

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No: 126/MP/2016

Coram:

**Shri P.K. Pujari, Chairperson
Shri Arun Goyal, Member
Shri P.K. Singh, Member**

Date of Order: 16th September, 2021

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 Article 10 of the Power Purchase Agreement dated 23.8.2013 (PPA) executed between the Petitioner and the Respondent.

And

In the matter of

Bharat Aluminium Company Limited,
Balco Nagar,
Korba - 495684, Chhattisgarh

.....Petitioner

Vs

1. Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO),
NPKRR Maligal, 6th Floor,
Eastern Wing, 144, Anna Salai,
Chennai-600 002, Tamil Nadu

2. Power Trading Corporation (PTC),
2nd Floor, NBCC Tower,
15 Bhikaji Cama Place, New Delhi - 110066

3. Kerala State Electricity Board (KSEB),
Vydyuthi Bhavanam, Pattom,
Thiruvananthapuram - 695004, Kerala

4. Prayas Energy Group,
Unit III A and B, Devgiri,
Joshi Railway Museum Lane, Kothrud Industrial Area,
Kothrud, Pune - 411038, Maharashtra

5. Chhattisgarh State Power Distribution Company Limited,



O/o The Chief Engineer (EITC), Energy Infor Tech Centre,
Block No. 8, CS Power Companies Campus,
Daganiya, Raipur – 492013, Chhattisgarh

6. Chhattisgarh State Power Trading Company Limited,
O/o The Chief Engineer (EITC),
Energy Infor Tech Centre,
Block No.8, CS Power Companies Campus,
Daganiya, Raipur - 492013, Chhattisgarh

... Respondents

Parties Present:

Shri Buddy Ranganadhan, Advocate, BALCO
Shri Hemant Singh, Advocate, BALCO
Ms. Supriya Rastogi Agarwal, Advocate, BALCO
Ms. Anusha Nagarajan, Advocate, TANGEDCO
Ms. M. Hemalatha, TANGEDCO
Shri S. Poonkodi, TANGEDCO

ORDER

Bharat Aluminium Company Limited ('BALCO') has set-up a 1200 MW (4x300 MW) Thermal Power Project (hereinafter referred to as 'the generating station') at Balco Nagar, Korba in the State of Chhattisgarh.

2. In the year 2012, Respondent No.1, Tamil Nadu Generation and Distribution Corporation Limited ('TANGEDCO') invited a bid for supply of power on long term basis through tariff based competitive bidding process under Case-1 bidding for meeting its base load power requirements. Pursuant to the bidding process, the Petitioner was selected by TANGEDCO for sale and supply of 100 MW to TANGEDCO for a period of 15 years commencing from 1.2.2014 and up to 30.9.2028 for which a PPA was executed on 23.8.2013. Subsequently, the said PPA was amended on 10.12.2013 and the total quantum of the original PPA was enhanced to 200 MW. The Petitioner started supplying 100 MW to TANGEDCO from 3.9.2015 and the balance 100 MW from 1.12.2015, as per the terms and conditions of the PPA.

3. The Petitioner, BALCO had filed Petition No. 126/MP/2016 before the Commission under Section 79(1)(b) and 79(1)(f) of the Electricity Act, 2003 (hereinafter referred to as 'the Act') read with Article 10 of the PPA seeking compensation on account of occurrence of the events of Change in Law affecting the Petitioner during the Operating Period and for restoration of the Petitioner to the same economic position as if these events had not occurred. The Commission, after hearing the parties, vide its order dated 27.4.2018 decided the Change in Law events as under:

