

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No.16/MP/2021**

**Coram:**

**Shri I.S. Jha, Member**

**Shri Arun Goyal, Member**

**Shri P.K. Singh, Member**

**Date of Order: 9<sup>th</sup> January, 2023**

**In the Matter of:**

Petition under Section 79 (1) (b) and 79 (1) (f) of the Electricity Act, 2003 read with Article 10 of the Power Purchase Agreement dated 1.4.2013 and amended Power Purchase Agreement dated 10.4.2015 entered into between Sembcorp Energy India Ltd. (formerly Thermal Powertech Corporation India Ltd.) and the distribution licensees of States of Andhra Pradesh and Telangana, seeking compensation on account of change in law event due to the levy of Evacuation Facility Charges and Rapid Loading Charges imposed by Coal India Limited.

**And**

**In the Matter Of:**

**Sembcorp Energy India Limited,**

(Formerly Thermal Powertech Corporation India Limited)

6-3-1090, A Block,

5th Floor, T.S.R Towers,

Rajbhawan Road, Somajiguda,

Hyderabad – 500082, Telangana

**...Petitioner**

**VS.**

**1. Southern Power Distribution Company of Telangana Limited (TSSPDCL),**

(Formerly, Central Power Distribution Company of Andhra Pradesh Limited),

Through its Chief General Manager (Comml. & RAC),

Mint Compound, Hyderabad – 500063, Telangana

**2. Northern Power Distribution Company of Telangana Limited (TSNPDCCL),**

(Formerly, Northern Power Distribution Company of Andhra Pradesh Limited),

Through its Chief General Manager (Comml. & RA),

Vidyuth Bhavan, Nakkalagutta,

Hanamkonda, Warangal-506001

**3. Southern Power Distribution Company of Andhra Pradesh Limited**

Through its Chief General Manager (P & MM, IPC)

D.No.19-13-65/a, Kesavayanagunta,

Tiruchanoor Road, Tirupati.



**4. Eastern Power Distribution Company of Andhra Pradesh Limited,**  
Through its Chief General Manager (Comml. & RA),  
P&T Colony, Seethammadhara,  
Visakhapatnam-530013

...Respondents

**Parties present:**

Shri Hemant Sahai, Advocate, SEIL  
Shri Nitish Gupta, Advocate, SEIL  
Ms. Nehul Sharma, Advocate, SEIL  
Shri D Abhinav Rao, Advocate, Telangana Discoms  
Shri Rahuk Jajoo, Advocate, Telangana Discoms  
Shri Gurpreet Singh Bagga, Advocate, AP Discoms

**ORDER**

The Petitioner, Sembcorp Energy India Limited, has filed the present Petition under Section 79 (1)(b) and Section 79 (1)(f) of the Electricity Act, 2003 (hereinafter referred to as 'the Act') read with Article 10 of the Power Purchase Agreement ('PPA') dated 1.4.2013 as amended, entered into between the Petitioner and the Respondents, seeking declaratory and consequential reliefs on account of the Change in Law events, namely, (i) introduction of Evacuation Facility Charges, and (ii) imposition of Rapid Loading Charges which occurred on account of issuance of the Notifications by Coal India Limited ('CIL'). The Petitioner has made the following prayers:

*"(a) Allow the present Petition;*

*(b) Declare the EFC Notification dated 19.12.2017, issued by CIL is a Change in Law event under the PPA dated 01.04.2013 and the Amended Power Purchase Agreements executed till date between the Petitioner and the Respondents, during Operating Period and having an impact on the Project of the Petitioner;*

*(c) Declare that the RLC Notifications notified from 26.02.2011 to 31.08.2017 issued by CIL is a Change in Law event impacting the Petitioner's Plant in terms of the PPA dated 01.04.2013, and the Amended Power Purchase Agreements executed till date between the Petitioner and the Respondents, during Operating Period and having an impact on the Project of the Petitioner;*

*(d) Grant compensation/additional tariff to the Petitioner as per the approved /devised methodology for the period from the issuance of the Change in Law Notifications, till the final disposal of the present petition along with carrying cost and future interest thereon;*

*(e) Allow consequential reliefs on account of additional expenditure incurred in generating and supplying power to the Respondents due to the occurrence of the*

*abovementioned Change in Law events from the date of levy, so as to restore the Petitioner to the same economic position as if such Change in Law has not occurred;*

*(f) Evolve a suitable compensatory mechanism for the period from the date of disposal of the petition till the balance operating period of the Project so as to compensate the Petitioner for the impact on costs during the operating period of the Project and restore the Petitioner to the same economic position prior to occurrence of the change in law events i.e. the imposition and levy of EFC and RLC;*

*(g) Grant carrying cost/ interest for the change in law events of Evacuation Facility Charge and Rapid Loading Charges; and*

*(h) Pass appropriate directions to restore the Petitioner to the same economic position in terms of Article 10 of the PPA.”*

### **Brief background:**

2. The Petitioner owns and operates two coal-based power plants each with an installed capacity of 1320 MW (2 X 660 MW) located at Nellore, Krishnapatnam, in the State of Andhra Pradesh ('the Project'). On 3.7.2009, a Letter of Assurance ('LoA') was issued to the Petitioner by Mahanadi Coalfields Limited, a subsidiary of CIL ('MCL') for supply of 4.273 MTPA of coal. Subsequently, based on the LoA provided by MCL, the Petitioner entered into a Fuel Supply Agreement ('FSA') with MCL on 22.6.2013 for supply of 4.273 MTPA domestic coal.

3. On 17.5.2010, the Respondents (distribution licensees of erstwhile undivided State of Andhra Pradesh i.e. Central Power Distribution Company of Andhra Pradesh Limited, Eastern Power Distribution of Andhra Pradesh Limited, Southern Power Distribution Company of Andhra Pradesh Limited, and Northern Power Distribution Company of Andhra Pradesh Limited) (collectively referred to as 'United AP Discoms') issued a Request for Proposal ('RfP') for procurement of 2000 MW power on long-term basis under Case-I bidding process. In response to the said RfP, the Petitioner, on 30.9.2010, submitted bid for supply of 500 MW power from the Project and consequently emerged as the successful bidder.

