



नईदिल्ली
NEW DELHI

याचिका संख्या./ Petition No. 188/MP/2018
185/MP/2018
190/MP/2018
191/MP/2018
184/MP/2018
52/MP/2019
70/MP/2019

कोरम/ Coram:

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: 25th November, 2022

IN THE MATTER OF:

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

AND IN THE MATTER OF

1. Petition No. 188/MP/2018

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

...Petitioner

VERSUS

1. NTPC Vidyut Vyapar Nigam Limited,
NTPC Bhawan,
Core 7, SCOPE Complex
7 Institutional Area, Lodhi Road,
New Delhi - 110 003.
2. NTPC Limited,
Core-7, SCOPE Complex
7 Institutional Area, Lodi Road
New Delhi-110 003
3. Punjab State Power Corporation Limited (PSPCL),
The Mall, PSEB Head Office,
Baradari, Patiala,
Punjab - 147 001
4. Uttar Pradesh Power Corporation Ltd (UPPCL),
Shakti Bhawan, 14 Ashok Marg,
Lucknow - 226 001
5. Chhattisgarh State Power Distribution Company Ltd. (CSPDCL),
4th Floor, Vidyut Seva Bhawan Dangania,
Raipur, Chhattisgarh-492 013
6. Grid Corporation of Orissa Ltd. (GRIDCO),
Bhoi Nagar, Janpath
Bhubaneswar - 751022
7. West Bengal State Electricity Distribution Company Ltd. (WBSEDCL),
Vidyut Bhaan, Bidhannagar,
Block DJ, Sector-II,
Kolkatta-700 091
8. Damodar Valley Corporation Ltd (DVC),
DVC Headquarters, DVC Towers,
VIP Road, Kolkatta - 700 054
9. Mangalore Electricity Supply Company Ltd. (MESCOM),
Paradigm Plaza, AB Shetty Circle,
Mangalore - 575 001
10. Bangalore Electricity Supply Company Ltd. (BESCOM),
BESCOM, KR Circle,
Bangalore-560 001
11. Chamundeshwari Electricity Supply Corp. Ltd. (CESC),
No. 927, New Kantharaj Urs Road,

Saraswatipuram Mysuru – 570 009

12. Gulbarga Electricity Supply Company Ltd. (GESCOM),
Corporate Office, Station Road,
Kalaburagi, Karnataka - 585 102
13. Hubli Electricity Supply Company Ltd. (HESCOM),
PB Road, Navanagar,
Hubli - 580 025
14. Assam Power Distribution Company Ltd (APDCL),
Bijulee Bhawan, Paltan Bazaar,
Guwahati - 781 001
15. Jaipur Vidyut Vitran Nigam Limited,
Vidyut Bhawan, Jyoti Nagar,
Jaipur-302 005
16. Jodhpur Vidyut Vitran Nigam Limited,
New Power House, Industrial Area,
Jodhpur, Rajasthan - 342 003
17. Ajmer Vidyut Vitran Nigam Limited,
Vidyut Bhawan, Panchsheel Nagar,
Makarwali Road,
Ajmer - 305 004

...Respondents

AND IN THE MATTER OF:

2. Petition No. 185/MP/2018

Azure Sunshine Private Limited
Asset No.301-4, World Mark 3
Aerocity, New Delhi - 110 037

...Petitioner

VERSUS

1. Solar Energy Corporation of India Limited,
1st Floor, A-Wing D-3,
District Centre Saket,
New Delhi - 110 017
2. Haryana Power Purchase Centre (HPPC),
Shakti Bhawan, Sector – 6,
Panchkula-134 108

...Respondents

AND IN THE MATTER OF:

3. Petition No. 190/MP/2018

Azure Green Tech Private Limited,
Asset No.301-4, World Mark 3
Aerocity, New Delhi - 110 017

...Petitioner

VERSUS

1. Solar Energy Corporation of India Limited,
1st Floor, A-Wing D-3,
District Centre Saket,
New Delhi - 110 017
2. Haryana Power Purchase Centre (HPPC),
Shakti Bhawan, Sector – 6,
Panchkula-134 108

...Respondents

AND IN THE MATTER OF:

4. Petition No. 191/MP/2018

Azure Clean Energy Private Limited,
AssetNo.301-4, World Mark 3
Aerocity, New Delhi - 110 017

...Petitioner

VERSUS

1. Solar Energy Corporation of India Limited,
1st Floor, A-Wing D-3,
District Centre Saket,
New Delhi - 110 017
2. Rajasthan Urja Vikas Nigam Limited (RUVNL),
Vidyut Bhawan, Janpath
Jaipur-302 005

...Respondents

AND IN THE MATTER OF:

5. Petition No. 184/MP/2018

Azure Power Mars Private Limited,
Asset No.301-4, World Mark 3,
Aerocity, New Delhi - 110 017

...Petitioner

VERSUS

1. Solar Energy Corporation of India Limited,
1st Floor, A-Wing D-3,
District Centre Saket,
New Delhi - 110 017
2. Jodhpur Vidyut Vitran Nigam Limited (JDVVNL),
New Power House,
Industrial Area, Jodhpur,
Rajasthan - 342 003
3. Rajasthan Urja Vikas Nigam Limited (RUVNL),
Vidyut Bhawan, Janpath
Jaipur-302 005

...Respondents

IN THE MATTER OF:

Petition under Section 79(1)(b) read with Section 79(1)(f) of the Electricity Act, 2003 for (i) approval of 'Change in Law'; and (ii) consequential relief to compensate for the increase in capital cost due to introduction of the Central Goods and Services Tax Act, 2017, the Integrated Goods and Services Tax Act, 2017 and the State Goods and Services Tax Acts enacted by respective states, in terms of Article 12 of the power purchase agreement dated 02.08.2016 between Solitaire Powertech Private Limited and Solar Energy Corporation of India Limited.

