

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 06/MP/2013**

**Coram:**

**Shri Gireesh B. Pradhan, Chairperson**

**Shri A. K. Singhal, Member**

**Date of Hearing: 6.5.2014**

**Date of Order: 30.3.2015**

**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 13.2(b) of the Power Purchase Agreement dated 7.8.2007 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  
C/o Reliance Power Ltd.  
3rd Floor, Reliance Energy Centre,  
Santa Cruz East,  
Mumbai

..... **Petitioner**

**Vs**

1. MP Power Management Company Ltd.,  
Shakti Bhawan, Jabalpur-482 008.
2. Paschimanchal Vidyut Vitran Nigam Ltd.,  
Victoria Park, Meerut-250 001.
3. Purvanchal Vidyut Vitran Nigam Ltd.,  
Hydel Colony, Bhikaripur,  
Post-DLW, Varanasi-221 004.
4. Madhyanchal Vidyut Vitran Nigam Ltd.,  
4A-Gokhale Marg, Lucknow-226 001.
5. Dakshinanchal Vidyut Vitran Nigam Ltd.,  
220kV, Vidyut Sub-Station,  
Mathura Agra By-Pass Road,



Sikandra, Agra-282 007.

6. Ajmer Vidyut Vitran Nigam Ltd.,  
400 kV GSS Building (Ground Floor), Ajmer Road,  
Heerapura, Jaipur
7. Jaipur Vidyut Vitran Nigam Ltd.,  
400 kV GSS Building (Ground Floor), Ajmer Road,  
Heerapura, Jaipur
8. Jodhpur Vidyut Vitran Nigam Ltd.,  
400 kV GSS Building (Ground Floor), Ajmer Road,  
Heerapura, Jaipur
9. Tata Power Delhi Distribution Ltd.,  
Grid Sub-Station Building,  
Hudson Lines, Kingsway camp,  
New Delhi-110 009.
10. BSES Rajdhani Power Ltd.,  
BSES Bhawan, Nehru Place,  
New Delhi-110 019.
11. BSES Yamuna Power Ltd.,  
Shakti Kiran Building, Karkardooma,  
Delhi-110 092.
12. Punjab State Power Corporation Ltd.,  
The Mall, Patiala-147 001.
13. Haryana Power Purchase Centre,  
Shakti Bhawan, Sector-6,  
Panchkula (Haryana)-134 109.
14. Uttarakhand Power Corporation Ltd.,  
Urja Bhawan, Kanwali Road,  
Dehradun-248 001.

.....Respondents

**For the Petitioner** : Shri J. J. Bhatt, Sr. Advocate,  
Shri Vishrov Mukerjee, Advocate  
Ms. Ritika Arora, Advocate,  
Shri Mayank Gupta,  
Shri Srikant,  
Shri Saurabh Mehra,  
Shri Vivek Kejriwal,  
Shri Arun Dhillon,

Shri Sandeep Somysetty,  
Shri P. Venkatarao,  
Shri R. S. Johri

**For the Respondent** : Shri G. Umapathy, Advocate for Respondent No.1  
Shri M.G. Ramachandran, Advocate for Respondent No.13  
Shri Poorva Saigal, Advocate for Respondent No.13  
Shri Apoorve Karol, Advocate for Respondent No.13  
Shri Alok Shankra, Advocate for Respondent No.9  
Ms. Shobana Masters, Advocate for Respondents 10 & 11  
Shri Himanshu Chauhan, BRPL  
Shri Padamjit Singh, PSPCL  
Shri T. P. S. Bawa, PSPCL  
Ms. Jyoti Prasad, POSOCO  
Shri S. S. Barpanda, 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%) and a contracted capacity of 3722.4 MW (hereinafter "Contracted Capacity") 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), RPower 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 Madhya 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:-

Sr. 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 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 (hereinafter "2003 Act"), Article 13 read with Article 17 of the PPA read with Paragraph 5.17 of the Competitive Bidding Guidelines and Regulations 82, 92 and 113 of the Central Electricity Regulatory Commission (Conduct of Business)

Regulations, 1999.

4. The petitioner has submitted that the following Changes in Law have occurred during the operating period of the project which have caused the capital cost of the project to increase substantially:

(a) Increase in water charges pursuant to Notification No.–18-1/91/Madhyam/31/436 dated 21.4.2010 issued by the Water Resources Department, Government of Madhya Pradesh.

(b) Increase in the rate of royalty on coal pursuant to Notification No. 349 (E), dated 10.05.2012 issued by the Ministry of Coal, Government of India.

(c) Levy of Clean Energy Cess by the Government of India in the Finance Act, 2010 with effect from 01.04.2010 in terms of Notification No. 03/2010-Clean Energy Cess dated 22.06.2010 issued by the Ministry of Finance, Government of India.

(d) Imposition of Excise Duty on Coal by the Government of India in the Finance Act, 2012 with effect from 01.04.2012.

(e) Increased Expenditure on account of the Mine Closure Plan which had to be formulated pursuant to a Notification No. 55011-01-2009-CPAM, dated 11.01.2012 issued by the Ministry of Coal, Government of India.

(f) Change in Income Tax Rates introduced in the Finance Act, 2012 with effect from 01.04.2012.

(g) Increase in Minimum Alternate Tax Rates introduced in the Finance Act, 2012 with effect from 01.04.2012.

(h) Change in merit rate of excise duty pursuant to a Notification No. 18/2012-Central Excise, dated 17.03.2012 issued by the Ministry of Finance, Government of India.

(i) Change in rates of Central Sales Tax pursuant to a Notification No. 1/2008-CST [F-No. 28/11/2007-ST], dated 30.05.2008 issued by the Ministry of Finance, Government of India.

(j) Change in Value Added Tax Rates pursuant to a Notification No. FA 3-22/09/i/V (16), dated 01.08.2009 issued by the Commercial Taxes Department, Government of Madhya Pradesh and the MP VAT Amendment Act dated 01.04.2010.

5. For claiming the benefits of “Change in Law” under Article 13 of the PPA, the events must have occurred seven days prior to the bid deadline which was 28.7.2007. Therefore, the due date is 21.7.2007. The summary of the financial impact on the Project as submitted by the petitioner on account of the aforesaid events which occurred after 21.7.2007 are as under:

Sl No.	Items for claim	Estimated cost before cut-off Date (21.07.2007)	Estimated cost as submitted by petitioner due to “Change in Law”
1	Increase in water charges (Rupees/m <sup>3</sup> )	1.8	5.50

2	Increase in the rate of royalty on coal (Rupees /MT)	65 for Grade F 85 for Grade E	14% of price of coal 89.6/MT for Grade F 109.2/MT for Grade E *	
3	Levy of Clean Energy Cess	-	Rs 50/ton	
4	Imposition of Excise Duty on Coal	-	6% on determined sale price of coal by CIL	
5	Increased Expenditure on account of the Mine Closure Plan	-	6Lacs/Hectare/Year Escalable 5% Annually	
6	Change in Income Tax Rates	33.99%	32.45%	
7	Increase in Minimum Alternate Tax Rates	11.33%	20.01%	
8	Change in merit rate of excise duty	16%	12%	
9	Change in rates of Central Sales Tax	3%	2%	
10	Change in Value Added Tax Rates	Schedule II (Part II)	4%	5%
		Schedule II(Part IV)	12.5%	13%

\*Based on Coal India Limited notified ₹780 per MT as the price for 4300-4600 kcal/kg Gross Calorific Value Coal (**Grade E Coal**) and ₹640 per MT as the price for 4000-4300 kcal/kg Gross Calorific Value Coal (**Grade F Coal**).

