CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 513/MP/2020

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

Date of order: 23rd June, 2023

In the matter of

Petition under Section 79 of the Electricity Act, 2003 read with Article 13 of the Power Purchase Agreements dated 7.8.2008 entered with Haryana Utilities, Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees dated 19.1.2005, amended from time to time, and revised Tariff Policy 2016, seeking compensation due to certain change in law events.

And
In the matter of

Adani Power (Mundra) Limited,
Adani House, near Mithakhali Six Roads, Navrangpura,
Ahmedabad, Gujarat – 380009. **…Petitioner**

Vs.

1. Uttar Haryana Bijli Vitran Nigam Limited,
Narela, New Delhi, Delhi - 131028

2. Dakshin Haryana Bijli Vitran Nigam Limited,
Shaheed Harikishan Marg, Block C,
Block G, New Industrial Twp 5,
New Industrial Town, Faridabad,
Haryana121001 **………Respondents**

Parties Present:

Shri Amit Kapur, Advocate, APMuL
Ms. Poonam Verma, Advocate, APMuL
Shri Saunak Rajguru, Advocate, APMuL
Shri Aniket Ojha, Advocate, APMuL
Shri M. G. Ramachandran, Sr. Advocate, HPPC
Shri Shubham Arya, Advocate, HPPC
Ms. Poorva Saigal, Advocate, HPPC
Ms. Shikha Sood, Advocate, HPPC
Shri Krishna Rao, APMuL

Shri Mehul Rupera, APMuL
Shri Sameer Ganju, APMuL
Shri Malav Deliwala, APMuL
Shri Kumar Gaurav, APMuL
Shri Tanmay Vyas, APMuL
Shri Rahul Panwar, APMuL
Shri Hitesh Modi, APMuL

ORDER

The Petitioner, Adani Power (Mundra) Limited (hereinafter "APMuL"), has filed the present Petition under Section 79(1)(b) read with Section 79(1)(f) of the Electricity Act, 2003 (hereinafter referred to as "the Act") seeking compensation through tariff adjustment along with carrying cost on account of certain Change in Law events which have occurred after the cut-off date of the PPAs with Haryana Utilities for supply of power from Phase IV of the Mundra Power Project. t The Petitioner has made the following prayers:

> *"(a) Admit the present Petition*
>
> *(b) Declare that Levy of Forest Tax upon coal procurement from SECL and amendments to the same are change in law events both in the State of Chhattisgarh and State of Madhya Pradesh.*
>
> *(c) Hold that Amendments to Chhattisgarh Infrastructure Development Cess and Chhattisgarh Environment Cess rates qualify as change in law events*
>
> *(d) Declare that levy of Evacuation Facility Charges by Coal India Limited is a change in law event.*
>
> *(e) Hold that levy of sulphur restrictions in fuel pursuant to MARPOL qualifies as a change in law event.*
>
> *(f) Direct the Respondents to make the payment of the compensation for the aforementioned change in law events from the date it affected the Petitioner under the PPAs.*
>
> *(g) Hold and declare that Petitioner is entitled to claim carrying cost at the rate of LPS as stipulated under the PPA for the period of delay in making payment from the date of notification of change in law on monthly compounding basis."*

2. The Petitioner has set up a 4620 MW coal fired power plant (hereinafter referred to as “Mundra Power Project”) within Special Economic Zone at Mundra in the State of Gujarat consisting of four (4) Units of 330 MW (subcritical) in Phase I and II, two (2) Units of 660 MW in Phase III and three (3) Units of 660 MW in Phase IV (supercritical technology). The Petitioner has entered into two separate Power Purchase Agreements (‘PPAs’) dated 7.8.2008 with Uttar Haryana Bijli Vitran Nigam Limited (UHBVNL) and Dakshin Haryana Bijli Vitran Nigam Limited (DHBVNL) (‘Haryana Utilities’) for supply of 712 MW each at a levelized tariff being Rs. 2.94 per kwh from Phase IV of Mundra Power Project which has an installed capacity of 1980 MW.

3. The last date for submission of the bid was 24.11.2007 and accordingly, the cut-off date for the purpose of Change in Law under Article 13 of the PPAs is 17.11.2007, which is 7 days prior to bid deadline. On 12.11.2008, the Standing Linkage Committee (Long Term) [‘SLC(LT)’] for coal decided to grant 70% of the normative coal requirement to the coastal power stations including APMuL. Accordingly, Letter of Assurance (LoA) for supply of domestic coal was issued to APMuL by Coal India Limited on 25.6.2009 for the capacity equivalent to 70% of the installed capacity of 1980 MW under Phase IV of the project. Subsequently, the Petitioner executed an FSA with Mahanadi Coal Fields (MCL) on 9.6.2012 for 1386 MW which is 70% of the installed capacity of 1980 MW. The Annual Contracted Quantity (ACQ) of coal agreed to be supplied by MCL and undertaken to be purchased by APMuL is 64.05 lakh tonne or 6.405 MTPA per year. Subsequently, Coal India Limited decided for partial transfer of the existing quantity of coal from MCL to SECL (2.315 MTPA coal out of 6.405 MTPA) for Phase-IV of Mundra Power Project. Accordingly, on 13.10.2015, APMuL entered into a Fuel Supply Agreement (FSA) with SECL for supply of 2.315 MTPA out of the total linkage of 6.405 MTPA.

4. APMuL has submitted that the following Change in Law events occurred after the cut-off date (i.e. 17.11.2007) resulting in additional expenditure being incurred by it during the operating period of the project:

(i) Levy of Forest Tax on dispatches/ lifting of coal through South Eastern Coalfields Ltd. (SECL) by way of Notification dated 16.9.2015**,** pursuant to amendment of the Chhattisgarh Transit Forest Produce Rules, 2001 by Govt. of Chhattisgarh on 30.6.2015.

(ii) Imposition of Forest Tax levied on dispatches/ lifting of coal through SECL Notification/ letter dated 9.11.2012 and amendments to the same dated 27.03.2020 in terms of MP Forest Produce Rules, 2000.

(iii) Amendments to Chhattisgarh (Adhosanrachna Vikas Evam Paryavaran) Upkar Adhiniyam 2005 ('Chhattisgarh Act') dated 16.6.2015 and 15.10.2019.

(iv) Levy of Evacuation Facility Charges through Coal India Ltd. Price Notification dated 19.12.2017.

(v) Levy of restrictions on sulphur content in fuel oil in terms of the International Convention for the Prevention of Pollution from Ships ("MARPOL") acceded to on 30.1.2012; notification to be applicable on 28.10.2016 to come into effect on 1.1.2020.

5. The Petitioner has made the following submissions on its various claims under Change in Law:

(A) Levy of Forest Tax on dispatches/ lifting of coal

(a) On 25.8.2001, Government of Chhattisgarh in exercise of its power under Section 76 read with Sections 41 and 42 of the Indian Forest Act, 1927 notified the Chhattisgarh Transit (Forest Produce) Rules, 2001 for regulating transit of forest produce. Rules 4 and 5 of the said Rules provide for imposition of forest tax/rate of transit forest produce. On 6.10.2012, Forest Department, Government of Chhattisgarh levied forest tax at the rate of Rs.7/tonne on coal mined and transported from SCEL mines located in the forest area and the said notification came into force with effect from 1.11.2012. On 30.6.2015, Forest

Department, Government of Chhattisgarh revised the rate of forest tax/ rate of transit forest produce on coal from Rs 7/tonne to Rs.15/tonne. Consequently, SECL by its notice dated 16.9.2015 implemented the revised applicable forest tax on dispatches/ lifting of coal from SECL from Rs. 7/tonne to Rs. 15/tonne. Since APMuL signed FSA with SECL on 13.10.2015 for supply of 2.315 MTPA, the forest tax was levied on APMuL from 13.10.2015 at the rate of Rs.15/tonne.

(b) On 13.12.2000, Government of Madhya Pradesh in exercise of its power under Section 76 read with Sections 41 and 42 of the Indian Forest Act, 1927 notified the Madhya Pradesh Forest Produce Rules, 2000 for regulating transit of forest produce. Rule 5 of the said Rules provides for the imposition of forest tax or rate for transport of forest produce at a rate to be fixed by the Government of Madhya Pradesh. On 28.5.2001, Government of Madhya Pradesh levied forest tax/transit fee at the rate of Rs.7/tonne on various minerals including coal procured from forest land and despatched through mines situated in the State. The said notification was declared as ultra vires by the Hon'ble High Court of Madhya Pradesh on 14.5.2007. Since the cut-off date of Phase III of Mundra Power Project (Units 7,8 and 9) was 17.11.2007, there was no forest tax as on the cut-off date. However, Hon'ble Supreme Court vide order dated 7.3.2008 stayed the said judgement SECL vide its Notice dated 9.11.2012 imposed the levy of forest tax at the rate of Rs.7/tonne. Since APMuL signed with SECL on13.10.2015, the forest tax was imposed on APMuL with effect from 13.10.2015. Hon'ble Supreme Court vide its judgement dated 15.9.2017 upheld the validity of notification dated 28.5.2001. On 5.3.2020, Government of Madhya Pradesh increased the forest tax/rate of transit forest produces from Rs.7/tonne

to Rs.57/tonne. Consequently, SECL vide its notice dated 27.3.2020 revised forest tax on dispatches/lifting of coal from Rs 7/tonne to Rs 57/tonne.

(c) SECL, being a subsidiary of Coal India Limited (CIL), is an Indian Government Instrumentality as acknowledged by the Appellate Tribunal for Electricity (APTEL) in judgment dated 14.8.2018 in the case of *Adani Power Rajasthan Ltd. vs. RERC & Ors. Appeal No. 119 of 2016 [2018 SCC Online APTEL 101].* Notifications issued by Coal India Limited or its subsidiaries which impose a mandatory levy having force of law are Change in Law events as held by the APTEL in the case of GMR Kamalanga Energy Ltd. vs. CERC & Ors. [2018 SCC OnLine APTEL 151].

(d) SECL vide notice dated 16.9.2015 pertaining to the State of Chhattisgarh brought into effect the amended rate of forest tax of Rs.15/tonne notified by the Forest Department, Government of Chhattisgarh vide Notification dated 30.6.2015 in exercise of power under Rule 4 of Chhattisgarh Transit (Forest Produce) Rules, 2001. Similarly, SECL vide notice dated 9.11.2012 and amendment dated 27.3.2020 pertaining to Government of Madhya Pradesh brought into effect the imposition of forest tax and amended forest tax while implementing the Notifications dated 13.12.2001 and 5.3.2020 issued by Government of Madhya Pradesh in exercise of Rule 5 of the Madhya Pradesh Forest Produce Rules, 2000. Therefore, levy of forest tax/foreset transit fee by the Government of Chhatisgarh and Government of Madhya Pradesh qualifies as Change in Law event under Article 13 of the PPAs.

(e) APTEL by judgment dated 14.8.2018 in Appeal No. 119 of 2016 (*Adani Power Rajasthan Limited vs. Rajasthan Electricity Regulatory Commission* and

others; [2018 SCC OnLine APTEL 101]) has allowed levy of Forest Tax as Change in Law. The Commission has also allowed Forest Tax as Change in Law event in Petition No. 16/MP/2016 (*Sasan Power Limited vs. MP Power Management Company Ltd.*), Petition No 156/MP/2018 (*MB Power (Madhya Pradesh) Limited vs. Uttar Pradesh Power Corporation Ltd. and Ors.*), Petition No 118/MP/2018 (*TRN Energy Private Limited. Vs. Uttar Pradesh Power Corporation Ltd. and Ors.*) and Petition No. 116/MP/2018 (*Maruti Clean Coal and Power Limited vs. Jaipur Vidyut Vitran Nigam Limited and Ors*).

(f) The Petitioner had incurred an additional expenditure to the tune of Rs 0.15 crore as on 31.1.2020 on account of levy of Forest Tax by SECL.

(B) *Amendment to rates of Chhattisgarh Environment and Development Cess*

(a) Chhattisgarh (Adhosanrachna Vikas Evam Paryavaran) Upkar Adhiniyam, 2005 (hereinafter referred to as Chhattisgarh Act) was promulgated for levy of cesses on land for raising funds to implement infrastructure projects and environment improvement projects. Sections 3(1) and 4(1) of the Chhattisgarh Act provides for imposition of Infrastructure Development Cess and Chhattisgarh Environment Cess. The Government of Chhattisgarh vide Gazette Notification dated 16.6.2015 increased the Chhattisgarh Development and Environmental Cess rates to Rs. 7.50/tonne from the prevailing rate of Rs. 5/tonne. Consequently, SECL vide notification dated 19.8.2015 started levying Chhattisgarh Infrastructure Development Cess and Chhattisgarh Environment Cess at Rs 7.5/tonne each w.e.f. 16.6.2015 on dispatch of coal.