AND IN THE MATTER OF PETITION NO. 52/MP/2019

Solitaire Powertech Private Limited,
616 A, 16A, 6TH Floor, Devika Tower,
Nehru Place- New Delhi-110019

...Petitioner

VERSUS

1. Solar Energy Corporation of India Limited,

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

2. Bangalore Electricity Supply Company Limited (BESCOM)
K.R. Circle
Bangalore-560001
3. Mangalore Electricity Supply Company Limited (MESCOM),
Bhavan, Kavour Cross Road, BEJAI,
Mangaluru-575004, Karnataka
4. Chamundeshwari Electricity Supply Corporation Limited,
No. 29, Vijaynagar 2nd Stage,
Hnkal, Mysore- 570017
5. Gulbarga Electricity Supply Company Limited,
Corporate Office, Station Road,
Kalaburagi- 585102, Karnataka
6. Hubli Electricity Supply Company Limited,
Tabib Land, Mantur Road,
Near CBT, APMC, Hubali-Dharwad,
Karnataka- 580020

...Respondents

IN THE MATTER OF:

A petition before the Central Electricity Regulatory Commission seeking an appropriate mechanism for grant of an appropriate adjustment/ compensation to offset financial/ commercial impact of Change in Law events on account of imposition of Goods and Service Tax

AND IN THE MATTER OF PETITION NO. 70/MP/2019

Solar Edge Power and Energy Private Limited,
SP Center, 41/44, Minoo Desai Marg,
COLOBA, Mumbai – 400 005

...Petitioner

VERSUS

1. Solar Energy Corporation of India Limited,
1ST Floor, D-3, A Wing, Religare Building
District Centre, Saket

New Delhi- 110017

2. Maharashtra State Electricity Distribution Company Limited,
Prakashgad Plot No. G9,
Proj. AnadKanehar Marg,
Bandra (East), Mumbai-400051

...Respondents

Parties Present:

Shri Buddy Ranganadhan, Advocate, APMPL
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 Anand Ganesan, Advocate, PSPCL & Rajasthan Discoms
Ms. Ritu Apurva, Advocate, PSCPL & Rajasthan Discoms
Ms. Amal Nair, Advocate, PSPCL & Rajasthan Discoms
Shri Ajitesh Garg, Advocate, NTPC
Shri Shubham Arya, Advocate, HPPC
Shri Ravi Nair, Advocate, HPPC
Ms. Sikha Sood, Advocate, HPPC
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 Petitioners, M/s Azure Solar Power Limited; M/s Azure Sunshine Pvt. Limited; M/s Azure Green Tech Pvt. Limited; M/s Azure Clean Energy Pvt. Limited; M/s Azure Power Mars Pvt. Limited; Solitaire Powertech Private Limited and Solar Edge Power and Energy Private Limited (hereinafter collectively referred to as ‘Petitioners’) are generating companies primarily engaged in the business of setting up solar power plants and generation of electricity.

2. The Jawaharlal Nehru National Solar Mission has inter-alia set a target for deployment of grid connected solar power capacity of 1,00,000 MW by 2022 and is targeted to be achieved in 3 phases.
3. The Petitioners were selected as successful bidders 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 in the States of Rajasthan, Karnataka and Maharashtra. The Solar Power Plants were to be developed on long term basis at a discovered tariff. The brief details are as under:

	188/MP/2018	185/MP/2018	190/MP/2018	191/MP/2018	184/MP/2018	52/MP/2019	70/MP/2019
Scheme	JNNSM						
Phase	I	II	II	II	II	II	II
Batch	II	I	I	I	I	III	IV
Nodal Agency	NTPC	SECI	SECI	SECI	SECI	SECI	SECI
RfS	24.08.2011	28.10.2013	28.10.2013	28.10.2013	18.10.2014	15.02.2016	14.06.2016
Capacity MW	20+15	20	40	40	5	30	130
Power	Bundled	Solar	Solar	Solar	Solar	Solar	Solar
Location	Rajasthan					Karnataka	Maharashtra
PPA	25.01.2012	28.03.2014	28.03.2014	28.03.2014	05.02.2015	02.08.2016	10.02.2017
SCoD	26.02.2013	28.04.2015	28.04.2015	28.04.2015	05.11.2015	02.09.2017	23.12.2017
Tariff /kWh	8.21	5.45	5.45	5.45	5.45	4.43	4.43
VGF	--	Yes	Yes	Yes	Yes	YES	YES
Change in Law	Art. 12	Art. 12	Art. 12	Art. 12	Art. 12	Art. 12	Art. 12

4. On 12.04.2017, Government of India (GOI) introduced the Goods and Services Tax, replacing multiple taxes levied by the Central and State Governments.

5. 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 was enacted for levy and collection of tax on intra-State supply of goods or services or both by the respective States.
6. The Petitioners filed the Petitions under Section 79 the Electricity Act, 2003 read with Article 12 of the Power Purchase Agreements executed between Petitioners and the Respondents, for seeking approval of Change in Law events due to enactment of the GST Laws and consequential reliefs.
7. The Commission, after hearing the parties, vide its Order dated 19.11.2019 decided the Petitions No. 188/MP/2018, 185/MP/2018, 190/MP/2018, 191/MP/2018 and 184/MP/2018 as under:

Summary of decisions:

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

- a. Issue No. 1: The introduction of “GST laws” w.e.f. 01.07.2017 is covered under “Change in Law” in terms of Article 12 of the respective PPAs. However, in the instant petitions as the SCoD of the Projects are before the introduction of “GST Laws” there is no impact of GST laws on the projects during the “Construction Stage”.*
- b. Issue No. 2: The claim of the Petitioners on account of additional tax burden on “O&M” expenses (if any), is not maintainable.*
- c. Issue No. 3: The claim regarding separate “Carrying Cost” and “interest on working capital” in the instant petitions is not allowed.*

111. With the above directions, Petition No. 188/MP/2018; Petition No. 185/MP/2018; Petition No. 190/MP/2018; Petition No. 191/MP/2018 and Petition No. 184/MP/2018 stands disposed of.

8. Aggrieved by the aforesaid Order dated 19.11.2019, the Petitioners preferred Appeal No. 61, 62, 63, 64 and 65 of 2021 before the Appellate Tribunal for Electricity (APTEL). The said appeals were decided by APTEL vide judgment dated 03.02.2022 as under:

3. It appears that the CERC has denied compensation on account of change in law events having an impact on O&M expenses for the reason that the appellants had outsourced such activities to third party. The appellants are also aggrieved by denial of carrying cost vis-à-vis the previously mentioned claim of compensation, the

reasons set out in the impugned order being that in the Power Purchase Agreements (PPAs) governing the relationship of the parties, there is no provision incorporating of restitutionary principle.

4. The appellants rely on decision of this tribunal in the case of Coastal Gujarat (Appeal No.172 of 2017) passed on 27.04.2021 and in Azure Power Eris Private Limited Vs. Bihar Electricity Regulatory Commission & Others (Appeal No.129 of 2019) rendered on 13.01.2022 to contend that since there is no inhibition in the PPAs against outsourcing of the activities relating to the operation & maintenance, the denial of relief on account of change in law events is unjust and unfair. The appellant also submits that the provision contained in Article 12.2.2 (under the head “for relief of change in law”) allows a decision to be rendered by the Central Commission upon it being approached by the aggrieved party for not only that “approval of change in law” but “for relief” to be provided in such respect. Reliance is placed on judgments including Sovintorg (India) Ltd. Vs. State Bank of India, New Delhi (1999) 6 SCC 406 and Dushyant N. Dalal and Anr. Vs. SEBI (2017) 9 SCC 660.

