

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 158/MP/2017

Coram:

**Shri P.K. Pujari, Chairperson
Shri A.K. Singhal, Member
Dr. M.K. Iyer, Member**

Date of Order: 17th September, 2018

In the matter of

Petition under Section 79(1)(b) and 79(1)(f) of the Electricity Act, 2003 for claiming compensation on account of event pertaining to change in law as per the terms of LOA dated 18.1.2016 read with the terms of NIT dated 22.12.2015 executed between the Petitioner No. 1 and the Respondent.

And

In the matter of

1. Tata Power Trading Company Limited
Shatabdi Bhawan, 2nd Floor,
B-12 & B-13, Sector-4
Noida-201301

2. Jindal India Thermal Power Ltd
Plot No. 12, Local Shopping Complex,
Sector B-I, Vasant Kunj,
New Delhi-110070

....Petitioners

Vs

Uttar Pradesh Power Corporation Ltd
Shakti Bhawan, 14, Ashok Marg,
Lucknow-226001

....Respondent

Parties present:

Shri Venkatesh, Advocate, TPTCL
Shri Somesh Srivastava, Advocate, TPTCL
Shri Rajiv Srivastava, Advocate, UPPCL
Shri Manish Tyagi, JITPL

ORDER

The Petitioners, TPTCL and JITPL have filed the present Petition seeking the following reliefs:



“(a) Declare and adopt that the following events / notifications are Change in law event within the meaning of Article 18.11 (c) of the NIT dated 22.12.2015 and allow compensation thereof:

- (i) Increase in Clean Energy Cess with effect from 1.3.2016 as communicated by Mahanadi Coalfields limited vide its notice dated 29.2.2016;*
- (b) Direct the Respondent to make payment of Rs 4,84,37,282/- to the Petitioner No. 1, which amount has accrued on account of the Change in law events;*
- (c) In the interim, grant prayer (b); and*
- (d) To pass such other and further order or orders as this Commission deems appropriate under the facts and circumstances of the present case.”*

Background

2. Petitioner No. 1, TPTCL is a company incorporated under the Companies Act and is an inter-State trading licensee under the provisions of the Electricity Act, 2003 (hereinafter referred to as ‘the 2003 Act’). The Petitioner No. 2, JITPL is a generating company and has authorized the Petitioner No. 1 for supply of power to the Respondent, UPPCL through back to back power sale arrangement. The Respondent, UPPCL is the distribution licensee in the State of UP and is procuring power from the Petitioner No. 1 by issuance of Letter of Intent (LOI) dated 18.1.2016. Thus, TPTCL has been supplying power to the Respondent through the generating station of the Petitioner No. 2, JITPL.

3. The Respondent initiated competitive bidding process by a Short Term Tender Notice (NIT) vide Tender specification No. 24/SPATC-155/2015 by issuance of RFP for selection of successful bidder to supply firm power on ‘short term basis’ for the period from 1.5.2016 to 30.9.2016. Pursuant to the bidding, the Petitioner No.1 TPTCL was selected as the successful bidder to supply power to the Respondent, through Petitioner No. 2, JITPL for the said period. Accordingly, the Respondent issued Letters of Intent (LOI) to TPTCL on 18.1.2016, 28.1.2016 and 30.1.2016 for sale of power for the months of May, June, August & September, 2016 as mentioned below:



Duration	Time period	Quantum (MW)
1.5.2016 to 31.5.2016	00 to 06 hrs	200 + 110
1.6.2016 to 30.6.2016	00 to 06 hrs	200 + 110
1.6.2016 to 30.6.2016	00 to 24 hrs	125
1.8.2016 to 31.8.2016	00 to 06 hrs	200 + 130
1.8.2016 to 31.8.2016	00 to 24 hrs	125
1.9.2016 to 30.9.2016	00 to 06 hrs	200 + 200

4. The Petitioner No.2 issued letters to Petitioner No.1 being the cost of change in per unit cost due to increase in Clean Environment Cess for different periods. As per provisions of the NIT, power is being procured by the Respondent, from the Delivery point i.e. Interconnection of UP STU and CTU, Northern Region. Hence, the electricity supplied by the Petitioner No.1 through Petitioner No.2, at a lump sum tariff which includes the fixed cost of the Project, Energy Charges, all relevant taxes, cess & duty is required to be paid by the Respondent.

5. In the present Petition, the Petitioners have sought to invoke the provisions of the “change in law” event as per Article 18.11 (c) of the NIT, which has resulted in additional expenditure on account of recurring/non-recurring event being increase in the Clean Energy Cess so imposed. In this background, the Petitioners have made the following submissions:

(a) As per Article 18.11(c) of the NIT, it is apparent that an event of change in law would be considered in case where there is a change in taxes, duties, Cess or introduction of any tax, duty, cess made applicable for supply of power by the Seller/Petitioners

(b) As per general principles governing the claim of change in law disputes, it is apparent that an event of change in law would only be considered for compensating the Seller/Petitioner in the event the said changes have occurred after the date which is seven days prior to the bid submission deadline.

(c) The bid submission deadline was 7.1.2016 and as such the cut-off date for a Change in law event resulting in compensation is 31.12.2015 (i.e. 7 days prior to the bid submission deadline), whereas the change in law event has



occurred on 29.2.2016, which is two months after the cut-off date. Any Change in law event occurring after the said date would result in compensation to the Petitioner No.1.

(d) The principle behind determining the consequence/compensation on account of change in law event is to restitute the affected party (the Petitioners) to the same economic position as if the change in law events have not occurred, in order to neutralize the effect of the changed circumstances which were not present when the Petitioner No.1 submitted its bid and such changes could not have been factored in the said bid.

(e) The power plant of the Petitioner No.2 is situated in the State of Odisha and is selling power to more than one State. It has also signed long term PPAs for supplying power to the distribution licensees under DBFOO arrangement with KSEB and BSPHCL for contracted capacity of 100 MW and 300 MW respectively and signed Medium term PPAs with Railways for its 9 divisions in nine different states for contracted capacity of 577 MW. Hence, this Commission has the necessary jurisdiction under section 79(1)(b) of the Electricity Act, 2003 ('the 2003 Act') to provide the reliefs sought for in the Petition.

