

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 79/MP/2013**

**Coram:**

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

**Date of Order : 3.2.2016**

**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 07.08.2008 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 (Operation 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**

**Vs**

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

2. Uttar Haryana BijliVitrان 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

**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



Limited(Petitioner No.2) to set up a 1400 MW Thermal Power Project (hereinafter referred to as the "Power Project") at village: Kamalanga, District: Dhenkanal in the State of Odisha. The Power Project comprises of two stages - the first stage having three units of 350 MW each and the second stage having one unit of 350 MW. Stage 1 of the Power Project has been accorded Mega Power Project status by Ministry of Power, Government of India on 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 Operation 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"). The petitioners have sought compensation under Change in Law during the Operation Period on account of the following events which have impacted the cost and revenue of supply of power from the Power Project to the procurers:

(a) Increase in the rate of royalty on coal pursuant to Notification No 349 (E) dated 10.5.2012 issued by the Ministry of Coal, Government of India.

(b) Levy of Clean Energy Cess by the Government of India under the Finance Act, 2010 with effect from 1.4.2010 in terms of Notification No 03/2010-Clean Energy Cess dated 22.6.2010 issued by Ministry of Finance, Government of India.

(c) Imposition of Excise Duty on coal by the Central Government in the Finance Act, 2012 with effect from 1.4.2012;

(d) Change in coal pricing policy from Useful Heat value(UHV) to Gross Calorific Value (GCV) vide Notification No 2421/1/2008-CRC-II dated 30.12.2012;



(e) Deviations from the New Coal Distribution Policy, 2007(the NCDP) and changes in coal distribution policy of the Government of India and Coal India Limited;

(f) Change in law events impacting Railway freight charges.

(g) Increase in Minimum Alternate Tax Rates introduced in the Finance Act, 2012 with effect from 1.4.2012.

(h) Increase in VAT levied on coal by Government of Odisha through Notification No. SRO No 126 dated 30.3.2012;

(i) Increase in water charges pursuant to SRO No. 429/2010 dated 1.10.2012 issued by the Department of Water Resources, Government of India.

4. The petitioners have made the following prayers in the petition:

- “(a) Declare that each of the items set out in Paragraphs 53 to 76 above are a Change in Law impacting revenues and costs during the Operating Period for which the Petitioners must be compensated in terms of Article 13 of the Haryana PPA;
- (b) Restore the Petitioners to the same economic condition prior to occurrence of the Changes in Law by permitting the Petitioner to raise Supplementary Bills in terms of Article 13.4.2 of the Haryana PPA as per the computations set out in hereinabove or through a suitable mechanism to compensate the Petitioners as and when the financial impact of the respective Changes in Law and Force Majeure event arise, either jointly or severally; and
- (c) Pass any such other and further reliefs as this Hon’ble Commission deems just and proper in the nature and circumstances of the present case.”

5. Haryana Power Generation Company Ltd (HPGCL) issued a Request for Proposal on 1.3.2007for 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 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 Bijli Vitran Nigam Limited (DHBVNL). GEL and PTC entered into a PPA dated 12.3.2009 as back to back arrangement to Haryana PPA.

6. As regards the fuel requirement for the power project, there was one firm linkage and one tapering linkage in favour of GEL, and allocation of captive coal mines in favour of a consortium of six companies including GEL as per the details given below:

(a) As regards the firm linkage, the Standing Linkage Committee (Long Term) (SLC-LT) approved a coal linkage for the project on 2.8.2007 which was communicated

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to the petitioner on 24.9.2007. Letter of Assurance (LOA) was issued in favour of GEL on 25.7.2008 for 2.14 MTPA of coal for 500 MW capacity of the Power Project. LOA was transferred in the name of GEKL by Ministry of Coal on 17.2.2011.

- (b) On 6.11.2007, Ministry of Coal conveyed its decision to allocate Rampia and Dip Side Rampia coal blocks in Odisha to a consortium comprising of GEL and five other companies (M/s Sterlite Energy Ltd, M/s Mittal Steel India Limited, M/s Lanco Group Limited, M/s Navbharat Power Private Ltd, and M/s Reliance Energy Ltd). Ministry of Coal vide its letter dated 17.1.2008 made the allocation under Section 3(3)(a)(iii) of the Coal Mines (Nationalisation) Act, 1973 for captive use in the specified end use projects by the allocatees. A joint venture company in the name of Rampia Coal Mine and Energy Private Limited was formed by the allocatees to carry out coal mining in early 2008.
- (c) On 12.11.2008, SLC-LT approved tapering coal linkage for the power project based on the recommendation of CEA that development of coal block allocated to GEL alongwith others was likely to take time. On 8.7.2009, LOA was issued for tapering coal linkage of 2.384 MTPA for 550 MW capacity in favour of GEL till coal from Rampia coal block was available. LOA was transferred in the name of GEKL by Ministry of Coal on 17.2.2011.



