

**APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)**

**APPEAL NO. 284 OF 2017 &
APPEAL NO. 09 OF 2018**

Dated : 29th January, 2020

**PRESENT: HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON
HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER (ELECTRICITY)**

IN THE MATTERS OF :

APPEAL NO. 284 OF 2017

Adani Power Rajasthan Limited

31-A, 6th Floor, Mahima Trinity
Plot No. 5, Swej Farm
New Sanganer Road, Sodala
Jaipur - 302019

.... **APPELLANT**

Versus

- 1. Rajasthan Electricity Regulatory Commission**
Through its Secretary
Vidyut Viniyamak Bhavan, Sahakar Marg,
Near State Motor Garage
Jaipur – 110001.
- 2. Jaipur Vidyut Vitran Nigam Limited**
Through its Managing Director
Vidhyut Bhavan, Jyotinagar
Jaipur – 302005.
- 3. Ajmer Vidyut Vitran Nigam Limited**
Through its Managing Director
Vidyut Bhawan, Panchsheel Nagar,
Makarwali Road, Ajmer – 305004.

4. **Jodhpur Vidyut Vitran Nigam Limited**

Through its Managing Director
New Power House, Industrial Area
Jodhpur – 352001.

5. **Rajasthan Urja Vikas Nigam Ltd.**

Through its Chief Engineer (HOD)
Vidyut Bhawan, Vidhan Sabha Rd,
Janpath, Jyothi Nagar,
Lalkothi, Jaipur - 302005

.... **RESPONDENTS**

Counsel for the Appellant(s) :

Mr. Amit Kapur
Ms. Poonam Verma
Ms. Abiha Zaidi
Ms. Apoorva Saxena
Mr. Tarul Sharma
Ms. Aparajitha Upadhyay
Ms. Tanesha Singh
Ms. Sakshi Kapoor

Counsel for the Respondent(s) :

Mr. Raj Kumar Mehta
Ms. Himanshi Andley for R-1

Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Neha Garg
Mr. Ashwin Ramanathan for R-2 to 4

APPEAL NO. 09 OF 2018

1. **Jaipur Vidyut Vitaran Nigam Limited,**

Through its Chairman and Managing Director
Vidyut Bhawan, Janpath,
Jaipur, Rajasthan – 302005

2. **Ajmer Vidyut Vitaran Nigam Limited**

Through its Chairman and Managing Director
Vidyut Bhawan Makarwali Road
Panchseel Nagar, Ajmer,
Rajasthan – 305004

3. Jodhpur Vidyut Vitaran Nigam Limited

Through its Chairman and Managing Director
Old Jhanwar Rd, Near CBI Offices,
Sector 18E, Chopasni Housing Board,
Jodhpur, Rajasthan – 342008

4. Rajasthan Urja Vikas Nigam Ltd.,

Through its Chairman and Managing Director
Vidhan Sabha Rd, Janpath,
Jyothi Nagar, Lalkothi,
Raipur, Rajasthan – 302005

.... **APPELLANTS**

Versus

1. Rajasthan Electricity Regulatory Commission

Through its Secretary
27, Shahakar Marg, Jyothi Nagar
Lalkothi, Jaipur
Rajasthan - 302007.

2. M/s Adani Power Rajasthan Limited

Through its Chairman and Managing Director
NH 90, Atru Road, Village Kawai,
Taluka Atru, Baran,
Rajasthan – 325219.

.... **RESPONDENTS**

Counsel for the Appellant(s) : Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Mr. Ashwin Ramanathan
Ms. Parichita Chowdhary
Ms. Neha Garg **for Appellant-1 to 4**

Counsel for the Respondent(s) : Mr. Raj Kumar Mehta
Ms. Himanshi Andley **for R-1**

Mr. Amit Kapur
Ms. Abiha Zaidi
Ms. Poonam Verma
Ms. Aparajita Upadhyay
Ms. Apoorva Saxena
Ms. Sakshi Kapoor **for R-2**

J U D G M E N T

PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON

1. Appeal No. 284 of 2017 is filed by Adani Power Rajasthan Limited (for short hereinafter referred to as “**Adani Power**”) and Appeal No. 9 of 2018 is filed by Rajasthan Discoms against the impugned order dated 08.06.2017 passed by Rajasthan Electricity Regulatory Commission (hereinafter referred to as “**RERC/State Commission/Commission**”) in Petition No. RERC 920 of 2016 filed by Adani Power.

2. Apparently, as could be seen from both the Appeals, when Adani Power filed the Petition claiming compensation based on change in law events, certain events pertaining to some claims were allowed and some were disallowed. Appeal No. 284 of 2017 is against disallowance of some change in law events including carrying cost. Appeal No. 9 of 2018 refers to challenge against some change in law events allowed in favour of Adani Power.

