



नईदिल्ली
NEW DELHI

याचिका संख्या./ Petition No.: 45/MP/2019 along with
IA No. 24/2021

कोरम/ Coram:

श्री पी. के. पुजारी, अध्यक्ष/ Shri P. K. Pujari, Chairperson
श्रीआई. एस. झा, सदस्य/ Shri I. S. Jha, Member
श्रीअरुण गोयल, सदस्य/ Shri Arun Goyal, Member
श्री पी.के. सिंह, सदस्य / Shri P. K. Singh, Member

आदेश दिनांक/ Date of Order: 10th of August, 2021

IN THE MATTER OF:

Petition under Section 79 (1) (b) & (f) of the Electricity Act, 2003 read with Article 12 of the Power Purchase Agreements dated 02.08.2016, executed between the Petitioner and Solar Energy Corporation of India Ltd., for seeking approval of Change in Law events due to enactment of the GST Laws

AND IN THE MATTER OF:

Talettutayi Solar Projects One Pvt. Limited,
Through its Authorized Representative,
Having its corporate office at Unit No. 001,
GF, Tower -C, Unitech Cyber Park,
Sector 39, Gurugram, Haryana – 122001

...PETITIONER

VERSUS

1. Solar Energy Corporation of India Limited,
Through its General Manager,
1st Floor, A-Wing, D-3, District Centre, Saket,
New Delhi- 110017

2. **The Ministry of New and Renewable Energy,**
Through its Secretary,
Block-14, CGO Complex,
Lodhi Road, New Delhi - 110003
 3. **Bangalore Electricity Supply Company Limited,**
Through its Managing Director,
Krishna Rajendra Circle,
Bangalore, Karnataka-560001
 4. **Mangalore Electricity Supply Company Limited,**
Through its Managing Director,
Having its Corporate Office at Paradigm Plaza,
A. B. Shetty Circle,
Pandeshwar, Mangalore - 575001
 5. **Chamundeshwari Electricity Supply Corporation Limited,**
Through its Managing Director,
Having its Corporate Office at No. 39,
CESC Corporate Office, Hinkal,
Vijaynagar 2nd Stage, Mysuru - 570017
 6. **Gulbarga Electricity Supply Company Limited,**
Through its Managing Director,
Having its Corporate Office at Main Road,
Gulbaraga, Gulbaraga-585102
 7. **Hubli Electricity Supply Company Limited,**
Through its Managing Director,
Having its Corporate Office at Corporate Office,
P. B. Road, Navanagar, Hubli-580025
- ...Respondents**

Parties Present: Shri Sakya Singha Chaudhuri, Advocate, TSPOPL
Ms. Nithya Balaji, Advocate, TSPOPL
Shri M. G. Ramachandran, Sr. Advocate, SECI
Ms. Tanya Sareen, Advocate, SECI
Ms. Anushree Bardhan, Advocate, SECI
Ms. Neha Singh, SECI
Shri Ajay Kumar Sinha, SECI
Shri Uday Pavan Kumar Kruthiventi, SECI
Shri Abhinav Kumar, SECI

आदेश/ ORDER

The Petitioner, Talettutayi Solar Projects One Pvt. Ltd. is a generating company for development of solar power project, generation and sale of solar power under the Jawaharlal Nehru National Solar Mission (JNNSM). The Petitioner is seeking approval of Change in Law and 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 the Power Purchase Agreements (PPAs) dated 02.08.2016.

2. The Respondent No.1, Solar Energy Corporation of India Limited (SECI) is a Central Public Sector Undertaking under the administrative control of Ministry of New and Renewable Energy (MNRE), set up to facilitate the implementation of Jawaharlal Nehru National Solar Mission for development, promotion and commercialization of solar energy technologies in the country and to achieve targets set out in the NSM. SECI is off-taking the entire 30 MW generated by the Petitioner's project for sale to the buying utilities on a back to back basis.
3. The Respondent No.2, Ministry of New and Renewable Energy (MNRE) is the nodal Ministry of the Government of India for all matters relating to new and renewable energy in India.
4. The Respondents 3 to 7 are the distribution companies of State of Karnataka (hereinafter referred to as 'the Karnataka Discoms').
5. The Petitioner has made the following prayers:

In Petition No.45/MP/2019

- (a) *Admit the present Petition;*
- (b) *Hold and declare that the imposition of the Integrated Goods and Services Tax, 2017, Central Goods and Services Tax, 2017 and Karnataka Goods and Services Tax, 2017 is an event under Change in Law under Article 12 of the PPA;*

- (c) Restore TSPPL to the same economic condition prior to occurrence of the Changes in Law by way of adjustment in tariff in terms of Article 12 of the PPA by increasing the tariff as prayed for in the present Petition along with carrying cost.
- (d) Pending proceedings, direct the SECI to pay to TSPPL the amount claimed under Change in Law which shall be subject to adjustment based on the final order passed by the Commission;
- (e) Pass any such other and further reliefs as this Commission deems just and proper in the nature and circumstances of the present case.

In IA No.24/2021

- (a) Direct Respondent No. 1 to disburse payment as has been mutually agreed upon by the Applicant and Respondent No. 1 towards verified claims up to commissioning of project, comprising of the following:
- I. Rs 13,91,572/- upfront; and
- II. 122 monthly annuity payments of Rs 66,500/- per month;
- (b) Direct the Respondent No. 1 to disburse payment of the verified claims post COD of Rs 3,74,221 /-.
- (c) Pass any other order(s) as this Commission may deem fit and proper in the circumstances of the present case.

Backdrop and Chronological Date of Events

6. **15.02.2016:** SECI under JNNSM Phase II Batch III Tranche-V invited proposals by a Request for Selection (RfS) for setting up solar power projects in the State of Karnataka.
7. **19.05.2016:** The Petitioner submitted its bid for setting up a solar power project having capacity of 30 MW at Village Sindhanoor, Tehsil Sindhanoor, District Raichur, in the State of Karnataka.
8. **09.06.2016:** E-reverse auction was conducted by SECI on TCIL portal and the Petitioner was declared as a successful bidder for 30 MW solar power project for generation and sale of power under NSM Phase-II, Batch-III Tranche-V.

