD	BCD
CESS	CESS*

CVD under Section 3(1) of CTA in lieu of Central Excise. Also known as ACD	IGST As per Section 7(2) of the IGST Act, supply of goods imported in to India till they cross the customs frontier of India shall be treated as supply of goods in the course of inter-state trade or commerce.
CVD under section 3(5) of CTA in lieu of Sales tax/VAT. Also known as SAD	

* Levy of cess has been abolished w.e.f. 1st February 2018. Levy of Social Welfare Surcharge at the rate of 10 percent on BCD has been introduced w.e.f. 1st February 2018.

B. Duties/Taxes applicable on Domestic procurements

Taxes applicable Pre GST Law	Taxes applicable Post GST Law
Excise Duty	Excise Duty abolished
Cess	Excise Duty Cess abolished
VAT on intra-state sale	Simultaneous levy of CGST and SGST
CST on inter-state sale	IGST
Octroi / Entry Tax / Local body tax	Octroi / Entry Tax / Local Body Tax abolished
Works contract	Deemed as service under GST law.
	Intra-state supply: CGST and SGST
	Inter-state supply: IGST

C. Taxes applicable on provisions of service (installation services)

Taxes Applicable Pre GST Law	Taxes Applicable Post GST Law
Service Tax (including Cess)	Intra-state supply: CGST and SGST
	Inter-state supply: IGST
Works Contract (including cess)	Deemed as Service under GST
	Intra-state supply: CGST and SGST
	Inter-state supply: IGST

D. Specific exemptions available to the Petitioners/ EPC Contractor under:

(i) Customs Law – Pre and Post GST Law

Notification	Entry	Chapter Heading	Description of goods	Concessional rate
BCD				
01/2011- Customs Dated 6 th January 2011	NA	Any Chapter	All items of machinery, including prime movers, instruments, apparatus and appliances, control gear and transmission equipment, and auxiliary equipment (including those required for testing and quality control) and components, required for initial setting up of a solar power generation or solar energy production project or facility	BCD-5% ACD-Nil
24/2005- Customs dated 1st March 2005	3	8541	Tariff Heading 8541 40 11 i.e. solar cells whether or not assembled in modules or panels	BCD - Nil
SAD				
21/2011- Customs Dated 7 th March 2012	14	Any Chapter	All items of machinery including prime movers, instruments, apparatus and appliances, control gear and transmission equipment and auxiliary equipment (including those required for testing and quality control) and components required for setting up of a solar power generation or solar energy production project or facility	Nil

(ii) Central Excise – Pre GST Law

Notification	Entry	Chapter Heading	Description of goods	Concessional rate

15/2011-CE Dated 27 th February 2010	NA	Any Chapter	All items of machinery, including prime movers, instruments, apparatus and appliances, control gear and transmission equipment and auxiliary equipment (including those required for testing and quality control) and components, required for initial setting up of a solar power generation project or facility	
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121. The Petitioners have submitted that at the time of filing of the Petition in August 2017, the setting up of the Project was still underway and as such, the Petitioners were not in a position to place on record the impact of GST Law in absolute numbers as well as substantiating documents.
122. The Petitioners have submitted that detailed computation demonstrating (i) tax incidence upon Capital Cost of the Project post GST Law in absolute numbers; and (ii) tax incidence upon Capital Cost of the Project Pre GST Law.
123. The Petitioners have placed on record the invoices raised on it for supply of various services post GST Law by vendors other than the EPC Contractor. The Petitioners have clarified that they procured module mounting structures domestically. Module mounting structure (BOS Domestic) is a component of the Solar Power Generating system.
124. The Petitioners have submitted that they were entitled to concessional rate of basic customs duty prior to 30.06.2017 by way of Notification No. 01/2011-Customs dated 06.01.2011, whereby goods required for setting up of a solar power project were subject to a concessional rate of basic customs duty being 50% of the prescribed duty of 10% i.e. 5% subject to the importer producing a certificate from the Ministry of New & Renewable Energy that the said imported goods are required for the purpose of setting up of a solar power plant. Under the said Notification, the Petitioners were importing Module Mounting Structures and Power Conditioning Units.

125. The Petitioners have submitted that the dispute has been raised by certain Customs houses in respect of classification of solar power modules. The Petitioner is classifying solar modules under Chapter heading 8541 of the First Schedule to the Customs Tariff Act, 1975 and is availing the benefit of exemption from payment of basic customs duty under Notification 24/2005-Cus dated 01.03.2005. However, the Customs authorities have disputed the classification and have proposed to classify solar modules under 8501 as DC power generating system and have proposed to charge basic customs duty of 7.5% ad valorem. The Customs authorities have primarily disputed the classification on the grounds that the solar modules imported by the Petitioner are equipped with diodes which controls the flow of current from the modules to the grid. It is against this erroneous stand of the Department that the Petitioner had challenged the classification of solar modules before the Madras High Court. The Central Board of Excise and Customs (“CBEC”) recently issued an Instruction No. 08/2018-Cus dated 06.04.2018 clarifying the classification issue. It has now been clarified that if solar modules are equipped with Bypass diodes meant for protection of the modules, then the said modules would be classified under chapter heading 8541 and not 8501. The solar modules imported by the Petitioner are equipped with bypass diodes, whose function is to protect the modules especially the shaded modules. Thus, the solar modules imported by the Petitioner would be exempted. In light of the above instructions issued by CBEC, the dispute between the Customs authorities and the Petitioner stands settled.

Submissions of Petitioners in I.A. No. 30/2018; I.A. No. 31/2018; I.A. No. 32/2018; I.A. No. 33/2018; I.A. No. 34/2018; I.A. No. 35/2018; I.A. No. 36/2018; I.A. No. 37/2018; I.A. No. 38/2018; I.A. No. 39/2018; I.A. No. 40/2018 & I.A. No. 50/2018:

126. The Petitioners have filed an application for the purpose of amending the Petition filed by the Petitioner so as to claim carrying costs/ interest incurred by the Petitioner further to the ‘Change in Law’ Events detailed in the Petitions.

127. The Petitioners have submitted that the ‘economic position’ which is sought to be restored in terms of the ‘Change in Law’ Article does not limit itself to a simple correlation of increased expenditure and a corresponding compensation amount but ought to also include compensation in terms of carrying costs incurred with respect to the said ‘Change in Law’

events. It is settled law that as per the dictionary meaning "compensation" means anything given to make things equal in value i.e. anything given as an equivalent, to make amends for loss or damage. The Hon'ble Appellate Tribunal for Electricity has held that the rationale behind allowance of carrying cost is to compensate the affected party for the time value of money or the monies denied at the appropriate time and paid after a lapse of time. In view thereof, the Petitioners are entitled to interest on the differential amount due to them as a consequence of additional expenditure incurred by them on account of a certain Change in Law event.

128. In view thereof, the Petitioners are seeking the following amendment to prayer (b) of the instant Petitions in order to make an express claim qua carrying costs incurred by the Petitioner with respect to the Change in Law Events detailed in the Petitions:

Original Prayer:

"b. Direct the Respondent to make payments on account of Change in Law in terms of Article 12 of the PPA dated 09.08.2016 of amounts specified/ provided at Annexure P-2 and P-4 respectively;"

Amended Prayer:

"b. Direct the Respondent to compensate the Petitioner in terms of Article 12 of the PPA for the additional capital cost incurred/ to be incurred by it due to introduction of GST Law by way of adjustment in the quoted tariff for the recurring expenditure as well as an upfront lumpsum payment for the non-recurring expenditure, as the case may be along with the carrying cost/ interest paid by the Petitioner @ 14%."

Reply dated 21.06.2018 of Respondent No.1 (SECI) to the Application of the Petitioner seeking Amendment of the Petition No. 188/MP/2017; 189/MP/2017; 190/MP/2017; 201/MP/2017; 202/MP/2017; 203/MP/2017 & 204/MP/2017 and Reply dated 21.06.2018 of Respondent No.2 (NTPC) to the Application of the Petitioner seeking Amendment of the Petition No. 230/MP/2017; 231/MP/2017; 232/MP/2017 & 233/MP/2017:

129. The Respondents have submitted that the amendment sought for by the Petitioner in the prayer clause is not consistent with the averments in the petition filed. In the petition as filed, the Petitioner had specifically referred to Annexures P-2 and P-4 as to the claim for the compensation alleged by the Petitioner. The Petitioner has not sought for any amendment in the petition with regard to any claim other than those what is covered by

Annexures P-2 and P-4. Without any averments in the petition to the scope of claim other than those covered under Annexures P-2 and P-4, the Petitioner cannot be allowed to expand the scope by changing the prayer clause.

130. The Respondents have submitted that it has proceeded to file its reply based on the averments and statements contained in the petition as was filed by the Petitioners on 18.08.2017. In the reply filed, it had specifically taken the plea with regard to the said Annexures P-2 and P-4 and stated that the pleadings of the Petitioners are not only inconsistent but is also an attempt to mix up the imported goods with domestic procurement of goods. The statements contained in Pages 97 and 98 deals with only three imported products, namely, PV Module, Invertor (Import) and Tracker component (Import) and all other components listed in the said statement are domestic components. It has been further stated in the reply that the documents at Annexure P-4 dealing with the Module Mounting Structure has been imported in the name of M/s ACME Cleantech Solutions Private Limited and not in the name of the Petitioners.
131. The Respondents have submitted that the petitions contains pleadings which lead to the inferences that the Petitioners may not be affected by the Change in Law brought about by the 'GST Laws' which came into effect on 1.07.2017 to the extent claimed by the Petitioner. The Petitioners are now seeking to withdraw from such admissions contained in the petition by amending the prayer clause and to relate the scope of the relief generally and not with a specific reference to any particular invoice or statement. The Petitioners should not be allowed to amend the Petitions to take away the prayer clause contained in the petition with reference to Annexures P-2 and P-4 only.
132. The Respondents have submitted that after it had filed the reply on 16.03.2018, the Petitioner has proceeded to file a rejoinder on 25.04.2018. Along with the rejoinder, the Petitioners have filed for the first time voluminous documents as Annexures P-1 to P-5 to the rejoinder running into 182 pages. The Petitioners ought to have filed the petitions based on the relevant documents. The Petitioners chose not to claim any relief in respect of various equipments i.e. other than those covered by Annexures P-2 and P-4 filed with the

initial petitions and upon being pointed out in the reply, the Petitioners are seeking to improve its case. Further, as these documents have been filed only with the rejoinder, the Respondents did not have any opportunity to deal with the said documents in the reply. If the Petitioners desire to base the claim with reference to the documents filed with the rejoinder, the Petitioners are required to amend the averments in the Petitions itself to refer to such documents and the Respondents should be given an opportunity to deal with the same in the reply to be filed to the amended petition.

133. The Respondents have submitted that in the facts and circumstances mentioned herein above, the application for amendment of the petition only by incorporating/substituting prayer clause (b) without proper amendment to the contents of the petition is in any event not admissible. For this reason, the application for amendment is liable to be dismissed.

134. The Respondents have submitted that the Petitioners cannot also add prayers for carrying cost when there is no provision in the PPA dated 14.10.2016 for grant of such carrying cost. The Change in Law claim of the Petitioners are yet to be adjudicated and the amount if any due to the Petitioners have to be determined/ computed first. Only after the amount has become crystalized, the Petitioners are required to raise 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 payment within the due date of raising the supplementary invoices based on the determination of the effect of change in law, the issue of Late Payment Surcharge would arise for the period after the due date. In regard to the above the provision of Article 10.3.3 of the PPA dealing with late Payment Surcharge and definition of the 'Due Date' in Article 1 of the PPA are relevant. The due date is the 45th day after the monthly bill/supplementary bill is raised and delivered by the Petitioners to the Respondents. 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/carrying cost for the period prior to the due date. In this regard it is also relevant to mention that there is no provision in the present PPA for restitution as may be contained in some of other PPAs.

Rejoinder dated 23.07.2018 filed by Petitioners to the Reply filed by Respondents DISCOMS in Petition No. 188/MP/2017; 189/MP/2017; 190/MP/2017; 201/MP/2017; 202/MP/2017; 203/MP/2017 & 204/MP/2017 and dated 23.07.2018 in Petition No. 230/MP/2017; 231/MP/2017; 232/MP/2017 & 233/MP/2017:

135. The Petitioners have submitted that the Respondents (DISCOMS) have filed their reply to the instant petition on 19.06.2018 where they have submitted as under:

Respondent's Submission: Respondents are not necessary parties to the instant petition and as such, the rejoinder thereof amounts to misjoinder of parties.

Petitioner's Response: The Petitioners agrees with this submission of said Respondents and submits that it has a contractual relationship and therefore, privity of contract is only with Respondents under PPA. Further, the 'Change in Law' clause (Article 12.2.2) of the PPA expressly states that the acknowledgment of such 'Change in Law' event has to be made by this Commission and that the said acknowledgment shall be final and shall govern only the parties to the agreement. Therefore, Article 12 of the PPA only envisages relief to the Petitioners against Respondents under PPA and no other party. In view thereof, the Petitioners had only made Respondents party to the instant proceedings as directed by the Commission.

Respondent's Submission - The State Electricity Regulatory Commission is the appropriate commission to decide the instant dispute.

Petitioner's Response - The Petitioners denies this submission of Respondents and states that: (i) The instant project was conceived in terms of the "Guidelines for Implementation of Scheme for Setting up of 2000 MW Grid-connected Solar PV Power Projects under Batch-III" issued by the Ministry of New and Renewable Energy and the Jawaharlal Nehru National Solar Mission. The said guidelines envisage setting up of Grid-Connected Solar PV power plants of 2000 MW aggregate capacity through open competitive bidding with

Respondent No. 1 acting as the nodal agency for implementation of the aforesaid scheme. In terms of the Guidelines, the solar power generated from the projects will be procured by Respondents and sold to willing state utilities under Power Sale Agreements. It is evident that there is nothing that restricts the Respondents from selling the power procured from the solar power developers to any state utility, either within or outside the concerned state. A perusal of Recital F of the PPA makes it clear that Respondents are only acting as an intermediary who can sell the aforesaid power to any willing state utility.

136. The Petitioner has submitted that that under Section 79 of the Electricity Act, 2003, this Commission has the power to adjudicate upon disputes between generating companies and trading licensees in terms of the Commission's judgment dated 11.10.2017 in *Welspun Energy Private Limited vs. Solar Energy Corporation of India (Petition No. 95/MP/2017)*. While relying upon the provisions of the JNNSM scheme and the relevant provisions of the power purchase agreement executed between the parties, this Commission inter alia held that in a scenario where a solar power generating company enters into a power purchase agreement with a trader (i.e. Respondents) under the JNNSM scheme, this Commission would have jurisdiction to adjudicate disputes between such generating company and trading licensee. In view of the afore-stated, this Ld. Commission is the appropriate Commission to adjudicate upon the instant dispute.

Rejoinder dated 23.07.2017 to the Reply filed by Respondents to Petitioner's Application for Amendment in Petition No. 188/MP/2017; 189/MP/2017; 190/MP/2017 and dated 23.07.2018 in Petition No. 232/MP/2017; 231/MP/2017; 232/MP/2017 & 233/MP/2017:

137. The Petitioner has submitted that the instant Application was filed for the purpose of amending the Petition filed by the Petitioner so as to claim carrying costs/ interest incurred by the Petitioner as a result of the Change in Law Events detailed in the Petition.

Respondent's submission: The Petitioner, by the said amendment, is seeking to widen the

scope of the Petition.

Petitioner's Response: The Petitioner has submitted that by way of the Petition, the Petitioners are seeking (i) a declaration that GST Law qualifies as a 'Change in Law' event; and (ii) compensation for the financial impact of the 'Change in Law' event. The Petitioners by way of the Amendment Application, are only making a claim for 'Carrying Cost' on the additional capital cost incurred by it as a result of 'GST Laws'. This carrying cost forms part of the additional capital cost. The claim for carrying cost and the grounds for such a claim could not have been put forth by the Petitioner by way of its Rejoinder dated 23.04.2018 when the same had not been included in the Petition. As such, the Petitioners were left with no option but to file the Amendment Application.

Respondent's submission: The amendment sought by the Petitioner in the Prayer is inconsistent with the averments in the Petition filed.

Petitioner's Response: The Petitioners have submitted that a bare perusal of the amended Prayer as captured in the Amendment Application, makes it abundantly clear that it is exactly the same as what is being sought by way of Prayer 'b' in the Petition. The Petitioner by way of the amended Prayer is only suggesting a manner in which the Petitioner can be compensated for the additional capital cost incurred by it as a result of 'GST Laws' and seeking the carrying cost incurred by it on procuring such additional capital cost. In addition, the Petitioners are removing specific reliance on Annexures P-2 and P-4 for determination of impact of GST Law on the Petitioner. Since at the time of filing the Petition, the Petitioner were not aware of the actual impact in absolute numbers, it engaged a reputed agency to prepare a sample chart on the basis of certain assumptions and understanding of the applicable taxes to demonstrate the impact of 'GST Laws'. At the time of filing of the Petition, the Petitioners were not in a position to place on record project-specific detailed information and substantiating documents demonstrating the impact of GST Law in absolute numbers.

Additional Counter-Affidavit dated 14.08.2018 by Respondents No. 7 & 8 (TSDISCOMS) on Maintainability in Petition No. 232MP/2017; 233MP/2017 and 13/MP/2018

138. The Respondents has submitted that Solar Projects (2x10 MW) were set up by the Petitioner in Telangana State under “State Specific Bundling Scheme”, notified by the Ministry of New and Renewable Energy under the Solar Mission Phase-2, Batch-2, Tranche-1. Under the said scheme, Telangana State was allocated 400 MW Solar PV Capacity vide letter dated 5th July 2017, and the Project was to be implemented by NTPC-NVVN. The mechanism of operation of the Model is as below:

- i) The Bidding called for was State Specific, which was conducted through e-bidding inasmuch as the entire power was to be generated and supplied exclusively within the State of Telangana for intra-state transmission/supply.
- ii) The bidding was based on fixed levelized tariff.
- iii) The Solar Power Developer (SPD) submitted bids quoting a Fixed levelized tariff for the entire Project duration of 25 years.
- iv) The guidelines stipulated that *“The Solar Power developers will then be committing to sell power from their Plants to NTPC-NWN at the quoted tariff over the 25 year period”*.
- v) The guidelines further stipulated that *“once agreed, the tariff will be applicable for 25 years and cannot be changed by the State Electricity Regulatory Commission for this period”*.
- vi) As submitted above, a PPA was entered on 9th August 2016 by NTPC-NVVN with the Petitioner for purchase of 2X10 MW Capacity Solar power from the Petitioner's power plants at a fixed levelized tariff of Rs.4.67 per KWh offered by SPD and finalized through the selection process.
- vii) The PPA came into effect from 19.07.2016 (Effective date) to be valid for 25 years from Effective date.
- viii) NTPC-NVVN in turn entered a PSA (Power Sale Agreement) with TSDISCOMS on 18th June 2016 for sale of Bundled Power, the bundling is done as per the guidelines in the ratio of 2:1 (2 MW Solar with 1 MW Thermal from unallocated Capacity from

NTPC Thermal Projects), at weighted average tariff of the Solar & Thermal components plus Trading Margin of Rs. 0.07 per kWh. The Petitioner is not concerned with the bundling process.

139. The Respondents have submitted that the Petitioner's Solar power plants were set up in Telangana (Generation) and power is being supplied/sold (Supply) to TSDISCOMS at the designated STU Sub-stations in Telangana at the fixed levelized tariff discovered in the bidding process notified by MNRE, Govt. of India under the National Solar Mission (NSM) guidelines.
140. The Respondents have submitted that as the entire generation and supply of power takes place within the State of Telangana only, therefore as per the Hon'ble Supreme Court's judgment dated 11th April 2017 in C.A. No. 5399-5400 of 2016 titled "Energy Watchdog vs. CERC and others", the jurisdiction will be in the State Commission i.e. Telangana State ERC.
141. The Respondents have submitted that the Petitioner has erroneously claimed jurisdiction of this Commission on the basis that since this scheme is notified under State Specific Bundling Scheme, bundling Solar power with Thermal Power from NTPC Thermal plants across various States, it is claimed as a Composite Scheme and hence comes under the jurisdiction of this Commission. Since, both generation and sale/supply from the Petitioner's Solar Project takes place exclusively within the State of Telangana, and there is no sale of Solar power to other States, the jurisdiction shall be in the State Commission only, in terms of the above judgment.
142. The Respondents have submitted that the State Commission (TSERC) has already considered the availability of 400 MW power from the NTPC State Specific bundling scheme as proposed in the ARR (Annual Revenue Requirement) filing done by TSDISCOMS for the FY 2018-19 and has issued the Tariff Order for FY 2018-19 incorporating the same. Further, since the fixed levelized tariff was discovered in the State Specific Competitive Bidding process, the same has been considered by the Telangana State ERC under Section 63 of the Electricity Act 2003 and is reflected in the Tariff Order passed for the FY 2018-19. It is also pertinent to point out that since the fixed levelized tariff was discovered in the State specific competitive bidding process, the Central Commission has not adopted the tariff discovered

under Section 63 of the Electricity Act 2003 and as such it is clear that this Commission does not have jurisdiction to deal with the present petition. From a perusal of the petition, it is clear that the Petitioner is mainly seeking relief based on a claim on account of new tax GST levy in terms of Article - 12. 1 of the PPA (subsisting between Petitioner and NTPC), which is extracted as follows:

"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.

It is pertinent to extract the similar provision from the PSA (between NTPC & TSDISCOMS) as below:

"8. 2- Relief for Change in Law

"8.2. 1 - The Aggrieved Party shall be required to approach the Appropriate Commission for seeking approval of change in Law ... "

8.2.2 - The decision of the Appropriate 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."

143. The Respondents have submitted that perusal of the relevant clauses as set out herein above, clearly shows that there is a change in the language of the clause in the two agreements in respect of the Commission in both the Agreements (PPA & PSA). While the PPA talks about Central Commission, the PSA talks about the Appropriate Commission. Further, both the Agreements define the Appropriate Commission as follows:

" Article 1. 1 - Definitions

Appropriate Commission - shall mean the CERC referred to in sub-section (1) of Section 76 or the State ERC referred to in section 82 or the Joint ERC referred to in Section 83 of the Electricity Act 2003, as the case may be "

144. The Respondents have submitted that since the scheme has been notified as State Specific, provision has been made in the PSA to substitute the relevant/appropriate Commission as the State Commission. Even though the PPA stipulates the Central Commission as the deciding

authority in respect of Change in Law, however in terms of the Hon'ble Supreme Court's judgment cited in the foregoing para, the Composite scheme is not attracted in the present case and the jurisdiction would be in the State Commission only.

145. The Respondents have submitted that it is a settled legal proposition that jurisdiction cannot be conferred on a Court/Tribunal with the consent of the Parties, without the Act providing for the same. In view of the above submissions the Respondents have submitted that this Commission lacks the jurisdiction in terms of Section 79 of the Electricity Act 2003 and also as per the Law settled by the Hon'ble Supreme Court in the judgment cited above.

146. The Respondents have submitted that 'without prejudice' to the preliminary objections of the Answering Respondents to the maintainability of the petition, the brief submissions on merits of the petition are set out herein below:

- a) That the Bids were finalized by NTPC-NVVN on the basis of lowest Fixed levelled tariff @ Rs.4.67 per KWh, fixed for entire 25 years of the PPA (at Article-9).
- b) That PPA also provides for Taxes and duties at Article 17.9 as extracted below:

“17. 9. 1 - The SPD shall bear and promptly pay all statutory taxes, duties, levies, and cess, assessed/levied on the SPD, contractors or their employees that are required to be paid as per the Law in relation to the execution of the Agreement and for supplying power as per the terms of this agreement...”

- c) That as per above the bid levelled tariff is fixed & payable for the energy supplied during the entire PPA duration (25 years) without any escalation. In view of the above unambiguous provision, the provision for Relief under Change in law becomes redundant and hence inoperative. The Petitioner was aware of the introduction of new tax GST, which was under consultation process for the last several years and therefore the Petitioner was expected to factor in all the possible future levies while quoting, as the tariff bid was Fixed Levelled tariff, for the entire PPA tenure. If the prayer of the Petition is considered, then there would be no sanctity to Competitive Bidding Process taken up by NTPC-NVVN and the tariff discovered in the Bidding, which has been adopted by the State Commission.

d) That the 'GST law' has subsumed various indirect taxes/levies and the Petitioner has not given any basis as to how the exact impact of the GST has been worked out in the present case. In any case, the Petitioner could have only claimed the additional burden arising from the GST application i.e. the difference between the earlier tax obligation under various heads and tax obligations arising from application of GST. However, in absence of any details as to the earlier tax liabilities vis-a-vis the enhanced liability, it is highly presumptuous on the part of the Petitioner to make the impugned demand.

147. The Respondents have submitted that as such there is no merit in the claim of the Petitioner for seeking relief on account of Change in Law in terms of the PPA. Hence the Petition be dismissed as devoid of merits.

Written Submissions dated 18.09.2018 on behalf of Petitioners on the limited issue of Jurisdiction in Petition No. 188/MP/2017; 189/MP/2017 and 190/MP/2017

148. The Petitioners have submitted that their solar power plants were conceived in terms of the "Guidelines for Implementation of Scheme for Setting up of 2000 MW Grid-connected Solar PV Power Projects under Batch-III issued by the Ministry of New and Renewable Energy and the Jawaharlal Nehru National Solar Mission. The said guidelines envisage setting up of Grid-Connected Solar PV power plants of 2000 MW aggregate capacity through open competitive bidding with SECI acting as the nodal agency for implementation of the aforesaid scheme. In terms of the Phase II Batch-III Guidelines, the solar power generated from the projects will be procured by SECI and sold to willing state utilities under power sale agreements. Further, in terms of provisions of the Phase II Batch-III Guidelines, the project should be designed for interconnection with the transmission network of STU/ CTU/ pooling sub-station of solar park or any other transmission utility at voltage level of 33kV or above. A perusal of Recital F of the SECI PPAs makes it clear that Respondents (SECI) is only acting as an intermediary which can sell power off-taken from the Petitioners to any willing state utility.

149. The Petitioners have placed their reliance on Commission's Judgment dated 11.10.2017 in *M/s Welspun Energy Private Limited vs. Solar Energy Corporation of India (Petition No. 95*

MP 2017). While relying upon the provisions of the JNNSM scheme and the relevant provisions of the power purchase agreement executed between the parties, this Ld. Commission inter alia held that in a scenario where a solar power generating company enters into a power purchase agreement with a trader under the JNNSM scheme, Commission would have jurisdiction to adjudicate upon disputes between such generating company and trading licensee. In view thereof, this Commission is the appropriate commission to adjudicate upon the instant dispute.

Reply dated 20.08.2018 on behalf of Respondents No. 5 & 6 (A.P. DISCOMS) in Petition No. 188/MP/2017; 189/MP/2017; 190/MP/2017 and 47/MP/2018

150. The Respondents DISCOMS have submitted that they have no privity of contract with Petitioners. The Respondents DISCOMS have entered into Power Sale Agreement (PSA) with other Respondents for supply of Solar Power for a period of 25 years. Other Respondents have entered into a PPA with the Petitioners who were selected through the "e-bidding process based on the Guidelines issued by MNRE, Government of India for selection of Grid-connected Solar-PV power project under Phase-II, Batch-III of the Jawaharlal Nehru National Solar Mission (JNNSM) with viability gap funding support from National Clean Energy Fund. The tender documents issued by other Respondents clearly demonstrate that it is a 'State Specific Project' and bidding is based on 'fixed levellised tariff'. Accordingly the Petitioners are committed to sell the power from their plants to Respondents at quoted tariff which is fixed over a period of 25 years and sign PPA and VGF Securitization Agreements for purchase of Solar Power. As the generation and supply of power takes place within the State of Andhra Pradesh, therefore as per the Hon'ble Supreme Court judgment dated 11.04.2017 in CA No.5399-5400 of 2016 (Energy Watchdog vs. CERC and others), the jurisdiction will be with the State Commission i.e. Andhra Pradesh State Regulatory Commission.
151. The Respondent DISCOMS have submitted that the proposal for procurement and adoption of tariff under section 63 of Electricity Act 2003 for solar power to be set up by Ananthapuram Ultra Mega Solar Park at Ananthapuram is pending before Andhra Pradesh

State Electricity Regulatory Commission. APERC has already taken into consideration of solar power availability in the ARR (Annual Revenue Requirement) for the FY 2018-19. This Commission has not adopted the tariff discovered under section 63 of Electricity Act 2003. It is specifically agreed in the said agreement that any effect due to change of law is suffered by either of the parties to the agreement, the aggrieved party shall approach the Andhra Pradesh State Electricity Regulatory Commission (APERC) for appropriate orders. In view of the above submissions, this Commission lacks jurisdiction in terms of the Electricity Act 2003 provisions (under Section 79) and also as per the Law settled by the Hon'ble Supreme Court in the judgment cited above.

152. The Respondent DISCOMS have submitted that as per the Article 9 of the PPA entered by the Petitioner and other Respondents, the Petitioner shall be entitled to receive the tariff of Rs.4.43 per kWh fixed for the entire term of this Agreement. The extract of the Article 17.9 of the PPA is as follows:

“ 17.9 Taxes and Duties

17.9.1 the SPD shall bear and promptly pay all statutory taxes, duties, levies and cess, assessed/levied on the SPD, contractors or their employees that are required to be paid by the SPD as per the Law in relation to the execution of the Agreement and for supplying power as per the terms of this Agreement.”

153. From the above, it is clearly evident that the tariff is fixed and the same is payable for entire duration of the PPA and Petitioners shall bear all the statutory taxes, duties levies etc. In view of the unambiguous provision, the provision for Relief under ‘Change in law’ becomes redundant and hence inoperative. GST came into force on 01.07.2017 and the notification No.50/17 customs dated 30.06.2017 was effective only from 30.06.2017/01.07.2017. As per the provisions in the PPA, the Petitioner is required to complete and commission the project by 16.10.2017. The Petitioner was, therefore required to import the necessary plant and equipment for installation at site of power project in Andhra Pradesh much prior to the scheduled commissioning date and similarly the Petitioner is required to get the clearance of the goods imported from the port of importation and from the custom authorities. As such the claim made by the Petitioner is

not tenable.