4. Pursuant to the above, the Petitioner entered into the Power Purchase Agreement dated 1.4.2013 with the Respondents for sale of 500 MW of cumulative power to them from the Project for a period of 25 years from Commercial Operation Date at a levelized tariff of Rs. 3.675/kWh. The said levelized tariff was quoted based on the coal supply assured to the Petitioner by MCL for 70% (4.273 MTPA) and balance 30% based on imported coal (2 MTPA). The said PPA was further amended on 10.4.2015 to capture the new arrangement of allocation of supply of power as a result of the Andhra Pradesh Reorganisation Act, 2014 dated 1.3.2014, which bifurcated the State of Andhra Pradesh leading to creation of new State of Telangana and also restructured the United UP Discoms so as to become the distribution licensees of the present-day State of Andhra Pradesh and State of Telangana.

**Submissions of the Petitioner:**

5. In support of its prayers, the Petitioner has mainly submitted as under:
- (a) As per Article 10 of the PPA, the Petitioner is entitled to be compensated and restored to the same economic position as if the Change in Law event did not occur, through monthly tariff payment in terms of the extent contemplated therein. Further, as per Article 10.1 of the PPA, the cut-off date for reckoning any event as Change in Law event is seven days prior to the bid deadline. In the present case, the last date of bid submission as per the RfP was 1.10.2010 and thus, the cut-off date works out to be 24.9.2010.
  - (b) On 19.12.2017, CIL which is an Indian Governmental Instrumentality as defined in the PPA, issued the Notification bearing No. CIL:S&M:GM(F)/Pricing/ 2017/1005 vide which Evacuation Facility Charges (EFC) of Rs.50/tonne was levied on all coal despatches except for the despatches through rapid loading arrangement w.e.f. 00:00 Hours of 20.12.2017. The aforesaid new levy of EFC in terms of the CIL Notification, which came to be notified after the cut-off date, amounts to Change in Law event under the PPA and the Petitioner is entitled for compensation on account

of imposition of EFC. The Commission has already considered the issue of EFC being a Change in Law event in number of its decisions.

(c) As regard Rapid Load Charges (RLC), in terms of Notification dated 26.2.2011, pit head prices of all grades of coal were revised w.e.f. 27.2.2011 and an additional charge of Rs.20/tonne was levied. The additional charge made with respect to coal loaded into the Indian Railways system or into the purchaser's own system of transport through high loading system with nominal capacity of 3500 tonnes per hour or more. On 16.2.2013, CIL revised and amended the amount of the above-mentioned additional charge to Rs. 26/tonne and subsequently on 31.8.2017, the same was revised to Rs. 29/tonne. The Petitioner's source for coal procurement i.e. MCL installed the rapid loading system at Talcher Coalfields since September, 2018 and pursuant to the said installation, MCL began to levy a charge of Rs. 29/tonne for coal loaded through the Rapid Loading System from the Petitioner.

(d) As the RLC levied by MCL has become applicable on the Petitioner after the cut-off date, during the operating period of the Project, it is squarely covered as Change in Law event in terms of the PPA.

(e) As per the provisions of Article 10 of the PPA, the Petitioner notified the Respondents of the Change in Law event on account of levy of EFC vide its letter dated 12.1.2018. However, no response was received from the Respondents. The Petitioner, vide letter dated 28.9.2020, also notified the Respondents of Change in Law event on account of levy of RLC on its Project. In the said letter, the Petitioner had stated that its coal procurement source i.e. MCL installed the rapid loading arrangement w.e.f. September, 2018 and started levying Rs. 29/tonne for coal loaded through the rapid loading system.

(e) The Petitioner is also entitled to carrying cost along with the compensation on account of EFC and RLC so as to restore it to the same economic position as if the said Change in Law events had not occurred. The aspect of the allowance of carrying cost along with the compensation on account of Change in Law events has already been considered by the Commission number of its decisions. The carrying cost ought to be allowed to the Petitioner for two stages; the first stage being from the period when the Change in Law event was notified and EFC & RLC respective became leviable till the final disposal of the present Petition and the second stage

being from the date of disposal of the present Petition to the date of actual payment by the Respondents.

(f) The Petitioner's Project is located in the State of Andhra Pradesh and the power is being supplied to the distribution licensees located in the State of Andhra Pradesh and the State of Telangana, pursuant to the bifurcation of erstwhile State of Andhra Pradesh into two new States i.e. State of Andhra Pradesh and State of Telangana. Therefore, the Petitioner's Project is a 'composite scheme' for generation and sale of electricity as envisaged in Section 79(1)(b) of the Act. Accordingly, this Commission has the jurisdiction to adjudicate the claims of the Petitioner w.r.t Change in Law events under Section 79 of the Act.

#### **Hearing dated 13.7.2021**

6. The matter was admitted and notice was issued to the Respondents. The parties were directed to complete the pleadings in the matter. Pursuant to this, the Respondent Nos. 1 and 2, Telangana Discoms filed their common reply dated 5.8.2021 and the Petitioner also filed its rejoinder dated 24.8.2021.

#### **Hearing dated 24.1.2022**

7. 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 listed on 24.1.2022 and was reserved for order. Subsequently, the Commission vide its order dated 31.1.2022 disposed of the this Petition directing the Petitioner to approach the Telangana Discoms and the Andhra Pradesh Discoms 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.

8. Subsequently, the Appellate Tribunal for Electricity (APTEL), vide its judgement 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 has 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. 16/MP/2021 were restored.

#### **Hearing dated 29.9.2022**

9. The matter was thereafter listed for hearing on 29.9.2022. During the course of hearing, learned counsel for the Petitioner submitted that the matter is squarely covered by the earlier decisions/orders of this Commission and no further hearing is required in the matter and the Respondents may be permitted to file their reply/written submission, if any. Whereas, learned proxy counsel appearing on behalf of the Respondent Nos. 3 and 4, AP Discoms submitted that they may be allowed a short accommodation to file the Vakalatnama and their reply as there was a change in the counsel. Learned counsel appearing on behalf of the Respondent Nos. 1 and 2, Telangana Discoms also made a similar request. After hearing the learned counsel for the parties, the Commission observed that the matter indeed appeared to be covered by the earlier orders of this Commission as well as the judgments of the APTEL and therefore, further oral hearing wasn't necessary and directed the Respondents to file their reply/written submissions, if any, within two weeks with copy to the Petitioner who may file its rejoinder/ written submissions, if any, within two weeks thereafter. The Commission clarified that after the filing of reply/rejoinder/written submissions in the

matter, if the Respondents still find a need for oral hearing in the matter, they may make a suitable request along with reasons thereof which will be considered appropriately. Pursuant to the above, Telangana Discoms have filed their written submissions dated 13.10.2022 and the Petitioner filed its response thereon on 10.12.2022. However, AP Discoms did not file any reply/written submissions in the stipulated timeline. However, based on oral mentioning by the learned counsel for AP Discoms, additional time was permitted to AP Discoms. Accordingly, AP Discoms filed their common reply vide affidavit dated 20.12.2022 and the Petitioner filed its rejoinder on 27.12.2022. Pertinently, none of the Respondents made any request for further oral hearing in the matter in terms of the liberty granted by the Commission and accordingly, the matter was reserved for order.

