CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No: 157/MP/2015
along with IA No.53/2021
And
Petition No: 121/MP/2017
along with IA No. 64/2021

Coram:
Shri P.K. Pujari, Chairperson
Shri I.S. Jha, Member
Shri Arun Goyal, Member
Shri P.K. Singh, Member

Date of Order: 20th December, 2021

Petition No. 157/MP/2015 along with IA No. 53/2021

In the matter of

Petition under Section 79(1)(b) of the Electricity Act, 2003 read with Article 13.2(b) of the Power Purchase Agreement dated 22.4.2007 (as amended from time to time) seeking adjustment of tariff for increase/ decrease in revenues/ costs of Coastal Gujarat Power Limited due to "Change in Law" during the Operating Period for the Financial Years 2011-12, 2012-13 and 2013-14.

And
In the matter of

Coastal Gujarat Power Limited,
C/o The Tata Power Company Limited,
34, Sant Tuka Ram Road, Carnac Bunder,
Mumbai-400 021 **.....Petitioner**

Vs

1. Gujarat Urja Vikas Nigam Limited,
Sardar Patel Vidyut Bhavan, Race Course,
Vadodara – 390 007, Gujarat

2. Maharashtra State Electricity Distribution Company Limited,
4th Floor, Prakashgad, Plot No. G-9, Bandra (East),
Mumbai-400 051, Maharashtra

3. Ajmer Vidyut Vitaran Nigam Limited,
Hathi Bhata, Old Power House,
Ajmer, Rajasthan

4. Jaipur Vidyut Vitaran Nigam Limited,

Vidyut Bhawan, Janpath,
Jaipur, Rajasthan

5. Jodhpur Vidyut Vitaran Nigam Limited,
New Power House, Industrial Area,
Jodhpur, Rajasthan

6. Punjab State Power Corporation Limited,
PP&R, Shed T-1, Thermal Design,
Patiala – 147 001

7. Uttar Haryana Bijli Vitran Nigam Limited,
Vidyut Sadan, Plot No. C-16, Sector-6,
Panchkula-134112, Haryana.

8. Dakshin Haryana Bijli Vitran Nigam Limited,
Vidyut Nagar, Vidyut Sadan,
Hissar, Haryana-125005 **... Respondents**

Petition No. 121/MP/2017 along with IA. No. 64/2021

In the matter of

Petition under Section 79(1)(b) of the Electricity Act, 2003 read with Article 13 of the PPA dated 22.4.2007 and Clause 4.7 of the Competitive Bidding Guidelines, seeking adjustment of tariff for increase/ decrease in cost/ revenue of CGPL due to occurrence of Change in Law events.

And
In the matter of

Coastal Gujarat Power Limited,
C/o The Tata Power Company Limited,
34, Sant Tuka Ram Road, Carnac Bunder,
Mumbai-400 021 **.....Petitioner**

Vs

1. Gujarat Urja Vikas Nigam Limited,
Sardar Patel Vidyut Bhavan, Race Course,
Vadodara – 390 007, Gujarat

2. Maharashtra State Electricity Distribution Company Limited,
4th Floor, Prakashgad, Plot No. G-9, Bandra (East),
Mumbai-400 051, Maharashtra

3. Ajmer Vidyut Vitaran Nigam Limited,
Hathi Bhata, Old Power House,
Ajmer, Rajasthan

4. Jaipur Vidyut Vitaran Nigam Limited,

Vidyut Bhawan, Janpath,
Jaipur, Rajasthan

5. Jodhpur Vidyut Vitaran Nigam Limited,
New Power House, Industrial Area,
Jodhpur, Rajasthan

6. Punjab State Power Corporation Limited,
PP&R, Shed T-1, Thermal Design,
Patiala – 147 001

7. Uttar Haryana Bijli Vitran Nigam Limited,
Vidyut Sadan, Plot No. C-16, Sector-6,
Panchkula-134112, Haryana.

8. Dakshin Haryana Bijli Vitran Nigam Limited,
Vidyut Nagar, Vidyut Sadan,
Hissar, Haryana-125005 **... Respondents**

Parties Present:

Shri Amit Kapur, Advocate, CGPL
Shri Abhishek Munot, Advocate, CGPL
Shri Tushar Nagar, Advocate, CGPL
Shri M.G. Ramachandran, Sr. Advocate, GUVNL, Haryana and Rajasthan Utilities
Ms. Ranjitha Ramachandran, Advocate, GUVNL, Haryana and Rajasthan Utilities
Ms. Anushree Bardhan, Advocate, GUVNL, Haryana and Rajasthan Utilities
Ms. Srishti Khindaria, Advocate, GUVNL, Haryana and Rajasthan Utilities
Shri Anup Jain, Advocate, MSEDCL
Shri Ajay Kapoor, CGPL
Shri Abhay Kumar, CGPL
Shri Prasad Bagade, CGPL
Shri S. K. Nair, GUVNL
Shri Swapnil S. Katkar, MSEDCL

ORDER

The Petitioner, Coastal Gujarat Power Limited ('CGPL'), which is a subsidiary of Tata Power Company Limited, has set up a 4150 MW Ultra Mega Power Project ('Mundra UMPP') consisting of 5 units of 830 MW each at Mundra in the State of Gujarat based on imported coal after Tata Power Company Limited was selected as the successful bidder based on the competitive bidding carried out in accordance with Section 63 of the Electricity Act, 2003 (hereinafter referred to as 'the Act'). The tariff of Mundra UMPP was adopted by the Commission under Section 63 of the Act vide order dated 19.9.2007 in Petition No.18/2007. The Petitioner has entered into a PPA

dated 22.4.2007 (in short, "the PPA") with the distribution companies in the States of Gujarat, Maharashtra, Rajasthan, Punjab and Haryana for supply of 3800 MW from Mundra UMPP for a period of 25 years. The distribution companies (Discoms) arrayed as Respondents are Gujarat Urja Vikas Nigam Limited (GUVNL); Maharashtra State Electricity Distribution Company Limited (MSEDCL); Ajmer Vidyut Vitran Nigam Limited, Jaipur Vidyut Vitran Nigam Limited, Jodhpur Vidyut Vitran Nigam Limited (Rajasthan Discoms); Punjab State Power Corporation Limited (PSPCL) and Haryana Power Generation Corporation Limited (HPGCL). The Discoms are collectively referred to as 'the Procurers' in this petition. Subsequently, the Petitioner and the Procurers have entered into a Supplemental PPA on 31.7.2008 for advancement of Scheduled Commercial Operation Dates (SCOD) in terms of Article 3.1.2 (iv) of the PPA.

2. The five units of the Mundra UMPP were commissioned as per the following dates:

Unit No.	Date of Commercial Operation
Unit -1	07.03.2012
Unit -2	30.07.2012
Unit -3	27.10.2012
Unit -4	21.01.2013
Unit -5	22.03.2013

3. The Petitioner had filed Petition No. 157/MP/2015 before the Commission under Section 79(1)(b) of the Act read with Article 13.2(b) of the PPA (read with Supplemental PPA) seeking adjustment of tariff for increase/ decrease in revenues/ costs due to 'Change in Law' during the operating period for the financial years 2011-12, 2012-13 and 2013-14. The Commission vide order dated 17.3.2017 disposed of the said Petition allowing certain 'Change in Law' events as under:

Sr. No.	Change in law events	Decision
1.	Levy of Clean Energy Cess on imported coal	Allowed
2.	Change in Basic Customs Duty and Countervailing Duty on imported coal	Allowed subject to outcome of pending proceedings before the

		Central Excise and Service Tax Appellate Tribunal
3.	Reduction in Excise Duty	Allowed
4.	Reduction in Central Sales Tax	Allowed
5.	Increase in Gujarat Value Added tax	Not Allowed
6.	Increase in Service tax	Allowed
7.	Levy of Green Cess	Not Allowed
8.	Additional condition imposed by MoEF&CC	Not Allowed
9.	Carrying cost	Not Allowed

4. Aggrieved by the order dated 17.3.2017, the Respondent, GUVNL filed Review Petition No. 22/RP/2017 seeking rectification of errors with regard to Change in Law events, namely, (a) allowing service tax on works contract as a Change in Law; and (b) computation of quantum of coal for considering the compensation for Clean Energy Cess. Considering the submissions of the parties, the Commission in its order dated 31.10.2017 in Review Petition No. 22/RP/2017 with regard to service tax on contract had observed that the Petitioner shall not be entitled for service tax on works contract under Change in Law. Similarly, with regard to correction in computation of quantum of coal for considering the compensation for Clean Energy Cess and other coal-based levies, the Commission observed that certain clerical errors as pointed out had crept in the order dated 17.3.2017 in Petition No. 157/MP/2015 and the same were corrected by the order dated 31.10.2017 in Review Petition No. 22/RP/2017. Accordingly, the review on this ground was allowed and the paragraph 20 of the order dated 17.3.2017 was corrected.

5. The Commission vide order dated 17.3.2017 had disallowed Gujarat Value Added Tax (Gujarat VAT) subject to outcome of Appeal No. 161 of 2015 pending before the Appellate Tribunal for Electricity (APTEL). On 2.5.2017, the Petitioner filed Interlocutory Application (IA) No. 26/2017 seeking modification of the Commission's order dated 17.3.2017 pursuant to judgment of APTEL dated 19.4.2017 in Appeal No. 161/2015. The Commission, vide order dated 29.1.2018, while allowing the IA allowed Gujarat VAT as Change in Law.

6. The Commission's order dated 17.3.2017 in Petition No. 157/MP/2015, order dated 31.10.2017 in Review Petition No. 22/RP/2017 and order dated 29.1.2018 in IA No. 26/2017 were challenged by the Petitioner before APTEL in Appeal No. 172 of 2017 challenging the following disallowances by the Commission:

(a) Increase in service tax on works contract and secondary & higher education cess on service tax on works contract,

(b) Refund of Green cess,

(c) Compensation for coal-based levies (Clean Energy Cess, Basic Customs Duty, Countervailing Duty, etc.) computed on the quantum of coal taking normative bid parameters and not on the basis of actual coal consumed;

(d) Compensation for increase in Gujarat VAT to be paid on fuel oil, allowed on lower of normative bid parameters or actuals;

(e) Corporate Social Responsibility (CSR) expenditure mandated by the Ministry of Environment and Forest and Climate Change (MoEF&CC); and

(f) Carrying cost on the Change in Law compensation payable.

7. Subsequently, the Petitioner filed Petition No. 121/MP/2017 seeking reliefs under Change in Law events during the operating period towards levy of Swachh Bharat Cess, levy of Krishi Kalyan Cess, service tax on transportation of goods by a vessel from a place outside India to the first customs station of landing in India and imposition of mandate under Companies Act, 2013 (Companies Act) to spend a minimum of 2% of the average net profits of the company towards the Corporate Social Responsibility (CSR) Policy. The Commission, after hearing the parties, in its order dated 21.2.2018 in Petition No. 121/MP/2017 allowed the levy of:

(a) Swachh Bharat Cess and Krishi Kalyan Cess on the following four services availed by the Petitioner:

(i) Transportation of goods by a vessel from a place outside India to the first customs landing station in India - ocean freight on coal received at Mundra.

(ii) Port Service - Fixed port handling charges and permission charges on usage of intake channel.

(iii) Technical Testing and Analysis Agency - Coal analysis charges and coal stock yard sampling and analysis and drinking water sampling and analysis.

(iv) Transport of goods by road - Hiring utility vehicle for material transportation and transportation charges on LDO, various equipment sent for repairing.

(b) Service tax on transportation of goods by a vessel from a place outside India to the first customs station of landing in India.

8. The Commission did not allow the claim of the Petitioner for relief under Change in Law on account of imposition of mandate of CSR under the Companies Act, 2013. Further, the Commission also did not allow carrying cost.

9. Subsequently, the Respondents (except MSEDCL) filed IA No. 71/2018 in Petition No. 121/MP/2017 seeking clarification that the quantum of coal to be considered for Change in Law as per order dated 21.2.2018 in Petition No. 121/MP/2017 be based on actual coal consumed subject to the ceiling of the parameters of SHR of 2050 kCal/kWh with 1% degradation every 10 years, auxiliary consumption of 4.75% and GCV of 5350 kCal/kg. The Commission vide order dated 3.9.2019 allowed the IA No. 71/2018 and clarified that the Petitioner shall be entitled to recover the compensation on account of service tax including Swachh Bharat Cess and Krishi Kalyan Cess on quantum of coal as per actual subject to ceiling based on parameters as decided by the Commission in paragraph 84 of the order dated 6.12.2016 in Petition No. 159/MP/2012 corresponding to the scheduled generation for supply of electricity to the Procurers. If actual generation is less than the scheduled generation, the coal consumed for actual generation based on normative parameters or actual quantum of coal consumed, whichever is lower shall be considered for the purpose of computation of impact of Change in Law events.

10. Aggrieved by the Commission`s order dated 21.2.2018 and order dated 3.9.2019 in aforesaid Petitions, the Petitioner filed Appeal before the APTEL being Appeal No. 154 of 2018 challenging the following disallowances by the Commission:

(a) Krishi Kalyan Cess and Swachh Bharat Cess on 20 services availed by CGPL;

(b) Costs/ expenses related to CSR mandated by the Companies Act, 2013 read with the Companies (Corporate Social Responsibility) Rules, 2014 (CSR Rules);

(c) Change in Law compensation related to coal-based levies computed on quantum of coal calculated on the basis of lower of normative parameters or actuals;

(d) Carrying cost on Change in Law compensation;

(e) Compensation for any reduction in rate of service tax on transportation of goods by a vessel from a place outside India to the first custom station of landing in India.

11. Appeal No. 172 of 2017 and Appeal No. 154 of 2018 (Appeals) have been decided by APTEL vide its judgment dated 27.4.2021. In the said judgment, the APTEL has allowed all the claims of the Petitioner except the claim towards expenses related to CSR mandated by the Companies Act, 2013 read with CSR Rules. As regards claim under Gujarat Green Cess Act (constitutional validity of the same is under challenge in the Hon'ble Supreme Court), it was accepted as change in law in principle by APTEL and it was held that if the burden on account of Gujarat Green Cess Act were to be borne by CGPL after decision is rendered by the Hon'ble Supreme Court, the same shall be treated by the Commission as a change in law event and necessary order shall be passed by the Commission. Relevant portion of the above judgment dated 27.4.2021 is extracted as under:

"THE FINAL ORDER

171. We have, thus, accepted, in principle, the claim of the appellant for compensation in relation to the payments made under Gujarat Green Cess Act, the constitutional validity of which legislation is pending before the Supreme Court of India. We have held that if the burden created and borne by the appellant on account of enforcement of the

said law, during the operation period, were to continue to be borne by the appellant even after decision is rendered by the Supreme Court on the pending challenge, the same shall be treated by the Commission as a CIL event and necessary order shall be passed by it to afford recompense to that extent along with corresponding carrying cost.

172. We have rejected the claim for compensation of the appellant for the expenditure incurred additionally under Section 135 of the Companies Act in order to fulfil its Corporate Social Responsibility.

