



नई दिल्ली
NEW DELHI

याचिका संख्या. /Petition No.: 388/MP/2018
395/MP/2018

कोरम/Coram:

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

आदेश दिनांक /Date of Order: 27th of March, 2020

IN THE MATTER OF:

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

AND IN THE MATTER OF:

1) Petition No. 388/MP/2018

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

...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 (MNRE)
Block-14, CGO Complex,
Lodhi Road, New Delhi-110 003
3. Mangalore Electricity Supply Company Ltd. (MESCOM)
MESCOM Bhavan, Kavoor Cross Road,
Bejai, Mangaluru, Karnataka 575004
4. Bangalore Electricity Supply Company Ltd. (BESCOM)
6, 2nd Floor, 2nd B Cross Rd,
Koramangala 1A Block Koramangala,
Bengaluru, Karnataka 560 034
5. Chamundeshwari Electricity Supply Corp. Ltd. (CESC)
Sri Harsha Rd,
Lashkar Mohalla, Mandi Mohalla,
Mysuru, Karnataka 570001
6. Gulbarga Electricity Supply Company Ltd. (GESCOM)
Station Road,
Kalaburagi, Karnataka 585 102
7. Hubli Electricity Supply Company Ltd. (HESCOM)
PB Road,
Durgad Bait Navanagar,
Hubballi, Karnataka 580 025
8. Northern Power Distribution Company of Telangana Limited,
H. No. 2-5-31/2,
Corporate Office, Vidyut Bhavan,
Nakkalgutta, Hanamkonda,
Warangal, Telangana. 506001
9. Southern Power Distribution Company of Telangana Limited,
Corporate office: # 6-1-50,
Mint Compound,
Hyderabad, Telangana. 500063

...Respondents

AND IN THE MATTER OF:

2) Petition No. 395/MP/2018

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

VERSUS

1. National Thermal Power Corporation Ltd. (NTPC),
Core-7, SCOPE Complex, 7,
Institutional Area, Lodi Road,
New Delhi – 110003
2. The Ministry of New and Renewable Energy (MNRE)
Block-14, CGO Complex,
Lodhi Road, New Delhi-110 003
3. Mangalore Electricity Supply Company Ltd. (MESCOM)
MESCOM Bhavan,
Kavoor Cross Road, Bejai,
Mangaluru, Karnataka 575004
4. Bangalore Electricity Supply Company Ltd. (BESCOM)
6, 2nd Floor, 2nd B Cross Rd, Koramangala 1A Block,
Koramangala, Bengaluru, Karnataka 560034
5. Chamundeshwari Electricity Supply Corp. Ltd. (CESC)
Sri Harsha Rd, Lashkar Mohalla, Mandi Mohalla,
Mysuru, Karnataka 570001
6. Gulbarga Electricity Supply Company Ltd. (GESCOM)
Station Road, Kalaburagi, Karnataka 585102
7. Hubli Electricity Supply Company Ltd. (HESCOM)
PB Road, Durgad Bail,
Navanagar, Hubballi,
Karnataka 580025

...Respondents

Parties Present:

Ms. Aparajita Upadhyay, Advocate, WS(M)PL and PSEPL
Shri Rakesh Shah, WS(M)PL and PSEPL
Ms. Poorva Saigal, Advocate, SECI and NTPC
Ms. Tanya Sareen, Advocate, SECI and NTPC

आदेश /ORDER

The Petitioner, M/s Wardha Solar (Maharashtra) Private Ltd. (hereinafter referred to as 'WSMPL') in Petition No. 388/MP/2018 is a project company of M/s Parampujya Solar Energy Pvt. Ltd. primarily engaged in the business of setting up of solar power plants and generation of electricity. WSMPL is developing Solar Photo Voltaic Power Plants of 40 MW at Village- Siddapur, Taluk- Vijayapura, District - Vijayapura, in the State of Karnataka and 10 MW at Village Kordi Kotagi, Taluk- Yelburga, District- Koppal i.e. cumulative of total 50 MW in the State of Karnataka.

2. The Petitioner, M/s Parampujya Solar Energy Pvt. Ltd. (hereinafter referred to as 'PSEPL') in Petition No. 395/MP/2018 is also engaged in the business of setting up of solar power plants and generation of electricity. PSEPL is developing five (5) Solar Photo Voltaic Power Plants Projects each of 10MW capacity i.e. 50 MW Capacity under DCR in State of Telangana.
3. The Respondent No. 1 (in Petition No. 388/MP/2018) Solar Energy Corporation of India Limited (hereinafter referred to as 'SECI') is a company under the administrative control of the Ministry of New and Renewable Energy, Government of India (hereinafter referred to as 'MNRE') established to facilitate the implementation of Jawaharlal Nehru National Solar Mission (hereinafter referred to as 'JNNSM'). SECI is responsible for the implementation of a number of schemes of MNRE, the major one being the VGF schemes for large scale grid connected projects under JNNSM, solar park scheme and grid connected solar rooftop scheme. SECI also has a power trading license for trading of solar power from projects set up under the schemes being implemented by it.
4. Whereas the Respondent No. 1 (in Petition No. 395/MP/2018) NTPC Ltd. (hereinafter referred to as 'NTPC') is a Public Sector Undertaking and is engaged in the business of generation of electricity and allied activities. NTPC is responsible for implementation of 'State Specific Bundling Scheme' of the National Solar Mission (hereinafter referred to as 'NSM') scheme of MNRE for setting up solar power plants.
5. The rest of Respondents in both the Petitions are Distribution Companies (hereinafter referred to as 'Discoms') in respective States of Karnataka and Telangana.

6. The Petitioners have made the following prayers:

In Petition No. 388/MP/2018

- (a) *Admit the Petition;*
- (b) *Hold and declare that the imposition of the Integrated Goods and Services Tax, 2017, Central Goods and Services Tax, 2017 and Karnataka Goods and Services Tax, 2017 is an event under Change in Law under Article 12 of the PPA;*
- (c) *Restore the Petitioner to the same economic condition prior to occurrence of the Changes in Law by directing SECI to pay to the Petitioner the amount claimed under Change in Law in terms of Article 12 of the PPA along with carrying cost.*
- (d) *To pass such other and further order or orders as this Commission deems appropriate under the facts and circumstances of the present case.*

In Petition No. 395/MP/2018

- (a) *Admit the Petition*
- (b) *Hold and declare that the imposition of the Integrated Goods and Services Tax, 2017, Central Goods and Services Tax, 2017 and Telangana Goods and Services Tax, 2017 is an event under Change in Law under Article 12 of the PPAs;*
- (c) *Restore the Petitioner to the same economic condition prior to occurrence of the Changes in Law by directing NTPC to pay to the Petitioner the amount claimed under Change in Law in terms of Article 12 of the PPAs along with carrying cost*
- (d) *To pass such other and further order or orders as this Commission deems appropriate under the facts and circumstances of the present case.*

Background

7. MNRE on 04.08.2015 issued Guidelines for implementation of the Scheme for setting up of 2000 MW Grid Connected Solar PV Power Projects under Phase-II, Batch-III with viability

gap funding support from National Clean Energy Fund, under which SECI was designated as the nodal agency for implementation of the scheme.

8. SECI issued the Request for Selection (hereinafter referred to as 'RfS') Document with RfS no. SECI/JNNSM/P-2/B-3/RfS/KA/022016 dated 15.02.2016 for Selection of Solar Power Developers for Setting up of Grid Connected Solar PV Power Projects of 1000 MW capacity in State of Karnataka. M/s Parampujya Solar Energy Pvt. Ltd. submitted its bid and was selected as the successful bidder. On 02.07.2016, SECI issued the Letter of Intent (hereinafter referred to as 'LOI') vide its Ref No. SECI/ JNNSM/ LOI /KA /PSEPL /P1 /8466 and Ref No. SECI/ JNNSM/ LOI/ KA/ PSEPL /P1/8467 to the M/s Parampujya Solar Energy Pvt. Ltd. for development of Solar Photo Voltaic Projects. M/s Parampujya Solar Energy Pvt. Ltd. formed the project company M/s Wardha Solar (Maharashtra) Pvt. Ltd. (Petitioner in Petition No. 388/MP/2018) within the provisions of the RfS. WSMPL entered into two (2) Power Purchase Agreements (hereinafter referred to as 'PPAs') for 50 MW (10 MW and 40 MW) with SECI dated 22.09.2016.
9. NTPC invited proposals through a RfS on 09.10.2015 for setting up Grid connected Solar-PV Power Projects of 350 MW capacity (10 MW x 35 Projects) on the land to be identified & arranged by the Solar Power Developers in the State of Telangana. PSEPL participated in the bids invited by NTPC and submitted its proposal for development of five Solar Photo Voltaic Project of 10MW each to be located in the State of Telangana. After following the process of Reverse Auction conducted by NTPC, PSEPL was selected as the successful bidder. On 20.06.2016, NTPC issued the LOI vide reference No. NTPC/NSM/TI/NSP-DCR/TEL-10/50MW/0024 for development of five Projects of 10 MW each i.e. 50 MW Solar Power Project to be located in the state of Telangana. PSPEL entered into the five (5) PPAs with NTPC dated 04.08.2016.
10. On 01.07.2017, the Central Goods and Services Tax Act, 2017; The Integrated Goods and Services Tax Act, 2017 for levy and collection of tax on inter-State supply of goods or services or both by the Central Government were enacted. The Karnataka Goods and Services Tax Act, 2017 and The Telangana Goods and Services Tax Act, 2017 were enacted for levy and collection of tax on intra-State supply of goods or services or both by the respective States.

11. On 15.07.2017, the Petitioners sent notice to SECI/NTPC regarding the Change in Law event that took place after applicability of GST w.e.f. 01.07.2017. In this regard, no response was received from SECI and NTPC.
12. The Petitioners have claimed that enactment of GST laws constitute change in law in terms of the provisions of the PPAs.
13. Hence, the Petitions.

Submissions of the Petitioners

14. The Petitioners have submitted that SECI and NTPC have been entrusted for setting up of grid connected Solar-PV Projects under various Schemes issued by the MNRE. The major ones being the Bundling Schemes, Viability Gap Funding schemes, solar park scheme and grid connected solar rooftop schemes. The SECI/NTPC issued RfS for selection of SPDs for development of cumulative capacity in the State of Karnataka and Telangana. The Petitioners were declared as the successful bidders and were awarded contracts and thereafter executed PPAs.
15. The Petitioners have submitted that the two (2) PPAs were executed on 22.09.2016 in Petition No. 388/MP/2018 and five (5) PPAs were executed in Petition No. 395/MP/2018 on 04.08.2016 i.e. well before the date of coming into effect of the “GST Laws” i.e. 01.07.2017.
16. The Petitioners have submitted that with the enactment of the GST Laws, the capital cost of the projects, including cost of construction has escalated, hence making the tariff quoted at the time of bid for allocation of project unviable. The total escalation in cost of WSMPL due to implementation of GST is about Rs. 14,17,79,776/- and similarly, total escalation in cost of PSEPL due to implementation of GST is about Rs. 16,82,51,612/-. On account of levy of IGST, CGST and SGST, the construction cost of WSMPL has escalated to Rs. 12,61,71,736/- and that for PSEPL has escalated to Rs. 14,81,11,128/-.
17. The Petitioners have submitted that before the Effective Date, Service Tax at the rate of 15% was being levied on O&M Expenses. In view of the Notification No. 20/2017-Central Tax

(Rate) of Department of Revenue, Ministry of Finance, Government of India under the CGST Act dated 22.08.2017 and under the Notification dated 29.06.2017 of the Finance Secretariat, Government of Karnataka and Telangana under the SGST Act, CGST and SGST @ of 9% each is being levied on O&M expenses. This will lead to an incremental impact of Rs. 1.56 Crore approximately on WSMPL and Rs. 2.1 Crore approximately on PSEPL.

