

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 83 of 2021

Case of RattanIndia Power Limited seeking compensation on account of occurrence of Change in Law events.

Coram
Sanjay Kumar, Chairperson
I.M.Bohari, Member
Mukesh Khullar, Member

RattanIndia Power Limited Petitioner
Vs
Maharashtra State Electricity Distribution Company Ltd.Respondent

Appearance

For Petitioner: - Shri.Vishrov Mukerjee (Adv.)
For Respondent: - Shri. Ravi Prakash (Adv.)

ORDER

Date: 16 November, 2021

1. RattanIndia Power Limited (**RPL**) has filed this Case on 15 July, 2021 under Section 86(1) (f) of the Electricity Act, 2003 (**EA, 2003**) read with Article 10 of the Power Purchase Agreements (**PPA**) dated 22 April, 2010 and 5 June, 2010 executed between RPL and Maharashtra State Electricity Distribution Company Ltd. (**MSEDCL**), seeking compensation on account of occurrence of Change in Law events.
2. **RPL's main prayers in the Petition are as under:**
 - a. *Declare imposition of Port Congestion Surcharge by Indian Railways as a Change in Law event;*
 - b. *Declare increase in Surface Transportation Charges vide Coal India Limited's notifications dated 13.11.2013 and 15.11.2017, respectively, as Change in Law events;*

- c. *Declare increase in Coal Sizing Charges vide Coal India Limited's notifications dated 16.12.2013 and 31.08.2017, respectively, as Change in Law events*
- d. *Declare expenses to be incurred towards transportation of fly ash pursuant to MOEFCC notification dated 25.01.2016 as a Change in Law event;*
- e. *Grant compensation by way of reimbursement of the expenses incurred by RattanIndia on account of the above-mentioned Change in Law events as set out in paragraphs above along with carrying cost thereon and direct Respondents to pay the same in a time bound manner;*

3. RPL in its Petition has stated as follows:

- 3.1 RPL and MSEDCL have executed two Power Purchase Agreements (PPA) pursuant to Case-1 competitive bidding process initiated by MSEDCL, for supply of 1200 MW [450 MW – PPA dated 22 April, 2010 and 750 MW – PPA dated 5 June, 2010] aggregate power to MSEDCL at levelled tariff of Rs.3.260/kWh. The Commission had approved the aforesaid PPAs and had adopted levelized tariff of Rs.3.260/kWh vide its Order dated 28 December, 2010 in Case No. 22 of 2010 in accordance with the provisions of the Act and the Competitive Bidding Guidelines issued by the Central Government. Subsequently, the PPAs were amended by way of two separate addendums dated 1 February, 2012. The date for consideration of Change in Law events, in terms of the PPAs, is 31 July, 2009, being seven (7) days prior to the Bid Deadline date (i.e., 7 August, 2009) i.e. Cut-off Date.
- 3.2 Article 10 of the PPAs provides for the mechanism to recognize and to deal with Change in Law. The underlying principle of the Change in Law provisions under the PPA is to determine the consequence of Change in Law and to compensate a party affected by a Change in Law such that the party is restored to the same economic position as if such change in law had not occurred. The principle of carrying cost and restitutive relief is no longer res-integra and is a settled position in terms of Hon'ble Supreme Court judgments in *Energy Watchdog vs. CERC & Ors. reported as (2017) 14 SCC 80* ; in *Uttar Haryana Bijli Vitran Nigam Ltd. & Anr. v. Adani Power Ltd. & Ors. reported as (2019) 5 SCC 325*; in *Jaipur Vidyut Vitran Nigam Ltd. & Ors. vs. Adani Power Rajasthan Ltd & Anr. reported as 2020 SCC Online SC 697*; Appellate Tribunal for Electricity (APTEL) judgment dated 20 November, 2018 in *Appeal No. 121 of 2018 titled Sasan Power Limited vs. CERC & Ors.*; in judgment dated 27 April, 2021 in *Appeal Nos. 172/2017 and 154/2018 titled as Coastal Gujarat Power Limited v. Central Electricity Regulatory Commission & Ors*
- 3.3 The present Petition has been filed seeking determination of compensation for the following Change in Law events which have additional recurring/ non-recurring expenditure by RPL along with carrying cost:

A. Imposition of Port Congestion Surcharge

- 3.4 On 20 November, 2014 Ministry of Railways, Government of India notified the levy of Port Congestion Surcharge on 10% of the base freight rate on goods traffic originating from ports w.e.f. 24 November, 2014. This imposition was post the Cut-Off Date under the PPAs.
- 3.5 RPL issued a Change in Law notice dated 17 March, 2016 to MSEDCL, as mandated under the provisions of Article 10.4.1 of the PPAs.
- 3.6 On 13 April, 2016, the Ministry of Railways withdrew Port Congestion Charges. This Notification was valid till 31 March, 2017. Accordingly, RPL is claiming relief for Change in Law with respect to Port Congestion Charges for the period till 31 March, 2017.
- 3.7 The Commission has recognized the imposition of Port Congestion Surcharge as a Change in Law event in its Order dated 5 April, 2018 passed in Case No. 84 of 2016. However, it was noted that Central Electricity Regulatory Commission (**CERC**) in its Order dated 1 February, 2017 in Petition No. 8/MP/2014 titled as *GMR Warora v MSEDCL* held the levy of Busy Season Surcharge (which is a similar levy) not to be a Change in Law event and against this Order, Appeal No. 111 of 2017 filed by GMR Warora was pending before the APTEL at that time. Thus, RPL was granted liberty to approach the Commission depending on the outcome of Appeal No. 111 of 2017.
- 3.8 Subsequently, APTEL in its Judgment dated 14 August, 2018 in Appeal Nos. 111 of 2017 held Busy Season Surcharge to be a Change in Law event. Further Port Congestion Surcharge has been allowed as a Change in Law event by APTEL vide Judgment in Appeal No. 119 of 2016 dated 14 August, 2018 (Adani).
- 3.9 Imposition of Port Congestion Charges has been levied by Indian Railways (Railway Board) pursuant to Section 30-32 of Railways Act, 1989 and was issued subsequent to the Cut-Off Date under the PPAs. The Ministry of Railways, Government of India has been held to be a Indian Government Instrumentality and qualifies as Law as defined under the PPAs.
- 3.10 Accordingly, the imposition of Port Congestion Charges qualifies as Change in Law under the PPAs and RPL is entitled for compensation of Rs. 9.71 Crores (till March 2021) along with carrying cost of Rs. 6.70 Crores (till March 2021) accordingly.

B. Imposition of Surface Transportation and Crushing / Sizing Charges

- 3.11 As on the Cut-Off Date under the PPAs, i.e. 31 July, 2009, the applicable Surface Transportation Charges were as per CIL Notification dated 12 December 2007. As per the said Notification the Surface Transportation Charge was Rs. 40 per tonne (for a distance of more than 3 km but not more than 10 km) and Rs. 70 per tonne (for a distance of more than 10 km but not more than 20 km).

