

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 159/MP/2017**

**Coram**

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

**Date of Order: 5<sup>th</sup> November, 2018**

**In the matter of**

Petition under Section 79(1)(b) and 79(1)(f) of the Electricity Act, 2003 for claiming compensation from Respondent on account of event pertaining to change in law as per the terms of LOI dated 14.1.2016 placed by the Respondent upon the Petitioner No.1

**And**

**In the matter of**

1. Tata Power Trading Company Limited  
Corporate Centre,  
34, Sant Tukaram Road,  
Carnac Bunder, Mumbai- 400009

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

**....Petitioners**

**Vs**

The Brihan Mumbai Electric Supply & Transport Undertaking  
1<sup>st</sup> floor, Multistoried Annex Building,  
BEST Marg, Colaba,  
Mumbai- 400001

**....Respondent**

**Parties present:**

Shri Venkatesh, Advocate, TPTCL & JITPL  
Shri Pratyush Singh, Advocate, TPTCL & JITPL  
Shri Somesh Srivastava, Advocate, TPTCL & JITPL  
Shri Vikas Maini, Advocate, TPTCL & JITPL  
Shri Sandeep Rajpurohit, Advocate, TPTCL & JITPL  
Shri Samarth Kashyap, Advocate, TPTCL & JITPL  
Ms. Nishtha Kumar, Advocate, TPTCL & JITPL  
Shri Harinder Toor, Advocate, BEST



## ORDER

The Petitioners, Tata Power Trading Company Limited (hereinafter referred to as TPTCL or Petitioner No.1) and JindalIndia Thermal Power Ltd (hereinafter referred to as JITPL or Petitioner No.2) have filed the present Petition seeking the following reliefs:

*“(a) Declare and adopt that the following event / notification is Change in law event within the meaning of Clause 17(E) of the LOI 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 ₹1,81,87,936.40/- 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 Hon’ble Commission deems appropriate under the facts and circumstances of the present case.”*

2. TPTCL is a company incorporated under the Companies Act and is an inter-State trading licensee within the provisions of the Electricity Act, 2003 (hereinafter referred to as ‘the 2003 Act’). JITPL is a generating company and has authorized TPTCL for supply of power to the Respondent, Brihan Mumbai Electric Supply & Transport Undertaking (hereinafter referred to as ‘BEST’ or Respondent) through back to back power sale arrangement. BEST is the distribution licensee in the State of Maharashtra and is procuring power from TPTCL by issuance of Letter of Intent (LOI) dated 14.1.2016. Thus, TPTCL has been supplying power to the Respondent from the generating station of JITPL as disclosed in the said LOI.

3. BEST had initiated competitive bidding process by issuance of Expression of Interest (EoI) for External Power Purchase for selection of successful bidder to supply power on short term basis for the period from February, 2016 to December, 2016. Pursuant to such competitive bidding process, TPTCL was selected as



successful bidder to supply power to BEST from the generation plant of JITPL for the said period in accordance with the terms and conditions indicated in the EoI for external power purchase. Accordingly, BEST issued Letter of Intent (LoI) to TPTCL on 14.1.2016 for supply of power for four months as tabulated under:

Duration	Time period	Quantum (MW)
1.3.2016 to 31.3.2016	00 to 24 hrs	50
1.4.2016 to 30.4.2016	00 to 24 hrs	50
1.7.2016 to 31.7.2016	00 to 24 hrs	30
1.12.2016 to 31.12.2016	00 to 24 hrs	50

4. JITPL has submitted that as per the terms of LOI, the power was being procured by BEST from the delivery point i.e. Interface of intra-State transmission network in Maharashtra periphery. Therefore, the electricity supplied by TPTCL to BEST through JITPL at a lump sum tariff includes the fixed cost of the project, energy charges, taxes, cess and duties and the same is required to be paid by BEST.

5. In the present Petition, the Petitioners have sought to bring on record the Change in law event in terms of Clause 17(E) of the LoI, which has resulted in additional recurring/non-recurring expenditure in the nature of increase in Clean Energy Cess imposed through the Act of Parliament. In this background, the Petitioners have made the following submissions:

(i) As per clause 17 (E) of the LOI and 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.

