

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Petition No. 700/MP/2020
Petition No. 121/MP/2022**

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

Date of order: 17th October, 2022

In the matter of

Petition under Sections 79(1)(b) and 79(1)(f) of the Electricity Act, 2003 for claiming compensation on account of the event pertaining to Change in Law as per Article 10 of the Power Purchase Agreement dated 29.6.2012 read with Addendum I to PPA dated 27.9.2017 executed between the Petitioner and TANGEDCO for 200 MW Medium term power supply (PPA-I) and as per the terms of the Power Purchase Agreement dated 23.8.2013 executed between the Petitioner and TANGEDCO for 400 MW long term power supply (PPA-II).

And

In the matter of

Jindal Power Limited,
Tamnar- 496107,
District Raigarh, Chhattisgarh

... Petitioner

Vs.

Tamil Nadu Generation and Distribution Corporation Limited,
NPKRR Maligai, 6th Floor,
Eastern Wing, 144, Anna Salai,
Chennai – 600 002

...Respondent

Petition No. 121/MP/2022

In the matter of

Petition under Sections 79(1)(b) and 79(1)(f) of the Electricity Act, 2003 read with Rule 3(8) of the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 for claiming compensation on account of the event pertaining to Change in Law as per Article 10 of the Power Purchase Agreement dated 29.6.2012 read with Addendum I to PPA dated 27.9.2017 executed between the Petitioner and TANGEDCO for 200 MW Medium term power supply (PPA-I) and as per the terms of the Power Purchase Agreement dated 23.8.2013 executed between the Petitioner and TANGEDCO for 400 MW long term power supply (PPA-II).

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Vs.

Tamil Nadu Generation and Distribution Corporation Limited,
NPKRR Maligai, 6th Floor,
Eastern Wing, 144, Anna Salai,
Chennai – 600 002

...**Respondent**

Parties Present:

Shri Matrugupta Mishra, Advocate, JPL
Shri Nipun Dave, Advocate, JPL
Ms. Ritika Singhal, Advocate, JPL
Ms. Anusha Nagarajan, Advocate, TANGEDCO
Ms. Aakanksha Bhola, Advocate, TANGEDCO

ORDER

Petition No. 700/MP/2020

The Petitioner, Jindal Power Limited, has filed the present Petition under Section 79(1)(b) read with Section 79(1)(f) of the Electricity Act, 2003 (hereinafter referred to as “the Act”) *inter alia* seeking compensation on account of occurrence of Change in Law event, namely, introduction of Evacuation Facility Charges @ Rs. 50/MT of coal by Coal India Limited vide its Price Notification dated 19.12.2017, in terms of Article 10 of (i) Power Purchase Agreement dated 29.6.2012 read with Addendum I dated 27.9.2017 for supply of 200 MW on medium-term basis, and (ii) Power Purchase Agreement dated 23.8.2013 for supply of 400 MW on long-term basis. The Petitioner has made the following prayers:

“(a) Declare the CIL notification dated 19.12.2017 bearing No. CIL:S&M:GM(F)/Pricing 2017/1005 as Change in Law event 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 event;

(b) Direct the Respondent to make payment of Rs. 3421.06 lakh to the Petitioner towards the additional expenditure incurred by the Petitioner till 31.03.2020 on account of the said Change in Law event;

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

Petition No. 121/MP/2022

2. The Petitioner, Jindal Power Limited, has filed this Petition under Section 79(1)(b) read with Section 79(1)(f) of the Act read with Rule 3(8) of the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 (hereinafter referred to as “Change in Law Rules”) seeking compensation on account of occurrence of Change in Law event, namely, introduction of Evacuation Facility Charges @ Rs. 50/MT of coal by Coal India Limited vide its Price Notification dated 19.12.2017, in terms of Article 10 of (i) Power Purchase Agreement dated 29.6.2012 read with Addendum I dated 27.9.2017 for supply of 200 MW on medium-term basis, and (ii) PPA dated 23.8.2013 for supply of 400 MW on long-term basis. The Petitioner has made the following prayers:

“(a) Declare the CIL notification dated 19.12.2017 bearing No. CIL:S&M:GM(F)/Pricing2017/1005 as Change in Law event 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 event;

(b) Direct the Respondent to make payment of Rs. 56.72 crore to the Petitioner towards the additional expenditure incurred by the Petitioner till 31.12.2021 along with carrying cost on account of the said Change in Law event;

(c) Grant liberty to the Petitioner to raise any other change in law claim not covered in the present petition, at a later stage; and

(d) Pass any such other and further reliefs as this Hon’ble Commission deems just and proper in the nature and circumstances of the present case.”

Brief Background of the case

3. On 29.6.2012, the Petitioner and the Respondent, Tamil Nadu Generation and Distribution Corporation Limited ('TANGEDCO') executed a Power Purchase Agreement for procurement of 200 MW power from medium-term ('MT-PPA') under the Case-1 bidding procedure through Tariff based competitive bidding process as per the Guidelines issued by the Government of India for determination of Tariff by bidding process for procurement of power by distribution licensee for a period from 1.9.2012 to 31.8.2017. Thereafter, the Petitioner and TANGEDCO, vide an addendum dated 27.9.2017, extended the period of the MT-PPA upto 31.8.2019.