- 3.12 The said charges were revised by CIL through Notifications dated 15 December, 2009 to Rs. 44 per tonne (for a distance of more than 3 km but not more than 10 km) and Rs. 77 per tonne (for a distance of more than 10 km but not more than 20 km) and thereafter vide notification dated 13 November, 2013 to Rs. 57 per tonne (for a distance of more than 3 km but not more than 10 km) and Rs. 116 per tonne (for a distance of more than 10 km but not more than 20 km).
- 3.13 On 15 November, 2017 South Eastern Coalfield Limited (**SECL**) issued revised Surface Transportation Charges incorporating charges for distances 0-3 kms and 3-10 kms from the pithead which would be effective from 5 November, 2017 for all modes of transport.
- 3.14 As on the Cut-Off Date under the PPAs, i.e., 31 July, 2009, the applicable crushing/sizing charges levied by CIL were in line with CIL Notification dated 12 December, 2007. The prevailing charges were Rs. 55/MT (excluding impact of taxes & duties). Subsequently, the charges were revised by CIL vide Notification dated 16 December, 2013 to Rs 79/MT (excluding impact of taxes & duties). CIL vide Notification dated 31 August, 2017 revised sizing charges for coal
- 3.15 RPL has issued Change in Law Notice dated 8 August, 2014 notifying increase in surface transportation charges and crushing and sizing charges as Change in Law as mandated under PPAs.
- 3.16 The Commission in its Order dated 25 March, 2015 in Case No. 173 of 2013 had kept the issue of whether increase in surface transportation charges and increase in coal sizing charges qualify as Change in Law under the PPAs undecided in view of the same issue pending before CERC at that time and RPL was granted liberty to approach the Commission subsequently.
- 3.17 The increase in coal sizing charges and surface transportation charges was introduced by way of notifications issued by CIL which falls within the definition of Change in Law under the PPAs. The said notifications issued have a ‘force of law’ as held by APTEL in Judgement dated 21 December, 2018 in *Appeal No. 193 of 2017 titled GMR Kamalanga Energy Limited v CERC & Ors.* Further APTEL in its judgment passed in respect of *Adani and GMR Warora*, held that a bidder cannot envisage any changes, which may happen in future, regarding taxes, levies, duties etc. Therefore, any increase in charges post the Cut-off date, as a result of any notification issued by an Indian Government Instrumentality has to be treated as a Change in Law event. The CIL notifications resulting into increase in coal sizing charges and surface transportation charges came into effect after the Cut-off date resulting in additional recurring expenditure for RPL.
- 3.18 CERC in its Order dated 2 April, 2019 in Petition No. 72/MP/2018, held that any notification issued by CIL, pertaining to the evacuation charges on coal qualifies as Change in Law event, as the same is an “Indian Government Instrumentality”.

- 3.19 Therefore, an increase in coal sizing charges and surface transportation charges on account of a CIL notification having force of law ought to be treated as a Change in Law event.
- 3.20 The bid was submitted by RPL on 7 August, 2009 and the Fuel Supply Agreement (FSA) was executed on 22 December, 2012. At the time of submission of the bid, RPL could not have known from which mine the coal linkage would be granted. Hence, the surface transportation charges, which depend upon the distance between the coal mine and the loading point, could not be factored while submitting bid. Since the surface transportation charges are uncertain, and are only known when an FSA is executed, the same cannot be factored in the escalation rate.
- 3.21 APTEL in its Judgment dated 14 August, 2018 in respect of Adani Power has disallowed sizing charges and surface transportation charges on the ground that the said charges are covered in the compensation to be provided under the PPA qua the escalation mechanism. CERC vide Order dated 18 October, 2019 in *Suo Motu* Petition No. 10/SM/2019, in the matter of Methodology for Compilation of Coal Price Index applicable for Power Sector, has clarified that Surface Transportation Charges and Sizing Charges are not part of the price of coal notified by CIL and are therefore not considered in the price of coal used for compilation of the coal price index
- 3.22 In view of the above, it is clear that Surface Transportation Charges and Sizing Charges are not part of the “price of coal” notified by CIL. Since CERC has clarified that the above charges are not part of the price notified by CIL, the same could never have been factored for computing Wholesale Price Index (WPI), and in turn the escalation index notified by CERC.
- 3.23 Therefore, it is requested to allow the aforesaid events as change in law events and RPL to be granted compensation on account of increase in crushing/sizing and surface transportation charges.

C. Imposition of fly ash transportation charges

- 3.24 In terms of the Notifications issued by Ministry of Environment, Forests and Climate Change (MoEF & CC) regarding Fly Ash (from 1999), the following position emerges:
- a. Notification dated 14 September, 1999, *inter-alia*, made it obligatory for thermal power plants to provide fly ash generated at the power station without any consideration for the manufacture of ash-based products etc.;
 - b. Notification dated 27 August, 2003 *inter-alia*, added an additional obligation on construction companies engaged within a radius of 50km from a thermal power plant;
 - c. Notification dated 3 November, 2009 merely stated that the obligation on thermal

power plants to provide fly ash free of consideration ceases to exist and that thermal power plants were allowed to sell the same. However, the proceeds of the sale were to be kept in a separate account head and were to be utilized for development of infrastructure and facilities etc. for utilization of fly ash until 100% fly ash utilization.

- d. Notification dated 25 January, 2016 for the first time introduced the condition that thermal power plants were to bear the complete cost of transportation of fly ash till 100km and half the cost from 100-300 km. Prior to 25 January, 2016, such condition did not exist.

3.25 The obligation to bear the cost of transportation was introduced only by way of Notification dated 25 January, 2016 which was issued after the Cut-Off Date. Notifications issued by the MoEF & CC falls within the definition of Law and within the ambit of an Indian Governmental Instrumentality under the PPAs.

3.26 CERC vide order dated 21 February, 2018 passed in Petition No. 131/MP/2016 held the MoEF & CC Notification dated 25 January, 2016 to be a Change in Law event and that the expenditure claimed on account of additional cost incurred towards fly ash transportation is admissible under the Change in Law provisions of the PPA. CERC vide Order dated 22 March, 2021 in Petition No. 405/MP/2019 granted relief for additional cost incurred towards fly ash transportation as a Change in Law event.

3.27 The Commission vide Order dated 26 February, 2019 in Case No. 301 of 2018 has held that MoEF & CC Notification dated 25 January, 2016 does not amount to Change in Law. This Order will not apply to the present case as it is only by way of Notification dated 25 January 2016 that the obligation to bear transportation costs by TPP has been introduced.

3.28 There is a difference between the terms “utilization” and “transportation” of fly ash which is fundamental and ought to be considered by the Commission. For instance- A TPP could be utilizing fly ash without having to pay for transportation if the arrangement was such that a purchaser of fly ash, say a company in the construction sector (Purchaser) would come to the doorstep of TPP and collect fly ash and pay for its transportation cost. This arrangement after Notification dated 25 January 2016 is completely obsolete. It is no longer open to “utilize” fly ash in this manner. Post Notification dated 25 January 2016, TPPs including RPL, have to mandatorily carry the fly ash to the site of the Purchaser and bear the cost of this “transportation”. This distinction between “utilization” and “transportation” cannot be overlooked and must be construed in terms of the Change in law provisions in the PPAs.

3.29 The impact on account of the said Change in Law events for the period FY 13-14 to FY 20-21 is Rs 272.23 Cr including carrying cost. Further there will be a recurring impact with respect to Sizing Charges and Surface Transportation Charges of Rs 4.23 Crs/month, respectively.

4. **MSEDCL in its submission dated 30 August, 2021 has stated as follows:**

A. Imposition of Port Congestion Surcharge

4.1 As per the PPA and RFP documents, the RPL's plant was set up with coal from local/domestic source and not based on imported coal. RFP documents submitted by RPL herein at clause 2 i.e. Fuel has been defined as domestic coal and imported coal was not applicable in the present case. Even in the present PPA the Fuel has been defined as under:

"Fuel :- shall mean the primary fuel used to generate electricity namely domestic coal"

4.2 As port congestion surcharge is applicable only on imported coal and not leviable on domestic coal, the present issue/determination may not be considered as change in law event in the present case.