(ii) The bid submission deadline was 5.1.2016 and as such the cut-off date for a Change in law event resulting in compensation is 29.12.2015 (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.

(iii) The Ministry of Finance, Government of India by notification dated 29.2.2016 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, leading to substantial increase in the expenditure of JITPL.

(iv) The principle behind determining the consequence/compensation on account of change in law event is to reconstitute 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.

(iv) The power plant of JITPL 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 2003 Act to provide the reliefs sought for in the Petition.

(v) JITPL vide letter dated 10.3.2016 requested TPTCL to accept the Change in law event, 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. JITPL again vide letter dated 23.4.2016 further requested TPTCL to accept the increase in tariff due to change in Clean Environment Cess by the Govt. of India.

(vi) Pursuant to the above letter, TPTCL issued Change in law notice dated 11.3.2016 wherein TPTCL apprised BEST about the increase in tariff of JITPL by ₹0.151/kWh claimed on account of the Change in law event. In response,



BEST by e-mail dated 18.4.2016 to TPTCL replied that the request made by TPTCL for increase in tariff by ₹0.151/kWh on account of change in cess/tax is not accepted by BEST. Thereafter, JITPL by letter dated 23.4.2016 to TPTCL again requested to consider the increase in tariff on account of change in law and in turn TPTCL vide its letters dated 13.5.2016 and 7.9.2016 requested BEST to accept the said increase in tariff due to increase in Clean Energy Cess.

(vii) BEST by letter dated 8.2.2017 denied the claim made by TPTCL at the behest of JITPL on the ground that since it was a short term power supply, there is no provision for change in law. Failure on the part of BEST to act upon the change in law claim made by JITPL through TPTCL has given rise to a cause of action for enforcement of contractual right in favour of the Petitioners. As on date, the total sum payable by BEST towards differential of the increase in Cess is ₹18187936/-. Hence, the dispute may be adjudicated by this Commission in terms of Section 79(1)(f) of the 2003 Act.

6. The Petition was admitted on 7.9.2017 and notice was issued to the Respondent, BEST. Pursuant to the hearing of the Petition on 30.1.2018, the Petitioners were directed to file copy of the Power Purchase Agreements/Documents to substantiate whether contracts were concluded with the distribution companies. The Petitioners have filed the Eofo for external power purchase issued by the Respondent. Reply to the Petition has been filed by the Respondent, BEST vide affidavit dated 5.10.2017. The Petitioners have filed rejoinder to the said reply vide affidavit dated 18.12.2017 and the Respondent vide affidavit dated 25.1.2018 has filed reply to the said rejoinder filed by the Petitioners.

### **Submissions of Respondent**

7. The Respondent, BEST vide its reply affidavit dated 5.10.2017 has mainly submitted the following:



(a) There is no privity of contract between BEST and JITPL. BEST has not entered into any agreement or arrangement with JITPL and thus, JITPL has no locus standi in the matter.

(b) The Petition is erroneously construed the Change in law as an independent and substantive clause which provides for and includes any changes in taxes, duties, cess or introduction of any tax, duty, cess made applicable for supply of power.

(c) The Petition is based on misconstruction of the factor of Change in law which is stated in clause 17 of the LOI (Force majeure). The LOI does not provide for an independent clause for Change in law, but merely includes the factor 'change in law' as a Force majeure event in the limited and specific context of force majeure.

(d) The LOI was issued by the Respondent under the process of competitive procurement of short term external power (limited to four months only) and without the execution of a formal PPA. Accordingly, the LOI stipulates a firm and specific tariff over the said four months and does not envisage any revision / variation in tariff quoted by the bidders (i.e. TPTCL).

(e) The LOI dated 14.1.2016 clearly stipulates for firm and specific tariffs, at the delivery point which are all inclusive. The quoted tariffs, including the tariffs in the LOI dated 14.1.2016 has been quoted by the bidders after taking into consideration all commercial, financial and taxation aspects and principles.

Accordingly, the Respondent has submitted that the Petition is not maintainable and is liable to be dismissed.

