

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated:30th June, 2014

Present:

HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

Appeal No. 29 of 2013

1. **Nabha Power Limited**
SCO-32, Sector-26D,
Madhya Marg,
Chandigarh-160 019

2. **L&T Power Development Ltd.**
Power Campus, Gate No.1,
'C' Building, 1st Floor,
Saki Vihar Road,
Mumbai-400 072

... Appellant(s)

Versus

1. **Punjab State Power Corporation Ltd.**
PSPCL, Shed No.T-2, Thermal Design Complex,
Patiala-147 001

2. **Punjab State Electricity Regulatory Commission**
SCO No.220-221, Sector 34-A,
Chandigarh

.....Respondent

Counsel for the Appellant : **Mr. S Ganesh, Sr Adv.**
Mr. Aniket Prasoon
Mr. Sitesh Mukherjee
Mr. Sakya Singha Chaudhuri
Ms. Mandakini Ghosh
Ms. Kanika Chugh

**Counsel for the Respondent (s): Mr. M G Ramachandran
Mr. Anand K Ganeshan
Ms. Swatika Sahoo
Ms. Swapna Seshadri for R-1
Mr. Sanjay Sen, Sr Adv
Ms. Sikha Ohri
Mr. Matrugupta Mishra
Mr. Anurag Sharma
Mr. Ruth Elwin for R-2**

J U D G M E N T

**PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,
CHAIRPERSON**

1. Nabha Power Limited Chandigarh and L&T Power Development Limited, Mumbai are the Appellants herein.
2. Both the Appellants filed a Petition before the Punjab State Commission u/s 86 (1) (f) of the Electricity Act, 2003 seeking for a direction to the Punjab State Power Corporation Limited in relation to the disputes arising on account of changes in the Mega Power Policy and the Foreign Trade Policy under Article 13 of the PPA dealing with the "Change in Law" provision.
3. The State Commission, after hearing the parties, dismissed the Petition filed by the Appellants by the Order dated 12.11.2012.
4. Aggrieved by this Order, the Appellants have filed the present Appeal.

5. The short facts are as follows:

(a) The First Appellant i.e. Nabha Power Limited is a Special Purpose Vehicle that has been set-up initially by the Punjab State Electricity Board for developing a Thermal Power Project at Rajpura, Chandigarh.

(b) Appellant-2, L&T Power Development Company, participated in the competitive bidding conducted by the Punjab State Electricity Board for development of the project. The Appellant-2, L&T Power Development Company was selected as the successful bidder.

(c) Pursuant to being selected as the successful bidder, the second Appellant, L&T Power Development Company took over the Nabha Power Limited.

(d) The Punjab State Power Corporation Limited (State Power Corporation) is the 1st Respondent. It is a successor entity of erstwhile State Electricity Board.

(e) Upon unbundling of the State Electricity Board, the State Power Corporation has been constituted as a separate entity succeeding to the generation and distribution business of the State Electricity Board. The second Respondent is the Punjab State Commission.

(f) The erstwhile State Electricity Board intending to procure power through competitive bidding decided to invite bids from Power Project developers to set-up the project.

(g) In terms of the competitive bidding guidelines, the State Electricity Board incorporated a Special Purpose Vehicle i.e. Nabha Power Limited to act as its authorised representative for carrying out pre bids obligation on behalf of the State Electricity Board.

(h) Accordingly, the First Appellant acting as an authorised representative of the State Electricity Board on 10.6.2009, issued Bidding Documents for selection of a developer through tariff based competitive bidding process for procurement of power on long term basis. The bid was invited in accordance with the Government of India guidelines.

(i) Earlier, the Government of India notified Mega Power Policy, 2006 on 2.8.2006.

(j) As per this policy, the primary condition of being treated as a Mega Power Project was that the project should supply the power from its power project to two or more States.

(k) The Union Cabinet held a meeting on 1.10.2009 and took a decision on the modification to the existing

Mega Power Policy and extended the benefits under the Mega Power Policy to a thermal power project of 1000 MW or above, irrespective of whether it was supplying power to one or more than one State.

(l) This decision of the Union Cabinet was published by way of Press Release through the Press Information Bureau on 1.10.2009 itself.

(m) As a result of the modification of the Mega Policy, 2006 by virtue of the Cabinet decision even the project which was supplying power to only one State became eligible to the benefits under Mega Power Policy.

(n) The second Appellant on coming to know about the decision of the Union Cabinet requested the State Electricity Board for extension of bid deadline through letter dated 2.10.2009 on account of recent changes in the then existing Mega Power Policy, 2006. However, this request was rejected by the State Board.

(o) Again on 6.10.2009, the Second Appellant sent another letter to the State Electricity Board stating that the bid was being submitted by the Appellant in the light of the changes approved by the Union Cabinet in the Mega Power Policy, 2006 on 1.10.2009.

(p) However, the State Electricity Board, on receipt of the said letter, asked the Appellant to withdraw the said letter stating that such letter was extraneous and the same would not be entertained. Accordingly, the Appellant took back the letter dated 6.10.2009.

(q) As per the bid deadline for submission of bids under the Bidding Documents, the Appellant -2 and others submitted the bids within the said deadline on 9.10.2009.

(r) After the Bid process was over, the Second Appellant was selected as a successful bidder for the development of the power project. In view of the same, the State Electricity Board issued the Letter of Intent in favour of the second Appellant on 18.11.2009.

(s) Thereupon, on 3.12.2009, the Ministry of Power, Government of India sent a letter to the States and Union Territories notifying the terms and conditions required to be satisfied for power project being eligible under the Mega Power Policy pursuant to the Union cabinet decision on 01.10.2009 on the modification to the Mega Power Policy.

(t) Then, the Ministry of Finance, Government of India on 11.12.2009, issued a Customs Notification

regarding amendment in exemption notification regarding Mega Power Projects. Subsequently on 14.12.2009, the Ministry of Power, Govt. of India issued an office memorandum regarding the Revised Mega Power Policy.

(u) At that stage, on 18.1.2010, the Appellant executed a Power Purchase Agreement with the State Electricity Board, the predecessor of the State Power Corporation providing for the terms and conditions for the supply of electricity by the Appellant. On 16.4.2014, the erstwhile State Electricity Board was unbundled into separate Corporations.

(v) Thereafter, on 11.5.2010, the Appellant made an Application to the Ministry of Power for grant of Mega Power status to the project. Accordingly, the Ministry of Power, Central Government on 30.7.2010, on the basis of the Application made by the Appellants and on the communication issued by the Government of Punjab, granted Mega Power status to the power project of the Appellant.

(w) Thereupon, the Appellant was required to obtain the Essentiality Certificate from the Department of Energy, Government of Punjab. However, Department of Energy, Government of Punjab asked

the Appellant to get the recommendations from the State Power Corporation for issuance of the Essentiality Certificate. But, the State Power Corporation refused to issue Essentiality Certificate unless the Appellant gave an undertaking to the State Power Corporation to pass on the benefits accrued to the project to the State Power Corporation after the submissions of the bids on account of becoming a Mega Power Project.

(x) With reference to this issue, there was correspondence between both the parties. Ultimately, the Appellant informed the State Power Corporation that it was not required to furnish any such undertaking. In this process, there was an inordinate delay in issuing the recommendation. Therefore, the Appellant had no other option but to issue undertaking to the Power Corporation under protest. Finally, the Essentiality Certificate was issued by the Department of Energy on 13.6.2011.