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7. After some hearing, it is fairly conceded by the learned Senior Counsel, Mr. M.G. Ramachandran on behalf of NVVN & SECI that the matter deserves to be remitted to the Central Commission for reconsideration of the issue of O&M expenses in light of rulings of this tribunal in Coastal Gujarat (supra) & Azure Power Eris Private Limited Vs. Bihar Electricity Regulatory Commission & Others (supra). Though the learned counsel for other respondents seem to have some reservations, we feel that it would be appropriate that the Commission is called upon to revisit the issue in light of the abovementioned rulings of this tribunal. We order accordingly.

8. Learned counsel for the respondents seek to contest the claim of the appellants on the subject of carrying cost. Learned counsel for the appellants submitted that since the issue of O&M expenses is being remitted, their right to challenge the view taken in the impugned order by the Central Commission vis-à-vis carrying cost may be reserved to be pursued and agitated after decision on O&M expenses issue has been rendered afresh by the Central Commission. We accept this request and grant liberty, as prayed.

9. For the forgoing reasons, and in these circumstances, we set aside the impugned orders to the extent thereby the Central Commission has denied the relief and impact of change in law on the O&M expenses and remit the same to the Central Commission for fresh consideration in light of the relevant law presently governing the subject. Needless to add, we expect the Central Commission to hold the proceedings expeditiously in accordance with law and render fresh decision under this remit at an early date preferably within two months. We request the Commission accordingly.

Hearing dated 28.04.2022

9. Pursuant to the above judgment dated 03.02.2022 of the APTEL, the matter was listed for virtual hearing on 28.04.2022. Learned counsel for the Petitioners submitted that the Commission in its Order dated 19.11.2019 had disallowed the Change in Law claims of the Petitioners for additional tax burden incurred on account of Service Tax and GST on Operation & Maintenance (O&M) expenses. The APTEL vide judgment dated 03.02.2022 has set aside the said findings of the Commission and remitted the matters back to the Commission for fresh consideration in light of the relevant law presently governing the subject being the judgment of APTEL dated 27.04.2021 in Appeal No. 172 of 2017 and Appeal No. 154 of 2018 [*Coastal Gujarat Power Ltd. v. Central Electricity Regulation Commission and Ors. (CGPL Judgment)*]. Learned counsel for the Respondents, PSCPL, Rajasthan DISCOMS and HPPC sought time to file their respective submissions on the aspect as to why the CGPL Judgment does not apply to the present matters. Learned counsel for the Petitioners sought liberty to file the submissions on the aspect that the CGPL Judgment squarely applies to the present matters. After hearing the learned counsels for the parties, the Commission directed the Petitioners to file their written submissions on affidavit by 10.05.2022 on the limited scope of the remand after serving a copy to the Respondents, who may file their reply by 24.05.2022. The Petitioners were also given liberty to file their rejoinder.

Written Submissions on behalf of the Petitioners in compliance with the Commission's record of proceedings dated 28.04.2022

10. The Petitioners have submitted as under:
- a) APTEL vide the *Coastal Gujarat Judgment* has inter alia held that outsourcing of activities/work to contractors is a commercial decision of a generating company and the generating company cannot be questioned for any such commercial decision, which has not been expressly barred under the relevant power purchase agreements. Further, reading/introducing/implying any extraneous provision into the PPAs has been disallowed by APTEL when there is no restrictive covenant in the PPAs.
 - b) APTEL has held that the contractors were engaged by the generating company therein within their discretion and that *there is no inhibition in the power purchase agreement in such regard*.
 - c) The only test which needs to be considered whilst looking into the Change in Law claim on outsourcing of services is *whether or not there is any inhibition in this*

regard in the power purchase agreement. In this regard, it is pertinent to mention here that there is no inhibition or restriction, whatsoever, on outsourcing in the PPAs.

- d) Accordingly, applying the said test to the present case, it becomes clear that since there is no such inhibition or restriction on outsourcing in the PPAs, the respective procurers are liable to bear the impact of the Change in Law events upon such outsourcing, in terms of the Change in Law clause, i.e., Article 12 of the PP As read with the Coastal Gujarat Judgment.
- e) Based on *Coastal Gujarat Judgment*, the Petitioner has submitted as under:
- (i) APTEL had applied test as to whether or not there is any inhibition in the relevant power purchase agreement in this regard.
 - (ii) On account of imposition of Krishi Kalyan Cess and Swachh Bharat Cess the incremental impact was allowed to be passed on under the ‘Change in Law’ provision, on the services which are similar to services outsourced by Petitioners in the present case.
 - (iii) Considering that the nature of services outsourced in the *Coastal Gujarat Judgment* are similar to the services outsourced by Petitioners, the observations rendered by APTEL in the *Coastal Gujarat Judgment* are binding on this Commission.
 - (iv) *Coastal Gujarat Judgment*, ex-facie establishes that the facts of the present case are parametria with the facts of the *Coastal Gujarat Judgment*. In this regard, the Petitioners deem it quintessential to provide the facts of the present case:

S.No.	Facts pertaining to the CGPL Judgment	Facts of the present case
1.	The appellant therein (<i>CGPL</i>) is a project specific Special Purpose Vehicle (<i>SPV</i>) set up solely for the purpose of generating and supplying electricity exclusively to the procurers in accordance with the power purchase agreement.	The Petitioners are also SPVs set up solely for purpose of generating and supplying electricity exclusively to the respective procurers in terms of the PPAs.
2.	CGPL engages in no other business undertaking.	The Petitioners are also engaged in no other business

		undertaking.
3.	All services availed by CGPL are undoubtedly used for its sole objective of generating electricity for supply to the procurers under the power purchase agreement.	The O&M services availed by the Petitioners are exclusively used for/related to their sole objective of generating power and supplying the same to the respective procurers in terms of the PPA.
4.	The increased cost towards Krishi Kalyan Cess and Swachh Bharat Cess affects the cost of the business of CGPL, for generation and sale of electricity.	The increase in cost on account of Service Tax Laws and GST Laws has impacted the cost of business of the Petitioners for generation and sale of electricity to the respective procurers.
5.	The twenty services disallowed by CERC also are connected to the commercial activities of CGPL, adding to its cost of production and supply.	The O&M services disallowed by this Commission <i>vide</i> the Original Order are intrinsically connected with the commercial activities <i>qua</i> the solar projects and are adding to the cost of the production and supply of power to the respective procurers, in terms of the PPAs.

- f) APTEL has categorically held that this Commission had erred in introducing an extraneous qualification or filter i.e., test of ***“direct relation to the input cost of generation”*** which is not borne out from the power purchase agreement.
- g) In the present case as well, no extraneous qualification or filter i.e., **outsourcing of O&M services being commercial decision of the Petitioners** can be introduced whilst interpreting the PPAs.

