

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 167/MP/2021

Coram:

Shri Jishnu Barua, Chairperson

Shri Arun Goyal, Member

Shri P.K. Singh, Member

Date of Order: 19th May, 2024

In the matter of

Petition under Section 79(1)(b) read with Section 79(1)(f) of the Electricity Act, 2003 inter alia seeking compensation on account of occurrence of 'Change in Law events' relating to the Power Purchase Agreements dated 18.12.2013 and 19.12.2013 entered into between the Petitioner and the Respondents.

And

In the Matter of

Adhunik Power and Natural Resources Limited,

9B, 9th Floor,

Hansalaya Building,

15, Barakhamba Road, Connaught Place,

New Delhi- 110001

..... **Petitioner**

VERSUS

1. Tamil Nadu Generation and Distribution Corporation Limited,

NPKRR Maligai, 6th Floor,

Eastern Wing, 144, Anna Salai,

Chennai-600 002, Tamil Nadu

2. PTC India Limited,

2nd Floor, NBCC Tower 15,

Bhikaji Cama Place,

New Delhi-110066

...**Respondents**

Parties present:

Shri Deepak Khurana, Advocate, APNRL

Shri Amit Griwan, APNRL

Shri Ashish Kr. Ghosh, APNRL

Shri Ravi Kishore, Advocate, PTC

Shri Keshav Singh, Advocate, PTC

Ms. Anusha Nagarajan, Advocate, TANGEDCO

Ms. Aakanksha Bhola, Advocate, TANGEDCO

Shri Rahul Ranjan, Advocate, TANGEDCO



ORDER

The Petitioner, Adhunik Power and Natural Resources Limited (APNRL) has filed the present Petition under Section 79(1)(b) read with Section 79(1)(f) of the Electricity Act, 2003 (hereinafter referred to as “the Act”) *inter alia* seeking compensation on account of the occurrence of Change in Law events, namely, (i) levy of Jharkhand Covid-19 pandemic cess, (ii) levy of forest transit fee, (iii) coal terminal surcharge/terminal charge, and (iv) introduction of fly ash transportation cost in terms of Power Purchase Agreements dated 18.12.2013 and 19.12.2013 entered into between the Petitioner and Respondents. The Petitioner has made the following prayers:

“a) Hold that the events enumerated in the Petition constitute Change in Law events as per the provisions of the PPAs and that the Petitioner is entitled to be restored to the same economic condition prior to occurrence of the said Changes in Law events;

b) Direct the Respondents to make payment of Rs. 33,69,38,018/- (Rupees Thirty Three Crores Sixty Nine Lacs Thirty Eight Thousand and Eighteen Only) to the Petitioner towards the additional expenditure incurred by the Petitioner on account of Change in Law events enumerated in the Petition in supplying power to the Respondents under the PPAs from uptill March, 2021;

c) Grant carrying cost @ 1.25% per month from the date(s) on which the said amount(s) became due to the Petitioner till the actual realization of the same;

d) Direct the Respondents to continue to make payments accrued in favor of the Petitioner on account of Change in Law events enumerated in the Petition, up to the effect of the said Change in Law events as also the expenses incurred by the Petitioner towards the aforementioned Change in Law events, on a regular basis;

e) In the interim pending final adjudication of the present Petition, direct the Respondents to make payment of Rs. 30,32,44,216 (Rupees Thirty Crores Thirty Two Lacs Forty Four Thousand Two Hundred and Sixteen Only) i.e. 90% of the already incurred amount by the Petitioner uptill March, 2021 towards supply of power to the Respondents;

f) Pass such other and further Orders as this Commission may deem fit in the facts and circumstances of the present case.”



2. The Petitioner has set up a 540 MW Thermal Power Project (hereinafter referred to as the “generating station”) in District Saraikela-Kharswan in the State of Jharkhand. On 18.12.2013, Respondent No. 1, Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO), and Respondent No. 2, PTC India Limited (PTCIL), entered into a Power Purchase Agreement for the supply of 100 MW power for a period of fifteen years for meeting the TANGEDCO’s base load power requirements. On 19.12.2013, the Petitioner entered into a back-to-back Power Purchase Agreement (PPA) dated 18.12.2013 with Respondent No. 2, PTCIL. The Petitioner commenced power supply to the Respondents from 1.1.2016 from its Power Plant. Subsequently, the Petitioner participated in the auction under the SHAKTI Scheme and offered a discount of three paise per kWh for securing coal linkage for the supply of power to the extent of coal supplied under the SHAKTI Scheme. This Commission vide order dated 18.5.2018 in Petition No. 84/MP/2018 approved the Supplementary PPAs dated 8.5.2018 and 10.5.2018 executed between the Petitioner and PTC and PTC and TANGEDCO respectively.

3. The Petitioner has sought the following reliefs under Change in Law in respect of the TANGEDCO PPA:

- (a) Levy of Jharkhand Covid-19 Pandemic Cess
- (b) Levy of Forest Transit Fee
- (c) Coal Terminal Surcharge / Terminal Charge
- (d) Fly Ash Transportation cost
- (e) Carrying cost

4. The Petitioner has submitted that during the period commencing from 1.1.2016 to 30.9.2018, it has already incurred an additional expenditure of Rs. 85.93 crore on account of the various change in law events.

5. The Petitioner has submitted that the events of Change in Law have a significant adverse financial impact on the costs and revenue of the Petitioner during

the operating period for which the Petitioner is entitled to be compensated in terms of Article 10 of the PPA. The Petitioner has submitted that in order to offset the impact on account of Change in Law events and to ensure a continuous, uninterrupted, and reliable supply of electricity to the Respondents as well as to restore the Petitioner to the same economic position as on cut-off date, the Commission may grant additional tariff over and above the tariff decided under the PPAs to compensate for increased cost.

Hearing dated 2.12.2021

6. The matter was first heard on 2.12.2021. In response to the Commission's observation regarding the Ministry of Power, the Government of India has now notified the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 (hereinafter referred to as 'the Change in Law Rules') and the Petitioner, therefore, being required to follow the process specified thereunder, the learned counsel submitted that the present Petition had been filed prior to the issuance of notification of the Change in Law Rules, i.e. on 22.10.2021 and, therefore, the rights have accrued in favour of the Petitioner when the present proceedings were initiated. The learned counsel further submitted that Change in Law Rules being a delegated legislation, their applicability has to be on a prospective basis except for (i) where the parent Act, i.e., the Electricity Act, 2003, permits the retrospective application of the delegated legislation, and (ii) where the language of the Rules itself indicates that they are meant to be applied retrospectively. The learned counsel, referring to Rules 1(2), 3(1), 3(2) and 3(3) of the Change in Law Rules, argued that the language used therein indicates that the Change in Law Rules are to be applied prospectively with regard to the Change in Law events that occur after the notification of the said Rules.

7. After hearing the learned counsel for the Petitioner, the Commission reserved the order on the 'admissibility' of the Petition. The Commission vide order dated 13.12.2021 clarified that the contention of the Petitioner that the language of the Change in Law Rules indicates that they will only apply to Change in Law events that have occurred after the notification of the Change in Law Rules is misplaced. The Commission further directed that the Petitioner may approach the procurer(s) for settlement of Change in Law claims amongst themselves in terms of the Change in Law Rules and approach the Commission only in terms of Rule 3(8) of the Change in Law Rules.

Hearing dated 9.5.2022

8. The matter was subsequently heard on 9.5.2022, along with other batch matters. After hearing the suggestions put forth by the learned senior counsels and the learned counsels for the parties, the Commission noted that as per the directions of the APTEL in the judgment dated 5.4.2022 in OP No. 1 of 2022 and Ors., in particular in paragraph 74, it would be apt to pass suo-motu order(s) in the Petitions which were disposed of by the Commission by applying the Change in Law Rules. However, for the Petitions where the dismissal orders of the Commission have already been set aside by the APTEL in paragraph 72 of the judgment, there would be no need to pass any suo-motu order(s). Accordingly, the Commission indicated that it would proceed to take the appropriate course of action in this regard, as to the various requests of the learned counsel for the parties, inter alia, permission to file additional affidavit and impleadment of distribution licensees, etc., the Commission observed that similar matters are listed for hearing on 17.5.2022, the Commission will take a view in this regard thereafter after proper bunching of the Petitions or independently.

9. During the course of the hearing on 22.9.2022, the learned counsel for the Petitioner submitted that earlier, the Petition had been disposed of by the Commission vide order dated 13.12.2021 at the admission stage in view of the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021. However, in view of the judgment of the Appellate Tribunal for Electricity ('the APTEL') dated 5.4.2022 in OP No.1 of 2022 and Ors., the Commission vide order dated 14.6.2022 in Petition No. 8/SM/2022 has restored the present Petition. Learned counsel accordingly requested to issue a notice in the matter. Accordingly, the Commission admitted the matter and notice was issued to Respondents to file their replies.

