CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 161/MP/2020

Coram:

Shri P.K. Pujari, Chairperson
Shri I.S Jha, Member
Shri P.K.Singh, Member

Date of Order: 14th August 2021

In the matter of

Petition under Section 79(1)(b) and 79(1)(f) of the Electricity Act, 2003 for claiming compensation on account of events pertaining to Change in Law as per Article 10 of the Power Purchase Agreement dated 23.8.2013 and Article 10 of the Addendum PPA dated 10.12.2013.

And
In the matter of

Bharat Aluminium Company Limited (BALCO),
Balco Nagar,
Korba-495684, Chhattisgarh **.....Petitioner**

Vs

1. Tamil Nadu Generation and Distribution Corporation Ltd. (TANGEDCO),
NPKRR Maligai, 6th Floor,
Eastern Wing, 144, Anna Salai,
Chennai-600 002, Tamil Nadu

2. Kerala State Electricity Board (KSEB),
Vydyuthi Bhavanam,
Pattom, Thiruvananthapuram - 695004, Kerala

3. Chhattisgarh State Power Trading Company Ltd.(CSPTCL),
O/o The Chief Engineer (EITC),
Energy Info. Tech Centre, Block No.8, CS Power Companies Campus,
Daganiya, Raipur-492013, Chhattisgarh

... Respondents

Parties Present:

Shri Buddy Ranganadhan, Advocate, BALCO
Shri Hemant Singh, Advocate, BALCO
Shri Chetan Garg, Advocate, BALCO
Shri Lakshyajit Bagdwal, Advocate, BALCO
Shri B. Vinodh Kanna, Advocate, TANGEDCO
Ms. M. Hemalatha, TANGEDCO
Shri S. Poonkodi, TANGEDCO

ORDER

The Petitioner, Bharat Aluminium Company Limited, has filed the present Petition under Section 79(1)(b) and 79 (1)(f) of the Electricity Act, 2003 (hereinafter referred to as 'the Act') read with Article 10 of the Power Purchase Agreement (in short, 'the PPA') dated 23.8.2013 executed between the Petitioner and the Respondent No. 1, Tamil Nadu Generation and Distribution Corporation Limited (in short, 'TANGEDCO') for supply of power from the Petitioner's generating station, seeking certain reliefs under Change in Law during the operating period.

Brief Background of the Case

2. The Petitioner has set-up a 1200 MW (4x300 MW) Thermal Power Project (hereinafter referred to as 'the generating station') at Balco Nagar, Korba in the State of Chhattisgarh.

3. In the year 2012, TANGEDCO invited a bid for supply of power on long term basis through tariff based competitive bidding process under Case-1 bidding procedure for meeting its base load power requirements. Pursuant to the bidding process, the Petitioner was selected by TANGEDCO for sale and supply of 100 MW to TANGEDCO for a period of 15 years commencing from 1.2.2014 and up to 30.9.2028 for which a PPA was executed on 23.8.2013. Subsequently, the said PPA was amended on 10.12.2013 and the total quantum of the original PPA was enhanced to 200 MW. The Petitioner started supplying 100 MW to TANGEDCO from 3.9.2015 and the balance 100 MW from 1.12.2015, as per the terms and conditions of the PPA.

4. It has been submitted by the Petitioner that under Article 10 of the PPA, the Petitioner is entitled to be compensated on account of occurrence of Change in Law events that result into additional recurring/non-recurring expenditure by the Petitioner. It has been further submitted that some Change in Law events have occurred after the cut-off date i.e. 27.2.2013, which is seven (7) days prior to the bid deadline i.e. 6.3.2013 and, therefore, in terms of Article 10 of the PPA, it has claimed compensation from TANGEDCO.

5. The Petitioner has sought compensation on account of the following Change in Law events during the operating period which have impacted the cost and revenue of supply of power from the generating station to the procurer:

(a) Introduction of Evacuation Facility Charges;

(b) Additional cost towards Fly Ash Transportation;

(c) Increase in Consent Fee;

(d) Increase/ change in levy of royalty;

(e) Increase in cost on account of Environment (Amendment) Rules, 2015; and

(f) Carrying cost.

6. Against the above background, the Petitioner has made the following prayers:

> "(a*) Declare and adopt that the following events/ notifications are Change in Law event(s) within the meaning of Article 10 of PPA dated 23.8.2013 and the addendum dated 10.12.2013 executed between the parties herein and allow compensation thereof against the following;*
>
> > *(i) Price notification bearing No. CIL: S&M;GM(F)/Pricing/2017/1005 dated 19.12.2017, notifying the levy of 'evacuation of facility charges' at the rate of Rs. 50/MT on coal;*
> >
> > *(ii) Notification No. S.O. 254(E) dated 25.1.2016 issued by MOEF, by way of which an additional cost towards 'Fly Ash Transportation' is being levied upon the Petitioner;*
> >
> > *(iii) Notification No. F1-20/2016/32 dated 6.10.2016 issued by the Government of Chhattisgarh leading to additional expenditure on 'consent fee'*
> >
> > *(iv) Notification dated 7.12.2015 issued by MoEF&CC, thereby leading to additional expenditure on account of installation of 'FGD' equipment and 'mercury analyser'; and*

(v) Additional amount of royalty incurred on the increased base price of coal, vide Coal India Limited notifications dated 25.5.2013, 29.5.2016 and 9.1.2018 as compared to the base price existing on the cut-off date.

(b) Allow in-principal approval for all the expenditure to be incurred towards the Change in Law events in relation to procurement, installation, commissioning, operation and maintenance of Flue Gas Desulphurizer (FGD) and associated systems for meeting SO2 emission norms and De-NoX systems for meeting NOx emissions (including all cost towards selection of the successful bidder through competitive bidding process) based on the coast as discovered through competitive bidding, along with carrying cost as per provisions of PPA, subject to true up;

(c) Device a methodology for the purpose of recovery of the amount incurred/to be incurred by the Petitioner, in installing the FGD and associated systems, along with methodology towards calculating tariff in relation to the estimated increase in O & M Expenses, other operating norms like Auxiliary Power Consumption and SHR, spares, water charges, landed cost of reagents, gypsum disposal cost, etc. with corresponding increase in capacity charges and ECR, as a result of complying with the change in law event of installation of FGD and associated systems.

(d) While considering prayers (b) and (c) above, issue directions for exclusion of the period of shutdown (required for installation of FGD) for the purpose of calculating the availability of the power project of the Petitioner, in order to ensure full recovery of capacity charges due to such shutdown;

(e) Direct the Respondent No. 1 to allow/reimburse to the Petitioner, the cost of Rs. 45 lakh incurred by the Petitioner towards installation of Mercury Analyzer, in compliance with the notification dated 7.2.2015 issued by MoEF&CC;

(f) Approve and grant carrying cost/ interest costs to the Petitioner from the effective date of change in law events.

(g) Direct the Respondent to make payment of 42,70,47,147/- to the Petitioner, which amount has accrued on account of the change in law events till July, 2019

(h) Direct the Respondent No. 1, in future, to continue to make the payments, accrued in favour of the Petitioner, on account of change in law events, as prayed under the above prayers."

Submissions of the Petitioner

7. The Petitioner has submitted that it is selling power to more than one State inasmuch as it has PPAs with Kerala State Electricity Board, TANGEDCO and Chhattisgarh State Power Trading Company Ltd. Therefore, the Petitioner in terms of Section 79(1)(b) of the Act has a composite scheme for generation and sale of electricity in more than one State. It has been further submitted by the Petitioner that under Section 79(1)(b) of the Act, this Commission has the powers to regulate tariff

of generating companies if such companies have a composite scheme for generation and sale of electricity. The Petitioner has submitted the details of the PPAs executed by it as under:

Date of Execution of PPA	Procurer	Quantum	Tenure
23.8.2013	Tamil Nadu Generation and Distribution Corporation Ltd.	200 MW RTC Power	15 years (Valid till 30.9.2028)
26.12.2014	Kerala State Electricity Board	100 MW RTC Power	25 years (Valid till 30.9.2042)
19.1.2015	Chhattisgarh State Power Distribution Company Ltd.	5%	For the entire life of the generating station.

8. In brief, the compensation claimed by the Petitioner on account of Change in Law events are as under:

Sr. No.	Change in Law event	Amount claimed (in Rs.)	Remarks
1	Increase in cost due to increase/change in levy of Royalty	111505537	Claim up to June, 19
2	Increase in Consent Fee	279662	Claim up to July, 19
3	Additional cost toward Fly Ash transportation	50820324	Claim up to March, 19
4	Introduction of Environment (Amendment) Rules, 2015	-	-
5	Introduction of Evacuation Charges	77540442	Claim up to July, 19
6	Carrying Cost	186901183	Claim up to June, 19
	Total	**427047147**	

9. The Petition was admitted on 7.7.2020 and notices were issued to the Respondents to file their replies to the Petition. Reply to the Petition has been filed by TANGEDCO vide affidavit dated 29.7.2020 and the Petitioner has filed its rejoinder on 31.8.2020.

Hearing dated 4.6.2021

10. The matter was heard on 4.6.2021 through video conferencing. During the course of hearing, learned counsels for the Petitioner and the Respondent, TANGEDCO reiterated the submissions made in their respective pleadings. Based on the requests of learned counsels, the Commission directed the Petitioner and the Respondent, TANGEDCO to file their respective written submissions. Pursuant to the said direction, while the Petitioner has filed its written submissions, TANGEDCO has not filed any written submissions. Submissions made by the parties during the hearing and in their replies and rejoinders have been dealt with in subsequent paragraphs.

Analysis and Decision

11. We have considered the submissions of the Petitioner and TANGEDCO. TANGEDCO has not raised any objection on the jurisdiction of this Commission to decide the matter. Besides, the generating station of the Petitioner is located in the State of Chhattisgarh and is supplying the power to KSEB in Kerala and TANGEDCO in the State of Tamil Nadu in terms of the PPA dated 23.8.2013, it qualifies within the scope of 'composite scheme' of generation and supply in more than one State as envisaged under Section 79(1)(b) of the Act and resultantly, the jurisdiction of this Commission gets attracted under Section 79(1)(f) read with Section 79(1)(b) of the Act.

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

Issue No.1: Whether the provisions of the Power Purchase Agreement with regard to notice of an event of Change in Law have been complied with?

Issue No.2: What is the scope of Change in Law in the Power Purchase Agreement?

