

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 380/MP/2018  
With IA No.8/2020**

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

**Date of Order: 31<sup>st</sup> 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 12.12.2013 executed between the Petitioner and the Respondent No. 1 for claiming compensation on account of events pertaining to Change in Law.

**And  
In the matter of**

IL&FS Tamil Nadu Power Company Limited  
4<sup>th</sup> Floor, KPR Tower,  
Old No. 21, New No. 2,  
1<sup>st</sup> Street, Subba Rao Avenue, College Road,  
Cennai-600 006

.....Petitioner

**Vs.**

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

2. PTC India Limited  
2<sup>nd</sup> Floor, NBCC Tower  
15 Bhikaji Cama Place,  
New Delhi-110 066.

.....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, IL&FS Tamil Nadu Power Company Limited, has filed the present Petition under Section 79(1) (b) and Section 79(1) (f) of the Electricity Act, 2003 (hereinafter referred to as 'the Act') seeking compensation on account of Change in Law events in terms of Power Purchase Agreement ('the PPA') dated 12.12.2013 entered into with the Respondent No. 1, Tamil Nadu Generation and Distribution Corporation Limited ('TANGEDCO').

### **Background**

2. The Petitioner has set up a 1200 MW coal-based thermal power plant (in short, 'the Generating Station') at Taluk Chidambaram, Cuddalore in the State of Tamil Nadu. On 12.12.2013, the Petitioner entered into a PPA with TANGEDCO for supply of 540 MW for a period of 15 years on long term basis.

3. The Petitioner has submitted that under Article 10 of the PPA, the Petitioner is entitled to be compensated on account of occurrence of Change in Law events which have resulted into additional recurring/non-recurring expenditure by the Petitioner. The Petitioner has submitted that Change in Law events have occurred after the cut-off date i.e. 27.2.2013, 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) Imposition of service tax on ocean transportation by a vessel from a place outside India and GST;

- (c) Increase in Countervailing Duty and introduction of Integrated Goods and Service Tax on imported coal and GST;
- (d) Additional Auxiliary Consumption on account of installation of Flue Gas Desulphurisation (FGD) system;
- (e) Station Heat Rate on sub-bituminous imported coal; and
- (f) Carrying cost.

5. The Petitioner has submitted that bid deadline was 6.3.2013 and any Change in Law event after the cut-off date i.e. 27.2.2013 (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. It is 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 12.12.2013.

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.235.75 Crs. to the Petitioner towards the additional expenditure incurred by the Petitioner on account of the said Change in Law events, in supplying power to the Respondent No. 1 under the PPA dated 12.12.2013 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 1.10.2018 upto the effect 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. 240.91 Crores i.e. 90% of the already incurred amount by the Petitioner from 29.9.2015 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;*

*(g) Grant liberty to the Petitioner to raise any other change in law claim not covered in the present Petition, at a later stage.”*

7. The Petitioner has submitted that the generating station of the Petitioner is having 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 Petitioner’s generating station is situated in the State of Tamil Nadu and has composite scheme for generation and supply of power in more than one State in as much as it has long-term PPA with TANGEDCO and it also has arrangement for supply of electricity to beneficiaries/distribution licensees situated outside the State of Tamil Nadu. The Petitioner has also entered into a Pilot Agreement for Procurement of Power (‘PAPP’) with Respondent No.2, PTC India Limited (aggregator) for supply of 550 MW to various utilities in the country under the Pilot Scheme of procurement of aggregated power for 2500 MW for three years from the generating companies as per the Ministry of Power Guidelines dated 16.4.2018 issued under Section 63 of the Act and in terms of the bid process conducted by PFC Consulting Limited being the Nodal Agency thereof. In addition, the Petitioner has entered into Letter of Awards/Letter of Intents (‘LoAs/Lols’) with various trading licensees for selling power to distribution licensees outside the State of Tamil Nadu.

8. The Petitioner has also filed Interlocutory Application No. 8/2020 with the following prayers:

*“(a) Allow the present application, thereby taking on record the additional documents, as mentioned in the present application; and*

*(b) Direct the Respondent (TANGEDCO) to pay Rs. 442.19 crores, as the amount pending qua the allowed/settled Change in Law events, in terms as stated in the present application.”*

9. Through the aforesaid IA, the Petitioner has sought to place on record (i) Request for Proposal ('RfP') dated 1.5.2018 issued by PFC Consulting Limited for the purpose of procurement of 2500 MW under Pilot Scheme, (ii) Pilot Power Supply Agreement ('PPSA') dated 27.10.2018 executed between PTC and TANGEDCO for onward supply of power for 550 MW and (iii) Minutes of meeting held on 27.10.2018 between the Petitioner and the Respondents in pursuance to the aforesaid agreements. The Petitioner has additionally submitted as under:

(a) PFC Consulting Limited, in its capacity of Nodal Agency, had issued Request for Proposal ('RfP') for procurement of 2500 MW under Pilot Scheme on 1.5.2018. The said Pilot Scheme was envisaged by the Central Government through issuance of bidding Guidelines under Section 63 of the Act.

(b) In terms of the said Scheme, PTC was appointed as the common aggregator/ trader for the purpose of executing agreements with the successful bidders/ generators and the distribution licensees pursuant to the bid process conducted by PFC Consulting Limited.

(c) Pursuant to participating in the bid process, Pilot Agreement for Procurement of Power ('PAPP') was executed between PTC and the Petitioner on 26.1.2018. Subsequently, on 27.10.2018, Pilot Power Supply Agreement ('PPSA') was executed between PTC and the Respondent, TANGEDCO for onward supply of 550 MW.

(d) Pilot Scheme envisaged an inter-State arrangement for procurement/ supply of power by various generators and distribution licensees. The Pilot Scheme as issued by the Central Government, RfP read with the PAPP and PPSA, constitute an arrangement to supply electricity on an inter-State basis. The arrangement envisaged under the aforesaid bidding process was composite, i.e. the supply could have been affected in more than one State in terms of the requirement of Section 79(1)(b) of the Act.

(e) The Petitioner also has an arrangement with distribution licensees through trading licensees for the purpose of supplying power to such distribution

licensees in various States, which qualifies as a composite scheme by way of binding arrangement.

(f) Since the various Change in Law events as claimed by the Petitioner have already been allowed by this Commission and/or Appellate Tribunal for Electricity ('APTEL') vide their orders/decisions, the Respondent, TANGEDCO may be directed to pay Rs. 442.19 crore qua such settled Change in Law claims as under:

<b>Sr. No.</b>	<b>Change in Law claims</b>	<b>Impact on account of Change in Law claims (from 29.9.2015 to 30.11.2019) (in Rs. crore)</b>
1	Increase in Clean Energy Cess on coal	245.21
2	Countervailing Duty	94.76
3	Service Tax on Ocean Transportation	16.84
4	Carrying Cost	71.93
5	Additional Auxiliary Consumption	6.16
6	Station Heat Rate on Sub-Bituminous Imported Coal	7.29
	<b>Total</b>	<b>442.19</b>

10. The Petition was admitted on 16.4.2019 and notice was issued to the Respondents, TANGEDCO and PTC to file their reply. Reply to the Petition has been filed by TANGEDCO and the Petitioner has filed its rejoinder thereof. However, the Respondent, PTC has not filed any 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 with TANGEDCO in the State of Tamil Nadu. There is no other long-term or medium-term PPA other than TANGEDCO and no sale of electricity by the Petitioner to more than one State. Therefore, the present Petition is not maintainable.

