

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Petition No. 351/MP/2018
With IA No. 4/2020**

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

Date of Order: 31st May, 2021

In the matter of

Petition under Section 79(1) (b) and 79(1) (f) of the Electricity Act, 2003 read with Article 10 of the Power Purchase Agreement dated 19.12.2013 executed between the Petitioner and the Respondent No. 1 and in terms of the directions issued by the Central Government vide its Notification dated 27.8.2018 for allowing pass through of additional expenditure incurred by the generator on account of events pertaining to Change in Law.

And

In the matter of

Coastal Energen Private Limited
7th Floor Buhari Towers,
4, Moores Road,
Chennai-600 008

.....**Petitioner**

Vs.

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

2. My Home Power Private Limited
5th Floor, 3rd Block, 'My Home Hub'
Madhapur, Hyderabad-500 081.

.....**Respondents**

The following were present:

Shri Hemant Singh, Advocate for the Petitioner
Shri Lakshyajit Singh Bagdwal, Advocate for the Petitioner
Shri Janmali Manikala, Advocate for the Respondent PTC
Shri Girik Bhalla, Advocate for the Respondent PTC

ORDER

The Petitioner, Coastal Energen Private Limited, has filed the present Petition under Sub-section (1)(b) and (1)(f) of Section 79 of the Electricity Act, 2003 (hereinafter referred to as 'the Act') seeking compensation on account of Change in Law events in terms of the Power Purchase Agreement (PPA) dated 19.12.2013 entered into with the Respondent No. 1, Tamil Nadu Generation and Distribution Corporation Limited (in short, 'TANGEDCO') for supply of 558 MW from the Petitioner's generating station.

Background of the case

2. The Petitioner is a generating company and has set up a 1200 MW (2X600 MW) power plant (hereinafter referred to as 'the Generating Station') at village Ottapidarum, Tuticorin district in the State of Tamil Nadu. On 19.12.2013, the Petitioner has entered into a PPA with TANGEDCO for supply of 558 MW for the period of 15 years.

3. It has been submitted by the Petitioner that under Article 10 of the PPA, it is entitled to be compensated on account of occurrence of Change in Law events thereby resulting into additional recurring/ non-recurring expenditure by the Petitioner. It has been further submitted that Change in Law events have occurred after the cut-off date i.e. 28.2.2013, which is seven (7) days prior to bid deadline, i.e. 6.3.2013.

4. The Petitioner has sought compensation on account of the following Change in Law events during the operating period which have resulted into additional financial impact on the Petitioner for supply of power to the Respondent, TANGEDCO:

- (a) Increase in Clean Energy Cess on Coal;
- (b) Increase in Wharfage Charges;
- (c) Introduction of Integrated Goods and Service Tax (IGST); and
- (d) Carrying cost.

5. It has been submitted by the Petitioner that bid deadline was 6.3.2013 and any Change in Law event after the cut-off date i.e. 28.2.2013 (seven days prior to the bid deadline) resulting in additional recurring or non-recurring expenditure incurred by the Petitioner falls within the ambit of Change in Law. The Petitioner has submitted that Change in Law events have significant financial impact on the costs and revenue of the Petitioner during the operating period for which the Petitioner is entitled to be compensated and restored through monthly tariff payment to the same economic position as if such Change in Law had not occurred, in terms of Article 10 of the PPA dated 19.12.2013.

6. In the above background, the Petitioner has filed the present Petition with the following prayers:

“(a) Declare that the events enumerated in the present petition constitute Change in Law events as per the provisions of the PPA and that the Petitioner is entitled to be restored to the same economic position as it was prior to occurrence of the said Change in Law events;

(b) Direct the Respondent No. 1 to make payment of Rs.255.49 Crs. to the Petitioner towards the additional expenditure incurred by the Petitioner till 31.03.2018 on account of the said Change in Law events, in supplying power to the Respondent No. 1 under the PPA dated 19.12.2013 along with the carrying cost as stated in the present petition;

(c) Direct the Respondent No. 1 to continue to make payments accrued in favour of the Petitioner on account of Change in Law events enumerated in the Petition from 1.04.2018 onwards till the subsistence of the said Change in Law events;

(d) Declare and/hold that the Petitioner is entitled to tariff over and above the tariff under the PPA on account of the events enumerated in the Petition,

(e) Adjudicate the present petition in an expeditious manner in terms of the directions issued by the Central Government vide its notification dated 27.08.2018;

(f) In the interim, direct the Respondents to make payment of Rs. 229.96 Crores i.e. 90% of the already incurred amount by the Petitioner from 24.12.2014 to 31.03.2018 towards supply of power to the Respondent No. 1 in order to ease the cash flow constraints faced by the Petitioner;....”

7. The Petitioner has submitted that the Generating Station has a composite scheme for generation and supply of power to more than one State, thereby satisfying the requirements under Section 79(1)(b) of the Act. It is submitted that the Generating Station is situated in the State of Tamil Nadu and has long-term PPA with TANGEDCO and it also has entered into Memorandum of Understanding (MoU) dated 28.11.2015 with Respondent No. 2, My Home Power Private Limited (in short 'MHPPL'), an inter-State trading licensee, for sale of 300 MW for a period of three years within the States of Andhra Pradesh and Telangana. Under the above MoU, Telangana State Power Co-ordination Committee (TSPCC) issued Letter of Intent (LoI) dated 27.2.2016 for purchase of 150 MW RTC (round the clock) power to the distribution companies of Telangana on firm basis from the Petitioner through MHPPL for the period from 27.5.2016 to 25.5.2017. Subsequently, on 29.2.2016, TSPCC issued another LoI to MHPPL for supply of 300 MW through the Petitioner for the period from 5.3.2016 to 31.3.2016 and 1.4.2016 to 26.5.2016. Pursuant to issuance of the above Lols, the Petitioner entered into PPAs with MHPPL dated 29.2.2016 and 21.3.2016 for the purpose of supplying power in terms of the Lols issued by TSPCC.

8. Accordingly, the Petitioner has filed the present petition before this Commission seeking relief on account of Change in Law events in terms of the provisions of the PPA dated 19.12.2013 executed with TANGEDCO.

9. The Petitioner has also filed Interlocutory Application No. 4/2020 seeking direction to the Respondent, TANGEDCO to pay Rs. 479.83 crore, the amount pending qua Change in Law events, as under:

Sr. No.	Change in Law events	Impact of the Change in Law claims (from 24.12.2014 to 31.12.2019) (Rs. in crore)
1.	Increase in Clean Energy Cess on coal	260.09
2.	Introduction of IGST on imported coal	48.73
3.	Increase in Wharfage Charges	55.49
4.	Carrying cost	28.17
	Total	479.83

10. The Petition was admitted on 16.4.2019 and notice was issued to the Respondents, TANGEDCO and MHPPL to file their reply. Reply to the Petition has been filed by TANGEDCO and the Petitioner has filed rejoinder thereof. The Respondent, MHPPL has not filed its reply.

