CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 560/MP/2020

Coram:

Shri P.K.Pujari, Chairperson
Shri A.K.Goyal, Member
Shri P.K.Singh, Member

Date of Order: 24th October, 2021

In the matter of

Petition under Section 79(1) (b) and (f) of the Electricity Act, 2003 read with Article 10 of the Power Purchase Agreement dated 23.8.2013 and in terms of the liberty granted by the Commission in its order dated 13.12.2017 passed in Petition No. 189/MP/2016 for recovery of additional expenditure incurred due to the occurrence of various change in law events.

And
In the matter of

Jindal Power Limited,
Tamnar – 496107, District Raigarh,
Chhattisgarh **…….Petitioner**

Vs

Tamil Nadu Generation and Distribution Corporation Limited,
Nadippisai Pulavur, K.R. Ramasamy Maligai,
44-Anna Salai, Chennai – 600002
Tamil Nadu ….**Respondent**

Parties Present:

Shri Venkatesh, Advocate, Jindal Power
Shri Ashutosh Kumar Srivastava, Advocate, Jindal Power
Shri Abhishek Nangia, Advocate, Jindal Power
Ms. Isnain Mazumil, Advocate, Jindal Power
Shri Souvik Khamrui, Jindal Power
Ms. Anusha Nagarajan, Advocate, TANGEDCO
Shri Rahul ranjan, Advocate, TANGEDCO
Ms. M. Hemalatha, TANGEDCO
Shri S. Poonkodi, TANGEDCO

ORDER

The Petitioner, Jindal Power Limited, has filed the present Petition in terms of the liberty granted by the Commission in the order dated 13.12.2017 in Petition No.

189/MP/2016 and has sought compensation on account of the additional expenditure incurred due to occurrence of change in law events, namely, levy of Excise Duty on coal, levy of Entry Tax on coal, levy of Value Added Tax (VAT)/ Central Sales Act (CST), levy of Service Tax and carrying cost. The Petitioner has made the following prayers:

> *'(a) Hold and declare that increase in the total amount of Excise Duty payable is an event of Change in Law;*
>
> *(b) Hold and declare that increase in the total amount of Entry Tax payable is an event of Change in Law;*
>
> *(c) Hold and declare that increase in the total amount of VAT/CST payable is an event of Change in Law;*
>
> *(d) Hold and declare that increase in the total amount of Service Tax payable is an event of Change in Law;*
>
> *(e) Direct the Respondent to reimburse the carrying cost (interest) from the date of applicability of the respective change in law events claimed…."*

Brief Background of the case

2. Tamil Nadu Generation and Distribution Corporation Limited ('TANGEDCO') issued a Request for Proposal (in short 'the RfP') on 5.12.2011 for procurement of power for 'Medium Term' under Case I bidding process for meeting its base load power requirements in the State of Tamil Nadu. The Petitioner participated in the bidding process and submitted bid on 18.2.2012, which was the bid deadline. Pursuant to the submission of bid, the Petitioner was declared as the successful bidder at a levellised tariff of Rs. 4.9165/kWh for supply of 200 MW RTC (round the clock) power. Thereafter, a Power Purchase Agreement (hereinafter referred to as 'MT-PPA') was executed between the Petitioner and TANGEDCO on 29.6.2012 for the period from 1.9.2012 to 31.8.2017. The MT-PPA postulated usage of domestic coal from captive mines as the primary fuel to be used for generating electricity. The MT-PPA signed between the Petitioner and the Respondent and levelized tariff of

Rs. 4.9165/kWh quoted by the Petitioner was approved and adopted by Tamil Nadu Electricity Regulatory Commission ('TNERC') under Section 63 of the Electricity Act, 2003 (hereinafter referred to as 'the Act') vide order dated 17.4.2013 in P.P.A.P No. 7 of 2012.

3. Subsequently, TANGEDCO issued another RfP on 21.12.2012 for procurement of 1000 MW ± 20% RTC Power for 'Long Term' under Case-I bidding process for meeting its base load power requirements in the State of Tamil Nadu. Pursuant to the submission of bid, the Petitioner was declared as the successful bidder at a levelized tariff of Rs 4.91/kWh for supply of 400 MW RTC power and another PPA (hereinafter referred to as "LT-PPA") was executed between the Petitioner and TANGEDCO on 23.8.2013 for the period from 1.2.2014 to 30.9.2028 in this regard. This PPA postulated usage of domestic coal from linkage as the primary fuel to be used for generating electricity. The LT-PPA signed between the Petitioner and the Respondent at the levelized tariff of Rs. 4.91/kWh was approved and adopted by TNERC under Section 63 of the Act vide order dated 29.7.2016 in P.P.A.P No. 3 of 2014.

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

5. In terms of the provisions of the LT-PPA and MT-PPA entered into with TANGEDCO, the Petitioner had earlier approached the Commission through Petition No. 189/MP/2016 seeking compensation on account of additional expenditure incurred due to occurrence of various change in law events, namely, levy of Forest Transit Fee, payment of National Mineral Exploration Trust and payment of District

Mineral Fund, levy of Clean Energy Cess, levy of Electricity duty on Auxiliary Consumption, levy of Chhattisgarh Paryavaran Upkar evam Vikas Upkar, levy of Excise Duty on coal, levy of Entry Tax on coal, levy of Service Tax including Swachh Bharat Cess on Coal Transportation, levy of VAT and carrying cost. The said Petition came to be decided by the Commission vide order dated 13.12.2017, wherein the Commission allowed various change in law claims of the Petitioner as prayed therein. However, the claims relating to levy of Excise Duty on coal, levy of Entry Tax on coal, levy of Service Tax and levy of VAT were not allowed on account of want of relevant details/ documents and the Petitioner was granted liberty to approach the Commission along with requisite documents.

6. Accordingly, in terms of the liberty granted by the Commission in the order dated 13.12.2017, the Petitioner has filed the present Petition seeking compensation under LT-PPA on account of additional expenditure incurred due to occurrence of change in law events during the Operating Period, namely, levy of Excise Duty on coal, levy of Entry Tax on coal, levy of Service Tax, levy of VAT/CST and carrying cost along with the details/ documents in support thereof.

Submissions by the Respondent and Rejoinder by the Petitioner

7. The matter was admitted on 6.4.2021 and notice was issued to the Respondent to file its reply. The Respondent, TANGEDCO has filed reply on 13.7.2021 and the Petitioner vide its affidavit dated 26.8.2021 has filed rejoinder thereof.

8. The Respondent, TANGEDCO, in its reply, has mainly submitted as under:

(a) As per clause 2.4.1(B)(xi) of the RfP dated 21.12.2012, the bidder is required to take into account all costs including capital and operating costs, statutory taxes, levies, duties while quoting such tariff. It also includes any

applicable transmission costs and transmission losses from the generation source up to the inter-connection point. Availability of the inputs necessary for supply of power is required to be ensured by the seller and all the costs involved in procuring the inputs (including statutory taxes, duties, levies thereof) at the plant location must be reflected in the quoted tariff.

