

केंद्रीय विद्युत नियामक आयोग
CENTRAL ELECTRICITY REGULATORY COMMISSION

नई दिल्ली
NEW DELHI

याचिका संख्या. / Petition No.: 50/MP/2018 and
52/MP/2018

कोरम/Coram:

श्री पी के पुजारी, अध्यक्ष/Shri P. K. Pujari, Chairperson
श्री ए के सिंघल, सदस्य/ Shri A.K. Singhal, Member
डॉ. एम के अय्यर, सदस्य/ Dr. M.K. Iyer, Member

आदेश दिनांक /Date of Order: 19th of September, 2018

IN THE MATTER OF:

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

AND IN THE MATTER OF:

M/s Prayatna Developers Private Ltd.,
Represented by its Authorised Signatory
7B, Sambhav House, Judges
Bungalow Road, Bodakdev,
Ahmedabad - 380015, Gujarat

..... Petitioners

VERSUS

1. National Thermal Power Corporation Ltd. (NTPC),
Core-7, SCOPE Complex, 7,

Institutional Area, Lodi Road,
New Delhi – 110003

2. Jaipur Vidyut Vitran Nigam Ltd.,
Vidyut Bhawan, Jyoti Nagar,
Jaipur – 302005
3. Ajmer Vidyut Vitran Nigam Ltd.,
Vidyut Bhawan, Panchsheel Nagar,
Makarwall Road, Ajmer – 305004
4. Jodhpur Vidyut Vitran Nigam Ltd.,
New Power House, Industrial Area,
Jodhpur-342003, Rajasthan
5. The Ministry of New and Renewable Energy,
Represented by its Secretary,
Block-14, CGO Complex,
Lodhi Road, New Delhi-110 003

..... Respondents

AND IN THE MATTER OF:

M/s Azure Power Venus Private Limited
Asset No.301-4
World Mark 3
Aerocity, New Delhi - 110 017

...Petitioner

VERSUS

- A. Solar Energy Corporation of India Limited,
1st Floor, A-Wing, D-3,
District Centre Saket,
New Delhi - 110 017
- B. Uttar Pradesh Power Corporation Limited,
Shakti Bhawan, 14, Ashok Marg,
Lucknow – 226 027

...Respondents

Parties Present:

Shri Shubham Arya, Advocate, NTPC
Shri Nishant Gupta, NTPC
Ms. Poonam Verma, Advocate, PDPL
Shri M.G. Ramachandran, Advocate, NTPC, SECI
Ms. Ranjitha Ramachandran, Advocate, SECI
Ms. Anushree Bardhan, Advocate, SECI
Ms. Abiha Zaidi, Advocate, PDPL
Shri S.K. Agarwal, Advocate, Rajasthan DISCOMS
Shri Jafar Alam, Advocate, APVPL
Shri Vishal Binod, Advocate, APVPL

आदेश/ ORDER

1. The Petitioners, M/s Prayatna Developers Private Ltd. (PDPL), and M/s Azure Power Venus Private Limited (APVPL) (hereinafter collectively referred to as “Petitioners”) are generating companies primarily engaged in the business of setting up of solar power plants and generation of electricity.
2. The Respondent No.1, M/s NTPC Ltd. (hereinafter referred to as “NTPC”) is a Public Sector Undertaking, incorporated under the Companies Act 1956. NTPC is engaged in the business of generation of electricity and allied activities. Under the State Specific Bundling Scheme of the National Solar Mission, NTPC is responsible for implementation of scheme of Ministry of New and Renewable Energy for setting up solar power plants.
3. Respondents No. 2 to 4, M/s Jaipur Vidyut Vitran Nigam Limited, M/s Ajmer Vidyut Vitran Nigam Limited and M/s Jodhpur Vidyut Vitran Nigam Limited respectively are the distribution licensees in the State of Rajasthan.
4. Respondent No. 5, Ministry of New and Renewable Energy (hereinafter referred to as “MNRE”), is the nodal Ministry of the Government of India for all matters relating to new and renewable energy. MNRE issued guidelines for implementation of Scheme for selection of 3000 MW Grid Connected Solar PV Power Projects under Phase-II, Batch-II, Tranche-I for “State Specific Bundling Scheme” under which NTPC was designated as the implementation agency.

5. Respondent No. A, Solar Energy Corporation of India Limited (hereinafter referred to as “SECI”) was appointed by the Government of India to purchase and sell solar photo-voltaic power through the Viability Gap Funding (hereinafter referred to as “VGF”) mode under the Government of India’s National Solar Mission, Phase II, Batch III Bidding Guidelines (hereinafter referred to as “NSM Guidelines”).
6. Respondent No. B, M/s Uttar Pradesh Power Corporation Limited is the distribution licensee in the State of Uttar Pradesh.
7. M/s Prayatna Developers Private Ltd., has made the following prayers:
 - (a) *Admit the Petition;*
 - (b) *Hold and declare that the imposition of the Integrated Goods and Services Tax, 2017, Central Goods and Services Tax, 2017 and Rajasthan Goods and Services Tax, 2017 is an event under ‘Change in Law’ under Article 12 of the PPA;*
 - (c) *Restore the Petitioners to the same economic condition prior to occurrence of the Changes in Law by way of adjustment in tariff in terms of Article 12 of the PPA by increasing the tariff as prayed for in the present Petition.*
 - (d) *To pass such other and further order or orders as the Commission deems appropriate under the facts and circumstances of the present case.*
8. M/s Azure Power Venus Private Limited, has made the following prayer:
 - a. *Declare that the promulgation of the Integrated Goods and Services Tax, 2017, the Central Goods and Services Tax, 2017 and the Uttar Pradesh Goods and Services Tax, 2017 with effect from 01.07.2017 are each a Change in Law under Article 12 of the Power Purchase Agreement dated 21.10.2016 executed between the Petitioners and the Respondent;*
 - b. *Direct a lump sum compensation of Rs. 6,50,40,687/- (Rupees Six crore fifty lakh forty thousand six hundred and eighty-seven only) to be paid to the Petitioners by the Respondent in lieu of the additional tax burden on the Engineering, Procurement and Construction Cost, as elaborated in the instant Petition, and a monthly levelled*

tariff payment of Rs. 0.02/kWh towards the additional tax burden on operation and maintenance expenses incurred by the Petitioners, as elaborated in the instant Petition, due to promulgation of the Integrated Goods and Services Tax, 2017, the Central Goods and Services Tax, 2017 and the Uttar Pradesh Goods and Services Tax, 2017;

- c. Without prejudice to and in the alternate to prayer b) above, direct the Respondent to pay the Petitioners an additional tariff of Rs. 0.28/ kWh with effect from the Commercial Operation Date of the Petitioner's Solar Power Generating Systems as compensation for the additional tax burden incurred by the Petitioners on establishing and running the said Solar Power Generating Systems, as elaborated in the instant Petition, due to promulgation of the Integrated Goods and Services Tax, 2017, the Central Goods and Services Tax, 2017 and the Uttar Pradesh Goods and Services Tax, 2017, along with **carrying costs**, subject to any adjustments based on the final additional expenditure incurred by the Petitioners as on the Commercial Operations Date of the Petitioner's Solar Power Generating Systems as duly audited and certified by the Petitioner's statutory auditor at the end of the relevant financial year;*
- d. Direct the Respondent to reimburse the legal and administrative costs incurred by the Petitioners in pursuing the instant Petition; and*
- e. Pass such other orders that this Hon'ble Commission deems fit in the interest of justice.*

Brief facts of the case:

9. On 10.03.2015, MNRE issued guidelines for implementation of Scheme for selection of 3000 MW Grid Connected Solar PV Power Projects under Phase-II, Batch-II, Tranche-I for "State Specific Bundling Scheme". Under the said State Specific Bundling Scheme, NTPC was made responsible for implementation. NTPC implemented the said scheme through its subsidiary NTPC Vidyut Vyapar Nigam Ltd., a trading licensee for inter-State trading in

electricity in whole of India.

10. SECI was appointed by the Government of India to purchase and sell solar photo-voltaic power through the Viability Gap Funding (“VGF”) mode under the Government of India’s National Solar Mission, Phase II, Batch III Bidding Guidelines (NSM Guidelines). The NSM Guidelines envisage providing VGF from the National Clean Energy Fund through SECI to the bidders selected through a transparent bidding process to procure solar power. The NSM Guidelines contemplate the sale of 90% of power generated by a solar power developer to buying utilities within the State and the remaining 10% power outside the State.
11. On 03.07.2015, NTPC invited proposals by a Request for Selection (hereinafter referred to as “RfS”) inviting proposals for setting up Grid Connected Solar-PV Power Projects (10 MW x 13 Projects) in the State of Rajasthan.
12. The Petitioners (PDPL) participated and after following the process of Reverse Auction conducted by NTPC, it was selected for setting up of two (2) such Solar PV ground mount Projects at Village Kanasar, Tehsil Baap, District Jodhpur, in the State of Rajasthan.
13. On 19.04.2016, SECI issued Request for Selection (RfS) SECI/JNNSM/P-2/B-3/RfS/UP/042016 for selection of solar power developers for the development of a cumulative capacity of 315 MW in Uttar Pradesh Solar Power Park. M/s APVPL was selected as the successful bidder in respect of an aggregate capacity of 40 MW of solar power.
14. On 29.07.2016, NTPC issued a Letter of Intent vide its Ref No. NTPC/NSM/TI/NSP-OPEN/RAJ-05/20MW/0027 (hereinafter referred to as “LoI”) to the PDPL for development of two (2) grid connected, Solar PV Projects of 10 MW capacity each in the State of Rajasthan. PDPL was selected as the successful bidder under the National Solar Mission Phase-II Batch-II Tranche I State Specific Bidding Scheme conducted by NTPC Ltd. (Respondent No. 1).
15. On 16.09.2016, PDPL entered into two Power Purchase Agreements (hereinafter referred to

as “PPAs”) with NTPC for setting up of 20 MW Solar PV ground mount Projects, located at Village Kanasar, Tehsil Baap, District Jodhpur, in the State of Rajasthan, for supply of power at a tariff of Rs. 4.36/kWh on long term basis.

16. On 21.10.2016, M/s APVPL executed Power Purchase Agreements with SECI.
17. On 12.04.2017, Government of India (hereinafter referred to as “GOI”) introduced the Goods and Services Tax, replacing multiple taxes levied by the Central and State Governments.
18. On 01.07.2017, the Central Goods and Services Tax Act, 2017; The Integrated Goods and Services Tax Act, 2017 for levy and collection of tax on inter-State supply of goods or services or both by the Central Government were enacted. The Rajasthan Goods and Services Tax Act, 2017 for levy and collection of tax on intra-State supply of goods or services or both by the State of Rajasthan was enacted.
19. On 15.07.2017 and 30.08.2017, the Petitioners sent notice to the Respondents regarding the Change in Law event that took place after applicability of Goods and Services Tax (hereinafter referred as “GST”) w.e.f. 01.07.2017. However, no response was received from the Respondents. Hence the Petition.
20. Further, 28.09.2017 was the Scheduled date of Commissioning (hereinafter referred to as “SCoD”) of both the projects of the PDPL. PDPL successfully commissioned its first 10 MW Project on 29.09.2017 and its second 10 MW Project on 11.10.2017. Further, 08.11.2017 was the SCoD of the project of the APVPL.

Submissions of the Petitioner in Petition No. 50/MP/2018:

21. PDPL has submitted that MNRE, on 10.03.2015, issued guidelines for implementation of Scheme for selection of 3000 MW Grid Connected Solar PV Power Projects under Phase-II, Batch-II, Tranche-I for ‘State Specific Bundling Scheme’. Under the said Solar PV Guidelines, NTPC was made responsible for implementation. NTPC implemented the said scheme through its subsidiary NTPC Vidyut Vyapar Nigam Ltd. (hereinafter referred to as “NVVNL”), a trading licensee for inter-State trading in electricity in whole of India.

22. NTPC invited proposals by RfS for setting up Grid Connected Solar-PV Power Projects (10 MW x 13 Projects) in the State of Rajasthan. PDPL participated in the bids and submitted its proposal for development of 2 solar PV ground mount projects of 10 MW each, totalling 20 MW, located at Village Kanasar, Tehsil Baap, District Jodhpur, in the State of Rajasthan. After following the process of Reverse Auction conducted by NTPC, PDPL was selected for setting up of two (2) such Solar PV ground mount Projects at Village Kanasar, Tehsil Baap, District Jodhpur, in the State of Rajasthan. NTPC issued a LoI vide its Ref No. NTPC/NSM/TI/NSP-OPEN/RAJ-05/20MW/0027 for development of two (2) grid connected, Solar PV Projects of 10 MW capacity each in the State of Rajasthan. PDPL entered into two PPAs with NTPC for setting up of 20 MW on 16.09.2016 for supply of power at a tariff of Rs. 4.36/kWh. However, the Effective date of PPA was 29.08.2016 and SCoD was 28.09.2017.
23. Subsequent to the Effective Date i.e. 29.08.2016, the following laws were enacted:
- a) The Central Goods and Services Tax Act, 2017 on 12.04.2017, for levy and collection of tax on intra-State supply of goods or services or both by the Central Government effective from 01.07.2017.
 - b) The Integrated Goods and Services Tax Act, 2017 on 12.04.2017, for levy and collection of tax on inter-State supply of goods or services or both by the Central Government effective from 01.07.2017.
 - c) The Rajasthan Goods and Services Tax Act, 2017 on 28.04.2017, for levy and collection of tax on intra-State supply of goods or services or both by the State of Rajasthan effective from 01.07.2017.
24. PDPL sent notice to NTPC on 15.07.2017 regarding the 'Change in Law' event that took place after applicability of GST *w.e.f.* 01.07.2017. PDPL successfully commissioned its two projects i.e. first 10 MW Project was commissioned on 29.09.2017 and thereafter, the second 10 MW Project was commissioned on 11.10.2017.
25. PDPL has submitted that before the 'Effective Date' under the PPA, the existing indirect tax regime provided for a complex tax environment due to multiplicity of taxes and elaborate

compliance obligations. However, pursuant to the Effective Date the new indirect taxation system in the country namely the ‘GST’ represents a paradigm shift in the mode and levy of indirect taxes. In accordance to the ‘GST laws’, with effect from 01.07.2017, on Intra-State supplies of goods or services - CGST & SGST were to be levied by the Central and State Government respectively and on Inter -State supplies of goods or services - IGST was to be levied by the Central Government, at the rate prescribed from time to time.

