

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Petition No: 101/MP/2017
(On remand)**

Coram:

**Shri Jishnu Barua, Chairperson
Shri Ramesh Babu V., Member
Shri Harish Dudani, Member**

Date of Order: 25th June, 2025

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' and/or Force Majeure events relating to Power Purchase Agreements both dated 01.11.2013 entered into between the Petitioner and the Respondents.

And

In the matter of:

DB Power Ltd.,
Office Block 1A, 5th Floor, Corporate Block,
DB City Park, DB City, Arera Hills,
Opposite MP Nagar, Zone-I,
Bhopal - 462016.

... Petitioner

Vs.

- 1) PTC India Limited,
2nd floor, NBCC Tower,
15 Bhikaji Cama Place,
New Delhi - 110066,
- 2) Rajasthan Urja Vikas Nigam Ltd,
Vidyut Bhawan, Janpat,
Jyothi Nagar- 302005,
Jaipur, Rajasthan
- 3) Jaipur Vidyut Vitran Nigam Ltd.,
Vidyut Bhawan, Jyoti Nagar,
Near New Vidhan Sabha Bhawan,
Jaipur- 302005, Rajasthan
- 4) Ajmer Vidyut Vitran Nigam Ltd.,
Vidyut Bhawan, Makarwali Road,
Panchsheel Nagar, Ajmer- 305004,
Rajasthan
- 5) Jodhpur Vidyut Vitran Nigam Ltd.,
New Power House, Industrial Area,
Jodhpur- 342003, Rajasthan

- 6) Prayas (Energy Group),
Prayas (Energy Group) unit II A & B, Devgiri,
Joshi Railway Museum Lane,
Kothrud Industrial Area, Kothrud
Pune-411038, Maharastra
- 7) Tamil Nadu Generation and Distribution Corporation Limited,
6th Floor, Eastern Wing,
144, Anna Salai,
Chennai-600002, Tamil Nadu

... Respondents

Parties Present:

Shri Deepak Khurana, Advocate, DBPL
Ms. Swapna Seshadri, Advocate, RUVNL
Ms. Kritika Khanna, Advocate, RUVNL
Shri Ashish Anand, Advocate, PTCIL
Shri Paramhans Sahani, Advocate, PTCIL
Ms. Anusha Nagarajan, Advocate, TANGEDCO
Shri Rahul Ranjan, Advocate, TANGEDCO

ORDER

The Petitioner, DB Power Limited, a generating company, has set up a 1200 MW (2 x 600 MW) coal-based Thermal Power Station at village Badadraha, District Janjgir Champa in the State of Chhattisgarh (the 'Project'). For the supply of power from its Project, the Petitioner has entered into the following long-term Power Purchase Agreements:

(i) Implementation Agreement dated 6.8.2009 for the supply of 5% of the net power generated from the Project to the State of Chhattisgarh.

(ii) Power Purchase Agreement dated 1.11.2013 with Respondent No.1, PTC India Limited (PTCIL), which in turn entered into a Power Purchase Agreement dated 1.11.2013 with Respondent Nos. 3-5, Rajasthan Discoms, for supply of 250 MW ('Rajasthan PPA'). Both the PPAs were entered into on a back-to-back basis, and the Rajasthan PPA became effective from 30.11.2016.

(iii) Power Purchase Agreement dated 19.8.2013 with Respondent No. TANGEDCO for the supply of 208 MW RTC power.

2. The Petitioner had filed the present Petition seeking the compensation on account of occurrence of Change in Law events and /or Force Majeure events under

the back-to-back PPA dated 1.11.2013 entered into between the Petitioner and Respondent No.1, PTCIL, pursuant to the PPA dated 1.11.2013 entered into between the Respondent, No.1, PTCIL and the Respondent Nos. 3-5, Rajasthan Discoms. The Petitioner made the following prayers:

“(a) Declare that the events enumerated in the Petition constitute Change in Law & Force Majeure 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 & Force Majeure events;

(b) Direct the Respondent to make payment of Rs. 24.40 Cr. to the Petitioner towards the additional expenditure incurred by the Petitioner on account of the said Change in Law & Force Majeure events, in supplying power to the Respondent under the PPA from 30.11.2016 to 31.03.2017 along with interest @ 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;

(c) Direct the Respondents to continue to make payments accrued in favor of the Petitioner on account of Change in Law & Force Majeure events enumerated in the Petition from 01.04.2017 up to the effect of the said Change in Law & Force Majeure events;

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

(e) In the interim pending final adjudication of the present Petition, direct the Respondents to make payment of Rs. 21.96 crores i.e. 90% of the already incurred amount by the Petitioner from 30.11.2016 to 31.03.2017 towards supply of power to the Respondents in order to ease the cash crunch faced by the Petitioner”.

3. The Commission, vide its order dated 19.12.2017, examined the Force Majeure and Change in Law claims of the Petitioner, and the gist of the findings of the order dated 19.12.2017 is tabulated herein below:

S.No.	Change in Law	Decision
1.	Increase in Royalty Rate on Coal	Allowed
2.	Increase in Sizing Charges on Coal	Not Allowed
3.	Increase in Surface Transportation Charges	Not Allowed
4.	Increase in Forest transit fee	Allowed

S.No.	Change in Law	Decision
5.	Increase in Chhattisgarh Environment Cess/ Chhattisgarh Environment Tax	Allowed
6.	Increase in Chhattisgarh Industrial Development/ Cess/ Chhattisgarh Development	Allowed
7.	Revision/addition of components in assessing the Central Excise Duty	Liberty granted to approach the Commission with relevant information from the Central Excise Department
8.	Increase in Clean Energy Cess	Allowed up to 30.6.2017
9.	Increase in the Busy Season Surcharge on the transportation of coal by rail	Not Allowed
10.	Levy of Coal Terminal Surcharge for the traffic of coal for distances beyond 100 Km	Not Allowed
11.	Withdrawal of short lead concession in charging of freight for all tariffs, including coal booked up to 100 Km	Not allowed on account of want of relevant documents. Liberty granted to approach the Commission with relevant documents.
12.	Introduction and Enhancement of Service Tax on the transportation of coal by rail and road	Allowed
13.	Consequent increase in Value Added Tax / CST, Entry Tax, Development Surcharge, and Niryatkar	
	(a) Increase in Value Added Tax / CST	Not allowed on account of want of relevant documents. Liberty granted to approach the Commission with relevant documents.
	(b) Entry Tax	Not allowed on account of want of relevant documents. Liberty granted to approach the Commission with relevant documents.
	(c) Development Surcharge	Not allowed
	(d) Niryatkar	Not allowed on account of want of relevant documents. Liberty is granted to approach the Commission with relevant information.
14.	Additional cost towards Fly Ash Transportation	Admissible in principle. However, to approach the Commission with documents and evidence to determine the transportation cost as per para. 106 above.
15.	Levy of Chhattisgarh Electricity Duty	Allowed
16.	Additional Capital Expenditure on account of Amendment in Environment Norms	Liberty granted to approach the Commission separately.
17.	Additional cost due to the reduction in the supply of coal from SECL	Allowed
18.	Carrying Cost	Not Allowed

4. Aggrieved with the Commission's order dated 19.12.2017, the Petitioner, DBPL

filed a Review Petition No. 22/RP/2018 seeking modification of the order to the extent it considered the Station Heat Rate as 2250 kCal/kWh and consider Gross Station Heat Rate of 2351 kCal/kWh for the purpose of computation of cost of coal. The Commission, *vide* its order dated 10.1.2019, rejected the Review Petition on the ground of limitation without going into the merits of the case.

