

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 104 of 2024

Petition of Adani Power Limited seeking adjustment in tariff due to the levy of User Fee Charges by MCL considering the same as Change in Law event in terms of the Article 13 of PPA dated 8 September 2008 for 1320 MW and Article 10 of the PPA dated 31 March 2010, 9 August 2010 and 16 February 2013 of 1200 MW, 125 MW and 440 MW, respectively.

Coram

**Sanjay Kumar, Chairperson
Anand M. Limaye, Member
Surendra J. Biyani, Member**

Adani Power Limited (APL) : Petitioner

Maharashtra State Electricity Distribution Company Limited : Respondent

Appearance

For the Petitioner: : Mr. Chintan Mankad (Rep)

For the Petitioner: : Adv. Rahul Chouhan

ORDER

Date: 17 January 2025

1. Petitioner, Adani Power Limited (APL) has filed this Petition being Case No. 104 of 2024 on 29 June 2024 seeking adjustment in tariff due to the levy of User Fee Charges by MCL considering the same as Change in Law event. The present petition has been filed under Section 86 of the Electricity Act, 2003 read with Article 13 of PPA dated 8 September 2008 for 1320 MW and Article 10 of the PPA dated 31 March 2010, 9 August 2010 and 16 February 2013 of 1200 MW, 125 MW and 440 MW, respectively.

2. Petitioner's main prayers are as under:

- a) *Hold and declare the levy of the User Fee of Rs. 1/ tonne notified by MCL vide notice dated*

24 April 2024 as an event of Change in Law under the respective PPAs.

- b) *Direct the Respondent to make the payment of compensation for the Change in Law event from the date that such Change in Law event has affected the Petitioner.*
- c) *Grant recovery of carrying cost on monthly compounding basis qua the change in law reliefs at the rate of Late Payment Surcharge (which is 2% in excess of SBI PLR) in terms of the PPAs.....”*

3. Facts of the Petition are summarized as under:

3.1. Adani Power Limited (APL) has entered into four Power Purchase Agreements (PPAs) viz. dated 8 September 2008 for 1320 MW, 31 March 2010 for 1200 MW, 9 August 2010 for 125 MW and 16 February 2013 for 440 MW with MSEDCL from the Tiroda Thermal Power Station on long term basis pursuant to competitive bidding process under Section 63 of the Electricity Act, 2003.

3.2. It is a settled position of law that to assess whether an event is a change in law or not, one must see the existence of the said event on the cut-off date as prescribed in the PPAs. The important dates associated with competitive bidding process and signing of PPAs are as follows:

Particulars	1320 MW	1200 MW	125 MW	440 MW
Cut-Off Date (7 days prior to bid deadline)	14.02.2008	31.07.2009	31.07.2009	31.07.2009
PPA Date	08.09.2008	31.03.2010	09.08.2010	16.02.2013
Date of Commencement of Supply	30.03.2013	01.10.2013	09.08.2014	16.02.2017

3.3. Mahanandi Coalfield Limited (MCL) through Notice dated 24 April 2024, decided to levy User Fee charges at Rs. 1/ tonne plus applicable GST, thereby making it mandatory for power generators off-taking coal from MCL to pay User Fee at Rs. 1/- per tonne.

3.4. The Petitioner has filed a present petition seeking adjustment in tariff due to the levy of User Fee Charges by MCL considering the same as Change in Law event in terms of the Article 13 of the 1320 MW PPA and Article 10 of the 1200 MW, 125 MW & 440 MW PPAs. Said Articles provides for restitution of the affected party to the same economic position as if no change in law has occurred.

3.5. APL has referred the Hon’ble Supreme Court’s judgement dated 11 April 2017 in *Energy Watchdog vs. Central Electricity Regulatory Commission and Ors.*, (2017) 14 SCC 80, wherein it has been held that on account of the Change in Law, the generating companies were entitled to compensation so as to restore the party to the same economic position as if such Change in Law had not occurred.

3.6. The levy of the User Fee is implemented subsequent to Cut-off Dates under the PPAs and also fulfils all the criteria of being Change in Law. The Change in Law event requires the Petitioner

to comply with the revised notifications. Therefore, the Petitioner is entitled to be compensated in terms of the PPA provisions.

3.7. On 19 October 2012, Government of Orissa vide Gazette notification Ext. No. 2032 made amendment to the Orissa Minerals Rules, 2007 and introduced User Fee Charges of Rs. 1 per tonne on transport of minerals including coal.

3.8. On 29 March 2018, APL entered into a Fuel Supply Agreement (FSA) with MCL for Annual Contracted Quantity (ACQ) of 6,00,000 tonnes.

3.9. MCL vide notice dated 24 April 2024 decided to pass on the User Fee Charges at Rs. 1 per tonne plus applicable GST to the coal consumers on sale of coal through Rail and Road mode with effect from 1 April 2024, thereby making it mandatory for power generators off-taking coal from MCL to pay User Fee at Rs. 1 per tonne.