**Reply & Written Submissions of Respondent Nos. 1 & 2:**

10. Respondent Nos. 1 & 2, Telangana Discoms, in their detailed reply dated 5.8.2021 and written submissions dated 13.10.2022 have mainly submitted as under:

(a) As to the Petitioner's reliance on the earlier orders of the Commission holding the EFC as a Change in Law event, the Respondents were not a party therein and therefore could not challenge the findings of the Commission therein. Also, the facts and circumstances of the matters in which the said orders were passed are different from the present case and hence, no reliance can be placed by the Petitioner on those earlier orders.

(b) Also, the Commission in its previous orders has not allowed the RLC as a Change in Law event and despite this the Petitioner has sought to claim compensation towards RLC along with carrying cost. Such claim is also not tenable as the RLC charges are levied on coal produced from Pit Head Stations whereas the Project of the Petitioner is located at a distance of 1214 km from the local mine and as such it cannot be qualified as a Pit Head Station.



(c) The Respondents have also entered into Power Supply Agreement dated 18.1.2016 with the Petitioner for a contracted capacity of 570 MW in respect of power from Unit 2 (660 MW) of the Project under DBFOO Bidding Guidelines. The said PSA stipulates that the domestic coal supply under the PSA will be allocated in proportion to the capacities contracted under the long-term agreements i.e. 53% of total FSA ACQ (53 % of 4.273 Million Tonnes) i.e. 2.27 million tonnes are to be allocated to PSA. Also, under the said PSA, the energy charges are computed based on the price of domestic coal billed by CIL/MCL and all other charges are passed through in the price of coal. Therefore, the Petitioner is supposed to segregate the coal quantities received from CIL/MCL against the two agreements and to the extent of domestic coal utilized in Unit 2, there should not be any levy of EFC and RLC for supply of 570 MW to the Respondents. Thus, in any case, the claim of Petitioner has to be limited to the extent of domestic coal utilized in Unit I for supply of 269.45 MW to the Respondents on a pro-rata basis.

(d) As regard RLC, the Petitioner itself, at paragraph 4 of the Petition, has stated that the original notification of CIL was of 15.10.2009 which was much prior to the bid cut-off date (24.9.2010). Therefore, this levy ought to have been factored by the Petitioner while bidding in the tender floated by the united AP Discoms. Therefore, it is impermissible for the Petitioner to claim the same as a Change in Law event.

### **Rejoinder of the Petitioner**

11. The Petitioner, vide its rejoinder dated 24.8.2021 and written submissions dated 10.12.2022 has mainly submitted as under:

(a) Merely because Telangana Discoms were not a party in the earlier matters does not mean that the legal principles settled by the Commission in the said orders will not hold precedential value. The doctrine of stare decisis refers to the doctrine that a court is to follow judicial decisions in earlier cases when the same questions or point are raised before it in the subsequent matters.

(b) The contention of Telangana Discoms w.r.t. RLC not being allowed as Change in Law by the Commission in previous orders is wrong and without any merits. Also, Telangana Discoms have wrongly stated that RLC is levied on coal produced from pit head stations and since the Project of the Petitioner is located 1214 kms from

the coal mine, its claim does not qualify as a Change in Law. The Petitioner's source for coal procurement i.e. MCL installed the rapid loading system at Talcher Coalfields since September 2018 and pursuant to the said installation, MCL began to levy a charge of Rs.29/tonne for coal loaded through Rapid Loading System from the Petitioner.

(c) Telangana Discoms have sought to correlate the PPA dated 1.4.2013 with another long-term PSA dated 18.2.2016 executed between the Petitioner and Telangana Discoms and the correlation as sought to be drawn by the Telangana Discoms is not relevant to the facts and circumstances of the present case. The claims made by the Petitioner in the present case pertains only to the PPA dated 1.4.2013 and not the PSA dated 18.2.2016. Both the agreements are separate contracts with non-identical provisions and there cannot be any inference drawn from the PSA dated 18.2.2016 in the present case.

(d) The contention of Telangana Discoms that since the RLC Notification was issued in 2009 – prior to the cut-off date, the Petitioner ought to have factored the same into the bid is also baseless. Although in terms of RLC Notification dated 26.2.2011, pit head prices of all grades of coal were revised w.e.f. 27.2.2011 and additional charge of Rs. 20/tonne was levied, the Petitioner's source for coal procurement i.e. MCL installed the rapid loading system at Talcher Coalfields only in September 2018 and pursuant to the said installation MCL began to levy a charge of Rs. 29/tonne for coal loaded through the Rapid Loading System from the Petitioner. Therefore, there was no basis for the Petitioner to have factored in the RLC at the time of placing its bid.

12. The Petitioner in its additional affidavit dated 28.6.2022 has placed on record the subsequent development. In the said affidavit, the Petitioner has, inter-alia, stated that after the filing of the Petition, CIL by way of Notification bearing No. CIL/M&S/Pricing: 733 dated 30.7.2021 declared that RLC stands subsumed with EFC w.e.f. 1.8.2021 and further it has been stated that all despatches shall be charged with EFC at an increased rate of Rs. 60/tonne w.e.f. 00:00 Hrs of 1.8.2021. In furtherance to the above, similar Notification was issued by MCL bearing No.MCL/M&S/SA/2021-

22/233 dated 31.7.2021. The Petitioner has submitted that the above Notifications, having been issued after the cut-off date and resulting into additional recurring expenditure incurred by the Petitioner, the same constitute a continuation of Change in Law event.