18. The Petitioners have submitted that O&M expenses are recurring expenses in terms of Article 12.1.1 of the PPA and includes activities like salary, estimated maintenance costs, and monthly income from leases etc. As a matter of prudent industrial practice, the O&M services are outsourced to third parties to ensure international standards in plant inspection procedures, quality assessment plans and checklists for maintenance. Outsourcing of O&M is thus a practical requirement to achieve targets in the most efficient way possible. The Commission in its Order dated 19.09.2018 in Petition No. 50/MP/2018– Prayatna Developers Pvt. Ltd. vs. NTPC Ltd. & Ors. has observed as under:-

“149. The Commission is of the view that the recurring expenses referred to in Article 12 of the PPA includes activities like salary, tax expenses, estimated maintenance costs, and monthly income from leases etc. It is apparent that GST will apply in case of outsourcing of the,, Operation and Maintenance” services to a third party (if any). However, outsourcing of the Operation and Maintenance” services is not the requirement of the PPA/ bidding documents. The concept of the outsourcing is neither included expressly in the PPA nor it is included implicitly in the Article 12 of the PPA. It is a pure commercial decision of the Petitioners taken for its own advantage and any increase in cost including on account of taxes etc. in the event the Petitioners choose to employ the services of other agencies, cannot increase the liability for the Respondents. Therefore, the Commission holds that claim of the Petitioners on account of additional tax burden on operation and maintenance expenses (if any), is not maintainable.”

19. The Petitioners have submitted that provisions of PPAs do not specially segregate and provide for covering outsourcing of O&M of solar projects. As a matter of industrial practice, it is considered a part of the expenditure incurred by the generator. The PPAs do not have any provision regarding requirement or prohibition for outsourcing O&M as it is dependent on various contingent physical and economic factors that cannot be determined at the time of drafting of PPAs. Outsourcing of O&M is not some dispensable activity as certain activities are required to be outsourced to experts to ensure quality of work. It is thus a prudent utility

practice and in following the same, the Petitioner has acted in compliance with its obligation to act in accordance with prudent utility practice as provided in the PPA.

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

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

21. The Petitioners have submitted that had it been the intention of the Commission that the O&M work is not to be outsourced it should have mentioned the word "employees" instead of "manpower". This clearly shows that intention of the Commission is not to restrict the solar power developers to use in-house staff responsible for entire operation and maintenance work.
22. The Petitioners have submitted that the equipment installed and commissioned by the solar project developer should be in operational/functional condition throughout the O&M period. Therefore, O&M expenses, apart from manpower cost also include supply of all tools, tackles, spares etc. for replacement of electrical, mechanical and electronic equipments which becomes beyond repair. GST paid on such supply, being recurring expenses should be made pass through.
23. The Petitioners have submitted that for determination of the impact of GST in O&M Expenses which the Petitioner is going to incur in next 25 years of PPA tenure, the Petitioners have worked on the basis of relevant normative parameters as specified by the Central Commission in the Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012 dated 06.02.2012 as amended on 31.03.2016. The Petitioners have considered the parameters with an additional 3% GST impact, i.e. 18% GST on the normative O&M expenses and accordingly, net present value of Pre-GST O&M Expenses and post GST impact works out to Rs. 1.56 Crores (approx.) in WSMPL and Rs. 2.1 crore (approx.) in PSEPL.

24. The Petitioners have submitted 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 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 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.

25. The Petitioners have submitted that in the instant petitions, the PPAs were executed before the date of coming into effect of the "GST Laws", i.e. 01.07.2017. The event of enactment of "GST Laws" has occurred after the "Bidding" and the enactment of the "GST Laws" have resulted in additional recurring and non-recurring expenditure for the Petitioners. In terms of the aforesaid Article 12.2 of the PPA, the Petitioners are entitled to claim the same being an event of Change in Law. As per Article 12 of the PPA, the underlying principle of Change in

Law provision is to determine the consequence of change in law and to restore a party affected to the same economic position by providing a relief under change in law, as if such change in law had not occurred. Article 12.1.1 of the PPA therefore cannot be restricted in its applicability. It specifies multiple events that would together or independently qualify as Change in Law. The events such as 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 qualify for Change in Law.

26. The Petitioners have submitted that first bullet of Article 12.1.1 is an all-inclusive provision and its applicability extends to all events irrespective of the events being covered under a specific bullet under Article 12.1.1. This position has been settled by the Commission in its Order dated 19.09.2018 in Petition No. 50/MP/2018– *Prayatna Developers Pvt. Ltd. vs. NTPC Ltd. & Ors.*
27. The Petitioners have submitted that as per the last bullet of Article 12.1.1, any event of change relating to tax applicable for supply of power will be a change in law event under the PPA. In the present case, the entire Indirect tax laws of the country have undergone a major overhaul and almost all of the Central and State level taxes which existed on the Effective Date have been replaced/ abolished/ subsumed by the GST Laws. In view thereof, the change in tax regime brought by the GST legislations qualify as change in law as per the last bullet of Article 12.1.1. It is further submitted that the words “supply of power” in last bullet of Article 12.1.1 include all the taxes that are payable for the raw material or the inputs required for generation of power.
28. The Petitioners have submitted that the Changes in Law claimed in the present Petitions meet the criteria laid down under the first bullet and last bullet of Article 12 of the PPAs to qualify as Changes in Law for which the Petitioner ought to be reimbursed. In this regard, it is essential to consider the directions issued vide letter dated 27.08.2018 by the Ministry of Power under Section 107 of the Electricity Act, 2003. In the aforesaid letter, the Ministry of Power has directed the Commission to treat any change in taxes imposed by the Central Government or the State Government as change in law. Accordingly, it is submitted that the

Change in law provision in the PPAs is not limited to tax on supply of power as contended by NTPC and includes all the taxes levied during construction of the solar power plant.

29. The Petitioners have submitted that in terms of and in accordance with the PPAs, the Petitioner shall be granted relief that would be equivalent to the financial impact of the Changes in Law on the costs and revenues of the Petitioner as to restore the Petitioner to the same economic condition prior to occurrence of the Changes in Law.
30. The Petitioners have submitted that they are entitled to “Carrying Costs” 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. It is submitted that the mandate of Change in Law provisions across all PPAs (standard documents drafted by the government) is restitution i.e. relief be granted in a manner so as to place an affected party in the same economic position as if a Change in Law had not occurred. Restitution is therefore inherent to compensation. Carrying cost is in the nature of compensation for money denied at the appropriate time, as held by APTEL 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. The principle of recovery of carrying cost/ interest and time value of money has been recognized in the following cases: Judgment of the APTEL dated 13.04.2018 in Appeal No. 210 of 2017, *Adani Power Limited vs. Gujarat Electricity Regulatory Commission & Ors.*; *North Delhi Power Ltd vs. DERC* 2010 ELR (APTEL) 0891; *Tata Power Company Ltd vs. Maharashtra Electricity Regulatory Commission* 2011 ELR (APTEL) 336.
31. The Petitioners have submitted that in view of the aforesaid, they are entitled to carrying cost for the period from the date of the effect of the Change in Law event.

Submissions of the Respondents SECI & NTPC

32. The Respondents SECI and NTPC have submitted that in order to qualify for relief under the change in law provision contained in the PPA, the conditions mentioned in Article 12 therein dealing with ‘Change in Law’ need to be satisfied, namely, each of the claim should fall within the scope of the said provision.

a. The Scope and Applicability of Article 12.1.1 of the PPAs

33. The Respondents SECI and NTPC have submitted that APTEL vide Judgment dated 14.08.2018 in Appeal No. 111 of 2017 in *M/s. GMR Warora Energy Limited –v- Central Electricity Regulatory Commission and Ors.* and in the case of *Adani Power Rajasthan Limited –v- Rajasthan Electricity Regulatory Commission and Ors.* and others has interpreted the scope of the last bullet point - ‘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’ and the first bullet under Article 12.1.1 as under:

“iv. Before dealing the issues there is need to deal one major issue related to tax which will settle many of the issues raised by the Discom. This issue is related to fifth bullet of Article 10.1.1 of the Change in Law event. The Discom/ MSEDCL/ Prayas Energy Group have contended that the any change in tax or levy of new tax is to be seen as tax on supply of power and not the taxes on the input costs for generation of electricity.

v. Thus, we hold that this issue has been dealt by this Tribunal in detail in the judgement dated 14.8.2018 of this Tribunal in Adani Judgement. The issue has been decided in favour of the Adani (generator/Seller) in the said judgement. The relevant extract from the Adani Judgement is reproduced below:

‘11. d) Before discussing the issues there is a need to address a common issue raised by the Discoms related to allowance of tax under Change in Law in terms of the PPA. According to the Discoms that as per the 5th bullet of the Article 10.1.1 of the PPA change in tax or introduction of any new tax is only applicable to supply of power which also means sale of power if definition of supply is taken in terms of the Act. The Discoms have contended that if there is specific provision dealing with the tax under Change in Law then other provisions of Change in Law Article are not allowed to deal with the tax and as such no other tax implications are allowed to be covered under Change in Law under the PPA. The Discoms have also relied on some judgements of Hon’ble Supreme Court on this issue. We have gone through the said judgements and we observe that according to the judgements relied by the Discoms, the taxes once dealt in a particular clause of a contract then there is no scope for considering taxes under other clauses of a contract.

*e) APRL has submitted that the generator undertakes many activities to ensure supply of power to the Discoms. APRL has relied on the judgement of Hon’ble Supreme Court in case of *State of A.P. v. NTPC (2002) 5 SCC 203* wherein it has been held that the production (generation), transmission, delivery and consumption are simultaneous, almost instantaneous. According to the said judgement, the applicable*

taxes on inputs for generation of power can be construed to be taxes on supply of power. APRL has further contended that if the contention of the Discoms is accepted than the Change in Law provision would be applicable during the Operating Period and the applicability of the said provision will become redundant during Construction Period. There is some strength in the contention of APRL as there will be no applicability of Change in Law provisions if there are changes in tax/duties/levies etc. rates or imposition of new tax/duties/levies etc. during Construction Period and on input costs related to power generation.

f) APRL has further contended that the reliance of the Discoms on the maxim 'reum facit cessare tactium' meaning when express inclusions are specified, anything which is not mentioned explicitly is excluded is misplaced as the Hon'ble Supreme Court in case of Assistant Collector of Central Excise Calcutta Division v. National Tobacco Company of India Ltd. (1972) 2 SCC 560 has held that the rule of prohibition by necessary implication could be applied only where a specified procedure is laid down for performance of duty or where there is an express prohibition.

