

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 598/MP/2020**

**Coram:**

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

**Date of Order: 24<sup>th</sup> November, 2021**

**In the matter of**

Petition under Section 79(1)(b) and 79(1)(f) of the Electricity Act, 2003 for claiming compensation on account of events pertaining to Change in Law as per Article 34 of the Power Supply Agreement dated 26.12.2014 read with Article 39.1 of the Power Supply Agreement.

**And**

**In the matter of**

Bharat Aluminium Company Limited (BALCO),  
Balco Nagar,  
Korba-495684, Chhattisgarh.

**.....Petitioner**

**Vs**

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

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

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

**... Respondents**

**Parties Present:**

Shri Sujit Ghosh, Advocate, BALCO  
Shri Nishant Kumar, Advocate, BALCO  
Shri Animesh Kumar, Advocate, BALCO  
Ms. Utkarsha Sharma, Advocate, BALCO  
Ms. Shweta Singh, Advocate, BALCO  
Shri Prabhas Bajaj, Advocate, KSEB

Ms. Pratiksha Chaturvedi, BALCO  
Shri Md. Zeyauddin, BALCO  
Shri Rajeev Goswami, BALCO  
Shri Amber Siddiqui, BALCO

### **ORDER**

The Petitioner, Bharat Aluminium Company Limited, has filed the present Petition under Sub-sections (1)(b) and (1)(f) of Section 79 of the Electricity Act, 2003 (hereinafter referred to as 'the Act') read with Article 34 of the Power Supply Agreement (in short, 'the PSA') dated 26.12.2014 executed between the Petitioner and the Respondent No. 1, Kerala State Electricity Board (in short, 'KSEB') for supply of power from the Petitioner's generating station, seeking certain reliefs under Change in Law during the operating period.

#### **Brief Background of the Case**

2. The Petitioner has set-up 810 MW (4x67.5 MW and 4X135 MW) and 1200 MW (4x300 MW) Thermal Power Project (hereinafter referred to as 'the generating station') at Balco Nagar, Korba in the State of Chhattisgarh.

3. On 25.4.2014, KSEB issued Request for Qualification to shortlist the bidders who own and operate generating stations and offer to supply electricity therefrom and shortlisted certain bidders including the Petitioner. After evaluation of the bids, KSEB accepted the bid submitted by the Petitioner and issued Letter of Award on 28.11.2014 for supply of 100 MW power. On 26.12.2014, the Petitioner entered into the PSA with KSEB for supply of 100 MW on Design, Build, Finance, Own and Operate basis ('DBFOO') for 25 years from the appointed date i.e. 1.10.2017.

4. It has been submitted by the Petitioner that under Article 34 of the PSA, the Petitioner is entitled to be compensated on account of occurrence of Change in Law events that result into additional recurring/ non-recurring expenditure by the

Petitioner. It has been further submitted that certain Change in Law events have occurred after the bid date i.e. 14.11.2014 and, therefore, in terms of Article 39.1 of the PSA, it has claimed declaration of certain events as Change in Law events and compensation from KSEB on account of such Change in Law events.

5. The Petitioner has sought compensation on account of the following Change in Law events during the operating period which have impacted the cost and revenue of supply of power from the generating station to the procurer:

- (a) Increase in cost due to introduction of Environment (Protection) Amendment Rules, 2015;
- (b) Additional cost towards Fly Ash Transportation;
- (c) Increase in Consent Fee; and
- (d) Carrying cost.

6. Against the above background, the Petitioner has made the following prayers:

*“(a) Permit the filing of the present petition and allow the Petitioner to submit the affidavit, Vakalatnama, authorization letter, etc. at the time of filing hard copies at the later stage.*

*(b) Declare and adopt the following events/ notifications as a change in law event(s), within the meaning of Article 34.1 of PSA dated 26.12.2014 and allow compensation, thereof, against the following:*

*(i) Notification dated 07.12.2015 issued by MoEF&CC, thereby leading to additional expenditure on account of installation of ‘FGD’ equipment and ‘mercury analyzer’;*

*(ii) Notification no. S.O. 254 (E) dated 25.01.2016 issued by MOEF, by way of which an additional cost towards ‘Fly Ash Transportation’ is being imposed upon the Petitioner;*

*(iii) Notification no. F1- 20/2016/32 dated 06.10.2016 issued by the Government of Chhattisgarh leading to additional expenditure due to the increase in ‘Consent Fee’;*

*(c) Allow in-principle approval for all the expenditure to be incurred towards the Change in Law events in relation to procurement, installation, commissioning, operation and maintenance of Flue Gas Desulphurizer (FGD) and associated systems for meeting SO<sub>2</sub> emission norms and De-NO<sub>x</sub> systems for meeting NO<sub>x</sub> emissions (including all cost towards selection of the Successful Bidder through*

*competitive bidding process) based on the cost as discovered through competitive bidding, along with carrying cost as per provisions of PSA;*

*(d) Devise a methodology for the purpose of recovery of the amount incurred/ to be incurred by the Petitioner, in installing the FGD and associated systems, alongwith the methodology towards calculating tariff in relation to the estimated increase in O&M Expenses, other operating norms like increase in Auxiliary Power Consumption, SHR, spares, water charges, landed cost of reagents, gypsum disposal cost etc., with corresponding increase in Capacity Charges, as a result of complying with the change in law event of installation of FGD and associated systems;*

*(e) issue directions for exclusion of the period of shutdown (required for installation of FGD) for the purposes of calculating the Availability of the power project of the Petitioner, in order to ensure full recovery of Capacity Charges in terms of the PSA;*

*(f) Direct the Respondent No. 1 to allow/ reimburse to the Petitioner, the cost of Rs. 53,10,000/- on pro-rata basis, incurred by the said Petitioner towards installation of Mercury Analyzer, in compliance with the notification dated 07.02.2015 issued by MoEF&CC;*

*(g) Declare that the Petitioner is entitled to carrying cost/ interest cost and allow the same to the Petitioner from the effective date of the respective change in law events till the date of making payment of change in law compensation to the Petitioner;*

*(h) In the interim, direct the Respondent to immediately make payment of the amount accrued on account of the change in law events, till 31.03.2020;*

*(i) Direct the Respondent No. 1, in future, to continue to make the payments, accrued in favour of the Petitioner, on account of the change in law events, as prayed under the aforementioned prayers; and*

*(i) Grant liberty to the Petitioner for claiming any other change in law compensation from the Respondent No. 1, at a later stage.”*

7. The Petitioner has submitted that it is selling power to more than one State inasmuch as it has PSA with Kerala State Electricity Board, Power Purchase Agreement (PPA) with Tamil Nadu Tamil Nadu Generation and Distribution Corporation Ltd. and back-to-back PPA with Chhattisgarh State Power Trading Company Limited. Therefore, in terms of Section 79(1) (b) of the Act, the Petitioner has a composite scheme for generation and sale of electricity in more than one State. It has been further submitted by the Petitioner that under Section 79(1)(b) of

the Act, this Commission has the powers to regulate tariff of generating companies if such companies have a composite scheme for generation and sale of electricity. The Petitioner has submitted the details of the PPAs executed by it as under:

8. In brief, the compensation claimed by the Petitioner on account of Change in Law events are as under:

<b>Date of Execution of PPA</b>	<b>Procurer</b>	<b>Quantum</b>	<b>Tenure</b>
23.8.2013	Tamil Nadu Generation and Distribution Corporation Ltd.	200 MW RTC Power	15 years (Valid till 30.9.2028)
26.12.2014	Kerala State Electricity Board	100 MW RTC Power	25 years (Valid till 30.9.2042)
19.1.2015	Chhattisgarh State Power Distribution Company Ltd.	5%	For the entire life of the generating station.

9. The Petition was admitted on 11.8.2020 and notices were issued to the Respondents to file their replies to the Petition. Reply to the Petition has been filed by KSEB vide affidavit dated 27.8.2020 and the Petitioner has filed its rejoinder on 19.9.2020. The reply and rejoinder filed by the parties have been considered in the succeeding paragraphs.

10. KSEB, vide affidavit dated 27.8.2020, has mainly submitted as under:

(a) As per the provisions of Article 39(1) and Article 34 of the PSA, the Petitioner would be eligible for compensation with respect to occurrence of events due to Change in Law only (i) if the expenses pointed out are already incurred in an accounting year, (ii) if as a result of Change in Law, the supplier/ Petitioner suffers an increase in cost or reduction in net after-tax return or other financial burden for and in respect of contracted capacity, the aggregate financial effect of which exceeds the higher of Rs. 1 crore and 0.1% of the capacity charges in any accounting year, and (iii) any demand for cash compensation payable for and in respect of subsequent Accounting Year shall

be made after commencement of the Accounting Year to which the demand pertains, but not later than 2 years from the close of such Accounting Year.

(b) On 14.1.2020, the Petitioner issued a notice to the KSEB under Article 34.1. of the PSA seeking compensation on account of Change in Law events and for complying with the statutory requirements as per the MoEF&CC Notification and the Notification of the Government of Chhattisgarh. However, while issuing the above notice, the Petitioner did not claim any amount towards Change in Law compensation in the said notice. Accordingly, KSEB vide its letter dated 3.2.2020, informed the Petitioner that its claims can be considered only after furnishing the required details as per the eligibility criteria and procedure specified under Article 34.1, Article 34.3 and Article 34.4 of the PSA.

(c) Thereafter also, in response to the Petitioner's letter dated 15.2.2020 requesting KSEB to furnish any query specifically required to process the Change in Law compensation, KSEB vide its letter dated 17.3.2020 gave a detailed reply, *inter alia*, stating as under:

(i) Relief on account of the Change in Law events having aggregate financial impact of less than Rs 1 crore in an accounting year is not eligible under the provisions of PSA. The criterion in respect of the Petitioner for claiming compensation under Change in Law as per the PSA is not met.

(ii) While as per the MoEF&CC Notification dated 25.1.2016, the norms regarding cost of fly ash transportation from thermal station have been specified, the Petitioner has not specified the date of implementation of this Notification in respect of its Project and the details of expenses, if any.

(iii) As per Notification of Government of Chhattisgarh dated 6.10.2016, consent fee for industries having an investment of more than Rs. 2500 crore but less than Rs. 5000 crore has been increased to Rs. 30 lakh for the first year and the consent renewal fee, applicable thereafter, to Rs. 10 lakh. However, the Petitioner has not provided the notification

existing on bid date. Also, it has indicated the consent renewal fee as Rs. 30 lakh, but as per the Notification it appears to be Rs. 10 lakh after first year. No clarification has been provided by the Petitioner in this regard.

(iv) Applicability of carrying cost can be ascertained only after the processing the compensation, if any, as per the terms and conditions of the PSA.

(d) The Petitioner has so far not responded to the queries of KSEB and instead has proceeded to filing of the present Petition before the Commission.

