



नई दिल्ली
NEW DELHI

याचिका संख्या./ Petition No.468/MP/2019

कोरम/ Coram:

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

आदेश दिनांक/ Date of Order: 12th of November, 2021

IN THE MATTER OF:

Petition under Section 79(1)(b) read with Section 79(1)(f) of the Electricity Act, 2003 for (i) approval of 'Change in Law'; and (ii) consequential relief to compensate for the increase in capital cost due to introduction of the Central Goods and Services Tax Act, 2017, the Integrated Goods and Services Tax Act, 2017 and the State Goods and Services Tax Acts enacted by the respective states, in terms of Article 17 of the Power Purchase Agreement dated 17.04.2017 between Mahindra Renewables Private Limited and M.P. Power Management Company Limited and the Power Purchase Agreement dated 17.04.2017 between Mahindra Renewables Private Limited and Delhi Metro Rail Corporation.

AND IN THE MATTER OF:

Mahindra Renewables Private Limited,
Mahindra Towers, Dr. G.M. Bhosale Marg,
P.K. Kurne Chowk, Worli,
Mumbai – 400018

...Petitioner

VERSUS

1. M.P. Power Management Company Limited,
Shakti Bhawan, Rampur,
Jabalpur, Madhya Pradesh 482001
2. Delhi Metro Rail Corporation,
Metro Bhawan, Fire Brigade Lane, Barakhamba Road,
New Delhi – 110001

...Respondents

Parties Present: Shri Hemant Sahai, Advocate, MRPL
Shri Nitish Gupta, Advocate, MRPL
Ms. Jyotsna Khatri, Advocate, MRPL
Shri G. Umapathy, Advocate, MPPMCL
Shri Tarun Johri, Advocate, DMRC
Shri Sanjay V Kute, Advocate, DMRC
Shri Devjeet Ghosh, MRPL
Shri V. Bharadwaj, MPPMCL

आदेश/ ORDER

The Petitioner, Mahindra Renewables Private Limited is a generating company and has been declared a successful bidder for development of one unit of 250 MW capacity of the 750MW solar project in Rewa District in the State of Madhya Pradesh.

2. The Respondent No. 1, M.P. Power Management Company Limited (MPPMCL) is the holding company for all the distribution licensees in the State of Madhya Pradesh with whom the Petitioner has executed a Power Purchase Agreement (PPA) dated 17.04.2017 for off-taking approximately 78% of the power generated by the Project Unit.
3. The Respondents 2, Delhi Metro Rail Corporation (DMRC) is a company established with equal equity participation of the Government of the National Capital Territory of Delhi and the Central Government for the construction and operation of a world class Mass Rapid Transport System with whom the Petitioner has executed a Power Purchase Agreement dated

17.04.2017 for off-taking the balance approximately 22% of the power generated by the Project Unit.

4. The Petitioner has made the following prayers:
 - a. *Declare that enactment of GST Law qualifies as 'Change in Law' in terms of Article 17 of the PPAs executed between the Petitioner and the Respondents and that the Petitioner is entitled to relief thereunder;*
 - b. *Direct the Respondent to compensate the Petitioner in terms of Article 17 of the PPAs for the additional non-recurring/ recurring capital cost incurred/ to be incurred by it to the tune of INR 61.32 crores and Rs. 20 lacs per year due to introduction of GST Law by way of upfront lumpsum payment/ adjustment in the quoted tariff along with the carrying cost;*
 - c. *Pursuant to grant of prayer (a) and (b) above, approve the necessary consequential amendments to the PPAs and LOI;*
 - d. *Grant such order, further relief(s) in the facts and circumstances of the case as this Commission may deem just and equitable in favour of the Petitioner.*

Background

5. The Government of Madhya Pradesh and the Government of India decided to set up the Rewa Solar Project, supported by the Solar Park Scheme issued by MNRE on 12.12.2014 for Development of Solar Parks and Ultra Mega Units.
6. Madhya Pradesh Urja Vikas Nigam Limited (MPUVN) and Solar Energy Corporation of India (SECI) incorporated a joint venture company namely Rewa Ultra Mega Solar Limited (RUMSL) with equal shareholding.
7. MNRE designated RUMSL as the solar project developer/ bid process coordinator for the Rewa Solar Project consists of three units (i.e. Unit 1, Unit 2 and Unit 3) of ground mounted grid-connected solar photovoltaic power plants of 250 MW capacity each and the energy generated from all the three units would be supplied to MPPMCL and DMRC.

