

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 729/MP/2020

Coram:

Shri Jishnu Barua, Chairperson

Shri I.S. Jha, Member

Shri Arun Goyal, Member

Shri P.K. Singh, Member

Date of Order: 25th September, 2023

In the matter of

Petition under Section 79 of the Electricity Act, 2003 for execution of order dated 19.8.2019 passed in Petition No. 17/MP/2019; and initiation of proceedings/appropriate action under Section 142 read with Section 149 of the Electricity Act, 2003 and Regulation 111 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 against the Respondents for non-compliance of the order dated 19.8.2019 passed in Petition No. 17/MP/2019.

And

In the matter of:

Adhunik Power and Natural Resources Limited,

9B, 9th Floor,

Hansalaya Building

15, Barakhamba Road, Connaught Place,

New Delhi- 110001

.....Petitioner

VERSUS

1. Tamil Nadu Generation and Distribution Corporation Limited,

NPKRR Maligai, 6th Floor,

Eastern Wing, 144, Anna Salai,

Chennai-600 002, Tamil Nadu,

2. Chairman and Managing Director,

Tamil Nadu Generation and Distribution Corporation Limited,

NPKRR Maligai, 6th Floor,

Eastern Wing, 144, Anna Salai,

Chennai-600 002, Tamil Nadu.

3. Director (Distribution),

Tamil Nadu Generation and Distribution Corporation Limited,

NPKRR Maligai, 6th Floor,

Eastern Wing, 144, Anna Salai,

Chennai-600 002, Tamil Nadu.



4. Director – Marketing

PTC India Limited
2nd Floor, NBCC Tower,
15 Bhikaji Cama Place, New Delhi-110 066.

5. The Chairman and Managing Director,

PTC India Limited
2nd floor, NBCC Tower,
15 Bhikaji Cama place.
New Delhi- 110066

6. The Vice President (Commercial),

PTC India Limited,
2nd floor, NBCC Tower,
15 Bhikaji Cama place, New Delhi-110066

...Respondents

Parties present:

Ms. Shreyanshi Srivastava, Advocate, APNRL
Shri Ashwini Tak, Advocate, APNRL
Shri Ravi Kishore, Advocate, PTCIL
Shri Keshav Singh, Advocate, PTCIL
Shri Dhruv Tripathi, Advocate, PTCIL
Ms. Anusha Nagarajan, Advocate, TANGEDCO
Shri Rahul Ranjan, Advocate, TANGEDCO

ORDER

The Petitioner, Adhunik Power and Natural Resources Limited (in short 'APNRL'), has filed the present Petition for execution of the order dated 19.8.2019 passed by the Commission in Petition No. 17/MP/2019 and initiation of proceedings/appropriate action under Section 142 read with Section 149 of the Electricity Act, 2003 (hereinafter referred to as 'the Act'), and Regulation 111 of the Central Electricity Regulation Commission (Conduct of Business) Regulations, 1999 against the Respondents for non-compliance of the said order and further to direct the Respondents to forthwith comply with the said order. The Petitioner has made the following prayers:

“(a) Direct the Respondents to comply with the Order dated 19.08.2019 passed in Petition No. 17/MP/2019 and to forthwith pay the pending amounts to the Petitioner as detailed in the present Petition i.e. an amount of Rs. 160.74 Crores (including Carrying Cost till 31.08.2020) for the power supplied in the period from January, 2016 to September, 2020 and further to continue to pay the Supplementary Invoices towards Change in Law being raised by the Petitioner as per the Order dated 19.08.2019 passed by this Hon'ble Commission;

(b) Initiate appropriate action against the Respondents, jointly and severally, under Section 142 of the Electricity Act, 2003 and/or any other appropriate provision/s of the Electricity Act, 2003, for contravention and disobedience of the directions issued by the Hon'ble Commission in Order dated 19.08.2019 passed in Petition No. 17/MP/2019;

(c) Issue appropriate directions for execution of the Order dated 19.08.2019 passed in Petition No. 17/MP/2019;

(d) Pass an ex-parte ad-interim Order directing the Respondents to pay 75% of the aforesaid amount of Rs 160.74 Crores i.e. an amount of Rs 107.16 Crores forthwith and without any delay whatsoever.

(e) Pass such other and further order or orders as this Commission may deem fit and proper under the facts and circumstances of the present case and in the interest of justice.”

Background

2. The Petitioner has set up a 540 MW Thermal Power Project (hereinafter referred to as the “generating station”) in the district of Saraikela-Kharswan in the State of Jharkhand. On 18.12.2013, Respondent, Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO), and Respondent, PTC India Limited (PTC) entered into a Power Purchase Agreement for the supply of 100 MW power for a period of fifteen years to meet TANGEDCO’s base load power requirements. On 19.12.2013, the Petitioner entered into a back-to-back PPA dated 19.12.2013 with the PTC.

3. Earlier, Petition No. 17/MP/2019 was filed by the Petitioner, seeking relief towards ‘Change in Law events’ on account of an increase in the rate of royalty towards contribution to the National Mineral Exploration Trust and District Mineral Foundation, increase in sizing charges on coal, increase in surface transportation



charges, increase in clean energy cess, levy of busy season charges & levy of development surcharge, introduction of service tax on transportation of coal by Rail and Road, introduction of Goods and Service Tax (GST) on coal, levy of Evacuation Facility Charges, levy of Management Fee, increase in Value Added Tax (VAT) on account of changes in individual components of tax, increase/change in Central Excise Duty on account of changes in individual components, and carrying cost. The said Petition was decided by the Commission vide its order dated 19.8.2019, whereby the Commission allowed the following Change in Law during the operating period:

