PUNJAB STATE ELECTRICITY REGULATORY COMMISSION
SCO NO. 220-221, SECTOR 34-A, CHANDIGARH

Petition No. 30 of 2012
(On remand by APTEL)
Date of Order: 16.12.2014

In the matter of : Petition under Section 86(1)(f) of the Electricity Act, 2003 in relation to disputes arising under the PPA dated 18.01.2010 between the petitioner herein – Nabha Power Limited and Punjab State Power Corporation Limited (PSPCL), a successor entity of the Punjab State Electricity Board (PSEB) - 2x700 MW Rajpura Thermal Power Project being executed by Nabha Power Limited under the PPA dated 18.01.2010 - Changes in the Mega Power Policy, 2006 and the Foreign Trade Policy, 2009 – 2014 and the corresponding claims of the parties under Article 13.1 of the PPA dealing with 'Change in Law' provision.

AND

In the matter of
1. Nabha Power Limited, SCO 32, Sector 26-D, Madhya Marg, Chandigarh - 160019.
2. L & T Power Development Limited, Powai Campus, Gate No.1, C Building, 1st Floor, Saki Vihar Road, Mumbai – 400072.

Versus

Punjab State Power Corporation Limited, Patiala

Present: Smt.Romila Dubey, Chairperson
Shri Gurinder Jit Singh, Member

ORDER

Nabha Power Limited (NPL) and L & T Power Development Limited filed a joint petition No.30 of 2012 under

Section 86 (1) (f) of the Electricity Act, 2003 (Act), seeking for a direction to the Punjab State Power Corporation Limited (PSPCL) in relation to the disputes arising on account of changes in Mega Power Policy and the Foreign Trade Policy (FTP) under Article 13 of the Power Purchase Agreement (PPA) dated 18.01.2010. The Commission after hearing the parties, dismissed the petition by Order dated 12.11.2012. Aggrieved by this Order the petitioners filed Appeal No.29 of 2013 against the Order. Hon'ble APTEL decided the Appeal by Judgment dated 30.06.2014. The Summary of Findings is given in para 105 of the ibid Judgment and directions to the Commission are given in para 106 of the Judgment, which are reproduced hereunder:-

"105. Summary of Our Findings :

i) 'Law' has been defined under the PPA to include only the statutory laws, ordinance, regulation, notification, code, rule or any interpretation of any of them by an Indian Govt instrumentality and having force of law. The press release of a Cabinet decision is only a communication of the decision of the Cabinet and cannot be termed as Law or having any enforceable effect. In the present case the Notification regarding amendment in exemption notification in respect of Mega Power Projects was issued on 11.12.2009 under Section 25 of the Customs Act,1962 which

will constitute the "Change in Law' within the meaning of the Article 13 of the PPA. Thus, the 'Change in Law' in Mega Power Policy will be considered to be occurring after the cut off date(2.10.2009). Accordingly, the first issue is decided as against the Appellant.

ii) We find that the State Commission has not analysed the question as to whether the benefits under the Foreign Trade Policy were available to the Appellant as on the cut off date(2.10.2009) which were subsequently withdrawn by the Govt. of India by clarification/notification and whether this would amount to 'Change in Law' under Article 13 of the PPA. Accordingly, we remand the second issue regarding 'Change in Law' with respect to benefits under Foreign Trade Policy to the State Commission for fresh consideration and decide the same in accordance with the law in light of the submissions made by both the parties without being influenced by its earlier decision.

106. Accordingly, the Appeal is allowed in part. The impugned order is set-side in respect of the alternative claim alone and the

matter is remanded to the State Commission for fresh consideration. The State Commission shall decide the matter at the earliest after giving opportunity of being heard to both the parties."

2. Notice dated 08.07.2014 was issued to the petitioners and respondent to re-hear them in compliance with the directions of Hon'ble APTEL, only on the issue of alternative claim of the petitioners under Foreign Trade Policy (FTP). The hearing of the case was fixed for 05.08.2014, which was adjourned to 14.08.2014 vide memo No.9305-09 dated 01.08.2014. NPL and PSPCL made detailed oral submissions on 14.08.2014. NPL also filed written submissions dated 14.08.2014 during hearing. After hearing the parties the Commission directed PSPCL to file reply to the written submissions dated 14.08.2014 of NPL by 02.09.2014 and NPL was directed to file rejoinder, if any, by 08.09.2014. The next date of hearing of the petition was fixed for 12.09.2014. PSPCL filed reply to the written submissions of NPL vide memo No.3935 dated 04.09.2014 with a copy to NPL. NPL filed rejoinder dated 09.09.2014 to the reply by way of written Note of Arguments dated 04.09.2014 filed by PSPCL.

The Commission heard the arguments on behalf of the parties at length on 12.09.2014 and directed the parties to file reply to the following queries of the Commission by 19.09.2014:-

"1. Clause 8.2 of the FTP provides certain categories of supply of goods which shall be regarded as "Deemed Exports", under FTP provided the goods are

manufactured in India. The developer / generator to confirm whether the goods in respect of which the deemed export benefits are being claimed have been manufactured in India.

Locus standi of TSPL / NPL to claim 'Deemed Export' benefit under FTP as the said benefit is available for supply of goods by main / sub contractor's (to the Project)?

2. The parties are directed to produce appropriate authorities / case laws for interpreting the phrase "ICB procedures have been followed at Independent Power Producer (IPP) stage". It may be clarified whether benefits under FTP be available if ICB is held,
   a) at the time of bidding of the Project; and/or
   b) at the time of Procurement of Material and Equipment after allocation of Project
3. TSPL / NPL shall file a detailed note to establish that benefits available under FTP and Mega Power Policy were identical, as claimed in their pleadings."

The Commission further directed the parties to file Written Note of Arguments along with copies of the Judgments/Decisions of the Courts supporting their contentions by 19.09.2014. Further hearing of the petition was closed and Order was reserved.

3. The brief background facts of the case are summed up as under:-

(i) The erstwhile Punjab State Electricity Board (PSEB) intending to procure power through competitive bidding

incorporated a Special Purpose Vehicle i.e. Nabha Power Limited to act as its authorized representative for carrying out pre-bid obligations in terms of competitive bidding guidelines. NPL issued Bidding Documents on 10.06.2009 for selection of a developer through tariff based competitive bidding. Petitioner No.2, L&T Power Development Limited was successful bidder, which took over the NPL in terms of the bidding documents. PSPCL is successor of erstwhile PSEB upon its unbundling on 16.04.2010, succeeding to the generation and distribution business of the PSEB. NPL executed PPA dated 18.01.2010 with PSEB, the predecessor of PSPCL.

(ii) As per then prevailing Mega Power Policy, 2006, notified by Government of India (GoI) on 02.08.2006, primary condition of being treated as a Mega Power Project was that the Project should supply power to two or more States. The Union Cabinet took a decision on 01.10.2009 on modification of then existing Mega Power Policy to extend the benefits under Mega Power Policy to a thermal power project of 1000 MW or above irrespective of whether it was supplying power to one or more than one State. This decision of Union Cabinet was published by way of Press Release through the Press Information Bureau on 01.10.2009 itself. The second Petitioner on coming to know about the decision of Union Cabinet requested the PSEB for extension of bid deadline through a letter dated 02.10.2009. The request was rejected by PSEB. The

second Petitioner again sent a letter dated 06.10.2009 that bid was being submitted in the light of changes approved by the Union Cabinet on 01.10.2009. The letter was withdrawn by the petitioner No.2 on asking of PSEB that such letter was extraneous and would not be entertained. The Ministry of Power, GoI, sent a letter to the States and Union Territories notifying the terms and conditions required to be satisfied for power project to be eligible under Mega Power Policy pursuant to the Union Cabinet decision on 01.09.2010 on the modification to the Mega Power Policy. The Ministry of Finance, GoI, on 11.12.2009 issued a Customs Notification regarding amendment in exemption Notification regarding Mega Power Projects. Subsequently on 14.12.2009, MoP, GoI, issued an office Memorandum regarding the Revised Mega Power Policy.

(iii) NPL made an Application dated 11.05.2010 to MoP, GoI, for grant of Mega Power Status to the Project which was granted on 30.07.2010. Thereafter NPL requested Ministry of Energy, GoP, to issue Essentiality Certificate, which was required to avail benefits under Mega Power Policy. The Essentiality Certificate was refused unless the Petitioner No.1 gave an undertaking to the PSPCL to pass on the benefits accrued to the project to the respondent after the submission of bids on account of becoming a Mega Power Project. Finally the Essentiality Certificate was issued by Department of Energy, GoP, on 13.06.2011

after the petitioner had given the undertaking dated 23.05.2011 under protest.

(iv) After submitting the bids for the Project, Foreign Trade Policy (FTP) provisions were interpreted / clarified on account of which the benefits being allowed to non-mega power projects were stopped being allowed. On account of this development, the petitioner made alternative claim against the respondent under 'Change-in-Law' so far as benefits under FTP are concerned. The petitioners filed this petition on 22.05.2012 under Section 86 (1) (f) of the Act for resolution of disputes arising on account of changes in Mega Power Policy and Foreign Trade Policy.

(v) The Commission decided this petition by Order dated 12.11.2012 and held that change in Mega Power Policy have been made after the cut-off date and hence the benefits have been accrued to the Project after that date and 'Change-in-Law' provision of PPA is applicable. The petitioner / developer is liable to pass on the benefits availed by it on account of Project having got the Mega Power Status after the cut-off date i.e. 02.10.2009. This finding / decision was challenged before the Hon'ble APTEL in Appeal No.29 of 2013 by the petitioner. Hon'ble APTEL upheld the decision of the Commission in its Judgment dated 30.06.2014. The appellant / petitioners have filed Second Appeal under Section 125 of the Electricity Act, 2003 before Hon'ble Supreme Court of India against the Judgment of Hon'ble APTEL on this account alone and the same is

pending before the Hon'ble Supreme Court of India and the matter rests at that so far as benefits under Mega Power Policy are concerned.