9. **02.07.2016:** SECI issued a Letter of Intent (LoI) to the Petitioner for development of 30 MW solar power project.
10. **02.08.2016:** Pursuant to issuance of LoI, the Petitioner entered into a Power Purchase Agreement (PPA) with SECI for setting up 30 MW solar power project in the State of Karnataka. As per the PPA, the scheduled date of commissioning (SCoD) of the solar power project was 02.09.2017.
11. **09.03.2017:** The project location was changed to Village Chikkopa, Taluk: Yelburga, Dist. Koppal, Karnataka with the consent of SECI and accordingly, amended PPA was signed between the parties to this effect.
12. **01.07.2017:** The Central Goods and Services Tax Act, 2017 (CGST Act) was enacted for levy and collection of tax, w.e.f. 01.07.2017, on inter-State supply of goods or services, or both, by the Central Government. The Integrated Goods and Services Tax Act, 2017 (IGST Act) was enacted for the levy and collection of tax, w.e.f. 01.07.2017, on inter-State supply of goods or services, or both, by the Central Government. The Karnataka Goods and Services Tax Act, 2017 (KGST Act), was enacted for levy and collection of tax w.e.f. 01.07.2017 on intra-State supply of goods or services or both by the State of Karnataka. (CGST Act, IGST Act and KGST Act are hereinafter referred to as “the GST Laws”).
13. **20.06.2018:** MNRE issued an Office Memorandum extending the scheduled commissioning date of the solar power plants on account of introduction of GST Laws with effect from 01.07.2017.
14. **05.01.2018:** The Petitioner successfully commissioned its project.
15. The Petitioner has submitted that it had not contemplated introduction of GST at the time of the bid submission. Introduction of GST made a substantial impact on the actual cost of the project vis-à-vis the projected cost, which was beyond its control and, therefore, relief on account of Change in Law is being prayed for. Introduction of the GST Laws qualifies as Change in Law under Article 12 of the PPAs and they should be compensated accordingly.

Further, in spite of reconciliation of claims, SECI has not released any amount towards compensation.

16. Hence the petition.

Submissions of the Petitioner

17. The Petitioner has submitted that this Commission has the jurisdiction to adjudicate upon the present petition.

18. The Petitioner has submitted that in view of enactment of the GST Laws w.e.f. 01.07.2017, a tax slab of 5% to 28% has been introduced with respect to goods and services required for execution, construction and operation of solar power plants. These goods and services were previously either exempted or were under lower tax slabs. The change of tax regime has escalated the capital cost of the Petitioner's project, hence making the tariff quoted at the time of bid for allocation of project unviable. The total escalation in cost of TSPPL due to implementation of GST is about Rs.87,90,302/-(Rupees Eighty seven lakhs ninety thousand three hundred and two only).

19. The Petitioner has submitted that Article 12 of the PPA provides for a specific provision qua Change in Law.

20. The Petitioner has submitted that enactment of the GST Law is squarely covered by the definition of Change in Law under Article 12 of the PPA. Perusal of this clause makes it clear that for an event to qualify as Change in Law, the following ingredients are required:

- (i) The enactment or coming into force of any law. (1st Bullet)
- (ii) Change in interpretation of any law. (2nd Bullet)
- (iii) Change in any consents, clearances or permits available for the project. (3rd Bullet)
- (iv) Inclusion of new or change in the terms and conditions prescribed for obtaining the consents, clearances, permits. (4th Bullet)
- (v) Change in tax or introduction of any tax made applicable. (5th Bullet)

21. The Petitioner has submitted that the coming into force of the GST Laws qualifies as Change in Law event under the PPA. It has already served upon the SECI, a Change in Law notice as required under PPA. The Tariff Policy as amended on 28.01.2016 also provides that increase in taxes and levies are Change in Law events.
22. The Petitioner has submitted that it ought to be compensated in terms of Article 12 and should be restored to its economic position as if such Change in Law had not occurred. Further, the Appellate Tribunal for Electricity (in short, “the Tribunal”) in its judgment dated 19.04.2017 passed in Appeal No. 161 of 2015 titled as ‘*Sasan Power Limited vs. CERC &Ors.*’ (hereinafter referred to as Sasan Judgment) has inter-alia held that any imposition of tax etc. carrying out the business if it has an impact on the revenue or expenditure of the seller shall be considered as Change in Law. The provisions of the PPA are to be read in a manner to ensure that Change in Law provision does not become redundant.
23. The Petitioner has submitted that on 27.08.2018, MoP (Ministry of Power, Government of India) has issued notification No. 23/43/2018-R&R in an attempt to ensure parity between the applicable laws and the principles enshrined in paragraph 6.2(4) of Tariff Policy, 2016 and directed this Commission under Section 107 of the Act w.r.t. incorporation of any variation in domestic duties, levies, cess and taxes leading to corresponding augmentation in costs post award of bid under Change in Law that is to be granted within a time bound period. Therefore, the Petitioner has submitted that it is admittedly entitled for the compensation by way of pass-through in cost for the impact of any and all Change in law events. The Petitioner has also placed its reliance on this Commission’s Order dated 09.10.2018 in Petition No. 188/MP/2017 and Order dated 19.09.2018 in Petition No. 50/MP/2018 and 52/MP/2018, wherein this Commission has specifically declared that the imposition of the Integrated Goods and Services Tax, 2017 and Central Goods and Services Tax, 2017 are Change in Law events and allowed consequential relief to the affected solar power developer.
24. The Petitioner has submitted that non-grant of interest on delayed recovery is contrary to Section 61(b), (c) and (d) of the Electricity Act, 2003. Further, interest on delayed payment is imperative to achieve the true object of restitution and is contemplated under Section 144 of

the Civil Procedure Code, 1908. Interest for carrying cost is a well-established concept which has been re-emphasized by the Government under Clause 8.2.2 of the Tariff Policy, 2016. The Petitioner has placed its reliance on interest on delayed payment/ carrying cost being allowed with respect to delayed payment by the Tribunal in the Judgment dated 13.04.2018 passed in Appeal No.210 of 2017 in the case of *Adani Power Ltd. Vs CERC &Ors* wherein the Tribunal has allowed carrying cost by holding that the principle of carrying cost is the compensation for time value of money or the monies denied at the appropriate time and paid after a lapse of time. In addition to the above, the Petitioner has submitted that the concept of restitution and payment of interest is interpreted by the Hon'ble Supreme Court and the Tribunal in a series of Judgments viz. the Hon'ble Supreme Court's judgement in case of *South Eastern Coalfields Ltd. v. State of M.P. [(2003) 8 SCC 648]*; *Seth Thawardas Phermul Vs. Union of India AIR 1955 SC 468*; *Satinder Singh Vs. Umrao Singh AIR 1961 SC 908*; and the Tribunal's judgment dated 30.07.2010 in *NDPL & Ors. Vs. DERC [2010 ELR (APTEL) 0891]*; *TPCL. Vs. MERC [2011 ELR (APTEL) 0336]*; Appeal No. 202 of 2010 titled as *R Infra Vs. MERC [2012 SCC OnLine APTEL 154]*; Appeal No. 150 of 2011 titled as *SLS Power Ltd. Vs. APERC reported as 2012 SCC OnLine APTEL 209*; Appeal No. 190 of 2011 titled as *TPL Vs. GERC reported as 2014 ELR (APTEL) 238*; Appeal No.212 of 2013 titled as *TPCL Vs. MERC*.

