



नई दिल्ली
NEW DELHI

याचिका संख्या./ Petition No.: 293/MP/2018
294/MP/2018
150/MP/2019
471/MP/2019 alongwith IA 60/2020

कोरम/ Coram:

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

आदेश दिनांक/ Date of Order: 30th of November, 2022

IN THE MATTER OF PETITION No. 293/MP/2018:

Petition under Section 79 of the Electricity Act, 2003 and Article 12 read with Article 16.3.1 of the Power Purchase Agreements executed by the Petitioner and NTPC Limited dated 19.04.2016 seeking relief on account of a 'Change in Law' viz. the introduction of Goods and Services Tax laws at the Central level and change in the rate of Service Tax, resulting in additional recurring expenditure in the form of an additional tax burden to be borne by the Petitioner after the Effective Date of the Power Purchase Agreements.

AND IN THE MATTER OF

Azure Power India Private Limited
Asset No.301-4,
World Mark 3, Aerocity, New
Delhi -110037

...Petitioner

Versus

1. NTPC Limited
Core-7, SCOPE Complex,
7 Institutional Area, Lodi Road,
New Delhi – 110003.

2. NTPC Vidyut Vyapar Nigam Limited
NTPC Bhawan, Core 7, SCOPE Complex,
7 Institutional Area, Lodhi Road,
New Delhi - 110 003

3. Andhra Pradesh Eastern Power Distribution Company
Waltair Station, Approach Road,
Dolphin Area, Allipuram,
Vishakhapatnam,
Andhra Pradesh- 530050

...Respondents

IN THE MATTER OF PETITION No. 294/MP/2018:

Petition under Section 79 of the Electricity Act, 2003 and Article 12 read with Article 16.3.1 of the Power Purchase Agreement executed by the Petitioner and Solar Energy Corporation of India Limited dated 14.10.2015 seeking relief on account of a 'Change in Law' viz. the introduction of Goods and Services Tax laws at the Central level and change in the rate of Service Tax, resulting in additional recurring expenditure in the form of an additional tax burden to be borne by the Petitioner after the Effective Date of the Power Purchase Agreement.

AND IN THE MATTER OF:

Azure Power India Private Limited
Asset No.301-4,
World Mark 3, Aerocity,
New Delhi -110037

...Petitioner

Versus

1. Solar Energy Corporation of India Limited
1st Floor, A-Wing,
D-3, District Centre, Saket,
New Delhi - 110 017

2. Public Works Department
Office of Executive Engineer (E),
Players Building & East (M-253),
2nd Level, C-Wing, Delhi Secretariat,
New Delhi – 110002

...Respondent

IN THE MATTER OF PETITION No. 150/MP/2019:

Petition under Section 79 of the Electricity Act, 2003 and Article 12 read with Article 16.3.1 of the Power Purchase Agreements dated 03.05.2016 and 08.05.2016 executed by the Petitioner with the Respondents, seeking relief on account of a 'Change in Law' viz. the introduction of Goods and Services Tax laws at the Central level and change in the rate of Service Tax, resulting in additional recurring expenditure in the form of an additional tax burden to be borne by the Petitioner after the Effective Date of the Power Purchase Agreements.

AND IN THE MATTER OF:

Azure Power Uranus Private Limited
Asset No.301-4,
World Mark 3, Aerocity,
New Delhi -110037

...Petitioner

Versus

1. Ordnance Factory Bhandara
Jawaharnagar, Bhandara,
Maharashtra – 441 906
2. Ordnance Factory Ambajhari,
Ambajhari Defence Project,
Amravati Road, Nagpur,
Maharashtra – 440021

...Respondents

IN THE MATTER OF PETITION No. 471/MP/2019

Petition under Section 79 of the Electricity Act, 2003 read with Article 12 of the Power Purchase Agreements dated 28.06.2016 and 04.01.2017, executed between Tata Power Renewable Energy Limited and NTPC Ltd., for seeking compensation on account of Change in Law events viz. introduction/ enactment of Central and State Specific Laws for implementing Goods & Services Tax.

AND IN THE MATTER OF:

Tata Power Renewable Energy Limited

Corporate Centre A,
34 Sant Tukaram Road, Carnac Bunder,
Mumbai 400 009, Maharashtra, India

...Petitioner

VERSUS

1. National Thermal Power Corporation Limited
Core – 7, SCOPE Complex,
7, Institutional Area, Lodi Road,
New Delhi – 110003
2. Hubli Electricity Supply Company Ltd. (HESCOM)
Corporate Office, Navanagar, P.B. Road,
Hubballi,
Karnataka-580025
3. Bangalore Electricity Supply Company Ltd. (BESCOM)
BESCOM Corporate office, Nunegundlapalli,
Ambedkar Veedhi, KR circle, Bengaluru,
Karnataka 560001
4. Mangalore Electricity Supply Company Ltd. (MESCOM)
MESCOM Bhavan, Corporate Office,
MESCOM, Kavoov Cross Road, Bejai,
Mangalore – 575 004 Karnataka
5. Chamundeshwari Electricity Supply Corporation Ltd. (CESC)
No.29, Vijayanagara 2nd stage,
Hinkal, Mysore
Karnataka-570017
6. Gulbaraga Electricity Supply Company Ltd. (GESCOM)
Corporate Office, Station Road,
Kalaburagi – 585102

...Respondents

Parties Present :

Ms. Priya Dhankhar, Advocate, Azure
Shri Rishabh Bhardwaj, Advocate, Azure
Shri Vishal Binod, Advocate, APIPL
Shri Nishant Talwar, Advocate, SPPL
Shri Nitish Gupta, Advocate, SPPL
Ms. Anushree Bardhan, SECI & NVVN
Ms. Tanya Sareen, Advocate, SECI & NVVN

Ms. Surbhi Kapoor, Advocate, SECI & NVVN
Shri Anukirat Singh, Advocate, SECI & NVVN
Shri Ajitesh Garg, Advocate, NTPC
Shri Sidhant Kumar, Advocate, AP Discoms
Ms. Manya Chandok, Advocate, AP Discoms
Shri M. U. Khan, Advocate, Ordnance Factory
Shri Pratush Singh, TPREL

आदेश/ ORDER

The Petitioner, Azure Power India Private Limited (APIPL) is a generating company and has the following projects:

- a) Two Solar Power Generating Systems (SPGS) of capacity of 50 MW each located inKurnool Ultra Mega Solar Park, at Gani Sakunala, Andhra Pradesh pursuant to which two identical Power Purchase Agreements (PPAs) dated 19.04.2016, for a capacity of 50 MW each were executed with NTPC Limited (NTPC), in Petition No. 293/MP/2018. The Scheduled Commissioning date (SCoD)was 20.04.2017.
 - b) 3 MW SPGS based on Photo Voltaic technology located at Indraprastha Thermal Power Station, New Delhi pursuant to a PPA dated 14.10.2015 executed withSolar Energy Corporation of India Limited (SECI), in Petition No. 294/MP/2018.The SCoD was 20.10.2015 for 1MW and 14.02.2016 for the remaining 2MW.
2. The Petitioner, Azure Power Uranus Private Limited (APUPL) in Petition no. 150/MP/2019, has indicated two projects comprising 2 MW and 5 MW SPGS based on Photo Voltaic technology to be set up in the Ordnance factories of Bhandara and Ambajhari in the State of Maharashtra. The SPGS have been developed pursuant to two PPAs dated 03.05.2016 executed with the Ordnance Factory, Bhandara and dated 08.05.2016 executed with the Ordnance Factory, Ambajhari in Petition No. 150/MP/2019.The SCoD for project for Ordnance Factory, Bhandara was 30.10.2016 and the SCoD for project for Ordnance Factory, Ambajhari was 07.11.2016.
3. The Petitioner, Tata Power Renewable Energy Limited (TPREL) in Petition no. 471/MP/2019, has indicated the Grid connected Solar-PV Power Projects of 100 MW capacity (50 MW X 2 Projects) to be set up in Pavagada Solar Park at Dist. Tumkur in the

State of Karnataka. TPREL submitted the bid on 23.02.2016 and e-Reverse Auction was conducted on 12.04.2016. TPREL was discovered as the successful bidder with a levelized tariff of Rs. 4.79/ kWh and has been allotted Plot Nos. B-32 and B-34 at Pavagada Solar Park in the State of Karnataka to set up the Projects. On 28.06.2016, two PPAs were executed between TPREL and NTPC. On 14.01.2018, TPREL commissioned the Projects at Plot Nos. B-32 and B-34 in Pavagada, Karnataka. Further, pursuant to issuance of another letter of Intent dated 04.11.2016, the Petitioner has agreed to set-up another Solar Power Project based on Photo-voltaic technology of 50MW capacity under DCR situated at Pavagada, Plot B-27 in the State of Karnataka. The PPA was executed on 04.01.2017 and the SCOD of the project was 02.01.2018. On 28.01.2018, TPREL commissioned the Project at Plot No. B-27 in Pavagada, Karnataka.

4. Since all the above petitions are similar in nature, they have been tagged together. Azure Power India Private Limited (APIPL), Azure Power Uranus Private Limited (APUPL) and Tata Power Renewable Energy Limited (TPREL) are collectively referred to as the Petitioners.
5. The Petitioners have made the following prayers:

In Petition No. 293/MP/2018

- a) Declare that the promulgation of the Finance Act, 2016 (with effect from 01.06.2016) and Central Goods and Services Tax, 2017 (with effect from 01.07.2017) are each a Change in Law under Article 12 of the Power Purchase Agreements dated 19.04.2016 executed between the Petitioner and Respondent No. 1;*
- b) Direct the Respondents to accordingly pay the Petitioner an additional tariff of Rs. 0.016/kWh and Rs. 0.018/kWh with effect from the Commercial Operation Date of the Petitioner's Solar Power Generating Systems located at location P-12 and P-13, respectively, in the Kurnool Solar Park, as compensation for the additional tax burden incurred by the Petitioner on operating and maintaining the said Solar Power Generating Systems, as elaborated in the instant Petition, due to the promulgation of the Finance Act, 2016 (with effect from 01.06.2016) and Central Goods and Services Tax, 2017 (with effect from 01.07.2017), along with carrying costs, subject to any adjustments based on the final additional expenditure incurred by the Petitioner 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;

- c) Direct the Respondents to reimburse the legal and administrative costs incurred by the Petitioner in pursuing the instant Petition; and*
- d) Pass such other orders that this Commission deems fit in the interest of justice.*

In Petition No. 294/MP/2018

- a) Declare that the promulgation of the Notifications No.21 and 22/2015-ST dated 06.11.2015 by the Ministry of Finance, Government of India (with effect from 15.11.2015), Finance Act, 2016 (with effect from 01.06.2016) and the Central Goods and Services Tax, 2017 are each a Change in Law under Article 12 of the Power Purchase Agreement dated 14.10.2015 executed between the Petitioner and the Respondent;*
- b) Direct the Respondent to accordingly pay the Petitioner an additional tariff of Rs. 0.243/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 Petitioner on operating and maintaining the said Solar Power Generating Systems, as elaborated in the instant Petition, due to the issuance of the Notifications No.21 and 22/2015-ST dated 06.11.2015 by the Ministry of Finance, Government of India (with effect from 15.11.2015), and promulgation of the Finance Act, 2016 (with effect from 01.06.2016) and the Central Goods and Services Tax, 2017, along with carrying costs, subject to any adjustments based on the final additional expenditure incurred by the Petitioner as on the Commercial Operation 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;*
- c) Direct the Respondent to reimburse the legal and administrative costs incurred by the Petitioner in pursuing the instant Petition; and*
- d) Pass such other orders that this Commission deems fit in the interest of justice.*