11. TANGEDCO vide replies dated 15.11.2019 and 17.8.2020 has submitted as under:

(a) The Petitioner has only one long-term PPA for 558 MW capacity with TANGEDCO and there is no other long-term or medium-term PPA. Thus, as on date, there is no composite scheme as the Petitioner is not supplying power to more than one State.

(b) The Petitioner had only MoU with MHPPL dated 28.11.2015 for 300 MW for a period of three years and was not extended thereafter. Further, in terms of said MoU, the Petitioner supplied power to Telangana Discoms only on short-term basis in respect of the Lol issued by TSPCC.

(c) In terms of the Hon`ble Supreme Court judgment in Energy Watchdog v. Central Electricity Regulatory Commission and Ors., [2017 (14) SCC 80] (hereinafter referred to as 'Energy Watchdog Case'), it is clear that to come under composite scheme, the generator is required to enter into long-term or medium-term PPA prior to date of commercial operation with more than one

State for generation and sale of electricity. Accordingly, the Petitioner's Project does not qualify as having composite scheme.

(d) The Petitioner did not have any composite scheme for generation and supply of electricity in more than one State on the date of filing of the present Petition. In absence of having a composite scheme, the Petitioner cannot invoke the power of the Commission under Section 79(1)(b) of the Act.

(e) The Petitioner has not submitted the relevant facts seeking relief under the provisions of the Act. The Petitioner has not placed on record the copy of the PPA executed with trader and distribution licensees. Accordingly, the present Petition is liable to be dismissed in absence of the Petitioner having composite scheme as required under Section 79(1)(b) of the Act.

12. The Petitioner vide rejoinders dated 28.11.2019 and 26.8.2020 has submitted as under:

(a) To qualify as composite scheme, there can be any arrangement/ PPA/ MoU, whatsoever, by generator to supply electricity in more than one State. The Act does not envisage that a generating company has to have a subsisting PPA. The Act only envisages an arrangement for supply of power in more than one State, which the Petitioner already has.

(b) The expression 'composite scheme' means a scheme for generation and sale of electricity in more than one State. The Act does not at all contemplate existence of a long term PPA to qualify under composite scheme. If part power is sold within the State and the some part is sold outside the State, including through Power Exchange or bilateral transaction, the same would be covered under composite scheme. The Act does not contemplate that there has to be a certain kind of an agreement or that there has to be actual generation and sale of power in more than one State.

(c) At the stage of participating in a bid process, if an overall character of the bid document does not disclose a specific State to which power is to be supplied, then an agreement executed pursuant to the said bid process would be covered under composite scheme. In this regard, the Petitioner has relied

upon the Commission's order dated 9.10.2018 in the Petition No. 188/MP/2017 and batch (ACME Bhiwadi Solar Power Pvt. Ltd. v. Solar Energy Corporation of India Ltd. and Anr.)

(d) As per the Commission's order dated 26.1.2019 in IA No. 100/2018 in Petition No. 275/MP/2018 (Tata Power Trading Company Limited v. SKS Power Generation (Chhattisgarh) Ltd. and Anr.), the moment there is a scheme for generation and sale of electricity in more than one State, the Commission will have jurisdiction in the matter.

(e) In terms of Hon'ble Supreme Court judgment in Energy Watchdog Case, the existence of an arrangement for generation and sale of power in more than one State is sufficient to qualify under the composite scheme. Such arrangement could be either in the form of long term PPA or in the form of any other arrangement such as Lol, LoA, PSA and Pilot Agreements, etc. It is not required to have subsisting power flow, under the above arrangement to more than one State, at all times to qualify under the above scheme.

(f) The Commission in its order dated 9.10.2018 in Petition No. 188/MP/2017 and batch (ACME Bhiwadi Solar Power Pvt. Ltd. v. SECI and Anr.) has already observed that the composite scheme can be decided only on the basis of the executed agreements for power flow which may happen in future. In the present case, apart from long-term PPA with TANGEDCO, the Petitioner also has MoU with MHPPL dated 28.11.2015 and the PPAs with MHPPL dated 29.2.2016 and 21.3.2016 for the purpose of supplying power in the States of Andhra Pradesh and Telangana.

(g) Further, in Energy Watchdog Case, the Hon'ble Supreme Court has, after going through the clauses of Tariff Policy, held that the composite scheme is nothing more than a scheme by a generating company for generation and sale of electricity in more than one State. There is no reference to the requirement of having the power sale arrangements before COD of the Project.

(h) The Petitioner has scheduled more than 1307 MU of power till 31.12.2019 from the date of COD to various entities through Power Exchanges and is continuing to supply power through the Power Exchanges till date. The

collective transactions through Power Exchange are deemed inter-State transactions. Since the Power Exchanges have been setup as per the provisions of the Central Electricity Regulatory Commission (Power Market) Regulations, 2010, the commercial and other settlements through transactions over the Power Exchanges are governed by regulations framed by the Commission.

(i) Since the Petitioner has executed various agreements for supply of power in more than one State, the Commission has jurisdiction to deal with the present case.

13. The case was called out for virtual hearing on 8.4.2021. Despite notice, none appeared on behalf of the Respondent, TANGEDCO. During the course of hearing, learned counsel for the Petitioner reiterated his submissions on the issue of jurisdiction and merits of the case as made in the pleadings, which for the sake of brevity, are not reproduced herein.

14. After consideration of the submissions of the Petitioner and the Respondent, TANGEDCO, the following issues arise for our consideration:

Issue No.1: Whether the Petition as framed by the petitioner is maintainable? Whether this commission has necessary jurisdiction?

Issue No.2: Whether the provisions of the Power Purchase Agreement with regard to notice of an event of Change in Law have been complied with?

Issue No.3: What is the scope of Change in Law in the Power Purchase Agreement?

Issue No.4: Whether the compensation claims are admissible under Change in Law? If yes, to what extent?

Issue No.5: What should be the mechanism for processing and reimbursement of admitted claims under Change in Law?

We now proceed to discuss the above issues and examine the claims of the Petitioner.

Issue No.1: Whether the Petition as framed by the petitioner is maintainable? Whether this commission has necessary jurisdiction?