3. The Appellant-Adani Power contends that subsequent to 03.07.2009, numerous changes/modifications occurred introducing various statutory taxes, duties, impositions and charges which have affected the

cost and revenue of the power plant of the Appellant. The Appellant said to have notified occurrences of the such changes/modifications, as stated above, to the Respondent procurers and sought consequential relief in accordance with the terms and conditions of PPA. RERC disposed of the Petition in RERC 493 of 2014 filed under Section 86 (1) (f) of the Electricity Act, 2003 (in short “**the Act**”) read with Article 10 of PPA filed by the Appellant-Adani Power on 29.04.2015.

4. Subsequently, a revised claim in accordance with the directions of RERC as stated above with documentary evidence in respect of change in law events were also submitted to the Respondent-procurers on 28.05.2015. Interlocutory Application was filed seeking additional events on account of change in law which occurred subsequent to filing of Petition No. RERC 577 of 2015. This came to be disposed of on 15.03.2016 rejecting most of the claims of the Appellant-Adani Power. Therefore, Appeal No. 119 of 2016 came to be filed before this Tribunal on 02.05.2016. Similarly, Appeal No. 277 of 2016 came to be filed by procurers against the very same order dated 15.03.2016.

5. Meanwhile, Adani Power filed a separate Petition in 920 of 2016 before the Respondent-Commission seeking compensation in respect of such change in law events which have occurred subsequent to reservation of orders by the Respondent-Commission in 577 of 2015. Subsequently,

one IA came to be filed in Petition No. 920 of 2016 adding 4 (four) more change in law events along with carrying cost in terms of PPA. The Respondent-procurers after appearing contested the matter and RERC passed the impugned order.

6. Appellant-Adani Power contends that this Tribunal in the judgment dated 19.04.2017 in Appeal No. 161 of 2015 opined that PPA gives express right to an affected party to claim change in law if the event qualifies under the applicable provisions of PPA and RFP cannot override this right. Based on Para 44 of the judgment in the above Appeal No. 161 of 2015 in **Sasan Power Limited vs. Central Electricity Regulatory Commission**, Appellant-Generator seeks reimbursement of cost/compensation as a consequent to introduction of Swachh Bharat Cess and Krishi Kalyan Cess contending that they fall within the ambit of Article 10 of PPA.

7. Appellant contends that Respondent-Commission has taken different views in the same impugned order saying that though levy of Swachh Bharat Cess/Krishi Kalyan Cess on rail transportation deserves to be held as change in law, but erred in opining that the impact of such levies on Operation and Maintenance service undertaken for the power plant during the operation period would not come to the benefit of the Appellant.

Similarly, the event of change in service tax from 10.3% to 14% was disallowed without any reason.

8. Coming to issues of levy of coal and coal terminal surcharge for rail transportation, Respondent-Commission disallowed the same opining that it would not fall within the ambit of change in law and it wrongly relied on its order dated 15.03.2016 in Petition No. RERC/577 of 2015. The Respondent Commission wrongly disallowed the said claim on the ground that surcharge on coal transportation which have been imposed by Ministry of Railways cannot be considered as change in law, as surcharge imposed cannot be equated with surcharge levied as tax or cess by Ministry of Finance, therefore it went wrong in opining that the Appellant-Generator was expected to consider all costs involved in procuring the inputs for quoting the tariff. According to them, since there is no distinction between notifications issued by Ministry of Finance and Ministry of Railways, but Respondent Commission observing so is incorrect. The terms of agreement i.e., PPA does not give scope for such interpretation. Respondent-Commission ignored fundamental premise of restitution which underlines the substratum of any change in law provision.

9. Appellant-Adani Power further contends that the executive powers of Central Government have been allocated among various Ministries, therefore, in terms of Article 77(3) of the Constitution, such executive

directions was made by Ministry of Railways from time to time invoking Section 2(35), 30, 31 and 32 of the Railways Act, 1989 which being Rate Circulars levying coal and coke terminal surcharge are nothing but statutory in nature. Therefore, they constitute orders issued by Indian Governmental Instrumentalities.

10. Appellant-Adani Power also contends that in terms of Paragraph 6.2.4 of the Tariff Policy, 2016, the changes in the cost as a result of domestic duties, levies, cess and tax imposed by Central Government or by any Government Instrumentality have to be treated as change in law events.

11. The Appellant further contends that Railway is not a commercial activity; therefore, charges like coal and coke terminal surcharge in the nature of statutory levies are imposed by a sovereign authority. Further, the Appellant-Adani Power relies upon judgment dated 19.04.2017 in **Sasan Power Limited Vs. CERC &Ors. [2017 ELR (APTEL) 0508]** ("**Sasan Judgment**"), contending that in the said judgment, the Tribunal considered and dealt with identical change in law events.