5. Aggrieved by the decision of the Commission, the Petitioner and the Rajasthan Discoms/ Respondent Nos. 2 to 5 approached the Appellate Tribunal for Electricity (APTEL) through separate Appeals through the Appeal No. 253/2018 and Appeal No. 148/2018, respectively. The Appeal No. 148/2018 filed by the Rajasthan Discoms was dismissed by the APTEL *vide* order dated 25.7.2023 as all the issues raised in the Appeal, including transportation of fly ash, were already covered by the previous orders of the Hon'ble Supreme Court and the APTEL.

6. As far as the Appeal No. 253/2018 is concerned, the Petitioner had sought to challenge the Commission's order dated 19.12.2017 on the following counts:

- (i) Disallowance of development surcharge on coal;
- (ii) Disallowance of Carrying Cost;
- (iii) Disallowance of the consequent increase in the VAT, Entry Tax, and Niryatkar on account of the increase in various levies such as NMET, DMF, etc.
- (iv) Consideration of the Station Heat Rate (SHR) as 2250 kCal/kWh for the purpose of computation of coal consumption.

7. The APTEL, *vide* its judgment dated 25.7.2023 in Appeal No. 253 of 2018, set aside the order dated 19.12.2017 and remanded the matter to the Commission. *Vide* its judgment, the APTEL has ordered for the (i) determination of the amount of compensation towards Station Heat Rate, (ii) examination of issues relating to Development Surcharge on Coal and Carrying Cost, and (iii) re-consideration of the claim pertaining to increase in VAT, and Entry Tax *etc.*, on merits.

8. The relevant extracts of the APTEL's judgment dated 25.7.2023 are as follows:

"This Appeal is filed, by the Petitioner before the CERC, aggrieved by the order in Petition No.101/MP/2017 dated 19.12.2017 disallowing three of their claims i.e 1) Development surcharge on coal; 2) Carrying Cost;3) Increase in VAT, Entry Tax, Niryatkar on account of increase in various levies such as NMET, DMF etc. The Appellant is also aggrieved by the findings recorded by the CERC, with respect to Station Heat Rate (SHR), that, for the purpose of computation of coal consumption, SHR of 2250 kCal/kWh, provided by the petitioner in Schedule 10 of the PPA, was reasonable, and should be taken into consideration. The CERC arrived at such a conclusion since the Appellant failed to furnish details of the actual generation in support of their claim of Rs.2.26 Crores for the period 30.11.2016 to 31.03.2017.

*Mr. Deepak Khurana, learned Counsel for the Appellant, would submit that, when the information was subsequently sought to be placed by way of a Review Petition, the CERC dismissed the Review Petition, necessitating the Appellant having to file an application before this Tribunal to receive additional documents; this Tribunal had, in Para 6.11 of its order dated 15.05.2020, observed that, even from the findings recorded by the CERC, it was clear that (a) Station Heat Rate of the plant of the Appellant was not available; (b) Station Heat Rate of the plant was essential for computation of coal quantity; (c) in the absence of the Station Heat Rate of the plant, the expected SHR, as given by the Appellant in Schedule 10 of the PPA, had been compared with the ceiling Design Heat Rate as per the 2014 Regulations; and, accordingly, the additional coal quantity had been computed. This Tribunal thereafter opined that, though the CERC required the Station Heat Rate of the Plant, it never asked the appellant to furnish the same, and accordingly the same was not furnished by the appellant; since the actual Station Heat Rate is essentially required for correct computation and would assist the court to arrive at the truth, and would not cause any harm to the other party, the appellant should be allowed to amend the appeal and to place the additional documents. **The additional documents, in support of their claim for being compensated at the actual Station Heat Rate, was placed by the Appellant before this Tribunal only on 25.01.2019. The Appellant had filed their petition before the Commission on 29.04.2017. While their claim for payment is from the date of supply i.e from 30.11.2016 onwards, the fact remains that the application, to receive additional evidence, was filed before this Tribunal only on 25.01.2019.***

While Counsel on both sides are in agreement that the Appellant is entitled to compensation for the actual Station Heat Rate, and that this issue is covered by orders of the Supreme Court, Mr. Anand K. Ganesan, learned Counsel for Respondent Nos.3 to 6, would submit that the dispute is not regarding the Appellant's entitlement, but their failure to place relevant material before the CERC which was the reason for the CERC being forced to adopt the rate, stipulated in the Schedule to the PPA, as the Station Heat Rate; and, having failed to provide the necessary information before the CERC, the Appellant cannot now claim the benefit of the judgment of the Supreme Court.

While the material placed on record does show that the Appellant had failed to produce this information before the CERC, either along with their petition or at any time subsequent thereto till the order under Appeal was passed, we cannot also ignore the fact that the Appellant had sought to place additional information on record before this Tribunal, by way of their application dated 25.01.2019. As the

Appellant is entitled to be compensated towards the actual Station Heat Rate, subject to the statutory regulations governing the field, its computation need alone be considered by the CERC, and not the appellant's entitlement thereto. As the Appellant cannot take advantage of its own delay / failure to furnish information in support of its claim for compensation towards the Station Heat Rate, we are of the view that the compensation which shall now be determined by the CERC shall not be entitled to carrying cost for the period from 29.04.2017, when the Appellant herein had earlier invoked the jurisdiction of the CERC by filing their petition, till 25.01.2019 when the application was filed before this Tribunal to receive additional evidence.

Learned Counsel on both sides agree that two of the other issues agitated in this appeal, i.e. (1) Development Surcharge on Coal and (2) Carrying Cost, have also been held in favour of the Appellant by judicial pronouncements. However, in so far as Carrying Cost is concerned, while the Appellant would contend, relying on the judgment of the Supreme Court in Civil Appeal No.11095 of 2018 dated 20.04.2023, that Carrying Cost equivalent to the late payment surcharge stipulated in the PPA should be paid, the submission urged by Mr. Anand K Ganesan, learned Counsel for Respondent Nos.3 to 6, relying on certain other judgments of the Supreme Court, is that the Appellant is entitled to carrying cost for a sum equivalent to interest on working capital, and nothing more.

