



नई दिल्ली
NEW DELHI

याचिका संख्या./ Petition No.: 177/MP/2019 and
178/MP/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: 24th of January , 2021

IN THE MATTER OF:

Petition under Section 79 the Electricity Act, 2003 read with Article 12 of the Power Purchase Agreements dated 07.02.2017, executed between the Petitioners and Solar Energy Corporation of India Ltd. for seeking approval of Change in Law events due to enactment of the GST Laws.

AND IN THE MATTER OF:

1. Petition No. 177/MP/2019

JBM Solar Power Maharashtra Private Ltd
Neel House, Lado Sarai,
Khasra No. 172, Opp. Qutub Minar,
New Delhi-110030

...Petitioner

VERSUS

1. Solar Energy Corporation of India Limited

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

2. Maharashtra State Electricity Distribution Company Ltd.
Hongkong Bank Building,
M.G. Road, Fort, Mumbai-400001
3. The Ministry of New and Renewable Energy
Block-14, CGO Complex,
Lodhi Road, New Delhi-110 003

...Respondents

AND IN THE MATTER OF:

2. Petition No. 178/MP/2019

JBM Solar Energy Maharashtra Private Ltd
Neel House, Lado Sarai,
Khasra No. 172, Opp. Qutub Minar,
New Delhi-110030

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Lodhi Road, New Delhi-110 003

...Respondents

Parties Present: Ms. Poonam Verma, Advocate, JBMSPML and JBMSEML
Ms. Aparajita Upadhyay, Advocate, JBMSPML and JBMSEML
Dr. B. D. Sharma, JBMSPML and JBMSEML
Shri M. G. Ramachandran, Sr. Advocate, SECI
Ms. Poorva Saigal, Advocate, SECI
Ms. Tanya Sareen, Advocate, SECI
Shri Manoj Mathur, SECI
Shri Ajay Kumar Sinha, SECI
Shri Abhinav Kumar, SECI
Shri Udaypavan Kumar Kruthiventi, SECI
Ms. Pallavi Sharma, Advocate, MSEDCL

आदेश/ **ORDER**

The Petitioners, JBM Solar Power Maharashtra Private Limited (in short, JBMSPML) in Petition No. 177/MP/2019 and JBM Solar Energy Maharashtra Private Limited (in short, JBMSEML) in Petition No. 178/MP/2019, are power generating project companies incorporated by M/s Neel Metal Products Ltd. The Petitioners are developing solar power projects based on Photo Voltaic technology located in Jalna District and Jalgaon District of Maharashtra. The Petitioners have filed the present petitions under Section 79 of the Electricity Act, 2003 read with Article 12 of the Power Purchase Agreements (hereinafter referred to as 'the PPAs') dated 07.02.2017 for seeking approval of Change in Law events due to enactment of GST Laws.

2. The Respondent No.1 in both the petitions, Solar Energy Corporation of India Limited (SECI), is a company under the administrative control of the Ministry of New and Renewable Energy, Government of India (MNRE) established to facilitate the implementation of National Solar Mission (NSM). SECI is responsible for the implementation of a number of

schemes of MNRE, the major ones being the VGF (viability gap funding) schemes for large scale grid connected projects under NSM, solar park scheme and grid connected solar rooftop scheme. SECI is also a inter-State trading licensee and is active in this domain through trading of solar power from projects set up under the schemes being implemented by it.

3. The Respondent No. 2 in both the petitions, Maharashtra State Electricity Distribution Company Ltd (MSEDCL), is a distribution company (Discom) in the State of Maharashtra which was formed pursuant to the restructuring of the erstwhile Maharashtra State Electricity Board.
4. The Respondent No. 3 in both the petitions, MNRE, is the nodal Ministry of the Government of India for all matters relating to new and renewable energy. MNRE issued ‘Guidelines for implementation of Scheme for selection of 5,000 MW Grid Connected Solar PV Power Projects with Viability Gap Funding (VGF) under Batch-IV of Phase – II’ (hereinafter referred to as ‘the NSM Guidelines’), of the National Solar Mission for implementation through SECI.
5. The Petitioners have made the following prayers:

In Petition No. 177/MP/2019

- (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 Maharashtra Goods and Services Tax, 2017 is an event under Change in Law under Article 12 of the PPA;*
- (c) *Restore the Petitioners to the same economic condition prior to occurrence of the Changes in Law by directing SECI to pay to the Petitioners the amount claimed under Change in Law in terms of Article 12 of the PPA along with carrying cost.*
- (d) *Pending proceedings, direct SECI to pay to the Petitioners the amount claimed under Change in Law which shall be subject to adjustment based on the final order passed by this 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.

In Petition No. 178/MP/2019

- (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 Maharashtra Goods and Services Tax, 2017 is an event under Change in Law under Article 12 of the PPA;*
- (c) Restore the Petitioners to the same economic condition prior to occurrence of the Changes in Law by directing SECI to pay to the Petitioners the amount claimed under Change in Law in terms of Article 12 of the PPA along with carrying cost.*
- (d) Pending proceedings, direct SECI to pay to the Petitioners the amount claimed under Change in Law which shall be subject to adjustment based on the final order passed by this 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.*

Background

6. On 14.03.2016, MNRE issued the NSM Guidelines for selection of 5,000 MW Grid Connected Solar PV Power Projects under Phase-II, Batch-IV with viability gap funding support from National Clean Energy Fund.
7. M/s Neel Metal Products Limited was declared as a successful bidder against RfS (Request for Selection) dated 14.06.2016 issued by SECI for selection of SPDs for development of cumulative capacity of 450 MW in the State of Maharashtra. M/s Neel Metal Products Limited, was issued Letters of Intent (LOI) for 40 MW (in Petition No. 177/MP/2019) and 60 MW (in Petition No. 178MP/2019) on 23.11.2016 for development of Solar Power Project for generation and sale of solar power, at a tariff of Rs 4.43/kWh.
8. M/s Neel Metal Products Limited formed project companies - JBMS PML (the Petitioner in Petition No. 177/MP/2019) and JBMSEPL (the Petitioner in Petition No. 178/MP/2019)

within the provisions of the RfS. The Petitioners agreed to execute Viability Gap Funding (VGF) Securitization Agreement with SECI for creating a charge on the project assets based on which the Petitioners would be eligible to receive VGF support amounting to maximum of Rs. 7,99,59,560/- (Rupees Seven Crores Ninety Nine Lacs Fifty Nine Thousand Five Hundred and Sixty Only) and Rs. 11,99,39,340/- (Rupees Eleven Crores Ninety Nine Lacs Thirty Nine Thousand Three Hundred and Forty Only) in Petition No. 177/MP/2019 and Petition No. 178/MP/2019 respectively as per terms and conditions of the VGF Securitization Agreement. The Petitioners have executed PPAs with SECI on 07.02.2017 (with effective date as 23.12.2016) and the Scheduled Commissioning Date (SCoD) was on 23.12.2017.