(e) Any claim for compensating the expenses incurred due to Change in Law event can be implemented only by considering the architecture of the DBFOO PSA envisaged by the Ministry of Power, based on which the Petitioner has participated in the bidding process and was selected as a successful bidder.

(f) The mechanism for implementation of new environmental norms for thermal power plants supplying power to the distribution licensees under concluded long-term or medium-term PPAs in respect of installation of FGD system has already been taken up with the Commission by Ministry of Power on 30.5.2018. As per the directive of the Ministry of Power, TPPs in respect of PSAs executed under Section 63 of the Act may approach the Appropriate Commission for approval of additional expenditure and compensation for additional cost. However, the Petitioner has not mentioned any expenditure incurred for this purpose as on date.

(g) In view of the above, the present Petition is pre-mature and is not maintainable.

11. The Petitioner vide rejoinder dated 18.9.2020 has mainly submitted as under:

(a) KSEB vide its letter dated 17.3.2020 directed the Petitioner to quantify the amount of compensation towards Change in Law events claimed by the Petitioner. However, while doing so, KSEB failed to appreciate that in-principle approval of Change in Law event is necessary before the Petitioner could

quantify the amount of compensation. KSEB outrightly rejected the request of approving the Change in Law events as sought by the Petitioner. KSEB also failed to appreciate that apart from the other Change in Law events, the Petitioner has requested to grant in principle approval of the FGD system installation along with the indicative cost as provided by CEA.

(b) In terms of Article 34.1 of the PSA, the Petitioner is required to notify KSEB about the occurrence of any Change in Law events which results in additional expenditure in cost of supply. As such, the Petitioner vide its letter dated 14.1.2020 rightly notified the KSEB about the occurrence of Change in Law events. Pursuant to the notice issued by the Petitioner, KSEB was required to carry out mutual discussion within 30 days of the said notice for the purpose of arriving at a mutual arrangement. However, KSEB vide its letters dated 3.2.2020 and 17.3.2020 rejected the claims of the Petitioner solely for the reason of non-quantification of the compensation despite the fact that the Petitioner has already provided the indicative cost towards installation of FGD system as provided by CEA.

(c) Quantification of compensation towards any Change in Law event can only be done after approval of Change in Law event is either accorded by the Procurer or by this Commission. Merely, by quantifying the amount of compensation, the Petitioner cannot claim approval of an event of Change in Law event. Even as per Article 34 of the PSA, the first step for claiming compensation on account of Change in Law event is to notify the Procurer for approval and acceptance of an event as Change in Law event i.e. to carry out mutual discussion for arriving at a mutually agreed arrangement. However, KSEB denied accepting the events as Change in Law events in absence of which the Petitioner could not have proceeded towards quantification of compensation.

(d) Apart from the other Change in Law events, KSEB also did not give its concurrence for installation of FGD system and its associated equipment despite knowing well that installation of FGD system and its associated equipment is to be completed within a stipulated time period and it also requires support from the lenders since it involves substantial infusion of capital. The



Commission in its order dated 23.4.2020 in Petition No. 446/MP/2019 observed that the lending agencies need comfort in terms of approval of the Commission so that there are no problems in debt servicing of loan that may be availed by the generating companies.

(e) The Commission vide order dated 18.5.2020 in Petition No. 210/MP/2019 in the matter of Sembcorp Energy India Limited v. Southern Power Distribution Company of Telangana Limited and Anr. has accorded in-principle approval of Change in Law event inasmuch as the Commission has allowed the indicative cost of Rs. 0.392 crore/MW towards installation of FGD as recommended by CEA on provisional basis. The above case was also related to interpretation of the provisions of the PSA executed on DBFOO model as in the present case and, therefore, the said decision squarely applies to the present case as well.

(f) MoEF&CC vide Notification dated 7.12.2015 has amended the Environment (Protection) Rules, 1986 and introduced the Environment (Protection) Rules, 2015, which requires the Petitioner to undertake measures like retrofitting, such as installation of FGD equipment, installation of mercury analyser. The said notification, being issued after the bid date, is Change in Law event in terms of the provisions contained under Article 39(1) of the PSA.

(g) Further, CEA vide its advisory dated 28.3.2019 in the case of the Petitioner has given an indicative estimated cost for limestone based FGD to Rs. 0.435 crore per MW, which is exclusive of operating cost. Thus, it is evident that installation of FGD system is capital intensive process which requires the Petitioner to approach financial institutions and other lenders. Therefore, the Petitioner is seeking in-principle approval of this expenditure as an order by the Commission would help the Petitioner in securing the loans from financial institutions or other lenders. This Commission has in Petition No. 209/MP/2019 (Sembcorp Energy India Ltd. v. Southern Power Distribution Co. Telangana Ltd. and Ors.) and Petition No. 446/MP/2019 (Sasan Power Ltd. v. MPPMCL and Ors.) has held that MoEF&CC Notification requiring compliance of Environment (Protection) Amendment Rules, 2015 is of the nature of Change in

Law and has also approved the provisional capital cost and operational cost along with other expenses.

(h) Pursuant to issuance of MoEF&CC Notification dated 25.1.2016, the Petitioner was subjected to incur additional expenditure towards the cost of fly ash transportation. The said provision of fly ash transportation was implemented by the Petitioner immediately after the said notification came into force. However, since the power supply started with effect from 1.10.2017, the Petitioner has claimed the additional cost towards fly ash transportation from the said date of 1.10.2017. The details of cost incurred towards fly ash transportation by the Petitioner are as under:

Year of supply	Energy supplied (MUs)	Cost incurred (Rs.)
1.10.2017 to 31.3.2018	322	63,52,929
1.4.2018 to 31.3.2019	715	1,29,25,116
1.4.2019 to 31.3.2020	766	1,30,63,522
	<b>Total</b>	<b>3,23,41,568</b>

(i) The Commission vide order dated 19.12.2017 in Petition No. 229/MP/2016 has held that the additional cost towards fly ash transportation is on account of amendment vide Notification dated 25.1.2016 issued by MoEF&CC and any expenditure incurred due to such amendment is admissible under Change in Law. Thus, the Petitioner is entitled to claim the compensation on account of the same. The Petitioner is willing to furnish any other proof or documents as may be ordered by the Commission for ascertaining a definite amount of compensation on account of cost incurred towards fly ash transportation.

(j) As on the date of bid, the applicable consent renewal fee was Rs. 2,50,000/- for industries having an investment of more than Rs. 1000 crore. Thereafter, the Government of Chhattisgarh vide Notification No. F-1/20/2016/32 dated 6.10.2016 amended the Water (Prevention and Control of Pollution) (Consent) Chhattisgarh Rules, 1975 and has also introduced two categories above the categories of 'More than Rs. 1000 crore but less than Rs. 2500 crore' based on the investment, namely, industries having investment of more than Rs. 2500 crore but less than Rs. 5000 crore with consent renewal

fee as Rs. 10 lakh and industries having investment of more than Rs. 5000 crore with consent renewal fees as Rs. 15 lakh. The asset value of the Petitioner's 1200 MW Project as on 30.6.2019 was Rs. 4670 crore and, therefore, Rs. 10 lakh was paid to Chhattisgarh Environment Conservation Board towards consent renewal under the category of industries having investment of more than Rs. 2500 crore but less than Rs. 5000 crore for the financial years 2017-18 and 2018-19. Thus, the Petitioner was subjected to pay an amount of Rs 10 lakh each for the financial years 2017-18 and 2018-19 as against the consent renewable fees of Rs. 2.5 lakh which was applicable as on the bid date i.e. 14.11.2014.

(k) Thereafter, the asset value of the Petitioner's Project increased to Rs. 5168 crore as on 31.12.2017 and, therefore, the Petitioner has paid Rs. 15 lakh to Chhattisgarh Environmental Conservation Board towards consent renewal fees under the category of industries having investment of more than Rs. 5000 crore for the financial years 2019-20 and 2020-21. The Notification dated 6.10.2016 issued by the Government of Chhattisgarh has already been considered and affirmed by the Commission as Change in Law in order dated 12.6.2019 in Petition No. 118/MP/2018 in the matter of TRN Energy Pvt. Ltd. v. PVVNL and Ors.

(l) In view of the above, the aggregate financial effect of Change in Law events exceeds Rs. 1 crore which fulfils the criteria provided in Article 34.1 of the PSA. Apart from the requirement of fulfilling the said condition of Rs. 1 crore, the Petitioner is also seeking in principle approval of the Change in Law events enumerated in the present Petition. Further, the actual compensation and establishing the NPV of net cash flow is nothing but the actual additional expenditure incurred by the Petitioner so as to place the Petitioner in the same economic position as it would have enjoyed had there been no such Change in Law events. Hence, the in-principle approval of the Change in Law events ought to be allowed by the Commission considering the settled position of law in relation to the claims made by the Petitioner.

(m) Admittedly, the carrying costs can be ascertained only after the processing of the compensation. However, its applicability cannot be

questioned, and the Petitioner is eligible to claim appropriate carrying cost on account of the Change in Law events. The Change in Law relief is based on the principle of restitution and requires the affected party to be restored to the same economic position as if the Change in Law event had not occurred. One of the key ingredients for such restitution contemplated under the PSA is payment of 'carrying cost'. If the same is not done, then the affected party will not be restored to the same economic position which existed as on bid date. Therefore, the Petitioner is entitled to the carrying costs/ interest cost from the effective date of the respective Change in Law events till the date of making payment of Change in Law compensation to the Petitioner.

### **Hearing dated 14.10.2021**

12. The matter was heard on 14.10.2021 through video conferencing. During the course of hearing, the learned counsel for the Petitioner placed reliance on the order dated 14.08.2021 passed by this Commission in Petition No. 161/MP/2020 (Bharat Aluminium Company Limited v. Tamil Nadu Generation and Distribution Corporation Ltd. & Ors.), wherein the Change in Law claims of the Petitioner in respect of PPA dated 23.8.2013 entered into between the Petitioner and TANGEDCO for supply of power from same generating station, have already been considered by this Commission.

13. *Per contra*, the learned counsel for Respondent, KSEB submitted that unlike the PPA entered into between the Petitioner and TANGEDCO under Case 1 bidding process, the PSA between the Petitioner and KSEB has been entered into on the basis of Design, Build, Finance, own and Operate ('DBFOO') and, therefore, any relief for Change in Law event is required to be granted to the Petitioner in terms of the provisions of this PSA. The learned counsel for KSEB further submitted that the various Change in Law events claimed by the Petitioner have already been declared/

considered by the Commission in various decisions as Change in Law events in-principle and as such the Respondent has no objection towards the same. However, in the present case, for declaration of such events as Change in Law events under Article 34.1 of the PSA, as prayed for by the Petitioner, the Petitioner has to show that Petitioner has incurred expenses for the compliance of the same and such expenditure has resulted in increase in costs or reduction of net after-tax return or other financial burden in respect of the contracted capacity, and the aggregate financial effect exceeds the higher of Rs. 1 crore or 0.1% of capacity charges in any accounting year. The learned counsel referred to communication of KSEB vide letter dated 17.03.2020 in which KSEB gave reply specifying the details to be submitted by the Petitioner for admission of Change in Law claim. However, the Petitioner has not responded to the queries of KSEB. Therefore, the present Petition is pre-mature as the Petitioner has either not incurred any expenditure so far or not provided the details of expenditure incurred so far in respect of its various Change in Law claims.