25. The Petitioner has submitted that principle of recovery of cost of funding is an established philosophy of regulatory jurisprudence as interest on delayed payment/ carrying cost. It has been held by the Hon'ble Supreme Court that if a person is deprived of the use of money to which he is legitimately entitled to, he has a right to be compensated for the deprivation, call it by any name. Interest pendent lite is not a matter of substantive law. For doing complete justice between the parties, such power has always been inferred. The Petitioner has placed its reliance on *Secy, Irrigation Department, Govt. of Orissa Vs. GC Roy reported as (1992) 1 SCCC 508 (CB)*; *Board of Trustees for the Port of Calcutta Vs. Engineers-De-Space-Age reported as (1996) 1 SCC 516*.
26. The Petitioner has submitted that since inception, the principle of interest has been embodied in the business of generation and supply of electricity. Schedule 6 of the Electricity Supply

Act, 1948 stipulated the principle qua the payment of interest to the utilities. Even after the repeal of Electricity Supply Act, 1948 on enactment of the Electricity Act, 2003, the provisions qua interest were retained and were embodied in Section 61(b) and Section 62(6) of the Electricity Act, 2003. In view of the above submissions, the Commission should recognize and declare the introduction of GST Laws by the Government of India as Change in Law under Article 12 of the PPA for the purpose of claim for adjustment/ recovery in tariff on account of the aforesaid Change in Law event.

Submission of Respondent No.1 (SECI)

27. SECI has submitted that the petition filed is not maintainable without impleading the distribution licensees/ buying utilities which have entered into a Power Sale Agreement (PSA) with SECI to purchase on a back to back basis, the quantum of electricity.

28. SECI has submitted that this Commission in the case of *Prayatana Developers Pvt. Ltd –v- NTPC Limited and Ors.* and *Azure Power Venus Pvt. Ltd. v Solar Energy Corporation of India Limited and Ors.* in Petition No. 50/MP/2018 and Petition No. 52/MP/2018, vide Order dated 19.09.2018, and various other subsequent Orders dealing with the GST Laws has laid down the circumstances where SPDs shall not be entitled to claim the impact of Change in Law. In terms of those Orders, implication of the GST Laws cannot be claimed in the following circumstances:
 - a. where the scheduled date of commissioning is prior to 01.07.2017; or
 - b. where the actual date of commissioning is prior to 01.07.2017; or
 - c. where the point of taxation of goods/ services is before 01.07.2017; or
 - d. when there is no clear/ one-to-one co-relation between the projects, supply of goods or services and the invoices raised by the supplier of goods and services.

29. SECI has submitted that the scope of Article 12.1.1 of the PPA has been interpreted and decided by this Commission in various Orders. The intention behind the last bullet in Article 12.1.1 of the PPA is clear. While considering the taxes as Change in Law, the scope is restricted to the taxes which are imposed for ‘supply of power’. If the incidence of tax is on events or transactions other than the supply of power, the conditions in the said provision are

not satisfied and the relief is not admissible. The harmonious construction of the provisions would require some meaning to be given and a purpose to be attached to the last bullet of Article 12.1.1. The intention behind incorporating a specific clause on taxes is to carve out a separate clause to restrict the nature of taxes which would be considered as change in law, unlike other bullets dealing with matters other than taxes. The basic aspect is that if the taxes are said to be dealt under clauses other than the last bullet, the incorporation of the last bullet is rendered redundant as all taxes can be covered under the First or Second bullet. Thus, the principles that emerge can be summarized as under:

- a) When a specific clause deals with taxes i.e. Clause 12.1.1 – last Bullet, the general clauses dealing with laws in general do not cover taxes, namely the Clause 12.1.1 – First Bullet.
- b) Clauses in the agreement cannot be interpreted in a manner to render a clause otiose, redundant or surplusage.
- c) The purpose of a specific clause on tax is to make it restrictive.
- d) When there is a specific clause relating to taxes, the general clauses dealing with laws in general have to be interpreted as necessarily excluding taxes. This is because there is a special entry on taxes whereas the laws other than taxes are dealt with in a general clause.

30. SECI has submitted that the scope of Article 12.1.1 - last Bullet is clear and specific. It relates to the supply of power. Thus, every change in tax or introduction of tax was not intended to be covered by the Change in Law provisions of the PPA. It cannot, therefore, be that the 'supply of power' be extended to other aspects such as taxes on input goods and services. The PPA entered into between the parties provides in the definition clause i.e. Article 1.1 that any term used in the PPA but not defined would have the meaning as applicable under the Electricity Act, 2003. The term 'Supply' is defined in Section 2 (70) of the Electricity Act, 2003 as:

“supply in relation to electricity means, the sale of electricity to a licensee or consumer”

31. SECI has submitted that in terms of the above, incidence of tax recognised under Article 12.1.1 – last Bullet is only on the transaction of sale of electricity and not on any other

transaction preceding it. Accordingly, the relief (if any) for taxes is admissible to the SPD if it squarely falls within the purview of Article 12.1.1 – last Bullet only and not otherwise. The SPD cannot claim the Change in Law effect for statutory taxes under any of the first five bullets under Article 12.1.1 of the PPA.

32. SECI has submitted that:
 - (a) PPA provision or the bid document did not mandate or prescribe or specifically provide for outsourcing O&M activities;
 - (b) Outsourcing O&M is an internal commercial decision of the SPD;
 - (c) If, for commercial expediency or benefit, the Petitioner outsources the O&M activities, the saving or additional expenditure is to the account of the SPD; and
 - (d) SPD has a full right to take a decision on the above at its risk or reward.

33. In these circumstances, the Petitioner is not entitled to any increase on account of the implications of the GST on the O&M services that have been outsourced.

34. SECI has submitted that there is no provision in the PPA regarding carrying cost or interest for the period till the decision of the Commission acknowledging the Change in Law and deciding on the amount to be paid for such Change in Law namely '*provide for relief for the same*', as specified in Article 12.2.2 of the PPA. The Change in Law claim of the Petitioner is yet to be adjudicated and the amount if any, due to the Petitioner has to be determined/computed first. Thereafter, only after the amount is determined, is the Petitioner required to raise a supplementary invoice for the amount so computed as per Article 10.7 of the PPA. It is only in case of default on the part of the SECI 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 about the date from which the Change in Law will be effective, relates 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.

35. SECI has submitted that with regard to the above, the provision of Article 10.3.3 of the PPA dealing with late payment surcharge and definition of the 'due date' in Article 1 read with

Article 10.3.1 of the PPA are relevant. The due date is forty-fifth (45th) day after a monthly bill or supplementary bill is received and duly accepted by 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. SECI has placed its reliance on 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.*, wherein 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. In the present case also, there is no provision in the PPA for carrying cost or restitution and, therefore, the same will not be applicable in the case of the Petitioner.

