

No./N/ 172/173/174/2019

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**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,  
No.16, C-1, Millers Tank Bed Area, Vasanth Nagar, Bengaluru-560 052.**

**Date: 29.10.2021**

**Present**

<b>Shri Shambhu Dayal Meena</b>	<b>: Chairman</b>
<b>Shri H.M. Manjunatha</b>	<b>: Member</b>
<b>Shri M.D. Ravi</b>	<b>: Member</b>

**O.P. No.65/2019**

**BETWEEN:**

Mytrah Advait Power Private Limited,  
A Company Registered under the  
Companies Act,1956, having its Registered  
Office at 8001, Q-City, S. No:109,  
Gachibowli,  
Hyderabad-500 032.

**.... PETITIONER**

(Represented by Sri Hemanth Sahai, Advocate  
for HSA Advocates)

**AND**

Bangalore Electricity Supply Company Limited,  
(Wholly owned Government of Karnataka undertaking)  
A Company Registered under the provisions  
of the Indian Companies Act,1956 having  
its Registered Office at K.R. Circle,  
Bangalore-560 001.  
(Represented by its Managing Director)

**... RESPONDENT**

(Represented by Sri S. Sriranga Advocate for  
M/s JUSTLAW Advocates)

**O.P. No.66/2019****BETWEEN:**

Mytrah Advait Power Private Limited,  
A Company Registered under the  
Companies Act,1956, having its Registered  
Office at 8001, Q-City, S. No:109,  
Gachibowli,  
Hyderabad-500 032.

**.... PETITIONER**

(Represented by Sri Hemanth Sahai, Advocate  
for HSA Advocates)

**AND**

Hubli Electricity Supply Company Limited,  
P.B. Road, Navangar,  
Hubballi.  
(Represented by its Managing Director)

**... RESPONDENT**

(Represented by Sri S. Sriranga Advocate for  
M/s JUSTLAW Advocates)

**O.P. No.67/2019****BETWEEN:**

Mytrah Akshaya Energy Private Limited,  
A Company Registered under the  
Companies Act,1956, having its Registered  
Office at 8001, Q-City, S. No:109,  
Gachibowli,  
Hyderabad-500 032

**... PETITIONER**

(Represented by Sri Hemanth Sahai, Advocate  
for HSA Advocates)

**AND**

Gulbarga Electricity Supply Company Limited,  
Corporate Office,  
Gulbarga Main Road, Gulbarga  
(Represented by its Managing Director)

**... RESPONDENT**

(Represented by Sri S. Sriranga, Advocate  
for M/s JUSTLAW Advocates)

**COMMON ORDERS**

1. These petitions involve common questions of facts and law, therefore, we clubbed all these cases, heard together and proposed to pass the common order. In all the petitions the relief prayed for are similar.
  
2. These petitions are filed under Section 86 (1) (b) (f) and other provisions of the Electricity Act, 2003 for (i) approval of "Change in Law", and (ii) consequential relief to compensate for the increase in capital cost due to introduction of the Central Goods and Services Tax Act, 2017, the Integrated Goods and Services Tax Act, 2017 and the State Goods and Services Tax Acts enacted by the respective States, in terms of Article 15 of the Power Purchase Agreements (PPAs) between the petitioners and respondents in above stated petitions. The main petitions filed on 18.10.2019, wherein the petitioners did not quantify the claims for additional non-recurring capital cost incurred and O & M cost which will be incurred due to introduction of GST Laws in terms of Article 15 of the PPAs. Subsequently, on 10.2.2021, the petitioners have filed applications seeking amendments to the main petitions with quantification of compensation amounts for additional non-recurring capital cost and Operation and Maintenance (O&M) expenditures from the respondents. petitioners prayed for the following reliefs:
  - a) Declare that enactment of GST Law qualifies as 'Change in Law' in terms of Article 15 of the PPA executed between the petitioners and

the respondents and that the petitioners are entitled to relief thereunder;

- b) Direct the respondents to compensate the petitioners under Article 15 of the PPA for the additional non-recurring capital cost of Rs.3,45,08,523 in OP No.65/2019; Rs.3,38,62,904 in OP No.66/2019 and Rs.3,87,11,470 in OP No.67/2019 due to the introduction of GST Law, on actuals as per the calculation in accordance with the invoices submitted, by way of Up-front lump sum payment/ adjustment in the quoted tariff along with the carrying cost.
- c) Direct the respondents to compensate the petitioners in terms of Article 15 of the PPA for the additional recurring O&M cost of Rs.31,99,445 in OP No.65/2019; Rs.31,16,701 in OP No.66/2019 and Rs.31,71,863 in OP No.67/2019 which will be incurred due to the introduction of GST Law, on actuals as per the calculation in accordance with the invoices submitted, by way of Upfront lumpsum payment/adjustment in the quoted tariff along with the carrying cost.
- d) Grant such order, further relief(s) in the facts and circumstances of the case this Ld. Commission may deem just and equitable in favour of petitioners.

The amended petitions filed on 10.2.2021 by the petitioners were allowed on 23.3.2021 by this Commission.

3. The brief facts set out in these petitions are as under:

- a) The Government of Karnataka (GoK) had resolved to undertake development of 1200 MW of Solar Power in Karnataka to be implemented in 60 Taluks through private sector participation. In pursuance of the same, Karnataka Renewable Energy Development Limited (KREDL), incorporated under the Companies Act, 1956 is a

nodal agency of the GoK for the development of renewable energy in Karnataka, had invited proposals by its Request for Proposal (RfP) dated 20.11.2015 (RFP) containing terms and conditions for selection of Bidders in respect of the proposed project. The copy of the said RfP is annexed as P-1.

- b) Through following a fair, transparent and competitive bidding process, Mytrah Energy (India) Private Limited (Mytrah) was declared one of the successful bidders for development of 15 MW AC capacity of solar power project of Sindagi, Hungund and Raibag taluks and KREDL issued Letter of Award (LOA) and allotment letters dated 23.03.2016 in petition No.65/2019 and 16.05.2016 for projects in petition No.66/2019 & No.67/2019, the copies of LoA are annexed as P-2.
- c) The petitioners have entered into the PPAs with the respondents for setting up of the Solar PV ground mounted projects (Crystalline Silicon Solar Cells and Modules), the details of project location, dates of signing of PPAs and the tariff discovered through bidding process are set out as in the following table:

Sl. No.	Petition No & Name of Project & Location	Capacity	Date of LoA	Date of signing PPA with concerned ESCOM	Date of approval of PPA from KERC	Date of signing SPPA	Tariff Rs.	Period allowed as per PPA for SCOD	Date of Commissioned
1	Petition No.65/2019 Mytrah Advait Power Pvt. Ltd Sindagi	15 MWAC	23.03.2016	31.05.2016 BESCO	17.10.2016	05.04.2017	5.44/KW	12months	08.02.2018
2	Petition No.66/2019 Mytrah Advait Power Private Limited, Hungund.	15 MWAC	16.05.2016	15.07.2016 HESCO	17.10.2016	01.02.2017	5.50/KW	12months	09.02.2018
3	Petition No.67/2019 Mytrah Akshay Energy Private Limited, Raibag	15 MWAC	16.05.2016	15.07.2016 GESCOM	29.09.2016	09.02.2017	5.50/KW	12 months	23.01.2018

d) The power purchase agreements entered into on different dates stated in the above tables, which were approved by this Commission vide letter dated 29.09.2016 (for Raibag) and on 17.10.2016 (for Sindagi and Hungund) with the direction for execution of Supplemental PPA for incorporating certain corrections/modification. Accordingly, SPPAs were executed on 05.04.2017 in OP No.65/2017; 01.02.2017 in OP No.66/2017 and on 09.02.2016 in OP No.67/2017 [Annexure-P-9 (colly)].

e) The petitioners have requested this Commission to consider the Notification of the Goods and Services Tax Act 2017 as "Change in Law" event and to compensate for the additional costs incurred under Article 15 of the PPA. The definition of Change in Law is reproduced as under: -

15.1 Definition:

15. 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 Developer or any income to the Developer:

- a. 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;
- b. change in the interpretation or application of any Law by any Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;
- c. the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;
- d. 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 Developer;
- e. any change in tax or introduction of any tax made applicable for supply of power by the Developer as per the terms of this.

- f) The terms "Government Instrumentality" and "Law" have been defined under Caption- Definitions of Article 21 of the PPA. The relevant excerpts of Article 21.1 of the PPA are set out below:

"ARTICLE 21 DEFINITIONS":

*21.1 Definitions: In this Agreement, the following words and expressions shall, unless repugnant to the context or meaning thereof, have the meaning hereinafter respectively assigned to them:*

*"Government Instrumentality" means any department, division or sub-division of Government of India or the State Government and includes any commission board, authority, agency or municipal and other local authority or statutory body including Panchayat under the control of Government of India or the State Government, as the case may be, and having jurisdiction over all or any part of the Project Facilities or the performance of all or any of the services or obligations of the Developer under or pursuant to this Agreement;*

*"Law" Shall mean in relation to this Agreement, all laws including Electricity Laws in force in India and any Statute, ordinance, regulation, notifications or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and shall further include without limitation all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include without limitation all rules, regulations, decisions and orders of the KERC. "*

- g) The definition of 'Change in Law' under Article 15 of the PPA read with the definitions of term "Government Instrumentality and Law" Article 21.1 of the PPA clearly shows that the enactment of the GST Laws falls under the 'Change in Law'. Further, the term 'Law' as defined under the PPA, is an inclusive definition and, inter alia, includes any

regulation, notification and rule issued by an Indian Governmental Instrumentality which has the force of law. The petitioners have further submitted the Department of Revenue, Ministry of Finance is a Ministry under the Central Government and therefore, qualifies as an Indian Government Instrumentality under the PPA, which has notified the GST Laws.

h) Further, from the bare perusal of the aforesaid clauses of the PPAs reflect that the essence of the Change in Law is to restore the affected party to the same economic position as if the said change in law event had not occurred, and as a result of introduction of GST law, the petitioners are entitled to compensation for the increase in capital cost and also entitled to carrying cost on the additional cost incurred by them and the same are payable for the period:

(a) From when the petitioners had incurred the additional cost on account of Introduction of GST Law till the approval of Change in Law by this Commission; and

(b) from the date of approval of Change in Law over the period of amortization, in the Scenario this Commission does not allow compensation by way of one-time upfront lumpsum payment.

i) The petitioners stated that they have entered into Turnkey Agreements for the supply of Solar Energy Generation System (here after referred as "Turnkey Agreement") incorporating all the conditions for performance of the supply of goods and performance of services with Mytrah Energy (India) Private Limited (hereinafter referred as MEIPL) on



28.06.2017 and also entered the Operation and Maintenance Services Agreement on 27.07.2017. The relevant provisions of Turnkey Agreement and O&M Agreement stipulate that any increase in the taxes and duties on account of 'Change in Law', will be borne by the petitioners. The Turnkey Agreement and O & M Agreement produced as Annexure-P5 and Annexure-P6.

j) In order to introduce a uniform indirect tax structure, the Parliament enacted the following Acts:

- i) Central Goods and Services Tax Act,2017 (CGST)
- ii) Integrated Goods and Services Tax Act,2017 (IGST)
- iii) Union Territories Goods and Services Act,2017(UGST)
- iv) Goods and Services Tax (Compensation to States) Act, 2017 (SGST).

k) It was further submitted that these GST Laws came into force on 01.07.2017 and brought fundamental structural changes in the prevailing tax regime in the country and has severely affected the various parameters upon which the petitioners had submitted their bids. The change in the taxation regime has adversely affected the capital cost of the projects as the rate of taxation on the goods and services required for setting up the projects has increased substantially, thereby resulting in escalation in the capital cost of the projects to the extent of impact of GST Law on such equipment. The GST Law has adversely affected the operational costs of the projects.

- l) The introduction of GST Law with new tax structures, subsumes or replaces or abolishes multiple taxes and duties which were levied by the Central and State Governments on goods and services. Further, pursuant to the introduction of GST Law, the exemptions earlier granted by the Government of India ("GOI") to the solar power industry in recognition of the importance of solar power as clean source of energy and to promote wide adoption of generation of power from such source have been rescinded and solar power has placed under the 5% to 18% tax bracket as per GST rate schedule for Goods and Services notified on 18.05.2017. It is submitted that such a steep increase in taxes from Zero to 18% has increased the capital cost to the petitioners significantly, making the quoted tariff unviable. Copy of the GST law Notification dated 01.07.2017 produced as Annexure- P7.
- m) Upon introduction of GST Law, the petitioners had issued notice dated 20.09.2019 requesting the respondents to acknowledge the enactment of GST Law as "Change in Law" within the terms of Article 15 of the PPA. The respondents have not made any reply to the notice. Copy of the notice produced as Annexure-P8.
- n) That the taxes prevailing prior to introduction of GST Law have either been replaced by or subsumed into GST Law, and as such, the burden of pre-GST Law taxes has not only been carried forward, but has also increased and is being borne by the petitioners. This has led to a

significant increase in the tax incidence and therefore, petition-wise capital cost of the Projects pre-GST and post-GST are as follows:

**OP No 65 of 2019**

**Table-1**

Particulars	Amount (in Rupees)
Total Cost Pre-GST Law (inclusive of all taxes)	74,85,80,570
Total Cost Post-GST (inclusive of all taxes)	78,30,89,093
Increase in Tax incidence	3,45,08,523

**OP 66 of 2019**

**Table-2**

Particulars	Amount (in Rupees)
Total Cost Pre-GST Law (inclusive of all taxes)	73,00,27,273
Total Cost Post-GST (inclusive of all taxes)	76,38,90,177
Increase in Tax incidence	3,38,62,904

**OP 67 of 2019**

**Table-3**

Particulars	Amount (in Rupees)
Total Cost Pre-GST Law (inclusive of all taxes)	82,51,63,971
Total Cost Post-GST (inclusive of all taxes)	86,38,65,839
Increase in Tax incidence	3,87,01,868

- o) That the detailed computation demonstrating tax incidence upon capital cost of the Project post- GST Law in absolute numbers and tax incidence upon Capital Cost of each of the Projects, pre-GST Law, Certificate of the Statutory Auditor supporting the computation and the invoices raised post GST Law is produced as Annexure- P9 in all the petitions.

p) That the introduction of GST Law has also had an incremental impact on the O&M cost. The petitioners had, at the time of submitting their bid, factored in the projected O&M cost to be incurred during the life of the projects. However, the increase in taxes applicable to O&M activities on account of GST Law has increased the O&M Cost and this impact will have to be borne by the petitioners, on account of 'Change in Law', therefore, the petitioners are entitled for reimbursement of such incremental increase in costs. The following tables demonstrate the incremental impact of GST Law on O&M cost:

**OP No 65 of 2019****Table- 4**

Particulars	Amount (in Rupees)
Total Cost Pre-GST Law (inclusive of all taxes)	12,26,45,383
Total Cost Post-GST (inclusive of all taxes)	12,58,44,827
Increase in Tax incidence	31,99,444

**OP No 66 of 2019****Table-5**

Particulars	Amount (in Rupees)
Total Cost Pre-GST Law (inclusive of all taxes)	11,94,73,519
Total Cost Post-GST (inclusive of all taxes)	12,25,90,220
Increase in Tax incidence	31,16,701

**OP No 67 of 2019****Table-6**

Particulars	Amount (in Rupees)
Total Cost Pre-GST Law (inclusive of all taxes)	12,15,88,095
Total Cost Post-GST (inclusive of all taxes)	12,47,59,958
Increase in Tax incidence	31,71,863

(Net Present Value calculated on total cost of which will be incurred for 25 years):

- q) The detailed computation of (i) tax incidence upon O&M expenses of the project is done as per tax structure of pre-GST Law in absolute numbers and (ii) tax incidence upon O&M expenses of the Project is done on the basis of tax structure of post-GST Law in absolute numbers and Certificate of the statutory Auditor supporting the computation is Annexure-P10.
- r) Petitioners have submitted that in view of increase in the capital cost and O&M Cost of the projects, owing to the introduction of GST law, the petitioners are seeking approval of Change in Law and Consequential relief to compensate for the increase in capital cost and O&M Cost due to introduction of GST Law in terms of Article 15 of the PPA. They also reserved their right to submit additional grounds, if necessary.

