



नई दिल्ली
NEW DELHI

याचिका संख्या. /Petition No.: 164/MP/2018 alongwith I.A. 5 of 2019 and
165/MP/2018 alongwith I.A. 6 of 2019

कोरम/Coram:

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

आदेश दिनांक /Date of Order: 18th of April, 2019

IN THE MATTER OF:

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

AND IN THE MATTER OF:

1) Petition No. 164/MP/2018 alongwith I.A. 5 of 2019

Parampujya Solar Energy Pvt. Ltd. (PSEPL)
5B, Sambhav House, Judges,
Bungalow Road, Bodakdev,
Ahmedabad - 380015, Gujarat

...Petitioner

VERSUS

National Thermal Power Corporation Ltd. (NTPC).
Core-7, SCOPE Complex,
1, Institutional Area,
Lodi Road. New Delhi-110003

The Ministry of New and Renewable Energy (MNRE)
Block-14, CGO Complex,
Lodhi Road, New Delhi-110 003

Mangalore Electricity Supply Company Ltd. (MESCOM)
MESCOM Bhavan,
Kavoor Cross Road, Bejai,
Mangaluru, Karnataka 575004

Bangalore Electricity Supply Company Ltd. (BESCOM)
6, 2nd Floor, 2nd B Cross Rd,
Koramangala 1A Block,
Koramangala, Bengaluru,
Karnataka 560034

Chamundeshwari Electricity Supply Corp. Ltd. (CESC)
Sri Harsha Rd, Lashkar Mohalla,
Mandi Mohalla, Mysuru,
Karnataka 570001

Gulbarga Electricity Supply Company Ltd. (GESCOM)
Station Road, Kalaburagi,
Karnataka 585102

Hubli Electricity Supply Company Ltd. (HESCOM)
PB Road, Durgad Bail,
Navanagar, Hubballi,
Karnataka 580025

...Respondents

AND IN THE MATTER OF:

2) Petition No. 165/MP/2018 alongwith I.A. 6 of 2019

Parampujya Solar Energy Pvt. Ltd. (PSEPL)
5B, Sambhav House, Judges,
Bungalow Road, Bodakdev,
Ahmedabad - 380015, Gujarat

...Petitioner

VERSUS

Solar Energy Corporation of India Ltd. (SECI)
1st Floor, A-Wing, 0-3,
District Centre, Saket,
New Delhi- 110017

The Ministry of New and Renewable Energy (MNRE)
Block-14, CGO Complex,
Lodhi Road,
New Delhi-110 003

M/s Chattisgarh State Power Distribution Company Ltd.
Near Water Tank, Mowa Road,
Dubey Colony, Mowa,
Raipur, Chattisgarh 492001

...Respondents

Parties Present: Ms. Poonam Verma, PSEPL
Ms. Abiha Zaidi, PSEPL
Shri Tarul Sharma, PSEPL
Shri M.G. Ramachandran, Advocate, NTPC and SECI
Ms. Poorva Saigal, Advocate, NTPC and SECI

आदेश/ ORDER

1. The Petitioner, M/s Parampujya Solar Energy Pvt. Limited (PSEPL) is a generating company and is primarily engaged in the business of setting up of solar power plants and generation of electricity. The Petitioner is a wholly owned subsidiary of M/s Adani Green Energy Limited. The Petitioner has filed Petition No. 164/MP/2018 and Petition No. 165/MP/2018.
2. The Respondent, M/s NTPC Ltd. is a Central Public Sector Undertaking and is engaged in the business of generation of electricity and allied activities. Under the State Specific Bundling Scheme of the National Solar Mission, NTPC is responsible for implementation of scheme of Ministry of New and Renewable Energy for setting up Solar Power Plants, with whom PSEPL has executed a Power Purchase Agreement.

3. The Respondent, M/s Solar Energy Corporation of India Limited (SECI), is a Central Public Sector Undertaking and has been designated by the Government of India as the nodal agency for implementation of Ministry of New and Renewable Energy (hereinafter referred to as 'MNRE') Scheme for developing grid connected solar power capacity including Phase-II, Batch-III, Tranche-VI of the Jawaharlal Nehru National Solar Mission (hereinafter referred to as 'JNNSM') of Government of India (hereinafter referred to as 'GOI').

4. The Petitioner has made the following prayers:

(a) Admit the Petition;

(b) Hold and declare that the imposition of the Integrated Goods and Services Tax, 2017, Central Goods and Services Tax, 2017 and Karnataka/Chhattisgarh Goods and Services Tax, 2017 is an event under Change in Law under Article 12 of the PPA;

(c) Restore PSEPL to the same economic condition prior to occurrence of the Changes in Law event by way of adjustment in tariff in terms of Article 12 of the PPA as prayed for in the present Petition.

(d) Pending proceedings, direct Respondents to pay to the Petitioner the amount claimed under 'Change in Law' which shall be subject to adjustment based on the final order passed by the Commission;

(e) Pass such other and further order or orders as the Commission deems appropriate under the facts and circumstances of the present case.

Related I.A.'s

(a) Grant carrying cost to the Applicants.

(b) Restore the Applicants to the same economic position as it were prior to the occurrence of the 'Change in Law' event.

(c) Direct the Respondents to pay to the Applicants the amount claimed under 'Change in Law' in terms of Article 12 of the PPA along with carrying cost from the date the change in law event has come into effect.

(d) Pass such further orders or directions as the Commission may deem just and proper in the circumstances of the case.

Brief facts of the case:

5. The Petitioner in Petition No. 164/MP/2018 was selected as the successful bidder under the National Solar Mission Phase-II Batch-II Tranche-I State Specific Bidding Scheme conducted by NTPC Ltd., on 17.05.2016. The Petitioner entered into Power Purchase Agreements with NTPC on 27.07.2016 for development of Solar Photo Voltaic Power Plants of 50 MW in the State of Karnataka. The Solar Power Plants were to be developed on long term basis at a tariff of Rs. 4.79/kWh. As per the PPAs as well as the Bidding Scheme, the solar power purchased by NTPC under the PPAs is to be bundled with thermal power produced at NTPC stations and then sold to the Distribution Companies in the State of Karnataka.
6. The Petitioner in Petition No. 165/MP/2018 was selected as the successful bidder on 02.07.2016 for development of solar power projects under the National Solar Mission Phase-II Batch-III Tranche-VI Bidding Scheme conducted by SECI. On 02.08.2016, the Petitioner entered into two Power Purchase Agreements with SECI for development of two Solar Photo Voltaic Power Plants of 50 MW each i.e. total 100 MWs in the State of Chhattisgarh. The Solar Power Plant was to be developed on long term basis at a tariff of Rs. 4.43/kWh. As per the terms of the PPAs as well as the bidding scheme, the solar power purchased by SECI as an intermediary, will be sold to the Distribution Companies.
7. On 12.04.2017, Government of India introduced the Goods and Services Tax, replacing multiple taxes levied by the Central and State Governments.
8. On 01.07.2017, the Central Goods and Services Tax Act, 2017; The Integrated Goods and Services Tax Act, 2017 for levy and collection of tax on inter-State supply of goods or services or both by the Central Government were enacted. The State (Karnataka / Chattisgarh) Goods and Services Tax Act, 2017 was enacted for levy and collection of tax on intra-State supply of goods or services or both by the respective States.
9. Hence the Petitions.

Submissions of Petitioner in the pleadings and during the hearings in Petition No. 164/MP/2018 & 165/MP/2018

10. The Petitioner in Petition No. 164/MP/2018 & 165/MP/2018 has submitted that the Commission, in its Order dated 19.09.2018 in Petition No. 50/MP/2018 titled as *Prayatna Developers Private Ltd. v. National Thermal Power Corporation Limited & Ors.*, has observed 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. Engineering Procurement and Construction (“EPC”) Stage i.e. during Construction Stage which is covered under “Goods” and
 - b. Operation & Maintenance (“O&M”) Stage i.e. during Construction and Operation Stage which is covered under “Services”.