(vi) So far as benefits under FTP are concerned, the Commission had held that the petitioners were not entitled to the same. The Hon'ble APTEL gave its findings in respect of this issue, remanding it back to the Commission by allowing Appeal No.29 of 2013 in part, setting aside the Order dated 12.11.2012 with the following direction:-

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

4. In accordance with the direction of Hon'ble APTEL, Notice dated 08.07.2014 was issued to the parties for re-hearing the matter regarding 'Change-in-Law' with respect to the benefits under Foreign Trade Policy for fresh consideration. The hearing was fixed for 14.08.2014. NPL filed written submissions dated 14.08.2014. PSPCL was accordingly directed to file reply to the written submissions of NPL. PSPCL filed Written Note of Arguments dated 02.09.2014 vide Chief

Engineer/Thermal Design memo No.3935 dated 04.09.2014. NPL filed rejoinder dated 09.09.2014 to the submissions dated 04.09.2014 of PSPCL.

5. The submissions of NPL in the matter are as under:-

(i) Irrespective of the availability of the benefits to the 2 x 700 MW Rajpura Power Project under Mega Power Policy, 2009 as a Mega Power Project (MPP) as on cut-off date of 02.10.2009, identical benefits were also available to the Project as a Non-Mega Power Project (Non-MPP) under Foreign Trade Policy, 2009-2014 (FTP) on cut-off date.

(ii) Based upon the availability of similar fiscal benefits in form of saving in custom duty and excise duty as MPP under Mega Power Policy and as a Non-MPP under the FTP, the petitioner No.2 (the successful bidder) had already considered and passed on such benefits in the form of lowest tariff for supply of energy from the Project.

(iii) The FTP provides for the benefits which are available to 'Deemed Exports' i.e. those transactions in which goods supplied do not leave India and payment is received either in Indian rupees or in free foreign exchange.

(iv) Chapter 8 of the FTP provides for Deemed Export benefits to MPP as well as Non-MPP. The Project was eligible for benefits in terms of paragraph 8.3 of the FTP. Paragraphs 8.2 (f) and 8.2 (g) of FTP provides

for benefits to MPP and Non-MPP respectively. Paragraph 8.4.4 (i) stipulates as under:-

> "In respect of the supplies made under paragraphs 8.2 (d), (f) and (g) of FTP, supplier shall be entitled to benefits listed in paragraphs 8.3 (a), (b) and (c) whichever is applicable".

Paragraph 8.4.4 (iv) further stipulates as follows:-

> "Supply of Capital goods and spares upto 10% of FOR value of Capital goods to power projects in terms of paragraph 8.2 (g) shall be entitled for deemed export benefits. ----------. Supplier shall be eligible for benefits listed in the paragraph 8.3 (a) and (b) of FTP, whichever is applicable".

which makes it abundantly evident that benefits under Paragraph 8.3 (a) and (b) were available for Non-MPP.

(v) Apart from benefits under Paragraph 8.3 (a) and (b) Non-MPPs were also entitled to the benefits on and before cut-off date under para 8.3 (c) i.e. exemption / refund of TED as the same were being allowed by Director General of Foreign Trade (DGFT) for supplies made to Non-MPP on the basis of then existing interpretation of FTP.

(vi) These benefits to Non-MPPs were withdrawn after the cutt-off date of 02.10.2009. In the Policy Interpretation Committee (PIC) meeting held on 15.03.2011, it was

clarified that the refund of TED would not be available on the supplies to Non-MPPs under the FTP. The decision of PIC, an Indian Government Instrumentality, was given effect to and/or adopted by DGFT by way of letter dated 27/28.04.2011 circulated to all the Regional Authorities of DGFT for compliance and consequential action.

(vii) The benefits under para 8.3 (a) and (b) were withdrawn vide Notification dated 21.03.2012 (2nd Amendment Notification) and Notification dated 28.12.2011 (1st Amendment Notification), respectively.

(viii) Withdrawal of benefits after the cut-off date of 02.10.2009 amounts to 'Change-in-Law' under Article 13 of the PPA.

(ix) NPL has further submitted that contention of the Respondent regarding FTP that since, neither the supplies of plant and machinery required for the project were procured by the Petitioners through International Competitive Bidding (ICB) nor was the award of the EPC contract made by the Petitioners through ICB, the Petitioners do not qualify to claim FTP benefits in the first place, is erroneous, misconceived and untenable. The Respondent has completely failed to appreciate that there is a basic and fundamental; legal and conceptual distinction between the eligibility or entitlement of a Non-MPP for claiming FTP benefits and conditions which such an eligible or entitled unit has to fulfill before it can avail such benefits. The ICB is not a condition of eligibility

or entitlement but a condition for actually availing the FTP benefits. The fulfillment of the said condition can not be a pre-requisite for deciding whether Non-MPP was eligible and entitled to FTP benefits prior to cut-off date. Further more, the price at which procurement of plant and machinery is made by the developer is really immaterial for the procurer / respondent as procurement price has no impact whatsoever on the tariff for the Project which has already been fixed by way of ICB, and can not change on the basis of procurement cost of supplies for the Project.

(x) The Petitioners have further submitted that contention of the Respondent (as made in sur-rejoinder in original proceedings of petition No.30 of 2012) that the benefits of deemed export are available on 'supply' of goods by main / sub-contractors to power projects and not to power project developer, is also erroneous, misconceived and devoid of any merit. As per Hand Book of Procedures (HoP), the recipient may also claim benefits on production of suitable disclaimer from supplier along with self declaration regarding non-availment of CENVAT.

(xi) The Petitioners have also contested the stand of the respondent that since the Petitioners were entitled to MPP status and benefits, therefore, the question of FTP benefits could not arise and could not be claimed by them. The Petitioners have submitted that their claim to FTP benefits is purely in the alternative and is made only in the event of their claim regarding MPP

benefits not being accepted for any reason. The Hon'ble APTEL in its Judgment dated 30.06.2011 in Appeal No.29 of 2013 has already held in favour of the Petitioners on this issue.

(xii) With regard to the reasons for availing benefit under Mega Power Policy and not under FTP, the Petitioners have submitted that whereas under the mega power route, the Project was straightway exempted from paying any duties, under the FTP route as a Non-MPP, the Project would have been required to first pay the necessary duties and thereafter seek refund of such duties.

(xiii) The Petitioners have further submitted that adjustment of tariff under Article 13.2 can not be carried out unless it is established that by carrying out such tariff adjustments, the basic principle envisaged in Article 13 of PPA i.e. restitution of parties to same economic position before the occurrence of the 'Change-in-Law' event so that party is not unjustly enriched, is complied with.

(xiv) The Petitioners are entitled to set-off and adjustment of the value of FTP benefits which were available to the Project as a Non-MPP at the time of bidding (prior to cut-off date) and which have been subsequently withdrawn by way of various 'Change(s) in Law". The value of these two sets of benefits (under Mega Power Policy and Foreign Trade Policy) is virtually the same and consequently PSPCL will in Law have no claim on the Petitioners under Article 13 of the PPA.

6. Punjab State Power Corporation Limited made following submissions in its Written Note of Arguments dated 04.09.2014.

(i) The Scheme for Deemed Export benefits has been completely brought out in Chapter 8 of the FTP. The main issue to be decided is whether the nature of supply of goods claimed by NPL falls under any of the categories of paragraph 8.2 of the Policy. Only paragraph 8.2 (g) applies to Non-MPPs, which provides:

> 'Supply of goods to power projects and refineries not covered in (f) above'.

There is specific condition at the end of paragraph 8.2 that

> "benefits of Deemed Export will be available under paragraphs (d), (e), (f) and (g) if the supply is made under procedure of ICB".

If the supply of goods is not under ICB, then Paragraph 8.2 (g) of FTP will have no application. Consequently there is no question of considering provisions under Paragraphs 8.3 or 8.4.4 (iv), if condition of ICB has not been complied with as NPL has not procured or intended to procure the supply of goods for the Project under ICB. There is no dispute regarding Paragraph 8.3 which specifies the type of

benefits available to eligible projects under Paragraph 8.2. Paragraph 8.4 specifies further conditions to be satisfied. Clause 8.4.4 (iv) is not an independent clause providing for benefits even if supply of goods is not covered under clause 8.2. Besides, this clause 8.4.4 (iv) provides that ICB procedure can be followed at the stage of IPP or EPC, which means that benefits for supply of goods under clause 8.2 (g) of the FTP is available to the Power Project Developer himself or to the Engineering and Procurement Contractor This provision does not deal with the supply of goods to a Non-MPP, where Project Developer has been selected through a ICB procedure but the supply is not through ICB. Paragraph 8.2 as well as clause 8.4.4 (iv) does not deal with the selection of the Project Developer through ICB but with the supply of goods through the ICB. From perusal of clause 8.2 (f) and clause 8.4.4 (iv) of FTP, it is evident that in the case of Mega Power Projects, ICB procedure is not a pre-condition for availing Deemed Export benefits for supply of goods, which on the other hand was mandatory for Non-MPP.

(ii) The conduct of NPL also establishes that the claim made under FTP is an after-thought that it did not consider claiming the FTP benefits is clear from :

(a) If it was so, there was no need for NPL to have sought Mega Power Status.

(b) There was no question of NPL giving undertakings dated 23.05.2011 and

08.06.2011 offering to pass on the benefits.

(c) There was not a whisper of entitlement to benefits under FTP till the year 2013.

NPL had thus duly accepted the position that it was not entitled to benefits under FTP.

(iii) There was misuse of FTP by certain project developers who were claiming exemption from TED even though they were Non-MPPs. The Policy Interpretation Committee (PIC) in its meeting dated 15.03.2011 made it clear that the benefit of refund of TED was not available to Non-MPPs and if already made, the same was to be recovered from such projects. The interpretation was clarificatory in nature. There was no 'Change-in-Law' within the meaning of Article 13 of PPA. Law remained the same. There was no prevalent interpretation of policy by DGFT or by any other Government Instrumentality that Non-MPPs were eligible to avail benefit under FTP. The project developers can not take advantage of their own wrong by a wrong interpretation and thereafter claim that there was 'Change-in-Law' when concerned authorities pointed out the erroneous interpretation and decided that all of the refunded money due to erroneous interpretation, be recovered.

(iv) The reliance placed by NPL on policy circulars issued by DGFT on 28.12.2011 and 21.03.2012 to contend that Deemed Export benefits were earlier available to NPL, is misplaced. The amendments provided in the

circulars are not with reference to clause 8.2 (g) of the FTP and makes no difference to the present case as even earlier the benefits were available to MPPs without following ICB route at IPP/EPC stage but were not available to Non-MPPs without ICB even before. NPL has not followed ICB for procurement of equipment and therefore was not entitled to Deemed Export benefits even earlier. There is no question of the same having been withdrawn later and thus there is no question of applicability of Article 13 of the PPA.

(v) The pendency of Writ Petitions before the Hon'ble High Courts and Hon'ble Supreme Court has no implication in the case where NPL is not entitled to any benefit under FTP. In fact the proceedings before the Hon'ble Courts relates to recovery of money under Handbook of Procedure relating to FTP, on the ground whether the Authorities can enforce recovery as per the FTP for money wrongly allowed as FTP benefits. These proceedings include the decision of the Hon'ble High Court of Gujarat dated 13.02.2014 in Special Civil Application No.11031 of 2013 entitled Alstom India Limited v Union of India and Ors and Hon'ble Delhi High Court decision dated 26.02.2014 in W.P.(C) 4455/2013 in the case of Simplex Infrastructure Limited v Union of India and Ors.

PSPCL, therefore, submitted that there is no merit in the contention of the petitioners.

7. (a) The Petitioners, in the rejoinder, dated 09.09.2014 made further submissions alongwith rejoinder submissions. The Petitioners cited paras No.99, 100 and 105 of the Judgment of Hon'ble APTEL dated 30.06.2014 in Appeal No.29 of 2013 and submitted that in view of these Paragraphs, the Commission is required to examine as to:-

(i) whether the benefits under FTP were available to 2x700 MW Rajpura Power Project as non-Mega Power Project as on cut-off date.

(ii) whether such benefits were subsequently withdrawn after cut-off date by the Indian Government Instrumentalities; and

(iii) whether such withdrawal of benefits after the cut-off date qualifies as 'Change-in-Law' under Article 13 of PPA dated 18.01.2010.

(b) The issue to be decided is regarding availability of the benefits under the FTP to the Project as Non-MPP on the cut-off date and not as to whether all conditions were fulfilled by the petitioner No.2 / bidder in order to actually avail the benefits available to the Project as a Non-MPP on the cut-off date.

(c) The fulfillment of condition of ICB for procuring supplies to the Project on cut-off date for availing FTP benefits, is irrelevant for determining 'Change-in-Law' claim under the

PPA. The proviso at the end of para 8.2, merely conveys the condition of ICB for actually availing the benefits. This condition can only be fulfilled after the award of the contract and execution of PPA, long after the cut-off date. Bidder could not have carried out the ICB for procuring supplies prior to bidding even before the selection of the successful bidder. The fulfillment of the said condition can not be a pre-requisite for deciding whether a Non-MPP was eligible and / or entitled to FTP benefits prior to cut-off date.

(d) Further, the condition of ICB, which the Petitioners would have proceeded to fulfill to get the benefits for the Project under the FTP, had lost relevance in the context of the present case, since the Petitioners decided to avail benefits under Mega Power Policy, 2009, after the award of the Project.

(e) Without prejudice to above submissions of the Petitioners, the petitioners further submitted that as per para 8.4.4 (iv), the condition of ICB can be fulfilled either at IPP stage or at EPC stage. Since procedure of ICB at IPP stage was followed, the Project is entitled to benefits under FTP

(f) In the rejoinder, the petitioners have further submitted that prior to PIC meeting dated 15.03.2011, there existed an interpretation on the basis of which DGFT (an empowered Indian Government Instrumentality) was regularly granting refunds of TED to project developers of Non-MPPs. The real effect of 'clarification' can only be ascertained by considering the substance and effect of such 'clarification'. The nomenclature would be of little relevance and one

must look to substance over form. The 'clarification' and 'amendment Notifications' effecting the withdrawal of benefits to Non-MPP, tantamounts to 'Change-in-Law'.

(g) With regard to the argument of PSPCL that as to why the petitioner proceeded to take benefits for the Project under mega power route as an MPP if the similar benefits were available to the Project as a Non-MPP, the Petitioners have again submitted in the rejoinder that under FTP the Petitioners were first to pay the Duties and then claim refunds and in case of Mega Power route duties are straightway exempted. Every prudent business entity would like to avoid any cash outflow.

(h) With regard to the undertakings given by NPL while seeking Essentiality Certificates; to pass on the benefits as MPP, the Petitioners have submitted that the same were given under protest and without prejudice to its legal rights and contentions as is clear from the language of undertaking dated 23.05.2011. However, NPL was coerced to modify / dilute the language in the subsequent undertaking dated 08.06.2011.

(i) The petitioner has submitted with respect to the argument of PSPCL that 'there was not a whisper of the entitlement to FTP till the year 2013, that the same is false and untrue. The Petitioner No.1 vide its letter dated 28.12.2011 had conveyed to the Respondent regarding availability of similar fiscal benefits to the Project as a Non-MPP on the cut-off date.

(j) In the parawise reply to the Written Note of Arguments of PSPCL, the Petitioners have denied the same on the

grounds by repetition of their submissions already described in the foregoing paras.

In the concluding para of the rejoinder, the petitioners have submitted that the Petitioner's alternative claim based on FTP be allowed and ingenuine, vague and misleading submissions of the respondent be rejected.

8. The Petitioners filed reply to the queries raised by the Commission in its Order dated 15.09.2014, vide No.NPL/PSERC/JSG/3112 dated 30.09.2014. 'Opinions' of Hon'ble Justice S.H.Kapadia, the Ex-Chief Justice of India and Shri Soli J.Sorabjee, Senior Advocate, Supreme Court of India and Former Attorney General of India were annexed with the reply. PSPCL raised objections to the annexation of 'Opinions' in its Additional Submissions dated 13.10.2014 as under:-

"4. The attempt to produce such opinion is to play undue influence in the minds of the Hon'ble Commission in a pending matter. Further, PSPCL had no opportunity to deal with the contents on such opinions.

5. PSPCL, therefore, respectfully submits that the written submissions along with the Opinions filed by NPL be either rejected and the case be considered on the oral submissions of NPL and pleadings on record, or in the alternative an opportunity be given to PSPCL to deal with the contents of the arguments based on the opinion given".

The Commission after considering the Additional Submissions filed on behalf of PSPCL, found it just and fair to give an opportunity to PSPCL and the Petitioners to re-argue the case on the annexation of 'Opinions'. The hearing of the petition, which was closed vide Order dated 15.09.2014, reserving the Order, was accordingly re-opened vide Order dated 16.10.2014 to re-hear the parties on 31.10.2014. The Petitioners filed reply dated 29.10.2014 to the Additional Submissions dated 13.10.2014, justifying the annexation of 'Opinions' of Hon'ble Justice S.H.Kapadia and Shri Soli Sorabjee, supporting their case by citing a few cases in which such 'Opinions' were considered by other State Commissions in similar circumstances. NPL further submitted during hearing on 31.10.2014 that annexation of 'Opinions' was not violative of the law laid down by the Hon'ble Supreme Court of India in its Orders in W.P.(C) No.513 of 2011, W.P.(C) No.866 of 2010 and Delhi High Court Judgment in W.P.(C) No.5892 of 1998 cited by PSPCL in its Additional Submissions dated 13.10.2014. NPL also submitted copies of Orders of CERC, MERC and GERC wherein 'Opinions' of Advocates had been filed by the parties and considered by those Commissions. On the other hand, the learned counsel of PSPCL submitted that the directions of Hon'ble Supreme Court of India are of later date and is the law of the land on the matter and required to be followed by all. The 'Opinions' be removed from the record of the case. After hearing the parties, the Commission directed PSPCL to file written submissions in this respect by 07.11.2014. PSPCL filed its written submissions dated 06.11.2014. PSPCL treated the said 'Opinions' as legal documents of the Petitioners and made the submissions on the similar lines,

as have been made in their earlier Written Submissions/arguments.

9. The Commission has carefully considered the Findings of Hon'ble APTEL in its Judgment dated 30.06.2014 in Appeal No.29 of 2013 and the directions therein to the Commission for fresh consideration of the alternative claim of the Petitioners under FTP with regard to eligibility of Petitioner No.2 as Non-MPP on cut-off date of 02.10.2009 and applicability of subsequent clarification / amendments made by PIC / DGFT to the effect that Non-MPPs were not eligible to avail benefits under FTP, as to whether the same constitute a 'Change-in-Law' under Article 13 of PPA dated 18.01.2010. The Commission has also considered minutely the rival contentions, views and arguments of the parties made in their Written Submissions, Note of Arguments, Rejoinder, Additional Submissions and Oral submissions during the hearings of the petition. The Commission has also made some inquiries from the office of DGFT with regard to pending cases on the matter before the Hon'ble High Courts and Hon'ble Supreme Court of India and has considered the material / information collected from the office of DGFT.

10. **Findings and Decision of the Commission**

(i) Perusal of the relevant paras 8.1, 8.2, 8.3 and 8.4 of the FTP 2009-14 brings out that **'Deemed Exports' refers to those transactions in which goods supplied** do not leave the country and payment for such supplies is received either in Indian rupees or in free foreign exchange (para 8.1). **Further, the supply of goods by main/sub-contractors shall be regarded as 'Deemed Exports' provided goods are manufactured in India and benefits of deemed exports shall be available under para 8.2(g) (purportedly applicable in the instant case) only if supply of goods is made under procedure of ICB (para 8.2)**. Para 8.3 lists out the benefits for Deemed Exports i.e. Advance Authorization [8.3(a)], Deemed Export Drawback [8.3(b)] and exemption from terminal excise duty where supplies are made against ICB and refund of TED in such cases [8.3(c)]. Further, under para 8.4.4(iv), **it is mentioned that supply of capital goods to power projects in terms of para 8.2(g) shall be entitled for deemed export benefits provided ICB procedures have been followed at Independent Power Producer (IPP) / Engineering and Procurement Contract (EPC) stage.** It is further brought out in this para that supplier shall be eligible for benefits listed in para 8.3(a) and 8.3(b) whichever is applicable. As such, the deemed export benefits under FTP were available subject to compliance of certain conditions / provisos. **The entitlement of**

deemed export benefits under the FTP is incumbent upon meeting these condition(s).

(ii) As the Commission understands, **classification of certain transactions as deemed exports allows them status of export thereby enabling a supplier (manufacturer of such goods including contractor or sub contractor) to get duty drawback benefits or refund of terminal excise duty so as to be competitive with suppliers of imported goods.** In other words, when locally manufactured goods are supplied duly classified as deemed exports, it provides a level playing field to such manufacturer/supplier by allowing drawback of duty paid on such goods.

(iii) **The Commission notes that paras 8.1 and 8.2 of the FTP make it clear that for a transaction to be qualified as deemed export, the following essential ingredients / constituents must be present i.e. (i) that the goods supplied do not leave the country (ii) that the goods are necessarily to be manufactured in India in respect of categories mentioned in paras 8.2(a) to 8.2(j) if supplied by main/sub contractor are regarded as deemed exports. Further, benefit of deemed export shall be available under paras (d), (e), (f) and (g) only if the supply is made under the procedure of International Competitive Bidding (ICB) except in cases of MPPs.**

(iv) The Commission further notes that **as per paras 8.4.1 to 8.6.2 of the FTP, these benefits are available to a supplier of goods manufactured in India**. The entire

purport of the benefits conferred under Chapter 8 is keeping in view the supplier of goods manufactured in India. Perusal of para 8.4.4(i) makes it clear that in respect of supplies made under paras 8.2(d), (f) and (g) of FTP, supplier shall be entitled to benefits listed in paras 8.3 (a), (b) and (c), whichever is applicable.

(v) As the Commission understands, **if a project authority imports goods from the supplier abroad and accordingly the goods have not been manufactured in India, it cannot contend that the project be considered eligible for benefit of duty drawback by relying upon the definition of 'manufacture' contained in the FTP read with DGFT Circular F.No. Misc. 8/AM-2001/DBK dated 05.12.2000 stating that setting up of a power plant through fabrication, assembly and other ancillary processes of the various supplies/capital goods get covered under the inclusive definition of 'manufacture' and consequently, supplies made to the project as a Non-MPP would qualify as 'deemed exports' in terms of the FTP. NPL has contended similarly.**

The Commission is of the view that such contention of NPL is not correct. The aforementioned Circular dated 05.12.2000 has to be regarded as applicable to the then existing EXIM policy and the same cannot apply to FTP 2009-14. Perusal of the same indicates that its scope is restricted mainly to supply of goods/services to civil construction projects. Further, as per Central Board of Excise and Customs Circular No. 58/1/2002-CX dated 15.01.2002,

excise duty is not payable on power plants erected on the project site as the same is not leviable on immovable property. As per the definition of 'goods' in the Customs Act, immovable property cannot be considered as 'goods'. FTP provides for payment of drawback on supply of goods. Therefore, deemed export drawback of duty paid on inputs of power plant set up at the project site is not available. Accordingly, NPL's contention in this regard is not tenable.

(vi) **The FTP does not envisage any benefit being conferred upon a project authority who is recipient of the goods and not the supplier.** Once the project authority enters into contract with a firm for supply/setting up of a project, it is not supposed to import machinery etc. itself. **If the project authority directly imports the goods, it cannot be termed as supply by main/sub-contractor.** Minutes of PIC meeting held on 15.03.2011 also, in para 3, clarified that if the Bill of Entry is in the name of project authority then deemed export benefits would not be available (such cases will be ineligible for grant of deemed export benefits). **If the goods are imported directly by the project authority itself, then such supplies do not become deemed exports under Chapter 8 of FTP. Deemed Export is essentially supply of goods manufactured in India. Deemed Export benefits under FTP are basically for import substitution and when the project authority directly imports the goods, there is no import substitution.**

(vii) **Import of capital goods by Non-MPP is subjected to 5% Basic Customs Duty. If a project authority imports the capital goods directly, pays 5% customs duty and takes it back as deemed export drawback, by adopting one mechanism or the other, it would defeat the purpose of imposition of 5% Basic Customs Duty on such import.**

(viii) **In the case of NPL, it imported the goods and after seeking recommendation/essentiality certificate from the Government of Punjab/PSPCL availed exemption from payment of customs duty due to it having been granted MPP status. However, as a Non-MPP, it was liable to pay 5% customs duty and the same was not refundable as a Deemed Export benefit under the FTP considering the contents of sub-para (vii) above.**

(ix) Further, NPL has contended that ICB procedures are not required to be followed at EPC stage since ICB was carried out at the Independent Power Producer (IPP) stage i.e. the project itself was awarded through tariff based competitive bidding (through ICB at the IPP stage), there was no further requirement for carrying out ICB at the stage of procuring supplies i.e. at the Engineering Procurement Contract (EPC) stage as para 8.4.4(iv) of the FTP provides an option to comply with ICB procedure either at the IPP stage or at the EPC stage. It has been further contended that on the basis of the combined reading of the last part of para 8.2 and para 8.4.4(iv) of the FTP, the requirement of ICB could be fulfilled either at the IPP stage or EPC stage. The Commission is of the view

that ICB is not required to be carried out at EPC stage, is applicable in case of MPPs only. To examine as to whether it is mandatory to follow ICB procedures at EPC stage or in case ICB procedures have been followed at IPP stage for selection of a Non-MPP, then the former is not required, the following relevant extracts of various documents were perused:

a) Foreign Trade Policy, 2009-14

"8.2 Following categories of supply of goods by main / sub-contractors shall be regarded as "Deemed Exports" under FTP, provided goods are manufactured in India:

(a) .....

.....

(f) Supply of goods to any project or purpose in respect of which the MoF, by a notification, permits import of such goods at zero customs duty;

(g) Supply of goods to power projects and refineries not covered in (f) above;

.....

Benefits of deemed exports shall be available under paragraphs (d), (e), (f) and (g) only if the supply is made under procedure of ICB."

…….

"8.4.4(iv) Supply of Capital goods and spares up to 10% of FOR value of capital goods to power projects in terms of paragraph 8.2(g), shall be entitled for

deemed export benefits provided the ICB procedures have been followed at Independent Power Producer (IPP) / Engineering and Procurement Contract (EPC) stage. Benefit of deemed exports shall also be available for renovation/modernization of power plants. Supplier shall be eligible for benefits listed in paragraph 8.3(a) and (b) of FTP, whichever is applicable. However, supply of goods required for setting up of any mega power project as specified in S.No. 400 of DoR Notification No. 21/2002-Customs dated 1.3.2002, as amended, shall be eligible for deemed export benefits as mentioned in paragraph 8.3(a), (b) and (c) of FTP, whichever is applicable, if such mega power project complies with the threshold generation capacity specified therein, in Customs Notification."

b) Mega Power Policy, 2006

"Fiscal concessions / benefits available to the **Mega Power Projects**

.....

Deemed Export Benefits: Under Chapter 8(f) of the Foreign Trade Policy, Deemed Export Benefits is available to domestic bidders for projects both under public and private sector on following the stipulations prescribed therein."

c) Policy Circular No.29(RE-08)/2004-2009 dated 20.08.2008 – Clarification regarding Grant of Deemed Export Benefits for supplies to Mega Power Projects.

……

"3. The representative from Department of Economic Affairs concurred with the viewpoint raised above. Accordingly, it is clarified that deemed export benefits are available on supply of goods to **Mega Power Projects**:-

(i) If power procurement from such projects has been tied up through ICB procedure;

OR

(ii) If ICB procedure has been followed by such projects at Engineering and Procurement Contract stage.

Accordingly, the ICB procedure may be either at the stage of IPP or EPC."

d) Revised/Modified Mega Power Policy, 2009

……..

"(v) There shall be **no further requirement of ICB for procurement of equipment for mega projects** if the requisite quantum of power has been tied up or the project has been awarded through tariff based competitive bidding as the requirements of ICB for the purpose of availing deemed export benefits under Chapter 8 of the Foreign Trade Policy would be presumed to have

been satisfied. In all other cases, ICB for equipments shall be mandatory."

From the conjoint reading of the relevant extracts of various documents brought out above, it can be inferred that the benefits of deemed exports under FTP are not available to Non-MPPs unless the goods are supplied/procured through ICB. The requirement of goods to be supplied/procured through ICB is waived of only in case of MPPs if power procurement for such projects has been tied up through ICB procedure.

(x) As per para 8.4.4(iv) of FTP, supply of capital goods and spares up to 10% of FOR value of capital goods to power projects in terms of para 8.2(g), shall be entitled for deemed export benefits provided the International Competitive Bidding procedures have been followed at Independent Power Producer (IPP) / Engineering and Procurement Contract (EPC) stage. **In case of NPL, goods were planned to be and have been directly imported by it and there is no supply of capital goods/spares, thus it is not a case of deemed exports. If the project authority directly imports goods, it cannot be termed as supply by main/sub-contractor. The essential requirement as per para 8.2(a) of the FTP i.e. Supply of goods by the main contractor/sub-contractor and goods should have been manufactured in India is not complied with.**

(xi) **NPL has stated that deemed export benefits under FTP can be claimed not only by the main/sub-contractors, but can also be claimed by the procurer/recipient of**

the goods i.e. developer of the project as per the provision in the Handbook of Procedures.

However, the Commission is of the opinion that deemed export benefits are not admissible to NPL even by invoking the Handbook of Procedures as the said Handbook cannot make provisions not contained in the FTP. It is meant to be subservient to the provisions and cannot in itself confer eligibility on a person not intended to be conferred with the benefit. Moreover, only a disclaimer of the contractor is not sufficient to confer benefit to be claimed by NPL in capacity of recipient since to enable the recipient to claim benefit, besides the disclaimer, there has to be a declaration regarding non-availment of CENVAT credit along with other requisite documents. In this case, the requirement of disclaimer along with a declaration regarding non-availment of CENVAT cannot be complied with since there is no supplier of goods manufactured in India as the goods were planned to be and have been imported directly.

(xii) **The Commission is of the view that if NPL is to be considered entitled for granting benefit of duty drawback, it would violate statutory provisions of the Customs Act. The intent of levying concessional rate of customs duty on the imported goods in the Customs Act cannot be annulled by considering NPL to be eligible to claim duty drawback.** In other words, if NPL is considered entitled to benefit of duty drawback, the very purpose of subjecting imports made by project

authority to concessional rate of duty would stand defeated. **NPL cannot be equated with that of a supplier of goods manufactured in India who only is entitled to claim benefit of deemed export duty drawback. NPL cannot be both an importer and deemed exporter.** In other words, essential requirements of existence of supplier based in India and goods being supplied by manufacturer in India are not satisfied.

(xiii) NPL has contended that the condition/proviso with regard to goods having been manufactured in India and following ICB procedure for the purpose was required to be done after award of the contract and execution of the PPA which would be long after the cut off date. Though partially agreeing with logic put forth by NPL, the Commission is not fully convinced as **projects of such nature, with huge investments cannot be conceived and planned unless the costing of the project is done prior to bidding considering the source of equipments/goods i.e. whether from outside country/within country. Unless broad outline of the various costs including the source of major equipments/goods is decided prior to the bidding, it may not be possible to bid for such a project. Moreover, NPL has not placed on record any documentary evidence or quotations etc. received from prospective suppliers of goods manufactured in India in support of its contention that the deemed export benefits under FTP had also been considered by the bidder at the time of preparing / submission of the bid.**

(xiv) NPL was granted Mega Power status on 30.07.2010. Consequently, NPL, at the time of obtaining Essentiality Certificate from Government of Punjab/PSPCL for availing exemption from payment of customs duty as per customs Notification No. 21/2002-Customs dated 01.03.2002, **provided undertakings dated 23.05.2011 and 08.06.2011 to pass on the aforesaid fiscal benefits as per the PPA to PSPCL due to the change in law i.e. grant of Mega Power status to NPL. These undertakings were given by NPL without reserving its right to claim benefits under FTP. This conduct of NPL indicates that it did not consider itself to be eligible to avail the deemed exports benefits under FTP on the cut off date i.e. 02.10.2009.**

(xv) The Commission has learnt on inquiries from the office of the DGFT that Hon'ble High Court of Gujarat at Ahmedabad in the Special Civil Appeal No.2569 of 2013 & 2571 of 2013, directed Alstom Projects India Ltd. to submit a detailed representation to the DGFT seeking a recall of the letter of rejection, rejecting the refund of drawback claims dated 20.03.2011 issued by Joint DGFT, Vadodara and further directed the DGFT to make a speaking order on the same. In obedience of the same, **the DGFT in his order dated 24.09.2013 did not agree to the request made in the application of Alstom on the grounds that Non-Mega Power Projects were never intended to be eligible for deemed export benefits under the Foreign Trade Policy.** Appeal against the order of the DGFT lies with the Central Govt. under provisions of FTDR **Act and it**

appears no such appeal has been filed and is now time barred.

In the meanwhile, Alstom moved the Hon'ble High Court of Gujarat vide SCA 11031 of 2013 challenging the powers of the DGFT to issue the order to his junior officers, to make and amend rules and pass orders for recovery of dues already refunded. The Hon'ble High Court allowed this application vide order dated 13.02.2014. The **Union of India and the DGFT have filed an SLP against this order of Hon'ble High Court which is pending in the Hon'ble Supreme Court of India. It would also be pertinent to add that all such cases pending before various courts have been called by the Hon'ble Supreme Court**.

In view of the above, order of the DGFT that Non-Mega Power Projects are not eligible for deemed export benefits under the FTP is final, untill the power of the DGFT to make this order is struck down by the Hon'ble Supreme Court in the pending cases.

Considering the discussion in sub-paras (i) to (xv) above, the Commission holds that benefits for deemed exports under FTP 2009-14 were not available to the petitioners as on the cut off date i.e. 02.10.2009. In view of the above decision, the Commission has not examined whether the clarifications dated 27/28.04.2011 and the subsequent notifications dated 28.12.2011 and 21.03.2012 issued by DGFT amount to 'Change in Law' under Article 13 of the PPA. As a

result, the petitioners are liable to pass on the benefits actually availed under Mega Power Policy 2009 to the respondent.

The petition is disposed of in terms of above without assigning any costs to either of the parties.

Further, Shri Virinder Singh, Ex-Member gave his own observations and Findings in this petition which are annexed with this Order.

Sd/-

(Gurinder Jit Singh)
Member

Sd/-

(Romila Dubey)
Chairperson

Chandigarh
Dated: 16.12.2014

PUNJAB STATE ELECTRICITY REGULATORY COMMISSION
SCO NO. 220-221, SECTOR 34-A, CHANDIGARH

Petition No. 30 of 2012
(On remand by APTEL)
Dated: 04.12.2014

In the matter of : Petition under Section 86(1)(f) of the Electricity Act, 2003 in relation to disputes arising under the PPA dated 18.01.2010 between the petitioner herein – Nabha Power Limited and Punjab State Power Corporation Limited (PSPCL), a successor entity of the Punjab State Electricity Board (PSEB) - 2x700 MW Rajpura Thermal Power Project being executed by Nabha Power Limited under the PPA dated 18.01.2010 - Changes in the Mega Power Policy, 2006 and the Foreign Trade Policy, 2009 – 2014 and the corresponding claims of the parties under Article 13.1 of the PPA dealing with 'Change in Law' provision.

AND

In the matter of

1. Nabha Power Limited, SCO 32, Sector 26-D, Madhya Marg, Chandigarh -160019.

2. L&T Power Development Limited, Powai Campus, Gate No.1, C Building, 1st Floor, Saki Vihar Road, Mumbai – 400072.

Versus

Punjab State Power Corporation Limited, Patiala

Er Virinder Singh, Member

The hearing of the petition was closed vide Order dated 04.11.2014 and the final Order was reserved. The final Order could not be issued till date. Since I am relinquishing my charge on 05.12.2014 (A.N.) on completion of my term as Member of the

Commission, I find it appropriate as per law to give my Observations/Findings and Decision on the Petition before the Commission, for making compliance of the directions of Hon'ble APTEL in its Judgment dated 30.06.2014 in Appeal No.29 of 2013. My Observations/Findings and Decision shall be made part of the final Order as and when the same is issued by the Commission. I am only giving my Observations/Findings and Decision without summing up the pleadings of the parties, as the same is matter of the record and eventually shall be summarized in the Order of the Commission. Hard and soft copy (both as MS word and PDF format) of this Order is being handed over to the Secretary of the Commission for incorporating it in the final Order of the Commission.

Observations and Findings

1. The matter has been remanded by the Hon'ble APTEL vide its Order dated 30.06.2012 in Appeal No. 29 of 2013. The relevant paragraphs of the Hon'ble APTEL Judgment dated 30.06.2014 in terms of which it decided to remand the matter to this Commission are as under:

"105 Summary of findings

(i) …….

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

respect to benefits under Foreign Trade Policy to the State Commission for fresh consideration and decide the same in accordance with the law in light of the submissions made by both the parties without being influenced by its earlier decision

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

2. (a) The Hon'ble APTEL has also, while partially allowing the said appeal, given following conclusive and binding findings, which are reproduced below:

"94. The entire thrust of the argument of the Respondent now made, is based on the premise that since the supplies of plant and machinery required for the Project were not procured by the Appellants through International Competitive Bidding, the Appellants would not qualify to claim the FTP benefits in the first place under Para 8.2 of the FTP and consequently, they cannot claim 'Change in Law' in respect of the FTP benefits.

95. This argument about the disqualification of the Appellant to claim the FTP benefits have never been argued before the State Commission. The State Commission also did not consider this point on the basis of the disqualification now claimed by the Respondent before this Tribunal.

96. The only reason given by the State Commission for rejecting the claim with regard to Foreign Trade Policy benefits is that the very fact that the Appellant originally claimed the benefits of Mega Power policy only and not the FTP Policy, would show that the Appellant was

aware at the time of bidding that the Appellant was not entitled to the Foreign Trade Policy benefits.

97. ***This reasoning, in our view, does not show that the State Commission adopted a judicial approach with reference to the alternative claim.*** *The term alternative claim itself would indicate that if the party did not succeed in respect of the main claim, the party is entitled at least to make an alternative claim. In that case, the State Commission would be expected to analyse the question as to whether the benefits under the Foreign Trade Policy were available to the Appellant as on the cut off date (02.10.2009) which were withdrawn subsequently by the Govt. of India by a clarification/notification and whether this would amount to 'Change in Law' under Article 13 of the PPA.*

98. *The State Commission has not gone into this aspect. Instead, the State Commission has simply stated that since the Petitioners never opted for FTP Policy benefits originally, it is debarred from seeking the alternative claim.*

99. *We are at loss to understand under what basis and under what provision the Appellant would be prevented to seek other alternative claim.*

100. ***It is relevant to note that when the Appellant is held to be not entitled to Mega Power Project benefits, it cannot be straightway held that the Appellant would not be entitled for the FTP benefits also. Similarly, merely because the Appellant at the time of bidding claimed for Mega Power benefits alone, it cannot be straightway held that it was not entitled to FTP benefits in the absence of the claim for the same at the time of bidding itself."*** *(Emphasis Supplied)*

The above findings of the Hon'ble APTEL lay down the legal framework within which the issues that have been remanded, need to be decided by this Commission.

(b) Further, while analyzing the above mentioned issues, this Commission is also required in terms of the Hon'ble APTEL's observations, to examine the argument put forth by the Respondent which is based on the premise that - "*since the supplies of plant and machinery required for the Project were not procured by the Petitioners through International Competitive Bidding (ICB), the Petitioners would not qualify to claim the FTP benefits in the first place under Para 8.2 of the FTP and consequently, they cannot claim 'Change in Law' with respect of the FTP benefits*".

3. The legal analysis of the issues remanded to this Commission, within the legal framework laid down by the Hon'ble APTEL, requires this Commission to determine the following issues:

A. Whether or not the Petitioner No. 2 was, as on the cut-off date, i.e. 02.10.2009, entitled to the FTP benefits as per law. It is therefore clear that the reference date for analyzing the availability of the FTP benefits is the cut-off date and not any later date.

B. In the event the finding on the first issue is that the Petitioner No. 2 was not entitled to such FTP benefits as on the cut-off date, then the matter ends there. However, on the other

hand, if the finding is that the Petitioner No. 2 was indeed entitled to such FTP benefits as on the cut-off date, then the next question to be examined will be 'whether such benefits were withdrawn after the cut-off date or not'.

C. Once again, if the answer to the second issue is that the FTP benefits were in fact withdrawn after the cut-off date, then the next question would be 'Whether such withdrawal(s) amount to 'Change in Law' within the terms of Article 13 of the PPA dated 18.01.2010'and on the other hand, if the answer to this question is that the FTP benefits were not withdrawn after the cut-off date, then the question of such withdrawal amounting to 'Change in Law' within the terms of Article 13 of the PPA dated 18.01.2010 would not arise.

4. My observations and findings on these issues are as under :

A. **Whether the benefits under the FTP were available to the Petitioners' Projects on the cut-off date.**

(i) It is the Petitioners' case that all the three benefits under Paragraph 8.3 (i.e., 8.3 (a), (b) and (c) of the FTP 2009 - 14) were available to the Project as a Non-MPP as on the cut-off date. However, the Respondent has raised the threshold objection that the Petitioner was not entitled to the FTP benefits as it had not conducted International Competitive Bidding (ICB) as required in the last portion of Paragraph 8.2 of the FTP, reproduced below:

"Benefits of deemed exports shall be available under paragraphs (d), (e), (f) and (g) only if the supply is made under procedure of ICB."

(ii) The Respondent has also raised an additional ground refuting the availability of the specific benefit under Paragraph 8.3(c) of the FTP, i.e. refund of Terminal Excise Duty (TED). The Respondent has submitted that since the PIC vide the minutes of its meeting dated 15.03.2011 has "clarified" the already existing legal position that relates back to the date of the FTP i.e. 27.08.2009, to state that the benefit of TED was in effect never intended to be refunded to Non-MPPs, and the same recommendation was acted upon by the DGFT vide its letter 27/28.04.2011 which has not only disallowed TED refund to Non-MPPs but has also started to seek recovery of TED refunds made earlier to Non-MPPs, it is abundantly clear that the Petitioner No. 2 was not entitled, as on the cut-off date, to the TED refunds under the said Paragraph 8.3(c) of the FTP. The Respondent has also submitted in support of its argument, that as "clarified" by the PIC, since Paragraph 8.4.4.(iv) did not envisage grant of benefit under Paragraph 8.3(c) for Non-MPPs, the benefit of TED was never available to Non-MPPs. Therefore, according to the Respondent, the PIC only "clarified" what the actual and correct legal position always was, even prior to the cut-off date and, therefore, the

"clarification" does not constitute a "Change in Law". According to the Respondent, the TED refunds which were made by DGFT were contrary to the FTP provisions and this was eventually clarified by PIC and was further acted upon by DGFT which proceeded with recovery of the TED refunds made in the past to Non-MPPs prior to the issuance of the PIC clarification.

The Respondent has not raised any other grounds to refute the availability of the FTP benefits under Paragraph 8.3 (a), (b) and (c), as on the cut-off date, to the Project as Non-MPP.

(iii) I will deal with these two objections separately.

(a) Firstly, I will examine the provisions of the FTP to determine whether or not, at the threshold itself, the FTP benefits were available to the Petitioner No. 2 as on the cut-off, keeping in view the aforesaid objections of the Respondent.

Paragraph 8.2 of the FTP specifies the categories of supply of goods that qualify as "Deemed Exports" under FTP. While Paragraph 8.2 (f) deals with supplies to projects in respect of which the Ministry of Finance, by a notification, permits import of such goods at zero customs duty (in effect MPPs), Paragraph 8.2(g) clearly provides that supplies made to projects not covered in Paragraph 8.2(f) would also qualify for the FTP benefits.

Therefore, at the threshold, it is clear that supplies made to Non-MPPs were covered under a specific category under Paragraph 8.2(g) of the FTP. This according to me, despite the objections raised by the Respondent above, provides the eligibility to a Non-MPP to claim benefits under the FTP.

(b) The related issue to be analysed is whether or not all of the benefits under FTP were available to a Non MPP. Paragraph 8.3 of the FTP specifies the benefits available to, inter alia, projects covered under Para 8.2(g) and these are subject to fulfillment of terms and conditions in the Hand Book of Procedures (HBP). The benefits are specified in Paragraph 8.3(a), (b) and (c). Furthermore, Paragraphs 8.4.4(i) and 8.4.4(iv) of the FTP specify the benefits available to supplies made to Non-MPPs under Paragraph 8.2(g). Paragraph 8.4.4(i) of the FTP stipulates that the supplies made to, inter alia, Non-MPP (Paragraph 8.2(g)) shall be entitled to the benefits listed in Paragraph 8.3(a), (b) and (c). Paragraph 8.4.4(i) is set out below:

> "*In respect of the supplies made under Paragraphs 8.2(d), (f) and **(g)** of FTP, supplier shall be entitled to benefits listed in Paragraph 8.3(a), (b) and (c) whichever is applicable*."

Further, Paragraph 8.4.4(iv) provides the details of benefits available specifically in the context of Non-

MPPs (8.2(g)). Relevant excerpt of Paragraph 8.4.4(iv) is as under:

> "*Supply of Capital goods and spares upto 10% of FOR value of capital goods to power projects in terms of Paragraph 8.2(g) shall be entitled for deemed export benefits provided the ICB procedures have been followed at Independent Power Producer (IPP) / Engineering and Procurement Contract (EPC) stage. Benefits of deemed export shall also be available for renovation/ modernization of power plant. Supplier shall be eligible for benefits listed in Paragraph 8.3(a) and (b) of FTP, whichever is applicable….*"

The conjoint reading of Paragraph 8.4.4(i) and 8.4.4(iv) clearly shows that benefits under Paragraph 8.3(a) and (b) were available to the Project as a Non-MPP on the cut-off date. However, the absence of reference to Paragraph 8.3(c) in the above Paragraph 8.4.4(iv) has been highlighted by the PIC in its "clarification" dated 15.03.2011 and on that basis, the Respondent has argued that this benefit under Paragraph 8.3(c) was not available to the Project as on the cut-off date. On the other hand, the Petitioner has argued that since the DGFT has consistently, prior to the cut-off date, been routinely making refunds of TED under Paragraph 8.3(c), therefore, the interpretation of the DGFT had, prior to the PIC "clarification" always been that Non-

MPPs were eligible for TED refunds under Paragraph 8.3(c). The Petitioners have also furnished several TED refund orders of the DGFT in support of their argument. The Petitioner has also relied on the provisions of HBP, Paragraph 8.3.1(iv) and Paragraph 8.4, that clearly provides the procedure to claim refund of TED for supplies made to Non-MPPs. The clauses (Paragraph 8.3.1(iv) and Paragraph 8.4) in the HBP specifically refer to Paragraph 8.2(g) (i.e., supplies made to Non-MPPs), thereby implying that all benefits in Paragraph 8.3 including TED refund were available to Non-MPPs. This signifies that there was always an intention to grant TED exemption/refund to Non-MPPs, otherwise policy makers would not have gone one step further to provide procedure to claim TED refund for supplies made under Paragraph 8.2(g).

(iii) (a) Let me at this stage, deal with the argument of the Respondent that since the Petitioners did not undertake an ICB for procurement of the equipment, therefore, the Project is, at the threshold, not entitled to the FTP benefits. The Respondent's arguments in this regard have been articulated by me hereinabove. In my view, this argument is not sustainable.

(b) Firstly, a distinction has to be made between "entitlement to" and "availment of" the FTP benefits. Based on the legal framework defined by the Hon'ble APTEL, it is clear that this Commission is required to

examine whether or not the Project was “entitled” to the FTP benefits “as on the cut-off date” and not at a later date. Secondly, as held by the Hon’ble APTEL, whether or not the Petitioner availed the FTP benefits or intended to avail the FTP benefits is not material. Thirdly, as held by the Hon’ble APTEL, the Petitioner is entitled to make an alternative claim and the fact that Petitioner did not originally opt for or claim the FTP benefits cannot disqualify the Petitioner from the alternative claim. The Hon’ble APTEL has also clearly held that merely because the Petitioner No. 2 claimed for Mega Power benefits alone and not the FTP benefits, it cannot be straightway held that it was not entitled to FTP benefits in the absence of the claim for the same, at the time of bidding itself.

(c) The conclusion of the above findings of the Hon’ble APTEL is clear. This Commission is required only to determine whether or not the Petitioner was “entitled” to claim FTP benefits as per law “as on the cut-off date” and the issue of whether or not the Petitioner intended to or in fact availed the FTP benefits is not relevant. In fact, the Petitioner has never disputed that, while submitting its bid, it relied on the MPP benefits. This fact was known to the Hon’ble APTEL too and despite that, the Hon’ble APTEL has held that ***merely because the Petitioner claimed for Mega Power benefits alone and not the FTP benefits, it cannot be straightway held that it was***

not "entitled" to FTP benefits in the absence of the claim for the same at the time of bidding itself.

(d) In this background, in my view there can be no manner of doubt that the Petitioner was "entitled" to FTP benefits as per law as on the cut-off date. The fact that the Petitioner relied entirely on the MPP benefits and did not avail nor sought to avail of the FTP benefits, does not disentitle the Petitioner from being "entitled" to the FTP benefits as per law as on the cut-off date. In a bidding process, the choice of financial structuring and planning is left entirely to the bidder (Petitioner in this case) and it is not open for this Commission to scrutinize or judge this structuring ex post facto. It is reiterated that as per the order of the Hon'ble APTEL, the limited issue to be determined by this Commission is whether or not the Petitioner was "entitled" as per law, to the FTP benefits as on the cut-off date and not whether or not it intended to or actually availed the FTP benefits.

(e) It cannot by any stretch of imagination be argued that undertaking ICB procedure for procurement of equipment needs to be fulfilled by a Project at the stage of "entitlement" i.e. as on the cut-off date. ICB procedure clearly has to be followed for a project to be able to "avail" the FTP benefits. It would be incorrect to argue that if subsequently ICB has not been undertaken then the Project becomes "dis-entitled" to

the FTP benefits retrospectively as on an earlier date, i.e. the cut-off date in the present context.

(f) This conclusion is also abundantly clear from a bare reading of the FTP provisions. Paragraph 8.2 specifies the category of supplies that would be eligible to be regarded as “Deemed Exports”, i.e. “entitled” for the FTP benefits. The last portion of this Paragraph 8.2 clarifies that the benefits would be “available” once the supplies are made under ICB procedure. Therefore, the ICB procedure has to be undertaken at a later date to be able to “avail” of the FTP benefits and does not need to be taken into consideration while determining whether or not a Project is “entitled” to the FTP benefits as on an earlier date, i.e. the cut-off date in the present case.

(g) Any other argument would lead to the untenable conclusion that the bidders at the cut-off date, ought to have already undertaken ICB procedure for procurement of equipment and then participated in the bidding process. On the other hand, the logical position is that bidders can assess their “entitlement” to the FTP benefits at the stage of bidding, factor the same in their bids and thereafter, ensure that to be able to avail the benefits, they must undertake the ICB procedure, failing which they would not be able to avail of the benefits to their detriment.

(h) In the above analyses, in my view, conducting an ICB procedure is not a condition precedent to "entitlement" to the FTP benefits, rather it is a condition subsequent to be able to "avail" the said FTP benefits. Accordingly, the ICB issue is not relevant from any angle, for the purposes of determining whether or not the Petitioner was "entitled" to the FTP benefits as on the cut-off date. Therefore, all issues raised regarding conduct of the ICB including whether the ICB needs to be conducted at the IPP stage or EPC stage, are not relevant. It is reiterated that the issues at hand are not 'whether or not the Petitioner actually conducted or intended to conduct an ICB' rather, whether or not on the cut-off date without on that date having conducted an ICB procedure, the Petitioner was "entitled to" FTP benefits.

(iv) Now coming to the issue of the entitlement of the Petitioner to the said FTP benefits, in my view, based on a bare reading of Paragraph 8.2(g), Paragraph 8.3, Paragraph 8.4.4(i) and Paragraph 8.4.4.(iv), there can be no dispute that at the very least, the benefits under Paragraph 8.3(a) and (b) were available to the Project as a Non-MPP on the cut-off date. I accordingly, hold that the Petitioner was, as on the cut-off date, entitled to the benefits under Paragraphs 8.3(a) and (b) of the FTP.

(v) As regards the argument of the Respondent that the benefit under Paragraph 8.3(c) was never available to the Project, as evidenced by the clarification of the PIC dated 15.03.2011, I am not inclined to accept this argument in respect of the current disputes and facts and in the context of the PPA dated 18.01.2010 between the Petitioner and the Respondent, for the reasons set out below. I clarify that it is not for this Commission to sit on judgment over the merits, validity or legal enforceability of the "clarification" dated 15.03.2011 issued by the PIC, however, for the current dispute, this Commission may examine, based on the interpretation of the FTP that was prevailing as on the cut-off date, whether or not the Project was entitled to the benefit under Paragraph 8.3(c). Therefore, if the interpretation of the FTP as on the cut-off date entitled a Non-MPP to the benefits of Paragraph 8.3(c), then for purposes of the current dispute and to decide the issues framed by the Hon'ble APTEL, the answer would be that the Petitioner was indeed entitled to the benefits under Paragraph 8.3(c) as on the cut-off date. Conversely, if the interpretation of the FTP as on the cut-off date did not entitle a Non-MPP to the benefits under Paragraph 8.3(c), then for purposes of the current dispute and to decide the issues framed by the Hon'ble APTEL, the answer would be that the Petitioner was not entitled to the benefits under Paragraph 8.3(c) as on the cut-off date.

(vi) The reasons for my finding are as follows:

(a) The Respondent's only contention is based on the PIC "clarification" dated 15.03.2011. As already noted by me above, the Respondent has argued that since the PIC vide the minutes of its meeting dated 15.03.2011 has "clarified" the already existing legal position that relates back to the date of the FTP i.e. 27.08.2009, to state that the benefit of TED was in effect never intended to be refunded to Non-MPPs, and the same recommendation being acted upon by the DGFT vide its letter 27/28.04.2011 which has not only disallowed TED refund to Non-MPPs but has also started to seek recovery of TED refunds made earlier to Non-MPPs, it is abundantly clear that the Petitioner was not entitled, as on the cut-off date, to the TED refunds under the said Paragraph 8.3(c) of the FTP. The Respondent has also submitted in support of its argument, that as "clarified" by the PIC, since Paragraph 8.4.4.(iv) does not envisage grant of benefit under Paragraph 8.3(c) for Non-MPPs, therefore, this benefit was never available to Non MPPs. Therefore, according to the Respondent, the PIC only "clarified" what the actual and correct legal position always was, even prior to the cut-off date and, therefore, the "clarification" does not constitute a "Change in Law". The Respondent has relied on Tamil Nadu Electricity Board and Anr. v. Status Spinning Mills Limited and Anr. (2008)7SCC353; Collector of Central Excise, Shillong v. Wood Craft Products Ltd. (1995)3SCC454 and

R.C.P. Singh &Ors. v. UoI and Ors (W.P.1217 of 2003) to state that “clarification” has retrospective operation and effect. According to the Respondent, the TED refunds which were made by DGFT were contrary to the FTP provisions and this was eventually clarified by PIC and was further acted upon by DGFT which proceeded with recovery of the TED refunds made in the past to Non-MPPs prior to the issuance of the PIC clarification.

(b) On the other hand, the Petitioners have argued that the withdrawal of TED benefit for Non-MPPs is based on the change in interpretation of the FTP, by the PIC which has been given effect to by the DGFT. The Petitioners argue that the “clarification” is nothing but a change of interpretation and is squarely covered within the definition of change in law under Article 13.1.1(ii) of the PPA. The fact that the PIC clarification relates retrospectively back to the date of the FTP, can mean only that the clarification is nothing but an interpretation since, on the earlier dates, the DGFT “interpreted” the provisions of the FTP in a particular manner to allow refunds of TED to Non MPPs and such “interpretation” was retrospectively changed by the PIC.

(c) The Petitioners have also argued that reliance by the Respondent on the nomenclature namely that it is a ‘clarification’ issued by the PIC is completely misplaced as the real effect of the ‘clarification’ can be only

ascertained by considering the “pith and substance” of such ‘clarification’ and considering that in context of legislation particularly in matters involving taxation, nomenclature is irrelevant and one must always look to the substance over form. The Petitioners have relied on State of Karnataka v. Drive In Enterprises (2001)4SCC 60, Good Year India Ltd. v. State of Haryana (1990)2SCC71 and Municipal Council, Kota Rajasthan v. Delhi Cloth & General in support of their argument that nomenclature is irrelevant and one must in pith and substance of the matter look into the effect of a particular decision.

(vii) **Conclusion**

In light of the above discussions, in my view, there can be no manner of doubt that, for the purposes of the current dispute and issue, and with reference to Article 13.1.1(ii) of the PPA between the Petitioner and Respondent, the Petitioner was entitled, as on the cut-off date, to the benefit under Paragraph 8.3(c) of the FTP. There was ample evidence to the effect that the DGFT was routinely refunding TED to non MPPs as on the cut-off date. This was based on an interpretation that was prevalent and was adopted and acted upon by the DGFT as on the cut-off date, and this interpretation was based on the same set of provisions of the FTP which existed even after the cut-off date. The PIC clarification was issued much later than the cut-off date. Even assuming, that (as the PIC clarification

seeks to do) that the TED refunds were being made under an incorrect interpretation by DGFT of the FTP provisions and that such flawed interpretation is later on rectified, it cannot lead to the automatic conclusion that a “Change in Law” has not occurred within the meaning of Article 13 of the PPA. The relevant issue to interpret Article 13.1.1(ii) of the PPA to determine whether or not a ‘Change in Law’ has occurred is whether there existed an “interpretation” based on which TED refunds were granted to Non-MPPs before the cut-off date and whether such “interpretation” has undergone any change after the cut-off date.Further, I also find merit in the Petitioners’ argument that the PIC decision is, in “pith and substance” a change in interpretation even though the nomenclature used is “clarification”. The judgments cited by the Petitioner to this effect are germane to the issue at hand. The judgments relied on by the Respondent that the ‘clarification’ has a retrospective effect does not lead to the conclusion that the interpretation of the FTP provisions has not changed after the cut-off date.

B. **Whether the benefits under Paragraph 8.3(a), (b) and (c) were withdrawn after the cut-off date.**

(i) Having concluded that the Petitioner was indeed entitled, as on the cut-off date, to the FTP benefits under Paragraph 8.3(a), (b) and (c), the next question

to be examined is whether these benefits were subsequently withdrawn.

(ii) There can be no dispute that at the very least, the benefits under Paragraph 8.3(a) and (b) were withdrawn by the MoCI vide its two separate amendment notifications dated 28.12.2011 and 21.03.2012 respectively, i.e., after the cut-off date. The Respondent has not argued otherwise, even though during the course of arguments the counsel had sought to cover these two benefits too under the purview of the PIC "clarification" dated 15.03.2011, however, it is clear that benefit under Paragraph 8.3(a) and (b) are different from benefit of TED under Paragraph 8.3(c) and the PIC clarification expressly covers only the benefit under Paragraph 8.3(c) of the FTP.

(iii) As regards the benefit of Paragraph 8.3(c), I have already dealt with this issue in detail hereinabove and have concluded that the said benefit was available to the Petitioner No. 2 as on the cut-off date by virtue of an accepted legal interpretation of the relevant FTP provisions. I have also held that the PIC modified this interpretation after the cut-off date. It is not disputed that the PIC, and the DGFT that acted upon the PIC recommendations, are authorized to do so in terms of Paragraph 2.3 of FTP and therefore, qualify as "Indian Governmental Instrumentality" as contemplated in

Article 13.1.1(ii) of the PPA between the Petitioner and the Respondent.