15. The Petitioner has submitted that this Commission has the necessary jurisdiction to entertain the present Petition and to provide the reliefs as sought for in the Petition. It has been submitted that the Petitioner has arrangement for generation and sale of power in more than one State in as much as it has a long term PPA with TANGEDCO and MoU with inter-State trader, MHPPL for sale of electricity in the States of Andhra Pradesh and Telangana. Pursuant to the MoU, TSPCC issued Lols dated 27.2.2016 and 29.2.2016 for purchase of 150 MW RTC power for the period from 27.5.2016 to 25.5.2017 and upto 300 MW power for the period from 5.3.2016 to 26.5.2016 for Telangana Discoms through MHPPL. Since the Petitioner has also entered into PPAs dated 29.2.2016 and 21.3.2016 with MHPPL for the purpose of supplying power in terms of the Lols issued by TSPCC, the Commission has jurisdiction to entertain the present Petition.

16. The Respondent, TANGEDCO has submitted that the present Petition is not maintainable in absence of 'composite' scheme. It has been submitted by the Respondent, TANGEDCO that the Petitioner's generating station does not have composite scheme as it does not have any subsisting long-term/medium-term PPA except for the PPA with TANGEDCO. It has been submitted by the Respondent, TANGEDCO that as per the judgment of Hon`ble Supreme Court in the case of Energy Watchdog Case, the composite scheme as specified under Section 79(1) of the Act shall mean a scheme by a generating company for generation and sale of electricity in more than one State, having signed long term or medium term PPA prior to the date of commercial operation of the Project. However, the Petitioner did not have any composite scheme on the date of the filing of the present Petition.

17. The Petitioner has submitted the details of the PPAs and Lols entered into with the Discoms and trader, MHPPL as under:

Sr. No.	Agreements	Target State/Distribution Licensee	Period of Supply	Quantum of Power
1	PPA with TANGEDCO dated 19.12.2013	Tamil Nadu/TANGEDCO	1.6.2014 to 30.9.2028	558 MW
2	Day Ahead Market in Indian Energy Exchange (IEX)	Delivery Point: Southern Regional Periphery	January, 2016 to 31.12.2019	1307 MUs
3	MOU with MHPPL dated 28.11.2015	Telangana State Power Committee	January, 2016 to December, 2018 (three years)	300 MW
4	PPA with MHPPL dated 29.2.2016	Telangana State Power Committee	5.3.2016 to 31.3.2016	300 MW
5	PPA with MHPPL dated 21.3.2016	Telangana State Power Committee	27.5.2016 to 25.5.2017	150 MW
6	Lol issued by Telangana State Power Co-ordination committee dated 27.2.2016	Telangana Discoms	27.5.2016 to 25.5.2017	150 MW
7	Lol issued by Telangana State Power Co-ordination Committee dated 29.2.2016	Telangana Discoms	5.3.2016 to 31.3.2016 and 1.4.2016 to 26.5.2015	300 MW

18. We have considered the submissions of the parties and perused documents on record. It is noticed that the Petitioner, whose generating station is situated in the State of Tamil Nadu, has entered into PPA with TANGEDCO on 19.12.2013 for supply of 558 MW for the period of 15 years. Subsequently, the Petitioner entered into MoU dated 28.11.2015 with the trader, MHPPL for sale of 300 MW for the period from January 2016 to December 2018. Under the said MoU, TSPCC issued Purchase Order to MHPPL for purchase of above power to Telangana Discoms from the Petitioner through MHPPL for the period from 5.3.2016 to 26.5.2016. Accordingly, a PPA dated 29.2.2016 was executed between the Petitioner and MHPPL for sale and purchase of 300 MW to onward sale to TSPCC for the period from 5.3.2016 to 31.3.2016 on as and when required basis and for the period from 1.4.2016 to 26.5.2016 on firm basis. Subsequently, the Petitioner entered into another PPA dated 21.3.2016 with MHPPL for sale and purchase of 150 MW to onward sale to TSPCC for the period from 27.5.2016 to 25.5.2017 up to the Southern Regional periphery.

19. The Hon'ble Supreme Court in its judgment dated 11.4.2017 in Energy Watchdog Case has dealt with the issue of composite scheme in detail as under:

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

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

20. Accordingly, the Hon'ble Supreme Court has set the following principles for consideration of a scheme as a composite scheme so as to qualify under Section 79(1)(b) of the Act:

(a) The State Commission's jurisdiction is where generation and supply take place within the State.

(b) The moment generation and sale takes place in more than one State in any manner, the Central Commission becomes the appropriate Commission under the Act.

(c) Composite scheme does not have any special meaning.

21. In the present case, the Petitioner whose generating station is located in the State of Tamil Nadu, is supplying only 558 MW of the total installed capacity of 1200

MW to the State of Tamil Nadu. The Petitioner has been selling the remaining capacity to other States through various contracts/Lols enumerated in paragraph 16 of this order. Therefore, the Petitioner meets the criteria of generation and sale of electricity to more than one State. Since the judgment of Hon'ble Supreme Court in the case of Energy Watchdog Case does not establish any qualifying criteria with regards to the term of the contract for a scheme to be classified as 'composite scheme', the contention of TANGEDCO to link composite scheme with long term or medium term PPA does not have merit. For the same reason, the contention of TANGEDCO that the Petitioner did not have composite scheme at the time of filing of the Petition is also incorrect as it is also an effort to link composite scheme with term of the PPA. For the Petitioner, the State Commission shall have jurisdiction only when the Petitioner is generating and supplying power only to the State of Tamil Nadu and it is not selling power outside the State by any means. Thus, in the light of the decision of the Hon'ble Supreme Court in Energy Watchdog Case, we are of the considered view that the Petitioner satisfies the condition of having a 'composite scheme' and, therefore, this Commission has the jurisdiction to adjudicate the disputes raised in the present Petition in terms of Section 79(1)(b) read with Section 79(1)(f) of the Act. It is answered accordingly that the present petition as framed is maintainable and further this commission has the necessary jurisdiction.

Issue No. 2: Whether the provisions of the Power Purchase Agreement with regard to notice of an event of Change in Law have been complied with?

22. The claims of the Petitioner in the present Petition pertain to Change in Law events related to PPA dated 19.12.2013. Article 10.4 of the PPA deals with the issue of notification of an event of Change in Law and the same is extracted as under:

"10.4 Notification of Change in Law

10.4.1 If the Seller is affected by a Change in Law in accordance with Article 10.1 and the Seller wishes to claim relief for such a Change in Law under this Article 10, it shall give notice to the Procurer(s) of such Change in Law as soon as reasonably

practicable after becoming aware of the same or should reasonably have known of the Change in Law.

10.4.2 Notwithstanding Article 10.4.1, the Seller shall be obliged to serve a notice to the Procurer(s) under this Article 10.4.2, even if it is beneficially affected by a Change in Law. Without prejudice to the factor of materiality or other provisions contained in this Agreement, the obligation to inform the Procurer(s) contained herein shall be material.