9. On 12.04.2017, the Parliament and State Legislative Assemblies introduced laws related to the Goods and Services Tax replacing multiple taxes levied by the Central and State Governments.
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 came into effect. On the same date, the Maharashtra Goods and Services Tax Act, 2017 also came into force for levy and collection of tax on intra-State supply of goods or services or both. The above-mentioned taxation laws are hereinafter referred to as 'the GST Laws' collectively.
11. The Petitioners have claimed that enactment of the GST Laws constitute change in law in terms of the provisions of the PPAs. Hence the Petitions.

Submissions of the Petitioners

12. The Petitioners have submitted that SECI issued RfS for selection of SPDs for development of solar capacity in the State of Maharashtra. The parent company of the Petitioners was declared successful bidder and was awarded contracts. The Petitioners executed PPAs on 07.02.2017 ('Effective Date' of the PPAs was 23.12.2016), which is before the date of coming into effect of the GST Laws i.e. 01.07.2017. With the enactment of the GST Laws, the capital cost of the project, including cost of construction have escalated and the tariff quoted at the time of bid for allocation of project became unviable.
13. The Petitioners have submitted that as per Article 12 of the PPAs, Change in Law means the occurrence of events subsequent to the Effective Date which result in the Petitioners incurring additional recurring/ non-recurring expenditure or income, as the case may be.
14. The Petitioners have submitted that as per Article 12.1 of the PPA, the qualifying elements for a Change in Law event, inter alia, are as follows:
 - a) That event claimed as change in law falls within one or more of the parameters enlisted in Article 12.1.1 of the PPAs.
 - b) That the said event of change in law occurred subsequent to the Effective Date, i.e. the date on which the PPAs are approved by the Commission.
 - c) That the occurrence of such event resulted in the SPD incurring recurring or non- recurring additional expenditure or income, as the case may be.
15. The Petitioners have submitted that Article 12.2 of the PPAs provides for the relief available to the affected party against the consequences of a Change in Law event. The Petitioners have submitted that the GST regime has imposed tax on components required for setting up of

solar power plants that were earlier exempted from tax. Components and services required for the construction, development, and operation of a solar power plant are taxed at the rates of 5% to 28% under the GST regime. As a result of the enactment of the GST Laws, it had to incur additional expenditure, both recurring and non-recurring, for setting up the projects and are, therefore, entitled to claim the increase in cost resulting from the enactment and enforcement of the GST Laws, in order to restore the Petitioners to the same economic position as if the change in law event had not occurred.

16. The Petitioners have submitted that before the Effective Date, Service Tax at the rate of 15% was being levied on O&M expenses. Due to enactment of the GST Laws, CGST and SGST at the rate of 9% each is being levied on O&M expenses. This has led to an incremental impact on the O&M cost of the project based on the invoices raised by the service provider. O&M expenses are recurring expenses in terms of Article 12.1.1 of the PPAs and includes activities like salary, estimated maintenance costs, and monthly income from leases etc. As a matter of prudent industrial practice, the O&M services are outsourced to third parties to ensure international standards in plant inspection procedures, quality assessment plans and checklists for maintenance. The outsourcing partner provides O&M services that include periodic and preventive maintenance checks with I-V 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 is thus a practical requirement to achieve targets in the most efficient way possible. Further, the tariff quoted at the time of submitting the bid was worked out on the basis of the existing tax

regime. They could not have contemplated the occurrence of the Change in Law. Therefore, they are contractually entitled to recover the additional expenditure.

17. The Petitioners have submitted that the Ministry of Power issued a direction dated 27.08.2018 under Section 107 of Electricity Act, 2003 to the Commission for allowing pass through of any changes in domestic duties, levies, cess and taxes imposed by the Central Government/ State Governments leading to corresponding changes in cost after the award of bid. It was stated that the direction for allowing pass through of such costs is issued in order to ensure sustainability of the electricity market and in larger public interest.
18. The Petitioners have submitted that the Commission suo-moto initiated proceedings to analyze and determine the impact of the GST Laws on stakeholders in the power sector. On due consideration of the views and concerns submitted by the stakeholders, the Commission held that enactment of the GST Laws is a Change in Law event and granted relief vide Order dated 14.03.2018 in Petition No. 13/SM/2017. Similarly, in Petition No. 50/MP/2018, the Commission examined the impact of the GST Laws on the cost components of solar power projects and held that the enactment of the GST Laws amounts to 'Change in Law'.
19. The Petitioners have submitted that the Commission has jurisdiction to adjudicate upon the present Petition and grant the reliefs sought herein as per Section 79 of the Electricity Act, 2003 and specifically in light of Article 12.2 of the PPAs.

Submissions of the Respondent No.1 (SECI)

a) SECI's obligation are on back to back basis:

20. The Respondent No. 1 (SECI) has submitted that in pursuance of the RfS , it entered into PPAs with the Petitioners for onward sale of electricity on back to back basis to the Distribution Companies under the respective Power Sale Agreement (PSA). It is acting as an intermediary utilizing its trading license to facilitate such purchase and resale of electricity. It is not acting as a merchant trader or otherwise independently purchasing the electricity from the SPDs (solar power developers) having the option to sell electricity to any person at such time and on such terms and conditions as it can decide from time to time. Its obligations and liabilities to the SPDs are on a back to back basis to the obligation to be performed and liabilities to be discharged by Distribution Companies. Further, the role of an intermediary trader as a 'conduit' has also been considered by the Commission in the various cases viz. Order dated 18.04.2016 in Petition No. 319/MP/2013 in the case of *Tata Power Delhi Distribution Company Limited v Jhajjar Power Limited and Ors*; Order dated 18.01.2019 in Petition No. 224/MP/2018 in the case of *M B Power (Madhya Pradesh) Limited v Uttar Pradesh Power Corporation Limited and Ors.*; Order dated 30.04.2019 in Petition No. 255/MP/2017 in the case of *Adhunik Power and Natural Resources Limited v West Bengal State Electricity Distribution Company Limited and Ors.*

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

21. The Respondent No. 1 has submitted that the fact that the GST Laws are 'law', as defined in the PPA is not disputed. However, in order to qualify for relief under the change in law provision contained in the PPAs, the conditions mentioned in Article 12 therein dealing with

‘Change in Law’ need to be satisfied, namely, each of the claim should fall within the scope of the said provision.