(b) Subsequently, pursuant to amendment notified by Government of Chhattisgarh on 15.10.2019, the Chhattisgarh Infrastructure Development Cess

and Chhattisgarh Environment Cess was further increased from Rs 7.5/tonne to Rs 11.25/tonne each by SECL vide Notification dated 11.10.2019.

(c) As on cut-off date, APMuL was not required to pay Chhattisgarh Infrastructure Development Cess and Chhattisgarh Environment Cess. However, it was only when Coal India Limited decided to divert portion of coal supply obligation from MCL to SECL, APMuL was compelled to procure coal from SECL w.e.f. 13.10.2015 and became bound to pay the levies/duties/cess, etc. applicable on such coal procurement from SECL.

(d) Chhattisgarh Infrastructure Development Cess and Environment Cess was imposed by Government of Chhattisgarh which is a Government of india Instrumentality. Further the cess for infrastructure development and environment was imposed in exercise of the powers under Section 3(1) and 4(1) of Chhattisgarh Act which is a statute enacted by the Government of Chhattisgarh. The enhanced rates were imposed subsequent to the cut-ff date. Therefore, incremental impact of Chhattisgarh Infrastructure Development Cess and Environment cess amounts to Change in Law. APMuL has incurred expenditure to the tune of Rs.4.03 crores as on 31.1.2020 which needs to be allowed under change in law.

(e) APTEL vide judgment dated 29.1.2020 in Appeal No. 284 of 2017 & Appeal No. 09 of 2018 has allowed amendments to Chhattisgarh Infrastructure Development and Environmental Cess rates as Change in Law event. Similarly, the Commission has allowed amendment to Chhattisgarh Infrastructure Development and Environmental Cess rates as Change in Law in Petition No 229/MP/2016 (DB Power Ltd. vs. Tamil Nadu Generation and Distribution

Corporation Limited), Petition No. 101/MP/2017 (*DB Power Ltd. vs PTC India Ltd*) and Petition No. 156/MP/2018 (*MB Power (Madhya Pradesh) Limited vs. Uttar Pradesh Power Corporation Ltd*).

(C) ***Levy of Evacuation Facility Charges***

(a) As on cut-off date of 17.11.2007, there was no evacuation facility charge imposed on the generators procuring coal from the coal India Limited or its subsidiaries. About 10 years after the bid cut-off date, the Evacuation Facility Charges were levied w.e.f. 20.12.2017 by Coal India Limited vide Notification dated 19.12.2017 on all coal despatches, except despatch through rapid loading arrangement.

(b) On 2012.2017, APMuL informed the Haryana Utilities regarding levy of evacuation facity charge by Coal India Limited after the cut-off date which amounts to Change in Law.

(c) Coal India Limited qualifies as an Indian Government Instrumentality in terms of the PPA. The evacuation facility charge has been imposed by an Indian Government Instrumentality through notification after the cut-off date. The Notifications issued by Coal India Limited imposing mandatory levy having force of law in accordance with Article 77(3) of the Constitution of India, 1950 is a Change in Law as held by the APTEL in *GMR Kamalanga Energy Ltd. vs. CERC & Ors. [2018* SCC OnLine APTEL 151]. The Commission has also allowed Evacuation Facility Charge as Change in Law vide its order dated 3.6.2019 in Petition No 156/MP/2018 (*MB Power (Madhya Pradesh) Limited vs. Uttar Pradesh Power Corporation Ltd*). and order dated 12.6.2019 in Petition No

118/MP/2018 (*TRN Energy Private Limited. Vs. Uttar Pradesh Power Corporation Ltd. and Ors.*).

(d) The levy of Evacuation Facility Charges led to incremental expenditure during the operating period of the power project is to the tune of Rs 49.23 crore (approximately) as on 31.1.2020.

(D) Levy of restrictions on sulphur content in fuel oil in terms of MARPOL

(a) On 10.10.2008, International Convention for the Prevention of Pollution from Ships [("MARPOL Convention"), (notified by International Maritime Organization- (IMO)] revised Annexure VI of the said Convention wherein, Regulation 14.1.3 of the said Convention stood revised restricting sulphur content of fuel oil to 3.5% m/m on and after 1.1.2012 and 0.5% m/m on and after 1.1.2020, subject to further review. Pursuant to India acceding to the Annexure VI of the said MARPOL Convention on 23.11.2011, the Directorate General of Shipping, Ministry of Shipping vide Circular No. 1 of 2012 dated 30.1.2012, informed all the stakeholders that the said Convention will come into effect from 23.2.2012. Thereafter, on 28.10.2016 the Marine Environment Protection Committee by a Resolution decided that the Regulation 14.1.3 of the said Convention which restricts sulphur emissions in fuel, will come into force on 1.1.2020. Accordingly, on 14.12.2018, Ministry of Shipping, vide Engineering Circular No. 5 of 2018 issued restriction on the sulphur content of fuel to be used/carried onboard ships to 0.5% from 1.3.2020. Further, on 28.8.2019, the same was restricted to be used to 0.5% from 1.1.2020 vide Ministry of Shipping Engineering Circular No. 2 of 2019, superseding Engineering Circular No. 5 of 2018.

(b) While quoting the energy charges, APMuL had considered the applicable cost of IFO 380cst which is the most commonly used fuel in the world. IFO 380cst, having a sulphur content of 3.5%, was permitted to be used by ships worldwide as on cut-off date. The cost of Low Sulphur Marine Gas Oil (LSMGO) is substantially higher than the cost of IFO 380 cst (estimated to be twice more expensive than IFO 380cst). The said levy of restrictions on sulphur content in fuel oil qualifies as Change in Law event under Article 13 of the PPAs.

(c) The Engineering Circular No.2 of 2019 dated 28.8.2019 superseding Circular No.5 of 2018 dated 14.12.2018 issued by the Ministry of Shipping, Government of India which is an Indian Government Instrumentality directing ships to be in compliance with the provisions of MARPOL Annexure IV, is a change in law event in terms of Article 13 of the PPAs as it impacts APMuL's cost/revenue from the business of generation and sale of electricity. Further, MARPOL Regulations has led to incremental expenditure during operating period to the tune of Rs.2.62 crore (approximately for one month) as on 31.1.2020. APMuL is entitled to be compensated for any impact arising out of the said change in law events, by way of restitution to the same economic position as if change in law has not taken place.

(E) Carrying Cost

(a) Carrying cost is an inherent provision in the PPAs because change in law compensation is premised on the underlying principle that the affected party is to be restored to the same economic position as if the change in law has not happened. The Hon'ble Supreme Court and consequently this Commission have already allowed carrying cost in the same PPA. For the purpose of restituting the

Petitioner for the actual additional expenditure incurred, rate of carrying cost allowable to APMuL should be based on the rate provided for LPS (SBI PLR plus 2%) in Article 11.3.4 of the PPA since both carrying cost and LPS are premised on time value of money.

(b) It is a settled principle of law that carrying cost is payable as per the provisions of the PPA to compensate the affected party for time value of money deployed on account of change in law events. The LPS provision in the PPA is also meant for compensation towards time value of money on account of delayed payments. Therefore, the rate prescribed for LPS ought to be followed for the recovery of carrying cost (i.e. SBI PLR plus 2%) on monthly compounding basis. Reliance has been placed on the judgments of Hon'ble Supreme Court in *Uttar Haryana Bijli Vitran Nigam Limited Vs* Adani Power Limited *[(2019) 5 SCC 325]*, Appellate Tribunal judgment dated 14.9.2019 in Appeal Nos. 202 & 305 of 2018 in *Jaipur Vidyut Vitran Nigam Ltd. vs. Rajasthan Electricity Regulatory Commission* & Ors 2019 [SCC Online APTEL 98], judegment dated 20.12.2012 in *SLS Power Limited vs. Andhra Pradesh Electricity Regulatory Commission* [2012 SCC OnLine APTEL 209] and judgment dated 22.5.2019 in *Lanco Amarkantak Power Limited vs. Haryana Electricity Regulatory Commission* in Appeal No. 308 of 2017.

6. The matter was admitted on 30.7.2020 and notice was issued to the Respondents. Respondent No. 1 and 2 i.e. Haryana Utilities have filed their detailed reply on 21.8.2020. Ministry of Power, Government of India notified on 22.10.2021 the Electricity (Timely Recovery of Costs Due to Change in Law) Rules, 2021 ('Change in Law Rules') according to which the parties are required to settle the claims among

themselves and approach the Commission in terms of Rule 3(8) of the Change in Law Rules. The Commission vide its order dated 31.1.2022 disposed of the Petition directing the Petitioner to approach the Haryana Utilities for settlement of Change in Law claims in terms of the Change in Law Rules with liberty to approach the Commission only in terms of Rule 3(8) of the said Rules.

7. The Appellate Tribunal for Electricity (APTEL), vide its judgement dated 5.4.2022 in OP No. 1 of 2022 and Ors., *inter-alia*, held that the Change in Law Rules apply only prospectively and cannot be retrospectively applied to the proceedings pending for adjudication before the Commission as on date of notification of Change in Law Rules and directed the Commission to exercise its review jurisdiction, suo-motu, to vacate its orders and restore all such Change in Law Petitions which have been disposed of on the basis of Change in Law Rules. Accordingly, the Commission vide order dated 14.6.2022 in Suo- Motu Petition No. 8/SM/2022 restored all such Petitions including the Petition No. 513/MP/2020.

Reply of Haryana Utilities

8. Respondents No. 1 and 2 i.e. Haryana Utilities, in their detailed joint reply dated 21.8.2020 have mainly submitted as under:

(a) The limitation period for instituting any suit sought for obtaining declaration is three years from the date when the right to sue first accrues. The right to sue accrued for the first time when the event being claimed as Change in Law had taken place. APMuL through the present Petition is seeking declaration of certain events as ‘Change in Law’ which are time barred and is seeking compensation based on the said time-barred claims.

(b) It is a settled law that the Commission cannot entertain time barred claim and to that extent time period provided under Limitation Act, 1963 applies to Petitions filed under Electricity Act, 2003. [*Andhra Pradesh Power Coordination Committee and Others v. Lanco Kondapalli Power Limited, (2016*) 3 SCC 468]. Appellate Tribunal for Electricity (APTEL) has also relied on the above mentioned Lanco case (Supra) in *Kalani Industries Pvt. Ltd. v. Rajasthan Electricity Regulatory Commission (RERC) and Ors*., Appeal No. 185 of 2015 dated 25.10.2018 and *Maharashtra State Electricity Distribution Co. Ltd. v. Maharashtra Electricity Regulatory Commission (MERC) and Ors*., Appeal No. 75 of 2017 dated 24.4.2018. Accordingly, Part III under the Schedule of the Limitation Act, 1963 which deals with suits relating to declaration is applicable in the present case.

(c) The Forest tax imposed by the Government of Madhya Pradesh was applicable from 2001 which had been set aside by High Court of Madhya Pradesh in 2007 and stayed by the Hon'ble Supreme Court in 2008. The Government of Chhattisgarh had notified the same on 30.6.2015. SECL Notifications were also issued in 2012 and 2015, respectively. Even as per the Petitioner, the impact on it commenced on 13.10.2015 when the Fuel Supply Agreement was signed. Therefore, the limitation had expired as on date of filing of the Petition on 16.5.2020.

(d) As regards amendments to rates of Chhattisgarh Environment and Development Cess, the said amendment was notified on 16.6.2015. The instant Petition has been filed on 16.5.2020 and thus the limitation has expired. Even as per the Petitioner's own claims, Change in Law event became applicable to the

Petitioner with effect from 13.10.2015 when it signed the FSA. Therefore, the limitation period to claim relief on the basis of the levy of cesses levied by the Government of Chhattisgarh has expired as on date of filing of the Petition.

(e) Without prejudice to the above and alternatively, even if any Change in Law claims are to be considered, only the claims which fall within the period of three years prior to the filing of the present Petition would be admissible for adjudication.