(b) Unit-I of the Generating Station declared commercial operation on 29.9.2015 and TANGEDCO executed long term PPA on 12.12.2013 (prior to COD). Unit-II of the generating station declared commercial operation on 30.4.2016 and the Petitioner had no long-term or medium-term PPA prior to COD of Unit-II with any other distribution licensees of any State.

(c) As per Hon`ble Supreme Court judgment in the case of Energy Watchdog v. Central Electricity Regulatory Commission reported in [(2017) 14 SCC 80] (hereinafter referred to as 'Energy Watchdog Case'), to be covered under composite scheme, the generator should have long-term or medium term PPA with more than one distribution companies for generation and sale of electricity prior to COD. However, the Petitioner has no such long term or medium-term PPA with more than one State prior to COD, especially in respect of the first unit of the generating station. The Petitioner has not brought on record any long-term or medium term PPA with any of the purchasers of its electricity. All the purchasers, apart from TANGEDCO are short-term purchasers.

(d) In an affidavit filed by the Petitioner in Petition No. 164/MP/2017, regarding relinquishment of LTA of 540 MW, the Petitioner itself has stated that it does not have any other PPA except TANGEDCO. Admittedly, the Petitioner had relinquished 540 MW on 30.12.2016 and this contention was upheld by the Commission in the said Petition. Since the Petitioner was not having LTA or MTOA, it did not get covered under composite scheme.

(e) As regards, PAPP executed by the Petitioner with PTC under the Pilot Scheme, the Petitioner has suppressed the following facts:

(i) TANGEDCO has also executed PPSA with PTC India Ltd. (aggregator) and IL&FS under the said Pilot Scheme as initiated by Government of India for 550 MW for a period of three years i.e. from 1.4.2019 to 31.3.2021 for supplying of 550 MW power.

(ii) Thus, both the quantum of 540 MW under case-I bidding (long-term) under PPA dated 12.12.2013 and 550 MW under Pilot Scheme (medium-term) are supplied to TANGEDCO by the Petitioner i.e. within Tamil Nadu and no inter-State supply is involved.

(g) The Petitioner has not made any other distribution company party to the Petition since there is no subsisting long-term or medium-term PPA with any other State other than the one with TANGEDCO. This itself proves that the

Generation Station does not have composite scheme for generation and supply of electricity in more than one State.

(g) The present Petition was filed on 20.11.2018 and the supply of power under the PPSA with PTC started only on 1.4.2019 under STOA for the months of April and May, 2019. There was no supply of power from PTC to TANGEDCO for the months of June, July and August, 2019. Power supply commenced from 1.9.2019 under MTOA for 550 MW for three years.

(h) There was no sale of power under LTA or MTOA prior to COD and prior to 1.4.2019 from Unit-II of the generating station even under the PPSA dated 1.10.2018 between PTC and TANGEDCO. Since on the date of the filing of the Petition, the Petitioner was not supplying power to more than one State, the Generating Station is not covered under composite scheme.

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

(a) As per the Hon`ble Supreme Court's judgment in Energy Watchdog Case, the composite scheme is nothing but a scheme, which can be executed in any manner, for generation and sale of electricity. The existence of an arrangement for generation and sale of power in more than one State is sufficient for qualifying under composite scheme, and that it is not required that there has to be a subsisting power flow, under the above arrangements to more than one State, at all times, for qualifying under the composite scheme.

(b) The Hon`ble Supreme Court in Energy Watchdog Case has nowhere stated that for the purpose of falling within the precincts of Section 79(1)(b) of the Act, it is imperative to have a long term PPA in more than one State. Rather the Hon`ble Supreme Court has stated that such composite scheme for generation and sale of electricity can be in any form/ manner. In the present case, the composite scheme of the Petitioner is evidenced through the fact that it has binding arrangements with various licensees (including trading licensees) for sale of power in more than one State and the same satisfies the condition of Section 79(1)(b) of the Act.



(c) The Commission in its order dated 9.10.2018 in Petition No.188/MP/2017 & batch (ACME Bhiwadi Solar Power Private Limited v. SECI and Anr.) has taken a considered stand that composite scheme can be decided only on the basis of the executed arrangements, for supply of power which may happen in future. In the present case, power was supplied to various distribution licensees across various States. The Petitioner has also arrangements for subsisting and future supply of power to distribution licensees in States other than Tamil Nadu.

(d) The Commission in its order dated 26.11.2019 in IA No.100/2018 in Petition No. 275/MP/2018 (Tata Power Trading Co. Ltd. v. SKS Power Generation Chhattisgarh Ltd. and Anr.) has held that mere existence of arrangement qua supply of power in more than one State constitutes a composite scheme. Therefore, for the purpose of demonstrating a composite scheme for generation and sale of electricity, qua Section 79(1)(b) of the Act, there ought to be merely an arrangement for such generation and sale in more than one State, either in the form of a long term PPA or any other arrangement such as Lol, LoA, PSA and Pilot Agreements, etc.

(e) Interpretation of judgment of Hon`ble Supreme Court in Energy Watchdog Case as put forth by TANGEDCO is not correct. The Hon`ble Supreme Court in the said judgment while interpreting the provisions of Tariff Policy, nowhere mandated the execution of a PPA for the purpose of evidencing a composite scheme for generation and sale of electricity in more than one State, and has rather stated that such a scheme means any scheme or arrangement, in any manner for generation and sale of power in more than one State. In other words, the existence of mere contracts for generation and sale in more than one State is the test for qualifying under composite scheme, and not a subsisting power flow at all times, to more than one State, for availing the benefit of such scheme.

(f) There is no requirement to have a composite scheme, in terms of an arrangement to generate and sell power in more than one State, before the COD of the generating station. Therefore, reliance placed by the Respondent to the explanation of clause 5.11(j) of the Tariff Policy, 2016 is misplaced. The Hon`ble Supreme Court only after considering the provisions of Tariff Policy

has observed that a composite scheme is nothing more than a scheme by the generating company for generation and sale of electricity in more than one State. In the judgment, there is no reference to the requirement of having the power sale arrangements before COD of the generating station.

(g) The reliance placed by TANGEDCO on the Commission's order in Petition No.164/MP/2017 regarding relinquishment of LTA granted by PGCIL is devoid of merits as for the purpose of composite scheme, existence of a long term PPA is not mandatory. The Petitioner has already supplied power to the States of Telangana, Karnataka and Tamil Nadu, etc. which evidences that the Petitioner has a scheme for generation and sale of power in more than one State.

