



नई दिल्ली  
NEW DELHI

याचिका संख्या. /Petition No.: 157/MP/2018  
alongwith I.A. 2 of 2019

कोरम/ Coram:

श्री आई. एस.झा, सदस्य/ Shri I. S. Jha, Member  
श्री अरुण गोयल, सदस्य/ Shri Arun Goyal, Member

आदेश दिनांक /Date of Order: 24<sup>th</sup> of January, 2021

**IN THE MATTER OF:**

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

**AND IN THE MATTER OF:**

Prayatna Developers Private Ltd. (PDPL)  
7B, Sambhav House, Judges  
Bungalow Road, Bodakdev,  
Ahmedabad - 380015, Gujarat Road,  
Andheri East Mumbai – 400069

**...Petitioner**

**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  
Represented by its Secretary  
Block-14, CGO Complex,  
Lodhi Road, New Delhi-110 003
3. Uttar Pradesh Power Corporation Limited (UPPCL)  
Represented Through its Chairperson,  
Shakti Bhawan, 14 Ashok Marg,  
Lucknow-226001-Uttar Pradesh

...Respondents

**Parties Present:** Ms. Poonam Verma, Advocate, PDPL  
Ms. Aparajita Upadhyay, Advocate, PDPL  
Shri Dipak Panchal, PDPL  
Ms. Poorva Saigal, Advocate, NTPC  
Ms. Tanya Sareen, Advocate, NTPC  
Shri Ishpaul Uppal, NTPC

### आदेश/ORDER

The Petitioner, M/s Prayatna Developers Private Ltd. (PDPL) is a generating company primarily engaged in the business of setting up solar power plants and generation of electricity in the State of Uttar Pradesh. The Petitioner has filed the present Petition under Section 79 of the Electricity Act, 2003 read with Article 12 of the Power Purchase Agreements (hereinafter referred to as “PPAs”) dated 18.05.2016 executed between PDPL and M/s NTPC Ltd., seeking appropriate relief from the Commission on account of certain ‘Change in Law’ events i.e. enactment of laws pertaining to Goods and Services Tax.

2. The Respondent No. 1, M/s NTPC Ltd. (‘NTPC’) is a Central Public Sector Undertaking and is engaged in the business of generation of electricity and allied activities. Under the State Specific Bundling Scheme of the National Solar Mission, NTPC is responsible for implementation of the scheme of the Ministry of New and Renewable Energy for setting up Solar Power Plants, with whom PDPL has executed a PPA.

3. The Respondent No. 2, Ministry of New and Renewable Energy ('MNRE'), is the nodal Ministry of the Government of India for all matters relating to new and renewable energy.
4. The Respondent No. 3, Uttar Pradesh Power Corporation Limited (UPPCL) is a deemed licensee in the State of Uttar Pradesh.
5. The Petitioner has made the following prayers:
  - (a) *Admit the Petition;*
  - (b) *Hold and declare that the imposition of the Integrated Goods and Services Tax, 2017, Central Goods and Services Tax, 2017 and Uttar Pradesh Goods and Services Tax, 2017 is an event under Change in Law under Article 12 of the PPA;*
  - (c) *Restore the PDPL to the same economic condition prior to occurrence of the Changes in Law by way of adjustment in tariff in terms of Article 12 of the PPAs as prayed for in the present Petition.*
  - (d) *Pending proceedings, direct the Respondent No. 1 to pay the amount claimed under Change in Law which shall be subject to adjustment based on the final order passed by the Commission;*
  - (e) *To pass such other and further order or orders as this Commission deems appropriate under the facts and circumstances of the present case.*

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- (a) *Grant carrying cost to the Applicant.*
- (b) *Restore the Applicant to the same economic position as it were prior to the occurrence of the Change in Law event.*
- (c) *Direct the Respondent to pay to the Applicant the amount claimed under Change in Law in terms of Article 12 of the PPAs along with carrying cost from the date the change in law event has come into effect.*
- (d) *Pass such further orders or directions as this Commission may deem just and proper in the circumstances of the case.*

**Brief facts of the case**

6. On 15.03.2016, PDPL was selected as the successful bidder under the National Solar Mission
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Phase-II Batch-II Tranche I State Specific Bidding Scheme conducted by NTPC.

7. On 18.05.2016, PDPL entered into five PPAs with NTPC for development of five grid connected solar photo voltaic power plants of 10 MW capacity each, at Village Ghutbai, Tehsil-Charkhari, District- Mahoba, in the State of Uttar Pradesh (hereinafter referred to as 'the projects'). The projects were to be developed on long term basis, at a tariff of Rs. 4.78/kWh. As per the PPAs as well as the bidding scheme, the solar power purchased by NTPC under the PPAs was to be bundled with thermal power produced at NTPC generating stations and sold to the Distribution Companies (Discoms) in the State of Uttar Pradesh.
8. As per the PPAs, the Schedule date of Commissioning (SCoD) of the Projects was 28.05.2017 which was later extended to 07.06.2017 vide Order of the Commission dated 09.01.2020 in Petition No. 229/MP/2018.
9. On 07.06.2017, the Petitioner successfully commissioned its Projects.
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 Uttar Pradesh Goods and Services Tax Act, 2017 was also enacted for levy and collection of tax on intra-State supply of goods or services or both by the States. The above laws are hereinafter referred to as 'the GST Laws' collectively.
11. The Petitioner has claimed that enactment of the GST Laws constitutes Change in Law in terms of the provisions of the PPAs. Hence the Petition.

### **Submissions of the Petitioner**

12. The Petitioner has submitted that on 10.03.2015, MNRE issued Guidelines for implementation of the Scheme for selection of 3000 MW Grid Connected Solar PV Power Projects under Phase-II, Batch-II, Tranche-I for "State Specific Bundling Scheme". Under the State Specific Bundling Scheme (in short, 'the Bundling Scheme'), NTPC was appointed the

nodal agency by MNRE. NTPC implemented the Bundling Scheme through its subsidiary NTPC Vidyut Vyapar Nigam Ltd. (NVVNL), which is a trading licensee for inter-State trading in electricity in whole of India. On 12.08.2015, NTPC issued Request for Selection ('RfS') inviting proposals for setting up Grid Connected Solar-PV Power Projects (10 MW x 5 projects) in the State of Uttar Pradesh.

13. The Petitioner has submitted that it participated in the bids and after following the process of reverse auction conducted by NTPC, it was selected as the successful bidder. On 15.03.2016, NTPC issued the Letter of Intent ('LoI'). On 18.05.2016, PDPL entered into 5 PPAs with NTPC for setting up 5X10 MW projects which were successfully commissioned on 07.06.2017. Though the projects were commissioned prior to implementation of the GST Laws, various project supply/ works contracts were pending for finalization and its invoices/ payments were made subsequent to GST implementation date (01.07.2017). Since it had not contemplated introduction of GST at the time of bid submission, introduction of the GST Laws made a huge impact on the actual cost of the project *vis-a-vis* budgeted cost, which was beyond its control and, therefore, relief on account of Change in Law is being prayed for.
14. The Petitioner has submitted that the definition of Law as provided under the PPAs is an inclusive and illustrative definition, and contemplates all laws, including the Electricity Laws applicable to India in various forms.
15. The Petitioner has submitted that the underlying principle of Change in Law provision of the PPAs is to determine the consequence of Change in Law and to compensate a party affected by such Change in Law so that the party is restored to the same economic position as if such Change in Law had not occurred. The total escalation in cost of the projects due to implementation of the GST Laws is Rs. 1,94,43,403/- of which Rs. 38,35,363/- is on account of increase in construction cost and Rs. 1,56,08,040/- is on account of increase in O&M expenses. The Petitioner has submitted that on account of levy of GST, the construction cost of project has escalated to the tune of Rs. 38,35,363/- which includes: (i) Construction Service (ii) Control Cables (iii) Miscellaneous Electrical (iv) Module Mounting Structures (MMS) Supply (v) Supervisory Control and Data Acquisition (SCADA) System (vi)

Supervisory Control and Data Acquisition (SCADA) Commissioning and (vii) Weather Monitoring Systems (WMS) Service. In order to determine the impact of GST on O&M expenses, it has considered relevant normative parameters as specified 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, which includes Service Tax of 15%, with an annual escalation of 5.72%. Considering the same parameter with an additional 3% GST impact, i.e. 18% GST on the normative O&M expenses, the net present value of pre-GST O&M expenses and post-GST, the impact works out to Rs. 1,56,08,040/- and has been claimed as compensation.