Provided that in case the Seller has not provided such notice, the Procurer(s) shall have the right to issue such notice to the Seller.

10.4.3 Any notice served pursuant to this Article 10.4.2 shall provide, amongst other things, precise details of:

- (a) The Change in Law; and*
- (b) The effects on the Seller.”*

23. The Petitioner has submitted that in compliance to Article 10.4 of the PPA, on 22.3.2017, 23.8.2017, 20.2.2018 and 19.3.2018 notices were issued to the Respondent, TANGEDCO along with all details and that the Petitioner had requested to consider its claim for relief of Change in Law events under Article 10 of the PPA. In response, TANGEDCO vide its letter dated 21.3.2018 informed the Petitioner that in terms of Article 10.3.4 of the PPA, the decision of the Appropriate Commission with regard to determination of compensation and date from which such compensation shall become effective and shall be final and binding on both the parties subject to right of appeal provided under applicable law.

24. We have considered the submission of the Petitioner. As per Article 10.4 of the PPA, the Petitioner is required to give notice about occurrence of Change in Law events as soon as reasonably practicable after being aware of such events i.e. Change in Law events which occurred after cut-off date i.e. 28.2.2013. The Petitioner had given Change in Law notices on 22.3.2017, 23.8.2017, 20.2.2018 and 19.3.2018 to the Respondent indicating the events under Change in Law and impact of such events on tariff. However, the same were rejected by the TANGEDCO on 21.3.2018

on the ground that the Appropriate Commission has to determine the compensation for Change in Law events. Such rejection by the TANGENDO amounts to proper service by the petitioner. Thus, in our view, the Petitioner has complied with the requirement of notice under Article 10.4 of the PPA. It is answered accordingly.

Issue No. 3: What is the scope of Change in Law in the Power Purchase Agreement?

25. The claims of the Petitioner are with respect to events under Change in Law under Article 10 of the PPA. The same is extracted as under:

“ARTICLE 10: CHANGE IN LAW

10.1 Definitions

In this Article 10, the following terms shall have the following meanings:

10.1.1 "Change in Law" means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline resulting into any additional recurring/ non-recurring expenditure by the Seller or any income to the Seller:

- the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;*
- a change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;*
- the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;*
- a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the Seller;*
- any change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of this Agreement.*

but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI Charges or frequency intervals by an Appropriate Commission or (iii) any change on account of regulatory measures by the Appropriate Commission including calculation of Availability.

10.2 Application and Principles for computing impact of Change in Law

10.2.1 While determining the consequence of Change in Law under this Article 10, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through monthly Tariff Payment, to the extent contemplated in this Article 10, the

affected Party to the same economic position as if such Change in Law has not occurred.

10.3 Relief for Change in Law

10.3.1 During Construction Period

10.3.2 During Operating Period

The compensation for any decrease in revenue or increase in expenses to the Seller shall be payable only if the decrease in revenue or increase in expenses of the Seller is in excess of an amount equivalent to 1% of the value of the Letter of Credit in aggregate for the relevant Contract Year.

10.3.3 For any claims made under Articles 10.3.1 and 10.3.2 above, the Seller shall provide to the Procurer(s) and the Appropriate Commission documentary proof of such increase/ decrease in cost of the Power Station or revenue/ expense for establishing the impact of such Change in Law.

10.3.4 The decision of the Appropriate Commission, with regards to the determination of the compensation mentioned above in Articles 10.3.1 and 10.3.2, and the date from which such compensation shall become effective, shall be final and binding on both the Parties subject to right of appeal provided under applicable Law.”

26. Article 14 of the PPA provides for dispute resolution arising out of claim made by any party for any change in or determination of tariff or any matter relating to tariff.

The said Article is extracted as under:

“14.3 Dispute Resolution

14.3.1 Dispute Resolution by the Appropriate Commission

14.3.1.1 (a) where any Dispute arise from a claim made by any Party for any change in or determination of the Tariff or nay matter related to Tariff or claims made by any Party which partly or wholly relate to any change in Tariff or determination of any such claims could result in change in Tariff or any other claims arising out of the terms of this Agreement, shall be submitted to adjudication by the Appropriate Commission. Appeal against the decisions of the Appropriate Commission shall be made only as per the provisions of the Electricity Act, 2003, as amended from time to time.

(b) Where SERC is appropriate commission, all disputes between the procurer and the seller shall be referred to SERC.”

27. A combined reading of the above provisions reveals that the events covered under Change in Law are broadly as under:

- (a) Any enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any law, or
- (b) Any change in interpretation of any law by a competent court of law, Tribunal or Indian Governmental Instrumentality acting as final authority under law for such interpretation, or
- (c) Imposition of a requirement for obtaining any consents, clearance and permits which was not required earlier, or
- (d) Any change in the terms and conditions or inclusion of new terms and conditions prescribed for obtaining any consents, clearances and permits otherwise than the default of the seller, or
- (e) Any change in the tax or introduction of any tax made applicable for supply of power by the Petitioner to TANGEDCO.
- (f) If such Changes (as mentioned at (a) to (e) above) result in additional recurring and non-recurring expenditure by the seller or any income to the seller.
- (g) The purpose of compensating the Party affected by Change in Law is to restore through Monthly Tariff Payments, to the extent contemplated in this Article 10, the affected Party to the same economic position as if such 'Change in Law' has not occurred.
- (h) The compensation for any increase/ decrease in revenue or cost to the seller shall be determined and made effective from such date as decided by the Commission which shall be final and binding on the Petitioner and TANGEDCO, subject to the rights of appeal provided under the Act.

28. The term 'Law' has been defined under Article 1.1 of the PPA as under:

"Law" shall mean in relation to this Agreement, all laws including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and shall further include without limitation all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include without limitation all rules, regulations, decisions and orders of the Appropriate Commission.

29. The term 'Indian Governmental Instrumentality' has been defined in Article 1.1 of the PPA as under:

"Indian Governmental Instrumentality" shall mean the Government of India, Governments of state Tamil Nadu, any ministry, department, board, authority, agency, corporation, commission under the direct or indirect control of Government of India or any of the above state Government or both, any political sub-division of any of them including any court or Appropriate Commission or tribunal or judicial or quasi-judicial body in India but excluding the Seller and the Procurer;

30. As per the above definition, law shall include (a) all laws including electricity laws in force in India; (b) any statute, ordinance, regulation, notification, code, rule or their interpretation by Government of India, Government of Tamil Nadu or any Ministry, Department, Board, Body Corporate agency or other authority under such Government; (c) all applicable rules, regulations, orders, notifications by a Government of India Instrumentality; and (d) all rules, regulations, decisions and orders of the Appropriate Commission. If any of these laws affect the cost of generation or revenue from the business of selling electricity by the seller to the procurer, the same shall be considered as Change in Law to the extent it is contemplated under Article 10 of the PPA. Thus, the scope of the change in law as stated above is admitted and unambiguous.