12. Appellant also contends that Respondent-Commission went wrong by considering CERC Escalation Index. According to Appellant, CERC Escalation Index covers only basic price list. The tariff quoted by the bidder excludes future change in rate of surcharges or levy of new

surcharge. Therefore, according to the Appellant, new change in rate of surcharge and levy of new surcharge are not part of inflation. Therefore, they have to be compensated under change in law in terms of PPA. Appellant also contends that they can only assume normal inflation as a bidder; therefore, the opinion of Respondent-Commission is wrong.

13. So far as denial of 'levy of CG Paryavaran Upkar' and 'levy of CG Vikas Upkar', Appellant contends that the opinion of Respondent-Commission is totally based on incorrect interpretation of the very concept of change in law under Article 10 of PPA. Since the State Government of Chhattisgarh issued Adhosanrachna Vikas Evam Paryavaran Upkar Adhinyam, 2005 is a law in terms of PPA; any increase on account of amendment of law post cut-off date, the Appellant is entitled to compensation.

14. So far as 'carrying cost', Appellant contends that there was no justification for the Respondent-Commission to disallow carrying cost on the claims that were allowed and it is incorrect opinion. In terms of Article 10 of the PPA, the parties must be restored to same economic position as if no change in law has taken place. The expenses are on account of change in law events subsequent to the cut-off date and the Appellant had no option than to incur additional cost. Such costs are incurred by the Appellant thinking that they would get reimbursed once they are approved

as change in law. The Appellant-Generator apart from burdened with additional working capital has to bear interest cost also till it gets the reimbursement from the procurers which involves delay in regulatory approvals and delay in payments by the procurers. The principle of recovery of carrying cost according to Appellant is an established principle of regulatory jurisprudence. Appellant-Adani Power also contends that if a person who is entitled legitimately to get compensation and if the same is deprived for no fault of him in law, such person is bound to get interest on the amounts legitimately due to him.

15. With these averments, Appellant-Adani Power has sought the following reliefs:

- a) To set aside the impugned Order dated 08.06.2017 passed by Rajasthan Electricity Regulatory Commission in Petition No. 920 of 2016, to the extent challenged in the present appeal;
- b) to pass such other or further orders as this Tribunal may deem appropriate.

Respondent No. 2 to 5, other than the Regulatory Commission-RERC have filed their reply in brief as under:

16. Contending that there is no merit in the claim of the Appellant in the present Appeal, Respondent Nos. 2 & 3 have sought for dismissal of the

Appeal on all counts. They contend that they have also preferred an Appeal against the change in law events which were allowed in DFR No. 3045 of 2017, which is now numbered as Appeal 09 of 2018.

17. According to the answering Respondent No. 2 to 5, the Appellant-Adani Power established 1320 MW generating station comprising two units of 660 MW each. The entire issue pertains to competitive bidding process under Section 63 of the Act which fructified into a PPA for supply of Aggregate Contracted Capacity of 1200 MW at a levelised tariff of Rs.3.238 per unit.

18. According to the answering Respondents, the claims made by the Appellant were not admissible in terms of PPA especially in the light of the definition of change in law and different clauses which means that every change in tax or introduction of any tax is not covered under change in law and according to the Respondents, only such tax which forms part of the transaction of supply of power by the seller are permissible. The Commission was justified in rejecting certain change in law claims including carrying cost, since those claims could not be allowed as they were contrary to terms of Article 10 of PPA. It is contended that the Appellant is completely misplaced in their submissions that any change in cost or revenue from the business of generation and sale of electricity to the Respondent-Discoms, in terms of PPA are to be allowed as a pass

through in monthly tariff bills. Since rights and obligations of parties are strictly governed by terms and condition of PPA, none of the claims of the Appellant-Generator is maintainable. The obligations and risks of these Respondents are clearly defined and identified in the bidding documents including PPA. Since bidder is fully aware of specific extent of costs and obligations assumed by the answering Respondents in advance; anything that is not specifically provided in the bidding document and PPA are to be excluded. The bidder is expected to apply its mind to possible liability and cost that may arise while giving his quote of tariff, is the stand of Respondent Nos. 2 to 5.

19. Further they contend that though the entities like Coal India and Indian Railways are entities under the control of Government of India, but all their actions cannot be said to have force of law. Both the entities are commercial entities; therefore, their conditions are business transactions. Therefore, pricing of coal is a de-regulated activity.

20. Respondent Nos. 2 to 5 also contend that none of the issues raised by the Appellant pertaining to **change in service tax rate including Swacch Bharat Cess and Krishi Kalyan Cess, levy of Swacch Bharat Cess on service tax and levy of Krishi Kalyan Cess on service tax during operation** period are change in law events.

21. Further, they contend that claim of the Appellant-Generator pertaining to levy of **coal and coke terminal surcharge** is also denied since such transportation of coal and the arrangement thereof is nothing but commercial transaction of the Appellant with the Indian Railways. Transportation of coal is not a statutory exercise; therefore, commercial agreement entered for the service rendered again has force of the Statute. The Indian Railway or Ministry of Railways only decides charges to be levied for the service rendered which would cover cost and expenses. Therefore, imposition of taxes is not by Ministry of Railways. Hence, rules for transaction of business relied upon by the Appellant does not apply.