(f) The Petitioner has issued notice of Change in Law only in 2019 and 2020 for many of the events and it cannot by any measure be considered as notice as per Article 13.3 of the PPA. The issuance of notice of Change in Law is a mandatory pre-condition and Adani Power cannot claim impact of Change in Law without such notice. When the contract provides for something to be done in a certain manner, it has to be done in that particular manner. Therefore, there cannot be any relief for Change in Law without an appropriate notice.

(g) SECL is not the competent authority to notify forest tax and Chhattisgarh Environment & Infrastructure Development Cess or impose such taxes. SECL is merely passing through the said taxes notified by Governments of Chhattisgarh and Madhya Pradesh in terms of the Fuel Supply Agreement entered into between Adani Power and SECL. The contractual arrangement with SECL for supply of coal and any change in such price cannot be considered as having force of law or qualify as Change in Law.

(h) The definition of 'Indian Governmental Instrumentality' in the PPA is specific and includes the Government of India (GoI), Government of Haryana and Government of Gujarat only. Government of Chhattisgarh or the

Government of Madhya Pradesh do not fall under the definition of 'Indian Governmental Instrumentality'. Thus, the implementation of the Forest Tax by the said State Governments are not 'law' for the purpose of the PPA entered into between the parties. Further the transfer of coal from MCL to SECL is not a Change in Law and no consequences can be claimed on the basis of the same. the APTEL in the judgment dated 21.12.2018 passed in the case of GMR Kamalanga Energy Limited v. CERC & Ors., Appeal No. 193 of 2017 has already held that the shifting from one Coal India subsidiary to another is not a Change in Law.

(i) Levy of Evacuation Facility Charges by Coal India Limited vide notification dated 17.11.2007 are in pursuance to a contractual arrangement for supply of coal and any change in such price by CIL cannot be considered as having force of law or qualify as Change in Law. APMuL has selectively relied on the decision of the APTEL in *GMR Kamalanga Energy Limited v. CERC & Ors*., Appeal No. 193 of 2017 dated 21.12.2018. In the said decision, the APTEL had not held that all decisions and notifications by the Coal India Limited would constitute Change in Law. The APTEL had held that the issues have to be considered as per the terms of the PPA. In fact, the APTEL in the said decision had relied on the decision dated 14.8.2018 in Appeal No. 119 of 2016 and Appeal No. 277 of 2016 wherein the APTEL had rejected the claim of Change in Law in respect of sizing/crushing charges and surface transportation charges imposed by Coal India Limited. The decision of this Commission in Petition No. 72/MP/2018 has not considered the above aspect of the APTEL's Order dated 14.8.2018.

(j) As regards restriction of sulphur content in fuel oil in terms of MARPOL, mere notification of the law is not sufficient for a Change in Law. The said law should have an impact on the costs and revenue of the business of selling electricity. In the present case, the impact has been claimed as change in freight for transportation of coal. The changes in transportation charges are to be covered in the bid under the escalation to be given as a part of the quoted tariff. The increase in transportation charges are already considered in escalation index of the Commission as a specific category i.e. "Escalation rate for transportation of imported coal".

(k) Since the changes are considered in the escalation index, the same cannot be considered under Change in Law. This has already been held by the APTEL even while dealing with the notifications by the Government Instrumentality in *Adani Power Rajasthan Limited v. Rajasthan Electricity Regulatory Commission* in Appeal No. 119 of 2016 dated 14.8.2018. The Commission vide Order dated 8.11.2019 and 15.1.2020 in Petition No. 11/SM/2019 has incorporated the impact on fuel transportation in the escalation index. Thus, changes in the basic freight charges i.e. the transportation charges cannot be considered as Change in Law.

(l) The contention of APMuL that the terms and conditions of the bid called out by Haryana Utilities were such that Haryana Discoms could select any tariff stream-escalable or non-escalable for procurement of power and the Haryana Utilities selected to procure power through non-escalable tariff stream and, thus, having exercised the option to procure power through non-escalable tariff stream, the Haryana Utilities cannot now use the same to the disadvantage of

Adani Power is baseless and without any merit. The same contention was raised by Adani Power in Review Petition No. 1/RP/2022 which has been rightly rejected by this Commission.

(m) Adani Power has not produced the agreement entered into by it with regard to imported coal and in particular related to transportation. If Adani Power had knowingly entered into the contract subsequent to the convention and despite being aware of the fuel requirements after 1.1.2020 and still entered into a contract with IFO 380 cst and with bunker de-escalation, Adani Power knowingly accepted the risk of increase in freight charges being aware of the provision in the competitive bid for quoting escalable and non-escalable tariff.

(n) Without prejudice to the contention on the merits, if the Commission holds any event to be Change in Law, the Commission may direct APMuL to submit complete details with proof. Further, once the relief is computed, it has to be considered whether it crosses the threshold of 1% of Letter of Credit in aggregate for a contract year in terms of Article 13.2(b) of the PPAs. Moreover, the impact has to be based on quantum of coal considered as per the actual quantum or quantum as per bid assumed parameters for Station Heat Rate (SHR), etc., whichever is lower. There has to be consideration of parameters of Station Heat Rate of 2206 kcal/kwh as upheld by APTEL vide Order dated 13.4.2018 in Appeal No. 210 of 2017 in specific case of APMul vis-à-vis Haryana Utilities.

(o) As regards the carrying cost, APMuL has filed the present Petition only in 2020 whereas a number of the events claimed as 'Change in Law' by APMuL date back to 2015. Therefore, APMuL cannot claim carrying cost for those events

where there has been delays and laches on the part of the APmUL to approach the Commission. The principle that the delays in filing Petition/information would result in denial of carrying cost has been settled by APTEL vide its judgement dated 19.9.2007 in Appeal No 70 of 2007 in the case of matter of *Maharashtra State Electricity Distribution Co. Ltd v. Maharashtra Electricity Regulatory Commission*, judgment dated 30.5.2014 in Appeal No. 147, 148 and 150 of 2013 in the case of *Torrent Power Ltd v. Gujarat Electricity Regulatory Commission* and judgment dated 4.12.2014 in Appeal No 45 of 2014 in *Paschim Gujarat Vij Company Ltd and Ors v. Gujarat Electricity Regulatory Commission*.

(p) On the claims made by APMuL that the carrying cost has to be allowed at the rate of the Late Payment Surcharge, the claim for Late Payment Surcharge only arises when there has been a default by the Respondents in making payments towards Supplementary Bill beyond one month from the date of billing (Article 11.8.3 of the PPA). The carrying cost, being claimed under restitutionary principle, can only be limited in nature, up to the maximum for the reasonable time value of money and not for penalty or excess burden on the Respondents. The Commission in the case of APMuL itself has allowed carrying cost (in remand from Hon'ble Supreme Court) on certain principles in Petition No. 235/MP/2015 dated 4.5.2017. This has not been challenged by the Petitioner. Therefore, the same parameter is to be applied.

9. The Petitioner, vide its rejoinder dated 11.9.2020, has mainly submitted as under:

(a) On 27.8.2018, Ministry of Power, Government of India (MoP) issued specific directions under Section 107 of the Act (MoP Direction) to the

Commission to avoid multiple proceedings pertaining to Change in Law for event which are already approved once by the Commission. MoP has categorically directed that, where the Commission has already passed an order to allow pass through of changes in domestic duties, levies, cess and taxes in any case under Change in Law, the same shall be applicable to all cases *ipso facto* and no additional Petition would need to be filed in this regard. Four out of five Change in Law events pertinent to the present Petition has already been allowed by this Commission vide its earlier orders. Therefore, unnecessary litigation pertaining to allowing Change in Law relief ought to be avoided with respect to domestic taxes/ duties/ levies/ cesses which has already been adjudged and allowed by the Commission.

(b) Para 6.2 (4) of National Tariff Policy 2016 provides that after the award of bids, if there is any change in domestic duties, levies, cess and taxes imposed by Central Government, State Governments/Union Territories or by any Government instrumentality leading to corresponding changes in the cost, the same may be treated as "Change in Law".

(c) Article 13.3.1 of the PPA specifically provides that the seller '*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*'. The Petitioner took some time for the purposes of internal discussions along with seeking legal opinions on the pertinent Change in Law claims. Further, parallel litigations were also ensuing with the Respondents for payment of taxes & duties and domestic coal shortfall on account of Change in Law whereby substantial time has elapsed. Therefore, the Petitioner has issued

the Change in Law notices as soon as reasonably practicable, after making an informed decision.

(d) Neither tariff policy nor PPA stipulates any specific time within which the Change in Law notice have to be issued by the Petitioner, failing which Adani Power's substantive rights would stand vitiated. The Commission is not inhibited by the technicalities of procedural law and is instead guided by sound principles of substantive law to further the ends of justice. It is a settled principle of law that procedure ought to be the handmaiden of justice.

(e) The Lanco Kondapalli judgment is not applicable to the matter because its application is only limited to judicial powers of the State Commission under Section 86(1)(f) of the Act. However, in the present Petition, the Petitioner is invoking the regulatory powers of the Commission. The Petitioner's prayer in light of the precedence established by the Commission, having allowed Change in Law compensation towards the events claimed by Adani Power, Revised Tariff Policy, 2016 and the MoP letter is regulatory in nature.

(f) In this regard, MoP has directed this Commission to *'only determine the per unit impact of such change in domestic duties, levies, cess and taxes, which will be passed on.'* Therefore, the Petitioner's relief seeking determination of supplementary tariff on account of said Change in Law events is regulatory in nature and ought to be treated differently than any other adjudicatory proceedings.

(g) Serial No. 104 under Schedule of Limitation Act, 1963 prescribes limitation of three years from when the periodically occurring right is refused. The said principle is followed by the Hon'ble Supreme Court in *Shakti Bhog Food*

Industries Ltd. vs. Central Bank of India [2020 SCC Online SC 482]. In terms thereof, Haryana Utilities have replied on 3.6.2020 to the Change in Law notice dated 14.4.2020 issued by Adani Power claiming Forest Tax is in the State of Madhya Pradesh. Haryana Utilities have not responded to the Change in Law notices dated 22.7.2019 and 22.11.2019 issued by the Petitioner claiming Forest Tax in the State of Chhattisgarh and Change in Law notices dated 22.7.2019 and 19.11.2019 claiming Chhattisgarh Environmental and Infrastructure Development Cess. Therefore, the period of limitation for claiming the aforesaid Change in Law events have not expired.

(h) The FSA dated 13.10.2015 with SECL was signed in pursuance to Coal India Limited decision for partial transfer of existing quantity of coal from MCL to SECL.

(i) The contention of Respondents that the definition of "Indian Government Instrumentality" is specific and includes only the Government of India (GoI), Governments of Haryana and Gujarat is completely erroneous and baseless in light of the Commission's order dated 29.3.2020 in Petition No. 327/MP/2018 in the case of Dhariwal Infrastructure Limited vs. TANGEDCO wherein the Commission has allowed the Chhattisgarh Infrastructure Development Cess and Chhattisgarh Environment Cess even though the definition of Indian Government Instrumentality as per PPA of Dhariwal Infrastructure Limited doesn't specify State of Chhattisgarh.

(j) The Respondents have referred to Judgment dated 21.12.2018 passed by the APTEL in Appeal No. 193 of 2017 wherein change in supply of coal from MCL to ECL resulted in increase in base price of coal due to change in grade of

coal supply. The said judgment is not relevant in the present context as imposition of taxes & duties on the SECL coal is not included in the base price of coal.

(k) As regards Evacuation Facility Charges, the Respondents have erroneously drawn reference to market price of coal which is irrelevant to the present matter. If Change in Law event occurs seven days prior to cut-off date being bid deadline, such additional cost suffered by either of the parties to the contract must be compensated.

(l) The Respondents have erroneously contended that increase in cost due to MARPOL shall be covered by escalation index published by the Commission vide its suo-moto order in Petition No. 11/SM/2019. Escalation index pertains to the escalable component of tariff. However, the tariff envisaged under the present PPA does not envisage any escalable component and therefore, the escalation index published by the Commission is not applicable.

(m) As regards the Procurers' submission that relief needs to be considered only if the impact of such Change in Law crosses the threshold of 1% of Letter of Credit, it is noteworthy that while Article 13.2 (a) dealing with construction period of the PPA uses the term 'As a result of any Change in Law', whereas Article 13.2 (b) which deals with Operation Period in contrast uses 'As a result of Change in Law'. Thus, it is clear that the aggregate of all Change in Law in the relevant Contract Year must be considered to decide the *de minimus* threshold for computation of impact. The APTEL has, in terms of Judgment dated 20.11.2018 in Appeal No. 121 of 2018 titled Sasan Power Limited vs. CERC & Ors., held that the Change in Law clause in PPA is essentially a vehicle to give

effect to the guiding principle of economic restoration and the same needs to be interpreted accordingly.

