CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 214/MP/2018 along with
IA Nos. 70/2018 and 101/2018

Coram:
Shri P.K. Pujari, Chairperson
Dr. M. K. Iyer, Member
Shri I.S.Jha, Member

Date of order: 6th of June, 2019

In the matter of

Petition under Section 79 of the Electricity Act, 2003 read with Article 13 of the PPAs dated 7.8.2008 in order dated 28.3.2018 in Case No. 104/MP/2017.

And
In the matter of

Adani Power (Mundra) Limited
"Adani House", Near Mithakhali Six Roads,
Navarangpura, Ahmadabad
Gujarat-380009 **…Petitioner**

Vs

1. Uttar Haryana Bijli Vitran Nigam Limited,
Shakti Bhawan, Sector 6 Panchkula,
Haryana– 134 109

2. Dakshin Haryana Bijli Vitran Nigam Limited,
Vidyut Sadan, Vidyut Nagar Hisar,
Haryana-125005 **…Respondents**

Parties Present:

Shri Amit Kapoor, Advocate, APMUL
Ms. Abiha Zaidi, Advocate, APMUL
Shri Jignesh Langalia, APMUL
Ms. Ranjita Ramachandran, Advocate, Haryana Utilities
Ms. Anushree Bardhan, Advocate, Haryana Utilities

ORDER

The Petitioner, Adani Power (Mundra) Ltd. (APMUL), has filed the present Petition for seeking clarification that the Petitioner is entitled for relief towards additional auxiliary consumption of Flue Gas De-Sulfurization (hereinafter referred to as 'FGD') on energy charges and direction to the Respondents to pay applicable compensation.

Background of the case:

2. The Petitioner has set up a 4620 MW Thermal Power Plant (hereinafter referred to as “Mundra Power Project”) in Special Economic Zone at Mundra, Gujarat consisting of four Units of 330 MW in Phase I and II Units, two Units of 660 MW in Phase III and three Units of 660 MW in Phase IV (7, 8 and 9). The Petitioner has entered into PPAs dated 7.8.2008 with Uttar Haryana Bijli Vidyut Nigam Ltd. and Dakshin Haryana Bijli Vidyut Nigam Ltd (hereinafter referred to as “Haryana Utilities/Respondents”) for supply of 1424 MW power from Phase IV of the generating station.

3. The Petitioner filed Petition No. 156/MP/2014 for seeking compensation on account of certain change in law events including the installation of FGD. The Commission while considering the claims, in its order dated 6.2.2017 granted liberty to the Petitioner to submit its claim for FGD through a separate Petition. Pursuant to liberty granted, the Petitioner filed Petition No. 104/MP/2017 seeking reimbursement of expenditure for installation and operation of FGD' Plant in Units 7, 8 and 9 of Mundra Power Plant under “Change in Law” provisions of the Power Purchase Agreements dated 7.8.2008 between the Petitioner and Haryana Utilities. The Commission in its

order dated 28.3.2018 in Petition No. 104/MP/2017 allowed Change in Law relief to the Petitioner towards installation and operation of FGD in terms of additional capital cost, O & M expenses and additional auxiliary power consumption. However, the Haryana Utilities denied payment of compensation for auxiliary consumption over energy charge on the ground that the Commission`s order dated 28.3.2018 was limited to the grant of auxiliary consumption on the capacity charges and that it cannot be read to include quoted energy charges.

4. The Petitioner has submitted that such an interpretation is patently incorrect since the Commission never held that Adani Power is not entitled for relief on energy charges. The auxiliary consumption has to be considered for the Phase-III as a whole and not separately for energy charges and fixed charges. Auxiliary consumption cannot be considered differently for computation of fixed and energy charges under the same PPA/Phase of the plant. Moreover, as per the Commission`s order, the impact of additional auxiliary consumption during operating period is to be reimbursed to the Petitioner. Therefore, the contention of the Respondents that the Commission has not allowed relief towards impact of additional auxiliary consumption on energy charge is not tenable. The Petitioner has submitted that the Commission has also held installation of FGD as change in law as per the provisions of the PPA and if relief is not granted on energy charge, the Petitioner shall not be put to the same economic condition as if change in law has not occurred which is contrary to the principle of restitution under Article 13.2 of the PPA. Adani power`s ability to supply more energy from the generated power is reduced to the extent of auxiliary consumption on account of FGD and there

will be consequent revenue loss in terms of both capacity charge and energy charge.

5. Against the above background, the Petitioner has filed the present Petition along with following prayers:

> *"(a) Issue clarification that the Petitioner is entitled for relief towards additional auxiliary consumption of FGD on Energy Charge in addition to capacity charge; and*
>
> *(b) Direct the Respondent to pay applicable compensation of additional auxiliary consumption of FGD on energy charge for the energy scheduled to the Respondent every month."*

I.A. No. 70/2018

6. The Petitioner has filed IA No. 70/2018 for approval of carrying cost from the date the change in law events have affected the Petitioner. The Petitioner has made the following prayers in the IA:

> *"(a) Approve carrying cost from the date the change in law event have affected the Petitioner to the date of order by the Commission in the present case at the rate claimed by the Petitioner in Para 9 above; and*
>
> *(b) Pass such further orders or directions as this Commission may deem juist and proper in the circumstances of the case."*

7. The Petitioner has submitted the following in the IA:

a) APTEL in its judgment dated 13.4.2018 in Appeal No. 210 of 2017 (Adani Power Ltd Vs CERC & Others) has held that the impact of Change in Law is to be done in the form of adjustment to the tariff which is nothing less than re-determination of the existing tariff and interest (i.e. carrying cost) is payable till re-determination of tariff. APTEL has also held that the provisions of Change in Law i.e. restoring the Appellant to the same economic position as if Change in Law has

not occurred is in consonance with the principle of 'restitution' i.e. restoration of some specific thing to its rightful status. Based on above Judgment, MERC (Maharashtra Electricity Regulatory Commission) in its order dated 19.4.2018 has allowed carrying cost while approving Change in Law compensation in Case No. 102 of 2016 at the rate applicable for working capital interest calculation as per MYT Regulations, 2011.

b) As per the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999, the Commission has inherent powers to make such orders as may be necessary for ends of justice and the Commission enjoys general powers to amend its decision in order to determine the real question or issue. Such amendment in the Impugned order is also essential to avoid multiplicity of proceedings and in the interest of natural justice since the grant of carrying cost is now merely an academic exercise in view of APTEL`s Judgment dated 13.4.2018 in Appeal No. 210 of 2017.

c) In view of the unavailability of fund for meeting the additional expenditure related to increased fuel expenses (i) consequent to Indonesian regulation, (ii) shortage in domestic coal supply by Coal India Ltd, and (iii) various change in law events, the Petitioner had to borrow additional loans as the revenue recovery at quoted tariff does not cover such new expenditure. It would be prudent to consider actual interest rate of 10.89% for computing carrying cost in the present case as considered in Petition No. 235/MP/2015. The Petitioner has submitted the comparison of interest rate for Working Capital under the Central Electricity

Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 and Late Payment Surcharge (LPS) under the PPA as under:

Period	Working Capital Interest Rate as per CERC Regulations	LPS Rate as per PPA
2015-16	13.04%	16.29%
2016-17	12.79%	16.04%
2017-18	12.43%	15.68%

d) In case of unavailability of fund in any month, the seller has to arrange the fund from various other sources by way of payment of compounding interest. Therefore, in order to correctly adhere to the principle of restitution, the Procurers are required to be compensated for the carrying cost on compounding basis.

IA No. 101/2018:

8. The Petitioner has filed another IA No. 101/2018 along with the following prayers:

"(a) Approve Rs 106.95 crore of IDC and FERV as against the provisionally approved Rs. 75.74 crore in order dated 28th March 2018 in Petition No. 104/MP/2017;

(b) Approve compensation for Capacity Charge at the rate of 13.07% of quoted Capacity Charge as against 12.44% approved provisionally earlier.