4. On 23.8.2013, the Petitioner and TANGEDCO also executed a Power Purchase Agreement for procurement of 400 MW RTC power under Case-1 bidding procedure through Tariff based competitive Bidding Process as per the guidelines issued by the Government of India for determination of Tariff by bidding process for procurement of power by distribution licensee for a period of 15 years commencing from 1.2.2014 to 30.9.2028 ('LT-PPA').

5. In addition to the above two PPAs, the Petitioner has also entered into two Power Supply Agreements ('PSA') with Kerala State Electricity Board Limited ('KSEB') on 29.12.2014 for supply of 200 MW and 150 MW Power on Design, Build, Finance, Own and Operate ('DBFOO') basis.

6. Consequent upon the issuance of the Electricity (Timely Recovery of Costs Due to Change in Law) Rules, 2021 ('Change in Law Rules') dated 22.10.2021 by the Ministry of Power, Government of India requiring a change in procedure dealing with the Change in Law cases, the matter was re-listed on 11.1.2022. Subsequently, the Commission vide its order dated 19.1.2022 disposed of the Petition No

700/MP/2020 directing the Petitioner to approach the procurer for settlement of Change in Law claims among themselves in terms of the Change in Law Rules and approach the Commission only in terms of Rule 3(8) of the Change in Law Rules. Accordingly, the Petitioner, after following the process laid down in the Change in Law Rules, again approached this Commission by filing Petition No. 121/MP/2022 on the similar issue.

7. Subsequently, the Appellate Tribunal for Electricity (APTEL), vide its judgment dated 5.4.2022 in OP No.1 of 2022 and Ors., *inter-alia*, held that the Change in Law Rules apply only prospectively and cannot be retrospectively applied to the proceedings pending for adjudication before the Commission and accordingly, also directed the Commission to exercise its review jurisdiction, *suo-motu*, to vacate its orders and restore all such Change in Law Petitions which had been disposed of on the basis of Change in Law Rules. Accordingly, vide order dated 14.6.2022 in *Suo-Motu* Petition No. 8/SM/2022 all such Petitions including the Petition No. 700/MP/2020 were restored.

8. The Petitioner has submitted that the Petitioner through the letter dated 5.2.2022 approached the Respondent for compensation with regard to Evacuation Facility Charges in terms of Change in Law Rules. In response, the Respondent vide letter dated 3.3.2022 denied the claim of Change in Law Compensation towards Evacuation Facility Charges ('EFC') raised by the Petitioner and had stated that the Petitioner should have notified the Respondent about the Change in Law event in a reasonable time and such levy of Evacuation Facility Charges is not an act, ordinance, regulation, or code amounting to a Change in Law event.

9. Both the Petitions were listed for hearing on 29.9.2022. During the course of hearing, learned counsel for the Petitioner submitted that the Petition No. 700/MP/2020 had already been argued in detailed by both the sides and the parties have also filed their respective written submissions in the matter and accordingly, the Commission may pass the appropriate orders in the matters. Learned counsel for the Respondent, TANGEDCO submitted that the written submissions filed by TANGEDCO in the Petition No. 700/MP/2020 may also be adopted in the Petition No. 121/MP/2022. Since the issue regarding compensation towards Evacuation Facility Charges in both the Petitions is similar, we are dealing both the Petitions together.

Reply and Rejoinder of the Respondent and the Petitioner

10. The Respondent and the Petitioner have filed the reply, rejoinder and written submissions in Petition No. 700/MP/2020 which have been dealt with in succeeding paragraphs.

Analysis and Decision

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

Issue No. 1: Whether the provisions of the PPAs with regard to notice have been complied with?

Issue No. 2: What is the scope of Change in Law in the PPAs?

Issue No. 3: Whether compensation claim is admissible under Change in Law in the PPAs?

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

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

Issue No. 1: Whether the provisions of the PPAs with regard to notice has been complied with?

12. The claims of the Petitioner in the present petition pertain to the Change in Law events during the operating period. Article 10.4 of the LT-PPA and MT-PPA envisages for notification of the Change in Law to the procurer. Article 10.4 being identical in both the PPAs, the relevant extract of the said Article from the MT-PPA is extracted as under:

“10.4 Notification of Change in Law

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

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

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

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

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

13. The Petitioner has submitted that it informed the Respondent about the occurrence of events of Change in Law and their impact on the supply of power in terms of the PPAs. The Petitioner has submitted that in accordance with the PPA, it has informed the Respondent about Change in Law event, namely introduction of Evacuation Facility Charges vide letter dated 17.8.2020 under both the Medium Term and Long Term PPAs.

14. The Respondent, TANGEDCO has submitted that as per Article 10.4 of the PPA, requirement of giving timely notice is a condition precedent for claiming the relief with respect to the Change in Law event and in absence thereof, the seller is not entitled to claim any relief for Change in Law. It has been submitted that while the PPAs do not specifically lay down a time line for giving of notice, it casts an obligation upon the Petitioner to give notice “as soon as “reasonably practicable or when it “should reasonably have known” about the Change in Law. Hon’ble High Court of Delhi in the case of All India Lawyers Union v. Union of India, while interpreting the phrase “as soon as” has held that the urgency is the hallmark of the said expression and it means promptly and with due diligence; as soon as was reasonably possible; forthwith; as soon as it can be conveniently done. However, in the present case, the Petitioner issued the Change in Law notice on 17.8.2020 for the EFC Notification dated 19.12.2017 i.e. after an undue delay of nearly three years and the said delay does not meet the requirement of giving notice as soon as reasonably practicable. TANGEDCO has submitted that it is well settled principle of law that when the parties enter into a contract, it is necessary to give importance to the procedure settled under such contract and the terms therein {Datar Switchgears v. Tata Finance Ltd. [(2000) 8 SCC 151]} and in absence of compliance with the contractual conditions under Article 10.4 of the PPAs, the Petitioner cannot be allowed to claim Change in Law compensation for EFC. It has been submitted that the contention of the Petitioner that the above submission of TANGEDCO not being part of the pleadings is violative of principle of pleadings is misplaced as the purpose of the rule prohibiting the parties from the traversing beyond their pleadings is to prevent parties from raising a new factual issue after the pleadings are complete so as to prevent putting the opposite to surprise. However, if the said fact was touched upon and formed part of the evidence, then the plea that no arguments qua the fact

