



नईदिल्ली
NEW DELHI

याचिकासंख्या. /Petition No.: 299/MP/2019
360/MP/2019

कोरम/Coram:

श्रीपी. के. पुजारी, अध्यक्ष/Shri P. K. Pujari, Chairperson
श्रीआई. एस. झा, सदस्य/ Shri. I.S. Jha, Member

आदेशदिनांक /Date of Order: 02nd of April , 2020

IN THE MATTER OF:

Petition under Section 79 of the Electricity Act, 2003 read with Article 12 of the Power Purchase Agreement dated 31.05.2017 executed between the Petitioner and Solar Energy Corporation of India Ltd., for seeking approval of Change in Law events due to enactment of the GST Laws.

AND IN THE MATTER OF:

I. Petition No.299/MP/2019

Sadipali Solar Private Limited
614, B Wing, 215 Atrium,
Andheri Kurla Road, Andheri East
Mumbai – 400069

...Petitioner

VERSUS

1. Solar Energy Corporation of India Limited
Through its Managing Director

1st Floor, A-Wing
D-3, District Centre
Saket, New Delhi, 110017

2. The Ministry of New and Renewable Energy
Represented by its Secretary
Block-14, CGO Complex,
Lodhi Road, New Delhi-110 003
3. Grid Corporation of Odisha Ltd,
Grid Corporation of Odisha Building,
Janpath, Bhubaneswar,
Odisha. 751022

...Respondents

AND IN THE MATTER OF:

II. Petition No.360/MP/2019

Jyoti Solar Solutions Private Limited
Represented by its Authorized Signatory
N-2/ 25, Nayapalli, Bhubaneswar,
Odisha – 751015.

...Petitioner

VERSUS

1. Solar Energy Corporation of India Limited
1st Floor, A-Wing
D-3, District Centre
Saket, New Delhi, 110017
2. The Ministry of New and Renewable Energy
Block-14, CGO Complex,
Lodhi Road, New Delhi-110 003
3. Grid Corporation of Odisha Ltd,
Grid Corporation of Odisha Building,
Janpath, Bhubaneswar,
Odisha. 751022

...Respondents

Parties Present: Shri Sourav Roy, Advocate, SSPL and JSSPL
Shri Guarav Majumdar, Advocate, SSPL and JSSPL

Shri Harsh Anand, Advocate, SSPL and JSSPL
Shri Amit Saha, SSPL
Shri Sandeep Saxena, SSPL
Shri Saurav Bagchi, SSPL
Ms. Poorva Saigal, Advocate, SECI
Ms. Tanya Sareen, Advocate, SECI
Shri Debasis, SECI

आदेश /ORDER

The Petitioner, M/s Sadipali Solar Private Limited, in Petition No. 299/MP/2019, is a project company of IBC Solar Ventures India B.V. (hereinafter referred to as 'IBC India') and is primarily engaged in the business of setting up of solar power plants and generation of electricity. The Petitioner, M/s Jyoti Solar Solutions Private Limited, in Petition No. 360/MP/2019, is a project company of M/s Jyoti Infrastructure Private Limited (hereinafter referred to as 'JIPL') and is also engaged in the business of setting up of solar power plants and generation of electricity.

2. The Respondent No.1 in both the Petitions, 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. SECI is responsible for the implementation of a number of schemes of Ministry of New and Renewable Energy, one of them being the Viability Gap Funding (hereinafter referred to as 'VGF') schemes under National Solar Mission, solar park scheme and grid connected solar rooftop scheme. SECI also has a power trading license.
3. The Respondent No. 2 in both the Petitions, Ministry of New and Renewable Energy (hereinafter referred to as 'MNRE'), is the nodal Ministry of the Government of India for all matters relating to new and renewable energy. MNRE issued guidelines for implementation of Scheme for selection of 5,000 MW Grid Connected Solar PV Power Projects with Viability Gap Funding (VGF) under Batch-IV of Phase – II, of the National Solar Mission (hereinafter referred to as 'NSM') through SECI.

4. The Respondent No. 3 in both the Petitions, Grid Corporation of Odisha (GRIDCO), is a Distribution Company (hereinafter referred to as 'DISCOM') in the State of Odisha.
5. The Petitioners have made the following prayers:

In Petition No. 299/MP/2019

- (a) Admit the Petition;
- (b) Hold and declare that the imposition of the Central Goods and Services Tax, 2017, Integrated Goods and Services Tax, 2017 and Odisha Goods and Services Tax Act, 2017 are change in law events under Article 12 of the PPA;
- (c) Direct the Respondent to pay the Petitioners an additional amount of Rs 7,55,13,001.00 as one-time compensation for the additional burden incurred by the Petitioner along with carrying cost.
- (d) Pass such other and further order or orders as this Commission deems appropriate under the facts and circumstances of the present case.

In Petition No. 360/MP/2019

- (a) Admit the Petition;
- (b) Hold and declare that the imposition of the Odisha Goods and Services Tax, 2017, Central Goods and Services Tax, 2017 and Integrated Goods and Services Tax, 2017 is an event under Change in Law under Article 12 of the PPA;
- (c) Direct the Respondent to pay the Petitioners an additional amount of Rs. 2.59 Crores (Rupees Two Crore Fifty Nine Lakhs only) as one time compensation for the additional burden incurred by the Petitioner along with carrying cost.
- (d) Pass such other and further order or orders as this Commission deems appropriate under the facts and circumstances of the present case.