154. The Respondent DISCOMS has further submitted that the Petitioner was aware of the introduction of new tax GST which was under consultation process for the last several years and therefore they were required either to import the necessary plant and equipment for installation at site of power project in Andhra Pradesh before implementation of GST i.e. 01.07.2017 in order to Commission the Project as per the time line fixed on 16.10.2017 or the Petitioner is expected to factor in all the possible future levies while quoting, as the tariff bidden was fixed levillised tariff for the entire PPA tenure. APDISCOMs are absolutely not liable to bear the adverse effect of GST which came into effect subsequent to the PSA. The SPD has agreed to indemnify SECI in the Agreement between SECI and the SPD as under:

“Article 17.9 Taxes and Duties

17.9.1 The SPD shall bear and promptly pay all statutory taxes, duties, levies and cess, assessed/levied on the SPD, contractors or their employees that are required to be paid by the SPD as per the law in relation to the execution of the Agreement and for supplying power as per the terms of this Agreement.

17.9.2 SECI shall be indemnified and held harmless by the SPD against any claims that may be made against SECI in relation to the matters set out in Article 17.9.1.

17.9.3 SECI shall not be liable for any payment of, taxes, duties, levies, cess whatsoever for discharging any obligation of the SPD by SECI on behalf of SPD.

This agreement between SECI and SPD absolves SECI from any liability relating to taxes and duties. When SECI as absolved from any liability by the SPD, respondent 2 and 3 who have an agreement with SECI, need not be liable to taxes and duties levied on SPD.”

155. Article 14.1.2 of the agreement between SECI and SPD is extracted hereunder:

“SECI shall call the Buying Utilities to indemnify, defend and hold the SPD harmless against:

- a) any and all 3rd party claims against the speedy, for any loss of or damage to property of such 3rd party, or death or injury to such 3rd party, arising out of a breach by Buying Utilities of any of their obligations under this agreement; and*
- b) any and all losses, damages, costs and expenses including legal costs, fines, penalties and interest ("indemnifiable losses") actually suffered or incurred by the SPD from 3rd party claims arising by reason of a breach by Buying Utilities of any of its obligations. SECI shall incorporate appropriate covenants in the PSA for the above obligation of Buying Utilities. Insofar as indemnity to SPD is concerned,*

Buying Utilities shall be the indemnifying party and not SECI.”

156. The Respondents DISCOMS have submitted that the above clause in the agreement makes it very clear as to what are the liabilities of other Respondents. There is no mention of any taxes, levies or duties in the said clause. In view of the terms agreed between SECI and the SPD there is no liability to pay any revised tax or duty or cess for the term of agreement between SECI and the Buying Utility.

157. The Respondents DISCOMS have submitted that Article 12 of the PPA does not open with a non-obstante clause so as to nullify the effect of order applicable of Article 14.1.2 and Article 17.9 of the said agreement. It is pertinent to note that contracts between parties are to be read and understood on their plain language to know the intention of the parties to the contract. The Respondents DISCOMS have placed the reliance on a three Judge bench of Hon'ble Supreme Court in *Bharat Aluminum Company versus Kaiser Aluminum Technical Services Inc. [(2016) 4 SCC 126]* in which it was held that :

“Approach in analysing terms of agreement should be straight and plain and at the same time cohesive and logical. In interpreting documents executed by laymen, intention alone of the executor is relevant. In a contract executed between two parties, court cannot adopt the approach of interpreting a statute. Terms of the contract will have to be understood in the way parties wanted and intended them to be, particularly in agreements of arbitration where party autonomy is Supreme apart from playing or grammatical meaning of expressions and use of expressions at proper places in the agreement.”

158. The Respondent DISCOMS have submitted that applying the above law settled by the Hon'ble Supreme Court to the facts of the present case, Article 12, Article 14.1.2 and 17.9 of the PPA should be read straight, plain, cohesively and logically; giving meaning and effect to both the Articles of the PPA. If the SPD claims relief under Article 12 of the PPA then it is bound to give effect to the provisions contained in Article 14.1.2 and 17.9 of the PPA and cannot absolve itself from the obligation cast under Article 14.1.2 and 17.9 of the PPA.

Written Submissions dated 18.09.2018 on behalf of Petitioners in the Petition No. 188/MP/2017; 189/MP/2017; 190/MP/2017 and dated 17.09.2018 in Petition No.

201/MP/2017; 204/MP/2017; 230/MP/2017; 231/MP/2017; 232/MP/2017 and 233/MP/2017 dated 30.09.2018 in Petition No. 13/MP/2018;

159. The Petitioners have submitted that being SPVs of Acme Solar Holdings Limited, they have filed Petitions under Section 79 Electricity Act, 2003 for approval of 'Change in Law' and consequential relief to compensate for the increase in capital cost due to introduction of the 'GST laws'. The relief is being sought in terms of Article 12 of PPAs executed between the Petitioners and Respondents (SECI/NTPC) in the aforesaid Petitions. This Commission heard the arguments of parties to the captioned Petitions on 30.08.2018. Subsequent thereto, the Petitioners are filing the Written Submissions to put forth a summary of their arguments.
160. The Petitioners have submitted that introduction of 'GST Laws' constitutes Change in Law under Article 12 of the PPAs. Article 12 is reproduced herein below:

“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/nonrecurring 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 change in tax or introduction of any tax made applicable for supply of power by the SPD as per the terms of this Agreement.
but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the SPD, or (it) 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.

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.”

161. The Petitioners have submitted that a bare perusal of the ‘Change in Law’ clause makes it abundantly clear that for an event to qualify as 'Change in Law', the following criteria have to be met:

- i. it should be an event as specified in any one of the Bullets 1-5 of Article 12;
- ii. the event should have taken place after the Effective Date, as defined in the respective SECI PPAs; and
- iii. the event should result in an additional recurring/non-recurring expenditure by the Solar Power Developer ("SPD") or any income to the SPD.

162. The Petitioners have submitted that as regards the first criterion, the ‘GST Laws’ were brought into force with effect from 01.07.2017, pursuant to the Constitution (One Hundred and First Amendment) Act, 2016 which confers concurrent powers on both Union and States to make laws with respect to Goods & Services and enables both the Union and State Governments to levy and collect Goods and Services Tax on a single taxable event (‘101st Amendment’). There can therefore, be no doubt that ‘GST Law’ is an event as specified in Bullet I of Article 12, i.e. *'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'*. As regards the second criterion, the GST Law was enacted by the GoI on 01.07.2017 whereas the Effective Date of all PPAs falls within the period August 2016 and September 2016. As such, the event, being enactment of GST Law, has taken place after the Effective Date as specified in the PPAs. As regards the third criterion, GST Law brought about fundamental structural changes in the prevailing tax regime in the country. It either subsumed or replaced or abolished various taxes and duties which were levied by the Central and State Governments on goods and services prior to GST Law. Further, recognizing the importance of solar power as a clean and green source of energy and to promote generation of power from a renewable source, GoI had granted various exemptions to the solar power industry. However, pursuant to the introduction of GST Law, the aforesaid exemptions were rescinded and solar power was placed under the 5% to 18% tax bracket as per the GST rate schedule for goods and services.

Such a steep increase in taxes from zero upto 18% increased the capital cost of the Petitioners and all other solar power developers significantly and has resulted in additional nonrecurring and recurring expenditure for the Petitioners, which had not been factored into the quoted tariff. In view of the aforesaid, the enactment of GST Law clearly qualifies as ‘Change in Law’ and entitles the Petitioners to relief under Article 12 of the SECI PPAs.

163. **GST Law is covered by Article 12.1 (Bullet 1) and not by Article 12.1 (Bullet 5), as argued by the Respondent:** SECI has argued that introduction of tax is covered by Article 12.1 (Bullet 5) and since, GST Law is not levied on supply of power but on purchase of input material for construction of power plant, it does not qualify as Change in Law. The Petitioners have denied the argument of SECI as incorrect and state as follows:

- (i) It is a settled principle of construction of a contract that a contract must be read as a whole, and the intention of the parties must be gathered from the language used in the contract by adopting harmonious construction of all the clauses contained therein. The specific exclusion in respect of ‘any change in any withholding tax on income or dividends distributed to the shareholders of the SPD’ provided at the end of Article 12.1.1 qualifies all five events specified in the Bullets 1 to 5 of Article 12.1.1. Therefore, the occurrence of an event in respect of ‘tax’ will qualify as Change in Law so long as the event meets the description provided in Bullets 1 to 5 of Article 12.1.1 and not just Bullet 5. As such, in a scenario where a new law has been enacted for overhaul of the entire tax regime of the country and whereby the Government has introduced/subsumed/replaced/abolished multiple taxes, such an enactment even though in regard to tax will be covered by Article 12.1.1 (Bullet 1). In this regard, the Petitioners have placed reliance on following judgments: *Bank of India & Anr. v. K. Mohandas & Ors.* [2009 5 SCC 313]; *Union of India v. Raman Iron Foundry* [1974 2 SCC 231].
- (ii) In any case, assuming arguendo that introduction of GST Law falls under Article 12.1.1 (Bullet 5), the Petitioners state that they are still entitled to relief under Article 12.2 of the SECI PPAs in view of the following:

- a. The Appellate Tribunal for Electricity in *Adani Power Rajasthan Limited v. Rajasthan Electricity Regulatory Commission & Ors.* [Appeal No. 119 of 2016 | Decided on 14.08.2018] wherein the events specified in the Change in Law clause were identical to the events specified in Article 12.1.1 of the PPAs and a similar argument had been made by the DISCOMS as regards interpretation of the term 'supply', held that "*any change in tax/levies/ duties etc. or application of new tax/levies/ duties etc. on supply of power covers the taxes on inputs required for such generation and supply of power to the DISCOMS*"; and
- b. This Commission has also previously interpreted the term 'supply of power' to include the capital cost and operating cost of the project which includes cost of materials, equipment, services for installation of the project and production and supply of electricity, and, taxes, duties and levies on such equipment, materials, services. In this regard, the Petitioners have placed reliance on *EMCO Energy Limited v. Maharashtra State Electricity Distribution Company Limited* [Petition No. 8/MP/2014 | Decided on 01.02.2017] and *GMR-Kamalanga Energy Limited & Anr. v. Bihar State Power (Holding) Company Limited* [Petition No. 112 MP 2015 Decided on 07.04.2017].
- (iii) It is settled law that a construction of contract which results in any part of the contract being rendered otiose must be avoided. A bare perusal of Article 12 of the PPAs makes it abundantly clear that the parties to the PPAs intended to secure the interest of the solar power developers in so far as a 'Change in Law' is concerned is by allowing the SPD to recover the impact of the Change in Law through this Commission. This is based on the settled economic position that the risk associated with a Change in Law cannot be absorbed by the Petitioners since it is locked in a long-term off-take agreement i.e. the PPAs, and therefore, does not have any avenue or opportunity to spread this risk to other buyers. Further, it is implicitly clear that a Change in Law risk is a risk that cannot be foreseen or mitigated by the Petitioners. In view thereof, interpreting Article 12.1 (Bullet 5) to mean that enactment of a new tax law such as introduction of GST Law which is neither '*any change in tax*' nor '*introduction of any tax made applicable for supply of power by the SPD*' will not qualify as Change in Law, will render Article 12.1

(Bullet 1) otiose. When Article 12 of the PPAs clearly and unambiguously provides for relief for Change in Law and acknowledges the enactment of a law as a Change in Law event, Article 12 must be harmoniously interpreted to allow introduction of GST Law as a Change in Law event. In this regard, the Petitioners have placed reliance on *Dr. Arun Snbrao Prabhu v. Rizvi Brothers & Ors.* [2009 6 Bom CR 745].

“16. While interpreting the words of a contract, the effort of the Court must be to read all the provisions harmoniously. A construction which results in any part of the contract being rendered otiose must be avoided.”

Recommendations for Quantification

164. The Petitioners have submitted for the consideration of this Commission, regarding the principles and methodology that may be adopted in respect of quantification of the impact of Change in Law.

Approach- Since the relief for Change in Law is contractual, the quantification should be done on a case to case basis. However, this Commission may set out the principles, framework, and assumptions for such case to case quantification, and the same should not be applied on a normative or generic basis, but should be applied only where such framework, principles and assumptions actually exist as a matter of fact. A normative or generic approach cannot be adopted at this stage since that may amount to questioning in hind sight, the investment decisions that were taken by the SPD, which would be contrary to the explicit intention and methodology specified in the Change in Law clause. In this regard, investment decisions made by developers such as (i) imported versus domestic modules; (ii) procurement through EPC vs. procurement by developer; and (iii) internalisation of O&M vs. outsourcing of O&M, should not be questioned at this stage. The economic and regulatory principle for such an approach is that the Petitioner’s projects have been set up pursuant to competitive bidding and the investors have worked out the most efficient and cost-effective structure to win the bids. Since the benefit of this structure in the form of lower tariff has already been passed to the off-takers, it is not now open to anyone to question the developers' investment and structuring decisions in hindsight.

The Petitioners have submitted that the Commission could compare the pre-GST tax regime with the post-GST regime of taxes to arrive at the methodology for formulating and determining the incremental cost impact due to the new GST Law. To determine increase in percentage terms, this Ld. Commission can look at the actual numbers or even take a normative number of Rs. 100 to arrive at percentage increase. Further, this Commission should specify the cost of components of a solar power plant such as modules, modules mounting structures, inverters, cables, meters, land, etc. as a percentage of the total project cost ('TPC'), for example Modules - 65% to 70%, BOS imported - 7 to 10%, BOS domestic - 14% to 17%, Service - 9% to 10%. The TPC as certified by the statutory auditor may be taken and the component wise break up of this TPC for determining the applicability of the applicable pre and post GST taxes, may be taken on a normative basis. For example, if the TPC as certified by the statutory auditor is 100, then the component wise break up on percentage basis, could be as follows:

S. No.	COMPONENT	PERCENTAGE OF TPC
1.	Module	65% - 70%
2.	BOS Imported	7%-10%
3.	BOS Domestic	14%-17%
4.	Services	9%-10%

Thereafter the actual incidence of pre-GST and post-GST array of taxes should be applied, as applicable, to the aforesaid break up of cost components.

Verification - The SPD will have to submit a statutory auditor's certificate for verification of the TPC.

Compensation Methodology - The Petitioners submit that since the PPAs are silent on the compensation methodology, the discretion to formulate the same is with this Ld. Commission. The compensation can be made in either one of the following manners:

- (i) One-time upfront lumpsum payment: This is the Petitioners' preferred option and is also favourable to the off-takers, as no carrying cost will have to paid on the upfront payment.

(ii) Amortisation of the impact over a shorter finite period: If the Commission does not deem it fit to allow option (i) above, it could alternatively amortise the impact. However, it is humbly submitted that such amortisation should be done over a reasonable finite period such as five (5) to seven (7) years instead of amortising the impact over the entire balance period of the PPA. Such an approach will also reduce the burden of carrying cost that the procurer has to bear in respect of the amortisation period.

Carrying Cost:

165. The Petitioners have submitted that carrying cost will have to be paid for the following two periods:

- Period 1 - from when the Petitioners incurred the additional cost on account of introduction of GST Law till the approval of Change in Law by this Commission; and
- Period 2 - from the date of approval of Change in Law over the period of amortisation, in the scenario this Commission does not allow compensation by way of one-time upfront lumpsum payment.

166. The Petitioners have submitted that as regards Period 2, they are entitled to carrying cost as a matter of right. As regards Period 1, the Petitioners respectfully state that they recognise the decision of APTEL by way of its judgments in *(a) Adani Case; and (b) Adani Power Ltd. Vs. Central Electricity Regulatory Commission and Others [Appeal No. 210 of 2017 | Decided on 13.04.2018]*, that carrying cost will not be allowed unless the power purchase agreement has a specific provision for restoration to the same economic position as if 'Change in Law' has not occurred. Therefore, the principle adopted in the above judgments was that in the absence of an express provision providing for restitution, the affected party would not be entitled to carrying cost. It is respectfully submitted that the correct legal position is converse, i.e. unless there is an express provision prohibiting the grant of restitution, the affected party

would be legally entitled to be restored to the same economic position that it would have been but for the Change in Law event. The following propositions may be considered.

- There is an agreement for payment of carrying cost for Period 1 between the parties;
or
- Alternatively, there is no agreement for payment of carrying cost for Period 1 between the parties.

167. The Petitioners have submitted that in either scenario, they are entitled to carrying cost for Period 1, albeit on different legal principles. In the first scenario, it is submitted that there is an implied term in the PPA for payment of carrying cost for Period 1. In the second scenario, the Petitioners are entitled to compensation of carrying cost on the principles of *quantum meruit*, as statutorily enshrined in Section 70 of Indian Contract Act, 1872 (“Section 70”). These legal principles are explained in greater detail below:

- i. That there is an implied contract with regard to carrying cost and/or interest between the parties: The very purpose of a Change in Law clause is to restore the affected party to the same economic position as if Change in Law had not occurred i.e. based on the principles of restitution. Accordingly, award of carrying cost on the additional cost incurred on account of Change in Law is implicit in SECI’s PPAs. The 'economic position' which is sought to be restored in terms of the Change in Law clause does not limit itself to a simple correlation of increased expenditure and a corresponding compensation amount but ought to also include compensation in terms of carrying costs incurred with respect to the said Change in Law Events. This is also supported by the principle of business efficacy, as elaborately discussed and expounded in *Nabha Power Limited v. Punjab State Power Corporation Limited and Anr*, [Civil Appeal No. 179 of 2017]. This principle provides that a contractual term can be implied in light of the express terms of the contract, commercial common sense and the facts known to both parties at the time of entering into the contract. Further, a Change in Law clause being a restitution clause, equity demands that the Petitioners' should be compensated for *all necessary and reasonable extra costs* including *carrying cost and/or interest* on the additional cost incurred on account of Change in Law. In this regard, the Petitioners'

would like to place reliance on *Sumitomo Heavy Industries Limited v. ONGC Limited* [(2010) 1J SCC296J.

- ii. That there is no contract in regard to carrying cost and/or interest between the parties: Without prejudice to the above submission, the Petitioners submit that even in the alternative scenario, they would be entitled to carrying cost under the principles of *quantum meruit*. Assuming the alternative argument that there is no implied clause in the SECI PPAs for payment of carrying cost and/or interest, the principles of *quantum meruit* as statutorily enshrined in Section 70 will be attracted and the Petitioners would be entitled to carrying cost for this Period 1. Section 70 provides that where a person lawfully does anything for another person and does not do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered. In view thereof, since the Petitioners have not incurred additional capital cost on account of introduction of GST Law gratuitously, the Petitioners are entitled to compensation for the same and such compensation has to be for all reasonable costs, including carrying cost. In this regard, the Petitioners' would like to place reliance on *Piloo Dhunjishaw Sidhwa v. Municipal Corporation of the City of Poona* [(1970) 1 SCC 213], the relevant extracts of which are reproduced herein below:

“10. In our view the High Court was in error in holding that the plaintiff is entitled not to the invoice value of the goods, but only to "the fair price" of the goods. Under Section 70 of the Contract Act, a person lawfully delivering goods to another, and not intending to do so gratuitously, is entitled to demand that the goods delivered shall be returned, or that compensation for the goods shall be made. Compensation would normally be the market price of the goods. By refusing to return the goods, the person to whom the goods have been delivered cannot improve his position and seek to pay less than the market-value of the goods. The High Court of Lahore in Secretary of State v. G. T. Sarin and Company [ILK II Lali 375] held that a person without an enforceable contract in his favour supplying goods to a Government Department is entitled to a money equivalent of the goods delivered assessed at the market rate prevailing on the date on which the supplies were made.

12. The plaintiff is also entitled to interest at the rate of 6 per cent per annum from "the date one month after the date of supply" till the date of institution of the suit, and at 6 per cent on judgment from the date of the suit till payment.”

Operation and Maintenance ('O&M') Activities and Costs

168. The Petitioners have submitted that they are entitled to compensation for the additional recurring expenditure to be made on O&M on account of introduction of GST Law. The following activities constitute O&M and there is no other significant activity covered by O&M for a solar plant:

- a. Site Security;
- b. Consumables and breakdown spares;
- c. Annual Maintenance Contract ("AMC"); and
- d. Module cleaning - labour and water supply.

169. The Petitioners have submitted that all of the aforestated activities have been outsourced to agencies who have experience in providing the said services in the most effective and cost-efficient manner. SECI has argued that the choice to outsource is that of the Petitioners and the Petitioners could have internalised these activities, in which case there would have been no GST impact. Therefore, the GST impact on outsourced activities is on account of the SPD's own convenience and choice and since there was an alternative to internalise these services, the burden of such GST impact has to be borne by the SPD itself. The Petitioners have submitted that this argument of Respondents (SECI) is baseless for the reason that if the Petitioners had internalised the cost of the aforestated constituents of O&M, the same would have to be factored into the quoted tariff. This would have inevitably resulted in a higher tariff. The Petitioners submit that internalising O&M activities would have increased the financial burden on the Petitioners for the following reasons:

- a. Site Security - The Petitioners submit that solar power projects are often isolated, installed in remote, sparsely populated regions and over large geographical areas (4 acre/MW). Site security/ surveillance entails hiring trained professional guards and supplying these guards with top end equipment such as walkie-talkies, transport, etc. Internalising site security would have resulted in an additional financial burden on the Petitioners, which would have reflected in a higher tariff.

- b. Consumables and breakdown spares - Since the consumables and breakdown spares are procured from original equipment manufacturers ("OEM") only, the Petitioners cannot manufacture the same.
- c. Annual Maintenance Contract - AMC is provided by the OEM and cannot be internalised.
- d. Module cleaning –
 - (i) Labour - The solar modules have to be washed occasionally to maintain efficiency. If the Petitioners had internalised the hiring of labour for the said activity, an entire army of labourers would have to be hired and paid for this activity alone. This would result in a higher cost compared to outsourcing this service to an agency that provides cleaning services to solar power developers.
 - (ii) Water supply - Whether internalised or outsourced, the Petitioners are required to pay GST on the same.

170. The Petitioners have submitted that they are and will be paying additional cost to these agencies due to increase in taxes on account of the introduction of GST Law for the life of their respective projects. As such, the Petitioners are entitled to compensation for this additional recurring expenditure.

171. **Components of the carrying cost: Interest on debt and Return on Equity /promoter contribution** -The Petitioners respectfully submit that they are entitled to carrying cost on the additional cost incurred on account of introduction of GST Law as follows:

- i) **For Period 1** - The additional cost incurred on account of introduction of GST Law by the Petitioners should be treated as having been funded through equity. The lenders refuse to finance this additional cost overrun on account of introduction of GST Law, since it was a result of an unpredicted event. Therefore, subject to verification of

extent of equity and/or debt, the Petitioners are entitled to Return on Equity ('RoE') on the entire additional cost, to be recovered during Period 2.

- ii) **For Period 2** - Till such time the additional cost is refinanced by the lenders pursuant to approval of Change in Law by this Ld. Commission, the Petitioners should be allowed RoE on the additional cost since the assumption remains same that the additional cost has been financed by equity. Alternatively, the Commission can use its own regulations being the CERC (Terms and Conditions for tariff determination from renewable energy sources) Regulations, 2017 which provide for a debt equity ratio of 70:30 for the purpose of determination of generic tariff for renewable energy projects and allow the Petitioners interest at the current market rate (SBI PLR + 200 basis points) and RoE at 14% respectively. The Petitioners further submit that the carrying cost should be calculated on post tax basis, as per CERC Regulations, 2017.

172. Further, the claims made by the Petitioners are on the basis of GST payable @5% on Power Generating Systems. In any eventuality of a different interpretation and/or adjudication thereof by any competent authority, court, forum, tribunal etc. which results in an increase in the tax payable by the Petitioners on account of introduction of GST Law, the Petitioners would be entitled to compensation of such additional cost and reserve their right to claim the same.

173. In view of the above submissions of the Petitioners, it is most humbly prayed that introduction of GST Law be approved as Change in Law and the relief sought by the Petitioners be granted by this Commission.

Written Submissions dated 17.09.2018 on behalf of the Petitioner in petition no. 33/MP/2018

174. The Petitioner has submitted that the Commission heard the arguments of parties in the captioned Petitions on 30.08.2018. Subsequent thereto, the Petitioner is filing the instant Written Submissions to put forth a summary of its arguments.

175. The Petitioner has submitted that Change in Law is defined as the occurrence in India of any of the events specified in the sub-clauses a to e of the definition of ‘Change in Law’, provided that the event has occurred subsequent to the Proposal Due Date (as defined in the RFP) and has an impact on the Unit or on any of the rights and obligations of the Parties under any of the Project Agreements (as defined in the PPAs).
176. The Petitioner respectfully submits that CGST, IGST, UTGST and SGST, collectively ‘GST Law’, are Applicable Laws as defined in clause (e) above (i.e. plural and therefore covering more than one Act), were enacted pursuant to the Constitution (122nd Amendment) Bill, 2014. The GST Law brought about fundamental structural changes in the prevailing tax regime in the country. It either subsumed or replaced or abolished various taxes and duties which were levied by the Central and State Governments on goods and services prior to GST Law and has in the process, resulted in a significant change in the incidence of tax liability on the Petitioner. The enactment of GST Law is clearly contemplated in sub-clause (e) to the definition of Change in Law in the PPAs. In view thereof, introduction of GST Law constitutes an event of Change in Law under the PPAs.
177. The Petitioner has submitted that Article 17 of the PPAs deals with Change in Law and Article 17.1 thereunder provides for consequences of Change in Law. While laying down the process for notification of occurrence of Change in Law and the approach of the parties thereto in Article 17.1(a) and (b), the PPAs by way of Article 17.1(c) lay down a threshold limit to the extent of which no relief can be claimed by the affected party. If the additional capital expenditure, interest and associated costs exceed the Threshold Limit, then the Petitioner shall approach the Appropriate Commission to seek approval of such Change in Law and the consequent impact on the Applicable Tariff. The said article also clarifies that the threshold limit shall apply to each event constituting a Change in Law and shall not be applied on a cumulative basis. Article 17.1(c) of PPA 1 is reproduced herein below:

“(c) If the Parties have complied with Article 17.1(b) or upon elapse of the time specified in the Article 17.1 (b) and if the SPD is required to incur any additional costs, including additional capital expenditure due to a Change in Law the aggregate financial effect of which, over the remaining Term of the PPA, is up to INR 20,000,000 (twenty million) (Threshold Limit), then the SPD shall obtain funding for such additional costs, including capital expenditure, at its cost and expense. The SPD shall bear all additional capital expenditure and/or interest and additional costs

incurred to obtain any funding to the extent of the Threshold Limit.

For the avoidance of doubt, it is clarified that the Threshold Limit shall apply to each event constituting a Change in Law and shall not be applied on a cumulative basis.

If the additional capital expenditure, interest and associated costs that the SPD may incur as a result of the Change in Law exceeds the Threshold Limit, then the Procurer or the SPD shall approach the Appropriate Commission to seek approval of such Change in Law and the consequent impact on the Applicable Tariff.”

178. The Petitioner has submitted on the argument of the Respondents that the Petitioner is required to demonstrate that the additional cost incurred by the Petitioner exceeds the Threshold Limit against each incidence of taxation. A bare perusal of the definition of Change in Law and Article 17.1(c), reproduced above, makes it abundantly clear that the Threshold Limit as specified in the PPAs applies to *each event* constituting a Change in Law and not each incidence of taxation, as argued by MPPMCL and DMRC.
179. The Petitioner has submitted that the enactment of GST Law through the framework of the multiple Applicable Laws, pursuant to the Constitution (122nd Amendment) Bill, 2014, is clearly contemplated in sub-clause (e) to the definition of Change in Law in the PPAs and therefore, constitutes one single event under the definition of Change in Law.
180. The Petitioner has submitted that it is required to pay CGST and SGST to its EPC Contractor and the impact of both CGST and SGST on the Petitioner has crossed the Threshold Limit of INR 2,00,00,000/- respectively. The incremental impact of GST Law on the Project is to the tune of INR 54.56 Crore i.e. above the Threshold Limit of INR 2 Crore and the Petitioner is entitled to relief for the entire amount in terms of Article 17.1 (c) of the PPAs.
181. The Petitioner has submitted that a bare perusal of Article 17.1 (c) of the PPAs makes it abundantly clear that the Petitioner has to obtain funding for the additional cost including capital expenditure incurred by it as a result of Change in Law.
182. The Petitioner has submitted that in view of the aforesaid, the Petitioner is entitled to compensation for the additional cost to the tune of INR 54.56 Crore incurred by it as a result of introduction of the GST Law.

183. The Petitioner has also made submissions regarding the principles and methodology that may be adopted in respect of quantification of the impact of Change in Law, Carrying Cost, Operation and Maintenance (“O&M”), Components of the carrying cost and Interest on debt and Return on Equity/promoter contribution as in written (since the same is already mentioned in ‘written submissions’ in the other Petitions above the same is not reproduced here again for the sake of brevity).

Rejoinder dated 24.08.2018 in Petition No. 13/MP/2018 and 47/MP/2018 and Rejoinder & Written Submissions on behalf of the Petitioner in Petition no. 34/MP/2018

184. The Petitioner has submitted that the captioned Petition was listed for final arguments on 30.08.2018 before the Commission. Pursuant to the hearing, the Commission was pleased to allow the parties to file written submissions. Accordingly, the Petitioner is filing these issue-wise Written Submissions:

Re: Respondents contention that impact of GST Laws is not covered by the Change in Law clause in the PPAs

185. The Petitioner has submitted that the term “supply of power” has been widely interpreted to cover the impact on capital cost and operating cost of the project, including the cost of materials, equipment, services for installation of the project and production and supply of electricity as well as taxes, duties and levies on such equipment, materials and services. In this regard, the Petitioner has placed its reliance on an Order dated 01.02.2017 passed by this Hon’ble Commission in Petition No. 8/MP/2014 titled *Emco Energy Limited v. Maharashtra State Electricity Distribution Company Limited and Anr.*, wherein this Hon’ble Commission held as under:

“33. Sub-clause under Article 10.1.1 provides that “any change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of the agreement” is covered under change in law...