Sr. No.	Change in Law events	Decision
I. Increase in coal cost on account of change in law events		
1	Royalty on Coal	Allowed
2	Service Tax on Royalty of Coal	Allowed
3	Increase in Niryatkar	Not Allowed but granted liberty
4	Increase in Environment Cess /Paryavaran Upkar	Allowed
5	Change in Infrastructure Development Cess	Allowed
6	Change in Clean Energy Cess (presently known as Clean Environment Cess)	Allowed
7	Change in the components of Central Excise Duty	Allowed. However, royalty is subject to the outcome of the decision of the Hon`ble Supreme Court.
8	Increase/ Change in Entry Tax on account of changes in the individual components of such Tax	Not Allowed but granted liberty
9	Increase/ Change in Value Added Tax (VAT) on account of changes in individual components of such Tax	Not Allowed but granted liberty
10	Increase in sizing and crushing charges	Not Allowed
11	Increase in Coal Surface Transportation charge	Not Allowed
12	Increase in base price of coal	Not Allowed
II. Increase in cost due to Change in law events pertaining to Transportation of domestic coal		
13	Increase in base Freight of Coal Transportation	Not Allowed
14	Levy of Busy Season Charges & Levy of Development Surcharge	Not Allowed
15	Withdrawal of Rebate and Additional Rebate loss due to change in base freight rate from Rs. 150.20 to Rs 205.60	Not Allowed
16	Increase in trip siding charges	Not Allowed
17	Increase in Service Tax Rate and imposition of	Allowed

Sr. No.	Change in Law events	Decision
	Swachh Bharat Cess and Krishi Kalyan Cess on Railway freight and trip siding charges	

4. Aggrieved by the aforesaid order dated 27.4.2018, the Respondent, TANGEDCO filed Appeal No. 22 of 2019 before the Appellate Tribunal for Electricity ('the APTEL') against the following Change in Law events allowed by the Commission:

- (a) Royalty on Coal;
- (b) Service Tax on Royalty of Coal;
- (c) Increase in Environment Cess/ Paryavaran Upkar;
- (d) Change in Infrastructure Development Cess;
- (e) Change in the components of Central Excise Duty;
- (f) Change in Clean Energy Cess (subsequently known as Clean Environment Cess); and
- (g) Increase in Service Tax Rate and imposition of Swachh Bharat Cess and Krishi Kalyan Cess on Railway freight and trip siding charges.

5. The Petitioner also filed an Appeal before the APTEL being Appeal No. 58 of 2019 along with IA No. 353 of 2020 against the following Change in Law events disallowed by the Commission:

- (a) Increase in sizing and crushing charges;
- (b) Increase in Coal Surface Transportation charge;
- (c) Increase in base price of coal;
- (d) Increase In base Freight of Coal Transportation;
- (e) Levy of Busy Season Charges & Levy of Development Surcharge;
- (f) Withdrawal of Rebate and Additional Rebate loss due to change in base freight rate.

6. The said appeals came to be decided by the APTEL in judgment dated 12.8.2021. In the said judgment, the APTEL dismissed Appeal No. 22 of 2019 filed by the Respondent, TANGEDCO. In Appeal No. 58 of 2019 filed by the Petitioner,

the APTEL allowed the claims regarding levy of Busy Season Charges & levy of Development Surcharge and Carrying cost, which was prayed for by BALCO in the said appeal before the APTEL. Relevant portion of the judgment dated 12.8.2021 of the APTEL is extracted as under:

“.....

ORDER

In view of the foregoing, we pass the following order:

(i) The decision of the Central Commission to allow compensation in respect of the following seven (7) items on account of change in law is as per the relevant provisions of the PPA, regulations on the subject and is as per law.

- 1. Royalty on Coal;*
- 2. Service Tax on Royalty of Coal;*
- 3. Increase in Environment Cess /Paryavaran Upkar;*
- 4. Change in Infrastructure Development Cess;*
- 5. Change in the components of Central Excise Duty;*
- 6. Change in Clean Energy Cess (subsequently known as Clean Environment Cess);*
- and*
- 7. Increase in Service Tax Rate and imposition of Swachh Bharat Cess and Krishi Kalyan Cess on Railway freight and trip siding charges.*

Accordingly, Appeal No. 22 of 2019 is dismissed as devoid of merits.

(ii) Compensation on account of change in law in respect of “Levy of Busy Season Charges and Levy of Development Surcharge” is allowed.

(iii) Compensation on account of change in law in respect of the following items is not allowed.

