



नईदिल्ली
NEW DELHI

याचिका संख्या./ Petition No.: 281/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(1)(b) read with Section 79(1)(f) of the Electricity Act, 2003 for (i) approval of 'Change in Law'; and (ii) consequential relief to compensate for the increase in capital cost due to introduction of the Central Goods and Services Tax Act, 2017, the Integrated Goods and Services Tax Act, 2017 and the State Goods and Services Tax Acts enacted by respective states, in terms of Article 12 of the power purchase agreements dated 21.07.2017 between Petitioner and PTC India Limited.

AND IN THE MATTER OF:

MytrahVayu (Sabarmati) Private Limited
8001, Q City, S No. 109,
Gachibowli,
Hyderabad- 500032

...Petitioner

VERSUS

1. PTC India Limited
2nd Floor, NBCC Tower,
15 Bhikaji Cama Place,
New Delhi - 110066
2. Solar Energy Corporation of India

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

3. North Bihar Power Distribution Company Limited
VidyutBhawan, JawaharLal Nehru Marg,
Patna – 800021, Bihar
4. South Bihar Power Distribution Company Limited
VidyutBhawan, JawaharLal Nehru Marg,
Patna – 800021, Bihar
5. Assam Power Distribution Company Limited
BijuleeBhawan, Paltan Bazar,
Guwahati – 781001, Assam
6. Jharkhand BijliVitrان Nigam Limited
Engineering Building, HEC Dhurwa,
Ranchi, Jharkhand
7. Uttar Pradesh Power Corporation Limited
Shakti Bhawan, 14, Ashok Marg
Lucknow – 226001, Uttar Pradesh

...Respondents

Parties Present: Ms. Aukriti Jain, Advocate, MV(S)PL
Shri Dharmendra Gupta, MV(S)PL
Ms. Tanya Sareen, Advocate, SECI
Ms. Poorva Saigal, Advocate, SECI
Shri Ravi Kishore, Advocate, PTC

आदेश/ ORDER

The Petitioner, Mytrah Vayu (Sabarmati) Private Limited, a Special Purpose Vehicle incorporated by Mytrah Energy (India) Private Limited is engaged in the business of developing 250 MW wind power project at village Maniyachi, taluk Ottapidaram, district Thoothukuddi, Tamil Nadu. The Petitioner has filed the present petition under Section 79(1)(b) read with Section 79(1)(f) of the Electricity Act, 2003 read with Article 12 of the Power Purchase Agreement (PPA) dated 21.07.2017 seeking approval of Change in Law due

to introduction of the Central Goods and Services Tax Act, 2017; the Integrated Goods and Services Tax Act, 2017; and the State Goods and Services Tax Acts enacted by respective States (these legislations are collectively referred to as ‘the GST Laws’) and consequential relief to compensate for the increase in capital cost.

2. The Respondent No. 1, PTC India Limited (in short, PTC) is the Trading Agency selected by Solar Energy Corporation of India (SECI) for purchase and sale of wind power from wind power projects being set up under the scheme for setting up 1000 MW ISTS-connected Wind Power Projects (WPP) on Build, Own and Operate basis (hereinafter referred to as ‘1000 MW WPP Scheme’). Request for Selection to select wind power developers under this scheme was issued by SECI on 28.10.2016.
3. The Respondent No. 2, Solar Energy Corporation of India Ltd. (SECI) has been designated by the Ministry of New and Renewable Energy, Government of India (MNRE) as the nodal agency for implementation of 1000 MW WPP Scheme.
4. The Respondents 3 to 7, are power procurement entities (hereinafter collectively referred to as ‘Discoms’) for the States of Bihar, Assam, Uttar Pradesh and Jharkhand. The Discoms have entered into Power Sale Agreements (PSAs) with PTC for purchase of wind power generated from the Petitioner’s wind power project and the said PSAs form part of the PPAs as Schedule I.
5. The Petitioner has made the following prayers:
 - (a) *Declare that enactment of GST Law qualifies as ‘Change in Law’ in terms of Article 12 of the PPAs executed between the Petitioner and the Respondent No.1 and that the Petitioner is entitled to relief thereunder;*
 - (b) *Direct Respondent No.1 to compensate the Petitioner in terms of Article 12 of the PPAs for the additional non-recurring cost incurred/ to be incurred by it to the tune of INR 51,98,43,746/- (Rupees Fifty One Crore Ninety Eight Lakh Forty Three Thousand Seven Hundred and Forty Six Only) due to introduction of GST Law by way of upfront lumpsum payment/ adjustment in the quoted tariff along with the carrying cost;*
 - (c) *Direct Respondent No.1 to compensate the Petitioner in terms of Article 12 of the PPAs for the additional recurring cost to be incurred by it i.e. O&M cost to the tune of INR 2,50,77,825/- (Rupees Two Crore Fifty Lakh Seventy Seven Thousand Eight Hundred*

and Twenty Five Only) due to introduction of GST Law by way of upfront lumpsum payment/ adjustment in the quoted tariff along with the carrying cost.

(d) Pursuant to grant of prayer (a) and (b) above, approve the necessary consequential amendments to the PPAs and LOA;

(e) Grant such order, further relief(s) in the facts and circumstances of the case as this Ld. Commission may deem just and equitable in favour of the Petitioner.

6. The Petitioner through an additional affidavit has *inter-alia* submitted that part (d) of the above prayers may be considered as deleted.