(h) Since the Petitioner is not seeking relief from any other entity, there is no requirement under law for the Petitioner to make any other entity i.e. distribution company as party to the Petition. TANGEDCO has failed to demonstrate as to how making any other distribution company a party would affect the claims made by the Petitioner in the present Petition.

(i) The Petitioner has also entered into PAPP with PTC through the Pilot Scheme, under Section 63 of the Act, issued by the Ministry of Power for assisting the distribution licensees of the various States which have a fluctuating power demand. Post the bid process, the Petitioner was issued LoA date 12.10.2018 which was silent on the aspect of which distribution licensee, the aggregator/ trade viz. PTC would execute a back to back arrangement. Hence, the said Pilot Scheme falls squarely within the ambit of composite scheme.

(j) The Petitioner has scheduled more than 1143 MU of power till 28.8.2020 starting from the COD to various entities through Power Exchanges. The collective transactions through Power Exchanges are deemed inter-State transactions. Also, since the Power Exchanges have been setup under 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 and thus, the transactions are inherently inter-State in nature.

13. The case was called out for virtual hearing on 8.4.2021. Despite notice, none appeared on behalf of the Respondent, TANGEDCO. After hearing the learned counsel for the Petitioner, order was reserved. During the course of hearing on 8.4.2021, learned counsel for the Petitioner submitted as under as recorded in paragraph 2 of the Record of Proceedings (RoP) of the said hearing:

*“(a) As per Section 79(1)(b) of the Electricity Act, 2003 (in short, ‘the Act’), this Commission will have jurisdiction to adjudicate upon any dispute under a PPA with a distribution licensee, which is related to tariff, provided the generating company has entered into or otherwise have a "composite scheme" for generation and sale of electricity in more than one State.*

*(b) The issue of composite scheme, in the facts and circumstances of the present cases, is covered by the judgment of the Hon'ble Supreme Court dated 11.4.2017 in the matter of Energy Watchdog and Others v. CERC and Others [(2017) 14 SCC 80]. As per the said judgment, the expression "composite scheme" means a scheme for generation and sale of electricity in more than one State. Further, 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 some part is sold outside the State, including through Power Exchange or bilateral transaction, the same will be covered under "composite scheme”.*

*(c) The Commission in its order dated 26.11.2019 in Petition No. 275/MP/2018 had observed that the moment there is a scheme for generation and sale of electricity in more than one State, this Commission will have jurisdiction.*

*(d) In Petition No. 188/MP/2017 & batch matters (‘the ACME case’) before the Commission, the distribution licensees specifically argued that the supply of electricity is taking place in only one State, and as such the Commission did not have jurisdiction. The Commission after hearing the parties held in its order dated 9.10.2018 that since it is evident from a reading of the tender documents that it was an inherently inter-State scheme and that power was envisaged to be supplied to more than one State, the actual supply to only one State would have no bearing.*

*(e) The above decision of the Commission is applicable to the present cases, since apart from the supply of electricity to the Respondent, TANGEDCO, the Petitioner has entered into another arrangement through the Pilot Scheme under Section 63 of the Act. The Pilot Scheme has been issued by the Ministry of Power for the purpose of helping the distribution licensees of various States which have a fluctuating power demand. Therefore, it is evident that the Pilot Scheme is clearly a composite scheme which envisaged supply of electricity in more than one State. The Petitioner participated in the Pilot Scheme and declared successful bidder for 550 MW over a period of three years. Applying the principle of the ACME case (Supra), the execution of an agreement.”*

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 is maintainable and 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?**

**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?**

**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 is maintainable and this Commission has the 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. According to the Petitioner, it 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 it has also entered into agreement for supply of power to distribution companies in the States of Andhra Pradesh, Karnataka and Gujarat. Further, the Petitioner has submitted that it has also participated in the inter-State bid conducted under the Pilot Scheme under guidelines issued by Ministry of Power, and having been declared a successful bidder, it has executed a PAPP with PTC. Transaction under the Pilot Scheme is a deemed inter-State transaction, for onward supply to distribution licensees. Therefore, the Commission has jurisdiction to entertain the present Petition.

16. The Respondent, TANGEDCO has submitted that the present Petition is not maintainable in the absence of existence of a 'composite' scheme as required under Section 79(1)(b) of the Act for this Commission to have jurisdiction. According to TANGEDCO, the 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 TANGEDCO that in Energy Watchdog Case, the Hon'ble Supreme Court has affirmed amendment to Tariff Policy dated 28<sup>th</sup> January, 2016, as per which the composite scheme as specified under Section 79(1)(b) 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. TANGEDCO has submitted that the Generating Station neither had composite scheme prior to its commercial operation nor as on the date of filing of the Petition. It has also been submitted that for the PAPP of 550 MW executed by the Petitioner with PTC under the Pilot Scheme, corresponding PPSA has been executed by PTC with TANGEDCO itself and, therefore, even under the PAPP under the Pilot Scheme, supply is being made to TANGEDCO only and that there is no inter-State supply.

17. *Per contra*, the Petitioner has submitted that as held by the Hon'ble Supreme Court in Energy Watchdog Case, the expression 'composite scheme' only means a scheme for generation and sale of electricity in more than one State and the said expression does not have any special meaning. In the said decision, the Hon'ble Supreme Court had duly taken note of the provisions of Tariff Policy, 2016 while arriving at the aforesaid conclusion. It has been further submitted that the Act does not at all contemplate existence of a long-term PPA or any certain kind of agreement to qualify under the 'composite scheme' and it is enough that generating company, in any manner, has a scheme for generation and sale of electricity in more than one

State. The expression 'scheme' means a mere execution of agreement or arrangements for supply to more than one State, and that the same is sufficient to attract Section 79(1)(b) of the Act. In support of its contentions, the Petitioner has placed its reliance on the decisions/ orders of the Commission in Petition No.188/MP/2017 and batch (ACME Bhiwadi Solar Power Pvt. Ltd. v. SECI and Anr.) dated 9.10.2018 and in IA No. 100/2018 in Petition No. 275/MP/2018 (Tata Power Trading Company Limited v. SKS Power Generation (Chhattisgarh) Ltd. and Anr.) dated 26.11.2019.

18. We have considered the submissions of the parties and perused documents available on record. According to the Petitioner, since in terms of Section 79(1)(b) of the Act, it has a composite scheme for generation and sale of electricity in more than one State, this Commission has the jurisdiction to adjudicate the disputes in question. The Respondent, TANGEDCO has submitted that as per Hon`ble Supreme Court judgment in Energy Watchdog Case, the composite scheme as specified under Section 79(1)(b) of the Act means 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. According to TANGEDCO, not only the Generating Station did not have any long-term or medium-term PPA prior to the commercial operation date, it also did not have any subsisting composite scheme on the date of the filing of the present Petition. However, the Petitioner has contended that the judgment of Hon`ble Supreme Court in Energy Watchdog Case makes it clear that the composite scheme under Section 79(1)(b) of the Act is nothing but a scheme which can be executed in any manner be it PPA/LoA/Lol, etc., for generation and sale of electricity in more than one State and the contention of the Respondent/ TANGEDCO that in order to qualify under the

composite scheme, the Petitioner was required to have entered into long-term or medium-term PPA prior to the date of CoD of its Project, is misplaced.