8. On **16.03.2016**, RUMSL issued Request for Proposal for development of 750MW (3 x 250MW) Grid Connected Ground Mounted Solar Photovoltaic Project under the competitive bidding process.
9. On **23.01.2017**, the Petitioner submitted its bid tariff of INR 2.979/ kWh with escalation of 5 paisa/ kWh every year up till the 16th year of the PPA.
10. On **21.02.2017**, the Petitioner was declared successful bidder and RUMSL issued the Letter of Intent for development of the Project Unit for generation and onward sale of solar power to MPPMCL and DMRC.
11. On **17.04.2017**, the Petitioner executed MPPMCL PPA with MPPMCL for a Guaranteed Energy Offtake of at least 411 MUs of solar energy, and DMRC PPA with DMRC for a Guaranteed Energy Offtake of at least 115 MUs of solar energy.
12. On **01.07.2017**, the Central Goods and Services Tax Act, 2017 (CGST Act) was enacted for levy and collection of tax, w.e.f. 01.07.2017, on inter-State supply of goods or services, or both, by the Central Government. The Integrated Goods and Services Tax Act, 2017 (IGST Act) was enacted for the levy and collection of tax, w.e.f. 01.07.2017, on inter-State supply of goods or services, or both, by the Central Government. The Madhya Pradesh Goods and Services Tax Act, 2017 (MPGST Act), was enacted for levy and collection of tax w.e.f. 01.07.2017 on intra-State supply of goods or services or both by the State of Madhya Pradesh. (CGST Act, IGST Act and MPGST Act are hereinafter referred to as ‘the GST Laws’).
13. Pursuant to the introduction of GST Law, solar power industry was placed under the 5% to 18% tax bracket. An increase in taxes from zero up to 18% led to increase in the capital cost of the project.
14. Hence the Petition.

Submissions of the Petitioner

15. The Petitioner has submitted the following:

- a) The enactment of the GST Laws led to a significant increase in the tax incidence equal to INR 61.32 Crore and impacting capital cost of the Project and making tariff discovered through Reverse Auction unviable.
- b) The introduction of GST Laws qualifies as ‘Change in Law’ under sub-clauses (a) to (e) of Article 1.1 of the PPAs.
- c) Article 1 of the PPA defines ‘Change in Law’ stipulates as:

“Change in Law means the occurrence of any of the following events in India, subsequent to the Proposal Due Date (as defined in the RFP), and such event(s) has/have an impact on the Unit or on any of the rights and obligations of the Parties under any of the Project Agreements:

- (a) the modification, amendment, variation, alteration or repeal of any existing Applicable Laws;*
- (b) the enactment of any new Applicable Law or the imposition, adoption or issuance of any new Applicable Laws by any Government Authority;*
- (c) changes in the interpretation, application or enforcement of any Applicable Laws or judgement by any Government Authority;*
- (d) the introduction of a requirement for the SPD to obtain any new Applicable Permit; or*
- (e) the modification, amendment, variation, introduction, enactment or repeal of any Tax, resulting in a change in the incidence of Tax liability, including pursuant to any Applicable Laws promulgated or to be promulgated in furtherance of the Constitution (122nd Amendment) Bill, 2014.*

It is clarified that for the purposes of Change in Law, Taxes shall not include taxes on corporate income, any withholding tax on dividends distributed to the shareholders of the SPD or income tax.”

- d) Article 17 of the PPAs clearly envisages a compensation to be paid to the Petitioner, either by way of adjustment in tariff or an upfront lump sum payment, for any additional capital expenditure, interest and additional costs incurred as a result of ‘Change in Law’.
- e) Additional capital expenditure, interest and associated costs (Additional Cost) that the Petitioner has incurred on the Project as a result of introduction of GST Laws exceeds the threshold limit of INR 20,000,000 (twenty million) as provided in the PPAs. In terms of Article 17.1(c) of the PPAs, Petitioner is empowered to approach this Commission to seek approval of such ‘Change in Law’ and consequential relief to compensate for the increase in capital cost due to introduction of GST Laws.
- f) Article 17 of the PPAs provides for ‘Change in law’ as under:

“17. Change in law

17.1 Consequences of Change in Law

- (a) *If a Change in law occurs or is shortly to occur, then a Party shall notify the other Parties expressing its opinion on its likely effects and giving details of its opinion of whether;*
- (i) *any changes are required to the scope of work to be performed by the SPD under this Agreement;*
 - (ii) *any changes are required to the terms of this Agreement to deal with such Change in Law.*
 - (iii) *relief from compliance with my obligations is required, including the obligation of the SPD to achieve the Unit SCOD;*
 - (iv) *any increase or decrease in costs (other than incurring additional capital expenditure), or any increase in Taxes or delay is likely to result from the Change in Law; and*
 - (v) *any capital expenditure is required or no longer required as on result of a Change in Law*
- (b) *As soon as practicable but no later than 15 (fifteen) Days after receipt of any notice from a Party under Article 17.1(a), the Parties shall discuss the issues referred to therein and any ways in which the parties can mitigate the effect of the Change in Law, including;*
- (i) *demonstrating that the SPD has used reasonable endeavours (including, where practicable, the use of competitive quotes) to minimise any increase in costs and maximise any reduction in costs;*
 - (ii) *demonstrating how any capital expenditure to be incurred or avoided is being measured in a cost-effective manner, including showing that when such expenditure is incurred or would have been incurred, foreseeable Changes in Law at that time have been taken into account by the SPD.*
 - (iii) *demonstrating as to how the Change in Law has affected prices charged by similar business to the Unit, including similar businesses in which the shareholders or their associates carry on business;*
 - (iv) *demonstrating to the Procurer that the Change in Law is the direct cause of increase or decrease in costs and/or loss or gain of revenue or delay and the estimated increase or decrease in costs or loss or gain in net profit after Tax could not reasonably be expected to be mitigated or recovered by the SPD acting in accordance with Good Industry Practices; and*
 - (v) *demonstrating that any expenditure, which was anticipated to be incurred to replace or maintain assets that have been affected by the Changes in Law, has been taken into account in the amount stated in its opinion presented under Article 17.1(a).*
- (c) *if the parties have complied with Article 17.1(b) or upon elapse of the time specified in the Article 17.1(b) and if the SPD is required to incur any additional*