Issue No.3: Whether compensation claims are admissible under Change in Law? If yes, to what extent?

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

We now proceed to discuss the above issue and examine the claims of the Petitioner.

Issue No. 1: Whether the provisions of the Power Purchase Agreement with regard to notice of an event of Change in Law have been complied with?

13. The claims of the Petitioner in the present Petition pertain to Change in Law events related to PPA dated 23.8.2013 read with addendum dated 10.12.2013. Article 10.4 of the PPA deals with the issue of notification of an event of Change in Law 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 of such Change in Law as soon as reasonably practicable after becoming aware of the same or should reasonably have known of the Change in Law.

10.4.2 Notwithstanding Article 10.4.1, the Seller shall be obliged to serve a notice to the Procurer under this Article 10.4.2, even if it is beneficially affected by a Change in Law. Without prejudice to the factor of materiality or other provisions contained in this Agreement, the obligation to inform the Procurer contained herein shall be material. Provided that in case the Seller has not provided such notice, the Procurer shall have the right to issue such notice to the Seller.

10.4.3 Any notice served pursuant 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."

14. The Petitioner has submitted that in compliance to Article 10.4 of the PPA, on 25.1.2018, notice was issued to TANGEDCO for compensation on account of

increase in cost due to introduction of evacuation facility charges. The Petitioner has further submitted that notice dated 25.9.2019 was issued to TANGEDCO for compensation on account of additional cost towards fly ash transportation, increase in Consent Fee, increase in cost due to increase/ change in levy of Royalty and increase in cost due to introduction of Environment (Amendment) Rules, 2015. However, TANGEDCO did not respond to the said letters. It has been further submitted by the Petitioner that Change in Law notice regarding introduction of Environment (Amendment) Rules, 2015 was also issued to TANGEDCO on 14.1.2016 which was not replied by it.

15. We have considered the submissions of the Petitioner. 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 i.e. Change in Law events which occurred after the cut-off date of 27.2.2013. The Petitioner had given Change in Law notices on 14.1.2016, 25.1.2018 and 25.9.2019 to TANGEDCO indicating the events under Change in Law and likely impact of such events on tariff. However, no response was received from TANGEDCO in this regard. Since the Petitioner has issued notice after occurrence of event of Change in Law, the Petitioner has complied with the requirement of notice under Article 10.4 of the PPA as far as Change in Law viz. introduction of Evacuation Facility Charges, additional cost towards Fly Ash transportation, consent fees, increase/change in levy of royalty and Environment (Protection) Amendment Rules, 2015 are concerned. However, it is noticed that the Petitioner's Change in Law claim towards installation of 'Mercury Analyser' on basis of the Central Pollution Control Board's ('CPCB') Guidelines for Continuous Emission Monitoring System do not find mention in any of the Change in Law notice, in particular notice dated 25.9.2019, despite such

Guidelines having been issued by CPCB in June, 2018 and the Petitioner having already placed the order for installation of 'Mercury Analyser' in November, 2018 itself. Accordingly, in our view, since the Petitioner has failed to provide the details of aforesaid Change in Law as per Article 10.4.3 of the PPA despite being clearly available to it, the Petitioner cannot be said to have complied with the requirement of Change in Law notice with regard to its claim towards installation of 'Mercury Analyser'. It is accordingly answered.

Issue No.2: What is the scope of Change in Law in the Power Purchase Agreement?

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

> *"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
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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 Standby Letter of Credit in aggregate for the relevant Contract Year.

10.3.3 For any claims made under Articles 10.3.1 and 10.3.2 above, the Seller shall provide to the Procurer and the Appropriate Commission documentary proof of such increase /decrease in cost of the Power Station or revenue/expense for establishing the impact of such Change in Law.

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

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

"14.3 Dispute Resolution

14.3.1 Dispute Resolution by the Appropriate Commission

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

(b) Where SERC is appropriate Commission, all disputes between the procurer and the seller shall be referred to SERC."

18. A combined reading of the above-mentioned provisions of Article 10 of PPA reveals that the events covered under Change in Law are broadly as under:

(a) Any enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any law, or

(b) Any change in interpretation of any law by a competent court of law, Tribunal or Indian Governmental Instrumentality acting as final authority under law for such interpretation, or

(c) Imposition of a requirement for obtaining any consents, clearances and permits which was not required earlier, or

(d) Any change in the terms and conditions or inclusion of new terms and conditions prescribed for obtaining any consents, clearances and permits otherwise than the default of the seller, or

(e) Any change in the tax or introduction of any tax made applicable for supply of power by the Petitioner to TANGEDCO.

(f) Such Change in Law (as mentioned in (a) to (e) above) result in additional recurring and non-recurring expenditure by the seller or any income to the seller.

(g) The purpose of compensating the party affected by such Change in Law is to restore through Monthly Tariff Payments, to the extent contemplated in this Article 10, the affected party to the same economic position as if such "Change in Law" has not occurred.

(h) The compensation for any increase/decrease in revenue or cost to the seller shall be determined and made effective from such date, as decided by the Commission which shall be final and binding on both the Petitioner and TANGEDCO, subject to rights of appeal provided under Act.

19. The term "Law" has been defined under Article 1.1 of the PPA 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 Governmental Instrumentality and having force of law and shall further include without limitation all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include without limitation all rules, regulations, decisions and orders of the Appropriate Commission."

20. The term “Indian Governmental Instrumentality” is also defined in Article 1.1 as under:

> *“Indian Governmental Instrumentality” shall mean the Government of India, Government of state of Tamil Nadu, Chhattisgarh, Korba, New Delhi 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 Governments or both, any political sub-division of any of them including any court or Appropriate Commissions or tribunal or judicial or quasi-judicial body in India but excluding the Seller and the Procurer.”*

21. As per the above definitions, law as per PPA includes (a) all laws including electricity laws in force in India; (b) any statute, ordinance, regulation, notification, code, rule or their interpretation by Government of India, Government of Tamil Nadu, Government of Delhi or Government of Chhattisgarh (since the project is located in Chhattisgarh) or any Ministry, Department, Board, body corporate agency or other authority under such Governments; (c) all applicable rules, regulations, orders, notifications by a Government of India Instrumentality; and (d) all rules, regulations, decisions and orders of the Appropriate Commission. If any of these laws affects the cost of generation or revenue from the business of selling electricity by the seller to the procurers, the same shall be considered as Change in Law to the extent it is contemplated under Article 10 of the PPA. Thus, the scope of Change in Law as stated above is admitted and unambiguous. It is answered accordingly.

Issue No. 3: Whether compensation claims are admissible under Change in Law event? If yes, to what extent?

22. In the light of and in view of the broad principles discussed above, we proceed to deal with the claims of the Petitioner under Change in Law during the operating period.

(a) Introduction of Evacuation Facility Charges

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

24. TANGEDCO has submitted that the claim on account of levy of Evacuation Facility Charges on dispatch of coal is not maintainable. As per the definition of 'Indian Governmental Instrumentality', a body corporate under Government of India is an Indian Government Instrumentality. Coal India Limited is a body corporate under the Government of India and an Indian Governmental Instrumentality under the PPA. However, all the circulars and notifications issued by Coal India Limited cannot be included under Change in Law. As per the term 'Law', notifications by the Indian Governmental Instrumentality should be pursuant to any statute, ordinance, regulation or code. Notification dated 19.12.2017, which is a decision of GM (M&S) Marketing & Sales is not an Act, Ordinance, Regulations or Code amounting to Change in Law but a commercial decision of Coal India Limited. Since the Petitioner has to deal with such commercial charges as per terms of FSA signed by it with Coal India Limited, introduction of Evacuation Facility Charges by Coal India Limited cannot be treated as Change in Law under the provisions of the PPA of the Petitioner. The contract entered into by the generator is one under Section 63 of Act and not Section 62 of the Act.

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

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

27. It has been submitted by the Petitioner that the issue of levy of Evacuation Facility Charges by Coal India Limited has already been dealt with by the Commission in its various orders including the order dated 2.4.2019 in Petition No. 72/MP/2018 (GMR Kamalanga Energy Ltd. and Anr. v. Dakshin Haryana Bijli Vitran Nigam Ltd. and Ors.), wherein the Commission has allowed levy of Evacuation Facility Charges by Coal India Limited as Change in Law event. The relevant portion of the said order dated 2.4.2019 in Petition No. 72/MP/2018 is extracted as under:

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

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

28. The above decision of the Commission may also be appreciated in the context of present case. Therefore, the introduction of Evacuation Facility Charges by Coal India Limited beyond the cut-off date is admissible to the Petitioner as Change in Law and all the contrary submissions of TANGEDCO deserve to be rejected.

29. Accordingly, we find and hold that the Petitioner shall be entitled to recover Evacuation Facility Charges from TANGEDCO in proportion to the 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 TANGEDCO. If the actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of Evacuation Facility Charges. The Petitioner is directed to furnish along with its monthly regular and/or supplementary bill(s), computations duly certified by the auditor to TANGEDCO. The Petitioner and TANGEDCO are directed to carry out reconciliation on account of these claims annually. The above Change in Law is to be implemented from 20.12.2017; the Petitioner is entitlement of compensation subject to claim under change in law is more than 1% of LC amount in financial year as per PPA.

(b) Additional cost towards fly ash transportation

30. The Petitioner has submitted that as on the cut-off date i.e. 27.2.2013, the Petitioner was not required to incur any additional cost towards fly ash transportation. Subsequently, the Ministry of Environment, Forest and Climate Change ("MoEF&CC") vide its notification dated 25.1.2016, amended the Environment (Protection) Rules, 1986 regarding fly ash. It has been submitted that additional cost towards fly ash transportation imposed by MoEF&CC qualifies as Change in Law event in terms of Article 10 of the PPA. The Petitioner has submitted that pursuant to the said notification, the Petitioner entered into a Transport Agreement with Shree Pashupatinath Transport dated 2.11.2018. As per the said agreement, the Petitioner is obligated to pay the rates for the purpose of transportation of fly ash for the generating station as specified under the Agreement.

31. TANGEDCO has submitted that the claim for additional cost towards fly ash transportation is not maintainable on the following grounds:

(a) Fly ash transportation contract was not awarded through a transparent competitive bidding process;

(b) No information has been provided by the Petitioner regarding bidding process undertaken for awarding fly ash transportation contract;

(c) No communication was made with TANGEDCO indicating the price discovered through competitive bidding process for award of contract to transportation of fly ash;

(d) No document regarding revenue generated from fly ash sales has been maintained/ provided by the Petitioner before and after 25.1.2016;

(e) No document showing that the claim for transportation of coal is beyond 100 km from the generating station, has been placed on record;

(f) No documents in respect to copies of bills, debit notes/or invoices have been submitted by the Petitioner.