19. The issue of composite scheme has been dealt with in detail by Hon`ble Supreme Court in Energy Watchdog Case. The relevant extract of the said judgment is extracted 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.*

23. This also follows from the dictionary meaning [(Mc-Graw-Hill Dictionary of Scientific and Technical Terms (6th Edition), and P.Ramanatha Aiyar's Advanced Law Lexicon (3rd Edition)] of the expression "composite":

(a) 'Composite' – "A re-recording consisting of at least two elements. A material that results when two or more materials, each having its own, usually different characteristics, are combined, giving useful properties for specific applications. Also known as composite material."

(b) 'Composite character' – "A character that is produced by two or more characters one on top of the other."

(c) 'Composite unit' – "A unit made of diverse elements."

The aforesaid dictionary definitions lead to the conclusion that the expression "composite" only means "consisting of at least two elements". In the context of the present case, generation and sale being in more than one State, this could be referred to as "composite".

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.

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26. Another important facet of dealing with this argument is that the tariff policy dated 6th June, 2006 is the statutory policy which is enunciated under Section 3 of the Electricity Act. The amendment of 28th January, 2016 throws considerable light on the expression "composite scheme", which has been defined for the first time as follows:

*"5.11 (j) Composite Scheme: Sub-section (b) of Section 79(1) of the Act provides that Central Commission shall regulate the tariff of generating company, if such generating company enters into or otherwise have a composite scheme for generation and sale of electricity in more than one State. Explanation: 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 (the COD of the last unit of the project will be deemed to be the date of commercial operation of the project) for sale of at least 10% of the capacity of the project to a distribution licensee outside the State in which such project is located."*

27. That this definition is an important aid to the construction of Section 79(1)(b) cannot be doubted and, according to us, correctly brings out the meaning of this expression as meaning nothing more than a scheme by a generating company for generation and sale of electricity in more than one State. Section 64(5) has been relied upon by the Appellant as an indicator that the State Commission has jurisdiction even in cases where tariff for inter-State supply is involved. This provision begins with a non-obstante clause which would indicate that in all cases involving inter-State supply, transmission, or wheeling of electricity, the Central Commission alone has jurisdiction. In fact this further supports the case of the Respondents. Section 64(5) can only apply if, the jurisdiction otherwise being with the Central Commission alone, by application of the parties concerned, jurisdiction is to be given to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity. We, therefore, hold that the Central Commission had the necessary jurisdiction to embark upon the issues raised in the present cases."

20. In the above judgment, the Hon'ble Supreme Court has clearly held that the expression 'composite scheme' used in Section 79(1)(b) of the Act does not have some special meaning and it is enough that generating companies have, in any manner, a scheme for generation and sale of electricity in more than one State. It has also been clearly held that the moment the generation and sale takes place in more than one State, the jurisdiction of the Central Commission will get attracted. While returning the aforesaid decision, the Hon'ble Supreme Court has duly taken into account the provisions of the Tariff Policy, 2016, and further held that the meaning of the word "composite scheme" is nothing more than a scheme by a



generating company for generation and sale of electricity in more than one State. Therefore, the contention of TANGEDCO that to qualify under the 'composite scheme' in terms of Section 79(1)(b) of the Act, the Petitioner was required to have entered into long-term or medium-term PPA prior to the commercial operation of the Project is not tenable. As long as the generating company has PPAs/any other arrangements for generation and sale of power in more than one State, this Commission has exclusive jurisdiction in matter of regulation of tariff of a generating company, in terms of the decision of the Hon'ble Supreme Court in the Energy Watchdog Case.

21. The Petitioner has submitted that details of PPAs and LoAs/Lols entered into with distribution companies/ traders as under:

Sr. No.	Agreement	Target State/Distribution Licensee	Period of Supply	Quantum of Power (in MW)
1.	PPA with TANGEDCO dated 12.12.2013	Tamil Nadu/TANGEDCO	1.6.2014 to 30.9.2028	540
2.	PAPP with PTC dated 26.10.2018	Various Utilities in India [Although under the Guidelines for procurement of power under Pilot Scheme as issued by Ministry of Power and the RfP, the entire Scheme was for various undisclosed distribution licensees in India, it was only at the stage of execution of PPSA dated 27.10.2018 that the Petitioner came to know that the power would be supplied to TANGEDCO]	3 years commencing from the appointed date	550
3.	LoA with JSW Power Trading Company Limited dated 26.4.2016	Power Company of Karnataka Limited/ESCOMs	1.5.2016 to 31.5.2016	24
4.	LoA with Adani Enterprises Limited dated 26.4.2016	Andhra Pradesh	1.5.2016 to 26.5.2016	100
5.	LoA with Tata Power Trading Company Limited	Power Company of Karnataka Limited/ESCOMs	1.5.2016 to 31.5.2016	20

Sr. No.	Agreement	Target State/Distribution Licensee	Period of Supply	Quantum of Power (in MW)
6.	LoA with GMR Energy Trading Limited dated 4.5.2016	Delivery Point: Southern Region periphery with beneficiaries, Andhra and Telangana Discoms	4.5.2016 to 31.5.2016	200-400
7.	LoI with LANCO Kondapalli Power Limited dated 10.2.2017	Telangana State Power Co-ordination Committee/ Telangana Discoms	15.2.2017 to 28.2.2017	14
8.	LoA with LANCO Kondapalli Power Ltd. Dated 25.2.2017	Telangana State Power Co-ordination Committee/Telangana Discoms	5.3.2016 to 31.3.2016	14
9.	LoA with LANCO Kondapalli Power Limited dated 13.3.2017	Telangana State Power Co-ordination Committee/ Telangana Discoms	1.4.2017 to 30.4.2017	150
10.	LoA with NTPC Vidyut Vypar Nigam Limited dated 11.4.2017	Telangana	7.4.2017 to 30.4.2017	50
11.	LOA with NTPC Vidyut Vypar Nigam Limited dated 25.1.2018	Telangana	16.1.2018 to 15.2.2018 and 16.2.2018 to 15.4.2018	500
12.	LOA with NTPC Vidyut Vypar Nigam Limited dated 10.7.2018	Telangana	1.9.2018 to 30.9.2018	450
13.	LoA with NTPC Vidyut Vypar Nigam Limited dated 30.8.2018	Nepal Electricity Authority	1.9.2018 to 9.9.2018	50
14.	LoA with NTPC Vidyut Vypar Nigam Limited dated 28.8.2018	Gujarat	10.9.2018 to 30.9.2018	100
15.	Term Ahead Market in Indian Energy Exchange Limited	West Bengal, Bihar, Andhra Pradesh and Telangana, etc.	June 2016, October 2016, December 2016, May 2017, September 2017, and April 2018,	9-300
16.	Day ahead market in Indian Energy Exchange Limited	Delivery Point: Southern Regional Periphery	March 2016 to October 2018 (depending on the market condition)	Up to 573