### **Reply of Respondent Nos. 3 and 4**

13. The Respondent Nos. 3 and 4, AP Discoms, vide their common reply dated 20.12.2022 have mainly submitted as under:

(a) Admittedly, the RLC was already in existence before the RfP was issued as is evident from the Notification dated 15.10.2009 issued by CIL. Article 10 of the PPA clearly stipulated that the Change in Law event shall be the introduction of the new tax, rate or other levy and not the date it is applied by the Supplier of the Petitioner. The introduction of RLC is prior to the cut-off date under the PPA and therefore, the Petitioner is not entitled to seek declaration of RLC Notifications as Change in Law.

(b) As per Clause 2.4.1.1 (B)(ix) of the RfP, the Petitioner was required to quote an all-inclusive tariff including coal costs in escalable/non-escalable components based on the risks perceived by it. This includes not only the charges in existence at the time of issuance of the bid but all the possible escalations of such charges. The bid was submitted by the Petitioner on 30.9.2010 i.e. after the RLC Notification dated 15.10.2009 was first introduced by CIL and therefore, the Petitioner was deemed to have knowledge about and included the RLC as well as the other charges in the levelized tariff proposed by it in the bid. The Commission and the APTEL in catena of orders/judgments have held that increase/revision in applicable charges is not a Change in Law event and therefore, subsequent notifications concerning increase in RLC cannot be declared to be Change in Law events under the PPA.

(c) In any event, Clause 9 of FSA makes it evident that the Petitioner must take into account any change in RLC and any other applicable charges in its quoted tariff appropriately. The levy of EFC and RLC are squarely covered and stipulated under Clause 9.2.3 & Clause 9.2.4 of the FSA. They are not new charges which are levied on the Petitioner pursuant to RLC or EFC Notifications and which are not

contemplated under the FSA. In any event, APTEL has held that the revision in pricing of coal in accordance with FSA from time to time is covered by the contractual arrangement and is not pursuant to any law. The APTEL has also held that such increase in charges cannot be considered as Change in Law events.

(d) Despite the EFC and RLC Notifications having first issued in 2017 and 2009 respectively, the Petitioner filed the present Petition much later in December, 2020. Further, Article 10.4 of the PPA stipulates that upon being affected by any Change in Law event, the Petitioner is required to intimate the Respondents and provide details regarding the changes as well as its effects on the Petitioner within a reasonable period of time from occurrence of Change in Law event. A vague intimation regarding EFC Notification by the Petitioner vide letter dated 12.1.2018 was neither in accordance with the stipulation under Article 10.4 nor did it state the effect of such Notification of the Petitioner. Notice stating the impact of the EFC and RLC Notification on its cost of supply was issued by the Petitioner belatedly only on 28.9.2020. Therefore, the Petitioner has itself delayed in claiming the reliefs sought in the present Petition despite knowing about the claimed Change in Law events since 2009 and 2017 respectively. Consequently, the Petitioner cannot be entitled to any carrying cost on account of its unjustified and unreasonable delays.

(e) Even if assuming that EFC and RLC Notifications are Change in Law events, the methodology for calculation of the additional tariff adopted by the Petitioner is erroneous and misconceived. The Petitioner deliberately ignored the overall impact on the delivery price of coal by virtue of Notification dated 30.7.2021 issued by CIL whereby EFC and RLC charges have been subsumed. Pertinently, the Petitioner ought to have taken into account the overall impact of subsuming of EFC and RLC, which in turn would decrease the overall price of coal and hence reduce the cost of producing the electricity for the Petitioner. The Petitioner has also failed to provide any documents in support of its contention of adverse financial impact of the claimed Change in Law events.

### **Rejoinder of the Petitioner**

14. The Petitioner, in its rejoinder dated 27.12.2022, has mainly submitted as under:

(a) APTEL vide order dated 22.3.2022 in Appeal Nos. 118 of 2021 & 40 of 2022 and this Commission vide order dated 2.4.2019 in Petition No. 72/MP/2018 and order dated 19.8.2019 in Petition No. 17/MP/2019 has already allowed EFC as Change in Law event and has further allowed the developers to claim such additional cost incurred on account of Change in Law event under the respective PPAs. Therefore, considering the law already settled by this Commission as well as the APTEL, the Petitioner is entitled for compensation on account of imposition of EFC.

(b) Though the RLC was introduced in 2009, since the said cost was not levied by ML till September, 2018 i.e. till the installation of rapid loading system at the mines, from where the supply of fuel under the FSA, the Petitioner could not considered the cost at the time of submission of bid. It was only after the installation of the rapid loading system by MCL at Talcher Coalfields in September, 2018, it began to levy a charge of Rs. 29/tonne for coal loaded through the Rapid Loading System from the Petitioner. Thus, there was no basis for the Petitioner to have factored in the RLC at the time of placing its bid as the Petitioner suffered from the impact of RLC from September, 2018 onwards.

(c) AP Discoms have wrongly relied on the provisions of the PPA to contend that increase in rate of taxes cannot be considered as Change in Law event. Under Article 10 of the PPA, any “amendment”/ “modification” in “Law” or “any change in tax” has been specifically recognized as Change in Law event under the PPA. The notification issued by CIL qualifies under the definition of “Law” and as the PPA specifically recognizes “any amendment/ modification in law” or “any change in taxes” as Change in Law event, the subsequent notification issued by CIL after the cut-off date increasing the rate of RLC qualify as Change in Law events under the PPA.

(d) As per the provisions of the RfP, the Petitioner was only required to consider the existing law and nowhere it provided that the Petitioner should take into account future changes as well. On the contrary, the bid/PPA provisioned for Change in Law, the whole basis of which was to protect the interest of the parties from unforeseen future changes in law events. AP Discoms cannot expect the Petitioner to take into account the future changes which may or may not occur.

(e) AP Discoms have wrongly relied upon the FSA while disputing the Change in Law claims under Article 10 of the PPA. The Change in Law claims have been raised under the PPA and no claim has been raised by the Petitioner under the FSA. On the contrary, the provisions of FSA relied upon by AP Discoms itself establishes that if there is any change in RLC or any other charges of similar nature are imposed, then the Petitioner is required to pay the same to MCL. Similar contentions raised by AP Discoms have already been rejected by the Commission vide order dated 21.8.2020 in Petition No. 217/MP/2016 between the same parties and concerning the very same PPA dated 1.4.2013.

