



नई दिल्ली
NEW DELHI

याचिका संख्या /Petition No.: 4/MP/2019
352/MP/2018
355/MP/2018
358/MP/2018
359/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. एस. झा, सदस्य/ Sh. I.S. Jha, Member

आदेश दिनांक /Date of Order: 30th of December, 2019

IN THE MATTER OF:

Petition under Section 79 of 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. 4/MP/2019**

Parampujya Solar Energy Pvt. Ltd. (PSEPL)
7B, Sambhav House, Judges
Bungalow Road, Bodakdev,
Ahmedabad - 380015, Gujarat

... Petitioner

VERSUS

1. National Thermal Power Corporation Ltd. (NTPC),
Represented by its Chairman
Core-7, SCOPE Complex, 7,

Institutional Area, Lodi Road,
New Delhi – 110 003

2. The Ministry of New and Renewable Energy (MNRE)
Represented by its Secretary
Block-14, CGO Complex,
Lodhi Road, New Delhi-110 003
3. Mangalore Electricity Supply Company Ltd. (MESCOM)
Represented by its Chairman
MESCOM Bhavan, Kavoor Cross Road,
Bejai, Mangaluru, Karnataka 575 004
4. Bangalore Electricity Supply Company Ltd. (BESCOM)
Represented by its Chairman
6, 2nd Floor, 2nd B Cross Rd, Koramangala 1A Block,
Koramangala, Bengaluru, Karnataka 560 034
5. Chamundeshwari Electricity Supply Corp. Ltd. (CESC)
Represented by its Chairman
Sri Harsha Rd, Lashkar Mohalla, Mandi Mohalla,
Mysuru, Karnataka 570 001
6. Gulbarga Electricity Supply Company Ltd. (GESCOM)
Represented by its Chairman
Station Road, Kalaburagi,
Karnataka 585 102
7. Hubli Electricity Supply Company Ltd. (HESCOM)
Represented by its Chairman
PB Road, Durgad Bail,
Navanagar, Hubballi,
Karnataka 580 025

...Respondents

AND IN THE MATTER OF:

- 2) **Petition No. 352/MP/2018**
- 3) **Petition No. 355/MP/2018**
- 4) **Petition No. 358/MP/2018**
- 5) **Petition No. 359/MP/2018**

Wardha Solar (Maharashtra) Private Ltd. (WSMPL)
Represented by its Authorized Signatory
Adani House, Nr Mithakhali Six Roads
Navrangpura, Ahmedabad 380 009
Gujarat, India

... Petitioner

VERSUS

1. Solar Energy Corporation of India Ltd. (SECI)
Represented by its Directors
1st Floor, A-Wing, 0-3, District Centre, Saket,
New Delhi- 110017
2. The Ministry of New and Renewable Energy (MNRE)
Represented by its Secretary
Block-14, CGO Complex,
Lodhi Road, New Delhi-110 003
3. Mangalore Electricity Supply Company Ltd. (MESCOM)
Represented by its Chairman
MESCOM Bhavan, Kavour Cross Road,
Bejai, Mangaluru, Karnataka 575004
4. Bangalore Electricity Supply Company Ltd. (BESCOM)
Represented by its Chairman
6, 2nd Floor, 2nd B Cross Rd, Koramangala 1A Block
Koramangala, Bengaluru, Karnataka 560 034
5. Chamundeshwari Electricity Supply Corp. Ltd. (CESC)
Represented by its Chairman
Sri Harsha Rd, Lashkar Mohalla,
Mandi Mohalla,
Mysuru, Karnataka 570001
6. Gulbarga Electricity Supply Company Ltd. (GESCOM)
Represented by its Chairman
Station Road, Kalaburagi,
Karnataka 585 102
7. Hubli Electricity Supply Company Ltd. (HESCOM)
Represented by its Chairman
PB Road, Durgad Bait
Navanagar, Hubballi,
Karnataka 580 025

...Respondents

Parties Present:

Ms. Poonam Verma, Advocate, PSEPL & WS(M)PL
Ms. Abiha Zaidi, Advocate, PSEPL & WS(M)PL
Ms. Aparajita Upadhyay, Advocate, PSEPL & WS(M)PL
Shri M.G. Ramachandran, Sr. Advocate, SECI
Ms. Tanya Sareen, Advocate, SECI
Ms. Poorva Saigal, Advocate, SECI
Shri Shubham Arya, Advocate, SECI
Ms. Ranjitha Ramachandran, Advocate, SECI
Ms. Anushree Bardhan, Advocate, SECI

आदेश/ ORDER

1. The Petitioners, M/s Parampujya Solar Energy Pvt. Ltd. (PSEPL) and M/s Wardha Solar (Maharashtra) Pvt. Ltd. (WSMPL) (hereinafter collectively referred to as 'Petitioners') are generating companies primarily engaged in the business of setting up of solar power plants and generation of electricity.
2. M/s Solar Energy Corporation of India Limited (hereinafter referred to as 'SECI') was 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. It is pertinent to mention here that in Petition No. 4/MP/2019, NTPC is mentioned as Respondent in the title, however, since the relief has been sought against SECI and the pleadings have been submitted and thereafter substantiated by SECI, therefore, the Commission has taken a view that the name of NTPC has been inadvertently mentioned as Respondent in the Petition and thus rectified to that extent.
3. The Petitioners have made the following prayers:
 - (a) *Admit the Petition;*
 - (b) *Hold and declare that the imposition of the Integrated Goods and Services Tax, 2017, Central Goods and Services Tax, 2017 and Karnataka Goods and Services Tax, 2017 is an event under Change in Law under Article 12 of the PPA;*
 - (c) *Restore the Petitioner to the same economic condition prior to occurrence of the Changes in Law by directing SECI to pay to the Petitioner the amount claimed under Change in Law in terms of Article 12 of the PPA along with carrying cost;*
 - (d) *To pass such other and further order or orders as this Commission deems appropriate under the facts and circumstances of the present case.*

Background

4. 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 to be achieved in 3 phases.
 5. M/s Parampujya Solar Energy Pvt. Ltd. is the Petitioner in the Petition No. 4/MP/2019. M/s
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Parampujya Solar Energy Pvt. Ltd. was declared as a successful bidder, but it subsequently formed the project company in the name of M/s Wardha Solar (Maharashtra) Private limited within the provisions of the RfS who is the Petitioner in Petition No. 352/MP/2018; 355/MP/2018; 358/MP/2018 & 359/MP/2018. The Petitioners were selected as successful bidders under the National Solar Mission Phase-II Batch-III 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 Karnataka 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.

6. The Respondent (SECI) had issued RfS of SPDs for setting up grid-connected Solar PV Projects through an e-bidding process based on guidelines issued by MNRE in the State of Karnataka. Pursuant to issuing of the RfS, the Petitioners were selected by SECI as SPD for the setting up of a solar power generation facility and entered into PPAs with SECI for setting up of solar power projects in the State of Maharashtra.
7. 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.
8. On 01.07.2017, the Central Goods and Services Tax Act, 2017; The Integrated Goods and Services Tax Act, 2017 for levy and collection of tax on inter-State supply of goods or services or both by the Central Government were enacted. The Karnataka Goods and Services Tax Act, 2017 was enacted for levy and collection of tax on intra-State supply of goods or services or both by the respective States.
9. The Petitioners have claimed that enactment of GST laws constitute change in law in terms of the provisions of the PPAs. Hence the Petitions.

Submissions of the Petitioners

10. The Petitioners have submitted that SECI is a 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 Karnataka and the Petitioners were declared as the successful bidders and were awarded contracts and executed PPAs with a commitment to purchase power.

11. The Petitioners have submitted that the PPAs were executed on 02.08.2016 in Petition No. 4/MP/2019 and on 22.09.2016 in rest four petitions i.e. well before the date of coming into effect of the 'GST Laws' i.e. 01.07.2017.
12. The Petitioners have submitted that with the enactment of the GST Laws, the capital cost of the project, including cost of construction has escalated, hence making the tariff quoted at the time of bid for allocation of project unviable.
13. The Petitioners have submitted that, with the enactment of the GST Laws, 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.
14. The Petitioners have submitted that the promulgation of the GST Laws after the Effective Date of the PPAs resulting in additional capital expenditure and additional recurring expenditure to be incurred by the Petitioners squarely attracts Article 12 of the PPAs thereby entitling the Petitioners to Change in law relief stipulated thereunder. Definition of Law under the PPAs 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;"

15. 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."

