

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 75/MP/2013

Coram:

Shri V. S. Verma, Member

Shri M. Deena Dayalan, Member

Date of hearing: 10.10.2013

Date of order: 22.02.2014

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 Articles 13.2.(b) of the Power Purchase Agreement dated 07.08.2007 executed between Sasan Power Limited and the Procurers for compensation due to Change in Law impacting revenues and costs during the Operating Period.

And

In the matter of

Sasan Power Limited
3rd Floor, Reliance Energy Centre,
Santa Cruise East,
Mumbai

....**Petitioner**

Vs

1. MP Power Management Company Ltd.
Shakt Bhawan, Jabalpur-462 008, Madhya Pradesh
2. Paschimanchal Vidyut Vitran Nigam Limited
Victoria Park,
Merrut-250 001, Uttar Pradesh
3. Purvanchal Vidyut Vitran Nigam Limited
Hydel Colony, Bhikaripur,
Post-DLW, Varanasi-221 004
Uttar Pradesh
4. Madhyanchal Vidyut Vitran Nigam Limited
4-A-Gokhale Marg,
Lucknow-226 00, Uttar Pradesh
5. Dakshinanchal Vidyut Vitran Nigam Limited
220 kV Vidyut sub-station,
Mathura Agra By-Pass Road,
Sikandra, Agra-282 007, Uttar Pradesh



6. Ajmer Vidyut Vitran Nigam Limited
Hathi Bhata, City Power House,
Ajmer-305 001, Rajasthan
7. Jaipur Vidyut Vitran Nigam Limited
Vidyut Bhawan, Jaipur-302 005, Rajasthan
8. Jodhpur Vidyut Vitran Nigam Limited
New Power House, Industrial Area,
Jodhpur-342 003, Rajasthan
9. Tata Power Delhi Distribution Limited
Grid sub-station Building, Hudson lines,
Kisngsway Camp, New Delhi-110 009
10. BSES Rajdhani Power Limited
BSES Bhawan, Nehru Place,
New Delhi-110 019
11. BSES Yamuna Power Limited
Shakti Kiran Buildidng,
Karkardooma, Delhi-110 096
12. Punjab State Power Corporation Limited
The Mall, Patiala-147 001
Punjab
13. Haryana Power Purchase Centre
Room No. 239, Shakti Bhawan, Sector-6,
Panchkula-134 109
14. Uttarakhand Power Corporation Limited
Urja Bhawan, Kanwali Road,
Dehradun-248 001

..... Respondents

The following were present:

Shri J.J.Bhatt, Senior Advocate, SPL
Shri Vishrov Mukherjee, Advocate SPL
Ms. Ritika Arora, Advocate, SPL
Shri P.Venkatarao, SPL
Shri Arun Dhillon, SPL
Shri N. K. Deo, SPL
Shri Raj Verma, SPL
Shri Sandeep S. Mysetty, SPL
Shri Mayank Gupta, SPL
Shri Srikant, SPL
Shri Vivek Kejirwal, SPL
Shri R.S.Johri, SPL
Shri G.Umpathy, Advocate, MPPMC

Shri M.G.Ramchandran, Advocate, HPPC
Shri Poorva Saigal, Advocate, HPPC
Shri Apoorve Karol, Advocate, HPPC
Shri Padamjit Singh, PSPCL
Shri T.P.S. Bawa, PSPCL
Ms. Shobana Masters, Advocate, BRPL and BYPL
Shri Himanshu Chauhan, BRPL
Shri Alok Shankar, Advocate, TPDDL
Shri S.S.Barpanda, NLDC
Ms. Jyoti Prasad, NLDC

ORDER

The petitioner, Sasan Power Limited is a special purpose vehicle which was incorporated by M/s Power Finance Corporation Limited (PFC), the nodal agency of Government of India for implementation of its Ultra Mega Power Project initiative on 10.2.2006 for the development and implementation of a coal fired, ultra mega power project based on linked captive coal mine using super-critical technology with an installed capacity of 4000 MW (plus/minus 10%) at Sasan, District Singrauli, Madhya Pradesh (hereinafter referred to as "Sasan UMPP"). The project was conceived by Government of India to be implemented by a developer to be selected through tariff based international competitive bidding process.

2. Based on the competitive bidding carried out by Power Finance Corporation as the Bid Process Coordinator, Reliance Power Limited(hereinafter referred to as "RPower") having quoted the lowest bid was declared as successful bidder for execution of the project. Accordingly, Letter of Intent (LoI) was issued to RPower on 1.8.2007 which was accepted. Consequently, in terms of the provisions of the Request for Proposal (RfP), R Power acquired 100% shareholding of the SPV on 7.8.2007. A PPA dated 7.8.2007 was executed between the petitioner and 14 procurers who are the distribution companies in the State of Madya Pradesh, Uttar

Pradesh, Rajasthan, Punjab, Haryana, Uttarakhand and Delhi. On 15.10.2008 a Supplemental Power Purchase Agreement (SPPA) was entered into between the petitioner and the procurers primarily to pre-pone the scheduled date of commercial operation (CODs) of the various units of the Project. In the Joint Monitoring Committee meeting held on 17.9.2010, the date of commercial operation of the various units of the project was revised by mutual consent. The dates of commercial operation of various units of Sasan UMPP as per the PPA and the SPPA are as under:-