(y) Thereupon, correspondence was exchanged between the Appellant and the State Power Corporation for issuance of the second Essentiality Certificate for importing further goods for the project. After submitting the bids for the project, Foreign Trade Policy (FTP) provisions were amended, on account of

which the benefits which were earlier available to the project have been withdrawn. Therefore, the Appellant made a 'Change in Law' benefits claim against the Power Corporation.

(z) According to the State Power Corporation there had been no 'Change in Law'. Under those circumstances, the Appellants filed a Petition on 22.5.2012 before the State Commission u/s 86 (1)(f) of the Electricity Act, 2003 to resolve the disputes between the Appellants and the State Power Corporation arising on account of changes in the Mega Power Policy and Foreign Trade Policy (FTP).

(aa) By interpreting Article 13.1 of the PPA dealing with the 'Change in Law' provision, the State Commission after hearing the parties passed the Impugned Order on 12.11.2012 rejecting the prayer of the Appellants. Hence, the present Appeal.

6. The learned Senior Counsel for the Appellant has made the following submissions while assailing the Impugned Order:

(a) The Appellant's case is based upon reading and the correct interpretation of the relevant Clauses of the PPA dated 18.1.2010 entered into between the Appellant and the State Electricity Board, the predecessor of the State Power Corporation including

Article 13 of the PPA which relates to the 'Change in Law'.

(b) By reason of Union Cabinet decision dated 1.10.2009 which was made known to the general public by a Press Note on the same day, there was a 'Change in Law' within the meaning of Article 13 of the PPA. Since a decision was taken on 1.10.2009 by the Union Cabinet, the 'Change in Law' occurred before the cut-off date of 2.10.2009 in respect of the eligibility of the power project to be considered as Mega Power Project. Before the cut off date of 2.10.2009, there was a very significant change in the eligibility condition which had to be fulfilled by power project in order to be considered as a Mega Power Project and to be entitled to claim for all the benefits available to Mega Power Project. Before, 1.10.2009, a project was eligible to be considered as a Mega Power Project only when it supplied power to two or more States. This basic eligibility condition was deleted by the decision of the Union Cabinet which was announced on 1.10.2009. Public was informed that the Power project which supplied power even to one State, became eligible to be considered as a Mega Power project.

(c) Union Cabinet's decision which was made known to the general public on 1.10.2009 would constitute a 'Change in Law'. By this decision, the members of the general public including the Appellant acquired the right in law to enforce the Union Cabinet's decision. It does not at all matter that even after the change in eligibility condition; the eligible project would have to comply with various other conditions for the purpose of becoming entitled to Mega Power Project benefits. The mere fact that these other conditions have not been complied with by a particular party, it does not at all lead to the conclusion that there was no 'Change in Law' before the cut off date. This aspect has not been considered by the State Commission in the Impugned Order.

(d) In the alternative, the Appellant's prayer is this: In the event of the Appellant's submission regarding the 'Change in Law' on the basis of Mega Power Policy not being accepted by this Tribunal then, in that event, the Appellants are entitled to rely upon the 'Change in Law' in respect of the benefits available to the project under the Foreign Trade Policy 2009-14 as a Non Mega Power Project which were withdrawn after the said cut off date 2.10.2009. Therefore, even assuming that the Appellant was not eligible for the

‘Change in Law’ on the basis of the Cabinet decision taken on 01.10.2009 regarding medication in Mega Power Policy, the Appellant was certainly eligible for the benefits under Foreign Trade Policy as on the cut-off date 2.10.2009, which were withdrawn subsequently through a clarification by the Govt. of India. This alternative prayer also has not been given due consideration by the State Commission in the Impugned Order.

7. On these grounds, the Appellants have prayed that the Impugned Order be set aside and the consequential orders be passed.
8. In reply to the above arguments, the learned Counsel for the State Power Corporation, the contesting Respondent strenuously submits that the State Commission has dealt with these issues in detail and gave elaborate reasonings to reject the claims of the Appellant and that therefore, the Impugned Order does not call for any interference. He also elaborately argued in support of the conclusion arrived at by the State Commission contending that both the main prayer as well as the alternative prayer, cannot be granted to the Appellants in view of the correct interpretation of the various Clauses of the PPA especially Clause 13 of the PPA by the State Commission. In short, the learned Counsel for the

Respondent prayed for the dismissal of this Appeal as devoid of merits.

9. We have carefully considered the submissions of both the parties and given our thoughtful consideration.

10. As enumerated above, the Appellant has sought for two prayers:

(a) The Appellant has attained the eligibility to become Mega Power Project on 1.10.2009 itself since the Union Cabinet took a decision on 1.10.2009 and made known to the general public by way of a press note to the effect that the Mega Power policy would apply to the project supplying the power even to one State and therefore, the Appellant is entitled to the benefits of Mega Power Policy as per the Union Cabinet decision dated 1.10.2009 as there was a "Change in Law" within the meaning of Article 13 which occurred before the cut-off date namely 2.10.2009.

(b) The Second prayer is an alternative prayer. In the event the Appellant's submission regarding 'Change in Law' on the basis of Mega Power Policy not being accepted by this Tribunal, then in any event the Appellants are entitled to rely upon the change in law in respect of the benefits available to

the project under the Foreign Trade Policy 2009-14 as a Non Mega Power Project which occurred after the said cut-off date namely 2.10.2009.

11. As indicated above, both the claims through these prayers have been rejected by the State Commission by the Impugned Order dated 12.11.2012.
12. The main prayer as referred to above is with reference to the 'Change in Law' in respect of the eligibility of the project to be considered as a Mega Power Project on 1.10.2009 by reason of the Union Cabinet decision which has been taken on that date and informed to the public. The alternative prayer is in respect of 'Change in Law' relating to the eligibility for the benefits of Foreign Trade Policy.
13. The main question with regard to the main prayer made by the Appellant is as follows:

“Whether there has been a ‘Change in Law’, within the meaning of Article 13 of the PPA dated 18.1.2010 with reference to the Mega Power Policy which has occurred either before or after the cut-off date on 2.10.2009?”

14. While dealing with the said question, it is appropriate to refer to both the prayers sought for by the Appellants before the State Commission as well as the findings on those prayers by the State Commission.

15. The prayers made by the Appellant in the Petitions are quoted as under:

“Prayer: *The petitioners have prayed as under:*

(a) declare that the decision of the Union Cabinet dated 01.10.2009 modifying the Mega Power Policy 2006 reported vide Press Information Bureau on the same date does not amount to „‘Change in Law’” under Article 13 of the PPA;

(b) following the declaratory relief sought by the petitioners, hold that consequential relief as set out under Article 13.2 of the PPA has not triggered and no consequential benefits under Article 13 have to be passed on to the respondent by the petitioner under the PPA on account of Union Cabinet’s decision dated 01.10.2009 to change the Mega Power Policy 2006;

(c) in alternative, if relief sought under Para (i) and (ii) above are not granted, then to direct and allow that the petitioners shall be entitled to claim „‘Change in Law’” against the respondent’s claim on the basis of withdrawal of fiscal benefits which were available to the Project under the Foreign Trade Policy on the date of bidding on standalone basis, without considering Mega Power Policy, 2009”.