10. Respondent 1, Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO), has filed its reply dated 2.12.2022, which has been dealt with in the succeeding paragraphs and has mainly submitted as under:

(a) As per Article 10.4 of the PPAs, the Petitioner is required to inform the Respondent about the Change in Law event "as soon as reasonably practicable after becoming aware of the same or should reasonably have known of the Change in Law" if it wanted to claim relief with respect to the said event. The requirement of giving such timely notice is a condition precedent for claiming relief with respect to a Change in Law event, as Article 10.4.1 stipulates that "*if the Seller wishes to claim relief for such a Change in Law,*" then the Seller is bound to comply with the requirement of notice. Therefore, in the absence of timely notice giving details of the Change in Law event and the effects of the same on the Seller, the Seller is not entitled to claim any relief for Change in Law. This position has been confirmed by the Hon`ble Supreme Court vide its judgment dated 8.10.2021 in the case of MSEDCL v. MERC, 8.10.2021.

(b) While the PPAs do not specifically lay down a timeline for giving the notice, it casts an obligation upon the Petitioner to give the notice "as soon as" reasonably practicable or when it "should reasonably have known" about the Change in Law. In the present case, the Petitioner has issued a notice of

Change in Law events with undue delays, which does not meet the requirements of giving notice as soon as reasonably practical as is necessary under Article 10.4 of the PPAs. The delay in providing notice by the Petitioner to TANGEDCO about the Change in Law events is as under:

S. No.	Change in Law event	Details of Relevant Circulars/Notifications	Notified Date to TANGEDCO by Appellant	Time Taken to provide notice
1	Levy of Jharkhand Covid-19 Pandemic Cess	The Jharkhand Mineral Bearing Lands (COVID-19 Pandemic) Cess Ordinance No.01 of 2020 dated 06.07.2020	02.09.2020	1 Month and 27 days
2	Levy of Forest Transit Fee	Coal India Notification Ref No. CCL/HQ/M&S/STC/20-21/4283 dated 09.11.2020	10.12.2020	1 Month
3	Coal Terminal Charge	Ministry of railways Circular No.TCR/1078/2015/07 Corrigendum No.14to Rate Circular No.8 of 2015 dated 22.8.2016	12.07.2019	10 Months and 20 Days
	Coal Terminal Surcharge	Ministry of Railways Circular No. TCR/1078/2018/17 Corrigendum No.14 to Rate Circular No.14 to rate Circular No.24 of 2018 dated 27.12.2018	12.07.2019	6 Months and 15 days
4	Fly Ash Transportation	Ministry of Environment and Forest vide its Notification No. S.O.254 € dated 25.1.2016 amended the Environment (Protection) Rules, 1986	12.07.2019	3 years, 5 months and 15 days

(c) Hence, as is evident from the above table, the Petitioner has failed to meet the requirements of giving notice as soon as reasonably practical as is necessary under Article 10.4 of the PPAs. Thus, without prejudice to the other submissions made by TANGEDCO, the Change in Law claims of the Petitioner are liable to be dismissed on this ground alone.

Hearing dated 14.3.2023

11. During the course of the hearing, the learned counsel for the Petitioner prayed for additional time to file an additional affidavit for furnishing the information/details as called for vide Record of Proceedings for the hearing dated 29.9.2022 and

rejoinder to the reply filed by Respondent, TANGEDCO. Learned counsel for the Respondent, TANGEDCO, sought liberty to file its response on the additional information/details to be furnished by the Petitioner if required.

12. Pursuant to the direction given by the Commission, the Petitioner, vide its affidavit dated 17.6.2023, has submitted the details/information as called for by the Commission vide Record of Proceedings for the hearing dated 14.3.2023.

Hearing dated 28.6.2023

13. During the course of the hearing, the Commission observed that in the Petition filed on 21.7.2021, the Petitioner has claimed Rs. 8.66 crore, Rs. 1.62 crore, Rs. 23.03 crore, and Rs. 0.38 crore towards Coal Terminal Surcharges, Levy of Forest Transit Fee, Fly Ash Transportation and Covid-19 Pandemic Cess, respectively. However, subsequent to details sought through ROP for the hearing dated 22.12.2022, the Petitioner vide affidavit dated 17.6.2023 has revised the claims as Rs. 8.36 crore, Rs. 1.07 crore, Rs. 13.8 crore and Rs. 0.22 crore for the same. The Commission directed the Petitioner to submit the reason for each such revision along with supporting documents and each claim exclusively associated with the Respondents.

14. The Petitioner, vide its affidavit dated 21.8.2023, has submitted the reason for revision of the claimed amount as called for by the Commission vide Record of Proceedings for the hearing dated 28.6.2023:

S. No	Component	Period	Earlier Claimed as per Petition	Revised Claim submitted on 17.6.2023	Difference in Claim	Reason for difference
			A	B	C=A-B	
1 (a)	Coal Terminal Surcharge	Jan'2016 to Mar'2018	4,69,45,584	5,75,61,009	(1,06,15,424)	The Ministry of Railway applied the Coal Terminal Surcharge at its base freight rates from August, 2016 onwards. In the Affidavit dated 17.6.2023, the Petitioner



						<p>considered this Surcharge from September, 2016 onwards on the basis of actual payment made to Railways in its revised calculation, whereas in the Petition, the Petitioner had inadvertently omitted the months of September, 2016 and October 2016. The claim in the affidavit dated 17.6.2023 is the correct factual position.</p> <p>The documents in support of this claim are already filed along with the affidavit dated 17.06.2023</p>
1 (b)	Coal Terminal Charge	Jan'2019 to Oct'2021	3,97,33,488	2,60,78,055	1,36,55,432	<p>The Ministry of Railways introduced Coal Terminal Charges at its base freight rates December, 2018 onwards. Majority of coal has been procured by the Petitioner from the Central Coalfields Limited ('CCL'). In addition, the said tax i.e. @ Rs. 20 per tonne was applied for DTC (Destination Terminal Charges) only, whereas in the Petition, the Petitioner inadvertently considered Rs. 20 per tonne on OTC (Over the Counter) and DTC (Destination Terminal Charges). Therefore, there was double charging while calculating the claim, which occurred on account of oversight and was corrected in the affidavit dated 17.6.2023. Further, the Petitioner inadvertently omitted the claim for December 2018, which has been included in the revised computation in the affidavit dated 17.6.2023. The claim in the affidavit dated 17.6.2023 is the correct factual position.</p> <p>The documents in support of this claim are already filed with the affidavit dated 17.6.2023</p>
	Sum Total of the above two components (Coal Terminal Surcharges)		8,66,79,072	8,36,39,064	30,40,008	<p>In totality, there is downward revision of the claim on account of Coal Terminal Surcharges.</p>

	as mentioned in the ROP dated 28.6.2023)					
	Covid Cess + GST	Jul'2020 to Mar'2021	38,11,851	22,38,705	15,73,146	<p>Jharkhand Govt. enforced the Covid-19 cess on mining of minerals through ordinance dated 6.7.2020. However, as per the actual coal invoices, CCL has charged Covid-19 cess from November 2020 onwards. Accordingly, the Petitioner has affected downward revision in this claim in the affidavit dated 17.6.2023. The claim in the affidavit dated 17.6.2023 is the correct factual position.</p> <p>The documents in support of this claim are already filed with the affidavit dated 17.6.2023</p>
	Forest Transit Fee + GST	Oct'2020 to Mar'2021	1,62,26,787	1,06,73,921	55,52,921	<p>Jharkhand Govt. implemented Jharkhand Forest Produce Rules 2020 from 1.10.2020. CCL and Bharat Coking Coal Limited ('BCCL') enforced and intimated the said Cess from November, 2020 onwards.</p> <p>As per the actual supporting coal invoices, coal companies (CCL & BCCL) have charged Forest transit fee with applicable GST from December, 2020 onwards. Accordingly, the Petitioner has affected downward revision in this claim in the affidavit dated 17.6.2023 and has claimed from December, 2020 onwards. The claim in the affidavit dated 17.6.2023 is the correct factual position.</p> <p>The documents in support of this claim are already filed with the Affidavit dated 17.6.2023 [</p>
	Fly Ash (prorated to TANGEDCO)	Jan'2016 to Oct'2021	23,02,72,635	13,80,59,872	9,22,12,763	<p>The claim earlier submitted by the Petitioner for Fly ash was from January, 2016 to March, 2021, whereas the revised claim amount is from October, 2016 to September 2022 as per direction given by this Commission in the RoP dated 29.9.2022.</p> <p>Further, the Petitioner had</p>