Background

6. On 14.03.2016, MNRE issued guidelines for implementation of Scheme for setting up of 450 MW Grid Connected Solar PV Power Projects under Batch-IV of Phase – II with VGF for “State Specific Bundling Scheme” under which SECI is responsible for implementation of NSM–II scheme of MNRE for setting up Solar Power Plants.

7. On 11.05.2016, SECI invited proposals by a Request for Selection (hereinafter referred to as 'RFS') for setting up Grid Connected Solar-PV Power Projects for 450 MW under NSM Phase – II, Batch – IV, Tranche – II. IBC India and JIPL participated in the bids invited and after following the process of reverse auction conducted by SECI, were selected for setting up of Solar PV ground mount Project at specified locations in the State of Odisha. On 22.11.2016, SECI issued a Letter of Intent vide its Ref. No. SECI/NSM/LOI/OD/IBCSVIBV/10265 to IBC India and Ref. No. SECI/NSM/LOI/OD/JIPL/10264 JIPL for the development of projects. IBC India formed a project company M/s Sadipali Solar Private Limited (Petitioner in Petition No. 299/MP/2019) and JIPL formed a project company M/s Jyoti Solar Solutions Private Limited (Petitioner in Petition No. 360/MP/2019).
8. On 08.02.2017, M/s Jyoti Solar Solutions Private Limited entered into a PPA with SECI for sale of power of 10 MW Solar PV ground mounted project located at Ganjaudar Village, Patnagarh Town, Bolangir District in the State of Odisha at a tariff of Rs. 4.43 per kWh for a period of 25 years from the COD. The Effective Date of the PPA was 22.12.2016 and the SCoD for the project was 22.12.2017.
9. On 31.05.2017, M/s Sadipali Solar Private Limited entered into a Power Purchase Agreement (hereinafter referred to as 'PPA') with SECI for sale of power of 20 MW Solar PV ground mount project located at Village Kandel and Sindhbahali, Tehsil Kesinga, District Kalahandi in the State of Odisha at a tariff of Rs. 4.43 per kWh for a period of 25 years from the COD. The Effective Date of the PPA was 22.12.2016 and the Scheduled Commissioning Date (hereinafter referred to as 'SCoD') for the project was 22.12.2017.
10. On 01.07.2017, the Central Goods and Services Tax Act, 2017 (CGST Act) and the Integrated Goods and Services Tax Act, 2017 (IGST Act) for levy and collection of tax on inter-State supply of goods or services or both by the Central Government were enacted. The Odisha Goods and Services Tax Act, 2017 (OGST Act) was enacted for levy and collection of tax on intra-State supply of goods or services or both by the State of Odisha. Hereinafter, CGST Act, IGST Act and OGST Act are collectively referred to as the 'GST Laws'.

11. The Petitioners have submitted that at the time of submissions of bids they had not contemplated the introduction of additional taxes. Introduction of GST Laws have had a huge impact on the actual cost of the project *vis-a-vis* budgeted cost, which was beyond their control.
12. The Petitioners have claimed that enactment of GST Laws constitute change in law in terms of the provisions of the PPAs. Hence the Petitions.

Submissions of the Petitioners

13. The Petitioners have submitted that they have entered into PPAs with SECI. As per Article 2.1.1 of the PPAs, the agreement came into effect from 22.12.2016 and such date is referred to as the 'Effective Date', which is well before the date of coming into effect of the GST Laws i.e. 01.07.2017.
14. The Petitioners have submitted that Article 12 of the PPAs deals with 'Change in Law' and the consequences thereof. As per Article 12 of the PPAs, 'Change in Law' means the occurrence of events subsequent to the Effective Date which result in the Solar Power Developer i.e. the Petitioners herein, incurring additional recurring/ non-recurring expenditure or income, as the case may be.
15. The definition of "Law" as provided under the PPA is quoted as under:-

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

16. The Article 12 of the PPAs stipulates as under:

12. ARTICLE 12: CHANGE IN LAW

12.1 Definitions

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

12.1.1 "Change in Law" means the occurrence of any of the following events after the Effective Date resulting into any additional recurring/ non-recurring expenditure by the SPD

or any income to the SPD:

- *the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;*
- *a change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;*
- *the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;*
- *a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the SPD;*
- *any change in tax or introduction of any tax made applicable for supply of power by the SPD as per the terms of this Agreement.*

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

12.2 Relief for Change in Law

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

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

17. The Petitioners have submitted that the Change in Law event in the present case has taken place after the Effective Date. In terms of the aforesaid Article 12.2 of the PPAs, the Petitioners are entitled to be compensated for an event of Change in Law. In doing so, the Commission has the power to acknowledge the event of change in law and award a suitable compensation to the affected party to bring it back to the financial position as if the change in law event had not occurred in the first place, from the date on which the Change in Law event has occurred.
18. The Petitioners have submitted that as per Article 12 of the PPAs, the following conditions have to be met with while claiming a relief under Change in Law: -
 - a) The underlying principle of Change in Law provision is to determine the consequence of change in law and to compensate a party affected by a change in law such that the party is restored to the same economic position as if such change in law had not occurred.