22. Regarding **levy of CG Paryavaran Upkar and CG Vikas Upkar**, according to answering Respondents, this also is not a statutory levy on the Appellant. Therefore, any increase on account of contractual and commercial arrangements of the Appellant with South Eastern Coalfields Limited (in short "**SECL**") and similar entities cannot fall within the definition of change in law clauses. The answering Respondents further contend that Article 10 does not act as a blanket provision covering all expenses on account of increase in the expenses.

23. Regarding **Carrying Cost**, according to the answering Respondents, there cannot be consideration of interest before ascertainment of the amount especially in the absence of any statutory or contractual provision

providing for the same. The Appellant will become entitled for the payment towards change in law claims only after decision of the concerned Commission. Therefore, in the absence of any such terms in the light of PPA, there cannot be carrying costs. In terms of supplementary bills, it provides only payment of surcharge for any delay in payments beyond one month. The same cannot be extended to change in law claims. The Appellant cannot selectively rely on Article 10.2, is the stand of the answering Respondents.

24. With these averments, Respondent No. 2 to 5 sought for dismissal of the Appeal.

25. **In the rejoinder filed by the Appellant-Adani Power**, they contend that the interpretation of tax for supply of power is not correct, since generation is incidental to supply of power under PPA and number of activities right from procurement of coal till supply of electricity undertaken by the generator is towards ensuring supply of power to Discoms. In the case of ***State of Andhra Pradesh Vs. National Thermal Power Corporation*** [(2002) 5 SCC 203], it was held that generation and supply of electricity is instantaneous and has to be treated as one transaction. If stand of the Respondents is accepted, that only from the period when the supply of power commences, the very provisions pertaining to change in law become act of supply in respect of construction period so also the

period prior to commencement of supply of power or prior to commissioning of the generating unit.

26. According to Appellant, Discoms are making self-contradictory statement that if 5th Bullet for tax on supply of power alone is taken into consideration, Bullet 1 to 4 would completely become redundant. The change in law provision being wide to cover, any additional recurring/non-recurring expenditure in consequence of occurrence of any events that are covered under Article 10.1.1 of PPA, the stand of the answering Respondents cannot be sustained is the contention of the Appellant.

27. Appellant also contends that applicability of **Sasan Judgment** and the stand of Discoms are incorrect. This Tribunal in **Sasan Judgment** has clearly dealt with identical change in law events, so also other relevant matters. Even in terms of Clause 4.7 of competitive bidding guidelines referred to compensation of change in law on account of any event that affects the business of selling electricity to the procurer; therefore, contention of the Discoms that it refers only to supply of power is erroneous. Clause 6.2.4 of the amended tariff policy dated 28.01.2016 also reaffirms the principles of compensation for change in the cost due to change in law event after the award of bids. So also contention of Rajasthan Discoms that in the absence of any particular risk or cost

specifically agreed upon, the Appellant is not entitled for any relief is also incorrect and denied by the Appellant.

28. The Appellant reiterate their stand for claiming several change in law events and how they are supported not only in terms of PPA but also on account of various judgments of this Tribunal, so also Hon'ble Supreme Court. By reiterating their contentions, Appellant affirms that the impugned order deserves to be interfered with so far as disallowance of certain change in law events.

29. In Appeal No. 9 of 2018, the contentions of the Appellant-Discoms in brief are as under:

30. According to Appellant-Discoms, granting of relief to Respondent-Adani Power pertaining to levies on Royalty i.e., National Mineral Exploration Trust effective from 14.08.2015 and District Mineral Foundation effective from 12.01.2015 are erroneous. So also they contend that levy of Swacch Bharat Cess along with service tax for rail transportation with effect from 15.11.2015 was wrongly awarded by the Respondent-Commission. Similar ground is raised so far as levy of Krishi Kalyan Cess along with service tax and Swacch Bharat Cess for rail transportation from 01.06.2016. More or less the grounds of defence in Appeal No. 284 of 2017 are grounds of Appeal by the Appellant-Discoms in this Appeal.

31. According to Appellant-Discoms, PPA is a binding contract between the parties and all claims of parties have to be strictly in accordance with terms of PPA, but allowing the above three change in law events is contrary to the terms of PPA. Therefore, we are not referring to all grounds since they are nothing but repetition of the stand of Appellant-Discoms herein as answering Respondents in the connected Appeal, i.e. Appeal No. 284 of 2017.

32. Respondent-Adani Power has filed objections contending that Adani Power has already filed Appeal challenging the impugned order dated 08.06.2017 in Petition No. 920 of 2016. They also contend that the present submissions would be without prejudice to the rights and contentions raised by them in the connected Appeal.