(d) On 26.3.2013, Mahanadi Coalfield Limited (MCL) signed the Fuel Supply Agreement with GEKL for supply of 1.819 MTPA of coal per annum.

7. According to the petitioners, the financial closure of the power project was achieved on 29.5.2009 and the petitioners went ahead with execution of the project with the expected COD of Unit 1 as 25.4.2013 as on the date of filing the present petition.

### **Background of dispute between the Petitioners/PTC and Haryana Discoms**

8. The petitioners have submitted that on 31.12.2009, GKEL had written to PTC informing that there was a material deviation in the Model Coal Supply Agreement in comparison with the New Coal Development Policy which would adversely impact the variable cost, capital cost, increased capital cost requirement and material obligations of GKEL under the Haryana PPA. On 2.8.2010, PTC wrote to HPGCL raising inter alia the issue of change in coal allocation policy. On 15.6.2011, GEKL wrote to PTC informing PTC of, inter alia, the deviation from the NCDP which made it impossible for GKEL to supply the energy at the tariff agreed in the Haryana PPA. On 15.6.2011, HPGCL filed Petition No. HERC/PRO-21 of 2012 before Haryana Electricity Regulatory Commission (HERC) under section 86 of the Electricity Act, 2003 requesting HERC to adjudicate the disputes that the events pertaining to land acquisition, visa policy and NCDP are covered under change in law or force majeure under the Haryana PPA. GKEL filed a reply dated 28.11.2011 before the HERC requesting to initiate conciliation proceedings





in order to resolve the issues. HERC vide its order dated 9.12.2011 passed an order directing the parties to try and hold negotiation to resolve the issues amicably.

9. The petitioner, PTC, HPGCL and Haryana Discoms held meetings on 15.2.2012, 18.6.2012 and 16.7.2012 and made correspondence regarding various events of change in law and force majeure but could not arrive at an amicable solution. On 10.4.2013, GKEL wrote a letter to PTC with copy marked to Haryana Discoms, HPGCL and HERC that the issues could not be resolved amicably. GKEL further informed that the power project being an inter-State project, GKEL proposed to approach CERC for resolution of disputes. Thereafter, the petitioners have filed the present petition seeking reliefs under change in law provisions of Haryana PPA during the Operating Period.

### **Jurisdictional Issue**

10. The petitioners have submitted that GKEL has a composite scheme for generation and sale of electricity in more than one State as much as 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 in the light of the judgement of the Appellate Tribunal for Electricity in Appeal No. 15 of 2011 (Lanco Power Ltd Vs Haryana Electricity Regulatory Commission) and therefore, the present petition is maintainable. Haryana Discoms vide their affidavit dated 12.7.2013 have raised a preliminary issue regarding the jurisdiction of the



Commission to adjudicate the dispute. Haryana Discoms have submitted that the PTC was selected as the successful bidder to supply power from the power project of GKEL through Case 1 competitive bidding and the essence of the bidding process was to supply electricity at the State periphery. Haryana Discoms have further submitted that the Discoms filed petition before HERC for adjudication of disputes and the petitioners participated in the proceedings before HERC without taking objection with regard to jurisdiction and therefore, the petitioners cannot invoke the jurisdiction of the Commission. The Commission considered and decided the issue of jurisdiction in its 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.”*

11. Haryana Discoms have filed Appeal No. 44/2014, before the Appellate Tribunal for Electricity against the said order dated 16.12.2013. The appeal is presently pending, though the Appellate Tribunal in its order dated 30.5.2014 has permitted, subject to the result/outcome of the appeal, continuation of the proceedings before this Commission. It is, therefore, made clear that this order being passed in this petition shall be subject to the outcome of appeal of the Haryana Discoms pending before the Appellate Tribunal.