- 1. Increase in sizing and crushing charges;*
- 2. Increase in Coal Surface Transportation charge;*
- 3. Increase in base price of coal;*
- 4. Increase In base Freight of Coal Transportation;*
- 5. Withdrawal of Rebate and Additional Rebate loss due to change in base freight rate from Rs. 150.20 to Rs.205.60;*

(iv) Carrying cost on the compensation allowed on account of change in law is allowed.

(v) In view of the above orders at ii) and iv), the appeal No. 58 of 2019 is partly allowed. The impugned order dated 27.04.2018 passed by the Central Commission in Petition No. 126/MP/2016 is hereby set aside to the extent indicated above. The Central Commission is hereby directed to pass the appropriate order considering the opinion expressed in this judgement within three months from the date of pronouncement of judgment.”

7. Pursuant to the above judgment of the APTEL, the matter was listed for hearing on 3.9.2021 through video conferencing. During the course of hearing, the learned counsel for the Petitioner requested to pass the consequent order in terms of the aforesaid judgment of the APTEL. The learned counsel also relied upon the Article 8.3.5 read with Article 8.8.3 of the PPA, order of the Commission dated 17.9.2018 in Petition No. 235/MP/2015 and the judgment of APTEL dated 12.8.2021 in Appeal No. 421 of 2019. Based on the request of learned counsels for the Petitioner and the Respondent, TANGEDCO, both the parties were given opportunity to file their note of submissions. Pursuant to the said liberty, the Petitioner filed its written note of submission on 10.9.2021. However, the Respondent, TANGEDCO did not file any submissions in the given period.

8. The Petitioner in its written note has made the following submissions:

(a) In terms of judgment of the APTEL dated 12.8.2021 in Appeal No. 58 of 2019 and Appeal No. 22 of 2019, the Commission ought to direct TANGEDCO to make payment of compensation towards Busy Season Charge and Development Surcharge, which have been allowed by the APTEL. The Petitioner undertakes to provide all the relevant documents/ data to TANGEDCO for computation of the said Change in Law event. TANGEDCO may also be directed to continue to make payment till the subsistence of the said Change in Law event qua the terms of the PPA.

(b) The Commission ought to further direct TANGEDCO to make payment of carrying cost to the Petitioner qua the allowed Change in Law components. As per the principle adopted by the Commission in its various orders, the carrying cost has been permitted from the date of notification of Change in Law event to the date of actual payment of compensation by the distribution licensee(s). However, in the present case, after the passage of the order dated 27.4.2018, TANGEDCO did not make immediate payment of Change in Law compensation to the Petitioner and subsequently, the APTEL vide interim orders dated

21.11.2019 and 12.12.2020 directed TANGEDCO to make payment of 50% of the agreed Change in Law compensation to the Petitioner. Accordingly, TANGEDCO made the payment of Rs. 85,35,30,339/- to the Petitioner in instalments.

(c) TANGEDCO is required to make payment of carrying cost in terms of: (i) carrying cost calculated from the date of notification of Change in Law events (as allowed by the Commission in order dated 27.4.2018) to the dates on which a part of the principal amount was paid by TANGEDCO in terms of the interim orders of the APTEL; and (ii) carrying cost calculated from the date of notification of Change in Law events to the date of actual payment to be made by TANGEDCO of the balance principle Change in Law amount (by considering the Change in Law components allowed by the Commission in order dated 27.4.2018 and the component allowed by the APTEL vide judgement dated 12.8.2021).

(d) The Petitioner is entitled to claim interest on carrying cost from the date of actual payment of the Change in Law compensation made by TANGEDCO, in terms of the interim orders of APTEL, to the actual date of payment of the carrying cost amount determined in terms of the present compliance proceedings. The principle of payment of interest on carrying cost has been upheld by the APTEL in the judgment dated 12.8.2021 in Appeal No. 421 of 2019.

9. Accordingly, in terms of the direction of the APTEL, this consequential order is issued in Petition No. 126/MP/2016 to the extent the Appeal No. 58 of 2019 has been allowed by the APTEL.