14. *In rebuttal*, the learned counsel for Petitioner relied on the Commission's order dated 18.05.2020 in Petition No. 210/MP/2019 in the case of Sembcorp Energy India Limited v. Southern Power Distribution Company of Telangana Limited (TSSPDCL) & Anr. wherein the provisions of PSA were executed on DBFOO model as that in the present case and this Commission allowed the indicative cost towards the installation of FGD system as recommended by CEA on provisional basis. The learned counsel for the Petitioner submitted that by virtue of the present Petition, the Petitioner is only claiming the approval of the Change in Law events and the details of compensation for the actual expenses already incurred/ would be incurred and its computation would be submitted to KSEB. The issue of satisfying the threshold of Rs. 1 crore as envisaged in Article 34.1 of PSA does not hold any relevance for

approval of Change in Law events and would only be relevant when the Petitioner would seek payment of compensation on account of the Change in Law events. The learned counsel further submitted that the Petitioner will furnish the details of actual expenditure to be incurred/ already incurred by the Petitioner to the Respondent, KSEB. However, it ought not to be the basis for not considering the prayers of the Petitioner seeking declaration of the aforesaid events as Change in Law events.

15. In response to the specific query of the Commission as to whether the Petitioner is seeking only in-principle approval towards additional expenditure towards transportation of fly ash pursuant to MoEF&CC Notification dated 25.1.2016, the learned counsel for the Petitioner submitted that the Petitioner has already incurred certain expenditure towards fly ash transportation. However, presently, the Petitioner is only seeking in-principle approval of aforesaid event as Change in Law event with liberty to approach the Commission with the necessary documents in this regard.

16. Based on the request of the learned counsel for the parties, the Commission permitted the Petitioner and the Respondent, KSEB to file their brief notes of submissions, if any. Pursuant to the aforesaid liberty, the Petitioner and KSEB have filed their respective note of submissions/ written submissions mainly reiterating the submissions made in their pleadings, which are not repeated herein for the sake of brevity.

### **Analysis and Decision**

17. We have considered the submissions of the Petitioner and KSEB. KSEB has not raised any objection on the jurisdiction of this Commission to decide the matter. Besides, since the generating station of the Petitioner is located in the State of

Chhattisgarh and is supplying power to KSEB in the State of Kerala in terms of PSA dated 26.12.2014 and TANGEDCO in the State of Tamil Nadu in terms of PPA dated 23.8.2013, it qualifies within the scope of 'composite scheme' of generation and supply in more than one State as envisaged under Section 79(1)(b) of the Act. Thus, this Commission has the jurisdiction to adjudicate the dispute in terms of the PSA executed between the Petitioner and the Respondent, KSEB in terms of provisions of Section 79(1)(b) of the Act and as held by the Hon'ble Supreme Court in its judgment dated 11.4.2017 in Civil Appeal Nos.5399-5400 of 2016. Accordingly, we proceed to deal with the issues involved in the present case.

18. After going through the pleadings on the record and the submissions during the hearing, the following issues arise for our consideration:

**Issue No.1: Whether the provisions of the Power Supply Agreement with regard to notice of an event of Change in Law have been complied with?**

**Issue No.2: What is the scope of Change in Law in the Power Supply Agreement?**

**Issue No.3: Whether claims are admissible under Change in Law? If yes, to what extent?**

**Issue No.4: What should be the mechanism for processing and reimbursement of admitted claims under Change in Law?**

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

**Issue No. 1: Whether the provisions of the Power Supply Agreement with regard to notice of an event of Change in Law have been complied with?**

19. The claims of the Petitioner in the present Petition pertain to Change in Law events related to PSA dated 26.12.2014. There is no specific provision for notification of Change in Law in the PSA dated 26.12.2014. However, Article 34.1 of

the PSA provides for 'Increase in Cost', wherein there is a reference to notice to be given by the supplier to the procurers. Relevant portion is extracted as under:

*34.1 If as a result of Change in Law, the Supplier suffers an increase in costs or reduction in net after-tax return or other financial burden for and in respect of Contracted Capacity, the aggregate financial effect of which exceeds the higher of Rs. 1 crore (Rupees one crore) and 0.1% (zero point one per cent) of the Capacity Charge in any Accounting Year, the Supplier may so notify the Utility and propose amendments to this Agreement so as to place the Supplier in the same financial position as it would have enjoyed had there been no such Change in Law resulting in increased costs, reduction in return or other financial burden as aforesaid. Upon notice by the Supplier, the Parties shall meet, as soon as reasonably practicable as but no later than 30 (thirty) days from the date of notice, and either agree on amendments to this Agreement or on any other mutually agreed arrangement:*

*Provided that if no agreement is reached within 90 (ninety) days of the aforesaid notice, the Supplier may by notice require the Utility to pay an amount that would place the Supplier in the same financial position that it would have enjoyed had there been no such Change in Law, and within 15 (fifteen) days of receipt of such notice, along with particulars thereof, the Utility shall pay the amount specified therein; provided that if the Utility shall dispute such claim of the Supplier, the same shall be settled in accordance with the Dispute Resolution Procedure. For the avoidance of doubt, it is agreed that this Clause 34.1 shall be restricted to changes in law directly affecting the Supplier's costs of performing its obligations under this Agreement."*

20. There is similar reference in Article 34.2 of the PSA that deals with the case when Change in Law leads to reduction in cost. In the latter case, the procurers have to serve notice upon the supplier. Article 34.1 and Article 34.2 of the PSA provide for timelines once the initial notice is served upon the other party. However, there is no mention about the period when the initial notice for Change in Law is to be served upon the party.

21. As per the provision in Article 34.1 of the PSA, if as a result of Change in Law, the supplier suffers an increase in costs or reduction in net after-tax return or other financial burden for and in respect of the contracted capacity, the aggregate financial impact of which exceeds higher of Rs. 1 crore and 0.01% of the capacity charges in any accounting year, it is required to give a notice to the Procurers about occurrence of Change in Law.



22. The Petitioner has further submitted that notice dated 14.1.2020 was issued to KSEB seeking declaration and compensation on account of additional cost towards amendment in Environment (Protection) Rules, 1986; fly ash transportation; and increase in consent fee. In response, KSEB vide its letter dated 3.2.2020 informed the Petitioner that its claim can be considered only after furnishing the required details in terms of Articles 34.1, 34.3 and 34.4 of the PSA. The Petitioner vide its letter dated 15.2.2020 requested KSEB to furnish any specific query required for approving the Change in Law claims and to process the Change in Law compensation. In response, KSEB vide its letter dated 17.3.2020 communicated various queries and intimated that based on the available details, its claims cannot be processed at this stage. The Petitioner has submitted that KSEB vide its letter dated 17.3.2020 has failed to appreciate that in principle approval of the Change in Law events is necessary before the Petitioner could quantify the amount of compensation and that KSEB has rejected the request of approving the Change in Law events sought by the Petitioner.

23. Considering the fact that there is no specific requirement in the PSA for notifying the Respondents in a given time frame; that the Petitioner has served a notice to this effect on 14.1.2020; and that KSEB has not recognised the claims of the Petitioner and rather sought various clarifications, in our view, the Petitioner has complied with the requirement of PSA regarding prior notice to the Respondents before approaching the Commission.

## **Issue No.2: What is the scope of Change in Law in the Power Supply Agreement?**

24. Article 34 of the PSA between the Petitioner and KSEB that deals with events of Change in Law and Article 36.4 that deals with dispute resolution which are extracted for reference as under:

### *“ARTICLE 34 CHANGE IN LAW*

#### *34.1 Increase in costs:*

*If as a result of Change in Law, the Supplier suffers an increase in costs or reduction in net after-tax return or other financial burden for and in respect of Contracted Capacity, the aggregate financial effect of which exceeds the higher of Rs. 1 crore (Rupees one crore) and 0.1% (zero point one per cent) of the Capacity Charge in any Accounting Year, the Supplier may so notify the Utility and propose amendments to this Agreement so as to place the Supplier in the same financial position as it would have enjoyed had there been no such Change in Law resulting in increased costs, reduction in return or other financial burden as aforesaid. Upon notice by the Supplier, the Parties shall meet, as soon as reasonably practicable but no later than 30 (thirty) days from the date of notice, and either agree on amendments to this Agreement or on any other mutually agreed arrangement:*

*Provided that if no agreement is reached within 90 (ninety) days of the aforesaid notice, the Supplier may by notice require the Utility to pay an amount that would place the Supplier in the same financial position that it would have enjoyed had there been no such Change in Law, and within 15 (fifteen) days of receipt of such notice, along with particulars thereof, the Utility shall pay the amount specified therein; provided that if the Utility shall dispute such claim of the Supplier, the same shall be settled in accordance with the Dispute Resolution Procedure. For the avoidance of doubt, it is agreed that this Clause 34.1 shall be restricted to changes in law directly affecting the Supplier's costs of performing its obligations under this Agreement.*

#### *34.2 Reduction in costs*

*If as a result of Change in Law, the Supplier benefits from a reduction in costs or increase in net after-tax return or other financial gains for and in respect of Contracted Capacity, the aggregate financial effect of which exceeds the higher of Rs. 1 crore (Rupees one crore) and 0.1% (zero point one per cent) of the Capacity Charge in any Accounting Year, the Utility may so notify the Supplier and propose amendments to this Agreement so as to place the Supplier in the same financial position as it would have enjoyed had there been no such Change in Law resulting in decreased costs, increase in return or other financial gains as aforesaid. Upon notice by the Utility, the Parties shall meet, as soon as reasonably practicable but no later than 30 (thirty) days from the date of notice, and either agree on such amendments to this Agreement or on any other mutually agreed arrangement:*

*Provided that if no agreement is reached within 90 (ninety) days of the aforesaid notice, the Utility may by notice require the Supplier to pay an amount that would place the Supplier in the same financial position that it would have enjoyed had there been no such Change in Law, and within 15 (fifteen) days of receipt of such notice, along with particulars thereof, the Supplier shall pay the amount specified therein to the*

*Utility; provided that if the Supplier shall dispute such claim of the Utility, the same shall be settled in accordance with the Dispute Resolution Procedure. For the avoidance of doubt, it is agreed that this Clause 34.2 shall be restricted to changes in law directly affecting the Supplier's costs of performing its obligations under this Agreement.*