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

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

.....”

34. The Respondents SECI and NTPV have submitted that the scope of Article 12.1.1 of the PPAs have been interpreted and decided by the Commission vide order dated 19.09.2018 in *Prayatana Developers Pvt. Ltd –v- NTPC Limited and Ors and Azure Power Venus Pvt. Ltd. -v -Solar Energy Corporation of India Limited and Ors*, in Petition No. 50/MP/2018 and 52/MP/2018; Order dated 09.10.2018 in Petition No.188/MP/2018 and Batch in the matter of *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors. Batch*; and Order dated 05.02.2019 in Petition No.187/MP/2018 and Batch in the matter of *M/s. Renew Wind Energy (TN2) Private Limited –v- NTPC Limited Batch*; Order dated 18.04.2019 in Petition No. 164/MP/2018 and 165/MP/2018 in the case of *Parampujya Solar*

Energy Pvt. Limited v NTPC and Others and Batch and by the APTEL in the decision dated 13.04.2018 in the case of *Adani Power Limited –v- Central Electricity Regulatory Commission and Others*, in Appeal No. 210 of 2017 and Judgment dated 14.08.2018 in *Appeal No. 119 of 2016 and Batch in M/s Adani Power Rajasthan Private Limited –v- Rajasthan Electricity Regulatory Commission and Ors* (and as followed in Appeal No. 111 of 2017 in *M/s. GMR Warora Energy Limited -v- Central Electricity Regulatory Commission and Ors*). Since the views taken in these case have been somewhat in variance, the Respondents are placing its submissions on the scope and applicability of Article 12.1.1.

35. The Respondents SECI and NTPC have submitted that the intention behind the last bullet in Article 12.1.1 of the PPAs is clear. While considering the taxes as change in law, the scope is restricted to the taxes which are imposed for ‘supply of power’. If the incidence of tax is on events or transactions other than the supply of power, the conditions in the said provision is not satisfied and the relief is not admissible. The harmonious construction of the provisions would require some meaning to be given and a purpose to be attached to the last bullet of Article 12.1.1. The intention behind incorporating a specific clause on taxes is to carve out a separate clause to restrict the nature of taxes which would be considered as change in law, unlike other four bullets dealing with matters other than taxes. The basic aspect is that if the taxes are said to be dealt under clauses other than the last bullet, the incorporation of the last bullet is rendered redundant as all taxes can be covered under the First or Second bullet. It is settled principle of interpretation that no provision can be ignored as redundant or superfluous. Reference: *JSW Infrastructure Ltd. v. Kakinada Seaports Ltd., (2017) 4 SCC 170* and *Life Insurance Corporation of India v. Dharam Vir Anand, (1998) 7 SCC 348*.
36. The Respondents SECI and NTPC have submitted that the idea of carving out a separate bullet for dealing with taxes and thereafter restricting its ambit by specific stipulation therein, unequivocally establishes that any and every tax needs to be considered under the last bullet and not otherwise. The claims which are to be considered on account of statutory taxes etc. should squarely fall within the scope of last bullet. The last bullet is the entire repository of dealing with taxes. When there is a specific clause relating to taxes, the general clauses dealing with laws in general have to be interpreted as necessarily excluding taxes. Reference: *South India Corporation (P) Ltd -v- Secretary, Board of Revenue Trivandrum and Another,*

(1964) 4 SCR 280. In the above decision, the Hon'ble Supreme Court was dealing with the entries in Article 277 and Article 372(1) of the Constitution of India, which saved the existing laws. Article 372(1) dealt with laws in general whereas Article 277 dealt with tax laws specifically. Therefore, based on the above it can be summarized that when a specific clause deals with taxes i.e. Clause 12.1.1 – last Bullet, the general clauses dealing with laws in general do not cover taxes, namely the Clause 12.1.1 – First Bullet. Clauses in the Agreement cannot be interpreted in a manner to render a clause otiose, redundant or surplusage. The purpose of a specific clause on tax is to make it restrictive. When there is a specific clause relating to taxes, the general clauses dealing with laws in general have to be interpreted as necessarily excluding taxes. This is because there is a special entry on taxes whereas the laws other than taxes are dealt with in a general clause.

b. Scope of Article 12.1.1 of the PPA – Last Bullet

37. The Respondents SECI and NTPC have submitted that the scope of Article 12.1.1 – last Bullet is clear and specific. It relates to the supply of power. Thus, every change in tax or introduction of tax was not intended to be covered by the Change in Law provisions of the PPAs. It cannot, therefore, be that the 'supply of power' be extended to other aspects such as taxes on input goods and services. The term "for" used in Article 12.1.1 – last bullet needs to be given a meaning that naturally flows from the scheme under which the expression is used, namely 'tax made applicable for supply of power'. The expression clearly confines within its scope the incidence of tax on the supply of power. The expression 'for' cannot be given a wider interpretation to cover taxes on input material and services. The use of the expression 'For' does not necessarily mean that it encompasses all activities relating to the generation of electricity prior to the sale of power. The natural meaning of the term 'Taxes made applicable for supply of power' is that it relates to taxes on the transaction for supply/sale of power. It cannot include the taxes paid at different stages by different persons for supply of input material and services to the Petitioner. In this regard, the expression 'For' was considered in the context of taxes in the decisions of the House of Lords in *Sir W.J.R Cotton v Vogan and Company* (Judgment dated 19.05.1896 by the House of Lords) and in *State of U.P v. Ramkrishan Burman*, (1970) 1 SCC 80 by the Hon'ble Supreme Court.

38. The Respondents SECI and NTPC have submitted that the PPAs entered into between the parties provides in the definition clause i.e. Article 1.1 that any term used in the PPA but not defined would have the meaning as applicable under the Electricity Act, 2003. The scope of different bullets under Article 12.1.1 also has to be given due meaning. Thus, where it was intended that the input cost be allowed, it has been specifically incorporated in the PPA. No such stipulation was made in respect of the last Bullet which is confined to 'supply of power'. Thus, different versions of the PPAs cover different scopes. With regard to each PPA, the intention of parties should be gathered from the express language used in the contract. Therefore, if the words used in the PPA are clear and unambiguous, it would be difficult to gather their intention different from the language used in the agreement. Thus it can be concluded that in the Change in Law provisions of the PPA between the Petitioners and the Respondents, a deviation was consciously made and a separate provision in the form of the last bullet was incorporated restricting the taxes to those which are made applicable on supplying power.

c. Outsourcing of Operation and Maintenance

39. The Respondents SECI and NTPC have submitted that the provision in PPAs or in the bid documents did not mandate or prescribe or specifically provide for the outsourcing of O&M. Outsourcing of O&M is an internal commercial decision of the SPD. If, for commercial expediency or benefit, the Petitioner outsources the O&M, the saving or additional expenditure is to the account of the SPD and SPD has a full right to take a decision on the above at its risk or reward. In this regard, the SPD is responsible for undertaking generation and supply of electricity. In terms of Article 4.1.1(g) – the SPD has undertaken to be responsible, at its own cost and risk for fulfilling all obligations undertaken by the SPD under this Agreement. The change in law under the last bullet is admissible only if the transaction which is assessed as tax, is mandated or required to be performed in terms of the PPAs and not when it is undertaken as a discretionary commercial decision.

40. The Respondents SECI and NTPC have submitted that the O&M is the responsibility of the Petitioners and in the event of the Petitioner choosing to employ the services of other agencies, it cannot increase the liability of SECI (and consequentially the Distribution

Licensee/Buying Entity) in terms of tariff. The outsourcing of the O&M to a third party is not a requirement of the PPA and is a commercial decision of the Petitioner for its own advantage and any increase in cost including on account of taxes etc. is entirely to the account of the Petitioner. In this regard, the Commission vide Order dated 16.03.2018 in Petition No. 1/MP/2017 in *GMR Warora Energy Limited -v- Maharashtra State Electricity Distribution Company Limited and Ors* has held that any increase in cost of O&M expenditure on account of increase in service tax cannot be considered as Change in Law. The same view, namely the inadmissibility of the Change in Law claim in respect of O&M expense was re-iterated by the Commission in its Order dated 18.04.2019 in Petition No. 164/MP/2018 and 165/MP/2018 in the case of *Parampujya Solar Energy Pvt Limited v NTPC and Others and Batch*. Thus the Petitioner is not entitled to any increase on account of the implications of the GST on the O&M Services that have been outsourced.

d. Inadmissibility of Carrying Cost

41. The Respondents SECI and NTPC have submitted that there is no provision in the PPA regarding carrying cost or interest for the period till the decision of the Commission acknowledging the change in law and deciding on the amount to be paid for such change in law namely 'provide for relief for the same', as specified in Article 12.2.2 of the PPA. The Change in Law claim of the Petitioner is yet to be adjudicated and the amount if any, due to the Petitioner has to be determined/computed first. Thereafter, only after the amount is determined, is the Petitioner required to raise a Supplementary invoice for the amount so computed as per Article 10.7 of the PPA. It is only in case of default on the part of the SECI/NTPC 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. The provision of Article 10.3.3 of the PPAs dealing with late Payment Surcharge and definition of the 'Due Date' in Article 1 read with Article 10.3.1 of the PPA are relevant. The due date is forty-fifth (45th) day after a Monthly Bill or Supplementary Bill is received and duly accepted by Respondents SECI and NTPC 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. The Respondents SECI and NTPC have placed their reliance on decision of APTEL in *SLS Power Limited -v- Andhra Pradesh Electricity Regulatory Commission and Others* (Appeal No. 150 of 2011) and Batch which recognizes that the interest will be due from the date when payment is due. In the present case, the payment is due only after issuance of the Supplementary Bill after the decision of the Appropriate Commission. In the Judgment of the APTEL 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.