Srl. No.	Unit	COD as per PPA	COD as per SPPA
1	First	7.5.2013	31.12.2011
2	Second	7.12.2013	31.3.2012
3	Third	7.7.2014	30.6.2012
4	Fourth	7.2.2015	30.9.2012
5	Fifth	7.9.2015	31.12.2012
6	Sixth	7.4.2016	31.3.2013

According to the petitioner, the COD of the first unit at the time of filing of the petition was expected to be by 31.3.2013 subject to the completion of procurer's condition subsequent and other procurers obligations set out in the PPA.

3. The Petitioner has filed the present petition under section 79(1)(b) and 79 (1) (f) of the Electricity Act, 2003(herein after "2003 Act"),Article 13 of the PPA read with Paragraph 5.17 of the Competitive Bidding Guidelines and Regulations 82, 93 and 113 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 seeking relief on account of recoupment/adjustment of the project economics due to a Change in Law which has led to an increase in the price of the diesel which has the impact on the costs during the operative period of the project. The petitioner has submitted that this is a fit case for the Commission to exercise its

regulatory power to devise a mechanism to compensate the petitioner for the financial impact on account of increase in the price of the diesel .The petitioner has made the following prayers:-

"(a) Declare that the decision of the Government of India with respect to creation of two categories of diesel consumers and changing of market linked price of diesel to the bulk consumers is a Change in Law even impacting revenues and costs of the petitioner during the operating period for which the petitioner may be compensated in terms of Article 13 of the PPA; and

(b) Restore the petitioner to the same economic prior to occurrence of the Change in Law by permitting the petitioner to raise supplementary bills in terms of Article 13.4.2 of the PPA as per the computation set out to compensate the petitioner as and when the financial impact of the Change in Law arises; and/or

(c) 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."

Submissions of the Petitioner:

4. The Petitioner has submitted that the UMPP Policy in Paragraphs 1.2 and 1.4 envisage domestic coal based UMPPs as integrated projects where the power station and the captive coal mines are treated as integrated units. The Petitioner has submitted that the PPA also recognizes the coal mines as an integral part of the Project in the following provisions:

(a) Recital A of the PPA states that the Procurers have identified the Project to be located at Sasan along with the captive coal mines.

(b) "Project" has been defined under the PPA to mean the Power Station and the Captive Coal Mine(s).

(c) Under Article 13 of the PPA, the increase in price of land of the coal mines, increase in cost of compensatory afforestation and cost of implementation of the R&R Plan for the coal mines have been included as a Change in Law.

5. The petitioner has submitted that coal blocks of Moher, Moher Amlohri extension and Chhatrasal are an integral part of the project and any Change in Law which affects the cost of the petitioner relating to coal mines is a change in law under the provisions of the PPA. The Petitioner has further submitted that diesel is major requirement for the operation of equipments for mining and increase in price of diesel would impact the costs in the operating period of the project.

6. The major mining equipments consuming diesel and the estimated yearly diesel consumption for peak coal production of 20 MTPA for Moher and Moher Amlohri Extension coal blocks are indicated below:

Particulars	No of equipment	Diesel consumption (kL per annum)
<i>Overburden Removal</i>		
Dumper 240T	42	23,934
Dozer 850HP	6	2,053
Dozer 560HP	6	1,474
<i>Coal Production</i>		
F.E. Loader	2	1,105
Drill 160mm	4	818
Dumper 240T	13	6,626
Dozer 850HP	2	563
Dozer 560HP	2	390
<i>Common</i>		
Grader	7	308
Wheel Dozer 450HP	2	108
Dozer 240HP	2	80
<i>Reclamation</i>		
Dozer 560HP	2	390
Grader	2	88
Water Sprinkler	6	612
<i>Others</i>	-	370
Total Diesel Consumption		38,920

7. The major mining equipments consuming diesel and estimated yearly diesel consumption for peak coal production of 5 MTPA for Chhatrasal coal block are:

Particulars	No of equipment	Diesel consumption (kL per annum)
<i>Overburden Removal</i>		
Hyd BH 10 cu mtr	1	322
Dumper 240T	19	10,029
Dumper 100T	5	885
Dozer 850HP	2	912
Dozer 560HP	2	642
<i>Coal Production</i>		
Surface Miner	2	966
F.E. Loader 10 cu mtr	2	716
Dumper 100T	10	2360
Dozer 560HP	2	642
<i>Common</i>		
Grader	3	192
Wheel Dozer	4	960
F.E. Loader 10 cu mtr	1	358
<i>Reclamation</i>		
Dozer 560HP	1	321
Grader	1	64
Water Sprinkler	3	536
<i>Others</i>		
Total Diesel Consumption		20,252

8. The Petitioner has submitted that the price of diesel has been regulated by Government of India by subsidising the actual cost of diesel through the Administered Pricing Mechanism (APM). In 2002 APM was discontinued on paper but remained to be applicable in spirit. The price of diesel continued to remain subsidized and hence controlled by the Government of India. This subsidy has been available to all the consumers of diesel.