... As per the terms of the RfPs, the bidders are required to quote an all-inclusive tariff for a period of 25 years notwithstanding source and technology. The quoted tariff shall include the capital cost and operating cost including taxes, duties, levies and duties. Further all costs involved in procurement of inputs for supply of power including statutory taxes, duties, levies thereof shall be reflected in quoted tariff. It is clear from the above that the capital cost and operating cost of the project which include cost of materials, equipment, services for installation of the project and production and supply of electricity, and taxes, duties and levies on such equipment materials, and services shall be the responsibility of the bidder. However, if any recurring or non-recurring expenditure is required to be incurred by the Petitioner on account of occurrences of the events covered under Article 10.1.1 of the PPAs, then such expenditure will be admissible under change in law to the Petitioner. If any income accrues to the Petitioner on account of events covered under Change in Law, then such income shall be adjusted against tariff. One of the events covered under change in law is “the change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of the Agreement.” In our view, this sub-clause cannot be read in isolation but has to be read with the provision that such occurrences should have the effect of “resulting into any recurring or non-recurring expenditure by the Seller or any income to the Seller”. Therefore, if the Petitioner has to incur any recurring or non-recurring expenditure on account of the change in tax or introduction of any tax for supply of power to MSEDCL and DNH in terms of the respective PPAs, then such expenditure shall be admissible to the Petitioner under Change in Law.”

186. The Petitioner has also placed its reliance on judgment dated 14.08.2018 passed by the Hon’ble Appellate Tribunal for Electricity (“APTEL”) in *Adani Power Rajasthan Limited v. Rajasthan Electricity Regulatory Commission and Ors.*, Appeal No. 119 of 2016, in which the Hon’ble APTEL has rejected arguments similar to those made by NTPC in the present matter to hold that any change in tax/levies/ duties etc. or application of new tax/levies/ duties etc. on supply of power covers the taxes on inputs required for such generation and supply of power under the relevant power purchase agreement. The relevant paragraph from the aforesaid judgment of the Hon’ble APTEL is excerpted below:

“f) The Discoms have also reproduced the definition of Change in Law under different PPAs under Section 63 of the Act. We have gone through the said provisions and we find that the other provisions of the PPA are similar to that in the other PPAs under Section 63 of the Act except the fifth bullet which is additional specifically covering tax on supply of power. The judgements of the Hon’ble Supreme Court relied upon by the Discoms were under different context and could not be equated to the scheme of power procurement by Discoms under Section 63 of the Act which is based on guidelines issued by GoI under different scenarios wherein the treatment of taxes depends upon the specific conditions of the RFP and tariff quotes by the bidders.

g) In view of our discussions as above and after duly considering the earlier judgements

of this Tribunal, we are of the considered opinion that any change in tax/levies/ duties etc. or application of new tax/levies/ duties etc. on supply of power covers the taxes on inputs required for such generation and supply of power to the Discoms.”

187. The Petitioner has submitted that Article 12 of the PPAs must be construed widely to give effect to the intentions of the Parties as has been held by the Hon’ble Supreme Court of India in *M/S Sumitomo Heavy Industries Ltd v. Oil & Natural Gas Corporation Limited*, (2010) 4 SCC 459, in which it was held that a change in law clause ought to be construed widely, with a view to further the intention of the parties, which is to compensate for any necessary and reasonable extra expenditure incurred after the relevant cut-off date on account of a change in law. The Hon’ble Supreme Court has also held in *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.*, (2016) 4 SCC 126, that the courts while interpreting contracts cannot adopt the same approach as they may take while interpreting legislative instruments, and that contracts between the parties must be understood in the manner the parties intended them to be. The relevant paragraph from the aforesaid judgment of the Hon’ble Supreme Court is excerpted below:

“10. In the matter of interpretation, the court has to make different approaches depending upon the instrument falling for interpretation. Legislative drafting is made by experts and is subjected to scrutiny at different stages before it takes final shape of an Act, Rule or Regulation. There is another category of drafting by lawmen or document writers who are professionally qualified and experienced in the field like drafting deeds, treaties, settlements in court, etc. And then there is the third category of documents made by laymen who have no knowledge of law or expertise in the field. The legal quality or perfection of the document is comparatively low in the third category, high in second and higher in first. No doubt, in the process of interpretation in the first category, the courts do make an attempt to gather the purpose of the legislation, its context and text. In the second category also, the text as well as the purpose is certainly important, and in the third category of documents like wills, it is simply intention alone of the executor that is relevant. In the case before us, being a contract executed between the two parties, the court cannot adopt an approach for interpreting a statute. The terms of the contract will have to be understood in the way the parties wanted and intended them to be. In that context, particularly in agreements of arbitration, where party autonomy is the grundnorm, how the parties worked out the agreement, is one of the indicators to decipher the intention, apart from the plain or grammatical meaning of the expressions and the use of the expressions at the proper places in the agreement.”

188. The Petitioner has submitted that a bare perusal of the terms of the PPAs provides that the PPAs intend to provide a very wide scope to change in law events, as the definition of the

term “law” and the list of change in law events, as set out in Article 12.1 of the PPAs, are very widely worded. The intention to provide a wide scope to change in law events is also clear from the select list of exclusions provided in the proviso to Article 12.1 of the PPAs which is exhaustive. Article 12.1 of the PPAs does not exclude impact of changes in law on the construction/ input costs in developing the Project.

189. The Petitioner has submitted that the “effective date” for the purpose of determining whether a change in law event is covered under Article 12 of the PPAs is the date of signing of the PPAs, as opposed to the COD of the Project, which clearly contemplates that the change in law clause is applicable and available to the parties with as much force even for the period prior to the COD, i.e., to the construction period. Accordingly, if the interpretation advanced by NTPC is accepted, the stipulation of “effective date” in Article 12.1 and the fifth bullet of Article 12.1.1 qua claims pertaining to input costs will be rendered otiose.
190. The Petitioner has submitted that it is also pertinent to note that the phrase “*for supply of power*” in the fifth bullet of Article 12.2.1 is followed by the phrase “*in terms of this agreement*”. That is to say, the fifth bullet of Article 12.2.1 does not contemplate a situation which entails a simpliciter supply of power to NTPC, it actually specifies that such supply is to be in terms of the PPAs. As is clear from the bare perusal of the PPAs, the obligations of the Petitioner under the PPAs are not limited to merely supplying power to NTPC, but to also establish and commission the Project as per the terms specified. Therefore, the meaning of “*for supply of power*” also includes establishing and commissioning the project as per the terms of the PPAs.
191. The Petitioner has submitted that the phrase “*supply of power*” in the fifth bullet is preceded by the term “*for*” as opposed to “*on*”, thereby making the intention clear that the fifth bullet intends to cover all activities to be carried out *for* supplying power in terms of the PPAs, and not just restricted to taxes *on* the activity of supply of power. Accordingly, any impact of a change or introduction of a new tax on the setting up of the Project has to be necessarily covered by the fifth bullet of Article 12.2.1 as well.

Re: Respondents reliance on draft power purchase agreement issued under the Phase II, Batch IV of the National Solar Mission is misplaced

192. The Petitioner has submitted that the subsequent draft PPA merely clarifies and reflects the settled position of law, as elaborated in the foregoing paragraphs. The draft PPA only demonstrates the underlying intent, and the true purpose of the change in law clause, as has been correctly interpreted by the Commission in a catena of orders. It is submitted that the draft PPA does not operate to create a special right for the later NSM projects executing such PPA, as such an interpretation would be manifestly discriminatory in nature.
193. The Petitioner has submitted that NTPC has erroneously contended that the introduction of GST Laws is covered only by the fifth bullet of Article 12.1.1, and that the first bullet of Article 12.1.1 has no application in the present case. In this regard, it is submitted that first bullet of Article 12.1.1 covers the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal of any law in India. Clearly, the introduction of the GST Laws would also be covered by the first bullet, as the GST Laws have been *inter alia* enacted by the state and central legislatures. Per contra, the fifth bullet of Article 12.1.1 covers any change in tax or an introduction of a new tax which is made applicable for supply of power by the solar power developer in terms of the PPAs. The GST Laws are both a change in tax (as they change the existing tax regime, replaces various existing indirect taxes and also alter the tax rates), and the introduction of a new tax (as they introduce a new tax regime and are in the nature of a new tax). Article 12.1.1 of the PPAs uses the word “any” before indicating the list of events that constitute change in law events. The use of the word “any” in Article 12.1.1 implies that each of the change in law events under the clause are independent of each other and are not mutually exclusive.
194. The Petitioner has submitted that the exclusions indicated at the end of Article 12.1 of the PPAs are applicable to all the five bullets of Article 12.1.1, and not restricted to the fifth bullet alone because the exclusions contemplated in the proviso to Article 12.1.1 not only relate to the fifth bullet of tax, but also include changes on account of regulatory measures by the Appropriate Commission which obviously fall outside the scope of the fifth bullet. It is therefore submitted that Article 12.1 does not contemplate restricting all tax related changes

in law to the fifth bullet alone, as has been contended erroneously by NTPC. Nor does the fifth bullet (which deals specifically with any change in or introduction of taxes) of Article 12.1.1 in any manner limit the scope of the first bullet (which deals with any change in any law) or vice versa, as has been wrongly contended by NTPC.

Re: Respondents contention that the present Petition is without any cause of action

195. The Petitioner has submitted that the present Petition expressly, and in detail, sets out the cause of action which forms the basis of the reliefs claimed thereunder. The Petition, inter alia at paragraph 8 thereof, explicitly sets out the details of the changes in law on the basis of which the Petitioner has made its claims. Further the Petition, inter alia at paragraphs 9-10 and 17 thereof, and at ANNEXURE P-5 thereto, sets out the impact of the change in law, namely the introduction of GST Laws, on various components of the Project, including inter alia on Modules, Invertors, Mounting Structures, Transmission lines materials, AC and DC Cables, AC and DC Electrical Material, Combiner Boxes, Connectors, Balance of Supplies, Installation, Erection and Commissioning works; Installation, Erection & Procurement services, Operation and Maintenance services etc. The Petition, including in the aforesaid paragraphs and ANNEXURE P-5 thereto, specifically sets out the estimated impact of the introduction of GST Laws on each of the aforesaid components and also establishes a direct nexus between the introduction of GST Laws and the impact thereof on the specific procurement of goods and services by the Petitioner.

Re: Respondents contention that the Petitioner's claim is unsubstantiated, vague and without any basis

196. The Petitioner has submitted that as on the date of filing of the captioned Petition, the Project was in the final stages of development and was yet to be commissioned. Therefore, the Petitioner in good faith filed its claim on the basis of reasonable estimates, the details of which were duly provided in the Petition and the annexures thereto. The Petitioner has provided the estimated impact of introduction of GST Laws on each component of the Project, as is clear from a bare perusal of the Petition and the annexures thereto. The Petitioner in good faith had also intimated NTPC about the introduction of GST Laws and the nature of impact thereof on the Project by way of its letter dated 30.08.2017. However,

NTPC did not respond to the aforesaid letter.

197. The Petitioner has submitted that Petitioner's bona fides are indisputable as the Petitioner itself has proposed that the increase in tariff allowed by this Commission to offset the impact of GST Laws be subject to an annual reconciliation based on the actual additional tax impact of the GST Laws as per the annual audited account books of the Petitioner, as certified by its statutory auditor.

Re: Respondents contention that Petitioner's claim for impact of GST Laws on operation and maintenance expenses is non-maintainable

198. The Petitioner has submitted that outsourcing of O&M activities by the Petitioner to an O&M service provider does not disentitle the Petitioner from claiming change in law relief under the PPA, as the PPA does not prohibit the Petitioner from engaging an O&M service provider to efficiently operate and maintain the project. Indeed, it is a standard market practice for project developers to engage O&M service providers having expertise in operating and maintaining large power projects. In the present case, the O&M of the Petitioner's project is being carried out not by a third party but the Petitioner's parent entity, i.e., Azure Power India Private Limited, which was also the entity which successfully bid for the Project, and incorporated the Petitioner in terms of the provisions of the relevant RfS document. Accordingly, the award of O&M contract is not equivalent to an award to a third-party vendor, as has been contended erroneously by NTPC. Hence NTPC's reliance on this Commission's decision in *GMR Warora Energy Limited v. MSEDCL and Ors.*, Petition No. 1/MP/2017 is misplaced.

Re: Respondents contention that the Petitioner's claims are non-maintainable on account of delay in commissioning of the Project

199. The Petitioner has submitted that any delay in commissioning of the Project was on account of factors beyond the control of the Petitioner, and accordingly the Petitioner cannot be held liable for any consequences, financial or otherwise, of such delay. Any purported delay in commissioning of the Project has no relevance whatsoever to the Petitioner's change in law claim under Article 12 of the PPAs. None of the provisions of the PPAs disentitles the

Petitioner from making a change in law claim if the Project fails to achieve COD within the stipulated date. As per law settled by courts in India, including the Hon'ble Supreme Court of India, a delay in completion of a works contract does not ipso facto disentitle the contractor to claim price escalation, and *that escalation of price is a normal incident arising out of gap of time in this inflationary age in performing any contract.*

200. The Petitioner has submitted that in light of the above submissions, it is humbly prayed that the Commission may be pleased to allow the relief sought for in the present Petition.

Written Submissions dated 18.09.2018 on behalf of Respondents on the limited issue of Jurisdiction in Petition No. 188/MP/2017; 189/MP/2017 & 190/MP/2017 and dated 17.09.2018 in Petition No. 201/MP/2017; 204/MP/2017; 230/MP/2017 and 231/MP/2017:

201. The Petitioners have submitted that their solar power plants were conceived in terms of the "Guidelines for Implementation of Scheme for Setting up of 2000 MW Grid-connected Solar PV Power Projects under Batch-III issued by the Ministry of New and Renewable Energy and the Jawaharlal Nehru National Solar Mission. The said guidelines envisage setting up of Grid-Connected Solar PV power plants of 2000 MW aggregate capacity through open competitive bidding with SECI acting as the nodal agency for implementation of the aforesaid scheme. In terms of the Phase II Batch-III Guidelines, the solar power generated from the projects will be procured by SECI and sold to willing state utilities under power sale agreements. Further, in terms of provisions of the Phase II Batch-III Guidelines, the project should be designed for interconnection with the transmission network of STU/ CTU/ pooling sub-station of solar park or any other transmission utility at voltage level of 33kV or above. A perusal of Recital F of the SECI PPAs makes it clear that Respondent (SECI) is only acting as an intermediary which can sell power off-taken from the Petitioners to any willing state utility.

202. The Petitioners have placed their reliance on Commission's Judgment dated 11.10.2017 in *M/s Welspun Energy Private Limited vs. Solar Energy Corporation of India (Petition No. 95 MP 2017)*. While relying upon the provisions of the JNNSM scheme and the relevant provisions of the power purchase agreement executed between the parties, this Ld. Commission inter alia held that in a scenario where a solar power generating company enters

into a power purchase agreement with a trader under the JNNSM scheme, Commission would have jurisdiction to adjudicate upon disputes between such generating company and trading licensee. In view thereof, this Commission is the appropriate Commission to adjudicate upon the instant dispute.

Written Submissions on behalf of Respondents No. 1 & 2 in Petition No. 188/MP/2017; 189/MP/2017 & 190/MP/2017 and dated 17.09.2018 in Petition No. 201/MP/2017; 204/MP/2017; 230/MP/2017 and 231/MP/2017:

203. The Respondents have submitted a common written submissions in the Petitions on the following issues stated as under:

- a. The implications of the judgments dated 14.08.2018 passed by the Hon'ble Appellate Tribunal of Electricity in the case of *M/s Adani Power Rajasthan Limited Vs. Rajasthan Electricity Regulatory Commission and Ors and others (Appeal No. 119 of 2016)* and in the case of *M/s. GMR Warora Energy Limited v. Central Electricity Regulatory Commission and Ors (Appeal No. 111 of 2017)*;
- b. Scope and applicability of the Change in Law provision in Article 12 of the Power Purchase Agreements entered into between the various Solar Power Developers and SECI;
- c. Implications of the GST on the Operation and Maintenance Expenditure;
- d. Admissibility of carrying cost;
- e. Lack of documentation/information furnished by the Solar Power Developers;
- f. The import of the Directions dated 27.08.2018 issued by the Central Government under Section 107 of the Electricity Act, 2003 to this Hon'ble Commission; and
- g. Miscellaneous issues such as the plea of the principles of business efficacy, Quantum Meruit etc.

204. The PPAs were executed between the various Solar Power Developers, namely the Petitioners in the Petitions and Respondents for sale and purchase of solar power generated their Power Projects for a period of 25 years in pursuance of the competitive bidding

conducted by SECI under Jawaharlal Nehru National Solar Mission Phase-II Batch -III Guidelines.

205. The effect of change in law has been claimed on account of enactment of the Central Goods and Services Tax Act 2017, Integrated Goods and Services Tax Act 2017 and Uttar Pradesh Goods and Services Tax Act, 2017 w.e.f. 01.07.2017.

206. The Respondents have submitted that the claim for change in law has to be considered in terms of Article 12 of the relevant PPA. Article 12 of the PPA provides an exhaustive list of six (6) events to be considered as 'Change in Law'. The conditions to be fulfilled in terms of Article 12 of the PPA to qualify as a Change in Law are:

- a) The event should be one of the six events mentioned in Article 12. Events which are outside the above six events cannot be considered as change in law;
- b) The event should have occurred after the Effective date; and
- c) The event should result into any additional recurring/nonrecurring expenditure by the Solar Power Developer (SPD) i.e. the Petitioners.

207. The Respondents have submitted that the Hon'ble Appellate Tribunal by the Judgment dated 14.08.2018 in Appeal No. 111 of 2017 in *M/s. GMR Warora Energy Limited v. Central Electricity Regulatory Commission and Ors* and in the case of *Adani Power Rajasthan Limited Vs. Rajasthan Electricity Regulatory Commission and Ors. (Appeal No. 119 of 2016)* has decided on the interpretation of a similar 'Change in Law' provision as in the present PPA. The term '*any change in tax or introduction of any tax made applicable for supply of power by the SPD as per the terms of this Agreement*' has been interpreted to include the taxes on inputs required for generation and supply of power to the Distribution Licensees. Further, on the carrying cost aspect, it has been held that the same will be allowed only if there is a specific provision of restoration in the PPA and not otherwise. Respondents submit that the provision of the present PPA are different from the PPA in the case of GMR Warora/Adani wherein there was a specific clause dealing with the relief applicable during the Construction Period. In the present PPA, there is no such clause dealing with specific relief under the construction period. Accordingly, the term '*any change in tax or introduction*

of any tax made applicable for supply of power by the SPD as per the terms of this Agreement' and the scope of the first bullet under Article 12.1.1, has been taken note of by the Hon'ble Tribunal in the GMR Warora case, as under:

“iv. Before dealing the issues there is need to deal one major issue related to tax which will settle many of the issues raised by the Discom. This issue is related to fifth bullet of Article 10.1.1 of the Change in Law event. The Discom/ MSEDCL/ Prayas Energy Group have contended that the any change in tax or levy of new tax is to be seen as tax on supply of power and not the taxes on the input costs for generation of electricity.

v. Thus, we hold that this issue has been dealt by this Tribunal in detail in the judgement dated 14.8.2018 of this Tribunal in Adani Judgement. The issue has been decided in favour of the Adani (generator/Seller) in the said judgement. The relevant extract from the Adani Judgement is reproduced below:

“11 d) Before discussing the issues there is a need to address a common issue raised by the Discoms related to allowance of tax under Change in Law in terms of the PPA. According to the Discoms that as per the 5th bullet of the Article 10.1.1 of the PPA change in tax or introduction of any new tax is only applicable to supply of power which also means sale of power if definition of supply is taken in terms of the Act. The Discoms have contended that if there is specific provision dealing with the tax under Change in Law then other provisions of Change in Law Article are not allowed to deal with the tax and as such no other tax implications are allowed to be covered under Change in Law under the PPA. The Discoms have also relied on some judgments of Hon'ble Supreme Court on this issue. We have gone through the said judgments and we observe that according to the judgments relied by the Discoms, the taxes once dealt in a particular clause of a contract then there is no scope for considering taxes under other clauses of a contract.

e) APRL has submitted that the generator undertakes many activities to ensure supply of power to the Discoms. APRL has relied on the judgement of Hon'ble Supreme Court in case of State of A.P. v. NTPC (2002) 5 SCC 203 wherein it has been held that the production (generation), transmission, delivery and consumption are simultaneous, almost instantaneous. According to the said judgement, the applicable taxes on inputs for generation of power can be construed to be taxes on supply of power. APRL has further contended that if the contention of the Discoms is accepted then the Change in Law provision would be applicable during the Operating Period and the applicability of the said provision will become redundant during Construction Period. There is some strength in the contention of APRL as there will be no applicability of Change in Law provisions if there are changes in tax duties/ levies etc. rates or imposition of new tax/duties/levies etc. during Construction Period and on input costs related to power generation.

f) *APRL has further contended that the reliance of the Discoms on the maxim 'expressum facit cessare tactium' meaning when express inclusions are specified, anything which is not mentioned explicitly is excluded is misplaced as the Hon'ble Supreme Court in case of Assistant Collector of Central Excise Calcutta Division v. National Tobacco Company of India Ltd. (1972) 2 SCC 560 has held that the rule of prohibition by necessary implication could be applied only where a specified procedure is laid down for performance of duty or where there is an express prohibition.*

g) *The Discoms have also reproduced the definition of Change in Law under different PPAs under Section 63 of the Act. We have gone through the said provisions and we find that the other provisions of the PPA are similar to that in the other PPAs under Section 63 of the Act except the fifth bullet which is additional specifically covering tax on supply of power. The judgments of the Hon'ble Supreme Court relied upon by the Discoms were under different context and could not be equated to the scheme of power procurement by Discoms under Section 63 of the Act which is based on guidelines issued by Govt under different scenarios wherein the treatment of taxes depends upon the specific conditions of the RFP and tariff quotes by the bidders.*

h) *In view of our discussions as above and duly considering the earlier judgments of this Tribunal, we are of the considered opinion that any change in tax levies / duties etc. or application of new tax levies/ duties etc. on supply of power covers the taxes on inputs required for such generation and supply of power to the Discoms.'*

vi. *Now, we will consider the issues raised by the MSEDCL. Let us first consider the issues related to Construction Period. These issues are change in rates of Customs Duty/ Excise Duty/ Service Tax/ Other Taxes (WCT, VAT, CST). Let us first examine the findings of the Central Commission on these issues. The relevant extracts from the Impugned Order are reproduced below:*

'38. We have examined the submissions of the Petitioner, MSEDCL and Prayas. It is noted that the applicable Countervailing Duty as on seven days prior to the bid deadline was 8% which was revised upward to 10% in 2010 and 12% in 2012 by Ministry of Finance, Government of India vide its Notification No.6/2010 dated 27.2.2010 and Notification No. 18/2012 dated 17.3.2012. It is further noticed that Ministry of Finance, Government of India vide its Notification Nos. 13/2012 and 14/2012 exempted education cess 2% and secondary and higher education cess 1% on CVD. The above revisions in CVD have taken place after the cutoff date in terms of the MSEDCL PPA. The issue is whether the changes in rates of taxes which have impact on the project cost during the construction period can be admissible under change in law. In terms of Article 10.1.1 of the PPA, if the change in law event results in additional recurring or non-recurring expenditure by the Petitioner, it will be admissible under change in law.

Since the impact of revision of CVD is on the capital cost, it is a non-recurring expenditure. Further, it is a change in tax which affects the tariff quoted by the Petitioner since the Petitioner has quoted an all-inclusive tariff including taxes, duties and levies. Therefore, the expenditure is covered under Change in Law and the Petitioner is entitled to relief proportionate to the contracted capacity with MSEDCL. The Petitioner is directed to share with MSEDCL the detailed computations of the impact of change in customs duty paid on account of CVD duly audited and certified by the statutory auditor while claiming the compensation.

41. We have considered the submission of the Petitioner, MSEDCL and Prayas. As on the cut-off date(i.e. 31.7.2009), the applicable excise duty was 8% as per the Ministry of Finance Notification No. 29/2004- Central Excise dated 9.7.2004 notified as GSR 420 (E),dated 9.7.2004. In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944, Ministry of Finance issued Notification No.6/2010 increasing the excise duty from 8% to 10% and vide Notification No. 18/2012 dated 17.3.2012, excise duty has been increased to 12%. The said changes from 8% to 10% and from 10% to 12% claimed by the Petitioner have occurred after the cutoff date and have an impact on the cost during construction period. Since these changes have occurred after the cut-off date, the Petitioner cannot be expected to factor the same in the bid submitted to MSEDCL. Therefore, these increases in excise duty by Indian Government Instrumentality pursuant to the powers vested under Acts of the Parliament are admissible as Change in Law under Article 10 of the MSEDCL PPA. Accordingly, the Petitioner is entitled to be compensated through adjustment in tariff on account of excise duty proportionate to the contracted capacity with MSEDCL.

44. We have considered the submissions of the Petitioner, MSEDCL and Prayas. The increase in Service Tax was affected through Finance Act, 2012 Since the enhanced rate of Service Tax is through an Act of Parliament after the cut-off date and has resulted in additional expenditure by the Petitioner, the same is covered as change in law under Article 10.1.1 of the MSEDCL PPA. Accordingly, the Petitioner is entitled to be compensated by MSEDCL for the impact of difference in the rate of service tax on the project cost.

48. We are of the view that in terms of MSEDCL PPA, change in tax or introduction of any tax applicable for supply of power has been recognised as change in law. Accordingly, change in Work Contract Tax, Value Added Tax and Central Sales Tax which has resulted in reduction in capital cost shall be passed on to MSEDCL. The Central Commission has held that change in customs duty have impact on project cost and as per Article 10.1.1 of the PPA, any change in recurring/ non-recurring cost have been considered as change in law event and is required to allowed. The changes in Excise Duty/ Service Tax was done by IGI pursuant to powers vested under the Act of the Parliament and the same was changed after the cut-off

date which could not be factored in by GWEL at the time of bid submission and hence to be allowed under Change in Law. The Central Commission has also held that change in tax/introduction of new tax for supply of power is recognised as Change in Law in terms of the PPA and has allowed change in WCT, VAT and CST under Change in Law.

vii. From the above it is crystal clear that the Central Commission has considered the tax on supply of power as tax on inputs for supply of power and allowed the same under Change in Law. Further, the State Commission has considered that change in duties/ tax imposed by IGI under Act of the Parliament resulting in change in cost of the project is to be considered under Change in Law. We agree to this conclusion arrived at by the Central Commission as we have also concluded the same while allowing the Busy Season Surcharge and Development Surcharge imposed by MoR, IGI under the Act of the Parliament for transportation of coal which has resulted in change in cost to GWEL as such change in cost could not be factored in by GWEL at the time of bid submission.

vii. Accordingly, in view of discussions as above, we are of the considered opinion that the Central Commission has rightly allowed the above claims in favour of GWEL. Hence, these issues are answered against the MSEDCL.

x. Thus we hold that, the Central Commission has considered that GWEL could not have factored in the costs/ change in costs related to excise duty/ clean energy cess/ service tax/ Swachh Bharat tax as the same were not applicable as on the cut-off date. The imposition/change of the said taxes/duty/ cess has resulted in increase in cost of generation for GWEL. We have already held that such imposition/change in taxes/duty/ cess qualify for Change in Law event and GWEL is required to be compensated for the same.

Accordingly, these issues are answered against the Discom/MSEDCL”.

208. The Respondents have submitted that the phrase 'tax applicable for supply of power' cannot cover within tax on the input material or cost of generation etc. Respondents crave leave to refer to the detailed submissions on the scope of Article 12. They accept that the decision of the GMR Warora to the extent it applies to the facts of case, is a binding precedent. There are, however, differences in the facts of the case, as detailed here in below (relating in particular to the provisions of the PPA regarding the construction period) and therefore, the Commission can take a view on the scope of applicability of the Hon'ble Tribunals decision. In any event, the Commission may record the detailed submissions made by the Respondents on the interpretation of Article 12 dealing with 'tax for supply for power'.

Principles of Interpretation of Contract

209. It is a settled principle of construction that a document or a contract must be read as a whole and the intention of the parties must be gathered from the language used in the contract. Such an intention could be gathered by the express terms of the contract or from the conduct and by the surrounding circumstances incidental to such a contract. The cardinal principle is to ascertain intention of the parties to the contract through the words they have used which are key to open the mind of makers. The natural and ordinary sensible meaning to the language through which the parties have expressed themselves unless the meaning leads to absurdity, provides the guidance for finding out the intention of parties. In this regard the Respondents have placed the reliance on the Hon'ble Supreme Court in *ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705 has decided as under:

“40. It cannot be disputed that for construction of the contract, it is settled law that the intention of the parties is to be gathered from the words used in the agreement. If words are unambiguous and are used after full understanding of their meaning by experts, it would be difficult to gather their intention different from the language used in the agreement. If upon a reading of the document as a whole, it can fairly be deduced from the words actually used therein that the parties had agreed on a particular term, there is nothing in law which prevents them from setting up that term. (Re: Modi & Co. v. Union of India [AIR 1969 SC 9: (1968) 2 SCR 565].) Further, in construing a contract, the court must look at the words used in the contract unless they are such that one may suspect that they do not convey the intention correctly. If the words are clear, there is very little the court can do about it. (Re: Provash Chandra Dalui v. Biswanath Banerjee [1989 Supp (1) SCC 487].)”

210. The Change in Law provision of the present PPA stands on a different footing in comparison to the provisions of Change in Law, as incorporated in other Standard Bidding Document issued by Government of India as well as in other Power Purchase Agreements:

a) The Change in Law provision in the standard PPA issued by the Central Government as a part of the guidelines under Section 63 of the Electricity Act reads as under:

“13.1.1 "Change in Law" means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline:

(i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law or (ii) a change in interpretation of any Law by a Competent Court of law, tribunal or Indian Governmental Instrumentality

provided such Court of law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation or (Hi) change in any consents, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurers under the terms of this Agreement, or (iv) any change in the (a) Declared Price of Land for the Project or (b) the cost of implementation of the resettlement and rehabilitation package of the land for the Project mentioned in the RFP or (c) the cost of implementing Environmental Management Plan for the Power Station (d) the cost of implementing compensatory afforestation for the Coal Mine, indicated under the RFP and the PPA (Only Applicable in case where coal block is allocated); but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of ill Charges or frequency intervals by an Appropriate Commission."

