

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY  
(Appellate Jurisdiction)**

**APPEAL NO. 421 OF 2019 &  
IA NOs. 1296 of 2019 & 471 of 2020**

**Dated: 12<sup>th</sup> August, 2021**

**Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson  
Hon'ble Mr. Ravindra Kumar Verma, Technical Member**

**IN THE MATTER OF:**

**Adani Power (Mundra) Limited,**  
Adani Corporate House,  
"Shantigram",  
S.G. Highway,  
Ahmedab  
ad – 382 421,  
Gujarat

**.....Appellant**

**VERSUS**

- 1. Central Electricity Regulatory Commission**  
Through Secretary,  
3<sup>rd</sup> and 4<sup>th</sup> Floor, Chanderlok Building,  
36, Janpath,  
New Delhi-110001.
- 2. Uttar Haryana Bijli Vitran Nigam Limited**  
Through Chief Engineer  
(Haryana Power Purchase Centre)  
Shakti Bhawan, Sector-6,  
Panchkula, Haryana – 134109.
- 3. Dakshin Haryana Bijli Vitran Nigam Limited**  
Through Chief Engineer  
(Haryana Power Purchase Centre)

Vidyut Sadan, Vidyut Nagar,  
Hisar, Haryana – 125005.

..... Respondent(s)

**Counsel for the Appellant** : Mr. Amit Kapur  
Mr. Hemant Singh  
Mr. Ambuj Dixit  
Mr. Nishant Kumar

**Counsel for the Respondent** : Mr. M.G. Ramachandran, Sr. Adv.  
Ms. Ranjitha Ramachandran  
Ms. Poorva Saigal  
Ms. Anushree Bardhan  
Mr. Shubham Arya  
Mr. Arvind Kumar Dubey for  
R-2 & 3

## **JUDGMENT**

### **PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON**

1. This appeal is preferred challenging the legality, propriety and validity of part of the order dated 28.03.2018 passed in Petition No. 104/MP/2017, along with the corrigendum order dated 20.04.2018, and Order dated 06.06.2019 passed in Petition No. 214/MP/2018 (hereinafter collectively referred to as "Impugned Orders") passed by the Central Electricity Regulatory Commission (hereinafter referred to as "Respondent Commission").
2. The Appellant is a Generating Company which has set up a 4620 MW (comprising 4 units of 330 MW (subcritical technology) and 5 units

of 660 MW (supercritical technology) coal fired power plant in Mundra, Gujarat. Respondent No. 1 is the Central Electricity Regulatory Commission having power to regulate tariff of generating companies. Respondent Nos.2 & 3, Uttar Haryana Bijli Vitran Nigam Limited (for short "UHBVNL") and Dakshin Haryana Bijli Vitran Nigam Limited ("DHBVNL"), are the distribution licensees which are supplying electricity to the consumers in the State of Haryana. Both Respondent Nos. 2 and 3 (collectively referred to as "*Respondents*") procure power through Haryana Power Purchase Centre ("*HPPC*"), which is a joint forum of Haryana Utilities.

**3.** The facts that led to filing of the present appeal are as under:

On behalf of Respondents Nos. 2 and 3, HPPC initiated the process of procurement of power through Case-I competitive bidding process. Pursuant thereto, the Appellant submitted its bid for supply of 1424 MW of power from Units 7, 8 and 9 (Phase IV) of Mundra Power Project and was declared a successful bidder. Subsequently, two separate Power Purchase Agreements dated 07.08.2008 were executed by the Appellant with Respondent Nos. 2 and 3 for supply of 712 MW of power to each from Phase IV of the Mundra Power Project (hereinafter referred to as the "PPAs").

4. The Appellant filed a petition, being Petition No. 156/MP/2014, before the Commission for approval of compensation for certain Change in Law events as well as carrying cost in terms of Article 13 of the PPAs. The Respondent Commission, after hearing the parties at length, passed an order dated 06.02.2017 in Petition No. 156/MP/2014, allowing compensation only for certain Change in Law events and disallowing the component of carrying cost in entirety. The summary of the said order is as under:

| <b>Components</b>   | <b>Change in Law Event</b>   |
|---|--|
| Change in Rate of Royalty   | Allowed  |
| Levy of Central Excise Duty subject to directions in para 32 of the order | Allowed  |
| Levy of Clean Energy Cess   | Allowed  |
| Levy of Customs Duty on energy removed from SEZ to DTA                    | Allowed  |
| Increase in Busy Season Surcharge on transportation of coal               | Not Allowed  |
| Increase in Development Surcharge on transportation of coal               | Not Allowed  |
| Levy of Service Tax on transportation of coal                             | Allowed  |
| Levy of Green Energy Cess in Gujarat                                      | Liberty granted to approach after Hon`ble Supreme Court's Decision |
| Increase in Sizing Charges of coal  | Not Allowed  |
| Increase in Surface Transportation  | Not Allowed  |

| <b>Components</b>   | <b>Change in Law Event</b>      |
|---|---------------------------------|
|   |                                 |
| Change in pricing of coal from UHV to GCV basis   | Not Allowed                     |
| Change in class from 140 to 150 for Railway freight for coal for trainload movement   | Not Allowed                     |
| Levy of Minimum Alternate Tax on plants situated in SEZ   | Not Allowed                     |
| Linking railway tariff revision with movement in cost of fuel   | Not Allowed                     |
| Imposition of Swachh Bharat Cess  | Allowed                         |
| Payment to National Mineral Exploration Trust   | Allowed                         |
| Payment to District Mineral Foundation  | Allowed                         |
| Installation of FGD as per Environmental clearance dated 20.5.2010<br>Auxiliary consumption due to FGD installation affecting capacity charges<br>Additional operating expenditure on FGD | Not decided and liberty granted |
| Carrying cost   | Not Allowed                     |