In Petition No.150/MP/2019

- a) Declare that the promulgation of the Finance Act, 2016 (with effect from 01.06.2016) and the Central Goods and Services Tax, 2017 are each a Change in Law under Article*

12 of the Power Purchase Agreements dated 03.05.2016 and 08.05.2016 executed between the Petitioner and the Respondents;

- b) Declare that that the Petitioner is entitled to be paid against monthly supplementary invoices in the amount of the economic impact of the change in law events (namely, the enhancement in the tax liability of the Petitioner) supported by such documentary evidence as may be deemed appropriate by this Commission, as compensation for the additional tax burden incurred by the Petitioner on operating and maintaining the said Solar Power Generating Systems, as elaborated in the instant Petition, due to the promulgation of the Finance Act, 2016 (with effect from 01.06.2016) and the Central Goods and Services Tax, 2017;*
- c) Declare and direct that the Petitioner is entitled to raise a consolidated supplementary bill towards change in law impact (namely, the enhancement in the tax liability of the Petitioner), as elaborated in the instant Petition, for such prior period supported by such documentary evidence as may be deemed appropriate by this Commission, along with appropriate carrying costs;*
- d) Direct the Respondents to reimburse the legal and administrative costs incurred by the Petitioner in pursuing the instant Petition; and*
- e) Pass such other orders that this Commission deems fit in the interest of justice.*

In Petition No. 471/MP/2019

- a) Hold and declare that introduction/ enactment of GST Laws, as specified in Paras 16 and 17 above, amounts to Change in Law, which has resulted in/ increased additional recurring/ non-recurring expenditure of TPREL;*
- b) Hold and declare that the Petitioner is entitled to a sum of Rs. 18.60 Crores along with the carrying cost towards compensation for Change in Law during the construction period;*
- c) Direct/ Permit the Procurers to make payment the sum of Rs. 2.61 Crores along with the carrying cost towards compensation for Change in Law during the Operating Period; and*
- d) Pass any such other and further reliefs as this Commission deems just and proper in the nature and circumstances of the present case.*

IA 60 of 2020 in 471/MP/2019

a) Approve the methodology proposed by the Applicant in Para 16 and 17 of the present Application to make payments of Change in Law compensation to SPDs on issues which have been adjudicated upon by the Commission;

b) Pass any such Order/ direction as this Commission may deem fit.

6. The Petitioners were selected as the successful bidder under the National Solar Mission Scheme conducted by NVVN, NTPC & SECI. The Petitioners entered into PPAs with Respondents for development of Solar Photo Voltaic Power Plants. The brief details of the Petitions are as under:

	293/MP/2018	294/MP/2018	150/MP/2019	471/MP/2019
Scheme	JNNSM			
Phase	Phase – II	Phase – II	Phase – II/III	Phase - II
Batch	Batch – II (Tranche – I)	Batch - III		Batch – II (Tranche – I)
Nodal Agency	NTPC	SECI	SECI	NTPC
RfS	No.: NTPC/2015-16/NSM/TI/AP/02 dated: 21.05.2015	No. SECI/SOLAR/SP V/IPTPS/RfS/08 2015 dated 28.08.2015	Nos. SECI/SOLAR/SP V/OFBA/RfS/12 2015 and SECI/SOLAR/SP V/OFAJ/RfS/122 015 dated 22.12.2015	No.: NTPC/2015-16/NSM/TI/KAR/09 dated: 01.09.2015
Capacity MW	2 * 50 MW	3 MW	2 MW and 5 MW	2x50 MW (Open Category) and 50 MW (DCR category)
Power	Under State Specific Bundling Scheme	Solar Power Project	Solar Power Project	Under State Specific Bundling Scheme
Location	Plot No. 12 & 13 Kurnool Ultra Mega Solar Park, at Gani Sakunala, Andhra Pradesh	Indraprastha Thermal Power Station, New Delhi	Ordnance factories of Bhandara and Ambajhari, Maharashtra	2x50 MW at Plot Nos. B-32 and B-34 50 MW at Plot No. B-27 Pavagada Solar Power Plant, Tumkur District, Karnataka
PPA	19.04.2016	14.10.2015	03.05.2016 Bhandara and 08.05.2016 Ambajhari	28.06.2016 (2*50 MW) and 04.01.2017 (50MW)

SCoD	20.04.2017	20.10.2015 (1MW) and 14.02.2016 for remaining 2MW of the contracted capacity.	30.08.2016 (Ordance Factory, Bhandara) and 07.11.2016 (Ordance Factory, Ambajhari)	20.07.2017 (2*50 MW) and 02.01.2018 (50MW)
Tariff /kWh	Rs 5.12 per kWh	Rs. 5.43 per kWh	Rs. 5.50 per kWh (for Ordance Factory, Bhandara) and Rs. 5.31 per kWh (for Ordance Factory, Ambajhari)	Rs. 4.79/- per kWh (2*50 MW) and Rs. 4.84 per kWh (50MW)
VGF	N/A	Yes	Yes	N/A
Change in Law	Article 12			

2. On 12.04.2017, Government of India (GOI) introduced the Goods and Services Tax, replacing multiple taxes levied by the Central and State Governments.
3. 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 States Goods and Services Tax Act, 2017 were enacted for levy and collection of tax on intra-State supply of goods or services or both by the respective States.
4. As per the Petitioners, the implementation of GST has resulted in an increase in the recurring and non-recurring expenditure for the Petitioners after the Effective Date of the PPAs, and consequently has adversely impacted the business of the Petitioners.
5. The Petitioners filed the Petitions under Section 79 the Electricity Act, 2003 read with Article 12 of the Power Purchase Agreements (PPAs) executed between Petitioners and the Respondents, for seeking approval of Change in Law events due to enactment of the GST Laws and consequential reliefs.

Hearing dated 31.01.2019 in Petition No. 293/MP/2018&294/MP/2018

Hearing dated 04.07.2019 in Petition No. 150/MP/2019

Hearing dated 04.06.2020 in Petition No. 471/MP/2019

6. Learned counsel for the Petitioners submitted that the present Petitions have been filed for seeking relief on account of a 'Change in Law' namely, the introduction of Goods and Services Tax laws at the Central level and change in the rate of Service Tax, resulting in additional expenditure in the form of additional tax burden to be borne by the Petitioner after the effective date. Learned counsel further submitted that Ministry of New and Renewable Energy (MNRE) vide its letter dated 12.3.2020 read with letter dated 23.3.2020, has clarified that since the Commission has already laid down the principles to be followed with regard to 'Change in Law' compensation on account of imposition/enhancement of effective rates of GST and levy of Safeguard Duty on import of Solar PV cells and modules in earlier cases, there is no need to ask every Developer to approach the Commission for seeking orders individually in similar cases. In terms of the said letters, the Petitioner has written to the Respondents along with the computation of its claims. However, no reply has been received from Respondents. The Commission admitted the Petitions and directed the Petitioners to implead the distribution companies as parties to the petitions and to file revised memo of parties. The Respondents including distribution companies were directed to file their replies with an advance copy to the Petitioner, who may file its rejoinder, if any.
7. Accordingly, the Petitioners impleaded the distribution companies as parties to the petitions and to file revised memo of parties. The Respondents filed the replies followed by the Petitioner filing their rejoinders to the same. The Petitioner also filed an I.A. No. 60 of 2020 in Petition No. 471/MP/2019.

Hearing dated 21.12.2021 in Petition No. 293/MP/2018; 294/MP/2018&150/MP/2019

8. The cases were called out for virtual hearing on 21.12.2021. During the course of hearing, the learned counsel for the Petitioner submitted that the Ministry of Power, Government of India has notified *the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021* (hereinafter referred to as 'Change in Law Rules') and the Petitioner will approach Respondents/procurers for settlement of Change in Law claims amongst themselves in terms of the Change in Law Rules and will approach the Commission in terms of Rule 3(8) of the said Rules. The learned counsel for the Petitioner further submitted that the filing fees

deposited by the Petitioner in respect of the present Petition may be adjusted against the Petition to be filed by the Petitioner in terms of Rule 3(8) of the Change in Law Rules.

Hearing dated 21.12.2021 in Petition No. 471/MP/2019

9. During the course of hearing, the learned counsel for Petitioner submitted that the Commission directed the Respondent, NTPC to submit its views/comments on MNRE's letter dated 12.03.2020 read with letter dated 23.03.2020 along with its reply. NTPC has filed the response and the Petitioner has submitted the computation of its claims for reconciliation with NTPC in the month of August, 2021. However, NTPC has not submitted any reply on reconciliation of the claims and hence, the reconciliation is not finalised as on date. In response to the Commission's observation that the Ministry of Power, Government of India has notified *the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021* (hereinafter referred to as 'Change in Law Rules'), the Petitioner submitted that it will approach NTPC/procurers for settlement of Change in Law claims amongst themselves in terms of the Change in Law Rules and will approach the Commission in terms of Rule 3(8) of the said Rules. The learned counsel for the Petitioner further submitted that the filing fees deposited by the Petitioner in respect of the present Petition may be adjusted against the Petition to be filed by the Petitioner in terms of Rule 3(8) of the Change in Law Rules.

10. **Subsequent proceedings:**

- a) After having heard the matter on 21.12.2021, petition No. 471/MP/2019 was disposed of on 31.12.2021 and petitions No. 293/MP/2018, 294/MP/2018 & 150/MP/2019 were disposed of on 03.01.2022 vide separate Orders, holding as under:

"5. The Commission further observes that as per the above quoted provisions, on occurrence of an event of Change in Law, the affected party, in the present case the Petitioner, and other parties, in the present case the Respondents/procurers, are to settle the Change in Law claims among themselves and approach the Commission only in terms of Rule 3(8) of the Change in Law Rules.

6. In view of the above, the Commission holds that the Petitioner may approach the Respondents/ procurers for settlement of Change in Law claims amongst themselves in terms of the Change in Law Rules and thereafter approach the Commission in terms of Rule 3(8) of the said Rules.

7. The filing fees deposited by the Petitioner in respect of the present Petitions shall be adjusted against the Petitions to be filed by the Petitioner in terms of Rule 3(8) of the Change in Law Rules."

- b) The Commission disposed of several Petitions seeking similar reliefs under Change in Law events, taking the view that the concerned entities must have recourse to the Change in Law Rules, 2021. Several of these decisions were appealed against, before the Appellate Tribunal in O.P No. 1 of 2022 and Appeal Nos. 116, 74, 75 & 76 of 2022.
- c) **Order of Appellate Tribunal dated 05.04.2022:** The Appellate Tribunal passed its judgment, setting aside the Orders of this Commission challenged in O.P No. 1 of 2022 and Appeal Nos. 116, 74, 75 & 76 of 2022, which originally sought compensation on account of Change in Law events, and were disposed by this Commission. Appellate Tribunal passed the following decision in the aforementioned appeals:

“72. For the foregoing reasons, we find the impugned orders of the Central Commission applying the CIL Rules to matters pending before it for adjudication under Section 79(1)(f) of Electricity Act on the date of coming into force of said rules wholly erroneous, improper and bad in law. The said orders are thus set aside. In the result, the proceedings in claim cases (in which impugned orders were passed – and that includes the orders dated 04.02.2022 in the Original Petitions) remain inchoate. The Central Commission is duty-bound to consider each of them on the merits of the claims and adjudicate in accordance with law on the dispute(s) in proper exercise of its jurisdiction under Section 79 of the Electricity Act. It is directed to proceed to do so expeditiously.

