

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 160/MP/2017**

**Coram:**

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

**Date of Order: 18<sup>th</sup> 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 placed by the Respondent upon the Petitioner No. 1 for supply of power from plant of Petitioner No. 2

**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**

West Bengal State Electricity Distribution Company Limited  
Vidyut Bhawan, 7<sup>th</sup> floor  
DJ- Block, sector-II  
Salt Lake, Kolkata- 700091

**....Respondent**

**Parties present:**

Shri Venkatesh, Advocate, TPTCL  
Shri Somesh Srivastava, Advocate, TPTCL  
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 event / notification are Change in law event within the meaning of Article 11 of the PPA 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 9,93,15,799/- 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. 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 Petitioner No. 1 for supply of power to the Respondent, WBSEDCL through back to back power sale arrangement. The Respondent, WBSEDCL is the distribution licensee in the State of West Bengal and is procuring power from the Petitioner No. 1 by issuance of Letter of Award (LOA) dated 19.12.2015, 23.12.2015 and 16.1.2016. Thus, TPTCL has been supplying power to the Respondent through the generating station of the Petitioner No. 2, JITPL.

3. The Respondent, WBSEDCL initiated competitive bidding process vide Tender No. WBSEDCL/PT&T/e-NIT/07/2015 and WBSEDCL/PT&T/e-NIT/08/2015 by issuance of Request for Proposal (RFP) dated 2.12.2015 and 30.12.2015 respectively for selection of bidder to supply power on short term basis for the period from 1.1.2016 to 30.6.2016 and from 16.3.2016 to 31.5.2016. Pursuant to the said bidding process, Petitioner No. 1, TPTCL was selected as successful bidder



to supply power to the Respondent for the said period. Accordingly, the respondent issued Letter of Award (LoA) to TPTCL on 19.12.2015, 23.12.2015 & 16.1.2016. The details of the power supply contracted with the Respondent by TPTCL are as detailed below:

Tender No.	LoA Memo No.	Duration	Quantum
NIT NO: WBSEDCL/PT&P/e-NIT/07/2015 dated 2.12.2015	C/BP/Purchase/WBSEDCL/PTP/e-IT/07/RA01/2015/176 dated 19.12.2015	1.1.2016 to 31.1.2016	200
NIT NO: WBSEDCL/PT&P/e-NIT/07/2015 dated 2.12.2015	C/BP/Purchase/WBSEDCL/PTP/e-IT/07/RA01/2015/205 dated 23.12.2015	15.1.2016 to 31.1.2016	40
NIT NO: WBSEDCL/PT&P/e-NIT/07/2015 dated 2.12.2015	C/BP/Purchase/WBSEDCL/PTP/e-IT/07/RA01/2015/177 dated 19.12.2015	1.2.2016 to 29.2.2016	170
NIT NO: WBSEDCL/PT&P/e-NIT/07/2015 dated 2.12.2015	C/BP/Purchase/WBSEDCL/PTP/e-IT/07/RA01/2015/178 dated 19.12.2015	1.3.2016 to 31.3.2016	150
NIT NO: WBSEDCL/PT&P/e-NIT/07/2015 dated 2.12.2015	C/BP/Purchase/WBSEDCL/PTP/e-IT/07/RA01/2015/205 dated 23.12.2015	8.3.2016 to 31.3.2016	30
NIT NO: WBSEDCL/PT&P/e-NIT/07/2015 dated 2.12.2015	C/BP/Purchase/WBSEDCL/PTP/e-IT/07/RA01/2015/179 dated 19.12.2015	1.4.2016 to 30.4.2016	150
NIT NO: WBSEDCL/PT&P/e-NIT/07/2015 dated 2.12.2015	C/BP/Purchase/WBSEDCL/PTP/e-IT/07/RA01/2015/205 dated 23.12.2015	1.4.2016 to 30.4.2016	30
NIT NO: WBSEDCL/PT&P/e-NIT/07/2015 dated 2.12.2015	C/BP/Purchase/WBSEDCL/PTP/e-IT/07/RA01/2015/180 dated 19.12.2015	1.5.2016 to 31.5.2016	200
NIT NO: WBSEDCL/PT&P/e-NIT/07/2015 dated 2.12.2015	C/BP/Purchase/WBSEDCL/PTP/e-IT/07/RA01/2015/205 dated 23.12.2015	1.5.2016 to 31.5.2016	40
NIT NO: WBSEDCL/PT&P/e-NIT/07/2015 dated 2.12.2015	C/BP/Purchase/WBSEDCL/PTP/e-IT/07/RA01/2015/181 dated 19.12.2015	1.6.2016 to 30.6.2016	150
NIT NO: WBSEDCL/PT&P/e-NIT/08/2015 dated 30.12.2015	C/BP/Purchase/WBSEDCL/PTP/e-IT/07/RA01/2015/181 dated 16.1.2016	16.3.2016 to 31.3.2016	150
NIT NO: WBSEDCL/PT&P/e-NIT/08/2015 dated 30.12.2015	C/BP/Purchase/WBSEDCL/PTP/e-IT/07/RA01/2015/181 dated 16.1.2016	1.4.2016 to 30.4.2016	160
NIT NO: WBSEDCL/PT&P/e-NIT/08/2015 dated 30.12.2015	C/BP/Purchase/WBSEDCL/PTP/e-IT/07/RA01/2015/181 dated 16.1.2016	1.4.2016 to 30.4.2016	75