(b) In terms of financial bid format, the bidder had the option to quote the tariff as non-escalable and escalable components and the Petitioner had quoted energy charge as (i) quoted non-escalable energy charges: NIL, (ii) quoted escalable energy charges: Rs.0.815/kWh, (iii) quoted non-escalable inland transportation charges: NIL, and (iv) quoted escalable inland transportation charges: Rs. 0.525/kWh.

(c) The bidder was required to quote the base price of coal in escalable component and all taxes in non-escalable component and accordingly, the Petitioner had quoted the escalable energy charges of Rs. 0.815/kWh which includes the base price of coal along with taxes.

(d) The Commission notifies escalation index for domestic coal once in six months based on the Wholesale Price Index ('WPI') of the coal which reflects the change in price of the coal alone. Since the tariff of Rs.0.815/kwh is inclusive of base price of the coal and also the tax components, while escalating the quoted tariff with the index, all tax components are also getting escalated and the escalated tariff is used in payment of monthly energy bills.

(e) The compensation on account of change in law is the payment difference in cost due to change in taxes or introduction of taxes. The tax portion is also escalated while applying the index which is applicable for quoted escalable energy charges. Therefore, the escalated amount is deducted in compensation amount claimed by the Petitioner to avoid dual payment. The Petitioner has also agreed to deduction of the escalated amount from its change in law compensation amount claimed on the basis of the order of the Commission dated 13.12.2017 in Petition No. 189/MP/2016 and has signed an agreement dated 19.11.2020 to that effect. Similar methodology will be adopted in the present case also.

(f) The Petitioner is only required to be paid the balance after deducting the already paid tax portion which is escalated every month by the escalation

index in monthly bill thereby eliminating the dual payment of certain portion of change in law. If the Commission approves the change in law events, the compensation amount would be subject to deduction of escalated change in law in energy tariff except the introduction of new taxes.

9. The Petitioner, vide its rejoinder affidavit dated 26.8.2021, has mainly submitted has under:

(a) The Petitioner while submitting its bid and quoting the tariff under the competitive bidding process, was required to quote the break-up of tariff consisting of various components, namely, capacity charge, energy charge and transportation charges and was further free to quote each component of tariff under escalable or non-escalable heads.

(b) The escalable component quoted by the Petitioner is subjected to the application of escalation index published by the Commission for factoring any increase/ decrease under the corresponding head. Therefore, the escalation Index is applied only on the escalable components of the quoted tariff.

(c) In terms of the guidelines issued by Ministry of Power qua determination of tariff by bidding process, the Commission issues notification for the applicable discount rate, escalation rate for coal/ gas and inflation rate, every six months, for the purpose of better evaluation and payment. The escalation rate for domestic coal is computed based on the data on WPI for non-coking coal. The WPI considered is based on the Index notified by the Ministry of Commerce and Industry. Further, the escalation for inland transportation charges for coal is computed based on the data on coal freight rates. The data used for this index is collected from the Ministry of Railways.

(d) The fuel/ coal price escalation rates notified by the Commission cover only the changes in basic price of fuel. However, the change in rate/ percentage of taxes and duties on base price is not covered under the escalation index. For instance, the escalation rates notified by the Commission for transportation charges of coal covers only the variations in basic freight rates notified by the Ministry of Railways and that the change in rate of any taxes or any new taxes imposed by the Railways are not considered by the

Commission in the computation/ notification of escalation rates for transportation charges of coal.

(e) The escalation rates notified by the Commission, which are being issued since the inception i.e., prior to bidding and presently also, considers only the changes in basic price of fuel and basic railway freight rates for the purpose of escalation index. No other cost elements, such as increase in Clean Energy Cess, Royalty on Coal, Entry Tax, Excise Duty, Forest Tax or VAT, etc., are considered by the Commission while notifying the escalation rates. Since the CERC escalation index takes care of energy charge and transportation charge as it covers the increase in base price, covers changes in the base price of coal. The change in law provision, on the other hand, covers events and increases which affect the landed price of the coal.

(f) The escalation of energy charge and inland transportation charge are independent of the change in law events. Clean Energy Cess, Royalty, Electricity Duty on Auxiliary Consumption, Excise Duty, Forest tax, VAT and Service Tax, etc. are not the component of base price of coal or basic freight rate but are statutory taxes and duties made applicable on procurement of coal or on transportation and hence any increase in such taxes have to be dealt with in terms of the change in law provisions of the PPAs.

(g) Clause 6.2 of the National Tariff Policy amended on 28.1.2016, also provides that increase in taxes and levies are change in law events. Therefore, it is a settled position that increases in any applicable taxes, duties and levies will be covered under change in law provision and the same is not covered under the escalation index issued by the Commission from time to time. Various change in law events claimed by the Petitioner have been allowed by the Commission as well as the Appellate Tribunal for Electricity ('APTEL'). If such events were part of the escalation index as claimed by the Petitioner, the Commission would not have allowed them in cases of other generating companies.

(h) In terms of Clause 2.4.1.1(B)(xi) of the RfP, the bidder is required to bear in mind the prevailing rules/ regulations, statutory taxes, levies and duties at the time of submission of bid. According to the provisions of the RfP, the quoted tariff shall be an inclusive one including statutory taxes, duties and

levies. But the PPA gives express right to an affected party to claim change in law if the event qualifies in terms of Article 10 of the PPA. The RfP cannot override this right if an event qualifies as change in law. If an event qualifies as a change in law event, then the compensation must follow because otherwise Article 10 of the PPA will become redundant.

(i) There is no link whatsoever between the compensation as per the escalation index and the compensation as per change in law already held by the APTEL in its judgment dated 12.9.2014 in Appeal No. 288 of 2013 in the matter of Wardha Power Co. Ltd. v. Reliance Infrastructure Limited and Anr. Also, the APTEL, in very recent judgment dated 12.8.2021 in Appeal Nos. 22 of 2019 and 58 of 2019, in the matter of TANGEDCO v. CERC and Ors., has held that the Respondent cannot add word to PPA by seeking to deduce change in law compensation with the perceived/ alleged increase in the component of energy charges quoted in the bid which may or may not include the applicable tax as on the bid date.

