

TAMIL NADU ELECTRICITY REGULATORY COMMISSION
(Constituted under section 82 (1) of the Electricity Act, 2003)
(Central Act 36 of 2003)

PRESENT:-

Thiru M.Chandrasekar

.... Chairman

and

Thiru K.Venkatasamy

.... Member (Legal)

D.R.P. No. 19 of 2021

M/s. OPG Power Generation Pvt. Ltd.
OPG Power Plant, OPG Nagar
Periya Obulapuram Village
Nagaraja Kandigai
Madharapakkam Road
Gummidipoondi
Thiruvallur – 601 201

..... Petitioner
(Thiru Rahul Balaji
Advocate for the Petitioner)

-Versus-

Tamil Nadu Generation and Distribution
Corporation Limited
Rep. by its Chairman
NPKRR Maaligai
144, Anna Salai
Chennai – 600 002.

....Respondent
(Thiru M.Gopinathan
Standing Counsel for the Respondents)

**Dates of hearing : 12-10-2021; 15-12-2021; 28-12-2021;
11-01-2022; 25-01-2022; 15-02-2022;
22-02-2022; 15-03-2022 and 05-04-2022**

Date of order : 05.05.2022

ORDER

The D.R.P.No. 19 of 2021 came up for final hearing on 05.04.2022. The Commission, upon perusal of the petition and connected records and after hearing the submissions of the petitioner hereby makes the following order:-

1. Prayer of the Petitioner in D.R.P No.19 of 2021:-

The prayer of the petitioner in D.R.P. No.19 is to-

- (a) declare that the events enumerated in the Table No 1 of paragraph 2 constitute "Change in Law" events in terms of Article 10 of the PPA dated 12.12.2013; and consequently confirm that as agreed between the parties and which are specifically set out in the Undertaking dated 30.4.2021 issued by the petitioner, the petitioner is, *inter alia*, entitled to the amounts mentioned in Table No.2 towards financial impact of the Change in Law events;
- (b) determine the correct rate of CVD and other consequential claims for purposes of Change in Law and confirm the correctness and entitlement to the sum of Rs.8,25,91,046 (Rupees Eight Crores Twenty Five Lakhs, Ninety One Thousand and Forty Six Only) being the differential working after applying the correct rate towards CVD, Cess and Carrying Cost attributable to Change in Law under the PPA; and
- (c) clarify that the Carrying Cost is to be determined on the basis of Compound interest basis for purposes of Change in Law entitlement for future periods.

2. Facts of the case:-

The Miscellaneous Petition under Section 86(1)(b) of the Electricity Act, 2003 read with Article 10 of the PPA dated 12.12.2013, seeking issuance of necessary directions to the Respondent for complying with the provisions of the PPA dated 12.12.2013 in terms of the settled law and for compensating the Petitioner for the additional recurring expenditure of the Petitioner on account of 'Change in Law' events in order to revert the Petitioner to the same economic position that it would be in if the change in law events had not occurred.

3. Contentions of the petitioner:-

3.1. The present Petition is being filed by the Petitioner under Section 86(1 Xb) and other applicable provisions of the Electricity Act, 2003 ("Electricity Act") seeking issuance of necessary directions to the Respondent in accordance with Article 10 of the Power Purchase Agreement dated 12.12.2013 executed between the Petitioner and the Respondent ("PPA"). The relief sought by the Petition are arising out of various 'Change in Law' events and pursuant to the Agreement reached between the parties and are being filed for the formal Regulatory approval. In addition thereto the petitioner is also seeking for appropriate clarification to be issued on the manner in which computation is to be arrived at for the future.

3.2. The present Petition is being filed due to the following Change in Law events occurring after the entering into of the said PPA dated 12.12.2013.

S.No.	Change in Law Events
1	<p>Increase in the cost. of Coal due to change in the rate of levy of Clean Energy Cess/Green Cess on Coal</p> <p>(i) Rate of Clean Energy Cess increased from Rs.50 per ton to Rs.100 Per Ton by way of Gazette Notification dated 01.07.2014 by Union of India (Effectuated Period - 01.07.2014 to 01.03.2015)</p> <p>(ii) Rate of Clean Energy Cess increased from Rs.100 Per Ton to Rs.200 by way of Gazette Notification dated 01.03.2015 by Union of India (Effectuated Period - 01.03.2015 to 01.03.2016)</p> <p>(iii) Rate of Clean Energy Cess increased from Rs.200 Per Ton to Rs.400 Per Ton by way of Gazette Notification dated 01.03.2016 by Union of India (Effectuated Period - 01.03.2016 to till date)</p>

2	<p>Increase in Service Tax on various vital and integral Services for running of Power Plant including stevedoring & Handling Transportation and Insurance and IGST impact on import of Coal due to enforcement of GST Regime.</p> <p>(i) Rate of Service Tax on the various vital services for running of Power Plant increased from 12.36% to 14% by way of Notification dated 19.05.2015 (No. 14/2015-Service Tax) in the Finance Act, 1994. (Effected Period -June 2015 to 14th November 2015)</p> <p>(ii) Rate of Service Tax on the various vital services for running of Power Plant increased from 14% to 14.5% by way of Notification dated 06.11.2015 (Service Tax Notifications Nos 21&22- 06.11.2015) in the Finance Act, 1994 (Effected Period: 15th November 2015 to 31th May 2016)</p> <p>(iii) Rate of Service Tax on the various vital services for running of Power Plant increased from 14.5% to 15% by way of Notification dated 26.05.2016 (No. 28/2016-Service Tax) in the Finance Act, 1994 (Effected Period: 1st June 2016 to 30th June 2017)</p> <p>(iv) Rate of Service Tax on the various vital services for running of Power Plant increased from 15% to 18% by way of Notification dated 19.06.2017 (Notification No. 112017 - Central Tax) Notifying the Applicability of GST Act, 2017 replacing Service Tax. Further, IGST imposed @ 5% on import purchases. (Effected Period: July 2017 till date)</p>
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3	<p>Increase in Customs Duty</p> <p>(i) Levy of education cess at 3% on the amount paid as coal cess from December, 2014 onwards</p> <p>(ii) Increase in the amount of coal cess from Rs.50 per mt to Rs.100 per mt, Rs.200 per mt and Rs.400 per mt from July, 2014 onwards</p> <p>(iii) Rate of countervailing duty stood increased from 2% to 5% by way of Notification dated 19.06.2017 (Notification No. 1/2017 - Central Tax) Notifying the Applicability of GST Act, 2017 replacing Service Tax. The base rate, in this regard would be 1%. However, due to an inadvertent error by both parties, the claims and discussions as also the payment effected proceeded on the incorrect basis that the rate was 2%. The differential amount may also therefore be considered to be ordered since it relates to the application of the correct rate, where the parties are already in agreement on the principle.</p>
4	<p>Carrying Cost</p> <p>The parties had expressly agreed that as a consequence of change in law the affected party would be placed in the economic position as if such change in law events had not occurred. In light of the agreement between the parties and the principles of restitution enshrined by various judicial precedents of the Hon'ble Supreme Court of India, the Petitioner is entitled to carrying cost arising out of the increased costs incurred by it consequent to the approved Change in Law events from the effective date of Change in Law till the actual payment is made to the Petitioner.</p>

3.3. The Petitioner (OPG Power Generation Pvt. Ltd.), is a generating company as defined in Section 2 (28) of the Electricity Act, 2003. The Petitioner owns and operates a 414 MW coal fired power thermal plant at Gummudipoondi, Tamil Nadu (the "OPGPGTPP"). One of the units of OPGPG TPP (74 MW) was duly commissioned on 05.06.2013 and has been generating and supplying the contracted capacity to the Respondent from 01.01.2014 in accordance with PPA, without any interruption.

3.4. The Respondent (TANGEDCO) is an electrical power generation and distribution public sector undertaking that is owned by the Government of Tamil Nadu. It was formed on 1 November 2010 under section 131 of the Electricity Act of 2003, and is the successor to the erstwhile Tamil Nadu Electricity Board and is in the business of distribution as well as generation.

3.5. On 27.9.2012, the Board of Directors of the Respondent approved a proposal to procure 1000 MW + 20% each RTC power by floating two tenders with two different delivery dates to meet the base load requirement throughout the year under Case -I bidding for a period of 15 years under the guidelines issued by the Ministry of Power / Government of India.

3.6. On 9.10.2012, Miscellaneous Petition No. 37/2012 was filed before the Commission for the approval of certain deviations from the standard bid documents for the procurement of 1000 MW + 20% RTC power. The Commission accorded its

approval for certain deviations specified by it in its order dated 18.12.2012. On 21.12.2012, the Respondent floated a tender (03/PPLT/2012) (in the form of a Request for Proposal) to procure 1000 MW + 20% RTC power on long term basis under the Case I bidding procedure for meeting its base load requirements for period of 15 years, i.e., 1.10.2013 to 30.9.2028.

3.7. Its Bid in response to the Request for Proposal floated by the Respondent. In the Evaluation of Bids by the Bid Evaluation Committee of the Respondent, the Petitioner was declared as one amongst the successful Bidders.

3.8. Negotiations for rate matching were called for from 9 bidders including Petitioner subject to the approval of the Board of Directors of the Respondent TANGEDCO and the Commission. The Petitioner agreed to match the levelized tariff of Rs.4.910/kWhr pursuant to the negotiations.

3.9. On 30.10.2013, the Board of Directors of the Respondent TANGEDCO approved the issuance of letters of intent to and the execution of power purchase agreements with the successful bidders (which included the petitioner) for the purchase of 2122 MW RTC power through long term under Case I for a period of 15 years from 2013 through 2028. During this meeting, it was also agreed that a petition would be filed before the Commission for the adoption of tariff.

3.10. Thereafter, letters of intent were issued to the Petitioner on 14.11.2013 and power purchase agreements were executed. As stated above, the PPA was executed by the Petitioner on 12.12.2013.

3.11. In 2014, the Respondent TANGEDCO filed a petition (P.P.A.P. No. 3/2014) before the Commission for the adoption of the levellised tariff of Rs.4.91/ kWhr under the Power Purchase Agreements signed between the Respondent TANGEDCO and the successful bidders. This includes the PPA executed with the Petitioner.