was made in the pleadings cannot succeed as noted by the Hon'ble Supreme Court in the case of Bhagwati Prasad v. Chandramaul, [(1966) 2 SCR 286]. As such, TANGEDCO has not relied on any new evidence and has merely pointed out delay in issuing the Change in Law notice (given on 17.8.2020) for EFC Notification dated 19.12.2017 both of which are part of documents filed by the Petitioner. In any event, the strict rule on pleadings form part of Code of Civil Procedure, 1908 (CPC) as applicable for civil suits and trials and it is an established principle of law that elaborate procedural rules of CPC do not bind Tribunals and the Commission, which are free to regulate their own procedure.

15. *Per contra*, the Petitioner has submitted that nowhere in the Petition, the Respondent has raised in its pleadings, any averment with regard to delay in issuing notice under Article 10.4 of the PPAs and therefore, bringing such argument at the stage of final hearing is violative of the principle of pleadings and cannot be admissible by this Commission. The Hon'ble Supreme Court in the case of Bachhaj Nahar v. Nilima Mandal & Ors.,[(2008) 17 SCC 491], has observed that the object and purpose of pleadings and issues is that the litigants arrive at the trial with all the issues clearly determined and to prevent the case from being expanded unnecessarily or grounds being shifted during the trial. Accordingly, the Respondent cannot take the Petitioner or for that matter this Commission for surprise and averments or substantive allegations/ defence not made part of the pleadings or through any communication, cannot be entertained at the time of the fag end of the litigations. The Petitioner has submitted that initially at the time of Change in Law event occurring, the Petitioner was included to settle the dispute amicably with the Respondent and thus was communicating with the Respondent in order to resolve the same. Only when it became clear that the Respondent was not willing/included to

resolve the issues, did the Petitioner issue a notice as per the PPAs. It has been submitted that under Article 10.4 of the PPAs, no specific time period is prescribed within which the generator shall have to inform the Respondent with regard to occurrence of Change in Law and since the generator was in communication with the procurer regarding grant of compensation, the delay in issuance of notice cannot be construed to have violated the requirement of Article 10.4.1 of the PPAs. The Petitioner has submitted that the intent behind the said clause is not to deny the compensation payable to the generator when the latter is entitled to the same.

16. We have considered the submissions made by the parties. While there is no denial to the fact that the Petitioner had issued a formal Change in Law notice on 17.8.2020 for the EFC Notification dated 19.12.2017, the contest put-up by the Respondent is with regard to delay in issuing such notice. As quoted above, Article 10.4.1 of the PPAs as such do not specifically lay down a timeline for giving a notice for Change in Law event, it however, requires the seller affected by Change in Law event to give notice of such event as soon as reasonably practicable after becoming aware of the same or should have reasonably have known of the Change in Law event. We observe that Evacuation Facility Charges @ Rs. 50/MT of coal by Coal India Limited were introduced vide its Price Notification dated 19.12.2017, a Government Notification. It is to be mentioned that such notification is a law within the meaning of Article 13 of the Constitution of India as well as defined in Article 1.1 of the PPA. Furthermore, every law has an inherent notice and a fact judicially noticeable within the meaning of Section 57 of the Indian Evidence Act, 1872. It is admitted case that the Petitioner was making efforts to reconcile the matter before the notice. The notice is a legal concept describing a requirement that a party be aware of legal process affecting their rights, obligations or duties. In this case, the

Respondent cannot raise such claim that such forewarning was not given by the Petitioner. Thus, it amounts to a constructive notice upon the Respondent. Accordingly, we answer the issue.

Issue No. 2: What is the scope of Change in Law under the PPAs?

17. The claims of the Petitioner are with respect to events under Change in Law under Article 10 of the PPAs which occurred after the cut-off date i.e.11.2.2012 and 27.2.2013. Article 10 of the LT-PPA and MT-PPA between the Petitioner and TANGEDCO deals with events of Change in Law and is extracted for reference as under:

“10.1 Change in Law

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

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

- The enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such law;*
- A change in the interpretation or application of any law by any Indian governmental instrumentality having the legal power to interpret or apply such law, or any competent court of law;*
- The imposition of a requirement for obtaining any consents, clearances and permits which was not required earlier;*
- A change in terms and conditions prescribed for obtaining any consents, clearances and permits or the inclusion of any new terms or conditions for obtaining such consents clearances and permits; except due to any default of the seller;*
- Any change in tax or introduction of any tax made applicable for supply of power by the seller as per the terms of this agreement.*

But shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the seller, or (ii) change in respect of UI charges or frequency intervals by an appropriate commission, or (iii) any change on account of regulatory measures by the appropriate commission including calculation of availability.

