



नई दिल्ली  
NEW DELHI

याचिका संख्या/ Petition No.: 211/MP/2018

कोरम/ Coram:

श्री पी. के. पुजारी, अध्यक्ष/ Shri P. K. Pujari, Chairperson  
श्रीआई. 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: 30<sup>th</sup> of November, 2021

**IN THE MATTER OF:**

Petition under Section 79 of the Electricity Act, 2003 and Article 12 read with Article 16.3.1 of the Power Purchase Agreements executed by the Petitioner and NTPC Vidyut Vyapar Nigam Limited dated 10.01.2011 seeking relief on account of a 'Change in Law' viz. the introduction of Goods and Services Tax Laws at the Central level and change in the rate of Service Tax, resulting in additional recurring expenditure in the form of an additional tax burden to be borne by the Petitioner after the Effective Date of the Power Purchase Agreements.

**AND IN THE MATTER OF:**

**1) Petition No. 211/MP/2018**

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

**...Petitioner**

**VERSUS**

1. NTPC Vidyut Vyapar Nigam Limited  
(Through its Chief Executive Officer)  
NTPC Bhawan, Core 7, SCOPE Complex  
7 Institutional Area, Lodhi Road,  
New Delhi - 110 003
2. NTPC Limited  
{Thorough its General Manager (Commercial)}  
Core-7, SCOPE Complex  
7 Institutional Area, Lodi Road  
New Delhi-110 003
3. Punjab State Power Corporation Limited (PSPCL)  
(Through its Managing Director)  
The Mall, PSEB Head Office,  
Baradari, Patiala, Punjab - 147 001
4. Uttar Pradesh Power Corporation Limited (UPPCL)  
(Through its Managing Director)  
Shakti Bhawan, 14 Ashok Marg,  
Lucknow - 226 001
5. Chhattisgarh State Power Distribution Company Limited (CSPDCL)  
(Through its Managing Director)  
4<sup>th</sup> Floor, Vidyut Seva Bhawan Dangania,  
Raipur, Chhattisgarh-492 013
6. Grid Corporation of Orissa Limited (GRIDCO)  
(Through its Managing Director)  
Bhoi Nagar, Janpath  
Bhubaneshwar - 751 022
7. West Bengal State Electricity Distribution Company Limited (WBSEDCL)  
(Through its Managing Director)  
Vidyut Bhaan, Bidhannagar,  
Block DJ, Sector-II, Kolkatta-700 091
8. Damodar Valley Corporation Limited (DVC)  
(Through its Chairman)  
DVC Headquarters, DVC Towers,  
VIP Road, Kolkatta - 700 054
9. Mangalore Electricity Supply Company Limited (MESCOM)  
(Through its Managing Director )  
Paradigm Plaza, AB Shetty Circle,  
Mangalore - 575 001

10. Bangalore Electricity Supply Company Limited (BESCOM)  
(Through its Managing Director)  
BESCOM, KR Circle,  
Bangalore-560 001
11. Chamundeshwari Electricity Supply Corp. Limited (CESC)  
(Through its Managing Director)  
No. 927, New Kantharaj Urs Road,  
Saras watipuram Mysuru – 570 009
12. Gulbarga Electricity Supply Company Limited (GESCOM)  
(Through its Managing Director)  
Corporate Office, Station Road,  
Kalaburagi, Karnataka - 585 102
13. Hubli Electricity Supply Company Limited (HESCOM)  
(Through its Managing Director)  
PB Road, Navanagar,  
Hubli - 580 025
14. Assam Power Distribution Company Limited (APDCL)  
(Through its Managing Director)  
Bijulee Bhawan, Paltan Bazaar,  
Guwahati - 781 001
15. Jaipur Vidyut Vitran Nigam Limited  
(Through its Managing Director)  
Vidyut Bhawan, Jyoti Nagar,  
Jaipur-302 005
16. Jodhpur Vidyut Vitran Nigam Limited  
(Through its Managing Director)  
New Power House, Industrial Area,  
Jodhpur, Rajasthan - 342 003
17. Ajmer Vidyut Vitran Nigam Limited  
(Through its Managing Director)  
Vidyut Bhawan,  
Panchsheel Nagar, Makarwali Road,  
Ajmer - 305 004

...Respondents

**Parties Present:** Shri Sahil Kaul, Advocate, Azure Power  
Shri M. G. Ramachandran, Sr. Advocate, NVVN  
Ms. Tanya Sareen, Advocate, NVVN  
Ms. Anushree Bardhan, Advocate, NVVN  
Shri Anurag Gupta, NVVN  
Shri Sukesh Mohan, NVVN

## आदेश/ ORDER

The Petitioner, M/s Azure Power (Rajasthan) Pvt. Ltd. is a generating company primarily engaged in the business of setting up solar power plants and generation of electricity. The Petitioner has developed one Solar Power Generating System (SPGS) of 5 MW in Kathauti village, Nagaur District, Rajasthan pursuant to a Power Purchase Agreement (PPA) dated 10.01.2011 executed with the Respondent No. 1, NTPC Vidyut Vyapar Nigam Limited.

2. The Respondent No. 1, M/s NTPC Vidyut Vyapar Nigam Limited ('NVVN') has been identified by the Government of India as the nodal agency for facilitating purchase & sale of 33kV and above grid connected 'Solar PV Power' under the National Solar Mission of Government of India (Gol). NVVN is a wholly owned subsidiary of Respondent No. 2 NTPC Limited (NTPC) and an inter-State trading licensee. Rest of the Respondents are Discoms (Distribution companies) of various States of India viz. Punjab, Uttar Pradesh, Chhattisgarh, Odisha, West Bengal, Karnataka, Assam & Rajasthan. NVVN is the nodal agency for facilitating purchase and sale of 33kV and above grid connected Solar PV Power under the National Solar Mission of Government of India (Gol).
3. The Respondent No. 2, M/s NTPC Limited is a Central Public Sector Undertaking and is engaged in the business of generation of electricity and allied activities.
4. The Petitioner has made the following prayers:
  - a) *Declare that the promulgation of the Finance Act, 2012 (with effect from 01.04.2012), Finance Act, 2015 (with effect from 01.06.2015), Notifications No.21 and 22/2015-ST dated 06.11.2015 by the Ministry of Finance, Government of India (with effect from 15.11.2015), Finance Act, 2016 (with effect from 01.06.2016) and Central Goods and Services Tax, 2017 (with effect from 01.07.2017) are each a Change in Law under Article 12 of the Power Purchase Agreement dated 10.01.2011 executed between the Petitioner and Respondent No. 1;*
  - b) *Direct the Respondents to accordingly pay the Petitioner an additional tariff of Rs. 0.143/ kWh with effect from the Commercial Operation Date of the Petitioner's Solar Power Generating System as compensation for the additional tax burden incurred by the Petitioner on operating and maintaining the said Solar Power Generating Systems, as elaborated in the instant Petition, due to the promulgation of the Finance Act, 2012*