(j) The agreement dated 19.11.2020 relied upon by TANGEDCO regarding change in law compensation should not be taken into consideration on the premise that the circumstances at the time of entering into the said agreement were quite different. Prior to signing of the said agreement, a huge amount of compensation on account of change in law was due from TANGEDCO and if not paid at that time, it would have left the Petitioner's cash flow in complete lurch and without any recourse, leading to default on its debt servicing and liability to make coal payments and eventually, turning its plant into an NPA. Hence, upon urgent requirement of fund under such pressing circumstances, the Petitioner had entered into the said agreement. The agreement dated 19.11.2020 executed between the Petitioner and TANGEDCO forms part of the subject matter and pertains to Appeal No. 337 of 2018 and Appeal No. 123 of 2018 filed before APTEL and has no bearing/relevance in the present case.

(k) Each case depends on its facts and a close similarly between one case and another is not enough because a single significant detail may alter the entire aspect. Therefore, a similar methodology for deduction of escalated amount from the claimed amount cannot be adopted in the present Petition.

10. The matter was heard on 17.9.2021 through video conferencing. During the course of hearing, learned counsel for the Petitioner and the Respondent mainly reiterated the submission made in their respective pleadings and the same are not repeated here for sake of brevity. Based on the request of the learned counsel for the parties, the Commission permitted the Petitioner and Respondent to file their note of arguments/ written submission, if any, within a week. The Petitioner and the Respondent have filed their respective written submissions.

Analysis and Decision

11. We have considered the submissions of the Petitioner and the Respondent and perused documents available on record. The Petitioner had earlier approached the Commission through Petition No. 189/MP/2016 seeking compensation in terms of Article 10 of the LT-PPA and MT-PPA on account of additional expenditure incurred due to occurrence of various change in law events during the Operating Period which had adversely impacted the economic position of the Petitioner in course of supply of power from its Project to the Procurer/ TANGEDCO**.** The said Petition came to be decided by the Commission vide order dated 13.12.2017 and the summary of the decisions of the Commission in respect of the various change in law claims of the Petitioner is under:

"*70. 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:*

S. No.	***Parameter***	***MT PPA***	***LT PPA***
1	*Levy of Forest Transit Fee*	*Allowed in terms of para 31*	*Allowed in terms of para 31*
2	*Payment of National Mineral Exploration Trust and Payment of District Mineral Fund*	*Allowed in terms of para 39*	*Allowed in terms of para 39*
3	*Levy of Clean Energy Cess*	*Allowed upto 30.6.2017 or the last date of supply of power as per the PPA whichever is earlier (Para 43,*	*Allowed upto 30.6.2017 or the last date of supply of power as per the PPA whichever is earlier (Para 43,*

S. No.	Parameter	MT PPA	LT PPA
		44 & 45)	*44, and 45)*
4	*Levy of Electricity duty of Auxiliary Consumption*	*Allowed in terms of para 55*	*Allowed in terms of para 55*
5	*Levy of Chhattisgarh Paryavaran Upkar evam Vikas Upkar*	*Allowed as per para 49*	*Allowed as per para 49*
6	*Levy of Excise Duty on coal*	*Not allowed on account of want of relevant documents*	*Not allowed on account of want of relevant documents*
7	*Levy of Entry Tax on coal*	*Not allowed on account of want of relevant documents*	*Not allowed on account of want of relevant documents*
8	*Levy of Service Tax including Swachh Bharat Cess on Coal Transportation*	-	*Not allowed on account of want of relevant documents*
9.	*Levy of VAT*	*Not allowed on account of want of relevant documents*	*Not allowed on account of want of relevant documents*
10.	*Carrying cost*	*Not Allowed*	*Not Allowed*

12. Thus, in the aforesaid order, the claims of the Petitioner for change in law events, namely, levy of Excise Duty on coal, levy of Entry Tax on coal, levy of Service Tax and levy of VAT were not allowed on account of want of relevant details/ documents and the Petitioner was granted liberty to approach the Commission for appropriate relief along with all required documents. In terms of the liberty granted by the Commission in the aforesaid order, the present Petition has been filed by the Petitioner seeking compensation for the aforesaid change in law events and carrying cost thereon, along with the various requisite details, albeit only in respect of LT-PPA.

13. However, prior to examining the aforesaid change in law claims of the Petitioner and the details/ documents now furnished in support thereof, it would be appropriate to deal with certain primary objections raised by the Respondent, TANGEDCO.

14. TANGEDCO has submitted that in terms of clause 2.4.1(B)(xi) of the RfP, the bidder was required to take into account all cost including the statutory taxes, levies and duties while quoting the tariff and in terms of the financial bid format, which gave bidders an option to quote the tariff in escalable and non-escalable components, the Petitioner had quoted the escalable energy charge at Rs. 0.815/kWh which includes therein the base price of coal along with taxes. TANGEDCO has contended that since the aforesaid tariff of Rs.0.815/kWh is inclusive of base price of coal and tax components, when the escalation index published by the Commission is applied thereon, the tax components are also getting escalated and that such escalated tax components are required to be deducted from the change in law compensation on account of changes in taxes in order to avoid the dual payment.

15. *Per contra*, the Petitioner has submitted that the escalation index notified by the Commission from time to time only covers the basic price of fuel/ railway freight and not the taxes and levies thereon. The change in law provisions, on the other hand, cover the events and increases such as the taxes and duties applicable on procurement of coal or on transportation of coal, which affect the landed price of coal. The Petitioner has further submitted that it is a settled position that increases in any applicable taxes, duties and levies will be covered under change in law provisions since the same are not covered under the escalation index issued by the Commission. Also, as per clause 2.4.1.1(B)(xi) of the RfP, the bidder was required to bear in mind the prevailing rules/ regulations, statutory taxes, levies and duties at the time of submission of bid. Further, when the PPA gives express right to an affected party to claim change in law if the event qualifies in terms of Article 10 of the PPA, the provisions of RfP cannot override this right, otherwise, Article 10 of the PPA will become redundant. The Petitioner has also placed reliance on the judgment of the

APTEL dated 12.9.2014 in Appeal No.288 of 2013 (Wardha Power Co. Ltd. v. Reliance Infra. Ltd. and Anr.) and judgment dated 12.8.2021 in Appeal Nos. 22 of 2019 and 58 of 2019 (TANGEDCO v. CERC and Ors.)