16. These prayers would show that the Appellants as the Petitioners before the State Commission sought for a declaration from the State Commission that the decision of the Union Cabinet dated 1.10.2009 modifying the Mega Power Policy, 2006 which was announced to the public on the same date would amount to ‘Change in Law’ occurring before the cut off date and therefore no consequential

benefits under Article 13 of the PPA would be passed on to the Respondent, the State Power Corporation.

17. As indicated above, the alternative prayer is that even assuming that the Petitioners are not given the above relief in respect of the Mega Power Policy, they were in any event, entitled for the fiscal benefits under the Foreign Trade Policy (FTP) on the cut off date and therefore withdrawal of the financial benefit under FTP would amount to “Change in Law” which the Appellants would be entitled to claim against the Respondent’s claim for consequential benefits under ‘Change in Law’ in respect of Mega Power Policy occurring after the cut off date.
18. Let us now refer to the findings with regard to the main prayer made by the Petitioner/Appellants in regard to the Mega Power Policy:

“14. Findings: The contention of the petitioners is that Article 13 of the PPA executed between the petitioner no.1 and the respondent dealing with ‘Change in Law’ has no application in the present case as the amendment to the Mega Power Policy was announced by the Union Cabinet in the press release dated 01.10.2009.

However, The contention of the respondent is that the ‘Change in Law’ in the form of amendment to the Mega Power Policy came into force not on the date of the press release on 01.10.2009 but much after the cut-off date of 02.10.2009, being 7 days prior to date for submission of bids i.e. 09.10.2009 and therefore,

Article 13 applies to the respondent for getting the benefit accruing due to concessional duties etc.

Considering the aforementioned observations, the Commission finds that irrespective of the difference in opinion regarding the date of availability of the Mega Power Status to the Project under the Mega Power Policy of the Ministry of Power, Government of India i.e. date of the decision of the Union Cabinet (01.10.2009) or the date of the notification(s) by Government of India, through Ministry of Power dated 14.12.2009 and Ministry of Finance dated 11.12.2009, the Mega Power Status was to be made available to the Project subject to, the State in which the Project was being set up, undertaking the reforms intimated vide Ministry of Power's letter dated 03.12.2009. The Commission notes that the same were undertaken by the Government of Punjab on 16.04.2010 and intimated to the Central Government vide its letter dated 30.04.2012. The Commission further notes that the respondent no.1, thereafter, made an application, vide its letter dated 11.05.2010, to the Ministry of Power specifically informing that as per its understanding, the Government of Punjab vide letter dated 30.04.2010 has fulfilled the conditions required in respect of carrying out the necessary reforms for enabling a Project being set up in the State for grant of Mega Power Status and has carried out the requisite reforms, and therefore, the Project is eligible for grant of Mega Power Status, which was granted by the Ministry on 30.07.2010. This clearly establishes that the Project became eligible for grant of Mega Power Status and acquired the same only after the State Government carried out the requisite reforms and thereafter the Mega Power Status was granted to the Project. The grant of Mega Power Status under the Mega Power Policy was contingent upon the concerned State carrying out the reforms which was done by the Government of Punjab on

16.04.2010. Rightly so, the petitioner no.1, applied for the Mega Power Status on 11.05.2010 i.e. after the date of reforms carried out by the Government of Punjab on 16.04.2010 and not immediately after the decision of Union Cabinet on 01.10.2009 or the notifications of the Ministry of Finance dated 11.12.2009 and Ministry of Power dated 14.12.2009. Even the recommendations by the Government of Punjab to the Customs authorities for custom duties concession/exemption, in view of the Mega Power Status of the Project, were subject to PSPCL "s right for appropriate decrease in Tariff on account of reduced capital cost of the Project in terms of Article 13 of the PPA with respect to provision of 'Change in Law'.

Furthermore, the Commission is of the view that the benefit of Mega Power Status can not be granted w.e.f. 01.10.2009 considering that it is only after the gazette notification that public at large is informed of the decisions of the Government. As submitted by the respondent, the Commission notes that all the detailing in respect of the amendment in the Mega Power Policy was not available in the press release dated 01.10.2009. The same was covered in the letter dated 03.12.2009 of the Ministry of Power to the States and in the notification of the Ministry of Power dated 14.12.2009. The Commission also notes the submission of the respondent that the press release itself provided for the disclaimer that though all efforts have been made to ensure the accuracy and currency of the content on the website of the Press Information Bureau, Government of India, the same should not be construed as a statement of Law or used for any legal purposes. Also, the Commission notes that as submitted by the respondent, Section 25 of the Customs Act, 1962 provides that, unless otherwise provided, every notification issued under sub-section(1) or (2A) shall come into force on the date of its issue by

the Central Government for publication in the Official Gazette.

In view of the above findings, the Commission holds that since the Mega Power Status was granted to the Project under the Mega Power Policy by the Ministry of Power on 30.07.2010 on the application dated 11.05.2010 filed by the respondent no.1, having become eligible on 16.04.2010, the benefits, if any, accruing there under to the Project would be applicable only from 30.07.2010 and not from any prior date, notwithstanding that the decision for granting the Mega Power Status was taken/announced on 01.10.2009 or the notifications in respect of the said decision of the Union Cabinet were issued by the concerned Ministries of the Government of India on 11.12.2009 and 14.12.2009. Accordingly, the Commission is unable to grant the aforementioned prayers (a) and (b) in this petition.

19. The crux of the findings rendered by the State Commission rejecting the claim of the Appellants/Petitioners are as follows:

(a) According to the Petitioners, Article 13 of the PPA executed between the Petitioner and the Respondent dealt with the change in the law has no application to the present case as the amendment to the Mega Power Project was announced by the Union Cabinet through the Press Release on 1.10.2009 itself. Per contra, the Respondent Power Corporation has contended that the 'Change in Law' in the form of amendment to the Mega Power Policy came into force

not on the date of Press Release on 1.10.2009 but much after the cut-off date of 2.10.2009 and therefore, Article 13 applies to the Respondent Power Corporation for getting the benefit accruing due to concessional duties.

(b) The Government of India through Union Cabinet took a decision on 1.10.2009. The Ministry of Finance and Ministry of Power issued Notifications on 11.12.2009 and 14.12.2009 respectively to the effect that Mega Power status was to be made available to the project subject to some conditions. Thereafter, the Government of Punjab undertook the process and intimated the Central Government through its letter dated 30.4.2010. Thereupon, the Power Corporation made an application to the Ministry of Power informing that as per the understanding, the Government of Punjab by the letter dated 30.4.2010 fulfilled the conditions required in respect of carrying out necessary reforms for enabling the project being set-up in the State for grant of Mega Power status. Then the Mega Power status was granted to the Project on 30.7.2010. This shows that the benefits accruing to the Project under Mega Power Policy would be applicable only from 30.7.2010.

(c) The First Petitioner applied for the Mega Power status on 11.5.2010 i.e. after the date of reforms carried out by the Government of Punjab. Admittedly, this application was not made immediately after the decision of the Union Cabinet on 1.10.2009 or immediately after the Notification of the Ministry of Finance issued on 11.12.2009.

(d) The State Commission is of the view that the benefit of Mega Power status cannot be granted to the Appellant w.e.f. 1.10.2009 in view of the fact that it will come into effect only after the gazette notification through which public at large was informed of the decision of the Government.