(f) The Ministry of Finance, Government of India by notification dated 29.2.2016 has increased the levy of Clean Energy Cess from ₹200/ tonne to ₹400/tonne to all dispatches/lifting from 00.00 hrs of 1.3.2016 which directly has an additional impact on the variable component of generation tariff of the Petitioner No.2 leading to substantial increase in the expenditure of the Petitioner No.2. Such changes have occurred after the cut-off date and therefore, the Petitioner No.2 could not have factored in the above changes while submitting the bid.

(g) The Petitioner No. 2, vide letters dated 10.3.2016 & 23.4.2016 had requested the Petitioner No.1 (TPTCL) to accept the Change in law events, whereby there has been an increase in the Clean energy cess from ₹200/ tonne to ₹400/tonne on coal, increasing the cost of power generation by ₹ 0.151 (approx.) per unit, effective from 1.3.2016. The Petitioner No.2 again vide letter dated 30.4.2016 informed the Petitioner No.1 that the supply of power will initiate from 1.5.2016 and further requested to accept the



increase in tariff due to change in Clean Environment Cess by the Govt. of India.

(h) Petitioner No.1 issued Change in law notices dated 11.3.2016, 13.4.2016, 9.5.2016 and 7.9.2016 to the Respondent, wherein, the Petitioner No.1 claimed an increase in tariff of ₹0.151/kWh on account of increase in Clean energy cess from ₹200/MT to ₹400/MT, which is a Change in law event in terms of Article 18.11 (c) of the NIT. However, no response has been received from the Respondent. Failure of the Respondent to act upon the change in law claim made by the Petitioner No.1 gives rise to a cause of action for enforcement of contractual right in favour of the said Petitioner.

(i) Under Article 18.11 (c) of the NIT dated 22.12.2015 any change in tax or introduction of any tax applicable for supply of power by the seller in terms of the agreement will fall within the definition of change in law. The National Tariff Policy also provides that increase in taxes and levies are change in law events.

6. The Petition was admitted on 7.9.2017 and notice was issued to the Respondent, UPPCL. Pursuant to the hearing of the Petition on 30.1.2018, the Petitioners were directed to file copy of the Power Purchase Agreements/other agreements/documents to substantiate whether contracts were concluded with the distribution companies. In compliance with the directions of the Commission, the Petitioner vide affidavit dated 27.2.2018 has filed a copy of Request for Proposal (RFP) dated 22.12.2015 as regards purchase of power. Reply to the Petition has been filed by the Respondent, UPPCL vide affidavit dated 14.5.2018 and the Petitioner No. 1, TPTCL has filed its rejoinder to the said reply vide affidavit dated 29.5.2018.

Submissions of Respondent UPPCL

7. The Respondent, UPPCL vide reply affidavit dated 14.5.2018 has submitted the following:



(a) The Respondent has issued two Letters of Intent on 18.1.2016 and 28.1.2016 which was modified on 30.1.2016 for supply of firm power on short term basis in favour of the petitioner No.1 in acceptance of the offer given by Petitioner No.1 in response to the RFP.

(b) The Petitioner No.1 in its capacity as a Trading Licensee, could not maintain the present Petition before this Commission in exercise of the power conferred under Section 79(1)(b) and Section 79(1)(f) respectively as these provisions are with respect to generating companies or transmission licensee. The Petitioner No.1 being a trading licensee could not invoke the aforesaid provisions for filing the present Petition.

(c) There was no arrangement, agreement or contract for supply of power between UPPCL and JITPL and the purported agreement between TPTCL and JITPL would not create any legal basis between UPPCL and JITPL to provide a locus to JITPL to maintain this petition. Since JITPL could not have a cause of action in law against the Respondent, therefore, JITPL could not be a Petitioner in this Petition.

(d) The LOIs issued by Respondent UPPCL in favour of Petitioner No.1 TPTCL was in terms of the RFP document. Clause 18.20 of the RFP provides that in case of disputes regarding determination of tariff or tariff related matters, which could partly or wholly result in change in tariff, such dispute shall be adjudicated by UPERC. All other disputes shall be resolved by arbitration under the Indian Arbitration and Conciliation Act. The Petitioner No.1 had furnished certificate to abide by the above and the same form part & parcel of the RFP document. The Petitioner No.1 could not claim the right of a generating company having a composite scheme for generation and sale of electricity in more than one state as contemplated under Section 79(1)(a) of the Act. The Petitioner No.1 cannot claim anything which was not there in the RFP document which created a bilateral contract between the Petitioner No.1 and the Respondent UPPCL.

(e) The reference made Article 18.11 (c) of RFP change in law, in order to claim amounts 'to compensate the Petitioners' is misconceived, for there is nothing in Article 18.11(c) of RFP documents forming part of LOI given by UPPCL to Petitioner No.1, which even remotely supports the claim of the



Petitioner No.1 for seeking compensation under change in law, over and above the tariffs agreed upon between the parties. Article 18.5 of the RFP document is categorical about the tariff quoted by the Petitioner No.1 remaining constant throughout the contractual period.

(f) In so far as JITPL claiming increase in tariff from Petitioner No.1 TPTCL vide letter dated 10.3.2016 is concerned, it is a matter strictly to be sorted out between JITPL and TPTCL. For short term power supply to UPPCL, the Petitioner No.1 had agreed to a 'lump sum tariff' which included the fixed cost of the project , the energy charges, all relevant taxes , cess & duties required to be paid by the Petitioner No.1 under a bilateral arrangement. The tariff was not discovered through a bid process undertaken under Section 63 of the Act. There was no tariff determination by this Commission or UPERC and the supply of power from TPTCL to UPPCL was under a bilateral contract and no PPA was entered into by parties.

(g) The Petitioner No.1 had quoted lumpsum tariff with its calculations embedded in the tariff and after its acceptance by UPPCL, the escalation in the rate of tariff on any score would amount to a breach of the concluded contract.

(h) UPPCL has submitted that the Petition is not maintainable and is accordingly liable to be dismissed

Rejoinder of Petitioners

8. The Petitioner No.1 vide rejoinder affidavit dated 29.5.2018 has submitted the following:

(a) JITPL had authorized TPTCL for supply of power to UPPCL through back to back power sale arrangement and it is an admitted fact that TPTCL is supplying power to UPPCL through the generating station of JITPL which was clearly disclosed in the LOI issued on 18.1.2016 and 28.1.2016 by UPPCL, who identified JITPL as the generation source for supply of power.