					<p>inadvertently included Coal handling charges while calculating the fly ash transportation expenses, which now have been reduced from the claim.</p> <p>Further, there was an inadvertent error in the computation of generation share for PTC-TANGEDCO from January, 2016. The year-wise comparison in the generation share originally submitted in the Petition and corrected in the affidavit dated 17.6.2023 is as follows:</p> <table border="1"> <thead> <tr> <th>Year</th> <th>PTC-TANGEDCO percentage share the Petition (Pg. 2)</th> </tr> </thead> <tbody> <tr> <td>2015-16</td> <td>23.50%</td> </tr> <tr> <td>2016-17</td> <td>27.13%</td> </tr> <tr> <td>2017-18</td> <td>26.92%</td> </tr> <tr> <td>2018-19</td> <td>25.93%</td> </tr> <tr> <td>2019-20</td> <td>31.63%</td> </tr> <tr> <td>2020-21</td> <td>28.86%</td> </tr> <tr> <td>2021-22</td> <td></td> </tr> <tr> <td>2022-23 (till Sept'22)</td> <td></td> </tr> </tbody> </table> <p>The claim in the affidavit dated 17.6.2023 is the correct factual position.</p> <p>The documents in support of this claim are already filed with the affidavit dated 17.06.2023</p>	Year	PTC-TANGEDCO percentage share the Petition (Pg. 2)	2015-16	23.50%	2016-17	27.13%	2017-18	26.92%	2018-19	25.93%	2019-20	31.63%	2020-21	28.86%	2021-22		2022-23 (till Sept'22)	
Year	PTC-TANGEDCO percentage share the Petition (Pg. 2)																						
2015-16	23.50%																						
2016-17	27.13%																						
2017-18	26.92%																						
2018-19	25.93%																						
2019-20	31.63%																						
2020-21	28.86%																						
2021-22																							
2022-23 (till Sept'22)																							
Total Claim			35,28,22,272	24,46,11,562	10,23,78,783																		

Hearing dated 21.2.2024

15. On the request, the parties were permitted to file their respective written submissions, and accordingly, the matter was reserved.

Written submissions of the TANGEDCO

16. Pursuant to the liberty granted by the Commission, Respondent, TANGEDCO, and the Petitioner vide their respective written submissions dated 18.3.2024 and 3.2.2024 have reiterated their submissions already made in their reply and rejoinder, which are not repeated for the sake of brevity.

Analysis and Decision

17. Since there are no objections with regard to jurisdiction and the maintainability of the Petition, we proceed to examine the issues raised by the Petitioner on merits.

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

Issue No. 1: Whether claims of the Petitioner are barred by principles of waiver, estoppel or law of limitation?

Issue No. 2: Whether the provisions of the PPA with regard to notice have been complied with?

Issue No. 3: What is the scope of Change in law in the PPA?

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

The above issues have been dealt with in the subsequent paragraphs.

Issue No. 1: Whether claims of the Petitioner are barred by principles of waiver, estoppel or law of limitation?

19. Respondent, TANGEDCO, has submitted that certain claims of the Petitioner, like Coal Terminal Surcharges and Reimbursement on account of the Fly-Ash Transportation are barred by the principles of estoppel, waiver, and limitation from seeking any relief in respect of the claims made in the instant Petition. The Petitioner has submitted that the Petitioner, in its earlier Petition No. 17/MP/2019, filed in the year 2019 had sought compensation for certain Change in Law events, wherein the Petitioner did not prefer any claim for Change in Law compensation on account of the Coal Terminal Surcharges/Terminal Charges and reimbursement on account of the Fly-Ash Transportation, even though the cause of action for such claims first accrued much prior to the year 2019. The Petitioner, having failed to make a claim in respect of matters for which the cause of action had evidently arisen, has evidently abandoned and waived its rights to prefer any such claim with respect to the Change

in Law events forming the subject matter of the present Petition. Accordingly, events claimed as Change in Law by the Petitioner were exits existing as on the date of filing of Petition No. 17/MP/2019, i.e., 11.1.2019 (Coal Terminal Surcharges/Terminal Charges coming into force 22.8.2016 and 27.12.2018 and reimbursement on account of the Fly-Ash Transportation 25.1.2016). The Petitioner, instead of taking any action against any claim of Change in Law events at the time of filing of Petition No. 17/MP/2019, despite adequate knowledge of its existence, and proceeded to file Petition No. 17/MP/2019 deliberately and therefore the claims of Petitioner are barred by the act of waiver, relinquishment, abandonment, and acquiescence. Therefore, there is the intentional relinquishment of a known right or the voluntary relinquishment or abandonment of a known existing legal right on the part of the Petitioner. In support of its argument, Respondent has relied upon the judgment of the Supreme Court in the case of State of Punjab v. Davinder Pal Singh Bhullar, [(2011) 14 SCC 770]. Therefore, the claims of the Petitioner regarding Coal Terminal Surcharges/Terminal Charges and Reimbursement on account of the Fly-Ash Transportation are liable to be dismissed on the principles of waiver, estoppel and abandonment.

20. *Per contra*, the Petitioner has submitted that the claims of Change in Law event are based on continuing cause of action as the supply of power is continuous in nature throughout the term of the PPA (the Commission's Order dated 19.8.2019 in Petition No. 17/MP/2019 between the same parties, i.e., Petitioner & TANGEDCO under this very PPA), therefore, the said objection of estoppel is wholly misconceived. At no point of time before filing the present Petition, did the Petitioner give up or waive or abandon the Change in Law claims sought in the present Petition. As contended by TANGEDCO itself, the waiver is the intentional relinquishment of a known right or the voluntary relinquishment of a known existing

legal right. TANGEDCO has failed to point out any material/evidence/document where the Petitioner has abandoned, waived, or given up its right to raise Change in Law claims, as raised in the present Petition. TANGEDCO's objection that the claim is time-barred on the ground that the notification was issued in 2016 and the Petition was filed on 21.7.2021 is wholly misconceived & baseless, as the recovery of claims being sought on account of such Change in Law event is not barred by limitation. The amount accrued or part thereof on account of these Change in Law events is not barred by limitation. The first financial year in respect of which the present claim is made is the financial year ending 31.3.2017 and therefore, the limitation for the same would have expired on 1.4.2020. The exclusion of the Covid-19 period as granted by the Hon'ble Supreme Court vide Order dated 10.1.2022 passed in Suo Motu Writ Petition (C) No. 3 of 2020 [In Re: Cognizance for Extension of Limitation] shall be applicable in the present case as well and therefore, in case the limitation expires after 15.3.2020, the Petition filed on 21.7.2021 shall not be barred by limitation. The Petitioner is entitled to benefit of such exclusion as per the directives of the Hon'ble Supreme Court. It is not TANGEDCO's case that the Petitioner's claims are barred by limitation; thus, claims raised within limitation, in respect of different subject matter, cannot be said to be barred by estoppel and *res judicata*.

21. We have considered the submissions of the parties. Respondent, TANGEDCO has sought to contest the certain Change in Law claims, namely, Coal Terminal Surcharge/ Terminal Charges and reimbursement on account of the Fly Ash Transportation on the ground that even though the Petitioner was aware of the existence of the said event, it failed to include them in earlier round of litigation under Petition No. 17/MP/2019 and therefore, such claims are barred by act of waiver, relinquishment, abandonment and acquiescence. However, we find such contention entirely misplaced. The Petitioner being dominus litis, it is entirely in its discretion as

to what events to, include and claim a relief in respect thereof in the Petition. Merely because the Petitioner did not include the above-indicated events in an earlier round of litigation under Petition No. 17/MP/2019 does not restrict the Petitioner from raising a subsequent matter as under the scheme of PPA, the Petitioner can approach the Commission in respect of each Change in Law event even separately. Also, as rightly pointed out by the Petitioner, TANGEDCO has failed to point out any material/evidence/document where the Petitioner has abandoned, waived, or given up its right to raise claim Change in Law claims, as raised in the present Petition. Therefore, in our view, the claims of the Petitioner are not barred by acts of waiver, relinquishment, abandonment, and acquiescence as contended.

22. Respondent TANGEDCO has contended that the aforesaid Change in Law claims are time barred. *Per contra*, the Petitioner has submitted that the amount accrued or part thereof on account of these Change in Law events are not barred by limitation. The Petitioner has submitted that the financial year in respect of which the present claims are made is the financial year 31.3.2017 and, therefore, the limitation for the same would have expired on 1.4.2020. The exclusion of the Covid-19 period as granted by the Hon'ble Supreme Court vide order dated 10.1.2022 passed in *Suo Motu Writ Petition (C) No. 3 of 2020* shall be applicable in the present case as well and therefore, in case the limitation period expires after 15.3.2020, the Petition filed on 21.7.2021 shall not be barred by limitation. The Petitioner is entitled to the benefits of such extension as per the directives of the Hon'ble Supreme Court.

23. We have considered the submissions made by the parties. The aspect of applicability of the limitation period in relation to the claims for compensation towards the impact of Change in Law has recently been considered by the Commission in its

order dated 23.6.2023 in Petition No. 513/MP/2020 in the matter of APMuL v. UHBVNL and Ors. The relevant extract of the said order is reproduced as under:

“16..... We have examined the provisions of the PPA. Article 13.2 of the PPA provides for Change in Law during construction period as well as operation period. In the present case, the Petitioner’s claims are for the operation period which is covered under Article 13.2(ii) of the PPA. Article 17.3.1 of the PPA provides for adjudication of disputes by the Commission which is extracted as under:

It is provided in the above quoted Article that if the claims relate to Article 13.2 of the PPA, it shall be submitted for adjudication of the Commission. Since APMuL has approached the Commission for relief under Article 13.2(ii), the dispute involves adjudication under Article 17.3.1. The dispute raised in the Petition being adjudicatory in nature, Limitation Act will be applicable for examining the claims in terms of the judgement in Lanco Kondapalli case.