4. Based on the above, the Petitioner No.1 TPTCL supplied power to the Respondent, WBSEDCL in accordance with the details enumerated under the LoAs. The power was supplied by TPTCL from the power plant of Petitioner No. 2, JITPL pursuant to the competitive bidding process initiated by the Respondent, through issuance of RFP for procurement of power for meeting the base load power requirements of Respondent. The agreement was executed on the understanding that JITPL subsequently authorized TPTCL for sale and supply of aggregate contracted capacity of power in terms of the aforesaid LoAs.

5. JITPL has submitted that as per provisions of PPA, power is being procured by Respondent from the delivery point i.e interconnection of WB, STU and CTU in Eastern Region. Hence, the electricity supplied by TPTCL through Petitioner No. 2, JITPL at a tariff which includes the fixed cost of the project, energy charges, all relevant taxes, cess & duty is required to be paid by the Respondent.

6. In the present Petition, the Petitioners have sought to invoke the provisions of Article 11 of the PPA (herein after referred to as 'the model PPA') annexed to the aforementioned LOAs, in order to claim the amount to compensate the Petitioners on account of occurrence of Change in law events so that the Petitioners will be restored to the position where it was before the commencement of occurrences falling under the definition of Change in law events as enumerated in Article 11 of the model PPA. The Petitioners have further submitted that TPTCL had signed and sent the model PPA, but the same was not signed by the Respondent. However, the supply of power took place in accordance with the terms of the LOAs which referred to the model PPA, the draft whereof was made part of the bid documents and made binding on the parties.



7. The Petitioners have submitted that the Change in law event as per Article 11 of the model PPA resulted in additional expenditure on account of recurring/ non-recurring event being the increase in Clean energy Cess, so imposed. In this background, the Petitioners have submitted the following:

(a) As per Article 11 of the model PPA and the 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 where the said event has occurred after the date which is seven days prior to the bid submission deadline.

(b) The bid submission deadline for Tender No. WBSEDCL/PT&T/e-NIT/07/2015 was 14.12.2015 and for Tender No. WBSEDCL/PT&T/e-NIT/08/2015 was 11.1.2016 and as such the cut-off dates for Change in law event resulting in compensation are 7.12.2015 and 4.1.2016 respectively. Since the Change in law event has occurred on 29.2.2016 which is subsequent to the cut-off dates, such events would result in compensation to JITPL as per the said article.

(c) 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.

(d) 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 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 ('referred to as 'the 2003 Act') to provide the reliefs sought for in the Petition.



(e) The Ministry of Finance, Government of India by notification dated 29.2.2016 has increased the levy of Clean Energy Cess 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.