26. PDPL has submitted that new slabs under ‘GST laws’ have led to an increase in the overall project cost. The change of tax regime has escalated the capital cost of the PDPL’s project, hence making the tariff quoted at the time of bid for allocation of project unviable. The total escalation in cost of PDPL due to implementation of GST is about Rs. 4.59 Crores.
27. PDPL has submitted that out of Rs. 4.59 crores on account of levy of GST, the construction cost of PDPL has escalated to the tune of Rs. 3.96 Crores while remaining amount is on account of increase in O&M expenses. A description of the levy and impact thereof of GST laws on each component (goods/ services) is as under:-

	Component	Previous Tax (%)	IGST/ CGST Tax (%)	RGST (%)	Incremental impact on cost of Project (Rs.)
1	PV Module	0	5		1,42,06,368/-
2	Mounting Structure & Nut-Bolts; Clamp & Fasteners	0	9	9	92,00,440/-
3	Inverter Transformer	2	9	9	16,19,043/-
4	Switchgear	2	9	9	4,42,528/-
5	Cables	2	14	14	17,60,224/-
6	Transmission - Supply + Service including all taxes, duties, freight etc.	15	9	9	27,12,945/-
7	Programmable Logic Controller (PLC), (SCADA) System	0	9	9	91,025/-
8	Connectors	0	18		15,554/-
9	Miscellaneous Electrical	0	9	9	11,89,546/-

10	DC Battery & Battery Charger	0	9	9	29,380/-
11	Logistics Services (Inland transportation and Customs House Agent charges)	0	2.5+2.5	2.5	6,30,657/-
12	Mounting Structure Foundation	15	9	9	34,05,535/-
13	Erection of Module Mounting Structures (MMS) and Module	15	9	9	1,33,950/-
14	Balance of Plant (BOP) – Civil	15	9	9	16,23,167/-
15	Roads & Drainage	15	9	9	7,14,283/-
16	Fencing Work (chain link)	15	9	9	10,38,936/-
17	Electrical Erection	15	9	9	2,76,941/-
18	Preoperative & Other Indirects	15	9	9	4,81,885/-
19	Safety	15	9	9	14,533/-
20	Security	15	9	9	32,742/-
21	IT Services	15	9	9	22,416/-

28. As regards O&M expenses, PDPL has submitted that before the Effective Date, Service Tax @ 15% was being levied on this component. In view of the Notification No. 20/2017-Central Tax (Rate) of Department of Revenue, Ministry of Finance, Government of India under the CGST Act dated 22.08.2017 and under the Notification dated 22.08.2017 of the Finance Department (Tax Division), Government of Rajasthan under the RGST Act, CGST and RGST at the of 9% each is being levied on operation and maintenance expenses. This will lead to an incremental impact of Rs. 62,43,000/- on the cost of the Project as tabulated below:

Component	Previous Tax (%)	IGST/CGST Tax (%)	RGST (%)	Incremental impact on cost of Project (Rs.)
O&M Expenses	15	9	9	62,43,000/-

29. PDPL has submitted that for determination of the impact of GST in ‘Operation & Maintenance’ Expenses which it is going to incur in next 25 years of PPA tenure has been

worked on the basis of relevant normative parameters as specified by the Commission in the Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012 dated 06.02.2012 as amended on 31.03.2016. The Regulations prescribe O&M expenses for the year of 2017-18 at Rs. 7.41 Lakhs/ MW, which includes Service Tax of 15%, with an annual escalation of 5.85%. In the present petition, PDPL has considered the same parameter with an additional 3% GST impact, i.e. 18% GST on the normative O&M expenses. Accordingly, net present value of Pre-GST O&M Expenses and post GST impact works out to Rs. 62.43 Lakhs and is being claimed as compensation.

30. PDPL has submitted that the PPAs entered into between the PDPL and NTPC provide for a specific provision qua the concept of “Change in Law”. The fundamental philosophy behind the said code is to ensure that additional recurring/ non-recurring expenditure by the Seller due to “Change in Law” event is compensated through monthly tariff payment to the extent it restores the affected party to the same economic position as if such change in law had not occurred.
31. PDPL has submitted that the definition of ‘Law’ as provided under the PPA is an inclusive and illustrative definition, and contemplates all laws, including the Electricity Laws applicable in India in various forms. The definition of law is quoted as under:-

“Law shall mean in relation to this Agreement, all laws including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian Government Instrumentality and having force of law and shall further include without limitation all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include without limitation all rules, regulations, decisions and orders or the Appropriate Commission;”

32. The relevant clause of the PPAs i.e. Article 12 is quoted as under:

12. ARTICLE 12: CHANGE IN LAW

12.1 Definitions

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

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

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

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

12.2 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.

33. PDPL has submitted that as per Article 12 of the PPA, the following conditions have to be met with while claiming compensation under ‘Change in Law’:-

- (a) To determine the consequence of change in law and to compensate a party affected by a change in law such that the party is restored to the same economic position as if such change in law had not occurred.
- (b) The coming into effect of:
 - i. The enactment or coming into force of any law.
 - ii. Change in interpretation of any law.
 - iii. Change in any consents, Clearances or Permits available for the Project.
 - iv. Inclusion of new or Change in the terms and conditions prescribed for obtaining the Consents, Clearances, Permits.
 - v. Change in tax or introduction of any tax made applicable.
- (c) Provided that such change in law results in any additional recurring/ non-recurring expenditure by the SPD or any income to the SPD.

34. PDPL has submitted that the enactment of the Constitutional Amendment Act along with the aforesaid 'GST' legislations is a 'Change in Law' event according to 1st Bullet of Article 12.1.1 of the PPA since:-
- (a) The enactment of the GST legislations is the enactment of a Law repealing the current indirect tax regime.
 - (b) The GST legislations have been passed by the Parliament of India and State Legislatures;
 - (c) The GST Legislations have been enacted subsequent to 29.08.2016 (which is the Effective Date under the PPA); and
 - (d) Implementation of the GST Legislations will result in the change in the cost of or revenue.
35. PDPL has also placed its reliance on the Order dated 19.04.2017 pronounced by Hon'ble Appellate Tribunal for Electricity in *Sasan Power Limited v. Central Electricity Regulatory Commission* in Appeal No. 161 of 2015, Clause 6.2(4) of the Tariff Policy dated 28.01.2016 and Order of the Commission dated 21.08.2017 in its *suo-moto* Petition No. 13/SM/2017 wherein hearings have been initiated to facilitate the settlement of the dues arising on account of the introduction of GST Laws being events of Changes in Law under the respective PPAs.
36. In view of above, PDPL has submitted that it may be allowed compensation that would be equivalent to the financial impact of the 'Changes in Law' on the costs and revenues of the PDPL so as to restore the PDPL to the same economic condition prior to occurrence of the 'Changes in Law'.
37. PDPL has submitted that the Commission has the jurisdiction to adjudicate the present matter. It has placed its reliance on the Judgment of the Hon'ble Supreme Court in *Energy Watchdog Vs. CERC & Ors.* reported as 2017 (4) SCALE 580.

Submissions of the Respondent in Petition No. 50/MP/2018:

38. NTPC has submitted that the Petition is not maintainable and is liable to be dismissed in

limine, inter alia, for the following reasons:

- a. While the Petitioner is cumulatively claiming a net increase of Rs 4.59 crores on account of total impact of 'GST Laws' w.e.f. 01.07.2017 onwards, Petitioner has not produced all the underlying invoices and material in support thereof. Annexure P-17 has been filed depicting the Net incremental impact of GST on the Petitioner project. The document states that actual GST paid out is based on the actual invoices paid. However, the Petitioner has not produced invoices to support the claim of actual GST paid except in relation to the Solar PV modules.
- b. Petitioner is claiming certain costs under the head 'expected GST Impact' without substantiating the same. The document is inadequate to consider the issues of 'Change in Law'.
- c. The Petitioner has only produced the purchase order, invoices etc. in respect of the Solar PV modules, to the exclusion of the other items such as mounting structure, inverter transformers etc.
- d. In respect of the Solar PV Modules, for which an incremental impact of Rs 1.42 crores has been claimed, Petitioner has furnished a copy of the contract dated 11.05.2017 for Supply of Photovoltaic Modules to the Petitioner. In terms of Clause 6 of the Contract, the Modules pertaining to 10 MW capacities were to be delivered at the Project Site by 30.06.2017 i.e. before the coming into effect of the GST Laws on 01.07.2017. Therefore, the delay (if any) in the delivery or receipt of such modules and the consequential increase in the cost, cannot be passed onto to the Respondent since the transaction in respect of the goods and services in regard to 10 MW was envisaged to be done prior to the coming into force of the GST Laws.
- e. 'GST Laws' were notified as far back as 12.04.2017 and 28.04.2017, thus, the Petitioner was aware of the promulgation of the GST Laws and could have arranged its affairs in a manner to mitigate the effect of the increase in costs on account of the enactment of the GST Laws;
- f. Operation and Maintenance is the responsibility of the Petitioner and in the event the Petitioner chooses to employ the services of other agencies, it cannot increase the liability of the NTPC in terms of tariff. The outsourcing of the O&M to a third party (if any) is not a requirement of the PPA and is a commercial decision of the Petitioner

for its own advantage and any increase in cost including on account of taxes etc. is entirely to the account of the Petitioner. In terms of a Section 63 quoted tariff the Petitioner is required to include the cost of operation and maintenance in the levelled tariff quoted.

- g. The details and documents filed by the Petitioner are inadequate to consider the issues of Change in Law. For appropriate consideration of Change in Law, the relevant details and documents includes but are not limited to the following, namely (i) the date on which the Purchase order was placed either for procurement of goods or for procurement of services; (ii) the date on which the goods were delivered to the Petitioner or the services were rendered and; (iii) the date on which the invoices were raised; (iv) the date on which the payment for the goods or services were made by the Petitioner and (v) In case of imported goods, the date on which the goods were custom cleared either for own consumption or to be stored in the custom warehouse. There has to be a clear and one to one correlation between the projects, the supplier of goods or services and the invoices raised by the supplier of goods and services.
- h. No details have been furnished as regards the original vendor/ original equipment manufacturer. A bare perusal of the select few invoices relating to Solar PV Modules furnished by the Petitioner would indicate that the goods have been supplied through M/s Mundra Solar PV Limited.

39. NTPC has submitted that in the absence of the above particulars, the petition filed for claiming 'Change in Law' is not maintainable. There is no impact of the 'Change in Law' in respect of goods procured by the Petitioner or the services rendered to the Petitioner before 01.07.2017 i.e. date of the notification of the 'GST Laws'. The mere production of a Comparative Chart demonstrating the impact of GST Regime on Petitioner Project cost without material particulars and basic relevant documents in support thereof cannot be considered as sufficient to entertain the present petition and to analyse and decide the entitlement of the Petitioner to any relief under the Change in Law provisions contained in the PPAs.

40. NTPC has submitted that the 'Change in Law' provision contained in Article 12 of the PPAs is specific in as much as it is applicable only to any change in taxes or introduction of any

new tax made applicable for supply of power by the Petitioner, as per the terms of the PPAs. The implications of 'GST Laws' referred to by the Petitioner relates to the setting up of the Solar Power Projects and not to the supply of power and the same is not covered under Article 12 of the PPAs. The PPAs executed by the Petitioner and the Respondent No.1 had specifically restricted the impact of 'Change in Law' only to the change in taxes or introduction of any tax made applicable for the supply of power by the Solar Power Developers and did not extend to the tax on the setting up of the Solar Power Projects. Article 12 of the PPA entered into between the Petitioner and the Respondent No.1 for sale and purchase of solar power generated from the 2x10 MW Solar Power Project of the Petitioner for a period of 25 years provides as under:

"12. ARTICLE 12: CHANGE IN LAW

12.1 Definitions

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

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

- the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such law;*
- a change in 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 or income or dividends distributed to the shareholders of the SPD, or (ii) any change on account of regularity 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;"

41. In view of the above, the NTPC has submitted that the relief for ‘Change in Law’ in the case of PPAs dated 16.09.2016 between Petitioner and the Respondent No.1 in regard to any tax is available only if it is *‘for supply of power by the SPDs as per the terms of this Agreement’* (PPA). Sub clause of 12.1.1 providing for *‘any change in tax or introduction of any tax’* is specifically circumscribed by the above qualification. This clearly shows that every change in tax or introduction of tax is not intended to be covered by the Change in Law provisions of the PPA. There is a specific and additional condition that the impact of change in law should be on the supply of power by the Seller. Merely because the statutory levies or taxes may affect the financials of the project developer, it does not get covered under the Change in Law within the meaning of the PPA or entitle the Petitioner to a revision in tariff.
42. NTPC has submitted that the claim that taxes which do not fall under the sixth bullet under Article 12.1.1 are to be considered as admissible by virtue of first bullet under Article 12.1.1 is wrong and should be rejected. If such claims are considered, then the sixth bullet is rendered redundant. There was no need to have a specific provision for tax on supply of power since taxes would be covered under ‘law’ in the first bullet. The harmonious construction of the provisions would require some meaning and purpose to be given to the sixth bullet of Article 12.1.1 and the claims which are to be considered on account of statutory taxes etc. falls within the scope of sixth bullet. If the tax is not in respect of supply of power but in respect of any purchase of input goods, equipment, plant, machinery etc. (input material for construction of the power plant), i.e. taxes etc. related to the setting up of the Power Project as distinguished from the sale of power generated, the same is not covered within the scope of Article 12.1 of the PPA and, therefore, the relief provided for in Article 12.2 of the PPA will have no application.
43. The Bidding Documents and the Agreements reached between the Petitioner and the Respondent No.1 did not envisage covering the tax on activities leading to the construction and commissioning of the power plant. This is clear when the PPAs entered into between the Petitioner and the Respondent No.1 in the present case is contrasted with the draft of the Standard PPA issued in November, 2016 under the NSM Phase II, Batch II which, inter alia, provided for the following clauses:

“12. ARTICLE 12: CHANGE IN LAW

12.1 Definitions

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

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

- the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such law;
- a change in 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 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 in to existence shall be considered as effective date for the same. 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 regularity measures by the Appropriate Commission.

{Emphasis Supplied}

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.”*

44. NTPC has submitted that from the above it is clear that the change in taxes, structure or introduction of any tax made applicable for setting up of the solar power project, in addition to the supply of power from the project has been treated as Change in Law in the subsequent Draft PPA. Accordingly, the Petitioner cannot seek any relief with regard to the change in taxes related to the setting up of the solar power project in comparison to the sale of power from the solar power project. The entire claim made by the Petitioner is in respect of the tax on the setting up of the power project and not on the sale of power from the power project.

45. NTPC has submitted that the Petitioner had not given any details of the claim in regard to the 'Change in Law' to the Respondent No.1, except for the Letter dated 15th July, 2017. The Petitioner cannot claim compensation, increase in tariff etc. on ad hoc basis. The Petitioner is obligated to place on record the correct computation of the impact of the Change in Law, establishing first the exact nature of law which would constitute a change in law within the meaning of Article 12, its nexus to the supply of power from the solar power project and thereafter, it is for the Commission to decide on the manner of compensation to the Petitioner for such 'Change in Law'. Accordingly, the various prayers made by the Petitioner in the petition are not sustainable.