### **Rejoinder of Petitioners**

8. The Petitioners vide rejoinder affidavit dated 18.12.2017 have submitted the following:



(i) JITPL had authorized TPTCL for supply of power to BEST through back to back power sale arrangement. It is an admitted fact that TPTCL is supplying power to BEST from the generating station of JITPL which was clearly disclosed in the LOI dated 14.1.2016 issued by BEST who identified JITPL as the generation source for supply of power. Hence, even if JITPL is not a signatory to the said LOI, privity of contract exists between JITPL and the Respondent, BEST.

(ii) 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 (LancoBudhil 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. In terms of the said judgments, it is clear that Lol and PPA are back to back agreements as there exist direct nexus between them as the source of generation in the LOI has been specifically recognized by BEST for supply of power. In case, no privity was intended by BEST, there was no need for seeking disclosure of the source of supply. BEST had the underlying intent of entering into an arrangement whereby firm supply could be sourced through TPTCL and resultantly, the present Lol came into being discerning the source of supply.

(iii) Privity of contract can be gathered by way of conduct also, either express or implied, and courts are duty bound to see whether there is actually a privity of contract or the plea of no privity of contract is taken only to defeat the legitimate claims of the party. In the present case, JITPL stands adversely affected with the increase in Clean Energy Cess on coal which is the primary fuel for the disclosed source of generation and as such, the plea of no privity of contract has been raised by BEST to deny the legitimate entitlement of the Petitioners.

(iv) A contract shall stand concluded and enforceable for all intent and purpose in relation to all clauses thereof irrespective of the duration for and form in which the same has been executed. It cannot be averred that the contract being a short term does not attract a change in law clause, more so when the



clause forms a sub-sect of force majeure clause in the Lol. The form and content of the Lol has been decided by the Respondent unilaterally and without the consultation of the Petitioners as to the form and content thereof. The Respondent cannot now hide behind the form and appearance of change in law covenant to deny its liability to bear the additional financial expenses for the Change in law event. While the Respondent does not deny the factum of the increase in Clean Energy Cess, it is placing reliance on the form and appearance as a sub-sect of force majeure clause.

(v) The intent of the parties as can be gathered from the overall construction of the terms of the Lol appears to be that although the event may be a change in law; however, the same shall be treated as an event of force majeure if it qualifies the additional criteria of '*adversely affects, prevents or delays any party in performance of its obligation ...*'. An event shall nonetheless constitute a Change in Law event even though it may not qualify as a force majeure strictly in accordance with the terms of the Lol. In such a situation, the Petitioners cannot be denied the restitution for the resultant difference in the cost of generation, more so when the Respondent has received and enjoyed the benefit of firm power supply for the relevant period.

(vi) In case the change in law as sought to be put by the Respondent were to be interpreted as an event of force majeure only, then there was no need to term it as 'change in law' and any other plausible reference could have sufficed. Having led to believe that they stand protected against any event leading to change in positions of parties caused by change in law event, the Respondents are now estopped from denying the right to restitution accruing thereunder. The provisions of the Lol also cover the scope, so that any such increase/additional expenditure incurred by the generator for any or all purposes of supply of power to the procurer has to be construed as change in law event.

(vii) The term 'Change in law' in the Lol shall be interpreted in a way to give meaning of a contract and particularly, a commercial one must be gathered by adopting a common sense approach and not by a narrow pedantic and legalistic interpretation. It is well settled law that a contract needs to be read as a





whole in its entirety and while interpreting the contract, the scheme of the contract has to be taken into consideration to give holistic and purposive construction of each and every clause. The use of the word 'adverse effect' in clause 17 of the Lol signifies the negative/harmful financial impact i.e. financial loss incurred by the generating company, in this case JITPL. Therefore, the Respondent is obliged to make payments to JITPL on account of the change in law event. In line with the decisions of the Hon'ble Supreme Court in LIC v DharanVirAnand[(1998) 7 SCC 348], DLF Quitab Enclave Complex Educational Charitable Trust V State of Haryana [(2003) 5 SCC 622] and Energy Watchdog V CERC [2017 (4) SCALE 580], the Commission may direct BEST to pay the amount to JITPL which has accrued on account of the Change in Law events.

9. The Respondent BEST vide affidavit dated 25.1.2018 has submitted a *sur-rejoinder* in which it has mainly reiterated the submissions made in its reply affidavit dated 5.10.2017.