73. We would be failing in our duty if we do not also note here (as also indicated earlier in this judgment) that prior to the decisions which were challenged by the captioned petitions/appeals, as indeed subsequently, the Central Commission has been taking the impugned approach on pending claims which has and would have resulted in a large number of such claims being unduly scuttled, non-suiting the parties similarly placed as the petitioners/appellants herein. If the factual back-ground is same as in the cases at hand, such decisions would also constitute want of performance of statutory function by the Central Commission meriting an appropriate direction by this tribunal. This would be constrained to seek remedy against such order, if it thereby feels aggrieved. The remedies available in law include approaching the Central Commission for review or this tribunal ordinarily by an appeal.

74. Such that the affected parties do not suffer on account of faulty approach of adjudicatory authority, and this tribunal is not flooded by appeals raising identical issues against such other decisions as above, rendered in similar fact-situation by the Central Commission, it would be appropriate that it be asked to properly and fully perform its statutory function by exercise of its review jurisdiction, suomotu, in all similarly-placed claims for compensation founded on change in law events where similar decisions have been taken by the Central Commission after coming into force of CIL Rules on 22.10.2021 and, if such decisions are found running afoul of the view taken by this tribunal by this judgment, to vacate the same and restore the concerned Claim cases to its file and complete the process of adjudication thereupon in accordance with law. Needful action in above nature shall be initiated by the Central

Commission within four weeks of this judgment. Of course, review can be undertaken even at the instance of the parties in question should they approach the Commission on their own. We may add that these directions are without prejudice to the remedy, if any, already pursued or intended to be pursued by the concerned parties vis-à-vis other such cases.”

- d) **Order on 14.06.2022 in 8/SM/2022:**Pursuant to the decision of the Appellate Tribunal, the present Petition, along with several others were re-listed before this Commission where it passed the following Order:

“3. After hearing the suggestions put forth by the learned senior counsels and the learned counsels for the parties, the Commission is of the view that as per the directions of the APTEL in judgment dated 5.4.2022 in OP No. 1 of 2022 and Ors., in particular at paragraph 74, suo-motu order(s) are required to be issued to restore the petitions which were disposed by the Commission by applying the Change in Law Rules but which were not challenged before the APTEL. However, for the Petitions where the orders of the Commission have been set aside by the APTEL in terms of para 72 of the judgment, the petitions shall be restored on the records of the Commission for further necessary action.

4. Accordingly, as per the direction of the APTEL, in exercise of our suo-motu power of review, we hereby restore the Petitions mentioned in paragraph 1 above, on the record of the Commission at same stages, as were existing prior to the disposal of petitions.”

- e) **Hearing dated 17.05.2022:**The present Petitions were re-listed for hearing before this Commission where it made the following observations:

4. Learned counsel for the Petitioners in Petition No. 168/MP/2021 and Petition No. 171/MP/2021 submitted that while notice in the matters had already been issued prior to their disposal, but the pleadings were yet to be completed. He added that in Petition No. 471/MP/2019, the Respondent, NTPC had already filed its reply. However, the distribution licensee did not file its reply and thus, the distribution licensee may be given last opportunity to file the reply in the matter, if any. Learned counsel for the Petitioner therein requested for a direction to NTPC to expedite the reconciliation of its Change in Law claims.

5. In Petition No. 293/MP/2018 and Petition No. 294/MP/2018, learned counsel for the Petitioners submitted that the pleadings in the matters have already been completed. However, learned counsel for the Respondent, NTPC in Petition No. 293/MP/2018 sought liberty to file an additional affidavit to place on record the series of communication exchanged with the distribution licensee in the said matter. In Petition No. 150/MP/2019, learned counsel for the Petitioner sought liberty to file rejoinder in the matter.

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8. Keeping in view the submissions made by the learned senior counsel and the learned counsels for the parties and their agreement to the observations of the Commission expressed in the Record of Proceedings dated 9.5.2022 in the similarly

placed matters with regard to the methodology for implementation of APTEL's directions in judgment dated 5.4.2022 as contained in paragraph 74, the Commission indicated that it will proceed for passing appropriate orders in these matters as per directions and further observed that with regard to the various requests of the learned counsels for the parties, inter alia, permission to file additional affidavit, reply and/or rejoinder etc., the necessary direction or liberty in this regard will be granted in the suo-motu order(s) to be issued by the Commission in these matters.

f) **Hearing dated 14.07.2022:** The present Petitions were again re-listed for hearing before this Commission, where it made the following observations:

2. At the outset, the Commission observed that in the instant Petitions, the Petitioners have sought reliefs on account of Change in Law viz. change in the rates of Service Tax and introduction of GST Laws leading to an additional expenditure on the Operation & Maintenance (O&M) services. It was further observed that the Commission is yet to dispose of petition Nos. 184/MP/2018 & Others remanded by Appellate Tribunal for Electricity ('APTEL') vide its judgment dated 3.2.2022 in Appeal Nos. 61 of 2021 and Ors. where issues involved pertain to the similar claims of O&M services.

3. In response to the aforesaid observations, learned counsel for the Petitioner submitted that the present Petitions may be taken-up for hearing along with Petition Nos. 184/MP/2018 & Ors remanded by APTEL.

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5. Learned counsel for the Respondent, AP Discom sought liberty to file its reply in Petition No. 293/MP/2018. In response, learned counsel for the Respondent, NTPC also sought liberty to respond to such reply, if required.

6. Learned senior counsel for the Respondent, SECI submitted that the present Petitions may be heard together along with Petition Nos. 184/MP/2018 and Ors.

7. Learned counsel for the Respondents, Ordnance Factory in Petition No. 150/MP/2019 submitted that the Respondents have already filed their reply in the said matter. Learned counsel for the Petitioner, however, submitted that reply filed by the Respondents is not supported by any affidavit. The said submission was refuted by learned counsel for the Respondents.

8. After hearing the learned counsel for the parties, the Commission permitted the Respondent, AP Discoms to file its reply in the Petition No. 293/MP/2018 within two week after serving copy to the Petitioner, who may file its rejoinder, if any by within two weeks thereafter. The Respondent, NTPC was also permitted to file additional affidavit on the reply of AP Discom, if any, within two weeks.

9. The Petitions shall be listed along with Petition Nos.293/MP/2018 and Ors. for hearing in due course for which separate notice will be issued.

g) **Hearing dated 09.09.2022:** The present Petitions were again re-listed for hearing before this Commission where it made the following observations:

Since the issue involved in all the petitions was common, they were taken up for hearing together.

2. During the course of hearing, the learned counsel for the Petitioner, APMPL in Petition No. 184/MP/20218 referred to the judgments of Appellate Tribunal for

*Electricity dated 27.4.2021 in Appeal No. 172/2017 & and Ors. (CGPL v. CERC &Ors.) dated 20.9.2021 in Appeal No. 215/2021 (TPREL v. MERC &Ors.) and the provisions of the Power Purchase Agreement and made detailed submissions in the matter. The learned counsel for the Petitioners in the rest of the Petitions adopted the submissions made by the learned counsel for APMPL. **The learned counsel for the Petitioner, APIPL in Petition Nos. 293/MP/2018 & 294/MP/2018 pointed out that as such the O&M of the Projects is being carried out by the Petitioners themselves and not through a third party intermediary and the Project covered in Petition No. 293/MP/2018 being located in the Solar Park, the Petitioner is required to pay the O&M under the Implementation Agreement entered into with the Solar Park Implementing Agency.** Whereas, the learned counsel for the Petitioner in Petition No. 70/MP/2019 sought for short accommodation on account of non-availability of arguing counsel.*

3. The learned counsel for the Respondents in these matters, namely, PSPCL, Rajasthan Utilities, SECI, NVVN and AP Discoms made the detailed submissions in the matters.

4. Based on the request of the learned counsel for the parties, the Commission permitted the Respondents to file their respective written submissions, if any, within two weeks with copy to the Petitioners, who may file their written submissions, if any within ten days thereafter. The Commission also permitted the parties to file their respective reply and/or rejoinder, if any, in these matters within two weeks.

5. Subject to the above, the Commission reserved the order in these matters.

Submissions dated 19.09.2022 of NTPC in Petition No.293/MP/2018

11. NTPC has submitted as under:

Re. Change in Law provisions under PPA does not recognize liabilities beyond supply of power

- a) The perusal of clause 12 of the PPA (Change in Law clause) makes it clear that the same provides for any change in taxes or introduction of any tax applicable for the supply of power by the Petitioner. A conjoint reading of clause 17.10 as well as Clause 12 of the PPA makes it clear that the services which the Petitioner may secure from any sub-contractor are specifically not considered/included for the purpose of Change in Law. On the contrary, in terms of clause 17.9 and 17.10, the SPD/Petitioner is required to insulate/indemnify the Respondent from the acts of the Contractors/Sub-Contractors further appointed by the Petitioner by way of its own commercial decisions.
- b) The works pertaining to the O&M were particularly outsourced by the Petitioner to other agencies as a part of its own commercial decision. If the said works were internalized, the burden of such GST would have been borne by the SPD itself and resultantly, no extra costs would have been incurred by the parties. It was the sole discretion of the Petitioner to outsource the said works pertaining to O&M at its own cost, risk and responsibility and the same can in no manner be saddled upon the

Respondent.

- c) The outsourcing done by the Petitioner has resultantly diluted the sanctity of the bid submitted by it in terms of the RFS issued by the Respondent.

Re. Outsourcing of O&M is an internal commercial decision of the SPD

- d) O&M is the responsibility of the Petitioner and in the event of the Petitioner choosing to employ the services of other agencies, it cannot increase the liability of NTPC (and consequentially the Distribution Licensee/Buying Entity) in terms of tariff. The outsourcing of O&M to a third party is not a requirement of the PPAs 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. If the said works were internalized by the Petitioner, the burden of such GST would have been borne by the SPD itself and resultantly, no extra costs would have been incurred by the parties.
- e) This Commission has taken identical views in several matter such as *Petition No. 1/MP/2017, GMR Warora Energy Ltd. Vs. MSEDCL &Ors., Petition No. 52/MP/2018 titled as Prayatna Developers Pvt. Ltd. vs. NTPC LTd. & Ors., Acme Bhiwadi Solar Power Pvt. Ltd. vs. Solar Energy Corporation of India &Ors (Batch), Petition No. 187/MP/2018 titled as M/s Renew Wind Energy (TN2) Pvt. Ltd. vs. NTPC Ltd. &Ors. (Batch)* etc.
- f) The bid submitted by the SPD was levelized tariff without disclosing the details of the calculations of the project cost. Therefore, the said decision of outsourcing O&M works being the sole discretion and a business commercial decision taken by it at its own risk and cost cannot increase the liability of the Respondent. This Commission has taken the exactview in *Petition No. 187/MP/2018 titled as M/s Renew Wind Energy (TN2) Pvt. Ltd. vs. NTPC Ltd. &Ors. (Batch)*.