(n) As regards Haryana Utilities' contention that the impact of Change in Law must be based on quantum of coal considered as per the actuals or bid assumed parameters of SHR and GCV, etc., whichever is lower, it is submitted that the relief for Change in Law is to restitute the affected party to the same economic position as if such Change in Law events had not occurred.

10. The Petitioner vide its written submission dated 2.1.2023 has reiterated its submissions made in the petition and the rejoinder. The Petitioner while relying on APTEL judgment dated 14.11.2022 in *APSPDCL vs. APERC & Ors.* in Appeal No. 397 of 2022, has additionally contended that any issue bearing implication of 'tariff' falls under the regulatory jurisdiction of the Commission and not adjudicatory jurisdiction. The Petitioner has further submitted that levy of Forest Tax by Governments of Chhattisgarh and Madhya Pradesh and the increase in the rate of Chhattisgarh Environment Cess and Infrastructure Development Cess by Government of Chhattisgarh are both covered by APTEL's Judgment dated 14.8.2018 in *APRL vs. JVVNL & Ors.*, in Appeal No. 119 of 2016 and 277 of 2016 [Para 11 A (xxii)] and judgment dated 29.1.2020 in *APRL vs. JVVNL & Ors.*, in Appeal No. 284 of 2017 and 09 of 2018 [Para 46] respectively. In the said judgments, the definition of 'Indian Governmental Instrumentality' in the PPA did not specifically include the Governments of Madhya Pradesh and Chhattisgarh, yet the APTEL did not adopt a narrow construction of the PPA as contended by Haryana Utilities. Therefore, it is a fit case for this Commission to apply the 'Business Efficacy' test, adopt purposive interpretation, and grant relief to APMuL [*Nabha Power Ltd. v. Punjab SPCL, [(2018)*

11 SCC 508]. In any case, South-Eastern Coalfields Ltd., which admittedly falls under the ambit of the definition of 'Indian Governmental Instrumentality' [*GMR Kamalanga Energy Limited v. Central Electricity Regulatory Commission,* 2018 SCC OnLine APTEL 151 (Para 26)] has implemented the notifications of Governments of Chhattisgarh and Madhya Pradesh.

11. The Respondents in their written submissions have reiterated their contentions in the reply. The Respondents have additionally submitted that the communications in 2019 and 2020 for the events which took place in 2012, 2015 or 2008 cannot be considered as a reasonable time for issuance of notice as per Article 13.3 of the PPAs in terms of judgment of Supreme Court in *Maharashtra State Electricity Distribution Company Limited v. Maharashtra Electricity Regulatory Commission* [(2022) 4 SCC 657]. Further, the decisions of APTEL in *Adani Power Rajasthan Limited v. Rajasthan Electricity Regulatory Commission* in Appeal No. 119 of 2016 dated 14.8.2018 is distinguishable as the plea of restricted scope of Indian Government Instrumentality and levy of the above cess by Government of Chhattisgarh not by SECL was not raised in the said case and therefore, the conclusion reached of the taxes being covered under Change in Law event in the said case is *per-incuriam* and *sub-silentio.* Respondents have further submitted that APMuL appears to be claiming impact of MARPOL convention and consequent dollar rate, etc., in regard to imported coal. Since APMUL's case is that the Project is based on 100% domestic coal, there is no occasion for APMuL to seek Change in Law compensation qua MARPOL on imported coal.

Analysis and Decision

12. On consideration of the facts on record and arguments during the hearing of the Petition, the following issues arise for our consideration:

> **Issue No.1: Whether Change in Law claims of APMuL are barred by Limitation?**
>
> **Issue No.2: Whether compensation claims of APMuL are admissible under Change in Law in the PPAs?**
>
> **Issue No. 3: What should be the mechanism for processing and reimbursement of admitted claims under Change in Law?**
>
> We deal with the above issues in subsequent paragraphs.

Issue No.1: Whether Change in Law claims of APMuL are barred by Limitation?

13. The Respondents have contended that the limitation period for instituting any suit sought for obtaining declaration is three years from the date when the right to sue first accrues. The right to sue accrued for the first time when the event being claimed as Change in Law had taken place. Relying on Lanco Kondapalli judgment of Hon'ble Supreme Court, the Respondents have further contended that the Commission cannot entertain time barred claims as the time periods for limitation provided under Limitation Act, 1963 apply to Petitions filed under Electricity Act, 2003. It has been further submitted that even where the Commission decides to consider any Change in Law claims of APMuL, only those claims which fall within the period of three years prior to the filing of the present Petition should be considered for adjudication.

14. ***Per Contra***, APMuL has submitted that the Lanco Kondapalli judgment is not applicable to the present matter because its application is only limited to judicial powers of the Commission under the Act, whereas, the present Petition has been filed invoking the regulatory powers of the Commission. Serial No. 104 under Schedule, Limitation Act, 1963 prescribes limitation of three years from when the periodically

occurring right is refused. APMuL has submitted that Haryana Utilities have replied on 3.6.2020 to the Change in Law notice dated 14.4.2020 and did not respond to other Change in Law notices. Therefore, the period of limitation for claiming the aforesaid Change in Law events has not expired.

15. We have considered the submissions made by the Petitioner and the Respondents. Hon'ble Supreme Court in a number of judgements has held that Limitation Act is not applicable in case of Tribunals and quasi-judicial bodies since they are not courts in strict sense of the term. However, in *Andhra Pradesh Power Co-ordination Committee Vs. Lanco Kondapalli Power Limited [(2016) 3SCC 468], Hon'ble Supreme Court extended the the applicability of law of limitations in case of proceedings before Regulatory Commissions, particularly, in respect of proceedings being held in exercise of its adjudicatory power. Relevant portions of the judgement are extracted as under:*

> ***"29.*** *The only other weighty contention of Mr Giri that there is nothing in the Electricity Act, 2003 to create a right in a suitor before the Commission to seek claims which are barred by law of limitation, merits a serious consideration. There is no possibility of any difference of opinion in accepting that on account of the judgment of this Court in Gujarat Urja [Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd., (2008) 4 SCC 755] the Commission has been elevated to the status of a substitute for the civil court in respect of all disputes between the licensees and generating companies. Such dispute need not arise from the exercise of powers under the Electricity Act. Even claims or disputes arising purely out of contract like in the present case have to be either adjudicated by the Commission or the Commission itself has the discretion to refer the dispute for arbitration after exercising its power to nominate the arbitrator. …………..*
>
> ***30.*** *In such a situation it falls for consideration whether the principle of law enunciated in State of Kerala v. V.R. Kalliyanikutty [State of Kerala v. V.R. Kalliyanikutty, (1999) 3 SCC 657] and in New Delhi Municipal Committee v. Kalu Ram [New Delhi Municipal Committee v. Kalu Ram, (1976) 3 SCC 407] is attracted so as to bar entertainment of claims which are legally not recoverable in a suit or other legal proceeding on account of bar created by the Limitation Act. On behalf of the respondents those judgments were explained by pointing out that in the first case the peculiar words in the statute—"amount due" and in the second case "arrears of rent payable" fell for interpretation in the context of powers of the tribunal concerned and on account of the aforesaid particular words of the statute this Court held that the duty cast upon the authority to determine what is recoverable or payable implies a duty to determine such claims in accordance with law. In our considered view a statutory authority like the Commission is also required to*

determine or decide a claim or dispute either by itself or by referring it to arbitration only in accordance with law and thus Sections 174 and 175 of the Electricity Act assume relevance. Since no separate limitation has been prescribed for exercise of power under Section 86(1)(f) nor this adjudicatory power of the Commission has been enlarged to entertain even the time-barred claims, there is no conflict between the provisions of the Electricity Act and the Limitation Act to attract the provisions of Section 174 of the Electricity Act. In such a situation, on account of the provisions in Section 175 of the Electricity Act or even otherwise, the power of adjudication and determination or even the power of deciding whether a case requires reference to arbitration must be exercised in a fair manner and in accordance with law. In the absence of any provision in the Electricity Act creating a new right upon a claimant to claim even monies barred by law of limitation, or taking away a right of the other side to take a lawful defence of limitation, we are persuaded to hold that in the light of nature of judicial power conferred on the Commission, claims coming for adjudication before it cannot be entertained or allowed if it is found legally not recoverable in a regular suit or any other regular proceeding such as arbitration, on account of law of limitation. We have taken this view not only because it appears to be more just but also because unlike labour laws and the Industrial Disputes Act, the Electricity Act has no peculiar philosophy or inherent underlying reasons requiring adherence to a contrary view."

16. APMuL has submitted that the petition has been filed under Section 79(1)(b) of the Act for determination of the impact of Change in Law during the operation period and therefore, its claims are not subject to the limitation under the Limitation Act in terms of the judgement in Lanco Kondapalli case which is applicable in case of adjudicatory petitions only. We have examined the provisions of the PPA. Article 13.2 of the PPA provides for Change in Law during construction period as well as operation period. In the present case, the Petitioner's claims are for the operation period which is covered under Article 13.2(ii) of the PPA. Article 17.3.1 of the PPA provides for adjudication of disputes by the Commission which is extracted as under:

"Article 17.3.1
Where any Dispute arises 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 or (ii) relates to any matter agreed to be referred to the Appropriate Commission under Articles 4.7.1, 13.2, 18.1 or clause 10.1.3 of Schedule I 7 hereof, such Dispute 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."

It is provided in the above quoted Article that if the claims relate to Article 13.2 of the PPA, it shall be submitted for adjudication of the Commission. Since APMuL has approached the Commission for relief under Article 13.2(ii), the dispute involves adjudication under Article 17.3.1. The dispute raised in the Petition being adjudicatory in nature, Limitation Act will be applicable for examining the claims in terms of the judgement in Lanco Kondapalli case.

17. Schedule to the Limitation Act lays down various types of suits for the purpose of limitation. However, Change in Law claims under the PPA is not specifically provided for in the Limitation Act. In that case, Article 113 of the Schedule is relevant which is extracted as under:

Description of application	Period of limitation	Time from which period begins to run
113. Any suit for which no period of limitation is provided elsewhere in the schedule	Three years	When the right to sue accrues

Thus, the period of limitation for filing petitions in adjudicatory cases involving Change in Law claims before the Commission shall be governed under Article 113 of the Limitation Acct which is three years from the time when the right to sue accrues.

18. The next question for consideration is when the right to accrues in favour of APMuL to bring the petition before the Commission. The PPA provides that the Seller is required to give a notice to the procurer as soon as reasonably practicable after becoming aware of the Change in Lw events or should reasonably have known of the Change in Law. Article 13.3 pertaining to notice under Change in Law is extracted as under:

"13.3 Notification of Change in Law

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

13.3.2 Notwithstanding Article 13.3.1, the Seller shall be obliged to serve a notice to the procurer under this Article 13.3.2 if it is beneficially affected by a Change in Law. Without prejudice to the factor of materiality or other provisions contained in this Agreement, the obligation to inform the Procurer contained herein shall be material.

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

13.3.3 Any notice served pursuant to this Article 13.3.2 shall provide, amongst other things, precise details of:

(a) the "Change in Law"; and

(b) the effects on the Seller of the matters referred to in Article 13.2".

19. The date of events of events of Change in Law and the notice issued by the Petitioner is summarised below:

S.No.	Additional Levy	Date of Notification	Date of signing of FSA with SECL	Notice Date
1	Forest Tax Chhattisgarh-Chhattisgarh	SECL Notification: 16.9.2015 (from Rs.7/ to Rs.15/ per tonne)	13.10.2015	22.7.2019 & 21.11.2019
2	Forest Tax Madhya Pradesh-	SECL Notification: 9.11.2012(Rs.7 per tonne) SECL Notification: 27.3.2020(Rs.7/- to Rs.57/- per tonne)	13.10.2015	22.7.2019 14.4.2020
3	Chhattisgarh Development Cess and Environmental Cess	SECL Notification: 19.8.2015 (from Rs.5/ to Rs.7.5/ per tonne) for each Cess SECL Notification: 11.10.2019(from Rs.7.5/ to Rs.11.25/ per tonne) for each Cess	13.10.2015	22.7.2019 19.11.2019
4	Evacuation Facility Charges	CIL Notification: 19.12.2017		20.12.2017
5	Levy of restrictions on sulphur content in fuel oil in terms of MARPOL.	Min of Shipping Circular: 28.8.2019 (to be effective from 1.1.2020)		4.2.2020

20. It is noticed that APMuL has issued notice of Change in Law in respect of forest tax of Madya Pradesh, and forest tax of Chhattisgarh and Chhattisgarh Development and Environment tax on 22.7.2019 even though it became aware of the same on 13.12.2015 when it signed the FSA with SECL. In respect of SECL Notification dated 27.3.2020, SECL Notification dated 11.10.2019 and CIL Notification dated 19.12.2017, APMuL has given notices on 14.4.2020, 19.11.2019 and 20.12.2017 respectively which are within reasonable period. In respect of MARPOL, notice has been given after 5 months and five days.