46. NTPC has submitted that the Petitioner has also not placed before the Commission in a transparent manner, the taxes, duties and levies which stand withdrawn and are no longer payable by reason of the introduction of the GST. Admittedly, there are number of taxes, duties, cess and levies which have been subsumed in the above Taxes which came into force on 01.07.2017. The list of such taxes, duties, cess and levies etc. include the following:

- i. Central Excise Duty
- ii. Stowing Excise Duty
- iii. Additional Duties of Excise
- iv. Additional Duties of Customs – Countervailing Duty (CVD)
- v. Special Additional Duty of Customs (SAD)
- vi. Service Tax
- vii. Value Added Tax
- viii. Central Sales Tax
- ix. Purchase Tax
- x. Entry Tax, Octroi etc.
- xi. Terminal Tax
- xii. Works Contract Tax
- xiii. Forest Tax/Cess
- xiv. Nirayat Kar
- xv. Education Cess and Secondary and Higher Education Cess
- xvi. Clean Energy Cess
- xvii. Swachh Bharat Cess and Krishi Kalyan Cess

xviii. Environment Cess and Infrastructure Development Cess

xix. Electricity Duty

47. NTPC has submitted that the Petitioner is also required to place before the Commission the extent to which the Petitioner's project are subject to such taxes etc. existing prior to 01.07.2017 which have been subsumed in the 'GST Laws'. In the absence of proper particulars being placed by the Petitioner on the extent of taxes, levies, duties and cess etc. subsumed in the GST Laws, the Commission should dismiss the petition filed by the Petitioner. It is incumbent on the Petitioner to disclose in a transparent manner in regard to the increase or decrease in the taxes on net basis.

Submission of Petitioner in Petition No. 52/MP/2018

48. Azure Power Venus Private Limited (Petitioner) is a generating company and is developing a 40 MW Solar Power Generating System (SPGS) based on Photo Voltaic technology in Dakor, District Jalaun at the UP Solar Park in the state of Uttar Pradesh. It has executed PPA on 21.10.2016 (effective date 08.10.2018) with SECI (Respondent).
49. The Petitioner has submitted that there is occurrence of 'Change in Law' events namely the promulgation of the IGST, 2017, the CGST, 2017 and the UPGST, 2017 with effect from 01.07.2017 (collectively "GST Laws"). The GST laws have replaced various Central and State tax laws applicable to the SPGS after the Effective Date of the PPAs, as per Article 2.1.1 of the PPAs thereby resulting in additional recurring and non-recurring expenditure in the form of tax burden.
50. The Respondent (SECI) was appointed by the Government of India to purchase and sell solar photo-voltaic power through the Viability Gap Funding (VGF) mode under the Government of India's National Solar Mission, Phase II, Batch III Bidding Guidelines (NSM Guidelines). The NSM Guidelines envisage providing VGF from the National Clean Energy Fund through SECI to the bidders selected through a transparent bidding process to procure solar power. SECI enters into power purchase agreements with the successful bidders with a commitment to purchase power at fixed rate for a period of 25 years. The NSM Guidelines contemplate

the sale of 90% of power generated by a solar power developer to buying utilities within the state and the remaining 10% power outside the State.

51. The Respondent issued Request for Selection No. SECI/JNNSM/P-2/B-3/RfS/UP/042016 dated 19.04.2016 (RfS) for selection of solar power developers for the development of a cumulative capacity of 315 MW in Uttar Pradesh Solar Power Park under the NSM Guidelines. Azure Power India Private Limited, the parent company of the Petitioner, placed a bid for a 40 MW project in the Uttar Pradesh Solar Park and was selected as the successful bidder. Thereafter, the Petitioner executed the PPA with SECI and undertook the obligation to develop the SPGS and sell the solar power generated at the SPGS to SECI as per the NSM Guidelines.

52. The Petitioner has submitted that with the enactment of the GST laws with effect from 01.07.2017, the Petitioner is required to bear additional recurring and non-recurring expenditure after the Effective Date under the PPAs in the form of an additional tax burden on various components including inter alia on Modules, Invertors, Mounting Structures, Transmission lines materials, AC and DC Cables, AC and DC Electrical Material, Combiner Boxes, Connectors, Balance of Supplies, Installation, Erection and Commissioning works, Installation, Erection & Procurement services, Operation and Maintenance services etc. for setting up, operating and maintaining the SPGS. The changes that took place in the effective applicable rates on the promulgation of the GST Laws include:
 - a. increase in the effective rate of applicable Central Sales Tax on supply of materials ranging from 0% - 2% originally to 5% now;
 - b. increase in the effective rate of service tax on operations and maintenance services from 15% originally to 18% now;
 - c. reduction in service tax on provision of installation services for Solar Power Generating Systems changed from 15% originally to 5% now;
 - d. reduction in the tax on civil works for Solar Power Generating Systems changed from an aggregate of 11% of Value Added Tax and Service Tax originally to 5% now.

53. A tabular representation comparing the old tax laws and rates applicable to the Petitioner as on the Effective Date of the PPA with the GST Laws and revised rates is as under:

S. No.	Old Tax Law Applicable as on Effective Date of PPAs	Old Tax Rate Applicable as on Effective Date of PPAs	New GST Law after Effective Date of PPAs	New GST Rate after Effective Date of PPAs
1.	The Central Sales Tax Act, 1956 on inter-state sale of goods	0% - 2%	The Integrated Goods and Services Tax, 2017	5% on Goods required for the Solar Power Generating Systems
2.	The Finance Act, 1994 levying Service Tax	15%	The Central Goods and Services Tax, 2017	5% on Services for Solar Power Generating Systems 18% on Operation and Maintenance Services
3.	The Uttar Pradesh Value Added Tax Act, 2008 levying tax on intra-state sale of goods at a rate of 5% on total civil contract value and The Finance Act, 1994 levying Service Tax at a rate of 15% on 40% of the civil contract value	11% aggregate	The Uttar Pradesh Goods and Services Tax, 2017	5% on Supply of Solar Power Generation System

54. The Petitioner has submitted that as per the Certificate from a Chartered Accountant dated 31.08.2017 the net amount additionally incurred and to be incurred by the Petitioner in developing the SPGS on account of the promulgation of the GST Laws is approximately:

- a. Rs. 6,50,40,687/- (Rupees Six Crore Fifty Lakh Forty Thousand Six Hundred And Eighty-Seven Only) on the Engineering, Procurement and Construction Cost (“EPC Cost”)
- b. Rs. 3,85,11,868/- (Rupees Three Crore Eighty Five Lakh Eleven Thousand Eight Hundred And Sixty-Eight Only) on the Operation and Maintenance costs (O&M Cost) of the SPGS, assuming that the GST rate for services remains constant for the entire period of the PPA.

55. The Petitioner has submitted that SPGS is in the process of procuring the remaining capital goods in accordance with its construction schedule. The Petitioner is also procuring services required as on-going basis in order to install the said capital goods and for the purpose of installing and commissioning the SPGS. Moreover, the Petitioner will also avail of operation and maintenance services in the operations phase of the SPGS, which will be a recurring expenditure throughout the term of the PPAs. Thus, the additional tax burden on account of the promulgation of the GST Laws is being incurred by the Petitioner. Further, the Petitioner will also incur various legal and administrative costs in pursuing the instant Petition, which it humbly submits should also be compensated through tariff as Change in Law relief.
56. The Petitioner has submitted that the promulgation of the GST Laws after the Effective Date of the PPAs resulting in additional recurring and non-recurring expenditure to be incurred by the Petitioner squarely attracts Article 12 of the PPAs thereby entitling the Petitioner to Change in Law relief stipulated thereunder.
57. The Petitioner has submitted that Article 12 above is squarely attracted as the GST Laws are Central and State statutes in the meaning contemplated under the PPAs. Accordingly, the Petitioner is entitled to compensatory relief for the aforesaid Change in Law. Indeed, it is also established industry practice in the Indian power sector, particularly in respect of Change in Law events that the procurer viz. SECI in the present case compensates the seller viz. the Petitioner in the present case for any increased or additional expenditure incurred pursuant to the Change in Law.
58. The Petitioner has submitted that while Article 12 of the PPAs do not require a Change in Law notice to be sent, in accordance with prudent utility practice and in good faith, the Petitioner has promptly notified SECI of the promulgation of the GST Laws vide its letter dated 30.08.2017. However, the Petitioner has not received any response from SECI to its said letter.
59. The Petitioner has submitted that under Article 9 of the PPAs, the Petitioner was originally entitled to receive a tariff of Rs. 4.43/kWh from the Commercial Operation Date of the

SPGS. However, such tariff was fixed prior to the promulgation of the GST Laws. Therefore, the aforesaid tariff would need to be revised upwards to account for and reflect the additional tax burden incurred/ to be incurred by the Petitioner on account of the promulgation of the GST Laws. It is submitted that such revised tariff ought to account for the carrying costs incurred by the Petitioner in discharging the additional tax burden. It is submitted that the principal objective of Article 12 of the PPA is to grant relief in a manner so as to place an affected party in the same economic position as if a change in law had not occurred.

60. The Petitioner has submitted that in alternate, fixed lump sum compensation in respect of the additional taxes on the EPC Cost may be allowed to the Petitioner to avoid any carrying costs in respect of the EPC Cost of the SPGS. The Petitioner has submitted that approaching the Commission each year for allowance of compensation for such Change in Law events is a time-consuming process, which would result in a time lag between the amount paid by the Petitioner and actual reimbursement by SECI necessitating the payment of interest and carrying costs by SECI. The Petitioner has submitted that to compensate for the monetary impact of the promulgation of the GST Laws: (i) a sum of Rs. 6,50,40,687/- (Rupees six crore fifty lakh forty thousand six hundred and eighty-seven only) incurred/ to be incurred by the Petitioner as additional tax burden may be granted to the Petitioner as lump sum compensation in respect of the EPC component of the total cost; and (ii) a monthly levellised tariff payment of Rs. 0.02/kWh be allowed towards the additional tax burden on O&M Cost incurred by the Petitioner.
61. The Petitioner has submitted that in alternate, an additional tariff including carrying costs, payable on a monthly basis, may be approved by the Commission, which may later be reconciled with the actual additional tax paid by the Petitioner on the basis of its annual audited books of account certified by its statutory auditor. The Petitioner has submitted that as per calculation of the additional tax burden to be incurred, the levellised tariff increase of Rs. 0.28/ kWh would compensate the Petitioner for the aforesaid Change in Law. Such levellised tariff increase would also include the impact of additional tax burden on the O&M Costs of the SPGS. The Petitioner has suggested that the proposed levellised tariff increase of Rs. 0.28/ kWh may be allowed by the Commission, subject to a reconciliation with the actual expenditure incurred as per the Petitioner's final audited books of account certified by the Petitioner's statutory auditor at the end of the relevant financial year.

Submissions of Respondent No. A in Petition No. 52/ MP/2018

62. The Respondent has submitted that the Petition is not maintainable and is liable to be dismissed in limine, inter alia, for the following reasons:

- (a) The petition does not set out the cause of action based on which the Petitioner has claimed the relief. Except for vaguely stating that there is a 'Change in Law' within the scope of Article 12 of the PPA dated 21.10.2016, the Petitioner has not placed on record, the specific changes in law which have occurred and the extent to which such Change in Law has an impact within the meaning of Article 12 of the PPA.
- (b) The Petitioner has not disclosed or referred to the nexus of such 'GST Laws' change to the impact on the specific procurement of goods and services by the Petitioner;
- (c) The invoices produced along with the Petition refers to following items-
 - An item described as a 'Civil Works-Fencing', the tax invoice date being 29.06.2017.
 - Another tax invoice dated 09.10.2017 describes an item as 'Building Infrastructure-SPGE'.
 - The third tax invoice refers to the 'Cable 1C x 150 sqmm A1 UN', the date of tax invoice being 30.06.2017.
 - The fourth tax invoice dated 18.08.2017 refers to the 'Cable 1Cx25 sqmm Cu UN'.
- (d) In addition to the above, Annexures have been filed relating to recurring and non-recurring expenditures incurred/ to be incurred along with the Chartered Accountant's Certificate.
- (e) The details and documents filed by the Petitioner is inadequate to consider the issues of Change in Law. For appropriate consideration of Change in Law, the relevant details and documents includes but are not limited to the following, namely (i) the date on which the Purchase order was placed either for procurement of goods or for

procurement of services; (ii) the date on which the goods were delivered to the Petitioner or the services were rendered and; (iii) the date on which the invoices were raised; (iv) the date on which the payment for the goods or services were made by the Petitioner and (v) In case of imported goods, the date on which the goods were custom cleared either for own consumption or to be stored in the custom warehouse. There has to be a clear and one to one correlation between the projects, the supplier of goods or services and the invoices raised by the supplier of goods and services;

(f) In the absence of the above particulars, the petition filed for claiming ‘Change in Law’ is not maintainable at all. This is particularly when there is no impact of the alleged Change in Law in respect of goods procured by the Petitioner or the services rendered to the Petitioner before 01.07.2017 i.e. date of the notification of the GST Laws.

(g) In terms of the above, the petition filed is vague and material particulars have not been given.

63. The petition filed is otherwise not maintainable as the Petitioner has not approached the Commission with clean hands. The Petitioner has not disclosed the basic particulars and the supporting documents required for considering whether there is an impact of Change in Law as alleged by the Petitioner. The mere production of the Chartered Accountant’s Certificate without material particulars and basic relevant documents in support thereof cannot be considered as sufficient to entertain the present petition and to analyse and decide the entitlement of the Petitioner to any relief under the Change in Law provisions contained in the PPA. It is the Petitioner who is seeking increase in Tariff and it is incumbent on the Petitioner to establish the same with necessary details and documents, failing which an adverse inference should be drawn on the claim of the Petitioner namely if the relevant details and documents are not disclosed, the change in law will not be established.

64. Without prejudice to the above, the Change in Law provision contained in Article 12 of the PPA is specific in as much as it is applicable only to any change in taxes or introduction of any new tax made applicable for supply of power by the Petitioner, as per the terms of the PPA. The implications of GST Laws referred to by the Petitioner relates to the setting up of

the Solar Power Projects and not to the supply of power and the same is not covered under Article 12 of the PPA. The PPA executed by the Petitioner and the Respondent had specifically restricted the impact of Change in Law only to the change in taxes or introduction of any tax made applicable for the supply of power by the Solar Power Developers and did not extend to the tax on the setting up of the Solar Power Projects. In this regard, the subsequent PPA entered into with some of the Solar Power Developers specifically provides for '*any statutory change in tax structure or introduction of any new tax made applicable for setting up of the Solar Power Projects as well as supply of power by the Solar Power Developers*'. The Respondent has dealt with the aspects in detail herein. The claim of the Petitioner being contrary to the terms of the PPA, the petition filed is not maintainable and is liable to be rejected.