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

S.	Change in Law events	Decision
1.	<i>Increase in the Rate of Royalty towards contribution to the National Mineral Exploration Trust and District mineral Foundation</i>	<i>Allowed</i>
2.	<i>Increase in Sizing charges and Surface Transportation Charges on Coal</i>	<i>Not Allowed</i>
4.	<i>Increase in Clean Energy Cess</i>	<i>Allowed</i>
5.	<i>Levy of Busy Season Charges & Levy of Development Surcharge</i>	<i>Allowed</i>
6.	<i>Introduction of Service Tax on Transportation of coal by Rail and Road</i>	<i>Allowed</i>
7.	<i>Introduction of Goods and Service Tax (GST) on coal</i>	<i>Allowed</i>
8.	<i>Levy of Evacuation Facility Charges</i>	<i>Allowed</i>
9.	<i>Levy of Management Fee</i>	<i>Allowed</i>
10.	<i>Increase in Value Added Tax (VAT) on account of changes in individual components of tax</i>	<i>Allowed</i>
11.	<i>Increase/change in Central Excise Duty on account of changes in individual components</i>	<i>Liberty granted to approach the Commission along with full details</i>
12.	<i>Carrying cost</i>	<i>Allowed</i>

Submission of the Petitioner

4. The Petitioner, has mainly, submitted as under:

(a) Pursuant to the above order dated 19.8.2019, the Petitioner vide its letter dated 2.9.2019 had submitted all the required documents to the Respondents through Respondent No. 4 vide its letter dated 10.7.2019 and requested to convene a meeting to discuss the payment of the claims awarded by the Commission.

(b) The Petitioner, vide letter dated 7.9.2019, submitted the computation and documents pertaining to each of the claims in terms of the said order dated 19.8.2019 along with the Chartered Accountant's certificates for the claim period of January 2016 to March 2019.

(c) The Petitioner, further, vide its letter dated 30.9.2019, submitted its supplementary bill as per the format requested by the Respondent No. 4 for the supply of power for the period from 1.1.2016 to 31.3.2019 for Rs. 1,19,19,68,712/- with a request to release the aforementioned payment to the Petitioner. However, no payment was made by the Respondent, TANGEDCO.

(d) The Petitioner vide its letter dated 5.12.2019, further informed the Respondents that the total outstanding amount for the power supplied till October 2019 comes to Rs. 271.47 crore and once again highlighted its adverse financial situation.

(e) The Petitioner vide its letters dated 24.3.2020 & and 26.3.2020 once again requested the Respondents to release outstanding payments towards the Change in Law bills. In response, Respondent No. 1 informed the Petitioner that it was in the process of releasing an amount of Rs. 25 crore against the Change in Law.

(f) Even after numerous follow-ups by the Petitioner, the Respondents failed to release the said amount. The Respondents had also failed to pay amounts towards regular energy bills for the period from March 2019 to June 2019 of Rs. 122.43 crore as also the regular Change in Law claims for Rs. 33.28 crore for the period from April 2019 to February 2020.

(g) The Petitioner vide its letters dated 8.4.2020 and 18.4.2020 referred to its previous letter dated 26.3.2020, once again requested the Respondents to make the payment of at least Rs. 27.83 crore immediately. The Petitioner stated in the said letters that the Petitioner would not be able to continue operating the plant & and supplying power to the Respondents without receiving payments from the Respondents.

(h) The Petitioner further, vide its letters dated 27.5.2020, 8.6.2020, 6.7.2020, 30.7.2020 and 14.8.2020 requested the Respondent to release the outstanding payment and informed that due to non-payment of bills by the Respondents, the Petitioner has not been able to fulfil its payment obligations towards the purchase of coal from various coal companies, coal transporters, and other suppliers.

(i) The Petitioner, vide its letter dated 16.9.2020, raised the invoice for the revised carrying cost, in terms of the order dated 19.8.2019. Further, vide its letter dated 19.10.2020 it apprised the Respondents that an amount of Rs. 467.91 crore is outstanding.

(j) The details of the supplementary invoices raised by the Petitioner towards the Change in Law claims, along with the requisite certificates/documents, are as under:

Sr. No.	Particulars of Invoice	Period of Supply	Date of Raising Invoice	Due Date	Principal Amount	Carrying Cost	Total Claim
					in Rs.	in Rs.	in Rs.
					A	B	C=A+B
1	Change in Law (Tax) Invoices including Carrying Cost till 19th Aug-2019	Jan-2016 to Mar-2019	23-10-2019	23.11.2019	93,86,10,395	23,48,47,567*	1,17,34,57,962
2	Change in Law (Tax) Invoice including Carrying Cost till 8th Aug-2020	Apr-2019 to Mar-2020	08-08-2020	8.9.2020	35,45,18,279	3,13,78,315**	38,58,96,594
3	Change in Law (Tax) Invoice including Carrying Cost till 31st Aug-2020	Apr-20	11-05-2020	11.6.2020	2,43,99,462	7,41,075	2,51,40,537
4	Change in Law (Tax) Invoice including Carrying Cost till 31st Aug-2020	May-20	10-06-2020	11.7.2020	2,70,09,424	5,43,925	2,75,53,349

5	Change in Law (Tax) Invoice including Carrying Cost till 31st Aug-2020	Jun-20	09-07-2020	9.8. 2020	2,24,72,136	2,29,985	2,27,02,121
6	Change in Law (Tax) Invoice including Carrying Cost till 31st Aug-2020	Jul-20	11-08-2020	11-09-2020	2,90,09,999	-	2,90,09,999
7	Change in Law (Tax) Invoice including Carrying Cost till 31st Aug-2020	Aug-20	14-09-2020	15-10-2020	3,57,87,377	-	3,57,87,377
8	Change in Law (Tax) Invoice including Carrying Cost till 31st Aug-2020	Sep-20	12-10-2020	12-11-2020	2,40,71,390	-	2,40,71,390
Total Claim against Change in Law (Taxes & Duties) against power supply to TANGEDCO for the period from Jan-2016 to Sep-2020 [*Note: On 11th Sep, 2020 APNRL had raised Carrying Cost claim as on 31st Aug-2020 for the period from Jan-2016 till Mar-2019 for an amount of Rs. 36,59,66,356] [**Note: On 11th Sep, 2020 APNRL had raised Carrying Cost claim as on 31st Aug-2020 for the period from Apr-2019 till Mar-2020 for an amount of Rs. 3,40,70,226]							1,85,74,30,030
Payment received from TANGEDCO on 2nd Jul-2019							25,00,00,000
Amount Due							1,60,74,30,030