6. The petitioner has submitted that in accordance with Article 13.3 of the PPA, the petitioner notified the procurers about the above stated events amounting to “Change in Law’ which will affect the revenues/cost of the petitioner during the operating period. The petitioner has stated in the said letter that since the compensation for any increase/decrease in revenues/costs to SPL would be determined the Central Commission, it was proposed to approach the Central Commission for suitable compensation for the above mentioned “Change in Law”. The petitioner has submitted that the events of “Change in Law” have a financial impact on the costs and revenues of the petitioner during operating period for which the petitioner is entitled to be compensated in terms of Article 13 of the PPA. Accordingly, the petitioner has filed the present petition with the following prayers:

"(a) Declare that each of the items set out in Paragraphs 27 to 37 above are a "Change in Law" impacting revenues and costs during the Operating period for which the petitioner and/or the Procurers may be compensated in terms of Article 13 of the PAA;

(b) Restore the Petitioner and/or the Procurers to the same economic condition prior to occurrence of the Changes in Law by permitting the Petitioner to raise Supplementary Bills in terms of Article 13.4.2 of the PPA as per the computations set out in Paragraphs 27 to 37 above to compensate the Petitioner and/or the Procurers as and when the financial impact of the respective Changes in Law arise, either jointly or severally; and/or

(c) Pass any such other and further relief as this Hon`ble Commission deems just and proper in the nature and circumstances of the present case"

7. Replies to the petition have been filed by MPPMCL, Haryana Power Purchase Centre, Rajasthan Utilities (AVVNL/JVVNL/JoVVNL), Punjab State Power Corporation Limited (PSPCL), Tata Power Delhi Distribution Company Limited (TPDDCL), BSES Rajdhani Power Limited (BRPL), and BSES Yamuna Power Limited (BYPL). The replies of the respondents are discussed in brief as under:

(a) The lead procurer, MPPMCL, in its reply dated 23.5.2013 has specifically submitted that the Clauses of RFP 2.7.1.4 (3), No. 2.7.2.1 and No. 2.7.2.3 where the bidder has to quote the tariff in the prescribed format taking into account all costs including capital and operation costs, statutory taxes, duties and levies. Availability of inputs necessary for the 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 and levies thereof must be reflected in the quoted tariff. Also, as per the RFP conditions, the procurers and authorized representative shall not permit any change in any time schedule mentioned therein or financial adjustment arising due to lack of clear information on matters such as site conditions, laws and regulations and other related information and/or its effect on the bid. The lead procurer has also stated that the petitioner cannot



claim all events which costs change in price or items to be deemed as “Change in Law”. The petitioner is bound to demonstrate that each of the alleged “Change in Law” would adversely affect the cost or revenues of the petitioner. As regards increased cost of coal, MPPMCL has submitted that the same need to be computed based on the coal requirement of the generating unit at normative heat rate upto the contracted capacity and not on the basis of coal production. MPPMCL has submitted that mine closure would not be covered under “Change in Law” as the obligation to create a mine closure plan was in existence even before 2012 notification. As regards the computation of additional cost involved on account of increased water charges and royalty of coal, MPPMCL has submitted that the computation has been made by the petitioner on the basis of maximum allocation and peak production capacity and does not reflect any genuine estimates of the additional cost that is likely to be incurred by the petitioner. MPPMCL has submitted that the petitioner is required to disclose on affidavit of the “Change in Law” beneficial to the petitioner subsequent to the cutoff date and account for such benefits.

(b) HPPC in its reply dated 7.5.2013 has submitted that the main condition that is to be satisfied for claiming “Change in Law” is that there is a change in cost or revenue from the business of selling electricity by the petitioner to the procurers. HPPC has submitted that some of the claims do not relate to the cost or revenue from the business of electricity and are therefore not admitted. HPPC has submitted that the royalty payable by the petitioner for coal, the impact of Clean Energy Cess, expenditure on mine closure plan, change in effective income tax

rate or minimum alternate tax, change in value added tax rate are not covered under "Change in Law". HPPC has submitted that the change in the merit rate of excise duty and the change in the rate of Central Sales Tax need to be given as per the provisions of the PPA. As regards the increase in water charges, HPPC has submitted that if the Notification dated 21.4.2010 issued by the Government of Madhya Pradesh is considered to be a law within the meaning of the provisions of the PPA and further if such notification results in increase in the cost in the business of generation of electricity for supply to the procurers within the meaning of Article 13, the actual impact can be considered.

(c) Ajmer Vidyut Vitran Nigam Ltd (AVVNL), Jaipur Vidyut Vitran Nigam Limited and Jodhpur Vidyut Vitran Nigam Limited in their common reply vide affidavit dated 29.3.2013 have submitted that Power Finance Corporation was the nodal agency for carrying out the bidding process and therefore, it is necessary to make nodal agency i.e. PFC as respondent to explain the genesis and meaning/understanding of different provisions of RFQ and RFP based on which bids were evaluated. It has been further submitted that any deviation in the adopted tariff beyond the provisions of RFQ and RFP may give rise to possibility of raising issues by unsuccessful bidders on the ground of level playing field.

(d) Punjab State Power Corporation Limited (PSPCL) in its affidavit dated 7.6.2014 has submitted that the petition contains fictitious figures based on an assumed COD date and the figures/calculations needs to be amended on assumed date of 31.1.2013. Further, the petition can only be considered if the Notice under Article

13.3.3 has been issued after knowing the actual COD date.

(e) Tata Power Delhi Distribution Company Limited (TPDDCL) in its reply dated 7.5.2013 has submitted that the petitioner was required to give notice to the procurers about “Change in Law” as soon as reasonably practicable after being aware of the change. However, the procurer has given notice on 8.1.2013 for “Change in Law” events which took place in 2008. TPDDCL has submitted that changes in minimum alternate tax, central sales tax and value added tax do not give any indication of the additional cost that the petitioner would incur. Any adverse impact on the petitioner due to enhanced excise duty, central sales tax and value added tax would have to be clearly brought to the notice of the Commission and the procurers prior to claiming any relief in that respect. The cost with respect to closure of mine would neither affect the revenue of SPL nor its cost and therefore, compensation for the same is not made out under Article 13.2(b) of the PPA. As regards the increased cost of coal, TPDDCL has submitted that the increased cost of coal qua the capacity not being procured by the procurers would have to be excluded while any benefit in terms of “Change in Law” is allowed to the petitioner. As regards the excise duty, it has been submitted that the coal quantity for which additional burden of excise duty can be considered would be limited to the quantum of coal required towards the contracted capacity. Further, the benefits of any input credit of excise duty payable should also be passed on to the beneficiaries in the event any other excisable good is produced. As regards the mine closure plan, TPDDCL has submitted that the obligation to create mine closure plan was in existence even

before January 2012 notification which mandates a specified amount to be credited to the fund to give effect to the closure plan. The expenses to be incurred towards mine closure do not affect the cost or revenue during the operation period. As regards income tax rate, TPDDCL has submitted that prior to allowing any benefit for change in income tax rate, the petitioner must be required to clearly demonstrate the surplus on which it would have paid tax and only such surplus should be eligible for adjustment in the light of any enhanced tax rate.

(f) BRPL in its reply dated 20.5.2013 has submitted that the claims made by the petitioner be considered as “Change in Law” events under the PPA and the petitioner’s grievance needs to be addressed at the earliest.

(g) BYPL in its reply dated 24.5.2013 has made its submission with regard to diesel prices which was subject matter of petition No.75/MP/2013.

8. The petitioner has filed rejoinders to the replies of the respondents. The petitioner has submitted that the changes in law will impact the cost or revenue of the project during the operating period. The petitioner has submitted that the claims in the petition fall within the category of expense items in the course of ordinary activity and classified as an expense item to the project. In this connection, the petitioner has relied on the provisions of Accounting Standard AS-05. As regards the notice, the petitioner has submitted that a consolidated notice for the changes in law was given on 8.1.2013 which also set out the basis for claim and its computation. As regards quantification, the petitioner has submitted that “Change in Law” in some of the items such as royalty on

coal, water charges, clean energy cess, mine closure plan, and excise duty on coal can be quantified based on the estimated consumption pattern as well allocated capacity. The petitioner has quantified the financial impact of these changes in law on estimated basis. In other changes in law like income tax, minimum alternate tax, merit rate of excise duty, central sales tax and value added tax, their financial impact can be quantified based on the accounts of the petitioner. The petitioner has submitted that the reliance of the respondents “on the cost or revenue from the business of selling electricity” is misplaced. The petitioner has submitted that any “Change in Law” affects 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 the latter case, the claim will be under Article 13(1)(b) of the PPA. The petitioner has further submitted that the coal mine is an integral part of the project and any cost incurred towards operation of the coal mines is included in the operation and maintenance cost of the project. As regards the increase in taxes, the petitioner has submitted that fuel cost is the largest component in the cost of generation and therefore, increase in the cost of coal on account of increase in taxes, duties and levies will affect cost of the project during the operating period and is covered under Article 13.2 (b) of the PPA. Therefore, any impact on the mining operation will automatically translate to an impact on Sasan UMPP for which the petitioner needs to be compensated. As regards the mine closure, the petitioner has submitted that prior to coming into force of the Notification, there was no requirement to deposit a specific amount every year and therefore, the annual deposit of money towards the mine closure plan is a “Change in Law”. As regards the changes in the income tax rate, the same will be to the benefits of

the procurers. Moreover, AS-22 provides guidelines on treatment of taxes on income according to which tax on income is considered as an expense incurred by the enterprise in earning income.

