



नई दिल्ली
NEW DELHI

याचिका संख्या /Petition No.: 188/MP/2018
185/MP/2018
190/MP/2018
191/MP/2018
184/MP/2018

कोरम/Coram:

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

आदेश दिनांक /Date of Order: 19th of November, 2019

IN THE MATTER OF:

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

AND IN THE MATTER OF:

1) **Petition No. 188/MP/2018**

Azure Solar Private Limited
Asset No.301-4, World Mark 3, Aerocity
New Delhi-110037

...Petitioner

VERSUS

1. NTPC Vidyut Vyapar Nigam Limited
Through its Chief Executive Officer
NTPC Bhawan, Core 7, SCOPE Complex
7 Institutional Area, Lodhi Road,

New Delhi - 110 003

2. NTPC Limited
Through its General Manager (Commercial)
Core-7, SCOPE Complex
7 Institutional Area, Lodi Road
New Delhi-110 003
3. Punjab State Power Corporation Limited (PSPCL)
Through its Managing Director
The Mall, PSEB Head Office,
Baradari, Patiala, Punjab - 147 001
4. Uttar Pradesh Power Corporation Ltd (UPPCL)
Through its Managing Director
Shakti Bhawan, 14 Ashok Marg,
Lucknow - 226 001
5. Chhattisgarh State Power Distribution Company Ltd. (CSPDCL)
Through its Managing Director
4th Floor, Vidyut Seva Bhawan Dangania,
Raipur, Chhattisgarh-492 013
6. Grid Corporation of Orissa Ltd. (GRIDCO)
Through its Managing Director
Bhoi Nagar, Janpath
Bhubaneshwar - 751 022
7. West Bengal State Electricity Distribution Company Ltd (WBSEDCL)
Through its Managing Director
Vidyut Bhaan, Bidhannagar,
Block DJ, Sector-II, Kolkatta-700 091
8. Damodar Valley Corporation Ltd (DVC)
Through its Chairman
DVC Headquarters, DVC Towers,
VIP Road, Kolkatta - 700 054
9. Mangalore Electricity Supply Company Ltd. (MESCOM)
Through its Managing Director
Paradigm Plaza, AB Shetty Circle,
Mangalore - 575 001
10. Bangalore Electricity Supply Company Ltd. (BESCOM)
Through its Managing Director
BESCOM, KR Circle,
Bangalore-560 001
11. Chamundeshwari Electricity Supply Corp. Ltd. (CESC)
Through its Managing Director

No. 927, New Kantharaj Urs Road,
Saras watipuram Mysuru – 570 009

12. Gulbarga Electricity Supply Company Ltd. (GESCOM)
Through its Managing Director
Corporate Office, Station Road,
Kalaburagi, Karnataka - 585 102
13. Hubli Electricity Supply Company Ltd. (HESCOM)
Through its Managing Director
PB Road, Navanagar,
Hubli - 580 025
14. Assam Power Distribution Company Ltd (APDCL)
Through its Managing Director
Bijulee Bhawan, Paltan Bazaar,
Guwahati - 781 001
15. Jaipur Vidyut Vitran Nigam Limited
Through its Managing Director
Vidyut Bhawan, Jyoti Nagar,
Jaipur-302 005
16. Jodhpur Vidyut Vitran Nigam Limited
Through its Managing Director
New Power House, Industrial Area,
Jodhpur, Rajasthan - 342 003
17. Ajmer Vidyut Vitran Nigam Limited
Through its Managing Director Vidyut Bhawan,
Panchsheel Nagar, Makarwali Road,
Ajmer - 305 004

...Respondents

**AND IN THE MATTER OF:
2) Petition No. 185/MP/2018**

Azure Sunshine Private Limited
Asset No.301-4
World Mark 3
Aerocity, New Delhi - 110 037

...Petitioner

VERSUS

1. Solar Energy Corporation of India Limited
Through its Managing Director
1 st Floor, A-Wing D-3, District Centre
Saket, New Delhi - 110 017

2. Haryana Power Purchase Centre (HPPC)
Through its Chief Engineer Shakti
Bhawan, Sector - 6 Panchkula-134 108

...Respondents

AND IN THE MATTER OF:

3) Petition No. 190/MP/2018

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

...Petitioner

VERSUS

1. Solar Energy Corporation of India Limited
Through its Managing Director
1 st Floor, A-Wing D-3, District Centre
Saket, New Delhi - 110 017
2. Haryana Power Purchase Centre (HPPC)
Through its Chief Engineer Shakti
Bhawan, Sector - 6 Panchkula-134 108

...Respondents

AND IN THE MATTER OF:

4) Petition No. 191/MP/2018

Azure Clean Energy Private Limited
AssetNo.301-4
World Mark 3
Aerocity, New Delhi - 110 017

... Petitioner

VERSUS

1. Solar Energy Corporation of India Limited
Through its Managing Director
1 st Floor, A-Wing D-3, District Centre
Saket, New Delhi - 110 017
2. Rajasthan Urja Vikas Nigam Limited (RUVNL)
Through its Managing Director
Vidyut Bhawan, Janpath
Jaipur-302 005

...Respondents

AND IN THE MATTER OF:

5) Petition No. 184/MP/2018

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

... Petitioner

VERSUS

1. Solar Energy Corporation of India Limited
Through its Managing Director
1 st Floor, A-Wing D-3,
District Centre Saket,
New Delhi - 110 017
2. Jodhpur Vidyut Vitran Nigam Limited (JDVVNL)
Through its Managing Director
New Power House, Industrial Area,
Jodhpur, Rajasthan - 342 003

... Respondents

Parties Present:

Shri Saahil Kaul, Advocate, ASPL, Azure Sunshine, AGPL, ACEPL, APMPL
Shri M.G.Ramachandran, Sr. Advocate, SECI, NVVNL, NTPC
Ms. Tanya Sareen, Advocate, SECI, NVVNL, NTPC
Ms. Poorva Saigal, Advocate, SECI, NVVNL, NTPC
Shri Shubham Arya, Advocate, SECI, NVVNL, NTPC
Shri S. K. Agrawal, Advocate, Rajasthan Discoms
Ms. Shikha Saloni, Advocate, Rajasthan Discoms
Ms. Sashika Jain, Advocate, Rajasthan Discoms
Ms. Swapna Seshadri, Advocate, PSPCL
Shri Apoorv Kurup, Advocate, CSPDCL
Shri Nidhi Mittal, Advocate, CSPDCL

आदेश/ ORDER

The Petitioners, M/s Azure Solar Power Ltd.; M/s Azure Sunshine Pvt. Ltd.; M/s Azure Green Tech Pvt. Ltd.; M/s Azure Clean Energy Pvt. Ltd. and M/s Azure Power Mars Pvt. Ltd. (hereinafter collectively referred to as 'Petitioners') are generating companies primarily engaged in the business of setting up solar power plants and generation of electricity.

2. The Respondent No. 1, M/s NTPC Vidyut Vyapar Nigam Limited (hereinafter referred to as 'NVVN') is a wholly owned subsidiary of NTPC and inter-state trading licensee.
3. The Respondent No. 2, M/s NTPC Limited (hereinafter referred to as 'NTPC') and

Respondent No. 3, M/s Solar Energy Corporation of India Limited (hereinafter referred to as 'SECI') were appointed as nodal agency by MNRE for implementation of Jawaharlal Nehru National Solar Mission Scheme (hereinafter referred to as 'JNNSM') for selection of Solar PV Power Projects.