17. Schedule to the Limitation Act lays down various types of suits for the purpose of limitation. However, Change in Law claims under the PPA is not specifically provided for in the Limitation Act. In that case, Article 113 of the Schedule is relevant which is extracted as under:

<i>Description of application</i>	<i>Period of limitation</i>	<i>Time from which period begins to run</i>
<i>113. Any suit for which no period of limitation is provided elsewhere in the schedule</i>	<i>Three years</i>	<i>When the right to sue accrues</i>

Thus, the period of limitation for filing petitions in adjudicatory cases involving Change in Law claims before the Commission shall be governed under Article 113 of the Limitation Act which is three years from the time when the right to sue accrues.

23. We have already observed in para 19 that limitation in the present case will be governed by Article 113 of the Schedule of the Limitation Act which provides for a period of three years from the date when the right to sue accrues. It is pertinent to mention in this connection that all the Change in Law claims in the present petition are recurring in nature. In other words, the Change in Law claims in the form of tax and cess will arise every time when the coal is supplied. In this connection, Section 22 of the Limitation Act is relevant which is extracted as under:

“22. Continuing breaches or tort- In the case of a continuing breach of contract or in the case of continuing tort, a fresh period of limitation begins to run at every moment of the time during which the breach or the tort, as the case may be, continues.”

24. In this connection, the following observations of the APTEL in its judgment dated 2.11.2020 in batch of Appeals led by Appeal No. 10 of 2020 (Power Company of Karnataka Limited vs UPCL & Ors) are relevant:

171. There can be no quarrel with the broad proposition that under the general application of the Limitation Act, a claim with respect to non-payment of money payable on a monthly / periodic basis brought before an adjudicatory forum cannot be sustained with respect to recovery of money for a period of more than three years prior to the date of institution of the proceedings.”

25. Thus, in case of non-payment of money payable on periodic or monthly basis brought before an adjudicatory forum, even though the right to sue has accrued earlier, the claims for recovery of money cannot be sustained for a period of more than three years prior to the date of institution of proceedings. In other words, the claims of APMuL for compensation towards impact of Change in Law can be entertained if the claim relates to a period of three years preceding the date of filing of the petition before the Commission i.e. three years prior to 16.5.2020 which works out to 17.5.2017. The Respondents have submitted that even if any Change in Law claims are to be considered, only the claims which fall within three years prior to the filing of the present petition would be admissible for adjudication. Therefore, Limitation period shall be reckoned from 17.5.2017 i.e. 3 years prior to the filing of the present petition on 16.5.2020. The claims arising before 17.5.2017 shall be time barred whereas claims arising on or after 17.5.2017 shall be within the period of limitation...”

Thus, in the aforesaid order, it has been held that the claims of compensation towards the impact of Change in Law can be entertained if the claims relate to a period of three years preceding the date of filing of the Petition before the Commission. Keeping in view the above findings and the fact the period from 15.3.2020 till 28.2.2022 stands excluded for the purpose of limitation in terms of the Order of the Hon’ble Supreme Court dated 10.1.2022 in Suo Motu Writ Petition (C) No. 3 of 2020 and instant Petition having been filed on 21.7.2021 (i.e., with the above exclusion period), we hold that the limitation period, for the claims of compensation towards impact of the Fly Ash Transportation and Coal Terminal Surcharge, shall be reckoned from 15.3.2017 i.e., 3 years prior to 15.3.2020. As all the subsequent claims of compensation would fall within the period of exclusion as decided by the Hon’ble Supreme Court and since the Petitioner has filed the Petition within this period of exclusion itself, they cannot be considered as barred by limitation. In view of the above, we find and hold that the claims of Change in Law compensation of the Petitioner towards Coal Terminal Charges and Fly Ash Transportation Charges are neither barred by law of limitation nor by of principles of waiver or estoppel. Accordingly, the issue is decided.

Issue No. 2: Whether the provisions of the PPA with regard to notice have been complied with?

24. The claims of the Petitioner in the present Petition pertain to Change in law events related to the PPA dated 18.1.2013. Article 10.4 of the PPA is extracted as under:

“10.4 Notification of Change in Law

10.4.1. If the Seller is affected by a Change in Law in accordance with Article 10.1 and the Seller wishes to claim relief for such a Change in Law under this Article 10, it shall give notice to the Procurer of such Change in Law as soon as reasonably practicable after becoming aware of the same or should reasonably have known of the Change in Law.

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

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

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

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

25. Respondent, TANGEDCO has submitted that in the present case, the Petitioner has issued notice of Change in Law events after undue delay, which does not meet the requirement of giving notice “as soon as reasonably practical” as is necessary under Article 10.4 of the PPA. The Petitioner issued a Change in Law Notice especially qua the Coal Terminal Surcharge and Fly-ash transportation with an undue delay of nearly three years or more. Hence, the requirement of giving notice as soon as reasonably practicable has not been met. Thus, the requirement of Article 10.4.2 of the said PPA has not been complied with by the Petitioner. It is well settled that it is necessary to adhere to the procedure settled under such contract and the terms therein {Datar Switchgears v. Tata Finance Ltd. [(2000) 8 SCC 151]} and in the absence of compliance with the contractual conditions under Article 10.4

of the PPAs, the Petitioner cannot be allowed to claim Change in Law compensation for the aforesaid claims.

26. *Per contra*, the Petitioner has submitted that there is no specific timeline provided under the PPA for intimation by the Petitioner to Respondent, TANGEDCO, thus after agreeing to such a Clause under the PPA, TANGEDCO now cannot aver that notification of Change in Law events after a gap of a few months is not valid. The Petitioner has further submitted that in any event, upon being aware of a Change in Law event, a generator has to analyse and discuss the impact of the said Change in Law event. Only upon such analysis and after figuring out that a Change in Law event would adversely impact the Petitioner's supply and which impact would be covered under the relevant PPA would a generator intimate the occurrence of a Change in Law event. Thus, in light of the same, the purported delay mentioned by TANDEGCO is wholly misconceived and an attempt to avoid its obligations under the PPA to pay such charges to the Petitioner. The Petitioner, having sent the Change in Law notices, as soon as reasonably practicable for it, its claims ought to be adjudicated by this Commission, and the objection raised in this regard is unmerited and liable to be rejected. As regards the delay in notifying the claim in relation to Fly Ash Transportation, the actual impact of the said 'Change in Law' event could not be quantified owing to the effect of the said notification being ongoing. After the issuance of the MoEF&CC Notification dated 25.01.2016, the Petitioner started consultations with the nearby companies for the disposal of the fly ash, however, the cement companies were lifting Fly Ash from the power plants nearer to their plants. After a lot of persuasion and follow up with various cement companies, it was in the financial year 2016-17 only, that the companies gradually started making arrangements for the lifting of the Fly Ash. The exact amount under the Change in Law event of the said MoEF&CC notification cannot be pre-estimated

as the effect is ongoing during the life of the plant as the MoEF&CC notifications are to be mandatorily complied with by all the generating companies (both Govt. owned and privately owned) across India. The amount to be incurred for disposal of the Fly Ash could not be pre-estimated as the Fly Ash lifting by the companies is irregular and varying and depends on their requirements for production which is again dependent upon the supply-demand scenario of cement.

27. We have considered the submissions of the Petitioner and Respondent, TANGEDCO. As indicated by the Petitioner, it gave notice to the Respondents, i.e., TANGEDCO & PTC, on 12.7.2019 for the Coal Terminal Charges, Surcharge, and Fly Ash Transportation, on 2.9.2020 for levy of Jharkhand Covid 19 Pandemic Cess, and on 10.12.2020 for levy of Forest Transit Fees, regarding Change in Law events claimed in the Petition.