16. 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.
17. 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 Karnataka 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.

18. The Petitioners have submitted that the change of tax regime has escalated the capital cost of the Petitioners, hence making the tariff quoted at the time of bid for allocation of project unviable. On account of levy of IGST, CGST and SGST, the construction cost of the Petitioners have escalated to the tune of few Crores of Rupees due to increase in the cost of Electrical Supply, Civil Supply, Module Supply, Switch Gear PEB Room, Balance of Plant (BOP) Civil Service, Consultancy Services, Land Cost Services, Financing & Insulation Displacement Contact Charges Services, Electrical Services, Mechanical Services, O&M and its Misc. Services, Logistics Services, Preoperative & Other Indirects and Statutory Services. The description of the levy of GST laws on each component is detailed as under:

	Component	Previous Tax (%)	IGST/CGST/State Tax (%)
1	Electrical supply	2 against 'C' form	2.5 to 28
2	Civil Supply	2 against 'C' form	18
3	Module Supply	0	5
4	Switchgear PEB Room	2 against 'C' form	18
5	Balance of Plant (BOP) Civil Service	6	18
6	Consultancy Service	15	18
7	Land Cost Service	15	18
8	Financing & Insulation Displacement Contact Charge Services	15	18
9	Electrical Services	15	18 to 28
10	Mechanical Services	15	18
11	O & M and Its. Misc. Services	15	18
12	Logistic Services	15	18 to 24
13	Pre-op. & Other Indirect(s)	15	18
14	Statutory Services	15	18

19. The Petitioners have submitted that the equipment installed and commissioned by the solar project developers should be in operational/functional condition throughout the O&M period. The O&M expenses are recurring expenses in terms of Article 12.1.1 of the PPA and include activities like salary, estimated maintenance costs, and monthly income from leases etc. As a matter of prudent industrial practice, the O&M services are outsourced to third parties to ensure international standards in plant inspection procedures, quality assessment plans and checklists for maintenance. Often, certain services are also outsourced to experts when a company is not well-equipped to perform certain activities. The outsourcing partner provides O&M services that include periodic and preventive maintenance checks with IV curve analysis and thermographic imaging. Physical Operation & Maintenance tasks, such as

module cleaning, housekeeping and security are carried out through third parties under the supervision of the generator.

20. The Petitioners have submitted that the Regulation 2 (1) (c) of the CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2017 defines the term 'O&M expenses' as under:

“(s) 'Operation and maintenance expenses' or 'O&M expenses' means the expenditure incurred on operation and maintenance of the project, or part thereof, and includes the expenditure on manpower, repairs, spares, consumables, insurance and overheads;”

21. The Petitioners have submitted that had the Commission intended that the O&M work is not to be outsourced, it would have mentioned the word “employee” instead of “manpower”. This clearly shows that intention of the Commission is not to restrict the solar power developers to use in-house staff responsible for entire operation and maintenance work. Principles used in determination of cost plus tariff under Section 62 of the Electricity Act, 2003 would also stand valid for project selected for sale of power to utilities under Section 63 of the Act.
22. The Petitioners have submitted that as per the prudent industrial practices, across the world, solar power plants have always contracted with Original Equipment Manufacturers (OEMs) for supply of spares for maintenance work and also contracted with maintenance contracting companies, and consultants to assist for maintenance work. On the other hand, in-house staff are generally responsible for routine and minor maintenance work and to supervise the contract given to maintenance contracting companies. In the current competitive environment, solar power projects are being selected through competitive bidding followed by e-reverse auction process. Such solar power projects offer lowest rate per unit. Such project developers, in order to remain competitive look at outsourcing of their maintenance requirements. Some plants have also outsourced 100% of the maintenance. Now it can be said that the outsourcing of the O&M to a third party is not a requirement of the PPA and will be a commercial decision of the Petitioner for its own advantage.
23. The Petitioners have submitted that the equipment installed and commissioned by the solar project developer should be in operational/functional condition throughout the O&M period. Therefore, O&M expenses, apart from manpower cost also include supply of all tools,

tackles, spares etc. for replacement of electrical, mechanical and electronic equipments which become beyond repair. GST paid on such supply, being recurring expenses should be made pass through. In this regard, the Petitioners relied upon Para 146 of CERC Order Dated 19.9.2018 in Petition Nos. 50/MP/2018 and 52/MP/2018.

*"146. Therefore, the Commission directs that the Petitioners have to exhibit clear and one to one correlation between the projects, the supply of goods or services and the invoices raised by the supplier of goods and services backed by auditor certificate. The certification should include "Certified that all the norms as per "CST Laws" have been complied with by the Petitioner and the claim of the amount being made by the Petitioner are correct as per the effective taxes in pre and post "CST regime". **The Petitioners should then make available to the Respondents, the relevant documents along with the auditor certification who may reconcile the claim and then pay the amount so claimed to the SPD w.e.f. 01.07.2017 qua EPC cost on the basis of the auditor's certificate as per the methodology discussed in para no. 133 above.**"*

24. The Petitioners have submitted that the Commission, in aforesaid order, has recognized the different contracting structures i.e. direct procurement of goods and services vis-a-vis single EPC contracts adopted by solar power project developers. Once the Petitioners exhibit clear and one to one correlation between the projects, the supply of goods or services and the invoices raised by the supplier of goods and services, an artificial distinction between EPC Contractors and O&M Contractors may not be created. For determination of the impact of GST in Operation & Maintenance Expenses which the Petitioners are going to incur in next 25 years of PPAs tenure, the Petitioners have worked on the basis of relevant normative parameters as specified by this Commission in the Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012 dated 06.02.2012 as amended on 31.03.2016.
25. The Petitioners have submitted that the total impact of the enactment of GST Laws on the overall project is as under:-

	4/MP/2019	352/MP/2018	355/MP/2018	358/MP/2018	359/MP/2018
Incremental impact (Rs.)					
• EPC	14,78,39,268	15,54,85,250	14,20,24,775	11,56,91,005	13,61,43,432
• O&M	1,24,86,420	1,56,08,040	1,56,08,040	1,56,08,040	1,87,00,000

26. 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'.

27. The Petitioners have submitted that first bullet of Article 12.1.1 of PPA is an all inclusive provision and its applicability extends to all events irrespective of the events being covered under a specific bullet under Article 12.1.1. In this regard, the Petitioners have relied upon Commission's Order dated 19.09.2018 in Petition No. 50/MP /2018- *Prayatna Developers Pvt. Ltd. vs. NTPC Ltd. & Drs.* wherein it was observed as under: -

"125 The Commission is of the opinion that harmonious construction of the bullet points under Article 12 makes it clear that bullet point one is wider in scope and refers to the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal of any Law in India, including rules and regulations framed pursuant to such Law whereas bullet point sixth in seriatim refers specifically to any change in tax or introduction of any tax made applicable for "supply of power" by the SPD as per the terms of Agreement.

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Clearly, the "CST 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. It is a comprehensive indirect tax reform which created a common national market by dismantling inter-State trade barriers. Various laws were subsumed and repealed. Hence, the Commission holds that the enactment of "CST laws" is covered as "Change in Law" under the first bullet of Article 12 of the PPA."

28. The Petitioners have submitted that as per the last bullet of Article 12.1.1, any event of change relating to tax applicable for supply of power will be a change in law event under the PPA. In the present case, the entire Indirect tax laws of the country have undergone a major overhaul and almost all of the central and State level taxes which existed on the Effective Date have been replaced/ abolished/ subsumed by the GST Laws. In view thereof, the change in tax regime brought by the GST laws qualifies as change in law as per the last bullet of Article 12.1.1. The Petitioners further submitted that the words "supply of power" in last bullet of Article 12.1.1 include all the taxes that are payable for the raw material or the inputs required for generation of power. In this regard, the Petitioners relied upon CERC Order dated 19.09.2018 in Petition No. 50/MP/2018 wherein change in tax laws has been allowed as Change in Law events by holding *inter-alia* that the phrase "for supply of power" shall include inputs required for such generation and supply of power to the Discoms.

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

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

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

29. In this regard, the Petitioners have also referred to the directions issued *vide* letter dated 27.08.2018 by the Ministry of Power under Section 107 of the Electricity Act, 2003. In the aforesaid letter, the Ministry of Power has directed this Commission to treat any change in taxes imposed by the Central Government or the State Government as change in law. Petitioners submitted that the Change in law provision in the PPAs is not limited to tax on supply of power as contended by SECI but also includes all the taxes levied during construction of the solar power plant.