Since the matter is being remanded to the CERC to determine the amount of compensation which the appellant is entitled towards Station Heat Rate, both these issues, i.e Development Surcharge on Coal and Carrying Cost, shall also be examined by the CERC in the light of the judgments relied on by Learned counsel on either side. In so far as the Claim, for Increase in VAT, Entry Tax etc, is concerned, suffice it to observe that, since the order under Appeal is being set aside and the matter is being remanded to the CERC, this claim shall be re-considered by the CERC on its merits uninfluenced by the observations made in the Order passed by it earlier, i.e in the order which has now been set aside. All other claims stand dismissed, and the Appeal stands disposed of accordingly."

(Emphasis supplied)

9. Pursuant to the APTEL's remand, the matter was listed for the hearing on 20.9.2023. Learned counsel for the Petitioner, during the course of the hearing, submitted that in light of the judgment of the APTEL dated 25.7.2023, the Commission is required to determine the compensation which the Petitioner is entitled to towards (i) actual Station Heat Rate (SHR), subject to the SHR prescribed in the applicable Tariff Regulations, (ii) rate of carrying cost, (iii) development surcharge on coal, and (iv) increase in VAT, Entry Tax, and Niryat Kar on account of an increase in various levies such as NMET, and DMF, etc. The learned counsels for Respondents, PTCIL and Rajasthan Discoms, sought time to file their response in the matter. The Commission permitted the Petitioner, DBPL, to

file its affidavit with respect to the detailed computation of its compensation claims in light of the APTEL's judgment dated 25.7.2023. The Petitioner filed its compliance affidavit on 15.1.2024, and the Rajasthan Discoms filed their reply to the same on 22.1.2024.

10. The gist of the submissions made by the Petitioner is as follows:

(i) In light of the APTEL judgment, the Petitioner is entitled to actual SHR or SHR as per applicable Regulations, whichever is lower. The computation of actual SHR and the SHR computed as per the Tariff Regulations has been submitted. The shortfall/ differential in the Change in Law claims compensation by taking the actual SHR (subject to SHR as per Tariff Regulations, *i.e.*, whichever is lower) instead of the expected SHR of 2250 kCal/ kWh indicated in the bid, works out to Rs. 43,73,35,024/-.

(ii) The APTEL, in Adani Power (Mundra) Limited v. CERC [2021 SC Online APTEL 18] has already allowed the claim of Development Surcharge on coal as Change in Law and the said judgment has been upheld by the Hon'ble Supreme Court in its judgment dated 22.4.2023 in the case of Maharashtra State Electricity Distribution Company Limited v. Adani Power Maharashtra Limited and Ors. [2023 SCC OnLine SC 464]. Thus, the claim of Development Surcharge on coal should be allowed as a Change in Law. In this regard, an amount of Rs. 4,39,54,133/- is to be refunded towards Development Surcharge on Coal.

(iii) Regarding the claim of the Petitioner on account of consequent increase in VAT, Entry Tax, and Niryatkar, there is no change in the rate of taxes, namely VAT, Entry Tax, and Niryatkar. However, the increase in the amount being paid on account of the said taxes is consequential to the increase in the NMET and DMF, etc. The claim due to the increase in various levies, such as NMET, DMF, *etc.*, is Rs. 1,01,64,293/-.

(iv) The Petitioner is entitled to Carrying Cost on the shortfall/differential amount towards the Change in Law compensation equivalent to the Late Payment Surcharge stipulated in the PPAs. Thus, the carrying cost in the present matter works out to be Rs. 34,03,50,417/-.

11. Rajasthan Discoms in their reply have made the following submissions:

(i) The Petitioner has failed to provide the necessary details regarding the rated Design Heat Rate guaranteed by the equipment supplier, which are essential for the verification and computation of the Station Heat Rate. Resultantly, Respondent No. 2, RUVITL, is unable to calibrate the Station Heat Rate in the absence of such details. Further, in terms of the 2014 Tariff Regulations and the 2019 Tariff Regulations, the Design Heat Rate for sub-critical units of 600 MW at a pressure rating of 170 Kg/ cm² and temperature of 537/565 °C using sub-bituminous Indian Coal shall not exceed 2250 kCal/kWh. Thus, for the purpose of verifying/calculating compensation, the following Gross Station Heat Rate may be considered:

a. For the control period 2014-19 and as per 2014 Tariff Regulations- *Gross Station Heat Rate = 2351.25*

b. For the control period 2019-24 and as per 2019 Tariff Regulations -*Gross Station Heat Rate = 2362.50*

(ii) As per the APTEL's judgment, the Petitioner is not entitled to carrying cost for the period from 29.4.2017, when the Petitioner had earlier invoked the jurisdiction of the Commission till 25.1.2019, when the application was filed before the APTEL to receive additional evidence.

(iii) Carrying cost should only be allowed if there is a corresponding restitution clause in the PPA that the Petitioner can rely upon to claim such cost. In the present matter, there is no provision in the PPA for carrying cost or restitution, and thus, the same may not be allowed. Even otherwise, the carrying cost is to be given for the period starting from 25.1.2019, then the carrying cost ought to be equated with the interest on working capital only. Reliance in this regard was placed on the judgment of the Hon'ble Supreme Court dated 20.4.2023 in the case of Maharashtra State Electricity Distribution Company Limited v. Adani Power Maharashtra Limited and Ors., Civil Appeal Nos. 687 and 688 of 2021.

(iv) Claims such as Development surcharge, consequent increase in VAT, Entry tax, Niryatkar on account of increase in various levies, i.e., NMET, and DMF, etc. ought to be considered afresh strictly in terms of the applicable regulations and after subjecting the same to a strict prudence check by the Commission.

(v) An Auxiliary Power Consumption (APC) of 5.25% for the control period

2014-19 and an APC of 5.75% for the control period 2019-24 was allowed by the Commission. Placing reliance on the order dated 3.12.2019 passed by the Commission in Petition No. 213/MP/2018, it was also submitted that in the present case also, the APC should be considered lower of actual or normative as per applicable regulation for computing the Change in Law claims.

12. The matter was further listed for the hearing on 24.1.2024 along with Petition No. 229/MP/2018, comprising similar issues as in the present matter. The Commission permitted the Petitioner to file rejoinders in both matters. Pursuant thereto, the Petitioner filed its rejoinder on 9.4.2024 to the reply filed by Rajasthan Discoms.

13. In rejoinder, the Petitioner mainly submitted as under:

(i) The averments of the Rajasthan Discoms regarding non-furnishing of documents relating to rated design heat, design boiler efficiency, etc., are wholly incorrect. The Petitioner has already provided all the details, including the supporting documents in respect of the Design Heat Rate, Performance Guarantee, etc., under the Contract for Supply of BTG Package, issued by the equipment manufacturer, Bharat Heavy Electricals Ltd. Further, in light of the APTEL judgment, the SHR payable to the Petitioner shall be as per actuals, subject to the Regulations.