(f) There is no basis for AP Discoms to negate the carrying cost claim of the Petitioner. The Commission in its order dated 21.8.2020 in Petition No. 217/MP/2016 has settled that the Petitioner is entitled to carrying cost as consequence of Change in Law in terms of the PPA. The Petitioner's claim for carrying cost is in terms of the decision of the Hon'ble Supreme Court in judgment dated 25.2.2019 in case of Uttar Haryana Bijli Vitran Nigam Ltd. and Anr. v. Adani Power Ltd. & Ors., [(2019) 5 SCC 325] and the recent judgment of APTEL in Appeal No. 256 of 2019 and batch in the matter of Parampujya Solar Energy Pvt. Ltd. & Anr. v. Central Electricity Regulatory Commission and Ors. wherein the APTEL has held that the purpose of Change in Law clause in the PPAs is to relieve the developer of the additional burden and the developer should be entitled to claim carrying cost over and above the principal claim raised "for time value of money".

(g) AP Discoms are erroneously arguing that the Petitioner has delayed in notifying its claim of Change in Law. It is an admitted position that AP Discoms were notified by the Petitioner about occurrence of Change in Law event vide notice dated 12.1.2018. However, the AP Discoms chose to remain silent on the same. Thereafter, the Petitioner issued another Change in Law notice on 28.9.2020. Considering that RLC was installed by MCL only in year 2018 and the Petitioner promptly informed to the AP Discoms about the same, the AP Discoms cannot allege that there was any delay on the part of Petitioner while notifying AP Discoms about occurrence of Change in Law event.

## **Analysis and Decision**

15. Based on the pleadings on record and submissions made by the parties, the following issues arise for our consideration:

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

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

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

**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 PPA with regard to notice have been complied with?**

16. The claims of the Petitioner in the present Petition pertain to Change in Law events during the operating period. Article 10.4 of the PPA deal with the issuance of notification of Change in Law event and the same 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(s) 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(s) 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(s) contained herein shall be material.*

*Provided that in case the Seller has not provided such notice, the Procurer(s) shall leave 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.”*

17. The Petitioner has submitted that on 12.1.2018, in terms of the provisions of Article 10.4 of the PPA, it notified the Respondents of the Change in Law event on account of levy of EFC. However, no response was received from the Respondents. Thereafter, on 28.9.2020, the Petitioner also issued the Change in Law notice for levy of RLC on its Project clearly specifying that its coal procurement source MCL having installed the rapid loading arrangement w.e.f. September, 2018 has started levying Rs. 29/tonne for coal loaded through the rapid loading system. The Petitioner has submitted that in the said notice it had once again sought the charges on account of levy of EFC.

18. AP Discoms have submitted that a vague intimation regarding the EFC Notification as issued by the Petitioner vide letter dated 12.01.2018 was neither in accordance with the stipulations under Article 10.4 nor did it state the effect of such Notification on the Petitioner. It has been further submitted that the subsequent notice dated 28.9.2020 indicating the impact of EFC and RLC Notifications on its cost of supply was issued only belatedly by the Petitioner.

19. We have considered the submissions made by the Petitioner and the AP Discoms. Under Article 10.4 of the PPA, the Petitioner is required to give notice about occurrence of Change in Law events as soon as reasonably practicable after being aware of such events or should reasonable have known of such events. Pertinently, the said article as such does not lay down any specific timeline for giving a notice for Change in Law event. In the instant case, the Petitioner issued the Change in Law notice in regard to levy of EFC on 12.1.2018 wherein it had clearly pointed out the Change in Law event, namely, CIL Price Notification dated 19.12.2017 levying EFC @ Rs. 50/tonne on all despatches except despatch through rapid loading arrangement



and its intention to claim the relief under the Change in Law provisions of the PPA for the aforesaid event. AP Discoms have, however, contended that the said letter was only a vague intimation and did not comply with the requirement of Article 10.4 as it did not indicate the effect of the said notification on the Petitioner. However, the said contention of AP Discoms, in our view, is misplaced. In the said notice, the Petitioner had indicated the Change in Law event as well as its effect –levy of EFC @ Rs. 50/tonne on all dispatch except for dispatch through rapid loading system. Moreover, the said notice having issued soon after the issuance of CIL Notification dated 19.12.2017, the Petitioner cannot be faulted with for not having shown the detailed computation of actual impact of such levy under the said notice. It is also pertinent to note that none of the Respondents had even responded to the said notice expressing their concerns regarding the said notice being bereft of requisite details or seeking additional details with regard to its effect on the Petitioner.

20. Similarly, for imposition of RLC, the Petitioner issued the Change in Law notice on 28.9.2020 wherein it had pointed out the increases in the RLC in terms of the CIL Notifications dated 26.2.2011, 16.2.2013, 31.8.2017 and had also stated that its coal procurement source – MCL started levying and collecting RLC @ Rs. 29/tonne w.e.f. September, 2018 pursuant to MCL having installed the rapid loading arrangement. Keeping in view the specific aspects of the case that the Petitioner has been affected /impacted by the levy of RLC only from September, 2018 when its source MCL installed the rapid loading arrangement and the Petitioner has prayed for the compensatory relief only from such date, we are inclined to consider the Change in Law notice issued by the Petitioner dated 28.9.2020, which still suffers from certain delays, in compliance with Article 10.4 of the PPA and to examine the said claim on merit. However, we would like to expressly clarify that above consideration will be

construed as the Petitioner having been permitted to make the incremental RLC claims on account of 2011 and 2013 Notifications at this stage as the said aspect including the extent of relief permissible to the Petitioner will be examined if the RLC is found to be a Change in Law event under the PPA.