Background

7. On 14.06.2016, MNRE issued a scheme for setting up 1000 MW WPP Scheme to facilitate fulfilling of non-solar RPO of distribution companies of non-windy States through supply of wind power; and encourage competitiveness in wind power sector through transparent e-bidding followed by e-reverse auction.
8. On 22.10.2016, MNRE issued the ‘Guidelines for implementation of Scheme for setting up 1000 MW ISTS connected Wind Power Projects’ (hereinafter referred to as ‘the 1000 MW WPP Guidelines’) and SECI has been designated as the nodal agency for implementation of the Scheme.
9. On 28.10.2016, SECI invited proposals by issuing a Request for Selection (RfS) for selecting Wind Power Developer (WPD) for an aggregate capacity of 1000 MW. Under the RfS, PTC has been designated as the Trading Agency for purchase and sale of power generated by such WPDs. PTC was to enter into PPAs with successful WPDs for a period of 25 years from the date as specified in the PPAs.
10. On 23.02.2017, Mytrah Energy (India) Private Limited (MEIPL) was declared a successful bidder for development of 250 MW wind power project with a tariff of Rs. 3.46/kWh for generation and onward sale of wind power @ 3.46/kWh to PTC.

11. On 05.04.2017, SECI issued the Letter of Award (LOA) to Mytrah Energy (India) Private Limited (MEIPL). Subsequently, MEIPL has incorporated the Petitioner as a special purpose vehicle for implementation of the 250 MW wind power project awarded to it.
12. On 01.07.2017, the GST Laws were enacted.
13. On 21.07.2017, the Petitioner executed four PPAs with PTC for off-taking the entire 250 MW capacity and for sale to the Respondents 3-7 on a back to back basis. The scheduled date of commercial operation (SCoD) of the project was 04.10.2018.
14. The Petitioner has claimed that enactment of the GST Laws constitute Change in Law in terms of the provisions of the PPAs. Hence the Petition.

Submissions of the Petitioner

15. The Petitioner has submitted that it has executed four Power Purchase Agreements for 25 years with PTC on 21.07.2017 with following details:
 - i. PPA for 50 MW further to PSA dated 23.06.2017 between PTC and Jharkhand Bijli Vitran Nigam Limited;
 - ii. PPA for 50 MW further to PSA dated 27.06.2017 between PTC and North Bihar Power Distribution Company Limited, and PTC and South Bihar Power Distribution Company Limited;
 - iii. PPA for 100 MW further to PSA dated 13.07.2017 between PTC and Uttar Pradesh Power Corporation Limited; and
 - iv. PPA for 50 MW further to PSA dated 01.08.2017 between PTC and Assam Power Distribution Company Limited.
16. The Petitioner has submitted that it has commissioned total of 250 MW wind generation capacity till 11.05.2019 (128.79 MW on 30.01.2019, 58.32 MW on 16.04.2019 and 62.89 MW on 11.05.2019).

17. The Petitioner has submitted that the GST Laws have severely affected various parameters based on which MEIPL (parent company of the Petitioner) had submitted its bid. The change in the taxation regime has adversely affected the capital cost and operational costs of the wind project. Pursuant to introduction of GST, wind power was placed under the 5% to 18% tax bracket and a steep increase in taxes from zero to 18% has increased the capital cost of the Petitioner significantly, making tariff discovered through e-reverse auction unviable.
18. The Petitioner has submitted that the provisions of all the PPAs are identical and Article 12 of the PPAs deals with Change in Law and the consequences thereof. Article 12 of the PPAs stipulates as under:

“12 ARTICLE 12: CHANGE IN LAW

12.1 Definition

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 date, which is the Bid Submission Date resulting into any additional recurring/non-recurring expenditure by the WPD or any income to the WPD:

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

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

12.2 Relief for Change in Law

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

12.2.2 The decision of the Appropriate 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.”

19. The Petitioner has submitted that from the above provisions of the PPAs, it can be observed that enactment of the GST Laws meets the criteria laid in the Article 12 of the PPAs and hence is squarely covered as Change in Law.
20. The Petitioner submitted that Article 12 of the PPAs clearly envisages a relief/ compensation to be granted to the Petitioner on account of additional non-recurring and recurring expenditure that the Petitioner has to incur as a result of a Change in Law event, which would be determined and given effect to from such date as decided by this Commission.
21. The Petitioner submitted that this Commission has in multiple cases held that introduction of a new tax which was not in existence at the time of submission of bid would be covered within the definition of Change in Law. The Petitioner has placed its reliance on Order dated 30.03.2015 issued by the Commission in Petition No. 06/MP/2013, wherein the Commission while dealing with the 'introduction of clean energy cess' has recognized it to be covered under Change in law.
22. The Petitioner has submitted that it entered into the Power Evacuation Common Facility Agreement (hereinafter referred to as 'the PE Agreement') dated 02.06.2017 and a composite contract for supply of wind mills and engineering, procurement and construction with MEIPL ('Composite Supply Contract') dated 04.09.2017 for timely setting-up of the project.
23. The Petitioner has submitted that as per the PPAs, SCoD of the project was 04.10.2018 and it has commissioned total of 250 MW wind generation capacity till 11.05.2019. The delay in commissioning is owing to certain unforeseeable events not attributable to the Petitioner. However, the delay in achieving SCoD is not the subject matter of the instant petition.
24. The Petitioner has submitted that due to enactment of the GST Laws, there is increase of Rs. 51,98,43,746/- in capital cost of the project and increase of Rs. 25,077,825/- in Operations and Maintenance (O&M) cost. Further, only a few O&M activities such as maintenance of overhead line and pooling station, maintenance of WTG and site security have been outsourced since neither the 1000 MW WPP Guidelines nor the PPAs prohibit outsourcing of O&M. Rather, good utility practices warrant appointment of experienced agencies/ contractors for O&M. The aforesaid additional recurring capital expenditure could not have

been factored in by the Petitioner at the time of submission of bid and as such, has to be allowed to the Petitioner by way of an adjustment in the tariff/ upfront lumpsum payment, in terms of Article 12 of the PPAs.