5. As regards FGD, the Respondent Commission granted liberty to the Appellant to approach the Commission with a separate petition, along with information as sought in the above said order. However, the claim of carrying cost was disallowed holding that there is no provision in the PPAs regarding carrying cost and therefore, the prayer with respect to grant of carrying cost on the principle of restitution, from the

date of occurrence of the Change in Law events till the date of raising of the claims or invoices, cannot be allowed. Aggrieved thereby, the Appellant preferred an Appeal, being Appeal No. 158 of 2017, before this Tribunal against the above order dated 06.02.2017 passed by the Respondent Commission, wherein the said decision has been challenged with respect to the disallowed Change in Law compensation claims, along with carrying cost. The said Appeal is presently pending adjudication before this Tribunal. The carrying cost claim in the said Appeal covers the carrying cost for all Change in Law events claimed in Petition No. 156/MP/2014 including the claim for FGD as Change in Law event, all being under same PPAs.

6. In terms of the liberty granted in the order dated 06.02.2017, the Appellant preferred a petition, being Petition No. 104/MP/2017 (Impugned Order), before the Respondent Commission claiming compensation for installation of FGD plants in its generating units as Change in Law event including carrying cost on such contractual Change in Law event in terms of Article 13 of the PPAs dated 07.08.2008. However, the Respondent Commission vide the Impugned Order dated 28.03.2018, while allowing compensation on account of the Change in Law event pertaining to FGD, disallowed the Appellant's claim for carrying cost.

7. Meanwhile, this Tribunal vide its Judgement dated 13.04.2018 in Appeal No. 210 of 2017 granted carrying cost to the Appellant with respect to the Change in Law claim under the same PPAs and against the same set of Respondents as set out in the present Appeal. This Tribunal in various other Judgments passed in Appeal No. 111 of 2017 dated 14.08.2018 [*GMR Warora Ltd. v. CERC & Ors.*], and Appeal No. 119 of 2016 dated 14.08.2018 [*Adani Power Rajasthan Ltd. v. RERC & Ors.*] has also allowed carrying cost to various generators qua compensation under Change in Law. Further, the Hon'ble Supreme Court vide its Judgement dated 25.02.2019 in Civil Appeal No. 5865 of 2018 ("**SC Carrying Cost Judgment**"), has upheld the claim of carrying cost granted by this Tribunal in Appeal No. 210 of 2017.

8. Since, this Tribunal vide its Judgment dated 13.04.2018 in Appeal No. 210 of 2017 has remanded the matter to the Respondent Commission to pass consequential order in terms of its findings, including the carrying cost, qua the same PPAs which are the subject matter of the present appeal, the Respondent Commission granted the carrying cost in the remanded matter vide its order dated 17.09.2018 in Petition No. 235/MP/2015.

**9.** Subsequent to the Impugned Order dated 28.03.2018 of the Respondent Commission, the Appellant filed an Interlocutory Application, being (I.A) No. 575 of 2018 on 15.05.2018 in Appeal No 158 of 2017, for placing on record the said order where the Respondent Commission while allowing the relief of Change in Law for FGD disallowed the relief of carrying cost and requested this Tribunal to allow carrying cost from the effective date of Change in Law event pertaining to installation of FGD along with all other Change in Law events in question.

**10.** In terms of the Impugned Order, the Appellant raised an invoice dated 12.05.2018 upon Respondent Nos. 2 and 3, for claiming the said compensation. However, Respondents No. 2 and 3 disputed the impact of additional Auxiliary Consumption over the Energy Charge. Hence, the Appellant filed a clarification petition, being Petition No. 214/MP/2018, before the Respondent Commission seeking clarification of the Impugned Order dated 28.03.2018, with respect to the denial of the Respondent Nos. 2 and 3 to pay the Change in Law compensation corresponding to additional auxiliary consumption of FGD on energy charge. Along with the Petition, the Appellant has also filed an application-I.A No. 70 of 2018 seeking carrying cost qua FGD. However, the Respondent Commission vide its order dated



06.06.2019 while clarifying that the Appellant is entitled to the compensation of increased energy charge on account of additional auxiliary consumption as a result of installation of FGD disallowed the claim of carrying cost on FGD by relying upon the Impugned Order.

The relevant portion of the order reads thus:

*"44. The Appellate Tribunal vide its judgment dated 13.4.2018 in Appeal No. 210 of 2017, allowed carrying cost on the change in law events from the date of effectiveness till the date of the order granting relief for such change in law event in respect of the same PPA under consideration in the present Petition. Meanwhile, the Respondents had challenged the above referred judgment of the Appellate Tribunal before the Hon'ble Supreme Court in Appeal No. 5865 of 2018. The Hon'ble Supreme Court, vide its Judgment dated 25.2.2019 by interpreting the same PPAs under consideration in this Petition, has upheld the judgment of the Appellate Tribunal holding that principle of restitution is in-built under Article 13.2 of the same PPA and accordingly held that carrying cost is payable.*

*45. However, this Commission has already adjudicated the issue of carrying cost in its order dated 28.3.2018 in Petition No. 104/MP/2017. The present Petition has been filed by the Petitioner, APML seeking certain clarification in the above order dated 28.3.2018. The Petitioner has filed I.A. No. 101/2018 seeking claim of IDC and FERV on actual basis*