**Common Grounds urged by the Petitioners in all the petitions viz., OP No.65/2019, OP No.66/2019 & OP No.67/2019:**

- s) The grounds urged by the petitioners are that the introduction of GST Laws has impacted the project costs and the enactment of the GST Law, is covered by the definition of 'Change in Law' under Article 15 of the PPA.
- t) Petitioners submitted that the GST Laws covered under the change in law under Article 15 read with Article 21.1 of the PPA and the Law" is defined under the PPA as it includes regulation, notification and rule issued by the Indian Governmental Instrumentality which has the force

of law and shall include the rules and regulations decisions and orders of the KERC. The Department of Revenue, Ministry of Finance is a Ministry under the Central Government and therefore, qualifies as an Indian Government Instrumentality under the PPA. Hence, the Notification is 'Law' as defined under Article 21.1 of the PPA. They further submitted that a bare perusal of the 'Change in Law' clause, under Article 15, makes it abundantly clear that for an event to qualify as 'Change in Law', the following criteria have to be met:

- a) It should be an event as specified in Bullets a & e of Article 15 of the PPA.
- b) The event should have taken place after the "Effective Date" as defined in the PPA; and
- c) The event should result in an additional recurring/non-recurring expenditure by the petitioners or any income to the petitioners.

As regards the first requirement, the petitioners submitted that GST Law was enacted by the Parliament, pursuant to the Constitution (One Hundred and First Amendment) Act, 2016 which confers concurrent powers on both Union and States to make laws with respect to goods and services and enables both Union and State Governments to levy Goods and Services Tax on a single taxable event. The introduction of GST Law therefore, is an event as specified in Bullet-a of Article 15 of the PPA. As regards, the requirement of the event to have taken place after the Effective Date, the petitioners submitted that the GST law came into force on 01.07.2017, after the Effective Date

17.10.2016/29.09.2016 in these petitions, as specified in Article 3.1 of the PPA. The said additional non-recurring and recurring expenditure have not been factored into the bid tariff by the petitioners at the time of bid submission, but taken into consideration the extant tax regime prevailing at that time of bidding. In view of the same, the enactment of GST Law qualifies the 'Change in Law' event under the PPA and the petitioners are entitled to relief under Article 15 of the PPA.

u) That the petitioners were compelled to incur additional capital expenditure on procurement of Solar Power Generating System as a result of enactment of GST Law and such additional expenditure on procurement of equipment for setting up the project has led to an increase in Capital Cost of their projects and if the additional cost is not compensated, it would impact the viability of the projects. Such additional capital expenditure due to the enactment of GST law could not be factored in the quoted tariff at the time of bid submission, as the Government rolled out the rate of taxation on each category of goods and services after the submission of the bids. It is incumbent on the part of this Commission to acknowledge the enactment of GST Law as a "Change in Law" event and provide relief to the petitioners' projects by way of additional tariff or upfront lumpsum payment by the respondents. It is a settled Law that a Generating Company must be compensated for incurring the additional capital cost due to change in Law event, if provided for in the PPA. In addition, the respondents

are bound to compensate the petitioner under the General Law of contract.

- v) That the restitution is an integral part of compensation granted under Change in law, carrying cost is to be allowed as part of compensation on account of change in Law provision of the PPAs. Carrying Cost, simply put, is a compensation for the time value of money. It is relevant to highlight the meaning of word 'Compensation' as has been laid down by the Hon'ble Supreme Court in the matter of R.C. Cooper Vs. Union of India (AIR 1970 SC 540) wherein it was held that "compensation means anything given to make things equal in value: anything given as equivalent, to make amends for loss or damage," further, the Hon'ble Supreme Court in case of Yadava Kumar Vs. Divisional Manager. National Insurance Corporation Limited and Others (2010 10 SCC 341) held that "compensation is a comprehensive term and is aimed at restoring the party to same economic position as if no injury was caused."
4. The petitioners submitted that these petitions are filed by them seeking intervention of this Commission in terms of Article 15.2. of the PPA to resolve the issues raised in the present petitions qua recognitions of introduction of GST Laws as a "Change in Law" event in terms of Article 15 of the PPA. Upon issuance of notice, the respondents have appeared through their Counsel and filed common preliminary statement of objections on the basis of



grounds made by the petitioners in original petitions. The brief facts of submissions made by the respondents are as hereunder:

- a) KREDL has accepted the bids of M/s Mytrah Energy (India) Private Limited for the Development of 15 MW AC capacity each Solar PV Ground Mounted Project (Advanced Technology) in Sindagi taluk in Vijayapura District, in Hungund taluk in Bagalkot District and in Raibag taluk in a Belgaum District. Subsequent to the issuance of the Letter of Award, M/s Mytrah Energy (India) Private Limited had incorporated the petitioner, i.e., M/s Mytrah Advait Energy Private Limited (For Sindagi & Hungund) and M/s Mytrah Akshaya Energy Private Limited (for Raibag) for the purpose of development of the said projects. The KREDL has requested the respondents to accept the petitioner as entity which would undertake and perform, the obligations and exercise the rights of the selected bidders under the LoAs.
- b) Thereafter, the petitioners have entered into PPA dated 31.05.2016 with BESCOM in respect of development of 15 MW AC Sindagi project and PPAs dated 15.07.2016 with HESCOM for Hungund project and GESCOM for Raibag project for the development of 15 MW AC capacity Solar Power Plant (Annexure-P-3). These PPAs were approved by this Commission on 17.10.2016 in respect of Sindagi and Hungund projects in OP No.65/2019 and OP No.67/2019 and on 29.09.2016 for Raibag project (Annexure-P-4). Subsequently, these petitioners have signed the Supplementary PPAs.

- c) On 12.04.2017, the Government of India, promulgated the Central Goods and Services Tax Act 2017 and the Integrated Goods and Service Tax Act, 2017 and on 27.06.2017 the Karnataka Goods and Service Tax Act was also enacted, (hereinafter jointly referred to as GST Laws), these GST Laws came into effect on 01.07.2017, thereby replacing multiple indirect taxes levied by the Central and State Governments. The new GST Laws encompassed taxes such as Central Excise Duty, Service Tax, VAT, CST, Entry Tax, Entertainment tax, etc., into one tax, namely the Goods and Service Tax which resultantly did away with the complex multifarious tax regime that was prevalent prior to the date 01.07.2017.
- d) Aggrieved by the alleged additional financial burden of the new GST Law regime, the petitioners have filed these petitions seeking for the implementation of GST Laws is to be declared as an event constituting Change in Law, thereby giving the benefits of the additional financial burden to the petitioners. The data in the table produced hereunder indicate that the said statements are quite contrary and in fact, tax burden after the introduction of the new GST laws has actually reduced. Therefore, the contention of the petitioners that introduction of GST Laws resulted in increased the total incidence of tax on their projects are untenable. Prior to implementation of GST, the following taxes were being levied:

Tax	Rate	Act
Central Excise Duty	12%	Union Tax
VAT	5.5% or 14.5 % - purchase within in the State	KVAT Act
GST	2%	C-Form
CST	5.5% or 14.5 % - purchase from outside the State	Central Sales Tax Act
Entry Tax	2% - machinery and parts	KTEG Act

- e) Further, it is submitted by the petitioners that with the introduction of GST Laws, the above-mentioned taxes were subsumed and made into a single tax under GST. In this regard, it is contended that most of the taxes on goods and services have been kept on par with the erstwhile pre-GST rate of Tax. Therefore, the contention of the petitioners that due to the introduction of GST Laws, the rate of tax has increased in respect of Solar Power Generating Systems is denied. Further, the exemptions provided in the pre-GST regime in respect of services have been continued even after the introduction of GST.
- f) It is the case of the petitioners that the introduction of GST has led to an increase in the capital costs, the petitioners have also claimed the Goods and Service Tax levied on Operation and Maintenance expenses. The petitioners have claimed that they are entitled to get relief under Article 15.2 of the PPAs on account of the 'Change in Law' provision of 15.1 of PPA. The petitioners have also sought the relief of carrying costs from the date on which they have incurred the additional cost on account of the introduction of GST laws till the date of approval of Change in law event by this Commission as well as from

the date of the approval of Change in law over the period of amortization, in the event that the Commission does not allow compensation by way of a one-time upfront lump sum payment.

g) In this regard, the respondents have contended that the petitioners are neither entitled to the relief of change in law under the Article 15 of the PPA nor carrying costs as the relevant timeline of events that ought to be examined prior to considering the request of the petitioners in these petitions are set out as under:

Events	Date of events in OP 65/2019	Date of events in OP 66/2019	Date of events in OP 67/2019
Request for proposals	20.11.2015	20.11.2015	20.11.2015
Letter of Awards	23.03.2016	16.05.2016	16.05.2016
Power Purchase Agreement	31.05.2016	15.07.2016	15.07.2016
Date of KERC approval & Effective Dates	17.10.2016	17.10.2016	29.09.2016
Notification of CGST Act 2017	12.04.2017	17.10.2016	17.10.2016
Notification of IGST Act 2017	12.04.2017	12.04.2017	12.04.2017
Notification of SGST Act 2017	27.06.2017	27.06.2017	27.06.2017
Timeline for achieving CP	16.06.2017	16.06.2017	28.05.2017
Implementation of GST Law	01.07.2017	01.07.2017	01.07.2017
SCOD as per PPA	17.10.2017	17.10.2017	29.09.2017

h) The respondents submitted that it is clear from the time lines as presented in the above table that the petitioners have participated in bid for the projects, executed the PPAs and started implementing the projects much before the promulgation of the GST laws. In view of the same, the petitioners

are not affected by the promulgation of GST laws and are not entitled to any relief under Article 15 of the PPAs.

- i) That the petitioners have produced the statements outlining the alleged impact of the GST laws on the capital cost of the projects along with Chartered Accountant's Certificate, with a series of Tax Invoices raised by M/s. MEIPL, the parent organization of the petitioners at Annexure-P9. As per the Article 4.1 of the PPA, the petitioners had to achieve Conditions precedent before or on 16.06.2017 in OP 65/2019 and OP 66/2019 and by 28.05.2017 in OP 67/2019. Under Article 4.2 of the PPA, the petitioners had to fulfill the technical requirements for [Solar PV ground mount project] as per the format provided in Schedule II to the PPAs and also provide the documentary evidence for the same. The technical qualifications as stipulated in Schedule II of the PPA contains technical details of the solar modules to be used in the project in order to ensure their quality for their use in the grid connected solar power project. The stipulations indicate the exact editions of modules to be used, their safety qualification testing, warranties for their workmanship and use, identification and traceability, as well as the necessary equipment that has to be installed in order to measure solar radiation, and other weather parameters. These technical qualifications had to be completed by the petitioners within the time lines set for achieving Conditions Precedent i.e., 16.06.2017/28.05.2017 as the case may be. In order to complete the said qualifications, the petitioners had to purchase the solar modules and related components required for

the setting up of the project along with the machinery and auxiliary equipment required to complete the testing stipulated in Clause 4.2 (f) of the PPA for the fulfillment of the Conditions precedent

- j) Respondents submitted that the question with regard to whether the implementation of GST can be considered to be an event of Change in law has received the detailed consideration of the Hon'ble Central Electricity Regulatory Commission (CERC) in the Petition No.187/MP/2018 and in other similar matters, wherein it has clearly held that any additional cost claim of the petitioners, incurred by them during the construction period due to purchase of any goods or service has to be correlated with invoices raised by the supplier of goods and service and along with auditor's certificate. It is submitted that the production of invoices is essential to determine whether goods and service in question have been taxed before or after the GST law came into effect. If the invoices were raised before 01.07.2017, then the petitioners would be taxed as per pre-GST laws and would therefore not be considered a part of the alleged additional taxing event. However, if the petitioners have suffered an additional burden, the onus of proving the same lies with the petitioners. In the present case(s), despite there being clear directions from Hon'ble CERC in various Orders, the petitioners in these petitions have produced vague invoices with inadequate descriptions of the items purchased, all invoices were raised after the implementation of the GST Laws, which is in violation of the deadline for fulfilling the conditions precedent, and in these cases, the vendor/EPC contractor is the parent

organization of the petitioners which raises the questions as to the reasons for the delay in purchase of the items in purchase orders and the nature of the items actually purchased in view of the ambiguity in the invoices themselves. An extract of the Order dated 09.10.2018 passed by the Hon'ble CERC, in Petition 188/MP/2018 reads as follows:

*"The Commission directs that the petitioners have to exhibit clear and one to one correlation between the projects, the supply of goods or services, and the invoices raised by the supplier of goods and services backed by an auditors' certificate."*

- k) The attention of this Commission is also drawn to Paragraph 129 of the Order of the Hon'ble CERC in Petition No 50/MP/2018 in the context of change in law for the imposition of GST, which states as follows:

*"Para 129. Respondents have further submitted that the Petition is not maintainable and is liable to be dismissed in limine, since the petitioners have claimed the compensation without producing all the underlying invoices and material in support thereof. Petitioners are claiming costs under the head "expected GST Impact" without substantiating the same. The documents are inadequate to consider the issues of "Change in Law". The petitioners have only produced the purchase order, invoices etc. in respect of one or two components like Solar PV modules, to the exclusion of other items such as mounting structure, inverter, transformers etc. Further, as per the clause 6 of the contract executed between one of the petitioners (PDPL) and supplier, the Modules pertaining to 10 MW capacities were to be delivered at the Project Site by 30.06.2017 i.e., before coming*

*into effect of the "GST Laws" on 01.07.2017. Therefore, the delay (if any) in the delivery or receipt of such modules and the consequential increase in the cost, cannot be passed on to the Respondents since the transaction was envisaged to be done prior to the coming into force of the "GST Laws". "GST Laws" were notified as far back as 12.04.2017 and 28.04.2017 and therefore, the petitioners were aware of the promulgation of the GST Laws and could have arranged its affairs in a manner to mitigate the effect of the increase in costs on account of the enactment of the GST Laws. The details and documents filed by the petitioners are inadequate to consider the issues of Change in Law. For appropriate consideration of Change in Law, the relevant details and documents include but are not limited to the following, namely:*

- (i) the date on which the purchase order was placed either for procurement of goods or for procurement of services;*
  - (ii) the date on which the goods were delivered to the petitioners or the services were rendered and;*
  - (iii) the date on which the invoices were raised;*
  - (iv) the date on which the payment for the goods or services were made by the petitioners; and*
  - (v) in case of imported goods, the date on which the goods were custom cleared either for own consumption or to be stored in the custom warehouse. There are no details regarding the original vendor/original equipment manufacturer."*
- l) That in the present petitions, the petitioners have failed to produce even a single bill or invoice with specifics to the items purchased for current projects, that can correlate with the figures in Auditors' certificate.



Additionally, the Auditors' certificate contains no clarity as to the manner of arriving at figures mentioned in its. It contains merely an identical copy of table produced by the petitioners with no clarification as to the process utilized to arrive at the figures as mentioned therein and no supporting documents whatsoever. Such being a case, the petitioners are not entitled to any relief sought for in the present petitions. Therefore, in the absence of any such material, the claims of the petitioners to declare the imposition of GST Laws to be a Change in Law cannot be considered. Further, the petitioners have not submitted any information on the actual taxes, duties and levies which stand withdrawn and are no longer payable by reason of the Introduction of GST. The petitioners have contradictorily contended that the taxes that were applicable pre-GST have both have been replaced or subsumed by the new GST law and also that the result of this is that the pre-GST law taxes have been carried forward and have increased the total tax burden on the petitioners and hence the increase in capital cost of the project. The petitioners have produced three tabular statements of duties/taxes applicable on the import of goods and services, on domestic procurements as well as on the provisions of installation services, with merely academic descriptions of the duties applicable pre and post GST law with no additional calculations of its practical impact on the petitioners. The petitioners have failed to provide any details as to the taxes that were paid that are included in the calculation, nor have any document or tax paid receipts been produced to verify the figures stated in these tabulations. Therefore, it is submitted

that the petitioners have produced no documentation in support of any tax incidence calculated, in view of which it is submitted that the number devised by the petitioners is highly unreliable and remains unconfirmed.

m) That the provisions of Article 5.1.1 (g) of the PPA are set out below:

*“Article 5.1.1: Subject to and on the terms and conditions of this Agreement, the Developer shall as its own cost and expense:*

a) to f) xxxxxxxxxxxxxx

g) be responsible for all payment related to any taxes, cess, duties or levies imposed by the Government instrumentality or competent statutory authority on land, equipment, material or works of the project to or on the electricity consumed by the project or by itself or on income or assets owned by it.”

n) That as per Article 5.1.1 (g) the petitioners should have taken into account certain taxes that were payable as per their original bid. Their final claims would have to exclude the original calculation of taxes payable prior to the introduction of GST Laws. Accordingly, a true and faithful disclosure of existing taxes which have been subsumed by GST Laws needs to be furnished by the petitioners. In the absence of the details of claims, the Commission ought to dismiss these petitions. It is incumbent on the petitioners to disclose the increase or decrease in taxes.

o) The respondents have submitted that the petitioners have submitted that the introduction of GST Laws impacted the cost of Operation and Maintenance (O&M) as the higher rates of taxes are applicable to various

O& M activities. The petitioners have produced a tabular statement of the increase in tax incidence on O&M activities that have to be incurred by the petitioners. In support of their claims, the petitioners have produced a tabular statement at Annexure- P-10 without any substantiation as to how they arrived at the figures stated in these statements. No additional statements have been placed to verify the figures in the statement produced and petitioners have furnished a certificate created by themselves rather than an external Auditor's certificate. The certificate produced by the petitioners are wholly misplaced and completely baseless and irrelevant. The respondents placed reliance on the Judgement of Hon'ble CERC in Petition No.187/MP/2018 has held that there will be no GST Law impact, if O& M services were undertaken by the generator itself. If the services are outsourced, the PPA does not provide for payment of GST amount on outsourced O&M activities and no claim for such additional tax is payable.