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

22. The Respondent No. 1 has submitted that the Commission and the Appellate Tribunal for Electricity (hereinafter referred to as ‘the Tribunal’) in various decisions have interpreted the scope and applicability of Article 12.1.1 under various sub-clauses. An appeal against an Order passed by the Tribunal dated 14.08.2018 in Appeal No.111 of 2017 and connected Appeals in the matter of *M/s. GMR Warora Energy Limited –v- Central Electricity Regulatory Commission and Ors.* is pending before the Hon’ble Supreme Court in Civil Appeal No. 11910-1191 of 2018 on the issue of scope and applicability of the clauses of Article 12 of the PPAs including in particular the sixth bullet under Article 12.1.1 and the scope of earlier sub-clauses of Article 12.1.1. Further, the scope of Article 12.1.1 of the PPAs has already been interpreted and decided by the Commission vide order dated 19.09.2018 in *Prayatana Developers Pvt. Ltd –v- NTPC Limited and Ors and Azure Power Venus Pvt. Ltd. -v -Solar Energy Corporation of India Limited and Ors*, in Petition No. 50/MP/2018 and 52/MP/2018; Order dated 09.10.2018 in Petition No.188/MP/2018 and Batch in the matter of *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors. Batch*; Order dated 05.02.2019 in Petition No.187/MP/2018 and Batch in the matter of *M/s. Renew Wind Energy (TN2) Private Limited –v- NTPC Limited Batch*; Order dated 18.04.2019 in Petition No. 164/MP/2018 and 165/MP/2018 in the case of *Parampujya Solar Energy Pvt. Limited v NTPC and Others and Batch* and by the Tribunal in the decision dated 13.04.2018 in the case of *Adani Power Limited –v- Central Electricity Regulatory Commission and*

Others, in Appeal No. 210 of 2017 and Judgment dated 14.08.2018 in Appeal No. 119 of 2016 and Batch in *M/s Adani Power Rajasthan Private Limited –v- Rajasthan Electricity Regulatory Commission and Ors* (and as followed in Appeal No. 111 of 2017 in *M/s. GMR Warora Energy Limited -v- Central Electricity Regulatory Commission and Ors*).

d) Outsourcing of operation and maintenance (O&M)

23. The Respondent No. 1 has submitted that the provision in PPAs or the bid documents did not mandate or prescribe or specifically provide for the outsourcing of O&M services and that outsourcing of such services is an internal commercial decision of the Petitioners. In terms of Article 4.1.1(g) , the Petitioners have undertaken to be responsible, at their own cost and risk for fulfilling all obligations under the PPAs. In the event of the Petitioners choosing to employ the services of other agencies for O&M, it cannot increase the liability of SECI (and consequentially the Distribution Licensee) in terms of tariff. In this regard, the Commission vide Order dated 16.03.2018 in Petition No. 1/MP/2017 in *GMR Warora Energy Limited -v- Maharashtra State Electricity Distribution Company Limited and Ors* has held that any increase in cost of O&M expenditure on account of increase in service tax cannot be considered as Change in Law. The same view, namely the inadmissibility of the Change in Law claim in respect of O&M expense was reiterated by the Commission in its Order dated 18.04.2019 in Petition No. 164/MP/2018 and 165/MP/2018 in the case of *Parampujya Solar Energy Pvt Limited v NTPC and Others and Batch*. Thus, the Petitioners are not entitled to any increase on account of the implications of the GST Laws on the O&M Services that have been outsourced.

e) Inadmissibility of carrying cost

24. The Respondent No. 1 has submitted that there is no provision in the PPAs regarding carrying cost or interest for the period till the decision of the Commission acknowledging the change in law and deciding on the amount to be paid for such change in law namely 'provide for relief for the same', as specified in Article 12.2.2 of the PPAs. The Change in Law claim of the Petitioners is yet to be adjudicated and the amount if any, due to the Petitioners has to be determined/ computed first. Only after the amount is determined, are the Petitioners required to raise a supplementary invoice for the amount so computed as per Article 10.7 of the PPAs. It is only in case of default on the part of SECI in not making the payment by the due date as per supplementary invoices, does the issue of late payment surcharge arise i.e. for the period after the due date. The reference in Article 12.2.2 of the Commission deciding on the date from which the change in law will be effective, refers to the principal amount to be computed from the date on which change in law comes into force and not to the payment of interest and carrying cost. The provision of Article 10.3.3 of the PPAs dealing with late payment surcharge and definition of the 'Due Date' in Article 1 read with Article 10.3.1 of the PPAs are relevant. The due date is forty-fifth (45th) day after a monthly bill or a supplementary bill is received and duly accepted by SECI and if such a day is not a business day, the Due Date will be the immediately succeeding business day. The supplementary bill needs to be raised by the Solar Power Developer for the adjustment of the Change in Law after the Change in Law claim is approved by the Commission. There cannot be any claim for late payment surcharge for the period prior to the Due Date.

25. The Respondent No. 1 has further submitted that the PPAs do not have a provision dealing with restitution principles of restoration to same economic position. Therefore, the Petitioners are not entitled to claim relief which is not provided for in the PPAs. In the Judgment of the Tribunal dated 13.04.2018 in Appeal No. 210 of 2017 in *Adani Power Limited –v- Central Electricity Regulatory Commission and Ors*, it was held that since the Gujarat Bid-01 PPA has no provision for restoration to the same economic position, carrying cost will not be applicable.

f) Documents to be provided as per the Orders of the Hon'ble Commission

26. The Respondent No. 1 has submitted that documents with regard to claim of Change in Law submitted by the Petitioners in accordance with the orders of the Commission (order dated 09.10.2018, 05.02.2019 and 18.04.2019) shall be examined by SECI at appropriate stage for verification.

Rejoinder of the Petitioners in reply to Respondent No. 1

27. The Petitioners vide rejoinder dated 25.10.2019 have reiterated their submissions made in the Petition and as such the same has not been reproduced for the sake of brevity. Additionally, the Petitioners have submitted that:

a) Re. SECI has the obligation to pay compensation for Change in Law to the Petitioner

28. The MNRE Guidelines specifically provide for a Payment Security Fund to be created by SECI so that timely payment to the Petitioners could be ensured under Clause 4.5. The NSM Guidelines provide for a scenario where, if payment from buying utilities is delayed, the solar power developers (i.e. the Petitioners in this case) would still be paid by SECI out of the

Payment Security Fund. Therefore, SECI now cannot claim that payment of Change in Law compensation to the Petitioners is contingent upon the amount being remitted by the distribution licensee. The Petitioners have placed their reliance on the following Orders of the Commission; Order dated 12.04.2019 in *Parampujya Solar Energy Pvt. Ltd. Vs. NTPC & Ors.* in Petition No. 206/MP/2018; Order dated 19.09.2018 in *M/s Prayatna Developers Private Ltd Vs. NTPC & Ors.* in Petition No. 50/MP/2018 and Petition No. 52/MP/2018; Order dated 2.05.2019 in *ACME Jodhpur Solar Power Private Limited Vs. SECI & Ors.* in Petition No. 342/MP/2018 and Petition No. 343/MP/2018.