(c) Approve provisional O&M expenses @ 10.25 crore per annum pending prescription of norms by CEA.

(d) Allow Carrying Cost on prayer "a", "b" and "c" in line with the decision in IA No. 70 of 2018 in Petition No. 214/MP/2018 filed with this Commission."

9. The Petitioner in the IA has submitted as under:

a) The Commission in its order dated 28.3.2018 in Petition No. 104/MP/2017 has allowed the installation of FGD as a Change in Law event and also approved capital cost of Rs. 616.81 Crore including provisional amount of Rs. 75.74 Crore

for IDC and FERV as against claimed Capital Cost of Rs. 646.22 Crore. Pursuant to the liberty granted by the Commission to true up Interest During Construction (IDC) and Foreign Exchange Rate Variation (FERV) based on submission of documents duly supported by Auditors Certificate in Petition No. 104/MP/2017, the present I.A. has been filed.

b) The Auditors have carried out detailed due diligence and certified the IDC and FERV amount to be Rs.106.95 crore as against the amount of Rs.105.16 crore originally claimed by the Petitioner and the same has been captured in the order dated 28.3.2018. This is on account of capitalized FERV of Rs. 1.79 crore beyond Commercial Operation Date i.e. 29.1.2014 to 31.8.2018 as per Accounting Standards which allows FERV capitalization beyond Commercial Operation Date till the payment of Foreign Denominated Debt/LC/Capital Creditors etc. In view of above, the total capital cost of the FGD to be admitted finally arrives to be Rs. 648.01 crore comprising of Rs. 541.06 crore (Admitted Hard Cost of FGD vide Order dated 28.3.2018) and Rs. 106.95 crore (Audited IDC and FERV).

c) As regards consequential relief, the Petitioner has submitted that considering gross generation capacity of 1565.66 MW at Generator Terminal at Mundra end corresponding to 1424 MW at Haryana Periphery based on Auxiliary Energy Consumption of 6.38% and transmission losses of 2.85% of March 2014, the capital cost attributable to Haryana PPAs comes out to be Rs. 512.41 crore (Rs. 648.01 crore X (1565.66 MW / 1980 MW)) and the relief on capacity charge comes out to be 13.07% (Rs. 512.41 crore/Rs. 8.9 crore X 0.227%), provisional O&M expenses at 2% per annum of capital cost for Haryana PPA i.e. Rs. 10.25

crore per annum. The Petitioner has also sought carrying cost on the final IDC and FERV components in the capital cost, revised Capacity Charge owing to increased IDC and FERV as well as the revised O&M expenses.

10. Notice was issued to the Respondents to file reply on the Petition and IAs. Reply to the Petition and IAs have been filed by the Haryana Utilities.

11. The Respondents, Haryana Utilities in their joint reply dated 6.10.2018, have submitted that they have entered into the Power Purchase Agreements with Adani Power Limited and not with Adani Power (Mundra) Limited and that they have not recognized the acquisition of the Mundra Power Project Units 7,8 and 9 by the Petitioner and no supplementary agreement recognizing such transfer is executed. Therefore, the Petition filed by Adani Power (Mundra) Limited is liable to be rejected as not maintainable. The Respondents have further submitted as under:

a) The order dated 28.3.2018 was passed by the Commission to give effect to the claim for change in law made by the Adani Power under the PPA dated 7.8.2008 and the Commission has granted compensation under change in law for operational expenditure and auxiliary consumption on account of the installation of FGD .

b) The Petitioner is entitled to relief only as allowed in the order dated 28.3.2018 and cannot claim any relief in deviation or in addition to those considered and allowed in para 45 to 49 of the order.

c) The Commission in para 49 of the order dated 28.3.2018 has provided for O&M expenses provisionally at the rate of 2% per annum of the capital cost of FGD subject to adjustment in the light of the norms to be prescribed by the CEA.

d) Even as mentioned in the letter dated 27.4.2018, the claim made by the Petitioner was only the increase in the capacity charges for auxiliary consumption and it is trite that the Commission could not have granted a relief not even sought by the Petitioner. This is also clear from the paras 45 to 47 of the order wherein the reference is only to the impact on capacity charges.

Rejoinder by the Petitioner:

12. The Petitioner in its rejoinder dated 17.12.2018, has submitted as under:

a) The Respondents' claim that the Petition being filed by APMuL and not APL is not maintainable is incorrect. The National Company Law Tribunal ("NCLT") Ahmedabad Bench vide its order dated 3.11.2017 has duly approved the Scheme of transfer of Mundra Thermal Power Station to Adani Power (Mundra) Limited in terms of Section 232(4) of the Companies Act, 2013. Accordingly, all assets, liabilities, contracts and obligations of the Mundra undertaking including generation assets stands transferred from Adani Power Ltd. to the Petitioner vis-à-vis the PPAs dated 7.8.2008 with the Haryana Utilities. The NCLT Order is a legal arrangement and binding on all the concerned parties including the Haryana Utilities. The Petitioner had duly informed the Respondents about the scheme of arrangement approved by NCLT and also requested them vide letter dated 5.10.2018 to execute a tripartite agreement for effective implementation of the NCLT approved scheme. However, the Respondents have not responded to this

request and are instead contesting the maintainability of the Petition for lack of supplementary agreement. NCLT approved scheme was taken cognizance of by the Commission in Petition No. 97/MP/2017 and 235/MP/2015 wherein the Haryana Utilities were also a party. Similar objections were raised by the Respondents in Petition No. 24/RP/2018. However, the same was not pressed by the Respondents at the time of arguments and are now precluded from taking the same objection.

b) The Respondents are not paying legitimate dues on the basis of an incorrect interpretation of the order and in the garb of technicality. By withholding payments in relation to the additional AEC on Energy Charge, the Respondents are denying the contractual right of the Petitioner to be restored to the same economic position that was altered on account of the adverse impact of the Change in Law event in terms of the PPA.

c) Due to installation of the FGD, not only is the generation capacity blocked but the energy available for sale will reduce resulting into reduction of the revenue apart from additional AEC. In order to compensate for the additional capital expenditure, relief has to be provided through increased Capacity Charges. For increased O&M charges, the relief has to be granted through additional O&M expenses. Similarly, to the extent of increase in Auxiliary Consumption in FGD, the energy available for sale will reduce and therefore, the relief has to be provided through additional auxiliary consumption on both Capacity Charge and Energy Charge. The Commission has granted relief as captured at para 47 of the order without any restriction which must be honoured by the parties. The Petitioner has

raised the invoice seeking relief for additional Auxiliary Consumption over both the Capacity Charge and Energy Charge. However, the Respondents have refused to honour the relief.

d) The Commission, in Para 47 of Order in Petition No. 101/MP/2017, has clearly directed Haryana Utilities to reimburse the Petitioner for actual AEC on account of operation of FGD which requires relief of additional auxiliary consumption on Energy Charge and not only the Capacity Charge. The interpretation of the Haryana Utilities that the decision of the Commission with respect to the additional auxiliary consumption is restricted to relief for only the Capacity Charge is not only adding words to the order of the Commission but also contradicts the PPA provisions to restore the affected party to the same economic position.