32. *Per contra*, the Petitioner has submitted that it did call for bids on 31.10.2019 and 3.2.2020 through various newspapers for inviting interested persons to submit their rates. The Petitioner has already placed on record the copy of newspaper publications. It has also been submitted by the Petitioner that it has already annexed with the Petition, a copy of the Transportation Agreement, which was executed after conducting the bidding process along with all the other necessary details like capturing the actual cost which is being incurred by the Petitioner and other related information.

33. We have examined the submissions of the parties. The Petitioner has sought declaration of the MoEF&CC Notification dated 25.1.2016 as Change in Law event within the meaning of Article 10 of the PPA. The Petitioner has submitted that as on cut-off date, it was not required to incur any cost towards fly ash transportation. However, MoEF&CC vide Notification No.S.O.254(E) dated 25.1.2016 has amended

the Environment (Protection) Rules, 1986 by which an additional cost towards fly ash transportation has been levied upon the Petitioner. The relevant extract of said Rules is extracted as under:

> *"(10) The cost of transportation of ash for road construction or for manufacturing of ash based products or use as soil conditioner in agriculture activity within a radius of hundred kilometers from a coal or lignite based power plant shall be borne by such coal or lignite based thermal power plant and cost of transportation beyond the radius of hundred kilometers and up to three hundred kilometers shall be shared between the user and the coal or lignite based thermal power plant equally."*

34. As per Article 10.1.1 of the PPA, any enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any law is covered under Change in Law if this results in additional recurring/ non-recurring expenditure by the seller or any income to the seller. Since the additional cost towards fly ash transportation is on account of Notification No. S.O 254(E) dated 25.1.2016 issued by the Ministry of Environment and Forests and Climate Change, Government of India, the expenditure on account of complying with this Notification is admissible under the Change in Law in-principle.

35. However, it is noticed that the aforesaid MoEF&CC Notification requires that coal or lignite based thermal power plants shall bear the additional cost of transportation of fly ash for particular end usage, namely, for construction of roads, for manufacturing of ash-based products or use of soil conditioner in agricultural activity. But the perusal of the tabular details of ash produced/ utilised submitted by the Petitioner indicates that fly ash from the generating station has been utilized in land development, ash dyke raising, mine filing, bricks, cements and others. It is observed that out of the total fly ash transportation charges claimed in the present Petition, to a large extent, such claims are towards land development, ash dyke raising and others. There is no clarification/ justification by the Petitioner for claiming

fly ash transportation charges towards end usage that are not covered under the said MoEF&CC Notification.

36. The Commission, in its various orders, has observed that the admissibility of claim towards fly ash transportation charges will be subject to the following conditions:

a) Award of fly ash transportation contract through a transparent competitive bidding procedure so that a reasonable and competitive price for transportation of ash/MT is discovered;

b) Any revenue generated/ accumulated from fly ash sales, if CoD of units/ station was declared before the MoEF&CC notification dated 25.1.2016, shall also be adjusted from the relief so granted;

c) Revenue generated from fly ash sales must be maintained in a separate account as per the MoEF&CC notification; and

d) Actual expenditure incurred as claimed should be duly certified by auditors and the same should be kept in possession so that it can be produced to the beneficiaries on demand.

37. With regards to condition (a), the Petitioner has submitted that on 31.10.2019 and 3.2.2020, bids were invited through various newspapers to submit their rates in transparent manner. However, the Petitioner has not submitted any details of bidding process conducted by it, prices discovered therein and contract awarded pursuant thereto. The Petitioner has filed a Transportation Agreement entered into with Shree Pashupatinath Transport dated 2.1.2018 for transportation of fly ash from its generating station to Chotia Mines I/II. However, there is no clarity regarding the end use of such ash and whether such end use is covered under the MoEF&CC Notification dated 25.1.2016. The Petitioner has not submitted the certificate of end users of ash along with the details such as (i) ash received and utilised from the

Petitioner's generating station and (ii) financial implications, if any such as ash transportation charges or cost of ash, etc. paid to the Petitioner. With regard to conditions (b) and (c), the Petitioner has submitted that it has not generated any revenue from fly ash. However, no documents have been placed on record indicating any efforts undertaken by the Petitioner towards selling of fly ash. As regards condition (d), the Petitioner has not submitted copy of the Chartered Accountant certificate certifying the expenditure incurred towards fly ash.

38. The Petitioner has not submitted basic details as indicated at paragraph 36 above, the claim towards compensation on transportation of fly ash cannot be allowed at this stage. However, the Petitioner is granted liberty to approach the Commission with complete details to analyse the case for determination of compensation.

(c) Increase in Consent Fee

39. The Petitioner has submitted that as on the cut-off date i.e. 27.2.2013, the applicable Consent Fee, including renewable fee, was charged at a flat rate of Rs. 10,00,000/- for the category of industries, having an investment of more than Rs. 1,000 crore. Subsequently, the Government of Chhattisgarh vide Notification No. F1-20/2016/32 dated 6.10.2016 amended the Water (Prevention and Control of Pollution) (Consent) Chhattisgarh Rules, 1975 and also introduced a new category for industries of "More than Rs.1000 crore but less than Rs. 2500 crore". Vide the said amendment, the aforementioned Consent Fee (of Rs. 10,00,000/-), payable by the Petitioner, was increased to Rs. 30,00,000/. The Petitioner has also submitted the details with respect to the payments made towards the Consent Fee.

40. TANGEDCO has submitted that as per the RfP/PPA, seller is responsible to obtain and maintain the consents, clearance and permits required for supply of power to the procurer. It has been further submitted that industry requires to obtain consent for discharge of sewage/ trade effluent into any stream or well or into sewer or land under Water (Prevention and Control of Pollution) Act, 1974 and to operate the plant in air pollution control area under the Air (Prevention and Control of Pollution) Act, 1981. TANGEDCO has submitted that as per Article 10 of the PPA, Change in Law is applicable only for the imposition of a requirement for obtaining any consents, clearances and permits which was not required earlier. But in this case, consent has already been obtained and it is not a new requirement and that it is the responsibility of the Petitioner to maintain the same and, therefore, the expenditure incurred by the Petitioner in this regard is not covered under Change in Law.

41. *Per contra* the Petitioner has submitted that the contention of TANGEDCO is without taking into account the fact that the notification dated 6.10.2016 issued by the Government of Chhattisgarh has already been considered and affirmed by this Commission in its decision dated 12.6.2019 in Petition No.118/MP/2018 (TRN Energy Pvt. Ltd. v. PVVNL and Ors.) and decision dated 25.9.2019 in Petition No. 116/MP/2018 (Maruti Clean Coal and Power Ltd. v. JVVNL and Ors). The Commission in the aforesaid orders has discussed the entire issue pertaining to the increase in Consent Fee and has held it to be a Change in Law event.

42. We have considered the submissions made by the Petitioner and TANGEDCO. On Perusal of the documents placed on record by the Petitioner, it is noticed that the Consent Fee is being levied by the Government of Chhattisgarh

through the Water (Prevention and Control of Pollution) (Consent) Chhattisgarh Rules, 1975 in exercise of the powers conferred by Section 64 of the Water (Prevention and Control of Pollution) Act, 1974 (No. 6 of 1974). As on the cut-off date, the applicable Consent Fee and annual consent renewal fee were Rs. 10,00,000/- and Rs. 2,50,000/- respectively for the industries having an investment of more than Rs. 1,000 crore (being the highest category specified for industries based on the investment). However, subsequently, after the cut-off date, the Government of Chhattisgarh vide its Notification No. F1- 20/2016/32 dated 6.10.2016 has amended the Water (Prevention and Control of Pollution) (Consent) Chhattisgarh Rules, 1975 and has also introduced three new categories for the industries having an investment of more than Rs.1000 crore, namely, "More than Rupees 1000 crore but less than Rs. 2500 crore", "More than Rupees 2500 crore but less than Rupees 5000 crore" and "More than Rupees 5000 crore" and has correspondingly specified the increased consent fee and annual consent renewal fee for these categories. Since these increases have been brought out in terms of notification issued by the Government of Chhattisgarh dated 6.10.2016 and after the cut-off date, they qualify as Change in Law event under the Article 10 of the PPA.

43. The Petitioner has submitted that the issue of revision in Consent Fee in terms of the Notification of the Government of Chhattisgarh dated 6.10.2016 has also been considered by the Commission in its order dated 12.6.2019 in Petition No. 118/MP/2019, wherein it has been held that the revision of consent fee falls under the category of Change in Law. The relevant extract of the order dated 12.6.2019 is extracted as under:

> *"147. Since the amendment brought out by the Chhattisgarh Government vide its Notification dated 6.10.2016 is after the cut-off date, the Consent Fee revision falls under the category of Change in law as per the Article 10 of the PPAs. Accordingly, the*

compensation on account of revision in Consent Fee should be reimbursed by UP Discoms in the monthly bill on pro-rata basis. The Petitioner shall furnish copies of the payment made, supported by Auditor certificate, while claiming the expenditure under Change in Law."