costs, including additional capital expenditure due to a Change in Law the aggregate financial effect of which, over the remaining Term of the PPA, is up o INR 20,000,000 (twenty million) (Threshold Limit), then the SPD shall obtain funding for such additional costs, including capital expenditure, as its cost and expenses. The SPD shall bear all additional capital expenditure and/or interest and additional costs incurred to obtain any finding to the extent of the Threshold Limit.

For the avoidance of doubt, it is clarified that the Threshold Limit shall apply to each event constructing a Change in Law and shall not be applied on a cumulative basis.

If the additional capital expenditure, interest and associated costs that the SPD incur as a result of the Change in Law exceeds the Threshold Limit, then the Procurer or the SPD shall approach the Appropriate Commission to seek approval of such Change in Law and the consequent impact on the Applicable Tariff.

- (d) If the parties have complied with Article 17.1(b) or upon elapse of the time specified in the Article 17.1(b) and if as a result of the Change in Law, there is a decrease in costs, or decrease in Taxes and/or gain revenue or net profits after Tax, then any financial benefit ascending to the SPD on account of such decrease in costs, or decrease in Taxes and/or gain in revenue or net profits after Tax shall be passed through to the Procurer on its entirety.*
- (e) The amount determined in accordance with Article 17.1(c) and Article 17.1(d) in the eventuality of any increase or decrease in cost (or decrease or increase in revenues or net profit after Tax) of the SPD on account of a Change in Law shall be adjusted either in the Tariff payment or through a lump sum payment, and shall be paid through a Supplementary Bill to be raised by either the SPD or the Procurer in terms of Article 10. In case of any change in the Applicable Tariff by reason of Change in Law, as determined in accordance with this Agreement, the Monthly Bill to be raised by the SPD after such change in Applicable Tariff shall appropriately reflect the changed Applicable Tariff and the Procurer agrees to pay the revised Applicable Tariff accordingly.”*

- g) Solar Park Scheme or the RFP or the PPA do not prohibit outsourcing of O&M and good utility practices warrant appointment of experienced agencies/ contractors for execution of the Project/ O&M. As such, the Petitioner outsourced O&M activities to the Contractor.
- h) The introduction of GST Laws increased taxes applicable to various O&M activities, which led to an incremental impact on the O&M Cost. This incremental impact will have to be borne by the Petitioner. Since this increase is on account of ‘Change in

Law', the Petitioner is entitled to relief for such increase.

- i) Before the Effective Date, Service Tax at the rate of 15% was being levied on Operation & Maintenance Expenses (O&M). With effect from 01.07.2017, GST at the rate of 18% (9% CGST and 9% SGST) is being levied on O&M Expenses.
- j) The Commission has itself held on earlier occasions that introduction of a new tax which was not in existence at the time of submission of bid would be covered within the definition of 'Change in Law'. In this regard, reference is made to order dated 30.03.2015 issued by the Commission in Petition No. 06/MP/2013, wherein the Commission while dealing with the introduction of clean energy cess held as follows:

“33. We have considered the submissions made by both petitioner and the respondents on the clean energy cess. The clean energy cess on coal was introduced by the Government of India through the Finance Act, 2010 for the first time which is after the due date i.e. seven days prior to the bid deadline. Since there was no clean energy cess on the date of submission of the bid, the petitioner could not be expected to factor in the impact of such cess in the bid. Moreover, clean energy cess adds to the input cost of production of electricity. Therefore, the claim is covered under Article 13.1.1(i) of the PPA and consequently the liabilities shall be borne by the procurers.”

- k) It is also entitled to carrying cost on the additional cost incurred by it as a result of introduction of the GST Laws and the same will have to be paid for the following two periods: Period 1 - the date from which the Petitioner incurred the additional cost on account of introduction of GST Laws till the approval of Change in Law by this Commission; and Period 2 - from the date of approval of Change in Law over the period of amortisation, in the scenario this Commission does not allow compensation by way of one-time upfront lumpsum payment.
- l) In terms of the Revised Tariff Policy dated 28.01.2016 issued by the Ministry of Power, Government of India, change in taxes and levies has been acknowledged as Change in Law events.

Reply of the Respondent MPPMCL

16. MPPMCL has submitted as under:
 - a) Relief claimed by the Petitioner with regard to the declaration of the introduction of the GST Act, 2017 being a 'Change in Law' event is not opposed and is admissible as per the decision dated 09.10.2018 of this Hon'ble Commission for M/s ACME Jaipur Solar

Pvt Ltd. (another Developer in the same 750 MW Project of RUMSL at Rewa) in Petition No. 33/MP/2018 and connected matters.