(b) In terms of the RFP conditions, the successful bidder was to disclose the source of power supply and to provide a confirmation from the source of generation and that as per RFP, JITPL was identified as generation source



which implies that UPPCL had a jural relationship with the generating company i.e JITPL.

(c) The Appellate Tribunal (the Tribunal) in its judgment dated 20.7.2012 in Appeal No. 130/2011 (JPVNL v HERC & ors), judgment dated 9.8.2012 in Appeal No. 188/2011 (Lanco Budhil HPL v HERC & ors) and judgment dated 31.8.2016 in Appeal No. 168/2014 (PTC v UERC & ors) had ruled that upon such back to back agreements, the non-signatory parties are obligated to each other, if there exists a direct nexus between the agreements. It is clear from the judgments of the Tribunal that the provisions of LOI and NIT read with RFP are back to back agreements as there exists a direct nexus between them, as the source of generation in the LOI issued by UPPCL specifically recognizes the same.

(d) Any dispute between inter-state trading licensee and generating company or between inter-state trading licensee and distribution licensee must be adjudicated by this Commission. It is well settled position that the State Commission can only exercise jurisdiction of a licensee who has been granted to undertake intra-state trading within the territory of the State concerned. In the present case, TPTCL has been issued inter-state trading license by this Commission and qualifies as an inter-state trading licensee, falling within the territorial jurisdiction of this Commission.

(e) The Petitioner No.2, JITPL is supplying power to BEST, WBSEDCL and UPPCL from its power plant situated in Odisha. It has also entered into multiple long term PPAs for supplying power to other discoms such as KSEB and BSPHCL under the DBFOO arrangement for contracted capacity of 100 MW and 300 MW. It has also signed medium term PPAs with Railways for its nine divisions. Therefore, JITPL has a composite scheme for generation and supply of power to more than one State and falls within the scope of Section 79(1)(b) of the 2003 Act and is covered by the judgment dated 11.4.2017 of the Hon'ble Supreme Court in Energy Watch Dog case.

(f) Clauses 18.3, 18.5 and 18.11(c) of the RFP shall be interpreted in a way to give meaning of a contract and particularly a commercial one and must be gathered by adopting a common sense approach and not by a narrow and pedantic interpretation. The change in rate of any applicable taxes and levies



or imposition of any new taxes and levies, which was not considered / contemplated under the bidded tariff at the time of bid submission and which has an impact on the Petitioners is an event which squarely falls within clause 18.11(c) of the RFP i.e Change in law.

(g) TPTCL placed the bid taking into account the rates of the taxes and levies prevailing at that time. The Petitioners are therefore entitled for reimbursement of costs increased consequent to change in rates of Clean Energy Cess.

In the above circumstances, the Petitioners have prayed that the Commission may direct UPPCL to make payment to JITPL which amount has accrued on account of change in law event.

9. The matter was heard on 26.7.2018 and the learned counsels for the Petitioners and the Respondent, UPPCL mainly reiterated their submissions made in the Petition and the reply respectively. Accordingly, after hearing the parties, the Commission reserved its order in the Petition.

Analysis

10. After consideration of the submissions of the Petitioner and the Respondent, UPPCL, the claim of the Petitioner has been dealt with as under:

- (a) Whether the Commission has the jurisdiction to decide the dispute?
- (b) Whether the compensation claimed is admissible under Change in law?

Issue (a): Whether the Commission has the jurisdiction to decide the dispute

11. To determine whether this Commission has the jurisdiction to decide the disputes, we examine as to whether there exists (1) a composite scheme for generation and supply of power to more than one state and (2) back to back arrangement for supply of power from generating station to the distribution licensee through trader.



(i) Composite Scheme

12. The Petitioners have submitted that this Commission has the jurisdiction to decide the dispute raised by the Petitioners. They have submitted that the power plant of JITPL is situated in the State of Odisha and is selling power to more than one state and has also signed long term PPAs for supplying power to the distribution licensees under DBFOO arrangement with KSEB and BSPHCL for a contracted capacity of 100 MW and 300 MW respectively and signed medium term PPAs with Railways for its nine divisions in different States for a contracted capacity of 577 MW. Accordingly, they have submitted that a composite scheme exists for generation and sale of electricity from the project of JITPL and the Commission has the jurisdiction to adjudicate the dispute between the Petitioners and the Respondent in terms of Section 79(1)(b) read with Section 79(1)(f) of the 2003 Act. The Respondent has argued that TPTCL in its capacity as trading licensee cannot invoke the jurisdiction of this Commission since section 79(1)(b) read with Section 79(1)(f) of the 2003 Act contain provisions to deal with disputes involving generating companies and transmission licensees and not the trading licensees. It has further contended that there was no arrangement/agreement/contract between JITPL and the Respondent and the purported agreement between TPTCL and JITPL would not create any legal basis between Respondent and JITPL to provide locus to JITPL to invoke the jurisdiction of this Commission. The Respondent further contended that TPTCL as a trading licensee cannot claim the right of a generating company having a composite scheme for generation and sale of power in more than one state as contemplated in section 79(1)(b) of the 2003 Act.

13. The submissions have been considered. As stated, JITPL is supplying power to BEST, WBSEDCL and the Respondent, UPPCL from its power project situated in



State of Odisha. It has entered into multiple long term PPAs for supplying power from its power plant to other discoms situated in the State of Kerala (KSEB) and State of Bihar (BSPHCL) under the DBFOO arrangement for a contracted capacity of 100 MW & 300 MW respectively. It is further noticed that JITPL had signed medium term PPAs with Railways in nine different states for total capacity of 577 MW. It is therefore evident that JITPL is supplying electricity to multiple states from the same generating station and such supply is governed by the binding arrangements, namely the PPAs. Sub-section (b) of Section 79(1) of the 2003 Act provides that Central Commission shall regulate the tariff of generating company, if such generating company enters into or otherwise have a composite scheme for generation and sale of electricity in more than one State. The Hon'ble Supreme Court vide its judgment dated 11.4.2017 in Civil Appeals titled Energy Watchdog v CERC & ors (2017 (4) SCALE 580) while upholding the jurisdiction of this Commission for regulating the tariff of projects which meet the composite scheme, has explained the term 'composite scheme' as under:

“22. The scheme that emerges from these Sections is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79(1) itself in sub-sections (c), (d) and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression “within the State” in sub-clauses (a), (b), and (d), and “intra-state” in sub-clause(c). This being the case, it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission. The State Commission's jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. What is important to remember is that if we were to accept the argument on behalf of the appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being the case, we are constrained to observe that the expression “composite scheme” does not mean anything more than a scheme for generation and sale of electricity in more than one State.