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

29. The Petitioners have submitted that the Commission, while interpreting similar PPAs, has already recognized that the promulgation of the GST Laws has a wide impact on the solar power projects and its effect cannot be merely restricted to supply of power. In this regard, the following Orders passed by the Commission are noteworthy: Order dated 19.09.2018 in *Prayatna Developers Private Ltd. vs. National Thermal Power Corporation Ltd.* 2018 SCC Online CERC 165 (in Petition Nos. 50/MP/2018 and 52/MP/2018); Order dated 09.10.2018, in *ACME Bhiwadi Solar Power Private Ltd. vs. Solar Energy Corporation of India Limited & Ors.* 2018 SCC Online CERC 204 [in Petition No. 188/MP/2017 and Batch]; Order dated 05.02.2019, in *M/s. Renew Wind Energy (TN2) Private Limited vs. NTPC Ltd.* in Petition No. 187/MP/2018].

c) Re. Impact of GST on O&M Expenses

30. The Petitioners have submitted that:
- a) The Respondent has not disputed the fact that expenses towards O&M are recurring in nature in terms of Article 12.1.1 of the PPAs. The Respondent's objection

towards grant of Change in Law relief to the Petitioners is limited to the impact of the GST Laws on additional expenditure incurred towards O&M expenses. In this regard, Article 12.1.1 of the PPAs specifically provide relief for any increase in recurring or non-recurring expenditure. The usage of the word ‘any’ signifies the wide ambit of the Change in Law clause and unless something is specifically excluded, the word ‘any’ ought to be read broadly.

b) The Petitioners have submitted that outsourcing of O&M services by the Petitioners can also be inferred by having reference to the provisions of the CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2017 issued under the Electricity Act, 2003 (hereinafter referred to as ‘the Act’) wherein O&M expenses are treated as a fixed cost component of the tariff structure for renewable energy technologies. The O&M expenses are factored as a cost component in arriving at the tariff structure for supply of power by generating stations covered under Section 62 of the Act. The same logic is applicable in respect of tariffs quoted under bidding process in Section 63 of the Act since all bidders do factor such cost, even while quoting tariff under Section 63 of the Act, and given that O&M activity is a sine qua non for the solar project achieving the desired output efficiency. Thus, even if it is assumed that the PPAs are silent on the aspect of O&M expenses being outsourced, the O&M cost can be necessarily inferred into the PPAs given that the O&M activity is essential for supply of the contracted capacity of power under the PPAs.

c) The Commission in its earlier Orders referred in this petition granted compensation on account of the impact of the GST Laws in the ‘construction’ stage. However, the Commission erroneously failed to extend a similar relief to the ‘operation’ stage viz. O&M expenses. O&M expenses, being recurring in nature, any additional expenditure due to promulgation of the GST Laws, irrespective of whether outsourced or internalized, must be construed harmoniously to fall under the allowable Change in Law reliefs in terms of Article 12.1.1 of the PPAs. It is noteworthy that the

incremental impact of the GST Laws on the O&M expenses ultimately leads to increase in the cost of generation of power. Therefore, the solar power developers are entitled to compensation for incurring such additional costs which is beyond their control.

d) Outsourcing of O&M services is a prudent industrial practice to ensure international standard of the best practices in plant inspection procedures, quality assessment plans and checklists for maintenance. Had the Petitioners internalized the afore-said constituent O&M services, the same would have to be factored into the quoted tariff. It is also noteworthy that the PPAs neither specifically mandate internalization of the O&M activities nor do they restrict O&M activity as a sole responsibility of the Petitioners.

d) Re. Carrying cost

31. The Petitioners have submitted that the mandate of Change in Law provisions across all PPAs (standard documents drafted by the government) is 'restitution' i.e. 'relief' be granted in a manner so as to place an affected party in the same economic position as if a Change in Law had not occurred. In *Energy Watchdog & Ors. vs. CERC & Ors. (2017) 14 SCC 80*, the Hon'ble Supreme Court held that Change in Law provisions must be construed in line with the principle of 'restitution'. Therefore, it was laid down that restitution is inherent to compensation on account of Change in Law events.
32. The Petitioners have submitted that while adjudicating a claim concerning grant of interest in a contract where no provision expressly enabled such a claim, the Hon'ble Supreme Court in *South Eastern Coalfields Ltd. vs. State of Madhya Pradesh & Ors. (2003) 8 SCC 648* laid down that in absence of an express prohibition either in law or in the contract entered into between the parties, interest must be payable by exercise of equitable jurisdiction of the

courts. In the instant case, the PPAs do not explicitly preclude/ prohibit the grant of carrying cost/ interest. Instead, the phrase ‘all interest’ used in Article 1.2.15 of the PPAs must be construed as an enabling provision for grant of carrying cost.

Submissions of the Respondent No.2 (MSEDCL)

33. The Respondent No. 2 (MSEDCL) vide its reply dated 09.07.2020 has submitted that the Petitioners are generators in the State of Maharashtra and all power is being procured and consumed in State of Maharashtra by MSEDCL. Therefore, the Commission lacks jurisdiction to deal with the present petition. Further, the transaction taking place between the contracting parties attract the provisions of Section 86(1)(c) and 86(1)(f) of the Act which clearly provide that, in the matters related to intra-State transaction, the State Electricity Regulatory Commission will have the jurisdiction.
34. The Respondent No. 2 has submitted that the Petitioners have only submitted an amount on account of GST impact without providing details substantiating the additional cost incurred on account of GST and the taxes that would have been applicable as per the earlier tax provisions that existed at the time of bid submission. Hence, the information furnished by the Petitioners is insufficient and inadequate to determine the extent to which (if any) the Petitioners are affected by the change in applicable GST rate.
35. The Respondent No. 2 has submitted that they refute the applicability of Change in Law Provisions on O&M expenses. Expenses that are in the nature of Operation and Maintenance are assumed to be included by the bidder in the quoted bid. The bidder has to take into account all costs involved, including the operating costs at the plant locations while quoting

the tariff for the contracted period and the contracted capacity i.e. for the supply of power. While quoting the tariff, it is expected from the bidder to make an independent enquiry and satisfy himself with respect to all the required information, inputs, conditions and circumstances and factors that may have any effect on the bid.

36. The Respondent No. 2 has submitted that Maharashtra Electricity Regulatory Commission (MERC) vide its Order dated 23.08.2017 in case no 117 of 2016 has held that the O&M cost components are subsumed in the rate offered by Petitioners and only generator knows the extent and weightage in the internal computation underlined in the bid. Also, CERC in its Order dated 02.04.2019 (Petition No. 72/MP/2018- GMR Kamalanga Energy Limited v/s Dakshin Haryana Bijli Vitran Nigam Limited and Others) has disallowed claim under Change in Law on O&M contracts.
37. The Respondent No. 2 has submitted that the generator can take its commercial decision of undertaking O&M activities through internal employees or outsource such activity which creates tax liability on generator. Change in Law provision under the PPA cannot be used to compensate business decision/ risk of any party. Accordingly, O&M activities through outsourced agencies cannot be passed on to the consumers by allowing the said impact as an approved change in law. If such a practice is followed, it would lead to compensating part of business risk of generators, which otherwise they are supposed to calculate while quoting the tariff at the time of bid. In other words, if the tariffs so quoted at the time of bid are made subject to such changes, they would have no relevance, so as to calculate the power purchase cost for the distribution licensees. The Respondent No. 2 has placed its reliance on following

orders in other similar matters, where O&M has been disallowed: Order dated 02.04.2019 in Petition No. 72/MP/2018 case titled *GMR Kamalanga Energy Ltd Vs. Dakshin Haryana Bijli Vitran Nigam Ltd & Ors.*; Order dated 16.03.2018 in Petition No. 1/MP/2017; Order dated 14.03.2018 in Petition No. 13/SM/2017; Order dated 09.10.2018 in Petition No. 188/MP/2017.