28. As per Article 10.4.2 of the PPA, the Petitioner is required to serve notice about the occurrence of Change in Law events as soon as practicable after being aware of such events. In the present case, it is beyond the dispute that the Petitioner has given notices for the above Change in Law events as claimed in the Petition. However, the objection has been raised by Respondent, TANGEDCO towards the inordinate delay in issuing such notice(s), particularly for Coal Terminal Charges and Fly Ash Transportation Costs, and has stated such delayed notice cannot be construed to be “as soon as reasonably practicable” as prescribed in the PPAs. We notice that a similar aspect of delays in issuing the Change in Law notice has also been considered by the Commission in its order dated 23.6.2023 in Petition No. 513/MP/2020 in the matter of APMuL and UHBVNL and Ors., the relevant extract of the said order is reproduced hereunder:

“.....22. We have considered the submissions made by the parties. There is no denial of the fact that APMuL has issued formal notices for certain events of Change in Law events after a lapse of more than 3 years after signing of the FSA when it came to be affected by Change in Law. The issue is whether such delay in giving notice would result in denial of compensation for the expenditure incurred by APMuL in respect of these events of the Change in Law. It is pertinent to note that Article 13.3.1 of the PPA provides that if the Seller is affected by a Change in Law in accordance with Article 13.2 and wishes to claim a change in law, it shall give notice of such event as soon as reasonably practicable after becoming aware of the same or should reasonably have known of the Change in Law event. As per Article 13.3.3, the notice shall provide among other things the precise details of the Change in Law and effects on the Seller of the matters referred to in Article 13.2 (for construction period as well as operation period). Thus, the purpose of notice is to inform the Procurer about the details of Change in Law and its impact on the Seller. Further, PPA does not provide for any adverse consequences including denial of compensation for the actual expenditure incurred on account of Change in Law where delay has occurred in issuing the Change in Law notices. Therefore, in the absence of any specific timeline for giving notice about the occurrence of Change in Law event, delay in giving notice will not adversely affect or obliterate the claims of APMuL except to the extent the claims are barred by limitation....”

Therefore, in order to maintain regulatory uniformity with the aforesaid findings, we hold that in the present case also, the delay in giving the Change in Law notices will not adversely affect or obliterate the Petitioner’s claims except to the extent the claims are barred by limitation.

Issue No. 3: What is the scope of Change in law in the PPA?

29. The Petitioner has approached the Commission under Article 10 of the PPA, read with Section 79 of the Act, for adjustment/ compensation to offset the financial/ commercial impact of the Change in Law during the operating period along with the carrying cost.

30. Article 10 of the PPA dealing with the events of Change in law is extracted as under:

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

- the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;*

- a change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;
- the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;
- a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the Seller;
- any change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of this Agreement.

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

10.2 Application and Principles for computing impact of change in law

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

10.3 Relief for Change in Law

10.3.2 During Operating Period

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

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

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

31. The term “Law” has been defined under Article 1.1 of the PPA as under:

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

pursuant to or under any of them and shall include without limitation all rules, regulations, decisions and orders of the Appropriate Commission.”

32. The term “Indian Governmental Instrumentality” is also defined in Article 1.1

as under:

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

33. The events broadly covered under ‘Change in Law’ are as under:

- a) Any enactment, bringing into effect, adoption, promulgation, amendment, modification, or repeal of any law, or
- b) Any change in interpretation of any Law by a Competent Court of law, Tribunal, or Indian Governmental Instrumentality acting as the final authority under law for such interpretation, or
- c) Imposition of a requirement for obtaining any consents, clearances, and permits which was not required earlier.
- d) Any change in the terms and conditions or inclusion of new terms and conditions prescribed for obtaining any consents, clearances and permits otherwise than the default of the settler.
- e) Any change in the tax or introduction of any tax made applicable to Petitioner’s supply of power to TANGEDCO as per terms of the Agreement.
- f) Such Changes (as mentioned in (a) to (c) above) result in additional recurring and non-recurring expenditures by the seller or any income to the seller.
- g) The purpose of compensating the Party affected by such Change in Law is to restore through Monthly Tariff Payments, to the extent contemplated in Article 10, the affected Party to the same economic position as if such “Change in Law” has not occurred.
- h) The Petitioner shall provide to the Procurer and the Appropriate Commission documentary proof of such increase/ decrease in cost of the Power Station or revenue/ expense for establishing the impact of such Change in Law;

i) The decision of the Commission with regard to the determination of compensation and the date from which such compensation shall become effective shall be final and binding on both parties, subject to rights of appeal provided under the Electricity Act, 2003.

j) The compensation shall be payable for any decrease in revenue or increase in expenses to the seller (Petitioner) in excess of an amount equivalent to 1% of the value of the standby Letter of Credit in aggregate for the relevant Contract Year.

34. A combined reading of the above provisions of the PPA reveals that the Commission has the necessary jurisdiction to adjudicate upon the dispute between the Petitioner and TANGEDCO with regard to the 'Change in Law' events that occur after the cut-off date which is seven days prior to the bid deadline.

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

35. The Bid deadline and the cut-off date in respect of the PPAs dated 18.12.2013 and 19.12.2013 are as under:

Events	Dates
Bid Deadline date	6.3.2013
Cut-off date (seven (7) days prior to the Bid deadline)	27.2.2013

36. The Petitioner has raised claims under Change in Law in respect of events during the operating period, namely, levy of Jharkhand Covid-19 Pandemic Cess, levy of Forest Transit Fees, Coal Terminal Surcharges/Terminal Charges, and reimbursement on account of the Fly-Ash Transportation as well as carrying cost on the above elements. Accordingly, we proceed to adjudicate the following Change in Law events as claimed by the Petitioner.

- (i) Levy of Jharkhand Covid-19 Pandemic Cess
- (ii) Levy of Forest Transit Fee
- (iii) Coal Terminal Surcharge / Terminal Charge

(iv) Fly Ash Transportation

(i) Levy of Jharkhand Covid-19 Pandemic Cess

37. The Petitioner has submitted that the Government of Jharkhand, on 6.7.2020, i.e. after the cut-off date, issued an Ordinance being Jharkhand Ordinance No.1 of 2020 titled “Jharkhand Mineral Bearing Lands (Covid 19) Cess Ordinance, 2020” and in terms of Section 3 read with Schedule I thereof, levied a Covid-19 Cess at the rate of Rs. 10 per metric tonnes of coal dispatch on the coal-bearing land situated in the State. The Petitioner has submitted that since the Petitioner procures coal from the Bharat Coking Coal Ltd. (BCCL) and Central Coalfields Ltd. (CCL) having various mines located in the State of Jharkhand, BCCL and CCL vide notices dated 14.7.2020 and 13.8.2020 respectively informed all their consumers about the above-mentioned Ordinance and the consequent levy of Covid-19 Pandemic Cess @ Rs. 10 per metric tonne for all coal dispatches w.e.f. 6.7.2020. It is submitted that the above Ordinance issued by the Government of Jharkhand qualifies to be the law within the meaning of the PPA, and levy of Covid 19 Cess is a Change in Law event for which the Petitioner needs to be compensated in terms of Article 10.3 read with Article 10.5 of the PPAs.

38. *Per contra*, TANGEDCO has opposed the above claim of the Petitioner on the ground that levy of Jharkhand Covid Cess is akin to levy of Corporate Social Responsibility as the same has been imposed for the period of three years to mitigate the loss suffered by the society on account of the lockdown. TANGEDCO has also submitted that the calculation set out by the Petitioner in respect of its aforesaid claim also suffers from several discrepancies, and, as such, the basis for computation has not been disclosed in the affidavits filed by the Petitioner.

39. We have considered the submissions made by the party. Indisputably, there was no Jharkhand Covid-19 Cess as on the cut-off date of the PPAs, and the same came to be introduced by the Jharkhand Mineral Bearing Lands (Covid-19 Pandemic) Cess Ordinance, 2020, dated 6.7.2020. In terms of Section 3 read with Schedule of the said Ordinance, a Covid 19 Cess of Rs. 10 per metric tonne of coal dispatched from the coal-bearing land within the State came to be imposed on the holder on despatch of Run-of-mine/mineral w.e.f. 6.7.2020 for the period of three years. Consequently, BCCL and CCL, vide notice dated 14.7.2020 and 13.8.2020, informed all its consumer about the above imposition and their liability thereof. In our view, not only the Ordinance dated 6.7.2020 as issued by the Government of Jharkhand but also the Notices dated 14.7.2020 and 13.8.2020, all of which culminated in the levy of Covid 19 Cess upon the generators, including the Petitioner herein constitute Change in Law event and the Petitioner is entitled to compensation on account of the additional expenditure incurred towards Jharkhand Covid 19 Cess. Respondent TANGEDCO has opposed the said claim by stating that it is akin to CSR and, hence, cannot be considered a Change in Law. However, we are unable to agree with the said contention as unlike the CSR, the levy of Jharkhand Covid 19 Cess is not linked to the profits of the company but to the despatch of coal from coal-bearing land in the State of Jharkhand and is mandatory in nature. Accordingly, the Petitioner shall be entitled to claim compensation for the additional expenditure incurred towards the levy of Jharkhand Covid-19 Cess, including levy of the GST thereon, if any. The Petitioner shall be entitled to recover such expenditure from Respondents in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for the supply of electricity to Respondents. If the actual generation is less than the scheduled generation, the coal

consumed for actual generation shall be considered for the purpose of computation of the impact of the Jharkhand Covid 19 Cess. The Petitioner shall furnish, along with its monthly regular and/or supplementary bill(s), computations of its claims duly certified by the auditor to the Respondents.