Submissions of the Respondents in IA No. 70/2018:

13. Haryana Utilities vide its reply dated 26.9.2018 to the IA No. 70/2018 have re-iterated the submissions made in the reply of the Petition and have submitted as under:

a) The IA does not arise out of any of the prayers contained in the Petition No. 214/MP/2018 and goes beyond the scope of the issues for consideration in the main Petition. It is well settled principle that the interim relief is in aid of and ancillary to the main relief which may be available to the party on final determination of its rights. Since, the Commission in its order dated 28.3.2018 had rejected the issue of carrying cost, the Petitioner is not entitled to claim carrying cost.

b) The Petitioner has filed an Appeal before APTEL against the order dated 28.3.2018 in which the same issues have been raised. Therefore, the same issues raised in Appeal or which could have been raised in Appeal cannot be raised in this IA. The principle of the restoration to the same economic position cannot be read in isolation and the Petitioner is not entitled to claim any relief for carrying cost or otherwise on the basis of Article 13.2 alone de-hors of the provisions of Article 13.4 read with Article 11.8 of the PPA.

c) The question of LPS arises when a bill or supplementary bill is raised and the payment towards the same is not made within the stipulated date. The LPS or carrying cost cannot be held admissible in respect of the period prior to the issue of supplementary bills.

d) Since the carrying cost has been rejected by the Commission, there cannot be any exercise of regulatory powers by the Commission or powers under the provisions of the Conduct of Business Regulations to grant carrying cost.

e) Since, no Appeal has filed by the Petitioner against the order dated 28.3.2018, it has become final and binding. The decision of APTEL in order dated 19.4.2018 is not binding on the Commission and if the contention of the Petitioner is allowed then the principles of res judicata would never apply as a party can repeatedly see re-adjudication of the same issue under the guise of an amendment of an order. Accordingly, there is no general or otherwise any power to amend any order or decision of the Commission.

f) Any carrying cost cannot exceeding 9% per annum which was allowed in the order dated 28.9.2017 in Petition No. 97/MP/2017.

Rejoinder by the Petitioner in IA No. 70/2018:

14. The Petitioner in its rejoinder dated 17.12.2018 has mainly submitted that both Main Petition as well as IA pertain to a common issue of Change in Law relief on FGD. The Petitioner has submitted as under:

a) An Interlocutory Application means an application to the court in any suit, appeal or proceeding already instituted in such court, other than a proceeding for execution of a decree or order. There is no such embargo with regard to scope of IA as claimed by the Respondents.

b) APTEL vide its judgment dated 13.4.2018 in Appeal No. 210 of 2017 has held that Carrying Cost is not only permissible but is required to meet the ends of justice as there will always be a time lag between the Change in Law and its approval by the Commission. This being a question of law which has been settled by APTEL, there is no case of res judicata. The Hon'ble Supreme Court in the cases of Mathura Prasad Bajoo Jaiswal & Ors. V. Dossibai N. B. Jeejeebhoy [(1970) 1 SCC 613], Canara Bank V. N. G. Subbaraya Setty [(2018) SCC OnLine SC 427], Satyendra Kumar and Ors. V. Raj Nath Dubey & Ors.[(2016) 14 SCC 49] has held that principle of Res-Judicata does not apply when an issue involves question of law, as in the present case.

c) The Respondents, by referring to Article 11.8 of the PPA, have tried to confuse the Commission as the said Article relates to Late Payment Surcharge whereas the present matter relates to carrying cost. Late Payment Surcharge is applicable when one party has not paid the bill raised to the other party by due date as per Contract. However, Carrying Cost is applicable for the period where

one party enjoys the usage of cash / working capital at the cost of other party due to reasons such as procedural delays etc. To stop such unjust enrichment and to restore the other party to its original economic position, Carrying Cost is awarded.

d) As regards rate for carrying cost, the actual interest rate at which APMuL borrowed capital is 10.89% on monthly compounding basis. Any other ad-hoc rate would not serve the purpose. In the order dated 28.9.2017 in Petition No. 97/MP/2017, the Commission granted only an interim relief. Both, the relief at 75% of the claim up to March 2017 as well as the interest rate of 9% were ad-hoc orders subject to final decision and this rate has no link to the interest rate considered in terms of the PPA to restore the affected party to the same economic position.

Reply of the Respondents in IA No. 101/2018:

15. The Respondents vide its reply dated 5.10.2018 to the IA No.101/2018 have submitted as under:

a) Each of the claims made by the Petitioner is higher than the prudent and reasonable costs that are to be considered by the Commission with reference to cost plus projects and therefore, cannot be allowed. There is no reason for the actual costs to be higher than the normative 14% considered by the Commission. Further the claim of IDC and FERV of Rs. 106.95 crore is 19.76% of Rs. 541.06 crore which is much higher than 14%. Such claim is higher than the amount of Rs. 105.16 crore claimed earlier which itself was claimed in the Petition filed in 2017. There is no rationale for the costs increasing beyond 2017. In fact, there can be no capital cost beyond the COD date of 29.1.2014.

b) The Petitioner has vaguely referred to the Accounting Standards without producing the same. In any case, the Accounting Standards are for Petitioner and such standards are there to provide information to the stakeholders of the enterprise but they do not create any additional liability on other entities such as the Procurer-Respondent. The Commission has already rejected such contentions raised by generators on basis of Accounting Standards in its order dated 30.3.2015 in Petition No. 6/MP/2013 in the case of Sasan Power Limited and the said order has been upheld by APTEL vide its judgment dated 19.4.2017 in Appeal No. 161 of 2015. The capital costs are to be considered only for the construction period which comes to an end on COD.

c) The computation made by the Petitioner is incorrect as the PPA provides for the increase in capacity charge for every increase of Rs. 8.9 crore. If the block of increase is less than Rs. 8.9 crore, there is no relief for such increase until the amount crosses Rs. 8.9 crore. Therefore, for an increase of Rs. 7 crore, there is no corresponding increase in capacity charge. For increase of Rs. 10 crore, there would be a corresponding increase of 0.227% only i.e. one block of Rs. 8.9 crore. For Rs. 17.8 crore (8.9*2), there would be an increase of 0.227% + 0.227% in capacity charges. Therefore, even assuming but not admitting the amount of Rs. 512.41 crore, the increase would be considered as 57 X 0.227 (12.93%) and not 57.57 X 0.227 (13.068%) as considered by the Petitioner. There is an arithmetical/ clerical error or accidental omission in the earlier order which can be corrected under Regulation 103A of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999.

d) The allowance of carrying cost in another matter does not change or modify a specific finding given in the order dated 28.3.2018 which is sought to be implemented. Once the claim has been rejected, the only alternate for the Petitioner is to challenge such rejection and not file another Petition/Application claiming the same relief again. In the present case, the Petitioner has delayed in filing the information and cannot claim carrying cost for such period. The Petitioner had not filed the relevant documents at the time of filing of the Petition. In this regard, APTEL vide its judgment dated 22.4.2015 in Appeal No. 174 of 2013 (Punjab State Power Corporation Limited v. Punjab State Electricity Regulatory Commission) has considered the delay in providing complete documents as a reason for denying carrying cost. There can be no change in the O&M costs as there is no change in capital costs.

