THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 158 OF 2017 & IA No. 575 OF 2018
&
APPEAL NO. 316 OF 2017

Dated: 7th June, 2021

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

In the matter of:-

APPEAL NO. 158 OF 2017 & IA No. 575 OF 2018

Adani Power (Mundra) Limited
"Adani House"
Near Mithakhali Six Roads,
Navarangpura,
Ahmedabad, Gujarat- 380009 .... **Appellant**

VERSUS

1. Central Electricity Regulatory Commission
The Secretary.
3rd& 4th Floor, Chanderlok Building,
36, Janpath, New Delhi- 110001

2. Uttar Haryana BijiliVitran Nigam Limited
The Chairman
Shakti Bhawan, Sector-6
Panchkula, Haryana 134 109

3. Dakshin Haryana BijiliVitran Nigam Limited
The Managing Director
Vidyut Sadan, Vidyut Nagar,
Hisar, Haryana – 125 005 ... **Respondents**

Counsel for the Appellant(s) : Mr. Amit Kapur
Mr. Akshat Jain
Mr. Pratyush Singh
Mr. Raghav Malhotra
Mr. Matrugupta Mishra
Ms. Shikha Ohri
Mr. Hemant Singh
Mr. Nishant Kumar
Ms. Ankita Bafna
Mr. Divyanshu Bhatt
Mr. Shourya Malhotra
Mr. Ananya Mohan

Counsel for the Respondent(s) : Mr. Ganesan Umapathy **for R-2 & 3**

APPEAL NO. 316 OF 2017

1. Uttar HaryanaBijliVitran Nigam Limited
Having its Registered Office at Shakti Bhawan,
Sector 6 Panchkula, Haryana- 134 109
represented by the Chief Engineer, HPPC

2. Dakshin Haryana BijliVitran Nigam Limited
Having its Registered Office at Vidyut Sadan,
Vidyut Nagar Hisar, Haryana-125005
represented by the Chief Engineer, HPPC - **Appellants**

VERSUS

1. Central Electricity Regulatory Commission
Through its Secretary.
3rd & 4th Floor, Chanderlok Building,
36, Janpath, New Delhi- 110001

2. Adani Power (Mundra) Limited,
"Adani House"
Near Mithakhali Six Roads, Navarangpura,
Ahmedabad-380009
represented by its Authorised Signatory ... **Respondents**

Counsel for the Appellant(s) : Mr. G. Umapathy **for App 2**

Counsel for the Respondent(s) : Mr. Matrugupta Mishra
Ms. Shikha Ohri
Mr. Hemant Singh
Mr. Nishant Kumar
Ms. Ankita Bafna
Mr. Divyanshu Bhatt
Mr. Shourya Malhotra
Mr. Ananya Mohan **for R-2**

JUDGMENT

(PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON)

1. Since these two appeals are cross appeals, they are disposed of by this common judgment.

2. These Appeals are preferred challenging the legality, propriety and validity of a portion of the order dated 06.02.2017 (**"Impugned Order"**) passed by the Central Electricity Regulatory Commission (**"CERC/Central Commission"**) in Petition No. 156/MP/2014 whereby the Respondent Commission has denied certain claims of compensation

to the Appellant on account of Change in Law events in terms of Article 13 of the Power Purchase Agreement (**"PPA"**) dated 07.08.2008.

3. The facts that are necessary for disposing of these Appeals, in brief, are narrated hereunder:

4. The Appellant/Respondent No.2, Adani Power Mundra Limited (for short **"APL"**) is a company engaged in the business of generation, transmission and sale of electricity having composite scheme for generation and sale of electricity to more than one State. It has set up thermal power plant with total capacity of 4620 MW (comprising 4 units of 330 MW and 5 units of 660 MW) within Special Economic Zone at Mundra. Respondent No. 1 is the Central Electricity Regulatory Commission. Respondent Nos. 2 & 3 - Uttar Haryana Bijli Vitran Nigam Ltd. (**"UHBVL**") and Dakshin Haryana Bijli Vitran Nigam Ltd. ("**DHBVNL**") respectively (collectively referred to as **"Haryana Utilities/ Procurers / Respondent Discoms"**) have entered into long term Power Purchase Agreements (PPAs) with the Appellant for procuring long term power from the Appellant's Mundra power plant. The Respondent Discoms are distribution licensees and are supplying electricity in the State of Haryana.

5. On 25.05.2006, HPGCL issued a Request for Qualification ("RFQ") for procuring 2000 MW power on long term basis on behalf of Respondent Nos. 2 & 3 - UHBVNL and DHBVNL. On 04.06.2007, HPGCL issued the Request for Proposal ("RFP") to the qualified bidding companies. The bid deadline as per RFP was 26.11.2007. As such, the cut-off date for claiming compensation on account of change in law events in the present case is 19.11.2007. 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 as successful bidder. Pursuant thereto, two separate PPAs, both dated 07.08.2008 were executed by the Appellant with Respondent Nos. 1 and 2 - UHBVNL and DHBVNL, for supply of 712 MW of power to each from Phase IV of the Mundra Power Project at a levelized tariff of Rs.2.94 per kWh. The Scheduled Delivery Date under the above PPAs for supply of power was 07.08.2012 and 07.02.2013 for 474 MW and 950 MW respectively (totaling to 1424 MW). The Appellant commenced supply to the Respondent Discoms from 07.08.2012.

6. Subsequent to 19.11.2007, i.e., the cut-off date, there were certain Change in Law events, which resulted in additional expenditure on the

Appellant on account of recurring / non-recurring events but not limited to introduction of new taxes, levies, change in the rates of taxes, etc. or change in the incidences on which the taxes, levies etc., are imposed. It is submitted that the imposition of the said taxes, duties and levies fall within the ambit of "Change in Law" as embodied in Article 13 of the PPAs, which evidences the understanding between the parties to the effect that any change in law that occurs after seven days prior to the bid deadline and which results into any additional recurring and non-recurring expenditure by the Seller (i.e. Appellant / APL) or any income to the Seller and effects the cost and revenue of the Appellant, qualifies as a "Change in Law" event. On the occurrence of various 'Change in Law' events, the Appellant in accordance with Article 13.4.1 of the PPA, notified the occurrence of such events to the Respondent Discoms and sought consequential reliefs vide Notices dated 04.09.2012, 21.02.2013, 21.03.2013, 24.12.2013, 18.01.2014 and 14.04.2014. Though the Appellant submitted the claims for April 2014 and May 2014 and for the period from the Scheduled Commercial Operation Date (SCOD) to February, 2014, and issued several reminders for requisite payments on account of change in law claims, the Respondent Discoms did not make any payments against any of the change in law claims raised by the

Appellant. Therefore, the Appellant was constrained to approach the Respondent Commission by filing Petition No. 156/MP/2014.

7. The Respondent Commission after hearing the matter at length passed the Impugned Order dated 06.02.2017 and allowed only part of the claims of the Appellant and rejected certain other claims arbitrarily and illegally on untenable reasons. The relevant portion of the Impugned Order at Para 107, reads as under:

> *"107. Based on the above analysis and decisions, the summary of our decision under the Change in Law during the operating period of the project is as under:*

Components	***Change in Law Event***
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*

Components	***Change in Law Event***
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*
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 *Auxiliary consumption due to FGD installation affecting capacity charges* *Additional operating expenditure on FGD*	*Not decided and liberty granted*
Carrying cost	*Not Allowed*

"

8. Aggrieved by the rejection of certain reliefs claimed by the Appellant, in the impugned order, the Appellant has filed the present appeal praying for the following reliefs:

> "a) To set aside the impugned order dated 06.02.2017 passed by Hon'ble Central Electricity Regulatory Commission in Petition No. 156/MP/2014, to the extent challenged in the present appeal;
>
> b) to pass such other or further orders as this Hon'ble Tribunal may deem appropriate."

Short facts in Appeal No. 316 of 2017

9. The Appellants, Uttar Haryana Bijli Vitran Nigam Ltd. and Dakshin Haryana Bijli Vitran Nigam Ltd. are the distribution licensees and are supplying electricity to the consumers in the State of Haryana. These Appellants are procuring power through Haryana Power Purchase Centre (HPPC) which is a joint forum of Haryana Utilities. By filing Petition No. 154/MP/2014 before the Central Commission, APL sought compensation with regard to Levy of customs duty on electricity removed from SEZ to DTA on account of per unit impact on the levy of customs duty on energy removed from SEZ to DTA for the month of March 2013. Central Commission by the impugned order dated 06.02.2017 allowed the claim

of customs duty on sale of energy from SEZ to DTA under change in law. Aggrieved thereby, UHBVNL and DHBVNL have filed this appeal before this Tribunal.