- h) The commercial decision of the Petitioners to outsource to a third party or sister concern/parent company is an extraneous test which cannot be applied specifically in view of the fact that there is no such inhibition under the PPAs.
- i) *The Coastal Gujarat Judgment* is squarely applicable to the present case and is binding upon this Commission and on the basis of the same, the Change in Law claims of the Petitioners visa-vis the impact of Service Tax and GST Laws, respectively on the outsourced O&M activities deserves to be allowed.
- j) APTEL has held that as long as an event qualifies as a Change in Law event in terms of the PPA, one has to apply the plain and simple meaning and the same does not depend upon whether the goods or services supplied are commercial or not.
- k) The Commission vide its order dated 24.02.2021 in Petition No. 365/MP/2019 titled *Mahindra Renewables Private Limited vs. M.P. Power Management Company Limited & Ors.*, reported as 2021 SCC On Line CERC 108 has *inter alia* held that a generator cannot be questioned for its commercial decision.

Written Submission of NVVN dated 24.05.2022 in Petition No. 188/MP/2018 and SECI in Petition No. 184/MP/2018; 185/MP/2018; 190/MP/2018, 191/MP/2018, 70/MP/2022 and 52/MP/2022

11. NVVN and SECI have submitted as under:

Re: Decision of the APTEL in Coastal Gujrat Power Limited's case is distinguishable

- a) The parent company which was the bidder on whose qualification the bid was considered and selected has the primary and overriding obligation to operate and manage the Power Station. The Petitioner was formed only as the SPV of the bidder. The appointment of parent company as the O&M contractor in the circumstances will constitute round-tripping and cannot increase the cost of generation and supply of electricity to NVVN/ Buying Utilities. Therefore, the *CGPL Case* decided by the Tribunal is not applicable to the facts of the present matter.

Re: Implication under GST laws of outsourcing of O&M

- b) The Petitioner is responsible to NVVN for due fulfilment of all the obligations assumed under the PPAs. NVVN is not in any manner concerned with the way the

Petitioner implements the projects, generates and supply electricity to NVVN. These are entirely left to the Petitioner's discretion and there is no manner provided in the PPAs that the Petitioner should appoint contractors or sub-contractors including O&M Contractors for the purpose of undertaking various services.

- c) Article 12 of the PPAs dealing with the Change in Law provision 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 NVVN or on a back to back basis against the Buying Utilities.
- d) The method and manner in which the Petitioner shall operate the Solar Power Plant has not been prescribed under the Request for Proposal Document or in the PPA. It is left to the commercial convenience of the Petitioner to undertake the implementation of the work either by itself or by appointing contractors on turnkey basis or by appointing contractors for various packages and allowing the contractors to engage sub-contractors.
- e) In terms of the provisions of the PPA, even dealing with Force Majeure, the affected party recognized is only the Petitioner and not its contractors, sub-contractors etc. Whereas in the CGPL case, the affected party under the Force Majeure provision of the PPA dated 22.04.2007 covers not only CGPL but contractors etc.
- f) Article 13 of the CGPL PPA provides for both 'Construction Period' and 'Operation Period' unlike the present case.
- g) In the absence of any mandate given under the PPA that the Petitioners shall undertake the implementation of the work under the PPA through the contractors, the commercial arrangement between the Petitioners and the contractors is without any recognition under the PPA terms and conditions.
- h) The Petitioner is selectively reading the decision of the APTEL in CGPL case by referring to the opening statement in para 68 of the CGPL decision. Para 68 is required to be read as a whole and rather the entire decision and more importantly based on the provisions of the PPA executed by CGPL, the APTEL had passed the said decision.
- i) CGPL was established as the Special Purpose Vehicle by the Bid Process Coordinator [Power Finance Corporation (PFC)] who had acted on behalf of the Procurers and the

bidding process held was based on acquisition of the 100% shares in CGPL by the successful bidder namely Tata Power Limited. Unlike CGPL case, the Special Purpose Vehicle in the present case was the outcome of the option of the Successful bidder (Azure India Private Limited) post the bidding process and in the bidding process the successful bidder assumed all the obligation to operate and maintain the power station. As mentioned above, the bidder – the parent company was selected based on its qualification and experience and not the qualification and experience of the Special Purpose Vehicle it will create if it is successful in the bidding. The said qualification and experience of the parent company is being used when post selection, the power station is being operated.

- j) In these circumstances, the privilege or concession given by NVVN to allow the successful bidder (Azure India Private Limited) to establish Special Purpose Vehicle (Petitioner) cannot lead to an increase in cost by round tripping the operation and management entirely to the successful bidder namely the parent company. In CGPL case, there is no such round tripping of operation and management to the parent company – bidder.
- k) There cannot be any comparison in the O&M services through O&M Contractors which are post Commercial Operation Date (COD) stage with the Engineering, Procurement and Construction Contractors.
- l) There is also no law which forces/ mandates the Petitioner to outsource any services. It is entirely the commercial decision and expediency of the Petitioner to either undertake the services itself or to outsource the services. The Petitioner may outsource the services for convenience for reduction in the contract cost. The Petitioner cannot claim any change in the tax payable by it to the Contractor on account of GST Laws under the Change in Law provision of the PPA.
- m) The tax elements relating to O&M Expenses are during the operation period. During the operation period, there is no liability of NVVN or the procurer utilities to reimburse any capital cost incurred by the Petitioner on a recurring basis. There is no additional capitalization allowed. Accordingly, any tax incurred on such maintenance, replacement of goods etc. is also not admissible.
- n) The Petitioners are entitled to a fixed tariff in terms of the provisions of the PPA. The tariff payable to the Petitioner is in terms of Article 9 of the PPAs. The above is a composite fixed amount. There is no breakup of the above amount into various tariff

elements such as Return on Equity, Interest on Loan, Depreciation, O & M Expenses, Interest on Working Capital, Incentive, Disincentive etc. as in the case of the tariff determined under Section 62 of the Electricity Act, 2003. It is entirely for the selected bidder to submit the bid on the basis of the fixed sum provided in the Bid Documents pursuant to competitive bidding process. The Petitioner cannot now claim that such tariff is inadequate and it is liable to get relief on account of the GST Laws on the outsourcing of the O&M Services to its parent company.

- o) Any additional cost that is to be allowed on account of O&M expenses would be ultimately a burden on the consumer at large.
- p) 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.
- q) The Petitioner has not given any details in regard to the Operation and Maintenance agreements or copies thereof, or the invoices for claim of Operation and Maintenance expenses etc., in the earlier proceedings before this Commission or in the present proceedings. The requisite notifications of change in law events have also not been placed.
- r) The Petitioner has wrongly alleged in the Written Submissions filed on 10.05.2022 that the Commission in its decision dated 19.11.2019 passed in Petition Nos.188/MP/2018 and Batch has acknowledged Service Tax Laws as Change in Law under Article 12 of the PPA.