9. The matter was heard on 30.1.2013, 14.3.2013, 16.4.2013, 9.5.2013, 23.5.2013, 18.7.2013, 27.8.2013, 10.10.2013 and 6.5.2014. Learned senior counsel for the petitioner explained the individual items of claims and submitted that since these developments have taken place after the submission of bids and has an impact on the cost of the project, the same needs to be compensated by the procurers in terms of Article 13 of the PPA. Learned counsel for HPPC submitted that Article 13.1.1 provides that “Change in Law” refers to the occurrences as noted in the said article “which results in change in any cost or revenue from the business of selling electricity by the seller to the procurers under the terms of this agreement.” Therefore, mere enactment of any law or change in interpretation of any law or change in the consent, approval, licences etc. will not amount to “Change in Law” unless there is any change in the cost or revenue from the business of generation and sale of electricity by the petitioner under the terms of the agreement. In response, learned senior counsel for the petitioner submitted that the construction of Article 13.1.1 by the respondents that the “Change in Law” should relate to change in cost or revenue from the business of electricity, is not correct as the events enumerated under the said article are mutually exclusive and the words “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” is relatable to sub-clause (iii) only which provides for “change in any consents or approvals or licenses available or obtained for the project, otherwise than the default of the seller”. It is corroborated by

the fact that sub-clause (iv) of Article 13.1.1 is a separate clause by itself. The interpretation that everything should be judged on the benchmark of change in cost or revenue from the business of selling electricity is not the correct interpretation.

10. On the issue of minimum value of Changes in Law under Article 13(2)(b), learned senior counsel for the petitioner submitted that it should be 1% of the aggregate Letter of Credit amount in a calendar year and as per Article 11.4.1.1, the letter of credit for the first year will be equal to 1.1 times the estimated average monthly billing based on the normative availability. For the subsequent years, the letter of credit amount will be equal to 1.1 times the average of the monthly tariff payment of the previous contract year plus the estimated monthly billing during the current year from any additional unit expected to be put on COD during that year on normative availability. Learned senior counsel submitted that as per the above formula, the threshold amount is about ₹0.91 lakh for the first year, ₹84 lakh for the second year and when all the six units will be operational for a full year, the threshold amount would be about ₹3.1 crore. Since the aggregate amount claimed under “Change in Law” is about ₹350 crore and the aggregate amount claimed in the first year would be about ₹36 crore, which is more than the threshold amount prescribed under Article 13.2(b) of the PPA, the petitioner is entitled to be compensated for the same.

11. The representative of PSPCL submitted that the plant is a super critical technology and a supercritical plant uses less coal and generates less carbon dioxide. Therefore, carbon credit is related to supercritical nature of plant and the petitioner should clarify whether it is earning any carbon credit and how it is accounted for.

Learned senior counsel for the petitioner submitted that the RFP dealt with the carbon credit according to which the bidders may factor the carbon credit in their bid. We had directed the petitioner to place on affidavit that the carbon credit has been considered by the petitioner at the time of the submission of bid and that all savings have been considered and passed on to the beneficiaries. The petitioner, vide affidavit dated 24.10.2013, has submitted that as per Clause 2.7.2.4 of the Request for Proposal for Tariff Based Bidding Process for Procurement of Power on Long Term Basis, the bidders were to take into consideration the benefits of Certified Emission Reductions (CERs) while bidding. Accordingly, the petitioner has taken into consideration the benefits of Carbon Finance at the time of bidding.

### **Analysis and Decision**

12. After going through the pleadings on record and during the hearing, the following issues arise for our consideration:

- (a) Whether the provisions of the PPA with regard to notice has been complied with?
- (b) Whether the claims are premature?
- (c) What is the interpretation of "Change in Law" under the PPA?
- (d) Examination of Changes in Law on the various items submitted by the petitioner.



(e) Mechanism for processing and reimbursement of admitted claims under “Change in Law”.

13. The above issues have been dealt with hereunder.

**(A) Compliance with the requirement of Issue of notice under the PPA**

14. The petitioner has submitted that a consolidated notice was issued to all the procurers on 8.1.2013 regarding the "changes in law" that took place during the period between the cut-off date and the start of the operating period which will affect the cost or revenue of the project during the operating period. TPDDL and MPPMCL have submitted that the petitioner is required to give notice to the procurers as soon as reasonably practicable about the “Change in Law”. However, the petitioner has given notice to the procurers on 8.1.2013 for the events dating back to 2008. In response, the petitioner has submitted that a consolidated notice has been given to all the procurers regarding the events amounting to "changes in law" which affect the cost or revenue of the petitioner during the Operating Period. The petitioner has submitted that the notice was given to the procurers prior to the commencement of the 'operating period" and no prejudice has been caused to the procurers on account of the delay in issue of notice. The petitioner has further submitted that Article 13 of the PPA is a beneficial provision and should be construed liberally.

15. We have considered the submissions of both the petitioner and the respondents. Under Article 13(3) of the PPA, the seller is obliged to notify the events of “Change in Law” both beneficial to him as well as to the procurers as and when they occur. The

petitioner has given a notice to all procurers under Article 13.3 of the PPA vide letter dated 8.1.2013 setting out the events which have an impact on the revenues or costs of the petitioner. The petitioner has approached the Commission for compensation in terms of Article 13.2 (b) of the PPA which is extracted as under:-

**“13.2 (b) Operating Period**

As a result of “Change in Law”, the compensation for any increase/decrease in revenues or costs 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 Letter of Credit in aggregate for a Contract Year.”

As per the above provisions, the compensation for increase/decrease in revenue and the date of the effect of such compensation shall be decided by the Commission. Moreover, the compensation shall be payable only after the commercial operation of the generating station. The petitioner has given notice to the procurers vide its letter dated 8.1.2013 prior to the date of commercial operation of the generating station. In our view, the petitioner has complied with the requirement of notice under the PPA before approaching the Commission.

**(B) Whether the petition is pre-mature before the date of commercial operation?**

16. The respondents have argued that the petition is not maintainable as the generating station has not achieved commercial operation and operating period has not started and the petitioner is merely seeking a declaration regarding the “Change in Law” during operating period. The Commission in its order dated 8.8.2014 in Petition No.85/MP/2013 has decided the date of commercial operation of the first unit of Sasan

UMPP as 17.8.2013. Therefore, the increase in tariff on account of “Change in Law” during the operating period which is being considered in this order would be recoverable with effect from 17.8.2013 to the extent they are allowed under “Change in Law”. Since the first unit has been declared under commercial operation, the petition is not considered as premature.

### **(C) Interpretation of Article 13 of the PPA**

17. The petitioner has approached the Commission under Articles 13 and 17 of the PPA read with section 79 of the Act and Para 5.17 of the Competitive Guidelines for compensation of the cost incurred by the petitioner due to “Change in Law” during the operating period. Article 13 of the PPA which deals with “Change in Law” 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 Procurer under the terms of this Agreement or (iv) any change in the (a) the Declared Price of Land for the Projector (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.

Provided that if Government of India does not extend the income tax holiday for power generation projects under Section 80 IA of the Income Tax Act, upto the Scheduled Commercial Date of the Power Station, such non-extension shall be deemed to be a "Change in Law".

### **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 (₹50 crore) 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 ₹ Fifty (50) Crore.

(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 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 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:

- (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/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."

Article 17 of the PPA provides as under:

#### **"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 (a) (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."

Para 5.17 of the Competitive Bidding Guidelines published by the Ministry of Power vide OM No 23/11/2004-R&R (Vol-II) dated 19.1.2005 provides as under:

"5.17 Where any dispute 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, such dispute shall be adjudicated by the Appropriate Commission."

Section 79(1) (b) and (f) provide as under:

"79 (1) (b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State.

.....

(f) to adjudicate upon disputes involving generating companies or transmission licensee and to refer any dispute for arbitration."

18. A combined reading of the above provisions would reveal that this Commission has the jurisdiction to adjudicate upon the disputes between the petitioner and the respondents with regard to "Change in Law" which occur after the date which is seven days prior to the bid deadline. The events broadly cover the following:

(a) Events occurring as a result of the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law;

(b) Events on account of 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;

(c) Events on account of 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;

(d) Events occurring on account of any change in the Declared Price of Land for the Project;

(e) Events occurring on account of any change in the cost of implementation of the resettlement and rehabilitation package of the land for the project mentioned in the RFP;

(f) Events occurring on account of any change in the cost of implementing Environmental Management Plan for the Power Station mentioned in the RFP;

(g) The cost of implementing compensatory afforestation for the Coal Mine, indicated under the RFP and the PPA;

(h) If the Tax Holiday under section 80IA of the Income Tax Act, 1961 is not extended upto the scheduled commercial operation date of the generating station, then such non-extension shall be considered as "Change in Law";

(i) It specifically excludes any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, and any change in respect of UI Charges or frequency intervals by an Appropriate Commission.