10.2 Application and principles for computing impact of Change in Law:

10.2.1 while determining the consequence of change in law under this article 10, the parties shall have due regard to the principle that the purpose of compensating the party affected by such Change in Law, is to restore through

monthly tariff payment to the extent contemplated in this Article 10, the affected party to the same economic position as if such Change in Law has not occurred.

10.3.2 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 to the seller is in excess of an amount equivalent to 1% of the value of the stand by 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.

10.5 Tariff Adjustment Payment on account of Change in Law.

10.5.1 Subject to Article 10.2, 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 /judgement 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 Change in Law shall be through Supplementary Bill as mentioned in Article 8.8. 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”.

Further, Article 14 of the PPAs provides that in case of dispute between the parties arising out of claim made by any party for any change in or determination of tariff or any matter relating to tariff. The said Article is extracted as under:

“14.3 Dispute Resolution

14.3.1 Dispute Resolution by the Appropriate Commission

14.3.1.1 (a) Where any Dispute arising from a claim made by any Party for any change in or determination of the tariff or any matter related to tariff or claims made by any party which partly or wholly relate to any change in the Tariff or determination of any of such claims could result in change in the Tariff, shall be submitted to adjudication by the Appropriate Commission. Appeal against the decisions of the Appropriate Commission shall be made only as per the provisions of the Electricity Act, 2003, as amended from time to time.”

18. A combined reading of the above provisions would reveal that the Commission has the jurisdiction to adjudicate upon the disputes between the Petitioner and the Respondent with regard to “Change in Law” which occur after the cut- off date which is seven days prior to the bid deadline. The events broadly covered under Change in Law are following:

- (a) Any enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law;
- (b) Any change in interpretation of any Law by a Competent Court of law, Tribunal or Indian Governmental Instrumentality acting as final authority under law for such interpretation, or
- (c) Imposition of a requirement for obtaining any consents, clearances and permits which was not required earlier.
- (d) A change in terms and conditions prescribed or inclusion of any new terms and conditions for obtaining consents, clearances and permits, except due to any default of the seller;
- (e) 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.
- (f) Such Changes [as mentioned in (a) to (e) above] result in additional recurring and non-recurring expenditure by the seller or any income to the seller.
- (g) The purpose of compensating the Party affected by such Change in Law is to restore through Monthly Tariff Payments, to the extent

contemplated in this Article 10, the affected Party to the same economic position as if such “Change in Law” has not occurred.

(h) The Appropriate Commission shall determine the compensation for any increase/decrease in revenue or cost to the Seller and effective date of such compensation which shall be final and binding on both the parties, subject to rights of appeal provided under the Act.

“Law” has been defined under Article 1.1 of the PPAs as under:

“Law” shall mean in relation to this Agreement, all laws including Electricity Law 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;

The term “Indian Government Instrumentality” is also defined in Article 1.1 as under:

“Indian Governmental Instrumentality” shall mean the Government of India, Government of State(s) of Tamil Nadu, Chhattisgarh 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 Procurer”.

As per the above definition, law shall include (a) all laws including electricity laws in force in India, (b) any statute, ordinance, regulation, notification, code, rule or their interpretation by Government of India, Government of Tamil Nadu or Government of Chhattisgarh (since the project is located in Chhattisgarh) by Ministry, Department, Board, body corporate agency or other authority under such Government(s); (c) all applicable rules, regulations, decisions and others of the Appropriate Commission. If any of these laws affect the cost of generation or revenue from the business of selling electricity by the seller to the procurer, the same

shall be considered as Change in Law to the extent it is contemplated under Article 10 of the PPAs.

Issue No. 3: Whether compensation claim is admissible under Change in Law in the PPAs?

19. The events of Change in Law should occur after seven days prior to the Bid Deadline. The Bid Deadlines for MT-PPA and LT-PPA were 18.2.2012 and 6.3.2013 respectively. Therefore, the cut-off date for reckoning the Change in Law event under the MT-PPA and LT-PPA works out to 11.2.2012 and 27.2.2013 respectively. In the light of and in view of the broad principles discussed above, we proceed to deal with the claim of the Petitioner regarding levy of Evacuation Facility Charges by Coal India Limited under Change in Law during the operating period.

20. The Petitioner has submitted that as on cut-off dates i.e. 11.2.2012 and 27.2.2013, there was no Evacuation Facility Charges levied by Coal India Limited. However, subsequently Coal India Limited vide its price Notification No. CIL: S&M: GM (F): Pricing 2017/1005 dated 19.12.2017, levied Evacuation Facility Charges at the rate of Rs.50/MT on all dispatch of coal w.e.f. 20.12.2017. The Petitioner has submitted that the notifications issued by the Coal India Limited, an Indian Governmental Instrumentality, are in effect the mandate/ directive of the Central Government and are statutory in nature, covered under Change in Law in the PPAs.