3.12. On 29.7.2016, the Commission passed an order adopting the levellised tariff of Rs.4.91 per kWhr as discovered under Tender 31PPLT/2012.

3.13. The rate of Clean Energy Cess on Coal as applicable when the Petitioner had submitted its bid for long term power supply to Respondent was Rs.50/- per Ton, levied by Notification No. 3/201 O-Clean energy Cess dated 22.06.2010. As such, the estimation of fuel charges while making the bid was made by taking into account, the said levy of Clean Energy Cess at the rate applicable at Rs.50/- Per Ton as applicable at that time.

3.14. The said rate of Clean Energy Cess has been revised by the Central Government by way of various Central Government Notification, from time to time and at the present time, the effective rate is Rs.400/- Per Ton.

3.15. The said change in the rate of Clean Energy Cess is clearly a change in law event since the same is covered by Clause 10.1.1 being a "Change in Tax" and having been brought about by way of Gazette Notifications by the Central Government from time t time, under its executive powers, thereby having force of law.

3.16. The Change in rates of Clean Energy Cess, that have been increased from time to time are shown in the Table below:

S. No.	Date	Cess Notification	Rate Applicable
1	01-01-2014	Notification No.3/2010-Clean Energy Cess	Rs.50/- per ton
2	01-07-2014	Notification No.20/2014-Clean Energy Cess	Rs.100/- per ton
3	01-03-2015	Notification No.1/2015-Clean Energy Cess	Rs.200/- per ton
4	01-03-2015	Notification No.1/2016-Clean Energy Cess	Rs.400/- per ton

3.17. Therefore, there is a 800% increase in the levy of rate of duty on account of Clean Cess on Coal and the same is an additional financial burden on the Petitioner which is required to be compensated to the Petitioner on account of Change in Law Clause provided in the Contract.

3.18. The Financial impact of the Change in law up to 31.03.2020, brought about by the said Notifications revising the Clean Energy Cess on Coal is tabulated below:

S. No.	Financial Year	Total Financial Impact for the Year
1	2014-2015	Rs.1,02,97,923/-
2	2015-2016	Rs.2,23,00,246/-
3	2016-2017	Rs.3,65,50,722/-
4	2017-2018	Rs.7,25,94,784/-
5	2018-2019	Rs.9,51,93,261/-
6	2019-2020	Rs.9,16,31,335/-
	Total	Rs.32,85,68,271/-

3.19. The increase in clean energy cess has been held to be a change in law event by the Hon'ble Central Electricity Regulatory Commission (CERC). In this context, reference is made to the following orders of the Hon'ble CERC:

- (i) Order dated 19.12.2017 passed in Petition No. 101/MP/2017, titled as DB Power Ltd Vs PTC India Ltd & Ors.;
- (ii) Order dated 27.04.2018 passed in Petition No. 126/MP/2016, titled as Bharat Aluminium Company Limited v. TANGEDCO & Ors.

Therefore, in view of the above orders, the Commission may take a similar approach, thereby allowing the change in law claim of the Petitioner qua increase in clean energy cess.

3.20. Initially and at the time the PPA was executed, the authorities levied Education Cess at the rate of 3% only on the amounts paid as Basic Customs Duty and Countervailing Duty. On and from December, 2014, the authorities also levied 3% educational cess on the amount paid coal cess in addition to Basic Customs Duty and Countervailing Duty, thereby increasing the total amount of education cess. Further, the amount of Coal Cess as on the date of execution of PPA was Rs.50 per mt. Thereafter, the amounts were increased to Rs.100, Rs.200 and Rs.400 per mt starting July, 2014.

3.21. The rate of Customs Duty on Coal as applicable when the Petitioner had submitted its bid for long term power supply to Respondent and at the time of entering into the Power Purchase Agreement was 1% on imported coal. When the Central Goods and Services Tax Act, 2017 came into effect on July 1, 2017, the rate of countervailing duty on imported coal became 5%.

3.22. The said change in the rate of Customs Duty / Countervailing Duty, i.e., differential rate of 3%, is clearly a change in law event since the same is covered by Clause 10.1.1 being a “Change in Tax” and having been brought about by way of implementation of the Central Goods and Services Tax Act, 2017 and Gazette Notifications by the Central Government from time to time, under its executive powers, thereby having force of law.

3.23. The Financial impact of this change in law up to 31.03.2020, brought about by the aforesaid events, which formed subject-matter of the claim and discussed for resolution is tabulated below:

S. No.	Financial Year	Total Financial Impact for the Year (in Rs.)
1	2014-2015	3,08,938/-
2	2015-2016	6,69,007/-
3	2016-2017	10,96,522/-
4	2017-2018	21,77,844/-
5	2018-2019	2,68,29,516/-
6	2019-2020	2,62,29,290/-
	Total	5,73,11,117/-

3.24. The Petitioner clarifies that the Petitioner and consequently the Respondent had erroneously considered the erstwhile CVD rate (before the change in law event took place) as 2% (prevailing as on 28.02.2013). In fact, the erstwhile rate that is to be considered, keeping in mind Clause 10.1.1 of the PPA, is the rate that prevailed 7 days prior to the bid deadline, i.e., 27.02.2013. As on the said date CVD rate was 1%. Since the Parties had under a bonafide mistake considered erstwhile CVD rate as 2% and held discussions the Respondent has acknowledged the same amount to be due and payable. An undertaking was also furnished by the petitioner in terms of the above calculation. However, the bonafide error has been discovered only at the

time of filing the present petition when the Counsel; for the petitioner had while preparing the present petition pointed out the discrepancy and the change in rates that had taken place from 1% to 2% during the relevant period and the fact that the PPA mandates adoption of 1%. The Petitioner has now separately raised this aspect and would commence discussions and hopes to arrive at an appropriate conclusion with the Respondent with respect to the claim of the differential amount (i.e., difference between computation of erstwhile CVD before the change in law event at 2% and at 1 %) and it has therefore become necessary for the Commission to also rule on this issue. In the meantime, if a specific agreement is reached between the parties, the petitioner undertakes to file such outcome to facilitate the determination.

3.25. The calculation in that regard are set out herein below:-

CVD applicability	
Bid Dead line date	06 March 2013
Seven days prior	7
Date prevailing for PPA	27 February 2013
CVD rate prevailing for PPA	1%
Notification from Finance act	28 February 2013
CVD on and from 28-02-2013	2%
CVD before 28-02-2013	1%

Change in Law OPG Claim Working			
Particulars	Revised Working	Original Working	Difference (in Rs.)
Scenario	@ PPA CVD 1% (in Rs.)	@ PPA CVD 2% (in Rs.)	
CVD	104,997,176	54,866,391	50,130,785
Coal Cess	328,568,271	328,568,271	-0
Edu Cess	3,948,648	2,444,725	1,503,923
ST/GST	20,522,578	20,522,578	-
Carrying Cost	159,546,395	128,590,058	30,956,337
Difference	617,583,069	534,992,023	82,591,046

There is therefore a differential working of Rs.8,25,91,046/- (Rupees Eight Crores Twenty Five Lakhs, Ninety One Thousand and Forty Six Only) which is also required

to be paid as part of the Change in Law payment. The Commission may therefore consider this aspect as part of its Regulatory prudence check and issue appropriate directions determining the correct working.

3.26. The rate of Service Tax on the various vital and integral Services for running of Power Plant including stevedoring & Handling, Transportation and Insurance as applicable when the Petitioner had submitted its bid for long term power supply to Respondent was 12.36%, levied by Notification No.2/2012 - Service Tax under the Finance Act, 1994 dated 17.03.2012. As such, the estimation of O&M and other services while making the bid was made by taking into account, the said levy of Service tax at 12.36% as applicable at that time.

3.27. The said rate of Service Tax has been revised by the Central Government by way of various Central Government Notification between the period from June 2015 till June 2017, when the rates were increased from 12.36% to 15%.

3.28. From July 2017, the Central Government promulgated the Goods and Services Act, 2017, superseding the previous Service Tax Regime and increasing the rate of tax leviable on all the above services further to 18% and further imposing IGST tax @ 5% on goods imported into the country.

3.29. The said change in the rate of Service Tax is clearly a change in law event since the same is covered by Clause 10.1.1 being a "Change in Tax" and having been brought about by way of Gazette Notifications by the Central Government from time to time, under its executive powers, having force of law.

3.30. The Change in rates of Service Tax/ GST, that have been increased from time to time are shown in the Table below:

S. No.	Date	Service Tax / GST Notifications Applicable	Rate Applicable
1	Year 2013	Notification No.02/2012-dated 17 th March 2012	12.36%
2	01-06-2015	Notification No.14/2015-dated 19 th May 2015	14%
3	15-11-2015	Notification No.21 & 22 6 th November 2015	14.5%
4	01-06-2015	Notification No. Finance Bill 2016	15%
5	01-07-2017	As per enactment GST Act	18%

3.31. Therefore, there is a substantial increase in the levy of rate of Service tax on various vital and integral Services for running of Power Plant including stevedoring & Handling, Transportation and Insurance and the same is an additional financial burden on the Petitioner which is required to be compensated on account of Change in Law Clause provided in the Contract. The Gazette Notification No. 02/2012 dated 17th March 2012, no. 14/2015 dated 19th May 2015, Notification Nos. 21&22 dated 6th November 2015 and Notification No. 1/2017 dated 28th June, 2017

3.32. The Financial impact of the Change in law up to 31.03.2020 brought about by the said Notifications revising the Service Tax /GST/ IGST on import purchases is tabulated below:

S. No.	Financial Year	Total Financial Impact for the Year (in Rs.)
1	2015-2016	10,91,611/-
2	2016-2017	25,61,664/-
3	2017-2018	30,60,296/-
4	2018-2019	90,30,213/-
5	2019-2020	47,78,793/-
	Total	2,05,22,578/-

3.33. It is further submitted that the introduction of GST being a change in law event, is no more *res-integra* on account of the judgment dated 03.10.2019 passed by the Hon'ble Appellate Tribunal for Electricity in Appeal No. 131 of 2019, titled as DNH Power Distribution Company Ltd. v. CERC & Ors, wherein the following was held:

"viii) The Act regarding the Goods and Services Taxes ("GST") have come into effect from 01.07.2017. With this the taxes and duties have been replaced by either Central GST or State GST. In addition certain existing taxes have been abolished and certain new taxes have been introduced. The Goods and Services (Compensation to State) Act, 2017 provides for the compensation to States for loss of their revenue. These changes in tax may result into additional recurring/non-recurring expenditure by the seller or any income to the seller and they have also been notified after the cut off date and are also applicable for supply of power by the seller. Therefore this is a 'change in law'."