10. We have heard Mr. Amit Kapur, learned counsel appearing for the Adani Power (Mundra) Limited and Mr. Ganesan Umapathy, learned counsel appearing for Respondent-Discoms.

11. Learned counsel for the Appellant has filed written submissions, the gist of which, is as under:

12. Learned counsel reiterating the background of the case submits that in terms of the liberty granted by the Central Commission in the Impugned Order, the Appellant filed separate petition being Petition No. 104/MP/2017 claiming compensation on account of installation of FGD, associated operational expenditure and Carrying Cost. The Central Commission by its Order dated 28.03.2018 read with Corrigendum dated 20.04.2018 while allowing the claim of FGD as Change in Law, has disallowed the claim of associated operational expenditure and Carrying Cost.

13. On 06.04.2017, the Appellant filed Appeal No. 158 of 2017 claiming the following events / components as Change in Law events, which were not considered by the Central Commission as change in law events:

(a) Increase in Busy Season Surcharge and Development Surcharge on transportation of coal.

(b) Increase in Surface Transportation and Sizing Charges of coal.

(c) Change in pricing of coal from UHV to GCV basis

(d) Levy of Minimum Alternate Tax on power plants situated in SEZ

(e) Carrying cost.

14. On 12.05.2017, being aggrieved by the impugned order to the extent of allowing the claim of the Appellant/APL i.e., compensation with regard to Levy of customs duty on electricity removed from SEZ to DTA, Haryana Discoms have filed Cross Appeal No. 316 of 2017.

15. Learned counsel points out that the following events / components claimed as Change in Law events by the Appellant in terms of Article 13 of the PPAs, are squarely covered by the Judgments of the Hon'ble Supreme Court and of this Tribunal, having been allowed as Change in Law events.

Event	Status
Increase in Busy Season Surcharge on transportation of coal	Allowed by this Hon'ble Tribunal in:- (a) Appeal No. 119/2016, 277/2016: *Adani Power Rajasthan Ltd. v. RERC* judgment dated 14.08.2018. (b) Appeal No. 111/2017: *GMR Warora Energy Ltd. v. CERC* judgment dated 14.08.2018. (c) Appeal No. 193/2017: *GMR Kamalanga Energy Ltd. v. CERC &Ors.* dated 21.12.2018.
Increase in Developmental Surcharge on transportation of coal	Allowed by this Hon'ble Tribunal in:- (a) Appeal No. 119/2016, 277/2016:*Adani Power Rajasthan Ltd. v. RERC* judgment dated 14.08.2018. (b) Appeal No. 111/2017: *GMR Warora Energy Ltd. v. CERC* judgment dated 14.08.2018. (c) Appeal No. 193/2017: *GMR Kamalanga Energy Ltd. v. CERC &Ors.* dated 21.12.2018.
Carrying cost	Allowed by Hon'ble Supreme Court in *Uttar Haryana Bijli Vitran Nigam Ltd. v. Adani Power Ltd.*: (2019) 5 SCC 325 dated 25.02.2019.

16. The increase in Surface Transportation and Sizing Charges of coal though was disallowed by this Tribunal in the ***Adani Judgment*** and ***GWEL Judgment***, Appellant seeks to distinguish the present case.

17. Learned counsel submits that as per the PPA, the definition of "law" is an inclusive definition which includes, without limitation, regulation, notifications, orders, circulars, letters etc. issued by an Indian

Governmental Instrumentality. Any notification, regulation, orders, circulars, letters etc. issued by an Indian Governmental Instrumentality having "force of law" will fall within the definition of "Law". In support of his contention, learned counsel relies on the decision of the Hon'ble Supreme Court in "***Kusum Ingots & Alloys v. Union of India"*** [(2004) 6 SCC 254] wherein it was held that executive instructions, devoid of any statutory backing would also be considered as 'law'. The Change in Law provisions under the PPA aims to determine the consequence of change in law and to compensate a party affected such that the party is restored to the same economic position as if such change in law had not occurred. This Tribunal has in its Judgment dated 19.04.2017 in Appeal No. 161 of 2015 titled "***Sasan Power Ltd. vs. CERC &Ors."*** (**"Sasan Power Judgment"**) held that compensation ought to be meted out for a Change in Law event despite the bidder having quoted an all-inclusive tariff, as denial of compensation will render the Change in Law clause otiose. Further, this Tribunal also held that change in rates of taxes are a Change in Law event and compensation for the same ought to be given. The Hon'ble Supreme Court in "***Energy Watchdog v. CERC &Ors."*** [(2017) 14 SCC 80] (**"Energy Watchdog Judgment"**), held that policy documents such as the Tariff Policy dated 28.01.2016 issued under

Section 3 of the Electricity Act and the letter dated 31.07.2013 issued by Ministry of Power are statutory documents having force of law and any change / amendment introduced by way of such document amounts to Change in Law.

18. Alleging that levy of Busy Season Surcharge and Developmental Surcharge on transportation of coal fall under Change in Law events, learned counsel, referring to the following decisions, submits that the issues involved in the present Appeal have been finally settled and are squarely covered in favour of the Appellant by the following judgments of this Tribunal:

(a) Appeal No. 119/2016, 277/2016: *Adani Power Rajasthan Ltd. v. RERC* (judgment dated 14.08.2018). ("Adani Power Judgment".)

(b) Appeal No. 111/2017: *GMR Warora Energy Ltd. v. CERC* (judgment dated 14.08.2018). ("GWEL Judgment")

(c) Appeal No. 193/2017: *GMR Kamalanga Energy Ltd. v. CERC &Ors.* (judgement dated 21.12.2018). ("GKEL Judgment")

19. As regards the increase in Busy Season Surcharge and Development Surcharge, it is submitted that the Central Commission

erred in holding that they do not come within the ambit of Change in Law, since the said increase is in terms of Circulars dated 12.10.2011, issued by the Ministry of Railways, Government of India, which is an Indian Governmental Instrumentality as defined under the PPA and came into effect from 19.11.2007 i.e., after the cut-off date. There was further increase in Busy Season Surcharge by Circulars dated 27.09.2012 and 18.09.2013, which is after the cut-off date. The increase in Busy Season Surcharge led to an increase in the landed cost of coal which in turn leads to an increase in cost of generating and supplying power to Haryana Discoms. Further, it is submitted that inasmuch as the Railway Board is vested with the powers and functions of the Central Government, it falls within the definition of Indian Governmental Instrumentality. The powers of the Railway Board include the power to fix freight charges.

20. It is further submitted that the circulars issued by the Railway Board are in the nature of orders having force of law as held in the judgment of the Hon'ble High Court of Calcutta in ***Rashmi Metaliks Limited & Anr. v. Union of India &Ors***, reported as 2014 SCC Online Cal 17706.

21. Learned counsel contends that the Central Commission rejected the claim for busy season surcharge and Development surcharge firstly on

the ground that the provisions relating to the Railway Board's power to fix charges were existing prior to the Cut-off date, which according to the learned counsel, is contrary to several orders passed by the Central Commission itself wherein increase in rate of existing taxes has been allowed as change in law. Secondly, the Central Commission rejected the claim on the ground that the generating company was required to take into account possible revisions while quoting the bid, which rationale has been rejected by this Tribunal in the '***Sasan Power Judgment***'.

22. The above submissions have been affirmed by this Tribunal in terms of the ***Adani Judgment*** and the ***GWEL Judgment***.

23. So far as the increase in sizing / crushing charges and surface transportation charges of coal are concerned, the Central Commission erred in holding that they do not constitute a change in law event in terms of the PPA. Before Cut-off date, i.e. 19.11.2007, sizing charges and Surface Transportation charges were applicable in accordance with Coal India Limited ("**CIL**") notification dated 15.6.2004. The increase in the said charges was introduced by way of notifications issued by CIL, a Governmental Instrumentality, which fall within the definition of change in Law under the respective PPAs. This Tribunal in its judgments passed in

Appeal Nos. 119 of 2016 and 111 of 2017, held that a bidder cannot envisage any changes, which may happen in future, regarding taxes, levies, duties etc. Therefore, any increase in charges post the Cut-off date, as a result of any notification issued by an Indian Government Instrumentality has to be treated as a "Change in Law" event. The CIL notifications resulting into increase in crushing / sizing charges and surface transportation of coal came into effect after the Cut-off date resulting in additional recurring expenditure for the Appellant. Since the conditions for change in law are satisfied, the affected party i.e., the Appellant will be entitled to relief. This position has been upheld by this Tribunal in the ***Sasan Power Judgment***. Further, the Appellant submitted its bid based on the base price, other charges and statutory charges existing as on 18.11.2007. As such, any increase in the said Charges, post Cut-off date, which qualifies as Change in Law, will have to be reimbursed to the Appellant.