#### *34.3 Protection of NPV*

*Pursuant to the provisions of Clauses 34.1 and 34.2 and for the purposes of placing the Supplier in the same financial position as it would have enjoyed had there been no Change in Law affecting the costs, returns or other financial burden or gains, the Parties shall rely on the Financial Model to establish a net present value (the "NPV") of the net cash flow and make necessary adjustments in costs, revenues, compensation or other relevant parameters, as the case may be, to procure that the NPV of the net cash flow is the same as it would have been if no Change in Law had occurred. For the avoidance of doubt, the Parties expressly agree that for determination of NPV, the discount rate to be used shall be equal to the weighted average rate of interest at which the Supplier has raised the Debt Due under its Financing Agreements.*

#### *34.4 Restriction on cash compensation*

*The Parties acknowledge and agree that the demand for cash compensation under this Article 34 shall be restricted to the effect of Change in Law during the respective Accounting Year and shall be made at any time after commencement of such year, but no later than one year from the close of such Accounting Year. Any demand for cash compensation payable for and in respect of any subsequent Accounting Year shall be made after the commencement of the Accounting Year to which the demand pertains, but no later than 2 (two) years from the close of such Accounting Year.*

*34.5 No claim in the event of recovery from Buyers Notwithstanding anything to the contrary contained in this Agreement, the Utility shall not in any manner be liable to reimburse to the Supplier any sums on account of a Change in Law if the same are recoverable from the Buyers.*

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#### **36.4 Adjudication by the Commission**

*36.4.1 In the event a Dispute is required under Applicable Laws to be adjudicated upon by the Commission, such Dispute shall be submitted for adjudication by the Commission in accordance with Applicable Laws and all references to Dispute Settlement Procedure shall be construed accordingly. For the avoidance of doubt, the Parties hereto agree that the adjudication hereunder shall not be final and binding until an appeal, if any, against such adjudication has been decided by the appellate tribunal, or no such appeal has been preferred within the time specified in the Applicable Law."*

25. As per Article 39 of the PSA dated 26.12.2014, Change in Law is defined as under:

*"Change in Law" means the occurrence of any of the following after the Bid Date:*

*(a) the enactment of any new Indian law';*

*(b) the repeal, modification or re-enactment of any existing Indian law;*

*(c) the commencement of any Indian law which has not entered into effect until the Bid Date;*

*(d) a change in the interpretation or application of any Indian law by a judgment of a court of record which has become final, conclusive and binding, as compared to such interpretation or application by a court of record prior to the Bid Date; or*

*(e) any change in the rates of any of die Taxes that have a direct effect on the Project;”*

26. A reading of the above-mentioned provision of Article 39 of PSA reveals that the events covered under Change in Law are broadly as under:

(a) Any enactment of Indian law; or

(b) Any repeal, modification or re-enactment of any law; or

(c) Any change in interpretation or application of any Indian law by a court of record, or

(d) Any change in the rates of any direct taxes which have direct impact on the project imposition.

27. In clause (b) of Article 1.2 of the PSA, there is an interpretation of the term “law’ as under:

*“(b) reference to laws of the State, laws of India or Indian law or regulation having the force of law shall include the laws, acts, ordinances, rules, regulations, bye laws or notifications which have the force of law in the territory of India and as from time to time may be amended, modified, supplemented, extended or re-enacted.”*

28. The term “Governmental Instrumentality” is also defined in Article 39 of the PSA as under:

*“Governmental Instrumentality” shall means any department, division or sub-division of the Government of India or the State Government and includes any Commission, board, authority, agency or municipal and other local authority or statutory body including Panchyat, under the control of the Government of India or the State Government, as case may be, and having jurisdiction over all or any part of the Power Station or the perforce of all or any of the services or obligations of the Supplier under or pursuant to this Agreement .”*

29. As per the above definitions, *Governmental Instrumentality* includes (a) all laws department, division or sub-division of the Government of India or the State Government and includes any Commission, board, authority, agency or municipal and other local authority or statutory body, including Panchayat, under the control of the Government of India or the State Government, as the case may be, and having jurisdiction over all or any part of the Power Station or the performance of all or any of the services or obligations of the supplier under or pursuant to this Agreement. If any of these laws affects 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 39 of the PSA. Thus, the scope of Change in Law as stated above is admitted and unambiguous.

30. At the juncture, it is also pertinent to deal with the primary objection of the Respondent, KSEB which has contended that the present Petition is pre-mature and, therefore, is not maintainable. KSEB has submitted that as per Article 34.1 to Article 34.5 of the PSA, the Petitioner would be eligible for compensation with respect to the occurrence of Change in Law event only (i) if the expenses pointed out are already incurred in an accounting year, (ii) if as a result of Change in Law, the Petitioner has suffered an increase in cost or reduction in net after tax return or other financial burden for and in respect of contracted capacity, the aggregate financial effect of which exceeds the higher of Rs. 1 crore and 0.1% of the capacity charges in any accounting year, and (iii) any demand for cash compensation payable for and in respect of the any subsequent accounting year shall be made after the commencement of the accounting year to which the demand pertains, but not later than 2 years from the close of the said accounting year. KSEB has submitted that despite writing to the Petitioner on 17.3.2020, no details regarding expenditure, if

any, actually incurred by it in any particular year, purpose/ nature of such expenditure and apportionment of such expenditure, etc. have been furnished by the Petitioner in support of its claims in terms of the aforesaid Articles. Therefore, it has been contended that the present Petition is not maintainable.

31. *Per contra*, the Petitioner has submitted that the present Petition has been filed seeking approval of Change in Law events and the requirement to meet the threshold of Rs. 1 crore as specified under Article 34.1 of the PSA does not hold any relevance at this stage. In any case, it is evident that the estimation of expenses attributable to the Change in Law events as claimed would exceed the threshold of Rs.1 crore. However, the said issue as such would only be relevant when the compensation on account of Change in Law events has to be approved by the Commission. The detailed computation of the compensation would be submitted by the Petitioner once the Change in Law events as claimed by the Petitioner are allowed by the Commission. It has also been submitted that KSEB has failed to appreciate that in-principle approval of the Change in Law events is necessary before the Petitioner could quantify the amount of compensation and a final claim towards compensation on account of Change in Law events can be made only after commissioning of the Project which in turn can only be done after approval of Change in Law event is either accorded by the Procurer or by the Commission.

32. We have considered the submissions made by the parties. At the outset, we take note that the Petitioner has neither denied nor refuted the applicability of the provisions of the Article 34 of the PSA in respect of compensation to be provided for the Change in Law events. The only contention is that prior to the determination/ computation of the compensation in respect of its Change in Law claims, the

approval of such Change in Law events are necessary either by the Procurer or by the Commission. Further, the Petitioner has also undertaken to provide the details computation regarding Change in Law events upon approval of such events. We notice that in terms of the provision of the Article 34.1 of the PSA, the Petitioner had issued notice for approval of Change in Law and consequently, for the compensation for such event and the parties also exchanged certain communications for want of additional details. However, ultimately, the matter regarding Change in Law approval and/or compensation could not be mutually resolved and culminated into filing of the present Petition. In the above circumstances, we do not find any reason not to consider the prayers of the Petitioner for declaration of the events as Change in Law events especially in terms of the Article 39 of the PSA. Indisputably, any relief/compensation for Change in Law events approved by the Commission in the present Petition has to be in terms of the provisions of Article 34 of the PSA for which the Petitioner will require to furnish all the necessary details and computations to the Respondent, KSEB.

**Issue No. 3: Whether claims are admissible under Change in Law event? If yes, to what extent?**

33. In the light of and in view of the broad principles discussed above, we proceed to deal with the claims of the Petitioner under Change in Law.

*(A) Increase in cost due to introduction of Environment (Protection) Amendment Rules, 2015*

34. The Petitioner has submitted that subsequent to the bid date i.e. 14.11.2014, MoEF&CC vide Notification dated 7.12.2015 introduced the Environment (Protection) Amendment Rules, 2015 (hereinafter referred to as 'the 2015 Amendment Notification') and amended the Environment (Protection) Rules, 1986. As per 2015 Amendment Notification, the Petitioner is required to undertake measures for plant



retrofitting, such as, installation of Flue Gas De-sulphurization (FGD) system in order to comply with revised emission norms. The Petitioner has submitted that to install FGD system, it is required to incur substantial capital expenditure towards setting up of additional plant, machinery and equipment as well as carrying out necessary modifications to the existing plant, machinery and equipment. It has been submitted that the requirement of installation of FGD system to comply with the revised emission norms specified in the 2015 Amendment Notification is covered under Change in Law in terms of Article 39 of the PSA.

35. The Petitioner has further submitted that Ministry of Power, vide letter dated 30.5.2018, has issued direction to the Commission under Section 107 of the Act, wherein it has been recognized that the 2015 Amendment Notification is Change in Law event. The Petitioner has submitted that the Commission in its various orders has considered the 2015 Amendment Notification as Change in Law event. The Commission in its order dated 20.3.2017 in Petition No. 72/MP/2016 while granting in-principle approval for additional expenditure on account of installation of FGD system and associated facilities, directed the Petitioner therein to approach CEA for deciding the optimum technology, associated costs and major issues to be faced in installation of different systems in compliance of the 2015 Amendment Notification.

36. It has been submitted by the Petitioner that it had approached CEA seeking advice for suitable technology and indicative cost in installation of FGD system for compliance of the 2015 Amendment Notification. CEA vide its Advisory dated 28.3.2019 advised that wet limestone based FGD or ammonia based FGD technologies are feasible for the generating station of the Petitioner. Based on the advice of CEA, the Petitioner has opted for wet limestone based FGD. CEA, in its



report, indicated an additional increase in auxiliary power consumption of 1% (excluding 0.3% with CGH) and has given an indicative estimated cost of limestone based FGD, amounting to Rs. 0.435 crore per MW [capital expenditure (CAPEX) only], which is exclusive of operating cost (OPEX). OPEX will include reagent cost, cost towards water consumption, manpower cost, cost on account of additional auxiliary power consumption and by product handling cost, etc.

37. The Petitioner has submitted that based on the advice of CEA, it has already issued tender for the purpose of installation of wet limestone based FGD system. It has been further submitted that on account of additional cost towards installation of FGD system, the Petitioner is entitled to compensation as the 2015 Amendment Notification is a Change in Law event.

38. The Petitioner has submitted that pursuant to the 2015 Amendment Notification, the Central Pollution Control Board has also, in April 2018, issued guidelines for online continuous emission monitoring system. In compliance thereof, the Petitioner has installed a Mercury Analyser in order to have a continuous emission monitoring system of the generating station, which has cost Rs. 53.10 lakh.

39. The Respondent, KSEB has submitted that the expenditure for installation of FGD system has not been incurred as on date and the Petitioner is claiming that it may incur certain expenditure in near future. However, under Article 34 of the PSA, the claim can only be raised after the expenditure is actually incurred by the Petitioner and the relevant details being submitted for consideration of its eligibility under the said Article. The Petitioner has also referred the cost of installation of Mercury Analyser as Rs. 53.10 lakh without supporting any details of such expenditure and without giving any date or supporting data for such expenditure.