## **Reply of respondents on the issues on merit**

12. After deciding the issue of jurisdiction, the Commission had directed the respondents to file their reply to the petition on merit. Haryana Discoms in their reply have submitted that the commercial operation of the Power Project has not been achieved and accordingly, the operating period as defined in the PPA has not commenced. Therefore, the petition is premature and the petitioner cannot maintain any claim in the petition at this stage. Haryana Discoms have further submitted that the impact of increase and decrease in tariff to be given under the provisions of “Change in Law” can be considered only after the tariff year is over and not before. According to the Haryana Discoms, the petitioner is required to file appropriate application for adjustment of tariff on account of real impact of change of law at a later stage. The Haryana Discoms have urged that the petitioners have not served notice of “Change in Law” as required under the PPAs and for this reason also, the claim raised by the petitioner in the present petition is not admissible. The Haryana Discoms have objected to the adjustment in tariff claimed by the petitioners on the ground that the petitioner ought to have factored all the issues at the time of participation in the bidding process and should not seek revision of tariff on any of the grounds. Haryana Discoms have submitted that as per the terms of the PPAs, coal required for the Project is to be sourced from Mahanadi Coalfields Ltd based on the coal linkage provided to the petitioner and any increase in costs on account of use of imported coal or auction coal or other incidental costs cannot be recovered through tariff. Haryana Discoms have pointed out the following on some of the specific claims of the petitioners. As regards



the increase in water charges, Haryana Discoms have submitted that the impact can be considered on the basis of actual charges payable by the petitioner but on the basis of rate of increase *qua* the quantum of water actually required to be used for generation of electricity as envisaged at the time of submission of bid. As regards the increase in royalty on coal, Haryana Discoms have submitted that royalty payable by the petitioner is not an increase in the cost for generation of electricity since royalty is payable for the use and exploitation of mines by the petitioner. As regards the change in effective Income Tax Rate and MAT, Haryana Discoms have submitted that the tax on income including MAT has nothing to do with the cost or revenue from the business of generation and sale of electricity as it is post-revenue operating profit or net profit of the business. PTC in its reply has supported the petitioner's claim for adjustment in tariff on account of imposition or increase in rates of indirect taxes. The petitioner in its rejoinder has refuted the submissions of Haryana Discoms and PTC.

### **Submission of parties during hearing**

13. Learned counsel for the petitioners submitted that Article 13.1.1 of the PPA provides that the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal of any law etc. are Change in Law events, where law means any Statutes, Ordinances, Regulations, Notifications, etc. Since, all claims in the petition are as a result of amendments in the statutes, they come under the purview of Change in Law. Learned counsel for the petitioner further submitted that Article 13 of the PPA provides for the mechanism to recognize and deal with events under Change in Law which includes compensation for any increase and decrease in revenue or cost to the



seller. Further, the petitioner's claims have met all the criteria laid down in Article 13 of the PPA to qualify as Change in Law. Learned counsel submitted that change in royalty structure of coal, shift from UHV based pricing to GCV based pricing, levy of Central Excise duty, levy of clean energy cess, changes in New Coal Distribution Policy by Government of India, levy of development surcharge by Railways, etc. are Change in Law events and the petitioner is entitled to be restored to the same economic position as if the changes have not occurred.

14. Learned counsel for Haryana Discoms submitted that the petitioners have not complied with provisions of Article 13 of the PPA strictly. The project was conceived based on domestic coal and the imported coal was never the basis for the project and any increase in cost on account of imported coal cannot be fastened to the procurers. Since claims such as increase in MAT rate, Income tax rate, Service tax etc. do not constitute a cost of business of selling of electricity, they cannot be construed as Change in Law events. Learned counsel for Haryana Discoms submitted that the petitioner was required to supply power from the COD of first unit i.e. 30.4.2013 whereas Haryana Discoms did not get the full contracted capacity till 9.2.2014. The petitioners should provide the details of the power sold in the open market and the same should be taken into account while considering the claims of the petitioners for revision of tariff under change in law. Learned counsel for the PTC India Ltd submitted that the claims in the present petition are akin to imposition of new levy, tax, charge etc. attributable to Government or Government Instrumentality. Since the viability of the project has come into jeopardy due to the external reasons attributable to Government



or Government Instrumentality, the same may be kept in mind while deciding the present case.

15. Learned counsel for the petitioner submitted that in terms of Article 13 of the PPA, the change in law events were notified to the procurers. With regard to inclusion of imported coal, learned counsel for the petitioner submitted that as per the decision of Cabinet Committee dated 21.6.2013, CEA had issued directions to all generating companies to provide for imported coal blending facility due to shortage of domestic coal. Therefore, whether cost of imported coal can be treated as a pass-through is covered in the statutory advice. Learned counsel for the petitioner requested the Commission for an early resolution for the fuel cost part of the claim and devise a mechanism to recover the same.