42. The Respondents SECI and NTPC have submitted that the PPAs do not have a provision dealing with restitution principles of restoration to same economic position. Therefore, the Petitioner is not entitled to claim relief which is not provided for in the PPA. The decision by the Commission can only be after the Petitioners have submitted complete information and not before. Thus, any delay in the determination of the impact of change in law is on account of the petitioner. Accordingly, the carrying cost admissible (if any) to the Petitioner shall be from the date of furnishing of the complete prescribed information. Any adverse consequences for not approaching the Commission with the full documentation/information at the first instance, ought to be borne by the defaulting party i.e. the Petitioner itself.

e. Back to Back Basis – to be allowed as a Pass through in PSA

43. The Respondents SECI and NTPC have submitted that the PPAs has been entered into by SECI/NTPC in its capacity as an intermediary company for the bulk purchase of electricity from the Petitioner for bulk supply of electricity to the Distribution licensees under a Power Sale Agreement (hereinafter referred to as ‘PSA’). Such purchase and resale of electricity is under a scheme envisaged under JNNSM. The Respondents SECI and NTPC are in a position to discharge its obligations under the PPAs including the payment for any change in Law implication etc. only upon the distribution licensees remitting the amount to the SECI/NTPC in terms of the respective PSA. The obligation of the distribution licensee under the PSA is
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therefore on a back to back basis with the obligation of the Respondents SECI and NTPC to the Petitioners. The Respondents SECI and NTPC have placed their reliance on the Order dated 09.10.2018 in case of *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors. Batch.* and Order dated 05.02.2019 in Petition No.187/MP/2018 and Batch in the matter of *M/s. Renew Wind Energy (TN2) Private Limited –v- NTPC Limited Batch.*

44. The Respondents SECI and NTPC have submitted that in view of the above, it is therefore appropriate that the Commission may give directions to the concerned distribution licensees/Buying Entities, determining the amount payable to the SPD (if any) in the abovementioned petition, keeping in view the intermediary status and role of the Respondents SECI and NTPC as a nodal agency to facilitate the Solar Power Project and for the Distribution Licensee/Buying Entity to have an arrangement for generation and procurement of solar power and thereby, promote the solar power development in the country, as per the policy decisions of the Central Government. Any enforcement of the claim by the Petitioner against the Respondents SECI and NTPC without the distribution licensees/ Buying Entities being obligated to pay and discharge the corresponding claim under the PSA in advance of the discharge of the obligation of the Respondents SECI and NTPC will result in serious financial issues to the SECI/NTPC and thereby, effect the implementation of the scheme.
45. The Respondents SECI and NTPC have submitted that the methodology that may be determined by the Commission for payment on account of the change in law implications by the Respondents SECI and NTPC to the Solar Power Developer, namely one-time payment or increase in per unit tariff or in any other manner, should be directed to be implemented mutatis mutandis for the payment by the Distribution Licensees under the PSA to SECI/NTPC.

f. Absence of Necessary Particulars- Adverse Inference

46. The Respondents SECI and NTPC have submitted that the Petitioner has not placed before the Commission in a transparent manner the taxes, duties and levies which stands withdrawn and no longer payable by reason of the introduction of the GST. Admittedly, there are number of taxes, duties, cess and levies which have been subsumed in the above Taxes which

came into force on 01.07.2017. In this regard, the Commission in its Order dated 09.10.2018 in Petition No. 188/MP/2018 and Batch in *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors. Batch*, have quoted a list of taxes subsumed in the GST as laid down in Goods And Service Tax (GST), Concept & Status, published by Central Board Of Indirect Taxes And Customs, Department Of Revenue, Ministry Of Finance, Government Of India. The 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 GST decisions passed by the Commission, the Commission has taken note of the implications of various taxes which were in existence prior to 1.07.2017 and were subsumed/reduced/remitted. These have to be taken into account to determine the net effect of GST Laws.

47. The Respondents SECI and NTPC have submitted that the Petitioners are proceeding on the assumption that the entire quantum of taxes under the GST are payable. This is contrary to the very scheme of the introduction of the GST and the intention of the Central Government is for rationalising the tax structure in a manner that various existing taxes will get subsumed in the GST. Accordingly, true and faithful disclosure of existing taxes which have been subsumed by the GST needs to be furnished by the Petitioners.
48. The Respondents SECI and NTPC have submitted that it is incumbent on the Petitioners to place before the Commission in a transparent manner the increase or decrease in the taxes on net basis. For instance, if pre-GST, the Petitioner was subjected to 4% Excise Rate and post-GST, the same became a cumulative 5%, then the Petitioner would be entitled to claim only the difference i.e. 1% as a change in law and not the entire 5%. Before the amounts are computed, the Petitioners should be directed to give the following particulars/documents in respect of each claim under GST Laws:
 - a) Name of the Goods/Equipment
 - b) Date of the Purchase Order (PO)
 - c) Date of the Goods/Custom Clearance
 - d) Date of the Goods being handed over to the Common Carrier.
 - e) Date on which the goods were received at site
 - f) Date on which the goods were installed at site
 - g) The name of the manufacturer of the Goods

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

49. The Respondents SECI and NTPC have submitted that the above particulars/ documents are required to be given in respect of each items 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.

Rejoinder submitted by the Petitioners

50. The Petitioners have reiterated the submissions made in the petitions and as such the same are not being reproduced herewith for the sake of brevity. Additionally, the Petitioners have submitted as follows:

a. Re. Scope of Article 12.1.1 of the PPAs – First and Last Bullet

51. The Petitioners have submitted that the use of the words ‘any and ‘including’ shows that the first bullet of Article 12.1.1 of the PPAs is comprehensive enough to include promulgation of taxing statutes and that the provision is intended to exclude any limitation. In this regard, the Petitioners have placed their reliance on the judgment dated 05.01.2007 of the Hon’ble Supreme Court in *Associated Indem Mechanical (P) Ltd. vs. W.B. Small Industries Development Corpn. Ltd. & Ors. (2007) 3 SCC 607*.

52. The Petitioners have submitted that the restrictive interpretation to the first bullet as contended by the Respondent would be applicable only if a particular tax specifically applicable only for supply of power has either been introduced or taken away by the legislature. However, in the present case, the entire Indirect Tax regime of the country has undergone a major overhaul and almost all of the Central and State level taxes which existed as on the effective date i.e. 19.07.2016, have been replaced/ abolished/ subsumed by the GST Laws. Therefore, the first bullet of Article 12.1.1 of the PPAs cannot be interpreted to exclude the Change in Law brought about by the change in taxation regime of the country.

Further, no particular clause of the PPAs would be rendered otiose or redundant in considering the overall impact of GST laws. In fact, so far as overall impact of GST on the solar power project is concerned, first bullet of Article 12.1.1 of the PPAs would be attracted and for computing the impact of GST on supply of power from the project, the last bullet would be attracted. The present PPA has to be interpreted in light of Clause 6.2(4) of the Tariff Policy dated 28.01.2016 as issued by Central Government from time to time under Section 3 of the Electricity Act, 2003 that recognizes the concept of Change in Law.

b. Re. Impact of GST on O&M Expenses

53. The Petitioners have submitted that the Respondents have not disputed to the fact that expenses towards O&M are recurring in nature in terms of Article 12.1.1 of the PPAs. Outsourcing of O&M services has not been specifically barred under the PPAs. It is a settled rule of interpretation of contracts that the words used in the contract must be given full effect to and unless something has been specifically excluded, it must be treated as permitted under the contract. In this regard, the PPAs entered into by the Petitioner specifically provide relief for any increase in recurring or non-recurring expenditure in terms of Article 12.1.1. The usage of the word ‘any’ signifies the wide ambit of the Change in Law clause and unless something is specifically excluded, the word ‘any’ ought to be read broadly. Additionally, outsourcing of O&M services by the Petitioners can also be inferred by having reference to the provisions of the CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2017 issued under the Electricity Act wherein O&M expenses are treated as a fixed cost component of the tariff structure for renewable energy technologies.
54. The Petitioners have submitted that the O&M expenses are factored as a cost component in arriving at the tariff structure for supply of power under Section 62 of the Electricity Act. The same logic is applicable in respect of tariffs quoted under bidding process in Section 63 of the Electricity Act since all bidders do factor such cost, even while quoting tariff under Section 63 of the Electricity Act, and given that O&M activity is a sine qua non for the solar power achieving the desired output efficiency. Thus, even if it is assumed that the PPAs are silent on the aspect of O&M expenses being outsourced, the O&M cost can be necessarily inferred

into the PPAs given that the O&M activity is essential for supply of the contracted capacity of power under the PPAs.

55. The Petitioners have submitted that none of the provisions of the PPAs seek to distinguish between the expenditure incurred on account of activities carried out by the Petitioner in its own capacity and the activities which have been outsourced by the Petitioner to third parties.
56. The Petitioners have submitted that O&M expenses, being recurring in nature, any additional expenditure due to promulgation of GST laws, irrespective of whether outsourced or internalized, must be construed harmoniously to fall under the allowable Change in Law reliefs in terms of Article 12.1.1 of the PPAs.
57. The Petitioners have submitted that they adopted 'prudent utility practices' with respect to outsourcing of O&M expenses which have been recognized under the respective PPAs. Had the Petitioner internalized the afore-said constituent O&M services, the same would have to be factored into the quoted tariff.

c. Re. Carrying Cost

58. The Petitioners have submitted that the mandate of Change in Law provisions across all PPAs (standard documents drafted by the government) is 'restitution' i.e. 'relief' be granted in a manner so as to place an affected party in the same economic position as if a Change in Law had not occurred. In *Energy Watchdog & Ors. vs. CERC & Ors.* (2017) 14 SCC 80, the Hon'ble Supreme Court held that Change in Law provisions must be construed in line with the principle of 'restitution'. Therefore, it was emphatically laid down that restitution is inherent to compensation on account of Change in Law events.
59. The Petitioners have submitted that the Central Commission should consider the overall economic impact of GST laws which ought to include 'carrying cost'. It is a settled position of law that carrying cost is the compensation for time value of funds deployed on account of Change in Law events. Therefore, the Petitioners cannot be restored to the same economic position, as it was prior to the enactment of GST laws, unless carrying cost on account of time value of funds deployed by the Petitioner on account of promulgation of GST laws is granted.

60. The Petitioners have submitted that grant of restitutionary relief in the form of carrying cost is sine qua non to give effect to the true import of a Change in Law clause as contained in Article 12.2 of the PPAs.
61. The Petitioners have submitted that since specific elements of 'relief' on account of Change in Law events have not been explicitly laid down in the aforesaid provision, the Commission has been entrusted with discretionary powers to provide appropriate relief. In this regard, the Commission in its Order dated 18.04.2019 in *Parampujya Solar Energy Pvt. Ltd. vs. NTPC & Ors.* in Petition Nos. 164/MP/2018 and 165/MP/2018, itself recognized that Article 12.2.2 of the PPAs 'empowers' the Commission to grant appropriate relief in case a party incurs recurring/non-recurring additional expenditure on account of Change in Law events. The Commission has invoked such wide powers to acknowledge the introduction of GST laws as a Change in Law event. A similar interpretation can be accorded to grant carrying cost to give effect to the true import of the Change in Law clauses in the PPAs since the basic premise of Change in Law provisions mandate restoration of parties to the same economic position as if the Change in Law had not occurred.
62. The Petitioners have submitted that while adjudicating a claim concerning grant of interest in a contract where no provision expressly enabled such a claim, the Hon'ble Supreme Court in *South Eastern Coalfields Ltd. vs. State of Madhya Pradesh & Ors. (2003) 8 SCC 648* emphatically laid down that in absence of an express prohibition either in law or in the contract entered into between the parties, interest must be payable by exercise of equitable jurisdiction of the courts. In the instant case, the PPAs do not explicitly preclude/prohibit the grant of carrying cost/interest. Instead, the phrase 'all interest' used in Article 1.2.15 of the PPAs must be construed as an enabling provision for grant of carrying cost. Therefore, the ratio laid down by the Hon'ble Supreme Court in *South Eastern Coalfields* would squarely apply to the Petitioner's claim for an equitable relief of carrying cost.
63. The Petitioners have submitted that the Commission is duty bound to apply the 'Business Efficacy' test to imply terms into a contract to grant carrying cost where a provision for relief on account of Change in Law has been envisaged in the PPA. The courts have the power to imply words into a contract considering the intention of the prudent businessmen at the time

of the formation of the contract. Accordingly, the Commission is obliged under the law to imply the principle of restitution into Article 12.2.2 of the PPAs keeping in the mind the fact that restitution is the foundational basis of Change in Law provisions. In this regard, reliance is placed on the Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects notified by Ministry of Power on 03.08.2017.