65. In terms of Article 12 of the PPA, the relief for change in law is restricted to the impact of such Change in Law. The Petitioner cannot claim a lump-sum compensation, additional amounts etc. on ad hoc basis. The Petitioner is not entitled to claim any recurring or non-recurring expenditure as prayed by the Petitioner. The outsourcing of the operation and maintenance to a third party was not a requirement of the PPA and has been a commercial decision of the Petitioner for its own advantage and any increase in cost, including on account of taxes etc. is entirely to the account of the Petitioner. Similarly, the Petitioner cannot claim reimbursement of legal or administrative cost incurred by the Petitioner in pursuing the proceedings before the Commission. The Petitioner is obligated to place on record the correct computation of the impact of the Change in Law, establishing first the exact nature of law which would constitute a change in law within the meaning of Article 12, its nexus to the supply of power from the solar power project and thereafter, it is for the Commission to decide on the manner of compensation to the Petitioner for such Change in Law. Accordingly, the various prayers made by the Petitioner in the petition are not sustainable.
66. Without prejudice to the above, it is submitted that the Petitioner had not given any details of the claim in regard to the Change in Law to the Respondent, except for the Letter dated 30.8.2017.

Submissions of Respondent No. B in Petition No. 52/ MP/2018

67. The Respondent No. B has submitted that there is no “Agreement”, of any kind between the Petitioner and UPPCL. The outcome of the petition, therefore, will not have any impact upon UPPCL, ipso facto.

68. The Power Sale Agreement (PSA) was entered into between SECI and Uttar Pradesh Power Corporation Ltd. (UPPCL), on 4th January, 2017. The rights and obligations between UPPCL and SECI are to be determined in terms of the PSA dated 04.01.2017. Article 8 of PSA provides for “Change in Law” and Article 8.2 provides for “Relief for Change in Law”. Article 8.2.1 of the PSA stipulates as under:

“The aggrieved party shall be required to approach the Appropriate Commission for seeking approval of Change in Law.”

69. Article 8.2.2 of the PSA stipulates as under:

“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 both the Parties.”

70. The Respondent has submitted that in terms of Article 8.2 of the PSA, reproduced in the preceding paragraph as above, “Change in Law” impacting tariff for Sale of power by SECI to the buying utility i.e. UPPCL, can be determined only in terms of Article 8 “Change in Law” as provided in the PSA and not on the basis of Article 12 of the PPA, dated 08.10.2016, entered into between the petitioner and SECI. UPPCL is not a necessary party to the above noted petition for, in case of any “Change in Law” as per Article 8 of the PSA and will exercise its right to contest the claim of “Change in Law”, on its own merits, impacting the tariff with respect to power purchased by UPPCL from SECI. It is submitting reply to the petition, ‘without prejudice’ to its right contained in the PSA dated 04.01.2017.

71. The Respondent has submitted that SECI may be assessed only in reference to the Scheduled Commissioning Date of the Project. GST Laws came into effect on 01.07.2017. If, COD in respect of the project was earlier than 01.07.2017, the impact of GST in respect of the cost of the project during construction period could not be factored and hence, cannot be claimed by

the Petitioner from the Respondent no. A. Further, Annexures pertaining to recurring and nonrecurring expenditures incurred/ to be incurred, does not provide necessary information for assessing the impact of the purported “Change in law”. The project cost cannot be computed without the invoices given by the supplier of goods and services in support of the cost of the project during the construction period. The Certificate of the Chartered Accountant in support of the petition, without necessary particulars and relevant documents, is not enough to sustain the petition.

72. The Respondent has submitted that claim to “various legal and administrative costs” in pursuing the instant petition is utterly misconceived because it is the mandate of Article 12.2 “Relief for change in law” of the PPA, in compliance of which the aggrieved party has to approach the Central Commission for seeking approval of ‘Change in Law’ and the Respondent is bound by the determination (if any) of the Commission. The Respondent without there being a determination by the Commission under ‘Change in Law’, could not incur any liability to pay the compensation sought by the Petitioner under ‘Change in Law’.
73. The Respondent has submitted that a perusal of bullet point 6 under Article 12.1.1 of the PPA, “Relief for change in law” on account of “any change in tax or introduction of any tax”, can be made only for “supply of power by the SPD as per the terms of this Agreement”. The Petitioner has not sought that the impact of ‘Change in Law’ on account of GST will be on the ‘supply of the power’.
74. The Respondent has submitted that the prayers made by the Petitioner are misconceived and are liable to be rejected by the Commission. The petitioner has failed to make out a case for being compensated under 'change in law' on account of introduction of GST laws, in terms of Article 12 of the PPA. The petitioner has purposely not come clean in a comprehensive manner with regard to specific provisions of GST and their impact, if any on the claim of the petitioner. There were a number of taxes, duties and levies which were payable before the introduction of GST and which stood subsumed in GST, thereby making the impact of GST under 'change in law' a rather complicated exercise. The petition is vague and misleading as the same is not based on verifiable data. As such may kindly be dismissed.

Further Written Submissions of Petitioner in Petition No. 50/ MP/2018

75. In compliance with the directions of the Commission given during the hearing held on 25.07.2018, the Petitioner has filed further written submissions in which it has reiterated the stand taken in the petition. Additionally, the Petitioner has submitted that NTPC is trying to create an artificial distinction between 'Change in Law' with respect to setting up of the power project *vis-a-vis* 'supply of power'. The expression 'supply of power' cannot only mean sale of power but everything that needs to be done for sale of power, i.e. from purchase of coal and other inputs, running the plant, producing electricity and then selling the same. In this regard, the Petitioner has placed its reliance on the Commission's Order dated 01.02.2017 in Petition No. 8/MP/2014 in case titled EMCO Energy Ltd. Vs. MSEDCL & Ors. The Order was upheld by the Hon'ble Appellate Tribunal for Electricity by its Judgment dated 19.04.2017 in Appeal No. 161 of 2015 reported as 2017 ELR (APTEL) 508. The relevant extracts are as under:-

"33. ... It is clear from the above that the capital cost and operating cost of the project which include cost of materials, equipment, services for installation of the project and production and supply of electricity, and taxes, duties and levies on such equipment materials, and services shall be the responsibility of the bidder. However if any recurring or non-recurring expenditure is required to be incurred by the Petitioner on account of occurrences of the events covered under Article 10.1.1 of the PPAs, then such expenditure will be admissible under change in law to the Petitioner. If any income accrues to the Petitioner on account of events covered under Change in Law, then such income shall be adjusted against tariff. One of the events covered under change in law is "the change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of the Agreement." In our view, this sub-clause cannot be read in isolation but has to be read with the provision that such occurrences should have the effect of "resulting into any recurring or non-recurring expenditure by the Seller or any income to the Seller". Therefore, if the Petitioner has to incur any recurring or non-recurring expenditure on account of the change in tax or introduction of any tax for supply of power to MSEDCL and DNH in terms of the respective PPAs, then such expenditure shall be admissible to the Petitioner under Change in Law."

76. The Petitioner has submitted that while considering 'Change in Law' claims of generators for similarly worded PPA clause, the Commission has held that the term 'supply of power' has to be considered holistically to include all activities, such as purchase and import of material

and generating equipment, which enable a solar developer to ultimately generate power from its generating station. Interpretation of the term supply of power in the PPA cannot be restricted to mean only the act of ‘supply’ of power but must mean the entire process from generation till the sale and consumption of power. The Petitioner has placed its reliance on the Hon’ble Supreme Court’s Judgments in *State of Andhra Pradesh Vs. National Thermal Power Corporation* [(2002) 5 SCC 203] wherein it has held that generation and supply of electricity are instantaneous and have to be treated as one transaction and *Rajasthan State Industrial Development and Investment Corporation and another Vs. Diamond & GEM Development Corporation Ltd. & Anr.*, (2013) 5 SCC 470 wherein it was held that the contract has to be interpreted without giving any outside aid. The terms of the contract have to be construed strictly without altering the nature of the contract, as it may affect the interest of either of the parties adversely.

77. The Petitioner has submitted that the definition of Change in Law in the PPA includes both recurring and non-recurring expenditure incurred by the SPD. Article 12 of the PPA defines Change in Law as under:-

*“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:
.....”*

78. The Petitioner has submitted that the ‘Change in Law’ provision of the PPA includes both *recurring and non-recurring* expenditure. Construction Cost being a non-recurring expenditure is thus covered by the Change in Law provision in the PPA. The Commission should, taking a consistent view, allow the change in rate of tax in the present case as ‘Change in Law’ event. The Petitioner has placed its reliance on the decision of the Hon’ble Appellate Tribunal for Electricity in *Sasan Power Limited Vs. Central Electricity Regulatory Commission* 2017 ELR (APTEL) 508 wherein it has been held at para 43 that the Commission ought to take a consistent view, when deciding on compensation of Change in Law under similar PPA provisions.

79. The Petitioner has submitted that outsourcing of O&M is a prudent industrial practice to ensure international perspective of the best practices in plant inspection procedures, quality

assessment plans and checklists for maintenance. The outsource partner provides O&M services that include periodic and preventive maintenance checks with IV curve analysis and thermographic imaging. Physical O&M tasks, such as module cleaning, housekeeping and security are carried out through third parties under the supervision of the generator. The mandate of 'Change in Law' Claims of PPA does not mandate in house O&M Expenditure. Accordingly, increase in costs of O&M on account of 'GST Laws' leads to an additional expenditure and is therefore an event of 'Change in Law'. The Petitioner has submitted that it is not claiming the cost of O&M but only claiming compensation for an increase in the O&M expenditure on account of the GST Laws which is in terms of the 'Change in Law' clause under the PPA and applicable to Section 63 bid tariffs.

80. The Petitioner has submitted that it is entitled to the 'carrying cost' for the costs incurred due to the 'change in law' events. The carrying cost is the compensation for time value of money. 'Carrying Cost' is an inherent provision in the PPA which has a provision for recognition of 'Change in Law' event. This is because the 'Change in Law' provision is premised on the underlying principle that the affected party is to be restored to the same economic position as if such change in law has not occurred. The Petitioner has placed its reliance on the various decisions of the Commission/ Appellate Tribunal viz. Judgement of the APTEL in *Adani Power Ltd. Vs. CERC & Ors.* dated 13.04.2017 in Appeal No. 210 of 2017 and *SLS Power Ltd Vs. Andhra Pradesh Electricity Regulatory Commission* reported as [2012] APTEL.
81. The Petitioner has submitted that it is entitled to levy the carrying cost from the effective dates from which it was affected and incurred expenditure on account of the approved 'Change in Law' events till the date of this Order to ensure that the economic viability of the Project is safeguarded.
82. The Petitioner has submitted that the Commission may formulate a mechanism to compensate the Petitioner against the escalation of project cost by way of adjustment in the tariff. The RfS envisages tariff adjustment mechanism for a claim under the Change in Law provision. Sr. No. 5 of the Addendum II dated 19/07/2018 to the RfS reads as under :-

"In case of Change in Law on account of 9.1.1 (b) above, the Power Producer shall be allowed an increase / decrease in tariff of 1 paise / unit for every increase/decrease of Rs. 2 Lakh per MW of project capacity (AC) in the Project Cost which shall be allowed upon submission of proof of payment made by the Power Producer towards

safeguard duty and/or anti-dumping duty to the concerned Authority and with due approval of GERC. The formula provided by GUVNL is properly calculated and hence, no change required."

Further Written Submissions of Petitioner in Petition No. 52/ MP/2018

83. In compliance with the directions of the Commission given during the hearing held on 25.07.2018, the Petitioner has filed further written submissions in which it has reiterated the stand taken in the petition. Additionally, the Petitioner has submitted that the Government of India, on 27.08.2018, has issued a direction under Section 107 of the Act, by way of which this Commission has been directed to take into account the impact of any change in domestic duties, levies, cess and taxes imposed by the Central Government, State Government/ Union Territories or by any Government instrumentality, which leads to a corresponding change in the cost, as a Change in Law event and to allow the same as a pass through in tariff.
84. The Petitioner has submitted that the Commission has settled the law on the interpretation of similarly worded 'Change in Law' clauses. The term "supply of power" has been widely interpreted to cover the impact on capital cost and operating cost of the project, including the cost of materials, equipment, services for installation of the project and production and supply of electricity as well as taxes, duties and levies on such equipment, materials and services. The Petitioner has placed its reliance on an order dated 01.02.2017 passed by the Commission in Petition No. 8/MP/2014 titled *Emco Energy Limited v. Maharashtra State Electricity Distribution Company Limited and Anr.*, judgment dated 14.08.2018 passed by the Hon'ble Appellate Tribunal for Electricity in *Adani Power Rajasthan Limited v. Rajasthan Electricity Regulatory Commission and Ors.*, Appeal No. 119 of 2016; judgment passed by the Hon'ble Supreme Court of India in *M/S Sumitomo Heavy Industries Ltd v. Oil & Natural Gas Corporation Limited*, (2010) 4 SCC 459 and *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.*, (2016) 4 SCC 126.
85. The Respondent has submitted that the "effective date" for the purpose of determining whether a 'Change in Law' event is covered under Article 12 of the PPA is the date of signing of the PPA, as opposed to the COD of the Project, which clearly contemplates that the change in law clause is applicable and available to the parties with as much force even for

the period prior to the COD. Accordingly, if the interpretation advanced by the Respondents is accepted, the stipulation of “effective date” in Article 12.1 and the fifth bullet of Article 12.1 qua claims pertaining to input costs will be rendered otiose.

86. The Petitioner has submitted that it has duly and fairly accounted for the positive impact of reduction of tax rate due to introduction of GST Laws in its tariff computations, and has made its claims after taking into account, and adjusting the taxes, levies and duties withdrawn by and subsumed under the GST Laws.
87. The Petitioner has submitted that the carrying costs and the legal and administrative costs incurred in pursuing the captioned Petition are a necessary and direct consequence of the relevant change in law event, i.e., introduction of GST Laws, and hence the Petitioner is entitled to claim the same under Article 12 of the PPA.
88. The Petitioner has submitted that there is no privity of contract between the Petitioner and UPPCL and hence all objections raised by UPPCL to the present proceedings ought to be disregarded by the Commission. Any purported delay in commissioning of the Project has no relevance whatsoever to the Petitioner’s ‘Change in Law’ claim under Article 12 of the PPAs. The PPAs have specific provisions to address issues pertaining to delays in commissioning of the Project, including pertaining to levy of liquidated damages and extension of time. 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. The issues pertaining to any delay in commissioning of the Project have to be considered within the four corners of the specific provisions pertaining to delay alone, and the effect of such delay, if any, cannot extend to any other provision of the PPAs.
89. The Respondent has submitted that outsourcing of O&M activities by the Petitioner to a third-party vendor does not disentitle the Petitioner from claiming change in law relief under the PPAs, as the PPAs do not prohibit the Petitioner from engaging a third-party vendor to efficiently operate and maintain the project. Indeed, it is a standard market practice for project developers to engage third party O&M vendors having expertise in operating and maintaining large power projects.