16. The petitioners were directed to submit detailed computations of all the cost impacts claimed (on actual usage basis based on the audited accounts). The petitioner, vide its affidavit dated 29.8.2014, has placed on record the audited account for financial year 2013-14 and has submitted the financial impact as under:

<b>Description</b>	<b>Amount (Rs.crore)</b>
Shortfall in the quantum of Linkage coal	46.10
Change in Law during Feb-July,2014	10.00
Water Charges	1.13
<b>Total impact</b>	<b>57.23</b>

#### **Analysis and Decision:**

17. According to the Haryana Discoms, the present petition is premature since the impact of "Change in Law" can be ascertained only during the operation period, that is,

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after the power project has been declared under commercial operation. In this regard, it is noted that 1<sup>st</sup> Unit of the power project was commissioned on 30.4.2013 and has been taken note of by the Haryana Power Purchase Centre (which is responsible for purchase of power on behalf of the Haryana Discoms) in its letter dated 20.5.2013. Subsequently, in its letter dated 8.8.2013, HPCC in response to the petitioner's offer contained in the letter dated 4.7.2013, consented for scheduling of power from the Project. The 2<sup>nd</sup> Unit achieved COD on 12.11.2013 and supply to the Haryana Discoms commenced on 7.2.2014. 3<sup>rd</sup> Unit achieved COD on 25.3.2014. Since all units of the power project have achieved COD, the operating period has already commenced, making the petitioners eligible for compensation under Change in Law during the operating period. The objections of Haryana Discoms on this count are disposed of accordingly.

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

- (a) Whether the provisions of the PPA with regard to notice has been complied with?**
- (b) What is the scope of change in law in the PPAs?**
- (c) Whether compensation claims are admissible under Change in Law in the PPA?**
- (d) Mechanism for processing and reimbursement of admitted claims under Change in Law?**

The above issues have been dealt with in the succeeding paragraphs.



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

19. The 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 petitioner has countered the allegation and has 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 or revenue of the project during the operating 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.”





20. The petitioner vide its letter dated 31.12.2009 informed PTC, *interalia*, about the deviations in the Model Coal Supply Agreement in comparison with the NCDP, adversely impacting the supply of power. PTC in its letter dated 2.8.2010 raised the issue of deviations with HPGCL. The petitioner in its further letter dated 15.6.2011 addressed to PTC reiterated, *interalia*, the issue of deviations from the NCDP asserting that the circumstances made it impossible for the petitioner to supply the power at the tariff agreed to under the PPAs. Thereafter, HPGCL filed a petition before the HERC on 21.9.2011 for adjudication whether certain events, including the issue of deviations from the NCDP, amounted to the *Force Majeure* or “Change in Law” events under the PPAs. In the petition, GKEL was impleaded as one of the respondents. 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 the petitioner was bound under the PPAs.

21. GKEL in its letter dated 22.5.2012 addressed to PTC with copy to HPGCL informed that the following events had adversely impacted the Project timelines and economics, and sought revision of tariff on their account:

- (a) The imposition of 14% *ad valorem* royalty on price of coal which would lead to an increase in royalty amount and consequently the cost of coal.
- (b) The changes in the Coal Distribution Policy including reduction of guaranteed supply amount to approximately 65% of Annual Contracted



Quantity (**ACQ**) as well as increase in cost due to inclusion of imported coal and procurement of coal through the e-auction process.

(c) A change in the pricing policy of coal from Useful Heat Value to cross Calorific Value which would lead to the price of coal increasing from Rs.570 per tonne to Rs.640 per tonne.

(d) Increase in water charges for water drawn for construction activities from Rs.1.05 per 1000 litres to Rs.5.30 per 1000 litres.

(e) Increase in water charges for water used for commercial purposes from Rs. 0.44 per 1000 litres to Rs.3.40/4.50 per 1000 litres.

22. On 18.6.2012, another meeting was held between GKEL and the respondents (PTC, HPGCL and Haryana Discoms), in which the petitioner was informed that pass through of fuel cost was not possible. In another meeting held on 16.7.2012, HPGCL and Haryana Discoms told GKEL to start supplying power to Haryana and the issues raised by GKEL would be considered thereafter.