25. The Petitioner has submitted that it is also entitled to carrying cost on the additional cost incurred by it as a result of introduction of the GST Laws and the same will have to be paid for the following two periods:

- Period 1 – from the date the Petitioner incurred the additional cost on account of introduction of the GST Laws till the approval of Change in Law by this Commission; and
- Period 2 – from the date of approval of Change in Law over the period of amortisation, in a scenario when the Commission does not allow compensation by way of one-time upfront lumpsum payment.

26. The Petitioner has submitted that Clause 6.2(4) of the Tariff Policy regarding Change in Law stipulates as under:

“6.2 Tariff structuring and associated issues

...

(4) After the award of bids, if there is any change in domestic duties, levies, cess and taxes imposed by Central Government, State Governments/Union Territories or by any Government instrumentality leading to corresponding changes in the cost, the same may be treated as “Change in Law” and may unless provided otherwise in the PPA, be allowed as pass through subject to approval of Appropriate Commission.”

27. The Petitioner has submitted that Clause 3.2 (ii) of the 1000 MW WPP Guidelines clearly provides that *‘In case of any change in tax provisions, after selection of the bidder, having financial implications on the bidder, it will be pass-through, if the same is allowed by the CERC /respective SERC.’*. The Guidelines are binding on the procurers/ intermediary procurers/ end procurers.

28. The Petitioner has submitted that the Commission has the jurisdiction to decide the instant petition in terms Section 79(1)(b) of the Electricity Act, 2003 read with Article 12 of the PPAs. The instant petition involves issues relating to regulation of tariff of a generating company (the Petitioner), which has a composite scheme of generation of electricity in more than one State and, therefore, only the Commission has the jurisdiction.

29. The Petitioner has submitted that it sought permission to file an additional affidavit incorporating certain amendments to the Petition and the request was allowed by the Commission. Therefore, in accordance with the RoP of hearing dated 05.03.2020, it has filed an additional affidavit vide which it has submitted a table showing tax incidence on basic value (inclusive of both incurred and committed values) at pre-GST and post-GST amounting to Rs. 51,98,43,746/- as under:

Taxes applicable pre-GST Law	Taxes applicable post-GST Law
Excise Duty	Excise Duty abolished
Cess	Excise Duty Cess abolished
VAT on intra-state sale	Simultaneous levy of CGST and SGST
CST on inter-state sale	IGST
Octroi / Local body tax	Octroi / Local Body Tax abolished
Works contract	Deemed as service under GST law
	Intra-state supply: CGST and SGST
	Inter-state supply: IGST

Reply of Respondent No.2 (SECI)

30. SECI has submitted that it is neither a party to the PPAs dated 21.07.2017 nor there is privity of contract between the Petitioner and SECI. SECI has only acted as an implementing nodal agency of the scheme. Directions for subject matter raised by the Petitioner are sought with reference to Respondent No.1. Therefore, any claim of the Petitioner is maintainable only against Respondent No.1 and the Petitioner is not entitled to seek any relief against SECI.

Written Submissions by Respondent No.1 (PTC)

31. The Respondent No.1 (PTC) has filed the written statement on 17.07.2020.

32. PTC has submitted that PSAs were attached with the PPAs as mandated in Recital F which reads as under:-

F. Buyer has agreed to purchase Wind Power from WPD as an intermediary and sell it to identified Discom as per the Buyer-DiscomPower Sale Agreement, accordingly Buyer has signed Power Sale Agreement for----- MW Contracted Capacity with --

----- (name of the Discom(s))dated ----- which is annexed as Schedule-I of this Agreement and is the basis of execution of this Agreement

33. PTC has submitted that from the above quoted provision, it is evident that the PSA is the basis of signing the PPAs and accordingly the PSAs becomes an intrinsic part of the PPAs. Further, it is an accepted position that the PSAs and PPAs are on back to back basis.

34. PTC has submitted that some of the relevant provisions of RfS issued by SECI are as under:

1.1.2 SECI has been designated as the nodal agency for implementation of MNRE Schemes for developing grid connected Wind Power wind capacity in the country.

1.3.2. SECI has selected PTC India Ltd as the Trading Agency for purchase and sale of power from such wind power projects.....

3.14 Power Purchase Agreement

3.14.1 A copy of the Standard Power Purchase Agreement to be executed between the Trading Company selected for the purpose of SECI and the Wind Power Developers shall be provided by SECI along with the RfS. The PPA shall be signed within 06 month from the date of issue of Letter of Award (LOA) (for e.g. if the LOA is dated 07.06.2016, then the date for signing of the PPA shall be 07.04.2017) Subsequent extension in this PPA shall be finalized as mutually agreed between SECI and the Trader.....

35. PTC has submitted that from the above facts it is clear that it was acting only as a Trader and even the PPAs were signed after the price was discovered under the tender floated by SECI and LOA was issued by SECI. In a typical trading activity, it is the prerogative of the trader to finalize the sale and purchase of power, which is not in the present case. Even PTC was selected by a bidding process undertaken by SECI and it also had a much bigger role to play being the nodal agency for implementation of the Scheme. With the introduction of GST, the Petitioner has claimed relief under Change in Law clause and filed the present petition. However, the Petitioner has claimed relief only against PTC even though Discoms have been made respondents in the present Petition, but no relief has been sought against them. This is against the scheme.