(iv) **Conclusion**

In light of the above discussions, I hold that all the benefits under Paragraph 8.3(a), (b) and (c) were withdrawn after the cut-off date.

C. **Whether the withdrawal of the FTP benefits after the cut-off date amount to a "change in law" within the terms of Article 13 of the PPA dated 18.01.2010**

(i) To examine this issue, the relevant provisions of the PPA are Article 13.1.1 (i) and (ii), read with the definition of the term "Indian Governmental Instrumentality" and the expression "Law". The relevant portions are extracted below:

Article 1.1

"Indian Governmental Instrumentality" means the Government of India (GOI), Government of Punjab and any ministry or, department or board or agency other regulatory or quasi-judicial authority controlled by GOI or Government of States where the Procurers and Project are located and includes the Appropriate Commission;

"Law" means, in relation to this Agreement, all laws including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law

and shall further include all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include all rules, regulations, decisions and orders of the Appropriate Commission ;

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

….

(ii) There can be no manner of doubt that the FTP is “Law” within the definition in the PPA and accordingly, withdrawal of the benefits under Paragraphs 8.3(a) and (b) by the MoCI vide its two separate amendment notifications dated 28.12.2011 and 21.03.2012 respectively, after the cut-off date, amounts to an amendment, modification and/or repeal of certain

provisions of the FTP. Therefore, these two notifications are squarely covered under Article 13.1.1(i) of the PPA and will constitute “Change in Law” within the meaning of the terms of the PPA.

(iii) As regards the PIC clarification dated 15.03.2011 with respect to the benefit under Paragraph 8.3(c) of the FTP, I have already held above that this amounts to a change in interpretation of the relevant provisions of the FTP resulting in withdrawal of the said benefit under Paragraph 8.3(c). The PIC and DGFT are Indian Governmental Instrumentality within the meaning of the definition contained in the PPA and are the final authority for such interpretation in terms of Paragraph 2.3 of the FTP. Accordingly, this change of interpretation of Law is covered under Article 13.1.1(ii) of the PPA and will constitute “Change in Law” within the meaning of the terms of the PPA.

(iv) **Conclusion**

It is also pertinent to note that the fiscal benefits under FTP and Mega Power Policy are identical and therefore, the Petitioner too is entitled to claim a set off compensation on account of ‘Change in Law’ that has occurred due to withdrawal of the FTP benefits after the cut-off date. Since the fiscal benefits under the FTP and Mega Power Policy are identical, there is no net impact on the Project and no compensation is payable either to the Respondent or the Petitioners.

5. **Other aspects/issues**

While disposing of this matter, I would also like to touch upon certain aspects and issues that were argued at length by the Petitioner and Respondent. While these may not affect my final findings, however, they do merit discussion and dealing with.

(a) The Petitioner pointed out the provisions of Article 13.2 of the PPA and has argued that this provision sets out the legal principle of restitution and that fulfilment of the principles set out therein are a condition to any relief. The Petitioner has relied on certain judgements of the Hon'ble Supreme Court in support of its contentions. I find merit in this argument.

(b) The said Article 13.2 of the PPA encompasses the principle that has to be fulfilled while evaluating the consequence of the 'Change in Law' under Article 13. Therefore, unless the pre-condition specified in this Article 13.2 is fulfilled, there can be no consequence of change in law.

(c) The principle that has been articulated in this Article 13.2 is that the purpose of compensating a party affected by 'Change in Law' is to restore such party to the same economic position as if such 'Change in Law' has not occurred. The methodology for such compensation has also been specified as through Monthly Tariff payments.

(d) For purposes of this argument, even if we assume that the Customs notification after the cut-off date amounts to a

‘Change in Law’, as contended by the Respondent, in my view this is still not conclusive and does not give the Respondent a right to claim compensation under Article 13. In this connection, the following judgments cited by the Petitioner merit attention:

The Supreme Court, in the case of State of Gujarat and Ors.Vs. Essar Oil Limited and Anr. (2012) 3 SCC 522, has held:

> “*62. If we analyze the concept of restitution one thing emerges clearly that the obligation to restitute lies on the person or the authority that has received unjust enrichment or unjust benefit (See Halsbury's Laws of England, Fourth Edition, Volume 9, page 434)*….
>
> …..
>
> *66. Equity demands that if one party has not been unjustly enriched, no order of recovery can be made against that party. Other situation would be when a party acquires benefits lawfully, which are not conferred by the party claiming restitution, Court cannot order restitution*.”

Moreover, in the case of Indian Council ForEnviro-Legal Action V. Union of India and Ors. (2011) 8 SCC 161, the Supreme Court has held:

> “159. Unjust enrichment is basic to the subject of restitution, and is indeed approached as a fundamental principle thereof. They are usually linked together, and restitution is frequently based upon the theory of unjust enrichment. However, although unjust enrichment is

often referred to or regarded as a ground for restitution, it is perhaps more accurate to regard it as a prerequisite, for usually there can be no restitution without unjust enrichment…."

….

"161. The terms ***'unjust enrichment' and 'restitution' are like the two shades of green*** – one leaning towards yellow and the other towards blue. With restitution, so long as the deprivation of the other has not been fully compensated for, injustice to that extent remains…."

The Supreme Court in Mahabir Kishore and Ors.v. State of Madhya Pradesh [1990]184ITR548(SC) has held:

"the principle of unjust enrichment requires - first that the defendant has been 'enriched' by the receipt of a 'benefit'; secondly, that this enrichment is 'at the expense of the plaintiff; and thirdly, that the retention of the enrichment be just. This justifies restitution."

(e) The legal principle that emerges from the above judgments is that before the Respondent can claim or recover any compensation, it has to be established that the Petitioner has as a matter of fact been unjustly enriched as a result of the 'Change in Law', i.e. the Customs notification. Unjust enrichment would arise only where it can be demonstrated that the Petitioner in fact gained or earned a financial benefit as a result of the Customs notification after the cut-off date.

(f) In this context, I note that the Petitioner has consistently contended that it had assumed and factored the MPP

benefits in its bid, relying on the Union Cabinet's decision dated 01.10.2009 which modified the then existing Mega Power Policy 2006 to allow a project selling power to one state (like the instant Project). This contention has not at any stage been rebutted or objected to by the Respondent. In fact, the argument of the Respondent has always been that notwithstanding whether or not the Petitioner factored the benefits of MPP in its bid, since the change in law occurred after the cut-off date, the Respondent is entitled to the compensation under Artcile 13.

(g) In my view, such an argument by the Respondent is pedantic and inequitable. Article 13.2 of the PPA read with the Supreme Court judgments, mandates that the compensation should be paid by a party only if it is being unjustly enriched. In the present facts, if the Petitioner has not in fact made any gain, then the restitutionary relief under Article 13 would not be available to the Respondent.

(h) Therefore, even if the FTP issue had not been raised by the Petitioner as an alternate claim, in my view the Respondent would not be entitled to automatically claim compensation under Article 13.1 of the PPA.

(i) The Respondent has made several other allegations including that the issue of FTP was raised by the Petitioner as an afterthought and that the Petitioner has given undertakings to the effect that the benefit of MPP policy would be passed on to the Respondent and at that stage it did not raise the issue of setting off loss of FTP benefits. In

my view, these are not relevant to the issue and detract from the core legal issue remanded by the Hon'ble APTEL. I also note that the Petitioner has in fact raised the FTP issue well in advance and on diverse occasions. The Petitioner had also issued the undertaking regarding passing on of MPP benefits, initially under protest and had also reserved its rights to take appropriate action. This, in my view, demonstrates the bona fides and diligence of the Petitioner and it cannot be prevented from raising the FTP issue at this stage. In any event, the FTP issue is a legal issue and can be raised at any stage. Furthermore, the Hon'ble APTEL was cognisant of all these facts and has still remanded the matter. It is re iterated that issues framed by the Hon'ble APTEL are pure legal issues and the aforesaid facts alleged by the Respondents do not have any bearing in the determination of the same.

(j) I would also like to note that the Project was awarded to the Petitioner through a competitive bidding process and the benefits of FTP or Mega Power Policy as available to the bidders would logically have been factored into the competitively bid tariffs. Therefore, I don't perceive any loss or prejudice to the consumers if the Respondent is not permitted any compensation under Article 13. The issue cannot be viewed purely from a consumer interest perspective since it is equally in consumer interest that a competitively bid and constructed Project be allowed to operate without incurring cash and financial losses.

6. **Decision**

In light of the above discussions and for the detailed reasons articulated by me hereinabove, on the issues framed by the Hon'ble APTEL while remanding the matter to this Commission, I decide as under:

(i) **Whether the benefits under the FTP were available to the Petitioners as on the cut-off date** –I hold that all the benefits under Paragraph 8.3(a), (b) and (c) of the FTP were available to the Petitioner as on the cut-off date of 02.10.2009;

(ii) **Whether such benefits were subsequently withdrawn after the cut-off date by the Indian Government Instrumentalities** – I hold that each of the benefits under Paragraph 8.3(a), (b) and (c) of the FTP were withdrawn after the cut-off date by Indian Government Instrumentalities; and

(iii) **Whether such withdrawal of benefits after the cut-off date qualify as "Change in Law" under Article 13 of the PPA** – I hold that such withdrawal of benefits under Paragraph 8.3(a), (b) and (c) of the FTP after the cut-off date by Indian Government Instrumentalities amounts to a "Change in Law' within the meaning of Article 13 of the PPA dated 18.01.2010 between the Petitioner and Respondent.

I further hold that while the Respondent may be entitled to claim compensation under "Change in Law' occurring due to the Customs notification after the cut-off date, the Petitioner

too is entitled to claim a set off compensation on account of 'Change in Law' that has occurred due to withdrawal of the FTP benefits after the cut-off date. Since the fiscal benefits under the FTP and Mega Power Policy are identical, there is no compensation payable either to the Respondent or the Petitioner as the benefits under the 'Change in Law' with respect to Mega Power Policy are set off against the losses under the 'Change in Law' related to FTP. As a result, the Petitioner is not liable to pass on the benefits availed under Mega Power Policy to the Respondent.

Sd/-
(Er Virinder Singh)
Member

Chandigarh
Dated: December 4, 2014