4. The Respondent No. 4, M/s Rajasthan Urja Vikas Nigam Limited (hereinafter referred to as 'RUVNL') has been formed by the Government of Rajasthan to carry out Power trading business of the State Power sector distribution companies.
5. The Respondent No. 5, Punjab State Power Corporation Limited (hereinafter referred to as 'PSPCL') has been formed by the Government of Punjab to carry out Power trading business of the State Power sector distribution companies. The Respondent No. 1 to 5 along with other Respondent Discoms herein are collectively referred to as 'Respondents'.
6. The Petitioners has made the following prayers:

IN

- 1) Petition No. 188/MP/2018**
- 2) Petition No. 185//MP/2018**
- 3) Petition No. 190//MP/2018**
- 4) Petition No. 191//MP/2018**
- 5) Petition No. 184/MP/2018**

- a) *Declare that the promulgation of the Finance Act, 2012 (with effect from 01.04.2012), Finance Act, 2015 (with effect from 01.06.2015), Notifications No.21 and 22/2015-ST dated 06.11.2015 by the Ministry of Finance, Government of India (with effect from 15.11.2015), Finance Act, 2016 (with effect from 01.06.2016) and Central Goods and Services Tax, 2017 (with effect from 01.07.2017) are each a Change in Law under Article 12 of the Power Purchase Agreement dated 10.01.2011 executed between the Petitioner and Respondent No. 1;*
 - b) *Direct the Respondents to accordingly pay the Petitioner an additional tariff with effect from the Commercial Operation Date of the Petitioner's Solar Power Generating System as compensation for the additional tax burden incurred by the Petitioner on operating and maintaining the said Solar Power Generating Systems, as elaborated in the instant Petition, due to the promulgation of the Finance Act, 2012 (with effect from 01.04.2012), Finance Act, 2015 (with effect from 01.06.2015), Notifications No.21 and 22/2015-ST dated 06.11.2015 by the Ministry of Finance, Government of India (with effect from 15.11.2015), Finance Act, 2016 (with effect from 01.06.2016) and Central Goods and Services Tax, 2017 (with effect from 01.07.2017), along with carrying costs, subject to any adjustments based on the final additional expenditure incurred by the Petitioner as on the Commercial Operations Date of the Petitioner's Solar Power Generating Systems as duly audited and certified by the Petitioner's statutory auditor at the end of the relevant financial year;*
 - c) *Direct the Respondents to reimburse the legal and administrative costs incurred by*
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the Petitioner in pursuing the instant Petition; and
d) *Pass such other orders that this Commission deems fit in the interest of justice.*

Brief facts of the case:

7. The Jawaharlal Nehru National Solar Mission had inter-alia set a target for deployment of grid connected solar power capacity of 1,00,000 MW by 2022 targeted to be achieved in 3 phases.
8. The Petitioner in Petition No. 188/MP/2018 was selected as the successful bidder under the National Solar Mission Phase I Batch –II conducted by NTPC. The Petitioner entered into Power Purchase Agreement (hereinafter referred to as ‘PPA’) with NTPC for development of Solar Photo Voltaic Power Plants in the State of Rajasthan to be developed on long term basis. As per the PPA as well as the Bidding Scheme, the solar power purchased by NTPC under the PPA was to be bundled with thermal power produced at NTPC stations in 1:1 ratio and then sold to the Distribution Companies.
9. The Petitioners in Petition No. 184/MP/2018; 185/MP/2018; 190/MP/2018 & 191/MP/2018 were selected as the successful bidders under the National Solar Mission Phase-II Batch-I conducted by SECI. The Petitioners entered into Power Purchase Agreements (hereinafter referred to as ‘PPAs’) with SECI for development of Solar Photo Voltaic Power Plants in the State of Rajasthan to be developed on long term basis. As per the PPAs as well as the Bidding Scheme, the solar power purchased by SECI under the PPAs was to be sold to the Distribution Companies.
10. The Respondents (NTPC/SECI) issued Request for Selection (hereinafter referred to as ‘RfS’) on various dates for selection of Solar Power Developers (hereinafter referred to as ‘SPDs’) for setting up grid-connected solar projects in the State of Rajasthan through e-bidding process. Pursuant to the RfS, the Petitioners were selected for setting up of a solar power generation facility in the State of Rajasthan. The Petitioners have entered into separate PPAs with NTPC for setting up of solar power projects in the State of Rajasthan for the consequent sale of solar power to NTPC.
11. On 12.04.2017, Government of India (hereinafter referred to as ‘GOI’) introduced the Goods and Services Tax, replacing multiple taxes levied by the Central and State Governments.

12. On 01.07.2017, the Central Goods and Services Tax Act, 2017; The Integrated Goods and Services Tax Act, 2017 for levy and collection of tax on inter-State supply of goods or services or both by the Central Government were enacted. The Rajasthan Goods and Services Tax Act, 2017 was enacted for levy and collection of tax on intra-State supply of goods or services or both by the State.
13. Hence the Petitions.

Submissions of the Petitioners:

14. The Petitioners have submitted that NTPC is a generating company owned and controlled by the Central Government, and subject to the jurisdiction of the Commission in accordance with Section 79(1)(a) of the Act whereas NVVN is a wholly owned subsidiary of NTPC and holds a license granted by the Commission to undertake inter-state trading in electricity in accordance with Section 14 of the Act. SECI is the company under the administrative control of the MNRE established to facilitate the implementation of JNNSM. The Respondents are responsible for the implementation of various schemes of MNRE, the major one being the Bundling Schemes, Viability Gap Funding schemes, solar park scheme and grid connected solar rooftop schemes. The Respondents issued RfS for selection of SPDs for development of cumulative capacity in the State of Rajasthan and the Petitioners were declared as the successful bidders and were awarded contracts and executed PPAs with a commitment to purchase power at fixed rate for a period of 25 years.
15. The Petitioners have submitted that the PPAs in all Petitions were executed well before the date of coming into effect of the 'GST Laws', i.e. 01.07.2017.
16. The Petitioners have submitted that, with the enactment of the Service Tax Laws and the GST Law, the Petitioners are required to bear additional recurring expenditure after the Effective Date under the PPAs in the form of any additional tax burden on the operation and maintenance expenses of the SPDs. There has been an increase in the effective rate of service tax on operations and maintenance services. The Petitioner have submitted the comparison between the old tax laws and rates applicable on the Effective date:

Old Tax Law	Old Tax Rate	New Tax Law	New Tax Rate	Applicable Period for New Tax Law
Finance Act, 2012	12.36%	Finance Act, 2015	14%	01.06.2015-14.11.2015
Finance Act, 2015	14%	Imposition of Swacch Bharat Cess by Notification No.21/2015-ST, dated 06.11.2015 issued by the Ministry of Finance, Government of India	14.5%	15.11.2015-31.05.2016
Finance Act, 2015	14.5%	Imposition of Krishi Kalyan Cess by Finance Act, 2016	15%	01.06.2016-30.06.2017
Finance Act, 2016	15%	The Central Goods and Services Tax, 2017	18%	01.07.2017 - till date

17. The Petitioners have submitted that the promulgation of the Service Tax Laws and the GST Law has resulted in additional recurring expenditures to be incurred by the Petitioner after the Effective Date in the form of an additional tax burden applicable on the necessary services required to operate and maintain the SPDs.
18. The Petitioners have submitted that with the enactment of the Service Tax Laws and the GST Laws, the Petitioners are required to bear additional recurring expenditure in the form of additional tax burden on the operation and maintenance expenses of the Solar Power Generating Station.
19. The Petitioners have submitted that the promulgation of the Service Tax Laws and the GST Laws after the Effective Date of the PPA resulting in additional recurring expenditure to be incurred by the Petitioner squarely attracts Article 12 of the PPA thereby entitling the Petitioners to Change in law relief stipulated thereunder. Definition of Law and Article 12 of the PPA is reproduced below:

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

decisions and orders of the Appropriate Commissions;”

20. The Petitioners have submitted that Art. 12 of the PPAs stipulates as below:

“ARTICLE 12: ‘CHANGE IN LAW’

12.1. Definitions

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

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

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

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

12.2. Relief for ‘Change in Law’

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

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

21. The Petitioners have submitted that in the instant petitions, the ‘PPAs are executed before the date of coming into effect of the ‘GST Laws’, i.e. 01.07.2017. The event of enactment of ‘GST Laws’ has occurred after the ‘Bidding’ and the enactment of the ‘GST Laws’ have resulted in additional recurring and non-recurring expenditure for the Petitioners.