36. PTC has submitted that PPAs between the Petitioner and PTC as also the PSAs executed with Respondent Discoms were back to back arrangements as the PPAs have specific reference to the PSAs and were annexed with the PPAs. Therefore, PPAs and PSAs are inter-dependent

and interconnected. Discoms are the ultimate beneficiaries and, therefore, Discoms need to be impleaded as necessary parties.

37. PTC has submitted that a perusal of the 1000 MW WPP Scheme and various clauses of the PPAs show that the PPAs envisage execution of back to back PSAs with Discoms. Therefore, the PPAs must be construed in a manner so as to give effect to this intention and understanding of the parties.

38. PTC has submitted that the Tariff Policy requires the Regulatory Commissions to fix the trading margin in a manner which would reduce the costs of electricity to the consumers and, at the same time, an endeavor should be made to meet the requirement for investments. The term trading has been defined under Section 2(71) of the Electricity Act as under:

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

39. PTC has submitted that if a direction is issued only to it to pay for any compensation without receipt of payment from Respondent Discoms, such direction will not be in line with the scheme of the Electricity Act, 2003.

40. PTC has submitted that scheme for the wind power and solar power is entirely different. Under the 1000 MW WPP Scheme, SECI is responsible for entire implementation of the scheme wherein PTC was the intermediary who was buying power for re-sale to various Respondent Discoms, whereas, solar power was developed under various schemes of MNRE under National Solar Mission. For “3000 MW Grid- Connected Solar PV Power Projects under Batch-II – State Specific Bundling Scheme”, NTPC/ NVVN was not acting as an intermediary trader alone but as an implementing agency for the Scheme. Thus, the role of NTPC/NVVN was totally different from that of PTC in the present case. For “2000 MW Grid-connected Solar PV Power projects under Batch –III State Specific VGF Scheme”, SECI was not acting as an intermediary trader alone but as an implementing agency for the Scheme. Thus, the role of SECI was totally different from that of PTC in the present case.

41. PTC has submitted that its role as a conduit in the entire transaction has been noted in a catena of judgments. PTC has placed its reliance on the following cases: *PTC India Limited v.*

Jaiprakash Power Ventures, 2012 (130) DRJ 351; PTC India Limited v. Uttarakhand Electricity Regulatory Commission & Ors., (2011) ELR (APTEL) 81; Lanco Power Limited v. HERC & Ors., (2011) ELR (APTEL) 1714; PTC India Ltd. v. Uttarakhand Electricity Regulatory Commission and Ors., (2016) ELR (APTEL) 1176; MB Power (Madhya Pradesh) Ltd. v. Uttar Pradesh Power Corporation Ltd. in Petition 224/MP/2018 and State of A.P. v. NTPC, (2002) 5 SCC 203.

42. PTC has submitted that the cases relied upon by the Petitioner are not applicable in the present case. The present Petition is in respect of wind power whereas cases relied upon by the Petitioner relate to solar power. PTC was selected by SECI through a transparent bidding process, whereas, in the case of solar power, NTPC & SECI acted as intermediaries in terms of the JNNSM Scheme and SECI & NTPC have a much bigger role to play as a nodal agency for implementation of the Scheme.
43. PTC has submitted that the prayer of the Petitioner claiming relief only against PTC is unsustainable and PTC is not liable to pay the amount of compensation, if decided by this Commission without receipt of corresponding payment from Discoms as the same will expose PTC to financial risks which it cannot take being a trader and a conduit between the generator and the Discoms. This is as per law settled by various judgments of APTEL and the provisions of the Electricity Act, 2003.
44. PTC has submitted that the Petitioner is required to exhibit clear one to one correlation between the project, the supply of goods or services and the invoices raised by the supplier of goods and services backed by auditor's certificate. It is necessary to first verify all the claim documents. The Petitioner is required to place on record the correct computation of the impact of the Change in Law and the extent to which the Petitioner's project is subject to such taxes etc.
45. PTC has submitted that as per the provisions of the GST Laws, if point of taxation of Goods or Services lies before the GST implementation, it will be taxed under earlier law and accordingly GST will not be applicable. Any portion of any supply whose point of taxation is after GST implementation will be taxed under GST. The liability of the Respondents for

payment for purchase of power from the Petitioner starts from the Commercial Operation Date (COD).

46. PTC has submitted that delay in commissioning the Project is entirely attributable to the Petitioner. There is no provision in the PPAs for payment of any additional capital cost for undertaking any capital investments done by the Petitioner at any time after the commissioning. The Petitioner has failed to provide the certification stating that all the norms as per the GST Laws have been complied with by the Petitioner and the claim of the amount being made by the Petitioner are correct as per the effective taxes in pre-GST and post-GST regime.
47. PTC has submitted that increase in taxes applicable to various O&M activities on account of introduction of the GST Laws and increase in the O&M cost of the Petitioner and incremental impact will have to be borne by the Petitioner and the Petitioner is not entitled to any relief on account of O&M expenses with regard to change in law.

Written Submissions by the Petitioner

48. The Petitioner has placed reliance on the decision of this Commission in order dated 09.10.2018 in Petition 188/MP/2017 (and connected matters) titled *ACME Bhiwadi Solar Power Private Limited vs. SECI and Ors.*; Order dated 19.11.2019 in Petition No. 188/MP/2018 titled *Azure Solar Private Limited vs. NTPC VidyutVyapar Nigam Limited and Ors.*; Order dated 30.12.2019 in Petition No. 4/MP/2019 (and connected matters) titled *Parampujya Solar Energy Pvt. Ltd. vs. NTPC and Ors.* and order dated 28.01.2020 in Petition No. 67/MP/2019 (and connected matter) titled *Clean Sustainable Energy Private Limited vs SECI and Ors.*
49. The Petitioner has submitted that the contractual scheme for generation of renewable power i.e. the PPAs do not differentiate between the sources of energy (i.e. wind and solar). Therefore, the contention of PTC is liable to be rejected outright.
50. The Petitioner has submitted that the delay caused in commissioning the project has been entirely due to the reasons beyond the control of the Petitioner. Further, delay in