21. This issue is answered accordingly.

## **Issue No. 2: What is the scope of Change in Law under the PPA?**

22. Article 10 of the PPA between the Petitioner and the Respondents deals with the events of Change in Law during the operating period and is extracted for reference as under:

### **“10.1 Definition**

*In this Article 10, the 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 the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the Seller;*
- *Any change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of this Agreement.*

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

10.3 *Relief for Change in Law*

10.3.1 *During Construction Period, incase the Seller is not a Trading Licensee*

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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(s) 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’.*

23. Further, Article 14 of the PPA 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 Tariff or determination of any such claims could result in change in Tariff or any other claims arising out of the terms of this Agreement, 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.*

*(b) Where SERC is the Appropriate Commission, all disputes between the Procurers and the Seller shall be referred to SERC.*

*14.3.1.2 The obligations of the Procurer(s) under this Agreement towards the Seller shall not be affected in any manner by reason of inter-se disputes amongst the Procurer(s)".*

24. 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 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;
- (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 for obtaining any consents, clearances and permits or the inclusion, if any, new terms or conditions for obtaining such consents, clearances and permits; except due to any default of the seller;
- (e) Any change in tax or introduction of any tax applicable for supply of power by the seller as per the terms of this Agreement.
- (f) Such changes [as mentioned in (a) to (e) above] result in additional recurring/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.

25. "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 Laws in force in India and any statute, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian Government 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;*

26. 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 Andhra Pradesh 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(s);*

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 state(s) of Andhra Pradesh (as the Project is located at Nellore, Krishnapatnam, Andhra Pradesh) by any 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 PPA?**

27. The events of Change in Law should occur after seven days prior to the bid deadline. The bid deadline as per the RfP was 1.10.2010. Therefore, the cut-off date for reckoning the Change in Law event under PPA works out to 24.9.2010. 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 the EFC and RLC by Coal India Limited under Change in Law during the operating period.

**Evacuation Facility Charges (EFC)**

28. The Petitioner has submitted that as on the cut-off date i.e. 24.9.2010, there was no EFC 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/tonne on all coal dispatches (except for dispatches through rapid loading arrangement) 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 PPA. The Petitioner has further submitted that the issue pertaining to the Notification 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 event.

29. Telangana Discoms have submitted that no reliance can be placed by the Petitioner on the earlier orders of the Commission as the Respondents were not a party to said cases and were unable to challenge the finding therein. Telangana Discoms have also submitted that facts and circumstances of the present case are different from those of the earlier orders. Whereas, AP Discoms have submitted that

levy of EFC is squarely covered and stipulated under Clause 9.2.3 & Clause 9.2.4 of the FSA and there is no new charge which is being levied on the Petitioner which is not contemplated under the FSA. It is also submitted that in absence of new charges levied under the FSA, there is no reason for the Petitioner to claim increase in tariff under the PPA. It has been further submitted that APTEL in catena of judgments has held that the revision in pricing of coal in accordance with the FSA from time to time, is covered by the contractual arrangement and is not pursuant to any law and thus, cannot be considered as a 'Change in Law' event.

30. In response, the Petitioner has submitted merely because the Telangana Discoms were not party in the other matters does not mean that the legal principles settled by this Commission in the said orders will not hold precedential value. The Petitioner has submitted that as per the doctrine of Stare Decisis, a court is to follow judicial decisions in earlier cases when the same questions or points are raised before it in subsequent matters. Telangana Discoms have failed to establish as to how the present case is distinguishable from the earlier orders of the Commission holding the EFC as Change in Law event. It has been further submitted that AP Discoms have wrongly relied upon the FSA while disputing the Change in Law claim as the Change in Law claims have been raised under the PPA and not the FSA. The Petitioner has pointed out that in terms of Price Notification No. CIL/M&S/Pricing:733 dated 30.7.2021 of CIL and Price Notification No. MCL/M&S/SA/2021-22/2033 dated 31.7.2022, all dispatches are subject to the EFC @ Rs. 60/tonne with effect from 1<sup>st</sup> August, 2021 and that this increase in the EFC from Rs. 50/tonne to Rs. 60/tonne constitutes a continuous Change in Law event.

31. We have considered the submissions of the Petitioner and the Respondents. 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/tonne on all coal dispatches except the dispatch through rapid loading arrangement. Evacuation Facility Charges could not be envisaged at the time to bid submission by the Petitioner (cut-off date being 24.9.2010) and its subsequent introduction have resulted into additional recurring expenditure for the Petitioner. Further, the Evacuation Facility Charges have been increased to Rs.60/tonne with effect from 00:00 Hrs. of 1.8.2021 by the Coal India Limited vide its price Notification No.CIL/M&S/Pricing:733 dated 30.7.2021.

32. 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 levy of Evacuation Facility Charges by Coal India Limited has been held as a Change in Law event by the Commission. 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”.*

The above decision of the Commission may also be appreciated in the context of the present case. Therefore, the introduction of Evacuation Facility Charges as well as the subsequent increase thereto by Coal India Limited which is an Indian Governmental Instrumentality in terms of the PPA, after the cut-off date, is admissible to the Petitioner as Change in Law and all the contrary submissions of Respondents deserve to be rejected.

33. 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. In the said judgment, the APTEL has also negated the similar argument as raised by AP Discoms that the Evacuation Facility Charges are covered under the “any other charges” as notified by Coal India Limited from time to time as stipulated in the FSA. The relevant extract of the said judgment is reproduced as under:

*“.....7. It is also the argument of the respondent distribution licensee that under the respective Fuel Supply Agreement (FSA), the delivery price of coal is described as the sum of basic price, statutory charges and other charges as applicable at the time of delivery of coal. In terms of the relevant provisions in the FSA, other charges are also levied and include rapid loading charges and “any other charges” as notified by Coal*

India from time to time. It is submitted that the EFC which is the bone of contention in the present cases falls under the category of "other charges" imposed by Coal India on commercial basis and, thus, forming part of the base/basic price. The learned counsel argued that since delivery price of coal includes the basic price as well as statutory or other charges, the same has always been known to the appellants to be anticipated in future "from time to time" and consequently the same are not envisaged to be covered as "change in law event" under the PPA.

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 brought 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 Coal 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 bidding 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 in 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.....”*

34. Accordingly, we find and hold that the Petitioner shall be entitled to recover Evacuation Facility Charges from Telegana Discoms and AP Discoms in proportion to linkage coal (FSA coal) consumed 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 Telangana Discoms and AP Discoms under the PPA. 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 Telangana Discoms and AP Discoms. The Petitioner and Telangana Discoms and AP Discoms 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 entitlement of compensation subject to claim under Change in Law being more than 1% of the Letter of Credit amount in the financial year as per the PPA.