3.10. APL issued Change in Law notice to MSEDCL on 11 May 2024, inter alia notifying levy of such User Fee of Rs. 1 per tonne plus applicable GST as a Change in Law event under Article 13 of the 1320 MW PPA and Article 10 of the 1200 MW, 125 MW and 440 MW PPAs.

3.11. MSEDCL vide letter dated 30 May 2024, in reply to APL's change in law notice dated 11 May 2024, has not disputed the occurrence of change in law event however, it refused to accept the notice of change in law merely on the ground that for any compensation payable due to change in law event, the increase or decrease in revenue must be in excess of an amount equal to 1% of the value of the Letter of Credit which is not the case here.

3.12. The four pre-conditions for levy dated 24 April 2024 of User Fee Charges by MCL to qualify as a Change in Law event under the PPAs are as follows:

3.13. Coal India Limited Falls under the Definition of Indian Government Instrumentality

3.13.1. It is a settled law that Coal India Limited qualifies as an Indian Governmental Instrumentality in terms of the PPAs. The Appellate Tribunal of Electricity (APTEL) in its Judgment dated 14 August 2018 in Adani Power Rajasthan Limited vs. RERC & Ors., Appeal No. 119 of 2016 [reported as 2018 SCC Online APTEL 101] has specifically acknowledged the same.

3.13.2. APTEL vide judgment dated 22 March 2022 in Rattan India Power Limited vs. MERC and Anr., Appeal No. 118 of 2021 and Adani Power Ltd. vs. MERC and Anr. in Appeal No. 40 of 2022 has held that Coal India Limited is an Indian Government Instrumentality.

3.13.3. The Supreme Court vide its judgment dated 20 April 2023 in batch of Civil Appeals titled GMR Warora Energy Ltd. CERC & Ors. 2023 SCC OnLine SC 464 upheld the above APTEL judgment dated 22 March 2022.

3.13.4. Hence, Pre-condition- 1 as mentioned above is fulfilled.

3.14. MCL Notification dated 24 April 2024 levying User Fee Charges at Rs. 1 per tonne has ‘force of law’.

- 3.14.1. Notification dated 24 April 2024 issued by MCL satisfies the pre-conditions enumerated under the Change in Law Clauses under the PPAs.
- 3.14.2. APL vide notice dated 11 May 2024 brought to MSEDCL’s notice that this levy of User Fee by MCL, shall be covered under Article 13 and Article 10 of the PPAs entered into between APL and MSEDCL.
- 3.14.3. Levy of MCL is of a mandatory nature and APL shall be constrained to procure coal from MCL at this additional price.
- 3.14.4. Pursuant to APL’s long-term FSA with Coal India Limited qua coal supply and pursuant to Coal India Limited enjoying the monopoly qua coal distribution and supply, APL is bound to comply with the Notification issued by MCL.
- 3.14.5. The APTEL in the case of *Adani Power Rajasthan Limited v Rajasthan Electricity Regulatory Commission & Ors.* Appeal No. 119 of 2016 has held that Indian Government Instrumentality includes departments and corporations/companies like those that IR/CIL formed under a statute.
- 3.14.6. Coal India Limited, is a Government Instrumentality as it is bound by the policy decisions of the Government of India. The Hon’ble Supreme Court in the case of *Coal India Limited vs. Alok Fuels (P) Limited.*, (2010) 10 SCC 157 has held that Coal India Ltd. and BCCL are government companies of the Government of India and are bound by the policy decisions of the Government of India, Ministry of Coal.
- 3.14.7. Thus, a levy of User Fee by MCL dated 24 April 2024, is binding on all consumers of coal and thus has force of law and qualifies as change in law.
- 3.14.8. Therefore, Pre-condition - 2 as mentioned above is fulfilled.

3.15. Levy of User Fee at Rs. 1 per tonne results in recurring increased expenditure for the Petitioner for supplying power to the Respondent

- 3.15.1. Notification issued by MCL dated 24 April 2024 will have an overall additional impact of Rs. 1 per tonne on the landed price of linkage coal from 1 April 2024, which has resulted in the increase in cost of generation. This expenditure is recurring in nature.
- 3.15.2. Such increase in cost of generation during the operating period is a recurring process as opposed to a one-time transaction and such levy of User Fee poses a significant recurring financial burden on APL.
- 3.15.3. Therefore, Pre-condition - 3 of change in cost or revenue from the business of selling electricity by the Seller to the Procurer under the terms of the PPAs, as mentioned above is

fulfilled.

3.16. Such instrument/notification occurred after the bid cut-off dates.

3.16.1. MCL's notice dated 24 April 2024 was issued after the Bid Cut-off Dates i.e., 14 February 2008 and 31 July 2009 under the respective PPAs.

3.16.2. Therefore, Pre-condition - 4 as mentioned above is fulfilled.

3.17. The Competitive Bidding Guidelines, 2005 issued under Section 63 of the Electricity Act, 2003 mandates that any change in law impacting cost or revenue with respect to the law applicable on the date which is 7 days before the last date for RFP bid submission shall be adjusted separately.

3.18. The Tariff Policy, 2016 mandates that domestic levies imposed inter alia by Central Government leading to corresponding changes in the generation cost ought to be considered as a Change in Law event.