23. On 26.9.2012, the petitioner sent a letter narrating in detail the *Force Majeure* and "Change in Law" events affecting the Project and the financial implications of each of these events. The letter dated 26.9.2012 was followed by another letter dated 31.10.2012 wherein the petitioner informed of levy of service tax on railway freight. By yet another letter dated 31.10.2012, the petitioner notified to PTC the following events, terming them as the events of "Change in Law":

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- (a) Increase in merit rate of excise duty from 5% to 6% for non-petroleum products,
- (b) Levy of 5% Development Surcharge by Ministry of Railways on all goods with effect from 15.10.2011, and
- (c) Levy of Busy Season Surcharge of 12% with effect from 1.10.2012 by Ministry of Railways.

24. 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 “Change in Law” events affecting the cost of generation of power or its revenue. HPGCL, acting on behalf of the Haryana Discoms, filed petition before HERC for adjudication whether the events amounted to “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 GKEL and Haryana Discoms to resolve the issue at the instance of HERC, it can be safely inferred that the petitioner has complied with the requirement of notice under Article 13.3 of the Haryana PPA.



## Issue No.2 : What is the scope of Change in Law under the PPAs?

25. Article 13 of the Haryana PPA deals with the events of Change in Law and is extracted for reference as under:

“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 licences 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;

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).

### 13.2 Application and Principles for computing impact of “Change in Law”

While determining the consequence of “Change in Law” under this Article 13, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through Monthly Tariff Payments, to the extent contemplated in this Article 13, the affected Party to the same economic position as if such “Change in Law” has not occurred.

(a) \*\*\*\*\*

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



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

26. Further Article 17 of the Haryana PPA provides that in case of dispute between the parties arising out of claim made by any party for any change in or determination of tariff or any matter relating to tariff. The said Article is extracted as under:

“17.3 Dispute Resolution:

17.3.1 Where any dispute arises from a claim made by any party for any change in or determination of the tariff or any matter related to tariff or claims made by any party which partly or wholly relate to any change in the tariff or determination of any of such claims could result in change in the tariff or (a) (ii) relates to any matter agreed to be referred to the Appropriate Commission under Articles 4.7.1,13.2,18.1 or clause 10.1.3 of Schedule 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.”

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

- (a) Any enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law, or
- (b) Any change in interpretation of any Law by a Competent Court of law, tribunal or Indian Governmental Instrumentality acting as final authority under law for such interpretation, or



- (c) Any change in any consents or approvals or licenses available or obtained for the project, otherwise than the default of the seller.
- (d) Such changes shall result 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.
- (e) 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.
- (f) The Appropriate Commission shall determine the compensation for any increase/decrease in revenues or cost to the Seller and effective date of such compensation which shall be final and binding on both the Parties, subject to rights of appeal provided under applicable Law.

28. "Law" has been defined under Article 1.1 of the Haryana PPA as under:

"Law means in relation to this Agreement, all laws including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and shall further include all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include all rules, regulations, decisions and orders of the Appropriate Commission".

The term "Indian Governmental Instrumentality" is also defined in Article 1.1 as under:

"Indian Governmental Instrumentality" means the Government of India (GOI), Government of Haryana and any Ministry, department, body corporate, Board, agency, or other authority of GOI or Government of the State where the Project is located and includes the Appropriate Commission".



As per the above definition, law shall include (a) all laws including electricity laws in force in India; (b) any statute, ordinance, regulation, notification, code, rule or their interpretation by Government of India, Government of Haryana or Government of Odisha (since the project is located in Odisha) or any ministry, department, board, body corporate agency or other authority under such Governments; (c) all applicable rules, regulations, orders, notifications by a Government of India Instrumentality; and (d) all rules, regulations, decisions and orders of the Appropriate Commission. If any of these laws affects the cost of generation or revenue from the business of selling electricity by the seller to the procurers, the same shall be considered as change in law to the extent it is contemplated under Article 13 of the PPA.

**Issue No.3 : Which of the individual claims of the petitioner are admissible under Change in Law in accordance with the provisions of Haryana PPA?**

29. The events of Change in Law should occur after seven days prior to the Bid Deadline. The Bid Deadline was 23.11.2007. Therefore, the Change in Event should occur on or after 16.11.2007. The individual claims of the petitioner are discussed in the succeeding paragraphs.