- p) The respondents further contended that in present petitions, the O&M services have been outsourced to M/s. MEIPL as per petitioners' own admissions as they entered into O& M Agreement dated 27.6.2017 between the petitioners and M/s MEIPL, the claim of the petitioners on account of incurring additional cost towards outsourced O&M expenses is not maintainable.
- q) The respondents have submitted that the petitioners have claimed carrying cost and interest in their prayers. In this regard it is submitted that

the law is very clear regarding Carrying Cost / interest that if there is a provision in the PPA for the restoration of the Developer/ Seller to the same economic position as if no change in law event has occurred and allowed such change in law event by the appropriate authority by an Order / Judgment, petitioners have the right to claim. In the present case, neither does the PPA entered into between the parties provides for restoring to same financial position as prior to the change in law, nor does it contemplate the payment of carrying cost or interest of any kind to the aggrieved party on account of change in law. In this regard, reliance is placed on the decision of the CERC in the matter of Petition No. 188/MP/2017 wherein this issue has been analyzed in depth by CERC and came to the conclusion that unless carrying cost is stipulated in the PPA, the aggrieved party is not entitled to it. The relevant portion of the Order of the CERC is extracted below for ready reference:

*"373. ... From the above judgments, the Commission observes that if there is a provision in the PPA for restoration of the Petitioners to the same economic position as if no Change in Law event has occurred, the Petitioners are eligible for "Carrying Cost" for such allowed "Change in Law" event(s) from the effective date of Change in Law event until the same is allowed by the appropriate authority by an order/judgment. The Commission observes that the PPA does not have a provision dealing with restitution principles of restoration to same economic position....*

*374. ... Therefore, the Commission is of the view that the claim regarding separate "Carrying Cost" in the instant Petitions is not attracted."*

In view of the above cited decision of the CERC, the petitioners are not entitled to the relief for restoration to the previous financial position as the PPA contains no provision for such relief and the PPA is binding on the parties to the contract and petitioners are not eligible for carrying cost.

- r) The Learned Counsel for petitioners have filed the rejoinders separately on different dates, in each case reiterating the contents of petition and denying the contentions raised by the respondents in their preliminary statement of objections and also filed the following documents as given below:

In OP No.65/2017:

- i) Commissioning certificate (Annexure- P-11, at page-355)
- ii) A copy of Finance Department Notification No.FD 71 CSL 2015 dated 1.8.2015 ( Annexure-P-12, at page- 357)
- iii) Copy of Summary of GST working Sheet, GSTR-1; GSTR-2A and GSTR-B (Annexure-P-13, at page 358 to 441).

In OP No.66/2017:

- i) Commissioning Certificate issued by KPTCL (Annexure-R-1, at page 349-350)
- ii) FD Notification No.71 CSL 2015 dated 01.08.2015 (Annexure-R-2, at page- 357)
- iii) Approval of Electrical Installation to 15 MW at Hungund by CEIG's letter dated 6.2.2018 (Annexure- R-1, at page-351 to 354)

In OP No.67/2019:

- i) Commissioning Certificate dated 23.1.2018 (Annexure- P-11 at page 348-349)
- ii) FD Notification No.71CSL dated 1.8.2015 (Annexure- P-12 at page 350)
- iii) A copy of Summary of GST working, GSTR-1, GSTR-2A and GSTR-3-B [(Annexure-P-13 (colly) at page 352 to 436)].

5. Earlier, the Respondents had filed preliminary statements of objections on the basis of grounds made in the main petitions, but during the course of hearing of these cases, the learned Counsel for petitioners have filed amended petitions, various documents/ certificates by way of affidavits, in view of such additional documents filed by the petitioners, the learned Counsel for respondents have filed additional common submission on 3.8.2021 in each petition, the brief facts of these submissions are as under:

- i) It is the contention of the petitioners that post introduction of GST, solar generation system is taxed at 5% as per Notification No. 01 of 2017 dated 24.6.2017 as per Chapter/Heading, Sub-heading tariff Item No. 84 or 85 (IGST-5%; CGST-2.50%; SGST-2.50%). However, the petitioners are claiming pre-GST tax to be zero. The said contention of the petitioners is untenable and without any basis. It is pertinent to note that the pre- GST regime, the petitioners would have been liable to pay the following tax:
  - a) Central Sales tax was levied at 2% in case of inter-sate purchases and submission of 'C Form' as per Section 4 of CST Act,1956.
  - b) Central Sales Tax Act was levied at 5.5%- 14.5% in case of inter-state purchase where C Form is not submitted.

- c) Excise Duty at 12% as admitted by the petitioners in their rejoinders.
  - d) Karnataka Value Added tax is levied at 5.5% for purchase of at PV Modules.
  - e) In case of works contract, service component of the contract was taxed at the rate of 6% (15% of 40% of service component) as per the Rule 2A of the Service Tax (Determination of Value) Rules, 2006 and material components at VAT of 10.15% (70% of 14.5%) as per the KVAT Rules,2005.
- ii) Further, the petitioners have stated in Para 11 of the petition that "it is not in dispute that the Central Excise (charged at 12%) have been subsumed in GST, but at the time of Safeguard Duty @25% was levied at the prevailing time". With respect to said contention, it is submitted that Notification No.01/2018-Customs (SG) dated 30.7.2018 levied Safeguard Duty at 25% on import of solar modules from certain countries with effect from 30.7.2018. It is submitted that the petitioners have produced Invoices for the period from September 2017 to April 2018. During this period there was no Safeguard Duty prevailing on import of PV modules. In addition to the above, the safeguard duty is applicable only when solar modules imported to India and not for procurement within India. All invoices produced are from within India and hence the claims by the petitioners about the impact of Safeguard Duty is not tenable in Law.
- iii) It is contended by the petitioners that the Government of Karnataka had issued Notification No. FD 71 CSL 2015, giving exemption to solar

power related products and therefore, pre-GST regime, tax was at zero%. In this regard, it is submitted that the exemption mentioned in the said Notification was applicable only to solar PV panels and solar inverters and was not applicable to other items. In this regard, Government of Karnataka had issued a clarification on 8.2.2016 with regard to applicability of exemption vide Notification No. FD 71 CSL 2015 to other related items wherein, it was clarified that "Other commodities other than solar panels and solar inverter are taxable at 5.5% from 1.8.2012 onwards as renewal energy devices and part thereof under schedule III to the Karnataka value Added Tax Act,2003. Therefore, the claims of the petitioners that Pre-GST regime, tax was Nil, is wrong. If above Pre-GST Taxes are taken into consideration, there is no additional cost impact on the petitioners' projects on account of implantation of GST Law.

- iv) It is submitted that in support of claim amount, the petitioners have produced invoices issued by M/s.ME IPL to the petitioners (Annexure-P9(Colly)) in each petition. On verification of these invoices, the respondents have noticed infirmities and the same are as under:
- a) The petitioners have produced Invoices titled "part consideration towards renewal energy devices". In this regard, it is submitted that from the said Invoices, there is no clarity regarding items purchased by the petitioners for setting up a solar power plant. The solar power generating system consists of many components like panels, inverters and other electrical devices. The petitioners have



not produced purchase orders in order to ascertain the goods purchased by the petitioners and consequent tax impact.

- b) Further, it is submitted that the petitioners have produced invoices raised by M/s. MEIPL, which is a holding company of the petitioners and petitioners have executed EPC contract and it is mere a supplier of solar power systems and not a manufacturer. Further, the Turnkey Agreements and O& M Agreements are executed between the petitioners and M/s. Mytrah Energy (India) Private Limited which do not fall under arm's length transaction. The invoices of M/s. Mytrah Energy (India) Private Limited are raised only as an internal arrangement between related companies and cannot be considered as regular transaction and acceptance of such transaction would affect the public interest adversely.
- v) It is contended by the petitioners that they are entitled to get carrying cost on account of introduction of GST Law. In this regard, this Commission in the matter of ACME Guledagudda Solar Energy vs. BESCO, in OP No. 98 of 2018 had an occasion to examine the issue of carrying cost and held that the PPA in question did not have any explicit provisions which allow carrying cost to be awarded to the concerned generator. Therefore, it is submitted the PPA provisions in the present case(s) as well as in the case of ACME Guledagudda Solar Energy vs. BESCO in OP No.98 of 2018 are similarly worded. Hence, in the light of the above decision of this Commission, the petitioner's prayer for carrying cost deserves to be rejected.

6. The learned Counsel for petitioners has submitted an Affidavit duly signed on 07.06.2021 by the Authorized Signatory to bring on records the certified

copies of fresh Chartered Accountant's Certificate dated 31.05.2021( Annexure A-1, at page-4); A true copy of calculations details of impact of incremental cost and CA certificate dated 28.08.2019 (Annexure P-9, at page-311); Copies of Tax Invoices (page 6-20) and Form GSTR-1, GSTR-2A & GSTR-3 B ( Annexure- A/1, at page-4- 97); in OP No.65/2019, affidavit filed on 06.07.2021 duly signed on 05.07.2021 by the Authorized signatory with Statement of GSTR-3B( Annexure-A/1 at page4-79) and status report of GST filings on GST Web portal( Annexure- A/1 at page 80-88) and in OP No.67/2019, affidavit filed on 07.06.2021 duly signed by the Authorized signatory along with a Fresh CA certificate dated 31.05.2021 acknowledging the payment of GST has already been made to government authorities (at page-4); true copies of abstract of incremental cost impact( Annexure A/1 & Annexure-P-9 at pages- 4 - 5); a copy of CA certificated dated 28.08.2019 at page-5 and true copies of Tax invoices (Annexure-A/1 at pages-6-20) and this petitioner has further filed on 08.07.2021 another affidavit dated 08.07.2021 duly signed by the authorized signatory with a copy of GSTR-1, GSTR-2A and GSTR-3B (Annexure-A/1, page 4-88) and a copy of status report of the GST filings available on GST Web portal ( Annexure-A/2 at page 89-98).

7. Petitioners & Respondents relied on the following Rulings:

Case Law/ Rulings submitted by Petitioner:

- (i) *Appeal No. 307/2016 - Subhash Infraengineers Pvt. Ltd vs Haryana Electricity Regulatory Commission & Anr.*
- (ii) *Petition No. 188/MP/2017 - M/s Acme Bhiwadi Solar Power Private Limited Vs. SECI & others.*

- (iii) AIR 1988 SC 2181- *Bharath Singh vs State of Haryana*
- (iv) AIR 2010 SC 2221 – *Rajasthan Pradeh Vidya Samiti, Sardarshahar & Anr vs Union of India & others.*
- (v) *Secretary, Irrigation Department Government of Orrisa and Ors. vs. G.C. Roy and Ors* (1992) 1 SCC 508.
- (vi) *Central Bank of India vs. Ravindra and Ors.*(2002) 1 SCC 367.
- (vii) *South Eastern Coal Fields Limited vs. State of Madhya Pradesh & Ors,* (2003) SCC 648.
- (viii) *Nabha Power Limited vs. Punjab State Power Corporation Limited and Ors.* (Civil Appeal No.179 of 2017).
- (ix) *Sumtomo Heavy Industries Limited vs. ONGC Limited* {(2010) 11 SCC 296}

Case Law/ Rulings submitted by Respondent:

- (i) *OP No. 98 to 103/2018 – Acme Guledaguddu Solar Energy vs BESCO*
- (ii) (2011)15 SCC 580 – *NTPC vs Madyapradesh State Electricity Board.*

8. We have heard the learned Counsels for the parties. The petitioners have filed written arguments. We have perused the contents of various court rulings mentioned in above paras and observed that facts of these cases are similar to these petitions and are applicable.

9. From the above pleadings, and rival contentions raised by the parties, the following issues arise for our consideration:

Issue No.1: Whether the promulgation of the Integrated Goods and Service Tax Act, 2017, the Central Goods and Service Tax Act, 2017, the Karnataka Goods and Service Tax Act, 2017, with effect from 01.07.2017 is covered under the scope of 'Change in Law' under Article 15 of the Power Purchase Agreement?

Issue No.2: Whether the Petitioners are entitled for claiming additional capital cost on account of “Change in Law” event under Article 15 of PPA due to introduction of GST Laws? If so, then what would be the compensation amount?

Issue No.3: Whether the claims of additional recurring O&M expenditure incurred/to be incurred by the petitioners on account of Change in Law can be considered for the re-imburement from respondents?

Issue No.4: Whether there is a need to evolve suitable mechanism to compensate the petitioners for additional non- recurring capital cost and recurring expenditure incurred by the petitioners on account of Change in Law event under Article 15 of the PPA?

Issue No.5: What order?

10. **Issue No.1:** Whether the promulgation of the Integrated Goods and Service Tax Act, 2017, the Central Goods and Service Tax Act, 2017, the Karnataka Goods and Service Tax Act, 2017, with effect from 01.07.2017 is covered under the scope of ‘Change in Law’ under Article 15 of the Power Purchase Agreement?

a) It is not in dispute that the petitioners have entered into Power Purchase Agreements on 31.05.2016 in OP No.65/2019 and on 15.07.2016 in OP No.66/2019 & in OP No.67/2019 with the respondents to setup Solar Power Projects at Sindagi, Hungund and Raibag in Karnataka State. These Solar Power Projects are commissioned as stated in rejoinders filed by the petitioners, on 08.02.2018 in OP No.65/2019 (Annexure-11 at page-355); on 9.2.2018 in OP No.66/2019 (Annexure- R-1 at page-309-350) and on 23.1.2018 in OP No.67/2019 (Annexure P-11, page-348-349).

Now, the petitioners have sought from this Commission to declare that enactment of Integrated Goods and Service Tax Act,2017, Central Goods and Service Tax Act,2017 and Karnataka Goods and Service Tax Act, 2019 (hereafter referred as "GST Law") qualifies as "Change in Law" in terms of Article 15 of PPA. The enactment of the GST Law is squarely covered by the definition of 'Change in Law' under Article 15 of the PPA read with Article 21.1 of the PPA. 'Law' as defined under the PPA, is an inclusive definition and, inter alia, includes any regulation, notification and rule issued by an Indian Governmental Instrumentality which has the force of law.

- b) The petitioners have submitted that the introduction of GST Laws is a "Change in Law" event as per first and fifth bullet point of the Article 15.1.1 of the PPA and it is in the nature of an enactment, coming into effect after the "effective date" of PPAs and qualifies as introduction of a tax on the supply of power leading to additional recurring/ non-recurring expenditure for the petitioners. Hence, it is claimed by the petitioners that they are eligible for the benefit of GST Laws as a "Change in Law" event in terms of first and fifth bullet point of Article 15.1.1 of PPAs. Further, they have submitted that in terms of Article 15.2.1 of the PPA, an aggrieved party who had incurred additional recurring/non-recurring expenditure is required to approach the Commission for seeking approval of such change in law event and thereby, may claim relief for the same upon approval by the

Commission. Accordingly, the petitioners have approached this Commission for seeking relief on account of introduction of GST Law as a "Change in Law" event, as per the first and fifth bullet of Article 15.1.1 of the PPAs. Per Contra, the respondents have contended that the 'Change in Law' clause in PPA makes it very clear that for an event to qualify as "Change in Law" should meet the criteria specified in first and fifth bullet points of the Article 15.1.1 of the PPA. Further, the combined effect of above conditions is that the GST implications will be applicable only if the point of taxation occurs on or after 1.7.2017. The respondents further contended that the petitioners have participated in bid for the projects, executed the PPAs and started implementing the projects much before the promulgation of GST Laws. In view of above, the petitioners are not affected by the introduction of GST Laws and are not entitled to any relief under Article 15.2 of the PPAs.

