

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 153/MP/2015

Coram:

Shri Gireesh B. Pradhan, Chairperson

Shri A.K. Singhal, Member

Shri A.S. Bakshi, Member

Dr. M.K.Iyer, Member

Date of Hearing: 15.10.2015

Date of Order: 19.02.2016

In the matter of

Application for computation of compensation for Change in Law events during Operating Period

And

In the matter of

Sasan Power Limited

Reliance Power Ltd. 3rd Floor,

Reliance Energy Centre,

Santa Cruz East, Mumbai

..... **Petitioner**

Vs

1. MP Power Management Company Ltd.
Shakti Bhawan, Jabalpur-482 008.
2. Paschimanchal Vidyut Vitran Nigam Ltd.
Victoria Park, Meerut-250 001.
3. Purvanchal Vidyut Vitran Nigam Ltd.
Hydel Colony, Bhikaripur, Post-DLW, Varanasi-221 004.
4. Madhyanchal Vidyut Vitran Nigam Ltd.
4A-Gokhale Marg, Lucknow-226 001.
5. Dakshinanchal Vidyut Vitran Nigam Ltd.
220kV, Vidyut Sub-Station,
Mathura Agra By-Pass Road,
Sikandra, Agra-282 007.

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

.....Respondents

Parties Present:

For the Petitioner : Shri J.J.Bhatt, Senior Advocate, SPL
Shri Vishrov Mukherjee, Advocate, SPL
Ms. Janmali Manikala, Advocate, SPL
Shri N.K. Deo, SPL
Shri Mayank Gupta, SPL

For the Respondents : Shri G.Umapathy, Advocate, MPPMCL
Ms. R. Mekhala, Advocate, Advocate MPPMCL
Ms. Ranjitha Ramachandran, Advocate, Advocate, Rajasthan

Discoms and HPCC
Shri Shubham Arya, Advocate, HPPC
Shri Rajiv Srivastava, Advocate, UP Discoms
Shri Rahul Dhawan, Advocate, BRPL and BYPL
Ms. Ridhi Diwan, Advocate, BRPL and BYPL

ORDER

The petitioner, Sasan Power Limited, has set up a 4000 MW coal fired super critical, Ultra Mega power project based on linked captive coal mine at Sasan, District: Singrauli, in the State of Madhya Pradesh (hereinafter referred to as "Sasan UMPP") is supplying power to the distribution companies in 13 States. The petitioner had filed the Petition No. 6/MP/2013 under Articles 13 and 17 of the PPA read with Section 79 of the Electricity Act, 2003 and Para 5.17 of the competitive Guidelines for compensation of the costs incurred by the petitioner due to 'Change in Law' events during the operating period. The Commission, after considering the submission of the parties, vide order dated 30.3.2015 directed the petitioner to submit the following information with regard to increase in water charges, impact of cost increase due to imposition of royalty, clean energy cess and excise duty on coal:

(a) Increase in water charges:

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

(b) Imposition of royalty, clean energy cess and excise duty on coal:

- (i) Quantum of coal approved with calorific value of coal in the coal mine plan along with copy of approved plan for the captive mine of the project.
- (ii) Quantum of coal with calorific value of coal required to generate the contracted capacity of electricity from Sasan, UMPP has assumed in the bid.
- (iii) Quantum of coal sold to other projects with project-wise , calorific value of coal and the cost price and sale price of coal.
- (iv) Sale price of electricity in the other projects where the coal from the captive mines of Sasan UMPP is used, clearly indicating the energy charge therein.
- (v) Returns filed before statutory authorities in this regard.

2. The petitioner has submitted the information in compliance with the directions of the Commission which has been discussed in the succeeding paragraphs in brief.

Increase in Water charges:

3. The petitioner has submitted that the compensation on account of Change in Law events is required to be computed on the actual increase/decrease in the revenue or cost incurred by the petitioner and the petitioner is required to be compensated to the full extent and restored to the same economic position as if such change has not occurred, and not by taking into account the precedents of any cost escalation of water charges. However, the Commission in para 23 of the order dated 30.3.2015 has observed that the water charges have been revised for the years starting 1.1.2010, 1.1.2011, 1.1.2012 and that the petitioner has claimed compensation for change in law

on the basis of the notification dated 21.4.2010 issued by Government of Madhya Pradesh.

4. The petitioner has submitted that the cut-off date for submission of bid was 21.7.2007. As per the notification dated 27.7.2003 issued by Government of Madhya Pradesh, the applicable water rate as on the date of submission of the bid was Rs. 1.80/M. Based on the notification issued by Government of Madhya Pradesh dated 21.4.2010, the water charges were revised for the year starting 1.1.2010, 1.1.2011, 1.1.2012 and 1.1.2013 @ Rs. 4.00, Rs.4.50, Rs.5.00 and Rs.5.50 respectively. The petitioner has submitted that it has claimed the water charges on the basis of the Govt. of Madhya Pradesh`s notification dated 21.4.2010 treating it as “Change in Law”. The petitioner has submitted that as per Article 13.1.1 of the PPA, the revision in the water rate by Govt. of Madhya Pradesh through notifications is a change in law event.

5. The petitioner has submitted that it was only required to take into account the water charges prevailing as on cut-off date (7 days prior to the bid deadline). The expectation of Commission that bidder should have considered in its bid on year-to-year escalation or based on historical data is contrary to the premise of Article 13 of the PPA. The petitioner has submitted that the Hon`ble Appellate Tribunal for Electricity in its Judgment dated 12.9.2014 in Appeal No. 288 of 2013 (Wardha Power Company Limited Vs. Reliance Infrastructure Limited and another) has expressly rejected the obligation of any escalable index or indexing of cost of fuel in order to determine the compensation due on account of Change in Law. Therefore, the petitioner ought to be compensated for the difference in the water charges arising out of the rate prevailed as on cut-off date of the bid and the actual water charges prevails as on date.

6. Without prejudice to the submissions of the petitioner as discussed in paras 3 to 5 above, the petitioner has submitted the information with regard to increase in water charges as per the Commission`s directions as under:

(a) The petitioner has placed on record the rates of water charges prevailing in Madhya Pradesh from the year 1995 onwards along with the supporting notifications which is annexed as Annexure-A to the petition. The summary of the applicable water charges in Madhya Pradesh is as under:

S.No.	Water Charges	Applicable from the following date
	Rs/Cu.M.	
1	0.53	1.4.1991
2	1.00	1.5.1998
3	1.25	1.11.2003
4	1.55	1.11.2004
5	1.65	1.11.2005
6	1.8	1.11.2006
7	2	1.11.2007
8	4	1.1.2010
9	4.5	1.1.2011
10	5	1.1.2012
11	5.5	1.1.2013

(b) The water charges assumed and factored while the quoted bid for the project along with year to year escalation assumed for the entire bid period, the petitioner has submitted that water charges assumed and factored in the quoted bid was Rs. 1.8/m³ without any year to year escalation as the water charges

were premised on the charges as notified by Madhya Pradesh Water Resources Department (MPWRD) at the time of submission of the bid.

(c) As regards the actual quantum of water required for generating the contracted capacity of electricity and the basis of calculation of water consumption, the petitioner has submitted as under:

(i) Water Resources Department vide its letter dated 18.7.2006 allocated 0.14 MAF of water from the Rihand Reservoir for use at the Project.

(ii) As per the policies/rules/regulations of Government of MP governing the allocation and use of water, the petitioner entered into a Water Supply Agreement on 5.1.2013 with Executive Engineer, Water Resources Division No.2, Singrauli, Madhya Pradesh. In terms of the Water Supply Agreement, the petitioner has been granted permission to draw 0.14 MAF i.e. 172.71 MCM of water from the Rihand reservoir for the use at the Project. The Water Supply Agreement contains a 'Take or Pay' provision according to which the company was required to pay water charges for at least 90% of the total quantum of water allowed to be drawn even though the actual quantity of water drawn by the Commission is less than 90%.

(iii) Subsequently, the petitioner optimized the usage of water by opting for higher cycle of concentration with chemical dosing which has resulted into additional costs for the petitioner and therefore, increased

annual O&M costs. Accordingly, the petitioner vide its letters dated 28.3.2014 and on 3.5.2014 requested MPWRD to revise annual allocated water quantity based on additional measures taken by the petitioner. On the basis of the petitioner's request, MPWRD reduced the allocation of water to 0.091 MAF (112.26 MCM) from 0.14 MAF (172.71 MCM) of water from the Rihand reservoir for 3960 MW Sasan UMPP with effect from 1.6.2014.

(iv) From 1.6.2014 onwards, the amount to be paid by the petitioner to MP Government towards water allocated to Sasan UMPP would be 90% of the water charges for which the petitioner is liable to pay irrespective of the actual consumption of the water which works out to Rs.55.57 crore per annum ($112.26 \times 10^{-1} \times \text{Rs } 5.50 \times 90\%$) or actual consumption quantity whichever is higher.

(v) As regards the impact of the change in water prior to 1.6.2014, the petitioner has submitted that it is liable to pay water charges based on earlier allocated quantity of 172.71 SCM of water which is maximum of Rs.94.99 crore ($172.71 \times 10^{-1} \times \text{Rs.}5.50$) p.a. and 90% of the water charges for which the petitioner is liable to pay irrespective of the use which works out to Rs.85.49 crore per annum. Before the increase in water charges, the petitioner was required to pay only Rs.31.08 crore ($172.71 \times 10^{-1} \times \text{Rs.}1.80$) and for 90% of the water charges, it was liable to pay water charges irrespective of the use which works out to Rs.27.98 crore per annum. Therefore, minimum yearly impact is

Rs.57.51 crore (Rs. 85.49 crore-Rs.27.98 crore) and maximum yearly impact is Rs.63.90 crore (Rs.94.99 crore-Rs.31.08 crore).

(vi) As regards the impact of change in water charges for the period after 1.6.2014, the petitioner has submitted that it is required to pay water charges based on reduced allocated quantity of water which is maximum of Rs.61.74 crore ($112.26 \times 10^{-1} \times \text{Rs.}5.50$) per annum and 90% of the water flow it is liable to pay irrespective of the use which works out to Rs.55.57 crore per annum. The petitioner, before the increase in water charges, was required to pay only Rs.20.21 crore ($112.26 \times 10^{-1} \times \text{Rs.}1.80$) and for 90% of the water charges, it is liable to pay irrespective of the use which works out to Rs.18.19 crore per annum. Further, due to the reduction in quantity of water pursuant to the request made by the petitioner, the outflow from the petitioner has reduced as under:

(a) Quantum of water for which petitioner would have made payments before reduction in water allocation: 90% of earlier allocation of 172,71 MCM (due to “take or pay” provision) i.e. 155.42 MCM.

(b) Current allocation of water is 112.26 MCM

(c) Saving for the petitioner is Rs.7.77 crore p.a. from 1.6.2014 onwards $*155.43 - 112.26 \times 10^{-1} \times \text{Rs.}1.80$

Therefore, the minimum yearly impact on the petitioner is Rs.29.61 crore (Rs.55.57 crore-Rs.18.19 crore-Rs.7.77 crore) and maximum yearly impact on the petitioner is Rs.33.77 crore (Rs.61.74 crore-Rs.20.21 crore-Rs.7.77 crore).

(d) As regards the impact on the petitioner due to amendment of Madhya Pradesh Irrigation Rules, 1974, the petitioner has submitted that Government of Madhya Pradesh, vide notification dated 22.6.2013, amended the then prevailing Madhya Pradesh Irrigation Rules, 1974 ("MP Rules"). As per Rule 3 (a) of the MP Rules, the petitioner is required to pay a one-time water allocation fee equivalent to one month water tax and cess on the annual allocated water quantity. Accordingly, the water allocation fee payable by the petitioner is Rs.7.12 crore [172.71 MCM x Rs.5.5 x 90% x 1/12]. The petitioner has submitted that the obligation imposed on the petitioner for the payment of one time water allocation fee pursuant to the said amendment dated 22.6.2013 is a change in law event in terms of Article 13 of the PPA and the petitioner is entitled to be compensated for the same.

7. The petitioner has submitted that the quantification of compensation on account of increase in water charges has to take into account take-or-pay obligation in the agreement entered into between the petitioner and the Government of Madhya Pradesh. The said agreement amounts to consent/transfer necessary for drawl of water which is essential input for generation of power by the project. As per the agreement, the petitioner is required to pay minimum of 90% of the total charges for the contracted

capacity of water. Therefore, the computation of the impact has to be on the basis of actual i.e. atleast 90% for the take-or-pay for obligation of the contracted capacity. In case the actual consumption is more than 90% of allocated quantity, then actual amount of water consumed has to be taken into account.

8. The petitioner has submitted that the Commission in the order dated 30.3.2015 has held that the increase in rate of royalty, imposition of clean energy cess and excise duty on coal are change in law events. However, the Commission observed that the Project is not the sole beneficiary of the captive coal mines and therefore, the compensation to the petitioner on account of increase in royalty of coal, imposition of clean energy cess and excise duty would be restricted to the quantum of coal used by the project for production of electricity and will exclude coal extracted from the captive mines to be used in other projects. As per the Commission's direction, the petitioner has submitted the following information:

(a) Auditor's certificate for quantum of coal approved with calorific value of coal in the coal mine plan along with copy of the approved plan for the captive mine of the project;

(b) The petitioner has submitted that the average Gross Calorific Value (GCV) of coal as assumed in the bid was 4600 kcal/kg; and the annual quantum of coal required to generate contracted capacity at Sasan UMPP as per bid varied between 14 to 16 MTPA. However, actual quantum of coal will be derived based on actual GCV, Heat Rate of the Unit and operating PLF of the plant.

(c) As regards the Auditors' certificate for quantum of coal sold to other projects with project-wise details, calorific value for coal, cost price, sale price of coal and sale price of electricity by other projects, the petitioner has submitted that no coal from the captive coal block has been sold/supplied to any project other than the Sasan UMPP.

(d) The petitioner has submitted the month-wise details of coal despatched and royalty paid, copies of the return of royalty deposited with appropriate authority and the Auditor's certificate certifying the same. The petitioner has submitted that the impact of Change in Law due to increase in royalty on coal up till 28.2.2015 is Rs.35.92 crore as per the following details:

S.No.	Period	Quantity of coal dispatched (in MT)	Amount paid against Royalty on coal (Rs. In lakh)	Prevailing royalty rate (in Rs/MT)	Royalty rate applicable at the time of bid (in Rs./MT)	CIL Amount (in Rs. lakh)
1	March 2013	81003	72.58	89.6	85	3.73
2	1.4.2013 to 31.5.2014	108988	119.01	109.2	85	26.38
3.	1.6.2014 to 31.3.2014	1735881	2090.00	120.4	85	614.50
4.	1.4.2014 to 28.2.2015	8326631	10025.26	120.4	85	2947.63
	Total	10252502.6	12306.85			3592.23

9. The petitioner has placed on record the auditor's Certificate for actual expenditure incurred on clean energy cess on coal and the copies of clean energy cess deposited with the appropriate authority. The petitioner has submitted that the impact of the imposition of clean energy cess on coal till 28.2,2015 is Rs.81.89 crore.

10. As regards excise duty on coal, the petitioner has submitted that the impact on that account on the petitioner till 28.2.2015 is Rs.61.36 crore. The petitioner has placed on record the auditor's Certificate for actual expenditure incurred on excise duty on coal and the copies of the excise duty deposited with the appropriate authority.

11. The petition was admitted and notices were issued to the respondents to file their replies to the petition. The petitioner was directed to furnish the details of scheduled generation, actual generation at generator terminal, ex-bus generation, coal consumed in station, coal consumed in units under construction and coal dispatched. Madhya Pradesh Power Management Company Limited (MPPMCL) and Distribution Companies of Rajasthan have filed their replies.

12. The petitioner vide its affidavit dated 9.10.2015 has submitted the information towards Royalty on coal, Clean Energy Cess and Excise Duty on Coal for the period from March 2013 till August 2015 supported by the copies of royalty on coal, clean energy cess and excise duty on coal deposited with the appropriate authorities and auditors' certificates for each of them. The petitioner has further clarified that since the appeal regarding COD of first unit (Unit 3) of Sasan UMPP is pending adjudication before the Appellate Tribunal for Electricity, the petitioner is reserving its right in this regard. The petitioner is stated to have paid the following amounts towards royalty, clean energy cess and excise duty as under:

S. No.	Month	Quantity of coal Dispatched (In MT)	Excise Duty (Rs. in lakh)	Royalty (Rs. lak)	Clean Energy Cess (Rs. In lakh)	Reference Pg. No. (Returns filed)		
						Royalty	Clean Energy Cess	Excise duty
1	March 2013	81,003	32	73	41	7	84	158
2	April 2013	55,610	22	61	28	7A	85	161
3	May 2013	53,378	21	58	27	14	86	164
4	June 2013	36,185	20	44	18	12	87	167
5	July 2013	28,436	16	34	14	10	88	170
6	August 2013	-	-	-	-	-	-	173
7	September 2013	74,359	41	90	37	18	89	176
8	October 2013	111,674	62	134	56	21	90	179
9	November 2013	283,333	157	341	142	25	91	182
10	December 2013	278,740	155	336	139	29	92	185
11	January 2014	198,393	110	239	99	32	93	188
12	February 2014	320,657	178	386	160	35	94	191
13	March 2014	404,104	225	487	202	38	95	194
14	April 2014	688,702	422	829	344	41	97	197
15	May 2014	580,175	355	699	290	44	101	200
16	June 2014	628,897	385	757	314	47	102	203
17	July 2014	907,788	556	1,093	757	50	103	207
18	August 2014	744,274	456	896	744	53	105	212
19	September 2014	791,190	484	953	791	55	107	216

20	October 2014	738,410	452	889	738	57	109	220
21	November 2014	692,760	424	834	693	59	111	225
22	December 2014	963,919	590	1,161	964	61	118	230
23	January 2015	781,342	478	941	781	65	120	235
24	February 2015	809,175	495	974	809	68	122	240
25	March 2015	934,570	555	1,125	1,869	71	124	245
26	April 2015	1,258,852	748	1,516	2,518	74	128	250
27	May 2015	1,316,913	783	1,586	2,634	76	134	254
28	June 2015	1,130,396	672	1,361	2,261	78	140	258
29	July 2015	1,566,834	931	1,886	3,134	80	145	262
30	August 2015	1,279,555	760	1,541	2,559	82	152	266

Replies of the Respondents

13. MPPMCL has submitted that at the time of bid submission, the prevalent/notified rate of royalty on coal was Rs. 85/MT (for Moher and Moher-Amlori Coal i.e. E Grade coal) and Rs.65/MT (for Chhatrasal coal i.e. F Grade coal) which formed the basis of the bid submitted by Reliance Power. Subsequent increase of royalty on coal to an ad valorem rate of 14% on price of coal vide GOI Notification dated 10.5.2012 will not amount to change in law. MPPMCL has submitted that Clean Energy Cess is levied only on the production of coal and not on the business of generation or sale of electricity. If the Clean Energy Cess is allowed by the Commission, then the impact shall be restricted in proportion to the quantum of coal used for generation of contracted capacity of power from Sasan UMPP. As regards the Excise duty on coal, MPPMCL has submitted that though at the time of bid, there was no excise duty on coal and

Finance Act, 2012 levied excise duty @ 6% on the determined sale price of coal for captive use, the petitioner was however expected to factor such risks in the bid taking into account all such relevant conditions and also the risks and contingencies and other circumstances which might influence or affect the supply of power. MPPMCL has further submitted that when the seller is affected by Change in Law under Article 13.2 is required to give a notice to the procurers of such change in law as soon as reasonably practicable after becoming aware of the same which has not been done by the petitioner. As regards the water charges, MPPMCL has submitted that the petitioner has claimed the water charges on the basis of the notification issued by Government of Madhya Pradesh dated 21.4.2010; however, price variation is not a change in law.

14. The distribution companies of Rajasthan in their reply dated 13.10.2015 have submitted as under:

(a) In terms of Article 13.2 of the PPA, the impact of change in law should be for the period from actual commissioning dates of the generating units and cannot be allowed with regard to scheduled commercial operation dates as stipulated in the PPA.

(b) As on the cut-off date, the petitioner should be deemed to have included the per unit charge of the rate at which various taxes, levies, charges and duties etc. was payable to the concerned authorities. The petitioner is entitled to only the increased rate due to change in law subsequent to the cut-off date.

(c) For considering the effect of change in law, the quantum of items such as water and coal need to be appropriately determined as the normative quantum

and the effect of change in law needs to be considered with reference to such quantum and not with the normative quantum as the ceiling. The petitioner should furnish the details of the quantum of water and coal with reference to what is reasonable, normative and the performance parameters assured by the Original Equipment Manufacturers (OEM).

(d) The petitioner has not submitted the requisite information as per the Commission's direction. The petitioner has assumed the water charges at the time of bidding at Rs.1.8/m³ which is not correct. The notification issued by Water Resource Department, Government of Madhya Pradesh dated 25.7.2003 clearly provide that the water charges effective from 1.11.2007 would be Rs.2/m³. Therefore, the petitioner cannot claim that it has assumed Rs.1.8/m³ as the water charges when the notification clearly provided for an escalation w.e.f. 1.11.2007. The trend of applicable water charges shows a clear year on year escalation and it cannot be claimed that the fixed water charges was considered for the entire term. The petitioner was required to take into account or cost on levis related to water charges including escalation. The petitioner has merely reiterated its stand that water charges at 90% of the agreed quantum had to be paid irrespective of the actual usage which has been disputed by the respondents. The quantum of water drawal agreed by the petitioner has been reduced from 172.71 MCM to 112.26 MCM with effect from 1.6.2014 and benefit on this account should be given to the respondents. The reduction in the water quantum itself shows that the claim of requirement of 171.71 MCM water was not correct or prudent.

(e) The judgment in Wardha case relied upon by the petitioner is related to base price of coal being calculated on the basis of the bid submitted and is not relevant for consideration of normative quantum for the impact of change in law.

(f) The impact of increase in royalty and imposition of clean energy cess and excise duty would have to be computed on the normative coal requirement assumed at the time of the bid and should be allowed on the quantum of coal utilized in the power plant and not with regard to the coal dispatched from the mines. In a competitive bidding process, the variation from norms is to be account of the bidder.

(g) There is no provision in the PPA to provide for carrying cost. Article 11.8 of the PPA provides for a payment of surcharge for any delay in payment beyond one month from the date of billing. As per Article 13.2 (b) of the PPA, the compensation is payable with effect from the date on which the net effect of the increases and decrease finally admitted by the Commission is in excess of the 1% of letter of credit. The petitioner first should demonstrate the date on which the impact exceeded 1%.

15. The petitioner has refuted the submission of Rajasthan Discoms in its rejoinder. The petitioner has submitted that in term of Article 13.2 of the PPA, due regard must be given to the principle that the purpose of compensating the party affected by such change in law events is to restore through monthly tariff payment to the same economic position as if change in law has not occurred. The petitioner raised the claim for compensation under change in law events during the operating period for Sasan UMPP

on 8.1.2013. Since, the procurers disputed the claims, the petitioner approached the Commission by way of Petition 06/MP/2013 which was disposed of by the Commission on 30.3.2015 partly allowing the claim of the petitioner. The petitioner is entitled to carrying cost on the amount due for the period between the occurrence of event of change of law and the date of actual payment of the compensation by the procurers.

Analysis and Decision:

16. We have considered the submissions of the petitioner and the respondents and perused documents on record. The petitioner approached the Commission for compensation of the cost incurred by it due to change in law events during the operating period. The Commission, after considering the submissions of the parties, vide order dated 30.3.2015 in Petition No. 6/MP/2013 directed the petitioner to submit the information with regard to impact of cost increase due to increase in water charges, imposition of royalty, clean energy cess and excise duty on coal. Accordingly, the petitioner has filed the present petition seeking compensation due to change in law. The following issues arise for our consideration:

- (a) Objections of MPPMCL to the petition on the ground of non-compliance of the provisions of the PPA with regard to the notification of the change in law event.
- (b) Claims of the petitioner with regard to clean energy cess on coal, excise duty on coal and royalty on coal.
- (c) Claims of the petitioner for water charges under change in law.
- (d) Mechanism for processing and reimbursement of admitted claims under Change in Law.

The above issues have been dealt with as under:

(a) Objections of MPPMCL to the petition on the ground of non-compliance of the provision of the PPA with regard to the notification of the change in law event.

17. The claims of the petitioner in the present petition pertain to the Change in Law events which have an impact of the cost or revenue of the project during the operating period. MPPMCL vide its affidavit dated 17.12.2015 has submitted that the petitioner was required to give notice to the procurers as soon as reasonably practicable about the Change in Law. However, the petitioner has given notice to the procurers on 8.1.2013 for the events dating back to 2008. MPPMCL has submitted that under Article 13 of PPA, the seller is obliged to notify the event in change in law both beneficial to the seller as well as the procurers as and when occur. This issue has been dealt with by the Commission in order dated 30.3.2015. The relevant portion of the order is extracted as under:

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

Since, this issue has already been decided in order dated 30.3.2015 in petition No. 6/MP/2013, the same issue stands settled and cannot be agitated in the present petition.

(b) Claims of the petitioner with regard to clean energy cess on coal, excise duty on coal and royalty on coal.

18. The petitioner was directed vide ROP dated 22.9.2015 to submit the details of scheduled generation, actual generation at generator terminal, ex-bus generation, coal consumed in the generating station, coal consumed in units under construction and coal

dispatched for verification. The petitioner vide affidavit dated 9.10.2015 has placed on record the said details. The petitioner has also submitted the details of the coal consumption based on actual generation at generator terminal. Since the liability of the beneficiaries/procurers under the PPA is towards the payment of tariff for the scheduled generation and not the actual generation, the computation of compensation has been worked out based on coal required corresponding to scheduled generation for each event as discussed below:

Year	Actual Generation at Generator terminal (MU)	Ex-bus Generation (MU)	Schedule Generation (MU)	Net Coal Consumed in Units (MT)	Coal Dispatch (MT)
2013-14	2907	2652	2523	1500002.00	1671260
2014-15	17502	16307	14857	8526901.00	9261200
2015-16 (till Sep. 2015)	14870	13937	13683	7924541.00	7947909
Total	35279	32897	31063	17951444	18880369

19. Coal consumed for generation of scheduled energy has been worked out by adopting the following methodology:

(i) Auxiliary consumption has been considered as 6% to compute actual generation required at generator terminal to deliver schedule energy to beneficiaries. The reason for considering 6% APC given in Petition No. 118/MP/2015 is extracted as under:

“28.....Since the tariff of project is based on competitive bidding, the auxiliary power consumption considered is not known. However, based on the installed capacity of the Project i.e. (6X660) = 3960 MW and the contracted capacity of 3722.40 MW, the auxiliary power consumption works out to 6.0%. Therefore, we have considered 6% auxiliary power consumption for power plant inclusive of consumption of coal mine as power required for mining operation is also taken from the power station for

computing electricity duty and energy development cess on auxiliary power consumed in power plant inclusive of consumption of Coal mine.”

- (ii) Actual power at generator terminal required to be generated including auxiliary power consumption of 6% would be scheduled energy divided by (1-6%) i.e. 0.94

20. Based on the above, the actual generation, schedule generation, coal consumption has been computed as under:

Year	Actual Generation at Generator terminal as submitted by the petitioner (MU)	Actual Generation required at generator terminal considering 6 % APC as computed in this order (4/0.94) (MU)	Schedule Generation as submitted by the petitioner (MU)	Net Coal Consumed in Units as submitted by the petitioner (MT)	Net Coal Consumed w.r.t. schedule generation in Units which were under operation as computed in this order (3*5/2) (MT)
1	2	3	4	5	6
2013-14	2907	2684.04	2523	1500002.00	1384955.41
2014-15	17502	15805.32	14857	8526901.00	7700285.62
2015-16 (till August. 2015)	12292	12052.13	11329	6559991	6431977.25
Total	32701	30541.49	28709	16586894	15517218.28

21. The claims of the petitioner for royalty on coal, excise duty and clean energy cess on coal have been examined in succeeding paragraphs based on the net coal consumed subject to ceiling of coal consumed corresponding to scheduled generation.

Royalty on Coal

22. The Commission in its order dated 30.3.2015 in petition no 6/MP/2013 had decided that the petitioner was entitled to compensation on account of royalty on coal under change in law. The relevant portion of the order is extracted as under:

“.....Therefore, royalty on coal is part of the terms and conditions of the mining lease to do mining in coal and any change in the amount of royalty amounts to change in the terms and conditions of mining lease. Moreover, enhancement of royalty results in increase in the input cost of coal which has a direct impact on the cost of generation of electricity. The total annual cost impact due to increase in the rate of royalty on coal from captive mines would be equal to the amount of coal actually produced in a particular year multiplied by the price of the particular grade of coal as notified by Coal India Limited for the particular year multiplied by 14% of the new royalty rate minus the royalty on that particular grade of coal at the time of bid submission. In our view, the change in royalty by Government of India falls within ambit of “Change in Law” in accordance with PPA.”

23. MPPMCL has submitted that change in the rate of royalty on coal is change in price variation which will not amount to change in law. In this connection, it is clarified that the Commission has already taken a decision that increase in royalty on coal is covered under change in law and therefore, objection of MPPMCL cannot be entertained at this stage.

24. After deciding that change in the royalty on coal is covered under change in law, the Commission further directed the petitioner to submit certain information. The relevant para of order dated 30.5.2015 is extracted as under:

“29. The respondents have submitted that Sasan UMPP is not the sole beneficiary of the captive coal mines and the petitioner is using the coal in its other projects as well. This fact has not been denied by the petitioner who has clarified that compensation has been and would be claimed with respect to the quantum of coal necessary and used for producing the contracted capacity of power from Sasan UMPP. Therefore, compensation to the petitioner due to increase in royalty of coal will be restricted to quantum of coal used by Sasan UMPP for production of electricity as per the methodology stated above and it will exclude the coal extracted from the captive mines to be used in other projects. The petitioner should submit the details of quantum of coal produced in the mines and its grades, the actual supplies to all its projects duly reconciled with the total coal production of the mines and the actual amount of royalty paid and the price of coal charged to other projects. The petitioner

shall approach the Commission with the quantified impact calculated as on the last date of the tariff year as indicated in the PPA.

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

(a) Quantum of coal approved with calorific value of coal in the coal mine plan along with copy of the approved plan for the captive mine of the project.

(b) Quantum of coal with calorific value of coal required to generate the contracted capacity of electricity from Sasan UMPP as assumed in the bid.

(c) Quantum of coal sold to other projects with project-wise details, calorific value of coal and the cost price and sale price of coal.

(d) Sale price of electricity in the other projects where the coal from the captive mines of Sasan UMPP is used, clearly indicating the energy charge therein.

(e) Return of royalty deposited with appropriate authority.”

25. The petitioner has not submitted the quantum of coal approved with calorific value in the coal mine plan. However, the petitioner has submitted an Auditor Certificate regarding Coal Mine Plan. As regards the quantum of coal with calorific value of coal required to generate the contracted capacity of electricity from Sasan UMPP, the petitioner has submitted that the average gross calorific value of coal as assumed in the bid was 4600 Kcal/kg and the annual quantum of coal required to generate contracted capacity as per bid varied between 14-16 MTPA. The petitioner has submitted that actual quantum of coal will be derived based on actual GCV of coal, heat rate of the unit and operating PLF of the plant. As regards the quantum of coal sold to other projects and sale price of coal, the petitioner has submitted that no coal has been sold or supplied to any other project. However, Auditor Certificate to that effect has not been submitted. The petitioner has submitted the Auditor's Certificate regarding the royalty

deposited with appropriate authority. The petitioner has submitted the details of amounts paid towards royalty on coal till August 2015 as under:

	Amount paid as per applicable prevailing rate (Rs. in crore)	Amount payable as rate applicable at the time of bid submission (Rs. in crore)	Difference (Rs. in crore)
Royalty	213.21	150.79	62.43

26. The petitioner has computed the payment made towards royalty of coal based on dispatch of coal from coal mine. Rajasthan Distribution Utilities have submitted that the impact of increase in royalty is with regard to the quantum of coal utilized in the power plant and not with regard to the coal despatched from the mine. We have considered the increase in royalty on coal based on the actual coal consumption w.r.t scheduled generation. However, if actual generation is less than the schedule generation, then coal consumption for actual generation shall be considered. The increase in royalty of coal in the years 2013-14, 2014-15 and 2015-16 (till August,2015) have been computed on the basis of coal consumed for schedule generation as given below :

Financial Year	Net Coal Consumed corresponding to scheduled generation in Units as computed by us (MT)	Applicable Rate notified by CIL (Rs./MT)	Prevailing royalty rate (in Rs/MT)	Amount paid against Royalty on coal (Rs Cr.) (2*4)	Royalty rate applicable at the time of bid (in Rs./Mt)	Amount applicable on SPL as per Bid against Royalty on coal (Rs Cr.) (2*6)	Difference as allowed (in Rs Cr.) (5-7)
1	2	3	4	5	6	7	8
2013-14	1384955.41	860	120.40	16.67	85	11.77	4.90
2014-15	7700285.62	860	120.40	92.71	85	65.45	27.26

2015-16 (till Aug., 2015)	6431977.25	860	120.40	77.44	85	54.67	22.77
Total	15517218.28			186.82		131.89	54.93

27. Based on applicable rate on royalty of coal at the time of submission of bid, the total amount recovered through quoted tariff till August, 2015 on royalty of coal (consumed for schedule generation) is Rs.131.89 crore. However, the royalty of coal payable by the petitioner from COD of 1st unit i.e. 16.8.2013 to 31.8.2015 is Rs.186.82 crore. Therefore, increase in royalty of coal of Rs. 54.93 crore shall be payable by the beneficiaries to the petitioner on the scheduled generation. However, the petitioner will claim lower amount from the beneficiaries in case the actual generation is lower than the schedule generation. The petitioner is further directed to provide auditor certificate to the beneficiaries that no coal has been sold to the third parties and the entire coal is used for Sasan UMPP.

Increase in Clean Energy Cess on coal

28. The petitioner's claim for clean energy cess on coal was dealt with as under in order dated 30.3.2015 in Petition No.6/MP/2013 as under:

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

power from Sasan UMPP. The petitioner is directed to submit the information sought in para 30 of the order.”

29. The petitioner has submitted the Auditor’s Certificate for actual expenditure incurred on clean energy cess along with copies of the clean energy cess deposited with appropriate authority. The petitioner has submitted that the impact of the imposition of clean energy cess on coal till 28.2.2015 was Rs.81.89 crore. However, the petitioner vide affidavit dated 9.10.2015, has computed the financial impact on account of increase in rate of Clean energy cess on till August 2015 coal as under:

	Amount paid as per applicable prevailing rate (Rs. in crore)	Amount payable as rate applicable at the time of bid submission. (Rs. in crore.)	Difference (Rs. in crore)
Clean energy cess on coal	231.64	Nil	231.64

30. The petitioner has computed the payment made towards clean energy cess on coal based on dispatch of coal from coal mine. Rajasthan Distribution Utilities have submitted that the impact of clean energy cess is with regard to the quantum of coal utilized in the power plant and not with regard to the coal despatched from the mine. We have considered the clean energy cess on the actual coal consumption w.r.t scheduled generation. Accordingly, coal consumption computed in above table at para 20, the increase in clean energy cess on coal in the years 2013-14, 2014-15 and 2015-16 (up to August 2015) is as under:

Year	Net Coal Consumed corresponding to scheduled generation in Units as computed (MT))	Prevailing clean energy cess rate (in Rs/MT)	Amount paid against clean energy cess on coal (Rs in crore)	Clean Energy rate applicable at the time of bid (in Rs./MT)	Amount applicable on SPL as per Bid against clean energy cess on coal (Rs in crore)	Difference as allowed (Rs in crore)
2013-14	1384955.41	50	6.92	0.00	0	6.92
2014-15						
1.4.2014 to 10.7.2014	1822037.25	50	9.11	0.00	0	9.11
11.7.2014 to 28.2.2015	5120317.37	100	51.20	0.00	0	51.20
1.3.2015 to 31.3.2015	957931.00	200	15.16	0.00	0	15.16
Total	7700285.62	2015	75.47	0.00	0.00	75.47
2015-16	6431977.25	200	128.64	0.00	0	128.64
Total	15517218.28		211.03	0.00	0	211.03

31. Based on applicable imposition of Clean Energy Cess at the time of submission of bid, the total amount recovered through quoted tariff till 31.08.2015 on Clean Energy Cess was nil as there was no cess at the time of submission of bid. Clean Energy Cess to be paid by the petitioner based on the applicable rate from COD of 1st unit i.e. 16.8.2013 to 31.8.2015 is Rs. 211.72 crore. Therefore, increase in Clean Energy Cess of Rs. 211.72 crore shall be payable by the procurers to the Petitioner. The increase in Clean Energy Cess of Rs. 211.72 crore shall be payable by all the beneficiaries of the generating station to the petitioner on the schedule energy pro-rated to contracted capacity of each beneficiary of the generating station. However, the petitioner will claim lower amount from the beneficiaries in case the actual generation is lower than the schedule generation. The petitioner is further directed to provide auditor certificate to

the beneficiaries that no coal has been sold to the third parties and the entire coal is used for Sasan UMPP.

Imposition of Excise Duty on Coal

32. The petitioner's claim for clean energy cess on coal was dealt with as under in order dated 30.3.2015 in Petition No.6/MP/2013 as under:

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

It was further directed that the impact of excise duty on coal would be calculated based on certain information submitted by the petitioner.

33. The petitioner, vide affidavit dated 9.10.2015, has computed the financial impact on account of increase in rate of Excise Duty on Coal pursuant to Notification No. 349 (E), dated 10.05.2012 issued by the Ministry of Coal, Government of India. The petitioner has submitted details of amounts payable for excise duty on coal till August - 2015 as under:

	Amount paid as per applicable prevailing rate (Rs. in crore)	Amount payable as rate applicable at the time of bid submission (Rs. in crore)	Difference (Rs. in crore)
Excise Duty on Coal	105.85	Nil	105.85

34. The petitioner has computed the payment made towards Excise Duty on Coal based on dispatch of coal from coal mine. However, coal consumption w.r.t. schedule generation as computed in above table at para 20 have been considered for calculating the increase in Excise Duty on Coal in the years 2013-14, 2014-15 and 2015-16 (till August -2015) is as under:

Year	Net Coal Consumed corresponding to scheduled generation in Units as computed by us (MT)	Applicable Rate notified by CIL (Rs./MT)	Prevailing Excise Duty on Prevailing Coal rate* (in Rs/MT)	Amount paid against Excise Duty on Coal (Rs in crore)	Excise Duty on Coal rate applicable at the time of bid (in Rs./Mt)	Amount applicable on SPL as per Bid against Excise Duty on Coal (Rs in crore)	Difference as allowed (Rs in crore)
2013-14	1384955.41	860	6.18%	7.36	0	0	7.36
2014-15	7700285.62	860	6.18% till Feb.-2015 & 6% for March-2015	41.17	0	0	41.17
2015-16	6431977.25	860	6.0%	33.18	0	0	33.18
Total	15517218.28			81.71	0	0	81.71

35. Based on applicable Excise Duty on coal at the time of submission of the bid, the total amount recovered through quoted tariff till 31.8.2015 on Excise Duty on coal was nil as there was no excise duty on coal at the time of submission of the bid. Excise Duty on coal to be paid by the petitioner based on the applicable rate from COD of 1st unit i.e. 16.8.2013 to 31.8.2015 is Rs. 81.71 crore. Therefore, increase in Excise Duty on coal of Rs.81.71 crore shall be payable by the beneficiaries to the petitioner. The increase in Excise Duty on coal of Rs.81.71 crore shall be payable by all the beneficiaries of the generating station to the petitioner on the schedule energy pro-rated

to contracted capacity of each beneficiary of the generating station. However, the petitioner will claim lower amount from the beneficiaries in case the actual generation is lower than the schedule generation. The petitioner is further directed to provide auditor certificate to the beneficiaries that no coal has been sold to the third parties and the entire coal is used for Sasan UMPP.

36. The summary of our decision with regard to the petitioner's claims on increase in royalty on coal, clean energy cess on coal and excise duty on coal during financial years 2013-14, 2014-15 and 2015-16 is as under:

(Rs. in crore)				
Events of Change in Law	2013-14	2014-15	2015-16 (till August 2015)	Total
Royalty on coal	4.90	27.26	22.77	54.93
Clean Energy cess on coal	6.92	75.47	128.64	211.03
Excise duty on coal	7.36	41.17	33.18	81.71
Grand Total	19.18	143.90	184.59	347.67

37. The increase in royalty on coal, clean energy cess on coal and excise duty on coal shall be payable by all the beneficiaries/procurers of the generating station in proportion to their share in the scheduled generation.

(c) Claims of the Petitioner with regard to Water Charges

38. The claim of the petitioner for reimbursement of the increase in Water Charges on account of the Notification dated 21.4.2010 issued by Government of Madhya Pradesh was dealt with as under:

“25. The cutoff date for submission of bid was 21.7.2007. As per the notification dated 27.7.2003 issued by Government of Madhya Pradesh, the applicable water rate as on the date of submission of the bid was ₹1.80/M₃. Through the notification issued by Government of Madhya Pradesh dated 21.4.2010, the water charges have been revised for the years starting 1.1.2010, 1.1.2011, 1.1.2012 and 1.1.2013 @₹4.00, 4.50, 5.00 and 5.10 respectively. The petitioner has claimed the water charges on the basis of the notification dated 21.4.2010 treating it as “Change in Law”. At this stage, we have not gone into the aspect whether the notification dated 10.4.2010 issued by the Government of Madhya Pradesh would amount to “Change in Law” and whether the said notification would have the effect on the cost/revenue of the petitioner from the business of selling electricity to the procurers under the terms of the PPA. For taking a view whether increase in water charges should be considered as “Change in Law”, we direct the petitioner to submit the following information:

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

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

39. The petitioner has submitted that as per Article 13.1.1 of the PPA, Change in Law means occurrence of any of the following events after the date which is prior to the bid deadline: (i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal of any law orwhich results in any change in the cost of or from the business of selling electricity by the Seller to the Procurers under the terms of this agreement, or.....”. The petitioner has submitted that in view of the above definition of change in law, revision of water charges by the Government of Madhya Pradesh vide various notifications is a change in law. The petitioner has submitted that the petitioner was only required to take into account the water charges

prevailing as on cut-off date (7 days prior to the bid deadline) and the expectation of the Commission that the bidder should have considered in its bid any year to year escalation or based on historical data is contrary to the premise of Article 13 of the PPA. Placing reliance on the judgment dated 12.9.2014 in Appeal No. 288 of 2013 (Wardha Power Company Limited Vs. Reliance Infrastructure Limited and Another), the petitioner has submitted that in the said judgment, the Appellate Tribunal has expressly rejected the obligation of any escalation index or indexing of cost of fuel in order to determine the cost of compensation due on account of Change in Law. The petitioner has submitted that in the light of the said judgment, the petitioner ought to be compensated for the difference in the water charges which prevailed as on the cut-off date of the bid and the actual water charges which prevails as on date. Without prejudice to the above contention, the petitioner has submitted the information as sought in order dated 30.3.2015.

40. MPPMCL has submitted that water charges are cost involving procuring raw material as inputs for running of power stations during the operating period. At the time of the bid, the petitioner / bidder was required to quote an all inclusive tariff consisting capital cost, operating cost, taxes, cess, etc. after taking into all relevant factors and examining the laws and regulations in force in India. MPPMCL has submitted that the petitioner was also expected to quote the water charges by taking into account the laws and regulation in force and make a realistic assessment of the water charges for a contract period of 25 years. MPPMCL has further submitted that the notification issued by Govt. of Madhya Pradesh on 21.4.2010 revising the water charges cannot be treated as change in law as price variation is not covered under change in law. Rajasthan

Distribution Utilities have submitted that the trend of applicable water charges in Madhya Pradesh shows a clear year on year escalation and it cannot be accepted that the petitioner considered a fixed water charge for the entire term. The petitioner was required to take into account all cost and levies related to water charges including the escalation.

41. We have considered the submissions of the petitioner and respondents. The Commission in the order dated 30.3.2015 in 6/MP/2013 had deferred the decision on the claim of the petitioner for compensation on account of water charges under change in law. After considering the provisions of the Madhya Pradesh Irrigation Act, the notifications issued thereunder and other relevant material on record, the Commission is of the considered view that revision of water charges through the notification dated 21.4.2010 issued by the Govt. of Madhya Pradesh cannot be considered as change in law under Article 13 of the PPA. Water charges are paid for procuring the water which is used for generation of power. Therefore, the water charges are an input cost during the operating period. The petitioner has submitted the water charges prevalent in the State of Madhya Pradesh since 1991 as under:

S.No.	Water Charges	Applicable from date
	Rs/Cu.M.	
1	0.53	1.04.1991
2	1.00	01.05.1998
3	1.25	01.11.2003
4	1.55	01.11.2004
5	1.65	01.11.2005

6	1.8	01.11.2006
7	2	01.11.2007
8	4	01.11.2010
9	4.5	01.11.2011
10	5	01.11.2012
11	5.5	01.11.2013

It is apparent from the above that water charges are increasing on year to year basis. Article 2.7.1.4.3 of the PPA is relevant which enjoins upon the bidder to quote an all inclusive tariff without any exclusion after taking into account all cost including capital and operating costs, statutory taxes, duties, levies while quoting such tariff. Further Article 2.7.2.1 of the PPA requires the bidder to make independent enquiry and satisfy itself with respect to the required information, inputs, conditions and circumstances and factors that may have effect on its bid. Annexure 9 of the Format of Covering Letter also requires the bidder to give a categorical confirmation about taking into account all relevant laws and regulations while quoting the bid. The said provision is extracted as under:

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

In view of the above categorical affirmation by the petitioner that it has examined all relevant Indian Laws and regulations while quoting the bid, it cannot be accepted that the petitioner took into account the prevalent rate of water charges at the time of bid submission without assessing the impact of the increase in water charges throughout

the contract period. The water charges needed to be realistically assessed and factored in the bid for the entire contract period and failure of the petitioner to capture the same in its bid cannot be passed on to the account of the beneficiaries.

42. The petitioner has relied on the judgment of the Appellate Tribunal for Electricity in Wardha case and has submitted that the Commission is not expected to look into the various cost assumed by the bidder at the time of the bid while granting the relief under change in law. We have carefully perused the judgment of the Appellate Tribunal of Electricity in Wardha Case. In our view, the said judgment needs to be read in the context and facts in which it has been rendered. In Appeal No. 288 of 2013, the appellant, Wardha Power Co. Ltd., had challenged an order of the Maharashtra Electricity Regulatory Commission dated 13.8.2013 in which MERC allowed change in excise duty, clean energy cess and customs duty, etc. under change in law but directed that compensation shall be calculated with the same base as used for the bid and will be effective from the date of Government Circular/Ordinance. The grievance of Wardha Power is captured in para 7(e) and (i) of the judgment which is extracted as under:

“(e) that while a generator quotes a tariff in a bid, it is free to quote escalable and non-escalable energy or capacity charges. When a generator quotes non-escalable energy charges, as in the present case, it means that the generator has locked its risk for that particular base price of coal, in which event the generator cannot later on seek an enhanced payment for any increased base price of fuel/coal. In case a generator quoting escalable energy charges, then the said generator is eligible for claiming compensation under a different mechanism in accordance with the annual escalation index issued by the Central Commission. The said compensation is not part of the present Appeal. Hence, the escalable/non-escalable energy charges are not for calculating compensation under Article 10 of the PPA.

.....
(i) that the Appellant is not demanding the increased base price of coal since the same is not the intent of the Article 10 of the PPA. What the Appellant is asking, is only the tax component, which it is actually incurring for “supply of power”.

Thus, claim of Wardha Power before the Appellate Tribunal was that having quoted a non-escalable energy charges, it was not entitled to seek relief for any increase in the base price of coal or fuel. But Wardha Power was entitled to claim the tax component on coal which it had actually incurred for supply of power.

43. The Appellate Tribunal after noting the submissions of the Appellant and Respondents in that case has captured the issue in para 19 of the judgment as under:

“19. The State Commission is of the view that Change in Law has occurred as per the provisions of the bid documents and the economic position of the bidder should be restored as of 7 days prior to bidding date. However, the State Commission has held that compensation shall be calculated with the same base as used in the bid.”

After considering the provisions of the PPA, the Appellate Tribunal decided the issue as under:

“23. The provisions of the PPA regarding principles for computing Change in Law and consequential relief to the affected party in the operation stage of a power plant, as applicable in the present case, are summarized as under:

(i) The purpose of compensating the party affected by Change in Law is to restore the affected party to the same economic position as if such Change in Law has not occurred.

(ii) The compensation is payable only if the decrease in revenue or increase in expenses of the Seller is in excess of an amount equivalent to 1% of the value of the Letter of Credit for the relevant contract year.

(iii) The documentary proof that is required to be provided by the seller to establish the impact of Change in Law is the proof for increase/decrease in its revenue/expenses.

24. We find that as per the provisions of the PPA, there is no co-relation of the base price of electricity quoted by the Seller and computation of compensation as a consequence of Change in Law. The compensation is only with respect to the increase/decrease of revenue/expenses of the Seller following the Change in Law. The minimum financial impact to qualify for claim of compensation is also linked to the increase in expenses/decrease in revenue of the seller. 25. For example, if the tax on cost of coal has been increased from 5% to 8%, then for computing the impact of Change in Law, only the increase in the actual expenditure of Seller due to increase in tax from 5% to 8% has to be considered. This is because if the tax had not increased, the Seller would have paid tax of 5% on the actual cost of coal. With the Change in Law, the Seller has now to pay 8% on the actual cost of coal. Therefore, to restore the Seller to the same economic position as if such Change in Law has not occurred, the Seller

has to be compensated for additional tax of 3% on the actual cost of coal. However, the Seller will have to submit proof regarding payment of tax on coal.”

44. From the above judgement of the Appellate Tribunal, it emerges that the base price of any of the capital input or operating input which form the basis of the bid cannot undergo any change on account of price escalation of such input cost. However, the compensation on account of change in law, namely, on account of introduction of any new tax or levy or cess or variation in the existing rate of any of them which occur after the bid deadline will be admissible under change in law.

45. We have considered the case of the petitioner in the light of the judgement of the Appellate Tribunal in Wardha Case. MP Irrigation Act, 1931 provides for fixation of rates of charges for supply of water. Sections 37 and 40 of the said Act are extracted as under:

“37. Purpose for which water may be supplied

(1) Water may be supplied from a canal:-

- a. Under an irrigation agreement, in accordance with the provisions of Chapter VI;
- b. On demand, for the irrigation of specified areas;
- c. To supplement a village tank ;
- d. For industrial urban or other purposes not connected with agriculture;
- e. For the irrigation of a compulsorily assessed area

(2) Charges for the supply of water under clause (a), (b),(c), [or (e) of sub – section (1) shall be paid at such rates as may be fixed by the State Government in accordance with rules made under this Act.

40. Supply of water for industrial, urban or other purposes.- The conditions for the supply of water for Industrial, urban or other purposes not connected with agriculture, and the charges therefor, shall be as agreed upon between the State Government and the company, firm, private person or local body concerned and fixed in accordance with rules made under this Act.nce with rules made under this Act.”

The notification dated 21.4.2010 revising the water rates have been issued under Sections 37 and 40 of the MP Irrigation Act, 1931. The said notification provides that an industrial undertaking before utilisation of water is required to execute in Form 7A of the

MP Irrigation Rules 1974. The petitioner has placed on record the Agreement for Supply of Water to Industrial Power Plant between Sasan Power Limited and Government of Madhya Pradesh on 5.1.2013. As per para 2 of the Agreement, Sasan Power is required to pay to MP Government the water rates for water drawn by it @ Rs.5.50 per Cum as on 1.1.2013 as per the notification dated 21.4.2010. The said para further provides as under:

“In addition to the payment of water rates specified above, the company shall also pay the Water Resources Department Local fund cess or any other tax at the rates as fixed by the Government from time to time. The Government hereby reserves the rights to revise the rates from time to time the said water rates and the local cess or other taxes to be paid by the company and the company shall pay such revised water rates and local cess or other taxes as may be fixed by the Government from time to time.....”

Therefore, the Agreement entered into by the petitioner with Government of MP clearly recognises the water rates as distinct from local cess or other taxes. The water charges at the water rates are therefore paid for the use of water by the petitioner and are in the nature of operating cost incurred for procuring the water during operating period for supply of power to the procurers. In terms of the judgement of the Appellate Tribunal in Wardha case, only new taxes or cess or levies on the prevalent price of water charges are payable if they are otherwise covered under change in law i.e. they were not in force at the time of bid deadline or their rates have changed after the bid deadline. However, the actual water charges are not admissible under change in law in accordance with the ratio of the judgement of the Appellate Tribunal in Wardha case. Accordingly, we disallow the claims of the petitioner for compensation on account of water charges under change in law. In view of our decision to disallow the water charges under change in law, there is no need to consider the materials placed on record regarding quantification of the compensation on account of water charges.

46. The petitioner has submitted that Government of Madhya Pradesh vide notification dated 22.6.2013 has amended the Madhya Pradesh Irrigation Rules, 1974 in terms of which the petitioner is required to pay onetime fee for water allocation equivalent to one month water tax and cess on the annual allocated water quantity. The petitioner has submitted that water allocation fees payable by the petitioner is Rs.7.12 crore (172.71 MCM x Rs.5.5 x 90% x 1/12). It is noticed that the petitioner has taken the water rate as equivalent to water tax and cess whereas as per the agreement tax and cess are in addition to water charges. In our view, one time water allocation fees cannot be covered under any of the provisions of Change in Law under the PPA and hence the claim is disallowed.

(d) Mechanism for compensation on account of Change in Law during the operating period:

47. The Commission in para 51 of the order dated 30.3.2015 had decided about the mechanism for computation of the impact of change in law during Operating Period as under:

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

"Operation Period

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

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

The above provision enjoins on the Commission to decide the effective date from which the compensation for increase/decrease revenues or cost shall be admissible to the petitioner. Moreover, the compensation shall be payable only if the increase/ decrease in revenues or cost to the seller in excess of an amount equivalent to 1% of the letter of credit in aggregate for contract year. In our view, the effect of "Change in Law" as

approved in this order shall come into force from the actual date when the expenditure on account of the "Change in Law" has been incurred or the date of commercial operation of the concerned unit/units of the generating stations whichever is later. The compensation for any increase/decrease in revenue or cost to the seller shall be calculated for the entire contract year based on the audited balance sheet and shall be submitted alongwith the details of letter of credit maintained in accordance with law for the contract year with copy to the procurers through an application made in accordance with law. The impact of the "Change in Law" during operating period would be admissible if the increase or decrease in the revenue or cost is in excess of 1% of the LC in aggregate in a contract year."

48. In terms of the above decision, the petitioner is directed to calculate the threshold limit for each contract year for claiming impact of change in law allowed in this order. The payment of compensation under Change in Law shall commence with effect from 16.8.2013 (i.e. date of commercial operation of first unit of the generating station) and the compensation during a contract year shall be in due consideration of the date of commercial operation of the units of the generating station.

49. In the present case, the compensation of Rs.19.18 crore, Rs.143.90 crore and Rs.184.59 crore have been allowed in the years 2013-14, 2014-15 and 2015-16 (upto August 2015) respectively. If the compensation allowed is higher than the threshold limit as may be worked out in accordance with Article 13.2 (b) of the PPA, the petitioner shall claim the compensation from the beneficiaries in proportion to their respective contracted capacity in the project.

50. The Commission has specified a mechanism herein considering the fact that compensation for such Change in Law shall be paid in subsequent contract years also. To approach the Commission in every year for computation and allowance of compensation for such Change in Law is a time consuming process which results in time lag between the amount paid by Seller and actual reimbursement by the Procurers which may result in payment of carrying cost to the amount actually paid by the Seller.

Accordingly, the following mechanism shall be adopted for payment of compensation due to Change in Law events as per Article 13.4.2 of PPA in the subsequent years of the Contracted Period:

- (a) Compensation shall be paid on monthly basis.
- (b) Monthly compensation payment shall be effective from the date of start of supply of scheduled energy to the procurers or from the date of Change in Law whichever is later.
- (c) The increase in royalty on coal, clean energy cess and excise duty on coal shall be computed based on actual subject to ceiling of coal consumed corresponding to scheduled generation based on SHR of 2241 kCal/kWh (based on the submission made in Petition No. 14/MP/2013) and shall be payable by the beneficiaries on pro-rata based on their respective share in the scheduled generation. In case of reduction in royalty on coal, clean energy cess and excise duty on coal, the petitioner shall compensate the procurers on the basis of above principle.
- (d) At the end of the year, the petitioner shall reconcile the actual payment made towards additional coal, excise duty and increase in royalty with the books of accounts duly audited and certified by statutory auditor and adjustment shall be made based on the energy scheduled by all the beneficiaries during the year. The reconciliation statement duly certified by auditor shall be kept in possession by the petitioner and can be shown to the beneficiaries/procurers, if so desired.

51. The petitioner has prayed that the petitioner be allowed interest/carrying cost for the expenditure incurred on account of change in law event detailed in the affidavit so that the economic position of the petitioner is restored. Rajasthan Distribution Utilities have submitted that there is no provision in the PPA for such carrying cost. It has been further submitted that the compensation payable to the petitioner should be strictly in accordance with Article 13.2(b) which provides for compensation from the date as decided by the Commission. We are not inclined to allow interest/carrying cost as there is no specific provision in the PPA. However, against the decision of the Commission not to allow carrying cost pertaining to Sasan UMPP in Petition No.402/MP/2014, the petitioner has filed a Review Petition 1/RP/2016. The Commission has issued notice in the said matter. Therefore, the decision taken in the said RP will be applicable in this case also.

52. This order disposes of Petition No.153/MP/2015.

Sd/-
(Dr. M.K.Iyer)
Member

sd/-
(A. S. Bakshi)
Member

sd/-
(A. K. Singhal)
Member

sd/-
(Gireesh B. Pradhan)
Chairperson