*(with effect from 01.04.2012), Finance Act, 2015 (with effect from 01.06.2015), Notifications No.21 and 22/2015-ST dated 06.11.2015 by the Ministry of Finance, Government of India (with effect from 15.11.2015), Finance Act, 2016 (with effect from 01.06.2016) and Central Goods and Services Tax, 2017 (with effect from 01.07.2017), along with carrying costs, subject to any adjustments based on the final additional expenditure incurred by the Petitioner as on the Commercial Operations Date of the Petitioner's Solar Power Generating Systems as duly audited and certified by the Petitioner's statutory auditor at the end of the relevant financial year;*

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

### **Background**

5. The Jawaharlal Nehru National Solar Mission had inter-alia set a target for deployment of grid connected solar power capacity of 1,00,000 MW by 2022 to be achieved in 3 phases.
6. **On 18.08.2010**, NTPC issued Request for Selection (RfS) for setting up grid-connected solar projects in the State of Rajasthan through e-bidding process. Pursuant to the RfS, the Petitioner was selected for setting up a solar power generation facility in the State of Rajasthan. Pursuant to the issuance of LOI (letter of intent) by NVVN (wholly owned subsidiary of NTPC), the Petitioner has agreed to set up Solar Power project based on crystalline technology of 5 MW capacity in the State of Rajasthan.
7. **On 10.01.2011**, the Petitioner executed Power Purchase Agreement with NVVN to sell solar power to NVVN which agreed to purchase power from the Petitioner as an intermediary and sell it to the Respondent Discoms after bundling it with the unallocated power procured from the central unallocated quota of coal based power projects of NTPC, the holding company of NVVN, as per the provisions of the National Solar Mission.
8. **On 14.01.2011**, NVVN executed Power Sale Agreements (PSAs) with the Respondent Discoms to sell bundled power as per the provisions of the National Solar Mission.

9. As per PPA, the Scheduled Commissioning Date of the solar power project to be set up by the Petitioner was **09.01.2012**.
10. With effect from **01.04.2012**, the Finance Act, 2012; with effect from **01.06.2015**, the Finance Act, 2015; on 06.11.2015, Notifications No.21 and 22/2015-ST (effective from 15.11.2015); with effect from **01.06.2016**, the Finance Act, 2016; and with effect from **01.07.2017**, the Central Goods and Services Tax, 2017 were promulgated. These Acts are hereinafter referred to as 'Service Tax Laws and GST Laws'.
11. The Petitioner has submitted that with the enactment of Service Tax Laws and GST Laws, it is required to bear additional recurring expenditure after the Effective Date under the PPA.
12. Hence the Petition.

#### **Submissions of the Petitioner**

13. The Petitioner has submitted as under:
  - a) The PPA was executed well before the date of coming into effect of the Service Tax Laws and GST Laws. With the enactment of the Service Tax Laws and GST Laws, the Petitioner is required to bear additional recurring expenditure after the Effective Date under the PPA. There has been an increase in the effective rate of service tax on operations and maintenance services. The Petitioner has submitted comparison between the old tax laws and rates which were applicable to the Petitioner as on the Effective date of the PPA and revised rates as under:

Old Tax Law	Old Tax Rate	New Tax Law	New Tax Rate	Applicable Period for New Tax Law
Notification No. 8/ 2009- ST dated 24.02.2009 issued by the Ministry of Finance, Government of India	10.30%	Finance Act, 2012	12.36%	01.04.2012 to 31.05.2015
Finance Act, 2012	12.36%	Finance Act, 2015	14%	01.06.2015 to 14.11.2015
Finance Act, 2015	14%	Imposition of Swacch Bharat Cess by Notification No.21/2015-ST, dated 06.11.2015	14.5%	15.11.2015 to 31.05.2016

		issued by the Ministry of Finance, Government of India		
Finance Act, 2015	14.5%	Imposition of Krishi Kalyan Cess by Finance Act, 2016	15%	01.06.2016 to 30.06.2017
Finance Act, 2016	15%	The Central Goods and Services Tax, 2017	18%	From 01.07.2017 till date

- b) The promulgation of the Service Tax Laws and GST Laws has resulted in additional recurring expenditure for the Petitioner after the Effective Date in the form of an additional tax burden applicable on the necessary services required to operate and maintain the SPDs. It is also required to bear additional recurring expenditure in the form of additional tax burden on the operation and maintenance expenses of the Solar Power Generating Station. Since promulgation of the Service Tax Laws and GST Laws is after the Effective Date of the PPA, it squarely attracts Article 12 of the PPA thereby entitling the Petitioner to ‘Change in law relief’ stipulated thereunder. Definition of Law as in the PPA is reproduced below:

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

- c) The Petitioner has submitted that Art. 12 of the PPA stipulates as under:

**“ARTICLE 12: ‘CHANGE IN LAW’**

*12.1. Definitions*

*In this Article 12, the following terms shall have the following meanings;*

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

- the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re - enactment or consolidation) in India, of any law, including rules and regulations framed pursuant to such law;*
- a change in the interpretation or application of any law by any Indian Governmental Instrumentality having the legal power to interpret or apply such law or any Competent Court of Law;*

- *the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;*
- *a change in the terms and conditions prescribed for obtaining any consents, clearances and permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits, except due to any default of the SPD;*
- *any statutory change in tax structure or introduction of any new tax made applicable for setting up of Solar Power Project and supply of power from the Project by the SPD, shall be treated as per the terms of this Agreement. For the purpose of considering the effect of this change in Tax structure due to change in law after the date of submission of Bid, the date such law comes into existence shall be considered as effective date for the same;*

*but shall not include (1) any change in any withholding tax on income or dividends distributed to the shareholders of the SPD, or (2) any change on account of regulatory measures by the Appropriate Commission.*

### ***12.2. Relief for ‘Change in Law’***

*12.2.1. The aggrieved party shall be required to approach the central commission for seeking approval of ‘Change in Law’.*

*12.2.2. The decision of the central commission to acknowledge a ‘Change in Law’ and the date from which it will become effective, provide relief for the same, shall be final and governing on both the parties.”*

- d) In the instant petition, the PPA was executed before the date of coming into effect of the Service Tax Laws and GST Laws and the enactment of the Service Tax Laws and GST Laws has resulted in additional recurring and non-recurring expenditure for the Petitioner.
- e) The Service Tax Laws and GST Laws imposed GST to the tune of 5% to 28% on goods required for execution, construction and operation of solar projects which were previously exempted. GST on various items required for the construction and operation of solar power projects in the State.
- f) Under Article 9 of the PPA, it was originally entitled to receive a tariff of Rs. 11.94/kWh from the Commercial Operation Date of the SPGS. However, such tariff was fixed prior to the promulgation of the Service Tax Laws and GST Laws. Therefore, the aforesaid tariff would need to be revised upwards to account for and reflect the additional tax burden incurred/ to be incurred by the Petitioner on account of the promulgation of the Service Tax Laws and GST Laws. Further, as per the

Certificate from a Chartered Accountant dated 01.06.2018, the net amount to be incurred additionally by the Petitioner over the entire period of the PPA in operating and maintaining the SPGS on account of the promulgation of the Service Tax Laws and GST Laws is approximately Rs. 2,11,98,230/- (Rupees Two Crore Eleven Lakh Ninety-Eight Thousand Two Hundred and Thirty only) on the Operation and Maintenance costs of the SPGS, assuming that the GST rate for services remains constant for the entire period of the PPA.

