



नई दिल्ली
NEW DELHI

याचिका संख्या /Petition No.: 127/MP/2019
135/MP/2019
129/MP/2019
130/MP/2019 and
134/MP/2019

कोरम/Coram:

श्री पी. के. पुजारी, अध्यक्ष/Shri P. K. Pujari, Chairperson
श्री आई. एस. झा, सदस्य/ Sh. I.S. Jha, Member

आदेश दिनांक /Date of Order: 26th of March, 2020

IN THE MATTER OF:

Petition under Section 79(1)(f) the Electricity Act, 2003 read with Article 12 of the Power Purchase Agreements executed between the Petitioner and the Respondents for seeking approval of Change in Law events due to enactment of the GST Laws and seeking relief for non-recurring additional expense incurred by the Petitioner on account of the said Change in Law and also the carrying cost associated therewith.

AND IN THE MATTER OF:

- 1. Petition No. 127/MP/2019**
- 2. Petition No. 135/MP/2019**

Clean Solar Power (Gulbarga) Private Limited,
201, Third Floor, Okhla Industrial Estate
Phase III, New Delhi- 110020

...Petitioner

VERSUS

1. Solar Energy Corporation of India Limited
1st Floor, A-Wing
D-3, District Centre
Saket, New Delhi, 110017
2. Gulbarga Electricity Supply Company Limited,
Station Road, Kalaburagi,
Karnataka-585102

...Respondents

AND IN THE MATTER OF:

3. **Petition No. 129/MP/2019**
4. **Petition No. 130/MP/2019**
5. **Petition No. 134/MP/2019**

Clean Solar Power (Gulbarga) Private Limited,
201, Third Floor, Okhla Industrial Estate
Phase III, New Delhi- 110020

...Petitioner

VERSUS

1. Solar Energy Corporation of India Limited
1st Floor, A-Wing
D-3, District Centre
Saket, New Delhi, 110017
2. Bangalore Electricity Supply Company Limited,
BESCOM, K.R. Circle,
Bangalore, Karnataka- 560001

...Respondents

Parties Present: Shri Sakya Singh Chaudhuri, Advocate, CSPGPL
Shri Avijeet Lala, Advocate, CSPGPL
Shri Shivam Sinha, Advocate, CSPGPL
Shri Arnav Vidyarthi, Advocate, CSPGPL
Ms. Nithya Balaji, Advocate, CSPGPL
Ms. Poorva Saigal, Advocate, SECI
Ms. Tanya Sareen, Advocate, SECI

आदेश /ORDER

Clean Solar Power (Gulbarga) Private Limited, the Petitioner, in Petition No. 127/MP/2019, 129/MP/2019, 130/MP/2019, 134/MP/2019 and 135/MP/2019, is a power generating project company incorporated by M/s Hero Solar Energy Private Limited (hereinafter referred to as “Hero Solar”) primarily engaged in the business of setting up of solar power plants and generation of electricity. The Petitioner is developing solar power project based on Photo Voltaic technology located in Bidar, Raichur, Tumkur and Kalburgi District in the State of Karnataka.

2. The Respondent No.1, Solar Energy Corporation of India Limited (hereinafter referred to as ‘SECI’) is a company under the administrative control of the Ministry of New and Renewable Energy, Government of India (hereinafter referred to as ‘MNRE’) established to facilitate the implementation of Jawaharlal Nehru National Solar Mission (hereinafter referred to as ‘JNNSM’). SECI is responsible for the implementation of a number of schemes of MNRE, the major one being the VGF schemes for large scale grid connected projects under JNNSM, solar park scheme and grid connected solar rooftop scheme. SECI also has a power trading license and is engaged in trading of solar power.
3. M/s Gulbarga Electricity Supply Company Limited (GESCOM), the Respondent No. 2 in Petition No. 127/MP/2019 and 135/MP/2019 and M/s Bangalore Electricity Supply Company Limited (BESCOM), the Respondent No. 2 in Petition No. 129/MP/2019, 130/MP/2019 and 134/MP/2019 are distribution companies in the State of Karnataka.
4. The Petitioner has made the following prayers:

In Petition No. 127/MP/2019

(a) Acknowledge and approve the promulgation of the Central Goods and Services Tax Act, 2017, as a Change in Law event under first bullet of Article 12.1.1 as well as under sixth bullet of Article 12.1.1 of the PPA with effect from 01.07.2017;

- (b) Acknowledge and approve the promulgation of the Integrated Goods and Services Tax Act, 2017, as a Change in Law event under first bullet of Article 12.1.1 as well as under sixth bullet of Article 12.1.1 of the PPA with effect from 01.07.2017;
- (c) Acknowledge and approve the promulgation of the Karnataka Goods and Services Tax Act, 2017 as a Change in Law event under first bullet of Article 12.1.1 as well as under sixth bullet of Article 12.1.1 of the PPA with effect from 01.07.2017;
- (d) Declare that the Petitioner is entitled to claim relief under Article 12.2 of the PPA for the non-recurring additional expenditure incurred on account of the Change in Law events, i.e. promulgation of the Central Goods and Services Tax Act, 2017, the Integrated Goods and Services Tax Act, 2017 and the Karnataka Goods and Services Tax Act, 2017 with effect from 01.07.2017;
- (e) Direct the Respondent to pay compensation of INR 10,72,24,792.20 with interest, as applicable, to the Petitioner in lieu of the non-recurring additional expenditure incurred on account of the aforesaid Change in Law events;
- (f) Direct the Respondent to reimburse the carrying costs incurred by the Petitioner from the period of payment of GST to the date of reimbursement by the Respondent;
- (g) Direct the Respondent to reimburse the legal and administrative costs incurred by the Petitioner in pursuing the instant Petition; and
- (h) Pass such other orders that this Commission deems fit in the facts of this case.

In Petition No. 129/MP/2019

- (a) Acknowledge and approve the promulgation of the Central Goods and Services Tax Act, 2017, as a Change in Law event under first bullet of Article 12.1.1 as well as under sixth bullet of Article 12.1.1 of the PPA with effect from 01.07.2017.
- (b) Acknowledge and approve the promulgation of the Integrated Goods and Services Tax Act, 2017, as a Change in Law event under first bullet of Article 12.1.1 as well as under sixth bullet of Article 12.1.1 of the PPA with effect from 01.07.2017;
- (c) Acknowledge and approve the promulgation of the Karnataka Goods and Services Tax Act, 2017 as a Change in Law event under first bullet of Article 12.1.1 as well as under sixth bullet of Article 12.1.1 of the PPA with effect from 01.07.2017;

- (d) *Declare that the Petitioner is entitled to claim relief under Article 12.2 of the PPA for the non-recurring additional expenditure incurred on account of the Change in Law events, i.e. promulgation of the Central Goods and Services Tax Act, 2017, the Integrated Goods and Services Tax Act, 2017 and the Karnataka Goods and Services Tax Act, 2017 with effect from 01.07.2017;*
- (e) *Direct the Respondent to pay compensation of INR 4,54,46,778.78 with interest, as applicable, to the Petitioner in lieu of the non-recurring additional expenditure incurred on account of the aforesaid Change in Law events;*
- (f) *Direct the Respondent to reimburse the carrying costs incurred by the Petitioner from the period of payment of GST to the date of reimbursement by the Respondent;*
- (g) *Direct the Respondent to reimburse the legal and administrative costs incurred by the Petitioner in pursuing the instant Petition; and*
- (h) *Pass such other orders that this Commission deems fit in the facts of this case.*

In Petition No. 130/MP/2019

- (a) *Acknowledge and approve the promulgation of the Central Goods and Services Tax Act, 2017, as a Change in Law event under first bullet of Article 12.1.1 as well as under sixth bullet of Article 12.1.1 of the PPA with effect from 01.07.2017;*
- (b) *Acknowledge and approve the promulgation of the Integrated Goods and Services Tax Act, 2017, as a Change in Law event under first bullet of Article 12.1.1 as well as under sixth bullet of Article 12.1.1 of the PPA with effect from 01.07.2017;*
- (c) *Acknowledge and approve the promulgation of the Karnataka Goods and Services Tax Act, 2017 as a Change in Law event under first bullet of Article 12.1.1 as well as under sixth bullet of Article 12.1.1 of the PPA with effect from 01.07.2017;*
- (d) *Declare that the Petitioner is entitled to claim relief under Article 12.2 of the PPA for the non-recurring additional expenditure incurred on account of the Change in Law events, i.e. promulgation of the Central Goods and Services Tax Act, 2017, the Integrated Goods and Services Tax Act, 2017 and the Karnataka Goods and Services Tax Act, 2017 with effect from 01.07.2017;*