19. As already stated in para 10 of this order, there is considerable disagreement between parties about what shall be the criteria for assessing whether an item falls under changes in law during the operating period. While the learned counsel for HPPC

and other respondents have argued that mere enactment of any law or change in interpretation of any law or change in the consent, approval, licences etc. will not amount to “Change in Law” and the impact of changes in law should stand the test of whether there is any change in the cost or revenue from the business of generation and sale of electricity by the petitioner under the terms of the agreement. Learned senior counsel for the petitioner has argued that the words “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” is relatable to sub-clause (iii) only which provides for “change in any consents or approvals or licenses available or obtained for the project, otherwise than the default of the seller”. On perusal of the Article 13.1.1, it is apparent that Changes in Law have been grouped into two broad categories i.e. (a) enactment/amendment of law, interpretation of law, changes in the consents/approval/licences, and (b) change in prices of specified items which were declared in the RFP by the Bid Process Coordinator during the bidding. There are two specific exclusions in the form of change in withholding tax and change in UI or frequency interval and one specific inclusion in the form of non-extension of income tax holiday upto the scheduled commercial operation date of the power station. Only at the end of Article 13.1.1(iii), the qualifying criteria are “which results in any change in the cost of or revenue from the business of selling electricity by the seller to the procurers under the terms of the agreement”. In our view, this qualifying criteria is applicable to Article 13.1.1(i), (ii) and (iii) as in all these cases, changes in law occur on account of the actions independently taken by external agencies and the impact of those actions need to be assessed on the cost or revenue of the seller before it is passed on to the



procurers. On the other hand, Article 13.1.1(iv) talks about the changes in cost on certain items which were indicated by the bid process coordinator at the time of bids and factored by the bidders in the bids. In our view, the changes in law on the items covered under Article 13.1.1 (i) to (iii) will have to be tested on two touchstones i.e. whether such changes are not attributable to the seller and whether they result in change in the cost of or revenue from the business of selling electricity under the terms of the agreement.

#### **(D) Consideration of the claims under “Change in Law” during Operating Period**

20. The petitioner has claimed the benefits of “Change in Law” during operating period in respect of ten items which have been examined in the succeeding paragraphs:

##### **(I) Increase in water charges**

21. The petitioner has submitted that the Water Resources Department, Government of Madhya Pradesh has increased the water charges from ₹1.8/m<sup>3</sup> at the time of bid to ₹5.50/m<sup>3</sup> vide notification dated 21.4.2010. The petitioner has submitted that as per the policies/rules/regulations of Government of MP governing the allocation and use of water, a Water Supply Agreement (WSA) has been entered into with the Executive Engineer, Water Resources Division No.2 on 5.1.2013. As per the WSA, the petitioner has been permitted to draw 0.14 MAF i.e. 172.71 MCM of water from Rihand reservoir for use in 3960 MW Sasan UMPP. The petitioner has submitted that the WSA contains the "Take or Pay" provision and as per the Agreement, the petitioner is liable to pay the water charges for atleast 90% of the total quantum of water allowed to be drawn by it

though the actual quantity of water drawn by the company may be less than 90% of the quantum of water to be drawn. In response to the claims of the petitioner, HPCC has submitted that if the Notification dated 21.4.2010 issued by the Government of Madhya Pradesh is considered to be a law within the meaning of the provisions of the PPA and further if such notification results in increase in the cost in the business of generation of electricity for supply to the procurers within the meaning of Article 13, the actual impact can be considered. The actual impact cannot be considered on the basis of allocation of water by the Government of Madhya Pradesh or the actual charges by the petitioner but on the basis of the rate increase qua the quantum of water actually required to be used for the generation of electricity as envisaged at the time of submission of the bid. Therefore, the calculation submitted by the petitioner in para 27 read with annexure P-10 of the petition has not been admitted by HPCC. TPDDL has submitted that the compensation for increase in water charges should be based on the water actually consumed for generation of electricity as envisaged at the time of submission of the bid. The respondents have also submitted that the calculation made by the petitioner regarding the impact of water charges is incorrect and the actual impact can be worked out only after the specific data is available. The petitioner has clarified that the compensation for increase in water charges will be based on actual water charges paid by the petitioner for the water consumed for the purpose of generation of electricity.

22. The petitioner in its affidavit dated 24.08.2013 has submitted that the agreement with Govt. of Madhya Pradesh for supply of Water for Industrial Power Plant was based on the revised rates of water charges as notified by the Government of Madhya Pradesh on 21.4.2010. Moreover, the Agreement contained a "Take or Pay" Clause:

“(2) The company shall pay to the Government water rates for water drawn by it from said Government water source at the rates fixed by Water Resource Department No 18-1/91/Madhyam/31/436, Bhopal Dated 21-4-2010 which is Rs 5.50 (₹ Five and paisa fifty) per Cum as on 1.1.2013.

Note:- For the quantities drawn in excess of the agreed quantities and for any other unauthorized drawl of water, then 50% (Fifty percent) additional rates shall be charged in addition to the normal rates as specified above.

In addition to the payment of water rates as specified above, the company shall also pay the Water Resource Department Local fund cess or any other tax the rates as fixed by the Government from time to time. Government hereby reserves the right to revise the rates from time to time the said water rates and the local cess or other taxes to be paid by the company and the company shall pay such revised water rates and local cess or other taxes as may be specified by the Government from time to time. Excepting the circumstances or the short of water supply specified in clause (15) the company shall in any event, pay water charges for at least 90% of the total quantum of water allowed to be drawn by it, though the actual quantity of water drawn by the company is less than 90% of the quantum of the water allowed to be drawn by under clause (1)#.

[# the permissible drawl of water is 0.14 MAF/172.71 MCM of water from Rihand reservoir]

As per the Water Supply Agreement, the water charges are payable @₹5.50/m<sup>3</sup> in accordance with the Water Resource Department No 18-1/91/Madhyam/31/436, Bhopal Dated 21-4-2010. The Agreement further provides that the Madhya Pradesh Government reserves the right to revise the water charges and local cess or other taxes thereon from time to time and the petitioner is bound to pay the same.

23. The petitioner has submitted that as per the Water Supply Agreement, the amount to be paid by the petitioner to MP Government towards water allocated to Sasan UMPP after the increase would be ₹94.9905 crore (172.71x10<sup>6</sup>x₹5.50) and 90% of the water charges for which the petitioner is liable to pay irrespective of the use which works out to ₹85.49145 crore. The petitioner, before the increase was required to pay only ₹31.0878 crore (172.71x10<sup>6</sup>x₹1.80). The petitioner has submitted that the minimum yearly impact is ₹ 54.40365 crore (₹85.49145-₹31.0878 crore) and maximum yearly impact is ₹63.90270 crore (₹94.9905-₹31.0878 crore).

24. We have considered the submission of the petitioner and the respondents.

Clause 2.7.1.4.3 of the RFP provides as follows:-

"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."

Clause 2.7.2.1 of the RFP provides as follows:-

"The Bidder shall make independent enquiry and satisfy itself with respect to all the required information, inputs, conditions and circumstances and factors that may have any effect on his Bid. In assessing the Bid, it is deemed that the Bidder has inspected and examined the site conditions and its surroundings, examined the laws and regulations in force in India, the transportation facilities available in India, the grid conditions, the conditions of roads, bridges, ports, etc. for unloading and/or transporting heavy pieces of material and has based its design, equipment size and fixed its price taking into account all such relevant conditions and also the risks, contingencies and other circumstances which may influence or affect the supply of power."

Annexure-9 of "Format of Covering Letter" Point No. 3- "Familiarity with relevant

Indian Laws and regulations, the petitioner provides that:

"We confirm that we have studied the provisions of relevant Indian laws and regulations as required to enable us to quote for this Bid and execute the EFP Project Documents, if awarded. We further undertake and agree that all such factors as mentioned in Clause 2.7.2 of RFP have been fully examined and considered while submitting the Bid".

The water charges are cost involved in procuring the inputs for generation of power during the operating period. As per the above provisions, the bidder is required to quote an all inclusive tariff including capital costs, operating cost, taxes, cess etc., after taking into account all relevant factors. The bidder is also required to examine the laws and regulations in force in India. Therefore, the petitioner was expected to quote the water charges by taking into account the laws and regulations in force and make a realistic assessment of the water charges for a contract period of 25 years.