- g) An additional tariff including carrying costs, payable on a monthly basis, may be approved by this Commission, which may be reconciled later with the actual additional tax paid by the Petitioner on the basis of its annual audited books of account certified by its statutory auditor. As per calculation of the additional tax burden to be incurred, the Petitioner has submitted that a levelized tariff increase of Rs. 0.143/ kWh would compensate the Petitioner for the impact of additional tax burden on the O&M Costs of the SPGS.
- h) This Commission has the jurisdiction to decide the instant Petition under section 79(1)(a) and (b) read with section 79(1)(f) of the Electricity Act. Further, Article 12 of the PPA specifically provides that this Commission has the jurisdiction to decide the issue of Change in Law. Hence, only this Commission has the jurisdiction to adjudicate the instant Petition.

#### **Submissions of the Respondent No. 1 - NVVN**

14. NVVN has submitted as under:

- a) The Commission in the case of *Prayatana Developers Pvt. Ltd v NTPC Limited and Ors and Azure Power Venus Pvt. Ltd. v Solar Energy Corporation of India Limited and Ors*, in Petition No. 50/MP/2018 and 52/MP/2018, vide Order dated 19.09.2018, has laid down the circumstances where the SPD shall not be entitled to claim the impact of change in law. It was held that the GST implications will be applicable if the point of taxation occurs on or after 01.07.2017 and not when the point of taxation has occurred prior to 01.07.2017, in which case the taxes shall be payable only under the pre-Service Tax Laws and GST Laws and therefore, there is no change in law.

NVVN has denied that promulgation of the Service Tax Laws and GST Laws entitles the Petitioner for any compensatory tariff, as claimed by the Petitioner, in terms of Article 12 of the PPA i.e. Change in Law clause.

The Scheduled Commissioning Date (SCoD) for the Solar PV Projects is much earlier than the date(s) of promulgation of the Service Tax Laws and GST Laws.

- b) There cannot be any additional claim in regard to the O&M expenditure on account of Service Tax Laws and GST Laws. The Petitioner is not entitled to any relief on account of the additional tax implication on the O&M services in respect of Petitioner's project. O&M is the responsibility of the Petitioner and in the event of the Petitioner choosing to employ the services of other agencies, namely its Parent Company i.e. Azure Power India Private Limited, it cannot increase the liability of the Respondents (and consequentially the Distribution Licensees) in terms of tariff. The outsourcing of the 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. The issue has been decided by the Commission in its Order dated 19.09.2018 passed in Petition No. 50/MP/2018 and 52/MP/2018.
- c) There is no provision in the PPA regarding carrying cost or interest for the period till the determination of the relief amount on account of 'Change in Law'. The Change in Law claim of the Petitioner is yet to be adjudicated and the amount if any due to the Petitioner has to be first determined/computed. When the amount is determined by the Commission, the Petitioner is required to raise a supplementary invoice for the amount so computed as per Article 10.7 of the PPA and the payment has to be made on the due date of such Supplementary Bill. The issue of carrying cost or interest or late payment surcharge will arise only for the period after the due date.
- d) The decision by the Commission can only be after the Petitioner has submitted complete information and not before. Thus, any delay in the determination of the impact of 'Change in Law' is to the account of the Petitioner, as the Petitioner has not placed complete information and supporting documents. The Respondent No.1 has

placed its reliance on the Judgment of the 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.*, vide which it has been 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 had 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 either for carrying cost or for restitution. Therefore, the Petitioner is not entitled to claim relief which is not provided in the PPA.

- e) The jurisdiction of the Commission is not denied.
- f) The Petitioner has not raised any notice on the Respondents with the petition. Accordingly, even on this count, the Petition is not maintainable and is liable to be dismissed in limine.
- g) Further it is wrong and denied that the Petitioner is entitled:
  - a) to be compensated for legal or administrative costs or otherwise in pursuing the proceedings before the Commission.
  - b) the tariff of the project needs to be revised upwards to account for additional tax burden incurred/to be incurred by the Petitioner on account of Service Tax Laws and GST Laws or Service Law.
  - c) to revise tariff to account for carrying costs incurred by the Petitioner in discharging the additional tax burden.
  - d) to be restored to the same economic position as if a change in law had not occurred.
  - e) to a levelized additional tariff

### **Submissions of the Respondent No. 3 - Punjab State Power Corporation Limited**

15. PSPCL has submitted as under:

- a) It is one of the procurers of the power which is being purchased from the Petitioner through NVVN under the Power Sale Agreement 'PSA' dated 14.01.2011.

#### ***Re: Claims under the 'Change in Law' clause***

- b) In terms of the PPA and PSA entered into in the present matter, in order to qualify for relief under the 'Change in Law' provision contained in the PSA, the conditions mentioned in Article 8 dealing with 'Change in Law' need to be satisfied. The PPA entered into between the trader NVVN and the Petitioner provides in the definition clause i.e. Article 1.1 that any term used in the PPA but not defined would have the meaning as applicable under the Electricity Act, 2003.
- c) The term 'Supply' is defined in Section 2 (70) of the Electricity Act, 2003 as:

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

In terms of the above, incidence of tax recognised under Article 8.1.1 - Last Bullet is only on the transaction of sale of electricity and not on any other transaction preceding it.

- d) The intention of the parties becomes further clear since in the PPA, the last bullet uses the term “Supply of Power” and in the PSA, last bullet uses the term “Sale of Power”. Section 2(72) of the Electricity Act defined supply to be sale of electricity to a licensee or consumer. Therefore, the clear intention of the parties is to compensate for the change in taxes when the incidence of such tax is on the sale of power or supply of power and not on the input materials used for generation of power. The above interpretation also stands fortified by the fact that the Change in Law provision of the present PPA stands on a different footing in comparison to the provisions of Change in Law, as incorporated in other Standard Bidding Documents issued by Government

of India as well as in other PPAs. It can be concluded that in the Change in Law provisions of the PSA between the trader NVVN and the answering Respondent, a deviation was consciously made and a separate provision in the form of last bullet was incorporated restricting the taxes to those which are made applicable on sale of power.

- e) In the present PPA, there is no clause dealing with specific relief under the construction period and therefore, the Petition is liable to be dismissed.