*pursuant to the liberty granted by the Commission in the said order. The Petitioner has also filed IA N. 70/2018 seeking carrying cost, based on subsequent judgment of the higher court. In our view, once the claim has been rejected by this Commission, the Petitioner cannot approach this Commission again for the same relief through an IA based on a subsequent judgment of the higher court. Therefore, the Petitioner is granted liberty to approach the Commission for appropriate relief through a separate Petition in accordance with law."*

**11.** Aggrieved thereby, i.e., Order dated 28.03.2018 passed by the Respondent Commission in Petition No. 104/MP/2017 and Order dated 06.06.2019 passed in clarification petition No. 214/MP/2018, the Appellant has preferred the instant appeal praying for the following reliefs:

- (a) "Allow the present appeal and set aside the Impugned Order dated 28.03.2018, passed by the Respondent Commission in Petition No. 104/MP/2017, to the extent challenged in the present appeal;
- (b) Hold that the Appellant is entitled to recover carrying cost, as per Article 13 of the PPA dated 07.08.2008, for the change in law event approved by the Respondent Commission, in respect of installation of Flue Gas De-

sulphurizer (FGD) as provided in the orders dated 28.03.2018, 20.04.2018 and 06.06.2019 passed in Petition Nos. 104/MP/2017 and 214/MP/2018; and

(c) to pass such other or further orders as the Hon'ble Tribunal may deem appropriate.”

**12.** Learned counsel for the Appellant has filed a brief note, the gist of which is as under:

Learned counsel contends that in the present appeal the issue involved is “whether the Appellant is entitled to receive carrying cost, on an allowed change in law component qua installation of Flue Gas De-sulphurizer (**FGD**) equipment, as provided under Article 13 of the Power Purchase Agreements dated 07.08.2008”? According to him, Article 13 provides for the change in law provision. As per the said provision, the Appellant is entitled to recover any additional, recurring or non-recurring, expenditure incurred for the purpose of supply of power to the Respondent Nos. 2 & 3, in the case of occurrence of any change in law event, in order to restore the affected party (Appellant) to the same economic position, as if the change in law event did not occur. In terms of Article 13 of the PPAs, the eligibility to claim change in law compensation arises only in such an event that such change in law occurs post 7 days prior to the bid deadline (i.e.

cut-off date). In the instant case, the bid deadline was 26.11.2007 and accordingly the cut-off date was 19.11.2007. However, after the aforesaid cut-off date, MoEF&CC in the EC dated 20.05.2010 stipulated the condition for installation of FGD. Accordingly, the said requirement qualified as a change in law event inasmuch as the said requirement was stipulated after the cut-off date of 19.11.2007. On this aspect, it is submitted that as per Article 13.2 of the PPAs, affected party has to be awarded with the carrying costs on account of the deferred recovery of the change in law compensation for the purpose of restoring the said affected party to the same economic position.

**13.** It is further submitted that the claim of the Appellant for carrying cost with respect to the compensation qua the allowed change in law claim of FGD has been denied by the Commission holding that there is no provision in the PPAs to grant carrying cost from the date of incurring the expenditure under Change in Law vide order dated 28.03.2018; and also held that once the claim has been rejected by the Commission by an earlier Order, the parties cannot approach the Commission again for the same relief through an I.A based on a subsequent judgment of the Higher Court. Referring to these impugned orders, learned counsel submits that the issue

pertaining to grant of carrying cost on specific claim of FGD as well as on allowed Change in Law claims is no more res-integra for the reasons appearing below:

- (a) This Tribunal by its Judgment dated 28.08.2020 passed in Appeal No. 21 of 2019 in the case of “**Talwandi Sabo Power Ltd. v. Punjab State Electricity Regulatory Commission & Anr**” while allowing the MoEF&CC Notification dated 07.12.2015 and its consequential mandate to install FGD system as an event of Change in Law has also allowed carrying cost with the view to bring the generator to the same economic position as if such Change in Law event has not occurred. The Relevant portion of the Judgment is as under:

-

*“140. In the light of our discussion and reasoning, we are of the opinion that the impugned Orders, dated 21.12.2018 and 09.01.2019 challenged in both the appeals deserve to be set aside and accordingly set aside by allowing the appeals.*

- a) The MoEF & CC Notification dated 07.12.2015 is a Change in Law event under PPAs in question having regard to the facts and circumstances of the case of the Appellants.*

*[..]*

- a) Appellants are entitled for carrying cost in terms of provisions of the PPAs to bring the seller-Appellants to the same economic position*

*as if such Change in Law event has not occurred.”*

- (b) This Tribunal by its judgment dated 13.04.2018 passed in Appeal No. 210 of 2017 in the case of “***Adani Power Ltd. vs CERC & Ors.***” considering the restitutionary principle under Article 13.2 of the PPA allowed carrying cost on the allowed change in law claims from the effective date of change in law till the approval of the said claim by the appropriate authority. It is pertinent to mention that the Judgment in this matter was passed in respect of the same PPA and Distribution Licensees under consideration in the present Appeal.
- (c) Further, the Respondents in the instant Appeal, had challenged the Judgment dated 13.04.2018 passed in Appeal No. 210 of 2017 in the case of “***Adani Power Ltd. vs CERC & Ors***” before the Hon’ble Supreme Court, which was disposed of by the Hon’ble Supreme Court by its order dated 25.02.2019 by upholding the Judgment passed by this Tribunal.
- (d) Even the Commission while issuing the staff paper on the mechanism for compensating Section 63 Projects on account of installation of FGD system (issued on 05.09.2020) has

taken note of the principles enunciated in the above-mentioned judgments and stated that the generic mechanism for compensation will ensure to restore the affected parties to the same economic position which includes carrying cost, which reads as under:

*“3.6. It is clear from above judgments of APTEL and the Hon’ble Supreme Court that the provision contained in Article 13.2 of the PPAs requiring to restore the affected parties to the same economic position as if the event of Change in Law had not occurred “is in consonance with the principle of ‘restitution’ i.e. restoration of some specific thing to its rightful status” and that the affected party “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”. Keeping the principles laid down in the judgements of APTEL and the Hon’ble Supreme Court, this Staff Paper attempts to formulate a generic mechanism of compensation to restore the affected parties to the same economic position.”*

**14.** Learned counsel submits that in addition to the above stated judgments, this Tribunal in the following judgments also held that carrying cost is payable on allowed component of change in law: -

- I. Judgment dated 14.08.2018 passed in Appeal No. 111 of 2017, titled as GMR Warora Ltd. v. CERC & Ors.
- II. Judgment dated 14.08.2018 passed in Appeal No. 119 of

2016, titled as Adani Power Rajasthan Ltd. v. RERC & Ors.

- iii. Judgment dated 14.09.2019 passed in Appeal No. 202 & 305 of 2018, titled as Adani Power Rajasthan Ltd. v. RERC & Ors.

**15.** As regards the argument of Respondent Nos. 2 & 3 that the Commission has rightly rejected the claim of the Appellant vide impugned order dated 06.06.2019 since the same was barred by the principle of *res judicata*, learned counsel submits that the said contention is entirely misplaced and not tenable inasmuch as both the impugned orders dated 28.03.2018 and 06.06.2019 have been challenged and the carrying cost has already been allowed to the Appellant in terms of the aforementioned judgments. Therefore, for claiming the same allowed relief of carrying cost in the present appeal, *res-judicata* as a principle is not applicable.

**16.** So far as the averment of Respondent Nos. 2 & 3 that the Appellant cannot claim carrying cost for the period where there has been delay and laches on the part of the Appellant is concerned, it is submitted that the said averment is completely baseless and frivolous since there has been no delay on the part of the Appellant for claiming carrying cost since the Appellant was diligently pursuing its legal remedies for claiming carrying cost on change in law compensation,



including for FGD, which is evident from the chronology of events appearing below:

- I. On 11.07.2014, the Appellant filed Petition No. 156/MP/2014 seeking compensation for change in law event qua FGD along with Auditor Certificate for its claim. In fact, Respondent Nos. 2 & 3, even after submission of requisite documents by the Appellant, opposed the claim of the Appellant qua its claim for FGD.
- II. In terms of the liberty granted to the Appellant to submit the claim for FGD through a separate application vide order dated 06.02.2017 , the Appellant filed a separate petition (Petition No. 104/MP/2017) seeking compensation for change in law event qua FGD, along with carrying cost on FGD and also provided the requisite information as sought by the Commission vide Order dated 06.02.2017. The Commission vide the impugned order dated 28.03.2018, after taking into account all the necessary documents, allowed the change in law claim of FGD to the Appellant. However, the carrying cost on FGD was disallowed.
- III. Thereafter, the Appellant filed another petition before the Commission (Petition No. 214/MP/2018) seeking clarification of its previous impugned order dated 28.03.2018, qua impact of additional auxiliary consumption of FGD on energy charges. In the said petition, the Appellant filed I.A. No. 101/IA/2018 wherein it sought for approval of Rs. 106.95 Crores towards FERV and IDC, as against the provisionally allowed amount of Rs. 75.74 Crores in the order dated

28.03.2018. The Appellant duly submitted the auditor's certificate in support of the same.

- M. The Appellant also filed an I.A. (70/IA/2018) seeking carrying cost on FGD, in terms of the judgment dated 13.04.2018 passed by this Tribunal in Appeal No. 210 of 2017, which involved the same parties and same set of PPAs. The said judgment was also affirmed by the Hon'ble Supreme Court in the final order dated 25.02.2019.
- V. Both the claims of the Appellant, in I.A. Nos. 70/IA/2018 and 101/IA/2018 were again disputed by the Haryana Discoms. The Commission passed the second impugned order dated 06.06.2019, wherein the claim of the Appellant qua additional auxiliary consumption of FGD on energy charges and differential amount towards FERV & IDC was allowed. However, the claim of carrying cost towards FGD was rejected.

**17.** From the chronology of events mentioned above, it is evident that the Appellant has been diligently pursuing its claim towards carrying cost on FGD since inception, including providing requisite information / documents as and when sought by the Commission towards the said claim.

**18.** It is contended that Respondent Nos. 2 & 3 have raised the argument that there is no concept of interest on carrying cost. In this regard, learned counsel submits that in another Petition No.