3.19. Competitive Bidding Guidelines as well as Tariff Policy being statutory documents under Section 3 and 63 of the Electricity Act, 2003 respectively, the principles of 'pass-through' are binding and thus, MSEDCL shall be liable to reconstitute APL for the cost incurred towards levy of User Fee up to date, and for the period thereafter.

3.20. Aggregate financial impact of all the approved Change in Law events exceeds 1% of the LC amount in the relevant Contract Year

3.20.1. MSEDCL vide letter dated 30 May 2024, in reply to APL's change in law notice dated 11 May 2024, refused to accept the notice of change in law merely on the ground that for any compensation payable due to change in law event, the increase or decrease in revenue must be in excess of an amount equal to 1% of the value of the Letter of Credit. MSEDCL's contention is that impact of every change in law event in any given Contract Year should individually exceed the 1% of LC value. This contention of MSEDCL is completely misplaced and incorrect.

3.20.2. MERC vide Order dated 5 April 2018 in Case No. 84 of 2016 in case of RattanIndia Power Limited vs. MSEDCL held that the financial impact of all approved Change in Law events in aggregate must exceed 1% of the of the LC amount in the relevant Contract Year to be considered for Change in Law compensation. Relevant extract of the order is extracted hereinbelow:

20.1. In its Petition and during these proceedings, RPL has presented its computations of the impacts of some of the Change in Law events considering both the PPAs. For each of the PPAs, it needs be ensured that, in aggregate (i.e., for all the approved Change in Law events taken together), the financial impact of the events approved as Change in Law in this and earlier Orders exceeds 1% of the LC amount in the relevant

Contract Year, as required under Article 10.3.2 of the PPAs.

- 3.20.3. The said Order dated 5 April 2018 was challenged by RattanIndia Power Limited before the APTEL, however the decision of consideration of financial impact of all Change in Law claims on an aggregate basis to exceed 1% of LC for being eligible for Change in Law compensation has not been altered by APTEL vide its judgment dated 18 October 2022 in Appeal No. 263 of 2018. Thus the stance of this Commission that the financial impact of all Change in Law claims to be considered on an aggregate basis has attained finality.
- 3.20.4. In present case, the aggregate financial impact of all the Change in Law events taken together exceeds 1% of the of the LC amount in the relevant Contract Year, as required under Article 10.3.2 of the PPA dated 31 March 2010, 9 August 2010 and 16 February 2013 and Article 13.2(b) of the PPA dated 8 September 2008. Therefore, MSEDCL is liable to compensate APL towards additional expenditure incurred towards User Fee Charges payable to MCL, which is a change in law event.

3.21. Carrying Cost

- 3.21.1. As per change in Law Articles in these PPAs, relief is based on the Restitution Principle and requires the affected party to be restored to the same economic position as if the Change in Law event had not occurred.
- 3.21.2. The principle of Carrying Cost has been settled by the Hon'ble Supreme Court vide its Uttar Haryana Bijli Vitaran Nigam Limited vs. Adani Power Limited and Ors. (2019) 5 SCC 325 in which it held that 'carrying cost' is an integral component of the restitutive principle envisaged under the PPA and the same ought to be granted in terms of the PPA.
- 3.21.3. Thus, the Petitioner is required to be compensated on commercial principles in order to safeguard the economic basis of the Project. Failure to do so would render Article 13/10 of the respective PPAs otiose. The claim of the Petitioner for carrying cost is premised on a contractual provision of the PPAs wherein it is explicitly provided that the Petitioner is to be restored to the same economic position as if Change in Law events did not take place.
- 3.21.4. APL to be restituted for the actual expenditure incurred at the rate provided for LPS in the PPAs (i.e. SBI PLR plus 2%), since both carrying cost and Late Payment Surcharge are premised on time value of money. Furthermore, the computation of Carrying Cost needs to be done on monthly compounding basis, for APL to be restituted for the actual expenditure incurred.
- 3.21.5. The Hon'ble Supreme Court in case of Uttar Haryana vs Adani Power Limited, 2022 SCC OnLine SC 1068, on the concept of time value of money and based on restitutionary principles, held that interest on carrying cost must be compensated on monthly compounding basis.
- 3.21.6. It is a settled position of law that carrying cost is payable as per the provisions of PPAs to

compensate the affected party for time value of funds deployed on account of change in law events.

- 3.21.7. The APTEL vide its judgment dated 22 March 2022 in Appeal No. 40 of 2022 with respect to the same PPAs had held that the Petitioner shall be granted carrying cost as per the prescribed rate of LPS in order to restore the Petitioner to the same economic position as if such Change in Law event had not occurred.
- 3.21.8. In GMR Warora Energy Ltd. vs. CERC and Ors., 2023 SCC OnLine SC 464, in view of the consistent position of law and application of restitutionary principles and privity of contractual obligations between the parties as contained in the PPAs, Hon'ble Supreme Court upheld the above mentioned APTEL Judgment in Appeal No. 40 of 2022 and held that carrying cost has to be paid at the rate of Late Payment Surcharge (LPS) as mentioned in the PPA on monthly compounding basis.
- 3.21.9. Therefore, the Petitioner prayed to allow carrying cost at the rate of LPS in the PPAs (2% in excess of SBI PLR), on monthly compounding basis, to reconstitute APL to the same economic position as if Change in Law has not taken place, in terms of the PPAs.