(e) All the details in respect of the amendment in the Mega Power Policy were not made available in the press release dated 01.10.2009. But, the same was covered only in the letter of Ministry of Power issued on 03.12.2009 and in the notification of Ministry of Power dated 14.12.2009.

(f) In fact, the Press release issued on 1.10.2009, itself provided for the disclaimer that though all efforts have been made to ensure the accuracy and currency of the content on the website of the Press Information Bureau, Government of India, the same should not be

construed as a statement of Law or used for any legal purposes. That apart, Section 25 of the Customs Act, 1962 also provides that every notification issued under the Act shall come into force only on the date of its issue of notification by the Central Government for publication in the Official Gazette.

(g) Since the Mega Power status was granted to the Project under the Mega Power Policy by Ministry of Power on 30.7.2010 on the Application dated 11.5.2010 made by the Petitioner, the benefits accruing there under to the Project would be applicable only from 30.7.2010 and not from any other prior date. Therefore, the prayer for not allowing consequential benefit under Article 13 of PPA to the Respondent, Power Corporation on account of grant of Mega Power status benefits in favour of the Petitioner is rejected.

20. In the light of the above findings, let us deal with the main issue in question.

21. The learned Senior Counsel for the Appellant has cited the following decisions to substantiate his submissions:

(a) State of Bihar Vs Suprabhat Steel Limited
1999 (1) SCC 31

(b) Union of India v Shree Ganapati Rolling
Mills Pvt Ltd and Ors (2006) GLR 586

- (c) State of Jharkhand v Tata Cummins Limited and Anr., 2006 (Suppl) GLT 211;
- (d) Kashmir Lal v State of Punjab AIR 1984 P&H 87
- (e) Subash Ram Kumar V State of Maharashtra (2003) 1 SCC 506
- (f) Dayal v The Collector, Nagpur 1962 Raj L W 32
- (g) CIT Bombay v Amritlal Bhogilal (1959) 1 SCR 713
- (h) State of Rajasthan v Sripal Jain (1964) 1 SCR 742
- (i) Dattatraya Moreshwar Pangarkar v State of Bombay & Ors., 1952 SCR 612

22. The learned Counsel for the Respondent has cited the following authorities in support of his reply:

- (a) Union of India v Ganesh Das Bhojraj (2000) 9 SCC 461;
- (b) Gujarat Urja Vikas Nigam Limited v Essar Power Limited (2008) 4 SCC 755;
- (c) B K Srinivasan v State of Karnataka (1987) 1 SCC 658;
- (d) J P Bansal V State of Rajasthan & Another (2003) 5 SCC 134;
- (e) Bimla Nand Prasad & Others v State of Bihar & Ors, 1994 Supp (3) SCC 753;
- (f) Eurotex Industries and Exports Limited and Others v Union of India and Others (Bombay High Court judgment dated 9.3.2011)

23. The nature of controversy which arises in this Appeal relates to the question **as to when did the 'Change in Law' of eligibility of grant of Mega Power Status occurred?**
24. As pointed out by the learned Counsel for the Respondent, the Appellant would be entitled to retain such benefits of Mega Power project only when 'Change in Law' has occurred prior to 2.10.2009 namely the cut off date specified in Article 13 with reference to the bid deadline namely 9.10.2009.
25. In other words, if the 'Change in Law' has occurred after the above cut-off date, the Appellant is not entitled to retain such benefits under Mega Power Policy and is required to pass on the benefits to the Power Corporation, the First Respondent.
26. According to the State Commission there was no 'Change in Law' by 2.10.2009 i.e. by the cut-off date for the Appellant to retain the benefits accruing from being granted the Mega Power status. The State Commission has come to the conclusion in the Impugned Order that the 'Change in Law' giving effect to the benefits of Mega Power status for the project occurred only after 2.10.2009 and therefore, such benefit was required to be passed on to the Respondent Power Corporation in terms of Article 13 of the Power Purchase Agreement till the 'Change in Law' occurred.

27. The Appellant's contention is that the decision of the Union Cabinet of Central Government on 1.10.2009 which was announced to the public through the Press Release dated 1.10.2009 itself would amount to 'Change in Law' with regard to the Mega Power status being given to the Appellant's project in terms of the various definitions contained in the PPA inclusive of Article 13 which deals with the 'Change in Law'.
28. Now let us refer to the relevant provisions of the Power Purchase Agreement:

"Definitions:

"Bid Deadline" shall mean the last date for submission of the bid, in response to the RFP, specified in Clause 2.8.1 of the RFP.

*"Law" means, in relation to this Agreement, all laws including Electricity Laws in force in India and **any statute, ordinance, regulation, notification or code, rule**, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and shall further include all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include all rules, regulations, decisions and order of the Appropriate Commission;"*

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Article 13: 'Change in Law'

13.1 Definitions

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

13.1.1 ‘Change in Law’ means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline:

(i) the enactments, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law or (ii) a change in interpretation of any Law by a Competent Court of Law, tribunal or Indian Governmental Instrumentality provided such Court of Law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation or (iii) change in any consents, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer under the terms of this Agreement, or (iv) any change in the (a) Declared Price of Land for the Project or (b) the cost of implementation of the resettlement and rehabilitation package of the land for the Project mentioned in the RFP or (c) the cost of implementing Environmental Management Plan for the Power Station (d) Deleted

but shall not include (i) any change in any withholding tax on income or dividends distributed other shareholders of the Seller, or (ii) change in respect of UI Charges or frequency intervals by an Appropriate Commission.

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29. The Appellant’s main claim as mentioned earlier that the ‘Change in Law’ of Mega Policy providing for the benefits to be given to the power purchase having agreements for sale

of power to one State came into effect on 1.10.2009 itself when a Cabinet decision was taken by the Central Government which was intimated to the public through the Press Release.

30. According to the Respondent Power Corporation, the Cabinet decision and the press release issued on 1.10.2009 did not have the effect of 'Law' or "Change in Law" within the meaning of Article 13 of the PPA.
31. It is further contended by the Respondent that the Cabinet decision was an in principle decision. The 'Change in Law' was occurred only on 11.12.2009 after exemption notifications were issued.
32. In the light of the rival contentions let us look into the definition of the term 'Law' which reads as under;

*"**Law**" means, in relation to this Agreement, all laws including Electricity Laws in force in India and **any statute, ordinance, regulation, notification or code, rule**, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and shall further include all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include all rules, regulations, decisions and order of the Appropriate Commission;"*

.....

33. So, as per this definition law is:

(a) Statute; or

- (b) Ordinance; or
- (c) Regulation; or
- (d) Notification; or
- (e) Code; or
- (f) Rules; or
- (g) Any interpretation of any of them by the Indian Government instrumentality and having the force of law as provided in the definition of the term 'Law'.

34. The careful reading of the definition of the law would make it clear that the decision or order would relate to the decision of the Appropriate Commission. This means it is only the decisions and orders of the Appropriate Commissions that are included in the term "law".
35. Thus, the term 'law' has been defined including only the statutory laws, notifications, regulations, ordinances, codes and rules etc and not a decision of the Indian Government instrumentality.
36. The specific reference to the decision and orders relating to the Appropriate Commission would reveal that the decision of the Government is not a law, till they assume statutory form mentioned specifically.
37. The press release of the Cabinet decision dated 1.10.2009 did not indicate the terms and conditions on which the Mega Power status would be made available to the projects

selling power to a single State. In other words, the details have to be worked out and appropriate Notification containing those details was to be issued specifically.