16. We have considered the submissions made by the parties. It is relevant to note that the contention of TANGEDCO that increases in duties, taxes and levies are covered by the escalation indices issued by the Commission from time to time and, therefore, the change in law compensation cannot be allowed or ought to be reduced to that effect (as contended in the present case in variation of its earlier argument) has already been considered and rejected by the Commission in its various previous decisions. In this regard, we may refer to the decision of this Commission dated 31.5.2018 in Petition No. 170/MP/2016 (KSK Mahanadi Power Co. Ltd. v. TANGEDCO), the relevant extract of which reads as under:

> *"15. We have examined the submission of the Petitioner and Respondent, TANGEDCO. The contention of the Respondent is that any increase in duties and levies are covered in escalation index issued by the Commission and therefore it cannot be allowed as Change in law. We are unable to accept this contention as such interpretation will render the provisions of Change in Law in the PPA redundant. Moreover, the escalation indices notified by this Commission consider only the changes in the basic price of fuel and basic railway freight rates and do not include any change in rates of taxes, duties and cess. The respondents have further argued that as per RFP, the bidder is expected to take into account all costs within statutory taxes, levies, duties while quoting the tariff and the since the quoted tariff includes taxes, duties and cess assumed at the time of bid, the successful bidder gets escalation on the taxes, duties and cess also. In our view such an approach, if accepted, will lead to reopening of the bid which is not permissible in terms of the judgment of the Appellate Tribunal dated 10.4.2017 in Appeal No. 161 of 2015 & IA No. 259 of 2015 and Appeal No. 205 of 2015 which is extracted as under:*
>
> > *"44. It is true that according to the provisions of the RFP, the quoted tariff shall be inclusive one including statutory taxes, duties and levies. But the PPA gives express right to an affected party to claim Change in Law if the event qualifies thus in terms of Article 13. The RFP cannot override this right if an event qualifies as a Change in Law. The Competitive Bidding Guidelines (Article 4.7 thereof has already been reproduced hereinabove) and the PPA have to be read together. If an event qualifies as a Change in Law event then the compensation must follow because otherwise Article 13 of the PPA will become redundant. But, this will of course depend on facts and circumstances of each case. Facts of each case will have to be carefully studied before granting such a relief. It is rightly pointed out that in Wardha Power Company Limited, this Tribunal has rejected the obligation of any escalable index or indexing of cost of fuel in order*

to determine the compensation due on account of Change in Law. Sasan will have to be compensated keeping the law in mind."

17. Further, the aforesaid contention has also been examined by the APTEL in its various decisions and came to be rejected by the APTEL as well. In this regard, we may refer the decision of the APTEL dated 14.8.2018 in Appeal No. 119 of 2016 in the matter of Adani Power (Rajasthan) Limited v. RERC and Ors. The relevant extract of the aforesaid judgment reads as under:

"xvi. From the above discussions it is clear that the CERC escalation index for transportation covers only the basic freight charges. The Bidder was required to suitably incorporate the other taxes, duties, levies etc. existing at the time of bidding. The Bidder cannot envisage any changes happening regarding taxes, levies, duties etc. in future date. As such, any increase in surcharges or imposition of new surcharge after the cut-off date i.e. 30.7.2009 in the present case cannot be said to be covered under CERC Escalation Rates for Transportation Charges, which is indexed for basic freight rate only ..."

18. Also, the very same arguments as raised by TANGEDCO in the present case were also raised in Appeal No. 22 of 2019 (TANGEDCO v. BALCO and Ors.) before the APTEL, which have been rejected by the APTEL in its judgment dated 12.8.2021 in the said appeal. The relevant extract of the said judgment reads as under:

"49. It is the case of the TANGEDCO that escalable energy charge quoted by BALCO consists not only coal price but also all the taxes and levies and therefore by applying escalation rate on energy tariff every month, not only the coal price and taxes get escalated but also the hidden component like profit also get escalated. It is precisely for this reason, no further compensation on account of change in law can be allowed to BALCO as it would result in double payment.

50. The TANGEDCO has further submitted that compensation on change in law is the payment of difference in cost due to changes in taxes or introduction of taxes. The generator/seller has to prove increase/decrease in cost of power generation or revenue/ expense due to change in law. A portion of tax components has already been escalated and paid in monthly tariff. The argument of the TANGEDCO is that no further compensation on account of change in law should be allowed to BALCO and if allowed, then the same should be allowed only after adjusting the amount of taxes and duties which have already been paid to BALCO on monthly basis as tariff.

……

57. We also note the submission of BALCO that in a Section 63 bid PPA, the tariff quoted by the generator cannot be re-opened. BALCO executed the PPA with TANGEDCO on the basis of the provisions of the bidding guidelines, and the standard RFP and PPA documents, which did not contemplate any correlation between change in law compensation and compensation based on escalable parameters, as both are distinct. Therefore, TANGEDCO cannot today shift the goal post, and add words to the

PPA by seeking to deduct change in law compensation with the perceived/ alleged increase in the component of energy charges quoted in the bid which may or may not include the applicable tax as on the bid date."

19. In view of the above, the contention of TANGEDCO is not sustainable.

20. TANGEDCO has further submitted that the Petitioner has also agreed to the aforesaid methodology of compensation in respect of the compensation amount to be payable in terms of the order of the Commission dated 13.12.2017 in Petition No. 189/MP/2016 due to occurrence of various change in law events approved by the Commission therein and has entered into an agreement to that effect. On the basis of this agreement, the Petitioner has also withdrawn the Appeal No. 337 of 2018 filed by it before the APTEL. Thus, in the present case also, if the Commission approves any of the change in law events, the compensation amount will be subject to a deduction of escalated change in law component in energy tariff except for the introduction of new taxes.

21. *Per contra*, the Petitioner has submitted that the said agreement ought not to be taken into consideration on the premise that the circumstances at the time of entering into the said agreement were quite different as of today. Prior to signing of the said agreement, a huge amount of compensation on account of change in law was due from TANGEDCO and if not paid at that time, it would have left the Petitioner's cash flow in complete lurch and without any recourse, leading to defaulting on its debt servicing by the Petitioner and turning its Plant into an NPA. It has also been submitted that the said agreement was without prejudice to its rights/ claims and it formed part of the subject matter and pertained to Appeal Nos. 337 of 2018 and 123 of 2018 filed before the APTEL and has no bearing/ relevance in the present case.

22. We have considered the submissions made by the parties. It is noticed that pursuant to the Commission's order dated 13.12.2017 in Petition No. 189/MP/2016 allowing compensation to the Petitioner on account of occurrence of certain change in law events and during the pendency of the Appeal Nos. 123 of 2018 and 337 of 2018 filed by the parties before the APTEL against the said order, the Petitioner and TANGEDCO agreed, through an agreement dated 19.11.2020, upon certain computation methodology for change in law compensation; undertook the reconciliation; and the payments were made by TANGEDCO to the Petitioner in terms thereof. However, it is pertinent to note that the said computation methodology and the amount of compensation thereof did not form part of the order of this Commission dated 13.12.2017 in Petition No. 189/MP/2016 rather was an outcome of agreement between the parties entered into on their own volition.

23. Even otherwise, the aforesaid Appeals were filed against the order of the Commission dated 13.12.2017 and, hence, related to the claims decided by the Commission in Petition No. 189/MP/2016. We also note that the calculation/ reconciliation arrived in the said agreement dated 19.11.2020 was limited to the issues involved in the aforesaid Appeals. This fact is borne out of the order of the APTEL dated 2.3.2020 in the aforesaid Appeals, where TANGEDCO and the Petitioner were directed to "*place on record Calculation Memo in terms of impugned order including carrying cost payable by them pertaining to the controversy involved in these two appeals*".