4. MSEDCL submission dated 2 September 2024 is summarized as under:

- 4.1. The levy of user fee by the MCL vide Notice dated 24 April 2024 is arising out of the obligation of the Petitioner under the FSA dated 29 March 2018 executed between APL and MCL. Clause 9.3 of the FSA explicitly mandates that all statutory charges shall become effective and payable by the Purchaser/Petitioner in this instance, from the date specified in the notice.
- 4.2. The responsibility for fulfilling this obligation rests entirely with the Petitioner. Furthermore, at the time of entering the FSA, APL was fully cognizant of the associated risks and costs inherent in the terms of the FSA. Thus, the Petitioner's present endeavor to characterize the imposition of the user fee by MCL as a "change in law" event appears to be a strategic effort to evade the contractual obligations and circumvent the responsibilities stipulated under the FSA.
- 4.3. Hence, the Petitioner cannot interpret the Change in law clause as per his own convenience. The instant Petition is only an attempt of the Petitioner to divert the contractual commitments that were acknowledged and accepted at the time of signing of the FSA towards the Respondent.
- 4.4. Further, the Petitioner lacks a legitimate basis to claim compensation for the change in law event on the account of levy of user fee under the PPAs or the Electricity Act, 2003. The dispute concerning the imposition of a user fee of Rs 1 per tonne is fundamentally an internal dispute between the Petitioner and MCL. This issue does not fall within the purview of claims that can be adjudicated under the PPAs or the statutory framework provided by the Electricity Act, 2003.

- 4.5. Therefore, the Petitioner should have sought recourse through the appropriate legal channels directly addressing their grievances with MCL. The proper course of action would have been to approach the relevant legal forums or dispute resolution mechanisms that has jurisdiction to deal with contractual disputes between the Petitioner and MCL. The Commission's jurisdiction does not extend to resolving disputes of this nature between APL and MCL.
- 4.6. The present petition is devoid of details which are necessary to be submitted for claiming any compensation in lieu of any Change in Law event. As per Article 13.2(b)/ 10.3.2 of the PPAs, the compensation for any decrease in revenue or increase in expenses to the Seller shall be payable only if the decrease in revenue or increase in expenses of the Seller is in excess of an amount equivalent to 1 % of the value of the Letter of Credit (LC) in aggregate for the relevant Contract Year.
- 4.7. The Petitioner has vaguely sought reliefs under the Change in Law provisions of the PPAs without furnishing any details with respect to the actual expenditure which it may have incurred due to the occurrence of the alleged Change in Law events. The aforesaid provisions of the PPAs are abundantly clear to state that the compensation against the occurrence of the Change in Law event shall be payable only if the impact of such an event is in excess of an amount equivalent to 1% of the value of the LC in aggregate for the relevant Contract Year.
- 4.8. The present value of Letter of Credit for FY 2024-25 provided to APL by MSEDCL through Canara Bank is Rs. 1056.76 Cr. APL in its notice itself informed that due to MCL Notice dated 24 April 2024, the net financial impact is to the extent of Rs. 6,00,000 per annum which is very less than the 1% of LC value.
- 4.9. Therefore, since the Petitioner has failed to provide details of claims corresponding to relevant Contract Year, its claim for compensation ought to be rejected by this Hon'ble Commission
- 4.10. Admittedly, Carrying Cost is awarded to a party as restitution for the actual expenditure that has been incurred. However, the rate of LPS that may be awarded is distinct from the rate of Carrying Cost. The former is on account of non-payment or default in payment of invoices by the due date while the latter is a restitution to bring an affected party to the same economic position as if such Change in Law event has not occurred. In this regard, reliance may be placed on the Order of the Hon'ble APTEL in Review Petition No. 1 of 2019. The relevant portion of the Order has been produced as under for ease of reference:

“44. It needs to be borne in mind that carrying cost is the value for money denied at the appropriate time and is different from LPS which is payable on non-payment or default in payment of invoices by the Due Date. Payment of carrying cost is a part of the Change in Law clause which is an in-built restitution clause [see Uttar Haryana Bijli Vitran Nigam Ltd. Vs. Adani Power Ltd. (2019) 5 SCC 325]. We are satisfied that carrying costs on the CIL amount should have been on actuals and not the Late Payment Surcharge (“LPS”) rate specified in the PPAs i.e., 1.25% in excess of 1- year MCLR of

SBI for the period of 25 years.”