Submissions filed by PSPCL dated 24.05.2022

12. PSPCL has submitted as under:

Re: Decision in the Coastal Gujarat Case has no application to the present case

- a) The legal and factual background in the case of Coastal Gujarat is completely different from the present case.
- b) In the *Coastal Gujarat Case*, APTEL has held that
 - (i) the ‘*the definition of ‘Project Documents’ read with ‘O&M contracts’*

contemplating that a third-party O&M contractor might be appointed by it (CGPL)'.

- (ii) The PPA between the parties explicitly envisaged and provided for O&M to be contracted out to third parties.
 - (iii) It is not the core activity of generation of electricity that was contracted out by CGPL, but peripheral and ancillary activities such as security services, travel etc.
- c) In the present case, the PPAs do not have any such clause. O&M contracts do not form part of the PPAs and as such the *ratio* as held in the *Coastal Gujrat Case* has no application whatsoever to the facts of the present case. The PPAs does not even contemplate the outsourcing of O&M activities to third parties.
- d) There is also a specific rationale for the same. A thermal generator, particularly of the size of CGPL, would have numerous activities that have to be undertaken. The core generation activity is of course undertaken by the company, but the numerous ancillary and subsidiary activities are to be outsourced, and this is what is contemplated in the PPA. For a solar generator, it is only the O&M of the solar panels and the civil structures that is to be undertaken on a regular basis. There is no fuel procurement or storing of fuel, running auxiliary equipment, regulating generation levels etc.
- e) The PPAs do neither contemplate the outsourcing of O&M activities nor O&M contracts being awarded to the third parties.
- f) APTEL having specifically noted that the O&M contracts are expressly included and form part of the Project Documents provided in the PPA, has held that having included the same, there can be no inhibition for the generator to enter into O&M Contracts. There was a positive clause in the PPA specifically recognizing the award of O&M contracts as a part of Project Documents, and having positively recognized it, there was no inhibition in the award of the O&M contracts. This has no application in the present case, where the PPA does not have the said clause.
- g) Article 14.4 of the PPA, the rights and claims of the parties have to be only as expressly provided for in the Agreement. Therefore, the contention of the Petitioner is grossly misconceived.
- h) The bid was placed by Azure India Private Limited, which was the successful bidder. After the bidding process, Azure India Private Limited set up the Petitioner company

as a subsidiary to undertake the project. After the project is established, the Petitioner has awarded the O&M contract to its own parent company, which was also the bidder. The internal arrangement between the bidder/parent company and the SPV/subsidiary company cannot obviously increase the cost to the procurers and the consumers.

- i) The parent company cannot first create an SPV for its own convenience and then have the SPV outsource the entire O&M activities to the parent company and then pass on the tax burden, which has solely arisen due to such outsourcing, to the consumers.
- j) If the parent company undertakes the activity of O&M of the project, it obviously has the expertise to do so, which was also the bidding company. There is no justification in the bidder creating subsidiary companies to arrange its commercial affairs and then increase the tariff for the procurers and consumers.
- k) The Petitioners in the present case has outsourced the entire O&M of its Plant to its parent company. Any regulatory acknowledgement given to the practice as adopted by the Petitioner would have far reaching effects on the sector namely where an entity bids for a power project in the capacity of a generator and then later on outsources the entire running of the plant to a third party.
- l) The facts of the present case are totally distinguishable from the ratio as held in the Coastal Gujrat Case and that the present Petition deserves to be dismissed for lack of merits.

Written Submission filed by HPPC dated 03.06.2022

13. HPPC has submitted as under:

- a) The formation of the SPV- Petitioner Companies by the Parent Company- M/s. Azure Power India Limited was a conscious decision made by the selected bidder itself. There was no reason for the selected bidder to not to execute the project. The parent company cannot create the SPV (Petitioner herein) for its own convenience and then seek SECI and the HPPC (i.e., the Buying Utility) to pay for more than the quoted tariff admissible.
- b) The tariff quoted by the Petitioners is an all-inclusive fixed tariff during the term of the PPA consisting of O&M expenditure. There is no component wise break-up available as in the case of tariff determined under Section 62 of the Electricity Act,

2003. Reliance is placed on the Judgment dated 14.08.2018 passed by APTEL in the matter of *M/s GMR Warora Energy Limited –v- Central Electricity regulatory Commission and Others in Appeal No. 111 of 2017*.

- c) The reliance placed by the Petitioners on the decisions passed by APTEL in *GMR Kamalanga Energy –v- CERC, passed in Appeal No. 193 of 2017 (dated 21.12.2018)*; *Nisagra Renewable energy Ltd. –v- MERC, passed in Appeal No. 163 of 2020 (dated 16.11.2021)* and the reliance placed on the decision of this Commission in *Mahindra Renewables Pvt. Ltd. –v- M.P. Power Management Company Ltd.* passed in Petition No. 365/MP/2019 (dated 24.02.2021) is misplaced.
- d) In the case of *GMR Kamalanga*, APTEL was considering whether the notifications and circulars issued by Coal India Limited and Ministry of Railways are covered under the scope of law. There was no issue involving change in taxes and duties on the outsourced O&M activities. In the case of *Nisagra Renewables*, APTEL was considering whether the imposition of safeguard duty is to be restricted to AC capacity or it should be allowed to the extent of DC capacity installed. APTEL held that the relief on account of imposition of safeguard duty is to be allowed on the installed DC capacity. The above judgment also did not consider the issue involving change in taxes and duties on the outsourced O&M activities. In the case of *Mahindra Renewable*, the findings of this Commission in Paras 69 and 70 are in the context of whether goods required for establishing the solar power generating stations be sourced from a specific location to avoid the impact of a Change in Law event. In that background, this Commission had held that the decision for project implementation was taken prior to the imposition of safeguard duty and therefore it would not be appropriate to question the commercial decisions. The above judgment also did not consider the issue involving change in taxes and duties on the outsourced O&M activities.
- e) The Petitioner has not placed on record the O&M agreement entered into with the parent company. The Certificate of the Chartered Accountant quantifying the amount is not sufficient to substantiate the claim of the Petitioner. Necessary computation for such difference on account of GST vis-à-vis O&M Expenses has to be provided by the Petitioner.
- f) The claim of the Petitioners towards service tax, is wrong and denied that in the order dated 19.11.2019, this Commission had acknowledged the change in Service Tax

Laws/Finance Act as a change in law event.

- g) The claim towards Service Tax Laws/Finance Act is an afterthought and suffers from delays and laches and is liable to be rejected.