21. The Respondent, TANGEDCO has submitted that the claim on account of levy of Evacuation Facility Charges on dispatch of coal is not maintainable. As per the definition of 'Indian Governmental Instrumentality', a body corporate under Government of India is an Indian Government Instrumentality. Coal India Limited is a body corporate under the Government of India and an Indian Governmental Instrumentality under the PPA. However, all the circulars and notifications issued by

Coal India Limited cannot be included under Change in Law. As per the term 'Law', notifications by the Indian Governmental Instrumentality should be pursuant to any statute, ordinance, regulation or code. In the present case, the Notification dated 19.12.2017, which is a decision of GM (M&S) Marketing & Sales is not an Act, Ordinance, Regulations or Code amounting to Change in Law but a commercial decision of Coal India Limited. Since the Petitioner has to deal with such commercial charges as per terms of FSA signed by it with Coal India Limited, introduction of Evacuation Facility Charges by Coal India Limited cannot be treated as Change in Law under the provisions of the PPA of the Petitioner. The generator has entered into the contract under Section 63 of Act and not under Section 62 of the Act. The Respondent in its written submissions has submitted that while allowing levy of Evacuation Facility Charges as Change in Law in previous orders, the Commission only considered the aspect that Coal India Ltd. is an Indian Government Instrumentality as defined under the PPAs and consequently held the Evacuation Facility Charges notification issued by Coal India Ltd. to be a Change in Law event. However, the ratio/decision of APTEL in the case of Adani Power Rajasthan Ltd v RERC which has also been followed in GWEL v CERC in Appeal No. 111 of 2017, in the context of sizing charges and surface transportation charges, would equally apply in relation of Evacuation Facility Charges. In the former, the APTEL has held that the merely because Coal India Ltd. is an Indian Government Instrumentality, its notification increasing the sizing charges and surface transportation charges cannot be considered as Change in Law under the PPAs. In the present case, TANGEDCO is not disputing that Coal India Ltd is an Indian Government Instrumentality. However, Evacuation Facility Charges is a non-statutory charge and does not have the force of law. Therefore, even though Evacuation Facility Charges impacts the price of coal, it does not fall within the scope of Change in Law. It is the Petitioner`s

responsibility to bear the price of coal and the Respondent has no obligation or liability to compensate the Petitioner for all changes in the price of coal, especially in respect of PPAs under Section 63 of the Act.

22. *Per contra*, the Petitioner has submitted that the issue pertaining to the notifications issued by Coal India Limited qua Evacuation Facility Charges has already been considered by the Commission in its various orders and held the same as Change in Law events. The Petitioner has further submitted that the Respondent has failed to establish as to how the present case is distinguishable from the said orders of this Commission.

23. We have considered the submissions of the Petitioner and the Respondent, TANGEDCO. As on cut-off date, there was no Evacuation Facility Charges levied by Coal India Limited and subsequently, Coal India Limited vide its price Notification No. CIL:S&M:GM(F)/Pricing/2017/1005 dated 19.12.2017 notified the levy of Evacuation Facility Charges at the rate of Rs.50/MT on coal. Evacuation Facility Charges were not possible to envisage at the time to bid submission by the Petitioner (cut-off dates being 11.2.2012 and 27.2.2013) and its subsequent introduction has resulted into additional recurring expenditure for the Petitioner. Therefore, levy of Evacuation Facility Charges is covered under provisions of Article 10 of PPA dealing with Change in Law event. TANGEDCO has also admitted that Coal India Limited is an Indian Government Instrumentality.

24. The Petitioner has submitted that the issue of levy of Evacuation Facility Charges by Coal India Limited has already been dealt with by the Commission in its various orders including the order dated 2.4.2019 in Petition No.

72/MP/2018 (GMR Kamalanga Energy Ltd. and Anr. v. Dakshin Haryana Bijli Vitran Nigam Ltd. and Ors.), wherein the Commission has allowed levy of Evacuation Facility Charges by Coal India Limited as Change in Law event. The relevant portion of the said order dated 2.4.2019 in Petition No. 72/MP/2018 is extracted as under:

“42. We have considered the submission made by the Petitioner. We notice that as on the cut-off date of the respective PPAs there was no Evacuation Facility Charges levied by CIL and subsequently Coal India Ltd. vide its price notification no CIL:S&M:GM(F)/Pricing/2017/1005 dated 19.12.2017 notified the levy of 'evacuation facility charges' at the rate of Rs.50/MT on coal. The Tribunal vide its judgement dated 21.12.2018 had concluded that "departments, corporations/ companies like Coal India Limited or Indian Railways formed under different Statutes are Indian Government Instrumentality". In view of the submissions of the Petitioner and in view of the said judgment, we note that the Evacuation Facilities Charges are levied pursuant to notification issued by CIL which is an Indian Governmental Instrumentality in terms of the PPAs. The Evacuation Facility Charges were not possible to be envisaged at the time of bid submission by the Petitioner and its subsequent introduction has an adverse financial impact on the Petitioner which is one of the requirements of claiming relief for change in law event. We further note that the Tribunal in the case of Sasan Power Ltd. V. CERC [2017 ELR(APTEL)508] has held that as long as the conditions of Change in law are satisfied, the affected party will be entitled to relief. In the present case, the introduction of Evacuation Facility Charges satisfies the criteria of change in law events as contained in the respective PPAs. Further, Evacuation Facilities Charges is not part of the escalation index for coal notified by this Commission. Hence, we are of the view that introduction of Evacuation Facility Charges beyond cut-off date of the respective PPAs is admissible to the Petitioner as a change in law event.