3.34. Therefore, in view of the above judgment of the Hon'ble APTEL, the additional expenditure incurred by the Petitioner due to increase in service tax, imposition of IGST on import purchases and shift to GST regime, ought to be allowed as a change in law event.

3.35. The Petitioner states that the parties had expressly agreed that as a consequence of change in law the affected party would be placed in the economic position as if such change in law events had not occurred.

3.36. Accordingly, the Petitioner submits that it is entitled to the carrying cost arising out of the increased costs incurred by it consequent to the approved Change in Law events from the effective date of Change in Law till the actual payment is made to the Petitioner. The Petitioner has taken into consideration the Prime Lending Rate of State Bank of India. A tabulation of the interest on the increased amounts calculated due to change in law events is tabulated herein below:

S. No.	Period	Surcharge (in Rs.)
1	FY 2014-15	61,350/-
2	FY 2015-16	13,66,980/-
3	FY 2016-17	41,55,356/-
4	FY 2017-18	1,00,19,648/-
5	FY 2018-19	2,25,12,741/-
6	FY 2019-20	3,95,06,040/-
7	FY 2020-21	5,09,67,944/-
	Total	12,85,89,059/-

3.37. As a one time measure and to bring quietus to the disputes arising out of a significant amounts outstanding to it by the Respondent and as a good-faith gesture, the Petitioner had agreed to compute and claim the carrying cost, for the purposes of the agreement using the simple interest formula as opposed to compound interest and additionally agreed to a waiver of 50% on the said amount as well. While there is no monetary claim being made, in view of the voluntary reduction of the interest claim as part of the settlement, it is necessary that a clear Regulatory guidance be provided on the carrying cost interest calculation. Since Carrying Cost is essentially

only the compensation for the costs already incurred due to the non-payment of monies when the effective change in law took place, interest is the compensation that would put the generator in the same position. In the real World and also under the PPA, the interest is recognized only on a compounding basis. Therefore, the petitioner specifically seeks for a direction that interest for the purposes of carrying cost would be done on the basis of compound interest at the applicable rate of interest.

3.37. The Petitioner issued Change in Law notices to the Respondent TANGEDCO dated 15.09.2018 and 06.06.2019 with reference to its Claim for increased rates of Coal Cess and Notice Dated 09.07.2019 in respect for its Claim towards increase in rate of Service Tax, thereby intimating the Respondent of the Change in Law events set out in more detail in the petition above. Furthermore, the Petitioner issued a Change in Law notice dated 16.11.2019 with reference to its Claim for IGST impact on import purchases and increased rates of Coal Cess. The Petitioner, along with the said Notice for Change in Law, also sent the Supplementary Bills for the compensatory amount payable on account of the Change in Law Events.

3.38. Further, the Petitioner issued follow-up demand notice dated 20.12.2019 referencing the earlier supplementary bills raised by the Petitioner and requesting the Respondents to release the payments for the following claims arising out of change in law (i) Coal cess claim on fuel; (ii) GSTI service tax claim; (iii) IGST claim on coal imports as per the amounts set out therein.

3.39. On 23.12.2019, the Respondents had communicated to the Petitioners, declining to process any of the supplementary bills dated 15.09.2018, 06.06.2019, 09.07.2019 & 16.11.2019 raised by the Petitioner on account of 'Change in Law' events on the ground that the compensation amount is to be determined by the Appropriate Commission as per Article 10.3.4 of the PPA.

3.40. In response thereto, the Petitioner addressed letter dated 20.05.2020, where it placed reliance on the order dated 24.06.2019 of the Hon'ble Maharashtra Electricity Regulatory Commission (MERC) in the matter of Azure Power Thirty Four Private Limited and informed the Respondent that the compensation in respect of a Change in Law event is a matter to be agreed between the parties to the PPA and only in case of a dispute the same will have to be determined the Commission. The Petitioner also raised an updated claim for additional expenses on account of Change in Law events up to 31.03.2020, vide the aforesaid communication.

3.41. In supersession of all the claims made previously, the Petitioner issued two letters dated 17.08.2020 and 19.08.2020 providing an updated claim in respect of increase in rate of clean energy cess and customs duty and impact due to increase in service tax respectively and a sum of Rs.64,08,04,330/- as on March 31, 2020 is due and payable by the Respondent towards claims that constitute change in law.

3.42. Further to the submission of the claim, the Petitioner and Respondent held various discussions in respect of the amounts owed by the Respondent towards change in Law events. The Petitioner, on a without prejudice basis and of its own volition, agreed to waive 50% of the claim towards carrying cost and also adopted

simple rate of interest provided the Respondent was ready and willing to duly honour its obligation and pay the amount it owed to the Petitioner towards the change in law events outlined above. Accordingly, the Respondent, after reconciling its books of accounts clearly and unequivocally admitted the following amounts as being due and payable towards the various heads of claims made by the Petitioner and the total amount admittedly due and payable by TANGEDCO is tabulated hereunder:

Total amount admittedly due and payable by TANGEDCO to the Petitioner
for change in law event

Sl. No.	Description	Amount claimed (Rs.)	Amount admitted by TANGEDCO (Rs.)	50% Waiver	Total amount payable by TANGEDCO
1	CVD (upto March 2020)	5,48,66,391	5,12,96,110		5,12,96,110
2	Coal Cess (upto March 2020)	32,85,68,271	30,70,67,784		30,70,67,784
3	Edu. Cess (upto March 2020)	24,44,725	12,85,774		12,85,774
4	ST / GST (upto March 2020)	2,05,22,578	73,67,395		73,67,395
5	Carrying cost upto 31-03-2021	12,85,90,058	10,03,97,832	5,01,98,916	5,01,98,916
	Total	53,49,92,023	46,74,14,895	5,01,98,916	41,72,15,979

3.43. Therefore, by the Respondent's own admission a sum of Rs.41,72,15,979/- was determined as due and payable by the Respondent to the Petitioner. The Respondent's admission along with the other terms of understanding between the parties was recorded by the Petitioner in the form of an undertaking dated 30.04.2021. It was agreed between the parties that the Petitioner would file a claim on the basis of this categoric agreement with regard to the amounts towards change in law before the Commission. The understanding between the Petitioner and Respondent in this regard was recorded by way of an undertaking dated 30.04.2021 issued by the Petitioner.

3.44. The Petitioner repeats and reiterates that in the Undertaking, the Petitioner had erroneously considered the erstwhile CVD rate (before the change in law event took place) as 2% (prevailing as on 28.02.2013). In fact, the erstwhile rate that is to be considered, keeping in mind Clause 10.1.1 of the PPA, is the rate that prevailed 7 days prior to the bid deadline, i.e., 27.02.2013. As on the said date CVD rate was 1%. The Petitioner is in the process of negotiation discussing with the Respondent to claim the differential amount (i.e., difference between computation of erstwhile CVD before the change in law event at 2% and at 1 %) and that portion of the claim is the additional claim in respect of increase in customs duty and EDU Cess as also the corresponding carrying cost subsequently. The outcome of the negotiations that have commenced in this regard would be placed before the Commission. However, in view of the filing deadline agreed to between the parties, the present petition is being filed.

3.45. For the purposes of the present petition, Article 10 of the PPA (which defines and provides for consequences of Change in law) read with the definition of 'Law' is important. Extracts of these provisions of the PPA (along with other relevant provisions) are reproduced hereunder for ease of reference:-

"

1. ARTICLE 1: DEFINITIONS AND INTERPRETATION

1.1 Definitions

The terms used in this Agreement, unless as defined below or repugnant to the context, shall have the same meaning as assigned to them by the Electricity Act, 2003 and the rules or regulations framed there under, including those issued/framed by Appropriate Commission (as defined hereunder), as amended or re-enacted from time to time.

<i>"Indian Governmental Instrumentality"</i>	<i>shall mean the Government of India, Governments of state(s) of Uttar Pradesh, Tamil Nadu and Chhattisgarh and any ministry, department, board, authority, agency, corporation, commission under the direct or indirect control of the Government of India or any of the above state Government(s) or both, any political sub-division of any of them including any court or Appropriate Commission(s) or tribunal or judicial or quasi-judicial body in India, but excluding the Seller and the Procurers;</i>
<i>Competent Court of Law</i>	<i>shall mean any court or tribunal or similar judicial or quasi-judicial body in India that has jurisdiction to adjudicate upon issues relating to this Agreement;</i>
<i>"Law "</i>	<i>shall mean, in relation to this Agreement, all laws including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and shall further include all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include, without limitation, all rules, regulations, decisions and orders of the Appropriate Commission;</i>
<i>" Operating Period"</i>	<i>shall mean the period commencing from the Delivery Date, until the Expiry Date or date of earlier termination of this Agreement in accordance with Article 2 of this Agreement;</i>

10. ARTICLE 10: CHANGE IN LA W

10.1 Definitions

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

10.1.1. "Change in Law" means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline resulting into any additional recurring/non-recurring expenditure by the Seller or any income to the Seller:

the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;

- a change in the interpretation or application of any Law by a Indian Governmental instrumentality having the legal power to interpret or apply such Law or Competent Court of Law;*

- *The imposition of a requirement for obtaining any Consents, Clearances or Permits which was not required earlier;*
- *a change in the terms and conditions prescribed for obtaining any Consents, Clearances or Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the Seller;*
- *any change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of this Agreement. but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller; or (ii) change in respect of UI Charges or frequency intervals by an Appropriate Commission or (iii) any change on account of regulatory measures by the Appropriate Commission including calculation of Availability.*

10.2 Application and Principles for computing impact of Change in Law

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

10.3 Relief for Change in Law

.....