Rejoinder submitted by the Petitioners dated: 07.07.2022

14. The Petitioners have filed a common rejoinder to the replies submitted by the Respondents. The Petitioners have reiterated their submissions made in the written statement dated 10.05.2022 as such the same have not reproduced herewith for the sake of brevity. Additionally, the Petitioners have submitted as under:

Re: The PPA does not mandate internalization of O&M activities of the Solar Project by the Petitioner

- a) The Respondents have admitted that the method and manner in which the Petitioners operate their projects have been left to the commercial convenience of the Petitioners, including whether to undertake implementation of work either by itself or by appointing contractors. Since the same is left to the discretion of the Petitioners, it is evident that the test of whether there is any specific restriction against the outsourcing of the O&M services by the Petitioners to another entity/company, is fulfilled in favour of the Petitioners. Thus, reliance by the Respondents on the fact that the Petitioners have outsourced the O&M activities to their parent company is completely misplaced.
- b) Additional tax burden on account of Service Tax Laws and GST Laws leading to an additional recurring expenditure towards O&M expenses is squarely covered under the Change in Law provision of the respective PPAs. All the averments/contentions raised by the Respondents to the contrary are specifically denied and disputed being incorrect, misleading and misconceived.

Re: As a 'prudent utility practice' and 'standard industry practices' activities of the projects were outsourced to the parent company of the Petitioners, due to its vast experience in providing such services in the most effective and cost-efficient manner

- c) There is no logical reason/rationale for drawing a distinction between outsourcing of EPC contracts and O&M services, since the provisions of the PPAs create no such distinction. In fact, Article 4.1.1 covers both, construction related aspects as well as O&M related aspects. Accordingly, considering that the PPAs do not, in any manner,

whatsoever, create any such distinction between outsourcing of EPC contracts and O&M services in so far extent of outsourcing is concerned, the Respondents ought not to be permitted to interpolate terms into the PPAs which are not otherwise present.

Re: There is no additional monetary benefit to the Petitioners by way of the claims sought in the Petitions

- d) The Petitioners are only claiming the additional tax burden being incurred by them on account of increase in tax rate on O&M services due to promulgation of Service Tax Laws and GST Laws. There is no additional monetary benefit to Petitioners or APIPL in the present case as the additional taxes have either already been remitted to the government account, or the same will be remitted for the future period. The Petitioners are only seeking reimbursement/compensation for the same.

Re: The Respondents' allegations regarding lifting/piercing of corporate veil

- e) The Petitioners are only claiming additional tax burden which has already been remitted/will be remitted to the government account. All the averments/contentions raised by the Respondents to the contrary are denied and disputed being incorrect, misleading and misconceived.

Re: The Respondent's submissions regarding there being no component wise break up of tariff elements

- f) The Petitioners do not deny the fact that there is no component-wise breakup of the tariff(s) into various elements. However, the same, does not in any manner, whatsoever, preclude the Petitioners from claiming Change in Law *qua* O&M services. In this regard, it is significant to refer to and rely upon APTEL's Judgment dated 12.09.2014 in Appeal No. 228 of 2013 titled as *M/s Wardha Power Company Ltd. v. Reliance Infrastructure Ltd.*, wherein it has *inter alia* observed that it is not correct to co-relate the compensation on account of Change in Law with the price contemplated by bidder in its financial bid and that only the increase in the actual expenditure due to increase in tax has to be considered.

Tagging of Petition No. 70/MP/2019 and Petition No. 52/MP/2019

15. Meanwhile, the Commission vide its Order dated 09.08.2022 in Petition No. 70/MP/2019 and

Order dated 23.08.2022 in Petition No. 52/MP/2019 observed that *that the issue regarding O&M cost has been remanded by the Appellate Tribunal of Electricity in Appeal Numbers 61, 62, 63, 64 and 65 of 2021*. Therefore, the Petition No. 70/MP/2019 and Petition No. 52/MP/2019 were tagged with Petition Nos. 184/MP/2018 & batch qua recurring expenditure (O&M) for Orders.

Affidavit of the Petitioner dated 11.08.2022

16. Vide Affidavit dated 11.08.2022, the Petitioner has placed on record the Order dated 03.08.2022 passed by Bihar Electricity Regulatory Commission in case no. 05 of 2022 inter alia holding and declaring that *Azure Eris* (the Petitioner in case no. 05 of 2022) is entitled to compensation towards the increased O&M expenses incurred by it on account of the Change in Law events, i.e., the Service Tax Laws and GST Laws, in light of the *Coastal Gujarat Judgment*.

Hearing dated 09.09.2022

17. The matter was again listed for virtual hearing on 09.09.2022. During the course of hearing, the learned counsel for the Petitioner in Petition No. 184/MP/2018 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 PPA 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 in Petition No. 184/MP/2018. The learned counsel for the Respondents also made detailed submissions in the matters. 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 thereafter. The Commission also permitted the parties to file their respective reply and/or rejoinder, if any. Subject to the above, the Commission reserved the order in these matters.

Written submissions dated 19.09.2022 filed by PSPCL in Petition No. 188/MP/2018

18. PSPCL has reiterated its submissions already filed on 24.05.2022 as such the same have not been reproduced for the sake of brevity. Additionally, PSPCL has submitted as under:

Re: Ratio of the Coastal Gujarat case is distinguishable from the ratio in the present

case

- a) Outsourcing of the O&M to a third party is not a requirement of the PPA/PSA as was in the *Coastal Gujarat Case* and is a commercial decision of the Petitioner for its own advantage. Even dealing with *Force Majeure* under Article 11 of the PPA, the affected party recognized is only the Petitioner and not its contractor or sub-contractor.
- b) Article 13 of the in *Coastal Gujarat Case* PPA provides for both ‘Construction Period’ and ‘Operation Period’ unlike the PPA in the present case
- c) Article 17.10 of the PPA provides that the Petitioner would be solely responsible for the obligations of the PPA. This is clearly distinguishable from the facts of the Coastal Gujarat Case where no such Article was contemplated in the PPA.
- d) Article 14 of the PPA does not deal with the relationship between the Petitioner and its Contractors, particularly those contractors who render O&M services.
- e) The core activity of generation of electricity was not contracted out by the generator in the *Coastal Gujrat Case*, but only the peripheral and ancillary activities such as security services, travel etc. The O&M of the boiler and other generation equipment was carried out by generator itself.
- f) The internal arrangement between the bidder/parent company and the SPV/subsidiary company cannot increase the cost to the procurers and the consumers.
- g) Any regulatory acknowledgment given to the practice as adopted by the Petitioner would have far reaching effects on the sector itself, where competitive bids would be placed by entity ‘A’ whereas the plant would be run by entity ‘B’.
- h) It is thus evident from the above distinguishing factors that the ratio of the *Coastal Gujarat Case* is not applicable to the facts of the present case both on facts as well as on law.

Re: Absence of Necessary Particulars – Adverse Inference

- i) The Petitioner has not placed on record the O&M documents for PSPCL or this Commission to verify the same. The O&M contracts may have indemnifying clauses or any such other clause which renders the claim made the Petitioner *void ab initio*. The O&M contracts of the Petitioner ought to be called for by this Commission prior to any dispensation in favour of the Petitioner.