Rejoinder by the Petitioner in IA No. 101/2018:

16. The Petitioner in its rejoinder dated 31.1.2019 to the reply of IA. No. 101/2018 has submitted as under:

a) IDC, as a matter of industry practice, is always project specific and dependent upon the two variables namely (i) duration of construction period and (ii) the interest rate during construction which differs with different kinds of projects/industry. Therefore, to arrive at the amount of soft cost, a generalized percentage of hard cost cannot be considered as a point of reference to deduct the otherwise approved capital cost by the Commission. Since the above components of IDC are not same for each project, IDC cannot be considered as a standard

percentage for all the projects as the same will defeat the principle of restituting the affected party to the same economic position.

b) FERV is dependent upon the date of ordering of equipment or the date of disbursement of foreign currency loan and closing date for which the accounts are prepared. Since the above dates vary from case to case, there cannot be a standard FERV possible for the purposes of computation of the capital cost. As per CERC Tariff Regulations, FERV is not a controllable factor and any change in FERV ought to be allowed on actual basis. The intent of the Commission was to 'true up' the expenditure provisionally (at 14%) allowed on IDC and FERV upon submission of the documents duly supported by Auditor's certificate.

c) As per Para 46 A of the Accounting Standard-11 (The Effects of Changes in Foreign Exchange Rates), the difference in the exchange rate arising out of reporting of long-term foreign currency items at rates different from those initially recorded during the period, or reported in previous financial statements, in so far as they relate to the acquisition of depreciable asset, can be proportionately added or deducted from the cost of the asset. The liability of the Petitioner increases with the increase in foreign exchange rate and such increased liability is to be reimbursed as per Change in Law provision of PPA.

d) The facts of the Commission`s order dated 21.2.2014 in Petition No. 14/MP/2013 (Sasan Power Limited v. MP Power Management Company Ltd.), can be distinguished from the case of Petitioner; on account of the factual matrix and grounds of adjudication being admissibility of Minimum Alternate Tax as an expense, which in the present case is regarding FERV on loan.

e) With regard to relief at the rate of 13.07% on the revised capital cost of Rs. 512.41 crore, the Petitioner has submitted that clause 13.2 of the PPA has nowhere provided that in case the capital cost incurred by the Petitioner is not perfectly divisible by the amount of Rs. 8.9 Crore then the capital cost has to be rounded off downwards for the purpose of relief. There is no explicit mention of the alleged understanding in the PPA and hence accepting the Respondents' contentions would tantamount to adding words to the Agreement which would be against the Rules of Interpretation of Contracts. The Commission`s order dated 28.3.2018 has not been challenged by Haryana Utilities before any fora and accordingly, it has attained finality.

f) Restitution is not possible if the corresponding carrying cost is not paid as an adjustment towards time value of money that has been well accepted as an integral part of the principle of restitution by the Hon'ble Supreme Court in the case of Indian Council for Enviro-Legal Action vs. Union of India & Ors. [(2011) 8 SCC 161]. In order to give effect to the above principle, Article 13.4 of the PPA reads that the compensation payable for Change in Law event shall be effective from the date of Change in Law. Since there is always time lag between the occurrence of Change in Law event and its approval by the Appropriate Commission, the only way for restitution is when the corresponding carrying cost is paid towards time value of money in addition to the compensation towards Change in Law.

17. The Petitioner and the Respondents have filed their written submissions dated 14.3.2019 where the Petitioner and the Respondents have mainly reiterated the

submissions made in the Petition and their replies.

Analysis and Decision:

18. The Petitioner has filed the present Petition for seeking direction to the Respondent, Haryana Utilities to pay the applicable compensation with regard to additional auxiliary consumption of FGD on energy charge for the energy scheduled to the Haryana Utilities. The Petitioner has filed Interlocutory Applications No. 70/2018 and 101/2018 for seeking carrying cost and true up of capital cost in relation to the relief granted for FGD only. The Respondents have challenged the maintainability of the Petition on various grounds. Based on the submissions of the parties and documents on record, the following issues arise for our consideration:

Issue No. 1: Whether the Petition is maintainable?

Issue No. 2: Whether the Petitioner is entitled to increase in Energy Charge on account of additional auxiliary consumption of FGD in terms of the order in Petition No. 104/MP/2017?

Issue No. 3: Whether the Interlocutory Applications are maintainable?

Issue No. 4: Whether the Petitioner is entitled to Carrying Cost?

Issue No. 5: What is the quantum of IDC and FERV for which relief can be granted ? And what would be the consequential relief in capacity charge and O&M expenses?

Issue No. 1: Whether the Petition is maintainable?

19. The Respondents have challenged the maintainability of this Petition on the ground that the Power Purchase Agreements dated 7.8.2008 were entered into by the Respondents with Adani Power Limited and not with Adani Power (Mundra) Limited and

Respondents have not recognized the acquisition of the Mundra Power Project generating units 7, 8 and 9 by Adani Power (Mundra) Limited from Adani Power Limited and there is no supplementary agreement recognizing the transfer of the Mundra Power Project - Units 7, 8 and 9 to Adani Power (Mundra) Limited under the scheme of amalgamation or de-merger or any such reconstruction.

20. In our opinion, contention of the Respondent is misplaced as scheme of De-merger was approved by National Company Law Tribunal (Ahmedabad Bench) ("NCLT") vide its Order dated November 03, 2017. The approved Scheme envisages that the 'Mundra Power Generating Undertaking' (including all the estate, assets, rights, claims, title, interest and authorities including accretions) shall be transferred to and vested in APMuL upon the coming into effect of the Scheme and with effect from the Appointed Date of March 31, 2017 without any further act or deed. As defined in the Scheme, the Mundra Power Generating Undertaking, inter alia includes, (a) 4620 MW Thermal Power Plant set up and commissioned on an area of 293.9910 hectares in the multi product Special Economic Zone ("SEZ") at Villages Tunda and Siracha, Taluka Mundra, District Kutch, Gujarat, and (b) all contracts, agreements including Power Purchase Agreements, Coal Linkages Agreement, an all other arrangements, undertakings, deeds, bonds and other instruments of whatsoever nature and description, whether written, oral or otherwise and all rights, title, interests, claims and benefits thereunder as pertaining to the Mundra Power Generating Business. Therefore by virtue of the Order of the NCLT, the Mundra Power Generating Undertaking including the PPAs stand transferred to APMuL upon the Scheme being effective.

21. During proceedings before the Commission in Petition No. 97/MP/2017, the Petitioner had vide affidavit dated 2.1.2018 submitted that NCLT, Ahmedabad bench vide its order dated 3.11.2017, had approved arrangement between Adani Power Ltd. and Adani Power (Mundra) Ltd. The Commission had observed as under:

> *"2.During the pendency of the petition before the Commission, the Petitioner vide its affidavit dated 2.1.2018 has submitted that Learned National Company Law Tribunal, Ahmedabad vide order dated 3.11.2017 has sanctioned the arrangement between Adani Power Limited (Transferor Company) and Adani Power (Mundra) Limited (Transferee Company) whereby the 4620 MW Mundra Power Project of Adani Power Limited stand vested with Adani Power (Mundra)Limited. The Petitioner has also placed a copy of the order of the Learned National Company Law Tribunal, Ahmedabad on record. The Petitioner has requested that the newly formed Adani Power (Mundra) Limited may be taken on record in place of Adani Power Limited. On perusal of the common order dated 3.11.2017 in CP (CAA) No. 104/NCLT/AHM/2017 with CP (CAA) No. 105/NCLT/AHM/2017, we find that the scheme of arrangement between Adani Power Limited and Adani Power (Mundra)Limited has been sanctioned by the Learned National Company Law Tribunal, Order in Petition No. 97/MP/2017Page 3Ahmedabad. In para 25 of the order, it has been directed that "all concerned authorities to act on copy of this order along with the scheme duly authenticated by the Registrar of the Tribunal". The Petitioner has placed on record copy of the duly authenticated order along with the scheme. Accordingly, the name of the Petitioner has been change from Adani Power Limited to Adani Power (Mundra) Limited on the record of the Commission."*

22. The Respondents had also raised similar objections in the review Petition No. 24/RP/2018. The relevant portion of our Order dated 3.12.2018 is as under:

> *"26. In the petition filed, the Review Petitioners have sought review on the issue of substitution of Adani Power (Mundra) Limited in place of Adani Power Limited. However, the learned counsel for the Review Petitioners submitted during the hearing that he was not pressing the issue. We are, therefore, not dealing with this issue in this order as issue was not argued."*

23. It was also pointed out to us that the Respondents have not objected to the prayer of the Petitioner for the same issue before APTEL in the Interlocutory Applications filed by the Petitioner in Cross Appeals No. 158/2017 and 316/2017 and vide order dated 25.01.2018, APTEL has considered the issue in favour of the

Petitioner. We are of the view that the Respondents cannot press the issue time and again once it has been decided.