24. Learned counsel further points out that the Central Commission in its order dated 02.04.2019 in Petition No. 72/MP/2018, titled as "***GMR Kamalanga Energy Ltd. & Anr. vs. Dakshin Haryana Bijli Vitran Nigam Limited &Ors***", held that any notification issued by Coal India

Limited, pertaining to the "evacuation charges on coal", is a "change in law" event, as the same is an "Indian Government Instrumentality". Therefore, applying the same principle, the increase in Sizing Charges of Coal and Surface Transportation Charges ought to be treated as a "change in law" event. Moreover, the bid was tendered by the Appellant on 26.11.2007, whereas the Coal / Fuel Supply Agreement was executed on 09.06.2012. The Appellant, at the time of bid, could not have factored as to from which mine the coal linkage would be granted. Hence, the surface transportation charges, which depend upon the distance between the coal mine and the loading point, can never be factored while submitting bid. Since, the surface transportation charges are uncertain, and are only known when an FSA is executed, the same can never be factored in the escalation rate.

25. As regards carrying cost, learned counsel submits that carrying cost is nothing but compensation for time value of money or monies denied at the appropriate time. It is settled position of law that whenever payments are deferred or delayed, then carrying cost is payable along with such deferred payments. Further, Article 13 of the PPAs itself provides that to mitigate the impact of Change in Law, a party is to be restituted to the same economic position as if such Change in Law event had not

occurred. The principle of carrying cost and restitutive relief is well established in the following decisions by the Hon'ble Supreme Court:

(a) *UHBVNL v. Adani Power Ltd.*: (2019) 5 SCC 325 ("***Uttar Haryana Judgment***"), Para-10, 11, 13 & 19.

(b) *Energy Watchdog v. CERC*: (2017) 14 SCC 80, Para 57.

26. Learned counsel points out that in the Uttar Haryana Judgment, the Hon'ble Supreme Court while interpreting Article 13 of the same PPA between the same parties, has held that the Appellant is entitled to carrying cost in view of the inbuilt restitutionary principle contained in Article 13.2. Therefore, the issue of carrying cost is no longer *res integra* having been settled finally by the Hon'ble Supreme Court while interpreting the same Article 13, pertaining to Change in Law.

27. Alleging that levy of customs duty on electricity removed from Special Economic Zone to Domestic Tariff Area constitutes as Change in Law event, learned counsel submits that the Central Commission is justified in its finding as there was no Customs Duty imposed as on Cut-off date and it was introduced after the Cut-off date i.e., after 19.11.2007 by the Ministry of Finance (Department of Expenditure) and the Customs Department being the Indian Governmental Instrumentality in terms of the

PPAs. As per the bid, the Appellant was required to factor in all taxes, duties, cess, etc. in the bid. However, since there was no such Customs Duty as on the Cut-off date, the Appellant could not have factored the same in its bid. Therefore, the Customs Duty qualifies as a Change in Law event as rightly held by the Central Commission in the Impugned Order.

28. Learned counsel appearing for the Respondent-Discoms has filed written submissions, the gist of which in brief, is as under:

29. Learned counsel submits that the Appellant / APL in the present appeal has confined to the following issues:-

a. Levy of Minimum Alternate Tax on plants situated in SEZ;
b. Change in pricing of coal from UHV TO GCV basis; and
c. Disallowance of Interest/Carrying Cost.
d. Increase in Busy Season Surcharge on transportation of coal;
e. Increase in Development Surcharge on transportation of coal;
f. Increase in Sizing Charges of Coal;
g. Increase in Surface Transportation

30. As regards the issues of 'Levy of Minimum Alternate Tax on plants situated in SEZ and 'the Change in Pricing of coal from UHV to GCV basis', the Appellant has submitted that it is not pressing the said issues.

Coming to the issue of carrying cost, learned counsel submits that this issue is covered in favour of the Appellant in terms of the Judgment dated 13.04.2018 passed by this Tribunal in A No. 210 of 2017 – ***Adani Power Limited V. CERC*** and affirmed by the Hon'ble Supreme Court.

31. So far as the issues of 'increase in busy season surcharge on transportation of coal' and 'increase in development surcharge on transportation of coal' are concerned, it is submitted that the said claims of the Appellant are wholly unjustified inasmuch as the charges imposed by the railways, from time to time, are not in pursuance of any statutory declaration or levy, and therefore cannot be considered as Change in Law. Further, the freight charges are the cost involved for procuring coal which is an input for generating power for supply, and the generator is expected to take into account the possible revision in these charges while quoting the bid. It is further submitted that the activity of Railways is a commercial activity, which has been settled by the Hon'ble Supreme Court in the following judgments:

i) Union of India (UOI) vs. Ladulal Jain (1964) 3 SCR 624,
ii) Railway Board vs. Chandiram Das (2000) 2 SCC 46
iii) Baktawar Singh Bal Kishan vs. Union of India (1988) 2 SCC 293.

32. Therefore, increase in cost of Railway Freight in the form of Busy Season Surcharge, Development Surcharge are merely components of dynamic pricing policy of Railways and do not have any force of law but are only commercial consideration under the contract. Hence, these changes ought not to be considered as change in law.

33. Coming to the issue of increase in Sizing Charges of Coal, learned counsel submits that this Tribunal has already decided this issue in favour of the Respondents/Procurers vide its judgment dated 14.08.2018 in Appeal No. 111 of 2017 titled as "***GMR Warora Energy vs. MSEDCL & Ors***.," and judgment in Appeal No. 119 of 2016 titled as "***APL (Raj) vs. CERC &Ors***."

34. On the issue of increase in Surface Transportation, learned counsel submits that the said issue is also covered and decided in favour of the Procurers by this Tribunal vide Judgment dated 14.08.2018 passed in Appeal No. 111 of 2017 and judgment in Appeal No. 119 of 2016.

35. Learned counsel contends that by placing reliance on the order of CERC dated 02.04.2019 in Petition No. 72/MP/2018, wherein the

judgment of this Tribunal in ***Sasan Power vs. CERC*** (2017 ELR APTEL 508) was relied upon, the Appellant is trying to distinguish the above two judgments, however it was clearly held therein that sizing charges for coal must be reflected in the price of coal charged by Coal India Ltd., and covered in the CERC Escalation Rates. As regards increase in surface transportation charges, the same must have been taken care in quoted tariff appropriately and, accordingly, rejected the claim of the above two events under change in law. However, from a reading of para 42 of the order dated 02.04.2019 passed in Petition No. 72/MP/2018, it is evident that it is not a case of sizing or surface transportation charges but a case of evacuation facility charges. Thus, the submissions of the Appellant that the Judgment of this Tribunal is distinguishable in the light of the subsequent CERC's Judgment dated 02.04.2019 in Petition No. 72/MP/2018 is wholly misplaced. CERC has been consistently following the rulings of this Tribunal and holding that increase in Sizing Charges and Surface Transportation Charges are not covered under Change in Law.

36. In view of the above pleadings and arguments, the point that would arise for our consideration is as under:

(i) Whether the Appeal of the Appellant Generator deserves to be allowed?

(ii) Whether the Appeal of the Haryana Discoms deserves to be allowed?

ANALYSIS AND DISCUSSION

37. Apparently, before the Commission, the Appellant Generator totally claimed 18 events of compensation on the basis of change in law, and one more claim was carrying cost for the deferred payment. The Appeal filed by the Appellant Generator refers to total of five (5) claims which were disallowed by the Respondent Commission in the impugned order. The said claims are as under:

(a) Increase in Busy Season Surcharge and Developmental Surcharge on transportation of coal.

(b) Increase in Surface Transportation and Sizing Charges of coal.

(c) Change in pricing of coal from UHV to GCV basis

(d) Levy of Minimum Alternate Tax on power plants situated in SEZ.

(e) Carrying cost.

38. The Appeal No. 316 of 2017 filed by the Appellant Haryana Discoms is pertaining to levy of customs duty on sale of energy from Special Economic Zone (SEZ) to Domestic Tariff Area (DTA). This customs duty claim of the Appellant Generator was allowed, therefore, the Discoms are before us challenging the said claim.