173. Subject to the above, all other claims of the appellant in these appeals have been accepted as giving rise to legitimate ground justifying compensation under Change in Law clauses of the PPAs with the Procurers.

174. The impugned orders of the Commission stand modified accordingly. In view of above noted observations and directions, subject-wise, the Central Electricity Regulatory Commission is directed to pass the necessary consequential orders within four weeks of this judgment and ensure that the benefit, to the extent allowed, inures without delay to the appellant."

Submissions of CGPL in IA No. 53/2021 in Petition No. 157/MP/2015 and in IA No. 64/2021 in Petition No. 121/MP/2017

12. Pursuant to the aforesaid judgment of the APTEL, CGPL has filed IA No. 53/2021 in Petition No. 157/MP/2015 and IA No. 64/2021 in Petition No. 121/MP/2017, *inter alia*, to place on record the copy of the judgment of APTEL dated 27.4.2021 in Appeal No.172/2017 and Appeal No. 154/2018 and for passing of consequential orders/ directions in terms of the finding and directions of the APTEL therein. Submissions made by CGPL in both the IAs, are summarized below:

(a) Interpretation of Article 13: On the interpretation of Article 13 of PPA, the APTEL in the judgment dated 27.4.2021, has *inter alia* held that the regulatory authority cannot introduce any extraneous words or qualifications to limit or whittle down the scope of Article 13 with respect to what constitutes Change in Law and how relief has to be computed and that once Change in Law is established, it must provide restitutive compensation (on actuals) to the affected party.

(b) Levy of Green cess: APTEL in the aforesaid judgment has *inter alia* held that levy of Green cess is Change in Law event; CGPL has already paid Rs. 55,24,176/- towards Green cess during the operation period; the contention of Procurers that CGPL's claim for Green cess is premature is incorrect and, hence, was rejected; since CGPL had already paid the new revenue to the

State, its expectation to be compensated was immediate; while CGPL's claim is upheld, concrete relief for this levy must be deferred for some time; and CGPL is also entitled to carrying cost on the Change in Law compensation for Green cess. While CGPL's claim is upheld, concrete relief for this levy must be deferred for some time. Challenge to the constitutional validity of the Gujarat Energy Cess Act, 2011 and Gujarat Green Cess Rules, 2021 are still pending before the Hon'ble Supreme Court in SLP (Civil) No. 18494-18515/2013. Therefore, the Commission should hold that the levy of Green cess amounts to Change in Law in terms of Article 13 of the PPA.

(c) Service Tax on Works Contract: As on the cut-off date, CGPL had considered service tax @12% on the service component of the works contract. However, due to certain Change in Law events, the cost of electricity has been increased, namely (i) option given to the work-contractor to pay service tax on works contract either at the rate of 12% on the service component or 2% of gross amount charged for the works contract (by Notification No. 32/2007-Service Tax dated 22.5.2007); (ii) increase in rate of service tax on works contract from 2% to 4% on account of amendment to Rule 3(1) of the Works Contract Rules (by way of Notification dated 1.3.2008); and (iii) levy of secondary and higher education cess at the rate of 1% on the aggregate duty of service tax levied and collected by the Central Government (by Section 130 of the Finance Act, 2007).

(d) In light of the APTEL's findings, CGPL is entitled to restitution for service tax on works contract in terms of the formula, namely *'impact of Additional Service Tax (Rs) = Service Tax paid by the Petitioner during the Operation Period (inclusive of Education Cess and Secondary and Higher Education Cess) [Rs] less Service Tax payable by the Petitioner at the rate prevailing on the Cut-Off Date (inclusive of Education Cess) [Rs]'.*

(e) In terms of the aforesaid formula, CGPL is entitled to compensation of Rs.4,02,340/- for the period financial year 2013-14 (Rs.2,88,638/-) and financial year 2014-15 (Rs.1,13,701/-) from the Procurers. CGPL has already billed and received compensation for service tax on works contract from certain Procurers. However, GUVNL and PSPCL have not yet compensated CGPL for the same. The procurer-wise liability towards Change in Law compensation qua service tax on works contract is as under:

Sr. No.	Procurer	Pro rata compensation for Service Tax on Works Contract (Rs.)	Amount Received (Rs.)	Amount Unpaid (Rs.)
1.	GUVNL	1,91,111	-	1,91,111
2.	MSEDCL	80,469	80,469	-
3.	PSPCL	50,292	-	50,292
4.	Rajasthan Discoms	40,234	40,234	-
5.	HPGCL	40,234	40,234	-
Total		**4,02,340**	**1,60,937**	**2,41,403**

(f) Additional conditions mandated by MoEF&CC: APTEL has held that the additional conditions relating to Corporate Environment Responsibility (CER) imposed by Ministry of Environment, Forest and Climate Change (MoEF&CC**)** vide corrigendum dated 26.4.2011 is a Change in Law event impacting CGPL's costs. APTEL has held that the Commission has erred in treating the additional expenditure incurred by CGPL in compliance with modified conditions of environment clearance as a CSR-related expenditure under Section 135 of the Companies Act, 2013. The mandate of CER by MoEF&CC is not linked to net profits and has to be met irrespective of whether or not a generating company is making net profits. Therefore, CER obligation has arisen due to Change in Law event within the meaning of Article 13 of the PPA and CGPL is entitled to compensation. According to CGPL, as on 31.3.2021, it has incurred Rs. 68,36,96,656/- in complying with the additional conditions imposed by MoEF&CC vide its corrigendum dated 26.4.2011. CGPL has placed on record the audited details and financial statements in support of its claim and has computed the Procurer-wise liability in this regard as under:

Sr. No.	Procurer	Pro rata compensation payable by Procurers (Rs.)
1.	GUVNL	32,47,55,911
2.	MSEDCL	13,67,39,331
3.	PSPCL	8,54,62,082
4.	Rajasthan Discoms	6,83,69,666
5.	HPGCL	6,83,69,666
Total		**68,36,96,656**

(g) Limiting relief for Change in Law on coal-based levies to normative bid parameters: In its judgment dated 27.4.2021, APTEL has held that Change in Law relief on coal-based levies cannot be linked to normative parameters as it negates the principle underlying Article 13 of PPA as well as the law laid down by the Hon'ble Supreme Court in the cases of Energy Watchdog v. CERC and UHBVNL & Anr. v. Adani Power Limited and by APTEL in Wardha Power

Company Ltd. v. Reliance Infrastructure Ltd. APTEL has further held that Article 13 of the PPA envisages restitution of the affected party on actuals to the same economic position as if Change in Law events had not occurred. The principle contemplated under Article 13.2 of the PPA is to grant relief to mitigate the actual loss suffered by the affected party. Neither PPA nor bid documents confers any discretion on the Commission to limit relief to normative parameters.

(h) In light of the judgment of the APTEL, Change in Law relief for coal-based levies such as Clean Energy Cess, Basic Customs Duty (BCD) and Countervailing Duty (CVD) on imported coal BCD and CVD should be on actual coal consumed by CGPL. In terms of the Commission's order dated 17.3.2017 and order dated 31.10.2017, CGPL has been billing the Procurers as per coal consumption on normative bid parameters corresponding to scheduled generation or actual generation, whichever is lower. In this regard, the following is pertinent:

i. On and from 1.7.2017, Clean Energy Cess has been abolished and replaced with GST Compensation Cess.

ii. CVD has been subsumed in Goods and Service Tax (GST).

iii. Introduction of GST, the consequential abolishing of Clean Energy Cess, introduction of GST Compensation Cess and the subsuming of CVD in Central Goods and Service Tax (CGST) has been held to be a Change in Law by the Commission vide order dated 14.3.2018 in Petition No. 13/SM/2017.

iv. On and after 1.7.2017, CGPL has billed and recovered the Change in Law relief for GST Compensation Cess, CGST (erstwhile CVD) and BCD on normative coal consumed in terms of the methodologies laid down by the Commission in its order dated 17.3.2017 and order dated 31.10.2017. Admittedly, these computational principles will continue to govern the GST era as well.

(i) CGPL has billed the Procurers on the basis of normative coal corresponding to scheduled generation or actual generation, whichever is lower. For the purposes of computing the actual energy (in MU) to be billed to the Procurers in their pro-rata shares, CGPL has considered energy in MU on account of Reserve Regulation Ancillary Services (RRAS-UP) and the energy

sold to the national pool pursuant to this Commission's Pilot Security Constrained Economic Despatch (SCED) scheme. CGPL has delivered energy to the national pool under SCED scheme only during April 2019 to September 2019. CGPL has claimed compensation for coal-based levies (on normative basis) and billed the Procurers on pro-rata basis. For working out the Change in Law compensation based on actual coal consumed in terms of the judgment of APTEL dated 27.4.2021, coal consumption and the value of Clean Energy Cess, BCD, CVD, GST Compensation Cess (replacing Clean Energy Cess) and IGST (replacing CVD) certified by the Auditor is taken as corresponding to actual generation sent out. These values have been apportioned to the Procurers corresponding to their scheduled generation on monthly basis. The energy scheduled under RRAS and SCED has not been considered and consumption corresponding to UI injection has also been excluded. The following table summarizes the computations as on 31.3.2021:

Sr. No.	Change in Law event	Change in Law relief billed on normative as per order dated 17.3.2017 read with Review order dated 31.10.2017 [Rs] (A)	Change in Law relief on actuals as per judgment dated 27.4.2021 [Rs.] (B)	Additional Change in Law relief [Rs.] (C) = (B) – (A)
A. **Pre-GST regime (i.e. financial year 2011-12 to 30.06.2017)**				
1.	Clean Energy Cess (until 30.6.2017)	8,48,04,91,210	9,21,09,79,429	73,04,88,219
2.	BCD	(774,97,21,665)	(8,74,46,22,447)	(99,49,00,783)
3.	CVD	344,45,35,526	3,90,44,07,302	45,98,71,777
B**. GST regime (from 1.7.2017 to 31.3.2021)**				
4.	Compensation Cess	1496,66,63,171	16,33,08,94,597	1,36,42,31,426
5.	BCD	(835,45,36,442)	(9,12,99,56,315)	(77,54,19,872)
6.	IGST	850,67,70,677	9,28,83,51,206	78,15,80,529
Total Change in Law compensation to be paid by Procurers to CGPL				1,56,58,51,296

(j) CGPL has computed the Procurer-wise liability towards aforementioned Change in Law compensation for coal-based levies in terms of their pro-rata shares in the lower of scheduled or actual generation as under:

	CIL Event	**Period**	**Pro rata Change in Law compensation payable (Rs.)**
A. GUVNL			
1.	Clean Energy Cess	Until 30.6.2017	34,31,94,244
2.	BCD	Until 30.6.2017	(45,18,50,181)
3.	CVD	Until 30.6.2017	20,93,61,827

	CIL Event	Period	Pro rata Change in Law compensation payable (Rs.)
4.	Compensation Cess	1.7.2017 -31.3.2021	65,70,57,306
5.	IGST	1.7.2017 - 31.3.2021	37,69,89,405
6.	BCD	1.7.2017 - 31.3.2021	(37,37,32,288)
Total			76,10,20,313
B. MSEDCL			
1.	Clean Energy Cess	Until 30.6.2017	15,01,82,971
2.	BCD	Until 30.6.2017	(20,92,96,821)
3.	CVD	Until 3006.2017	9,66,18,014
4.	Compensation Cess	1.7.2017 - 31.3.2021	27,49,10,426
5.	IGST	1.7.2017 - 31.3.2021	15,68,66,972
6.	BCD	1.7.2017 - 31.3.2021	(15,57,21,256)
Total			31,35,60,306
C. PSPCL			
1.	Clean Energy Cess	until 30.6.2017	9,03,38,852
2.	BCD	until 30.06.2017	(12,51,25,158)
3.	CVD	until 30.06.2017	5,75,76,859
4.	Compensation Cess	1.7.2017 -31.3.2021	17,46,09,467
5.	IGST	1.7.2017 - 31.3.2021	9,99,58,128
6.	BCD	1.7.2017 - 31.3.2021	(9,92,70,615)
Total			19,80,87,533
D. HPGCL			
1.	Clean Energy Cess	Until 30.6.2017	7,01,80,585
2.	BCD	Until 30.6.2017	(9,94,88,800)
3.	CVD	Until 30.6.2017	4,62,27,412
4.	Compensation Cess	1.7.2017 - 31.3.2021	13,54,68,519
5.	IGST	1.7.2017 - 31.3.2021	7,75,69,915
6.	BCD	1.7.2017 - 31.3.2021	(7,70,88,751)
Total			15,28,68,880
E. Rajasthan Discoms			
1.	Clean Energy Cess	Until 30.6.2017	7,65,91,568
2.	BCD	Until 30.6.2017	(10,91,39,823)
3.	CVD	Until 30.6.2017	5,00,87,666
4.	Compensation Cess	1.7.2017 - 31.3.2021	12,21,85,706
5.	IGST	1.7.2017 - 31.3.2021	7,01,96,109
6.	BCD	1.7.2017 - 31.3.2021	(6,96,06,962)
Total			**14,03,14,264**
Grand Total			**1,56,58,51,296**

(k) Gujarat VAT: APTEL in its judgment has held that relief for Gujarat VAT on fuel oil cannot be linked to bid assumed parameters as there is no bid assumed parameter for secondary fuel. Secondary fuel cost (i.e. cost of fuel oil) is recovered through capacity charges and not energy charges. Linking computation of coal to bid assumed parameters is incorrect since these

numbers are based on the perception of the generator as to the risks and estimates of expenditure at the time of submission of bid and it will not be reflective of actual energy charge corresponding to actual landed price of fuel and consequently will not restitute the seller to the same position as if the Change in Law had not occurred. By order dated 31.8.2017 for Change in Law during the construction period, the Commission has allowed Gujarat VAT as Change in Law without linking it to scheduled or actual generation. Hence, for the operation period, Gujarat VAT on fuel oil has to be allowed as recoverable on actual. In light of the judgment of APTEL, CGPL is entitled to being compensated for Gujarat VAT on secondary fuel on actuals. CGPL has invoiced Gujarat VAT on spare parts and fuel oil on actuals from financial year 2013-14 to financial year 2017-18 to all Procurers aggregating to Rs.2,39,54,338/-. Certain Procurers have paid their shares of the Change in Law compensation for Gujarat VAT. However, GUVNL has not paid the entire amount towards Gujarat VAT i.e. Rs.1,13,78,309/- (for both spare parts and secondary fuel). The Rajasthan Discoms have also not paid Rs.4,68,938/- towards Gujarat VAT (on spare parts and secondary fuel) for the financial year 2015-16 to financial year 2017-18. Accordingly, CGPL is entitled for the following amounts from GUVNL and Rajasthan Discoms:

Sr. No	Procurer	Pro rata Change in Law compensation payable by each Procurer (Rs.)	Payments outstanding (Rs.)
1.	GUVNL	1,13,78,309	1,13,78,309
2.	MSEDCL	47,90,867	-
3.	PSPCL	29,94,292	-
4.	Rajasthan Discoms	23,95,435	4,68,938
5.	Haryana Discoms	23,95,435	-
Total		2,39,54,338	1,18,47,247

(l) Swachh Bharat Cess and Krishi Kalyan Cess: In its judgment dated 27.4.2021, APTEL has held that all services availed by CGPL are in furtherance of its sole objective of generating electricity for supply to the Procurers under the PPA. Article 13 of PPA refers to the “business of selling electricity”. The compensation for Change in Law cannot be restricted to the activity of “generating electricity”. Accordingly, CGPL is entitled to Change in Law compensation for levy of Swachh Bharat Cess (SBC) and Krishi Kalyan Cess (KKC) on actuals on all the services availed by it. By Affidavit dated 8.1.2018 in Petition No. 121/PM/2017, CGPL had placed on record a list of twenty-four

taxable services on which it paid up levies of SBC and KKC for financial year 2015-16 and financial year 2016-17. In this regard, (a) CGPL has invoiced the procurers for Rs.5,07,83,283/- for Change in Law compensation on actuals qua the twenty-four services rendered till 30.6.2017, and (b) against the said invoices, CGPL has received payments from all Procurers with the only exception being MSEDCL which owes Rs.6,62,539/- .