(A) Levy of Busy Season Charges and Development Surcharge

10. The Commission in its order dated 27.4.2018 had rejected the claim of the Petitioner in respect of Busy Season Charges and Development Surcharge levied by Railway Board as Change in Law in terms of the PPA and had observed as under:

“109. We have considered the submissions of the parties. The issue whether change in the rates of busy season surcharge and development surcharge levied by Railway Board qualifies as a Change in Law event has been considered by the Commission in order dated 3.2.2016 in Petition No. 79/MP/2013. Based on merits, the Commission in order dated 3.2.2016 in Petition No. 79/MP/2013 has disallowed the change in the rates of busy season surcharge and development surcharge levied by Railway as a Change in law. Thereafter, the Commission vide order dated 1.2.2017 in Petition No. 8/MP/2014 (EMCO Energy Ltd Vs MSEDCL & ors), order dated 7.4.2017 in Petition No. 112/MP/2015 and order dated 19.12.2017 in Petition No. 101/MP/2017 (DB Power Ltd. Vs PTC India Ltd & ors.) disallowed the busy season surcharge and development surcharge under Change in law. The relevant portion of the order dated 1.2.2017 in Petition No. 8/MP/2014 is extracted as under:

‘86.....Therefore, the change in the rates of busy season surcharge and development surcharge are not admissible under Change in Law. The Commission is of the view that non-admissibility of busy season surcharge and development surcharge under change in law has been correctly decided in GMR case and in the light of the said decision and the reasons recorded above, the Petitioner cannot be granted relief under Change in Law on account of revision in the busy season surcharge and development surcharge by Railway Board.’

111. In the light of the above decision, the Petitioner cannot be granted relief under change in law on account of revision in the busy season surcharge and development surcharge by Railway Board. Accordingly, the claim is not allowed as a Change in law event.”

11. The APTEL vide judgment dated 12.8.2021 has set aside the aforesaid findings of the Commission and relying upon its earlier judgment in Appeal No. 119 of 2016 in the case of Adani Power Rajasthan Ltd. v. Rajasthan Electricity Regulatory Commission & Ors., held that levy of Busy Season Charges and levy of Development Surcharge are Change in Law events and the Petitioner is entitled to compensation in this regard. Relevant portion of the judgment of APTEL is extracted as under:

“62. We note the submissions made by BALCO that levy of busy season charges and levy of development surcharge has been allowed by this Tribunal as a change in law event in appeal No. 119 of 2016, M/s. Adani Power Rajasthan Ltd. Vs. Rajasthan

Electricity Regulatory Commission & Ors. and the relevant extract of the judgment reads as under:

“xiii. From the above it is crystal clear that the Circulars issued by MoR regarding Busy Season Surcharge, Development Surcharge and Port Congestion Charges which have bearing on costs of the Kawai Project of APRL have force of law.

xiv. It is also observed that the State Commission has concluded that the CERC Escalation Rates covers only the Base Freight Rate. This is obvious from the observations of the State Commission at various paras in the Impugned Order. The relevant extract from the Impugned Order is reproduced below:

“43. Further, it is observed that the Base Freight Rate is being used by the CERC for computation of the Escalation Index. Service Tax on Transportation being levied additionally as a percentage of Normal Tariff Rate, is not covered in the escalation rates notified by CERC.

.....
47. Commission observes that there is merit in this contention of Respondents. It is noted that CERC computes escalation in the Base Freight. Any variation in base freight due to any reason including FAC gets reflected in the escalation index.

Therefore, we hold that the Fuel Adjustment Component does not qualify as a change in law event as claimed by the Petitioner.