Re. Claim for Change in Law on account of increase in EPC Cost

11. The Petitioner has submitted that the Commission in the Order dated 19.09.2018, has allowed the claim for ‘Change in Law’ for escalation in the construction cost (EPC cost) of the project, on account of levy of ‘GST Laws’. The Petitioner has placed reliance upon the aforesaid findings of the Commission and is accordingly, claiming the amount for ‘Change in Law’ on account of additional tax burden qua EPC cost. The relevant extract of the Order dated 19.09.2018 is reproduced herein under: -

“146...The Petitioner 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.133 above.”

Re. Claim for Change in Law on account of increase in O&M Expenses

12. The Petitioner has submitted that the Commission in the aforesaid Order had allowed the

‘Change in Law’ claim on the impact of GST Laws on the EPC stage which is covered under “Goods” but, at the same time rejected the claim on account of additional tax burden on operation and maintenance expenses which is covered under “Services”. One of the reasons being that the outsourcing of the O & M services is not the requirement of the Power Purchase Agreement / bidding documents. It is a pure commercial decision of the Solar Power Developer taken for its own advantage and any increase in cost including on account of taxes etc. in the event the Solar Power Developer chooses to employ the services of other agencies, cannot increase the liability for the Procurer. In this regard, the Petitioner has submitted that:-

- a. 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 on the basis of the normative parameters as specified by the Commission in the CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012 dated 06.02.2012 as amended on 31.03.2016.
- b. The issue of impact of GST on EPC (goods) being Change in Law is squarely covered by the CERC Orders dated 19.09.2018 in Petition No. 50/MP/2018 and dated 09.10.2018 in Petition No. 188/MP/2017 and batch matters. Similarly, the impact of GST on O&M being the services part would rationally entail Change in law given the wide scope of GST laws; equally applicable on both goods and services.
- c. The PPA in the present petition provides for prudent utility practices (@ pg. 273 of the Paper book) which specifically provides that O&M services are prudent utility practices and the only objection taken by the Procurers for O&M services in the previous matters was that providing O&M services is a commercial agreement. However, EPC is also in the form a commercial agreement and not a standard bidding document and therefore, O&M expenses should be seen in the wholistic manner and consequent relief should be provided.

13. The Petitioner has submitted that even if the PPA is silent on the aspect of O&M expenses, the Hon’ble Supreme Court in paragraphs 19 and 20 of its Judgment dated 11.04.2017 in the case of Energy Watchdog v. CERC & Ors., has clearly provided that if the guidelines or the contract is specifically silent on a given aspect then this Commission has been provided the regulatory power to devise a mechanism to serve the interests of the sector. In this regard,

reliance is also placed upon Section 70 of the Indian Contract Act wherein the principle of restitution is explicitly laid down.

Re. Claim for Carrying Cost

14. The Petitioner has submitted that the PPAs provide for extensive provisions for qualifying any event as Change in Law and granting relief from effective date i.e. the date on which the Change in Law event took effect. Relevant provision of the PPAs is extracted herein below:

“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 an 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.”

15. The Petitioner has submitted that the mandate of Change in Law provisions across all PPAs (standard documents drafted by the government) is restitution i.e. *relief* be granted in a manner so as to place an affected party in the same economic position as if a Change in Law had not occurred. Restitution is therefore inherent to compensation. In this regard, Petitioner

has referred to the Ministry of Power's letter dated 27.08.2018 to the Commission wherein the Government has specifically recorded under clause 2 of the letter, the difficulty faced by the Generating Companies in terms of '*considerable time*' being consumed in the approval process resulting into severe cash flow problems to the Generating Companies, further leading to stress in the Power Sector.

16. The Petitioner has submitted that where the purpose is of restoration to the same economic position, the Commission ought to consider the aggregate economic impact including carrying cost which is in the nature of compensation for time value of funds deployed on account of Change in Law events. The Hon'ble Appellate Tribunal for Electricity in its judgment dated 12.09.2014 in Appeal No. 288 of 2013 titled *Wardha Power Company Ltd. v. Reliance Infrastructure Ltd. & Ors.*, has recognized the principle that in order to 'restore the affected party to the same economic position', compensation for Change in Law claims has to be such, as to reimburse the affected party for the expense actually incurred. Thus, the same will include expenditure attributable towards carrying cost. The relevant portion of the judgment is given below:-

"27. For example, if the price of coal calculated on the same base as used in the bid is more than the prevalent price of coal, then using the base price of coal for computing the compensation for Change in Law will result in over compensation to the Seller. Similarly, if the coal price calculated on the same base as used in bid is less than the actual price of coal, it will result in under compensation to the Seller. In both these cases, the affected party will not be restored to the same economic position as if such Change in Law has not occurred, as intended in the PPA."

17. The Petitioner has submitted that the principle of recovery of carrying cost/interest and time value of money is well settled and reliance is placed upon the following Judgments: -

(a) *Energy Watchdog v. CERC & Ors.* reported as (2017) 14 SCC 80

"57...it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sources is cut down, the PPA read with these documents provides in Clause 13.2 that while determining the consequences of change in law, parties shall have due regard to the principle that the purpose of compensating the party affected by such change in law is to restore, through monthly tariff payments, the affected party to the economic position as if such change in law has not occurred..."

(b) *South Eastern Coalfield Limited v. State of Madhya Pradesh* reported as (2003) 8 SCC 648

“21. Interest is also payable in equity in certain circumstances. The rule in equity is that interest is payable even in the absence of any agreement or custom to that effect though subject, of course, to a contrary agreement (see Chitty on Contracts, 1999 Edn., Vol. II, Para 38-248 at p. 712). Interest in equity has been held to be payable on the market rate even though the deed contains no mention of interest. Applicability of the rule to award interest in equity is attracted on the existence of a state of circumstances being established which justify the exercise of such equitable jurisdiction and such circumstances can be many.

.....
24. We are, therefore, of the opinion that in the absence of there being a prohibition either in law or in the contract entered into between the two parties, there is no reason why the Coalfields should not be compensated by payment of interest for the period for which the consumers/purchasers did not pay the amount of enhanced royalty which is a constituent part of the price of the mineral for the period for which it remained unpaid...”

(c) Judgment of the Hon’ble Tribunal dated 20.12.2012 in Appeal No. 150 of 2011, *SLS Power Ltd v. Andhra Pradesh Electricity Regulatory Commission & Ors.*

*“35...
35.5. The principle of carrying cost has been well established in the various judgments of the Tribunal. The carrying cost is the compensation for time value of money or the monies denied at the appropriate time and paid after a lapse of time. Therefore, the developers are entitled to interest on the differential amount due to them as a consequence of re-determination of tariff by the State Commission on the principles laid down in this judgment....”*

(d) Judgment of the Hon’ble Tribunal dated 13.04.2018 in Appeal No. 210 of 2017, *Adani Power Limited vs. Gujarat Electricity Regulatory Commission & Ors.*

*“12...d)
...
ix...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.... 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.”*

18. The Petitioner has also placed its reliance upon Section 70 of the Indian Contract Act, 1872. It does not require express provision in the contract/PPA especially when the term ‘relief for Change in Law’ is appropriately used and inserted to cover the restitution part. In the instant case, NTPC/procurer of power at a price/tariff and as the matter is finally disposed of, the Petitioner is entitled to be compensated for time value of money as the supply of power is not

a non-gratuitous act. The Petitioner has placed reliance on *Piloo Dhunjishaw Sidhwa v. Municipal Corporation of the City of Poona* reported as (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 [ILR 11 Lah 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.”