"In order to address the issue of considerable time being consumed in the approval process resulting into severe cash flow problems to the Generating Companies and ensure sustainability of the electricity market in the larger public interest, the Central Government 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 States/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."

30. The Petitioners have submitted that in terms of the PPA, Petitioners may be granted relief equivalent to the financial impact of the Changes in Law on the costs and revenues of the Petitioner so as to restore the Petitioner to the same economic condition prior to occurrence of the Changes in Law. In this regard, Petitioners relied upon the Order dated 19.4.2017 of Appellate Tribunal for Electricity in *Sasan Power Limited v. Central Electricity Regulatory Commission* 2017 ELR CAPTEL) 508.

"44. It is true that according to the provisions of the RFP, the quoted tariff shall be inclusive one including statutory taxes, duties and levies. But the PPA gives express right to an affected party to claim Change in Law if the event qualifies thus in terms of Article 13. The RFP cannot override this right if an event qualifies as a Change in Law. The Competitive Bidding Guidelines (Article 4.7 thereof has already been reproduced hereinabove) and the PPA have to be read together. If an event qualifies as a Change in Law event then the compensation must follow because otherwise Article 13 of the PPA will become redundant."

31. The Petitioners have submitted that they are entitled to "Carrying Costs" for the costs incurred due to the change in law events and any compensation for change in law is incomplete if it does not come with carrying cost that is inherent to the very provision. In this regard, Petitioners submitted that the mandate of Change in Law provisions across all

PPAs (standard documents drafted by the government) is restitution i.e. *relief* be granted in a manner so as to place an affected party in the same economic position as if a Change in Law had not occurred. Restitution is therefore inherent to compensation.

32. The Petitioners have submitted that Appellate Tribunal for Electricity in its judgment dated 12.09.2014 in Appeal No. 288 of 2013 titled *Wardha Power Company Ltd. v. Reliance Infrastructure Ltd. & Ors.*, has recognized the principle that in order to 'restore the affected party to the same economic position', compensation for Change in Law claims has to be such, as to reimburse the affected party for the expense actually incurred. Thus, the same will include expenditure attributable towards carrying cost.

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

33. The Petitioners have submitted that the principle of recovery of carrying cost/ interest and time value of money has been recognized by the Tribunal in the following cases:-
- a. Judgment dated 13.04.2018 in *Appeal No. 210 of 2017, Adani Power Limited vs. Gujarat Electricity Regulatory Commission & Ors.*
 - b. Judgement in *North Delhi Power Ltd vs. DERC 2010 ELR (APTEL) 0891*
 - c. Judgment in *Tata Power Company Ltd vs. MERC 2011 ELR (APTEL) 336*
34. 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.

Submissions of the Respondent No. 1 (SECI)

35. The Respondent No. 1 has denied that promulgation of Service Tax Laws or the GST Laws entitles the Petitioners for any compensatory tariff. The Petitioners having participated and made a bid for the projects and for generation and sale of electricity as per bidding documents, are bound by all inclusive tariff bid by the Petitioners and incorporated in the PPAs. Therefore there cannot be any additional claim except as authorized under PPAs.
36. The Respondent has submitted that the intention behind the last bullet in article 12.1.1 of PPAs is that while considering the taxes as 'Change in Law', the scope is restricted to the taxes which are imposed for 'supply of power'. If the incidence of tax is on events and transactions other than supply of power, the conditions in the said provision are not satisfied and the relief cannot be given. The change in law under the last bullet is admissible only if the transaction which is assessed as tax is mandated or required to be performed in terms of PPAs and not when it is undertaken as a discretionary commercial decision.
37. The Respondent has submitted that the idea of carving out a separate bullet for dealing with taxes and thereafter restricting its ambit by specific stipulation therein, unequivocally establishes that any and every tax needs to be considered under the last bullet and not otherwise.
38. The Respondent has submitted that the PPA does not contain any specific clause providing specific relief under the construction period and therefore, the entire basis of the decision of APTEL regarding the provision of 'Change in Law' is rendered redundant.
39. The Respondent has submitted that in terms of Article 4.1.1 (g), the Petitioners are responsible for undertaking generation and supply of electricity at its own cost and risk for fulfilling all their obligations under the agreement.
40. As regards increase in O&M expenditure, the Respondent has submitted that O&M is responsibility of the Petitioners. The decision of Petitioners to employ services of other agencies is a commercial decision of the Petitioners for their own advantage and any increase in cost including on account of taxes is entirely to the account of the Petitioners.
41. As regards claim for carrying cost, the Respondent has submitted that the cost incurred due to change in law is misconceived and there is no provision in PPAs regarding carrying cost or interest for the period till the decision by the Commission.

42. The Respondent has submitted that the PPAs entered into by them is in their capacity as an intermediary company for the bulk purchase of electricity from the Petitioner to the distribution licensee under PSAs. Therefore, the Respondents are in a position to discharge their obligations under the PPAs including payment for any change in law implication only upon distribution licensees remitting the amount to the SECI in terms of the respective PSA. The Respondent has submitted that appropriate directions may be given by the Commission to the distribution licensees / buying entities determining the amount payable to the Petitioners. The methodology for payment may be evolved regarding implication of change in law, i.e. one time payment or increase in per unit tariff or any other method.
43. The Respondent has submitted that the Petitioners have not placed before the Commission in a transparent manner, the taxes, duties and levies which stand withdrawn and no longer payable by reason of the introduction of the GST. In the absence of proper particulars being placed by the Petitioners on the extent of taxes, levies, duties and cess etc. subsumed in the GST, the Commission should dismiss the petitions filed by the Petitioners. It is incumbent on the Petitioners to place before the Commission in a transparent manner with regard to the increase or decrease in the taxes on net basis. For instance, if pre-GST, the Petitioner were subjected to 4% Excise Rate and post-GST, the same became a cumulative 5%, then the Petitioners would be entitled to claim only the difference i.e. 1% as a change in law and not the entire 5%.
44. The Respondent has submitted that in the Petitions filed, the Petitioner/SPD has chosen to give few odd documents, including some invoices without any correlation and other related documents. Before the matters are adjudicated, the Petitioners should be directed to give the following particulars/documents in respect of each claim under GST Laws:
- a. Name of the Goods/Equipment
 - b. Date of the Purchase Order (PO)
 - c. Date of Delivery of the Goods/Custom Clearance
 - d. Date of the Goods being handed over to the Common Carrier
 - e. Date on which the goods were received at site
 - f. Date on which the goods were installed at site
 - g. The name of the manufacturer of the Goods

- h. The name of the intermediary between the Original Equipment Manufacturer and SPD
- i. The GST/Tax Invoice raised
- j. The supporting documents in respect of each of the above

The above is to be given in respect of each item of goods/equipment/services. All the above information is within the possession/control of the SPDs and the Commission as well as the Procurers need to rely on the information furnished. The Authorised Officer of the SPDs should file an undertaking that information has been duly verified and is true and correct to his knowledge. There should also be a further direction that in case the information is found to be wrong, the SPDs shall be liable to adjust the money recovered with penal interest of 18% per annum. This is necessary to disincentive the SPDs making a wrong declaration and deriving unlawful benefit. In the facts and circumstances mentioned above, the Petitions filed by the Petitioners ought to be dismissed both for lack of data and on the merits.

Submissions by the Petitioners in the Rejoinder

- 45. The Petitioners have submitted that the objections raised by the Respondents are devoid of merit and ought to be rejected out-rightly.
- 46. The Petitioners have submitted that First bullet of Article 12.1.1 covers the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal of any law including rules and regulations framed pursuant to such law and that would together or independently qualify as change in law. 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.
- 47. The Petitioners have submitted that Article 12.1.1 of the PPAs uses the word “any” and ‘including’ shows that the first bullet of Article 12.1.1 of PPAs is comprehensive enough to include promulgation of taxing statutes and the provision is intended to exclude any limitation. Restrictive interpretation as contended by the Respondent would be applicable only if a particular tax specifically applicable only for supply of power has either been introduced or taken away by the legislature. In the instant case, the entire indirect tax regime of the country has undergone a major overhaul and almost all of the Central and State level

taxes which existed have been replaced / abolished / subsumed by the GST laws. Therefore, the first bullet of Article 12.1.1 of the PPAs cannot be interpreted to exclude the change in law brought about by the change in taxation regime of the country.