***Re: Claims towards Operation and Maintenance***

- f) The O&M is the responsibility of the Petitioner and in the event of the Petitioner choosing to employ the services of other agencies it cannot increase the liability of the Respondent in terms of tariff. The Petitioner has admitted in the petition that it has an O&M service provider for operating and maintaining the Solar Generating plant. The outsourcing of the O&M to a third party is not a requirement of the PPA/PSA 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. Further, the Solar Power Developer is employing the services of their own parent company namely *Azure Power India Private Limited* to carry out the Operation and Maintenance. PSPCL has placed its reliance on the Order dated 16.03.2018 in Petition No. 1/MP/2017 in *GMR Warora Energy Limited v. Maharashtra State Electricity Distribution Company Limited and Ors* and the Order dated 19.09.2018 in Petition No. 50/MP/2018 and Petition No. 52/MP/2018 in the case of *Prayatana Developers Private Limited v NTPC Limited and Ors*. In the circumstances, the Petitioner is not entitled to any increase on account of the implications of the GST and/or the Finance Act on the O&M Services that have been outsourced. In any event, the claims raised by the Petitioner in respect of the implications of the Service Tax Laws and GST Laws are an after-thought, and suffers from delay and laches and is liable to be rejected.

***Re: Inadmissibility of Carrying Cost***

- g) There is no provision in the PSA regarding carrying cost or interest. The Change in Law claim of the Petitioner is yet to be adjudicated and the amount if any, due to the

Petitioner has to be determined/computed first. Only after the amount is determined, is the Petitioner required to raise a supplementary invoice for the amount so computed as per Article 10.7 of the PPA. It is only in case of default on the part of the answering Respondent in not making the payment by the due date as per supplementary invoices, does the issue of Late Payment Surcharge arise i.e. for the period after the due date. PSPCL has placed its reliance on the decision of the Tribunal in *SLS Power Limited -v- Andhra Pradesh Electricity Regulatory Commission and Others (Appeal No. 150 of 2011) and Batch* and judgment of the Tribunal dated 13.04.2018 in Appeal No. 210 of 2017 in *Adani Power Limited v. Central Electricity Regulatory Commission and Ors.* Further, there is no provision in the PSA dealing with carrying cost and it is a well settled principle that the parties cannot go beyond the pleadings. In this matter, reliance is placed on the judgment of the Hon'ble Supreme Court in the case of *Trojan & Co, v. Nagappa Chettiar (AIR 1953 SC 235)*; *Ishwar Dutt v. Collector (L.A.) (2005) 7 SCC 190*; *State of Maharashtra v. Hindustan Construction Co. Ltd. (2010) 4 SCC 518* and *Nabha Power Limited v. Punjab State Electricity Regulatory Commission in Civil Appeal No. 179 of 2017 dated 05.10.2017*.

***Re: Absence of necessary particulars***

***(i) Non-furnishing of details of taxes subsumed/withdrawn by reason of GST***

- h) The Petitioner has not placed before the Commission in a transparent manner the taxes, duties and levies which stand withdrawn and no longer payable by reason of the introduction of the GST. In the absence of proper particulars being placed by the Petitioner on the extent of taxes, levies, duties and cess etc. subsumed in the GST, the Commission should dismiss the petition filed by the Petitioner. It is incumbent on the Petitioner to place before the Commission in a transparent manner, the increase or decrease in the taxes on net basis. For instance, in pre-GST, the Petitioner was subjected to 4% Excise Rate and post-GST, the same became a cumulative 5%, then the Petitioner would be entitled to claim only the difference i.e. 1% as a change in law and not the entire 5%.

***(ii) Non-furnishing of all the relevant details***

- i) In the petitions filed, the Petitioner/SPD has chosen to give some few odd documents, including some invoices without any correlation and the related documents. Before the matter is adjudicated, the Petitioner should be directed to give the following particulars/documents in respect of each claim under the Service Tax Laws and GST Laws:
- a. Name of the Goods/Equipment
  - b. Date of the Purchase Order (PO)
  - c. Date of Delivery of the Goods/Custom Clearance
  - d. Date of the Goods being handed over to the Common Carrier
  - e. Date on which the goods were received at site
  - f. Date on which the goods were installed at site
  - g. The name of the manufacturer of the Goods
  - h. The name of the intermediary between the Original Equipment Manufacturer and the SPD
  - i. The GST/Tax Invoice raised
  - j. The supporting documents in respect of each of the above
- ii) The above is to be given in respect of each item of goods/equipment/services. All the above information are within the possession/control of the Petitioner and the Commission as well as the Procurers need to rely on the information furnished. The Authorised Officer of the Petitioner should file an undertaking that each of the information has been duly verified and is true and correct to his knowledge. There should also be a further direction that in case the information is found to be wrong, the Petitioner shall be liable to adjust the money recovered with penal interest of 18% per annum. This is necessary to disincentivise the SPD from making a wrong declaration and deriving unlawful benefit. In the facts and circumstances mentioned above, the petition filed by the Petitioner ought to be dismissed both for lack of data and on the merits.

**Submissions by the Respondent No. 15, Respondent No. 16 and Respondent No.17 - Jaipur Vidyut Vitran Nigam Limited, Jodhpur Vidyut Vitran Nigam Limited & Ajmer Vidyut Vitran Nigam Limited**

16. The Respondents No. 15 to 17 are the three Rajasthan Discoms who have submitted as under:
- a) That they are not the parties to the said PPA and therefore, are neither proper nor necessary party in this petition. Hence, they seek deletion from the array of parties for being improperly impleaded as parties to the petitions.
  - b) The Petitioner has not submitted any document or supporting evidence furnishing the requisite details backed by auditor certificate or computation of impact of 'Change in Law'. Therefore, no relief can be granted without any appropriate proof thereof.
  - c) The Service Tax Laws and GST Laws constitute a 'Change in Law' within the scope of the PPAs, when the Petitioner sufficiently satisfies the Commission with respect to the expenditure incurred, amount of taxes actually to be paid under the Service Tax Laws and GST Laws.

**Rejoinder by the Petitioner**

17. The Petitioner has denied all the objections raised by the Respondents and has submitted as under:
- a) There is no merit in the objections raised by the Respondents and same are ought to be rejected outright.

***Re: Claims under GST Law if SCoD is prior to 01.07.2017***

- b) The claim of the Petitioner in the instant Petition relates to the additional recurring expenditure incurred by the Petitioner on the O&M activities due to the introduction of Service Tax Laws and GST Laws i.e. the activities carried out by the Petitioner pursuant to commissioning the project. The date of procurement of goods and services for this purpose is therefore irrelevant as the impact of Service Tax Laws and GST Laws on O&M activities is to be borne by the Petitioner only after commissioning and for the entire tenure of the PPA thereafter.

***Re: Impact of GST Law as covered by the Change in Law clause in the PPAs***

- c) The findings of this Commission in its various Orders qua Article 12.1.1 are correct and require no reconsideration.