### **Rapid Loading Charges (RLC)**

35. The Petitioner has submitted that in terms of the RLC Notification dated 26.2.2011, pit head prices of all grades of coal were revised w.e.f. 27.02.2011 and an additional charge of Rs. 20 per tonne were levied with respect to the coal loaded into the Indian Railways system or into the Purchaser's own system of transport through high loading system with nominal capacity of 3500 tonnes per hour or more.

Thereafter, on 16.2.2013, CIL amended the above-mentioned additional charge to Rs. 26/tonne and subsequently on 31.8.2017, the same was revised to Rs. 29/tonne. The Petitioner has submitted that Petitioner's source for coal procurement i.e. MCL installed the rapid loading system at the Talcher Coalfields only in September 2018 and pursuant to the same, MCL began levying Rs. 29 per tonne for coal loaded through rapid loading system from the Petitioner. It has been further submitted by the Petitioner that the RLC levied by the MCL has become applicable on the Petitioner after the cut-off date, during the operating period of the Project, and is, therefore, squarely covered as a Change in Law event in terms of the PPA.

36. *Per contra*, Telangana Discoms have submitted that the original notification of CIL imposing the RLC was of 15.10.2009 which was much prior to the bid cut-off date and the Petitioner ought to have factored the same while placing its bid and as such cannot amount to Change in Law event. It has also been submitted that the RLC charges are levied on coal produced from Pit Head Stations whereas the Project of the Petitioner does not qualify as a Pit Head Station. Whereas AP Discoms have contended that since the RLC was already in existence before the issuance of RfP and since the Article 10 only covers the introduction of new tax, rate or other levy, levy of RLC cannot be considered as Change in Law. AP Discoms have also submitted that as per RfP, the Petitioner was required to quote all-inclusive tariff including cost of costs in escalable and non-escalable components based on the risks perceived by it and this includes not only the charges in existence at the time of submission of bid but all the possible escalation of such charges. It has also been submitted that levy of RLC is squarely covered and stipulated under Clause 9.2.3 & Clause 9.2.4 of the FSA and it is not a new charge being levied upon the Petitioner, which is not completed

under the FSA and therefore, the Petitioner cannot claim Change in Law in respect of levy of RLC.

37. In response, the Petitioner has submitted that although the RLC was introduced in 2009, since the said cost was not levied by MCL till September, 2018 i.e. till the installation of rapid loading system at the mines from where the coal is supplied under the FSA, the Petitioner could not have considered this cost at the time of submission of bid . There was no basis for the Petitioner to have factored in the RLC at the time of placing its bid as the Petitioner suffered from the impact of RLC only from September 2018 onwards. The Petitioner has argued that the contention of AP Discoms that the increase in rate of taxes cannot be considered as Change in Law is misplaced as any “amendment”/ “modification” in “Law” or “any change in tax” has been specifically recognized as Change in Law event under the PPA. It is also submitted that as per RfP, the Petitioner was only required to consider the existing law and the RfP nowhere provided that the Petitioner ought to have taken into account the future changes as well and on the contrary, the bid/PPA provisioned for Change in Law, the whole basis of which was to protect the interest of parties from unforeseen future changes in law events. It has been also submitted that AP Discoms have wrongly relied upon the FSA as the Change in Law claim has been raised under the PPA and not under the FSA.

38. We have considered the submissions made by the parties. At the outset, we observe that the additional levy/charge @ Rs. 20/tonne where coal is loaded, either into Indian Railways System or into the Purchasers’ own system of transport, through high capacity loading system with a nominal capacity of 3500 tonnes per hour or more, also referred to as Rapid Loading Charges, was already in existence in terms of Price

Notification of CIL vide No. S&M:GM(F):Pricing: 1181 dated 15.10.2009 as on the cut-off date i.e. 24.9.2010. Further, vide CIL Price Notification bearing No. CIL:S&M:GM(F):Pricing 1907 dated 26.2.2011, which was issued in suppression of the Notification dated 15.10.2009, the RLC @ Rs. 20 /tonne was retained and remained unchanged. Subsequently, Coal India Limited vide Price Notification No. CIL:S&M:GM(F):Pricing 2784 dated 16.12.2013 and Price Notification No. CIL:S&M:GM(F):Pricing/2017/766 dated 31.8.2017 revised the RLC to Rs. 26/tonne and Rs.29 per tonne w.e.f. 17.12.2013 and 1.9.2017 respectively. According to the Petitioner, it has been affected by the aforesaid levy of RLC only w.e.f. September 2018 onwards when its source for coal procurement i.e. MCL installed the rapid loading system at Talcher coalfields and started levying the RLC @ Rs. 29/tonne on the coal supplied to the Petitioner from such system. However, apart from the number of invoices of MCL dated 21.6.2019, 31.7.2019, 29.2.2020 and 5.3.2020 raised on the Petitioner, no communication of MCL indicating the installation of rapid loading arrangement at Talcher Coalfield and consequent levy of RLC from September 2018 onward has been placed on record by the Petitioner. Nevertheless, RLC are indeed the charges covered under the FSA between the Petitioner and MCL and are akin to Surface Transport Charges and Sizing Charges - as all three fall under the head of 'Other Charges' at Clause 9.2 of the FSA. The relevant extract of the provisions of the FSA is reproduced as under:

**“9.2 Other Charges:**

*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.*

*9.2.3 Rapid Loading Charges: Where Coal is loaded through rapid loading system, the Purchaser shall pay rapid loading charges notified by CIL/Seller from time to time .....*”

39. Pertinently, this Commission as well as the APTEL had occasions to consider as to whether the increase in the Surface Transportation Charges and Sizing Charges amount to Change in Law event under provisions of PPA and after examining the provisions of the PPA and FSA, this Commission as well as the APTEL has held that increase in such charges do not amount to Change in Law events. In this regard, we may refer to the order of the Commission dated 29.3.2020 in Petition No. 327/MP/2018 in the matter of Dhariwal Infrastructure Ltd. v. TANGEDCO, which also refers to and captures the relevant findings of the APTEL on this aspect. The relevant extract of the Commission’s order dated 29.3.2020 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 Purchaser 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:*

*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 Gol 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 Gol 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 Gol 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 Gol. 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 issue 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.”*

The aforesaid findings of the Commission as well as of the APTEL squarely apply to the present case in respect of the Petitioner’s Change in Law claim with regard to levy RLC.