B. Imposition of Surface Transportation and Crushing /Sizing Charges

4.3 The issue of Change in Law on account of surface transportation and crushing charges has already been dealt and rejected by APTEL vide its common Judgment dated 7 June, 2021 in Appeal No. 158 of 2017 titled *Adani Power (Mundra) Ltd. vs. CERC & Ors.* and Appeal no. 316 of 2017 titled as *Uttar Haryana Bijli Vitran Nigam Lts. And Ors. vs. CERC and Ors.* The APTEL considered the following judgments while rejecting the claim of compensation (i) Appeal No. 111 of 2017 – *GMR Warora Energy V. MSEDCL & Ors.* (ii) Appeal No. 119 of 2016 – *Adani Power Limited Rajasthan Ltd. V. CERC & Ors.* (iii) Order dated 29 March, 2020 of CERC in Petition No. 327/MP/2018 pertaining to *Dhariwal Infrastructure Limited vs. TANGEDCO*

4.4 As for the contention of RPL in reference to the CERC Order dated 18 October, 2019 in *Suo Motu* Petition No. 10/SM/2019 is concerned, CERC vide its subsequent Judgment dated 29 March, 2020 passed in Petition no. 327/MP/2018; while deciding the similar issue, as raised in the present case, has rejected the contention and claim for change in law on account of surface transportation and sizing/ crushing charges. Thus, CERC order dated 18 October, 2019 has no relevance or implication in determination of the issue at hand as the same stands substituted in view of the subsequent judgment dated 29 March, 2020.

4.5 The Commission vide its Order dated 12 November, 2020 in a similar matter being Case No. 195 of 2020 of Sai Wardha Power Generation Limited matter has already disallowed Crushing/Sizing Charges and surface transportation charges as Change in law events.

4.6 In view of the above, change in law claim on this account deserves to be rejected.

C. Imposition of fly ash transportation charges:

- 4.7 The present issue/determination sought by RPL has already been rejected by the Commission vide its Order dated 26 February, 2019 passed in Case No. 301 of 2018 filed by Adani Power Maharashtra Ltd. (APML).
- 4.8 The prayers sought by APML in Case No. 301 of 2018 and in the present petition in respect of expenses incurred towards transportation of fly ash, are identical and thus, the decision conferred by the Commission vide its Order dated 26 February, 2019 in Case No. 301 of 2019 is squarely applicable to the present issue/determination raised by RPL.
- 4.9 The said Order dated 26 February, 2019 passed in Case No. 301 of 2019 was challenged before the APTEL vide Appeal No. 148 of 2019, however the same is pending adjudication till date and there is no stay granted against the Order dated 26 February 2019 passed in Case No. 301 of 2019.
- 4.10 Hence, in view of the above it is most respectfully submitted that the present issue of considering Fly Ash Transportation charges as change in law deserves to be rejected.

5. At the time of E-hearing held on 1 September, 2021:

Advocate of Petitioner:

- 5.1 Advocate of Petitioner reiterated the submission made in the Petition.
- 5.2 He stated that it is not denied that the APTEL in its recent judgment in Appeal No 158 of 2017 has denied surface transportation and sizing charges as a change in law events, but there is no reference of CERC Order in Case No. 10/SM/ 2019 wherein CERC has clearly stated that surface transportation and sizing charges are not included in the pricing of coal by CIL and therefore not considered in the escalation index. He requested the Commission to decide the matter in light of this CERC Order.
- 5.3 On the issue of Port congestion charges, he stated that the contention of MSEDCL that as per PPA, RPL plant is operating on domestic coal and therefore port congestion charges are not applicable is wrong. Imported coal has been utilised by RPL in case of shortfall of domestic coal. Such argument was raised before the Commission in Case No 84 of 2016 and the Commission in that Order has recognised the event as Change in Law.
- 5.4 On the issue of fly ash transportation, he stated that CERC has principally approved change in law for fly ash transportation and has also allowed compensation in GMR Order where MSEDCL is the Respondent. MSEDCL has not challenged that CREC Order and it is binding on it. Here, MSEDCL is opposing the fly ash transportation based on the Commission's Order in Adani Case No 301 of 2018. MSEDCL cannot take contradictory views before different Commissions when GMR and RPL are the similarly placed generators having similar PPAs with MSEDCL. RPL is before the Commission for in-principle approval of the event as change in law and at a later stage would come up with the detailed quantification of the claims. Though CERC decisions

are not binding on the State Commission, Commission may take appropriate view in respect of this claim.

Advocate of MSEDCL:

- 5.5 Advocate of MSEDCL reiterated the submission made in the Reply.
- 5.6 On the issue of surface transportation and sizing charges, he stated that APTEL in its recent Judgment has denied the change in Law on account of these claims. Further, CERC in its recent Order has also rejected such claims of Change in Law.
- 5.7 On the issue of port congestion charges, he stated that RPL's plant was set up on domestic coal and not based on imported coal. Therefore, these charges are not applicable to RPL. Further the Commission in its Order in Case No 84 of 2016 has denied the compensation on account of imported coal. Therefore, the claims need to be rejected.
- 5.8 On the issue of fly ash transportation, he stated that the Commission has rejected the claims in Case No 301 of 2018 and the Petition filed by RPL is on the similar lines and hence, needs to be rejected.

Commission's Analysis and Ruling:

6. RPL has filed the present Petition under Section 86 of the EA, 2003 read with Article 10 of PPA dated 22 April, 2010 for 450 MW and PPA dated 5 June, 2010 for 750 MW executed with MSEDCL. The Petition is in respect of reliefs under change in Law claims for the following events:
 - a. Imposition of Port Congestion Surcharge
 - b. Imposition of Surface Transportation and Sizing/ Crushing Charges
 - c. Imposition of Fly Ash Transportation Charges
7. The Commission notes that this Petition is for approval of Change in Law claim under the provisions of PPA. Therefore, it is important to test whether each of such events claimed meets the qualification stipulated under the PPA for declaring it as Change in Law event. In order to do that, the Commission has analysed and given its findings and rulings on the following aspects:
 - A. Context of RPL's Change in Law claims
 - B. Scope and meaning of "Change in Law" as per the PPA
 - C. Scope and meaning of the term "Indian Governmental Instrumentality" as per the PPAs
 - D. Evaluation of events claimed by RPL as Change in Law
 - E. Carrying Cost
 - F. Billing, and date of applicability

A. Context of RPL's Change in Law claims:

8. The PPAs dated 22 April, 2010 for 450 MW and 5 June, 2010 for 750 MW have been entered between RPL, a Generating Company, and MSEDCL, a Distribution Licensee, and hence the matter falls squarely within the Commission's jurisdiction under Section 86 (1) (b) and (f) of the EA, 2003.
9. The PPA was entered into following a Competitive Bidding process under Section 63 of the EA, 2003 and has been approved by the Commission vide its Order in Case No 22 of 2010 dated 28 December, 2010. Article 10.3.4 of the PPAs dated 22 April, 2010 (450 MW) and 5 June, 2010 (750 MW) which applies to Change in Law events during the Operation Period of the contracted Generating Unit, provides as follows:

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.
10. The date for consideration of Change in Law events, in terms of the PPAs, is 31 July 2009, being seven (7) days prior to the Bid Deadline date (i.e., 7 August, 2009) i.e. Cut-off Date.
11. Further, as per Article 10.4 of the PPA, for claiming relief under Change in Law provision of the PPA, affected party must give notice to other party about occurrence of Change in Law event. In present case, RPL has filed this Petition after notifying MSEDCL about events of Change in Law vide notice dated 8 August, 2014 and 17 March, 2016 as contemplated under PPA. It is observed that RPL has not provided notice to MSEDCL on account of MoEF& CC notification dated 25 January, 2016 as a Change in Law event.