**(A) Increase in rate of royalty on Domestic linkage of coal:**

30. The petitioner has submitted that at the time of bid submission, the prevalent/notified rate of royalty on coal was Rs.55+5% of ROM price per tonne which formed the basis of the winning bid submitted by GKEL through PTC. Subsequently, Ministry of Coal, Government of India issued Notification No. 349 (E) dated 10.5.2012 increasing the rate of royalty on coal to an ad-valorem rate of 14% on price of coal. The



petitioner has submitted that as per the said notification, the ad valorem rate of 14% will be levied on the price of coal as reflected in the invoice excluding taxes, levies and other charges. The petitioner has submitted that the peak annual requirement of coal for the power project to be procured at the mines end when all three units are operational is estimated to be 4.39 million tonnes. The Run-of-the-Mine price of coal proposed to be procured for the power project is Rs.640 per MT as per the Notification dated 1.1.2012 issued by Coal India Limited. The petitioner has suggested the following formula for computation of financial impact on account of increase in royalty of coal:

Impact (In Rs.) = {Actual monthly royalty paid on coal purchased for entire power plant **less**[Quantity of coal in the month in metric ton (MT) purchased for the entire power plant x ROM price x (Rs.55 + 5%)]} x % share of gross plant capacity in MW allocated for Haryana Discoms.

The petitioner has also submitted the computation of the increase in cost to GKEL during the Operating Period on account of levy of ad valorem royalty based on estimated coal requirement at Annexure P-39 to the petition.

31. Haryana Discoms in their reply have denied that royalty paid by the petitioners for coal is an increase in the cost for generation of electricity. It is a royalty payable for the use and exploitation of the mines by the petitioner whereas the petitioner has lined up coal linkage as per the bid document and the PPA. Haryana Discoms have not admitted the quantum of increase in the royalty or the methodology suggested by the petitioners.





32. We have considered the submissions of the petitioners and Haryana Discoms. As per the Notification No.349 (E) dated 10.5.2012 of Ministry of Coal, Government of India, the royalty on coal has been fixed as under:

“(1) Royalty on Coal: The rate of royalty on coal shall be @ 14% (Fourteen percent) ad-valorem on price of coal, as reflected in the invoice, excluding taxes, levies and other charges.”

Through this notification dated 10.5.2012, Second Schedule of the Mines and Minerals (Development and Regulations) Act, 1957 has been amended. The Notification has been issued after 16.11.2007. As change in rate of royalty on coal has an impact on the cost of coal and hence, the cost of generation of power for supply to the Haryana Discoms, the change will be covered under change in law. The petitioner will now be required to pay the increased cost of coal including royalty on coal @ 14% ad-valorem on the price of coal as reflected in the invoice, excluding taxes, levies and other charges. The petitioner has submitted that at the time of bid, the rate of royalty on coal was Rs.55 + 5% of the ROM price per tonne which formed the basis of its bid. The petitioner has prayed that the difference between the rate of royalty on coal prevalent as on the date of submission of the bid and the rate of royalty on coal revised through the Notification dated 10.5.2012 may be allowed to the petitioner on the ad valorem price of coal as reflected in the invoice excluding taxes, duties and levies. The Appellate Tribunal for Electricity in its judgement dated 12.9.2014 in Appeal No.288 of 2013 (M/s Wardha Power Company limited Vs Reliance Infrastructure Limited &Another) has observed as under:



“26. The price bid given by the Seller for fixed and variable charges both escalable and non-escalable is based on the Appellant’s perception of risks and estimates of expenditure at the time of submitting the bid. The energy charge as quoted in the bid may not match with the actual energy charge corresponding to the actual landed price of fuel. The seller in its bid has also not quoted the price of coal. Therefore, it is not correct to correlate the compensation on account of Change in Law due to change in cess/excise duty on coal, to the coal price computed from the quoted energy charges in the Financial bid and the heat rate and Gross Calorific value of Coal given in the bidding documents by the bidder for the purpose of establishing the coal requirement. The coal price so calculated will not be equal to the actual price of coal and therefore, compensation for Change in Law computed on such price of coal will not restore the economic position of the Seller to the same level as if such Change in Law has not occurred.”

Therefore, as per the above judgement, the seller is required to be allowed the compensation on account of change in law on the actual price of coal in order to restore economic position of the seller at the same level as if change in has not occurred. Accordingly, we hold that GKEL shall be entitled for compensation @ 14% ad valorem price of coal per tonne as reflected in the invoice excluding taxes, duties and levies which shall be reduced by Rs.55 plus 5% of the ad valorem price of coal excluding taxes, duties and cess. In case the rate of Royalty is reduced from 14% or Rs.55 plus 5%,GKEL shall compensate for the reduction in cost of coal based on above principles.