16. The Petitioner has placed reliance on the Order of the Commission dated 21.08.2017 in *Suo-Moto* Petition No. 13/SM/2017, related to introduction of GST Laws being Change in Law events under the respective PPAs.

**Reply of Respondent No. 1 (NTPC)**

17. NTPC has submitted that the Commission vide its Order dated 19.09.2018 in Petition No. 50/MP/2018 and Petition No. 52/MP/2018 in the case titled *Prayatana Developers Pvt. Ltd – v- NTPC Limited and Ors and Azure Power Venus Pvt. Ltd. v Solar Energy Corporation of India Limited and Ors.* has laid down the principles for an SPD to be eligible for claiming the impact of Change in Law events. Impact of the GST Laws cannot be claimed under the following circumstances:
- a) where the SCoD is prior to 01.07.2017; or
  - b) where the Actual Date of Commissioning is prior to 01.07.2017; or
  - c) where the point of taxation of Goods/Services is before 01.07.2017; or
  - d) when there is no clear/one-to-one co-relation between the projects, supply of goods or services and the invoices raised by the supplier of goods and services.
18. NTPC has submitted that even if the SCoD is after 1.07.2017, (for example such as on 20.07.2017 as stated in Petition No. 193/MP/2018 related to Renew Wind Energy (TN2) Project), the actual procurement of goods would have been prior to 01.07.2017. There has to be lead time for placing the purchase order, the delivery of goods, the installation and

commissioning of the power project etc. There has to be a one-to-one co-relation between the goods/ services procured and the invoices raised. The Petitioners should submit the following details in respect of all goods/ services:

- a) Date of Purchase Order;
- b) Date of raising of Invoice by the Supplier;
- c) Date of handing over of the goods to the common carrier/delivery date;
- d) Date of Bill of Lading in case of imported goods;
- e) Date of Custom clearance in case of imported goods;
- f) Date of arrival of the goods at the project site;
- g) Date of rendering of the actual services; and
- h) Date of actual commissioning.
- i) Along with above Certificate by Auditors regarding compliance of GST Laws

19. Regarding the scope of Article 12.1.1 of the PPAs, NTPC has submitted that the Commission in its Order dated 19.09.2018 in Petition No. 50/MP/2018 and Petition No. 52/MP/2018 has held that 'GST Laws' do not fall under the ambit of last bullet of Article 12.1.1. However, the decision of the Commission that the first bullet of Article 12.1.1 includes the 'GST Law' on input material is required to be re-considered as it is contrary to the well settled interpretation. It will amount to rendering the last bullet redundant. The Respondents have submitted that the principles that emerge from various judgments can be summarized as under:

- a) When a specific clause deals with taxes, the general clauses dealing with laws in general do not cover taxes.
- b) Clauses in the Agreement cannot be interpreted in a manner to render a clause otiose, redundant or surplusage.
- c) The purpose of a specific clause on tax is to make it restrictive.
- d) When Agreements under Section 63 and the same Guidelines of the Government of India use different expressions, then they cannot be interpreted to mean the same thing.
- e) 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.

20. NTPC has submitted that the last bullet of Article 12.1.1 relates to the 'supply of power'. Therefore, every change in tax or introduction of tax was not intended to be covered by the 'Change in Law' provisions of the PPA. It cannot, therefore, be that the 'supply of power' be extended to other aspects such as taxes on input goods and services.
21. NTPC has submitted that O&M is the responsibility of the Petitioners and in the event of the Petitioners choosing to employ the services of other agencies, it cannot increase the liability of the Respondents. The outsourcing of O&M to a third party is not a requirement of the PPAs and is a commercial decision of the Petitioners for its own advantage and any increase in cost including on account of taxes etc. is entirely to the account of the Petitioner.
22. NTPC has submitted that there is no provision in the PPAs regarding carrying cost or interest for the period till the decision of the Commission acknowledging the Change in Law and deciding on the amount to be paid for such Change in Law namely '*provide for relief for the same*', as specified in Article 12.2.2 of the PPA. Further, it is not a case of amount being denied at appropriate time or any deprivation of amount due to actions of the Procurers. The Procurers cannot make the payment for Change in Law until the amount is determined by the Commission once the complete information regarding the claim is provided by the Petitioner and not before. Any delay in the determination of impact of Change in Law is to the account of the Petitioner. The Petition has been filed after approx. 11 months of the enactment of the GST Laws. The consequences of any time delay in approaching the Commission should be borne by the Petitioner. There is no provision in the PPAs dealing with carrying cost and it is well settled principle that the parties cannot go beyond the pleadings in the matter. Since there was no pleading in relation to carrying cost, the Commission could not have granted any such relief.
23. 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. For instance, if in pre-GST regime, the Petitioner was subjected to 4% Excise Rate and post-GST, the same became a cumulative 5%, then the Petitioners would be entitled to claim only the difference i.e. 1% as a change in law and not the entire 5%.

24. The Petitioners have chosen to give some documents, including some invoices without any correlation and the related documents. Before the matter is adjudicated, the Petitioners should be directed to give the following particulars/ documents along with the Auditor's Certificate in respect of each claim under GST Laws:

- i. Name of Good/Equipment
- ii. Date of Purchase Order
- iii. Date of Delivery of Goods/Custom Clearance
- iv. Date of Goods being Handed over to the common carrier
- v. Date on which Goods were received at site
- vi. Date at which Goods were installed at site
- vii. The name of the manufacturer of Goods
- viii. The name of the intermediary between the OEM and the SPD
- ix. The GST/Tax Invoice raised
- x. Supporting document in rest of each above documents

25. NTPC has submitted that in the order dated 19.09.2018 in Petition No. 50/MP/2018 and Petition No. 52/MP/2018, the Commission has taken note of the substantial difference in the GST, namely, 5% if the components are bought as a part of the solar generation system and 18% if the components are individually and directly purchased. As a Prudent Utility, the SPD ought to have considered the reduction in the impact of GST by arranging to buy the assets as a part of the Projects at the cost of paying GST at a lower rate instead of purchasing it individually by paying higher GST of 18%. The SPD had the duty to mitigate the costs. Any higher cost paid, without mitigating the cost, should not be allowed to be passed on to the Respondents and thereby to consumers at large.

26. NTPC has submitted that the PPAs entered into by the Petitioner with the Respondent

envisages the status of the Respondent as an intermediary company for bulk purchase of electricity from the Petitioners for bulk supply of electricity to the Discoms under a PSA. NTPC is in a position to discharge its obligations under the PPAs including the payment for any change in law implication etc. only on the Discoms remitting the amount to NTPC in terms of the respective PSAs. The obligation of the Discoms under the PSAs is, therefore, on a back to back basis with the obligation of NTPC to the Petitioner.