***Re: Claims under O&M***

- d) No provision under the PPA disentitles the Petitioner from claiming Change in Law relief for activities that have been outsourced to a third party. The PPA does not prohibit the Petitioner from engaging a third-party vendor to efficiently operate and maintain the project. The PPA leaves it to the Petitioner to determine how to execute the Projects. Further, Article 12, stipulates that “... *the occurrence of any of the following events resulting into any additional recurring expenditure ... by the SPD...*” Hence, it entitles the developers to relief against the additional expenditure. It does not restrict the Petitioner from claiming relief for any additional expenditure it has to incur on O&M as a result of any ‘Change in law’. Moreover, by outsourcing O&M activities, the Petitioner has acted prudently and in accordance with standard market practice, as it is well known and well established that it is cost-efficient for project developers to engage third party O&M vendors having expertise in operating and maintaining power projects rather than carry out all O&M activities themselves.
- e) The Commission itself, in the ‘Statement of Reasons’ dated 30.03.2016 in relation to the CERC (Terms and Conditions for Tariff Determination from Renewable Energy Sources) (Fifth Amendment), Regulations 2016, has observed that outsourcing of O&M services is widely adopted by power producers as a prudent utility practice and that such outsourcing, in fact, reduces the financial burden of O&M on the Project. The relevant extracts of the aforesaid SOR are reproduced below (emphasis supplied):

***“Analysis and Decision***

*Additionally, it may be noted that specialized firms have been established over the last few years that provide O&M services to several solar PV projects in different locations. With increasing density of projects in particular high irradiation areas as well as more technically skilled manpower available as the industry grows, O&M contracts have in fact become cheaper. Thus, even with inflation resulting in increased cost of manpower, specialization and outsourcing has in fact reduced the financial burden of O&M on power producers.*

...

*In the order dated 23.3.2016 in Petition No. 17/SM/2015 (Suo-Motu), in the matter of “Determination of Benchmark Capital Cost Norm for Solar PV power projects and Solar Thermal power projects applicable during FY 2016-17”, it has been stated that the cost of forecasting and scheduling services is minimal on per MW and monthly basis. The Commission maintains that Skilled personnel required to manage this process are generally stationed at the control centre as all data are remotely monitored. This process is typically outsourced which has brought down the cost of service in the market. Most power producers do not employ full-time personnel to undertake these activities...”*

- f) Many of the activities that comprise O&M are specialized and cannot be carried out by a power generating company, e.g., supplying consumables and spares. Many O&M activities can be carried out far more economically and effectively by companies that specialize in such jobs, rather than by a solar power generation company, e.g., providing site security and contracting technically qualified personnel for module cleaning. Many O&M activities, such as providing security services or water supply for module cleaning, require that the service providers meet the special statutory requirements and obtain specific approvals. For instance, to undertake the activity of private security services, the Petitioner would be required to obtain a license under the Private Security Agencies (Regulation) Act, 2005 and there are various conditions linked to the grant of such license which are otherwise not applicable on a company involved in the business of generation of electricity, if the same are outsourced. Further, for undertaking the activity of washing of modules, specific approvals are required from the concerned panchayat, environmental authorities or municipalities as applicable. If the Petitioner was required to carry out all O&M activities itself, it would have resulted in a higher project cost which would mean a higher tariff for the Respondents.
- g) The Respondents’ denial of the Petitioner’s claim is self-serving and lacks bona fide. In the ordinary course, the Petitioner would have borne the entire burden of the tax payable on O&M services had the tax not been changed. However, a change in tax that imposes an additional cost upon the Petitioner is squarely contemplated by the Change in Law clause, for which the Petitioner is entitled to relief compensating for the additional cost.

- h) The Government of India, on 27.08.2018, issued a direction under Section 107 of the Electricity Act, 2003 by way of which this Commission was directed to take into account the impact of any change in domestic duties, levies, cess and taxes imposed by the Central Government, State Government/ Union Territories or by any Government instrumentality, which leads to a corresponding change in the cost, as a Change in Law and to allow the same as a pass through in tariff. The above directive is in line with the mechanism for compensation on account of a Change in Law provided for in the National Tariff Policy, 2016 issued by the Central Government and the Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Projects notified by the MNRE on 03.08.2017.
- i) Respondents' reliance upon the CERC Order and judgment dated 16.03.2018 in Petition No. 1/MP/2017, is misplaced. While passing the said judgment, the Commission has not considered certain material facts and market realities including the Commission's own observations in relation to O&M expenses as mentioned in the aforesaid 'Statement of Reasons'. Also, the issue involved in the aforesaid decisions has not attained finality and the same is currently pending adjudication before the Tribunal in Appeal Nos. 394, 395, 398 and 399 of 2018.

***Re: Claims regarding Carrying Cost***

- j) The underlying purpose of Article 12 of the PPA is to provide compensation and restore a party affected by Change in Law events to a position as if such Change in Law had not taken place. Further, for the Petitioner to effectively perform its obligations under the PPA, it is imperative that tariff under the present PPA be suitably revised so as to bring the Petitioner to a position as if the introduction of Service Tax Laws and GST Laws never occurred. The Petitioner can be brought to the position existing prior to the occurrence of the 'Change in Law' event only if the Petitioner is also compensated in the amount of the financial cost of the additional expenditure incurred as a result of the 'Change in Law' by paying it carrying cost. The Petitioner could not have raised supplementary invoices claiming the additional recurring expenditure incurred by the Petitioner due to introduction of the Service Tax Laws and GST Laws as Article 12.2 of the PPA makes it obligatory upon the Petitioner to approach the Commission to seek relief for a Change in Law event

before raising any supplementary invoices claiming such amount. The Petitioner has approached the Commission within the period of limitation and at the earliest possible instance. Moreover, the Respondents' reliance upon certain decisions of the Tribunal relating to denial of carrying cost is erroneous and misconceived. The said decisions have not attained finality as the same are subject matter of appeal before the Hon'ble Supreme Court in Civil Appeal Nos. 7990 and 11095 of 2018, which are currently pending adjudication.

***Re: Furnishing of sufficient details along with supporting documentary evidence of taxes subsumed/ withdrawn pursuant to introduction of Service Tax Laws and Service Tax Laws and GST Laws***

- k) The Petitioner has submitted that it has provided details of the taxes existing prior to the introduction of the Service Tax Laws and GST Laws along with the net additional recurring impact due to the introduction of Service Tax Laws and GST Laws on the Project. A few invoices have also been provided by way of sample raised by the Petitioner's Operation and Maintenance service provider for supplying goods and services prior to and after the promulgation of the Service Tax Laws and GST Laws. The Petitioner's bona fides are indisputable as the Petitioner itself has proposed that the increase in tariff allowed by the Commission to offset the impact of the Service Tax Laws and GST Laws be subject to an annual reconciliation based on the actual additional tax impact of the Service Tax Laws and GST Laws as per the annual audited account books of the Petitioner, as certified by its statutory auditor.
- l) The details relating to the procurement of goods and equipment for the project as sought by Respondents are irrelevant for the purpose of adjudicating the instant petition since the Petitioner's present claim only pertains to the additional recurring expenditure incurred by the Petitioner in O&M for the Project as a result of introduction of the Service Tax Laws and GST Laws. Therefore, they have only furnished documents demonstrating the additional recurring expenditure incurred by it due to introduction of the Service Tax Laws and GST Laws.

***Re: Taking of adequate mitigating steps so as to reduce the impact of GST Law***

- m) The manner of procurement of the goods for the Projects is irrelevant for the purpose of adjudicating the present Petition as the goods and other equipment for the Project were procured by the Petitioner prior to the introduction of Service Tax Laws and GST Laws.