33. It is noted that liability of Haryana Discoms for payment of royalty on coal shall be in proportion to the coal consumed for generation and supply of power to Haryana Discoms. GKEL is directed to furnish along with its monthly bill the proof of payment to coal companies and computations (based on SHR of 2378 kg/Kcal and GCV of coal received) duly certified by the auditor to the Haryana Discoms. It is clarified that the Haryana Discoms shall be liable to make payment in proportion to the actual coal consumed for generation subject to ceiling of coal consumption corresponding to



scheduled generation for supply of electricity to them. GKEL and Haryana Discoms are directed to carry out reconciliation on account of these claims annually.

**(B) Levy of Clean Energy Cess:**

34. The petitioners have submitted that at the time of submission of the bid, there was no Clean Energy Cess on coal. However, Government of India introduced Clean Energy Cess in the Finance Act, 2010, whereby a statutory cess of Rs.100 per ton has been levied on coal, lignite and peat and subsequently, the cess has been reduced to Rs.50 per ton vide Ministry of Finance notification dated 22.6.2010. The petitioners have submitted the following formula for calculation of Clean Energy Cess:

Impact (in Rs.) = (The entire amount paid towards Clean Energy Cess for the power plant) x (% share of gross plant capacity in MW allocated to Haryana Discoms)

The petitioners have submitted that cess is applied uniformly to all sources of coal proposed to be procured by the GEKL i.e. linkage, e-auction, and imported. The indicative financial impact to be passed through to Haryana Discoms is expected to be Rs.7.32 crore for a full year period. However, the actual amount will be on the basis of actual cess paid on the coal to be procured for supply of power to Haryana Discoms. No specific reply on this point has been given by Haryana Discoms.

35. We have considered the submission of the petitioner. It is noticed that the clean energy cess was introduced by Government of India through the Finance Act, 2010 which was after 7 days prior to the Bid Deadline i.e.16.11.2007. Further, clean energy



cess was reduced from Rs.100 to Rs.50 vide Notification dated 22.6.2010. Therefore, the net effect of clean energy cess is Rs.50 per tonne. Since the clean energy cess was not in existence at the time of submission of the bids, the petitioner cannot be expected to factor in its impact in the bid. The issue of clean energy cess as a Change in Law event has been considered by the Commission in order dated 30.3.2015 in Petition No. 6/MP/2013. Relevant portion of said order dated 30.3.2015 is extracted as under:

“33. We have considered the submissions made by both petitioner and the respondents on the clean energy cess. The clean energy cess on coal was introduced by the Government of India through the Finance Act, 2010 for the first time which is after the due date i.e. seven days prior to the bid deadline. Since there was no clean energy cess on the date of submission of the bid, the petitioner could not be expected to factor in the impact of such cess in the bid. Moreover, clean energy cess adds to the input cost of production of electricity. Therefore, the claim is covered under Article 13.1.1(i) of the PPA and consequently the liabilities shall be borne by the procurers....”

36. The above decision is applicable in case of the petitioners. Therefore, levy of clean energy cess on coal is admissible to the petitioner as a change in law event under Article 13 of the Haryana PPAs. Accordingly, the GKEL is entitled to recover clean energy cess from the Haryana Discoms in proportion to the coal consumed for generation and supply of electricity to Haryana Discoms. GKEL is directed to furnish along with its monthly bill the proof of payment and computations (based on SHR of 2378 kg/Kcal and GCV of coal received) duly certified by the auditor to the Haryana Discoms. It is clarified that the Haryana Discoms shall be liable to make payment in proportion to the actual coal consumed subject to ceiling of coal consumed corresponding to scheduled generation for supply of electricity to them. GKEL and Haryana Discoms are directed to carry out reconciliation on account of these claims



annually. In case of reduction in clean energy cess, GKEL shall compensate the Haryana Discoms on the basis of above principles.