24. The Respondents have further argued that the present Petition is in nature of implementation of order dated 28.3.2018 and cannot be used as a proceeding to modify or amend the order or otherwise seek additional reliefs. As observed from the pleadings, consequent to our order dated 28.3.2018 in Petition No. 104/MP/2017, the Petitioner has raised the claims in terms of our order. However, these claims have been disputed by the Respondents vide letter dated 27.4.2018. The Relevant portion of the letter of the Respondents dated 27.4.2018 is as under:

> *"Adani Power Ltd. has raised bill to the tune of Rs. 688.98 crores vide ibid referred memo on account of change in law compensation allowed by CERC for installation of Flue Gas-Sulphurization (FGD) plant vide its order dated 28.03.2018 in Petition No.104/MP/2017. On scrutiny of bills raised by APL, it is observed that the change in law compensation claim on account of FGD under the head aux. consumption is not in accordance with the ibid referred CERC order allowing change in law compensation to APL. The CERC had allowed the impact of FGD on account of increase in auxiliary consumption on the capacity charges & energy charges from HPPC at total units consumed by FGD out of total gross generation. M/s APL, itself had assessed & claimed the impact of increase in aux. consumption on the capacity charges because of the FGD (Refer pg no. 7 of CERC order dated 28.3.2018)*
>
> *As such, the above referred bills raised by APL on account of FGD are being returned in original with a request to claim the same strictly as per the CERC order dated 28.03.2018 allowing change in law compensation to Adani Power Ltd. under FGD."*

25. From contents of the above letter, we note that the Respondents have interpreted our order dated 28.3.2018 differently from that of the Petitioner. The Petitioner, therefore, filed the present Petition to adjudicate the issue of change in law relief on account of FGD installation as regards its impact on energy charge. We note that the parties are in agreement as regards impact of FGD installation on capacity

charge. Therefore, it is incorrect on part of the Respondents to state that the present Petition is for implementation of our earlier order. In our view, the Petition is in the nature of clarification of the earlier order. Therefore, we reject the contention of the Respondents on this ground.

Issue No. 2: Whether the Petitioner is entitled to increase in Energy Charge on account of additional auxiliary consumption of FGD in terms of the order in Petition No. 104/MP/2017?

26. The Petitioner approached the Commission through the Petition No. 156/MP/2014 *inter-alia* for seeking compensation on account of change in law events including installation of FGD equipment in terms of the PPA dated 7.8.2008. The Commission in its order dated 6.2.2017 granted liberty to the Petitioner to file a separate Petition regarding claim of FGD. Relevant part of the Order dated 6.2.2017 is as under:

> *"95. The petitioner has made huge investment on FGD in order to comply with the conditions laid down in the environment clearance dated 20.5.2010. In order to consider the claims of the petitioner under Change in Law for compensation for the installation and operation of FGD in Phase III of the Mundra Power Project, the following information/documents are considered relevant:*
>
> *(a) Copy of the application made to MoEF for environment Clearance for Phase III of the Mundra Power Project;*
>
> *(b) Copy of the Terms of Reference issued by MoEF for phase –I, II & III prior to grant of environment clearance;*
>
> *(c) Copies of the Minutes of the Expert Appraisal Committee in connection with the application of the Petitioner for Environment Clearance for phase -III;*
>
> *(d) Copy of the Financial Closure indicating the expenditure on different heads in respect of Phase III of Mundra Power Project;*
>
> *(e) The petitioner was granted environmental clearance for Phase I of the project on 13.8.2007 and or Phase II of the project on 21.10.2008.One of the conditions of environment clearance is that "separate funds should be allocated for implementation of Environmental Protection measures along with item-wise break-up. These cost should be included as part of the project cost. The funds earmarked for the environmental measures should not be diverted for other purposes and year-wise expenditure should be reported to the Ministry." The Petitioner shall place on record the year-wise expenditure submitted to MoEF in compliance with the environmental clearance dated 13.8.2007 and 21.10.2008.*
>
> *(f) Any other information considered relevant for the purpose of consideration of the claim for FGD under Change in Law.*

96. The petitioner is granted liberty to submit the claim for FGD through a separate application including the information sought in terms of para 95 above.

(XVII) Increase in Auxiliary Consumption due to FGD Installation affecting Capacity Charges & Additional Operating Expenditure on FGD

97. The petitioner has submitted that the installation of FGD has resulted in the higher auxiliary consumption. This has lead to blockage of capacity required for generating additional auxiliary consumption which thereby impacts per unit capacity charges. The petitioner has furnished per unit impact of Rs.0.023 on capacity charges in the month of March,2014 due to additional auxiliary consumption. The petitioner has submitted that installation of FGD has also resulted in higher expected operating expenses of Rs.48 crore/annum. The respondents have opposed the above claims on the ground that since the expenditure on FGD is not admissible under Change in Law, the expenditure on auxiliary consumption on account of FGD and the operating expenses are not admissible under Change in Law.

98. The petitioner has been granted liberty to approach the Commission through a separate application along with certain relevant information/documents. The issue of auxiliary consumption and operating expenses will be considered while considering the claim of FGD in the light of the submissions to be made by the petitioner."

27. Accordingly, the Petitioner filed the Petition No. 104/MP/2017. The Commission, in the impugned order dated 28.3.2018, granted change in law relief for installation of FGD. The Respondents have disputed change in law relief of auxiliary consumption on energy charge stating that the Petitioner has not sought such relief and no relief can be granted over and above what is prayed for. In this regard, it is relevant to refer to our decision at Para 47 of the said order which is extracted as under:

"47. We have considered the submissions of the parties. The Petitioner has furnished the Auxiliary Energy Consumption of 1.92% on account of installation of FGD, based on the OEM parameters. The Petitioner, in paras 11 and 15 of Petition No. 156/MP/2014 had submitted 6.38% as the actual Auxiliary consumption for the month of March, 2014 which was after commissioning of the FGD. The Petitioner in the present Petition has submitted that the actual Auxiliary Energy Consumption is 7.06% in the month of March, 2017 which is much lower than the claimed Auxiliary Energy Consumption of 8.42%. Central Electricity Authority vide its letter dated 1.8.2016 addressed to the Commission has recommended operational norms in respect of coal based thermal power plants for implementation of the Environmental (Protection) Amendment, Rules, 2015. In the said recommendations, CEA, referring to the operational norms proposed by it during the year 1997, has recommended 1% additional Auxiliary Energy Consumption for FGD using Sea water provision. ***We are of the view that the Petitioner shall be granted compensation @1.0% as additional***

Auxiliary Energy Consumption or actual Auxiliary Energy Consumption on account of operation of FGD for Phase III of the project, whichever is lower. If the norms are revised by CEA in future, then the revised norms or 1.92% or the actual consumption whichever is lower shall be admissible. Considering the fact that expenditure on account of additional Auxiliary Energy Consumption shall be on recurring basis during the operating period, the same shall be reimbursed to the Petitioner by Haryana Utilities in terms of Article 13.2(b) of the PPA."

28. From the above order, it is noticed that the change in law relief of auxiliary consumption of FGD is not restricted to any particular component of the tariff. We, therefore, are unable to accept the contention of the Respondents that the relief is restricted to capacity charge. From the plain reading of our decision as extracted above, it is clear that our decision is to reimburse the impact being caused by additional auxiliary consumption during the operating period.

29. The Respondents have relied on the judgments of the Hon'ble Supreme Court in the cases of State of Punjab Vs Krishan Dayal Sharma [(2011) 11 SCC 212] and Food Corpn. of India v. S.N. Nagarkar, [(2002) 2 SCC 475]. The essence of both the judgments quoted by the Respondents is that in the subsequent execution proceedings, it is not permissible to go beyond the earlier order on the same issue. In our view, the said judgments deal with the situation where the subsequent order of the court considers relief over and above that granted in the earlier judgment. The instant Petition is not an execution or implementation proceedings. Therefore, the judgments referred to by the Respondents are not applicable in the present case since this Petition has its genesis in the dispute raised by the Respondents vide letter dated 27.4.2018 in interpreting an earlier order of the Commission. As stated earlier, our decision did not specify that the relief of auxiliary consumption shall be restricted only to the capacity

charge. But the Respondents have interpreted it differently and have submitted that the impugned order only allowed relief on account of capacity charge. Hence the Petition.

30. In the Order dated 28.3.2014 in Petition No. 104/MP/2017, we had granted relief to the Petitioner on account of additional auxiliary consumption due to installation of FGD. In our view, additional auxiliary consumption on account of FGD not only entails blockage of additional capacity for generation of the same output but it also involves consumption of additional coal for generation of the same output. Therefore, there cannot be a separate treatment to capacity charge and energy charge on account of FGD installation and neither has such proposition been envisaged in the PPAs. Therefore, the impact of additional auxiliary consumption on energy charges due to FGD is also required to be reimbursed. In view of the above, we clarify that in terms of our decision at Para 47 of the order dated 28.3.2018, the relief granted to the Petitioner is not restricted to capacity charge but the Petitioner is also entitled for relief in energy charge on account of additional auxiliary consumption.

31. In the said para, we had observed that "*if the norms are revised by CEA in future, then the revised norms or 1.92% or the actual consumption whichever is lower shall be admissible. Considering the fact that expenditure on account of additional Auxiliary Energy Consumption shall be on recurring basis during the operating period, the same shall be reimbursed to the Petitioner by Haryana Utilities in terms of Article 13.2 (b) of the PPA*." Therefore, once the norms are prescribed by CEA, the parties shall implement the same without approaching this Commission.

Issue No 3: Whether the Interlocutory Applications are maintainable?

32. The Respondents have submitted that the present interlocutory applications have been filed for relief for carrying cost and for truing up of capital cost which are beyond the scope of the issues for consideration in the main Petition. The Respondents have submitted that the court cannot amend or alter the order/ decree while implementing/ executing the order. In support of its contention, the Respondents have relied on the judgments of the Hon`ble Supreme Court in the matter of State of Karnataka and Ors. Vs B. Krishna Bhat and Ors. [(2001) 2 Kant LJ 1 (FB)].

33. *Per contra*, the Petitioner has submitted that the scope of the main Petition and the interlocutory applications are to seek grant of relief for the expenditure incurred on the installation of FGD as change in law event. The reliefs sought in the IAs and the main Petition are ancillary to the findings of the Commission vide order dated 28.3.2018 allowing change in law for installation of FGD. The above order dated 28.3.2018 is conclusive in so far as it allows payment towards installation of FGD as change in law event, recognizing the requirement to restitute the Petitioner to the same economic position as if the change in law event had not occurred. The Petitioner has submitted that since the Petition and the IAs are inter-linked and arise out of the same order, there is no bar in law for the Petitioner to claim relief as prayed in the Petition.

34. The Petitioner has further submitted that the Commission is not inhibited by the technicalities of procedural law but guided by principles of substantive law to meet the

ends of justice otherwise the very means for the furtherance of justice would be frustrated. Applying the said principles it can be held that the declaratory relief sought by the Petitioner by way of an IA cannot come in the way for granting the relief merely on the ground that the Petitioner has not made the said prayer in the main Petition.

35. We have considered submissions of the Petitioner and the Respondents. The Judgments cited by the Respondents are not applicable in the present matter. The said Judgments talk about ambit of Interim Relief whereas the IAs filed by the Petitioner relates to final relief for carrying cost/ true up of capital cost and not for any interim relief. Also the main Petition is not for execution or implementation of an earlier order and rather is a Petition for clarification of some issues with regard to dispute raised by the Respondents (vide letter dated 27.4.2018 addressed to the Petitioner) in interpretation of an earlier order.

36. We note that the issue raised in one IA (No. 70/2018) being carrying cost is a claim in accordance with the provisions of the PPA to restore the Petitioner to the same economic position as if the Change in Law had not occurred in view of admissibility of carrying cost for Change in Law having been upheld by the Hon'ble Supreme Court by Judgment dated 25.2.2019 for the same PPAs. Further, we also note that the issues raised in the other IA (No. 101/2018) relates to capital cost for which direction was given to the Petitioner to approach this Commission with additional details for true-up. Therefore, we do not find any reason not to consider such issues.

37. In view of the above, we hold that the IAs are maintainable since the relief claimed in the IAs are related to the reliefs claimed in the main petition.

Issue No. 4: Whether the Petitioner is entitled to Carrying Cost?

38. The Respondents have submitted that once the claim has been rejected, the only alternate for the Petitioner is to challenge such rejection and not file another Application claiming the same relief again. The Petitioner having failed to challenge the finding, the same has attained finality in so far as the issue of carrying cost of FGD is concerned. The Respondents have argued that a subsequent decision cannot be a ground for reviewing or modifying an earlier Order. In support, the Respondents have relied on the Order 47 Rule 1 Explanation of CPC and Judgments of Hon'ble Supreme Court in the cases of State of West Bengal and Others Vs. Kamal Sengupta and Another [(2008) 8 SCC 612] and Haridas Das v. Usha Rani Banik [(2006) 4 SCC 78]. The Respondents have submitted that the Petitioner had not even filed Review Petition and if the decision on carrying cost could not be corrected even in review, then obviously there cannot be any correction or modification of the order dated 28.3.2018. In support of their contention, the Respondents have relied upon the Hon`ble Supreme Court in the cases of State of West Bengal Vs. Hemant Kumar Vhattacharjee and others [1963 Supp (2) SCR 542], Pardeep Kumar Maskara Vs. State of West Bengal [(2015) 2SCC 653] a Mohanlal Goenka Vs. Benoy Krishna Mukherjee [AIR 1953 SC 65] and Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman [(1970) 1SCC 670].

39. *Per contra*, the Petitioner has submitted that the earlier order is binding on both

the parties unless the findings are reversed (i) either by this Commission while moulding the relief granted to Adani Power, or (ii) by APTEL on Appeal. The Petitioner has distinguished its case stating that said Judgments refer to the issue 'Review Jurisdiction' of the courts and have no applicability in the present case where it has requested this Commission to exercise inherent powers under Regulation 111 read with Regulation 114 of Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 for grant of carrying cost. In this regard, the Petitioner has relied on the judgment of the Hon'ble Supreme Court in the case of UP Power Corporation Ltd. vs. NTPC Ltd. [(2009) 6 SCC 235] and Judgment of APTEL in the matter of Madhya Pradesh Power Generation Company Ltd vs. Madhya Pradesh Electricity Regulatory Commission in Appeal No. 170 of 2010.

40. The Respondents have submitted that on the issue of res judicata, the Petitioner has relied on the judgment of the Hon`ble Supreme Court in the case of Canara Bank vs. N.G. Subbaraya Setty, [(2018) 16 SCC 228] and has submitted that an erroneous judgment cannot operate as res judicata. The Respondents have submitted that the principle of res judicata is that a decision in a dispute between the same parties would apply to subsequent proceedings between the same parties. However, the present case is not an issue of any subsequent case but an implementation or execution of same order dated 28.3.2018.

41. The Petitioner has made counter argument that res judicata has no application where the position of law has changed on account of a later decision by a higher court.