Re. The arrangement was back to back from the source i.e. Solar Power Developer to the end buyer

- g) The Respondent merely being an intermediary was neither generating nor consuming the said power. The Respondent was working for its trading margin by procuring and selling the power from the Petitioner to the DISCOMs. Therefore, the compensation

paid by the Respondent to the Petitioner on account of promulgation of GST Laws has to be duly passed on to the DISCOMs in terms of the above stated back to back arrangement between the parties.

Submission of SECI dated 26.09.2022 in Petition No. 294/MP/2018

12. SECI has submitted as under:

- a) The claims raised by the Petitioner have been covered by the decision dated 27.03.2020 of the Commission in Petition No.388/MP/2018 and 395/MP/2018 in the matter of *Wardha Solar (Maharashtra) Private Limited -v- Solar Energy Corporation of India Limited &Ors. & Another* as under:
 - (i) GST as Change in Law- Allowed
 - (ii) GST implications on O&M activities- Rejected; and
 - (iii) Carrying Cost- Rejected.
- b) The Commission vide Order dated 16.03.2018 in Petition No. 1/MP/2017 in *GMR Warora Energy Limited -v- Maharashtra State Electricity Distribution Company Limited and Ors.* has held that any increase in cost of O&M expenditure on account of increase in service tax cannot be considered as Change in Law.

Re: Decision of the Appellate Tribunal in Coastal Gujarat Power Limited (CGPL) case is distinguishable

- c) In terms of the directions of the Tribunal in Order dated 03.02.2022 passed in Appeal Nos.61 of 2021 and Batch, the Commission in Petition Nos.184/MP/2018 and Batch in the matters of *Azure Solar Power Private Limited –v- NTPC Vidyut Vyapar Nigam Limited* has to consider the implications of the decision dated 27.04.2021 passed by the Appellate Tribunal in Appeal Nos. 172 of 2017 and 154 of 2018 in the matter of *Coastal Gujarat Power Limited –v- Central Electricity Regulatory Commission and Others.*
- d) The Tribunal in the CGPL case has allowed the impact of service tax on works contract under the PPA dated 22.04.2017 taking into account the following aspects:
 - *Article 7 of the Model PPA which was a part of the RFQ documents had envisaged that the generator (Seller) alone shall be liable to operate and maintain the power station at its own cost but, in the final PPA that was executed between the parties, the clause to such effect was removed this clearly*

indicative of the common understanding of the parties that the generator (CGPL) would not be solely responsible for O&M

- *the definition of 'Project Documents' read with 'O&M contracts' contemplating that a third-party O&M contractor might be appointed by it (CGPL).*

- e) The present case of the Petitioner is distinguishable on facts and the decision in CGPL case has no application as submitted herein.
- f) Unlike the CGPL case, the PPAs in the present case do not recognize O&M contracts. There is no prescription under the PPAs or the bidding documents regarding the appointment of contractors or sub-contractors including O&M Contractors for fulfilling obligations of the Petitioner under the PPAs.
- g) Article 12 of the PPA deals with Change in Law and does not deal with the relationship between the Petitioner and its Contractors, particularly, those contractors who render O&M services. The services which the Petitioner may avail from various agencies appointed by the Petitioner or such agency may in turn secure from others are not to be considered for the purpose of Change in Law claims against SECI or on a back to back basis against the Buying Entity.
- h) In terms of the provisions of the PPA regarding Force Majeure, the affected party recognized is only the Petitioner and not its contractors, sub-contractors etc. In this regard, Article 11.2 of the PPA defines an 'Affected Party' to only include the SPD and SECI, whereas, in the CGPL case, the affected party under the Force Majeure provision covers not only CGPL but contractors etc.
- i) The Change in Law provision (Article 13) in the CGPL PPA is different from Change in Law provision in the PPA executed with the Petitioner. Article 13 of the CGPL PPA provides for both 'Construction Period' and 'Operation Period' unlike the present case.
- j) The O&M activities relate to the period post the commercial operation of the power project. During the operation period there is no liability of the procurers to reimburse any capital cost incurred by the Petitioner on a recurring basis. There is no additional Capitalization allowed. Anything which is to be incurred on a day to day basis for repair, consumables, replacement, maintenance etc. does not qualify for a tariff increase in terms of the PPA. Accordingly, any tax incurred on such maintenance, replacement of goods etc. is also not admissible.
- k) There is no provision in the PPA for servicing any additional capital cost for capital

investments done by the Petitioner at any time after the COD of the power projects i.e. after the construction period is over. Any up-gradation or improvement or repair or changes that are undertaken by the Petitioner at any time after the COD and during the Operation period are entirely to the account of the Petitioner, to be undertaken at the cost and expense of the Petitioner with no liability on SECI or the Buying Entity.

- l) The above is consistent with the principle that the tariff quoted in pursuance of the competitive bidding process is applicable for the entire duration of the PPA and all costs to be incurred for maintaining the solar power plant is to the account of the Petitioner. If there cannot be any reimbursement of costs for the equipment, machinery, consumables etc. after setting up of the power project, there is no question of any claim on account of any tax increase or decrease on such goods.
- m) At the stage of implementation, it is not open to the Petitioner to claim break-up of the tariff elements and setting up the amount towards O&M Expenses and claim escalation in O & M Expenses.
- n) Any additional cost that may be allowed on account of O&M expenses would be ultimately passed on to distribution licensee/Buying Entity on account of the back to back transactions under the PPA and PSA.
- o) The Commission in the decision dated 13.05.2021 passed in Petition No.73/MP/2020 along with I.A. No.21 of 2021 in the matter of *SB Energy One Private Limited –v- Solar Energy Corporation of India Limited and Another* has held that PPA and PSA are interconnected and are of back to back nature implying that the distribution licensee/buying entity is liable to pay to SECI all that SECI has to pay to the Power Developer on account of GST/Safeguard Duty.

Submissions of NTPC in Petition No. 150/MP/2019

13. The Respondents have submitted as under:
 - a) The Petitioner is submitting “Bill of supply”. A bill of supply is a document of transaction which is different from a normal tax invoice. A bill of supply is issued in cases when a registered person is a supplier of exempted goods/services, or, if they have opted to pay GST under the composition scheme. The supply of solar power is exempted under the GST Act and therefore, the Petitioner is not paying any tax on selling the solar power energy to the respondents. As per the PPA , the respondents are purchasing the solar power on long term basis for 25 Years. Therefore, the

expenditure incurred by the Petitioner on O&M shall be borne by the Petitioner itself and the respondent has to pay the bill amount as per the fixed tariff. In case the Central Govt. introduces any additional tax on supply of solar power, that will be shared by the Respondents.

- b) The O&M is the responsibility of the Petitioner and in the event of the Petitioner choosing to employ the services of other agencies; it cannot increase the liability of Respondents in terms of tariff.
- c) This Commission in the Order dated 12.04.2019 in Petition No. 206/MP/2018 &Ors. already held that “claim of the Petitioners on account of addition tax burden on operation and maintenance expenses (if any), is not maintainable.” This view is in consonance with the view taken by the Commission in its Order dated 09.10.2019 in Petition No. 188/MP/2019 &Ors. case titled *ACME Bhiwandi Solar Power Private Limited –v- Solar Energy Corporation of India &Ors.*

Submission of NTPC dated 26.09.2022 in Petition No. 471/MP/2019

14. The NTPC has submitted as under:

- a) NTPC is merely an intermediary in the present case and has entered into a back to back agreement with distribution licensees in the State of Karnataka.
- b) If the present Petition is allowed and TPREL is granted the relief sought, then the compensation / relief shall be paid by the ultimate beneficiaries i.e. Karnataka Discoms. In view of this arrangement, this Commission may take a suitable view while adjudicating the present Petition.

Re. Impact of GST on Capital Cost

- c) TPREL has contended that the introduction of GST laws has led to an increase in indirect taxes thereby increasing the project cost of TPREL’s Solar Power Projects situated at Pavagada, Plot B-27, B-32 and B-34 in the State of Karnataka.
- d) TPREL has argued that the implementation of GST has increased the Capital Cost of the Project. This Commission, in various orders, has approved the introduction of GST Laws as “Change in Law” event within the scope of the PPA. This Commission vide Order dated 09.10.2018 in Petition No.- 188/MP/2017 case titled *ACME Bhiwadi Solar Power Private Limited versus Solar Energy Corporation of India Limited and Ors.* has categorically held that SPD has to demonstrate a clear one to one relationship

between the projects, the supply of goods and services and invoices raised. Further, the same has to be backed by an auditor's certificate.

- e) The issue of impact of "GST Laws" as "Change in Law" event is no more res integra and "GST Laws" have been declared as "Change in Law".

Re. Impact of GST on O&M activities

- f) TPREL has contended that on account of the Notification No. 20/2017 dated 22.08.2017 under the CGST Act and Notification dated 29.06.2017 under the SGST Act, CGST and SGST at the rate of 9% is levied on O&M expenses, therefore subjecting it to the GST at 18%, increasing an incremental impact of Rs 2.61 Crores (approx.).
- g) The impact on account of outsourcing of O&M activities is no longer res integra and the same has been disallowed by the Commission in its earlier Orders.

Re. Claim of Carrying Cost

- h) This Commission in its ACME Judgment has held that the prayer to allow carrying cost or any interest on working capital is liable to be rejected in absence of a restitutive provision under the PPA. Therefore, in absence of any provision of restitution in the present PPA, TREPL's claim of carrying cost cannot be allowed.

Re: Judgment dated 15.09.2022 passed in Parampujya Solar Energy Pvt. Ltd. v. Central Electricity Regulatory Commission, Appeal No. 256 of 2019 by the APTEL

- i) The Tribunal in Parampujya Judgment allowed the appellant therein Change in law compensation (on account of GST laws) from the date of enforcement of the new taxes for the entire period of its impact, including post Commercial Operation Date of the projects in question, as indeed towards O&M expenses, along with carrying cost, subject to necessary prudence check.
- j) Further, the Tribunal held that the burden of carrying cost is a consequence directly flowing from the Change in Law event, therefore the relief in such regard cannot be complete unless this part of the additional expenditure is also allowed as pass-through. Still further, the Tribunal has held that SPDs are entitled to compensation for additional expenditure (recurring/non-recurring) towards O&M activities as well, notwithstanding the fact that they were outsourced.

Re: Any claim, if allowed should be recovered on Back-to-Back basis from the Distribution Licensee

- k) This Commission vide ACME Judgment as well as in its Order dated 05.02.2019 passed in Petition No. 187/MP/2018 titled *Renew Wind Energy (TN2) Private Limited v. NTPC Ltd.*, has held that the distribution licensees, under their respective PSAs, are under a back-to-back obligation to make timely and full payments to intermediary and ultimately to the SPD. Therefore, it is clear that the payment by the Respondent to TPREL is contingent upon such payment being made by Distribution Licensees to the Respondent.