48. The Petitioners have submitted that no particular clause of the PPAs would be rendered otiose or redundant considering the overall impact of GST laws. Overall impact of GST on the solar power project is covered under first bullet of Article 12.1. and for computing the impact of GST on supply of power, the last bullet would be attracted.
49. The Petitioners have submitted that denial of pass through of impact of GST Laws on O&M charges is erroneous. PPAs entered into by the Petitioners specifically provide relief for any increase in recurring or non-recurring expenditure in terms of Article 12.1.1 and the usage of the word 'Any' signified the wide ambit of the change in law clause and unless something is specifically excluded, the word 'any' ought to be read broadly. Therefore, the outsourcing of O&M activities have not been specifically excluded from the ambit of change in law clauses. The said clauses ought to be construed broadly to encompass even the expenses on account of the outsourcing of O&M activities. Further, outsourcing of O&M services by the Petitioner can also be inferred by having reference to the provisions of the CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2017, where-in O&M expenses are treated as fixed cost component of the tariff structure for RE technologies. The Petitioners have submitted that none of the provisions of the PPAs seek to distinguish between the expenditure incurred on account of activities carried out by the Petitioner in its own capacity and the activities which have been outsourced by the Petitioners to third parties.
50. 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 it carrying cost.

51. The Petitioners have submitted that they have 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 on the Project in the Petitions. Few invoices have also been provided by way of sample raised by the Petitioner's 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. 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.
52. 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 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.

Written Submissions of the Petitioners

53. The Petitioners have filed the written submissions in which they have reiterated the facts already mentioned in the Petitions and as such the same are not reproduced for the sake of brevity. Additionally, they have submitted that the Respondent No.1 has made part payment of invoices raised towards 'Change in Law'. Some payments have been withheld from the Change in Law invoices towards the following:-
- a. SPDs claim towards cost incurred for installation of Solar PV Modules and other associated equipment and allied services, which were installed after commissioning of the solar power plants.
 - b. Invoices of certain goods and services which have been raised after the date of commissioning of the solar power plants.
54. The Petitioners have submitted that the SPDs have installed certain additional solar PV modules to enhance the DC capacity of their respective projects, after the COD of the said

projects. SPDs' solar power projects were duly commissioned with the available solar PV modules under the PPAs and commissioning certificates were issued by the relevant authorities. In terms of normal industry practice, COD of the project can be validly declared with DC capacity equal to contracted capacity under the PPA which was done in the SPDs' case. However, in terms of clause 4.4.1 of the respective PPAs, the SPDs are obligated to generate solar power within the maximum and minimum Capacity Utilization Factor (hereinafter referred to as 'CUF') band specified therein. Such CUF cannot be attained with the DC modules having capacity equal to the contracted capacity. Therefore, certain modules and module mounting structure (hereinafter referred to as 'MMS') along with cables etc. were delivered and erected post commissioning, to achieve the contracted CUF. It is pertinent to mention that the order for these modules and MMS were placed before the COD.

55. The Petitioners have submitted that CUF is calculated on an annual basis and not as on the date of commissioning. Therefore, the SPDs are required to install the additional modules within one year of the COD, to enhance the CUF of the projects and to generate solar power as required under the PPA. SPDs are entitled to be paid the entire compensation for Change in Law, including the GST paid on the modules installed (and allied materials and services) in the solar power plant after the COD.
56. The Petitioners have submitted that the Commission may direct the Procurers to release the withheld payment and make full payment of the GST compensation for components installed after the COD of the project.
57. The Petitioners have submitted that the Respondents are also refusing to make payment of the incremental impact of GST due under invoices for certain goods and services that have been raised by the contractor after the date of commissioning of the solar power plants. The Petitioners have submitted that:
 - a. There is no restriction in the PPAs for the invoices to be raised by the contractors post the date of commissioning of the projects.
 - b. It is a common business practice for contractors to raise invoices after the complete satisfaction of both the parties (i.e. project developer and contractor) with respect to completion of work and delivery of such goods and services.

c. Timing of raising invoices is a contractual understanding between the developer and supply/service contractor and has no implications with respect to the commissioning of the project.

58. The Petitioners have submitted that the objection of the Respondents that no capital expenditure can be incurred after the COD is erroneous. The expenditure towards installation of modules/MMS after COD is only to comply with the PPAs and cannot be confused with the expenditure to be made for commissioning. The SPDs are only seeking payments towards GST which has been paid by them after the commissioning of projects. As such any expenditure incurred by the SPDs after the commissioning of the project is also, towards generation and supply of power under the PPA. Therefore, no distinction can be made by the procurers in compensating the SPDs for expenditure incurred before and after the COD.

Written Submissions of the Respondent No. 1 (SECI)

59. The Respondent No.1 has submitted that submissions of the Petitioners claiming the implication of the GST Laws as a change in law event in regard to procurement of goods after the actual date of commercial operation declared by the Petitioner, is devoid of any merit and is liable to be dismissed because of following reasons:-

a) Transactions with regard to procurement of goods by the SPDs after the date of commissioning are not per se admissible and they are outside the scope of the change in law provisions contained in the relevant PPAs.

b) In the Order dated 19.09.2018 passed by the Commission in Petition No.50/MP/2018 and 52/MP/2018 in the case of *Prayatana Developers Pvt. Ltd –v- NTPC Limited and Ors and Azure Power Venus Pvt. Ltd. v Solar Energy Corporation of India Limited and Ors*, the Commission has rejected the implication of GST Laws which came into force on 01.07.2017 in respect of projects which were actually commissioned prior to 01.07.2017. The Commission has proceeded on the basis of the date of Commissioning as the Cut-off Date for consideration of the Change in law claims in regard to the GST on goods and has not considered the claim of GST on goods after the said cut-off Date.

c) In terms of Section 12 of the Central Goods and Services Act, 2017 (as notified on 12.04.2017 and effective 1.07.2017), the liability to pay tax on the supply of good, namely the point of taxation, is defined as under:

“12. (1) The liability to pay tax on goods shall arise at the time of supply, as determined in accordance with the provisions of this section.

(2) The time of supply of goods shall be the earlier of the following dates, namely:—

(a) the date of issue of invoice by the supplier or the last date on which he is required, under sub-section (1) of section 31, to issue the invoice with respect to the supply; or

(b) the date on which the supplier receives the payment with respect to the supply:

Provided that where the supplier of taxable goods receives an amount up to one thousand rupees in excess of the amount indicated in the tax invoice, the time of supply to the extent of such excess amount shall, at the option of the said supplier, be the date of issue of invoice in respect of such excess amount.

Explanation 1.—For the purposes of clauses (a) and (b), “supply” shall be deemed to have been made to the extent it is covered by the invoice or, as the case may be, the payment.

Explanation 2.—For the purposes of clause (b), “the date on which the supplier receives the payment” shall be the date on which the payment is entered in his books of account or the date on which the payment is credited to his bank account, whichever is earlier.....

Similarly, the liability to pay the tax on services, is defined under Section 13 as under:

“13. (1) The liability to pay tax on services shall arise at the time of supply, as determined in accordance with the provisions of this section.

(2) The time of supply of services shall be the earliest of the following dates, namely:—

(a) the date of issue of invoice by the supplier, if the invoice is issued within the period prescribed under sub-section (2) of section 31 or the date of receipt of payment, whichever is earlier; or

(b) the date of provision of service, if the invoice is not issued within the period prescribed under sub-section (2) of section 31 or the date of receipt of payment, whichever is earlier; or

(c) the date on which the recipient shows the receipt of services in his books of account, in a case where the provisions of clause (a) or clause (b) do not apply:

Provided that where the supplier of taxable service receives an amount up to one thousand rupees in excess of the amount indicated in the tax invoice, the time of supply to the extent of such excess amount shall, at the option of the said supplier, be the date of issue of invoice relating to such excess amount.

Explanation.—For the purposes of clauses (a) and (b)—

(i) the supply shall be deemed to have been made to the extent it is covered by the invoice or, as the case may be, the payment;

(ii) “the date of receipt of payment” shall be the date on which the payment is entered in the books of account of the supplier or the date on which the payment is credited to his bank account, whichever is earlier.....”