10. The matter was heard on 26.7.2018. The learned counsel for the Petitioners reiterated their submissions made in the Petition. None appeared on behalf of the Respondent, BEST. Accordingly, the Commission reserved its order in the Petition. Pending order in the Petition, the Petitioner has filed additional affidavit on 5.9.2018 with copy to the Respondent. In the said affidavit, the Petitioners have referred to the directions issued by MOP, Gol vide Notification No. 23/43/2018-R&R dated 27.8.2018 to this Commission under Section 107 of the 2003 Act and has submitted that in terms of the said directions, the impact of change in law due to levy of Clean Energy Cess may be made a pass through from the date of occurrence of the said event.

11. Since order in the Petition could not be passed prior to one Member of the Commission who heard the matter, demitting office, the Petition was listed for



hearing on 23.10.2018. During the hearing, the learned counsel for the Respondent, BEST submitted that it has filed its reply vide affidavit 22.10.2018 to the additional affidavit dated 5.9.2018 filed by the Petitioner and prayed that the same may be taken on record. The learned counsel for the Petitioner submitted that it has received a copy of the said reply filed by the Respondent. The learned counsels for both the parties however submitted that no further arguments were required and order may be passed based on the submissions of the parties and the documents available on record. Accordingly, the Commission reserved its order in the Petition.

12. The reply dated 22.10.2018 filed by the Respondent BEST is taken on record. In the said reply, the Respondent has mainly contended that the MOP directions dated 27.8.2018 is not applicable to the LOI dated 14.1.2016 placed by BEST on TPTCL for purchase of short term power on firm basis for a specified period of 4 months without execution of formal PPA. In addition to this, the Respondent has reiterated the submissions made in its reply affidavit dated 5.10.2017.

### **Analysis**

13. After consideration of the submissions of the Petitioners and the Respondent, the following issues arise for our consideration:

- (a) Issue No.1: Whether the Petition filed by Petitioner No.2, JITPL is maintainable?**
- (b) Issue No.2: Whether the relief for compensation is admissible under Change in law?**

**Issue No.1: Whether the Petition filed by Petitioner No.2, JITPL is maintainable?**

14. The Petitioners have submitted that this Commission has the necessary jurisdiction to entertain the present Petition and to provide the reliefs as sought



for in the petition. According to the Petitioners, the power plant of JITPL is situated in the State of Odisha and JITPL is selling power to more than one State and hence in terms of Section 79(1)(b), it has a composite scheme for generation and sale of electricity in more than one State attracting the jurisdiction of the Commission. Resultantly, this Commission has the power under Section 79(1)(f) of the Act to adjudicate the dispute with regard to change in tariff on account of change in law for supply of power to BEST through TPTCL. The Respondent has submitted that the Petition by or on behalf of the Petitioner No.2 (JITPL) is not maintainable in law as there is no privity of contract between BEST and JITPL. The Respondent has further submitted that it had not entered into any agreement or arrangement with JITPL and the contract under Lol dated 14.1.2016 is limited and relevant to contractual relationship between BEST and TPTCL. Accordingly, the Respondent has submitted that JITPL has no locus standito maintain the present Petition before this Commission for adjudication of disputes qua BEST.

15. In order to examine the question as to whether JITPL has the locus standito maintain the present Petition, it is required to determine (1) whether there exists a composite scheme for generation and supply of power to more than one State; (2) Whether there is privity of contract between JITPL and BEST; and (3) whether back to back arrangement for supply of power from generating station to the distribution licensee through trader amounts to supply of power by a generating company to a distribution licensee.

#### **(A) Composite Scheme**

16. As stated, JITPL is supplying power to UPPCL, WBSEDCL and BEST (which is the Respondent in the present petition) from its power project situated in the State of Odisha. JITPL 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 more than one State from its generating station in Odisha through binding arrangements including PPAs. Sub-section (b) of Section 79(1) of the 2003 Act provides that Central Commission shall “regulate the tariff of generating companies other than those owned or controlled by the Central Government, if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State”. The Hon’ble Supreme Court in the judgment dated 11.4.2017 in *Energy Watchdog v CERC &ors[(2017 (4) SCALE 580)]* has explained the scope of composite scheme and the jurisdiction of this Commission in respect of the generating companies having 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 any 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. Accordingly, this Commission has the jurisdiction to regulate the tariff of the generating station of JITPL Section 79 (1) (b) and also adjudicate the disputes with regard to tariff raised in the present Petition in terms of section 79(1)(f) of the 2003 Act.