- b) Claim of the Petitioners seeking carrying cost on account of the introduction of the GST Act, 2017 is devoid of merits. There is no provision in the PPA regarding carrying cost for the period till the decision of the Commission acknowledging the change in law and deciding on the amount to be paid for such change in law as per Article 17.1(c) of the PPA. It is submitted that the PPAs do not have a provision dealing with restitution principles of restoration to the same economic position. MPPCL has put its reliance on APTEL's Order dated 13.04.2018 in *Adani Power Limited v. Central Electricity Regulatory Commission and Ors*; and this Commission's Order dated 09.10.2018 in Petition No. 33/MP/2018.
- c) The provisions of the PPAs do not mandate or prescribe or specifically provide for the outsourcing of O&M. The O&M is the responsibility of the petitioner and in the event of the petitioner choosing to employ the services of other agencies, the liability of the distribution licensee in terms of tariff cannot be increased. The change in law is only admissible if the transaction which is assessed for tax is mandated or required to be performed in terms of the PPAs and not when it is undertaken as a discretionary commercial decision. The CERC in its order dated 09.10.2018 in Petition No. 33 / MP / 2018 and others, held that, "*The claim of the Petitioners on account of additional tax burden on "O&M" expenses (if any), is not maintainable*"
- d) With regard to increase in capital cost of the project stated to be Rs. 61.32 Crores, the figures provided by the Petitioner may not be relied without evidence of payment of GST, the relevant documents for establishing one to one correlation.

Reply of the Respondent DMRC

- 17. The Respondent No. 2 has submitted as under:
 - a) The Petitioner has failed to comply with the terms and conditions of the Article 17.1 (b) of PPA, which envisages the joint meeting of the parties for the purposes of demonstrating through evidence that all reasonable efforts for minimizing the effect of Change in Law had been made by the SPD.
 - b) Petitioner is not entitled to claim any carrying costs in view of the law laid down by this Commission in the matter of *M/s Sadipali Solar Pvt. Ltd. Vs Solar Energy Corporation*

of India Ltd. &Ors.; 299/MP/2019 decided on 02.04.2020.

- c) The date of bid submission as well as the date of execution of PPA are earlier than the date (03.08.2017) of the issuance of the 'Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects' by MoP. There is no provision in the PPA, which states that in the event of Change in Law, pursuant to the bid submission date, the Petitioner has to be restored to the same financial position, as if the Change in Law had not occurred. In the light of the above, no benefit of the Notification dated 03.08.2017, can legally be passed on to the Petitioner.
- d) It is evident that the other SPD (M/s Arinsun Clean Energy Pvt. Ltd.) of the same Rewa Project has installed equal capacity of 250 MW solar plant with less GST liability i.e. 45.3 Crores on the Procurers. The main difference is that M/s Arinsun Clean Energy Pvt. Ltd. has executed the project through independent EPC contractor and made all efforts to minimize the impact of Change in Law as per Power Purchase Agreement. Therefore, impact of GST cannot be more than Rs. 45.3 Crores which the Petitioner has made Rs. 73 Crores with the help of execution of work through sister concern.
- e) Claim for relief on account of impact of Change in law on O & M contract is liable to be rejected. The outsourcing of O&M to a third party is not a requirement of the PPA and is a commercial decision of the Petitioner for its own advantage and any increase in cost including on account of taxes etc. is entirely to the account of the Petitioner.

Petitioner's Rejoinder to the Reply by MPPMCL

18. The Petitioner has submitted as under:
 - a) Carrying cost will have to be paid for the following two periods: Period 1 - the date from which the Petitioner incurred the additional cost on account of introduction of GST Laws till the approval of Change in Law by this Commission; and Period 2 - from the date of approval of Change in Law over the period of amortisation, if this Commission does not allow compensation by way of one-time upfront lumpsum payment.
 - b) As regards Period 2, the Petitioner is entitled to carrying cost as a matter of right. As regards Period 1, it recognises the decision of the APTEL dated 13.04.2018 in its judgement in *Adani Power Ltd. v. Central Electricity Regulatory Commission and Others in Appeal No. 210 of 2017*.

- c) It would still be affected by GST Laws, even if the O&M cost had been internalised and would be entitled to relief for the increase in O&M cost under Article 17 of the PPA.

Petitioner's Rejoinder to the Reply by DMRC

19. The Petitioner has submitted as under:
- a) DMRC has failed to appreciate that as per Article 17.1(a) of the PPA, the Petitioner issued Change in Law Notice to DMRC on 27.03.2019 whereby it notified DMRC about the occurrence and impact of introduction of GST Laws. But DMRC never responded to the notice. After receiving no response from DMRC, the Petitioner rightfully approached this Commission for declaration of Change in Law.
 - b) It was difficult for the Petitioner to compute the exact financial impact that might be caused with the introduction of GST laws due to uncertainty in both the timelines of implementation of GST and the tax slabs under which a particular industry might fall. There were significant changes in the GST laws which were not contemplated at the time of bidding process.
 - c) Carrying cost will have to be paid for the two periods: Period 1 - the date from which the Petitioner incurred the additional cost on account of introduction of GST Laws till the approval of Change in Law by this Commission; and Period 2 - from the date of approval of Change in Law over the period of amortisation, if this Commission does not allow compensation by way of one-time upfront lumpsum payment.
 - d) The Petitioner is entitled to compensation for additional recurring expenditure on O&M activities due to increase in taxes on account of the introduction of GST Law for the life of the Project.