B. Scope and meaning of "Change in Law" as per the PPA

12. PPA dated 22 April, 2010 and 5 June, 2010 provides as follows with respect to Change in Law events:

"Article 1.1 Definitions

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- "Bid Deadline"* shall mean the last date and time for submission of the Bid in response to the RFP;
- "Change in Law"* shall have the meaning ascribed thereto in Article 10.1.1 of the Agreement;

“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;

Indian Government Instrumentality Shall mean the Government of India, Governments of state (s) of Maharashtra, and any other ministry, department, board, authority, agency, corporation, commission under the direct or indirect control of Government of India or any of the above state Government (s) or both, any political sub-division of any of them including any court or Appropriate Commission (s) or tribunal or judicial or quasi-judicial body in India but excluding the seller and the procurer.

10 ARTICLE 10: CHANGE IN LAW

10.1 Definitions

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

10.1.1 “Change in Law” means the occurrence of any to 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 the 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

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10.3.2 During Operating Period

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

10.3.3 For any claims made under Articles 10.3.1 and 10.3.2 above, the Seller shall provide to the Procurer 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.

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 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.*

10.5 Tariff Adjustment Payment on account of Change in Law

10.5.1 Subject to Article 10, the adjustment in Monthly Tariff Payment shall be effective from:

- (i) the date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law; or*
- (ii) the date of order/judgment of the Competent Court or tribunal or Indian Governmental Instrumentality, if the Change in Law is on account of a change in interpretation of Law.*

10.5.2 The payment for Changes in Law shall be through Supplementary Bill as mentioned in Article 11.8. However, in case of any change in Tariff by reason of Change in Law, as determined in accordance with this Agreement. The Monthly Invoice to be raised by the Seller after such change in Tariff shall appropriately reflect the changed Tariff.”

13. The PPAs provide an exhaustive code qua the concept of “Change in Law”. The philosophy behind it is to ensure that additional recurring or non-recurring expenditure by the Seller due to the “Change in Law” event is compensated through monthly Tariff payments to the extent so as to restore the same economic position of the affected party as if such change in law had not occurred.
14. Although the definition of “Law” is illustrative under the PPA, in order to do justice to the contentions of both parties it is necessary to evaluate each event to arrive at a finding as to whether or not it qualifies as a “Change in Law” or not, keeping in mind the PPA provisions, and judgments of the APTEL and Hon’ble Supreme Court. In the Commission’s view, the key characteristics for an event to qualify as “Change in Law” are as follows:

- a) The definition of Law is an inclusive and illustrative definition and contemplates all laws applicable in India in various forms. To be considered a Change in Law event, it is imperative that the event is caused by an Indian Government Instrumentality.
- b) “Change in Law” means the occurrence of any of the events after the date, which is seven days prior to the Bid Deadline resulting into any additional recurring/ non-recurring expenditure by the Seller.
- c) The recurring/ non-recurring expenditure/income should be on actual basis, which should financially impact the Seller.
- d) The object of the “Change in Law” provision is to ensure compensation to the Party affected by such Change in Law and to restore it through monthly Tariff payments to the same economic position as if such Change in Law had not occurred.
- e) The Change in Law events are described in Article 10.1.1 of the PPAs.
- f) During the Operation Period, the relief on account of Change in Law will be governed by Article 10.3.2 of the PPAs:

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

15. The above fundamentals of the PPAs shall be the guiding principles for evaluating whether an event qualifies as a “Change in Law” or not.

C. Scope and meaning of the term “Indian Governmental Instrumentality” as per the PPA

16. The PPA defines “Indian Government Instrumentality” as follows:

“Indian Government Instrumentality” shall mean the Government of India, Governments of state(s) of Maharashtra, 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(s) or both, any political sub-division of any of them including any court or Appropriate Commission (s) or tribunal or judicial or quasi-judicial body in India but excluding the Seller and the Procurer:

Thus, as per the definition “Indian Governmental Instrumentality” has to be given a wide interpretation as it covers Government of India, Government of Maharashtra and any

Ministry, Department, Board, Authority, Agency, Corporation, Commission under the direct or indirect control of Government of India or Government of Maharashtra.

17. Hence, an event arising from the actions of an Authority covered within the definition of Indian Government Instrumentality would be covered within the definition of “Change in Law”.

D. Evaluation of events claimed by RPL as Change in Law

18. The Commission’s assessment of the events claimed by RPL as amounting to “Change in Law” and entitling it to consequential reliefs in terms of the PPA is set out below.

I. Imposition of Port Congestion Surcharge :

19. RPL has submitted that Ministry of Railways, Government of India notified the levy of Port Congestion Surcharge on 10% of the base freight rate on goods traffic originating from ports w.e.f. 24 November, 2014 vide notification dated 20 November, 2014 and it was valid till 31 March, 2017. Further the Commission has recognized the imposition of Port Congestion Surcharge as a Change in Law event in its Order in Case No. 84 of 2016 dated 5 April, 2018 however relief was not granted and liberty was granted to RPL to approach the Commission in view of the Appeal No 111 of 2017 filed against CERC Order before APTEL. APTEL in its judgment in Appeal No 111 of 2017 has approved Busy Season Surcharge (which is a similar levy) and in Appeal No. 119 of 2016 has approved Port Congestion Surcharge as a Change in Law events.
20. Accordingly, RPL in the present Petition has claimed imposition of Port Congestion Surcharge as Change in Law event and adjustment in tariff for consequent increase in expenses
21. MSEDCL has opposed such imposition of Port Congestion Surcharge stating that as per the PPA and RFP documents, the RPL’s plant was set up with coal from local/domestic source and not based on imported coal. As port congestion surcharge is applicable only on imported coal and not leviable on domestic coal and therefore the claim needs to be rejected.
22. The Commission notes that MSEDCL has raised similar contention in Case No 84 of 2016 dated 5 April, 2018 where RPL had approached the Commission for various Change in Law events. The Commission had already dealt with the issue in that Order and had made following observations: -

18.34. Such Notifications and Rate Circulars are orders issued pursuant to the statute, namely the Railways Act, 1989, by an Indian Governmental Instrumentality, namely the Railway Board of the Ministry of Railways.

18.35. Hence, the Commission is of the prima facie view that the imposition of a Port Congestion Surcharge, which flows from the sanction of an Indian Governmental Instrumentality under the Railways Act, is a Change in Law event under Article 10 of the PPAs, and that it meets the requirements explained earlier in this Order.

18.36. However, in its Order dated 1.2.2017 in Petition No. 8/MP/2014 (GMR Warora Energy Ltd. V/s MSEDCL, etc.), the CERC has taken a different view with regard to a similar levy of Busy Season Surcharge, also notified by the Railway Board, namely that it is not a Change in Law. The Commission notes that Appeal No. 111 of 2017 against the CERC Order is pending before the APTEL. Depending on the APTEL decision on this point, RPL may approach this Commission for its final decision on the levy of Port Congestion Surcharge as a Change in Law event.

18.37. Port Congestion Surcharge is relevant to the import of coal by RPL. If the Port Congestion Surcharge is ultimately confirmed to be a Change in Law event, the extent to which its financial impact is to be compensated would be determined on the principles and methodology relating to the admissible quantum and period of imported coal referred to at paras. 18.1 to 18.8 earlier in this Order.

Thus, the Commission had recognised Port Congestion Surcharge as a Change in Law event but had not allowed the compensation at that time.