19. The Petitioner has submitted that what is to be allowed as “Relief for Change in Law” is nothing but *the impact of any Change in Law on the Petitioner's revenues and costs*. In case of delay, the impact will also include carrying cost as an integral part of the cost on account of change in law since the Petitioner has to incur the financing cost to borrow the additional fund to be paid to the statutory authorities pending timely reimbursement from the NTPC. In terms of Article 12 of the PPAs, the affected party is to be restored to the same economic position as if the Change in Law event had not occurred. Therefore, any relief granted under Article 12.2 must conform to the primary principle of restoring the Petitioner to the same economic position. Failure to do so would defeat the underlying principle of restitution and render Article 12 of the PPAs otiose. Further, Article 12 of the PPAs is a restitutive provision and thus ought to be given a wide and purposive interpretation. Article 12.2 of the PPAs accords plenary powers to the Commission to determine the compensation to be awarded. Article 12.2 of the PPAs neither limits nor restricts the power of the Commission to grant carrying cost.
20. The Petitioner has submitted that the ‘*Relief for change in Law*’ does not limit itself to a simple correlation of increased expenditure and a corresponding compensation amount but ought to include payment towards carrying costs in respect to the Change in Law events. Hon’ble Supreme Court has in the case of *R.C. Cooper v. Union of India* reported as AIR

1970 SC 564 noted that as per the dictionary meaning "compensation" means anything given to make things equal in value: anything given as an equivalent, to make amends for loss or damage". The aforesaid principle has also been recognized by the Hon'ble Supreme Court in the case of *N.B. Jeejeebhoy v. Assistant Collector, Thana Prant, Thana* reported as AIR 1965 SC 1096 in relation to Article 31 of the Constitution of India wherein it was held that:

"the expression "compensation" in Art. 31(2) of the Constitution means "just equivalent" of what the owner has been deprived of."

21. The Petitioner has submitted that compensation is a comprehensive term and is aimed at restoring a party to the same position as if no injury was caused to him, as held by the Hon'ble Supreme Court in the case of *Yadava Kumar v. The Divisional Manager, National Insurance Co. Ltd. and Anr.*, reported as (2010) 10 SCC 341, the relevant extract of which is reproduced herein below:-

"20. The High Court and the Tribunal must realize that there is a distinction between compensation and damage. The expression compensation may include a claim for damage but compensation is more comprehensive. Normally damages are given for an injury which is suffered, whereas compensation stands on a slightly higher footing. It is given for the atonement of injury caused and the intention behind grant of compensation is to put back the injured party as far as possible in the same position, as if the injury has not taken place, by way of grant of pecuniary relief. Thus, in the matter of computation of compensation, the approach will be slightly more broad based than what is done in the matter of assessment of damages. At the same time, it is true that there cannot be any rigid or mathematical precision in the matter of determination of compensation."

22. The Petitioner has submitted that from the above it is evident that: -
- a. Compensation implies equivalence and not simpliciter making equal a loss sustained. Thus, time value of money will also have to be considered while awarding compensation.
 - b. It is a term of broader implication.
 - c. Where the purpose is restoration to the same economic position, the courts ought to consider the aggregate economic impact including carrying cost which is in the nature of compensation.
 - d. The term 'restitution' is used in three senses, firstly, return or restoration of some specific thing to its rightful owner or status, secondly, the compensation for benefits

derived from wrong done to another and, thirdly, compensation or reparation for the loss caused to another.

23. The Petitioner has further submitted that a Change in Law clause being a restitutive clause in the PPA, equity demands that the Petitioner should be compensated for all the necessary and reasonable extra costs including carrying cost and/or interest on the additional cost incurred on account of Change in Law event. In this regard, the Petitioner has placed reliance on the Hon'ble Supreme Court's Judgment in *Sumitomo Heavy Industries Limited v. ONGC Limited* reported as (2010) 11 SCC 296. The relevant extract is reproduced as hereunder: -

“It is an obligation of the parties to a contract that they must perform their respective promises, and if a party does not so perform, the arbitrator or the umpire has to give the necessary direction if sought. In that process, they have to give a meaningful interpretation to all the relevant clauses of the contract to make them effective and not redundant. The intention of the parties in providing a clause like Clause 17.3 could not be ignored... This is what the umpire has done and has given the direction to the respondent to compensate the appellant for the amount of the necessary and reasonable extra cost caused by change in law. We have no hesitation in holding that the award of the umpire is a well-reasoned award and one within his jurisdiction, and which gives a meaningful interpretation to all the clauses of the contract including Clause 17.3.

The Petitioner has submitted that 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.

24. The Petitioner has submitted that the Hon'ble Supreme Court in the case of *Energy Watchdog v. CERC & Ors.* reported as (2017) 14 SCC 80, has held that where a situation arises which is not covered by the guidelines or the guidelines do not deal with a given situation, the Commission's general regulatory powers under Section 79(1)(b) can be used. It is submitted that this is a fit case where the Commission ought to exercise its power and devise a suitable mechanism to ensure that the Petitioner is restored to the same economic position. The Commission ought to recognise time-value of money and that the Petitioner is restored to the same economic position by allowing carrying cost for the period when the Petitioner pays the change in law amount and when the Respondent-Procurementers compensate the Petitioner.
25. The Petitioner has submitted that it is entitled to compensation not only arising directly on account of the Change in Law events as claimed in Petitions but also compensation on

account of additional deployment of funds (carrying costs) in relation to the Change in Law events, so as to effectively restore the Petitioner to the same economic position as if the Change in Law event had not taken place. The carrying cost is payable even in terms of the principles of Equity, Business Efficacy and Unjust Enrichment as detailed hereunder:-

- a) **Principle of Equity** - Hon'ble Supreme Court in the SLS case has held that "a party finally found to be entitled to a relief in terms of money, would be entitled to be compensated by award of interest which would also be payable in equity on the basis of principle of restitution which is recognized in Section 144 of Code of Civil Procedure".
- b) **Principle of Business Efficacy** - In order to address a specific situation where the PPA is silent on the aspect of 'Change in Law', the power producing companies may resort to reading the PPA 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. In this regard, the Petitioner has placed the reliance upon the judgment of the Hon'ble Supreme Court in the case of *Nabha Power Limited v. Punjab State Power Corporation Limited and Anr. reported as (2018) 11 SCC 508*, the relevant extract is reproduced herein below: -

"48...

The principle of business efficacy is normally invoked to read a term in an agreement or contract so as to achieve the result or the consequence intended by the parties acting as prudent businessmen. Business efficacy means the power to produce intended results. The classic test of business efficacy was proposed by Bowen, L.J. in Moorcock [(1889) LR 14 PD 64 (CA)]. This test requires that a term can only be implied if it is necessary to give business efficacy to the contract to avoid such a failure of consideration that the parties cannot as reasonable businessmen have intended. But only the most limited term should then be implied--the bare minimum to achieve this goal. If the contract makes business sense without the term, the courts will not imply the same.

...

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The principle of 'business efficacy' would also require us to read the 'Monthly Energy Charges' formula in a manner as would be normally understood."

- c) **Doctrine of Unjust Enrichment**– Alternatively, if carrying cost is not payable, then there will be an adverse incentive for the Procurer to delay the adjudication of Change in Law as he stands to gain in terms of time value of Money as he has to make

payment of effect of Change in Law event (principle) only subsequent to adjudication of Change in Law as per the directions of the Commission. This in turn will lead to unjust enrichment of the Procurer at the cost of the Seller. This doctrine is embodied in Sections 69 of the Indian Contract Act. Mr. Rajah Ayyar referred to the following passage in Leake on Contracts (8th edition) which may be taken as an accurate statement of the English Law, 'A debt for money paid arises where a person has paid money for another under circumstances and upon occasions which make it just and equitable that it should be repaid; a debt or promise to pay is then implied in law, without any actual agreement to that effect'.

26. In view of aforesaid submissions, the Petitioner has submitted to direct the NTPC to make the legitimate payments towards the additional tax burden on impact of GST and carrying cost due to the Petitioner.