Further Written Submissions of Respondents No. A & B in Petition No. 50/MP/2018 and 52/ MP/2018

90. In compliance with the directions of the Commission given during the hearing held on 25.07.2018, the Petitioner has filed the further written submissions in which it has reiterated the stand taken in the petition. Additionally, the Respondents have submitted that the claim for change in law has to be considered only in terms of Article 12 of the PPA. Article 12 of the PPAs provides an exhaustive list of six (6) events to be considered as ‘Change in Law’. Further, the said events are required to fulfil following two conditions in terms of Article 12 of the PPAs for qualification as Change in Law:
- a. The event should have occurred after the Effective date.
 - b. The event should result into any additional recurring/ non-recurring expenditure by the Solar Power Developer (SPD) i.e. the Petitioner.
91. The Respondents have submitted that after the last hearing before the Commission, the Hon’ble Appellate Tribunal for Electricity by the Judgment dated 14.08.2018 in Appeal No. 111 of 2017 in *M/s. GMR Warora Energy Limited v. Central Electricity Regulatory Commission and Ors* has decided on interpretation of a similar ‘Change in Law’ provision as in the present PPA. The term 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 has been interpreted to include the taxes on inputs required for generation and supply of power to the Distribution Licensees. In the said decision the Hon’ble Tribunal has also held that the tax issues need to be considered under the sixth bullet only and it cannot fall under the first bullet if the sixth bullet does not have application. Further on the carrying cost aspect, it has been held that the same will be allowed only if there is a specific provision of restoration in the PPA and not otherwise.
92. The Respondents have submitted that it is a settled principle of ‘construction’ that a document of a contract must be read as a whole and the intention of the parties must be gathered from the language used in the contract. Such an intention could be gathered by the express terms of the contract or from the conduct and by the surrounding circumstances

incidental to such a contract. The cardinal principle is to ascertain intention of the parties to the contract through the words they have used which is key to open the mind of makers. The natural and ordinary sensible meaning to the language through which the parties have expressed themselves unless the meaning leads to absurdity, provides the guidance for finding out the intention of parties. The Respondent has placed its reliance on the judgment given by Hon'ble Supreme Court in *ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705.

93. The Respondents have submitted that the 'Change in Law' provision of the PPAs stands on a different footing in comparison to the provisions of Change in Law as incorporated in the Standard Bidding Document issued by Government of India as well as in other PPAs. In view of the fifth bullet of Article 12 of the Standard PPA dated November 2016, it emerges that the intention was to treat change in tax structure or introduction of any tax made applicable for setting up of the solar power project, in addition to the supply of power from the project as Change in Law. The Hon'ble Appellate Tribunal of Electricity (hereinafter referred to as 'Hon'ble Tribunal') vide its judgment on 13.4.2018 Appeal No. 210 of 2017 in *Adani Power Limited v Central Electricity Regulatory Commission and Others*, had examined the provisions of Article of the PPA relating to change in tax. It was held that 'Change in Law' provisions are applicable only if it results in any change with respect to any tax or surcharge or cess levied or similar charges by the Competent Government on water, primary fuel used by the generating plant, the generation of electricity (leviable on the final output in the form of energy) or sale of electricity. Thus, different versions of the PPAs cover different scopes. With regard to each PPA, the intention of parties should be gathered from the express language used in the contract. Therefore, if the words used in the PPA are clear and unambiguous, it would be difficult to gather their intention different from the language used in the agreement.
94. The Respondents have submitted that in 'Change in Law' provisions of PPA a deviation was consciously made and a separate provision in the form of sixth bullet was incorporated restricting the taxes, that is, made applicable for supplying power. Further, the sixth bullet in Article of the PPAs stating 'any change in tax or introduction of any tax' is circumscribed by the qualification contained in the said provision, namely, which is made applicable for 'supply of power' by the Seller as per the terms of this Agreement. Thus, every change in tax

or introduction of tax was not intended to be covered by the ‘Change in Law’ provisions of the PPAs. It cannot, therefore, be interpreted that the stipulation for ‘supply of power’ cannot be extended to other aspects such as taxes on input goods and services.

95. The Respondents have submitted that there was a valid reason to adopt such a course in the competitive bid process initiated by NTPC. It is obvious that the Procurers did not wish to get into tariff change on account of taxes on input goods and services to have certainty of tariff and limit the tax implications to sale of Power. The sanctity of such bidding process cannot be affected by considering changes in taxes etc. on aspects other than the ‘supply of power’. The Respondent has placed its reliance on various decisions of the Hon’ble Appellate Tribunal viz. *Adani Power Limited v. Central Electricity Regulatory Commission & Ors* in Appeal No. 210 of 2017 dated 13.04.2018; *Nabha Power Limited v. Punjab State Power Corporation Ltd* in Appeal No. 283 of 2015 dated 17.05.2018.

96. The Respondents have submitted that Article 12.1 – sixth bullet of the PPAs is specific and unambiguous. It applies only if the condition specified therein, of taxes being for ‘supply of power’ by the Seller under the PPAs, is satisfied. The term “for” used in sixth bullet needs to be given a meaning that naturally flows from the scheme under which the expression is used, namely ‘tax made applicable for supply of power’. The expression clearly confines within its scope the incidence of tax on the supply of power. The expression ‘for’ cannot be given a wider interpretation to cover taxes on input material and services. The use of the expression ‘For’ does not necessarily mean that it encompasses all activities relating to the generation of electricity prior to the sale of power. The natural meaning of the term ‘Taxes made applicable for supply of power’ is that it relates to taxes on the transaction for supply/ sale of power. It cannot include the taxes paid at different stages by different persons for supply of input material and services to the Petitioner. The Respondent has placed its reliance on the decisions of the House of Lords in *Sir W.J.R Cotton v Vogan and Company (Judgment dated 19.05.1896 by the House of Lords)*; *The Municipal Corporation, Tuticorin v T. Shanmuga Moopanan AIR 1926 Mad 219*; *C. Gangadharan v Alandur Municipality, represented by its Commissioner (1977) 2 MLJ 159*; *State of U.P v. Ramkrishan Burman, (1970) 1 SCC 80*. The Respondent has also placed its reliance on the decision of the Hon’ble Supreme Court in the following cases, where the expression – ‘tax for...’ was used: *Yesyem Arecanut Co. vs. State*

of Kerala – (2015) 14 SCC 367; V. Guruviah Naidu and Sons and Ors. v. State of Tamil Nadu and Ors. - (1977) 1 SCC 234.

97. The Respondents have submitted that qualifying expression ‘Supply of Power’ is used only in the sixth bullet and not in the first five bullets of Article 12.1 of the PPAs. The same is with the purpose namely when the change in law is considered for taxes, it should be confined to ‘supply of power’. In other words, expenditures incurred on account of taxes by reason of change in taxes is to be considered only on taxes related to supply of power and same should not be extended to all taxes at different stages prior to the transaction of supplying/ sale of power. The Respondent has submitted that the case law relied upon by the Petitioner are not squarely applicable to the facts and circumstances of the case.
98. The Respondents have submitted that the binding effect of a decision on a case has to be considered in light of the questions which arose for consideration in that decision. What is binding is the principle underlying the decision. In this regard the Respondent has placed its reliance on the following judgments *Delhi Administration (Now NCT of Delhi) v. Manohar Lal (2002) 7 SCC 222; Arnit Das vs. State of Bihar (2000) 5 SCC 488; Govt. of Karnataka v. Gowramma, (2007) 13 SCC 482.*
99. The Respondents have submitted that the alternate claim of the Petitioner that taxes which do not fall under the sixth bullet under Article 12.1 are to be considered as admissible under the first bullet under Article 12.1, is wrong and not sustainable. If the claim is accepted, then the incorporation of the sixth bullet is rendered redundant. There was no need to have a specific provision for tax for supply of power since taxes would be covered under ‘law’ in the first bullet. The Respondent has placed its reliance on *JSW Infrastructure Ltd. v. Kakinada Seaports Ltd., (2017) 4 SCC 170 and Life Insurance Corporation of India v. Dharam Vir Anand, (1998) 7 SCC 348.*
100. The Respondents have submitted that clause 6.2(4) of Tariff Policy 2016 dated 28.01.2016 does not provide for all taxes to be considered as ‘Change in Law’ irrespective of the provisions of the PPA. In fact, the Policy specifically recognizes that the treatment of ‘change in law’ is “unless provided otherwise in the PPA”. The PPA between various generators and

procurers has different provisions relating to 'Change in Law'. It cannot be held that despite such differing provisions, the treatment of various laws etc. should be treated identically.

101. The Respondents have submitted that the implications of 'GST Laws' referred to by the Petitioner relates to the setting up of the Solar Power Projects and not to the supply of power and the same is not covered under Article 12.1 of the PPAs. The PPAs executed by the Petitioner and the NTPC had specifically restricted the impact of Change in Law only to the change in taxes or introduction of any tax made applicable for the supply of power by the Solar Power Developers and did not extend to the tax on the setting up of the Solar Power Projects. If the tax is not in respect of supply of power but in respect of any purchase of inputs goods, equipment, plant, machinery etc. (input material for construction of the power plant), i.e. taxes etc. related to the setting up of the Power Project as distinguished from the sale of power generated, the same is not covered within the scope of Article 12.1 of the PPA and, therefore, the relief provided for in Article 12.2 of the PPA will have no application.

102. The Respondents have submitted that the contention of the Petitioner that Outsourcing of Operation and Maintenance (hereinafter referred to as 'O&M') expenditure is not prohibited under the PPA and is considered as a 'prudent industrial practice' is misconceived. It is submitted that the O&M is the responsibility of the Petitioner and in the event of Petitioner choosing to employ the services of other agencies, it cannot increase the liability of the NTPC in terms of tariff. The outsourcing of the O&M to a third party is not a requirement of the PPA and will be a commercial decision of the Petitioner for its own advantage and any increase in cost including on account of taxes etc. is entirely to the account of the Petitioner. The Respondent has placed its reliance on the decision of the Commission dated 16.03.2018 in Petition No. 1/MP/2017 in *GMR Warora Energy Limited v. Maharashtra State Electricity Distribution Company Limited and Ors.* wherein it has been held that any increase in cost of O&M expenditure on account of increase in service tax cannot be considered as Change in Law.

103. The Respondents have submitted that the contention of the Petitioner that it is entitled to carrying cost for the costs incurred due to 'Change in Law' events is misconceived. There is no provision in the PPA regarding carrying cost or interest for the period till the determination of the relief amount on account of 'Change in Law'. 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 after the amount has become crystalized, the Petitioner is required to raise 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 NTPC in not making payment within the due date of raising of the supplementary invoices based on the determination of the effect of change in law, the issue of Late Payment Surcharge would arise for the period after the due date. Without prejudice to the above it is further submitted that the PPA does not have a provision dealing with restitution principles of restoration to same economic position. Therefore, the Petitioner is not entitled to claim relief which is not provided for in the PPA. The Respondents have placed its reliance on the decision 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 Gujarat Bid-01 PPA has no provision for restoration to the same economic position, therefore the decision of allowing carrying cost will not be applicable. With regard to carrying cost, the law stands settled by the Judgment of the APTEL dated 14.08.2018 in Appeal No. 111 of 2017 in *M/s. GMR Warora Energy Limited v. Central Electricity Regulatory Commission and Ors*. The APTEL vide the above judgment has decided that if there is a provision in the PPA for restoration of the Seller to the same economic position as if no Change in Law event has occurred, the Seller is eligible for carrying cost for such allowed Change in Law event(s) from the effective date of Change in Law event until the same is allowed by the appropriate authority by an order/ judgment. In the present case, there is no provision in the PPA either for carrying cost or restitution.

Analysis and decision:

104. We have heard the learned counsels for the Petitioner and the Respondents and have carefully perused the records.
105. The Central Goods and Services Tax Act, 2017, The Integrated Goods and Services Tax Act, 2017 on 12.04.2017, The Rajasthan Goods and Services Tax Act, 2017, The Uttar Pradesh Goods and Services Tax Act, 2017 are hereinafter collectively referred as 'GST Laws'.

106. In Petition No. 50/MP/2018, the brief facts of the case are that on 10.03.2015, MNRE issued guidelines for implementation of Scheme for selection of 3000 MW Grid Connected Solar PV Power Projects under Phase-II, Batch-II, Tranche-I for “State Specific Bundling Scheme”. Under the “State Specific Bundling Scheme”, NSM provides for bundling of relatively expensive solar power with cheaper power from NTPC coal based stations out of the unallocated quota of the Government of India (Ministry of Power) in the ratio of 2:1 basis (2 MW of Solar Power with 1 MW of Thermal Power). NTPC invited proposals by RfS for setting up Grid Connected Solar-PV Power Projects (10 MW x 13 Projects) in the State of Rajasthan. PDPL was selected for setting up of such 2 Solar PV ground mount Projects at Village Kanasar, Tehsil Baap, District Jodhpur, in the State of Rajasthan. NTPC issued a LoI vide its Ref No. NTPC/NSM/TI/NSP-OPEN/RAJ-05/20MW/0027 for development of two (2) grid connected, Solar PV Projects of 10 MW capacity each in the State of Rajasthan. The PDPL entered into two PPAs with NTPC for setting up of 20 MW on 16.09.2016 for supply of power at a tariff of Rs. 4.36. However, the Effective date of PPA was 29.08.2016 and SCoD was 28.09.2017. Subsequent to the Effective Date i.e. 29.08.2016, the ‘GST laws’ were enacted on 01.07.2017. PDPL sent notice to NTPC on 15.07.2017 regarding the ‘Change in Law’ event that took place after applicability of GST *w.e.f.* 01.07.2017. PDPL successfully commissioned its two projects i.e. first 10 MW Project was commissioned on 29.09.2017 and thereafter, the second 10 MW Project was commissioned on 11.10.2017.

107. In Petition No. 52/MP/2018, the brief facts of the case are that SECI was appointed by the Government of India to purchase and sell solar photo-voltaic power through the Viability Gap Funding (“VGF”) mode under the Government of India’s National Solar Mission, Phase II, Batch III Bidding Guidelines (NSM Guidelines). The NSM Guidelines envisage providing VGF from the National Clean Energy Fund through SECI to the bidders selected through a transparent bidding process to procure solar power. NSM Guidelines envisage providing VGF from the National Clean Energy Fund through SECI to the bidders selected through a transparent bidding process to procure solar power. The NSM Guidelines contemplate the sale of 90% of power generated by a solar power developer to buying utilities within the state and the remaining 10% power outside the state. On 19.04.2016, SECI issued Request for Selection (RfS) SECI/JNNSM/P-2/B-3/RfS/UP/042016 for selection of solar power developers for the development of a cumulative capacity 315 MW in Uttar Pradesh Solar

Power Park. The Petitioner was selected as the successful bidder in respect of an aggregate capacity of 40 MWs of solar power and the PPA was executed on 21. 10.2016. On 01.07.2017, the Government of India enacted Integrated Goods and Services Tax Act, 2017, the Central Goods and Services Tax Act, 2017 and Government of Uttar Pradesh enacted the Uttar Pradesh Goods and Services Tax Act, 2017 and the Petitioner notified SECI of the promulgation of the GST Laws. However, the Petitioner has not received any response from SECI to its said letter.