64. The Petitioners have submitted that Courts should not facilitate unjust enrichment to any party. It is undisputed that the procurers are being unjustly enriched since the procurers stand to gain in terms of time value of money for amounts deployed by the Petitioner. Therefore, the Commission ought to take note of it and avoid passing an Order that would facilitate the unjust enrichment of the procurers. The principle that unjust enrichment of a party to the contract must be prevented is a part of the Indian law of contract as settled by the Hon'ble Supreme Court in *Mahabir Kishore vs. State of M.P. (1989) 4 SCC 1*.
65. The Petitioners have submitted that the purpose behind the recognition of regulatory powers of the Commission was to facilitate it to render substantial justice where non-exercise of such power would result in grave miscarriage of justice. Therefore, the Commission is empowered to grant carrying cost by invoking its regulatory powers.

d. Re. Necessary particulars

66. The Petitioners have submitted that they have submitted details of each component and the tax applicable along with the Petition. Further, they have duly annexed the sample invoices as may be required to demonstrate its claim for compensation and prays for determination of relief and compensation in the manner as granted in Order dated 19.09.2018 in Petition No. 50/MP/2018.

Written Submission by the Petitioners

67. The Petitioners have submitted that the Respondents SECI/NTPC have made part payment of invoices raised towards Change in Law. Some payments have been withheld from the Change in Law invoices towards the following:-

- (a) Solar Power Developers claim towards cost incurred for installation of Solar PV Modules and other associated equipment and allied services, which were installed after commissioning of the solar power plants.
- (b) Invoices of certain goods and services which have been raised after the date of commissioning of the solar power plants.

68. The Petitioners have submitted as under:

A. Additional Solar PV Modules, other associated equipment and allied services

Re. No embargo on the SPD to install additional PV modules after the commissioning of the solar power plant.

69. The Petitioners have submitted that they have installed certain additional solar PV modules to enhance the DC capacity of their respective projects, after the Commercial Operation Date (hereinafter referred to as “COD”) of the said projects. The Petitioners plants were duly commissioned with the available solar PV modules under the PPA and commissioning certificates were issued by the relevant authorities. Further,
- (a) In terms of normal industry practice, COD of the project can be validly declared with DC capacity equal to contracted capacity under the PPA which was done in the Petitioners case. [Clause 10 of the Bidding Document]
 - (b) In terms of clause 4.4.1 of the respective PPAs, the SPDs are obligated to generate solar power within the maximum and minimum Capacity Utilization Factor (hereinafter referred to as “CUF”) band specified therein. Such CUF cannot be attained with the DC modules having capacity equal to the contracted capacity. Therefore, certain modules and module mounting structure (hereinafter referred to as ‘MMS’) along with cables etc. were delivered and erected post commissioning, to achieve the contracted CUF. The order for these modules and MMS were placed before the COD.
 - (c) This CUF is calculated on an annual basis and not as on the date of commissioning. Therefore, the Petitioners are required to install the additional modules within one year

of the COD, to enhance the CUF of the projects and to generate solar power as required under the PPA.

70. The Petitioners have submitted that they are entitled to be paid the entire compensation for Change in Law, including the GST paid on the modules installed (and allied materials and services) in the solar power plant after the COD. Further,
- (a) The Change in Law clause under the respective PPAs provides that Change in Law is an event which occurs after the Effective Date and results into any additional recurring or non-recurring expenditure by the Petitioners / income to the Petitioners. Pertinently, the PPAs do not stipulate any condition which bars the Petitioners from claiming compensation for Change in Law for expenditures which may occur after the COD of the solar power project. This is an imaginary distinction created by the Procurers to deny the legitimate claims of the Petitioners and the same is contrary to the terms of the PPAs executed by the Petitioners.
 - (b) The Commission in its Order dated 09.10.2018 passed in Petition No. 188/MP/2017 and batch in *ACME Bhiwadi Solar Power Private Limited v. SECI & Ors.* has interpreted the Change in Law clause of the PPAs and held that GST laws are applicable in all cases, except the cases where the actual date of commissioning is prior to 01.07.2017. Therefore, the increase in expenditure on account of GST laws is equally applicable to the components of the power plant which are installed after the COD (which is after 01.07.2017).
 - (c) These additional DC modules have been installed by the Petitioners to maintain the annual CUF as mandated in the PPAs. Further, the respective PPAs allow the Petitioners to (i) reconfigure and repower the project; and (ii) install additional DC field as per the project's requirement.
 - (d) The RfS issued by Respondents SECI/NTPC for procurement of solar power (pursuant to which the power projects were set up by the Petitioners) specifies that the Petitioners shall be entitled to revise the CUF of the solar power project within one year of commissioning. Therefore, installation of additional modules by the Petitioners to revise/improve the CUF of the project is in line with the RFS issued by Respondent

No.1. and, Respondent No.1 cannot now claim that no additional modules could have been installed by the Petitioners after the COD.

- (e) Further, in terms of the provisions of aforesaid RfS, the capacity of DC arrays installed at the project is to be considered for the purpose of commissioning and the project is considered to be commissioned if requisite DC Arrays have installed and power has flown into the grid.
- (f) Therefore, as on the date of commissioning, the Petitioner's projects were commissioned with the DC modules having capacity equal to the contracted capacity (as mandated in the RfS and PPA). And these additional modules have been installed post COD (these were ordered prior to COD) in order to:-
 - i. boost the DC capacity in order to maintain the annual CUF as per the PPA.
 - ii. ensure optimum utilization of inverter capacity, grid evacuation infrastructure etc. without changing the maximum AC capacity which is in the interest of the project as well as the consumers.

71. The Petitioners have submitted that the Commission may direct the Procurers to release the withheld payment and make full payment of the GST compensation for components installed after the COD of the project. The same will go a long way in providing necessary support to SPDs and building a sustainable solar power industry.

B. Invoices for modules, equipment and allied services raised after COD

72. The Petitioners have submitted that the Procurers are also refusing to make payment for the incremental impact of GST due under invoices for certain goods and services that have been raised by the contractor after the date of commissioning of the solar power plants. In this regard the Petitioners have submitted that:

- a. There is no restriction in the PPAs for the invoices to be raised by the contractors post the date of commissioning of the projects.
- b. It is a common business practice for contractors to raise invoices after the complete satisfaction of both the parties (i.e. project developer and contractor) with respect to completion of work and delivery of such goods and services.

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

73. The Petitioners have submitted that the objection of the Procurers that no capital expenditure can be incurred after the COD is erroneous. The expenditure towards installation of modules/MMS after COD is only to comply with the PPA and cannot be confused with the expenditure to be made for commissioning. The Petitioners are only seeking payments towards GST which has been paid by them after the commissioning of projects. As such any expenditure incurred by the SPDs after commissioning of the project is also, towards generation and supply of power under the PPA. Therefore, no distinction can be made by the procurers in compensating the SPDs for expenditure incurred before and after the COD. The Commission may consider the example of expenditure towards installation of FGD system in thermal power plants. the same is incurred after the COD. However, since it is necessary to have FGD system (under the relevant environment laws) for generation and supply of power, the same becomes part of the capital cost of the project and the thermal power generators are compensated for it.

Written Submissions by Respondent no.1 (SECI/NTPC)

74. The Respondent No.1 (SECI/NTPC) have submitted that in the Order dated 19.09.2018 passed by the Commission in Petition No.50/MP/2018 and 52/MP/2018 in the case of *Prayatana Developers Pvt. Ltd –v- NTPC Limited and Ors and Azure Power Venus Pvt. Ltd. v Solar Energy Corporation of India Limited and Ors.*, the Commission has rejected the implication of GST Laws which came into force on 01.07.2017 in respect of projects which were actually commissioned prior to 01.07.2017. The Commission has proceeded on the basis of the date of Commissioning as the Cut-off Date for consideration of the Change in law claims with regard to the GST on goods and has not considered the claim of GST on goods after the said cut-off Date.

75. The Respondents SECI/NTPC have submitted that in terms of Section 12 of the Central Goods and Services Act, 2017 (as notified on 12.04.2017 and effective 1.07.2017), the liability to pay tax on the supply of goods, namely the point of taxation, is defined as under:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*“31. (1) A registered person supplying taxable goods shall, before or at the time of—
(a) removal of goods for supply to the recipient, where the supply involves movement of goods; or
(b) delivery of goods or making available thereof to the recipient, in any other case, issue a tax invoice showing the description, quantity and value of goods, the tax charged thereon and such other particulars as may be prescribed:*

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

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

Provided that the Government may, on the recommendations of the Council, by notification and subject to such conditions as may be mentioned therein, specify the categories of services in respect of which— (a) any other document issued in relation to the supply shall be deemed to be a tax invoice; or (b) tax invoice may not be issued.

.....

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

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

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

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

76. The Respondents SECI/NTPC have submitted that the settled legal position is that the incidence of tax i.e. the levy of tax as a taxable event is distinct and separate from the collection of tax. The incidence of tax has to be considered in the light of the provisions of the Central Goods and Services Tax Act, 2017 with regard to the taxable event irrespective of the fact that the collection of tax or the reference point of collecting the tax is any later date. This principle has already been laid down by the Hon'ble Supreme Court in number of cases and is well settled. Reference in this regard may be made to *Union of India–v-Bombay Tyre International Limited and Ors (1984) 1 SCC 467* and as recently upheld by the Constitution Bench of the Hon'ble Supreme Court in the case of *CCE–v-Grasim Industries Ltd. (2018) 7*

SCC 233. The incidence of tax is as per section 9 (1) of the Central Goods and Services Tax Act, 2017 which states that there shall be a levy of tax called Central Goods and Services Tax Act, 2017 on all Intra State supply of goods or services or both. Thus, the incidence of tax is on Intra State supply of goods or services or both. The ‘taxable supply’ has been defined in Section 2 (108) as meaning supply of goods or services or both which is liable to be taxed under the Central Goods and Services Tax Act. The term ‘Supply’ is not defined in Section 2. Section 7, however, deals with the supply in an inclusive form to mean all forms of supply or services or both. The term ‘goods’ is defined in Section 2 (52) as every kind of movable property other than the money and security. Similarly, the term ‘services’ has been defined in Section 2 (102) as meaning anything other than goods, money and security. The supply has to be given a natural meaning of transferring goods or services by one entity to another.