36. SECI has submitted that the PPA has been entered into by SECI in its capacity as an intermediary company for the bulk purchase of electricity from the Petitioner for bulk supply of electricity to the Distribution Licensees under a PSA. Such purchase and resale of electricity is under a scheme envisaged under JNNSM. SECI is in position to discharge its obligations under the PPA, including the payment for any Change in Law implication, only upon the distribution licensees remitting the amount to SECI in terms of the respective PSA. The obligation of the distribution licensee under the PSA is, therefore, on a back to back basis with the obligation of SECI to the Petitioner. SECI has placed its reliance on the Order dated 09.10.2018 in case of *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors. Batch*; 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* and 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*.
37. SECI has submitted that it is appropriate that the Commission may give directions to the distribution licensees, determining the amount payable to the SPD, keeping in view the intermediary status and role of SECI as a nodal agency to facilitate the solar power project and for the distribution licensee to have an arrangement for generation and procurement of

solar power and thereby, promote solar power development in the country, as per the policy decisions of the Central Government. Any enforcement of the claim by the Petitioner against SECI without the distribution licensees being obligated to pay and discharge the corresponding claim under the PSA in advance of the discharge of the obligation of SECI will result in serious financial issues to SECI and thereby, affect implementation of the scheme.

38. SECI has submitted that the Petitioner has not placed before the Commission in a transparent manner, the taxes, duties and levies which stands withdrawn and no longer payable by reason of the introduction of the GST. Admittedly, there are a number of taxes, duties, cess and levies which have been subsumed in GST which came into force on 01.07.2017. The Petitioner is required to place before the Commission the extent to which its project is subject to such taxes existing prior to 01.07.2017 which have been subsumed in GST. Further, the Petitioner is proceeding on the assumption that the entire quantum of taxes under GST are payable. This is contrary to the very scheme of the introduction of GST and the intention of the Central Government in rationalising the tax structure in a manner that various existing taxes will get subsumed in GST. Accordingly, true and faithful disclosure of existing taxes which have been subsumed by the GST needs to be furnished by the Petitioner.
39. SECI has submitted that the Petitioner should be directed to submit the following particulars/ documents in respect of each claim under the GST Laws:
- a. Name of the goods/equipment
 - b. Date of the purchase order (PO)
 - c. Date of the goods/ custom clearance
 - d. Date when the goods were handed over to the common carrier
 - e. Date on which the goods were received at site
 - f. Date on which the goods were installed at site
 - g. The name of the manufacturer of the goods
 - h. The name of the intermediary between the Original Equipment Manufacturer and the SPD

- i. The GST/tax invoice raised
 - j. The supporting documents in respect of each of the above
40. SECI has submitted that the above particulars/ documents are required to be given in respect of each item of the goods/ equipment/ services. The auditor's certificate in this respect is also to be provided in terms of the directions of this Commission in its Order dated 09.10.2018 in the case of Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors. Batch, in Petition No. 188/MP/2017 and Batch.

Rejoinder submitted by the Petitioner

41. In the rejoinder, the Petitioner has reiterated the submissions given in the petition and as such, the same have not been reproduced herewith for the sake of brevity.
42. Additionally, the Petitioner has submitted that:
- (a) the Article providing for change in law relief (i.e. Article 12.1.1) of the respective PPA is pari-materia and identical to the PPAs in various Orders previously notified by the Commission.
 - (b) In paragraphs 23 and 24 of the petition, it has provided detailed information regarding the impact of GST on each and every component of the project.
 - (c) Averments of SECI vis-à-vis outsourcing of O&M activities have no relevance whatsoever in the present case. The Petitioner has not sought any compensation on account of imposition of GST on outsourcing O&M activities.

Written submissions of the Petitioner

43. The Petitioner has filed the written submissions vide which it has reiterated the submissions made earlier in the pleadings and as such, the same are not reproduced herewith for the sake of brevity. Additionally, the Petitioner has submitted as under:
44. The Petitioner has submitted that the issue of non-joinder arises if a necessary party to the proceedings has not been included. For a party to be considered as necessary party, there must be a right to some relief against such party with respect to the dispute involved. PPA has

been executed between the Petitioner and SECI. Article 12 of the PPA envisages relief to the Petitioner against SECI and no other party. The Petitioner has a contractual relationship only with SECI and the privity of contract only exists with SECI under the PPA. It is, therefore, submitted that the distribution companies are not required in law, to be impleaded as they are not a necessary party. The Petitioner has no claim against the DISCOMs. Nonetheless, the Petitioner, in deference to the directions of the Commission to implead the DISCOMs as respondents, will do so.

45. The Petitioner has submitted that SECI has adopted a very pedantic and isolated interpretation of the phrase “supply of power” provided under Article 12. Article 12.1.1 specifies multiple events that would together or independently qualify as Change in Law. A restricted and isolated interpretation of the phrase “supply of power” cannot be accepted. The imposition of GST as a Change in Law event is covered under 1st and 2nd bullet of Article 12.1.1. In any case, the true scope and extent of the words “supply of power” has to be construed having regard to the rights and obligations of the parties under the PPA. Supply of power by the Petitioner, is a culmination of all its obligations and functions under the PPA, and cannot be construed restrictively, only to the act of supply. The tax imposed on sale or consumption of electricity under Entry 53 of List II of the Constitution of India may not apply simpliciter for supply of power under the PPA, since the supply under the present PPA is not for consumption, but for onward sale by SECI to the DISCOMs. Therefore, it is submitted without prejudice that the last bullet has to be read in a broader manner, to include all aspects leading to supply of power.
46. The Petitioner has submitted that billing and payment between the Petitioner and SECI is not dependent on and has no relation to the billing and payment between SECI and the DISCOMs. The Petitioner has placed its reliance on Order dated 28.01.2020 passed in Petition No. 67/MP/2019 and Petition No. 68/MP/2019 and Order dated 26.03.2020 passed in Petition No. 129/MP/2019. Further, the back-to-back arrangement does not absolve Respondent No. 1 of the liability towards the Petitioner under the PPA.