**Rejoinder by Petitioner to reply of Respondent-NTPC (Dated 12.10.2018)**

27. The Petitioner has submitted as under:

a) The Commission's Order dated 19.09.2018 in Petition No. 50/MP/2018 and Petition No. 52/MP/2018 has dealt with the contentions of NTPC in detail and has concluded that impact of taxation change of solar power plants during the construction period are covered by Change in Law. NTPC is in effect re-agitating the issue which has been settled by the Commission in a previous Order to which NTPC itself was a party.

b) Outsourcing of O&M is a prudent industrial practice to ensure international standard of the best practices in plant inspection procedures, quality assessment plans and checklists for maintenance. The outsourcing partner provides O&M services that include periodic and preventive maintenance checks with IV curve analysis and thermographic imaging. Physical O&M tasks, such as module cleaning, housekeeping and security are carried out through third parties under the supervision of the generator. Outsourcing of O&M is thus a practical requirement. Outsourcing of O&M of solar projects is not prohibited under the PPAs and is considered a part of the expenditure incurred by the generator.

c) 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. The Petitioner has placed its reliance on Judgments of APTEL dated 20.12.2012 in Appeal No. 150; dated

13.04.2018 in Appeal No. 210 of 2017; and dated 13.04.2018 in Appeal No. 210 of 2017 (*Adani Power Limited vs. Gujarat Electricity Regulatory Commission &Ors.*). It has also referred to judgements of APTEL in matter of *North Delhi Power Ltd vs. DERC* 2010 ELR (APTEL) 0891; and in matter of *Tata Power Company Ltd vs. Maharashtra Electricity Regulatory Commission* 2011 ELR (APTEL) 336.

d) It is a settled position of law that relief cannot be denied merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure. The Court always gives leave to amend the pleading of a party. In addition, the amendment sought does not alter the cause of action, but it only brings out correctly the capacity of the plaintiff suing. It does not change the identity of the plaintiff who remains the same. The Petitioner has placed its reliance on the judgments of the Hon'ble Supreme Court in *M/s Ganesh Trading Co. v. Moji Ram* (1978) 2 SCC 91 (para 16); *Greater Mohali Area Development Authority &Ors. vs. Manju Jain &Ors.* (2010) 9 SCC 157 (para 26); and *National Textile Corporation Ltd. vs. Naresh kumar Badru kumar Jagad & Ors.* (2011) 12 SCC 561 (para 19).

e) Details of each component and the tax applicable has been submitted along with the Petition. Further, it has duly annexed the sample invoices as may be required to demonstrate its claim for compensation.

f) As per Article 12.1 of the PPA, it is entitled to Change in Law claim for events occurring after the Effective Date and immaterial conditions such as intent or motive cannot be artificially built into the PPA. It has been prudent in considering the impact of the GST Laws. It is wrong to construe individual purchase of assets as a way to mitigate the cost of implication of GST. As a prudent utility, the Petitioner's obligations include ensuring that prudent business decisions are taken based on commercial principles. Following this, the assets were purchased individually and hence their purchase cannot be termed as imprudent.

#### **Additional submissions by NTPC**

28. NTPC has filed additional submissions on 03.07.2019 and submitted that it has been settled

by this Commission vide Order dated 19.09.2018 in Petition No. 50/MP/2018 and Petition No. 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.* and Order dated 09.10.2018 in Petition No. 188/MP/2017 and Batch in the case of *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors. and Batch* that there shall be no implications of the GST Laws in respect of projects which are commissioned prior to 01.07.2017. The Petitioner has not provided any material or supporting documents to establish that the transactional events were taxable events occurring on or after 01.07.2017 with reference to the specific provisions of the GST Laws. The Petitioner has failed to satisfy that the point of taxation for the goods/ services is after 1.07.2017. Also, for one-to-one correlation, the Petitioner has to produce proper documentation in respect of each of the goods/ services claimed in the Petition, namely the Construction Services, Control Cables, Module Mounting Structure, SCADA System, SCADA commissioning and Weather Monitoring System service etc., duly certified by the Auditors. The Petitioner has only filed one document relating to procurement of Armoured Cable and no documentation has been produced with regard to other items. The documents filed by the Petitioner are inadequate and insufficient for considering impact of the GST Laws, if any, on the items listed in the Petition.

29. NTPC has submitted that considering that the SCoD for the 5 X 10 MW Solar PV Project was 28.05.2017 and the Petitioner had in fact achieved actual commissioning by 07.06.2017, in natural course, all pending works/ services and supply of goods were required to be carried out and the respective invoices (including taxable invoices) be raised by the actual commissioning date for claiming that the power project was duly commissioned on 07.06.2017. The burden of establishing to the contrary is on the Petitioner.
30. NTPC has submitted that the Petitioner is required to commission the plant in accordance with the applicable laws, the Grid Code, the terms and conditions of the PPAs as well as prudent utility practices. It is, therefore, incumbent upon the Petitioner to prove to the satisfaction of the Commission that:

(i) Either it could commission the plant in accordance with Article 4.1.1(c) of the PPAs without the completion of the aforesaid works i.e. Construction Services, Control Cables, Miscellaneous Electrical, Module Mounting Structure, SCADA System, SCADA commissioning and Weather Monitoring System; or

(ii) alternatively, that the invoices of the said works/equipment and the point of taxation for the said works was after 01.07.2017 in accordance with the provisions of the Central Goods and Services Act, 2017.

31. NTPC has submitted that the implications of time over-run (subject matter of 229/MP/2018), is subject to a maximum of 10 days (if so allowed) and has no relevance to the present proceedings relating to Change in Law.

**Rejoinder of the Petitioner to the additional submissions of NTPC**

32. On 30.12.2019, the Petitioner has filed rejoinder to the additional submissions filed by NTPC. The Petitioner has submitted that:

- a. Order dated 19.09.2018 in Petition No. 50/MP/2018 and Petition No. 52/MP/2018 was passed based on the pleadings and arguments in that case; and
- b. present Petition is maintainable and the Petitioner should be given the opportunity to plead its case.

33. The Petitioner has submitted that it had duly commissioned its projects in terms of the respective PPAs on 07.06.2017. To this effect, commissioning certificate was also issued by the competent authority certifying that the projects were commissioned and synchronized on 07.06.2017. Therefore, NTPC cannot raise any contentions against the commissioning of the Petitioner's projects.

34. The Petitioner has submitted that NTPC's contentions that invoices for all the services and goods supplied to the Petitioner by its contractor for commissioning the projects naturally would have been issued before enactment of the GST Laws (i.e. prior to 01.07.2017) is wrong and denied. There is no correlation between supply of goods/ services by the contractor and the date of issue of such invoices. Most of the goods and services required for commissioning

the projects were received by the Petitioner before the actual commissioning (i.e. before 07.06.2017). However, the invoices for such goods and services were raised by the contractor after commissioning the project and also after the enactment of the GST Laws. Therefore, GST was paid by the contractor for such supply and the Petitioner was required to pay such GST to the contractor. Therefore, the Petitioner ought to be compensated for the same in terms of Article 12 of the PPAs (Change in Law). Further, for certain goods and services supplied before commissioning the projects, the contractor had issued invoices prior to 01.07.2017 and on such invoices, no GST was paid by it. However, it is not seeking any relief qua the invoices which did not include payment of GST. It is only claiming relief in relation to those invoices which were issued after enactment of GST Laws and for which the Petitioner has actually paid GST.

35. The Petitioner has submitted that the findings of the Commission qua impact of GST Laws are unambiguous so far as impact of GST Laws is concerned. The Commission in its Order dated 12.04.2019 in Petition No. 206/MP/2018 and batch has clearly held that any portion of supply whose point of taxation is after implementation of the GST Laws will be taxed under the GST Laws. The Commission has not restricted the applicability of the GST Laws only to the pre-commissioning stage. No distinction has been created between invoices raised pre and post-commissioning of the projects.
36. The Petitioner has submitted that GST's impact on the construction stage of the projects is a continuing cause of action to claim Change in Law relief. The Petitioner is entitled to compensation for the actual expenditure incurred on account of introduction of GST Laws in the procurement of goods and services even for the post-commissioning period.
37. The Petitioner has submitted that this Commission is duty bound to apply the 'Business Efficacy' test to imply terms into a contract to grant relief where a provision for relief on account of Change in Law has been envisaged in the PPA. Accordingly, this 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, the Petitioner has placed its reliance 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.

38. The Petitioner has submitted that it is a settled position of law 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, this Commission ought to take note of the judgment of the Hon'ble Supreme Court in *Mahabir Kishore vs. State of M.P.* (1989) 4 SCC 1. The terms of the PPAs must be interpreted giving due weightage to the test of 'Business Efficacy' of the solar power projects which resulted in additional expenditure being incurred by the petitioner after the implementation of GST.
39. The Petitioner has submitted that NTPC has contended that the Petitioner has not submitted any document or supporting evidence with respect to its claim. In this regard, the Petitioner has submitted details of each component and the tax applicable along with the Petition.