.....
56. The Commission notes that class 150 of Railways freight schedule was applicable to the Petitioner at the time of bid deadline. The change in class to 145 was vide notification dated 16.03.2015, which is subsequent to the bid deadline. Commission observes that the CERC index, which uses Base Freight Rate linked to the class of goods, includes the impact of change in class for railway freight for coal from 140 to 150.....”

xv. APRL/Appellant has further submitted that, MERC has allowed the Development Surcharge and Busy Season Surcharge under Change in Law in Case No. 163 of 2014. Let us examine the findings of the MERC on the said issues. The relevant extract from the order of MERC is reproduced below:

“J. Development Surcharge on Coal Transportation

12.35 The Commission notes that:

Increase in Development Surcharge on Coal Transportation has been effected by the Ministry of Railways, Gol in exercise of powers under Sections 30, 31 and 32 of the Railways Act, 1989. Rate Circulars issued by the Ministry of Railways are akin to Orders issued pursuant to an Act, in this case the Railways Act, 1989, by an Indian Governmental Instrumentality, i.e. Indian Railways.

(b) Thus, the increase in Development Surcharge on Coal Transportation falls within the definition of “Law” and Article 13.1.1(i) of the PPA

(c) At the time seven days prior to the bid deadline, i.e. 14.2.2008, the applicable "Development Surcharge on Coal Transportation" was 2% of the Normal Tariff Rate (NTR) as notified in Rate Circular No. 28 of 2007 dated 29.5.2007. That rate has been revised to 5% vide Rate Circular No. 38 of 2011 dated 12.10.2011.

(d) Further, as mentioned earlier, only the Base Freight Rate is being used by the CERC for computation of the Escalation Index. Development Surcharge on Coal Transportation, being levied additionally as a percentage of NTR, is not covered in the escalation rates notified by CERC.

12.36 In view of the above, the Commission finds that the increase in Development Surcharge on Coal Transportation is a "Change in Law" event as per Article 13.1.1(i) of the PPA and satisfies the requirements as explained in Paras. 12.6 and 12.8 above.

K. Busy Season Surcharge on Coal Transportation

12.37 The Commission observes as follows:

(a) Busy Season Surcharge on Coal Transportation has been imposed by the Ministry of Railways, Gol in exercise of powers conferred by Section 30, 31 and 32 of the Railways Act, 1989. Rate Circulars issued by Ministry of Railways are akin to the Orders issued pursuant to the Act, i.e. the Railways Act, 1989 by an Indian Governmental Instrumentality, i.e. Indian Railways.

(b) Thus, the introduction of Busy Season Surcharge on Coal Transportation falls within the definition of "Law" and Article 13.1.1 (i) of the PPA.

(c) The imposition of Busy Season Surcharge on Coal Transportation is admittedly subsequent to seven days prior to the Bid Deadline, i.e., on 29.03.2011, vide Rate Circular No. 13 of 2011. The rate of 5% was subsequently increased to 10%, 12% and then to 15% vide Rate Circular Nos. 38 of 2011 (dated 12.10.2011), 28 of 2012 (dated 27.09.2012) and 24 of 2013 (dated 18.09.2013), respectively.

(e) Further, as mentioned in para. 12.32 above, only the Base Freight Rate is being used by the CERC for computation of the Escalation Index. Busy Season Surcharge on Coal Transportation, being levied additionally as a percentage of the Base rate, is not covered in the escalation rates notified by CERC.

12.38 Considering the above, the Commission is of the view that imposition and further increase in Busy Season Surcharge on Coal Transportation are "Change in Law" events as per Article 13.1.1(i) of the PPA and meet the requirements set out at Paras.12.6 and 12.8 above."

Now let us consider the provisions of Article 13.1.1 of the PPA in Case No. 163 of 2014. The relevant extract is reproduced as below:

"ARTICLE 13: CHANGE IN LAW

13.1. Definitions In this Article 13, the following terms shall have the following meanings:

13.1.1 "Change in Law" means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline:

(i) The enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any law or;

(ii) A change in interpretation of any law by a competent court of law, tribunal, Indian Governmental Instrumentality provided such court of law, tribunal, Indian Governmental Instrumentality is final authority under law for such interpretation.

But shall not include (i) any change in withholding tax on income or dividends distributed to the shareholder of the seller, or (ii) change in respect of UI charges or frequency interval by an appropriate commission.
.....”