38. In other words, the press release of the Government of India issued on 01.10.2009 cannot be termed as a law or having any enforceable effect.

39. The press release is only a communication of the decision taken by the Cabinet of Government of India for the proposed amendment to the Mega power Policy. In short, the press release by the Press Information Bureau cannot be construed as the statement of law or used for any legal purpose as conferring a right. In fact, the press release itself provided for the disclaimer. The same is as follows:

“This website is designed, updated and maintained by Press information Bureau, Government of India. Though all efforts have been made to ensure the accuracy and currency of the content on this website, the same should not be construed as a statement of law or used for any legal purposes.....”

40. It is settled law that the law has to be in accordance with the statute or notification issued under the statute.

41. In the present case the Notification was issued on 11.12.2009. This Notification specifies the terms and conditions for eligibility for grant of status of Mega Power. This Notification dated 11.12.2009 u/s 25 of the Customs Act, 1962 constitutes the ‘Change in Law’ within the meaning of Article 13.

42. In other words, the above Notification was law within the meaning of Article 13 read with the definition of the term 'law', as provided in the Power Purchase Agreement. The Appellant became entitled to avail the benefit of Mega Power Policy only when the Government of Punjab granted the Mega Power status to the power project of the Appellant on 30.7.2010 on the basis of the application dated 11.5.2010 filed by the Appellant to the Ministry of Power, Government of India. All these things have taken place subsequent to the cut-off date as provided in Article 13.

43. In respect of Custom Exemption, Section 25 of the Customs Act itself provides for the Notification to be issued. The Relevant provision is as follows:

"SECTION 25: Power to grant exemption from duty,

(1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification goods of any specified description from the whole or any part of duty of customs leviable thereon.

(2) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by special order in each case, exempt from the payment of duty, under circumstances of an exceptional nature

to be stated in such order, any goods on which duty is leviable.

.....

*(4) Every notification issued under sub-section (1) [or sub-section (2A)] shall, - **unless otherwise provided, come into force on the date of its issue by the Central Government for publication in the Official Gazette;***

also be published and offered for sale on the date of its issue by the Directorate of Publicity and Public Relations of the Board, New Delhi.

*(5) **Notwithstanding anything contained in sub-section (4), where a notification comes into force on a date later than the date of its issue, the same shall be published and offered for sale by the said Directorate of Publicity and Public Relations on a date on or before the date on which the said notification comes into force.***

44. While interpreting this Section, the Hon'ble Supreme Court in the Case of Union of India Vs Ganesh Das Bhojraj (2000) 9 SCC 461 has categorically held that the Notification u/s 25 of the Customs Act would come into operation only when it was issued in the official gazette and not earlier.

45. In the present case, since the Notification had been issued only on 11.12.2009, there cannot be any question of the Appellant claiming any amendment to the law or otherwise any benefit of custom duty exemption being available under the law to the Appellants at any time prior to 11.12.2009.

46. It is settled law that no law comes into force merely by virtue of the Cabinet decision. When the prescribed procedure for law to come into force is by way of Notification in the official gazette, the same has to be followed. If the statute requires the things to be done in a particular manner, it is to be done in that manner and not otherwise.
47. This is a well laid down principle by the Hon'ble Supreme Court in the case of Gujarat Urja Vikas Nigam Limited v Essar Power Limited (2008) 4 SCC 755. In other words, the policy decision taken by no means be construed as a binding law until the same has been published in the official gazette or otherwise in any manner provided for.
48. In this context the following decisions rendered by the Hon'ble Supreme Court are relevant:

(a) **J P Bansal V State of Rajasthan & Another (2003) 5 SCC 134**

*“8.....The Constitution requires that action must be taken by the authority concerned in the name of the Governor. It is not till this formality is observed that the action can be regarded as that of the State. Constitutionally speaking, the Council of Ministers are advisers and as the Head of the State, the Governor is to act with the aid or advice of the Council of Ministers. **Therefore, till the advice is accepted by the Governor, views of the Council of Ministers do not get crystallised into action of the State.***

(b) Bimla Nand Prasad & Others V Sate of Bihar & Ors 1994 Supp (3) SCC 753;

“2. The main contention was that the decision of May 27, 1967 created a vested right traceable to Articles 14/16 which could not be taken away by statutory provision such as Section 9 of the Act. The High Court negated the contention holding it was merely a policy decision which was not translated into a rule as several objections were received which had to be sorted out but mandamus issued by the High Court compelled implementation.

(c) Eurotex Industries and Eports Limited and Others- V- Union of India and Others (Bombay High Court Judgment dated 9.3.2011)

“.....In the present case, the office memorandum / press release dated 1-12-2010 states that the Central Government has taken a policy decision to ban export of cotton yarn beyond 720 million kgs during the year 2010-11. Admittedly, the said office memorandum / press release dated 1-12-2010 is neither an order u/s. 3(2) nor a notification u/s. 5 of the 1992 Act and the same has not been published in the Official Gazette. Therefore, the office memorandum / press release dated 1-12-2010 being not in consonance with the provisions of the law contained in the 1992 Act would have no legal force and the ban imposed there under cannot be said to be in accordance with law.

49. Admittedly, at the time when the bid documents were issued there was no applicability of the Mega Power Policy, 2006 to the project of the Appellant on account of the project being not an Inter State Project. If the intention of the Punjab State Electricity Board was to allow the bidders to consider the Cabinet's decision proposing the Mega Power status communicated to the public through a press release as part of the bidding documents, even before the appropriate notification under the Customs Act, 2003, or the Mega Power status conditions are prescribed, there would have been an amendment proposed to the bid terms. In the present case, the Electricity Board did not incorporate any such amendment to the bid terms.
50. The press note was issued on 1.10.2009. The cut off date for 'Change in Law' provision was on 2.10.2009. The bidders have to be given a level playing field. After issuing the bid documents, it was not open to the State Electricity Board to allow the Appellant's bid to take into account the Mega Power status that may be available pursuant to the Press Release dated 1.10.2009 while the other bidders bid on the basis that the Mega Power status is not available.
51. The Appellants have referred to the communication dated 2.10.2009 and 6.10.2009 sent by the Appellants. The State Electricity Board was not expected to take any cognizance of the said communication dated 2.10.2009 and 6.10.2009.

52. In fact, as per the bid documents the State Electricity Board was prohibited to entertain any such communications with regard to the Mega Power policy. That was the reason that these communications were not entertained and in fact, the Appellant was asked to withdraw the said letters and accordingly, the said letters were subsequently withdrawn.
53. In view of the above, there is no effect whatsoever over the Appellant sending letters to Punjab State Electricity Board seeking clarification.
54. Admittedly, the bid documents would specifically mention that no clarification can be sought by the bidders during 15 days up to the bid deadline. Therefore, the letters dated 2.10.2009 and 6.10.2009 sent by the Appellant could not be entertained as they were being contrary to the RFP.
55. There is one more aspect which shall be noticed in this context.
56. In the Applications for a Mega Power Status made by the Appellant to the Ministry of Power, Government of India filed on 11.5.2010, the Appellant has specifically stated as under:

“As per the terms of the PPA signed with PSEB, the first unit is to be declared for commercial operations in the month of January 2014. Therefore, the Notice to Proceed (“NTP”) for EPC contractor therefore needs to be placed by the second quarter of 2010.”