39. During course of the arguments, Mr. Amit Kapur, learned counsel appearing for the Appellant Generator, fairly submitted that they are not pressing the claim in respect of two of the claims i.e., (1) Change in pricing of coal from UHV to GCV basis, and (2) Levy of Minimum Alternate Tax on power plants situated in SEZ. Therefore, we are concerned with 4 claims only i.e., (i) **increase in Busy Season Surcharge and Developmental Surcharge on transportation of coal**, (ii) **increase in Surface Transportation and Sizing Charges of coal**, (iii) **Carrying cost**, and (iv) **levy of customs duty**, the claim put forth by the Appellant's counsel in his arguments in response to the Appeal filed by the Haryana Discoms.

Increase in Busy Season Surcharge and Development Surcharge on transportation of coal:

40. The Appellant Generator's counsel brought to our notice contents of the PPA i.e., Article 13 to contend what constitute change in law events and how the claim qualifies for change in law events. It is well settled that in order to qualify an event as change in law event, the said change in law event has to occur after the cut-off date i.e., seven days prior to bid deadline which happens to be 26.11.2007, since the cut-off date undisputedly is 19.11.2007. This event of change in law must result in additional either recurring or non-recurring expenditure by the seller of the power or to the income of the seller. It is also now well settled that the definition of law as envisaged under the PPA would include all laws in India, any Statute, Ordinance, Regulation, notifications, Code and Rules; and all applicable Rules, Regulations, Orders, Notifications or interpretation of the above-mentioned Statute, Ordinance, Regulation, notifications, Code and Rules by any Indian Governmental Instrumentality. In other words any notification, Regulation, Order, Circular, GO issued by Indian Governmental Instrumentality having force of law would fall within the ambit of definition of 'law'. We have to refer to this aspect, since the Respondent's counsel, Mr. Ganesan Umapathy submits that the notification issued by Railways is not of binding nature having force of law.

41. It is well settled that even executive instructions devoid of any statutory backing would also amount to law as subordinate legislation. For this, we rely upon the Judgment of Hon'ble Supreme Court in ***Kusum Ingots & Alloys vs. Union of India*** *[(2004) 6 SCC 254]*, Para 26 which reads as under:

> *"26. In fact, a legislation, it is trite, is not confined to a statute enacted by Parliament or the legislature of a State, which would include delegated legislation and subordinate legislation or an executive order made by the Union of India, State or any other statutory authority. In a case where the field is not covered by any statutory role, executive instructions issued in this behalf shall also come within the purview thereof."*

42. The learned counsel for Haryana Discoms contended that Railway freight in the form of Busy Season Surcharge merely forms part of dynamic pricing policy of Railways and do not have any force of law. He further stressed upon the argument that such increase of cost by Railways are only commercial consideration under contract, therefore, they do not have any force of law, hence it does not amount to change in law.

43. What we have to consider in these Appeals is whether the claims amount to change in law in terms of PPA and whether the said change in law was brought into force by Indian Governmental Instrumentality. If the answer is affirmative on the above two points, then the third exercise would be what is the consequential impact which fulfils the threshold as provided under the PPA.

44. As already held in ***Kusum Ingots****'s* case, even the executive instructions without having any statutory force would amount to change in law. Therefore, the Railway Act 1989 (in short **"1989 Act"**), read with Gazette Notification No. 990 dated 31.03.1999, the Central Government has invested the Railway Board with all the powers and functions of the Central Government in terms of Section 30 and 31 of the 1989 Act. Therefore, the Railway Board falls within the definition of Indian Governmental Instrumentality. The powers conferred on the Railway Board include the power to fix freight charges. As held in the case of ***Rashmi Metaliks Limited & Anr. vs. Union of India &Ors***, reported as *2014 SCC Online Cal 17706*, the circulars are in the nature of orders having force of law. The relevant portion of the judgment reads as under:

"21. …The Rates Circular issued by the Railway Board are of a different

genre, which creates duties and obligations on the part of the consignor or consignee. Though termed as Circulars, these are actually Orders, as would be evident from Section 30 of the 1989 Act. These circulars have the force of law. …"

45. The definition of Indian governmental Instrumentality includes any Ministry, Department, Board, Authority, Agency, Corporation and Commission under direct or indirect control of Government of India. This definition of Governmental Instrumentality in terms of ***Kusum Ingots**'s* case would include all Ministries and Departments including the Ministry of Finance, Railway Board and Indian Railways, Coal India Limited and its subsidiaries as they are Corporations formed under direct / indirect control of Government of India.

46. The next question is whether the change in law event deserved to be compensated despite the bidder having quoted all inclusive tariff, since denial of compensation will result in change in law clause purposeless or redundant. This Tribunal in the Judgment dated 19.04.2017 in Appeal No. 161 of 2015 titled as ***Sasan Power Ltd. V. CERC and Ors.*** at Para 41 dealt with the said issue and held as under:

"41. We must now go to Reduction in Merit Rate of Excise Duty,

Reduction in rate of Central Sales Tax and increase in Value Added Tax. It is submitted by the Appellant that the CERC has held that quoted tariff according to the provisions of paragraph 2.7.1.4.3 of the RFP shall be an inclusive one including statutory taxes, duties and levies and, therefore, the Appellant was expected to take into account all cost including capital cost and the operating cost, statutory taxes, duties, levies while quoting the tariff in the bid. Therefore, the claim of Change in Law in respect of the above items cannot be allowed. It is submitted that RFP cannot override the express right given to an affected party under the PPA to claim Change in Law as long as the said event qualifies as Change in Law event in terms of Article 13.…

44. It is true that according to the provisions of the RFP, the quoted tariff shall be inclusive one including statutory taxes, duties and levies. But the PPA gives express right to an affected party to claim Change in Law if the event qualifies thus in terms of Article 13. The RFP cannot override this right if an event qualifies as a Change in Law. The Competitive Bidding Guidelines (Article 4.7 thereof has already been reproduced hereinabove) and the PPA have to be read together. If an event qualifies as a Change in Law event then the compensation must follow because otherwise Article 13 of the PPA will become redundant. But, this will of course depend on facts and circumstances of each case. Facts of each case will have to be carefully studied before granting such a relief. It is rightly pointed out that in Wardha Power Company Limited, this Tribunal has

rejected the obligation of any escalable index or indexing of cost of fuel in order to determine the compensation due on account of Change in Law. Sasan will have to be compensated keeping the law in mind."

47. Similarly, Hon'ble Supreme Court of India in ***Energy Watchdog v. CERC &Ors.*** *[(2017) 14 SCC 80]*, it was held that policy documents such as the Tariff Policy dated 28.01.2016 issued under Section 3 of the Electricity Act and the letter dated 31.07.2013 issued by Ministry of Power are statutory documents having force of law and any change / amendment introduced by way of such document amounts to Change in Law.

48. The counsel arguing for the Appellant Generator contends that the Central Commission has erroneously held that increase in Busy Season Surcharge and Developmental Surcharge do not fall within the ambit of change in law event. Coming to the said issue, it is seen that the increase in Developmental Surcharge was in pursuance of a Circular dated 12.10.2011 from 2% to 5% as indicated by Ministry of Railways. The Circular came into effect after the cut-off date 19.11.2007. The Circular as stated above is issued by Railways which is an Indian

Governmental Instrumentality as defined under the PPA. The increase of 3% in the Developmental Surcharge amounts to additional recurring expenditure for the Appellant Generator.

49. The Busy Season Surcharge was increased from 5% to 12% pursuant to a Circular issued by Ministry of Railways dated 27.09.2012 which is also subsequent to cut-off date. This Busy Season Surcharge was again increased to 15% from 12% by Circular No. 24 of 2013 dated 18.09.2013. The Circulars were issued by the Ministry of Railways, as stated above, which is an Indian Governmental Instrumentality and they are apparently after cut-off dates. According to Appellant Generator's counsel, the Busy Season Surcharge led to an increase in landed cost of coal, which in turn results in increase in the cost of generation and supply of power to Haryana Discoms.

50. In the impugned order, the above said change in law was rejected on the ground that the provisions relating to Railway Board's power to fix charges were existing prior to the cut-off date and further that the generating company was required to take into account the possible revision while quoting the bid. Learned counsel for the Respondent

Discoms opposed the claim of the Appellant Generator by contending that this opinion of the Respondent Commission is just and proper. So far as the generating company is required to take into account possible revisions while quoting the bid, as already stated above in ***Sasan Power's*** Judgment at Para 41 and Para 44, the Tribunal has rejected such arguments put up by the Discoms.