44. In a similar matter, APTEL has also upheld decision of Rajasthan Electricity Regulatory Commission allowing the increase in fee for 'Consent to Operate' on the basis of notification issued by the Government of Rajasthan under Change in Law. The relevant extract of the judgment of APTEL dated 14.8.2018 in Appeal Nos. 119 of 2016 and 277 of 2016 (Adani Power Rajasthan Ltd. v. Rajasthan Electricity Regulatory Commission and Ors.) is reproduced as under:

"xii. Now let us take the last issue raised by the Discoms related to increase in fees for 'Consent to Operate' under the Environmental Laws of the State. Let us examine the findings of the State Commission on this issue. The relevant extract is reproduced below:

> ***"xii. Increase in Fees for 'Consent to Operate' Required Under Rajasthan Air (Prevention & Control of Pollution) Rules, 1983 and Rajasthan Water (Prevention & Control of Pollution) Rules, 1975***
>
> *57. The Petitioner through Interlocutory Application submitted that at the time of Bid Deadline as per the Notification dated 25.05.2007 the application fee for 'Consent to Operate' under Rajasthan Air and Water Act was Rs. 91,500/- each [Rs. 61,000 X 1.50] for air and water, i.e., a total of Rs. 1,83,000/-. Subsequently, the State Government vide Gazette Notification dated 10.12.2010 amended the above referred rules to increase the Fees from Rs. 61,000/- per annum to Rs. 2,49,000/-. Further, vide Notification dated 05.06.2015, the fees was revised to Rs. 48,000 + Rs. 1000 per Crore of incremental investment above Rs. 50 Crore. It is submitted that the effect of the said Notification is that annual Fees required for Consent to Operate has increased to Rs. 2,12,34,000/-. The Petitioner has notified the same to the respondents vide letter dated 22.10.2015. The event of increase in fee for consent to operate has led to increase in cost of generation and such increased cost needs to be reimbursed by the Respondents. 58. Respondents in reply contended that as per clause 3.1.1 (f) and 4.2.1 (a), the Seller has to obtain and maintain all consents, clearance and permits required for supply of power to the Procurers as per the terms of the PPA. Also it is the duty of the Petitioner to challenge such exorbitant rates. Petitioner has not submitted any proof of applicability or challenge.*
>
> *59. <u>The contention of the Respondents that seller has to obtain and maintain all consents, clearance and permits required for supply of power at its cost is untenable as the cost to be incurred for operation of plant if increased has to be compensated.</u>*
>
> *60. The Commission notes that the item under change in law claim existed at the rate of Rs. 91,500/ton at the time of bid deadline. <u>It is further noted that the increase in fee for consent to operate was notified by Rajasthan Government and</u>*

thus falls under third bullet of Article 10.1.1 to qualify as change in law. Therefore, the extra amount is to be paid by the Petitioner to the Rajasthan Government every year as a fee for the "Consent to Operate". Such additional fee which was not envisaged at the time of bidding therefore falls under the last but one bullet, hence has to be allowed." From the above it can be seen that the State Commission based on the notification issued by Government of Rajasthan regarding change in the condition for 'Consent to Operate' has allowed the increase in fee for 'Consent to Operate' under Change in Law as it has resulted in recurring expense to APRL.

xiii. *We have gone through the details related to 'Consent to Operate' and we observe that the Govt. of Rajasthan has changed the terms and conditions prescribed for obtaining any Consents, by a way of increasing the fee for Consent to Operate which affects the economic position of APRL and it falls under the fourth bullet of the Article 10.1.1 related to Change in Law of the PPA. The same has been observed by the State Commission and we do not find any error or perversity in the findings recorded by the State Commission.*

Accordingly, this issue is also answered against the Discoms."

45. However, at the same time, perusal of the 'Note for Approval' dated 16.6.2011, placed on record by the Petitioner along with supporting documents, indicates that the as per Water (Prevention and Control of Pollution) Act, 1974 (in short, "the Water Act") and Air (Prevention and Control of Pollution) Act, 1981 (in short, "the Air Act"), the Petitioner had already paid Rs. 10 lakh (under each Act) towards Consent Fee on 6.6.2006 for its 1200 MW generating station. However, due to change in configuration of the generating station and the necessary amendment incorporated in accorded environment clearance, CECB (Chhattisgarh Environment Conservation Board) has demanded Rs. 15 lakh (under the Air Act and the Water Act) for grant of consent to operate. In this regard, we clarify that the entitlement of the Petitioner for compensation towards the increase in Consent Fee shall be limited to the extent of increase in Consent Fee/ Consent Renewal Fee due to the amendment to the Water (Prevention and Control of Pollution) (Consent) Chhattisgarh Rules, 1975 dated 6.10.2016 and not on account of its own action of changing the configuration of its generating station.

46. Accordingly, the compensation on account of revision in consent fee shall be reimbursed by TANGEDCO in the monthly bill on pro-rata basis. The Petitioner shall furnish copies of the payment made, supported by auditor certificate, while claiming the expenditure under Change in Law and shall also furnish an undertaking to the effect that such incremental Consent Fee is not due to the change in configuration of its generating station and consequent amendment incorporated in environment clearance.

(d) Increase in coal cost on account of levy of royalty

47. During the course of hearing and vide written submissions, the Petitioner submitted that it is not pressing for increase in cost due to change in levy of royalty. Accordingly, the Commission is not going into the merits of the said claim.

(e) Increase in cost due to introduction of Environment (Amendment) Rules, 2015

48. The Petitioner has submitted that subsequent to the cut-off date i.e. 27.2.2013, MoEF&CC vide Notification dated 7.12.2015 introduced the Environment (Protection) Amendment Rules, 2015 (hereinafter referred to as 'the 2015 Amendment Notification') and amended the Environment (Protection) Rules, 1986. As per 2015 Amendment Notification, the Petitioner is required to undertake measures for plant retrofitting, such as, installation of Flue Gas De-sulphurization (FGD) system in order to comply with revised emission standards. The Petitioner has submitted that to install FGD system, it is required to incur substantial capital expenditure, as the technology envisaged under the Environment Rules, includes setting up of additional plant, machinery and equipment, as well as, carrying out necessary modifications to the existing plant, machinery and equipment. It has been submitted that the requirement of installation of FGD system to comply with the

revised emission norms specified in the 2015 Amendment Notification is covered under Change in Law in terms of Article 10 of the PPA.

49. The Petitioner has further submitted that Ministry of Power vide letter dated 30.5.2018 wherein direction has been issued to the Commission under Section 107 of the Act, has also recognized the 2015 Amendment Notification as Change in Law event. The Petitioner has submitted that the Commission in its various orders has considered the 2015 Amendment Notification as Change in Law event. The Commission in its order dated 20.3.2017 in Petition No. 72/MP/2016 while granting in-principle approval for additional expenditure on account of installation of FGD system and associated facilities, directed the Petitioner therein to approach CEA for deciding the optimum technology, associated costs and major issues to be faced in installation of different systems in compliance of the 2015 Amendment Notification.

50. It has been submitted by the Petitioner that it had approached CEA seeking advice for suitable technology and indicative cost in installation of FGD system for compliance of the 2015 Amendment Notification. CEA vide its report dated 28.3.2019 advised that wet limestone based FGD or ammonia based FGD technologies are feasible for the generating station of the Petitioner. Based on the advice of CEA, the Petitioner has opted for wet limestone based FGD. CEA, in its report, indicated an additional increase in auxiliary power consumption of 1% (excluding 0.3% with CGH) and has given an indicative estimated cost of limestone based FGD, amounting to Rs. 0.435 crore per MW [capital expenditure (CAPEX) only], which is exclusive of operating cost (OPEX). OPEX will include reagent cost, cost towards water consumption, manpower cost, cost on account of additional auxiliary power consumption and by product handling cost, etc.

51. The Petitioner has submitted that based on the advice of CEA, it is already in the process of issuing tender for the purpose of installation of wet limestone based FGD system. It has been further submitted that on account of additional cost towards installation of FGD system, the Petitioner is entitled to compensation as the 2015 Amendment Notification is a Change in Law event. The Petitioner has submitted that it is also entitled for carrying cost from the date of notification of such event.

52. The Petitioner has submitted that pursuant to the 2015 Amendment Notification, the Central Pollution Control Board has also, in June 2018, issued guidelines for online continuous emission monitoring system. In compliance thereof, the Petitioner has installed a Mercury Analyser in order to have a continuous emission monitoring system of its generating station, which has cost Rs. 45 lakh.

53. TANGEDCO has submitted that as per paragraph 5.1(b) of the Ministry of Power letter dated 30.5.2018 (through which direction under Section 107 of the Act was issued to the Commission), the Petitioner cannot claim compensation under Change in Law. The Environmental Clearance (EC) granted to the Petitioner had been acquired prior to the date of bid deadline by the Petitioner itself and the said EC specifically requires the generator to provide for space provision for FGD system; to allocate separate funds for implementation of environmental measures; and also to include the same as part of the project cost. Therefore, the Petitioner cannot deviate from the conditions mandated under EC. It has been submitted by TANGEDCO that as per the conditions of EC, cost of provision of FGD should have been included in the project cost which is reflected in the fixed cost now. TANGEDCO has also placed reliance on the judgment of APTEL dated 21.1.2013 in

Appeal No. 105/2011 (JSW Energy Limited v. MSEDCL and Ors.) (in short, 'JSW Case').

54. TANGEDCO has further submitted that since 7.12.2015, the Petitioner was aware of the 2015 Amendment Notification and it was mandatory on the part of the Petitioner to comply with the direction given under the said Notification. However, the Petitioner has filed the present Petition only on 9.1.2020 and there is no explanation for not taking any action since December 2015 and for not filing the Petition within the stipulated three years of limitation. Placing reliance on the decision of Hon`ble Supreme court in the case of AP Power Co-ordination Committee Vs. Lanco Kondapalli Ltd. [(2016) 3 SCC 468], it has been submitted by TANGEDCO that the Petitioner having failed to comply with the MoEF&CC notification in time, it cannot now claim the cost under Article 10 (Change in Law) of the PPA after lapse of three years. The cost to be incurred in compliance of the various notifications, which are sought to be implemented and claimed beyond three years are required to be borne by the Petitioner. It is also submitted by TANGEDCO that the Petitioner having failed to comply with the 2015 Amendment Notification in time, in the event the claim is allowed, it can only be at the price prevalent in the financial year 2015-16.

55. TANGEDCO has submitted that the Petitioner is seeking in-principle approval for implementation of FGD system to comply with revised emission standards pertaining to SO_2 as per the 2015 Amendment Notification. However, the Petitioner has failed to comply with the process specified in Regulations 11 and 29(1) of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2019 inasmuch as it has failed to share the details such as its proposal, detail of proposed technology as specified by CEA, scope of work, phasing of

expenditure, schedule of completion, estimated cost, detailed computation of indicative impact on tariff of beneficiaries and other relevant details.

56. The Petitioner in its rejoinder has submitted that paragraph 5.1(b) of the letter of Ministry of Power dated 30.5.2018 specifically states that 2015 Amendment Notification shall not be a Change in Law where requirement of pollution control system was mandated under the EC of the plant before the notification of the Environmental Rules. However, there was no such mandate upon the Petitioner for installation of FGD equipment or for installation of any pollution control system, at the time of grant of EC to the Petitioner, which only provided that the Petitioner needs to provide a space provision for FGD. Further, the said EC specifically mentioned that space provision is to be made for FGD, if it is required at a later stage. This clearly means that at the time of grant of EC, there was no stipulation/ condition upon the Petitioner for installation of FGD.