NPL has already initiated the process of appointment of Erection, Procurement and Construction (“EPC”) Contractors and we would request you to grant the Mega Power Project Status at an early date so that the contracts can be finalised accordingly and goods required for setting up the Project may qualify for fiscal benefits under the Mega Power Policy.”

57. Admittedly, this Application was entertained by the Government of India. After necessary legal conditions were fulfilled, the Mega Power status was granted to the Appellant only on 30.7.2010 on the basis of the Applications sent by the Appellant on 11.5.2010. Prior to above Notification dated 11.12.2009, there cannot be any vested right on the Appellant either to become eligible or to fall within the definition of Mega Power Project or to be entitled to any other benefits available under the Mega Power Policy.
58. To put it in a nutshell, there is no legal mandate or requirement to grant Mega Power status to the Appellant until the conditions are fulfilled.
59. Learned Senior Counsel for the Appellants has mainly relied upon the judgment of the Hon’ble Supreme Court reported in the case of State of Bihar and Ors V Suprabhat Steel Ltd and Ors (1999) 1 SCC 31 in support his plea.
60. The Appellant has strongly relied upon this judgment for the proposition that a Cabinet decision which is published to the general public through press release gives the enforceable

legal right and that, therefore, it would constitute a 'Change in Law'.

61. The submissions made by the Appellant on this issue on the strength of the 'Suprabhat Judgment' is as follows:

“In the above Suprabhat Judgment, the Bihar Industrial Policy which was issued by the Government of Bihar for the grant of sales tax exemption would apply even to already existing units. This was approved by the Bihar State Cabinet on 1.4.1993 and thereafter, notified in the official gazette in July, 1993. The exemption notification under the Bihar Finance Act was issued much later i.e. only on 4.4.1994. Under the Industrial Policy which was approved by the State Cabinet, the right to avail of sales tax exemption commenced for a pre-existing unit as on 1.4.1993. However, the Notification dated 4.4.1994 issued by the Bihar Government under the Bihar Finance Act did not grant sales tax exemption to pre existing units. Therefore, the old pre industrial units filed a Writ Petition before the Patna High Court challenging the legality of the said Notification. The Patna High Court in the Writ Petition quashed the offending Notification dated 4.4.1994 and gave a direction to the State Government to extend the facility of sales tax exemption to old and pre-existing units also. The

said decision of the Patna High Court in Suprabhat case was upheld by the Hon'ble Supreme Court in 1999 (1) SCC 31. The said judgment of the Hon'ble Supreme Court makes it clear that the Cabinet decision approved and industrial policy notified conferred a legal right on the pre-existing industrial units and that therefore, the exemption notification issued thereafter under the Sales tax statute had to be strictly in accordance with the said notified and Cabinet approved industrial policy. It is this legal principle laid down by the Hon'ble Supreme Court in the Suprabhat case that a Cabinet decision clearly confers the legal right which would apply to the present case. As the cabinet decision which is notified to the public at large creates a legal right, it necessarily constitutes a 'Change in Law'. This principle laid down by the Hon'ble Supreme Court ought to have been followed by the State Commission".

62. This argument on the strength of the Suprabhat case has been refuted by the learned Counsel for the Respondent by advancing following submissions contending that the said judgment would not apply to the present facts of the case:

- (a) the subject case was based on the doctrine or principle of promissory estoppel;

(b) In that case, Cabinet decision does not as such become law.

(c) In that case there was a notified industrial policy after the Cabinet decision which created rights. Accordingly, the process involved in Suprabhat case also is that there was a Cabinet decision which was followed by Notification on Industrial Incentive Policy specifying all terms and conditions for grant of Sales Tax exemption as applicable to old Units. Thereafter a Sales Tax notification was issued under the Bihar Sales Tax Act limiting the exemption only to the units set up from 01.4.1993. But in the present case, there is no such notified industrial policy.

63. We have considered the submissions made by both the parties with reference to the principle laid down in the Suprabhat case.

64. After careful consideration of the submissions as well as a careful perusal of the judgment in Suprabhat case, we are of the view that the decision taken in that case, would not apply to the present facts of the case.

65. In the Suprabhat case, the Industrial Incentive Policy itself provided that a separate order/notification for Sales Tax Exemption will be issued by the Commercial Tax

Department. The said policy clearly provided that it would also apply to the old industrial units.

66. Contrary to this policy, the Notification was issued without giving exemption to the old industrial units. In that context the High Court allowed the Writ Petition in exercise of the Writ Jurisdiction and directed the Sales Tax Exemption to be made available for the old units also.
67. In this context, it is relevant to note that in the Suprabhat judgment there was a reference to the Industrial Incentive Policy being notified by the Government of Bihar after the Cabinet decision.
68. In that case, the Industrial Incentive Policy was issued by the State Government after such policy was approved by the Cabinet itself. Accordingly, there was a Cabinet decision which was followed by the Notification on Industrial Incentive Policy specifying the terms and conditions for grant of Sales Tax exemption as applicable to old units.
69. But contrary to the said Notification on the basis of the Cabinet decision, the Sales Tax Notification was issued thereafter under the Bihar Sales Tax Act limiting the exemption only to units set up from 1.4.1993 and not for the old units set up earlier.
70. Bearing these facts in our mind, if we look at the facts of the present case, it is noticed that though the Cabinet decision

was taken on 1.10.2009 with regard to Mega Power Policy, it was notified by the Central Government only on 11.12.2009 on the basis of the above Cabinet decision specifying various terms and conditions.

71. Therefore, the Cabinet decision on 1.10.2009 which was yet to be notified through the Notification did not constitute a 'Change in Law' but only on 11.12.2009 when the Notification issued specifying the terms and conditions a 'Change in Law' had occurred.

72. Therefore, the submission made by the Appellant that the Cabinet decision in the present case has to be considered as a 'Change in Law' like in the Suprabhat case on which the reliance was placed by the Appellant, is totally misconceived.

73. Various arguments were advanced with reference to Promissory Estoppel but, learned Senior Counsel for the Appellants clarified his stand that he has not placed reliance on the principle of Promissory Estoppel.

74. Therefore, we need not deal with various decisions cited by the Respondent with reference to the Promissory Estoppel.

75. This aspect has to be analysed from yet another angle.

76. According to the Appellants, the 'Change in Law' occurred on 1.10.2010 and all other things which happened

subsequently on implementation issues are only ministerial acts. This argument cannot be countenanced.

77. The 'Change in Law', as indicated above occurred only on 11.12.2009 when the Custom Notification was issued. The implementation of the 'Change in Law' was subsequent to the above, when the Appellant got the Mega Power status on 30.7.2010.

78. According to the Appellants the term "notification" used in the definition of the term 'law' under Article 1.1 would cover the Cabinet decision also. This is misplaced. There is a process which is required to be followed for the issuance of the notification of the Cabinet decision. The press release cannot be treated as a Notification.

79. The learned Counsel for the Appellants has placed various authorities to substantiate his plea that the Cabinet decision and its press release would amount to Notification. The following decisions have been cited by the Appellant:

- (a) Kashmir Lal vs State of Pb, AIR 1984 P&H 87
- (b) Subhash Ramkumar v Satate of Maharashtra (2003)1 SCC 506
- (c) Dayal V The collector, Nagpur 1962 Raj LW 32

80. The ratio decided in these decisions was not where a Cabinet decision can be construed to be as a Notification. In

these decisions, it has been held that in the event of a statute speaking of a Notification being published in the official gazette, the same cannot but mean a Notification published by the authority of Law in the Official Gazette.