(k) The Petitioner has only received an amount of Rs. 25 crore out of the total dues of Rs. 185.74 crore for bills raised till September 2020 (including carrying costs as on 31.8.2020) and that too under the interim order dated 28.5.2019 passed by the Commission in Petition No. 17/MP/2019.

(l) The Respondents have failed to comply with the Order dated 19.8.2020 inasmuch as the Respondents have failed to clear the outstanding amounts due to the Petitioner as on date of the Order, as also the Supplementary Invoices raised by the Petitioner pursuant to the said Order. Therefore, the Respondents be directed to make payment to the Petitioner as detailed in the Petition and further continue to pay the amounts due under the Supplementary Invoices raised by the Petitioner.

(m) The Respondents are clearly guilty of disobedience to the order dated 19.8.2019 passed by the Commission and, thus, are liable to be proceeded against under Sections 142 and 149 of the Electricity Act, 2003. The Commission may pass appropriate directions for the execution and enforcement of the Order dated 19.8.2019.

Hearing dated 3.9.2021

5. The Petition was admitted on 3.9.2021. During the course of the hearing, the learned counsel for the Petitioner submitted that, subsequent to the filing of the present Petition, certain developments have taken place, and the Respondent, TANGEDCO, has released the substantial amount payable to the Petitioner in terms of the Commission's order dated 19.8.2019 in Petition No.17/MP/2019. Accordingly, the learned counsel sought the liberty to file an additional affidavit to bring on record such subsequent developments.

6. The Petitioner, vide Record of Proceedings for the hearing dated 3.9.2021, was permitted to file an additional affidavit to bring on record the subsequent developments, including the details of payment received from the Respondent, TANGEDCO. The Respondent, TANGEDCO was directed to file its response/reply.

Reply on behalf of Respondent Nos. 1, 2 & 3

7. The Respondents No. 1 to 3, vide their joint reply dated 11.1.2023, have mainly submitted as under:

(a) During the pendency of Petition No. 17/MP/2019, TANGEDCO, in compliance with the daily order dated 28.5.2019, paid Rs 25 crore to PTC. Pursuant to the order dated 19.8.2019, the Petitioner and PTC raised Change in Law compensation bills for the period from January 2016 to October 2020. During the reconciliation of bills towards the Change in Law events, the following transpired:

(i) At the time of bidding, the quoted energy charges were based on the source of coal as linkage for the first 4 years and thereafter from the Ganeshpur captive coal block, on which basis the levelized tariff arrived at Rs.4.91 per Kwh was approved by TNERC on 27.9.2016. The Hon'ble Supreme Court, vide order dated 24.9.2014, has de-allocated the Ganeshpur captive coal block, earlier allocated to the Petitioner. On de-allocation, the Petitioner, in order to avail of

the coal under the Shakti Scheme, filed Petition No. 84/MP/2018 before the Commission. vide order dated 16.5.2018, the Commission directed that the energy tariff be revised to match the levelized tariff adopted by TNERC on 27.9.2016.

(ii) Subsequently, the Petitioner reduced the quoted escalable energy charge from Rs. 0.241 per Kwh to Rs.0.222 per Kwh, and as per the direction of the Commission, TANGEDCO executed an amended PPA, changing the source of fuel to linkage coal for the entire term of the PPA.

(iii) The tariff calculations were revised from the date of commencement of supply using the escalation index issued by the Commission from time to time for domestic coal. However, the Petitioner had claimed compensation based on the linkage coal procured through e-auction, which is costlier than linkage coal supplied by Coal India Limited. The same was discussed with the Petitioner during reconciliation and thereafter, a Tri-partite Agreement was executed on 18.12.2020 wherein it was mutually agreed upon that TANGEDCO will adopt the notified price of G12 Grade Coal published by Coal India Limited for coal purchased by APNRL through e-auction.

(b) Thus, in terms of the Agreement dated 18.12.2020, TANGEDCO has worked out the compensation for the period from January 2016 to October 2020 for an amount of Rs. 130.13 crore against the claim of the Petitioner and PTC of Rs. 151 crore. In the calculation, TANGEDCO has considered the notified base price of G-12 Grade coal for the period from January 2016 to October 2020 (From July 2019 linkage coal received by the Petitioner under the Shakti Scheme), whereas, the Petitioner has claimed amounts based on actual price of coal.

(c) In consideration of TANGEDCO agreeing to settle the entire amount as above in one-shot and at the request of TANGEDCO, the Petitioner agreed to offer a waiver of Rs. 2,02,54,890/- on carrying costs and Rs. 2,34,98,225/- on Late Payment Surcharge (LPS) as a one-time dispensation only, provided the entire amount is paid by TANGEDCO on or before 10.7.2021. The Petitioner

also submitted an undertaking to the effect that it had no further claims for this period.

(d) After considering waivers on account of LPS and carrying costs, TANGEDCO paid an amount of Rs. 100,75,57,560/- to PTC on 7.7.2021. PTC had accordingly, paid to the Petitioner an amount of Rs. 97,81,90,554/- on 9.7.2021 after deducting applicable TDS.