(m) Service Tax on ocean freight: In its judgment dated 27.4.2021, APTEL has held that relief for Change in Law is related to actuals. In terms of the order of the Commission dated 21.2.2018 read with order dated 3.9.2019, CGPL has been compensated for service tax on ocean freight on normative coal consumed. However, now in terms of the judgment of APTEL dated 27.4.2021, CGPL is entitled to relief for service tax on ocean freight on actual coal consumed. CGPL's claim for service tax on ocean freight on normative parameters as invoiced to the Procurers and on actuals is as under:

Change in Law Event	**Change in Law relief billed on normative as per order dated 21.02.2018 read with 03.09.2019 (Rs.) [A]**	**Change in Law relief on actuals (Rs.) [B]**	**Additional Change in Law relief (Rs.) [C] = [B] – [A]**
Service tax on Ocean Freight	17,40,82,095	18,65,58,870	1,24,76,776

(n) The Procurer-wise liability as regards service tax on ocean freight is as under:

CIL Event	**GUVNL (Rs.)**	**MSEDCL (Rs.)**	**PSPCL (Rs.)**	**Haryana Discoms (Rs.)**	**Rajasthan Discoms (Rs.**
Service tax on Ocean Freight	60,11,222	25,25,801	15,42,473	11,62,850	12,34,430

(o) Carrying cost**:** APTEL by its judgment dated 27.4.2021 has held that carrying cost is payable on Change in Law compensation. APTEL has held that Article 13 of the PPA envisages the relief for Change in Law to be on actuals. The principle contemplated under Article 13 is to grant relief to mitigate the actual loss suffered by the affected party. Therefore, the rate of carrying cost must be the actual rate of short-term working capital funding arranged by CGPL for meeting the gap in cash flow that arose on account of it being out of pocket due to Change in Law events. For the financial year 2011-12 to financial year

2020-21, CGPL has arranged short term funding to meet its working capital requirements against the following interest rates as under:

Sr. No.	Period	Audited rate of Interest (%)
1.	1.4.2012 to 31.3.2013	10.83%
2.	1.4.2013 to 31.3.2014	10.73%
3.	1.4.2014 to 31.3.2015	10.94%
4.	1.4.2015 to 31.3.2016	10.42%
5.	1.4.2016 to 31.3.2017	9.22%
6.	1.4.2017 to 31.3.2018	8.76%
7.	1.4.2018 to 31.3.2019	9.04%
8.	1.4.2019 to 31.3.2020	9.28%
9.	1.4.2020 to 25.1.2021	8.18%

Hearing dated 13.7.2021

13. The Petition was heard on 13.7.2021. After hearing the submissions of the parties, the Commission directed GUVNL to call, by way of a letter or by convening a meeting, for the requisite details/ information from CGPL and CGPL was directed to provide such details/ information.

Replies of Rajasthan Discoms, Haryana Discoms, GUVNL and MSEDCL

14. The Respondents, Rajasthan Discoms, Haryana Discoms, GUVNL and MSEDCL vide their replies to IA No. 53/2021 in Petition No. 157/MP/2015 and IA No. 64/2021 in Petition No. 121/MP/2017 (filed by CGPL) have mainly submitted as under:

(a) GUVNL and Haryana Discoms have filed Civil Appeals before the Hon'ble Supreme Court against the APTEL order dated 27.4.2021 in Appeal No 172 of 2017, along with an application for interim relief. Accordingly, the present applications may not be heard/ final decision not passed until the above appeal is heard by the Hon'ble Supreme Court.

(b) Auditor certificate submitted by CGPL: CGPL has only given total amounts under each head and has not tabulated in a clear manner the impact of each item of Change in Law (increase and decrease) in order to enable the Procurers to make comments on veracity of the claims. There has to be a certification of the impact of taxes claimed with detailed break-up of amount, rate of tax as on

cut-off date and after Change in Law and impact for each good/ service and each tax/cess.

(c) Interpretation of Article 13 of the PPA: APTEL has recognized the requirement of prudence check and that restitution under Change in Law does not mean that inefficiencies of generators are to be passed on to the consumers.

(d) Green cess**:** The issue of Green cess has to be considered only after the final decision of the Hon'ble Supreme Court in appeal preferred by Government of Gujarat against order of Hon'ble High Court of Gujarat.

(e) Service Tax on works contract: Though the APTEL has reversed the finding of the Commission in order dated 31.10.2017 in regard to service tax on works contracts, it has been clarified that the existing rate of service tax on cut-off date is to be considered. This has also been admitted by CGPL. However, the claim that the introduction of Notification dated 22.5.2007 is Change in Law is not tenable. The APTEL has proceeded on the basis that 12% on service component is similar to 2% of the gross amount. Therefore, there is no impact of Change in Law in regard to above notification providing for the option of 2%. The auditor certificate has considered the work contract tax nil as on bid deadline/ cut-off date. However, as submitted by CGPL itself and noted by APTEL, the service tax on 12% on service component was existing even on cut-off date.

(f) Additional condition imposed by MoEF&CC: As recognized by APTEL, the periods under consideration in the appeal was 2012 to 2015 and no claim can be considered for the subsequent period in remand proceedings. Even otherwise, CGPL has not submitted Auditor certificate for the year 2016-17 onwards. As per the financial statements, CGPL has requested MoEF&CC for waiver of conditions related to spending of Rs. 14.40 crore towards CER that is pending decision of MoEF&CC. Thus, CGPL is required to inform the Commission and the Procurers of the latest status in this regard. In the event, the waiver request of CGPL is accepted by MoEF&CC, CGPL is liable to refund the entire amount paid towards CER to the beneficiaries.

(g) Computation of coal for coal-based levies: CGPL is required to submit the detailed tabulation with corresponding rate as well as computation of coal. CGPL is required to certify that the quantum of coal so arrived at was actually used in the Mundra UMPP and was not diverted to its any other plant. CGPL has to submit an energy auditor certificate with regard to actual heat rate and auxiliary consumption considered for calculation of actual coal consumption with necessary break up and the detailed computation of coal quantum considering the parameters as per Tariff Regulations applicable from time to time. Coal quantum for reimbursement of Change in Law claims is to be considered as lower of actual or as per Tariff Regulations corresponding to actual injection subject to ceiling of scheduled generation after adjusting the quantum of energy towards RRAS, SCED or AGC mechanism.

(h) It has to be ensured that coal towards energy scheduled by the beneficiaries or actually injected for beneficiaries is only considered and where the schedule of CGPL is increased under RRAS, SCED or AGC as per the system requirement, the same is not accounted for in the present claim. Further, lower of actual and scheduled generation shall be considered to account for the excess injection under deviation settlement mechanism. The consideration of scheduled or actual generation, whichever is lower, has already been held by the Commission in its order dated 17.3.2017 in Petition No. 157/MP/2015 and this aspect was not challenged by CGPL. However, this has not been considered in computation now submitted by CGPL. CGPL has considered the actual coal used and not certified that the actual coal quantum is less than the coal quantum as per parameters specified in the Tariff Regulations. The APTEL has consistently held that for computation of coal quantum for Change in Law, the actual coal consumed is subjected to the Tariff Regulations notified by the Regulatory Commission. Reliance is placed on judgments of APTEL dated 13.11.2019 in Appeal No. 136/2016, dated 14.9.2020 in Appeal No. 182/2019, dated 3.11.2020 in Appeal No. 168/2019 and in Appeal No. 264/2018. CGPL's claims are required to be modified to reflect the computation as per Tariff Regulations or actuals, whichever is lower (in addition to the above consideration and adjustments). CGPL is also required to submit auditor certificate with regard to calculation providing for full details along with proof of payment.

(i) Gujarat VAT: Similar to the coal-based levies, the consideration is to be on actual or parameters as per Tariff Regulations, whichever is lower. The APTEL had held that the relief cannot be linked to bid assumed parameters as there is no bid assumed parameter.

(j) Carrying cost**:** CGPL is required to submit Auditor certificate for the exact date of incurring of expenditure and computation of interest rates, etc., Statutory Auditor certificate certifying the interest rate, interest on working capital as per Tariff Regulations and late payment surcharge as per PPA and certifying that the lowest rate has been considered. CGPL has raised issue of carrying cost with regard to IGST, which is not within the scope of the present proceedings. There is no reference to IGST in Appeals decided by the APTEL. When the Petition No. 121/MP/2017 and the Appeal No. 154 of 2018 did not relate to IGST, the said issue cannot be raised in the remand proceedings.

Rejoinder of the Petitioner to the replies of the Rajasthan Discoms, Haryana Discoms, GUVNL and MSEDCL

15. CGPL in its consolidated rejoinder has submitted the following:

(a) In light of the directions of the Commission dated 26.7.2021, GUVNL issued a letter (as lead Procurer) seeking various information and data from CGPL in addition to what was already provided in the Petitions and the IAs. On 5.8.2021, CGPL issued a preliminary response to GUVNL seeking time to collate all the necessary data and information. Thereafter, multiple emails and computations were exchanged between CGPL and GUVNL. On 19.8.2021, CGPL has issued a detailed response to GUVNL's letter dated 26.7.2021 along with all relevant data/ computations and emails exchanged between the parties.

(b) After passing of the order dated 17.3.2017 in Petition No. 157/MP/2015 by the Commission, CGPL has been issuing supplementary invoices to the Procurers along with the relevant Auditor certificates for each Change in Law claims. Not once have the Procurers raised any objection with respect to the format of the Auditor certificates or the supplementary invoices raised in the past, and have made payments towards CGPL's Change in Law claims. The objection being raised by the Procurers on the format of the Auditor certificate is without any basis. Along with all its past supplementary invoices, CGPL has

already shared the actual invoices demonstrating payment of taxes. CGPL has forwarded all necessary information required by the Procurers in the format that has been followed for the past four years. Further, by its letter dated 19.8.2021, CGPL has shared detailed computations (in excel format) along with Auditor's certificates in justification of its claims.

(c) In view of the judgment of APTEL dated 27.4.2021, Change in Law relief on actuals cannot be denied to CGPL. The contention of the Procurers pertaining to prudence check and passing on of extravagant and unnecessary costs by CGPL to consumers have been dealt with by the APTEL, are well settled and are no longer *res integra*. The Procurers cannot re-agitate and/ or this Commission cannot entertain these submissions in the present remand proceedings where the scope is limited to quantifying the Change in Law relief in terms of judgment dated 27.4.2021. The scope of the present proceedings is to compute and provide the restitutive compensation to CGPL in terms of the judgment dated 27.4.2021 of APTEL. The present exercise is not to once again determine the validity and legality of CGPL's Change in Law claims.

(d) CGPL is incurring losses on per unit of energy generated and sold to the Procurers due to the promulgation of Indonesian Regulations. In such circumstances, it is quite improbable for CGPL to incur any extravagant costs and seek to pass them on the Procurers/ consumers.

(e) Under the garb of prudence check, the Procurers cannot be permitted to question the commercial decisions and wisdom of CGPL and/or rewrite the express terms of the PPA. In the judgment dated 27.4.2021, the APTEL has succinctly summed up the role of this Commission under Article 13 of the PPA while holding that Article 13 of the PPA has to be read as it is and words cannot be added to the PPA. By another judgment dated 20.9.2021 in the case of Tata Power Renewable Energy Limited v. Maharashtra Electricity Regulatory Commission & Ors., APTEL has held that prudence check does not extend to denying relief for Change in Law. The costs incurred by CGPL towards Change in Law are in the course of discharging its contractual obligations under the PPA and have to be made good by the Procurers on actuals.

(f) As regards service tax on works contract, as on the cut-off date, i.e. 30.11.2006, there was no separate levy called service tax on works contract. However, in terms of the Finance Act, 2006, a tax of 12% on service component of the works contract was levied. Therefore, Tata Power Limited (CGPL's parent company) premised its bid on the basis of the then prevailing service tax i.e. @12% on the service component/ element of the works contract. After the cut-off date, vide Notification No. 32/2007 Service Tax dated 22.5.2007, the Government of India notified the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 giving an option to persons liable to pay service tax on works contract to discharge its liability by paying an amount equivalent to 2% of the gross amount charged for the works contract instead of paying service tax at 12% on the service component of works contract. Service tax @12% on service components of a works contract considered by CGPL in its bid amounts to approximately 2% of total contract value (including materials and services), which is an admitted position by all the parties. Subsequently, vide Notification No. 7/2008-Service Tax dated 1.3.2008, the rate of service tax on works contract was increased from 2% to 4%. Thus, CGPL is claiming restitution for Change in Law on account of enhancement of rate of service tax on works contract from 2% to 4%. To that extent, there is a clerical error in the auditor certificate dated 24.8.2015 for financial year 2013-14, which inadvertently captures 'Nil' rate of service tax on works contract. However, the compensation amount remains unchanged. CGPL is in process of obtaining the rectified auditors certificate which would be provided at the earliest.

(g) As regards additional conditions imposed by MoEF&CC qua CER, while the Petition No. 157/MP/2015 was for Change in Law claims upto the financial year 2014-15, the Change in Law events allowed by the Commission and subsequently by APTEL in the judgment dated 27.4.2021 continue to impact CGPL beyond the original period of consideration. CGPL cannot be expected to approach the Commission seeking a fresh declaratory and consequential relief for Change in Law qua a claim which has in-principle been allowed by the Commission or APTEL, as the case may be. Hence, the Procurers' contention that claims relating to additional conditions imposed by MoEF&CC beyond financial year 2014-15 cannot be considered in the present remand proceedings is incorrect. At the time of filing the IA No. 53/2021, CGPL did not have the

relevant Auditor Certificate for the costs incurred by it towards CER as per MoEF&CC's corrigendum dated 26.4.2011 for the financial year 2016-17 onwards. However, the said Auditor certificate is now available and has also been shared by CGPL with GUVNL on 7.8.2021 and the Procurers along with its letter dated 19.8.2021. Further, vide letter dated 19.8.2021, CGPL has confirmed to the Procurers that at present, no waiver has been granted by MoEF&CC to CGPL from incurring CER-related costs. CGPL has also undertaken that in the event its request for waiver is accepted by MoEF&CC in future and the amounts incurred by CGPL towards CER in terms of the corrigendum dated 26.4.2011 are refunded, CGPL shall pass the benefit of such refund to the Procurers.