- (e) Direct the Respondent to pay compensation of INR 18,19,37,667.74 with interest, as applicable, to the Petitioner in lieu of the non-recurring additional expenditure incurred on account of the aforesaid Change in Law events;*
- (f) Direct the Respondent to reimburse the carrying costs incurred by the Petitioner from the period of payment of GST to the date of reimbursement by the Respondent;*
- (g) Direct the Respondent to reimburse the legal and administrative costs incurred by the Petitioner in pursuing the instant Petition; and*
- (h) Pass such other orders that this Commission deems fit in the facts of this case.*

In Petition No. 134/MP/2019

- (a) Acknowledge and approve the promulgation of the Central Goods and Services Tax Act, 2017, as a Change in Law event under first bullet of Article 12.1.1 as well as under sixth bullet of Article 12.1.1 of the PPA with effect from 01.07.2017;*
- (b) Acknowledge and approve the promulgation of the Integrated Goods and Services Tax Act, 2017, as a Change in Law event under first bullet of Article 12.1.1 as well as under sixth bullet of Article 12.1.1 of the PPA with effect from 01.07.2017;*
- (c) Acknowledge and approve the promulgation of the Karnataka Goods and Services Tax Act, 2017 as a Change in Law event under first bullet of Article 12.1.1 as well as under sixth bullet of Article 12.1.1 of the PPA with effect from 01.07.2017;*
- (d) Declare that the Petitioner is entitled to claim relief under Article 12.2 of the PPA for the non-recurring additional expenditure incurred on account of the Change in Law events, i.e. promulgation of the Central Goods and Services Tax Act, 2017, the Integrated Goods and Services Tax Act, 2017 and the Karnataka Goods and Services Tax Act, 2017 with effect from 01.07.2017;*
- (e) Direct the Respondent to pay compensation of INR 7,09,35,542.34 with interest, as applicable, to the Petitioner in lieu of the non-recurring additional expenditure incurred on account of the aforesaid Change in Law events;*
- (f) Direct the Respondent to reimburse the carrying costs incurred by the Petitioner from the period of payment of GST to the date of reimbursement by the Respondent;*

- (g) *Direct the Respondent to reimburse the legal and administrative costs incurred by the Petitioner in pursuing the instant Petition; and*
- (h) *Pass such other orders that this Commission deems fit in the facts of this case.*

In Petition No. 135/MP/2019

- (a) *Acknowledge and approve the promulgation of the Central Goods and Services Tax Act, 2017, as a Change in Law event under first bullet of Article 12.1.1 as well as under sixth bullet of Article 12.1.1 of the PPA with effect from 01.07.2017;*
- (b) *Acknowledge and approve the promulgation of the Integrated Goods and Services Tax Act, 2017, as a Change in Law event under first bullet of Article 12.1.1 as well as under sixth bullet of Article 12.1.1 of the PPA with effect from 01.07.2017;*
- (c) *Acknowledge and approve the promulgation of the Karnataka Goods and Services Tax Act, 2017 as a Change in Law event under first bullet of Article 12.1.1 as well as under sixth bullet of Article 12.1.1 of the PPA with effect from 01.07.2017;*
- (d) *Declare that the Petitioner is entitled to claim relief under Article 12.2 of the PPA for the non-recurring additional expenditure incurred on account of the Change in Law events, i.e. promulgation of the Central Goods and Services Tax Act, 2017, the Integrated Goods and Services Tax Act, 2017 and the Karnataka Goods and Services Tax Act, 2017 with effect from 01.07.2017;*
- (e) *Direct the Respondent to pay compensation of INR 10,36,76,660.18 with interest, as applicable, to the Petitioner in lieu of the non-recurring additional expenditure incurred on account of the aforesaid Change in Law events;*
- (f) *Direct the Respondent to reimburse the carrying costs incurred by the Petitioner from the period of payment of GST to the date of reimbursement by the Respondent;*
- (g) *Direct the Respondent to reimburse the legal and administrative costs incurred by the Petitioner in pursuing the instant Petition; and*
- (h) *Pass such other orders that this Commission deems fit in the facts of this case.*

Brief Facts of the case:

5. On 04.08.2015, MNRE has issued Guidelines for implementation of the Scheme for setting up 2000 MW Grid Connected Solar PV Power Projects under Phase-II, Batch-III with viability gap funding support from National Clean Energy Fund, under which SECI was designated as the nodal agency for implementation of the scheme.
6. On 15.02.2016, SECI issued the Request for Selection (hereinafter referred to as 'RfS') document for selection of Solar Power Developers (hereinafter referred to as 'SPDs') for setting up Grid Connected Solar PV Power Projects of 1000 MW capacity in the State of Karnataka. The Petitioner submitted its bid and was selected as the successful bidder.
7. On 02.07.2016, SECI issued the Letter of Intent (hereinafter referred to as 'LOI') in favour of Hero Solar vide its Ref No. SECI/JNNSM/LOI/KA/HSEPL/P1/8453 (Petition No. 127/MP/2019), Ref No. SECI/JNNSM/LOI/KA/HSEPL/P1/8454 (Petition No. 129/MP/2019 & 130/MP/2019), Ref No. SECI/JNNSM/LOI/KA/HSEPL/P1/8451 (Petition No. 134/MP/2019) and Ref No. SECI/JNNSM/LOI/KA/HSEPL/P1/8452 (Petition No. 135/MP/2019). M/s Hero Solar formed a Project Company M/s Clean Solar Power (Gulbarga) Pvt. Ltd. (the Petitioner) within the provisions of the RfS for the development of Solar Power Project and generation and sale of solar power under JNNSM. The Petitioner accordingly entered into the Power Purchase Agreements (hereinafter referred to as 'PPAs') with SECI dated 02.08.2016.
8. 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.
9. 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 State of Karnataka. The above laws enacted by the Parliament/Legislative Assembly of Karnataka are hereinafter referred to as 'GST Laws' collectively.

10. The Petitioner has claimed that enactment of GST Laws constitute change in law in terms of the provisions of the PPAs. Hence the Petitions.

Submissions of the Petitioner

11. The Petitioner has submitted that SECI issued RfS for selection of SPDs for development of cumulative capacity in the State of Karnataka. The Petitioner was declared as the successful bidder and was awarded contracts and executed PPAs with SECI on 02.08.2016.
12. The Petitioner has submitted that Article 2.1.1 of the PPAs provides for the 'Effective Date', which is well before the date of coming into effect of the GST Laws i.e. 01.07.2017. 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 Petitioner has submitted that Article 12 of the PPAs deals with 'Change in Law' and the consequences thereof. As per Article 12, 'Change in Law' means the occurrence of events subsequent to the Effective Date which result in the Petitioner incurring additional recurring/ non-recurring expenditure or income, as the case may be. The relevant clause of the PPAs i.e. Article 12 is quoted 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 change in tax or introduction of any tax made applicable for supply of power by the SPD as per the terms of this Agreement,*

but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Developer, or (ii) any change on account of regulatory measures by the Appropriate Commission”

12.2 Relief for Change in Law

12.2.1 The aggrieved party shall be required to approach the Central Commission for seeking approval of Change in Law.

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

14. The Petitioner has submitted that as per Article 12.1 of the PPA, the qualifying elements for a Change in Law event, inter alia, are as follows:
- a) That event claimed as change in law falls within one or more of the parameters enlisted in Article 12.1.1 of the PPAs.
 - b) That the said event of change in law occurred subsequent to the Effective Date, i.e. the date on which the PPAs are signed.
 - c) That the occurrence of such event resulted in the SPD incurring recurring or non-recurring additional expenditure or income, as the case may be.
15. The Petitioner has submitted that Article 12.2 of the PPAs provides for the relief available to the affected party against the consequences of a Change in Law event. Article 12.2 enables the aggrieved party to approach the Commission for approval of Change in Law. The Commission is vested with the power to approve whether an event qualifies as a ‘Change in Law’ event under Article 12.1 of the PPAs. Upon acknowledging the occurrence of a ‘Change in Law’ event and the date from which it becomes effective, the Commission may grant appropriate relief to the affected party.
16. The Petitioner has submitted that from a combined reading of Article 12.1 and 12.2, it is clear that the PPAs allow the party affected by any ‘Change in Law’ to approach the Commission

for appropriate relief. Since the tariff for the present Project was worked out on the basis of cost factors existing as on date of bidding, fairness demands that additional cost incurred by the Petitioner due to occurrence of change in law events after the Effective Date should be reimbursed to the Petitioner.

17. The Petitioner has submitted that in the present case, the Change in Law event occurred subsequent to the Effective Date, i.e. 02.08.2016, by the enactment of the GST Laws, which fundamentally and considerably altered the indirect tax regime in India by repealing, subsuming, or amending various levies like sales tax, excise duty and VAT that were levied under the central or State laws. Further, the GST Laws has imposed tax on components required for setting up solar power plants that were earlier exempted from tax. Components and services required for the construction, development, and operation of a solar power plant are taxed at the rates of 5% to 28% under the GST Laws.
18. The Petitioner has submitted that as a result of the enactment of the GST Laws, it had to incur additional expenditure, both recurring and non-recurring, for setting up the Project. Change in Law events have resulted in increase in cost of procurement, engineering, construction, and operation of the Project. It is entitled to the increase in cost resulting from the enactment and enforcement of the GST laws, in order to restore the Petitioner to the same economic position as if the change in law events had not occurred. In respect of the procurement, engineering, and construction of the Project, it has submitted that the Petitioner incurred additional expenditure on account of the Change in Law events. The expenditure incurred is mentioned below:

Petition No.	Additional EPC Expenditure
127/MP/2019	Rs. 10,72,24,792.20
129/MP/2019	Rs. 4,54,46,778.78
130/MP/2019	Rs. 18,19,37,667.74
134/MP/2019	Rs. 7,09,35,542.34
135/MP/2019	Rs. 10,36,76,660.18

19. The Petitioner has submitted that such computation was carried out on the basis of invoices raised by the suppliers of goods and services which contain a clear and specific description regarding the levy of GST. All the norms as per GST Laws have been complied with by the Petitioner and the claim of the amount being made by the Petitioner are correct as per the effective taxes in pre and post GST regime duly certified by Chartered Accountant. Further, there is a clear and one to one correlation between the construction of the Project, the supplier of goods or services and the invoices raised by the supplier of goods and services to establish that the additional cost was incurred on account of the Change in Law events.
 20. The Petitioner has submitted that the tariff provided in Article 9.1 of the PPAs was discovered through a competitive bidding process. The tariff quoted by it at the time of submitting the bid was worked out on the basis of the existing tax regime. The Petitioner at the time of submitting the bid could not have contemplated the occurrence of the Change in Law. Therefore, the Petitioner is contractually entitled to recover the non-recurring additional expenditure.
 21. The Petitioner has submitted that the Ministry of Power issued a direction dated 27.08.2018 under Section 107 of Electricity Act, 2003 to the Commission for allowing pass through of any changes in domestic duties, levies, cess and taxes imposed by the Central Government/ State Governments leading to corresponding changes in cost after the award of bid. It was stated that the direction for allowing pass through of such costs is issued in order to ensure sustainability of the electricity market and in larger public interest. As per the direction, any change in domestic duties, levies, cess and taxes imposed by Central Government, State Government/ 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. Further, the directive also mentions that the impact of the 'Change in Law' would be effective from the date of change in law.
 22. The Petitioner has submitted that the Commission has also acknowledged, declared, and approved the enactment of GST Laws as 'Change in Law' event on multiple occasions and
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granted relief to various developers on that account. The Commission suo moto initiated proceedings to analyze and determine the impact of the GST Laws on stakeholders in the power sector. Upon due consideration of the views and concerns submitted by the stakeholders, the Commission held that the enactment of GST Laws is a 'Change in Law' event and granted appropriate relief vide order dated 14.03.2018 in Petition No. 13/SM/2017. Similarly, in Petition No. 50/MP/2018, the Commission extensively examined the impact of GST Laws on the cost components of solar power projects and held that the enactment of GST Laws amounts to 'Change in Law'. The Commission further held that the relief for the same will be computed on the basis of the quantum of increase in the cost in acquiring goods and services under the GST Laws.

23. The Petitioner has submitted that the present Petition is made bonafide and in the interest of justice. It has further submitted that the Commission has jurisdiction to adjudicate upon the present Petition and grant the reliefs sought as per section 79 of the Electricity Act, 2003 and specifically in light of Article 12.2 of the PPA. Further, Clause 1.6 of the guidelines for Phase-II, Batch-III JNNSM Scheme provides that the power from the Projects developed under the Scheme shall be supplied to more than one State. Accordingly, the PPAs constitutes as a composite scheme and hence within the jurisdiction of the Commission.
24. The Petitioner has submitted that the issue of jurisdiction of the Commission to entertain issues with respect to PPAs signed under Phase II, Batch III JNNSM Scheme is no longer res integra. The Commission in its order dated 11.10.2017 passed in Petition No. 95/MP/2017 - M/s. Welspun Energy Private Limited v. Solar Energy Corporation of India has already decided this issue.

Submissions of the Respondent No. 1 - SECI

a) SECI's Obligation are on Back to Back Basis:

25. The Respondent has submitted that it entered into the PPAs with the Petitioner. The electricity procured by it from the Petitioner under the PPAs is for onward sale on back to back basis to the Buying Entities/ Distribution companies under the respective Power Sale Agreements (hereinafter referred to as 'PSA'). It is acting as an intermediary utilizing its trading license to facilitate such purchase and resale of electricity. It is not acting as a merchant trader or otherwise independently purchasing the electricity from the SPDs having the option to sell electricity to any person at such time and on such terms and conditions as it can decide from time to time. It is also not retaining the powers to trade electricity so purchased in the open market or through the platform of Power Exchange or through another trader on a long term basis to earn a trading margin. It is constrained to the fixed trading margin of 7 Paise/kWh. Its obligations and liabilities to the SPD are on a back to back basis to the obligation to be performed and liabilities to be discharged by buying entities/ Distribution Companies.
26. The Respondent has submitted that in pursuance of the RfS issued, upon the selection of the SPD/ Petitioner, the PPAs were entered into between the SPD and SECI. The provisions of the PPAs specifically deal with back to back PSAs between SECI and the concerned Distribution Companies/ Buying Entities. Accordingly, the PPAs with the Petitioner were executed on a back to back basis after the PSA had been executed with the Respondent No. 2. It can be seen that the provisions of the PPAs and the PSAs, are inextricable and intertwined with one another. The clauses and provisions of the bidding documents, PPA and the PSA are sufficient indication of the back to back arrangement under the entire scheme. The provisions have been made in the PPAs and the PSAs recognizing that SECI, as an intermediary nodal agency cannot be required to pay the amounts becoming due to Petitioner out of its own resources, till such time the amount can be recovered by SECI from the Respondent No. 2. The role of an Intermediary Trader as a 'conduit' has also been considered by the Commission in the following cases: Order dated 18.04.2016 in Petition No. 319/MP/2013 in the case of *Tata Power Delhi Distribution Company Limited v Jhajjar Power Limited and Ors*; Order dated 18.01.2019 in Petition No. 224/MP/2018 in the case of *M B Power (Madhya Pradesh) Limited v Uttar Pradesh Power Corporation Limited and Ors.*; Order

dated 30.04.2019 in Petition No. 255/MP/2017 in the case of *Adhunik Power and Natural Resources Limited v West Bengal State Electricity Distribution Company Limited and Ors.*

27. The Respondent has submitted that in terms of the above mentioned decisions, the Commission has rejected the claim of absence of privity of contract between the generator and the Distribution Licensee when the generator sells the electricity to an intermediary trading company and the trading company re-sells the electricity on a back to back basis to the Distribution Licensee. The said two transactions being under two separate agreements, it has been held that the two agreements are inextricably linked to each other and the rights and obligations arising out of one agreement are also reflected in the other agreement. It is on the above basis only that the Commission has decided on the jurisdiction to entertain the Petition filed by a generating company involving the Distribution Licensee on a sale of power through a trading company to grant the necessary relief for matters such as penalties for shortfall in availability of contracted capacity, effect of change in law etc. Therefore, SECI is in a position to and is also required to discharge its obligations under the PPAs including the payment for any change in law implication etc. only upon the Distribution Licensee remitting the amount to SECI in terms of the respective PSA.
28. The Respondent has submitted that it is, therefore, appropriate that directions are issued to the Respondent No. 2, to pay the amount that may be determined as payable to the Petitioner, keeping in view the intermediary status and role of SECI as a nodal agency to facilitate development of Solar Power Project and for the Distribution Licensee/ Buying Entity to have an arrangement for procurement of solar power to fulfill their Renewable Purchase Obligation. Any enforcement of claim by the SPD against the SECI without the Distribution Licensee/ Buying Entity being obligated to pay and discharge the corresponding claim under the PSA in advance of discharge of the obligation of SECI will result in serious financial issues to SECI and thereby, effect implementation of the scheme.

b) GST Laws are covered under the scope of 'LAW'

29. The Respondent has submitted that the fact that the GST Laws are ‘law’, as defined in the PPA is not disputed. However, in order to qualify for relief under the change in law provision contained in the PPA, the conditions mentioned in Article 12 therein dealing with ‘Change in Law’ need to be satisfied, namely, each of the claim should fall within the scope of the said provision.

c) The scope and Applicability of Article 12.1.1 of the PPA

30. The Respondent has submitted that the Commission and the Appellate Tribunal for Electricity (hereinafter referred to as ‘the Tribunal’) in various decisions have interpreted the scope and applicability of Article 12.1.1 under various sub-clauses. An appeal against an order passed by the Tribunal dated 14.08.2018 in Appeal No.111 of 2017 and connected Appeals in the matter of *M/s. GMR Warora Energy Limited –v- Central Electricity Regulatory Commission and Ors.* is pending before the Hon’ble Supreme Court in Civil Appeal No. 11910-1191 of 2018 on the issue of scope and applicability of the clauses of Article 12 of the PPAs including in particular the sixth bullet under Article 12.1.1 and the scope of earlier sub-clauses of Article 12.1.1. Further, the scope of Article 12.1.1 of the PPAs has already been interpreted and decided by the Commission vide order dated 19.09.2018 in *Prayatana Developers Pvt. Ltd –v- NTPC Limited and Ors and Azure Power Venus Pvt. Ltd. -v -Solar Energy Corporation of India Limited and Ors, in Petition No. 50/MP/2018 and 52/MP/2018*; Order dated 09.10.2018 in Petition No.188/MP/2018 and Batch in the matter of *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors. Batch*; Order dated 05.02.2019 in Petition No.187/MP/2018 and Batch in the matter of *M/s. Renew Wind Energy (TN2) Private Limited –v- NTPC Limited Batch*; Order dated 18.04.2019 in Petition No. 164/MP/2018 and 165/MP/2018 in the case of *Parampujya Solar Energy Pvt. Limited v NTPC and Others and Batch* and by the Tribunal in the decision dated 13.04.2018 in the case of *Adani Power Limited –v- Central Electricity Regulatory Commission and Others*, in Appeal No. 210 of 2017 and Judgment dated 14.08.2018 in Appeal No. 119 of 2016 and Batch in *M/s Adani Power Rajasthan Private Limited –v- Rajasthan Electricity Regulatory Commission and Ors* (and as followed in Appeal No. 111 of 2017 in *M/s. GMR Warora Energy Limited -v- Central Electricity Regulatory Commission and Ors*).

d) Inadmissibility of Carrying Cost

31. The Respondent has submitted that there is no provision in the PPAs regarding carrying cost or interest for the period till the decision of the Commission acknowledging the change in law and deciding on the amount to be paid for such change in law namely 'provide for relief for the same', as specified in Article 12.2.2 of the PPAs. The Change in Law claim of the Petitioner is yet to be adjudicated and the amount if any, due to the Petitioner has to be determined/ computed first. Only after the amount is determined, is the Petitioner required to raise a Supplementary invoice for the amount so computed as per Article 10.7 of the PPA. It is only in case of default on the part of the SECI 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 PPA about 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. The provision of Article 10.3.3 of the PPAs dealing with late Payment Surcharge and definition of the 'Due Date' in Article 1 read with Article 10.3.1 of the PPAs are relevant. The due date is forty-fifth (45th) day after a monthly bill or supplementary bill is received and duly accepted by SECI and if such a day is not a Business Day, the due date will be the immediately succeeding Business Day. The supplementary bill needs to be raised by the Solar Power Developer for 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.
32. The Respondent has further submitted that the PPAs do not have a provision dealing with restitution principles of restoration to same economic position. Therefore, the Petitioner is not entitled to claim relief which is not provided for in the PPA. In the Judgment of the 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, the carrying cost will not be applicable.

33. The Respondent has submitted that the present case is not a case of amounts being denied at appropriate time or any deprivation of amount due to actions of the procurers. The procurers cannot make the payment for change in law until the amount is determined by the Commission. It is further submitted that the decision on the admissibility of the monetary claim can only be after the Petitioner has submitted complete information and not before. Thus, any delay in the determination of the impact of change in law is on account of the Petitioner. Any adverse consequences for not approaching the Commission with the full documentation/ information at the first instance ought to be borne by the defaulting party i.e. the Petitioner itself.

e) Absence of Necessary Particulars

34. The Respondent has submitted that there are number of taxes, duties, cess and levies which have been subsumed after GST Laws came into force on 01.07.2017. In this regard, the Commission in its Order dated 09.10.2018 in Petition No. 188/MP/2018 and Batch in *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors. Batch*, has quoted list of taxes subsumed in the GST as laid down in Goods And Service Tax (GST), Concept & Status, published by Central Board Of Indirect Taxes And Customs, Department Of Revenue, Ministry of Finance, Government Of India. The Petitioner is required to place before the Commission the extent to which the Petitioner’s project is subject to such taxes etc. existing prior to 01.07.2017 which have been subsumed after promulgation of the GST Laws. In its previous orders related to adjudication of change in law claims on account of GST Laws, the Commission has taken note of the implications of various taxes which were in existence prior to 1.07.2017 and were subsumed/ reduced/ remitted. These have to be taken into account to determine the net effect of GST Laws.

Rejoinder of the Petitioner to the reply of Respondent No. 1

35. The Petitioner has submitted that it is not correct to suggest that the Respondent No. 1 is merely acting as an intermediary and is only facilitating the purchase and resale of electricity,

or that the obligations of SECI is only on a back to back basis and the liabilities are to be discharged by the Distribution Company. In this regard, it has submitted that the Petitioner has entered into an agreement with SECI to sell the power produced by the Petitioner's project to SECI. While SECI has entered into back to back arrangements with Respondent No. 2, the same does not have the effect of releasing SECI of all contractual obligations.

36. The Petitioner has denied that it was aware of the fact that Respondent No. 2 would be supplied electricity generated from the Project. The mere fact that the provisions of the PPAs provides for a PSA to be signed between SECI and the Respondent No. 2, does not do away with the requirements under Clause 10.7.1 of the PPA, wherein the Petitioner Company is required to raise a Supplementary Bill upon SECI. Even as per Clause 12.2, the Petitioner has to seek its relief against SECI for the expenditure incurred due to the 'Change in Law' event.
37. The Petitioner has submitted that as per the definition of trading licensee under the Electricity Act, 2003, power is procured by SECI, even though it may be selling the same on back to back basis to the Respondent No. 2. It is incorrect that the role of the Respondent No. 1 is merely that of an intermediary.
38. The Petitioner has submitted that its relief contractually lies against the Respondent No. 1 and not from the Distribution Companies since the 'privity of contract' exists between the Petitioner and the Respondent No. 1. It is for the Commission to pass appropriate directions to the Respondent No. 2 to pay the amount awarded under Change in Law.
39. The Petitioner has submitted that the previous orders of the Commission and the Tribunal which are referred by SECI dealt with the relationship between the PPAs and the PSAs and how the two agreements are intrinsically linked to each other. The Petitioner in the present case is not disputing the importance of the PSA executed between SECI and the Respondent No. 2 but is submitting that the relief sought by the Petitioner is on the basis of the PPA and it can be sought contractually against SECI. It is for the Commission to pass appropriate Orders for payment by the Respondent No. 2.

40. The Petitioner has submitted that SECI cannot avoid the commercial consequences under the PPA, by relying on the back to back arrangement with the Respondent No. 2 under the PSA.
41. The Petitioner has submitted that the contention of SECI regarding claim of carrying cost by the Petitioner is false. It is denied that the decision of the Commission with regards to the date from which the Change in Law will come into force only refers to the principal amount being computed from that date and not the payment of interest and carrying cost. It is also denied that the supplementary bill can be raised by the Petitioner only after the claim for Change in Law is approved by the Commission.
42. The Petitioner has submitted that it is entitled to claim relief which is not provided for in the PPA. The concept of 'Change in Law' is a principal of restitution by which the party seeks remedy for increase in costs due to factors beyond its control. Even if the words "the parties must be restored to the same economic position" may not be present in the Article of the PPA, the same must be read having regard to the purpose of the 'change in law' clauses.
43. The Petitioner has submitted that the Auditor of the Petitioner Company has made detailed calculations and has issued a certificate after verifying the amounts. The Auditor has further certified that the amount claimed is correct.
44. The Petitioner has further submitted that the Commission in its order dated 05.02.2019, in Petition No. 187/MP/2018 and Batch has directed the Petitioner to submit all the relevant documents with the break-up for each of the claims. The Petitioner is ready and willing to place these documents on record or provide the same to SECI, to the extent found necessary to determine the impact of the Change in Law.

Written Submissions by the Petitioner dated 05.03.2020

45. The Petitioner has filed the written submissions as per the directions of the Commission vide record of proceedings dated 25.02.2020.

Re: Approval of Change in Law

46. The Petitioner has submitted that the Commission has acknowledged, declared, and approved the enactment of GST Laws as 'Change in Law' event on multiple occasions and relief has already been granted to various developers. The relief for 'Change in Law' has to be made applicable in the following manner:
- (i) GST Laws are applicable in all cases except in case of generating companies whose actual date of commissioning is prior to 01.07.2017.
 - (ii) Petitioner has 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 and provide the same to Respondent for reconciliation.
 - (iii) The impact of GST Laws is to be backed by auditor certificate.
47. The Petitioner has submitted that in the present petitions, both the scheduled commissioning date and actual commercial operation date are after 01.07.2017. The certificate from the chartered accountant verifying the correctness of the figures adopted by the Petitioner stating that all norms as per GST Laws have been complied with by the Petitioner and that the claim of the amount made by the Petitioner are correct has already been annexed with the Petition. As such, the Petitioner is entitled to relief as claimed on account of introduction of GST Laws, which falls in the realm of 'Change in Law' under the PPA.

Re: Back to back arrangement between Petitioner, SECI & distribution licensee

48. The Petitioner has submitted that the back-to-back arrangement does not absolve the Respondent No. 1 of the liability towards the Petitioner. SECI is entitled to recover payments made to the Petitioner from the Respondent No. 2. However, the payment to the Petitioner is not contingent upon payment from the Respondent No. 2 to SECI. The Petitioner has placed its reliance on the decision of the Commission in Petition No. 67/MP/2019 - *Clean Sustainable Energy Private Limited vs. Solar Energy Corporation of India Limited & Batch.*

Re: Applicability of Carrying Cost

49. The Petitioner has submitted that the Commission has denied the relief of ‘carrying cost’ to other developers on the ground that there was no provision in the PPA for restoration of the parties to the same economic position. The Commission has inter alia relied on the judgment in Appeal No. 210 of 2017 - *Adani Power Ltd vs. Central Electricity Regulatory Commission* passed by the Tribunal. It is relevant to mention here that the Tribunal had disallowed the claim of carrying cost for one of the Gujarat PPAs, as the PPAs therein provided for mechanism for tariff adjustment for Change in Law, which did not include the provision of carrying cost. The principle of ‘expressio unius est exclusio alterius’ i.e. expression of one is the exclusion of another, is applicable to the said case. As a result, the mechanism of tariff adjustment provided under the PPA for ‘Change in Law’, implies exclusion of any carrying cost thereof.
50. The Petitioner has submitted that the PPAs in the present case, do not stipulate or indicate any mechanism to be adopted for making payment for ‘Change in Law’. The PPAs requires the Commission to pass an order not only to acknowledge the ‘Change in Law’ event but also to decide the date from which the ‘Change in Law’ event will become effective and provide relief for the same. To such extent, the ‘Change in Law’ clause is distinct and different from the one in Gujarat PPA. In the present case, the Commission while deciding the date from which the Change in Law is effective has the authority to also provide consequential relief from such date.
51. The Petitioner has submitted that it is a settled legal position that it is the ratio decidendi of a judgment and not the final order in the judgment, which forms a precedent. It is also an established legal principle that the ratio decidendi of a case is distinct from the relief granted. (*Islamic Academy of Education vs. State of Karnataka, (2003) 6 SCC 697*). Non-grant of carrying cost by the Tribunal to developers wherein PPA did not provide for carrying cost in the mechanism for payment towards Change in Law, cannot be equated with the present case. The said decision which centered around its own facts cannot be a precedent in the present case which is based on different facts. The same has been reiterated by the Hon’ble Supreme
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Court in *P.G.I. of M.E. and Research, Chandigarh vs. Raj Kumar*; (2001) 2 SCC 54. The facts of the present case are significantly different inasmuch as there are no guidelines/mechanism in the PPA on how to compute the remedy for Change in Law.

52. The Petitioner has submitted that the Commission has wide powers to grant general or other reliefs even if not prayed for in the petition. In this case, the monetary value of the amount payable under 'Change in Law' has been specifically prayed for. The determination of 'effective date' by the Commission, as provided under Clause 12.2.2 of the PPA, will necessarily entail determination of 'appropriate relief' along with the 'carrying cost' in the present case. The Commission's power as a regulator to grant ancillary and incidental relief, such as, carrying cost in this case, are very wide. The Hon'ble Supreme Court in various judgments has discussed the wide import of 'regulation' by Commissions viz. *K. Ramanathan vs. State of Tamil Nadu* (1985) 2 SCC 116; *Deepak Theatre, Dhuri vs. State of Punjab* (1992) Supp (1) SCC 614; *Cellular Operators Association of India and Ors. vs. Union of India and Ors.* AIR 2003 SC 899.
53. The Petitioner has submitted that the claim of Petitioner towards carrying cost is not covered under the PPA, as the PPA only defines 'Change in Law' and the power to grant 'appropriate relief' lies with the Commission in discharge of its functions under section 79(1)(f) of the Electricity Act, 2003. No such provision can be found in the bidding guidelines and there is no embargo under the PPA which denies the Petitioner grant of carrying cost. The present case is a fit case for exercise of regulatory powers by the Commission for grant of relief on account of promulgation of GST Laws, along with the carrying costs associated therewith.
54. The Petitioner has submitted that the Tribunal in *Tata Power Company Limited vs. Maharashtra Electricity Regulatory Commission - Appeal No. 173 of 2009* has laid down the specific conditions wherein the claim for carrying cost can be allowed. The relevant portion is excerpted as follows:

"...However, we would like to add that the Appellant is entitled to carrying cost on his claim of legitimate expenditure if the expenditure is:

(a) accepted but recovery is deferred, e.g. interest on regulatory assets;

(b) claim not approved within a reasonable time; and

(c) disallowed by the State Commission but subsequently allowed by the superior authority.”

55. The Petitioner has submitted that the Tribunal in *M/s. SLS Power Limited vs. Andhra Pradesh Electricity Regulatory Commission - Appeal No. 50 of 2012* has held that the rationale behind allowance of carrying cost is to compensate the affected party for the time value of money or the monies denied at the appropriate time and paid after a lapse of time. The Apex Court in *South Eastern Coalfields Ltd. vs. State of M.P – (2003) 8 SCC 648*, has held that ‘*..in the absence of there being a prohibition either in law or in the contract entered into between the two parties, there is no reason why the Coalfields should not be compensated by payment of interest for the period for which the consumers/purchasers did not pay the amount of enhanced royalty which is a constituent part of the price of the mineral for the period which it remained unpaid.*’
56. The Petitioner has submitted that in view thereof, it is entitled to interest on the differential amount due to it as a consequence of additional expenditure incurred on account of ‘Change in Law’ event. The PPA grants power to the Commission to determine the effective date for granting relief for ‘Change in Law’ and hence, the Petitioner is entitled to grant of carrying cost in the present case.

Written Submissions by the Respondent No. 1 (SECI) dated 12.03.2020

Re: Back to Back Obligation of SECI under PPA & PSA:

57. The Respondent has submitted that the obligations and liabilities of SECI to the Petitioner, in the facts and circumstances pertaining to such dealing, are on a back to back basis to the obligation to be performed and liabilities to be discharged by Buying Entities/ Distribution Companies to SECI. The back to back arrangement of the purchase of solar power from the SPDs and resale of the solar power to the Buying Entities in the context of similar PPAs and PSAs entered into under the scheme for promotion of solar power involving SECI as nodal agency and an intermediary trader has been considered by the Tribunal in the recent decision dated 27.02.2020 passed in Appeal Nos. 368, 369, 370, 371, 372 & 373 of 2019 in the matter

58. The Respondent has submitted that the stipulations of the back to back scheme have been made in the PPA and the PSA recognizing that SECI, as an intermediary nodal agency cannot be required to pay the amounts becoming due to SPD out of its own resources, till such time the amount can be recovered by SECI from the concerned distribution licensees. SECI is in a position to and is also required to discharge its obligations under the PPA including the payment for any change in Law implication etc. only upon the distribution licensee remitting the amount to SECI in terms of the respective PSA. Any enforcement of the claim by the SPD against SECI without the Distribution Licensee/ Buying Entity discharging the corresponding claim under the PSA in advance of the discharge of the obligation of the SECI will result in serious financial issues to SECI and thereby, affect the implementation of the scheme.

Re.: Inadmissibility of Carrying Cost

59. The Respondent has submitted that there is no provision in the PPA regarding carrying cost or interest for the period till the decision of the Commission acknowledging the change in law and deciding on the amount to be paid for such change in law namely ‘provide for relief for the same’, as specified in Article 12.2.2 of the PPA. The Change in Law claim of the Petitioner is yet to be adjudicated and the amount if any, due to the Petitioner has to be determined/ computed first. Each contract has to be interpreted on the basis of the terms and provisions contained in it. The intention of the parties has to be gathered from the express terms contained in the contract. Thus, if the PPAs already contemplate for the provision of Late Payment Surcharge for the delay in payment of the bill, supplementary or otherwise (Ref: Article 10.7 of the PPA) for the period from the date of determination of the amount due, then it cannot be construed that the intent of the PPAs was to restore/ reimburse the parties to the same economic position in case of such contingency.

60. The Respondent has submitted that it is not open for the Petitioner to read conditions into the PPA and/or seek to alter the meaning of the express un-ambiguous words of Article 12.2.2 of the PPA. The term 'relief' cannot be interpreted to mean restitution, as is sought to be contended by the Petitioner. It is a settled principle that contract terms have to be given their natural meaning and when different expressions have been used, the natural inference is that intent/ objective of the different expressions is different. Accordingly, wherever, the intent of the parties was to reconstitute the party to the same economic position as if the Change in Law had not occurred, the same had been duly incorporated in the PPA.
61. The Respondent has submitted that it is a settled principle of construction of contract that natural and ordinary sensible meaning to the language through which the parties have expressed themselves unless the meaning leads to absurdity, provides guidance for finding out the intention of parties. The Respondent has placed its reliance on the decision of Hon'ble Supreme Court in *ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705*. In this present case, the PPA does not have a provision dealing with restitution principles of restoration to same economic position. Therefore, the Petitioner is not entitled to claim relief which is not provided for in the PPA.
62. The Respondent has submitted that the Petitioner executed PPAs with SECI having knowledge of the terms and conditions contained in it. The Petitioner cannot now claim relief which is not provided for in the PPAs. The Petitioner cannot invoke the regulatory powers of the courts to defeat the sanctity of the PPA. The Petitioner cannot claim exercise of the regulatory powers contrary to express provisions of the PPA namely Article 10 of the PPA which provides for payment of late payment surcharge for delay in paying the Supplementary Invoice. The present case is not a case for exercise of regulatory powers since the relief as contemplated is already provided for in the PPA. The Petitioner cannot read conditions or add to the provisions already provided in the PPA.

Re.: Documents to be provided as per the Orders of the Commission:

63. The Respondent has submitted that details and documents related to GST claims may be furnished by the Petitioner in accordance with the orders of the Commission and as per the checklist provided by SECI. The same shall be examined by SECI at appropriate stage for verification. The Petitioner is required to submit the claim related documents along with the Auditor's certificate duly certifying the impact of GST Laws on actual project cost.

Re.: Methodology for payment of Compensation (if any) on Account of GST Laws

64. The Respondent has submitted that the Commission in its earlier orders, with regard to methodology of payment of compensation on account of GST Laws, has given two kinds of mechanism for payment of compensation on account of GST Laws:

- a. One time payment in a time bound manner; and
- b. Payment on annuity basis, spread over such period not exceeding the duration of PPAs as a percentage of tariff agreed in the agreements, as mutually agreed between SPDs and procurers (in the present case, SECI and consequentially the Distribution Company).

65. The Respondent has submitted that for the purpose of present petitions, the impact of change in law on account of enactment of GST Laws, if any, should be recovered on annuity basis. The impact of Change in Law is an addition to the capital cost and not an operating and maintenance expense of a recurring nature to be incurred on year on year basis. The increased costs are claimed to have been incurred for the purpose of supply of power and therefore, the costs should be recovered only if the Petitioner supplies the power. If the petitioner does not supply the requisite power, the petitioner should not be entitled to recover the cost proportionate to such non-supply, similar to any other capital cost. On the other hand, if the Petitioner is allowed to recover the same in lump sum, then SECI (and consequentially the distribution companies) would have paid for capital cost even without the actual supply of power. This is contrary to the fundamental principle of recovery of capital cost through tariff.

66. The Respondent has submitted that the payment of the amount as one-time payment in respect of renewable power developers would result in substantial amount being paid to them upfront by the Discoms/ buying utilities and by SECI and thereby causing serious financial prejudice. The payment of such impact on annuity basis is consistent with the principles governing the servicing of the capital cost over the duration of the PPA and, therefore, ought to be the principal basis for settlement of the claims unless in a given case the buying utilities/Discoms voluntarily agree to make a one-time payment of the amount determined as impact of GST Laws subject to necessary adjustment by way of determination of the net present value.
67. The Respondent has submitted that if the Change in Law event had occurred prior to the cut off date, the SPD would have factored the higher cost to be incurred by them in establishing the solar power project in the per unit tariff to be quoted. Accordingly, the treatment of the impact of Change in Law occurring after the cut-off date cannot be different. The same methodology should be adopted for servicing the impact of Change in Law as in the case of servicing of other capital expenditure incurred in establishing the project. In terms of Article 12 of the PPA, the nature of the relief has to be moulded by the Commission. In these circumstances, if the Commission deems it fit to grant relief in the form of an ‘annuity payment’, the same shall be applicable on both the parties.
68. The Respondent has submitted that SECI wishes to propose the following methodology for payment of compensation (if any) on account of GST Laws on annuity basis:
- a.* The total amount of compensation payable as determined by the Commission, subject to prudence check by SECI and the distribution company, in the present Petition, shall form the basis of computation for ascertaining the per unit rate;
 - b.* The above amount shall be divided over each year of the remaining duration of the PPA and PSA based on the discounting factor. In the present example, the discount factor as provided in Generic Tariff Order dated 19.03.2019 passed by the Commission for renewable energy projects is considered;

- c. The above amount shall be converted to per unit rate based on the Capacity Utilisation Factor/ contracted energy agreed in the PPA. For example, the maximum contracted energy as per the PPA is 73.234 MUs and considering that the maximum is 110% of the contracted energy (as per RFS), the contracted energy is 66.57 MUs;
- d. The per unit rate for change in law should be payable on actual generation subject to annuity value.

Analysis and Decision

69. The Petitions were filed on 27.04.2019, admitted on 12.06.2019 and reserved for orders on 25.02.2020. We have heard the learned counsels for the Petitioner and the Respondents and have carefully perused the records. Since, Petitions are likely worded and contain similar issues to be adjudicated, the same are clubbed together.
70. The brief facts of the petitions are that the Petitioner is a generating company engaged in the business of development, building, owning, operating and maintaining utility scale grid connected solar power projects, for generation of solar power. The facts are summarized as under:

	127/MP/2019	129/MP/2019	130/MP/2019	134/MP/2019	135/MP/2019
Scheme	JNNSM	JNNSM	JNNSM	JNNSM	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	40	30	40
Power	Solar	Solar	Solar	Solar	Solar
Location	Village Jonnikere, Limgadahalli, Aurad Taluk, Bidar District. Karnataka	Village Kurdi, Manvi Taluk, Raichur District Karnataka	Village Godaratagi and Talekana, Sindanoor Taluk, Raichur District	Village Beejihalli, Sira Taluk, Tumkur District Karnataka	Villages Dongaragav and Bachinal, Kalburgi Taluk, Kalburgi District

			Karnataka		Karnataka
PPA Executed	02.08.2016	02.08.2016	02.08.2016	02.08.2016	02.08.2016
Effective date	02.08.2016	02.08.2016	02.08.2016	02.08.2016	02.08.2016
GST Laws	01.07.2017				
SCoD	12.06.2018	17.02.2018	02.07.2018	19.03.2018	04.07.2018
Tariff	4.43/KWh	4.43/KWh	4.43/KWh	4.43/KWh	4.43/KWh
VGF	YES	YES	YES	YES	YES
Change in Law	Article 12	Article 12	Article 12	Article 12	Article 12
Incremental impact (Rs.) on Account of EPC Cost as claimed by the Petitioner	Rs. 10,72,24,792.20	Rs. 4,54,46,778.78	Rs. 18,19,37,667.74	Rs. 7,09,35,542.34	Rs. 10,36,76,660.18

71. 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 Petitioner and sold to the Distribution Companies in the State of Karnataka. On 01.07.2017, the GST Laws were enacted for levy and collection of tax on supply of goods or services or both.
72. The Petitioner has submitted that it participated in the bids and pursuant thereto, entered into PPAs for setting up of solar power plants at a fixed tariff for 25 years. Subsequent to the 'Effective Date' of 02.08.2016 as per the PPAs, the 'GST Laws' were enacted w.e.f. 01.07.2017. Introduction of 'GST Laws' increased the actual cost of the project vis-a-vis budgeted cost, which was beyond their control and hence the Petitioner filed Petitions praying that enactment of 'GST Laws' be declared as a change in law event under Article 12 of the PPAs and to grant consequential reliefs as provided in the PPAs. The PPAs entered into between the parties provide for a specific provision qua the concept of "Change in Law". The concept of 'Change in Law' has been introduced in the PPAs to ensure that the parameters/ contours based on which the Petitioner has bid for supplying power do not change in times to come and that no detriment to either Petitioner or Respondents is caused due to such 'Change in Law' events. **Per Contra**, the Respondent No. 1, SECI, has submitted

that the PPAs do not contain any Clause providing specific relief during the construction period. In terms of Article 4.1.1 (b) of the PPAs, the SPDs are responsible at their own cost and risk for designing, constructing, erecting, commissioning, completing and testing the Power Project in accordance with the Prudent Utility Practices. Further, regarding the amount payable to the Petitioner (if any) on account of 'GST Laws' the liability will be back to back because of intertwining nature of PPAs and PSAs.

73. 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 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?

Issue No. 2: Whether the Petitioner is entitled to claim relief under Article 12.2 of the PPAs for the non-recurring additional expenditure incurred on account of promulgation of the GST Laws?

Issue No. 3: Whether the claim of "Carrying Cost" for delay in reimbursement by the Respondent is sustainable?

Issue No. 4: Whether the Respondent should be directed to reimburse the legal and administrative costs incurred by the Petitioner in pursuing the instant Petition?

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

Issue No. 1: Whether the promulgation of the IGST Act, 2017, the CGST Act, 2017, the 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?

75. The Petitioner has 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 Petitioner has approached the Commission for seeking relief on account of introduction of GST as a change in law event, as per the first and last bullet of Article 12.1.1 of the PPAs. **Per Contra**, the Respondent No. 1 has submitted that there is no dispute to the fact that the GST Laws are 'law', as defined in the PPAs. However, in order to qualify for relief under the change in law provision contained in the PPAs, the conditions mentioned in Article 12 of the PPAs dealing with 'Change in Law' need to be satisfied, namely, each of the claims should fall within the scope of the said provision.

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

"ARTICLE 12: 'CHANGE IN LAW'

12.1. Definitions

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

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

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

but shall not include (1) any change in any withholding tax on income or dividends

distributed to the shareholders of the SPD, or (2) any change on account of regulatory measures by the Appropriate Commission.

12.2. Relief for ‘Change in Law’

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

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

77. 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 ‘GST Laws’ have been enacted by the Act of Parliament and the State Legislative Assemblies. The change in duties/ tax imposed by the Central Government and State Government(s) has resulted in the change in cost of the inputs required for generation and the same is to be considered as ‘Change in Law’. Hence, the Commission holds that the enactment of ‘GST laws’ is squarely covered as ‘Change in Law’ under the first, and last bullet in seriatim of Article 12.1.1 of the PPA.

78. The Commission notes that the Petitioner has executed the PPAs on 02.08.2016 (Effective Date) i.e. before the introduction of GST Laws on 01.07.2017. Further, the SCoD of all the

projects were on or after 17.02.2018 i.e. after the introduction of GST Laws on 01.07.2017. Therefore, the Petitioner is entitled for relief under ‘GST laws’.

Issue No. 2: Whether the Petitioner is entitled to claim relief under Article 12.2 of the PPAs for the non-recurring additional expenditure incurred on account of promulgation of the GST Laws?

79. The Petitioner has submitted that it has incurred adverse financial consequences due to introduction of GST Laws, which have resulted in additional financial burden on the Petitioner on account of increase in the Engineering, Procurement & Construction costs and these costs were not contemplated by the Petitioner at the time of bid submission. **Per Contra**, the Respondent has submitted that the claim may be denied.
80. The Commission observes that the ‘GST Laws’ became effective from 01.07.2017. ‘GST Laws’ provide for a tax slab (previously exempted) of 5% to 28% with respect to Goods & Services required for execution, construction and operation of Solar Projects w.e.f. 01.07.2017. The ‘Goods and Services’ in the context of the present petitions can be broadly categorized under the following two heads:
- i. EPC Stage i.e. Construction Stage which is covered under ‘Goods’ and
 - ii. O & M Stage i.e. Post Construction Stage which is covered under ‘Services’.
81. The Commission observes that the Petitioner has made the claim regarding the Change in Law events which have resulted in increase in cost of procurement, engineering, construction, and operation of the Projects. It has made no claims for reimbursement of GST for O&M stage. As such, we will only 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
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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.

82. 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 73.234 Million kWh (MU). If for any Contract Year, it is found that the SPD has not been able to generate minimum energy of 56.590 Million kWh (MU) till the end of 10 years from the COD and 53.261 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
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.”

83. The Commission notes that commissioning of the projects as defined in Article 1 read with Article 5 and Schedule 6 of the PPAs implies that all the equipment as per rated project capacity has been installed and energy has flown into the grid. Further, the liability of the Respondents for payment of purchase of power from the petitioner starts from the Commercial Operation Date (COD). As per definition of Commercial Operation Date (COD) provided in Article 1 of the PPAs, COD will be the date 30 days subsequent to the actual date

of commissioning of full capacity. Accordingly, the Commission holds that the liability of payment on account of impact of GST on procurement of Solar PV panels and associated equipment by the Petitioner shall lie with the Respondent 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.

84. The Commission observes that in the instant petitions, the tariff has been discovered under transparent e-bidding process in accordance with the JNNSM guidelines issued by the Central Government. In the Competitive Bidding Scenario, the SPDs bid levelled tariff without disclosing the details of the calculations of the project cost including capital expenditure. The component wise details of the capital employed are not required to be declared by the bidders. The design of the bid levelled tariff is solely a decision of the SPDs.
85. The Commission observes that the Petitioner requested for the payment to be made in lumpsum by way of one-time payment whereas the Respondent No.1 (SECI) has submitted that the payment by way of one-time payment will be financially burdensome for distribution companies. Instead the SECI has proposed a methodology for payment of compensation (if any) on account of GST Laws on annuity basis.
86. The Commission observes that it has already proposed a mechanism in various similar Orders as under:
 - a. one-time payment in a time bound manner which shall be paid within 60 days from the date of issue of the 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.
 - b. Alternatively, the Petitioner and the Respondents may mutually agree to a mechanism for the payment of such compensation on annuity basis spread over such period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs. This will obviate the hardship of the Respondents for one-time payment.

87. In view of above, 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 para 81 & 83 above. Accordingly, it is directed that the GST bills shall be paid within 60 days from the date of issue of this Order or from the date of submission of claims by the Petitioner, whichever is later, failing which it shall attract late payment surcharge in terms of the PPA. Alternatively, the Petitioner and the Respondents may mutually agree to a mechanism for the payment of such compensation on annuity basis spread over such period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs. This will obviate the hardship of the Respondents for one-time payment. It is pertinent to mention here that the Petitioner will submit the required documentation to the Respondent No.1 which will satisfy itself and submit the same along with its recommendations to the Respondent Discoms.

88. The next issue raised in the petitions are that 'the obligations and liabilities of Respondents to the Petitioner are on a 'back to back' basis vis-à-vis the obligation to be performed and liabilities to be discharged by the relevant Respondents as the Buying Entities'.

89. The Commission observes that the PPAs dated 02.08.2016, inter alia, provide as under:

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

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

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

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

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

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

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

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

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

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

.....

24. *In other words, even though the Haryana Power (R-2) was not the party to the PPA dated 19.10.2005 and the Amended Agreement dated 18.9.2006, the parties to the PPA have intended that the power sold under the PPA to be further sold to Haryana Power (R-2), the ultimate beneficiary for the purpose of distribution to the consumers of the State of Haryana. As such the Haryana Power (R-2) is entitled to enforce the terms of PPA. To put it in a nut shell, the sale of entire contracted capacity of 300 MW by the Appellant, is intended for re-sale by PTC (R-3) to Haryana Power (R-2) and as such, the ultimate sale of entire 300 MW to Haryana Power (R2) was under the PSA.*

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

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

.....

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

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

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

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

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

.....

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

.....

50. As per the terms of the PPA entered into between the Lanco Power, the Appellant and PTC (R-3), the PTC was required to enter into power sale agreement with the purchaser for onward sale of power from the Appellant’s project. Thus the requirement to execute the PSA was an intrinsic and material provision of the PPA since the performance of the PPA was completely dependent upon the execution of the PSA. Thus, the PPA and PSA are the two documents which are heavily inter-dependent on one another for their sustenance. In order to refer to this aspect, it would be proper to quote the relevant provisions of the PPA.

.....

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

“Recital C-

PTC has entered into a Power Purchase Agreement (hereinafter referred to as “PPA) on 19th October, 2005 as amended further vide an amendment agreement dated

18th September, 2006 with M/s. Lanco Amarkantak Power Private Ltd., (the “Company”), a Generating Company as defined under the Electricity Act, 2003 and which the implementing a coal based thermal power station at Pathadi Village, Korba District, Chhattisgarh, India, to purchase the power and energy output from its unit with an installed capacity of 300 MW, Phase II proposed to be set up (the “Project”), for a period of twenty five (25) years from the Commercial Operation Date of the Project”.

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

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

91. From the above, the Commission is of the view that the PPAs and PSAs are interconnected and inextricably linked to each other and as such there is privity between the Petitioner which is the power generator and the Respondents which are the Discoms and the ultimate beneficiaries of the PPAs as well as parties to the PSA. The back to back nature of the PPAs and PSAs implies that the Respondent Discoms are liable to pay to the Respondent SECI all that the said Respondent SECI has to pay to the Petitioner. However, in so far as payment mechanism is considered, the issue raised for decision of the Commission is whether in view of the back to back nature of PPAs and PSAs, the Respondent SECI were liable to pay to the Petitioner only when/if the Respondent Discoms make payment to the Respondent SECI In this context, the Commission notes the Provisions of Article 10 of PPAs and Article 6 of PSAs (It is pertinent to note that Articles under reference are likely worded in the instant petitions).

92. Article 10 of the PPAs stipulates that:

“10 ARTICLE 10: BILLING AND PAYMENT

10.1 General

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

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

10.2 Delivery and Content of Monthly Bills/Supplementary Bills

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

10.3 Payment of Monthly Bills

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

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

- i) deductions required by the Law; and
- ii) amounts claimed by SECI, if any, from the SPD, through an invoice to be payable by the SPD, and not disputed by the SPD within fifteen (15) days of receipt of the said Invoice and such deduction or set-off shall be made to the extent of the amounts not disputed. It is clarified that SECI shall be entitled to claim any set off or deduction under this Article, after expiry of the said fifteen (15) Days period.
- iii) The SPD shall open a bank account at New Delhi (the "SPD's Designated Account") for all Tariff Payments (including Supplementary Bills) to be made by SECI to the SPD, and notify SECI of the details of such account at least ninety (90) Days before the dispatch of the first Monthly Bill. SECI shall also designate a bank account at New Delhi for payments to be made by the SPD to SECI, if any, and notify the SPD of the details of such account ninety (90) Days before the Scheduled Commissioning Date. SECI and the SPD shall instruct their respective bankers to make all payments under this Agreement to the SPD' Designated Account or SECI's Designated Account, as the case may be, and shall notify either Party of such instructions on the same day.

10.3.3 Late Payment Surcharge

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

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

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

“ARTICLE 6: BILLING AND PAYMENT

6.1. General

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

6.2. Delivery and Content of Monthly Bills

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

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

- i) Provisional Bill for Solar Power Supplied in the immediately preceding Month;*
- ii) (a) Adjustments against the Provisional Bill(s) based on Energy Accounts for the Solar Power Supplied in the Month(s) preceding to the previous month(s);*
- ii) (b) Any other adjustments to cover open access related charges and any other prior-period adjustments;*
- iii) Late Payment Surcharge, if any; and*
- iv) Taxes, Duties, Levies etc. as applicable.*

6.3. Payment of Monthly Bills

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

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

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

Issue No. 3: Whether the claim of “Carrying Cost” for delay in reimbursement by the Respondent is sustainable?

95. The Petitioner has 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 Laws never occurred. The Petitioner 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 Petitioner due to introduction of GST Laws under Article 10.3.3 of the PPA, as Article 12.2 of the PPA makes it obligatory upon the Petitioner to approach the Commission to seek relief for a Change in Law event before raising any supplementary invoices claiming such amount.

96. **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 Petitioner is yet to be adjudicated and the amount if any, due to the Petitioner has to be determined/ computed first. Thereafter, only when the amount is determined, is the Petitioner required to raise a Supplementary invoice for the amount so computed as per Article 10.7 of the PPAs. It is only in case of default on the part of the 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.
97. The Respondent No. 1 has submitted that the PPAs do not have a provision dealing with restitution principles of restoration to same economic position. Therefore, the Petitioner is not entitled to claim relief which is not provided for in the PPAs. The Respondent No. 1 has submitted that in the Judgment of the Tribunal dated 13.04.2018 in Appeal No. 210 of 2017 in *Adani Power Limited –v- Central Electricity Regulatory Commission and Ors*, it was held that since the Gujarat Bid-01 PPA has no provision for restoration to the same economic position, therefore, the carrying cost will not be applicable.
98. The Commission observes that in the judgment of the Tribunal dated 13.04.2018 in Appeal No. 210 of 2017 in *Adani Power Limited v. Central Electricity Regulatory Commission and Ors.*, it was held that since Gujarat Bid-01 PPA has no provision for restoration to the same economic position, 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."

99. Relevant extracts of the Judgment of the 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."

100. As per the above judgment, if there is a provision in the PPAs for restoration of the Petitioner to the same economic position as if no Change in Law event has occurred, the Petitioner 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. In the current case, 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.

Issue No. 4: Whether the Respondent should be directed to reimburse the legal and administrative costs incurred by the Petitioner in pursuing the instant Petition?

101. The Commission makes no Order as to the claim regarding 'legal and administrative costs'.

Summary of decisions

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

a. Issue No. 1: The introduction of 'GST laws' w.e.f. 01.07.2017 is covered under 'Change in Law' in terms of Article 12 of the respective PPAs.

b. *Issue No. 2:* As regards the claims during construction period, the Petitioner has to exhibit clear and one to one correlation between the projects and the supply of goods and services duly supported by the Invoices raised by the supplier of goods and services and auditors certificate as discussed in para 87 above. Respondent SECI is liable to pay to the Petitioner which is not conditional upon the payment to be made by the Respondent Discoms to Respondent SECI. However, the Respondent SECI is eligible to claim the same from the Respondent Discoms on 'back to back' basis as discussed in para 94 above. The Claim based on discussions in para 81 and 83 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 the 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.

c. *Issue No. 3:* The claim regarding separate 'Carrying Cost' in the instant petitions is not allowed.

d. *Issue No. 4:* The Commission makes no Order as to the claim regarding 'legal and administrative costs'.

103. With the above directions, Petition No. 127/MP/2019, Petition No. 129/MP/2019, Petition No. 130/MP/2019, Petition No. 134/MP/2019 and Petition No. 135/MP/2019 stand disposed of.

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