- b) The following, inter alia, and not exhaustive items constitute change in law-
 - i. The enactment or coming into force of any law.
 - ii. Change in interpretation of any law.
 - iii. Change in any consents, Clearances or Permits available for the Project.
 - iv. Inclusion of new or Change in the terms and conditions prescribed for obtaining the Consents, Clearances, Permits.
 - v. Change in tax or introduction of any tax made applicable.
 - c) Provided that such change in law results in any additional recurring/ non-recurring expenditure by the SPD or any income to the SPD.
19. The Petitioners have submitted that the enactment of the GST Laws is a Change in Law event according to 1st bullet of Article 12.1.1 of the PPAs since:
- a) The enactment of the GST Laws is enactment of a law repealing the current indirect tax regime.
 - b) The GST Laws have been passed by the Parliament of India and State Legislatures;
 - c) The GST Laws Legislations have been enacted subsequent to 22.12.2016 (which is the Effective Date under the PPA); and
 - d) Implementation of the GST Laws have resulted in the change in the cost of or revenue of the Petitioners.
20. The Petitioners have submitted that the Appellate Tribunal for Electricity (hereinafter referred to as ‘the Tribunal’) in its order dated 19.04.2017 in Sasan Power Limited v Central Electricity Regulatory Commission in Appeal No. 161 of 2015 held that: -

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

21. The Petitioners have submitted that the event being claimed as Change in Law in the present Petitions meets the criteria set out under Article 12 of the PPA and the Petitioners ought to be duly compensated for the same. In terms of and in accordance with the PPAs, the Petitioners may be allowed compensation that would be equivalent to the financial impact of the Changes in Law on the costs incurred by Petitioners so as to restore them to the same economic condition prior to occurrence of the Changes in Law.
22. The Petitioners have submitted that Clause 6.2(4) of the Tariff Policy dated 28.01.2016 issued by Central Government under Section 3 of the Electricity Act, 2003 also recognizes the concept of Change of Law and provides as under:-

“6.4(2) After the award of bids, if there is any change in domestic duties, levies, cess and taxes imposed by Central Government, State Governments/Union Territories or by any Government instrumentality leading to corresponding changes in the cost, the same may be treated as “Change in Law” and may unless provided otherwise in the PPA, be allowed as pass through subject to approval of Appropriate Commission.”
23. The Petitioners have 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. This Article 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 PPA. 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.
24. The Petitioners have submitted that since the tariff for the present projects were worked out on the basis of cost factors existing as on date of bidding, fairness demands that additional cost incurred by the Petitioners due to occurrence of change in law events after the Effective Date should be reimbursed to the Petitioners.
25. The Petitioners have submitted that enactment of the GST Laws has imposed tax on components required for setting up solar power plants that were earlier exempted from tax. For instance, all items of machinery, auxiliary equipment and components required for initial setting up of a solar power generation project or facility were exempted from tax under the Central Excise Tariff Act, 1985 (5 of 1986) vide notification no. 15/2010-CE., dt. 27.2.2010.

However, the Central Excise Tariff Act, 1985 was repealed by the CGST Act. The IGST Act provides for the levy and collection of tax on inter-State supply of goods or services or both by the Central Government. Further, the OGST Act repealed several indirect taxes extant in the State of Odisha, including Value Added 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.

26. The Petitioners have submitted that as a result of the enactment of the GST Laws, the Petitioner 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. The Petitioner 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.
27. The Petitioners have submitted that in respect of the total cost of the Project, they have incurred additional expenditure on account of the Change in Law events. The additional expenditure incurred is mentioned below:

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Description	Amount in Rs.	Description	Amount in Rs.
Civil Works	33,06,030	Supply of PV Modules	1,51,88,708
Supply of Equipment	3,00,37,062	Electrical Balance of Plant (Supply)	71,50,124
Supply of Equipment from IBC solar energy, Germany	3,52,96,079	Civil Works	4,80,826
Variation Under Service Agreement	22,10,160	Installation (Engineering & Service)	2,70,399
Pre-operative, Land Related & Other Indirect	46,63,670	Construction of Transmission Line (33 KV)	17,57,571
N.A.	N.A.	Boundary Wall (Pre Cast)	1,76,266

N.A.	N.A.	Pre-Operative & Other Indirect	9,02,628
Total	7,55,13,001	Total	2,59,26,522

28. The Petitioners have submitted that the tariff of Rs. 4.43/ kWh provided in Article 9.1 of the PPAs was discovered through a competitive bidding process. The tariff quoted by the Petitioners at the time of submitting the bid was worked out on the basis of the existing tax regime at that time. The Petitioners 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 on account of GST Laws.
29. The Petitioners have submitted that the Commission has also acknowledged, declared, and approved the enactment of GST Laws as ‘Change in Law’ event on multiple occasions and 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 was 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 of acquiring goods and services under the GST Laws.
30. The Petitioners have submitted that vide the present petitions, they are seeking relief for the additional expenditure incurred on account of increase in the cost of procurement, engineering, and construction of the Project, i.e. non-recurring additional expenditure under the present petition. The Petitioners reserves the right to approach the Commission to seek appropriate relief for the additional recurring expenditure.
31. The Petitioners have submitted that they are entitled to ‘carrying cost’ for the costs incurred due to the Change in Law events. Carrying cost is the compensation for time value of the

money. Any compensation for Change in Law is incomplete if it does not come with carrying cost that is inherent to the very provision. The cornerstone of Change in Law relief is restitution i.e. relief be granted in a manner so as to place an affected party in the same financial position as if a Change in Law had not occurred.