Analysis & Decision

20. We have heard the learned counsels for the Petitioner and the Respondents and have carefully perused the records.
21. The Petitioner M/s Mahindra Renewables Private Limited has developed one unit of 250 MW capacity of the 750MW solar project in Rewa District in the State of Madhya Pradesh. The Petitioner has submitted that imposition of the GST Laws is a Change in Law event under Article 17 of the PPA and is therefore entitled to relief due to occurrence of the said

Change in Law and MPPCL and DMRC be directed to pay the amount claimed in terms of Article 17 of the PPA along with carrying cost.

22. We observe that during the hearing dated 30.07.2021 the Petitioner submitted that issues involved in the present Petition are already covered by the Commission's earlier orders relating to Change in Law arising out of enactment of GST Laws. Also, the Petitioner's Project being located in Rewa Solar Park, the facts and issues involved in the present case are identical to those involved in Petition No. 33/MP/2018 (*ACME Jaipur Solar Power Pvt. Ltd. v. MPPMCL*), which have been decided by the Commission vide its order dated 09.10.2018. Further, the claims towards GST impact on O&M expenses and carrying cost have also been dealt with by the Commission in its earlier orders. In respect to other two Projects located in Rewa Solar Park, the beneficiaries, MPPMCL and DMRC, have paid compensation on account of GST Laws on one-time basis and since the amount in question in this Petition is very small, similar dispensation may also be adopted in the Petitioner's case.
23. Respondent No.2, (DMRC) also reiterated that the issues involved in the present case have already been dealt with by the Commission in its earlier decisions and the Commission has disallowed the claims in respect of impact of GST Laws on O&M expenses and carrying cost. Respondent No.1, (MPPMCL) submitted that the Respondent has already filed its reply which may be taken into the consideration.
24. We have noted that in its reply, the Respondent No.1, (MPPMCL) has specifically submitted that "Relief claimed by the Petitioner with regard to the declaration of the introduction of the GST Act, 2017 being a 'Change in Law' event is not opposed and is admissible as per the decision dated 09.10.2018 of this Hon'ble Commission for M/s ACME Jaipur Solar Pvt Ltd. (another Developer in the same 750 MW Project of RUMSL at Rewa) in Petition No. 33/MP/2018 and connected matters."
25. We observe that the Commission in its Order dated 09.10.2018 in Petition No. 33/MP/2018 (*ACME Jaipur Solar Power Pvt. Ltd. v. MPPMCL*) has held as under:

314. Issue No. 3: Whether there will be incremental impact in the cost of construction due to additional tax burden on the Engineering, Procurement and Construction (EPC) Cost on account of promulgation of the GST Laws?

AND

Issue No. 4: Whether there will be incremental impact on the cost of project due to additional tax burden on operation and maintenance expenses on account of promulgation of the GST Laws, since the PPAs are for 25 years?

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349. Therefore, the Commission directs that the Petitioners have to exhibit clear and one to one correlation between the projects, the supply of goods or services and the invoices raised by the supplier of goods and services backed by auditor certificate. The certification should include "Certified that all the norms as per "GST Laws" have been complied with by the Petitioner and the claim of the amount being made by the Petitioner are correct as per the effective taxes in pre and post "GST regime". The Petitioners should then make available to the Respondents, the relevant documents along with the auditor certification who may reconcile the claim and then pay the amount so claimed to the SPD w.e.f. 01.07.2017 qua EPC cost on the basis of the auditor's certificate as per the methodology discussed in para no. 338 & 348 above. Further, as Government of India has appointed "Nodal agencies" under JNNSM scheme to act as an intermediary to facilitate the purchase and sale of electricity from solar power developer to DISCOMS. Accordingly, the amount determined as payable above by Petitioners shall on "back to back" basis be paid by DISCOMS to intermediary nodal agency under the respective "Power Sale Agreements".