Issue No. 4: Whether the compensation claims are admissible under Change in Law? If yes, to what extent?

31. Having dealt with preliminary objections, we now proceed to deal with the claims of the Petitioner under Change in Law during the operating period.

(a) Clean Energy Cess

32. The Petitioner has submitted that as on cut-off date i.e. 28.2.2013, Clean Energy Cess was levied @ Rs. 50/MT in terms of Notification No. 3/2010-Clean Energy Cess dated 22.6.1010 issued by Ministry of Finance, Government of India. Subsequently, Clean Energy Cess was increased by Ministry of Finance vide its

Notification dated 10.7.2014 to Rs. 100/MT; vide Notification dated 1.3.2015 to Rs. 200/MT; and vide Notification dated 29.2.2016 to Rs. 400/MT. The Petitioner has submitted that the said Notifications of the Ministry of Finance, enhancing the rate of Clean Energy Cess after the cut-off date, are Change in Law events as per Article 10.1.1 of the PPA.

33. The Petitioner has further submitted that after introduction of Goods and Service Tax (GST) with effect from 1.7.2017, Clean Energy Cess has been abolished. However, the levy of Cess still continues under newly enacted Goods and Service Tax (Compensation to States) Act, 2017 and is being levied @ Rs. 400/MT on quantum of coal procured. The Commission, in its order dated 14.3.2018 in Petition No. 13/SM/2017, has already recognized the introduction of GST Compensation Cess w.e.f. 1.7.2017 as Change in Law.

34. The Respondent, TANGEDCO has submitted that as per the Commission's earlier orders in Petition No. 229/MP/2017, Petition No. 1/MP/2017, Petition No. 170/MP/2016, Petition No. 126/MP/2016 and Petition No. 189/MP/2016, TANGEDCO has settled compensation on Clean Energy Cess for certain period of time to all the generators.

35. We have considered the submissions of the Petitioner and the Respondent. Clean Energy Cess on coal was introduced at the rate of Rs. 100/MT by Section 83 of the Finance Act, 2010. Further, the Ministry of Finance, Government of India by Notification No. 3 of 2010 dated 22.6.2010 exempted the Clean Energy Cess over and above Rs. 50/MT. By Notification No. 20 of 2014 dated 11.7.2014, Government of India rescinded the Notification No. 3 of 2010 and made Clean Energy Cess payable at the rate of Rs. 100/MT. By Section 166 of the Finance Act, 2015, Tenth

Schedule of the Finance Act, 2010 was amended to increase the Clean Energy Cess to Rs. 300/MT. However, by Notification No. 1 of 2015 dated 1.3.2015, Government of India exempted the Clean Energy Cess over and above Rs. 200/MT. By Clause 232 of the Finance Bill, 2016, Clean Energy Cess has been renamed as Clean Environment Cess and increased to Rs. 400/MT which came into effect from 1.3.2016. The Clean Energy Cess/ Clean Environment Cess applicable at different points of time is given in the table below:

From	To	Applicable Clean Energy Cess/Clean Environment Cess (Rs./MT)
1.7.2010	10.7.2014	50
11.7.2014	28.2.2015	100
1.3.2015	29.2.2016	200
1.3.2016	30.6.2017	400

36. Clean Energy Cess was introduced through the Acts of Parliament prior to the cut-off date of 28.2.2013 under the PPA. The effective rate of Clean Energy Cess from 22.6.2010 till its revision with effect from 11.7.2014 was Rs. 50/MT. The Petitioner was expected to factor in the Clean Energy Cess of Rs. 50/MT in its bid as this was the prevailing rate of Clean Energy Cess at bid deadline. However, after the Bid Deadline, the Clean Energy Cess/ Clean Environment Cess has been revised with effect from 11.7.2014, 1.3.2015 and 1.3.2016 and fixed at Rs. 100/MT, Rs. 200/MT and Rs. 400/MT respectively. Since the revised rates of Clean Energy Cess/ Clean Environment Cess have been introduced through amendment to the relevant Finance Acts and the changes have resulted in additional recurring expenditure by the Seller, we are of the view that the said changes are covered Change in Law in terms of Bullet 1 under Article 10.1.1 of the PPA.

37. Clean Energy Cess/ Clean Environment Cess was abolished with effect from 1.7.2017. Therefore, increase in Clean Energy Cess on coal is admissible to the Petitioner as a Change in Law event (up to 30.6.2017) under Article 10 of the PPA. As on the cut-off date, Clean Energy Cess was levied at the rate of Rs. 50/MT and the Petitioner was expected to factor the same in the bid. Thereafter, the applicable rate of Clean Energy Cess/ Clean Environment Cess for the purpose of Change in Law compensation computation shall be based on the relevant date/s on which changes in rate of Clean Energy Cess/ Clean Environment Cess occurred. The Change in Law amount would be worked out on the basis of the notified new rates less Rs. 50/MT as applicable as on cut-off date, per/MT of coal consumed.

38. Accordingly, the Petitioner is entitled to recover increase in Clean Energy Cess from TANGEDCO as per applicable rate of Clean Energy Cess/ Clean Environment Cess in proportion to the coal consumed corresponding to schedule generation at normative parameters as per applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of power to TANGEDCO. 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 Change in Law. The Petitioner shall furnish to TANGEDCO, the details of payments made, supported by Auditor's Certificate, while claiming the expenditure and TANGEDCO shall reimburse to the Petitioner on the basis of actual payments made. The Petitioner and TANGEDCO are directed to carry out reconciliation on account of these claims on annual basis.

39. Since the Clean Energy Cess has been abolished through Taxation Laws Amendment Act, 2017 with effect from 1.7.2017, increase in Clean Energy Cess/ Clean Environment Cess has been allowed as a Change in Law event up to

30.6.2017. With effect from 1.7.2017, the Petitioner shall be entitled for GST Compensation Cess in terms of the Commission's order dated 14.3.2018 in Petition No. 13/SM/2017. Relevant portion of the said order dated 14.3.2018 is extracted as under:

“30. From the foregoing, we are of the view that the Clean energy cess was applicable @ 400/MT as on 30.06.2017 and was earlier allowed by this Commission as a pass through cost as consequence of change in law, on case to case basis. But this was abolished from 01.07.2017 and this event of abolition is hereby allowed as a change in law event. Hence, the procurer shall not be liable to pay the Clean energy cess from 01.07.2017.