Written Submissions by the Petitioners

38. The Petitioners were allowed to file written submissions during the hearing held on 07.07.2020. Through written submissions dated 15.07.2020, the Petitioners have reiterated their submissions made in the earlier pleadings and as such the same has not been reproduced for the sake of brevity. Additionally, the Petitioners have submitted that:

i. SECI's contentions regarding payment on annuity basis ought to be rejected by the Commission and SECI ought to be directed to make one-time payment of Petitioner's claim of Change in Law (backed by auditor certificate) on lump-sum basis in view of the following:

a) The Petitioners have already paid the applicable GST to its vendors/contractors based on actual invoices and such GST payment was not contemplated by the Petitioners at the time of bidding for its solar project. Accordingly, the Petitioners have to infuse more capital in the project by way of additional funding from Petitioner's lender(s). The Petitioners will have to pay interest on such additional borrowings.

b) The existence of a large number of solar power developers who are claiming enactment of the GST Laws as a change in law event cannot be a ground for delaying the rightful claim of the Petitioner. SECI is the nodal agency appointed by MNRE to invite bids for setting up solar power plants based on the demands of different States and their consumers. The Petitioners' projects have also been set up pursuant to one such bidding process conducted by SECI. Therefore, SECI's contention now that payment of GST claims will be burdensome has no basis in fact.

c) The NSM Guidelines as well as the PPAs make adequate arrangements for providing payment security to the solar power developers.

d) The Commission has disallowed payment of carrying cost to solar power developers for their GST claims in earlier orders. In such a case, if payment of GST claims by SECI is deferred based on annuity method, then the Petitioners will be denied its time value of money for such delayed payment which will be contrary to the position of law settled by the Hon'ble Supreme Court. Reliance is in this regard is placed on *South Eastern Coalfields Ltd. vs State of MP & Ors. (2003) 8 SC 648*.

e) SECI has wrongly tried to link payment of GST claims under Article 12 of the PPAs with the performance of obligations under the PPAs. PPAs signed by the Petitioners and SECI separately provide for performance of obligation of the Petitioners and the corresponding relief in case, the Petitioners do not fulfil such obligations.

f) Article 12 of the PPAs is a separate clause which provides for adjustment in tariff due to occurrence of a Change in Law event that results in recurring/ non-recurring expenditure to the Petitioner. Article 12 does not have any provision that makes payment of Change in Law claims dependent on performance of the PPAs. SECI cannot be allowed to read new conditions in the PPAs, where there exists none.

g) The Petitioner's claims mainly pertain to the period of construction. Therefore, SECI cannot be allowed to impose new conditions which are applicable during the operation period of the PPAs (i.e. performance of contract) for deciding and paying the GST impact which is limited to construction period.

h) The Commission in its various orders has clarified 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 long as the Petitioners can demonstrate one-to-one correlation between the projects, supply of goods/ services and the invoices raised by the supplier of goods and services, the SECI is obligated to make payment as per the invoices submitted by the Petitioner.

ii. Filing of Petition No. 536/MP/2020 by SECI does not affect the right of the Petitioners to be paid its legitimate claims of GST impact under the present Petitions. The Petitioners have not been impleaded in the said petition. The Petitioners may be granted opportunity to make submissions in the said petition of SECI, before any adverse finding is passed against the Petitioners.

iii. MSEDCL (Respondent No. 2) has filed its reply to the petition only on 09.07.2020..

The petition was admitted by the Commission on 22.08.2019 and Respondents were directed to file their objections/ reply to the Petition by 13.09.2019. MSEDCL failed to file any response to the petitions or appear before the Commission during the hearing on 07.07.2020. Therefore, MSEDCL cannot be allowed to file its belated reply after a period of almost ten months. MSEDCL has filed its reply limited to the maintainability of the petitions as the sale and purchase of power from the Petitioners solar projects is within the State of Maharashtra. As per the provisions of the NSM Guidelines, MNRE is required to specify the total State-wise capacity for the projects based on commitments from the State for off-take of not less than 90% of power and for the remaining 10% of power, the host State is required to facilitate inter-State transfer of power to sell to other buying entities. Therefore, the NSM Guidelines envisage that the power from the projects developed under the scheme shall be supplied to more than one State.

iv. MSEDCL's contention that the Petitioners have not provided details of taxes that would have existed before coming into effect of GST Laws is wrong on the face of the record. The Petitioners have provided all details with respect to GST, whether affecting the petitioners adversely or beneficially .

Analysis and Decision

39. We have heard the learned counsels for the Petitioners and the Respondent and have carefully perused the records. Since the petitions are likely worded and contain similar issues, the same are clubbed together.

40. Before discussing the issue on merits, we consider it appropriate to deal with a few preliminary issues. The Petitioners have submitted that the Respondents were directed to file their objections/ reply by 13.09.2019. However, Respondent No. 2 (MSEDCL) filed its reply

only on 09.07.2020 i.e. after delay of 10 months and that was after the matter was reserved for final order on 07.07.2020. It has requested that the reply of MSEDCL should not be taken on record. However, the Commission observes that the Petitioners vide their written submissions have replied to the objections raised by MSEDCL. In view of the above, we consider it appropriate to take the submissions filed by MSEDCL on record.