57. It has been submitted by the Petitioner that the said stipulation/ condition was imposed upon the Petitioner, only after issuance of the 2015 Amendment Notification and the Petitioner was subjected to a statutory obligation qua installation of FGD system and associated works in its generating station. With regard to reliance placed by TANGEDCO on JSW Case, the Petitioner has submitted that the said judgment was rendered by the APTEL, prior to the 2015 Amendment Notification, and as such, is based on a completely different set of facts, to that of the present case. Additionally, the said judgment was passed on the premise that EC which was granted to the generator (i.e. JSW Energy Limited), specifically provided and stipulated for allocation of separate corpus of funds for installation of FGD, which ought to be included in the project cost. However, no such provision/ stipulation/

condition qua any separate allocation of funds for installation of FGD is mandated in EC granted to the Petitioner. Therefore, reliance of TANGEDCO on the judgment in JSW Case is completely misplaced and misleading, as it is based on a completely different and distinguishable set of facts from that of the present case.

58. The Petitioner in its written submissions has also relied upon the APTEL judgment dated 28.8.2020 passed in Appeal No. 21 of 2019 (Talwandi Sabo Power Ltd. v. Punjab State Electricity Regulatory Commission & Anr.), which distinguished the earlier judgment in JSW Case. The Petitioner has submitted that its case is squarely covered by the aforesaid judgment in Appeal No. 21 of 2019.

59. We have considered the submissions made by the parties. MoEF&CC is a Ministry under Government of India and, therefore, is an Indian Government Instrumentality in terms of Article 1.1 of the PPA. The Environment (Protection) Rules, 1986 was issued by MoEF&CC in exercise of powers conferred under Sections 6 and 25 of the Environment (Protection) Act, 1986 which qualify as “law” in terms of the PPA dated 23.8.2013. The norms for emission of environmental pollutants to be complied with by the thermal power plants were prescribed in Schedule I of Environment (Protection) Rules, 1986. The cut-off date in present case under the PPA is 27.2.2013 and the MoEF&CC issued the Environment Clearance for setting up the generating station on 14.7.2007. MoEF&CC notified the 2015 Amendment Rules on 7.12.2015 amending Schedule I of the Environment (Protection) Rules, 1986 which provided for revised parameters for water consumption, particulate matters, Sulphur Dioxide, Oxides of Nitrogen and Mercury in respect of thermal power plants. The cut-off date of the PPA being 27.2.2013, the 2015 Amendment Notification which was notified on 7.12.2015 by MoEF&CC, an

Indian Government Instrumentality in terms of the PPA, which revised the environmental norms prescribed in the Environment (Protection) Rules, 1986, qualifies as Change in Law event in terms of the PPA dated 23.8.2013.

60. However, TANGEDCO has submitted that since the EC dated 14.7.2007 contemplated the space provision for FGD system and separate funds to be allocated for implementation of environmental measures, the Petitioner was required to factor the cost of FGD into the project cost which is reflected in the fixed cost quoted by the Petitioner at the time of bidding. TANGEDCO has claimed that the Petitioner cannot now claim the additional expenditure towards FGD system in order to get increased fixed cost.

61. We have considered the submissions of TANGEDCO. The relevant provision of the EC dated 14.7.2007 granted to the Petitioner provides as follows:

> *"3.*
> *….*
> *(v) Space provision shall be made for Flue Gas De-sulphurisation (FGD) unit of requisite efficiency of removal of SO2, if required at a later stage.*
>
> *(xxi) Separate funds should be allocated for implementation of environment protection measures along with item-wise break-up. These cost should be included as part of the project cost. The funds earmarked for the environment protection measures should not be diverted for other purposes and year-wise expenditure should be reported to the Ministry…."*

62. TANGEDCO has also relied on the APTEL's judgment dated 21.1.2013 in Appeal No. 105 of 2011 in the case of JSW Energy Limited v. Maharashtra State Electricity Distribution Co. Ltd. & Anr, wherein it was held as under:

> *"50. Summary of Our Findings*
>
> *(i) The Environmental Clearance dated 17.5.2007 provided for installation of the FGD at a later stage. It further mandated that separate funds must be allotted for installation of the said FGD, which are to be included in the project cost. Admittedly, these conditions have not been complied with by the Appellant after getting the Environmental Clearance.*

(ii) On a careful perusal of the relevant clause of the PPA, the Environmental Clearance dated 17.5.2007 and the letter issued by the Central Government on 16.4.2010, it is clear that there is no "Change in Law" as contemplated by the PPA. In fact, the letter dated 16.4.2010 issued by the Central Government merely confirms the requirement of installation of the FGD intimated through the letter dated 17.5.2007. It merely informs the Appellant the state of the installation of the FGD. Therefore, there is no "Change in law" as claimed by the Appellant. The reasonings given in the impugned order for rejecting the claim of the Appellant are perfectly valid in law."

63. *Per contra*, the Petitioner has relied upon the judgment dated 28.8.2020 passed by the APTEL in Appeal No. 21 of 2019 & batch in the case of Talwandi Sabo Power Ltd. v. Punjab State Electricity Regulatory Commission & Anr. to contend that in the said judgment, the APTEL has distinguished the JSW Case, on the basis of facts and that the Petitioner's case is squarely covered by the said decision. The relevant extracts of the judgment dated 28.8.2020 are extracted as under:

"97. It is also seen that the environmental clearance granted by MoEF & CC for thermal power projects prior to revised norms of 2015 with reference to installation of FGD system broadly categorized into two types. One category covers the projects which were given environmental clearances similar to that of the Appellants envisaging a condition that a space provision is to be kept for the installation of the FGD equipment if required at a later stage in terms of environmental Regulations. The other category of environmental clearance is where MoEF & CC specifically mandated installation of FGD equipment as a statutory requirement.

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99. Therefore, in all those thermal power projects where there was requirement of only space provision, it is difficult to accept the contention of the Respondents that in spite of absence of specification and design for FGD, the Appellants were still required to estimate the cost and earmark funds anticipating revised norms after six years or so from the cut-off date. ....Depending upon the requirement in terms of conditions of EC recommended by relevant authority some thermal plants like JSW, Adani etc., might have installed FGD system. But one has to see what were the existing norms, conditions imposed in EC or other allied documents before notification in question and not the availability of FGD system in the market. As already stated, anticipating such change, substantial cost cannot be included as capital cost of the project at the time of bidding itself. If such requirement of FGD did not occur during the entire term of the Project, the consumer would be burdened with higher tariff. As a matter of fact, such substantial and significant cost as part of capital cost of the project would not have been approved at all.

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102. The Respondent-Commission opined that requirement for installation of FGD equipment was already envisaged as part of environmental clearance for the project, therefore, it does not amount to Change in Law event. We note from the records and the documents relied upon by the Appellants that a standard clause was introduced in the ECs for many of the thermal power projects i.e., only the provision for space for the installation of FGD. As discussed above, there was no clarity on any of the norms for SO2 and NOx emission, which required specific FGD system and/or SNCR or any other suitable technology for achieving efficiency level as existed at the time of granting ECs. One cannot find fault with the Appellants or any other project of similar nature with similar facts that they did not estimate and earmark funds for the installation of such mechanism as stated above. Therefore, we are of the opinion that installation of FGD and funds for the same was not contemplated or envisaged in the ECs, which were issued six year prior to the Notification in question.

103. It is pertinent to mention Para 58 of "Energy Watch Dog & Ors vs. CERC" (2017 (14) SCC 80) on this issue. The Hon'ble Supreme Court Categorically rejected the submissions advanced by the Appellants before the Apex Court that the relevant policy (controversy pertaining to Change in Law event in Energy Watch Dog's case) was announced much prior to the effective date, therefore, it has to be presumed that Generators were aware of such policy much prior to the effective date or promulgation of the revised norms.

…..

104. It is clear from the above opinion of the Apex Court that Law does not work on contemplations unless an action factually takes place i.e., cause of action for such action. We also place reliance on the Judgment of the Hon'ble Supreme Court in "Ahmedabad Municipal Corp. vs. Haji Abdulgafur" (1971) 1 SCC 757. Therefore, we have no hesitation to opine that installation of FGD became mandatory only after the issuance of Notification in December 2015 and the strict compliance came to be implemented when directions of CPCB came to be issued in this regard.

105. According to the Respondents, the judgment of this Tribunal in JSW's case is binding on this Tribunal as settled position. Even otherwise, one has to see whether facts and circumstances in the instant appeals and facts and circumstances in JSW's case are one and the same. Based on the judgment of JSW's case, the Respondent-Commission denied the claim of Appellants pertaining to Change in Law event.

106. On perusal of records and documents, we note that there were two ECs in the case of JSW. Appellants stand is that apart from requirement of space provision for installation of FGD, if required at a later stage, it also conditioned installation of FGD and earmarking of funds for environmental protection measures i.e., FGD system. The Appellant-NPL brings on record the distinguishing facts of their appeal with JSW case, which reads as under:

……

109. It is well settled legal principle that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. In this regard, reliance is placed on the decisions of the Hon'ble Supreme Court in "Zee Telefilms Ltd. vs. Union of India" (2005 (4) SCC 638 (para 254); "P.S. Sathappan vs. Andhra Bank Ltd."

(2004 (11) SCC 672) "Bhavnagar University v. Palitana Sugar Mills Pvt. Ltd." (2003 (2) SCC 111) and "KTMTM Abdul Kayoom & Anr. v. Commissioner of Income Tax, Madras" (AIR 1962 SC 680).

110. Therefore, one significant factual difference can change the determination of a legal principle. It is also a well settled legal principle that each case has to be considered and disposed of in the factual matrix pertaining to the said case.

111. Before issuing ECs pertaining to the Appellants there must have been environment study of the area of the projects and also allied assets of the projects. In JSW case because of existence of marine life i.e., fisheries and Alphanso Orchids, Krishi Vidyapith was requested to make a study of environmental impact on the surroundings situated within 10 kms radius from the project and allied assets of the project. This study led to requirement of installation of FGD system and accordingly second EC incorporating above condition including earmarking of funds was mandated. JSW itself undertook to comply with the conditions recommended in the report of Krishi Vidyapith if necessary for controlling the impact of the power plant on the surrounding environment. Contrary to this position, in the case of projects in question, there is no such ecologically sensitive area within 10 kms radius of the projects in question. As stated above, such conditions were imposed for the power projects of Assam and Chittinad. Therefore, we agree with the contention of the Appellants that though a standard condition of provision for space demarcation for FGD was mentioned in all the ECs, but depending upon facts and circumstances pertaining to each project, ECs were granted with condition of installation of FGD and the funds required for the same to be earmarked.