Submission by the Petitioner in IA No. 24 of 2021

47. The Petitioner has submitted that the Commission, vide ROP of hearing dated 04.06.2020 had directed the Petitioner and SECI to reach a settlement regarding the GST claims and to place the same on record before the Commission.
48. The Petitioner has submitted that SECI vide letter No. dated 26.11.2020 has reconciled the claims of the Petitioner towards the verified claims up to the commissioning of the project, based on the documents/ details submitted by the Petitioner, as per the methodology provided in Orders passed by this Commission in other similar petitions, as under:

Sr. No.	Description	Amount (Rs.)
A.	GST claim submitted by SPD	70,93,762
B.	Claims not considered	3,34,680
C.	Verified claims 1. Up to commissioning 2. After commissioning & up to COD 3. Beyond COD	63,84,861 0 3,74,221
D.	GST claim till COD	63,84,861

49. The Petitioner has submitted that 122 monthly annuity payments of Rs. 66,500/- and upfront lumpsum amount of Rs. 13,91,572/- calculated against the claims upto the date of commissioning was duly accepted by the Petitioner vide letter dated 04.12.2020.
50. The Petitioner has submitted that SECI had stipulated in its letter dated 26.11.2020 that the Petitioner must issue an undertaking, prior to the release of the annuity payment to the effect that the reconciliation amount was subject to the observations/ directions/ decisions of any Tribunal/ Commission/ Court/ Government of India. The Petitioner has issued the undertaking, as specified, vide letter dated 04.12.2020.
51. The Petitioner has submitted that it had further requested SECI to advise on the payment mechanism of the verified claims of Rs 3,74,221/- post-COD. However, SECI has neither made the payment nor provided a payment mechanism for the same, till date.

Reply of SECI on I.A.

52. SECI has submitted that the Petitioner achieved commissioning on 05.01.2018 and commercial operation on 04.02.2018. SECI vide its letter dated 26.11.2020 to the Petitioner and by the letter dated 05.04.2021 to Respondent BESCOM has communicated the provisional reconciliation of the GST claims of the Petitioner till COD.
53. SECI has submitted that vide its email and letter dated 08.07.2020, it had forwarded the GST challans and returns, certificate of the statutory auditor, copy of invoices in relation to the GST claims of the Petitioner and had informed BESCOM to verify the same. BESCOM is yet to respond to the reconciliation given by SECI to BESCOM vide its letter dated 05.04.2021 in respect of the GST claims of the Petitioner.
54. SECI has submitted that after the decision of this Commission holding the event as Change in Law, the Petitioner is required to raise supplementary bill under Article 10.7.1(ii) of the PPA. The due date for payment of the supplementary bill as defined in Article 1.1 of the PPA is the 45th day after the supplementary bill is raised by the Petitioner and the same being received and duly accepted by SECI. The amount as evaluated and reconciled by SECI and to the extent confirmed by BESCOM or the amount duly adjudicated by this Commission with regard to GST claims of the Petitioner is payable 'within sixty days of the date of this Order or from the date of submission of claims by the Petitioner whichever is later'. SECI is also entitled to claim the receipt of the said amount from BESCOM on back-to-back basis.
55. SECI has submitted that the Commission may clarify the cut-off date with regard to liability of payment on account of impact of GST on procurement of plants, equipment etc. for the present matter. Considering the substantial amount payable by SECI to the Petitioner on account of GST, SECI seeks issuance of effective directions by the Commission to BESCOM, the procurer of the power under the PSA dated 29.06.2016, to make payment towards the evaluated claims of the GST payable by SECI to Petitioner, on a back to back basis under the PSA in a time bound manner.

Analysis and Decision:

56. We have heard the learned counsels for the Petitioner and the Respondent and have carefully perused the records.
57. The brief facts of the Petition are that SECI under JNNSM Phase II Batch III Tranche-V invited proposals by RfS for setting up of solar power projects in the State of Karnataka. The Petitioner was declared as successful bidder for development of 30 MW Solar Power Project and on 02.08.2016, it entered into a PPA with SECI. As per the PPA, SCoD of the solar power projects was 02.09.2017. The project location was changed with the consent of SECI and accordingly, amended PPA was signed between the parties to this effect. The GST Laws were enacted for levy and collection of tax, w.e.f. 01.07.2017, on intra-State supply of goods or services, or both, by the Central Government. MNRE issued an Office Memorandum extending SCoD of the solar power plants on account of introduction of GST with effect from 01.07.2017. The Petitioner achieved commissioning on 05.01.2018 and commercial operation on 04.02.2018.
58. From the submissions of the parties, the following issues arise for adjudication

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

Issue No. 2: Whether the Petitioner may be restored to the same economic condition prior to occurrence of the Change in Law by way of adjustment in tariff in terms of Article 12 of the PPA by increasing the tariff along with carrying cost?

59. No other issue was pressed or claimed. We now discuss the issues one by one.

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

60. The Petitioner has submitted that imposition of the GST Laws is a Change in Law event under Article 12 of the PPA and that SECI should be directed to pay the amount claimed in terms of Article 12 of the PPA. During the hearing held on 04.06.2020, the Petitioner further submitted that the issue involved in the petition is already covered in the Commission's

earlier Orders relating to Change in Law arising out of enactment of the GST Laws. *Per Contra*, SECI has submitted that it has already reconciled the GST claims till COD (provisionally) with the Petitioner and has further communicated the same to BESCOM vide its letter dated 05.04.2021. However, BESCOM is still to respond to the reconciliation. SECI has submitted that after the decision of this Commission holding the event as Change in Law, the Petitioner is required to raise supplementary bill under Article 10.7.1(ii) of the PPA. SECI has requested that the Commission may also clarify the cut-off date with regard to liability of payment on account of impact of GST Laws.

61. We observe that Article 12 of the PPA stipulates as below:

“12 ARTICLE 12: CHANGE IN LAW

12.1 Definitions

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

12.1.1 “Change in Law” means the occurrence of any of the following events after the last date of bid submission 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, i.e. change in rates of taxes, duties and cess, 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 and has direct effect on the Project, shall be treated as per the terms of this Agreement;*

but shall not include (i) any change in taxes on corporate income or any withdrawn 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.”

62. Thus, as per provisions of the PPA, occurrence of events specified under Article 12.1.1 of the PPA after the last date of bid submission resulting into any additional recurring/ non-recurring expenditure by the SPD or any income to the SPD, is a Change in Law event. The implementation of GST Laws is through promulgation of laws by the Parliament/ Legislative Assembly of Karnataka. The GST Laws have resulted into additional expenditure by the Petitioner. The Respondent SECI has submitted that the issues involved in the instant petition has been covered by various previous orders of the Commission. SECI has not disputed that the imposition of GST Laws is a Change in Law event in terms of the PPA dated 02.08.2016. Rather SECI has submitted that it has already reconciled the claims of the Petitioner in respect of Change in Law and forwarded them to the Respondent BESCOM.
63. We observe that the Petitioner has submitted the bid on 19.05.2016 and the same was accepted and crystallised after e-reverse auction held on 09.06.2016. The PPA was executed on 02.08.2016. However, the GST Laws were enacted on 01.07.2017 which is after the last date of bid submission. Therefore, the imposition of GST Laws qualifies as ‘Change in Law’ under the PPA and entitles the Petitioner to relief under Article 12 of the PPAs.
64. The Commission further observes that as per Record of Proceedings of hearing dated 15.04.2021 *“the Petitioner has agreed to payment of its GST claims on annuity basis subject to the outcome of the Petition No. 536/MP/2020 filed by SECI”*. Accordingly, the Commission directs SECI to pay to the Petitioner as per mutually agreed mechanism for such compensation on annuity basis, subject to the outcome of Petition No. 536/MP/2020 filed by SECI for approval of annuity methodology including annuity rate. It is clarified here that the compensation paid to the Petitioners is not conditional upon the payment to be made by the Respondent Discoms to SECI. However, SECI is eligible to claim the same from the Respondent Discoms on ‘back to back’ basis in terms of the PSA. The first instalment of the annuity amount 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 PPA/PSA.