### **(B) Privity of Contract**

17. As regards the contention of BEST that there is no privity of contract, the Petitioners have contended that JITPL has authorized TPTCL to supply power to BEST through back to back power sale arrangement and hence, power was supplied to BEST by TPTCL through the generating station of JITPL. The Petitioners have also submitted that the Respondent at all times was aware about the source of intended supply as well as the corridor booked for such supply. 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 them through the agreements. Based on this, the Petitioners have argued that the provisions of the LOI between TPTCL and BEST and PPA between JITPL and TPTCL are back to back agreements which establish a direct nexus between JITPL and BEST in so far as supply of power is concerned. The Petitioners have further pointed out that had



noprivitybeenintended by BEST, there was no need for seeking disclosure of the source of supply and/or insert a clause for alternate arrangement of supply. The Petitioners have added that they have a joint cause of action qua the Respondent in terms of the PPA/Lol and in terms of the provisions of the Civil Procedure Code, joinder of parties is permissible. The Petitioners have contended that the reliefs claimed against the Respondent are based on series of acts/transactions between the Petitioners and the Respondent and hence, the Petitioner No.2 (JITPL) is a necessary party to the dispute. Accordingly the Petitioners have submitted that the objections of BESTto the maintainability of the petition on the ground of lack of privity of contract are liable to be rejected.

18. We have considered the submissions of the parties and examined the legal position on the issues raised. As stated earlier, BEST had initiated competitive bidding process by issuance of Eol for External Power Purchase for selection of bidder to supply power on short term basis between February, 2016 to December, 2016. Under the said EOI, it was obligatory upon the suppliers to specify the source of supply and provide confirmation from the said source. TPTCL as the bidder had indicated JITPL as the identified source for supply of power. TPTCL was selected as the successful bidder for supply of power to BEST and in accordance with the terms and conditions of the Eol,BEST issued LOI to TPTCL on 14.1.2016 for supply of power as detailed below:

Month	Time in hours	Quantum (MW)	Rate ₹/kWh	Remarks
March, 2016	00.00 to 24.00	50	2.95	On RTC basis
April, 2016	00.00 to 24.00	50	3.03	
July, 2016	00.00 to 24.00	30	3.07	
December, 2016	00.00 to 24.00	50	3.11	

*(above rates are inclusive of Trading margin of 2.5 paise/kWh for the month of March, 2016 and 3 paise/kWh for the months of April, 2016, July, 2016 and December, 2016)*



19. The LOI issued by BEST indicated the source as JITPL with the delivery point as “Interface of Intra-State Transmission network in Maharashtra”. In the present case, though no PPA was executed between JITPL (the generating company) and TPTCL (the inter-State trader), JITPL had authorized TPTCL for supply of power to BEST through back to back power sale arrangement. Similarly, though no PSA was executed by BEST with TPTCL, BEST had issued the LOI for supply of power by TPTCL from the indicated source as the generating station of JITPL in Odisha. In this background, the question which begs for our consideration is whether the LOI can be considered as a legally binding contract.

20. 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.”*

21. Let us consider the present case in the light of the legal position of Lol settled through the above judgment of the Tribunal. Clause 18 of the EoI floated by BEST provided as under:

*“After receipt of Letter of Intent (Lol) from BEST, the supplier has to stick on to the contracted quantum of power for delivery...”*



TPTCL submitted its offer clearly indicating the source of supply of power as the generating station of JITPL. The offer of TPTCL was accepted by BEST and accordingly, LOI dated 14.1.2016 in favour of TPTCL was issued for supply of power for four months during the year 2016 as per the details in para 16 above. Thus, the LOI issued by BEST is in the nature of acceptance of offer for supply of power in favour of BEST for a valid consideration (accepted tariff) and therefore, constitute an award of contract by BEST to TPTCL for supply of power from the generating station of JITPL in Odisha.