51. Over and above these facts, it is relevant to point out that the levy of Busy Season Surcharge and Developmental Surcharge on transportation of coal whether amounting to change in law events, this Tribunal and the Central Commission in the following Judgments have held that such levy amounts to change in law events:

(a) Appeal No. 119/2016, 277/2016: Adani Power Rajasthan Ltd. vs. RERC (Judgment dated 14.08.2018).

(b) Appeal No. 111/2017: GMR Warora Energy Ltd. vs. CERC (Judgment dated 14.08.2018).

(c) Appeal No. 193/2017: GMR Kamalanga Energy Ltd. vs. CERC & Ors.(Judgment dated 21.12.2018).

(d) Petition No. 72/MP/2018: GMR Kamalanga Energy Limited vs. Dakshin Haryana Bijli Vitran Nigam Limited (Order dated 02.04.2019)

(e) Petition No. 17/MP/2019: Adhunik Power and Natural Resources Limited vs. Tamil Nadu Generation and Distribution Corporation Ltd.(Order dated 19.08.2019)

(f) Petition No. 327/MP/2018: Dhariwal Infrastructure Limited vs. Tamil Nadu Generation and Distribution Corporation Limited (Order dated 29.03.2020).

52. The Appeal of the Appellant Generator was filed on 06.04.2017 prior to the Judgments / Orders, as stated above were pronounced. The Appellant's counsel contends that the above issue was finally settled by this Tribunal / the Commission in the above matters.

53. As against this argument of the learned counsel Mr. Amit Kapur, learned counsel Mr. Ganesan Umapathy appearing for Discoms contends that the Judgment dated 14.08.2018 in Appeal No. 119 of 2016 in ***Adani Power Rajasthan vs. RERC*****,** Appeal No. 111 of 2017 in ***GMR Warora vs. CERC*** and Appeal No. 193 of 2017 in ***GMR Kamalanga vs. CERC***

are under challenge before the Hon'ble Supreme Court, therefore, the issue of Busy Season and Developmental Surcharge on transportation of coal is not yet settled finally.

54. No doubt, the Judgment of this Tribunal in the above matters are under challenge before the Hon'ble Supreme Court. However, till date there is no stay of the operation of that Judgment and as on date, there is no modification or setting aside the opinion expressed by this Tribunal in the above Judgment. Therefore, the contention of the Respondent's counsel that the opinion expressed by the Tribunal in the Judgment in the above three Appeals may not be of any assistance to the Appellant Generator cannot be sustained.

55. We are of the opinion that the issue of Busy Season Surcharge and Developmental Surcharge as it stands today are already answered by this Tribunal as change in law event and the generator needs to be compensated if such change in law occurs subsequent to the cut-off date. As already stated above, the change in law event has occurred subsequent to the cut-off date and therefore, the Appellant Generator is

entitled for change in law compensation in respect of Busy Season Surcharge and Developmental Surcharge on transportation of coal.

Increase in Surface Transportation and Sizing Charges of coal:

56. According to the Appellant Generator, the Respondent Central Commission was not justified in rejecting the change in law compensation in respect of increase in Surface Transportation and Sizing / Crushing Charges of coal. According to the Appellant's counsel, sizing charges were applicable in accordance with Coal India Limited's notification dated 15.06.2004. This was prior to cut-off date. However, the said charges were increased by virtue of notifications dated 12.12.2007, 15.10.2009 and 16.12.2013. He also brought to our notice that the surface transportation charges which were applicable in terms of 2004 notification was enhanced by subsequent notification of 2007, 2009 and 2013. Therefore, since the increase in crushing / sizing charges as well as surface transportation charge was by subsequent notifications of CIL, they fall within the definition of change in law, since the notifications have force in law.

57. According to the learned counsel for Appellant Generator, in Appeal Nos. 119 of 2016 and 111 of 2017, this Tribunal opined that bidder could not have envisaged any change which may happen in future regarding tax, levies and duties, therefore this increase in crushing / sizing charges and transportation of coal charges also falls within the said opinion. Therefore, such claim being additional recurring expenditure, the same ought to have been allowed.

58. According to the Appellant Generator's counsel, the finding and observation of the Respondent Commission are wrong for the following reasons:

> "*(a) Sizing charges and surface transportation charges are notified by a Governmental Instrumentality i.e. M/s Coal India Ltd. (CIL), (which is a "Body Corporate" and falls within the definition of an "Indian Governmental Instrumentality").*
>
> *(b) The rights of the parties have to be construed strictly in terms of the language of the PPA (i.e. definition of "Law"). When Body Corporate of the Government of India is an "Indian Governmental Instrumentality", Ld. Central Commission was wrong in denying change in law for an event notified by it.*

(c) *The Central Commission completely misinterpreted that the notifications have not been issued pursuant to any Law. The said notifications increasing the Sizing charges and surface transportation charges were issued by Coal India Limited which is a Government Instrumentality. The said notifications issued have a 'force of law'.*

(d) *If the intent of the parties was to remove all coal related expenditures along with the cost of coal from the scope of 'Change in Law' provision then a suitable provision would have been made in Article 13.1.1 itself listing out exceptions such as change in withholding tax, change in UI charges and change on account of regulatory measures."*

59. They also rely upon the Judgment of the Central Commission by Order dated 02.04.2019 in Petition No. 72/MP/2018, titled as ***GMR Kamalanga Energy Ltd. & Anr. vs. Dakshin Haryana Bijli Vitran Nigam Limited & Ors.*** Para 38, pertaining to evacuation charges on coal to contend that the same principle and logic apply to the claim of crushing / sizing charges and surface transportation charges of coal. They rely upon Para 42 of the Central Commission's Order dated 02.04.2019 which reads as under:

"42. We have considered the submission made by the Petitioner. We notice that as on the cut-off date of the respective PPAs there was no Evacuation Facility Charges levied by CIL and subsequently Coal India Ltd. vide its price notification no. Order in Petition No. 72/MP /2018 Page 26 of 35 CIL:S&M:GM(F)/Pricing/2017/1005 dated 19.12.2017 notified the levy of "evacuation facility charges" at the rate of Rs. 50/MT on coal. The Tribunal vide its judgement dated 21.12.2018 had concluded that "departments, corporations/ companies like Coal India Limited or Indian Railways formed under different Statutes are Indian Government Instrumentality". In view of the submissions of the Petitioner and in view of the said judgment, we note that the Evacuation Facilities Charges are levied pursuant to notification issued by CIL which is an Indian Governmental Instrumentality in terms of the PPAs. The Evacuation Facility Charges were not possible to be envisaged at the time of bid submission by the Petitioner and its subsequent introduction has an adverse financial impact on the Petitioner which is one of the requirements of claiming relief for change in law event. We further note that the Tribunal in the case of Sasan Power Ltd. V. CERC [2017 ELR (APTEL) 508] has held that as long as the conditions of Change in law are satisfied, the affected party will be entitled to relief. In the present case, the introduction of Evacuation Facility Charges satisfies the criteria of change in law events as contained in the respective PPAs. Further, Evacuation Facilities Charges is not part of the escalation index for coal notified by this Commission. Hence, we

are of the view that introduction of Evacuation Facility Charges beyond cut-off date of the respective PPAs is admissible to the Petitioner as a change in law event."

60. By making the above submissions, they seek intervention of this Tribunal to rely on the opinion of the Central Commission.

61. As against this, the learned counsel for Respondent Discom vehemently argues by placing reliance on the Judgment of this Tribunal in Appeal No. 111 of 2017 so also Appeal No. 119 of 2016 contending that this Tribunal rejected the claim of the generator so far as sizing and surface transportation charges and opined in favour of the procurer-Discom. Pertaining to increase in sizing charges of coal, they rely upon the following Judgments dated 14.08.2018:

(i) Appeal No. 111 of 2017 ***– GMR Warora Energy V. MSEDCL & Ors.*** *(Para xv, Pages 66-69).*

"xv. The present case is also similar to the case as in the Adani Judgement. The provisions of the RFP are also similar. Accordingly, in view of our decision Adani Judgement as reproduced above we are of the considered opinion that there is no merit in the contentions of GWEL on the issues of

change in sizing charges of coal and surface transportation charges.

Accordingly, these issues are answered against GWEL/Appellant and we do not find any error on the face of record in the findings recorded by the Central Commission on these issues."