(e) The Petitioner and PTC raised a subsequent claim towards compensation on account of Change in Law events for the period from November 2020 to December 2021 for Rs. 27,01,00,341/- and the said claim is under reconciliation. During the reconciliation process, TANGEDCO made an *ad-hoc* payment of Rs. 22,13,08,481/- on 10.2.2022.

(f) The only contention raised by the Petitioner by way of an additional affidavit dated 6.12.2021 is that TANGEDCO has to consider the actual base price notified by Coal India Limited for the grade so supplied by Central Coalfields Limited to the Petitioner, instead of G-12 grade coal, for the purposes of the Change in Law claims of the Petitioner as held by the Commission in the original order. On this basis, the Petitioner requested TANGEDCO to clear an outstanding amount of Rs. 7.94 crore calculated till 31.10.2020.

(g) In the present case, no case of wilful, deliberate, or intentional non-compliance is made out, which can warrant the initiation of proceedings under Sections 142 and 149 of the Act.

Rejoinder by the Petitioner:

8. The Petitioner, vide its rejoinder dated 11.4.2023, has mainly submitted as under:

(a) The Respondents have sought to aver that in terms of the Tri-Partite Agreement dated 18.12.2020, it was mutually agreed that TANGEDCO shall adopt the notified price of G12 Grade Coal published by Coal India Limited ('CIL') instead of the actual price of the coal actually purchased by APNRL through e-auction, open market, and using which APNRL generated and

supplied power to TANGEDCO. The Respondents, therefore, contended that in light of the said Tri-Partite Agreement, the Petitioner is not entitled to the differential amount of Rs 7.94 crore (for the period from January 2016 to October 2020) which is the difference on account of the actual coal price and the G-12 grade coal notified price, for the purpose of calculating Change in Law impact.

(b) The Respondent, TANGEDCO, has only taken the purported defence in its reply that the calculation adopted by TANGEDCO has been accepted by the Petitioner. TANGEDCO has not disputed or controverted any of the facts and circumstances as stated in the additional affidavit filed by the Petitioner in which the Petitioner was constrained to sign the said Tripartite Agreement and to give the undertaking. Further, TANGEDCO has admitted that it has calculated the Change in Law compensation not on the actual price of coal but on some notional coal price (G-12 grade). Such an approach by TANGEDCO is in the teeth of the Order dated 19.8.2019 passed *inter-parties* by this Commission in Petition No. 17/MP/2019. The order dated 19.8.2019, placing reliance upon the decision of the APTEL in the case of Wardha Power Company Ltd v. Reliance Infrastructure Ltd & Anr. [Appeal No. 288 of 2013] ('Wardha Judgement'), has returned a finding that compensation under Change in Law cannot be connected to the coal price computed for the quoted charges. In light of the Wardha Judgment (*supra*), the same is to be computed with reference to the actual price of coal paid by the developer.

(c) The mechanism for computation adopted by TANGEDCO in the tri-partite agreement notionally considers the base price of G-12 grade coal and disregards the price of the actual grade of coal purchased by the Petitioner for the purpose of supply of power. The said methodology is contrary to the order dated 19.8.2019, wherein the Commission was pleased to hold that the compensation for Change in Law claims is to be calculated on the actual base price of coal, and is impermissible and illegal, and therefore, is not binding or enforceable against the Petitioner to its detriment. The said tri-partite agreement and undertaking cannot take the Petitioner's right to receive the

Change in Law compensation in terms of this Commission's order dated 19.8.2019 along with carrying costs and LPS.

(d) No discussion has happened regarding the actual price of coal and not on the basis of some notional price, which TANGEDCO is seeking to adopt. The Respondent was also aware of the fact that the numbers were provisional. Therefore, an amount of Rs 7.94 crore still remains due & payable to the Petitioner by the Respondents and the Petitioner is entitled to the said amount in terms of the order dated 19.8.2019 passed by this Commission in Petition No. 17/MP/2019 along with LPS/carrying cost, which has accrued to Rs 14,54,32,547 as on 31.3.2023.

Hearing dated 13.4.2023

9. During the course of the hearing, the learned counsel for the Respondent, TANGEDCO, submitted that pursuant to the order dated 19.8.2019 in Petition No.17/MP/2019, reconciliation of the Change in Law claims of the Petitioner, as allowed by the Commission, was undertaken and a Tripartite Agreement was executed on 18.12.2020, wherein it was mutually agreed upon that TANGEDCO will adopt the notified price of G12 grade coal published by Coal India Limited for coal purchased by the Petitioner through e-auction. In terms of the said agreement, TANGEDCO worked out the compensation for the period from January 2016 to October, 2020 as Rs. 130.13 crore (out of which Rs. 25 crores was already paid on an ad-hoc basis) as against the claim of the Petitioner and PTCIL of Rs. 151 crore. He further submitted that in consideration of TANGEDCO agreeing to settle the entire amount in a lump sum, the Petitioner also agreed to offer a waiver of Rs. 2.02 crore on a carrying cost and Rs.2.34 crore on LPS, and consequently, TANGEDCO paid an amount of Rs.100.75 crore to PTCIL on 7.7.2021, which in turn paid Rs. 97.81 crore to the Petitioner on 9.7.2021 after deducting the applicable TDS.

10. After hearing the learned counsel for the TANGEDCO, the parties were permitted to file their respective written submissions.