(ii) The computations of the Rajasthan Discoms regarding the consideration of SHR as 2351.25 (as per 2014 Tariff Regulations) and SHR as 2362.50 (as per 2019 Tariff Regulations) are incorrect.

a. The Petitioner comes under the 2nd row of the Table of Regulation 36(C)(b), i.e., Maximum Turbine Heat Rate of 1950 kCal/kWh and not 1935 kCal/kWh, and therefore the Design Heat Rate of the Petitioner's Plant is 2267 kCal/kWh. Upon multiplying the Design Heat Rate by 1.045 as per Regulation 36, the Station Heat Rate of Petitioner's Plant is 2369/KWh as per CERC Tariff Regulations 2014 applicable for the 2014-19 period. Since the Petitioner has considered the Design Heat Rate of 2252 kCal/kWh, multiplying the same by 1.045, the Station Heat Rate works out to 2353 Kcal/KWh.

b. As per the CERC Tariff Regulations 2019, upon multiplying the Design Heat Rate with 1.05 with 2267 kCal/kWh, as per Regulation 49, the Station

Heat Rate of Appellant's Plant is 2380 kCal/kWh. Since, the Petitioner has considered the Design Heat Rate of 2252 kCal/kWh, multiplying the same with 1.05, the Station Heat Rate works out to 2365 kCal/kWh.

c. The Petitioner has computed its claim considering lower of actual SHR or normative SHR of 2353 kCal/kWh for the period 2014-19 and normative SHR of 2365 kCal/kWh for the period 2019-24.

14. Vide Record of Proceedings for the hearing dated 10.4.2024, the Commission directed the Petitioner to file the detailed calculation of the Differential/Balance Outstanding amount in excel sheets (amounting to Rs. 43.73 crores as submitted by the Petitioner) along with the proper justification of the input values used for the said calculation. The Petitioner was also directed to file the Performance Guarantee Test Report as issued by the OEM certifying the Design Heat Rate, Design Boiler efficiency, and Design Turbine Heat Rate. The Petitioner, vide its compliance affidavit dated 25.9.2024, has clarified that there was a minor error in the calculation of the differential/balance amount. The correct amount is Rs. 40.17 crores, as opposed to Rs. 43.73 crores. The amount of Rs. 43.73 crores includes Rs. 3,55,55,272/-, which is recoverable from the Respondents towards the claim for fly ash transportation, as allowed by this Commission vide Order dated 3.12.2019 in Petition No. 213/MP/2018. Since the said amount of Rs. 3,55,55,272/- does not form part of the present proceeding, it has been excluded from the claim. However, this amount is due and payable by the Respondents.

15. The matter was further listed on 19.10.2024, and the order was reserved after considering the detailed submissions made by the learned counsels of the parties.

Analysis and Decision

16. We have considered the submissions made by the parties. As noted above, the APTEL has remanded the matter to the Commission for determination of the

compensation which the Petitioner is entitled to towards actual Station Heat Rate (SHR), subject to the SHR prescribed in the applicable Tariff Regulations and for re-examination of the issues pertaining to carrying cost, Development Surcharge on coal and increase in VAT, Entry Tax, Niryat Kar on account of an increase in various levies such as NMET, DMF, etc. Now, we proceed to decide the issue-wise relief to be allowed to the Petitioner in light of the APTEL's judgment dated 25.7.2023.

Development Surcharge on coal

17. In light of the APTEL's remand order, we hereby proceed to examine whether the increase in levy of Development Surcharge is a Change in Law event. The Petitioner has submitted that as on the cut-off date, i.e., 11.9.2012, the rate of Development Surcharge was 5% on the applicable base freight and the Busy Season Surcharge. Although the rate of Development Surcharge remained unchanged, the rate of Busy Season Surcharge was enhanced from 10% to 12% of the base freight vide Circular No. 28 of 2012 dated 27.9.2012. Further, vide rates Circular No. 24 of 2013 dated 18.9.2013, the rate of Busy Season Surcharge was further enhanced from 12% to 15% of the base freight. Thereafter, the Ministry of Railways, Government of India, vide its Notification No. TCR/1078/2015/07 dated 9.1.2018, had withdrawn the Busy Season Surcharge and Development Surcharge with effect from 15.1.2018. The Petitioner is, thus, claiming the Change in Law compensation for the increase in Development Surcharge due to the increase in the rates of Busy Season Surcharge from the power supply commencement date under the respective PPAs till 15.1.2018. The summary of the compensation claimed by the Petitioner towards Development Surcharge is as under:

Development Refund/Claim	Surcharge	Claim at actuals & refund at base rate at the time of bid for through rail mode (in Rs. crores)
FY 16-17		0.07

Apr'17 - Jan' 18	0.32
Feb' 18 – Mar' 18	-0.07
FY 18-19	-0.56
FY 19-20	-0.56
FY 20-21	-1.08
FY 21-22	-0.98
FY 22-23	-1.01
FY 23-24 (till Oct' 23)	-0.52
	-4.39

18. On the contrary, Rajasthan Discoms have contended that the claims such as Development surcharge, consequent increase in VAT, Entry tax, Niryatkar on account of increase in various levies, i.e., NMET, DMF, etc. ought to be considered afresh strictly in terms of the applicable regulations and after subjecting the same to a strict prudence check by the Commission.

19. We have considered the submissions of the parties. Undoubtedly, the levy of the Development Surcharge and the Busy Season Surcharge by Indian Railways on the transportation of coal has been recognized as a Change in Law event by the APTEL as well as the Hon'ble Supreme Court. The Hon'ble Supreme Court in its judgment dated 20.4.2023 in the case of GMR Warora Energy Ltd. & Ors. v. CERC & Ors. [2023 SCC Online SC 464], while upholding the APTEL's findings on the above aspects in the order dated 14.8.2018 in Appeal Nos. 111 of 2027 and 290 of 2017, observed as under:

“...101. Insofar as increase in Busy Season Surcharge, Development Surcharge on transportation of coal, and Port Congestion Surcharge by the Indian Railways are concerned, the learned APTEL had found that the Indian Railways is an instrumentality of the State. It has been found that the Busy Season Surcharge, Development Surcharge and Port Congestion Surcharge were increased from time to time vide Circulars/Notifications issued by the Ministry of Railways, through the Railway Board.

102. A Constitution Bench of this Court, in the case of Railway Board, Government of India v. M/s Observer Publications (P) Ltd.⁶, has held the Railway Board to be a State within the meaning of Article 12 of the Constitution of India. (1972) 2 SCC 266

103. As such, no error could be found in the finding of the learned APTEL

that the revision of charges to be paid on Busy Season Surcharge, Development Surcharge and Port Congestion Charges from time to time by the 'Railway Board' would come within the ambit of 'Change in Law'..."

20. However, as noted above, the claim of the Petitioner for the Development Surcharge is *per se* not for the introduction or the increase in its rates by the Indian Railways but for the increase in the net outflow *qua* Development Surcharge due to increase in the rates of Busy Season Surcharge by the Indian Railways as the incidence of Development Surcharge is computed on the base freight and the Busy Season Surcharge. However, in the case of the Petitioner, the revision in the rates of Busy Season Surcharge has not been recognised as Change in Law event by the Commission in its earlier order dated 19.12.2017 and the finding to this effect also does not appear to have been challenged by the Petitioner in the Appeal No. 253 of 2018. Accordingly, no relief on account of an increase in the net outflow *qua* Development Surcharge till 14.1.2018 due to the increase in the rate of Busy Season Surcharge, which has not been recognised as a Change in Law event, can be granted to the Petitioner. However, w.e.f. 15.1.2018, the Development Surcharge has been withdrawn by the Railways, and the benefits accrued to the Petitioner on account of such withdrawal shall be shared with the Respondents in proportion to the consumption of coal for the supply to them.