23. Subsequently, APTEL in its judgment in Appeal No 111 of 2017 dated 14 August, 2018 has held Busy Season Surcharge to be a Change in Law event. Relevant extract of the same is as follows:

“xi.....This Tribunal has concluded that the circulars issued by MOR have force of law. CERC escalation rate notifications cover only basic freight and other prevailing charges were to be factored in by APRL at the time of bidding. Accordingly any change in such surcharges/levy of new surcharge was to be treated as Change in Law event requiring compensation to be paid to APRL.

xii. In view of the decision of this Tribunal as above which is squarely applicable to the present case, we are of the considered opinion that GWEL is entitled for compensation arising out of change in Busy Season Surcharge and Development Surcharge by the Railways under Change in Law. The Development Surcharge is not applicable in DNHPPA. Accordingly, these issues are decided in favour of GWEL.”

24. APTEL in its judgement in Appeal No 119 of 2016 dated 14 August, 2018 has also held imposition of Port Congestion Surcharge to be a Change in Law event. Relevant extract of the same is as follows:

“xiii. From the above it is crystal clear that the Circulars issued by MoR regarding Busy Season Surcharge, Development Surcharge and Port Congestion Charges which have bearing on costs of the Kawai Project of APRL have force of law.

.....

xvi. From the above discussions it is clear that the CERC escalation index for transportation covers only the basic freight charges. The Bidder was required to suitably incorporate the other taxes, duties, levies etc. existing at the time of bidding. The Bidder cannot envisage any changes happening regarding taxes, levies, duties etc. in future date. As such, any increase in surcharges or imposition of new surcharge after the cut-off date i.e. 30.7.2009 in the present case cannot be said to be covered under CERC Escalation Rates for Transportation Charges, which is indexed for basic freight rate only. Accordingly, any such change by Indian Governmental Instrumentality herein Indian Railways has to be necessarily considered under Change in Law event and need to be passed on to APRL. **In terms of the PPA, such changes in the surcharges and levy of new Port Congestion Surcharge which do not exist at the time of cut-off date falls under 1st bullet of Article 10.1.1 of the PPA read with the definitions of the ‘Law’ and ‘Indian Government Instrumentality’ under the PPA.**”

25. Thus, in view of above rulings of the Hon’ble APTEL, imposition of Port Congestion Surcharge by Indian Railways qualifies as Change in Law event. However, while allowing compensation for the same so as to restore RPL to the same economic position if such Change in Law event had not occurred, the Commission needs to ensure that such compensation does not lead to extra compensation on account of other dispensation allowing compensation which already includes compensation on account of Port Congestion Surcharge.
26. The Commission notes that it is admitted position that RPL has used imported coal as alternate coal for mitigating shortfall of domestic coal. Issue on allowing compensation for use of alternate coal (including imported coal) under Change in Law provisions of the PPA has undergone two rounds of litigation and the APTEL vide its judgment dated 13 November, 2020 in Appeal No 264 of 2018 has allowed compensation on actual basis. The Commission vide its recent Order dated 16 November, 2021 in Case No. 240 of 2020 has issued consequential order on that APTEL judgment. As per said Order dated 16 November, 2021, RPL has been allowed to claim compensation for difference in landed cost of domestic coal and alternate coal. As landed cost of alternate coal (including imported coal) includes all taxes, duties, transportation cost etc., it includes Port Congestion Surcharge paid by RPL on import of coal. Hence, compensation for the same is already included in dispensation allowed in Order dated 16 November, 2021.
27. In view of the above, to avoid the double accounting of Change in Law compensation, the Commission is not inclined to approve separate compensation for Port Congestion Surcharge as it is part of the Change in Law event approved by the Commission in its Order dated 16 November, 2021 in Case No 240 of 2020

II. Revision in Surface Transportation Charges and Sizing/ crushing Charges

- 27.1 RPL has submitted that as on the Cut-Off Date under the PPAs, i.e. 31 July, 2009, the applicable Surface Transportation Charges were as per CIL Notification dated 12 December, 2007 which were revised by CIL through Notifications dated 15 December 2009; 13 November, 2013 and 15 November, 2017. Further the applicable crushing/sizing charges levied by CIL were in line with CIL Notification dated 12 December, 2007 which were revised by CIL through Notifications dated 6 December, 2013 and 31 August, 2017. These notifications fall within the definition of Law under the PPAs. The Commission in its Order dated 25 March, 2015 in Case No. 173 of 2013 had kept the issue undecided in view of the same issue pending before CERC at that time and granted liberty to approach the Commission subsequently. CERC vide Order dated 18 October, 2019 in *Suo Motu* Petition No. 10/SM/2019, in the matter of Methodology for Compilation of Coal Price Index applicable for Power Sector, has clarified that Surface Transportation Charges and Sizing Charges are not part of the price of coal notified by CIL and are therefore, not considered in the price of coal used for compilation of the coal price index. Accordingly, RPL claimed imposition of Sizing Charges and Surface Transportation Charges by CIL as Change in Law event and adjustment in tariff for consequent increase in expenses.
28. MSEDCL has opposed such imposition of charge as Change in law stating that Change in Law on account of surface transportation and sizing/crushing charges has already been dealt and rejected by APTEL vide its common Judgment dated 7 June, 2021 in Appeal No. 158 of 2017 titled *Adani Power (Mundra) Ltd. vs. CERC & Ors.* and Appeal No. 316 of 2017 titled as *Uttar Haryana Bijli Vitran Nigam Ltd. and Ors. vs. CERC and Ors.* Further the Order passed by CERC in Petition No 10/SM/2019 dated 18 October, 2019 has no relevance or implication in determination of the issue at hand as the same stands substituted in view of the subsequent Order passed by CERC in Case No 327/MP/2018 dated 29 March, 2020 on this issue.
29. The Commission notes that APTEL in the recent Judgment in Appeal No. 158 of 2017 & IA No. 575 of 2018 dated 7 June, 2021 in the matter of *Adani Power Limited Mundra Limited vs. CERC* has disallowed the claim of change in Law due to Sizing / Crushing charges and Surface Transportation Charges. Relevant extract of the same is as follows:

61. As against this, the learned counsel for Respondent Discom vehemently argues by placing reliance on the Judgment of this Tribunal in Appeal No. 111 of 2017 so also Appeal No. 119 of 2016 contending that this Tribunal rejected the claim of the generator so far as sizing and surface transportation charges and opined in favour of the procurer-Discom. Pertaining to increase in sizing charges of coal, they rely upon the following Judgments dated 14.08.2018:

(i) Appeal No. 111 of 2017 – GMR Warora Energy V. MSEDCL & Ors. (Para xv, Pages 66-69).

“xv. The present case is also similar to the case as in the Adani Judgement. The provisions of the RFP are also similar. Accordingly, in view of our decision Adani Judgement as reproduced above we are of the considered opinion that there is no merit in the contentions of GWEL on the issues of change in sizing charges of coal and surface transportation charges. Accordingly, these issues are answered against GWEL/Appellant and we do not find any error on the face of record in the findings recorded by the Central Commission on these issues.”

(ii) Appeal No. 119 of 2016 – Adani Power Limited Rajasthan Ltd. V. CERC & Ors. (Para xix)

“xix. In view of our discussions as above, perusal of the Impugned Order and the order of the CERC quoted by the State Commission and the judgement of this Tribunal quoted by CERC, we are of the considered opinion that any change in sizing charges for coal must be reflected in the price of coal charged by CIL and gets covered in the CERC Escalation Rates for coal. We uphold the findings of the State Commission.

Accordingly, this issue is answered against APRL/Appellant.”