Further, Section 14 dealing with the change in the rate of tax on goods/services, reads as under:

“14. Notwithstanding anything contained in section 12 or section 13, the time of supply, where there is a change in the rate of tax in respect of goods or services or both, shall be determined in the following manner, namely:—

(a) in case the goods or services or both have been supplied before the change in rate of tax,—

(i) where the invoice for the same has been issued and the payment is also received after the change in rate of tax, the time of supply shall be the date of receipt of payment or the date of issue of invoice, whichever is earlier; or

(ii) where the invoice has been issued prior to the change in rate of tax but payment is received after the change in rate of tax, the time of supply shall be the date of issue of invoice; or (iii) where the payment has been received before the change in rate of tax, but the invoice for the same is issued after the change in rate of tax, the time of supply shall be the date of receipt of payment;

(b) in case the goods or services or both have been supplied after the change in rate of tax,—

(i) where the payment is received after the change in rate of tax but the invoice has been issued prior to the change in rate of tax, the time of supply shall be the date of receipt of payment; or

(ii) where the invoice has been issued and payment is received before the change in rate of tax, the time of supply shall be the date of receipt of payment or date of issue of invoice, whichever is earlier; or

(iii) where the invoice has been issued after the change in rate of tax but the payment is received before the change in rate of tax, the time of supply shall be the date of issue of invoice: Provided that the date of receipt of payment shall be the date of credit in the bank account if such credit in the bank account is after four working days from the date of change in the rate of tax.

Explanation.—For the purposes of this section, “the date of receipt of payment” shall be the date on which the payment is entered in the books of account of the supplier or the date on which the payment is credited to his bank account, whichever is earlier.”

Section 31 provides the date for raising the tax invoice in respect of supply of goods/services as under:

“31. (1) A registered person supplying taxable goods shall, before or at the time of,—

(a) removal of goods for supply to the recipient, where the supply involves movement of goods; or

(b) delivery of goods or making available thereof to the recipient, in any other case, issue a tax invoice showing the description, quantity and value of goods, the tax charged thereon and such other particulars as may be prescribed:

Provided that the Government may, on the recommendations of the Council, by notification, specify the categories of goods or supplies in respect of which a tax invoice shall be issued, within such time and in such manner as may be prescribed.

(2) A registered person supplying taxable services shall, before or after the provision of service but within a prescribed period, issue a tax invoice, showing the description, value, tax charged thereon and such other particulars as may be prescribed:

Provided that the Government may, on the recommendations of the Council, by notification and subject to such conditions as may be mentioned therein, specify the

categories of services in respect of which— (a) any other document issued in relation to the supply shall be deemed to be a tax invoice; or (b) tax invoice may not be issued.

.....
(5) *Subject to the provisions of clause (d) of sub-section (3), in case of continuous supply of services,—*

(a) where the due date of payment is ascertainable from the contract, the invoice shall be issued on or before the due date of payment;

(b) where the due date of payment is not ascertainable from the contract, the invoice shall be issued before or at the time when the supplier of service receives the payment;

(c) where the payment is linked to the completion of an event, the invoice shall be issued on or before the date of completion of that event.”

- d) The settled legal position is that the incidence of tax i.e. the levy of tax as a taxable event is distinct and separate from the collection of tax. This principle has already been laid down by the Hon'ble Supreme Court in number of cases and is well settled. Reference in this regard may be made to Union of India–v–Bombay Tyre International Limited and Ors (1984) 1 SCC 467 and as recently upheld by the Constitution Bench of the Hon'ble Supreme Court in the case of CCE–v–Grasim Industries Ltd. (2018) 7 SCC 233.
- e) The incidence of tax is as per section 9 (1) of the Central Goods and Services Tax Act, 2017 which states that there shall be a levy of tax called Central Goods and Services Tax Act, 2017 on all Intra State supply of goods or services or both. Thus, the incidence of tax is on Intra State supply of goods or services or both.
- f) The 'taxable supply' has been defined in Section 2 (108) as meaning supply of goods or services or both which is liable to be taxed under this Act. The term 'Supply' is not defined in Section 2. Section 7, however, deals with the supply in an inclusive form to mean all forms of supply or services or both.
- g) The 'goods' are however, defined in Section 2 (52) as every kind of movable property other than the money and security. Similarly, the 'services' have been defined in Section 2 (102) as meaning anything other than goods, money and security. The supply has to be given a natural meaning of transferring goods or services by one entity to another.
- h) The PPAs dated 22.09.2016 in the above case of the SPD defines the terms

'Commissioning' and 'Commercial Operation Date' as under:

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

Commercial Operation Date (COD) shall be the date 30 days subsequent to the actual date of commissioning of full capacity (i.e. the full capacity of the Power Project has been commissioned and the SPD starts scheduling and injecting power from the Power Project to the Delivery Point) of the Project as declared by the SNA/SECI and the developer has

paid to SECI, a Performance Guarantee Deposit (PGD) @10 lakhs/MW for the entire Contracted Capacity and the SPD not availing any VGF shall be required to demonstrate/infuse cumulative capital in the form of Equity for an amount of at least Rs. 1.20 Cr./MW before the COD”

- i) In terms of Article 4.1.1 (b) of the PPAs, the SPD has the obligation to design, construct, erect, commission, complete and test the Power Project. The above can be broadly categorised as the construction period. This has to be done by the SCoD as defined in the PPA. In terms of Article 4.1.1(c), the SPD has the obligation to commence supply of power by the Scheduled Commissioning Date and continue such supply throughout the term of the Agreement. This period is an operating period. Article 5 of the PPA deals with construction period till the commissioning date.
- j) The procurement of goods for the construction and commissioning of the Power Project therefore relates to construction period mentioned above. The Change in Law provision, dealt in Article 12, deals with impact of change in law applicable for supply of power by the SPD as per the terms of the agreement. In so far as the change in law in regard to the procurement of equipments is concerned, it can be only till the stage of commissioning and not beyond i.e. during the operation period after the commencement of the supply of the electricity.
- k) The scheme under the PPAs is that the commencement of supply is after the commissioning and commercial operation. The delay in commissioning of the Power Project, achievement of CUF, the shortfall in generation, consequences of liquidated damages etc. are not deferred beyond the commissioning date and such deferment cannot spill over to the operation period. There is no provision in the PPA for payment of any additional capital cost for undertaking any capital investments done by the SPD at any time after the commissioning and commercial operation i.e. after the construction period is over. This position will apply irrespective of any upgradation or improvement or repair or changes that are undertaken by the SPD at any time throughout the term of the operation period. All such costs are entirely to the account of the SPD with no liability on SECI/Buying Utilities.
- l) The Petitioner/SPD’s claim is that although no capital cost needs to be paid for the expenditure incurred after the actual commissioning date, GST Law implications on the procurement of such capital goods after the commissioning date should still be paid. This is contrary to the entire scheme under the PPAs and all capital expenditure to be incurred after the actual commissioning date is entirely to the account of the Petitioner/SPD.

- m) It is in the above context, the provisions of Clause 3.9 of the RfS dated 15.02.2016 and Clause 4.4.2 of the PPAs relied on by the Petitioner in support of the claim made are required to be considered. The purpose of these provisions is not to create any additional liability on SECI/Buying Utility.
- n) In terms of Clause 3.9 of the RfS the SPDs are required to achieve the said CUF on an annual basis within +10% and -15% till the end of 10 years from the COD with reference to the contracted capacity. The band of -15% to 10% for CUF provided as mentioned above is basically for the purpose of and is designed to cater for weather fluctuations and any unforeseen circumstances, implying that the SPD should have designed the full capacity of project, in a manner, where at the time of COD all modules were installed and functional.
- o) Clause 3.9 of the RfS and Article 4.4 of the PPAs deals with the quantum of the power to be generated on an annual basis for any contract year. In the present case, the Minimum Quantum of energy to be generated is stipulated till the end of the 10th Year from the COD based on the contracted capacity and CUF. Article 4.4.1 of the PPAs obligates SECI to purchase minimum MUs in any contract year with the provision that the SECI need not purchase beyond the above quantum in any contract year upto 10 years from the COD. Further, if the Petitioner generates and supplies less than minimum, there is a compensation to be paid by the Petitioners for shortfall in generation, subject to the terms as specified therein. It is in the above context, to enable the Petitioners to mitigate the shortfall in generation and reach the stipulated CUF, Clause 3.9 of the RfS and Article 4.4 of the PPA, allows the Petitioners/SPDs to install DC Solar field to achieve the required output and to reconfigure and repower the project from time to time during the term of the PPA. Thus, the above is an option given to the Petitioners/SPDs under Clause 3.9(c) of the RfS and Article 4.4.2 of the PPAs to mitigate the circumstances by raising the required output and is not, otherwise, a mandate contained in the PPAs to be necessarily implemented by the Petitioners/SPDs.
- p) The above enabling provision providing for increase of the CUF and required output is totally at the cost of Petitioners/SPDs and there cannot be any claim for monetary compensation from SECI (Intermediary Agency) either for the capital cost or for taxes, duties etc.
- q) The anomaly in the claim made by the Petitioners/SPDs is clear from the fact that the Petitioners/SPDs are not claiming any basic capital cost or the taxes etc. which were applicable before the GST coming into force on 01.07.2017 but only the impact of GST
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Laws. If the basic capital cost and the basic duties prior to the impact of GST Laws is not admissible as an additional cost to be recovered from SECI, the same being after the COD Date, there cannot be any question of further impact of the GST to be considered.