Increase in VAT, Entry Tax, and Niryatkar on account of increase in various levies such as NMET, DMF, etc.

21. The Petitioner has submitted that its claims on account of consequent increase in VAT, Entry Tax, and Niryatkar due to increase in various levies such as NMET, DMF, etc. were not allowed by the Commission in its order dated 19.12.2017 on the ground the Petitioner having not submitted the required/supporting documents in terms thereof. However, the APTEL, vide its order dated 25.7.2023, has directed the Commission to reconsider such claim on merits uninfluenced by the observations made in the earlier

order. The Petitioner has submitted that there is no change in rates of taxes, namely, VAT, Entry Tax, and Niryatkar, and the increase in the amount being paid on account of the said taxes is consequential to the increase in NMET, DMF, etc. The documents in support thereof, along with the statement of computation, have been filed by the Petitioner. In the said statement, the Petitioner pointed out that as on the bid cut-off date i.e. 11.9.2012, VAT was levied at the rate of 5% on the summation of base price of coal, Royalty, Stowing Excise Duty, Surface Transportation Charge, Sizing and Crushing Charge, Niryat Kar, Infrastructure Development Cess, Forest tax, Environment Cess, Excise Duty, Clean Energy Cess, and Entry Tax. Though the rate of VAT, Entry Tax, etc., remained unchanged, the introduction of new taxes such as NMET and DMF, along with the change in the rate at which the aforesaid components are levied, had an overall impact on the net tax outflow *qua* VAT. As per the Petitioner, the additional expenditure of payment of VAT, due to a change in the underlying components on which the said VAT is imposed, is as follows:

Period	Value Added Tax (Rs.)
Nov, 16	-3,500
Dec, 16	4,23,168
Jan, 17	17,62,814
Feb, 17	14,49,228
Mar, 17	8,93,246
Apr, 17	22,75,363
May, 17	23,74,012
Jun, 17	9,89,963
Total FY 17-18	1,01,64,296

22. We have considered the submissions made by the Petitioner. In terms of the order of APTEL dated 25.7.2023, the Commission is required to reconsider the claims of the Petitioner for the consequential increase in VAT, Entry Tax, and Niryatkar on account of the increase in various levies such as NMET, and DMF, etc., on their merits without being influenced by the observations made in the earlier order. In the earlier order dated 19.12.2017, the Commission observed that the Petitioner had failed to

produce the supporting documents in respect thereof, and accordingly, the liberty was granted to the Petitioner to approach the Commission with relevant details. The Petitioner has, however, submitted that as such, there is no change in rates of these taxes, namely, VAT, Entry Tax, and Niryatkar, and the increase in the amount being paid on account of the said taxes is consequential to the increase in NMET and DMF, etc. The Petitioner has also placed on record the various invoices raised by SECL showing the above levies for the purpose of illustration. It is noticed that a similar issue had been addressed by the Commission in its order dated 4.7.2022 in Review Petition No. 26/RP/2021 in Petition No. 560/MP/2020, wherein the Commission has observed as under:

“15. Thus, in the impugned order, the levy of entry tax was disallowed by the Commission considering that the Petitioner had failed to place on record any documentary proof to show that entry tax has been increased by promulgation/ amendment of any statute or any governmental instrumentality. However, in doing so, the impugned order as such appears to overlook the specific submission of the Review Petitioner that it had not sought the compensation towards increase in rate of entry tax rather it is claiming compensation on account of consequent impact on entry tax due to increase in component on which entry tax is levied i.e. Excise Duty, Clean Energy Cess, Chhattisgarh Paryavaran Evam Vikas Upkar, DMF and NMET, which have already been recognized as Change in Law events in the case of the Review Petitioner. The Review Petitioner has pointed out that in the impugned order, the compensation claimed on account of Excise Duty, VAT/CST, Service Tax has been allowed by the Commission on account of their overall change due to change in their components.

16. It is observed that with regard the Petitioner’s claim of increase in VAT, which was similar to its claim of entry tax, the following held in the impugned order:

“(C) Value added Tax

37. The Petitioner has submitted that as on cut-off date of LT-PPA i.e. 27.2.2013, VAT was levied at the rate of 5% and CST was levied at the rate of 2%, which was considered and factored by the Petitioner in its bid. VAT/CST is payable, inter alia, on DMF & NMET, Excise Duty, Entry Tax, Clean Energy Cess and Chhattisgarh Paryavaran Evam Vikas Upkar. Though the rate of VAT/CST remained unchanged, due to increase in the rate at which the aforesaid components are levied, there is corresponding increase in VAT/CST, which qualifies as change in law event under 5th bullet of Article 10.1.1 of the LT-PPA. The Petitioner has placed on record the auditor certificate certifying the payment made towards VAT/CST w.r.t to LT-PPA and sample invoice elaborating as to how Excise Duty, Entry Tax and VAT/CST are computed.

38. We have examined the matter. The Petitioner has submitted the sample invoice dated 6.4.2017 raised by South Eastern Coalfields Limited showing levy of VAT @ 5% of total invoice value of coal. Since DMF & NMET, Excise Duty, Entry Tax, Clean Energy Cess and Chhattisgarh Paryavaran Evam Vikas Upkar have been held as change in law events, consequential increase in VAT linked with these taxes and duties is also allowed under the change in law provision on the principle of restitution.”

Thus, as regards increase in VAT, the impugned order allows the consequential increase in VAT on account of increase in DMF, NMET, Excise Duty, Entry Tax, Clean Energy Cess and Chhattisgarh Paryavaran Evam Vikas Upkar under Change in Law provision on the principle of restitution since they had already been held as Change in Law events in the case of the Petitioner.

17.Accordingly, in line with the decision of the Commission in respect of claim of VAT, the Review Petitioner also needs to be compensated for consequential increase in entry tax payable on account of other Change in Law events viz. increase in DMF, NMET, Excise Duty, Clean Energy Cess and Chhattisgarh Paryavaran Evam Vikas Upkar under Change in Law provision on the principle of restitution.

.....
20. In view of the foregoing observation, we hold that since DMF & NMET, Excise Duty, Clean Energy Cess and Chhattisgarh Paryavaran Evam Vikas Upkar have been held as Change in Law events, consequential increase in entry tax linked with these taxes and duties will also be allowed under Change in Law provision on the principle of restitution. The Commission has already devised the mechanism for payment of Change in Law compensation in its order dated 13.12.2017 in Petition No. 189/MP/2016. The parties are required to follow the same mechanism for payment of Change in Law stipulated in the order dated 13.12.2017 in Petition No. 189/MP/2016 for payment of entry tax.”