24. However, the claims raised in the present Petition were not subject matter of the Appeal pending before the APTEL and, hence, there was no agreement between the parties with respect to these claims. Thus, the said agreement dated 19.11.2020, in our view, is extraneous to present proceedings and consequently, no directions

can be issued for payment of the compensation of change in law events to be considered by the Commission in the present case in terms of the said agreement dated 19.11.2020.

25. TANGEDCO, in its next objection has submitted that claims regarding change in law events of the Petitioner are barred under law. It has been submitted that by entering into a settlement agreement, without reserving their right to make any further claims, the Petitioner has waived all rights in respect of further compensation pertaining to such change in law events that were recognized by the APTEL. Even assuming the Petitioner was to make out such a case, the only recourse available to the Petitioner would have been to approach the APTEL. In this regard, reliance has been placed on the judgment of the Hon'ble Supreme Court in the case of Triloki Nath Singh Vs. Anirudh Singh [(2020) 6 SCC 629]. It has been submitted that the computation of change in law compensation under the PPA has been arrived at, reconciled and computed by agreement of both parties. Any other approach would re-open the entire settlement agreement which has already been acted upon by both parties having already made the entire payment due thereunder. Therefore, the same method for calculating the change in law compensation ought to be followed even if the Commission were to award the additional compensation in the present case.

26. We have considered the submissions of TANGEDCO. The submission made by TANGEDCO by relying on the judgment of the Hon'ble Supreme Court has no relevance in the present matter. In this regard, relevant extracts of observations made by the Hon'ble Supreme Court in the said judgment is as under:

> ***"1.*** *The question arises in the appeal for our consideration is as to whether the decree passed on a compromise can be challenged by a stranger to the proceedings in a separate suit.*
> ***

21. *In the present case, the partition suit was filed in 1978 and after the decision of the trial court, the matter went in first appeal and eventually, Second Appeal No. 495/86 before the High Court. During the pendency of first appeal being continuation of the suit as stated, one of the parties to the pending proceedings, namely, Sampatiya allegedly entered into a sale deed with the appellant on 6-1-1984. Indubitably the issue regarding right, title and interest in respect of the land which was the subject-matter of sale deed dated 6-1-1984, was still inchoate and not finally decided. In that sense, the claim of the appellant was to be governed by the decision in favour of or against Sampatiya in the pending appeal. It must follow that the alleged transaction effected in favour of the appellant by a sale deed dated 6-1-1984 ought to abide by the outcome of the said proceedings which culminated with the compromise decree passed by the High Court in Second Appeal No. 495/86 dated 15-9-1994.*

22. *Indeed, the appellant was not a party to the stated compromise decree. He was, however, claiming right, title and interest over the land referred to in the stated sale deed dated 6-1-1984, which was purchased by him from Sampatiya judgment-debtor and party to the suit. It is well settled that the compromise decree passed by the High Court in the second appeal would relate back to the date of institution of the suit between the parties thereto. In the suit now instituted by the appellant, at best, he could seek relief against Sampatiya, but cannot be allowed to question the compromise decree passed by the High Court in the partition suit. In other words, the appellant could file a suit for protection of his right, title or interest devolved on the basis of the stated sale deed dated 6-1-1984, allegedly executed by one of the party (Sampatiya) to the proceedings in the partition suit, which could be examined independently by the Court on its own merits in accordance with law. The trial court in any case would not be competent to adjudicate the grievance of the appellant herein in respect of the validity of compromise decree dated 15-9-1994 passed by the High Court in the partition suit.*

23. *In other words, the appellant can only claim through his predecessor — Sampatiya, to the extent of rights and remedies available to Sampatiya in reference to the compromise decree. Merely because the appellant was not party to the compromise decree in the facts of the present case, will be of no avail to the appellant, much less give him a cause of action to question the validity of the compromise decree passed by the High Court by way of a substantive suit before the civil court to declare it as fraudulent, illegal and not binding on him. Assuming, he could agitate about the validity of the compromise entered into by the parties to the partition suit, it is only the High Court, who had accepted the compromise and passed decree on that basis, could examine the same and no other court under the proviso to Order 23 Rule 3 CPC. It must, therefore, follow that the suit instituted before the civil court by the appellant was not maintainable in view of specific bar under Rule 3-A of Order 23 CPC as held in the impugned judgment…"*

27. On a bare perusal of the aforesaid observations made by the Hon'ble Supreme Court, it emerges that the issue therein pertained to challenge of a compromise decree passed by a High Court by a third party before a Civil Court. The said judgment has no application and relevance in the present proceedings for the following reasons:

(a) As stated above, the said agreement dated 19.11.2020 pertained to the issues raised before the APTEL in Appeal No. 337 of 2018 and Appeal No. 123 of 2018. However, the issues raised in the present Petition relate to separate claims which were not subject matter of the said Appeals before the APTEL. Therefore, in so far as the agreement dated 19.11.2020 is concerned, it does not encompass the issues raised herein.

(b) The judgment of the Hon'ble Supreme Court which adjudicated on the right of a third party to challenge a compromise decree is not applicable in the present case as the Petitioner has not challenged the said agreement as void or illegal before this Commission.

28. In view of the above and the fact that claims of the Petitioner in the present petition were not the subject matter of the appeal before the APTEL and, therefore, cannot be covered under the said agreement dated 19.11.2020, the referred judgement of the Hon'ble Supreme Court has no application in the instant petition that covers change in law claims that are yet to be adjudicated upon and decided. The Commission vide order dated 13.12.2017 in Petition No. 189/MP/2016 allowed compensation towards certain change in law events while in respect of certain other change in law claims in which relevant documents were not filed, liberty was granted to the Petitioner to approach the Commission along with all the relevant details in support thereof. Since the present Petition has been filed pursuant to liberty granted by the Commission in order dated 13.12.2017, the contention of TANGEDCO that claim of the Petitioner is barred under law is not sustainable.

29. Accordingly, we now proceed to examine the various change in law claims raised by the Petitioner in the present case:

(A) Levy of Excise Duty on Coal

30. The Petitioner has submitted that as on cut-off date of the LT-PPA i.e. 27.2.2013, the applicable Excise Duty was 6% along with 2% education cess and

1% high education cess, which was factored in the bid tariff. However, after the cut-off date, South Eastern Coalfields Limited ('SECL') vide its letter dated 8.3.2013 directed for inclusion of the components, namely 'royalty' and 'stowing excise duty' for imposition of Central Excise Duty, applicable retrospectively from 1.3.2011. Further, on 25.3.2013, SECL issued a public notice stating that the components which will be considered for assessing the Central Excise Duty will include (a) Basic Coal Value, (b) Crushing & Sizing charges, (c) SILO Charge, (d) Surface Transportation charges, (e) Royalty, (f) Stowing Excise Duty, (g) Terminal Tax, (h) Forest Cess, (i) CG Environment Cess, and (j) CG Development Cess.