(ii) Levy of Forest Transit Fee

40. The Petitioner has submitted that as on the cut-off date, i.e., 27.2.2013, there was no levy of transit fee on the coal dispatched in forest land. Coal India Limited, vide its Notification dated 9.11.2020, imposed a transit fee @ Rs. 57/- per tonne of coal dispatched from mines falls under forest land area, as applicable from 1.10.2020. It is also submitted that some of the land that has to be excavated by the coal company for mining for procurement of coal for the Petitioner's Power Plant falls under the Forest Land, and thus, the Petitioner has to pay the aforementioned transit fee in respect of these areas. As such, the same is covered within the meaning of Change in Law as defined in Article 10.1.1 of the PPAs, being levied by Coal India Limited, which was not in existence as on the cut-off date. Due to the said levy of forest transit fee, the cost of supply of power by the Petitioner to Respondents under the PPAs has increased, and thus, the Petitioner needs to be compensated for it as per Article 10.3 read with Article 10.5 of the PPAs.

41. *Per contra*, TANGEDCO has submitted that invoices of CCL as submitted by the Petitioner vide affidavit dated 17.6.2023 do not reflect the levy of Forest Transit Fees but only reflect the levy of Forest Cess, which is not the subject matter of the current proceeding. TANGEDCO has also submitted that the calculation set out by the Petitioner in respect of its aforesaid claim also suffers from several

discrepancies, and, as such, the basis for computation has not been disclosed in the affidavits filed by the Petitioner.

42. In response, the Petitioner has submitted that the Petitioner has already provided the details in Annexure 8 to the Petition, and as per the rates provided in the Notification dated 9.11.2020, the Petitioner has claimed the recovery of the amount on coal dispatched from October 2020 to March 2021. The Petitioner has also submitted that it shall supply all details for computation of the claim once the Change in Law claims are approved by the Commission. The Petitioner has indicated that considering the coal quantity consumed against the power supplied to PTC – TANGEDCO and the coal received & consumed from the mines located in the State of Jharkhand, a total claim for the period from November 2020 to March 2021 is Rs. 83,93,688/-.

43. We have considered the submissions made by the parties. The levy of Forest Transit Fee in terms of Coal India Limited's Notification dated 9.11.2020, basis the Jharkhand Forest Produce Transit Rules, 2020, being an event subsequent to the cut-off date, qualifies to be a Change in Law event under the PPAs. Previously also, the Commission, in an order dated 13.12.2017 in Petition No. 189/MP/2016 in the matter of Jindal Power Ltd. v TANGEDCO, had held the enhancement of transit fees in term of the Notification of Govt. of Chhattisgarh as a Change in Law event. The relevant portion of the said order is extracted as under:

“31. As per the notification of Forest Department, Govt. of Chhattisgarh dated 14.6.2002, the transit fee for transportation of coal in the forest area was Rs. 7/ tone. However, SECL vide its letter dated 31.10.2012 addressed to its Field Officers directed that the above transit fee to be compulsorily implemented with effect from 1.11.2012. Therefore, the transit fee of Rs. 7/ tone was already in existence as on the cut-off date of both MT PPA and LT PPA. Only after issue of notification dated 30.6.2015 by the Forest Deptt. of Government of Chhattisgarh, the transit fee was increased for Rs. 15/ tone. Under last bullet of Article 10.1.1. of the PPA, any change in taxes or introduction of tax

made applicable for supply of power by the seller as per terms of the agreement shall be admissible under Change in Law. Therefore, change in the rate of forest transit fee shall be admissible under Change in Law. The Petitioner shall be entitled for enhancement of transit fee @ 8/ tone with effect from 30.6.2015. The Petitioner has not placed any document received from SEPL regarding its liability to pay transit fee or the actual payment of transit fee in accordance with letter dated 16.9.2015. The Petitioner shall share with the respondent all documents including the actual payment of transit fee made for the coal consumed for supply of electricity to the respondent duly supported by Auditor Certificate”

In light of the above, the Petitioner shall be entitled to Change in Law compensation on account of the additional expenditure incurred towards the Forest Transit Fee, including the impact of GST thereon, if any. The Petitioner shall be entitled to recover such expenditure from Respondents in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for the supply of electricity to the Respondents. If the actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of the impact of the Forest Transit Fee. The Petitioner shall furnish, along with its monthly regular and/or supplementary bill(s), computations of its claims duly certified by the auditor to the Respondents.

(iii) Coal Terminal Surcharge and Terminal Charge

44. The Petitioner has submitted that as on the cut-off date, i.e., 27.2.2013, no Coal Terminal Surcharge on transportation of Coal was leviable/applicable for distances beyond 100 km. However, by way of Corrigendum No. 14 to Rates Circular No. 8 of 2015 dated 22.8.2016, the Ministry of Railways, Railway Board has started levying Coal Surcharge at the rate of Rs. 55 per metric tonne at both loading and unloading terminals for all commodities, including coal, for the distance beyond 100 km. The Petitioner has also submitted that the above Corrigendum No. 14 to Rates Circular No. 8 of 2015 dated 22.08.2016 was withdrawn by the Railway Board,

the Ministry of Railways, Government of India vide its Corrigendum No. 20 to Rates Circular No. 8 of 2015 dated 06.07.2017. However, the Railway Board, the Ministry of Railways, Government of India vide its Rates Circular No. 24 of 2018 dated 27.12.2018, has started levying Terminal charge @ Rs. 20 per tonne on both inward and outward traffic (totalling Rs. 40 per tonne) for all commodities, including coal, being handled at Railway goods sheds and Private Terminals both green fields and brownfields, to be collected by the Railways. Accordingly, the Petitioner has submitted that levy of additional Coal Terminal Surcharge for the distance beyond 100 km by Circular dated 22.8.2016 and also the levy of terminal charge on the inward and outward traffic for the commodities (including Coal) by way of the Rates Circular No. 24 of 2018 dated 27.12.2018 issued by the Railway Board, Ministry of Railways, Government of India are 'Change in Law' events within the meaning of Article 10.1.1 of the PPAs. The Petitioner has indicated that additional expenditure incurred by the Petitioner on account of the levy of Coal Terminal Surcharge for the distance beyond 100 Km and the levy of Terminal Charge on both inward & outward traffic for all commodities until March 2021 is Rs. 8,36,39,064/-

45. *Per contra*, TANGEDCO has submitted that the levy of coal terminal surcharge does not constitute a Change in Law event as it is based on a price notification by the Railways or Coal India Limited and not due to a Change in Law as envisaged in the PPAs. TANGEDCO has also placed reliance on the judgment of the APTEL in Appeal No. 119 of 2016 (*M/s. Adani Power Rajasthan Ltd. (APRL) vs Rajasthan Electricity Regulatory Commission (RERC) & Ors.*), which was upheld by the Hon`ble Supreme Court in the context of Surface Transportation charges and Coal Sizing charges, which disallowed such charges as Change in Law events. As regards the Terminal Charges, TANGEDCO has relied upon the Commission's order dated 31.1.2021 in Petition No. 260/MP/2019 and has submitted that, similar to that

case, the Petitioner herein has also failed to explain the requirement to transport the coal through railway goods sheds and/or through private freight termination and accordingly, such claim ought not to be considered as held in the order dated 31.1.2021.

46. In response, the Petitioner has submitted that the Coal Terminal Surcharge has been held to be a 'Change in Law' event by the APTEL vide Order dated 29.1.2020 in Appeal No. 284 of 2017 & Appeal No.9 of 2018 (*Adani Power Rajasthan Limited v. Rajasthan Electricity Regulatory Commission and Ors.*). The Petitioner has also indicated that the terminal charges are applicable on the public railway goods shed, and the Petitioner is transporting the coal through the nearest available railway goods shed, which also helps in reducing the coal transportation losses.

47. We have considered the submissions made by the parties. The introduction of Coal Terminal Surcharge on the transportation of coal by the Ministry of Railways and Railway Board constitutes a Change in Law event that is no longer res integra. The Appellate Tribunal for Electricity vide its judgment dated 29.1.2020 in Appeal No. 284 of 2017 and Anr. in the matter of Adani Power Rajasthan Ltd. v. RERC and Ors. has held the introduction of Coal Terminal Surcharge as a Change in Law event. Moreover, the said findings of the APTEL have also been upheld by the Hon'ble Supreme Court in *GMR Warora Energy Limited v. Central Electricity Regulatory Commission*, 2023 SCC Online SC 464. Accordingly, the Petitioner shall be entitled to Change in Law compensation on account of the additional expenditure incurred towards Coal Terminal Surcharge, including the impact of GST thereon, if any. However, as noted above, such entitlement shall be subject to the period of limitation as noted in paragraph 23 above.