9. On 17.1.2013, the Ministry of Petroleum & Natural Gas (MoP&G) has issued orders to the Oil Marketing Companies relating to the diesel price change. Two separate categories of diesel consumers were created (i) bulk consumers who purchased diesel directly from the refineries of the marketing companies; and (ii) retail consumers who would purchase diesel from the fuel pumps operated by the OMC and their dealers. For bulk diesel consumers, the subsidy available on diesel

was withdrawn and they were required to purchase diesel at the actual market prices. On 17.1.2013, Indian Oil Corporation issued a press release intimating of the withdrawal of the subsidized pricing for bulk consumer of diesel.

10. The Petitioner has submitted that as a bulk consumer of diesel, it has to now procure diesel from the OMCs at the non subsidized market determined' price. The chart given by the petitioner regarding the increase in prices of diesel over the last few months is given below:-

Diesel Prices in Rs/Ltr			
Date of change of Diesel Price (Effective Date)	Retail (Bhopal, MP)	Bulk (for depot near Sasan coal mine)	Remarks
25-Jul-12	45.68		No separate price for bulk consumers
01-Aug-12	45.75		No separate price for bulk consumers
14-Sep-12	51.87		No separate price for bulk consumers
27-Oct-12	52.09		No separate price for bulk consumers
18-Jan-2013	52.66	62.88	
16-Feb-2013	53.21	64.82	
01-Mar-13	53.21	66.06	

11. The petitioner has submitted that the decision of the Govt. of India to create two separate categories of diesel consumers is a Change in Law in terms of Article 13 of the PPA. Prior to 17.1.2013, the price of diesel was regulated by Govt. of India and the price of diesel was the same for bulk as well as retail consumers. However, the decision taken by the Govt. of India on 17.1.2013 has led to withdrawal of the benefit of the subsidy to bulk consumers including the petitioner.

12. The petitioner has submitted that at the time of the bid submission, the price of the diesel was subsidized in accordance with the policies of the Govt. of India. The price of diesel as on 21.7.2007, which was the cut off date was around Rs.33.91 per litre. At the time of bid submission, an escalation of 4.5% p.a. was considered for the coal mining cost of which diesel is an important component. The escalation rate at the time of the bid was based on the historical movement of Wholesale Price Index (WPI) and Consumer Price Index (CPI). Detailed working of the same is given below:-

CPI-IW				WPI			Wt Avg (60% WPI + 40% CPI)
Year	CPI Value	Annual increase	CAGR from 2000	WPI Value	Annual increase	CAGR from 2000	
2000	441	-	-	152.8	-	-	-
2001	458	3.85%	-	160.7	5.17%	-	-
2002	477	4.15%	-	164.7	2.49%	-	-
2003	496	3.98%	-	173.4	5.28%	-	-
2004	514	3.63%	-	184.9	6.63%	-	-
2005	536	4.28%	-	193.7	4.76%	-	-
2006 (new)**	123	-	-	-	-	-	-
2006 (old)**	563	5.10%	4.17%	203.0	4.80%	4.85%	4.58% (4.5%)

13. The estimated impact (as on 1.3.2013) on account of aforesaid Change in Law will be approximately Rs.133 Crores per annum for the approved peak coal production levels. A calculation of the estimated impact on account of the aforesaid Change in Law is annexed by the petitioner as Annexure P-14 to the petition. The details are as under:

Current Diesel Price as on Jan 18, 2013 (Rs/ltr)	62.88
Diesel price on July 21, 2007 (Rs ltr) (Average of Kolkata and Mumbai Price)	33.91
Current Diesel Price as on Jan 18, 2013 based on CERC index for energy charges payment (Rs/ltr)	46.71
Current Diesel Price as on Jan 18 2013 based on CERC index for evaluation (Rs/ltr)	48.70

IMPACT on Moher / Moher Amlohri (As on 18th Jan' 2013) in Rs. Crs.	
Based on CERC index for energy charge payment	64.49
Based on CERC index for Evaluation	56.58
IMPACT on Chhatrasal (as on 18th Jan' 2013) in Rs. Crs.	
Based on CERC index for energy charge payment	32.74
Based on CERC index for Evaluation	28.73

14. The Petitioner has submitted that Article 13 of the PPA read with paragraph 5.17 of the Competitive Bidding Guidelines in terms of which this Commission has the power to determine the compensation to be awarded for any change in Law and date from which such compensation is to be granted and to adjudicate upon any dispute that arises claiming any change in or regarding determination of the tariff or any tariff related matters, or which partly or wholly could result in change in tariff.