***Re: Obligations of PPA-PSA are on a back to back basis***

- n) The rights of the Petitioner arising out of the PPA with Respondents cannot be made contingent on any other contractual arrangements to which the Petitioner are not a party. As per Article 12 of the PPA, the Petitioner is required to approach this Commission for relief on account of a 'Change in Law'. The rights of the Petitioner under the PPA are only against NVVN/NTPC and are not dependent upon or subject to third parties. Further, Article 12.2.2 expressly provides that the decision of this Commission is final and binding on both parties to the PPA and compliance with such decision by the Respondents have not been made subject to the third parties performing their obligations qua their respective contractual arrangements.

***Re: Necessary or proper parties to the Petition***

- o) Respondent Discoms have been impleaded as a party to the present proceedings at the instance of the directions of the Commission. In case the reliefs sought by the Petitioner are not granted, the Petitioner may not be able to meet its existing debt service obligations and operate the project in terms of the PPA, potentially rendering it unviable. In the light of the above submissions, it is prayed that the Commission may be pleased to allow the relief sought for in the present petition and grant an appropriate adjustment/ compensation to offset financial/ commercial impact of introduction of Service Tax Laws and GST Laws, since the same is critical to ensuring the viability of the Project and due performance of the Petitioner's obligations under the PPA.

**Reply of Chhattisgarh State Power Distribution Company Limited (CSPDCL)**

18. CSPDCL has filed reply vide which it has submitted that:

a) It is one of the buyers of the power supplied by NVVN vide a Power Sale Agreement dated 19.07.2011.

b) In terms of the PSA, the conditions mentioned in Article 8 therein dealing with 'Change in Law' needs to be satisfied. Article 8.1 of the PSA reads as under:

*"8.1 Definitions*

*In this Article 8, the following terms shall have the following meanings:*

*8.1.1. "Change in law" means the occurrence of any of the following events after the Effective Date resulting into any additional recurring/non-recurring expenditure by NVVN or any income to NVVN.*

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

*But shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of NVVN, or (ii) any change on account of regulatory measures by the Appropriate Commission including calculation of Availability."*

c) The scope of Article 8.1.1 relates to the taxes to be levied on 'sale of power'. Thus, every change in tax or introduction of tax was not intended to be covered by the provision of 'Change in Law' as mentioned in the PSA. Therefore, the 'Sale of Power' cannot be extended to other aspects such as taxes on input goods and services.

d) The PSA provides in the definition clause i.e. Article 1.1 that any term used in the PSA but not defined would have the meaning as applicable under the Electricity Act, 2003. Incidence or tax recognized under Article 8.1.1 is only on the transaction of sale of electricity and not on any other transaction preceding it.

- e) The PSA executed between the parties clearly reflects the intentions of the parties as to the liability. Therefore, the party to the PSA is required to compensate only for the changes in taxes when the incidence of such tax is on the sale of power or supply of power, and not on the inputs used for generation of power.
- f) Inferences of the above provisions with respect to change in law can easily be drawn as provisions of the present PSA are different in comparison to the provisions of Change of Law, as incorporated in other Standard Bidding Document issued by Government of India as well as in other PPAs.
- g) The language of the provision in the PSA dated 19.07.2011 concerning change in law is in deviation from the standard PPA. Separate provision in the form of last bullet was incorporated restricting the taxes to those which are made applicable on sale of power.
- h) As per the PPA, the O&M is the responsibility of the Petitioner and in the event of the Petitioner chooses to employ the services of other agencies, it cannot increase the liability of the Answering Respondent in terms of the tariff. Outsourcing of the O&M to a third party is not a requirement of the PPA/PSA and is a commercial decision of the Petitioner for its own advantage and the liability of any increase in cost including on account of taxes etc. is entirely accruable to the Petitioner. However, it is also pertinent to note that the Solar Power developer is employing the services of its own parent company – Azure Power India Private Limited to carry out the O&M. It is pertinent to note that the above submission is already covered by the principle laid down by this Commission in its judgment dated 16.03.2018 in Petition No. 1/MP/2017, titled as '*GMR Warora Energy Limited v. Maharashtra State Electricity Distribution Company Limited & Ors.*' and judgment dated 19.09.2018 in Petition No(s). 50/MP/2018 and 52/MP/2018, titled as '*Prayatana Developers Private Limited vs. NTPC Limited & Ors.*'.
- i) Claim for relief on account of change in law is an afterthought and suffers delay and laches and liable is dismissed.

- j) There is no provision in the PSA regarding carrying cost or interest. The Change in Law claim of the Petitioner is yet to be adjudicated and the amount if any, due to the Petitioner has to be determined first. Once the amount is determined, accordingly, the Petitioner will be required to raise a supplementary invoice for the amount so computed. On account of default in payment on behalf of the Respondent, the issue of late payment surcharge would arise (only after the period of due date). The said principle has been already laid down by the Tribunal in Appeal No. 150 of 2011, titled as '*SLS Power Limited vs. Andhra Pradesh Electricity Regulatory Commission and Others*'.
- k) The PSA does not have a provision dealing with restitution principles of restoration to the same economic position. Therefore, the Petitioner is not entitled to claim any relief which is not provided for in the PSA.
- l) The Petitioner has after 10 months of the enactment approached this Commission and therefore, the said charges cannot be passed on to the Respondents. Also, the Petitioner has not placed details in a transparent manner with respect to the taxes, duties and levies which stand withdrawn and are no longer payable on introduction of the Service Tax Laws and GST Laws. Thus, before the matter is adjudicated, the Petitioner should be directed to give all relevant details, for example, date of purchase order, the GST/ tax invoice raised, the name of the manufacturer of the goods etc.
- m) The Petition filed by the Petitioner ought to be dismissed as it is devoid of merits and as well as complete facts.

#### **Submissions of NVVN dated 28.05.2021**

19. NVVN has made the following submissions:

- a) The Petitioner has made the following claims:
- i) Implications of Finance Act, 2012; Finance Act, 2015; Notification No.21 and 22/2015-ST dated 06.11.2015 of Government of India; Finance Act, 2016 and GST on Operation and Maintenance (O&M) of the Project
  - ii) Carrying Cost.

- b) The above aspect has been covered by decision dated 19.11.2019 of the Commission in Petition No.188/MP/2018 and connected Petitions in the matter of *Azure Solar Private Limited –v- NTPC Vidyut Vyapar Nigam Limited & Others Batch* vide which claim for O&M and Carrying cost stands rejected.
- c) The Commission may clarify that apart from implications of GST on O&M, implications of Finance Act, 2012; Finance Act, 2015; Notification No.21 and 22/2015-ST dated 06.11.2015 of Government of India; Finance Act, 2016 are also not maintainable.

