

**TAMIL NADU ELECTRICITY REGULATORY COMMISSION**

**Order of the Commission dated this the 25<sup>th</sup> Day of July 2024**

**PRESENT:**

Thiru M.Chandrasekar .... Chairman  
Thiru K.Venkatesan .... Member  
and  
Thiru B.Mohan .... Member (Legal)

**D.R.P. No.9 of 2023**

M/s. OPG Power Generation Pvt Ltd.  
OPG Power Plant, OPG Nagar,  
Periya Obulapuram Village, Nagaraja Kandigai  
Madharapakkam Road,  
Gummidipoondi, Thiruvallur - 601201.

... 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  
Tvl.N.Kumanan & A.P.Venkatachalapathy  
Standing Counsel for TANGEDCO

The Dispute Resolution Petition No.9 of 2023 filed under the Electricity Act, 2003 seek to 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 direct the Respondent to pay the difference amounts stated in Table Nos. 2, 3 and 4 of Rs.1,43,96,752/-, Rs.2,26,56,943/- and Rs.85,29,540/- totally amounting to

Rs.4,55,83,235/- (Rupees Four Crores Fifty Five Lakhs Eighty Three Thousand Two Hundred and Thirty Five Only) being the amounts disputed by TANGEDCO towards financial impact of change in law events, for the period 01.04.2020 to 31.03.2022, costs of the present petition and pass any such other and further reliefs as the Commission deems just and proper in the facts and circumstances of the present case.

This petition coming up for final hearing on 16-04-2024 in the presence of Thiru Rahul Balaji, Advocate for the Petitioner and Tvl. N.Kumanan and A.P.Venkatachalapathy, Standing Counsel for the Respondent and on consideration of the submissions made by the Counsel for the Petitioner and the Respondent, this Commission passes the following:

## **ORDER**

### **1. Contention of the Petitioner:-**

1.1 The present Petition is being filed by the Petitioner under Section 86(1)(f) 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 pursuant to the Agreement reached between the parties.

1.2 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:

## Change in Law event

S.No.	Change in Law Events
1.	<p><u>Increase in the cost of Coal due to change in the rate of levy of Clean Energy Cess/Green Cess on Coal</u></p> <p>i. 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 (Effected Period - 01.03.2016 to till date)</p>
2.	<p><u>Increase in Service Tax on various vital and integral Services for running of Power Plant including stevedoring &amp; Handling, Transportation and Insurance and IGST impact on import of Coal due to enforcement of GST Regime</u></p> <p>i. 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. 1/2017 - 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>
3.	<p><u>Increase in Customs Duty</u></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><u>Carrying Cost:</u></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</p>

	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.
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1.3. 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 422 MW coal fired power thermal plant at Gummudipoondi, Tamil Nadu (the "OPGPGTPP"). One of the units of OPGPG TPP (80 MW) was duly commissioned on 05.06.2013 and has been generating and supplying the contracted capacity (74 MW) to the Respondent from 01.01.2014 in accordance with PPA, without any interruption.

1.4. 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<sup>st</sup> of 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.

1.5. 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.

1.6. On 9.10.2012, Miscellaneous Petition No. 37/2012 was filed before the Tamil Nadu Electricity Regulatory Commission (the TNERC") for the approval of certain deviations from the standard bid documents for the procurement of 1000 MW + 20% RTC power. The TNERC 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.

1.7. The Petitioner submitted 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.

1.8. Negotiations for rate matching were called for from 9 bidders including the 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.

1.9. 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 to 2028. During this meeting, it was also agreed that a petition would be filed before the Commission for the adoption of tariff.

1.10. 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.

1.11. 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.

1.12. On 29.7.2016, the Commission passed an order adopting the levellised tariff of Rs.4.91 per kWhr as discovered under Tender 3/PPLT/2012.

1.13. 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. 3/2010-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.

1.14. 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.

1.15. 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 to time, under its executive powers, thereby having force of law.

1.16. Therefore, there is an 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.

1.17. The Financial impact of the Change in law from 01.04.2020 to 31.03.2022 brought about by the said Notification revising the Clean Energy Cess on Coal is tabulated below:

Sl. No.	Financial Year	Total Financial Impact for the year
1.	2020-2021	Rs.5,01,00,697/-
2.	2021-2022	Rs.1,35,21,873/-
	Total	Rs.6,36,22,570/-

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

1.19. 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.

1.20. 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%.

1.21. 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.



1.22. The Financial impact of this change in law from 01.04.2020 to 31.03.2022, brought about by the aforesaid events, which formed subject-matter of the claim and discussed for resolution is tabulated below:

Sl. No.	Financial Year	Total Financial Impact for the year
1.	2020-2021	Rs.1,62,59,900/-
2.	2021-2022	Rs.97,07,316/-
	Total	Rs.2,59,67,216/-

1.23. 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.

1.24. 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%.

1.25. 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 1~% and further imposing IGST tax @ 5% on goods imported into the country.

1.26. 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.

1.27. 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.

1.28. The Financial impact of the Change in law from 01.04.2020 to 31.03.2022, brought about by the said Notifications revising the Service Tax/GST /IGST on import purchases is tabulated below:

Sl.No.	Financial Year	Total Financial Impact for the year(INR)
1.	2020-2021	Rs.30,59,445/-
2.	2021-2022	Rs.8,84,369/-
	<b>Total</b>	<b>Rs.39,43,814/-</b>

1.29. 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.'"*

1.30. 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.

1.31. 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.

1.32. 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:

Sl.No.	Period	Surcharge (in Rs.)
1.	2020-2021	1,27,66,601/-
2.	2021-2022	29,95,641/-
	Total	1,57,62,242/ -

The Calculation sheet showing the calculation of interest on the increased amounts expended by the Petitioner owing to various change in law events for various impact periods is filed herewith.

1.33. At this juncture, it is pertinent to clarify that the 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 only for period April 2014 till March, 2020. 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.

1.34. The Petitioner issued Change in Law notices to the Respondent TANGEDCO dated 21.06.2022 and 11.10.2022 with reference to the above claims, thereby intimating the Respondent of the Change in Law events set out in more detail in the petition above. 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.

1.35. On 16.11.2022 and 12.01.2023, the Respondents had communicated to the Petitioner citing certain discrepancies in the calculations for the FY 2020-2021 and 2021-2022 respectively, that were never raised in the previous years' calculations.

1.36. According to the Respondent in its letter dated 16.11.2022, the change in law compensation for the period FY 2020 - 2021 is as below:

Sl. No.	Description	Amount Claimed by Petitioner (Rs.)	Amount admitted TANGEDCO (Rs.)	Difference (Rs.)
1.	CVD & Edu Cess	1,62,59,900	1,46,32,965	16,26,935
2.	Coal Cess	5,01,00,697	4,52,29,886	48,70,811
3.	ST/GST	30,59,445	5,00,517	25,58,928
4.	Carrying cost	1,27,66,601 (calculated upto 23.05.2022)	74,26,523 (Calculated upto 05.05.2022)	53,40,078
	Total	8,21,86,643	6,77,89,891	1,43,96,752

1.37. Further, TANGEDCO claimed that the change in law compensation for revision of CVD from 2% to 1% must be calculated as below:

Sl. No.	Description	Difference claim by the Petitioner from 2% to 1% (Rs.)	Amount admitted TANGEDCO (Rs.)	Difference (Rs.)
1.	CVD & Edu Cess	5,16,34,708	4,87,64,452	28,70,256
2.	ST/ GST	0	-75,60,270	75,60,270
3.	Carrying cost	3,09,56,337	1,87,29,920	1,22,26,417
	Total	8,25,91,045	5,99,34,102	2,26,56,943

1.38. Thus, for the FY 2020-2021, TANGEDCO has admitted only the above amounts tabulated, citing that Edu. Cess must not be considered, coal quantity has been

calculated as per actual instead of as per the minimum of SHR in regulation, ST/GST has been calculated on fuel inland transportation based on road instead of railway etc., when these reasons have been never an issue for the previous years' calculations. Therefore, there is a dispute for an amount totaling to Rs.3,70,53,695/-(Rs.1,43,96,752/- + Rs.2,26,56,943/-) for the period 2020-2021.

1.39. Similarly, vide letter dated 12.01.2023, the change in law compensation for the period FY 2021-2022 according to the Respondent is as below:-

Sl. No.	Description	Difference claim by the Petitioner from 2% to 1% (Rs.)	Amount admitted TANGEDCO (Rs.)	Difference (Rs.)
1.	CVD & Edu Cess	97,07,316	57,20,883	39,86,433
2.	Coal Cess	1,35,21,873	1,16,30,128	18,91,745
3.	ST / GST	8,84,369	1,18,959	7,65,410
4.	Carrying cost	29,95,641	11,09,689	18,58,952
	Total	2,71,09,200	1,85,79,659	85,29,540

1.40. Thus, for the FY 2021-2022, TANGEDCO has admitted only the above amounts tabulated, citing the same reasons as stated in its previous letter dated 16.11.2022, when these reasons have been never an issue for the previous years' calculations. Therefore, there is a dispute for an amount totaling to Rs.85,29,540/- for the period 2021-2022.

1.41. The Petitioner had filed D.R.P. No. 19 of 2021 before the Commission seeking to declare the above events as 'change in law' and grant the consequent reliefs for the period April, 2014 to March, 2020 and to determine the correct rate of CVD and

consequential claims for the purposes of 'change in law'. In the said petition, the TANGEDCO filed a counter categorically stating that it is accepting the claim of the Petitioner:

*"The Petitioner even before filing the petition before Hon'ble CERC submitted the documentary evidences relating to CVD, Coal cess, Edu.cess, STIGST 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. "*

Thus, it is evident from the above that TANGEDCO has accepted the Petitioner's calculations of relief due to 'change in law' relating to CVD, Coal Cess, Edu. Cess, ST/GST on inland transport and cannot now reject the Petitioner's calculations regarding Edu. Cess and ST/GST on inland transport.

1.42. The Commission in its order dated 05.05.2022, allowed the claims of the petitioner with respect to change in law as well as CVD.

1.43. 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.