24. Even otherwise, the expression used in Section 79(1)(b) is that generating companies must enter into or otherwise have a “composite scheme”. This makes it clear that the expression “composite scheme” does not have some special meaning - it is enough that generating companies have, in any manner, a scheme for generation and sale of electricity which must be in more than one State.”

Since JITPL is supplying power to multiple states through PPAs/binding arrangements, its generating station has a ‘composite scheme’ for generation and sale of power to more than one state. Hence, in the light of the decision of the Hon’ble Supreme Court we are of the considered view that this Commission has the jurisdiction to regulate the tariff of the Project of the Petitioners and thereby adjudicate the disputes raised in the present Petition in terms of Section 79 (1) (b) read with 79(1)(f) of the 2003 Act. Accordingly, the decision of the Commission shall be binding on the parties herein.

(ii) Back to back Power Sale Arrangement

14. One more contention of the Respondent, UPPCL is that the Petitioner No.1, TPTCL in its capacity as Trading licensee could not maintain the present Petition for adjudication of disputes in exercise of power conferred upon this Commission under Section 79(1)(b) read with Section 79(1)(f) of the 2003 Act. It has argued that the provisions contained in section 79(1)(b) and 79(1)(f) are with respect to generating companies or transmission licensee and the Petitioner No.1, TPTCL being a trading licensee, could not invoke the aforesaid provisions for filing the present Petition. The Respondent has further contended that there is no privity of contract or arrangement with JITPL and therefore the Petitioner No.2, JITPL has no locus to maintain the present Petition for adjudication of disputes against UPPCL.

15. In response, the Petitioners have contended that any disputes between an inter-state trading licensee and generating company or between inter-state trading company and distribution licensee must be adjudicated by this Commission. They



have further contended that the State Commission can only exercise jurisdiction over a licensee who has been granted a license under section 14 of the 2003 Act, to undertake intra-state trading within the territory of the state concerned. The Petitioners have submitted that the Petitioner No.1, TPTCL has been granted license by this Commission and therefore qualifies as an inter-state trading licensee falling within the jurisdiction of this Commission. As regards the contention of UPPCL that there is no privity of contract, the Petitioners have contended that JITPL has authorized TPTCL to supply power to UPPCL through back to back power sale arrangement and hence power was supplied to UPPCL by TPTCL through the generating station of JITPL. Referring to the judgments of the Tribunal in *M/s Jaiprakash Power Ventures Limited vs Haryana Electricity Regulatory Commission & ors*, *M/s Lanco Budhil Hydro Power Private Ltd vs Haryana Electricity Regulatory Commission & ors* and *PTC India vs Uttarakhand Electricity Regulatory Commission & ors*, the Petitioners have contended that in case of back to back agreements, the non-signatory parties are obligated to each other if there exists a direct nexus between the agreements. Based on this, the Petitioners have argued that the provisions of the LOI and NIT read with RFP are back to back agreements and there exists direct nexus between JITPL and UPPCL. According to the Petitioners, the submissions of UPPCL are liable to be rejected.

16. We have considered the submissions of the parties and examined the legal position. As stated earlier, UPPCL had initiated competitive bidding process by issuance of RFP for supply of firm power for the period from 1.5.2016 to 30.9.2016. Under the said RFP, it was obligatory upon the successful bidders to disclose, amongst others (i) the identified source of power (ii) the generation source wise details, and (iii) the details of the generating station from which the supply is intended. TPTCL as the bidder had indicated JITPL as the identified source of



power. TPTCL was selected as successful bidder for supply of power to UPPCL and in accordance with the terms and conditions of the RFP, UPPCL issued LOIs to TPTCL on 18.1.2016, 28.1.2016 & 30.1.2016 for sale of power for the months of May, 2016, June, 2016, August, 2016 and September, 2016. These LOIs issued by UPPCL envisaged the supply of firm power at delivery point, “UP State periphery (transmission system of STU) interfaced with the transmission system of CTU in Northern region” as under:

LOI dated 18.1.2016

Sl. No.	Source	Period (month)	Time period (hours)	Quantity (MW)	Landed rate at delivery point (Rs/KWh)
1	JITPL	May, 2016	00.00 to 06.00	200	2.6000
2	JITPL	June, 2016	00.00 to 06.00	200	2.6000
3	JITPL	August, 2016	00.00 to 06.00	200	2.6000
4	JITPL	September, 2016	00.00 to 06.00	200	2.8000

LOI dated 28.1.2016

Source	Period	Duration	Quantum (MW)	Rate at delivery point (Rs/KWh)
JITPL	1 st May to 31 st May, 2016	00.00 to 06.00	110	2.6000
	1 st June to 30 th June, 2016		110	2.6000
	1 st August to 31 st August, 2016		130	2.6000
	1 st September to 30 th September, 2016		200	2.8000

LOI dated 30.1.2016

Source	Period	Duration	Quantity (MW)	Rate at delivery point (Rs/KWh)
JITPL	1 st June to 30 th June, 2016	00.00 to 24.00	125	2.9900
	1 st August to 31 st August, 2016		125	2.9900

17. In this case, no PPA had been executed between JITPL (the generating company) and TPTCL (the inter-State trader). Also, no PSA had been executed by UPPCL (the distribution licensee) with TPTCL. UPPCL had only issued the above LOIs for supply of power by TPTCL from the source, JITPL. In this background, the



question which begs for consideration is whether the LOI can be considered as a legally binding contract.