Re. Response to the Commission's queries in RoP dated 04.06.2020

- l) This Commission vide its RoP dated 04.06.2020 has directed the Respondent to submit its comments on MNRE's letters dated 12.03.2020 read with 23.03.2020. The Respondent has submitted as under:
- (a) In accordance with the position adopted by the Commission, NTPC in order to process the claim of SPDs, requires all documents from the SPDs exhibiting clear and one to one co-relation between projects and supply of goods & services, duly supported by the invoices raised by the supplier of such goods & services.
- (b) Further, the SPD/TPREL may also submit the above documents to the buying entities/beneficiaries as well.
- (c) Upon reconciliation of such documents, the reconciled amount along with the annuity would be communicated to the SPD/TPREL. The said documents would be further subject to examination, verification and acceptance of the beneficiaries.
- m) With regard to payment of compensation in Annuity Mode, the Commission in the Prayatna Judgment (Supra) (Relevant para 151) has held that if the quantum of payment is not large, then relief for 'Change in Law' should be allowed as a separate element on one time basis in a time bound manner. Therefore, the quantum of payment towards relief (i.e. large/not large) should be the basis for payment on one-time basis or payment in Annuity Mode. Notably, this Commission has been allowing one-time payment in six (06) instalments in case of tariff revision for projects under Section 62 of the Act. Also, a monthly variation of 20% (e.g., in case of energy charges) in billing is considered to be in normal range. Based on above, compensation

in the range of more than 120% (20% × 6 months) of average monthly billing of any SPD should be allowed to be collected in Annuity Mode.

- n) This Commission in its Prayatna Judgement (Supra) has observed that the discovered tariff under transparent e-bidding process should not be altered. It is therefore submitted that the relief may be allowed to be paid back as per norms of CERC's Regulations at the Normative Interest Rate for the loans over the normative period allowed for loan repayment (13 Years). In this manner, the SPD will have the option available to fund/finance its entire relief allowed under Change in law through Banks/Financial institution without any additional liability.
- o) The Respondent in its Reply had submitted that once the process of reconciliation is complete, the Respondent would furnish copy of such reconciled amount along with the annuity working (as applicable) to the SPDs/TPREL. In this respect, it is noteworthy that, this Commission vide RoP dated 14.07.2022 had directed the Respondent to complete the reconciliation of TPREL's GST amount. In this respect, it is humbly submitted that:-
- (i) The preliminary reconciliation was carried out between TPREL and NTPC from 02.08.2022 to 05.08.2022. Notably, GST invoices which are falling upto COD date, were accepted by the Respondent. However, it is humbly submitted that the GST invoices which were raised after COD date but wherein the material dispatched was prior to COD are not tenable as per law. Accordingly, these invoices shall not be taken into consideration.
- (ii) During the reconciliation, it was discussed that TPREL needs to submit documents for which VAT/ CST is applicable (Before GST period). TPREL has declared zero tax on all items for period before GST regime for which documents are required to be submitted to confirm the same. The tax implication shall be computed after receiving the necessary documents. However, the said documents are still awaited from their side despite numerous communications between the parties. Notably, as per email dated 05.09.2022, TPREL had assured to submit the required document latest by 13.09.2022 but still not submitted till date i.e. 22.09.2022.
- p) In view of the submissions made above, the Commission may take a suitable view in the present Petition based on the Orders already passed by the Commission.

Submission dated 05.10.2022 of the Petitioner in Petition No. 293/MP/2018; 294/MP/2018& 150/MP/2019

15. The Petitioners have submitted as under:

- a) Increase in the O&M Expenses due to enactment of the GST Law and Service Tax Law is covered under Change in Law

Re. The PPAs provide for reimbursement of additional recurring expenditure due to Change in Law

- b) The Change in Law clause of the PPAs, namely, Article 12, is deliberately widely worded and unqualified, saying that “... *the occurrence of any of the following events after the Effective Date resulting into any additional recurring expenditure ... by the SPD...*” entitles the developer to compensatory relief against such additional expenditure.
- c) Further, the PPAs at Article 12.1.1 provides an exhaustive (*as opposed to illustrative or inclusive*) list of exclusions under change in law. The impact of any changes in law on the expenses incurred in the O&M of the Project has not been excluded therein, and hence ought to be considered included.

Re. The Petitioners claim is in line with the extant policies and guidelines

- d) The Tariff Policy, 2016 issued by the Government of India and the Guidelines for *Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Projects* notified by the MNRE on 03.08.2017 also provide for the pass through of any change in domestic duties, levies, cess and taxes of the nature mentioned above.
- e) Clause 6.2 of the Tariff Policy, 2016 also provides for grant of change in law relief on account of change in rates of taxes.
- f) The Respondents have argued that there is no separate clause in the PPAs which provides for outsourcing of the O&M of the Projects, and have contended on this basis that the Petitioner shall undertake and be responsible for the O&M of the Projects.

Re. The PPAs do not have any prohibition regarding engagement of third parties

for carrying out O&M related activities

- g) The PPAs do not prohibit or bar the Petitioners in any manner from outsourcing the O&M of the Projects. In fact, the Respondents have been unable to provide reference to even a single provision under the PPAs or the RfP which contains such a prohibition on outsourcing of O&M activities.
- h) Article 12 of the PPAs, which provides for grant of change in law relief, also does not contemplate any such condition or exclusion which disentitles the Petitioners from grant of change in law compensation if the Petitioners have chosen to employ the services of a third party in relation to O&M activities. Therefore, as per settled law, extraneous conditions or words cannot be added by this Commission to the clear wording of a change in law provision while deciding on the grant of change in law relief.

Re. The Petitioner has not outsourced the O&M of the Projects to an O&M contractor in Petition No. 293/MP/2018

- i) In the present case, the Petitioner has not outsourced the operation and maintenance of the Projects to an O&M contractor. O&M for the Projects is being carried out by the Petitioner itself and not through a third-party intermediary.
- j) The Petitioner has directly procured services and equipment for certain O&M activities to effectively and efficiently operate the Projects, and the impact of Change in Law Events only on such transactions is being sought under the present Petition. Indeed, it would be impossible for the Petitioner to operate and maintain the Projects without procuring services and equipment from external vendors. Further, a holistic reading of the various provisions of the PPAs (such as Articles 11.4.1, 14.4.1 and 17.10) makes it evident that the PPAs contemplate the engagement of contractors to effectively and efficiently operate the Projects.
- k) For the purpose of carrying out O&M of the Projects, it has hired personnel on its own payroll for carrying out activities such as handlingplant control room operations, monitoringsolar power generation equipment etc. Pertinently, the Petitioner has not incurred any additional expenditure due to introduction of GST Laws to the extent mentioned above.
- l) However, the Petitioner has incurred additional tax liability in engaging contractors for activities which cannot be carried out by the Petitioner in its capacity as a solar

power generator or which are specialized and regulated requiring specific permits and approvals. In this regard, the following facts and instances are noteworthy:

- (i) The Petitioner is required to engage contractors for supply of spares and consumables for the Projects. The spares and consumables have to be purchased from Original Equipment Manufacturers and vendors and the Petitioner cannot manufacture such equipment on its own.
 - (ii) To undertake the activity of private security services, the Petitioner would be required to obtain a license under the Private Security Agencies (Regulation) Act, 2005 and there are various conditions linked to the grant of such license which are otherwise not applicable to a company involved in the business of generation of electricity.
 - (iii) Similarly, it would be imprudent for the Petitioner to own and operate a fleet of commercial vehicles on its books of accounts for its conveyance requirements that are occasional and need based.
- m) Clearly, the PPAs do not contemplate that all activities of any nature whatsoever (such as those referred above) required to be undertaken for performance of various obligations under the said PPAs are to be carried out by the Petitioner on its own. Such an approach would be contrary to the Prudent Utility Practices as well as the generally accepted industry practices for operating power projects.

Re. Claims on account of O&M expenses payable under the Implementation and Support Agreement executed with the Solar Park Implementation Agency in Petition No. 293/MP/2018

- n) As per the bidding documents namely, the NSM and the RfS, read with the relevant provisions of the PPAs, the successful bidder in the bidding conducted by NTPC was required to enter into an Implementation and Support Agreement with Andhra Pradesh Solar Power Corporation Private Limited (i.e. the SPIA in the instant case) for provision of various services relating to operation of the SPGS such as allotment of land and development of the SPGS within the Kurnool Ultra Mega Solar Park (Solar Park).
- o) The execution of the ISAs by the Petitioner with the SPIA was not a commercial decision of the Petitioner but a requirement under the bidding documents. In

furtherance thereof, the Petitioner upon being declared the successful bidder, executed two Implementation and Support Agreements dated 16.09.2016 and 01.10.2016 (ISAs) with the SPIA for establishing the Projects within the Solar Park. Under the ISAs, the Petitioner is required to pay various charges to the SPIA for the development and maintenance of the Solar Park by the SPIA. Out of the various charges payable by the Petitioner under the ISAs, the payments on which the Petitioner is incurring additional tax liability can be categorized as follows:

- (i) Meter reading charges;
 - (ii) Annual land lease charges;
 - (iii) Annual operation and maintenance charges; and
 - (iv) Water charges (SPIA O&M Charges).
- p) This Commission has already allowed change in law compensation in relation to SPIA O&M Charges by its order dated 25.01.2021 in Petition No. 213/MP/2019, titled *Yarrow Infrastructure Private Limited v. NTPC Limited and Ors.*

Re. Regarding Respondents' contention that the judgment of APTEL in Coastal Gujarat Power Limited v. CERC is not applicable in the present case

- q) It is denied that the judgment dated 27.04.2021 passed by the APTEL in *Coastal Gujarat Power Limited v. CERC*, Appeal No. 172 of 2017 and batch (CGPL Judgment), does not apply to the present case and is distinguishable on facts.
- r) In this regard, the aforesaid contention of the Respondents is based on a grossly erroneous reading of the CGPL Judgment:
- (i) Paragraph 67 of the CGPL Judgment reiterates the arguments of the respondents therein to the effect that the deployment of services to other agencies cannot increase the liability of the procurers as the same was a commercial decision of the Appellant therein. In this regard, it is significant to highlight that the submissions advanced by the respondents in the CGPL Judgment are identical to the gist of the arguments made by the Respondents in the present case as well.
 - (ii) APTEL at paragraph 68 of the CGPL Judgment has rejected such contentions as a matter of principle of law and held that the contractors were engaged by the generating company therein within their discretion and that there is no inhibition in the PPAs in such regard.

- (iii) In view of the above, it is amply clear that the *only* test which needs to be considered whilst looking into the change in Law on account of outsourcing of O&M services is whether or not there is any inhibition in this regard in the PPAs. Applying the said test to the facts of the present case, it becomes clear that since there is no inhibition or restriction, whatsoever, in the present PPAs for outsourcing O&M services to a third party.
- (iv) Additionally, the CGPL Judgment also sets out the nature of services which were outsourced to a third party.

Re. APTEL's judgment dated 15.09.2022 in Parampujya Solar Energy Pvt. Ltd. and Anr. v. CERC and Ors.

- s) The change in law clause which formed the subject matter of the Parampujya Judgment is identical to Article 12 of the Petitioner's PPAs. As such, the contentions raised by the Respondents regarding any purported variation between the Change in Law clause in the CGPL Judgment and the Petitioner's PPAs now stand decided against the Respondents. Further, another facile distinction made by the Respondents that the Petitioner's project is a renewable project and that the project in the CGPL Judgment was a thermal project, also stands rejected as the projects in the Parampujya Judgment are also solar projects, selected by way of competitive bidding under section 63 of the Electricity Act, 2003

Re. BERC Order granting change in law relief in a similar matter based on CGPL Judgment

- t) BERC has also recently passed its order dated 03.08.2022 in remand proceedings initiated pursuant to APTEL's judgment dated 13.01.2022. BERC has granted change in law relief to a sister concern of the Petitioner herein in respect of identical change in law events, which had increased the taxes on outsourced O&M activities for the Petitioner.