43. Accordingly, the Petitioner is entitled to recover the Evacuation Facility Charges as per applicable rates in proportion to the coal as per the parameters of the applicable Tariff Regulations of the Commission or coal actually consumed whichever is lower, for generation and supply of electricity to the discoms concerned. As on cut-off dates of the Bihar and Haryana PPAs, Evacuation Facilities Charges were Nil. Thereafter, the applicable rates of Evacuation Facilities Charges shall be used based on the relevant date/s. The Petitioner is directed to furnish along with its monthly regular and/or supplementary bill(s) and computations duly certified by the auditor to the discoms concerned. The Petitioner and the discoms concerned are directed to carry out reconciliation on account of these claims annually.”

25. The above decision of the Commission may also be appreciated in the context of present case. Therefore, the introduction of Evacuation Facility Charges

by Coal India Limited beyond the cut-off date is admissible to the Petitioner as Change in Law and all the contrary submissions of TANGEDCO deserve to be rejected.

26. It is also pertinent to note that the APTEL in its judgment dated 22.3.2022 in Appeal Nos. 118 of 2021 and 40 of 2022 in the matter of Rattan India Power Ltd v. MERC and Ors. has also held that introduction of Evacuation Facility Charges by the Coal India Limited constitutes a Change in Law under the provisions of the PPA. The relevant extract of the said judgment is reproduced as under:

“.....8. In our considered opinion, the view taken by the respondent Commission on, and the opposition by the respondent distribution licensee to, the claim for compensation on account of levy of EFC as change in law event bought in by Coal India is unfair and unjust. It is well settled that Coal India manages coal mines in India in terms of Coal Mines (Nationalization) Act, 1973, it having been conferred with the statutory power to determine the prices of coal. Reference is rightly made in this context to Colliery Control Order 2000, Colliery Rules 2004 and decision of Hon’ble Supreme Court reported as Ashok Smokeless Cool India (P) Ltd v Union of India (2007) 2 SCC 640. By virtue of its position, Coal India enjoys monopoly over coal, it thus rightly having been referred to as an alter ego of the State.

9. It is incorrect to argue that to be covered as a change in law event under such contractual clauses as quoted earlier, the instrument whereby the law is claimed to have undergone a change must have been published in official gazette to have the force of law. In Energy Watchdog & Ors. (supra), for illustration, even a letter of the Ministry of Power in the Government of India was accepted as an instrument having the “force of law”. Similarly, in Kusum Ingots & Alloys v. Union of India (2004) 6 SCC 254 executive instructions without any statutory backing were also considered as “law”. That Coal India is Government instrumentality and the notifications, circulars, etc. issued by it have a force of law under Regulation 77(3) of the Constitution of India was accepted by this tribunal in GMR Kamalanga Energy Ltd. (supra).

10. As observed earlier, the publication of notification or circular in gazette cannot be invariably a pre-requisite for an instrument to have a force of law. The trappings of law do not come by virtue of publication which facilitates only dissemination of knowledge of law, statutes, etc. [Harla vs. The State of Rajasthan (AIR 1951 SC 467)].

11. It is not correct to argue that EFC is a part of escalation index for coal notified by CERC. This has been so held even by CERC, which oversees the periodical review of escalation index, in its order reported as GMR Kamalanga Energy Limited v. Dakshin Haryana Bijli Vitran Nigam Limited, 2019 SCC On Line CERC 211. In competitive bidding guidelines for purchase governed by Section 63 of the Electricity Act, 2003, the bidder only assumes the price of coal to the extent of its mitigation by escalation index. CERC having accepted that EFC is not part of escalation index has been consistently holding Coal India notification in question to be a change in law event [Adhunik Power and Natural Resources Limited v. West Bengal State Electricity Distribution Company Limited (2021 SCC On Line CERC 27)].

12. We do not have the least doubt that the Coal India circular on EFC fulfills all the requisite characteristics of “law” and, therefore, does have the “force of law” so as to

be accepted as change in law event giving rise to a legitimate claim for compensation in favor of the appellants. The notification admittedly applies in rem, there being no element of mutuality. The price notification is issued by Coal India which is not a party to the PPA. It is a statutory levy. It binds the conduct of the parties nonetheless since it has been issued in mandatory terms, the binding nature of the instrument itself being sufficient to add the element of "force of law". [Gulf Goans Hotels Co. Ltd v. Union of India (2014) 10 SCC 673; Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi (1975) 1 SCC 421 and Bengal Nagpur Cotton Mill Ltd v. Board of Revenue (1964) 4 SCR 190].

13. In our considered view, the subject at hand is fully covered by a previous decision of this tribunal in the case of GMR Kamalanga Energy Ltd (supra), the relevant observations wherein to the following effect need to be quoted here.....”

27. Accordingly, we find and hold that the Petitioner shall be entitled to recover Evacuation Facility Charges from TANGEDCO in proportion to the CIL linkage coal consumed in terms of PPA provisions corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual generation, whichever is lower, for supply of electricity to TANGEDCO under both the PPAs. If the actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of Evacuation Facility Charges. The Petitioner is directed to furnish along with its monthly regular and/or supplementary bill(s), computations duly certified by the auditor to TANGEDCO. The Petitioner and TANGEDCO are directed to carry out reconciliation on account of these claims annually. The above Change in Law is to be implemented from 20.12.2017; the Petitioner is entitled to compensation subject to claim under Change in Law is more than 1% of Letter of Credit amount in financial year as per PPAs.