22. In the present case, the Generating Station is located in the State of Tamil Nadu and is supplying 540 MW of the total installed capacity of 1200 MW to TANGEDCO under PPA dated 12.12.2013 and has LoAs/ Lols with several other

distribution companies for sale of power. The Petitioner is also supplying 550 MW to PTC in terms of PAPP dated 26.10.2018 under the Pilot Scheme in terms of guidelines issued by the Ministry of Power, Government of India. For supply of power under the Pilot Scheme, the Petitioner participated in the bid process conducted by PFC Consulting Limited that was for procurement of aggregated power of 2500 MW for the period of three years wherein the Petitioner emerged as one of the successful bidders. In terms of the Pilot Scheme, PTC has been designated to act as the aggregator to facilitate procurement and supply of power between the successful bidders/ generating companies and the distribution licensees on pan-India basis. Accordingly, the Petitioner has entered into the PAPP dated 26.10.2018 with the PTC (in its capacity of aggregator) which is valid up to the period 30.9.2021. It is relevant to note that under the Pilot Scheme, in the bid documents, the buying utilities/distribution companies were not identified and PTC in its capacity of aggregator was required to identify the buying entities/distribution licensees on the basis of their requisition and to enter into PPSA on back-to-back basis in terms of the Guidelines and the bid documents. The Petitioner participated in the said bid process for supply of power to any State across the country. However, eventually, the aggregator PTC allocated the power to be procured from the Petitioner to TANGEDCO by entering into PPSA with TANGEDCO. As is evident from the arrangement, the Petitioner is selling power to the aggregator PTC and the aggregator, which being entitled to supply such power to any distribution licensees/ utilities across the country, has allocated the same to TANGEDCO for which the aggregator has entered into separate agreements with both the Petitioner and TANGEDCO. Therefore, in our view, the Pilot Scheme by its nature is an inter-State scheme for generation and sale of power.

23. Therefore, in light of the aforesaid arrangements in respect of the Petitioner's generating station, in our opinion, the Petitioner meets the criteria of generation and sale of power to more than one State. Since the judgment of Hon'ble Supreme Court does not establish any qualifying criteria with regard to the term of the contract for a scheme to 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. Thus, in the light of the above and in terms of decision of the Hon'ble Supreme Court in Energy Watchdog Case, we are of the considered view that the Petitioner has 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 2003 Act.

24. Thus, this issue is decided in favour of the Petitioner and it is answered that this commission is the Appropriate Commission having jurisdiction and the Petition as framed is maintainable.

**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?**

25. The claims of the Petitioner in the present Petition pertain to Change in Law events related to PPA dated 12.12.2013. 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.”*

26. The Petitioner has submitted that in compliance to Article 10.4 of the PPA, on 30.3.2016, 16.8.2016, 20.3.2017 and 22.08.2017, notices were issued to the Respondent, TANGEDCO along with all details and that the Petitioner had requested to consider its claim for relief of such Change in Law under Article 10 of the PPA.

27. We have considered the submissions of the Petitioner. Under 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. 27.2.2013. The Petitioner had given Change in Law notice on 30.3.2016, 16.8.2016, 20.3.2017 and 22.8.2017 to TANGEDCO indicating the occurrence of Change in Law events and impact of such events on tariff. However, no reply was received from TANGEDCO in this regard. Thus, in our view, the Petitioner has complied with the requirement of notice under Article 10.4 of the PPA. However, it is noticed that in none of the notices listed above, the Petitioner have mentioned about “additional auxiliary consumption on account of installation of FGD system” and “Station Heat Rate on

sub-bituminous imported coal” as Change in Law events which affected the revenues or cost of the Petitioner with effect from a particular date during operating period. Thus, in our view, the Petitioner has complied with the requirement of notice under Article 10.4 of the PPA except for its claim towards “additional auxiliary consumption on account of installation of FGD system” and “Station Heat Rate on sub-bituminous imported coal”.

28. This issue is answered accordingly.

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

29. 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*

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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."*

30. 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."*

31. (i) 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.

(ii) However, such changes as mentioned at (a) to (e) above must result in additional recurring and non-recurring expenditure by the seller or any income to the seller.

(iii) The purpose of compensating the Party affected by Change in Law is to restore through Monthly Tariff Payments, to the extent contemplated in the Article 10, the affected Party to the same economic position as if such 'Change in Law' has not occurred.

(iv) 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.

32. 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.*

33. 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;"*

34. 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.

35. Thus, the scope of the Change in Law as stated above is not under dispute.

#### **Issue No. 4: Whether the compensation claims are admissible under Change in Law?**

36. We now proceed to deal with the claims of the Petitioner under Change in Law during the Operating Period.

##### **(a) Clean Energy Cess**

37. The Petitioner has submitted that as on cut-off date i.e. 27.2.2013, Clean Energy Cess was levied @ Rs. 50/MT in terms of Notification No. 3/2010-Clean

Energy Cess dated 22.6.2010 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 (Rs. 206/MT including Education Cess and Secondary Education Cess); and vide Notification dated 29.2.2016 to Rs. 400/MT (Rs. 412/MT including Education Cess and Secondary Education Cess). The Petitioner has further submitted that vide Notification dated 1.3.2015, Education Cess and Higher Education Cess was also included in the calculation of Clean Energy Cess and due to increase in the above levies on coal, cost of generation has increased. The Petitioner has submitted that the said Notifications of the Ministry of Finance, enhancing the rate of Clean Energy Cess (including Education Cess and Secondary Education Cess) after the cut-off date, are Change in Law events as per Article 10.1.1 of the PPA.

38. 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 Goods and Service Tax (Compensation to States) Act, 2017 as GST Compensation Cess 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.

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

40. 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. Through 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 applicable at different points of time is given in the table below:

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

41. Clean Energy Cess was introduced through the Acts of Parliament prior to the cut-off date of 27.2.2013 under the PPA. The effective rate of Clean Energy Cess from 1.7.2010 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. However, after the Bid Deadline i.e. 27.2.2013, the Clean Energy 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 have been introduced through amendments to the relevant Finance Acts after the cut-off date and the changes have resulted in additional recurring expenditure by the seller, we are of the view that the said changes are covered under Change in Law in terms of Bullet 1 under Article 10.1.1 of the PPA.

42. It has been further submitted by the Petitioner that vide Notification dated 1.3.2015, Education Cess and Secondary & Higher Education Cess were also included in the calculation of Clean Energy Cess and that due to increase in the above levies on coal, cost of generation has increased. Accordingly, the Petitioner is entitled to reimbursement of Education Cess and Secondary & Higher Education Cess paid on the Clean Energy Cess to the concerned authorities w.e.f. 1.3.2015 subject to submission of documentary evidence in this regard.

43. Clean Energy Cess/ Clean Environment Cess were abolished with effect from 1.7.2017. Therefore, increase in Clean Energy Cess including levies of Education Cess and Secondary & Higher Secondary Cess on coal is admissible 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 Rs. 50/MT and the Petitioner was expected to factor the same in the bid. Thereafter, the applicable rate of Clean Energy Cess along with Education Cess and Secondary & Higher Education Cess thereon 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 occurred.