112. The ECs of the projects of the Appellants, no doubt, at condition (vi) only refer to provision of space if required at a later stage was made, but there was no specific condition mandating earmarking of funds for FGD installation for SO2 or SNCR or any other suitable mechanism for NOx.

….
124. It is seen that based on the Expert Appraisal Committee report, ECs were granted. In both the reports Expert Appraisal Committee while granting recommendation for ECs did not state anything with regard to earmarking of funds towards installation of FGD for SO2 and any suitable system to control NOx emissions. Out of total cost of the project of Rs.8000 Crores, a sum of Rs. 461 Crores was earmarked for the existing environmental protection measures so far as Appellant-TSPL's project is concerned. As far as the Appellant-NPL is concerned, the total cost of the project was about Rs.5500 Crores, which included Rs. 410.10 Crores for environment protection measures. In none of the documents, based on which ECs were provided, there is no mandate for installation of FGD and no separate fund was directed to be earmarked for FGD installation and/or SNCR system.
…….

127……Apparently, in ECs pertaining to the instant appeals there is no condition of earmarking of funds for SNCR/any other suitable technology for controlling NOx emissions. It is not in dispute that the existing low NOx burners with over fire

assembly installed may not ultimately achieve the prescribed NOx levels. This is clearly mentioned in the feasibility reports prepared by Tata Consulting Engineers Limited. In terms of PPA, change in legal position during "operation period", which has an adverse financial impact on the projects of the Appellants, would definitely quality as a Change In Law event.

64. APTEL in the aforesaid judgment observed that a standard clause was introduced in the EC for many of the thermal power projects that required only the provision for space for the installation of FGD system and in such cases, there was no specific mandate for installation of FGD system and/or SNCR or any other technology for reduction of SO_2 or NOx. We note that in the present case also, in the EC granted to the Petitioner, it is only mentioned that the space is to be provided for FGD, if required at a later stage and as in case of EC granted to various other TPPs, there is no specific stipulation provided towards installation of FGD system and/or SNCR or any other such technology.

65. Further, APTEL in the above judgment has also distinguished its earlier judgment in JSW Case by observing that in JSW Case, there were two ECs. In JSW Case, because of the existence of marine life i.e. fisheries and Alphanso Orchids, Krishi Vidyapith was requested to make a study of environmental impact on the surroundings situated within 10 km radius from the project and allied assets of the project. The initial EC granted in JSW Case itself incorporated a condition that "...*The detailed study regarding the impact on Alphonso mango and marine fisheries as recommended in the report of Dr. B. S. Konkan Krishi Vidyapith Shall be undertaken. Based on same, addition safeguard measures as required will be taken by the proponent.....The cost towards undertaking the study and implementation of safeguard measures, if any, will be borne by the project.*" The said study led to requirement of installation of FGD system and accordingly, second EC was granted

to JSW Energy Limited after incorporating above condition including earmarking of funds was mandated. However, APTEL observed that in the case of Talwandi Sabo and Nabha Power, EC granted only required provisions for space for installation of FGD, if required, to be made. We note that in the case of the Petitioner as well, EC mandated provision for space only and there is no specific requirement for installation of FGD system. Therefore, the argument of TANGEDCO comparing the present case with that of JSW Case has no basis and deserves to be rejected.

66. TANGEDCO has also contended that the Petitioner has failed to take timely actions in terms of the 2015 Amendment Notification and that the Petitioner has filed the present Petition only on 9.1.2015. It has also been submitted that there is no explanation for not taking action immediately after the 2015 Amendment Notification and for not filing the Petition within the stipulated three years of limitation and it has, therefore, been submitted that the claim of the Petitioner is time barred. In this regard, the reliance has also been placed on the decision of the Hon'ble Supreme Court in A.P. Power Coordination Committee v. Lanco Kondapalli Ltd. [(2016) 2 SCC 468].

67. The aforesaid contention of TANGEDCO, in our view, is not correct. Upon the notification of the 2015 Amendment Notification, the Petitioner, as early as on 14.1.2016, had intimated TANGEDCO regarding the Change in Law event qua the 2015 Amendment Notification stating that the Petitioner had initiated the assessment of financial implication in terms of additional recurring/ non-recurring expenditure. Moreover, in terms of the 2015 Amendment Notification, initially, all the thermal power plants were required to meet the revised emission standards within two years from the date of publication of the notification. However, considering the technical

challenges, time requirements (for design & engineering, approvals, funds arrangement, tendering, erection and commissioning etc.) for installation of emission control systems, shutdown requirements, availability of technologies and suppliers as well as the phasing plan for implementation as proposed by Ministry of Power, MoEF&CC vide its letter dated 7.2.2017 directed CPCB to direct all the thermal power plants to ensure compliance with the revised norms as specified in the 2015 Amendment Notification by 2022. On this basis, CPCB had specified time limit to the various thermal power plants for complying with the revised emission norms ranging from 2018 to 2022, which was to be abided by thermal power plants. Thereafter, the MoEF&CC vide Notification dated 1.4.2021 has further extended for time limit for implementation of emission control system to comply with the revised emission standards as specified in the 2015 Amendment Notification. The said Notification also provides for constitution of task force to categorise the thermal power plants in three categories on basis of their location and the time line ranging from 2022 to 2025 to comply with the revised emission standards. In the above circumstances, it cannot be contended that the Petitioner has failed to take action timely in terms of 2015 Amendment Notification. Therefore, the contention of TANGEDCO is rejected.

68. Having dealt with objections of TANGEDCO, we proceed to analyse the claims of the Petitioner as regards installation of FGD and de-NOx system.

69. The Petitioner in the present Petition is seeking in-principle approval for the expenditure to be incurred in installing the FGD system in order to comply with the revised emission norms. In this regard, the Petitioner approached CEA for approval of suitable technology. CEA vide letter dated 28.3.2019 has recommended suitable FGD technology and corresponding indicative cost for the Petitioner's Project. CEA

also suggested that the FGD system installation should be done through the process of open competitive bidding in consultation with representative of the lead Procurer and that lead Procurer may be invited to participate in the bidding process. However, responsibility for adhering to timelines of relevant Pollution Control Board was the responsibility of the Petitioner. Relevant extracts from the report of CEA as regards technology and cost aspects, are as under:

*"**TECHNOLOGY***

In feasibility report BALCO Power Plant has opted for "Wet Lime Stone" technology. However following two So2 removal technologies are technically & Commercially feasible at BALCO-KORBA .

i. Wet Lime stone Base FGD.

ii. Ammonia Based FGD

In case Wet FGD (Lime stone based) is considered by BALCO-KORBA, the reagent source may be selected based on availability of limestone, limestone purity, cost and quality. Additionally Source of limestone should be chosen with life cycle cost analysis.

In case of Ammonia based FGD, utmost case shall be needed to handle the reagent and the demand of the by product may be ascertained. Also disposal/ use of by product if no demand is available, may be taken care off.

ENGINEERING ASPECTS

1. *Absorber-Individual absorber for each Unit.*

2. *Limit SO_2 below environment norms with up to 0.6 % Sulfur content in Coal.*

3. ***Absorber Lining —** Such as Ceramic Tiles/clad sheet of C-276/Alloy 59 /Steel Alloy/Glass flake filled multi-functional epoxy /glass flake lining etc.*

4. ***Other lining -** All ducts, effluent handling pits or concrete zone etc. to be protected with glass flake based coating/ Steel Alloy Lining etc. Piping may be of flake glass based coating/carbon steel rubber lined (CSRL)/rubber lining however lesser diameter pipes can be of GRP (Glass Reinforced Plastic) / FRP (Fibre Glass reinforced Plastic)/ Alloy Steel material etc.*

5. ***Monitoring System-** Measurement of SO_2 in the outlet and inlet are important for the calculation of the FGD efficiency and control the*

amount of reagent. The important parameters for deciding monitoring system are response time (shorter the better), less inventory (common for inlet and outlet), less maintenance (high maintenance interval). In view of this proven advance technology may accordingly be selected considering the plant specific requirements.

6. ***Auxiliary Power Consumption-*** *The maximum Additional Auxiliary power Consumption for complete FGD facilities will be maximum 1.0% for Limestone based FGD and maximum 0.8% for Ammonia based FGD.*

If the existing chimney is used, the requirement of GGH may be seen. The additional Auxiliary Power Consumption with GGH (only if using old chimney) will be maximum 0.3%.

INDICATIVE COST ESTIMATION

An indicative Base cost estimation is done by CEA in order to facilitate BALCO-KORBA determine the price for installation of FGD on the major heads of CAPEX & OPEX.

CAPEX

The indicative estimated cost for Limestone based FGD has been estimated Rs. 0.435 Cr/MW (CAPEX only). In case of ammonia based FGD, CAPEX is typically around 10 % less as compared to wet lime stone based FGD, considering the fact that Pulverizes / crushers / milling system / transfer belts is not required as ammonia is in liquid form. The circulation pumps and associated system will be much smaller and also the waste water disposal system is not required in ammonia based FGD.

This cost estimation is based on the price of equipment, infrastructure and related services discovered during transparent and open bidding being carried out by Central and State Sector Undertakings.

This indicative cost is the "Base Cost" only and does not include Opportunity cost (associated with generation loss due to interconnection of chimneys with absorber) and Taxes-Duties. This Indicative "Base cost is calculated considering new chimney without GGH.

The cost of retrofitting FGD for BALCO-KORBA should be discovered through open competitive bidding in consultation with lead procurer. The lead procurer (to be invited by BALCO-KORBA) may participate in bidding process till final award of FGD contract.

CHIMNEY & LINING

In feasibility report BALCO-KORBA has opted for using existing chimney and converting it to wet stack instead of going for new wet stack. The existing chimney can be converted to wet and provided by fixing some appropriate corrosion protection lining.

OPTION I (As opted by BALCO-KORBA)

Using existing chimney and converting it to wet stack by applying appropriate corrosion resistant lining and to avoid loss of generation a temporary chimney may be provided above each absorber or on ground.