Written Submissions of the Petitioner

11. The Petitioner has reiterated the submissions made in the Petition and/or rejoinder. On the aspect of its entitlement, the Petitioner has made the following additional submissions:

(a) It is an undisputed fact that the Petitioner's plant was identified as a stressed coal based thermal plant by the Ministry of Power in its 37th report. Further, the onset of COVID-19 compounded the otherwise stressed condition of the Petitioner. Thus, the Petitioner, being already under severe financial stress, such unjustified non-payment of its valid claims by the Respondents, whose claims had been duly adjudicated by this Commission, compounded the misery of the Petitioner. Constrained by these circumstances, the Petitioner was left with no other option but to request, chase, follow up, and plead with the Respondents for the release of its payments, which had already been paid by the Petitioner in the nature of taxes, duties, or cess to various State/Central Government authorities. Pertinently, the said factum of the Petitioner having been identified as a stressed coal based thermal plant was communicated to TANGEDCO vide letters dated 14.8.2020 and 24.8.2020. The same has been pleaded in the Petition by the Petitioner, however, there is no denial of the same by the Respondents in their pleadings.

(b) In the above circumstances, the Petitioner was compelled to sign a Tripartite Agreement with the Respondents, TANGEDCO and PTC, on 18.12.2020 at the behest of TANGEDCO for settlement of its dues, hoping that it would receive payment, which was vital to provide some relief to the Petitioner and to continue to survive. It is not in dispute that TANGEDCO unilaterally provided the format of the said Agreement and unilaterally dictated and decided the terms of the said Agreement, and the Petitioner had absolutely no negotiating or bargaining power at all. The Petitioner was thus constrained to sign on the dotted line. The same has been pleaded by the Petitioner in its

affidavit dated 6.12.2021 which has not been denied/controverted by the Respondents in their pleadings.

(c) One of the unilateral conditions imposed by TANGEDCO in the Tripartite Agreement was that for the period from January 2016 to June 2019, TANGEDCO shall calculate compensation towards Change in Law based on the notified base price of G-12 grade coal (a notional price), whereas, admittedly, as per the Order dated 19.8.2019 as also various Judgments of the APTEL, including the judgment in the case of Wardha Power Company Ltd. v. Reliance Infrastructure Limited and Anr. [Appeal No. 288 of 2013] ('Wardha Power'), the compensation for Change in Law events has to be based on the actual base price of coal. The Petitioner had no other option but to accept the said unilaterally imposed methodology regarding the base price of the coal because of the above circumstances, namely its financially precarious condition resulting from the apathy shown by the Respondents in not paying the legitimate dues of the Petitioner, hoping that it would expeditiously receive its long outstanding payment, which was being withheld, and then take steps for recovery of its legitimate remaining due by approaching this Commission. Accordingly, the Petitioner was constrained to sign the Tripartite Agreement on the terms dictated by the Respondents.

Written Submissions of the Respondents No. 1, 2 & 3/TANGEDCO

12. The Respondents reiterated the submissions made in the reply. On the aspect of its denial, the Respondents have made the following additional submissions:

(a) The Petitioner has alleged that it was coerced and pressurized into accepting the sums mentioned in the Tripartite Agreement as a full and final settlement of its claims. However, all such pleas are not only unsubstantiated and baseless; on the contrary, they are clearly belied by the record. Even before executing the Undertaking dated 28.6.2021, the Petitioner had sent a letter dated 20.4.2021, agreeing to the reconciliation of amounts in terms of the methodology adopted by the parties in the Tripartite Agreement. The Petitioner did not dispute the applicability of the notified base Price of G-12 Grade Coal as the basis for the computation of claims.

(b) On the basis of negotiations, the Tripartite Agreement and the Undertaking issued by the Petitioner, on 7.7.2021, the Respondent, TANGEDCO, released Rs. 100,75,57,560/- after a waiver of 4.37 crore (approximately) on account of LPS and carrying costs as a one-time settlement mechanism.

(c) The plea of the Petitioner that it was forced into accepting the settlement is also belied by the fact that the present Petition seeking directions under Section 142 of the Act was already pending when the Tripartite Agreement and Undertaking were executed. Therefore, the Petitioner had already taken recourse to its remedies before this Commission and was clearly not in a position where it had to forego any genuine claims that it could have made. It is pertinent to point out that this Commission started its regular function in March 2021 and there was no restriction on the Petitioner to approach this Commission.

(d) No further directions by the Commission are warranted in the present case, as the jurisdiction exercised by the Commission under Section 142 of the Act is not to investigate the validity of settlement agreements entered into between the parties and re-open the same. TANGEDCO has already made payment in respect of the period for which non-compliance has been alleged, which has been accepted by the Petitioner.

(e) The Petitioner is estopped from making any claims contrary to the Tri-partite Agreement and its own Undertaking and all such pleas are hit by the doctrine of *qui approbate non-reprobate* (one who approbates cannot reprobate). Reliance has been placed on the judgement of the Hon'ble Supreme Court in the case of R.N. Gosain v. Yashpal Dhir, [(1992) 4SCC 683].

(f) The Petitioner entered into an agreement fully knowing of its rights and agreed not to assert any right contrary to the terms of the Agreement. In this regard, reliance has been placed on the judgments of the Hon'ble Supreme Court in the case of Adani Gas Ltd. v. Union of India, [(2022) 5 SCC 210].

(g) It is well settled that it is not open to any party to the contract to unilaterally set up a case of mistake/coercion/ unequal bargaining power after an agreement has been entered into pursuant to negotiation. The Hon'ble Delhi High Court in the case of Airport Authority of India vs. Sikka Associates, [reported at 2017 SCC Online Del 12557] has held that “.....The parties agreed to a particular consideration in the agreement and are bound by the same. As observed above, a party cannot seek unilateral modification of such consideration alleging that it has been agreed by it due to some mistake....”

(h) The Hon'ble Supreme Court in the case of Delhi Development Authority vs Joint Action Committee, Allottees of SFS Flats, [(2008) 2 SCC 672 (@ para 22)] held that “...A party to the contract cannot at later stage, while the contract was being performed, impose terms and conditions which were not part of the offer and which are based upon unilateral issuance of office orders...”.