10.3.2 During Operating Period

The compensation for any decrease in revenue or increase in expenses to the Seller shall be payable only if the decrease in revenue or increase in expenses of the Seller is in excess of an amount equivalent to 1% of the value of the Letter of Credit in aggregate for the relevant Contract Year.

.....

10.3.4 The decision of the Appropriate Commission, with regard to the determination of the compensation mentioned above in articles 10.3.1 and

10.3.2, and the date from which such compensation shall become effective, shall be final and binding on both the parties subject to right of appeal provided under applicable Law.

10.5 Tariff Adjustment Payment on account of Change In Law

10.5.1 Subject to Article 10.2, the adjustment in Monthly Tariff Payment shall be effective from:

(i) the date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law; or

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

10.5.2 The payment for Change in Law shall be through Supplementary Bill as mentioned in Article 8.8. However, in case of any change in Tariff by reason of Change in Law, as determined in accordance with this Agreement, the Monthly Invoice to be raised by the Seller after such change in Tariff shall appropriately reflect the changed Tariff

....."

3.46. It is submitted that the quotation set out in the Petitioner's Bid was premised on the prevailing law in force at the time, which includes government policy, applicable taxes, duties, levies, cesses etc. The Bid was also predicated on the supply of power using coal and the rate of tax (clean energy cess) levied on coal as then imposed by the Government of India. As the PPA was structured as a long-term agreement, the parties to the PPA contemplated that an adjustment would be made to offset the impact of events which influence the Project and are beyond the control of the parties.

3.47. In the event of Change in Law (Article 10 of the PPA) provides for restitution in a manner designed to ensure that the affected party is brought back to the same economic position as if such change in law/ policies had not occurred.

3.48. All bidders compete only on price by offering the lowest possible tariff. In return for bidders quoting the lowest possible price and bearing the commercial risk, the quid pro quo is that the procurer agrees under the PPA to bear the regulatory risk of compensating them for changes in law. This is a commercially reasonable bargain

even for the procurer as it gets the lowest possible price in return for taking on the risk of change in law.

3.49. Various clauses of the PPA have to be purposively interpreted in a manner which enables the Petitioner to recover any increase in cost of or revenue from the business of selling electricity, which is beyond the control of the said Petitioner and on account of factors which are sovereign. As such, any unrecovered component on account of any notification, which falls under the definition of "Law", has to be recovered by taking recourse to the provisions of change in law events.

All the events mentioned in the present petition, fall under Article 10 of the PPA, being change in law events. Accordingly, as per the principle contained under Article 10.2, the Petitioner is entitled to be reimbursed, in order to be restored to the same economic position, which existed as on the cut- off date, as if the change in law events had not occurred.

3.50. Furthermore, the Ministry of Power, Government of India, on 28.01.2016 notified the revised Tariff Policy ("2016 Tariff Policy") which clarified that any change in domestic duties, levies, cess and taxes, after award of the bids, leading to a corresponding change in cost would be treated as "Change in Law" and allowed as a pass through. The relevant provision of the 2016 Tariff Policy is reproduced below:

"6.2 Tariff structuring and associated issues

.....

(4) 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" and may unless provided otherwise in the PPA, be allowed as pass through subject to approval of Appropriate Commission. ... "

3.51. Further, on 27.8.2018, the Ministry of Power, Union of India issued a notification (No. 23/43/2018-R7R) under section 107 of the Electricity Act containing the following directions:

"2. It has been brought to the notice of this Ministry that Generating Companies are facing difficulties in getting pass - through of changes in cost due to any change in domestic duties, levies, cess and taxes imposed by the Central Government, State Government/Union Territories or by any government instrumentality under "change in Law" by Appropriate Commission. The difficulty is mainly because of considerable time being consumed in the approval process resulting in severe cash flow problems to the Generating Companies. This has also resulted in stress in the power sector.

3. Now in order to address the above issue and ensure sustainability of the electricity market in the larger public interest, the Central Government, in exercise of the powers conferred under section 107 of the Act, hereby issues this direction to the Central Electricity Regulatory Commission:

a) any change in domestic duties, levies, cess and taxes imposed by the Central Government, State Governments/Union Territories or by any Government instrumentality leading to corresponding changes in the cost may be treated as "Change in Law "and may unless provided otherwise in the PPA, be allowed as pass through.

b) Central Commission will only determine the per unit impact of such change in domestic duties, levies, cess and taxes, which would be passed on.

d) the order for pass through giving the calculation for per unit impact will be issued within 30 days of filing of petition.

e) The impact of such Change in Law shall be effective from the date of change in Law,

f) Where CERC 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, this will apply to all cases ipso facto and additional petition would not need to be filed in this regard"

3.52. The Hon'ble Supreme Court of India has, in Energy Watchdog v. Central Electricity Regulatory Commission, (2017) 14 SCC 80 ("Energy Watchdog"), placed its imprimatur upon the 2016 Tariff Policy and further held that domestic change in law events such as change in rates of taxes would be treated as change in law events:

"56. However, insofar as the applicability of Clause 13 to a change in Indian law is concerned, the respondents ate on firm ground. It will be seen that under Clause 13.1.1 if there is a change in any consent, approval or license available or obtained (or the project. otherwise titan for the default of the seller. which results in any change in any cost of the business of selling electricity. then the said seller will be governed under Clause 13.1.1

.....

57.Both the letter dated 31-7-2013 and the revised Tariff Policy are statutory documents being issued under Section 3 of the Act and have the force of law.

This being so, it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sources is cut down, the PP A read with these documents provides in Clause 13.2 that while determining the consequences of change in law, 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, the affected party to the economic position as if such change in law has not occurred. Further, for the operation period of the PPA, compensation for any increase/decrease in cost to the seller shall be determined and be effective from such date as decided by the Central Electricity Regulation Commission. This being the case, we are of the view that though change in Indonesian law would not qualify as a change in law under the guidelines read with the PP A, change in Indian law certainly would."

3.53. Under Section 86(1)(b) of the Electricity Act read with the provisions of Article 10 of the PPA and Clause 4.7 of the Competitive Bidding Guidelines, the Commission has the power under its regulatory jurisdiction with regard to a Change in Law event.

3.54. The Hon'ble Supreme Court has settled the law regarding regulatory jurisdiction of State Commission in (1) Tamil Nadu Generation & Distribution Corporation vs. PPN Power Generation Co. Pvt. Ltd. [(2014) 11 SCC 53] and in (2) Gujarat Urja Vikas Nigam Limited vs. Tarini Infrastructure Limited and Ors. [(2016) 8 SCC 743] by holding that the State Commission, under its regulatory function, can adjudicate on money claims and determine tariff between the Distribution Licensees

and the Generating Companies. Therefore, the present petition is within the regulatory jurisdiction of the Commission under Section 86(1)(b) read with other applicable provisions of the Electricity Act, 2003 and not under its adjudicatory jurisdiction.

3.55. In the case of M/s. Ramnad Renewable Energy vs. Tamil Nadu Generation & Distribution Corporation decided on 24.09.2019, the Hon'ble Appellate Tribunal for Electricity has held that,

"The Electricity Act, 2003 has assigned multiple functions to the State Commission. The State Commission determines the tariff, regulates the purchase and procurement of electricity, plays the role of facilitator, issue licences, promote the co-generation and new and renewable energy sources, levy fees, specify grid code, enforce standards, fix trading margin and discharge other functions assigned under the Electricity Act, 2003 besides adjudicating function."

Thus it is settled law that the Commission shall regulate the purchase and procurement of electricity, determination of tariff etc. under its regulatory jurisdiction and not under its adjudicatory function.

3.56. Further, it has been repeatedly held by the Hon'ble Appellate Tribunal for Electricity in cases such as (1) M/s. Adani Power Rajasthan Ltd. vs. RERC [2018 SCC Online APTEL 101], (2) Raj West Power Ltd. vs. Secretary, RERC [2019 SCC Online APTEL 64] and (3) GMR Karmalanga Energy Ltd vs. CERC [2019 sec Online APTEL 36) that events of "increase in Service Tax incidence", "increase in Clean Energy Cess" do constitute change in law events for which the generating company has to be compensated as per the terms of the relevant Power Purchase Agreement.

3.57. As for the claim pertaining to carrying cost, the Petitioner submits that APTEL in its judgment dated 13.4.2018 in Appeal No. 210 of 2017 in the matter of Adani Power Limited v. Central Electricity Regulatory Commission &Ors. has allowed the carrying cost on the claim under Change in Law and held as under:

"ix. In the present case we observe that from the effective date of Change in Law the Appellant is subjected to incur additional expenses in the form of arranging for working capital to cater the requirement of impact of Change in Law event in addition to the expenses made due to Change in Law. As per the provisions of the PPA the Appellant is required to make application before the Central Commission for approval of the Change in Law and its consequences. There is always time lag between the happening of Change in Law event till its approval by the Central Commission and this time lag may be substantial.. We also observe that this Tribunal in SLS case after considering time value of the money has held that in case of re-determination of tariff the interest by a way of compensation is payable for the period for which tariff is redetermined till the date of such re-determination of the tariff. In the present case after perusal of the PPAs we find that the impact of Change in Law event is to be passed on to the Respondent Nos. 2 to 4 by way of tariff adjustment payment as per Article 13.4 of the PPA.

.....