This section will further speak about the other chimney options for BALCO-KORBA

Option II
Four new independent wet chimney on ground or above each absorber.

Option Ill
Two new independent wet chimney on ground with Two flues on each.

Final selection of chimney may only be made after conducting a lifecycle cost benefit analysis and seeing technical feasibility of available options before opting for either of above option.

Corrosion Protection Lining for Chimney:

Currently there are various lining material is available in the industry which can resist the sulfur based acids and which can be used for corrosion protection as mentioned below.

i. *Borosilicate Block lining*
ii. *Steel Alloy lining*
iii. *Glass flake filled epoxy phenol novolac .*
iv. *Glass flake lining etc.*

BALCO-KORBA is advised to study "the cases of failure" of all lining material used for corrosion protection for various sections of FGD system. The life cycle cost analysis for selection of these materials may be done considering these failure studies for optimum selection."

70. Based on the above recommendation of CEA, the Petitioner has submitted that it has opted for wet limestone based FGD technology and has prayed for in-principle approval of the expenditure to be incurred towards installation of the same.

71. We observe that the Ministry of Power has recognised the problems being faced by generating companies on account of financial institutions seeking assurance of fund flow after installation of FGD system. The Ministry of Power, vide

its letter dated 21.1.2020, addressed to Secretary to Forum of Regulators (who is also Secretary to the Commission), stated as under:

"2. A copy of the minutes of the meeting held in Ministry of Power on 21.10.2019 with Banks/Financial Institutions regarding issues related to financing of FGDs is enclosed wherein as per Para 4.2 inter alia mentioned as follows:

"IPPs requested that provisional tariff on account of FGD may be allowed as Banks are not willing to finance unless there is clear cut CERC orders on additional tariff, which could be possible only when FGD is commissioned. It was requested that based on the estimation of cost by CEA, CERC may fix provisional tariff after allowing some discount (say 10%). Chairperson, CEA informed that they had drafted some norms on provisional tariff and it had been sent to CERC for consideration. Hon'ble Minister advised CEA to follow up with CERC and this issue may be taken up in the Forum of Regulators (FOR) meeting which could be convened at the earliest. The matter regarding fixation of provisional tariff on account of FGD installation may be discussed with CERC."

3. In this regard, CEA has informed that:

i. Financing of pollution control equipment is mainly an issue for the projects commissioned under section 63 of the Act.

ii. During discussion, CERC pointed out that a few generating companies, which have set up generating station under section 63 of the Act have filed petition for compensation due to change in law impacting revenue and cost during the operating period.

iii. CERC has already passed some orders in such petitions recommending requirement of installing additional equipment to meet revised environmental norms as change in law and giving liberty to the Petitioner to approach to the commission for determination of revised norms.

iv. CERC was of the opinion that normally such assurance from regulator should be sufficient for the lenders to fund additional capital expenditure required to meet revised environmental norms.

4. In view of the above, it is requested that the issue on 'provisional tariff' on account of installation of FGD, may be included as an Agenda for the next Forum of Regulators (FOR) meeting and the decision taken, therein, may be communicated to Ministry of Power, at the earliest."

72. Further, the Ministry of Power vide its letter dated 20.4.2020 addressed to the Secretary of the Commission, has stated as under:

"I am directed to refer to the meeting taken by Secretary (Power) through Video Conferencing on 09.04.2020 (copy of the meeting are enclosed as Annex-I) and this Ministry's letter of even number dated 21.01.2020 (copy enclosed as Annex-II) with regard to taking up the matter with Forum of Regulators on the above mentioned subject. It was observed that CERC was also contemplating to amend the Tariff

Regulations 2019-24 to provide for norms for installation of FGDS for complying with the environmental operating norms as Change in Law.

2. In the above-mentioned meeting held on 09.04.2020, it was recommended that in view of the stipulated timelines decided by the Hon'ble Supreme Court for installation of FGDs, investment approval may be accorded by CERC at the earliest possible on applications of FGDS submitted by Gencos based on the CEA"s benchmark cost and indicative technologies so as to facilitate funding of banks/ FIs. It was also felt that upon completion of the installation of FGD or a month before the completion of installation, the applications for fixation/revision of tariff may be filed and CERC would, as far as possible, dispose them in a time frame of 3 months so that the Gencos are not cash strapped and the lenders feel assured. Similar process may also be taken up by CERC with SERCs.

3. Accordingly, CERC is requested to take necessary action and devise a mechanism vide which applications of Gencos for installation of FGD as per norms of CEA, gets decided by the Appropriate Commission within a period of three months for Investment approval. The same is expected to facilitate assurance for lenders on their lending to Gencos for installation of FGD.

4. This issue with the approval of Hon'ble Minister of State (IC) Power and NRE."

73. We note that CEA in its recommendation (quoted in paragraph 69 above) has stated as under:

CAPEX

The indicative estimated cost for Limestone based FGD has been estimated Rs. 0.435 Cr/MW (CAPEX only). …..

This cost estimation is based on the price of equipment, infrastructure and related services discovered during transparent and open bidding being carried out by Central and State Sector Undertakings.

This indicative cost is the "Base Cost" only and does not include Opportunity cost (associated with generation loss due to interconnection of chimneys with absorber) and Taxes-Duties. This Indicative "Base cost is calculated considering new chimney without GGH."

74. It is clear that the cost recommended by CEA is an indicative cost that is primarily based upon rates of such installation by Central/ State PSUs. CEA has also stated that the costs are 'base cost' only. The generating companies such as the Petitioner are required to discover the price through transparent competitive bidding process. Therefore, while approving costs of installation of FGD system, the

Commission needs to take into account the recommendations of CEA and the discovered cost through transparent competitive bidding process and then take a view as to reasonableness of costs.

75. The Petitioner has submitted that based on the advice of CEA, the Petitioner had issued tenders for the purpose of installation of the Wet Limestone based FGD system and had issued the public notices in this regard on 23.10.2019, 25.10.2019 and 28.10.2019 in various national and international newspapers, namely, Business Standard, Financial Times (London) and China Daily. The Petitioner vide its e-mails dated 25.4.2020 and 29.4.2020 had also invited TANGEDCO to witness in the bid opening process on 29.4.2020. However, no response was received from TANGEDCO. Further, pursuant to the aforesaid bidding process, the Petitioner has also issued Letter of Intent (LoI) dated 29.6.2020 to Zhejiang TUNA Environmental Science & Technology Co. Ltd. Total hard cost for the implementation of FGD system at the Petitioner's project as indicated in the LoI is as under:

Particulars	**Wet Limestone based Flue gas Desulphurization**	
	With Existing Chimney Lining & GGH	**With Wet Stack above absorber top**
On Shore (INR)	227,72,41,511	221,63,44,698
Off Shore (USD)	4,32,42,624	3,65,28,974
Off Shore (INR) (Conversion rate 1 USD – Rs.75 taken for reference purpose only)	324,31,96,800	273,96,73,050
Total (INR)	552,04,38,311	495,60,17,748
Per MW basis (Rs. in crore/MW)	**0.460**	**0.413**

76. Thus, the approximate hard cost of installation of FGD system with existing chimney line & GGH works out to Rs.0.460 crore/MW and that with Wet Stack above absorber top works out to Rs. 0.413 crore/MW. While the former is higher than the indicative cost recommended by CEA (Rs. 0.435 crore/ MW) by Rs. 0.025 crore/MW

(Rs. 0.460 crore/MW – Rs. 0.435 crore/MW), the latter is lesser than the indicative cost recommended by CEA by Rs. 0.022 crore/MW (i.e. Rs. 0.435 crore/MW – Rs. 0.413 crore/MW). In the above circumstances, we deem it appropriate to provisionally allow the hard cost of FGD system as recommended by CEA i.e. Rs. 0.435 crore/MW.

77. In view of the above, the Commission accords provisional approval to the Petitioner for incurring the following hard cost on provisional basis:

Description	**Recommendation of CEA (Rs. crore/MW)**
FGD base Cost	0.435

78. CEA, in its report, has observed that since inter-connection of chimneys with absorber may result in loss of generation of plant, the Petitioner is advised to minimize this interconnection time by taking suitable measures so that the 'Opportunity Cost' associated with interconnection may have least impact on tariff revision. However, CEA has not specified number of days for which units would have to be shut down for interconnection of FGD system with the chimney. The Commission is of the view that the beneficiary and the Petitioner shall plan the interconnection of FGD system with the main plant by synchronizing it with annual overhaul. Therefore, the Commission is not considering the opportunity cost at this stage. However, the same would be considered on actual number of days of shutdown after prudence check to the effect that the Petitioner has tried to synchronize the interconnection of FGD system with annual overhaul and has consulted the beneficiary/Respondent in this respect.

79. The Petitioner has also prayed for devising of a methodology towards calculating tariff in relation to the estimated increase in O&M Expenses, other Operating Norms like Auxiliary Power Consumptions, Station Heat Rate, Spares, Water Charges, landed cost of reagents and gypsum disposal cost, etc. with the corresponding increase in capacity charges and energy charges as result of complying with the Change in Law event of installation of FGD system and associated system.

80. The Commission is of the view that on account of installation of FGD system, there would be impact on O&M expenditure (R&M, manpower, services, maintenance water charges etc.) and impact of additional auxiliary energy consumed on quoted capacity & energy charges under PPA and reagent charges. The recurring operational charges i.e. O&M expenses and cost of reagent would increase the cost of generation of electricity and additional auxiliary consumption would (i) reduce the recovery of the quoted capacity charges as the ex-bus available energy corresponding to normative availability would reduce; and (ii) increase the cost of generation due to more consumption of fuel per unit of ex-bus energy delivered. Therefore, such recurring operational expenditure are allowable expense during operational period of the generating station in terms of the PPA as an impact of Change in Law event i.e. installation of FGD system in terms of the 2015 Amendment Notification.

81. However, the extent of compensation and manner in which the compensation is to be recovered by the Petitioner on monthly basis as supplementary capacity charges and supplementary energy charges, in due consideration of additional capital expenditure on installation of emission control equipment including FGD, cost

of reagent consumption, O&M expenses and impact of additional auxiliary consumption is already under finalization by the Commission.