77. The Respondents SECI/NTPC have submitted that the PPAs dated 22.09.2016 in the above case of the Petitioner defines the terms ‘Commissioning’ and ‘Commercial Operation Date’ as under:

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

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

78. The Respondents SECI/NTPC have submitted that the procurement of goods for the construction and commissioning of the Power Project therefore relates to construction period. The Change in Law provision, dealt in Article 12, deals with impact of change in law applicable for supply of power by the Petitioner as per the terms of the agreement. In so far as the change in law with regard to the procurement of equipment is concerned, it can be only till the stage of commissioning and not beyond i.e. during the operation period after the commencement of the supply of the electricity. The scheme under the PPAs is that the commencement of supply is after the commissioning of the power project. The delay in commissioning of the Power Project, achievement of CUF, the shortfall in generation,

consequences of liquidated damages etc. are not deferred beyond the commissioning date and such deferment cannot spill over to the operation period. There is no provision in the PPAs for payment of any additional capital cost for undertaking any capital investments done by the Petitioner at any time after the commissioning i.e. after the construction period is over. This position will apply irrespective of any up-gradation or improvement or repair or changes that are undertaken by the Petitioner at any time throughout the term of the operation period. All such costs are entirely to the account of the Petitioner with no liability on Respondent No.1 /Buying Entities.

79. The Respondents SECI/NTPC have submitted that the Petitioners claim is that although no capital cost is admissible for the expenditure incurred after the commissioning date, the GST Laws implications on the procurement of such capital goods after the commissioning date should still be paid. This is contrary to the entire scheme under the PPAs and all capital expenditure to be incurred after the commissioning date is entirely to the account of the Petitioners. In this context, the provisions of Clause 3.9 of the RfS dated 15.02.2016 and Clause 4.4.2 of the PPAs relied on by the Petitioners in support of the claim made are required to be considered. The purpose of these provisions is not to create any additional liability on The Respondent No. 1/Buying Entities. The purpose is quite the opposite namely to make an enabling provision to allow the Petitioner to upgrade, install new machines/panels etc. to reach the specified level of performance provided in the said documents entirely at the cost of the Petitioner and without any financial liability to Respondent No. 1/Buying Entities.
80. The Respondents SECI/NTPC have submitted that in terms of Clause 3.9 of the RfS, the CUF stipulated to achieve for the Petitioner is 17%. The Petitioner is required to achieve the said CUF on an annual basis within +10% and -15% till the end of 10 years from the COD with reference to the contracted capacity i.e. in the present case, 40 MW and 10 MW as per the respective PPAs. The band of -15% to 10% for CUF provided as mentioned above is basically for the purpose of and is designed to account for weather fluctuations and any unforeseen circumstances, implying that the Petitioner should have designed the full capacity of project, in a manner, where at the time of COD all modules were installed and functional. Clause 3.9 of the RfS and Article 4.4 of the PPAs deals with the quantum of the power to be generated on an annual basis for any contract year.

81. The Respondents SECI/NTPC have submitted that to enable the Petitioners to mitigate the shortfall in generation and reach the stipulated CUF, Clause 3.9 of the RfS and Article 4.4 of the PPA, allows the Petitioners to install DC Solar field to achieve the required output and to reconfigure and repower the project from time to time during the term of the PPAs. Thus, the above is an option given to the Petitioners under Clause 3.9(c) of the RfS and Article 4.4.2 of the PPA to mitigate the circumstances by raising the required output and is not, otherwise, a mandate contained in the PPAs to be necessarily implemented by the Petitioners. This is clear from the use of the expression 'allowed', 'free to' used in the said provisions.
82. The Respondents SECI/NTPC have submitted that the above enabling provision providing for increase of the CUF and required output is totally at the cost of Petitioners and there cannot be any claim for monetary compensation from Respondent No. 1 (Intermediary Nodal Agency) either for the capital cost or for taxes, duties etc. The anomaly in the claim made by the Petitioners is clear from the fact that the Petitioners are not claiming any basic capital cost or the taxes etc. which were applicable before the GST coming into force on 01.07.2017 but only the impact of GST Laws. If the basic capital cost and the basic duties prior to the impact of GST Laws is not admissible as an additional cost to be recovered from SECI, the same being after the commissioning date, there cannot be any question of further impact of the GST to be considered. Therefore, no invoices for GST for modules, equipment and allied services raised after the date of commissioning date is admissible in view of:
- a. No capital cost after the commissioning date for procurement of goods etc. can be considered; and
 - b. The tax invoices in respect of the goods procured prior to the commissioning date have to be necessarily raised in terms of the GST Laws (quoted above) by the delivery date.
83. The Respondents SECI/NTPC have submitted that even the goods procured before the commissioning date have to be necessarily supported with a taxable invoice of a date prior to the commissioning date and not after the date of the commissioning. It cannot be that goods were delivered after the commissioning or Invoices were raised after the commissioning but were incorporated in the Power Project by the commissioning date. Any such contention

would mean that the Petitioner had declared commissioning before the Power Project was ready, which is not permissible.

84. The Respondents SECI/NTPC have submitted that the only exception to the above is in the case of tax invoices for GST claims on services (as opposed to goods) which can be raised under Section 31 of the GST Laws within a month or the period specified after the services are rendered and to that extent, the same can be considered if the services relate to the period prior to the commissioning date. Further, the Commission in its order dated 30.12.2019 passed in Petition No.4/MP/2019 and connected Petitions in the matter of *Parampujya Solar Energy Private Limited –v- Solar Energy Corporation of India Limited & Ors* has already dealt with the cut off Date.
85. The Respondents SECI/NTPC have submitted that for the reasons mentioned herein above, there is no basis for the Petitioner to claim that Respondent No.1 has wrongly rejected the claims of the Petitioners. The claims of the Petitioners in the present case are squarely covered by the earlier decision of the Commission as per the chart attached hereto as ‘**Annexure A**’ which was submitted to the Commission during the hearing on 21.01.2020.
86. The Respondents SECI/NTPC have submitted that the Commission in its order dated 28.01.2020 in Petition No. 67/MP/2019 & 68/MP/2019 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 SPD and procurers.
87. The payment by way of one-time payment will be financially burdensome for distribution companies. Accordingly, Respondent No.1 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 Respondent No.1 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 CUF/contracted energy agreed in the PPA;
- d) The per unit rate for change in law should be payable on actual generation subject to annuity value.

Analysis and Decision:

88. The Petitions were filed on 31.12.2018, admitted on 11.04.2019 and reserved for orders on 21.01.2020. 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.
89. 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:

	388/MP/2018	395/MP/2018
Scheme	JNNSM (Phase II Batch III)	NSM (Bundling scheme 2:1)
Nodal agency	SECI	NTPC
RfS	15.02.2016	09.10.2015
Capacity MW	50 (10 MW + 40MW)	50 (5X10 MW)
Power	Solar	Solar
Location	Karnataka	Telangana

Bidding Date	19.05.2016	29.03.2016
Letter of Intent	02.07.2016	20.06.2016
PPA	02.08.2016	04.08.2016
Effective date	02.08.2016	19.07.2016
GST	01.07.2017	
SCoD	02.09.2017	18.08.2017
Tariff (Rs./ kWh)	4.43	5.19
VGF	Yes	No
Change in Law	Art. 12	Art. 12
Incremental impact (Rs.) of GST as claimed by the Petitioners.	14,17,79,776/-	16,82,51,612/-

90. The Solar Power Plants were to be developed on long term basis at a discovered tariff. As per the PPAs executed with Respondents SECI and NTPC , the Solar PV power was to be purchased from the Petitioners and sold to the Distribution Companies in the State of Karnataka and Telangana. On 01.07.2017, the GST Laws were enacted for levy and collection of tax on supply of goods or services or both.
91. The Petitioners have submitted that they participated in the bids and pursuant thereto they entered into PPAs for setting up of solar power plants at different rates of fixed tariff for 25 years. Subsequent to the 'Effective Date' as per the PPAs, the 'GST Laws' were enacted. Introduction of 'GST Laws' made a huge impact on the actual cost of the project *vis-a-vis* budgeted cost, which was beyond their control and therefore, notice regarding the 'Change in Law' as per PPAs was sent to the Respondents. The 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 Petitioners or Respondents is caused due to such 'Change in Law' events. The Petitioners have submitted that in terms of Article 12 of the PPAs, they are entitled to claim the impact of GST being an event of 'Change in Law'. Further, the Respondents SECI/NTPC have withheld part payment from invoices towards cost incurred for installation of Solar PV Modules and other associated equipment and allied services, which were installed after commissioning of the solar power plants and Invoices of certain goods and services which have been raised after the date of commissioning of the solar power plants. They prayed for the Respondent No. 1 to be directed to release the payments at the

earliest. *Per Contra*, the Respondent No.1 has submitted that separate provision in the PPAs were carved out in the form of the last bullet which incorporated restricting the taxes to those which are made applicable to supplying power. The Commission has already held that claim of the Petitioners on account of additional tax burden on O&M services that have been outsourced is not maintainable. Further, regarding the amount payable to the Petitioners (if any) on account of 'GST Laws' the liability will be back to back because of inter winding nature of PPAs and PSAs and hence the liability (if any) is to be allowed as a pass through in PSAs. Further, the Respondents SECI and NTPC have submitted that the Petitioners have claimed that although no capital cost is admissible for the expenditure incurred after the commissioning date but GST Laws implications on the procurement of such capital goods after the commissioning date should still be paid. This is contrary to the entire scheme under the PPAs and all capital expenditure to be incurred after the commissioning date is entirely to the account of the Petitioners.

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

Issue No. 1: Whether the promulgation of the IGST Act, 2017, the CGST Act, 2017, the State(s) (Karnataka, Telangana) 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 Respondent Nos.1 should be directed to pay to the Petitioners the amount claimed under Change in Law in terms of Article 12 of the PPA along with carrying cost to restore to the same economic condition prior to occurrence of the Changes in Law?

93. 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 State(s) (Karnataka, Telangana) 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?

94. 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 as a change in law event, as per the first and last bullet of Article 12.1.1 of the PPAs. *Per Contra*, the Respondents SECI and NTPC have submitted that the fact that the GST Laws are 'law', as defined in 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 therein dealing with 'Change in Law' need to be satisfied, namely, each of the claims should fall within the scope of the said provision.

95. 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.”

96. The Commission observes that as per Article 12, ‘Change in Law’ means the enactment/ coming into effect/ adoption/ promulgation/ amendment/ modification or repeal of any Law in India; change in the interpretation of any law in India; imposition of a requirement for obtaining any consents or change in tax or introduction of any tax made applicable for supply of power by the SPD as per the terms of this Agreement, resulting into any additional recurring/ non-recurring expenditure or any income to the SPD. The Commission is of the view that harmonious construction of the bullet points under Article 12 makes it clear that bullet point one is wider in scope and refers to the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal of any law in India, including rules and regulations framed pursuant to such law whereas bullet point last in seriatim refers specifically to any change in tax or introduction of any tax made applicable for ‘supply of power’ by the SPD as per the terms of Agreement. Clearly, the ‘GST laws’ enacted are not in the nature of a mere change in the tax having limited applicability on supply of power. Rather, it is in the nature of an enactment having wide ranging implication on the entire indirect taxation regime in India. In the instant case, the ‘GST Laws’ have been enacted by the Act of Parliament and the State Legislative Assemblies. The change in duties/ tax imposed by the Central Government and State Government(s) has resulted in the change in cost of the inputs required for generation and 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.
97. The Commission notes that the Petitioners have placed their bids on 19.05.2016 & 29.03.2016 and even the PPAs were executed on 02.08.2016 & 04.08.2016 in Petitions No. 388/MP/2018 & 395/MP/2018 respectively i.e. before the introduction of GST Laws on 01.07.2017. Further, the SCoD of the projects were on 02.09.2017 & 18.08.2017 i.e. after 01.07.2017. Therefore, the Petitioners are entitled for relief under ‘GST laws’.