commissioning has no applicability on the Change in Law claims of the Petitioner in terms of the present PPAs. The Petitioner has submitted that none of the provisions of the PPAs disentitles the Petitioner from making a change in law claim if the project fails to achieve COD within the stipulated date. Even if it is assumed that there was delay on the part of the Petitioner in achieving commissioning of the project, the SCoD of the project in this case was 04.10.2018 i.e. after the promulgation of GST Laws which was in July 2017 and hence it is entitled to the claim for Change in Law as per the PPAs. Further, SECI had already condoned the delay of 39 days on account of Force Majeure events and is now considering the condonation of delay for the rest of the period till the time of commissioning.

51. The Petitioner has submitted that the increase in additional O&M cost due to the introduction of the GST Laws could not have been factored in by the Petitioner at the time of submission of the bid and, therefore, such loss has to be allowed to the Petitioner by way of an adjustment in tariff/ upfront lumpsum payment, in terms of Article 12 of the PPAs.
52. The Petitioner has submitted that Article 10 of the PPAs makes it abundantly clear that the tariff/ monthly bill/ supplementary bill will be raised by the Petitioner on PTC and the same shall be payable by PTC. Further, Article 10.7 of the PPAs states that WPD may raise a supplementary bill for payment on account of Change in Law and the same shall be payable by PTC by the due date. At no point the payment of the supplementary bill on account of Change in Law is to be made after the amounts are received by PTC from Respondent Discoms. The contractual construct of the PPAs and PSAs and the “back to back” arrangement have been settled by the Order dated 28.01.2020 in the matter of *ACME Kurukshetra and Ors. vs. NTPC and Ors.* bearing Petition No. 138/MP/2019. The Petitioner also submitted that Article 10.3.3 of the PPAs provides for payment of late payment surcharge to be made to the Petitioner after the same has been received by PTC.
53. The Petitioner has submitted that PTC was selected as the Trading Company to bear the responsibility of purchase and sale of power in terms of the PPAs. It is further stated that the idea to introduce an electricity trader, in generation, is that it serves the purpose of providing a hedge to independent power producers, by agreeing to purchase a certain amount of energy or capacity, thus enabling investors to build capacity, where they might otherwise have deferred. Moreover, traders are introduced so they can assume an agreed upon level of risk

that might help investors attain the requisite revenue stream to enable a plant to be built that otherwise might not have been completed and that is exactly the reason why SECI issued a tender for competitive bidding to select a trading company which could handle the responsibility.

54. The Petitioner has submitted that from a mere reading of the provisions of the Tender Document for “Selection of Power Trading Company for Purchase and Sale of Wind Power” and Letter of Award by SECI, it is clear that PTC is required to share with SECI atleast 25% of the trading margin. Therefore, SECI is responsible for implementation of the work/ obligations to be undertaken by PTC and fulfilment of contractual obligations with respect to PPAs dated 21.07.2017 entered into by PTC.

Analysis and Decision

55. We have heard the learned counsels for the Petitioner and the Respondent and have carefully perused the records.
56. We think it appropriate to first deal with preliminary objections advanced by PTC during the hearing and the written statement filed subsequently on 17.07.2020.
57. PTC has submitted that scheme for wind power and solar power are distinct from each other and accordingly it is the responsibility of SECI to compensate the Petitioner in terms of Article 12 of the PPAs for the additional non-recurring/ recurring cost incurred, due to introduction of the GST Laws, by way of upfront lumpsum payment/ adjustment in the quoted tariff along with the carrying cost. *Per contra*, SECI has submitted that it is neither a party to PPAs dated 21.07.2017 nor is there any privity of contract between the Petitioner and SECI. SECI has acted only as an implementing nodal agency of the scheme. Directions for subject matter raised by the Petitioner are sought with reference to PTC only. Therefore, any claim of the Petitioner is maintainable only against PTC and the Petitioner is not entitled to seek any relief against SECI. Further, the Petitioner has submitted that the contractual scheme for generation of renewable power i.e. the PPAs does not differentiate between the sources of energy therefore the contention of the PTC is liable to be rejected.
58. We observe that various clauses of the 1000 MW WPP Guidelines inter-alia provide as under:

“5. Implementation Arrangements:

.....
SECI will be the nodal agency for implementation of this Scheme.
.....

6. Role of SECI: *Through a transparent procedure, SECI shall select a Trading Company prior to issue of Request for Selection (RfS) document, which will sign Power Purchase Agreement with selected developers at bid tariff and back-to-back Power Sale Agreement with Discoms of non-windy States at a pooled price of the total bids selected.*

SECI shall issue the Request for Selection (RfS) document inviting developers to submit the bids quoting tariff for 25 years from sale of power from the Wind Power Project they proposed to set-up in a specified location through e bidding for which SECI will develop detailed guidelines.

In addition, SECI will develop a suitable mechanism for monitoring the performance of the projects.”

59. In terms of the above, we observe that SECI is the implementing nodal agency. SECI was entrusted to select a Trading Company prior to issue of RfS document, which will sign PPAs with selected developers at bid tariff and back-to-back PSAs with Discoms at a pooled price.

60. Further, various clauses of the 1000 MW WPP Guidelines inter-alia provide as under:

“1.3. Implementation Agency

SECI will be the nodal agency for implementation of this Scheme. SECI will develop guidelines for e-bidding process followed by e-reverse auction for eligible bidders and develop a suitable mechanism for monitoring the performance of the projects. No separate funding shall be provided by MNRE to SECI for this purpose.