32. The Petitioners have submitted that carrying cost is in the nature of compensation for money denied at the appropriate time, as held by the Tribunal in the judgment dated 20.12.2012 in Appeal No. 150 and in the judgment dated 13.04.2018 in Appeal No. 210 of 2017. They are entitled to carrying cost and the failure to grant the same would defeat the underlying principle of restitution and render the Change in Law article otiose. Further, the said Article is a restitutive provision and thus ought to be given a wide interpretation.
33. The Petitioners have submitted that compensation is a comprehensive term and is aimed at restoring a party to the same position as if no injury was caused to it, as held by the Hon'ble Supreme Court in the case of *Yadava Kumar vs. The Divisional Manager, National Insurance Co. Ltd. and Anr., (2010) 10 SCC 341*.
34. The Petitioners have submitted that it is now settled law that non-grant of carrying cost would vitiate and defeat the purpose of Change in Law provision of the PPA of restoring the affected party to the same financial position. They had to incur costs due to Change in Law events from the date such events came into force resulting in cash outflow from the date of actual payment to the relevant authorities. They are already incurring these costs and are burdened with additional working capital interest till they get reimbursed . Therefore, they are required to be restored to the same economic position as if Change in Law event has not taken place.
35. The Petitioners have submitted that in view of the above submissions, the Commission ought to recognize and declare the introduction of GST Laws as Change in Law under Article 12 of the PPAs for the purpose of claim for adjustment/ recovery in tariff and that they are entitled to carrying cost for the period from the date of the effect of the Change in Law event.

Submissions of the Respondent No. 1 (SECI)

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

36. The Respondent has submitted that SECI entered into PPAs with the Petitioners for procurement of solar power from the Petitioner's projects in the State of Odisha. The electricity procured by SECI from the Petitioner under the PPA is for onward sale on back to back basis to GRIDCO (Respondent No. 3) under the Power Sale Agreement (hereinafter referred to as 'PSA') dated 25.10.2016 in Petition No. 299/MP/2019 and Petition No. 360/MP/2019. SECI is acting as an intermediary utilizing its trading license to facilitate such purchase and resale of electricity. SECI is not acting as a merchant trader or otherwise independently purchasing the electricity from the SPD having the option to sell electricity to any person at such time and on such terms and conditions as SECI can decide from time to time. SECI 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 decided by MNRE.
37. The Respondent has submitted that the obligations and liabilities of SECI to the Petitioners are on a back to back basis to the obligation to be performed and liabilities to be discharged by GRIDCO. NSM Guidelines for selection of 5,000 MW Grid Connected Solar PV Power Project under Phase-II Batch-IV notified by the MNRE on 14.03.2016, in pursuance to which the above transaction involving SECI is being undertaken with the SPD, inter alia, provides as under:

"3.2. Mechanism of Operation of the VGF Scheme

This scheme envisages providing Viability Gap Funding through SECI to the bidders selected through a transparent bidding process to procure solar power at a pre-determined fixed tariff. The salient feature of the overall mechanism would be as follows:

.....
iv. Sale of solar power: SECI will sign Power Purchase Agreement with developers with pre-determined or discounted tariff (as applicable) fixed by MNRE and back-to-back Power Sale Agreement with buying DISCOMs/State Utilities/bulk consumers. SECI will be entitled to charge a trading margin of Rs. 0.07 per kWh. The solar power tariff as to be paid by SECI to developers will be fixed by MNRE depending on market conditions. MNRE will constitute an Empowered Committee to determine the tariff for purchase of solar power by SECI. This Committee will give recommendations based on which MNRE will, with the approval of Minister in-charge, fix tariff for purchase of solar power by SECI every year before tendering process is started or as and when required. Tariff for sale of solar power by SECI will be determined based on the tariff for purchase of solar power by adding trading margin of Rs. 0.07 per kWh."

“3.11 Power Purchase Agreement

3.11.1 A copy of Standard Power Purchase Agreement to be executed between SECI and the Project Developer shall be provided by SECI along with Invitation for Submission of response to RfS. Within one month of the date of issue of Letter of Intent (LoI), the Power Purchase Agreement (PPA) between SECI and the Project Developer for Purchase of Power from the project will be executed. The PPA shall be for a period of 25 years from the date of CoD.

3.11.2 The developers will be free to reconfigure and repower their plants from time to time during the PPA duration. However, SECI will be obliged to buy power only within the Capacity Utilization Factor (CUF) range laid down in Power Purchase Agreement (PPA) as per guidelines. Excess power generated will be purchased at a notional Support Price of Rs.3 per kWh only. The developers are free to operate their plants after expiry of the 25 years' PPA period if other conditions like land lease etc., permits. However, any extension of the PPA period beyond 25 years shall be through agreements between the Solar Power Developer, SECI and the Buying Utilities.

3.11.3 SECI will execute a Power Sale Agreement (PSA) with the State Utilities/DISCOMs/Bulk Consumers of the buying States for sale of power to them valid for 25 years. Further, State Utilities/DISCOMs will have to maintain LC and Escrow Arrangement as may be defined in the PSA.”

38. The Respondent has submitted that being a State Specific VGF Scheme, from the very beginning, the ultimate beneficiaries had been identified, namely the Distribution Licensee of the State in which the Solar Power project was being set up. Thus, the Petitioners were aware from the beginning that ultimate beneficiaries of the power generated from their project shall be GRIDCO.