- c) On the basis of examination of written submission/ statement of objections and rejoinders submitted by the parties, we proceed to examine as to whether Introduction of GST Laws (IGST Act, 2017; CGST Act, 2017 and KGST Act,2017) by the Government of India and State Government of Karnataka are covered under the scope of "Change in Law" event or otherwise under the provisions of PPAs of the Solar Power Projects of the petitioners. Now, we proceed to go through the relevant definitions/provisions of Article of PPAs, Competitive bidding guidelines, GST notifications and Court rulings which are relevant to the facts and

issues raised in these petitions and will give our findings in subsequent paras of this Order.

- d) The Commission notes that Article 21 of the PPA inter alia, defines the terms 'Law' and 'Government Instrumentality'. The abstract of these definitions is as under: -

*"Government Instrumentality" means any department, division or sub-division of the Government of India or the State Government and includes any commission board, authority, agency or municipal and other local authority or statutory body including panchayat under the control of Government of India or the State Government, as case may be, and having jurisdiction over all or any part of the project facilities or the performance of all or any of the services or obligations of the developer under or pursuant to this Agreement."*

*"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 any an Indian Government Instrumentality pursuant to or under any of them and shall include without limitation all rules, regulations, decisions and orders of the KERC."*

- e) The Commission further notes that Article 15 deals with Change in Law event, which is set out as under:

Article 15.1.1 of PPA, defines the term 'Change in Law' means the occurrence of any of the following events after the submission of online Techno Commercial Bid resulting into any additional recurring/non-recurring expenditure by the Solar Power Developer (SPD) or any income to SPD.

The sub-clauses of Article 15.1.1 read as under:

- a) the enactment coming into effect, adoption, promulgation, modification or repeal in India, of any law, including rules and regulations framed pursuant to such Law;
- b) a change in the interpretation or application of any law by Indian Government Instrumentality having legal power to interpret or apply such Law.
- c) -----
- d) -----
- e) any change in tax or introduction of any tax made applicable for supply of power by the developer as per the terms of this Agreement.

f) Further, Article 15.2 provides relief for change in law. Article 15.2.1 stipulates that the aggrieved party shall be required to approach to KERC for seeking approval of 'Change in Law'. Further, Article 15.2.2 states that the decision of the State Commission, to acknowledge a 'Change in Law' and the date from which it will become effective and to provide relief for the same, shall be final and governing on both the parties.

g) The Commission observes that as per Article 15 "Change in Law" comes into effect on 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 consent or change in tax or introduction of any tax made applicable for supply of power by the Solar Power Developer (SPD) as per the terms of the Agreement, resulting into any additional non-recurring expenditure to the SPD. The Commission is of the view that harmonious construction of the sub-clauses under Article



15.1.1 makes it clear that bullet point first ( it refers to sub-clause-a) of said PPA is wider in scope and refers to an enactment, coming into effect, adoption, promulgation, amendment, modification or any or repeal in India, of any law, including rules and regulations framed pursuant to such Law, whereas bullet point fifth( refer to sub-clause-e)of PPA in seriatim refers specifically to any change in tax or introduction of any tax made applicable for supply of power by the developer as per this agreement. Further, we are of the considered view that fifth bullet point i.e., sub-clause (e)of Article 15.1.1 would be applicable as "Change in Law" to the cases where the Change in tax or introduction of any tax directly impacts "supply of power" and in that case remedy of change in law is available to the petitioner under this bullet point five i.e., sub-clause (e) of the PPA. Therefore, the GST Laws enacted are not in the nature of a mere change in the tax having limited applicability on supply of power. Rather, it is in the nature of an enactment having wide ranging implication on the entire indirect taxation regime in India. Various laws were subsumed and repealed with the enactment of GST laws.

- h) This Commission observes that the Hon'ble Appellate Tribunal for Electricity by the judgment dated 14.08.2018 in Appeal No. 111 of 2017 in M/s. GMR Warora Energy Limited vs. Central Electricity Regulatory Commission and Others, has decided on the interpretation of "Change in Law" provisions and the facts in the cited Judgement are similar to the present PPAs. Hon'ble APTEL held as hereunder:

“This Tribunal has decided that any tax or application of new tax on supply of power also covers on inputs required for such generation and supply of power to the distribution licensees.”

Further, it held that any tax levied through an Act of Parliament after cut-off date which results in additional expenditure by the petitioner, the same is covered as “Change in Law”. The “GST Laws” have enacted by the Act of Parliament such as the IGST Act,2017 (No. 12 of 2017) and CGST Act,2017 (No.13 of 2017) and published in Extra-ordinary Gazette of India on 12.4.2017 and the Karnataka Legislatures have enacted the Karnataka Goods and Service Act,2017(Karnataka Act No.27 of 2017), which was published on 27.06.2017 in Extra-ordinary Gazette. In the instant cases, the KREDL had issued the RfP on 21.11.2015 for inviting bids for development of these 15 MW Ac capacity solar power PV ground mount projects and Letter of Acceptance (LoA) issued on 23.03.2016 and PPAs were executed on 31.05.2016 and 15.07.2016 and KERC has approved these PPAs on 29.09.2016 and 17.10.2016 earlier to introduction of GST Laws. The change in duties/tax-imposed consequent upon these Acts has resulted in the change in cost of inputs required for generation by the petitioners and same is to be considered as “Change in Law”. Therefore, the contention of the respondents that the present petitions/cases would not qualify the criteria specified in Article 15.1 of the PPAs for considering as an event of “Change in Law” has no force

and liable to be rejected. Hence, this Commission holds that the enactment of "GST Laws" is squarely covered as "Change in Law" under the sub-clause (a) and (e) of Article 15.1.1 of the PPAs.

i) Hence, our answer on Issue No.1 is in affirmative.

11. **Issue No.2:** Whether Petitioners are entitled for claiming additional capital cost on account of "Change in Law" event under Article 15 of PPA due to introduction of GST Laws? If so, then what would be the compensation amount?

(a) The petitioners have submitted that they had entered a Turnkey Agreement on 28.06.2017 with M/s. Mytrah Energy (India) Private Limited (hereafter referred to as "MEIPL") for supply of solar energy systems which has resulted in additional capital cost of Rs.3,45,08,523 in OP No.65/2019); Rs.3,38,62,904 in OP No.66/2019 and Rs.3,87,11,470 in OPNo.67/2019 on account of introduction of GST Laws and these costs were not contemplated by the petitioners at the time of bid submission. They made a prayer in their petitions that respondents are to be directed to pay the amount claimed under "Change in Law" event in terms of Article 15 of the PPA along with recurring cost.

(b) The petitioners have submitted that while introducing new GST Laws, the multiple taxes and duties which were levied by the Central and State Governments on goods and services were either subsumed, replaced or abolished. Further pursuant to the introduction of GST Law, the exemptions earlier granted by the Government of India (GOI) to the solar power industry, in recognition of the importance of solar power as

a clean and green source of energy and to promote wider adoption of generation of power from such source, have been rescinded and solar power has been placed under the 5% to 18% tax bracket as per the GST rate schedule for goods and services notified on 18.05.2017. It is submitted that such a steep increase in tax rate from zero % to tax rate of 18% has increased the capital cost of the projects of the petitioners substantially, making the quoted tariff rate unviable.

- (c) The petitioners have submitted that the taxes that were applicable pre-GST Law regime have either been replaced by or subsumed into GST Law. As Such, the burden of pre-GST Law taxes has not only been carried forward, but has also increased and is being borne by the petitioners. This has led to a significant increase in the tax incidence and therefore, capital cost of the Project, as set out below:

Table No: 07

Particulars	OP No 65/2019 Amount	OP No 66/2019 Amount	OP No 67/2019 Amount
Total Cost Pre-GST Law ( inclusive of all taxes )	74,85,80,570	73,00,27,273	82,51,63,971
Total Cost Post-GST (inclusive of all taxes)	78,30,89,093	76,38,90,177	86,38,65,839
Increase in Tax incidence	3,45,08,523	3,38,62,904	3,87,01,868

- (d) Per Contra, the respondents have submitted that the reimbursement of GST claims of the petitioners may be denied because of the petitioners had to achieve the Conditions precedent within 8 months from the effective date as per Article 4.1 of PPA. As per Article 4.2 (f) of the PPA, the petitioners had to fulfill the technical requirements for

[Solar PV ground mount project] as specified in Schedule-II to the PPA and should have purchased the solar modules and auxiliary equipment required for the setting up of their projects. Further, the Notifications for both the Central Goods and Services Tax Act 2017 and the Integrated Goods and Service Tax Act were notified more than two months prior to the time line set for achieving the Conditions precedent of these projects. Additionally, neither of the two enactments came into effect until 01.07.2017, i.e., about two weeks after the time line set for achieving the Conditions precedent by the petitioners, by which time the petitioners ought to have achieved the financial closure. In view of the same, with respect to the Central and Integrated Goods and Services Tax Acts 2017, the petitioners had sufficient time, prior to the time line set for fulfilling its Conditions precedent and would have arranged their affairs in a manner in order to mitigate the effect of any alleged increase in costs on account of the enactment of the GST laws. The date of the implementation of all the GST laws was the 1st of July 2017, which was two weeks after the deadline for the achievement of the condition precedent. The promulgation of the aforementioned GST laws has no bearing whatsoever on the petitioners. Further, on perusal of the purchase orders/tax invoices produced at Annexure P-9 make it clear that all the purchase orders placed by the petitioners are dated after the deadline for the achievement of the Conditions precedent on the 16.06.2017/ 29.05.2017 as the case may be.

- (e) The respondents have submitted that the petitioners have produced Chartered Accountants' certificate dated 28.8.2019 (Annexure-P-9 at page 311-313 in OP 65/19, 308-309 in OP 66/19 and 304-306 in OP 67/19) wherein it has been mentioned that in EPC contract, pre-GST period tax rate on solar power generating system was "Nil" but after the introduction of GST laws, it has increased to 5% which does not have any basis. Moreover, there is no clarity on how the petitioners have classified as Hard and Soft components as mentioned in CA certificates. Before GST regime, there was 12% excised duty leviable on solar module and Central Sales Tax (CST) at 2% in case of Inter-state purchases on production of "C" Form as per Section 4 of CST Act, 1956 and 5.5% to 14.5% in case of default of non-submission of "C" Form. If purchases were done from Karnataka state, then 5.5% VAT would be attracted. In view of above facts, the petitioners ought to have been paid more taxes on purchase of solar modules, prior to enactment of GST Laws and such taxes have been taken into account while participating in bids and now they are not eligible to claim 5% GST on supply of solar renewal energy device/system on account of "Change in Law" event due to introduction of GST Laws. Hence, their prayer for compensation of additional capital cost of the petitioners is liable to be rejected.
- (f) In view of above, this Commission will proceed to deal with the issue as to whether the petitioners are entitled for claiming additional capital cost on account of "Change in Law" event under Article 15 of

PPA due to introduction of GST Laws in relevant paras and will give our findings accordingly.

(g) The Commission observes that prior to the introduction of Goods & Service Tax Act (GST), the components were taxed at the time of production as Excise duty and at the time of Sale as Value Added Tax (VAT) by the concerned state. For sale of components between two States, Central Sales Tax (CST) was applicable. Moreover, for projects executed within certain Municipal Corporation limits, additional octroi was applicable to the components. After implementation of GST Laws, the multiple indirect taxes levied by Central and State Governments, the new GST Tax structure which resultantly did away with the complex multifarious tax regime that was prevalent prior to the date i.e., 01.07.2017.

(h) This Commission relies upon a "Concept and Status on Goods and Service Tax (GST)" published by Central Board of Indirect Taxes and Customs, Department of Revenue, Ministry of Finance, Government of India, as on 1st August, 2018, wherein a list of indirect taxes, duties, cesses and surcharges have subsumed under GST is provided. The extract of the "Concepts and Status on GST" is produced as under:

*"10.21 Subsuming of taxes, duties etc.: Among the taxes and duties levied and collected by the Union, Central Excise duty, Duties of Excise (Medicinal and Toilet Preparations), Additional Duties of Excise (Goods of Special Importance), Additional Duties of Excise (Textiles and Textile*

*Products), Additional Duties of Customs (commonly known as CVD), Special Additional Duty of Customs (SAD), Service Tax and cesses and surcharges insofar as they related to supply of goods or services were subsumed. As far as taxes levied and collected by States are concerned, State VAT, Central Sales Tax, Purchase Tax, Luxury Tax, Entry Tax, Entertainment Tax (except those levied by the local bodies), Taxes on advertisements, Taxes on lotteries, betting and gambling, cesses and surcharges insofar as they related to supply of goods or services were subsumed.”*

(i) The Commission observes that with the enactment of Central Goods and Services Tax Act, 2017, the following Acts were repealed by the Parliament:

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

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

“GENERAL EXEMPTION No. 64:

*Exemption on all items of machinery, including prime movers, instruments, apparatus and appliances, control gear and transmission equipment and auxiliary equipment*



*and components, required for initial setting up of a solar power generation project or facility. [Notification No. 15/2010-CE., dated 27.2.2010 as amended by 26/12, 15/14]*

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

- (1) That an officer not below the rank of a Deputy Secretary to the Government of India, in the Ministry of New and Renewal Energy recommends the grant of this exemption, including quantity, description and specification of goods and certifies that they are required for initial setting up of a solar power generation or solar energy production project facility, as case may be; and*
- (2) The Chief Executive Officer of the project furnishes an undertaking to the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, having jurisdiction over the factory of the manufacture, to the effect that-*
  - (i) the said goods will be used only in the said project and not for any other use; and*
  - (ii) in the event of non-compliance of sub-clause(i), the Project Developer of such Project shall pay the duty which would have been leviabale at the time of clearance of goods, but for this exemption."*

(k) Similarly, the Commission notes that with the enactment of the Goods and Services Tax, 2017, Karnataka VAT, Central Sales Tax, Purchase Tax,

Luxury Tax, Entry Tax, Entertainment Tax Acts (except those levied by the local bodies), Taxes on advertisements, Taxes on lotteries, betting and gambling, cesses and surcharges insofar as they related to supply of goods or services were subsumed.

- (I) The Commission observes that GST rates are ranging from 5% to 18%. In case of PV Modules, the applicable GST is 5%, as against 0% VAT applicable in various states including Karnataka during pre-GST roll out. Excise duty on components required for initial setting up of a solar power generation or solar energy production project or facility was at "zero" tax rate and also enjoyed concessional Basic Customs Duty and Additional Customs Duty on imports. The imposition of VAT on solar power generating equipment has been diverse with some States offering complete exemption while on the other hand, few States have levied a concessional rate of tax at 4% (four per cent) and 5% (five per cent) respectively, on the equipment and components used for setting up of solar power generating equipment. The GST rate on solar power generating systems and raw material used (including modules), has been notified at 5% tax of value of such goods. It may be noted that in Karnataka solar PV panels and solar Inverters were taxable at 4% to 5.5% from 1.4.2005 to 31.7.2015 and exempted from tax w.e.f. 1.8.2015. Subsequently, the Government of Karnataka had issued a clarification on 8.2.2016 with regard to applicability of tax exemption vide its Notification No. FD 71 CSL 2015 to other related items stating that "other commodities other than solar and solar inverters are taxable at 5.5% from

01.08.2012 as against 0% VAT. Further, the GST on various services such as works contract service, technology etc. which are typically used in setting up of a solar power plant has been kept at 18% tax rate. It is further noted that Services, Commercial, Contractual, Erection and Commissioning, all attracted Service Tax @15%, Swachh Bharat Cess of 0.5% and Krishi Kalyan Cess of 0.5% before GST regime.