Re. Grant of Carrying Cost

- u) APTEL by the Parampujya Judgment has granted carrying costs to the similarly situated solar developers in the said matter and has laid down the relevant legal principles for the award of carrying costs.

- v) Undisputedly, the change in law clause, namely Article 12 of the Petitioner's PPAs, in the present case is *identical* to the change in law clause considered by APTEL while rendering the aforesaid findings. As such, the Petitioner is also entitled to carrying costs on the Change in Law compensation prayed for under the present Petition.
- w) The calculation for the actual compensation amount may be done in the following manner:

Compensation to be Paid = (Actual tax paid by the Petitioner as per the documentary evidence) – (Tax as computed at the tax rate as applicable on the Effective Date under the PPAs, i.e., 14.50%)

Submission dated 04.10.2022 of the Petitioner (TPREL) in Petition No. 471/MP/2019

16. The Petitioner has submitted as under:

Re. Interpretation of Change in Law provision and Introduction of GST Laws is a Change in Law

- a) As a consequence of the Change in Law event, Article 12.2 of the PPA provides that the Affected Party is entitled to claim relief/ compensation for Change in Law by approaching this Commission. This Commission is empowered to acknowledge the Change in Law event and grant appropriate 'relief' for such Change in Law event.
- b) Introduction of GST falls within the scope of Change in Law provision as:
- (i) GST Laws have been brought into force with effect from 01.07.2017 [i.e. after 21.06.2016 (being the Effective Date for Project at B-32 and B-34, Pavagada Solar Park) and 03.12.2016 (being the Effective Date for Project at B-27 Pavagada Solar Park)].
 - (ii) Introduction of GST falls within the purview of first and fifth bullet of Article 12, being a new statutory enactment, which increased the rate of taxation.
 - (iii) Introduction of GST has increased the recurring/ non-recurring expenditure of the project.
- c) The introduction of GST Laws as a Change in Law is no longer res-integra. This Commission, by its various Orders have already held that introduction of GST is a Change in Law event under the PPA, viz. Order dated 19.09.2018 in Petition Nos. 50/MP/2018 titled as *M/s Prayatna Developers Private Ltd. v. NTPC Ltd. & Ors.* and Petition No. 52/MP/2018 titled as *M/s Azure Power Venus Private Limited v. SECI & Ors.*; Order dated 09.10.2018 in Petition No. 188/MP/2017 and Batch matters titled

as *ACME Bhiwadi Solar Power Private Limited v. SECI &Ors.*; Order dated 05.02.2019 in Petition No. 187/MP/2018 and Batch matters titled as *M/s Renew Wind Energy (TN2) Private Limited v. NTPC Ltd. &Ors.* and Batch.

- d) APTEL vide its Judgment dated 15.09.2022 in A. No. 256 of 2019 titled *Parampujya Solar Energy Pvt. Ltd. &Anr. v. CERC &Ors. &Ors.* (Judgment dated 15.09.2022) has also held that introduction of GST is a change in law.
- e) In its Written Submissions, NTPC has admitted that GST is a Change in Law within the scope of the PPA.

Re. Impact of Introduction of GST Laws during Construction Period

- f) TPREL has provided the rate of tax pre-GST and post GST and basis for its computation of claim. These submissions have not been disputed by NTPC. Hence, TPREL's claim ought to be allowed. Further, the Tribunal in its recent Judgment dated 15.09.2022 in *Parampujaya's case* has held that Change in Law compensation cannot be restricted upto commissioning only and the same can be granted after COD as well.
- g) In terms of the directions of this Commission, another round of reconciliation was carried out between TPREL and NTPC, on 02.08.2022 and 05.08.2022. During the visit all the invoices pertaining to the said Plant for GST claim has been verified and resubmitted along with the Lorry receipts. A reconciliation statement drawn by the parties has also been jointly signed by the parties. Subsequently, NTPC requested to provide applicability of Central Sales Tax, 'CST' in the States from where the material was supplied for the plants and requested to pass on the benefit of the differential amount, if any, vide its email dated 17.08.2022. TPREL has carried out the exercise and is agreeable to pass on the benefit to NTPC. Further, CA certificate certifying the veracity of the benefit from TPREL to NTPC will be shared shortly with NTPC. In view of the above, TPREL's claim, as provided in the Petition subject to the deductions arrived at basis the CA certificate is be allowed by this Commission.

Re. Impact of Introduction of GST Laws during operating period

- h) The Tribunal in its recent Judgment dated 15.09.2022 in *Parampujaya's case* has held that Change in Law compensation ought to be allowed for O&M expenses.

Re. NTPC's obligation to retribute TPREL is not contingent on beneficiaries compensating NTPC for the same

- i) As per the PPA, NTPC's obligations are not contingent upon compliance of obligation by the beneficiary distribution licensee under the PSA executed between NTPC and the distribution licensee. This is evident from the reading of Recitals, Articles 2 (Term of the Agreement), 4.3 (Purchase and Sale of Contracted Capacity), 4.4 (Right to Contracted Capacity and Energy), 10 (Billing and Payment) and 13 (Event of Default and Termination), which demonstrates that:
- (i) The execution and subsistence of the PPA between TPREL and NTPC is not contingent upon execution and/ or subsistence of PSA between NTPC and the beneficiary distribution licensees.
 - (ii) Supply of electricity by TPREL to NTPC has not been made conditional upon supply by NTPC to the beneficiary distribution licensees.
 - (iii) NTPC's obligation to pay monthly tariff is not dependent upon NTPC receiving necessary payments from the beneficiary distribution licensees.
 - (iv) Termination of the PPA is not contingent upon the termination of PSA between NTPC and the beneficiary distribution licensees.
- j) In line with the PPA provisions, till date, the monthly invoices have been issued by TPREL on NTPC and the payment for the same has been made by NTPC.
- k) In any case, whether the intermediaries are liable to make payment to the project developer is no longer res-integra. As stated above, in the Judgment dated 15.09.2022, the Tribunal has held that any payment from NTPC to TPREL is not contingent upon NTPC receiving the same from beneficiaries.
- l) This Commission has also held that payment obligation of an intermediary is not dependent upon the payment received by it from the beneficiary distribution licensee. This is evident from the following Orders of this Commission: *Talettutayi Solar Projects One Pvt. Limited v. SECI Ltd. &Ors* [Petition No. 45/MP/2019, Order dated 10.08.2021] (Para 64); *Clean Solar Power (Bhadla) Pvt. Ltd. v. SECI &Anr* [Petition No. 181/MP/2020, Order dated 17.06.2021] (Para 73); *SB Energy One Private Limited v. SECI &Anr.* [Petition No. 73/MP/2020 Order dated 13.05.2021] (Para 130-137) and *SBG Cleantech Projectco Five Private Limited v. SECI &Anr* [Petition No. 81/MP/2019, Order dated 04.05.2021] (Para 52).

Re. Carrying Cost

- m) The purpose of relief for a Change in Law provision is to ensure that the affected party is restored to the same economic position as if such Change in Law had not occurred. Restitution is therefore inherent to compensation on account of Change in Law. This has been reiterated by the Tribunal in Judgment dated 15.09.2022. In view of the aforesaid, it is submitted that TPREL is entitled to carrying cost for the period from the date of the effect of the Change in Law event.

Re. Methodology of payment of compensation

- n) The issues raised by NTPC in the instant application has also been raised by SECI in Petition No. 536/MP/2020. On 20.08.2021, this Commission had passed a detailed order providing the mechanism for payment of compensation to solar power developers. The principles laid down by this Commission in its Order dated 20.08.2021 in Petition No. 536/MP/2020 ought to apply in the present case well.
- o) As regards the issue of computation of Change in Law relief on the basis of normative parameters provided in RE Tariff Regulations 2020, this Commission should follow the principles decided by it in its Order dated 20.08.2021 in Petition No. 536/MP/2020 to maintain parity. Furthermore, the present projects were conceptualized and constructed during 2017 when CERC Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2017 (RE Tariff Regulations 2017) was applicable. Hence, at best, the normative parameters mentioned in RE Tariff Regulations 2017 can be made applicable and not the parameters mentioned in RE Tariff Regulations 2020.
- p) In any case, this Commission in its Order dated 20.08.2021 in Petition No. 536/MP/2020 had approved the following normative principles:-
- (i) Discounting rate of 10.41% of annuity payments towards the expenditure incurred on GST or Safeguard Duty;
 - (ii) Period of annuity payment of 13 years from the COD of the project.
- q) Hence, the period of annuity payment is to be computed as 13 years from the COD of the project.

Analysis and Decision:

17. We have heard the learned counsels for the Petitioners and the Respondents in these Batch

Petitions and have carefully perused the records. The following issues arise before us for adjudication:

Issue No.1: Whether introduction/ enactment of GST Laws amounts to Change in Law?

Issue No.2: Whether the Petitioners are entitled to non-recurring additional expenditure

and recurring additional expenditure (operation and maintenance) towards compensation for Change in Law? AND

Issue No.3: Whether the Petitioners are entitled to carrying cost towards compensation for Change in Law?

18. Since Issue No. 1, Issue No. 2 and Issue No. 3 are interlinked, they are being taken up together for discussion. The Petitioners have submitted that Article 12 of the PPAs provides for 'Change in Law'. It includes *inter alia* the enactment, promulgation, adoption in India of any Law, as well as, any change in tax or introduction of any tax made applicable for supply of power. The event of enactment of 'GST Laws' has occurred after the execution of PPAs and has resulted in additional recurring and non-recurring expenditure. In terms of Article 12.2.1 of the PPAs, an aggrieved party who has incurred additional recurring/ non-recurring expenditure is required to approach the Commission for seeking approval of such change in law event and thereby, claim relief for the same upon approval by the Commission. Accordingly, the Petitioners have approached the Commission for seeking relief on account of introduction of GST as a Change in Law event, as per the first and last bullet of Article 12.1.1 of the PPAs.
19. We observe that Article 12 of the PPAs provides the definition of Change in Law provision and the relief on account of occurrence of Change in Law event. Article 12 read 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.....”*

20. The Commission observes that as per Article 12, ‘Change in Law’ means the enactment/coming into effect/ adoption/ promulgation/ amendment/ modification or repeal of any Law in India; change in the interpretation of any law in India; imposition of a requirement for obtaining any consents or change in tax or introduction of any tax made applicable for supply of power by the SPD as per the terms of this Agreement, resulting into any additional recurring/ non-recurring expenditure or any income to the SPD. The Commission is of the view that harmonious construction of the bullet points under Article 12 makes it clear that bullet point one is wider in scope and refers to the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal of any law in India, including rules and regulations framed pursuant to such law whereas bullet point last in seriatim refers specifically to any change in tax or introduction of any tax made applicable for ‘supply of power’ by the SPD as per the terms of Agreement. Clearly, the ‘GST laws’ enacted are not in the nature of a mere change in the tax having limited applicability on supply of power. Rather, it is in the nature of an enactment having wide ranging implication

on the entire indirect taxation regime in India. In the instant case, the ‘GST Laws’ have been enacted by the Act of Parliament and the State Legislative Assemblies. The change in duties/ tax imposed by the Central Government and State Government(s) has resulted in the change in cost of the inputs required for generation and the same is to be considered as ‘Change in Law’. Hence, the Commission holds that the enactment of ‘GST laws’ is squarely covered as ‘Change in Law’ under the first, and last bullet in seriatim of Article 12.1.1 of the PPA.