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40. The Petitioner has 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 Change in Law had not occurred. Restitution is therefore inherent to compensation.
41. The Petitioner has further submitted that APTEL in its judgment dated 12.09.2014 in Appeal No. 288 of 2013 titled *Wardha Power Company Ltd. v. Reliance Infrastructure Ltd. & Ors.*, has recognized the principle that in order to 'restore the affected party to the same economic position', compensation for Change in Law claims has to be such, as to reimburse the affected party for the expense actually incurred. Thus, the same will include expenditure attributable towards carrying cost.
42. The Petitioner has submitted that the principle of recovery of carrying cost/ interest and time value of money has been recognized in numerous cases including Judgment of APTEL dated 13.04.2018 in Appeal No. 210 of 2017, *Adani Power Limited vs. Gujarat Electricity*

*Regulatory Commission & Ors.*; Judgment dated 15.02.2011 in Appeal No. 173 of 2009, *Tata Power Company Ltd vs. Maharashtra Electricity Regulatory Commission*; Judgment dated 20.12.2012 in Appeal No. 150 and batch matters, *SLS Power Ltd v. Andhra Pradesh Electricity Regulatory Commission* and Judgement of the Hon'ble Supreme Court in *South Eastern Coalfield Ltd vs. State of Madhya Pradesh* (2003) 8 SCC 648.

43. The Petitioner has submitted that the Hon'ble Supreme Court in the case of *Energy Watchdog vs. Central Electricity Regulatory Commission and Ors.* (2017) 14 SCC 80, has held that where a situation arises which is not covered by the Guidelines issued by the Central Government or the Guidelines do not deal with a given situation, the Commission's general regulatory powers under Section 79(1)(b) can be used. This is a fit case for exercise of such power to devise a suitable mechanism to ensure that the Applicant is restored to the same economic position and time-value of money is restored by allowing carrying cost for the period when the Applicant pays the Change in Law amount and the Respondent compensates the Applicant.
44. The Petitioner has submitted that in the view of the above, it is entitled to compensation not only arising directly on account of the Change in Law events but also compensation on account of additional deployment of funds (carrying costs) in relation to the Change in Law events, so as to effectively restore it to the same economic position as if the Change in Law event had not taken place.

#### **Written Submissions of the Petitioner**

45. As per Record of Proceedings dated 07.07.2020, the Commission allowed the Petitioner to file written submissions. Accordingly the Petitioner filed the written submissions on 20.07.2020 which have been taken on records.
46. The Petitioner has submitted that the issues raised in the present Petition have already been adjudicated and decided by this Commission in its earlier orders. The same are tabulated hereunder for the convenience of the Commission:-



<b>S. No.</b>	<b>Issues</b>	<b>View taken by this Commission</b>
1.	Enactment of GST Laws is a Change in Law event under the PPA.	<b>Allowed.</b> Reference: (a) Order dated 30.12.2019 in Petition No. 4/MP/2019 and batch in <i>Parampujya Solar Energy Pvt. Ltd v. SECI &amp;Ors. vs. SECI &amp;Ors.</i> (b) Order dated 27.03.2019 in Petition No. 388/MP/2018 in <i>Wardha Solar (Maharashtra) Pvt. Ltd vs. SECI &amp;Ors.</i>
2.	The intermediary procurer (NTPC) is liable to make payment of the GST claims based on the actual invoices paid by the solar power developer.	<b>Allowed.</b> Reference: (a) Order dated 12.04.2019 in <i>Parampujya Solar Energy Pvt. Ltd. Vs. NTPC &amp;Ors.</i> in Petition No. 206/MP/2018. (b) Order dated 18.04.2019 in <i>Parampujya Solar Energy Pvt. Ltd. vs. NTPC &amp;Ors.</i> in Petition Nos. 164/MP/2018 and 165/MP/2018.
3.	Compensation for GST impact should be paid on O&M expenses of the solar power developer.	<b>Disallowed.</b> Reference: (a) Order dated 30.12.2019 in Petition No.4/MP/2019 and batch in <i>Parampujya Solar Energy Pvt. Ltd v. SECI &amp;Ors. vs. SECI &amp;Ors.</i> (b) Order dated 27.03.2019 in Petition No.388/MP/2018 in <i>Wardha Solar (Maharashtra) Pvt. Ltd vs. SECI &amp;Ors.</i>
3.	Carrying Cost is admissible in addition to GST claims.	<b>Disallowed.</b> Reference: (a) Order dated 30.12.2019 in Petition No.4/MP/2019 and batch in <i>Parampujya Solar Energy Pvt. Ltd v. SECI &amp;Ors. vs. SECI &amp;Ors.</i> (b) Order dated 27.03.2019 in Petition No.388/MP/2018 in <i>Wardha Solar (Maharashtra) Pvt. Ltd vs. SECI &amp;Ors.</i>

### *Issues-wise Submissions*

47. The Petitioner has submitted that this Commission in its earlier orders has held enactment of GST Laws to be a Change in Law event. The same is also expressly admitted by NTPC in its written submissions and also during the hearing before this Commission on 07.07.2020. In its earlier orders, the Commission has consistently held that the procurer shall pay the compensation for the financial impact of GST laws to the generator based on the actual invoices raised and supported by Auditor's certificate. Therefore, the present Petition may also be decided on the same lines.
48. The Petitioner has submitted that the Commission has settled the issue of the payment obligation of the Intermediary Procurer with respect to GST claims. The Commission has consistently held in its orders that the Intermediary Procurer (NTPC) is liable to pay the GST claims of solar power developers (after reconciliation) based on actual invoices backed by Auditor's certificate.
49. The Petitioner has submitted that Projects were commissioned on 07.06.2017 and achieved commercial operation date ('COD') on 07.07.2017. The Petitioner had procured most of the goods and services required for the project before COD of the project (07.07.2017). However, the invoices for some of the goods and services were raised by the Petitioner's contractor after the COD and consequently after the implementation of the GST laws. Therefore, the Petitioner has paid GST on such invoices raised after enactment of GST laws.
50. The Petitioner has submitted that in various earlier petitions, SPDs had sought compensation for GST paid on invoices for goods procured/ installed after the COD of the project. It is in that context that the Commission has held that liability to pay GST for goods procured (DC modules) for commissioning of the project shall be limited to COD. However, in the instant case, the goods and services for the Petitioner's project were received before the COD.
51. The Petitioner has submitted that the Commission in a catena of orders has crystallized the position that the procurer shall pay the compensation to the generator for Change in Law based on the actual invoices raised and supported by Auditor's certificate. Therefore, as along

as the Petitioner can demonstrate one-to-one correlation between the projects, supply of goods/ services and the invoices raised by the supplier of goods and services, NTPC is obligated to make payment as per the invoices submitted by the Petitioners.

52. The Petitioner has submitted that it has placed on records the Auditor's Certificate which certifies that the Petitioner has paid Rs. 99,13,937/- as additional tax in the form of additional GST on the material and services utilized for the project.
53. The Petitioner has submitted that the GST Laws contemplate several situations where the invoices can be raised even after the supply of goods/ services. The time of supply under the GST Laws will be determined by the nature of the supply of goods and services. In fact, Sections 12 and 13 of the CGST Act, 2017 relied upon by NTPC also further the case of the Petitioner. Section 12 (in relation to supply of goods) and Section 13 (in relation to supply of services) also mandate that liability to pay tax on goods/services shall arise on, earlier of the following two dates:
- (a) the date of issue of invoice by supplier; or
  - (b) the date on which the supplier receives payment for such supply.
54. The Petitioner has submitted that it procured construction services for the purpose of the construction and erection of the solar power plant. Such a contract for construction services is quite different from the usual contract for one time supply of services. A contract for construction services would fall under the definition of "continuous supply of services" as defined under Section 2(33) of the CGST Act, 2017 since the services were required to be provided continuously, with periodic payment obligations over an extended period of time. Therefore, in the present case, Section 31(4) (5) of the CGST Act, 2017 which specifically provides the time limit for issuing tax invoice under a contract of continuous supply will be applicable. Accordingly, the time of raising of invoice, in case of continuous supply of service is guided by the agreement between the parties as invoices are raised against the progress made in executing the project. Moreover, the combined reading of the provisions related to continuous supply of services [Section 2(33), 13(2) and 31 (5)] clearly shows that the invoice can be raised after the service has been provided. Therefore, the argument of

NTPC that the invoices ought to have been raised before or at the time of the supply of services [based on Section 31(1) and (2)]is misplaced. It is settled law that a specific provision of law overrides a general provision of law (*Generalia specialibus non derogant*). Section 31(5) of the CGST Act, 2017 incorporates a specific provision of law providing the time limit for issuing a Tax invoice in cases of continuous supply of services. Section 31(2) of the CGST Act provides the general time limit for issuing tax invoice. Therefore, in cases of continuous supply of services, Section 13 ought to be read with Section 31(5) for determining the time of supply of service.