33. According to Respondent-Adani Power, even in respect of change in law event decided in favour of Adani Power, payments are not made; the said conduct of Rajasthan Discoms, according to them, has to be condemned. Respondent-Adani Power contends that by filing the above Appeal, it is not an automatic stay in honouring the directions of the Respondent-Commission. They reiterate their stand in rejoinder in the connected Appeal that the term 'tax' for supply of power in PPA has been wrongly interpreted by Rajasthan Discoms. According to Respondent-Adani Power, all activities right from procurement of coal till supply of

power to ensure supply of power to the concerned Discom are instantaneous and are part of same transaction. So also they reiterate their rejoinder in respect of contentions raised by the Appellant-Discom pertaining to three change in law events allowed by Respondent-Commission.

34. The point that would arise for our consideration is -

“Whether the impugned order dated 08.06.2017 warrants interference?”

35. The admitted facts are as under:

Request for Proposal (RFP) came to be issued by Rajasthan Rajya Vidyut Prasaran Nigam Limited (“RRVPNL”) for procurement of power on long term basis through tariff based competitive bidding process. This was followed by a revised RFP in order to bring it in line with standard bidding document pertaining to Case 1 in terms of notification of Ministry of Power, Government of India. On 06.08.2009, the Appellant-Adani Power submitted its bid at a levelised tariff of Rs.3.248 per kWh for supplying 1200 MW power. Admittedly, it was selected as successful bidder. Subsequently, this levelised tariff was reduced by the Appellant to Rs.3.238 per kWh in terms of negotiations with the Government of Rajasthan. Letter of intent came to be issued by RRVPNL to Adani. PPA

came into existence between the parties on 28.01.2010. Several terms were clearly indicated in the PPA i.e., “Effective Date” in terms of Article 2.1 and “Scheduled Delivery Date” in terms of Article 4.1.1.

36. Relevant Articles for our consideration in these appeals are Article 10. Article 10.1.1 reads as under:

“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 Government Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;*
- *the imposition of a requirement for obtaining any Consents, 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.”

37. Article 10.2.1 refers to restoration of the affected party to the same economic position as if Change in Law event had not occurred. Article 10.3 refers to relief on account of Change in Law. Article 10.4 pertains to notification pertaining to Change in Law.

“ 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

Sd/-	Sd/-	Sd/-	Sd/-
Jaipur Vidyut Vitaran Nigam Limited	Ajmer Vidyut Vitaran Nigam Limited	Jodhpur Vidyut Vitaran Nigam Limited	Adani Power Rajasthan Limited

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 Sixteen crore Fifty Lakh (Rs. 16.50 crore) 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 six seven (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 Sixteen crore Fifty Lakh (Rs. 16.50 crore).

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.

10.3.3 *For any claims made under Articles 10.3.1 and 10.3.2 above, the Seller shall provide to the Procurers 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 Procurers 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 Procurers 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 Procurers contained herein shall be material.

Sd/-	Sd/-	Sd/-	Sd/-
Jaipur Vidyut Vitaran Nigam Limited	Ajmer Vidyut Vitaran Nigam Limited	Jodhpur Vidyut Vitaran Nigam Limited	Adani Power Rajasthan Limited

provided that in case the Seller has not provided such notice, the Procurers shall have the right to issue such notice to the 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.”*

38. The case of the Appellant is subsequent to 30.07.2009, several changes occurred with reference to various statutory taxes, duties, impositions and charges, which affect the cost and revenue of the generator. It is not in dispute that when such Change in Law event occurred, the Appellant notified the Appellant Discoms, concerned Discoms on different dates. It is also seen that the impugned order came to be passed in a separate petition filed by the Appellant-Adani Power being Petition No. 920 of 2016. It is also not in dispute that this petition came to be filed subsequent to RERC reserving orders for pronouncement in Petition No. 577 of 2015 claiming 8 (eight) events as Change in Law. Another 4 (four) events including carrying cost claim came to be made by filing IA in Petition No. 920 of 2016. Ultimately, 3 (three) out of 12 (twelve) claims came to be allowed rejecting the rest of the claims pertaining to Change in Law events. Both, Adani Power and Appellant Discom, are before this Tribunal aggrieved by the impugned order. Appeal No. 284 of 2017 is filed by Adani Power and Appeal No. 9 of 2018 is filed by the concerned Discom. They have also claimed carrying cost for the past period in Appeal No. 284 of 2017.

39. We will first consider such allowances/cost, which were disallowed by the Commission, which are the claims, which form the claims of Adani Power in Appeal No. 284 of 2017.

40. First we will take up the issue of 'Coal Terminal Surcharge'. Respondent-RERC apparently disallowed this Coal Terminal Surcharge by placing reliance on its own Order dated 15.03.2016 in Petition No. 577 of 2015.

41. The said order dated 15.03.2016 was challenged in Appeal No. 119 of 2016 before this Tribunal. The 3 Discoms of Rajasthan also challenged the said order dated 15.03.2016, wherein certain claims were allowed by the Respondent-RERC as Change in Law events. The said Appeal was numbered as Appeal No.277 of 2016. Both these appeals were disposed of by a judgment of this Tribunal dated 14.08.2018.

42. It is not in dispute that if Change in Law event occurs seven days prior to cut-off date being bid deadline, such additional cost suffered by either of the parties to the contract must be compensated, in other words by restoring the parties to the same economic position. This also refers to any additional recurring and non-recurring expenditure. The events which amount to Change in Law event in terms of PPA includes any enactment / coming into effect / adoption / promulgation / amendment / modification or repeal of any law in India which also includes rules and regulations framed

pursuant to such Law. Change in interpretation / application of any Law by any Indian Governmental Instrumentality having the legal power to interpret / apply such Law, or any Competent Court of Law. Requirement for obtaining new consents / clearance / permits or change in the terms and conditions prescribed for obtaining any consents / clearances / permits or inclusion of any new terms or conditions for obtaining such consents / clearances / permits. Any change in tax / introduction of any tax made applicable for supply of power by the seller as per the terms of the PPA.

43. The Discoms in the present appeal also contend that in terms of 5th bullet of Article 10.1.1 of PPA, it would only mean that change in tax or introduction of any tax will only be applicable to supply of power, which also means sale of power if definition of supply is taken into consideration in terms of the statute. Therefore, they contend that if specific provision dealing with tax under Change in Law is provided, then other provisions of Change in Law in other Article cannot be taken into consideration. Therefore, no other tax implications would fall within the ambit of Change in Law in terms of PPA.

44. The contention of the Appellant-Adani Power is in terms of settled law by the Apex Court since generation, transmission, delivery and consumption are part of supply of power since all these activities are

simultaneous rather instantaneous to ensure supply of power to the Discoms, therefore the applicable taxes on inputs for generation of power has to be considered as taxes on supply of power. The Appellant-Discom in the above appeal also has raised the contention that strict reliance has to be placed on the specific provision applicable to tax or introduction to new tax vis-à-vis supply of power. If such narrow interpretation of terms of PPA restricting the said change in tax or introduction of any new tax only to sale/supply of power, then the other provisions of PPA, which refers to Change in Law during construction period would have no meaning at all and the said provision will be redundant. Therefore Change in Law provisions apply during the operating period of PPA whenever there is Change in tax/duties/levies etc., or imposition of new taxes, duties, levies etc., during operation period i.e., on input cost with reference to activity of generation of power which includes simultaneously or instantaneously, transmission, delivery and consumption. Therefore, this Tribunal in the Judgment dated 14.08.2018 in Appeal Nos. 119 & 277 of 2016 has already opined that the Change in tax, levies, duties or introduction of new levies, duties etc., of supply of power covers the taxes on inputs which are necessary for generation of power and supply of power to the Discoms.

45. Pertaining to Coal Terminal Surcharge, in the said Judgment of the Tribunal by reversing the order of the Respondent-Commission in Appeal

No. 577 of 2015 has allowed such busy season surcharge and increase in development surcharge levied on transportation of coal by Indian Railways by opining that Indian Railways is an instrumentality of Government of India. Apparently, CERC by its Order dated 02.04.2019 in the matter of **“GMR Kamalanga Energy Limited vs. Dakshin Haryana Bijli Vitran Nigam Limited & Ors** in Petition No. 72/MP/2018 has allowed levy of Coal Terminal Surcharge by Indian Railways as Change in Law. In view of the above, we are of the opinion that Coal Terminal Surcharge also to be allowed as change in law event.

46. ‘CG Paryavaran Upkar’ and **‘CG Vikas Upkar’** was introduced by Notification dated 16.06.2015 issued by Chhattisgarh Government under Section 8 of Chhattisgarh Adhosanrachna Vikas Evam Paryavaran Upkar Adhiniyam, 2005. This was followed by order issued by Joint Secretary of MoEF dated 28.04.2016 wherein a direction was given to comply with the said amendments made by State Government or Union Territories. Though not exact levy but in principle such Change in Law event was allowed by this Tribunal in Appeal No. 119 of 2016 by its judgment dated 14.08.2018. In the order dated 15.03.2016, the Commission opined that the said claim for forest tax could not be allowed on the ground that forest tax is in the nature of a fee, which does not amount to Change in Law, but setting aside the said opinion, this Tribunal opined that levy of such fee/tax

could not have been factored in by the bidder at the time of submitting bid. In other words, such tax or fee could not have been factored in at the time of submission of the bid, therefore this Tribunal in the above said judgment opined that levy of forest tax or fee cannot be considered as part of pricing mechanism for coal, therefore it cannot form part of CERC escalation rates for coal. Therefore, any such increase in expenses related to coal due to such levy must fall within Change in Law in terms of Article 10.1.1 of PPA, hence, allowed the said claim. Since this Judgment covers the field on this point as on today, we allow the said 'CG Paryavaran Upkar' and 'CG Vikas Upkar' as Change in Law event, in favour of Adani Power.

47. The next claims are towards '**Change in Service Tax Rate** during Operation Period' and '**Change in Swacch Bharat Cess @ 0.5% on Service Tax for Operation Period**' and '**Change in Krishi Kalyan Cess @ 5% on Service Tax for Operation Period**'. Common arguments were addressed relating to these claims. According to the Appellant this tax/levy/duty came into effect subsequent to cut-off date. It is further contended that these rates were notified by Government of India Notifications or by Notifications issued by Railways. According to the Appellant the reasoning and opinion of the Commission on these issues is not justified since the Commission failed to appreciate that the provisions of RFP cannot override the express right conferred on a party (affected

party) under the PPA to claim Change in Law compensation so long as these fall within the ambit of Change in Law events. In support of their contention, they place reliance in the Judgment of this Tribunal in Appeal No. 161 of 2015, dated 19.04.2017. Para 44 of which reads as under:

“44. It is true that according to the provisions of the RFP, the quoted tariff shall be inclusive one including statutory taxes, duties and levies. But the PPA gives express right to an affected party to claim Change in Law if the event qualifies thus in terms of Article 13. The RFP cannot override this right if an event qualifies as a Change in Law. The Competitive Bidding Guidelines (Article 4.7 thereof has already been reproduced hereinabove) and the PPA have to be read together. If an event qualifies as a Change in Law event then the compensation must follow because otherwise Article 13 of the PPA will become redundant.....”

48. Apart from that in the Judgment of this Tribunal dated 14.08.2018 stated above, such Change in Law events were allowed on the ground that supply of power covers the tax on inputs required for such generation and supply of power to Discoms. Therefore, it amounts to Change in Law. That being the situation, once the event qualifies as Change in Law event, then automatically compensation must follow, otherwise the very terms and conditions of PPA will become purposeless. ‘Swacch Bharat Cess’ and ‘Krishi Kalyan Cess’ during operation period of the project would squarely fall within the ambit of Change in Law event, therefore, the Respondent-Commission was not justified in denying the same as part of

quoted tariff or on the ground that the provision of escalation provided in the PPA covers such event. In the light of specific and express provision for Change in Law in the PPA, there was no need for the bidder to cover such taxes in the quoted tariff. Apparently, bidders cannot anticipate such change/introduction of tax, duty, levy at the time of submitting the bid.

49. Coming to the issue of 'Carrying Cost', according to the Appellant, in terms of Judgment of this Tribunal dated 13.04.2018 passed in Appeal No. 210 of 2017 at Pg. 26 to 28 of the Judgment); judgment of this Tribunal dated 14.08.2018 passed in Appeal Nos. 119 & 277 of 2016 (Para xxix, xxx) and judgment of the Hon'ble Supreme Court dated 25.02.2019 in ***Uttar Haryana Bijli VitranNigam & Anr. vs. Adani Power Ltd. & Ors.*** (2019 (5) SCC 325) (Para 10, 13 and 19), the Appellant-Adani Power is entitled for such carrying cost even for the past period. The relevant paragraphs in these judgments read as under:

Para (x) of Appeal No. 210 of 2017 (at page 69 of the Judgment)

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

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

(Para xxix, xxx) of Appeal Nos. 119 & 277 of 2016

“xxix Now let us analyse the provisions of the PPA in the present case in light of the above judgement of this Tribunal. The relevant extract from the PPA is reproduced 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 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.”

From the above it can be seen that due to Change in Law event, the affected party is to be restored to the same economic position as if Change in Law event has not occurred.

Further, from the perusal of the PPA we hold that the allowed Change in Law event (s) is to be passed on to the Procurer by way of adjustment in Tariff.

xxx. We also observe that the PPA in the present case is having similar provisions as in case of the judgement of this Tribunal produced above on the issue related to the carrying cost.

Accordingly, in view of our discussions as above, this issue is considered in favour of APRL/Appellant.”

Paras 10, 13 and 19 of Uttar Haryana Bijli Vitran Nigam's case (2019

(5) SCC 325)

10. Article 13.2 is an in-built restitutionary principle which compensates the party affected by such change in law and which must restore, through monthly tariff payments, the affected party to the same economic position as if such change in law has not occurred. This would mean that by this clause a fiction is created, and the party has to be put in the same economic position as if such change in law has not occurred, i.e., the party must be given the benefit of restitution as understood in civil law. Article 13.2, however, goes on to divide such restitution into two separate periods. The first period is the “construction period” in which increase/decrease of capital cost of the project in the tariff is to be governed by a certain formula. However, the seller has to provide to the procurer documentary proof of such increase/decrease in capital cost for establishing the impact of such change in law and in the case of dispute as to the same, a dispute resolution mechanism as per Article 17 of the PPA is to be resorted to. It is also made clear that compensation is only payable to either party only with effect from the date on which the total increase/decrease exceeds the amount stated therein.

13. 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.

19. Lastly, the judgment of this Court in *Energy Watchdog v. Central Electricity Regulatory Commission*, (2017) 14 SCC 80 was also relied upon. In this judgment, three issues were set out and decided, one of which was concerned with a change in law provision of a PPA. In holding that change in Indonesian law would not qualify as a change in law under the guidelines read with the PPAs, this Court referred to Clause 13.2 as follows:

“57. 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.....”

50. In the light of the settled law so far as carrying cost as stated above is concerned, the contention of the Appellant-Discom that carrying cost for the past period cannot be allowed cannot be accepted and deserves to be rejected.

51. Coming to the challenge made by the Appellant-Discom in **Appeal No. 9 of 2018**, it is seen that ‘National Mineral Exploration Trust’ and ‘District Mineral Foundation’ relate to levies on royalty. The National Mineral Exploration Trust levy has come into effect from 14.08.2015 and District Mineral Foundation levy has come into effect from 12.01.2015. According to the Appellant-Discom the Commission was not justified in allowing the said levy as Change in Law event. According to the Appellant-Adani Power rate of levies on royalty was approved by CERC in following matters:

- a) Adani Power Ltd. vs. Uttar Haryana Bijli Vitran Nigam Limited & Ors., Order dated 06.02.2017 in Petition No. 156/MP/2014.

- b) GMR Kamalanga Energy Ltd. & Anr. vs. Dakshin Haryana Bijli Vitran Nigam Ltd. & Ors., Order dated 03.02.2016 in Petition No. 79/MP/2013(at para 32)
- c) Sasan Power Co. Ltd. vs. MP Power Management Company Ltd. & Ors in Petition No. 153/MP/2015 (at para 28).

52. That apart Royalty issue came up for consideration before this Tribunal and the same came to be allowed by the Judgment of this Tribunal dated 14.08.2018 passed in Appeal Nos. 119 and 277 of 2016. We have gone through the same and the relevant portion of which reads as under:

(Para(ix) at page 77-78)

- ix. *“We observe that in view of the judgement of this Tribunal as quoted above, the letter issued by Gol has no application in the instant case. APRL has also contended that CERC, which publishes the escalation rates, has also allowed the Royalty on coal as a Change in Law event in its Orders. We observe that the contention of APRL is right. CERC has considered change in rate of Royalty as a Change in Law event in Sasan Power Ltd. and GMR Kamalanga cases.*

In view of our discussions as above, the issue of Royalty is decided against the Discoms.”

53. In view of the settled position as on today pertaining to Royalty, we are of the opinion that once this Tribunal in the said Judgment dated

14.08.2018 has allowed Royalty, the levies on NMET and DMF also deserve to be allowed as change in law event.

54. Then coming to 'Swacch Bharat Cess on Rail Freight' and Krishi Kalyan Cess on Rail Freight, these came to be allowed by the Commission in the impugned order. According to the Appellant-Discom these could not have been allowed in terms of 5th bullet of Article 10 of PPA. We have already considered the said argument in the beginning of the discussion. That apart, the CERC in the matter of **EMCO Energy Limited/GMR Warora Energy Limited vs. Maharashtra State Electricity Distribution Company Limited** by order dated 01.02.2017 (at para 91) allowed this issue and the same came to be upheld by this Tribunal in terms of the judgment in Appeal Nos. 119 & 277 of 2016 dated 14.08.2018 while dismissing Rajasthan Discoms Appeal. The relevant portion at para (xi) page 80 of the judgment reads as under:

- ix. *“Thus, we also hold that in view of our decision on tax issue as above the levy of Service Tax by MoR on transportation of coal which was not earlier levied as on cut-off date and falls under the category of Change in Law event. Accordingly, there is no legal infirmity in the order of the State Commission on this issue.*

Hence, this issue is answered against the Discoms/Appellant.”

55. So also in the judgment of this Tribunal in **GMR WARORA Energy Ltd vs. CERC and ors**, Appeal Nos. 111 and 290 of 2017 dated 14.08.2018 service tax on rail freight was allowed as Change in Law. Once levy of service tax on transportation of goods by Indian Railways is allowed, we are of the opinion that 'Swacch Bharat Cess on Rail Freight' and 'Krishi Kalyan Cess on Rail Freight' also deserve to be allowed as Change in Law events.

56. In the light of the above discussion and reasoning, Appeal No. 284 of 2017 deserves to be allowed and Appeal No. 9 of 2018 deserves to be dismissed. Order accordingly. All the pending IAs, if any, shall stand disposed of.

57. Parties shall bear their own costs.

58. Pronounced in the Open Court on this, the **29th day of January, 2020.**

(S. D. DUBEY)
Technical Member

(Justice Manjula Chellur)
Chairperson

✓
REPORTABLE / NON-REPORTABLE

tpd/ts