Written Submissions dated 26.09.2022 filed by SECI in Petition No. 52/MP/2019

19. In Petition No. 70/MP/2019 & 52/MP/2019, SECI has reiterated its submissions made in the written statement dated 24.05.2022 (In 188/MP/2018 & Ors.). Accordingly, the same are not reproduced herewith for the sake of brevity. Additionally, SECI has submitted as under:

GST implication on O&M

- a) The O&M activities have been outsourced to contractor of the Petitioner. In this regard, Paragraph 4.2 of the Petition filed by the Petitioner is relevant wherein the Petitioner has admitted to engage O&M contractor- Hindustan EPC-CO Private Ltd for undertaking the O&M activities. Further, the Petitioner has placed the O&M Agreement dated 15.05.2017 executed between the Petitioner and Hindustan EPC-CO. Private Ltd.
- b) APTEL in the CGPL case has allowed the impact of service tax on works contract under the PPA dated 22.04.2017 taking into the account Article 7 of the model PPA and the definition of '*Project Documents*' read with '*O&M contracts*' contemplating that a third-party O&M contractor might be appointed by it CGPL.
- c) 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.

Written Submissions dated 06.10.2022 filed by Petitioners in Petition No. 188/MP/2018, 185/MP/2018, 190/MP/2018, 191/MP/2018 and 184/MP/2018

20. The Petitioners have reiterated their submissions made in the pleadings. Accordingly, the same are not reproduced herewith for the sake of brevity. Additionally, the Petitioners have submitted as under:

Re: Applicability of the CGPL Judgment to the present case

- a) The Respondents are raising various baseless and untenable distinctions between the facts of the present case and the CGPL Judgment to allege that the CGPL Judgment is distinguishable/does not apply to the present case.

Re: During the pendency of the Petitions before this Commission, BERC vide its Order dated 03.08.2022, passed in a matter having similar facts as the present case,

has allowed the Change in Law claims of the petitioner therein

- b) The appeal bearing Appeal No. 129 of 2019 was filed by *Azure Power Eris Private Limited* against the Order 07.02.2019 in Case No. 30 of 2018, issued by BERC thereby disallowing the Change in Law claims of the Azure Eris on the very same basis contained in the Original Order, i.e., that the said Change in Law events do not qualify for relief since the Petitioner had outsourced the O&M of their respective projects purely based on its commercial decision. APTEL *vide* its Orders dated 13.01.2022 passed in Appeals No. 129 of 2019, had set aside similar Order dated 07.02.2019, issued by BERC, respectively, which were based on the exact same rationale as the Original Order. APTEL *vide* its orders dated 13.01.2022 and 03.02.2022 remanded the said matters to BERC and the Respondent Commission for fresh consideration.
- c) BERC *vide* its Order dated 03.08.2022 *inter alia* held and declared that Azure Eris is entitled to compensation towards the increased O&M expenses incurred by it on account of the Change in Law events, i.e., the Service Tax Laws and GST Laws, in light of the CGPL Judgment.

Written submission dated 06.10.2022 filed by the Petitioner in Petition no. 52/MP/2019

21. The Petitioner has submitted as under:

- a) APTEL in *Appeal No.129 of 2019* titled as *Azure Power Eris Private Limited Vs. Bihar Electricity Regulatory Commission & Others*, had considered similar issue at hand wherein BERC had rejected the claim of additional O&M expenditure incurred by the developer on account of introduction of GST Laws as change in law event due to the reason that the O&M service in that case was also outsourced. BERC *vide* its order dated 03.08.2022 in Case No. 05 of 2022 had allowed additional O&M cost incurred by the developer on account of introduction of GST as a change in law event under the PPA.
- b) The PPA executed between the Petitioner and SECI provides that all the ‘recurring’ / ‘non-recurring’ events are to be permitted as Change in Law. As the PPA itself permits the developer to claim recurring expenditure as change in law event, therefore, the O&M expenditure which is in the nature of recurring expense has to be allowed to the Petitioner as change in law event under the PPA.
- c) Along with O&M activities, the Petitioner had also outsourced the construction of the

Project to an EPC contractor. This Commission has passed various orders allowing implementation of GST laws as change in law event till the construction stage including this case also. Reliance is placed on order dated 15.09.2022, passed by the APTEL in Appeal No. 256 of 2019 and Batch, titled *Parampujya Solar Energy Private Ltd. &Anr. v. Central Electricity Regulatory Commission &Ors.*, wherein compensation for additional expenditure (recurring /non-recurring) towards O&M activities as well, were allowed notwithstanding the fact that they were outsourced.

- d) The Petitioner's claim towards increased O&M expenditure on account of implementation of GST laws deserves to be allowed as a change in law event.
- e) The Petitioner will also be entitled to get carrying cost on these additional recurring expenditure in light of the APTEL's order dated 15.09.2022 in Appeal No. 256 of 2019 and Batch. Since the burden of carrying cost is a consequence directly flowing from the change in law event, the relief in such regard cannot be complete unless this part of the additional expenditure is also allowed as pass-through.
- f) The Hon'ble Supreme Court vide its judgment dated 24.08.2022 in Civil Appeal No. 7129 of 2021 has held that the entire concept of restitutionary principles engrained in the PPAs has to be read in the correct perspective.

Analysis and Decision:

- 22. We have heard the learned counsels for the Petitioners and the Respondent and have carefully perused the records. Since the petitions contain similar issues, the same are clubbed together.
- 23. Before discussing the issue on merits, we consider it appropriate to deal with other issues raised by the Petitioner in Petition No. 52/MP/2019. The Petitioner has submitted that the Hon'ble Supreme Court vide its judgment dated 24.08.2022 in Civil Appeal No. 7129 of 2021 has held that the entire concept of restitutionary principles engrained in the PPAs has to be read in the correct perspective. The said principle that governs compensating a party for the time value for money, is the very same principle that would be invoked and applied for grant of interest on carrying cost on account of a Change in Law event.
- 24. We have considered the submissions made by the Petitioner. Pertinently, the scope of the

present proceedings is limited to the implementation of the directions of the APTEL in its judgment dated 03.02.2022 in Appeal Numbers 61, 62, 63, 64 and 65 of 2021 of 2019 and 58 of 2019. It is a well settled principle that the scope of the remand proceedings is limited and the court is bound to act within the scope of remand. In this regard, we refer to the judgment of the APTEL dated 10.5.2010 in Appeal No. 146 of 2009 (*Damodar Valley Corp. v. Central Electricity Regulatory Commission and Ors.*), wherein APTEL has summarized the principles governing the scope of remand proceedings as laid down in terms of the various decisions of the Hon'ble Supreme Court as under:

“40. In the cases referred to above, the following principles have been laid down:

(i) When a matter is remanded by the superior court to subordinate court for rehearing in the light of observations contained in the judgement, then the same matter is to be heard again on the materials already available on record. Its scope cannot be enlarged by the introduction of further evidence, regarding the subsequent events simply because the matter has been remanded for a rehearing or de novo hearing.