44. Accordingly, the Petitioner is entitled to recover increase in Clean Energy Cess along with Education Cess and Secondary & Higher Secondary Cess thereon from TANGEDCO 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 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. The Petitioner is directed to furnish along with its monthly bill and/or supplementary bills, 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.

45. Since the Clean Energy Cess has been abolished after coming into effect of GST 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 suomoto 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.”*

46. Thus the issue as stated is answered in terms of the above discussion.

**(b) Service Tax on Ocean Transportation by a vessel from a place outside India and GST**

47. The Petitioner has submitted that as as per Section 66D of the Finance Act, 1994, the services on the transportation of goods by a vessel from a place outside India to the first customs station of landing in India was in the negative list, thereby excluding this service from service tax. However, after the Finance Act 2016,

published on 14.5.2016, Section 66D was amended to omit the services on the transportation of goods by a vessel from a place outside India to the first customs station of landing in India from the negative list with effect from 1.6.2016, thereby resulting in inclusion of this service under the service tax regime. The exclusion of the aforesaid service tax from the negative list, resulted in increase in the input cost of the Petitioner for generation of power for the purpose of supplying the same to TANGEDCO. As such, the Petitioner is entitled to claim any such increase in the cost of generation which is an event of Change in Law as provided under Article 10 of the PPA.

48. The Petitioner has further submitted that upon the introduction of the GST Laws, the Department of Revenue, Ministry of Finance, Govt. of India vide Notification No. 8/2017 – Integrated Tax (Rate) dated 28.6.2017 notified GST @ 5% on the services of transport of goods in a vessel, which in effect subsumed the then prevailing service tax and thus, the effect of service tax which was levied earlier continued to the same extent by virtue of a nomenclature which has come into effect after introduction of GST Laws, which also constitutes a Change in Law event in terms of the PPA.

49. The Respondent, TANGEDCO has submitted that the services of transportation from outside India to first custom station of landing in India were in the negative list and w.e.f. 1.6.2016, the service was included under the service tax regime. TANGEDCO has further submitted that service tax on transportation of domestic coal is being paid by it to all the generators to whom the component is allowed.

50. We have considered the submissions of the Petitioner and TANGEDCO. As on cut-off date, i.e. 27.2.2013, no service tax was payable on transportation of goods by a vessel from a place outside India to the custom station landing in India. Government of India, Ministry of Finance vide Finance Act, 2012 through Section 66D(p)(ii) exempted transportation of goods by an aircraft or a vessel from a place outside India to the first customs station of landing in India from payment of service. Relevant portion of the Finance Act, 2012 is extracted as under:

*“66D. Negative list of services: The negative list shall comprise of the following services, namely:  
(a) to (o) \*\*\*\*\*  
(p) Service by way of transportation of goods-  
(ii) by an aircraft or a vessel from a place outside India to the first customs station of landing in India.”*

51. However, subsequently Ministry of Finance, Department of Revenue vide its Notification No. 9/2016 dated 1.3.2016 by amending the said notification and the negative list therein, exempted only the transportation of goods by an aircraft from payment of service tax. Relevant portion of the said Notification is extracted as under:

*“53.....Services by way of transportation of goods by an aircraft from a place outside India upto the customs station of clearance in India.”*

52. After the above amendment, transportation of goods by an aircraft is exempted from the service tax. However, service tax exemption to transportation of goods by vessel no longer remained available.

53. The Government of India vide its Notification No. 26/2012 dated 20.6.2012 exempted the taxable services by way of transportation of goods by a vessel in excess of 50% of the taxable value. Subsequently, vide Notification No. 8/2014 dated 11.7.2014, the Government of India exempted the taxable services by way of transportation of goods in a vessel in excess of 50% to 40% of the taxable value.

Further, vide Notification No. 8/2015 dated 1.3.2015, the Government of India exempted the taxable services by way of transportation of goods in a vessel in excess of 30% of the taxable value. The Government of India, vide Notification No. 9/2016 introduced service tax on transportation of imported goods with effect from 1.6.2016 and the applicable rate of service tax as on 1.6.2016 was 15% inclusive of Swachh Bharat Cess and Krishi Kalyan Cess i.e. (14% of Service Tax + 0.5 % each of Swachh Bharat Cess and Krishi Kalyan Cess). Since the service tax on transportation of good in a vessel is chargeable only to the extent of 30%, the applicable rate of service tax on transportation of goods from a vessel would come to 4.5% i.e. 30% of the rate of 15% inclusive of Swachh Bharat Cess and Krishi Kalyan Cess. i.e. service tax at the rate of 4.20% and Swachh Bharat Cess and Krishi Kalyan Cess at the rate of 0.15% each. As per the Notifications No. 26/2012, 8/2014 and 8/2015, the said rate of service tax is applicable only subject to this condition that the CENVAT credits on inputs, capital goods and input services, used for providing the taxable service, has not been availed by the Petitioner under the provisions of the CENVAT Credit Rules, 2004.

54. The said notifications of the Ministry of Finance, Govt. of India resulting into levy of service tax on goods transported by a vessel from a place outside India to the custom station of clearance on India after the cut-off date qualify as Change in Law under Article 10.1.1(i) of the PPA as they have been levied by the Ministry of Finance, Government of India which is a Government of India Instrumentality. Accordingly, the Petitioner is entitled to compensation on account of the aforesaid Change in Law.

55. Further, in regard to the subsuming of service tax into GST w.e.f. 1.7.2017, the Commission in its order dated 14.3.2018 in Petition No. 13/SM/2017 (supra) has



already held that the service tax, Swachh Bharat Cess and Krishi Kalyan Cess have been subsumed in GST and the same is a Change in Law event. Accordingly, the Petitioner is entitled to recover the additional expenditure incurred on account of service tax including Swachh Bharat Cess and Krishi Kalyan Cess (upto 30.6.2017) and on account of GST w.e.f. 1.7.2017 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.

56. This issue is decided in terms of the above direction and findings.

**(c) Countervailing Duty (CVD) on imported coal and GST**

57. The Petitioner has submitted that the Department of Revenue, Ministry of Finance, Government of India vide Notification No. 12/2013-Customs dated 1.3.2013, notified increase in the rate of Countervailing Duty from 1% to 2% on steam coal. Further, as a result of the enactment of GST Act, Countervailing Duty or additional duty has been subsumed in GST. Coal, as one of the Schedule 1 goods, which falls under the chapter-Heading No. 2701, attracts a GST of 5%. The introduction of GST has resulted in levy of additional expenditure on coal.