22. The Petitioners have submitted that any tax levied through an Act of Parliament after the cut-off date which results in additional expenditure by the Petitioner is covered as 'Change in Law'. The cut-off date in this context means the bidding date when the tariff is fixed (without factoring in the GST). This position finds support from the last bullet of Article 12.1.1 of the PPAs since it makes provision for changes in law affecting tariff after the date of bid submission. The Petitioners have placed the reliance on the Order dated 15.02.2019 passed by the Maharashtra Electricity Regulatory Commission in Case Nos.276/2018, 325/2018 & 340/2018 where it was held that:

“'Change in Law' encompasses introduction, increase, or modification of any law after last date of Bid submission (which is 8 May, 2018 in this case) which results in additional expenditure to the Power Producer, or in increase or decrease in revenues or cost to it;”

23. The Petitioners have submitted that the 'GST Laws' have been enacted by the Indian Government Instrumentalities i.e., by the Act of Parliament and the State Legislative Assemblies. The change in duties/ tax imposed by various Government Instrumentalities at Centre and State level had resulted in the change in cost of the inputs required for generation after the cut-off date and hence the same is to be considered as 'Change in Law'.

24. The Petitioners have submitted that in terms of Article 12 of the PPAs, it is clear that:

- a. A change in law event is any of the events enumerated above. Enactment of a new Law as well as a change in tax structure or introduction of any tax for setting up of solar power projects are listed as events of Change in Law;
- b. Such change in law event must occur after the bid has been submitted since in such case the submission of bid does not take into account the effect of imposition of GST. and
- c. The change in law should result in any additional recurring/non-recurring expenditure or income.

25. The Petitioners have submitted that all of the aforementioned conditions are duly satisfied in the instant petitions. After the bidding in the instant Petitions following new laws have been enacted or brought into force:

a) The Central Goods and Services Tax Act, 2017, for levy and collection of tax on intra-State supply of goods or services or both by the Central Government effective from 01.07.2017.

b) 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 effective from 01.07.2017.

c) The Rajasthan Goods and Services Tax Act, 2017, for levy and collection of tax on intra-State supply of goods or services or both by the States of Rajasthan effective from 01.07.2017.

(hereinafter collectively referred to as the 'GST Laws').

26. The Petitioners have submitted that the Central Government vide Notification No. 12/2017 and 13/2017 introduced the Central Goods and Services Tax Act, 2017 and Integrated Goods and Services Tax Act, 2017 imposing GST to the tune of 5% to 28% on goods required for execution, construction and operation of solar projects which were previously exempted. The Rajasthan Goods and Services Tax Act, 2017 also levied GST on various items required for the construction and operation of solar power projects in the respective States.
27. The Petitioners have submitted that in terms of Article 12 of the PPAs executed between the Petitioners and the Respondents, this Commission is empowered to acknowledge a 'change in law' and to provide relief that will be binding on all the parties. The Petitioners have incurred adverse financial consequences due to introduction of GST Laws, which have resulted in additional financial burden on the Petitioners accordingly the Petitioners are entitled to compensatory relief for the aforesaid Change in law.
28. The Petitioners have submitted that the imposition of GST Laws have resulted in additional cost for the Petitioner because this cost was not contemplated by the Petitioners at the time of the bid submissions. The GST Laws were implemented subsequently leaving the Petitioners with no choice but to bear the additional burden and therefore, there is a need for adjustment/recovery in tariff for the generation of solar power by the Petitioners.
29. The Petitioners have submitted that the operations and maintenance activities have been outsourced to agencies that are experienced in providing the said services in the most effective and cost-efficient manner. The concept of the 'O&M' expenses is implicitly covered under Article 12. As per the PPAs, Clause 12.1.1 stipulates that 'Change in Law' means the occurrence of any of the events resulting into any additional recurring/ non-recurring expenditure by the SPD or any income to the SPD. As 'O&M' expenses are recurring in nature, therefore the same are squarely covered under Article 12 of the PPAs and the same

may be allowed. Further, 'O&M' expenses should be paid on the principles of normative parameters as specified by the Commission in the CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012 dated 06.02.2012 as amended on 31.03.2016.

30. The Petitioners have submitted that on 27th August 2018, the Government of India, vide letter no. 23/43/2018-R&R, issued the directions under Section 107 of the Electricity Act, 2003 (Act) to the Commission:

“Now in order to address the above issue and ensure sustainability of the electricity market in the larger public interest, the Central Government, in exercise of the powers conferred under Section 107 of the Act, hereby issues this direction to the Central Electricity Regulatory Commission:

- a) Any change in domestic duties, levies, cess and taxes imposed by Central Government, State Governments/Union Territories or by any Government instrumentality leading to corresponding changes in the cost, may be treated as "Change in Law" and may unless provided otherwise in the PPA, be allowed as pass through.*
- b) Central Commission will only determine the per unit impact of such change in domestic duties, levies, cess and taxes which will be passed on.*
- c) A draft Order for determination of per unit impact under change in law shall be circulated by Central Commission to all the State/Beneficiary on 14th Day of filing of petition any objection/ representation shall be submitted by them within 21 days of filing of petition.*
- d) The order for pass through giving the calculation for per unit impact will be issued within 30 days of filing of petition.*
- e) The impact of such Change in law shall be effective from the date of change in law.*
- f) Where CERC has already passed an order to allow pass through of Changes in domestic duties, levies, cess and taxes in any case under Change -in-law, this will apply to all cases ipso facto and no additional petition would need to be filed in this regard.”*

31. The Petitioners have submitted that the imposition of GST Laws falls squarely within the ambit of the aforesaid direction since it is tantamount to a change in the domestic duties, levies, cess and taxes. Accordingly, the Petitioners are entitled to relief in terms of Article 12 of the PPAs and the direction under Section 107 of the Act by way of a revision of the tariff to compensate it for the increased project cost on account of the levy of GST and the interest/ carrying cost.

32. The Petitioners have submitted that the introduction of 'GST Laws' to solar power projects by the Government is an event beyond the control of the Petitioner and the same has been

declared as a 'Change in Law' event in a recent Order dated 19.09.2018 passed by the Commission in the matter of *M/s. Prayatna Developer Private Limited and M/s Azure Power Venus Private Limited Vs. NTPC and SECI*. Another Order dated 09.10.2018, was passed by the Commission in Petition No.188/MP/2017, which recognised the introduction of 'GST Laws' as a 'Change in Law' event under Article 12 and 17 of the PPAs therein. Similar findings have been passed by the Commission in Order dated 05.02.2019 in Petition Nos. 187, 192, 193, 178, 189 of 2018. In the aforementioned Order it was held that the introduction and implementation of GST laws is an event under 'Change in Law'. Accordingly, the Petitioners pray that the Commission may hold and declare the enactment of 'GST laws' as an event under 'Change in Law' as per Article 12 of the PPA and thereby, allow a revised tariff for generation of solar power or grant a lump sum compensation to the Petitioner in a time bound manner.

33. The Petitioners have submitted that the Commission has the jurisdiction to entertain the present petition since the Petitioner conceived its solar power project under a composite JNNSM scheme.