15. The petitioner has submitted that as on date, the financial impact on account of increase in diesel prices can be quantified on the basis of estimated consumption patterns as well as allocated capacity. The Petitioner has quantified the financial impact based on proposed usage. However, the Procurers will be billed on the actual expenditure, duly supported by documentary evidence. The petitioner has filed the present Petition invoking:-

- (a) Section 79(1)(b) of the Act under which this Hon'ble Commission has the power to regulate the tariff of the Petitioner.
- (b) Section 79(1)(f) of the Act which gives this Hon'ble Commission the power to adjudicate upon disputes involving the Petitioner.
- (c) Article 13 of the PPA read with Paragraph 5.17 of the Competitive Bidding Guidelines in terms of which this Hon'ble Commission has the power to:-

- (i) Determine the compensation to be awarded for any change in law and date from which such compensation is to be granted.
- (ii) Adjudicate upon any dispute that arises claiming any change in law or regarding determination of the tariff or any tariff related matters, or which partly or wholly could result in change in tariff.

16. The Petitioner has submitted that in terms of Article 13.2 of the PPA, the Petitioner is entitled to be compensated and restored to the same economic position as if the instances of change in law did not occur.

17. On the issue of the minimum value of Changes in Law which should be more than 1% of the aggregate Letter of Credit amount in a calendar year, as per Article 11.4.1.1, the letter of credit amount for the first year will be equal to 1.1 times the estimated average monthly billing based on Normative Availability. For subsequent years, the letter of credit amount will be equal to 1.1 times the average of the monthly tariff payments of the previous contract year plus the estimated monthly billing during the current year from any additional units expected to be put on COD during that year on Normative Availability. The Petitioner has submitted that:-

- (a) The tariff of the Project in the first year is Rs 0.70 per unit. Based on Normative Availability of 80%, total units in the first year are about 12 million units. (With commissioning of 1st unit on 30.03.2013).
- (b) Consequently, the average aggregate monthly bill based on the aforesaid Normative Availability is Rs. 0.83 Crores. The Letter of Credit

amount which is 1.1 times the estimated average monthly billing based on Normative Availability is about Rs. 0.91 Crores.

- (c) As per Article 13.2 (b) of the PPA, the threshold amount beyond which compensation for change in law can be claimed is 1% of the aggregate letter of credit amount for a Contract year. Hence for the first year, threshold amount is about Rs. 0.91 Lacs.
- (d) In line with the Projected COD dates of remaining units (contingent on Procurers expeditiously fulfilling their obligations under the PPA), threshold amount for the second year will be about Rs 84 Lacs.
- (e) When all the six units will be operational for the full year, aggregate letter of credit amount would be about Rs. 310 Crores and therefore, 1% of aggregate letter of credit is about Rs 3.1 Crores.
- (f) Since the amount claimed for Changes in Law is around Rs. 133 Crores, which is significantly higher than the threshold amount prescribed under Article 13.2(b) of the PPA, the Petitioner is entitled to be compensated for the same.

18. We have heard the learned counsel for the parties. The Counsel for Haryana Power Purchase Centre (HPPC) vide its affidavit dated 3.6.2012 has filed its reply to the claim of the petitioner and submitted as under:

- (a) The commercial operation of the first unit of 660 MW has not occurred as provided in the PPA and accordingly the operating period as defined in the

PPA has not commence to unable the petitioner to maintain any claim as stated in the petition.

(b) The unit can be said to have achieved COD if the performance test establish the test of at least 95 percent of the contracted capacity of the unit and not otherwise. The petitioner has not conducted a performance test for the above capacity. The petitioner claim that the COD was excepted on 30th March 2013 is wrong and petition is liable to dismissed for this reason.

(c) The Petitioner has claimed the impact of Charge in Law having occurred in respect of the diesel used for mining coal during the Operating period. The Change in diesel prices from time to time is not on account of any law including Electricity Laws in force in India and any state, ordinance, regulation, notification or code, rule or otherwise any rules, regulations, orders, notifications by an Indian Government Instrumentality pursuant to the above as provided for in the definition of law contained in the PPA. The provision of change in law contained in Article 13 of the PPA, has no application.

(d) Admittedly the regulation of diesel prices through Administrated Price Mechanism (APM) by the Government of India was legally changed by the year 2002 and accordingly the change in law occurred much prior to the cutoff date of the bidding with reference to the bid submitted on 27.07.2007 pursuant to which the PPA was signed. Accordingly the change over from APM to the market driven prices for diesel did not occur post the cutoff date of constitute a change in law under Article 13 of the PPA.

(e) The bidders including the investors were fully aware of the legal regime on the pricing of diesel at the time of the submission of bids in July 2007. It was clear that the APM as the legal mechanism of pricing diesel no longer subsisted and the pricing of diesel would be governed by market determined factors. The provision of subsidy thereafter by the Government of India for Diesel was not pursuant to any legal mandate and was a decision by the Government of India which cannot be said to be covered by the term Law as defined in the PPA. The subsidy provided was totally discretionary and was not pursuant to any mandate of law. The bidders were not entitled to proceed on the basis that the subsidy will continue to be available. The bidders were rather required to proceed on the basis of the legal regime then prevalent of APM being not applicable and taken into account into account the Diesel prices that would be as per the market forces. The increase or decrease of diesel prices could not therefore be a subject matter of adjustment on account of changes in law under Article 13 of the PPA.

(f) Unless there is an impact on the cost or revenue related to the business of selling of electricity, by the petitioner to the procurers, mere change in law is not sufficient. In context of the above the mining operation of the petitioner is claimed to be distinct and separate from the business of selling of electricity and the coal extracted from the mines can be and are being used by the petitioner for other purposes. The petitioner is, therefore, having significant financial benefit out of the allocation of coal mine not restricted to the use of coal for the purpose of business of generation of electricity and supply to the procurers.

(g) The increase in diesel prices cannot therefore be treated as an increase in the cost of business of selling electricity. The diesel is used for use and exploitation of coal mine as a whole. In view of the above, the petitioner cannot claim the impact of the increase in the diesel price as a cost of generation of electricity when the petitioner has significant advantage over the coal mines for other businesses and the coal mine exploitation and mining operation is independent of generation and sale of electricity to the procurers.

19. The Learned Counsel for MP Power Management Company Ltd & Ors (Respondent No 1) vide affidavit dated 23.8.2013 has filed its reply and submitted that the claim of the petitioner need to be confined to the terms of the PPA and the tariff based competent bidding process needs to be maintained. The claim of the petitioner that the impact of change in law having occurred in respect of diesel used for mining coal during the operating period is wrong and the provisions of change in law contained in Article 13 of the PPA has no application. The change in diesel prices from time to time is not on account of any law including electricity loss in force in India. It is further submitted that the change over from Administrated Price Mechanism (APM) to the market driven prices for diesel did not occur post the cut of date to constitute a change in law under Article 13 of the PPA. The provision of subsidy thereafter by the Government of India for diesel was not pursuant to any legal mandate and in any event, the increase in diesel prices cannot be said to be covered by the term LAW as defined in the PPA.

20. It has been further submitted that unless there is an impact on cost or revenue related to the business of selling electricity by the petitioner to the procurers, mere change in law is not sufficient. The increase in the diesel prices cannot be therefore

treated as an increase in the cost of business of selling electricity. The diesel is used for use and exploitation of coal mines as a whole. The petitioner cannot claim the impact of the increase in the diesel price as a cost of generation of electricity when the coal mine exploitation and mining operation is independent of generation and sale of electricity to the procurers.

21. The Learned Counsel for the Tata Power Delhi Distribution Ltd (Respondent No. 9) vide affidavit dated 7.11.2013 has filed its reply and submitted that the rights and obligations of the parties in the Sasan Ultra Mega Power Project are governed by the terms and conditions of the PPA and the supplementary PPA entered into between the Sasan Power Ltd and the procurers. Therefore, claims for increase in tariff and monitoring compensation for change in law would have to be based on the PPA between the parties and it is entitled to be placed in a financial position as if no change in law had occurred. It is further submitted that eliminating subsidy on bulk consumers is a policy decision of the Government and is not law as per the definition in the PPA and therefore the present petition is mis-conceived, non-maintainable and therefore, relief prayed cannot be granted.

22. It has been further submitted that Clause 13.2 of the PPA clearly provides that the compensation for a change in law event, would be paid only if the change in revenue or cost is in excess of 1% of the aggregated value of the LC. Therefore, no interference in the tariff that has been arrived at through tariff based competitive bidding undertaken in accordance with the competitive bidding guidelines by the Central Government is warranted at this stage.

23. Learned counsel for BRPL and BYPL vide affidavit dated 26.6.2013 has filed its reply and submitted that the claims made by the petitioner be considered as Change in law events under the PPA and petitioner needs to be fully compensated for all these changes in Law events.

24. The representative of PSPCL has submitted that at the time of submission of the bid, the bidder is required to bid for escalable and non-escalable price. The petitioner must have included the cost of diesel while making the bid. The present application seems to convert a competitive bidding into a cost plus tariff.

25. The petitioner in response to reply by Haryana Power Purchase Centre, (Respondent No. 13) filed rejoinder dated 27.08.2013 and has submitted as under:

(a) The claim made in the present petition fall within the category of expense items in the course of ordinary activity and classified as an expense item. Therefore, the petitioner has to be compensated for any increase in the cost of the project in terms of Article 13.2(b) of the PPA.

(b) The financial impact on account of increase in diesel prices can be quantified on the basis of estimated consumption patterns as well as allocated capacity. The petitioner has quantified the financial impact based on the proposed usage.

(c) There is no restriction on claiming the compensation for change in law as and when the same impacts the petitioner. The Petitioner has in any event stated that the compensation will be payable as and when the same falls due. To expect the petitioner to wait till the end of the tariff year will defeat the purpose

of Article 13 which is to place the affected party to the same economic position.

(d) The creation of two categories of diesel consumers and charging of market linked price to the bulk consumers (Petitioner of diesel to the bulk consumers (petitioner being the one such bulk consumer) is a Change in Law event in terms of the Article 13 of the PPA. The Petitioner has submitted that the existing subsidy and its withdrawal are well-documented and the same have been placed on record with the Petition.

(e) The Petitioner has submitted that any Change of Law can affect the project in two ways, viz. increase/decrease in capital cost or increase/decrease in revenue and/or cost. In the first case, the claim will be under Article 13(2)(a) of the PPA and in case of latter, the claim will be under Article 13(2)(b) of the PPA. The applicable test is whether the Change in Law will affect the capital cost or the cost/ revenue of the project. The answering respondent's reliance on 'cost or revenue from business of selling of electricity' is misplaced. The aforesaid provision only applies to a change in permissions, licenses and consents under Article 13.1.1(iii) and not the entire Article 13.1.1. It is also submitted that coal mines are an integral part of Sasan UMPP. Any cost incurred towards the operation of the mines is included in the Operation and maintenance cost of Sasan UMPP.

Analysis and Decision

26. The issues in the petition have been examined in the light of various written submissions of the Petitioner and Respondents and their submissions before the

Commission during the hearings. The following issues arise for our consideration:-

(a) Whether the units of the generating station have been declared under commercial operation and whether relief can be sought in the PPA for force majeure events irrespective of the date of commercial operation?

(b) Whether increase in diesel prices is covered under the "Change in law".

A. Commercial Operation of the Generating Station and relief sought under conditions of PPA

27. The present petition along with three other petitions filed by the petitioner were heard together on 18.7.2013 and 27.8.2013 wherein the date of commercial operation of unit 3 of the generating station was raised. During the hearing on 27.8.2013, learned senior counsel appearing on behalf of the petitioner submitted that fresh commissioning test was carried out from 11.8.2013 to 14.8.2013 and the unit has completed successful testing for 72 hours and power is being scheduled to the procurers. Learned counsel for HPPC and representative of PSPCL submitted that COD has not been declared as per the PPA as the unit did not run continuously for 72 hours at 95% of the installed capacity and there was a dip in injection below 575 MW on 12.8.2013 at around 17.45 hours. However, the representative of WRLDC submitted that the unit has been tested for 72 hours from 11.8.2013 to 14.8.2013 and based on the acceptance by the lead procurer, scheduling has commenced from 16.8.2013. The Commission had directed WRLDC to file complete details of the performance test which has been filed. The issue of commercial

operation is being addressed in Petition No.6/MP/2013 and 85/MP/2013. The fact remains that the scheduling of power has started from 16.8.2013, pending decision of this Commission regarding date of commercial operation of the generating station. Therefore, commercial operation of the generating station no more remains an issue for consideration of the claims of the petitioner in this petition as the relief if granted will be serviced in tariff from the date of commercial operation as may be decided.

B. Whether increase in diesel prices is covered under the "Change in law".

28. The provisions in Para 2.7.1.1.3 of the RfP document provide as under:

2.7.1.1.3 The Quoted Tariff in Format 1 of Annexure 4 shall be an all inclusive tariff and no exclusions shall be allowed. The Bidder shall take into account all costs including capital and operating costs, statutory taxes, duties, levies while quoting such tariff. Availability of the inputs necessary for generation of power should be ensured by the Seller at the Project Site and all costs involved in procuring the inputs (including statutory taxes, duties, levies thereof) at the Project Site must be reflected in the Quoted Tariff."

Therefore, escalation of price of diesel is not admissible under the competitive bidding guidelines and it has to form part of levelised tariff quoted by the petitioner.

29. Next we consider whether it is covered under Change in Law. Law has been defined as under:-

"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, decisions and orders of

the Appropriate Commission;”. “Indian Governmental Instrumentality” has been defined to mean “the GOI, Government of States where the Procurers and Project are located and any ministry or department of or board, agency or other regulatory or quasi-judicial authority controlled by GOI or Government of States where the Procurers and the Project are located and includes the Appropriate Commission.” The term “Operating Period” means “In relation to the Unit means the period from its COD and in relation to the Power Station the date by which all units achieve COD, until the expiry or earlier termination of this Agreement in accordance with Article 2 of this Agreement;”

30. Article 13 of the PPA provides the mechanism to recognize and deals with Change in Law are reproduced below:-

“13. ARTICLE 13: CHANGE IN LAW

13.1 Definitions

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

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

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

13.2 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 crores (Rs. 50 crores) in the Capital Cost over the term of this Agreement, the increase/decrease in Non Escalable Capacity Charges shall amount 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 Rs. Fifty (50) Crores.

(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 Appropriate 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 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 Procurer of such Change in Law as soon as reasonable 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 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 Procurer contained herein shall be material. Provided that in case the Seller has not provided such notice, the Procurer shall 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:

14.1 the Change in Law; and

14.2 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/judgement of the Competent Court or tribunal or Indian Government Instrumentality, if the Change in Law is on account of a change in interpretation of Law.

13.4.2 The payment for Change 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.”

31. From the reading of the above provision, it is clear that the payment of compensation has to be through Monthly Tariff Payments and therefore, any compensation can only be provided only after COD of a unit(s) i.e. completion of construction period.