350. It is pertinent to note that in Petition No. 33/MP/2018, the Petitioner has submitted that Article 17 of the PPAs envisage a compensation to be made to the Petitioner, either by way of adjustment in tariff or an upfront lump sum payment, due to any increase in the cost to the Petitioner. The approval for such Change in Law has to be obtained by the Petitioner from the Commission, in terms of Article 17.1(c) of the PPA. The compensation is aimed at putting the affected party i.e. the Petitioner in the present case, in the same economic position as if the "Change in Law" had never occurred. In other words, the Respondents in the present case are liable in terms of the PPAs, to compensate the Petitioner by way of an upfront lump sum payment, to the extent of additional capital expenditure that the Petitioner is compelled to incur as a result of introduction of GST Law. Further, the Respondents are also liable to compensate the Petitioner, by way of adjustment in the quoted tariff, on account of the additional operating/ recurring expenditure that the Petitioner would be compelled to incur for the entire term of the Project. The relevant provisions of the PPAs are being reproduced herein below:

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356. The Commission observes that Article 17.1(c) provides that the SPD shall bear all additional capital expenditure and/or interest and additional costs incurred to obtain any funding to the extent of the Rs. 2.00 Crores (Threshold Limit). Further, the Threshold Limit shall apply to each event constituting a "Change in Law" and shall not be applied on a cumulative basis. The Commission is of the view that the enactment of "GST Law"

constitutes as one single event under the definition of “Change in Law” and the threshold limit of Rs. 2,00,00,000/- is to be applicable accordingly.

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361. The Commission is of the view that the recurring expenses referred to in Article 12 of the PPA includes activities like salary, tax expenses, estimated maintenance costs, and monthly income from leases etc. It is apparent that GST will apply in case of outsourcing of the “Operation and Maintenance” services to a third party (if any). The Petitioner has themselves submitted that “the O&M of their projects are being carried out not by a third party but the Petitioner’s parent entity which was also the entity which successfully bid for the Project, and incorporated the Petitioners in terms of the provisions of the relevant RfS document. Accordingly, the award of O&M contract is not equivalent to an award to a third-party vendor, as has been contended erroneously by NTPC, and hence NTPC’s reliance on this Commission’s decision in GMR Warora Energy Limited v. MSEDCL and Ors., Petition No. 1/MP/2017 is misplaced.” The Commission is of the view that outsourcing of the “Operation and Maintenance” services is not the requirement of the PPA/bidding documents. The concept of the outsourcing is neither included expressly in the PPA nor it is included implicitly in the Article 12 of the PPA. It is a pure commercial decision of the Petitioners taken for its own advantage and any increase in cost including on account of taxes etc. in the event the Petitioners choose to employ the services of other agencies, cannot increase the liability for the Respondents. Therefore, the Commission holds that claim of the Petitioners on account of additional tax burden on operation and maintenance expenses (if any), is not maintainable.

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364. Issue No. 6: Whether the claim of “Carrying Cost” as prayed by the Petitioners in the I.A.’s is sustainable?

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373. The Commission further observes that in the Judgment of the Hon’ble Tribunal dated 14.08.2018 in Appeal No. 111 of 2017 in M/s. GMR Warora Energy Limited v. Central Electricity Regulatory Commission and Ors. it was held that if there is a provision in the PPA for restoration of the Seller to the same economic position as if no Change in Law event has occurred, the Seller is eligible for carrying cost for such allowed Change in Law event(s) from the effective date of Change in Law event until the same is allowed by the appropriate authority by an order/ judgement. In the present case, there is no provision in the PPA neither for carrying cost nor restitution. The relevant extract from the decision in GMR Warora on the aspect of carrying cost reads as under:

“ix. In the present case we observe that from the effective date of Change in Law the Appellant is subjected to incur additional expenses in the form of arranging for working capital to cater the requirement of impact of Change in Law event in addition to the expenses made due to Change in Law. As per the provisions of the PPA the Appellant is required to make application before the Central Commission for approval of the Change in Law and its consequences. There is always time lag between the happening of Change in Law event till its approval by the Central

Commission and this time lag may be substantial. As pointed out by the Central Commission that the Appellant is only eligible for surcharge if the payment is not made in time by the Respondent Nos. 2 to 4 after raising of the supplementary bill arising out of approved Change in Law event and in PPA there is no compensation mechanism for payment of interest or carrying cost for the period from when Change in Law becomes operational till the date of its approval by the Central Commission. We also observe that this Tribunal in SLS case after considering time value of the money has held that in case of redetermination of tariff the interest by a way of compensation is payable for the period for which tariff is re-determined till the date of such re-determination of the tariff. In the present case after perusal of the PPAs we find that the impact of Change in Law event is to be passed on to the Respondent Nos. 2 to 4 by way of tariff adjustment payment as per Article 13.4 of the PPA. The relevant extract is reproduced below:

13.4 Tariff Adjustment Payment on account of Change in Law 13.4.1 Subject to Article 13.2 the adjustment in Monthly Tariff Payment shall be effective from: the date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law; or the date of order/ judgment of the Competent Court or tribunal or Indian Government instrumentality, if the Change in Law is on account of a change in interpretation of Law. (c) the date of impact resulting from the occurrence of Article 13.1.1. From the above it can be seen that the impact of Change in Law is to be done in the form of adjustment to the tariff. To our mind such adjustment in the tariff is nothing less than re-determination of the existing tariff.

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

This Tribunal vide above judgement has decided that if there is a provision in the PPA for restoration of the Seller to the same economic position as if no Change in Law event has occurred, the Seller is eligible for carrying cost for such allowed Change in Law event (s) from the effective date of Change in Law event until the same is allowed by the appropriate authority by an order/ judgment.”