- r) Accordingly, no invoices for GST for modules, equipments and allied services raised after the date of COD are admissible in view of:
 - i. No capital cost after the COD for procurement of goods etc. can be considered; and
 - ii. The tax invoices in respect of the goods procured prior to the COD have to be necessarily raised in terms of necessary GST Laws (quoted above) by the delivery date.
- s) Accordingly, even the goods procured before the COD date have to be necessarily supported with a taxable invoice of a date prior to the COD and not after the date of the COD. It cannot be that goods were delivered after the COD or Invoices were raised after the COD but were incorporated in the Power Project by the commercial operation date. Any such contention would mean that the Petitioner/SPD had declared COD before the Power Project was ready, which is not permissible.
- t) The only exception to the above is that in the case of tax invoices for GST claims on services (as opposed to goods) can be raised in Section 31 of the GST Laws within a month or the period specified after the services are rendered and to that extent, the same can be considered if the services relate to the period prior to the COD.

60. The Respondent No. 1 has submitted that there is no basis for the Petitioner to claim that SECI has wrongly rejected the claims of the Petitioner.

Analysis and Decision

61. The Petition No. 4/MP/2019; 352/MP/2018; 355/MP/2018; 358/MP/2018; 359/MP/2018 were admitted on 04.04.2019 and were reserved for Orders on 29.08.2019. We have heard the learned counsels for the Petitioners and the Respondents and have carefully perused the records. Since, Petitions are similarly worded and contain similar issues to be adjudicated, the same are clubbed together.

62. 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.

63. The Central Goods and Services Tax Act, 2017, The Integrated Goods and Services Tax Act, 2017 on 12.04.2017, The Karnataka Goods and Services Tax Act, 2017 are hereinafter collectively referred as ‘GST Laws’.
64. The brief facts of the case are as under:

	4/MP/2019	352/MP/2018	355/MP/2018	358/MP/2018	359/MP/2018
Scheme	JNNSM				
Phase	II	II	II	II	II
Batch	III	III	III	III	III
Nodal Agency	SECI	SECI	SECI	SECI	SECI
RfS	15.02.2016	15.02.2016	15.02.2016	15.02.2016	15.02.2016
Capacity MW	40	50	50	50	50 (40+10)
Power	Solar	Solar	Solar	Solar	Solar
Location	Karnataka				
PPA	02.08.2016	22.09.2016	22.09.2016	22.09.2016	22.09.2016
Effective date	02.08.2016	02.08.2016	02.08.2016	02.08.2016	02.08.2016
GST Laws	01.07.2017				
SCoD	02.09.2017	02.09.2017	02.09.2017	02.09.2017	02.09.2017
Tariff	4.43	4.43	4.43	4.43	4.43
VGF	--	--	Yes	Yes	Yes
Change in Law	Art. 12	Art. 12	Art. 12	Art. 12	Art. 12
Incremental impact (Rs.)					
• EPC	14,78,39,268	15,54,85,250	14,20,24,775	11,56,91,005	13,61,43,432
• O&M	1,24,86,420	1,56,08,040	1,56,08,040	1,56,08,040	1,87,00,000

65. The Petitioners were selected as the successful bidders under the National Solar Mission Scheme conducted by SECI. The Petitioners entered into PPAs with Respondents No. 1 for development of Solar Photo Voltaic Power Plants in the State of Karnataka. The Solar Power Plants were to be developed on long term basis at a discovered tariff. As per the PPAs executed with SECI, the Solar PV power was to be purchased from the Petitioners and sold to the Distribution Companies in the State of Karnataka.
66. On 01.07.2017, the GST Laws were enacted for levy and collection of tax on supply of goods or services or both.
67. The Petitioners have submitted that it participated in the bids after following the process of ‘Reverse Auction’ and were selected as the successful bidders. Pursuant thereto, the Petitioners entered into PPAs for setting up of solar power plant at different rates of fixed tariff for 25 years. Subsequent to the ‘Effective Date’ as per the PPAs, the ‘GST Laws’ were enacted. Introduction of ‘GST Laws’ made a huge impact on the actual cost of the project *vis-*

a-vis budgeted cost, which was beyond their control and therefore, notice regarding the ‘Change in Law’ as per PPAs was sent to the Respondents. The 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’.

68. **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 PPAs do not contain any specific clause providing specific relief under the construction period. The idea of carving out a separate bullet for dealing with taxes establishes that any and every tax needs to be considered under the last bullet in Article 12.1.1 of the PPAs and not otherwise. The Respondents have denied that promulgation of the GST Laws entitles the Petitioners for any compensatory tariff. 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. 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 PPAs, the SPDs 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 the Respondents 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 because of inter winding nature of PPAs and PSAs.

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

Issue No. 1: *Whether the promulgation of the IGST Act, 2017, the CGST Act, 2017, the and the Karnataka 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 on the cost of construction on account of promulgation of the GST Laws?*

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?*

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

70. No other issue was pressed or claimed.

71. 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 Karnataka 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 on the cost of construction on account of promulgation of the GST Laws?*

72. The Petitioners have submitted that Article 12 of the PPAs provides for 'Change in Law'. It includes *inter alia* the enactment, promulgation, adoption in India of any Law, as well as, any change in tax or introduction of any tax made applicable for supply of power. The event of enactment of 'GST Laws' has occurred after the execution of PPAs and has resulted in additional recurring and non-recurring expenditure. In terms of Article 12.2.1 of the PPAs, an aggrieved party who has incurred additional recurring/ non-recurring expenditure is required to approach the Commission for seeking approval of such change in law event and thereby, claim relief for the same upon approval by the Commission. Accordingly, the Petitioners have approached this Commission for seeking relief on account of introduction of GST as a change in law event, as per the first and last bullet of Article 12.1.1 of the PPAs. The Respondent No.1 has made part payment of invoices raised towards 'Change in Law'. Some payments have been withheld from the Change in Law invoices towards the following:-

- a. SPDs claim towards cost incurred for installation of Solar PV Modules and other associated equipment and allied services, which were installed after commissioning of the solar power plants.
 - b. Invoices of certain goods and services which have been raised after the date of commissioning of the solar power plants.
73. The Petitioners have submitted that the SPDs have installed certain additional solar PV modules to enhance the DC capacity of their respective projects, after the COD of the said projects. In terms of normal industry practice, COD of the project can be validly declared with DC capacity equal to contracted capacity under the PPA which was done in the SPDs' case. However, in terms of clause 4.4.1 of the respective PPAs, the SPDs are obligated to generate solar power within the maximum and minimum Capacity Utilization Factor band specified therein. Such CUF cannot be attained with the DC modules having capacity equal to the contracted capacity. Therefore, certain modules and module mounting structure along with cables etc. were delivered and erected post commissioning, to achieve the contracted CUF.
74. **Per Contra**, the Respondent No.1 has submitted that the settled legal position is that the incidence of tax i.e. the levy of tax as a taxable event is distinct and separate from the collection of tax. The scheme under the PPAs is that the commencement of supply is after the commissioning and commercial operation. The delay in commissioning of the Power Projects, achievement of CUF, the shortfall in generation, consequences of liquidated damages etc. are not deferred beyond the commissioning date and such deferment cannot spill over to the operation period. There is no provision in the PPAs for payment of any additional capital cost for undertaking any capital investments done by the SPD at any time after the commissioning and commercial operation i.e. after the construction period is over. The position applies irrespective of any upgradation or improvement or repair or changes that are undertaken by the SPD at any time throughout the term of the operation period. All such costs are entirely to the account of the SPD with no liability on SECI/Buying Utilities. The anomaly in the claim made by the Petitioners/SPDs is clear from the fact that the Petitioners/SPDs are not claiming any basic capital cost or the taxes etc. which were applicable before the GST Laws coming into force on 01.07.2017. If the basic capital cost and the basic duties prior to the impact of GST Laws is not admissible as an additional cost to
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be recovered from SECI, the same being after the COD Date, there cannot be any question of further impact of the GST to be considered. Accordingly, no invoices for GST for modules, equipments and allied services raised after the date of COD is admissible. The petitions are devoid of any merit and are liable to be dismissed.