235/MP/2015 having same set of Respondents and under the same PPA as in the instant case, though the Commission by its Order dated 04.05.2017 allowed certain Change in Law events and disallowed carrying cost on change in law events, however, in terms of the judgment dated 13.04.2018 passed by this Tribunal in Appeal No. 210 of 2017 (filed by Appellant challenging Order dated 04.05.2017), holding that carrying cost is payable, the Commission passed the Order dated 17.09.2018 in Petition No. 235/MP/2015, allowing carrying cost from the date when the actual payments were made to the authorities till the date of the Order dated 17.09.2018. Pursuant to the said order of the Commission dated 17.09.2018, upon Carrying Cost Invoice raised by the Appellant, Respondent Nos. 2 & 3 paid carrying cost till the date of approval of change in law events by the Commission vide order dated 04.05.2017 in Petition No. 235/MP/2015. In fact, Respondent Nos. 2 & 3 have paid interest on such carrying cost amount from the date of approval of Change in Law by the Commission vide Order dated 04.05.2017 till the subsequent Order dated 17.09.2018 of the Commission approving Carrying Cost in the above petition. Similarly, in the instant case, Respondent Nos. 2 & 3 are liable to pay the carrying cost from the date the Change in Law event occurred, till the date the change in law event of FGD was allowed by the Commission vide the first impugned

order dated 28.03.2018. However, on account of non-allowance of carrying cost on FGD, the Appellant has been deprived of the claim of Carrying Cost till date, for which it is legitimate that the Appellant shall be reimbursed in the form of interest on carrying cost, from the date when the change in law event of FGD was allowed by the Commission vide order dated 28.03.2018, till the date of approval of Carrying Cost by Appropriate Authority.

**19.** Learned counsel further contends that Respondent Nos. 2 & 3 have averred that the principle for determination of interest rate as approved by the Commission vide Order dated 17.09.2018 in Petition No. 235/MP/2015 should be applied i.e., based on actual interest rate or the interest on working capital, whichever is lower. On this aspect, it is submitted that it is not in dispute that which rate has to be considered for payment of carrying cost for FGD, as the Appellant is considering the same rate and methodology as approved by the Commission in its Order dated 17.09.2018 i.e. actual interest rate or working capital interest rate as per CERC Regulations, whichever is lower for computing carrying cost on the other approved Change in Law events, and Respondents are also paying considering the same methodology.

**20.** The Respondents Nos. 2 and 3 have filed detailed written submissions. However, Respondent Nos. 2 and 3 have also filed brief submissions limited to the challenge made by the Appellants to the order dated 28.03.2018 of the Commission in Petition No. 104/MP/2017 read with the corrigendum order dated 20.04.2018. Learned counsel submits that if the carrying cost, which is the subject matter of consideration is dealt with and decided by this Tribunal in challenge to the order dated 28.03.2018, it is not necessary for this Tribunal to consider the challenge made by the Appellant to the order dated 06.06.2019 passed by the Central Commission in Petition No. 214/MP/2018.

**21.** It is further submitted that when the impugned order was passed on 28.03.2018, the Central Commission was of the view that the carrying cost for the period prior to adjudication and determination of the change in law claim by an order of the Central Commission is not admissible and accordingly has disallowed the claim for carrying cost. However, in view of the subsequent decision of this Tribunal dated 13.04.2018 in Appeal No. 210 of 2017 (Adani Power Limited vs Central Electricity Regulatory Commission and Others) it has been held that in power purchase agreements (PPAs) where there is a restitution provision, the carrying cost is admissible and where there is no such

provision, the carrying cost is not admissible. The view has been upheld by the Hon'ble Supreme Court in its judgment dated 25.02.2019 in "Uttar Haryana Bijli Vitaran Nigam Limited -v- Adani power limited and Others" [(2019) 5 SCC 325]. Therefore, learned counsel submits that since the PPAs entered into between the parties in the present case contain a restitution provision, the carrying cost is admissible.

**22.** Learned counsel contends that two other aspects need to be considered by this Tribunal based on the admissibility of the carrying cost namely,

- a. the rate at which carrying cost to be allowed; and
- b. the implication of the delay on the part of the Appellant in filing the Petition before the Central Commission claiming the impact of change in law.

**23.** As regards the rate, learned counsel submits that carrying cost is different from the late payment surcharge. Therefore, the Rules notified by the Ministry of Power dated 22.02.2021 dealing with the late payment surcharge will not be applicable as they specifically deal with delay in the payment of monthly charges. Such charges refer to adjudicated charges payable as per the monthly bills raised. Further, the Rules are applicable in case of PPAs governed by Section 63 only

where PPAs are effective after the Rules have come into force. Learned counsel points out that the Appellant in his written submissions has stated that the interest rate as approved by the Commission vide order dated 17.09.2018 in Petition No. 235/MP/2015 be applied i.e. based on actual interest rate or interest on working capital whichever is lower.

**24.** Learned counsel further submits that Respondent Nos. 2 and 3 objects to the interest on carrying cost (the carrying cost itself being an interest) being claimed by the Appellant. The carrying cost may be restricted to the interest rate mentioned above, without any additional claim. It is submitted that in the absence of any provision in the PPAs, there cannot be interest on interest or interest on compounding basis. The payment of interest by the Haryana Utilities in Petition No. 235/MP/2015 cannot be a ground for claiming such computation of interest on carrying cost. There is no such order of Commission to allow interest on carrying cost nor had such provision been allowed by this Tribunal or the Hon'ble Supreme Court.