82. We note that few other similar petitions have been filed by other generating companies in respect of their generating stations wherein tariff has been determined through the tariff based competitive bidding route under Section 63 of the Act. PPAs in those cases also contain similar provisions as Article 10.2 of the instant Petition i.e. there is no explicit provision with regard to methodology for compensation for Change in Law events which occur during the operation period. In those cases too, the PPAs have left it for the Commission to decide at the compensation for any increase/ decrease in revenues or cost on account of Change in Law during the operation period. Since the FGD system is required to be installed by all thermal generating stations as per the 2015 Amendment Notification, more such Petitions are likely to be filed by generating companies for determination of compensation on account of Change in Law during operation period. In view of above, the Commission has thought it appropriate to adopt a uniform compensation mechanism in respect of all such generating stations.

83. Therefore, the Commission vide order dated 23.4.2020 in Petition No. 446/MP/2019 directed staff of the Commission to float a Staff Paper at the earliest on the issue of compensation mechanism and tariff implications on account of the 2015 Amendment Notification in case of those thermal power plants where the PPA does not have explicit provision for compensation mechanism during the operation period and the PPA requires the Commission to devise such mechanism and invite comments/suggest from all the stakeholders. In compliance of the same, on 5.9.2020 the staff of the Commission floated the Staff Paper titled “Mechanism for

Compensation on account of Change in Law for compliance with Revised Emission Standards notified by MoEF&CC in respect of Competitively Bid Thermal generating".

84. Based on the comments/suggestions obtained on the Staff Paper, the Commission through the Draft Suo-Motu order dated 12.4.2021 in Petition No. 06/SM/2021 had solicited comments/suggestions of stakeholders on the proposed methodology. Based on the comments/suggestions of stakeholders received, the Commission through the Suo-Motu order dated 13.8.2021 in the said Petition No. 06/SM/2021 has finalised the methodology. The Petitioner shall be at liberty to approach this Commission to recover the compensation on account of installation of FGD in terms of the mechanism finalized by the Commission in Petition No. 06/SM/2021.

85. The Petitioner has also sought in-principle approval for the expenditure to be incurred towards procurement, installation, commissioning, operation and maintenance of De-NOx systems for meeting the NOx emissions based on the cost discovered through competitive bidding process. However, the Petitioner has not submitted the NOx emission level at present and OEM Guaranteed value (at 6% oxygen level). Further, in this regard, we observe that the Petitioner's generating units are already equipped with combustion control technologies of Low NOx Burners (LNB) with supply of Over Fire Air, through Close-Coupled Over Fire Air (COFA) ports above the windbox as well as Separated Over Fire Air (SOFA) ports in the furnace. Further, vide Notification of MoEF&CC dated 19.10.2020, the norms of NOx have been revised to 450 mg/Nm^3 from that of 300 mg/Nm^3 that was stipulated through the 2015 Amendment Notification. As per the Feasibility Report for its units

as prepared by Tata Consulting Engineers, the baseline NOx emission level at full load is 341 mg/Nm^3 (design) and 385 mg/Nm^3 (worst). Also, the maximum baseline NOx emission level at part load/ during operation changes is 395 mg/Nm^3 (design) and 445 mg/Nm^3 (worst) and are, thus, already meeting the new NOx emission level of 450 mg/Nm^3 with existing Low NOx Burners in place. Therefore, in our view, there is no need for any further additional capital expenditure to be incurred in this regard.

86. It is noticed that apart from the above, the Petitioner has also prayed for reimbursement of additional cost to the tune of Rs. 45 lakh incurred towards installation of 'Mercury Analyser' in compliance of CPCB's Guidelines for Continuous Emission Monitoring Systems as issued in June, 2018. It is noted that no Change in Law notice has been issued by the Petitioner to TANGEDCO in regard to the aforesaid Guidelines. In none of the Change in Law notices issued by the Petitioner, there is any mention regarding aforesaid CPCB Guidelines or installation of Mercury Analyser despite the Guidelines having been issued in June 2018 and the Petitioner having placed the order for installation of Mercury Analyser on 19.11.2018. Therefore, in our view, the Petitioner is not entitled for compensation towards installation of Mercury Analyser.

(e) Carrying cost

87. The Petitioner has submitted that as per Article 10 of the PPA, 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 term 'economic position' does not limit itself to a simple correlation of increased expenditure and a corresponding compensation amount and includes compensation in terms of carrying costs incurred on account of

Change in Law events. It has been submitted by the Petitioner that carrying cost is compensation for time value of money and it is different from interest. Therefore, the Petitioner is entitled to be compensated and restored to the same economic position as if such Change in Law events had not occurred.

88. TANGEDCO has submitted that the Petitioner is not entitled to any carrying costs in respect of the above claims from the date of incurring of additional amounts till the date of payment by the Respondent. There is no provision in the PPA to allow carrying cost on the amount covered under Change in Law till its determination is done by the Commission. Terms and conditions of the PPA govern the parties. The liability for making payment of carrying cost arises when the cost incurred is determined, supplementary invoice is raised and due date lapses. In addition to the above, the Petitioner should bring on record the cost incurred by it for the said change in law as on the date of claim. In the absence of any document, no claim of carrying cost is payable.

89. *Per contra*, the Petitioner has submitted that TANGEDCO has ignored the decisions of APTEL and the Hon'ble Supreme Court wherein the payment of carrying cost has been upheld.

90. We have considered the submissions of the Petitioner and TANGEDCO. According to the Petitioner, it should be restored to the same economic position in terms of Article 10.2 as if the Change in Law had not occurred. APTEL in its judgment dated 13.4.2018 in Appeal No. 210/2017 (Adani Power Limited v. Central Electricity Regulatory Commission & Ors.) has allowed the carrying cost on the claim under Change in Law and held as under:

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

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

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

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

"*10. A reading of Article 13 as a whole, therefore, leads to the position that subject to restitutionary principles contained in Article 13.2, the adjustment in monthly tariff payment, in the facts of the present case, has to be from the date of the withdrawal of exemption which was done by administrative orders dated 06.04.2015 and*

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

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

92. 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 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".

93. 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 events from the effective date of Change in Law till the actual payment to the Petitioner. 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 TANGEDCO within due date.

94. 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:-

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

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."

95. In line with above order of the Commission, in the instant case, the Petitioner shall be eligible for carrying cost at the actual interest rate paid by the Petitioner for arranging funds (supported by Auditor`s Certificate) or the Rate of Interest on Working Capital rate as per applicable CERC Tariff Regulations or the Late Payment Surcharge Rate as per the PPA, whichever is the lowest.

96. In view of the above discussions, the issue raised is answered.

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

97. Articles 10.2 and 10.3 of the PPA provides for the principle for computing the impact of change in law during the operating period as under:

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

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

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

10.3 Relief for Change in Law

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.

10.3.4 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."

98. The Petitioner is entitled to compensation on account of Change in Law events admitted by the Commission during the operating period. However, it is clarified that the Petitioner shall be entitled to claim the compensation, in accordance with this order, after the expenditure allowed under Change in Law during operating period (including the reliefs allowed for operating period, if any) exceed 1% of the value of Letter of Credit in aggregate and for this purpose, the Petitioner shall furnish all the relevant documents supported by Auditor Certificate.

99. Article 10 of the PPA provides for the principle for computing the impact of Change in Law during the operating period. These provisions enjoin upon the Commission to decide the effective date from which the compensation for decrease in revenue or increase in expenses shall be admissible to the Petitioner. In our view, the effect of Change in Law as approved in this order shall come into force from the date of commencement of supply of electricity to the procurer or from the date of occurrence of Change in Law event, whichever is later.

100. Approaching the Commission every year for allowance of compensation for such Change in Law is a time-consuming process, which may result in payment of

carrying cost. We have, therefore, specified a mechanism, in the following paragraphs, considering the fact that compensation for Change in Law events allowed as per PPA shall be paid in subsequent years of the contract period:

(a) Monthly “Change in Law” compensation shall be effective from the date of commencement of supply of electricity to the Respondent or from the date of Change in Law, whichever is later.

(b) The monthly relief corresponding to Evacuation Facility Charges shall be calculated by the Petitioner based on coal quantity which is lower of i) actual quantity of coal consumed during the month corresponding to scheduled energy ii) coal consumption for scheduled energy calculated based on norms of operation as mentioned in the Tariff Regulations for the period in which the month for which relief is being calculated lies. If 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 Change in Law.

(c) Monthly relief corresponding to increase in Consent Fee shall be calculated by the Petitioner on pro-rata basis.

(d) Having arrived at the coal quantity eligible for relief, monthly compensation corresponding to a Change in Law event shall be arrived after multiplying the eligible quantity with the impact of the Change in Law event on price of the coal (Rs./MT). The monthly compensation so arrived at shall be distributed among the procurer(s) who have scheduled the power during the month in proportion to their share in the scheduled energy.

(e) At the end of the year, the Petitioner shall reconcile the actual payment made towards Change in Law with the books of accounts duly audited and certified by Auditor. The reconciliation statement duly certified by the Auditor shall be kept in possession by the Petitioner so that same could be produced on demand from TANGEDCO.

(f) Year-wise compensation henceforth shall be payable only if such increase in revenue or cost to the Petitioner is in excess of an amount

equivalent to 1% of LC in aggregate for a contract year as per provision of the PPA.

(g) If the Petitioner is eligible to receive compensation for Change in Law as per the provisions of the PPA, the compensation amount allowed shall be shared by the Procurer (TANGEDCO) based on the scheduled energy.

(h) The mechanism prescribed above is to be adopted for payment of compensation due to Change in Law events allowed as per Article 10.3.2 of the PPA for the subsequent period as well.

101. In the above mentioned manner, the issue raised is answered.

Summary of Decisions

102. Based on the above analysis and decisions, the summary of our decision under the Change in Law during the operating period of the project is as under:

Sr. No.	Change in Law events	Decision
1.	Introduction of Evacuation Facility Charges	Allowed
2.	Additional cost towards fly ash transportation	Not allowed. Liberty granted to approach with necessary details
3.	Increase in Consent Fee	Allowed in terms of Paragraphs 45 and 46
4.	Increase in cost due to increase/ change in levy of royalty	Not pressed
5.	Increase in cost due to introduction of Environment (Amendment) Rules, 2015	Allowed in terms of Paragraphs 76 & 77
6.	Carrying cost	Allowed

103. The Petition No. 161/MP/2020 is disposed of in terms of above.

Sd/-	sd/-	sd/-
(P.K. Singh)	**(I.S. Jha)**	**(P.K. Pujari)**
Member	**Member**	**Chairperson**