- 4.11. Considering the said APTEL Order, since there is no amount due being payable by MSEDCL to APL, the Petitioner is wholly misplaced in seeking Carrying Cost at the rate of LPS.
- 4.12. It is a settled position of law that the rationale for awarding Carrying Cost is restitution of the affected party to the same economic position as if such Change in Law Event did not occur. In this regard, reliance may be placed on the judgment of the Hon’ble Supreme Court in *Energy Watchdog v. Central Electricity Regulatory Commission and Ors.* [(2017) 14 Supreme Court Cases 80] (*Energy Watchdog*). In addition, reliance may be placed on the Commission’s Order dated 8 July 2022 in M.A. No 100 of 2022 in Case No. 124 of 2018.
- 4.13. The contention of the Petitioner that it may be awarded Carrying Cost at the rate of LPS under the PPA is erroneous and against the purposes of awarding Carrying Cost to an affected party. Therefore, the claim of the Petitioner for award of Carrying Cost on the same lines as LPS may not be allowed.

5. APL’s rejoinder dated 11 September 2024 is summarized as under:

- 5.1. The Coal India Limited qualifies as an Indian Government Instrumentality in terms of the PPAs. It is clearly established that the Petitioner is bound to pay User Fee to MCL, not because of contractual obligation under the FSA, but because it is a statutory levy by an Indian Government Instrumentality.
- 5.2. The issue in the present case does not contain to payment of statutory levy by the petitioner to MCL but it pertains to admission of change in law claim by the respondent towards payment of such user fee charges petitioner to MCL, and thereafter adjustment of such change in law claim in Tariff to be paid by the respondent to the petitioner.
- 5.3. Under Section 86 of the Electricity Act 2003 read with Change in Law Articles in the PPAs executed between APL and MSEDCL, the Commission solely possesses the jurisdiction to adjudicate the dispute between APL and MSEDCL under Section 86 (1) (f) of the Electricity Act, 2003.
- 5.4. Pertinently, this Commission which has adjudicated the dispute inter-se APL and MSEDCL in respect of all change in Law events such as domestic coal shortfall, taxes and duties, Evacuation Facility Charges, Fly ash Transportation cost, compliance with revised Emission Control norms etc. all of which pertain to imposition of a levy by an Indian Governmental Instrumentality same as that levied in the present case.
- 5.5. MSEDCL’s contention is the same as that raised vide letter dated 30 May 2024 in reply to APL’s Change in Law notice dated 11 May 2024, wherein MSEDCL refused to acknowledge the Change in Law event notified by APL on the basis that the impact of every change in law event in any contract year should individually exceed the 1% of LC value as provided for under the respective PPAs.

- 5.6. In the Petition, it has been already referred the Commission's Order dated 5 April 2018 in Case No. 84 of 2016 wherein it was held that the financial impact of all approved change in law events in aggregate must exceed 1% of the LC amount in the relevant contract year to be considered for compensation. Presently, MSEDCL is paying compensation towards other approved change in law events such as domestic coal shortfall, taxes and duties, Evacuation Facility Charges, Fly ash Transportation charges, etc.
- 5.7. The Petitioner has cited and relied upon various APTEL and Supreme Court's Judgements in the Petition to support and substantiate its claim for admissibility of carrying cost on the same line provided for the Late Payment Surcharge in the PPAs (2% in excess of SBI PLR), on monthly compounding basis, therefore MSEDCL's contention qua payment of carrying cost is devoid of merits and ought to be dismissed in limine.
6. **At the e-hearing held on 25 October 2024**, the Petitioner and Respondent reiterated its submission as made in its petition along with the IA. The Commission reserved the matter for final Orders.

Commission's Analysis and Ruling:

7. APL has filed the present Petition under Section 86 of the Electricity Act, 2003 seeking declaration of levy of the User Fee of Rs. 1/ tonne notified by MCL vide notice dated 24 April 2024 as an event of Change in Law under the respective PPAs and seeking direction to MSEDCL for making payment of compensation for the Change in Law event from the date that such Change in Law event has affected the Petitioner.
8. MSEDCL has opposed the APL's claim stating that the levy of user fee by the MCL vide Notice dated 24 April 2024 is arising out of the obligation of APL under the FSA dated 29 March 2018 executed between APL and MCL, and APL's failure to provide necessary documentary details such as actual expenditure, for the claims, further invalidates it. MSEDCL further contended that it has refused to acknowledge the Change in Law event notified by APL on the basis that the impact of every change in law event in any contract year should individually exceed the 1% of LC value as provided for under the respective PPAs.
9. The Commission notes that any event can be said to be a 'Change in Law Event', only if satisfies the provisions stipulated under the PPA. APL has signed four different PPAs with MSEDCL as stated in para 3.2 above. These four PPAs are based on two different bidding process, and hence has slightly different clauses related to Change in Law which are reproduced below:

a. PPA dated 8 September 2008 (1320 MW)

"13.1 Definitions

In this Article 13, the following terms shall have the following meanings:

13.1.1 "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:

(i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law or (ii) a change in interpretation of any Law by a Competent Court of law, tribunal or Indian Governmental Instrumentality provided such Court of law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation

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.

13.1.2 "Competent Court" means:

The Supreme Court or any High Court, or any tribunal or any similar judicial or quasi-judicial body in India that has jurisdiction to adjudicate upon issues relating to the Project.