41. In its written submission, MSEDCL has raised the issue of jurisdiction of the Commission for adjudication of the issues. MSEDCL has submitted that the Petitioners are SPDs in the State of Maharashtra and all the power is being procured by MSEDCL and consumed in State of Maharashtra. Therefore, transactions taking place between the contracting parties attract the provisions of Section 86(1)(c) and Section 86(1)(f) of Act which provide that, in matters related to intra-State transaction, the concerned SERC will have jurisdiction and hence, this Commission does not have jurisdiction to adjudicate the matter.
42. The Petitioners have filed the petition under Section 79 the Act read with Article 12 of the PPAs dated 07.02.2017, executed with SECI for seeking approval of Change in Law events due to enactment of the GST Laws. Relevant extract from Section 79 of the Act is extracted as under:

“79. (1) The Central Commission shall discharge the following functions, namely: -

b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;

f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;

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43. Clause (b) of Section 79(1) of the Act provides that the Commission shall have the jurisdiction if the sale of electricity shall be from a generating company to more than one State under a composite scheme. Under Clause (f) of Section 79(1) of the Act, the Commission has the power to adjudicate the dispute involving generating company or transmission licensee in respect of Clauses (a) to (d) of sub-section (1) of Section 79 of the Act. The word used is “involving” a generating company or a transmission licensee for a case to be brought before the Commission for adjudication of dispute under Section 79(1)(f) of the Act. In other words, if one of the parties to the dispute is a generating company or transmission licensee and the dispute can be relatable to any of the functions under Clauses (a) to (d) of sub-section (1) of the Section 79 of the Act, the case for adjudication of such dispute shall lie before the Central Commission.
44. Therefore, in order to invoke the jurisdiction of the Commission under Section 79 of the Act, the condition required to be satisfied is whether the Petitioners are covered under a composite scheme for generation and supply of power in more than one State. In order to consider whether the Petitioners fulfil the condition for generation and supply of power to more than one State, we examine the NSM scheme under which the instant solar projects were developed.
45. Vide O.M. No. 32/3/2014-15/GSP dated 14.03.2016, MNRE approved the NSM Guidelines for implementation of Scheme for setting up of over 5000 MW Grid-Connected Solar PV Power Projects with Viability Gap Funding (VGF) under Batch-IV of Phase-II of the National Solar Mission (NSM). Clause 1.2 of the NSM Guidelines stipulates as under:

“1.2 NSM Phase-II, Batch-IV: State Specific VGF Scheme:

Solar Energy Corporation of India (SECI) has been designated as the implementing agency for selection of Grid-connected Special Purpose Vehicle (SPV) projects for a cumulative capacity of at least 5000 MW to be set up on ‘Build-Own-Operate’ basis through Viability Gap Funding (VGF) mechanism. The Solar Projects under the State Specific VGF Scheme will be set up in the Solar Parks of various states, to be developed through coordinated efforts of Central and State Agencies. However, as implementation of solar parks have begun recently, it could be possible that Solar Parks in some of the States may not be feasible or do not become available soon. For such States, Solar Projects would be allowed to be located outside solar parks with land being provided either by the State Government, or arranged by the Solar Power Developers (SPDs).

These Guidelines shall form the basis for selection of Grid Connected Solar Photo Voltaic (PV) projects under this scheme. Out of total capacity of 5000 MW, MNRE may fix some quantity of power to be procured with domestic content requirement of cells and modules made in India depending on availability and price.

*MNRE shall specify the total State-wise Capacity of the Projects (both “Open Category” and “Domestic Content Requirement (DCR) Category”) based on commitments from the State for off take of not less than 90% of the Capacity to be invited by SECI before issue of Request for Selection (RfS). **SECI shall tie up for the remaining capacity with the other Buying Entities for which the Host State shall facilitate Inter-State transfer of power.**”*

46. Further, Clause 1.2.6 of the NSM Scheme as contained in RfS dated 14.06.2016 provides as under:

“1.2.6. NSM Phase-II, Batch-IV: The proposed 5000 MW Solar PV Projects to be selected under Batch-IV of NSM Phase-II, will be implemented by SECI either in Solar Parks to be developed through association of Central and/ or State Agencies with Land provided by State Governments or in Land identified and arranged by Solar Power Developers in the respective States. MNRE is facilitating development of 25 Solar Parks to accelerate the Solar Capacity Addition in various States. Approximately, 1,250 MW capacity is envisaged for bidding in each of the four financial years viz. 2015-16, 2016-17, 2017-18, 2018-19.”

47. The relevant Recitals of the PPAs dated 07.02.2017 stipulate as under:

*“F. The SECI has agreed to sign this Power Purchase Agreement with SECI to sell solar power to SECI as per the terms and conditions of this Agreement.
G. SECI has agreed to purchase such Solar Power from SPD as an intermediary Seller and sell it to the Buying Utilities back to back basis as per provisions of the JNNSM.
H. SECI has agreed to sign up for Power Sale Agreement with the Buying Utilities to sell such power as per the provisions of the JNNSM.”*

“The Buying Utilities shall mean Discoms/State Utilities/ Bulk Consumers who entered the PSA (s) with SECI for purchase of power.”

48. Article 12 of the PPAs dated 07.02.2017 stipulate as under:

“ARTICLE 12: CHANGE IN LAW

12.1 Definitions

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

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

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

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

12.2 Relief for Change in Law

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

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

49. From the above, the Commission observes that as per provisions of NSM Scheme (Phase-II, Batch-IV), the proposed 5000 MW Solar PV Projects to be selected under the scheme will be implemented by SECI either in Solar Parks to be developed through association of Central and/ or State Agencies with land provided by State Governments or on land identified and arranged by Solar Power Developers in the respective States. The Scheme allows SECI to tie up for the remaining capacity with the other buying entities for which the host State shall facilitate inter-State transfer of power. In the instant case, SECI was to purchase solar power from the Petitioners and to sell the same to other buying utilities on back to back basis as per provisions of the NSM scheme. Therefore, the NSM scheme envisages that the power from the projects developed under the scheme shall be supplied to more than one State and hence is covered as a composite scheme.
50. Further, as per Article 12 of the PPAs, the change in duties/ tax imposed by the Central Government and State Government(s) has resulted in the change in cost of the inputs required for generation and the same is to be considered as 'Change in Law'. As per Article 12.2 of the PPAs, the parties have to approach this Commission for seeking approval of Change in Law. It is further provided that the decision of this Commission to acknowledge a Change in Law and the date from which it will become effective, to provide relief for the same, shall be final and governing on both the parties.
51. The issue of composite scheme has been dealt with in Energy Watchdog Judgment {2017 (14) SCC 80} by Hon'ble Supreme Court. The relevant extract is as under:

“22. The scheme that emerges from these Sections is that whenever there is inter State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79 itself in Subsections (c), (d) and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression “within the State” in Sub-clauses (a), (b), and (d), and “intra-state” in sub-clause (c). This being the case, it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission. The State Commission's jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. What is important to remember is that if we were to accept the argument on behalf of the Appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the Appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being the case, we are constrained to observe that the expression “composite scheme” does not mean anything more than a scheme for generation and sale of electricity in more than one State.
 ... 24. Even otherwise, the expression used in Section 79(1)(b) is that generating companies must enter into or otherwise have a “composite scheme”. This makes it clear that the expression “composite scheme” does not have some special meaning-it is enough that generating companies have, in any manner, a scheme for generation and sale of electricity which must be in more than one State.”