31. The GST Compensation cess was introduced from 01.07.2017 @ 400/MT. This was claimed by most of the generators as change in law event. This matter was under consideration of this Commission under the instant suo moto Petition. The Commission hereby allow this event of introduction of GST Compensation cess, as a Change in law event in all cases of Intra-State supplies or Inter-State supplies of coal. Hence, GST compensation cess is not allowed in case of generating stations having captive mines such as Sasan Power Limited and NLC as no intra-state or Interstate supplies are involved.”

(b) Increase in Wharfage charges

40. The Petitioner has submitted that as on cut of date, i.e. 28.2.2013, Wharfage charges were levied @Rs. 72.19/MT. Subsequently, Tariff Authority of Major Ports vide its Notifications dated 19.8.2014 and 10.10.2016 issued under Sections 48, 49 and 50 of the Major Port Trust Act, 1963 revised the rate of Wharfage charges from Rs. 72.19/MT to 125.50/MT with effect from 1.10.2014 and subsequently to Rs. 141.60/MT with effect from 10.10.2016. The Petitioner has submitted that the above Notification pertaining to increase in Wharfage charges constitute Change in Law within the meaning of Article 10 of the PPA.

41. The Respondent, TANGEDCO has submitted that Wharfage charges are the fee charged by freight terminal on passage of cargo through ocean. At the time of bidding, the Petitioner had quoted non-escalable overseas transportation charges in USD separately for each year which is converted into rupee by multiplying with

average of foreign exchange prevailed 15 days period to the current month. As the Petitioner has quoted non-escalable component on overseas transportation for every year in increasing trend, the risk of any increase is being covered and the Petitioner is not eligible for any increase thereafter.

42. In response, the Petitioner has submitted that the Wharfage charges come under the purview of fuel handling charges, which are in the nature of escalable charges, in terms of Schedule 8 of the PPA. Further, these charges are statutory in nature and levied by a Government Instrumentality which is the Tariff Authority of Major Ports and hence, qualifies as Change in Law event under the PPA.

43. We have considered the submissions of parties. According to the Petitioner, at the time of submission of bid, there was Wharfage charges of Rs. 72.19/MT. Subsequently, Tariff Authority of Major Ports vide Notifications dated 19.8.2014 and 10.10.2016 issued under Sections, 48, 49 and 50 of the Major Port Trust Act, 1963 revised the rate of Wharfage Charges from Rs. 72.19/MT to Rs. 125.5/MT and thereafter to Rs. 141.6/MT. Section 48 of the Major Port Trust Act, 1963 provides as under:

“48. Scales of rates for services performed by Board or other person:

(1) The Authority shall from time to time, by notification in the Official Gazette, frame a scale of rates at which, and a statement of conditions under which, any of the services specified hereunder shall be performed by a Board or any other person authorised under section 42 at or in relation to the port or port approaches:

(a) transshipping of passengers or goods between vessels in the port or port approaches;

(b) landing and shipping of passengers or goods from or to such vessels to or from any wharf, quay, jetty, pier, dock, berth, mooring, stage or erection, land or building in the possession or occupation of the Board or at any place within the limits of the port or port approaches;

(c) cranage or portorage of goods on any such place;

(d) wharfage, storage or demurrage of goods on any such place;

(e) any other service in respect of vessels, passengers or goods,

(2) Different scales and conditions may be framed for different classes of goods and vessels.”

44. As per the above provision, Tariff Authority of Major Ports is required to frame scale of rates on any services specified therein such as wharfage, storage or demurrage of goods on any such place. Accordingly, the Authority has notified the rates of services provided by it in terms of the above provisions. It is noted that the Petitioner has not clarified that on which services/ items, the Tariff Authority for Major Port Trust has levied the Wharfage charges. The Petitioner has also not submitted any documentary evidence to the effect that it had taken the services and paid the Wharfage charges to the Tariff Authority for Major Ports. Therefore, in absence of required information, the claim in this regard is rejected.

(c) Introduction of IGST

45. The Petitioner has submitted that Government of India vide its Notification No. 1/2017 dated 28.6.2017 introduced Goods and Services Tax and replaced old structure of tax and duties whereby in addition to the custom duty on imported coal, an Integrated Goods and Services Tax @ 5% was levied on imported coal with effect from 1.7.2017. The Petitioner has submitted that since ISGT was not applicable on the cut-off date, the Petitioner could not factor levy of IGST at the time of bidding. Therefore, after the advent of GST regime, the Petitioner is subjected to additional expenditure due to levy of IGST @ 5% on imported coal. Accordingly, the levy of IGST has a considerable impact on duty calculation.

46. The Respondent, TANGEDCO has submitted that GST on coal and transportation are being paid by TANGEDCO to all the generators. The generation of power by the Petitioner is based on imported coal.

47. We have considered the submissions of the Petitioner and TANGEDCO. It has been submitted by the Petitioner that the Commission in order to facilitate the settlement of the dues arising on account of the introduction of GST and GST Compensation Cess, initiated a suo-motu Petition No. 13/SM/2017 to hear the generating companies and the Procurers and to decide the issues. The Commission vide its order dated 14.3.2018 in the said suo-motu Petition has, *inter-alia*, held that the introduction of GST w.e.f. 1.7.2017 and subsuming/ abolition of specific taxes and duties, etc. in GST is in the nature of Change in Law event. The relevant extract of the order dated 14.3.2018 is reproduced below:

“32. At the same time GST and IGST were also introduced from 01.07.2017 and some of the taxes, duties and levies were abolished or subsumed therein. The Commission through the instant petition tried to ascertain the impact of the same on the generators and discoms/beneficiary States by seeking detailed submissions from all concerned.

33. It has been observed that some of the generators and discoms have submitted the calculations of impact of Change in Law. These calculations show varying impact of such changes on different generators and discoms on various dates. The impact worked out by the discoms was different from that submitted by the generators. Further, the generators have also not submitted a clear declaration as called for that there are no other taxes, duties, cess etc., which have been reduced or abolished or subsumed. From the forgoing, the Commission feels that due to varied nature of such taxes, duties and cess etc. that have been subsumed/ reduced, it is not possible to quantify in a generic manner, the impact of Change in Law for all the generators.

34. Hence, we are of the opinion that introduction of GST and subsuming/ abolition of such taxes, duties and levies has resulted in some savings for the generators having generation based on domestic coal and the same needs to be passed to the discoms/ beneficiary States. Since, these are Change in Law events beneficial to the procurers, the same needs to be passed on to the procurers by the generators.