48. Pursuant to the withdrawal of the Coal Terminal Surcharge w.e.f. 10.7.2017, the Railway Board, the Ministry of Railways vide Rates Circular No. 24 of 2018 introduced the levy of Terminal Charge @ Rs. 20 per tonne on both inward and outwards tariff for all commodities (excluding container tariff) being handled at Railway Goods shed and Private Freight Terminal (PFTs) both greenfield and brownfield with immediate effect. In view of the Hon'ble Supreme Court Order in GMR Warora Energy Limited v. Central Electricity Regulatory Commission [2023 SCC Online SC 464], having already upheld that revision of charges BSS, Development charges, etc., or introduction of charges such as Coal Terminal Surcharge, by the Railway Board – a State within the meaning of Article 12 of the Constitution of India – would come within the ambit of Change in Law, there cannot be any dispute as to introduction of Terminal Charge in terms of the Rates Circular No. 24 of 2018 of Railway Board, the Ministry of Railways would qualify as Change in Law event under the PPAs. Insofar as the reliance by TANGEDCO on the Commission's order dated 31.1.2021 in Petition No. 260/MP/2019 regarding the lack of necessary information is concerned, we note that in the present case, the Petitioner has clarified that it has been using the nearest public railway good sheds for transportation of coal which also helps in reduction in coal transportation losses. Accordingly, in our view, the Petitioner shall be entitled to Change in Law compensation on account of the additional expenditure incurred by it towards the Terminal Charge, including the impact of GST thereon, if any. The Petitioner shall be entitled to recover the expenditure incurred towards Coal Terminal Surcharge and Terminal Charge from Respondents in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for the supply of electricity to the Respondents. If the actual generation is less than the

scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of Coal Terminal Surcharge and Terminal Charge. The Petitioner shall furnish, along with its monthly regular and/or supplementary bill(s), computations of its claims duly certified by the auditor to the Respondents.

(iv) Fly Ash Transportation

49. The Petitioner has submitted that as on the cut-off date, i.e., 27.2.2013, the Petitioner was not required to incur any additional cost towards the Fly Ash Transportation. However, vide Notification dated 25.1.2016, the Ministry of Environment of Forest ('MoEF') amended the previous Notification dated 3.11.2009 regarding the Fly Ash Management Rules and stipulated that the cost of transportation of ash for road construction or for manufacturing of ash-based products or use as a soil conditioner in agriculture activity within a radius of hundred kilometers from a coal or lignite based power plant is required to 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 is to be shared between the user and the coal or lignite based thermal power plant equally. The Petitioner has submitted that the aforesaid Notification dated 25.1.2016 is a 'Change in Law' event within the meaning of Article 10.1.1 of the PPA, and the Petitioner needs to be compensated for it as per Article 10.3 read with Article 10.5 of the PPA.

50. *Per contra*, TANGEDCO has further submitted that in order to claim compensation for the 'Fly Ash Transportation' as a Change in Law event, certain conditions have to be fulfilled by the Petitioner, as have been laid down by this Commission vide order dated 19.12.2017 in Petition No. 101/MP/2017 titled as *DB Power Ltd vs. PTC India Ltd & ors.* The Petitioner has admitted under Paragraphs

8D(iv) and 8D(vii) of the Petition that the Petitioner scrapped the bidding process for awarding contracts for the Fly Ash Transportation and negotiated with various local firms/vendors/companies for Fly Ash Transportation and this demonstrates non-satisfaction of the first condition i.e., condition a), as laid down by this Commission in order dated 19.12.2017 for claiming compensation in regard to the Fly Ash Transportation. The Petitioner has failed to award fly ash transportation contracts through a transparent, competitive bidding procedure so that a reasonable and competitive price for transportation of ash/MetricTonne is discovered and hence, the claim of the Petitioner for compensation in regard to the Fly Ash Transportation is liable to be dismissed.

51. We have considered the submissions made by the party. The issue as to the MoEF's Notification dated 25.1.2016 constitutes a Change in Law event is no longer res-integra as not only this Commission but the APTEL also in its judgment dated 21.10.2022 in Appeal No. 148 of 2019 in the matter of Adani Power Maharashtra v. MERC and Anr. has recognised the said Notification as Change in Law event. Insofar as the admissibility of the claim on the above account is concerned, the Commission, in its order dated 19.12.2017 in Petition No. 101/MP/ 2017, in the matter of DB Power Ltd. v. PTCIL and Ors. observed as under:

"106.....Since, the additional cost towards fly ash transportation is on account of amendment to the Notification dated 25.1.2016 issued by the Ministry of Environment and Forests, Govt. of India, the expenditure is admissible under the Change in law in principle. However, the admissibility of this claim is 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/ Metric Tonne is discovered;*
- b) Any revenue generated/ accumulated from fly ash sales, if CoD of units/ station was declared before the MoEF notification dated 25.01.2016, 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 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.”

52. In regard to the above stipulations, the Petitioner has mainly submitted as under:

(a) From the year 2016 onwards, the Petitioner had to enter into arrangements with various local firms/ vendors/ companies for the transportation of Fly Ash. In this regard, considering that the local firms/ vendors/ companies only off take fly ash in small quantities, therefore, bidding was not possible. Thus, the Petitioner was constrained to negotiate with each of the local firms/ vendors/ companies for the different quantities of fly ash transportation.

(b) The Petitioner also entered into a Fly Ash Off Take Agreement on 23.3.2019 with Shree Cement Limited for disposal of the Fly Ash. Subsequently, the Petitioner entered into Addendum No. 1 dated 18.9.2019 and Addendum No. 2 dated 1.6.2020 with Shree Cement Limited. It may be noted that as a matter of practice, cement companies do not participate in the bidding process for the Fly Ash transportation, and it is for this reason that the Petitioner entered into Agreements with Shree Cement Limited by way of a negotiated route.

(c) The Petitioner also attempted to carry out the bidding process and in furtherance of the same, issued Expression of Interest in various newspapers on 4.3.2020. Pursuant to the aforementioned expression of interest, various companies/ firms participated in the bidding process.

(d) However, the price discovery from the aforementioned bidding process was extremely low and unreasonable, and thus, the Petitioner had no option but to scrap the bidding process and enter into private arrangements with the parties, the price of which was better than the price discovered in the bidding. The details of the bidders who participated in the bidding process have already been placed on record in a tabular form on page 32 of the Petition.

(e) Thereafter, the Petitioner again floated requisite tender in the month of May –June 2022, and after getting no response, floated another tender later in the month of July 2022 through which it awarded a service order to the L1 Bidder, Ashtech India Pvt Ltd. and other parties. However, owing to the low demand for Fly Ash, the Petitioner is still constrained to issue service orders to private parties.

(f) The Petitioner approached all the nearby companies/ agencies for the sale of ash, but the said agencies/ companies did not agree to lift the Fly Ash on a chargeable basis owing to the low demand for Fly Ash. The Petitioner was able to sell only very small quantities of ash. Inasmuch as the sale of Fly Ash is minuscule, the Petitioner has not maintained any ash fund.

(g) The Petitioner had already submitted a CA certificate providing all the relevant details and computations.

53. We have considered the submissions made by the parties and the various efforts undertaken by the Petitioner as indicated in the pleadings. As pointed out by the Petitioner, the Commission, in its order dated 6.1.2020 in Petition No. 208/MP/2018, in the matter of DB Power Ltd. v. TANGEDCO, has indeed acknowledged the agreements entered into with the cement companies on a negotiated route basis and consequently, has also allowed the recovery of ash transportation charges incurred pursuant to such agreements. The relevant extract of the Commission's order dated 6.1.2020 in Petition No. 208/MP/2018 reads as under:

"50. We observe that the Petitioner had invited bids for disposal of fly ash. While the non-cement companies submitted the bids and were selected on the basis of such bids, the cement companies did not participate in the bids. Consequently, the Petitioner could not fulfil the requirement of the order of the Commission dated 19.12.2017 related to award of contract on basis of competitive bidding as regards to cement companies. The Petitioner has contended that since the cement companies as an industry do not participate in competitive bidding process but they make their arrangements for off-taking and transporting fly ash from the generating stations like that of the Petitioner, the Petitioner entered into arrangements with various cement companies for off take of fly ash from its generating station. The Petitioner negotiated with the cement companies and awarded the contracts accordingly. The Petitioner has submitted that the rate agreed in the agreements was further reduced and brought down at the time of actual payments.

51. The Petitioner has placed on record agreements dated 1.9.2014, 24.8.2015, 1.11.2015 entered into with cement companies, namely Ambuja Cements Limited, Shree Cement Limited, Emami Cement Limited respectively for transportation and disposal of ash and bill/ invoices/ debit notes, etc. Perusal of agreements reveals that the rate of transportation to the cement companies (decided through negotiations) is less than rate of transportation to the non-cement companies (arrived at through bidding process). We also note that the agreements entered into by the Petitioner with the cement companies were prior to the order of the Commission dated 19.12.2017 in Petition No. 229/MP/2016. Taking into account the Petitioner's contention that the cement companies as an industry do not participate in bids for transportation of fly ash, the fact that the rates are lower in case of cement companies compared to noncement companies and that the agreements with cement companies were entered into prior to the order of the Commission, we are of the view that the objective of keeping the cost of transportation reasonable is fulfilled. In our opinion, therefore, the cost incurred in respect of cement companies through the negotiated route also needs to be allowed.