Issue No. 2: Whether the Respondent Nos.1 should be directed to pay to the Petitioners the amount claimed under Change in Law in terms of Article 12 of the PPA along with carrying cost to restore to the same economic condition prior to occurrence of the Changes in Law?

98. The Petitioners have submitted that they have 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 construction cost and increase in operation & maintenance cost and these costs were not contemplated by the Petitioners at the time of bid submission. The Respondents SECI and NTPC should be directed to restore the Petitioners to the same economic condition prior to occurrence of the Changes in Law and to pay the amount claimed under Change in Law in terms of Article 12 of the PPA along with carrying cost. Further, the Respondents SECI/NTPC have withheld part payment from invoices towards cost incurred for installation of Solar PV Modules and other associated equipment and allied services, which were installed after commissioning of the solar power plants and Invoices of certain goods and services which have been raised after the date of commissioning of the solar power plants. In view of the above, the Respondents SECI and NTPC may be directed to release the payments at the earliest. *Per Contra*, the Respondents have submitted that the claim may be denied. Further, the levy of tax as a taxable event is distinct and separate from the collection of tax. The incidence of tax has to be considered in the light of the provisions of the Central Goods and Services Tax Act, 2017 with regard to the taxable event irrespective of the fact that the collection of tax or the reference point of collecting the tax is any later date. The procurement of goods for the construction and commissioning of the Power Project therefore relates to construction period. The Change in Law provision, dealt in Article 12, deals with impact of change in law applicable for supply of power by the Petitioner as per the terms of the agreement. In so far as the change in law with regard to the procurement of equipment is concerned, it can be only till the stage of commissioning and not beyond i.e. during the operation period after the commencement of the supply of the electricity. The scheme under the PPAs is that the commencement of supply is after the commissioning of the power project. The delay in commissioning of the Power Project, achievement of CUF, the shortfall in generation, consequences of liquidated damages etc. are not deferred beyond the commissioning date and such deferment cannot spill over to the operation period. There is no provision in the PPAs for payment of any additional capital

cost for undertaking any capital investments done by the Petitioner at any time after the commissioning i.e. after the construction period is over. This position will apply irrespective of any up-gradation or improvement or repair or changes that are undertaken by the Petitioner at any time throughout the term of the operation period. All such costs are entirely to the account of the Petitioner with no liability on Respondent Nos.1 /Buying Entities. Further, the provision providing for increase of the CUF and required output is totally at the cost of Petitioners and there cannot be any claim for monetary compensation from Respondents SECI and NTPC (Intermediary Nodal Agency) either for the capital cost or for taxes, duties etc. The anomaly in the claim made by the Petitioners is clear from the fact that the Petitioners are not claiming any basic capital cost or the taxes etc. which were applicable before the GST coming into force on 01.07.2017 but only the impact of GST Laws. If the basic capital cost and the basic duties prior to the impact of GST Laws is not admissible as an additional cost to be recovered from Respondent Nos. 1, the same being after the commissioning date, there cannot be any question of further impact of the GST to be considered. Therefore, no invoices for GST for modules, equipment and allied services raised after the date of commissioning date is admissible.

99. 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'.

100. We will first discuss the impact of 'GST laws' on the Engineering, Procurement and Construction (hereinafter referred to as 'EPC') Stage. EPC stage can be also construed broadly to be 'Construction Stage' which is covered under Goods under 'GST Laws'. 'GST Laws' came into effect from 01.07.2017 and accordingly, the Commission is of the view that the GST in the context of the present petitions is applicable on all cases except in case of the generating company where 'Scheduled date of Commissioning' or 'the actual date of

Commissioning' as per the respective PPA is prior to 01.07.2017. It is pertinent to note that under 'GST Laws' it has been provided that *"If point of taxation of Goods/Services before the GST implementation then it will be taxed under earlier law. GST will not be applicable. Any portion of any supply whose point of taxation is after GST implementation will be taxed under GST. The time of goods/supply of services shall be the earlier of the:- (a) the date of issuing invoice (or the last day by which invoice should have been issued) OR (b) the date of receipt of payment - whichever is earlier."* A plain reading of the above implies that according to 'GST Laws', in cases where the invoice is raised or consideration for the goods/supply of services have been received before 01.07.2017 and the tax has already been paid under the earlier law, the GST will not be applicable in such cases. It is immaterial whether the consideration for supply has been paid fully or partly.

101. The Commission observes that various provisions of PPAs dated 02.08.2016 in Petition No. 388/MP/2018 stipulate as under:

"ARTICLE 1

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

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

ARTICLE 5: SYNCHRONISATION, COMMISSIONING AND COMMERCIAL OPERATION

5.1 Synchronization, Commissioning and Commercial Operation

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

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

requirements for synchronization to the Grid System.

- 5.1.3 *The synchronization equipment and all necessary arrangements / equipment including RTU for scheduling of power generated from the Project and transmission of data to the concerned authority as per applicable regulation shall be installed by the SPD at its generation facility of the Power Project at its own cost. The SPD shall synchronize its system with the Grid System only after the approval of synchronization scheme is granted by the head of the concerned sub-station/Grid System and checking/verification is made by the concerned authorities of the Grid System.*
- 5.1.4 *The SPD shall immediately after each synchronization/tripping of generator, inform the sub-station of the Grid System to which the Power Project is electrically connected and all other concerned authorities in accordance with applicable Grid Code under intimation to SECI. In- Addition the SPD will inject in-firm power to grid time to time to carry out operational/ functional test prior to commercial operation.*
- 5.1.5 *The SPD shall commission the Project as detailed in “**Schedule 6: Commissioning Procedure**” within thirteen (13) Months of the date of signing of PPA*

ARTICLE 4

4.4. Right to Contracted Capacity & Energy

- 4.4.1 *SECI, at any time during a Contract Year, shall not be obliged to purchase any additional energy from the SPD beyond 45.867 Million kWh (MU). If for any Contract Year, it is found that the SPD has not been able to generate minimum energy of 35.443 Million kWh (MU) till the end of 10 years from the COD and 33.358 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*

102. The Commission observes that various provisions of PPAs dated 04.08.2016 in Petition No. 395/MP/2018 stipulate as under:

“ARTICLE 1

“Commercial Operation Date (COD)” shall mean the 30 days from the actual commissioning date of the last module of the contracted capacity of the Power Project where upon the SPD starts injecting power from the Power Project to the Interconnection point/ Delivery Point/Metering Point, CoD is intended to match allocation and availability of thermal power for bundling”

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 and NTPC 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 respective units of 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, CEA guidelines and CERC Regulations then in effect and otherwise meets all other Indian legal requirements for synchronization to the Grid System.

5.1.3 The synchronization equipment 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 / desynchronization, inform the sub-station of the Grid System to which the Power Project is electrically connected in accordance with applicable Grid Code.

5.1.5 The SPD shall commission the Project within thirteen (13) Months from the Effective Date.

5.1.6 The project shall be entitled for payment of energy @ Rs. 3.00 per kWh as

infirm power till Commercial Operation Date (CoD). The Project CoD shall be considered after 30 days from the actual date of commissioning. CoD is intended to match allocation and availability of thermal power for bundling.

5.1.7 The 25 year tenure of PPA shall commence from Commercial Operation Date.”

4.4 Right to Contracted Capacity & Energy

4.4.1 NTPC, at any time during a Contract Year, shall not be obliged to purchase any additional energy from the SPD beyond 24.97 Million kWh (MU) of energy generated corresponding to a CUF of 28.5% as committed by the SPD. If for any Contract Year, it is found that the SPD has not been able to generate minimum energy of 20.59 Million kWh (MU) corresponding to a CUF of 23.5% (i.e., 28.5% - 5%), 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 Discoms and shall duly pay such compensation to NTPC to enable NTPC to remit the amount to Discoms. This compensation shall be applied to the amount of shortfall in generation during the Contract Year. The amount of compensation shall be computed at the rate equal to the compensation payable by the Discoms towards non-meeting of RPOs, subject to a minimum of 25% of the applicable tariff.

4.4.2 Notwithstanding Article 4.4.1, the SPD is free to sell any capacity which is in excess of the quantum of power agreed to be supplied under this Agreement from Scheduled Commissioning Date either to NTPC or sell in open market. Provided that the SPD shall not be entitled to claim benefit of bundling of power provided in this Agreement in any manner whatsoever on such sale of infirm power or power in excess of the contracted capacity as the case may be. Such excess energy, if accepted by the Discom(s), may be purchased by NTPC at a notional Support Price of Rs. 3/- per kWh.”

103. The Commission notes that commissioning of the projects as defined in Article 1 read with Article 5 [along with Schedule 6 in Petition No. 388/MP/2018] 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 the power from the Petitioner starts from the Commercial Operation Date (COD). As per definition of Commercial Operation Date (COD) provided in Article 1 of the PPAs, COD will be the date 30 days subsequent to the actual date of commissioning of full capacity. Accordingly, the Commission holds that the liability of payment on account of impact of GST on procurement of Solar PV panels and associated equipment by the Petitioners shall lie with the Respondents till the Commercial Operation Date (COD) only. The Commission is also of the view that there has to be a clear and one to one correlation between the projects, the supply of goods or services and the invoices raised by the supplier of goods and services.

104. 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 levelled tariff is solely a decision of the SPDs.
105. The Commission observes that the Petitioners requested for the payment to be made in lumpsum by way of one-time payment whereas the Respondents SECI and NTPC have submitted that the payment by way of one-time payment will be financially burdensome for distribution companies. Instead the Respondents NTPC and SECI have proposed a methodology for payment of compensation (if any) on account of GST Laws on annuity basis. The Commission observes that it has already proposed an 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 Petitioners, 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.
106. 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 100 & 103 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 Petitioners, whichever is later, failing which it shall attract late payment surcharge in terms of the PPA. Alternatively, the Petitioners and the Respondents may mutually agree to a mechanism for

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

107. 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’.

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

“E. 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.

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

109. The Commission observes that the PPAs dated 04.08.2016, inter alia, provide as under:

“F. NTPC has agreed to sign a Power Sale Agreement (PSA) with the Discom to sell such bundled power as per the provisions of the National Solar Mission.”

110. The Commission observes that APTEL 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.

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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.

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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 19thOctober, 2005 as amended further vide an amendment agreement dated 18thSeptember, 2006 with M/s. Lanco Amarkantak Power Private Ltd., (the “Company”), a Generating Company as defined under the Electricity Act, 2003 and which the implementing a coal based thermal power station at Pathadi

Village, Korba District, Chhattisgarh, India, to purchase the power and energy output from its unit with an installed capacity of 300 MW, Phase II proposed to be set up (the “Project”), for a period of twenty five (25) years from the Commercial Operation Date of the Project”.