55. The Petitioner has submitted that Article 12 does not restrict the compensation to the date of the commissioning of the project. Article 12.1.1 of the PPAs unambiguously states that Change in Law means the occurrence of “any” of the events listed in the Article, after the effective date of the project that results in any additional recurring or non-recurring expenditure by the Solar Power Developer.
56. The Petitioner has submitted that this Commission has denied Change in Law relief *qua* O&M expenses in its earlier orders and such orders are subject matter of Appeal before the Tribunal. These orders run on the premise that merely because outsourcing of O&M services is not a mandate of the PPAs, any incremental impact of GST laws on such outsourcing of O&M expenses cannot be allowed as pass-through. In this regard, the following submissions are placed before for this Commission to be considered:
- a. Outsourcing of O&M services has not been specifically barred under the PPAs.
  - b. 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’ and “recurring” signifies the wide ambit of the Change in Law clause and unless something is specifically excluded, the word ‘any’ and ‘recurring’ ought to be read broadly.
  - c. The outsourcing of O&M activities has not been specifically excluded from the ambit of Change in Law clauses.
  - d. Outsourcing of O&M services by the Petitioner can also be inferred by having

reference to the provisions of the CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2017 issued under the Electricity Act wherein O&M expenses are treated as a fixed cost component of the tariff structure for renewable energy technologies.

e. 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 (without prejudice) 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.

57. The Petitioner has submitted that PPAs do not differentiate between internalization and outsourcing of O&M services. There is no distinction between tax liability of the Petitioner during 'construction' stage and 'operation' stage.
58. The Petitioner has submitted that although this Commission has rejected the claim of carrying cost of SPDs in its earlier orders and the same are subject matter of appeal before the Tribunal, it is placing the following submissions for the consideration of this Commission and to appropriately decide regarding carrying cost:
- a. 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.
  - b. Carrying cost is in the nature of compensation for money denied at the appropriate time, as held by the Tribunal for Electricity 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: Adani Power Ltd. v. CERC &Ors..

- c. Hon'ble Supreme Court has in the case of *R.C. Cooper vs. Union of India*: AIR 1970 SC 564 noted that as per the dictionary meaning, "compensation" means anything given to make things equal in value: anything given as an equivalent, to make amends for loss or damage". The aforesaid principle has also been recognized by the Hon'ble Supreme Court in the case of *N.B. Jeejeebhoy vs. Assistant Collector, Thana Prant, Thana*: AIR 1965 SC 1096.
- d. Compensation is a comprehensive term and is aimed at restoring a party to the same position as if no injury was caused to it, as held by the Hon'ble Supreme Court in the case of *Yadava Kumar vs. The Divisional Manager, National Insurance Co. Ltd. and Anr.*, (2010) 10 SCC 341.

59. The Petitioner has submitted that it has provided all details with respect to GST claims as part of the present petition. Once the present petition is allowed by the Commission, it shall provide actual invoices and any other related information to NTPC for reconciliation of Petitioner's claims as directed by this Commission in its earlier orders.

### **Analysis and Decision**

60. We have heard the learned counsels for the Petitioner and the Respondents and have carefully perused the records.

61. We find that the following issues are raised in the context of the present petition:

**Issue No. 1:** *Whether enactment of the GST Laws is an event under Change in Law under Article 12 of the PPA?*

**Issue No. 2:** *Whether the GST paid on goods and services after the Scheduled date of Commissioning can be claimed by the petitioner?*

**Issue No. 3:** *Whether the Petitioner should be restored to the same economic position as it was prior to the occurrence of the Change in Law event and Whether ‘Carrying Cost’ can be granted to the Petitioner?*

62. No other issue was pressed or claimed.

**Issue No. 1:** *Whether enactment of the GST Laws is an event under Change in Law under Article 12 of the PPA?*

63. The Petitioner has submitted that the enactment of the GST laws constitutes Change in law in terms of Article 12 of the PPA. *Per contra*, NTPC has submitted that the Commission may re-consider its earlier decision holding that the first bullet of Article 12.1.1 includes the ‘GST Law’, as this will amount to rendering the last bullet redundant.

64. The relevant Recitals of the PPAs are as under:

12. *ARTICLE 12: CHANGE IN LAW*

12.1 *Definitions*

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

12.1.1 *‘Change in Law’ means the occurrence of any of the following events after the Effective Date resulting into any additional recurring/ non-recurring expenditure by the SPD or any income to the SPD:*

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

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

12.2.1 *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.”*

65. In case of PPAs with the same provisions and involving the Petitioner and NTPC, the Commission vide its combined Order dated 19.09.2018 in Petition No. 50/MP/2018 and Petition No. 52/MP/2018 has held that:

*“125. The Commission observes that as per Article 12, “Change in Law” means the enactment/ 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 opinion that harmonious construction of the bullet points under Article 12 makes it clear that bullet point one is wider in scope and refers to the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal of any Law in India, including rules and regulations framed pursuant to such Law whereas bullet point sixth in seriatim refers specifically to any change in tax or introduction of any tax made applicable for “supply of power” by the SPD as per the terms of Agreement. It implies that bullet point sixth in seriatim would be applicable as “Change in Law” to the cases where the change in tax or introduction of any tax directly impacts “supply of power” only. Thus, the ambit of the sixth bullet point is limited in that if any change in Tax is made or any tax is introduced having its impact specifically on the “supply of power” in that case the remedy of “Change in Law” is available to the Petitioners under bullet point number six only. 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. It is a comprehensive indirect tax reform which created a common national market by dismantling inter-State trade barriers. Various laws were subsumed and repealed. Hence, the Commission holds that the enactment of „GST laws” is covered as “Change in Law” under the first bullet of Article 12 of the PPA.”*

66. Therefore, the above order is squarely applicable to the instant petition. Hence, the enactment of the GST laws is Change in Law event in terms of the PPAs. As regards contention of NTPC that there is a need to re-consider earlier decision of the Commission holding that the first bullet of Article 12.1.1 includes the GST Laws, as this will amount to rendering the last bullet redundant, we are of the view that the issue has been dealt with in the above-mentioned order and we do not find any new contention being raised by NTPC. We are not inclined to consider the submission of NTPC.