Submissions of the Respondent No. 1 - NVVN:

34. The Respondent No. 1 has denied that promulgation of Service Tax Laws or the GST Laws entitles the Petitioners for any compensatory tariff, as claimed by the Petitioner, in terms of Article 12 of the PPA i.e. Change in Law clause.
35. The Respondent No. 1 has submitted that the Scheduled Commissioning Date (hereinafter referred to as 'SCoD') for the Solar PV Projects is much before the promulgation of the GST Laws. The implications of 'Change in Law' have to be considered in the light of the SCoD if the project had been fully commissioned by the SCoD, then there would have been no impact of the GST Laws. The Petitioner cannot seek the impact of any change in law which would have otherwise had no effect if the Petitioner had commissioned the project in time, as laid down by this Commission in its Order dated 19.09.2018 in Petition No. 50/MP/2018 and 52/MP/2018.
36. The Respondent No. 1 has submitted that there cannot be any additional claim in regard to the O&M expenditure on account of GST Laws or Service Laws, as also held in the order

dated 19.09.2018 in Petition No. 50/MP/2018 and 52/MP/2018. The Petitioners are not entitled to any relief on account of the additional tax implication on the O&M services in respect of Petitioners Projects. The O&M is the responsibility of the Petitioners and in the event of the Petitioners choosing to employ the services of other agencies, namely its Parent Company i.e. Azure Power India Private Limited, it cannot increase the liability of the Answering Respondent (and consequentially the Distribution Licensees) in terms of tariff. The outsourcing of the O&M to a third party is not a requirement of the PPAs and will be a commercial decision of the Petitioners for its own advantage and any increase in cost including on account of taxes etc. is entirely to the account of the Petitioners. The issue has been decided by the Commission order dated 19.09.2018 passed in Petition No. 50/MP/2018 and 52/MP/2018.

37. The Respondent No. 1 has submitted that it is wrong and denied that the Petitioners are entitled:-
- a) to be compensated for legal or administrative costs or otherwise in pursuing the proceedings before the Commission.
 - b) the tariff of the Project needs to be revised upwards to account for additional tax burden incurred/to be incurred by the Petitioners on account of GST Laws or Service Law.
 - c) to revise tariff ought to account for carrying costs incurred by the Petitioners in discharging the additional tax burden.
 - d) that the Petitioner is required to be restored to the same economic position as if a change in law had not occurred.
 - e) that the Petitioner is entitled to a levelised additional tariff
38. The Respondent No. 1 has submitted that there is no provision in the PPAs regarding carrying cost or interest for the period till the determination of the relief amount on account of 'Change in Law'. The Change in Law claim of the Petitioners is yet to be adjudicated and the amount if any due to the Petitioners have to be determined/computed first. When the amount gets determined by the Commission, the Petitioners are required to raise the Supplementary invoice for the amount so computed as per Article 10.7 of the PPAs and the payment has to be made on the Due Date of such Supplementary Bill. The issue of carrying cost or interest or Late Payment Surcharge will arise only for the period after the due date.

39. The Respondent No. 1 has submitted that the decision by the Commission can only be after the Petitioners have submitted complete information and not before. Thus, any delay in the determination of the impact of 'Change in Law' is on account of the Petitioners, as the Petitioners have not been placed the complete information and supporting documents. The Respondent No.1 has placed its reliance on the Judgment of the APTEL dated 14.08.2018 in Appeal No. 111 of 2017 in *M/s. GMR Warora Energy Limited –v- Central Electricity Regulatory Commission and Ors.*, vide which it has been held 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, there is no provision in the PPAs neither for carrying cost nor restitution. Therefore, the Petitioners are not entitled to claim relief which is not provided for in the PPAs.
40. The Respondent No. 1 has submitted that the jurisdiction of the Commission is not denied. However, it is denied that the Petitioners have raised any notice on the Respondents. The Petitioner have not produced any notice whatsoever with the Petitions. Accordingly, even on this count, the Petitions are not maintainable and are liable to be dismissed in limine.

Submissions of the Respondent No. 4 – RUVNL:

41. The Respondent No. 4 has submitted that the three Rajasthan Discoms are not the parties to the said PPAs and therefore, are neither proper nor necessary party in this petition. Hence, seeks deletion from the array of parties for being improperly impleaded as parties to the petitions.
42. The Respondent No. 4 has submitted that the Petitioners have not furnished any document or supporting evidence furnishing the requisite details backed by auditor certificate or computation of impact of 'Change in Law'. Therefore, no relief can be granted without any appropriate proof thereof.
43. The Respondent No. 4 has submitted that the GST Laws constitute a 'Change in Law' within the scope of the PPAs, when the Petitioners sufficiently satisfies the Commission with respect to the expenditure incurred, amount of taxes actually to be paid under the GST Laws.
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Submissions by the Petitioners in the Rejoinder

44. The Petitioners have submitted that denied all the objections raised by the Respondents don't have any merit and ought to be rejected outright.

Re: Claims under GST Law if SCoD is prior to 01.07.2017

45. The Petitioners have submitted that the claim of the Petitioners in the instant Petition relates to the additional recurring expenditure incurred by the Petitioners on the O&M activities due to introduction of GST Law i.e. activities carried out by the Petitioners pursuant to commissioning the Project. The date of procurement of goods and services for this purpose is therefore irrelevant as the impact of GST Law on O&M activities is to be borne by the Petitioners only after commissioning and for the entire tenure of the PPAs thereafter.

Re: Impact of GST Law is not covered by the Change in Law clause in the PPAs

46. The Petitioners have submitted that the findings of this Commission in the CERC Order qua the first bullet of Article 12.1.1 are correct and require no reconsideration. The Petitioner's submissions in this regard are set out below:

a. change in law relief is covered under the first bullet of Article 12.1.1

47. The Petitioners have submitted that the Respondents have admitted in their replies that GST Law is covered within the meaning of "law" under Article 12 of the PPAs. First bullet of Article 12.1.1 covers the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal of any law in India. The introduction of the GST Law is covered by the first bullet, as the GST Law has been inter alia enacted by the state and central legislatures. The GST Law is not in the nature of a mere change in the tax having limited applicability, it is an enactment affecting the entire indirect taxation regime in India.

48. The Petitioners have submitted that Article 12.1.1 of the PPAs uses the word “any” before indicating the list of events that constitute change in law events. The use of the word “any” in Article 12.1.1 implies that each of the ‘Change in Law’ events under the clause is independent of each other and not mutually exclusive. In other words, an event may be covered under one or more of the change in law events; accordingly, the width and amplitude of one change in law event does not limit the width and amplitude of any other change in law event. The exclusions indicated at the end of Article 12.1 of the PPAs are applicable to all the six bullets of Article 12.1, and not restricted to the last bullet alone because the exclusions contemplated in the proviso to Article 12.1 do not only relate to the last bullet of tax, but also include changes on account of regulatory measures by the Appropriate Commission which obviously fall outside the scope of the last bullet. The last bullet (which deals specifically with any change in or introduction of taxes) of Article 12.1.1 does not in any manner limit the scope of the first bullet (which deals with any change in any law) or vice versa.

b. Last bullet of Article 12.1 of the PPAs

49. The Petitioners have submitted that the Commission has settled the law on the interpretation of similarly worded ‘Change in Law’ clauses. The term “supply of power” has been widely interpreted to cover the impact on capital cost and operating cost of the project, including the cost of materials, equipment, services for installation of the project and production and supply of electricity as well as taxes, duties and levies on such equipment, materials and services.