3.2 Mechanism of Operation of the Scheme

ii. Sale of wind power: The Trading Company selected by SECI shall sign Power Purchase Agreement (PPA) with developers at bid tariff and back-to-back Power Sale Agreement (PSA) with Buying Entities at a pooled price of the total bids selected. The process of selection of Trading Company will be completed prior to issue of Request for Selection (RfS) document, so that bidders have clarity on position of Trading Company with which they are going to sign PPA. The selected Trading Company will be entitled to charge a trading margin as mutually agreed with Buying Entity or as decided by the CERC for long-term sale of electricity. Trading Company to share at least 25% of trading margin with SECI without any liability to SECI. The duration of PPA and PSA will be 25 years from Commercial Operation Date (COD) of the project.

All the commercial transactions under the scheme for sale and purchase of wind power between Wind Project Developer, Trading Company and Buying Entities will be governed by the PPA/PSA as the case may be. MNRE and SECI in no case shall be held responsible for any loss or damage to any company/person arising out of the provisions of the Scheme/guidelines.

In case of any change in tax provisions, after selection of the bidder, having financial implications on the bidder, it will be pass-through, if the same is allowed by the CERC /respective SERC.”

61. The relevant extract of the ‘Letter of Award’ has been reproduced as under:

“M/s. PTC India Limited, the power trading company selected by SECI for sale and purchase of wind power under the scheme, shall purchase the power generated from the proposed ISTS-Connected Wind Power Project under the above scheme”

62. In terms of the above-mentioned provision of the 1000 MW WPP Guidelines, we observe that SECI was to select a Trading Company that was to sign PPAs with developers at bid tariff and back-to-back PSA with Discoms at a pooled price. The process of selection of Trading Company was to be completed prior to issue of RfS, so that bidders have clarity on position of Trading Company with which they are going to sign PPAs. The selected Trading Company was entitled to charge a trading margin as mutually agreed with Discoms or as decided by the Commission for long-term sale of electricity. It was mandate of the 1000 MW WPP Guidelines that Trading Company was to share at least 25% of trading margin with SECI without any liability to SECI. Further, all the commercial transactions under the scheme for sale and purchase of wind power between WPD, Trading Company and Discoms were to be governed by the PPAs/ PSAs as the case may be. In case of any change in tax provisions, after selection of the bidder, having financial implications on the bidder, the same was to pass-through, if the same was allowed by the Commission. As per Letter of Award, it was stipulated that PTC shall purchase the power generated from the proposed ISTS-Connected Wind Power Project under the above scheme.

63. The relevant ‘Recitals’ of one of the PPAs executed on 21.07.2017 inter-alia stipulate as under (other PPAs being similar worded):

F. The WPD has agreed to sign this Power Purchase Agreement with Buyer to sell energy generated from Wind Power Project corresponding to 50 MW installed capacity of Wind Power Project (20% of generation) to Buyer for 25 years from the COD of the Project as per the terms and conditions of this Agreement.

G. Buyer has agreed to purchase Wind Power from WPD as an intermediary Seller and sell it to identified Discom as per the Buyer-Discom Power Sale Agreement, accordingly Buyer has signed Power Sale Agreement for 50 MW Contracted Capacity with North Bihar Power distribution company Limited (NBPDCCL) & South Bihar Power distribution company Limited (SBPDCL), dated 27.06.2017 which is annexed as Schedule-1 of this Agreement and is the basis of execution of this Agreement.

H. Pursuant to the aforesaid objective, the Parties are desirous of entering into a Power Purchase Agreement (“PPA”) i.e. a definitive agreement, regarding purchase of power from the Project. Pending execution of the necessary agreements and other relevant documents in relation to the transaction contemplated herein, the Parties wish to execute this PPA setting out the respective obligations of the Parties and the steps necessary to complete the transactions contemplated herein.

64. In terms of above, we observe that WPD (the Petitioner) has agreed to sign PPAs with buyer (PTC) to sell energy generated from wind power project corresponding to installed capacity of wind power project to buyer for 25 years from COD of the project as per the terms and conditions of PPAs. The buyer has also agreed to purchase wind power from WPD as an intermediary seller in order to sell it to identified Discoms as per the PSAs. Thus, the Change in Law issue has to be adjudicated and decided in terms of the PPAs between the Petitioner and PTC and not against SECI as SECI is not a party to the PPAs. No other document has been placed on record which shows that SECI has accepted the responsibility under the PPAs on behalf of PTC including to compensate the Petitioner for Change in Law event. Rather we observe that the 1000 MW WPP Guidelines specifically mention that PTC is to share at least 25% of trading margin with SECI without any liability to SECI. Further, the PPA is a binding document for all purposes between the Petitioner and PTC in terms of which the Petitioner has agreed to sell wind power generated from the project to PTC which in turn has agreed to procure such power at the rate agreed in the PPAs and also to compensate for the consequences of Change in Law. In fact, there is no privity of contract between the Petitioner and SECI with regard to generation and supply of power from the project of the Petitioner and payments thereof. We are of the view that the objection of PTC cannot be sustained as it is PTC which is liable to compensate the Petitioner for events of Change in Law in terms of the PPAs.

65. Having dealt with preliminary objections, the following issues arise before us:

Issue No. 1: Whether enactment of GST Law qualifies as 'Change in Law' in terms of Article 12 of the PPAs executed between the Petitioner and the PTC?

Issue No. 2: Whether PTC should be directed to compensate the Petitioner in terms of Article 12 of the PPAs for the additional non-recurring cost incurred/ to be incurred due to introduction of GST Law by way of upfront lumpsum payment/ adjustment in the quoted tariff along with the carrying cost?