75. 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.”

76. 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."

77. 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."

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.”

78. 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.*

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

	4/MP/2019	352/MP/2018	355/MP/2018	358/MP/2018	359/MP/2018
RfS	15.02.2016	15.02.2016	15.02.2016	15.02.2016	15.02.2016
Capacity MW	40	50	50	50	50 (40+10)
PPA	02.08.2016	22.09.2016	22.09.2016	22.09.2016	22.09.2016
Effective date	02.08.2016	02.08.2016	02.08.2016	02.08.2016	02.08.2016
GST Laws	01.07.2017				
SCoD	02.09.2017	02.09.2017	02.09.2017	02.09.2017	02.09.2017
Incremental impact (Rs.)					
• EPC	14,78,39,268	15,54,85,250	14,20,24,775	11,56,91,005	13,61,43,432

80. The Commission, in its Order dated 14.03.2018 in Petition No. 13/SM/2017 has decided the following as regards settlement of dues arising on account of the introduction of GST under the respective PPAs:

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

81. The Commission observes that the Petitioners have submitted following details of components on which the GST has been levied leading to escalation in the construction cost of the project:

	Component	Previous Tax (%)	IGST/CGST/State Tax (%)
1	Electrical supply	2 against 'C' form	2.5 to 28
2	Civil Supply	2 against 'C' form	18
3	Module Supply	0	5
4	Switchgear PEB Room	2 against 'C' form	18
5	Balance of Plant (BOP) Civil Service	6	18
6	Consultancy Service	15	18
7	Land Cost Service	15	18
8	Financing & Insulation Displacement Contact Charge Services	15	18
9	Electrical Services	15	18 to 28
10	Mechanical Services	15	18
11	O & M and Its. Misc. Services	15	18
12	Logistic Services	15	18 to 24
13	Pre-op. & Other Indirect(s)	15	18
14	Statutory Services	15	18

82. The Commission observes that 'GST Laws' became effective from 01.07.2017. 'GST Laws' provide for a tax slab (previously exempted) of 5% to 28% with respect to Goods & Services required for execution, construction and operation of Solar Projects w.e.f. 01.07.2017. The 'Goods and Services' in the context of the present petitions can be broadly categorized under the following two heads:

- a) EPC Stage i.e. Construction Stage which is covered under 'Goods' and
- b) O & M Stage i.e. Post Construction Stage which is covered under 'Services'.

83. We will first discuss the impact of 'GST laws' on the Engineering, Procurement and Construction (hereinafter referred to as 'EPC') Stage. EPC stage can be also construed broadly to be 'Construction Stage' which is covered under Goods under 'GST Laws'. 'GST Laws' came into effect from 01.07.2017 and accordingly, the Commission is of the view that the GST in the context of the present petitions is applicable on all cases except in case of the generating company where 'Scheduled date of Commissioning' or 'the actual date of Commissioning' as per the respective PPA is prior to 01.07.2017. It is pertinent to note that under 'GST Laws' it has been provided that *"If point of taxation of Goods/Services before the GST implementation then it will be taxed under earlier law. GST will not be applicable. Any portion of any supply whose point of taxation is after GST implementation will be taxed under GST. The time of goods/supply of services shall be the earlier of the:- (a) The date of issuing invoice (or the last day by which invoice should have been issued) OR (b) The date of receipt of payment - whichever is earlier."* A plain reading of the above implies that according to 'GST Laws', in cases where the invoice is raised or consideration for the goods/supply of services have been received before 01.07.2017 and the tax has already been paid under the earlier law, the GST will not be applicable in such cases. It is immaterial whether the consideration for supply has been paid fully or partly.

84. The Commission observes that Respondent No.1 has made part payment of invoices raised by the Petitioner on account of escalation of the construction cost. However, part/some payments have been withheld from the invoices due to: *a) cost incurred for installation of Solar PV Modules and other associated equipment and allied services, which were installed after commissioning of the solar power plants and b) invoices which have been raised after the date of commissioning of the solar power plants.* The Petitioners have submitted that the SPDs have installed certain additional solar PV modules to enhance the DC capacity of their respective projects, after the COD of the said projects. In terms of normal industry practice, COD of the project can be validly declared with DC capacity equal to contracted capacity under the PPA which was done in the SPDs' case. Further, in terms of clause 4.4.1 of the respective PPAs, the SPDs are obligated to generate solar power within the maximum and minimum 'CUF' band specified therein. Such CUF cannot be attained with the DC modules having capacity equal to the contracted capacity. Therefore, certain modules and module

mounting structure along with cables etc. were delivered and erected post commissioning, to achieve the contracted CUF.

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

“ARTICLE 1

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

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

“ARTICLE 5: SYNCHRONISATION, COMMISSIONING AND COMMERCIAL OPERATION

5.1 Synchronization, Commissioning and Commercial Operation

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

5.1.2 Subject to Article 5.1.1, the Power Project may be synchronized by the SPD to the Grid System when it meets all the connection conditions prescribed in applicable Grid Code then in effect and otherwise meets all other Indian legal requirements for synchronization to the Grid System.

5.1.3 The synchronization equipment and all necessary arrangements / equipment including RTU for scheduling of power generated from the Project and transmission of data to the concerned authority as per applicable regulation shall be installed by the SPD at its generation facility of the Power Project at its own cost. The SPD shall synchronize its system with the Grid System only after the approval of synchronization scheme is granted by the head of the concerned sub-station/Grid System and checking/verification is made by the concerned authorities of the Grid System.

5.1.4 The SPD shall immediately after each synchronization/tripping of generator, inform the sub-station of the Grid System to which the Power Project is electrically connected and all other concerned authorities in accordance with applicable Grid Code under intimation to SECI. In- Addition the SPD will inject in-firm power to grid time to time to carry out operational/ functional test prior to commercial operation.

*5.1.5 The SPD shall commission the Project as detailed in “**Schedule 6: Commissioning Procedure**” within thirteen (13) Months of the date of signing of PPA”*

“ARTICLE 4

4.4. Right to Contracted Capacity & Energy

4.4.1 SECI, at any time during a Contract Year, shall not be obliged to purchase any additional energy from the SPD beyond **100.214 Million kWh (MU)**. If for any Contract Year, it is found that the SPD has not been able to generate minimum energy of **77.438 Million kWh (MU)** till the end of 10 years from the COD and **72.883 Million kWh (MU)** for the rest of the term of the Agreement, on account of reasons solely attributable to the SPD, the non-compliance by SPD shall make SPD liable to pay the compensation provided in the PSA as payable to Buying Utilities and shall duly pay such compensation to SECI to enable SECI to remit the amount to Buying Utilities. This will, however be relaxable by SECI to the extent of grid non-availability for evacuation, which is beyond the control of the developer. This compensation shall be applied to the amount of shortfall in generation during the Contract Year. The amount of compensation shall be equal to the compensation payable (including RECs) by the Buying Utilities towards non-meeting of RPOs, if such compensation is ordered by the State Commission. However, this compensation shall not be applicable in events of Force Majeure identified under PPA with SECI affecting supply of solar power by SPD.