Therefore, the aforesaid claims of the Petitioner do not fall within the ambit of Article 34 of the PSA and, therefore, deserve to be rejected.

40. *Per contra*, the Petitioner has submitted that as per the advisory dated 28.3.2019 issued by CEA, installation of FGD system is capital intensive process which requires the Petitioner to approach financial institutions and other lenders. The Petitioner has submitted that on 23.10.2019, 25.10.2019 and 28.10.2019, bids were invited for installation of FGD system. Subsequently, the Petitioner vide its e-mail dated 25.4.2020 invited KSEB to witness the opening of bids. However, no response was received from KSEB in this regard. On 29.6.2020, the Petitioner issued Letter of Intent (LoI) to Zhejiang TUNA Environmental Science and Technology Company Limited. The Petitioner has submitted that in order to install FGD system, it would be required to infuse substantial capital as well as operational expenditure. Therefore, it is seeking in-principle approval in securing loan from financial institutions or other lenders. The Petitioner in this regard has relied upon the orders of the Commission in Petition No. 161/MP/2020, Petition No. 210/MP/2019, Petition No. 209/MP/2019 and Petition No. 446/MP/2019 whereby the 2015 Amendment Notification requiring compliance of Environment (Protection) Amendment Rules, 2015 has been held as Change in Law event. In view of the above, the Petitioner has submitted that KSEB is liable to compensate the Petitioner for such additional expenses and the estimated cost as mentioned in the advisory of CEA dated 28.3.2019 may be allowed on provisional basis.

41. We have considered the submissions made by the parties. MoEF&CC is a Ministry under Government of India and, therefore, is an Indian Government Instrumentality in terms of Article 39.1 of the PSA. The Environment (Protection)

Rules, 1986 was issued by MoEF&CC in exercise of powers conferred under Sections 6 and 25 of the Environment (Protection) Act, 1986 which qualify as “law” in terms of the PSA dated 26.12.2014. The norms for emission of environmental pollutants to be complied with by the thermal power plants were prescribed in Schedule I of Environment (Protection) Rules, 1986. The cut-off date in present case under the PSA is 14.11.2014 and MoEF&CC issued the Environment Clearance for setting up the generating station on 14.7.2007. MoEF&CC notified the 2015 Amendment Notification on 7.12.2015 amending Schedule I of the Environment (Protection) Rules, 1986 which provided for revised parameters for water consumption, particulate matters, Sulphur Dioxide, Oxides of Nitrogen and Mercury in respect of thermal power plants. The bid date of the PSA being 14.11.2014, the 2015 Amendment Notification which was notified on 7.12.2015 by MoEF&CC, an Indian Government Instrumentality in terms of the PSA, which revised the environmental norms prescribed in the Environment (Protection) Rules, 1986, qualifies as Change in Law event in terms of the PSA dated 26.12.2014.

42. Further, the issue of allowing in-principle approval for incurring the capital expenditure towards installation of emission control systems on the provisional basis to comply with the revised emission norms as specified vide 2015 Amendment Notification is no longer res-integra. The Commission in its various orders has accorded the approval to the generating stations for incurring the capital expenditure towards installation of emission control system on provisional basis. Moreover, the Commission has also recognized the need of comforting the lenders financing the generating station for undertaking capex for installation of FGD/ emissions control systems. Also, as rightly pointed out by the Petitioner, the Commission vide order dated 18.5.2020 in Petition No. 210/MP/2019 in the matter of Sembcorp Energy

India Ltd. v. Southern Power Distribution Co. of Telangana Limited and Anr has also accorded the approval to the indicative cost towards installation of FGD system as recommended by CEA on provisional basis under the PSA, which was also on the basis of DBFOO Guidelines. The relevant extract of the said decision dated 18.5.2020 is as under:

*“51. Considering the above and recognizing the fact that the cost considered by CEA is indicative only and the cost claimed by the Petitioner would be discovered based on open competitive bidding, the Commission allows the indicative cost of Rs. 0.392 crore/MW recommended by CEA on provisional basis. The Commission also allows, subject to prudence check, the Petitioner to claim expenditure towards IDC, taxes & duties, FERV (if any) and expenditure towards project management & engineering services at actuals after commissioning of the FGD system.”*

43. Further, Ministry of Power has also recognized the problems being faced by the generating companies on account of financial institutions seeking assurance of fund flow after installation of FGD system. The Ministry of Power, vide its letter dated 21.1.2020, addressed to Secretary to Forum of Regulators (who is also Secretary to the Commission) stated as under:

*“2. A copy of the minutes of the meeting held in Ministry of Power on 21.10.2019 with Banks/Financial Institutions regarding issues related to financing of FGDs is enclosed wherein as per Para 4.2 inter alia mentioned as follows:*

*“IPPs requested that provisional tariff on account of FGD may be allowed as Banks are not willing to finance unless there is clear cut CERC orders on additional tariff, which could be possible only when FGD is commissioned. It was requested that based on the estimation of cost by CEA, CERC may fix provisional tariff after allowing some discount (say 10%). Chairperson, CEA informed that they had drafted some norms on provisional tariff and it had been sent to CERC for consideration. Hon'ble Minister advised CEA to follow up with CERC and this issue may be taken up in the Forum of Regulators (FOR) meeting which could be convened at the earliest. The matter regarding fixation of provisional tariff on account of FGD installation may be discussed with CERC.”*

*3. In this regard, CEA has informed that:*

*i. Financing of pollution control equipment is mainly an issue for the projects commissioned under section 63 of the Act.*

*ii. During discussion, CERC pointed out that a few generating companies, which have set up generating station under section 63 of the Act have filed petition for*

compensation due to change in law impacting revenue and cost during the operating period.

iii. CERC has already passed some orders in such petitions recommending requirement of installing additional equipment to meet revised environmental norms as change in law and giving liberty to the Petitioner to approach to the commission for determination of revised norms.

iv. CERC was of the opinion that normally such assurance from regulator should be sufficient for the lenders to fund additional capital expenditure required to meet revised environmental norms.

4. In view of the above, it is requested that the issue on 'provisional tariff' on account of installation of FGD, may be included as an Agenda for the next Forum of Regulators (FOR) meeting and the decision taken, therein, may be communicated to Ministry of Power, at the earliest."

44. Further, the Ministry of Power vide its letter dated 20.4.2020 addressed to the Secretary of the Commission, has stated as under:

*"I am directed to refer to the meeting taken by Secretary (Power) through Video Conferencing on 09.04.2020 (copy of the meeting are enclosed as Annex-I) and this Ministry's letter of even number dated 21.01.2020 (copy enclosed as Annex-II) with regard to taking up the matter with Forum of Regulators on the above mentioned subject. It was observed that CERC was also contemplating to amend the Tariff Regulations 2019-24 to provide for norms for installation of FGDS for complying with the environmental operating norms as Change in Law.*

*2. In the above-mentioned meeting held on 09.04.2020, it was recommended that in view of the stipulated timelines decided by the Hon'ble Supreme Court for installation of FGDs, investment approval may be accorded by CERC at the earliest possible on applications of FGDs submitted by Gencos based on the CEA's benchmark cost and indicative technologies so as to facilitate funding of banks/ FIs. It was also felt that upon completion of the installation of FGD or a month before the completion of installation, the applications for fixation/revision of tariff may be filed and CERC would, as far as possible, dispose them in a time frame of 3 months so that the Gencos are not cash strapped and the lenders feel assured. Similar process may also be taken up by CERC with SERCs.*

*3. Accordingly, CERC is requested to take necessary action and devise a mechanism vide which applications of Gencos for installation of FGD as per norms of CEA, gets decided by the Appropriate Commission within a period of three months for Investment approval. The same is expected to facilitate assurance for lenders on their lending to Gencos for installation of FGD.*

*4. This issue with the approval of Hon'ble Minister of State (IC) Power and NRE."*

45. The Petitioner in the present Petition is seeking in-principle approval for the expenditure to be incurred in installing the FGD system in order to comply with the revised emission norms. In this regard, the Petitioner had approached CEA for

approval of suitable technology. CEA vide letter dated 28.3.2019 has recommended suitable FGD technology and corresponding indicative cost for the generating station. CEA also suggested that the FGD system installation should be done through the process of open competitive bidding in consultation with representative of the lead Procurer and that lead Procurer may be invited to participate in the bidding process. However, responsibility for adhering to timelines of relevant Pollution Control Board was the responsibility of the Petitioner. Relevant extracts from the report of CEA as regards technology and cost aspects, are as under:

#### ***“TECHNOLOGY***

*In feasibility report BALCO Power Plant has opted for “Wet Lime Stone” technology. However following two So<sub>2</sub> removal technologies are technically & Commercially feasible at BALCO-KORBA .*

*i. Wet Lime stone Base FGD.*

*ii. Ammonia Based FGD*

*In case Wet FGD (Lime stone based) is considered by BALCO-KORBA, the reagent source may be selected based on availability of limestone, limestone purity, cost and quality. Additionally Source of limestone should be chosen with life cycle cost analysis.*

*In case of Ammonia based FGD, utmost care shall be needed to handle the reagent and the demand of the by product may be ascertained. Also disposal/ use of by product if no demand is available, may be taken care off.*

#### ***ENGINEERING ASPECTS***

- 1. Absorber-Individual absorber for each Unit.*
- 2. Limit SO<sub>2</sub> below environment norms with up to 0.6 % Sulfur content in Coal.*
- 3. **Absorber Lining** — Such as Ceramic Tiles/clad sheet of C-276/Alloy59 /Steel Alloy/Glass flake filled multi-functional epoxy /glass flake lining etc.*
- 4. **Other lining** - All ducts, effluent handling pits or concrete zone etc. to be protected with glass flake based coating/ Steel Alloy Lining etc. Piping may be of flake glass based coating/carbon steel rubber lined(CSRL)/rubber lining however lesser diameter pipes can be of GRP (Glass Reinforced Plastic) / FRP (Fibre Glass reinforced Plastic)/ Alloy Steel material etc.*
- 5. **Monitoring System-** Measurement of SO<sub>2</sub> in the outlet and inlet are important for the calculation of the FGD efficiency and control the amount of*

reagent. The important parameters for deciding monitoring system are response time (shorter the better), less inventory (common for inlet and outlet), less maintenance (high maintenance interval). In view of this proven advance technology may accordingly be selected considering the plant specific requirements.

- Auxiliary Power Consumption-** The maximum Additional Auxiliary power Consumption for complete FGD facilities will be maximum 1.0% for Limestone based FGD and maximum 0.8% for Ammonia based FGD.