50. The Petitioners have submitted that the Respondents averments that the judgment dated 14.08.2018 passed by the APTEL in *Adani Power Rajasthan Limited v. Rajasthan Electricity Regulatory Commission and Ors.*, Appeal No. 119 of 2016 is not applicable in the facts and circumstances of the present case is also erroneous and misconceived. By the aforesaid judgment, the APTEL has rejected arguments similar to those made by the Respondents in the present matter to hold that any change in tax/levies/ duties etc. or application of new tax/levies/ duties etc. on supply of power covers the taxes on inputs required for such generation and supply of power under the relevant PPAs. In view of the above, the last bullet of Article 12.1.1 covers any change in tax or an introduction of a new tax which is made applicable for supply of power by the solar power developer in terms of the PPAs. Therefore, the GST Law is both a change in tax (as it changes the existing tax regime, replaces various

existing indirect taxes and also alter the tax rates), and the introduction of a new tax (as it introduces a new tax regime and is in the nature of a new tax). The Commission has already considered the aforesaid judgment passed by the APTEL in various decisions and has rightly held that the introduction of GST Law is covered within the first and last bullet of 'Change in Law'.

c. Article 12 of the PPA must be construed widely to give effect to the intentions of the Parties.

51. The Petitioners have submitted that a 'Change in Law' clause ought to be construed widely, with a view to further the intention of the parties, which is to compensate for any necessary and reasonable extra expenditure incurred after the relevant cut-off date on account of a change in law. Further, it has also been held that the courts while interpreting contracts cannot adopt the same approach as they may take while interpreting legislative instruments, and that contracts between the parties must be understood in the manner the parties intended them to be. A bare perusal of the terms of the PPAs provides that the PPAs intends to provide a very wide scope to change in law events, as the definition of the term "law" and the list of change in law events, as set out in Article 12.1 of the PPAs, are very widely worded. The provisions of the PPAs must be liberally interpreted to further the intention of the parties, and a restrictive reading of the PPAs, including that of the last bullet of Article 12 of the PPAs, as has been contended by the Respondents, must be rejected by the Commission. Here, it is also pertinent to note that the phrase "for supply of power" in the last bullet of Article 12.1.1 is followed by the phrase "as per the terms of this agreement". As is clear from the bare perusal of the PPAs, the obligations of the Petitioners under the PPAs include establishment, commissioning and operation of the Project as per the terms specified. Therefore, the meaning of "for supply of power" necessarily includes all the activities resulting in the supply of power i.e. erecting, commissioning and operating and maintaining the project as per the terms of the PPAs. Moreover, the phrase "supply of power" in the last bullet is preceded by the term "for" as opposed to "on", thereby making the intention clear that the last bullet intends to cover all activities to be carried out for supplying power in terms of the PPA, including the activity of operating and maintaining the project to ensure continuous supply of power to NTPC.

d. Reliance on draft PPAs issued under the Phase II, Batch IV of the NSM is irrelevant.

52. The Petitioners have submitted that the Respondents in their reply have relied upon Article 12 of a draft power purchase agreement issued in November 2016 under the Phase II, Batch IV of the National Solar Mission to contend that since the said subsequent draft PPA specifically included impact of change in existing taxes or introduction of new taxes on setting up of the solar power project, the PPAs executed by the Petitioners by implication exclude the impact on setting up of the solar power project. The draft PPAs only demonstrates the underlying intent, and the true purpose of the change in law clause, as has been correctly interpreted by the Commission in a catena of orders. The draft PPAs does not operate to create a special right for the later NSM projects executing such PPAs, as such an interpretation would be manifestly discriminatory in nature.

Re: Claims under O&M

53. The Petitioners have submitted that no provision under the PPA disentitles the Petitioners from claiming change in law relief for activities that have been outsourced to a third party. The PPAs does not prohibit the Petitioners from engaging a third-party vendor to efficiently operate and maintain the project. The PPAs leaves it to the Petitioners to determine how to execute the Projects. Further, Article 12, stipulates that “... *the occurrence of any of the following events resulting into any additional recurring expenditure ... by the SPD...*” Hence, it entitles the developers to relief against the additional expenditure. It does not restrict the Petitioners from claiming relief for any additional expenditure it has to incur on O&M as a result of any ‘Change in law’. Moreover, by outsourcing O&M activities, the Petitioners have acted prudently and in accordance with standard market practice, as it is well known and well established that it is cost-efficient for project developers to engage third party O&M vendors having expertise in operating and maintaining power projects rather than carry out all O&M activities themselves.

54. The Petitioners have submitted that the Commission itself, in the ‘Statement of Reasons’ dated 30.03.2016 in relation to the CERC (Terms and Conditions for Tariff Determination from Renewable Energy Sources) (Fifth Amendment), Regulations 2016, has observed that outsourcing of O&M services is widely adopted by power producers as a prudent utility practice and that such outsourcing, in fact, reduces the financial burden of O&M on the

Project. The relevant extracts of the aforesaid SOR are reproduced below (emphasis supplied):

“Analysis and Decision

Additionally, it may be noted that specialized firms have been established over the last few years that provide O&M services to several solar PV projects in different locations. With increasing density of projects in particular high irradiation areas as well as more technically skilled manpower available as the industry grows, O&M contracts have in fact become cheaper. Thus, even with inflation resulting in increased cost of manpower, specialization and outsourcing has in fact reduced the financial burden of O&M on power producers.

...

In the order dated 23.3.2016 in Petition No. 17/SM/2015 (Suo-Motu), in the matter of “Determination of Benchmark Capital Cost Norm for Solar PV power projects and Solar Thermal power projects applicable during FY 2016-17”, it has been stated that the cost of forecasting and scheduling services is minimal on per MW and monthly basis. The Commission maintains that Skilled personnel required to manage this process are generally stationed at the control centre as all data are remotely monitored. This process is typically outsourced which has brought down the cost of service in the market. Most power producers do not employ full-time personnel to undertake these activities...”

55. The Petitioners have submitted that many of the activities that comprise O&M are specialized and cannot be carried out by a power generating company. For instance supplying consumables and spares. Many O&M activities can be carried out far more economically and effectively by companies that specialize in such jobs, rather than by a solar power generation company. For instance, providing site security and contracting technically qualified personnel for module cleaning. Many O&M activities, such as providing security services or water supply for module cleaning, require that the service provider meet special statutory requirements and obtain specific approvals. For instance, to undertake the activity of private security services, the Petitioners would be required to obtain a license under the Private Security Agencies (Regulation) Act, 2005 and there are various conditions linked to the grant of such license which are otherwise not applicable on a company involved in the business of generation of electricity, if the same are outsourced. Further, for undertaking the activity of washing of modules, specific approvals are required from the concerned panchayat, environmental authorities or municipalities as applicable. If the Petitioners were required to carry out all O&M activities itself, it would have resulted in a higher project cost which would mean a higher tariff for the Respondents.

56. The Respondents' denial of the Petitioner's claim is self-serving and lacks bona fides. In the ordinary course, the Petitioners would have borne the entire burden of the tax payable on O&M services had the tax not been changed. However, a change in tax that imposes an additional cost upon the Petitioners are squarely contemplated by the Change in Law clause, for which the Petitioners are entitled to relief compensating the Petitioners for the additional cost.
57. The Petitioners have submitted that the Government of India, on 27.08.2018, issued a direction under Section 107 of the Electricity Act, 2003 by way of which this Commission was directed to take into account the impact of any change in domestic duties, levies, cess and taxes imposed by the Central Government, State Government/ Union Territories or by any Government instrumentality, which leads to a corresponding change in the cost, as a Change in Law and to allow the same as a pass through in tariff. The above directive is in line with the mechanism for compensation on account of a change in law provided for in the National Tariff Policy, 2016 issued by the Central Government and the Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Projects notified by the MNRE on 03.08.2017.
58. The Petitioners have submitted that Respondents reliance upon the CERC Order and judgment dated 16.03.2018 in Petition No. 1/MP/2017, is misplaced. While passing the said judgments, the Commission has not considered certain material facts and market realities including the Commission's own observations in relation to O&M expenses as mentioned in the aforesaid 'Statement of Reasons'. Also, the issue involved in the aforesaid decisions has not attained finality and the same is currently pending adjudication before the APTEL in Appeal Nos. 394, 395, 398 and 399 of 2018.