From the above judgments the Commission observes 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 appropriate authority by an order/ judgment. The Commission observes that the PPA does not have a provision dealing with restitution principles of restoration to same

economic position. Further in the “Written Submissions” dated 17.09.2018 and 18.09.2018 on behalf of Petitioners in the Petition No. 188/MP/2017; 189/MP/2017; 190/MP/2017; 201/MP/2017; 204/MP/2017; 230/MP/2017; 231/MP/2017; 232/MP/2017 and 233/MP/2017 the Petitioners have categorically stated that:

*“3.3.3 Compensation Methodology: The Petitioners submit that since the PPAs are silent on the compensation methodology, the discretion to formulate the same is with this Ld. Commission. The compensation can be made in either one of the following manners:
(i) One-time upfront lumpsum payment - this is the Petitioners' preferred option and is also favourable to the off-takers, as no carrying cost will have to be paid on the upfront payment.
(ii) ...”*

374. The Commission further observes that it has been decided in Issue No. 5 that the Petitioners shall raise its claim based on discussions in paragraph 338 & 348 of this Order and the same shall be paid by the Respondents within sixty days of the date of this Order failing which it will attract late payment surcharge as provided under PPA. Therefore, the claim is to be raised as one-time upfront lumpsum payment which becomes due on the sixtieth date from the date of this Order by the Commission and after that the “late payment surcharge” as provided under PPAs is to be levied. Therefore, the Commission is of the view that the claim regarding separate “Carrying Cost” in the instant petitions is not attracted.

26. We observe that as submitted by the contracting parties the above decision is also applicable in case of the Petitioner in the instant petition. The introduction of the GST Laws w.e.f. 01.07.2017 is covered under Change in Law in terms of Article 17 of the respective PPAs. In view of the facts, the Petitioner is directed to make available to the Respondents all relevant documents exhibiting clear and one to one correlation between the projects and the supply of goods or services, duly supported by relevant invoices and Auditor’s Certificate with respect to claims (subject to threshold limit). The Respondents are further directed to reconcile the claims for Change in Law on receipt of the relevant documents and pay the amount (subject to threshold limit) so claimed to the Petitioner. The quantum of compensation on account of introduction of GST Laws w.e.f. 01.07.2017 should be discharged by the Respondents within 60 days from the date of issue of this Order or from the date of submission of claims by the Petitioner, whichever is later, failing which it shall attract late payment surcharge at the rates provided for in the PPAs. Alternatively, the Petitioner and the Respondents may mutually agree to a mechanism for the payment of such compensation on annuity basis spread over a period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs.

27. The prayer of Petitioner to grant GST on the O&M expenses is not allowed. Since the PPAs in the instant Petition do not have a provision dealing with restitution principle of restoration to the same economic position, we hold that the claim regarding ‘carrying cost’ is not admissible.
28. Further, various Sections of CGST Act, 2017 stipulate as under:

“TIME AND VALUE OF SUPPLY

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

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

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

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

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

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

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

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

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

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

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

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

*(2) The time of supply of services shall be the earliest of the following dates, namely:
(a) the date of issue of invoice by the supplier, if the invoice is issued within the period prescribed under sub-section (2) of section 31 or the date of receipt of payment, whichever is earlier; or
(b) the date of provision of service, if the invoice is not issued within the period prescribed under sub-section (2) of section 31 or the date of receipt of payment, whichever is earlier; or
(c) the date on which the recipient shows the receipt of services in his books of account, in a case where the provisions of clause (a) or clause (b) do not apply:
Provided that where the supplier of taxable service receives an amount up to one thousand rupees in excess of the amount indicated in the tax invoice, the time of supply to the extent of such excess amount shall, at the option of the said supplier, be the date of issue of invoice relating to such excess amount.*

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

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

*(3) In case of supplies in respect of which tax is paid or liable to be paid on reverse charge basis, the time of supply shall be the earlier of the following dates, namely:
(a) the date of payment as entered in the books of account of the recipient or the date on which the payment is debited in his bank account, whichever is earlier; or
(b) the date immediately following sixty days from the date of issue of invoice or any other document, by whatever name called, in lieu thereof by the supplier:*

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

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

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

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

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

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

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

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

(ii) where the invoice has been issued prior to the change in rate of tax but payment is received after the change in rate of tax, the time of supply shall be the date of issue of invoice; or

(iii) where the payment has been received before the change in rate of tax, but the invoice for the same is issued after the change in rate of tax, the time of supply shall be the date of receipt of payment;

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

(i) where the payment is received after the change in rate of tax but the invoice has been issued prior to the change in rate of tax, the time of supply shall be the date of receipt of payment; or

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

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

Explanation. For the purposes of this section, "the date of receipt of payment" shall be the date on which the payment is entered in the books of account of the supplier or the date on which the payment is credited to his bank account, whichever is earlier.