(f) The Petitioner No. 2, vide letter dated 10.3.2016 to Petitioner No. 1 raised its claim for Change in law events, wherein the increase in levy of Clean Energy Cess from ₹200/ tonne to ₹400/tonne on coal, effective from 0.00 hours of 1.3.2016 has been informed to the Respondent. TPTCL vide letter dated 11.3.2016 apprised the Respondent about the letter dated 10.3.2016 with regard to increase in tariff of JITPL by Rs 0.151 per unit on account of Change in law. The Petitioner No. 2 again vide letter dated 23.4.2016 informed TPTCL and requested to accept the increase in tariff by Rs 0.151 per unit of power due to increase in Clean Environment Cess by Govt. of India. TPTCL also sent letters dated 13.4.2016 & 14.4.2016 to the Respondent to consider the request of JITPL for increase in tariff by 0.151 per unit.

(g) The Respondent vide letter dated 16.9.2016 sought clarifications from TPTCL with regard to the increase in Clean Energy Cess and in response TPTCL vide letter dated 22.9.2016 submitted its clarification. However, the Respondent by letter dated 9.11.2016 to TPTCL rejected the change in law claim of JITPL.

8. In the above background, the Petitioners have filed the Petition for adjudication of disputes by this Commission in exercise of the powers under section 79(1)(b) read with section 79(1)(f) of the 2003 Act.

9. The Petition was admitted on 7.9.2017 and notice was issued to the Respondent, WBSEDCL. 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. In compliance with the directions of the Commission, the Petitioner vide its affidavit dated 27.2.2018 has enclosed copy of the model PPA signed only by TPTCL and the quantum and details of power supplied by TPTCL to WBSEDCL under the LoAs. The Respondent, WBSEDCL has not filed its reply in the matter.

10. Thereafter, the matter was heard on 26.7.2018 and the learned counsel for the Petitioners reiterated the submissions made in the Petition. None appeared on behalf of the Respondent, WBSEDCL. Accordingly, the Commission reserved its order in the Petition.

### **Analysis**

11. Based on the above submissions, the claims of the Petitioners have been dealt with as under:

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

Issue (b): Whether there existed a concluded contract between the parties?

Issue (c): Whether the compensation claimed is admissible under Change in law?

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

12. 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 in terms of Section 79(1)(b) of the 2003 Act and (2) arrangement between the generator and trader and back to back arrangement between the trader and distribution licensee qualifies for supply of power by the generating station to the distribution licensee.



## Composite scheme

13. The Petitioners have submitted that in terms of Section 79(1)(b) of the 2003 Act, the Petitioner No. 2, JITPL has a composite scheme for generation and sale of electricity in more than one State. Accordingly, they have argued that this Commission has the jurisdiction to adjudicate the disputes in respect of the project of the Petitioner No.2, JITPL. It is noticed that JITPL, whose project is located in State of Odisha has been supplying power to the Respondent, WBSEDCL through the Petitioner No.1, TPTCL. It has also 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. 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 in Energy Watchdog case, we are of the considered view that this Commission has the jurisdiction to regulate the tariff of the Project of the Petitioner No.2 and thereby adjudicate the disputes raised in the present Petition in terms of Section 79 (1) (b) read with section 79(1)(f) of the 2003 Act. Accordingly, the decision of the Commission shall be binding on the parties herein.

### **Back to back Power Sale Arrangement**

14. 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 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 APTEL 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.

15. 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.”

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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 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.

16. 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 present case, the Petitioners have contended that JITPL had authorized TPTCL for supply of power to the Respondent, WBSEDCL through back to back power sale arrangement and accordingly, TPTCL continued to supply power to the Respondent, WBSEDCL in accordance with the terms of LOAs read with the RFP. Therefore, in the light of the settled legal position and the factual matrix of the present case, 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.

**Issue (b): Whether there existed a concluded contract between the parties?**

17. As stated, the Petitioners have filed the present Petition under Section 79(1)(b) and 79(1)(f) of the 2003 Act read with Article 11 of the model PPA annexed to the LOAs, in order to compensate the Petitioner on account of the consequences of change in law event. The Petitioners have submitted that although TPTCL had signed and sent the draft PPA, the same was not signed by the Respondent, WBSEDCL. However, supply of power took place in accordance with the terms of the LOAs which contained reference to the model PPA, and therefore, the terms of the model PPA were made binding on the parties. The Petitioners vide their affidavit dated 27.2.2018 have submitted that pursuant to the LOAs dated 19.12.2015, 23.12.2015 and 16.1.2016 issued by WBSEDCL, the TPTCL issued letter dated 28.12.2015 to the Chief Engineer, WBSEDCL enclosing the signed PPAs for sale of power for the period from 1.1.2016 to 30.6.2016.