32. The petitioner has estimated cost impact due to increase in diesel price from 21.07.2007 to 18.01.2013 as under:-

Current Diesel Price as on Jan 18, 2013 (Rs/ltr)	62.88
Diesel price on July 21, 2007 (Rs ltr) (Average of Kolkata and Mumbai Price)	33.91
Current Diesel Price as on Jan 18, 2013 based on CERC index for energy charges payment (Rs/ltr)	46.71
Current Diesel Price as on Jan 18 2013 based on CERC index for evaluation (Rs/ltr)	48.70
IMPACT on Moher / Moher Amlohri (As on 18th Jan' 2013) in Rs. Crs.	
Based on CERC index for energy charge payment	64.49
Based on CERC index for Evaluation	56.58
IMPACT on Chhatrasal (as on 18th Jan' 2013) in Rs. Crs.	
Based on CERC index for energy charge payment	32.74
Based on CERC index for Evaluation	28.73

33. The petitioner has submitted that the Changes in Law claimed in the present Petition have all occurred after the cut-off date which was seven (7) days prior to the bid submission deadline.

34. In terms of Article 13 of the PPA, the following conditions have to be met for claiming relief under a Change in Law:-

- (a) The enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law or
- (b) 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
- (c) change in any consents, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer under the terms of this Agreement or
- (d) Any change in the
 - (i) The Declared Price of Land for the Project or
 - (ii) The cost of implementation of the resettlement and rehabilitation package of the land for the project mentioned in the RFP or
 - (iii) The cost of implementing Environmental Management Plan for the Power Station mentioned in the RFP; or
 - (iv) 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.

Provided that such change in law came into effect after 21.07.2007 (7 days prior to the bid dead line).

35. By reading through the definition of change in law as defined in Article 13.1(i) to (iv) of PPA reproduced above, present petition for change in price of diesel does not come under Change of Law, as any of the conditions for a matter to be considered as Change of Law is not satisfied.

36. The petitioner had full liberty to quote an escalable component keeping in view diesel price variation at the time of bid submission. The power project is a long term project having life of 25 years and price of a fuel like diesel is bound to increase a number of times during such a long period. The petitioner has submitted that an escalation of 4.5% per annum was considered for coal mining costs of which Diesel price is an important component and this has been considered by the petitioner while calculating the impact. However what escalation figures the petitioner has considered for internal calculation was neither disclosed in the Bid nor is it of concern to the Commission. The fact remains there was no escalable component for diesel price variation attached to the bid price.

37. Further it is found that the decision to dismantle Administered Pricing Mechanism (APM) and deregulate petroleum products dates as far back as 1997. The Govt. of India vide Gazette Notification No. P-20012/29/97-PP dated 21.11.1997, had decided to dismantle APM in a phased manner and the details and timeline for such implementation was also given. It was decided that the consumer prices of major petroleum products will be moved to market prices. Relevant portions are quoted below:

The Government of India has now decided the details of phasing of dismantling programme of administered pricing mechanism and the duty structure for the terminal

year i.e. 2001-02, after taking into the account the recommendations of Expert Technical Group. The details are given below:

- (a) *Dismantling of APM in the petroleum sector in phases as per sequence given in Annexure-I starting from 1998-99.*
- (b) *Cost-plus formula is withdrawn for indigenous crude oil producers, the price receivable by oil producers will be increased to international levels in a phased manner by paying a pre announced increasing percentage of weighted average FOB price of actual imports of crude oil during the transition period.*
- (c) *The system of retention pricing is abolished for all(existing and new) refineries and pricing of petroleum products at the refinery gate level will be moved to import parity, however, Refinery Gate prices of controlled products viz. MS, HSD, SKO,LPG and ATF will be fixed at "adjusted import parity" prices for existing refineries during the transition period, all other products will be sold by the refineries at market driven prices.*
- (d) *Consumer prices of all major petroleum products will be moved to market prices, prices of HSD will be fixed on the principle of import parity pricing upto ex-storage point level with immediate effect, and prices of other major products, viz. LPG, ATF,SKO and MS, will be moved towards principle of import parity in a phased manner and pricing of Paraffin-Wax, Bitumen, Naphtha, FO and LSHS will be decontrolled.*

38. On 28.03.2002, Govt. of India issued another notification no. P-20029/22/2001-PP declaring the dismantling of APM in hydrocarbon sector with effect from 1st April, 2002. The notification clearly states Consumer prices of motor spirit (MS) and high speed diesel (HSD) will be market determined with effect from 1st April 2002. The said notification further announced winding up of Oil Pool Account with effect from 1st April, 2002 and stated that new entrants including private sector will be allowed to market transportation fuel. The relevant portions are quoted below:

"Persuant to the decisions contained in aforesaid Resolution of November 1997, the Government have now decided to dismantle the APM in the hydrocarbon sector with effect from 1st April 2002.The details of the decisions are given below.:-

- (ii) *Consumer prices of motor spirit (MS) and high speed diesel (HSD) will be market determined with effect from 1st April 2002.Consequently, the pricing of petroleum products, except for PDS kerosene and domestic LPG will be market determined with effect from 1st April 2002.*

(iii) *The Subsidies on PDS Kerosene and domestic LPG will be borne by the Consolidated Fund of India from 1st April 2002. These subsidies will be on a specified flat rate basis, scheme for which will be notified separately. These subsidies will be phase out in the next 3 to 5 years.*

.....