**25.** As regards the period for which the carrying cost is to be computed, it is submitted that though the change in law event occurred on 20.05.2010, the petition was filed before the Commission only on

17.07.2014 without requisite information. However, the Commission vide order dated 06.06.2017 has granted liberty to submit the claim for FGD including the information sought for through a separate petition Accordingly, fresh petition being Petition No. 104/MP/2017 was filed only on 15.05.2017. Even in the said Petition full information was not given, which was sought by Central Commission vide order dated 28.03.2018 and the same was provided only in December, 2018. Learned counsel points out that the principle that delays in filing petition or information thereof would result in denial of carrying cost has been settled by the Hon'ble Courts in the following decisions:

- a. Maharashtra State Electricity Distribution Co. Ltd. –v- Maharashtra Electricity Regulatory Commission dated 19.09.2007 in Appeal No. 70 of 2007 [Paras 7 to 9];
- b. Torrent Power Ltd. –v- Gujarat Electricity Regulatory Commission dated 30.05.2014 in Appeal No. 147, 148 and 150 of 2013 [Para 17];
- c. Paschim Gujarat Vij Company Ltd and Ors -v- Gujarat Electricity Regulatory Commission dated 04.12.2014 in Appeal No. 45 of 2014 [Para 17];
- d. Punjab State Power Corporation Limited -v- Punjab State Electricity Regulatory Commission dated 22.04.2015 in Appeal No. 174 of 2013 [Para 29 and 30 (iv)];
- e. Kanwar Singh and Ors. -v- Union of India (UOI), 2005 (82) DRJ 397, 120 (2005) DLT 348 [Para 12];



- f. Budh Ram -v- Union of India (UOI) and Ors., 2011 SCC OnLine Del 1192 [Para 18];

**26.** We have heard Mr. Amit Kapur, learned counsel appearing for the Appellant and Mr. M.G. Ramachandran, learned senior counsel arguing for Respondent Nos.2 & 3.

### **ANALYSIS & CONCLUSION**

**27.** Based on the arguments, the point which arises for our consideration is ***“whether the impugned order warrants interference, if so, what order?”***

**28.** The genesis for this appeal seems to have commenced in the year 2012. For determination of compensatory tariff, Appellant filed Petition No.155/MP/2012 on 05.07.2012. In respect of this petition, a joint study pertaining to change in law events was conducted in the presence of Appellant and finance wing of HPPC. On 04.09.2012, the Appellant seems to have furnished change in law notice to HPPC, and several notifications in this regard were submitted. Among several change in law events, we are concerned with installation of FGD. In terms of 8<sup>th</sup> Co-ordination meeting, representative of the Appellant explained HPPC officials the various change in law events during the

discussion held between 04.09.2012 to 05.09.2012. Meanwhile, on 16.10.2012, Petition No. 155/MP/2012 came to be disposed of wherein the Commission opined that Mundra project being a composite scheme, CERC has jurisdiction to try the dispute raised in the petition. However, on 02.04.2013, the Appellant's claim for force majeure and change in law were rejected. Though CERC expressed that under Section 79 an amicable solution should be examined, and in that regard a Committee was constituted.

**29.** Meanwhile, Haryana Discom approached this Tribunal in Appeal No. 100 of 2013 challenging the order dated 02.04.2013. In this appeal, issue of jurisdiction was raised along with other issues. Meanwhile, the installation of equipment of FGD at the power plant of the Appellant was commissioned on 29.01.2014. On 07.04.2014, Haryana Discom filed Appeal No. 98 of 2014 challenging the Order of the Commission dated 21.02.2014 by raising the issue of jurisdiction of the CERC to decide the petition.

**30.** When things stood as stated above between 14.04.2014 to 12.05.2014, several invoices (bills) were raised by the Appellant claiming compensation for change in law events for the months of March and April 2014. Several letters were exchanged between the

parties. Discussions were also held between the parties. But no positive response was received from the Discom. On 11.06.2014, again invoices were raised for the month of May, wherein the claim was for the period commencing from 07.08.2012 to 28.02.2014.

**31.** On 08.07.2014, Haryana Discom rejected the claim of Adani, on the ground that the settlement of issues pertaining to change in law cannot be decided without following the process in accordance with PPA. Therefore, the Appellant filed change in law claim Petition No. 156/MP/2014, in which compensation for FGD and carrying cost on the same came to be made. On 13.10.2015, CERC disposed of the issue of maintainability of the Petition and opined that CERC has jurisdiction to entertain the Petition. On 16.10.2015, one more Petition came to be filed before the Commission in Petition No. 235/MP/2015 for change in law compensation towards taxes and duties on imported coal. On 21.01.2016, Commission directed the Appellant to furnish certain additional documents along with the information. The matter was kept pending.

**32.** Meanwhile, this Tribunal said to have passed judgment in Appeal No. 100 of 2013 so also Appeal No. 98 of 2014, whereby the jurisdiction of CERC to adjudicate upon disputes between the

generating companies and distribution licensees having composite scheme was upheld. So far as the petition filed by Adani before CERC i.e., Petition No.156/MP/2014, CERC opined that Appellant should approach the Commission claiming compensation on the issue of FGD by filing a separate petition along with information and documents.

**33.** In pursuance of this direction, Petition in 104/MP/2017 was filed before the Commission claiming compensation for FGD as change in law event. On 15.05.2017, claim of compensation on FGD as change in law event was allowed, though carrying cost was disallowed.

**34.** On 04.05.2017, Petition No.235/MP/2015 was disposed of disallowing certain change in law events, like actual SHR and also carrying cost.

**35.** Appeal No. 210 of 2017 came to be disposed of by this Tribunal on 13.04.2018 wherein carrying cost on change in law was allowed. It is pertinent to note that the issues raised in the appeal relate to the same set of PPA between the same parties as in the present case.