58. The Petitioner has further submitted that since it is running a coal based thermal power plant, the requirement of coal for generation of electricity is an

indispensable requirement to meet the obligations under the PPA. Article 10 of the PPA provides for compensation on account of occurrence of Change in Law event in order to restore the Petitioner to the same economic position as it was on the date of bid submission. Further, the purpose of Article 10 of the PPA is to enable the generator to recover any additional expenditure which may accrue on account of any Change in Law event affecting the cost of generation for supply of such power under the PPA. The introduction of GST is by way of an Act of Parliament is clearly an event squarely covered under the provisions of Article 10 of the PPA.

59. The Respondent, TANGEDCO has submitted that CVD was levied at 1% up to 28.2.2013 and from 1.3.2013, it was increased to 2% and from 1.7.2017, GST was introduced subsuming CVD. TANGEDCO has submitted that GST on coal and transportation are being paid by it to all the generators and that the generation of power by the Petitioner is based on imported coal.

60. We have considered the submissions made by the Petitioner and the Respondent. Countervailing Duty is the additional duty on the customs duty equivalent to Central Excise Duty leviable on the similar goods produced in India. As on cut-off date i.e. 27.2.2013, the prevailing Countervailing Duty on imported coal was @ 1% in terms of the Notification No. 12/2012-Customs dated 17.3.2012. Subsequently, Department of Revenue, Ministry of Finance by Notification No. 12/2013-Customs dated 1.3.2013 increased the rate of Countervailing Duty from 1% to 2% on the steam coal. Since the increase in the Countervailing Duty is in terms of the Notification of Ministry of Finance, Govt. of India under the enabling provisions of the Customs Act, 1962 and is after the cut-off date, it qualifies as Change in Law event and consequently, the Petitioner is entitled to reimbursement of the additional expenditure incurred on account of the increase in the rate of Countervailing Duty.

61. Accordingly, the Petitioner will be entitled to reimbursement of increase in the Countervailing Duty (from 1% to 2%) on imported coal after the cut-off date. The Petitioner shall be entitled to recover the increase in the Countervailing Duty on imported coal 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 is directed to furnish along with its monthly bill and/or supplementary bills, 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.

62. Further, with coming into force of GST w.e.f. 1.7.2017, the Countervailing Duty along with various other taxes, duties and levies have been subsumed into GST and imported coal has been subjected to the GST of 5%. As noted above, the Commission in its order dated 14.3.2018 in Petition No. 13/SM/2017 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. ....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.”*

63. The above decision of the Commission is applicable in the present case of the Petitioner. The Petitioner shall be entitled to recover the GST 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 and/or supplementary bills, 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.

64. This issue is answered in terms of the above discussion and findings.

**(d) Additional Auxiliary Consumption on FGD**

65. The Petitioner has submitted that in terms of Article 10 of the PPA, it needs to be compensated for the Additional Auxiliary Consumption ('Aux.') on account of

installation of FGD in the plant. Further, the Petitioner has submitted that the additional Aux. is being sought as there are no existing norms for additional auxiliary consumption on account of installation of FGD. The FGD installed by the Petitioner is operational, on account of which the Petitioner is incurring huge expenditure. Therefore, the Petitioner should be allowed to recover from TANGEDCO, at the normative Aux. rate plus additional auxiliary of 2% for FGD to restore the Petitioner to the economic position before the cut-off date.

66. The Respondent, TANGEDCO has submitted that the Additional Auxiliary consumption on account of provision of FGD is under the purview of this Commission to be decided as per the provision of law.

67. We have considered the submissions of the Petitioner and the Respondent. The Petitioner has sought to be compensated for additional Auxiliary on account of installation of FGD and in support has relied upon the order of the Commission dated 28.3.2018 in Petition No. 104/MP/2017 (Adani Power Limited v. Uttar Haryana Bijli Vitran Nigam Limited and Ors.) which is reproduced as under:

*“37. In view of the above discussions, we hold that the condition in EC dated 20.5.2010 mandating installation of FGD for Phase III of the project of the Petitioner was the result of the revision of NAAQS vide MOE&F Notification dated 16.11.2009 and CPCB Notification dated 18.11.2009 which took place after the cut-off date and MOE&F and CPCB being India Government Instrumentalities, the said notifications constitute Change in Law in terms of the PPAs dated 7.8.2008 between the Petitioner and Haryana Utilities.*

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*47. We have considered the submissions of the parties. The Petitioner has furnished the Auxiliary Energy Consumption of 1.92% on account of installation of FGD, based on the OEM parameters. The Petitioner, in paras 11 and 15 of Petition No. 156/MP/2014 had submitted 6.38% as the actual Auxiliary consumption for the month of March, 2014 which was after commissioning of the FGD. The Petitioner in the present Petition has submitted that the actual Auxiliary Energy Consumption is 7.06% in the month of March, 2017 which is much lower than the claimed Auxiliary Energy Consumption of 8.42%. Central Electricity Authority vide its letter dated 1.8.2016 addressed to the Commission has recommended operational norms in respect of coal based thermal power plants for implementation of the Environmental (Protection) Amendment, Rules, 2015. In the said recommendations, CEA, referring to the operational norms proposed by it during the year 1997, has recommended 1%*

*additional Auxiliary Energy Consumption for FGD using Sea water provision. We are of the view that the Petitioner shall be granted compensation @1.0% as additional Auxiliary Energy Consumption or actual Auxiliary Energy Consumption on account of operation of FGD for Phase III of the project, whichever is lower. If the norms are revised by CEA in future, then the revised norms or 1.92% or the actual consumption whichever is lower shall be admissible. Considering the fact that expenditure on account of additional Auxiliary Energy Consumption shall be on recurring basis during the operating period, the same shall be reimbursed to the Petitioner by Haryana Utilities in terms of Article 13.2(b) of the PPA.”*

68. It is pertinent to note that the issue involved in the aforesaid case was as to whether the condition in the Environment Clearance mandating the installation of FGD for the Phase III of the Petitioner's Project therein constituted a Change in Law event or not. The Commission, only after arriving at the conclusion that it gets covered under Change in Law event in terms of the PPA, allowed the consequent reliefs to the Petitioner including the compensation on account of increase in the auxiliary consumption due to installation of FGD.

69. The present case is clearly distinguishable from aforesaid case in as much as it does not involve the issue as to whether the installation of FGD by the Petitioner is a Change in Law event or not under the PPA. The Petitioner in the instant Petition has neither claimed that installation of FGD is a Change in Law event for the Generating Station nor has produced documents to establish that consequent increase in auxiliary consumption was a result of certain Change in Law events which occurred during operating period of the Generating Station. Hence, consequent reliefs on account of the installation of FGD (as in case of Petition No. 104/MP/2017) by the Petitioner cannot be granted. As has been noted in earlier part of the order while dealing with Issue No. 2, no notice was sent in this regard to the beneficiaries indicating that the increased auxiliary consumption due to operation of FGD is a Change in Law event which has resulted into increased cost of operation. Therefore, we are not inclined to grant any relief to the Petitioner on this count.