108. Petitioners have submitted that before the 'Effective Date' under the PPA, the existing indirect tax regime provided for a complex tax environment due to multiplicity of taxes and elaborate compliance obligations. However, pursuant to the Effective Date, the new indirect taxation system was enacted namely 'GST' which represents a paradigm shift in the mode and levy of indirect taxes. In accordance to the 'GST laws', with effect from 01.07.2017, on Intra-State supplies of goods or services - CGST & SGST were to be levied by the Central and State Government respectively and on Inter -State supplies of goods or services - IGST was to be levied by the Central Government, at the rate prescribed from time to time. Petitioners have submitted that new slabs under 'GST laws' have led to an increase in the overall project cost. 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 PDPL (Petitioner in Petition No. 50/MP/2018) due to implementation of 'GST Laws' is about Rs. 4.59 Crores. On account of levy of 'GST Laws', the construction cost has escalated to the tune of Rs. 3.96 Crores and incremental impact on O&M Expenses to the tune of Rs. 62,43,000/-. The total escalation in cost of APVPL (Petitioner in Petition No. 52/MP/2018) due to implementation of 'GST Laws' is about Rs. 10.35 Crores. On account of levy of 'GST Laws', the construction cost has escalated to the tune of Rs. 6.50 Crores and incremental impact on O&M Expenses to the tune of Rs. 3.85 Crores.

109. The Petitioners have submitted that the fundamental philosophy behind the 'Change in Law' as contained in Article 12.1.1 is to ensure that additional recurring/ non-recurring expenditure by the Seller due to 'Change in Law' event is compensated through monthly Tariff Payment to the extent it restores the affected party to the same economic position as if such change in

law event had not occurred.

110. The Petitioners have placed its reliance on the Order dated 19.04.2017 pronounced by Appellate Tribunal for Electricity in *Sasan Power Limited v. Central Electricity Regulatory Commission* in Appeal No. 161 of 2015; Clause 6.2(4) of the Tariff Policy dated 28.01.2016 and Order of the Commission dated 21.08.2017 in its *suo-moto* Petition No. 13/SM/2017 wherein hearings have been initiated to facilitate the settlement of the dues arising on account of the introduction of GST Laws being events of Changes in Law under the respective PPAs. In view of above, the Petitioners have submitted that it may be allowed compensation that would be equivalent to the financial impact of the 'Changes in Law' on the costs and revenues so as to restore the Petitioners to the same economic condition prior to occurrence of the 'Changes in Law'.
111. **Per Contra**, Respondents have submitted that the Petition is not maintainable and is liable to be dismissed in limine, inter alia, since 'GST Laws' were notified as far back as 12.04.2017 and 28.04.2017, therefore, the Petitioners could have arranged its affairs in a manner to mitigate the effect of the increase in costs on account of the enactment of the 'GST Laws'. The Petitioners have not produced all the underlying invoices and material in support of Net incremental impact of GST thereof. In terms of Clause 6 of the Contract, the Modules (10 MW) were to be delivered at the Project Site by 30.06.2017 i.e. before the coming into effect of the 'GST Laws' on 01.07.2017. Therefore, the delay (if any) in the delivery or receipt of such modules and the consequential increase in the cost, cannot be passed on to the Respondent. The outsourcing of the O&M to a third party (if any) is not a requirement of the PPA and is a commercial decision of the Petitioners for its own advantage and any increase in cost including on account of taxes etc. is entirely to the account of the Petitioners. In terms of a quoted tariff under provisions of Section 63 of the Act, the Petitioners are required to include the cost of operation and maintenance in the levelled tariff quoted. The Petitioners have not furnished details regarding the original vendor/ original equipment manufacturer. A bare perusal of the select few invoices relating to Solar PV Modules furnished by the Petitioners indicates that the goods have been supplied through M/s Mundra Solar PV Limited. Therefore, petition filed for claiming 'Change in Law' is not maintainable. The mere production of a Comparative Chart demonstrating the impact of GST Regime on Petitioners Project cost without material particulars and basic relevant documents in support thereof

cannot be considered as sufficient to entertain the present petition and to analyse and decide the entitlement of the Petitioners to any relief under the Change in Law provisions contained in the PPAs.

112. Respondents have submitted that the 'Change in Law' provision contained in Article 12 of the PPAs is applicable only to any change in taxes or introduction of any new tax made applicable *'for supply of power by the SPDs as per the terms of this Agreement' (PPA)*. Sub clause of 12.1.1 providing for *'any change in tax or introduction of any tax'* is specifically circumscribed by the above qualification. This clearly shows that every change in tax or introduction of tax is not intended to be covered by the 'Change in Law' provisions of the PPA. There is a specific and additional condition that the impact of change in law should be on the supply of power by the Seller. Merely because the statutory levies or taxes may affect the financials of the project developer, it does not get covered under the 'Change in Law' within the meaning of the PPA or entitle the Petitioners to a revision in tariff. Respondents have submitted that the claim that taxes which do not fall under the sixth bullet under Article 12.1.1 are to be considered as admissible by virtue of first bullet under Article 12.1.1 is wrong and should be rejected. If such claims are considered, then the sixth bullet is rendered redundant. There was no need to have a specific provision for tax on supply of power since taxes would be covered under 'law' in the first bullet. The harmonious construction of the provisions would require some meaning and purpose to be given to the sixth bullet of Article 12.1.1 and the claims which are to be considered on account of statutory taxes etc. falls within the scope of sixth bullet. If the tax is not in respect of supply of power but in respect of any purchase of inputs goods, equipment, plant, machinery etc. (input material for construction of the power plant), i.e. taxes etc. related to the setting up of the Power Project as distinguished from the sale of power generated, the same is not covered within the scope of Article 12.1 of the PPA and, therefore, the relief provided for in Article 12.2 of the PPA will have no application.

113. Respondents have submitted that the Petitioners have also not placed before the Commission in a transparent manner, the taxes, duties and levies which stands withdrawn and no longer payable by reason of the introduction of the GST. Admittedly, there are number of taxes, duties, cess and levies which had been subsumed in the above taxes which came into force on

01.07.2017. The Petitioners are also required to place before the Commission the extent to which the Petitioner's project are subject to such taxes etc. existing prior to 01.07.2017 which have been subsumed in the 'GST Laws'. In the absence of proper particulars being placed by the Petitioners on the extent of taxes, levies, duties and cess etc. subsumed in the GST Laws, the Commission should dismiss the petition filed by the Petitioners. It is incumbent on the Petitioners to disclose in a transparent manner with regard to the increase or decrease in the taxes on net basis.

114. From the submissions of the parties, the following issues arise before this Commission:
115. **Issue No. 1:** *Whether the promulgation of the IGST Act, 2017, the CGST Act, 2017, the Rajasthan GST Act, 2017 and the UP GST Act, 2017 with effect from 01.07.2017 are covered under the scope of 'Change in Law' under Article 12 of the Power Purchase Agreements?*
116. **Issue No. 2:** *Whether there will be incremental impact in the cost of construction due to additional tax burden on the Engineering, Procurement and Construction (EPC) Cost on account of promulgation of the GST Laws?*
117. **Issue No. 3:** *Whether there will be incremental impact on the cost of project due to additional tax burden on operation and maintenance expenses on account of promulgation of the GST Laws, since the PPAs are for 25 years?*
118. **Issue No. 4:** *Whether the Petitioners should be restored 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 or any other way?*
119. The Petitioners have submitted that they are entitled to the 'Carrying Cost' for the costs incurred due to the 'Change in Law' events. They have argued that the Carrying Cost is the compensation for time value of money and is an inherent provision in the PPA which has a provision for recognition of 'Change in Law' event. However, the Respondents have submitted that there is no provision in the PPA regarding carrying cost or interest for the period till the determination of the relief amount on account of 'Change in Law'. We note that the Petitioner in Petition no. 50/MP/2018 has neither made any claim regarding 'Carrying Cost' in its petition nor has filed any amendment application for amending the prayers of the Petition to include 'carrying cost'. Therefore, this claim of the Petitioner is beyond the scope of the petition and the prayers. The Commission is of the view that the same cannot be entertained in Petition No. 50/MP/2018. However, in the Petition No. 52/MP/2018 the Petitioner has sought relief regarding 'Carrying Cost'. The Commission observes that the issue regarding 'Carrying Cost' has been argued before the Commission at great length in the eleven I.A.'s filed alongwith various other petitions (188/MP/2017 & Ors.). Therefore, the Commission is of the

view that the issue regarding 'Carrying Cost' will be dealt in the eleven I.A.'s filed alongwith various petitions (188/MP/2017 & Ors.) and accordingly the same will be applicable to the Petitioner in Petition No. 52/MP/2018. No other issue was pressed or claimed.

120. We may now discuss the issues one by one:

121. **Issue No. 1:** *Whether the promulgation of the IGST Act, 2017, the CGST Act, 2017, the Rajasthan GST Act, 2017 and the UP GST Act, 2017 with effect from 01.07.2017 are covered under the scope of 'Change in Law' under Article 12 of the Power Purchase Agreements?*

122. The Petitioners have submitted that the fundamental philosophy behind the 'Change in Law' is as contained in Article 12 of the Power Purchase Agreement to ensure that additional recurring/ non-recurring expenditure by the Seller due to 'Change in Law' event is compensated through monthly Tariff Payment to the extent it restores the affected party to the same economic position as if such change in law event had not occurred. The Petitioner has submitted that NTPC is trying to create an artificial distinction between change in law with respect to setting up of the power project *vis-a-vis* supply of power. The expression "supply of power" cannot only mean sale of power but everything that needs to be done for sale of power, i.e., from purchase of coal and other inputs, running the plant, producing electricity and then selling the same. In this regard, the Petitioner has placed its reliance on the Commission's Order dated 01.02.2017 in Petition No. 8/MP/2014 in case titled *EMCO Energy Ltd. Vs. MSEDCL & Ors.* The Order was upheld by the Appellate Tribunal for Electricity by its Judgment dated 19.04.2017 in Appeal No. 161 of 2015 reported as 2017 ELR (APTEL) 508. The Petitioner has submitted that the Change in Law provision of the PPA includes both *recurring and non-recurring* expenditure. Construction Cost being a non-recurring expenditure is thus covered by the Change in Law provision in the PPA. The petitioners have requested that the Commission should, taking a consistent view, allow the change in rate of tax in the present case as 'Change in Law' event. The Petitioner has placed its reliance on the decision of the Hon'ble Appellate Tribunal for Electricity in *Sasan Power Limited Vs. Central Electricity Regulatory Commission* 2017 ELR (APTEL) 508 wherein it has been held at para 43 that the Commission ought to take a consistent view, when deciding on compensation of Change in Law under similar PPA provisions.

123. **Per Contra**, Respondents have submitted that the ‘Change in Law’ provision contained in Article 12 of the PPAs is applicable only to any change in taxes or introduction of any new tax made applicable *‘for supply of power by the SPDs as per the terms of this Agreement’* (PPA). Sub clause of 12.1.1 providing for *‘any change in tax or introduction of any tax’* is specifically circumscribed by the above qualification. This clearly shows that every change in tax or introduction of tax is not intended to be covered by the ‘Change in Law’ provisions of the PPA. Respondents have submitted that the claim *“that taxes which do not fall under the sixth bullet are to be considered under first bullet of Article 12.1.1”* is wrong and should be rejected. If such claims are considered, then the sixth bullet is rendered redundant. There was no need to have a specific provision for tax on supply of power since taxes would be covered under ‘law’ in the first bullet. The harmonious construction of the provisions would require some meaning and purpose to be given to the sixth bullet of Article 12.1.1 and the claims which are to be considered on account of statutory taxes etc. falls within the scope of sixth bullet. The Respondent has submitted that the Appellate Tribunal for Electricity by the Judgment dated 14.08.2018 in Appeal No. 111 of 2017 in *M/s. GMR Warora Energy Limited v. Central Electricity Regulatory Commission and Ors* has decided on interpretation of ‘Change in Law’ provision similar to the present PPA. The term 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 has been interpreted to include the taxes on inputs required for generation and supply of power to the Distribution Licensees. In the said decision, the appellate Tribunal has also held that the tax issues need to be considered under the sixth bullet only and it cannot fall under the first bullet if the sixth bullet does not gave application. The Respondent has submitted that qualifying expression ‘Supply of Power’ is used only in the sixth bullet and not in the first five bullets of Article 12 of the PPAs. The same is with the purpose namely when the change in law is considered for taxes, it should be confined to ‘supply of power’. In other words, expenditures incurred on account of taxes by reason of change in taxes is to be considered only on taxes related to supply of power and same should not be extended to all taxes at different stages prior to the transaction of supplying/ sale of power. The Respondent has submitted that the case law relied upon by the Petitioner are not squarely applicable to the facts and circumstances of the case.

124. Article 12 of the Power Purchase Agreement stipulates as under:

“12. ARTICLE 12: CHANGE IN LAW

12.1 Definitions

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

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

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

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

12.2 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.”

125. The Commission observes that as per Article 12, ‘Change in Law’ means the enactment/ adoption/ promulgation/ amendment/ modification or repeal of any Law in India; Change in the interpretation of any Law in India; Imposition of a requirement for obtaining any consents

or Change in tax or introduction of any tax made applicable for supply of power by the SPD as per the terms of this Agreement, resulting into any additional recurring/ non-recurring expenditure or any income to the SPD. The Commission is of the opinion that harmonious construction of the bullet points under Article 12 makes it clear that bullet point one is wider in scope and refers to the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal of any Law in India, including rules and regulations framed pursuant to such Law whereas bullet point sixth in seriatim refers specifically to any change in tax or introduction of any tax made applicable for 'supply of power' by the SPD as per the terms of Agreement. It implies that bullet point sixth in seriatim would be applicable as 'Change in Law' to the cases where the change in tax or introduction of any tax directly impacts 'supply of power' only. Thus, the ambit of the sixth bullet point is limited in that if any change in Tax is made or any tax is introduced having its impact specifically on the 'supply of power' in that case the remedy of 'Change in Law' is available to the Petitioners under bullet point number six only. Clearly, the 'GST laws' enacted are not in the nature of a mere change in the tax having limited applicability on supply of power rather it is in the nature of an enactment having wide ranging implication on the entire indirect taxation regime in India. It is a comprehensive indirect tax reform which created a common national market by dismantling inter-State trade barriers. Various laws were subsumed and repealed. Hence, the Commission holds that the enactment of 'GST laws' is covered as 'Change in Law' under the first bullet of Article 12 of the PPA.