**36.** It is seen that after disposal of the matter before CERC dated 28.03.2018, wherein FGD was accepted as change in law event, the Appellant seems to have raised invoices claiming compensation

towards FGD. This was disputed by the Haryana Discoms. Therefore, Petition No.214/MP/2018 came to be filed before CERC seeking clarification. An interlocutory application was filed on 25.07.2018 claiming carrying cost, since this Tribunal allowed carrying cost in its judgment dated 13.04.2018.

**37.** On 06.06.2019, CERC disposed of Petition 214/MP/ 2018 along with IA Nos.70 of 2018 and 101 of 2018. In this order, CERC seems to have modified its earlier order dated 28.03.2018 by granting relief towards additional auxiliary consumption of FGD on energy charges, though according to the Appellant, on hyper technical ground carrying cost was rejected.

**38.** At this stage, the Appellant filed the instant appeal challenging the impugned order dated 28.03.2018 restricting its claim only to the denial of carrying cost to Appellant on change in law event pertaining to FGD. An application came to be filed for amendment of appeal so as to challenge the later order dated 06.06.2019 passed in Petition No. 214/MP/2018 denying carrying cost on the event of change in law of FGD. The amendment application was allowed, and subsequently the matter was heard at length.

**39.** According to the Appellant, the Appellant was alert, and all along he was seeking carrying cost. It is not in dispute that in terms of Article 13 of the PPA dated 07.08.2008, the installation of FGD was opined as consequence of change in law. According to the Appellant, in terms of PPA, the Appellant has to be restored to same economic position as if no change in law event has occurred. Therefore, apart from compensation for change in law event, they are also entitled for carrying cost on account of deferred recovery of the compensation towards change in law event in respect of installation of FGD.

**40.** In this case, the change in law is at Article 13, which reads as under:

***13 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 enactment, 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;*

*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.*

*Provided that if Government of India does not extend the income tax holiday for power generation projects under Section 80 IA of the Income Tax Act, upto the Scheduled Commercial Operation Date of the Power Station, such non- extension shall be deemed to be a Change in Law (applicable only in case the Seller envisaging supply from the Project awarded the status of "Mega Power Project" by Government of India).*

.....

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

*While determining the consequence of Change in Law under this Article 13, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through Monthly Tariff Payments, to the extent contemplated in this Article 13, the affected Party to the same economic position as if such Change in Law has not occurred.*

**41.** So far as FGD installation being change in law event it is no more *res integra*. This Tribunal in its judgment dated 28.08.2020 in Appeal No. 21 of 2019 titled as Talwandi Sabo Power Ltd. v. Punjab State Electricity Regulatory Commission & Anr., opined that installation of FGD on account of MoEF Notification dated 07.12.2015 is a change in law event, therefore, on the principle of restoration clause in the PPA, this Tribunal opined that compensation has to be paid so as to bring the Generator to same economic position as if change in law event has not occurred and carrying cost has to be allowed. The operative portion of the said judgment is as under:

*“140. In the light of our discussion and reasoning, we are of the opinion that the impugned Orders, dated 21.12.2018 and 09.01.2019 challenged in both the appeals deserve to be set aside and accordingly set aside by allowing the appeals.*

*a) The MoEF & CC Notification dated 07.12.2015 is a Change in Law event under PPAs in question having regard to the facts and circumstances of the case of the Appellants.*

*[..]*

*b) Appellants are entitled for carrying cost in terms of provisions of the PPAs to bring the seller-Appellants to the same economic position as if such Change in Law event has not occurred.”*

**42.** The entitlement of Generator for carrying cost on the principle of restoration is no more *res integra* in the light of the following judgments:



- a) Judgment dated 13.04.2018 passed in Appeal No. 210 of 2017 titled ***Adani Power Ltd. vs CERC & Ors;***
- b) Judgment dated 25.02.2019 passed by the Hon'ble Supreme Court in ***Uttar Haryana Bijli Vitaran Nigam Limited v. Adani Power Ltd. & Ors.***, reported in ***(2019) 5 SCC 325*** (*wherein the aforesaid judgment dated 13.04.2018 of this Hon'ble Tribunal was upheld, which reads as under:*

*“7. 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.....*

*10 ..... Since it is clear that this amount of carrying cost is only relatable to Article 13 of the PPA, we find no reason to interfere with the judgment of the Appellate Tribunal...*

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

- c) Judgment dated 28.08.2020 passed in Appeal No. 21 of 2019 titled ***Talwandi Sabo Power Ltd. v. Punjab State Electricity Regulatory Commission & Anr*** (*wherein this Hon'ble Tribunal allowed carrying cost, specifically on FGD*)

**43.** According to the Appellant, the CERC was not justified in denying carrying cost in the impugned order dated 28.03.2018, opining

that there was no provision in the PPA to grant carrying cost from the date of incurring the expenditure under change in law. In the impugned order dated 06.06.2019, it opined that CERC having rejected the claim of the Appellant earlier, cannot adjudicate the same relief by way of IA on account of subsequent judgment of the higher court. They also place reliance on SC carrying Cost Judgment, which was disposed of by the Hon'ble Supreme Court on 25.02.2019, wherein it was held as under:

*“7. 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.....*

*10 ..... Since it is clear that this amount of carrying cost is only relatable to Article 13 of the PPA, we find no reason to interfere with the judgment of the Appellate Tribunal...*

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

**44.** As against this, the contention of the Respondent is that the CERC was justified in rejecting the claim of the Appellant in the second

impugned order dated 06.06.2019 on the principle of *res judicata*.