Issue No. 3: Whether PTC should be directed to compensate the Petitioner in terms of Article 12 of the PPAs for the additional recurring cost to be incurred by it i.e. O&M due to introduction of GST Law by way of upfront lumpsum payment/ adjustment in the quoted tariff along with the carrying cost?

66. No other issue was pressed or claimed.

Issue No. 1: Whether enactment of GST Law qualifies as 'Change in Law' in terms of Article 12 of the PPAs executed between the Petitioner and the PTC?

67. During the hearing held on 07.07.2020, the Petitioner has submitted that the issues involved in the Petition stand covered by the Commission's earlier orders relating to Change in Law event arising out of enactment of the GST Laws. The Petitioner has placed its reliance on judgment of Hon'ble Supreme Court dated 04.03.1975 in the case of *Mamleshwar Prasad & Anr. V. Kanahaiya Lal (1975 AIR 907)* and submitted that a prior decision of the court on identical facts and law binds the court on the same points in a later case. Accordingly, the Commission may pass an appropriate order in line with its earlier orders on the subject matter. However, PTC has submitted that the PPAs and PSAs are inter-dependent and interconnected and are executed back to back. Since the Respondent Discoms are the ultimate beneficiaries, any direction issued to PTC to pay for any compensation without receipt of payment from Respondent Discoms will not be in line with the scheme of the Electricity Act, 2003 and will put PTC to a grave financial risk. Further, there is a delay in the commissioning of the project which is entirely attributable to the Petitioner and that there is no provision in the PPAs for payment of any additional capital cost for undertaking any capital investments done by the Petitioner at any time after the commissioning. *Per contra,*

the Petitioner has further submitted that SCoD of the project was 04.10.2018, while the Petitioner has commissioned 128.79 MW on 30.01.2019, 58.32 MW on 16.04.2019 and 62.89 MW on 11.05.2019 i.e. the total of 250 MW capacity has been commissioned as on 11.05.2019. The delay in commissioning is owing to certain unforeseeable events not attributable to the Petitioner. However, the delay in achieving SCoD is not the subject matter of the instant petition. Further, SECI had already condoned the delay of 39 days on account of Force Majeure events and is now considering the condonation of delay for the rest of the period till the time of commissioning.

68. 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:

“85. The Petitioners have submitted that Article 12 of the PPAs provides for ‘Change in Law’. It includes inter alia the enactment, promulgation, adoption in India of any Law, as well as, any change in tax or introduction of any tax made applicable for supply of power. The event of enactment of ‘GST Laws’ has occurred after the execution of PPAs and has resulted in additional recurring and non-recurring expenditure. In terms of Article 12.2.1 of the PPAs, an aggrieved party who has incurred additional recurring/ non-recurring expenditure is required to approach the Commission for seeking approval of such change in law event and thereby, claim relief for the same upon approval by the Commission. Accordingly, the Petitioners have approached this Commission for seeking relief on account of introduction of GST as a change in law event, as per the first and last bullet of Article 12.1.1 of the PPAs. Per Contra, Respondent No. 1 has submitted that the fact that the GST Laws are ‘law’, as defined in the PPAs is not disputed. However, in order to qualify for relief under the change in law provision contained in the PPAs, the conditions mentioned in Article 12 therein dealing with ‘Change in Law’ need to be satisfied, namely, each of the claims should fall within the scope of the said provision. The Respondents 2 to 4 in Petition No. 67/MP/2019 have submitted that since, in the present case, the ‘Effective Date’ of the PPAs is 16.09.2017 and the GST Laws were implemented with effect from 01.07.2017, before the ‘effective date’, the event of the implementation of the GST Laws would not fall under ‘Change in Law’ as defined under Article 12 and therefore, the Petitioner would not be entitled to any relief thereof.

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

“ARTICLE 12: ‘CHANGE IN LAW’

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

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

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

For the purpose of considering the effect of this change in Tax structure due to change in law after the date of submission of Bid, the date such law comes into existence shall be considered as effective date for the same; but shall not include (1) any change in any withholding tax on income or dividends distributed to the shareholders of the SPD, or (2) any change on account of regulatory measures by the Appropriate Commission.

12.2. Relief for 'Change in Law'

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

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

87. The Commission observes that as per Article 12, 'Change in Law' means the enactment/ coming into effect/ adoption/ promulgation/ amendment/ modification or repeal of any Law in India; change in the interpretation of any law in India; imposition of a requirement for obtaining any consents or change in tax or introduction of any tax made applicable for supply of power by the SPD as per the terms of this Agreement, resulting into any additional recurring/ non-recurring expenditure or any income to the SPD. The Commission is of the view that harmonious construction of the bullet points under Article 12 makes it clear that bullet point one is wider in scope and refers to the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal of any law in India, including rules and regulations framed pursuant to such law whereas bullet point last in seriatim refers specifically to any change in tax or introduction of any tax made applicable for 'supply of power' by the SPD as per the terms of Agreement. Clearly, the 'GST laws' enacted are not in the nature of a mere change in the tax having limited applicability on supply of power. Rather, it is in the nature of an enactment having wide ranging implication on the entire indirect taxation regime in India. In the instant case, the 'GST Laws' have been enacted by the Act of Parliament and the State Legislative Assemblies. The change in duties/ tax imposed by the Central Government and State Government(s) has resulted in the change in cost of

the inputs required for generation and the same is to be considered as 'Change in Law'. Hence, the Commission holds that the enactment of 'GST laws' is squarely covered as 'Change in Law' under the first, and last bullet in seriatim of Article 12.1.1 of the PPA. 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. titled Acme Bhiwadi Solar Power Private Limited –v-Solar Energy Corporation of India and Ors.