(h) As regards Change in Law compensation for coal-based levies, GUVNL vide letter dated 26.7.2021 and letter dated 7.9.2021 and the Respondents in their replies have contended that the computation of coal for computing the relief for Change in Law on coal-based levies has to be on lower of actual coal consumed or normative parameters as per the Commission's Tariff Regulations. This submission is contrary to the judgment dated 27.4.2021. APTEL has categorically rejected the Procurers' contention and the Commission's earlier findings that relief for Change in Law has to be linked to normative parameters. APTEL, in its judgment dated 27.4.2021, has set aside the Commission's findings rendered in the order dated 17.3.2017, order dated 21.2.2018 and order dated 3.9.2019 that relief for Change in Law on coal-based levies is to be limited to lower of actual or normative coal consumed. APTEL has further held that the relief envisaged under Article 13 of the PPA is related to actuals. Reference to the order of the Commission to suggest that computation of coal has to be linked to normative parameters as per the Commission's Tariff Regulations is misplaced. In the judgment dated 27.4.2021, APTEL while arriving at its decision has relied primarily upon Article 13 of the PPA, judgment of the Hon'ble Supreme Court in the case of UHBVNL v. Adani Power Limited [(2019) 5 SCC 325] and judgment of APTEL in the case of Wardha Power Company Limited v. Reliance Infrastructure Ltd. The said judgments nowhere link relief for Change in Law on coal-based levies to normative parameters whether under the PPA or this Commission's Tariff Regulations. Normative parameters set out in the Tariff Regulations cannot be made applicable to a

PPA under Section 63 of the Act. Tariff Regulations are applicable to PPAs under Section 62 of the Act and the principles/ normative parameters set out therein cannot be made applicable to PPAs under Section 63 of the Act. A PPA executed in terms of Section 63 of the Act is governed by the express terms of such PPA and, at the highest, by the bid documents. Neither the bid documents nor the PPA contemplates that relief for Change in Law can be linked to normative parameters set out in the Commission's Tariff Regulations. The Procurers' contentions are in teeth of the judgment dated 26.4.2021. For the purpose of computing relief for coal-based levies, CGPL has only considered lower of energy scheduled by the Procurers or the actual injection for the Procurers. While arriving at these computations, CGPL has taken care to specifically exclude any injection on account of instructions from RLDC under Reserves Regulation Ancillary Services (RRAS), Security Constrained Economic Dispatch (SCED) or Automatic Generation Control (AGC) mechanism as per system requirement.

(i) As regards computation of Change in Law relief on lower of schedule or actual injection, compensation for Change in Law on coal-based levies has to be on the lower of actual injection or scheduled generation computed on an annual or monthly basis. The methodology proposed by GUVNL by considering lower of actual injection or scheduled generation for each 15 minute time block leads to under-recovery of CGPL's Change in Law compensation as final compensation is lower than the total of actual injection or scheduled generation. Further, GUVNL's methodology cannot be made applicable given that CGPL's billing for energy charges takes place on a monthly basis. In the letter dated 19.8.2021, CGPL has categorically informed the Procurers that the coal procured was used at Mundra UMPP and not diverted to any other power plant of Tata Power Company Limited. CGPL has forwarded all necessary details along with its supplementary invoices to the Procurers. Further, revised/ additional details have also been submitted along with the subject IAs.

(j) CGPL, in its responses dated 19.8.2021 and 11.9.2021 has informed GUVNL that it is does not undertake energy audits for certification of station heart rate and auxiliary consumption. Further, neither various orders of the Commission pertaining to Change in Law nor judgment of APTEL dated 27.4.2021 nor the PPA nor the bid documents require CGPL to undertake energy audits. CGPL

has, on a monthly basis, shared the details of its actual power generation, coal consumption and auxiliary consumption with the Central Electricity Authority (CEA). CGPL is ready and willing to submit this data to the Procurers, if required. The data sought by the Procurers is irrelevant and appears to be an attempt to protract the present remand proceedings.

(k) Relief for Gujarat VAT has to be on actuals and cannot be linked to normative parameters in light of judgment of the APTEL dated 27.4.2021.

(l) As regards service tax on ocean freight, it has inadvertently mentioned the period of financial year 2014-15 to financial year 2016-17 for service tax on ocean freight. The correct period is financial year 2014-15 to Q1 of financial year 2017-18.

(m) As regards contention of Rajasthan Discoms that CGPL has not undertaken annual reconciliation as mandated by the Commission in its order dated 17.3.2017 and order dated 21.2.2018, CGPL submits Auditor certificates to the Procurers on a monthly basis along with its supplementary invoices. Given that audited numbers are provided to the Procurers on a monthly basis, there is no need to carry out a quarterly or bi-annual or annual reconciliation. CGPL vide its letter dated 1.1.2020, has informed the Rajasthan Discoms that annual reconciliation is not required since Auditor certificates are being submitted by CGPL on a monthly basis. Further, on 15.12.2020, CGPL had sent email to Rajasthan Discoms with requisite details in an excel sheet for the purposes of reconciliation.

(n) As regards carrying cost, in terms of judgment of the APTEL dated 27.4.2021, rate of carrying cost cannot be equated with the rate of Late Payment Surcharge (LPS) under the PPA. Since the principle set out in Article 13 of the PPA is to grant relief on actuals, the rate of carrying cost can only be the actual rate at which CGPL has availed short term loans/ working capital during the relevant period to meet the gap in cash flow that arose as a result of the Change in Law events impacting CGPL's finances. CGPL, by email dated 12.8.2021, has submitted the Auditor certificate certifying actual rate of interest for the financial year 2012-13 to 31.3.2021 to GUVNL. Further, CGPL has also submitted a statement capturing the normative rate of Interest on Working

Capital (IWC) as per the Commission's Tariff Regulations and the rate of LPS under the PPA. The data submitted by CGPL demonstrates that the actual interest rates are lower than the normative IWC and LPS under the PPA. These details have been resubmitted to the Procurers vide CGPL's detailed letter dated 19.8.2021.

Hearing dated 27.9.2021

16. The Petition was heard on 27.9.2021. The learned senior counsel for the Respondents submitted that pursuant to the directions of the Commission vide Record of Proceedings for the hearing dated 13.7.2021, financial claims/ details have been reconciled between the parties. However, there are mainly two issues which are required to be considered by the Commission, namely, (i) computation of coal for coal-based levies; and (ii) compensation for coal-based levies has to be on lower of actual injection or scheduled generation for each 15-minute time block. The learned senior counsel submitted that the quantum of coal for coal-based levies ought to be on actual subject to ceiling of the quantum arrived at as per the parameters specified in the applicable Tariff Regulations notified by the Commission. The APTEL has consistently held that for computation of coal quantum for Change in Law, the actual coal consumed is subject to the Tariff Regulations notified by the Commission. The learned senior counsel also submitted that scheduling of generation is done on 15 minute time block as per the provisions of the Grid Code and, therefore, the comparison of actual and schedule generation has to be on 15 minute basis. The contention of the Petitioner that the compensation has to be considered as lower of actual or scheduled generation on annual or monthly basis cannot be considered. The learned counsels for the Respondents, Haryana Utilities, Rajasthan Utilities and MSEDCL adopted the submission made by the learned senior counsel for the Respondent, GUVNL. During the course of hearing, the learned counsel for the Petitioner reiterated the submissions from its note of arguments and mainly submitted

that computation of coal for coal-based levies has to be on actual coal consumed as held by APTEL in its judgment dated 27.4.2021. Procurers' contention that it has to be lower of actuals or normative parameters as per the Commission's Tariff Regulations is contrary to the express findings of the judgment of the APTEL and that consideration of lower of actual injection or scheduled generation for each 15 minute time block, as suggested by GUVNL, leads to under-recovery of the Change in Law compensation and such methodology is neither contemplated by the PPA nor in orders of this Commission nor the judgment of APTEL. Compensation on the basis of 15 minute time block is lower than compensation on the basis of lower of total of actual injection or scheduled generation. Therefore, it has to be computed on lower of total actual injection or total scheduled generation computed on annual or monthly basis. Besides, billing for energy charges takes place on a monthly basis. The Commission permitted the parties to file their written statements. Pursuant to the said direction, the Petitioner and the Respondent, GUVNL have filed their written submissions, whereby they have mainly reiterated the submissions made in their respective pleadings and, therefore, are not reproduced herein for the sake of brevity.

17. Accordingly, in terms of the direction of the APTEL, this consequential order is issued in Petition No. 157/MP/2015 and Petition No. 121/MP/2017 to the extent the Appeal No. 172/ 2017 and Appeal No. 154/2018 have been allowed by the APTEL.

Petition No. 157/MP/2015

(A) Levy of Green Cess

18. The Commission in its order dated 17.3.2017 had rejected the claim of the Petitioner in respect of levy of Green cess as Change in Law in terms of the PPA and had observed as under:

"VII. Levy of Green Cess

46. We have considered the submissions of the petitioner and the respondents. A similar issue has been considered by the Commission in its order dated 6.2.2017 in Petition No. 156/MP/2014 ***wherein the Commission did not allow the Green Cess pending disposal of the appeal before the Hon'ble Supreme Court****. Relevant portion of the said order is extracted as under:*

> *"57. We have considered the submissions of the petitioner and the respondents. The Gujarat Energy Cess Act, 2011 and Gujarat Green Cess Rules have been set aside by the Hon`ble Gujarat High Court vide judgment dated 21.1.2013. The said judgment has been challenged before the Hon'ble Supreme Court in Civil Appeal No. 5135-5157 of 2013. The Hon'ble Supreme Court vide order dated 3.7.2013 has directed as under:*
>
> > *"During the pendency of the Appeals the operation of the impugned judgment of the High Court shall remain stayed.*
> >
> > *It will be open to the appellants to determine the cess under the Gujarat Green Cess Act, 2011 and raise demand on the respondents. However, such demand shall not be enforced against the respondents until disposal of the Appeals. Moreover, determination of such cess shall be subject to the final decision in the Appeals."*
>
> *The judgement of the Hon'ble Gujarat High Court setting aside the Gujarat Energy Cess Act, 2011 has been stayed by the Hon'ble Supreme Court and Government of Gujarat has been permitted to determine the cess in accordance with the said Act and raise the demand but Government of Gujarat has been restrained to enforce the demand until disposal of the appeal. The petitioner has prayed for determination of the issue whether the cess levied under the Gujarat Energy Act is covered under Change in Law or not. The respondents have submitted that the petitioner may approach the Commission after the Green Energy Act, 2011 is upheld by the Hon'ble Supreme Court. The respondents have reserved their rights to raise appropriate objections at relevant time. In our view, since the respondents have not filed their objections on merit, it will not be appropriate to determine the issue whether the Green Cess under the Gujarat Green Energy Act, 2011 is admissible under Change in Law or not. Accordingly, we grant liberty to the petitioner to file appropriate application before the Commission for consideration of its claim with regard to the green cess if the demand for green cess is allowed to be enforced by the Hon'ble Supreme Court pending disposal of the appeal or after disposal of the appeal if the Gujarat Green Cess Act, 2011 is upheld by the Hon'ble Supreme Court."*

47. ***In the light of the above decision, the claim of the petitioner for relief under change in law on account of levy of green cess is not admissible at this stage. However, the petitioner is granted liberty to file appropriate application before the Commission for consideration of its claim with regard to the green cess if the demand for green cess is allowed to be enforced by the Hon'ble Supreme Court pending disposal of the appeal or after disposal of the appeal if the Gujarat Green Cess Act, 2011 is upheld by the Hon'ble Supreme Court***

…."

19. The APTEL in its judgment dated 27.4.2021 has held that levy of Green cess by enactment of Gujarat Green Cess Act, 2011 and the Gujarat Green Cess Rules, 2011 is a Change in Law event. However, in view of the fact that the constitutional challenge to Gujarat Green Cess Act, 2011 and the Gujarat Green Cess Rules, 2011

are pending adjudication before the Hon'ble Supreme Court, the APTEL has held that while the claim of the Petitioner for compensation on account of Change in Law due to levy of Green cess has merit, the compensation/ concrete relief for the said Change in Law needs to be deferred till such time as the Hon'ble Supreme Court decides the challenge to the constitutional validity of Gujarat Green Cess Act, 2011 and the Gujarat Green Cess Rules, 2011. Accordingly, APTEL has directed that if the burden created and borne by the Petitioner on account of enforcement of Green Cess Act, continues to be borne by the Petitioner after the decision of Hon`ble Supreme Court on the pending constitutional challenge, the Commission shall treat it as a Change in Law event and shall pass necessary orders to compensate the Petitioner for the Change in Law along with carrying cost. Relevant portion of the judgment of APTEL is extracted as under:

> *"...58.* ***There is merit in the claim for compensation on account of CIL due to levy of Gujarat Green Cess, should the fiscal law be eventually upheld, and the judgment of High Court be vacated. Conversely, however, if the Supreme Court were to endorse the view taken by the High Court and the law is held bad and inoperative and the Government of Gujarat were called upon to refund the tax collected, the claim for compensation as CIL by the Procurer would be rendered meaningless.*** *At best, in such scenario, the carrying cost suffered would need to be considered and taken care of, unless the decision of the Supreme Court comes with directions having a bearing even on such aspects. If the cess is not due, it cannot be collected or passed on. This stage is one where there can be no speculation as to what shape the judgment of Supreme Court will take. In our considered view, a practical approach has to be adopted, by deferring issuance of any directions on the subject at this intermediary stage.*
>
> *59. For foregoing reasons, and in the circumstances,* ***we hold that if the burden created and borne by the appellant on account of enforcement of Green Cess Act, during the operation period, were to continue to be borne by the appellant even after decision is rendered by the Supreme Court on the pending challenge, the same shall be treated by the Commission as a CIL event and necessary order shall be passed by it to afford recompense to that extent along with corresponding carrying cost****.*
>
> *-----*
>
> *171. We have, thus, accepted, in principle, the claim of the appellant for compensation in relation to the payments made under Gujarat Green Cess Act, the constitutional validity of which legislation is pending before the Supreme Court of India. We have held that if the burden created and borne by the appellant on account of enforcement of the said law, during the operation period, were to continue to be borne by the appellant even after decision is rendered by the Supreme Court on the pending challenge, the same shall be treated by the Commission as a CIL event and necessary order shall be*

passed by it to afford recompense to that extent along with corresponding carrying cost."

20. As on date, the constitutional challenge to Gujarat Green Cess Act, 2011 and the Gujarat Green Cess Rules, 2011 is pending adjudication before the Hon`ble Supreme Court in SLP (Civil) No. 18494-18515/2013. Accordingly, in terms of the judgment of the APTEL, if the Hon`ble Supreme Court decides the aforesaid challenge in favour of the State of Gujarat and upholds the levy of Gujarat Green Cess, the Petitioner shall be at liberty to approach the Commission for seeking compensation for this Change in Law event.