In this regard, the Petitioner has relied upon the judgments of the Hon`ble Supreme Court in the cases of Mathura Prasad Bajoo Jaiswal & Ors. vs. Dossibai N. B. Jeejeebhoy [(1970) 1 SCC 613 (3 J)], Sushil Kumar Mehta vs. Gobind Ram Bohra [(1990) 1 SCC 193 (3 J)] and Suresh Chandra vs. State of UP, [(1995) 6 SCC 614 (2 J)]. The Petitioner has further argued that the Commission is not inhibited by the technicalities of procedural law and is instead guided by sound principles of substantive law to further the ends of justice. The Petitioner, in support of its contention has relied on the judgments of the Hon`ble Supreme Court in the cases of Sangram Singh vs. Election Tribunal [AIR 1955 SC 425] and Sushil Kumar Sen vs. State of Bihar, ([1975) 1 SCC 77], Salim Haji Abdul Khayumsab vs. Kumar, [2006) 1 SCC 46] and Union of India vs. Madras Bar Assn.,[(2010) 11 SCC 1].

42. The Petitioner has submitted that in a plethora of decisions, the courts have persisted on avoiding multiple litigations arising out of the same transaction. The Petitioner has relied on the Judgment in case of Ram Sumer Puri Mahant vs. State of UP [(1985) 1 *SCC 427]*. The Petitioner has referred the direction of the Ministry of Power dated 27.8.2018 issued under Section 107 of the Electricity Act, 2003 and has submitted that the said direction essentially talks about avoiding multiple proceedings for any event which is already approved once by the Commission. Ministry of Power in the said letter has categorically directed that where the Commission has already passed an order to allow pass through of changes in domestic duties, levies, cess and taxes in any case under Change in Iaw, this will apply to all cases ipso facto and no additional Petition would need to be filed in this regard.

43. We have considered the submission of the parties. The Commission in the order dated 28.3.2018 in Petition No.104/MP/2017 after analyzing the provisions of Articles 11.8, 13.2 and 13.4 of PPAs rejected the claims of the Petitioner for carrying cost on the ground that there is no provision for carrying cost on Change in Law claims in the PPA. Relevant para of the said order has been extracted as under:

> *"52. The above provisions do not provide for payment of carrying cost from the date the additional cost was incurred on account of change in law till the date of determination of the change in law events by the Commission. After determination of change in law events, the Petitioner shall be required to claim payment on account of the change in law through the supplementary bill raised in accordance with Article 11.8 of the PPA. Article 11.8 of the PPA provides that either party may raise a supplementary bill for payment on account of Change in Law and the bills shall be paid by the other party. Article 11.8.3 provides that "in the event of delay in payment of a supplementary bill by either party beyond one month from the date of billing, a late payment surcharge shall be payable at same terms applicable to the Monthly Bill in Article 11.3.4." From the above provisions, it emerges that late payment surcharge is payable only if the payment of supplementary bill by either party beyond one month from the date of billing is delayed. There is no provision in the PPAs to grant carrying cost from the date of incurring the expenditure under Change in Law."*

44. The Appellate Tribunal vide its judgment dated 13.4.2018 in Appeal No. 210 of 2017, allowed carrying cost on the change in law events from the date of effectiveness till the date of the order granting relief for such change in law event in respect of the same PPA under consideration in the present Petition. Meanwhile, the Respondents had challenged the above referred judgment of the Appellate Tribunal before the Hon'ble Supreme Court in Appeal No. 5865 of 2018. The Hon'ble Supreme Court, vide its Judgment dated 25.2.2019 by interpreting the same PPAs under consideration in this Petition, has upheld the judgment of the Appellate Tribunal holding that principle of restitution is in-built under Article 13.2 of the same PPA and accordingly held that carrying cost is payable.

45. However, this Commission has already adjudicated the issue of carrying cost in its order dated 28.3.2018 in Petition No. 104/MP/2017. The present Petition has been filed by the Petitioner, APML seeking certain clarification in the above order dated 28.3.2018. The Petitioner has filed I.A. No. 101/2018 seeking claim of IDC and FERV on actual basis pursuant to the liberty granted by the Commission in the said order. The Petitioner has also filed IA N. 70/2018 seeking carrying cost, based on subsequent judgment of the higher court. In our view, once the claim has been rejected by this Commission, the Petitioner cannot approach this Commission again for the same relief through an IA based on a subsequent judgment of the higher court. Therefore, the Petitioner is granted liberty to approach the Commission for appropriate relief through a separate Petition in accordance with law.

Issue No 5: What is the quantum of IDC and FERV for which relief can be granted? And what would be the consequential relief in capacity charge and O&M expenses?

46. The Petitioner has submitted that the Commission has allowed the installation of FGD as change in law event and approved the capital cost of Rs. 616.81 crore on this account in its order dated 28.3.2018 read with corrigendum dated 20.4.2018 in Petition No. 104/MP/2017. The allowed capital cost included provisional amount of Rs. 75.74 crore towards IDC and FERV. While restricting IDC and FERV to 14% of the capital cost, the Commission had observed that the Petitioner did not submit detailed information/ documents in support of expenditure incurred and further observed that this provisional cost was being allowed on basis of prudence practice adopted in case of projects whose tariff is determined on cost plus basis.

47. Pursuant to the liberty granted to the Petitioner in order dated 28.3.2018 in Petition No. 104/MP/2017, the Petitioner has filed IA No. 101/2018 for seeking true up of expenditure approved in regard to installation of FGD and has claimed Rs. 105.65 crore along with auditor certificate. The Petitioner has submitted that the contention of the Respondents that IDC and FERV of 14% of hard cost is reasonable and any unreasonable increase cannot be granted in the capital cost, is not tenable due to the following reasons:

a) IDC is always project specific and is dependent on the duration of construction period and interest rate during construction period. The duration and interest rate is different for different projects and a generalized percentage of hard cost to derive the soft cost cannot be considered as point of reference. If a fixed percentage is considered for IDC, the very principle of restitution of the affected party to the same economic position will be defeated.

b) FERV is dependent upon the date of ordering of the equipment or the date of disbursement of the foreign currency loan and the closing date for which the accounts are prepared. Since the above dates vary from case to case, there cannot be a standard FERV possible for the purpose of computation of the capital cost. As per applicable Tariff Regulations of the Commission, FERV is not a controllable factor and any change in FERV ought to be allowed on actual basis so that the Petitioner is restituted to the original economic position as if no change in law event occurred.

48. The Respondents have submitted that the Petitioner cannot be allowed costs

merely on the basis of auditor certificate. The Petitioner's claim is higher than the prudent and reasonable costs considered by the Commission with reference to the cost plus projects. The Petitioner can be allowed only reasonable and prudent expenditure and not all expenditure claimed by it. The Respondents in support of their contention have relied on the judgment of the Hon`ble Supreme Court in the case of West Bengal Electricity Regulatory Commission Vs. CESC Ltd. etc. [(2002) 8 SCC 7 17]. The Respondents have submitted that the principle of consideration of prudence and reasonableness was considered by the Commission in order dated 28.3.2018 wherein the Commission had allowed the capital cost of FGD after comparing the same to costs of other projects and finding the same to be reasonable. The Respondents have submitted that FERV and IDC should be restricted to normative 14% of the Hard Cost based on normative parameters.

49. We have considered the submissions of the Parties. The following was held as regards IDC and FERV in our Order dated 28.3.2018:

> *41. …….Therefore, cost of installation of FGD by the Petitioner in Phase III of the project appears to be reasonable in comparison to the costs incurred by other developers who have installed FGD. Accordingly, we are allowing the hard cost of `541.06 crore. As reagrds the FERV and IDC are concerned, we find that detailed doceuments have not been placed on record in support of the expenditure incurred. However, as per the prudence practice adopted in case of cost plus tariff, it is observed that the cost on FERV and IDC constitutes around 14% of the capital cost. Accordingly. 14% of the capital cost of `541.06 crore, works out to `75.74 crore. We have allowed this expenditure provisionally which shall be trued-up on submission of the documents duly supported by Auditor"s certificate. The total expenditure allowed is `616.81 crore including provisional amount of `75.74 crore."*

50. It may be noted from the above Order that we had allowed soft cost @14% of hard cost on provisional basis and had decided that the same shall be trued up on

submission of the documents duly supported by Auditor's certificate. We had arrived at the figure of 14% based on the practice of prudence check in case of projects where tariff is determined on cost-plus basis. In the present case, the Commission had provisionally allowed 14% towards FERV and IDC. Therefore, the Petitioner has made the present application in pursuance to our direction.