25. The cutoff date for submission of bid was 21.7.2007. As per the notification dated 27.7.2003 issued by Government of Madhya Pradesh, the applicable water rate as on the date of submission of the bid was ₹1.80/M<sup>3</sup>. Through the notification issued by Government of Madhya Pradesh dated 21.4.2010, the water charges have been revised for the years starting 1.1.2010, 1.1.2011, 1.1.2012 and 1.1.2013 @₹4.00, 4.50, 5.00 and 5.10 respectively. The petitioner has claimed the water charges on the basis of the notification dated 21.4.2010 treating it as “Change in Law”. At this stage, we have not gone into the aspect whether the notification dated 10.4.2010 issued by the Government of Madhya Pradesh would amount to “Change in Law” and whether the said notification would have the effect on the cost/revenue of the petitioner from the business of selling electricity to the procurers under the terms of the PPA. For taking a view whether increase in water charges should be considered as “Change in Law”, we direct the petitioner to submit the following information:

- (a) Prevailing rates of water charges in Madhya Pradesh from the year 1995 onwards along with the supporting notifications.
- (b) Water charges assumed and factored while the quoted bid for the project along with year to year escalation assumed for the entire bid period.
- (c) Actual quantum of water required to generate the contracted capacity of electricity and the basis of calculation of water consumption.
- (d) Other bid parameters (final and operation) assumed in the bid in respect of quoted tariff like cost of additional water beyond requirement, etc.

The petitioner is granted liberty to approach the Commission along with the above information for consideration of its claim in terms of the PPA.

## **(II) Royalty on coal**

26. The petitioner has submitted that at the time of bid submission, the prevalent/notified rate of royalty on coal was ₹85/MT (for Moher and Moher-Amlohri Coal i.e. E-Grade coal) and ₹65/MT (for Chhatrasal Coal i.e. F-Grade coal) which formed the basis of the winning bid submitted by RPower. Subsequently, Ministry of Coal, Government of India issued Notification No. 349 (E) dated 10.05.2012 increasing the rate of royalty on coal to an ad-valorem rate of 14% on price of coal. As per the said notification, for calculating the royalty on coal from captive mines, the price of coal will be the basic pithead price of run of mine coal as notified by Coal India Limited for coal of similar Gross Calorific Value. Coal India Limited has notified ₹780 per MT as the price for 4300-4600 kcal/kg Gross Calorific Value Coal (Grade E Coal) and ₹640 per MT as the price for 4000-4300 kcal/kg Gross Calorific Value Coal (Grade F Coal). The petitioner has submitted that the peak annual coal production from the captive coal mines of the Project approved by Ministry of Coal is 25 million MT. During FY 21012-13, the coal production was likely to be 2.45 million MT which would be ramped up to 25 million MT over time. At peak production levels, it is expected that out of 25 million MT of coal, 20 million MT will be Grade E coal mined from the Moher and Moher-Amlohri Mine and 5 million MT will be Grade F Coal from the Chhatrasal Mine. Based on the annual production target of coal, the annual impact on the cost of the Petitioner on account of increase in royalty on coal is estimated to range between ₹5.93 Crore to

₹60.7 Crore. The petitioner has submitted that this amount will be claimed on the basis of actual coal supplied to the Project. The petitioner has further submitted that the financial impact will be computed in the following manner:

“Impact (in Rs) = Actual monthly royalty paid less {(Actual E Grade coal production in the month in metric ton (MT) X Rs 85/MT) + (Actual F Grade coal production in the month in MT X Rs 65/MT) which was the extant rate of royalty on coal at the time of submission of the bid}”

27. In response, MPPMCL has submitted that the increase in cost of coal should be computed on the coal requirement of the generating unit at the normative heat rate upto the contracted capacity. TPDDL has submitted that the increase in cost of coal will have to be computed on the basis of coal requirement of the generating units at normative heat rate. It has also been submitted that only such increase can be passed on which is in relation to the capacity being supplied to the procurers. HPPC has submitted that the petitioner is using the coal extracted from the mines not only for the project but also for other purposes. The petitioner is having significant financial benefit out of the allocation of coal mine. The increase in the royalty calculated on the basis of per metric ton of coal used is only a measure of payment of consideration to the Government of India for use and exploitation of coal mines as a whole. The petitioner cannot claim the impact of the increase in the rate of royalty as a cost of generation of electricity when the petitioner has other significant advantage over the coal mines. The quantum of increase claimed and the methodology suggested by the petitioner is not agreeable to HPCC. Therefore, the claim should not be allowed. PSPCL has submitted that coal from Sasan mines is

allotted to Chitrangi plant as per the CAG report and the benefit on account of power sale at market rate from Chitrangi has been quantified by CAG as ₹ 29033 crore and this benefit should be shared with the procurers. The petitioner has clarified that the compensation will be computed on the actual impact and same has also been stated in the petition. There is no incentive for the petitioner to operate the unit(s) at an inferior heat rate since that will only entail extra coal being consumed which will further harm the project economics. The Petitioner has submitted that Sasan UMPP is an integrated project and the captive coal mines are an integral part of the project. It is further submitted that Sasan UMPP being a coal-fired project, fuel cost is the largest component in the cost of electricity generation. Any increase in the cost of coal on account of increase in taxes, duties and levies will affect the cost of the project during the operating period and is covered under Article 13.2 (b) of the PPA. The petitioner has clarified that compensation has been claimed with respect to the quantum of coal necessary and used for producing the contracted capacity of power.

28. Article 13.1.1 (iii) provides that the seller will be entitled for the benefits of “Change in Law” if there is “change in any consents or approvals or licences available or obtained for the project, otherwise than the default of the seller which results in any change in the cost of selling electricity by a seller to the procurers under the terms and conditions of the agreement.” Under the Mines and Minerals (Development and Regulations) Act, 1957(Mining Act), mining lease is granted for the purpose of undertaking mining operations. Under Section 4 of the Mining Act, no person shall undertake any mining operation in any area without a mining licence granted under the said Act. Section 9(2) of the Mining Act provides that the holder of a mining lease



granted on or after the commencement of the said Act shall pay royalty in respect of the minerals removed or consumed by him or by his agent, employee, contractor or manager or sub-lessee from the leased area at the rate for the time being specified in the Second schedule in respect of that mineral. Section 9(3) of the Mining Act provides that the Central Government may by notification in the Official Gazette amend the Second Schedule so as to enhance or reduce the rate at which royalty shall be payable in respect of any mineral with effect from the date as may be specified in the notification. Therefore, royalty on coal is part of the terms and conditions of the mining lease to do mining in coal and any change in the amount of royalty amounts to change in the terms and conditions of mining lease. Moreover, enhancement of royalty results in increase in the input cost of coal which has a direct impact on the cost of generation of electricity. The total annual cost impact due to increase in the rate of royalty on coal from captive mines would be equal to the amount of coal actually produced in a particular year multiplied by the price of the particular grade of coal as notified by Coal India Limited for the particular year multiplied by 14% of the new royalty rate minus the royalty on that particular grade of coal at the time of bid submission. In our view, the change in royalty by Government of India falls within ambit of "Change in Law" in accordance with PPA.

29. The respondents have submitted that Sasan UMPP is not the sole beneficiary of the captive coal mines and the petitioner is using the coal in its other projects as well. This fact has not been denied by the petitioner who has clarified that compensation has been and would be claimed with respect to the quantum of coal necessary and used for producing the contracted capacity of power from Sasan UMPP. Therefore, the

compensation to the petitioner due to increase in royalty of coal will be restricted to quantum of coal used by Sasan UMPP for production of electricity as per the methodology stated above and it will exclude the coal extracted from the captive mines to be used in other projects. The petitioner should submit the details of quantum of coal produced in the mines and its grades, the actual supplies to all its projects duly reconciled with the total coal production of the mines and the actual amount of royalty paid and the price of coal charged to other projects. The petitioner shall approach the Commission with the quantified impact calculated as on the last date of the tariff year as indicated in the PPA.

30. In order to decide the exact impact of the royalty on coal, the petitioner is directed to submit certificate from Statutory Auditors certifying the following information:

- (a) Quantum of coal approved with calorific value of coal in the coal mine plan along with copy of the approved plan for the captive mine of the project.
- (b) Quantum of coal with calorific value of coal required to generate the contracted capacity of electricity from Sasan, UMPP has assumed in the bid.
- (c) Quantum of coal sold to other projects with project-wise details, calorific value of coal and the cost price and sale price of coal.
- (d) Sale price of electricity in the other projects where the coal from the captive mines of Sasan UMPP is used, clearly indicating the energy charge therein.
- (e) Return of royalty deposited with appropriate authority.

### **(III) Clean energy cess on coal**

31. The petitioner has submitted that at the time of submission of the bid, there was no Clean Energy Cess on coal. However, Government of India has introduced Clean Energy Cess in the Finance Act, 2010, whereby a statutory cess of ₹100 per ton has been levied on coal, lignite and peat and subsequently, the cess has been reduced to ₹50 per ton vide Ministry of Finance notification dated 22.6.2010. The actual impact of the levy of clean energy cess is expected to range from ₹12.25 crore to ₹125 crore based on the coal production levels.