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

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

111. From the above, the Commission is of the view that the PPAs and PSAs are interconnected and inextricably linked to each other and as such there is privity between the Petitioners which are the power generators and the Respondents which are the Discoms and the ultimate beneficiaries of the PPAs as well as parties to the PSAs. The back to back nature of the PPAs and PSAs implies that the Respondent Discoms are liable to pay to the Respondents SECI and NTPC all that the said Respondents have to pay to the Petitioners. 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 Respondents SECI and NTPC are liable to pay to the Petitioners only when and if the Respondent Discoms make payment to the said Respondents . 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 similarly worded in both the instant petitions).

112. Article 10 of the PPAs dated 02.08.2016 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 Ahmedabad (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 subject to acceptance by SECI, 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.”

113. 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 net of energy drawl from grid, 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.”

114. From the above, the Commission observes that the billing and payment between the Petitioner and the Respondents SECI and NTPC are not conditional upon billing and payment

between the Respondents SECI and NTPC and the Respondent Discoms. Although, the above provisions, namely, 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 equally applicable to the payment towards incremental impact on account of GST being a change in law, as well. In view of the above, the Commission holds that the Power Purchase Agreement and Power Sale Agreement being back to back in nature are interconnected implying thereby that the Respondent Discoms are liable to pay to the Respondents SECI and NTPC all that the said Respondents have to pay to the Petitioner. However, payment to the Petitioners by Respondents SECI and NTPC is not conditional upon the payment to be made by the Respondent Discoms to Respondents SECI and NTPC in view of the provisions of Article 10 of PPA and Article 6 of the PSA. . The Commission having held that GST is a change in law, the Respondents SECI and NTPC are liable to pay to the Petitioners as per discussion above. However, the Respondents SECI and NTPC are eligible to claim the same from the Respondent Discoms on back to back basis.

115. The next issue is that of the impact of “GST laws” on the “Operations and Maintenance” stage. The Petitioners have submitted that O&M activities have been outsourced to agencies that are experienced in providing the said services in the most effective and cost-efficient manner. The concept of the O&M expenses is implicitly covered under Article 12 of the PPAs. As per the PPAs, Clause 12.1.1 stipulates that 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. As O&M expenses are recurring in nature, therefore the same are squarely covered under Article 12 of the PPAs and the same may be allowed. O&M expenses on the principles of normative parameters as specified by the Commission in the CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012 dated 06.02.2012 as amended on 31.03.2016 may be allowed. *Per Contra*, the Respondents have submitted that PPAs provisions or the bid documents did not mandate or prescribe or specifically provide for the outsourcing of O&M. Outsourcing of O&M is an internal commercial decision of the Petitioners. The Respondents are not concerned whether the Petitioners undertake the O&M

by themselves or outsource the O&M. If, for commercial expediency or benefit, the Petitioner outsources the O&M, the saving or additional expenditure is to the account of the Petitioners.

116. The Commission is of the view that O & M stage can be construed broadly to be Post-Construction Stage which is covered under Services under GST Laws. The following activities constitute O&M for a solar plant: Site Security; Consumables and breakdown spares; Annual Maintenance Contract; and Module cleaning - labour and water supply. The Commission observes that as per the GST Act, 2017, the supply of services includes:

“5. Supply of services

The following shall be treated as supply of services, namely:-

- (a) renting of immovable property;*
- (b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier.*

Explanation.-

For the purposes of this clause-

(1) the expression “competent authority” means the Government or any authority authorised to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely:-

- (i) an architect registered with the Council of Architecture constituted under the Architects Act, 1972 (Central Act No. 20 of 1972); or*
- (ii) a chartered engineer registered with the Institution of Engineers (India); or*
- (iii) a licensed surveyor of the respective local body of the city or town or village or development or planning authority;*

(2) the expression “construction” includes additions, alterations, replacements or remodeling of any existing civil structure;

- (c) temporary transfer or permitting the use or enjoyment of any intellectual property right;*
- (d) development, design, programming, customization, adaptation, up gradation, enhancement, implementation of information technology software;*
- (e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act; and*
- (f) transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration.”*

117. The Commission is of the view that the recurring expenses referred to in Article 12 of the

PPAs includes activities like salary, tax expenses, estimated maintenance costs, and monthly income from leases etc. The Commission notes, based on the records submitted in the context of the petitions, that outsourcing of 'Operation and Maintenance' services is not the requirement of the PPAs/ bidding documents. The concept of outsourcing is neither included expressly in the PPAs nor is it included implicitly in Article 12 of the PPAs. The Commission is of the view that in the Competitive Bidding Scenario, the SPDs bid levelled tariff without disclosing the details of the calculations of the project cost. It has already been held by the Commission in its earlier Orders that it is a pure commercial decision of the Petitioners taken for its own advantage. In the event the Petitioners choose to employ the services of other agencies, it cannot increase the liability for the Respondents. Therefore, the Commission holds that claim of the Petitioners on account of additional tax burden on operation and maintenance expenses (if any), is not maintainable. This view is in consonance with the view taken by the Commission in Order dated 09.10.2018 in Petition No. 188/MP/2017 & Ors. case titled *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors.* The Commission does not find merit in the argument of the Petitioners that compensation on O&M expenses should be allowed on lines of the Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012. The present Petition relates to section 63 of the Electricity Act, 2003 and as such drawing reference to cost plus tariff fixation principles, is misplaced.

118. The Petitioners have submitted that the underlying purpose of Article 12 of the PPAs is to provide compensation and restore a party affected by Change in Law events to a position as if such Change in Law had not taken place. Further, for the Petitioner to effectively perform its obligations under the PPAs, it is imperative that tariff under the present PPAs be suitably revised so as to bring the Petitioner to a position as if the introduction of GST 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 Petitioner is also compensated for the financial cost of the additional expenditure incurred as a result of the Change in Law by paying it carrying cost. The Petitioner could not have raised supplementary invoices claiming the additional recurring expenditure incurred by the Petitioners due to introduction of GST Laws under Article 10.3.3 of the PPA, as Article 12.2 of the PPA makes it obligatory upon the Petitioner

to approach this Commission to seek relief for a Change in Law event before raising any supplementary invoices claiming such amount.

119. **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 PPA. It is only in case of default on the part of the Respondents in not making the payment by the due date as per supplementary invoices does the issue of Late Payment Surcharge arise i.e. for the period after the due date. The reference in Article 12.2.2 of the Commission deciding on the date from which the ‘change in law’ will be effective, refers to the principal amount to be computed from the date on which change in law comes into force and not to the payment of interest and carrying cost.
120. The Respondents have submitted that the provision of Article 10.3.3 of the PPAs dealing with late Payment Surcharge and definition of the ‘Due Date’ in Article 1 read with Article 10.3.1 of the PPA are relevant. The due date is forty-fifth (45th) day after a Monthly Bill or a Supplementary bill received and duly accepted by Respondents. If such day is not a Business day, the immediately succeeding Business day, by which date such Monthly Bill or Supplementary Bill is payable by the Respondents. The supplementary bill needs to be raised by the Petitioners for the adjustment of the ‘Change in Law’ after the Change in Law claim is approved by the Commission. There cannot be any claim for late payment surcharge for the period prior to the due date. The Respondents have relied upon the decision of the Appellate Tribunal in *SLS Power Limited -v- Andhra Pradesh Electricity Regulatory Commission and Others (Appeal No. 150 of 2011)* and Batch that recognizes that the interest will be due from the date the payment is due. In the present case, the payment is due only after issuance of the Supplementary Bill after the decision of the Commission.
121. The Respondents have submitted that the PPAs do not have a provision dealing with

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

122. The Respondents have submitted that the issue regarding Carrying Cost has been decided by the Judgment of the Appellate Tribunal dated 14.08.2018 in *Appeal No. 111 of 2017 in M/s. GMR Warora Energy Limited –v- Central Electricity Regulatory Commission and Ors*. The Appellate Tribunal vide the above judgment has decided that if there is a provision in the PPAs for restoration of the Seller to the same economic position as if no Change in Law event has occurred, the Seller is eligible for carrying cost for such allowed Change in Law event(s) from the effective date of Change in Law event until the same is allowed by the appropriate authority by an order/ judgment. In the present case also, there is no provision in the PPAs for carrying cost or restitution and therefore the same, will not be applicable in the case of the Petitioner. In its Order dated 09.10.2018 in *Petition No. 188/MP/2017 and Batch in Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors. Batch*, the Commission has also reiterated the aforementioned findings of the Hon'ble Tribunal.
123. The Respondents have submitted that in the absence of the express provision in the PPAs, it is not open for the Petitioners to claim relief under principles of equity. Reference in this regard may be made to the judgment – *Alopi Parshad and Sons Ltd. v. Union of India, (1960) 2 SCR 793 : AIR 1960 SC 588*.
124. The Respondents have submitted that in view of the above, the Petitioners are not entitled to interest on incremental working capital at normative interest rate or otherwise to put the Petitioners to the same economic position as if the change in law has not occurred.
125. The Commission observes that in the judgment of the Appellate Tribunal for Electricity dated 13.04.2018 in Appeal No. 210 of 2017 in *Adani Power Limited v. Central Electricity Regulatory Commission and Ors.*, it was held that since Gujarat Bid-01 PPA has no provision

for restoration to the same economic position, the decision of allowing carrying cost will not be applicable. The relevant extract of the Judgment dated 13.04.2018 reads as under:

“ISSUE NO.3: DENIAL OF CARRYING COST

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

126. Relevant extracts of the Judgment of the Appellate 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."

127. From the above judgment, the Commission finds that if there is a provision in the PPAs for restoration of the Petitioners to the same economic position as if no Change in Law event has occurred, the Petitioners are eligible for 'Carrying Cost' for such allowed 'Change in Law' event(s) from the effective date of Change in Law event until the same is allowed by the Commission. The Commission observes that the PPAs do not have a provision dealing with restitution principles of restoration to same economic position. Therefore, the Commission is of the view that the claim regarding separate carrying cost is not admissible.

Summary of decisions:

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

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

b. *Issue No. 2:* As regards the claims during construction period, the Petitioner has to exhibit clear and one to one correlation between the projects and the supply of goods and services duly supported by the Invoices raised by the supplier of goods and services and auditors certificate as discussed in paragraph 106 above. The Respondents SECI and NTPC are liable to pay to the Petitioners, which is not conditional upon the payment to be made by the Respondent Discoms to Respondents SECI and NTPC as discussed in paragraph 114 above. . However, the Respondents SECI and NTPC are eligible to claim the same from the Respondent Discoms on ‘back to back’ basis as discussed in the said paragraph. The claim based on discussions in paragraph 100 and 103 above shall be paid within sixty days of the date of this Order or from the date of submission of claims by the Petitioner whichever is later, failing which it will attract late payment surcharge as provided under PPAs/PSAs. Alternatively, the Petitioner and the Respondents may mutually agree to mechanism for the payment of such compensation on annuity basis spread over the period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs. The claim of the Petitioners on account of additional tax burden on “O&M” expenses (if any), is not maintainable. The claim regarding separate ‘Carrying Cost’ and ‘interest on working capital’ in the instant petitions is not allowed.

129. With the above directions, Petition No. 388/MP/2018 and Petition No. 395/MP/2018 stand disposed of.

Sd/-
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