(v) *The oil pool accounts will be wound up with effect from 1st April 2002. The cumulative outstandings of the oil companies against the oil pool account will be liquidated in the following manner.*

.....

(viii) *The new entrants, including private sector, will be allowed to market transportation fuels namely motor spirit, high speed diesel and aviation turbine fuel as per the guidelines contained in the Ministry of Petroleum and Natural Gas Resolution No P-23015/1/2001-Mkt Dated 8th March 2002.*

(ix)

39. So it is very clear from the above stated documents that the policy to dismantle APM and market linked pricing of Diesel was existing before the cutoff date, i.e. 21.07.2007.

40. The petitioner has argued that the APM was discontinued on paper but remained to be applicable in spirit. The price of diesel remained to be subsidized and hence controlled by Government of India. The petitioner in this regard has quoted Petroleum and Natural Gas Regulatory Board (PNGRB) judgment dated 02.07.2012 in Complaint No. 4 of 2008, in which PNGRB has noted submission of Oil Marketing Companies (OMC) that the price of petroleum products were kept well below market price and that the price of petroleum products was regulated by the Government of India through pricing orders and this contention has been accepted by PNGRB.

41. However PNGRB in the said order refrained from commenting on the nature of price control order-whether it should be construed as policy, but it also noted that even if it is policy, the UoI can and does issue directives that create a special class

of entities with a responsibility to implement the policy. The relevant portions of the order are quote here:

50. When global crude and product prices began to harden, the UoI, concerned with the inflationary impact of such mass-consumed goods, could have directed PSU OMCs not to raise domestic fuel prices. The UoI, in the present instance, seems to have taken a conscious decision to keep fuel prices down by directing PSU OMCs not to raise prices. Whether this is in the nature of policy that would be applicable to all entities in the business of marketing petroleum fuels is the question before us. We refrain from commenting on the nature of the price control order - whether it should be construed as policy, but even if its policy, the UoI can and does issue directives that create a special class of entities with a responsibility to implement the policy.

51. It has been argued that any shareholder's mandate is to maximize profits and therefore, the UoI as shareholder, cannot direct prices to be kept down. We have already said that the Government may have issued the price control order in its capacity as Sovereign, thereby creating a special class of companies. The learned counsel for the Complainants has argued that the price control order was issued only in its capacity as shareholder. The learned counsel for the Respondents has countered that shareholders aim to maximize profits and since this order actually reduces the profits of PSU OMCs, it should be deemed as policy decision by the Government, not a shareholder directive to its companies. While shareholders normally focus on maximizing profits, it need not be a universal rule. Different shareholders may have different priorities. Some shareholders would like to maximize market share even at the cost of profits, others might want to build a brand and may keep prices low to achieve that end. There could be yet others who might want to maximize public/consumer welfare. Government shareholders may fall in the last category.

.....
53..... In any case, the policy notification dismantling APM which was extended to upstream oil companies to allow import parity with global crude prices should also be read as guidance price or ceiling price for domestically produced crude. We again reiterate that in a truly competitive market, no price linkage can be mandated by the government, except as a ceiling or a guidance.

42. Thus it emerges from the above paragraphs that Government of India did not control the market price as a whole, but it only directed PSU OMCs to control their selling price. However as the market was deregulated w.e.f. 1st April 2002, and there were private players whose prices were not covered under the Govt. of India directive and they were free to price their products as per their discretion, the

argument that the Govt. of India continued to determine retail price of petroleum products including diesel is not tenable.

43. The petitioner has claimed that on 17.01.2013 the Cabinet Committee on Political Affairs took a decision with respect to de-regulation of price of diesel, based on which Ministry of Petroleum and Natural Gas (MoPNG) had issued orders to the oil marketing companies relating the diesel price change. Based on this order two separate categories of diesel consumers were created Bulk consumers and Retail Consumers. For Bulk diesel consumers, the subsidy available on diesel was withdrawn and they were required to purchase diesel at the actual market prices.

44. However the petitioner has not submitted any documentary proof of this order which explicitly directs OMCs to raise prices for bulk consumers. It has only submitted a Press Release of Indian Oil Corporation one of the PSU OMCs intimating the withdrawal of subsidized pricing for bulk consumers. Even if Government of India ordered the PSU OMCs to raise the price of diesel for bulk consumers, it is only applicable for the specific Oil marketing Companies, and not for the other private players or to the market as a whole, as the price of petroleum products are already deregulated vide Gazette Notification dated 28.03.2002. So the argument of the petitioner that charging market determined price and withdrawal of subsidy for bulk consumers is a change of law event is not tenable. The petitioner must have been aware of such possibility at the time of bid submission as decision for phased dismantling of APM, gradually migrating towards market determined pricing and specific timeline for it were determined in Gazette Notification dated

24.11.1997. Hence any relief to the petitioner will not be admissible under Change of Law.

45. Petition No. 75/MP/2013 is disposed of in terms of the above.

sd/-
(M Deena Dayalan)
Member

sd/-
(V. S. Verma)
Member