32. HPCC has submitted that the Clean Energy Cess is not on the business of generation or sale of electricity and it is levied only on the production of coal. HPCC has also submitted that the petitioner is having substantial benefit as the coal block is being used for other purposes and the impact of clean energy cess is to be adjusted against the benefit so derived. TPDDL has submitted that the increased cost of coal should be computed based on the coal requirement of the generating units at normative heat upto the contracted capacity. The petitioner has submitted that any increase in the cost of coal will affect the cost of the project during the "operating period" and the petitioner is required to be compensated for the same. The petitioner has further clarified that the compensation is claimed with respect to the quantum of coal necessary and used for producing the contracted capacity of power from Sasan UMPP.

33. We have considered the submissions made by both petitioner and the respondents on the clean energy cess. The clean energy cess on coal was introduced

by the Government of India through the Finance Act, 2010 for the first time which is after the due date i.e. seven days prior to the bid deadline. Since there was no clean energy cess on the date of submission of the bid, the petitioner could not be expected to factor in the impact of such cess in the bid. Moreover, clean energy cess adds to the input cost of production of electricity. Therefore, the claim is covered under Article 13.1.1(i) of the PPA and consequently the liabilities shall be borne by the procurers. It has been submitted that Sasan UMPP is not the sole beneficiary of the captive coal block and the petitioner is using the coal for its other generation projects. Accordingly, impact of clean energy cess shall be restricted in proportion to the quantum of coal used for generation of contracted capacity of power from Sasan UMPP. The petitioner is directed to submit the information sought in para 30 of the order.

#### **(IV) Excise duty on coal**

34. The petitioner has submitted that at the time of submission of bid, there was no excise duty on coal. The Government of India, vide Finance Act, 2012 has levied excise duty @ 6% on the determined sale price of coal for captive use. The determined sale price of coal as notified by Coal India Limited is ₹780 per MT for 4600-4900 kcal/kg GCV of coal (Grade E coal) and ₹640 per MT for 4000-4300 GCV of coal (Grade F coal). The annual estimated impact on account of levy of excise duty is expected to range from ₹11.8 crore to about ₹116.2 crore. The petitioner has submitted that the same will be claimed on the basis of actual quantity of coal supplied to the project.

35. In response, MPPMCL has submitted that the quantity of coal on which Excise Duty can be claimed must be calculated on the basis of the normative coal consumption

determined in accordance with the normative heat rate specified by the Commission and not on the basis of the actual quantum of coal consumed. The additional burden of Excise Duty should be limited to quantum of coal required for generation of contracted capacity. The benefit of any input credit of Excise Duty should be passed on to the consumers. TPDDL has submitted that the increase cost of coal should be computed on the basis of coal requirement of the generating units at normative heat rate. It has also been submitted that only such increase can be passed on which is in relation to the capacity being supplied to the procurers. The petitioner has submitted that none of the respondents have disputed that levy of Excise Duty on coal is a “Change in Law” and the compensation due to levy of Excise Duty on coal will be based on the actual quantity of coal used for producing the contracted capacity of power.

36. After taking into consideration the submissions made by both the parties, we are of the view that there was no excise duty on coal at the time of submission of the bid. The petitioner cannot be expected to factor in the bid a duty which was not in existence. Through the Finance Act, 2012, excise duty has been levied at the rate of 6% of the determined price of coal for captive use. Moreover, excise duty on coal adds to the input cost for generation of electricity. In our view, excise duty on coal is covered under Article 13.1.1(i) of the PPA and fulfills the requirement of “Change in Law”.

37. It is noted that Sasan UMPP is not the sole beneficiary of the captive coal blocks and the petitioner is using the coal for its other generation projects. Accordingly, excise duty on coal shall be re-imbursible in proportion to the quantum of coal used for generation of contracted capacity of power from Sasan UMPP. The impact of clean

energy cess on coal will be calculated based on the information submitted the input on clean energy cess on coal will be calculated based on the information submitted by the petitioner sought in para 30 of this order. For actual expenses on clean energy cess, the petitioner is directed to submit auditor's certificate in this regard.

#### **(V) Mine closure plan**

38. The petitioner has submitted that, Ministry of Coal, Government of India has issued Notification No. 55011-01-2009-CPAM dated 11.1.2012 relating to guidelines for preparation of mine closure plan. As per the guidelines, the petitioner is required to deposit ₹6 lakh per hectare annually in an escrow account towards Mine Closure Fund Creation and this amount is escalated by 5% annually. As per the petitioner's approved Mine Closure Plan, the amount required to be deposited in the first year is approximately ₹4.67 crore which would increase to ₹18.32 crore in the 29th year. The petitioner has further submitted that this amount may undergo change if any revisions are made by the Government of India to the Whole Sale Price Index as well as the actual mine closure cost. The petitioner has submitted that since there was no requirement for deposit of funds in an escrow account towards a mine closure plan at the time of submission of the bid, the entire amount paid by the petitioner towards mine closure plan needs to be reimbursed.

39. In response, MPPCL and HPCC have submitted that the obligation to create the mine closure plan was in existence even prior to January, 2012 notification, and therefore there is no additional cost to the petitioner. HPCC has also submitted that mine closure is a condition for development of mine and there was an obligation on the

petitioner to close the mine at the time of bidding and the amount to be deposited by the petitioner for mine closure is not a statutory levy. It cannot be considered to be within the scope of Article 13 of the PPA. Therefore, the claim should not be allowed.

40. The petitioner has submitted that prior to the notification issued in January, 2012, mine closure plans were formulated by the project proponent which were then approved by the Government of India and there was no requirement for deposit of any amounts annually in an escrow account towards the mine closure plan. It is only after issuance of the notification by the Ministry of Coal that the petitioner has to be deposit ₹6 lakh per hectare, which is escalated by 5% by every year, in an escrow account. Since this additional liability did not exist at the time of submission of the bid, it is a “Change in Law” for which the petitioner should be compensated. The coal mines are an integral part of Sasan UMPP and cost incurred towards the operation of the mine is included in the operations and maintenance of cost of SUMPP. Any increase in the operations and maintenance cost of Sasan UMPP will affect the cost or revenues of the project. Therefore, the expenses towards the mine closure plan are on account of “Change in Law” and needs to be compensated.

41. We have considered the submissions made by both the petitioner and the respondents regarding the Mine Closure Plan. The Mineral Conservation and Development Rules 1988 (hereinafter “the Rules”) issued in pursuance of section 18 of the Mines and Minerals (Development and Regulation) Act, 1957. The Rules were amended vide Mineral Conservation and Development (Amendment) Rules, 2003 vide Notification dated 10.4.2003. The said amendment introduced Rule 23A to 23F which

pertained to Mine Closure Plan. The Rules provide that every mine shall have a mine closure plan which shall comprise of a Progressive Mine Closure Plan and Final Mine Closure Plan. Progressive Mine Closure Plan is required to be made at the time of fresh grant of mining lease and Final Mining Closure Plan is to be made one year prior to the proposed closure of mines. Rule 23 B provides as under with regard to Progressive Mine Closure Plan and Rule 23 C provides for Final Mine Closure Plan which are extracted as under:

“23B. Submission of Progressive Mine Closure Plan.- (1) The owner, agent, manager or mining engineer shall, in case of fresh grant or renewal of mining lease, submit a progressive mine closure plan as a component of mining plan to the Regional Controller of Mines or officer authorized by the State Government in this behalf as the case may be.

-----  
(4) The Regional Controller of Mines or the officer authorized by the State Government in this behalf, as the case may be, shall convey his approval or refusal of the progressive mine closure plan within ninety days of the date of its receipt.”

23C. Submission of final mine closure plan.- (1) The owner, agent, manager or mining engineer shall submit a final mine closure plan to Regional Controller of Mines or the officer authorised by the State Government in this behalf, as the case may be, for approval one year prior to the proposed closure of the mine.

(2) The Regional Controller of Mines or the officer authorised by the State Government in this behalf, as the case may be, shall convey his approval or refusal of the final mine closure plan within ninety days of the date of its receipt to the owner,agent, manager or mining engineer.”

Further, Rule 23E of the Rules deals with the responsibility of the mining lease holder to carry out the protective measures including the reclamation and rehabilitation works and submit a yearly report thereof to the Regional Controller of Mines and the officer authorized by the State Government on that behalf. Rule 23E is extracted as under:

“23E. Responsibility of the holder of mining lease.- (1) The owner, agent, manager or mining engineer shall have the responsibility to ensure that the protective measures contained in the mine closure plan referred to in this rule including reclamation and rehabilitation works have been carried out in accordance with the approved mine closure



plan or with such modifications as approved by the Regional Controller or the officer authorized by the State Government in this behalf under this rule.