Thereafter, on 21.1.2016 TPTCL again issued letter to the Chief Engineer, WBSEDCL enclosing the signed PPA for sale of power from 16.3.2016 to 31.5.2016. The Petitioners have pointed out that although TPTCL had signed the draft PPA and forwarded the same to WBSEDCL vide aforesaid letters, the said PPA could not be executed between the parties. After issuance of the LOAs, TPTCL duly acting upon the representations made therein supplied power to WBSEDCL for the aforesaid periods in accordance with the terms of the LOAs which referred to the model PPA. The Petitioners have stated that TPTCL after supply of power had raised various invoices upon WBSEDCL in terms of the tariff represented under the LOAs and WBSEDCL had made payments for the quantum of power sourced through TPTCL from the generating station of JITPL. The Petitioners have referred to the judgment of the Tribunal dated 11.10.2012 in Appeal No. 46/2012 (Karamchand Thapar & Bros V MPPTCL) and the judgment dated 16.4.2015 in Appeal No. 51/2015 (Essar Power Ltd V CERC & Ors) and submitted that if after issuance of LoA/Lol, the parties have duly acted upon the representations made therein, in such case the offer and acceptance have been clearly established and the final contract has come into existence. Accordingly, the Petitioners have contended that in the present case, the offer and acceptance have been clearly established and therefore the LoAs issued by WBSEDCL are final concluded contract between the parties.

18. The matter has been examined. As stated earlier, WBSEDCL had initiated competitive bidding process by issuance of RFPs dated 2.12.2015 and 30.12.2015 for purchase of power on short term basis for the periods from 1.1.2016 to 30.6.2016 and from 16.3.2016 to 31.5.2016. In clause 3.2 (a) the said RFPs, it was obligatory upon the bidders to quote, amongst others, the rate, quantity and



source online in the price bid as per format provided in **Annexure-F**, which is as under:

**RFP dated 2.12.2015**

*“We will supply power as per the following rates given in following schedule (table) to the delivery point as per the set condition in Annexure A and various clause of RFP:*

Sl. No.	Period		Duration of time in each day of the period for supply of power		Quantum in MW	Total landed price in Rs/	Source
	From Date	To Date	From Hours	To Hours			
1	1/1/2016	31/1/2016					
2	1/2/2016	29/2/2016					
3	1/3/2016	31/3/2016					
4	1/4/2016	30/4/2016					
5	1/5/2016	31/5/2016					
6	1/6/2016	30/6/2016					

**RFP dated 30.12.2015**

*“We will supply power as per the following rates given in following schedule (table) to the delivery point as per the set condition in Annexure A and various clause of RFP:*

Sl. No.	Period		Duration of time in each day of the period for supply of power		Quantum in MW	Total landed price in Rs/	Source
	From Date	To Date	From Hours	To Hours			
1	18/1/2016	23/1/2016	06.00	20.00			
2	24/1/2016	31/1/2016	00.00	24.00			
3	24/1/2016	31/1/2016	07.00	12.00			
4	1/2/2016	29/2/2016	04.00	14.00			
5	8/3/2016	15/3/2016	00.00	24.00			
6	16/3/2016	31/3/2016	00.00	24.00			
7	1/4/2016	30/4/2016	00.00	24.00			
8	1/5/2016	31/5/2016	00.00	24.00			

Also, we/I have noted the following:

1.xxx

2.xx

3. We are capable to supply power to WBSEDCL, for the contract period at the delivery point (as defined in Annexure-A “PPA format”) for which the responsibility will be on us and we have ensured necessary infrastructure/ground work in this regard, while participating in the bid.”