***Issue No. 2: Whether the GST paid on goods and services after the Scheduled date of Commissioning can be claimed by the petitioner?***

67. NTPC has submitted that from the Section 12(1) & 12(2), Section 13(2)(a) & 13(2)(b), Section 14(a)(i), Section 31(1) & (2) of the CGST Act, 2017 read along with Rule 47 of the CGST Rules, 2017, it can be inferred that there cannot be any invoice under law, post supply of goods and if the tax invoice has not been raised at the time of delivery, then the point of taxation is deemed to be the date of delivery of goods. The Commission vide previous Orders has already rejected the claims with respect to O&M. Since the PPAs in those petitions are in pari-materia with the PPA of the instant petition, same Orders will be applicable. Per contra, the Petitioner has submitted that in earlier petitions, the SPDs had sought compensation for GST paid on invoices for goods procured/ installed after the COD of the project wherein the Commission held that liability to pay GST for goods procured (DC modules) for commissioning the project shall be limited to COD. However, in the instant case, though goods and services for the projects were received before the COD (07.07.2017), the invoices for some of these goods and services viz. Construction Services, Control Cables, Misc. Electricals, Module Mounting Structure, SCADA System, SCADA commissioning and Weather Monitoring System service were issued after the COD by contractor after receiving due quality check from the Petitioners. The Commission, in a catena of orders has crystallized the position that the procurer shall pay compensation to the generator for Change in Law based on actual invoices raised and supported by Auditor's certificate. The Petitioner has submitted that the GST Laws contemplate several situations where the invoices can be raised even after the supply of goods/ services. However, a contract for construction services would fall under the definition of "continuous supply of services" as defined under Section 2(33) of the CGST Act, 2017 since the services were required to be provided continuously, with periodic payment obligations over an extended period of time. Therefore, in the present case, Sections 31(4) and (5) of the CGST ACT, 2017 which specifically provides the time limit for issuing tax invoice under *a contract of continuous supply* will be applicable. The combined reading of the provisions related to continuous supply of services {Sections 2(33), 13(2) and 31(5)} clearly shows that invoice can be raised after the service has been provided. There is nothing in the GST laws which prevent the raising of invoices at a time after the supply of

goods/ services. Further, Article 12 of the PPAs does not restrict the compensation to the date of the commissioning of the project.

68. We observe that the PPAs in the instant case were signed on 18.05.2016 and became effective from 29.04.2016. SCoD of the projects as per PPAs was 28.05.2017 which was later extended to 07.06.2017 (vide Order of the Commission dated 09.01.2020 in Petition No. 229/MP/2018). The GST Laws were notified on 01.07.2017. Article 12 of the PPA, stipulates that occurrence of any event after the Effective Date resulting into any additional recurring/ non-recurring expenditure/ income of the Petitioner is covered as 'Change in law'.
69. The various provisions of the PPAs stipulates 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"*

*Project Commissioning shall mean all equipments upto the rated project capacity have been installed and energy has flown into grid"*

*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 22.34 Million kWh (MU) of energy generated corresponding to a CUF of 25.5% 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 17.96 Million kWh (MU) corresponding to a CUF of 20.5% (i.e., 25.5% - 5%), on account of reasons solely attributable to the SPD, the noncompliance 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.”

70. From the above, we note that the PPAs provide two types of inherent flexibilities to the contracting parties. *Firstly*, Article 4 of the PPAs provides that the supply of energy can be in the range of 20.5% to 25.5% of CUF. On one hand, this provision provides the Respondent with option not to purchase any additional energy above 25.5% CUF and penalise the Petitioner if it is unable to generate minimum energy whereas on the other hand this provision provides flexibility to the Petitioner to vary the supply of energy in the range of 20.5% to 25.5% of CUF. *Secondly*, Article 1 of the PPA provides that Commercial Operation Date will be the date 30 days subsequent to the actual date of commissioning of full capacity.

71. Therefore, we are of the view that 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. In the instant case, the Petitioner has submitted that the goods and services for the projects were received before the COD (07.07.2017). However, the invoices for some of these goods and services were issued after the COD by contractor after

receiving due quality check from the Petitioner. Therefore, the only issue which is to be addressed is whether the invoices of goods and services can be raised after the supply of goods and services and what is the time limit (if any) as provided under the 'GST laws'.

72. The Commission observes that in its Order dated 27.03.2020 in Petition No. 395/MP/2018, it has held that:

*"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 PPAs 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."*

73. In view of the above, it is observed that the implication of GST Laws will be there only if the point of taxation is on or after 01.07.2017 and not where the point of taxation has occurred prior to 01.07.2017, in which case the taxes shall be payable only under the pre-GST laws. The point of taxation means the point in time when goods have been deemed to be supplied or services are deemed to be provided. The point of taxation is important to determine the rate of tax, value, and due dates for payment of taxes.

74. Various Sections of CGST Act, 2017 stipulate as under:

*Section 2(33): "continuous supply of services" means a supply of services which is provided, or agreed to be provided, continuously or on recurrent basis, under a contract, for a period exceeding three months with periodic payment obligations and includes supply of such services as the Government may, subject to such conditions, as it may, by notification, specify.*

#### *TIME AND VALUE OF SUPPLY*

*12. (1) The liability to pay tax on goods shall arise at the time of supply, as determined in*

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*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.*

*(3) In case of supplies in respect of which tax is paid or liable to be paid on reverse charge basis, the time of supply shall be the earliest of the following dates, namely:—*

*(a) the date of the receipt of goods; or*

*(b) the date of payment as entered in the books of account of the recipient or the date on which the payment is debited in his bank account, whichever is earlier; or*

*(c) the date immediately following thirty days from the date of issue of invoice or any other document, by whatever name called, in lieu thereof by the supplier: Provided that where it is not possible to determine the time of supply under clause (a) or clause (b) or clause (c), the time of supply shall be the date of entry in the books of account of the recipient of supply.*

*(4) In case of supply of vouchers by a supplier, the time of supply shall be—*

*(a) the date of issue of voucher, if the supply is identifiable at that point; or*

*(b) the date of redemption of voucher, in all other cases*

*(5) Where it is not possible to determine the time of supply under the provisions of sub-section (2) or sub-section (3) or sub-section (4), the time of supply shall—*

*(a) in a case where a periodical return has to be filed, be the date on which such return is to be filed; or*

*(b) in any other case, be the date on which the tax is paid.*

*(6) The time of supply to the extent it relates to an addition in the value of supply by way of interest, late fee or penalty for delayed payment of any consideration shall be the date on which the supplier receives such addition in value.”*

**13. (1) The liability to pay tax on services shall arise at the time of supply, as determined in**

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*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.*

- (3) *In case of supplies in respect of which tax is paid or liable to be paid on reverse charge basis, the time of supply shall be the earlier of the following dates, namely:—*
- (a) *the date of payment as entered in the books of account of the recipient or the date on which the payment is debited in his bank account, whichever is earlier; or*
  - (b) *the date immediately following sixty days from the date of issue of invoice or any other document, by whatever name called, in lieu thereof by the supplier:*

*Provided that where it is not possible to determine the time of supply under clause (a) or clause (b), the time of supply shall be the date of entry in the books of account of the recipient of supply:*

*Provided further that in case of supply by associated enterprises, where the supplier of service is located outside India, the time of supply shall be the date of entry in the books of account of the recipient of supply or the date of payment, whichever is earlier*

- (4) *In case of supply of vouchers by a supplier, the time of supply shall be—*
- (a) *the date of issue of voucher, if the supply is identifiable at that point; or*
  - (b) *the date of redemption of voucher, in all other cases.*
- (5) *Where it is not possible to determine the time of supply under the provisions of sub-section (2) or sub-section (3) or sub-section (4), the time of supply shall—*
- (a) *in a case where a periodical return has to be filed, be the date on which such return is to be filed; or*
  - (b) *in any other case, be the date on which the tax is paid.*



(6) *The time of supply to the extent it relates to an addition in the value of supply by way of interest, late fee or penalty for delayed payment of any consideration shall be the date on which the supplier receives such addition in value.*

**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.*

#### **CHAPTER VII** **TAX INVOICE, CREDIT AND DEBIT NOTES**

**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*

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*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.*

(3) *Notwithstanding anything contained in sub-sections (1) and (2)—*

*(a) a registered person may, within one month from the date of issuance of certificate of registration and in such manner as may be prescribed, issue a revised invoice against the invoice already issued during the period beginning with the effective date of registration till the date of issuance of certificate of registration to him;*

*(b) a registered person may not issue a tax invoice if the value of the goods or services or both supplied is less than two hundred rupees subject to such conditions and in such manner as may be prescribed;*

*(c) a registered person supplying exempted goods or services or both or paying tax under the provisions of section 10 shall issue, instead of a tax invoice, a bill of supply containing such particulars and in such manner as may be prescribed: Provided that the registered person may not issue a bill of supply if the value of the goods or services or both supplied is less than two hundred rupees subject to such conditions and in such manner as may be prescribed;*

*(d) a registered person shall, on receipt of advance payment with respect to any supply of goods or services or both, issue a receipt voucher or any other document, containing such particulars as may be prescribed, evidencing receipt of such payment;*

*(e) where, on receipt of advance payment with respect to any supply of goods or services or both the registered person issues a receipt voucher, but subsequently no supply is made and no tax invoice is issued in pursuance thereof, the said registered person may issue to the person who had made the payment, a refund voucher against such payment;*

*(f) a registered person who is liable to pay tax under sub-section (3) or sub-section (4) of section 9 shall issue an invoice in respect of goods or services or both received by him from the supplier who is not registered on the date of receipt of goods or services or both;*

*(g) a registered person who is liable to pay tax under sub-section (3) or sub-section (4) of section 9 shall issue a payment voucher at the time of making payment to the*



supplier.