81. In the present case, the Exemption Notification under the Customs Act, Excise Act etc., has to be in the form specifically provided for in the respective Acts.
82. The term “Notification” used in Article 1.1 of the PPA in the present case is in the context of “law” which is to be considered in respect of the plenary Acts, Rules, and Regulations etc. It deals with the enforceable provision. Accordingly, the Cabinet decision until it is followed by a Notification of the Policy or Exemption Notification as per the provisions of law cannot be called a Law within the meaning of Article 1.1.
83. Thus, the contentions of the Appellants that the ‘Change in Law’ had occurred on 1.10.2009 itself when Cabinet decision was taken and made known to the Public through Press release and the subsequent Acts were only ministerial which do not affect the ‘Change in Law’ that has already occurred, are not tenable.
84. Therefore, the **First issue is decided** as against the Appellants while confirming the finding of the State Commission.

85. The **Second Issue** relates to the **Alternative Claim under the Foreign Trade Policy.**

86. On this issue, the learned Senior Counsel for the Appellants has made the following submissions:

“In the event, if it is held by this Tribunal that the ‘Change in Law’ as regards the Mega Power policy had not taken place prior to the cut-off date of 2.10.2009 and as such prior to the said cut-off date, the project was not eligible for the benefits under the Mega Power Policy, then the project would at least become eligible for certain benefits under the Foreign Trade Policy (FTP) as a Non Mega Power project on the cut-off date of 2.10.2009.

As the FTP benefits granted to the Non Mega Power Projects were withdrawn subsequent to that, the Appellants would be entitled to the requisite tariff adjustment based on this “Change in Law” pursuant to the Article 13 of the PPA in respect of Foreign Trade Policy”.

87. In reply to the above submissions, the learned Counsel for the Respondent has strenuously contended as follows:

“The claim of the Appellants is baseless and misconceived. This is established by the very fact that if the said benefits now claimed by the Appellants

were available at the relevant time, there was no necessity for the Appellant to take the efforts to register the project as Mega Power project in terms of the revised Mega Power Policy especially when the Appellant approached the Government of Punjab for recommendations for grant of Essentiality Certificate.

The Appellant even at this stage could have very well taken all the benefits under the Foreign Trade Policy without requiring any action to be taken under the Mega Power Policy. On the other hand, the Appellants sent a communication dated 2.10.2009 and 6.10.2009 claiming that it was considering the benefits under the Mega Power Policy. If the same benefits were available under the Foreign Trade Policy on that date, there was no requirement for the above communications which were sent by the Appellant to the Respondent.

The alleged 'Change in Law' in Foreign Trade policy came much later in the year 2011-12 when the Appellant was registered and confirmed as a Mega Power Project and the revised Mega Power Policy of the Government of India. This very fact would establish that the Appellants were aware that claims with regard to the Foreign Trade Policy benefits were not available to the Appellants under the provisions of

Foreign Trade Policy, as claimed by the Appellant now. Therefore, the rejection of this alternative claim by the State Commission in the Impugned Order is well justified”.

88. Before dealing with the issue relating to this Alternative Claim, let us now refer to the findings which has been rendered by the State Commission on this issue:

“15. Foreign Trade policy Observations and Findings:

With regard to the aforementioned prayer (c) in this petition, the Commission notes that the petitioners have stated that before 01.10.2009, the petitioner no.2 was considering fiscal benefits available to the Project under the Foreign Trade Policy (FTP). It has been submitted that pursuant to the revision in the Mega Power Policy 2006 by the Union Cabinet on 01.10.2009, the petitioner no.2 considered the benefits available to the Project from the prospective of this Policy since the benefits were identical to that under the FTP. The petitioners have further submitted that without prejudice, if in terms of the PPA, the change in the Mega Power Policy amounts to ‘Change in Law’, in view of the prevailing FTP prior to the submission of the bids, there is no economic impact on account of such ‘Change in Law’ as the benefits under the FTP would in any case be available to the Project regardless of the status of Mega Power Project. The petitioners have further submitted that the benefits under the FTP which were available to the Project at the time of bidding, irrespective of it being having the Mega Power Status have since been withdrawn by the relevant authorities of the Government of India. The petitioners have averred that, therefore, the petitioners have a claim under the

'Change in Law' provision under Article 13 of PPA for withdrawal of benefits available to the Project without considering its status under the Mega Power Policy as on the date of bidding.

16. The Commission notes that a holistic reading of the relevant extracts of the Foreign Trade Policy 2009-14 as prevalent at the time of bidding, the decision of the Policy Interpretation Committee (PIC) dated 15.03.2011 and subsequent clarifications issued by the Director General of Foreign Trade (DGFT) vide letter/circular dated 27/28.04.2011 and notifications of the Ministry of Commerce and Industry dated 28.12.2011 and 21.03.2012 make it clear that the benefits under FTP were not available to the Project. Probably for this very reason, the petitioners did not rely upon FTP for claiming the benefits and opted for the identical benefits purported to be available under the Mega Power Policy on the date of bidding. The Commission opines that if the benefits under the FTP were available to the petitioners on the date of bidding, there was no necessity for the petitioner no.2 to inform the Procurer vide letter dated 06.09.2009 stating that benefits associated with the Mega Power Status have also been taken into consideration in its evaluation of the Project and take further actions to apply and obtain the Mega Power Status as also to request for the essentiality certificate from the Government of Punjab. Furthermore, the Commission notes that the Mega Power Status was granted to the Project on 30.07.2010 and the alleged change in the FTP was announced in 2011. The Commission opines that if the FTP in the year 2010 provided the benefits to the petitioners, there was no occasion for the petitioner no.1 to claim the benefit under the Mega Power Policy and obtain the essentiality certificate from the Government of Punjab and claim the benefit of Customs duty concession/exemption under the notification dated 11.12.2009 of the Government of

India. The Commission is of the considered opinion that the petitioners claiming the benefits under Mega Power Policy itself sufficiently establishes that the benefits under the FTP were not applicable to the petitioners' Project. Notwithstanding the discussion above, the Commission is of the opinion that even if it is assumed for the sake of argument, that benefits were available to the Project under the FTP on the date of bidding, the petitioners forfeited their right to subsequently claim the benefits under the FTP by opting out of the same having claimed the benefits under the Mega Power Policy. Accordingly, the Commission decides that the prayer (c) of the petitioner also cannot be granted.

89. The crux of the findings given in the Impugned Order on this issue as referred to above, is as follows:

(a) According to the Petitioners, the benefits under the Foreign Trade Policy (FTP) which were available to the project at the time of bidding irrespective of it being having the Mega Power status have been withdrawn by the Government of India subsequent to the cut off date. Therefore, the Petitioners claimed that under a 'Change in Law' provision under Article 13 of the PPA for withdrawal of benefits available to the projects without considering its status under the Mega Power Policy as on the date of bidding. This claim is not sustainable.