In line with the aforesaid findings, the Petitioner in this case too shall be eligible to recover the additional expenditure incurred towards the consequential increase in VAT, Entry Tax, and Niryatkar on account of increase in the underlying taxes and duties on which the VAT, Entry Tax, and Niryatkar are computed provided these taxes and duties are also recognized as Change in Law. For the sake of clarity, the consequential increase in VAT, Entry Tax, and Niryatkar on account of revision/variation in the base price of coal, etc., which have not been recognized as a Change in Law, would not be recoverable. Whereas, the consequential increase in VAT, Entry Tax, and Niryatkar on account of introduction/increase in rates of levies such as NMET, DMF, etc., which have been recognized as a Change in Law, will be recoverable from the Respondents. Accordingly, the Petitioner shall be entitled to recover the additional expenditure

incurred towards consequential increase in VAT, Entry Tax, and Niryatkar on account of increase in levies such as NMET, DMF, and other such levies, which have been recognized as Change in Law, from the Respondents in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations 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 computing the impact of consequential increase in VAT, Entry Tax, and Niryatkar.

Station Heat Rate

23. In terms of the APTEL's judgment dated 25.07.2023, we now proceed to determine the amount of compensation, which the Petitioner is entitled to, towards the actual Station Heat Rate, subject to the statutory regulation governing the field. In this regard, the Petitioner, vide affidavit dated 15.01.2024, has submitted shortfall/differential in the Change in Law claims compensation as Rs. 43,73,35,024/- calculated by taking the lower of (actual SHR & SHR as per Regulations) and the lower of (actual APC & APC as per Regulations). Further, the Petitioner, vide its affidavit dated 25.09.2024, has submitted that there is a minor error in the calculation of the above shortfall in the Change in Law compensation of Rs. 43.73 crores, stating it should be Rs. 40.17 crores instead of Rs. 43.73 crores and the amount include Rs. 3,55,55,272/-, which is recoverable from the Respondents for fly ash transportation. Accordingly, Petitioner has claimed a shortfall in Change in Law compensation of Rs. 40,17,79,869/- and submitted Excel sheets for calculating the following differential/balance outstanding amount.

Table-1

Impact of SHR			
Impact on Taxes (in Rs.)			
Month	Original	Revised	Difference
Nov-2016	12,38,109	12,99,544	61,434
Dec-2016	3,61,62,618	3,79,79,098	18,16,480
Jan-2017	3,30,98,819	3,43,09,651	12,10,832
Feb-2017	2,95,58,991	2,98,24,267	2,65,276
Mar-2017	3,44,11,308	3,54,31,471	10,20,163
Total FY 2017	13,44,69,845	13,88,44,030	43,74,186
Total FY 2018	89,55,14,989	1,01,36,41,568	11,81,26,579
Total FY 2019	1,68,43,52,711	1,80,28,99,665	11,85,46,954
Total FY 2020	1,19,51,18,291	1,24,80,91,255	5,29,72,964
Total FY 2021	75,09,67,269	76,59,35,993	1,49,68,724
Total FY 2022	71,44,39,797	75,67,31,997	4,22,92,201
Total FY 2023	72,92,90,179	76,02,57,432	3,09,67,253
Total FY 2024	44,38,41,673	46,33,72,682	1,95,31,009
GRAND TOTAL from Nov 2016 to March 2024	6,54,79,94,753	6,94,97,74,622	40,17,79,869

Table-2

FY	SHR Actual	SHR Norms	SHR (Minimum of Actual & Norms)	APC Actual	APC Norms	APC Min of Actual & Norms
Nov-2016	2,383	2,353	2,353	5.61%	5.25%	5.25%
Dec-2016	2,399	2,353	2,353	5.30%	5.25%	5.25%
Jan-2017	2,338	2,353	2,338	5.00%	5.25%	5.00%
Feb-2017	2,279	2,353	2,279	4.94%	5.25%	4.94%
Mar-2017	2,297	2,353	2,297	5.09%	5.25%	5.09%
FY 2017-2018	2,421	2,353	2,353	5.67%	5.25%	5.25%
FY 2018-2019	2,302	2,353	2,302	5.52%	5.25%	5.25%
FY 2019-2020	2,289	2,365	2,289	5.64%	5.75%	5.64%
FY 2020-2021	2,299	2,365	2,299	5.30%	5.75%	5.30%
FY 2021-2022	2,365	2,365	2,365	5.33%	5.75%	5.33%
FY 2022-2023	2,362	2,365	2,362	5.55%	5.75%	5.55%
Apr-2023	2,310	2,365	2,310	5.37%	5.75%	5.37%
May-2023	2,339	2,365	2,339	5.15%	5.75%	5.15%
Jun-2023	2,398	2,365	2,365	5.53%	5.75%	5.53%
Jul-2023	2,439	2,365	2,365	5.96%	5.75%	5.75%
Aug-2023	2,403	2,365	2,365	5.59%	5.75%	5.59%
Sep-2023	2,352	2,365	2,352	5.52%	5.75%	5.52%
Oct-2023	2,345	2,365	2,345	5.32%	5.75%	5.32%

24. Furthermore, it is observed that the Petitioner has also submitted a copy of the

OEM Performance Guarantee Test Report for the Plant, wherein, the Design Heat Rate is 2252 kCal/kWh (i.e., Minimum Guaranteed Gross Turbine Heat Rate of 1944 kCal/kWh at 86.32% Efficiency of the Steam Generator) and the Petitioner computed its claim using the lower of actual or normative SHR of 2353 kCal/kWh for 2014-19 and 2365 kCal/kWh for 2019-24 as per the Regulations.

25. The Commission reviewed the submissions of both the Petitioner and the Respondents, along with supporting documents and calculations. It is observed that the Petitioner had submitted calculation, detailing the differential compensation amount arising due to variation in the coal consumption quantum along with applicable taxes and duties with consideration of ceiling SHR of 2353 kCal/kWh (during 2016-19) / 2365 kCal/kWh (during 2019-24) as compared to the ceiling SHR of 2250 kCal/kWh allowed in the Commission's Order dated 19.12.2017 in Petition No.101/MP/2017. The calculations have been carried out considering the lower of either the Actual Station Heat Rate (SHR) or Normative SHR, and the lower of Actual Auxiliary Consumption (AUX) or Normative AUX.