18. The Tribunal vide its judgment dated 16.4.2015 in Appeal No. 51/2015 (Essar Power MP Ltd V CERC & ors) had held as under:

“26. Having regard to the definition of the term Lol as given in K. J. Aiyer’s Judicial Dictionary and having regard to the relevant provisions of the Indian Contract Act and the Connectivity Regulations and the Detailed Procedure and judgments of the Supreme Court and of this Tribunal, which we have referred to hereinabove, we must conclude that whether an unconditionally accepted Lol reflects a concluded contract, whether it can take place of a PPA must depend on facts and circumstances of each case. There must be a clear offer. There must be an unequivocal, unambiguous and unconditional acceptance of the offer. The recitals of the Lol are of great significance. The Lol must make the intention of the parties apparent. Conduct of the parties is also relevant. If Lol merely imposes conditions to be complied with in future, it may not fall in the category of concluded contracts. If the Lol communicates the acceptance of the offer and goes further and asks the contractor to start work, in a given set of circumstances, it may amount to a concluded contract between the parties. The question as to whether the Lol is merely an expression of intention to place order in future or whether it is a final acceptance of the offer leading to a contract, is a matter which has to be decided with reference to the terms of the said letter and having regard to the facts and circumstances of each case.”

19. Let us consider the present case in the light of the legal position of Lol settled through the above judgment of the Tribunal. Clause 17 of the RFP provides as under:

“This RFP Documents is an offer to bid and is subject to the award of letter of Intent by UPPCL and acceptance of the LOI by the selected bidder.”

20. TPTCL at the stage of bidding had submitted an undertaking for acceptance of the general terms and conditions of RFP as under:

“We/I have carefully gone through the RFP documents and satisfied ourselves/myself and hereby confirm that our/my offer strictly conforms to the requirements of RFP documents and all the terms and conditions specified therein are acceptable to us. As a token of acceptance we have attached and signed & sealed copy of RFP documents.....”

The above undertaking would indicate that TPTCL had unconditionally accepted the terms and conditions of RFP and had submitted an unqualified offer. The said unconditional offer was accepted by UPPCL through issue of LOIs dated 18.1.2016,



28.1.2016 & 30.1.2016. The LOIs issued by UPPCL in favour of TPTCL contain the following:

“Refer to your above subject offer in reference to Tender Specification.....This is to intimate that UPPCL is pleased to accept your offer for the supply of Firm power, at delivery point.....”

Other terms and conditions shall remain same as per RFP document of UPPCL Tender specification No. 24/SPATC-155/2015...”

21. Thus, the LOIs issued by UPPCL reveal that they are in the nature of acceptance of offer for supply of power in favour of UPPCL for a valid consideration. Thus, the LOIs dated 18.1.2016, 28.1.2016 and 30.1.2016 issued by UPPCL constitute an award of contract by UPPCL to TPTCL for supply of power.

22. It is however observed that Clause 18.23 of the RFP provides for execution of a contract agreement with UPPCL within 15 days from acceptance of LOIs failing which LOIs shall be terminated and EMD forfeited. However, neither any such agreement was executed by UPPCL with TPTCL nor the LOIs terminated by UPPCL and EMD forfeited. The Petitioner No.1, TPTCL after accepting the LOIs, had acted upon the same and has supplied power to the respondent UPPCL. Also, UPPCL had made payments for the quantum of power supplied by TPTCL. Thus, by conduct of the parties, a final concluded contract came into existence from that date onwards. In view of this, we hold that the LOIs constitute legally binding contracts between TPTCL and UPPCL.

23. In terms of the RFP, the successful bidder was to disclose the source of supply of power and to provide a confirmation from the source of generation. The Petitioner No.2, JITPL had authorised TPTCL to supply power from its plant to UPPCL based on which TPTCL had indicated the plant of JITPL as the source of supply. Further, the LOIs issued by UPPCL also recognised JITPL as the generation source for supply of power by TPTCL. Moreover, it is undisputed that TPTCL had



also supplied power to UPPCL from the generating station of JITPL in terms of the LOIs. The LOIs read with the provisions of RFP unambiguously established the nexus between the generating company JITPL and the distribution licensee, UPPCL even though power is supplied through TPTCL, which is an inter-state trading licensee. Hence, the contention of the Respondent UPPCL that it has no privity of contract or arrangement with JITPL lacks merit. We therefore hold that the present Petition filed by JITPL for adjudication of disputes against UPPCL is maintainable under Section 79(1)(b) read with Section 79(1)(f) of the 2003 Act.

24. The issue whether the supply of power by a generating company to a trading licensee and supply of the said power by the trading licensee to the distribution companies shall be subject to the regulatory jurisdiction of the Regulatory Commission arose for consideration in Appeal No.15/2011 (Lanco Power Limited v Haryana Electricity Regulatory Commission) before Appellate Tribunal for Electricity and in OMP 677 of 2011 [PTC India Limited Vs. Jaiprakash Power Ventures Ltd.] before Hon'ble High Court of Delhi. In Appeal No.15/2011, Lanco Power Limited had a PPA with PTC and PTC had a back to back PSA with Haryana Utilities. Lanco Power Limited raised a preliminary objection that since power was supplied by the generator to PTC India Limited which is a trader, the Haryana Electricity Regulatory Commission would not have jurisdiction to determine the tariff. The Tribunal after considering the provisions of Sections 79, 86 and 66 of the Act has in its judgment dated 4.11.2011 has observed as under:

“21. So, the combined reading of the above provisions brings out the scheme of the Act. A trader is treated as an intermediary. When the trader deals with the distribution company for re-sale of electricity, he is doing so as a conduit between generating company and distribution licensee. When the trader is not functioning as merchant trader, i.e. without taking upon itself the financial and commercial risks but passing on the all the risks to the Purchaser under re-sale, then there is clearly a link between the ultimate distribution company and the generator with trader acting as only an intermediary linking company

.....

61. It cannot be debated that the whole scheme of the Act is that from the very generation of electricity to the ultimate consumption of electricity by the consumers is one interconnected transaction and is regulated at each level by the statutory Commissions in a manner so that the objective of the Act are fulfilled; the electricity industry is rationalized and also the interest of the consumer is protected. This whole scheme will be broken if the important link in the whole chain i.e. the sale from generator to a trading licensee is to be kept outside the regulatory purview of the Act. If such a plea of the Appellant is accepted, the same would result in the Act becoming completely ineffective and completely failing to serve the objective for which it was created.

25. In OMP No. 677/2011 (PTC India Limited v Jaiprakash Power Ventures Limited), PTC India Limited had challenged the Arbitral Award dated 28.4.2011 in the dispute between PTC India Limited and Jaiprakash Power Ventures Limited under Section 34 of the Arbitration and Conciliation Act, 1996. One of the issues framed by the Hon'ble High Court of Delhi was whether the decision of the majority of the Tribunal that CERC had no power to determine the tariff for electricity supplied by a generating company to a trading licensee suffered from patent illegality or was otherwise opposed to public policy. The Hon'ble High Court after examining the relevant provisions of the Act, the Statement of Reasons of the Act and the various decisions of the Hon'ble Supreme Court and Appellate Tribunal observed in its judgment dated 15.5.2012 as under:

“52. In order to examine the above issue, first the relevant portion of the SOR of the EA requires to be referred to. Paras 4(ix) and (x) of the SOR acknowledge that under the EA, trading in electricity was for the first time being recognized as a distinct activity. The said clauses read as under: “(ix) Trading as a distinct activity is being recognized with the safeguard of the Regulatory Commissions being authorised to fix ceilings on trading margins, if necessary. (x) Where there is direct commercial relationship between a consumer and a generating company or a trader the price of power would not be regulated and only transmission and wheeling charges with surcharge would be regulated.”

53. A careful reading of Clause 4(x) of the SOR shows that it talks of direct commercial relationship between (i) a consumer and a generating company; (ii) a consumer and a trader. In the chain of supply of electricity, it is possible that a generating company makes a direct supply to a consumer. Sometimes, a trader could also be an intermediary in the supply by the generating company to the consumer. Such supplies would not be regulated by the appropriate Commission. Where there is a direct transfer of electricity from either the generating company to the consumer or from a trader to the consumer then the tariff would not be subject to regulation. However, where a trader or trading licensee sells electricity to a distribution licensee which in turn supplies to the consumer, the tariff would be subject to regulation.



55. The words "supply of electricity by a generating company to a distribution licensee" occurring in Section 62 would, in the above context, envisage apart from a direct supply from a generating company to a distribution licensee, also a supply from a generating company to a trading licensee who in turn sells to a distribution licensee. The trader could intervene either in the supply by a generating company to a consumer or he could intervene in the supply by a generating company to the distribution licensee. The latter transaction would certainly form the subject matter of regulation by the appropriate Commission within the meaning of Section 62 read with Para 4 (x) of the SOR. 56. It appears inconceivable that where a trading licensee is selling to a distribution licensee and not directly to a consumer, the tariff for such a supply by the generating company to the trading licensee would not be amendable to the regulatory jurisdiction of CERC or SERC under Section 62 of the EA. An interpretation to the contrary would defeat the rights of the consumers which are intended to be protected by the CERC and SERCs. The only freedom was given to the direct commercial relationship between a generating company and consumer where presumably there would be bulk consumption by such consumer. However, in cases like the present one where the trader is selling electricity to a distribution licensee who is eventually selling or supplying electricity to the consumer, the tariff would necessarily have to be regulated. Otherwise, every generating company would route the sale of electricity through a trading licensee to evade the applicability of the regulatory framework EA."

64. The Tribunal in the present case did not discuss the changed legal position as a result of the decisions of the APTEL subsequent to Gajendra Haldea and Lanco I in light of the altered decisions of the Supreme Court including the one in the GUVNL case. It went by only a literal and not a purposive and contextual interpretation of Section 62 EA. The majority of the Tribunal was, therefore, in error in holding that the transaction involving supply by a generating company to a trading licensee was outside the purview of regulation by the CERC under Section 79 (1) (f) read with Section 62 of the Act."

The above judgement was challenged before the Division Bench of the Hon^{ble} High Court of Delhi in FAO (OS) No. 244/2012 (Jaiprakash Power Venture Pvt Limited v PTC India Limited). Subsequently, the said FAO was withdrawn and there was no further challenge to the judgement dated 15.5.2012 in OMP No. 677/2011. The decision in the said OMP has attained finality which clearly provides that when power is supplied through a trading licensee to a distribution licensee for ultimate consumption of consumer, the tariff has to be regulated by the Regulatory Commissions.

26. The Appellate Tribunal in Lanco Power Ltd v Haryana Electricity Regulatory Commission has taken the view that when power is supplied to a trading licensee which has back to back arrangement for supply of the same power to the distribution licensees, the appropriate Commission has the power to determine the



tariff. The Hon'ble High Court of Delhi in PTC India Ltd v Jaiprakash Power Ventures Ltd has categorically held that when the trading licensee intervenes in the process of supply of electricity by a generating company to the distribution licensee, the transaction would be subject matter of regulation under Section 62 of the Act. In the context of JP Power Venture Ltd, the High Court has held that the transactions involving the supply of power by the generating company to PTC would be regulated by CERC since PTC is selling the power to the distribution licensees for eventual supply to the consumers. It is pertinent to mention that this Commission relying on the judgement of Hon'ble High Court had decided the jurisdiction of this Commission in case of supply of power by GMR Kamalanga Ltd to Haryana Utilities through PTC India Limited. The jurisdiction of the Commission was upheld by the Appellate Tribunal in its judgement dated 7.4.2016 against which GRIDCO filed Civil Appeal No. 5415/2016. The Hon'ble Supreme Court in its judgement dated 11.4.2017 in Energy Watchdog case upheld the jurisdiction of the Commission. In the light of the settled legal position and the factual matrix of the present case, the contentions of UPPCL with regard to absence of jurisdiction of this Commission to adjudicate the dispute between JITPL/TPTCL and UPPCL are rejected. We hold that the Petition filed by TPTCL/JITPL to adjudicate the disputes with regard to Change in Law claims by this Commission is maintainable under Section 79(1)(b) read with section 79(1)(f) of the 2003 Act.

27. Another objection of UPPCL is that in terms of Clause 18.11(e) of the RFP document disputes between the parties arising out of or in connection with the bid documents shall be settled by both parties and in case disputes are not settled amicably through mutual discussions, the dispute shall be referred to arbitration as provided therein. Clause 18.11(e) of the RFP dated 22.12.2015 provides as under:



“18.11 (e) Dispute Resolution mechanism- All differences or disputes between the parties arising out of or in connection with the bid documents shall be settled by both the parties amicably. In the event such disputes are not settled amicably through mutual discussions amongst parties concerned within two months, then dispute shall be referred to, arbitration as provided herein.