(B) Service Tax on Works Contract

21. The Commission in its order dated 17.3.2017 had allowed the claim of the Petitioner in respect of service tax on works contract as Change in Law in terms of the PPA and had observed as under:

*"**VI. Increase in rate of Service Tax***

….

43. We have considered the submissions of the petitioner and MSEDCL. As on the cut-off date of 30.11.2006, there was no service tax on Works Contract Service. As per the bid documents, the petitioner was required to factor in all the taxes, cess, duties etc. in the bid. In the absence of service tax on Works Contract Service as on cut-off date, the petitioner could not be expected to factor the same while quoting the tariff. The service tax on works contract service was introduced through the Finance Act, 1994 and levied by the Ministry of Finance, Department of Revenue vide Notification No. 32/2007-Service Tax dated 22.5.2007 at the rate of 2% under Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 issued under Section 93 and 94 of the Finance Act, 1994. Subsequently, Government of India, Ministry of Finance, Department of Revenue (Tax Research Unit) vide Notification No. 7/2008-Service Tax dated 1.3.2008 increased service tax on works contract service from 2% to 4%. Government of India, Ministry of Finance through Finance Act, 2007 levied a Secondary and High Educational Cess at the rate of 1% on aggregate duty of service tax levied and collected by the Central Government. The petitioner has been paying service tax on work contract service at the rate of 4% and 1% of Secondary and Higher Education Cess to the tune of Rs.13 lakh and Rs. 39 lakh for the years 2012-13 and 2013-14 respectively since the effective date of the notifications. ***Therefore, the service tax on works contract service and levy of Secondary and Higher Education cess were introduced after the cut-off date through the Act of Parliament and the rates were being notified from time to time by Ministry of Finance (Department of Revenue) and Department of Revenue (Tax Research***

Unit) which are Indian Government Instrumentalities. Accordingly, the claim of the petitioner is allowed under Change in Law. *The petitioner shall submit to the beneficiaries the auditor certificate based on the service tax paid on the service component of the works contract after obtaining all relevant documents from the contractor on annual basis."*

22. Thereafter, by order dated 31.10.2017 in Review Petition No. 22/RP/2017, the Commission disallowed the claim of the Petitioner in respect of service tax on works contract holding that the increase in service tax has resulted due to exercise of option by the Petitioner. The Commission in its order dated 31.10.2017 had observed as under:

"15. Based on the above discussions, there exists sufficient reasons to review the impugned order dated 17.3.2017 with regard to the decision to allow the Service Tax on Works Contract services under Change in Law as claimed by the respondent, CGPL. ***Considering the fact that the increase in Service tax has resulted due to exercise of an option by the Petitioner, we in line with the decision of the Commission dated 31.8.2017 in Petition No. 141/MP/2016, review the decision in para 43 of the order dated 17.3.2017 as unde****r:*

"43. It is noticed that the Service tax of 12% was imposed on service component/ elements of Works Contract, thereby effectively considering 2% of service tax on Works Contract at the time of the bid. This has been considered by the Petitioner as on the cutoff date (30.11.2006). Thus, the notification dated 22.5.2007 of the Ministry of Finance giving options to the persons by paying an amount equal to 2% of the gross amount charged for the Works Contract, instead of paying service tax at the rate specified under the Finance Act, 1994 is not a new levy but an option given to the person to pay 2% of the gross instead of 12% of the service component. ***Thus, in our view, the exercise of option by the Petitioner, which is beneficial to the person liable to pay tax, cannot therefore be termed as a Change in law event falling within the scope of Article 13 of the PPA. Similarly, the increase of Service tax to 4% as per Notification dated 1.3.2008 is also an option to the person to discharge his tax liability. Since the increase in Service tax has resulted due to exercise of an option by the Petitioner, the impact of the same cannot be passed on to the Procurers. In this background, the claim of the Petitioner during the Operating period is not allowed."***

Accordingly, the Respondent shall not be entitled for service tax on works contract under change in law. The impugned order dated 17.3.2017 shall stand modified to this extent.*"*

23. The APTEL in its judgment dated 27.4.2021 has reversed the findings of the Commission rendered in order dated 31.10.2017 and restored the Commission's original findings dated 17.3.2017 in respect of service tax on works contract. APTEL has held that option of service tax on works contract at 2% or 4% was to be exercised not by the Petitioner but by its contractor. Hence, the Petitioner cannot be penalised

or faulted by denying it the offset of adverse effect of such Change in Law event. Work contractors are engaged by the Petitioner in its discretion. The PPA does not prevent the Petitioner from outsourcing O&M related works to contractors. The Procurers' contention that O&M is the responsibility of the Petitioner and any increased costs as a result of the Petitioner outsourcing O&M work cannot be passed onto the Procurers is incorrect and rejected. Admittedly, Service Tax @12% on service component of a works contract considered by CGPL in its bid amounts to approximately 2% of total contract value (including materials and services). The enhancement of rate to 4% of total contract value (including levy of Secondary and higher education Cess @1%) constitutes a Change in Law event deserving restitution. APTEL has directed the Commission to undertake the exercise of ascertaining the net effect of the change effected by the option exercised after Change in Law event and the subsequent change in rate of the tax and allow adjustment accordingly to recompense the party which has suffered the impact. Relevant portion of the judgment of APTEL dated 27.4.2021 is extracted as under:

> *"66. No doubt, the amended law gave an option and it may be assumed that a person would exercise only such option as is beneficial.* ***We are, however, not impressed with the argument of the respondents that if due to the exercise of the option, there was any benefit in reduction of service tax, the same should be passed on to the Procurers but if converse be the result (that is to say, if there has been an increase in the liability of service tax due to such exercise of option), the same cannot be passed on to the Procurers and ultimately the beneficiaries. This argument is flawed and not merely because it leads to inequitable consequences. If there is decrease, the benefit must go to the Procurers and if there is increase in liability, the adjustment in tariff must follow. That is the letter and spirit of the contractual terms and law binding the parties****.*
>
> *…..*
>
> *68. We find no substance in the above submissions. The work contractors are engaged by the appellant within its discretion and there is no inhibition in PPA in such regard. In fact, it is pointed out by the appellant, and rightly so, that Article 7 of the Model PPA which was a part of the RFQ documents had envisaged that the generator (Seller) alone shall be liable to operate and maintain the power station at its own cost but, in the final PPA that was executed between the parties, the clause to such effect was removed, this clearly indicative of the common understanding of the parties that the generator (CGPL) would not be solely responsible for O&M, the definition of 'Project Documents' read with 'O&M contracts' contemplating that a third-party O&M contractor might be appointed by it (CGPL).*
>
> *….*

73. ***We find substance in the argument that having correctly appreciated the effect and import of the events, albeit wrongly noting that Service tax did not exist prior to the cut-off date, the Commission fell into error at review stage by accepting the argument that since Service Tax on Works Contract existed (@ 12%) before the Cut-Off Date, the impact of increase in rate having occurred due to exercise of option renders the claim of CIL inadmissible. This was too simplistic an approach missing out the crucial fact that the Seller was being penalised for an act of volition exercised by another entity over which it had no control in the matter.***

…..

74. We are of the considered opinion that CERC has failed to appreciate that at the time of bidding for UMPPs various works contracts are not finalized but are contemplated to be finalized, inter alia, within fourteen months period thereafter [Article 3.1.2 of PPA]. To work out the bid numbers, each participant in the bid process is expected to factor in the applicable tax rates prevalent as on the Cut-Off Date which are beneficial to the person. Any change in such rates after the Cut-Off Date are covered by Article 13. It is not contested that Service Tax @ 12% on service component of a Works Contract considered by CGPL in its Bid amounts to approximately 2% of total contract value (including materials and services). Hence, the enhancement of the rate to 4% of total contract value (including levy of Secondary & Higher Education Cess @ 1%) constitutes a CIL event deserving restitution. We agree with the submission that in terms of Article 3.1.2 of the PPA, various Works Contracts (such as EPC & BTG contracts) were contemplated to be finalized either within twelve months from the Effective Date (i.e. 22.04.2007) or fourteen months from the date of issuance of Letter of Intent (i.e. 28.12.2006), each date being well after the Cut-Off Date (i.e. 30.11.2006). The CIL provision, for the purpose of Works Contract, is to be interpreted in light of Article 3.1.2 of the PPA.

75. What is crucial and must be the decisive factor, however, ***is the fact that the option of paying an amount equivalent to 2% of the gross amount charged for the Works Contract instead of 12% on the Service Component was granted to the Contractor(s) employed by CGPL for executing the Works Contract. This was not within the choice, domain or discretion of the appellant. It cannot be penalised or faulted by denying it the offset of adverse effect of such recompense the party which has suffered the impact." CIL, due to the exercise of option by the contractor to pay Service Tax on Works Contract at the then prevalent rate of 2% and thereafter at the increased rate of 4% on the gross or total value of the contract.***

76. It is the argument of the respondents that the claim of the appellant that it has been additionally burdened to the extent that there was an increase to 4% is misconceived. It is contrarily argued that by exercise of the option, there was discharge of the service tax liability at 12% and, therefore, the benefit of 12% has to be passed on to the Procurers. It is submitted that the benefit of 12% is likely to be higher than the expenditure of 2% and 4% because otherwise the person would not exercise the option of paying the tax at 2% or 4% as opposed to 12%. These arguments are based on unfounded assumptions. The Commission has not gathered the requisite information nor done the necessary mathematical exercise to find out the net effect of the changes brought about as a result of change in law, levy and method of calculation.

77. ***The reversal by impugned order dated 31.10.2017, thus, must be vacated and the dispensation on the subject upon correct view taken initially by original order dated 17.03.2017 being restored. We order accordingly. The Commission shall be obliged to undertake the exercise of ascertaining the net effect of the change effected by the option exercised after CIL event and the subsequent change in rate of the tax and allow adjustment accordingly."***

24. In terms of judgment of APTEL, the Commission is required to undertake the exercise of ascertaining the net effect of the Change in Law and allow adjustment in tariff accordingly to compensate the affected party. It is noted that the Petitioner in IA No. 53/2021 has claimed compensation for service tax on works contract to the tune of Rs.4,02,340/- (Rs.2,88,638/- for 2013-14 and Rs.1,13,701/- for 2014-15). In support of its claim, the Petitioner has filed Audited statements and detailed calculations at Annexure P-3 and Annexure P-4 respectively of the aforesaid IA. it is noticed that the Auditor Certificate dated 24.8.2015 provided by the Petitioner states 'Nil' rate of service tax contrary to the Petitioner's contention that at the time of bid, it had considered service tax at the rate of 12% on the service element/ component of the works contract. In its letter to GUVNL, rejoinder and in the written submissions, the Petitioner has stated that due to a clerical error, the Auditor certificate shows 'Nil' rate of service tax and has undertaken to submit the corrected certificate to the Procurers. On 27.10.2021, the Petitioner has submitted the corrected Auditors certificate. The Petitioner has also enclosed the letter dated 25.10.2021 by which it had submitted the Auditor certificate to the Procurers. Therefore, CGPL has complied with the Procurers' request and submitted the correct Auditor certificate.

25. In terms of the revised Auditor certificate, the Petitioner has claimed Rs.6,13,122/- towards service tax on works contract for 2013-14. The claim for 2014-15 is Rs.1,13,701/- that is the same as claimed in IA No. 53/2021. In light of the judgment of the APTEL and on analysis of the details provided by the Petitioner, the Commission holds that the Petitioner is entitled to compensation of Rs.6,13,122/- for 2013-14 and Rs.1,13,701/- for 2014-15 from the Procurers on account of Change in Law. The Procurers are directed to compensate the Petitioner in proportion to their contracted capacity.

(C) Additional conditions mandated by MoEF&CC

26. The Commission in its order dated 17.3.2017 had rejected the claim of the Petitioner in respect of the costs/ expenses incurred by the Petitioner as a result of the additional conditions imposed by MoEF&CC by corrigendum dated 26.4.2011 to the Petitioner's environment clearance dated 5.4.2007 and had observed as under:

> *"51. We have considered the submissions of the petitioner and the respondents. A similar issue has been considered by the Commission in its order dated 17.2.2017 in Petition No. 16/MP/2016* ***where in the Commission has not considered conditions specified in EC under change in law****. The relevant portion of the said order is extracted as under:*
>
> > *".....*
> >
> > ***Thus corporate social responsibility also includes expenditure on ensuring environmental sustainability, ecological balance and conservation of natural resources and maintaining quality of soil, air and water.*** *MoEF has prescribed that the CSR cost should be Rs. 5 per Tonne of Coal produced which should be adjusted as per annual inflation. As per sub-section (5) of section 135 of the Companies Act, 2013, the Board of the Company shall ensure that the Company spends, in every financial year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy. Therefore, the Corporate Social Responsibility Committee of the Petitioner`s company should consider and include the expenditure on account of condition (xxiii) of the environmental clearance in the Corporate Social Responsibility Policy of the company and meet the expenditure out of the net profits of the company.* ***In our view, this expenditure cannot be allowed under Change in Law as the environment clearance has specifically classified as CSR cost for which provisions have been made in the Companies Act, 2013 to be met out of the net profit of the company.****"*
>
> *52.* ***In the light of the above decision, the claim of the petitioner for relief under change in law on account of imposition of new conditions by the MoEF is not admissible and is accordingly disallowed****."*

27. The APTEL in its judgment dated 27.4.2021 has set aside the Commission's findings dated 17.3.2017 and held that the additional expenditure incurred by the Petitioner in terms of the modified environment clearance condition on account of the additional conditions imposed by MoEF&CC in the corrigendum dated 26.4.2011 has added to the capital expenditure for the project. APTEL has held that the additional conditions specified in the corrigendum dated 26.4.2011 has no nexus with Corporate Social Responsibility obligation under the Companies Act, 2013. APTEL has further held that the additional condition imposed by MoEF&CC is in the nature of Corporate

Environment Responsibility (CER) as is evident from the Office Memorandum dated 1.5.2018 issued by MoEF&CC. The mandate of CER is not linked to the net profits and must be met irrespective of whether or not the Petitioner is making net profits as is evident from MoEF&CC`s Office Memorandum dated 11.8.2014. CER obligation under corrigendum dated 26.4.2011 has been held a Change in Law event within the meaning of Article 13 of the PPA and the Petitioner is entitled to compensation. Relevant portion of the APTEL Judgment is extracted as under*:*

> *"145. In our considered view, the CERC has fallen into error by treating the additional expenditure incurred by the appellant for adding to the infrastructure in terms of mandatory works undertaken in compliance with modified conditions of EC issued by the MoEF as an expenditure in nature of Corporate Social Responsibility (CSR) under Section 135 of the Companies Act. The statutory provision contained in Section 135 of the Companies Act, 2013 has been quoted by us earlier. The use of the expression CSR in the discourse seems to have misguided the approach.* ***As was confirmed by the learned counsel for both sides at the hearing that in the communications issued by MoEF on the subject of EC (or its modification) there is no reference, not even a remote one, to the statutory requirement of Section 135 of the Companies Act. In view of this distinguishing feature, the rulings cited by the respondents are rendered inapplicable.***
>
> *….*
>
> *150. More than semantics, however, it is pertinent to note that* ***the mandate by MoEF in EC (whether called CSR or CER) is not linked to the net profits (unlike under the Companies Act). Such obligation must be met irrespective of whether or not the generating company is making any profits. This obligation, noticeably, is also applicable during the construction period of the power plant, where there may not be any revenue received much less profits earned. This obligation is, therefore, a cost or expense added to the business of generation and sale of electricity in the particular context of the appellant - a one project company****. Hence, we agree, the comparison with Income Tax or other cesses which are levied on profits or income is misplaced and erroneous. We have already rejected the plea that the qualifying requirement under Article 13 is that the Change in Law event must have an impact on the cost of, or revenue from, the activity of generation of electricity since that clause (Article 13) of the PPA deals with the "business of selling electricity" and not restricted to the literal activity of "generating electricity.*
>
> *151. …..* ***Naturally, the investor would work out the price to be quoted in the bid taking into account all factors relevant for computation of cost of generation and supply of electricity including not only the capital expenditure (capex), fuel cost, operational and maintenance costs, recurring expenditure on human and other resources, operational losses, erosion in value of money or inflation, etc. but also the impact of change in law that adds to the cost of production or supply like increased taxation, approvals, modifications, infusion of improved technology mandated in view of concerns such as environment etc. It is with this view that the guidelines formulated by the Central Government in exercise of power vested in it by virtue, inter alia, of Section 63 of Electricity Act create a right, and a legitimate expectation, in favour of the parties for readjustment of the price discovered and adopted by bid process to be suitably adjusted in the event of CIL situation so as to accommodate the impact (increase or decrease, as the***

case may be) on the equitable principle of restitution, it getting incorporated in the contract (PPA) in the form and shape of Article 13. As noted earlier, the obligation created by modification of EC by MoEF was not in the nature of CSR under Companies Act (which would be out of profits) but CER for environmental protection and in the nature of Capex, a factor that has a direct bearing and impact on bid price quoted and accepted (or adopted) prior to such expenditure being conceived or mandated.