(ii) Appeal No. 119 of 2016 **– *Adani Power Limited Rajasthan Ltd. V. CERC & Ors.*** *(Para xix)*

"xix. In view of our discussions as above, perusal of the Impugned Order and the order of the CERC quoted by the State Commission and the judgement of this Tribunal quoted by CERC, we are of the considered opinion that any change in sizing charges for coal must be reflected in the price of coal charged by CIL and gets covered in the CERC Escalation Rates for coal. We uphold the findings of the State Commission.

Accordingly, this issue is answered against APRL/Appellant."

62. Pertaining to increase in surface transportation, they rely upon the following Judgments of this Tribunal dated 14.08.2018:

(i) A No. 111 of 2017 – ***GMR Warora Energy V. MSEDCL & Ors.***(Para xv, pgs. 63-65):

"xv. The present case is also similar to the case as in the Adani Judgement. The provisions of the RFP are also similar. Accordingly, in view of our decision Adani Judgement as reproduced above we are of the considered opinion that there is no merit in the contentions of GWEL on the issues of change in sizing charges of coal and surface transportation charges.

Accordingly, these issues are answered against GWEL/Appellant and we do not find any error on the face of record in the findings recorded by the Central Commission on these issues."

(ii) A No. 119 of 2016 – ***Adani Power Limited Rajasthan vs. CERC & Ors.*** (Page 64-65 Para xxv):

"xxv. In view of the above, we are of the considered opinion that any change in surface transportation charges must have been taken care by APRL in its quoted tariff appropriately. Accordingly, the contention of APRL that the increase in transportation charges which forms part of coal cost by an Indian Government Instrumentality i.e. CIL would be covered under Change in Law provision of PPA is misplaced. Accordingly, we do not find any legal infirmity in the decision of the State Commission on this issue.

Hence, this issue is answered against APRL/Appellant."

63. Learned counsel for Respondent Discoms, Mr. Ganesan Umapathy also contends that the Judgment relied upon by the Appellant Generator i.e., MP/72/2018 dated 02.04.2019 will not come to the aid of the Appellant. He further contends that the specific claim of Appellant in respect of the above two events came to be rejected after referring to the Judgment of ***Sasan Power***, therefore, this Tribunal has to follow its own earlier dictum. He also contends that CERC at Para 42 of the Order dated 02.04.2019 has clearly held that introduction of evacuation facility charges beyond cut-off date of the respective PPAs deserves to be allowed as change in law event. He also brought to our notice the Order dated 29.03.2020 of CERC in Petition No. 23/MP/2018 pertaining to ***Dhariwal Infrastructure Limited vs. TANGEDCO***, Para 56, 57 & 58, which reads as under:

> *"56. Issues pertaining to Sizing Charges and Surface Transportation Charges has been dealt with by the Commission in its earlier orders. The Commission in its order dated 1.2.2017 in Petition No. 8/MP/2014, while dealing with the issue of increase in Sizing and Crushing Charges and Surface Transportation Charges observed as under:*

"93. We have considered the submission of the Petitioner and the respondent and perused the notifications issued by Coal India Ltd. with regard to Sizing Charges of coal and surface transportation charges. The Petitioner has not placed on record any document to prove that these notifications have been issued pursuant to any Act of the Parliament. On the other hand, a perusal of the Fuel Supply Agreement dated 22.2.2013 between the Petitioner and SECL shows that under para 9.0, the delivery price of coal for supply pursuant to Fuel Supply Agreement has been shown as the sum of basic price, other charges and statutory charges as applicable at the time of delivery of coal. Base price has been defined in relation to a declared grade of coal produced by the seller, the pit head price notified from time to time by CIL. Under Para 9.2 of the FSA, other charges include transportation charges, Sizing/crushing charges, rapid loading charges and any other charges as notified by CIL from time to time. Sizing/crushing charges and transportation charges have been defined as under:-

"9.2.1 Transportation Charges: Where the coal is transported by the seller beyond the distance of 3

(three) kms from Pithead to Delivery Point, the Purchase shall pay the transportation charges as notified by CIL/seller from time to time. 9.2.2 Sizing/Crushing Charges:

Where coal is crushed/sized for limiting the top-size to 250 mm or any other lower size, the purchaser shall pay sizing/crushing charges as applicable and notified by CIL/seller from time to time. Therefore, the revision in sizing charges of coal and transportation charges by Coal India Limited from time to time is the result of contractual arrangement between the Petitioner and SECL in terms of the FSA dated 22.2.2013 and is not pursuant to any law as defined in the PPAs and therefore cannot be covered under Change in Law."

57. The Appellate Tribunal vide its judgment dated 14.8.2018 in Appeal No. 111 of 2017 has upheld the Commission's order dated 1.2.2017 in Petition No. 8/MP/2014 pertaining to treatment of Sizing and Crushing Charge and Surface Transportation Charge as Change in Law events. Relevant portion of the Appellate Tribunal's judgment dated 14.8.2018 in Appeal No. 111 of 2017, in the matter of GMR Warora Energy Limited v. Central Electricity Regulatory Commission and Ors., is extracted as under:

xiv. We consider that similar issues have been decided by this Tribunal in the Adani Judgment. In our opinion the findings of this Tribunal in the said judgment are directly applicable to the instant case. The relevant portion from the said judgment is reproduced below:

Sizing Charges:

"11. A xvii. .....

The State Commission based on the order of CERC has held that increase in Sizing Charges for Coal is part of the methodology for the calculation of the cost of coal decided by CIL and merely CIL being Indian Government Instrumentality the change in method of charging made by it for coal pricing does not qualify for Change in Law event and dismissed the claim of APRL xviii. APRL has contended that the GoI under Sub Section 3 of the CC Rules, 2004 (notified under MMDR Act) has the power to categorise the coal including its classes, grades and sizes and the specifications for each such class, grade or size of coal and hence any change in sizing charges of coal by CIL an Indian Government Instrumentality qualifies for Change in Law event. We observe that GoI under the said Rules have power to categorise the coal including its classes, grades and sizes and the specifications for each such class, grade

or size of coal. Here the case is not that the GoI have changed the sizing of coal under the said Rules, the case is that CIL has changed the sizing charges for coal for sizes, which already existed as specified by the GoI. The change in sizing charges of coal by CIL is part of coal pricing mechanism. Further, in terms of the RFP, APRL was required to quote an all-inclusive tariff including coal costs in escalable/ non-escalable components based on the risks perceived by APRL. Accordingly, this contention of APRL is misplaced.

xxiv. We have gone through the Schedule 8 (Quoted Tariff) of the PPA executed between the Discoms and APRL. After careful perusal of the same we find that the tariff quoted by APRL comprises of Non- escalable and escalable components of tariff elements viz. Capacity Charges, Energy Charges and Inland In view of our discussions as above, perusal of the Impugned Order and the order of the CERC quoted by the State Commission and the judgment of this Tribunal quoted by CERC, we are of the considered opinion that any change in sizing charges for coal must be reflected in the price of coal charged by CIL and gets covered in the CERC Escalation Rates for coal. We agree to the findings of the State Commission. Accordingly, this

issue is decided against APRL. Transportation Charges: xxiv. We have gone through the Schedule 8 (Quoted Tariff) of the PPA executed between the Discoms and APRL. After careful perusal of the same we find that the tariff quoted by APRL comprises of Non- escalable and escalable components of tariff elements viz. Capacity Charges, Energy Charges and Inland Transportation Charges. There is no separate component surface transportation charges either in the bid or in the standard bidding documents. We observe that APRL was supposed to consider all the cost inputs for generation of power in its bid as per the RFP. It is presumed that the surface transportation charges charged by CIL forms part of cost of coal and it was the responsibility of APRL consider the same in its bid appropriately.

xxv. In view of the above, we are of the considered opinion that any change in surface transportation charges must have been taken care by APRL in its quoted tariff appropriately. Accordingly, the contention of APRL that the increase in transportation charges which forms part of coal cost by an Indian Government Instrumentality i.e. CIL would be covered under Change in Law provision of PPA is misplaced. Accordingly, we

do not find any infirmity in the decision of the State Commission on this issue. Hence, this issue is answered against APRL/Appellant."

xv. The present case is also similar to the case as in the Adani Judgment. The provisions of the RFP are also similar. Accordingly, in view of our decision Adani Judgment as reproduced above we are of the considered opinion that there is no merit in the contentions of GWEL on the issues of change in sizing charges of coal and surface transportation charges. Accordingly, these issues are answered against GWEL/Appellant and we do not find any error on the face of record in the findings recorded by the Central Commission on these issues."