65. The next point raised by SECI in the reply to I.A. is to clarify the cut-off date with regard to liability of payment on account of impact of GST Laws in respect of ‘commercial operation date’ instead of ‘scheduled commissioning date’.
66. We observe that relevant Articles of the PPA stipulates as under:

“ARTICLE 1

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

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

ARTICLE 5: SYNCHRONISATION, COMMISSIONING AND COMMERCIAL OPERATION

5.1 Synchronization, Commissioning and Commercial Operation

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

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

5.1.3 *The synchronization equipment and all necessary arrangements / equipment including RTU for scheduling of power generated from the Project and transmission of data to the concerned authority as per applicable regulation shall be installed by the SPD at its generation facility of the Power Project at its own cost. The SPD shall synchronize its system with the Grid System only after the approval of synchronization scheme is granted by the head of the concerned sub-station/Grid System and checking/verification is made by the concerned authorities of the Grid System.*

5.1.4 *The SPD shall immediately after each synchronization/tripping of generator, inform the sub-station of the Grid System to which the Power Project is electrically connected and all other concerned authorities in accordance with*

applicable Grid Code under intimation to SECI. In- Addition the SPD will inject in-firm power to grid time to time to carry out operational/ functional test prior to commercial operation.

5.1.5 The SPD shall commission the Project as detailed in “Schedule 6: Commissioning Procedure” within thirteen (13) Months of the date of signing of PPA

ARTICLE 4

4.4. Right to Contracted Capacity & Energy

4.4.1 SECI, at any time during a Contract Year, shall not be obliged to purchase any additional energy from the SPD beyond 79.497 Million kWh (MU). If for any Contract Year, it is found that the SPD has not been able to generate minimum energy of 61.430 Million kWh (MU) till the end of 10 years from the COD and 57.816 Million kWh (MU) for the rest of the term of the Agreement, on account of reasons solely attributable to the SPD, the non-compliance by SPD shall make SPD liable to pay the compensation provided in the PSA as payable to Buying Utilities and shall duly pay such compensation to SECI to enable SECI to remit the amount to Buying Utilities. This will, however be relaxable by SECI to the extent of grid non-availability for evacuation, which is beyond the control of the developer. This compensation shall be applied to the amount of shortfall in generation during the Contract Year. The amount of compensation shall be equal to the compensation payable (including RECs) by the Buying Utilities towards non-meeting of RPOs, if such compensation is ordered by the State Commission. However, this compensation shall not be applicable in events of Force Majeure identified under PPA with SECI affecting supply of solar power by SPD.

4.4.2 Notwithstanding Article 4.4.1, any excess generation over and above 10% of declared annual CUF will be purchased by SECI at a tariff as per Article 9.4, provided SECI is able to get any buyer for sale of such excess generation. While the SPD would be free to install DC solar field as per its design of required output, including its requirement of auxiliary consumption and to reconfigure and repower the Project from time to time during the term of the PPA, it will not be allowed to sell any excess power to any other entity other than SECI (unless refused by SECI). However, in case at any point of time, the peak of capacity reached is higher than the contracted capacity and causes disturbance in the system at the point where power is injected, the SPD will have to forego the excess generation and reduce the output to the rated capacity and shall also have to pay the penalty/charges (if applicable) as per applicable regulations / requirements / guidelines of CERC / SERC /SLDC or any other competent agency

Any energy produced and flowing into the grid before CoD shall not be at the cost of SECI under this scheme and the SPD will be free to make short-term sale to any organisation or individual. SECI may agree to buy this power as a trader if they find it viable outside this scheme.”

SCHEDULE 6: COMMISSIONING PROCEDURE:

** Capacity of Solar PV Projects:*

i) maximum AC Capacity at the delivery point as described below:

<i>Sr. No.</i>	<i>Solar PV Project Capacity Bid</i>	<i>Minimum DC Arrays Capacity to be installed</i>	<i>Minimum Rated Inverter Capacity*</i>	<i>Maximum AC Capacity Limit at Delivery point</i>
<i>1</i>	<i>10 MW</i>	<i>10 MW</i>	<i>10 MW</i>	<i>10 MW</i>
<i>2</i>	<i>20 MW</i>	<i>20 MW</i>	<i>20 MW</i>	<i>20 MW</i>
<i>3</i>	<i>30 MW</i>	<i>30 MW</i>	<i>30 MW</i>	<i>30 MW</i>
<i>4</i>	<i>40 MW</i>	<i>40 MW</i>	<i>40 MW</i>	<i>40 MW</i>
<i>5</i>	<i>50 MW</i>	<i>50 MW</i>	<i>50 MW</i>	<i>50 MW</i>

**In case the rated capacity is mentioned in kVA, the IEC test certificate declaring the power factor of the Inverter/PCU at rated power has to be submitted and the power factor shall be multiplied by the kVA rating to calculate the rated capacity of the inverter in kW.*

ii) Higher DC capacity arrays so as to achieve AC capacity limit as mentioned above for scheduling at the delivery point in compliance to Article 4.4 “Right to Contracted Capacity & Energy” of the PPA is allowed.

iii) For commissioning of the Project, capacity of DC arrays installed shall be considered. In case of part commissioning of Project, it shall be required to have the DC Arrays Capacity be installed not less than the proposed part commissioning capacity.

iv) Provisions of Article 4.6.1 of the PPA with SPD shall apply for the capacity not commissioned by the scheduled commissioning date.

v) If generation at any time exceeds the maximum permissible AC capacity at delivery point, the excess generation during that period shall not be considered under PPA.