“Indian Governmental Instrumentality”	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 subdivision 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;
Competent Court of Law	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;
“Law”	Shall mean, in relation to this Agreement, all laws including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and shall further include 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;
“Operating Period”	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;

10. ARTICLE 10: CHANGE IN LAW

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 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.*

*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 B.B. 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. .. "*

1.44. 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.

1.45. 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.

1.46. 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.

1.47. The 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.

1.48. 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.

1.49. 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 .....

1.50. 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 perunit 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"*

1.51. 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 are 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 for the project, otherwise than 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 PPA 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 PPA, change in Indian law certainly would."*

1.52. 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, this Hon'ble

Commission has the power under its regulatory jurisdiction with regard to a Change in Law event.

1.53. 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 101J, (2) Raj West Power Ltd. vs. Secretary, RERC [2019 SCC Online APTEL 64J and (3) GMR Karmalanga Energy Ltd vs. CERC [2019 SCC 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.

1.54. 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 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-OI 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-OI PPA.*

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

1.55. The aforesaid decision was challenged and the Hon'ble Supreme Court vide its judgment dated 25.02.2019 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 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."*

1.56. 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.

1.57. The same has also been confirmed by the Hon'ble Supreme Court in its recent Order dated 24.08.2022 in Uttar Haryana Bijli Vitran Niam Ltd. and Anr. vs. Adani Power (Mundra) Limited and Anr. (Civil Appeal No. 7129 of 2021):

*"18. We are not persuaded by the submission made on behalf of the appellants that since no fault is attributable to them for the delay caused in determination of the amount, they cannot be saddled with the liability to pay interest on carrying cost; nor is there any substance in the argument sought to be advanced that there is no provision in the PPAs for payment of compound interest from the date when the Change in Law event had occurred.*



*19. The entire concept of restitutionary principles engrained in Article 13 of the PPAs has to be read in the correct perspective. The said principle that governs compensating a party for the time value for money, is the very same principle that would be invoked and applied for grant of interest on carrying cost on account of a Change in Law event. Therefore, reliance on Articles 11.3.4 r/w 11.8.3 on the part of the appellants cannot take their case further. Nor does the decision in Priya Vart'S Case<sup>7</sup> have any application to the facts of the present case as the said case relates to payment of compensation under the Land Acquisition Act and the interest that would be payable in case of delayed payment of compensation.*

*20. In view of the aforesaid discussion, the impugned judgment and order dated 12th August, 2021 passed by the Appellate Tribunal is upheld and the present appeal is accordingly dismissed as meritless. "*

1.58. In view of the above judgement, it is clear that the Petitioner is entitled to compounding interest for the period beginning April, 2020 till March, 2022, which is the subject matter of the present claim. The carrying cost computation for the period April, 2014 to March, 2020 cannot be applied to future periods since the Petitioner had intentionally waived its right to claim compounding interest only for the said period, vide an undertaking which is not applicable for other periods.

1.59. 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.

1.60. In view of the provisions of the PPA, the principles laid down by the aforementioned judgments of the Hon'ble Supreme Court of India 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.

1.61. 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, 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 Ld. 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 6.3-8 (3) of the CERC (Indian Electricity Grid Code) (Fourth Amendment) Regulations, 2016.

1.62. 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 Ld. CERC have to be adopted.

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

1.64. 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 PPA 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].

1.65. 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, doption,

promulgation, amendment, modification or repeal, of any statutes, notifications, ordinance, rules, regulations, codes etc.

1.66. The Respondent has categorically admitted and acknowledged their liability to pay the amounts that are outstanding towards the change in law events. In view of the express acknowledgment by the Respondent, there arises no ambiguity in its liability to pay the amounts calculated by the Petitioner. It is accordingly entitled to the reliefs sought for.

1.67. 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.

1.68. 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.

## **2. Contention of the Respondent:-**

2.1. The Respondent had executed Power Purchase Agreement with the Petitioner, a generating company for supply of 74 MW RTC power for a period of fifteen years from 2013 under long term contract. The petitioner commenced supply of power to the Respondent from 01.01.2014.

2.2 The Petitioner has filed the Dispute Resolution Petition No.9 of 2023 before the Commission praying the following: 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 12.12.2023, and consequently direct the Respondent to pay the difference amounts

stated in Table Nos.2, 3 and 4 of Rs.1,43,96,752/-, Rs.2,26,56,943/- and Rs.85,29,540/- totally amounting to Rs.4,55,83,235/- (Rupees Four Crores Fifty-Five Lakhs Eighty-Three Thousand Two Hundred and Thirty-Five only) being the amounts disputed by TANGEDCO towards financial impact of change in law events, for the period 01.04.2020 to 31.03.2022, cost of present petition and pass any such other and further reliefs as the Commission deems just and proper in the facts and circumstances of the present case.

2.3. The provisions of the Power Purchase Agreement are as follows.

*"Article 10.1.1 of the PPA:*

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

- The enactment, coming into effect, adoption promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;*
  
- A change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;*
  
- The imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;*
  
- A change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the Seller;*
  
- Any change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of this Agreement. but shall not include (I) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI Charges or frequency intervals by an Appropriate Commission or (iii) any change on account of*

*regulatory measures by the Appropriate Commission including calculation of Availability.*

*Article 10.2.1 of the PPA:*

*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*

*Article 10.3 of the PPA: Relief for Change in law.*

*Article 10.3.2 of the PPA : During Operating Period*

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

*Article 10.3.3 of the PPA:*

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

*Article 10.3.4 of the PPA:*

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

*Article 10.4 of the PPA: Notification .of Chang in Law*

*Article 10.4.1 of the PPA:*

*If the Seller is affected by a Change in Law in accordance with Article 10.1 and the Seller wishes to claim relief for such a Change in Law under this Article 10, it shall give notice to the Procurer of such Change in Law as soon as reasonably*

*practicable after becoming aware of the same or should reasonably have known of the Change in Law.*

*Article 10.4.2 of the PPA:*

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

*Article 10.4.3 of the PPA:*

*Any notice served pursuant to this Article 10.4.2 shall provide, amongst other things, precise details of:*

- (a) the Change in Law; and*
- (b) the effects on the Seller,*

*Article 10.5. of the PPA:*

*Tariff Adjustment Payment on account of Change in law*

*Article 10.5.1 of the PPA:*

*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.*

*Article 10.5.2 of the PPA:*

*The payment for Change in Law shall be through Supplementary Bill as mentioned in Article B.B. 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.”*



2.4. The Petitioner in for accepting the compensation amount paid by the Respondent for Change in Law events had furnished an undertaking dated 30.04.2021 wherein, the Petitioner had accepted the methodology adopted by the Respondent in arriving at the compensation amount for the period from April 2014 to March 2020.

2.5. As per, the Undertaking dated 30.04.2021, the Petitioner had agreed upon the methodology arrived at by the Respondent. The relevant extracts are reproduced herein below:

*"9. M/s. OPG agrees for the methodology of deduction of already paid escalated Service Tax amount by escalating the quoted Inland Transportation Charges and Fuel Handling Charges notified by CERC escalation rate from the Change in Law claim.*

*10. M/s. OPG undertakes that with respect to the amount payable for degradation factor for calculating additional coal consumption on account of part load operation and for carrying cost applicable for the amount for the degradation will not be claimed for the period from April 2014 to March 2020. "*

2.6. The Respondent has already processed the Change in law claims raised by OPG as per the provisions of PPA and relevant orders passed by the Commission and Hon'ble CERC. For settling the issues of Change in law, the Respondent had issued the dispute notices dated 16.11.2022 and 12.01.2023 with clear reasons for the disallowed amount.

2.7. The method of Change in law calculations of 2020-2021 and 2021-22 are one and the same as previous year's calculation methodology for 2014 to 2020. The

calculations for 2014-2020 were reconciled with the Petitioner and the Petitioner by furnishing the undertaking dated 30.04.2021 had agreed the calculations and the reconciliation amount. That as the Respondent had made payments in full as enumerated in the undertaking. The same methodology of Change in law calculations has been extended to the subsequent years of 2020-2021 and 2021-2022.

2.8. There is a difference between the Petitioner's and 40 estimation of the coal quantity as compared to the Respondent's estimate due to different values of SHR and AUX. The Petitioner has taken actual SHR and AUX. However, the Respondent had taken minimum of actual and CERC regulation SHR and AUX. The Hon'ble CERC in its order in GMR Warora Energy Limited vs. Maharashtra State Electricity Distribution Company Limited 71/MP/2018 had stated that the Evacuation Facility Charges have to be recovered as per the applicable rates in proportion to the coal as per the parameters of the applicable Tariff Regulations of the Commission or coal actually consumed whichever is lower. Therefore, in compliance with the order passed by Hon'ble CERC, the Respondent has taken minimum of actual and regulation SHR and AUX. This methodology was also agreed to by the Petitioner in vide their undertaking dated 30.04.2021.

2.9. The Respondent had taken into consideration of Customs/Education and Sec. Hr. Education Cess on Coal Cess as 2% and 1% respectively for calculation of bid time workings since the Petitioner had furnished their invoice No. SAMTAN 130218-065 dated 18.02.2013 in which during bid time 2% Customs/Education Cess and 1% Sec. Hr.

Edn. Cess was levied. From 01.07.2017 Customs/Education cess and Higher education cess got subsumed on introduction of GST. Hence TANGEDCO deducts Customs/Education cess and Sec. Higher education cess on coal cess. The said methodology was agreed by the Petitioner in their Undertaking dated 30.04.2021. Therefore, the Petitioner's contention that such reasons were not an issue for the previous year calculations is untenable as such methodology was accepted by the Petitioner for period of 01.04.2014 to 31.03.2020.

2.10. The Petitioner has calculated ST /GST on fuel inland transportation based on road. The Respondent has calculated ST /GST on fuel inland transportation based on railway escalation index issued by the Hon'ble CERC. This methodology was also accepted by the Petitioner vide their undertaking dated 30.04.2021.

2.11. The Petitioner's claim of carrying cost on the basis of compound interest is untenable in law as the Commission vide order dated 05.05.2022 in DRP 19 of 2021 had already rejected such claims raised by the Petitioner. Consequently, the Respondent has paid carrying cost till the date of order dated 05.05.2022 on simple interest basis.

2.12. The details of the amounts and the methodology of the amounts paid by the Respondent to the Petitioner which was agreed upon by the Petitioner in the Undertaking dated 30.04.2021 are herein below:

2014-2020					
Description	OPG's Claim of with Bid CVD 2%	TANGEDCO's admitted & OPG agreed amount with CVD 2%	Disallowed amount agreed by OPG vide undertaking dt. 30.04.2021	50% Waiver offered in Rs.	Total Amount paid by TANGEDCO after deducting the waiver amount
In Rs.					
1	2	3	4	5	6=3-5
CVD	5,48,66,391	5,12,96,110	35,70,281		5,12,96,110
Coal cess	32,85,68,271	30,70,67,784	2,15,00,487		30,70,67,784
Edu.cess	24,44,725	12,85,774	11,58,951		12,85,774
ST/GST	2,05,22,578	73,67,395	1,31,55,183		73,67,395
Carrying cost (upto 31.03.21)	12,85,90,058	10,03,97,832	2,81,92,226	5,01,98,916	5,01,98,916
Total	53,49,92,023	46,74,14,895	6,75,77,128	5,01,98,916	41,72,15,979

From the above table, it is made clear that for the period 2014-2020, OPG agreed the reconciled amount of Rs.46,74,14,895/- and the disallowed amount of Rs.6,75,77,128/- vide undertaking dated 30.04.2021.

2.13. For the year 2014 to 2020 (01.04.2014 to 31.03.2020), the Petitioner has claimed an amount of Rs.53,49,92,023/- (Rupees Fifty-Three Crores Forty-Nine Lakhs Ninety Two Thousand Twenty- Three Only) towards compensation amount of change in law events with bid CVD @ 2%.

2.14. After reconciliation and execution of undertaking dated 30.04.2021 received from the Petitioner, the Respondent admitted an amount of Rs.46,74,14,895/- and disallowed

an amount of Rs.6,75,77,128/- which was accepted by Petitioner vide undertaking dated 30.04.2021.

2.15. Based on the Commission's order in the Petition No. DRP 19 of 2021, the Petitioner had claimed CVD for 1% considering the bid time CVD @ 1%.

The claim made by OPG	:	Rs.8,25,91,045/-
Admitted by TANGEDCO	:	Rs.5,99,34,102/-
Difference	:	Rs.2,26,56,943/-

Difference details: -

- i. Carrying cost calculated upto TNERC order dt. 05.05.2022 by TANGEDCO whereas OPG calculated upto 23.05.2022. : Rs.1,22,26,417/-
- ii. Error in calculation of ST on fuel handling from 01.07.2017 to 31.03.2020. : Rs.75,60,270/-
- iii. CVD and Edu cess calculated from the already admitted @CVD 2% to 1%. OPG calculated @ CVD 2% to 1% from the claim already made by OPG including the disallowed amount : Rs.28,70,256/-

The details for disallowing an amount of Rs.2,26,56,943/- was intimated to OPG vide TANGEDCO's Letter dated 16.11.2022.

**Accounting Year 2020-2021 (01.04.2020 to 31.03.2021)**

a. Claim of OPG	:	Rs.8,21,86,643/-
b. TANGEDCO admitted amount	:	Rs.6,77,89,891/-

c. Difference : Rs.1,43,96,752/-

d. The details of calculation are as under:

Sl. No.	Billing Details	OPG claim	TANGEDCO calculations	Difference
1	CVD & Edu cess	Rs.1,62,59,900	Rs.1,49,32,965	Rs.16,26,935
2	Coal Cess	Rs.5,01,00,697	Rs.4,52,29,886	Rs.48,70,811
3	ST/GST	Rs.30,59,445	Rs.5,00,517	Rs.25,58,928
4	Carrying cost	Rs.1,27,66,601	Rs.74,26,523	Rs.53,40,078
	Total	Rs.8,21,86,643	Rs.6,77,89,891	Rs.1,43,96,752
		Less TDS 0.1%	Rs.67,789.89	
		Amount payable to OPG	Rs.6,77,22,101	

**2.16. Reasons for Disallowance of amount:**

- i. The Edu. Cess for. Coal Cess is not considered for bid time workings leading to a difference in the Custom Duty.
- ii. The coal quantity is calculated by the Petitioner based on actual SHR and Aux. consumption. The Respondent arrived at such calculations based on consideration of minimum of SHR and Aux of station furnished by the Petitioner and CERC regulation leading to difference in the coal quantity of 13917 MT.
- iii. The Petitioner has calculated the ST/GST on fuel inland transportation based on road whereas the Respondent had calculated based on the railway rates for inland transportation since the monthly energy tariff is calculated based on railway escalation rates as declared by CERC from time to time in consonance with the Schedule VI of the PPA.

- iv. That the details for disallowing an amount of Rs.1,43,96,752/- was intimated by the Respondent to the Petitioner vide Letter dated 16.11.2022.

**2.17. Accounting Year 2021-2022 (01.04.2021 to 31.03.2022)**

- a) Claim of OPG : Rs.2,71,09,200/-  
 b) TANGEDCO admitted amount : Rs.1,85,79,659/-  
 c) Difference : Rs. 85,29,540/-  
 d) The details of calculation are as under.

Sl. No.	Billing Details	OPG claim	TANGEDCO calculations	Difference
1	CVD & Edu cess	Rs.97,07,316	Rs.57,20,883	Rs.16,26,935
2	Coal Cess	Rs.1,35,21,873	Rs.1,16,30,128	Rs.39,86,433
3	ST/GST	Rs.8,84,369	Rs.1,18,959	Rs.18,91,745
4	Carrying cost	Rs.29,95,641	Rs.11,06,689	Rs.7,65,410
	Total	Rs.2,71,09,200	Rs.1,85,79,659	Rs.18,85,952
		Less TDS 0.1%	Rs.18,580	Rs.85,29,540
		Amount payable to OPG	Rs.1,85,61,079	

**2.18. Reason for disallowing of amount**

- i. The Edu. Cess for Coal Cess is not considered for bid time workings leading to a difference in the Custom Duty.
- ii. The coal quantity is calculated by the Petitioner based on actual SHR and Aux. consumption. The Respondent arrived at such calculations based on consideration of minimum of SHR and Aux of station furnished by the Petitioner and CERC regulation leading to difference in the coal quantity of 5,405 MT.

- iii. The Petitioner has calculated the ST/GST on fuel inland transportation based on road whereas the Respondent had calculated based on the railway rates for inland transportation since the monthly energy tariff is calculated based on railway escalation rates declared by CERC from time to time in consonance with the Schedule VI of the PPA.
- iv. The components of Basic Customs Duty and Social Welfare Cess claimed in vessels United Sapphire and Emperor Pamper are not allowed as there is no provision in TNERC order dated 05.05.2022 in DRP 19 of 2021 for Change in Law compensation.
- f) The details for disallowing an amount of Rs.85,29,540/- was intimated to OPG vide TANGEDCO's letter dated 12.01.2023.

2.19. The Petitioner has alleged that the change in the rate of Service Tax is clearly a change in law event since there is a substantial increase in the levy of the rate of Service Tax on various vital and integral services for running of Power Plant including stevedoring & Handling, Transportation and Insurance. The above mentioned expenses are usually categorized as Operation & Maintenance Expenses.

2.20. The Petitioner by merely stating these expenses is attempting to conceal the fact that these are Operation & Maintenance Expenses in nature therefore, could not be considered as Change in Law.



2.21. The Hon'ble CERC in GMR Warora Energy Limited vs. Maharashtra State Electricity Distribution Company Limited 71/MP/2018 at para 52 has categorically held that the O&M contracts cannot fall within the scope of change in law. Therefore, the Petitioner cannot claim any such compensation on any increase in the O&M expenses.

2.22. The Petitioner vide its undertaking dated 30.04.2021 had already accepted the methodology adopted by the Respondent in deduction of already paid escalated Service Tax amount by escalating the quoted Inland Transportation Charges and Fuel Handling Charges notified by CERC escalation rate from the Change In Law claims. Therefore, the Petitioner now cannot isolate itself out of the terms of the undertaking which were mutually agreed by the Parties.

2.23. The Petitioner's claims that for the years 2014 to 2020, the Petitioner had agreed to compute and claim the carrying cost for the purposes of the agreement, using simple interest formula as opposed to compound interest and additionally agreed to a waiver of 50% on the said amount as well as a one-time measure and for bringing quietus to the disputes arising out of significant amounts outstanding is false, untrue and totally baseless.

2.24. Similar claims were raised by the Petitioner pursuant to submission of Undertaking dated 30.04.2021 by filing the DRP 19 of 2021 before the Commission wherein the Commission has categorically rejected the Petitioner's prayer pertaining to determination of carrying cost on the basis of compound interest for the purposes of change in law entitlement for future periods. The relevant para is extracted herein below:

*"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*

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*6.14 It may be seen from the above that there is no question of in-principal 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 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 exceptions circumstance warranting the dealing of the same in the regulatory jurisdiction. Hence/ the prayer "c" in regard to carrying cost is not sustainable. "*

2.25. The methodology adopted for change in law calculation during 2014-2020 was accepted by OPG vide undertaking dated 30.04.2021 and the same method is continued during 2020-21 and 2021-22 also the reason for disallowance of claim was intimated to OPG vide dispute notices dated 16.11.2022 and 12.01.2023. After receiving all the payments, OPG now filed this petition for the disallowed amount which is not tenable.

2.26. There is no change/deviation from the methodologies adopted by the Respondent in compensating the Petitioner for their Change in Law claims therefore, there was no reason for the Petitioner to file the present Petition since, the methodology was already accepted by the Petitioner as per the terms of the Undertaking dt.

30.04.2021. Therefore, the present Petition is not maintainable and is liable to be dismissed at this ground alone.

2.27. It is the settled position of law that a party cannot be permitted to approbate and reprobate on the same facts and take inconsistent shifting stands in the different stages of a case. In the present dispute, the Petitioner had accepted the methodology for the period between 01.04.2014 to 31.03.2020 and based on the undertaking and orders passed by the Commission in DRP No. 19 of 2021, the Petitioner had availed the payment and derived their due benefit. However, after availing such benefit, the Petitioner is again changing their stand and challenging the same methodology for the subsequent FY 2020-2021, 2021-2022 which is totally in teeth of the doctrine of approbate and reprobate.

2.28. The Hon'ble Supreme Court in Adani Gas Limited vs. Union of India (2022) 5 SCC 210 at paras 122 to 124 had held that one cannot challenge a decision, from which an advantage is enjoyed. The relevant paras are extracted herein below:

*"122. The doctrine of approbate and reprobate is issued on the estoppel. Paraphrased, it implies that one cannot challenge a decision from which an advantage is enjoyed. As was tersely stated in another context an order "cannot be partly good and partly bad like the curate's egg" [Union of India v. Shakuntala Gupta/ (2002) 10 SCC 694] . In Suzuki Parasrampurua Suitings (P) Ltd. v. Official Liquidator [Suzuki Parasrampurua Suitings (P) Ltd. v. Official Liquidator, (2018) 10 SCC 707 : (2019) 1 SCC (Civ) 91] this Court described the principle as one which does not permit a litigant to "take contradictory stands in the same case. A party cannot be permitted to approbate and reprobate on the same facts and take inconsistent shifting stands". In Amar Singh v. Union of India [Amar Singh v. Union of India/ (2011) 7 SCC 69: (2011) 3 see (Civ) 560] this Court held that: (Amar Singh case [Amar Singh v. Union of India/ (2011) 7 SCC 69 : (2011) 3 see (Civ) 560) / sec p. 8~ para 50*

*"50. This Court wants to make it clear that an action at law is not a game of chess. A litigant who comes to Court and invokes its writ jurisdiction must come with clean hands. He cannot prevaricate and take inconsistent positions."*

2.29. Since the Petitioner having already accepted the methodology applied by the Respondent in settling the Change in Law claims vide Undertaking dated 30.04.2021, the Petitioner is hereby estopped from challenging the said methodology for the FY 2020-2021, 2021-2022 as well.

### **3. Rejoinder filed on behalf of the Petitioner:-**

3.1. At the very outset, before addressing the contentions raised by the Respondent on the methodology used to compute the change in law claims for the period 2020-2022, the Petitioner wishes to categorically deny and vehemently dispute all instances, particularly in paragraphs 12, 15, 16, 17, 18, and 19 in the counter affidavit where reliance has been placed by the Respondent/TANGEDCO, on an undertaking given by the Petitioner for the period 2014-2020, relating to the reconciliation of change in law claims and the methodology for computing the same.

3.2. The undertaking, dated 30.04.2021, given on a without prejudice basis, pertains exclusively to the period 2014-2020 and delineates a specific methodology for computing Change in Law compensation for that period. The compensation sought in the present petition, as evident from the prayer extracted hereinabove, pertains to a period

subsequent to that covered by the undertaking. It is both legally and factually untenable for the Respondent to unilaterally extend the applicability of this undertaking for FY 2020-21 and 2021-22 without an explicit and mutual agreement to that effect. The Petitioner submits that the methodology for computing the Change in Law compensation for these subsequent periods ought to be determined in accordance with the clauses of the PPA, and relevant orders passed by the Commission.

3.3. The Respondent seeks to contend that the Petitioner, by accepting a methodology for computing change in law claims for the period between 01.04.2014 to 31.03.2020, as a one-time and good faith measure, and availing the consequent payment thereunder, is somehow estopped from challenging the application of the same methodology for the subsequent financial years 2020-2021 and 2021-2022. Asserting the doctrine of approbate and reprobate to contend that the Petitioner is bound by a methodology for computing change in law claims, agreed upon for a specific period, is absurd and contrary to express terms of the contract. The undertaking, by its very nature, is time-bound and specific to the terms agreed upon within its duration and, it is without prejudice to any claims that may arise in the future.

3.4. In this regard, the change in law claim for the subsequent years 2020-2021 and 2021-2022 is in full compliance with the stipulations of the PPA, and in line with the relevant regulatory orders by various Regulatory commissions, APTEL & Supreme Court and should be considered on its own merits, independent of the undertaking and methodologies applied to the previous period. 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 with regard to a Change in Law event.

3.5. Having set out its position in so far as the Respondent's reliance on the undertaking as the basis for computing the change in law claims is concerned, the Petitioner places on record its response to the additional contentions raised by the Respondent regarding the methodology used for computing the change in law claims for the period 2020-2022.

3.6. The contents of para 7 dealing with Carrying Cost and para 14, are vehemently denied. The Respondent has relied on the order dated 05.05.2020 passed in DRP 19 of 2021 to contend that the Commission has already rejected the claims made by the Petitioner in this regard and consequently, the Respondent has computed carrying cost on simple interest basis. The operative portion of the order relied upon is extracted below:

*"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.*

*6.14 It may be seen from the above that there is no question of in- principal 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 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 exceptions circumstance warranting the dealing of the same in the regulatory jurisdiction. Hence, the prayer "c" in regard to carrying cost is not sustainable. "*

3.7. The prayer in DRP 19 of 2021 was for a clarification that the carrying cost should be determined based on a compound interest basis for the purpose of 'Change in Law' claim calculations for future periods. The prayer sought to establish a general rule for calculating carrying costs with compound interest in future periods under the 'Change in Law' clause. The Commission's rejection of the prayer, as evident from the order extracted above, was procedural in nature, since its determination would require examination within its regulatory jurisdiction and would constitute a general in-principle approval with regard to the PPA.

3.8. The order of the Commission in DRP 19 of 2021, is *sub-silentio qua* a substantive determination of using compound interest on merits, in any specific case, including the present one. It was merely predicated on not establishing a blanket rule for future cases. It is pertinent to note that the present case requires adjudication of a dispute pertaining to use of compound interest as the basis for computing carrying cost, rather than a general clarification as sought in DRP 19 of 2021. Consequently, the Commission's rejection of an in-principle approval in DRP 19 of 2021 holds no precedential value in determining the calculation of carrying costs with compound interest in the context of the present dispute.

3.9. The Petitioner has already recorded its position in the instant affidavit regarding the Respondent's reliance on the undertaking dated April 30, 2021, given by the Petitioner. It is pertinent to reiterate that a bare reading of the Undertaking would make it apparent that such an undertaking, given on a without prejudice basis, was intended only as a one-time measure to bring quietus to the disputes arising from significant amounts outstanding to the Petitioner by the Respondent. As a gesture of good faith, the Petitioner agreed to compute and claim the carrying cost, for the purposes of the agreement, using a simple interest formula, as opposed to compound interest, and additionally agreed to a waiver of 50% on the said amount for the period from April 2014 to March 2020. However, it is reiterated that such an undertaking would have no bearing on the current dispute.

3.10. Further, it is submitted that 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 as if such change in the law had not occurred. In the real World and also under the PPA, the interest is recognized only on a compounding basis.

3.11. While there can be no dispute insofar as the Petitioner's entitlement to carrying costs with interest is concerned, the methodology of calculating these costs based on compound interest, has been affirmed by the Hon'ble Supreme Court in its judgment in Uttar Haryana Bijli Vitran Nigam Ltd. and Anr. vs. Adani Power (Mundra) Limited and



Anr. (Civil Appeal No. 7129 of 2021), dated August 24, 2022. This stance was further upheld by the Hon'ble Apex Court in a recent judgment in GMR Warora Energy Limited v. Central Electricity Regulatory Commission & Ors., Civil Appeal No. 11095 of 2018, dated April 20, 2023, wherein the Hon'ble Supreme Court categorically held as follows:

*"123. Recently, this Court, in the case of Uttar Haryana Bijli Vitran Nigam Limited and Another v. Adani Power (Mundra) Limited and Another, had an occasion to consider the similar issue. The Court observed thus: "20. It is clear that the restitutionary principles encapsulated in Article 13.2 would take effect for computing the impact of change in law. We see no reason to interfere with the impugned judgment [Adani Power (Mundra) Ltd. v. CERC, 2021 SCC OnLine APTEL 67} , wherein it has been held by the Appellate Tribunal that Respondent 1 Adani Power had started claiming change in law event compensation in respect of installation of FGD unit along with carrying cost, right from the year 2012 and that it has approached several fora to get this claim settled. Respondent 1 Adani Power finally succeeded in getting compensation towards FGD unit only on 28-3-2018, but the carrying cost claim was denied. The relief relating to carrying cost was granted to Respondent 1 Adani Power by the Appellate Tribunal vide order dated 13-4-2018 [Adani Power Ltd. v. CERC, 2018 sec Online APTEL 5] which was duly tested by this Court and upheld on 25-2-2019 [Uttar Haryana Bijli Vitran Nigam Ltd. v. Adani Power Ltd., (2019) 5 SCC 325 : (2019) 2 SCC (Civ) 657] Once carrying cost has been granted in favour of Respondent Adani Power, it cannot be urged by the appellants that interest on carrying cost should be calculated on simple interest basis instead of compound interest basis. Grant of compound interest on carrying cost and that too from the date of the occurrence of the change in law event is based on sound logic. The idea behind granting interest on carrying cost is not far to see, it is aimed at restituting a party that is adversely affected by a change in law event and restore it to its original economic position as if such a change in law event had not taken place.*

xxx xxx xxx

23. We are not persuaded by the submission made on behalf of the appellants that since no fault is attributable to them for the delay caused in determination of the amount, they cannot be saddled with the liability to pay interest on carrying cost; nor is there any substance in the argument sought to be advanced that there is no provision in the PPAs for payment of compound interest from the date when the change in law event had occurred.

*24. The entire concept of restitutionary principles engrained in Article 13 of the PPAs has to be read in the correct perspective. The said principle that governs compensating a party for the time value for money, is the very same principle that would be invoked and applied for grant of interest on carrying cost on account of a change in law event. Therefore, reliance on Article 11.3.4 read with Article 11.B.3 on the part of the appellants cannot take their case further. Nor does the decision in Priya Vart case [Priya Vart v. Union of India, (1995) 5 SCC 437J have any application to the facts of the present case as the said case relates to payment of compensation under the Land Acquisition Act and the interest that would be payable in case of delayed payment of compensation. "*

*124. It is clear that this Court has reiterated that once carrying cost has been granted, it cannot be urged that interest on carrying cost should be calculated on simple interest basis instead of compound interest basis. It has been held that grant of compound interest on carrying cost and that too from the date of the occurrence of the 'Change in Law' event is based on sound logic. It has been held that it is aimed at restituting a party that is adversely affected by a 'Change in Law' event and restore it to its original economic position as if such a 'Change in Law' event had not taken place.*

*125. The argument that there is no provision in the PPAs for payment of compound interest from the date when the 'Change in Law' event had occurred, has been specifically rejected by this Court.*

*126. In view of this consistent position of law and application of restitutionary principles and privity of contractual obligations between the parties as contained in the PPAs, we do not find that the view taken by the learned APTEL with regard to carrying cost warrants interference."*

3.12. Carrying cost is the compensation for time value of the money. Any compensation for Change in Law is incomplete if it does not come with carrying cost, which is inherent to the very provision and the concept of 'relief' to be granted to a generating company. The purpose of relief for a Change in Law provision is to ensure that the affected party is restored to the same economic position as if such Change in Law had not occurred. Restitution is therefore inherent to compensation on account of

Change in Law which has been reiterated by Supreme Court as per above mentioned order in the case of Uttar Haryana Bijli Vitran Nigam Limited and Another v. Adani Power (Mundra) Limited and Another.

3.13. Payment of carrying cost to the generator on the principles of restitution has been enshrined in Clause 10.2 of the PPA extracted below:

*"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. "*

3.14. As a consequence of change in law, the affected party would have to be restored to the economic position, as if such change in law events had not occurred.

3.15. Since carrying cost is simply in the nature of compensation for money denied at the appropriate time, the Petitioner submits that it is entitled to the carrying cost with compound interest, 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.

3.16. Thus, in view of the provisions of the PPA, the principles laid down by the aforementioned judgments of the Hon'ble Supreme Court of India and Hon'ble APTEL, the Petitioner is eligible for carrying cost with compound interest 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.

3.17. The Respondent would dispute the increase in the rate of service tax for integral services like stevedoring & handling, transportation and insurance, in light of its own admission to the contrary in the undertaking dated 30.04.2021, provided by the Petitioner. The undertaking was a result of extensive discussions between the Petitioner and the Respondent regarding the amounts owed by the Respondent for change in law events and, after a thorough reconciliation of its books of accounts, the Respondent clearly and unequivocally admitted its debt towards the claim, ST/GST for inland transport and fuel handling, thereby recognizing it as a change in law event. Such explicit admission by the Respondent incontrovertibly establishes their liability in respect of subsequent periods for the same Change in Law event, viz. the increase in service tax for integral services like stevedoring & handling, transportation, and insurance. The Respondent's current position is, therefore, in direct contradiction to its previous clear acknowledgment of liability. In this context, it is submitted that the Respondent is estopped from challenging the said claim for the FY 2020-2021, 2021-2022.

3.18. It has made a claim for various vital and integral services including stevedoring and handling, transportation and insurance. 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.

3.19. In view of subsequent developments, the Respondent's reliance on the Hon'ble CERC's judgement in GMR Warora Energy Limited vs. Maharashtra State Electricity Distribution Company Limited, 71/MP/2018, dated 02.04.2019, to contend that O&M contracts cannot fall within the scope of change in law and the reasoning employed thereunder for such contention, is rendered obsolete and erroneous. The operative portion of the decision rendered in the said judgement is extracted below:

*"51. The Petitioner has not submitted any information of the contracts affected by Goods and Service Tax. Even otherwise, the decision to carry out operation & maintenance through any other agency is a commercial decision and any increase in expenditure on this count cannot be considered as a change in law.*

*52. Therefore, in our considered view, it is the responsibility of the Petitioner to operate the generating station and any increase in service tax on O&M contracts cannot fall within the scope of change in law. Hence, the relief sought for by the Petitioner under this head cannot be allowed and is hence rejected. "*

3.20. The Commission cannot whittle down the scope of Change in Law provisions, and conditions not expressed in the Change in Law clause cannot be read into/ added by the Commission. Further, the business decisions of the Petitioner cannot be looked into by the Commission for denying Change in Law relief arising out of the said claim.

3.21. While there can be no dispute regarding the fact that the enactment of GST constitutes a Change in Law event, the issue of GST on O&M has been subject-matter of extensive litigation including the recent judgment of the Hon'ble APTEL, delivered on 15.09.2022, wherein the APTEL, categorically overruled the reasoning employed in the

judgment cited by the Respondent, in *Parampujya Solar Energy Pvt. Ltd. v. CERC and Ors.*, Appeal Nos. 256 of 2019 & Ors., and held as follows:

*"104. There can be no two views as to the fact that O&M expenses form part of the recurring expenditure within the meaning of change in law clause contained in Article 12. Concededly, the appellant SPPDs have availed of O&M services by outsourcing them, statedly following standard industry practice.*

*105. Questions as to the correctness, propriety and legality of similar view taken by the Central Commission in another matter had come up before this tribunal, decided by judgment dated 27.04.2021 reported as *Coastal Gujarat Power Limited v. CERC & Ors. 2021 sec Online APTEL 10*. We had held in the said case as under:*

*"67. It is argued that the operation and maintenance of the plant is the responsibility of the appellant and if the appellant seeks to employ services of other agencies, the same cannot increase the liability of the Procurers; this was a commercial decision and choice of the appellant; and that if the appellant had not employed services of outside agencies, there would have been no impact of the alleged changes of tax rates.*

*69. It is wrong to argue that because the appellant stands in the capacity of the Principal in relation to the work contractors engaged by it, it is responsible for the. action (or inaction) on their part in such matters as have financial implication for the Procurers because the option exercised by the contractor is not a change in law but part of the commercial and business decision and has to be dealt inter se the former two.*

*92. We agree with the submission that CERC erred to introduce an extraneous qualification or filter which is not borne out from the PPA. The qualifying factor under Article 13 of the PPA is whether or not a CIL event has an impact on the cost of, or revenue from, the business of generation and sale of electricity by the seller (CGPL). In this view, the test applied by CERC that taxable service should have a "direct relation to the input cost of generation" is extraneous to the provisions of the PPA and must be rejected. It is trite that explicit terms of a contract (PPA) bind and it is not open for the adjudicating forums to substitute their own view on the presumed understanding of the commercial terms by the parties [*Nabha Power Limited v. PSPCL & Anr. (2018) 11 SCC 5087*. Once it is established that levy of a tax on services availed by CGPL has an impact*

*on the cost of or revenue from business of generation and sale of electricity whether directly or indirectly compensation must follow.”*

*106. The above view has been followed by this tribunal in at least two subsequent decisions reported as Azure Solar Private Limited v. CERC & Ors. 2022 SCC OnLine APTEL 24 and Azure Power Eris Private Limited v. BERG & Ors. 2022 SCC OnLine APTEL 8.*

*107. The above decision applies on all fours. We adopt the view taken in case of Costal Gujarat Power Limited (supra) and disapprove the decision of the Central Commission on the subject as quoted above and hold that the appellant SPPDs are entitled to compensation for additional expenditure (recurring /non-recurring) towards O&M activities as well, notwithstanding the fact that they were outsourced.”*

3.22. An appeal against the above order is pending adjudication before the Hon'ble Supreme Court, in Civil Appeal no. 8880/2022 in the case of Telengana Northern Power Distribution Co. Limited & Anr. Vs. Parampujya Solar Energy Pvt. Limited & Ors., wherein it was held as under in the Order dated 24.03.2023:

*"Pending further orders, the Central Electricity Regulatory Commission (CERC) shall comply with the directions issued in paragraph 109 of the impugned order dated 15 September 2022 of the Appellate Tribunal for Electricity. However, the final order of the CERC shall not be enforced pending further orders. "*

3.23. Paragraph 109 of the Parampujya Judgment which has been referred to in the aforesaid order is reproduced as under:-

*"109. The other captioned appeals - Appeal no. 256 of 2019 (Parampujya Solar Energy Pvt. Ltd & AnT. v. CERC & Ors.), Appeal no. 299 of 2019 (Parampujya Solar Energy Pvt. Ltd. v. CERC & Ors.), Appeal no. 427 of 2019 (Mahoba Solar (UP) Private Limited v. CERC & Ors.), Appeal no. 23 of 2022 (Prayatna Developers Pvt. Ltd. v. CERC & Ors.) Appeal no. 131 of 2022 (Wardha Solar (Maharashtra) Private Ltd. & Anr. v. CERC &Ors.) and Appeal no. 275 of 2022 (Parampujya Solar Energy Pvt. Ltd. & Anr. v. CERC &Ors.) - deserve to be*

*allowed. We order accordingly directing the Central Electricity Regulatory Commission to take up the claim cases of the Solar Power Project Developers herein for further proceedings and for passing necessary orders consequent to the findings recorded by us in the preceding parts of this judgment, allowing Change in Law (CIL) compensation (on account of GST laws and Safeguard Duty on Imports, as the case may be) from the dates of enforcement of the new taxes for the entire period of its impact, including the period post Commercial Operation Date of the projects in question, as indeed towards Operation & Maintenance (O&M) expenses, along with carrying cost subject, however, to necessary prudence check. "*

3.24. In view of the aforesaid extracts, it is clear that the aforesaid order has only been passed in the context of the Appeals referred to in Para 109 of the Parampujya Judgment and the said directions have not been passed in rem. The Hon'ble Supreme Court has not issued any blanket stay on the operation of the Parampujya Judgment and therefore, the Commission ought to adjudicate the said claim in terms of the principles laid down by APTEL in the Parampujya Judgment, which are relevant and applicable to the present case.