152. ***What must clinch the issue in favour of the appellant is an explanatory statement given by the competent authorities. On 11.08.2014, the MoEF in GOI issued an Office Memorandum clarifying that CSR obligations under EC is not linked to net profit and is separate from the CSR obligation under the Companies Act****. It may be quoted, to the extent necessary, verbatim…..*

153. It is rightly submitted by the appellant that the Procurers, having failed to obtain the necessary EC before the Cut-Off Date (i.e. 30.11.2006), cannot seek to benefit from their own default by alleging that imposition of Additional Conditions by MoEF is not a CIL. Had the Procurers obtained the EC and made it available to all the Bidders, all Bidders including Tata Power would have taken into account the costs involved for complying with the EC at the time of quoting its tariff. It is a settled position of law that a person cannot take benefit of its own wrong. Reliance is placed on Union of India v. Major General Madan Lal Yadav 1996 (4) SCC 127 and Ashok Kapil v. Sana Ullah & ors. 1996 (6) SCC 342. ***Since procuring the EC was not its responsibility, CGPL cannot be held liable for any additional costs that have resulted from the EC and on account of any change to the EC and which qualify to be treated as a CIL****.*

…..

156. ***In the Impugned Order dated 17.03.2017, the CERC has linked the expenditure mandated through EC by MoEF to the CSR mandated under the Companies Act, 2013. As discussed earlier, the expenditure mandated by MoEF is over and above the CSR mandated under the Companies Act, the former being directly linked to the Project cost. In sharp contrast, the CSR under the Companies Act is linked to the net profits of the company [see OM dated 11.08.2014 (supra)].***

157. ***We, thus, unhesitatingly hold that the additional expenditure incurred by the appellant in terms of the modified EC added to the capital expenditure for the project, there being no nexus with CSR under Section 135 of the Companies Act, the obligation having arisen due to CIL event within the meaning of Article 13 of the PPA, the appellant (seller) is entitled to commensurate compensation. We order accordingly.****"*

28. In terms of judgment of APTEL, the Petitioner is entitled to compensation on account of the impact of the additional conditions related to CER imposed by MoEF&CC vide corrigendum dated 26.4.2011. In the IA No. 53/2021, the Petitioner has stated that as a result of the Change in Law event, it has incurred Rs.68,36,96,656/- from the financial year 2013-14 to the financial year 2020-21. Along with the IA, the Petitioner has submitted Auditor certificates for financial year 2013-14 to financial year 2015-16 and has submitted financial statements for financial

year 2016-17 to financial year 2020-21 to substantiate its claim. By its rejoinder, the Petitioner has submitted copy of the Auditor certificate dated 26.7.2021 certifying CER expense (community welfare) for financial year 2013-14 to financial year 2020-21. Accordingly, in light of the judgment of the APTEL, the Petitioner is entitled to be compensated for the impact of this Change in Law. The Respondents are directed to compensate the Petitioner for CER in terms of the corrigendum dated 26.4.2011 in proportion to their contracted capacity. The Petitioner is directed to furnish to the Procurers audited statements with proof of payment demonstrating the amounts incurred by it towards CER in terms of the corrigendum dated 26.4.2011 of MoEF&CC, if not already done. Further, the Respondents have pointed out that as per the Financial Statement submitted by the Petitioner, the Petitioner's request to MoEF&CC for waiver of conditions related to spending of Rs.14.40 crore towards CSR is pending. In response, the Petitioner vide its rejoinder has submitted that vide its letter dated 19.8.2021, it has already confirmed to the Procurers that at present no waiver has been granted by MoEF&CC to the Petitioner from incurring CER related cost. We take on record the aforesaid submission of the Petitioner. As undertaken by the Petitioner, in the event its request for waiver is accepted by MoEF&CC in future, the amounts incurred by the Petitioner towards CER in terms of corrigendum dated 26.4.2011 will be refunded to the Procurers in proportion of their contracted capacity.

(D) Gujarat Value Added Tax (Gujarat VAT)

29. The Commission in its order dated 17.3.2017 had disallowed levy of Gujarat VAT as a Change in Law event subject to outcome of Appeal No. 161 of 2015 pending before the Appellate Tribunal for Electricity (APTEL) and had held as under:

> *"38. We have considered the submissions of the petitioner and MSEDCL. The Commission vide order dated 30.3.2015 in Petition No. 6/MP/2013 did not allow the increase in VAT. Relevant portion of the said order is extracted as under:*
>
> > *"49. We have considered the submissions made by the petitioner and the respondents. Government of India, Ministry of Finance Notification dated*

17.3.2012 notifying the change in excise duty, Notification dated 30.5.2008 notifying the change in rate of Central Sales Tax and Madhya Pradesh VAT (Amendment) Act, 2010 notifying the changes in VAT rates are not covered under "Change in Law". The quoted tariff according to provisions of Para 2.7.1.4.3 of the RFP shall be an inclusive one including statutory taxes, duties and levies. Therefore, the petitioner was expected to take into account all cost including capital cost and operating cost, statutory taxes, duties levies while quoting tariff in the bid. Therefore, the "Change in Law" in this respect is not admissible."

39. In the light of the decision as quoted above, ***the claim of the petitioner for reimbursement of the impact on account of revision in Gujarat VAT rate under change in law is not admissible and is accordingly disallowed. The decision of the Commission disallowing claim of the Petitioner for reimbursement of VAT has been challenged by Sasan Power Ltd. In the Appellate Tribunal for Electricity in Appeal No. 161 of 2015. Our decision in Para 38 above shall be subject to the final outcome of the appeal on this point****."*

30. Thereafter, the Commission by its order dated 29.1.2018 modified its above findings and allowed (in IA No. 26/2017 filed by the Petitioner) levy of Gujarat VAT as a Change in Law in light of judgment of APTEL in Appeal No. 161 of 2015. The Commission had held as under:

"….

9. The Petitioner has submitted that at the time of bidding, Gujarat VAT payable on fuel oil, plant, machinery and spares was 4% or 12.50% depending on the category in which the consumables fall into under the Gujarat Value Added Tax. However, Government of Gujarat in the year 2008 amended the Gujarat Value Added Tax Act, 2003 and increased the rate of value added tax on fuel oil, plant and machinery and spares to 5% or 15% respectively. Since, increase in the rate of VAT is pursuant to the amendments of Gujarat Value Added Tax (Amendment) Act, 2008 by the Government of Gujarat, the same (difference between the new and old rates) qualifies as Change in Law event. The Applicant is directed to furnish the proof of actual payment of Gujarat VAT duly certified by the Statutory Auditor to the Procurers while claiming the compensation under Change in Law. ***It is clarified that the Applicant shall be entitled to recover actual Gujarat VAT (differential) paid in case of consumables and spares of plant and machineries which are used for generation and supply of power to the Procurers during operation period. In case of fuel oil, the relief shall be admissible proportionate to the scheduled generation or actual generation, whichever is lower at bid parameter or actual, whichever is lower****, for supply of electricity to the Procurers."*

31. The aforesaid order of the Commission dated 29.1.2018 was also challenged by the Petitioner before APTEL. The APTEL in its judgment dated 27.4.2021 has set aside the directions of the Commission as regards claim being admissible in proportion to scheduled generation or actual generation, whichever is lower, at bid parameter or actual, whichever is lower. APTEL has held that relief for Gujarat VAT

on fuel oil cannot be linked to bid assumed parameters as there is no bid assumed parameters for secondary fuel. The relevant portion of judgment of the APTEL is extracted as under:

"….

113. Thus, even while granting relief of compensation on account of levy of Gujarat VAT, following the ruling of this tribunal in case of Sasan, CERC declined the full relief to the appellant, restricting it to normative bid parameters and not as per actuals, just like in case of coal based levies discussed above.

114. It needs to be recapitulated that the CERC had disallowed increase in rate of Gujarat VAT as an incidence of CIL to the appellant (CGPL), holding it to be subject to the final outcome of Appeal No. 161 of 2015 (Sasan Power Limited v. CERC & Ors.) then pending before this tribunal. On 19.04.2017, decision was rendered in the said appeal the claim of appellant having been allowed as change in rate of VAT was construed as an incidence of CIL. It was pursuant to the said judgment that the appellant filed application before CERC (I.A. No. 26/2017 in Petition No. 157/MP/2015) seeking modification of the Impugned Order dated 17.03.2017 to the extent that change in rate of Gujarat VAT be allowed as a CIL event. By its Order dated 29.01.2018 on said application, the CERC allowed Gujarat VAT as a CIL event but has proceeded to limit recovery of Gujarat VAT levied on fuel oil to normative bid parameters. ***It is pointed out by the appellant, and rightly so, that no such normative bid parameters exist as might cover the subject.***

….

116. Unlike coal related costs (primary fuel related costs) recovered under the Energy Charges component of Tariff, fuel oil (i.e. secondary fuel) relates to the costs recovered under the Capacity Charges component of Tariff as O&M expenditure. ***There are no normative bid parameters for fuel oil i.e. LDO or HFO. The direction of CERC that in case of fuel oil, CGPL is entitled to recover Gujarat VAT in proportion to its scheduled generation or actual generation, as per normative bid parameter or actuals, whichever is lower, is clearly erroneous****.*

117. ***Relief for Gujarat VAT on fuel oil cannot be linked to bid assumed parameters as there are no bid assumed parameters for secondary fuel. Secondary fuel cost (i.e. cost of fuel oil) is recovered through Capacity Charges and not Energy Charges.*** *It is not correct to argue that there has to be some ceiling for coal computation to ensure that generators operate efficiently or, putting it conversely, that allowing computation of coal on actual parameters will result in passing on of the inefficiencies to the Procurers. The position of law on the subject was settled by this tribunal by judgment dated 12.09.2014 in the matter of Wardha Power Company Limited v. Reliance Infrastructure Limited & Ors. (Appeal no. 288 of 2013) and reiterated in judgment dated 14.09.2020 in Adani Power Maharashtra Limited v. MSEDCL & Ors. (Appeal no. 182 of 2019), holding that linking computation of coal to bid assumed parameters is incorrect since these numbers are based on the perception of the generator as to the risks and estimates of expenditure at the time of bid submissions and it will not be reflective of actual energy charge corresponding to actual landed price of fuel and consequently not restitute the seller to the same level as if the Change in law has not occurred.*

118. It is pointed out that by its Order dated 31.08.2017 on the petition (no. 141/MP/2016) of the appellant (CGPL) for CIL during the Construction Period, the CERC has allowed Gujarat VAT as an incidence of CIL without linking it to actual or scheduled generation. There is no justification as to why a contrary approach was adopted for similar relief vis-à-vis operation period as well. ***We, thus, hold that for the***

Operation Period, Gujarat VAT on fuel oil has to be allowed as recoverable as per actuals."

32. In terms of judgment of the APTEL, the Petitioner is entitled to compensation for Gujarat VAT on fuel oil as per actuals. The Procurers shall make payment of compensation amount in proportion to their scheduled generation. In its IA, the Petitioner has submitted that it has invoiced the Procurers for Gujarat VAT on spare parts and fuel oil from financial year 2013-14 to financial year 2017-18 for Rs.2,39,54,338/-. PSPCL, HPGCL and MSEDCL have paid their share. However, GUVNL has not paid its share of Rs.1,13,78,309/- for both spare parts and secondary fuel. Further, Rajasthan Discoms have also not paid their share of Rs.4,68,938/- on spare parts and secondary fuel. GUVNL and Rajasthan Discoms are directed to compensate CGPL towards Gujarat VAT in terms of the judgment of APTEL dated 27.4.2021.

33. Accordingly, the Procurers who are yet to pay their share towards Gujarat VAT in terms of the judgement dated 27.4.2021 of APTEL shall make payment accordingly.

Petition No. 121/PM/2017

(E) Swachh Bharat Cess and Krishi Kalyan Cess

34. The Commission in order dated 21.2.2018 had allowed the claim of the Petitioner for Change in Law in respect of Swachh Bharat Cess and Krishi Kalyan Cess. However, the Commission had allowed compensation for Krishi Kalyan Cess and Swachh Bharat Cess on the following four taxable services only:

(a) Transportation of goods by a vessel from a place outside India to the first customs landing station in India - Ocean Freight on coal received at Mundra.

(b) Port Service - Fixed Port Handling charges and Permission Charges on usage of intake channel.

(c) Technical Testing & Analysis Agency - Coal analysis charges and coal stock yard sampling & analysis and Drinking Water sampling and analysis.

(d) Transport of goods by road - Hiring utility vehicle for material transportation and transportation charges on LDO, various equipment sent for repairing.

35. APTEL in its judgment dated 27.4.2021 has modified the Commission's findings and held that the Petitioner is entitled to compensation for Swachh Bharat Cess and Krishi Kalyan Cess on all the services availed by it. APTEL has held that since the Petitioner is a project-specific SPV set up solely for the purpose of generating and supplying electricity to the Procurers in accordance with the PPA, all services availed by it are in furtherance of its sole objective of generating electricity for supply to the Procurers under the PPA. Accordingly, APTEL has held that the Petitioner is entitled to relief for Change in Law on all the taxable services availed by the Petitioner. The relevant portion of the judgment of APTEL is extracted as under:

"….