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

x. Further, the provisions of Article 13.2 i.e. restoring the Appellant to the same economic position as if Change in Law has not occurred is in

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

xi. Accordingly, this issue is decided in favour of the Appellant in respect of above mentioned PPAs other than Gujarat Bid - 01 PPA. "

3.58. The aforesaid decision was challenged and the Hon'ble Supreme Court vide its judgment dated 25.2.2019 in Civil Appeal No. 5865 of 2018 with Civil Appeal No.6190 of 2018 (Uttar Haryana Bijli Vitran Nigam Limited & Anr. Vs. Adani Power Ltd. & Ors.) has upheld the judgement of APTEL regarding payment of carrying cost to the generator on the principles of restitution and held as under: "10. A reading of Article 13 as a whole, therefore, leads to the position that subject to restitutionary principles contained in Article 13.2, the adjustment in monthly tariff payment, in the facts of the present case, has to be from the date of the withdrawal of exemption which was done by administrative orders dated 06.04.2015 and 16.02.2016. The present case, therefore, falls within Article 13.4.1 (i). This being the case, it is clear that the adjustment in monthly tariff payment has to be effected from the date on which the exemptions given were withdrawn. This being the case, monthly invoices

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

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

3.59. Further, the same principle was also adopted by APTEL in judgment dated 14-08-2018 passed in Appeal No. 111 of 2017 – GMR Warora Ltd. v.CERC & Ors., judgment dated 14.08.2018 passed in Appeal No. 119 of 2016 – Adani Power Rajasthan Ltd. v. RERC & Ors., judgment dated 14.08.2019 passed in Appeal No. 202 & 305 of 2018 - Adani Power Rajasthan Ltd. v. RERC & Ors, and judgment dated 28.08.2020 passed in Appeal No. 21 of 2019 -Talwandi Sabo Power Ltd. PSERC & Anr.

3.60. Additionally, it is submitted that Article 10.2.1 of the PPA provides that the affected party by a Change in Law event has to be restored through Monthly Tariff

Payments, to the same economic position as if such Change in Law has not occurred. Therefore, the restitutionary principle is available under the PPA executed between the Petitioner and the Respondent! TANGEDCO

3.61. In view of the provisions of the PP A, the principles laid down by the aforementioned judgments of the Hon'ble Supreme Court of Indian and Hon'ble APTEL, the Petitioner is eligible for carrying cost arising out of approved Change in Law events, from the effective date of Change in Law till the actual payment is made to the Petitioner.

3.62. For the purpose of computation of change in law compensation, and in order to restore the generating company to the same economic position as if the change in law event had not occurred, it is necessary that the actual consumption of coal is computed. On the basis of actual consumption of coal, the impact of change in law is computed. In this context, that as a power plant grows older, its performance parameters degrade. In order to factor the said economic degradation, reference be made to the fact that the Hon'ble Central Commission has specified the degradation factor for a power plant, qua its operational parameters such as Station Heat Rate (SHR) and Auxiliary consumption, in Regulation 6.3-B (3) of the CERC (Indian Electricity Grid Code) (Fourth Amendment) Regulations, 2016.

Regulations of the Commission do not provide for degradation parameters. In such a situation, Section 61 (a) of the Electricity Act, 2003 provides that the methodologies and principles of the Ld. CERC ought to be followed. In this context, it is stated that it is a settled principle of law that where the State Regulations are

silent, then the Regulations of the Hon'ble CERC have to be adopted. In this context, reference is made to the judgment dated 03-01-2014 passed by the Hon'ble APTEL in Appeal No.65 of 2013, titled as Lanco Amarkantak Power Ltd. v. HERC & Ors.

The change in law compensation in the present case ought to be computed by considering the operational parameters in line with the aforesaid Regulations.

3.63. Article 10 of the PPA, which deals with the provisions relating to 'Change in Law', provides as under:-

(a) '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 date:-

(i) The enactment, coming into effect, adoption, promulgation, amendment, modification or repeal, of any Law; or

(ii) Change in interpretation or application of any Law by any Indian Governmental Instrumentality having the power to interpret/apply such Law or any Competent Court of Law;

(iii) Imposition of a requirement for obtaining any Consents, Clearances and Permits which were not previously required; or

(iv) Change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits, otherwise than for default of the Petitioner which results in any additional recurring/non-recurring expenditure by the Petitioner or any income to the Petitioner.

(b) The definition of Law under Article 1.1 of the PP A is an inclusive definition which includes statutes, notifications, ordinance, rules, regulations, codes etc.

(c) The provision relating to 'Change in Law' is segregated as per stage of the Project, viz. during the Construction Period and the Operation Period. For the Operation Period, as a result of Change in Law, the compensation for any increase/decrease in revenues/ cost to the Petitioner shall be determined and effective from such date, as decided by the Commission whose decision shall be final and binding on all Parties.

(d) The adjustment in Monthly Tariff Payment shall be effective from:-

(i) The date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law; or

(ii) The date of order/ judgment of the Competent Court or Tribunal or Indian Governmental Instrumentality, if the Change in Law is on account of a change in interpretation of Law [Article 10.5 of the PPA];

(e) The compensation for Changes in Law shall be made through Supplementary Bill as mentioned in Article 10.2.1 of the PPA.

(g) While determining the Change in Law, the parties shall have due regard to the principle that the purpose of compensating a party affected by such Change in Law, is to restore the affected party to the same economic position as if such Change in Law has not occurred. In this regard, the compensation is payable to the affected party through Monthly Tariff Payments. [Article 10.2.1 of the PPA].

3.64. The Changes in Law enumerated in the tables above fall well within the prescribed categories in terms of Article 10, viz. enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any statutes, notifications, ordinance, rules, regulations, codes etc.

3.65. The Respondent has categorically admitted and acknowledged their liability to pay the amounts that are outstanding towards the change in law events and has in fact agreed that the Petitioner can file appropriate proceedings before the Commission to obtain the necessary directions in this regard. In view of the express acknowledgment by the Respondent, there arises no ambiguity in its liability to pay the amounts mentioned in Table No.2 of the Petition. The additional value attributable to the inadvertent application of the wrong rate with regard to CVD is also being claimed. It is accordingly entitled to the reliefs sought for.

3.66. The Changes in Law claimed in the present Petition have all occurred after the Cut-off date which was seven (7) days prior to the Bid Submission deadline.

3.67. As required under Article 10.4 of the PPA, the Petitioner has given notice for the Change in Law events to the procurers with regard to Change in Law claim.

3.68. The Petitioner reserves its right to amend, modify, add any pleadings if the situation so demands and subject to the permission of the Commission.

4. Counter Affidavit filed on behalf of the Respondent (TANGEDCO):-

4.1. The Respondent (TANGEDCO) had executed Power Purchase Agreement with the Petitioner (OPG Power Generation Pvt. Ltd) is a generating company ,for supply of 74 MW RTC power for a period of fifteen years under long term contract. The petitioner commenced supply of power to the Respondent (TANGEDCO) from 01.01.2014.

4.2. The Petitioner has filed the Dispute Resolution Petition No.19 of 2021 before the Commission praying the following:

(a) to declare the events constitute 'Change in Law' events in terms of Article 10 of the PPA dated 12.12.2013 and consequently confirm that as agreed between the parties and which are specifically set out in the Undertaking dated 30.04.2021 issued by the Petitioner is entitled to the amounts towards financial impact of the Change in Law events.

(b) Determine the correct rate of CVD and other consequential claims for purposes of Change in Law and confirm the correctness and entitlement to the sum of Rs.8,25,91,046/- (Rupees Eight Crores Twenty Five Lakhs, Ninety One Thousand and Forty Six only) being the differential working after applying the correct rate towards CVD, Cess and Carrying Cost attributable to Change in Law under the PPA;

(c) Clarify that the Carrying Cost is to be determined on the basis of Compound interest basis for purposes of Change in Law entitlement for future periods.

4.3. The provisions of the Power Purchase Agreement are as follows:-

The relevant Article of the PPA for adjudicating the issue involved in the present petition is Article 10 of the PPA:

"Article 10: Change in law means the occurrence of any of the following events after the date which is seven days prior to the Bid Deadline resulting into any additional recurring/nonrecurring expenditure by the Seller or any Income to the seller:

- The enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any law including rules and regulations framed pursuant to such law*

- A change in the interpretation or application of any law by any Indian Government Instrumentality having the legal power to interpret or apply such law, or any Competent Court of law.*

- *The imposition of a requirement for obtaining any Consents/ clearance and Permits which was not required earlier;*
- *A change in terms and conditions prescribed for obtaining any Consents, Clearances and Permits/ except due to any default of the Seller;*
- *Any change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of this Agreement but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of VI charges or frequency intervals by an appropriate commission or (iii) any change on account of regulatory measures by the appropriate commission including calculation of availability.*

4.4. The petitioner had claimed compensation on account of Change in law events for the period from April-14 to March-2020 vide letter dated 17.08.2020 and 19.08.2020 for the following events

- Customs Duty/Counter Veiling Duty.
- Clean Energy Cess
- Educational Cess and Higher Education Cess
- ST/GST on transport

While claiming the compensation for Counter Veiling Duty, the petitioner had computed compensation considering the percentage rate prevailed at the time of bidding as 2%.

4.5. As per clause 10.3.3 and 10.3.4 of PPA, "Seller shall provide to the procurer and the Appropriate Commission documentary proof of such increase/decrease in cost of the Power Station or revenue /expense for establishing the impact of such Change in Law"

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

4.6. The Petitioner even before filing the petition before Hon'ble CERC submitted the documentary evidences relating to CVD, Coal cess, Edu. cess, ST/GST on inland transport and fuel handling and carrying cost. The petitioner undertook to give offer of 50% waiver in the carrying cost calculated for the period from April'14 to March'21. On scrutiny of the document provided by the petitioner, the respondent TANGEDCO had arrived at the compensation amount as Rs,41,72,15,979/- for the period from 01.04.2014 to March'20. The respondent processed the claim as all the components except Counter Veiling Duty have been approved by Hon'ble CERC while disposing Change in Law petitions filed by the generators supplying power to the respondent and also other generators in the power sector.

4.7. Compensation amount was passed on getting an undertaking dated 30.04.2021 from the Petitioner that

- The Petitioner shall not make further claims in future for the said period
- The petitioner undertakes to file a petition before TNERC within a month, failing which the amount shall be adjusted in the subsequent month energy bills.
- The said amount was paid on 04.05.2021.

4.8. The petitioner as per the undertaking furnished filed an affidavit before the Commission. But in contrary to the undertaking, the petitioner is now claiming revision in the compensation amount with respect to Counter veiling Duty stating that the petitioner had erroneously adopted the percentage rate at the time of bidding as 2% instead of 1% and request for revision.