(4) *In case of continuous supply of goods, where successive statements of accounts or successive payments are involved, the invoice shall be issued before or at the time each such statement is issued or, as the case may be, each such payment is received.*

(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.*

(6) *In a case where the supply of services ceases under a contract before the completion of the supply, the invoice shall be issued at the time when the supply ceases and such invoice shall be issued to the extent of the supply made before such cessation.*

(7) *Notwithstanding anything contained in sub-section (1), where the goods being sent or taken on approval for sale or return are removed before the supply takes place, the invoice shall be issued before or at the time of supply or six months from the date of removal, whichever is earlier.*

*Explanation.—For the purposes of this section, the expression “tax invoice” shall include any revised invoice issued by the supplier in respect of a supply made earlier.”*

75. As per Rule 47 of the CGST Rules, 2017, the invoices in respect of taxable supply of services have to be issued within 30 days:

*“47. Time limit for issuing tax invoice.- The invoice referred to in rule 46, in the case of the taxable supply of services, shall be issued within a period of thirty days from the date of the supply of service:”*

76. Rule 55 of the CGST Rules, 2017 stipulates as under:

*“55. Transportation of goods without issue of invoice.-*

*(1) For the purposes of-*

*(a) supply of liquid gas where the quantity at the time of removal from the place of business of the supplier is not known,*

*(b) transportation of goods for job work,*

*(c) Transportation of goods for reasons other than by way of supply*

*(d) Such other supplies as may be notified by the Board*

*the consigner may issue a delivery challan, serially numbered not exceeding sixteen characters, in one or multiple series, in lieu of invoice at the time of removal of goods for transportation, containing the following details, namely....*

*...*

*(3) Where goods are being transported on a delivery challan in lieu of invoice, the same shall*

*be declared as specified in rule 138.*

77. We observe that the philosophy behind the 'Point of taxation' and 'raising of invoice' is enshrined in Sections 12, 13 & 14 read with Section 31 of the CGST Act, 2007 and Rule 47 and 55 of the CGST Rules, 2017. It is observed that Section 12 governs the determination of 'time of supply of goods', Section 13 governs the determination of 'time of supply of services' whereas Section 14 determines the 'time of supply for goods and services in case there is a change in the rate of tax'.
78. Section 12 of CGST Act, 2017 stipulates 'time of supply of goods' as date of issue of invoice or the last date specified under section 31(1) to issue the invoice, whichever is earlier. Therefore, in the instant petition, the date of invoice of goods cannot be after the date of delivery of goods.
79. Section 13 of CGST Act, 2017 stipulates that 'time of supply of services' is the date of issue of invoice which is to be within the period prescribed under section 31(2) or the date of receipt of payment, whichever is earlier. In the instant case, the date of invoice of services can be a date before or after providing the services.
80. Section 14 of the CGST Act, 2017 prescribes the time of supply in case there is a change in the rate of tax. In one supply transaction, the following dates assume relevance: (i) date of supply; (ii) date of issue of invoice and (iii) date of receipt of payment. Two scenarios that emerge are as follows:- (a) supply is completed before change in the rate of tax and (b) supply is completed after change in the rate of tax.
81. Section 31 of the CGST Act, 2017 stipulates that a registered person supplying taxable goods shall issue a tax invoice before or at the time of delivery of goods, whereas a registered person supplying taxable services can issue a tax invoice before or after the provision of service but within one month from the date of issuance of certificate of registration and issue a revised invoice against the invoice already issued during the period beginning with the effective date of registration till the date of issuance of certificate of registration to him. However, in case of continuous supply of services related to the goods procured before COD,

the invoice is to be issued on or before the due date of payment if the same is ascertainable from the contract or 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. Further, where the payment is linked to the completion of an event, the invoice is to be issued on or before the date of completion of that event. Further, as per Rule 47 of the CGST Rules, 2017, the invoices in respect of taxable supply of services have to be issued within 30 days and as per Rule 55 of the CGST Rules 2017, the delivery of a few goods is specifically allowed to be transported on a delivery challan in lieu of invoice at the time of removal of goods for transportation.

82. From the above, the Commission is of the view that in case of 'supply of goods', the date of issue of invoice cannot be after the date of supply of goods as per sections 12, 14 and 31 of the CGST Act, 2017 whereas as per section 2(33) in case of 'continuous supply of services' related to the goods procured upto the date of COD, the date of issue of invoice can be thirty days after the supply of services as per Sections 13, 14 and 31 of the CGST Act, 2017 along with the Rule 47 of the CGST Rules, 2017.
83. The Commission observes that in the instant case, the projects were commissioned on 07.06.2017 and achieved COD on 07.07.2017. However, the invoices of some of the goods and services were raised by the Petitioner's contractor after the COD (07.07.2017) and consequently after the implementation of the GST Laws. Therefore, GST has been paid on such invoices raised after enactment of the GST Laws. The Commission observes that there cannot be any invoice under law, post supply of goods as the goods are not exempted under Rule 55 of the CGST Rules, 2017. Further, in case the invoices are not raised, the point of taxation for supply of goods is deemed to be the date of delivery of goods. Hence, the invoices related to supply of the goods can be raised till 07.07.2017 i.e. COD. Though we note the submission of the Petitioner that most of the supply was complete before commissioning of the Project, but it has submitted that some supply continued till COD i.e. 07.07.2017. The Commission observes that there is a possibility of a few 'continuous supply of services', related to goods procured up to COD, to be completed on the last date of COD. Hence, in case of 'continuous supply of services' related to the Engineering, Procurement
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and Construction Stage, the invoices can be raised till 06.08.2017 i.e. 30 days after COD and the Petitioner is entitled to be compensated under Article 12 of the PPAs accordingly. The Petitioner, however, 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. NTPC is liable to pay to the Petitioner which is not conditional upon the payment to be made by UPPCL to NTPC. However, NTPC is eligible to claim the same from UPPCL on 'back to back' basis. The claim shall be paid within sixty days of the date of this Order or from the date of submission of claims by the Petitioner whichever is later failing which it will attract late payment surcharge as provided under PPAs/PSAs. Alternatively, the Petitioner and the Respondents may mutually agree to the mechanism for the payment of such compensation on annuity basis spread over the period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs. The issues are decided accordingly.

84. The Petitioner has claimed impact on account of the GST Laws on O&M expenses. It has submitted that outsourcing of O&M is a prudent industrial practice to ensure international standard of the best practices in plant inspection procedures, quality assessment plans and checklists for maintenance. The outsourcing partner provides O&M services that include periodic and preventive maintenance checks with IV curve analysis and thermo-graphic imaging. Physical O&M tasks, such as module cleaning, housekeeping and security are carried out through third parties under the supervision of the generator. Outsourcing of O&M of solar projects is not prohibited under the PPAs and is considered a part of the expenditure incurred by the generator. 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' and "recurring" signifies the wide ambit of the Change in Law clause and unless something is specifically excluded, the word 'any' and 'recurring' ought to be read broadly. Outsourcing of O&M services by the Petitioner can also be inferred by having reference to the provisions of the CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2017 issued under the Electricity Act, 2003 wherein O&M expenses are treated as a fixed cost component of the tariff structure for renewable energy technologies. The Petitioner has submitted that PPAs do not differentiate
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between internalization and outsourcing of O&M services. There is no distinction between tax liability of the Petitioner during ‘construction’ stage and ‘operation’ stage.