If the existing chimney is used, the requirement of GGH may be seen. The additional Auxiliary Power Consumption with GGH (only if using old chimney) will be maximum 0.3%.

## **INDICATIVE COST ESTIMATION**

An indicative Base cost estimation is done by CEA in order to facilitate BALCO-KORBA determine the price for installation of FGD on the major heads of CAPEX & OPEX.

### **CAPEX**

The indicative estimated cost for Limestone based FGD has been estimated Rs. 0.435 Cr/MW (CAPEX only). In case of ammonia based FGD, CAPEX is typically around 10 % less as compared to wet lime stone based FGD, considering the fact that Pulverizes / crushers / milling system / transfer belts is not required as ammonia is in liquid form. The circulation pumps and associated system will be much smaller and also the waste water disposal system is not required in ammonia based FGD.

This cost estimation is based on the price of equipment, infrastructure and related services discovered during transparent and open bidding being carried out by Central and State Sector Undertakings.

This indicative cost is the "Base Cost" only and does not include Opportunity cost (associated with generation loss due to interconnection of chimneys with absorber) and Taxes-Duties. This Indicative "Base cost is calculated considering new chimney without GGH.

The cost of retrofitting FGD for BALCO-KORBA should be discovered through open competitive bidding in consultation with lead procurer. The lead procurer (to be invited by BALCO-KORBA) may participate in bidding process till final award of FGD contract.

### **CHIMNEY & LINING**

In feasibility report BALCO-KORBA has opted for using existing chimney and converting it to wet stack instead of going for new wet stack. The existing chimney can be converted to wet and provided by fixing some appropriate corrosion protection lining.

#### **OPTION I (As opted by BALCO-KORBA)**

Using existing chimney and converting it to wet stack by applying appropriate corrosion resistant lining and to avoid loss of generation a temporary chimney may be provided above each absorber or on ground.



*This section will further speak about the other chimney options for BALCO-KORBA*

*Option II*

*Four new independent wet chimney on ground or above each absorber.*

*Option III*

*Two new independent wet chimney on ground with Two flues on each.*

*Final selection of chimney may only be made after conducting a lifecycle cost benefit analysis and seeing technical feasibility of available options before opting for either of above option.*

*Corrosion Protection Lining for Chimney:*

*Currently there are various lining material is available in the industry which can resist the sulfur based acids and which can be used for corrosion protection as mentioned below.*

- i. Borosilicate Block lining*
- ii. Steel Alloy lining*
- iii. Glass flake filled epoxy phenol novolac .*
- iv. Glass flake lining etc.*

*BALCO-KORBA is advised to study "the cases of failure" of all lining material used for corrosion protection for various sections of FGD system. The life cycle cost analysis for selection of these materials may be done considering these failure studies for optimum selection."*

46. Based on the above recommendation of CEA, the Petitioner has submitted that it has opted for wet limestone based FGD technology and has prayed for in-principle approval of the expenditure to be incurred towards installation of the same.

47. It is clear that the cost recommended by CEA is an indicative cost that is primarily based upon rates of such installation by Central/ State PSUs. CEA has also stated that the costs are 'base cost' only. The generating companies such as the Petitioner are required to discover the price through transparent competitive bidding process. Therefore, while approving costs of installation of FGD system, the Commission needs to take into account the recommendations of CEA and the discovered cost through transparent competitive bidding process and then take a view as to reasonableness of costs.



48. The Petitioner has submitted that based on the advice of CEA, the Petitioner had issued tenders for the purpose of installation of the Wet Limestone based FGD system and had issued the public notices in this regard on 23.10.2019, 25.10.2019 and 28.10.2019 in various national and international newspapers, namely, Business Standard, Financial Times (London) and China Daily. The Petitioner vide its e-mails dated 25.4.2020 and 29.4.2020 had also invited KSEB to witness the bid opening process on 29.4.2020. However, no response was received from KSEB. Further, pursuant to the aforesaid bidding process, the Petitioner has also issued Letter of Intent (Lol) dated 29.6.2020 to Zhejiang TUNA Environmental Science & Technology Co. Ltd. Total hard cost for the implementation of FGD system at the generating station as indicated in the Lol is as under:

Particulars	Wet Limestone based Flue gas Desulphurization	
	With Existing Chimney Lining & GGH	With Wet Stack above absorber top
On Shore (INR)	227,72,41,511	221,63,44,698
Off Shore (USD)	4,32,42,624	3,65,28,974
Off Shore (INR) (Conversion rate 1 USD – Rs.75 taken for reference purpose only)	324,31,96,800	273,96,73,050
Total (INR)	552,04,38,311	495,60,17,748
<b>Per MW basis (Rs. in crore/MW)</b>	<b>0.460</b>	<b>0.413</b>

49. Thus, the approximate hard cost of installation of FGD system with existing chimney line & GGH works out to Rs.0.460 crore/MW and that with Wet Stack above absorber top works out to Rs. 0.413 crore/MW. While the former is higher than the indicative cost recommended by CEA (Rs. 0.435 crore/ MW) by Rs. 0.025 crore/MW (Rs. 0.460 crore/MW - Rs. 0.435 crore/MW), the latter is lesser than the indicative cost recommended by CEA by Rs. 0.022 crore/MW (i.e. Rs. 0.435 crore/MW - Rs. 0.413 crore/MW). In the above circumstances, we deem it appropriate to

provisionally allow the hard cost of FGD system as recommended by CEA i.e. Rs. 0.435 crore/MW.

50. In view of the above, the Commission accords provisional approval to the Petitioner for incurring the following hard cost on provisional basis:

<b>Description</b>	<b>Recommendation of CEA (Rs. crore/MW)</b>
FGD base Cost	0.435

51. CEA, in its report, has observed that since inter-connection of chimneys with absorber may result in loss of generation of plant, the Petitioner is advised to minimize this interconnection time by taking suitable measures so that the 'opportunity cost' associated with interconnection may have least impact on tariff revision. However, CEA has not specified number of days for which units would have to be shut down for inter-connection of FGD system with the chimney. The Commission is of the view that the beneficiary and the Petitioner shall plan the inter-connection of FGD system with the main plant by synchronizing it with annual overhaul. Therefore, the Commission is not considering the opportunity cost at this stage. However, the same would be considered on actual number of days of shutdown after prudence check to the effect that the Petitioner has tried to synchronize the interconnection of FGD system with annual overhaul and has consulted the beneficiary/ Respondent in this respect.

52. The Petitioner has also prayed for devising a methodology towards calculating tariff in relation to the estimated increase in O&M expenses, other Operating Norms like Auxiliary Power Consumptions, Station Heat Rate, Spares, Water Charges, landed cost of reagents and gypsum disposal cost, etc. with the corresponding

increase in capacity charges and energy charges as result of complying with the Change in Law event of installation of FGD system and associated system.

53. The Commission is of the view that on account of installation of FGD system, there would be impact on O&M expenditure (R&M, manpower, services, maintenance water charges etc.) and impact of additional auxiliary energy consumed on quoted capacity & energy charges under PSA and reagent charges. The recurring operational charges i.e. O&M expenses and cost of reagent would increase the cost of generation of electricity and additional auxiliary consumption would (i) reduce the recovery of the quoted capacity charges as the ex-bus available energy corresponding to normative availability would reduce; and (ii) increase the cost of generation due to more consumption of fuel per unit of ex-bus energy delivered. Therefore, such recurring operational expenditure are allowable expense during operational period of the generating station in terms of the PSA as an impact of Change in Law event i.e. installation of FGD system in terms of the 2015 Amendment Notification.

54. The extent of compensation and manner in which the compensation is to be recovered by the Petitioner on monthly basis as supplementary capacity charges and supplementary energy charges, in due consideration of additional capital expenditure on installation of emission control equipment including FGD, cost of reagent consumption, O&M expenses and impact of additional auxiliary consumption is already finalised by the Commission vide the order dated 13.8.2021 passed in Petition No. 6/SM/2021.

55. The Petitioner shall be at liberty to approach this Commission to recover the compensation on account of installation of FGD system in terms of the mechanism finalized by the Commission in Petition No. 06/SM/2021.

56. The Petitioner has also sought in-principle approval for the expenditure to be incurred towards procurement, installation, commissioning, operation and maintenance of De-NOx systems for meeting the NOx emissions based on the cost discovered through competitive bidding process. However, the Petitioner has not submitted the NOx emission level at present and OEM Guaranteed value (at 6% oxygen level). Further, in this regard, we observe that the Petitioner's generating units are already equipped with combustion control technologies of Low NOx Burners (LNB) with supply of Over Fire Air, through Close-Coupled Over Fire Air (COFA) ports above the windbox as well as Separated Over Fire Air (SOFA) ports in the furnace. Further, vide Notification of MoEF&CC dated 19.10.2020, the norms of NOx have been revised to 450 mg/Nm<sup>3</sup> from that of 300 mg/Nm<sup>3</sup> that was stipulated through the 2015 Amendment Notification. As per the Feasibility Report for its units as prepared by Tata Consulting Engineers, the baseline NOx emission level at full load is 341 mg/Nm<sup>3</sup> (design) and 385 mg/Nm<sup>3</sup> (worst). Also, the maximum baseline NOx emission level at part load/ during operation changes is 395 mg/Nm<sup>3</sup> (design) and 445 mg/Nm<sup>3</sup> (worst) and are, thus, already meeting the new NOx emission level of 450 mg/Nm<sup>3</sup> with existing Low NOx Burners in place. Therefore, in our view, there is no need for any further additional capital expenditure to be incurred in this regard.

57. It is noticed that apart from the above, the Petitioner has also prayed for reimbursement of additional cost to the tune of Rs. 53.10 lakh on pro-rata basis, incurred towards installation of 'Mercury Analyser' in compliance of CPCB's

Guidelines for Continuous Emission Monitoring Systems as issued in April, 2018. However, it is observed that in terms of the Environmental Clearance dated 18.9.2014, the Petitioner was required to provide the suitable measures for monitoring of the mercury emission from stack on periodic basis. Further, it appears that as per the clause 18 of the Permission to Establish dated 25.9.2007 granted by Chhattisgarh Environment Conservation Board, the Petitioner was required to install the continuous monitoring system for monitoring the emission levels both in the ambient and the stack level before the commissioning of the Plant. The relevant portion of the clause 18 of the Permission to Establish dated 25.9.2007 is extracted as under:

*'Without prejudice to the powers of this Board under the Water (Prevention and Control of Pollution) Act, 1974, and the Air (Prevention and Control of Pollution) Act, 1981 and without reducing your responsibilities under the said AQ Act, and after going through your proposal for achieving the effluent and gaseous emission standards, it is to inform you that this Board grant our permission only for installation thermal power plant 1200 Megawatt Coal Based Thermal Power Plant...subject to fulfillment of the terms and conditions mention below:*

*Terms and Conditions:*

*\*\*\*\*\**

*18) Continuous monitoring system shall be installed for monitoring of emissions level both in the ambient and the stack before commissioning of the plant."*

58. Hence, in view of the aforesaid requirements already prevailing before the bid date, in our view, the installation of 'Mercury Analyser' under the Guidelines for Continuous Emission Monitoring System cannot constitute a Change in Law and, therefore, the expenditure to this count cannot be allowed to be passed on to the Procurer.