In the above, there was no separate provision for taxes to be considered within the scope of change in law. Therefore it can be deduced that the intention was to deliberately provide enlarged scope of the Change in law provision including within its ambit any event which 'results in any change in any cost of or revenue from the business of selling electricity by the Seller'.

b) The change in law provision in the PPA dated 06.02.2007 entered into between Adani Power Limited and Gujarat Urja Vikas Nigam Limited (GUVNL) reads as under:

"13.1.1 Change in Law- means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline:

(i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any stature, decree, ordinance or other law, regulation, notice, circular, code, rule, or direction by any Governmental Instrumentality or a change in its interpretation by a Competent Court of law, tribunal, government or statutory authority or any of the above regulations, taxes, duties, charges, levies, etc., or

(ii) the imposition of any Governmental Instrumentality, which includes the Government of the State, where the project is located, of any material condition in connection with the issuance, renewal, modification, revocation or nonrenewal (other than for cause) of any Consent after the date of this Agreement.

a) that in either of the above cases results in any change with respect to any tax or surcharge or cess levied or similar charges by the Competent Government on water, primary fuel used by the generating plant, the generation of electricity (leviable on the final output in the form of energy), sale of electricity and,

b) relating to consents/ compliance pertaining to environment result in any change

in costs or revenue;"

From the above it emerges that the applicability of tax provision, besides sale of electricity has been extended to *water, primary fuel used by the generating plant, the generation of electricity (leviable on the final output in the form of energy)*. Even in such a situation, the tax provisions will extent to limited inputs only. It cannot be extended to all input goods and services.

c) The draft of the Standard PPA issued by SECI in November, 2016 under the National Solar Mission Phase II, Batch IV, inter alia, provided for the following clauses:

“12. 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/ nonrecurring 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 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 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 in to existence shall be considered as effective date for the same.

but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the SPD, or (ii) any change on account of regularity 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."

In view of the sixth bullet of Article 12 of the Standard PPA issued in November 2016, it emerges that the intention was to treat change in tax structure or introduction of any tax made applicable for setting up of the solar power project, in addition to the supply of power from the project as a Change in Law.

211. The Hon'ble Appellate Tribunal of Electricity in its Order of 13.04.2018 in the case of Adani Power Limited v Central Electricity Regulatory Commission and Others, in Appeal No. 210 of 2017 had examined the provisions of Article 13.1.1 of the PPA relating to change in tax. The issue which arose for consideration as raised by Adani Power is as under:

"Whether the Central Commission has erred in not allowing levy of taxes on spares and consumables as Change in Law events under the Gujarat Bid-01 PPA while the same have been allowed under the other 3 PPAs (Gujarat Bid-02 PPA and the Haryana PPA) and has therefore failed to appreciate that:-

(i) Article 13.1.1 of the Gujarat Bid-1 PPA has to be interpreted in view of mechanism for tariff adjustment for Change in Law provided under Article 13.2.1 and Article 13.2.2 of the PPA?

(ii) In terms of Article 1.2.14 of the Gujarat Bid-01 PPA different parts of the PPA are to be taken as mutually explanatory and supplementary to each other and any inconsistency between or among the parts of the PPA has to be interpreted in a harmonious manner so as to give effect to each part?

(iii) In terms the observations of the Hon'ble Supreme Court, it ought to have exercised its regulatory powers under Section 79(1)(b) of the Act to vary the tariff discovered/adopted under Section 63 and therefore grant relief to the Appellant?"

The submissions of Respondent in the said case are taken note in para 11 (d) which are as under:

"d) The Central Commission has correctly interpreted the Article 13 of the PPA dated 6.2.2007 under Gujarat Bid-01. No relief can be given to the Appellant for duties on import or procurement of any other good or service tax by way of regulatory powers or otherwise. The interpretation of Article 13.1 sought by the Appellant is erroneous. This Article provides for changes in law for taxes on water, primary fuel and generation and sale of electricity. The provisions of Article 13.2 cannot be used to

expand the scope of the Article 13.1 or to introduce change in law events not covered under Article 13.1. The term generation would not include all input cost. The rule of contra proferentum would not apply in the present case.”

Ultimately, the Hon'ble Tribunal held as under:

“From the above it can be seen that Change in Law provisions are applicable only in case if it results in any change with respect to any tax or surcharge or cess levied or similar charges by the Competent Government on water, primary fuel used by the generating plant, the generation of electricity (leviable on the final output in the form of energy) or sale of electricity.”

212. The respondents have submitted that thus, different versions of the PPAs cover different scopes. With regard to each PPA, the intention of parties should be gathered from the express language used in the contract. Therefore, if the words used in the PPA are clear and unambiguous, it would be difficult to gather their intention different from the language used in the agreement. In the above context, it can be concluded that in the Change in Law provisions of the PPA between the Solar Power Developers and Respondents, a deviation was consciously made and a separate provision in the form of sixth bullet was incorporated restricting the taxes to those which are made applicable on supplying power. Further, the sixth bullet in Article 12.1.1 of the PPA stating '*any change in tax or introduction of any tax*', is circumscribed by the qualification contained in the said provision, namely, **which is made applicable for supply of power by the Seller as per the terms of this Agreement**. Thus, every change in tax or introduction of tax was not intended to be covered by the Change in Law provisions of the PPA. It cannot, therefore, be that the 'supply of power' be extended to other aspects such as taxes on input goods and services.

213. The Respondents have submitted that there was a valid reason to adopt such a course in the competitive bid process initiated by them. It is obvious that the Procurers did not wish to get into tariff changes on account of taxes on input goods and services to have certainty of tariff and limit the tax implications to sale of Power. The sanctity of such bidding process cannot be affected by considering on aspects other than the supply of power such as changes in taxes etc.. In this regard, reference is made to the following decisions of the Hon'ble Appellate Tribunal:

(i) M/s Adani Power Limited v. Central Electricity Commission & Ors. in Appeal No. 210

of 2017 dated 13.04.2018

“12(c)(vi.)... We are of the considered opinion that once PPA has been entered into between the parties pursuant to the competitive bidding, the rights and obligations of the parties are to be seen in terms of the agreed PPA. Accordingly, the reliance of the Appellant on various judgments of Hon'ble Supreme Court is misplaced”

(ii) Nabha Power Limited v. Punjab State Power Corporation Ltd in Appeal No. 283 of 2015 dated 17.05.2018:

“9.8 While PPA is a binding document for the parties and cannot be subjected for re-defining by any of the parties merely on account of subsequent development like in this case with specific reference to increase in SHR due to low load operation of the plant

10.2 We, therefore, conclude that the PPA being binding and statutory in nature cannot be re-opened or re-interpreted merely for the consequential circumstances as in the present case...”

The Scope and Applicability of Article 12.1.1 - Sixth Bullet

214. The Respondents have submitted that Article 12.1.1 - sixth bullet of the PPA is specific and unambiguous. It applies only if the condition specified therein, of taxes being for supply of power by the Seller under the PPA, is satisfied. The intention behind the sixth bullet in Article 12.1.1 of the PPA is clear. While considering the taxes as change in law, the scope is restricted to the taxes which are imposed for supply of power. If the incidence of tax is on events or transactions other than the supply of power, the conditions in the said provision are not satisfied and the relief is not admissible. The qualifying expression "Supply of Power" is used only in the sixth bullet and not in the first five bullets of Article 12.1.1 of the PPA. The same is with the purpose, namely when the change in law is considered for taxes, it should be confined to supply of power. In other words, expenditures incurred on account of taxes by reason of change in taxes is to be considered only on taxes related to supply of power and same should not be extended to all taxes at different stages prior to the transaction of supplying/sale of power.
215. The Respondents have submitted that if it was intended that the changes in law should cover even those incidents with regard to input goods and services, the same would have been

provided for in the said clause. For example, the case of Change in Law provision in the standard PPA issued by the Central Government as a part of the guidelines under Section 63 of the Electricity Act 2003. The scope of Article 12.1.1 - sixth Bullet is therefore clear and specific. It relates to the supply of power. The PPA entered into between the parties provides in the definition clause i.e. Article 1.1 that any term used in the PPA but not defined would have the meaning as applicable under the Electricity Act, 2003. The term 'Supply' is defined in Section 2 (70) of the Electricity Act, 2003 as:

“supply in relation to electricity means, the sale of electricity to a licensee or consumer”

216. In terms of the above, incidence of tax recognised under Article 12.1.1 - sixth Bullet is only on the transaction of sale of electricity and not on any other transaction.

Claim of the Petitioner that First Bullet is Applicable

217. The Respondents have submitted that the alternate claim that taxes which do not fall under the sixth bullet of Article 12.1.1 are to be considered as admissible under the first bullet under Article 12.1.1, is wrong and not sustainable. If the claim is accepted, then the incorporation of the sixth bullet is rendered redundant. There was no need to have a specific provision for tax for supply of power since taxes would be covered under 'law' in the first bullet. It is a settled principle of interpretation that no provision can be ignored as redundant or superfluous. Reference: JSW Infrastructure Ltd. v. Kakinada Seaports Ltd., (2017) 4 SCC 170 and Life Insurance Corporation of India v. Dharam Vir Anand, (1998) 7 SCC 348.

218. The Respondents have submitted that the harmonious construction of the provisions would require some meaning to be given and a purpose to be attached to the sixth bullet of Article 12.1.1. A stipulation cannot be treated as a superfluous and redundant provision. 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 five bullets dealing with matters other than taxes. The claims which are to be considered on account of statutory taxes etc. should squarely fall within the scope of sixth bullet. The sixth bullet is the entire repository of dealing with taxes. When there is a specific clause relating to taxes, the general clauses dealing with laws in general have to be interpreted as necessarily

excluding taxes. Reference: South India Corporation (P) Ltd v Secretary. Board of Revenue Trivandrum and Another, (1964) 4 SCR 280. In the above decision, the Hon'ble Supreme Court was dealing with the entries in Article 277 and Article 372(1) of the Constitution of India, which saved the existing laws. Article 372(1) dealt with laws in general whereas Article 277 dealt with tax laws specifically. The relevant Articles read as under:

“277. Savings. - Any taxes, duties, cesses or fees which, immediately before the commencement of this Constitution, were being lawfully levied by the Government of any State or by any municipality or other local authority or body for the purposes of the State, municipality, district or other local area may, notwithstanding that those taxes, duties, cesses or fees are mentioned in the Union List, continue to be levied and to be applied to the same purposes until provision to the contrary is made by Parliament by law,

372. Continuance in force of existing laws and their adaptation.

- (1) Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.”

219. Dealing with the interpretation of Article 277 and 372(1) in the above context, the Hon'ble Supreme Court held that Article 372 being general in nature whereas Article 277 being specific to taxes, Article 372 would have to be interpreted to include all other laws excluding tax laws. The Hon'ble Supreme Court, held as under:

“18. With this background let us now consider the following two questions raised before us: (1) Whether Article 372 of the Constitution is subject to Article 277 thereof; and (2) whether Article 372 is subject to Article 278 thereof. Article 372 is a general provision; and Article 277 is a special provision. It is settled law that a special provision should be given affect to the extent of its scope, leaving the general provision to control cases where the special provision does not apply. The earlier discussion makes it abundantly clear that the Constitution gives a separate treatment to the subject of finance, and Article 277 saves the existing taxes etc. levied by States, if the conditions mentioned therein are complied with. While Article 372 saves all pre-Constitution valid laws. Article 277 is confined only to taxes, duties, cesses or fees lawfully levied immediately before the Constitution. Therefore, Article 372 cannot be construed such a way as to enlarge the scope of the saving of taxes, duties, cesses or fees. To state it differently, Article 372 must be read subject to Article 277. We have already held that an agreement can be entered

into between the Union and the States in terms of Article 278 abrogating or modifying the power preserved to the States under Article 277."

220. The maxim *expressum facit cessare taciturn* - When there is express mention of certain things, then anything not mentioned is excluded. It has been held that the maxim is the principle of logic and common sense and not merely a technical rule of construction. Reference in this regard is made to the decision of the Constitution Bench of the Hon'ble Supreme Court in the case of Union of India v. Tulsiram Patel, (1985) 3 SCC 398:

"70. The position which emerges from the above discussion is that the keywords of the second proviso govern each and every clause of that proviso and leave no scope for any kind of opportunity to be given to a government servant. The phrase "this clause shall not apply" is mandatory and not directory. It is in the nature of a constitutional prohibitory injunction restraining the disciplinary authority from holding an inquiry under Article 311(2) or from giving any kind of opportunity to the concerned government servant. There is thus no scope for introducing into the second proviso some kind of inquiry or opportunity by a process of inference or implication. The maxim "expressum facit cessare taciturn" ("when there is express mention of certain things, then anything not mentioned is excluded") applies to the case. As pointed out by this Court in B. Shankara Rao Badami v. State of Mysore[(1969) 1 SCC 1 : (1969) 3 SCR 1, 12] this well-known maxim is a principle of logic and common sense and not merely a technical rule of construction. The second proviso expressly mentions that clause (2) shall not apply where one of the clauses of that proviso becomes applicable. This express mention excludes everything that clause (2) contains and there can be no scope for once again introducing the opportunities provided by clause (2) or any one of them into the second proviso."

221. The principles can be summarized as under:

- a. When a specific clause deals with taxes, the general clauses dealing with laws in general do not cover taxes.
- b. Clauses in the Agreement cannot be interpreted in a manner to render a clause otiose, redundant or surplusage.
- c. The purpose of a specific clause on tax is to make it restrictive.
- d. When Agreements under Section 63 and the same Guidelines of the

Government of India use different expressions, then they cannot be interpreted to mean the same thing.

- e. When there is a specific clause relating to taxes, the general clauses dealing with laws in general have to be interpreted as necessarily excluding taxes. This is because there is a special entry on taxes whereas the laws other than taxes are dealt with in a general clause.

Cost Incurred During Construction Period is not admissible

222. The Respondents have submitted that the Change in Law provision contained in Article 12 of the PPA is specific in as much as it is applicable only to any change in taxes or introduction of any new tax made applicable for supply of power by the Petitioners, as per the terms of the PPA. The implications of GST Laws referred to by the Petitioners relates to the setting up of the Solar Power Projects and not to the supply of power and the same is not covered under Article 12 of the PPA. The PPA executed by the Petitioners and SECI had specifically restricted the impact of Change in Law only to the change in taxes or introduction of any tax made applicable for the supply of power by the Solar Power Developers and did not extend to the tax on it setting up of the Solar Power Projects. If the tax is not in respect of supply of power but in respect of any purchase of inputs goods, equipment, plant, machinery etc. (input material for construction of the power plant), i.e. taxes etc. related to the setting up of the Power Project as distinguished from the sale of power generated, the same is not covered within the scope of Article 12.1 of the PPA and, therefore, the relief provided for in Article 12.2 of the PPA will have no application. The Bidding Documents and the Agreements reached between the Petitioner and SECI did not envisage to, cover the tax on activities leading to the construction and commissioning of the power plant.

223. The Respondents have submitted that insofar as implications of the Judgment dated 14.08.2018 passed by the Hon'ble Tribunal in the case of Adani/GMR Warora, the provisions of the present PPA are different from the PPA in the case of GMR Warora/Adani wherein there was a specific clause dealing with the relief applicable during the Construction Period. In the present PPA, there is no such clause dealing with specific relief under the construction

period.

Increase in Operation and Maintenance (O&M) Expenditure is not admissible

224. The Respondents have submitted that the O&M is the responsibility of the Petitioner and in the event of the Petitioner choosing to employ the services of other agencies, it cannot increase the liability of Respondents in terms of tariff. The outsourcing of the O&M to a third party is not a requirement of the PPA and will be 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. This is particularly when the Solar Power Developers are employing the services of their own parent company – M/s ACME Cleantech to carry out the Operation and Maintenance.
225. The Respondents have placed their reliance on the decision of the Hon'ble Central Commission dated 16.03.2018 in Petition No. 1/MP/2017 in M/s *GMR Warora Energy Limited v. Maharashtra State Electricity Distribution Company Limited and Ors.* wherein it has been 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 relevant portion of the decision dated 16.03.2018 of the Central Commission reads as under:

“150. The matter has been examined. The Petitioner has claimed increase in Service Tax on O&M contracts based on the Notifications dated 17.3.2012 and 19.5.2015 (in respect of MSEDCL PPA), Notification dated 19.5.2015 (in respect of DNH and TANGEDCO PPAs) in addition to the levy of Swachh Bharat cess and Krishi Kalyan Cess on such services. The Petitioner has not submitted any information of the contracts affected by service tax. Even otherwise, the decision to carry out operation & maintenance through any other agency is commercial decision and any increase in expenditure on this count cannot be considered as a change in law. In our view, it is the responsibility of the Petitioner to operate the generating station and any increase in service tax on O&M contracts cannot fall within the scope of change in law. Hence, the relief sought by the Petitioner under this head is not allowed.”

Carrying Cost is not admissible

226. The Respondents have submitted that the contention of the Petitioner that it is entitled to carrying cost for the costs incurred due to change in law events is misconceived. There is no

provision in the PPA regarding carrying cost or interest for the period till the determination of the relief amount on account of change in law. 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. Only after the amount has become crystalized, the Petitioner is required to raise 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 SECI in not making payment within the due date of raising of the supplementary invoices based on the determination of the effect of change in law, the issue of Late Payment Surcharge would arise for the period after the due date.

227. The Respondents have submitted that the provision of Article 10.3.3 of the PPA 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 the forty-fifth (45th) day after a Monthly Bill or a Supplementary bill is received and duly accepted by SECI, 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 SECI. 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 Hon'ble Commission. There cannot be any claim for late payment surcharge/carrying cost for the period prior to the due date.

228. The Respondents have placed their reliance on the decision of the Hon'ble Tribunal in SLS Power Limited -v- Andhra Pradesh Electricity Regulatory Commission and Others (Appeal No. 150 of 2011) and Batch which recognizes that the interest will be due from when the date of payment is due. In the present case, the payment is due only after issuance of the Supplementary Bill after the decision of the Appropriate Commission. The Respondents have submitted that the PPA does not have a provision dealing with restitution principles of restoration to same economic position. The said position has not been controverted by the Petitioners at the time of the arguments before the Commission on 30.08.2018. Therefore, the Petitioners are not entitled to claim relief which is not provided for in the PPA.

229. The Respondents have submitted 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 crystalized by the

Central Commission. It is further submitted that the decision by the Central Commission can only be after the Petitioners has submitted complete information and not before. Thus, any delay in the determination of the impact of change in law is to the account of the petitioner.

230. In the Judgment of the Hon'ble 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 Gujarat Bid-01 PPA has no provision for restoration to the same economic position, therefore 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 EtOrs., 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.”

231. With regard to carrying cost, the law stands settled 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 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/ judgement. In the present case, there is no provision in the PPA neither for carrying cost nor restitution. The relevant extract from the decision in GMR Warora 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 Respondent 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 re-determination 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 Respondent 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 :

- (a) the date of adoption, promulgation, amendment, reenactment or repeal of the Law or Change in Law; or*
- (b) 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."

232. Further, the reliance on the decision of the Hon'ble Supreme Court in the case of Energy Watchdog vs. Central Electricity Regulatory Commission and Ors (2017) 14 SCC 80, is misconceived for the following reasons:

- a. In the said judgment, the Hon'ble Supreme Court had held that the extent of shortfall in domestic coal would constitute a change in law within the meaning of the PPA;
- b. The said judgment did not deal with the taxes for supply of power or carrying cost to be paid by the Procurers to the generator; and
- c. In any event, there was a provision in the Adani PPAs for restoration to the same economic position (unlike in the present case)

233. The Respondents have submitted that in the Petition, as filed, there was no claim for carrying cost. In May, 2018, the Petitioners filed an Application seeking an Amendment in the Petition filed before the Hon'ble Commission. Thus, the consideration of carrying cost cannot in any event be for the period prior to the date when the amendment applications were allowed.

Non Furnishing of Information

234. The Respondents have submitted that without prejudice to the above legal submissions, the Petitioners have not placed before the Commission in a transparent manner the taxes, duties and levies which stands withdrawn and no longer payable by reason of the introduction of the GST. Admittedly, there are number of taxes, duties, cess and levies which have been subsumed in the above taxes which came into force on 01.07.2017.

235. The Petitioners are also required to place before the Commission the extent to which the Petitioner's project are subject to such taxes etc. Further, the Petitioners are proceeding on the

assumption that the entire quantum of taxes under the GST are payable. This is contrary to the very scheme of the introduction of the GST and the intention of the Central Government is rationalising the tax structure in a manner that various existing taxes will get subsumed in the GST. Accordingly, true and faithful disclosure of existing taxes which have been subsumed by the GST needs to be furnished by the Petitioner. In the absence of proper particulars being placed by the Petitioner on the extent of taxes, levies, duties and cess etc. subsumed in the GST, the Commission should dismiss the petition filed by the Petitioner. It is incumbent on the Petitioner to disclose in a transparent manner with regard to the increase or decrease in the taxes on net basis.

236. Further, the information furnished by the Petitioners along with the Petition was insufficient and inadequate for the Commission to determine the extent to which (if any) the Petitioners were affected by the enactment of the GST Laws. It is only when the Rejoinder was filed by the Petitioners that the details of the date of import, Bills of entry, equipment imported etc. were furnished by the Petitioner. 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 themselves.

Section 107 Directions Issued by the Central Government

237. The Respondents have submitted that on the hearing before this Hon'ble Commission on 30.08.2018, reliance was placed by the Petitioners on the directions issued by the Central Government on 27.08.2018 under Section 107 of the Electricity Act, 2003 for '*allowing pass-through of any change in domestic duties, levies, cess and taxes imposed by the Central Government/Union Territories or by any Government Instrumentality leading to corresponding changes in the cost, after the award of bids, under "Change in Law" unless other provided in the PPA*'. As stated in the subject matter itself, the directions to grant a pass through in respect of domestic duties etc. are circumscribed by the qualification contained, namely "*unless otherwise provided in the PPA*". Since the PPAs in the present case restrict the applicability of the 'change in law' provision to the taxes '*made applicable for supply of power*', therefore only those taxes would be allowed as a pass through which are for supply of power, even in terms of the Section 107 directions.

Miscellaneous Issues

(A) Business Efficacy

238. The Respondents have submitted that it has been contended by the Petitioners that even if the PPA is silent on the aspect of carrying cost, the document must be read under the principle of "business efficacy" wherein the explicit terms of the contract are final with regard to the intention of the parties to the contract. Reliance in this regard is made on the judgment dated 05.10.2017 of the Hon'ble Supreme Court in Civil Appeal No. 179 of 2017 in the case of *Nabha Power Limited v Punjab State Power Corporation Limited and Anr.* The reliance on the principle of business efficacy in the context of the aforementioned PPA, is misconceived. It is a settled law that terms cannot be implied into a contract, contrary to the express terms of the PPA. Thus, if the PPA already contemplates for the provision of Late Payment Surcharge for the delay in payment of the bill, supplementary or otherwise (as stated above), then by no stretch of means can it be said that the intent of the PPA was to restore/restitute the parties to the same economic position in case of such contingency. Thus, if one event was specifically provided in the PPA and other event is excluded, it clearly indicates that the events which are not included are not to be considered. Further, the reliance on the decision in the case of *Sumitomo Heavy Industries Limited v ONGC Limited (2010) 11 SCC 296* is also misconceived. The said decision is under the Arbitration Act where the scope of judicial interference is limited. The Hon'ble Supreme Court had only opined that the Award given by the Arbitrator is a possible view and did not interfere in the matter. This cannot be said to be either a law on the admissibility of interest laid down by Hon'ble Supreme or a precedent on the above aspect.
239. Incidentally, even in the Nabha case (as relied on by the Petitioners), the interest was granted only from three months after the decision of the Hon'ble Supreme Court and not before. In this regard, the relevant extracts from the Judgment dated 5.10.2017 read as under:

“71. Last but not the least is the claim for interest. It is undisputed that no such claim has been laid so far, at any stage. The appellant claims to rely upon clause 11.3.4 read with clause 11.6.8. We have extracted the relevant clause aforesaid. No doubt there is a provision for a late payment surcharge in the event of delay in payment of a monthly bill but in the present case it is not as if there are undisputed

bills remaining unpaid. There were serious disputes regarding the interpretation of the contractual clauses itself. We do not think that the present one is a fit case where the principle of compensation for deprivation should enure for the benefit of the appellant as a measure of restitution. More so as it has not been claimed by them at any stage. It does appear that this inclusion in the written synopsis does seem to arise as canvassed by the learned Senior Advocate for the first respondent on account of the Tribunal not finding favour with such claim in the remand proceedings by reason of no claim being laid towards the same. We are, thus, not inclined to grant this claim.

72. We may, however, in the end, extend a word of caution. It should certainly not be an endeavor of commercial courts to look to implied terms of contract. In the current day and age, making of contracts is a matter of high technical expertise with legal brains from all sides involved in the process of drafting a contract. It is even preceded by opportunities of seeking clarifications and doubts so that the parties know what they are getting into. Thus, normally a contract should be read as it reads, as per its express terms. The implied terms is a concept, which is necessitated only when the Penta-test referred to aforesaid comes into play. There has to be a strict necessity for it. In the present case, we have really only read the contract in the manner it reads. We have not really read into it any 'implied term' but from the collection of clauses, come to a conclusion as to what the contract says. The formula for energy charges, to our mind, was quite clear. We have only expounded it in accordance to its natural grammatical contour, keeping in mind the nature of the contract.

Conclusion:

73. We, thus, partly allow the appeal to the extent that the appellant is held entitled to the washing cost of coal, the transportation from the mine site via washing of coal to the project site inclusive of cost of road transportation for the period where it was necessary. The Calorific Value of the coal would have to be taken at the project site. All other claims in appeal stand rejected. The amount payable to the appellant as the consequences thereof be remitted within a period of three (3) months from the date of this order, failing which it would carry interest @ 12 per cent per annum (simple interest). No costs.”

240. The Respondents have submitted that it is a well settled principle that in matters of contract, relief cannot be granted on principles of equity. The contract becoming onerous is not a ground for relief to be granted. Reference in this regard may be made to the following judgments: *Alopi Parshad and Sons Ltd. v. Union of India*, (1960) 2 SCR 793 : AIR 1960 SC 588; *Naihati Jute Mills Ltd. v. Khvaliram Jagannath*, (1968) 1 SCR 821 : AIR 1968 SC 52.

241. The Respondents have submitted that the business efficacy rule can be considered as a part

of interpretative rule where the provision is vague and cannot be relied upon to create a substantive right in favour of the Petitioners.

(B) Quantum Meruit

242. The Respondents have submitted that the Petitioners have also raised the issue of applicability of Section 70 of the Indian Contract Act, 1872 namely that when a person does or delivers something to another without intending to do so gratuitously, he is entitled to receive compensation for the thing or restoration of the thing delivered if the other party has enjoyed the benefit of the thing done or delivered. The liability for payment of levies under the GST Laws to perform the obligations under the PPA cannot be claimed as an act done as a service by the Petitioner and that they ought to be compensated accordingly.
243. The Respondents have submitted that quite apart from the fact that compliance with the prevailing law is not a thing done or delivered to SECI, the principle has no application where there is a specific agreement in operation. Quantum Meruit has application when the contract is held to be invalid. Further, the principle of Quantum Meruit has to be specifically pleaded. Reference in this regard may be made to the following extracts from Pollock and Mulla, Fourteenth Edition (Vol II) (Page 249 and 250 of the Compilation handed over by the Petitioner on 30.08.2018):

Quantum Meruit

The principle of quantum meruit is often applied where for some technical reason a contract is held to be invalid. Under such circumstances an implied contract is assumed, by which the person for whom the work is to be done contracts to pay reasonably for the work done, to the person who does the work. The provisions of his section are based on the doctrine of quantum meruit, "but the provisions of the Contract Act admit of a more liberal interpretation; the principle of the section being wider than the principle of quantum meruit". The principle has no application where there is a specific agreement in operation. A case based on quantum meruit must be pleaded.

244. The Respondents have submitted that the PPA entered into by the Petitioners with the Respondents envisage the status of Respondents as an intermediary company for the bulk purchase of electricity from the Petitioner for bulk supply of electricity to the Distribution

licensees under a Power Sale Agreement. Such purchase and resale of electricity is under a scheme envisaged under JNNSM. SECI is in a position to discharge its obligations under the PPA including the payment for any change in Law implication etc. only upon the distribution licensees remitting the amount to Respondents, 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 SECI to the Petitioner. The Commission has been pleased to implead the distribution licensees as parties in the petitions. It is therefore appropriate that the Commission may give directions to the distribution licensees determining the amount payable to the SPD (if any) in the abovementioned petitions, keeping in view intermediary status and role of SECI as a nodal agency to facilitate the Solar Power Project and for the Distribution Licensees to have an arrangement for generation and procurement of solar power and thereby, promote the solar power development in the country, as per the policy decisions of the Central Government. Any enforcement of the claim by the Petitioner against Respondents without the distribution licensees being obligated to pay and discharge the corresponding claim under the PSA in advance of the discharge of the obligation of SECI will result in serious financial issues to SECI and thereby effect the implementation of the scheme.

245. The Respondents have submitted that for the reasons mentioned hereinabove, the Petition filed by Solar Power Developers is liable to be dismissed.

Rejoinder dated 10.09.2018 to the Reply filed by Respondent No. 4 (Delhi Metro Rail Corporation Limited):

246. The Petitioner has submitted that the Commission, while recognizing introduction of GST Law as a Change in Law event, has already initiated 13/SM/2017 proceedings to grant relief to affected parties, including but not limited to generating stations, distribution licensees and Transmission Service Providers (“TSPs”). The Petitioner has also placed reliance on Petition No. 01/SM/2018.

Written Submission dated 17.09.2018 on behalf of Respondent No. 3 (M.P. Power Management Company Limited) and Written Submission dated 06.09.2018 Respondent No. 4 (Delhi Metro Rail Corporation Limited):

247. The Respondents have submitted that in the proceedings dated 30.08.2018, the Commission directed the parties to file their final written submissions. In pursuance thereof, written submission on the following issues are as under:

1. The scope and applicability of the definition of Change in Law contained in Article 1 read with the consequences of change in law contained in Article 17 of the PPA;
2. Implications of the GST on the Operation and Maintenance Expenditure;
3. Admissibility of carrying cost and the implications of the judgments dated 14.08.2018 passed by the Hon'ble Appellate Tribunal of Electricity in the case of Adani Power Rajasthan Limited –v- Rajasthan Electricity Regulatory Commission and others (Appeal No. 119 of 2016) and in the case of M/s. GMR Warora Energy Limited -v- Central Electricity Regulatory Commission and Ors (Appeal No. 111 of 2017);
4. The import of the Directions dated 27.08.2018 issued by the Central Government under Section 107 of the Electricity Act, 2003 to this Hon'ble Commission; and
5. Miscellaneous issues such as the plea of the principles of business efficacy, Quantum Meruit etc.

248. The Respondents have submitted that effect of change in law has been claimed on account of enactment of the Central Goods and Services Tax Act 2017, Integrated Goods and Services Tax Act 2017 w.e.f. 01.07.2017.

- a) The event should be one of the five events mentioned in Article 1 of the PPA. Events other than the specified five events cannot be considered as change in law;
- b) The event should have occurred after the Effective date; and
- c) The additional expenditure incurred by the Petitioner for each individual change in law event should satisfy a threshold limit of INR 2,00,00,000/- provided in

Article 17.1 (c) of the PPA or otherwise the Petitioner will be responsible to obtain funding for such additional costs, including capital expenditure, as its cost and expenses.

Relevant Provisions in the Power Purchase Agreement:

249. Article 1.1 of the PPA defining the term ‘Change in Law’ and ‘Threshold Limit’ reads as under:

“1. DEFINITIONS

1.1 Definitions

CHANGE IN LAW

Change in Law means the occurrence of any of the following events in India, subsequent to the proposal Due Date (as defined in the RFP), and such event(s) has/have an impact on the Units or on any of the rights and obligations of the Parties under any of the Project Agreements:

(a) The modification, amendment, variation, alteration or repeal of any existing Applicable Laws:

(b) The enactment of any new Applicable Law or the imposition, adoption or issuance of any new Applicable Laws by any Government Authority.

(c) Changes in the interpretation, application or enforcement of any Applicable Laws or judgment by any Government Authority.

(d) The introduction of a requirement for the SPD to obtain any new Applicable Permit; or

(e) The modification, amendment, variation, introduction, enactment or repeal of any Tax resulting in a change in the incidence of Tax liability, including pursuant to any Applicable Laws promulgated or to be promulgated in furtherance of the constitution (122nd Amendment) Bill 2014.

THRESHOLD LIMIT

Threshold Limit has the meaning ascribed to it in Article 17.1(c).”

250. Article 17 of the PPA dealing with Change in Law reads as under:

“17. Change in law

17.1 Consequences of Change in Law

- (a) *If a Change in law occurs or is shortly to occur, then a Party shall notify the other Parties expressing its opinion on its likely effects and giving details of its opinion of whether;*
- (i) *any changes are required to the scope of work to be performed by the SPD under this Agreement;*
 - (ii) *any changes are required to the terms of this Agreement to deal with such Change in Law.*
 - (iii) *relief from compliance with my obligations is required, including the obligation of the SPD to achieve the Unit SCOD;*
 - (iv) *any increase or decrease in costs (other than incurring additional capital expenditure), or any increase in Taxes or delay is likely to result from the Change in Law; and*
 - (v) *any capital expenditure is required or no longer required as on result of a Change in Law*
- (b) *As soon as practicable but no later than 15 (fifteen) Days after receipt of any notice from a Party under Article 17.1(a), the Parties shall discuss the issues referred to therein and any ways in which the parties can mitigate the effect of the Change in Law, including;*
- (i) *demonstrating that the SPD has used reasonable endeavours (including, where practicable, the use of competitive quotes) to minimise any increase in costs and maximise any reduction in costs;*
 - (ii) *demonstrating how any capital expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred or would have been incurred, foreseeable Changes in Law at that time have been taken into account by the SPD.*
 - (iii) *demonstrating as to how the Change in Law has affected prices charged by similar business to the Unit, including similar businesses in which the shareholders or their associates carry on business;*
 - (iv) *demonstrating to the Procurer that the Change in Law is the direct cause of increase or decrease in costs and/or loss or gain of revenue or delay and the estimated increase or decrease in costs or loss or gain in net profit after Tax could not reasonably be expected to be*

mitigated or recovered by the SPD acting in accordance with Good Industry Practices; and

- (v) demonstrating that any expenditure, which was anticipated to be incurred to replace or maintain assets that have been affected by the Changes in Law, has been taken into account in the amount stated in its opinion presented under Article 17.1(a).*
- (c) if the parties have complied with Article 17.1(b) or upon elapse of the time specified in the Article 17.1(b) and if the SPD is required to incur any additional costs, including additional capital expenditure due to a Change in Law the aggregate financial effect of which, over the remaining Term of the PPA, is up to INR 20,000,000 (twenty million) (Threshold Limit), then the SPD shall obtain funding for such additional costs, including capital expenditure, as its cost and expenses. The SPD shall bear all additional capital expenditure and/or interest and additional costs incurred to obtain any finding to the extent of the Threshold Limit.*

For the avoidance of doubt, it is clarified that the Threshold Limit shall apply to each event constructing a Change in Law and shall not be applied on a cumulative basis.

If the additional capital expenditure, interest and associated costs that the SPD incur as a result of the Change in Law exceeds the Threshold Limit, then the Procurer or the SPD shall approach the Appropriate Commission to seek approval of such Change in Law and the consequent impact on the Applicable Tariff.

- d) if the parties have complied with Article 17.1(b) or upon elapse of the time specified in the Article 17.1(b) and if as a result of the Change in Law, there is a decrease in costs, or decrease in Taxes and/or gain revenue or net profits after Tax, then any financial benefit ascending to the SPD on account of such decrease in costs, or decrease in Taxes and/or gain in revenue or net profits after Tax shall be passed through to the Procurer on its entirety.*
- e) The amount determined in accordance with Article 17.1(c) and Article 17.1(d) in the eventuality of any increase or decrease in cost (or decrease or increase in revenues or net profit after Tax) of the SPD on account of a Change in Law shall be adjusted either in the Tariff payment or through a lump sum payment, and shall be paid through a Supplementary Bill to be raised by either the SPD or the Procurer in terms of Article 10. In case of any change in the Applicable Tariff by reason of Change in Law, as determined in accordance with this Agreement, the Monthly Bill to be raised by the SPD after such change in Applicable Tariff shall appropriately reflect the changed Applicable Tariff and the Procurer agrees to pay the revised Applicable Tariff accordingly.”*

Principles of Interpretation of Contract

251. The Respondents have submitted that it is a settled principle of construction that a document or a contract must be read as a whole and the intention of the parties must be gathered from the language used in the contract. Such an intention could be gathered by the express terms of the contract or from the conduct and by the surrounding circumstances incidental to such a contract. The cardinal principle is to ascertain intention of the parties to the contract through the words they have used which are key to open the mind of makers. The natural and ordinary sensible meaning to the language through which the parties have expressed themselves unless the meaning leads to absurdity, provides the guidance for finding out the intention of parties. The Respondent has placed its reliance on the Hon'ble Supreme Court in ONGC Ltd. -v- Saw Pipes Ltd., (2003) 5 SCC 705.

Scope of Definition of Change in Law in Article 1 Read with Article 17 and the requirement to provide documents to substantiate Petitioner's Claim

252. The Respondents have submitted that in terms of the abovementioned Change in Law provisions, the relief for change in law in the case of PPA dated 17.04.2017 between Petitioner and the Respondent with regard to any tax is available only '*If the additional capital expenditure, interest and associated costs that the SPD incur as a result of the Change in Law exceeds the Threshold Limit (INR 20,000,000).*' As per Article 17.1 (c), the threshold limit has been prescribed as INR 20,000,000 (twenty-million) for each incidence of Change in Law and not to be considered on a cumulative basis. Accordingly, each incidence of taxation has to be considered independently and separately and if the amount of the claim in respect to such independent incidence of taxation exceeds the threshold limit, the claim will be admissible. The above has to be considered before determining the liability of the Respondent No.1 to pay for the Change in Law.

253. The Respondents have submitted that the effect of the change in law (if any) has to be construed and applied strictly in accordance with the Article 17 of the PPA including and in particular the mitigation to be undertaken under Article 17.1(b) and further to the extent provided in Article 17.1 (b) to (e). Further, even in case, the impact of GST is established,

Article 17 of the PPA provides for either lump sum compensation or adjustment in tariff and not both, as claimed by the Petitioner.

254. The Respondents have submitted that the Petitioner is required to produce all the relevant documents to substantiate its claim for seeking the relief for change in law. In absence of the documents showing additional capital expenditure, associated cost etc. incurred as a result of change in law by the Petitioner, the claim for change in law does not survive.
255. The Respondents have submitted that the Petitioner has not placed before the Commission in a transparent manner, the taxes, duties and levies which stands withdrawn and no longer payable by reason of the introduction of the GST. Admittedly, there are number of taxes, duties, cess and levies which have been subsumed in the above taxes which came into force on 01.07.2017.
256. The Respondents have submitted that the Petitioner is also 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. Further, the Petitioner is proceeding on the assumption that the entire quantum of taxes under the GST are payable. This is contrary to the very scheme of the introduction of the GST and the intention of the Central Government in rationalizing the tax structure in a manner that various existing taxes will get subsumed in the GST. Accordingly, true and faithful disclosure of existing taxes which have been subsumed by the GST needs to be furnished by the Petitioner.
257. Further, as the Petitioner itself has admitted in the Rejoinder dated 25.05.2018 filed before the Commission at Para 4.7, Page 562 that the procurement of solar modules/modules mounting structures has not been undertaken by the Petitioner and therefore, the documents in support thereof are not available with the Petitioner. In view of the above, the present petition filed by the Petitioner is premature and not maintainable. The reliance of the Petitioner on the Judgment of the Hon'ble Tribunal dated 19.04.2017 in Appeal No. 161 of 2015 in Sasan Power Limited v. Central Electricity Regulatory Commission and Ors is misconceived. The judgment of the Hon'ble Tribunal in Sasan matter can be distinguished on the ground that Change in Law provision of Sasan PPA was different from the present PPA dated 17.04.2017. The reliance placed by the Petitioner on the decision of the Commission

dated 14.03.2018 in suo-moto Petition No. 13/SM/2017 and decision of the Commission dated 10.01.2018 in suo-moto Petition No. 01/SM/2018 is misplaced. The Change in Law provision of the PPA considered in the said decision was different from the present PPA dated 17.04.2017.

258. It is a settled principle that the binding effect of a decision on a case has to be considered in light of the questions which arose for consideration in that decision. What is binding is the principle underlying the decision. In regard to the precedential value of a judgment, Respondent No.1 craves reference to the following judgments: *Delhi Administration (Now NCT of Delhi) v. Manohar Lal* (2002) 7 SCC 222; *Arnit Das vs. State of Bihar* (2000) 5 SCC 488; *Govt. of Karnataka v. Gowramma*, (2007) 13 SCC 482.

Increase in Operation and Maintenance (O&M) Expenditure: Not Admissible

259. The Respondents have submitted that Operation and Maintenance is the responsibility of the Petitioner and in the event of the Petitioner choosing to employ the services of other agencies, it cannot increase the liability of Respondent No.1 in terms of tariff. The outsourcing of the O&M to a third party is not a requirement of the PPA and will be 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. The Respondent has placed its reliance on the decision of the Central Commission dated 16.03.2018 in Petition No. 1/MP/2017 in *GMR Warora Energy Limited v. Maharashtra State Electricity Distribution Company Limited and Ors* wherein it has been 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 relevant portion of the decision dated 16.03.2018 of the Central Commission reads as under:

“150. The matter has been examined. The Petitioner has claimed increase in Service Tax on O&M contracts based on the Notifications dated 17.3.2012 and 19.5.2015 (in respect of MSEDCL PPA), Notification dated 19.5.2015 (in respect of DNH and TANGEDCO PPAs) in addition to the levy of Swachh Bharat cess and Krishi Kalyan Cess on such services. The Petitioner has not submitted any information of the contracts affected by service tax. Even otherwise, the decision to carry out operation & maintenance through any other agency is commercial decision and any increase in expenditure on this count cannot be considered as a change in law. In our view, it is the responsibility of the Petitioner to operate the generating station and any increase

in service tax on O&M contracts cannot fall within the scope of change in law. Hence, the relief sought by the Petitioner under this head is not allowed.”

Carrying Cost: Not Admissible

260. The Respondents have submitted that there is no provision in the PPA regarding carrying cost for the period till the determination of the relief amount on account of change in law. The quantum to be allowed towards Change in Law is the extra expenditure incurred by the Petitioner. The carrying cost which is for the period from the date on which the expenditure is incurred till the monthly bill/supplementary is raised by the petitioner in accordance with the amount determined by the Commission is not admissible as liability for the payment of money crystallizes only upon when the Monthly/Supplementary Bill is raised in terms of Article 17(1)(e) read with Article 10 of the PPA. Further, the interest referred to in Article 17.1(c) is the interest forming part of the capital cost upto the date of the commissioning of the asset and not carrying cost from the time when the claim is made by the petitioner till the claim is determined by the Hon'ble Commission and thereafter Supplementary bill is raised. This is amply clear from the fact that there is no mention of any interest element in Article 17.1 (d) which provides for the situation where on account of the change in law there is a decrease in cost or increase in revenue leading to the benefit being passed onto to the procurer. Accordingly, the carrying cost is not same as the term interest used in Article 17.1 (c).

261. The Respondents have submitted that 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. Only after the amount has become crystallized the Petitioner is required to raise Supplementary invoice for the amount so computed as per Article 10.9 of the PPA. It is only in case of default on the part of the Respondent No.1 in not making payment within the due date of raising of the supplementary invoices based on the determination of the effect of change in law, the issue of Late Payment Surcharge would arise for the period after the due date. In regard to the above, the provision of Article 10.10 of the PPA dealing with late Payment Surcharge and definition of the 'Due Date' in Article 1 of the PPA are relevant. The due date is the 30th (thirtieth) day from the date of receipt of the monthly bill and 60th

(sixtieth) day from the date of receipt of the Supplementary bill by the procurer, with the day after the day of receipt of the Monthly Bill or Supplementary Bill being counted as the 1st (first) 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 Hon'ble Commission. There cannot be any claim for late payment surcharge/carrying cost for the period prior to the due date. In this regard it is also relevant to mention that there is no provision in the present PPA for restitution. The Hon'ble Tribunal in SLS Power Limited -v- Andhra Pradesh Electricity Regulatory Commission and Others (Appeal No. 150 of 2011) and Batch has recognized that the interest will be due from the date of payment is due. In the present case, the payment is due only after issuance of the Supplementary Bill after the decision of the Appropriate Commission.

262. The Respondents have submitted that the PPA does not have a provision dealing with restitution principles of restoration to same economic position. The said position has not been controverted by the Petitioner at the time of the arguments before the Commission on 30.08.2018. Therefore, the Petitioner is not entitled to claim relief which is not provided for in the PPA.

263. The Respondents have submitted 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 crystalized by the Central Commission. It is further submitted that the decision by the Central Commission 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. In the judgment of the Hon'ble 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 Gujarat Bid-01 PPA has no provision for restoration to the same economic position, therefore 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."

264. The Respondents have submitted that with regard to carrying cost, the law stands settled 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 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. In the present case, there is no provision in the PPA neither for carrying cost nor restitution. The relevant extract from the decision in GMR Warora 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 Respondent 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 re-determination 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 Respondent 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 :

(a) the date of adoption, promulgation, amendment, reenactment or repeal of the Law or Change in Law; or

(b) the date of order/ judgement 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 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.

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/ judgement."

Section 107 Directions issued by the Central Government

265. The Respondents have submitted that on the hearing before the Commission on 30.08.2018, reliance was placed by the Petitioner on the directions issued by the Central Government on 27.08.2018 under Section 107 of the Electricity Act, 2003 for '*allowing pass-through of any change in domestic duties, levies, cess and taxes imposed by the Central Government/Union*

Territories or by any Government Instrumentality leading to corresponding changes in the cost, after the award of bids, under “Change in Law” unless otherwise provided in the PPA’. As stated in the subject matter itself, the directions to grant a pass through in respect of domestic duties etc. are circumscribed by the qualification contained, namely “unless otherwise provided in the PPA”.

266. The Respondents have submitted that since the PPAs in the present case restrict the applicability of the ‘change in law’ provision to the taxes ‘made applicable for supply of power’, therefore only those taxes would be allowed as a pass through which are for supply of power, even in terms of the Section 107 directions.
267. In any event, for the implementation of the matters dealt in the above directions of the Central Government, it is a pre-condition that the Petition should be filed by the Petitioner with complete details, supporting documents and satisfactory evidence along with the Petition itself. As mentioned above, the Petition did not contain the requisite particulars, supporting documents etc.
268. On the Miscellaneous Issues: BUSINESS EFFICACY and QUANTUM MERUIT the Respondent has submitted the same submissions as other Respondents therefore the same have not been reproduced here for the sake of brevity.
269. The Respondents have submitted that the Petition filed by the Petitioner is liable to be dismissed.

Analysis and decision:

270. We have heard the learned counsels for the Petitioner and the Respondents and have carefully perused the records.
271. The Central Goods and Services Tax Act, 2017, The Integrated Goods and Services Tax Act, 2017 on 12.04.2017, The Rajasthan Goods and Services Tax Act, 2017, The State(s) Goods and Services Tax Act, 2017 are hereinafter collectively referred as ‘GST Laws’.
272. The brief facts of the case are as under: -

S. N o.	Petition No.	Location	Capacity (MW)	RfS	No. of PPAs	PPA Effective date	Notice for Change in Law(GST)	SCoD/ Actual CoD	Tariff +VGF
1	34/MP/18	U.P.	10X5 = 50	12.08.15	5	29.04.16	30.08.2017	28.05.2017	4.78
2	230/MP/17	Karnataka	50	01.09.15	1	21.06.16	05.07.2017 / 14.07.2017	20.07.2017	4.79
3	231/MP/17	Karnataka	50	01.09.15	1	21.06.16	05.07.2017 / 14.07.2017	20.07.2017	4.79
4	232/MP/17	Telangana	10X3 = 30	09.10.15	3	19.07.16	05.07.2017 / 14.07.2017	09.09.2017 / 11.09.2017 / 12.09.2017	4.67
5	233/MP/17	Telangana	10X2 = 20	09.10.15	2	19.07.16	05.07.2017	17.09.2017 / 26.09.2017	4.67
6	13/MP/18	Telangana	10X10 = 100	09.10.15	10	19.07.16	30.08.2017	18.08.2017	4.67
7	201/MP/17	Karnataka	40	15.02.16	1	02.08.16	05.07.2017 / 14.07.2017	02.09.2017 (claimed 22.10.17 in the Petition)	4.43 + VGF
8	202/MP/17	Karnataka	40	15.02.16	1	02.08.16	05.07.2017 / 14.07.2017	02.09.2017 (claimed 22.10.17 in the Petition)	4.43 + VGF
9	203/MP/17	Karnataka	40	15.02.16	1	02.08.16	05.07.2017 / 14.07.2017	02.09.2017 (claimed 22.10.17 in the Petition)	4.43 + VGF
10	204/MP/17	Karnataka	40	15.02.16	1	02.08.16	05.07.2017 / 14.07.2017	02.09.2017 (claimed 22.10.17 in the Petition)	4.43 + VGF
11	188/MP/17	A.P.	50	02.01.16	1	16.09.16	05.07.2017 / 14.07.2017	16.10.2017	4.43 + VGF
12	189/MP/17	A.P.	50	02.01.16	1	16.09.16	05.07.2017 / 14.07.2017	16.10.2017	4.43 + VGF
13	190/MP/17	A.P.	50	02.01.16	1	16.09.16	05.07.2017 / 14.07.2017	16.10.2017	4.43 + VGF
14	47/MP/18	A.P.	50	02.01.16	1	16.09.16	30.08.2017	16.10.2017	4.43 + VGF
15	33/MP/18	M.P.	750x2 = 1500	16.03.16	2	17.04.17	05.07.2017	18 months	2.97 + 0.75

273. The Petitioners have submitted their bids in terms of a 'Request for Selection' issued by the Respondents which were accepted and in result of the same, 'Power Purchase Agreement' was executed between Petitioners and Respondents for a period of 25 years. The Petitioners have already commenced the construction of its solar power plant to meet the deadline as per the Scheduled Date of Commercial Operation as per the PPA.
274. Respondent No. 1, Solar Energy Corporation of India Limited (SECI) is a Central Public Sector Undertaking under the administrative control of the Ministry of New and Renewable Energy set up on 20.09.2011 to facilitate the implementation of Jawaharlal Nehru National Solar Mission. SECI is responsible for implementation of a number of schemes of the MNRE, out of them the major ones being the Viability Gap Funding (VGF) schemes for large scale grid connected projects under JNNSM, solar park scheme and grid connected solar rooftop scheme, along with a host of other specialized schemes such as defence scheme, canal-top scheme, Indo-Pak border scheme etc. SECI was appointed to purchase and sell solar photo-voltaic power through the Viability Gap Funding mode under the Government of India's National Solar Mission, Phase II, Batch III Bidding Guidelines (NSM Guidelines). The NSM Guidelines envisage providing VGF from the National Clean Energy Fund through SECI to the bidders selected through a transparent bidding process to procure solar power. The NSM Guidelines contemplate the sale of 90% of power generated by a solar power developer to buying utilities within the State and the remaining 10% power outside the State. SECI issued Request for Selection (RfS) for selection of solar power developers for the development of a cumulative capacity in various States. The Petitioners were selected as the successful bidders and the PPAs were executed. On 01.07.2017, the Government of India enacted Integrated Goods and Services Tax Act, 2017, the Central Goods and Services Tax Act, 2017 and various States enacted State(s) Goods and Services Tax Act, 2017. The Petitioners notified SECI about the 'Change in Law' event that took place after applicability of GST *w.e.f.* 01.07.2017. However, the Petitioners did not receive any response from SECI.
275. MNRE issued another set of guidelines for implementation of Scheme for selection of 3000 MW Grid Connected Solar PV Power Projects under Phase-II, Batch-II, Tranche-I for "State Specific Bundling Scheme". Under the "State Specific Bundling Scheme", NSM provides for

bundling of relatively expensive solar power with cheaper power from Respondent No. 2, NTPC coal based stations out of the unallocated quota of the Government of India (Ministry of Power) in the ratio of 2:1 basis (2 MW of Solar Power with 1 MW of Thermal Power). NTPC invited proposals by RfS for setting up Grid Connected Solar-PV Power Projects in various States. Petitioners were selected for setting up of Solar PV ground mount Projects in various States of India. NTPC issued a LoI for development of grid connected, Solar PV Projects and entered into two PPAs with Petitioners. Subsequent to the 'Effective Date' the 'GST laws' were enacted by Government Instrumentalities. The Petitioners sent notices to NTPC regarding the 'Change in Law' event that took place after applicability of GST *w.e.f.* 01.07.2017. However, the Respondent No. 2 NTPC failed to give response to the Petitioners.

276. Respondent No. 3, M/s M. P. Power Management Company Limited is the holding company for all the distribution licensees in the State of Madhya Pradesh. Respondent No. 4, Delhi Metro Rail Corporation was established with equal equity participation of the Government of the National Capital Territory of Delhi and the Central Government for the construction and operation of a world class Mass Rapid Transport System. The Government of Madhya Pradesh and the Government of India decided to set up a 750MW solar project in Rewa District. The Rewa Solar Project is supported by the MNRE in accordance with the Scheme for Development of Solar Parks and Ultra Mega Units issued by MNRE on 12.12.2014. Madhya Pradesh Urja Vikas Nigam Limited and SECI incorporated Rewa Ultra Mega Solar Limited ("RUMSL"). RUMSL in its capacity as the bidding authority for the Rewa Solar Project, invited proposals from the prospective bidders pursuant to issuance of a Request for Proposal dated 16.03.2016 for the development of one number of Unit comprising 250 MW capacity. In furtherance of the RfP, ACME Solar submitted a competitive escalable bid tariff of Rs. 2.97/kwh for the first contract year, with an annual escalation of 5 paisa at the start of each contract year for a total of 15 contract years under both PPA 1 and PPA 2. ACME Solar was declared as one of the successful bidders by RUMSL on 10.02.2017. ACME Solar informed the Respondents and RUMSL that the said project would be implemented by the Petitioner and the Petitioner executed PPA 1 with Respondent No. 3 for a Guaranteed Energy Offtake of at least 411 MUs of solar energy, in terms of Article 8.2(a) of the said PPA and PPA 2 with Respondent No. 4 for a Guaranteed Energy Offtake of at least 115 MUs of solar energy, in terms of Article 8.1(a) of the said PPA. The GST Laws were enacted which

brought about fundamental structural changes in the prevailing tax regime in the country and has severely affected the various parameters upon which the parent company of the Petitioner had submitted its bid. The Petitioner furnished a 'Change in Law' notice upon Respondents in terms of Article 17.1(a) of the PPA, highlighting consequent major financial impact on all industries including solar generation. The Petitioner also informed Respondents that it will approach the Commission, in terms of Article 17 of the PPAs, for seeking approval of the said 'Change in Law' event and the consequent compensation on account of excess cost to be incurred due to implementation of GST Law.

277. Petitioners have submitted that before the 'Effective Date' under the PPAs, the existing indirect tax regime provided for a complex tax environment due to multiplicity of taxes and elaborate compliance obligations. However, pursuant to the Effective Date, the new indirect taxation system was enacted namely 'GST' which represents a paradigm shift in the mode and levy of indirect taxes. In accordance to the 'GST laws', with effect from 01.07.2017, on Intra-State supplies of goods or services - CGST & SGST were to be levied by the Central and State Government respectively and on Inter -State supplies of goods or services - IGST was to be levied by the Central Government, at the rate prescribed from time to time. Petitioners have submitted that new slabs under 'GST laws' have led to an increase in the overall project cost. The change of tax regime has escalated the capital cost of the Petitioner's project, hence making the tariff quoted at the time of bid for allocation of project unviable.

278. The Petitioners have submitted that the fundamental philosophy behind the 'Change in Law' as contained in Article 12.1.1 is to ensure that additional recurring/ non-recurring expenditure by the Seller due to 'Change in Law' event is compensated through monthly Tariff Payment to the extent it restores the affected party to the same economic position as if such change in law event had not occurred.

279. The Petitioners have placed their reliance on the Order dated 19.04.2017 pronounced by Appellate Tribunal for Electricity in *Sasan Power Limited v. Central Electricity Regulatory Commission* in Appeal No. 161 of 2015; Clause 6.2(4) of the Tariff Policy dated 28.01.2016 and Order of the Commission dated 21.08.2017 in its *suo-moto* Petition No. 13/SM/2017

wherein hearings have been initiated to facilitate the settlement of the dues arising on account of the introduction of GST Laws being events of Changes in Law under the respective PPAs. In view of above, the Petitioners have submitted that it may be allowed compensation that would be equivalent to the financial impact of the 'Changes in Law' on the costs and revenues so as to restore the Petitioners to the same economic condition prior to occurrence of the 'Changes in Law'.

280. **Per Contra,** Respondents have submitted that the Petition is not maintainable and is liable to be dismissed in limine, inter alia, since 'GST Laws' were notified as far back as 12.04.2017 and 28.04.2017. Therefore, the Petitioners could have arranged its affairs in a manner to mitigate the effect of the increase in costs on account of the enactment of the 'GST Laws'. The Petitioners have not produced all the underlying invoices and material in support of Net incremental impact of GST thereof. In terms of Clause 6 of the Contract, the Modules (10 MW) were to be delivered at the Project Site by 30.06.2017 i.e. before the coming into effect of the 'GST Laws' on 01.07.2017. Therefore, the delay (if any) in the delivery or receipt of such modules and the consequential increase in the cost, cannot be passed on to the Respondent. The outsourcing of the O&M to a third party (if any) is not a requirement of the PPA and is a commercial decision of the Petitioners for its own advantage and any increase in cost including on account of taxes etc. is entirely to the account of the Petitioners. In terms of a quoted tariff under provisions of Section 63 of the Act, the Petitioners are required to include the cost of operation and maintenance in the levelled tariff quoted. The Petitioners have not furnished details regarding the original vendor/ original equipment manufacturer. A bare perusal of the select few invoices relating to Solar PV Modules furnished by the Petitioners indicates that the goods have been supplied through M/s Mundra Solar PV Limited. Therefore, petition filed for claiming 'Change in Law' is not maintainable. The mere production of a Comparative Chart demonstrating the impact of GST Regime on Petitioners Project cost without material particulars and basic relevant documents in support thereof cannot be considered as sufficient to entertain the present petition and to analyse and decide the entitlement of the Petitioners to any relief under the Change in Law provisions contained in the PPAs.

281. Respondents have submitted that the 'Change in Law' provision contained in Article 12 of

the PPAs is applicable only to any change in taxes or introduction of any new tax made applicable *for supply of power by the SPDs as per the terms of this Agreement* (PPA). Sub clause of 12.1.1 providing for *any change in tax or introduction of any tax* is specifically circumscribed by the above qualification. This clearly shows that every change in tax or introduction of tax is not intended to be covered by the 'Change in Law' provisions of the PPA. There is a specific and additional condition that the impact of change in law should be on the supply of power by the Seller. Merely because the statutory levies or taxes may affect the financials of the project developer, it does not get covered under the 'Change in Law' within the meaning of the PPA or entitle the Petitioners to a revision in tariff. Respondents have submitted that the claim that taxes which do not fall under the sixth bullet under Article 12.1.1 are to be considered as admissible by virtue of first bullet under Article 12.1.1 is wrong and should be rejected. If such claims are considered, then the sixth bullet is rendered redundant. There was no need to have a specific provision for tax on supply of power since taxes would be covered under 'law' in the first bullet. The harmonious construction of the provisions would require some meaning and purpose to be given to the sixth bullet of Article 12.1.1 and the claims which are to be considered on account of statutory taxes etc. falls within the scope of sixth bullet. If the tax is not in respect of supply of power but in respect of any purchase of inputs goods, equipment, plant, machinery etc. (input material for construction of the power plant), i.e. taxes etc. related to the setting up of the Power Project as distinguished from the sale of power generated, the same is not covered within the scope of Article 12.1 of the PPA and, therefore, the relief provided for in Article 12.2 of the PPA will have no application.

282. Respondents have submitted that the Petitioners have also not placed before the Commission in a transparent manner, the taxes, duties and levies which stands withdrawn and no longer payable by reason of the introduction of the GST. Admittedly, there are number of taxes, duties, cess and levies which had been subsumed in the above taxes which came into force on 01.07.2017. The Petitioners are also 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 absence of proper particulars being placed by the Petitioners on the extent of taxes, levies, duties and cess etc. subsumed in the GST Laws, the Commission should dismiss the petition filed by the Petitioners. It is

incumbent on the Petitioners to disclose in a transparent manner with regard to the increase or decrease in the taxes on net basis.