31. The Petitioner has further submitted that Ministry of Finance, Government of India vide its Notification dated 28.2.2015 exempted Education Cess and Higher Education Cess from the ambit of Central Excise Duty which resulted in net applicable Central Excise Duty of 6%. Thus, while the rate of Excise Duty remained at 6%, the bucket of items to compute assessable value of Excise Duty has been increased by SECL and such items have had an increase due to various subsequent notifications, which is a change in law event. The Petitioner has submitted that in terms of SECL Notification dated 25.3.2013, Excise Duty is payable on District Mineral Fund ('DMF'), National Exploration Trust ('NMET), Forest Transit Fee and Chhattisgarh Paryavaran Evam Vikas Upkar. Also, there has been increase in DMF and NMET, Forest Transit Fee and Chhattisgarh Paryavaran Evam Vikas Upkar after the cut-off date, which has already been allowed as change in law event by the Commission vide order dated 13.12.2017. Therefore, increase in the quantum of aforesaid taxes/ imposition/ cess has also resulted in consequent increase in the total amount of Excise Duty payable by the Petitioner and, thus, it qualifies as 'change in law' event in terms of 5th bullet of Article 10.1.1 of the LT-PPA. The Petitioner has submitted that in compliance with the direction of the Commission vide

order dated 13.12.2017, the Petitioner has submitted auditor certificate certifying the payment made towards change in law events claimed in the present case with respect to LT-PPA. It has also been submitted that the issue whether increase in Excise Duty payable by generating company would qualify as change in law event is no more *res intergra* and in this regard reliance has been placed on the various decisions of this Commission and judgments of the APTEL.

32. We have considered the submissions of the Petitioner. The Petitioner has submitted that in terms of Notification of SECL dated 25.3.2013, Excise Duty is payable on DMF, NMET, Forest Transit fee and Chhattisgarh Paryavaran Evam Vikas Upkar. Also, DMF, NMET, Forest Transit fee and Chhattisgarh Paryavaran Evam Vikas Upkar have increased after cut-off date and the same have been allowed as change in law by the Commission vide order dated 13.12.2017 in Petition No. 189/MP/2016. Increase in the quantum of aforesaid taxes/ imposition/ cess has resulted in increase in total amount of Excise Duty payable and, therefore, it qualifies as change in law under Article 10 of the LT-PPA. The Petitioner has further submitted that SECL issued a public notice stating that the components which will be considered for assessing the Central Excise Duty will include (a) Basic Coal Value, (b) Crushing & Sizing charges, (c) SILO Charge, (d) Surface Transportation charges, (e) Royalty, (f) Stowing Excise Duty, (g) Terminal Tax, (h) Forest Cess, (i) CG Environment Cess, and (j) CG Development Cess.

33. The Commission in its various decisions has allowed inclusion of the various components for arriving at assessable value of coal for Central Excise Duty after the cut-off date as change in law under the terms of PPA on the basis of requisite clarification issued by the concerned office of the Assistant Commissioner, Central GST and Central Excise Division. In its order dated 31.5.2018 in Petition No.

170/MP/2016 (M/s KSK Mahanadi Power Company Ltd. vs. TANGEDCO), the Commission held as under:

> *"38. We have considered the submissions of the parties. As on the cut-off date, Excise Duty on coal was at the rate of 6.18% on the determined sale price of coal which admittedly form the basis of the bid submitted by the Petitioner. By Notification dated 28.2.2015, Education Cess and Secondary & Higher Education Cess have been exempted on Excise Duty on coal, thereby leaving a net applicable Central Excise Duty of 6%. Since the change in Excise Duty has been introduced through an Act of Parliament and has impacted the expenditure of the seller, the same is covered under Change in law in terms of Article 10.1.1 of the PPA. Accordingly, the Respondents are entitled to the reimbursement of Excise Duty on coal. The Petitioner has furnished SECL Notice No. SECL/ BSP/S&M/ RS/619 dated 25.3.2013 which considers components like Crushing/ Sizing Charges, Surface Transportation Charge, Royalty, Stowing Excise Duty etc for assessing Central Excise Duty on coal. Since this letter has been issued by SECL after 25.3.2013 for payment of Excise Duty on coal, based on Notification of Ministry of Finance, GOI, the same shall be considered as Change in law. It is clarified that the Commission has held that crushing and sizing charges, SILO charges, Surface Transportation Charges are not admissible under Change in law. However, these expenditures have been considered for the computation of assessable value of coal for the purpose of Excise Duty. Therefore, the Petitioner cannot claim these charges under change in law. The Commission in its order dated 16.3.2018 in Petition No. 1/MP/2017 (GMRWEL vs MSEDCL & ors) has considered this issue and has decided the following:*
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> > *"161. All components indicated by SECL for computation of assessable value of coal such as the value of coal, Stowing Excise Duty, contribution to National Mineral Exploration Trust and District Mineral Foundation, Sizing Charges, Surface Transportation Charge, Niryat Kar, Chhattisgarh Development Tax and Chhattisgarh Environment Tax (except royalty) are in the nature of "Price-cum-duty" and shall be considered as part of the assessable value of coal for the purpose of computation of Excise Duty. The Commission has not allowed the expenditure of Sizing Charges and Surface Transportation Charges under Change in Law. However, these charges have been allowed to be included in the assessable value of coal for the purpose of computation of Excise Duty. It is clarified that allowing these charges for inclusion in the assessable value for computation of Excise Duty shall not be construed that these charges are allowed under Change in Law."*
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> *39. As regards "Royalty", it is noted that the issue whether Royalty determined under Section 9/15 (3) of the Mines and Minerals (Development and Regulations) Act, 1957 is in the nature of tax is pending for consideration of a Nine Judges Bench of the Hon'ble Supreme Court on a reference by Five Judges Bench of the Hon'ble Supreme Court in Mineral Area Development Authority of India & ors v/s Steel Authority of India & ors (2011 SCC 450). Therefore, the claim of royalty in the assessable value of coal shall be subject to the decision of the Hon'ble Supreme Court in the concerned case. -----"*

34. In line with the above-quoted order, the claim of the Petitioner is allowed as change in law as regards increase in Central Excise Duty on account of inclusion of applicable Duty District Mineral Fund ('DMF'), National Exploration Trust ('NMET), Forest Transit Fee and Chhattisgarh Paryavaran Evam Vikas Upkar in assessing the

Central Excise Duty. The Petitioner is directed to furnish along with its monthly bill the proof of payment and computations duly certified by the auditor to TANGEDCO. 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 Central Excise Duty on coal. The Petitioner and TANGEDCO are directed to carry out reconciliation on account of these claims annually.