35. Accordingly, we direct the beneficiaries/ procurers to pay the GST compensation cess @ Rs 400/ MT to the generating companies w.e.f 01.07.2017 on the basis of the auditors certificate regarding the actual coal consumed for supply of power to the beneficiaries on basis of Para 28 and 31. In order to balance the interests of the generators as well as discoms/beneficiary States, the introduction of GST and subsuming/abolition of specific taxes, duties, cess etc. in the GST is in the nature of Change in Law events. We direct that the details thereof should be worked out between generators and discoms/beneficiary States. The generators should furnish the requisite details backed by auditor certificate and relevant documents to the discoms/ beneficiary States in this regard and refund the amount which is payable to the Discoms/ Beneficiaries as a result of subsuming of various indirect taxes in the Central and State GST. In case of any dispute on any of the taxes, duties and cess, the respondents have liberty to approach this Commission.”

48. In our view, the above decision of the Commission is applicable in the present case of the Petitioner. Accordingly, the Petitioner shall be entitled to recover the IGST in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of power to TANGEDCO. If the actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of TANGEDCO. The Petitioner is directed to furnish along with its monthly bill, the proof of payment and computations duly certified by the auditor to TANGEDCO. The Petitioner and TANGEDCO are further directed to carry out reconciliation on account of these claims annually.

(d) Carrying Cost

49. The Petitioner has submitted that as per Article 10 of the PPA, the Petitioner is entitled to be compensated in such a way that it is restored, through monthly tariff payment, to the same economic position as if such Change in Law had not occurred. The Petitioner has submitted that the term 'economic position' does not limit itself to a simple correlation of increased expenditure and a corresponding compensation amount and includes compensation in terms of carrying costs incurred on account of Change in Law events. The Petitioner has submitted that since carrying cost is compensation for time value of money and is different from interest, it is entitled to be compensated and restored to the same economic position as if such Change in Law events had not occurred.

50. The Respondent, TANGEDCO has submitted that the Petitioner is not entitled to carrying cost from the date of incurring of additional amount till the due date of payment of supplementary invoice to be raised after reconciliation, pursuant to

adjudication of the claims of the Petitioner by the Commission. The liability for making payment for carrying cost arises only when the cost incurred is determined, supplementary invoice is raised and the due date lapses. Therefore, in absence of any such documents, no claim of carrying cost is payable.

51. We have considered the submissions of the Petitioner and the Respondent. APTEL in its judgment dated 13.4.2018 in Appeal No. 210 of 2017 in the matter of Adani Power Limited v. Central Electricity Regulatory Commission & Ors. has allowed the carrying cost on the claim under Change in Law and held as under:

“ix. In the present case we observe that from the effective date of Change in Law the Appellant is subjected to incur additional expenses in the form of arranging for working capital to cater the requirement of impact of Change in Law event in addition to the expenses made due to Change in Law. As per the provisions of the PPA the Appellant is required to make application before the Central Commission for approval of the Change in Law and its consequences. There is always time lag between the happening of Change in Law event till its approval by the Central Commission and this time lag may be substantial.....We also observe that this Tribunal in SLS case after considering time value of the money has held that in case of re-determination of tariff the interest by a way of compensation is payable for the period for which tariff is re-determined till the date of such re-determination of the tariff. In the present case after perusal of the PPAs we find that the impact of Change in Law event is to be passed on to the Respondent Nos. 2 to 4 by way of tariff adjustment payment as per Article 13.4 of the PPA.

.....

From the above it can be seen that the impact of Change in Law is to be done in the form of adjustment to the tariff. To our mind such adjustment in the tariff is nothing less than re- determination of the existing tariff.

x. Further, the provisions of Article 13.2 i.e. restoring the Appellant to the same economic position as if Change in Law has not occurred is in consonance with the principle of “restitution” i.e. restoration of some specific thing to its rightful status. Hence, in view of the provisions of the PPA, the principle of restitution and judgement of the Hon’ble Supreme Court in case of Indian Council for Enviro-Legal Action vs. Union of India &Ors., we are of the considered opinion that the Appellant is eligible for Carrying Cost arising out of approval of the Change in Law events from the effective date of Change in Law till the approval of the said event by appropriate authority. It is also observed that the Gujarat Bid-01 PPA have no provision for restoration to the same economic position as if Change in Law has not occurred. Accordingly, this decision of allowing Carrying Cost will not be applicable to the Gujarat Bid-01 PPA.

xi. Accordingly, this issue is decided in favour of the Appellant in respect of above mentioned PPAs other than Gujarat Bid – 01 PPA.”

52. The aforesaid judgment of APTEL was challenged before the Hon'ble Supreme Court wherein the Hon'ble Supreme Court vide its judgment dated 25.2.2019 in Civil Appeal No. 5865 of 2018 with Civil Appeal No.6190 of 2018 (Uttar Haryana Bijli Vitran Nigam Limited & Anr. v. Adani Power Ltd. & Ors.) has upheld the judgment of APTEL regarding payment of carrying cost to the generator on the principles of restitution and held as under:

“10. A reading of Article 13 as a whole, therefore, leads to the position that subject to restitutionary principles contained in Article 13.2, the adjustment in monthly tariff payment, in the facts of the present case, has to be from the date of the withdrawal of exemption which was done by administrative orders dated 06.04.2015 and 16.02.2016. The present case, therefore, falls within Article 13.4.1(i). This being the case, it is clear that the adjustment in monthly tariff payment has to be effected from the date on which the exemptions given were withdrawn. This being the case, monthly invoices to be raised by the seller after such change in tariff are to appropriately reflect the changed tariff. On the facts of the present case, it is clear that the respondents were entitled to adjustment in their monthly tariff payment from the date on which the exemption notifications became effective. This being the case, the restitutionary principle contained in Article 13.2 would kick in for the simple reason that it is only after the order dated 04.05.2017 that the CERC held that the respondents were entitled to claim added costs on account of Change in Law w.e.f. 01.04.2015. This being the case, it would be fallacious to say that the respondents would be claiming this restitutionary amount on some general principle of equity outside the PPA. Since it is clear that this amount of carrying cost is only relatable to Article 13 of the PPA, we find no reason to interfere with the judgment of the Appellate Tribunal.

16.....There can be no doubt from this judgment that the restitutionary principle contained in Clause 13.2 must always be kept in mind even when compensation for increase/decrease in cost is determined by the CERC.”

53. Article 10.2.1 of the PPA provides as under:

“10.2.1 While determining the consequence of Change in Law under this Article 10, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through monthly Tariff Payment, to the extent contemplated in this Article 10, the affected Party to the same economic position as if such Change in Law has not occurred.”

54. In view of the provisions of the PPA, the principles of restitution and the judgment of Hon'ble Supreme Court, we are of the considered view that the Petitioner is eligible for carrying cost arising out of approved Change in Law events from the effective date of Change in Law till the actual payment is made to the Petitioner. Once a supplementary bill is raised by the Petitioner in terms of this order,

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

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

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

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

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

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

56. In line with above order of the Commission, in the instant case, the Petitioner shall be eligible for carrying cost at the actual interest rate paid by the Petitioner for arranging funds (supported by Auditor’s Certificate) or the Rate of Interest on Working Capital as per the applicable CERC Tariff Regulations or the Late Payment Surcharge Rate as per the PPA, whichever is lower.