91. ***It is not disputed that the appellant (CGPL) is a project specific Special Purpose Vehicle (SPV) set up solely for the purpose of generating and supplying electricity exclusively to the Procurers in accordance with the PPA. It engages in no other business undertaking. All services availed by CGPL are undoubtedly used for its sole objective of generating electricity for supply to the Procurers under the PPA.*** *The increased cost towards Krishi Kalyan Cess and Swachh Bharat Cess affects the cost of the business of the appellant for generation and sale of electricity.* ***The twenty services left out by CERC also are connected to the commercial activities of the appellant adding to its cost of production and supply. In this view, there was no justification for disallowance of the claim for additional financial burden on other services covered under Swachh Bharat Cess and Krishi Kalyan Cess contrary to Article 13 of the PPA.***

92. We agree with the submission that ***CERC erred to introduce an extraneous qualification or filter which is not borne out from the PPA****. The qualifying factor under Article 13 of the PPA is whether or not a CIL event has an impact on the cost of, or revenue from, the business of generation and sale of electricity by the seller (CGPL). In this view, the test applied by CERC that taxable service should have a "direct relation to the input cost of generation" is extraneous to the provisions of the PPA and must be rejected. It is trite that explicit terms of a contract (PPA) bind and it is not open for the adjudicating forums to substitute their own view on the presumed understanding of the commercial terms by the parties [Nabha Power Limited v. PSPCL & Anr. (2018) 11 SCC 508].* ***Once it is established that levy of a tax on services availed by CGPL has an impact on the cost of or revenue from business of generation and sale of electricity - whether directly or indirectly - compensation must follow.***

93. We are not impressed with the plea of the respondents that the qualifying requirement under Article 13 is that the Change in Law event must have an impact on the cost of, or revenue from, the activity of generation of electricity. This argument is

based on selective reading of the text of the clause. ***The contract (PPA), by Article 13, refers to the "business of selling electricity". <u>The compensation envisaged here cannot be restricted to the activity of "generating electricity". The expression "business" has a very wide connotation.</u> It is defined as an activity carried on continuously and systematically by a person by the application of his labour or skill with a view to earning an income [see Mitra's Legal & Commercial Dictionary (Sixth Edition)]. <u>Entire gamut of activities connected to the generation, wheeling etc of electricity will have to be treated as covered by the expression "business of supply of electricity".</u>***

94. ***The expression "Supply of electricity" has to be interpreted to mean <u>all activities that are required to be undertaken by a generating company</u> for the purpose of generation and supply of electricity to the Procurers. Levy of any taxes or duties or cess on the said services tantamount to a tax implication on the supply of electricity by CGPL to the Procurers. Accordingly, it ought to have been allowed as a CIL event in terms of Article 13 of the PPA.***

95. For foregoing reasons, ***we allow relief for CIL qua Swachh Bharat Cess and Krishi Kalyan Cess on all the twenty-four taxable services availed by CGPL during FY 2014-15 to FY 2016-17.****"*

36. In terms of the judgment of APTEL, the Petitioner is entitled to compensation for all twenty-four taxable services availed by it during 2014-15 to 2016-17. In IA No. 64/2021, the Petitioner has submitted that it has invoiced the Procurers for Rs.5,07,83,283/- for Change in Law compensation on actuals for the services availed by it till 30.6.2017. The Petitioner has received payments from all the Procurers except MSEDCL which owes a sum of Rs.6,62,539/-. The Petitioner has filed copies of the supplementary invoices raised on the Procurers along with detailed computations in to the IA. In view of the above, MSEDCL is directed to pay its share of Change in Law compensation towards Swachh Bharat Cess and Krishi Kalyan Cess.

<u>Petition No. 157/MP/2015 and Petition No. 121/PM/2017</u>

(F) Limiting Relief on coal-based levies to Normative Bid Parameters

37. This issue is common to both Petitions and involves various claims. While dealing with the Petitioner`s claim in Petition No. 157/MP/2015 for Clean Energy Cess, Basic Customs Duty, Countervailing Duty and other coal-related Change in Law claims, the Commission in its order dated 17.3.2017 had held that the Change in

Law compensation for such levies would be on actual coal consumed subject to normative bid parameters determined by the Commission in paragraph 82(d) of the order dated 6.12.2016 in Petition No. 159/MP/2012. The Commission had observed as under:

"…..

20. ….Therefore, ***levy of clean energy cess on coal is admissible as a change in law event under Article 13 of the PPA.*** *Further, we find force in the submissions of the petitioner that it is liable to be compensated for the additional expenditure incurred due to levy of clean energy cess, since it was not payable at the time of bid deadline. Accordingly, the petitioner is entitled to recover the additional generating cost on account of clean energy cess from the Procurers as per applicable rate of clean energy cess in proportion to the coal consumed for generation and supply of electricity to the procurers. The respondents are directed to compensate the petitioner for the cost incurred at different points of time in accordance with the applicable rates of the Clean Energy Cess at that point of time. MSEDCL has submitted that the clean energy cess imposed by the Government of India is Rs. 50/- per ton of imported coal and not Rupees 51.50 per ton of imported coal. The Petitioner is directed to furnish along with its monthly bill, the proof of payment and computations duly certified by the auditor to procurers.* ***It is clarified that the petitioner shall be entitled to recover clean energy cess on coal in proportion to the actual coal consumed in accordance with the parameters as decided by the Commission in Para 82 (d) of the order dated 6.12.2015 in Petition No. 159/MP/2012 corresponding to the scheduled generation for supply of electricity to the procurers****. 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 petitioner. and the procurers are directed to carry out reconciliation on account of these claims annually.*

…..

27. The Petitioner is directed to furnish along with its monthly bill, the proof of payment of duty and computations duly certified by the auditor to the procurers. ***The Petitioner shall be entitled to recover custom duty and CVD on imported coal in proportion to the actual coal consumed corresponding to the scheduled generation for supply of electricity to the Procurers. If actual generation is less than the scheduled generation, the coal consumed in accordance with the parameters as decided by the Commission in Para 82 (d) of the order dated 6.12.2016 in Petition No.159/MP/2012 for actual generation shall be considered for the purpose of computation of impact of custom duty and CVD on coal.*** *The Petitioner and the procurers are directed to carry out reconciliation on account of these claims annually.*

….

55…..

(b) The increase in clean energy cess, customs duty, excise duty on coal, Central Sales tax and service tax shall be computed based on actual payment subject to ceiling of coal consumed corresponding to scheduled generation and shall be payable by the beneficiaries pro-rata based on their respective share in the scheduled generation. In case of reduction of clean energy cess, custom duty, sale tax and excise duty on coal, the Petitioner shall compensate the procurers on the basis of above principle."

38. Thereafter, by the Commission's order dated 31.10.2017, certain typographical errors made in the Commission's order dated 17.3.2017 were corrected. The relevant portion of the order dated 31.10.2017 is extracted as under:

> *"17. Accordingly, the Petitioner has pointed out that the order dated 6.12.2015 mentioned in the above para is 6.12.2016 and not 6.12.2015. It has also submitted that the reference to para 82(d) is also erroneous and that the reference should be to all bid parameters as considered in Para 84 of the order dated 6.12.2016.*
>
> *18. We have examined the matter. It is observed that certain clerical errors as pointed above by the Petitioner had crept in the order dated 17.3.2017 and the same is required to be corrected by this order.* ***Accordingly, the review on this ground is allowed and the para 20 of the order dated 17.3.2017 stands corrected as under:***
>
> ***"(a) The order dated 6.12.2015 is corrected as '6.12.2016'.***
>
> ***(b) The sentence, "the parameters as decided by the Commission in Para 82(d) of the of the order dated 6.12.2016 in Petition No. 159/MP/2012" is corrected as "the parameters as decided by the Commission in Para 84 of the of the order dated 6.12.2016 in Petition No. 159/MP/2012."***
>
> *19. The respondent, CGPL has submitted that the issue of computation of impact of change in law with respect to levies is pending adjudication before the Hon'ble Appellate Tribunal for Electricity (Tribunal) and therefore this Commission ought not to consider it in the present Review Petition. It is noticed that the respondent CGPL has filed Appeal No. 172/2017 before the Tribunal challenging the order dated 17.3.2017 on change in law events which have not been allowed by the Commission in the said order. Moreover, the issue of Service Tax on Works Contract Service is not a matter pending before the Tribunal. Even otherwise, the pendency of the appeal filed by the respondent, CGPL do not bar the consideration of the issues raised in the review Petition filed by the Petitioner, GUVNL. Accordingly, the submissions of the respondent are rejected."*

39. The same issue had come up for consideration of the Commission in Petition No. 121/MP/2017 in the context of service tax on ocean freight. The Commission in order dated 21.2.2018 allowed Change in Law compensation for service tax on ocean freight on actual coal consumed. Relevant extract of the order dated 21.2.2018 is extracted as under:

> *"….*
>
> *27. It is clarified that the Petitioner shall be entitled to recover on account of service tax on transportation of goods by a vessel from a place outside India to the first Customs Station of landing in India required in proportion to the actual coal consumed corresponding to the scheduled generation for supply of electricity to the Procurers. 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 service tax on transportation of goods by a vessel from a place outside India to the first Customs Station of landing in India. The Petitioner and Procurers are directed to carry out reconciliation on account of these claims annually.*
>
> *….*

50. …..

(b) The increase in Service Tax on transportation of goods by a vessel from a place outside India to the first custom station of landing in India ***shall be computed based on actual payment subject to ceiling of coal consumed corresponding to scheduled generation and shall be payable by the beneficiaries pro-rata based on their respective share in the scheduled generation****. In case of reduction of Service Tax on transportation of goods by a vessel from a place outside India, the Petitioner shall compensate the procurers on the basis of above principle. If actual generation is less than scheduled generation then compensation payable shall be computed based on actual payment subject to ceiling of coal consumed corresponding to actual generation….."*

40. In IA No. 71/2018 in Petition No. 121/MP/2017 (filed by the Respondents except MSEDCL), the Commission vide order dated 3.9.2019 clarified that in view of the principles laid down by the Commission in its order dated 17.3.2017 in Petition No. 157/MP/2015, the Petitioner shall be entitled to recover the compensation on account of service tax on ocean freight including Swachh Bharat Cess and Krishi Kalyan Cess on quantum of coal as per actual subject to ceiling based on parameters as decided by the Commission in paragraph 84 of the order dated 6.12.2016 in Petition No. 159/MP/2012. The relevant portion of the Commission's order dated 3.9.2019 is extracted as under:

"….

17. Therefore, ***the decision in the said appeal on the aspect of computation methodology will squarely apply to the present case. Till such time APTEL delivers judgement, the methodology prescribed by the Commission vide orders dated 17.3.2017 read with order dated 31.10.2017 in Petition Nos. 157/MP/2015 and 22/RP/2017 respectively will also apply in the present case.***

22. In view of the above, ***we clarify that the Petitioner shall be entitled to recover the compensation on account of Service Tax including Swachh Bharat Cess and Krishi Kalyan Cess on quantum of coal as per actual subject to ceiling based on parameters as decided by the Commission in Para 84 of the order dated 6.12.2016 in Petition No. 159/MP/2012*** *corresponding to the scheduled generation for supply of electricity to the Procurers. If actual generation is less than the scheduled generation, the coal consumed for actual generation based on normative parameters or actual quantum of coal consumed, whichever is lower, shall be considered for the purpose of computation of impact of change in law events."*

41. The APTEL in its judgment dated 27.4.2021 has set aside the Commission's findings rendered in order dated 17.3.2017 (in Petition No. 157/MP/2015), order dated 21.2.2018 (in Petition No. 121/MP/2017) and order dated 3.9.2019 (in IA No.

71/2018) and held that relief for Change in Law has to be based on actual coal consumed. APTEL has held that the principle contemplated under Article 13.2 of the PPA is to grant relief to mitigate the actual loss suffered by the affected party. Accordingly, APTEL has directed the Commission to undertake suitable correction. The relevant part of judgment of APTEL dated 27.4.2021 is as under:

> *"….*
>
> *101. The appellant relies upon, and rightly so, Article 13 of the PPA and the judgments of Supreme Court in Energy Watchdog v. CERC & Ors. [(2017) 14 SCC 80] and UHBVNL & Anr. v. Adani Power Limited [(2019) 5 SCC 325] in terms of which the disallowance of compensation on account of the CIL event is erroneous and in teeth of settled principles.*
>
> *102. The appellant also refers to the following observations of this tribunal in Judgment dated 12.09.2014 in Wardha Power Company Ltd. V. Reliance Infrastructure Ltd. (Appeal no. 288 of 2013):*
>
> *….*
>
> *103.* ***The above ruling was based on conclusion that compensation for CIL on the basis of normative bid parameters does not restitute the affected party to the same economic position as if the CIL had not occurred and, therefore, the compensation for CIL has to be on actuals.***
>
> *104. The aforesaid principle has been followed and reiterated in the recent Judgment dated 14.09.2020 in the matter of Adani Power Maharshtra Ltd. V. MSEDCL (Appeal no. 182 of 2019) thus:*
>
> *…..*
>
> *105.* ***In effect, the CERC has held that to compute impact of CIL qua Clean Energy Cess, Change in Basic Customs Duty and Countervailing Duty (i.e. coal based levies), the quantum of coal consumed by CGPL (for generating electricity) must be based on normative parameters. This finding, we agree, negates Article 13 and as also is violative of the principles laid down in Energy Watchdog v. CERC & Ors. (supra) and UHBVNL & Anr. v. Adani Power Limited (supra).***
>
> *106. As ruled in UHBVNL & Anr. v. Adani Power Ltd. (supra), the PPA, by Article 13, envisages restitution of the affected party on actuals to the same economic position as if such CIL events had not occurred.* ***The principle contemplated under Article 13.2 of the PPA is to grant relief to mitigate the actual loss suffered by the affected party. Neither the PPA nor the bid documents contemplate discretion to vest in the Commission to limit relief to normative parameters. There was no justification for the CERC to reduce the relief for CIL, especially when the differential amount (i.e. amount spent by CGPL vis-à-vis the amount calculated after computing the quantum of coal in terms of the normative parameters) had already been incurred by CGPL and had been duly audited. If the relief for CIL to be granted is computed on the basis of normative parameters (and not on actual impact), the appellant CGPL would stand penalised by lower relief, for no fault on its part.***
>
> *107.* ***The approach of CERC linking the computation of quantum of coal to its Order dated 06.12.2016 is erroneous. The said Order dated 06.12.2016 was passed by it (CERC) in the Compensatory Tariff remand proceedings, wherein***

the scope of relief to be granted to the appellant (CGPL) was confined to Force Majeure (under Article 12). In contrast, the relief of restitution on the basis of actuals is permitted in case of CIL (under Article 13). The CERC could not have arbitrarily reduced the quantum of relief to be granted to the affected party being aware of the ruling in Energy Watchdog (supra).