39. The Respondent has submitted that RfS document dated 11.05.2016 was issued by SECI for selection of SPDs for development of cumulative capacity of 450 MW in the State of Odisha in terms of the provisions of the Guidelines. The RfS document, inter-alia, reads as under:

3.14.4 Back-to-Back Power Sale Agreement (PSA) will be executed by SECI with the State Buying Utilities for sale of power to them.

40. The Respondent has submitted that in pursuance of the RfS issued, upon selection of the Petitioners as successful bidders, PPAs were entered into between the Petitioners and SECI. Various provisions of the PPAs specifically deal with the back to back PSAs between SECI and GRIDCO.

41. The Respondent has submitted that the PSAs were executed by SECI with GRIDCO with initialed copy of the PPAs to be entered into by SECI with the Petitioner, as an annexure to the PSA. The list of PPAs between SECI and SPDs was also annexed along with the PSAs. The PPAs were entered after due execution of the PSAs. Accordingly, the PPAs with the Petitioners were executed on a back-to-back basis after the PSAs had been executed with GRIDCO. It is evident from the provisions of the PPAs and the PSAs that both the documents are inextricable and intertwined with each other. The clauses and provisions of the bidding documents, PPAs and the PSAs 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 the Petitioner out of its own resources, till such time the amount can be recovered by SECI from the distribution licensee i.e. Respondent No. 3.
42. The Respondent has submitted that the role of an intermediary trader as a ‘conduit’ has also been considered by the Commission in the 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.*
43. 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 SPD and Discoms when the SPD sells electricity to an intermediary trader that in turn re-sells the electricity on a back to back basis to Discoms. 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 that it has the jurisdiction to entertain Petitions filed by generating companies selling power through an intermediary trader to Discoms to grant the necessary relief for matters such as penalties for shortfall in availability of contracted capacity, effect of change in law etc.

44. The Respondent has submitted that 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 GRIDCO remitting the amount to SECI in terms of the respective PSAs. It is, therefore, appropriate that directions are issued to GRIDCO (Respondent No. 3) to pay the amount that may be determined as payable to the Petitioners in the Petition, keeping in view the intermediary status and role of the SECI as a nodal agency to facilitate the Solar Power Project and for the Discom to have an arrangement for procurement of solar power to fulfill their Renewable Purchase Obligation. Any enforcement of the claim by the Petitioners against SECI without the Discom being obligated to pay and discharge the corresponding claim under the PSAs in advance of the discharge of the obligation of the SECI will result in serious financial issues to SECI and thereby, effect implementation of the scheme.

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

45. The Respondent has submitted that the contention of the Petitioner that GST Laws are 'law', as per the PPAs, is not disputed. 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 claim should fall within the scope of the said provision.

46. The Respondent has submitted that it has also given an extension to the Petitioner for 61 days during the period between 01.07.2017 and 30.08.2017 for achieving the commissioning till 21.02.2018 on account of promulgation of the GST Laws in accordance with MNRE Office Memorandum dated 20.06.2018 with respect to extension in SCoD of Solar Plant on account of GST Laws.

47. The Respondent has submitted that the relief claimed by the Petitioner as Prayer (b) is admissible as per the decision taken by the Commission in its earlier decisions namely decision dated 09.10.2019 in Petition No.188/MP/2017 and connected Petitions, decision dated 05.02.2019 in Petition No.187/MP/2018 and connected Petitions and decision dated 18.04.2019 in Petition No.164/MP/2018.

c) Re.: Admissibility of Carrying Cost

48. 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 Petitioners is yet to be adjudicated and the amount if any, due to the Petitioners have to be determined/ computed first. Only after the amounts are determined, are the Petitioners 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 SECI in not making the payment by the due date as per Supplementary invoices, does the issue of Late Payment Surcharge (LPS) 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.
49. The Respondent has submitted that the provision of Article 10.3.3 of the PPAs dealing with late Payment Surcharge and definition of the 'Due Date' in Article 1 read with Article 10.3.1 of the 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 the adjustment of the Change in Law after the Change in Law claim is approved by the Commission. There cannot be any claim for Late Payment Surcharge for the period prior to the due date.
50. The Respondent has submitted that the PPAs do not have a provision dealing with restitution principles of restoration to same economic position. Therefore, the Petitioners are not entitled to claim relief which is not provided for in the 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, therefore, the 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.”

51. 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. The decision on the admissibility of the monetary claim can only be after the Petitioners have submitted complete information and not before. Thus, any delay in the determination of the impact of change in law is on account of the Petitioners. 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 Petitioners themselves.

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

52. 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/2017 and Batch in *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors. And 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.
53. The Respondent has submitted that the Petitioners are required to place before the Commission the extent to which the Petitioner’s projects are subject to such taxes etc. existing prior to 01.07.2017 which have been subsumed in the GST Laws. In the Petitions wherein Orders involving GST Laws have been passed by the Commission, the Commission

has taken note of the implications of various taxes which were in existence prior to 01.07.2017 and were subsumed/ reduced/ remitted. These have to be taken into account to determine the net effect of GST Laws.