Carrying cost

28. The Petitioner has submitted that as per Article 10 of the PPAs, the Petitioner is entitled to be compensated in such a way that it is restored through monthly tariff payment to the same economic position as if such Change in Law had not occurred. It has also been submitted that the issue of carrying cost is no more res-integra and

is squarely covered by the judgment of Hon'ble Supreme Court in Uttar Haryana Bijli Vitran Nigam Ltd. v. Adani Power Ltd. and Ors., [(2019) 5 SCC 325]. In the present case, Petitioner's LT-PPA has identical provisions capturing the 'restitutive' principle as in the case dealt by the Hon'ble Supreme Court in the aforesaid judgment.

29. We have considered the submissions of the Petitioner. The issue of applicability of carrying cost is no longer *res integra*. The APTEL in its judgment dated 13.4.2018 in Appeal No. 210 of 2017 (Adani Power Limited v. Central Electricity Regulatory Commission & Ors.) has allowed the carrying cost on the claim under change in law and held as under:

"ix. In the present case we observe that from the effective date of Change in Law the Appellant is subjected to incur additional expenses in the form of arranging for working capital to cater the requirement of impact of Change in Law event in addition to the expenses made due to Change in Law. As per the provisions of the PPA the Appellant is required to make application before the Central Commission for approval of the Change in Law and its consequences. There is always time lag between the happening of Change in Law event till its approval by the Central Commission and this time lag may be substantial. As pointed out by the Central Commission that the Appellant is only eligible for surcharge if the payment is not made in time by the Respondent Nos. 2 to 4 after raising of the supplementary bill arising out of approved Change in Law event and in PPA there is no compensation mechanism for payment of interest or carrying cost for the period from when Change in Law becomes operational till the date of its approval by the Central Commission. We also observe that this Tribunal in SLS case after considering time value of the money has held that in case of re-determination of tariff the interest by a way of compensation is payable for the period for which tariff is re-determined till the date of such re-determination of the tariff. In the present case after perusal of the PPAs we find that the impact of Change in Law event is to be passed on to the Respondent Nos. 2 to 4 by way of tariff adjustment payment as per Article 13.4 of the PPA.

.....From the above it can be seen that the impact of Change in Law is to be done in the form of adjustment to the tariff. To our mind such adjustment in the tariff is nothing less than re-determination of the existing tariff.

x. Further, the provisions of Article 13.2 i.e. restoring the Appellant to the same economic position as if Change in Law has not occurred is in consonance with the principle of 'restitution' i.e. restoration of some specific thing to its rightful status. Hence, in view of the provisions of the PPA, the principle of restitution and judgement of the Hon'ble Supreme Court in case of Indian Council for Enviro-Legal Action vs. Union of India & Ors., we are of the considered opinion that the Appellant is eligible for Carrying Cost arising out of approval of the Change in Law events from the effective date of Change in Law till the approval of the said event by appropriate authority. It is also observed that the Gujarat Bid-01 PPA have no provision for restoration to the same economic position as if Change in Law has not occurred. Accordingly, this decision of allowing Carrying Cost will not be applicable to the Gujarat Bid-01 PPA..."

30. The aforesaid judgment of the APTEL was challenged before the Hon'ble Supreme Court wherein the Hon'ble Supreme Court vide its judgment dated 25.2.2019 in Civil Appeal No.5865 of 2018 with Civil Appeal No.6190 of 2018 (Uttar Haryana Bijili Vitran Nigam Limited & Anr. v. Adani Power Ltd. & Ors.) has upheld the directions of payment of carrying cost to the generator on the principles of restitution and held as under:

“10. A reading of Article 13 as a whole, therefore, leads to the position that subject to restitutionary principles contained in Article 13.2, the adjustment in monthly tariff payment, in the facts of the present case, has to be from the date of the withdrawal of exemption which was done by administrative orders dated 06.04.2015 and 16.02.2016. The present case, therefore, falls within Article 13.4.1(i). This being the case, it is clear that the adjustment in monthly tariff payment has to be affected from the date on which the exemptions given were withdrawn. This being the case, monthly invoices to be raised by the seller after such change in tariff are to appropriately reflect the changed tariff. On the facts of the present case, it is clear that the respondents were entitled to adjustment in their monthly tariff payment from the date on which the exemption notifications became effective. This being the case, the restitutionary principle contained in Article 13.2 would kick in for the simple reason that it is only after the order dated 04.05.2017 that the CERC held that the respondents were entitled to claim added costs on account of change in law w.e.f. 01.04.2015. This being the case, it would be fallacious to say that the respondents would be claiming this restitutionary amount on some general principle of equity outside the PPA. Since it is clear that this amount of carrying cost is only relatable to Article 13 of the PPA, we find no reason to interfere with the judgment of the Appellate Tribunal ...

16...There can be no doubt from this judgment that the restitutionary principle contained in Clause 13.2 must always be kept in mind even when compensation for increase/decrease in cost is determined by the CERC.”

31. Article 10.2 of the PPAs provides as under:

“10.2 Application and Principles for computing Impact of Change in Law:

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

32. In view of the provisions of the PPAs, the principles of restitution and the aforesaid judgment of the Hon'ble Supreme Court, we are of the considered view that the Petitioner is eligible for carrying cost arising out of approved change in law

events from the date of actual payment towards Change in Law till the date of this order.