3.25. There is no regulatory or contractual provision that precludes the Petitioner from calculating fuel inland transportation charges on the metrics of road transportation. Further, the Respondent's reliance on the undertaking dated 30.04.2021 is unlawful. The Petitioner has already recorded its position in the instant affidavit regarding the Respondent's reliance on the undertaking dated April 30, 2021, given by the Petitioner. A bare reading of the Undertaking would make it apparent that such an undertaking, given on a without prejudice basis, was intended only as a one-time measure to bring quietus to the disputes arising from significant amounts outstanding to the Petitioner by



the Respondent. As a gesture of good faith, the Petitioner agreed to compute and claim the carrying cost, for the purposes of the agreement, using a simple interest formula, as opposed to compound interest, and additionally agreed to a waiver of 50% on the said amount for the period from April 2014 to March 2020. However, it is reiterated that such an undertaking would have no bearing on the current dispute.

3.26. 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, 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 Ld. 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 6.3-8 (3) of the CERC (Indian Electricity Grid Code) (Fourth Amendment) Regulations, 2016.

3.27. The 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 Ld. CERC have to be adopted.

3.28. Thus, the relief for Change in Law cannot be linked to normative parameters and has to be on actuals. Neither the PPA nor the bid documents contemplate relief for Change in Law on normative parameters. If the relief for Change in Law to be granted is computed on the basis of normative parameters (and not on actual impact), the Petitioner would stand penalised by lower relief, for no fault on its part.

3.29. Additional expenses incurred by a Petitioner due to a Change in Law event are allowed only after a prudence check. The prudence check does not automatically imply that the costs incurred by the Petitioner are not to be allowed as per actuals. It is submitted that the costs incurred by the Petitioner have been prudently incurred, and compensation for the same cannot be restricted to normative bid parameters and ought to be allowed on actuals.

3.30. The Respondent's reliance on obsolete and invalid documents and methodologies, specifically referencing an invoice dated 18.02.2013 and the Undertaking dated 30.04.2021, is fundamentally untenable. In this regard, the invoice from 2013 should not be relevant for current calculations, especially since the taxation regime has significantly changed with the introduction of GST in 2017, whereby earlier cesses were subsumed and any previous arrangements regarding these cesses have been rendered obsolete or invalid.

3.31. The Respondent/TANGEDCO's continued deduction of these specific cesses post-GST is not in line with current tax laws and regulations.

3.32. Para 8 provides the following reason for disallowing the claim for FY 2021-22, "The components of Basic Customs Duty and Social Welfare Cess claimed in vessels United Sapphire and Emperor Pamper are not allowed as there is no provision in TNERC order dated 05.05.2022 in DRP 19 of 2021 for Change in Law compensation. The reliance placed on the order passed by the Commission in DRP 19 of 2021, is wholly misplaced and erroneous. The said order did not make a substantive determination on the issue, as there was an Undertaking dated 30.04.2021 recording an agreement between the parties delineating a specific methodology for computing Change in Law compensation for the period 2014-2020. Neither the Order dated 05.05.2022 nor the Undertaking dated 30.04.2021 has any bearing on the present dispute.

4. Oral arguments advanced on either side heard. Records perused Relevant provisions of the Electricity Act; Code of Civil Procedure and Regulations traversed.

Written arguments submitted on either side perused.

5. On scrutiny of the rival pleadings and contentions raised during the course of advancing arguments, this Commission decides that formulating the following issues and determining the same on evaluation of evidence on record is essential for adjudicating the lis completely and effectively.

(1) Whether the plea of Res judicata raised by the respondent is sustainable under law and facts?.

- (2) Whether the items enumerated in Table 1 of paragraph 2 of the petition constitute change in law in terms of Article 10 of the PPA dated 12-12-2023 as contended by the petitioner ?
- (3) Whether the contention of the respondent that the claims arising out of change in law as set forth by the petitioner shall have to be allowed only on normative parameters deserves consideration?
- (4) Whether the petitioner is entitled to any relief, in regard to change in law and if so, to what extent?
- (5) To what extent the petitioner is entitled to claim carrying cost?

## **6. Findings of the Commission :-**

### **6.1. Issue No.1 :-**

The bone of contention of the respondent is that the Charge-in-Law events issue raised by the petitioner in the present petition was directly and substantially in issue in the previous petition D.R.P.No.19 of 2021 filed by the petitioner against the respondent and that since the said issue came to be decided by the Commission vide order dated 05.05.2022, the present petition is barred by the principles of Res Judicata envisaged u/s. 11 of the Code of Civil Procedure.

To buttress the above referred contention the learned counsel placed reliance on the judgment rendered by our Hon'ble Supreme Court in the case of Shiv Chander More and others Vs. Lieutenant Governor and others (2014 ) 11 SCC 744.

6.2. The above said contention is sought to be jettisoned by the petitioner's counsel bringing to the notice of this Commission that the order dated 05.05.2022 came to be passed purely on the basis of an undertaking letter dated 30.04.2021 given by the petitioner in respect of the claim covering the period 2014-2020 and as the present claim pertain to the period 2020-2021 and 2021-2022, the question of the doctrine of "Res judicata" envisaged u/s 11 of CPC being made applicable to the present case does not arise at all.

6.3. To evaluate the merit of the rival contentions it is desirable to bear in mind the rudimentary principles which govern the doctrine of "Res Judicata" being made applicable by Courts. The general principle of res judicata contains rules of conclusiveness of judgment but for res judicata to apply, the matter directly and substantially in issue in the subsequent suit must be the matter which was directly and substantially in issue in the former suit. The suit should have been decided on merit and the decision should have attained finality. The doctrine of res judicata is founded on the principles of equity, justice and good conscience. The purpose of this principle was to inculcate finality into litigation. Useful reference can be had in this regard in the judgment rendered by our Apex Court in the case of State of Uttar Pradesh and another Vs. Jadish Sharan Agarwal and Others (2009), 1 SCC 689.

6.4. The fact that the claim of the petitioner towards the financial impact caused on account of change of law events made in the earlier petition D.R.P.No.19 of 2021 and the present petition arose out of the terms and conditions set out in the Power Purchase

Agreement dated 12.12.2013; that the claim made in D.R.P.No.19 of 2021 is for the period 2014-2020; that the claim made in the present petition is for the period 2020-2021 and 2021-2022 and that the order dated 05.05.2022 came to be passed primarily on consideration of the undertaking letter dated 30.04.2021 given by the petitioner to the respondent is not seriously disputed.

6.5. The relevant portion of the undertaking letter dated 30.04.2021 executed by the petitioner is as hereunder :-

- “2. *Provisions of PPA dated 12-12-2013 as follows:*  
10.3.3 *The seller shall provide to the Procurer and the Appropriate Commission documentary proof of such increase/decrease in cost of Power Station or Revenue / expense for establishing the impact of such Change in Law*  
10.3. 4 The decision of the Appropriate Commission, with regards to the determination of the compensation mentioned above in Articles 10.3.1 and 10.3.2, and the date from which such compensation shall become effective, shall be final and binding on both the parties subject to right of appeal provided under applicable law.
3. M/s. OPG even before filing the petition before the Hon’ble TNERC had submitted the documentary evidences relating to claim of CVD, Coal Cess, Edu. Cess, ST / GST on inland transport & fuel handling and carrying cost.
4. M/s. OPG undertakes to give offer of 50% waiver in the carrying cost calculated for the period from April 2014 to March 2021.
5. On scrutiny of the documents provided by M/s. OPG and also considering the offer given by M/s. OPG, TANGEDCO has arrived at the compensation amount as detailed below:-

Sl. No.	Description	Amount claimed in Rs.	Amount admitted by TANGEDCO in Rs.	50% waiver offered in Rs.	Total amount payable by TANGEDCO after deducting the waiver amount in Rs.
<i>Compensation amount on account of Change in Law events reconciled for the period from April 2014 to March 2020</i>					
1	CVD	5,48,66,391	5,12,96,110	-	5,12,96,110
2	Coal cess	32,85,68,271	30,70,67,784	-	30,70,67,784
3	Edu.cess	24,44,725	12,85,774	-	12,85,774
4	ST/GST	2,05,22,578	73,67,395	-	73,67,395
5	Carrying Cost upto 31-03-21	12,85,90,058	10,03,97,832	5,01,98,916	5,01,98,916
	<b>Total</b>	<b>53,49,92,023</b>	46,74,14,895	5,01,98,916	41,72,15,979

6. *M/s. OPG accept that the payment of compensation subject to Filing of petition as per the provision of PPA before the Commission and outcome of the decision of the Commission.*
7. *The net amount payable after deducting 50% waiver on carrying cost is Rs.41,72,15,979/-.*
8. *M/s. OPG undertakes that it shall not make any further claims in future for the components reconciled for the period from April 2014 to March 2020.*
9. *M/s. OPG agrees for the methodology of deduction of already paid escalated Service Tax amount by escalating the quoted Inland Transportation Charges and Fuel handing charges notified by CERC escalation rate from the change in law claim.*
10. *M/s. OPG undertakes that with respect to the amount payable for degradation factor for calculating additional coal consumption on account of part load operation and for carrying cost applicable for the amount for the degradation will not be claimed 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."*

6.6. Apposite to point out that even after receiving a sum of Rs.4,72,15,979/- from the respondent in terms of the undertaking letter dated 30.04.2021, the petitioner filed D.R.P.No.19 of 2021 praying for actual cost of expenditure incurred under various heads invoking change of law events. This Commission in the light of the undertaking letter dated 30.04.2021 executed by the petitioner passed an order in favour of the petitioner on all the items except the claim relating to carrying cost.

6.7. As already pointed out, the present claim of the petitioner relate to the periods 2020-2021 and 2021-2022. The undertaking letter dated 30.04.2021 executed by the petitioner in regard to the claim for the period 2014-2020, at no stretch of imagination, can be extended to the subsequent periods. The respondent cannot take umbrage under the undertaking letter dated 30.04.2021 to defend the claim of the petitioner on account of change of law for the subsequent periods i.e., 2020-2021 and 2021-2022.

6.8. The methodology employed in computing the compensation which the petitioner was entitled to on account of change of law events adopted in D.R.P.No.19 of 2021 cannot be mechanically adopted in the present case since compensation was computed in D.R.P.No.19 of 2021 on the basis of the undertaking letter dated 30.04.2021 executed by the petitioner wherein some concession was given by the petitioner to the respondent in respect of its claim which included waiver of 50% in the carrying cost. In short, the claim of the petitioner in D.R.P.No.19 of 2021 was not decided by the Commission on



merit. The order so passed by this Commission is, in no lesser terms, a compromise decree/ order.

6.9. A compromise decree is not a decision of the court nor can it be said that a decision of the court was implicit in it. It is the acceptance by the Court of something to which the parties agreed. Such a decree cannot operate as *res judicata*. Situated thus, *dehors* of the order passed by this Commission in D.R.P.No.19 of 2021, the present claim of the petitioner claiming compensation on account of change of law events pleaded in the petition for the period 2020-2021 and 2021-2022 has to be decided independently by this Commission on proper evaluation of the evidence placed by both the parties in this regard.

6.10. Ultimately, based on the preceding elaborate discussion and findings rendered, this Commission decides that the plea of “*Res Judicata*” raised by the respondent is not sustainable on law and facts.

Accordingly this issue is decided.

## **7. Findings of the Commission on the Second Issue:-**

7.1. In order to resolve the aforesaid question, it is necessary to reproduce the relevant portions of the PPA which has been entered into between the parties:-

*“10. Article 10: Change in Law*

*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 any Indian Governmental instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;*
- \* the imposition of a requirement for obtaining any consents, clearances and permits which was not required earlier.*
- \* a change in the terms and conditions prescribed for obtaining any consents, clearances and permits or the inclusion of any new terms or conditions for obtaining such consents, clearances and permits except due to any default of the seller;*
- \* any change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of this Agreement.*

*but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the seller, or (ii) change in respect of UI charges or frequency intervals by an Appropriate Commission or (iii) any change on account of regulatory measures by the Appropriate Commission including calculation of Availability.*

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

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

## *10.3. Relief for Change in Law*

### *10.3.1. During Construction Period*

*As a result of any Change in Law, the impact of increase / decrease of capital cost of the Power Station in the Tariff shall be governed by the formula given below:-*

*For every cumulative increase / decrease of "Each rupees one crore twenty five lakhs (Rs.1.25 crores) in the capital cost during the construction period, the increase / decrease in Non Escalable Capacity charges shall be "an amount*

*equal to zero point two by seven percent (0.267%) of the non escalable capacity charges in case of dispute, Article 14 shall apply.*

*It is clarified that the above mentioned compensation shall be payable to either party only with effect from the date on which the total increase / decrease “exceeds amount of Rupees one Crore twenty five lakhs (1.25 Crores)”*

#### *10.3.2. During Operating Period*

*The compensation for any decrease in revenue or increase in expenses to the seller shall be payable only if the decrease in revenue or increase in expenses of the seller is in excess of an amount equivalent to 1% of the value of the Standby Letter of Credit in aggregate for the relevant contract year.*

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

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

#### *10.4. Notification of Change in Law*

*10.4.1. If the Seller is affected by a change in law in accordance with Article 10.1 and the Seller wishes to claim relief for such a change in law under this Article 10, it shall give notice to the Procurer of such change in law as soon as reasonably practicable after becoming aware of the same or should reasonably have known of the change in law.*

*10.4.2. Notwithstanding Article 10.4.1, the seller shall be obliged to serve a notice to the procurer under this Article 10.4.2 even if it is beneficially affected by a Change in Law, without prejudice to the factor of materiality or other provisions contained in this Agreement, the obligation to inform the procurer contained herein shall be material.*

*Provided that in case the seller has not provided such notice, the procurer shall have the right to issue such notice to this seller.*

10.4.3. Any notice served pursuant to this Article 10.4.2 shall provide, amongst other things precise details of:

- (a) the change in law; and
- (b) the effects on the Seller.

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 Government 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.”

7.2. It may be seen from the above recitals of the PPA that the Article 10.2.1 postulates that the agreement shall have due regard to the principle that the party affected by change in law is to be restored through monthly tariff payment to the extent contemplated in Article 10 and to put the affected party to the same economic position as if change in law has not occurred. This effectively means that the principle of restitution has been fully recognized in para 10.2.1 of the PPA enabling the party affected by change in law to seek to restore it to the original position before the sufferance of the economic hardship.

7.3. Article 10.3.3 of the PPA provides for a condition that the generator shall provide to the procurer documentary proof of increase or decrease in cost of power station or

revenue expenditure for establishing the impact of such change in law. It is to be observed here that while the affected party is entitled to restore to the original position by way of monthly tariff payment in the event of sufferance arising out of change in law, at the same time it is incumbent on the part of the generator who has suffered economic hardship arising out change in law to provide the necessary documentary proof to the purchaser.

7.4. In view of the same, it can be safely concluded that the petitioner herein is entitled to be restored to its original position subject to production of necessary documentary proof in case of adverse impact arising out of change in law. Here, we are not rendering conclusive opinion here itself on allowing the entire claim for the reason that there is yet another issue which is to be dealt with and the findings thereon will be rendered in the following paragraphs of this order. Hence, to what extent the original position can be restored to the petitioner is a matter to be decided on merits. Having said that let us discuss the issue which arises for consideration i.e. whether four items enumerated in Table 1 of paragraph 2 constitute change in law. The four items set out by the petitioner for compensation on account of change in law are as follows:-

Sl. No.	Description	Amount Claimed by Petitioner (Rs.)	Amount admitted TANGEDCO (Rs.)	Difference (Rs.)
1.	CVD & Edu Cess	1,62,59,900	1,46,32,965	16,26,935
2.	Coal Cess	5,01,00,697	4,52,29,886	48,70,811
3.	ST/GST	30,59,445	5,00,517	25,58,928
4.	Carrying cost	1,27,66,601 (calculated upto	74,26,523 (Calculated	53,40,078

		23.05.2022	upto 05.05.2022	
	Total	8,21,86,643	6,77,89,891	1,43,96,752

Sl. No.	Description	Difference claim by the Petitioner from 2% to 1% (Rs.)	Amount admitted TANGEDCO (Rs.)	Difference (Rs.)
1.	CVD & Edu Cess	5,16,34,708	4,87,64,452	28,70,256
2.	ST/ GST	0	-75,60,270	75,60,270
3.	Carrying cost	3,09,56,337	1,87,29,920	1,22,26,417
	Total	8,25,91,045	5,99,34,102	2,26,56,943

Sl. No.	Description	Difference claim by the Petitioner from 2% to 1% (Rs.)	Amount admitted TANGEDCO (Rs.)	Difference (Rs.)
1.	CVD & Edu Cess	97,07,316	57,20,883	39,86,433
2.	Coal Cess	1,35,21,873	1,16,30,128	18,91,745
3.	ST / GST	8,84,369	1,18,959	7,65,410
4.	Carrying cost	29,95,641	11,09,689	18,58,952
	Total	2,71,09,200	1,85,79,659	85,29,540

7.5. On a perusal of the claims made by the petitioner, it emerges that there is no manner of doubt that the countervailing duty and educational cess STGST squarely fall within the meaning of change in law as any notification issued by the Government instrumentality and which causes economic impact would fall within the meaning of change in law. The respondent, on the other hand, has contended that such claim is not maintainable in the light of the undertaking given by the petitioner for the period from 01-04-2014 to 31-03-2020. It is seen that except for the defence set up by the respondent

that the issue is settled in view of the undertaking dated 30-04-2021, no other defence has been setup effectively.

7.6. The petitioner has also relied upon the National Tariff Policy issued by the Government of India on 28-01-2016 which clarifies that any change in domestic duty, levies, cess and taxes after the award of the bids leading to change in cost would be treated as change in law and shall be allowed as pass through. The relevant portion of the said tariff policy is reproduced for reference:-

*"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 .....* "

7.7. The petitioner has also drawn our reference to the Notification 23/43/2018-R7R, dated 27-08-2018 issued by MoP under section 107 of the Electricity Act which read as follows:-

*"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"*

7.8. On a conspectus evaluation of the materials placed before us, we are of the view that the clarifications issued by the Ministry of Power confirms the position that any change in tax or cess or duty shall be treated as change in law and unless and otherwise, it is contrary to the PPA, it shall be allowed as pass through. There is no express provision contrary to the MoP direction dated 27-08-2018 in the PPA under reference precluding the absorption of the adverse effect of the actual economic hardship suffered by a generator and hence there is no difficulty whatsoever in holding that CVD, educational cess, ST/GST can be allowed as pass through. Accordingly it is



decided that the counterveiling duty, educational cess on ST/GST are within the ambit of change in law and are to be allowed as pass through but as stated supra, the extent to which it can be allowed will be decided in the succeeding parts of this order.

Accordingly this issue is decided.

## **8. Findings of the Commission on the Third and Fourth Issues :-**

8.1. This issue assumes enormous significance for the reason that there is a head-on conflict between the restitutionary principle in case of economic hardship and the normative principles. It is the contention of the petitioner that the PPA postulates the restitutionary principle of putting back a person in the same position as he was prior to sufferance of economic hardship and the change in law is no exception to the same. On the other hand, the respondent has banked reliance of normative principles prescribed in this Commission's Regulation and CERC Regulation for settlement of various claims.

8.2. No doubt, the restitutionary principle inheres in itself a law of equity and fair play enabling a person to seek remedy for restoration of original position. The law on the subject is well settled and it is not necessary to delve further upon it. The communication of Gol in support of such restitution have also been given anxious consideration by us. But the facts governing the present case make it patently clear that there cannot be an overzealous attempt to borrow the same and implant in a contract such as PPA for the reason that only in a contract between two parties, which is not statutory, there will be no difficulty in invoking the doctrine of restitution in entirety as it governs the rights of two parties in individual realm. There will no third party who may

complain of sense of dissatisfaction or disenchantment in such cases. But in a case such as this, the settlement of actuals on pass through basis, can by no stretch of imagination, be viewed as adjudication of rights of two sides alone. The statutory flavour engrained in the PPA is so visible that it is hedged by Rules, Regulations on the subject in the normal course. In the absence of the same, the same is governed by the specific agreement between the parties in a given subject. But when such agreement is modified to bring forth a broad methodology, the same has to prevail for the reason that in cases where the pass through is indeterminate and unquantified, it would be safer to go for a methodology agreed at any point of time rather than going to normative principles or actual. In the present case, not only the PPA itself has its own set of methodology and Rules for the parties to strictly follow, but also it was found at expedient to amend it to make way for rationalising it. Coming to the contentions advanced by the respondent on invocation of normative principle it is to be stated that when the recitals of the PPA are subject to regulatory regime, the normative principle can be allowed to influence the contract to some extent but cannot cloud the contract and efface or subsume it altogether. It has to be slightly distanced and placed at a place where the contract is not unduly suffocated by the overreach of normative principles. Situated thus, we have to observe categorically that the normative principles cannot be seen as a panacea when a party is not palatable to the actual pass through. Further, the concept of change in law and normative principle cannot go together. Nor the normative principles can be seen as

a substitute for change in law. Normative principles are meant for general tariff fixation and are not intended to address specific issue such as change in law.