The provisions of Article 13.1.1 (i) of the PPA under MERC is similar to that of the PPA under instant case.

xvi. From the above discussions it is clear that the CERC escalation index for transportation covers only the basic freight charges. The Bidder was required to suitably incorporate the other taxes, duties, levies etc. existing at the time of bidding. The Bidder cannot envisage any changes happening regarding taxes, levies, duties etc. in future date. As such, any increase in surcharges or imposition of new surcharge after the cut-off date i.e. 30.7.2009 in the present case cannot be said to be covered under CERC Escalation Rates for Transportation Charges, which is indexed for basic freight rate only. Accordingly, any such change by Indian Governmental Instrumentality herein Indian Railways has to be necessarily considered under Change in Law event and need to be passed on to APRL. In terms of the PPA, such changes in the surcharges and levy of new Port Congestion Surcharge which do not exist at the time of cut-off date falls under 1st bullet of Article 10.1.1 of the PPA read with the definitions of the 'Law' and 'Indian Government Instrumentality' under the PPA.

According to these issues are answered in favour of APRL/Appellant.”

63. In view of the above judgment passed by this Tribunal the levy of busy season charges and levy of development surcharge is hereby allowed as change in law event.”

12. In light of the above judgment, the Petitioner shall be entitled to recover the compensation on account of levy of Busy Season Charges and levy of Development Surcharge in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of this Commission or at actual, whichever is lower, for supply of electricity to TANGEDCO. If the 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 Busy Season Charges and Development Surcharge. The Petitioner is directed to furnish along with its monthly bill, the proof of payment and computations duly certified by the auditor to TANGEDCO. The Petitioner and TANGEDCO are further directed to carry out reconciliation on account of these claims annually.

(B) Carrying cost

13. The Petitioner had not prayed for grant of carrying cost in Petition No. 126/MP/2016 and accordingly, it was not dealt with by the Commission in the order dated 27.4.2018. However, in the Appeal No. 58 of 2019, the Petitioner vide IA No. 353 of 2020 had prayed for grant of carrying cost on the compensation allowed on account of Change in Law events and after considering the submissions of the parties, the APTEL vide its judgment dated 12.8.2021 has held that the Petitioner is entitled to carrying cost on amount of compensation allowed on account of Change in Law. The relevant portion of the judgment of APTEL is extracted as under:

“64. BALCO has prayed for carrying cost on the compensation allowed on account of change in law and has referred to the judgments passed by the Hon’ble Supreme Court as well as this Tribunal wherein it has been held that carrying cost is inbuilt in the change in law claims as the same is based upon the principle of restitution, so that the generator/affected party is restored to the same economic position as if the change in law event did not occur. This principle is provided in Article 10.2.1 of the PPA. The counsel representing BALCO submitted that BALCO has filed an application seeking amendment of the present appeal for the purpose of claiming carrying cost.

.....

This Hon’ble Tribunal by its judgment dated 13.04.2018 passed in Appeal No. 210 of 2017 titled Adani Power Ltd. vs CERC & Ors., considering the restitutionary principle under the change in law provision of the PPA allowed carrying cost on the allowed change in law claims from the effective date of change in law till the approval of the said claim by the appropriate authority. Relevant extract of Adani Judgment is as under: -

“x. Further, the provisions of Article 13.2 i.e., restoring the Appellant to the same economic position as if Change in Law has not occurred is in consonance with the principle of ‘restitution’ i.e., restoration of some specific thing to its rightful status. Hence, in view of the provisions of the PPA, the principle of restitution and judgement of the Hon’ble Supreme Court in case of Indian Council for Enviro-Legal Action vs. Union of India & Ors., we are of the considered opinion

that the Appellant is eligible for Carrying Cost arising out of approval of the Change in Law events from the effective date of Change in Law till the approval of the said event by appropriate authority. It is also observed that the Gujarat Bid-01 PPA have no provision for restoration to the same economic position as if Change in Law has not occurred. Accordingly, this decision of allowing Carrying Cost will not be applicable to the Gujarat Bid-01 PPA.”