57. Thus, we find that the Petitioner is entitled to be compensated for change in law in the above stated manner.

Issue No. 5: What should be the mechanism for processing and reimbursement of admitted claims under Change in Law?

58. The Petitioner has submitted that aggregate amount for Change in Law claims is more than 1% of the value of the Standby Letter of Credit (LC) [in aggregate for the relevant Contract Year] and thus, fulfills the condition laid down in Article 10.3.2 of the PPA for claiming the additional cost/ expenses incurred by the Petitioner in supplying power to the Respondent under the PPA.

59. Articles 10.2 and 10.3 of the PPA provides for the principle of computing the impact of Change in Law during the operating period as under:

“10.2 Application and Principles for computing impact of Change in Law

10.2.1 While determining the consequence of Change in Law under this Article 10, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through monthly Tariff Payment, to the extent contemplated in this Article 10, the affected Party to the same economic position as if such Change in Law has not occurred.

10.3 Relief for Change in Law

10.3.1 During Construction Period

As a result of any Change in Law, the impact of increase/decrease of Capital Cost of the Power Station in the Tariff shall be governed by the formula given below:

For every cumulative increase/ decrease of “Each rupees one Crore twenty five Lakhs (Rs.1.25 Crore) in the capital cost” during the Construction Period, the increase/ decrease in Non Escalable Capacity Charges shall be “an amount equal to zero point two six seven percent (0.267%) of the non escalable” Capacity Charges. In case of Dispute, Article 14 shall apply.

It is clarified that the abovementioned compensation shall be payable to either Party, only with effect from the date on which the total increase/ decrease “exceeds amount of Rupees one Crore twenty five Lakhs (1.25 Crores)”.

10.3.2 During Operating Period

The compensation for any decrease in revenue or increase in expenses to the Seller shall be payable only if the decrease in revenue or increase in expenses of the Seller is in excess of an amount equivalent to 1% of the value of the Letter of Credit in aggregate for the relevant Contract Year.

10.3.3 For any claims made under Articles 10.3.1 and 10.3.2 above, the Seller shall provide to the Procurer and the Appropriate Commission documentary proof of such increase/ decrease in cost of the Power Station or revenue/ expense for establishing the impact of such Change in Law.

10.3.4 The decision of the Appropriate Commission, with regards to the determination of the compensation mentioned above in Articles 10.3.1 and 10.3.2, and the date from which such compensation shall become effective, shall be final and binding on both the Parties subject to right of appeal provided under applicable Law.”

60. The Petitioner is entitled to charge the compensation on account of Change in Law events admitted by the Commission during the operating period. However, it is clarified that the Petitioner shall be entitled to claim the compensation, in accordance with this order, after the expenditure allowed under Change in Law during operating period (including the reliefs allowed for operating period, if any) exceed 1% of the value of Letter of Credit in aggregate and for this purpose, the Petitioner shall furnish all the relevant documents likes supported by Auditor Certificate.

61. Article 10 of the PPA provides for the principle for computing the impact of Change in Law during the operating period. These provisions enjoin upon the Commission to decide the effective date from which the compensation for decrease in revenue or increase in expenses shall be admissible to the Petitioner. In our view, the effect of Change in Law as approved in this order shall come into force from the date of commencement of supply of electricity to the procurer or from the date of occurrence of Change in Law event, whichever is later.

62. Approaching the Commission every year for allowance of compensation for such Change in Law is a time-consuming process, which may result in payment of carrying cost. We have, therefore, specified a mechanism, in the following paragraphs, considering the fact that compensation for Change in Law events allowed as per PPA shall be paid in subsequent years of the contract period:

(a) Monthly "Change in Law" compensation shall be effective from the date of commencement of supply of electricity to the Respondent or from the date of Change in Law, whichever is later. The monthly relief corresponding to a Change in Law event shall be calculated by the Petitioner based on coal quantity which is lower of i) actual quantity of coal consumed during the month corresponding to scheduled energy ii) coal consumption for scheduled energy calculated based on norms of operation as mentioned in the Tariff Regulations for the period in which the month for which relief is being calculated lies. 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 Change in Law.

(b) Having arrived at the coal quantity eligible for relief, monthly compensation corresponding to a Change in Law event shall be arrived after multiplying the eligible quantity with the impact of the Change in Law event had on price of the coal (Rs./MT). The monthly compensation so arrived at shall be distributed among the procurer(s) who have scheduled the power during the month in proportion to their share in the scheduled energy.

(c) At the end of the year, the Petitioner shall reconcile the actual payment made towards Change in Law with the books of accounts duly audited and certified by Auditor and adjustment shall be made based on the energy scheduled by procurer during the year. The reconciliation statement duly certified by the Auditor shall be kept in possession by the Petitioner so that same could be produced on demand from the procurer(s).

(d) For Change in Law events related to the operating period, the year-wise compensation henceforth shall be payable only if such increase in revenue or cost to the Petitioner is in excess of an amount equivalent to 1% of LC in aggregate for a contract year as per provision of the PPA.

(e) If the Petitioner is eligible to receive compensation for Change in Law as per the provisions of the PPA, the compensation amount allowed shall be shared by the procurer (TANGEDCO) based on the scheduled energy.

(f) The mechanism prescribed above is to be adopted for payment of compensation due to Change in Law events allowed as per Article 10.3.2 of the PPA for the subsequent period as well.

63. Thus, the mechanism for processing and reimbursement of admitted claims under Change in Law shall be as above.

Summary of Decision

64. The summary of our decision under Change in Law during the Operating Period is as under:

Sr. No.	Change in Law event	Decision
1	Increase in Clean Energy Cess on coal	Allowed
2	Increase in Wharfage Charges	Not allowed
3	Introduction of IGST on imported coal	Allowed
4	Carrying Cost	Allowed

65. The Petitioner while calculating reliefs on account of above Change in Law events shall duly take into account any reduction of taxes/levies/duties/charges.

66. As regards introduction of GST regime with effect from 1.7.2017, the order of the Commission dated 14.3.2018 in Petition No. 13/SM/2017 shall be applicable.

67. Petition No. 351/MP/2018 along with IA No. 4/2020 is allowed in terms of the above.

Sd/-
(P.K.Singh)
Member

sd/-
(Arun Goyal)
Member

sd/-
(I.S. Jha)
Member

sd/-
(P.K.Pujari)
Chairperson