51. The Respondents have further contended that IDC and FERV being claimed as Rs. 106.95 crore is higher than even the claimed amount of Rs. 105.16 crore when the Petition was filed in 2017. They have submitted that there can be no increase in capital cost beyond the date of commercial operation i.e. 29.1.2014. We are in agreement with the Respondents as regards IDC that it cannot increase after the COD of the generating station of the Petitioner. However, from the auditor's certificate, we observe that there is no change in the IDC considered by the Petitioner in its application as compared to the details filed in Petition No. 104/MP/2017. Thus the apprehension of the Respondents that the Petitioner has not produced the correct data in the Auditor's certificate does not have merit. . But when it comes to FERV, we do not agree to the contention of the Respondents that there can be no increase under this head after COD. FERV is mainly Foreign Exchange Variation on foreign currency loans or foreign denominated project payments. Foreign currency loans are not immediately paid off on COD of the project. For that matter, no project debt is immediately paid off on the COD of the project. The project debt is paid generally over a period of 12 to 15 years after the date of commercial operation depending on the agreed repayment schedule. During this tenure, the capital cost is always subjected to Foreign Exchange Rate Variation on either side.

Accordingly, the IDC and FERV of Rs. 106.95 crore is allowed as per the Auditor's certificate.

52. The Respondents have argued that relief in capacity charge on account of increase in capital cost ought to be granted in the multiple of entire block of Rs 8.9 crore and not for the part of such block. The Respondents have contended that the order dated 28.3.2018 is not correct to that extent and needs to be corrected. This order has not been reviewed or challenged by the Respondents and, therefore, attained finality. Moreover, the matter being raised by the Respondents relates to a decision in Petition No. 104/MP/2017 and is not covered within ambit of this Petition. If Respondents are not satisfied with some portions of Order dated 28.3.2014, they have the right to appeal before the appropriate forum. We, therefore, reject the contention of the Respondents to have a review of the formula for relief to the Petitioner as regards capacity charge on account of change in law. Article 13.1 of the PPA provides as under:

> *"13.2 Application and Principles for computing impact of Change in Law*
>
> *While determining the consequence of Change in Law under this Article 13, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through Monthly Tariff Payments, to the extent contemplated in this Article 13, the affected Party to the same economic position as if such Change in Law has not occurred.*
>
> *a) Construction Period*
>
> *As a result of any Change in Law, the impact of increase/decrease of Capital Cost of the Project in the Tariff shall be governed by the formula given below: For every cumulative increase/decrease of each Rs. 8,90,000,00 (Rupees eight crore ninety lakh only) Rupees of the Contracted Capacity in the Capital Cost over the term of this Agreement, the increase/decrease in Quoted Capacity Charges shall be an amount equal to zero point two two seven (0.227%) percent of the Quoted Capacity Charges. Provided that the Seller provides to the Procurer documentary proof of such increase/decrease in Capital Cost for establishing the impact of such Change in Law. In case of Dispute, Article 17 shall apply."*

b) Operation Period

As a result of Change in Law, the compensation for any increase/decrease in revenues or cost to the Seller shall be determined and effective from such date, as decided by the Appropriated Commission whose decision shall be final and binding on both the Parties. Subject to rights of appeal provided under applicable law.

Provided that the above mentioned compensation shall be payable only if and for increase/decrease in revenues or cost to the Seller is in excess of an amount equivalent 1% of Letter of Credit in aggregate for a Contract Year."

53. Having allowed IDC and FERV of Rs. 106.9 crore, the allowed capital cost on account of change in law comes to Rs. 648.01 crore [541.06 crore (hard cost) + 106.9 crore (soft cost)]. The consequent relief as per the methodology approved by this Commission in Petition No. 104/MP/2017 is as under:

Particulars	**Formula**	**Amount**
Capital Cost on account of FGD	A	Rs. 648.01 crore
Gross Generation Capacity corresponding to PPA capacity of 1424 MW at Haryana Periphery based on Auxiliary Energy Consumption of 6.38% and transmission losses of 2.85% of March 2015	B = 1424/(1-6.38%)/(1-2.85%)	1565.66 MW
Total Capacity	C	1980 MW
Capital Cost of FGD attributable to Haryana PPA	D = A *B/C	Rs. 512.41 crore
Relief in Capacity Charge – Increase in Escalable Capacity Charges of 0.227% for increase in Rs. 8.9 crore of Capital Cost	E = D/8.9 * 0.227%	13.07%

54. Further, in Petition No. 104/MP/2017, O&M expenses were approved provisionally @2% of the project cost pending prescription of CEA Norms. The Order dated 28.3.2014 stated as under:

"48. As regards the additional O& M expenses, it is observed that in the PPAs dated 7.8.2008,there is no provision for any separate compensation for O&M other than the capital expenditure in terms of Article 13.2(a) of the PPA. Since FGD is a new requirement under Change in Law and the O&M expenditure is incurred over and above the capital cost on a recurring basis, O&M expenditure for FGD should be admissible for putting the generating company in the same economic position as if Change in Law has not occurred. CEA is in the process of developing the norms for O&M for FGD. As per MOP, GOI Notification for generating companies dated 30.3.1992, the norms of O&M are given as under:(i) at the rate of 2.5% of the actual capital expenditure of ceiling on capital expenditure provided in the power purchase agreement: or (ii) at 2% of the actual capital expenditure on ceiling on capital expenditure provided in the power purchase agreement together with actual expenditure on insurance.

49. Pending the prescription of norms by CEA, we allow the O&M expenses provisionally at the rate of 2% per annum of the capital cost of FGD, subject to adjustment in the light of the norms to be prescribed by CEA."

55. Based on the revised capital cost admitted, the provisional O&M expenses comes out in the following manner which shall be payable from the year from which the FGD achieved COD.

Particulars	**Formula**	**Amount**
Capital Cost on account of FGD	A	Rs. 648.01 crore
Gross Generation Capacity corresponding to PPA capacity of 1424 MW at Haryana Periphery based on Auxiliary Energy Consumption of 6.38% and transmission losses of 2.85% of March 2015	B = 1424/(1-6.38%)/(1-2.85%)	1565.66 MW
Total Capacity	C	1980 MW
O & M @2% of capital cost corresponding to capacity attributable to Haryana	=2%xAxB/C	10.25 crore

This quantum of additional 2% towards O&M charges is subject to the prescription of CEA norms in this regard as stated in Order dated 28.3.2018 in Petition No. 104/MP/2017. Once the norms are prescribed by CEA, the Parties shall implement the same without approaching this Commission.

Summary of our findings:

56. Based on the above analysis and decisions, the summary of our decision is as under:

a) Relief for additional Auxiliary Energy Consumption of FGD is to be calculated on both capacity charge as well as energy charge.

b) The Petitioner is granted liberty to approach the Commission for appropriate relief regarding the carrying cost.

c) The Petitioner is entitled for relief on account of differential amount of FERV and IDC.

57. The Petition No. 214/MP/2018 along with IA No. 70 of 2018 and IA No. 101 of 2018 are disposed of in terms of the above.

Sd/-	sd/-	sd/-
(I.S.Jha)	**(Dr. M.K. Iyer)**	**(P.K. Pujari)**
Member	**Member**	**Chairperson**