### **Analysis and Decision**

20. We have heard the learned counsels for the Petitioner and the Respondent and have carefully perused the records.
21. Some facts relating to the project are as under:

	<b>211/MP/2018</b>
Scheme	JNNSM
Phase	I
Batch	I
Nodal Agency	NVVN
RfS	18.08.2010
Capacity MW	5
Power	Bundled
Location	Rajasthan
PPA	10.01.2011
Effective date	10.01.2011
SCoD	09.01.2012
Tariff /kWh	11.94
VGF	--
Change in Law	Art. 12
Actual Date of Commissioning	01.01.2012
GST	01.07.2017
Incremental impact in O&M (Rs.) as claimed by the Petitioner	2,11,98,230

22. The Petitioner has submitted that with the enactment of the Service Tax Laws and the GST Laws, it is required to bear additional recurring expenditure after the Effective Date (10.01.2011) under the PPA in the form of an additional tax burden on the operation and maintenance expenses of the SPGS. There has been an increase in the effective rate of service tax on Operations and Maintenance (O&M) services from 10.30% as on the Effective Date to 18% now and accordingly, incremental impact in O&M is Rs.2,11,98,230/-.
23. Before proceeding with the issues on merit, we feel it imperative to first address the issue of limitation. We observe that the Petitioner has claimed additional recurring expenditure after the Effective Date of 10.01.2011 due to gradual increase in the effective rate of service tax on Operations and Maintenance (O&M) services on five different occasions viz. 12.36% (for period 01.04.2012 to 31.05.2015); 14% (for period 01.06.2015 to 14.11.2015); 14.5% (for period 15.11.2015 to 31.05.2016); 15% (for period 01.06.2016 to 30.06.2017); 18% (from 01.07.2017 till date).
24. We observe that the petition has been filed by the Petitioner before the Commission on 06.06.2018. As per the Limitation Act, 1963, the period of limitation is three years from the cause of action. Accordingly, the Commission is of the view that claims from 01.04.2012 to 05.06.2015 are not admissible as per law, are liable to be rejected and therefore rejected.
25. Now we proceed to answer the various issues which arise for adjudication from the submissions of the parties:

***Issue No.1: Whether the promulgation of the Services Tax Laws and GST Laws are 'Change in Law' under Article 12 of the Power Purchase Agreement dated 10.01.2011?***

***Issue No. 2: Whether the Petitioner should be compensated for the additional tax burden incurred by the Petitioner on operating and maintenance cost along with carrying costs?***

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

***Issue No.1: Whether the promulgation of the Services Tax Laws and GST Laws are ‘Change in Law’ under Article 12 of the Power Purchase Agreement dated 10.01.2011?***

28. The Petitioner has submitted that promulgation of the Services Tax Laws and GST Laws are Change in Law events under Article 12 of the PPA and that NVVN should be directed to pay the amount claimed in terms of Article 12 of the PPA. *Per Contra*, NVVN has submitted that that the issue involved in the petition is already covered in the Commission's earlier Orders relating to Change in Law arising out of enactment of the Service Tax Laws and GST Laws.
29. We observe that Article 12 of the PPA stipulates as below:

***“ARTICLE 12: ‘CHANGE IN LAW’***

*12.1. Definitions*

*In this Article 12, the following terms shall have the following meanings;*

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

- the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re - enactment or consolidation) in India, of any law, including rules and regulations framed pursuant to such law;*
- a change in the interpretation or application of any law by any Indian Governmental Instrumentality having the legal power to interpret or apply such law or any Competent Court of Law;*
- the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;*
- a change in the terms and conditions prescribed for obtaining any consents, clearances and permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits, except due to any default of the SPD;*
- any statutory change in tax structure or introduction of any new tax made applicable for setting up of Solar Power Project and supply of power from the Project by the SPD, shall be treated as per the terms of this Agreement. For the purpose of considering the effect of this change in Tax structure due to change in law after the date of submission of Bid, the date such law comes into existence shall be considered as effective date for the same;*

*but shall not include (1) any change in any withholding tax on income or dividends distributed to the shareholders of the SPD, or (2) any change on account of regulatory measures by the Appropriate Commission.*

***12.2. Relief for ‘Change in Law’***

*12.2.1. The aggrieved party shall be required to approach the central commission for seeking approval of ‘Change in Law’.*

*12.2.2. The decision of the central commission to acknowledge a ‘Change in Law’ and the date from which it will become effective, provide relief for the same, shall be final and governing on both the parties.”*

30. The Commission observes that as per Article 12, ‘Change in Law’ means the enactment/ coming into effect/ adoption/ promulgation/ amendment/ modification or repeal of any Law in India; Change in the interpretation of any Law in India; Imposition of a requirement for obtaining any consents or Change in tax or introduction of any tax made applicable for supply of power by the SPD as per the terms of this Agreement, resulting into any additional recurring/ non-recurring expenditure or any income to the SPD. The Commission is of the view that harmonious construction of the bullet points under Article 12 makes it clear that bullet point one is wider in scope and refers to the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal of any Law in India, including rules and regulations framed pursuant to such Law whereas the bullet point last in seriatim refers specifically to any change in tax or introduction of any tax made applicable for ‘supply of power’ by the SPD as per the terms of Agreement. Clearly, the Service Tax Laws and GST Laws were enacted by the Parliament and are covered under the first and the last bullet of Article 12.1.1 of the PPA. As per provisions of the PPA, occurrence of events specified under Article 12.1.1 of the PPA after the effective date (10.01.2011 in the instant case) resulting into any additional recurring/ non-recurring expenditure by the SPD or any income to the SPD, is a Change in Law event. NVVN has also not disputed that the imposition of the Service Tax Laws and GST Laws is a Change in Law event in terms of the PPA dated 10.01.2011. Hence, the Commission holds that the enactment of Service Tax Laws and GST Laws is squarely covered as ‘Change in Law’ under Article 12.1.1 of the PPA.

***Issue No. 2: Whether the Petitioner should be compensated for the additional tax burden incurred by the Petitioner on operating and maintenance cost along with carrying costs?***

31. The Petitioner has submitted that there will be incremental impact of Rs.2,11,98,230/- due to O&M expenses because of increase in tax incidence. Impact of GST in O&M expenses in next 25 years of PPA tenure, has been worked out on the basis of the relevant normative parameters as specified by the Commission in the Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources)

Regulations, 2012 dated 06.02.2012 as amended on 31.03.2016. The Regulations specify O&M expenses for the year of 2017-18 at Rs. 7.41 Lacs/MW, which includes Service Tax of 15%, with an annual escalation of 5.72%. The same parameter has been considered with an additional 3% GST impact, i.e. 18% GST on the normative O&M expenses. Accordingly, net present value of Pre-GST O&M Expenses and post GST impact has been claimed as the differential amount as per the change in law provision of the PPA. Under Article 9 of the PPAs, it was originally entitled to receive a tariff from the Commercial Operation Date. However, such tariff was fixed prior to the promulgation of the Service Tax Laws and GST Laws. Therefore, the aforesaid tariff would need to be revised upwards to account for and reflect the additional tax burden incurred/ to be incurred by the Petitioner on account of the promulgation of the Service Tax Laws and the Service Tax Laws and GST Laws.