26. Accordingly, the tentative differential quantity of coal eligible for compensation has been assessed by considering lower of SHR of 2250 kCal/kWh or actual, and the lower of AUX of (5.25% for 2014-2019 and 5.75% for 2019-2024) or actual, in the computation submitted by the Petitioner. The same is tabulated as below:

FY	Coal consumption based on minimum of the Actual SHR or Normative SHR*, as well as minimum of Actual AUX or Normative AUX		Coal consumption based on minimum of SHR of 2250 kCal/kWh or Actual SHR, as well as minimum of AUX of 5.25% or actual AUX		Tentative differential Quantity for the change in law compensation	
	Linkage Coal	Alternate Coal	Linkage Coal	Alternate Coal	Linkage Coal	Alternate Coal
	MT	MT	MT	MT	MT	MT
FY 2016-2017	285444	57967	285444	46546	0	11420
FY 2017-2018	987476	406563	987476	339423	0	67140

FY 2018-2019	1084029	462818	1084029	423345	0	39473
FY 2019-2020	998903	495340	998903	466637	0	28703
FY 2020-2021	1502088	103794	1498579	68619	3508	35175
FY 2021-2022	1447019	150739	1446437	86589	582	64150
FY 2022-2023	1596546	43312	1533779	34200	62767	9112
FY 2023-2024	987349	1713	947022	0	40327	1713
Total					107184	256887
Note: * Upto March 2019, the normative SHR ceiling is 1.045 X Design Heat Rate (kCal/kWh), i.e, 2353kCal/kWh and AUX is 5.25%.						
*From April 2019, the normative SHR ceiling is 1.05 X Design Heat Rate (kCal/kWh), i.e, 2365 kCal/kWh and AUX is 5.75%.						

27. It is observed that the Petitioner has claimed a revised differential compensation amounting to ₹40,17,79,869/- for the period from November 2016 to March 2024. This amount includes components such as National Mineral Exploration Trust (NMET), District Mineral Foundation (DMF), Chhattisgarh Development Tax, Chhattisgarh Environment Tax, Clean Energy/Environment Cess, Service Tax/GST on Transportation, and under-supply of coal from SECL. The inclusion of these elements ensures that the compensation comprehensively covers all additional costs incurred due to statutory changes. Furthermore, it was observed that the Respondents did not contest the claim, indicating that there was no dispute regarding the calculations or the methodology submitted by the Petitioner. As the Respondents have not contested the claim or the methodology adopted by the Petitioner, the claim is found to be admissible. As far as the compensation amount is concerned, the Petitioner and the Respondent may carry out reconciliation, if any, based on the additional coal quantum.

Carrying Cost

28. The Petitioner has submitted that it is entitled to Carrying Cost on the shortfall/differential amount towards the Change in Law compensation equivalent to the Late Payment Surcharge stipulated in the PPA. On the other hand, the Respondents have submitted that the carrying cost should not be allowed in the present scenario, even if the carrying cost is to be given for the period starting from 25.1.2019, then the carrying cost ought to be equated with the interest on working capital only. We have

considered the submissions of both sides. While the Respondents, Rajasthan Discoms, in their affidavit dated 22.1.2024, have also sought to contend that the PPAs in this case do not contain any specific provision for carrying cost or restitution, the claim of the Petitioner for carrying cost ought not to be allowed. However, we find the aforesaid submissions completely misconceived. The Rajasthan PPA, at Article 10.2.1, clearly provides that while determining the consequences of Change in Law, 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 therein, the affected Party to the same economic position as if the Change in Law had not occurred. The PPA entered into between the Petitioner and PTCIL also adopts the Change in Law provisions of the Rajasthan PPA in totality without any deviation. Thus, both the PPAs in the present case envisage the restitutionary principle for the Change in Law relief. Further, the said article is identical to Article 13.2 considered by the Hon'ble Supreme Court in the case of Uttar Haryana Bijli Vitran Nigam Limited and Anr. v. Adani Power Limited and Ors. [(2019) 5 SCC 325], while upholding the grant of carrying cost on the basis of restitutionary principles enshrined therein. Hence, the averments of the Respondents, Rajasthan Discoms, to the contrary cannot be sustained. Accordingly, the Petitioner shall be entitled to the carrying cost from the date of incurring of additional expenditure on account of Change in Law events as allowed by the Commission vide order dated 19.12.2017 till the date of said order. Similarly, for the Change in Law event(s) allowed by this order, the Petitioner shall be entitled to the carrying cost from the date of incurring the additional expenditure till the date of this order. However, for the incremental Change in Law compensation on account of actual SHR subject to the ceiling of normative SHR, as computed above, the Petitioner shall be entitled to carrying cost only for the period prior to 29.4.2017 and after 20.1.2019 in terms of the APTEL's order dated 25.7.2023.

29. Coming back to the applicable rate for the carrying cost for the aforesaid period(s), it pertinent to refer the recent observations of the APTEL in the judgment dated 16.4.2025 in Appeal No. 842 of 2023 in the matter of Essar Power Gujarat Limited v. Gujarat Electricity Regulatory Commission and Anr., as extracted below:

“[...].....The Appellant’s entitlement for interest, in view of Article 13.2(b) of the PPA, is as a measure of restitution, and in order to put them back in the same position they were in, but for the change in law event. Article 13.2 of the PPA does not prescribe the manner in which a party should be restituted or the nature of interest (whether simple or compound) or the rate of interest they are entitled to as a measure of restitution. The interest they are entitled to should, therefore, be such as to put them back in the same position they would have been in, but for the occurrence of the change in law event.

Consequently, the Appellant would be entitled not only to the principal amounts which they incurred as a result of the change in law, but also for interest thereon till the date on which they were compensated for the change in law event, on payment of the principal sum. What Article 13.2 requires is for the Appellant to be compensated for the loss and not to permit the Appellant to unduly enrich itself in the process. The obligation of the Court/Tribunal is to ensure equity, fairness and justice for both the parties. It should not only adopt a realistic and verifiable approach, but also take into consideration the actual loss suffered by the party entitled to restitution, while at the same time ensuring that the said party is not unduly enriched in the process. [Citybank vs. Hiten P. Dalal (2016) 1 SCC 411].

In Uttar Haryana Bijli Vitran Nigam Ltd. v. Adani Power (Mundra) Ltd., (2023) 2 SCC 624, the Supreme Court, alluding to Reserve Bank of India Circulars dated 14-8-2003 and 3-3-2016 that provided for a borrower to pay interest to the lender on compound interest basis, noted the submission urged on behalf of Respondent 1 Adani Power, that, having borrowed money from banks to install the FGD unit and having paid compound interest on the borrowed sum, it was only seeking restitution for the interest incurred by it and paid to the banks at the same rate; and this was not a case of unjust enrichment.

The Supreme Court held that the restitutionary principles encapsulated in Article 13.2 would take effect for computing the impact of change in law; in the instant case, Respondent 1 Adani Power had to incur expenses to purchase the FGD unit and install it in view of the terms and conditions of the environment clearance given by the Ministry of Environment and Forests; it had to arrange finances by borrowing from banks; the interest rate framework followed by scheduled commercial banks and regulated by Reserve Bank of India mandated that interest shall be charged on all advances at monthly rests; and, in this view of the matter, Respondent 1 Adani Power was justified in stating that, if the banks had charged it interest on monthly rest basis for giving loans to purchase the FGD unit, any restitution would be incomplete, if it was not fully compensated for the interest paid by it to the banks on compounding basis.