(ii) The court below to which the matter is remanded by the superior court is bound to act within the scope of remand. It is not open to the court below to do anything but to carry out the terms of the remand in letter and spirit.

(iii) When the matter comes back to the superior court again – on appeal after the final order upon remand is passed by the court below, the matter/issues finally disposed of by order of remand, cannot be reopened.

(iv) Remand order is confined only to the extent it was remanded. Ordinarily, the superior court and set aside the entire judgement of the court below or it can remand the matter on specific issues through a “Limited Remand Order”. In case of Limited Remand Order, the jurisdiction of the court below is limited to the issue remanded. It cannot sit on appeal over the Remand Order.

(v) If no appeal is preferred against the order of Remand, the issues finally decided in the order of remand by the superior court attains finality and the same can neither be subsequently re-agitated before the court below to which remanded not before the superior court where the order passed upon remand is challenged in the Appeal.

(vi) In the following cases, the finality is reached:

a) The issue being not challenged before the superior court, or

b) The issue challenged but not interfered by the superior court, or

c) The issue decided by the superior court from which no further appeal is preferred.

These issues cannot be re-agitated either before the court below or the superior court.”

25. In view of the settled principles governing remand proceedings, the prayer of the Petitioner for grant of interest on carrying cost cannot be considered in the present proceedings, as it is beyond the scope of the present remand proceedings initiated in terms of the judgment of APTEL dated 03.02.2022. In the said judgment, APTEL has directed the Commission that

the matter deserves to be remitted for reconsideration of the issue of O&M expenses in light of rulings of this tribunal in *Coastal Gujarat case & Azure Power Eris Private Limited Vs. Bihar Electricity Regulatory Commission & Others*. The Appellants were also granted liberty to challenge the view already taken by the Central Commission *vis-à-vis* carrying cost, before APTEL, after decision on O&M expenses is rendered afresh by the Central Commission.

26. We now deal with the issue remanded. The APTEL vide judgment dated 03.02.2022 has held that “*the matter deserves to be remitted for reconsideration of the issue of O&M expenses in light of rulings of this tribunal in Coastal Gujarat case & Azure Power Eris Private Limited Vs. Bihar Electricity Regulatory Commission & Others.*”

27. The Commission vide its Order dated 19.11.2019 decided the Petitions No. 188/MP/2018, 185/MP/2018, 190/MP/2018, 191/MP/2018 and 184/MP/2018 and held as under:

Issue No. 2: Whether there will be incremental impact in O&M expenses on account of promulgation of the GST Laws? And Whether there is a need to evolve a suitable mechanism to compensate the Petitioners for the increase in recurring and non-recurring expenditure incurred by the Petitioners on account of Change in Law?

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....

98. The Commission is of the view that the recurring expenses referred to in Article 12 of the PPAs includes activities like salary, tax expenses, estimated maintenance costs, and monthly income from leases etc. It is apparent that GST will apply in case of outsourcing of the ‘Operation and Maintenance’ services to a third party (if any). **The Commission is of the view that outsourcing of the ‘Operation and Maintenance’ services is not the requirement of the PPAs/ bidding documents. The concept of the outsourcing is neither included expressly in the PPAs nor it is included implicitly in the Article 12 of the PPAs. The Commission is of the view that in the Competitive Bidding Scenario, the SPDs bid levelized tariff without disclosing the details of the calculations of the project cost. It has already been held by the Commission in the earlier Orders and also appreciated above that 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. This view is in consonance with the view taken by the Commission Order dated 09.10.2018 in Petition No. 188/MP/2017 & Ors. case titled *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors.*

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Summary of decisions:

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

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b. Issue No. 2: The claim of the Petitioners on account of additional tax burden on "O&M" expenses (if any), is not maintainable.

28. We observe that 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 Swatch 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”.

29. We observe that the Petitioners have submitted that *Coastal Gujarat Judgment*, ex-facie establishes that the facts of the present case are pari-materia with the facts of the *Coastal Gujarat Judgment*. *Per contra*, the Respondents have submitted that the ratio of the *Coastal Gujarat case* is distinguishable from the present petitions both on law as well as on facts. In the *Coastal Gujarat Case*, APTEL has held that the definition of ‘Project Documents’ read with ‘O&M contracts’ contemplates that a third-party O&M contractor might be appointed by it (CGPL)’ i.e. The PPA between the parties explicitly envisaged and provided for O&M to be contracted out to third parties. It is not the core activity of generation of electricity that was contracted out by CGPL, but peripheral and ancillary activities such as security services, travel etc. However, in the present case, the PPAs does not have any such clause. O&M contracts do not form part of the PPAs and as such the *ratio* as held in the *Coastal Gujarat Case* has no application whatsoever to the facts of the present case. The PPAs do not even contemplate the outsourcing of O&M activities to third parties.
30. We observe that from the *ratio-decidendi* as decided by the APTEL in *Coastal Gujarat Judgment & A.No. 256 of 2019 & Batch* 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.
31. We further observe that APTEL vide its judgement dated 15.09.2022 in A.No. 256 of 2019 & Batch, has held as under:
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.***

...

...

*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.***

32. APTEL in the *above Judgements* observed that the purpose of the Change in Law clause in the PPAs is to relieve the developer of the additional burden. Since the impact of GST notification would be effective from the date of enforcement of the new laws, the 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-decidendi* emerge:

- a) For the services availed by the Petitioners and used for the sole objective of generating electricity for supply to the Procurers under the PPA, the increased cost due to 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 additional 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, refer to the business of supply of electricity. The compensation envisaged 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 compensation for additional expenditure towards O&M activities notwithstanding the fact that they were outsourced.

33. 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 for O&M expenses due to promulgation of the GST Laws. Accordingly, the

Commission directs the contracting parties to carry out reconciliation, on account of incremental impact in O&M expenses due to promulgation of the GST Laws, by exhibiting clear and one to one correlation with the projects and the invoices raised backed by auditor certificate. The Contracting parties are to also follow the directions given in Order dated 20.08.2021 in Petition No. 536/MP/2020 meticulously. The Commission further directs that the responding DISCOMS are liable to pay to the NTPC/NVVN/SECI 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.

34. Petition no. 188/MP/2018; Petition No. 185/MP/2018; Petition No. 190/MP/2018; Petition No. 191/MP/2018; Petition No. 184/MP/2018; 52/MP/2019 and 70/MP/2019 stands disposed of.

Sd/-

पी. के. सिंह
(सदस्य)

Sd/-

अरुण गोयल
(सदस्य)

Sd/-

आई. एस. झा
(सदस्य)