126. **Issue No. 2:** *Whether there will be incremental impact in the cost of construction due to additional tax burden on the Engineering, Procurement and Construction (EPC) Cost on account of promulgation of the GST Laws?*

AND

Issue No. 3: *Whether there will be incremental impact on the cost of project due to additional tax burden on operation and maintenance expenses on account of promulgation of the GST Laws, since the PPAs are for 25 years?*

127. Issue no. 2 and Issue no. 3 are interrelated and hence they are being taken together for discussions. The Petitioners submitted that new slabs under 'GST laws' have led to an increase in the overall project cost. The change of tax regime has escalated the capital cost of the Petitioners' project, hence making the tariff quoted at the time of bid for allocation of

project unviable. The total escalation in cost of Petitioners due to implementation of GST is about few Crores. Both the cost of construction and the 'Operation & Maintenance' Expenses has escalated. 'O & M' expenses which they are going to incur in next 25 years of PPA tenure has been worked on the basis of relevant normative parameters as specified by the Commission in the CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations which provide for O&M expenses for the year 2017-18 at Rs. 7.41 Lakhs/ MW (including) Service Tax of 15%, with an annual escalation of 5.85%. The Petitioners have submitted that as per Order dated 21.08.2017 in Petition No. 13/SM/2017, the Commission has initiated to facilitate the settlement of the dues arising on account of the introduction of 'GST Laws' considered as events of 'Changes in Law' under the respective PPAs. In view of above, the Petitioners have submitted that they may be allowed compensation that would be equivalent to the financial impact of the 'Changes in Law' on the costs and revenues so as to restore the Petitioners to the same economic condition prior to occurrence of the 'Changes in Law'.

128. **Per Contra**, Respondents have submitted that the Petitioners have not placed before the Commission in a transparent manner the taxes, duties and levies which stand withdrawn and no longer payable by reason of the introduction of the GST. There are a number of taxes, duties, cess and levies which had been subsumed in the above Taxes which came into force on 01.07.2017. The Petitioners are required to place before the Commission the extent to which the Petitioners' projects are subject to such taxes etc. prior to 01.07.2017 which have been subsumed in the 'GST Laws'. It is incumbent on the Petitioners to disclose in a transparent manner the increase or decrease in the taxes on net basis.

129. Respondents have further submitted that the Petition is not maintainable and is liable to be dismissed in limine, since the Petitioners have claimed the compensation without producing all the underlying invoices and material in support thereof. Petitioners are claiming costs under the head 'expected GST Impact' without substantiating the same. The documents are inadequate to consider the issues of 'Change in Law'. The Petitioners have only produced the purchase order, invoices etc. in respect of one or two components like Solar PV modules, to the exclusion of other items such as mounting structure, inverter, transformers etc. Further, as per the clause 6 of the contract executed between one of the Petitioners (PDPL) and supplier, the Modules pertaining to 10 MW capacities were to be delivered at the Project Site by

30.06.2017 i.e. before coming into effect of the 'GST Laws' on 01.07.2017. Therefore, the delay (if any) in the delivery or receipt of such modules and the consequential increase in the cost, cannot be passed on to the Respondents since the transaction was envisaged to be done prior to the coming into force of the 'GST Laws'. 'GST Laws' were notified as far back as 12.04.2017 and 28.04.2017 and therefore, the Petitioners were aware of the promulgation of the GST Laws and could have arranged its affairs in a manner to mitigate the effect of the increase in costs on account of the enactment of the GST Laws. The details and documents filed by the Petitioners are inadequate to consider the issues of Change in Law. For appropriate consideration of Change in Law, the relevant details and documents include but are not limited to the following, namely (i) the date on which the Purchase order was placed either for procurement of goods or for procurement of services; (ii) the date on which the goods were delivered to the Petitioners or the services were rendered and; (iii) the date on which the invoices were raised; (iv) the date on which the payment for the goods or services were made by the Petitioners and (v) In case of imported goods, the date on which the goods were custom cleared either for own consumption or to be stored in the custom warehouse. There are no details regarding the original vendor/original equipment manufacturer.

130. Further, 'Operation and Maintenance' is the responsibility of the Petitioners and in the event the Petitioners choose to employ the services of other agencies, it cannot increase the liability of the Respondents in terms of tariff. The outsourcing of the O&M Expenses to a third party (if any) is not a requirement of the PPA and is a commercial decision of the Petitioners for its own advantage and any increase in cost including on account of taxes etc. is entirely to the account of the Petitioners. In terms of a tariff quoted under Section 63 of the Act, the Petitioners are required to include the cost of 'Operation and Maintenance' in the Levelled tariff quoted. Hence, the petition may be dismissed.

131. The Commission, in its Order dated 14.03.2018 in Petition No. 13/SM/2017 has decided the following as regards settlement of dues arising on account of the introduction of GST under the respective PPAs:

"35. Accordingly, we direct the beneficiaries/ procurers to pay the GST compensation cess @ Rs 400/ MT to the generating companies w.e.f 01.07.2017 on the basis of the auditors certificate regarding the actual coal consumed for supply of power to the beneficiaries on basis of Para 28 and 31. In order to

balance the interests of the generators as well as discoms/beneficiary States, the introduction of GST and subsuming/abolition of specific taxes, duties, cess etc. in the GST is in the nature of change in law events. We direct that the details thereof should be worked out between generators and discoms/beneficiary States. The generators should furnish the requisite details backed by audit or certificate and relevant documents to the discoms/ beneficiary State s in this regard and refund the amount which is payable to the Discoms/ Beneficiaries as a result of subsuming of various indirect taxes in the Central and State GST. In case of any dispute on any of the taxes, duties and cess, the respondents have liberty to approach this Commission.”

132. The Commission observes that ‘GST Laws’ became effective from 01.07.2017. ‘GST Laws’ provide for a tax slab (previously exempted) of 5% to 28% with respect to Goods & Services required for execution, construction and operation of Solar Projects w.e.f. 01.07.2017. The ‘Goods and Services’ in the context of the present petitions can be broadly categorized under the following two heads:

- a) EPC Stage i.e. Construction Stage which is covered under ‘Goods’ and
- b) O & M Stage i.e. Post Construction Stage which is covered under ‘Services’.

133. We will first discuss the impact of ‘GST laws’ on the Engineering, Procurement and Construction (hereinafter referred to as ‘EPC’) Stage. EPC stage can be also construed broadly to be ‘Construction Stage’ which is covered under Goods under ‘GST Laws’. ‘GST Laws’ came into effect from 01.07.2017 and accordingly, the Commission is of the view that the GST in the context of the present petitions is applicable on all cases except in case of the generating company where ‘Scheduled date of Commissioning’ or ‘the actual date of Commissioning’ as per the respective PPA is prior to 01.07.2017. It is pertinent to note that under ‘GST Laws’ it has been provided that *“If point of taxation of Goods/Services before the GST implementation then it will be taxed under earlier law. GST will not be applicable. Any portion of any supply whose point of taxation is after GST implementation will be taxed under GST. The time of goods/supply of services shall be the earlier of the:- (a) The date of issuing invoice (or the last day by which invoice should have been issued) OR (b) The date of receipt of payment - whichever is earlier.”* A plain reading of the above implies that according to ‘GST Laws’, in cases where the invoice is raised or consideration for the goods/ supply of services have been received before 01.07.2017 and the tax has already been paid

under the earlier law, the GST will not be applicable in such cases. It is immaterial whether the consideration for supply has been paid fully or partly. The Petitioners have claimed that on account of levy of ‘GST Laws’, the construction cost of project has escalated to the tune of few crores. The Petitioners have also given the description of the levy of ‘GST laws’ on each component. The Commission is of the view that there has to be a clear and one to one correlation between the projects, the supply of goods or services and the invoices raised by the supplier of goods and services. Accordingly, the Commission directs the parties to reconcile the accounts as per discussion above.

134. The Commission observes that in the instant petition, the tariff has been discovered under transparent e-bidding process in accordance with the NSM guidelines issued by the Central Government. In the Competitive Bidding Scenario, the SPDs bid levelled tariff without disclosing the details of the calculations of the project cost including capital expenditure. The component wise details of the capital employed are not required to be declared by the bidders. The design of the bid levelled tariff is solely a decision of the SPDs.

135. The Petitioners have submitted the details of components on which the GST has been levied leading to escalation in the construction cost of the project. The same are tabulated as under:

In Petition No. 50/MP/2018:

	Component	Previous Tax (%)	IGST/ CGST Tax (%)	State GST (%)	Incremental impact on cost of Project (Rs.)
1	PV Module	0	2.5	2.5	1,42,06,368/-
2	Mounting Structure & Nut-Bolts; Clamp & Fasteners	0	9	9	92,00,440/-
3	Inverter Transformer	2	9	9	16,19,043/-
4	Switchgear	2	9	9	4,42,528/-
5	Cables	2	14	14	17,60,224/-
6	Transmission - Supply + Service including all taxes, duties, freight etc.	15	9	9	27,12,945/-
7	Programmable Logic Controller (PLC), (SCADA) System	0	9	9	91,025/-
8	Connectors	0	9	9	15,554/-
9	Miscellaneous Electrical	0	9	9	11,89,546/-
10	DC Battery & Battery Charger	0	9	9	29,380/-
11	Logistics Services	0	2.5	2.5	6,30,657/-

	(Inland transportation and Customs House Agent charges)				
12	Mounting Structure Foundation	15	9	9	34,05,535/-
13	Erection of Module Mounting Structures (MMS) and Module	15	9	9	1,33,950/-
14	Balance of Plant (BOP) – Civil	15	9	9	16,23,167/-
15	Roads & Drainage	15	9	9	7,14,283/-
16	Fencing Work (chain link)	15	9	9	10,38,936/-
17	Electrical Erection	15	9	9	2,76,941/-
18	Preoperative & Other Indirects	15	9	9	4,81,885/-
19	Safety	15	9	9	14,533/-
20	Security	15	9	9	32,742/-
21	IT Services	15	9	9	22,416/-

In Petition No. 52/MP/2018:

	Component	CST (%)	IGST/CGST Tax (%)	State GST (%)	Incremental impact on cost of Project (Rs.)
1	PV Module	0	2.5	2.5	6,09,12,170
2	Inverter Transformer	0	2.5	2.5	53,56,968
3	Mounting Structure	2	2.5	2.5	51,93,967
4	Transmission – Line	2	2.5	2.5	7,05,746
5	AC – Cable	2	2.5	2.5	6,52,186
6	DC - Cable	2	2.5	2.5	6,86,913
7	AC – Electric Material	2	2.5	2.5	48,77,237
8	DC – Electric Material	2	2.5	2.5	5,80,612
9	Combiner Box	2	2.5	2.5	2,67,468
10	Connectors	2	2.5	2.5	18,514
11	BOS (SCADA, OFC Misc.)	2	2.5	2.5	1,05,862
12	EPC Services	15	2.5	2.5	-91,50,435
13	EPC Civil	11	2.5	2.5	-51,66,521
	Total				6,5040,687

136. It is apparent from the above that there is a wide variation in the claim of compensation by the Petitioners due to ‘GST laws’ on the account of ‘Previous Tax’ being levied on the components. It is observed that different taxes were levied by different States prior to promulgation of the GST. It is also observed that the Petitioners have claimed different taxes to be levied under the ‘GST Laws’ on the components post enactment i.e. 01.07.2017. According, to the Petitioner M/s Azure Power Venus Private Limited in Petition No. 52/MP/2018, the maximum ‘GST’ levied is 5% (2.5% + 2.5%) in comparison to 18% (9% +

9%) being claimed by Petitioner M/s Prayatna Developers Private Ltd. in Petition No. 50/MP/2018.

137. The Commission observes that prior to the introduction of Goods & Service Tax Act (GST), the components were taxed at the time of production (Excise) and at the time of Sale (VAT). For sale of components between two States, CST was applicable. Moreover, for projects executed within certain Municipal Corporation limits, additional Octroi was applicable to the components. As per Goods And Service Tax (GST), *Concept & Status*, published by Central Board Of Indirect Taxes And Customs, Department Of Revenue, Ministry Of Finance, Government Of India, as on 1st August, 2018, the list of the taxes subsumed in the GST, 2017 is as under:

“10.21 Subsuming of taxes, duties etc.: Among the taxes and duties levied and collected by the Union, Central Excise duty, Duties of Excise (Medicinal and Toilet Preparations), Additional Duties of Excise (Goods of Special Importance), Additional Duties of Excise (Textiles and Textile Products), Additional Duties of Customs (commonly known as CVD), Special Additional Duty of Customs (SAD), Service Tax and cesses and surcharges insofar as they related to supply of goods or services were subsumed. As far as taxes levied and collected by States are concerned, State VAT, Central Sales Tax, Purchase Tax, Luxury Tax, Entry Tax, Entertainment Tax (except those levied by the local bodies), Taxes on advertisements, Taxes on lotteries, betting and gambling, cesses and surcharges insofar as they related to supply of goods or services were subsumed.”

138. The Commission observes that with the enactment of Central Goods and Services Tax Act, 2017, the following Acts were repealed by the Central Government of India:

- i) *the Central Excise Act, 1944 (except as respects goods included in entry 84 of the Union List of the Seventh Schedule to the Constitution),*
- ii) *the Medicinal and Toilet Preparations (Excise Duties) Act, 1955,*
- iii) *the Additional Duties of Excise (Goods of Special Importance) Act, 1957,*
- iv) *the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978, and*
- v) *the Central Excise Tariff Act, 1985*

139. The Central Excise Tariff Act, 1985 (5 of 1986) and Exemption Notifications (other than general) the ‘General Exemption No. 64’ stipulates as under:

“GENERAL EXEMPTION NO. 64

Exemption on all items of machinery, including prime movers, instruments, apparatus and appliances, control gear and transmission equipment and auxiliary equipment and components, required for initial setting up of a solar power generation project or facility.