40. The claim of the Petitioner can also be viewed from another angle. As per the RfP, the Petitioner was required to consider all cost inputs for generation and supply of power while placing the bid. RLC was already prevailing @ Rs. 20/tonne prior to the submissions of bid by the Petitioner in terms of the CIL’s Notification dated 15.10.2009. Hence, it was incumbent on the Petitioner to factor into such RLC while placing the bid on 30.9.2010. The argument of the Petitioner that MCL started levying RLC only in September, 2018 after the installation of rapid loading system at Talcher Coalfield and hence, there was no occasion for the Petitioner to factor into such charges is

completely misplaced. LoA issued by MCL to the Petitioner dated 3.7.2009 did not identify the source of coal/coal mine. Moreover, the perusal of the FSA dated 22.6.2013 along with subsequent amendments thereto also indicates the Source Coal field of the Seller as “Any Coalfield/Mines of MCL” and in such circumstances, it be beyond logic that any prudent generator would not include the charges prevailing as on cut-off date including RLC while placing its bid. Further, had it been the understanding of the Petitioner that such changes/increase in RLC would amount to Change in Law then it ought to have come forward to the pass on the benefits of the RLC which was not levied upon it till the September, 2018 and it being required to factor into such charges as prevailing on the cut-off date. However, admittedly, the Petitioner did not do so. Therefore, any increase or decrease in RLC has to lie entirely onto the Petitioner and the Petitioner cannot seek to pass on such burden at its convenience under the Change in Law provisions.

41. In view of the foregoing observations, the Change in Law claim of the Petitioner with regard to levy of RLC w.e.f. September, 2018 onwards is hereby rejected.

42. This issue is answered accordingly.

### **Carrying Cost**

43. 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. The Petitioner has submitted that the issue of carrying cost is no more res-integra and is squarely covered by the judgement of Hon'ble Supreme Court in Uttar Haryana Bijli Vitran Nigam Ltd. v. Adani Power Ltd. & Ors. [(2019) 5 SCC 325]. In the present case,

Petitioner's PPA has identical provisions capturing the 'restitutive' principle as in the case dealt by the Hon'ble Supreme Court in the aforesaid judgment.

44. AP Discoms have submitted that the present Petition is filed by the Respondent after lapse of almost 3 years from the issuance of the first notice in January 2018 and thus, the Petitioner has itself delayed in claiming the reliefs sought in the present petition, despite knowing about the alleged Change in Law events since 2009 and 2017 respectively. Hence, the Petitioner is not entitled to any carrying cost on account of its unjustified and unreasonable delays.

45. 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 Change in Law claims 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 PPAs, 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 the 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 occurred. Accordingly, this decision of allowing Carrying Cost will not be applicable to the Gujarat Bid – 01PPA....”*

46. The aforesaid judgment of the APTEL was challenged before the Hon'ble Supreme Court wherein the Hon'ble Supreme Court vide its judgement dated 25.2.2019 in Civil Appeal No. 5865 of 2018 with Civil Appeal No. 6190 of 2018 (Uttar Haryana Bijli 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, 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 judgement of the Appellate Tribunal...*

*16....There can be no doubt from this judgement 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.”*

47. Article 10.2 of the PPA provides as under:

*“10.2 Application and Principles for computing impact of Change in Law*

*10.2.1 while determining the consequences of Change in Law under this Article 10, the Parties shall have due regard to the principle that the purpose of compensating the*

*Party affected by such Change in Law, is to restore through monthly Tariff Payment, to the extent contemplated in this Article 10, the affected Party to the same economic position as is such Change in Law has not occurred.”*

48. The Petitioner has submitted that the carrying cost ought to be allowed for two stages; the first stage being from the period when Change in Law event was notified and EFC & RLC respectively became leviable till the final disposal of the present Petition, and the second stage being from the date of disposal of the present Petition to the date actual payment by the Respondents. In view of the provisions of the PPA, the principles of restitution and the aforesaid judgment of the Hon'ble Supreme Court, we are of the considered view that the Petitioner is eligible for carrying cost arising out of approved Change in Law event(s) from the date of actual payment towards Change in Law till the date of this order.

49. 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>2015-2016</i>	<i>10.68%</i>	<i>13.04%</i>	<i>16.29%</i>
<i>2016-2017</i>	<i>10.95%</i>	<i>12.97%</i>	<i>16.04%</i>
<i>2071-2018</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."*

50. 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 PPA, 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 Respondents.

#### **Issue No. 4: Mechanism of Payment of Change in Law Compensation**

51. The Petitioner has submitted that it is entitled to be compensated on lumpsum basis by way of supplementary bill on monthly basis on the quantity of coal used in a particular month and considering the fact that the Petitioner's claim have a recurring impact through operating period of the Project and the time lag between the amount paid by the Petitioner and the actual reimbursement by the procurers, the Petitioner is seeking establishment of financial and commercial principles for quantification of the amounts that ought to be applied to for the period upto the date of filing of the petition as well as for the remainder period of the PPA. Accordingly, the Petitioner has stated that the Commission may establish the principles for compensating the Petitioner in respect of its claims for Change in Law as claimed in the Petition as also done in other similar cases.

52. Articles 10.3.2 and 10.3.4 of the PPA provide 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 in excess of an amount equivalent to 1% of the value of the Letter of Credit in aggregate for the relevant Contract Year.*

*10.3.4 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”.*

53. 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 payment after introduction of Evacuation Facility Charges i.e. 19.12.2017. 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:

(i) 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.

(ii) Levy of Evacuation Facility Charges on coal shall be computed based on actual subject to ceiling of linkage coal consumed corresponding to scheduled generation and shall be payable by the beneficiary on pro-rata based on its share in the scheduled generation.

(iii) At the end of this 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.

(iv) 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 the LC in aggregate for a contract year as per provision under Article 10.3.2 of PPA.

(v) 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 Procedure 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 PPA for the subsequent period as well.

54. The Commission has not computed the threshold value of eligibility for 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 PPA during operating period. Accordingly, the compensation amount allowed shall be shared by the Procurers based on the scheduled energy.

55. In view of the above discussions and findings, Petition No. 16/MP/2021 is disposed of.

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

Sd/  
**(Arun Goyal)**  
Member

Sd/  
**(I.S.Jha)**  
Member