Following its earlier judgement in Uttar Haryana Bijli Vitran Nigam Ltd. v. Adani Power (Mundra) Ltd., (2023) 2 SCC 624, the Supreme Court, in GMR Warora Ltd. vs. CERC : (2023) 10 SCC 401, held that grant of compound interest as carrying cost. on occurrence of the change in law event, is based on sound logic; the idea behind granting interest on carrying cost is aimed at restituting a party that is affected by a change in law event, and to restore it to its original economic position as if such a change in law event had not taken place; in order to restore the party, which has suffered an economic disadvantage as a result of the change in law event, to its original economic position it was in but for such change in law, it is permissible to grant them compound interest on carrying cost; application of restitutionary principles and privity of contractual obligations between the parties as contained in the PPA, may, in view of

the consistent position of law declared by the Supreme Court, justify payment of compound interest even if there is no specific provision in the PPA for payment of compound interest.

In *GMR Warora Ltd. vs. CERC* : (2023) 10 SCC 401, the Supreme Court affirmed the judgment of this Tribunal, in *Adani Power Maharashtra Limited v. MERC* (Order in Appeal No. 40 of 2022 dated 22.03.2022), wherein the rate prescribed for LPS in the relevant Article of the PPA (i.e., SBI PLR plus 2%) was directed to be considered for recovery of carrying cost; and it was held that, unless the rate of interest applicable for LPS is granted, the Appellant cannot be restored to the same economic position it was in prior to the occurrence of the change in law event.

In *MSEDCL vs. MERC* : (2022) 4 SCC 657, the Supreme Court observed that Late payment surcharge is only payable when payment against monthly bills is delayed, and not otherwise; the object of LPS was to enforce and/or encourage timely payment of charges by the procurer; in other words, LPS dissuaded the procurer from delaying payment of charges; and LPS cannot be equated with carrying cost or actual cost incurred for the supply of power.

The law on restitution vests expansive power in the court but such power has to be exercised to ensure equity, fairness and justice for both the parties. The court should adopt a realistic and verifiable approach instead of resorting to hypothetical and presumptive value. In the context of restitution, the court should keep under consideration not only the loss suffered by the party entitled to restitution but also the gain, if any, made by other party who is obliged to make restitution. No unmerited injustice should be caused to any of the parties. (*CITI Bank vs. Hiten P. Dalal* : (2016) 1 SCC 411).

In the absence of an express stipulation in this regard in Article 13.2 of the PPA, there can be no hard-and-fast rule as to how much interest should be granted as a measure of restitution, and it would depend on the facts and circumstances of each case. Awarding of compound interest without examining the relevant factors may, in certain cases, lead to unjust enrichment by the party seeking restitution in the name of disgorgement of benefits purportedly derived by the other party. (*Suneja Towers Pvt. Ltd. vs. Anita Merchant* : (2023) 9 SCC 194; *Clariant International Ltd. v. SEBI*, (2004) 8 SCC 524; and *Alok Shanker Pandey v. Union of India*, (2007) 3 SCC 545).

While the Appellant may be entitled to claim compound interest as a measure of restitution in case they had paid compound interest while borrowing money to make payment for the change in law event, as in *Uttar Haryana Bijli Vitran Nigam Ltd. v. Adani Power (Mundra) Ltd.*, (2023) 2 SCC 624, they may not be entitled, under the guise of restitution, to unduly enrich themselves in the process. For instance, if they had borrowed money at simple interest to discharge their dues which arose as a result of the change in law, paying them compound interest as a measure of restitution would undoubtedly result in their unjust enrichment, at the cost of the 2nd Respondent-GUVNL, which cost would, eventually, be borne by the consumers whose interest the GERC is obligated to protect under Section 61(d) of the Electricity Act. It is only for the loss suffered by them as a result of the change in law event, can they seek restitution, and not beyond.

The extent of loss they have suffered, as a result of belated payment of compensation for change in law to them by the 2nd Respondent, is a question of fact which necessitates consideration on the basis of the documentary evidence adduced in this regard. The onus is on the Appellant to produce documentary proof to show that they had paid compound interest for borrowing money to pay GST, and they are therefore entitled to be paid the same rate of compound interest to compensate them for the loss they suffered on account of belated payment of change in law compensation. We may not be understood to have held that the quantum of loss suffered by the Appellant must be determined with absolute precision or with mathematical exactitude. All that we have held is that the Appellant must adduce documentary evidence to reasonably establish the quantum of loss suffered by them.

We may also not be understood to have held that the Appellant is disentitled for compound interest. As held in *Uttar Haryana Bijli Vitran Nigam Limited vs. Adani Power Mundra Limited: (2023) 2 SCC 624*, in case the Appellant is able to establish that they had paid compound interest to borrow money from the banks for meeting the expenditure incurred on account of the change in law event, they would be entitled to be compensated for such amount by payment of compound interest.

.....

While it is no doubt true that LPS cannot be equated with carrying cost [*MSEDCL vs. MSERC (2022) 4 SCC 657*], the affected party may, in a given case, only be restored to the same economic position they were in before the change in law occurred, by applying the LPS rate, as held by the Supreme Court in *GMR Warora Ltd. vs. CERC : (2023) 10 SCC 401* while affirming the judgment of this Tribunal, in *Adani Power Maharashtra Limited v. MERC (Order in Appeal No. 40 of 2022 dated 22.03.2022)*, The interest (simple or compound) to which the appellant is entitled to, and in case of compound interest, whether it should be on quarterly or half yearly or yearly rests, are matters to be decided on the basis of documentary evidence adduced on behalf of the Appellant in this regard.

As there is no material on record to show how the Appellant had paid the amounts as a result of the change in law, whether or not they had borrowed money to pay the said amounts, and whether any such borrowings were on payment of compound interest, we deem it appropriate to remand the matter, requesting the GERC to determine the interest, and the applicable rate thereof, to which the appellant is entitled to as a measure of restitution for belated payment of change in law compensation, after permitting them to adduce documentary evidence in this regard. Needless to state that the 2nd Respondent-GUVNL shall also be given a reasonable opportunity of rebutting the contentions urged on behalf of the Appellant.

30. In the present case, the Petition has placed on record the details of the actual rates of interest on the working capital paid by it to lenders as well as the LPS rates worked out as per the PPAs. Given the actual interest rates on the working capital arranged by the Petitioner is lower than the LPS rates as well as the interest rates on working capital as worked out as per the applicable Tariff Regulations, we find it appropriate to permit the Petitioner to claim the carrying cost at the actual rate of interest on the working capital arranged by the Petitioner. As regards the simple or compound interest and frequency of rests in case of compound interest, they shall be in line with the applicable interest on working capital arranged by the Petitioner. Accordingly, the Parties shall reconcile the Petitioner's entitlement to the various compensation allowed by this order including the carrying cost within a month from the issuance of this order and the payments to the Petitioner shall be made within 15 days thereafter.

31. With this order, the directions of the APTEL in Appeal No. 253 of 2018 stand implemented, and the Petition stands disposed of to the extent of the remand.

Sd/-
(Harish Dudani)
Member

sd/-
(Ramesh Babu V.)
Member

sd/-
(Jishnu Barua)
Chairperson