62. Pertaining to increase in surface transportation, they rely upon the following Judgments of this Tribunal dated 14.08.2018:

(i) A No. 111 of 2017 – GMR Warora Energy V. MSEDCL & Ors.(Para xv, pgs. 63-65):

“xv. The present case is also similar to the case as in the Adani Judgement. The provisions of the RFP are also similar. Accordingly, in view of our decision Adani Judgement as reproduced above we are of the considered opinion that there is no merit in the contentions of GWEL on the issues of change in sizing charges of coal and surface transportation charges. Accordingly, these issues are answered against GWEL/Appellant and we do not find any error on the face of record in the findings recorded by the Central Commission on these issues.”

(ii) A No. 119 of 2016 – Adani Power Limited Rajasthan vs. CERC & Ors. (Page 64-65 Para xxv):

“xxv. In view of the above, we are of the considered opinion that any change in surface transportation charges must have been taken care by APRL in its quoted tariff appropriately. Accordingly, the contention of APRL that the increase in transportation charges which forms part of coal cost by an Indian Government Instrumentality i.e. CIL would be covered under Change in Law provision of PPA is misplaced. Accordingly, we do not find any legal infirmity in the decision of the State Commission on this issue.

Hence, this issue is answered against APRL/Appellant.”

63. Learned counsel for Respondent Discoms, Mr. Ganesan Umapathy also contends that the Judgment relied upon by the Appellant Generator i.e., MP/72/2018 dated 02.04.2019 will not come to the aid of the Appellant. He further contends that the specific claim of Appellant in respect of the above two events came to be rejected after referring to the Judgment of **Sasan Power**, therefore, this Tribunal has to follow its own earlier dictum. He also contends that CERC at Para 42 of the Order dated 02.04.2019 has clearly held that introduction of evacuation facility charges beyond cut-off date of the respective PPAs deserves to be allowed as change in law event. He also brought to our notice the Order dated 29.03.2020 of CERC in Petition No. 23/MP/2018 pertaining to **Dhariwal Infrastructure Limited vs. TANGEDCO**, Para 56, 57 & 58, which reads as under:

“56. Issues pertaining to Sizing Charges and Surface Transportation Charges has been dealt with by the Commission in its earlier orders. The Commission in its order dated 1.2.2017 in Petition No. 8/MP/2014, while dealing with the issue of increase in Sizing and Crushing Charges and Surface Transportation Charges observed as under:

“93. We have considered the submission of the Petitioner and the respondent and perused the notifications issued by Coal India Ltd. with regard to Sizing Charges of coal and surface transportation charges. The Petitioner has not placed on record any document to prove that these notifications have been issued pursuant to any Act of the Parliament. On the other hand, a perusal of the Fuel Supply Agreement dated 22.2.2013 between the Petitioner and SECL shows that under para 9.0, the delivery price of coal for supply pursuant to Fuel Supply Agreement has been shown as the sum of basic price, other charges and statutory charges as applicable at the time of delivery of coal. Base price has been defined in relation to a declared grade of coal produced by the seller, the pit head price notified from time to time by CIL. Under Para 9.2 of the FSA, other charges include transportation charges, Sizing/crushing charges, rapid loading charges and any other charges as notified by CIL from time to time. Sizing/crushing charges and transportation charges have been defined as under:-

“9.2.1 Transportation Charges: Where the coal is transported by the seller beyond the distance of 3 (three) kms from Pithead to Delivery Point, the Purchase shall pay the transportation charges as notified by CIL/seller from time to time.

9.2.2 Sizing/Crushing Charges:

Where coal is crushed/sized for limiting the top-size to 250 mm or any other lower size, the purchaser shall pay sizing/crushing charges as applicable and notified by CIL/seller from time to time.

Therefore, the revision in sizing charges of coal and transportation charges by Coal India Limited from time to time is the result of contractual arrangement between the Petitioner and SECL in terms of the FSA dated 22.2.2013 and is not pursuant to any law as defined in the PPAs and therefore cannot be covered under Change in Law.”

57. The Appellate Tribunal vide its judgment dated 14.8.2018 in Appeal No. 111 of 2017 has upheld the Commission’s order dated 1.2.2017 in Petition No. 8/MP/2014 pertaining to treatment of Sizing and Crushing Charge and Surface Transportation Charge as Change in Law events. Relevant portion of the Appellate Tribunal’s judgment dated 14.8.2018 in Appeal No. 111 of 2017, in the matter of GMR Warora Energy Limited v. Central Electricity Regulatory Commission and Ors., is extracted as under:

xiv. We consider that similar issues have been decided by this Tribunal in the Adani Judgment. In our opinion the findings of this Tribunal in the said judgment are directly applicable to the instant case. The relevant portion from the said judgment is reproduced below:

Sizing Charges:

“11. A xvii.

The State Commission based on the order of CERC has held that increase in Sizing Charges for Coal is part of the methodology for the calculation of the cost of coal decided by CIL and merely CIL being Indian Government Instrumentality the change in method of charging made by it for coal pricing does not qualify for Change in Law event and dismissed the claim of APRL xviii. APRL has contended that the GoI under Sub Section 3 of the CC Rules, 2004 (notified under MMDR Act) has the power to categorise the coal including its classes, grades and sizes and the specifications for each such class, grade or size of coal and hence any change in sizing charges of coal by CIL an Indian Government Instrumentality qualifies for Change in Law event. We observe that GoI under the said Rules have power to categorise the coal including its classes, grades and sizes and the specifications for each such class, grade or size of coal. Here the case is not that the GoI have changed the sizing of coal under the said Rules, the case is that CIL has changed the sizing charges for coal for sizes, which already existed as specified by the GoI. The change in sizing charges of coal by CIL is part of coal pricing mechanism. Further, in terms of the RFP, APRL was required to quote an all-inclusive tariff including coal costs in escalable/ non-escalable components based on the risks perceived by APRL. Accordingly, this contention of APRL is misplaced.

xxiv. We have gone through the Schedule 8 (Quoted Tariff) of the PPA executed between the Discoms and APRL. After careful perusal of the same we find that the tariff quoted by APRL comprises of Non-

escalable and escalable components of tariff elements viz. Capacity Charges, Energy Charges and Inland In view of our discussions as above, perusal of the Impugned Order and the order of the CERC quoted by the State Commission and the judgment of this Tribunal quoted by CERC, we are of the considered opinion that any change in sizing charges for coal must be reflected in the price of coal charged by CIL and gets covered in the CERC Escalation Rates for coal. We agree to the findings of the State Commission. Accordingly, this is decided against APRL. Transportation Charges: xxiv. We have gone through the Schedule 8 (Quoted Tariff) of the PPA executed between the Discoms and APRL. After careful perusal of the same we find that the tariff quoted by APRL comprises of Non- escalable and escalable components of tariff elements viz. Capacity Charges, Energy Charges and Inland Transportation Charges. There is no separate component surface transportation charges either in the bid or in the standard bidding documents. We observe that APRL was supposed to consider all the cost inputs for generation of power in its bid as per the RFP. It is presumed that the surface transportation charges charged by CIL forms part of cost of coal and it was the responsibility of APRL consider the same in its bid appropriately.

xxv. In view of the above, we are of the considered opinion that any change in surface transportation charges must have been taken care by APRL in its quoted tariff appropriately. Accordingly, the contention of APRL that the increase in transportation charges which forms part of coal cost by an Indian Government Instrumentality i.e. CIL would be covered under Change in Law provision of PPA is misplaced. Accordingly, we do not find any infirmity in the decision of the State Commission on this issue. Hence, this issue is answered against APRL/Appellant.”

xv. The present case is also similar to the case as in the Adani Judgment. The provisions of the RFP are also similar. Accordingly, in view of our decision Adani Judgment as reproduced above we are of the considered opinion that there is no merit in the contentions of GWEL on the issues of change in sizing charges of coal and surface transportation charges. Accordingly, these issues are answered against GWEL/Appellant and we do not find any error on the face of record in the findings recorded by the Central Commission on these issues.”