21. The Respondents have submitted that notices in respect of forest taxes of Madhya Paresh and Chhattisgarh and Development and Environment Cess of Chhattisgarh cannot by any measure be considered as notice as per Article 13.3 of the PPA. Reliance has been placed on Section 50 of the Contract Act, 1872 to contend that when the contract provides for something to be done in a certain manner, it has to be done in that particular manner. Respondents have pleaded that there cannot be any relief for Change in Law without an appropriate notice. *Per Contra*, APMuL has submitted that it took some time for the purposes of internal discussions along with seeking legal opinions on the pertinent Change in Law claims. Further, parallel litigations were also ensuing with the Respondents for payment of taxes & duties and domestic coal shortfall on account of Change in Law whereby substantial time has elapsed.

22. We have considered the submissions made by the parties. There is no denial of the fact that APMuL has issued formal notices for certain events of Change in Law events after a lapse of more than 3 years after signing of the FSA when it came to be affected by Change in Law. The issue is whether such delay in giving notice would

result in denial of compensation for the expenditure incurred by APMuL in respect of these events of the Change in Law. It is pertinent to note that Article 13.3.1 of the PPA provides that if the Seller is affected by a Change in Law in accordance with Article 13.2 and wishes to claim a change in law, it shall give notice of such event as soon as reasonably practicable after becoming aware of the same or should reasonably have known of the Change in Law event. As per Article 13.3.3, the notice shall provide among other things the precise details of the Change in Law and effects on the Seller of the matters referred to in Article 13.2 (for construction period as well as operation period). Thus, the purpose of notice is to inform the Procurer about the details of Change in Law and its impact on the Seller. Further, PPA does not provide for any adverse consequences including denial of compensation for the actual expenditure incurred on account of Change in Law where delay has occurred in issuing the Change in Law notices. Therefore, in the absence of any specific timeline for giving notice about the occurrence of Change in Law event, delay in giving notice will not adversely affect or obliterate the claims of APMuL except to the extent the claims are barred by limitation.

23. We have already observed in para 19 that limitation in the present case will be governed by Article 113 of the Schedule of the Limitation Act which provides for a period of three years from the date when the right to sue accrues. It is pertinent to mention in this connection that all the Change in Law claims in the present petition are recurring in nature. In other words, the Change in Law claims in the form of tax and cess will arise every time when the coal is supplied. In this connection, Section 22 of the Limitation Act is relevant which is extracted as under:

> "*22. Continuing breaches or tort- In the case of a continuing breach of contract or in the case of continuing tort, a fresh period of limitation begins to run at every moment of the time during which the breach or the tort, as the case may be, continues.*"

24. In this connection, the following observations of the APTEL in its judgment dated 2.11.2020 in batch of Appeals led by Appeal No. 10 of 2020 (*Power Company of Karnataka Limited vs UPCL & Ors*) are relevant:

> *"171. There can be no quarrel with the broad proposition that under the general application of the Limitation Act, a claim with respect to non-payment of money payable on a monthly / periodic basis brought before an adjudicatory forum cannot be sustained with respect to recovery of money for a period of more than three years prior to the date of institution of the proceedings."*

25. Thus, in case of non-payment of money payable on periodic or monthly basis brought before an adjudicatory forum, even though the right to sue has accrued earlier, the claims for recovery of money cannot be sustained for a period of more than three years prior to the date of institution of proceedings. In other words, the claims of APMuL for compensation towards impact of Change in Law can be entertained if the claim relates to a period of three years preceding the date of filing of the petition before the Commission i.e. three years prior to 16.5.2020 which works out to 17.5.2017. The Respondents have submitted that even if any Change in Law claims are to be considered, only the claims which fall within three years prior to the filing of the present petition would be admissible for adjudication. Therefore, Limitation period shall be reckoned from 17.5.2017 i.e. 3 years prior to the filing of the present petition on 16.5.2020. The claims arising before 17.5.2017 shall be time barred whereas claims arising on or after 17.5.2017 shall be within the period of limitation.

26. Considered in the light of the above period of limitation for change in law claims raised in the petition, four claims namely, (i) levy of forest tax on despatches/lifting of coal through SECL Notification dated 16.9.2015 in the State of Chhatisgarh; (ii) levy of forest tax on despatches/lifting of coal through SECL Notification dated 9.11.2012 in the State of Mahya Pradesh; (iii) Levy of the Chhatisgarh Infrastructure

Development Cess and Chhatisgarh Environment Cess at the rate of Rs.7.5 per tonne through SCEL Notification dated 19.8.2015; and (iv) imposition of Evacuation Facility Charges at the rate Rs.50/tonne through CIL Notification dated 19.12.2017 shall be subject to the limitation date of 17.5.2017. However, in case of (i) levy of Forest tax at the rate of Rs.57/ per tonne vide SECL Notification dated 27.3.2020; (ii) levy of Chhatisgarh Development and Environment Cess at the rate of Rs.11.25/tonne vide SECL Notifications dated 11.10.2019; (iii) Engg Circular No. 2 of 2019 dated 28.8.2019 of Ministry of Shipping directing ships to be in compliance with the provisions of MARPOL Annexure VI restricting sulphur content of fuel to be used to 0.5% to come into effect from 1.1.2020, the petition has been filed within a period of three years from the date of occurrence of Change in Law event and therefore, these claims are within the period of limitation.

Issue No.2: Whether compensation claims of APMuL are admissible under Change in Law in the PPAs?

27. The claims of the Petitioner are with respect to events under Change in Law under Article 13 of the PPAs which occurred after the cut-off date i.e.17.11.2007. Article 13 of the PPAs between the Petitioner and Haryana Utilities is extracted as under:

"13 ARTICLE 13 CHANGE IN LAW

13.1 Definitions

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

13. 1.1 "Change in Law" means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline:

(i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law or (ii) a change in interpretation of any Law by a Competent Court of law, tribunal or Indian Governmental Instrumentality provided such Court of law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation or (iii) change in any consents, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller, which

results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer under 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.

Provided that if Government of India does not extend the income tax holiday for power generation projects under Section 80 IA of the Income Tax Act, upto the Scheduled Commercial Operation Date of the Power Station, such non-extension shall be deemed to be a Change in Law (applicable only in case the Seller envisaging supply from the Project awarded the status of "Mega Power Project" by Government of India).

13.1.2 "Competent Court" means:

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

13.2 Application and Principles for computing impact of Change in Law While determining the consequence of Change in Law under this Article 13, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through Monthly Tariff Payments, to the extent contemplated in this Article 13, the affected party to the same economic position as if such Change in Law has not occurred.

b) Operation Period As a result of Change in Law, the compensation for any increase/decrease in revenues or cost to the Seller shall be determined and effective from such date, as decided by the Appropriate Commission whose decision shall be final and binding on both the Parties, subject to rights of appeal provided under applicable Law.

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

28. Further, the terms "Law" and "Indian Government Instrumentalities" have been defined in the PPAs as under:

"*Law" means 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 all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include all rules, regulations, decisions and orders of the Appropriate Commission".*

"Indian Governmental Instrumentality" means the Government of India (GOI), Government of Haryana and any Ministry, department, body corporate, Board, agency, or other authority of GOI or Government of the State where the Project is located and includes the Appropriate Commission".

29. A combined reading of the above provisions would reveal that this Commission has the jurisdiction to adjudicate upon the disputes between the Generating Company and Procurer(s) with regard to "Change in Law" which occur after the date which is seven days prior to the bid deadline ("cut-off date"). The events broadly covered under Change in Law are following:

a) Any enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law, 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) Any change in any consents or approvals or licences available or obtained for the project, otherwise than the default of the seller.

d) Such changes (as mentioned in (a) to (c) above) result in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer under the Agreement.

e) The purpose of compensating the party affected by Change in Law is to restore through Monthly Tariff Payments, to the extent contemplated in this Article 13, the affected party to the same economic position as if such "Change in Law" has not occurred.

f) The adjustment in monthly tariff payment shall be effective from the date of (i) adoption, promulgation, amendment, re-enactment or repeal of the law or change in law or (ii) the date of order/judgement of the Competent Court or

Tribunal or Indian Government Instrumentality if the Change in Law is on account of change in interpretation of Law.

30. Keeping in view the above broad principles, we proceed to deal with the claims of the Petitioner under Change in Law.

(I) Levy of Forest Tax on dispatches/ lifting of coal in Chhattisgarh and Madhya Pradesh.

31. APMuL has submitted that, initially, it had executed an FSA with Mahanadi Coal Fields on 9.6.2012 for supply of Annual Contracted Quantity of 6.405 MTPA. Subsequently, Coal India Limited transferred 2.315 MTPA coal out of 6.405 MTPA from MCL to SECL. Accordingly, APMuL entered into an FSA with SECL on 13.10.2015 for supply of 2.315 MTPA of coal. Pursuant to transfer of linkage to SECL, Forest Tax has been levied on the coal supplied to the Petitioner from SECL in terms of Chhattisgarh Transit Forest Produce Rules, 2001 and MP Transit (Forest Produce) Rules, 2000. Further, Chhattisgarh Development and Environmental Cess is also levied on the coal supplied to the Petitioner by SECL in accordance with Chhattisgarh (Adhosanrachna Vikas Evam Paryavaran) Upkar Adhiniyam 2005. As per the SECL letter dated 14.10.2015 placed on record by the Petitioner, the FSA dated 13.10.2015 came into force with effect from 1.11.2015. A chart of additional levy imposed on the Petitioner on account of supply of coal from SECL from 1.11.2015 onwards is as under:

S.No.	**Additional levy**	**Relevant Notification of State Government as on 13.10.2015**	**Relevant SECL Notification to pass on the State levy**	**Date from which applicable**
1	Forest Tax (Chhattisgarh) [@Rs 15/Tonne	Amendment dated 30.06.2015 of Chhattisgarh Transit Forest Produce Rules, 2001	SECL Notification: 16.9.2015	1.11.2015
2	Forest Tax (Madhya Pradesh) [@Rs 7/Tonne]	GoMP Notification dated 28.5.2001 under MP Transit (Forest Produce)	SECL Notification: 9.11.2012	1.11.2015 to 4.3.2020

		Rules, 2000 (Notification Set aside by High Court but stayed by Supreme Court In 2008)		
	@Rs 57/Tonne from 5.3.2020 onwards	GoMP Notification dated 5.3.2020	SECL Notification: 27.3.2020	5.3.2020 onwards

32. The Respondents have submitted that SECL is merely passing through the taxes notified by Governments of Chhattisgarh and Madhya Pradesh in terms of the Fuel Supply Agreement (FSA) entered into between the Petitioner and SECL. The contractual arrangement with SECL for supply of coal and any change in such price cannot be considered as having force of law or qualify as Change in Law. The implementation of Forest Tax by the said State Governments of Chhattisgarh and Madhya Pradesh is not 'law' as the definition of 'Indian Governmental Instrumentality' in the PPA is specific which includes only the Government of India (GoI), Governments of Haryana and Gujarat only. It has been further contended that the transfer of coal from MCL to SECL is not a Change in Law in terms of judgment dated 21.12.2018 passed by APTEL in the case of GMR Kamalanga Energy Limited v. CERC & Ors., in Appeal No. 193 of 2017.