The above judgment of this Tribunal in Appeal No. 210 of 2017 was challenged before the Hon'ble Supreme Court. The Hon'ble Supreme Court vide its judgment dated 25.02.2019 upheld the aforesaid Judgment passed by this Hon'ble Tribunal and held as under:-

“7. Article 13.2 is an in-built restitutionary principle which compensates the party affected by such change in law and which must restore, through monthly tariff payments, the affected party to the same economic position as if such change in law has not occurred. 10 Since it is clear that this amount of carrying cost is only relatable to Article 13 of the PPA, we find no reason to interfere with the judgment of the Appellate Tribunal... 16...There can be no doubt from this judgment that the restitutionary principle contained in Clause 13.2 must always be kept in mind even when compensation for increase/decrease in cost is determined by the CERC.”

With respect to the application for seeking amendment, filed by BALCO in the present appeal, which was filed out of abundant caution to claim carrying cost, it is submitted that this Tribunal in the following judgments allowed reliefs, including the relief of carrying cost, by way of moulding of relief:

65. In view of the foregoing, we are of the considered opinion that in order to grant relief on equities by keeping justice, equity and good conscience at the back of the mind, the Tribunal can shape the relief consistent with facts and circumstances established in a given cause of action. The Tribunal feels moulding of relief is necessary to meet ends of justice, after taking all facts and circumstances into consideration, can mould the relief by exercising discretionary power and accept the prayer of BALCO for carrying cost on the amount of compensation allowed on account of change in law.

66. If the terms of the contract provide that parties must be brought to same economic position, it would include that all additional costs, which occurs after the cut-off date in terms of the change in law event, have to be compensated and if there is any time gap between the date of spending and realising the said amount, carrying cost/interest has to be paid then only the parties could be put to same economic position. Therefore, the prayer of BALCO for carrying cost on amount of compensation allowed on account of change in law is hereby allowed.”

14. Accordingly, in terms of the judgment of APTEL, the Petitioner is entitled to carrying cost on amount of compensation allowed on account of Change in Law. The Petitioner is eligible for carrying cost arising from the date of spending as a consequence of approved Change in Law events till the date of this order. Once a supplementary bill is raised by the Petitioner in terms of this order, the provision of

Late Payment Surcharge in the PPA would kick in if the payment is not made by TANGEDCO within due date.

15. As regards rate of carrying cost, the Commission in its order dated 17.9.2018 in Petition No. 235/MP/2015 (AP(M)L v. UHBVNL & Ors.) had decided the issue of Carrying cost as under:

“24. After the bills are received by the Petitioner from the concerned authorities with regard to the imposition of new taxes, duties and cess, etc. or change in rates of existing taxes, duties and cess, etc., the Petitioner is required to make payment within a stipulated period. Therefore, the Petitioner has to arrange funds for such payments. The Petitioner has given the rates at which it arranged funds during the relevant period. The Petitioner has compared the same with the interest rates of IWC as per the Tariff Regulations of the Commission and late payment surcharge as per the PPA as under:-

<i>Period</i>	<i>Actual interest rate paid by the Petitioner</i>	<i>Working capital interest rate as per CERC Regulations</i>	<i>LPS Rate as per the PPA</i>
2015-16	10.68%	13.04%	16.29%
2016-17	10.95%	12.97%	16.04%
2017-18	10.97%	12.43%	15.68%

25. It is noted that the rates at which the Petitioner raised funds is lower than the interest rate of the working capital worked out as per the Regulations of the Commission during the relevant period and the LPS as per the PPA. Since, the actual interest rate paid by the Petitioner is lower, the same is accepted as the carrying cost for the payment of the claims under Change in Law.

26. The Petitioner shall work out the Change in Law claims and carrying cost in terms of this order. As regards the carrying cost, the same shall cover the period starting with the date when the actual payments were made to the authorities till the date of issue of this order. The Petitioner shall raise the bill in terms of the PPA supported by the calculation sheet and Auditor’s Certificate within a period of 15 days from the date of this order. In case, delay in payment is beyond 30 days from the date of raising of bills, the Petitioner shall be entitled for late payment surcharge on the outstanding amount.”