(i) The Petitioner received an amount of Rs.100 crore (approximately) paid by TANGEDCO without any demur and protest as a full and final settlement for the relevant period. The present case is a clear case of accord and satisfaction. In this regard, reliance has been placed on the Hon'ble Supreme Court in the case of the Union of India & Ors. Vs Onkar Nath Bhalla & Sons, [reported at (2009) 7 SCC 350]

(j) In the facts and circumstances of the instant case, no case of non-compliance arises, which can warrant the initiation of proceedings under Sections 142 and 149 of the Act.

Analysis and Decision

13. We have considered the submissions of the Petitioner and the Respondents and perused the documents available on record. Based on the above, the issue that arises for our consideration is whether the Respondent, TANGEDCO, is liable to make payment along with interest pursuant to the Tripartite Agreement dated 18.12.2020 and the Undertaking furnished by the Petitioner dated 26.6.2021 regarding the settlement of outstanding dues.

14. The Petitioner had filed Petition No. 17/MP/2019 seeking relief for Change in Law events. The Commission, vide order dated 19.8.2019 allowed certain Change in Law events that had occurred during the operating period. Pursuant to the order dated 19.8.2019, the Petitioner and PTC raised Change in Law compensation bills of Rs. 151 crore for the period from January 2016 to October 2020. However, the Respondent, TANGEDCO, worked out the compensation for an amount of Rs. 130.13 crore considering the notified base price of G-12 grade coal.

15. The Respondent, TANGEDCO, has submitted that during the pendency of the instant Petition, the Petitioner, PTC, and TANGEDCO entered into a Tripartite Agreement on 18.12.2020 to settle the entire amount as above in one-shot and at the request of TANGEDCO, the Petitioner offered a waiver of Rs.2,02,54,890/- on carrying costs and Rs. 2,34,98,225/- on LPS as a one-time dispensation. After considering waivers on account of LPS and carrying costs, TANGEDCO paid Rs. 100,75,57,560/- to PTC on 7.7.2021. Subsequent thereto, PTC paid Rs. 97,81,90,554/- to the Petitioner on 9.7.2021 after deducting the applicable TDS. The Respondents have submitted that the Petitioner and PTC raised a subsequent claim towards compensation on account of Change in Law events for the period from November 2020 to December 2021 for an amount of Rs. 27,01,00,341/-. However, during the reconciliation process, TANGEDCO made a payment of the ad hoc amount of Rs. 22,13,08,481/- on 10.2.2022.

16. The Petitioner has submitted that its plant was identified as a stressed coal based thermal plant by the Ministry of Power in its 37th report. Further, the onset of COVID-19 compounded the otherwise stressed condition of the Petitioner. Thus, the Petitioner, being already under severe financial stress, such unjustified non-payment

of its valid claims by the Respondents, whose claims had been duly adjudicated by this Commission, compounded the misery of the Petitioner. Constrained by these circumstances, the Petitioner was left with no other option but to request, chase, follow up, and plead with the Respondents for the release of its payments, which had already been paid by the Petitioner in the nature of taxes, duties, or cess to various State/Central Government authorities. In the above circumstances, the Petitioner was compelled to sign a Tripartite Agreement with the TANGEDCO and PTC on 18.12.2020 at the behest of TANGEDCO for settlement of its dues, hoping that it would receive payment, which was vital to provide some relief to the Petitioner and to continue to survive. The Petitioner has submitted that it is not in dispute that TANGEDCO unilaterally provided the format of the said Agreement and unilaterally dictated and decided the terms of the said Agreement, and the Petitioner had absolutely no negotiating or bargaining power at all. The Petitioner was thus constrained to sign on the dotted line. One of the unilateral conditions imposed by TANGEDCO in the Tripartite Agreement was that for the period from January 2016 to June 2019, TANGEDCO shall calculate compensation towards Change in Law based on the notified base price of G-12 grade coal (a notional price). However, as per the Order dated 19.8.2019, the compensation for Change in Law events has to be based on the actual base price of coal. The Petitioner has submitted that owing to the adoption of the notified price of G12 Grade Coal published by Coal India Ltd. on a notional basis, instead of the actual price of the coal actually purchased by the Petitioner through e-auction, open market, and using that the Petitioner generated and supplied power to PTC/TANGEDCO, there remains a differential principal amount of Rs 7.94 crore (for the period from January 2016 to October 2020), which is yet to be paid to the Petitioner by the Respondents, in terms of the order dated 19.8.2019



passed by the Commission in Petition No. 17/MP/2019. The Petitioner has submitted that the quantum of the differential amount of Rs 7.94 crore is not in dispute.

17. We have considered the rival submissions of the parties. The Petitioner has submitted that the Respondent has to consider the actual base price notified by the CIL for the given grade coal supplied by Central Coalfields Limited to the Petitioner, instead of G-12 grade coal for the purposes of the Change in Law claims of the Petitioner.

18. We are of the view that, vide order dated 19.8.2019, the Commission had already devised a mechanism, as to how compensation for Change in Law events allowed as per PPA shall be paid in subsequent years of the contract period. However, considering their financial implications, the parties have discussed the issues with each other and decided to settle the outstanding dues after reconciliation. Accordingly, a Tripartite Agreement was signed on 18.12.2020. Relevant portions of the Tripartite Agreement are extracted as under:

"1. A Meeting was held at TANGEDCO `s office between officials of PTC, APNRL and TANGEDCO to reconcile the Change in Law claim amount submitted by PTC/APNRL for the period from Jan-2016 to Oct-2020 in view of order in Petition 17/MP/2019 and SM 13 of 2017 by the Central Electricity Regulatory Commission and they settled the difference amicably.

2. TANGEDCO had already paid an amount of Rs. 25,00,0,000 (Rs. Twenty-Five Crore) to PTC India Ltd. as per the Central Electricity Regulatory Commission directives dated 28.5.2019, which has been paid by PTC to APNRL.

.....