Submissions of Respondents in the pleadings and during the hearings in Petition No. 164/MP/2018 & 165/MP/2018

27. The Respondents have submitted that as per Orders of Commission in Petition No. 50/MP/2018 & Another and in Petition No. 188/MP/2017, the 'GST Laws' implication cannot be claimed in the following circumstances:
- (a) where the Scheduled Date of Commissioning is prior to 01.07.2017; or
 - (b) where the Actual Date of Commissioning is prior to 01.07.2017; or
 - (c) where the point of taxation of Goods/Services is before 01.07.2017; or
 - (d) when there is no clear/one-to-one co-relation between the projects, supply of goods or services and the invoices raised by the supplier of goods and services.
28. The Respondents have submitted that combined effect of the above conditions is that the GST implications will be applicable only if the point of taxation occurs on or after 01.07.2017 and not when the point of taxation has occurred prior to 01.07.2017, in which case the taxes shall be payable only under the pre-GST laws. Therefore, there is no change in law.
29. The Respondents have further submitted as follows:

A. Scope and Applicability of Article 12 of the PPA

30. The Respondents have submitted that the scope of Article 12.1.1 of the PPA has been interpreted and decided by the Commission vide Order dated 19.09.2018 (Petition No. 50/MP/2018 and 52/MP/2018) and Order dated 09.10.2018 (Petition No. 188/MP/2017 and Ors.) and by the Hon'ble Tribunal in the decision dated 13.04.2018 in the case of *Adani Power Limited –v- Central Electricity Regulatory Commission and Others*, in Appeal No. 210 of 2017 and Judgment dated 14.08.2018 in Appeal No. 119 of 2016 and Batch in *M/s Adani Power Rajasthan Private Limited –v- Rajasthan Electricity Regulatory Commission and Ors.* (and as followed in Appeal No. 111 of 2017 in *M/s. GMR Warora Energy Limited - v- Central Electricity Regulatory Commission and Ors.*). The views taken in these cases have been somewhat in variance.
31. The Respondents have submitted that there are differences in the facts of the present case in comparison to the decision of the Hon'ble Tribunal in the case Adani and GMR Warora. The provision of the present PPA is different from the PPA in the case of Adani Rajasthan (and GMR Warora) wherein there was a specific clause, namely Article 10.3.1 dealing with the relief applicable during the Construction Period, which inter-alia reads as under:

“10.2 Application and Principles for computing impact of Change in Law

10.2.1 While determining the consequences of Change in Law under this Article 10, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through monthly Tariff Payment, to the extent contemplated in this Article 10, the affected Party to the same economic position as if such Change in Law has not occurred.

10.3 Relief for Change in Law

10.3.1 During Construction Period

As a result of any Change in Law, the impact of increase/decrease of Capital Cost of the Power Station in the Tariff shall be governed by the formula given below:

For every cumulative increase/ decrease of each Rupees Sixteen crore Five Lakh (Rs. 6.50 crore) in the Capital Cost during the Construction Period, the increase/ decrease in Non Escalable Capacity Charges shall be an amount

equal to zero point two six seven (0.267%) of the Non Escalable Capacity Charges. In case of Dispute, Article 14 shall apply.

It is sufficient that the above mentioned compensation shall be payable to either Party, only with effect from the date on which the total increase/decrease exceeds amount of Rupees Sixteen crore Fifty Lakh (Rs. 16.50 crore).”

32. The Respondents have submitted that in the present PPAs, there is no such clause dealing with specific relief under the construction period and therefore, the entire basis of the Hon'ble Tribunal's judgment, namely that the change in law provision would be rendered redundant in respect of the 'Construction Period' if the sixth bullet is interpreted to be confined to the 'sale of power', is not applicable to the facts of the present case. Accordingly, the relief (if any) for taxes is admissible to the SPD if it squarely falls within the purview of Article 12.1.1 – sixth Bullet only and not otherwise. The SPD cannot claim the change in law effect for statutory taxes under any of the first four bullets under Article 12.1.1 of the PPA. 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.
33. 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. 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 four bullets dealing with matters other than taxes. The basic aspect is that if the taxes are said to be dealt under clauses other than the sixth bullet, the incorporation of the sixth bullet is rendered redundant as all taxes can be covered under the First or Second bullet. It is 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.
34. The Respondents have submitted that the idea of carving out a separate bullet for dealing with taxes and thereafter restricting its ambit by specific stipulation therein, unequivocally establishes that any and every tax needs to be considered under the sixth bullet and not

otherwise. 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*. Thus, the principles that emerge can be summarized as under:

- a) When a specific clause deals with taxes i.e. Clause 12.1.1 – sixth Bullet, the general clauses dealing with laws in general do not cover taxes, namely the Clause 12.1.1 – First Bullet.
- 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 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.

B. Scope of Article 12.1.1 of the PPA – Sixth Bullet

35. The Respondents have submitted that the scope of Article 12.1.1 - sixth Bullet is clear and specific. It relates to the supply of power. 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. 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”

36. The Respondents have submitted that, 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 preceding it. The said interpretation has been upheld by this Hon'ble Commission in its Order dated 19.09.2018 and it has been held that the scope of the sixth Bullet is restricted to those taxes which directly impact 'supply of power' only (Reference: *Para 311 of the Order dated 09.10.2018*).

37. The Respondents have submitted that the above interpretation stands fortified by the fact that 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 PPAs. 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. The deviation was consciously made and a separate provision in the form of last bullet was incorporated restricting the taxes to those which are made applicable on supplying power. Even the Hon'ble Appellate Tribunal of Electricity, in its decision dated 13.4.2018 in the case of *Adani Power Limited v Central Electricity Regulatory Commission and Ors.*, in Appeal No. 210 of 2017 relating to the provisions of Article 13.1.1 of the PPA dealing with change in tax had confined the scope of the change in law in respect of tax to the bullet/provision dealing with tax.

C. Impact of GST on Operation and Maintenance (O&M) Expenses

38. The Respondents have submitted that vide Order dated 19.09.2018 in Petition No. 50/MP/2018 and Petition No. 52/MP/2018 in the case of *Prayatana Developers Private Limited v NTPC Limited and Ors* and vide Order dated 09.10.2018 in Petition No. 188/MP/2017 and Batch in the case of *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors.* and Batch, the Commission has already held that claim of the Petitioner on account of additional tax burden on operation and maintenance expenses (if any), is not maintainable.

D. Carrying Cost

39. The Respondents have submitted that vide Order dated 09.10.2018 passed by the Commission in Petition No. 188/MP/2017 and Batch in the case of *Acme Bhiwadi Solar Power Private Limited–v- Solar Energy Corporation of India and Ors.* and Batch, the Commission has held that the claim regarding separate “Carrying Cost” in the instant petitions is not attracted.
40. The Respondents have submitted that Judgment of the Hon’ble Appellate Tribunal dated 13.04.2018 in Appeal No. 210 of 2017 in *Adani Power Limited –v- Central Electricity Regulatory Commission and Ors*, wherein it was held that since the Gujarat Bid-01 PPA has no provision for restoration to the same economic position, therefore, the carrying cost will not be applicable.

E. The Scope and Applicability of Article 12 of the respective PPAs

41. The Respondents have submitted that the issue of interpretation of Article 12 has been decided in favour of the Petitioner vide Order dated 19.09.2018 in Petition No. 50/MP/2018 and Petition No. 52/MP/2018 in the case of *Prayatana Developers Private Limited v NTPC Limited and Ors.*; Order dated 09.10.2018 in Petition No. 188/MP/2017 and Batch in the case of *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors.* and Batch and Judgment dated 14.08.2018 in Appeal No. 119 of 2016 and Batch in *M/s Adani Power Rajasthan Private Limited v Rajasthan Electricity Regulatory Commission and Ors* (and as followed in Appeal No. 111 of 2017 in *M/s. GMR Warora Energy Limited v. Central Electricity Regulatory Commission and Ors*). The instant petitions can be disposed of with the same conclusion as reached in the decisions referred to herein above. However, in regard to the scope and interpretation of Article 12.1.1 of the PPAs dealing with the Change in Law, Respondents wishes to reserve its rights to take appropriate appellate remedies as may be advised.

F. Absence of necessary particulars- Adverse Inference

i. Non-furnishing of details of taxes subsumed/withdrawn by reason of GST

42. 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. In Order dated 09.10.2018 in Petition No. 188/MP/2017 and Batch in the case of *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors.* and in the Order dated 19.09.2018 the Commission has taken note of the implications of the various taxes which were in existence prior to 1.07.2017 and were subsumed/reduced/ remitted. These have to be taken into account to determine the net effect of GST Laws. Further, the Petitioner 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 Government of India is 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 . It is incumbent on the Petitioner to place before the Commission in a transparent manner in regard to the increase or decrease in the taxes on net basis. For instance, if pre-GST, the Petitioner were subjected to 4% Excise Rate and post-GST, the same became a cumulative 5%, then the Petitioner would be entitled to claim only the difference i.e. 1% as a change in law and not the entire 5%.

ii. Non-furnishing of all the relevant details

43. The Respondents have submitted that before the amount is computed, the Petitioner should be directed to give the particulars/documents in respect of each claim under GST Laws. The particulars/ documents are required to be given in respect of each item of goods/equipment/services. The Auditor Certificate in respect of the above is also to be provided in terms of the directions of this Commission in its Order dated 09.10.2018 in the case of *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors.* Batch, in Petition No. 188/MP/2017 and Batch.