Re: Claims regarding Carrying Cost

59. The Petitioners have submitted that the underlying purpose of Article 12 of the PPAs is to provide compensation and restore a party affected by Change in Law events to a position as if such Change in Law had not taken place. Further, for the Petitioners to effectively perform its obligations under the PPAs, it is imperative that tariff under the present PPAs be suitably revised so as to bring the Petitioners to a position as if the introduction of GST Laws never occurred. The Petitioners can be brought to the position existing prior to the occurrence of the

‘Change in Law’ event only if the Petitioners are also compensated in the amount of the financial cost of the additional expenditure incurred as a result of the ‘Change in Law’ by paying its carrying cost. The Petitioners could not have raised supplementary invoices claiming the additional recurring expenditure incurred by the Petitioners due to introduction of GST Laws as Article 12.2 of the PPA makes it obligatory upon the Petitioners to approach the Commission to seek relief for a Change in Law event before raising any supplementary invoices claiming such amount. The Petitioners have approached the Commission within the period of limitation and at the earliest possible instance. Moreover, the Respondents’ reliance upon certain decisions of the APTEL relating to denial of carrying cost is erroneous and misconceived. The said decisions have not attained finality as the same are subject matter of appeal before the Hon’ble Supreme Court in Civil Appeal Nos. 7990 and 11095 of 2018, which are currently pending adjudication.

Re: Furnishing of sufficient details along with supporting documentary evidence of taxes subsumed/ withdrawn pursuant to introduction of GST Laws

60. The Petitioners have submitted that it has provided details of the taxes existing prior to the introduction of the GST Laws along with the net additional recurring impact due to introduction of GST Laws and Service Tax Laws on the Project in the Petition. Few invoices have also been provided by way of sample raised by the Petitioners’ Operation and Maintenance service provider for supplying goods and services prior to and after the promulgation of the Service Tax Laws and the GST Laws. Petitioners’ bona fides are indisputable as the Petitioners themselves have proposed that the increase in tariff allowed by the Commission to offset the impact of GST Laws and Service Tax Laws be subject to an annual reconciliation based on the actual additional tax impact of the GST Laws as per the annual audited account books of the Petitioner, as certified by its statutory auditor.
61. The Petitioners have submitted that the details relating to the procurement of goods and equipment for the Project as sought by Respondents are irrelevant for the purpose of adjudicating the instant Petition since the Petitioners’ present claim only pertains to the additional recurring expenditure incurred by the Petitioners in O&M of the Project as a result of introduction of GST Laws. Therefore, they have only furnished documents demonstrating the additional recurring expenditure incurred by it due to introduction of GST Law.

Re: Taking of adequate mitigating steps so as to reduce the impact of GST Law

62. The Petitioners have submitted that the manner of procurement of the goods for the Projects is irrelevant for the purpose of adjudicating the present Petitions as the goods and other equipment for the Projects were procured by the Petitioners prior to the introduction of GST Laws.

Re: Obligations of PPA-PSA are on a back to back basis

63. The Petitioners have submitted that the rights of the Petitioners arising out of the PPAs with Respondents cannot be made contingent on any other contractual arrangements to which the Petitioners are not a party. As per Article 12 of the PPAs, the Petitioners are required to approach this Commission for relief on account of a 'Change in Law'. The rights of the Petitioners under the PPAs are only against NVVN/NTPC/SECI and are not dependent upon or subject to third parties. Further, Article 12.2.2 expressly provides that the decision of this Commission is final and binding on both parties to the PPAs and compliance with such decision by the Respondents have not been made subject to any third parties performing their obligations qua their respective contractual arrangements.

Re: Necessary or proper parties to the Petition

64. The Petitioners have submitted that Respondent Discoms have been impleaded as a party to the present proceedings at the instance of the directions of the Commission.
65. The Petitioners have submitted that in case the reliefs sought by the Petitioners are not granted, the Petitioners may not be able to meet its existing debt service obligations and operate the Project in terms of the PPA, potentially rendering it unviable. In light of the above submissions, the Petitioners have prayed that the Commission may be pleased to allow the relief sought for in the present Petitions and grant an appropriate adjustment/ compensation to offset financial/ commercial impact of introduction of GST Laws and Service Tax Laws, since the same is critical to ensuring the viability of the Project and due performance of Petitioner's obligations under the PPA.

Analysis and Decision:

66. The Petition No. 188/MP/2018; 185/MP/2018; 190/MP/2018; 191/MP/2018 and 184/MP/2018 were admitted on 17.09.2018 and were reserved on 23.07.2019. We have heard the learned counsels for the Petitioners and the Respondents and have carefully perused the records. Since, Petitions are likely worded and contain similar issues to be adjudicated, the same are clubbed together.
67. The brief facts of the petitions are that the Petitioners are generating companies engaged in the business of development, building, owning, operating and maintaining utility scale grid connected solar power projects, for generation of solar power.
68. The Central Goods and Services Tax Act, 2017, The Integrated Goods and Services Tax Act, 2017 on 12.04.2017, The Rajasthan Goods and Services Tax Act, 2017 are hereinafter collectively referred as ‘GST Laws’.
69. The brief facts of the case are as under:

	188/MP/2018	185/MP/2018	190/MP/2018	191/MP/2018	184/MP/2018
Scheme	JNNSM				
Phase	I	II	II	II	II
Batch	II	I	I	I	I
Nodal Agency	NTPC	SECI	SECI	SECI	SECI
RfS	24.08.2011	28.10.2013	28.10.2013	28.10.2013	18.10.2014
Capacity MW	20+15	20	40	40	5
Power	Bundled	Solar	Solar	Solar	Solar
Location	Rajasthan				
PPA	25.01.2012	28.03.2014	28.03.2014	28.03.2014	05.02.2015
Effective date	27.01.2012	28.03.2014	28.03.2014	28.03.2014	05.02.2015
SCoD	26.02.2013	28.04.2015	28.04.2015	28.04.2015	05.11.2015
Tariff /kWh	8.21	5.45	5.45	5.45	5.45
VGF	--	Yes	Yes	Yes	Yes
Change in Law	Art. 12	Art. 12	Art. 12	Art. 12	Art. 12
GST	01.07.2017				
Incremental impact in O&M (Rs.)	11,38,70,874	1,97,40,946	3,94,81,887	3,94,64,711	49,79,706

70. The Petitioners were selected as the successful bidder under the National Solar Mission Scheme conducted by NVVN, NTPC & SECI. The Petitioners entered into PPAs with Respondents No. 1, 2, & 3 on for development of Solar Photo Voltaic Power Plants in the State of Rajasthan. The Solar Power Plants were to be developed on long term basis at a discovered tariff. As per the PPAs as well as the Bidding Scheme, the solar power purchased by NVVN & 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 Rajasthan whereas in the PPAs executed with SECI, the Solar PV power purchased was to be purchased from the Petitioners and sold to the Distribution Companies.