52. Accordingly, the Petitioner shall be entitled to recover transportation costs on account of fly ash disposal to cement companies and non-cement also in compliance with notification of MoEF&CC dated 25.1.2016. To claim this expenditure, the

Petitioner shall furnish a copy of all the agreements entered into with cement and noncement companies to the TANGEDCO. The Petitioner shall also share copy of the bids floated for disposal of fly ash from its generating station and the list of bidders pursuant to the bid. These costs shall be recovered from the TANGEDCO in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of electricity to TANGEDCO. If the actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of transportation of fly ash. The Petitioner is directed to furnish along with its monthly regular and/or supplementary bill(s), computations duly certified by the auditor to TANGEDCO. The Petitioner and the TANGEDCO are directed to carry out reconciliation on account of these claims annually.

54. Albeit, in the aforesaid order, the generator had arrangement under both the routes, i.e., based on the bidding process as well as on the negotiated route, and accordingly, the Commission had the opportunity to compare the rates arrived under the negotiated route with the bidding rate to ascertain the reasonableness of the former. In the present case, such details are not available, and hence, we are not in a position to comment upon the reasonableness of the rates arrived at under the negotiated routes. However, at the same time, we are not inclined to defer the claims of the Petitioner any longer given that the additional expenditure incurred towards transportation of fly ash owing to MoEF Notification dated 25.1.2016 has already been held as a Change in Law event and accordingly, we deemed it appropriate to stipulate the following conditions for enabling the Petitioner to claim the compensation towards the Fly Ash Transportation cost, under Change in Law:

(a) The Petitioner shall furnish the applicable State Schedule of Rates and shall be entitled to the cost incurred towards transportation of fly ash at lower of actuals or applicable State Schedule Rates.

(b) The Petitioner shall be entitled to be compensated for the expenditure incurred towards the transportation of fly ash only to the extent of end usage specifically provided in the MoEF Notification dated 25.1.2016 and only upon providing end-user certificates from such end-users. The Petitioner shall also provide supporting documents from the end users indicating the distance within which the fly ash from the Petitioner's Project has been utilised.

(c) While claiming the expenditure, the Petitioner shall furnish a copy of the agreements entered into with transporters of fly ash to the Respondents along with invoices and tax challans.

(d) The actual expenditure incurred as claimed shall be duly certified by the auditors to be produced before the beneficiaries/procurers on demand.

(e) Revenue received from the sale of fly ash to cement companies and other users shall be adjusted against the transportation charges incurred by the Petitioner.

(f) With effect from 8.11.2021, the Petitioner is expected to have followed the Guidelines of the Ministry of Power dated 22.9.2021 for all the new commitments, and in case of substantial deviation from the Guidelines, the Petitioner will approach the Commission by way of a separate petition in respect of such claims.

(g) Similarly, the Petitioner's claims under this head shall also be subject to the MoEF Notification dated 31.12.2021 (Ash Utilisation Notification) and the subsequent Guidelines/ directives issued by the Ministry of Power, Govt. of India in this regard.

(h) The Petitioner shall continue to make all efforts to finalise ash transportation rates through a transparent competitive bidding process in the future.

(i) As noted above, claims under this head prior to 15.3.2017 will be time-barred.

(j) Costs incurred under this head shall be recovered from the Respondents in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower for the supply of electricity to the Respondents. If the actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of transportation of fly ash costs.

(v) Carrying Cost

55. The Petitioner, in its prayer at Para (c), has sought a direction to the Respondent to pay carrying cost @1.25% per month from the date on which the said amount became due to the Petitioner till the actual realization of the same to restore the Petitioner to the same economic position as existed prior to the Change in Law events.

56. *Per contra*, TANGEDCO has submitted that carrying cost ought not to be allowed as there are no provisions for the carrying cost. It has been further submitted

that in any event, the Change in Law claims of the Petitioner are yet to be adjudicated, and the amount, if any, due to the Petitioner has to be determined/computed first, and no carrying cost ought to be allowed for the period till the decision of the Commission acknowledging the Change in Law and deciding on the amount to be paid for such Change in Law as specified in the PPA. It is also submitted that carrying cost is to be restricted to the cost of financing a prudent and efficient utility, i.e., the interest rate at which such utility can borrow the money from the lenders after due and sincere efforts to minimize the interest cost.

57. We have considered the submissions made by the parties. The Petitioner has submitted that the Petitioner should be restored to the same economic position in terms of Article 10.2.1 as if the Change in Law had not occurred. The APTEL, in its judgment dated 13.4.2018 in Appeal No. 210 of 2017 (*Adani Power Ltd (APL) vs CERC & Ors*), has allowed the carrying cost on the claim under a change in law and held as under:

“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.

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..."

58. 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."

59. Article 10.2.1 of the PPA provides as under:

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

60. In view of the provisions of the PPA, the principles of restitution and the aforesaid judgment of the Hon'ble Supreme Court, we are of the view that the Petitioner would be eligible for carrying cost arising out of approved Change in Law events from the date the Petitioner incurred the additional expenditure owing to such Change in Law till the actual payment to the Petitioner. Once a supplementary bill is raised by the Petitioner in terms of this Order, the provisions of Late Payment Surcharge in the PPAs would kick in if payment is not made by the Respondents within due date.

61. However, at the same time, on the aspect of delays on the part of the generating companies in filing the Change in Law cases, the Commission, in its order dated 23.6.2023 in Petition No.513/MP/2020, has held as under:

"59. As per the settled principle of law, APMuL is entitled for carrying cost on its claims for change in law events. However, the Respondents have submitted that APMuL has filed the present Petition only in 2020 whereas a number of the events claimed as 'Change in Law' by APMuL date back to 2015 and therefore, APMuL cannot claim carrying cost for those events where there has been delays and laches on the part of the APMuL to approach the Commission. The principle that the delays in filing Petition/information would result in denial of carrying cost has been settled by APTEL vide its judgement dated 19.9.2007 in Appeal No 70 of 2007 in the case of matter of Maharashtra State Electricity Distribution Co. Ltd v. Maharashtra Electricity Regulatory Commission, judgment dated 30.5.2014 in Appeal No. 147, 148 and 150 of 2013 in the case of Torrent Power Ltd v. Gujarat Electricity Regulatory Commission and judgment dated 4.12.2014 in Appeal No 45 of 2014 in Paschim Gujarat Vij Company Ltd and Ors v. Gujarat Electricity Regulatory Commission.

60. We have considered the submission of Respondents. APTEL in its judgement dated 30.5.2014 in Appeal Nos.147, 148 and 150 of 2013 has referred to the Judgement dated 28.11.2013 in Appeal No. Appeal No.190 of 2011 & 162 and 163 of 2012 wherein the following principles have been laid down with regard to carrying cost claimed by distribution companies for revenue gap:

61. This judgement allows carrying cost on revenue gap where the deferment is on account of reasons other than attributable to the distribution licensee. Conversely, if the deferment is attributable to distribution licensee, then carrying cost can be legitimately denied. Extrapolating the same principle in case of delay in filing the petition for Change in Law claims by a generating company, it can be held that the carrying cost would not be admissible if the claims are not brought before the Commission as soon as possible after becoming aware of the Change in Law events. We consider a maximum gap of six month as reasonable between the occurrence of Change in Law event and filing of the petition. Accordingly, we hold that where there is a lapse of six months or more between the occurrence of Change in Law affecting the Seller and filing of the petition, no carrying cost shall be admissible for the period prior to filing of the petition. In case, the

petition is filed within six months, carrying cost shall be admissible from the date the seller is affected by change in law till the date of the Order provided the seller is eligible as per Article 13.2(b) of the PPA.”

62. In view of the above findings and since the present case also, there is a lapse of more than six months between the occurrence of Change in Law event affecting the Petitioner and the filing of the Petition in respect of all the events pleaded in the Petition, we hold that the Petitioner shall be entitled to the carrying cost on the additional expenditure incurred toward Change in Law events allowed under this Order only from the date of filing of the Petition to the date of this Order.

63. Insofar as the rate of carrying cost is concerned, the Commission vide order dated 17.9.2018 in Petition No. 235/MP/2015 [AP(M)L vs 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:-

Period	Actual interest rate paid by the Petitioner	Working capital interest rate as per CERC Regulations	LPS Rate as per the PPA
2015-16	10.68%	13.04%	16.29%
2016-17	10.95%	12.79%	16.04%
2017-18	10.97%	12.43%	15.68%

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

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

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

Summary of Decisions

65. 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:

S. No.	Change in Law events	Decision
1.	Levy of Jharkhand Covid-19 Pandemic Cess	Allowed in terms of Para 39
2.	Levy of Forest Transit Fee	Allowed in terms of Para 43
3.	Coal Terminal Surcharge and Terminal Charge	Allowed in terms Paras 47 & 48
4.	Fly Ash Transportation	Allowed subject to paragraph 54
5.	Carrying Cost	Allowed in terms of paragraphs 62 & 64

66. Petition No. 167/MP/2021 is disposed of in terms of the above discussions and findings.

Sd/-
(P.K.Singh)
Member

sd-
(Arun Goyal)
Member

sd/-
(Jishnu Barua)
Chairperson