58. In line with the above decisions of the Commission and the Appellate Tribunal, claim of the Petitioner for relief under 'Change in Law' in respect of Sizing Charges and Surface Transportation Charges of coal is disallowed."

64. We accept the contention of the Respondent's counsel that the Order dated 02.04.2019 made by CERC in Petition No. MP/72/2018 is distinguishable. This Tribunal in Appeal Nos. 111 of 2017 and 119 of

2016 on the very same issue did express its opinion and rejected the claim of the generators therein pertaining to sizing / crushing charges and surface transportation charges of coal. We are not convinced that there is modification of such opinion by any higher authority i.e., Hon'ble Supreme Court of India. In that view of the matter, we are not inclined to accept the contention of the Appellant and we opine that the rejection of change in law compensation in respect sizing charges and surface transportation charges of coal is just and proper.

Carrying cost:

65. The next argument of the Appellant Generator's counsel pertains to Carrying Cost on the deferred payment. The Appellant's contention is that carrying cost is nothing but a compensation for time value of money denied at the appropriate time to the claimant. They rely upon Article 13 of the PPA contending that the said Article provides to mitigate the impact of change in law i.e., a party is to be restored to the same economic position as if such change in law event had not occurred. By placing reliance on various Judgments as stated below, they contend that the terms of PPA i.e., Article 13 is a complete restitutionary principle and therefore, the issue of carrying cost is no longer *res integra*. The

Judgments relied upon by the learned counsel for the Appellant Generator are as under:

> *"(a)* ***UHBVNL v. Adani Power Ltd.****: (2019) 5 SCC 325 ("Uttar Haryana Judgment"):-*
>
> > *"10. Article 13.2 is an in-built restitutionary principle which compensates the party affected by such change in law and which must restore, through monthly tariff payments, the affected party to the same economic position as if such change in law has not occurred. This would mean that by this clause a fiction is created, and the party has to be put in the same economic position as if such change in law has not occurred i.e. the party must be given the benefit of restitution as understood in civil law. Article 13.2, however, goes on to divide such restitution into two separate periods. The first period is the "construction period" in which increase/decrease of capital cost of the project in the tariff is to be governed by a certain formula. However, the seller has to provide to the procurer documentary proof of such increase/decrease in capital cost for establishing the impact of such change in law and in the case of dispute as to the same, a dispute resolution mechanism as per Article 17 of the PPA is to be resorted to. It is also made clear that compensation is only payable to either party only with effect from the date on which the total increase/decrease exceeds the amount stated therein.*

11. So far as the "operation period" is concerned, compensation for any increase/decrease in revenues or costs to the seller is to be determined and effected from such date as is decided by the appropriate Commission. Here again, this compensation is only payable for increase/decrease in revenue or cost to the seller if it is in excess of an amount equivalent to 1% of the Letter of Credit in aggregate for a contract year. What is clear, therefore, from a reading of Article 13.2, is that restitutionary principles apply in case a certain threshold limit is crossed in both sub-clauses (a) and (b). There is no dispute that the present case is covered by sub-clause (b) and that the aforesaid threshold has been crossed. The mechanism for claiming a change in law is then set out by Article 13.3 of the PPA…..

13. A reading of Article 13 as a whole, therefore, leads to the position that subject to restitutionary principles contained in Article 13.2, the adjustment in monthly tariff payment, in the facts of the present case, has to be from the date of the withdrawal of exemption which was done by administrative orders dated 6-4-2015 and 16-2-2016. The present case, therefore, falls within Article 13.4.1(i). This being the case, it is clear that the adjustment in monthly tariff payment has to be effected from the date on which the exemptions given were withdrawn. This being the case, monthly invoices to be

raised by the seller after such change in tariff are to appropriately reflect the changed tariff. On the facts of the present case, it is clear that the respondents were entitled to adjustment in their monthly tariff payment from the date on which the exemption notifications became effective. This being the case, the restitutionary principle contained in Article 13.2 would kick in for the simple reason that it is only after the order dated 4-5-2017 [Adani Power Ltd. v. Uttar Haryana Bijli Vitran Nigam Ltd., 2017 SCC OnLine CERC 66] that CERC held that the respondents were entitled to claim added costs on account of change in law w.e.f. 1-4-2015. This being the case, it would be fallacious to say that the respondents would be claiming this restitutionary amount on some general principle of equity outside the PPA. Since it is clear that this amount of carrying cost is only relatable to Article 13 of the PPA, we find no reason to interfere with the judgment of the Appellate Tribunal….

….

19. Lastly, the judgment of this Court in Energy Watchdog v. CERC [Energy Watchdog v. CERC, (2017) 14 SCC 80: (2018) 1 SCC (Civ) 133] was also relied upon. In this judgment, three issues were set out and decided, one of which was concerned with a change in law provision of a PPA. In holding that change in Indonesian law would not qualify as

a change in law under the guidelines read with the PPAs, this Court referred to Clause 13.2 as follows: (SCC p. 131, para 57)

"57. … This being so, it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sources is cut down, the PPA read with these documents provides in Clause 13.2 that while determining the consequences of change in law, parties shall have due regard to the principle that the purpose of compensating the party affected by such change in law is to restore, through monthly tariff payments, the affected party to the economic position as if such change in law has not occurred."

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 CERC"

(b) ***Energy Watchdog v. CERC****: (2017) 14 SCC 80:-*

"57. Both the letter dated 31-7-2013 and the revised Tariff Policy are statutory documents being issued under Section 3 of the Act and have the force of law. This being so, it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sources is cut down, the PPA read with these documents

> *provides in Clause 13.2 that while determining the consequences of change in law, parties shall have due regard to the principle that the purpose of compensating the party affected by such change in law is to restore, through monthly tariff payments, the affected party to the economic position as if such change in law has not occurred. Further, for the operation period of the PPA, compensation for any increase/decrease in cost to the seller shall be determined and be effective from such date as decided by the Central Electricity Regulation Commission. This being the case, we are of the view that though change in Indonesian law would not qualify as a change in law under the guidelines read with the PPA, change in Indian law certainly would."*

66. As against this, learned counsel for the Respondent Discoms fairly contends that in the Judgment of the Tribunal dated 13.04.2018 carrying cost was allowed and was affirmed by the Hon'ble Supreme Court, in Appeal No. 210 of 2017 in the case of ***Adani Power Limited vs. CERC & Ors***.

67. In the light of above Judgment of the Hon'ble Supreme Court in ***Haryana Bijli Vitran vs. Adani Power Limited***, we are of the opinion that the controversy is no longer *res integra*, therefore, the opinion of the Central Commission in rejecting the claim of Carrying Cost is set aside

holding that the Appellant Generator is entitled for Carrying Cost on deferred payment.

68. Till now, we have dealt with the issues concerned in Appeal No. 158 of 2017 filed by the Appellant Generator.

Levy of customs duty:

69. Now, coming to the challenge made by the Appellant Haryana Discoms in Appeal No. 316 of 2017, according to the Appellant, the levy of customs duty on the sale of energy from SEZ to Domestic Tariff Area (DTA) with regard to retrospective amendment brought in by notifications dated 17.03.2012 and 18.04.2012 cannot be treated as change in law within the meaning of Article 13 of PPA. They contend that the generator was selected under Case-1 bidding where no project site was stipulated. Therefore, the project could be established anywhere whether inside or outside SEZ. The generator had to supply energy at Haryana periphery which cannot be considered in any manner to be part of energy supplied to SEZ.

70. That apart, according to Appellant Discoms, the customs duty was on removal of electricity from SEZ to DTA which was in existence by

virtue of Section 60 of Finance Act read with 2nd Schedule thereof with effect from 26.09.2001. The notifications dated 17.03.2012 and 18.04.2012 were issued only to clarify the position with retrospective effect that the sale of energy to DTA would not be considered as sale of energy in the SEZ area. This amendment was brought only to curb the misuse of custom notification giving benefit of customs duty exemption to SEZ. The cut-off date of the project in question was 19.11.2007. By notification dated 06.09.2010, the customs duty for removal of energy from SEZ to DTA was reduced to Rs.0.10 per unit. Again by a notification dated 17.03.2012, the customs duty was retained in terms of notification dated 06.09.2010. By notification dated 18.04.2012, the customs duty became leviable over and above Rs.0.03 per unit, was exempted from power plants. Therefore, the notification dated 17.03.2012 and 18.04.2012 reduced the customs duty leviable on removal of energy from SEZ to DTA. Therefore, according to the Appellant Discoms, the retrospective amendment cannot be treated as a change in law within the meaning of Article 13 of the PPA, and therefore, seeks intervention of this Tribunal to set aside the opinion allowing the claim of the Appellant Generator so far as levy of customs duty.