Appendix-A-1

Commissioning Procedure

i) At the time of commissioning, the Commissioning Committee shall verify compliance of technical parameter of the Project as per Annexure A of the RFS document.

ii) SPDs shall give to the concerned RLDC/SLDC, State Nodal Agency (SNA) and SECI at least sixty (60) days advance preliminary written notice and at least thirty (30) days advance final written notice, of the date on which it intends to synchronize the Power Project to the Grid System. The SPD shall be solely responsible for any delay or non receipt of the notice by the concerned agencies, which may in turn affect the Commissioning Schedule of the Project.

iii) A Solar PV Project will be considered as commissioned if all equipment as per rated project capacity has been installed and energy has flown into the grid

67. We note that the commissioning of the projects as defined in Article 1 read with Article 5 and Schedule 6 of the PPA implies that all the equipment as per rated project capacity has been installed and the energy has flown into the grid. The aforesaid clauses also provide for higher DC Arrays so as to achieve the AC capacity limit as mentioned for scheduling at the Delivery Point in compliance to Article 4.4.2 of the PPAs. We are of the view that this flexibility (of higher DC capacity arrays) has been provided so as to enable the SPD to meet the requirement of generation (CUF) within the range stipulated in the Article 4.4.1 of the PPA. It may be noted that the requirement of generation or the range of Capacity Utilization Factor (CUF) is an annual figure and the SPD is required to adhere to this requirement over the entire contract period of the PPA. It is for this reason that the PPA makes a provision granting flexibility to the SPD, if required, at any time during the contract period so that it is able to achieve the required level of generation. This does not imply that the procurer of Solar PV Panels (DC Capacity Arrays) at any time during the contract period would need to be compensated either in terms of its cost or for that matter the impact of taxation on such procurement. There has to be a deadline up to which the liability of compensation towards procurement of higher DC arrays can be made good by the SECI/ Respondent Discoms. The liability of SECI/ Respondent Discoms for payment for purchase of power from the Petitioner starts from the Commercial Operation Date (COD) as defined in Article 1 of the PPA.
68. Various Sections of CGST Act, 2017 stipulate as under:

“TIME AND VALUE OF SUPPLY

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

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

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

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

Provided that where the supplier of taxable goods receives an amount up to one thousand rupees in excess of the amount indicated in the tax invoice, the

time of supply to the extent of such excess amount shall, at the option of the said supplier, be the date of issue of invoice in respect of such excess amount.

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

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

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

- (a) the date of the receipt of goods; or*
- (b) the date of payment as entered in the books of account of the recipient or the date on which the payment is debited in his bank account, whichever is earlier; or*
- (c) the date immediately following thirty days from the date of issue of invoice or any other document, by whatever name called, in lieu thereof by the supplier: Provided that where it is not possible to determine the time of supply under clause (a) or clause (b) or clause (c), the time of supply shall be the date of entry in the books of account of the recipient of supply.*

(4) In case of supply of vouchers by a supplier, the time of supply shall be—
(a) the date of issue of voucher, if the supply is identifiable at that point; or
(b) the date of redemption of voucher, in all other cases

(5) Where it is not possible to determine the time of supply under the provisions of sub-section (2) or sub-section (3) or sub-section (4), the time of supply shall—
(a) in a case where a periodical return has to be filed, be the date on which such return is to be filed; or
(b) in any other case, be the date on which the tax is paid.

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

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

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

- (a) *the date of issue of invoice by the supplier, if the invoice is issued within the period prescribed under sub-section (2) of section 31 or the date of receipt of payment, whichever is earlier; or*
- (b) *the date of provision of service, if the invoice is not issued within the period prescribed under sub-section (2) of section 31 or the date of receipt of payment, whichever is earlier; or*
- (c) *the date on which the recipient shows the receipt of services in his books of account, in a case where the provisions of clause (a) or clause (b) do not apply:*

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

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

- (i) *the supply shall be deemed to have been made to the extent it is covered by the invoice or, as the case may be, the payment;*
- (ii) *“the date of receipt of payment” shall be the date on which the payment is entered in the books of account of the supplier or the date on which the payment is credited to his bank account, whichever is earlier.*

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

- (a) *the date of payment as entered in the books of account of the recipient or the date on which the payment is debited in his bank account, whichever is earlier; or*
- (b) *the date immediately following sixty days from the date of issue of invoice or any other document, by whatever name called, in lieu thereof by the supplier:*

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

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

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

- (a) *the date of issue of voucher, if the supply is identifiable at that point; or*
- (b) *the date of redemption of voucher, in all other cases.*

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

- (a) in a case where a periodical return has to be filed, be the date on which such return is to be filed; or
- (b) in any other case, be the date on which the tax is paid.

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

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

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

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

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

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

Provided that the date of receipt of payment shall be the date of credit in the bank account if such credit in the bank account is after four working days from the date of change in the rate of tax.

Explanation.—For the purposes of this section, “the date of receipt of payment” shall be the date on which the payment is entered in the

books of account of the supplier or the date on which the payment is credited to his bank account, whichever is earlier.

CHAPTER VII
TAX INVOICE, CREDIT AND DEBIT NOTES

31. (1) *A registered person supplying taxable goods shall, before or at the time of,—*

- (a) removal of goods for supply to the recipient, where the supply involves movement of goods; or*
- (b) delivery of goods or making available thereof to the recipient, in any other case,*

issue a tax invoice showing the description, quantity and value of goods, the tax charged thereon and such other particulars as may be prescribed:

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

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

Provided that the Government may, on the recommendations of the Council, by notification and subject to such conditions as may be mentioned therein, specify the categories of services in respect of which—

- (a) any other document issued in relation to the supply shall be deemed to be a tax invoice; or*
- (b) tax invoice may not be issued.*

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

- (a) a registered person may, within one month from the date of issuance of certificate of registration and in such manner as may be prescribed, issue a revised invoice against the invoice already issued during the period beginning with the effective date of registration till the date of issuance of certificate of registration to him;*
- (b) a registered person may not issue a tax invoice if the value of the goods or services or both supplied is less than two hundred rupees subject to such conditions and in such manner as may be prescribed;*
- (c) a registered person supplying exempted goods or services or both or paying tax under the provisions of section 10 shall issue, instead of a tax invoice, a bill of supply containing such particulars and in such manner as may be prescribed: Provided that the registered person may not issue a bill*

of supply if the value of the goods or services or both supplied is less than two hundred rupees subject to such conditions and in such manner as may be prescribed;

- (d) a registered person shall, on receipt of advance payment with respect to any supply of goods or services or both, issue a receipt voucher or any other document, containing such particulars as may be prescribed, evidencing receipt of such payment;*
- (e) where, on receipt of advance payment with respect to any supply of goods or services or both the registered person issues a receipt voucher, but subsequently no supply is made and no tax invoice is issued in pursuance thereof, the said registered person may issue to the person who had made the payment, a refund voucher against such payment;*
- (f) a registered person who is liable to pay tax under sub-section (3) or sub-section (4) of section 9 shall issue an invoice in respect of goods or services or both received by him from the supplier who is not registered on the date of receipt of goods or services or both;*
- (g) a registered person who is liable to pay tax under sub-section (3) or sub-section (4) of section 9 shall issue a payment voucher at the time of making payment to the supplier.*

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

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

- (a) where the due date of payment is ascertainable from the contract, the invoice shall be issued on or before the due date of payment;*
- (b) where the due date of payment is not ascertainable from the contract, the invoice shall be issued before or at the time when the supplier of service receives the payment;*
- (c) where the payment is linked to the completion of an event, the invoice shall be issued on or before the date of completion of that event.*

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

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

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

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

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

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

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

(1)For the purposes of-

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

(b) transportation of goods for job work,

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

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

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

...