85. Per contra, NTPC has submitted that O&M is the responsibility of the Petitioners and in the event of the Petitioners choosing to employ the services of other agencies, it cannot increase the liability of the Respondents. The outsourcing of O&M to a third party is not a requirement of the PPAs and is a commercial decision of the Petitioners for its own advantage and any increase in cost including on account of taxes etc. is entirely to the account of the Petitioner.

86. In a similar matter, in Petition No. 188/MP/2018 and batch, the Commission in its order dated 19.11.2019 held as under as regards compensation on account of GST Laws on O&M Expenses:

*“98. The Commission is of the view that the recurring expenses referred to in Article 12 of the PPAs includes activities like salary, tax expenses, estimated maintenance costs, and monthly income from leases etc. It is apparent that GST will apply in case of outsourcing of the „Operation and Maintenance” services to a third party (if any). The Commission is of the view that outsourcing of the „Operation and Maintenance” services is not the requirement of the PPAs/ bidding documents. The concept of the outsourcing is neither included expressly in the PPAs nor it is included implicitly in the Article 12 of the PPAs. The Commission is of the view that in the Competitive Bidding Scenario, the SPDs bid levelled tariff without disclosing the details of the calculations of the project cost. It has already been held by the Commission in the earlier Orders and also appreciated above that it is a pure commercial decision of the Petitioners taken for its own advantage and any increase in cost including on account of taxes etc. in the event the Petitioners choose to employ the services of other agencies, cannot increase the liability for the Respondents. Therefore, the Commission holds that claim of the Petitioners on account of additional tax burden on operation and maintenance expenses(if any), is not maintainable. This view is in consonance with the view taken by the Commission Order dated 09.10.2018 in Petition No. 188/MP/2017 & Ors. case titled Acme Bhiwadi Solar Power Private Limited –v-Solar Energy Corporation of India and Ors”.*

87. The above order is squarely applicable in case of the instant matter and impact of GST on O&M expenses is not allowed. The provisions of CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2017 cannot be applied to the instant case.

***Issue No. 3: Whether the Petitioner should be restored to the same economic position as it was prior to the occurrence of the Change in Law event and whether Carrying Cost can be granted to the Petitioner?***

88. Regarding the issue of Carrying Cost, the Petitioner has 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. It has submitted that the Hon'ble Supreme Court in the case of *Energy Watchdog vs. Central Electricity Regulatory Commission and Ors. (2017) 14 SCC 80*, has held that where a situation arises which is not covered by the Guidelines issued by the Central Government or the Guidelines do not deal with a given situation, the Commission's general regulatory powers under Section 79(1)(b) can be used. The petitioner has stated that this is a fit case for exercise of such power to devise a suitable mechanism to ensure that the Petitioner is restored to the same economic position and time-value of money is restored by allowing carrying cost for the period when the Applicant pays the Change in Law amount and the Respondent compensates the Petitioner.
89. **Per Contra**, NTPC has submitted that there is no provision in the PPAs regarding carrying cost or interest for the period till the decision of the Commission acknowledging the Change in Law and deciding on the amount to be paid for such Change in Law namely 'provide for relief for the same', as specified in Article 12.2.2 of the PPAs. The Change in Law claim of the Petitioner is yet to be adjudicated and the amount if any, due to the Petitioner has to be determined/ computed first. Thereafter, only when the amount is determined, is the Petitioner required to raise a Supplementary invoice for the amount so computed as per Article 10.7 of the PPAs. It is only in case of default on the part of the Respondents in not making the payment by the due date as per supplementary invoices does the issue of Late Payment Surcharge arise i.e. for the period after the due date. The reference in Article 12.2.2 of the Commission deciding on the date from which the Change in Law will be effective, refers to the principal amount to be computed from the date on which change in law comes into force and not to the payment of interest and carrying cost. NTPC has submitted that the PPAs do not have a provision dealing with restitution principles of restoration to same economic

position. Therefore, the Petitioner is not entitled to claim relief which is not provided for in the PPAs.

90. We observe that in the judgment of 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 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.”*

91. The above judgement of APTEL dated 13.04.2018 in Appeal No. 210 of 2017 in *Adani Power Limited v. Central Electricity Regulatory Commission and Ors.*, was challenged before the Hon’ble Supreme Court wherein the Hon’ble Supreme Court vide its judgment dated 25.2.2019 in Civil Appeal No.5865 of 2018 with Civil Appeal No. 6190 of 2018 (*Uttar Haryana Bijili Vitran Nigam Limited & Anr. Vs. Adani Power Ltd. & Ors.*) has held as under:

*“10. A reading of Article 13 as a whole, therefore, leads to the position that subject to restitutionary principles contained in Article 13.2, the adjustment in monthly tariff payment, in the facts of the present case, has to be from the date of the withdrawal of exemption which was done by administrative orders dated 06.04.2015 and 16.02.2016. The present case, therefore, falls within Article 13.4.1(i). This being the case, it is clear that the adjustment in monthly tariff payment has to be effected from the date on which the exemptions given were withdrawn. This being the case, monthly invoices to be raised by the seller after such change in tariff are to appropriately reflect the changed tariff. On the facts of the present case, it is clear that the respondents were entitled to adjustment in their monthly tariff payment from the date on which the exemption notifications became effective. This being the case, the restitutionary principle contained in Article 13.2 would kick in for the simple reason that it is only after the order dated 04.05.2017 that the CERC held that the respondents were entitled to claim added costs on*



*account of change in law w.e.f. 01.04.2015. This being the case, it would be fallacious to say that the respondents would be claiming this restitutionary amount on some general principle of equity outside the PPA. Since it is clear that this amount of carrying cost is only relatable to Article 13 of the PPA, we find no reason to interfere with the judgment of the Appellate Tribunal.”*

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*16.....There can be no doubt from this judgment that the restitutionary principle contained in Clause 13.2 must always be kept in mind even when compensation for increase/decrease in cost is determined by the CERC.”*

92. As per the above judgments of APTEL and Hon’ble Supreme Court, if there is a provision in the PPAs for restoration of the Petitioner to the same economic position, the Petitioner is eligible for Carrying Cost for such allowed Change in Law event(s). In the current case, we note that the PPAs do not have a provision dealing with restitution principles of restoration to the same economic position. Further, we don’t find the instant petition is fit case to invoke general regulatory powers under Section 79(1)(b) of the Electricity Act, 2003. Therefore, we hold that the claim regarding separate carrying cost is not admissible.

#### **Summary of decisions:**

93. Our decisions in this Order are summed up as under:
- a) **Issue No. 1:** The enactment of the GST Laws is covered as Change in Law under the first and last bullet in seriatim of Article 12.1.1 of the PPA.
  - b) **Issue No. 2:** The invoices related to supply of the goods can be raised till 07.07.2017 i.e. COD. In case of ‘continuous supply of services’ related to the Engineering, Procurement and Construction Stage, the invoices can be raised till 06.08.2017 i.e. 30 days after COD and the Petitioner is entitled for compensation under Article 12 of the PPAs accordingly. 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 auditor’s certificate. NTPC is liable to pay to the Petitioner which is not conditional upon the payment to be made by the Respondent Discoms to Respondent NTPC. However, the Respondent NTPC is eligible to claim the same from the Respondent Discoms on ‘back to back’ basis. The claim shall be paid within sixty



days of the date of this Order or from the date of submission of claims by the Petitioner whichever is later failing which it will attract late payment surcharge as provided under PPAs/PSAs. Alternatively, the Petitioner and the Respondents may mutually agree to the mechanism for the payment of such compensation on annuity basis spread over the period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs. The issues are decided accordingly. Any claim regarding GST on O&M expenses is not allowed.

c) **Issue No. 3:** The claim regarding separate carrying cost is not admissible.

94. With the above directions, Petition No. 157/MP/2018 along with I.A. No. 2 of 2019 stands disposed of.

Sd/-

**अरुण गोयल  
सदस्य**

Sd/-

**आई. एस. झा  
सदस्य**