(2) The owner, agent, manager or mining engineer shall submit to the Regional Controller of Mines or the officer authorised by the State Government in this behalf, as the case may be, a yearly report before 1st July of every year setting forth the extent of protective and rehabilitative works carried out as envisaged in the approved mine closure plan, and if there is any deviation, reasons thereof.”

Rule 23 F deals with the financial assurance to be committed by a mining lease holder for the purpose of mining closure plan which is extracted as under:

“23F. Financial assurance.- (1) Financial assurance, has to be furnished by every leaseholder. The amount of financial assurance shall be rupees twenty five thousand for A category mines and rupees fifteen thousand for B category mines, per hectare of the mining lease area put to use for mining and allied activities. However, the minimum amount of financial assurance to be furnished in any of the forms referred to in clause (2) shall be rupees two lakh for A category mines and rupees one lakh for B category mines.

Provided that a leaseholder shall be required to enhance the amount of financial assurance with the increase in the area of mining and allied activities:

Provided further that where a leaseholder undertakes reclamation and rehabilitation measures as part of the progressive closure of mine, the amount so spent shall be reckoned as sum of the financial assurance already spent by the leaseholder and the total amount of financial assurance, to be furnished by the lessee, shall be reduced to that extent;

(2) The financial assurance shall be submitted in one of the following forms to Regional Controller of Mines or the officer authorised by the State Government in this behalf, as the case may be, or any amendment to it:

- (a) Letter of Credit from any Scheduled Bank;
- (b) Performance or surety bond;
- (c) Trust fund build up through annual contributions from the revenue generated by mine and based on expected amount sum required for abandonment of mine; or
- (d) Any other form of security or any other guarantees acceptable to the authority;

(3) The lessee shall submit the financial assurance to the Regional Controller of Mines or the officer authorized by the State Government in this behalf, as the case may be, before executing the mining lease deeds. In case of an existing mining lease, the lessee shall submit the financial assurance along with the progressive mine closure plan.

(4) Release of financial assurance shall be effective upon the notice given by the lessee for the satisfactory compliance of the provisions contained in the mine closure plan and certified by the Regional Controller of Mines or the officer authorized by the State Government in this behalf, as the case may be.”

It is apparent from the above that the leaseholder is required to furnish financial assurance of the specified amount to the Regional Controller of Mines or to the Officer specified by the State Government in that behalf in such forms as letter of credit or performance/surety bond, or trust funds built up from the revenue generated from the mines or any other form of security/guarantee acceptable to the authority. Moreover the financial assurance has to be submitted to the Regional Controller of Mines or to the Officer specified by the State Government in that behalf before executing the mining lease deeds.

42. Ministry of Coal vide its Notification No.55011-01-2009-CPAM dated 11.1.2012 has issued guidelines for preparation of Mine Closure Plan which require the mine owner to adopt the Mine Closure Plan for each of their mines comprising progressive closure plan and final closure plan which will be included in the project report. The guidelines estimated the cost of mine closure plan at para 6.2 of the Annexure to the Notification dated 11.1.2012 as under:

“6.2 It is estimated that typically the closure cost of an open cast mine will come around rupees six lakhs per hectare of the total project area and it would be rupees one lakh per hectare for underground project area at current price level (August 2009) and these rates will stand modified based on the whole sale price index as notified by the Government of India from time to time.

In case of mine closure plans which have already been approved earlier on the basis of lease hold area, the project proponents are required to recalculate the closure cost on the basis of the total project area and submit a certificate stating that the amount in Escrow account would be deposited as per the recalculated amount.

6.3 Annual closure cost is to be computed considering the total leasehold area at the above mentioned rates and dividing the same by the entire life of the mine in years for new projects and balance life of mines in years for operating/existing mines. An amount equal to the annual cost is to be deposited each year throughout the mine life compounded @5% annually. ++++++”

Further, Para 7 of the Annexure to the Guidelines provides as under:

## “7. Financial Assurance

- i) All coal mine owners shall strictly adhere to the following.
- ii) For financial assurance, the mining company shall open an Escrow Account with any scheduled bank, with the Coal Controller Organization (on behalf of the Central Government) as exclusive beneficiary. The mining company shall cause payments to be deposited in such Escrow Account at the rate computed as indicated in para 6.3 above. The owner of the company may select the Scheduled Bank where the Escrow Account is to be opened and inform the Coal Controller, Kolkata. The Escrow Account has to be opened as per the aforesaid guidelines of the Mine Closure Plan. The amount so deposited will be reviewed with such periodicity as deemed fit by the Coal Controller.
- iii) When implementation of the final mine closure scheme is undertaken by the mine owner starting five years before the scheduled closure of mining operations, the Coal Controller may permit withdrawals (four years before final mine closure date) from the Escrow Account proportionate to the quantum of work carried out, as reimbursement. The withdrawn amount each year shall not exceed 20% of the total amount deposited in the account.”

43. From the above, it emerges that since 2003, there is provision for Progressive Mine Closure Plan and arrangement of financial assurance by the leaseholder for this purpose. Moreover, the leaseholder is required to submit a final mine closure plan one year prior to the closure of mines. Therefore, the RPower which quoted the revised bid in July 2007 was well aware of these provisions and was expected to factor in the bid financial implications of both progressive and final mine closure plan. Under Rule 23F (2), RPower was required to furnish financial assurance in any one form mentioned therein. Therefore, financial assurance for mine closure plan was in existence even at the time of submission of the bids and RPower was expected to factor in the cost of financial closure including the escalation thereon in the bid. The Guidelines issued on 11.1.2012 have sought to give effect to the provisions of Mine Closure Plan and has estimated an amount of rupees six lakhs per hectare of the total project area as the mine closure cost for an open cast mine and requires the mine owner to deposit the

amount in proportionate basis over the life of the mine in an Escrow Account in a scheduled bank which would be withdrawn starting five years before the scheduled closure of the mining operation. The liability for financial assurance was created under the Rules notified in the year 2003 and the Guidelines created no new liability.

44. We are of the view that the expenditure on mine closure plan is not admissible under “Change in Law” as the obligation for mine closure plan existed even at the time for bidding for the power project and the petitioner was expected to take into consideration the expenditure on mine closure plan at the time of submission of the bid. The Notification of Ministry of Coal dated 11.1.2012 has merely required an upfront deposit of the financial assurance for mine closure plan in the Mine Closure Fund. Therefore, the claim of the petitioner is not covered under any of the provisions of Article 13.1.1 of the PPA.

#### **(VI) Reduction in Income Tax Rates and Increase in Minimum Alternate Tax Rates**

45. The petitioner has submitted that the income tax rate has been reduced from 33.99% to 32.45% and the minimum alternate tax rate has been increased from 11.33% to 20.01% in the Finance Act, 2012. The petitioner has submitted that the change in the rate of income tax and MAT should be adjusted by the procurers through supplementary bills on a quarterly basis on the basis of its accounts. In response, TPDDL has submitted that prior to claiming any benefit for change in income tax rate, the petitioner should demonstrate the surplus on which it would have been paid tax and only that surplus would be eligible for adjustment in light of any enhanced tax rates. HPCC has submitted that the qualifying criteria for considering any change or impact as “Change in

Law” is that the impact or change should have an effect on the cost or revenue of the business of selling electricity. The tax on income including MAT or Income Tax has nothing to do with the cost or revenue from the business of selling electricity. Tax is a post revenue of the business and it is on the operating profit or net profit of the business. The tax does not affect either the cost of or revenue from the business of selling electricity and accordingly imposition of MAT, tax on income or any increase or decrease in the tax on income cannot be construed as “Change in Law” for the purpose of Article 13.1. HPCC has relied upon the judgements in *Mollins of India Ltd. vs C.L.T (Cal.) (1983) (VOL 144 ITR 317)* and *Sundaram Industries Ltd. vs C.I.T. (Mad) (1986) (VOL 159 ITR 646)* and has contended that tax is neither cost nor revenue. HPCC further referring to the Format of Statement of Profit and Loss Account prescribed in Schedule VI-Part I of the Companies Act, 1956 dealing with Form of Balance Sheet has submitted that the tax is a post revenue item. HPCC referring to the order of Gujarat Electricity Regulatory Commission dated 7.1.2013 in Petition No. 1210/2012 has submitted that MAT does not constitute a “Change in Law”. Therefore, it is not covered under "Change in Law" and the same should not be adjusted. The petitioner has clarified that the income tax rate has been reduced and is to the benefit of the respondents and it would be applicable on the basis of accounts of the petitioner. The petitioner has further submitted that MAT and income tax are categorized as statutory expenditure under Accounting Standards 22 and hence are covered under Article 13.2(b) of the PPA since they impact the revenue of the project.