4.4.2 Notwithstanding Article 4.4.1, any excess generation over and above 10% of declared annual CUF will be purchased by SECI at a tariff as per Article 9.4, provided SECI is able to get any buyer for sale of such excess generation. While the SPD would be free to install DC solar field as per its design of required output, including its requirement of auxiliary consumption and to reconfigure and repower the Project from time to time during the term of the PPA, it will not be allowed to sell any excess power to any other entity other than SECI (unless refused by SECI). However, in case at any point of time, the peak of capacity reached is higher than the contracted capacity and causes disturbance in the system at the point where power is injected, the SPD will have to forego the excess generation and reduce the output to the rated capacity and shall also have to pay the penalty/charges (if applicable) as per applicable regulations / requirements / guidelines of CERC / SERC /SLDC or any other competent agency

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

“SCHEDULE 6: COMMISSIONING PROCEDURE:

* Capacity of Solar PV Projects:

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

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

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

ii) Higher DC capacity arrays so as to achieve AC capacity limit as mentioned above for scheduling at the delivery point in compliance to Article 4.4 "Right to Contracted Capacity & Energy" of the PPA is allowed.

iii) For commissioning of the Project, capacity of DC arrays installed shall be considered. In case of part commissioning of Project, it shall be required to have the DC Arrays Capacity be installed not less than the proposed part commissioning capacity.

iv) Provisions of Article 4.6.1 of the PPA with SPD shall apply for the capacity not commissioned by the scheduled commissioning date.

v) If generation at any time exceeds the maximum permissible AC capacity at delivery point, the excess generation during that period shall not be considered under PPA.

Appendix-A-1

Commissioning Procedure

i) At the time of commissioning, the Commissioning Committee shall verify compliance of technical parameter of the Project as per Annexure A of the RFS document.

ii) SPDs shall give to the concerned RLDC/SLDC, State Nodal Agency (SNA) and SECI at least sixty (60) days advance preliminary written notice and at least thirty (30) days advance final written notice, of the date on which it intends to synchronize the Power Project to the Grid System. The SPD shall be solely responsible for any delay or non receipt of the notice by the concerned agencies, which may in turn affect the Commissioning Schedule of the Project.

iii) A Solar PV Project will be considered as commissioned if all equipment as per rated project capacity has been installed and energy has flown into the grid"

The Commission notes that commissioning of the projects as defined in Article 1 read with Article 5 and Schedule 6 of the PPAs implies that all the equipment as per rated project capacity has been installed and energy has flown into the grid. The aforesaid provisions also stipulate that DC Arrays so as to achieve the AC capacity limit as mentioned for scheduling at the Delivery Point in compliance to Article 4.4.2 of the PPAs is allowed. The Commission is of the view that this flexibility (of higher DC capacity arrays) has been provided so as to

enable the SPDs to meet the requirement of generation (CUF) within the range stipulated in the Article 4.4.1 of the PPAs. It may be noted that the requirement of generation or the range of Capacity Utilization Factor (CUF) is an annual figure and the SPDs are required to adhere to this requirement over the entire contract period of the PPAs. It is for this reason that PPAs make a provision granting flexibility to the SPDs if required at any time during the contract period so that it is able to achieve the required level of generation. This does not imply that procurer of Solar PV Panels (DC Capacity Arrays) at any time during the contract period would need to be compensated either in terms of its cost or for that matter impact of taxation on such procurement. There has to be a deadline upto which liability of compensation towards procurement of higher DC arrays can be made good by the Respondents. The Commission notes that the liability of the Respondents for payment of purchase of the power from the SPDs starts from the Commercial Operation Date (COD). Further, as per definition of Commercial Operation Date (COD) provided in Article 1 of the PPAs, COD will be the date 30 days subsequent to the actual date of commissioning of full capacity. Accordingly, the Commission holds that the liability of payment on account of impact of GST on procuring of Solar PV panels and associated equipment by the Petitioners shall lie with the Respondents till the Commercial Operation Date (COD) only. The Commission is also of the view that there has to be a clear and one to one correlation between the projects, the supply of goods or services and the invoices raised by the supplier of goods and services.

86. The Commission observes that in the instant petitions, the tariff has been discovered under transparent e-bidding process in accordance with the NSM guidelines issued by the Central Government. In the Competitive Bidding Scenario, the SPDs bid levellised tariff without disclosing the details of the calculations of the project cost including capital expenditure. The component wise details of the capital employed are not required to be declared by the bidders. The design of the bid levellised tariff is solely a decision of the SPDs.
87. The Petitioner is directed to make available to the Respondents all relevant documents exhibiting clear and one to one correlation between the projects and the supply of goods or services, duly supported by relevant invoices and Auditor's Certificate. The Respondents are further directed to reconcile the claims for Change in Law on receipt of the relevant documents and pay the amount so claimed to the SPDs as per the Para 85 above. It has been brought to our notice that the Respondent Procurers are questioning the rationale of the commercial decisions taken by the SPDs in cases where the rates of GST are on the higher

side. Since, the decision for project implementation including the mode of procurement of goods and services were taken by SPDs prior to the implementation of GST, it would not be appropriate to question such commercial decisions on the basis of the differential rates of GST on certain goods and services, and payments should be made based on the invoices raised and supported by Auditor's Certificate. The Commission is of the view that since the quantum of compensation on account of introduction of GST w.e.f. 01.07.2017 is not large, it should be discharged by the Respondent-Procurers as one-time payment in a time bound manner. Accordingly, it is directed that the GST bills shall be paid within 60 days from the date of issue of this Order or from the date of submission of claims by the Petitioner, whichever is later, failing which it shall attract late payment surcharge in terms of the PPA. Alternatively, the Petitioners and the Respondents may mutually agree to a mechanism for the payment of such compensation on annuity basis spread over such period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs. This will obviate the hardship of the Respondents for one-time payment.

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?

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

Per Contra, the Respondents have submitted the claim of the Petitioners on account of additional tax burden on O&M expenses is not maintainable.

89. 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.
90. The Petitioners have claimed the increase in total Cost & O&M expenses due to increase in tax incidence as given below:

	4/MP/2019	352/MP/2018	355/MP/2018	358/MP/2018	359/MP/2018
Incremental impact (Rs.)					
• O&M	1,24,86,420	1,56,08,040	1,56,08,040	1,56,08,040	1,87,00,000

91. 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.”*

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, it cannot increase the liability for the Respondents. Therefore, the Commission holds that claim of the Petitioners on account of additional tax burden on operation and maintenance expenses (if any), is not maintainable. This view is in consonance 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.* The Commission does not find merit in the argument of the Petitioners that compensation on O&M expenses should be allowed on the lines of Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012. The present Petitions relates to section 63 of the Electricity Act, 2003 and as such drawing reference to cost plus tariff fixation principles, is misplaced.

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

92. 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.

93. **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.
94. The Respondents have submitted that the provision of Article 10.3.3 of the PPAs dealing with late Payment Surcharge and definition of the 'Due Date' in Article 1 read with Article 10.3.1 of the PPA are relevant. The due date is forty-fifth (45th) 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.

95. The Respondents have submitted that the PPAs do not have a provision dealing with restitution principles of restoration to same economic position. Therefore, the Petitioners are not entitled to claim relief which is not provided for in the PPAs. The Respondents have submitted that in the Judgment of the Hon'ble Appellate Tribunal dated 13.04.2018 in Appeal No. 210 of 2017 in *Adani Power Limited –v- Central Electricity Regulatory Commission and Ors*, it was held that since the Gujarat Bid-01 PPA has no provision for restoration to the same economic position, therefore, the carrying cost will not be applicable.
96. 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.
97. 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*.

98. 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.
99. 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.”

100. 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:

101. 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. As regards the claims during construction period, the Petitioner has to exhibit clear and one to one correlation between the projects and the supply of goods and services duly supported by the Invoices raised by the supplier of goods and services and auditors certificate as discussed in para no. 85 and 87 above. The amount determined by the Petitioner shall be on ‘back to back’ basis and shall be paid by DISCOMS to the Petitioner under respective ‘Power Sale Agreements’. The Claim based on discussions in paragraph 91 above of this Order shall be paid within sixty days of the date of this Order or from the date of submission of claims by the Petitioner whichever is later failing which it will attract late payment surcharge as provided under PPAs/PSAs. Alternatively, the Petitioner and the Respondents may mutually agree to mechanism for the payment of such compensation on annuity basis spread over the period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs.
- 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.

102. With the above directions, Petition No. 4/MP/2019; Petition No. 352/MP/2018; Petition No. 355/MP/2018; Petition No. 358/MP/2018; Petition No. 359/MP/2018 stand disposed of.

Sd/-
आई. एस. झा
सदस्य

Sd/-
डॉ एम. के. अय्यर
सदस्य

Sd/-
पी. के. पुजारी
अध्यक्ष