16. Accordingly, the Petitioner shall be eligible for carrying cost at the actual interest rate paid by the Petitioner for arranging funds (supported by Auditor’s Certificate) or the Rate of Interest on Working Capital as per applicable CERC Tariff Regulations or the Late Payment Surcharge Rate as per the PPA, whichever is the lowest.

(C) Interest on Carrying Cost

17. Apart from grant of carrying cost, the Petitioner has prayed for interest on the carrying cost. The Petitioner has submitted that it also entitled to claim interest on the carrying cost amount from the date of actual payment of Change in Law compensation already made by TANGEDCO, in terms of the interim orders of the APTEL, to the actual date of payment of carrying cost determined in terms of the present compliance proceedings. The Petitioner has also submitted that the principle of payment of interest on carrying cost has been upheld by the APTEL in the judgment dated 12.8.2021 in Appeal No. 421 of 2019.

18. We have considered the submissions made by the Petitioner. Pertinently, the scope of the present proceedings is limited to the implementation of the directions of the APTEL in its judgment dated 12.8.2021 in Appeal Nos. 22 of 2019 and 58 of 2019. It is a well settled principle that the scope of the remand proceedings is limited and the court is bound to act within the scope of remand. In this regard, we may refer to the judgment of the APTEL dated 10.5.2010 in Appeal No. 146 of 2009 (Damodar Valley Corp. v. Central Electricity Regulatory Commission and Ors.), wherein the APTEL has summarized the principles governing the scope of remand proceedings as laid down in terms of the various decisions of the Hon'ble Supreme Court as under:

"40. In the cases referred to above, the following principles have been laid down:

(i) When a matter is remanded by the superior court to subordinate court for rehearing in the light of observations contained in the judgement, then the same matter is to be heard again on the materials already available on record. Its scope cannot be enlarged by the introduction of further evidence, regarding the subsequent events simply because the matter has been remanded for a rehearing or de novo hearing.

(ii) The court below to which the matter is remanded by the superior court is bound to act within the scope of remand. It is not open to the court below to do anything but to carry out the terms of the remand in letter and spirit.

(iii) When the matter comes back to the superior court again – on appeal after the final order upon remand is passed by the court below, the matter/issues finally disposed of by order of remand, cannot be reopened.

(iv) Remand order is confined only to the extent it was remanded. Ordinarily, the superior court and set aside the entire judgement of the court below or it can remand the matter on specific issues through a "Limited Remand Order". In case of Limited Remand Order, the jurisdiction of the court below is limited to the issue remanded. It cannot sit on appeal over the Remand Order.

(v) If no appeal is preferred against the order of Remand, the issues finally decided in the order of remand by the superior court attains finality and the same can neither be subsequently re-agitated before the court below to which remanded not before the superior court where the order passed upon remand is challenged in the Appeal.

(vi) In the following cases, the finality is reached:

a) The issue being not challenged before the superior court, or

b) The issue challenged but not interfered by the superior court, or

c) The issue decided by the superior court from which no further appeal is preferred.

These issues cannot be re-agitated either before the court below or the superior court."

19. Hence, in terms of the settled principles governing remand proceedings, the prayer of the Petitioner for grant of interest on carrying cost cannot be considered in the present proceedings, as it is beyond the scope of the present remand proceedings initiated in terms of the judgment of APTEL dated 12.8.2021. In the said judgment, the APTEL has directed the Commission to pass the appropriate order considering the opinion of APTEL as expressed therein, which are limited to the Change in Law claim of Busy Season Charges & Development Surcharge and carrying cost, which have already been considered and implemented in the foregoing paragraphs of this order.

20. All other terms and conditions of the order dated 27.4.2018 in Petition No. 126/MP/2016 to the extent not modified and/ or set aside by APTEL in its judgment dated 12.8.2021, shall remain unaltered.

21. In terms of the above order, the directions of the APTEL in its judgment dated 12.8.2021 in Appeal No. 58 of 2019 stand implemented.

Sd/-
(P.K.Singh)
Member

sd/-
(Arun Goyal)
Member

sd/-
(P.K.Pujari)
Chairperson