(3)Where goods are being transported on a delivery challan in lieu of invoice, the same shall be declared as specified in rule 138.”

71. We further observe that the philosophy behind the ‘point of taxation’ and ‘raising of invoice’ is enshrined in Sections 12, 13 & 14 read with Section 31 of the CGST Act, 2017 and Rule 47 and 55 of the CGST Rules, 2017. It is observed that Section 12 governs the determination of ‘time of supply of goods’, Section 13 governs the determination of ‘time of supply of services’, whereas Section 14 determines the ‘time of supply for goods and services in case there is a change in the rate of tax’.
72. Section 12 of the CGST Act, 2017 stipulates ‘time of supply of goods’ as the date of issue of invoice or the last date specified under section 31(1) to issue the invoice, whichever is earlier. Therefore, in the instant petition, the date of invoice of goods cannot be after the date of delivery of goods.
73. Section 13 of the CGST Act, 2017 stipulates that ‘time of supply of services’ is the date of

issue of invoice which is to be issued within the period prescribed under section 31(2) or the date of receipt of payment, whichever is earlier.

74. Section 14 of the CGST Act, 2017 prescribes the time of supply in case there is a change in the rate of tax. In one supply transaction, the following dates assume relevance: (i) date of supply; (ii) date of issue of invoice and (iii) date of receipt of payment. Two scenarios that emerge are as follows:
- (a) supply is completed before change in the rate of tax; and
 - (b) supply is completed after change in the rate of tax.
75. Section 31 stipulates that a registered person supplying taxable goods shall issue a tax invoice before or at the time of delivery of goods. Further, as per Section 31 read with Rule 47 of the CGST Rules, 2017, the invoices in respect of taxable supply of services have to be issued within 30 days and as per Rule 55 of the CGST Rules, 2017, the delivery of a few goods is specifically allowed to be transported on a delivery challan in lieu of invoice at the time of removal of goods for transportation.
76. Thus, in case of 'supply of goods', the date of issue of invoice cannot be after the date of supply of goods as per sections 12, 14 and 31 of the CGST Act, 2017 whereas in case of 'supply of services' related to the goods supplied up to COD, the date of issue of invoice can be thirty days after the supply of services as per sections 13, 14 and 31 of the CGST Act, 2017 read with the Rule 47 of the CGST Rules, 2017.
77. In view of the above, there cannot be any invoice under law, post supply of goods as the goods are not exempted under Rule 55 of the CGST Rules, 2017. Further, in case the invoices are not raised, the point of taxation for supply of goods is deemed to be the date of delivery of goods.
78. Hence, we hold that the invoices raised up to COD pertaining to supply of goods can be claimed under Change in Law on account of the GST Laws since the liability of SECI/ Respondent Discom for payment of purchase of the power from the Petitioner starts from the Commercial Operation Date (COD).

79. There is a possibility of a few services related to goods procured up to COD, to be completed on the last date of COD. Hence, in case of 'supply of services' related to goods procured up to COD completed on the last day of COD, the invoices can be raised within 30 days after COD. Thus, in case of supply of services related to goods procured up to COD, the invoices are to be raised within 30 days of supply of such services, which cannot be later than 30 day of COD and the Petitioner is entitled to be compensated accordingly.
80. The issue is decided accordingly.

Issue No. 2: Whether the Petitioner may be restored to the same economic condition prior to occurrence of the Change in Law by way of adjustment in tariff in terms of Article 12 of the PPA by increasing the tariff along with carrying cost?

81. The Petitioner has submitted that it should be restored to the same economic condition prior to occurrence of the Change in Law by directing SECI to pay the amount claimed in terms of Article 12 of the PPA along with carrying cost. ***Per Contra***, SECI has submitted that the Commission has already rejected similar prayer of carrying cost in various cases where the PPAs do not contain the '*restitution clause*'. Therefore, the Petitioner is not entitled to claim relief which is not provided for in the PPAs.
82. The Commission observes that in the judgment of the Tribunal dated 13.04.2018 in Appeal No. 210 of 2017 in *Adani Power Limited v. Central Electricity Regulatory Commission and Ors.*, it was held that since Gujarat Bid-01 PPA has no provision for restoration to the same economic position, the decision of allowing carrying cost will not be applicable. The relevant extract of the Judgment dated 13.04.2018 reads as under:

“ISSUE NO.3: DENIAL OF CARRYING COST

x. Further, the provisions of Article 13.2 i.e. restoring the Appellant to the same economic position as if Change in Law has not occurred is in consonance with the principle of 'restitution' i.e. restoration of some specific thing to its rightful status. Hence, in view of the provisions of the PPA, the principle of restitution and judgement of the Hon'ble Supreme Court in case of Indian Council for Enviro-Legal Action vs. Union of India &Ors., we are of the considered opinion that the Appellant is eligible for Carrying Cost arising out of approval of the Change in Law events from the

effective date of Change in Law till the approval of the said event by appropriate authority. It is also observed that the Gujarat Bid-01 PPA have no provision for restoration to the same economic position as if Change in Law has not occurred. Accordingly, this decision of allowing Carrying Cost will not be applicable to the Gujarat Bid-01 PPA.”

83. The above-mentioned judgement of the Tribunal 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.”

84. We note that the PPA in the instant matter does not have restitution provisions. Therefore, in view of the above judgements of the Tribunal and the 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.

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

a. **Issue No. 1:** 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 PPA. SECI shall pay to the Petitioner as per mutually agreed mechanism for payment of such compensation on annuity basis, subject to the outcome of the Petition No. 536/MP/2020. The compensation paid to the Petitioner by SECI is not conditional upon payment to be made by the Respondent Discoms to SECI. However, SECI is eligible to claim the same from the Respondent Discoms on 'back to back' basis. The first instalment of the annuity 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 PPA/PSA. The invoices raised up to COD pertaining to supply of goods can be claimed under Change in Law on account of the GST Laws whereas in case of supply of services related to goods procured up to COD, the invoices are to be raised within 30 days of supply of such services, which cannot be later than 30 day of COD and the Petitioner is entitled to be compensated accordingly.

b. **Issue No. 2:** The claim regarding carrying cost is not admissible.

86. In view of above, the Petition No. 45/MP/2019 along with I.A. 24 of 2021 stands disposed of.

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