13.2 Application and Principles for computing impact of Change in Law

While determining the consequence of Change in Law under this Article 13, 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 payments, to the extent contemplated in this Article 13, the affected Party to the same economic position as if such Change in Law has not occurred.

a) Construction Period

...

.....

b) Operation Period

As a result of Change in Law, the compensation for any increase/decrease in revenues or cost to the Seller shall be determined by the Maharashtra State Electricity Regulatory Commission whose decision shall be final and binding on both the Parties, subject to rights of appeal provided under applicable Law and effective from date specified in 13.4.1.

Provided that the above mentioned compensation shall be payable only if and for increase/ decrease in revenues or cost to the Seller is in excess of an amount equivalent to 1 % of the Letter of Credit in aggregate for a Contract

Year.

13.3 Notification of Change in Law

13.3.1 If the Seller is affected by a Change in Law in accordance with Article 13.2 and wishes to claim a Change in Law under this Article, it shall give notice to the Procurer of such Change in Law as soon as reasonably practicable after becoming aware of the same or should reasonably have known of the Change in Law.

13.3.2 Notwithstanding Article 13.3.1, the Seller shall be obliged to serve a notice to the Procurer under this Article 13.3.2 if it is beneficially affected by a Change in Law. Without prejudice to the factor of materiality or other provisions contained in this Agreement, the obligation to inform the Procurer contained herein shall be material. Provided that in case the Seller has not provided such notice, the Procurer shall have the right to issue such notice to the Seller.

13.3.3 Any notice served pursuant to this Article 13.3.2 shall provide, amongst other things, precise details of:
(a) the Change in Law;
and
(b) the effects on the Seller of the matters referred to in Article 13.2.

13.4 Tariff Adjustment Payment on account of Change in Law

13.4.1 Subject to Article 13.2, 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/judgment of the Competent Court or tribunal or Indian Governmental Instrumentality, if the Change in Law is on account of a change in interpretation of Law

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

b. PPA dated 31 March 2010 (1200 MW), 9 August 2010 (125 MW) and 16 February 2013 (440MW):

“ARTICLE 10 CHANGE IN LAW

10.1 Definitions

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

10.1.1 "Change in Law" means the occurrence of any 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.

10.2 Application and Principles for computing impact of Change in Law

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

10.3 Relief for Change in Law

10.3.1 During Construction Period

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 Procurers and the Appropriate Commission documentary proof of such increase/ decrease in cost of the Power Station or revenue/ expense for establishing the impact of such Change in Law.

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

10.4 Notification of Change in Law

10.4.1 If the Seller is affected by a Change in Law in accordance with Article 10.1 and the Seller wishes to claim relief for such a Change in Law under this Article 10, it shall give notice to the Procurers 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 Procurers under this Article 10.4.2, even if it is beneficially affected by a Change in Law. Without prejudice to the factor of materiality or other provisions contained in this Agreement, the obligation to inform the Procurers contained herein shall be material. Provided that in case the Seller has not provided such notice, the Procurers shall have the right to issue such notice to the Seller

10.4.3 Any notice served pursuant to this Article 10.4.2 shall provide, amongst other things, precise details of:
(a) the Change in Law; and
(b) the effects on the Seller.

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/ judgment of the Competent Court or tribunal or Indian Governmental Instrumentality, if the Change in Law is on account of a change in interpretation of Law.

10.5.2 The payment for 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.”

10. The provisions pertaining to Change in Law in these PPAs are essentially similar and are based on the principle of restitution. In terms of the relevant provisions of the PPAs, the following ingredients are necessary for an event to qualify as a ‘Change in Law’:

- a. The definition of ‘Law’ under the PPAs is an inclusive definition and contemplates all laws applicable in India in various forms. However, for an event to be considered a ‘Change in Law’ event requires that it be caused by the operation of law by an Indian Governmental Instrumentality.
- b. The term ‘Indian Governmental Instrumentality’ covers GoI, GoM and any Ministry, Department, Board, Authority, Agency or Corporation under their direct or indirect control, or the Appropriate Commission, etc.
- c. ‘Change in Law’ under the PPAs encompasses introduction, increase, or modification of any law after the cut-off date, i.e., 7 days prior to the bid deadline, which results in additional recurring or non-recurring expenditure to the Seller, or in increase or decrease in revenues or cost to the Seller.
- d. The recurring or non-recurring expenditure or income or decrease in cost to the Seller must be on actual basis and must financially impact the Seller.
- e. During operation period, compensation shall be payable only if 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.
- f. The object of the ‘Change in Law’ provision is to compensate the Party affected by such an event so as to restore it, through monthly Tariff Payments, to the same

economic position as if such Change in Law event had not occurred.

- g. If the Seller is affected by a Change in Law and wishes to claim relief for such a Change in Law, it shall give notice to the Procurers 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.

11. Considering above factual position, material placed on record and arguments made during hearing, the Commission frames following issued for its consideration:

- a. Whether levy of the User Fee of Rs. 1/ tonne notified by MCL vide notice dated 24 April 2024 as an event of Change in Law is Change in Law event? If yes, compensation for the same.
- b. Carrying cost, if applicable, on compensation for Change in Law event

The Commission is addressing the above issues in subsequent paragraphs.