G. Mitigating Steps: Whether undertaken by the Petitioner

44. The Respondents have submitted that in terms of Article 4.1.1 (b) of the PPA, the Solar Power Developers are responsible at its own cost and risk for designing, constructing, erecting, commissioning, completing and testing the Power Project in accordance with the Prudent Utility Practices. Therefore, it is the duty of the Solar Power Developers to prudently incur expenditure and mitigate the effect. In the order dated 19.09.2018, the Commission has taken note of the substantial difference in the GST, namely, 5% if the components are bought as a part of the Solar Generation System and 18% if the components are individually and directly purchased. The view has been reiterated by the Commission in its order dated 09.10.2018 passed in the case of *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors.* Batch, in Petition No. 188/MP/2017 and Batch.
45. The Respondents have submitted that any higher cost paid, without mitigating the cost, should not be allowed to be passed on to and thereby to the consumers at large.

H. Time Bound Payment within 60 days of the Order

46. The Respondents have submitted that regarding the amount payable to the Petitioner (if any) on account of GST Law, the Commission has stipulated a timeline of 60 days from the date of the passing of the Order dated 19.09.2018 in Petition No. 50/MP/2018 and 52/MP/2018, after which a Late Payment Surcharge shall be payable. There are certain issues which are being faced by NTPC in regard to the implementation of the above directions of this Commission. There are many instances where the Solar Power Developers had not furnished any letter or any detail whatsoever for more than a month from the date of the order of this Commission. Accordingly, besides the issue of judgement on inadequacy of the particulars and documents given, the period of 60 days should be computed only from the first day when the Solar Power Developers furnishes the information with an undertaking that the SPDs have duly furnished all the information and documents as per the Orders of this Commission. Accordingly, the timeline of 60 days should begin to run only from the day the Petitioner provides the entire documentation in the required format to the Respondents.

Analysis and decision:

47. We have heard the learned counsels for the Petitioner and the Respondents and have carefully perused the records. Since Petition No. 164/MP/2018 alongwith I.A. 5 of 2019; and Petition No. 165/MP/2018 alongwith I.A. 6 of 2019 are likely worded and contain the similar issues to be adjudicated the same are clubbed together.
48. The Central Goods and Services Tax Act, 2017, The Integrated Goods and Services Tax Act, 2017 on 12.04.2017, The State(s) Goods and Services Tax Act, 2017 are hereinafter collectively referred as 'GST Laws'.
49. The brief facts of the case are that the Petitioner in Petition No. 164/MP/2018 was selected as the successful bidder under the National Solar Mission Phase-II Batch-II Tranche-I State Specific Bidding Scheme conducted by NTPC Ltd., on 17.05.2016. The Petitioner entered into PPA with NTPC on 27.07.2016 for development of Solar Photo Voltaic Power Plants of 50 MW in the State of Karnataka. The Solar Power Plants were to be developed on long term basis at a tariff of Rs. 4.79/kWh. As per the PPAs as well as the Bidding Scheme, the solar power purchased by NTPC under the PPAs is to be bundled with thermal power produced at NTPC stations and then sold to the Distribution Companies in the State of Karnataka. Further, in Petition No. 165/MP/2018, the Petitioner was selected as the successful bidder on 02.07.2016 for development of solar power projects under the National Solar Mission Phase-II Batch-III Tranche-VI Bidding Scheme conducted by SECI Ltd. On 02.08.2016, the Petitioner entered into two PPAs with SECI for development of two Solar Photo Voltaic Power Plants of 50 MW each i.e. total 100MWs in the State of Chhattisgarh. The Solar Power Plant was to be developed on long term basis at a tariff of Rs. 4.43/kWh. As per the terms of the PPAs as well as the bidding scheme, the solar power purchased by SECI Ltd. as an intermediary, will be sold to the Distribution Companies.
50. 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 for levy and collection of tax on supply of goods or services or both. The State (Karnataka / Chhattisgarh) Goods and Services

Tax Act, 2017 was enacted for levy and collection of tax on intra-State supply of goods or services or both by the respective States.

51. The Petitioner has submitted that it participated in the bids after following the process of 'Reverse Auction' and was selected as the successful bidder. Pursuant thereto, the Petitioner entered into a PPA for setting up of solar power plant at different rates of fixed tariff for 25 years. Subsequent to the 'Effective Date' as per the PPAs, the 'GST Laws' were enacted. Introduction of 'GST Laws' made a huge impact on the actual cost of the project *vis-a-vis* budgeted cost, which was beyond their control and therefore, notice regarding the 'Change in Law' was sent to the Respondents. The Petitioner has submitted that the PPAs entered into between the parties provide for a specific provision *qua* the concept of "Change in Law". The fundamental philosophy behind the said provision is to ensure that additional recurring/non-recurring expenditure by the Seller due to "Change in Law" event through monthly Tariff Payment to the extent it restores the affected party to the same economic position as if such change in law had not occurred. The concept of change in law has been introduced in the PPAs to ensure that the parameters/ contours based on which the Petitioner has bid for supplying power do not change in times to come and that no detriment to either Petitioner or Respondents is caused due to such change in law events. The Petitioner has submitted that in terms of the Article 12 of the PPAs, they are entitled to claim the same being an event of 'change in law'.
52. **Per Contra**, the Respondents have submitted that the GST implications will be applicable only if the point of taxation occurs on or after 01.07.2017 and not when the point of taxation has occurred prior to 01.07.2017, in which case the taxes shall be payable only under the pre-GST laws. The Respondents have submitted that the scope of Article 12.1.1 of the PPA has been interpreted and decided by the Commission vide Order dated 19.09.2018 (Petition No. 50/MP/2018 and 52/MP/2018) and Order dated 09.10.2018 (Petition No. 188/MP/2017 and Ors.) and by the Hon'ble Tribunal in the decision dated 13.04.2018 in the case of *Adani Power Limited –v- Central Electricity Regulatory Commission and Others*, in Appeal No. 210 of 2017 and Judgment dated 14.08.2018 in Appeal No. 119 of 2016 and Batch in *M/s Adani Power Rajasthan Private Limited –v- Rajasthan Electricity Regulatory Commission and Ors.* (and as followed in Appeal No. 111 of 2017 in *M/s. GMR Warora Energy Limited -*

v- Central Electricity Regulatory Commission and Ors.). The views taken in these cases have been somewhat in variance. There are differences in the facts of the present case in comparison to the decision of the Hon'ble Tribunal in the case Adani and GMR Warora. The provision of the present PPA is different from the PPA in the case of Adani Rajasthan (and GMR Warora). The Respondents have submitted that the Commission has already held that claim of the Petitioner on account of additional tax burden on O&M expenses (if any), is not maintainable. Further, vide Order dated 09.10.2018 passed by the Commission in Petition No. 188/MP/2017 and Batch in the case of *Acme Bhiwadi Solar Power Private Limited–v- Solar Energy Corporation of India and Ors. & Batch*, the Commission has held that the claim regarding separate “Carrying Cost” in the instant petitions is not attracted. Further, vide judgment of the Hon'ble Appellate Tribunal dated 13.04.2018 in Appeal No. 210 of 2017 in *Adani Power Limited –v- Central Electricity Regulatory Commission and Ors.*, wherein it was held that since the Gujarat Bid-01 PPA has no provision for restoration to the same economic position, therefore, the carrying cost will not be applicable.