6. For the period Jan 2016 to June 2019 TANGEDCO prepared its calculation for Change in law amount based on the notified base price of G-12 grade coal, since APNRL did not have any FSA during that period, whereas APNRL claimed on the basis of actual coal price paid by it for the supply of power to PTC/TANGEDCO. APNRL entered into Shakti Scheme agreement with Central Coalfields Ltd, a subsidiary of Coal India Limited, accordingly, started lifting of coal from July 2019 onwards and gives discount to TANGEDCO for generation made using coal received under Shakti Scheme only from July 19 onwards.

7. PTC/APNRL has to refund Stowing Excise Duty (SED) and Central Excise Duty (CED) due to subsuming of these items by introduction of GST from 1.7.2027 onwards. TANGEDCO has made the deduction towards these items as per their calculation and the same is agreed by PTC/APNRL.

8. The parties are agreeing on the above payable amount based on reconciliation and the present settlement entered between parties.”

19. Subsequently, the Petitioner and PTC gave an Undertaking dated 29.6.2021 to the Respondent, TANGEDCO, that they would not make any further claims. The relevant portion of the said Undertaking dated 29.6.2021 is extracted as under:

“Pursuant to the joint provisional reconciliation of PTC /Adhunik Power and Natural Resources Ltd (APNRL) and TANGEDCO regarding outstanding dues from TANGEDCO, conducted in December 2020, a sum of Rs. 88,82,92,586 (Rupees Eighty-Eight Crores Eighty-Two Lakhs Ninety-Two Thousand Five Hundred and Eighty Six only), which includes a principal change in law amount of Rs. 73,07,99,776 (Rupees Seventy-Three Crores Seven Lakh Ninety-Nine Thousand Seven Hundred Seventy-Six only) and a carrying cost of Rs. 15,74,92,811 (Rupees Fifteen Crores Seventy-Four Lakh Ninety-Two Thousand Eight Hundred Eleven only) has been ascertained to be payable by TANGEDCO to PTC/APNRL as on 18.12.2020 for the period commencing from 1st January 2016 until 31st October 2020. The said amount comprises of claims pertaining to the 'Change in Law' events/components including carrying cost as settled jointly on 18.12.2020.

The above reconciliation statement has further been revised, during our meeting on 23.06.2021 for the period 1st Jan,2016 to 31st Oct,2020 which comes in tune of Rs. 105,13,10,675 (Rupees One Hundred Five Crore Thirteen Lakh Ten Thousand Six Hundred Seventy-Five only).

In consideration of TANGEDCO agreeing to settle the entire amount as above in one-shot and at the request of TANGEDCO, APNRL has agreed to offer a waiver of Rs. 2,02,54,890 (Rupees Two Crore Two Lakhs Fifty-Four Thousand Eight Hundred Ninety only) on Carrying Cost and Rs. 2,34,98,225 (Rupees Two Crore Thirty Four Lakhs Ninety Eight Thousand Two Hundred Twenty Five only) on Late Payment Surcharge as an one-time dispensation only, provided the entire amount will be paid by TANGEDCO on or before 10th July,2021.

After waving off the Carrying Cost and LPS, the net amount payable by TANGEDCO comes to the tune of Rs. 100,75,57,560/- (Rupees One Hundred Crores Seventy Five Lakhs Fifty Seven Thousand Five Hundred Sixty Only) until 31st Oct'20 the breakup of which is as follows:

- *Principal amount of Rs. 72,10,98,486/- (Rupees Seventy Two Crores Ten Lakh Ninty Eight Thousand Four Hundred Eighty Six only) for the period commencing from 1st January 2016 until 31st October 2020*

- Carrying Cost of Rs. 13,26,12,206/- (Rupees Thirteen Crores Twenty Six Lakhs Twelve Thousand Two Hundred Six only) for the period commencing from 1st January 2016 until 19th August, 2019 and
- LPS of Rs. Rs. 15,38,46,868/- (Rupees Fifteen Crores Thirty Eight Lakhs Forty Six Thousand Eight Hundred Sixty Eight only) for the period from 20th August,2019 to 31st Oct,2020 and calculated until 31st May'21

PTC/ APNRL submits that in future it shall not make any further claims in addition to the above amount, which amount has been calculated in line with the Hon'ble CERC's order dated 19.08.2019 in Petition No.17/MP/2019 for the above components and for the period mentioned above. In the event, the amount mentioned above is not received by PTC/APNRL on or before 10th July, 2021, the offer of waiver as above will stand withdrawn.

This waiver is offered as an one-time settlement. This undertaking may be, taken as part and parcel of PPA and PTC/APNRL will not raise any claim/litigation against the waiver so offered above in any forum.

PTC/APNRL further states that there shall not be any claim in addition to the above amount, which amount has been calculated in line with the Hon'ble CERC's order dated 19.08.2019 in Petition No. 17/MP/2019, in future for waiver offered above and/or there shall not be any claim in future based on approval / order of any regulatory authority in respect of all the accepted components and the period mentioned herein."

20. In this context, it is noted that the Hon`ble Supreme Court in Adani Gas Ltd. v. Union of India, [(2022) 5 SCC 210] has held that:

"122. The doctrine of approbate and reprobate is based on the principle of estoppel. Paraphrased, it implies that one cannot challenge a decision, from which an advantage is enjoyed. As was tersely stated in another context, an order "cannot be partly good and partly bad like the curate's egg" [Union of India v. Shakuntala Gupta, (2002) 10 SCC 694]. In Suzuki Parasrampuriah Suitings (P) Ltd. v. Official Liquidator [Suzuki Parasrampuriah Suitings (P) Ltd. v. Official Liquidator, (2018) 10 SCC 707: (2019) 1 SCC (Civ) 91] this Court described the principle as one which does not permit a litigant to "take contradictory stands in the same case. A party cannot be permitted to approbate and reprobate on the same facts and take inconsistent shifting stands". In Amar Singh v. Union of India [Amar Singh v. Union of India, (2011) 7 SCC 69: (2011) 3 SCC (Civ) 560] this Court held that: (Amar Singh case [Amar Singh v. Union of India, (2011) 7 SCC 69: (2011) 3 SCC (Civ) 560], SCC p. 86, para 50) "50. This Court wants to make it clear that an action at law is not a game of chess. A litigant who comes to Court and invokes its writ jurisdiction must come with clean hands. He cannot prevaricate and take inconsistent positions."