71. As against this, the Appellant Generator who is the Respondent in the Appeal of Discoms contends that the levy of customs duty on electricity, the opinion of the Respondent Central Commission is just and proper for the following reasons:

> *"(a) There was no Customs Duty imposed as on Cut-off date. Customs Duty was introduced under Section 60 of the Finance Act, 2010 read with Second Schedule thereof. As per the said provision, Customs Duty (@ 16%) was imposed on electrical energy removed from an SEZ into DTA w.e.f. 26.09.2009, i.e., after the Cut-off date (i.e., 19.11.2007).*
>
> *(b) After the Cut-off date, the Ministry of Finance (Department of Expenditure) and the Customs Department (being the "Indian Governmental Instrumentality" in terms of the PPAs), issued Notification (91 of 2010) dated 06.09.2010) whereby the Customs Duty on electricity removed from SEZ to DTA, was reduced to Re. 0.10 per unit for plants using imported coal and to Nil/ Zero for plants using domestic coal. This notification qualifies as "Law" in terms of the PPAs.*
>
> *(c) Vide Notification (12 of 2012) dated 17.03.2012, the Customs Duty as specified in the aforesaid Notification dated 06.09.2010 was reinstated with revised rates. Thereafter, vide Notification (26 of 2012) dated 18.04.2012, Custom Duty leviable on electrical energy removed from SEZ to DTA over and above Re. 0.03 per unit was*

exempted irrespective of usage of imported or domestic coal (which worked out to Re. 0.0309 per unit, after considering 2% education cess and 1% higher secondary education cess).

(d) As per the bid, the APMuL was required to factor in all taxes, duties, cess, etc. in the bid. However since there was no such Customs Duty at the time as on the Cut-off date, APMuL could not have factored the same in its bid."

72. The CERC in the impugned Order has opined while allowing the levy of customs duty as change in law, as under:

"45. From the above discussion, it emerges that as on the cut-off date of 19.11.2007, there was no duty on the electrical energy removed from SEZ to DTA. As per the bid documents, the petitioner was required to factor in all the taxes, cess, duties etc. in the bid. In the absence of any customs duty on the electrical energy removed from SEZ as on cut-off date, the petitioner could not be expected to factor the same. The Customs duty on electrical energy was introduced through the Finance Act, 2008 but the applied rate was maintained as Nil through an exemption. The Customs duty on electrical energy removed from SEZ was levied @ 16% through the Finance Act, 2010 and was given retrospective effect from 26.9.2009. Through the Notification No.91/2010- Customs dated 6.9.2010, the customs duty was prescribed as Rs.100 for 1000 kWh for projects using imported coal and Rs.110 for 1000 kWh for

projects using domestic coal which was subsequently recalibrated to Rs.30 for 1000 kWh in case of use of imported coal as well as domestic coal vide Notification No. 26/2012-Customs dated 18.4.2012. The petitioner has been paying the customs duty on the electrical energy removed from Phase IV and supplied to Haryana Utilities @ Rs. 0.0309 per unit after taking into account 2% education cess and 1% higher secondary education cess since the date of commencement of supply. Vide Notification No.9/2016 dated 16.2.2016, the customs duty on electrical energy removed from SEZ to DTA has been raised to Rs.40 and Rs.60 for projects using imported coal and domestic coal respectively. In respect of projects of 1000 MW and above, the customs duty is Nil subject to two conditions, namely, if the project developer been granted formal approval for setting up in SEZ prior to 27th February 2009; and if the jurisdictional Developmental Commissioner certifies that no benefit of customs duty and excise duty, as well as fuel transportation related service tax has been availed by the said power producer towards raw materials and consumables used in operation and maintenance of the power plant. Therefore, the customs duty on electrical energy removed from SEZ was introduced after the cut-off date through the Act of Parliament and the rates were being notified from time to timeby the Ministry of Finance (Department of Expenditure) and the Customs Department which are Indian Government Instrumentalities.

46. The petitioner has submitted that in respect of Phase I of the Mundra Power Project, Gujarat Electricity Regulatory Commission has allowed the customs duty imposed on the electricity removed from SEZ to DTA under Change in Law vide order dated 21.10.2011 in Petition No.1080/2011. We have gone through the said order. Para 8.8 of the said order is extracted as under:

> *"We have carefully considered the submissions made by the parties. According to Article 13.1.1 of the PPA, any change in respect of (a) any tax or (ii) surcharge or (iii) cess levied or (iv) similar charges by the competent Government falls in the category of change in law. The levy of custom duty imposed by the Govt. of India as state in para 8.2 above, falls in the category of change in law as agreed between the parties in Article 13.1.1. Therefore, it is obligatory on the part of the respondent to give effect in the agreed tariff rate between the petitioner and respondent in the PPA made under the competitive bidding process of Bid No. 01/LTPP/2006. It has been admitted by both the parties that the Govt. of India vide Notification No. 25/2010 dated 27.2.2007 made an amendment in the earlier notification No. 21 of 2002 and introduced basic custom duty at 16% ad valorem duty on electrical power removed from SEZ into Domestic Tariff area with retrospective effect from 26.6.2009, which was subsequently raised to Rs.1000 kWh or Rs.0.10 per kWh, vide G.O.I Notification No. 91/2010 dated 6.9.2010. It has also been established that the reference date for ascertaining any change in law is 4.1.2007, whereas in the present case the custom duty has been imposed w.e.f. 27.2.2007. As such imposition of this duty*

qualifies to be considered as "change in Law" and any consequential liabilities are to be borne by the respondent."

The above order has been rendered by the GERC in respect of Phase-I of the Mundra Power Project in the context of the PPA dated 6.2.2007 between the petitioner and Gujarat Urja Vikas Nigam Ltd. We have been informed that the said order has not been challenged and therefore, the order has attained finality. After it was established that the Mundra Power Project of the petitioner has a composite scheme for generation and supply of electricity in more than one State, the Commission came to exercise jurisdiction in respect of all units of the Project. Keeping in view the judicial propriety, we are of the view that the decision of the GERC in respect of Phase I of the Mundra Power Project should also be applicable in case of this phase of the project. Accordingly, the claim of the petitioner is allowed under Change in Law."

73. It is noticed that there was no customs duty imposed as on cut-off date. The customs duty was imposed on electrical energy removed from SEZ to DTA with effect from 26.09.2009 i.e., after cut-off date. By notification No. 91 of 2010 dated 06.09.2010, the customs duty on electricity removal from SEZ to DTA was reduced to Rs. 0.10 per unit for plants using imported coal and Rs.0 / nil for plants using domestic coal.

74. By Notification 12 of 2012, the customs duty specified in the above said notification dated 06.09.2010 was reinstated with revised rates. Since the Ministry of Finance (Department of Expenditure) and the Customs Department both being Indian Governmental Instrumentalities in terms of PPA, issued the above notifications, it qualifies as law having force of law and change in law in terms of the PPA.

75. It is pertinent to note that the Appellant Generator was required to include all tax, duties, cess etc. in the bid. Apparently, there was no such customs duty at the time of bid. Therefore, the said customs duty was absent as on the cut-off date and the same was introduced by Indian Governmental Instrumentality as stated above, they amount to change in law. Therefore, any financial burden added to the shoulders of the generator deserves to be compensated in terms of PPA. Therefore, we are of the opinion that the Central Commission was justified in allowing Customs Duty as change in law event in the impugned order.

76. In the light of the above discussion and reasoning, we are of the opinion that Appeal No. 158 of 2017 deserves to be partly allowed allowing the claim of Busy Season Surcharge and

Developmental Surcharge on transportation of coal and so also Carrying Cost. We reject the claim of the Appellant Generator pertaining to increase in Surface Transportation charges so also Sizing charges of coal.

77. Appeal No. 316 of 2017 is dismissed.

78. Accordingly, we direct the 1st Respondent Commission to make computation of compensation in respect of change in law events and so also carrying cost on deferred payments in terms of our directions in the above judgment.

79. IAs which are pending are disposed of accordingly.

80. No order as to costs.

Pronounced in the Virtual Court through video conferencing on this the **7th day of June, 2021**.

(Ravindra Kumar Verma)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

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