4.9. Counter Veiling Duty submitted the documentary evidence for showing percentage rate 2% on the date of bid dead line i.e. 06.03.2013 and claimed an amount of Rs.5,48,66,391/- for which the respondent admitted an amount of Rs.5,12,96,110/-. The petitioner through this petition now claims that the percentage rate has been erroneously furnished as 2% instead of 1% on the bid dead line and claims differential amount of Rs.8,25,91,046/-. The provision of PPA is as below:

As per Article 10 clause 10.1.1.of PPA, "Change in Law" means occurrence of any of the following events after the date, which is seven (7) days prior to the Bid dead line (i.e. 06.03.2013.) resulting in to any additional recurring/non recurring expenditure by the seller or any income to the seller".

4.10. In this regard it is submitted that the bid dead line (Last date for submission of bid) was 06.03.2013. Seven days before the bid dead line falls on 27.02.2013 and the rate of CVD as on date was 1%. The revision of percentage rate of CVD was under matter of talks in the Central Government's Budget proposals of the year 2013-14 during February 2013 itself and was publically spoken in media also.

4.11. The Petitioner had submitted the bid on 06.03.2013 after the revision of the revision of CVD rate as 2%.Hence it is certain that the petitioner would have quoted the tariff based on the prevailing rate of coal and associated tax component and the claim now made is an afterthought and baseless and liable to be rejected. The respondent had paid an amount of Rs.41,72,15,979/-on 04.05.2021 as per the reconciliation carried out between the parties which include compensation for Counter Veiling Duty at 2%.

4.12. The Article 10.2.1 of PPA states as follows:

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

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

Hence as per the PPA provision the affected petitioner has to be restored to the extent it is affected and not more than that.

4.13. The Hon'ble CERC and APTEL have approved carrying cost to various other generators and have been calculated and paid by the respondent in various time lines. The answering respondent adopted the same methodology to the carrying cost calculation of the change in law components claimed by the petitioner which is also accepted by the petitioner in their undertaking dated 30.04.2021. The petitioner also filed a petition, WP No.18273 of 2021 before High court of Chennai regarding this difference in CVD rate at the time of PPA and the petition was disposed by Hon'ble High Court on 06.09.2021 with a direction to TANGEDCO to reply the petitioner's representations dated 09.06.2021 and 19.06.2021 within 2 weeks. The respondent replied the petitioner's letter vide its letter dated 07.09.2021 and also conducted a meeting as per their claim.

4.14. In the above facts and circumstances, the petition seeking revision in the calculation of compensation on Counter Veiling Duty is liable to be dismissed and appropriate orders be passed by the Commission.

5. Written Submission on behalf of the Petitioner:-

5.1. TANGEDCO has agreed that all the compliances are strictly in accordance with the change in law provision and that there only one aspect that requires the consideration of the Commission. Therefore, it is submitted that on three aspects, i.e., clean energy cess, educational cess and higher educational cess and ST and GST on transport, the issues are resolved between the parties and there is no disagreement between the parties since TANGEDCO has complied with the same for other generators. The issue is also covered by the Orders of the Hon'ble CERC in Order dated 19.12.2017 passed in Petition No. 101/MP/2017, titled as DB Power Ltd Vs PTC India Ltd & Ors. and Order dated 27.04.2018 passed in Petition No. 126/MP/2016, titled as Bharat Aluminium Company Limited v. TANGEDCO & Ors., wherein the Hon'ble CERC held that an increase in the clean energy cess is a change in law event.

5.2. There is only one aspect where there is a disagreement between the parties, i.e., with respect to countervailing duty (CVD). It is pertinent to state that while the petitioner was executing the contract, a mistake occurred as to the applicable rate for CVD which was taken at the time of bidding as 2%. The same is a clear mistake and in fact, a perusal of the clause will demonstrate that it should have been 1%. The Petitioner relies on the Order of the Hon'ble CERC in its Order dated 31.05.2021 passed in Petition No. 380/MP/2018, titled as IL & FS Tamil Nadu Power Company Limited vs. TANGEDCO & Anr., wherein the Hon'ble CERC considered the very same issue again with respect to the TANEDCO for the very same tender in the present case, and held that it will be 1% which was the prevailing rate of CVD and the parties will be entitled to reimbursement of the increase.

5.3. The Petitioner clarifies that the petitioner as well as the respondent had erroneously considered the erstwhile CVD rate (before the change in law event took place) as 2% (prevailing as on 28.02.2013). In fact, they erstwhile rate that is to be considered, keeping in mind Clause 10.1.1 of the PPA, is the rate that prevailed seven days prior to the bid deadline, i.e., 27.02.2013. As on the said date CVD rate was 1%. Since the parties had under a bona fide mistake, considered the erstwhile CVD rate as 2% and held discussions, the respondent has acknowledged the same amount to be due and payable. An undertaking was also furnished by the petitioner in terms of the above calculation. However, the bona fide error was discovered only at the time of filing the present petition when the Counsel for the petitioner had while preparing the petition pointed out the discrepancy and the change in rates that have taken place from 1% to 2% during the relevant period and the fact that the PPA and its adoption of 1%. The Petitioner thus, filed a writ petition before the Hon'ble Madras High Court in WP 18273 of 2021, wherein the Hon'ble High Court was pleased to direct TANGEDCO to consider the representation of the Petitioner and hold discussions. Consequently, discussions were held and TANGEDCO reiterated the same stand that, it will be the rate as applicable as on date of bidding purportedly on the ground that the petitioner ought to have been aware.

5.4. Pertinently, in their counter, TANGEDCO has agreed to all the aspects raised in the petition except the rate of CVD. With respect to the applicable rate of CVD, TANGEDCO's reasoning is that the Petitioner had submitted the bid on 06.03.2013 after the revision of CVD rate as 2%, hence that the petitioner would have quoted the tariff based on the prevailing rate of coal and associated tax component.

5.5. The stand of the TANGEDCO is contrary not only contrary to the Order of the Hon'ble CERC in its Order of the Hon'ble CERC in its Order dated 31.05.2021 passed in Petition No. 380/MP/2018, titled as IL & FS Tamil Nadu Power Company Limited vs. TANGEDCO & Anr., but also to its own submissions before the Hon'ble CERC, wherein the Hon'ble CERC held:

"59. The Respondent, TANGEDCO has submitted that CVD was levied at 1% up to 28.2.2013 and from 1.3.2013, it was increased to 2% and from 1.7.2017, GST was introduced subsuming CVD. TANGEDCO has submitted that GST on coal and transportation are being paid by it to all the generators and that the generation of power by the Petitioner is based on imported coal.

*60. We have considered the submissions made by the Petitioner and the Respondent. Countervailing Duty is the additional duty on the customs duty equivalent to Central Excise Duty leviable on the similar goods produced in India. As on cut-off date i.e. 27.2.2013, the prevailing Countervailing Duty on imported coal was @ 1% in terms of the Notification No. 12/2012-Customs dated 17.3.2012. Subsequently, Department of Revenue, Ministry of Finance by Notification No. 12/2013-Customs dated 1.3.2013 increased the rate of Countervailing Duty from 1% to 2% on the steam coal. Since the increase in the Countervailing Duty is in terms of the Notification of Ministry of Finance, Govt. of India under the enabling provisions of the Customs Act, 1962 and **is after the cut-off date, it qualifies as Change in Law event and consequently, the Petitioner is entitled to reimbursement of the additional expenditure incurred on account of the increase in the rate of Countervailing Duty.***

61. Accordingly, the Petitioner will be entitled to reimbursement of increase in the Countervailing Duty (from 1% to 2%) on imported coal after the cut-off date. The Petitioner shall be entitled to recover the increase in the Countervailing Duty on imported coal in proportion to the coal consumed corresponding to schedule generation at normative parameters as per applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of power to TANGEDCO. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of Change in Law. The Petitioner is directed to furnish along with its monthly bill and/or supplementary bills, details of payments made, supported by Auditor's Certificate, while claiming the expenditure and TANGEDCO shall reimburse to the Petitioner on the basis of actual payments made. The Petitioner and TANGEDCO are directed to carry out reconciliation on account of these claims on annual basis.

62. Further, with coming into force of GST w.e.f. 1.7.2017, the Countervailing Duty along with various other taxes, duties and levies have been subsumed into GST and imported coal has been subjected to the GST of 5%.”

5.6. TANGEDCO cannot take two different stands in similar cases regulating the same tender. It is further submitted that mistake of the Petitioner and the Respondent cannot be the basis to deny the Petitioner of its entitlement under the contract.

5.7. TANGEDCO submitted that the Petitioner gave an undertaking dated 30.04.2021, wherein the Petitioner undertook that they shall not make any further claim in future for the components reconciled for the period from April 2014 to March 2020 and that now the petitioner is estopped from going back. The TANGEDCO further erroneously submitted that the date of increase of the rate of CVD was 01.03.2013 and the late date for submission of bid was 06.03.2013 and that thus, the Petitioner would have considered the increase in CVD while submitting its bid.

5.8. The undertaking was given based on a genuine mistake and based on the information that the petitioner had. In fact, the TANGEDCO being aware of the Clause in the PPA and the relevant dates since the same issue was considered before the Hon'ble CERC, the TANGEDCO ought to have informed the petitioner of the correct rate of CVD instead of taking undue advantage of the Petitioner's lack of knowledge. Since the mistake was discovered only later, it cannot bind the petitioner. This is the precise reason a written contract is entered into between the parties, so there is no confusion and the terms of the PPA must be adhered to. The Undertaking dated 30.04.2021 issued by the petitioner is void under Section 20 of the Indian Contract Act since the same was executed due to a mistake. The Hon'ble Supreme Court in *Tarsem Singh vs. Sukhminder Singh* (1998) 3 SCC 471 has categorically

held that mutual consent should be free consent and is since *qua non* of a valid agreement. Therefore, if a fact is not understood in the same sense by the other party that would under S.20 invalidate the agreement from its inception even if the discovery of this fact is made at a later stage. The Apex Court further held:

"29. Since, in the instance case, it has been found as a fact by the below that the agreement in question was void from its inception as the parties suffered from mutual mistake with regard to the area and price of the plots of land agreed to be sold, the forfeiture clause would, for that reason, be also void and, therefore, the petitioner could not legally forfeit the amount and seek the enforcement of forfeiture clause, even by way of defence, in a suit instituted for Specific Performance by the respondent.