283. From the submissions of the parties, the following issues arise before this Commission:

284. *Issue No. 1: Whether the Commission has the jurisdiction to entertain the Petitions?*

285. *Issue No. 2: Whether the promulgation of the IGST Act, 2017, the CGST Act, 2017, the Rajasthan 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?*

286. *Issue No. 3: Whether there will be incremental impact in 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?*

287. *Issue No. 4: 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?*

288. *Issue No. 5: Whether the Petitioners should be allowed adjustment in tariff in terms of Article 12 of the PPA by increasing the tariff as prayed for in the present Petition or any other way?*

289. *Issue No. 6: Whether the claim of 'Carrying Cost' as prayed by the Petitioners in the I.A.'s is sustainable?*

290. No other issue was pressed or claimed.

291. We may now discuss the issues one by one:

292. *Issue No. 1: Whether the Commission has the jurisdiction to entertain the Petitions?*

293. The Petitioners have submitted that their Solar Power Plants were conceived in terms of the one of the following schemes:

- a. “Scheme for Selection for 2000 MW Grid-connected Solar PV Power Projects under Phase-II, Batch-III JNNSM Scheme” issued by the MNRE.
- b. “Scheme for selection of 3000 MW Grid Connected Solar PV Power Projects under Phase-II, Batch-II, Tranche-I for “State Specific Bundling Scheme” issued by the MNRE.
- c. “Scheme for Development of Solar Parks and Ultra Mega Units” issued by MNRE. The Government of Madhya Pradesh and the Government of India decided to set up a 750MW solar project in Rewa District.

294. The Petitioners have submitted that all the Schemes mentioned above are ‘Composite Schemes’ hence the jurisdiction of this Commission to adjudicate upon the present petitions is undisputable. Under Section 79 of the Electricity Act, 2003, the Commission has the power to adjudicate upon disputes between generating companies and trading licensees in terms of the Commission’s judgment dated 11.10.2017 in *Welspun Energy Private Limited vs. Solar Energy Corporation of India (Petition No. 95/MP/2017)*. While relying upon the provisions of the JNNSM scheme and the relevant provisions of the PPAs executed between the parties, the Commission inter alia held that in a scenario where a solar power generating company enters into a PPAs with a trader (i.e. Respondents) under the JNNSM scheme, this Commission would have jurisdiction to adjudicate disputes between such generating company and trading licensee. In view of the afore-stated, the Commission is the appropriate commission to adjudicate upon the instant dispute.

295. **Per Contra**, the Respondents No. 5 & 6 DISCOMS have submitted that they have no privity of contact with Petitioners in Petition No. 188/MP/2017, 189/MP/2017 and 47/MP/2018. They have entered into Power Sale Agreement (PSA) with other Respondent No. 1 (SECI) for supply of Solar Power for a period of 25 years. SECI have entered into a PPA with the Petitioners who were selected through the “e-bidding process” based on the Guidelines issued by MNRE. As the generation and supply of power takes place within the State of Andhra Pradesh, therefore as per the Hon’ble Supreme Court judgment dated 11.04.2017 in *Energy Watchdog vs. CERC and Ors., CA No.5399-5400 of 2016*, the jurisdiction will be in the State Commission i.e. Andhra Pradesh State Regulatory Commission. **Similarly, the Respondents No. 7 & 8** have submitted that Solar Projects in Petition No. 232/MP/2017,

233/MP/2017 and 13/MP/2018 (2x10 MW) were set up by the Petitioner in Telangana State under “State Specific Bundling Scheme”, notified by the MNRE. Under the said scheme, Telangana State was allocated 400 MW Solar PV Capacity and the Project was to be implemented by NTPC-NVVN. The Petitioner's Solar power plants (Generation) were set up in Telangana and power is being supplied/sold (Supply) to TSDISCOMS at the designated STU Sub-stations in Telangana at the Fixed levelized tariff. As the entire generation and supply of power takes place within the state of Telangana only, therefore as per the Hon’ble Supreme Court’s judgment dated 11th April 2017 in C.A. No. 5399-5400 of 2016 titled “Energy Watchdog vs. CERC and others”, the jurisdiction will be in the State Commission i.e. Telangana State ERC. The Petitioner has erroneously claimed jurisdiction of this Commission on the basis that since this scheme is notified under State Specific Bundling Scheme, bundling Solar power with Thermal Power from NTPC Thermal plants across various States, it is claimed as a Composite Scheme and hence comes under the jurisdiction of this Commission.

296. All the Respondent DISCOMS have submitted that:

- a. the proposal for procurement and adoption of tariff under section 63 of Electricity Act 2003 is pending before respective State Electricity Regulatory Commissions (SERCs).
- b. SERCs have already taken into consideration of solar power availability in the Annual Revenue Requirement (ARR) for the FY 2018-19.
- c. This Commission has not adopted the tariff discovered under section 63 of Electricity Act 2003.
- d. It is specifically agreed in the said agreement that any effect due to ‘Change of Law’ is suffered by either of the parties to the agreement, the aggrieved party shall approach the SERC for appropriate orders.
- e. In view of the above submissions Central Commission lacks jurisdiction in terms of the Electricity Act 2003 provisions (under Section 79) and also as per the Law settled by the Hon'ble Supreme Court in the judgment cited above.
- f. As per Article 17.9 of the PPA once the tariff is fixed then the same is payable for entire duration of the PPA and Petitioners have to bear all the statutory taxes, duties

levies etc. In view of the unambiguous provision, the provision for Relief under 'Change in law' becomes redundant and hence inoperative. GST came into force on 01.07.2017 and the notification No.50/17 customs dated 30.06.2017 was effective only from 30.06.2017/01.07.2017.

- g. The Petitioners are required to import the necessary plant and equipment for installation at site of power project much prior to the scheduled commissioning date and similarly the Petitioner is required to get the clearance of the goods imported from the port of importation and from the custom authorities. As such the claim made by the Petitioner is not tenable.
- h. The Petitioner have agreed to indemnify SECI as per Article 17.9 & 14.1.2 of the PPAs. Further, there is no liability to pay any revised tax or duty or cess for the term of agreement between SECI and the Buying Utility.
- i. Article 12 of the PPA does not open with a non-obstinate clause so as to nullify the effect of order applicable of Article 14.1.2 and Article 17.9 of the said agreement. It is pertinent to note that contracts between parties are to be read and understood on their plain language to know the intention of the parties to the contract. The Respondents DISCOMS have placed the reliance on a three Judge bench of Hon'ble Supreme Court in *Bharat Aluminum Company versus Kaiser Aluminum Technical Services Inc. [(2016) 4 SCC 126]*.
- j. The PPAs talk about Central Commission whereas the PSAs talks about the Appropriate Commission. Further, both the Agreements define the Appropriate Commission as follows:

" Article 1. 1 - Definitions

Appropriate Commission - shall mean the CERC referred to in sub-section (1) of Section 76 or the State ERC referred to in section 82 or the Joint ERC referred to in Section 83 of the Electricity Act 2003, as the case may be "

Since the scheme has been notified as State Specific, provision has been made in the PSA to substitute the relevant/appropriate Commission as the State Commission. Even though the PPA stipulates the Central Commission as the deciding authority in respect of Change in Law, however in terms of the Hon'ble Supreme Court's judgment (*Energy Watchdog Vs.*

CERC & Ors.) cited in the foregoing para, the Composite scheme is not attracted in the present case and the jurisdiction would be in the State Commission only.

297. The Respondents have submitted that it is a settled legal proposition that jurisdiction cannot be conferred on a Court/Tribunal with consent of the Parties, without the Act providing for the same. In view of the above submissions the Respondents have submitted that this Commission lacks the jurisdiction in terms of Section 79 of the Electricity Act 2003 and also as per the Law settled by the Hon'ble Supreme Court in the judgment cited above.

298. Further, the Respondents have placed their reliance on the judgment of Hon'ble APTEL in *Appeal No. 200 of 2009 between M/s PUNE Power Development Private Limited (Inter-State Trading Licensee) and Karnataka DISCOMs*, wherein a similar dispute had arisen on the issue of jurisdiction of appropriate Commission, whether it is the Central Commission or State Commission, since the Appellant in this case, an Inter-State Licensee, was undertaking trading of power transaction from Karnataka DISCOMs. The findings of Hon'ble APTEL in this judgment is as extracted below:

“37. (I) The present case involves a dispute between the Distribution Licensee of Karnataka, the Respondent and the Appellant which is an inter-State licensee. The Appellant is selling power to the Distribution Licensee Respondent in the State of Karnataka, thereby having a nexus to the State. Since the procurement of power by the Distribution Licensee from the Trading Licensee is being done in the State of Karnataka, the Appellant falls within the jurisdiction of the State Commission under Section 86(1)(b) of the Act. The procurement of power has a direct nexus with the State of Karnataka as the supply is to the Karnataka Distribution Licensee. There is no restriction on the location of the Trading Licensees to determine the jurisdiction of the State Commission. The supply of electricity, namely, the Appellant being at a different place does not oust the jurisdiction of the State Commission under Section 86(1)(f) to adjudicate upon the dispute between the licensees. Therefore, we hold that so long as the Distribution Licensees are involved in procurement of power in the State, the State Commission alone will have the jurisdiction under Section 86(1)(f) to adjudicate upon the dispute. The 1 point is answered accordingly.

II. In the present case, the Appellant has entered into a contract with Respondent No.2 for procuring power for a trading margin. Therefore, the Appellant cannot be construed to be an agent or a broker of the disclosed principal. As held by the State Commission, the perusal of the documents produced by the Respondent prima facie indicate that the agreement of the Respondent was with the Appellant which is undertaking the responsibility of taking power from the Respondent to supply to M/s BSBS Rajdhani Power Limited. This is not a gratuitous act undertaken by the

Appellant The Appellant had two separate and distinct agreements, one agreement between the Appellant the Respondent, and another agreement was entered into between Appellant and the M/s BSES Rajdhani Power Limited. As such, there is no privity of contract between Respondent No.2 and BSES Rajdhani Power Limited.

Hence, BSES Rajdhani Power Limited cannot be construed to be a necessary party. As such the petition filed before the State Commission is maintainable”.

299. Further, in a similar issue, the Hon’ble APTEL, in *Appeal No. 31 of 2012 between PTC India Limited and Gujarat Urja Vikas Limited* passed judgment, held as follows:

“In view of the above reasons, we are to conclude that merely because the PTC, the Appellant is an inter-state Trading licensee and the license was granted by the Central Commission it would not oust the jurisdiction of the State Commission especially when we find that cause of action had taken place within the jurisdiction of the Gujarat State Commission.

“112. Summary of our Findings

ii) The, State Commission has the jurisdiction under Section 86(l)(f) of the Act to adjudicate upon the dispute between two licensees. In this case as the PPA has a nexus with the distribution licensees of Gujarat, the State Commission has the Jurisdiction to adjudicate upon the dispute between the two licensees.

7. The Respondents (3) & (4) humbly submit that the ratio-decidenti passed in the Ld. APTEL's judgments squarely apply to the instant Petition.”

300. The Respondents have submitted that in view of the above the Commission does not have jurisdiction in the instant Petition and the same may be dismissed as devoid of merits.

301. The Commission observes that the Petitioners conceived their projects under following schemes:

- 1) In Petition No. 188/MP/2017; 189/MP/2017; 190/MP/2017; 201/MP/2017; 202/MP/2017; 203/MP/2017; 204/MP/2017; 230/MP/2017; 231/MP/2017 and 47/MP/2018:

“Scheme for Selection for 2000 MW Grid-connected Solar PV Power Projects under Phase-II, Batch-III JNNSM Scheme” issued by the MNRE. The Guidelines under the said scheme envisage setting up of Grid-Connected Solar PV power plants of 2000 MW aggregate capacity through ‘Open Competitive Bidding’ with SECI acting as the nodal

agency. As per the 'Guidelines', the solar power generated from the projects was to be procured by SECI and sold to willing state utilities under power sale agreements. The projects were to be designed for interconnection with the transmission network of STU/CTU/ pooling sub-station of solar park or any other transmission utility at voltage level of 33kV or above. SECI is only acting as an intermediary which can sell power off-taken from the Petitioners to any willing state utility.

Further, Clause 1.6 of the Phase-II, Batch-III: State Special Viability Gap Funding (VGF) in the Scheme of JNNSM Scheme provides as under:

"1.6 Phase-II, Batch-III: State Special Viability Gap Funding (VGF) in the Scheme:

The Solar Projects of 2000 MW capacity under the State Specific VGF Scheme will be set up in the solar Parks of various States, to be developed through coordinated efforts of Central and State Agencies. As implementation of solar parks have begun recently, it could possible that Solar Parks in some of the State do not become available soon. For such States, Solar Projects would be allowed to be located outside solar parks with land being provided either by the State Government, or arranged by the Solar Power Developers (SPDs).

These guidelines shall form the basis for selection of Grid Connected Solar PV projects under this scheme. Out of total capacity of 2000 MW, a capacity of 250 MW will be earmarked for bidding with Domestic Content Requirement (DCR).

MNRE shall specify the total State-wise Capacity of the projects (both "open Category" and "DCR Category") based on commitments from the State for off take of not less than 90% of the capacity to be invited by SECI before issue of Request of Selection (RfS). SECI shall tie up for the remaining capacity with the other Buying Entities for which the Host State shall facilitate inter-State transfer of power."

As per the above provisions of Phase-II, Batch-III: State Special Viability Gap Funding (VGF) in JNNSM Scheme, MNRE is required to specify the total State-wise capacity for the projects based on commitments from the State for off-take of not less than 90% of power and for the remaining 10% of power, the host State is required to facilitate inter-State transfer of power to sell to other buying entities. Therefore, the JNNSM scheme envisages that the power from the projects developed under the scheme shall be supplied to more than one State and hence is covered as composite scheme.

2) In Petition No. 232/MP/2017; 233/MP/2017; 13/MP/2018; 34/MP/2018:

“Scheme for selection of 3000 MW Grid Connected Solar PV Power Projects under Phase-II, Batch-II, Tranche-I for “State Specific Bundling Scheme” issued by the MNRE. Under the “State Specific Bundling Scheme”, NSM provides for bundling of relatively expensive solar power with cheaper power from NTPC coal based stations out of the unallocated quota of the Government of India (Ministry of Power) in the ratio of 2:1 basis (2 MW of Solar Power with 1 MW of Thermal Power). Thereafter, such bundled power is sold to willing state utilities under long term power sale agreements. Further, in terms of provisions of the Phase II Batch-II Guidelines, the project must be designed for interconnection with the transmission network of STU/ CTU/ pooling sub-station of solar park or any other transmission utility at voltage level of 33kV or above.

Further, Clause 2.1 & 2.3 of the “Phase-II Batch-II State Specific Bundling Scheme for 3000 MW Solar PV Projects” under JNNSM Scheme provides as under:

2.1 NSM Phase-II Batch-II State Specific Bundling Scheme for 3000 MW Solar PV Projects:

The 1000 MW Bundling Scheme introduced under NSM Phase-I has been successful in incentivizing setting up of a large number of Solar Power Projects and minimizing the impact of tariff on the distribution companies. The proposed 3000 MW Solar PV Projects to be selected under Batch-II of NSM Phase-II, will be implemented by NVVN on Solar Parks to be developed through association of Central and State Agencies/ Land provided by State Governments or Land identified and arranged by Solar Power Developers in the respective States. MNRE is facilitating development of 25 Solar Parks to accelerate the Solar Capacity Addition in various States. The bidder will approach the Solar Park Implementation Agency (SPIA) for allotment of land and connectivity. The SPIA shall provide the details of land and the timelines for availability, allotment, possession and connectivity for the projects before submission of bids. The SPIA will provide the Cost of Land, Annual Charges, and Connectivity Charges etc. which the developer would take into consideration in their bid.

There could be three (3) situations:

- (A) Entire tendered quantity can be located in the Solar Parks in the State;*
- (B) Part of tendered quantity can be located in Solar Park and part outside Solar Park; and*
- (C) Entire tendered quantity can be located outside the Solar Park.*

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2.3 Mechanism of Operation:

The 3,000 MW Solar PV Capacity will be set up based on the model of bundling of solar power with unallocated thermal power and fixed levellised tariffs. The mechanism of operation of this model shall be as enumerated below:

1) Minimum project size will be 10 MW. NVVN will divide the entire quantity into projects of uniform size as far as possible. NVVN may also divide the bid lot into different sized projects also to match plot sizes in the solar park or to provide fair participation. For situation B & C as given in Para 2.1 above, range of project size starting from 10 MW may be given by NVVN.

2) The bidding will be State specific and conducted through e-bidding. It will be based on fixed levellised tariffs. The developers will submit bids quoting a fixed levellised tariff for the entire project duration of 25 years. They will then be committing to sell power from their plants to NVVN at the quoted tariff over the 25 year period.

3) The selection of bids will be done based on the tariff quoted by the bidders. Selection will be based on lowest quoted levellised tariffs. The quoted tariff cannot be higher than the Central Electricity Regulatory Commission (CERC) Approved Applicable Tariff as on the last date of receipt of financial bids by NVVN.

4) The bidders will be free to avail fiscal incentives like Accelerated Depreciation, Concessional Customs and Excise Duties, Tax Holidays, etc. as available for such projects. The same will not have any bearing on comparison of bids for selection. As equal opportunity is being provided to all bidders at the time of tendering itself, it is up to the bidders to avail various tax and other benefits. No claim shall arise on NVVN for any liability if bidders are not able to avail fiscal incentives and this will not have any bearing on the discovered tariff.

5) NVVN will purchase the Solar Power generated from the selected Solar PV plants at the quoted tariffs and Thermal Power at the Tariff as determined by CERC as per Regulations from time to time for power from the respective Thermal Power Plant from which power is allocated. NVVN will bundle the Solar Power with un-allocated Thermal Power from Coal based stations of NTPC on 2:1 basis (2 MW of Solar with 1 MW of Thermal), and sell the Bundled Power to willing State Utilities under 25 years Power Sale Agreements (PSAs), at Weighted Average Tariff of the Solar and Thermal components plus Trading Margin of Paisa Seven (7) per kWh. The weighted average of tariff will be separately calculated for each State for the Solar Power.”

As per the above provisions of Phase-II Batch-II State Specific Bundling in JNNSM Scheme, Solar PV Projects will be implemented by NVVN on Solar Parks to be developed through association of Central and State Agencies/ Land provided by State Governments or Land identified and arranged by Solar Power Developers in the respective States. MNRE is facilitating development of 25 Solar Parks to accelerate the

Solar Capacity Addition in various States. The Solar Park Implementation Agency (SPIA) shall provide the details of land and the timelines for availability, allotment, possession and connectivity for the projects before submission of bids. The SPIA will provide the Cost of Land, Annual Charges, and Connectivity Charges etc. which the developer would take into consideration in their bid. The Scheme envisages that the entire tendered quantity can be located in the Solar Parks in the State; Part of tendered quantity can be located in Solar Park and part outside Solar Park; and Entire tendered quantity can be located outside the Solar Park. The 3,000 MW Solar PV Capacity will be set up based on the model of bundling of solar power with unallocated thermal power and fixed levelled tariffs. As per the mechanism of operation the NVVN will purchase the Solar Power generated from the selected Solar PV plants at the quoted tariffs and Thermal Power at the Tariff as determined by CERC as per Regulations from time to time for power from the respective Thermal Power Plants from which power is allocated. NVVN will bundle the Solar Power with un-allocated Thermal Power from Coal based stations of NTPC on 2:1 basis (2 MW of Solar with 1 MW of Thermal), and sell the Bundled Power to willing State Utilities under 25 years Power Sale Agreements (PSAs), at Weighted Average Tariff of the Solar and Thermal components plus Trading Margin of Paisa Seven (7) per kWh. The weighted average of tariff will be separately calculated for each State for the Solar Power. There is nothing that restricts NVVN from selling the power procured from the solar power developers to any state utility, either within or outside the concerned state. NVVN is only acting as an intermediary which can sell power off-taken from the Petitioners to any willing state utility. Therefore, provisions of Phase-II Batch-II State Specific Bundling in JNNSM Scheme also envisage a composite scheme.

3) In Petition No. 33/MP/2018:

“Scheme for Development of Solar Parks and Ultra Mega Units” was issued by MNRE. The Government of Madhya Pradesh and the Government of India decided to set up a 750MW solar project in Rewa District. Madhya Pradesh Urja Vikas Nigam Limited and SECI incorporated Rewa Ultra Mega Solar Limited (“RUMSL”). RUMSL in its capacity as the bidding authority for the ‘Rewa Solar Project’, invited proposals from the prospective bidders pursuant to issuance of a Request for Proposal for the development of

one number of Unit comprising 250 MW capacity.

Further, Clause 2, 8 & 9 of the “Scheme for development of Solar Parks and Ultra Mega Solar Power Projects” provides as under:

“Scheme for development of Solar Parks and Ultra Mega Solar Power Projects:

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2. Proposal

MNRE through this scheme plans to set up 25 solar parks, each with a capacity of 500 MW and above; thereby targeting around 20000 MW of solar power installed capacity. These solar parks will be set up within in a span of 5 years commencing from 2014-15 and the solar projects may then come up as per demand and interest shown by developers.

At the State level, the solar parks will enable the States to bring in significant investment from project developers, meet its Solar Renewable Purchase Obligation (RPO) mandate and provide employment opportunities to local population. The State will also reduce its carbon footprint by avoiding emissions equivalent to the solar park's installed capacity and generation. Further, the State will also avoid procuring expensive fossil fuels to power conventional power plants.

The solar park will provide a huge impetus to solar energy generation by acting as a flagship demonstration facility to encourage project developers and investors, prompting additional projects of similar nature, triggering economies of scale for cost-reductions, technical improvements and achieving large scale reductions in GHG emissions. Some Ultra Mega Solar Power Projects may be set up in these Parks or the entire park may individually be an Ultra Mega Solar Power Project.

2.1 Applicability: All the States and Union Territories are eligible for benefits under the scheme.

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8. Transmission and evacuation of power from solar park:

Interconnection of each plot with pooling stations through 66 KV lother suitable voltage underground or overhead cable will be the responsibility of the solar project developer.

The designated nodal agency will set up the pooling stations (with 400/220. 220/66 KV or as may be suitable switchyard and respective transformers) inside the solar park and will also draw transmission to transmit power to 220 KV/400 KV sub-station.

The responsibility of setting up a sub-station nearby the solar park to take power from

one or more pooling stations will lie with the Central Transmission Utility (CTU) or the State Transmission Utility (STU). After following necessary technical and commercial procedures as stipulated in the various regulations notified by the Central/State Commission.

If the State Government is willing to buy over 50% of the power generated in the solar park, preference will be given to STU, which will ensure setting up of substation and development of necessary infrastructure for transmission of power from substation to load centres. The designated implementing agency will intimate POWERGRID and CEA at least 6 months before so that the planning and execution can be carried out in time.

If the state is not willing to buy at least 50% of the power generated in the solar park, then CTU may be entrusted with the responsibility of setting up 400 KV or bigger substation right next to the solar park and its connectivity with the CTU. For setting up of this transmission & evacuation infrastructure, Power Grid may prepare a separate project to be funded from NCEF I external funds I Green Corridor project, if the cost is very high. The system would be planned in such a manner so that there is no wheeling charge applicable on solar power in accordance with the CERC Regulation or reduce the wheeling charges to affordable level.

To build this infrastructure using the highest possible standards, the whole solar power evacuation network scheme may be designed using latest technologies like SCADA, GIS, Bay controller, online monitoring equipment for dissolved gas analysis, OPGW, PLCC etc.

9. Power Sale Arrangement:

Acceptance for development of solar park under the Scheme does not guarantee power purchase agreement (PPA) or tariff for the power to be produced. The project developers need to have their own arrangement for a PPA or get selected in any Government of India or State Government Scheme. The developer will be free to set up projects under any scheme or for third party sale.”

As per the above provisions of “Scheme for development of Solar Parks and Ultra Mega Solar Power Projects” MNRE planned to set up 25 solar parks, each with a capacity of 500 MW and above. Interconnection of each plot with pooling stations through 66 KV/ other suitable voltage underground or overhead cable was the responsibility of the solar project developer. The designated nodal agency was to set up the pooling stations (with 400/220, 220/66 KV or as may be suitable switchyard and respective transformers) inside the solar park. The responsibility of setting up a sub-station nearby the solar park to take power from one or more pooling stations was with the Central Transmission Utility (CTU) or the State Transmission Utility (STU). If the State Government was willing to buy over 50% of the power generated preference was to be given to STU however, in case the state was not

willing to buy at least 50% of the power generated in the solar park, then CTU was entrusted with the responsibility of setting up 400 KV or bigger sub-station right next to the solar park and its connectivity with the CTU. Therefore, provisions of Scheme also envisage a Composite Scheme.

302. The Commission observes that the issue of Composite Scheme has been dealt with in detail in *Energy Watchdog Judgment {2017 (14) SCC 80}* Hon'ble Supreme Court of India. The relevant extract is as under:

“22. The scheme that emerges from these Sections is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79 itself in Sub-sections (c), (d) and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression "within the State" in Sub-clauses (a), (b), and (d), and "intra-state" in sub-clause (c). This being the case, it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission. The State Commission's jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. What is important to remember is that if we were to accept the argument on behalf of the Appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the Appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being the case, we are constrained to observe that the expression "composite scheme" does not mean anything more than a scheme for generation and sale of electricity in more than one State.

...
24. Even otherwise, the expression used in Section 79(1)(b) is that generating companies must enter into or otherwise have a "composite scheme". This makes it clear that the expression "composite scheme" does not have some special meaning-it is enough that generating companies have, in any manner, a scheme for generation and sale of electricity which must be in more than one State.”

303. From the above it is observed that if under a scheme there is generation or sale of electricity in more than one State then the same is covered under the expression of the “Composite Scheme” and is consequently under the jurisdiction of the Central Commission. In the instant Petitions Phase-II, Batch-III: State Special Viability Gap Funding (VGF) in JNNSM Scheme

envisages that the power from the projects developed under the scheme shall be supplied to more than one State and hence is covered as composite scheme. Whereas Phase-II Batch-II State Specific Bundling in JNNSM Scheme envisage that NVVN will bundle the Solar Power with un-allocated Thermal Power from Coal based stations of NTPC on 2:1 basis (2 MW of Solar with 1 MW of Thermal) and finally provisions of “Scheme for development of Solar Parks and Ultra Mega Solar Power Projects” clearly stipulates that in case the state was not willing to buy at least 50% of the power generated in the solar park, then CTU was entrusted with the responsibility of setting up 400 KV or bigger sub-station for connectivity with the CTU. Thus, it is the clear case of composite schemes and the judgments relied upon by the Respondents viz. *Appeal No. 200 of 2009 between M/s PUNE Power Development Private Limited (Inter-State Trading Licensee) and Karnataka DISCOMs* and *Appeal No. 31 of 2012 between PTC India Limited and Gujarat Urja Vikas Limited* are not applicable in the instant Petitions. The Commission is of the view that it has the jurisdiction to adjudicate in the matter. It is pertinent to mention here that the view taken in the instant Petitions is consistent with the view taken in the Order of *Welspun Energy Private Limited vs. Solar Energy Corporation of India (Petition No. 95/MP/2017)*.

304. Further, the Respondents have argued that the proposal for procurement and adoption of tariff under section 63 of Electricity Act 2003 is pending before respective State Electricity Regulatory Commissions (SERCs). SERCs have already taken into consideration of solar power availability in the Annual Revenue Requirement (ARR) for the FY 2018-19. This Commission has not adopted the tariff discovered under section 63 of Electricity Act 2003. As per Article 17.9 of the PPA once the tariff is fixed then the same is payable for entire duration of the PPA and Petitioners have to bear all the statutory taxes, duties levies etc. In view of the unambiguous provision, the provision for Relief under ‘Change in law’ becomes redundant and hence inoperative. The PPAs talks about Central Commission whereas the PSAs talks about the Appropriate Commission.

305. The Commission observes that Article 1.1 of PPA and PSA defines the term “Appropriate Commission” as follows:

“ Article 1. 1 - Definitions

Appropriate Commission - shall mean the CERC referred to in sub-section (1) of

Section 76 or the State ERC referred to in section 82 or the Joint ERC referred to in Section 83 of the Electricity Act 2003, as the case may be "

306. From the above the Commission is of the view that since the schemes are covered as Composite Schemes therefore the Commission is the deciding authority in respect of 'Change in Law', in terms of the Hon'ble Supreme Court's judgment (*Energy Watchdog Vs. CERC & Ors.*) cited in the foregoing para.

307. **Issue No. 2:** *Whether the promulgation of the IGST Act, 2017, the CGST Act, 2017, 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?*

308. The Petitioners have submitted that the fundamental philosophy behind the 'Change in Law' is as contained in Article 12 of the Power Purchase Agreement to ensure that additional recurring/ non-recurring expenditure by the Seller due to 'Change in Law' event is compensated through monthly Tariff Payment to the extent it restores the affected party to the same economic position as if such change in law event had not occurred. The Petitioner has submitted that Respondents are trying to create an artificial distinction between 'Change in law' with respect to setting up of the power project *vis-a-vis* 'supply of power'. The expression "supply of power" cannot only mean sale of power but everything that needs to be done for sale of power, i.e., from purchase of the fuel/machinery and other inputs, running the plant, producing electricity and then selling the same. In this regard, the Petitioner has placed its reliance on the Commission's Order dated 01.02.2017 in Petition No. 8/MP/2014 in case titled *EMCO Energy Ltd. Vs. MSEDCL & Ors.* The Order was upheld by the Appellate Tribunal for Electricity by its Judgment dated 19.04.2017 in Appeal No. 161 of 2015 reported as 2017 ELR (APTEL) 508. The Petitioner has submitted that the 'Change in Law' provision of the PPA includes both *recurring and non-recurring* expenditure. Construction Cost being a non-recurring expenditure is thus covered by the Change in Law provision in the PPA. The petitioners have requested that the Commission should, taking a consistent view, allow the change in rate of tax in the present case as 'Change in Law' event. The Petitioner has placed its reliance on the decision of the Hon'ble Appellate Tribunal for Electricity in *Sasan Power Limited Vs. Central Electricity Regulatory Commission 2017* ELR (APTEL) 508 wherein it has been held at para 43 that the Commission ought to take a

consistent view, when deciding on compensation of Change in Law under similar PPA provisions.