[Notifn. no. 15/2010-CE., dt. 27.2.2010 as amended by 26/12, 15/14]

In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944(1 of 1944), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts all items of machinery, including prime movers, instruments, apparatus and appliances, control gear and transmission equipment and auxiliary equipment (including those required for testing and quality control) and components, required for initial setting up of a solar power generation or solar energy production project or facility, from the whole of the duty of excise leviable thereon which is specified in the First schedule to the Central Excise Tariff Act, 1985 (5 of 1986), subject to the following conditions, namely:-

(1) that an officer not below the rank of a Deputy Secretary to the Government of India, in the Ministry of New and Renewable Energy recommends the grant of this exemption, indicating the quantity, description and specification of the goods and certifies that they are required for initial setting up of a solar power generation or solar energy production project or facility, as the case may be; and

(2) the Chief Executive Officer of the project furnishes an undertaking to the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, having jurisdiction over the factory of the manufacturer, to the effect that-

*(i) the said goods will be used only in the said project and not for any other use; and
(ii) in the event of non-compliance of sub-clause (i), the Project Developer of such project shall pay the duty which would have been leviable at the time of clearance of goods, but for this exemption.”*

140. The Commission observes that with the enactment of the Rajasthan Goods and Services Tax, 2017, the following Acts were repealed by the State government of Rajasthan:

- i) the Rajasthan Value Added Tax Act, 2003(Act No. 4 of 2003), except in respect of goods included in the Entry 54 of the State List of the Seventh Schedule to the Constitution;*
- ii) the Rajasthan Entertainments and Advertisements Tax Act, 1957 (Act No. 24 of 1957);*
- iii) the Rajasthan Tax on Entry of Motor Vehicles into Local Areas Act, 1988 (Act No. 14 of 1988);*
- iv) the Rajasthan Tax on Luxuries (in Hotels and Lodging Houses) Act, 1990 (Act No. 9 of 1996);*
- v) the Rajasthan Tax on Luxuries (Tobacco and its Products) Act, 1994 (Act No. 11 of 1994); and*
- vi) the Rajasthan Tax on Entry of Goods into Local Areas Act, 1999 (Act No. 13 of 1999)*

141. Similarly, the Commission observes that with the enactment of the Uttar Pradesh Goods and Services Tax, 2017, the following Acts were repealed by the State government of Uttar Pradesh:

- i) *The Uttar Pradesh Value Added Tax Act, 2008, except in respect of goods included in the Entry 54 of the State List of the Seventh Schedule to the Constitution*
- ii) *The Uttar Pradesh Tax on Entry of goods into local areas Act, 2007*
- iii) *The Uttar Pradesh Entertainment and Betting Tax Act, 1979*
- iv) *The Uttar Pradesh Advertisements Tax Act, 1981*
- v) *The United Provinces Sales of Motor Spirit, Diesel Oil and Alcohol Taxation Act, 1939.*
- vi) *The Uttar Pradesh Sugarcane (Purchase Tax) Act, 1961*

142. The Commission observes that as per (i) Notification No.1/2017-Central Tax (Rate) G.S.R. 673 (E) dated 28th June, 2017; (ii) amendment as per G.S.R. 1387 (E) dated 14th November, 2017 published by Department of Revenue, Ministry Of Finance Government Of India; (iii) The Central Excise Tariff Act, 1985 (5 of 1986) and Exemption Notifications (other than general) ; (iv) The Rajasthan Value Added Tax Act, 2003 (as amended) and (v) The Uttar Pradesh Value Added Tax Act, 2008 (as Amended by notification no 292 dated March 12th, 2015), the taxes (i.e. pre-GST) and GST rates as applicable are given as under:-

	Component	Pre GST			Schedule	GST		
		Rajast. Tax etc. (%)	UP Tax etc. (%)	CEN Tax etc. (%)		Chapter/ Heading/ Sub Heading/ Tariff Item	IGST/ CGST (%)	SGST (%)
1	PV Module	0	4	0	I	84 or 85	2.5	2.5
2	Mounting Structure & Nut-Bolts; Clamp & Fasteners	5	4	5 (2% against the 'C' Form)	III	7308/ 7610	9	9
3	Inverter Transformer	14	4	5 (2% against the 'C' Form)	III	8504/ 8506	9	9
4	Switchgear	5	4	5 (2% against the 'C' Form)	III	9801	9	9
5	Cables	5	4	5 (2% against the 'C' Form)	III	7312/7413/ 7614/ 8544/9001	9	9

6	Transmission - Supply + Service including all taxes, duties, freight etc.	15 (service tax)+0.5 (swach Bharat Cess) +0.5 (Krishi Kalayan Cess)			III	8525/ 8527/ 8528	9	9		
7	Programmable Logic Controller (PLC), (SCADA) System	5	4	5 (2% against the 'C' Form)	III	8537	9	9		
8	Connectors	5	4	5 (2% against the 'C' Form)	III	8535	9	9		
9	Miscellaneous Electrical	5	4	5 (2% against the 'C' Form)	III		9	9		
10	DC Battery & Battery Charger	14	4	5 (2% against the 'C' Form)	III	8506/8548	9	9		
11	Logistics Services (Inland transportation and Customs House Agent charges)	15 (service tax)+0.5 (swach Bharat Cess) +0.5 (Krishi Kalayan Cess)				Goods Transport Agency	2.5	2.5		
12	Mounting Structure Foundation	14	4	5 (2% against the 'C' Form)	IV	6810	14	14		
13	Erection of Module Mounting Structures (MMS) and Module	15 (service tax)+0.5 (swach Bharat Cess) +0.5 (Krishi Kalayan Cess)			III	7415/7318/ 6810/7308/ 7610	9	9		
14	Balance of Plant (BOP) – Civil	5	4	5 (2% against the 'C' Form)	III	9954	9	9		
15	Roads & Drainage	15 (service tax)+0.5 (swach Bharat Cess) +0.5 (Krishi Kalayan Cess)			III	8530	9	9		
16	Fencing Work (chain link)	5	4	5 (2% against the 'C' Form)	III	7313	9	9		
17	Electrical Erection	15 (service tax)+0.5 (swach Bharat Cess) +0.5 (Krishi Kalayan Cess)			III	6810	9	9		
18	Pre-operative & Other Indirects								9	9
19	Safety				III	8536	9	9		
20	Security				III	8531	9	9		
21	IT Services								9	9

143. It is apparent from above that GST rates are ranging from 5% to 18%. In case of PV Modules, the applicable GST is 5%, as against 0% VAT applicable in various States pre-GST roll out. Excise duty on components required for initial setting up of a solar power generation or solar energy production project or facility was at 'Zero' rate and also enjoyed concessional Basic Customs Duty and Additional Customs Duty on imports. The imposition of VAT on solar power generating equipment has been diverse with State of Rajasthan offering complete exemption while on the other hand, the State of Uttar Pradesh has levied a concessional rate of tax at 4% (four per cent) on the equipment and components use for setting up of solar power generating equipment. The GST rate on solar power generating systems and raw material used (including modules), has been notified at 5% (five per cent) of value of such goods. However, other goods such as inverter, cement and cables have been kept under the 18% (eighteen per cent) bracket. Further, the GST on various services such as works contract service, technology etc. which are typically used in setting up of a solar power plant has been kept at 18% (eighteen per cent). It is pertinent to mention here that Services, Commercial, Contractual, Erection and Commissioning, all attracted Service Tax @15%, Swachh Bharat Cess of 0.5% and Krishi Kalyan Cess of 0.5%.

144. The Commission observes that as per Notification No. 1/2017-Central Tax (Rate) as contained at Sr. No. 234 Chapter heading 84, 85 or 94 the "*renewable energy devices & parts for the manufacture (C) Solar Power Generation System*" the concessional rate of 5% would also be available i.e. say inverters, cables, connectors etc. are under 28 per cent duty but whenever these products are used in the solar generation system, these will attract an effective levy of 5 per cent instead of 28 per cent. Further, in the case of the direct purchase of the mounting structures, power conditioning units etc. are under 18 per cent duty but in case these components are sold as part of Solar Power Generating system then the same will attract an effective levy of 5 per cent instead of 18 per cent. This fact gathers support from the pleadings of the Petitioner M/s Azure Power Venus Private Limited in Petition No. 52/MP/2018 who has claimed the maximum 'GST' levied at 5% (2.5% + 2.5%) in comparison to 18% (9% + 9%) being claimed by Petitioner M/s Prayatna Developers Private Ltd. in Petition No. 50/MP/2018. To suffice the claim, M/s Azure Power Venus Private

Limited has also submitted the bills regarding 'Balance of Plant-Civil' and 'Cables' at page 210 and 212 respectively in its petition.

145. With the above facts in mind, the Commission now proceeds to determine the impact of GST on the projects under consideration in the present petitions. As regards the component wise details of the project and respective percentage share of each such component in the overall capital cost, the Commission observes that in the absence of any related references in the projects selected through bidding, reliance could be placed on the Commission's Order dated 23.03.2016 passed in Petition No. 17/SM/2015 for the purpose of determining 'weightage of the Components of Capital cost' and the percentage impact of the taxation due to enactment of 'GST Laws' on the various components may be calculated accordingly. The calculations for the escalation as based on Petition no. 17/SM/2015 are tabulated as below:-

Particulars	Weightage of Component of Capital Cost As taken in Petition No. 17/SM/2015	50/MP/2018 Rajasthan		52/MP/2018 Uttar Pradesh		Comments	
		Previous Tax (pre 01.07.17)	GST (post 01.07.17)	Previous Tax (pre 01.07.17)	GST (post 01.07.17)	Previous Tax	GST
PV Modules	61.96 %	0 %	5 %	4 %	5 %		
Land Cost	4.72 %	0 %	0 %	0 %	0 %		
Civil and General Works (Balance of Plant-Civil; EPC-Civil; Roads & Drainage; Fencing Work)	6.60 %	15 %	18 %	15 %	5 %	Service Tax at 15%	GST at 18% ; However, in Petition No. 52/MP/2018 the Petitioner has claimed 5%.
Mounting Structures (Mounting Structure & Nut-Bolts; Clamp & Fasteners; Mounting Structure Foundation)	6.60 %	2 %	5 %	2 %	5 %	CST of 2% was charged on inter state procurements. In case	The GST rate GST at 18% (SGST-9% + CGST-9%) in

						of import the effective rate would be 0% MNRE certificate and high sea sale by EPC company	case of direct purchase. In case the structures are sold as part of Solar power generating system then 5% GST is applicable
Power Conditioning Unit (Inverter Transformer; DC Battery & Battery Charger)	6.60 %	0 %	5 %	0 %	5 %	Basis MNRE Certificate leading to 0% effective tax rate	The GST rate GST at 18% (SGST-9% + CGST-9%) in case of direct purchase. In case the structures are sold as part of Solar power generating system then 5% GST is applicable
Evacuation Cost up to Interconnection Point (AC/DC Cables; Switchgears; Programmable Logic Controller (PLC), (SCADA) System; Connectors; Transmission line; AC/DC- Electrical Materials; Combiner Box; Connectors; Misc. Electricals)	8.30 %	2 %	5 %	2 %	5 %	CST of 2% was charged on inter state procurements	Post GST sold as part of Solar power generating system hence 5% GST
Preliminary and Pre-Operative Expenses including IDC and Contingency (Transmission Services; Logistic Services; Erection of MMS and Module; Electrical	5.21 %	15 %	18 %	15 %	5 %	Service Tax at 15%	GST at 18% ; However, in Petition No. 52/MP/2018 the Petitioner has

Erection; Pre-Op & other indirects; Safety; Security and IT services; EPC-Services)							claimed 5%.
	Weighted Avg. of Tax/GST	2.07 %	6.30 %	4.55 %	4.76 %		
	Difference		4.23%		0.22 %		

It is pertinent to mention here that as per Entry No. 108 of the Schedule –II of The Uttar Pradesh Value Added Tax Act, 2008 (as Amended by notification no 292 dated March 12th, 2015) the ‘Renewable energy devices & Spares Parts’ attracted an effective levy of 4 per cent.

146. Therefore, the Commission directs that the Petitioners have to exhibit clear and one to one correlation between the projects, the supply of goods or services and the invoices raised by the supplier of goods and services backed by auditor certificate. The certification should include ‘*Certified that all the norms as per ‘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 and post ‘GST regime’.*’ The Petitioners should then make available to the Respondents, the relevant documents along with the auditor certification who may reconcile the claim and then pay the amount so claimed to the SPD w.e.f. 01.07.2017 qua EPC cost on the basis of the auditor’s certificate as per the methodology discussed in para no. 133 above.

147. The next issue is that of the impact of ‘GST laws’ on the ‘Operations and Maintenance’ (hereinafter referred to as “O & M”) stage. 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’. It is the case of the Petitioners that the concept of the ‘O & M’ expenses is implicitly covered under Article 12. As per the PPA, Clause 12.1.1 stipulates that “*Change in Law means the occurrence of any of the following events after the Effective Date resulting into any additional recurring/ non-recurring expenditure by the SPD or any income to the SPD*”. As ‘O & M’ expenses are recurring in nature, therefore the same are squarely covered under Article 12 of the PPA and the same may be allowed. The Petitioners have submitted that O & M expenses being claimed are on the principles of normative parameters

(escalation 5.85%) as specified by the Commission in the CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012 dated 06.02.2012 as amended on 31.03.2016.

148. The Commission observes that as per the GST Act, 2017, the supply of services include:

“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.”*

149. The Commission is of the view that the recurring expenses referred to in Article 12 of the PPA includes activities like salary, tax expenses, estimated maintenance costs, and monthly income from leases etc. It is apparent that GST will apply in case of outsourcing of the ‘Operation and Maintenance’ services to a third party (if any). However, outsourcing of the

‘Operation and Maintenance’ services is not the requirement of the PPA/ bidding documents. The concept of the outsourcing is neither included expressly in the PPA nor it is included implicitly in the Article 12 of the PPA. It is a pure commercial decision of the Petitioners taken for its own advantage and any increase in cost including on account of taxes etc. in the event the Petitioners choose to employ the services of other agencies, cannot increase the liability for the Respondents. Therefore, the Commission holds that claim of the Petitioners on account of additional tax burden on operation and maintenance expenses (if any), is not maintainable.

150. **Issue no. 4:** *Whether the Petitioners should be restored 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 or any other way?*

151. The Petitioners have submitted that they should be restored 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. It has already been discussed that in the present petitions, the tariff has been discovered under transparent e-bidding process in accordance with the NSM guidelines issued by the Central Government. The Commission is of the view that the basic tariff should not be altered. Also in view of the fact that the quantum of payment is not large, the relief, if any, for ‘Change in Law’ should be allowed as a separate element on one time basis in a time bound manner. The Petitioners shall raise its claim based on discussions in paragraph 146 of this Order and the same shall be paid by the Respondents within sixty days of the date of this Order failing which it will attract late payment surcharge as provided under PPA.

152. To sum up the:

a. **Issue No. 1:** The enactment of ‘GST laws’ is covered as ‘Change in Law’ under Article 12 of the PPA.

b. **Issue No. 2 & 3:** As regards its claim during construction period, the Petitioners have to exhibit clear and one to one correlation between the projects, the supply of goods or services and the invoices raised by the supplier of goods and services backed by auditor

certificate. The claim of the Petitioners on account of additional tax burden on 'O&M' expenses (if any), is not maintainable.

- c. **Issue No. 4:** The relief for 'Change in Law' is allowed as a separate element on one time basis in a time bound manner.

153. Accordingly, the Petitions are disposed of.

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