22. TPTCL after accepting the LOI acted upon the same and supplied power from the generating station of JITPL to BEST. Also, BEST had made payments for the quantum of power supplied by TPTCL from the generating station of JITPL. Thus, terms and conditions of the LOI and the conduct of the parties to act on such terms and conditions of the LOI by making supply of power for a valid consideration clearly established that an enforceable contractual relationship between JITPL/TPTCL and BEST came into existence during the period of supply of power. In view of this, we hold that the LOI dated 14.1.2016 constitute a legally binding contract between TPTCL and BEST for supply of power from the generating station of JITPL in Odisha to BEST.

23. Also, in terms of the EoI, the successful bidder was to disclose the source of supply of power and to provide a confirmation from the source of generation. JITPL had authorised TPTCL to supply power from its plant to BEST based on which TPTCL had indicated JITPL as the source of supply. Further, the LOI issued by BEST had recognised JITPL as the source for supply of power to it by TPTCL. Moreover, it is undisputed that TPTCL had supplied power to BEST from the generating station of JITPL in terms of the said LOI. Thus, the LOI dated 14.1.2016





read with the provisions of EoI unambiguously establish the nexus between the generating company JITPL and the distribution licensee, BEST, even though power was supplied through TPTCL, which is an inter-state trading licensee. Hence, the contention of BEST 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 BEST is maintainable under Section 79(1)(b) read with Section 79(1)(f) of the 2003 Act.

### **(C) Supply of Power through a Trader**

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 through back to back arrangement would 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 of EA.”

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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 GajendraHaldea 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 by a generating company to a distribution licensee through the intervention of a trading licensee for ultimate consumption of consumer, the tariff would be subject to the regulatory jurisdiction of the Regulatory Commission. Since in this case electricity was supplied from the generating station of JITPL to BEST through TPTCL through back to back arrangements, such supply of power



shall be subject to the regulatory jurisdiction of this Commission including adjudication of any dispute with reference to supply of such power and tariff thereof.

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 BEST is that the Petitioner No.2, JITPL is neither a necessary party nor a proper party in the said Petition and hence the Petition is not maintainable. In response, the Petitioners have submitted that JITPL is a necessary party to the proceedings for proper adjudication of the dispute.

28. The matter has been examined. Order 1 Rule 10(2) of the Code of Civil Procedure (“the Code”, for short) provides for impleadment of proper or necessary parties. The said sub-rule is extracted below:

*“10. (2) Court may strike out or add parties.—The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.”*

29. The said provision makes it clear that a Court may, at any stage of the proceedings either upon or even without any application, and on such terms as may appear to it to be just, direct that name of the person improperly joined as either plaintiff or defendant be struck out, and name of any person (a) who ought to have been joined as plaintiff or defendant, or (b) whose presence before the court may be necessary in order to enable the court to effectively and completely adjudicate upon and settle the questions involved in the suit, be added. Thus, the dominant consideration for addition or retention of a party as a plaintiff or defendant is whether in the consideration of the court, the presence of a party is necessary to enable the court to effectively and completely adjudicate upon and settle the questions involved in the suit. In the present case, the Petitioners have



filed the petition for reimbursement of Clean Energy Cess on coal which has increased the cost of generation for supply of power to BEST so that they are put in the same economic position as if the Change in Law (i.e. increase in the rate of Clean Energy Cess) had never occurred. Clean Energy Cess is paid by JITPL on the coal purchased by it and such coal is utilised for generation and supply of power to BEST through TPTCL in fulfilment of the contractual obligations under the Lols issued by BEST. Therefore, increase in Clean Energy Cess increases the input cost for generation of power for supply to BEST and thereby impacts the tariff payable by BEST. In our view, JITPL is a necessary party for adjudication and settlement of disputes with regard to Change in Law event arising out of the increase in the rates of Clean Energy Cess. The joinder of JITPL as Petitioner No.2 in the Petition for adjudication of the dispute with regard to Change in Law is maintainable.