88.The Commission notes that the Petitioners have placed their bids on 19.04.2017 & 05.08.2016 in Petitions No. 67/MP/2019 & 68/MP/2019 respectively. It is observed that the bids were accepted before the introduction of GST Laws i.e. 01.07.2017 and the SCOD was after 01.07.2017. Therefore, the Petitioners are entitled for relief under 'GST laws'."

69. The PPAs in Petition No. 67/MP/2019 and Petition No. 68/MP/2019 are pari materia with the PPAs in the instant case. We observe that the Petitioner submitted its bid on 09.01.2017 and was declared successful bidder on 23.02.2017. SECI issued the Letter of Award on 05.04.2017. Subsequently, the GST laws were enacted on 01.07.2017. It is pertinent to mention here that though the PPAs were executed on 21.07.2017, the bids were crystallised on 23.02.2017. SCOD of the projects was 04.10.2018 i.e. after coming into effect of the GST Laws on 01.07.2017. Thus, the above decision dated 28.01.2020 is also applicable in case of the Petitioner in the instant petition and 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.

Issue No. 2: Whether PTC should be directed to compensate the Petitioner in terms of Article 12 of the PPAs for the additional non-recurring cost incurred/ to be incurred due to introduction of GST Law by way of upfront lumpsum payment/ adjustment in the quoted tariff along with the carrying cost?

and

Issue No. 3: Whether PTC should be directed to compensate the Petitioner in terms of Article 12 of the PPAs for the additional recurring cost to be incurred by it i.e. O&M due to introduction of GST Law by way of upfront lumpsum payment/ adjustment in the quoted tariff along with the carrying cost?

70. As we have held that 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, therefore, the Petitioner is directed to make available to the Respondents all relevant documents exhibiting clear and one

to one correlation between the project 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 Petitioner. 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 Petitioner 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 Petitioner will submit the required documentation to PTC that will satisfy itself and submit the same along with its recommendations to Respondent Discoms.

71. The billing and payment between the Petitioner and PTC are not conditional upon billing and payment between PTC and the Respondent Discoms. The Power Purchase Agreement (between the Petitioner and PTC) and Power Sale Agreement (between PTC and the Respondent Discoms) being back to back in nature are interconnected implying thereby that Respondent Discoms are liable to pay to PTC all that PTC has to pay to the Petitioner.

72. The Petitioner has 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 Petitioner has 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 and that the concept of the O&M expenses is implicitly covered under Article 12 of the PPAs. Clause 12.1.1 of PPAs, 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 Petitioner has also based its arguments on the provision of O&M expenses as specified by the Commission in the CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2017. *Per Contra*, the Respondents have submitted that neither the provisions of

the PPAs nor the bid documents mandate outsourcing of O&M activities and such outsourcing is an internal commercial decision of the Petitioner. The Respondents are not concerned whether the Petitioner undertake the O&M by themselves or outsource it. If, for commercial expediency or benefit, the Petitioner outsources O&M activities, the saving or additional expenditure is to the account of the Petitioner.

73. 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.”

74. The above decision is squarely applicable in the instant case of the Petitioner. Therefore, the prayer of Petitioner to grant GST on the O&M expenses is not allowed.
75. The Petitioner has submitted that the underlying purpose of Article 12 of the PPAs is to provide compensation and restore a party affected by Change in Law events to a position as if such Change in Law had not taken place. For the Petitioner to effectively perform its 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 Petitioner has submitted that it can be brought to the position existing prior to occurrence of the Change in Law event i.e. introduction of the GST Laws only if the Petitioner is also compensated for the additional expenditure incurred as a result of the Change in Law by paying it carrying cost. The Petitioner could not have raised supplementary invoices claiming the additional recurring expenditure incurred by the Petitioner due to introduction of GST Laws under

Article 10.3.3 of the PPAs, as Article 12.2 of the PPAs makes it obligatory upon them to approach this Commission to seek relief for a Change in Law event before raising any supplementary invoices.

76. On the other hand, PTC 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 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 Petitioner is yet to be adjudicated and the amount if any, due to the Petitioner has to be determined/ computed first. Only when the amount is determined by the Commission, the Petitioner 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. PTC has submitted that the PPAs do not have a provision dealing with restitution principles of restoration of the Petitioner to same economic position and, the Petitioner is not entitled to claim relief which is not provided for in the PPAs.

77. We have considered the submissions of the Petitioner and PTC. 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:

“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.”

78. 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.*, 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 Bijli 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.”

79. 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, the claim regarding 'carrying cost' is not admissible.

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

a. Introduction of the GST Laws is an event of Change in Law under Article 12 of the PPAs. The Commission directs the Petitioner to make available to the Respondents all relevant documents exhibiting clear and one to one correlation between the project and the supply of goods and services, duly supported by relevant invoices and Auditor's Certificate. The claim raised by the Petitioner based on this Order shall be paid within sixty days of issue of this Order or from the date of submission of claims by the Petitioner, whichever is later, failing which late payment surcharge shall be payable as per rates provided under PPA. Alternatively, the Petitioner and the Respondents may mutually agree to a mechanism for payment of such compensation on annuity basis spread over the period not exceeding the duration of the PPA as a percentage of the tariff agreed in the PPA.

b. Claim regarding GST on O&M Expenses is not admissible.

c. Claim regarding grant of separate carrying cost is not admissible.

81. With the above directions, Petition No. 281/MP/2019 stand disposed of.

Sd/-
(अरुण गोयल)
सदस्य

Sd/-
(आई. एस. झा)
सदस्य