58. In line with the above decisions of the Commission and the Appellate Tribunal, claim of the Petitioner for relief under ‘Change in Law’ in respect of Sizing Charges and Surface Transportation Charges of coal is disallowed.”

64. We accept the contention of the Respondent's counsel that the Order dated 02.04.2019 made by CERC in Petition No. MP/72/2018 is distinguishable. This Tribunal in Appeal Nos. 111 of 2017 and 119 of 2016 on the very same issue did express its opinion and rejected the claim of the generators therein pertaining to sizing / crushing charges and surface transportation charges of coal. We are not convinced that there is modification of such opinion by any higher authority i.e., Hon'ble Supreme Court of India. In that view of the matter, we are not inclined to accept the contention of the Appellant and we opine that the rejection of change in law compensation in respect sizing charges and surface transportation charges of coal is just and proper."

30. This Commission in its Order in Case No 195 of 2020 dated 12 November, 2020 has rejected the claim for relief under 'Change in Law' in respect of Sizing Charges and Surface Transportation Charges of coal based on the above principles upheld by the APTEL.
31. Further RPL has contended that as per CERC Order dated 18 October, 2019 in *Suo Moto* Petition No. 10/SM/2019, CERC has clarified that Surface Transportation Charges and Sizing Charges are not part of the price of coal notified by CIL and hence not included in coal price index. In this regard the Commission notes that Surface Transportation and Sizing/ crushing charges are levied as per the relevant clauses in FSA as notified by CIL from time to time and were the part of the bid price quoted by the generator at its own risk. As these charges are subsumed in FSA, it could not be considered as applicable Change in Law events as per PPA. Further CERC in its Order in Petition No. 327/MP/2018 along with IA No.87/2018 dated 29 March, 2020 (which was subsequent to its *Suo Moto* Order dated 18 October 2019) has rejected Surface Transportation Charge and Sizing charges as Change in Law events as same was part of FSA. Hon'ble APTEL has also referred this Order of the CERC in its judgment dated 7 June, 2021 while rejecting claim of Sizing Charge and Surface Transportation Charge as Change in Law event.
32. Hence, in view of above, the Commission rejects RPL's claim that Sizing Charges and Surface Transportation Charges imposed by CIL are Change in Law events under the PPAs.

III. Imposition of Fly Ash Transportation Charges

33. RPL has claimed that MoEF& CC Notification dated 25 January, 2016 which is issued after the cut-off date requires the generator to incur additional cost towards fly ash transportation and therefore it is admissible under the Change in Law provisions of the PPA. Further CERC in its Order in Case No 131/ MP/2016 has allowed the MoEF& CC notification dated 25 January 2016 as Change in Law event and vide Order in Case No 405/MP/2019 has allowed the compensation for the same. In light of that, the Commission should in principle approve the notification dated 25 January, 2016 as a change in Law event.

34. MSEDCL has opposed such imposition of fly ash transportation charges stating that the Commission has already decided the matter in Case No 301 of 2018 in Adani Matter and has rejected the claim. RPL had made a similar prayer as in Case No 301 of 2018 for declaration of MOEF & CC notification dated 25 January 2016 as a Change in Law event and therefore the decision of the Commission is squarely applicable to RPL.
35. The Commission notes that RPL has approached the Commission without any comprehensive information about the impact of the said notification and further at the time of hearing RPL it has stated that the said notification has not yet impacted them financially. The basis for approving the change in Law claims is to restore the party to the same economic position as if change in Law has not occurred. Here as the said notification has not yet impacted RPL financially, it would be highly premature for RPL to approach the Commission for compensation under Change in Law for the said notification.
36. Further, this Commission in Case No 301 of 2018 has dealt with the notification dated 25 January 2016 and rejected the claim for any compensation under this notification as Change in Law event. Relevant extract of the said Order is as follows:

“18. The Commission notes that on account of obligations put in by same MoEF notification on certain industries for utilization of ash, following issues arise which needs serious consideration.

18.1. The contract price of the material used in infrastructure projects includes the cost on account of transportation and royalty amount of soft rock or soil which is sought to be replaced by ash. If the contract price is not commensurately lowered on account of free transportation of ash by thermal plants and passing on the transportation cost on to electricity users as change in law would clearly amount to double payment for the material. Clearly such a scenario is neither envisaged nor there such intended consequences.

18.2. So, instead of making claim for change in law, thermal power generators could first seek the transportation claims from the Government agency executing the infrastructure project, the contract amount of which includes the transportation charges.

18.3. There is consequent saving to thermal stations on account of lower O&M costs for ash handling. Land which is part of the capital cost of the thermal station acquired for ash disposal would also be freed. Such a resource has an opportunity cost which would need to be computed, otherwise it would unduly benefit thermal stations not adhering to the terms of environmental clearance while claiming transportation charges from the electricity users as change in law.

19. *The Commission also notes that provisions of PPA which requires the Commission to determine impact of Change in Law reads as follows:*

.....

As per above provision of the PPAs, for claiming impact of any Change in Law event, Seller needs to provide documentary proof of increase / decrease in cost or revenue / expenses. In present Petition, APML has only submitted indicative figures of possible impact of MoEF notification dated 25 January, 2016. In the opinion of the Commission, relief for Change in Law cannot be decided on estimated impact especially when other related aspects of cost savings on account of O&M costs, land resource, revenue generated from productive assets created within the premises and promotional costs in developing ash utilizing industry in the vicinity have not been computed and included in the overall costs that include the additional transportation costs being claimed as change in law. Hence, present Petition of APML is premature.

20. *Further, considering all above aspects highlighted by the Commission relating to implementation of MoEF notification dated 25 January, 2016, the Government of Maharashtra (Energy Department) needs to evolve a policy for uniform application within the State of Maharashtra based on which intra state impact of additional liability on account of transportation charges could be properly assessed.*

21. The Commission rules that it is the primary responsibility of APML to fully utilize the fly ash as per its commitment and action plan submitted to environment ministry while setting up thermal power station in terms of governing notifications on the material date. Later notification dated 25 January 2016 is in the nature of ensuring stringent compliance for full utilization of fly ash in a sustained manner. APML will have to make its case for claims in change in law if it can clearly demonstrate the additional liability of transportation charges for ash utilization, which in the instant cases as discussed in the foregoing paragraphs does not seem so.”

Thus, it is the prime responsibility of the generator to fully utilise the ash in a sustained manner and this decision of the Commission is squarely applicable in present matter. The observations of the Para 36 (Paras 18 and 19 of the Order quoted therein) are applicable to RPL also. .

37. Further the Commission notes the contention of RPL stating that CERC has allowed the MoEF & CC Notification dated 25 January, 2016 as a Change in Law event and has further allowed compensation in terms of the same. At the same time the Commission also notes RPL's submission that CERC's Orders are not binding on this Commission. As reproduced in para above, this Commission has ruled on the subject matter in Case No 301 of 2018 and that Order is challenged before APTEL in Appeal No. 148 of 2019. Matter is pending before the APTEL. Therefore, there is no reasons for the Commission to deviate from its earlier rulings.