**Issue No.2: Whether the relief for compensation is admissible under ‘Change in law’?**

30.Clause 17 of the Lol dated 14.1.2016 (clause 16 in Eol) provides as under:

*“17.Force majeure- A Force Majeure event or circumstance or combination of events or circumstances (not otherwise constituting and Indian political event) that adversely affects, prevents or delays any party in the performance of its obligation in accordance with the terms of this agreement, but only if and to the extent that (i) such events and circumstances are not within the reasonable control of the affected party, and (ii) such events or circumstances could not have been prevented through employment of prudent utility practices.*

*Neither party shall be in breach of its obligations pursuant to this understanding to the extent that the performance of its obligation was prevented, hindered or delayed due to force majeure event, and without in any way prejudicing the obligation of either party to make payments of amounts accrued due prior to the occurrence of the event of force majeure, which shall be payable on the original due date.*

*Force majeure events shall include but not limited to:*

- A) Act of war, invasion, armed conflict, blockade, revolution, riot, resurrection or civil commotion, terrorism, sabotage, fire explosion or criminal damage;*
- B) Act of God, including fire, lighting, cyclone, typhoon, flood, tidal wave, storm, earthquake, landslide, epidemic or similar cataclysmic event;*
- C) Any curtailment/ suspension / non availability of transmission capacity by intervening SLDC’s / RLDC’s;*



- D) Any restriction imposed by any RLDC's and including generation constraints/ equipment breakdown/ islanding/ accidents;
- E) **Change in law;**
- F) 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.
- G) Any directive by Government of Maharashtra not to export / import power outside Maharashtra boundary.”

31. The Petitioners have submitted that the provision of Change in law has been inserted in the Lol to enable the generator to recover costs which could not have been foreseen at the time of participating in the bid for sale of power. They have submitted that the change in law provision has been introduced under the Force majeure clause of the Lol to ensure that the parameters based on which the Petitioner had bid for supplying power, if modified or changed in times to come, would not have any adverse effect upon the performance of the generator. Accordingly, in return for bidders quoting the lowest possible price and bearing the commercial risk, the *quid pro quo* is that the procurer agrees under the PPA to bear the regulatory risk of compensating them for changes in the law, which is beyond the control of the bidder. The Petitioners have argued that BEST having induced the Petitioners to believe that any such event necessitating invocation of change in law event shall be adequately addressed within the confines of the Lol, cannot subsequently refuse to provide the relief otherwise admissible under the provisions of change in law. In addition, the Petitioners have contended that the intent of the parties as can be gathered from the overall construction of the terms of the Lol is that although the event may be a change in law event, the same shall be treated as Force majeure if it qualifies the additional criteria of “*adversely affects, prevents or delays any party in performance of its obligations...*”. Further, an event shall nonetheless constitute a change in law event even though it



may not qualify as a force majeure in terms of the Lol, if it otherwise meets the requirements of change in law. The Respondent BEST has submitted that the Lol does not provide for an independent and substantive clause for 'change in law' but merely includes "change in law" as a force majeure event in the limited and specific context of force majeure.

32. The submissions have been considered. It is evident from clause 17 of Lol as quoted in para30 above that "force majeure" can be invoked where "any event or circumstances or combination of events or circumstances adversely affects, prevents or delays any party in the performance of its obligations". Further, Clause 17 provides an inclusive definition of Force Majeure. Clause 17(E) recognises "change in law" as an event of force majeure. Unlike in the case of standard PPAs, Change in Law in Clause 17(E) is neither defined nor has its scope been clearly delineated. In our view, an event would constitute a change in law, even though it may not qualify as a force majeure in terms of the Lol, if it meets the requirements of change in law in standard PPA. In the standard model PPA issued by Ministry of Power Government of India under Section 63 of the 2003 Act, the term "Law" inter alia includes any statute, ordinance, regulation, notification or code, rule or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law. The term 'Change in Law' includes any enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal of any law, occurrence of any of the events mentioned therein if the same has occurred after the cut-off date (which is seven days before the bid deadline) and has the effect of incurring of recurring or non-recurring expenditure by the Seller (Generating Company). In the present case, the Petitioners have claimed compensation for additional expenditure incurred by





Petitioner No.1 due to increase rate of Clean Energy Cess on coal, after the cut-off date (31.12.2015) based on MOF, GOI notification dated 29.2.2016. Thus, the increase in levy of Clean Energy Cess, in our view, qualifies as a 'change in law' event in terms of clause 17(E) of the Lol. It is pertinent to note that the Model PPA provides for the award of compensation for Change in Law which occurred during the Construction Period and Operating Period. In the absence of any such provision for award of compensation for change in law in the Lol, it needs to be considered as to what relief should be admissible for Change in Law on account of change in rate of Clean Energy Cess.