(B) Additional cost towards fly ash transportation

59. The Petitioner has submitted that as on the bid date i.e. 14.11.2014, the Petitioner was not required to incur any additional cost towards fly ash

transportation. Subsequently, the Ministry of Environment, Forest and Climate Change ("MoEF&CC") vide its notification dated 25.1.2016, amended the Environment (Protection) Rules, 1986 regarding fly ash. It has been submitted that additional cost towards transportation of fly ash imposed by Notification of MoEF&CC dated 25.1.2016 qualifies as a Change in Law event in terms of Article 39.1 of the PSA.

60. KSEB has submitted that MoEF&CC notification dated 25.1.2016 specified the norms regarding cost of fly ash transportation from the thermal generating station. However, the Petitioner has not specified the date of implementation of this notification in the generating station and the details of the expenses, if any. In this regard, conditions laid down in the previous notifications of MoEF&CC are required to be examined and same was requested to the Petitioner. However, the Petitioner has not submitted any details in this regard.

61. *Per contra*, the Petitioner has submitted that it has complied with MoEF&CC Notification dated 25.1.2016. The provisions of transportation of fly ash were implemented immediately after enforcement of the said notification. However, since the power supply started with effect from 1.10.2017, the Petitioner has claimed the additional cost towards fly ash transportation from the said date.

62. We have examined the submissions of the parties. The Petitioner has sought declaration of the MoEF&CC Notification dated 25.1.2016 as Change in Law event within the meaning of Article 34 and Article 39 of the PSA. The Petitioner has submitted that as on cut-off date, it was not required to incur any cost towards fly ash transportation. However, MoEF&CC vide Notification No.S.O.254(E) dated 25.1.2016 has amended the Environment (Protection) Rules, 1986 by which an

additional cost towards fly ash transportation has been levied upon the Petitioner.

The relevant extract of said Rules is extracted as under:

*“(10) The cost of transportation of ash for road construction or for manufacturing of ash based products or use as soil conditioner in agriculture activity within a radius of hundred kilometers from a coal or lignite based power plant shall be borne by such coal or lignite based thermal power plant and cost of transportation beyond the radius of hundred kilometers and up to three hundred kilometers shall be shared between the user and the coal or lignite based thermal power plant equally.”*

63. As per Article 39 of the PSA, any enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any law is covered under Change in Law if this results in additional recurring/ non-recurring expenditure by the seller or any income to the seller. Since the additional cost towards fly ash transportation is on account of Notification No. S.O 254(E) dated 25.1.2016 issued by the Ministry of Environment and Forests and Climate Change, Government of India, the expenditure on account of complying with this Notification is admissible under the Change in Law in-principle.

64. The Commission, in its various orders, has observed that the admissibility of claim towards fly ash transportation charges will be subject to the following conditions:

- a) Award of fly ash transportation contract through a transparent competitive bidding procedure so that a reasonable and competitive price for transportation of ash/MT is discovered;
- b) Any revenue generated/ accumulated from fly ash sales, if CoD of units/ station was declared before the MoEF&CC notification dated 25.1.2016, shall also be adjusted from the relief so granted;
- c) Revenue generated from fly ash sales must be maintained in a separate account as per the MoEF&CC notification; and

d) Actual expenditure incurred as claimed should be duly certified by auditors and the same should be kept in possession so that it can be produced to the beneficiaries on demand.

65. It is noticed that the Petitioner has not informed if it has complied with the above conditions. Since the Petitioner has not submitted basic details as indicated above, the claim towards compensation on transportation of fly ash cannot be allowed at this stage. However, the Petitioner is granted liberty to approach the Commission with complete details to analyse the case for determination of compensation. Further, it is also relevant to note that the Ministry of Power vide its letter No. 9/7/2011-S.Th. (vol. IV) dated 22<sup>nd</sup> September, 2021 read with letter dated 8.11.2021 in the subject matter of 'Supply of Fly ash to the end users by the power plants to increase fly ash utilisation' has issued certain directions/guidelines to the all the coal/lignite based power plants for providing fly ash to the end users for all new commitments for supply of ash. Thus, the Petitioner is also required to abide by the aforesaid directions/guidelines.

*(C) Increase in Consent Fee*

66. The Petitioner has submitted that as on the cut-off date i.e. 14.11.2014, the applicable consent fee, including renewal fee, was charged at a flat rate of Rs. 10,00,000/- for the category of industries, having an investment of more than Rs. 1,000 crore. Subsequently, the Government of Chhattisgarh vide Notification No. F1-20/2016/32 dated 6.10.2016 amended the Water (Prevention and Control of Pollution) (Consent) Chhattisgarh Rules, 1975 and also introduced new categories for industries of "More than Rs.1000 crore but less than Rs. 2500 crore" and "More than Rupees 5000 Crores". Vide the said amendment, the aforementioned consent



fee (of Rs. 10,00,000/-), payable by the Petitioner, was increased to Rs. 30,00,000/-. The Petitioner has submitted that, as per notification dated 6.10.2016, it is required to bear an additional expenditure to the tune of Rs. 20 lakh per annum, for the purpose of supply of power to KSEB and same is constitutes a Change in Law events under Article 34 of the PSA. The Petitioner has also submitted the details with respect to the payments made towards the consent fee.

67. KSEB has submitted that the Petitioner has not provided the notification existing on the bid date but has mentioned that consent fee was 10 lakh during the bid date. Further, the Petitioner has stated the consent renewal fee as Rs. 30 lakh. However, as per notification dated 6.10.2016, it appears to be Rs. 10 lakh after first year. The Petitioner has submitted clarification in this regard in the rejoinder wherein it has been submitted that the consent renewal fee (of Rs. 2,50,000/-), payable by the Petitioner, was increased to Rs. 10,00,000/- for financial years 2017-18 and 2018-19 and to Rs. 15,00,000/- for financial years 2019-20 and 2020-21.

68. The Petitioner has submitted that the asset value of the generating station as on 30.9.2016 was Rs. 4670 crore and, therefore, Rs. 10 lakh has been paid to Chhattisgarh Environment Conservation Board towards consent renewal fee as the generating station of the Petitioner falls under the category of industries having an investment of 'more than Rs. 2500 crore but less than Rs. 500 crore'. The said category was applicable for the financial year 2017-18 and financial year 2018-19. Therefore, the Petitioner was subjected to pay an amount of Rs. 10 lakh each for the financial year 2017-18 and financial year 2018-19, against the consent renewal fee of Rs. 2,50,000/- which was applicable as on the bid date i.e. 14.11.2014. Thereafter, the asset value of generating station was increase to Rs. 5168 crore as

on 31.12.2017 and accordingly, the Petitioner has paid Rs. 15 lakh to Chhattisgarh Environment Conservation Board towards consent renewal fee as the generating station falls under the category of industries having an investment of 'more than Rs. 5000 crore'. The said category is applicable for the financial year 2019-20 and financial year 2020-21. Therefore, the Petitioner was subjected to pay an amount of Rs. 15 lakh each for the financial year 2019-20 and financial year 2020-21, against the consent renewable fee of Rs. 2,50,000/- which was applicable as on the bid date i.e.; 14.11.2014. The Petitioner has submitted that the contention of KSEB is without taking into account the fact that the notification dated 6.10.2016 issued by the Government of Chhattisgarh has already been considered and affirmed by this Commission in its decision dated 12.6.2019 in Petition No.118/MP/2018 (TRN Energy Pvt. Ltd. v. PVVNL and Ors.). The Commission in the aforesaid order has discussed the entire issue pertaining to the increase in consent fee and has held it to be a Change in Law event.

69. We have considered the submissions made by the Petitioner and the Respondent, KSEB. On Perusal of the documents placed on record by the Petitioner, it is noticed that the consent fee is being levied by the Government of Chhattisgarh through the Water (Prevention and Control of Pollution) (Consent) Chhattisgarh Rules, 1975 in exercise of the powers conferred by Section 64 of the Water (Prevention and Control of Pollution) Act, 1974 (No. 6 of 1974). As on the cut-off date, the applicable consent fee and annual consent renewal fee were Rs. 10,00,000/- and Rs. 2,50,000/- respectively for the industries having an investment of more than Rs. 1,000 crore (being the highest category specified for industries based on the investment). However, subsequently, after the cut-off date, the Government of Chhattisgarh vide its Notification No. F1- 20/2016/32 dated 6.10.2016

has amended the Water (Prevention and Control of Pollution) (Consent) Chhattisgarh Rules, 1975 and has also introduced three new categories for the industries having an investment of more than Rs.1000 crore, namely, “More than Rupees 1000 crore but less than Rs. 2500 crore”, “More than Rupees 2500 crore but less than Rupees 5000 crore” and “More than Rupees 5000 crore” and has correspondingly specified the increased consent fee and annual consent renewal fee for these categories. Since these increases have been brought out in terms of notification issued by the Government of Chhattisgarh dated 6.10.2016 and after the cut-off date, they qualify as Change in Law event under Article 39.1 of the PSA.