(B) Levy of Entry Tax

35. The Petitioner has submitted that as on cut-off date of LT-PPA, i.e. 27.2.2013, the applicable Entry Tax on coal was 1% if coal is used within the State of Chhattisgarh as a raw material for generation of power in terms of Section 4 of the Chhattisgarh Sthaniya Kshetra Mei Mal Ke Pravesh Par Kar Adhiniyam, 1976 ('Chhattisgarh Entry Tax Act, 1967'). It has been submitted that the Entry Tax was payable, *inter alia,* on DMF, NMET, Excise Duty, Clean Energy Cess and Chhattisgarh Paryavran Evam Vikas Upkar and that after the cut-off date, there has been increase in these levies, leading to the consequent increase in the total amount of Entry Tax payable by the Petitioner on the said levies, which qualifies as change in law event in terms of 5th bullet of Article 10.1.1 of the LT-PPA. The Petitioner has submitted that it is not seeking any compensation towards increase in rate of Entry Tax rather it is claiming compensation on account of consequent impact on Entry Tax due to increase in component on which Entry Tax is levied (which have already been approved by the Commission as well as the APTEL as change in law events) i.e. Excise Duty (as claimed in Petition), Clean Energy Cess, Chhattisgarh Paryavaran Evam Vikas Upkar, DMF and NMET.

36. We have considered the submissions of the Petitioner. It is noticed that as on the cut-off date, 27.2.2013, Entry Tax levied was 1% on the coal. At the time of

submission of bid, the Petitioner was expected to factor the above levy in the bid. The Petitioner has not placed on record any documentary proof to show that Entry Tax has been increased by promulgation/ amendment of any statute or any government instrumentality. Therefore, we are not inclined to treat the claim of the Petitioner as change in law as per Article 10.1.1 of the PPA and accordingly, the claim of the Petitioner in this regard is disallowed.

(C) Value added Tax

37. The Petitioner has submitted that as on cut-off date of LT-PPA i.e. 27.2.2013, VAT was levied at the rate of 5% and CST was levied at the rate of 2%, which was considered and factored by the Petitioner in its bid. VAT/CST is payable, *inter alia*, on DMF & NMET, Excise Duty, Entry Tax, Clean Energy Cess and Chhattisgarh Paryavaran Evam Vikas Upkar. Though the rate of VAT/CST remained unchanged, due to increase in the rate at which the aforesaid components are levied, there is corresponding increase in VAT/CST, which qualifies as change in law event under 5th bullet of Article 10.1.1 of the LT-PPA. The Petitioner has placed on record the auditor certificate certifying the payment made towards VAT/CST w.r.t to LT-PPA and sample invoice elaborating as to how Excise Duty, Entry Tax and VAT/CST are computed.

38. We have examined the matter. The Petitioner has submitted the sample invoice dated 6.4.2017 raised by South Eastern Coalfields Limited showing levy of VAT @ 5% of total invoice value of coal. Since DMF & NMET, Excise Duty, Entry Tax, Clean Energy Cess and Chhattisgarh Paryavaran Evam Vikas Upkar have been held as change in law events, consequential increase in VAT linked with these taxes and duties is also allowed under the change in law provision on the principle of restitution.

(D) Service Tax including Swachh Bharat Cess on coal transportation

39. The Petitioner has submitted that as on the cut-off date of LT-PPA i.e. 27.2.2013, the Service Tax was 12.36% as per Ministry of Finance Notification No. 43/2012-Service Tax dated 2.7.2012. Thereafter, the Government of India vide Notification No. 14/2015- Service Tax dated 19.5.2015 increased the Service Tax to 14% with effect from 1.6.2015, thereby increasing the Service Tax on rail freight to 4.2%. The Petitioner has submitted that the Ministry of Finance, Government of India vide its Notification No. 21/2015-Service Tax dated 6.11.2015 increased Service Tax to 14.50% after inclusion of 0.5% Swachh Bharat Cess. Further, the Ministry of Finance, Government of India vide Notification dated 26.5.2016 has introduced 0.5% Krishi Kalyan Cess with effect from 1.6.2016 thereby increasing the rate of Service Tax from 14.5% to 15%. The Petitioner has submitted that the said increase in Service Tax by an Act of the Parliament after the cut-off date squarely falls under Article 10.1.1 of the LT-PPA and qualifies as a change in law event.

40. We have considered the submissions of the Petitioner. Swachh Bharat Cess and Krishi Kalyan Cess have been imposed by an Act of Parliament on the taxable services at the rate of 0.5%. Sections 119(2) and 119(3) of the Finance Act, 2015 provide as under:

> *"119 (2). There shall be levied and collected in accordance with the provisions of this "Chapter, a cess to be called the Swachh Bharat Cess, as service tax on all or any of the taxable services at the rate of two percent, on the value of such services for the purposes of financing and promoting Swachh Bharat initiative or for any other purpose relating thereto. 119 (3). The Swachh Bharat Cess leviable under sub-section (2) shall be in addition to any cess or service tax leviable to such taxable services under Chapter V of the Finance Act, 1994 or under any other law for the time being in force."*

41. Further, Sections 161(2) and 161(3) of the Finance Act, 2016 provides as under:

> *"161 (2). There shall be levied and collected in accordance with the provisions of this Chapter, a cess to be called the Krishi Kalyan Cess, as service tax on all or any of the taxable services at the rate of 0.5 percent, on the value of such services for the*

purposes of financing and promoting initiatives to improve agriculture or for any other purpose relating thereto.

(3) The Krishi Kalyan Cess leviable under sub-section (2) shall be in addition to any cess or service tax leviable to such taxable service under Chapter V of the Finance Act, 1994, or under any other law for the time being in force."

42. Therefore, Swachh Bharat Cess and Krishi Kalyan Cess are Service Taxes on taxable services and have been introduced through an Act of Parliament and is, therefore, covered under change in law. The Petitioner has submitted that the Commission has already allowed Swachh Bharat Cess and Krishi Kalyan Cess as change in law events in its various orders including order dated 1.2.2017 in Petition No. 8/MP/2014 (EMCO Energy Limited/GMRWEL v. MSEDCL & Anr.), order dated 6.2.2017 in Petition No. 156/MP/2014 (APL v. UHBVNL & Anr.) and order dated 7.4.2017 in Petition No. 112/MP/2015 (GMRKEL & Anr. v. BSPHCL & Anr.) etc.