19. Some of the other relevant clauses in the said RFPs are extracted hereunder:

**“Clause 10**

*Other terms and conditions: Other terms and conditions such as delivery point, open access, scheduling and energy accounting, tariff, billing and payment, payment security mechanism, compensation, force majeure, dispute resolution, change in law, termination, jurisdiction etc. shall be as mentioned in clauses 1 to 14 of the format of PPA which is enclosed as Annexure A.*

**Clause 13**

*Contract award and conclusion: PPA will be signed with issue of award letter (LOA) with the bidders within 10 days from conclusion of the selection process or bid validity date, whichever is earlier.*

**Clause 17**

*Disclaimer: .....For the avoidance of doubt it is expressly clarified that this bid document is an offer to bid and is subject to award of LoA/ PPA by WBSEDCL and acceptance of the LoA/ PPA by the selected bidder will be construed as acceptance of terms and condition as per Annexure A.”*

Annexure-A as mentioned in the said RFPs refers to the ‘model PPA’ containing the terms and conditions for sale of power which was to be signed as token of acceptance of such terms and conditions by the successful bidder. In other words, the PPA was to be executed by the successful bidder with the Respondent WBSEDCL, after the award of LOAs.

20. TPTCL as a bidder had indicated JITPL as the identified source of power (in Annexure-F). TPTCL was selected as a successful bidder for supply of power to WBSEDCL in accordance with the terms and conditions of the RFPs. Thereafter, LOAs were issued by WBSEDCL on 19.12.2015 (two nos), 23.12.2015 and 16.1.2016 for purchase of power during the aforesaid periods. The LoAs issued by WBSEDCL are extracted hereunder:

**LOAs dated 19.12.2015**

Sl No.	From Date	To Date	From Hours	To Hours	Quantum in MW	Rate at delivery point (Rs/kWh)
1	1/3/2016	31/3/2016	00.00	24.00	150	2.75
2	1/4/2016	30/4/2016	00.00	24.00	150	2.82





### LOA dated 23.12.2015

Sl No	From Date	To Date	Previous LoA No and Date	Quantum in MW	Rate at delivery point (Rs/kWh)
1	15/1/2016	31/1/2016	C/BP/Purchase/WBSEDCL/PTP/e-IT/07/RA01/2015/176 dated 19.12.2015	40	2.86
2	8/3/2016	31/3/2016	C/BP/Purchase/WBSEDCL/PTP/e-IT/07/RA01/2015/178 dated 19.12.2015	30	2.75
3	1/4/2016	30/4/2016	C/BP/Purchase/WBSEDCL/PTP/e-IT/07/RA01/2015/179 dated 19.12.2015	30	2.82
4	1/5/2016	31/5/2016	C/BP/Purchase/WBSEDCL/PTP/e-IT/07/RA01/2015/180 dated 19.12.2015	40	2.90

### LOA dated 16.1.2016

Sl No.	From Date	To Date	From Hours	To Hours	Quantum in MW	Rate at delivery point (Rs/kWh)
1	16/3/2016	31/3/2016	00.00	24.00	150	2.61
2	1/4/2016	30/4/2016	00.00	24.00	160	2.76
3	1/5/2016	31/5/2016	00.00	24.00	75	2.70

21. These LoAs issued by WBSEDCL also envisaged the following:

1. *Delivery point: Delivery point shall be interconnection of STU, WB and CTU in Eastern Region*
2. *TPTCL is required to execute PPA and submit CPG in line with .....*

22. It is evident from the above that the supply of power by TPTCL was guided by the terms and conditions of the RFPs read with the LoAs/model PPA. It is observed that TPTCL had duly signed the PPAs (as per Annexure A of the RFP) accepting the terms and conditions for supply of power to WBSEDL through JITPL and had forwarded the same vide its letters dated 28.12.2015 and 21.1.2016. But the same has not been signed and executed by WBSEDCL. In our view, the non-signing of the PPA (as at Annexure-A) by WBSEDCL would not render the contract invalid, since the parties by conduct had given effect to the terms and conditions mentioned in