33. We have considered the submissions made by the parties. The APTEL by judgment dated 14.8.2018 in *Adani Power Rajasthan Limited vs. Rajasthan Electricity Regulatory Commission and others*, Appeal No. 119 of 2016 [reported as 2018 SCC OnLine APTEL 101] has allowed levy of Forest Tax as Change in Law. The relevant extract of the judgment is reproduced below:

> *"xxii. It is observed that the claim of APRL for the said fee at the rate of Rs. 7/tonne has been levied based on Chhattisgarh Government, Forest Department letter dated 6.10.2012, under Chhattisgarh Transit (Forest Produce Rule) 2001 on coal mined and transported from SECL mines located in Forest area with effect from 1.11.2012.* ***There was no such fee applicable as on cut-off date of the bid deadline. Accordingly, APRL could not have envisaged for factoring it in its bid. The levy of Forest Tax/Fee cannot be considered as a part of pricing mechanism for coal and hence it cannot form part of CERC Escalation Rates for coal. Accordingly, there has***

been increase in expenses related to coal due to such levy and the same falls under the category of first bullet of Article 10.1.1 of the PPA read with the definitions of the "Law" and "Indian Government Instrumentality" under the PPA. *This is also in line with the judgement of this Tribunal in Appeal No. 288 of 2013 as discussed above. Accordingly, the State Commission has not justified in rejecting the benefit claims of the APRL/Appellant."*

34. Hon'ble Supreme Court vide its judgement dated 20.4.2023 in GMR Waroora Energy Limited Vs CERC & Others and related civil appeals [(2023) SCC Online SC 464] has upheld the judgement of APTEL on the issue of forest tax as under:

"110. In so far as forest tax is concerned, perusal of the material placed on record would reveal that as on the cut-off date, there was no Forest Tax applicable on coal mined and transported fromSouth Eastern Coalfield Limited("SECL" for short) mines located in forest area.For the first time vide Notification of the Chhatisgarh State Government, Department of Forest, under the provisions of Chhaitisgarh Transit (Forest Produce) Rules, 2001, a fee at the rate of Rs.7 per ton was levied. Undisputedly, the said notification is issued by the Forest Department of Government of Chhatisgarh which an instrumentality of the State. As such no error can be found with the finding of the learned APTEL in this regard."

35. The Petitioner has submitted that Forest Tax as a Change in Law has also been allowed by the Commission in Petition Nos. 16/MP/2016, 156/MP/2018, 118/MP/2018 and 116/MP/2018. It is noted that the Commission has also allowed levy of Forest Tax in Chhattisgarh as Change in Law by order dated 25.9.2019 in Petition No 116/MP/2018 (*Maruti Clean Coal & Power Ltd. vs. Jaipur Vidyut Vitran Nigam*) relying on the aforesaid judgment of the APTEL. Relevant portion of the order dated 25.9.2019 is extracted below:

"63. We have considered the submissions of the Petitioner. This issue has been dealt with by APTEL in Appeal No. 119 of 2016 and others (Adani Power Limited Vs. Rajasthan Electricity Regulatory Commission and others). In this matter, Rajasthan Electricity Regulatory Commission (RERC) in its impugned order dated 15.3.2016 had denied the levy of Forest Tax stating that it did not meet the criteria under Change in Law. This decision of RERC was challenged before APTEL by Adani Power Ltd. wherein APTEL in its judgment dated 14.8.2018 allowed the Forest Tax as change in law event. Relevant portion of said judgment is extracted as under

………………..

64. As per the above decision of the APTEL, Forest Tax constitutes change in law event. No Forest Tax was existed as on cut-off date of 11.9.2012. It was levied @Rs.7/MT on coal mined and transported from SECL mines located in forest area had been levied with effect from 1.11.2012 under Chhattisgarh Transit (Forest Produce) Rule, 2001 based on Chhattisgarh Government, Forest Department`s letter dated 6.10.2012. Further, in pursuance to Notification dated 30.6.2015 of Government of Chhattisgarh, this Forest Tax was revised from Rs. 7/MT to Rs. 15/MT of coal with effect from 1.7.2015. Accordingly, the Petitioner shall be entitled to recover such levy and subsequent increase in Forest Tax from the Rajasthan Discoms 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, whichever is lower, for supply of electricity to Rajasthan Discoms. 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 Forest Tax."

36. Levy of Forest Tax or Transit Fee was also allowed by the Commission by order dated 17.2.2017 in Petition No. 16/MP/2016 as under:

"20. We have considered the submissions of the petitioner and the respondents. Government of Madhya Pradesh vide its notification dated 28.5.2001 levied a transit fee of Rs. 7 per metric tonne under the MP Transit (Forest Produce) Rules, 2000. In 2002, Northern Coalfields, South Eastern Coalfields, NTPC, Hindalco, Centuary Texities and others filed challenged the said notification dated 28.5.2001 levying of transit fee before Hon`ble High Court of Madhya Pradesh at Jabalpur. Hon`ble High Court vide its judgment dated 14.5.2007 declared the said notification ultra vires and directed for refund the collected amount. The cutoff date in terms of the Change in Law provisions of the PPA is 21.7.2007. As on the cut-off date, the notification dated 28.5.2001 issued under MP Transit (Forest Produce) Rules, 2000 was held to be ultra vires and therefore, the Petitioner could not be expected to factor the transit fees in the bid. After the cut-off date, Govt. of MP on 3.1.2008 filed a Special Leave Petition before the Hon`ble Supreme Court challenging the judgement dated 14.5.2007. Subsequently, Hon`ble Supreme Court vide its interim order dated 7.3.2008 stayed the judgment of High Court dated 14.5.2007. ……….. The Principal Chief Conservator of Forest, Land Management (PCCF, LM), GoMP vide its letter dated 15.10.2015 directed that if the Petitioner would be liable for penalty for non-deposit of transit fee and further directed for deposit of advance fee for transit of coal.

21. Under Article 13.1.1.(ii) of the PPA, a change in interpretation of any Law by a Competent Court of law, tribunal or Indian Governmental Instrumentality after the cut-off date shall amount to change in law provided such Court of law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation. As a result of interpretation by Hon'ble High Court of MP, the notification dated 25.8.2001 levying the transit fee was set aside. Against the said order, appeal is lying before the Hon'ble Supreme Court and stay has been granted on the judgement of the Hon'ble High Court vide order dated 7.3.2008. As a result, the notification dated 28.5.2001 got revived. This has taken place after the cut-off date and therefore, the liability to pay the transit fees has arisen after the cut-off date. Therefore, we hold that liability of payment of transit fees is covered under Change in Law, subject to final decision of the Hon'ble Supreme Court upholding the notification of Government of Madhya Pradesh."

37. However, the Respondents have contended that the judgment dated 14.8.2018 of the APTEL is distinguishable as the plea of restricted scope of Indian Government Instrumentality and further that the levy of the above cess is not of SECL but by Government of Chhattisgarh was not raised in the said case and therefore, the conclusion reached of the taxes being covered under Change in Law event in the said case is *per-incuriam* and *sub-silentio*. In the light of the judgement of Hon'ble Supreme Court quoted in para 35 above upholding the decision of APTEL that the Forest Tax imposed by Forest Department of Government of Chhattisgarh is covered under Change in Law, the objections of the Respondents are no more relevant to the adjudication of the claims of APMuL.

38. It is noted that Forest Tax @ Rs 7/Tonne was levied for the first time by the Government of Chhattisgarh vide notification dated 6.10.2012 which was subsequently increased to Rs. 15/Tonne vide amendment notification dated 30.6.2015. SECL has merely passed on the Forest Tax @ Rs 15/Tonne to all dispatches of coal vide its notice dated 16.9.2015 relying on revision of rates as per 'Chhattisgarh Transit Forest Produce Rules, 2001'. The relevant portion of SECL notice dated 16.9.2015 is extracted below:

> " *<u>Notice</u>*
>
> *Rates of "Chhattisgarh Transit Forest Produce Rules, 2001" has been revised from Rs 7.00 per tonne to Rs 15.00 per tonne respectively and is applicable to all dispatches/lifting from 00.00 Hrs. of 01.07.2015 ……."*

Though the Forest Tax of Government of Chhattisgarh @ Rs.15/- was made applicable from 1.7.2015 by SECL, APMuL started paying the forest tax from 1.11.2015 when the FSA came into force. In the light of our decision with regard to limitation, APMuL shall be entitled for reimbursement of Forest Tax paid to

Government of Chhattisgarh through SEPL with effect from 17.5.2017 i.e. three years prior to filing of the present petition.

39. Forest Tax in the State of Madhya Pradesh was levied on dispatches/ lifting of coal at the rate of Rs. 7/tonne on coal mined and transported from SECL mines vide GoMP notification dated 28.5.2001 in accordance with MP Transit (Forest Produce) Rules, 2000. However, the notification dated 28.5.2001 was held to be *ultra-vires* the Indian Forest Act, 1927 by the Hon`ble High Court of Madhya Pradesh ("MP High Court") vide a common order dated 14.5.2007 in six Writ Petitions filed before MP High Court including Writ Petition No. 2309/2002 (*Northern Coalfields Limited vs. State of Madhya Pradesh & Ors)*. The common order dated 14.5.2007 passed by the Hon`ble MP High Court was later stayed by Hon'ble Supreme Court vide order dated 7.3.2008. Hon'ble Supreme Court vide its judgement dated 15.9.2017 upheld the validity of Government of Madhya Pradesh notification dated 28.5.2001. After grant of stay on the judgement of MP High Court by Hon'ble Supreme Court vide order dated 7.3.2008, SECL vide its Notification dated 9.11.2012 levied Forest Tax @Rs 7/tonne Thus, as on cut-off date i.e. 17.11.2007 in case of present PPA, no Forest Tax was levied on dispatches/lifting of coal from SECL on account of the Notification of the Government of Madhya Pradesh dated 28.5.2001 since the Notification was held ultra vires by MP High Court, Since the Forest Tax at the rate of Rs.7 per tonne was levied with effect from 9.11.2012, APMuL became liable to pay the forest tax with effect from 1.11.2015 when the FSA with SECL came into force. Government of Madya Pradesh vide its notification dated 27.3.2020 increased the forest tax on despatches and lifting of coal from SECL from Rs.7 per tonne to Rs.57 per tonne. SECL notified the change in forest tax as a result of which APMuL became liable to pay forest tax at the rate of Rs.57 per tonne with effect from 27.3.2020. Since APMuL has given notice in time, the claim is

within the period of limitation. In the light of our decision with regard to limitation, APMuL shall be entitled to reimbursement of Forest Tax at the rate of Rs.7 per tonne with effect from 17.5.2017 i.e. three years prior to the filing of the present petition till 26.3.2020 and Rs.57 per tonne with effect from 27.3.2020 when the forest tax was further revised.

(II) Chhattisgarh Development Cess and Environmental Cess

40. Chhattisgarh Development Cess and Environmental Cess were levied for the first time vide Chhattisgarh (Adhosanrachna Vikas Evam Paryavaran) Upkar Adhiniyam, 2005 at the rate of Rs 5 per tonne on annual dispatch of coal. Thus, as on cut-off date, Chhattisgarh Development Cess and Environment Cess was Rs. 5/- per tonne each and hence this cess is not applicable in case of APMuL. The rates were increased from Rs 5/tonne to Rs 7.5/tonne each vide notification dated 16.6.2015 which is after the cut-off date and became applicable to APMuL with effect from 1.11.2015 when the FSA came into force. The rates of Development Cess and Environment Cess were further revised from Rs 7.5/tonne to Rs 11.25/tonne each vide notification dated 4.9.2019.

41. Increase in the rate of Chhattisgarh Environment Cess and Infrastructure Development Cess by Government of Chhattisgarh has been allowed as Change in Law by APTEL by judgment dated 29.1.2020 in Appeal No. 284 of 2017 & Appeal No 09 of 2018 (*Adani Power Rajasthan Limited vs JVVNL & Ors*). Relevant portion of the above judgment dated 29.1.2020 is extracted as under:

> *"46. '**CG Paryavaran Upkar'** and '**CG Vikas Upkar**' was introduced by Notification dated 16.06.2015 issued by Chhattisgarh Government under Section 8 of Chhattisgarh Adhosanrachna Vikas Evam Paryavaran Upkar Adhiniyam, 2005. This was followed by order issued by Joint Secretary of MoEF dated 28.04.2016 wherein a direction was given to comply with the said amendments made by State Government or Union Territories.*

Though not exact levy but in principle such Change in Law event was allowed by this Tribunal in Appeal No. 119 of 2016 by its judgment dated 14.08.2018. In the order dated 15.03.2016, the Commission opined that the said claim for forest tax could not be allowed on the ground that forest tax is in the nature of a fee, which does not amount to Change in Law, but setting aside the said opinion, this Tribunal opined that levy of such fee/tax could not have been factored in by the bidder at the time of submitting bid. In other words, such tax or fee could not have been factored in at the time of submission of the bid, therefore this Tribunal in the above said judgment opined that levy of forest tax or fee cannot be considered as part of pricing mechanism for coal, therefore it cannot form part of CERC escalation rates for coal. Therefore, any such increase in expenses related to coal due to such levy must fall within Change in Law in terms of Article 10.1.1 of PPA, hence, allowed the said claim. Since this Judgment covers the field on this point as on today, we allow the said 'CG Paryavaran Upkar' and 'CG Vikas Upkar' as Change in Law event, in favour of Adani Power."