108. It is well conceded by the appellant that additional expenses incurred by a Seller due to a CIL event are allowed only after a prudence check. This (prudence check) does not automatically imply that the costs incurred by a Seller are not to be allowed as per actuals. If the costs incurred by the Seller have been prudently incurred, the same must be allowed on actuals. No facts showing imprudence in such additional expenditure have been found by CERC. ***In this view, the rejection of the claim of the appellant for compensation on actual consumption of coal is without any justification****.*

109. In view of the settled law on the subject, it is held that ***CERC has fallen in grave error by declining to undertake the computation of coal for determining the CIL compensation based on actual coal consumed by CGPL****. Such compensation cannot be restricted to normative bid parameters as held by CERC. The Commission must bring about suitable correction and is directed to do so accordingly."*

42. The Respondents have contended that computation of coal for coal based levies has to be lower of actual coal consumed or as per normative parameters in the Commission's Tariff Regulations. It has been further submitted that judgment of APTEL dated 27.4.2021 is required to be read in the context of its earlier judgment dated 13.11.2019 in Appeal No. 136/2016, judgment dated 14.9.2020 in Appeal No. 182/2019, judgment dated 3.11.2020 in Appeal No. 168/2019 and in Appeal No. 264/2018. Accordingly, the claims of the Petitioner are required to be revised.

43. We have considered the submissions of the parties. It is noticed that scope of the present remand proceedings is to implement the judgment of APTEL and to pass consequential orders. In view of the limited scope of the present remand proceedings, the Commission cannot read into judgment of APTEL. In its judgment, APTEL has clearly held that relief for Change in Law cannot be linked to normative parameters and has to be on actuals. APTEL has further held that neither the PPA nor the bid documents contemplate relief for Change in Law on normative parameters.

44. Accordingly, to give effect to the judgment of APTEL, the coal consumption to be considered for computing impact of Change in Law events has been delinked from the normative parameters of Tariff Regulations. It is observed that the Petitioner has calculated the quantum of coal eligible for Change in Law impact corresponding to the energy quantum which is lower of actual injection and scheduled generation. However, considering the finding of the APTEL, we deem it appropriate to allow Change in Law impact corresponding to actual injection only.

45. GUVNL has submitted that computation has to be necessarily on 15 minutes time block basis as it is intrinsically connected to settlement period specified under the Grid Code and applicable Regulations. GUVNL has also submitted that there is no rationale in CGPL claiming the consideration of scheduled generation on monthly or annual basis. GUVNL has further submitted that in the past, CGPL has considered the scheduled generation on 15 minute time block basis and it is only in the present remand proceedings that CGPL is seeking computation on monthly or annual basis. Per contra, the Petitioner has submitted that the methodology proposed by GUVNL of considering lower of actual injection or scheduled generation for each 15 minute time block leads to under-recovery of CGPL's Change in Law compensation as the final compensation is lower than the total of actual injection or scheduled generation calculated on the monthly basis. The Petitioner has further contested that GUVNL's proposed methodology cannot be made applicable given that CGPL's billing for energy charges takes place on a monthly basis.

46. We have considered the rival submissions of the parties. We observe that this issue was not raised by either party before the APTEL in various appeals with regard to Change in Law events. It is noticed that the issue raised by the GUVNL regarding scheduled generation on 15 minute time block basis is beyond the scope of the

remand proceeding. Therefore, we are not inclined to deal with this issue in the present remand proceedings. However, having decided that Change in Law impact is required to be calculated based on coal consumed for actual injection only (after delinking from schedule generation), the issue of 15 minute time block-wise or month-wise is of no relevance. The Petitioner is entitled to relief for Change in Law on coal-based levies on actual coal consumed for the actual injection and further adjusted (reduced) by the coal consumption corresponding to energy injected under RRAS-up and SCED.

47. In view of the above and in terms of the judgment of APTEL, the Petitioner is entitled to compensation for Change in Law on coal-related levies such as Clean Energy Cess, BCD, CVD, Service Tax on Ocean Freight on the basis of actual coal consumed adjusted (reduced) by the coal consumption corresponding to energy injected under RRAS-up and SCED. Further, pursuant to introduction of GST regime, Clean Energy Cess has been replaced with GST Compensation Cess and CVD has been subsumed in GST. The Petitioner has billed the Respondents/ Procurers for Clean Energy Cess/GST Compensation Cess, BCD, CVD/ GST, Service Tax on Ocean Freight, etc. on the basis of normative parameters. In IA No. 53/2021 in Petition No. 157/PM/2015 and IA No. 64/2021 in Petition No. 121/MP/2017, the Petitioner has claimed compensation of Rs.1,57,83,28,072/- [Rs.1,56,58,51,296/- (for Clean Energy Cess/ GST Compensation Cess, BCD and CVC/ IGST) in Petition No. 157/MP/2015 + Rs.1,24,76,776/- (for Service Tax on Ocean Freight) in Petition No. 121/MP/2017] for the financial year 2011-12 to financial year 2020-21. In support of its claim, the Petitioner has submitted auditor certificates and detailed computations. The Petitioner is entitled to recover compensation after recasting its claim of Rs.1,57,83,28,072/- on the basis of actual coal consumed for the actual injection and further adjusted (reduced) by the coal consumption corresponding to energy injected

under RRAS-up and SCED. The Procurers are directed to compensate the Petitioner accordingly in proportion to scheduled generation.

(G) Carrying Cost

48. The issue of carrying cost is also common to both Petitions. The Commission by its order dated 17.3.2017 in Petition No. 157/PM/2015 and order dated 21.2.2018 in Petition No. 121/MP/2017 had disallowed carrying cost on the Change in Law compensation. Vide order dated 17.3.2017, the Commission had held as under:

> *"**(C) Carrying cost***
>
> *53. The petitioner has pleaded in the prayer clause of the petition that the procurers should be permitted to raise the Supplementary Bills for the sum of Rs. 25,96,00,000 along with the carrying cost in terms of Article 13.4.2 of the PPA.* ***In our view, there is no provision in the PPA to allow carrying cost on the amount covered under change in law till its determination by the Commission.*** *The issue has been decided in order dated 16.2.2017 in Review Petition No. 1/RP/2016 in Petition No. 402/MP/2015. Accordingly, the claim of the petitioner is rejected."*

49. Similarly, vide order dated 21.2.2018, the Commission had held as under:

> *"Carrying Cost*
>
> *47. The Petitioner has submitted that the intent of having change in law clause under the PPA is to restore the affected party to the same economic position as if change in law event has not taken place. The Petitioner has prayed for recovery of compensation for both past period and future period along with the carrying cost. GUVNL has submitted that the Petitioner is not entitled to any carrying cost as the same has been rejected by the Commission vide order dated 17.3.2017 in Petition No. 157/MP/2015. Similar submissions have been made by the other procurers, namely PSPCL and the Discoms of Haryana (UHBVNL and DHBVNL). In our view, there is no provision in the PPA to allow carrying cost on the amount covered under change in law till its determination by the Commission. The issue has been decided in order dated 16.2.2017 in Review Petition No. 1/RP/2016 in Petition No. 402/MP/2015. Accordingly, the claim of the Petitioner is rejected."*

50. The APTEL in its judgment dated 27.4.2021 has set aside the Commission's findings in order dated 17.3.2017 and order dated 21.2.2018 on the issue of carrying cost and held that in light of the judgment of Hon`ble Supreme Court in the case of *UHBVNL & Anr.* v. *Adani Power Limited & Ors.,* the Petitioner is entitled to carrying cost on the Change in Law compensation. APTEL has also held that carrying cost is payable from the date on which the affected party was impacted on account of the

Change in Law. Accordingly, APTEL has directed the Commission to pass appropriate orders. The relevant portion of the judgment of APTEL is extracted as under:

*"165. **The issue of Carrying Cost is no longer res integra**. This tribunal had allowed Carrying Cost on CIL compensation by decision in Adani Power Limited (supra) in context of similar Article 13 of PPA. **The view was upheld by Supreme Court in Haryana Bijli Vitran Nigam Ltd. & Anr. v. Adani Power Ltd. & Ors. [(2019) 5 SCC 325]**, the take-aways from said decision being:*

(a) Article 13.2 of the PPA is an in-built restitutionary principle which compensates the party affected by CIL and which must restore, through monthly tariff payments, the affected party to the same economic position as is if such CIL has not occurred;

(b) Article 13.2 of the PPA creates a fiction pursuant to which the affected party must be given the benefit of restitution as understood in civil law;

(c) In terms of Article 13.4.1 of the PPA, adjustment in monthly tariff payment on account of CIL has to, inter alia, be effected from the date of CIL, in case the CIL is on account of adoption, promulgation, amendment, re-enactment or repeal of any law;

(d) Upon a reading of Article 13 as a whole, it is clear that, subject to restitutionary principles contained in Article 13.2, adjustment in monthly tariff has to be from the date when CIL event takes place; and

(e) Article 13 of the PPA provides for payment of Carrying Cost.

166. We have not the least doubt that the afore-mentioned settled principles are squarely applicable to the claim for carrying cost at hand. The PPA executed between CGPL and its Procurers is identical to the PPA which was subject matter of the case cited above each, in turn, being based on the Model PPA commended by the Ministry of Power along with the Standard Bid Documents issued under the CBG.

*167. **We have not the least doubt that the afore-mentioned settled principles are squarely applicable to the claim for carrying cost at hand. The PPA executed between CGPL and its Procurers is identical to the PPA which was subject matter of the case cited above each, in turn, being based on the Model PPA commended by the Ministry of Power along with the Standard Bid Documents issued under the CBG.***

*168. While resisting the appeals on this subject, the respondents contend that the benefit will inure only from the date the appellant approached the CERC and not earlier since there has been inordinate delay. **This submission is neither correct nor fair**. **The effect of CIL is suffered from the date of such event**. There is sufficient documentary proof adduced to show that the appellant had been informing the Procurers about Change in Law events since 11.07.2011, initially respecting the impact during construction period and thereafter for the operation period, the latter (Procurers) having responded by some letters exchanged during 2011 to 2015, holding meetings to discuss the subject amongst themselves, auditor having been appointed at their instance, the report of auditor having been shared on 21.11.2014, another Procurers' Meet on 30.03.2015 having failed to bring about agreement, it being insisted by some (Punjab and Haryana Procurers) for the matter to be taken to the Commission, lack of consensus being eventually communicated by letter dated 15.04.2015 (by GUVNL) asking the CGPL to take appropriate action under the PPA. The petition was filed before CERC on 08.06.2015.*

*169. Reliance is placed by the appellant on ruling in UHBVNL v. Adani Power Limited & Ors. (2019) 5 SCC 325 **to the effect that the adjustment in monthly tariff payment on account of Change in Law shall be reckoned and made effective***

from the date of CIL in case the CIL happens by way of adoption, promulgation, notification, amendment, re-enactment or repeal of law. <u>Clearly, if the relief for CIL is to be effected from the date on which the CIL has occurred, Carrying Cost has to be paid from the date on which the affected party became out of pocket due to the impact of CIL. This is also the letter and spirit of Article 13 of PPA.</u>

*170. T**hus, we accept the contention of the appellant and direct that the carrying cost in respect of the additional expenditure allowed on account of nexus with CIL events shall also be allowed for the period(s) from which the Seller (appellant) incurred such additional expenditure, be it by payment to State under taxation laws or otherwise borne for infrastructural developments mandated by law. Needless to add, the CERC will have to pass necessary orders in such regard.**"*

51. Accordingly, in terms of the judgment of APTEL, the Petitioner is entitled to carrying cost on expenditure incurred on account of Change in Law.

52. As regards the rate of carrying cost, the Commission in its order dated 17.9.2018 in Petition No.235/MP/2015 (AP(M)L vs UHBVNL &Ors.) has 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:

Period	*Actual interest rate paid by the Petitioner*	*Working capital interest rate as per CERC Regulations*	*LPS Rate as per the PPA*
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 been titled for late payment surcharge on the outstanding amount."

53. The aforesaid methodology for determining the applicable rate of carrying cost has been followed by the Commission in its subsequent orders as well. In view of the above, interest rate shall be determined as per the methodology adopted in the order dated 17.9.2018 in Petition No. 235/MP/2015 which would be lowest of actual rate of interest at which funds were arranged by the Petitioner or rate of working capital worked out as per the Regulations of the Commission or the rate of LPS (late payment surcharge) as per the PPAs.

54. The Petitioner has submitted that given that the APTEL in its judgment has held that the relief for Change in Law has to be on actual, the compensation for carrying cost has to be at the actual rate of short-term working capital funding arranged by the Petitioner for meeting the gap in cash flow that arose on account of the Petitioner being out of pocket to Change in Law events. The Petitioner in its IA and rejoinder has submitted Auditor Certificate dated 26.7.2021 certifying the actual rates of short term borrowing by the Petitioner during the financial year 2012-13 to financial year 2020-21 along with statement capturing the normative rate of Interest on Working Capital as per Tariff Regulations and the rate of LPS under the PPA. Evidently, the actual interest rates as claimed by the Petitioner are lower than the normative Interest on Working Capital as per the applicable Tariff Regulations and the LPS under the agreement. Accordingly, the Petitioner is entitled to carrying cost at the actual interest rate paid by the Petitioner for arranging funds supported by Auditor certificate.

55. The Petitioner shall raise invoices for carrying cost on the basis of the rates in the Auditor certificate dated 26.7.2021 for the period(s) from which the Petitioner incurred such additional expenditure, be it by payment to the State under taxation laws or otherwise borne for infrastructural developments mandated by law and till

date of this order. Once invoices are raised by the Petitioner, delay in payment of the Change in Law compensation amounts mentioned in this order shall attract levy of Late Payment Surcharge at the PPA rates.

56. The beneficiaries are advised to reconcile the following key figures/ amounts with the Petitioner including the figures/ amounts certified by the Auditor for arriving at the claims towards Change in Law events:

a) Actual injection (MU), energy corresponding to RRAS-up (MU) and SCED (MU) for each month of claim;

b) Actual coal consumed during each month of claim (in MT); and

c) Change in Law impact certified by the Auditor for the actual coal consumption: It shall be ensured that for each Change in Law impact claimed, the certified impact represents only the difference between the cess/tax rate during the month of claim and cess/tax rate on the cut-off date.

57. In case of any computational/ inadvertent errors, parties are advised to correct the same with mutual consent.

58. Apart from the above, all other terms and conditions of the order dated 17.3.2017 (in Petition No. 157/MP/2015), order dated 31.10.2017 (in Review Petition No. 22/RP/2017), order dated 29.1.2018 (in Petition No. 157/MP/2015), order dated 21.2.2018 (in IA No.26/2017) and order dated 3.9.2019 (in Petition No. 121/MP/2017) to the extent not modified and/or set aside by the APTEL in its judgment dated 27.4.2021, shall remain unaltered.

59. In terms of the above order, the directions of the APTEL in its judgment dated 27.4.2021 in Appeal No. 172 of 2017 and Appeal No. 154 of 2018 stand implemented.

Sd/-	sd/-	sd/-	sd/-
(P.K. Singh)	**(Arun Goyal)**	**(I.S. Jha)**	**(P.K. Pujari)**
Member	**Member**	**Member**	**Chairperson**