43. Further, the Commission in its order dated 1.2.2017 in Petition No. 8/MP/2014 has also dealt with the issue of Service Tax on transportation of goods by Indian Railways and accordingly, allowed the event under change in law. Relevant portion of the said order dated 1.2.2017 is extracted as under:

"89. ... By Finance Act of 2006, though service tax on transportation of goods by rail was introduced, an exception was made in case of Government Railways. By Finance Act of 2009, this restriction was removed by providing that service tax is leviable "to any person by another person, in relation to transport of goods by rail in any manner". Therefore, transport of goods by Indian Railways became subject to service tax by Finance Act of 2009. Actual levy of service tax on transportation of goods by railways was exempted by Notification No. 33 of 2009 dated 1.9.2009. By Notification no. 26 of 2012 dated 20.6.2012, Ministry of Finance issued notification by exempting transport of goods by rail over and above 30% of the service tax chargeable with effect from 1.7.2012. By a Notification No. 43 of 2012 dated 2.7.2012, service tax on transportation of goods by Indian Railways was fully exempted till 30.9.2012. With effect from 1.10.2012, service tax on 30% of the transport of goods by rail is chargeable. Therefore, the basis of the service tax on transport of goods by Indian Railways is traceable to the Finance Act of 2009 which was enacted after the cut-off date in case of MSEDCL PPA. The rate Circular No. 27 of 2012 dated 26.9.2012 issued by Railway Board implemented the provisions of the Finance Act, 2009 at the ground level. In our view, since the imposition of service tax on transport of goods by Indian Railways is on the basis of the Finance Act, 2009 which has come into force after the cut-off date, the expenditure incurred by the Petitioner on payment of service tax on transport of goods by the Indian Railways is covered under change in law and the Petitioner is entitled for compensation in terms of the MSEDCL PPA. As on cut-off date in case of DNH PPA (i.e.1.6.2012), the service tax on transportation of goods by

Railways was in existence but was under exemption. Therefore, as on cut-off date in case of DNH PPA, the Petitioner could not have factored service tax on transportation of goods by Indian Railways which was under exemption. With effect from 1.10.2012, service tax on 30% of the transport of goods by rail became chargeable. This date being after the cut-off date in case of DNH PPA, the same shall be admissible under DNH PPA. Subsequent changes in service tax shall be admissible under change in law."

44. By Ministry of Finance Notification No. 43 of 2012 dated 2.7.2012, Service Tax on transportation of goods by Indian Railways was fully exempted till 30.9.2012. Thereafter, with effect from 1.10.2012, Service Tax on 30% of the transport of goods became chargeable. Therefore, as on the cut-off date of LT-PPA (i.e. 27.2.2013), the Petitioner has, in its bid, accounted Service Tax for 30% of 12.36% i.e. 3.708%. Ministry of Finance, Department of Revenue vide its Notification No.14/2015-Service Tax dated 19.5.2015 has revised the rates of Service Tax from 12.36% to 14%, which was further revised vide Notification No.21/2015-Service Tax dated 6.11.2015 to 14.5%. Subsequently, Ministry of Finance, Department of Revenue vide Notification No. 27/2016-Service Tax dated 26.5.2016 revised the rate of Service Tax from 14.5% to 15%. In view of the above, the Petitioner is entitled for the following relief:

Applicability Date	Rate of Service Tax	Service Tax on Transportation of goods @ 30% of Service Tax	Admissible rate of Service Tax under Change in Law
27.2.2013	12.36%	3.708%	0
1.6.2015	14.00%	4.200%	0.492%
15.11.2015	14.50%	4.350%	0.642%
1.6.2016 (till 30.6.2017)	15.00%	4.500%	0.792%

45. The Petitioner shall be entitled to recover on account of change in Service Tax on transportation of coal through Railways in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of this Commission or actual, whichever is lower, for supply of electricity to the Respondent. If actual generation is less than the

scheduled generation, then relief shall be restricted to actual generation. The Petitioner is directed to furnish along with its monthly bill, the proof of payment and computations duly certified by the auditor to the Respondent. The Petitioner and the Respondent are further directed to carry out reconciliation on account of these claims annually.

Carrying cost

46. 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. It has also been submitted that the issue of carrying cost is no more res-integra and is squarely covered by the judgment of Hon'ble Supreme Court in Uttar Haryana Bijli Vitran Nigam Ltd. v. Adani Power Ltd. and Ors., (2019) 5 SCC 325. In the present case, Petitioner's LT-PPA has identical provisions capturing the 'restitutive' principle as in the case dealt by the Hon'ble Supreme Court in the aforesaid judgment.

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

> *"ix. In the present case we observe that from the effective date of Change in Law the Appellant is subjected to incur additional expenses in the form of arranging for working capital to cater the requirement of impact of Change in Law event in addition to the expenses made due to Change in Law. As per the provisions of the PPA the Appellant is required to make application before the Central Commission for approval of the Change in Law and its consequences. There is always time lag between the happening of Change in Law event till its approval by the Central Commission and this time lag may be substantial. As pointed out by the Central Commission that the Appellant is only eligible for surcharge if the payment is not made in time by the Respondent Nos. 2 to 4 after raising of the supplementary bill arising out of approved Change in Law event and in PPA there is no compensation mechanism for payment of interest or carrying cost for the period from when Change in Law becomes operational till the date of its approval by the Central Commission. We also observe that this*

Tribunal in SLS case after considering time value of the money has held that in case of re-determination of tariff the interest by a way of compensation is payable for the period for which tariff is re-determined till the date of such re-determination of the tariff. In the present case after perusal of the PPAs we find that the impact of Change in Law event is to be passed on to the Respondent Nos. 2 to 4 by way of tariff adjustment payment as per Article 13.4 of the PPA.

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

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

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

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

49. Article 10.2 of the LT-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".

50. 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 date of actual payment towards change in law till the date of this order.

51. 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."

52. In line with above order of the Commission, in the instant case, the Petitioner shall be eligible for carrying cost at the actual rate of interest paid by the Petitioner for arranging funds (supported by Auditor`s Certificate) or the rate of interest on working capital as per applicable CERC Tariff Regulations or the late payment surcharge rate as per the PPA, whichever is the lowest. Once a supplementary bill is raised by the Petitioner in terms of this order, the provision of Late Payment Surcharge in the PPA would kick in if the payment is not made by the Respondent.

Mechanism of payment of Changes in Law compensation

53. The Commission has already devised the mechanism for payment of change in law compensation in its order dated 13.12.2017 in Petition No. 189/MP/2016. The parties are required to follow the same mechanism for payment of change in law as stipulated in the order dated 13.12.2017 in Petition No. 189/MP/2016 for the change in law events allowed under the present order also.

54. In view of above discussions and findings, Petition No. 560/MP/2020 is disposed of.

Sd/-	Sd/-	Sd/-
(P.K.Singh)	**(Arun Goyal)**	**(P.K.Pujari)**
Member	**Member**	**Chairperson**