42. The Commission allowed increase in the rate of Chhattisgarh Environment Cess and Infrastructure Development Cess by Government of Chhattisgarh vide order dated 18.4.2018 in Petition No. 18/MP/2017 and order dated 3.6.2019 in Petition No 156/MP/2018 (*MB Power (M.P.) Limited vs. UPPCL.*). Relevant extract of order dated 3.6.2019 in Petition No. 156/MP/2017 is reproduced as under:

"35. The issue of change in Chhattisgarh Infrastructure Development Cess and Chhattisgarh Environmental Cess as a Change in Law event had been considered in Petition No. 18/MP/2017 (BALCO Vs KSEB &ors) and after examining the provisions of the Chhattisgarh (Adhosanrachna Vikas Evam Paryavaran) Upkar Adhiniyam, 2005 and its amendment thereof, this Commission allowed the said claim. The relevant portion of the order dated 18.4.2018 in Petition No. 18/MP/2017 is extracted here under:

> *"48. It is noted that as on the cut of date, the rate of Infrastructure development cess and environmental cess was Rs.5 on each tonne of annual dispatch of mineral. Government of Chhattisgarh vide its Notification dated 18.9.2015 revised the Infrastructure development cess and Environment Cess from Rs. 5/MT to Rs. 7.50/MT which is applicable for all SECL coal dispatches from 16.6.2015 which has an impact on the cost of generation of electricity for supply to KSEB. Since, the Infrastructure development cess and Environment Cess has been imposed by an Act of Chhattisgarh State legislature, it fulfils the conditions of Change in Law event under Article 10 of PPA. Accordingly, the Petitioner is entitled for the expenditure incurred on this account......"*

36. In accordance with the above decision, the expenditure towards increase in rate of Chhattisgarh Infrastructure Development Cess and Chhattisgarh Environment Cess are admissible as a Change in Law events under Article 10 of the PPAs. Accordingly, the Petitioner is entitled to recover such increase in Chhattisgarh Infrastructure Development Cess and Chhattisgarh Environment Cess from the UP Discoms as per applicable rates of Chhattisgarh Infrastructure Development Cess and Chhattisgarh Environment Cess in proportion to the coal as per the parameters of the applicable Tariff Regulations of this Commission or actually consumed whichever is lower, for generation and supply of electricity to UP Discoms."

43. In light of the deliberation on Article 13 above, the Chhattisgarh Development and Environmental Cess, levied under the rules notified by the Government of Chhattisgarh, is also allowed as Change in Law under Article 13.3.1 (i) of the PPA. Though APMuL started paying the Development Cess and Environment Cess at the rate of Rs.7.5 per tonne each with effect from 1.11.2015, in the light of our decision with regard to limitation, APMuL shall be entiled for reimbursement of Chhatisgarh Development Cess and Environment Cess at the rate of Rs.7.5/ per tonne each with effect from 17.5.2017 i.e. three years prior to the filing of the present petition till 3.9.2019 i.e. a day prior to the revision of the rates from Rs.7/ per tonne to Rs.11.25 per tonne with effect from 4.9.2019 vide SECL Notification dated 11.10.2019. APMuL shall be entitled for reimbursement of Chhatisgarh Development Cess and Environment Cess @ Rs.11.25/tonne each with effect from 4.9.2019 as per the Notification of SECL vide its letter dated 11.10.2019 and the date of occurrence of the event of Change in Law being within the limitation.period of three years.

(III) Levy of Evacuation Facility Charges

44. The Petitioner has submitted that Evacuation Facility Charges imposed by Coal India Limited for the first time vide notification dated 19.12.2017 on despatch of coal is a Change in Law. *Per contra* the Respondents have submitted that levy of Evacuation Facility Charges by Coal India Limited (CIL) is in pursuance to a contractual arrangement for supply of coal and any change in such price by CIL cannot be considered as having force of law or qualify as Change in Law.

45. We have considered the submissions made by the parties. The issue of Evacuation Facility Charges as Change in Law is no more *res-integra*. The APTEL vide a common judgment dated 22.3.2022 in Appeal No. 118 of 2021 (*Rattan India*

Power Ltd vs MERC & Ors) and Appeal No. 40 of 2022 (*Adani Power Maharashtra Ltd vs MERC & Ors*) has allowed Evacuation Facility Charges as Change in Law event. Relevant portion of the judgment dated 22.3.2022 is extracted as under:

> *"8……….It is well settled that Coal India manages coal mines in India in terms of Coal Mines (Nationalization) Act, 1973, it having been conferred with the statutory power to determine the prices of coal. Reference is rightly made in this context to Colliery Control Order 2000, Colliery Rules 2004 and decision of Hon'ble Supreme Court reported as Ashok Smokeless Cool India (P) Ltd v Union of India (2007) 2 SCC 640. By virtue of its position, Coal India enjoys monopoly over coal, it thus rightly having been referred to as an alter ego of the State.*
>
> *9. It is incorrect to argue that to be covered as a change in law event under such contractual clauses as quoted earlier, the instrument whereby the law is claimed to have undergone a change must have been published in official gazette to have the force of law. In Energy Watchdog & Ors. (supra), for illustration, even a letter of the Ministry of Power in the Government of India was accepted as an instrument having the "force of law". Similarly, in Kusum Ingots & Alloys v. Union of India (2004) 6 SCC 254 executive instructions without any statutory backing were also considered as "law". That Coal India is Government instrumentality and the notifications, circulars, etc. issued by it have a force of law under Regulation 77(3) of the Constitution of India was accepted by this tribunal in GMR Kamalanga Energy Ltd. (supra).*
>
> *10. As observed earlier, the publication of notification or circular in gazette cannot be invariably a pre-requisite for an instrument to have a force of law. The trappings of law do not come by virtue of publication which facilitates only dissemination of knowledge of law, statutes, etc. [Harla vs. The State of Rajasthan (AIR 1951 SC 467)].*
>
> *11. It is not correct to argue that EFC is a part of escalation index for coal notified by CERC. This has been so held even by CERC, which oversees the periodical review of escalation index, in its order reported as GMR Kamalanga Energy Limited v. Dakshin Haryana Bijli Vitran Nigam Limited, 2019 SCC OnLine CERC 211. In competitive bidding guidelines for purchase governed by Section 63 of the Electricity Act, 2003, the bidder only assumes the price of coal to the extent of its mitigation by escalation index. CERC having accepted that EFC is not part of escalation index has been consistently holding Coal India notification in question to be a change in law event [Adhunik Power and Natural Resources Limited v. West Bengal State Electricity Distribution Company Limited (2021 SCC OnLine CERC 27)].*
>
> *12. We do not have the least doubt that the Coal India circular on EFC fulfills all the requisite characteristics of "law" and, therefore, does have the "force of law" so as to be accepted as change in law event giving rise to a legitimate claim for compensation in favor of the appellants. The notification admittedly applies in rem, there being no element of mutuality. The price notification is issued by Coal India which is not a party to the PPA. It is a statutory levy. It binds the conduct of the parties nonetheless since it has been issued in mandatory terms, the binding nature of the instrument itself being sufficient to add the element of "force of law". [Gulf Goans Hotels Co. Ltd v. Union of India (2014) 10 SCC 673; Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi (1975) 1 SCC 421 and Bengal Nagpur Cotton Mill Ltd v. Board of Revenue (1964) 4 SCR 190]."*

46. Hon'ble Supreme Court vide its judgement dated 20.4.2023 in GMR Warora Energy Limited Vs CERC & Others and related civil appeals [(2023) SCC Online SC 464] has upheld the judgement of APTEL on the issue of Evacuation Facility Charges by Coal India Limited as under:

> "***Evacuation Facility Charge (EFC)***
>
> *112. Undisputedly, EFC was imposed by CIL vide its Circular dated 19 December 2017.*
>
> *113. As already discussed herein above, CIL is an instrumentality of the State. It is thus clear that, on the cut-off date, there was no requirement of EFC, which has been brought into effect only on 19 December 2017. As such, the circular of CIL dated 19 December 2017 would also amount to 'Change in Law'.*
>
> *114. As discussed herein above, it is also not in dispute that EFC has been paid by the generators while paying the base price, other charges and statutory charges at the time of delivery of coal. As such, no interference would be warranted with the said finding."*

47. The Commission in various orders including in its order dated 2.4.2019 in Petition No. 71/MP/2018 (GMR Warora Energy Limited v. Maharashtra State Electricity Distribution Company Limited &Ors.). Relevant extract of the said order dated 2.4.2019 is reproduced as under:

> *"30. 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 (APPELLATE TRIBUNAL) 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."

48. In light of the above judgments, Evacuation Facility Charges are admissible to APMuL. Evacuation Facility Charges were imposed by Coal India Limited with effect from 19.12.2017 (effective from 20.12.2017 00:00 hrs) which is after the cut-off date of 17.11.2007 and accordingly, APMuL is entitled for reimbursement of Evacuation Facility Charges with effect from 20.12.2017 @ Rs.50 per tonne in terms of Article 13 of the PPA which also within the period of limitation being three years prior to the date of filing of the petition on 16.5.2020.

(IV) Levy of restrictions on sulphur content in fuel oil in terms of MARPOL

49. As regards restrictions on sulphur content in fuel oil in term of MARPOL, the Petitioner has submitted that Ministry of Shipping, Government of India, vide Engineering Circulars dated 30.1.2012, 14.12.2018 and 28.8.2019, has acceded to and ratified Annexure VI of the MARPOL Convention. Accordingly, all Indian flag bearing ships have to mandatorily limit sulphur content in fuel used on board such ships to 0.50% m/m on and from 1.1.2020. It has been submitted that all ships importing coal to India will have to stop using IFO 380cst and will shift to a low sulphur content fuel such as Low Sulphur Marine Gas Oil ("LSMGO") [sulphur content 0.5% m/m]; or Install equipment in their ships for reducing the sulphur content of IFO 380cst. LSMGO is substantially higher than the cost of IFO 380cst (estimated to be twice more expensive than IFO 380cst). In terms of the PPAs, any increase in cost due to introduction of any law/ regulation and/ or amendment of any law/ regulation for protection of environment, is liable to be reimbursed and Adani Power is entitled to be restored to the same economic position.

50. *Per Contra*, vide its written submission dated 2.1.2023, the Respondents have submitted that since the Petitioner's case is that Project is based on 100% domestic coal, there is no occasion for the Petitioner to seek Change in Law compensation qua MARPOL on imported coal. It is understood that domestic coal qua Haryana PPAs has not been transported through sea route.

51. We have considered the submissions made by the Petitioner and the Respondents. The Petitioner has explained as to the circumstances under which the Engineering Circular No.2 of 2019 dated 28.8.2019 was issued by Ministry of Shipping directing the ships to be in compliance with the provisions of MARPOL Annexure VI. The Petitioner has further submitted that MARPOL Regulations has led to incremental expenditure during the operating period of APMuL's power project to the tune of Rs.2.62 crores as on 31.1.2020. It is pertinent to mention that MARPOL Regulations are applicable only in cases ships are used for transportation of coal. The Respondents have contended that since the Petitioner's case is that the project is based on 100% domestic coal, there is no occasion for the Petitioner to seek Change in Law compensation qua MARPOL on imported coal. The Petitioner has not placed any document on record to show that it had to use transportation of coal by ship for generation and sale of electricity to the Respondents for which it had to incur additional expenditure on account of compliance with MARPOL Regulations. In the absence of relevant details, it is not possible to decide whether the Petitioner was affected by Change in Law during the claim period qua supply of electricity to the Respondents. Therefore, claim of the petitioner with regard to the change in Law on account of MARPOL Regulations is not allowed.

Issue No. 3: What should be the mechanism for processing and reimbursement of admitted claims under Change in Law?