21. The Commission observes that ‘GST Laws’ became effective from 01.07.2017. The details of the Capacity (MW), PPAs executed & SCoD of the Projects of the Petitioners are as under:

	293/MP/2018	294/MP/2018	150/MP/2019	471/MP/2019
Capacity MW	2 * 50 MW	3 MW	2 MW and 5 MW	2x50 MW (Open Category) and 50 MW (DCR category)
PPA	19.04.2016	14.10.2015	03.05.2016 Bhandara and 08.05.2016 Ambajhari	28.06.2016 (2*50 MW) and 04.01.2017 (50MW)
SCoD	20.04.2017	20.10.2015 (1 MW) and 14.02.2016 for remaining 2 MW of the contracted capacity.	30.08.2016 (Ordance Factory, Bhandara) and 07.11.2016 (Ordance Factory, Ambajhari)	20.07.2017 (2*50 MW) and 02.01.2018 (50MW)

22. From the above, the Commission observes that the *Scheduled dates of Commissioning* of the projects in Petition No. 293/MP/2018, 294/MP/2018 and 150/MP/2019 were before 01.07.2017. In view of above, the Commission holds that there is no impact of GST laws on the Construction Stage in Petition No. 293/MP/2018, 294/MP/2018 & 150/MP/2019.
23. In Petition No. 471/MP/2019, the Commission notes that the last date of the submission of Technical and Financial Bids was 23.02.2016 [2x50 MW (Open Category)] and 08.08.2016 [50 MW (DCR category)] respectively. On 12.04.2016, e-reverse auction was held for the Solar Plant [2x50 MW (Open Category)] to be set up at Plot Nos. B-32 and B-34 at Pavagada Solar Plant. Further, on 21.09.2016, e-reverse auction was held for the Solar Plant [50 MW (DCR Category)] to be set up at Plot Nos. B-27 at Pavagada Solar Plant. The Petitioner has

executed PPAs on 28.06.2016 (2*50 MW (Open Category)) and 04.01.2017 (50MW (DCR Category)) respectively i.e. before the introduction of GST Laws on 01.07.2017. Further, the SCoD of the projects were on 20.07.2017 (2*50 MW (Open Category)) and 02.01.2018 and (50MW (DCR Category)) respectively i.e. after 01.07.2017. Therefore, the Petitioner is entitled for relief under 'GST laws' for the expenditure during the Construction Stage.

24. **The next issue raised** by the Petitioners is that they are adversely impacted due to imposition of GST on the O&M expenses and that they are entitled for compensatory relief in accordance with Article 12 of the PPA. The Petitioners have also claimed carrying cost and submitted that the underlying purpose of Article 12 of the PPA is to provide compensation and to restore a party affected by Change in Law events to a position as if such Change in Law had not taken place. ***Per Contra***, the Respondents have submitted that the impugned PPAs do not contemplate outsourcing of O&M expenses and, therefore, any increase in cost as a result of outsourcing should be solely borne by the Petitioner.

O&M expenses and Carrying Cost:

25. We observe that the APTEL vide the judgement dated 27.04.2021 in A. No. 172 of 2017 and A.No.154 of 2018 (***Coastal Gujarat Judgement***) has held as under:

67. It is argued that the operation and maintenance of the plant is the responsibility of the appellant and if the appellant seeks to employ services of other agencies, the same cannot increase the liability of the Procurers; this was a commercial decision and choice of the appellant; and that if the appellant had not employed services of outside agencies, there would have been no impact of the alleged changes of tax rates.

68. We find no substance in the above submissions. *The work contractors are engaged by the appellant within its discretion and there is no inhibition in PPA in such regard. In fact, it is pointed out by the appellant, and rightly so, that Article 7 of the Model PPA which was a part of the RFQ documents had envisaged that the generator (Seller) alone shall be liable to operate and maintain the power station at its own cost but, in the final PPA that was executed between the parties, the clause to such effect was removed, this clearly indicative of the common understanding of the parties that the generator (CGPL) would not be solely responsible for O&M, the definition of 'Project Documents' read with 'O&M contracts' contemplating that a third-party O&M contractor might be appointed by it (CGPL).*

69. It is wrong to argue that because the appellant stands in the capacity of the Principal in relation to the work contractors engaged by it, it is responsible for the action (or inaction) on their part in such matters as have financial implication for the Procurers because the option exercised by the contractor is not a change in law but part of the commercial and business decision and has to be dealt inter se the former

two. We reject this plea against claim under consideration here for the simple reason the doctrine of agency cannot be invoked in this context. It is not shown that in matters of State revenue, the choices made by the contractors could have been controlled by the appellant.

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90. The respondents defend the impugned decision arguing that the Commission has duly allowed the claim of change in law in respect of the levy of Swachh Bharat Cess and Krishi Kalyan Cess in respect of such services as are linked to the business of generation and sale of electricity, such relief being not admissible in respect of other services since under Articles 13.1.1 and Article 13.2(b) read with Clause 4.7 of the Guidelines any change in law impact is confined to change in revenues and costs from the business of selling electricity by the Seller to the Procurers. Reference is made to the judgment dated 19.04.2017 of this tribunal in Appeal No. 161 of 2015 in *Sasan Power Limited v. Central Electricity Regulatory Commission and Others*. The respondents submit that there may be various activities carried out by the appellant as a commercial decision but which are neither necessary nor concerned with the business of selling electricity. It is argued that the appellant had failed to demonstrate as to how the other services claimed have an impact on the cost of or revenue from the business of selling electricity by it to the Procurers. At the same time, it is stated that the services claimed by CGPL, except in relation to transportation of goods (coal), are not related to the business of selling electricity. The submission also is that there has to be some benefit to the procurers or necessity for such services. The respondents further aver that the operation and maintenance of the power plant is the responsibility of Appellant and the fact that the appellant chose to employ services of other agencies cannot increase the liability of the Procurers.

91. It is not disputed that the appellant (CGPL) is a project specific Special Purpose Vehicle (SPV) set up solely for the purpose of generating and supplying electricity exclusively to the Procurers in accordance with the PPA. It engages in no other business undertaking. **All services availed by CGPL are undoubtedly used for its sole objective of generating electricity for supply to the Procurers under the PPA. The increased cost towards Krishi Kalyan Cess and Swachh Bharat Cess affects the cost of the business of the appellant for generation and sale of electricity. The twenty services left out by CERC also are connected to the commercial activities of the appellant adding to its cost of production and supply. In this view, there was no justification for disallowance of the claim for additional financial burden on other services covered under Swachh Bharat Cess and Krishi Kalyan Cess contrary to Article 13 of the PPA.**

92. We agree with the submission that CERC erred to introduce an extraneous qualification or filter which is not borne out from the PPA. The qualifying factor under Article 13 of the PPA is whether or not a CIL event has an impact on the cost of, or revenue from, the business of generation and sale of electricity by the seller (CGPL). In this view, the test applied by CERC that taxable service should have a "direct relation to the input cost of generation" is extraneous to the provisions of the PPA and must be rejected. It is trite that explicit terms of a contract (PPA) bind and it is not open for the adjudicating forums to substitute their own view on the presumed

*understanding of the commercial terms by the parties [Nabha Power Limited v. PSPCL &Anr. (2018) 11 SCC 508]. **Once it is established that levy of a tax on services availed by CGPL has an impact on the cost of or revenue from business of generation and sale of electricity - whether directly or indirectly - compensation must follow.***

*93. **We are not impressed with the plea of the respondents that the qualifying requirement under Article 13 is that the Change in Law event must have an impact on the cost of, or revenue from, the activity of generation of electricity. This argument is based on selective reading of the text of the clause. The contract (PPA), by Article 13, refers to the “business of selling electricity”. The compensation envisaged here cannot be restricted to the activity of “generating electricity”. The expression “business” has a very wide connotation. It is defined as an activity carried on continuously and systematically by a person by the application of his labour or skill with a view to earning an income [see Mitra’s Legal & Commercial Dictionary (Sixth Edition)]. Entire gamut of activities connected to the generation, wheeling etc of electricity will have to be treated as covered by the expression “business of supply of electricity”.***

26. We observe that APTEL vide its judgement dated 15.09.2022 in the ***Parampujaya Judgement*** reviewed its observations in the *Adani Power Ltd. case* and *GMR Warora case* and has held as under:

65. It is the argument of the contesting respondents that the claim for compensation under the PPAs at hand is contingent upon the decision in the first instance of the Central Commission on the admissibility and once such claim has crystallized upon approval of the claim of change in law, compensation from the date of such approval only can be granted, there being no provision for carrying cost being claimed for the anterior period. Referring to the expression “provide relief”, as appearing in Article 12.2.2 of the PPAs, the respondents submit that the same cannot be interpreted to mean restitution of the kind claimed in the present appeals.

*66. To put it simply, the controversy at hand requires to be addressed on the basis of interpretation to be put on the key words “provide relief” consequent to change in law appearing in Article 12.1.1. It may be noted at this very stage that the language employed in the PPAs at hand, using the above noted expression, is materially distinct from the one seen in corresponding Article 13 on change in law in Gujarat Bid-01 PPA which was subject matter of denial of carrying cost in the cases of Adani Power Ltd.(supra) and GMR Warora Ltd.(supra). Concededly, however, the words “the purpose of compensating the party affected by such change in law is to restore ... the affected party to the same economic position as if such change in law had not occurred”, as appearing in the Haryana PPA are missing here. **The question that arises is as to whether this renders the PPAs at hand one which do not at all contain the restitutionary provision. The answer to this question, in our considered view, depends on the construction that is to be placed on the words “provide relief”.***

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69. This principle has been reiterated and consistently applied in subsequent decisions by the Supreme Court, illustratively in judgments reported as *Torrent Power Limited v. GERC &Ors.*, 2019 SCC OnLine APTEL 110; *Uttar Haryana Bijli Vitran Nigam Ltd. &Anr. v. Adani Power (Mundra) Ltd. &Anr.* 2022 SCC OnLine SC 1068; and *Vidarbha Industries Power Limited v. Axis Bank Limited* 2022 SCC OnLine SC 841. Pertinently, in *Vidarbha Industries (supra)*, the court held that **“the law must ensure that time value of money is preserved, and that delaying tactics in these negotiations will not extend the time set for negotiations at the start”**.

70. The appellants SPPDs rightly point out that principle of time value of money has been recognized as an inherent attribute of “financial debt” by the provision contained in Section 5(8) of the Insolvency Bankruptcy Code, 2016. **Further, it needs to be noted here that principle of restitution is now part of the regime on change in law reflecting public policy, as introduced by the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 providing as under:**

“3. Adjustment in tariff on change in law.

(1) On the occurrence of a change in law, the monthly tariff or charges shall be adjusted and be recovered in accordance with these rules to compensate the affected party so as to restore such affected party to the same economic position as if such change in law had not occurred.”