30. We may also refer to Section 65 of the Contract Act with, minus the illustrations, is as follows:

"65. Obligation of person who has received advantage under void agreement or contract that becomes void.- When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

31. This Section, which is based on equitable doctrine, provides for the restitution of any benefit received under a void agreement or contract and, therefore, mandates that any "person" which obviously would include a party to the agreement, who has received any advantage under an agreement which is discovered to be void or under a contract which becomes void, has to restore such advantage or to pay compensation for it, to the person from whom he received that advantage or benefit.

33. Mutual consent, which should also be a free consent, as defined in Section 13 and 14 of the Act, is the sine qua non of a valid agreement. One of the essential elements which go to constitute a free consent is that a thing is understood in the same sense by a party as is understood by the other party. It may often be that the parties may realise, after having entered into the agreement or after having signed the contract, that one of the matters which was essential to the agreement, was not understood by them in the same sense and that both of them were carrying totally different impressions of that matter at the time of entering into the agreement or executing the document. Such realisation would have the effect of invalidating the agreement under Section 20 of the Act. On such realisation, it can be legitimately said that the agreement was "discovered to be void". The words "discovered to be void",

therefore, comprehend a situation in which the parties were suffering from a mistake of fact from the very beginning but had not realised, at the time of entering into the agreement or signing of the document, that they were suffering from any such mistake and had, therefore, acted bona fide on such agreement. The agreement in such a case would be void from its inception, though discovered to be so at a much later stage.”

5.9. In view of the fact that both parties were under mistake as to applicable CVD, the undertaking provided by the petitioner is void and unenforceable. It is further submitted that change in law is essentially a restitutory provision and as such, the petitioner, who has been disadvantaged due to undertaking which is void, has to be placed in the position before the undertaking was signed. Therefore, it is submitted that Change in Law events have significant financial impact on the costs and revenue of the Petitioner during the operating period for which the Petitioner is entitled to be compensated and restored through monthly tariff payment to the same economic position as if such Change in Law had not occurred, in terms of Article 10 of the PPA. The Hon'ble Supreme Court in *Kuju Collieries Ltd. vs. Jharkhand Mines Ltd.* (1974) 2 SCC 533 has categorically held that any person who has received any advantage under such agreement or contract is bound to restore such advantage, or to make compensation for it to the person from whom he received it.

5.10. The effect of the change in law agreed upon is to be implemented and the necessary consequences will flow. As such, the PPA to that extent would stand modified. It is submitted that the Petitioner is entitled to be compensated in such a way that it is restored through monthly tariff payment to the same economic position as if such Change in Law had not occurred. Further, it is submitted that the term “economic position” does not limit itself to a simple correlation of increased expenditure and a corresponding compensation amount and includes compensation in terms of carrying costs incurred on account of Change in Law events. The carrying

cost is compensation for time value of money and it is different from interest. Therefore, the Petitioner is entitled to be compensated and restored to the same economic position as if such Change in Law events had not occurred. In this regard, the Petitioner relies on the Order of the Hon'ble CERC in its Order dated 31.05.2021 passed in Petition No. 380/MP/2018, titled as IL & FS Tamil Nadu Power Company Limited vs. TANGEDCO & Anr., extracted below:

"82. We have considered the submissions of the Petitioner and the Respondent. APTEL in its judgment dated 13.4.2018 in Appeal No. 210 of 2017 in the matter of Adani Power Limited v. Central Electricity Regulatory Commission & Ors. has allowed the carrying cost on the claim under Change in Law and held as under:

"ix. In the present case we observe that from the effective date of Change in Law the Appellant is subjected to incur additional expenses in the form of arranging for working capital to cater the requirement of impact of Change in Law event in addition to the expenses made due to Change in Law. As per the provisions of the PPA the Appellant is required to make application before the Central Commission for approval of the Change in Law and its consequences. There is always time lag between the happening of Change in Law event till its approval by the Central Commission and this time lag may be substantial.....We also observe that this Tribunal in SLS case after considering time value of the money has held that in case of re-determination of tariff the interest by a way of compensation is payable for the period for which tariff is re-determined till the date of such re-determination of the tariff. In the present case after perusal of the PPAs we find that the impact of Change in Law event is to be passed on to the Respondent Nos. 2 to 4 by way of tariff adjustment payment as per Article 13.4 of the PPA.

.....

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

x. Further, the provisions of Article 13.2 i.e. restoring the Appellant to the same economic position as if Change in Law has not occurred is in consonance with the principle of "restitution" i.e. restoration of some specific thing to its rightful status. Hence, in view of the provisions of the PPA, the principle of restitution and judgement of the Hon'ble Supreme Court in case of Indian Council for Enviro-Legal Action vs. Union of India & Ors., we are of the

considered opinion that the Appellant is eligible for Carrying Cost arising out of approval of the Change in Law events from the effective date of Change in Law till the approval of the said event by appropriate authority. It is also observed that the Gujarat Bid-01 PPA have no provision for restoration to the same economic position as if Change in Law has not occurred. Accordingly, this decision of allowing Carrying Cost will not be applicable to the Gujarat Bid-01 PPA.

xi. Accordingly, this issue is decided in favour of the Appellant in respect of above mentioned PPAs other than Gujarat Bid – 01 PPA.”

83. The aforesaid judgment of APTEL in Appeal No. 210 of 2017, was challenged before the Hon'ble Supreme Court, wherein the Hon'ble Supreme Court vide its judgment dated 25.2.2019 in Civil Appeal No. 5865 of 2018 with Civil Appeal No.6190 of 2018 (Uttar Haryana Bijli Vitran Nigam Limited & Anr. v. Adani Power Ltd. & Ors.) has upheld the judgment of APTEL regarding payment of carrying cost to the generator on the principles of restitution and held as under:

“10. A reading of Article 13 as a whole, therefore, leads to the position that subject to restitutionary principles contained in Article 13.2, the adjustment in monthly tariff payment, in the facts of the present case, has to be from the date of the withdrawal of exemption which was done by administrative orders dated 06.04.2015 and 16.02.2016. The present case, therefore, falls within Article 13.4.1(i). This being the case, it is clear that the adjustment in monthly tariff payment has to be effected from the date on which the exemptions given were withdrawn. This being the case, monthly invoices to be raised by the seller after such change in tariff are to appropriately reflect the changed tariff. On the facts of the present case, it is clear that the respondents were entitled to adjustment in their monthly tariff payment from the date on which the exemption notifications became effective. This being the case, the restitutionary principle contained in Article 13.2 would kick in for the simple reason that it is only after the order dated 04.05.2017 that the CERC held that the respondents were entitled to claim added costs on account of Change in Law w.e.f. 01.04.2015. This being the case, it would be fallacious to say that the respondents would be claiming this restitutionary amount on some general principle of equity outside the PPA. Since it is clear that this amount of carrying cost is only relatable to Article 13 of the PPA, we find no reason to interfere with the judgment of the Appellate Tribunal.

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

85. In view of the provisions of the PPA, the principles of restitution and the judgment of APTEL/ Hon'ble Supreme Court, we are of the considered view that the Petitioner is eligible for carrying cost arising out of approved Change in Law events from the effective date of Change in Law till the actual payment is made to the Petitioner. Once a supplementary bill is raised by the Petitioner in terms of this order, the provisions of Late Payment Surcharge in the PPA would kick in if the payment is not made by the Respondent within due date."

5.11. Moreover, the bid was submitted under S.63 of the Electricity Act, 2003 and is in the nature of guidelines which are statutory in character. Therefore, there cannot be an undertaking contrary to the statutory guidelines that are part of the contract. Admittedly, the term of the contract specifies the cut of date and that must be applied. It is only precisely to take care of arguments between parties and to remove all doubts that the contract fixes a date and states that the petitioner will be entitled to compensation if any change after such date. Therefore, this undertaking ought not to be given effect. The contention of TANGEDCO that the petitioner would have been aware of the increase in CVD is in clear contravention of the express terms of the contract. It is the written contract that ought to govern the entitlements of the parties. It is reiterated that in the above-mentioned case, it was the TANGEDCO's own submission that the rate was 1% on the cut off date. In fact, the principle of estoppel applies to TANGEDCO and thus, TANGEDCO is estopped from taking different stands before the Hon'ble CERC and the Commission with respect to the same tender, to suit its purposes. Further, it is a question of equality when the issue of change in law involves the same bid and the same tender, two generators cannot be treated differently. It is therefore submitted that the Petitioner ought to be adequately compensated under Article 10.2.1 of the PPA as affirmed by the Hon'ble Supreme Court, Hon'ble CERC and the Hon'ble APTEL.

6. Findings of the Commission:-

6.1. The prayer of the petition is to-

- (a) declare that the events enumerated in the Table No 1 of paragraph 2 constitute "Change in Law" events in terms of Article 10 of the PPA dated 12.12.2013; and consequently confirm that as agreed between the parties and which are specifically set out in the Undertaking dated 30.4.2021 issued by the petitioner, the petitioner is, *inter alia*, entitled to the amounts mentioned in Table No.2 towards financial impact of the Change in Law events;
- (b) determine the correct rate of CVD and other consequential claims for purposes of Change in Law and confirm the correctness and entitlement to the sum of Rs.8,25,91,046 (Rupees Eight Crores Twenty Five Lakhs, Ninety One Thousand and Forty Six Only) being the differential working after applying the correct rate towards CVD, Cess and Carrying Cost attributable to Change in Law under the PPA; and
- (c) clarify that the Carrying Cost is to be determined on the basis of Compound interest basis for purposes of Change in Law entitlement for future periods.