52. Article 13.2(b) provides for the mechanism for determination of compensation on account of Change in Law during the operation period. Article 13(b) is extracted as under:

> *"b) Operation Period As a result of Change in Law, the compensation for any increase/decrease in revenues or cost to the Seller shall be determined and effective from such date, as decided by the Appropriate Commission whose decision shall be final and binding on both the Parties, subject to rights of appeal provided under applicable Law.*
>
> *Provided that the above-mentioned compensation shall be payable only if and for increase/decrease in revenues or cost to the Seller is in excess of an amount equivalent to 1 % of Letter of Credit it in aggregate for a Contract Year."*

Thus, during the 'Operation Period", compensation for any increase or decrease in revenues or costs to the seller is to be determined and effected from such date as is decided by the Commission. Further, the compensation is only payable for increase or decrease in revenue or cost to the seller if it is in excess of an amount equivalent to 1% of the Letter of Credit in aggregate for a contract year.

53. In this order, we have decided the entitlement of APMuL for compensation for Change in Law events as under:

Name of tax or cess	Notification Date	Rate	Date from which admissible
Forest Tax of Government of Chhattisgarh	SECL Notification dated 16.9.2015	Rs.15 per tonne	From 17.5.2017
Forest Tax of Government of MP	(i) SECL Notification dated 9.11.2012 (ii)SECL Notification dated 27.3.2020	(i) Rs.7 per tonne (ii)Rs.57 per tonne	(i) From 17.5.2017 till 26.3.2020 (ii) From 27.3.2020
Chhattisgarh (a) Development Cess and	(i) SECL Notification dated19.8.2015	(i) Rs.7.5 per tonne for each cess	(i) From 17.5.2017 till 3.9.2019 (ii) From

(b) Environment Cess	(ii) SECL Notification dated11.10.2019	(ii) Rs.11.25 per tonne for each cess	4.9.2019
Evacuation Facility Charge	CIL Notification dated 19.12.2017	Rs.50 per tonne	From 20.12.2017

54. Further, the Commission prescribes the following mechanism to be adopted for payment of compensation due to Change in Law events allowed as per the PPAs:

(i) Monthly change in Law compensation payment shall be effective form the dates from which compensation becomes admissible in accordance with this order.

(ii) Since all the Change in Law events are applicable on coal, they shall be computed based on actual corresponding to scheduled generation and shall be payable by the Respondents on pro-rata based on its share in the scheduled generation.

(iii) At the end of this year, the Petitioner shall reconcile the actual payment made towards Change in Law with the books of accounts duly audited and certified by an auditor and adjustment shall be made based on the energy scheduled by the procurers during the year. The reconciliation statement duly certified by an Auditor shall be kept in possession by the Petitioner so that same could be produced on demand from Procurer(s)/beneficiary(ies), if so desired.

(iv) For Change in Law items related to the operating period, the year-wise compensation shall be payable only if such increase in revenue or cost to APMuL is in excess of an amount equivalent to 1% of the LC in aggregate for a contract year as per provision under Article 13.2(b) of the PPAs.

(v) Approaching the Commission every year for allowance of compensation for such Change in Law is a time-consuming process which results in time lag between the amount paid by seller and actual reimbursement by the Respondents which may result in payment of carrying cost for the amount actually paid by APMuL. Accordingly, the mechanism prescribed above is to be adopted for payment of compensation due to Change in Law event allowed as per Article 13.2(b) of the PPA for the subsequent periods as well.

55. The Commission has not computed the threshold value of eligibility for getting compensation due to Change in Law during operating period. However, the Petitioner shall be eligible to get compensated if the impact due to Change in Law exceeds the threshold value as per Article 13.2(b) of the PPA during the contract year. Accordingly, the compensation amount allowed shall be recovered from the Procurers based on the scheduled energy.

Carrying Cost

56. As regards carrying cost, APMuL has submitted that the Hon'ble Supreme Court in *Uttar Haryana Bijli Vitran Nigam Ltd & Anr. vs. Adani Power Ltd. & Ors. [(2019) 5 SCC Online 325]* has allowed carrying cost to the Petitioner while considering the same PPA between the same parties. Similarly, while considering the same PPA between the same parties, the Hon'ble Supreme Court has also held that a party impacted by Change in Law event is entitled for carrying cost on compounding basis for the purposes of restitution vide Judgment dated 24.08.2022 in *Uttar Haryana Bijli Vitran Nigam Ltd. v. Adani Power (Mundra) Ltd., [2022 SCC OnLine SC 1068]*. The Petitioner has claimed carrying cost at the rate of Late Payment Surcharge as per Article 11.3.4 of the PPAs.

57. We have considered the submissions of the Petitioner. The issue of carrying cost is no more *res-integra* for the PPA under consideration. The Hon'ble Supreme Court in *Uttar Haryana Bijli Vitran Nigam Ltd & Anr. vs. Adani Power Ltd. & Ors. [(2019) 5 SCC Online 325]* has allowed carrying cost for the PPA entered into between the parties in this Petition. Relevant portion of the said judgment dated 25.2.2019 is extracted as under:

> "***10.*** *…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 4-5-2017 [Adani Power Ltd. v. Uttar Haryana Bijli Vitran Nigam Ltd., 2017 SCC OnLine CERC 66] that CERC held that the respondents were entitled to claim added costs on account of change in law w.e.f. 1-4-2015.* ***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*."

58. Further, while considering the dispute under the same PPA, the Hon'ble Supreme Court vide judgment dated 24.8.2022 in *Uttar Haryana Bijli Vitran Nigam Ltd. v. Adani Power (Mundra) Ltd., [2022 SCC On Line SC 1068]* has allowed carrying cost on compounding basis. The relevant extract of the Hon`ble Supreme Court judgment dated 24.8.2022 is extracted as under:

> *"17. In the instant case, the respondent No. 1 – Adani Power had to incur expenses to purchase the FGD and install it in view of the terms and conditions of the Environment Clearance given by the Ministry of Environment and Forests, Union of India, in the year 2010. For this, it had to arrange finances by borrowing from banks. The interest rate framework followed by Scheduled Commercial banks and regulated by the Reserve Bank of India mandates that interest shall be charged on all advances at monthly rests. In this view of the matter, the respondent No. 1 – Adani Power is justified in stating that if the banks have charged it interest on monthly rest basis for giving loans to purchase the FGD, any restitution will be incomplete, if it is not fully compensated for the interest paid by it to the banks on compounding basis. We are of the opinion that interest on carrying cost is nothing but time value for money and the only manner in which a party can be afforded the benefit of restitution in every which way. In the facts of the instant case, the Appellate Tribunal was justified in allowing interest on carrying cost in favour of the respondent No. 1 – Adani Power for the period between the year 2014, when the FGD was installed, till the year 2021. There was no justification for the Central Commission to have excluded the period between 2014 and 2018 and grant relief from the date of the passing of the order i.e., from 28th March, 2018 to 2021; nor is there any logic to such a segregation of time lines, particularly when the respondent No. 1 – Adani Power was prompt in raising a claim on the appellants and pursuing its legal remedies."*

59. As per the settled principle of law, APMuL is entitled for carrying cost on its claims for change in law events. However, the Respondents have submitted that APMuL has filed the present Petition only in 2020 whereas a number of the events claimed as 'Change in Law' by APMuL date back to 2015 and therefore, APMuL cannot claim carrying cost for those events where there has been delays and laches on the part of the APMuL to approach the Commission. The principle that the delays in filing Petition/information would result in denial of carrying cost has been settled by APTEL vide its judgement dated 19.9.2007 in Appeal No 70 of 2007 in the case of matter of *Maharashtra State Electricity Distribution Co. Ltd v. Maharashtra Electricity Regulatory Commission*, judgment dated 30.5.2014 in Appeal No. 147, 148 and 150 of 2013 in the case of *Torrent Power Ltd v. Gujarat Electricity Regulatory Commission* and judgment dated 4.12.2014 in Appeal No 45 of 2014 in *Paschim Gujarat Vij Company Ltd and Ors v. Gujarat Electricity Regulatory Commission*.

60. We have considered the submission of Respondents. APTEL in its judgement dated 30.5.2014 in Appeal Nos.147, 148 and 150 of 2013 has referred to the Judgement dated 28.11.2013 in Appeal No. Appeal No.190 of 2011 & 162 AND 163 OF 2012 wherein the following principles have been laid down with regard to carrying cost claimed by distribution companies for revenue gap:

> *"83. The relevant principles which have been laid down in these decisions are extracted below:*
>
> *(a) We do appreciate that the State Commission intents to keep the burden on the consumer as low as possible. At the same time, one has to remember that the burden of the consumer is not ultimately reduced by under estimating the cost today and truing it up in future as such method also burdens the consumer with carrying cost.*
>
> *(b) The carrying cost is allowed based on the financial principle that whenever the recovery of cost is deferred, the financing of the gap in cash flow arranged by the distribution company from lenders and/or promoters and/or accruals, has to be paid for by way of carrying cost.*

(c) The carrying cost is a legitimate expense and therefore recovery of such carrying cost is legitimate expenditure of the distribution company.

(d) "11.5. The utility is entitled to carrying cost on its claim of legitimate expenditure if the expenditure is:

i) accepted but recovery is deferred e.g. interest on regulatory assets,

ii) claim not approved within a reasonable time, and

iii) Disallowed by the State Commission but subsequently allowed by the Superior authority.

iv) Revenue gap as a result of allowance of legitimate expenditure in the true up.

The State Commission shall decide the claim of the Appellant regard to carrying cost on the above principles."

61. This judgement allows carrying cost on revenue gap where the deferment is on account of reasons other than attributable to the distribution licensee. Conversely, if the deferment is attributable to distribution licensee, then carrying cost can be legitimately denied. Extrapolating the same principle in case of delay in filing the petition for Change in Law claims by a generating company, it can be held that the carrying cost would not be admissible if the claims are not brought before the Commission as soon as possible after becoming aware of the Change in Law events. We consider a maximum gap of six month as reasonable between the occurrence of Change in Law event and filing of the petition. Accordingly, we hold that where there is a lapse of six months or more between the occurrence of Change in Law affecting the Seller and filing of the petition, no carrying cost shall be admissible for the period prior to filing of the petition. In case, the petition is filed within six months, carrying cost shall be admissible from the date the seller is affected by change in law till the date of the Order provided the seller is eligible as per Article 13.2(b) of the PPA. Accordingly, carrying costs are allowed as under:

Name of tax or cess	Notification Date	Rate	Date from which carrying cost admissible
Forest Tax of Government of Chhattisgarh	SECL Notification dated 16.9.2015	Rs.15 per tonne	16.5.2020 till issue of this order
Forest Tax of Government of MP	(i) SECL Notification dated9.11.2012 (ii)SECL Notification dated 27.3.2020	(i) Rs.7 per tonne (ii)Rs.57 per tonne	(i) From 16.5.2020 till issue of this order (ii) From 27.3.2020 till issue of this order
Chhattisgarh (a) Development Cess and (b) Environment Cess	(i) SECL Notification dated19.8.2015 (ii) SECL Notification dated 11.10.2019	(i) Rs.7.5 per tonne for each cess (ii) Rs.11.25 per tonne for each cess	(i) From 16.5.2020 till issue of this order (ii) From 16.5.2020 till issue of this order
Evacuation Facility Charge	CIL Notification dated 19.12.2017	Rs.50 per tonne	From 16.5.2020 till issue of this order.

62. As regards rate of carrying cost, the Commission by its order dated 24.10.2021 in Petition No. 156/MP/2014 in respect of other Change in Law claims under the same PPA has held as under:

> *"43. In view of the above, interest rate shall be determined as per the methodology adopted in the order dated 17.9.2018 in Petition No. 235/MP/2015 which would be lowest of actual rate of interest at which funds were arranged by the Petitioner or rate of working capital worked out as per the Regulations of the Commission or the rate of LPS (late payment surcharge) as per the PPAs...."*

63. In line with above order of the Commission, in the instant case, APMuL 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 as per the applicable CERC Tariff Regulations or the Late Payment Surcharge Rate as per the PPA, whichever is the lowest in accordance with para 62 above. Any delay occurring in payment of change in law claims after issue of this order shall be governed by the late payment surcharge provisions of the PPA.

64. The present Petition is disposed of in terms of the above.

Sd/-	sd/-	sd/-
(P.K. Singh)	**(Arun Goyal)**	**(I.S.Jha)**
Member	**Member**	**Member**