71. 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 Rajasthan Goods and Services Tax Act, 2017 was enacted for levy and collection of tax on intra-State supply of goods or services or both.
72. The Petitioners have submitted that it participated in the bids after following the process of 'Reverse Auction' and was selected as the successful bidder. Pursuant thereto, the Petitioners entered into a PPAs for setting up of solar power plant at different rates of fixed tariff for 25 years. Subsequent to the 'Effective Date' as per the PPAs, the 'GST Laws' were enacted. Introduction of 'GST Laws' made a huge impact on the actual cost of the project *vis-a-vis* budgeted cost, which was beyond their control and therefore, notice regarding the 'Change in Law' was sent to the Respondents. The Petitioners have 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 parties 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 Petitioners have bid for supplying power do not change in times to come and that no detriment to either Petitioners or Respondents is caused due to such 'Change in Law' events. The Petitioners have submitted that in terms of the Article 12 of the PPAs, they are entitled to claim the same being an event of 'Change in Law'.
73. **Per Contra**, the Respondents have submitted that the GST Laws 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 SCoD of all of the projects is before the introduction of GST laws and hence the same is beyond the scope of Article 12 of the PPAs. The Respondents have submitted that the Commission has already

held that claim of the Petitioners on account of additional tax burden on O&M expenses (if any), is not maintainable. 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 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.

74. The Respondents have further submitted that the Petitioners have not placed before the Commission in a transparent manner the taxes, duties and levies which stands withdrawn and no longer payable by reason of the GST Laws. 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. 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 Petitioners (if any) on account of ‘GST Laws’ the liability will be back to back since the inter winding nature of PPAs and PSAs.
75. From the submissions of the parties, the following issues arise before this Commission:
76. **Issue No. 1:** *Whether the promulgation of the IGST Act, 2017, the CGST Act, 2017, the and the Rajasthan 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? And Whether there will be incremental impact in the cost of construction on account of promulgation of the GST Laws?*
77. **Issue No. 2:** *Whether there will be incremental impact in 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 Petitioners for the increase in recurring and non-recurring expenditure incurred by the Petitioners on account of Change in Law?*

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

79. No other issue was pressed or claimed.

80. We now discuss the issues one by one:

Issue No. 1: Whether the promulgation of the IGST Act, 2017, the CGST Act, 2017, the and the Rajasthan 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? And Whether there will be incremental impact in the cost of construction on account of promulgation of the GST Laws?

81. The Petitioners have submitted that Article 12 of the PPAs provides for 'Change in Law'. It includes *inter alia* the enactment, promulgation, adoption in India of any Law, as well as, any change in tax or introduction of any tax made applicable for supply of power. The event of enactment of 'GST Law' has occurred after the execution of PPAs and has resulted in additional recurring and non-recurring expenditure. In terms of Article 12.2.1 of the PPAs, an aggrieved party who has incurred additional recurring/ non-recurring expenditure is required to approach the Central Commission for seeking approval of such change in law event and thereby, claim relief for the same upon approval by the Commission. Accordingly, the Petitioners have approached this Commission for seeking relief on account of introduction of GST as a change in law event, as per the first and last bullet of Article 12.1.1 of the PPAs.

82. **Per Contra**, the Respondents have submitted that the SCoD of all of the projects is before the introduction of GST laws and hence the same is beyond the scope of Article 12 of the PPAs. Further, the Commission has already held 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*, that claim of the Petitioners on account of additional tax burden on O&M expenses (if any), is not maintainable and that the claim regarding separate 'Carrying Cost' in the instant petitions is not attracted.

83. The Commission observes that Article 12 of the Power Purchase Agreements stipulates as under:-

"ARTICLE 12: 'CHANGE IN LAW'

12.1. Definitions

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

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

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

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

12.2. Relief for 'Change in Law'

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

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

84. The Commission observes that as per Article 12, 'Change in Law' means the enactment/ coming into effect/ adoption/ promulgation/ amendment/ modification or repeal of any Law in India; Change in the interpretation of any Law in India; Imposition of a requirement for obtaining any consents or Change in tax or introduction of any tax made applicable for supply of power by the SPD as per the terms of this Agreement, resulting into any additional recurring/ non-recurring expenditure or any income to the SPD. The Commission is of the view that harmonious construction of the bullet points under Article 12 makes it clear that bullet point one is wider in scope and refers to the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal of any Law in India, including rules and regulations framed pursuant to such Law whereas bullet point last in seriatim refers specifically to any change in tax or introduction of any tax made applicable for 'supply of power' by the SPD as per the terms of Agreement. Clearly, the 'GST laws' enacted are not in

the nature of a mere change in the tax having limited applicability on supply of power. Rather, it is in the nature of an enactment having wide ranging implication on the entire indirect taxation regime in India. 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."

85. 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."

86. 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 last bullet in seriatim of Article 12.1.1 of the PPA. This view is in consonance with the view taken by the Commission in Order dated 09.10.2018 in Petition No. 188/MP/2017 & Ors. titled *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors.*

87. The Commission observes that ‘GST Laws’ became effective from 01.07.2017. ‘GST Laws’ provides for a tax slab 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’.

88. The details of the PPAs executed, Effective date & SCoD of the Projects of the Petitioners is as under:

	188/MP/2018	185/MP/2018	190/MP/2018	191/MP/2018	184/MP/2018
RfS	24.08.2011	28.10.2013	28.10.2013	28.10.2013	18.10.2014
Capacity MW	20+15	20	40	40	5
PPA	25.01.2012	28.03.2014	28.03.2014	28.03.2014	05.02.2015
Effective date	27.01.2012	28.03.2014	28.03.2014	28.03.2014	05.02.2015
SCoD	26.02.2013	28.04.2015	28.04.2015	28.04.2015	05.11.2015

From the above the Commission observes that the PPAs executed by the parties are dated 05.02.2015 or before. The ‘Effective date’ of PPAs is also dated 05.02.2015 or before. Further the ‘Scheduled date of Commissioning’ of the projects of the Petitioners is dated 05.11.2015 or before. As such, all the projects were scheduled to be commissioned before the date of coming into effect of the ‘GST Laws’ i.e. 01.07.2017. In view of above the Commission holds that there is no impact of ‘GST laws’ on the ‘Construction Stage’. The Issue is decided accordingly.

Issue No. 2: Whether there will be incremental impact in 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 Petitioners for the increase in recurring and non-recurring expenditure incurred by the Petitioners on account of Change in Law?

89. The Petitioners have submitted that 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 new slabs have led to an increase in the recurring and non-recurring O&M expenditure hence making the tariff quoted at the time of bid for allocation of project unviable.
90. **Per Contra**, the Respondents have submitted the claim of the Petitioners on account of additional tax burden on O&M expenses and ‘Carrying is also not maintainable.
91. 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.
92. The Petitioners have claimed the increase in total Cost & O&M expenses due to increase in tax incidence as given below:

	188/MP/2018	185/MP/2018	190/MP/2018	191/MP/2018	184/MP/2018
Incremental impact in O&M (Rs.)	11,38,70,874	1,97,40,946	3,94,81,887	3,94,64,711	49,79,706

93. The Petitioners have submitted that under Article 9 of the PPAs, they were originally entitled to receive a determined tariff from the Commercial Operation Date. However, such tariff was fixed prior to the promulgation of the Service Tax Laws and the GST laws. Therefore, the aforesaid tariff would need to be revised upwards to account for and reflect the additional tax burden incurred/ to be incurred by the Petitioners on account of the promulgation of the Service Tax Laws and the GST laws.
94. The Petitioners have submitted that Article 12 of the PPAs is deliberately widely worded

saying that “... the occurrence of any of the following events resulting into any additional recurring expenditure ... by the SPD...” entitles the developer to relief against the additional expenditure. It does not restrict the Petitioners from claiming relief for any additional expenditure it has to incur on O&M as a result of any change in law. Respondents contention thus runs contrary to the PPAs as it seeks the restriction of the ambit of the change in law clause by excluding outsourced O&M activities from it. Moreover, by outsourcing O&M activities, the Petitioner has acted prudently and in accordance with standard market practice, as it is well known and well established that it is cost-efficient for project developers to engage third party O&M vendors having expertise in operating and maintaining power projects rather than carry out all O&M activities themselves.