32. The Petitioner has submitted that Article 12 of the PPAs is deliberately widely worded saying that “... *the occurrence of any of the following events resulting into any additional recurring expenditure ... by the SPD...*” entitles the developer to relief against the additional expenditure. It does not restrict the Petitioner from claiming relief for any additional expenditure it has to incur on O&M as a result of any change in law. Respondents’ contention thus runs contrary to the PPA as it seeks the restriction of the ambit of the Change in Law clause by excluding outsourced O&M activities from it. Moreover, by outsourcing O&M activities, the Petitioner has acted prudently and in accordance with standard market practice, as it is well known and well established that it is cost-efficient for project developers to engage third party O&M vendors having expertise in operating and maintaining power projects rather than carry out all O&M activities themselves. Further, the Commission itself, in the Statement of Reasons dated 30.03.2016 (‘SOR’) in relation to the CERC (Terms and Conditions for Tariff Determination from Renewable Energy Sources) (Fifth Amendment), Regulations 2016, has observed that outsourcing of O&M services is widely adopted by power producers as a prudent utility practice and that such outsourcing, in fact, reduces the financial burden of O&M on the Project.
33. During the hearing held on 28.05.2021, the Petitioner acknowledged that the Commission in its various Orders had disallowed the GST claims on the O&M expenses and requested the Commission to consider the following in this regard:

- (a) Article 12 of the PPA does not restrict the Petitioner from claiming relief for any additional expenditure which has incurred on O & M activities as a result of Change in Law event.
- (b) The PPA does not prohibit engaging a third-party vendor/ contractor to efficiently operate and maintain the Project. On the contrary, the PPA itself envisages engagement of contractors/ sub-contractors for performance of various activities. In this regard, the Petitioner placed its reliance on the Article 11.4.1(b) and 17.4.1 of the PPA.
- (c) O&M activities include many specialized activities, for instance, supplying consumables and spares, site security and module cleaning, which can be carried out far more economically and effectively by companies that specialize in such activities rather than by the Petitioner itself having a generating station of a modest 5 MW capacity. If the Petitioner was required to carry out all O&M activities itself, it would have resulted in a higher project cost and consequently a higher tariff.
- (d) It should also be compensated for the carrying costs incurred in discharging the additional tax burden.

34. ***Per contra***, NVVN/Respondents have submitted that the issues of implications of the Service Tax Laws and GST Laws on the O&M expenses and carrying cost are squarely covered by the various orders of the Commission. The Commission has already rejected similar prayer of carrying cost in various cases where the PPAs do not contain the 'restitution clause'. Therefore, the Petitioner is not entitled to claim relief which is not provided for in the PPAs.

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

*“5. Supply of services*

*The following shall be treated as supply of services, namely: -*

- (a) renting of immovable property;*
- (b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier.*

*Explanation. -*

*For the purposes of this clause-*

*(1) the expression “competent authority” means the Government or any authority authorized to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely: -*

*(i) an architect registered with the Council of Architecture constituted under the Architects Act, 1972 (Central Act No. 20 of 1972); or*

*(ii) a chartered engineer registered with the Institution of Engineers (India); or*

*(iii) a licensed surveyor of the respective local body of the city or town or village or development or planning authority;*

*(2) the expression “construction” includes additions, alterations, replacements or remodeling of any existing civil structure;*

*(c) temporary transfer or permitting the use or enjoyment of any intellectual property right;*

*(d) development, design, programming, customization, adaptation, up gradation, enhancement, implementation of information technology software;*

*(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act; and*

*(f) transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration.”*

36. 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 the Service Tax Laws and GST Laws will apply in case of outsourcing of the ‘Operation and Maintenance’ services to a third party, if any (in instant case parent company viz. *Azure Power India Private Limited*). 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 that it is a pure commercial decision of the Petitioner taken for its own advantage and any increase in cost including on account of taxes etc. in the event the Petitioner chooses to employ the services of other agencies, cannot increase the liability for the Respondents.

37. The Petitioner has referred to the provisions of the CERC (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2012 issued by the Commission to support its arguments for claiming compensation on account of the Service Tax Laws and GST Laws on the operation and maintenance cost. The Commission notes that

these regulations were issued under section 62 of the Electricity Act, 2003 whereas the Petitioner's project was selected through competitive bidding for which the aforesaid regulations of CERC are not applicable. As such, the Commission does not find any merit in this argument.

38. Therefore, the Commission holds that claim of the Petitioner 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 in its 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.*
39. The next issue raised by the Petitioner is that it should be allowed carrying costs. The Commission observes that in the judgment of the Tribunal dated 13.04.2018 in Appeal No. 210 of 2017 in *Adani Power Limited v. Central Electricity Regulatory Commission and Ors.*, it was held that since Gujarat Bid-01 PPA has no provision for restoration to the same economic position, the decision of allowing carrying cost will not be applicable. The relevant extract of the Judgment dated 13.04.2018 reads as under:

*“ISSUE NO.3: DENIAL OF CARRYING COST*

*x. Further, the provisions of Article 13.2 i.e. restoring the Appellant to the same economic position as if Change in Law has not occurred is in consonance with the principle of 'restitution' i.e. restoration of some specific thing to its rightful status. Hence, in view of the provisions of the PPA, the principle of restitution and judgement of the Hon'ble Supreme Court in case of Indian Council for Enviro-Legal Action vs. Union of India & Ors., we are of the considered opinion that the Appellant is eligible for Carrying Cost arising out of approval of the Change in Law events from the effective date of Change in Law till the approval of the said event by appropriate authority. It is also observed that the Gujarat Bid-01 PPA have no provision for restoration to the same economic position as if Change in Law has not occurred. Accordingly, this decision of allowing Carrying Cost will not be applicable to the Gujarat Bid-01 PPA.”*

40. Relevant extracts of the Judgment of the 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.* 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 Respondents 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 PPA we find that the impact of Change in Law event is to be passed on to the Respondents 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 judgment the Commission observes that if there is a provision in the PPA for restoration of the Petitioner to the same economic position as if no Change in Law event has occurred, the Petitioner 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 Commission. The Commission observes that the PPA does not have a provision dealing with restitution principles of restoration to same economic position. Therefore, the Commission is of the view that the claim regarding separate carrying cost is not admissible.

### **Summary of decisions**

41. The decisions in this Order are summarised as under:
- a. *Issue No. 1:* The introduction of Service Tax Laws and GST Laws are covered under ‘Change in Law’ in terms of Article 12 of the PPA.
  - b. *Issue No. 2:* The claim of the Petitioner on account of additional tax burden on ‘O&M’ expenses (if any) and additional carrying cost is not maintainable.
42. With the above directions, Petition No. 211/MP/2018 stands disposed of.

Sd/-

(पी. के. सिंह)  
सदस्य

Sd/-

(अरुण गोयल)  
सदस्य

Sd/-

(आई. एस. झा)  
सदस्य

Sd/-

(पी. के. पुजारी)  
अध्यक्ष