21. The Petitioner has already received final settlement amount from TANGEDCO in terms of Tripartite Agreement and undertaking, without any demur and protest as full and final settlement for the relevant period. The present case is a clear case of accord and satisfaction. The Hon'ble Supreme Court in ***Union of India & Ors. Vs Onkar Nath Bhalla & Sons***, reported at **(2009) 7 SCC 350** referring to the decision in ***P.K. Ramaiah & Co. vs. NTPC***, 1994 Supp (3) SCC 126 observed that:

*“6. It was further contended by the learned counsel for the appellants that when the agreement provided for arbitration by serving officer having degree in Engineering or equivalent, then a retired High Court Judge cannot be appointed as an arbitrator. To support his contentions, he would rely on the decision of this Court in *P.K. Ramaiah & Co. v. NTPC* [1994 Supp (3) SCC 126], wherein this Court has held that: (SCC p. 129, para 8)*

*“8. ... **Admittedly the full and final satisfaction was acknowledged by a receipt in writing and the amount was received unconditionally. Thus, there is accord and satisfaction by final settlement of the claims. The subsequent allegation of coercion is an afterthought and a device to get over the settlement of the dispute, acceptance of the payment and receipt voluntarily given.** In *Russell on Arbitration*, 19th Edn., p. 396 it is stated that ‘an accord and satisfaction may be pleaded in an action on award and will constitute a good defense’. Accordingly, we hold that the appellant having acknowledged the settlement and also accepted measurements and having received the amount in full and final settlement of the claim, there is accord and satisfaction.”*

22. The Petitioner has also raised a plea of economic duress in signing the Tripartite Agreement and furnishing the subsequent Undertaking. The Petitioner has submitted that it was constrained to give up part of its claim (differential principal amount of Rs. 7.94 crore) under economic duress, which is clearly demonstrated by the fact that (i) the Petitioner was constrained to accept the lesser amount than its entitlement and (ii) the Petitioner protested before and after the signing of the Settlement Agreement. However, we are not in agreement with the aforesaid contention of the Petitioner. Firstly, the Respondent was already directed to pay Rs. 25 crore (approximately 1/4th of total principal claims) to the Petitioner towards its

various Change in Law claims as raised in Petition No.17/MP/2019 vide Record of Proceedings for the hearing dated 28.5.2019 i.e. even prior to the issuance of the final order dated 19.8.2019 in the said matter. Furthermore, the Petitioner was already before the Commission with the present Petition seeking the execution of the Commission's order dated 19.8.2019 and directions upon the Respondents to comply with the said order by release of the outstanding dues in terms thereof prior to it having proceeded to enter into a Tripartite Agreement and furnish the Undertaking. It is true that at the time of filing the present Petition on 30.11.2020, this Commission was not functioning for the period from 28.8.2020 to 2.3.2021, in terms of the directions issued by the Hon'ble Supreme Court vide Order dated 28.8.2020 in Cont. Petition (c) No. 429/20202 in CA No. 14697/2015. However, the Commission duly started functioning w.e.f. 3.3.2021. Accordingly, in our view, the Petitioner had ample opportunity to point out such aspects /developments to the Commission in the present case prior to giving the Undertaking dated 29.6.2021 agreeing to a reconciliation statement and/or methodology and an Undertaking to the effect that it shall not make any further claims in addition to the amount indicated therein in relation to the order dated 19.8.2019. Despite the execution petition being pending before this Commission and the Commission having resumed functioning, the Petitioner chose not to move the Commission citing either these developments or, its urgent needs for funds and pressing for interim reliefs as prayed for in the Petition or for that matter, contesting the Tripartite Agreement as stated to have been required to be given under the financial duress at that juncture. On the other hand, the Petitioner continued with the methodology of settlement as proposed by TANGEDCO and also proceeded to give the Undertaking dated 26.9.2021 pursuant to which the amounts were released and received by the Petitioner. Even as on date, there are no independent prayer(s) by the



Petitioner contesting the Tripartite Agreement and the Undertaking in the present matter, and the above aspects came to be alluded to only vide an affidavit dated 6.12.2021 and subsequent rejoinder/written submissions. The above circumstances, in our view, as such do not reflect that TANGEDCO was in a position to compel the Petitioner to sign the Tripartite Agreement and/or to give an Undertaking. Consequently, we do not find that the Petitioner has made out any case for economic duress in respect of the Tripartite Agreement and the Undertaking.

23. In view of the above, the objections raised by the Respondents in the present Petition have merit. As already noted above, in terms of the Order dated 19.8.2019, the Parties after discussion/negotiation have arrived at a conclusion and signed a Tripartite Agreement. Based on such negotiations, the Tripartite Agreement and the Undertaking furnished by the Petitioner, the Respondent, TANGEDCO released the settlement amount during the pendency of the present proceedings. We therefore refrain from initiating proceedings under Section 142 read with Section 149 of the Act against the Respondents as prayed for by the Petitioner.

24. In light of the above discussion, Petition No. 729/MP/2020 is disposed of accordingly.

Sd/-
(P.K. Singh)
Member

sd/-
(Arun Goyal)
Member

sd/-
(I.S. Jha)
Member

sd/-
(Jishnu Barua)
Chairperson