38. Hence, in view of the above, the Commission rejects RPL's claim that MoEF & CC notification dated 25 January, 2016 is a Change in Law event under PPA and it needs to be compensated for the same.
39. Having ruled as above, and also considering the fact that till date RPL has not incurred any expenses on account of such alleged change in law, the Commission likes to bring to the notice of RPL that Ministry of Power vide its recent letter dated 22 September, 2021 has issued following advisory to the Thermal Power Plants for utilisation of fly ash:

"It is observed that the demand of Fly Ash has been increasing year on year basis contributing to increase in the Fly Ash utilization. Fly Ash is emerging as a valuable commodity. As the end users of Fly Ash like cement plants, brick kilns, road and construction agencies etc. are commercial ventures and all their input costs are accounted for, Fly Ash should invariably be auctioned through a transparent bidding process.

2. All Coal/lignite based power plants are hereby advised to provide fly ash to the end users for all new commitments for supply of fly ash based on the following guidelines:

2.1 The power plants shall provide the Fly Ash to end users through a transparent bidding process only.

2.2 If after bidding/ auction some quantity of Fly Ash still remains un-utilized, then only, as one of the options, it could be considered to be given free of cost on first come first served basis if the user agency is willing to bear transportation cost.

2.3 If ash remains unutilised even after the steps taken in Paras 2.1 and 2.2 above, TPP shall bear the cost of transportation of Fly Ash to be provided free to eligible projects.

2.4 The end users shall be obligated to source the fly ash from the nearest TPPs to reduce the cost of fly ash transportation. If the nearest TPP refuses to do so, the end user project shall approach Ministry of Power for appropriate directions.

2.5 The transportation cost wherever required to be borne as per provisions of MOEF&CC notification by the power plants, shall be discovered on competitive bidding basis only. Thermal Power Plants shall prepare a panel of transportation agencies every year based on competitive bidding for transportation in slabs of 50km which may be used for the period. The TPPs shall call for bids well in advance so, that a transportation panel is in place as soon as the previous panel expires. There should not be gap between the expiry of one panel and the finalization of the fresh panel.

2.6 The fly ash will be offered to the end users on the competing demand basis, i.e the end users who offer the highest price for fly ash and seek minimum support for

transportation cost will be offered the same fly ash on priority. This will reduce the tariff of electricity and burden on the consumers.

2.7 The power plants may offer fly ash subject to their technical restrictions such as all precautions required for Dyke Stability and Safety etc. The power plants having lower ash utilizations shall make all out efforts to increase the fly ash utilization.

3. All concerned are requested to take necessary action in this regard.”

Thus, Ministry of Power in above advisory has suggested that Thermal Power plants should take all efforts to earn revenue from sale of fly ash so as to reduce impact on tariff and only after exhausting all efforts of economical utilisation of fly ash, remaining fly ash may be given free of cost with free transportation. The Commission's earlier order quoted in para 36 above is consistent with such advisory now issued by the Central Government. Hence, RPL shall take all efforts to earn revenue from sale of fly ash instead of claiming increase expenses under the Change in Law.

E. Carrying Cost

40. RPL has contended that restoring the parties to the same economic position as if there was no change in law, incorporates carrying cost to be paid for the increase/decrease in tariff. Carrying cost is nothing but compensation for time value of money or monies denied at the appropriate time. This principle has also been settled by the Hon'ble Supreme Court in *Energy Watchdog vs. CERC & Ors.* reported as (2017) 14 SCC 80 ; in *Civil Appeal No. 5865 and 6190 of 2018 – Uttar Haryana Bijli Vitran Nigam Limited & Anr. v. Adani Power Limited & Ors ; in Jaipur Vidyut Vitran Nigam Ltd. & Ors. vs. Adani Power Rajasthan Ltd & Anr.* reported as 2020 SCC Online SC 697
41. MSEDCL has not objected to allowing carrying cost on the approved Change in Law events.
42. The Commission notes that it is settled position of law to allow carrying cost to reconstitute the parties to the same economical position as if change in Law event has not occurred. APTEL in the recent judgments in *Appeal No 116 of 2019 and Appeal No 155 of 2019 dated 28 September, 2020 and Appeal No 340 of 2019 and Appeal No 354 of 2019 dated 5 October, 2020* upheld the decision of the Commission allowing carrying cost on Change in Law claims for restitution of the affected party to same economic position as if Change in Law does not occur.
43. The Commission notes that as no compensation has been allowed in this Order on account of claimed Change in Law event, issue of allowing carrying cost does not arise in the present matter.
44. Notwithstanding above, the Commission likes to highlight important aspect of allowing carrying cost on Change in Law compensation. Carrying cost on the compensation

allowed by the Commission as per Change in Law event is computed from the date of Change in Law event that affects the generator till the date of Commission's Order approving the same. Therefore, it is important that generator approaches the Commission at the earliest so as to get approval of Change in Law compensation and keep impact of carrying cost at minimum level. But in present matter, it is observed that RPL has approached the Commission very late:

- a. In case of Port congestion Surcharge, RPL was not granted relief by the Commission vide its Order in Case No. 84 of 2016 dated 5 April, 2018 and granted liberty to approach the Commission in view of the Appeal No 111 of 2017 filed against CERC Order before APTEL on similar issue. APTEL has decided said matter vide its judgment dated 14 August 2018. But as against liberty granted by this Commission, RPL takes nearly three years to file present Petition on 15 July, 2021 and claimed carrying cost till March 2021.
- b. In case of Surface Transportation charges and Sizing/ Crushing charges, the Commission vide its Order dated 25 March, 2015 in Case No. 173 of 2013 has granted liberty to RPL to approach the Commission in view of the same issue pending before CERC at that time. Thereafter, CERC vide its Order in Petition No 8/MP/2014 dated 1 February, 2017 has rejected the claims of Surface Transportation charges and Sizing/ Crushing charges as Change in Law Events. But as against liberty granted by this Commission, RPL takes nearly four and half years to file present Petition on 15 July, 2021 and has claimed carrying cost till March 2021.

Such filing of Petition at very delayed stage and claiming carrying cost till date of filing of the Petition is not a prudent practice and hence cannot be allowed. The Commission would like to record its opinion that such inordinate delay by the petitioner cannot be used by them to enrich themselves by claiming carrying costs. This is consistent with provisions of MERC (State Grid Code) Regulations 2020 which stipulates as follows:

“33.10 In case of claim for un-approved change of law, the Seller/Generating Company shall file Petition before the Commission with its claim for un-approved change of law for purpose of incorporation in the merit order stack within reasonable time period not exceeding period of one month from the date of its first occurrence with intimation to the concerned Buyer/Distribution Licensee, failing which the Commission may take appropriate view, while approving the claim of Seller/Generating Company towards principal component of claim of change of law or its claim of carrying cost thereof or both”

Although, no carrying cost is allowable in the present matter as the Commission has not allowed any compensation, but even in case, had the compensation been found to be payable on account of above events, then also carrying cost would have not been allowed for the period of delay attributable to the generators.

45. Hence, the following Order.

ORDER

1. Case No 83 of 2021 is dismissed in terms of following:

- a. In view of compensation allowed for use of alternate coal in lieu of domestic coal shortfall as per Order dated 16 November, 2021 in Case No. 240 of 2020, no separate compensation is required to be allowed on account of Port Congestion Surcharge.
- b. Revision in Surface Transportation Charges and Sizing/crushing charges by the Coal India is not a Change in Law event as per provisions of PPAs
- c. Claim towards transportation of fly ash as per MOEF & CC notification dated 25 January, 2016 is premature as no actual impact has incurred. Further no compensation needs to be allowed in terms of para 36 above.

Sd/-
(Mukesh Khullar)
Member

Sd/-
(I.M. Bohari)
Member

Sd/-
(Sanjay Kumar)
Chairperson