46. We have considered the submission of the petitioner and the respondents. The question for consideration is whether the Finance Act, 2012 changing the rate of income

tax and minimum alternate tax are covered under Article 13.1.1(i) of the PPA. The income tax rates are changed from time to time through various Finance Acts and therefore, therefore they will be considered as amendment of the existing laws on income tax. However, all amendments of law will not be covered under “Change in Law” under Article 13.1.1(i) unless it is shown that such amendments result in change in the cost of or revenue from the business of selling electricity by the seller to the procurers under the terms of the agreement. The petitioner has relied upon the following provisions of Accounting standard 22 (AS 22) to contend that the taxes on income are expenses and therefore, any change in the tax rate results in the change in the revenue from the business of selling electricity and is covered under “Change in Law”. Relevant paras of AS 22 are extracted as under:

“9. Tax expense for the period, comprising current tax and deferred tax, should be included in the determination of the net profit or loss for the period.

10. Taxes on income are considered to be an expense incurred by the enterprise in earning income and are accrued in the same period as the revenue and expenses to which they relate. Such matching may result into timing differences. The tax effects of timing differences are included in the tax expense in the statement of profit and loss and as deferred tax assets (subject to the consideration of prudence as set out in paragraphs 15-18) or as deferred tax liabilities, in the balance sheet.”

In our view, the above provisions of AS 22 are for the purpose of management of tax portfolio of a business enterprise and the methodology for accounting of tax expenses in the balance sheet of the enterprise. These provisions do not create additional liabilities on other entities who contribute towards the income of the business enterprise. Income tax or minimum alternate tax are payable on the operating profit or net profit of the business enterprise and therefore, it does not affect the cost of or revenue from the business of selling electricity. Accordingly, any increase or decrease

in the tax on income or minimum alternate tax cannot be construed as “Change in Law” for the purpose of Article 13.1 of the PPA. In the case of tariff determination based on capital cost under Section 62 of the Electricity Act, 2003, one of the components specifically allowed as tariff is tax on income. The pass through of minimum alternate tax or income tax in case of tariff determination under section 62 is by virtue of the specific provision in the Tariff Regulations which require the beneficiaries to bear the tax on the income at the hand of the generating company from the core business of generation and supply of electricity. Such a provision is distinctly absent in case of tariff discovered through competitive bidding where the bidder is required to quote an all inclusive tariff including the statutory taxes and cesses. Thus, the change in rate of income tax or minimum alternate tax cannot be construed as “Change in Law” for the purpose of Article 13.1 of the PPA.

**(VIII) Reduction in Merit Rate of Excise Duty, Reduction in rate of Central Sales Tax and Increase in Value Added Tax Rates**

47. The petitioner has submitted that Ministry of Finance, Government of India, vide notification dated 17.3.2012 has changed the merit rate of Excise Duty from 16% at the time of bid submission to 12%. The Ministry of Finance, Government of India has reduced the central sales tax rate, vide Notification No.1/2008-CST(F-No.28/11/2007-ST) dated 30.5.2008 from 3% at the time of submission of bid to 2%. The petitioner has also submitted that MP VAT (Amendment) Act, 2010 was notified on 1.4.2010 and has increased the value added tax rate for Schedule II (Part II) goods from 4% at the time of bid submission to 5% and for Schedule II (Part IV) goods from 12.5% at the time of the bid submission to 13%. The impact of the change in Merit Rate on Excise Duty, CST

and VAT will be informed on monthly basis by the petitioner and it should be suitably adjusted through supplementary bill.

48. HPCC has submitted that the manner in which the impact of change in the Merit Rate of Excise Duty and the Central Sales Tax has to be adjusted has already been given in the PPA and their impact has to be given by the petitioner to the procurers in the form supplementary bills as envisaged in the PPA and there is no need for evolving any mechanism for giving effect to such changes. As regards VAT, HPCC has submitted that the increase in VAT notified by the Madhya Pradesh government is on the procurement of material by the petitioner and it is not imposable on the business on generation and sale of electricity. Accordingly, the increase in VAT cannot be passed on through tariff under the provisions of Article 13 of the PPA. TPDDL has submitted that the adverse impact of increase in the taxes should be clearly brought out by the petitioner to the notice of the Commission and the procurers prior to claiming any relief. The petitioner has clarified that VAT, like CST is a tax on the procurement of goods and affects the cost of the project and therefore it is covered under Article 13.2(b) of the PPA and should be allowed.

49. We have considered the submissions made by the petitioner and the respondents. Government of India, Ministry of Finance Notification dated 17.3.2012 notifying the change in excise duty, Notification dated 30.5.2008 notifying the change in rate of Central Sales Tax and Madhya Pradesh VAT (Amendment) Act, 2010 notifying the changes in VAT rates are not covered under "Change in Law". The quoted tariff according to provisions of Para 2.7.1.4.3 of the RFP shall be an inclusive one including



statutory taxes, duties and levies. Therefore, the petitioner was expected to take into account all cost including capital cost and operating cost, statutory taxes, duties levies while quoting tariff in the bid. Therefore, the “Change in Law” in this respect is not admissible.

**(E) The mechanism for compensation on account of Changes in Law during the operation period.**

50. The petitioner has submitted that the minimum value of “Change in Law” should be more than 1% of the Letter of Credit amount in a particular year. As per Article 11.4.1.1 the letter of credit amount for first year would be equal to 1.1 times of the estimated average monthly billing based on normative availability and subsequent years the letter of credit amount will be equal to 1.1 times of 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 when all the six units would be operational, the letter of credit calculated on the basis of the provisions of the PPA would be ₹310 crore and 1% of aggregated letter of credit is about 3.1 crore. Since, the aggregate amount claimed for “Change in Law” is about ₹350 crore, it is more than the threshold amount prescribed under Article 13.2 (b) of the PPA and the petitioner is entitled to be compensated for the same. The petitioner has further submitted that the petitioner may be permitted to claim from the procurer's compensation that would be equivalent to the financial impact on the “Change in Law” on the cost and revenue of the petitioner. The petitioner has further submitted that in certain items of “Change in Law”, like taxes the financial impact can only be ascertained once the accounts of the

petitioner are audited and the petitioner will quantify the impact of the "Change in Law" on the basis of its audit account on its annual basis.

51. Article 13.2 (b) of the PPA provides for the principle for commuting the impact of "Change in Law" during the operation period as under:-

"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."

The above provision enjoins on the Commission to decide the effective date from which the compensation for increase/decrease revenues or cost shall be admissible to the petitioner. Moreover, the compensation shall be payable only if the increase/decrease in revenues or cost to the seller in excess of an amount equivalent to 1% of the letter of credit in aggregate for contract year. In our view, the effect of "Change in Law" as approved in this order shall come into force from the actual date when the expenditure on account of the "Change in Law" has been incurred or the date of commercial operation of the concerned unit/units of the generating stations whichever is later. The compensation for any increase/decrease in revenue or cost to the seller shall be calculated for the entire contract year based on the audited balance sheet and shall be submitted alongwith the details of letter of credit maintained in accordance with law for the contract year with copy to the procurers through an application made in accordance with law. The impact of the "Change in Law" during operating period would

be admissible if the increase or decrease in the revenue or cost is in excess of 1% of the LC in aggregate in a contract year.

## 52. Summary of Findings:

- (a) The petitioner is granted liberty to approach the Commission with necessary information as sought in para 25 of this order in respect of water charges. The Commission will take a view on the claim of the petitioner with regard to water charges under “Change in Law” after taking into consideration the submission of the petitioner and the procurers.
- (b) Impact of cost increase due to imposition of royalty on coal, clean energy cess on coal, excise duty on coal are covered under “Change in Law” and is accordingly allowed. The exact impact will be calculated after submission of information by the petitioner as stated in this order.
- (c) Increase in the expenditure on account of mine closure plan, change in the rate of income tax, minimum alternate tax, merit rate of excise duty, rate of Central sales tax and Madhya Pradesh value added tax are not covered under “Change in Law” and are accordingly disallowed.
- (d) The petitioner is directed to file appropriate application within six months of the closure of the contract year after quantifying the impact on account of “Change in Law” during the contract year based on the audited accounts.

53. This order disposes of Petition No.6/MP/2013.

sd/-  
**(A. K. Singhal)**  
Member

sd/-  
**(Gireesh B. Pradhan)**  
Chairperson