95. The Petitioner have submitted that the Commission itself, in the statement of reasons dated 30.03.2016 (hereinafter referred to as ‘SOR’) in relation to the CERC (Terms and Conditions for Tariff Determination from Renewable Energy Sources) (Fifth Amendment), Regulations 2016, has observed that outsourcing of O&M services is widely adopted by power producers as a prudent utility practice and that such outsourcing, in fact, reduces the financial burden of O&M on the Project. The relevant extracts of the aforesaid SOR are reproduced below:

“Analysis and Decision

Additionally, it may be noted that specialized firms have been established over the last few years that provide O&M services to several solar PV projects in different locations. With increasing density of projects in particular high irradiation areas as well as more technically skilled manpower available as the industry grows, O&M contracts have in fact become cheaper. Thus, even with inflation resulting in increased cost of manpower, specialization and outsourcing has in fact reduced the financial burden of O&M on power producers.

...

In the order dated 23.3.2016 in Petition No. 17/SM/2015 (Suo-Motu), in the matter of „Determination of Benchmark Capital Cost Norm for Solar PV power projects and Solar Thermal power projects applicable during FY 2016-17“, it has been stated 5 that the cost of forecasting and scheduling services is minimal on per MW and monthly basis. The Commission maintains that. Skilled personnel required to manage this process are generally stationed at the control centre as all data are remotely monitored. This process is typically outsourced which has brought down the cost of service in the market. Most power producers do not employ full-time personnel to undertake these activities...”

96. The Petitioners have submitted that many of the activities that comprise O&M are specialized and cannot be carried out by a power generating companies. For instance, supplying consumables and spares. Many O&M activities can be carried out far more economically and

effectively by companies that specialize in such jobs, rather than by a solar power generation companies. For instance, providing site security and contracting technically qualified personnel for module cleaning. Many O&M activities, such as providing security services or water supply for module cleaning, require that the service provider meet special statutory requirements and obtain specific approvals. For instance, to undertake the activity of private security services, the Petitioners would be required to obtain a license under the Private Security Agencies (Regulation) Act, 2005 and there are various conditions linked to the grant of such license which are otherwise not applicable on a company involved in the business of generation of electricity, if the same are outsourced. Further, for undertaking the activity of washing of modules, specific approvals are required from the concerned panchayat, environmental authorities or municipalities as applicable.

97. 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.”

98. 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. The Commission is of the view that in the Competitive Bidding Scenario, the SPDs bid levelled tariff without disclosing the details of the calculations of the project cost. It has already been held by the Commission in the earlier Orders and also appreciated above that it is a pure commercial decision of the Petitioners taken for its own advantage and any increase in cost including on account of taxes etc. in the event the Petitioners choose to employ the services of other agencies, cannot increase the liability for the Respondents. Therefore, the Commission holds that claim of the Petitioners on account of additional tax burden on operation and maintenance expenses (if any), is not maintainable. This view is in consonance 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.*

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

99. The Petitioners have submitted that the underlying purpose of Article 12 of the PPAs is to provide compensation and restore a party affected by Change in Law events to a position as if such Change in Law had not taken place. Further, for the Petitioner to effectively perform its obligations under the PPAs, it is imperative that tariff under the present PPAs be suitably revised so as to bring the Petitioner to a position as if the introduction of GST Law never occurred. The Petitioners can be brought to the position existing prior to the occurrence of the Change in Law event only if the Petitioner is also compensated in the amount of the financial cost of the additional expenditure incurred as a result of the Change in Law by paying it carrying cost. The Petitioner could not have raised supplementary invoices claiming the additional recurring expenditure incurred by the Petitioners due to introduction of GST

Law under Article 10.3.3 of the PPA, as Article 12.2 of the PPA makes it obligatory upon the Petitioner to approach this Hon'ble Commission to seek relief for a Change in Law event before raising any supplementary invoices claiming such amount.

100. **Per Contra**, the Respondents have submitted that there is no provision in the PPAs regarding carrying cost or interest for the period till the decision of the Commission acknowledging the 'change in law' and deciding on the amount to be paid for such change in law namely '*provide for relief for the same*', as specified in Article 12.2.2 of the PPAs. The 'Change in Law' claim of the Petitioners is yet to be adjudicated and the amount if any, due to the Petitioners have to be determined/computed first. Thereafter, only after the amount is determined, are the Petitioners required to raise a Supplementary invoice for the amount so computed as per Article 10.7 of the PPA. It is only in case of default on the part of the Respondents in not making the payment by the due date as per supplementary invoices, does the issue of Late Payment Surcharge arise i.e. for the period after the due date. The reference in Article 12.2.2 of the Commission deciding on the date from which the 'change in law' will be effective, refers to the principal amount to be computed from the date on which change in law comes into force and not to the payment of interest and carrying cost.
101. 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 thirtieth (30th) day after a Monthly Bill or a Supplementary bill received and duly accepted by Respondents. If such day is not a Business day, the immediately succeeding Business day, by which date such Monthly Bill or Supplementary Bill is payable by the Respondents. The supplementary bill needs to be raised by the Petitioners for the adjustment of the 'Change in Law' after the Change in Law claim is approved by the Commission. There cannot be any claim for late payment surcharge for the period prior to the due date. The Respondents have relied upon the decision of the Hon'ble Appellate Tribunal in *SLS Power Limited -v- Andhra Pradesh Electricity Regulatory Commission and Others (Appeal No. 150 of 2011)* and Batch that recognizes that the interest will be due from the date the payment is due. In the present case, the payment is due only after issuance of the Supplementary Bill after the decision of the Commission.

102. The Respondents have submitted that the PPAs do not have a provision dealing with restitution principles of restoration to same economic position. Therefore, the Petitioners are not entitled to claim relief which is not provided for in the PPAs.
103. 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.
104. 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.
105. The Respondents have submitted that in the absence of the express provision in the PPAs, it is not open for the Petitioners to claim relief under principles of equity. Reference in this regard may be made to the judgment – *Alopi Parshad and Sons Ltd. v. Union of India, (1960) 2 SCR 793 : AIR 1960 SC 588*.
106. 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.*

107. The Respondents have submitted that in view of the above, the Petitioners are not entitled to interest on incremental working capital at normative interest rate or otherwise to put the Petitioners to the same economic position as if the change in law has not occurred.
108. 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.”

109. 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 PPAs for restoration of the Petitioners to the same economic position as if no Change in Law event

has occurred, the Petitioners are eligible for 'Carrying Cost' for such allowed 'Change in Law' event(s) from the effective date of Change in Law event until the same is allowed by the Commission. The Commission observes that the PPAs do not have a provision dealing with restitution principles of restoration to same economic position. Therefore, the Commission is of the view that the claim regarding separate carrying cost is not admissible.

Summary of decisions:

110. 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. However, in the instant petitions as the SCoD of the Projects are before the introduction of 'GST Laws' there is no impact of GST laws on the projects during the 'Construction Stage'.
- b. *Issue No. 2:* The claim of the Petitioners 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.

111. With the above directions, Petition No. 188/MP/2018; Petition No. 185/MP/2018; Petition No. 190/MP/2018; Petition No. 191/MP/2018 and Petition No. 184/MP/2018 stands disposed of.

Sd/-
आई. एस. झा
सदस्य

Sd/-
डॉ एम. के. अय्यर
सदस्य

Sd/-
पी. के. पुजारी
अध्यक्ष