**“Whether the principles of *res judicata* is applicable as contended by the Respondents?”** In the first impugned order dated 28.03.2018, carrying cost was rejected. The order in respect of claim of carrying cost, since the decision in the said order has not reached finality, therefore, the question of principle of *res judicata* coming in the way would not arise. Even otherwise, in this appeal, both the impugned orders are under challenge. So far as granting of carrying cost, as already stated, it is no more *res integra* since the law laid down by the Hon'ble Supreme Court in SC Carrying cost judgment pertaining to Adani Power Limited is the law of the land held by the Highest Court in the country. When the Supreme Court of India has opined that the restoration principle allows the affected party to have carrying cost on the change in law events, which are approved as change in law. Several judgments of this Tribunal also support the case of the Appellant with regard to carrying cost payable on allowed component of change in law.

**45.** Next ground raised by the Respondent is that the Appellant is not entitled for carrying cost for the period where there has been delay and laches on the part of the Appellant itself. To consider this issue, one has to see **“whether the Appellant was diligent in seeking**

***carrying cost?”*** Apart from seeking carrying cost, ***“whether the Appellant pursued available legal remedies claiming carrying cost on change in law compensation”?*** To answer this, we have to refer to certain facts at the cost of repetition.

**46.** After installation of FGD, the Appellant issued change in law notice as early as on 04.09.2012 to Respondent Nos.2 and 3 claiming change in law. Again, after installation of the FGD equipment, a Petition was filed in Petition No. 156/MP/2014. In this petition, CERC rejected the claim of the Appellant towards carrying cost on change in law by reserving liberty to the Appellant to submit the claim for FGD through separate petition. Therefore, Appellant filed Petition No.104/MP/2017. This came to be disposed of on 28.03.2018 allowing only change in law claim towards FGD but disallowed carrying cost on FGD. Another petition was also filed claiming additional expenditure incurred on account of auxiliary consumption of the FGD equipment in 214/MP/2018. In this petition, the claim of the Appellant for carrying cost was rejected.

**47.** It is seen that right from 2012, the Appellant started claiming change in law event compensation so far as FGD along with carrying cost. It has to approach several forums to get this claim settled.

Ultimately, only on 28.03.18, for the first time, compensation towards FGD was allowed as change in law, however carrying cost was denied. There was no delay on the part of the Appellant as argued by Respondents, since right from filing of the petition in 156/MP/2014 till filing of the present appeal. The Appellant with utmost diligence is pursuing the matter claiming carrying cost, therefore, we are of the opinion that there is no delay on the part of the Appellant in approaching the concerned authority claiming carrying cost. Therefore, the contention of the Respondent that the Appellant was not diligent in pursuing the claim for carrying cost is not justified.

**48.** The other defence raised by Respondent Nos.2 and 3 is the principle applicable for determination of interest rate. The Appellant is claiming the methodology approved by CERC in its order dated 17.09.2018 in Petition No. 235/MP/2015. In this order, CERC opined that actual interest rate or working capital interest rate as per CERC Regulations, whichever is lower, for computation of carrying cost on the approved change in law events was the methodology, which the Appellant is also claiming. The Respondents also contend that the principle evolved so far as methodology to determine the interest rate in the above said petition by CERC has to be adopted. Since the Appellant is adopting the same principle, we don't see any controversy

so far as the methodology pertaining to the determination of interest rate.

**49.** Then coming to another objection raised by Respondents that there is no concept of payment of interest on carrying cost, according to Respondents, since no provision exists in the PPA for payment of interest on interest or compounding basis, hence it cannot be granted. However, the Appellant contends that they are entitled for such interest on carrying cost. Appellants place reliance on the orders of the Commission dated 17.09.2018 passed in Petition No. 235/MP/15. In terms of this order of CERC, the Respondents have paid carrying cost from the date of approval of change in law events and thereafter, Respondents have also paid interest on such carrying cost till subsequent order dated 17.09.2018 of CERC in the said petition.

**50.** Though Respondents contend that the payment of interest by Haryana utilities in the said petition cannot be a ground for claiming computation of interest on carrying cost, but there is no explanation as to why Respondent utilities are taking different yardstick for different parties. The Respondent being a public utility, cannot adopt a different approach but should have same approach towards all the parties. In the absence of any explanation as to why the facts in the present

appeal are different from the facts in Petition No.235/MP/2015, we are of the opinion that the Appellants are entitled for interest on carrying cost as well.

**51.** As contended by the Respondents, once the challenge to the order dated 28.03.2018 is considered, there is no need to adjudicate the challenge to the order dated 06.06.2019.

**52.** In light of above discussion and reasoning, the appeal is allowed setting aside the impugned order partly to the extent challenged in the appeal so far as Petition No.104/MP/2018 (order dated 28.03.2018). Accordingly, we pass the following order:

- i) The Appellant is entitled for carrying cost in respect of compensation for change in law event towards FGD installation as approved by the Commission from the date of change in law occurrence.
- ii) The Appellant is entitled for interest on carrying cost, as claimed by the Appellant.
- iii) The Respondent Commission shall determine the amounts payable to the Appellant, in terms of our judgment within eight (8) weeks from today.

**53.** Needless to say that pending IAs, if any, shall stand disposed of.

There shall be no order as to costs.

**54.** Pronounced in the Virtual Court on this the 12<sup>th</sup> day of August, 2021.

**(Ravindra Kumar Verma)**  
Technical Member

**(Justice Manjula Chellur)**  
Chairperson

**REPORTABLE / NON-REPORTABLE**

ts