53. 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. In terms of Article 4.1.1 (b) of the PPA, the Solar Power Developers are responsible at its own cost and risk for designing, constructing, erecting, commissioning, completing and testing the Power Project in accordance with the Prudent Utility Practices. Therefore, it is the duty of the SPDs to prudently incur expenditure and mitigate the effect. In the order dated 19.09.2018, the Commission has taken note of the substantial difference in the GST, namely, 5% if the components are bought as a part of the Solar Generation System and 18% if the components are individually and directly purchased. The Respondents have submitted that any higher cost paid, without mitigating the cost, should not be allowed to be passed on to and thereby to the consumers at large. Further, regarding the amount payable to the Petitioner (if any) on account of ‘GST Laws’ the timeline of 60 days should begin to run only from the day the Petitioner provides the entire documentation in the required format to the Respondents.
54. From the submissions of the parties, the following issues arise before this Commission:

55. *Issue No.1: Whether the promulgation of the IGST Act, 2017, the CGST Act, 2017, the and the Karnataka/ Chhattisgarh 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?*
56. *Issue No. 2: Whether there will be incremental impact in the cost of construction and O&M expenses on account of promulgation of the GST Laws? and, Whether there is a need to evolve a suitable mechanism to compensate the Petitioner for the increase in recurring and non-recurring expenditure incurred by the Petitioner on account of Change in Law?*
57. *Issue No. 3: Whether the claim of 'Carrying Cost' for delay in reimbursement by the Respondents is sustainable?*
58. No other issue was pressed or claimed.
59. We now discuss the issues one by one:
60. *Issue No. 1: Whether the promulgation of the IGST Act, 2017, the CGST Act, 2017, the and the Karnataka/ Chhattisgarh 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?*
61. The Petitioner has submitted that Article 12 of the PPAs provides for a list of six (6) events which would be considered as 'Change in Law'. They include *inter alia* the enactment, promulgation, adoption in India of any Law, as well as, any change in tax or introduction of any tax made applicable for supply of power.
62. The Petitioner has submitted that the event of enactment of 'GST Law' has occurred after the Effective Date and has resulted in additional recurring and non-recurring expenditure for the Petitioner. In terms of Article 12.2.1 of the PPA, an aggrieved party who has incurred additional recurring/ non-recurring expenditure is required to approach the Central Commission for seeking approval of such change in law event and thereby, claim relief for

the same upon approval by the Central Commission. They have approached this Commission for seeking relief on account of introduction of GST as a change in law event, as per the first and sixth bullet of Article 12.1.1 of the PPAs, in as much as (i) it is in the nature of an enactment, coming into effect after the Effective Date and (ii) also qualifies as an introduction of a tax on the supply of power leading to additional recurring/ non-recurring expenditure for the Petitioner. Hence, it is claimed by the Petitioner that they are eligible for the benefit of GST as a change in law event in terms of the first and sixth bullet of Article 12.1.1 of the PPA.

63. Per Contra, the Respondents have submitted that as per Orders of Commission in Petition No. 50/MP/2018 & Another and in Petition No. 188/MP/2017, the 'GST Laws' implication cannot be claimed in the following circumstances:
- (e) where the Scheduled Date of Commissioning is prior to 01.07.2017; or
 - (f) where the Actual Date of Commissioning is prior to 01.07.2017; or
 - (g) where the point of taxation of Goods/Services is before 01.07.2017; or
 - (h) when there is no clear/one-to-one co-relation between the projects, supply of goods or services and the invoices raised by the supplier of goods and services.
64. The Respondents have submitted that combined effect of the above conditions is that the GST implications will be applicable only if the point of taxation occurs on or after 01.07.2017 and not when the point of taxation has occurred prior to 01.07.2017, in which case the taxes shall be payable only under the pre-GST laws. Therefore, there is no change in law. Furthermore, the Respondents have submitted that there are differences in the facts of the present petitions in comparison to the decision of the Hon'ble Tribunal in the case Adani and GMR Warora. The provision of the present PPA is different from the PPA in the case of Adani Rajasthan (and GMR Warora).
65. The Respondents have submitted that the intention behind the sixth bullet in Article 12.1.1 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. If the taxes are said to be dealt under clauses other than the sixth bullet, the incorporation of the sixth bullet is rendered redundant as all taxes can be covered under the First or Second bullet. It is settled principle of interpretation that no provision can be ignored as redundant or superfluous. The

Respondents have placed their reliance on judgment in case titled *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.

66. The Respondents have submitted that the relief (if any) for taxes is admissible to the SPD if it squarely falls within the purview of Article 12.1.1 – sixth Bullet only and not otherwise. The SPD cannot claim the change in law effect for statutory taxes under any of the first four bullets under Article 12.1.1 of the PPA.
67. The Commission observes that Article 12 of the Power Purchase Agreements 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 an 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.”

68. The brief facts of the petitions with respect to RfS dates, effective date of PPAs are as under:

Petition No.	Date of RFS	Signing date of PPAs	Effective date of PPAs	Scheduled Date of Commissioning
164/MP/2018	01.09.2015	27.07.2016	21.06.2016	20.07.2017
165/MP/2018	08.03.2016	02.08.2016	19.07.2016	02.09.2017

69. The Commission observes that the ‘Effective date of PPAs’ is before the date of coming into effect of the ‘GST Laws’ i.e. 01.07.2017. Further, the SCoD of all the Projects related to the Petitions are after the promulgation of the ‘GST Laws’. The event of enactment of ‘GST Law’ has occurred after the execution of ‘PPAs’ and it has been contended by the Petitioner that the enactment of the ‘GST Laws’ has resulted in additional recurring and non-recurring expenditure for the Petitioner and they have approached the Commission for seeking relief on account of introduction of GST as a change in law event, as per the first and sixth bullet of Article 12.1.1 of the PPA.

70. The Commission observes that as per Article 12, ‘Change in Law’ means the enactment/ coming into effect/ adoption/ promulgation/ amendment/ modification or repeal of any Law in India; Change in the interpretation of any Law in India; Imposition of a requirement for obtaining any consents or Change in tax or introduction of any tax made applicable for supply of power by the SPD as per the terms of this Agreement, resulting into any additional recurring/ non-recurring expenditure or any income to the SPD. The Commission is of the view that harmonious construction of the bullet points under Article 12 makes it clear that bullet point one is wider in scope and refers to the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal of any Law in India, including rules and regulations framed pursuant to such Law whereas bullet point 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 Petitioner 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. However, the Commission feels that the same are immaterial. 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 PPAs. It was held as under:

"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."

71. It has further been decided by APTEL 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.”

72. From the above, it is apparent that the 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, is covered under ‘Change in Law’. In the same judgment, it is also held that 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 Act of Parliament and the State Legislative Assemblies. The change in duties/ tax imposed by the Central Government and State Government(s) has resulted in the change in cost of the inputs required for generation and 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, and sixth bullet in seriatim of Article 12.1.1 of the PPA. As regards the argument of the Respondent that the PPAs in the case of Adani Rajasthan and GMR Warora were at variance with (being more explicit) than the PPAs in the present Petitions, the Commission is of the view that such difference is not material as it does not alter the basic premise of GST Laws being a ‘Change in Law’. Rather the ‘Relief for Change in Law’ as contained in the Article 12.2 empowers the Commission to provide the relief which shall be final and governing for both the parties. This view is in consonance with the view taken by the Commission in Order dated 09.10.2018 in Petition No. 188/MP/2017 & Ors. titled *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors.*

73. ***Issue No. 2: Whether there will be incremental impact in the cost of construction and O&M expenses on account of promulgation of the GST Laws? and, Whether there is a need to evolve a suitable mechanism to compensate the Petitioner for the increase in recurring and non-recurring expenditure incurred by the Petitioner on account of Change in Law?***

74. The Petitioner has submitted that prior to the Effective Date under the PPA, the erstwhile

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 viz. ‘GST Laws’ has been introduced, representing a paradigm shift in the mode and levy of indirect taxes. With introduction of ‘GST Laws’ a tax slab of 5% to 28% has been introduced with respect to goods & services required for execution, construction and operation of Solar Power Plants. The said goods and services were previously either exempted or fell under lower tax slabs. The new slabs have also led to an increase in the overall project cost of the Petitioner hence making the tariff quoted at the time of bid for allocation of project unviable. The Petitioner has claimed the increase in total Cost & O&M expenses due to increase in tax incidence as given below:

Petition No.	Increase in TAX due to GST Laws	Incremental impact on Cost due to increase in TAX indices	Increase in TAX due to GST Laws	Incremental impact on O&M due to increase in TAX indices	Total Escalation
164/MP/2018	5% to 28%	2,43,53,723	15% , 18%	2,01,40,482	4,44,94,205
165/MP/2018		2,186,55,848		4,02,80,966	25,89,36,814

75. Per Contra, the Respondents have submitted that in terms of Article 4.1.1 (b) of the PPAs, the Petitioners are responsible at their own cost and risk for designing, constructing, erecting, commissioning, completing and testing the Power Project in accordance with the Prudent Utility Practices. Therefore, it is the duty of the Petitioner to prudently incur expenditure and mitigate the effect.