8.3. In the same breath, we have to observe that the petitioner, in our view, has canvassed for literal interpretation of the clause pertaining to change in law for supporting its claim for pass-through on actual basis. However, any interpretation which defeats the provisions of the Act or the Regulations cannot be agreed to. If we are to accede to the plea for actual pass through in the present case, we will be certainly falling in error as it would give the pass through unfettered run in the tariff fixation to which we do not subscribe. It is our view that it is the bounden duty of a party to a contract to make provision for foreseeable events such as change in law and only when it is established beyond reproach that the same is beyond its foresight, such pass through can be allowed at actuals. At the same time, the fact that a provision has not been made by the petitioner to certain foreseeable events, in regard to change in law would not totally disentitle him to seek pass through at actuals and accept the counter offer made by the respondent on normative basis. Hence, the whole issue requires a pragmatic approach. The fact remains that the methodology accepted in the undertaking dated 30-11-2021 worked well for the period from 2014-2020 and we see no reason as to why the same cannot be extended for the subsequent periods. In such context, we would like to add that there is another dimension to the issue before us, namely, the examination of change in law within the parameters of PPA. The PPA which has a 20 or 25 years tenure provides for payment of uniform tariff throughout its currency. In our view, if the

undertaking dated 30.11.2021 for the subsequent periods of 2020-21 and 2021-22 is discarded altogether, it would make the terms in the PPA for payment of tariff absurd for the reason there will be different tariff for different periods which would make the tariff susceptible to variation every now and then. To put it otherwise, the tariff for supply of energy would be totally at the mercy of the external factors which is not desirable. Hence, there must be a specific and definite methodology even in the absence of or non-application of normative parameters without which the PPA would become desultory. Rightly, a methodology was agreed upon by the parties by means of undertaking dated 30.11.2021 and such methodology which is incidental to the PPA cannot be completely discarded for the subsequent years. Though the refusal of the petitioner to come within the purview of the undertaking dated 30.11.2021 for the subsequent years cannot be faulted, at the same time, in our view, the change-in-law cannot be given a free run moreso, when it is not guided by normative parameters. The view taken by the respondent that what was agreed to in the undertaking is not mere waiver of dues but acceptance of basic methodology has some force and hence cannot be repelled altogether. Needless to say that PPA is a document based on a specific methodology agreed between the parties and certainly, there cannot be multiple methodologies for PPA during different periods as it would render it rudderless without the driving force, i.e., the methodology.

8.4. It is so because the change in law by its very nature is amorphous. No straitjacket formula can be evolved for placing a check on the claims arising out of the same and

only a specific methodology can act as a reasonable yardstick and act as a driving force to measure it and place a check on it. We say so because as is being contended by the respondent, there was every occasion for the petitioner to make provision for change in law at the time of bidding and indeed a provision might have even been made or could have been made for the same. If it be so, any pass through of the same again will amount to undue gain.

8.5. One might wonder as to why the concept of methodology is sought to be pressed into service when the plain language of the PPA provides for actual pass through and why a painstaking exercise is required to gauge the validity of the claim. There is good enough reason for this. Be it noted that the petitioner's case is one which is governed by the competitive bidding under Section 63 and not under Section 62 of the Electricity Act 2003. If it is one under Section 62, there will be no difficulty at all in examining the effect of actual pass-through. But it is one which has been entered under Section 63. That being so, it would be a folly to assume that pass through can be allowed based on the actual recitals in the PPA. In other words, the actual pass through as provided in the PPA has to be tested on the touchstone of Section 63 without which the present adjudication would become erroneous. It is because the PPA in the instant case has to operate within the contours of Section 63 and viewed in such context, it is to be ensured that only in the face of absolute unviability of the price fixation, we can even remotely think of actual pass through which takes the colour of project specific determination under Section 62.

8.6. Thus, the question arises for determination is whether the petitioner's commercial viability did survive in the aftermath of the methodology agreed upon in the undertaking dated 31.10.2021 and is there anything otherwise to prove that such methodology worked out in the undertaking dated 30.11.2021 proved to be an irreparable loss or detriment to the petitioner. It is only after forming a conclusion thereon, we can even glance at the prospect of allowing actual pass through especially in a case which is purely governed by competitive bidding under Section 63. Here is a classic case where neither Section 62 can be automatically be pressed into service for authorising actual pass through nor the normative parameters for that matter, as the PPA is constricted by the contours of Section 63. The only way out is to take leaf out the mutual agreement entered in the undertaking dated 30.11.2021 and make it an integral part of the PPA to make it workable. In order to do the same, the litmus test which can be applied is whether at all, there was any unworkability or unviability which was reported consequent to undertaking dated 30.11.2021. We find that, no such unworkability or unviability reported by the petitioner and only thing that has been reported is that the undertaking was given under compulsion. We do not want to go into the said question deeper as the undertaking was an important piece of document for the period 2014-2020 and it is not for the petitioner to question the same at this stage on the ground of compulsion.

8.7. Hence, we conclude that even though we reject the contention of the respondent on the validity of undertaking dated 30-11-2021 and the canvass made by the petitioner for full-scale pass through, the undertaking under reference cannot be seen as a mere

piece of paper for a specific period to be discarded for the subsequent period as the very foundation of PPA rests on its methodology, be it at the time of signing or at the time of amendment or variation on the own volition of parties. The sanctity of the PPA is such that it has to run through its tenure on agreed methodology and if there is a change in the methodology of the PPA at any point of time, it cannot be brushed aside as being meant for a specific period, as the methodology goes to the root of the PPA and has to be carried through out its tenure until such time, the parties deem fit to introduce a fresh methodology.

8.8. Viewed in above backdrop, we find nothing amiss in the approach of the respondent to direct the petitioner to stick to the same methodology in settlement of claims. After all, all the claims which are allowed as pass through to the petitioner, are in turn further passed on to the consumers through ARR and hence there cannot be an unfettered or no-holds-barred passage of all claims. A well balanced approach is necessary to protect the interest of all stakeholders and as such it is held categorically that a methodology is the essence of a PPA and it is has to be accepted in entirety at the time of execution. It also follows as a natural corollary that if any modification is accepted in such methodology, the same has to run through the remaining tenure of the PPA uniformly. There is no scope for permitting different methodologies based on the proclivity of the executants at different point of time.

8.9. Be that as it may, it is to be noted that the bidding was done by the petitioner under Section 63 of the Electricity Act, 2003. If we are to allow pass through on actual

basis, it would virtually amount to tariff determination under Section 62 which is impermissible as Section 62 & 63 operate in independent sphere and cannot be allowed to overlap one another. Hence, as rightly stated by the respondent, the petitioner had all the liberty to foresee and provide for change in law events at the time of bidding. Notwithstanding the same, we are inclined to order settlement of dues to the petitioner on the basis of undertaking dated 30.11.2021 for the periods 2020-21 and 2021-22. In view of the above said findings rendered by this Commission, this Commission decides that the petitioner is entitled for compensation on account change of law events set out in petition as per the terms agreed by the petitioner in the undertaking letter dated 30.11.2021 for the periods 2020-21 and 2021-22.

Issue No.3 and 4 are decided accordingly.

#### **9. Findings of the Commission on the Fifth Issue:-**

9.1. Now the final question which remains to be answered is the sufferance in terms of carrying cost. It is dealt with separately for the reason that there is divergence of stand between the petitioner and the respondent. It is the case of the respondent that the claim with regard to the carrying cost has been pruned for the reason that the petitioner has calculated the carrying cost on the basis of compound interest instead of simple interest formula. It is further the case of the respondent that the Commission has already dealt with the issue in D.R.P. No. 19 of 2021 and categorically rejected the petitioner's prayer. However, having gone through the Commission's earlier order in D.R.P. No. 19 of 2021 we find that no conclusive findings have been rendered with



regard to the manner of calculation of interest and the Commission merely held that the prayer for claim of carrying cost would amount to in-principle approval which is alien to the PPA and that there was no exceptionable circumstances warranting the dealing of the same in the regulatory jurisdiction. Further, the Regulation 75 (4) of the Tariff Regulations of the Commission unequivocally provides that the cost of power purchase from IPPs shall be considered based on the power purchase agreements.

9.2. In view of the above carrying cost also will have to be allowed in the entirety as the PPA does not have any clause to the contrary. However, the PPA as entered into between the parties does not postulate any method of calculating the carrying cost. In such circumstances, we find it a fair and equitable to allow the 10% as enunciated by the Hon'ble Supreme Court of India as carrying cost for all cases where there is no broad agreement on the same.

10. Accordingly this issue is decided.

In fine, it is directed as follows:-

- 1) The prayer for declaration of items enumerated in Table No.1 paragraph 2 of the main petition constitute change in law events in terms of Article 10 of the PPA dated 12.12.2013 is allowed.
- 2) The prayer of the petitioner directing the respondent to pay Rs.4,55,83,235 is dismissed.
- 3) However, it is hereby declared that the petitioner is entitled to compensation for change in law events set out in the petition for the years 2020-2021 and 2021-

2022 also as per the terms agreed by the petitioner in the undertaking letter dated 30.11.2021.

- 4) Carrying cost is allowed at the rate of 10% per annum.
- 5) Considering the nature of dispute, both parties are directed to bear that cost.

Ordered Accordingly.

(Sd.....)  
Member (Legal)

(Sd.....)  
Member

(Sd.....)  
Chairman

/True Copy /

**Secretary  
Tamil Nadu Electricity  
Regulatory Commission**