54. The Respondent has submitted that relevant documents are required to be given in respect of each item of goods/ equipment/ services. The Auditor Certificate in respect of the above is also to be provided in terms of the directions of the Commission in its Order dated 09.10.2018.

e) Re.: Methodology for payment of compensation (if Any) on account of GST Laws

55. The Respondent has submitted that the Commission in its earlier order in Petition No 164/MP/2018 dated 18.04.2019, with regard to methodology of payment of compensation on account of GST Laws, has stated as under:

“86.

The Commission is of the view that since the quantum of compensation on account of introduction of GST w.e.f. 01.07.2017 is not large, it should be discharged by the Respondent-Procurement as one-time payment in a time bound manner. Accordingly, it is directed that the GST bills shall be paid within 60 days from the date of issue of this Order or from the date of submission of claims by the Petitioner, whichever is later, failing which it shall attract late payment surcharge in terms of the PPA. Alternatively, the Petitioner and the Respondents may mutually agree to a mechanism for the payment of such compensation on annuity basis spread over such period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs. This will obviate the hardship of the Respondents for one-time payment.”

56. The Respondent has submitted that in terms of the above, the Commission has proposed two kinds of mechanism for payment of compensation on account of GST Laws:

- a) One time payment in a time bound manner; or
- 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 Discom).

57. The Respondent has submitted that one time payment will be financially burdensome for the Distribution Company. Accordingly, 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; and
 - d) The per unit rate for change in law should be payable on actual generation subject to annuity value.

Rejoinder filed by the Petitioners

58. The Petitioners have submitted that in paragraph 30 of its reply, SECI has admitted that enactment of the GST Laws falls under the purview of ‘Law’ as defined in the Change in Law clause of the PPAs. Therefore, the questions which remain are:
- a) The manner and the method in which the compensation shall be paid to the Petitioner.
 - b) The payment of carrying cost as prayed for by the Petitioner.

a) Re: The payment of compensation has to be One Time Payment

59. The Petitioners have submitted that it is no longer res integra that compensation which is to be paid for GST as a Change in Law event should be a one-time lumpsum payment. This Commission in the case of *M/s Prayatna Developers Private Ltd. v National Thermal Power Corporation Ltd.* – Petition No. 50/MP/2018 and 52/MP/2018 has held that the basic tariff should not be altered and in view of the fact that the quantum of relief claimed by the Petitioners is not large, the compensation for a Change in Law event should be allowed as a one-time payment in a time bound manner. Similarly, in the case of *ACME Bhiwadi Solar Power Private Limited v Solar Energy Corporation of India Limited and Ors.* – 2018 SCC

OnLine CERC 204 (hereinafter referred to as ‘ACME Bhiwadi Case’) the Commission has allowed the compensation for GST as a Change in Law event to be paid on a one-time basis in a time bound manner.

b) Re.: Carrying Cost

60. The Petitioners have submitted that SECI is liable to pay the carrying cost. An additional burden of bearing the cost for imposition of GST Laws has been borne by the Petitioners from the date on which the GST Laws are in force. The amount of compensation which is being claimed by the Petitioners have also crystallized over a period of time and the compensation which is being claimed is not for the cost of running the project. Compensation is a comprehensive term and is aimed at restoring a party to the same position as if no injury was caused to it, as held by the Hon'ble Supreme Court in the case of *Yadava Kumar vs. The Divisional Manager, National Insurance Co. Ltd. and Anr.*, (2010) 10 SCC 341.
61. The Petitioners have submitted that where the stated purpose is restoration to the same financial position, the Commission ought to consider the aggregate economic impact including carrying cost which is in the nature of compensation. In the present petitions, the Petitioners have furnished complete information of the amounts which had to be paid towards the additional financial burden imposed by the GST Laws. The very essence of having a Change in Law clause in a PPA is to ensure that the economic viability of the developers is not affected and the cost of production remains the same.
62. The Petitioners have submitted that the compensation which they are seeking, is not only to regain the additional expenditure but also to compensate for the time value of money which was used from the working capital of the Petitioners.

c) Re.: Verification of Claims

63. The Petitioners have submitted that SECI has not denied any of the claims specifically pleaded by the Petitioners. The law on pleadings is clear that whenever a particular pleading is opposed/ denied; the plea in opposite must be specific and have material particulars on account of which a particular fact is being denied. Here, SECI has not denied any of the

submissions under the various heads of claims submitted by the Petitioners. If SECI had any objections, it should have specifically denied the facts urged and the claims made by the Petitioner, along with material particulars. The Petitioner has placed its reliance on the case of *Jaspal Kaur Cheema v. Industrial Trade Links*, (2017) 8 SCC 592. Hence, the Commission may pass appropriate orders on the quantum of compensation claimed.

64. The Petitioners have submitted that all the invoices related claim have been submitted by the Petitioner as annexures to the Petition. SECI ought to have verified the invoices. In absence of verification by SECI, the Commission can pass appropriate orders approving the compensation due to the Petitioner as Respondent No. 1 has already admitted that enforcement of the GST Laws falls under the purview of the Change in Law Clause under the PPA.

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

65. The Petitioners have submitted that the contention of SECI is wrong in which it states that SECI being an Intermediary Nodal Agency, cannot be made to pay the amounts which are due to the developers till such time the amounts can be recovered by SECI from Distribution Company itself under the Power Sale Agreements dated 25.10.2016 (Petition No. 299/MP/2019 and Petition No. 360/MP/2019) which is a back to back arrangement. In the Acme Bhiwadi Case, the Commission has held that merely because there may be a back to back arrangement, the generating company cannot be made to wait for compensation indefinitely on this pretext. The law is therefore no longer res-integra. Therefore, in the present petitions also, the Commission may pass such an order wherein the payment of the compensation for GST Laws as a Change in Law event should be paid as a one-time element in a time bound manner.
66. The Petitioners have submitted that the obligation to pay by the due date is not an obligation that is dependent on SECI receiving the payment from the Discom. This is in contrast to Clause 10.4 of the PPAs wherein it has been explicitly mentioned that the particular clause is to operate as a back to back obligation. Therefore, Clause 10.4 is a clause that is back to back whereas the clause on the payment by Due Date has not been made back to back and

therefore the payment by SECI to the developer is not dependent on the Discom paying SECI.

67. The Petitioners have submitted that under Clause 4.5 of the Guidelines for setting up of 450 MW Grid Connected Solar PV Power Projects under Batch – IV of Phase – II with Viability Gap Funding under the NSM, SECI has the liability to create a Payment Security Mechanism to cover delay/ defaults in payments to SECI, so that the payment to the developers can be made on time.

Hearing dated 25.02.2020

68. During hearing, Learned counsel for the Respondent, SECI submitted that the issues raised in the present Petitions are already covered in the earlier decisions of the Commission. Learned counsel further submitted that, with regard to the methodology of payment of compensation on account of GST Laws, the Commission in its earlier orders has approved two mechanisms, namely (i) one-time payment in a time bound manner, or (ii) payment on annuity basis spread over the duration of PPA as a percentage of tariff as mutually agreed between SPDs and SECI. Accordingly, SECI has proposed the methodology for payment of compensation on account of GST laws on annuity basis.
69. In response, the learned counsel for the Petitioners submitted that the Petitioners do not agree on annuity formula proposed by SECI. Learned counsel submitted that since the amount of compensation sought in the instant Petitions are only Rs. 7.55 crore and Rs 2.59 crore respectively, the Petitioners are insisting for one-time payment in line with the Commission`s earlier orders on the subject matter.

Analysis and Decision:

70. The Petition No. 299/MP/2019 was filed on 06.09.2019 and Petition No. 360/MP/2019 was filed on 03.10.2019. The Petitions were heard on 25.02.2020 and orders were reserved. We have heard the learned counsels for the Petitioners and the Respondents and have carefully perused the records. Since the petitions are likely worded and contain similar issues to be adjudicated, the same are clubbed together.

71. The brief facts of the petitions are that the Petitioners are generating companies engaged in the business of development, building, owning, operating and maintaining utility scale grid connected solar power projects, for generation of solar power. The facts are summarized as under:

	299/MP/2019	360/MP/2019
Scheme	NSM-II	NSM-II
Phase	II	II
Batch	IV	IV
Nodal Agency	SECI	SECI
RfS	11.05.2016	11.05.2016
Capacity MW	20	10
Power	Solar	Solar
Location	Village Kandel and Sindhbahali, Tehsil Kesinga, District Kalahandi in the State of Odisha	Village Ganjaudar, Patnagarh Town, Bolangir District in the State of Odisha
PPA Executed	31.05.2017	08.02.2017
Effective date	22.12.2016	22.12.2016
GST Laws	01.07.2017	01.07.2017
SCoD	22.12.2017	22.12.2017
Tariff	4.43/KWh	4.43/KWh
VGF	YES	YES
Change in Law	Article 12	Article 12
Incremental impact on Project Cost as claimed by the Petitioners	Rs. 7.55 Crore	Rs. 2.59 Crore

72. The Solar Power Plants were to be developed on long term basis at a discovered tariff. As per the PPAs executed with SECI, the Solar PV power was to be purchased from the Petitioners and sold to GRIDCO in the State of Odisha. On 01.07.2017, the GST Laws were enacted for levy and collection of tax on supply of goods or services or both.
73. The Petitioners have submitted that they 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 22.12.2016 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 Petitioners 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 Petitioners have bid for supplying power do not change in times to come and that no detriment to either the Petitioners or the Respondents is caused due to such 'Change in Law' events. **Per Contra**, the Respondent No. 1, SECI, has submitted that there is no dispute that the GST Laws are 'law', 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. Further, regarding the amount payable to the Petitioners (if any) on account of 'GST Laws' the liability will be back to back because of intertwining nature of PPAs and PSAs.

74. 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 Odisha 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 Petitioners are entitled to claim relief under Article 12.2 of the PPAs for the 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?*

75. 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 Odisha 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?*

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

77. 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.”

78. The Commission observes that as per Article 12 of the PPAs, ‘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.
79. The Commission notes that the Petitioners have executed the PPAs on 31.05.2017 and 08.02.2017 with effective date as 22.12.2016 in petition No. 299/MP/2019 and 360/MP/2019

respectively i.e. before the introduction of GST Laws on 01.07.2017. Further, the SCoD of the projects were on 22.12.2017 i.e. after the introduction of GST Laws on 01.07.2017. Therefore, the Petitioners are entitled for relief under 'GST laws'.

Issue No. 2: Whether the Petitioners are 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?

80. The Petitioners have submitted that it has incurred adverse financial consequences due to introduction of GST Laws, which have resulted in additional financial burden on the Petitioners on account of increase in the Engineering, Procurement & Construction costs and these costs were not contemplated by the Petitioners at the time of bid submission. **Per Contra**, the Respondent has submitted that the claim may be denied.
81. 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'.
82. The Commission observes that the Petitioners have 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 on account of GST Laws 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'. It is pertinent to note that under 'GST Laws' it has been provided that *"If point of taxation of Goods/Services before the GST implementation then it will be taxed under earlier law. GST will not be applicable. Any portion of any supply whose point of taxation is after GST implementation will be taxed under GST. The time of goods/supply of services shall*

be the earlier of the:- (a) the date of issuing invoice (or the last day by which invoice should have been issued) OR (b) the date of receipt of payment - whichever is earlier.” A plain reading of the above implies that according to ‘GST Laws’, in cases where the invoice is raised or consideration for the goods/ supply of services have been received before 01.07.2017 and the tax has already been paid under the earlier law, the GST will not be applicable in such cases. It is immaterial whether the consideration for supply has been paid fully or partly.

83. The Commission observes that various provisions of PPAs 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 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. 1.0 Cr./MW prior to declaration of 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 twelve (12) 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 46.253 Million kWh (MU). If for any Contract Year, it is found that the SPD has not been able to generate minimum energy of 35.741 Million kWh (MU) till the end of 10 years from the COD and 33.638 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."

84. 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 Petitioners 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 Petitioners 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.

85. The Commission observes that in the instant petitions, the tariff has been discovered under transparent e-bidding process in accordance with the NSM guidelines issued by the Central Government. In the competitive bidding scenario, the SPDs bid 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 levellised tariff is solely a decision of the SPDs.

86. The Commission observes that the Petitioners have requested for the payment to be made in lumpsum by way of one-time payment whereas the Respondent No.1 (SECI) has submitted that one-time payment will be financially burdensome for the distribution company. Instead the SECI has proposed a methodology for payment of compensation on account of GST Laws on annuity basis.
87. The Commission observes that it has already approved 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 Petitioners and the Respondents may mutually agree to a mechanism for the payment of such compensation on annuity basis spread over such period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs. This will obviate the hardship of the Respondents for one-time payment.
88. In view of above, the Petitioners are 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 paragraph 82 and 84 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 PPAs. Alternatively, the Petitioners and the Respondents may mutually agree to a mechanism for the payment of such compensation on annuity basis spread over such period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs. This will obviate

the hardship of the Respondents for one-time payment. It is pertinent to mention here that the Petitioners will submit the required documentation to the Respondent No.1 which will satisfy itself and submit the same along with its recommendations to GRIDCO.

89. The next issue raised in the petitions are that ‘the obligations and liabilities of Respondents to the Petitioners 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’.

90. The Commission observes that the PPAs, inter alia, provide as under:

“G. 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.

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

91. 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.

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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).

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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 is 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).”

92. From the above, it is clear that the PPAs and PSAs are interconnected and inextricably linked to each other and as such there is privity of contract between the Petitioners which are the power generators and the Respondent No. 3 (GRIDCO) which is the Discom and the ultimate beneficiary of the PPAs as well as party to the PSAs. The back to back nature of the PPAs and PSAs implies that the GRIDCO is 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 is liable to pay to the Petitioners only when/if GRIDCO makes 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).

93. 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."*

94. 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.”*

95. From the above, the Commission observes that the billing and payment between the Petitioners and Respondent SECI are not conditional upon billing and payment between Respondent SECI and the Respondent No. 3 (GRIDCO). 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 GRIDCO is liable to pay to the Respondent SECI all that Respondent SECI has to pay to the Petitioner. However, payment to the Petitioners 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 Petitioners 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?

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

occurred. The Petitioners can be brought to the position existing prior to the occurrence of the Change in Law event only if the Petitioners are also compensated in the amount of the financial cost of the additional expenditure incurred as a result of the Change in Law by paying it carrying cost. The Petitioners could not have raised supplementary invoices claiming the additional recurring expenditure incurred by the Petitioners 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 Petitioners to approach the Commission to seek relief for a Change in Law event before raising any supplementary invoices claiming such amount.

97. **Per Contra**, the Respondents have submitted that there is no provision in the PPAs regarding carrying cost or interest for the period till the decision of the Commission acknowledging the ‘change in law’ and deciding on the amount to be paid for such change in law namely ‘provide for relief for the same’, as specified in Article 12.2.2 of the PPAs. The ‘Change in Law’ claim of the Petitioners is yet to be adjudicated and the amount if any, due to the Petitioners have to be determined/ computed first. Thereafter, only when the amount is determined, are the Petitioners required to raise a Supplementary invoice for the amount so computed as per Article 10.7 of the 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.
98. 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 Petitioners are 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.

99. 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.”

100. 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.”

101. As per the above judgment, if there is a provision in the PPAs for restoration of the Petitioners to the same economic position as if no Change in Law event has occurred, the Petitioners are eligible for 'Carrying Cost' for such allowed 'Change in Law' event(s) from the effective date of Change in Law event until the same is allowed by the Commission. 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.

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 Petitioners have 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 paragraph 88 above. Respondent SECI is liable to pay to the Petitioners which are 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 paragraph 95 above. The claim based on discussions in paragraph 82 and 84 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 Petitioners, whichever is later, failing which it will attract late payment surcharge as provided under PPAs/PSAs. Alternatively, the Petitioners 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.

103. With the above directions, Petition No. 299/MP/2019 and Petition No. 360/MP/2019 stand disposed of.

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