(b) The reading of the relevant extract of Foreign Trade Policy 2009-14 as prevalent at the time of bidding, the decision of the Policy Interpretation Committee (PIC) dated 15.3.2011, the clarifications issued by the Director General of Foreign Trade through their Circular dated 28.4.2011 as well as the Notification of the Ministry of Commerce and Industry dated 28.12.2011 and 21.3.2011 would make it evident that the benefits under FTP were not available to the project of the Petitioner. Having fully know about this position, the Petitioners probably for this reason did not rely upon the FTP for claiming the benefits at that stage. On the other hand, it opted for the identical benefits purported to be available only under the Mega Power Policy on the date of bidding. If the benefits under the FTP were available to the Petitioner on the date of bidding, the Petitioners would have claimed that benefits on the date of bidding itself. There was no necessity for the Petitioners to inform the procurer through the letter dated 6.10.2009 stating that they will take further action to comply and obtain Mega Power status by requesting for Essentiality Certificate from the Government of Punjab.

(c) In fact, the Mega Power status was granted to the project on 30.7.2010. The alleged 'Change in Law' in Foreign Trade Policy was announced in 2011. If the Foreign Trade Policy provide benefits to the Petitioner, there was no occasion for the Petitioner to claim the benefits under the Mega Power Policy and to obtain Essentiality Certificate from the Government of Punjab and claim the benefits of custom duty etc., on the basis of the Notification issued on 11.12.2009 by the Government of India.

(d) The very fact that the Petitioner, at the time of bidding, claimed the benefits only under Mega Power Policy itself would establish that the Appellant had the knowledge that the benefits under the Foreign Trade Policy were not applicable to the Petitioner's project.

(e) Even assuming that the benefits were available to the project under the Foreign Trade Policy on the date of bidding, it is to be assumed that the Petitioner forfeited their right to claim the benefits under the Foreign Trade Policy by opting to claim the benefits under the Mega Power Policy. Therefore, the benefits under the Foreign Trade Policy cannot be granted to the Petitioner.

90. The reading of the Impugned Order in respect of the alternative issue would indicate that the State Commission dealt with the issue very briefly and cursorily with the Appellant's claim regarding the 'Change in Law' in respect of Foreign Trade Policy benefits after the cut-off date.
91. In the Impugned Order, the State Commission merely referred to the clarification issued by the Policy Interpretation Committee (PIC) on 15.3.2011 and subsequent amendment notification issued by the Ministry of Commerce and Industry and straightway concluded that these documents would make it clear that the benefits under the Foreign Trade Policy were not available to the project.
92. According to the Appellant, the withdrawal of the Foreign Trade Policy benefits after the cut-off date of 2.10.2009 amounts to 'Change in Law' under the PPA.
93. It is stated that the benefits conferred under Para 8.3 (a) and (b) of the Foreign Trade Policy which were earlier available to the non Mega Power Projects were also subsequently withdrawn by the Ministry of Commerce and Industry by way of an amendment notifications and such amendment under the existing law is squarely covered under Article 13.1.1 (i) of the PPA which provides that 'Change in Law' includes the notification providing for the amendment.

94. The entire thrust of the argument of the Respondent now made, is based on the premise that since the supplies of plant and machinery required for the Project were not procured by the Appellants through International Competitive Bidding, the Appellants would not qualify to claim the FTP benefits in the first place under Para 8.2 of the FTP and consequently, they cannot claim 'Change in Law' in respect of the FTP benefits.
95. This argument about the disqualification of the Appellant to claim the FTP benefits have never been argued before the State Commission. The State Commission also did not consider this point on the basis of the disqualification now claimed by the Respondent before this Tribunal.
96. The only reason given by the State Commission for rejecting the claim with regard to Foreign Trade Policy benefits is that the very fact that the Appellant originally claimed the benefits of Mega Power policy only and not the FTP Policy, would show that the Appellant was aware at the time of bidding that the Appellant was not entitled to the Foreign Trade Policy benefits.
97. This reasoning, in our view, does not show that the State Commission adopted a judicial approach with reference to the alternative claim. The term alternative claim itself would indicate that if the party did not succeed in respect of the

main claim, the party is entitled at least to make an alternative claim. In that case, the State Commission would be expected to analyse the question as to whether the benefits under the Foreign Trade Policy were available to the Appellant as on the cut off date (02.10.2009) which were withdrawn subsequently by the Govt. of India by a clarification/notification and whether this would amount to 'Change in Law' under Article 13 of the PPA.

98. The State Commission has not gone into this aspect. Instead, the State Commission has simply stated that since the Petitioners never opted for FTP Policy benefits originally, it is debarred from seeking the alternative claim.
99. We are at loss to understand under what basis and under what provision the Appellant would be prevented to seek other alternative claim.
100. It is relevant to note that when the Appellant is held to be not entitled to Mega Power Project benefits, it cannot be straightway held that the Appellant would not be entitled for the FTP benefits also. Similarly, merely because the Appellant at the time of bidding claimed for Mega Power benefits alone, it cannot be straightway held that it was not entitled to FTP benefits in the absence of the claim for the same at the time of bidding itself.

101. The State Commission in the Impugned Order did not analyse this question as to whether the Appellants are entitled to FPT benefits on the ground of 'Change in Law' as provided in Article 13 of the PPA especially when those benefits were subsequently withdrawn through the Notification.

102. As mentioned earlier, the Respondent's present contention about disqualification being suffered by the Appellant has not been dealt with, by the State Commission.

103. In the absence of the State Commission dealing with the said issue, in the context of the present plea of the Respondent about the disqualification, we are not inclined to go into this aspect in this Appeal as we feel that it would be appropriate for the State Commission to consider the issue relating to disqualification after considering the arguments to be advanced by both the Appellants and the Respondents before the State Commission.

104. In view of the above, it is appropriate to we set aside the Impugned Order in respect of the alternative claim alone and remand the matter to the State Commission for fresh consideration and decide the above issue in accordance with the law in the light of the submissions made by both the parties without being influenced by its earlier decision.

105. Summary of Our Findings:

i) 'Law' has been defined under the PPA to include only the statutory laws, ordinance, regulation, notification, code, rule or any interpretation of any of them by an Indian Govt instrumentality and having force of law. The press release of a Cabinet decision is only a communication of the decision of the Cabinet and cannot be termed as Law or having any enforceable effect. In the present case the Notification regarding amendment in exemption notification in respect of Mega Power Projects was issued on 11.12.2009 under Section 25 of the Customs Act,1962 which will constitute the "Change in Law' within the meaning of the Article 13 of the PPA. Thus, the 'Change in Law' in Mega Power Policy will be considered to be occurring after the cut off date(2.10.2009). Accordingly, the first issue is decided as against the Appellant.

ii) We find that the State Commission has not analysed the question as to whether the benefits under the Foreign Trade Policy were available to the Appellant as on the cut off date(2.10.2009) which were subsequently withdrawn by the Govt. of India by clarification/notification and whether this would amount to 'Change in Law' under Article 13 of the PPA.

Accordingly, we remand the second issue regarding 'Change in Law' with respect to benefits under Foreign Trade Policy to the State Commission for fresh consideration and decide the same in accordance with the law in light of the submissions made by both the parties without being influenced by its earlier decision.

106. Accordingly, the Appeal is allowed in part. The impugned order is set-side in respect of the alternative claim alone and the matter is remanded to the State Commission for fresh consideration. The State Commission shall decide the matter at the earliest after giving opportunity of being heard to both the parties.

107. Registry is directed to send the copy of this judgment to the State Commission forthwith.

108. Pronounced in the Open Court on this **30th day of June,2014.**

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 30th June, 2014

√REPORTABLE/~~NON-REPORTABLE~~