70. The Petitioner has submitted that the issue of revision in consent fee in terms of the Notification of the Government of Chhattisgarh dated 6.10.2016 has also been considered by the Commission in its order dated 12.6.2019 in Petition No. 118/MP/2019, wherein it has been held that the revision of consent fee falls under the category of Change in Law. The relevant extract of the order dated 12.6.2019 is extracted as under:

*“147. Since the amendment brought out by the Chhattisgarh Government vide its Notification dated 6.10.2016 is after the cut-off date, the Consent Fee revision falls under the category of Change in law as per the Article 10 of the PPAs. Accordingly, the compensation on account of revision in Consent Fee should be reimbursed by UP Discoms in the monthly bill on pro-rata basis. The Petitioner shall furnish copies of the payment made, supported by Auditor certificate, while claiming the expenditure under Change in Law.”*

71. In a similar matter, Appellate Tribunal for Electricity (‘APTEL’) has also upheld decision of Rajasthan Electricity Regulatory Commission allowing the increase in fee for ‘Consent to Operate’ on the basis of notification issued by the Government of Rajasthan under Change in Law. The relevant extract of the judgment of APTEL dated 14.8.2018 in Appeal Nos. 119 of 2016 and 277 of 2016 (Adani Power

Rajasthan Ltd. v. Rajasthan Electricity Regulatory Commission and Ors.) is reproduced as under:

*“xii. Now let us take the last issue raised by the Discoms related to increase in fees for ‘Consent to Operate’ under the Environmental Laws of the State. Let us examine the findings of the State Commission on this issue. The relevant extract is reproduced below:*

***“xii. Increase in Fees for ‘Consent to Operate’ Required Under Rajasthan Air (Prevention & Control of Pollution) Rules, 1983 and Rajasthan Water (Prevention & Control of Pollution) Rules, 1975***

*57. The Petitioner through Interlocutory Application submitted that at the time of Bid Deadline as per the Notification dated 25.05.2007 the application fee for ‘Consent to Operate’ under Rajasthan Air and Water Act was Rs. 91,500/- each [Rs. 61,000 X 1.50] for air and water, i.e., a total of Rs. 1,83,000/-. Subsequently, the State Government vide Gazette Notification dated 10.12.2010 amended the above referred rules to increase the Fees from Rs. 61,000/- per annum to Rs. 2,49,000/-. Further, vide Notification dated 05.06.2015, the fees was revised to Rs. 48,000 + Rs. 1000 per Crore of incremental investment above Rs. 50 Crore. It is submitted that the effect of the said Notification is that annual Fees required for Consent to Operate has increased to Rs. 2,12,34,000/-. The Petitioner has notified the same to the respondents vide letter dated 22.10.2015. The event of increase in fee for consent to operate has led to increase in cost of generation and such increased cost needs to be reimbursed by the Respondents. 58. Respondents in reply contended that as per clause 3.1.1 (f) and 4.2.1 (a), the Seller has to obtain and maintain all consents, clearance and permits required for supply of power to the Procurers as per the terms of the PPA. Also it is the duty of the Petitioner to challenge such exorbitant rates. Petitioner has not submitted any proof of applicability or challenge.*

*59. The contention of the Respondents that seller has to obtain and maintain all consents, clearance and permits required for supply of power at its cost is untenable as the cost to be incurred for operation of plant if increased has to be compensated.*

*60. The Commission notes that the item under change in law claim existed at the rate of Rs. 91,500/ton at the time of bid deadline. It is further noted that the increase in fee for consent to operate was notified by Rajasthan Government and thus falls under third bullet of Article 10.1.1 to qualify as change in law. Therefore, the extra amount is to be paid by the Petitioner to the Rajasthan Government every year as a fee for the “Consent to Operate”. Such additional fee which was not envisaged at the time of bidding therefore falls under the last but one bullet, hence has to be allowed.” From the above it can be seen that the State Commission based on the notification issued by Government of Rajasthan regarding change in the condition for ‘Consent to Operate’ has allowed the increase in fee for ‘Consent to Operate’ under Change in Law as it has resulted in recurring expense to APRL.*

*xiii. We have gone through the details related to ‘Consent to Operate’ and we observe that the Govt. of Rajasthan has changed the terms and conditions prescribed for obtaining any Consents, by a way of increasing the fee for Consent to Operate which affects the economic position of APRL and it falls under the fourth bullet of the Article*

10.1.1 related to Change in Law of the PPA. The same has been observed by the State Commission and we do not find any error or perversity in the findings recorded by the State Commission.

*Accordingly, this issue is also answered against the Discoms.”*

72. However, it is relevant to note that while dealing with similar Change in Law event as claimed by the Petitioner in respect to PPA with TANGEDCO, the Commission vide order dated 14.8.2021 in Petition No. 161/MP/2020, based on the documents produced therein, has restricted the Petitioner's entitlement to the compensation towards increase in consent fees only to the extent of increase in consent fee/ consent renewal fee due to the amendment to the Water (Prevention and Control of Pollution) (Consent) Chhattisgarh Rules, 1975 dated 6.10.2016 and has specifically excluded such imposition on account of its own action of changing the configuration of its generating station. The relevant portion of the said order dated 14.8.2021 is extracted as under:

*“45. However, at the same time, perusal of the ‘Note for Approval’ dated 16.6.2011, placed on record by the Petitioner along with supporting documents, indicates that the as per Water (Prevention and Control of Pollution) Act, 1974 (in short, “the Water Act”) and Air (Prevention and Control of Pollution) Act, 1981 (in short, “the Air Act”), the Petitioner had already paid Rs. 10 lakh (under each Act) towards Consent Fee on 6.6.2006 for its 1200 MW generating station. However, due to change in configuration of the generating station and the necessary amendment incorporated in accorded environment clearance, CECB (Chhattisgarh Environment Conservation Board) has demanded Rs. 15 lakh (under the Air Act and the Water Act) for grant of consent to operate. In this regard, we clarify that the entitlement of the Petitioner for compensation towards the increase in Consent Fee shall be limited to the extent of increase in Consent Fee/ Consent Renewal Fee due to the amendment to the Water (Prevention and Control of Pollution) (Consent) Chhattisgarh Rules, 1975 dated 6.10.2016 and not on account of its own action of changing the configuration of its generating station.”*

73. In the present case also, the Petitioner's entitlement to the compensation for the increase in the annual consent renewal fees shall be limited to the extent of increase in the consent renewal fees due to amendment to Water (Prevention and Control of Pollution) (Consent) Chhattisgarh Rules, 1975 dated 6.10.2016 and not on account of its own action of changing the configuration of the generating station.

74. Accordingly, the compensation on account of revision in consent fee shall be reimbursed by KSEB in the monthly bill on pro-rata basis. The Petitioner shall furnish copies of the payment made, supported by auditor certificate, while claiming the expenditure under Change in Law and shall also furnish an undertaking to the effect that such incremental consent fee is not due to the change in configuration of its generating station and consequent amendment incorporated in environment clearance. However, it also clarified that KSEB shall be required to reimburse the aforesaid expenditures in accordance with the provisions of Article 34 of the PSA.

*(D) Carrying cost*

75. The Petitioner has submitted that as per Article 34.1 of the PSA, it is entitled to be compensated in such a way that it is restored 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. It has been submitted by the Petitioner 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.

76. KSEB has submitted that the claim/ compensation towards Change in Law events has not been identified, processed and confirmed to the satisfaction of both the parties. Therefore, the applicability of carrying cost can be ascertained only after the processing the compensation, if any, as per the terms and conditions laid down in the PSA.

77. *Per contra*, the Petitioner has submitted that the Change in Law relief is based on the principal of restitution and requires the affected party to be restored to the same economic position as if the Change in Law event had not occurred. One of the key ingredients for such restitution as contemplated under the PSA is payment of carrying cost. If the same is not done, then the affected party will not be restored to the same economic position which existed as on the bid date.

78. We have considered the submissions of the Petitioner and KSEB. According to the Petitioner, it should be restored to the same economic position in terms of Article 34.1 as if the Change in Law had not occurred. APTEL in its judgment dated 13.4.2018 in Appeal No. 210/2017 (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. As pointed out by the Central Commission that the Appellant is only eligible for surcharge if the payment is not made in time by the Respondent Nos. 2 to 4 after raising of the supplementary bill arising out of approved Change in Law event and in PPA there is no compensation mechanism for payment of interest or carrying cost for the period from when Change in Law becomes operational till the date of its approval by the Central Commission. 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..."*

79. The aforesaid judgment of the APTEL was challenged before the Hon'ble Supreme Court wherein the Hon'ble Supreme Court vide its judgment dated 25.2.2019 in Civil Appeal No. 5865 of 2018 with Civil Appeal No.6190 of 2018 (Uttar Haryana Bijili Vitran Nigam Limited & Anr. Vs. Adani Power Ltd. & Ors.) has upheld the directions of 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."*

80. Article 34.1 of the PSA provides as under:

*"34.1 Increase in costs*

*If as a result of Change in Law, the Supplier suffers an increase in costs or reduction in net after-tax return or other financial burden for and in respect of Contracted Capacity, the aggregate financial effect of which exceeds the higher of Rs. 1 crore*



*(Rupees one crore) and 0.1% (zero point one per cent) of the Capacity Charge in any Accounting Year, the Supplier may so notify the Utility and propose amendments to this Agreement so as to place the Supplier in the same financial position as it would have enjoyed had there been no such Change in Law resulting in increased costs, reduction in return or other financial burden as aforesaid.....*

*Provided that if no agreement is reached within 90 (ninety) days of the aforesaid notice, the Supplier may by notice require the Utility to pay an amount that would place the Supplier in the same financial position that it would have enjoyed had there been no such Change in Law.....”*

81. In view of the provisions of the PSA, the principles of restitution and the aforesaid judgment of the 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 date of making actual payment on account of Change in Law till the date of this order. Once a supplementary bill is raised by the Petitioner in terms of this order, the provision of Late Payment Surcharge in the PSA would kick in if the payment is not made by KSEB within due date.

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

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

84. In view of the above discussions, the issue raised is answered.

**Issue No. 4: What should be the mechanism for processing and reimbursement of admitted claims under Changes in Law?**

85. The Petitioner is entitled to compensation on account of Change in Law events admitted by the Commission during the operating period. However, it is clarified that the Petitioner shall be entitled to claim the compensation, in accordance with this order, after the expenditure allowed under Change in Law during operating period (including the reliefs allowed for operating period, if any) strictly in terms of the provisions of the Article 34 including the threshold limit as prescribed under Article 34.1 of the PSA as already noted above.

86. 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 PSA shall be paid in subsequent years of the contract period:

(a) Monthly "Change in Law" compensation shall be effective from the date of commencement of supply of electricity to the Respondent or from the date of making actual payment on account of Change in Law, whichever is later.

(b) Monthly relief corresponding to increase in consent fee shall be calculated by the Petitioner on pro-rata basis. Accordingly, the compensation on account of revision in consent fee shall be reimbursed by KSEB in the monthly bill on pro-rata basis based on its contracted capacity.

(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. 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 KSEB.

(d) Year-wise compensation henceforth for Change in Law shall be payable only if increase in costs or reduction in net after-tax return or other financial burden, the aggregate financial effect of which exceeds the threshold limit as per Article 34.1 of the PSA.

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

(f) The mechanism prescribed above is to be adopted for payment of compensation due to Change in Law events allowed as per Article 34.1, 34.3 and 34.4. As per Article 34.4 of the PSA for the subsequent period as well.

87. In the above mentioned manner, the issue raised is answered.

### **Summary of Decisions**

88. Based on the above analysis and decisions, the summary of our decision under the Change in Law during the operating period of the project is as under:

<b>Sr. No.</b>	<b>Change in Law events</b>	<b>Decision</b>
1.	Increase in cost due to introduction of Environment (Amendment) Rules, 2015	Allowed in terms of Paragraph 49 and Paragraph 50.
2.	Additional cost towards fly ash transportation	Recognized as Change in Law in-principle. However, compensation/ relief not allowed in absence of requisite details. Liberty granted to approach with necessary details in terms of Paragraph 64.
3.	Increase in consent fee	Allowed in terms of Paragraph 72, Paragraph 73 and Paragraph 74.
4.	Carrying cost	Allowed in terms of Paragraph 81 and Paragraph 83.

89. The Petition No. 598/MP/2020 is disposed of in terms of above.

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

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

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

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