the model PPA. To elaborate, TIPTCL, at the time of submission of bid had given an undertaking that it is capable of supplying power to WBSEDCL for the contract period at the delivery point, as defined in Annexure A of the model PPA (as in para 18 above). This undertaking would indicate that TPTCL had unconditionally accepted the terms and conditions of RFP and submitted an unqualified offer. Also, the same was accepted by WBSEDCL through issue of the aforesaid LoAs. The LoAs issued by WBSEDCL envisaged that the delivery point shall be the interconnection of STU, WB and CTU in the Eastern Region and that TPTCL was required to execute the PPA and submit Contract Performance Guarantee (CPG) in line with the RFPs. Further, Clause 10 of the RFP (as quoted in para 19 above) provides that the terms and conditions such as delivery point, open access, energy accounting, tariff, billing and payment, Force majeure, change in law, termination etc., are to be guided by the clauses of the model PPA as at Annexure A of the RFP. Accordingly, TPTCL after accepting the LOAs and signing the PPAs had supplied the quantum of power at the delivery point and WBSEDCL had also made payments through tariff for the quantum of power supplied by TPTCL, based on the bills raised by it. Thus, the clauses relating to the model PPA (as in Annexure-A) such as energy accounting, tariff, billing and payments were implemented by the parties. In other words, the parties by conduct had given effect to the terms and conditions in the PPA at Annexure A of the RFP. Hence, in terms of the above and in the absence of any submissions of WBSEDCL to the contrary, we find no reason to overlook the provisions of the PPA for the reason that the same had not been signed by WBSEDCL. In our view, there existed a binding contract between the parties and therefore TPTCL is entitled to seek



relief in terms of the LOAs/PPA read with the RFPs for the supply of power made to WBSEDCL.

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

23. We have in this order decided that TPTCL is entitled to seek relief in terms of the LOAs/PPA read with the RFPs for the supply of power made to WBSEDCL.

Clause 11 of the PPA contains provision for Change in law as under:

**11. Change in law**

*i. Change in law shall include-*

*(a) Any change in transmission charges and open access charges*

*(b) 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*

*ii. 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.”*

24. 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 from ₹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 (7.12.2015 and 4.1.2016) which is seven days prior to the bid submission deadline of 14.12.2015 and 11.1.2016 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 cost 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 and 14.4.2016 to WBSEDCL and claimed an increase in tariff of ₹0.151/ kWh on account of Clean Energy Cess from ₹200/MT to ₹400/ MT in terms of Clause 11 of the PPA. The Petitioners have stated that the Respondent sought certain clarifications with regard to the increase in the Clean Environment Cess and the same was clarified by JITPL by letter dated 21.9.2016 and TPTCL vide letter dated 22.9.2016. However, the Respondent vide its letter dated 9.11.2016 had rejected the claim of the Petitioners on the ground that there was no merit in the said claim. Accordingly, the Petitioners have submitted that the cause of action for enforcement of contractual rights has arisen in favour of the Petitioners.

25. 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 =  
2375 (Heat Rate as per CERC Regulations) = 0.71364  
3328 (GCV - Last 3 months actual GCV)*

*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”*

26. Based on the above, the Petitioners have claimed compensation of ₹99315799/- accrued in favour of JITPL in terms of the Change in law event for the period of supply of power during the period from 1.3.2016 to 30.6.2016 (as per Annexure L of the Petition) as tabulated under:

Period of supply		Bill date	Due date	Energy (kWh)	Rate/ kWh	Gross amount
From	To					
1.3.2016	31.3.2016	9.4.2016	16.4.2016	158841093	0.151	23985005
1.4.2016	8.4.2016	9.4.2016	16.4.2016	57959640	0.151	8751906
9.4.2016	30.4.2016	17.5.2016	24.5.2016	167720340	0.151	25325711
1.5.2016	15.5.2016	17.5.2016	24.5.2016	91598941	0.151	13831440



16.5.2016	31.5.2016	4.6.2016	11.6.2016	98395810	0.151	14857767
1.6.2016	30.6.2016	4.7.2016	11.7.2016	83204700	0.151	12563910
<b>Total</b>				<b>657720524</b>		<b>99315799</b>

27. 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 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....”*

28. The Clean Energy Cess on coal was introduced through the Finance Act, 2010 and was being modified through subsequent Finance Acts. The cut-off dates in the present case are 7.12.2015 and 4.1.2016. 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. Since the Clean Energy Cess was increased after the cut-off date from ₹200/MT to ₹400/MT through an Act of Parliament, it is covered under Change in Law in terms of Clause 11 of the PPA read with the LoAs. Accordingly, the Petitioner is entitled to recover the differential Clean Energy Cess from the Respondent, WBSEDCL @ ₹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 WBSEDCL for the periods mentioned in the LOAs dated 19.12.2015, 23.12.2015 and 16.1.2016. 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, WBSEDCL are directed to carry out reconciliation on account of these claims.

29. Petition No. 160/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