- (m) The Commission further observes that as per Notification No.1/2017-Central Tax (Rate) dated 28.6.2017 issued the Ministry of Finance, Government of India, wherein Schedule I- as contained at Serial No. 234 Chapter/ Heading/sub-heading / Tariff item 84, 85 & 94 of the "*renewable energy devices & parts for the manufacture .....(b) Solar power-based devices and (c) Solar Power Generation System*" of GST rate at 5% would be applicable.
- (n) The contention of the respondents that the petitioners would have incurred/suffered 12% Central Excise Duty, 2% CST, if purchases of Solar based devices were made from Inter-state against "C" Form and in case purchases of said goods/ items were made within the state of Karnataka, then they would have paid 5% VAT. The respondents further averred that the petitioners were supposed to take all duties, cess and taxes leviable on solar power generation devices during the pre-GST period into consideration while participating in the biddings. The above stated argument of the respondents is not tenable and sustainable because of the simple reason that in the present case, the tariff has been discovered

under the transparent e-bidding process in accordance with the Guidelines for Tariff Based Competitive Bidding Procurement of Power for Grid Connected Solar PV Power Projects issued by Ministry of New and Renewable Energy, Government of India. Further, in the competitive bidding scenario, the Solar Power Developer bids levelized tariff without disclosing the details of the calculations of the project cost including components cost, taxes and it is not required to be declared by the bidders. The design of the bid levelized tariff is solely a decision of the SPDs. The Commission notes that in the instant case(s), bids were taken place before the introduction of GST Laws and procurements of the solar generating devices are done subsequently. Thus, the contention of the respondents is not tenable and liable to be rejected.

(o) Regarding: Absence of necessary particulars by the petitioners- adverse inference:

i) The respondents have submitted in their preliminary statement of objections stating that the petitioners have produced the Chartered Accountant's Certificate wherein, it has been mentioned that in EPC contract, pre- GST period, the Tax rate was shown as 'Nil', but after the introduction of GST Laws, it has shown as 5% which does not have any basis. There is no clarity on component of Hard cost/ Soft cost. However, solar power generating system consists of many components like solar panels, Inverters and other electrical devices/equipment. Further, the petitioners have not produced

purchase orders in order to ascertain the exact number of solar modules/ items and consequent tax impact thereon.

- ii) The respondents have submitted their written submissions dated 21.01.2020, 24.08.2020, 12.03.2020 and 03.08.2021, in these petitions reiterated that the petitioners have failed to provide any documents such as purchase orders or tax paid receipts which could establish the exact tax incidence suffered by them on account of introduction of GST Laws. However, they have provided only the tax Invoices which are titled as "part consideration towards renewal energy devices" raised by M/s. MEIPL, but from the said invoices there is no clarity on the number of solar power generation system received by the petitioners from the EPC contractor for setting up of solar power plant at their project sites. In this regard, the respondents have placed reliance on the Order dated 09.10.2018 passed by the Hon'ble CERC in, Petition 188/MP/2018 is as follows:

*"The Commission directs that the Petitioners have to exhibit clear and one to one correlation between the Projects, the supply of goods or services, and the invoices raised by the supplier of goods and services backed by an auditors' certificate."*

- iii) Per Contra, the petitioners have submitted that they have produced the copies of tax invoices and Chartered Accountant's certificate along with the original petitions which were filed on 18.10.2019, these documents are available with OP No.65/2019 (Annexure-P9 (colly))

page No.313-328, and at Page 309-322); in OP NO 66/2019 (Annexure-P-9 (colly) at page No. 306-324) and in OP No. 67/2018 (Annexure-P-9 (colly) at page 306-321). The same documents such as Tax Invoice and Chartered Accountant's Certificate dated 28.08.2019 & 31.05.2021 were once again filed on different dates in each petition by way of an affidavit duly signed by the authorized signatory on behalf of petitioner. A true copy of GSTR-1, GSTR-2A, GSTR-3B and the status report of filing GST returns on GST Web Portal were also filed as a proof of GST paid to Government Authority by M/s MEIPL, which is an EPC contractor to supply and install the solar power generation system at the project sites of these petitioners. The name and address of Supplier/Buyer, place of delivery, Invoice number, date and Description as "part consideration towards Renewal Energy Devices" are provided in these tax Invoice, which are set out in tables below:

**OP No.65 of 2018****Table No-8**

Sl. No	Vendor	Invoice No & Date	Description	Total Price / Consideration	CGST (2.5%)	SGST (2.5%)	IGST (5%)	Total GST Amount
1	2	3	4	5	6	7	8	9
1	MEIPL	MEIPL/SD/SG/07/1 01.09.2017	Part consideration towards Renewable Energy Device: SPGS	2,10,493	5,262	5,262		10,524
2	MEIPL	MEIPL/SD/SG/08/1 01.09.2017	Part consideration towards Renewable Energy Device: SPGS	61,09,454	1,52,736	1,52,736		3,05,472
3	MEIPL	MEIPL/SD/SG/09/1 08.09.2017	Part consideration towards Renewable Energy Device: Column Post	35,69,643	-	-	1,78,482	1,78,482
4	MEIPL	MEIPL/SD/SG/09/1 30.09.2017	Part consideration towards Renewable Energy Device: SPGS	35,44,212	88,605	88,605		1,77,210
5	MEIPL	MEIPL/SD/SG/10/1 31.10.2017	Part consideration towards Renewable Energy Device: SPGS	4,12,30,455	10,30,761	10,30,761		20,61,522
6	MEIPL	MEIPL/SD/SG/11/1 30.11.2017	Part consideration towards Renewable Energy Device: SPGS	3,80,64,527	9,51,613	9,51,613		19,03,226
7	MEIPL	MEIPL/SD/SG/11/2 30.11.2017	Part consideration towards Renewable Energy Device: SPGS	9,28,986	23,225	23,225		46,450
8	MEIPL	MEIPL/SD/SG/12/1 30.12.2017	Part consideration towards Renewable Energy Device: SPGS	7,16,98,706	17,92,468	17,92,468		35,84,936
9	MEIPL	MEIPL/SD/SG/01/1 31.01.2018	Part consideration towards Renewable Energy Device:	1,69,76,515	4,24,413	4,24,413		8,48,826

			SPGS					
10	MEIPL	MEIPL/SD/SG/02/001 01.02.2018	Part consideration towards Renewable Energy Device: SPGS	61,73,536	1,54,338	1,54,338		3,08,676
11	MEIPL	MEIPL/SD/SG/02/002 28.02.2018	Part consideration towards Renewable Energy Device: SPGS	1,71,26,176	4,28,154	4,28,154		8,56,308
12	MEIPL	MEIPL/SD/SG/03/1 31.03.2018	Part consideration towards Renewable Energy Device: SPGS	39,88,608	99,715	99,715		1,99,430
13	MEIPL	MEIPL/SD/SG/03/2 31.03.2018	Part consideration towards Renewable Energy Device: SPGS	41,24,92,166	1,03,12,304	1,03,12,304		2,06,24,608
14	MEIPL	MEIPL/SD/SG/04/1 30.04.2018	Part consideration towards Renewable Energy Device: SPGS	6,80,00,000	17,00,000	17,00,000		34,00,000
Total				<b>69,01,13,477</b>	<b>1,71,63,594</b>	<b>1,71,63,594</b>	<b>1,78,482</b>	<b>3,45,05,670</b>

**OP No 66 of 2018****Table No.9**

Sl. No.	Vendor	Invoice No & Date	Description	Total Price / Consideration	CGST (2.5%)	SGST (2.5%)	IGST (5%)	Total GST Amount
1	2	3	4	5	6	7	8	9
1	MEIPL	MEIPL/HG/SG/07/1 01.09.2017	Part consideration towards Renewable Energy Device: SPG	2,10,493	5,262	5,262		10,524
2	MEIPL	MEIPL/HG/SG/07/1 01.09.2017	Part consideration towards Renewable Energy Device: SPG	2,10,493	-	-	10,525	10,525
3	MEIPL	MEIPL/HG/SG/08/1 01.09.2017	Part consideration towards Renewable Energy Device: SPG	64,69,208	1,61,730	1,61,730		3,23,460
4	MEIPL	MEIPL/HG/SG/09/1 30.09.2017	Part consideration towards Renewable Energy Device: SPG	6,16,064	15,402	15,402		30,804
5	MEIPL	MEIPL/HG/SG/10/1 31.10.2017	Part consideration towards Renewable Energy Device: SPG	7,04,23,118	17,60,578	17,60,578		35,21,156
6	MEIPL	MEIPL/HG/SG/11/1 30.11.2017	Part consideration towards Renewable Energy Device: SPG	5,63,48,150	14,08,704	14,08,704		28,17,408
7	MEIPL	MEIPL/HG/SG/11/2 30.11.2017	Part consideration towards Renewable Energy Device: SPG	26,34,424	65,861	65,861		1,31,722
8	MEIPL	MEIPL/HG/SG/12/1 30.12.2017	Part consideration towards Renewable Energy Device: SPG	41956425	1048911	1048911		2097822
9	MEIPL	MEIPL/HG/SG/01/1 31.01.2018	Part consideration towards Renewable Energy Device: SPG	13858728	346468	346468		692936
10	MEIPL	MEIPL/HG/SG/02/001 28.02.2018	Part consideration towards Renewable Energy Device: SPG	2,11,06,002	5,27,650	5,27,650		10,55,300
11	MEIPL	MEIPL/HG/SG/03/1 31.03.2018	Part consideration towards Renewable Energy Device: SPGS	432920782	10823020	10823020		21646040
12	MEIPL	MEIPL/HG/SG/04/1 30.04.2018	Part consideration towards Renewable Energy Device: SPGS	29809523	745238	745238		1490476
Total				67,65,63,410	1,69,08,824	1,69,08,824	10,525	3,38,28,173

**OP No 67 of 2018****Table No-10**

Sl. No.	Vendor	Invoice No & Date	Discription	Total Price/Consi deration	CGST (2.5%)	SGST (2.5%)	IGST (5%)	Total GST Amount
1	2	3	4	5	6	7	8	9
1	MEIPL	MEIPL/RB/SG/07/1 01.09.2017	Part consideration towards Renewable Energy Device: SPGS	70,78,216	1,76,955	1,76,955	-	3,53,910
2	MEIPL	MEIPL/RB/SG/08/1 01.09.2017	Part consideration towards Renewable Energy Device: SPGS	1,08,92,564	2,72,314	2,72,314		5,44,628
3	MEIPL	MEIPL/RB/09/1 05.09.2017	Part consideration towards Renewable Energy Device: Torque Tube	2,85,23,197	-	-	14,26,160	14,26,160
4	MEIPL	MEIPL/RB/09/2 05.09.2017	Part consideration towards Renewable Energy Device: Purlin Hat	1,08,31,907	-	-	5,41,595	5,41,595
5	MEIPL	MEIPL/RB/09/3 12.09.2017	Part consideration towards Renewable Energy Device: Bearing Top & Bottom cast	17,32,693	-	-	86,635	86,635
6	MEIPL	MEIPL/RB/09/4 16.09.2017	Part consideration towards Renewable Energy Device: SPGS- Bearing Top & Bottom cast	13,86,154	-	-	69,308	69,308
7	MEIPL	MEIPL/RB/SG/9/1 30.09.2017	Part consideration towards Renewable Energy Device: SPGS	1,82,47,265	4,56,182	4,56,182		9,12,364
8	MEIPL	MEIPL/RB/SG/10/1 31.10.2017	Part consideration towards Renewable Energy Device: SPGS	6,09,95,989	15,24,900	15,24,900		30,49,800
9	MEIPL	MEIPL/RB/SG/11/1 30.11.2017	Part consideration towards Renewable Energy Device: SPGS	3,94,59,580	9,86,490	9,86,490		19,72,980
10	MEIPL	MEIPL/RB/SG/11/2 30.11.2017	Part consideration towards Renewable Energy Device: SPGS	38,51,208	96,280	96,280		1,92,560
11	MEIPL	MEIPL/RB/SG/12/01 30.12.2017	Part consideration towards Renewable Energy Device: SPGS	5,74,44,897	14,36,122	14,36,122		28,72,244
12	MEIPL	MEIPL/RB/SG/01/1 15.01.2018	Part consideration towards Renewable Energy Device: SPGS	52,00,00,000	1,30,00,000	1,30,00,000		2,60,00,000
13	MEIPL	MEIPL/RB/SG/04/1 30.04.2018	Part consideration towards Renewable Energy Device: SPGS	1,37,85,731	3,44,643	3,44,643		6,89,287
Total				77,42,29,401	1,82,93,886	1,82,93,886	21,23,698	3,87,11,471

iv) The respondents contended that the EPC contractor has raised these invoices, after the introduction of the GST laws and the petitioners could have procured the solar power generation devices, before the deadline set for fulfilling the Conditions precedent as mandated under the PPA. Moreover, the petitioners have procured this solar power generation system by entering into a Turnkey agreement with the parent organization i.e. MEIPL and the Tax Invoices are raised by the vendor, shown as "Part Consideration



towards Renewable Energy Devices." without disclosing full details of such devices.

- v) With regard to the contentions of respondents as raised in above paras, this Commission notes that the Invoice is raised by M/s Mytrah Energy (India) Private Limited i.e. EPC Contractor to the petitioner, which contains the details such as Name and Address of Buyer, Invoice Number, Date, Place of Delivery, Buyer's Tax Registration details, Description, HSN/SAC code, Quantity, Total Price in Rupees, per cent of Tax Rate and Total CGST/SGST charged and Name & Address of Supplier and Signed by Authorized Signatory. However, it is noticed that the number of Renewal Energy Device: Solar Power Generating System is not mentioned in the quantity column and in Description column it is shown as "Part consideration towards Renewal Energy Device: Solar Power Generating System. In view of above, the contention of the respondents that the petitioners have not produced the Tax Invoices with full details is not acceptable and liable to be rejected.
- vi) With regard to the contention of the respondents that the petitioners have not produced the relevant records on actual tax incidence suffered by the petitioner on account of introduction of GST Laws. This Commission observed on the basis of relevant records available on concerned case file that the relevant records such as Calculation Details of Impact of Incremental Cost, CA certificate and Tax Invoices are annexed as Annexure-P-9 (colly) with the Original Petitions which were filed on 18.10.2019. On perusal of contents of C.A. certificate dated 28.8.2019. The abstract of CA Certificate is as under:

“ The accompanying statement of additional expenditure incurred by the petitioner( Individual name of petitioner in each petition mentioned) due to change in law in respect of its ---- (individual name of solar project mentioned) has been prepared by the Company, pursuant to the requirements of Power Purchase Agreement dated( specific date of PPA is mentioned) entered between the Company and Respondent(specific ESCOM's name), for claiming refund of the additional expenditure incurred due to change in law. The Company has represented to me that additional indirect tax borne by the Company due to enactment of the Central Goods And Services Tax,2017(the “ACT” or “GST Laws”) is covered under change in law as defined in Article 15 of the PPA.

Based on my examination, I am of the opinion that the Company has borne additional indirect tax as detailed in Annexure-1 on account of enactment of the Act. Certified that all norms as per “GST Laws” have been complied with by the Company and the claim of the amount being made by the Company are correct as per effective taxes in pre and post “GST regime.” In this Certificate Annexure-1 is given with the details of Incremental cost impact on each solar power project.

vii) The Commission further observes that the petitioners have submitted the above stated documents along with the main petitions and

thereafter the respondents have submitted their statement of objections. It may be noted here that during the course of hearing, the learned Counsel for petitioners have filed rejoinders to the statement of objections, along with the relevant documents namely, true copy of Tax Invoices, a fresh Chartered Accountant's certificate and a copy of GSTR-1, GSTR-2A, GSTR-3B forms, by way of affidavit duly signed by the Authorized signatory on behalf of petitioners. Therefore, the respondents could have verified the facts / details from the available documents with these petitions before submitting their statement of objections in this regard. It may be noted here that subsequent to submission of preliminary statement of objections, the respondents have filed a written submission on 03.08.2021 in each petition, wherein the respondents have admitted that fact that they have received the relevant documents and made a detail analysis in point no. B of Para 13 (iii) at page 5-7, on invoices produced by the petitioners. The respondents have analyzed the contents of these invoices and found that by M/s. MEIPL has raised many invoices which are after the due date of scheduled commissioning date of these projects and raised objections stating that such invoices cannot be entertained because these are pertaining to supply of major materials like Renewal Energy Devices/Solar Power Generating System. In view of above, we are of the considered view that the adverse inference cannot be drawn against the petitioners as alleged by the respondents that they have not produced the relevant documents such as Tax Invoices, Auditors'

Certificate and Calculation Sheet of incremental cost impact on the projects on account of introduction of GST laws as a “Change in Law” event under Article 15 of the PPA.