76. 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’.

77. The impact of 'GST laws' on the Engineering, Procurement and Construction (hereinafter referred to as '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 Petitioner has claimed that on account of levy of 'GST Laws', the construction cost of project has escalated to the tune of few Crores. 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.
78. 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.
79. 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.”

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

- 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*

81. 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.”

82. Similarly, the Commission observes that with the enactment of the Goods and Services Tax, 2017, by State Legislative Assemblies of Karnataka and Chhattisgarh, 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.
83. 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 some States offering complete exemption while on the other hand, few States have levied a concessional rate of tax at 4% (four per cent) and 5% (five per cent) respectively, on the equipment and components used 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% before GST regime.

84. 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 of 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 case of 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.
85. 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:-

		GST	Comments
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Particulars	Weightage of Component of Capital Cost As taken in Petition No. 17/SM/2015	As claimed by the Petitioner	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 %	The GST rate at 18%; However, in few Petitions the Petitioner has claimed 9%.
Mounting Structures (Mounting Structure & Nut-Bolts; Clamp & Fasteners; Mounting Structure Foundation)	6.60 %	18 %	5 %	The GST rate 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 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	8.30 %	18 %	5 %	Post GST sold as part of Solar power generating system hence 5% GST rate.

Box;; Misc. Electricals)				
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 %	The GST rate at 18%; However, in few Petitions the Petitioner has claimed 5%.
	Weighted Avg. of Tax/GST	9.16 %	5.55 %	

86. The Petitioner is directed to make available to the Respondents (NTPC/SECI) all relevant documents exhibiting clear and one to one correlation between the projects and the supply of goods or services, duly supported by relevant invoices and Auditor's Certificate. The Respondents (NTPC/SECI) are further directed to reconcile the claims for Change in Law on receipt of the relevant documents and pay the amount so claimed to the SPDs as per the methodology discussed in Para 76 and 84 above. It has been brought to our notice that in some cases, the Respondent Procurers are questioning the rationale of the commercial decisions taken by the SPDs in cases where the rates of GST are on the higher side. Since, the decision for project implementation including the mode of procurement of goods and services were taken by SPDs prior to the implementation of GST, it would not be appropriate to question such commercial decisions on the basis of the differential rates of GST on certain goods and services, and payments should be made based on the invoices raised and supported by Auditor's Certificate. The Commission is of the view that since the quantum of compensation on account of introduction of GST w.e.f. 01.07.2017 is not large, it should be discharged by the Respondent-Procurers as one-time payment in a time bound manner. Accordingly, it is directed that the GST bills shall be paid within 60 days from the date of issue of this Order or from the date of submission of claims by the Petitioner, whichever is later, failing which it shall attract late payment surcharge in terms of the PPA. Alternatively, the Petitioner and the Respondents may mutually agree to a mechanism for the payment of

such compensation on annuity basis spread over such period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs. This will obviate the hardship of the Respondents for one-time payment.

87. The next issue is that of the impact of 'GST laws' on the 'Operations and Maintenance' 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.
88. The Petitioner has submitted that for determination of the impact of GST in Operation & Maintenance Expenses which they are going to incur in next 25 years of PPA tenure, has been worked on the basis of relevant normative parameters as specified by the Commission in the Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012 dated 06.02.2012 as amended on 31.03.2016. The Regulations prescribe O&M expenses for the year of 2017-18 at Rs. 7.41 Lacs/MW, which includes Service Tax of 15%, with an annual escalation of 5.72%. In the present petitions, the Petitioner has considered the same parameter with an additional 3% GST impact, i.e. 18% GST on the normative O&M expenses. Accordingly, net present value of Pre-GST O&M Expenses and post GST impact has been claimed as the differential amount as per the change in law provision of the PPA.
89. 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.”

90. The Commission is of the view that the recurring expenses referred to in Article 12 of the PPAs includes activities like salary, tax expenses, estimated maintenance costs, and monthly income from leases etc. It is apparent that GST will apply in case of outsourcing of the ‘Operation and Maintenance’ services to a third party (if any). The Commission is of the view that outsourcing of the ‘Operation and Maintenance’ services is not the requirement of the PPAs/ bidding documents. The concept of the outsourcing is neither included expressly in the PPAs nor it is included implicitly in the Article 12 of the PPAs. It is pertinent to mention here that the Petitioner in its petitions has categorically submitted that: *“Further, Article 12 also makes it abundantly clear that a statutory change in tax structure made applicable for setting up of Solar Power Projects resulting in an additional non-recurring and recurring expenditure for the Petitioner in the form of escalation of capital cost and operational cost of the Project also qualifies as ‘Change of law’. The aforesaid additional non-recurring and recurring expenditure has not been factored into the tariff bid by the SPDs at the time of submission, taken into consideration the extant tax regime prevailing at the time.”*. The Commission is of the view that in the Competitive Bidding Scenario, the SPDs bid levelled tariff without disclosing the details of the calculations of the project cost. It has already been

held by the Commission in the earlier Orders and also appreciated above that it is a pure commercial decision of the Petitioner taken for its own advantage and any increase in cost including on account of taxes etc. in the event the Petitioner chooses to employ the services of other agencies, cannot increase the liability for the Respondents. Therefore, the Commission holds that claim of the Petitioner on account of additional tax burden on operation and maintenance expenses (if any), is not maintainable. This view is in consonance with the view taken by the Commission Order dated 09.10.2018 in Petition No. 188/MP/2017 & Ors. case titled *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors.*

91. ***Issue No. 3: Whether the claim of ‘Carrying Cost’ for delay in reimbursement by the Respondents is sustainable?***

92. The Petitioner has submitted that the mandate of Change in Law provisions across all PPAs (standard documents drafted by the government) is restitution i.e. relief be granted in a manner so as to place an affected party in the same economic position as if a Change in Law had not occurred. Restitution is therefore inherent to compensation. In this regard, it is submitted that where the stated purpose is restoration to the same economic position, the Commission ought to consider the aggregate economic impact including carrying cost which is in the nature of compensation for time value of funds deployed on account of Change in Law events. The Appellate Tribunal for Electricity in its judgment dated 12.09.2014 in Appeal No. 288 of 2013 titled *Wardha Power Company Ltd. v. Reliance Infrastructure Ltd. & Ors.*, has recognized the principle that in order to ‘restore the affected party to the same economic position’, compensation for Change in Law claims has to be such, as to reimburse the affected party for the expense actually incurred. Thus, the same will include expenditure attributable towards carrying cost. The relevant portion of the judgment is given below:-

*“27. For example, if the price of coal calculated on the same base as used in the bid is more than the prevalent price of coal, then using the base price of coal for computing the compensation for Change in Law will result in over compensation to the Seller. Similarly, if the coal price calculated on the same base as used in bid is less than the actual price of coal, it will result in under compensation to the Seller. In **both these cases, the affected***

party will not be restored to the same economic position as if such Change in Law has not occurred, as intended in the PPA.”