6.2. We heard the petitioner and respondent. It is seen that there is no disagreement on the various claims made by the petitioner arising out of change in law and issue boils down to single issue namely whether the counter veiling duty claimed by the petitioner should be settled by the respondent @ 2% or 1%. The counter filed by the respondent also confirms that there is no disagreement on any issue except the counter veiling duty. The relevant portion of the counter affidavit is extracted for reference:-

“The petitioner had claimed compensation on account of Change in law events for the period from April-14 to March-2020 vide letter dated 17.08.2020 and 19.08.2020 for the following events

- Customs Duty/Counter Veiling Duty.*
- Clean Energy Cess*
- Educational Cess and Higher Education Cess*
- ST/GST on transport*

While claiming the compensation for Counter Veiling Duty, the petitioner had computed compensation considering the percentage rate prevailed at the time of bidding as 2%.

As per clause 10.3.3 and 10.3.4 of PPA,

"Seller shall provide to the procurer and the Appropriate Commission documentary proof of such increase/decrease in cost of the Power Station or revenue /expense for establishing the impact of such Change in Law”.

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

The Petitioner even before filing the petition before Hon'ble CERC submitted the documentary evidences relating to CVD, Coal cess, Edu.cess, ST/GST on inland transport and fuel handling and carrying cost.

The petitioner undertook to give offer of 50% waiver in the carrying cost calculated for the period from April'14 to March'21.

On scrutiny of the document provided by the petitioner, the respondent TANGEDCO had arrived at the compensation amount as Rs.41,72,15,979/- for the period from 01.04.2014 to March'20.

The respondent processed the claim as all the components except counter Veiling Duty have been approved by Hon'ble CERC while disposing Change in Law petitions filed by the generators supplying power to the respondent and also other generators in the power sector.

Compensation amount was passed on getting an undertaking dated 30.04.2021 from the Petitioner that

- *The Petitioner shall not make further claims in future for the said period*
- *The petitioner undertakes to file a petition before TNERC within a month, failing which the amount shall be adjusted in the subsequent month energy bills.*
- *The said amount was paid on 04.05.2021”.*

6.3. It may be seen from the above that the issue before us is whether the petitioner is justified in seeking relief in terms of percentage in regard to counter veiling duty after having agreed to the compensation payable by the respondent to the petitioner vide undertaking dated 30-04-2021.

6.4. The crux of the argument of the petitioner is that the change in the counter veiling duty was not known to the petitioner at the time of bidding and it was erroneously mentioned as 2% instead of 1% and hence the petitioner is entitled to the relief sought for. It is the stand of the petitioner that in consideration of the fact that the change in the counter veiling duty which had already come into force on the date of bid was prevailing 2% on the date of bidding, it was erroneously placed on record at the said percentage in the bidding process but having examined the provisions of the PPA in the handsight, it was realized that the CVD at 1% had come into force by way of GoI Notification, the present claim is made. However, the respondent contends that the petitioner submitted the bid on 06-03-2013 after the revision of CVD at 2% and hence it was certain that the petitioner would have quoted the tariff based on the prevailing rate of coal and associated tax component and the present claim made is an afterthought. The counsel for the respondent also sought to plead that having accepted the terms and conditions in the undertaking dated 30-04-2021, the petitioner is not entitled to any relief.

6.5. Having considered the rival submissions, we find that the issue narrows down to a single point i.e. whether the petitioner is entitled to go beyond the letter of undertaking seeking relief after having accepted all the terms and conditions.

6.6. It is seen that there is absolutely no dispute with regard to the amount paid as compensation by TANGEDCO to the tune of Rs.41,72,15,979/- on various heads for the period from 01-04-2014 to March 2020. It is also seen that even on the rate of counter veiling duty, there is no dispute and the entire dispute is solely rests on the question of seeking relief beyond the undertaking given by the petitioner to TANGEDCO on 30-04-2021. For this purpose, it is necessary to look into the clauses in the undertaking dated 30-04-2021 submitted by the petitioner to the respondent.

“8. M/s. OPG undertakes that it shall not make any further claim in future for the components reconciled for the period from April 2014 to March 2020”.

.....

11. Further M/s. OPG undertakes to file a petition before Hon'ble TNERC within a month, failing which it is agreed that the amount shall be adjusted in the subsequent monthly energy bill”.

6.7. It may be seen from the above that the petitioner has undertaken not to make any further claim in future for the components reconciled for the period from April 2014 to March 2020 and has further undertaken to file a petition before the Commission within a month, failing which it was agreed that the amount would be adjusted in the subsequent monthly energy bill.

6.8. During the course of hearing, the counsel for the petitioner sought to contend that the counter affidavit filed by the respondent does not indicate any dispute by placing reliance on para 7 of the counter affidavit and further sought to argue that the present claim being one arising out of change in law, the same is admissible. On the

other hand, the counsel for the respondent submitted that having agreed to the final settlement of Rs.41,72,15,979/- including the counter veiling duty of Rs.5,12,96,110/- the petitioner cannot seek any more relief beyond the undertaking dated 30-04-2021.

6.9. On a careful consideration of the material records provided before us, we find that the undertaking dated 30-04-2021 which is the subject matter of this dispute does not seem to be absolute in character. This may be seen from another provision in clause 11 which provides that after agreeing to all the terms and conditions, the petitioner shall have to file a petition before the Commission within a month. The conjoint reading of both clauses 8 and 11 of the undertaking dated 30-04-2021 would make it clear that the clause 8 in the undertaking is not absolute or unqualified or unconditional but it is subject to clause 11.

6.10. That being the case, we are of the view that the undertaking on the acceptance of the clauses in clause 8 is not absolute and unconditional in view of clause 11. It is to be observed further here that the undertaking has to be read in entirety and not solely with reference to clause 8. On a combined reading of clause 8 and 11 of the undertaking it emerges that at the time of undertaking, the parties had anticipated a possibility of dispute and only for this purpose liberty clause has been given in clause 11 to get over any dispute which may arise post signing of the undertaking. This is so apparent because the Commission can be approached only if there is a dispute and in the event of unanimity or *consensus ad idem* the incorporation of clause 11 would not have arisen at all. This is to say that though clause 8 looks absolute, in view of the liberty given in clause 11, the undertaking cannot be said to be an absolute one. Even assuming that clause 8 is binding, still, the doctrine of estoppel as sought to be canvassed by the counsel for the respondent cannot be pressed into service for deciding the case as estoppel will not

lie against statutory provisions and as a natural corollary it follows that the change in law being statutory in character cannot be brought within the purview of estoppel.

6.11. In view of the foregoing, we have to hold that in the absence of any dispute on the percentage rate with regard to CVD, the claim of the petitioner has to be necessarily upheld.

6.12. With regard to the prayer for clarifying that carrying cost should be determined on the basis of compound interest for the purpose of change in law entitlement for future periods, it is to be observed that the said prayer cannot be accepted for the following reasons:-

6.13. The question as to whether any matter which pertains to change in law can be taken up in regulatory jurisdiction is no longer integra and has been already decided by the Commission in its order dated 05-10-2021 in M.P. No. 17 of 2021 in TAQA Neyveli Power Company Private Limited Vs. TANGEDCO, the relevant portions of which are reproduced below:-

“8.9. In this connection, we may also profitably refer to the order dated 24-06-2019, Azure Power Thirty Four Private Limited Vs. Maharashtra State Electricity Distribution Company Limited, in the case of Azure wherein the MERC held that there is no concept of in-principle approval or declaration of any event as change in law under the PPA. The relevant portion of which are as follows:-

“12. As already observed in para 10 above, there is no concept of in-principle approval or declaration of any event as Change in Law under the PPA. At the same time it is fact that the Commission in its recent Orders dated 15 February, 2019 on the Petitions filed by some Solar power developers has provided declaratory dispensation that the imposition of Safeguard Duty on import of

solar panel / module is an event of Change in Law under PPA and additional expenditure and other consequential impacts on account of such Change in Law event would be considered on actual basis for reimbursement subject to prudent check. This dispensation on the Safeguard duty is an exception to the provisions in the PPA and was provided considering large impact of Safeguard duty ranging from 25% to 15%. In present case, alleged impact of change in GST rate is 3.9% only. Hence, circumstances in present case cannot be equated with that prevailing in Safeguard Duty matter.

13. In view of the above, the Commission is of the opinion that APTFPL's present Petition claiming impact of Change in Law event on estimated basis is premature and hence needs to be dismissed. Further as regards the request of declaring the event in principle as Change in Law, the Commission is of the opinion that PPA has very clear provisions describing which event can be considered as Change in Law event. Accordingly, parties to PPA can interpret which event can constitute as Change in Law event and accordingly claim compensation on actual basis. If there is dispute between the parties at that time or for allowing compensation for Change in Law event, then parties to PPA can approach the Commission. Concept of in-principle approval or declaration of any event as Change in Law event and then final approval of compensation in subsequent proceeding based on actual impact is alien to PPA provision and if so required, needs to be used only under exceptional circumstance. Making it as regular practice would not be consistent with PPA provisions. Hence, the following Order:

ORDER

The Case No. 46 of 2019 is dismissed."

6.14. It may be seen from the above that there is no question of in-principle approval with regard to PPA. Needless to say here that the prayer (c) of the

petitioner on carrying cost if taken up, will have to be examined in regulatory jurisdiction as it is for seeking clarification and not for resolution of dispute and any ruling thereon will amount to a general in-principle approval which is alien to the PPA provisions. Further, there is no exceptional circumstance warranting the dealing of the same in the regulatory jurisdiction. Hence, the prayer “c” in regard to carrying cost is not sustainable.

6.15. In the result, the following directions are given:-

- (a) All reliefs under various heads to the extent of Rs.41,72,15,979/- are allowed as there is no disagreement between the parties;
- (b) the petitioner is entitled to the relief to the extent of Rs.8,25,91,046/- in regard to CVD as the same has not been disputed by the respondent in terms of the quantum or in terms of law;
- (c) the prayer (c) is rejected for the reasons stated in para 6.14

Ordered accordingly.

(Sd.....)
(K.Venkatasamy)
Member (Legal)

(Sd.....)
(M.Chandrasekar)
Chairman

/True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission