

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Pétition No. 81/MP/2013**

**Coram:**

**Shri Gireesh B. Pradhan, Chairperson  
Shri A.K.Singhal, Member**

**Date of Order: 07.03.2016**

**In the matter of**

Petition under Section 79 of the Electricity Act, 2003 read with statutory framework governing procurement of power through competitive bidding and Articles 12, 13 and 17 of the Power Purchase Agreement dated 7.8.2008 executed between Discoms in Haryana & PTC India Ltd. and back-to-back PPA dated 12.3.2009 entered into between GMR and PTC for compensation due to Force Majeure events and Change in Law (Construction Period).

**And**

**In the matter of**

1. GMR-Kamalanga Energy Limited  
Skip House,  
25/1 Museum Road,  
Bangalore – 5600025

2. GMR Energy Ltd  
Skip House,  
25/1 Museum Road,  
Bangalore - 5600025

**Petitioners**

**V/s**

1. Dakshin Haryana Bijli Vitran Nigam Ltd  
Vidyut Nagar,  
Hissar (Haryana)

2. Uttar Haryana Bijli Vitran Nigam Ltd  
Vidyut Sadan, Plot No. C/16,  
Sector 6, Panchkula (Haryana)

3. Haryana Power Generation Corporation Ltd  
Urja Bhawan, Sector 6,  
Panchkula (Haryana)

4. PTC India Ltd.  
2<sup>nd</sup> Floor, NBCC Tower,  
15, Bhikaji Cama Place,  
New Delhi
5. Bihar State Power (Holding) Company Ltd.  
Vidyut Bhawan,  
Bailey Road,  
Patna – 800001
6. Bihar State Power Generation Company Ltd.  
Vidyut Bhawan,  
Bailey Road,  
Patna – 800001
7. South Bihar Power Distribution Company Ltd.  
Vidyut Bhawan,  
Bailey Road,  
Patna – 800001
8. North Bihar Power Distribution Company Ltd.  
Vidyut Bhawan,  
Bailey Road,  
Patna – 800001

.....Respondents

**Parties Present:**

Shri Amit Kapoor, Advocate, GMR  
Shri Vishrov Mukerjee, Advocate, GMR  
Shri Rohit Venkat, Advocate, GMR  
Shri V. Akshaya Babu, GMR  
Shri Rohan Jodhan, GMR  
Shri Jatinder Kumar, GMR  
Shri Sunil, GMR  
Shri G. Umapathy, Advocate, DHBVNL  
Shri R. Mekhala, Advocate, DHBVNL  
Shri Varun Pathak, Advocate, PTC  
Shri Mohit Kumar Shah, Advocate, BSPHCL

**ORDER**

GMR Kamalanga Energy Limited (Petitioner No.1) was incorporated as a public limited company under the Companies Act, 1956 as a subsidiary of GMR Energy Ltd.

(Petitioner No.2) to set up 1400 MW thermal power project (hereinafter referred to the Project) at village Kamalanga, District Dhenkanal in Odisha. The Project comprises of two stages. The first stage of the project has three units of 350 MW each and second Stage of the project has one unit of 350 MW. Stage 1 of the Project has been accorded Mega Power Project status by Ministry of Power vide its letter dated 1.2.2012.

2. Petitioner No.1, GMR Kamalanga Energy Limited (GKEL), entered into the following long-term PPAs for supply of power from the Power Project:

(a) Supply of 350 MW gross power (Stage 1:262.5 MW and Stage 2:87.5 MW) to Grid Corporation of Odisha Limited (GRIDCO) in terms of PPA dated 28.9.2006 (as amended on 4.1.2011 with delivery point as Odisha STU interconnection point).

(b) Supply of 282 MW gross power (260 MW net of auxiliary consumption) to Bihar State Electricity Board in terms of PPA dated 9.11.2011, with delivery point as the Bihar STU interconnection point.

(c) Supply of 350 MW gross power (300 MW net of transmission losses and auxiliary consumption) to Haryana Discoms based on the competitive bidding through back to back arrangements:

(i) The PPAs dated 7.8.2008 entered into between PTC India Limited and Haryana Discoms with delivery point as Haryana STU bus bar;

(ii) Back to back PPA dated 12.3.2009 between GMR Energy Limited (holding company of GKEL) and PTC India Limited.

3. In the present petition, the petitioners have sought adjustment of tariff on account of the events of Change in Law affecting the Power Project during the Construction Period in order to restore the petitioners to the same economic position as if the events have not occurred in terms of the PPAs between PTC and Haryana Discoms and back to back PPA between PTC and the petitioners (collectively known as “Haryana PPA”).

4. Haryana Power Generation Company Ltd (HPGCL) issued a Request for Proposal on 1.3.2007 for supply of 2000 MW power on long-term basis to Haryana Discoms. The Board of Directors of GEL passed a resolution on 13.7.2007, authorizing PTC to sell up to 500 MW to the Haryana Discoms and to take all necessary steps in that regard, including submission of bid, signing and execution of documents etc. and provision for the bank guarantee of an amount of Rs.15 crore in favour of PTC to enable PTC to issue back to back bank guarantee to HPGCL. On 31.10.2007, GEL and PTC entered into an agreement to sell 323 MW power from the Power Project and to enable PTC to participate in the bidding process initiated by HPGCL. PTC submitted its bid to HPGCL on 23.11.2007 for supply of 300 MW power from the Power Project. On 17.7.2008, the bid of PTC for supply of 300 MW at Haryana STU inter-connection point (323 MW at CTU Odisha) to Haryana Discoms was accepted and PTC was declared as the successful bidder. The tariff quoted by PTC for supply of power from the Power Project was adopted by the Haryana Electricity Regulatory Commission (HERC) under Section 63 of the Electricity Act, 2003 vide order dated 31.7.2008. Consequently, two separate PPAs, both dated 7.8.2008, were executed between PTC and each of the Haryana Discoms, namely, Uttar Haryana Bijli Vitran Nigam Limited (UHBVNL) and

Dakshin Haryana BijliVitrان Nigam Limited (DHBVNL). GEL and PTC entered into a PPA dated 12.3.2009 as back to back arrangement to Haryana PPA.

5. The dates of commercial operation of various units are as under:

S.No.	Unit	Date of commercial operation
1.	First	30.4.2013
2.	Second	12.11.2013
3.	Third	25.3.2014

6. The petitioners, GMR Kamalanga Energy Limited and GMR Energy Limited, have filed the present petition seeking adjustment in tariff structure to restore the economic/ financial equilibrium of the project by offsetting the impact of the following Force Majeure and Change in Law events during the construction period:

**(A) Force Majeure events:**

(i) Unprecedented and unforeseeable devaluation of 35% of the Indian Rupee vis-à-vis the US Dollar during the period from November, 2007 till the date of filing of the petition.

(ii) Delay of 10 months in availability of land for commencement of development of the Project on account of delay in land acquisition by the State Government of Odisha and its agencies and the resultant adverse impact in terms of delay of Commercial Operation Date (COD).

(iii) Stoppage of work on account of *status quo* order passed by the Hon'ble High Court of Odisha with respect to land on which the Merry-go-Round (MGR)

Railway line and the Direct Approach Road were being constructed resulting in delay in project completion.

- (iv) Fundamental Changes in the model Fuel Supply Agreement (FSA) issued by CIL including reduction of assured coal quantity, linking assured supply to long-term PPA tie-ups and use of imported coal.

**(B) Change in Law Events:**

- (i) Shift of evacuation point from Meramundali (through LILO) to Angul as per the inter-State transmission scheme approved by CEA as required under the Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access, Medium-term Open Access in inter-State Transmission and Related Matters) Regulations, 2009 with cost implication of Rs.62.34 crore.
- (ii) Lift irrigation deposit of Rs.18.60 crore paid to Odisha Lift Irrigation Corporation upon direction of the Department of Water Resources, Government of Odisha vide letter No. Ho./P&A/LAE-3959/11(Vol-III) dated 5.1.2012.

**(C) Both Force Majeure Changes and Change in Law Events:**

- (i) Changes in Visa policy by the Government of India restricting the number of foreign workers to be granted Visas for execution of Power Projects in India which also delayed execution of the Project.
- (ii) Deviation in the Fuel Supply Agreement (“FSA”) from the New Coal Distribution Policy, 2007 resulting in (a) reduction of assured quantity of coal and linking supply of coal to long-term PPA;(b) addition of wagon tippler for

imported coal in order to meet the deficit on account of reduction in assured quantity of coal; and creation of coal blending facility for use of imported coal.

7. The petitioners have submitted that the aggregate financial impact on the project on account of the above Force Majeure and Change in Law events was Rs.1767.64 crore. The petitioners have made the following prayers:

- “(a) Declare that there has been a fundamental change of circumstances, the impact of which is unforeseen, uncontrollable and has rendered the PPA/Project impracticable and impossible to perform as set out in Paragraph 4 of the Petition;
- (b) Declare that the items set out in Paragraph 4 (a) as Force Majeure Events;
- (c) Grant the relief sought in relation to the Force Majeure Events set out in Paragraph 209;
- (d) Evolve a mechanism to restore GKEL to the same economic condition prior to occurrence of the events set out in Paragraph 195 including adjustment/revision of the tariff at which power is to be supplied to Respondent No. 1 and Respondent No. 2 in accordance with CERC Regulations;
- (e) Declare that the items set out in Paragraph 218 above as Change in Law during Construction Period and/or changes which has led to an increase in the Capital Cost of the Project;
- (f) Restore GKEL to the same economic condition in terms of Article 13.2 (a) of PPA;
- (g) Pending disposal of the Petition, grant interim relief in the form of cost-plus tariff or suitable adjustment to the tariff to compensate GKEL; and
- (h) Pass any such other and further reliefs as this Hon'ble Commission deems just and proper in the nature and circumstance of the present case.”

8. The petitioner, vide its affidavit dated 24.4.2013, has submitted the revised aggregate financial impact of the force majeure and change in law events on the capital cost of the project as on 31.12.2013 as under:

S. No.	Capital Cost	As per the original petition filed on April, 2013			Revised estimate as on 31.12.2013			Reason for increase in claim vis-a-vis April petition
		Increase in project cost	Claimed under CIL	Claimed under FM	Increase in project cost	Claimed under CIL	Claimed under FM	
		₹ in crore	₹ in crore	₹ in crore	₹ in crore	₹ in crore	₹ in crore	
1	Land	20.25	0.00	2.55	24.00	0.00	24.00	Increase in land prices for MGR DAR land
2	EPC	362.36	0.00	362.36	445.60	0.00	445.60	Delay, Forex variation
3	Taxes and Duties	264.00	41.00	0.00	121.40	41.00	0.00	
4	Non-EPC Costs	385.98	214.04	0.00	526.77	217.85	0.00	Small increase in MGR-Wagon Tippler costs
5	Pre-operating costs	340.95	92.08	147.41	363.50	115.21	147.41	Increase in cost to generate start-up power due to coal cost increase
6	IDC & Finance cost	351.90	0.00	351.90	389.00	0.00	389.00	Delay, Forex variation
7	Working Capital Margin	19.90	0.00	0.00	88.50	0.00	0.00	
8	Contingency	78.00	0.00	0.00	78.00	0.00	0.00	
9	Additional Spares	100.00	0.00	0.00	100.00	0.00	0.00	
<b>10</b>	<b>Grand Total</b>	<b>1767.64</b>	<b>347.12</b>	<b>882.22</b>	<b>1980.77</b>	<b>374.06</b>	<b>1006.01</b>	<b>Total increase in claim ₹150.73 crore</b>

9. The petitioners have submitted that the compensation mechanism provided in Articles 12 and 13.2 (a) of the PPA will not be sufficient to restate the petitioner to the same economic condition as if the aforesaid 'Force Majeure' and 'Change in Law' events had not occurred. The petitioners have prayed to restore the project economics through a suitable mechanism that takes into account the full financial impact of events affecting the capital cost of the power project.



10. The petitioner is stated to have taken up the matter with PTC in its letter dated 31.12.2009 setting out the impact of the increase in the cost of the power project and schedule of completion of the project to find out an amicable solution to resolve the issues. On 2.8.2010, PTC informed HPGCL about force majeure and change in law events such as change in VISA Policy and change in Coal allocation. Further, on 15.6.2011, the petitioner informed PTC regarding continuation of force majeure events affecting the time line of the power project completion and increase in capital cost and seeking extension of SCOD by 12 months, increase in fixed tariff to reflect the extent of increase in project cost and fuel cost as a pass through. On 14.7.2011, the petitioner requested PTC to represent to Haryana Discoms that on account of force majeure and change in law events, the request for additional bank guarantee should be withdrawn. On 21.9.2011, HPGCL filed Petition No. 21 of 2012 before Haryana Electricity Regulatory Commission (HERC) on behalf of the distribution companies of Haryana to adjudicate upon whether the events pertaining to delay in land acquisition, change in visa policy and coal distribution policy are covered under force majeure/change in law under the Haryana PPA. HPGCL made Petitioner No.1 (GKEL) as a party to the petition who also filed a reply on 28.11.2011 before HERC requesting to initiate conciliation proceedings in order to resolve the pending issues while reserving its legal rights and contentions. HERC vide its order dated 9.12.2011 directed the parties to hold the meetings to resolve the issues amicably. A meeting of the petitioner with the Haryana Discoms and HPGCL was held on 15.2.2012 in order to discuss the issues and to examine whether the issues could be resolved amicably. The petitioners have submitted that in the said meeting, HPGCL and Haryana Discoms stated that the petitioners were

bound by the terms and conditions of the PPA and they should supply power as per the provisions of the PPA. Petitioner No.1 in its letter dated 22.5.2012 wrote to PTC informing about the occurrence of certain events of force majeure and change in law and requested to revise the tariff and extend the COD of the project. On 18.6.2012, another meeting was held between Petitioner No.1 and the Haryana Discoms and HPGCL (hereinafter “respondents”) in which the respondents informed Petitioner No.1 that it would not be possible to review the tariff fixed in the PPAs and suggested Petitioner No.1 to come up with a solution within the framework of the PPAs. On 16.7.2012, another meeting was held between Petitioner No.1 and the respondents in which the respondents requested Petitioner No.1 to supply power to Haryana and the issues raised by GKEL would be considered thereafter. The petitioners have submitted that the matter was taken up with respondents vide letters dated 26.11.2012, 26.2.2013 and 10.4.2013. However, the issues could not be resolved. The petitioners have submitted that the parties have tried to resolve the issues through conciliation amicably. Since, the respondents have refused to resolve the issues, the petitioners have filed the present petition for resolution of disputes that have arisen between the Petitioner No.1 and the respondents in terms of the PPAs.

### **Jurisdictional Issue**

11. The petitioners have submitted that GKEL has a composite scheme for generation and sale of electricity in more than one State since they have PPAs to supply electricity to the States of Odisha, Haryana and Bihar. As regards supply of electricity to Haryana through an inter-State trading licensee, namely, PTC, the petitioners have submitted that there is a direct nexus between GKEL and Haryana

Discoms and in the light of the judgement of the Appellate Tribunal for Electricity in Appeal No. 15 of 2011 (Lanco Power Ltd V/s Haryana Electricity Regulatory Commission), the present petition is maintainable.

12. The petitioners have submitted that the Appellate Tribunal in its judgement dated 4.9.2012 in Appeal No. 94/2012 (BSES Rajdhani Power Ltd. V/s DERC & Another) has held that in cases where both State Commission and Central Commission have jurisdiction, the State Commission will have to yield jurisdiction to the Central Commission. The petitioner has submitted that in the case of supply to Haryana Discoms and Bihar SEB, the tariff has been approved by respective State Commissions under Section 63 of the Act. However, the State Commissions have approved the tariffs for the purpose of retail supply and sale of power by distribution licensees to their customers. Therefore, even though the tariff for supply of power to Bihar SEB and Haryana Discoms have been adopted by the respective State Commissions, on account of the composite scheme being in place, it will be the Central Commission that will have jurisdiction in the present case. Haryana Discoms vide their affidavit dated 9.9.2013 have submitted that the jurisdiction of the Commission under Section 79(1)(f) for adjudication of the disputes would arise if it relates to matters connected with section 79(1)(a) or (b), and not otherwise. PTC has supported the contention of the Petitioners that this Commission has the jurisdiction to adjudicate the dispute between the Petitioners and Haryana Discoms. PTC has relied upon various judgements including the judgement in Appeal Nos.15 and 51 of 2011 passed by the Appellate Tribunal for Electricity.

13. Haryana Discoms have submitted that mere existence of one scheme for generation and sale of electricity by Petitioner No.1 to Haryana and another scheme for generation for sale of electricity to distribution companies in Odisha does not become a composite scheme for the purpose of Section 79(1)(b) of the Act. The respondents have submitted that there has to be some commonality or co-relation in the two arrangements for the scheme to become composite. It has been submitted that in the presence case, that there is no such commonality or co-relation in the agreements for sale of electricity to Haryana Discoms vis-a-vis agreement for sale of electricity to GRIDCO. Therefore, there is no composite scheme in existence in the case of the generating station of Petitioner No.1. The Respondents also submitted that there is non-joinder of necessary parties as the Bihar SEB to whom the Petitioner No.1 has PPA to supply power has not been made a party.

14. The petitioner vide record of proceedings for the hearing dated 10.9.2013 was directed to implead the beneficiaries of the generating station and serve copy of the petition on them immediately. The petitioner impleaded Bihar State Power (Holding) Company Ltd., Bihar State Power Generating Company Ltd., South Bihar Power Distribution Company Ltd. and North Bihar Power Distribution Company Ltd. as parties to the petition. However, the distribution companies of Bihar have not filed any reply to the petition.

15. The Commission after considering the submissions on record and hearing the learned counsel appearing on behalf of the parties decided the issue of jurisdiction in order dated 16.12.2013 as under:

*“33. To sum up, it is held that supply of electricity by the petitioner to the States of Odisha, Haryana and Bihar is under the composite scheme for generation and sale of electricity in more than one State. Accordingly, this Commission has power to regulate the tariff of the generating station of the petitioner under clause (b) of sub-section (1) of Section 79 of the Electricity Act, 2003. As a corollary it follows that the powers of adjudication of the claims and disputes involving force majeure and Change in Law events under the PPAs is vested in this Commission.*

*34. In view of the above discussion, the petitions are maintainable.”*

16. Haryana Discoms filed Appeal No. 44/2014 before the Appellate Tribunal for Electricity (Appellate Tribunal) against the said order dated 16.12.2013. The Appellate Tribunal in its order dated 30.5.2014 in I.A. No. 65/2014 and 143/2014 decided the stay applications of Haryana Discoms as under:

“10. It is a legal point whether the CERC has jurisdiction to entertain the petition filed under Section 79 (1) (b) of the Electricity Act, 2003 in the light of the judgment delivered on 15.05.2012 by Hon’ble Delhi High Court in OMP No. 677 of 2011 in PTC India Limited Vs. Jaiprakash Power Ventures Ltd. and the above referred rulings of this Appellate Tribunal. We shall discuss in detail and decide this jurisdictional point while deciding the Appeals on merits.

11. After considering the aforesaid submissions of the rival parties, we deem it proper to order that the proceedings, in the petitions pending before the CERC, shall be subject to the result/outcome of the instant Appeals being Appeal No. 44 of 2014 and 74 of 2014 and we order accordingly.

12. The aforesaid interim applications being numbered 65 of 2014 in Appeal No. 44 of 2014 and 143 of 2014 in Appeal No. 74 of 2014 are disposed of.”

In view of the above decision of the Appellate Tribunal, the Commission held hearings of the petition on merit. In the absence of any directions restraining the Commission to issue final order in the petition on conclusion of the proceedings, the Commission proceeds to issue final order in the present petition which shall be subject to the outcome of the Appeal No.44/2014.

**Reply of the Respondents:**

17. Haryana Discoms in their affidavit dated 6.9.2013 have also filed the reply on merit. Haryana Discoms have submitted that notwithstanding their position with regard to the composite scheme, the present petition is not maintainable as all the units of the generating station have not declared their COD before approaching the Central Commission. Haryana Discoms have further submitted that for compensation under change in law and force majeure events, the project evaluation as a whole including all the units in operation is required to be considered, and not the partial quantum of power being agreed to be supply to Haryana Discoms. The petitioner has further submitted that Haryana had invited the case 1 bids where GKEL and PTC were one of the successful bidders. Since, the essence of case 1 bidding is that the tariff including all factors are to be delivered at state periphery, the petitioners should have factored all the issues at the time of participation in case 1 bidding and should not seek revision on the same grounds. As regards the claim of compensation of the petitioner, Haryana Discoms have submitted that since the project has been delayed and the CODs of the units have not been achieved, the petitioner's claim has not maintainable. As regards the claim made under devaluation of Indian Rupee, delay in land acquisition and delay in VISA policy, Haryana Discoms have submitted that these events are not covered under force majeure. As regards the change in law, Haryana Discoms have submitted that the main condition to be satisfied to claim under Article 13 is that there is change in the cost or revenue from business of selling electricity by the seller to the procurers on account of change in law. Since, some of the claims of the petitioners do not relate to the cost of revenue from the business of selling the electricity, they are not cover under

change in law. Haryana Discoms have further submitted that the petitioners are required to file appropriate application for adjustment of tariff on account of real impact of change in law only after the tariff year is over.

18. The petitioners in their rejoinder have submitted that GKEL vide its letter dated 20.5.2013 informed the Haryana Discoms that the 1<sup>st</sup> unit of the power project achieved COD on 30.4.2013 which was acknowledged by the Haryana Discoms vide their letter dated 20.5.2013. The petitioners have further submitted that occurrence of COD is not a pre-condition for claiming the relief sought in the petition. The petitioners have further submitted that the petitioners are entitled to seek and to get relief/compensation for the change in law events even prior to the commencement of the operating period. As regard the devaluation of Indian Rupee, delay in land acquisition of land and change in VISA policy, petitioners have submitted that these are force majeure events in terms of the PPAs and are factors beyond the control of the petitioners which have considerable impact on the project economics for which the petitioners need to be compensated. As regards the contention regarding increase or decrease in revenue and/or cost of supply of electricity from the power project, the petitioners have submitted that said provision is applicable in case of change in law during the operating period whereas the claims of the petitioner in the present petition are confined to the construction period and the test in such cases is whether change in law will affect the capital cost.

19. The petitioners vide affidavit dated 14.8.2014 submitted the detailed justification and computation of increase in capital cost under different heads. The petitioners were directed vide Record of Proceedings for the hearing dated 8.1.2015 to file certain

information which the petitioners have filed vide their affidavit dated 29.1.2015. The petitioners have submitted the component-wise original appraised capital cost, latest lender approved project costs, change in costs along with claimed and unclaimed amounts, increase/decrease in capital cost due to any change in the scope of work, increase in capital cost due to time over-run along with details of increase in IDC, Incidental Expenditure During Construction (IEDC), and increase due to escalation in prices other than Change in Law.

20. During the hearing on 12.2.2015, learned counsel for Haryana Discoms submitted that devaluation of the Indian Rupee, delay in land acquisition and change in VISA policy are not force majeure events. *Per Contra*, learned counsel for the petitioner submitted that the change in VISA policy and delay in land acquisition would be a force majeure events in terms of the order dated 2.2.2014 in Petition No.160/GT/2012. Definition of force majeure is an inclusive one and thus the change in VISA policy would be a force majeure event.

21. The petitioner, vide ROP for the hearing dated 12.2.2013, was directed to submit certain information regarding old and new VISA Policy and its impact on project execution, and the details relating to the power sold during the period 20.5.2013 to 6.2.2014 with the details of revenue earned. The petitioner, vide its affidavit dated 16.2.2015, has submitted the requisite details in respect of VISA policy and details with regard to sale of power to third parties (other than GRIDCO) from 30.4.2013 i.e. date of commercial operation till 7.2.2014 (commencement of supply to Haryana). The petitioner



has submitted that in terms of the PPA, SCOD of the project was 7.12.2011. SCOD as per the Financial Closure Model approved by the lenders to the power project was January, 2012 and the first unit of the project was declared under commercial operation in April, 2013. However, PTC and HPPC accorded their consent for supply/scheduling almost one year later and accordingly, supply of power commenced from 7.2.2014. The petitioner has submitted that due to non-scheduling of power, the petitioner was forced to sell power at a rate much less than the actual cost of generation during this period and has incurred additional losses of Rs.763,493,597/- on account of sale of power during that period.

**Analysis and Decision:**

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

- (a) **Issue No.1: Whether the provisions of the PPAs with regard to notice have been complied with?**
- (b) **Issue No.2: What is the scope of change in law and force majeure provisions in the PPAs?**
- (c) **Issue No.3: Whether compensation claims are admissible under Change in Law and Force Majeure in terms of the PPAs?**
- (d) **Issue No.4: Mechanism for processing and reimbursement of admitted claims under Change in Law?**

**Issue No.1 : Whether the provisions of the PPAs with regard to notice have been complied with?**

23. Haryana Discoms have submitted that the petitioners have not served notice of “Change in Law” as required under Article 13.3.1 of the PPAs. The petitioners have

countered the allegation and have submitted that the requirement of Article 13.3.1 has been duly complied with. The claims of the petitioners in the present petition pertain to the Change in Law events which have an impact of the cost of the project during the construction period. Article 13.3 of the Haryana PPAs (PPAs between PTC and DHBVNL and UHBVNL) envisage for notification of the Change in Law to the procurers. Article 13.3 of the PPA is extracted as under:

“13.3 Notification of “Change in Law”

13.3.1 If the Seller is affected 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 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.”

In the back to back PPA signed between GEL and PTC, it has been provided that “the terms of Article 13 of the Haryana PPA shall be applicable to the parties in its totality without any deviation under this Agreement.”

24. Haryana Discoms have submitted that the petitioners have not served notice of force majeure as required under Article 12.5.1 of the PPAs. The petitioners have submitted that the requirement of Article 12.5.1 has been duly complied with. Article 12.5 of the PPA provides as under:

“12.5. Notification of Force Majeure Event:

12.5.1. The Affected Party shall give notice to the other Party of any event of Force Majeure as soon as reasonably practicable, but not later than seven (7) days after the date on which such Party knew or should reasonably have known of the commencement of the event of Force Majeure. If an event of Force Majeure results in a breakdown of communications rendering, it unreasonable to give notice within the applicable time limit specified herein, then the Party claiming Force Majeure shall give such notice as soon as reasonably practicable after reinstatement. Provided that such notice shall be a pre-condition to the Seller's entitlement to claim relief under this Agreement. Such notice shall include full particulars of the event of Force Majeure, its effects on the Party claiming relief and the remedial measures proposed. The Affected Party shall given the other Party regular (and no less than monthly) reports on the progress on those remedial measures and such other information as the other Party may reasonably request about the situation.

12.5.2. The Affected Party shall give notice to the other Party of (i) the cessation of the relevant event of Force Majeure; and (ii) the cessation of the effects of such event of Force Majeure on the performance on its rights or obligations under this Agreement, as soon as practicable after becoming aware of each of these cessation.”

In the back to back PPA signed between GEL and PTC, it has been provided that “the terms of Article 12 of the Haryana PPA shall be applicable to the parties in its totality without any deviation under this Agreement.”

25. In its letter dated 31.12.2009, Petitioner No.1 wrote to PTC that events like change in VISA policy adversely affecting SEPCO's ability to deploy sufficient manpower with adequate technical expertise, delay in acquisition of land for the project

by Government of Odisha, and the terms and conditions of model Coal Supply Agreement (FSA) adversely impacting variable cost and capital cost are force majeure events or change in law events. PTC in its letter dated 2.8.2010 to HPGCL raised the issue of change in visa policy and change in coal distribution policy. Petitioner No.1 in its further letter dated 15.6.2011 addressed to PTC stated that delay in land acquisition by IDCO, change in Visa policy and change in coal allocation policy has affected the timelines for project completion and increase in capital cost and sought extension of time for SCOD by 12 months, increase in fixed tariff to reflect the extent of increase in the project cost, and fuel cost pass through in the energy charge instead of agreed energy charge under the PPA. This letter was forwarded by PTC to Haryana Discoms on 8.7.2011. On 14.7.2011, Petitioner No.1 wrote to PTC requesting it to represent to Haryana Discoms that since GKEL was prevented from completing certain obligations on account of force majeure events, the request for additional bank guarantee should be withdrawn. Thereafter, HPGCL filed a petition (Case No. HERC/PRO-21 of 2012) before the Haryana Electricity Regulatory Commission (HERC) on 21.9.2011 to adjudicate whether the events pertaining to land acquisition, visa policy and coal distribution policy are covered under the provisions of force majeure or change in law under the PPA. On 28.11.2011, Petitioner No.1 filed its reply before HERC to initiate conciliation proceedings to resolve the pending issues. In its order dated 9.12.2011, HERC directed the parties to make efforts to resolve the issues amicably. Accordingly, a meeting was held on 15.2.2012. However, the issues remained unresolved since HPGCL and the Haryana Discoms were of the view that Petitioner No.1 and PTC were bound to supply power on the terms agreed under the

PPAs. Another meeting was held on 18.6.2012. At this meeting, Petitioner No.1 was informed that pass through of fuel cost was not possible. On 16.7.2012, another meeting was held between Petitioner No.1 and the Haryana Discoms in which Haryana Discoms and HPGCL requested Petitioner No.1 to start supplying power to Haryana and the issues raised by GKEL would be considered thereafter. On 26.9.2012, Petitioner No.1 sent a letter to PTC narrating in detail the Force Majeure and Change in Law events affecting the power project and the financial implications of each of these events. On 31.10.2012, Petitioner No.1 wrote to PTC intimating about the increase in rate of service tax on works contracts from 1.712% to 4.944%.Copies of these letters were marked to Power Secretary, Government of Haryana, HERC, HPPC and HPGCL. On 10.4.2013, GKEL wrote to PTC with copy to Haryana Discoms and HERC that it was not possible to resolve the issues pertaining to change in law and force majeure amicably. GKEL further intimated that since the petitioner's project is an inter-State generating station and has a composite scheme for supply of power to Haryana, Bihar and Odisha, it proposed to approach CERC for resolution of disputes.

26. From the above narration of facts, it is evident that the petitioner has from time to time informed the Haryana Discoms and HPGCL, and the State Government of the events that occurred after execution of the PPAs, which according to the petitioner, were the Force Majeure and Change in Law events affecting the cost of generation of power or its revenue from the power project. HPGCL, acting on behalf of the Haryana Discoms, filed petition before HERC for adjudication whether the events amounted to Force Majeure and Change in Law. Pursuant to the directions of the Haryana Commission, negotiations were carried out by the parties with a view to arriving at some

amicable settlement, though these negotiations did not yield any fruitful result. Therefore, HPGCL and the Haryana Discoms had due knowledge and notice of the facts which are presently relied upon by the petitioner in support of its plea for adjustment in tariff under Change in Law events. From the various correspondence between the petitioner with the Haryana Discoms through PTC and the meetings held on 15.2.2012, 18.6.2012 and 16.7.2012 between the Petitioner No.1 and Haryana Discoms to resolve the issue at the instance of HERC, it can be inferred that the requirement of notice under Articles 12.5.1 and 13.3.1 of the Haryana PPAs has been complied with.

**Issue No.2 : What is the scope of change in law and force majeure provisions in the PPAs?**

27. Article 12 of the PPAs deal with the events of 'Force Majeure' and Article 13 deals with events covered under "Change in Law". Article 12 of the Haryana PPA is extracted as under:

**"Article 12: FORCE MAJEURE**

**12.1 Définitions**

In this Article 12, the following terms shall have the following meanings:

**12.2 Affected Party**

An affected Party means the Procurer or the Seller whose performance has been affected by an event of Force Majeure.

An event of Force Majeure affecting the Haryana STU or an agent of the Procurer, which has affected the Interconnection Facilities or the transmission network beyond the Delivery Point, shall be deemed to be an event of Force Majeure affecting the Procurer. Provided that an event of Force Majeure affecting the CTU or an agent of the CTU, affecting the CTU network upto the Delivery Point will be construed as the Force Majeure affecting the Seller. Provided further that an event of Force Majeure affecting the Project Company will be construed as the Force Majeure affecting the Seller.

Any event of Force Majeure affecting the performance of the Project Company's contractors shall be deemed to be an event of Force Majeure affecting Seller only if the Force Majeure event is affecting and resulting in:

- a. Late delivery of plant, machinery, equipment, materials, spares parts, fuel, water or consumables for the Project; or
- b. A delay in the performance of any of the Project Company's Contractors.

Similarly, any event of Force Majeure affecting the performance of the Procurer's contractor for setting up or operation the Interconnection Facilities shall be deemed to be an event of Force Majeure affecting the Procurer only if the Force Majeure event is resulting in a delay in the Performance of the Procurer's Contractors.

### **12.3 Force Majeure**

A 'Force Majeure' means any event or circumstance or combination of events and circumstances including those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:

#### **i Natural Force Majeure Events:**

Act of God, including, but not limited to lightning, drought, fire and explosion, earthquake, volcanic eruption, landslide, flood, cyclone, typhoon, tornado, or exceptionally adverse weather conditions which are in excess of the statistical measures for the last hundred(100) years.

#### **ii Non- Natural Force Majeure Events:**

##### **Direct :Non-Natural Force Majeure Events**

- (a) Nationalization or compulsory acquisition by any Indian Governmental Instrumentality of any material assets or rights of the Seller ;
- (b) The unlawful, unreasonable or discriminatory revocation of, or refusal to renew, any Consent required by the Seller or any of the Sellers contractors to perform their obligations under the project documents or any unlawful, unreasonable or discriminatory refusal to grant any other consent required for the development/operation of the Project. Provided that an appropriate court of law declares the revocation or refusal to be unlawful, unreasonable or discriminatory and strikes the same down
- (c) Any other unlawful, unreasonable or discriminatory action on the part of an Indian Governmental Instrumentality which is directed against the project. Provided that an appropriate court of law declares the revocation or refusal to be unlawful, unreasonable a discriminatory and strikes the same down.

### **Indirect : Non- Natural Force Majeure Events**

- (a) Any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action ; or
- (b) Radio active contamination or ionizing radiation originating from a source in India or resulting from another Indirect Non Natural Force Majeure Event excluding circumstances where the source or cause of contamination or radiation is brought or has been brought into or near site by the Affected party or those employed or engaged by the Affected Party.
- (c) Industry wide strikes and labor disturbances having a nationwide impact in India.

#### 12.4 Force Majeure Exclusions:

Force Majeure shall not include (i) any event or circumstances which is within the reasonable control of the parties and (ii) the following conditions, except to the extent that they are consequences of an event of Force Majeure:

- (a) Unavailability, late delivery, or changes in cost of the plant, machinery, equipment, materials, spare parts, fuel or consumables for the project;
- (b) Delay in the performance of any contractor, sub-contractors or their agents including the conditions as mentioned in Article 12.2;
- (c) Non-performance resulting from normal wear and tear typically experienced in power generation materials and equipment;
- (d) Strikes or labour disturbance at the facilities of the Affected Party;
- (e) Insufficiency of finances or funds or the agreement becoming onerous to perform; and
- (f) Non-performance caused by, or connected with, the Affected Party's:
  - (i) Negligent or intention acts, errors or omissions;
  - (ii) Failure to comply with an Indian Law; and
  - (iii) Breach of, or default under this Agreement or any Project Documents.

28. The following may be inferred from the above definition of force majeure under the Haryana PPA:



(a) The definition of force majeure is an inclusive one. Though, it enumerates certain events under the headings natural force majeure and non-natural force majeure, it can also include other events or circumstances which adversely affects or unduly delays the affected party to discharge its obligations under the PPA.

(b) The event or circumstance or combination of events or circumstances that wholly or partly prevents or unavoidably delays an affected party from the performance of its obligations under the PPA, and which are not within the reasonable control of the affected party and could not have been avoided if the affected party had taken reasonable care or complied with prudent utility practices shall qualify as force majeure events.

(c) An affected party can be either the seller or the procurers if the performance of their obligations under the PPA is affected by any of the force majeure events.

(d) Any event or circumstance which is within the reasonable control of the parties are included under force majeure exclusions except to the extent they are consequences of an event of force majeure.

29. Next we consider the provisions of change in law in the PPAs. Article 13 of the Haryana PPA dealing with Change in Law provides as under:

**"13: "Change in Law"**

**13.1 Définitions.** 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 cost of or revenue from the business of selling electricity by the Seller to the Procurer under the terms of this Agreement

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” (applicable only in case the Seller envisaging supply from the Project awarded the status of Mega Power Project by Government of India.“

30. According to above provisions, the change in law events broadly covers 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) 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.

(e) 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";

31. During the construction period, all such expenditures which contribute towards the capital cost of the project and which fulfill the conditions of Article 13.1.1 of the PPA shall be admissible under "Change in Law" subject to the conditions laid down in the PPAs.

32. Article 17 of the Haryana PPAs deals with adjudication of disputes between the parties. Article 17.3.1 is extracted as under:

"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 13 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."

33. The consequence of events covered under change in law and force majeure will have impact on tariff admissible under the PPAs and if any dispute arises whether any event or occurrence fulfills the conditions of force majeure or change in law, the same shall be adjudicated by the Appropriate Commission, in this case the Central Commission, as the power project is supplying electricity to more than one State and fulfills the conditions of section 79(1)(b) of the Act.

**Issue No.3 : Whether compensation claims of the petitioners are admissible under Change in Law and force majeure events in terms of the PPAs?**

34. The petitioners have submitted that the power project was conceived pursuant to the MoU executed between the Petitioner No.1 and Government of Odisha. In terms of the said MoU, the power project had to be developed within 60 months from the date of execution of the MoU i.e. by 9.6.2011; a total of 1176.24 acres was to be acquired for the project by Government of Odisha through its designated agency IDCO and handed over to Petitioner No.1 free from all encumbrances; Government of Odisha was to assist Petitioner No.1 to get necessary environmental clearances; the project was contemplated based on domestic coal with coal linkage/allocation being provided by Government of India; and the Petitioner No.1 was to prepare the project milestones. The petitioners have submitted that after signing of the PPA with GRIDCO on 28.9.2006 and Haryana PPA on 12.3.2009, Petitioner No.1 achieved financial closure on 29.5.2009 with projected capital cost of Rs.4540 crore which has subsequently increased by 38.9% or Rs.1767 crore to Rs.6307 crore mostly on account of certain factors which are beyond the control of the Petitioner No.1. Accordingly, the petitioner has claimed the benefits of Force Majeure and Change in Law events during the

construction period in respect of the items mentioned in para 6 above. Though the Commission during the course of the proceedings had asked for certain details about the impact on cost of the project on account of various factors, the Commission is first considering whether the events or occurrences claimed by the Petitioners are covered under Change in Law and Force Majeure. Only in respect of the event or occurrence covered under Change in Law and Force Majeure, the cost details with justifications given by the Petitioners will be considered. The events or occurrences claimed by the Petitioners as Change in Law and Force Majeure have been examined in the succeeding paragraphs in the light of the provisions of the PPAs.

#### **A. Devaluation of the Indian Rupee vis-à-vis the US Dollar**

35. The petitioners have submitted that on account of limited equipment manufacturing capability in India and huge backlog with the country's largest power supply equipment manufacturer, BHEL, the petitioner No.1 decided to enter into an EPC contract with SEPCO of China on 28.8.2008. The off-shore supply part of total EPC cost as per the agreement with SEPCO was CNY 3151 million. The aggregate EPC cost was appraised by the lenders to the project at Rs.3658.40 crore which took into consideration the exchange rates existing at the time of bidding. The petitioners have submitted that at the time of bid submission on 23.11.2007, exchange rate of USD vis-a vis INR was Rs.39.29 per USD. The petitioners have submitted that it was on the basis of the prevailing foreign exchange rate and estimated escalation rate that the capacity charge was quoted at the time of submission of the bid. Further, at the time of submission of the bid, INR was showing trends of appreciation and in fact, during the period between 1998 and 2007, the Indian rupee appreciated by 1% annually, and

between 2006 to 2007 it appreciated by 11.14%. The petitioners have submitted that November 2007 to April 2014, the INR was devalued by 56% against US Dollar and as on April 2014, it was devalued from Rs.39.29 per USD at the time of bidding to about Rs.61.10 per USD. The petitioners have submitted that during the fiscal years 2006-07 and 2007-08, on account of anticipated growth in the economy based on sound economic fundamentals, financial experts were of the unanimous opinion that the INR would appreciate vis-a-vis USD and accordingly, the Petitioner No.1 and PTC had considered the exchange rate at the time of bid submission. The petitioners have submitted that while the Commission had provided a projected Rupee-Dollar devaluation of 0.74% per annum in 2007 and 0.20% per annum in 2008, the actual compounded growth rate (CAGR) of devaluation of INR has been about 6% per annum since 2007. The Petitioners have submitted that the Petitioner No.1 has done everything within its means to mitigate the impact of foreign exchange rate variation on the power project and exposure to off-shore EPC contract denominated by CNY by entering into hedging arrangement, by entering into US letter of credit arrangements for EPC payments to reduce the interest amount as well as the impact of exchange rate variation, and by adopting the process of settling the offshore EPC bills through US Dollar LCs. The petitioners have given a comparison of the estimated cost of EPC offshore deliveries at CERC escalation rate of 0.74% (at the time of bidding) vis-a-vis the cost of EPC offshore deliveries as per the actual rate of foreign exchange till August 2013 and have submitted that the total cost of EPC offshore deliveries comes to INR 19,960 million taking into account the CERC rate of devaluation at 0.74% year-on-year whereas the cost of EPC offshore deliveries on account of actual devaluation comes to

INR 23,717 million. The petitioners vide affidavit dated 31.12.2013 have claimed Rs.445 crore due to unprecedented and unforeseeable devaluation of 35% of INR.

36. The petitioners have submitted that devaluation of INR vis-a-vis USD constitutes force majeure under the Haryana PPA. The petitioners have submitted that in the event the Petitioner No.1 is unable to execute or operate the power project over the term of the PPA, then it will result in stranding of valuable capital that has been deployed in the power generation sector and will prevent the residents of the States of Haryana, Odisha, and Bihar from availing significant benefits. The petitioners have submitted that the power project is for the public good and the Commission should act in a manner which will enable the power project to be implemented by applying the doctrine of public trust and the benefits of the same to be enjoyed by the public at large thereby maximising welfare and securing optimal utilisation of infrastructure projects/public assets created for ultimate public good. The petitioners have submitted that there is an urgent need to restore the project economics through a suitable mechanism that takes into account the changes that have a significant financial impact on the power project.

37. Haryana Discoms have submitted that since the essence of case 1 bidding is that the tariff including all factors are to be delivered at state periphery, the petitioners should have factored all the issues at the time of participation in case 1 bidding and cannot seek revision of tariff on the same grounds.

38. We have considered the submission of the petitioners and respondents. The petitioner was awarded the bid to execute the project on the basis of the competitive

bidding carried out under section 63 of the 2003 Act. Para 4.3 of the Bidding Guidelines provides as under:

"4.3 Tariffs shall be designated in Indian Rupees only. Foreign exchange risks, if any, shall be borne by the supplier. Transmission charges in all cases shall be borne by the procurer.

Provided that the foreign exchange rate variation would be permitted in the payment of energy charges (in the manner stipulated in para 4.1 (iii) if the procurer mandates use of imported fuel for coastal power station in case-2. Provided further that the foreign exchange rate variation would also be permitted in the payment of energy charges (stipulated in para 4.11 (iii) if the bidder chooses to supply power using domestic gas of RLNG or both or imported coal for long term procurement under Case-1."

Thus, as per the Bidding Guidelines, the tariff shall be designated in INR. The only exception is in case of the projects covered under Case 2 bidding where the procurers mandate use of imported coal. The power project of the petitioners is neither a Case 2 project nor the procurers have mandated use of imported coal. Therefore, as per the bidding guidelines, the bidders are required to quote in INR only and if any foreign exchange cost is involved for purchase of equipments and materials, the same should be suitably factored by the bidders in the bid. Thus, the procurers are insulated from any foreign exchange risk and it falls within the exclusive domain of the bidder.

39. HPGCL invited bids for procurement of power under Case 1 bidding. As per para 2.7.2.1 of the RfP document issued by HPGCL, the bidders were required to quote tariffs under Stream 1 and Stream 2 while preparing and submitting financial bid. Under Stream 1, the bidders were required to quote a fixed tariff for both Capacity Charge and Energy Charge during the term of the PPA. Under Stream 2, the bidders were required



to quote firm Capacity Charge or a combination of escalable and non-escalable Capacity Charges, and firm Energy Charge or a combination of escalable and non-escalable Energy Charges. Para 2.4.1 of the RfP issued by HPGCL provides for the following:

“2.4 Tariff: The tariff shall be as specified in the PPA and shall be payable in Indian Rupee only. The Bidder shall quote Quoted Tariff for each Contract Year during the term of the PPA as per Format 1 of Annexure-2.

Thus as per the above provision, tariff is to be quoted by the bidder in INR only. Further, Article 2.7.2.4 the RFP requires the bidders to quote an all inclusive tariff:

“2.7.2.4 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 Bidder and all costs involved in procuring the inputs (including statutory taxes, duties, levies thereof) must be reflected in the Quoted Tariff”.

Thus under above provisions, it is the responsibility of the project developer to factor in the capital and operating cost including statutory taxes, levies and duties in the quoted tariff for supply of power to the procurers. Moreover, the bidder is required to quote in INR only. The petitioner has been selected for supply of power to Haryana Discoms on the basis of Stream 1 tariff quoted by it i.e. non-escalable capacity charges and non-escalable energy charges. Therefore, the petitioners have assumed all risks with regard to the capital cost and operating cost of the project and Haryana Discoms are responsible only to the extent of payment of charges in accordance with the PPAs for the power supplied to them. The foreign exchange risk, if any, has been exclusively assigned to the bidder, in this case the petitioners and therefore, the petitioners were expected to take necessary actions to build in sound economics in the bid including the

impact of foreign exchange rate variation in order to discharge the obligations under the PPA.

40. The petitioners have submitted that on account of limited manufacturing capability in the country and the huge backlog with BHEL, the petitioners awarded the EPC contract to SEPCO which had a component of CNY 3151 million. Further, the petitioners have submitted that they had considered the CERC escalation rate of 0.74% prevalent at the time of bidding to arrive at the estimated cost of EPC off-shore deliveries. However, on account of the devaluation of INR, the project capital cost has gone up making the project economics unsustainable. In our view, Haryana Discoms were not parties to any of these decisions of the petitioners and therefore, the consequences of such decisions cannot be fastened to the Haryana Discoms in terms of the PPA. As rightly pointed out by Haryana Discoms, in terms of the Case 1 bidding, the petitioners have accepted to deliver power at a particular tariff at the State periphery and after assuming all risks, the petitioners should have taken into account all factors including devaluation of INR. Even while quoting in INR, the petitioner had the option to insulate itself from the foreign exchange rate variation by a pragmatic mix of escalable and non-escalable elements. Since the quoted tariff was invited in INR only, it was the clear intention of Haryana Discoms that the bidder should factor in the foreign exchange component of the project including foreign exchange rate variation in the bid while quoting the tariff and the petitioners/PTC by quoting the tariff in INR and that too, non-escalable capacity charge and energy charge, have clearly assumed the foreign exchange risk and have insulated Haryana Discoms from the impact of appreciation/depreciation of INR.

41. The Hon'ble Supreme Court in M/s Dhanrajmal Gobindram Vs. M/s Shamji Kalidas & Co. AIR 1961 SC 1285 has observed that “where reference is made to “force majeure”, the intention is to save the performing party from the consequences of anything over which he has no control.” Let us examine the provisions of force majeure in the Haryana PPA. Definition of force majeure is an inclusive one. It enumerates certain events under the headings natural force majeure and non-natural force majeure events. The definition says that any event or circumstance or combination of events or circumstances including those enumerated that wholly or partly prevents or unavoidably delays an affected party from the performance of its obligations under the PPA and if such events and circumstances are not within the reasonable control of the affected party and could not have been avoided if the affected party had taken reasonable care or complied with prudent utility practices. The petitioners have claimed devaluation of INR as a force majeure event affecting the project economics and thereby preventing the petitioners to discharge their obligations under the PPA. First of all, devaluation of INR is not covered under any of the events enumerated under the headings ‘natural force majeure events’ and ‘non natural force majeure events’. Further, devaluation of INR vis a vis USD has not prevented or unavoidably delayed the performance of the obligations of PTC/Respondent No.1 under the PPA. Devaluation of INR has only resulted in additional financial burden on the Petitioner No.1 on account of payment to the EPC contractor than what was originally envisaged. The petitioners have submitted that Petitioner No.1 had taken actions to minimise the impact of devaluation of INR by entering into hedging arrangement, US letter of credit arrangements for EPC payments to reduce the interest amount as well as the impact of exchange rate variation, and by

adopting the process of settling the offshore EPC bills through US Dollar LCs. It is pertinent to mention that the petitioners have taken action to minimise the impact of devaluation of INR on the project as the petitioners are aware that in terms of the PPA, managing foreign exchange risks falls within the exclusive domain of the Petitioners. Hon'ble Supreme Court in *Alopi Parshad & Sons Ltd. vs. Union of India* [AIR (1960) SC 588] has held that wholly abnormal rise or fall in prices or sudden depreciation of currency do not by themselves result in frustration of contract. The relevant portion of the judgement is extracted as under:

"The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate - a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet this does not in itself affect the bargain they have made. If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point – not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation..."

In accordance with the above judgement, a sudden depreciation in currency does not by itself result in frustration of the contract. The parties should have envisaged at the time of entering into contract that they would not be bound by a fundamentally different situation on account of occurrence of such event, in this case depreciation of INR. Since the objective of force majeure clause in a contract is to save a party from performance of anything over which it has no control, it is necessary that the parties should have envisaged depreciation of currency under Force Majeure clause in order to save the affected party from the consequences of its occurrence. Perusal of the Haryana PPA clearly shows that the parties had never contemplated devaluation of INR as an event of force majeure. Under Article 12.4.(a) of the Haryana PPA provides that "unavailability,

late delivery or change in the cost of the plant, machinery, equipment, materials, spare parts, fuel or consumables for the project” shall not be considered as force majeure event unless there consequence of an event of force majeure. We have already come to the conclusion that depreciation of INR is not an event of force majeure and therefore, the impact of the depreciation of INR on the plant, equipment, machinery and spare parts etc. shall not be considered as an event of force majeure. In our view, the petitioner is not entitled to any relief on account of depreciation of INR under force majeure in terms of the Haryana PPA.

**B. Delay in completion of land acquisition for Main Plant, Merry Go Round and Direct Approach Road:**

42. The petitioners have submitted that the process of acquiring land for the main project area began in July, 2007 with the issue of relevant notice under Section 4 (1) of the Land Acquisition Act, 1894. A total of 823.32 acres was being acquired for the main plant area. The agreement with the EPC Contractor (SEPCO) was executed on 28.8.2008 and the Notice of Proceed (NTP) was issued on 27.5.2009. As per the EPC Agreement, the total land for the project was to be handed over to EPC Contractor not later than two months from the date of issue of NTP and the project completion schedule as committed by the contractor was premised on this critical obligation to the fulfilled by the petitioner. Due to circumstances and reasons beyond the control of the Petitioner No.1, the possession of the major portion of land required for the main project area was handed over to the petitioner only by 11.2.2010. The petitioners have further submitted that there was delay in acquisition of 32.55 acres of land spanning across 206 plots which comprised the main project area including the BTG area whose

possession was given as late as December 2012. The petitioners have submitted that clearance for diversion of a major portion of total forest land area of 78.03 acres to be used for Coal Handling Plant and other critical portions of the power project was granted on 7.1.2011 and the possession of the land was handed over to the Petitioner No.1 in December 2012. The petitioners have submitted that on or around 23.3.2012, Writ Petition No. 5559 of 2012 was filed before the Hon'ble High Court of Odisha challenging the land acquisition for the project and on 6.4.2012, the High Court passed an order for maintaining status quo with regard to land acquisition which was vacated on 12.10.2012. The petitioners have submitted that this affected the construction of the railway line (MGR) which was a crucial component of the project to transport coal. The petitioners have further submitted that in 2012, five writ petitions were filed before the Hon'ble High Court of Odisha challenging the land acquisition proceedings covering about 3 acres of land which was part of the land acquired by IDCO for the Direct Approach Road (DAR). Since the Hon'ble High Court vide its orders dated 28.6.2012, 23.7.2012 and 25.7.2012 passed status quo orders in respect of possession of land, the Petitioner No.1 could not take possession of the said land. The petitioners have submitted that had the land been acquired and handed over in time, EPC work would have started by 7.4.2009 in order to meet the SCOD of 7.11.2011 as per Haryana PPA. The petitioners have submitted that EPC work could start only from 11.2.2010 after a major portion of the main project area (823 acres of total 1167 acres) was handed over by IDCO after a delay of 10 months. The petitioners have submitted that the timeline for possession of land for the project is recognized as a very critical aspect impacting the project construction in the bids including Haryana PPA. The petitioners have submitted

that as per Article 3.1.2 of the Haryana PPA, possession of the land for the project is a condition subsequent which has to be completed within 12 months from the effective date of the PPA which works out to 6.8.2009. Further, the possession of land is a condition under the LOA for coal linkage granted to GKEL which provides that the LOA holders have to obtain possession of land for the main plant and coal handling plant within 18 months.

43. The petitioners have submitted that in the absence of timely acquisition and availability of land for the project, it was physically impossible to Petitioner No.1 to commence work on the project in an integrated manner as envisaged in the project development plan based on which the project schedule was agreed with the EPC contractor. The petitioners have submitted that had these delays not occurred, Petitioner No.1 would have been in a position to complete the project and achieve COD well in time to meet the commitment under Haryana PPA which would have ensured that it was not affected by the unprecedented, unforeseen and uncontrollable devaluation of the Indian Rupee. The petitioners have submitted that the delay in land acquisition was a precipitating factor that aggravated the impact of devaluation of INR on the project economics. Haryana Discoms have denied the claims of the petitioners.

44. We have considered the submissions of the petitioner and Haryana Discoms. The petitioners have submitted that the delay in land acquisition by IDCO for the Main Power Project, MGR and DAR are events of force majeure which were beyond the control of the Petitioner No.1 and since such delay has affected the project acquisition

schedule, it has not only resulted in escalation of cost but has aggravated the impact of devaluation of INR on the overall cost of the project. It is to be noted at this point that the tariff of part of the capacity of the project has been determined under section 62 of the Act in accordance with the tariff regulations issued by the Commission while the tariff for the major portion of the remaining capacity of the project has been discovered through competitive bidding and adopted under section 63 of the Act. While considering the claim of the petitioner for time and cost overrun on account of delay in land acquisition under section 62 of the Act, the Commission in its order dated 12.11.2015 in Petition No. 77/GT/2013 decided as under:

“26. Though the petitioner has submitted that the Project land could not be acquired by the Government of Odisha / IDCO and handed over to the petitioner in time for reasons such as delays due to land acquisition related litigations and resistance from locals, no documentary evidence has been furnished by the petitioner in support the same. In the absence of any proper justification, it cannot be held that the delay due to land acquisition was attributable to the Govt of Odisha/IDCO. In our view, there has been slackness on the part of the petitioner in coordinating with the District Administration to ensure the timely completion of the process of acquisition of land for main plant. In this background, we hold that the said delay in the acquisition of land cannot be said to be beyond the control of the petitioner and the petitioner is responsible for the said delay.

45. Under the Competitive bidding Guidelines, the distribution companies can purchase power through competitive bidding either through Case 1 bidding or Case 2 bidding. In Case 1 bidding, the seller assumes all risks including that of land and fuel arrangement whereas under Case 2 bidding, the procurers are responsible for arranging the land and other permits and consents, and fuel linkage. For that reason, in the PPA for Case 2 bidding, there is clear provision for compensation on account of rise in the cost of land and resettlement and rehabilitation under Change in Law. Such provisions are conspicuously absent in case of Case 1 bidding which means that the



Seller assumes all risks pertaining to land. As regards the claim of the petitioners to treat the delay in acquisition of land as a force majeure event under the PPA, the Commission is of the view that it is the responsibility of the petitioner to acquire the land for the project. Whether the petitioner is directly acquiring the land or through the State Government, the petitioner is required to ensure that the project is completed in time so that supply of power to the procurers is made as per the timeline stipulated in the PPAs. The petitioners have submitted that acquisition of land is a condition subsequent to be fulfilled by the Petitioner No. 1 under the Haryana PPA. We notice that under Article 3.1.2.vii of the Haryana PPA, “the project company shall have taken possession of the land for the power station” is a condition subsequent to the fulfilled by the Petitioner No. 1 within 12 months from the effective date or 14 months from the date of issue of letter of intent, whichever is later, unless such completion is affected due to the procurers’ failure to comply with its obligations under Article 3.1.4 of the PPA or by any force majeure event or if any of the activities is specifically waived in writing by the procurer. Article 3.1.4 of the Haryana PPA deals with the procurers’ responsibility to ensure availability of inter-connection point facility and evacuation of power at the delivery point and therefore, the provision is not applicable in this case. We have already held that delay in acquisition of the land is not a force majeure event. There is nothing on record to show that Haryana Discoms have waived the requirement of possession of land by the Petitioner No. 1 within the stipulated time mentioned in the PPA. Similarly, acquisition of land is a milestone to be fulfilled by Petitioner No.1 in terms of the LOA before signing Fuel Supply Agreement and in terms of the Haryana PPA, Haryana Discoms did not assume any responsibility with regard to the arrangement of fuel. From

the foregoing discussions, it emerges that it is the responsibility of the petitioners to ensure that land is acquired in time so that the project is implemented in order to supply power from the date of SCOD. In any case, the Petitioner No.1/PTC have quoted non-escalable capacity charges and non-escalable energy charges and thereby, have assumed all risks about project execution including acquisition of land and have insulated the Haryana Discoms from any escalation in the capital cost over and above that assumed in the bid. In our view, the delay in acquisition of land cannot be covered under force majeure and therefore, no relief on this account can be granted to the petitioners.

**C. Change in VISA Policy by the Government of India:**

46. The petitioners have submitted that Notice to Proceed was issued to SEPCO on 27.5.2009 to mobilize work force at the project site in June 2009 but Change in Visa Policy by Government of India led to disruption and delay in project schedule. The petitioners have submitted that Ministry of Commerce and Industry, Govt. of India, vide circular dated 20.8.2009 clarified that all the foreign nationals who have come to India under a Business Visa for execution of the projects should leave the country on expiry of existing VISA or by 31.10.2009, whichever was earlier. The petitioners have submitted that subsequently, the Ministry of Labour and Employment introduced a new VISA category "Project VISA" for foreign nationals coming to India for execution of projects in the power and steel sectors. According to the new VISA Policy, the maximum number of foreign nationals who could be granted visa for coming to India for execution of a project was capped. The petitioners have submitted that on account of implementation of Project VISA Policy and restrictions on the maximum number of

foreign nationals to be deployed, the number of experienced personnel which SEPCO could deploy at the project site was drastically reduced from the original estimates and balance workforce had to be sourced from within the country. The Petitioners have submitted the scheduled deployment and actual deployment of manpower by SEPCO as under:

<b>Year</b>	<b>Deployment of manpower</b>	<b>Scheduled Re-worked Scheduled Deployment of Manpower</b>	<b>Actual Deployment of Manpower</b>
2009	1100	138	14
2010	3950	517	61
2011	4250	577	132
2012	1000	419	190

47. The petitioners have submitted that on account of the requirements to be complied with for Project VISA, SEPCO was unable to deploy the requisite number of experienced foreign workers and EPC had to be subcontracted to Indian sub-contractors who were not familiar with the process and machinery leading to delay in completion in EPC work. The petitioners have submitted that change in Visa Policy is not only a force majeure event but is also in the nature of change in law which has had an adverse impact on the financial health of the power project.

48. Haryana Discoms in their reply dated 30.1.2015 have submitted that Govt. of India only placed stricter implementation of VISA rules for keeping foreigners out of semi-skilled jobs. The Petitioner No. 1 gave the EPC contract to the Chinese Company

and the work force employed by the EPC was under Business VISA, not under the Employment VISA which was a gross violation of the Indian VISA Policy. Haryana Discoms have submitted that the Petitioner No.1 who in gross violation of VISA Policy employed semi-skilled/unskilled workers cannot seek compensation initially under force majeure and subsequently under change in law. The change in VISA Policy could not be construed as change in law and the claim made under the same are wholly untenable and ought to be rejected. Haryana Discoms have submitted that for the issues relating to the delay in the execution of the project, the Petitioner No.1 can seek only time extension and not any tariff under Haryana PPA, subject to the consideration of the claim under Force Majeure or Change in Law by the Appropriate Commission.

49. We have examined the matter. It is observed that the Ministry of Commerce and Industry, Government of India, vide letter dated 20.8.2009 issued clarification on the grant of VISA to foreign nationals on project based assignment. The relevant portion of the said letter is extracted as under:-

“This is to inform that various industries/organizations have been seeking clarifications from the Government regarding VISA provisions for foreign personnel coming for execution of projects/contractual works in India.

2. In this context, the matter has been carefully examined and the following clarifications are hereby communicated:-

- (1) Business VISAs should be issued only to a foreign businessman who wants to visit India to establish an industrial/business venture or to explore possibilities to set up industrial business venture in India or wants to purchase/sell industrial products strictly as per the norms specified in the VISA Manual for Business VISAs.
- (2) Foreign nationals coming for executing projects/contracts in India do not fulfill the conditions laid down for grant of Business VISA. Hence, Business VISAs will not be granted to such foreign nationals.

- (3) All such category of foreign nationals coming for executing projects/contracts will have to come only on Employment Visa. Grant of Employment VISA should be in strict conformity with the provisions in the VISA Manual, salient points of which inter alia include:-
- (a) Employment VISA should be granted only for skilled and qualified professional or to a person who is being engaged or appointed by a company, organization, and industry or undertaking etc. In India on contract or employment basis at a senior level, skilled position such as technical expert, senior executive or in managerial position etc.
  - (b) Request for Employment VISAs for jobs for which a large number or qualified Indians are available should not be considered.
  - (c) Under no circumstances, should an Employment VISA be granted for routine, ordinary, or secretarial/clerical jobs.
- (4) Such foreign nationals who are already in the country on Business VISA and engaged in executing project/contracts should leave the country on expiry of their existing VISAs or within a period of 3 months i.e. by 30.9.2009 (by which time the VISA validity will expire), whichever is earlier. No extension will be granted. If they are required to come again, they must reply to the Indian Missions for appropriate Visa. As stated in (3) above, grant of Employment VISA be in strict conformity with the provisions in the VISA Manual.”

The above letter was issued by way of clarification to the VISA provisions applicable to the foreign nationals coming to India for execution of projects. It has been clarified that foreign officials coming for executing projects/contracts in India do not fulfill the conditions laid down for grant of Business VISA and hence, Business VISAs would not be granted to such foreign nationals. It was further clarified that all such foreign nationals coming for execution of the contracts/projects would be granted Employment VISA as per VISA Manual. In our view, the clarifications by Ministry of Commerce and Industry aimed at stricter implementation of the subsisting VISA Policy and therefore, the said clarification cannot be considered as change in law.

50. Ministry of Labour and Employment vide its letter dated 8.9.2009 introduced a new and specific VISA regime known as "Project (P) VISA". The relevant part of the said letter is introduced as under:

"As India is a labour surplus country and there is no dearth of unskilled and semi-skilled persons in the country and, therefore, no employment visa should be granted to this category of persons at any cost.

In case of projects of public sector undertakings, the component of foreign highly skilled and professionals should also be indicated in the project itself. Based on the experience of the Ministry, it is suggested that such highly skilled and professional persons on projects should not normally be more than 1% of the total workforce and, therefore, the following formulation is proposed:

- (a) A company shall not be permitted to bring any unskilled, semi-skilled or skilled persons for execution of the projects.
- (b) Highly skilled and professionals may be granted employment visas to the extent of 1% of the total persons employed on the project subject to a maximum of 20. However, if the 1% of the total number of persons working on the project works out to be less than 5, the Company could be permitted to bring 5 such persons.
- (c) The persons must have technical degree or diploma after 10 or 12 years of schooling indicating their field of specialization and specialized job they would do on the project.
- (d) If the project is very big and 1% exceeds 20, the company will have to send the details of all such persons with the details of technical qualifications and skills and nature of specialized job which they are required to do on the project.

Only applications of persons falling in para 3(d) above seeking visas, forwarded to the Ministry of Labour & Employment for clearance. All other applications falling in category of 1% subject to maximum of 20 may be cleared by the Missions at their level."

51. As per the above provisions, only highly skilled and professionals may be granted employment VISAs to the extent of 1% of the total persons employed on the project subject to a maximum 20 and where 1% of the total persons employed exceeds 20, the company is required to send all the details including the applications of the

persons seeking VISAs to Ministry of Labour & Employment for clearance. The petitioners have submitted that on account of the letter of Ministry of Labour & Employment, Petitioner No.1 in consultation with SEPCO reworked the scheduled deployment of manpower as per the details given in para 44 above and actual manpower deployed was almost one-fifth of the reworked manpower which delayed the execution of the project. We examine whether the capping of the number of foreign nationals coming on employment VISA for execution of the project has delayed the Petitioner No.1 in discharging its obligations under the Haryana PPA. The following provisions under Article 12 of Haryana PPA are relevant:

“Any event of Force Majeure affecting the performance of the Project Company's contractors shall be deemed to be an event of Force Majeure affecting Seller only if the Force Majeure event is affecting and resulting in:

- c. Late delivery of plant, machinery, equipment, materials, spares parts, fuel, water or consumables for the Project; or
- d. A delay in the performance of any of the Project Company's Contractors.”

On account of the requirement of arranging employment VISA for the highly skilled and professionals for execution of the project and arranging sub-contractors in India familiar with the EPC work on account of cap on foreign personnel for execution of the projects, the EPC contractor took time to mobilise the resources to start the work. Time taken for mobilization of resources was beyond the control of petitioner's contractor and in terms of the above provisions, Petitioner No.1 was affected by force majeure. It is pertinent to mention that in Petition No. 77/GT/2013 relating to the same power project, the Commission while determining the tariff under section 62 of the Act, vide order dated 12.11.2015 decided as under:

“35.....However, considering the fact that the Change in VISA Policy had caused some initial hiccups in the reorganisation/remobilisation/rescheduling of man power resources after acquiring the land for the project in February, 2010, the total delay of 3 months only is condoned and allowed considering the difficulties faced by the petitioner for the period from 11.2.2010 to 10.5.2010, as against the claim of petitioner for 10 months in Unit-I, 11 months in Unit-II and 13 months in case of Unit-III. In our view, the delay for the said period of three months for the reasons stated is not attributable to the petitioner and is beyond the control of the petitioner. Accordingly, in terms of the principles laid down by the Tribunal in the judgment dated 27.4.2011 [(situation (ii)], the total delay of 3 months is condoned and the generating company is given the benefit of the additional cost incurred due to time overrun. However, the LD recovered from the contractor and the insurance proceeds, if any, would be considered for reduction of capital cost.”

In terms of the above order, we hold that the Petitioner No.1 was affected by force majeure event for a period of three months on account of the time taken for mobilization of resources to start execution of the work on the project, in due compliance with the requirement of Project VISA issued by Ministry of Labour and Employment.

52. Next we consider the effect of such force majeure events in terms of Haryana PPA. Under Article 12.7.(b) of the PPA, “both parties shall be entitled to claim relief in relation to a Force Majeure Event in regard to their obligations including but not limited to those specified under Article 4.5.” Article 4.5.1(b) of the PPA provides that in the event that the contracted capacity cannot be commissioned by its scheduled Commercial Operation Date because of Force Majeure Event, the Scheduled Connection date and Expiry Date shall be deferred ‘on day for a day’ basis to permit the Seller, through the use of due diligence, to overcome the effect of force majeure events affecting the seller. Article 4.6.1 of the PPA says that if the contracted capacity is not commissioned by Scheduled Commercial Date for reasons other than those mentioned in Article 4.5.1, then the seller will be liable to the procurers the liquidated damages for



the delay in such commissioning. As per the provisions of the PPA, the force majeure event affecting the contractor of the Petitioner No.1 for three months on account of the time taken to mobilize the resources in compliance with the requirement of Project VISA will result in extension of SCOD by three months, without any liability of Petitioner No.1 to pay liquidated damages to Haryana Discoms for the corresponding period. The claim of Petitioner No.1 for compensation in tariff for the period of three months during which the Petitioner No.1 was affected by force majeure is not covered under any of the provisions of the PPA and therefore, the claim on this account is disallowed.

**D. Increase in Capital Cost on account of force majeure events**

53. The petitioner has submitted that the aggregate increase in capital cost on account of force majeure events during construction period is Rs.861.67 crore. They include the following:

- (a) The original appraised cost of land was Rs.73 crore. The actual expenditure on acquisition of the land for the project was Rs.93.55 crore. There has been an increase of Rs.20.55 crore in the cost of land on account of the increase in land acquisition rate.
- (b) IDC has risen from Rs.431.00 crore to Rs.782.90 crore due to increase in capital cost in rupee term on account devaluation of INR, delays in project completion on account of land acquisition issues and changes in VISA policy, and major delays in construction activity of Merry Go Round system and Direct Approach Road.

(c) Interest rate of 12% was considered for financial closure of the project.

However, the interest rates had increased significantly and the interest rates applicable for the project increased to 14% in keeping with the trend.

(d) Due to delay in the project, GKEL has incurred a sum of Rs.112.04 crore towards salary and operating cost. Further GKEL has incurred Rs.35.37 crore towards professional and consultancy charges.

54. We have already held in the earlier part of this order that devaluation of INR, delay in acquisition of land for the main project, MGR and ADR are not covered under force majeure. The Petitioner No.1 is affected by force majeure only for a period of three months on account of the time taken by the EPC contractor to mobilise the human resources, in compliance with the Project VISA requiring the companies to deploy foreign experts and professionals with Employment VISA for execution of the projects. In terms of the provisions of Article 4.5.1 read with para 4.6.1 of the PPA as discussed in para 50 above, the petitioner is entitled to extension of SCOD only for the period it was affected by force majeure in addition to waiver of penalty for the corresponding period. In view of the above discussions, the claims of the petitioner for monetary compensation for increase in capital cost on account of devaluation of INR, delay in acquisition of land for the main project, MGR and IDR, and delay caused on account of compliance with VISA Policy are disallowed.

**E. Change in the model Fuel Supply Agreement (FSA) issued by Coal India Limited (CIL)**

55. The petitioners have submitted that the power project was conceptualised on certain basic assumptions which were based on the existing policies of Government of India. The petitioners have submitted that the project was conceived based on domestic coal to be sourced by way of the coal linkages and share of coal from the captive coal blocks. The petitioners have submitted that on 18.10.2007, Government of India issued the New Coal Distribution Policy which assured power utilities to be supplied 100% of the fuel quantity as per the normative requirement. According to the petitioners, the assured supply of 100% of the coal requirement formed the basis for determining the project economics including the tariff at which power could be supplied under the Competitive Bidding Regime. However, on 17.2.2012, Ministry of Coal, Government of India advised CIL that for power utilities which have been commissioned after 31.3.2009, CIL should enter into FSAs with those utilities which have long term PPAs with distribution companies. This was followed by a new model FSA issued by CIL on 19.4.2012 which substantially altered the terms and conditions of NCDP. Some of the deviations noted by the Petitioners were: no penalty on CIL if the quantity of coal supplied is lesser than 100% but at least 65% of the annual contracted capacity; CIL had the option of supplying upto 15% of the coal by way of imported coal; and supply of coal was limited to the percentage of generation covered under long term PPAs with distribution companies. The petitioners have submitted that the FSA issued by CIL was a significant shift in the fundamental basis with regard to the supply of coal that had a cascading effect on the project. The petitioners have submitted that Petitioner No.2 alongwith five other entities were allocated Rampia and Dipside Rampia coal block and

a joint venture company was formed by the allottees in the name of Rampia Coal Mine and Energy Private Limited (RCMEPL). Though RCMEPL has taken all necessary initiatives under its control, on account of the non-issue of Prospecting Licence, the coal block cannot be developed which is beyond the control of the Petitioners. The petitioners have submitted that the non-availability of coal from the Rampia coal block coupled with the changes in the FSA which are material deviations from the NCDP has detrimentally affected the business of Petitioner No.1 leading to fundamental change in project economics by way of substantially adverse business and financial impact on its operations. The petitioners have submitted that the deviations and changes in NCDP are clearly factors which were unforeseen and beyond the control of the petitioners and accordingly, amount to force majeure. Further, the petitioners have submitted that as the changes and deviations are a direct result of government decision and directives and therefore, they amount to change in law.

56. The petitioners have submitted that the start-up costs have increased by Rs.92.08 crore. The petitioners have submitted that at the time of financial closure, the start-up cost was estimated to be Rs.33.61 crore which was based on the assumption that full quantity of coal required would be provided under the coal linkage granted to the Petitioner No.1. The petitioners have submitted that Petitioner No.1 required 3.2 lakh tonnes of coal for commissioning of the three units of Stage 1 of the power project. Mahanadi Coalfield Limited vide a MoU dated 19.7.2012 agreed to grant only 50,000 tonnes of coal out of which 20000 tonnes would be required to prepare the coal bed and only 30000 tonnes would be usable. Consequently, Petitioner No.1 would have to

procure 2.9 lakh tonnes of coal from the open market at an approximate cost of Rs.58.31 crore. The petitioners have further submitted that increase in other components of the start-up cost like secondary fuel, start-up power, start-up water and electricity cess led to an increase of cost by Rs.33.77 crores. The petitioners have submitted that since the assured quantity of coal had been reduced, Petitioner No.1 was required to meet the balance coal requirement through either e-auction coal or through imported coal which led to increase in cost. The petitioners have submitted that in order to receive the imported coal, Petitioner No.1 had to add a wagon tippler to the original MGR Rail Plan in addition to the two separate tracks which had to be made in order to accommodate the wagon tippler and this resulted in an additional expenditure of Rs.112.09 crore. The petitioners have submitted that the initial capital cost of coal handling plant was included in the EPC contract. Due to the need to use the imported coal, Petitioner No.1 had to change the design of the Coal Handling Plant to incorporate the coal handling system to meet the requirement of procuring imported coal which led to an increase of Rs.23.12 crore. The petitioners have submitted that the aggregate impact on account of changes in the coal distribution policy and resultant changes in the assured quantity of coal proposed to be made available to Petitioner No.1 is a change in law in terms of Article 13 of the Haryana PPA for which Petitioner No.1 is required to be compensated.

57. This issue of deviation from NCDP was discussed in the order dated 3.2.2016 in Petition No. 79/MP/2013. Relevant paras are extracted as under:

“46. GEL was issued a Letter of Assurance by Ministry of Coal on 20.9.2007 on normative basis for 500 MW capacity. It was made clear in the LOA that CIL

would issue Letter of Assurance in terms of the provisions of New Coal Distribution Policy (NCDP) which was under issue at that point of time. PTC while submitting the bid on behalf of GEL submitted the LOA dated 20.9.2007 issued in favour of GEL in support of proof of fuel arrangement. The New Coal Distribution Policy was notified by Government of India on 18.10.2007. Para 2.2 and 7.2 of the NCDP provided as under:

**“2.2 Power Utilities including Independent Power Producers (IPPs)/Captive Power Plants(CPPs) and Fertiliser Sector**

100% of the quantity as per the normative requirement of the consumers would be considered for supply of coal, through Fuel Supply Agreement (FSA) by Coal India Limited (CIL) at fixed prices to be declared/notified by CIL. The units/power plants, which are yet to be commissioned but whose coal requirements has already been assessed and accepted by Ministry of Coal and linkage/Letter of Assurance (LOA) approved as well as future requirements would also be covered accordingly.

7.2 The FSAs would cover 100% of normative coal requirements of the Power Utilities, including Independent Power Producers (IPPs) and Captive Power Plants (CPPs), Fertiliser units and 75% of normative coal requirement of other consumers.”

NCDP further provided that in order to meet the shortfall in domestic requirement of coal, CIL might have to import coal as per the requirement from time to time, if feasible and would adjust the overall price of coal accordingly. Thus, under the NCDP, it became the responsibility of CIL or its subsidiaries to meet full requirement of coal under FSAs even by resorting to imports, if necessary to the extent of shortfall.

47. GEL was also allocated a captive coal blocks with 5 others vide letter dated 6.11.2007. Subsequently, GEL was approved by SLC-LT for issue of LOA for tapering linkage for 550 MW in accordance with NCDP since development of coal block was taking time. LOA for coal linkage for 500 MW was issued on 25.7.2008 for 2.14 million tonnes of coal per annum as per normative requirement of the plant. Subsequently, LOA was issued for 2.384 million tonnes per annum of F grade coal for 550 MW capacity. The LOAs were valid for a period of 24 months and FSAs were to be signed within 3 months from the expiry of validity of LOAs. It has been clearly stipulated in the LOAs that “in the event that the incremental coal supplies available with the Assurer (after meeting out the commitments already made) is less than the incremental coal demand, such incremental availability shall be distributed on pro-rata basis and balance quantity of coal requirement shall be met through imported coal available with the Seller, which too shall be distributed on pro-rata basis.” Thus the LOAs which were issued in pursuance to NCDP clearly provide that in the event of shortage of coal, the requirement shall be met through import of coal. GEKL and Mahanadi Coalfield entered into FSA on

26.3.2013. The FSA provides for supply of annual contracted capacity of 18.19 lakh (1.819 million) tonnes of coal from any source/coalfield of MCL proportionate to the 425 MW generation capacity covered under the long term PPA with DISCOM/PTC having long term back to back PPA with DISCOM. Para 4.3 of the FSA provides that in case the Seller is not in a position to supply the scheduled quantity of coal from the sources indicated, the seller shall have the balance quantity of coal through import which shall not exceed 15% of the ACQ in the year 2012-13, 2013-14 and 2014-15, 10% of the ACQ in the year 2015-16 and 5% of the ACQ for the year 2016-17 and onwards.

48. NCDP is a policy statement of Government of India with regard to supply of coal. NCDP clearly provides that in case of shortage in supply of coal by CIL or its subsidiaries, the shortfall will be made up through import. The LOAs issued to GEL/GEKL also provided that shortfall would be made through import. Similarly, the FSA provided that shortfall in supply of coal by CIL or its subsidiaries would be made through import. Therefore, meeting part of the coal requirement through import has been provided in NCDP and has been reiterated through the LOAs and FSA in favour of GEKL. It is significant to note that the petitioner has long term PPAs with Haryana Discoms and the FSA clearly provides that ACQ of 1.819 million tonne is proportionate to the capacity tied up under long term PPA with Discoms/PTC having long term back to back PPA with Discoms. Thus, coal for supply of power to Haryana Discoms is secured through the FSA. In so far as captive coal block is concerned, the petitioner was granted tapering linkage of 550 MW on account of delay in development of captive coal block. The petitioner has not disclosed in the petition whether the FSA for supply of coal covered under the LOA for tapering coal linkage has been signed or not.

49. It is significant to note that the petitioner as an IPP has entered into PPAs with Haryana Discoms for supply of power from part of its capacity under Case 1 bidding. As per Para 2.7.2.4 of the RfP issued by HPGCL, the petitioner was required to quote an all inclusive tariff. The said para provides for the following:

“2.7.2.4 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 Bidder and all costs involved in procuring the inputs (including statutory taxes, duties, levies thereof) must be reflected in the Quoted Tariff”.

Under Case 1 bidding, it is the responsibility of the project developer to arrange for coal and the project developer is merely required to indicate the coal linkage in its bid in support of it being a serious bidder to supply power on sustained basis. The procurer does not take any responsibility in so far as fuel is concerned. Therefore, Haryana Discoms are responsible only to the extent of

payment of charges in accordance with the PPAs for the power supplied to them.”

58. It is clearly established in the order dated 3.2.2016 that meeting part of the requirement through imported coal was envisaged in NCDP, LOAs issued to the petitioner and the FSA signed by the petitioner. Therefore, it will not be appropriate to say that provision in the FSA regarding supply of imported coal was a new requirement which emerged after the bid deadline and therefore, qualifies under change in law. The petitioner having quoted a non-escalable energy charge and being aware that it would be supplied part of the coal through import is responsible for making arrangement for the fuel receipt system and blending facility. For the handling of imported coal and coal procured from open market, the petitioner has installed wagon tippler and blending system in the Coal Handling Plant. Though these expenditures have been allowed in Petition No. 77/GT/2013 as the tariff therein was determined under section 62 of the Act, similar treatment cannot be given in case of tariff discovered through competitive bidding and adopted under section 63 of the Act. The petitioners having quoted an all-inclusive tariff comprising non-escalable capacity charge and non-escalable energy charge have assumed all risks and the expenses associated with capital and operating cost of the project and have insulated the Haryana Discoms from its impact. Therefore, expenditure on account of wagon tippler and blending system cannot be allowed under change in law.



**F. Shift of evacuation point from Meramundali (through LILO) to Angul Pooling Station**

59. The petitioners have submitted that at the time of conception of the project, the evacuation point was proposed as OPTCL sub-station at Meramundali (through LILO) at a distance of 8 km from the generating station and the cost of the evacuation arrangement at Meramundali was envisaged to be Rs. 52 crore. On 7.8.2009, the Commission notified the Central Electricity Regulatory Commission (Grant of Connectivity, Long Term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009 (Connectivity Regulations). Pursuant to the notification of the Connectivity Regulations, comprehensive region wise transmission scheme was prepared including the transmission scheme for evacuation of power from the power project of the petitioner. Further, pursuant to and in accordance with the Connectivity Regulations, Petitioner No.1 entered into the Bulk Power Transmission Agreement with PGCIL under which the Petitioner was to be provided the evacuation point at Angul instead of Meramundli. The petitioners have submitted that shifting of evacuation point from Meramundali to Angul necessitated construction of dedicated 400 kV double circuit transmission line from the power project upto Angul sub-station at a cost of Rs.114.34 crore, resulting in an increase of cost by Rs.62.34 crores. The petitioners have submitted that shifting of the evacuation point from Meramondli to Angul was pursuant to change in law in the form of enactment of Connectivity Regulations and the transmission schemes formed thereunder. The petitioners have submitted that since the evacuation point was subject to approval by

CTU, the change in the evacuation point is a change in approvals, permissions and licences required by Petitioner No.1 and therefore, it constitutes Change in Law.

60. We have considered the submissions of the petitioner. The petitioners have submitted that the Petitioner No.1 conceived the evacuation from its power project through the OPTCL sub-station at Meramondli through a LILO at a distance of 8 km at a cost of Rs.52 crore. However, the said arrangement was changed from Meramundli to Angul after the notification of the Connectivity Regulations which required the CTU to plan the region-wise transmission scheme. Three points needs to be examined in this context. First, whether the Connectivity Regulations changed the interconnection point of the petitioner with CTU from Meramundli to Angul which resulted in additional cost to the petitioner for making a transmission line. Secondly, whether under the Haryana PPA, the Haryana Discoms have the obligations to pay for the dedicated transmission line from the power project till the inter-connection point with CTU.

61. As regards the first point, we find that the Connectivity Regulations came into force with effect from 1.1.2010 and BPTA was signed on 24.2.2010 and on that basis the petitioner has submitted that inter-connection point was changed from Meramundli to Angul in accordance with the Connectivity Regulations. Let us consider the provisions of BPTA. Recital B and C of BPTA provides as under:

“B) Whereas the comprehensive transmission system for above Long Term Open Access was evolved by CEA, developers, Constituents and POWERGRID which has discussed and finalized in various meetings.

C) The transmission system required for direct evacuation/dispatch of power from respective generating units to the pooling points of POWERGRID has been finalized in consultation with CEA, developers and Constituents and shall be built, owned, operated and maintained by respective Long Term Transmission Customers as indicated at Annexure-2”.

As per Annexure 2, Petitioner No. 1 is required to implement “GMR-Angul Pool 400 kV D/c line with associated bay”. The petitioner has placed on record a copy of the Minutes of the Meeting held under the Chairmanship of Member(PS), CEA for finalization of the evacuation system from advanced projects in Odisha held on 17.4.2009. In the said minutes it has been recorded that GMR had indicated connectivity and long term open access for 800 MW out of its installed capacity of 1050 MW. As per the said minutes, the generators were required to develop their dedicated transmission system from the generation projects to the pooling sub-stations of PGCIL. As per Annexure 2 of the minutes, GMR was required to develop GMR-Angul Pool 400 kV D/c line. In the said minutes, there is discussion about interim connectivity to GMR for evacuation of power for supply to Haryana. Relevant para is extracted as under:

“GMR indicated that 350 MW of power from their project has to be transferred to Haryana under Case 1 bidding. Member(PS) clarified that the connectivity to meet this requirement of power transfer can be made by LILO of Talcher-Meramundli 400 kV line (one circuit) as a dedicated system. However, upon completion of Angul sub-station, loop in and loop out arrangement may be restored and the same line may be utilized to terminate GMR TPS at Angul.”

From the above, it emerges that from the beginning, the system planned for evacuation of the power from the power project under LTOA was GMR-Angul 400 kV D/c line. The planning of GMR-Angul Transmission line took place before the Connectivity Regulations came into force and the said line has been included in the BPTA which was signed after Connectivity Regulations came into force. Moreover, LILO of Talcher-

Meramundli 400 kV line (one circuit) was agreed as a dedicated transmission system for supply of power to Haryana Discoms as an interim arrangement till the dedicated line is terminated at Angul sub-station. Therefore, promulgation of Connectivity Regulations has not changed the evacuation point from Meramundli to Angul as alleged by the petitioners and accordingly, the claim of the petitioners under change in law has not been made out.

62. As regards the second point whether under the Haryana PPA, the Haryana Discoms have the obligations to pay for the dedicated transmission line from the power project to the nearest pooling point of CTU, let us consider the provisions in the RfP and Haryana PPA with regard to the transmission systems for evacuation of power for supply to Haryana Discoms. In terms of the Haryana PPA Para 2.1.2 and 2.1.3 of the RfP document issued by HPGCL provide as under:

“2.1.2 The delivery point shall be the Power Station-HVPM interconnection point, in case the station is connected to the HVPL Grid directly or through a dedicated transmission network. In case the station is connected to any other Transmission Utility, the delivery point shall be the CTU-HVPM Interconnection Point....”

“2.1.3 The Transmission Charge for the CUT transmission network used by the Seller upto the Delivery Point (CTU-HVPM Interconnection Point) shall be paid on actuals. If a plant is not connected or envisaged to be connected to the CUT network, then the bidder can also explore the possibility of using the network of the concerned STU or may build a dedicated transmission line for connecting to the nearest point in the CTU network. The Transmission Charge/cost pertaining to such STU network or the dedicated transmission line shall not be paid by the procurer and therefore, it should be included by the bidder in other components of tariff quoted by him. The payment to the seller will be made during the term of the agreement on the basis of transmission charges notified by CTU for wheeling power upto the Delivery Point. In the event the seller wants to use different CTU network route than what was mentioned by the Selected Bidder in Format 3 of Annexure 3 of the RFP (“Original Route”), then the Transmission Charge payable

shall be the lower of (a) the Transmission Charge actually payable on the new CTU Transmission route; or (b) the Transmission Charge applicable on the Original Route. Transmission Charge on the Original Route shall be computed based on Transmission Service Charge notified by CTU in its notification for short-term transmission charges.”

Thus as per the RfP, if the power project of the bidder is connected to HVPN network, the delivery point would be Power Station-HVPN interconnection point and in case the power project is connected to any other Transmission Utility, the delivery point would be CTU-HVPN network. As regards the liability for transmission charge, Haryana Discoms would pay the transmission charges of CTU network on actual. It further provides that if the power project is not connected to CTU network, then the bidder can also explore the possibility of using the network of concerned CTU or may build a dedicated transmission line for connecting to the nearest CTU network. It further provides that the transmission charges/cost pertaining to STU network or dedicated transmission line should be included by the bidder in the bid. The provisions of the RfP are clear to the effect that the charges for the STU network or the dedicated transmission line upto the nearest inter-connection point of CTU shall be factored in the bid and cannot be passed on to the Haryana Discoms. Therefore, the Petitioner No.1/PTC were required to factor the transmission charges in the bid for the STU network or dedicated transmission line upto CTU inter-connection point. Schedule 9 of the Haryana PPA provides as under:

“Schedule-9: Details of inter- connection facilities

The Delivery Point shall be the CTU-Haryana STU interconnection. In the event the Seller uses the transmission network of any of other Transmission Licensee, the Delivery Point shall be the Transmission Licensee-Haryana STU interconnection point.”

Perusal of the above provisions of the PPA reveals that the petitioner is responsible to supply power to Haryana up to the delivery point i.e. CTU-Haryana Utility interconnection point. Further, the Petitioner No.1/PTC are entitled to the transmission charges for the CTU network only, and not for the STU network or dedicated transmission line. In view of the clear-cut provisions in the PPA that the transmission charges for the dedicated transmission line or STU network should be factored in the bid and shall not be payable by Haryana Discoms, the claims of the petitioner for allowing the cost of the dedicated transmission line under change is law cannot be sustained. Accordingly, the claim for Rs.62.34 crore on account additional cost incurred for executing the GMR-Angul 400 kV D/C Transmission Line has not been allowed.

**G. Additional capital cost on account of change of alignment of canal:**

63. The petitioners have submitted that one of the obligations of the Government of Odisha under the MOU was acquisition of land required by the petitioner for the Project. Pursuant to its obligations, the designated agency of the Govt. of Odisha, IDCO acquired the land for the project. However, a portion of the land acquired for the Project was irrigated land on which there was a canal system. In order to acquire the said land forming part of the canal system, approval of the Department of Water Resources, Government of Odisha was required. The petitioner vide its letters dated 15.2.2007 and 17.8.2007 requested IDCO to take steps to seek permission from the Department of Water Resources to close the canal. The Department of Water Resources granted permission for acquisition of the land comprising part of the canal system subject to the deposit of (a) Rs.12.80 crore towards compensation for the works executed on the

canal which were to be abandoned; (b) deposit of Rs. 0.067 crore towards cost of construction of RCC trough; and (c) deposit of Rs.3.02 crore towards creation of lift irrigation facilities. In addition, Petitioner No.1 is stated to have paid Rs.2 crore as cost of land. The petitioners have submitted that the liability of Rs.18.49 crore on account of conditions imposed by Department of Water Resources is change in law which has led to an increase in cost and therefore, is covered under Change in Law.

64. We have considered the submissions of the petitioner. It is noted that Petitioner No.1 wrote to IDCO on 15.2.2007 informing about the existence of the canal and requested IDCO to seek permission of Department of Water Resources, Government of Odisha to close the canal. Thus, at the time of submission of the bid on 26.11.2007, canal was situated in the land which was proposed to be acquired for the project and it also required realignment which involved expenditure. The petitioner at the time of bidding was expected to take into consideration the consequences and implication of the alignment of the canal system. The letter dated 23.12.2011 written by Department of Water Resources, Government of Odisha addressed to IDCO only accorded approval for the alignment of canal coming within the proposed plant area subject to fulfillment of certain terms and conditions for which the petitioner had to deposit a total amount of Rs.18.60 crore. The realignment of canal system was a condition prevailing before the bid submission by the bidder and the Petitioner No.1 as a project developer should have taken these expenditures into account while quoting the bid through PTC. Accordingly, the increase in project cost due to change of alignment of canal is not covered under the provisions of Change in Law and is, therefore, disallowed.

## **H. Increase in cost due to imposition of Service Tax**

65. The petitioner has submitted that at the time bidding, the service tax on EPC contracts was 2.06% which was increased to 4.12% in the Finance Act, 2008. The petitioner has submitted that Ministry of Finance, Government of India vide Notification No. 24/2012 had increased the service tax on civil works and erection services to 4.9% and 12% respectively. The petitioner has submitted that the aggregate impact of service tax during the construction period is Rs. 41 crore. The petitioner has placed on record the relevant notification regarding service tax.

66. Under Article 13.1.1.(i) of the Haryana PPA, Change in Law includes any enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law. Law has been defined as any law including Electricity Laws in force in India. The service tax on erection services and civil works were enhanced through the Finance Act, 2012 which is after bid deadline. Since, the enhanced rate of service tax has been imposed through an Act of Parliament; the same is covered under change in law. However, the petitioner has not submitted the break-up of the capital cost segregating the service component in the absence of which exact impact of service tax during construction period cannot be determined. We direct the petitioner to share with the Haryana Discoms the details of service tax paid duly audited by the statutory auditor. Further it is clarified that the Haryana Utilities would be liable to pay the service tax on civil works and erection services in proportion to the capacity covered under Haryana PPAs.



**Issue No.4 : Mechanism for processing and reimbursement of admitted claims under Change in Law?**

67. The petitioner has submitted that as per Article 13.2 (a) of the PPA, for every cumulative increase/decrease of Rs.1.875 crore in the capital cost, the quoted capacity charges shall be increased at the rate of 0.227%. The petitioner has submitted that Article 13 is a restitutive provision and is aimed at providing ameliorative relief to the party so affected by the Change in Law and the mechanism provided in Article 13.2 of the PPA is to ensure that Petitioner No.1 is restored to the same economic position. The petitioner has submitted that the total impact on the capital cost on account of change in law is Rs.347.12 crore and therefore, Petitioner No.1 is entitled to be compensated for the same in accordance with the formula set out in Article 13.2(a) of the Haryana PPA. During the course of hearing, learned counsel for Haryana Discoms submitted that the petitioner's request to give compensatory tariff over and above the scope of Change in Law provisions contained in the PPA is devoid of any merit and the claim of the petitioner needs to be determined in terms of the PPA. Learned counsel for Haryana Discoms further submitted that unless there is an impact on the cost or revenue to the business of selling electricity by the petitioner to the procurers, mere Change in Law is not sufficient.

68. We have considered the submissions of the petitioner and the respondents.

Article 13.2 (a) of the PPA provides as under:

"13.2. **Application and principles of 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 1,87,50,000 in the Capital Cost over the term of this Agreement, the increase/decrease in Quoted Capacity Charges shall be an amount equal to zero point two six seven (0.227%) of the Quoted Capacity Charges. Provided that the Seller provides to the procurers documentary proof of such increase/decrease in Capital Cost for establishing the impact of such "Change in Law". In case of Dispute, Article 17 shall apply.

It is clarified that the above mentioned compensation shall be payable to either Party, only with effect from the date on which the total increase/decrease exceeds amount of Rs 1,87,50,000."

Thus, as per the above provisions, the petitioner is entitled for compensation at the rate of 0.227% of the non-escalable capacity charges for every cumulative increase/decrease in capital cost for an amount of Rs.1.875 crore and further when the total increase/decrease exceeds Rs.1.875 crore. In our view, the petitioner has entered into the PPA on its free will and is bound by the terms of the PPA. It will not be appropriate to interfere with the provisions of the PPA which is a contractual arrangement between parties. Therefore, the impact of change in law as allowed in this order will be admissible in tariff to the petitioner in accordance with Article 13.2 of the PPA.

69. The effect of Change in law allowed in this order will take effect from the date of commercial operation of the generating station i.e. last unit of the generating station.

The petitioner shall furnish the audited account of the expenditure to Haryana Discoms which have been allowed under change in law in this petition.

### **Summary of Decisions**

70. The summary of our decisions in this order are as under:

- (a) The Appellate Tribunal for Electricity in its interim order dated 30.4.2014 in I.A. No. 65/2014 and 143/2014 in Appeal No.44 of 2014 has ordered that the proceedings in the petitions pending before the CERC shall be subject to the result/outcome of the Appeal. Accordingly, the order in this petition shall be subject to the final decision of the Appellate Tribunal in the said appeal.
- (b) The Petitioner No.1 had taken up the matter with Haryana Discoms and held several meetings to find an amicable solution. Since these efforts have failed to find a solution, the petitioners have approached this Commission. In the circumstances, the requirement of notice for change in law in accordance with the Haryana PPA has been complied with.
- (c) All claims of the Petitioner No.1 under force majeure except delay in execution of work on the project on account of Visa policy are rejected. For delay on account of Visa policy, the petitioner shall be entitled to the benefit of postponing the SCOD of the project by three months in addition to the waiver of penalty leviable under Article 4.6.1 of the Haryana PPA.
- (d) All claims of the petitioner under change in law are rejected except service tax on civil works and erection work. Impact of the expenditure on service

tax during the construction period paid for civil works and works contract will be admissible in tariff in accordance with Article 13.2 of the PPA. The petitioner is required to share the documents with regard to the actual payment of service tax with Haryana Utilities and claim compensation.

71. The petition is disposed of in terms of the above.

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

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