(p) Regarding: Contention on Engaging EPC contractor by the Petitioners:

i) The respondents contended that the petitioners have engaged M/s. MEIPL as EPC contractor and they had entered into a Turnkey Agreement on 28.6.2017 for supply, installation and commissioning the solar power generation systems to their solar projects. This company is a holding company of the petitioners and is mere a supplier of solar power system and not a manufacturer. Further, stated that the Turnkey Agreement executed between petitioners and M/s MEIPL does not fall under arm's length transaction. The tax Invoices raised by MEIPL is an internal arrangement between related companies and it cannot be considered as regular transaction and acceptance of such transaction would affect the public interest adversely. Therefore, claims sought for additional capital cost by the petitioners in these petitions may not be considered.

ii) In view of issue raised by the respondents in above para, there is a need to examine the relevant provisions of the Request for Proposal (RfP) Document and also the provision of Articles of the PPA, which would enable this Commission to give its findings accordingly.

iii) This commission notes that the KREDL has issued a Request for Proposal (RfP) Document-Volume-I, dated 20.11.2015 for Development of 1200

MW Solar Power Projects in Karnataka. The extracts of relevant clause are given as under:

(a) Clause 1.1.1 of RfP stipulates that the developer shall be responsible for design, finance, engineering, procurement, construction, operation and maintenance of the project(s) under and in accordance with the provisions of the PPA to be entered into between the Developer and the concerned ESCOMs, and shall be vetted by the KERC.

(b) Article 2.1 of the PPA deals with scope of the Project.

The relevant provisions of this article set out as under:

“Article 2.1- The scope of the project shall mean and include, during the term of this agreement.

Article 2.1 (a) designing, construction, erecting, testing. Commissioning and completing the (Solar PV ground mount projects) and supply of contracted capacity.

Article 2.1 (b) Operation and Maintenance of the (Solar PV ground mount projects) in accordance with the provisions of this agreement.”

Article 2.1(c) Performance and fulfillment of all other obligations of the Developer in accordance with the provisions of this Agreement and matters incidental thereto or necessary for the performance of any or all of the obligations of the Developer under this Agreement.

(c) Clause 2.1.2 (a) of Rfp- states that the Bidder may be single business entity (“Single Business Entity”) or a group of entities (the “Consortium”), coming together to implement the project(s). However, no Bidder applying individually or as a

member of a Consortium, as the case may, can be a member of another Consortium for any Taluk.

- (d) Clause 2.1.16- Where the Bidder is a Single Business Entity, it may at its option, form an appropriate Special Purpose Vehicle under the Companies Act,1956/2013 (the" SPV") to execute the PPA and implement the Project.
  - (e) Article 21.1 Defines "Contractor" means the persons excluding other developer, as the case may be with whom the developer has entered into any of the EPC contract, the O&M contact, or any other agreement or a material contract for construct, operation and / or maintenance of the project or matters incidental thereto, but does not include a person who has entered into an agreement for providing financial assistance to the developer".
  - (f) Article 21.1 Defines "Other Developer" shall means all the bidders other than the single business entity/ consortium, declared as selected bidders under the RfP and the SPV, if any formed by the selected bidder, with whom the power purchase agreement is executed in accordance with the provisions of the RfP to undertake any project (s) thereunder.
- iv) The Commission observes that, in the instance case(s), the petitioners have entered a Turnkey Agreement for Supply of Energy System on 28.06.2017 with M/s MEIPL in each petition. Further, the Turnkey Agreement's clause 1- defines the terms "Contract Price" and "Plant Commercial Operation Date or Plant COD" and clause-2 defines the Scope of Supplier and Clause-3 stipulates Obligations of Supplier and relevant Schedules annexed to this agreement specify details thereof.

Clause-6-Consideration: clause 6.1 states that in consideration for performance of Scope, the Purchaser agrees to pay the Supplier and Supplier agrees to accept, the price as specified in Schedule-VI A (the "Contract Price"). The Contract Price shall be firm and fixed. However, the contract price would be exclusive of all taxes.

- v) The Commission notes that the Article 21.1 of PPA defines various terms inter alia " Contractor" which means a person or persons excluding Other Developer, as case may be, with whom the Developer has entered into any of EPC Contract, the O& M Contract, or any other agreement or material contract for construction, operation and /or maintenance of the Project or matters incidental thereto, but does not include a person who has entered into an agreement for providing financial assistance to the Developer. Further, it may be noted that the KREDL has received proposals from certain bidders including, inter alia, the M/s. Mytrah Energy (India) Private Limited formerly known as M/e. Mytrah Energy (India) Limited (the single business entity). After evaluation of the proposal received, KREDL had accepted the bid of the entity for development of 15 MW AC capacity of solar PV ground mount project at Sindagi, Hungund and Raibag. The Letter of Acceptance and Letter of Award were issued to the single business entity, requiring, inter alia, the execution of this Agreement. Further, the single business entity has promoted and incorporated the developer (Special Purpose Vehicle or SPV), in accordance with the terms of RFP

and requested present Respondent in each petition, through a letter to accept the Developer as the entity which shall undertake and perform the obligations and exercise the rights of the selected Bidder under the LOA, including the obligation to enter into this Agreement pursuant to the LOA for executing the Project. In view of above, this Commission observes that the petitioners have fulfilled the requirements as specified in RFP. The term "Contractor" is defined under Article 21.1 of the PPA which envisages that the petitioners can engage EPC contractor for designing, constructing, erecting, testing, commissioning and completion of the Solar PV ground mount project. In the present case(s), the petitioners have engaged M/s. MEIPL as EPC contractor for completion of all deliverable in relation to supply, installation and commissioning of solar energy system with a capacity of 17.25 MWp DC/17.40 MWp DC and entered a Turnkey Agreement dated 28.06.2017, this arrangement is within framework of PPA, because PPA does not prohibit the petitioner for engaging a EPC contractor for procurement, installation and commissioning the solar power project. The contention of the respondents that the petitioners should have purchased the solar power energy generating system from manufacturing company only, not from the supplier such M/s. MEIPL which is a holding company of the petitioners and contention of the respondents does not stand be the legal scrutiny, therefore, it is not tenable and liable to be rejected.



q) Regarding: not providing documents pertaining to payment of CGS

Tax and SGS Tax to the Government Authorities:

- i) The respondents have alleged that the petitioners have not provided sufficient details about the tax incidence suffered by the petitioners on account of introduction of GST Law and no GST tax payment receipts were produced in order to ascertain the exact GST Tax liability is being foisted on the respondents and no record is produced to show that GST tax levied on Tax Invoices raised against the petitioners by the EPC Contractor that GST tax charged in these invoices are remitted to concern Government Authority, without having such information/ documents the refund claims of GST tax made by the petitioners should not be considered by this Commission.
- ii) In this regard, this Commission observes that the petitioners have submitted the calculation sheet of pre-GST and post-GST regime tax rates applicable on solar energy generating system and incremental cost impact on their solar power projects along with CA certificate dated 28.08.2019 (Annexure-P-9) in each petition. Further, during the course of hearing and arguments, the petitioners have once again submitted a fresh Chartered Accountant's certificate dated 31.05.2021 by way of an affidavit duly signed by the authorized signatory. On the perusal of Tax Invoices raised by M/s MEIPL i.e., EPC contractor, in the name of the petitioners, it could be seen from there that CGST at the rate of 2.5% and 2.5%

SGST are levied on total price/consideration as "Part Consideration towards Renewal Energy Device: Solar Power Generating System". This shows that the EPC contractor has charged/collected the above stated taxes from the petitioners.

- iii) The respondents contended that the petitioners have not produced any detail on GST tax payment receipts, when and to which Government Authority, it was remitted. Hence, without having such specific information, the claims of additional capital cost sought by the petitioners from respondents, on account of introduction of GST laws, cannot be considered by this Commission and such prayer may be rejected.
- iv) In this regard, it would be appropriate to go through the relevant provisions of the Central Goods and Services Tax (CGST) Rules, 2017 about the requirements of registration of a person/dealer, that a person is required to levy tax at source, liability to remit the tax amount collected from purchaser of goods by the supplier to the government authority and filing of returns and types of forms that are to be used after Introduction of GST Laws. It may be noted that Central Board of Indirect Taxes and Customs, Ministry of Finance, Government of India has notified the Central Goods and Service Tax (CGST) Rules,2017 vide its Notification No.3/2017- Central Tax, dated 19.6.2017 and also notified subsequent amendments as well. Similarly, the Finance Department, Government of Karnataka has also notified the Karnataka Goods and Services Tax Rules,2017 vide

its Notification No. FD 47 CSL2017, Bengaluru, dated 29.6.2017. The relevant provisions of the aforesaid rules are as under:

(a) Rule 8 (1) of CGST Rules envisages that every person, other than a non-resident taxable person has to apply for registration.

(b) Rule 10 stipulates that the subject to the provisions of sub-section (12) of section 25 of the GST Act,2017, where the application for grant of registration has been approved under rule 9, a certificate of registration in Form GST REG-06 showing the principal place of business and additional place or places of business shall be made available to the applicant on the common portal and a Goods and Services Tax Identification Number shall be assigned subject to the following characters namely: -

- Two characters of the State Code;
- Ten characters for the Permanent Account Number of Tax Deduction and Collection Account Number;
- Two characters for the entry code; and
- One checksum character.

(c) Rules 12- stipulates that any person required to deduct tax in accordance with the provisions of section 51 or a person required to collect tax at source in accordance with the provisions of section 52 shall electronically submit an application, duly signed or verified through electronic verification code, in Form GST REG-07 for the grant of registration through the common portal, either directly or through Facilitation Centre notified by the Commissioner.

(d) Rule 26 prescribes the method of authentication: It says that all applications, including reply, if any, to the notices, returns including details of outwards and inward supplies,

appeals or any other document required to be submitted under the provisions of these rules shall be so submitted electronically with the digital signature certification or through e-signature as specified under the provisions of the Information Technology Act,2000.

(e) Rule 46 deals with Tax Invoice and stipulates that subject to rule 54, a tax invoice referred to in section 31 shall be issued by the registered person containing the following particulars, namely, -

- (i) Name, address and Goods and Services Tax Identification Number of the supplier.
- (ii) A consecutive serial number not exceeding sixteen characters, in one or multiple series containing or numerals or specials characters hyphen or dash and slash symbolized as “-“and “/” respectively, and any combination thereof, unique for a financial year;
- (iii) Date of issue
- (iv) Name, address and Goods and Services Tax Identification Number or Unique Identity Number, if registered, of the recipient;
- (v) Name, address of the recipient and the address of delivery, along with the name of the State and its code, if such recipient is un-registered and where the value of the taxable supply is fifty thousand rupees or more.
- (vi) Name, address of the recipient and the address of delivery, along with the name of the State and its code, if such recipient is un-registered and where the value of the taxable supply is less than fifty thousand rupees and the recipient requests that such details be recorded in the tax in voice;
- (vii) Harmonized System of Nomenclature code for goods or services

- (viii) Description of goods and services;
  - (ix) Quantity in case of goods and unit or Unique Quantity Code thereof;
  - (x) Total value of supply of goods or services or both
  - (xi) Taxable value of the supply of goods or services or both taking into account discount or abatement, if any;
  - (xii) Rate of tax (central tax, State tax, integrated tax, union territory tax or cess);
  - (xiii) Amount of tax charged in respect of taxable goods or services (central tax, State tax, integrated tax, union territory tax or cess);
  - (xiv) Place of supply along with the name of the State, in the case of a supply in the course of inter-State trade or commerce;
  - (xv) Address of delivery where the same is different from the place of supply;
  - (xvi) Whether the tax is payable on reverse charge basis; and
  - (xvii) Signature or digital signature of the supplier or his authorized representative.
- (f) Rule 56 cast responsibility upon registered person to maintenance of accounts by the registered person.
- (g) Rule 59 elaborates various Forms and manner of furnishing details of outward/inward supplies and Rule 60 prescribes Form and manner of furnishing details of inward supplies.
- (h) Rule 61 prescribes the Forms such as GSTR-1; GSTR-2; GSTR-3 and GSTR-3B and manner of submission of monthly returns electronically through the common portal either directly or through a Facilitation Centre.

- (i) Rule 62 (2) cast responsibility on every registered person furnishing the (statement under sub-rule (1) shall discharge his liability towards tax or interest payable under the Act or the provisions of the Chapter- VI of the Rules by debiting the electronic cash ledger.
- (j) Section 122 prescribes penalty of certain offences and Section132(d) of the GST Act,2017 envisages punishment to such person whoever commits any offence such as collects any amount as tax but fails to pay the same to the Government beyond a period of 3 months from the date on which such payment becomes due, shall be liable for punishment as prescribed under this section.
- v) The Commission notes that the authorized signatory on behalf of the individual petitioner has filed an affidavit dated 5.7.2021 stating in Para 5 that, "the GST as claimed in the present petition(s) has been paid to the Government by adjusting Input Tax Credit (ITC) in which no challan or receipt of GST payments is generated on the GST portal." In order to demonstrate that GST tax, as claimed in the present petition(s) has already paid to the Government, the petitioners along with the Affidavit have filed a true copy of Form GSTR-3B (page-15 to 35 in OP 65/2019, page-5 to 32 in OP 66/2019, page-9 to 35 in OP 67/2019 ), GSTR-2A (page 36-43, in OP 65/2019, page- 33 to 41 in OP 66/2019, page-36 to 41 in OP 67/2019) and Form GSTR-1 (Page 44 to 88 in OP 65/2019, page-42 to 78 in OP 66/2019, page-42 to 88 in OP 67/2019) and a true copy of status reports of the GST filings available on GST Web

Portal as annexed at Annexure-A-2 (page-88 to 97 in OP 65/2019, page-79 to 88 in OP 66/2019, page-89 to 98 in OP 67/2019). Further, he states that the contents of this Affidavit are true and correct to his knowledge, no part of it is false and nothing material has been concealed therefrom.

- vi) In view of the facts mentioned in above paras, we observe that the respondents have not appreciated the facts that there is vast change in methodology and procedures in pre-GST era and which are to be adopted after the introduction of GST Laws. Therefore, we are of the considered view that the contention of the respondents that petitioners have not furnished the details about the exact GST tax amount, payment receipt/challan, date and to which government authority it was remitted. The above stated contention of the respondents is not acceptable, because of the fact that the liability to collect GST tax from purchaser and remit it to the concerned government department lies with the seller, not on the purchaser of goods and services as envisaged under the aforesaid Rules. In the instant case, M/s. MEIPL who is an EPC contractor and responsible for supplying, installation and commissioning the solar power generating system at project sites of the petitioners and who has collected the GST taxes from the petitioners on total price/ value of the Renewal Energy Devices and raised Tax Invoices to the

petitioners as" part consideration towards Renewal Energy Devices: Solar Energy Generating System". Therefore, it is responsibility of the EPC contractor i.e. M/s. MEIPL to remit the GST tax amount collected from the petitioners to the concerned govern authority. However, this commission places reliance on the Chartered Accountant's certificate dated 28.8.2018 and an Affidavit dated 5.7.2021 by duly signed by the authorized signatory on behalf of the petitioners wherein it has been mentioned that GST as claimed in these petitions have been paid to the government and all norms as per" GST Laws" have been complied with by the petitioners and claims of the amount being made by the petitioners are correct as per effective taxes in pre and post "GST regime".