52. From the above, the Commission is of the view that since the NSM scheme is a composite scheme in terms of Section 79(1)(b) of the Act, the Commission has jurisdiction to adjudicate the matter, in terms of provisions of the Act, the NSM Guidelines, the provisions of the PPAs and the judgement of the Hon’ble Supreme Court.
53. We now deal with other issues raised in the petitions. We note that the Petitioners are generating companies engaged in the business of development, building, owning, operating and maintaining utility scale grid connected solar power projects for generation of solar power. Brief facts about the projects involved in the two petitions are summarized as under:

	177/MP/2019	178/MP/2019
Scheme	NSM	NSM
Phase	II	II

Batch	IV	IV
Nodal agency	SECI	SECI
RfS	14.06.2016	14.06.2016
Capacity MW	40 MW	60 MW
Power	SOLAR	SOLAR
Location	JALNA DISTRICT, MAHARASHTRA	JALGAON DISTRICT, MAHARASHTRA
PPA executed	07.02.2017	07.02.2017
Effective Date	23.12.2016	23.12.2016
Implementation of GST Laws	01.07.2017	01.07.2017
SCOD	23.12.2017	23.12.2017
COD	18.05.2018	18.05.2018
Tariff	Rs. 4.43/KWh	Rs. 4.43/KWh
VGF	YES	YES
Change in law	ARTICLE 12	ARTICLE 12
GST impact as claimed by the Petitioners	Rs. 58,237,143	Rs. 88,013,505/-

54. As per the PPAs executed with SECI, power was to be purchased from the Petitioners and sold to the Distribution Companies. On 01.07.2017, the GST Laws were enacted for levy and collection of tax on supply of goods or services or both.
55. During the hearing held on 07.07.2020, the Petitioners submitted that the instant Petitions were filed, inter-alia, seeking declaration that the imposition of GST through the GST Laws is Change in Law event under Article 12 of the PPAs dated 7.2.2017 entered into with the SECI. The Petitioners and SECI submitted that issues involved in the present petitions stand covered by the Commission's earlier orders relating to Change in Law event arising out of enactment of the GST Laws. SECI submitted that the Commission may dispose of the present petitions in line with its earlier orders. SECI further submitted that it has also proposed the methodology for payment of the claims on annuity basis, which is already under consideration of the Commission in certain petitions as well as in Petition No.536/MP/2020.

SECI submitted that as an interim measure, it will make payment to the Petitioners as per the proposed methodology after reconciliation of their claims.

56. However, pursuant to the hearing held on 07.07.2020, the Petitioners filed written submissions wherein they reiterated their submissions made in the earlier pleadings. Additionally, they submitted that filing of Petition No. 536/MP/2020 by SECI does not affect their right to be paid the legitimate claims of GST impact under the present petitions. They have not been impleaded in the Petition No. 536/MP/2020 and are, therefore, not parties to the said petition filed by SECI. The Petitioners have submitted that they should be granted an opportunity to make submissions in Petition No. 536/MP/2020 filed by SECI, before any adverse finding is passed against the Petitioners. Further, the Petitioners have maintained that they are entitled to claim O&M expenses and carrying cost due to the impact of GST.

57. In Order dated 28.01.2020 in Petition No. 67/MP/2019 and Petition No. 68/MP/2019 in case titled *Clean Sustainable Energy Private Limited Vs. SECI & Ors.* read along with Corrigendum dated 05.02.2020 relating to Change in Law event arising out of enactment of the GST Laws, the Commission held as under:

“95. The Petitioner is directed to make available to the Respondents all relevant documents exhibiting clear and one to one correlation between the projects and the supply of goods or services, duly supported by relevant invoices and Auditor’s Certificate. The Respondents are further directed to reconcile the claims for Change in Law on receipt of the relevant documents and pay the amount so claimed to the SPDs as per paras 91 & 93 above. The Commission is of the view that since the quantum of compensation on account of introduction of GST w.e.f. 01.07.2017 is not large, it should be discharged by the Respondent-Procurement as one-time payment in a time bound manner. Accordingly, it is directed that the GST bills shall be paid within 60 days from the date of issue of this Order or from the date of submission of claims by the Petitioner, whichever is later, failing which it shall attract late payment surcharge in terms of the PPA. Alternatively, the Petitioners and the Respondents may mutually agree to a mechanism for the payment of such compensation on annuity basis spread over such period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs. This will

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

....

108. From the above, the Commission observes that the billing and payment between the Petitioner and the Respondent SECI are not conditional upon billing and payment between the Respondent SECI and the Respondent Discoms. Although, the above provisions (Article 10 of PPA and Article 6 of PSA) deal with regular monthly tariffs, the underlying philosophy that the billing and payment of one leg is not conditional upon the billing and payment of the other leg can be applied to the payment towards incremental impact on account of GST being a change in law, as well. In view of the above, Commission holds that the Power Purchase Agreement and Power Sale Agreement being back to back in nature are interconnected implying thereby that the Respondent Discoms are liable to pay to the Respondent SECI all that the said Respondent SECI has to pay to the Petitioner. However, payment to the Petitioner by Respondent SECI is not conditional upon the payment to be made by the Respondent Discoms to Respondent SECI. The Commission having held that GST is a change in law, the Respondent SECI is liable to pay to the Petitioners as per discussion above. The Respondent SECI is eligible to claim the same from the Respondent Discoms on back to back basis. The above decision may also be followed in all similar cases in which the Commission has already allowed "GST laws" as 'Change in law' under Article 12 of the PPAs.

.....

Summary of decisions:

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

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

b. Issue No. 2 & 3: As regards the claims during construction period, the Petitioner has to exhibit clear and one to one correlation between the projects and the supply of goods and services duly supported by the Invoices raised by the supplier of goods and services and auditors certificate as discussed in para 95 above. The Respondent SECI is liable to pay to the Petitioners which is not conditional upon the payment to be made by the Respondent Discoms to Respondent SECI. However, the Respondent SECI is eligible to claim the same from the Respondent Discoms on 'back to back' basis as discussed in para 108 above. The Claim based on discussions in para 95 above of this Order shall be paid within sixty days of the date of this Order or from the date of submission of claims by the Petitioner whichever is later failing which it will attract late payment surcharge as provided under PPAs/PSAs. Alternatively, the Petitioner and the Respondents may mutually agree to mechanism for the payment of such compensation on annuity basis spread over the period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs. The claim of the Petitioners on account of additional tax burden on "O&M" expenses (if any), is not maintainable.

bb. Based on submissions of Respondent No.1 SECI, the Commission clarifies that the tables referred to in para 348 of the Order dated 09.10.2018 in Petition No. 188/MP/2017 & connected Petitions, in Para 145 of the Order dated 19.09.2018 in Petition No. 50/MP/2018 and connected Petitions, in Para 85 of the Order dated 18.04.2019 in Petition No. 164/MP/2018 and connected Petitions and in Para 94 of the Order dated 12.04.2019 in Petition No. 206/MP/2018 and connected Petitions and in Para 182 of the order dated 05.02.2019 in Petition No. 187/MP/2018 and connected Petitions and in similar Orders are only illustrative in nature and computation on account of GST, being change in law, shall be paid on exhibiting clear and one to one correlation between projects and supply of goods & services, duly supported by relevant invoices and Auditor's Certificate by the Petitioners.

c. Issue No. 4: The claim regarding separate 'Carrying Cost' and 'interest on working capital' in the instant petitions is not allowed.

