

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 172/MP/2013

Coram:

Shri Gireesh B. Pradhan, Chairperson

Shri M. Deena Dayalan, Member

Shri A.K.Singhal, Member

Date of Hearing: 7.1.2014

Date of Order: 8.7.2014

In the matter of

Petition under Section 79 of the Electricity Act, 2003 read with statutory framework governing procurement of power through competitive bidding and Article 13 and 17 of the Power Purchase Agreement dated 10.9.2008 executed between Jharkhand Integrated Power Ltd. and Jharkhand SEB and 17 others for compensation due to 'Change in Law' during the Construction Period.

And

In the matter of

Jharkhand Integrated Power Ltd.
7th Floor, Raheja Point-I,
Jawaharlal Nehru Marg, Vakola Market, Santa Cruz (East)
Mumbai - 400005

....Petitioner

Vs

1. Jharkhand State Electricity Board
Engineering Building, HEC, Dhurwa,
Ranchi – 834004
2. Bihar State Electricity Board,
Vidyut Bhawan, Bailey Road,
Patna – 800021
3. Punjab State Electricity Board,
The Mall, Patiala – 147001
4. Paschimanchal Vidyut Vitran Nigam Ltd,
Victoria Park, Meerut – 250001



5. Purvanchal Vidyut Vitran Nigam Ltd,
Hydel Colony, Bhikharipur, Post – DLW
Varanasi – 221004
6. Dakshinanchal Vidyut Vitran Nigam Ltd,
220 kV Vidyut sub-station,
Mathura-Agra By-Pass Road,
Sikandara, Agra – 282007
7. Madhyanchal Vidyut Vitran Nigam Ltd,
4A, Gokhle Marg, Lucknow – 226001
8. Kanpur Electric Supply Company Ltd
KESA House, 14/71, Civil Lines KESCO
Kanpur – 208007
9. Madhya Pradesh Power Management Company Ltd,
Shakti Bhawan Rampur, Vidyut Nagar,
Jabalpur – 482008
10. Jaipur Vidyut Vitran Nigam Ltd,
Vidyut Nigam, Jyoti Nagar,
Near Vidhan Sabha,
Jaipur – 302005
11. Ajmer Vidyut Vitran Nigam Ltd,
Hathi Bhatia, Jaipur Road,
Ajmer – 305001
12. Jodhpur Vidyut Vitran Nigam Ltd,
New Powerhouse, Industrial Area,
Jodhpur – 342003
13. Haryana Power Purchase Centre,
Shakti Bhawan, C-7, Sector 8
Panchkula – 134109
14. Maharashtra State Electricity Distribution Company Ltd,
Prakashgad Anant Kankar Marg, Plot No G9,
Bandra (E), Mumbai – 400051
15. Gujarat Urja Vikas Nigam Ltd
2nd Floor, Sardar Patel Vidyut Bhawan,
Race Course, Vadodara – 390007
16. North Delhi Power Ltd
Grid Substation Building,

Hudson Lines, Kingway Camp,
Delhi – 110009

17. BSES Rajdhani Ltd
C Block, 2nd Floor,
BSES Bhawan, Nehru Place,
New Delhi – 110019
18. BSES Yamuna Ltd,
Shakti Kiran Building, Karkardooma,
New Delhi – 110092
19. Government of Jharkhand,
Through Principal Secretary,
Department of Energy,
Nepal House, Ranchi – 834004

.....Respondents

Parties Present

For Petitioner

1. Shri JJ Bhatt, Senior Advocate
2. Shri Hasan Murtaza, Advocate
3. Shri Janmesh Kumar
4. Shri P. Venkatarao
5. Shri Surendra Khot
6. Shri Arun Dhillon
7. Shri N. Balasubramanian
8. Shri N.K.Deo

For Respondents

1. Shri M.G. Ramachandran, Advocate, HPPC, Rajasthan and GUVNL
2. Ms Anushree Bardhan, Advocate, HPPC and GUVNL
3. Ms Apoorva Karol, Advocate, HPPC
4. Shri Kirish Gandhi, Advocate, HPPC
5. Shri Rahul Dhawan, Advocate, BRPL and BYPL
6. Shri Alok Shankar, Advocate, NDPL
7. Shri Himanshu Shekhar, Advocate, JSEB
8. Shri G. Umopathy, Advocate, MPPMCL
9. Shri Navin Kohli, MPPMCL



ORDER

The petitioner in the present has made the following prayers, namely:

“a) That this Hon’ble Commission may be pleased to hold that the Petitioner is entitled to be compensated through Monthly Tariff Payments on account of increase in the Capital Cost of the said Project (Tilaiya Ultra Mega Power Project), as if such increase has not happened, by reason of inter alia, the following:

- i. Increase in the Declared Price of Land;*
- ii. Increase in the cost of implementation of Resettlement and Rehabilitation package;*
- iii. Withdrawal of exemption in respect of Excise Duty on Cement and Steel;*
- iv. Withdrawal of exemption in respect of Customs, Additional, Auxiliary and Excise duties on mining and fuel transportation system required for the project;*
- v. Increase in the price of diesel;*
- vi. Increase in the cost of Geological Report;*
- vii. Increase in the cost of EPC (ISBL & OSBL) Contracts, Coal Mining and Fuel Transportation System by reason of increase in the Input Cost and Foreign Exchange Rate Variation;*

b) That this Hon’ble Commission may be pleased to hold that the formula set out in Article 13.2 (a) of the PPA to be applied during Construction Period does not compensate the Petitioner so as to restore the Petitioner to the same economic position as if such Change in Law had not occurred,

c) That this Hon’ble Commission may be pleased to stipulate an appropriate mechanism/methodology in place and instead of formula given in Article 13.2 (a) of the PPA in such a manner that the Petitioner is restored to the same economic position as if such Change in Law had not occurred,



d) That this Hon'ble Commission may be pleased to direct that costs relating to increase in the Declared Price of Land and increase in the R&R package be made payable through Monthly Tariff as fixed by this Hon'ble Commission within Two years from the Scheduled Commercial Operation Date of the Project,

e) That this Hon'ble Commission may be pleased to direct that for the purpose of escalation in Escalable Capacity Charge, November 14, the identified date for first unit COD, be deemed to be Zero date,

f) That this Hon'ble Commission may be pleased to direct that Commercial Operation Date of Units shall stand revised on day to day basis till commitment of Procurers as per Clause 3.1.2 (A) is not met in order to make the Tariff that has been adopted by this Hon'ble Commission applicable,

g) That this Hon'ble Commission may be pleased to direct the Procurers to comply with the conditions subsequent within such period as this Hon'ble Commission may deem fit in order to make the Tariff adopted by this Hon'ble Commission applicable,

h) For consequential reliefs,

i) Pass any such other and further reliefs as this Hon'ble Commission deems just and proper in the nature and circumstances of the present case.”

2. The petitioner, Jharkhand Integrated Power Ltd. has been selected through the competitive bidding for implementation of the 4000 MW Tilaiya Ultra Mega Power Project (**the Project**) in the State of Jharkhand. The distribution utilities in various States, presently impleaded as the respondents 1 to 18, are the beneficiaries of the Project and have entered into a Power Purchase Agreement dated 10.9.2008 (**PPA**) containing the detailed terms and conditions



for supply of electricity. The tariff of the project was adopted by the Commission under Section 63 of the Act vide Order dated 26.4.2010 in Petition No. 281/2009.

3. The petitioner has submitted that certain events, which according to the petitioner amount to "Change in Law" as defined under Article 13 of the PPA, have occurred during the construction period, leading to substantial increase in the capital cost of the Project and rendering the Project unviable to be executed at the levelised tariff of ₹1.77/kWh. The petitioner's contentions on various matters are briefly noted hereunder since for the purpose of the present order it is not necessary to refer them in detail.

4. The petitioner has submitted that there has been substantial increase in the Declared Price of Land needed for the Project as also implementation of Rehabilitation and Resettlement (R&R) package from ₹524 crore as indicated at pre-bid stage by Power Finance Corporation who invited the bids on behalf of the respondent-Procurement to ₹2468 crore as currently estimated. The petitioner has further submitted that since the pre-bid stage clarifications, there have occurred a number of other events too which amount to Change in Law under the PPA. Some of the events listed by the petitioner are alleged withdrawal of exemptions of Customs Duty and Excise Duty on mining equipment and Fuel Transportation System required for the Project; depreciation of Indian currency in international market; alleged withdrawal of Excise Duty on cement and steel; increase in the price of diesel; increase in the cost of Fuel Transportation System; alleged failure



of the Procurers to agree to change the allegedly faulty formula set out in Article 13.2 (a) of the PPA to offset the impact of 'Change in Law', failure of the Procurers to meet Conditions Subsequent as set out in Article 3.1.2A of the PPA; increase in the Input Cost consequent to delay in the implementation of the Project.

5. The petitioner in its supplementary affidavit dated 2.5.2014 has submitted that the project implementation will be adversely affected due to (i) the implementation of 'Right to Fair Compensation in Land Acquisition Rehabilitation & Resettlement Act 2013 (RFCLARR Act) wef 1.1.2014 and (ii) the decision of the Ministry of Environment and Forest to re-conduct the public hearing for Kerendari BC coal block in order to obtain EC are change in law and that the aforementioned will (i) have a huge additional cost impact on the project, (ii) render the project impracticable due to extreme economic distress; and (iii) further erode the bankability of the project making it impossible to arrange financing for the project thereby necessitating a compensatory tariff.

6. Through the present petition, the petitioner seeks to offset the adverse impact of the events narrated by the petitioner in terms of the prayers already noted.

7. Uttar Pradesh Power Corporation Ltd (UPPCL) has filed affidavit-reply dated 4.12.2013 on behalf of Respondent Nos. 4 to 8 raising the issue of



maintainability of the petition. UPPCL has submitted that the prayers at (b) to (i) are outside the scope of the PPA as the averments in the petition do not discharge the petitioner of the burden to demonstrate in clear terms that the estimated increase in the capital cost is on account of 'Change in Law' as defined under Article 13.1.1 of the PPA. With regard to prayers made at (a), UPPCL has stated that the compensation sought through increase in monthly tariff on account of increase in the capital cost of the Project is not based on any relevant date. According to UPPCL, 'Project Economics' to be determined in order to enable the petitioner to achieve 'financial closure' must be with reference to a specific date. More precisely, according to UPPCL, it should be linked to the date of commercial operation of the first unit which is scheduled for 7.5.2015, in terms of the PPA. The estimated increase in capital cost as claimed in the petition is not in conformity with the definition of 'capital cost' as given under Article 1.1 of the PPA.

8. UPPCL has urged that although the petition has been filed on the ground of Change in Law subsequent to execution of the PPA it in fact seeks a wholesale review of the PPA itself, which is clearly outside the mandate of law. UPPCL has alleged that the petitioner has sought to revise the capital cost on a continuing basis without any reference to various stages indicated in the PPA. Change in Law, if any, impacting the capital cost, is to be invoked with reference to various stages of scheduled date of commercial operation and contracted capacity. UPPCL has averred that the Procurers cannot be held to be bound to

an ongoing revision in the capital cost of the seller, without reference to any timeframe for the construction period. UPPCL has pointed out that the claim made for increase in capital cost on account of increase in Excise Duty on cement and steel; withdrawal of exemption of Custom and Excise Duty on mining equipments imported/domestically sourced; change in cost of Geological report; 'Change in Law' leading to increase in the price of diesel etc., would have to be examined separately on the test of 'Change in Law' at the appropriate stage with reference to the date of commercial operation.

9. North Delhi Power Ltd (NDPL) (Respondent No. 16) has submitted that compensation is payable for 'Change in Law' during construction period only when the aggregate increase or decrease in capital cost of the Project is ₹50 crore or the increase or decrease in revenue or cost to the generating company is in excess of an amount equivalent to 1% of the Letter of Credit in aggregate for a contract year. It has been submitted that assessment of actual impact on capital cost of the Project or the revenue of the generating company can only be made once the expenditure incurred can be determined accurately, which, as submitted by NDPL, is possible only on a date closer to the date of commissioning of the first unit of the Project. NDPL has urged that to avoid multiplicity of proceeding, tariff should be determined at the time of commissioning and as such no useful purpose would be served by entertaining the present petition at this stage as the actual expenditure of the petitioner would have to be trued-up and only on that basis final order revision the tariff from the

generating station could be considered. NDPL has urged that since the rights and obligations of the parties are governed under the PPA, the petitioner was entitled to terminate the PPA on failure of the Procurers to satisfy the Conditions Subsequent. NDPL has averred that having waived its rights under the PPA, the petitioner is now estopped from alleging that the Project was adversely affected due to reasons attributable to the Procurers which entitle them to a higher tariff,. NDPL has pointed out that Article 3.3.4 of the PPA expressly provides that no tariff adjustment would be allowed on account of any extension of time granted for satisfaction of Conditions Subsequent. According to NDPL, no tariff increase can be allowed on the alleged ground of failure of the Procurers to meet the Conditions Subsequent. NDPL has opposed the petitioner's plea for compensation for devaluation of rupee since it is neither based on the PPA nor any provision of applicable law and as such there is no basis for the claim for compensation as a result of depreciation of Indian currency.

10. The Distribution Companies in the State of Rajasthan (Respondent Nos. 10 to 12) in their common reply-affidavit dated 9.10.2013 have argued that the petition seeking compensation on the ground of 'Change in Law' is premature since the Project has not yet been commissioned, the scheduled date of commercial operation of the first unit being 7.5.2015. In the circumstances, the petition filed for consideration of the effect of 'Change in Law' is not maintainable at this stage.



11. Haryana Power Purchase Centre (Respondent No 13) in its reply-affidavit dated 2.12.2013 on maintainability of the petition has raised grounds similar to those raised by the Distribution Companies in the State of Rajasthan. It has stated that the petitioner is required to file appropriate application for adjustment of tariff on account of real impact of 'Change in Law' at a later stage and cannot seek a declaration as sought in the petition, without ascertaining the real impact on the tariff of the events relied upon by the petitioner, particularly when the operating period of the Project as referred to in Article 13 of the PPA has not yet commenced.

12. BSES Yamuna Power Ltd (Respondent No 18) in its affidavit dated 5.12.2013 has supported the case of the petitioner. It has been submitted that considering the advantages of highly competitive tariff being offered by the petitioner even if the claims are accounted for, it is in the interest of end consumers of the Procurers that the claims raised by the petitioner are dealt with expeditiously and fairly.

13. The lead Procurer, Jharkhand State Electricity Board ("JSEB"), has conceded that the responsibility is that of the lead procurer to procure and handover the land to the petitioner and that they could not fulfill the same due to a variety of reasons, not attributable to the petitioner, till today. JSEB has stated that long term power at very competitive tariffs will be available from the UMPP. JSEB has further submitted that Commission has the jurisdiction under Section



79 of the Electricity Act 2003 to adjudicate on the issues including the claims raised by the petitioner and the petition may be admitted on merit under Article 17 of PPA and Section 79 of Electricity Act, 2003

14. We have heard learned senior counsel for the petitioner and learned counsel for the respondents present at the hearing on maintainability of the petition.

15. This petition has been filed under Section 79 (1)(f) and Article 17.2 of the PPA read with Article 13.2 of the PPA. Under Section 79 (1)(f) of the Act, this Commission has been vested with the power to adjudicate the dispute including a generating company or transmission licensee in regard to matters connected with clauses (a) to (d) of the sub-section (1) of Section 79 of the Act. The petitioner is developing Ultra Mega Power Project for supply of power to 19 distribution companies in different States and is accordingly covered under Section 79 (1) (b) of the Act. In fact, this Commission has adopted the tariff of the generating station under Section 63 of the Electricity Act under order dated 26.4.2010 In Petition No. 218/2009. The claims of the petitioner pertains to 'Change in Law' which has been provided in the Article 13 of the PPA. Article 13 provides as under:-

"13 ARTICLE 13 : CHANGE IN LAW

13.1 Definitions

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



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

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

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

13.1.2 "Competent Court" means:

The Supreme Court or any High Court, or any tribunal or any similar judicial or quasi-judicial body in India that has jurisdiction to adjudicate upon issues relating to the Project.

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

a) Construction Period

As a result of any Change in Law, the impact of increase/decrease, of Capital Cost of the Project in the Tariff shall be governed by the formula given below:

For every cumulative increase/decrease of each Rupees Fifty Crore (Rs. 50,00,00,000) in the Capital Cost over the term of this Agreement, the increase/decrease in Non Escalable Capacity Charges shall be an amount equal to zero point two six seven (0.267%) of the Non Escalable Capacity Charges. Provided that the Seller provides to the Procurers

documentary proof of such increase/ decrease in Capital Cost for establishing the impact of such Change in Law. In case of Dispute, Article 17 shall apply.

It is clarified that the above mentioned compensation shall be payable to either Party, only with effect from the date on which the total increase/decrease exceeds amount of Rupees Fifty Crore (Rs. 50,00,00,000).

b) *Operation Period*

As a result of Change in Law, the compensation for any increase/decrease in revenues or cost to the Seller shall be determined and effective from such date, as decided by the Central Electricity Regulatory Commission whose decision shall be final and binding on both the Parties, subject to rights of appeal provided under applicable Law.

Provided that the above mentioned compensation shall be payable only 'if and for increase/ decrease in revenues or cost to the Seller is in excess of an amount equivalent to 1% of the Letter of Credit in aggregate for a Contract Year.

13.3 *Notification of Change in Law*

13.3.1 *If the Seller is affected by a Change in Law in accordance with Article 13.2 and wishes to claim a Change in Law under this Article, it shall give notice to the Procurers of such Change in Law as soon as reasonably practicable after becoming aware of the same or should reasonably have known of the Change in Law.*

13.3.2 *Notwithstanding Article 13.3.1, the Seller shall be obliged to serve a notice to all the Procurers' under this Article 13.3.2 if it is beneficially affected by a Change in Law. Without prejudice to the factor of materiality or other provisions contained in this Agreement, the obligation to inform the Procurers contained herein shall be material. Provided that in case the Seller has not provided such notice, the Procurers shall jointly have the right to issue such notice to the Seller.*

13.3.3 *Any notice served pursuant to this Article 13.3.2 shall provide, amongst other things, precise details of:*
(a) *the Change in Law; and*
(b) *the effects on the Seller of the matters referred to in Article 13.2.*

13.4 *Tariff Adjustment Payment on account of Change in Law*

13.4.1 *Subject to/Article 13.2, the adjustment in Monthly Tariff Payment shall be effective from:*
(i) *the date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law; or*

(ii) the date of order/judgment of the Competent Court or tribunal or Indian Governmental Instrumentality, if the Change in Law is on account of a change in interpretation of Law.

13.4.2 The payment for Changes in Law shall be through Supplementary Bill as mentioned in Article 11.8. However, in case of any change in Tariff by reason of Change in Law, as determined in accordance with this Agreement, the Monthly Invoice to be raised by the Seller after such change in Tariff shall appropriately reflect the changed Tariff."

As per the above provision, a party affected by 'Change in Law' is required to give a notice to the other party as soon as 'Change in Law' has occurred. The petitioner has given a notice to the procurers under Article 13.2 of the PPA vide its letter dated 20.6.2013. In the said letter, the petitioner has stated that the events of 'Changes in Law' have occurred after 22.12.2008 which date is seven days prior to the bid deadline. The petitioner has indicated the ' Changes in Law' in the said letter as under:-

"A. Change in Law affecting the Construction Phase

- (i) Increase in the cost of the land and R&R;*
- (ii) Imposition of Excise Duty on Cement and Steel.*
- (iii) Imposition of Customs Duty and Excise Duty on Mining Equipment acquired for Project;*
- (iv) Change in Cost of Geological Report (GR);*
- (v) Change in Law leading to increase in the price of diesel*

B. Change in Law during Operation Period

- (i) Introduction/levy of Clean Energy Cess*
- (ii) Excise Duty on Coal*
- (iii) Increased Expenditure on account of Mine Closure Plan*
- (iv) Increase in water charges*
- (v) Change in law leading to increase in the price of diesel*
- (vi) Change in merit rate of excise duty;*
- (vii) Change in rate of royalty on coal;*
- (viii) Change in effective Income Tax Rate;*
- (ix) Change in effective Minimum Alternate Tax Rates.*

C. Cost increase due to delay in handing over of land by Procurers

- (i) Capital Cost Escalation due to undue delay in handing over of Land by Procurers;*



- (ii) *Setting the Zero date for indexation of escalation of Escapable Capacity Charge;*
- (iii) *Increase in Project cost due to Foreign Exchange Rate Variation;"*

Subsequently, the petitioner and the procurers held a meeting on 8.7.2013 at CEA office, New Delhi under the Chairmanship of the Principal Secretary (Energy), Govt. of Jharkhand, which is the lead procurer of the Project. Para 11 to 17 of the Minutes of the Meeting are extracted as under:-

"11. JIPL's letter dated 20th July provides the details of occurrence of various Changes in Law as per Article 13.1.1 and 13.3 of PPA and other impacts affecting the financial viability of the project due to delay (refarticle) 12.5 of PPA)in fulfillment of obligations by Procurers under Article 3.1.2 A.B.1 of PPA, which is appended to this MOM for ready reference(Annexure IV).

12. In the course of the discussion, considering the increase in land and R & R cost being not in the control of the developer, the Lead Procurer opined that in order to restore the seller to the same economic position, the Seller needs to recover the additional cost of land and R & R , and additional cost incurred on account of other Changes in Law.

13. Procurers' from Delhi stated that their current power procurement cost is significantly high compared to the tariff offered by JIP Leven after taking into account all claims of JIPL and are therefore willing to buy the power.

14. However, after deliberations, the other Procurers' were of the view that the Seller may be provided relief strictly in accordance with the Provisions of the PPA and declined to go beyond PPA provisions.

15. JIPL pleaded that the relief provided under Article 13.2 (a) of the PPA is inconsistent and inadequate and does not restore the Seller (Affected Party) to the same economic position as if such change in law has not occurred. It was pointed out that such a significant increase in the cost makes the project financially unviable. At this stage it is even not worth passing the test of Financial Closure of any Lender. JIPL, therefore, is not in a position to accept the current stance of the procurers.

16. JIPL offered to discuss/ negotiate these issues with the procurers to find an amicable settlement. The procurers declined to accept the offer/suggestions of JIPL and expressed that neither they are inclined to discuss the said Issues with the Seller nor an amicable settlement is possible. As both the Parties did not agree to amicable settlement under article 17.2 of PPA, dispute has arisen.

17. Following is concluded:-



- a. *Further meetings on this issue would not be useful.*
- b. *JIPL may approach the Appropriate Commission for Dispute Resolution as per Article 17.3.1 of PPA, if so desired.*
- c. *the Procurers agreed to waive off the 30 days notice period which is mandatory as per article 17.2 of PPA".*

16. It appears from the above that some of the claims of the petitioner such as the increase in the cost of the land and increase in the cost of R&R are covered under the 'Change in Law'. Even the lead procurer has agreed to such cost being allowed under 'Change in Law' and the other procurers are of the view that the sellers may be provided relief strictly in accordance with the provisions of the PPA. The petitioner has pleaded before the procurers that the relief provided under Article 13.2 (a) of the PPA is inconsistent and inadequate and does not restore the petitioner to the same economic position as if the 'Change in Law' has not occurred. It has been concluded in the meeting that the petitioner may approach the Commission for dispute resolution as per Article 17.3.1 of the PPA, if so desired and the procurers have agreed to waive of the mandatory notice period under Article 17.2 of the PPA.

17. Article 17 of the PPA provides as under:-

"17 *ARTICLE 17: GOVERNING LAW AND DISPUTE RESOLUTION;*

17.1 *Governing law*

This Agreement shall be governed by and construed in accordance with the Laws of India.

17.2 *Amicable Settlement*

17.2.1 Either Party is entitled to raise any claim, dispute or difference of whatever nature arising under, out of or in connection with this Agreement including its existence or validity or termination (collectively "Dispute") by giving



a written notice to the other Party, which shall contain:

- (i) a description of the Dispute;
- (ii) the grounds for such Dispute; and
- (iii) all written material in support of its claim.

17.2.2 The other Party shall, within thirty (30) days of Issue of dispute notice issued under Article 17.2.1, furnish:

- (i) counter-claim and defences, if any, regarding the Dispute; and
- (ii) all written material In support of its defences and counter-claim.

17.2.3 Within thirty (30) days of issue of notice by any Party pursuant to Article 17.2.1 or Article 17.2.2, both the Parties to the Dispute shall meet to settle such Dispute amicably. If the Parties fail to resolve the Dispute amicably within thirty (30) days of receipt of the notice referred to in the preceding' sentence, the Dispute shall be referred to Dispute Resolution in accordance with Article 17.3.

17.3 Dispute Resolution

17.3.1 Where any Dispute arises from a claim made by any Party for any change in or determination of the Tariff or any matter related to Tariff or claims made by any Party which partly or wholly relate to any change in the Tariff or determination of any of such claims could result in change in the Tariff or (ii) relates to any matter agreed to be referred to the Appropriate Commission under Articles 4.7.1, 13.2, 18.1 or clause 10.1.3 of Schedule 17 hereof, such Dispute shall be submitted to adjudication by the Appropriate Commission. Appeal against the decisions' of the Appropriate Commission shall be made only as per the provisions of the Electricity Act, 2003, as amended from time to time;

The obligations of the Procurers under this Agreement towards the Seller shall not be affected in any manner by reason of inter-se disputes amongst the Procurers,

17.3.2 If the Dispute arises out of or in connection with any claims .not covered m Article 17.3.1, such Dispute shall be resolved by arbitration under the Indian Arbitration and Conciliation Act, 1996 and the Rules of the Indian Council of Arbitration, in accordance with the process specified in this Article. In the event of such Dispute remaining 'unresolved as referred to in Article 17.2.3 hereof, any party to such Dispute may refer the matter to registrar under the Rules of the Indian Council of Arbitration.

- (i) The Arbitration tribunal shall consist of three (3) arbitrators to be appointed in accordance with the Indian Council of Arbitration Rules
- (ii) The place of arbitration shall be Delhi, India. The language of the arbitration shall be English.
- (iii) The arbitration tribunal's award shall be substantiated in writing. The arbitration tribunal' shall also decide on the costs of the arbitration proceedings and the allocation thereof.



- (iv) *The award shall be enforceable in any court having jurisdiction, subject to the applicable Laws.*
- (v) *The provisions of this Clause shall survive the termination of this PPA for any reason whatsoever.*

17.4 *Parties to Perform Obligations*

Notwithstanding the existence of any Dispute and difference referred to the Appropriate Commission or the arbitral tribunal as provided in Article 17.3 and save as the Appropriate Commission or the arbitral tribunal may otherwise direct by a final or interim order,' the Parties hereto shall continue' to perform their respective obligations (which are not in dispute) under this Agreement."

18. Since the dispute relates to tariff of the project and the amicable settlement has broken down and both the petitioner and procurers have agreed that the petitioner may approach the Commission for dispute resolution under Article 17.3.1 of the PPA and the procurers have even waived the notice period, we are of the view that a dispute has arisen between the parties in terms of Article 17.3.1 of the PPA.

19. In view of the above, we admit the petition and direct the respondents to file their replies by 30.7.2014 with advance copy to the petitioner who may file its rejoinder, if any, by 15.8.2014. It is, however, clarified that admission of the petition should not be construed that the Commission has expressed any view on the admissibility of any of the claims made by the petitioner under 'Change in Law'. The Commission will take a view on the claims of the petitioner after hearing the petitioner and procurers.

20. List the petition on 9.9.2014.

Sd/-

(A. K. Singhal)
Member

sd/-

(M. Deena Dayalan)
Member

sd/-

(Gireesh B. Pradhan)
Chairperson