CHAPTER VII

TAX INVOICE, CREDIT AND DEBIT NOTES

31. (1) A registered person supplying taxable goods shall, before or at the time of,
- (a) removal of goods for supply to the recipient, where the supply involves movement of goods; or
- (b) delivery of goods or making available thereof to the recipient, in any other case,
- issue a tax invoice showing the description, quantity and value of goods, the tax charged thereon and such other particulars as may be prescribed:

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

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

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

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

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

(a) a registered person may, within one month from the date of issuance of certificate of registration and in such manner as may be prescribed, issue a revised invoice against the invoice already issued during the period beginning with the effective date of registration till the date of issuance of certificate of registration to him;

(b) a registered person may not issue a tax invoice if the value of the goods or services or both supplied is less than two hundred rupees subject to such conditions and in such manner as may be prescribed;

(c) a registered person supplying exempted goods or services or both or paying tax under the provisions of section 10 shall issue, instead of a tax invoice, a bill of supply containing such particulars and in such manner as may be prescribed: Provided that the registered person may not issue a bill of supply if the value of the goods or services or both supplied is less than two hundred rupees subject to such conditions and in such manner as may be prescribed;

(d) a registered person shall, on receipt of advance payment with respect to any supply of goods or services or both, issue a receipt voucher or any other document, containing such particulars as may be prescribed, evidencing receipt of such payment;

(e) where, on receipt of advance payment with respect to any supply of goods or services or both the registered person issues a receipt voucher, but subsequently no supply is made and no tax invoice is issued in pursuance thereof, the said registered person may issue to the person who had made the payment, a refund voucher against such payment;

(f) a registered person who is liable to pay tax under sub-section (3) or sub-section (4) of section 9 shall issue an invoice in respect of goods or services or both received by him from the supplier who is not registered on the date of receipt of goods or services or both;

(g) a registered person who is liable to pay tax under sub-section (3) or sub-section (4) of section 9 shall issue a payment voucher at the time of making payment to the supplier.

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

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

(a) where the due date of payment is ascertainable from the contract, the invoice shall be issued on or before the due date of payment;

(b) where the due date of payment is not ascertainable from the contract, the invoice shall be issued before or at the time when the supplier of service receives the payment;

(c) where the payment is linked to the completion of an event, the invoice shall be issued on or before the date of completion of that event.

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

(7) Notwithstanding anything contained in sub-section (1), where the goods being sent or taken on approval for sale or return are removed before the supply takes place, the

invoice shall be issued before or at the time of supply or six months from the date of removal, whichever is earlier.

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

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

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

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

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

(1)For the purposes of-

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

(b) transportation of goods for job work,

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

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

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

...

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

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

33. Section 13 of the CGST Act, 2017 stipulates that ‘time of supply of services’ is the date of issue of invoice which is to be issued within the period prescribed under section 31(2) or the date of receipt of payment, whichever is earlier.
34. Section 14 of the CGST Act, 2017 prescribes the time of supply in case there is a change in the rate of tax. In one supply transaction, the following dates assume relevance: (i) date of supply; (ii) date of issue of invoice and (iii) date of receipt of payment. Two scenarios that emerge are as follows:
- (a) supply is completed before change in the rate of tax; and
 - (b) supply is completed after change in the rate of tax.
35. Section 31 stipulates that a registered person supplying taxable goods shall issue a tax invoice before or at the time of delivery of goods. Further, as per Section 31 read with Rule 47 of the CGST Rules, 2017, the invoices in respect of taxable supply of services have to be issued within 30 days and as per Rule 55 of the CGST Rules, 2017, the delivery of a few goods is specifically allowed to be transported on a delivery challan in lieu of invoice at the time of removal of goods for transportation.
36. Thus, in case of ‘supply of goods’, the date of issue of invoice cannot be after the date of supply of goods as per Section 12, Section 14 and Section 31 of the CGST Act, 2017 whereas in case of ‘supply of services’ related to the goods supplied up to COD, the date of issue of invoice can be thirty days after the supply of services as per Section 13, Section 14 and Section 31 of the CGST Act, 2017 read with the Rule 47 of the CGST Rules, 2017.
37. In view of the above, there cannot be any invoice under law, post supply of goods as the goods are not exempted under Rule 55 of the CGST Rules, 2017. Further, in case the invoices are not raised, the point of taxation for supply of goods is deemed to be the date of delivery of goods.
38. We hold that invoices raised up to COD pertaining to supply of goods can be claimed under Change in Law on account of the GST Laws since the liability of Respondents for payment

of purchase of the power from the Petitioner starts from the Commercial Operation Date (COD). There is a possibility of a few services related to goods procured up to COD, to be completed on the last date of COD. Hence, in case of 'supply of services' related to goods procured up to COD completed on the last day of COD, the invoices can be raised within 30 days after COD. Thus, in case of supply of services related to goods procured up to COD, the invoices are to be raised within 30 days of supply of such services, which cannot be later than 30th day of COD and the Petitioner is entitled to be compensated accordingly.

39. Accordingly, the Petition No. 468/MP/2019 is disposed of in terms of discussions held in paragraph 26, 27 and paragraph 38 above.

Sd/-
पी. के. सिंह
(सदस्य)

Sd/-
अरुण गोयल
(सदस्य)

Sd/-
आई. एस. झा
(सदस्य)

Sd/-
पी. के. पुजारी
(अध्यक्ष)