12. **Issue A: Whether levy of the User Fee of Rs. 1/ tonne notified by MCL vide notice dated 24 April 2024 as an event of Change in Law is Change in Law event? If yes, compensation for the same.**

- 12.1. The Commission notes that the Government of Orissa vide Gazette notification Ext. No. 2032 dated 19 October 2012 made amendment to the Orissa Minerals Rules, 2007 and introduced User Fee Charges of Rs. 1 per tonne on transport of minerals including coal. Same is reproduced below:

NOTIFICATION

The 18th October, 2012

No. 7607-IV(A)SM-01/2012/SM.— In exercise of the powers conferred by Section 23C of the Mines and Minerals (Development and Regulation) Act, 1957 (67 of 1957), the State Government do hereby make the following rules further to amend the Odisha Mineral (Prevention of Theft, Smuggling and Illegal Mining and Regulation of Possession, Storage, Trading and Transportation) Rules, 2007, namely:—

1. (1) These rules may be called the Odisha Mineral (Prevention of Theft, Smuggling and Illegal Mining and Regulation of Possession, Storage, Trading and Transportation) Amendment Rules, 2012.

(2) They shall come into force on the date of their publication in the Odisha Gazette.

2. In the Odisha Mineral (Prevention of Theft, Smuggling and Illegal Mining and Regulation of Possession, Storage, Trading and Transportation) Rules, 2007, in rule 10, in sub rule (3), after Clause (i) the following clauses shall be inserted, namely :—

“(ia) The applicant shall, at the time of issue of e-permit, deposit a user fee of 1/- per tonne online wherever e-pass facilities are provided. The amount so collected shall be credited to the Head of Account, namely:— 0853- Non-ferrous Mining and Metallurgical Industries- 104- Mines Department – 0097 – Misc. Receipts – 02082 – Misc. and other Receipts.

(ib) The amount collected towards user fee may be provided from time to time in the expenditure budget of the Department of Steel & Mines under appropriate head of account to be spent for the following purposes;

- (a) Maintenance of Information Technology hardware, software installed in the Circles, Directorate of Mines and Steel & Mines Department.*
- (b) Purchase of furniture and stationery.*
- (c) Procurement and replacement of hardware, software and consumable goods.*
- (d) Development of new additional software and modules as and when required.*
- (e) Creation of Project Management Unit in Circles, Directorate of Mines and Steel & Mines Department and hiring of professionals.*
- (f) Payment of remuneration to the security guards and other personnel for manning the check gates, installation of Close Circuit TV (CCTV), high mast lights, solar lights, generators, pre-fabricated cabins and payment of cost of diesel, gasoline for generators etc.*
- (g) Procurement of equipments including hand held devices.*
- (h) Meeting the expenditure on Annual Maintenance Contract.”*

*By Order of the Governor
RAJESH VERMA
Principal Secretary to Government*

12.2. MCL vide notice dated 24 April 2024 decided to pass on the User Fee Charges at Rs. 1 per tonne plus applicable GST to the coal consumers on sale of coal through Rail and Road mode with effect from 1 April 2024, thereby making it mandatory for power generators off-taking coal from MCL to pay User Fee at Rs. 1 per tonne. The same is reproduced below:

*Notice to Consumers
Sub : Lew of User fee in Coal bill w.e.f 01.04.2024*

All the coal consumers taking coal from MCL are hereby informed that the Government of Orissa vide Gazette notification Ext. No. 2032 dated 19.10.2012 has made amendment to the Orissa Minerals (P.T.S.I.M.R.P.S.T.T.) Rules, 2007 and, has introduced User Fee charges of Re. 1 per tonne transport of minerals including coal.

In view of the above, it has been decided to pass on the User Fee charges @ Re. 1 per tonne plus applicable GST to the coal consumers on sale of coal through Rail and Road mode with effect from 01.04.2024. All the coal consumers are requested to make payment of the arrear User Fee charges against sale of coal w.e.f 01.04.2024 in the designated account of MCL.....”