33. The Petitioners have submitted that the increase in levy of Clean Energy Cess qualifies as a change in law event under clause 17 of the Lol and hence they ought to be compensated in terms of clause 17 and restored back to the same economic position as if such change in law has not occurred. It is to be noted that compensations under a contract has to be governed as per the provisions of the contract. The Lol dated 14.1.2016 does not contain any provision for payment of compensation on the occurrence of events of change in law. Further, Change in Law has been shown under "force majeure". The compensation for force majeure under the Lol is in terms of the following:

*"Neither party shall be in breach of its obligations pursuant to this understanding to the extent that the performance of its obligation was prevented, hindered or delayed due to force majeure event, and without in any way prejudicing the obligation of either party to make payments of amounts accrued due prior to the occurrence of the event of force majeure, which shall be payable on the original due date."*

Since "Change in Law" is a sub-sect of force majeure, the above provisions will be applicable for Change in Law also. In terms of the above provision, neither party will be in breach of its obligations to the extent the performance of its obligation was prevented or hindered or delayed due to force majeure event. Change in rates



of Clean Energy Cess which is covered under Change in Law and is a force majeure event in terms of the Lol will certainly hinder JITPL/TPTCL from discharging their obligations under the Lol and for such hindrance, JITPL/TPTCL would not have been in breach of their obligation under the Lol. However, JITPL/TPTCL despite being affected by force majeure arising out of change in law have supplied power by incurring additional expenditure. In our view, JITPL/TPTCL needs to be considered for compensation for the additional expenditure incurred by them on account of change in rate of Clean Energy Cess on coal which was used for supply of power to BEST.

34. Where the contract does not provide for a particular eventuality, the parties shall be governed by the provisions of the Indian Contract Act, 1872 (Indian Contract Act) in respect of that eventuality. Section 70 of the Indian Contract Act is extracted hereunder:

*“70. Obligation of person enjoying of non-gratuitous act.- Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered”.*

As per the above provision, where a person does a thing, not intending to act gratuitously and the other person derives any benefit of such act, then the person enjoying the benefit is liable to compensate the other to the extent of the benefit received.

35. In the present case, TPTCL had supplied firm power to BEST from the generating station of JITPL during the periods March, 2016, April, 2016, July, 2016 and December, 2016, in fulfillment of its contractual obligations even though it had to incur additional expenditure for generation and supply of power on account of change in rates of Clean Energy Cess which has occurred on account of Change



in Law. BEST has enjoyed the benefit of firm supply of such power by JITPL through TPTCL during the relevant period. In such a situation, the Petitioners have the right to be compensated by BEST for the non-gratuitous act incurring additional expenditure on account of increase in rates of Clean Energy Cess for supply of power to BEST in terms of the Lol. We hold that the Petitioners are entitled to be compensated for the additional expenditure incurred by them for payment of differential amount of Clean Energy Cess on coal for supply of power to BEST.

36. 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. Accordingly, the Petitioners have sought compensation of ₹181,87,93,640/- as the differential amount due to the increase in levy of Clean Energy Cess on coal from ₹200/MT to ₹400/MT with effect from 1.3.2016. The Appellate Tribunal for Electricity in its judgment dated 12.9.2014 in Appeal No. 288 of 2013 (Wardha Power Company Limited Vs. Reliance Infrastructure Limited and anr) has held that the Commission is not expected to look into the various cost assumed by the bidder at the time of the bid while granting the relief under change in law. Accordingly, we have not gone into the bid assumption. We hold that the Petitioner is entitled to recover from the Respondent, BEST the differential amount towards Clean Energy Cess for the period from 1.3.2016 till 30.6.2016, in proportion to the coal consumed corresponding to scheduled generation at normative parameters as per applicable tariff regulations or actuals, whichever is lower. The Petitioners shall furnish, along with the bills, the proof of payment of Clean Energy Cess duly certified by the Statutory Auditors. The Petitioners and the Respondent, BEST are directed to carry out reconciliation on account of these claims and make the payments within 60 days from the date of order.



37. Petition No. 159/MP/2017 is disposed of in terms of above.

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

*Sd/-*  
(P. K. Pujari)  
Chairperson