70. However, admittedly the FGD unit has been installed by the Petitioner and is operational. Hence, for computation of Change in Law reliefs (corresponding to the Change in Law events recognized/allowed by the Commission) based on coal consumed for scheduled generation to be calculated at the rate of the normative parameters as specified in the Tariff Regulations, additional auxiliary consumption on account of FGD is required to be considered. Since the Commission in the 2019 Tariff Regulations has specified norms of additional auxiliary consumption on account of installation of FGD system, the same in addition to the normative auxiliary consumption shall be used as one of the normative parameters as per the applicable Tariff Regulations of the Commission, for the purpose of computation of coal consumed corresponding to the scheduled generation.

71. Thus, the question is answered accordingly.

**(e) Station Heat Rate (SHR) on Sub-Bituminous imported coal**

72. The Petitioner has submitted that the Petitioner is using sub-bituminous imported coal for the Generating Station. However, the Commission, so far has not come out with any norms regarding computation of SHR of the plant when the said coal is used. Therefore, SHR should be considered as per the normative value of SHR for sub-bituminous domestic coal.

73. The Respondent TANGEDCO has submitted that since in the Commission's Regulations, there is no norm for sub-bituminous imported coal, this is under the purview of the Commission to decide the same as per the provisions of law.

74. We have considered the submissions of the Petitioner and the Respondent. Definition of "Fuel" under the PPA means the primary fuel used to generate electricity, namely imported coal. Further, as per Schedule 5 of the PPA, the primary

fuel has been indicated as the imported coal. Thus, the provisions of the PPA only envisage use of imported coal and not any particular kind/type of imported coal. The usage of sub-bituminous imported coal or bituminous imported coal for the purpose of supply was entirely at the discretion of the Petitioner.

75. Thus, the Petitioner's decision to use sub-bituminous imported coal at the Generating Station of the Petitioner is not due to any Change in Law event in terms of the PPA which occurred after the cut-off date. Rather it is the decision of the Petitioner itself to use specific type of coal i.e. sub-bituminous imported coal. Also, neither there is any corresponding notice to the beneficiaries indicating that the use of sub-bituminous imported coal resulting into increased SHR has been mandated due to certain Change in Law event and has resulted into increase in operational cost on recurring basis. As such, no relief can be allowed on account of any claimed increase in SHR due to use of sub-bituminous imported coal at the Generating Station of the Petitioner.

76. However, for the purpose of the computation of Change in Law reliefs (corresponding to the Change in law events allowed by the Commission) based on coal consumed for scheduled/actual generation to be calculated at the rate of the normative parameters as specified in the Tariff Regulations, it is observed that norms of SHR have not been notified in Tariff Regulations for the tariff periods 2009-14, 2014-19 and 2014-19 for generating stations using sub-bituminous imported coal as is the case for the Generating Station of the Petitioner.

77. The Generating Station has achieved COD during the applicability of the 2014 Tariff Regulations. Regulation 36(C)(b)(i) of the 2014 Tariff Regulations (applicable for the 2014-19 tariff period) has specified the normative Gross Station Heat Rate for the coal-based thermal generating stations which have achieved the commercial



operation date after 1.4.2014 as  $1.045 \times$  Design Heat Rate, wherein the design heat rate of a generating unit means the unit heat rate guaranteed by the supplier at conditions of 100% MCR, zero percent make up, design coal and design cooling water temperature/back pressure. Further, vide proviso to the above mentioned Regulation of the 2014 Tariff Regulations, it has been specified that the design heat rate shall not exceed the maximum design unit heat rates depending upon the pressure and temperature rating of the units and in that context, the 2014 Tariff Regulations has specified the maximum design unit heat rate for sub-bituminous Indian coal and bituminous imported coal.

78. The Petitioner has submitted that it is using sub-bituminous imported coal for the Generating Station. Since there are no norms regarding computation of station heat rate of a generating station when sub-bituminous imported coal is used, SHR should be considered as per the normative value of SHR for sub-bituminous domestic coal. Further, the Petitioner has not submitted any documents to prove that SHR is different in case of bituminous imported coal and sub-bituminous imported coal. As such, for calculating the relief for Change in Law events allowed by the Commission in the instant order, maximum value of design unit heat rate shall be the corresponding value of bituminous imported coal as provided in Regulation 36(C)(b)(i) of the 2014 Tariff Regulations.

79. Thus, the issue is answered in terms of the above discussion and findings.

**(f) Carrying Cost**

80. 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 carrying cost is compensation for time value of money and it is different from interest. Therefore, the Petitioner is entitled to be compensated and restored to the same economic position as if such Change in Law events had not occurred.

81. 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.

82. 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."*

83. The aforesaid judgment of APTEL in Appeal No. 210 of 2017, 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."*

84. 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.*

85. In view of the provisions of the PPA, the principles of restitution and the judgment of APTEL/ 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.

86. It was placed before that 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>
<i>2015-16</i>	<i>10.68%</i>	<i>13.04%</i>	<i>16.29%</i>
<i>2016-17</i>	<i>10.95%</i>	<i>12.97%</i>	<i>16.04%</i>
<i>2017-18</i>	<i>10.97%</i>	<i>12.43%</i>	<i>15.68%</i>

*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."*

87. In line with the 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 Interest on Working Capital rate as per the applicable CERC Tariff Regulations or the Late Payment Surcharge rate as per the provisions of the PPA, whichever is the lowest.

88. Thus, the issue is decided accordingly in terms of the above discussion and findings.

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

89. 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 Respondents under the PPA.

90. Articles 10.2 and 10.3 of the PPA provide for the principle for 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 Crores) 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 Standby 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.*

91. In our view, the Petitioner is entitled to charge the compensation on account of Change in Law admitted by the Commission during the operating period.

92. However, it is clarified that the Petitioner shall be entitled to claim the compensation after the expenditures allowed under Change in Law during operating period (including the reliefs allowed for operating period, if any) exceeds 1% of the value of Letter of Credit in aggregate and for this purpose, the Petitioner shall furnish all the relevant documents supported by Auditor Certificate.

93. 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 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.

94. 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(s) 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, and (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 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).

(c) 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.

(d) 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.

(e) 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.

95. In view of the above findings and discussion this issue is answered.

### **Summary of Decision**

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

<b>Sr. No.</b>	<b>Change in Law event</b>	<b>Decision</b>
1.	Increase in Clean Energy Cess on coal	Allowed
2.	Imposition of Service Tax on Ocean Transportation by a vessel from a place outside India and GST	Allowed
3.	Levy of Countervailing Duty on imported coal and GST	Allowed
4.	Additional Auxiliary Consumption on FGD	Not Allowed as a Change in Law event. However, allowed for computing the compensation for allowed Change in Law events.
5.	Station Heat Rate on sub-bituminous imported coal	Not Allowed
6.	Carrying Cost	Allowed



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

98. As regards introduction of GST regime w.e.f. 1.7.2017, order of the Commission dated 14.3.2018 in Petition No. 13/SM/2017 shall be applicable.

99. Petition No. 380/MP/2018 along with IA No. 8/2020 is disposed of in terms of the above.

**Sd/-  
(P.K.Singh)  
Member**

**sd/-  
(Arun Goyal)  
Member**

**sd/-  
(I.S.Jha)  
Member**

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