71. **Restitution is a principle of equity which is generally invoked by the adjudicatory authorities – Courts and Tribunals – to render substantial justice** and, in this context, we may quote the following observations of Supreme Court in judgment reported as *South Eastern Coalfields Ltd v. State of Madhya Pradesh &Ors.* (2003) 8 SCC 648:

....

72. As ruled in above mentioned case, absence of prohibition in law or contract against award of interest to recompense for delay in payment is also significant. As already quoted earlier, **in the case of Uttar Haryana Bijli Vitran Nigam Ltd(supra), the Supreme Court has upheld the view that in terms of restitutionary principle, the affected party is to be given the benefit of restitution “as understood in civil law”**.

73. The claim arising out of change in law provisions, across all kinds of PPAs under bidding route, is essentially a claim for compensation, the objective being to relieve the affected party of the impact of change in law on its revenues or cost or by way of additional expenditure. **The word “compensation” simply means anything given to make things equal in value, anything given as an equivalent, to make amends for loss or damage.**

...

...

75. The cardinal rule of interpretation is that words have to be read and understood in ordinary, natural and grammatical meaning. [*S. Ganapathraj Surana v. State of T.N.* 1993 Supp (2) SCC 565]. **The crucial words are “provide relief”**. The word relief is defined by Black’s Law Dictionary as under:

...

...

78. **The use of the word “relief” in the context of adjudicatory process, simply means the remedy which the adjudicatory forum may afford “in regard to some actual or apprehended wrong or injury”** or something which a party may claim as of right, or making the affected party “feel like easing out of ... hardship”. [Sarsuti v. Kunj Behari Lal, 1883 SCC OnLine All 85; Santhammav. Kerala State 2019 SCC OnLine Ker 1265; Commissioner of Income-Tax v. R.B. Jodhamal Kuthiala, 1963 SCC OnLinePunj 403; Dipti Aggarwal v. Ashish Chandra, 2017 SCC OnLine Cal 8835; Mewar Sugar Mills Ltd. v. Chairman Central Board of Direct Taxes and Ors. (09.10.1998 - DELHC)]. In Kavita Trehan v. Balsara Hygiene Products Ltd AIR (1995) SC 441, it was held by the Supreme court that jurisdiction to make restitution is inherent in every court and can be exercised whenever justice of the case demands.

...

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81. It is in this light that Hon’ble Supreme Court in the case of Energy Watchdog (supra) ruled, albeit in the context of Section 63, that the Regulatory Commission must exercise its functions in accordance with law and guidelines and in situations where no such guidelines exist, it may avail of its “general regulatory powers” under Section 79(1)(b).

82. We have already noted that the PPAs which were subject matter of decisions in the case of Adani Power Ltd (supra) and GMR Warora Ltd (supra) contained change in law clauses structured differently from the shape in which they occur in the present PPAs, the words “provide relief” not having been used in the former. The judgment dated 13.04.2018 of this tribunal in Adani Power Ltd.(supra) did not even consider the question as to whether the principle of time value of money would apply in examining the impact of change in law once change in law had been approved. The said decision for present purpose is, thus, sub silentio. When the judgment in the said case was carried in appeal to the Hon’ble Supreme Court leading to decision reported as Uttar Haryana Bijli Vitran Nigam Ltd (UHBVNL) (supra), the challenge was not in relation to what had been denied by this tribunal as the first appellate forum and, therefore, it is not correct to say that the issue stands settled by the said judgment. We are, at the same time, conscious of the fact that while upholding the relief to the extent granted in the case of Adani Power Ltd (supra), the Supreme Court by judgment reported as UHBVNL (supra) had observed that it would be fallacious to say that the claim of restitution was being put forward “on some general principle of equity”, the amount of carrying cost in that case being “relatable to Article 13 of the PPA” (the change in law clause).

83. In the present cases, the claim for compensation of SPPDs is primarily founded not on principles of equity but on the contractual clause stating that the affected party is entitled to approach the Commission which shall “provide relief” in relation to the impact of the change in law event if it has resulted in “any additional recurring /non-recurring expenditure”. The purpose of the change in law clause in the PPAs is to relieve the SPPDs of the additional burden. Since the impact of the new tax (GST or Safeguard Duty on Imports, as the case may be) would come from the date of enforcement of the new laws, the relief intended to be afforded under the contracts cannot be complete unless the said burden is allowed to be given a pass through from the date of imposition of the levy. Unlike the PPA in UHBVNL (supra) wherein the

phraseology of change-in-law provision was exhaustive, the words “provide relief” in present PPAs are open ended, not qualified in any manner so as to be given a restrictive meaning in order to treat the date of adjudication of the claim by the regulatory authority as the effective date or to justify denial of carrying cost **of widest amplitude and cannot be read to limit its scope the way the contesting respondents seek to propagate or the way the Central Commission has determined.**

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85. **There is one more justification for the view we are taking in the matter and that stems from the provision contained in Section 70 of Indian Contract Act, 1872 which relates to the obligation of person enjoying benefit of a non- gratuitous act.**

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87. As pointed out by learned counsel for Mahoba, under the PPA there is an obligation on the part of SPPDs to ensure “continuance of supply of power throughout the term of Agreement”. It is inherent in this that SPD, in order to continue to supply, must reconfigure or repower the plant, if so required, by installing additional modules after the COD since the contractual clause does not create any distinction as to expenditure pre or post COD, for purposes of change-in-law compensation. The plea for relief concerning post COD cannot be rejected, the expenditure incurred being not meant to be gratuitous, the intent instead being to discharge contractual responsibilities. We may quote the following passage from judgment of Hon’ble Supreme Court in State of West Bengal v. BK Mondal, AIR 1962 SC 779, in the context of Section 70 of the Indian Contract Act, 1872:

.....
“94. For the foregoing reasons, we cannot approve of the view taken by the Central Commission on the subject of carrying cost. **We hold that the appellant SPPDs are entitled to grant of relief in the nature of carrying cost over and above the compensation already allowed by the Central Commission.**”

...

CLAIM OF COMPENSATION FOR PERIOD POST-COD

95. The appellant SPPDs had also claimed compensation (on account of change in law events) for the consequent additional expenditure incurred or invoices raised after the Commercial Operation Date (COD) of the SPPs. The Central Commission, by the impugned decisions, **has held that liability towards additional expenditure is to be borne by the respondent beneficiaries only till the date of corresponding COD of the project.**

...

97. It bears repetition to note that change-in-law clauses in the PPAs (Article 12) assure relief to be provided in relation to “any additional recurring/non-recurring expenditure” arising out change-in-law. There is no restriction in the contracts as to application of this clause for period prior to the COD. The activities of generation of electricity and its supply, post COD, are bound to include non-recurring expenditure, O&M expenses being one such area. In fact, the use of the word “any” in relation to the consequent “recurring or non-recurring expenditure” signifies the wide ambit of

*the contractual clause, no exclusion of such nature as understood by the Commission deserving to be read there into. **The extraneous qualification that such expenditure must relate to period prior to COD cannot be approved of.***

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O&M EXPENSES

*107. The above decision applies on all fours. **We adopt the view taken in case of Costal Gujarat Power Limited (supra) and disapprove the decision of the Central Commission on the subject as quoted above and hold that the appellant SPPDs are entitled to compensation for additional expenditure (recurring /non-recurring) towards O&M activities as well, notwithstanding the fact that they were outsourced.***

27. We observe that from the *ratio-decidendi* as decided by the APTEL in *Coastal Gujarat Judgment & A.No. 256 of 2019 & Batch* and *Parampujaya Judgement dated 15.09.2022* (quoted above), it infers that the contractors can be engaged by the generating company if there is no inhibition in the agreement in such regard and once it is established that levy of a tax on services has an impact on the cost of or revenue from business of generation and sale of electricity - whether directly or indirectly, compensation must follow. Hence, the Petitioners are entitled to compensation for additional tax burden towards O&M activities notwithstanding the fact that they were outsourced.
28. We further observe that in order dated 12.04.2019 in the Petitions 2016/MP/2018 & Batch, based on APTEL judgments (*dated 13.04.2018 in Appeal No. 210 of 2017 in Adani Power Limited v. Central Electricity Regulatory Commission and Ors. and dated 14.08.2018 in Appeal No.111 of 2017 in M/s. GMR Warora Energy Limited v. Central Electricity Regulatory Commission and Ors.*), we had held that “if there is a provision in the PPA for restoration of the Petitioners to the same economic position as if no Change in Law event has occurred, the Petitioners are 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 Commission. The Commission observes that the PPAs do not have a provision dealing with restitution principles of restoration to same economic position. Therefore, the Commission is of the view that the claim regarding separate carrying cost is not admissible.” We observe that from the *ratio-decidendi* as decided by the APTEL in its judgement dated 15.09.2022 in the *Parampujaya Judgement* it infers that the burden of Carrying Cost flows directly from the Change in Law event, so the relief will be incomplete unless the part of additional expenditure is also allowed as pass through.

65. APTEL in both the *above Judgements* observed that the purpose of the change in law clause in the PPAs is to relieve the developer of additional burden. Since the impact of GST notification would come from the date of enforcement of the new laws, relief to be provided under the contracts cannot be complete unless the said burden is allowed to be given a pass through from the date of imposition of the levy. In light of the above judgments, the following *ratio-decidenti* emerges:

- a) All services availed by the Petitioners are undoubtedly used for the sole objective of generating electricity for supply to the Procurers under the PPA. The increased cost towards Change in Law affects the cost of the business of the appellant for generation and sale of electricity. The claims are covered under Article 12 of the PPAs.
- b) The contractors can be engaged by the generating company if there is no inhibition in the agreement in such regard.
- c) Once it is established that levy of a tax on services has an impact on the cost of or revenue from business of generation and sale of electricity - whether directly or indirectly - compensation must follow.
- d) The PPAs by Article 12, refers to the business of selling electricity. The compensation envisaged here cannot be restricted to the activity of generating electricity.
- e) The Petitioners can claim compensation on account of GST even after the occurrence of COD of the project.
- f) The Petitioners are entitled to grant of relief in the nature of carrying cost over and above the compensation already allowed by the Central Commission.
- g) The Petitioners are entitled to compensation for additional expenditure towards O&M activities notwithstanding the fact that they were outsourced.

66. In view of the above the Petitioners shall be entitled to recover the compensation on account of incremental impact due to 'Change in Law' even after the occurrence of COD of the project including O&M expenses. Further, the Petitioners are also entitled to grant of relief in the nature of carrying cost on the compensation on account of incremental impact due to 'Change in Law'. Accordingly, the Commission directs that the contracting parties may carry out reconciliation on account of incremental impact including O&M expenses due to promulgation of the GST Laws along with carrying cost by exhibiting clear and one to one

correlation with the projects and the invoices raised backed by auditor certificate. The Commission further directs that the responding DISCOMS are liable to pay NTPC/NVVN/SECI (as the case may be) all the above reconciled claims that NTPC/NVVN/SECI has to pay to the Petitioner. However, payment to the Petitioners by NTPC/NVVN/SECI is not conditional upon the payment to be made by the responding DISCOMS to NTPC/NVVN/SECI.

67. The Petition no. 293/MP/2018; Petition No. 294/MP/2018; Petition No. 150/MP/2019 and Petition No. 471/MP/2019 along with IA 60 of 2020 stand disposed of accordingly.

Sd/
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Sd/
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Sd/
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