33. The Commission in its order dated 17.9.2018 in Petition No. 235/MP/2015 (AP(M)L v. UHBVNL & Ors.) had decided the issue of carrying cost as under:

“24. After the bills are received by the Petitioner from the concerned authorities with regard to the imposition of new taxes, duties and cess, etc. or change in rates of existing taxes, duties and cess, etc., the Petitioner is required to make payment within a stipulated period. Therefore, the Petitioner has to arrange funds for such payments. The Petitioner has given the rates at which it arranged funds during the relevant period. The Petitioner has compared the same with the interest rates of IWC as per the Tariff Regulations of the Commission and late payment surcharge as per the PPA as under:-

<i>Period</i>	<i>Actual interest rate paid by the Petitioner</i>	<i>Working capital interest rate as per CERC Regulations</i>	<i>LPS Rate as per the PPA</i>
<i>2015-16</i>	<i>10.68%</i>	<i>13.04%</i>	<i>16.29%</i>
<i>2016-17</i>	<i>10.95%</i>	<i>12.97%</i>	<i>16.04%</i>
<i>2017-18</i>	<i>10.97%</i>	<i>12.43%</i>	<i>15.68%</i>

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

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

34. In line with above order of the Commission, in the instant case, the Petitioner shall be eligible for carrying cost at the actual rate of interest paid by the Petitioner for arranging funds (supported by Auditor’s Certificate) or the rate of interest on working capital as per applicable CERC Tariff Regulations or the late payment surcharge rate as per the PPAs, whichever is the lowest. Once a supplementary bill

is raised by the Petitioner in terms of this order, the provision of Late Payment Surcharge in the PPA would kick in if the payment is not made by the Respondent.

Mechanism of payment of Changes in Law compensation

35. The Petitioner has submitted that the minimum value of “Change in Law” should be more than 1% of the Letter of Credit amount in a particular year. As per Article 10.3.2 of MT and LT PPAs, the letter of credit amount for first year would be equal to 1.1 times of the estimated average monthly billing based on normative availability and for subsequent years, the letter of credit amount will be equal to 1.1 times of the average of the monthly tariff payments of the previous contract year plus the estimated monthly billing during the current year from any additional units expected to be put on COD during that year on normative availability.

36. Article 10.3.2 and 10.3.4 of the PPAs provides for the principle for computing the impact of Change in Law during the operation period as under:

“10.3.2 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 the excess of an amount equivalent to 1% of the value of the Stand by Letter of Credit in aggregate for the relevant Contract Year.

10.3.4 The decision of the Appropriate Commission, with regards to the determination of the compensation mentioned above in Article 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.”

37. The above provision enjoins on the Commission to decide the effective date from which the compensation for increase/decrease revenues or cost shall be admissible to the Petitioner. Moreover, the compensation shall be payable only if and for increase/decrease in revenue cost to the seller in excess of an amount equivalent to 1% of the letter of credit in aggregate for contract year. In our view, the effect of Change in Law as approved in this order shall come into force from the date of introduction of Evacuation Facility Charges i.e. 20.12.2017. It is noticed that while

the supply period under the MT-PPA is already over, LT-PPA is still in subsistence. Accordingly, the Commission has specified a mechanism considering the fact that compensation of Change in Law shall be paid in subsequent contract years also. Accordingly, the following mechanism prescribed to be adopted for payment of compensation due to Change in Law events allowed as per Article 10.2.1 of the PPAs in the subsequent years of the contracted period:

- (a) Monthly Change in Law compensation payment shall be effective from the date of commencement of supply of electricity to the Procurer or from the date of Change in Law, whichever is later.
- (b) Levy of Evacuation Facility Charges on coal shall be computed based on actual subject to ceiling of coal consumed corresponding to scheduled generation and shall be payable by the beneficiary on pro-rata based on its share in the scheduled generation.
- (c) At the end of the year, the Petitioner shall reconcile the actual payment made towards Change in Law with the books of accounts duly audited and certified by an auditor and adjustment shall be made based on the energy scheduled by the procure during the year. The reconciliation statement duly certified by an Auditor shall be kept in possession by the Petitioner so that same could be produced on demand from Procurer(s)/beneficiary(ies), if so desired.
- (d) For Change in Law items related to the operating period, the year-wise compensation henceforth shall be payable only if such increase in revenue or cost to the Petitioner is in excess of an amount equivalent to 1% of LC in aggregate for a contract year as per provision under 10.3.2 of the MT and LT PPAs.
- (e) Approaching the Commission every year for allowance of compensation for such Change in Law is a time consuming process which results in time lag between the amount paid by Seller and actual reimbursement by the Procurers which may result in payment of carrying cost for the amount actually paid by the Petitioner. Accordingly, the mechanism prescribed above is to be adopted for payment of compensation due to

Change in Law event allowed as per Article 10.3.2 of the PPAs for the subsequent period as well.

38. The Commission has not computed the threshold value of eligibility of getting compensation due to Change in Law during operating period. However, the Petitioner shall be eligible to get compensated if the impact due to Change in Law exceeds the threshold value as per Article 10.3.2 of the PPAs during operating period. Accordingly, the compensation amount allowed shall be shared by the Procurer based on the scheduled energy.

39. In view of above discussions and findings, Petition No. 700/MP/2020 and Petition No. 121/MP/2022 are disposed of.

Sd/-
(P.K.Singh)
Member

Sd/-
(Arun Goyal)
Member

Sd/-
(I.S.Jha)
Member