- 12.3. In view of the above, the Commission notes that MCL vide notice dated 24 April 2024 has conveyed implementation of notification of the Government of Orissa dated 19 October 2012 to its consumers. The Government of Orissa is a ‘Government Instrumentality’ under the PPA. Further, APL has issued a Change in Law Notice to MSEDCL immediately on 11 May 2024 conveying such imposition of User Fee. Therefore, the Commission rules that MCL notice dated 24 April 2024 read with above notification of Government of Orissa comply with criteria stipulated in the PPA for considering any event as Change in Law.
- 12.4. The Commission notes the submission of MSEDCL that it has refused to acknowledge the Change in Law event notified by APL on the basis that the impact of every change in law event in any contract year should individually exceed the 1% of LC value as provided for under the respective PPAs. MSEDCL also submitted that the Petitioner has failed to provide details of claims corresponding to relevant Contract Year, its claim for compensation ought to be rejected by the Commission.
- 12.5. On contrary, APL stated that the Commission vide Order dated 5 April 2018 in Case No. 84 of 2016 was held that the financial impact of all approved change in law events in aggregate must exceed 1% of the LC amount in the relevant contract year to be considered for compensation and presently, MSEDCL is paying compensation towards other approved change in law events such as domestic coal shortfall, taxes and duties, Evacuation Facility Charges, Fly ash Transportation charges, etc.
- 12.6. The Commission observes that the Commission vide Order dated 5 April 2018 in Case No. 84 of 2016 has ruled as follows:
- “...20.1. In its Petition and during these proceedings, RPL has presented its computations of the impacts of some of the Change in Law events considering both the PPAs. For each of the PPAs, it needs be ensured that, **in aggregate (i.e., for all the approved Change in Law events taken together)**, the financial impact of the events approved as Change in Law in this and earlier Orders exceeds 1% of the LC amount in the relevant Contract Year, as required under Article 10.3.2 of the PPAs. ...” (emphasis added)*
- 12.7. The same ruling has been made by the Commission in the Order dated 3 August 2018 in Case No. 124 of 2018 in the matter of Adani Power Maharashtra Limited vs MSEDCL
- 12.8. The Commission observes that MSEDCL has challenged the said Order dated 5 April 2018 before Hon’ble APTEL through Appeal No. 263 of 2018, however, the said treatment provided by the Commission was neither challenged by MSEDCL in the said appeal nor made any submission to rebut the claim of the Petitioner in the present case. Hence, the Commission’s above said ruling on aspect of considering all approved change in all together for considering threshold limit of 1% of Letter of Credit has attend the finality.

- 12.9. In respect of the MSEDCL's contention that APL has failed to submit the impact on account of such event, the Commission notes that under the PPAs, the Seller shall provide to the Procurers and the 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.
- 12.10. In view of above, the Commission held that levy of User Fees charges @ Re. 1 per tonne plus applicable GST by Mahanandi Coalfield Limited based on Government of Orissa's notification dated 19 October 2012 is Change in Law event under the PPAs and APL shall be eligible for compensation of Re. 1/tonne on submission of documentary evidence of incurring such expenses to MSEDCL and subject to condition that such increased expenses are more than 1% value of Letter of Credit in aggregate for the relevant Contract Year.
- 12.11. The Commission in its earlier Orders related to Change in Law compensation under these PPAs have already approved methodology for payment of compensation, same shall be used in present matter also.
- 13. Issue B: Carrying cost, if applicable, on compensation for Change in Law event**
- 13.1. APL has stated that in terms of as per Article 13.2 and 10.2 of the 1320 MW and 1200 MW/125 MW/440 MW PPAs respectively, compensation for the Change in Law has to be such that it is restored to the same economic position had such a Change in Law event not occurred. Payment of carrying cost is imperative to achieve the true objective of restitution, which is also recognized by the Hon'ble Supreme Court of India in the Energy Watchdog. The Hon'ble Supreme Court vide its Uttar Haryana Bijli Vitaran Nigam Limited vs. Adani Power Limited and Ors. (2019) 5 SCC 325 has also held that 'carrying cost' is an integral component of the restitutive principle envisaged under the PPA and the same ought to be granted in terms of the PPA. Therefore, the Petitioner prayed to allow carrying cost at the rate of LPS in the PPAs (2% in excess of SBI PLR), on monthly compounding basis.
- 13.2. While opposing claim of carrying cost, MSEDCL stated that as per PPAs, the rate of LPS that may be awarded is distinct from the rate of Carrying Cost. Therefore, the claim of the Petitioner for award of Carrying Cost on the same lines as LPS may not be allowed.
- 13.3. The Commission notes that issue of granting carrying cost on Change in Law compensation has finally been decided by the Hon'ble Supreme Court's judgment dated 20 April 2023 (Civil Appeal 4089 of 2022 titled MSEDCL Vs RattanIndia) in respect of similar PPAs under present case. Hon'ble Supreme Court in that judgment has upheld APTEL's judgment granting carrying cost at rate of LPS stipulated in the PPA on compounding basis. Accordingly, the Commission rules that APL shall be eligible to claim carrying cost on increased expenses on account of User Fee at LPS rate stipulated in the PPA on compounding basis. Said carrying cost is allowed from date of incurring such

increased expenses.

14. Hence, the following Order:

ORDER

- 1. Petition in Case No. 104 of 2024 is allowed.**
- 2. Adani Power Limited is eligible for Change in Law compensation on account of levy in User Fee vide Mahanadi Coalfield Limited notice dated 24 April 2024. The said Change in Law compensation be computed as per directions in para 12.11 above.**
- 3. Carrying cost shall also payable on above Change in Law compensation at LPS rate stipulated in the PPA on compounding basis.**

Sd/-
(Surendra J. Biyani)
Member

Sd/-
(Anand M. Limaye)
Member

Sd/-
(Sanjay Kumar)
Chairperson


(Dr. Rajendra G. Ambekar)
Secretary