- r) Regarding: what amount of compensation may be allowed towards claims made for additional capital cost on account of "Change in Law" event under Article 15 of the PPA?
- i) Petitioners are seeking relief for additional capital cost of Rs.3,45,08,523 in OP No.65/2019; Rs.3,38,62,904 in OP No.66/2019 and Rs.3,87,11,470 in OP No.67/2019 incurred by them on account of "Change in Law" event due to introduction of GST Laws, on basis of tax invoices submitted by them with these petitions.
  - ii) The respondents have submitted in their written submissions on 3.8.2021 in each petition. In para 13 (iv) of the written submission, it



is stated that the petitioners have produced many Invoices dated, after the Scheduled Commercial Operation Date (SCOD) of these projects and respondents cannot be made responsible to bear extra cost on account of delay on the part of the petitioners in commissioning the solar power projects. It is a settled law that parties cannot take advantage of their own wrong. They further submitted that M/s. Mytrah Advait Power Private Limited had filed a separate petition as OP No.176/2017 before this Commission and sought condonation of delay in commissioning its solar project, which was rejected by this Commission vide its Order dated 29.5.2020 and said Order has attained finality. In view of above facts, the respondents contended that tax Invoices raised by M/s. MEIPL to the petitioners which are dated, after the due date of Scheduled Commissioning Dates i.e.; 17.10.2017 in OP Nos 65/2019 and 66/2019 and 29.9.2017 in OP No.67/2019 and seeking reimbursement of GST Tax claims on such invoices from the respondents may not be considered by this Commission, because, they are unable to comprehend the situation that how could the solar power plants be Commissioned/ synchronized without the full delivery of solar power energy Generation Systems/renewal energy devices at project sites. It is very much possible that these Invoices raised by MEIPL in the name of petitioners do not pertain to the instant projects and could have been procured for other projects of the petitioners. Therefore, it is submitted that Invoices

after the date of commissioning of the plants cannot be entertained by this Commission for considering the claims of GST tax sought by the petitioners in these petitions.

- iii) To examine the issue, as raised by the respondents in their written submissions dated 03.08.2021 and to give our findings on this regard, it would be appropriate to go through the relevant records available with these petitions. After going through the relevant records filed by all the parties, it is observed that the petitioners have entered PPAs dated 31.5.2016 and 15.7.2016 with respondents for setting up of 15 MW AC solar power plants in Sindagi, Hungund and Raibag taluks and these PPAs were approved on 17.10.2016 and 29.09.2016 by this Commission. The project's commercial operation period envisaged under Article 8.5 of PPA, was 12 months from the effective date i.e.; date of approval of PPA by KERC. The projects were scheduled to be completed on or before 17.10.2017 and 29.9.2017, but all projects had been commissioned beyond the stipulated time frame under the PPAs.
- iv) It is not in dispute that the petitioners have entered on 28.06.2017 a Turnkey Agreement with M/s. MEIPL, i.e. EPC contractor for supply of Solar Energy Systems with the a contract price of Rs.75,17,07,561 (exclusive all taxes) and amended contract price of Rs.71,10,25,358 in OP65/2019 (Annexure- P-5, Schedule- VI, page-215 and 225) ;

contract price of Rs.75,17,07,561 (exclusive all taxes) and amended contract price of Rs.71,10,25,358 in OP No. 66/2019 ( Annexure-P5, Schedule- VI, page 212 and 222) and contract price of Rs.84,00,51,920 and amended contract price of Rs.81,27,51,920 (inclusive all taxes) in OP No.67/2019 ( Annexure- P-5, Schedule-VI, page 208 and 218).

- v) It may be noted that the Clause -2 of Turnkey Agreement stipulates that the Supplier shall complete all deliverables in relation to supply, installation and commissioning of solar power generation systems, viz. plant with a capacity of 17.25 MWp/17.40 MWp at various sites of the petitioners within the period of Plant Commercial Operation Date (COD). Further, clause-3.1.3 stipulates that the supplier shall ensure that the Plant shall achieve its commercial operation date, which shall in no event be later than 15.2.2018 or any other date mutually agreed between the parties in writing in OP Nos.65/2019 & 66/2019 and 26.1 2018 in OP No. 67/2018. It could be seen from the commissioning certificate issued by concerned ESCOMs and CEIG, wherein, it is noticed that in OP No.65/2019, project is commissioned on 08.02.2018 (Annexure-P-11 at page-355, of Rejoinder); in OP No.66/2019 it is on 09.02.2018(Annexure-R-1, page-349-350 of Rejoinder) and in OP No.67/2019 is on 23.01.2018 in OP No.67/2018 (Annexure P-11, page -348-349 of Rejoinder).

- vi) The contention of the respondents that the petitioners have submitted certain Tax invoices which are dated, after the commissioning date of the solar plants and these are related to major materials like Renewal Energy Devices Solar Power Generating Systems, therefore, such invoice should not be entertained by this Commission.
- vii) The Commission notes that as per PPA the capacity of each solar power plant is mentioned as 15MW<sub>AC</sub>, whereas in Clause-2 read with Schedule-I of the Turnkey Agreement, the scope of supplier is specified stating that the supplier shall supply, install and commission the solar energy system with a capacity of 17.40 MWp DC in OP No.65/2019( Annexure-P5,Schedule-I, page -208); 17.40 MWp DC in OP No.66/2019( Annexure P-5, Schedule-I, Page 205) and 17.25 MWp DC in OP No.67/2019( Annexure-P5, Schedule-I, page 201). The Commission observes that while filing rejoinder dated 23.9.2020 in OP No.66/2019, petitioner has submitted a Letter No. CEIG/TEC/DWD-82/41174-80 dated 06.02.2018 of the Chief Electrical Inspectorate of Government (Annexure- R-1( colly) page-351-354)pertaining to approval of electrical installation to 15 MW Solar Power Plant of M/s Mytrah Advait Power Private Limited, wherein it is clearly mentioned that approval is accorded for electrical installation pertaining to 15 MW solar power project at Chintawadi village in Hungund taluk, comprising of 52,560 modules (320 Wp: 27000 Nos; 325 Wp: 25560 Nos), 9x1700kW,4000

Inverters, 3x5MVA,400-400-400 V/33kV, Inverter transformers and other accessories. In view of above facts, it is evident that in the instant case, the petitioner has procured solar power generation system with the higher capacity of 17.40 MWp DC against the 15 MW AC as agreed in the PPAs. Though, no such CEIG Electrical Installation approval was not furnished either by petitioners or respondents in other petitions OP Nos 65/2019 and 67/2019 but an inference could be drawn on the basis of scope of supplier for 17.40 MWp DC in OP No.65/2019 and 17.25 MWp DC in OP No.67/2019 as indicated in Schedule-I of the Turnkey Agreement dated 28.6.2017 in above stated petitions. The Commission further observes that the Tax Invoices raised by M/s MEIPL against the petitioners in these petitions for payment of "part consideration towards Renewal Energy Device: Solar Power Generation System" and GST tax charged on total price of consideration thereon, such tax invoices were raised them during the period, dated 01.09.2017 to 30.04.2018. However, the solar projects were commissioned on 08.02.2018 (OP No.65/2019); 9.2.2018 (OP No.66/2019) and 23.01.2018 (OP No.67/2019), It is relevant to note here that some of Tax Invoices raised by M/s MEIPL against the petitioners for payment of part consideration towards Renewal Energy Device: Solar Power Generation System are pertaining to the period, after the date of Commercial Operation Date of the Projects, this facts can also be noted from para 13(iv) and (v) of the written

submissions made on 03.08.2021 by the respondents. A question arises here is that how it could be possible for the petitioners to commercially operationalized these solar power projects, without getting all deliverables in relation to supply, installation and commissioning of the solar energy system at plant sites within the Plant COD as agreed in Clause 2 read with the terms of Schedule-III of the Turnkey Agreement. Further, This Commission notes that though the respondents have raised this issue in their written submissions, but no justification put forth by the petitioners in this regard, either by written or by oral submissions during the course of hearing.

- viii) Keeping of above-mentioned facts in view, we agree with the contention of the respondents that those invoices by M/s MEIPL raised in the name of petitioner as “part consideration towards Renewal Energy Device: Solar Power Generation System and CGST/SGST/IGST levied on Total Price of such Invoices by the EPC contractor for the period, after the date of actual Commercial Operation of the solar projects. If GST tax reimbursement sought by the petitioners on such tax invoices are allowed on account of “Change in Law” event due to introduction of GST Laws, then it would be additional financial burden on the respondents which cannot be foisted on the respondents and in turn it will be passed on the consumers as additional tariff. Further, the respondents

have made their contention that the Tax invoices dated, after the due date of scheduled commercial operation date (SCOD) i.e., 17.10.2017 in OP Nos. 65/2019 and 66/2019 and 29.9.2019 in OP No.67/2019 of these power projects should also be rejected for reimbursement claims of GST tax from respondents made by the petitioners in their petitions. In view of submissions made by the respondents, this Commission is of the considered opinion that it would not be appropriate to reject the claims made by the petitioners for reimbursement of GST tax levied on total price mentioned in these invoices which were raised by M/s. MEIPL to the petitioners for payment as "part consideration towards Renewal Energy Devices: Solar Power Generating System" and Supplies of such devices made by the EPC contractor during the period of Scheduled Commercial Operation Date (SCOD) as envisaged under Article 8.5 of the PPAs, on account of "Change in Law" event due to introduction of GST Laws. In view of the above, we do not agree with the contention of the respondents that the tax invoices raised by the EPC contractor in the name of petitioner after the due date of SCoD to be rejected for consideration of reimbursement of compensation as sought for by the petitioners in these petitions.

- ix) In the interest of solar power developers and as well as consumers, this Commission takes pragmatic view after hearing the arguments/ submission from the parties and considers that those

tax Invoices raised by M/s. MEIPL in the name of the petitioners before the actual date of Commercial Operation Date( COD) of each solar power project and 2.5% CGS Tax, 2.5% SGS Tax/ IGST levied on the total price on such invoices as “ part consideration towards Renewal Energy Device: Solar Power Generation System” sought for payment from the petitioners by M/s. MEIPL i.e, EPC contractor should be allowed for compensating the impact of the additional capital cost of the petitioners on account of introduction of GST Laws due to change in law event. The Commission observes that in Tax Invoices raised by M/s. MEIPL, the Invoice number, date, total price/consideration amount in description column is mentioned and 2.5% CGST,2.5% SGST/IGST and total tax amount and HSN No.8541 are also mentioned in respective columns. However, it is noted that a column pertaining to quantity, no quantity is indicated therein. It is pertinent to note here that large number of tax invoices raised by M/s. MEIPL against the petitioners for payment of part consideration towards renewal energy devices/ solar power generating system are dated, after the actual date of commercial operation of these solar power projects, and if the GST tax reimbursement claims on those Tax Invoices is allowed on account of introduction of GST Laws, then it would be an additional financial burden on the respondents and in turn it will be passed on to the consumers as additional tariff. In view of above, we are of the considered opinion that the tax



Invoices raised by M/s. MEIPL in the name of petitioners after the date of successful commercial operationalization of each power project and claims made on such tax invoices by the petitioners for reimbursement of GST taxes from the respondents are not justiciable, untenable and liable to be rejected. Thus, we reject such claims made by the petitioners for reimbursement of GST taxes in respect of such tax invoices raised by M/s. MEIPL, in the name of the petitioners, after the dates of Commercial Operation of these projects. However, this Commission allows the reimbursement of GST tax amount collected by M/s. Mytrah Energy (India) Private Limited from the petitioners on total price/consideration on such Invoices which were raised in the name of petitioners as "part consideration towards Renewal Energy Device: Solar Power Generating System" before or on the date of Commercial Operationalization of each project. The details of such tax invoices such as Invoice Number & Date, Description, Total Price/ Consideration, and total amount of GST tax (CGST, SGST/IGST) for each petition are given in the below Tables.

**OP No.65 of 2018****Table No-11**

Sl. No.	Vendor	Invoice No & Date	Description	Total Price / Consideration	CGST (2.5%)	SGST (2.5%)	IGST (5%)	Total GST Amount
1	2	3	4	5	6	7	8	9
1	MEIPL	MEIPL/SD/SG/07/1 01.09.2017	Part consideration towards Renewable Energy Device: SPGS	2,10,493	5,262	5,262		10,524
2	MEIPL	MEIPL/SD/SG/08/1 01.09.2017	Part consideration towards Renewable Energy Device: SPGS	61,09,454	1,52,736	1,52,736		3,05,472
3	MEIPL	MEIPL/SD/SG/09/1 08.09.2017	Part consideration towards Renewable Energy Device: Column Post	35,69,643	-	-	1,78,482	1,78,482
4	MEIPL	MEIPL/SD/SG/09/1 30.09.2017	Part consideration towards Renewable Energy Device: SPGS	35,44,212	88,605	88,605		1,77,210
5	MEIPL	MEIPL/SD/SG/10/1 31.10.2017	Part consideration towards Renewable Energy Device: SPGS	4,12,30,455	10,30,761	10,30,761		20,61,522
6	MEIPL	MEIPL/SD/SG/11/1 30.11.2017	Part consideration towards Renewable Energy Device: SPGS	3,80,64,527	9,51,613	9,51,613		19,03,226
7	MEIPL	MEIPL/SD/SG/11/2 30.11.2017	Part consideration towards Renewable Energy Device: SPGS	9,28,986	23,225	23,225		46,450
8	MEIPL	MEIPL/SD/SG/12/1 30.12.2017	Part consideration towards Renewable Energy Device: SPGS	7,16,98,706	17,92,468	17,92,468		35,84,936
9	MEIPL	MEIPL/SD/SG/01/1 31.01.2018	Part consideration towards Renewable Energy Device: SPGS	1,69,76,515	4,24,413	4,24,413		8,48,826
10	MEIPL	MEIPL/SD/SG/02/001 01.02.2018	Part consideration towards Renewable Energy Device: SPGS	61,73,536	1,54,338	1,54,338		3,08,676
Total				18,85,06,527	46,23,421	46,23,421	1,78,482	94,25,324

**OP No 66 of 2018****Table No-12**

Sl. No.	Vendor	Invoice No & Date	Description	Total Price/ consideration	CGST (2.5%)	SGST (2.5%)	IGST (5%)	Total GST Amount
1	2	3	4	5	6	7	8	9
1	MEIPL	MEIPL/HG/SG/07/1 01.09.2017	Part consideration towards Renewable Energy Device: SPGS	2,10,493	5,262	5,262		10,524
2	MEIPL	MEIPL/HG/SG/07/1 01.09.2017	Part consideration towards Renewable Energy Device: SPGS	2,10,493	-	-	10,525	10,525
3	MEIPL	MEIPL/HG/SG/08/1 01.09.2017	Part consideration towards Renewable Energy Device: SPGS	64,69,208	1,61,730	1,61,730		3,23,460
4	MEIPL	MEIPL/HG/SG/09/1 30.09.2017	Part consideration towards Renewable Energy Device: SPGS	6,16,064	15,402	15,402		30,804
5	MEIPL	MEIPL/HG/SG/10/1 31.10.2017	Part consideration towards Renewable Energy Device: SPGS	7,04,23,118	17,60,578	17,60,578		35,21,156
6	MEIPL	MEIPL/HG/SG/11/1 30.11.2017	Part consideration towards Renewable Energy Device: SPGS	5,63,48,150	14,08,704	14,08,704		28,17,408
7	MEIPL	MEIPL/HG/SG/11/2 30.11.2017	Part consideration towards Renewable Energy Device: SPGS	26,34,424	65,861	65,861		1,31,722
8	MEIPL	MEIPL/HG/SG/12/1 30.12.2017	Part consideration towards Renewable Energy Device: SPGS	4,19,56,425	10,48,911	10,48,911		20,97,822
9	MEIPL	MEIPL/HG/SG/01/1 31.01.2018	Part consideration towards Renewable Energy Device: SPGS	13,85,828	3,46,468	3,46,468		6,92,936
Total				19,27,27,103	48,12,916	48,12,916	10,525	96,36,357