123. With the above directions, Petition No. 67/MP/2019 and Petition No. 68/MP/2019 stand disposed of."

58. The above decision is also applicable in case of the Petitioners in the instant petition. The introduction of the GST Laws w.e.f. 01.07.2017 is covered under Change in Law in terms of Article 12 of the respective PPAs. The Petitioners are directed to make available to the Respondents all relevant documents exhibiting clear and one to one correlation between the projects and the supply of goods or services, duly supported by relevant invoices and Auditor's Certificate. The Respondents are further directed to reconcile the claims for Change in Law on receipt of the relevant documents and pay the amount so claimed to the Petitioners. The quantum of compensation on account of introduction of GST w.e.f. 01.07.2017 should be discharged by the Respondents within 60 days from the date of issue of this Order or from the date of submission of claims by the Petitioner, whichever is later, failing which it shall attract late payment surcharge at the rates provided for in the PPAs. Alternatively, the Petitioners and the Respondents may mutually agree to a mechanism for the payment of such compensation on annuity basis spread over a period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs. The Petitioners will submit the required

documentation to SECI that will satisfy itself and submit the same along with its recommendations to MSEDCL.

59. The billing and payment between the Petitioners and SECI are not conditional upon billing and payment between SECI and MSEDCL. The Power Purchase Agreement (between the Petitioners and SECI) and Power Sale Agreement (between SECI and MSEDCL) being back to back in nature are interconnected implying thereby that MSEDCL is liable to pay to SECI all that SECI has to pay to the Petitioners.
60. As regards the Petitioners not being party in Petition No. 536/MP/2020, the Petitioners may, if they so want, file an appropriate petition before the Commission for impleading them as parties to that petition. No decision on this issue can be taken in this petition.
61. The Petitioners have claimed that they are adversely impacted due to imposition of GST on the outsourced O&M expenses and that they should be compensated for the same in terms of the provisions of the PPAs. The Petitioners have submitted that O&M activities have been outsourced to agencies that are experienced in providing the said services in the most effective and cost-efficient manner. The concept of the O&M expenses is implicitly covered under Article 12 of the PPAs. As per the PPAs, Clause 12.1.1 stipulates that Change in Law means the occurrence of any of the following events after the Effective Date resulting into any additional recurring/ non-recurring expenditure by the SPD or any income to the SPD. As O&M expenses are recurring in nature, the same are squarely covered under Article 12 of the PPAs and they should be compensated for the same. The Petitioners have also based their arguments of the provision of O&M expenses that is based on normative parameters as

specified by the Commission in the CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2017.

62. Per Contra, the Respondents have submitted that neither the provisions of the PPAs nor the bid documents mandate or prescribe or specifically provide for outsourcing of O&M activities and such outsourcing is an internal commercial decision of the Petitioners. The Respondents are not concerned whether the Petitioners undertake the O&M by themselves or outsource it. If, for commercial expediency or benefit, the Petitioners outsource O&M activities, the saving or additional expenditure is to the account of the Petitioners.
63. Similar issue has been considered and decided by the Commission in Petition No. 388/MP/2018 and Petition No. 395/MP/2018 vide its order dated 27.03.2020. The relevant extract from the order dated 27.03.2020 is as under:

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

“5. Supply of services

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

(a) renting of immovable property;

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

Explanation.-

For the purposes of this clause-

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

(i) an architect registered with the Council of Architecture constituted under the Architects Act, 1972 (Central Act No. 20 of 1972); or

- (ii) a chartered engineer registered with the Institution of Engineers (India); or
- (iii) a licensed surveyor of the respective local body of the city or town or village or development or planning authority;
- (2) the expression “construction” includes additions, alterations, replacements or remodeling of any existing civil structure;
- (c) temporary transfer or permitting the use or enjoyment of any intellectual property right;
- (d) development, design, programming, customization, adaptation, up gradation, enhancement, implementation of information technology software;
- (e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act; and
- (f) transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration.”

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

64. The above decision is squarely applicable in the instant case of the Petitioners. Therefore, the prayer of Petitioner to grant GST on the O&M expenses is not allowed.
65. The Petitioners have submitted that the underlying purpose of Article 12 of the PPAs is to provide compensation and restore a party affected by Change in Law events to a position as if such Change in Law had not taken place. For the Petitioners to effectively perform their

obligations under the PPAs, it is imperative that tariff be suitably revised so as to bring the Petitioner to a position as if the introduction of the GST Laws never occurred. The Petitioners have submitted that they can be brought to the position existing prior to the occurrence of the Change in Law event i.e. introduction of the GST Laws only if the Petitioners are also compensated for the financial cost of the additional expenditure incurred as a result of the Change in Law by paying it carrying cost. The Petitioners could not have raised supplementary invoices claiming the additional recurring expenditure incurred by the Petitioners due to introduction of GST Laws under Article 10.3.3 of the PPA, as Article 12.2 of the PPA makes it obligatory upon them to approach this Commission to seek relief for a Change in Law event before raising any supplementary invoices.

66. On the other hand, the Respondents have submitted that there is no provision in the PPAs regarding carrying cost or interest for the period till the decision of the Commission acknowledging Change in Law and deciding on the amount to be paid for such change in law as specified in Article 12.2.2 of the PPAs. The 'Change in Law' claim of the Petitioners is yet to be adjudicated and the amount if any, due to the Petitioners have to be determined/computed first. Only when the amount is determined by the Commission, the Petitioners can raise a supplementary invoice for the amount so computed. Only when there is default on 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. 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. There cannot be any claim for late payment

surcharge for the period prior to the due date. In the present case, the payment is due only after issuance of the supplementary invoice after the decision of the Commission. The Respondents have submitted that the PPAs do not have a provision dealing with restitution principles of restoration of the Petitioners to same economic position. The Petitioners are not entitled to claim relief which is not provided for in the PPAs. The Respondents have referred to judgements of the Tribunal and orders of the Commission.

67. We have considered the submissions of the Petitioners and the Respondents. The issue of carrying cost has been dealt with by APTEL that vide judgement dated 13.04.2018 in Appeal No. 210 of 2017 in Adani Power Limited v. Central Electricity Regulatory Commission and Ors, held that since Gujarat Bid-01 PPA had 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:

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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.”

68. The judgement of the Tribunal 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.”

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.”

69. We note that the PPAs in the instant matter do not have restitution provisions. Therefore, in view of above judgements of APTEL and Hon’ble Supreme Court, since the PPAs in the instant Petition do not have a provision dealing with restitution principles of restoration to same economic position, the claim regarding ‘carrying cost’ is not admissible.
70. With the above directions, Petition No. 177/MP/2019 and Petition No. 178/MP/2019 stand disposed of.

Sd/-
अरुण गोयल
सदस्य

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आई. एस. झा
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