309. **Per Contra**, Respondents have submitted that the ‘Change in Law’ provision contained in Article 12 of the PPAs is applicable only to any change in taxes or introduction of any new tax made applicable ‘*for supply of power by the SPDs as per the terms of this Agreement (PPA)*’. Sub clause of 12.1.1 providing for ‘*any change in tax or introduction of any tax*’ is specifically circumscribed by the above qualification. This clearly shows that every change in tax or introduction of tax is not intended to be covered by the ‘Change in Law’ provisions of the PPA. Respondents have submitted that the claim “*that taxes which do not fall under the sixth bullet are to be considered under first bullet of Article 12.1.1*” is wrong and should be rejected. If such claims are considered, then the sixth bullet is rendered redundant. There was no need to have a specific provision for tax on supply of power since taxes would be covered under ‘law’ in the first bullet. The harmonious construction of the provisions would require some meaning and purpose to be given to the sixth bullet of Article 12.1.1 and the claims which are to be considered on account of statutory taxes etc. falls within the scope of sixth bullet. The Respondents have submitted that the Hon’ble Appellate Tribunal for Electricity by the Judgment dated 14.08.2018 in Appeal No. 111 of 2017 in *M/s. GMR Warora Energy Limited v. Central Electricity Regulatory Commission and Ors* has decided on interpretation of ‘Change in Law’ provision similar to the present PPAs. The term any ‘Change in tax’ or introduction of any tax made applicable for supply of power by the SPD as per the terms of this Agreement has been interpreted to include the taxes on inputs required for generation and supply of power to the Distribution Licensees. In the said decision, the Hon’ble Appellate Tribunal has also held that the tax issues need to be considered under the sixth bullet only and it cannot fall under the first bullet if the sixth bullet does not give application. The Respondents have submitted that qualifying expression ‘Supply of Power’ is used only in the sixth bullet and not in the first five bullets of Article 12 of the PPAs. The same is with the purpose namely when the change in law is considered for taxes, it should be confined to ‘supply of power’. In other words, expenditures incurred on account of taxes by reason of change in taxes is to be considered only on taxes related to supply of power and same should not be extended to all taxes at different stages prior to the transaction of supplying/ sale of power. The Respondents have submitted that the case law

relied upon by the Petitioner are not squarely applicable to the facts and circumstances of the case.

310. Article 12 of the Power Purchase Agreement stipulates as under:

“12. 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 change in tax or introduction of any tax made applicable for supply of power by the SPD as per the terms of this Agreement.*

but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the SPD, or (ii) 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.”

311. The Commission observes that as per Article 12, 'Change in Law' means the enactment/ 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 opinion 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 sixth 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. It implies that bullet point sixth in seriatim would be applicable as 'Change in Law' to the cases where the change in tax or introduction of any tax directly impacts 'supply of power' only. Thus, the ambit of the sixth bullet point is limited in that if any change in Tax is made or any tax is introduced having its impact specifically on the 'supply of power' in that case the remedy of 'Change in Law' is available to the Petitioners under bullet point number six only. 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. Various laws were subsumed and repealed. The Commission has further observed that the Appellate Tribunal for Electricity by the Judgment dated 14.08.2018 in Appeal No. 111 of 2017 in *M/s. GMR Warora Energy Limited v. Central Electricity Regulatory Commission and Ors.* has decided on interpretation of 'Change in Law' provision similar to the present PPA as under:

“B. Issues raised by the Discom:

iv. Before dealing the issues there is need to deal one major issue related to tax which will settle many of the issues raised by the Discom. This issue is related to fifth bullet of Article 10.1.1 of the Change in Law event. The Discom/ MSEDCL/ Prayas Energy Group have contended that the any change in tax or levy of new tax is to be seen as tax on supply of power and not the taxes on the input costs for generation of electricity.

v. Thus, we hold that this issue has been dealt by this Tribunal in detail in the Judgment dated 14.8.2018 of this Tribunal in Adani Judgment. The issue has been decided in favour of the Adani (generator/Seller) in the said Judgment. The relevant extract from the Adani Judgment is reproduced below:

"11.

- d) Before discussing the issues there is a need to address a common issue raised by the Discoms related to allowance of tax under Change in Law in terms of the PPA. According to the Discoms that **as per the 5th bullet of the Article 10.1.1** of the PPA change in tax or introduction of any new tax is only applicable to supply of power which also means sale of power if definition of supply is taken in terms of the Act. The Discoms have contended that if there is specific provision dealing with the tax under Change in Law then other provisions of Change in Law Article are not allowed to deal with the tax and as such no other tax implications are allowed to be covered under Change in Law under the PPA. The Discoms have also relied on some Judgments of Hon'ble Supreme Court on this issue. We have gone through the said Judgments and we observe that according to the Judgments relied by the Discoms, the taxes once dealt in a particular clause of a contract then there is no scope for considering taxes under other clauses of a contract.
- e) APRL has submitted that the generator undertakes many activities to ensure supply of power to the Discoms. APRL has relied on the Judgment of Hon'ble Supreme Court in case of State of A. P. v. NTPC (2002) 5 SCC 203 wherein it has been held that the production (generation), transmission, delivery and consumption are simultaneous, almost instantaneous. According to the said Judgment, the applicable taxes on inputs for generation of power can be construed to be taxes on supply of power. APRL has further contended that if the contention of the Discoms is accepted than the Change in Law provision would be applicable during the Operating Period and the applicability of the said provision will become redundant during Construction Period. There is some strength in the contention of APRL as there will be no applicability of Change in Law provisions if there are changes in tax/duties/levies etc. rates or imposition of

new tax/duties/levies etc. during Construction Period and on input costs related to power generation.

- f) *APRL has further contended that the reliance of the Discoms on the maxim 'expressum facit cessare tactium' meaning when express inclusions are specified, anything which is not mentioned explicitly is excluded is misplaced as the Hon'ble Supreme Court in case of Assistant Collector of Central Excise Calcutta Division v. National Tobacco Company of India Ltd. (1972) 2 SCC 560 has held that the rule of prohibition by necessary implication could be applied only where a specified procedure is laid down for performance of duty or where there is an express prohibition.*
- g) *The Discoms have also reproduced the definition of Change in Law under different PPAs under Section 63 of the Act. We have gone through the said provisions and we find that the other provisions of the PPA are similar to that in the other PPAs under Section 63 of the Act except the fifth bullet which is additional specifically covering tax on supply of power. The Judgments of the Hon'ble Supreme Court relied upon by the Discoms were under different context and could not be equated to the scheme of power procurement by Discoms under Section 63 of the Act which is based on guidelines issued by GoI under different scenarios wherein the treatment of taxes depends upon the specific conditions of the RFP and tariff quotes by the bidders.*
- h) *In view of our discussions as above and duly considering the earlier Judgments of this Tribunal, we are of the considered opinion that any change in tax/levies/ duties etc. or application of new tax/levies/ duties etc. on supply of power covers the taxes on inputs required for such generation and supply of power to the Discoms."*

This Tribunal has decided that any tax or application of new tax on supply of power also covers the taxes on inputs required for such generation and supply of power to the Distribution Licensees."

312. It has further been decided in Appeal No. 111 of 2017 in *M/s. GMR Warora Energy Limited v. Central Electricity Regulatory Commission and Ors.* that:-

“vi. Now, we will consider the issues raised by the MSEDCL. Let us first consider the issues related to **Construction Period**. These issues are change in rates of Customs Duty/ Excise Duty/ Service Tax/ Other Taxes (WCT, VAT, CST). Let us first examine the findings of the Central Commission on these issues. The relevant extracts from the Impugned Order are reproduced below:

"44. We have considered the submissions of the Petitioner, MSEDCL and Prayas. The increase in Service Tax was affected through Finance Act, 2012. **Since the enhanced rate of Service Tax is through an Act of Parliament after the cut-off date and has resulted in additional expenditure by the Petitioner, the same is covered as change in law under Article 10.1.1 of the MSEDCL PPA.** Accordingly, the Petitioner is entitled to be compensated by MSEDCL for the impact of difference in the rate of service tax on the project cost.

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- .
- i. From the above it is crystal clear that the Central Commission has considered the tax on supply of power as tax on inputs for supply of power and allowed the same under Change in Law. Further, the State Commission has considered that change in duties/ tax imposed by IGI under Act of the Parliament resulting in change in cost of the project is to be considered under Change in Law. We agree to this conclusion arrived at by the Central Commission as we have also concluded the same while allowing the Busy Season Surcharge and Development Surcharge imposed by MoR, IGI under the Act of the Parliament for transportation of coal which has resulted in change in cost to GWEL as such change in cost could not be factored in by GWEL at the time of bid submission.
- viii. Accordingly, in view of discussions as above, we are of the considered opinion that the Central Commission has rightly allowed the above claims in favour of GWEL.”

313. From the above it is apparent that the Hon’ble Appellate Tribunal for Electricity has already held that any tax levied through an Act of Parliament after the cut-off date which results in

additional expenditure by the Petitioner, the same is covered as 'Change in Law'. In the same judgment it is also held that and any tax or application of new tax on 'supply of power' covers the taxes on inputs required for such generation and supply of power to the Distribution Licensees. In the instant case the 'GST Laws' have been enacted by the Indian Government Instrumentalities i.e. by the Act of Parliament and the State Government. The change in duties/ tax imposed by various Government Instrumentalities at Centre and State level has resulted in the change in cost of the inputs required for generation and hence 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, second and sixth bullet in seriatim of Article 12 of the PPA.

314. *Issue No. 3: Whether there will be incremental impact in 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. 4: 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?

315. Issue no. 3 and Issue no. 4 are interrelated and hence they are being taken together for discussions. The Petitioners submitted that new slabs under 'GST laws' have led to an increase in the overall project cost. The change of tax regime has escalated the capital cost of the Petitioners' project, hence making the tariff quoted at the time of bid for allocation of project unviable. The total escalation in cost of Petitioners due to implementation of GST is about few Crores.

316. The Petitioners have submitted that the Central Government vide Notification No. 12/2017 introduced the Central Goods and Services Tax Act, 2017 (hereinafter referred to as "CGST") of 5% to 28% on goods required for execution, construction and operation of Solar Projects which were previously exempted or fall under lower tax slabs w.e.f. 01.07.2017. With implementation of 'Goods and Services Tax' (hereinafter referred to as 'GST') has increased the capital cost of the project. Since, the increase in capital cost was not contemplated at the

time of bidding, the same has to be factored in the tariff, to enable the Petitioners to retain the economic value that was worked out/ considered at the time of bid and, also to ensure that the project is both viable and sustainable in the long term. Since, solar power has single part tariff structure and there is no variable charge, any increase in capital cost directly impact the overall economic viability of project as the tariff is fixed for the life on the basis of capital cost estimated at the time of bidding. As per the industry standards, the cost contribution of major three (3) items being Modules, Inverters and Structures is 70%. It is of relevance to point out the list of items which have an impact due to GST coming into force from 01.07.2017. The relevant items along with the rate of impact are provided herein below:-

Items	Impact in %
PV Modules	5%
Land Cost	0%
Civil and General Works	9%
Mounting Structures	18%
Power Conditioning Unit	28%
Evacuation Cost up to Inter-connection Point (Cables and Transformers)	18%
Preliminary and Pre-Operative Expenses including IDC and Contingency	18%

317. The Petitioners have further submitted that before the Notification 50/2017, the Basic Custom Duty on Mounting Structures and inverters was 5.15% (including Cess) as per the concessional certificate issued by MNRE and therefore the Petitioners were getting custom duty exemption of 50% on Basic Custom Duty for Mounting Structures and Inverters. The exemptions which were granted by MNRE in form of concessional certificate have now been discontinued pursuant to the issuance of Notification No. 50/2017 dated 30.06.2017, issued by Custom Department and therefore Petitioner is currently paying 10.30 % (including Cess) after the withdrawal of concessional certificate by MNRE due to Notification No. 50/2017 dated 30.06.2017. The withdrawal of issuance of concessional Certificate for Basic Custom Duty by MNRE has impacted the capital cost of the Petitioner project and hence, covered under Change in Law event under Article 12 of the PPA. The relevant items along with the rate of impact are as under:-

Items	Impact of BCD (excluding Cess) (in %)
Mounting Structures	10%
Power Conditioning Unit	10%

318. The Petitioners have submitted that they are facing severe financial impact. The impact of around 11.4% of the cost over and above the initial envisaged project cost has imposed severe hardship to the Petitioner and loss of economic value. The increased cost can be recovered through tariff, which is allowable to be recovered from the Respondent under Article 12 of the PPA. The Petitioners have submitted that on account of the above notifications, they have given notice to the Respondents mentioning about the occurrence of ‘Change in Law’ event as per Article 12 of the PPA due to implementation of GST by the Government of India on 01.07.2017.

319. The Petitioners have further submitted that they are only claiming the additional expense due increase in taxes/ duties which happened pursuant to the execution of the PPAs. A bid strategy to lock charges at a particular level is based upon an assessment of the overall returns the supplier (Petitioner) will make despite. However, the same cannot mean that any unexpected (recurring or non-recurring) increase in the duties/ taxes will not be paid by the Respondents. The same will lead to an absurd interpretation, of the change in law provisions of the PPA, wherein the Petitioners could be subjected to costs which they did not at all contemplate/ risked at the time of bidding. The whole intent of Article 12 of the PPA is to restore the Petitioners to the same economic position as such event has not have happened and therefore the effective date shall be meaningless in the event the Petitioners are denied additional financial impact due to raise in costs as contemplated under Article 12 of the PPA. The Petitioners submitted that the Respondents are required to comply with the following requirement of Article 12.1.1 of the PPA, wherein it is stated that the “change in law” means, among other things, *“any change in tax or introduction of any tax made applicable for supply of power by the SPD as per the terms of this Agreement.”*

320. The Petitioners have submitted that it has engaged ACME Cleantech Solution Private Limited (“ACME Cleantech”) as its EPC Contractor for engineering, procurement and

construction of its solar power project.

321. The Petitioners have submitted that since the relief for 'Change in Law' is contractual, the quantification should be done on a case to case basis. However, this Commission may set out the principles, framework, and assumptions for such case to case quantification, and the same should not be applied on a normative or generic basis, but should be applied only where such framework, principles and assumptions actually exist as a matter of fact. A normative or generic approach cannot be adopted at this stage since that may amount to questioning in hind sight, the investment decisions that were taken by the SPD, which would be contrary to the explicit intention and methodology specified in the Change in Law clause. In this regard, investment decisions made by developers such as (i) imported versus domestic modules; (ii) procurement through EPC vs. procurement by developer; and (iii) internalisation of O&M vs. outsourcing of O&M, should not be questioned at this stage. The economic and regulatory principle for such an approach is that the Petitioners projects have been set up pursuant to competitive bidding and the investors have worked out the most efficient and cost-effective structure to win the bids. Since the benefit of this structure in the form of lower tariff has already been passed to the off-takers, it is not now open to anyone to question the developers' investment and structuring decisions in hindsight.

322. The Petitioners have submitted that the Commission could compare the pre-GST tax regime with the post-GST regime of taxes to arrive at the methodology for formulating and determining the incremental cost impact due to the new GST Law. To determine increase in percentage terms, the Commission can look at the actual numbers or even take a normative number of Rs. 100 to arrive at percentage increase. Further, this Commission should specify the cost of components of a solar power plant such as modules, modules mounting structures, inverters, cables, meters, land, etc. as a percentage of the total project cost ('TPC'), for example Modules - 65% to 70%, BOS imported - 7 to 10%, BOS domestic - 14% to 17%, Service - 9% to 10%. The TPC as certified by the statutory auditor may be taken and the component wise break up of this TPC for determining the applicability of the applicable pre and post GST taxes, may be taken on a normative basis. For example, if the TPC as certified by the statutory auditor is 100, then the component wise break up on percentage basis, could be as follows:

S. No.	COMPONENT	PERCENTAGE OF TPC
1.	Module	65% - 70%
2.	BOS Imported	7%-10%
3.	BOS Domestic	14%-17%
4.	Services	9%-10%

323. Thereafter the actual incidence of pre-GST and post-GST array of taxes should be applied, as applicable, to the aforesaid break up of cost components. The SPD will have to submit a statutory auditor's certificate for verification of the TPC.

324. The Petitioners submit that since the PPAs are silent on the compensation methodology, the discretion to formulate the same is with the Commission. The compensation can be made in either one of the following manners:

- (i) One-time upfront lumpsum payment: This is the Petitioner's preferred option and is also favourable to the off-takers, as no carrying cost will have to be paid on the upfront payment.
- (ii) Amortisation of the impact over a shorter finite period: If the Commission does not deem it fit to allow option (i) above, it could alternatively amortise the impact. However, it is humbly submitted that such amortisation should be done over a reasonable finite period such as five (5) to seven (7) years instead of amortising the impact over the entire balance period of the PPA. Such an approach will also reduce the burden of carrying cost that the procurer has to bear in respect of the amortisation period.

325. **Per Contra**, The Respondents have submitted that the relief for Change in Law in the case of PPA in regard to any tax is available only if it is '*for supply of power*' by the SPDs as per the terms of PPA. If the tax is not in respect of supply of power but in respect of any purchase of inputs goods, equipment, plant, machinery etc. (input material for construction of the power plant), i.e. taxes etc. related to the setting up of the Power Project as distinguished from the sale of power generated, the same is not covered within the scope of Article 12.1 of the PPA and, therefore, the relief provided for in Article 12.2 of the PPA will have no application. The

Petitioners cannot seek any relief in regard to the change in taxes related to the setting up of the solar power project in comparison to the sale of power from the solar power project. The entire claim made by the Petitioners is in respect of the tax on the setting up of the power project and not on the sale of power from the power project. With regards to the goods which were to be imported prior to 01.07.2017, there is no implication of payment of taxes under the GST. The PPA, inter alia, provides for the SCoD. The Petitioners were required to complete and commission the solar power project in all respects by the SCoD. The Petitioners were, therefore, required to import the necessary plant and equipment for installation at the site much prior to the SCoD. The Petitioners were also required to get the clearance of the goods imported from the port of importation and from the Custom Authorities and the same could be prior to the SCoD.

326. The Respondents have submitted that the Petitioners have not given: i) the details of the date on which the Purchase Order was placed; ii) the date on which such goods were loaded for transshipment to India; iii) the date of arrival of goods in India; iv) the date on which the Petitioner were required to clear the goods from the Custom Authorities and v) the date on which the Petitioner did obtain the goods after custom clearance.

327. The Respondents have submitted that few of the Petitioners have filed the documents relating to the payment of basic custom duty of M/s Acme Cleantech Solutions Private Ltd. which is not the payment made by the Petitioners in regard to the importation of the solar panels and other plant and machinery. The custom duty as per the documents filed by the Petitioners has been paid by M/s Acme Cleantech Solutions Pvt. Ltd. The Petitioners have not given any particulars as to how the plant and machinery imported by M/s Acme Cleantech Solutions Pvt. Ltd.

328. The Respondents have submitted that the Petitioners have also not placed before the Commission the taxes, duties and levies which stands withdrawn and no longer payable and/or subsumed by reason of the introduction of the GST. The Petitioners itself has referred to the following items as being affected by the imposition of the GST:

<i>“Items</i>	<i>Impact in %</i>
<i>PV Modules</i>	<i>5%</i>

<i>Land Cost</i>	<i>0%</i>
<i>Civil and General Works</i>	<i>9%</i>
<i>Mounting Structures</i>	<i>18%</i>
<i>Power Conditioning Unit</i>	<i>28%</i>
<i>Evacuation Cost up to Inter- Connection Point (cables and transformers)</i>	<i>18%</i>
<i>Preliminary and Pre-operative expenses Including IDC and Contingency”</i>	<i>18%</i>

329. The Respondents have submitted that the pleadings made by the Petitioners are not only inconsistent but there is an attempt to mix up imported goods with domestic procurement of goods.
330. The Respondents have submitted that the claim of the Petitioners that taxes which do not fall under the fifth (sixth) bullet under Article 12.1.1 are to be considered as admissible by virtue of first bullet under Article 12.1.1, is wrong. If such claims are considered, then the fifth (sixth) bullet is rendered redundant. There was no need to have a specific provision for tax on supply of power since taxes would be covered under ‘law’ in the first bullet. The harmonious construction of the provisions would require some meaning and purpose to be given to the fifth bullet (sixth bullet) of Article 12.1.1 and the claims which are to be considered on account of statutory taxes etc. should fall within the scope of fifth bullet or sixth bullet as the case may be.
331. The Respondent No. 3 in Petition no. 33/MP/2018 has submitted that in the relief under Art. 17 of the PPA for ‘Change in Law’ with regard to any tax is available to the Petitioner only *‘If the additional capital expenditure, interest and associated costs that the SPD incur as a result of the Change in Law exceeds the Threshold Limit (INR 20,000,000).’* In view of Article 17.1 (c) of the PPA the threshold Limit criterion should be satisfied and needs to be substantiated by the petitioner.
332. Respondents have further submitted that the Petition is not maintainable and is liable to be dismissed in limine, since the Petitioners have claimed the compensation without producing all the underlying invoices and material in support thereof. Petitioners are claiming costs under the head ‘expected GST Impact’ without substantiating the same. For appropriate consideration of Change in Law, the relevant details and documents include but are not limited to the following, namely (i) the date on which the Purchase order was placed either

for procurement of goods or for procurement of services; (ii) the date on which the goods were delivered to the Petitioners or the services were rendered and; (iii) the date on which the invoices were raised; (iv) the date on which the payment for the goods or services were made by the Petitioners and (v) In case of imported goods, the date on which the goods were custom cleared either for own consumption or to be stored in the custom warehouse. There are no details regarding the original vendor/original equipment manufacturer.

333. Further, 'Operation and Maintenance' is the responsibility of the Petitioners and in the event the Petitioners choose to employ the services of other agencies, it cannot increase the liability of the Respondents in terms of tariff. The outsourcing of the O&M Expenses to a third party (if any) is not a requirement of the PPA and is a commercial decision of the Petitioners for its own advantage and any increase in cost including on account of taxes etc. is entirely to the account of the Petitioners. In terms of a tariff quoted under Section 63 of the Act, the Petitioners are required to include the cost of 'Operation and Maintenance' in the Levellized tariff quoted. Hence, the petition may be dismissed.

334. Before starting the discussions on the issues 3 & 4 raised in the Petitions, the Commission is of the view that it is of utmost importance to answer the very basic question raised by the Respondents regarding applicability of the 'GST Laws' in case of delay of SCoD. The Commission observes that as per 'Record of Proceedings' dated 30.08.2018 the learned Counsel for Respondents have specifically submitted as under:

“(c) Petition No. 34/MP/2018 is not maintainable as the SCoD for the 50 MW Solar PV project is 28.5.2017 i.e. before the notification of the GST Laws w.e.f.1.7.2017. The actual commercial operation took place on 1.6.2017 for 20 MW, 19.9.2017 for 20 MW and 22.9.2017 for 10 MW. Moreover, the Petitioner accepted its liability for delay of the project and paid the liquidated damages as well.”

335. The Commission observes that in Petition no. 34/MP/2018 the SCoD was 28.05.2017 i.e. before the promulgation of the 'GST Laws' w.e.f. 1.07.2017. The actual commercial operation took place on 1.06.2017 (for 20 MW), 19.09.2017 (20 MW) and 22.09.2017 (10 MW). As per PPA there is no provision of extension of time for SCoD or otherwise given in terms of Article 4.5 of the PPA. The Respondents had the option to terminate the contract, however, the Respondents preferred to continue with the PPAs in terms of Article 4.5 and 4.6 of the PPA. The Petitioner has already paid 'liquidated damages' in terms of Article 4.6 of

the PPA, for the delay in commissioning beyond 28.05.2017. Therefore the Commission is of the view that the GST in the context of the present petitions is applicable on all petitions except in the Petition where ‘the actual date of Commissioning’ of the generating company as per the respective PPA is prior to 01.07.2017.

336. Now coming to the Issues, the Commission observes that in its Order dated 14.03.2018 in Petition No. 13/SM/2017 it has decided the following as regards settlement of dues arising on account of the introduction of GST under the respective PPAs:

“35. Accordingly, we direct the beneficiaries/ procurers to pay the GST compensation cess @ Rs 400/ MT to the generating companies w.e.f. 01.07.2017 on the basis of the auditors certificate regarding the actual coal consumed for supply of power to the beneficiaries on basis of Para 28 and 31. In order to balance the interests of the generators as well as discoms/beneficiary States, the introduction of GST and subsuming/abolition of specific taxes, duties, cess etc. in the GST is in the nature of change in law events. We direct that the details thereof should be worked out between generators and discoms/beneficiary States. The generators should furnish the requisite details backed by audit or certificate and relevant documents to the discoms/ beneficiary States in this regard and refund the amount which is payable to the Discoms/ Beneficiaries as a result of subsuming of various indirect taxes in the Central and State GST. In case of any dispute on any of the taxes, duties and cess, the respondents have liberty to approach this Commission.”

337. The Commission observes that ‘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’.

338. 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’. 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. The Petitioners have claimed that on account of levy of ‘GST Laws’, the construction cost of project has escalated to the tune of few crores. The Petitioners have also given the description of the levy of ‘GST laws’ on each component. The Commission is 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. Accordingly, the Commission directs the parties to reconcile the accounts as per discussion above.

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.

340. The Petitioners have submitted the details of components on which the GST has been levied leading to escalation in the construction cost of the project. The same are tabulated as under:

Items	Impact in %
PV Modules	5%
Land Cost	0%
Civil and General Works	9%
Mounting Structures	18%
Power Conditioning Unit	28%

Evacuation Cost up to Inter-connection Point (Cables and Transformers)	18%
Preliminary and Pre-Operative Expenses including IDC and Contingency	18%

341. The Commission observes that the Petitioners have claimed increase in total Cost due to increase in tax incidence as below:

(Amount in Crores)

	Petition No.	Total Cost Pre GST Laws (inclusive of all taxes)	Total Cost Post GST Laws (inclusive of all taxes)	Increase in Tax Incidence
1	188/MP/2017	341.76	327.75	14.01
2	189/MP/2017	345.38	331.28	14.10
3	190/MP/2017	345.22	331.13	14.09
4	201/MP/2017	290.06	278.64	11.42
5	202/MP/2017	294.93	283.76	11.17
6	203/MP/2017	287.28	276.42	11.42
7	204/MP/2017	286.58	275.30	11.28
8	230/MP/2017	329.32	343.76	14.45
9	231/MP/2017	185.52	177.90	7.62
10	232/MP/2017	185.52	177.90	7.62
11	233/MP/2017	123.68	188.10	5.59
12	13/MP/2018	NA	NA	21.65
13	33/MP/2018	NA	NA	54.56
14	34/MP/2018	NA	NA	4.70
15	47/MP/2018	NA	NA	14.40

342. The Commission observes that prior to the introduction of Goods & Service Tax Act (GST), the components were taxed at the time of production (Excise) and at the time of Sale (VAT). For sale of components between two States, CST was applicable. Moreover, for projects executed within certain Municipal Corporation limits, additional Octroi was applicable to the components. As per Goods And Service Tax (GST), *Concept & Status*, published by Central Board Of Indirect Taxes And Customs, Department Of Revenue, Ministry Of Finance, Government Of India, as on 1st August, 2018, the list of the taxes subsumed in the GST, 2017 is as under:

“10.21 Subsuming of taxes, duties etc.: Among the taxes and duties levied and collected by the Union, Central Excise duty, Duties of Excise (Medicinal and Toilet Preparations), Additional Duties of Excise (Goods of Special Importance), Additional Duties of Excise (Textiles and Textile Products), Additional Duties of Customs (commonly known as CVD), Special Additional Duty of Customs (SAD), Service Tax and cesses and surcharges insofar as they related to supply of goods or services were subsumed. As far as taxes levied and collected by States are concerned, State VAT, Central Sales Tax, Purchase Tax, Luxury Tax, Entry Tax, Entertainment Tax (except those levied by the local bodies), Taxes on advertisements, Taxes on lotteries, betting and gambling, cesses and surcharges insofar as they related to supply of goods or services were subsumed.”

343. The Commission observes that with the enactment of Central Goods and Services Tax Act, 2017, the following Acts were repealed by the Central Government of India:

- i) *the Central Excise Act, 1944 (except as respects goods included in entry 84 of the Union List of the Seventh Schedule to the Constitution),*
- ii) *the Medicinal and Toilet Preparations (Excise Duties) Act, 1955,*
- iii) *the Additional Duties of Excise (Goods of Special Importance) Act, 1957,*
- iv) *the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978, and*
- v) *the Central Excise Tariff Act, 1985*

344. The Central Excise Tariff Act, 1985 (5 of 1986) and Exemption Notifications (other than general) the ‘General Exemption No. 64’ stipulates as under:

“GENERAL EXEMPTION NO. 64

Exemption on all items of machinery, including prime movers, instruments, apparatus and appliances, control gear and transmission equipment and auxiliary equipment and components, required for initial setting up of a solar power generation project or facility.

[Notifn. no. 15/2010-CE., dt. 27.2.2010 as amended by 26/12, 15/14]

In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944(1 of 1944), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts all items of machinery, including prime movers, instruments, apparatus and appliances, control gear and transmission equipment and auxiliary equipment (including those required for testing and quality control) and components, required for initial setting up of a solar power generation or solar energy production project or facility, from the whole of the duty

of excise leviable thereon which is specified in the First schedule to the Central Excise Tariff Act, 1985 (5 of 1986), subject to the following conditions, namely:-

(1) that an officer not below the rank of a Deputy Secretary to the Government of India, in the Ministry of New and Renewable Energy recommends the grant of this exemption, indicating the quantity, description and specification of the goods and certifies that they are required for initial setting up of a solar power generation or solar energy production project or facility, as the case may be; and

(2) the Chief Executive Officer of the project furnishes an undertaking to the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, having jurisdiction over the factory of the manufacturer, to the effect that-

(i) the said goods will be used only in the said project and not for any other use; and

(ii) in the event of non-compliance of sub-clause (i), the Project Developer of such project shall pay the duty which would have been leviable at the time of clearance of goods, but for this exemption.”

345. Similarly, the Commission observes that with the enactment of the Goods and Services Tax, 2017, by the Government of Uttar Pradesh, Madhya Pradesh, Karnataka, Andhra Pradesh and Telangana Acts related to State VAT, Central Sales Tax, Purchase Tax, Luxury Tax, Entry Tax, Entertainment Tax (except those levied by the local bodies), Taxes on advertisements, Taxes on lotteries, betting and gambling, cesses and surcharges insofar as they related to supply of goods or services were subsumed.