In case both the parties are unable to resolve the issue (amicably), difference relating to REA difference and RLDC/SLDC short term open Access charges, the matter will be referred to Member Secretary, NRPC or Chief engineer, UPSLDC in case seller/ Generator is in intra state for adjudication, after giving a written notice of 30 (thirty) days to the other party or parties. The decision of Member secretary, NRPC/ Chief engineer, UPSLDC shall be binding on both parties. Notwithstanding the existence of any dispute, whether referred to arbitration or not, the parties hereto shall continue to perform their respective obligations under this agreement throughout the terms and this agreement. The venue of the arbitration and meeting shall be at New Delhi. The sole arbitrator shall decide his fees with the consent of the parties and it will be shared equally.

Notwithstanding the occurrence of any disputes and differences referred to arbitration, the parties hereto shall continue to perform their respective obligations under this agreement.”

28. The above provisions of the RFP read with the Lols envisages amicable settlement of the disputes between parties and in case of non-settlement of the disputes, parties have to resort to arbitration. The question whether in case of disputes involving the matters which fall within the jurisdiction of the Regulatory Commission can be directly referred to arbitration arose for consideration before the Hon’ble Supreme Court in Gujarat Urja Vikas Nigam Limited V Essar Power Limited [(2008) 4 SCC 755]. The Hon’ble Supreme Court in the said case decided that under the scheme of the Electricity Act, 2003, the Appropriate Commission may either adjudicate the dispute itself or refer the dispute to arbitration. Relevant portion of the said judgment is extracted as under:

“58. In the present case we have already noted that there is an implied conflict between Section 86(1)(f) of the Electricity Act, 2003 and Section 11 of the Arbitration and Conciliation Act, 1996 since under Section 86(1)(f) the dispute between licensees and generating companies is to be decided by the State Commission or the arbitrator nominated by it, whereas under Section 11 of the Arbitration and Conciliation Act, 1996, the Court can refer such disputes to an arbitrator appointed by it. Hence on harmonious construction of the provisions of the Electricity Act, 2003 and the Arbitration and Conciliation Act, 1996 we are of the opinion that whenever there is a dispute between a licensee and the generating companies only the State Commission or Central Commission (as the case may be) or arbitrator (or arbitrators) nominated by it can resolve such a dispute, whereas all other disputes (unless there is some other provision



in the Electricity Act, 2003) would be decided in accordance with Section 11 of the Arbitration and Conciliation Act, 1996. This is also evident from Section 158 of the Electricity Act, 2003. However, except for Section 11 all other provisions of the Arbitration and Conciliation Act, 1996 will apply to arbitrations under Section 86(1)(f) of the Electricity Act, 2003 (unless there is a conflicting provision in the Electricity Act, 2003, in which case such provision will prevail.)”

29. In the above judgment, the Hon’ble Supreme Court has held that on harmonious construction of the provisions of the 2003 Act and the Arbitration and Conciliation Act, 1996, whenever there is a dispute between a licensee and generating company, only the State Commission or Central Commission (as the case may be) or the arbitrator or arbitrators nominated by them can resolve such disputes. Since the dispute raised in the present Petition has implication for tariff, the dispute can be either be adjudicated by the Commission or can be referred by the Commission to arbitration in terms of Section 79(1)(f) of the 2003 Act. Therefore, Clause 18.11(e) of the RFP read with the LOIs can only be invoked through this Commission in the light of the judgement in GUVNL case supra and cannot be invoked by the parties independently without approaching this Commission. We have in this order held that this Commission has the jurisdiction to adjudicate the dispute in the present case. Accordingly, we proceed to adjudicate the disputes raised by the Petitioners in this Petition in terms of Section 79 (1) (f) of the 2003 Act.

Issue (b): Whether the compensation claimed is admissible under ‘Change in law’?

30. Clause 18.11 (c) of the RFP provides for Change in law as under:

“18.11 In relation to the Letter of Intent (LOI) to be issued to the selected bidder, the following shall be deemed to have been included:

(c) Change in law- Change in law shall mean to include-

- Any change in transmission charges and open access charges*
- Any change in taxes (excluding income tax), duties, cess or introduction of any tax, duty, cess made applicable for supply of power by the seller*
- Regulatory intervention in the matter of power trading as also orders from CERC/SERCs/ Appellate Tribunal of Electricity/ High Courts/ Supreme Court particularly related to rates at which power can be sold/ purchased/ traded.*



This will also include regulations / orders already issued but yet to be conclusively enforced.

- In case of change in law or restriction imposed by Regulator (Central or State) or government (Central or State) or Appellate Tribunal or Courts on any aspect of sale or purchase of power, the same shall be binding on both the parties.”*

31. The Petitioners have submitted that Ministry of Finance, GOI vide its notification dated 29.2.2016 has increased the levy of Clean Energy Cess / Clean Environment Cess to ₹200/tonne to ₹400/tonne to all despatches/ lifting from 0.00 hrs of 1.3.2016. They have also submitted that Clean Energy Cess has been increased pursuant to a notification issued by Government of India under the Finance Act, 2010 and therefore constitute a Change in law. The Petitioners have further submitted that these changes have occurred after the cut-off date (31.12.2015) which is seven days prior to the bid submission deadline of 7.1.2016 and the same could not have been factored in the bid submitted. JITPL vide letters dated 10.3.2016 and 23.4.2016 requested TPTCL to accept the Change in law events, on account of increase in levy of Clean Energy Cess on coal, thereby increasing the coast of power generation by ₹0.151/kWh (approx) effective from 1.3.2016. Accordingly, TPTCL issued Change in law notices dated 11.3.2016, 13.4.2016, 9.5.2016 and 7.9.2016 to UPPCL and claimed an increase in tariff of ₹0.151/ kWh on account of Clean Environment Cess from ₹200/MT to ₹400/ MT in terms of clause 18.11 (c) of the RFP. The Petitioners have stated that the Respondent had not replied to the above Change in law notices and therefore has given rise to the cause of action for enforcement of contractual rights in favour of the Petitioners. The increase in cost of per unit power generation as computed by JITPL in its notices issued to TPTCL on account of change in law event is as under:

“A. Increase in cost of coal due to increase in CESS

*Rs 200.00 per MT of coal
Rs 10.00 5% VAT in the state
Rs 1.05 5% entry tax (Cess + VAT)
Rs 211.05 Total Cost increased*



B. Specific coal consumption =
 $\frac{2375 \text{ (Heat Rate as per CERC Regulations)}}{3328 \text{ (GCV - Last 3 months actual GCV)}} = 0.71364$

C. Increase in cost of per unit of power =
 Rs 211.05 (increase in coal cost/ MT x 0.71364 (specific coal consumption))
 = Rs 0.151 per unit of power”

32. Based on the above, the Petitioners have claimed the compensation of ₹4,84,37,282/- accrued in favour of JITPL in terms of the Change in law event for the period of supply of power during the period from 1.5.2016 to 30.6.2016 and 1.8.2016 to 30.9.2016 as tabulated under:

Period of supply		Bill date	Due date	Energy (kWh)	Rate/ kWh	Gross amount
From	To					
1.5.2016	31.5.2016	4.6.2016	11.6.2016	39545723	0.151	5971404
1.6.2016	30.6.2016	4.7.2016	11.7.2016	71243353	0.151	10757746
1.6.2016	30.6.2016	4.7.2016	11.7.2016	8327395	0.151	1257437
1.8.2016	31.8.2016	12.9.2016	19.9.2016	90751728	0.151	13703511
1.8.2016	31.8.2016	12.9.2016	19.9.2016	60213180	0.151	9092190
1.9.2016	30.9.2016	4.10.2016	11.10.2016	50695326	0.151	7654994
						48437282

33. The Respondent, UPPCL in its reply has submitted that there are no general principles governing the change in law disputes and it is through examination of Change in law provisions contained in a PPA, approved by an Appropriate Commission that Change in law is calculated. It has further submitted that no PPA was entered into between TPTCL and UPPCL and there is also no provision in the RFP document for evaluating the impact of the purported change in law. UPPCL has pointed out that Clauses 18.3 & 18.5 of the RFP document clearly prohibited any claim for increase in the quoted tariff on any ground and since TPTCL had quoted the lump sum tariff with its calculations embedded in the same, after its acceptance by UPPCL, the escalation in the rate of tariff on any score would amount to breach of the concluded contract. Clause 18.3 and 18.5 of the RFP are as under:



“18.3. The bidder shall quote the single tariff at the delivery point upto three (3) decimals which shall include capacity charge, energy charge, trading margin (in case of trader being bidder) and all taxes, duties, cess etc. imposed by Central Govt/State Govt/Local bodies. Tariffs shall be designated in Indian Rupees only. Each charge shall be indicated separately.

18.5. The tariff should be constant and there shall be no escalation during the contractual period. If bids are invited for different time slots then tariff may be different for each time slot. If the power is being supplied through alternate source, any additional charges and losses if any, due to cancellation of existing corridor and booking of new corridor etc., shall be to the account of Bidders.”

34. Accordingly, UPPCL has submitted that the claim of the Petitioners is not sustainable and therefore may be rejected. In response to this, the Petitioners have clarified that any expenditure incurred due to change / modification/ revision in tax regime is a Change in law event and the generator is entitled to be compensated to the extent of such impact. They have further submitted that clause 18.5 covers a scenario wherein, successful bidder supplies power through alternate source which is not disclosed by the bidder and hence any additional charges or losses will be on account of the bidder. They have also submitted that clauses 18.3, 18.5 & 18.11 (c) of the RFP shall be interpreted in a way to give meaning to a contract and not by a narrow and pedantic interpretation. Accordingly, they have prayed for a direction to UPPCL to make payment to JITPL on account of the Change in law event.

35. The submissions have been considered. The Commission in its various orders has held that the Clean Energy Cess is covered under Change in Law if its imposition or change in the rate of Clean Energy Cess has taken place after the cut-off date. The Commission in order dated 30.3.2015 in Petition No. 6/MP/2013 (Sasan Power Limited Vs. MPTCL & Others) has dealt with Clean Energy Cess as under:

“33. We have considered the submissions made by both petitioner and the respondents on the clean energy cess. The clean energy cess on coal was introduced by the Government of India through the Finance Act, 2010 for the first time which is after the due date i.e. seven days prior to the bid



deadline. Since there was no clean energy cess on the date of submission of the bid, the petitioner could not be expected to factor in the impact of such cess in the bid. Moreover, clean energy cess adds to the input cost of production of electricity. Therefore, the claim is covered under Article 13.1.1(i) of the PPA and consequently the liabilities shall be borne by the procurers....”

36. The Clean Energy Cess on coal was introduced through the Finance Act, 2010 and was being modified through subsequent Finance Acts. The cut-off date in the present case is 31.12.2015. The Clean Energy Cess applicable as on cut-off date is ₹200/ MT and the same was revised to ₹400/MT from 1.3.2016 to 30.6.2017. Since the Clean Energy Cess was increased after the cut-off date from ₹200/MT to ₹400/MT through the Act of Parliament, it is covered under Change in Law in terms of Clause 18.11 (c) of the RFP dated 22.12.2015 read with the Lols. Accordingly, the Petitioner is entitled to recover the differential Clean Energy Cess from the Respondent, UPPCL @ ₹200/MT in proportion to the coal consumed or as per the operational parameters in accordance with the applicable tariff regulations of this Commission whichever is lower for generation and supply of electricity to UPPCL for the periods mentioned in the LOIs dated 18.1.2016, 28.1.2016 and 30.1.2016 (i.e 1.5.2016 to 30.6.2016 and 1.8.2016 to 30.9.2016). The Petitioners are directed to furnish along with its bill the proof of payment and computations duly certified by the auditors. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of clean energy cess on coal. The Petitioners and the Respondent, UPPCL are directed to carry out reconciliation on account of these claims.

37. Petition No. 158/MP/2017 is disposed of in terms of above.

Sd/-
(Dr. M.K.Iyer)
Member

Sd/-
(A. K. Singhal)
Member

Sd/-
(P. K. Pujari)
Chairperson