**OP No.67/2019****Table-13**

Sl. No.	Vendor	Invoice No & Date	Discription	Total Price/ Consideration	CGST (2.5%)	SGST (2.5%)	IGST (5%)	Total GST Amount
1	2	3	4	5	6	7	8	9
1	MEIPL	MEIPL/RB/SG/07/1 01.09.2017	Part consideration towards Renewable Energy Device: SPGS	70,78,216	1,76,955	1,76,955	-	3,53,910
2	MEIPL	MEIPL/RB/SG/08/1 01.09.2017	Part consideration towards Renewable Energy Device: SPGS	1,08,92,564	2,72,314	2,72,314		5,44,628
3	MEIPL	MEIPL/RB/09/1 05.09.2017	Part consideration towards Renewable Energy Device: Torque Tube	2,85,23,197	-	-	14,26,160	14,26,160
4	MEIPL	MEIPL/RB/09/2 05.09.2017	Part consideration towards Renewable Energy Device: Purlin Hat	1,08,31,907	-	-	5,41,595	5,41,595
5	MEIPL	MEIPL/RB/09/3 12.09.2017	Part consideration towards Renewable Energy Device: Bearing Top & Bottom cast	17,32,693	-	-	86,635	86,635
6	MEIPL	MEIPL/RB/09/4 16.09.2017	Part consideration towards Renewable Energy Device: SPGS- Bearing Top & Bottom cast	13,86,154	-	-	69,308	69,308
7	MEIPL	MEIPL/RB/SG/9/1 30.09.2017	Part consideration towards Renewable Energy Device: SPGS	1,82,47,265	4,56,182	4,56,182		9,12,364
8	MEIPL	MEIPL/RB/SG/10/1 31.10.2017	Part consideration towards Renewable Energy Device: SPGS	6,09,95,989	15,24,900	15,24,900		30,49,800
9	MEIPL	MEIPL/RB/SG/11/1 30.11.2017	Part consideration towards Renewable Energy Device: SPGS	3,94,59,580	9,86,490	9,86,490		19,72,980
10	MEIPL	MEIPL/RB/SG/11/2 30.11.2017	Part consideration towards Renewable Energy Device: SPGS	38,51,208	96,280	96,280		1,92,560
11	MEIPL	MEIPL/RB/SG/12/01 30.12.2017	Part consideration towards Renewable Energy Device: SPGS	5,74,44,897	14,36,122	14,36,122		28,72,244
12	MEIPL	MEIPL/RB/SG/01/1 15.01.2018	Part consideration towards Renewable Energy Device: SPGS	52,00,00,000	1,30,00,000	1,30,00,000		2,60,00,000
Total				76,04,43,670	1,79,49,243	1,79,49,243	21,23,698	3,80,22,184

**The Abstract of Compensation of GST Amount is allowed as additional capital cost on account of “Change in Law” event under Article 15 of the PPA due to introduction of GST Laws.**

ABSTRACT**Table-14**

OP No.	Description	Total Amount/ Consideration	CGST (2.5%) levied	SGST (2.5%) levied	IGST (5%) levied	Total GST levied
1	2	3	4	5	6	7
Petition No.65/2019 Mytrah Advaith Power Pvt.Ltd Sindagi	Part consideration towards Renewable Energy Device: SPGS	18,85,06,527	46,23,421	46,23,421	1,78,482	94,25,324
Petition No.66/2019 Mytrah Advaith Power Pvt.Ltd Hungunda	Part consideration towards Renewable Energy Device: SPGS	19,27,27,103	48,12,916	48,12,916	10,525	96,36,357
Petition No.67/2019 Mytrah Akshay Energy Pvt.Ltd Raibag	Part consideration towards Renewable Energy Device: SPGS	76,04,43,670	1,79,49,243	1,79,49,243	21,23,698	3,80,22,184

(x) Issue No.2 ordered accordingly.

12. **Issue No.3:** Whether the claim of additional recurring O&M expenditure incurred/to be incurred by the Petitioners on account of Change in Law can be considered for the re-imbursement from Respondents?

a) The petitioners have prayed that the respondents may be directed to compensate in terms of Article 15 of PPAs for additional recurring O&M cost which will be incurred due to the introduction of GST laws by way of upfront lumpsum payment/adjustment in the quoted tariff along with the carrying cost. They have indicated such amount in para 5.2 of each petition. They submitted that at the time submitting their bid, they had factored O&M cost which is to be incurred during the life of the projects. However, the increase

in taxes, applicable to various O&M activities on account of introduction of GST Law has also increased the O&M cost of the petitioners and this incremental impact will have to be borne by the petitioners. Since this increase is on account of "Change in Law", the petitioners are entitled to relief for such increase. They have produced the Table in the petitions to demonstrate the incremental impact of GST Law on O&M cost. They have produced a detailed calculation on O&M for each project and its incremental cost impact with these petitions (Annexure P10).

b) The petitioners in their written submission dated 21.6.2021 have submitted that the O & M activities which are required to be undertaken by the petitioners have been outsourced to agencies that are experienced/ expertise in providing such services in the most effective and efficient manner and therefore, the petitioners after the introduction of GST regime are required to pay additional tax for the activities undertaken/ performed by such agencies. On this account the petitioners have internalized the cost of the afore-stated constituent of O&M then same would have increased the cost of the project. Further, after the introduction of the GST regime, the petitioners are required to pay additional cost to O&M agencies for the life of their respective projects, the same shall be allowed to be considered as change in law under the PPA and consequently the petitioners shall be allowed to claim compensation on account of additional cost required to pay O&M.

c) On account of Change in law event, the petitioners have incurred additional capital cost, therefore, the carrying cost /interest of 14.81% per annum is payable from the date of commissioning till the end of payment period. The carrying cost will have to be paid for the following three periods:

(i) Period -1: from the date as to when the petitioners incurred the additional cost on account of introduction of GST Law till the date of filing the present petitions.

(ii) Period-2: from the date of filing the present petition till the approval of Change in Law by this Commission; and

(iii) Period-3: from the date of approval of Change in law till the actual date of payment either through one-time upfront lumpsum payment or installment tariff as approved by this Commission.

d) As regards the carrying cost for the period-1 and 2 as mentioned above, the petitioners submitted that unless and until there is an express provision under PPA prohibiting the petitioners from claiming such cost on account of restitution, the petitioners should be legally entitled to be restored to the same economic position that it would have been if the Change in Law event would not have occurred.

e) The petitioners submitted that the restitution is an integral part of the compensation granted under Change in law, carrying cost, simply put, is

a compensation for the time and value of money. It is relevant to highlight the meaning of the word "compensation" as has been laid down by the Hon'ble Supreme Court in the matter of R.C. Cooper vs. Union of India(AIR1970 SC540) wherein it was held that "compensation means anything given to make things equal in value: anything given as equivalent, to make amends for loss or damage. "Further, the Hon'ble Supreme Court in case of Yadava Kumar vs. Divisional Manager, National Insurance Corporation Limited and Others (2010 10 SCC 341) held that "compensation is a comprehensive term and is aimed at restoring the party to same economic position as if no injury was caused."

- f) The petitioners contended that the carrying cost is nothing but compensation for the time and value of money or monies denied at the appropriate time. The petitioners have placed reliance on the Judgement of Hon'ble Supreme Court, in South Eastern Coalfields Limited Vs. State of Madhya Pradesh and Others (2003) 8 SCC 648 whereby the Hon'ble Supreme Court has held that interest is payable in equity in certain circumstances.
- g) The petitioners further averred that the economic position which sought to be restored in terms of Change in Law clause does not limit itself to a simple correlation of increased expenditure and corresponding compensation amount but ought to also include compensation in terms of carrying cost incurred in respect to the said change in law event. This is also supported by the principle of efficacy, as recognized in the case



of Nabha Power Limited Vs. Punjab State Power Corporation Limited and Others (Civil Appeal No.179 of 2017) which provides that a contractual term can be implied in the light of the express terms of the contract, commercial common sense and facts known to the parties at the time of entering into the contract. Further, a change in law clause being a restitution clause, demands that the petitioners should be compensated for all necessary and reasonable extra costs including carrying cost and interest on the additional cost incurred on account of change in law.

- h) Further, they have submitted that it is a well settled law by the Hon'ble Supreme Court in Secretary, Irrigation Department, Government of Orissa and Others Vs. G.C. Roy and Others (1992) 1 SCC 508 that unless and until the agreement between the parties specifically prohibits, the court in its discretionary power can allow interest pendent lite. Further, the Hon'ble Supreme Court in Central Bank of India Vs. Ravindra and Others. (2002) 1 SCC 367 has held that "Award of interest pendent lite and post decree is discretionary with the Court as it is essentially governed by the Section 34 of the CPC de hors the contract between the parties."
- i) Per contra, the respondents submitted that the petitioners have produced a tabular statement at Annexure-P-10 containing certain figures without any calculations as to how the said figures were arrived. No additional document has been provided by the petitioners to verify the figures in the statement as annexed with these petitions.

j) With regards to carrying cost claims made by the petitioners, the respondents submit that, it is a settled law that only if there is a provision in the PPA for restoration of developer to same economic position as if the change in law event has not occurred, the developer is eligible for carrying cost for such allowed change in law event from the effective date of change in law until the same is paid by the ESCOM as allowed by the appropriate authority by an order/judgement. In the present case(s), neither does the PPA entered into between the parties contain a single provision that permits/ stipulates restoring the solar power generator to the same economic position as prior to the change in law event, nor does it contemplate the payment of carrying cost or interest of any kind to the aggrieved party on account of change in law. The PPA is legally bidding contract entered into by the parties, reflecting the intension of both the parties and is bound by the terms of the same. Therefore, the petitioners are not entitled for restoration to the previous financial position, by way of interest/ carrying cost from the date of incurring till the date of reimbursement, as the PPA entered into by both the parties contains no provision of such relief. Further, they have submitted that this Commission, in the matter of ACME, Guledagudda Solae Energy vs. BESCO in OP No.98 of 2018 had an occasion to examine the issue of carrying cost in detail. This Commission was pleased to observe in the aforesaid order that the PPA in question, did not have any explicit or implicit provisions which allow carrying cost to be awarded to the concerned generator. It may be noted here that the PPA

provisions in the instant petitions as well as in case of M/s. ACME Guledgudda Solar Energy Vs. BESCO in OP No 98 of 2018 are similarly worded. Therefore, in the light of above decision of this Commission, the petitioner's prayer for seeking of carrying cost deserves to be rejected.

k) The respondents submitted that the Hon'ble CERC in Petition No.187/MP/2018 has held that the O&M stage can be broadly construed to be Post Construction Stage and same is covered under the services under GST Laws. The activities that constitute O&M with regard to solar plant are site security, consumables, breakdowns spares, annual maintenance contract, module cleaning, labour and water supply. In this regard, it is submitted that there will be no GST levied, if O&M services were undertaken by the Generator itself. In the event that such services are outsourced to a third party then, no claim for such additional tax payable on outsourced services can be considered to be change in law. In view of above, the respondents contended that claims of O& M cost and carrying cost sought by the petitioners are not justiciable. Hence, it is liable to be rejected.

l) In view of above rival contentions of both the parties, we proceed to examine as to whether prayer of the petitioners seeking additional O& M cost and carrying cost as "compensation "due to introduction of GST laws on account of change in law event, under the provisions of the Article 15 of the PPAs is permissible?

- (a) It would be appropriate to mention here that an O& M Agreement (in each petition) has been entered into entered on 27.7.2017 between the petitioners and M/s Mytrah Energy (India) Private limited. The scope of O&M agreement is that the Contractor shall perform the O& M services as set out in Schedule 1 of this agreement. For the performance of the scope of O&M to be provided by the contractor, Employer that is the petitioner shall pay to contractor charges as provided in Schedule -3 of the O& M agreement. Further, they have annexed an O&M cost detailed calculation table for each project for the period of 25 years as Annexure -P-10 to the petition. In this table they have shown the incremental O& M cost impact for each project. On perusal of the contents of Annexure -P-10 of the petition, this Commission observes that the projected O&M cost has been calculated on assumptions and service tax calculated thereon and without incurring as yet. The petitioners have failed to produce the reliable material/ document which could adduce that the petitioners have actually incurred such additional O&M expenditure for which they should be compensated on account of introduction of GST Laws.
- (b) This Commission observes that there is no specific provisions under the PPA for providing compensation of incremental O& M cost as sought for by the petitioners in these petitions.

(c) In this regard, the Commission further notes that the decision rendered by the Hon'ble CERC in Petition No.188/MP/2017, wherein upon analyzing this issue in depth, it came to the reasoned decision that unless carrying cost is stipulated in the PPA, the aggrieved party is not entitled to it.

(d) The Commission notes that in the Judgment of the Hon'ble Appellate Tribunal for Electricity (ATE) dated 13.4.2018 in Appeal No. 210 of 2018, in case of Adani Power Limited vs. CERC &Others, it was held that since Gujarat Bid-01 PPA has no provision for restoration to the same economic position as if the change in law has not occurred. Therefore, the question of allowing carrying cost will not arise. The relevant portion of the judgement dated 13.04.2018 reads as under:

Para 12 d) x "further, the provisions of Article 13.2 i.e., restoring 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 principles of restitution and judgment of the Hon'ble Supreme Court in case of Indian Council for Environ-Legal Action vs. Union of India & Others, 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 approval of the said event by the appropriate authority. It is also observed that the Gujarat Bid-01 PPA have no provision for restoration to the same economic position as if the Change in Law has not occurred. Accordingly, this decision of allowing carrying cost will not be applicable to the Gujarat Bid-01 PPA."

- (e) Reliance placed by this Commission on the Judgment of Hon'ble Supreme Court in the case of Union of India vs. Tulasiram Patel (1985 3 SCC 398), wherein it was held that "when express inclusions are specified, anything which is not mentioned explicitly is excluded". Therefore, this Commission notes that there are no explicit or implicit provisions available under the instant PPAs entered into by the parties which allows the O&M expenditure/ carrying cost on incremental project cost as sought by the petitioners on account of GST Laws to compensate them.
- (f) From the above judgements, the Commission notes that if there is a specific provision in the PPA for restoration of the petitioner to the same economic position as if no Change in Law event has occurred, then the petitioner is eligible for Carrying Cost. The Commission observes that in the instant petitions/case, PPAs do not have a specific provision for restoration of the petitioners to same economic position prior to the Introduction of GST Law regime. Therefore, the Commission is of the opinion that the claims to compensate the petitioner for the additional recurring O&M cost and carrying cost on account of introduction of GST Laws, are not tenable and liable to be reject.
- (g) Hence, we answer, Issue No.3 accordingly.

13. **Issue No.4:** Whether there is a need to evolve suitable mechanism to compensate the petitioners for additional non- recurring capital cost and recurring expenditure incurred by the petitioners on account of Change in Law event under Article 15 of the PPA?
- a) The petitioners have suggested the following methodologies which could be considered by the commission in following manner:
- (i) Option-1: Payment of entire aggregate claim amount, as lump sum amounts upfront, together with carrying cost may be allowed. The carrying cost is to be calculated on the basis of aggregated weightage average rate between cost of debt and cost of equity, that reflects the cost of this incremental investment towards capex.
- (ii) Option-2: Payment of entire aggregate claim amount, together with carrying cost up to COD, as an equated monthly instalment (EMIs), spread over a pre-determined period of time, starting from the COD. The carrying cost shall be calculated on the basis of an aggregated weighted average rate between cost of debt and equity, that reflects the cost of this incremental investment towards capex.
- (iii) Option-3: Payment of entire aggregate claim amount, together with carrying cost up to COD, in the form of an incremental tariff.
- b) The respondents submitted that in the unlikely event the introduction of GST is change in law, amount allowed by this Commission ought to be considered as compensation being paid to the petitioner and not to considered as capital cost. Hence, incremental tariff for the

balance tenure of PPA shall be determined by taking compensation amount allowed by this Commission divided by minimum contracted energy based on minimum contracted capacity utilization factor for remaining tenure of PPA.

- c) Keeping in view of the submissions made by both the parties and amount of compensation for incremental project cost due to introduction of GST Laws on account of Change in Law event, the Commission observes that payment of reimbursement of tax amount of GGST/ IGST and SGST as arrived at table 12 (aa) (vii) of this Order is not a huge amount, therefore, we are of the considered opinion that the payment may be made in two equal installments within 90 days from the date of this Order with single default clause.

14. **Issue No. 5:** What Order?

For the foregoing reasons, we pass the followings:

**ORDER**

- a) The Petitions are partly allowed.
- b) The petitioners are allowed compensation for additional capital cost as mentioned in column 7 of Table 14 of Para 11 (r) (ix) of this Order due to introduction of GST Laws on account of Change in Law event.
- c) No carrying cost and Operation and Maintenance (O&M) cost is allowed as sought by the petitioners.
- d) The payment of amount of CGS Tax/ IGS Tax and SGS Tax as mentioned in column 7 of Table 14 of para 11 (r) (ix) of this Order



shall be made by the respondents to the petitioners on two equal instalments within 90 days from the date of this order. If respondents fail to pay such amount within this period, then they shall be liable to pay interest at the rate of 6% per annum from the date of default after 90 days from the date of order, to the petitioners.

e) The original order is kept in OP No.65/2019 and the copy of it is kept in OP No.66/2019 & 67/2019.

sd/-

(SHAMBHU DAYAL MEENA)  
Chairman

sd/-

(H.M. MANJUNATHA)  
Member

sd/-

(M.D. RAVI)  
Member