346. The Commission observes that GST rates are ranging from 5% to 18%. In case of PV Modules, the applicable GST is 5%, as against 0% VAT applicable in various States pre-GST roll out. Excise duty on components required for initial setting up of a solar power generation or solar energy production project or facility was at ‘Zero’ rate and also enjoyed concessional Basic Customs Duty and Additional Customs Duty on imports. The imposition of VAT on solar power generating equipment has been diverse with States offering complete exemption while on the other hand, the States of Uttar Pradesh, Andhra Pradesh etc. have levied a concessional rate of tax at 4% (four per cent) and 5% respectively, on the equipment and components use for setting up of solar power generating equipment. The GST rate on solar power generating systems and raw material used (including modules), has been notified at

5% (five per cent) of value of such goods. However, other goods such as inverter, cement and cables have been kept under the 18% (eighteen per cent) bracket. Further, the GST on various services such as works contract service, technology etc. which are typically used in setting up of a solar power plant has been kept at 18% (eighteen per cent). It is pertinent to mention here that Services, Commercial, Contractual, Erection and Commissioning, all attracted Service Tax @15%, Swachh Bharat Cess of 0.5% and Krishi Kalyan Cess of 0.5%.

347. The Commission observes that as per Notification No. 1/2017-Central Tax (Rate) as contained at Sr. No. 234 Chapter heading 84, 85 or 94 the “*renewable energy devices & parts for the manufacture (C) Solar Power Generation System*” the **concessional rate of 5% would also be available i.e. say** inverters, cables, connectors etc. are under 28 per cent duty but whenever these products are used in the solar generation system, these will attract an effective levy of 5 per cent instead of 28 per cent. Further, in the case of the direct purchase of the mounting structures, power conditioning units etc. are under 18 per cent duty but in case these components are sold as part of Solar Power Generating system then the same will attract an effective levy of 5 per cent instead of 18 per cent.

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	61.96 %	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% (SGST-9% + 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% (SGST-9% + 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%.
	Weighted Avg. of Tax/GST	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'.

350. It is pertinent to note that in Petition No. 33/MP/2018, the Petitioner has submitted that Article 17 of the PPAs envisage a compensation to be made to the Petitioner, either by way of adjustment in tariff or an upfront lump sum payment, due to any increase in the cost to the Petitioner. The approval for such Change in Law has to be obtained by the Petitioner from the Commission, in terms of Article 17.1(c) of the PPA. The compensation is aimed at putting the affected party i.e. the Petitioner in the present case, in the same economic position as if the 'Change in Law' had never occurred. In other words, the Respondents in the present case are liable in terms of the PPAs, to compensate the Petitioner by way of an upfront lump sum payment, to the extent of additional capital expenditure that the Petitioner is compelled to incur as a result of introduction of GST Law. Further, the Respondents are also liable to compensate the Petitioner, by way of adjustment in the quoted tariff, on account of the additional operating/ recurring expenditure that the Petitioner would be compelled to incur for the entire term of the Project. The relevant provisions of the PPAs are being reproduced herein below:

"PPA 1

17. CHANGE IN LAW

17.2 Consequences of Change in Law

- (a) *If a Change in Law occurs or is shortly to occur, then a Party shall notify the other Parties expressing its opinion on its likely effects and giving details of its opinion of whether:*
- (i) *any changes are required to the scope of work to be performed by the SPD under this Agreement;*
 - (ii) *any changes are required to the terms of this Agreement to deal with such Change in Law;*
 - (iii) *relief from compliance with any obligations is required, including the obligation of the SPD to achieve the Unit SCOD;*
 - (iv) *any increase or decrease in costs (other than incurring additional capital expenditure), or any increase in Taxes or delay is likely to result from the Change in Law; and*
 - (v) *any capital expenditure is required or no longer required as a result of a Change in Law.*
- (b) *As soon as practicable but no later than 15 (fifteen) Days after receipt of any notice from a Party under Article 17.1 (a), the Parties shall discuss the issues referred to therein and any ways in which the Parties can mitigate the effect of the Change in Law, including;*
- (i) *demonstrating that the SPD has used reasonable endeavours (including, where practicable, the use of competitive quotes) to minimise any increase in costs and maximise any reduction in costs;*
 - (ii) *demonstrating how any capital expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred or would have been incurred, foreseeable Changes in Law at that time have been taken into account by the SPD;*
 - (iii) *demonstrating as to how the Change in Law has affected prices charged by similar businesses to the Unit, including similar businesses in which the shareholders or their associates carry on business;*
 - (iv) *demonstrating to the Procurer that the Change in Law is the direct cause of the increase or decrease in costs and/or loss or gain of revenue or delay and the estimated increase or decrease in costs or loss or gain in net profits after Tax could not reasonably be expected to be mitigated or recovered by the SPD acting in accordance with Good Industry Practice; and*
 - (v) *demonstrating that any expenditure, which was anticipated to be incurred to replace or maintain assets that have been affected by the Change in Law, has been taken into account in the amount stated in its opinion presented under Article 17.1(a).*
- (c) *If the Parties have complied with Article 17.1(b) or upon elapse of the time specified in the Article 17.1 (b) and if the SPD is required to incur any additional costs, including additional capital expenditure due to a Change in Law the aggregate financial effect of which, over the remaining Term of the PPA, is up to INR 20,000,000 (twenty million) (Threshold Limit), then the SPD shall obtain funding for such additional costs, including capital expenditure,*

at its cost and expense. The SPD shall bear all additional capital expenditure and/or interest and additional costs incurred to obtain any funding to the extent of the Threshold Limit.

For the avoidance of doubt, it is clarified that the Threshold Limit shall apply to each event constituting a Change in Law and shall not be applied on a cumulative basis.

If the additional capital expenditure, interest and associated costs that the SPD may incur as a result of the Change in Law exceeds the Threshold Limit, then the Procurer or the SPD shall approach the Appropriate Commission to seek approval of such Change in Law and the consequent impact on the Applicable Tariff.

- (d) If the Parties have complied with Article 17.1(b) or upon elapse of the time specified in the Article 17.1 (b) and if as a result of the Change in Law, there is a decrease in costs, or decrease in Taxes and/or gain in revenue or net profits after Tax, then any financial benefit accruing to the SPD on account of such decrease in costs, or decrease in Taxes and/or gain in revenue or net profits after Tax shall be passed through to the Procurer in its entirety.*
- (e) The amount determined in accordance with Article 17.1(c) and Article 17.1(d) in the eventuality of any increase or decrease in cost (or decrease or increase in revenues or net profits after Tax) of the SPD on account of a Change in Law shall be adjusted either in the Tariff Payment or through a lump sum payment, and shall be paid through a Supplementary Bill to be raised by either the SPD or the Procurer in terms of Article 10. In case of any change in the Applicable Tariff by reason of Change in Law, as determined in accordance with this Agreement, the Monthly Bill to be raised by the SPD after such change in Applicable Tariff shall appropriately reflect the changed Applicable Tariff and the Procurer agrees to pay the revised Applicable Tariff accordingly.”*

PPA 2

“17. CHANGE IN LAW

17.2 Consequences of Change in Law

- (a) If a Change in Law occurs or is shortly to occur, then a Party shall notify the other Parties expressing its opinion on its likely effects and giving details of its opinion of whether:
 - (i) any changes are required to the scope of work to be performed by the SPD under this Agreement;*
 - (ii) any changes are required to the terms of this Agreement to deal with such Change in Law;*
 - (iii) relief from compliance with any obligations is required, including the obligation of the SPD to achieve the Unit SCOD;*
 - (iv) any increase or decrease in costs (other than incurring additional**

- capital expenditure), or any increase in Taxes or delay is likely to result from the Change in Law; and*
- (v) *any capital expenditure is required or no longer required as a result of a Change in Law.*
- (b) *As soon as practicable but no later than 15 (fifteen) Days after receipt of any notice from a Party under Article 17.1(a), the Parties shall discuss the issues referred to therein and any ways in which the Parties can mitigate the effect of the Change in Law, including:*
- (i) *demonstrating through evidence that the SPD has used reasonable endeavours (including where practicable, the use of competitive quotes) to minimise any increase in costs and maximise any reduction in costs;*
- (ii) *demonstrating through evidence how any capital expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred or would have been incurred, foreseeable Changes in Law at that time have been taken into account by the SPD;*
- (iii) *demonstrating through evidence as to how the Change in Law has affected prices charged by similar businesses to the Unit, including similar businesses in which the shareholders or their associates carry on business;*
- (iv) *demonstrating through evidence to the Procurer that the Change in Law is the direct cause of the increase or decrease in costs and/or loss or gain of revenue or delay and the estimated increase or decrease in costs or loss or gain in net profits after Tax could not reasonably be expected to be mitigated or recovered by the SPD acting in accordance with Good Industry Practice; and*
- (v) *demonstrating through evidence that any expenditure, which was anticipated to be incurred to replace or maintain assets that have been affected by the Change in Law, has been taken into account in the amount stated in its opinion presented under Article 17.1(a).*
- (c) *If the Parties have complied with Article 17.1(b) or upon elapse of the time specified in the Article 17.1 (b) and if the SPD is required to incur any additional costs, including additional capital expenditure due to a Change in Law the aggregate financial effect of which, over the remaining Term of the PPA, is up to INR 20,000,000 (twenty million) (Threshold Limit), then the SPD shall obtain funding for such additional costs, including capital expenditure, at its cost and expense. The SPD shall bear all additional capital expenditure and/or interest and additional costs incurred to obtain any funding to the extent of the Threshold Limit.*

For the avoidance of doubt, it is clarified that the Threshold Limit shall apply to each event constituting a Change in Law and shall not be applied on a cumulative basis.

If the additional capital expenditure, interest and associated costs that the

SPD may incur as a result of the Change in Law exceeds the Threshold Limit, then the Parties agree and confirm that the decision of the Appropriate Commission applicable to the SPD and MPPMCL for such Change in Law event under the MPPMCL PPA shall be applicable on DMRC and the SPD, under this Agreement. The SPD shall immediately forthwith inform the Procurer of the decision of the Appropriate Commission or the appellate authority, as the case may be.

Provided however that:

- (i) upon occurrence of any Change in Law that exclusively impacts this Agreement and is not a Change in Law event under the MPPMCL PPA; or*
- (ii) if complying with the Appropriate Commission's decision under the MPPMCL PPA results in an additional financial liability on DMRC or the SPD or results in a change to the Applicable Tariff under this Agreement, and such decision of the Appropriate Commission is not acceptable to DMRC or the SPD under this Agreement;*

then DMRC and the SPD agree to mutually determine the consequences of such Change in Law under this Agreement. Such mutual determination of the consequences of Change in Law shall be done by a director-level officer of each of the SPD and DMRC. If pursuant to the mutual discussions, DMRC and the SPD fail to agree on the consequences of Change in Law, within 30 (thirty) Days from the issuance of notice under Article 17.1(a), then the matter shall be referred for resolution in accordance with Article 21.4.

- (d) If the Parties have complied with Article 17.1(b) or upon elapse of the time specified in the Article 17.1 (b) and if as a result of the Change in Law, there is a decrease in costs, or decrease in Taxes and/or gain in revenue or net profits after Tax, then any financial benefit accruing to the SPD on account of such decrease in costs, or decrease in Taxes and/or gain in revenue or net profits after Tax shall be passed through to the Procurer in its entirety.*

The amount determined in accordance with Article 17.1(c) and Article 17.1(d) in the eventuality of any increase or decrease in cost (or decrease and increase in revenues or net profits after Tax) of the SPD on account of a Change in Law shall be adjusted either in the Tariff Payment or through a lump sum payment, and shall be paid through a Supplementary Bill to be raised by either the SPD or the Procurer in terms of Article 10. In case of any change in the Applicable Tariff by reason of Change in Law, as determined in accordance with this Agreement, the Monthly Bill to be raised by the SPD after such change in Applicable Tariff shall appropriately reflect the changed Applicable Tariff and the Procurer agrees to pay the revised Applicable Tariff accordingly”

351. The Petitioner has submitted that from the above, it is evident that the threshold limit for claiming the benefit of Change in Law prescribed under the PPAs is Rs. 2.00 crore. In other words, the Petitioner is only entitled to a benefit under 'Change in Law' if the aggregate financial effect of the additional recurring/ non-recurring costs, including additional capital expenditure is more than the threshold limit prescribed under the PPAs i.e. Rs. 2.00 Crore.
352. The Petitioner has submitted that in terms of the data furnished at para 3.9 of the present petition, it is clear that the financial impact due to the introduction of GST Law is beyond the threshold prescribed under the PPAs and as such the Petitioner is entitled to claim 'Change in Law' in terms of Article 17 of the PPAs. In terms of Article 1.1 read with Article 17 of the PPAs, any introduction of a tax which results in a change in the incidence of tax liability for the Petitioner will fall within the ambit of 'Change in Law' so long as the financial impact of the said impact is beyond the threshold prescribed under Article 17.1(c) of the PPAs. The introduction of GST Law will have an adverse impact on the capital cost of the Project on the one hand for which the Petitioner seeks an upfront lump sum payment, while on the other hand, it will have an adverse impact on the cost of various services (i.e. operating costs) that will be availed by the Petitioner for the entire term of the Project.
353. The Petitioner has submitted that the enactment of GST Law through the framework of the multiple Applicable Laws, pursuant to the Constitution (122nd Amendment) Bill, 2014, is clearly contemplated in sub-clause (e) to the definition of Change in Law in the PPAs and therefore, constitutes one single event under the definition of Change in Law. It is required to pay CGST and SGST to its EPC Contractor and the impact of both CGST and SGST on the Petitioner has crossed the Threshold Limit of INR 2,00,00,000/- respectively. The incremental impact of GST Law on the Project is to the tune of INR 54.56 Crore i.e. above the Threshold Limit of INR 2 Crore and the Petitioner is entitled to relief for the entire amount in terms of Article 17.1 (c) of the PPAs.
354. **Per Contra**, the Respondents have submitted that in the relief under Art. 17 of the PPA for 'Change in Law' with regard to any tax is available to the Petitioner only *'If the additional capital expenditure, interest and associated costs that the SPD incur as a result of the Change in Law exceeds the Threshold Limit (INR 20,000,000)'*. In view of Article 17.1 (c)

of the PPA the threshold Limit criterion should be satisfied and needs to be substantiated by the petitioner.

355. The Respondent has submitted that in terms of the 'Change in Law' provisions, the relief for change in law in the case of PPAs in regard to any tax is available only '*If the additional capital expenditure, interest and associated costs that the SPD incur as a result of the Change in Law exceeds the Threshold Limit (INR 20,000,000).*' As per Article 17.1 (c), the threshold limit has been prescribed as INR 2,00,00,000 (Two Crores) for each incidence of Change in Law and not to be considered on a cumulative basis. Accordingly, each incidence of taxation has to be considered independently and separately and if the amount of the claim in respect to such independent incidence of taxation exceeds the threshold limit, the claim will be admissible. The above has to be considered before determining the liability of the Respondent No.1 to pay for the Change in Law.
356. The Commission observes that Article 17.1(c) provides that the SPD shall bear all additional capital expenditure and/or interest and additional costs incurred to obtain any funding to the extent of the Rs. 2.00 Crores (Threshold Limit). Further, the Threshold Limit shall apply to each event constituting a 'Change in Law' and shall not be applied on a cumulative basis. The Commission is of the view that the enactment of 'GST Law' constitutes as one single event under the definition of 'Change in Law' and the threshold limit of Rs. 2,00,00,000/- is to be applicable accordingly.
357. The next issue is that of the impact of 'GST laws' on the 'Operations and Maintenance' (hereinafter referred to as "O & M") stage. 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 and there is no other significant activity covered by O&M for a solar plant: Site Security; Consumables and breakdown spares; Annual Maintenance Contract; and Module cleaning - labour and water supply.
358. The Petitioners have submitted that all of the aforementioned activities have been outsourced to agencies that are experienced in providing the said services in the most effective and cost-efficient manner. The Respondents have argued that the choice to outsource is that of the

Petitioners and the Petitioners could have internalised these activities, in which case there would have been no GST impact. Therefore, the GST impact on outsourced activities is on account of the SPD's own convenience and choice and since there was an alternative to internalise these services, the burden of such GST impact has to be borne by the SPD itself. The Petitioners have submitted that this argument of Respondents is baseless for the reason that if the Petitioners had internalised the cost of the aforementioned constituents of O&M, the same would have to be factored into the quoted tariff. This would have inevitably resulted in a higher tariff. It is the case of the Petitioners that the concept of the 'O & M' expenses is implicitly covered under Article 12. As per the PPA, 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 PPA and the same may be allowed. The Petitioners have submitted that O & M expenses being claimed are on the principles of normative parameters (escalation 5.85%) 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.

359. The Petitioners have submitted that they are and will be paying additional cost to these agencies due to increase in taxes on account of the introduction of GST Law for the life of their respective projects. As such, the Petitioners are entitled to compensation for this additional recurring expenditure.

360. The Commission observes that as per the GST Act, 2017, the supply of services include:

"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.”

361. The Commission is of the view that the recurring expenses referred to in Article 12 of the PPA includes activities like salary, tax expenses, estimated maintenance costs, and monthly income from leases etc. It is apparent that GST will apply in case of outsourcing of the ‘Operation and Maintenance’ services to a third party (if any). The Petitioner has themselves submitted that *“the O&M of their projects are being carried out not by a third party but the Petitioner’s parent entity which was also the entity which successfully bid for the Project, and incorporated the Petitioners in terms of the provisions of the relevant RfS document. Accordingly, the award of O&M contract is not equivalent to an award to a third-party vendor, as has been contended erroneously by NTPC, and hence NTPC’s reliance on this Commission’s decision in GMR Warora Energy Limited v. MSEDCL and Ors., Petition No. 1/MP/2017 is misplaced.”* The Commission is of the view that outsourcing of the ‘Operation and Maintenance’ services is not the requirement of the PPA/ bidding documents. The concept of the outsourcing is neither included expressly in the PPA nor it is included implicitly in the Article 12 of the PPA. 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, 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.

362. **Issue no. 5:** *Whether the Petitioners should be allowed adjustment in tariff in terms of Article 12 of the PPA by increasing the tariff as prayed for in the present Petition or any other way?*

363. The Petitioners have submitted that they should be restored to the same economic condition prior to occurrence of the 'Changes in Law' by way of adjustment in tariff in terms of Article 12 of the PPA by increasing the tariff. It has already been discussed that in the present petitions, the tariff has been discovered under competitive bidding process in accordance with the NSM guidelines issued by the Central Government. The Commission is of the view that the basic tariff should not be altered. Also in view of the fact that the quantum of payment is not large, the relief, if any, for 'Change in Law' should be allowed as a separate element on one time basis in a time bound manner. The Petitioners shall raise its claim based on discussions in paragraph 338 & 348 of this Order and the same shall be paid by the Respondents within sixty days of the date of this Order failing which it will attract late payment surcharge as provided under PPA. It is pertinent to mention here that the claim in Petition No. 33/MP/2018 is subject to threshold limit as mentioned in the PPA in Petition No. 33/MP/2018.

364. **Issue No. 6:** *Whether the claim of 'Carrying Cost' as prayed by the Petitioners in the I.A.'s is sustainable?*

365. The Petitioners have filed an application I.A. No. 30/2018; 31/2018; 32/2018; 33/2018; 34/2018; 35/2018; 36/2018; 37/2018; 38/2018; 39/2018, 40/2018 & 50/2018 in various Petitions for the purpose of amending the Petition so as to claim carrying costs/ interest incurred by the Petitioner further to the 'Change in Law' events. The Petitioners have submitted that the 'economic position' which is sought to be restored in terms of the 'Change in Law' Article does not limit itself to a simple correlation of increased expenditure and a corresponding compensation amount but ought to also include compensation in terms of carrying costs incurred with respect to the said 'Change in Law' events. The Hon'ble Appellate Tribunal for Electricity has held that the rationale behind allowance of carrying cost is to compensate the affected party for the time value of money or the monies denied at

the appropriate time and paid after a lapse of time. In view thereof, the Petitioners are seeking the following amendment to prayer (b) of the instant Petition in order to make an express claim qua carrying costs incurred by the Petitioner with respect to the Change in Law Events detailed in the Petition:

Original Prayer:

“b. Direct the Respondent to make payments on account of Change in Law in terms of Article 12 of the PPA dated 09.08.2016 of amounts specified/ provided at Annexure P-2 and P-4 respectively;”

Amended Prayer:

“b. Direct the Respondent to compensate the Petitioner in terms of Article 12 of the PPA for the additional capital cost incurred/ to be incurred by it due to introduction of GST Law by way of adjustment in the quoted tariff for the recurring expenditure as well as an upfront lumpsum payment for the non-recurring expenditure, as the case may be along with the carrying cost/ interest paid by the Petitioner @ 14%.”

366. The Petitioners have submitted that a bare perusal of the amended Prayer as captured in the Amendment Application, makes it abundantly clear that it is exactly the same as what is being sought by way of Prayer 'b' in the Petition. The Petitioner by way of the amended Prayer is only suggesting a manner in which the Petitioner can be compensated for the additional capital cost incurred by it as a result of 'GST Laws' and seeking the carrying cost incurred by it on procuring such additional capital cost. In addition, the Petitioners are removing specific reliance on Annexures P-2 and P-4 for determination of impact of GST Law on the Petitioner, since at the time of filing the Petition, the Petitioner were not aware of the actual impact in absolute numbers, it engaged a reputed agency to prepare a sample chart on the basis of certain assumptions and understanding of the applicable taxes to demonstrate the impact of 'GST Laws'.

367. The Petitioners have submitted that since the PPAs are silent on the compensation methodology, the discretion to formulate the same is with the Commission. If 'One-time upfront lumpsum payment' is made to the Petitioner (which is preferred option of the Petitioner and is also favourable to the off-takers) then no carrying cost will have to paid on the upfront payment but in case the Commission does not deem it fit to allow 'One-time upfront lumpsum payment' then it could alternatively allow to 'amortise' the impact. In this case Petitioners are entitled to 'Carrying Cost'. The Petitioners have submitted that 'Carrying

Cost' will have to be paid for the following two periods:

- a. Period 1 - from when the Petitioners incurred the additional cost on account of introduction of GST Law till the approval of Change in Law by this Commission; and;
- b. Period 2 - from the date of approval of Change in Law over the period of amortisation, in the scenario this Commission does not allow compensation by way of one-time upfront lumpsum payment.

368. The Petitioners have submitted that as regards Period 2, they are entitled to carrying cost as a matter of right. As regards Period 1, the Petitioners submitted that they recognise the decision of APTEL by way of its judgments in (a) *Adani Power Rajasthan Limited v. Rajasthan Electricity Regulatory Commission & Ors.* [Appeal No. 119 of 2016 decided on 14.08.2018 and (b) *Adani Power Ltd. Vs. Central Electricity Regulatory Commission and Others (Appeal No. 210 of 2017) decided on 13.04.2018*], that carrying cost will not be allowed unless the PPA has a specific provision for restoration to the same economic position as if 'Change in Law' has not occurred. Therefore, the principle adopted in the above judgments was that in the absence of an express provision providing for restitution, the affected party would not be entitled to carrying cost. The Petitioners have submitted that the correct legal position is converse, i.e. unless there is an express provision prohibiting the grant of restitution, the affected party would be legally entitled to be restored to the same economic position that it would have been but for the 'Change in Law' event. The Petitioners have submitted that in either scenario, they are entitled to carrying cost for Period 1, albeit on different legal principles. In the first scenario, it is submitted that there is an implied term in the PPA for payment of carrying cost for Period 1. In the second scenario, the Petitioners are entitled to compensation of carrying cost on the principles of *quantum meruit*, as statutorily enshrined in Section 70 of Indian Contract Act, 1872 ("Section 70").

369. **Per Contra** the Respondents have submitted that the amendment sought for by the Petitioners in the prayer clause is not consistent with the averments in the petition filed. In the petition as filed, the Petitioners have specifically referred to Annexures P-2 and P-4 as to the

claim for the compensation. The Petitioner has not sought for any amendment in the petition in regard to any claim other than those what is covered by Annexures P-2 and P-4. Without any averments in the petition in regard to the scope of claim other than those covered under Annexures P-2 and P-4, the Petitioner cannot be allowed to expand the scope by changing the prayer clause. The pleadings leads to the inferences that the Petitioners may not be affected by the 'Change in Law' brought about by the 'GST Laws'. The Petitioners are now seeking to withdraw from such admissions.

370. The Respondents have submitted that there is no provision in the PPA dated 14.10.2016 for grant of such carrying cost. 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. Only after the amount has become crystalized the Petitioners are required to raise '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 payment within the due date of raising the 'Supplementary Invoices' the issue of Late Payment Surcharge would arise for the period after the due date. In regard to the above the provision of Article 10.3.3 of the PPA dealing with late Payment Surcharge and definition of the 'Due Date' in Article 1 of the PPA are relevant. The 'due date' is the 45th day after the monthly bill/supplementary bill is raised and delivered by the Petitioner to the Respondent. There cannot be any claim for late payment surcharge/carrying cost for the period prior to the due date. Further, there is no provision in the present PPA for restitution as may be contained in some of other PPAs.

371. The Respondents have submitted that the Hon'ble Appellate Tribunal by the Judgment dated 14.08.2018 in Appeal No. 111 of 2017 in *M/s. GMR Warora Energy Limited v. Central Electricity Regulatory Commission and Ors.* and in the case of *Adani Power Rajasthan Limited Vs. Rajasthan Electricity Regulatory Commission and Ors. (Appeal No. 119 of 2016)* has decided on the 'Carrying Cost' aspect, it has been held that the same will be allowed only if there is a specific provision of restoration in the PPA and not otherwise. The Respondents have also placed their reliance on the decision of the Hon'ble Tribunal in *SLS Power Limited -v- Andhra Pradesh Electricity Regulatory Commission and Others (Appeal No. 150 of 2011)* and Batch recognizes that the interest will be due from the date of payment is due. In the present case, the payment is due only after issuance of the Supplementary Bill after the

decision of the Appropriate Commission. The Respondents have submitted that the PPA does not have a provision dealing with restitution principles of restoration to same economic position.

372. The Commission observes that in the judgment of the Hon'ble 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, therefore 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.”

373. The Commission further observes that in 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.* it was held 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/ judgement. In the present case, there is no provision in the PPA neither for carrying cost nor restitution. The relevant extract from the decision in *GMR Warora* 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 Respondent 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 Respondent 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.”

From the above judgments the Commission observes that if there is a provision in the PPA 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 appropriate authority by an order/ judgment. The Commission observes that the PPA does not have a provision dealing with restitution principles of restoration to same economic position. Further in the 'Written Submissions' dated 17.09.2018 and 18.09.2018 on behalf of Petitioners in the Petition No. 188/MP/2017; 189/MP/2017; 190/MP/2017; 201/MP/2017; 204/MP/2017; 230/MP/2017; 231/MP/2017; 232/MP/2017 and 233/MP/2017 the Petitioners have categorically stated that:

“3.3.3 Compensation Methodology:

The Petitioners submit that since the PPAs are silent on the compensation methodology, the discretion to formulate the same is with this Ld. Commission. The compensation can be made in either one of the following manners:

- (i) One-time upfront lumpsum payment - this is the Petitioners' preferred option and is also favourable to the off-takers, as no carrying cost will have to paid on the upfront payment.*
- (ii) ...”*

374. The Commission further observes that it has been decided in Issue No. 5 that the Petitioners shall raise its claim based on discussions in paragraph 338 & 348 of this Order and the same shall be paid by the Respondents within sixty days of the date of this Order failing which it will attract late payment surcharge as provided under PPA. Therefore, the claim is to be raised as one-time upfront lumpsum payment which becomes due on the sixtieth date from the date of this Order by the Commission and after that the 'late payment surcharge' as provided under PPAs is to be levied. Therefore, the Commission is of the view that the claim regarding separate 'Carrying Cost' in the instant petitions is not attracted.

375. To sum up the:

- a. **Issue No. 1:** The Commission has jurisdiction to adjudicate in the matter.
- b. **Issue No. 2:** The enactment of 'GST laws' is covered as 'Change in Law' under Article 12 of the PPA.
- c. **Issue No. 3 & 4:** 'GST Laws' are applicable on all cases except in case of the generating company where the 'actual date of Commissioning' is prior to 01.07.2017. As regards its claim (subject to threshold limit in case of Petition No. 33/MP/2018) during construction period, 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. In respect of PV Modules post enactment of 'GST Laws' 5% will be applicable on intra state procurement as well as import by EPC or SPV. The amount as determined by Petitioners shall be on 'back to back' basis to be paid by DISCOMS to Petitioners under the respective 'Power Sales Agreements'. The claim of the Petitioners on account of additional tax burden on 'O&M' expenses (if any), is not maintainable.
- d. **Issue No. 5:** The relief for 'Change in Law' is allowed as a separate element on one time basis in a time bound manner. The Claim based on discussions in paragraph 338 & 348 of this Order shall be paid within sixty days of the date of this Order failing which it will attract late payment surcharge as provided under PPA.
- e. **Issue No. 6:** The claim is to be raised as one-time upfront lumpsum payment which becomes due on the sixtieth date from the date of this Order by the Commission and after that the 'late payment surcharge' as provided under PPAs is to be levied. Therefore, the claim regarding separate 'Carrying Cost' in the instant petitions is not attracted.

376. Parties to bear their own legal and administrative costs. Accordingly, the Petition No. 188/MP/2017 alongwith I.A. No. 30/2018, Petition No. 189/MP/2017 alongwith I.A. No. 31/2018, Petition No. 190/MP/2017 alongwith I.A. No. 32/2018, Petition No. 201/MP/2017

alongwith I.A. No. 33/2018, Petition No. 202/MP/2017 alongwith I.A. No. 35/2018, Petition No. 203/MP/2017 alongwith I.A. No. 36/2018, Petition No. 204/MP/2017 alongwith I.A. No. 37/2018, Petition No. 230/MP/2017 alongwith I.A. No. 34/2018, Petition No. 231/MP/2017 alongwith I.A. No. 38/2018, Petition No. 232/MP/2017 alongwith I.A. No. 39/2018, Petition No. 233/MP/2017 alongwith I.A. No. 40/2018, Petition No. 13/MP/2018, Petition No. 33/MP/2018 alongwith I.A. No. 50/2018, Petition No. 34/MP/2018 and Petition No. 47/MP/2018 are disposed of.

Sd/-

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