93. The Petitioner has submitted that principle of recovery of carrying cost/interest and time value of money has been recognized in numerous cases including Judgment of the Hon'ble Tribunal dated 13.04.2018 in Appeal No. 210 of 2017, *Adani Power Limited vs. Gujarat Electricity Regulatory Commission & Ors.*; Judgment of the Hon'ble Tribunal dated 15.02.2011 in Appeal No. 173 of 2009, *Tata Power Company Ltd vs. Maharashtra Electricity Regulatory Commission*; Judgment of the Hon'ble Tribunal dated 20.12.2012 in Appeal No. 150 and batch matters, *SLS Power Ltd v. Andhra Pradesh Electricity Regulatory Commission*; Judgement of the Hon'ble Supreme Court in *South Eastern Coalfield Ltd vs. State of Madhya Pradesh* (2003) 8 SCC 648. In addition to the aforesaid, the Hon'ble Supreme Court in the case of *Energy Watchdog vs. Central Electricity Regulatory Commission and Ors.* (2017) 14 SCC 80, has held that where a situation arises which is not covered by the Guidelines or the Guidelines do not deal with a given situation, the Commission's general regulatory powers under Section 79(1)(b) can be used. The Petitioner has argued that this is a fit case for exercise of such power to devise a suitable mechanism to ensure that the Petitioner is restored to the same economic position and time-value of money is restored by allowing carrying cost for the period between when the Petitioner pays the Change in Law amount and when the Respondents compensates them.
94. Per Contra, the Respondents have submitted that there is no provision in the PPA regarding carrying cost or interest for the period till the decision of the Commission acknowledging the 'change in law' and deciding on the amount to be paid for such change in law namely 'provide for relief for the same', as specified in Article 12.2.2 of the PPAs. The 'Change in Law' claim of the Petitioner is yet to be adjudicated and the amount if any, due to the Petitioner has to be determined/computed first. Thereafter, only after the amount is determined, is the Petitioner required to raise a Supplementary invoice for the amount so computed as per Article 10.7 of the PPA. It is only in case of default on the part of the Respondents in not making the payment by the due date as per supplementary invoices, does the issue of Late Payment Surcharge arise i.e. for the period after the due date. The reference in Article 12.2.2 of the Commission deciding on the date from which the 'change in law' will

be effective, refers to the principal amount to be computed from the date on which change in law comes into force and not to the payment of interest and carrying cost.

95. The Respondents have submitted that the provision of Article 10.3.3 of the PPAs dealing with late Payment Surcharge and definition of the 'Due Date' in Article 1 read with Article 10.3.1 of the PPA are relevant. The due date is fifth (5th) day of the immediately succeeding month in which Monthly Bill or a Supplementary bill is received and duly accepted by Respondents. In case the Monthly Bill or any other bill, including a Supplementary Bill is issued after the (fifteenth) 15th day of the next month, the Due Date for payment would be fifth (5th) day of the next month to the succeeding Month. The supplementary bill needs to be raised by the Petitioner for the adjustment of the 'Change in Law' after the Change in Law claim is approved by the Commission. There cannot be any claim for late payment surcharge for the period prior to the due date. The Respondents have relied upon the decision of the Hon'ble Appellate Tribunal in *SLS Power Limited -v- Andhra Pradesh Electricity Regulatory Commission and Others (Appeal No. 150 of 2011)* and Batch that recognizes that the interest will be due from the date the payment is due. In the present case, the payment is due only after issuance of the Supplementary Bill after the decision of the Commission.
96. The Respondents have submitted that the PPA does not have a provision dealing with restitution principles of restoration to same economic position. Therefore, the Petitioner is not entitled to claim relief which is not provided for in the PPA.
97. The Respondents have submitted that in the Judgment of the Hon'ble Appellate Tribunal dated 13.04.2018 in Appeal No. 210 of 2017 in *Adani Power Limited -v- Central Electricity Regulatory Commission and Ors*, it was held that since the Gujarat Bid-01 PPA has no provision for restoration to the same economic position, therefore, the carrying cost will not be applicable.
98. The Respondents have submitted that the issue regarding Carrying Cost has been decided by the Judgment of the Hon'ble Tribunal dated 14.08.2018 in *Appeal No. 111 of 2017 in M/s. GMR Warora Energy Limited -v- Central Electricity Regulatory Commission and Ors*. The Hon'ble Tribunal vide the above judgment has decided that if there is a provision in the PPAs

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

99. The Respondents have submitted that in the absence of the express provision in the PPA, it is not open for the Petitioner to claim relief under principles of equity. Reference in this regard may be made to the judgment – *Alopi Parshad and Sons Ltd. v. Union of India, (1960) 2 SCR 793 : AIR 1960 SC 588*.
100. The Respondents have further submitted that there cannot be any consideration for individual tariff elements such as interest on working capital or return on equity or any other in a competitive bid process under Section 63 of the Electricity Act, 2003 and there cannot be any computation of the same. There is no concept of interest on working capital or individual tariff elements in competitively bid process and bidders are required to give the bid based on all-inclusive tariff. Further, there cannot be any issue of return on equity on incremental working capital and margin. Reference in this regard may be made to the issue decided by the Hon'ble Tribunal in its Order dated 19.04.2017 in *Appeal No. 161 of 2015- Sasan Power Limited –v- Central Electricity Regulatory Commission* and Order dated 14.08.2018 in *Appeal No. 111 of 2017 in the case of GMR Warora v Central Electricity Regulatory Commission and Ors*.
101. The Respondents have submitted that in view of the above, the Petitioner is not entitled to interest on incremental working capital at normative interest rate or otherwise to put the Petitioner to the same economic position as if the change in law has not occurred.
102. The Respondents have submitted that the amount payable to the Petitioner (if any) on account of GST Law, the Commission has stipulated a timeline of 60 days from the date of the passing of the Order, after which a Late Payment Surcharge shall be payable. Respondents

have submitted that the timeline of 60 days should begin to run from the day the Petitioner provides the entire documentation in the required format to the Respondents. It is further submitted that the final decision by the Commission may be given 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. The adverse consequences for not furnishing the full documentation/information at the first instance, ought to be borne by the defaulting party i.e. the Petitioner itself.

103. The Commission observes that in the judgment of the Appellate Tribunal for Electricity dated 13.04.2018 in Appeal No. 210 of 2017 in *Adani Power Limited v. Central Electricity Regulatory Commission and Ors.*, it was held that since Gujarat Bid-01 PPA has no provision for restoration to the same economic position, the decision of allowing carrying cost will not be applicable. The relevant extract of the Judgment dated 13.04.2018 reads as under:

“ISSUE NO.3: DENIAL OF CARRYING COST

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

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

“ix. In the present case we observe that from the effective date of Change in Law the Appellant is subjected to incur additional expenses in the form of arranging for working capital to cater the requirement of impact of Change in Law event in addition to the expenses made due to Change in Law. As per the provisions of the PPA the Appellant is required to make application before the Central Commission for approval of the Change in Law and its consequences. There is always time lag

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

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

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

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

From the above it can be seen that the impact of Change in Law is to be done in the form of adjustment to the tariff. To our mind such adjustment in the tariff is nothing less than re-determination of the existing tariff.

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

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

From the above judgment the Commission observes that if there is a provision in the PPA for restoration of the Petitioner to the same economic position as if no Change in Law event has occurred, the Petitioner 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 Commission. The Commission observes that the PPAs do not have a provision dealing with restitution principles of restoration to same economic position. Therefore, the Commission is of the view that the claim regarding separate carrying cost is not admissible.

Summary of decisions:

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

- a. *Issue No. 1:* The introduction of 'GST laws' w.e.f. 01.07.2017 is covered under 'Change in Law' in terms of Article 12 of the respective PPAs.
- b. *Issue No. 2:* As regards the claims during construction period, the Petitioner has to exhibit clear and one to one correlation between the projects and the supply of goods and services duly supported by the Invoices raised by the supplier of goods and services and auditors certificate. The amount determined by the Petitioner shall be on 'back to back' basis and shall be paid by DISCOMS to the Petitioner under respective 'Power Sale Agreements'. The Claim based on discussions in paragraph 77 and 85 above of this Order shall be paid within sixty days of the date of this Order or from the date of submission of claims by the Petitioner whichever is later failing which it will attract late payment surcharge as provided under PPAs/PSAs. Alternatively, the Petitioner and the Respondents may mutually agree to mechanism for the payment of such compensation on annuity basis spread over the period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs. The claim of the Petitioner on account of additional tax burden on "O&M" expenses (if any), is not maintainable.
- c. *Issue No. 3:* The claim regarding separate 'Carrying Cost' and 'interest on working capital' in the instant petitions is not allowed.

106. Accordingly, the Petition No. 164/MP/2018 alongwith I.A. 5 of 2019 and Petition No. 165/MP/2018 alongwith I.A. 6 of 2019 are disposed of.

Sd/-
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