**(C) Excise Duty on Domestic linkage Coal:**

37. The petitioners have submitted that at the time of submission of bid, there was no excise duty on coal. The Government of India vide Finance Act, 2012 levied excise duty @ 6% on the determined sale price of coal. The petitioners have submitted that the sale price of coal is Rs.898 per MT which covers Run of Mine (ROM) price of Rs.640 /MT, royalty, stowing excise duty, sizing charges, surface transportation and loading charge components. The petitioners have suggested the following formula for computation of financial impact on account of levy of excise duty:

Impact (in Rs.) = (The entire amount paid towards excise duty on coal for the power plant) x (% share of gross plant capacity in MW allocated to Haryana Discoms)

The petitioners have submitted that the annual estimated impact on account of levy of excise duty is expected to be Rs. 8.12 crore for a full year. The petitioners have submitted that the amount will be claimed on the basis of actual quantity of coal supplied to the project. No specific reply has been filed by Haryana Discoms with regard to this claim of the petitioners.

38. We have considered the submission of the petitioners. The Commission vide order dated 30.3.2015 in Petition No. 6/MP/2015 considered the issue of excise duty on as a change in law event under the relevant PPA. The relevant portion of the said order dated 30.3.2015 is extracted 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 fulfils the requirement of “Change in Law”.

39. The levy of excise duty on coal through the Finance Act, 2012 was introduced after seven days prior to the bid deadline i.e.16.11.2007 and has impact on the cost of generation of power for supply to the procurers and therefore, levy of excise duties on coal is covered under change in law. Accordingly, GKEL is entitled to be compensated through adjustment in tariff on account of excise duty on coal.

40. GKEL is directed to furnish along with its monthly bill the proof of payment and computations (based on SHR of 2378 kg/Kcal and GCV of coal received) duly certified by the auditor to the Haryana Discoms. It is clarified that the Haryana Discoms shall be liable to make payment in proportion to the actual coal consumed subject to ceiling of coal consumed corresponding to scheduled generation for supply of electricity to them. GKEL and Haryana Discoms are directed to carry out reconciliation on account of these claims annually. In case of any reduction in excise duty on coal, the GKEL shall compensate the Haryana Discoms on the basis of the above principles.

**(D) Increase in the cost of fuel due to changes in the Fuel Supply Arrangements.**

41. The petitioners have submitted that the power project was conceived on the basis of domestic coal to be sourced from linkages and share of coal from captive coal



blocks. Thereafter, there have been substantial changes in the Coal Policy and availability which has affected the project economics. On 18.10.2007, Government of India introduced the New Coal Distribution Policy (NCDP) in terms of which Coal India Limited or its subsidiaries were responsible for supply of 100% of the fuel quantity to all the IPPs including the petitioner. GMR Energy Limited (GEL) was issued LOAs by Mahanadi Coalfields Ltd on 25.7.2008 and 8.7.2009 providing firm linkage of 2.14 MTPA coal for 500 MW and tapering linkage of 2.384 MTPA for 550 MW respectively in terms of the NCDP which were subsequently transferred in the name of GKEL. The petitioners have submitted that the assured supply of 100% of the coal requirement was the fundamental premise on which power could be supplied under the Competitive Bidding Regime. The petitioners have submitted that subsequent to the submission of the Haryana bid on 23.11.2007, there were substantial deviations from the New Coal Distribution Policy (NCDP) and the stipulations in the model FSA due to decision of the Government of India. On 17.2.2007, Ministry of Coal 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 the distribution companies. According to the petitioners, a new model FSA was issued by CIL on 19.4.2012 which substantially altered the terms and conditions of the NCDP such as (i) no penalty was on CIL if the quantity of coal supplied is less than 100% but atleast 65% of the annual contracted capacity; (ii) CIL had the option of supplying up to 15% of the coal by way of imported coal; and (iii) supply of coal was limited to the percentage of generation covered under long term PPAs with the distribution companies. CEA in its letter dated 19.4.2011 also noted the issue of imported coal to ensure that all future coal based thermal power

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stations should be designed to accommodate use of imported coal. Mahanadi Coalfield Ltd has signed FSA with GEKL on 26.3.2013 which is based on the model FSA which has significant deviation from NCDP. The petitioners have submitted that the reduction in the assured quantity of coal from 100% to 65% of annual contracted capacity and consequent effect on the petitioner to tie up coal from other sources has significant effect on the cost or revenue of the project of the petitioner. The petitioners have submitted that the deviations from NCDP and the stipulations in the model FSA are a result of the decision of the Government of India particularly the Ministry of Coal and signifies change in policy of the Government of India and therefore, is covered under change in law.

42. The petitioners have submitted that the delay in development and operationalizing the captive coal block has had a significant impact on the business of GKEL. It has been submitted that GKEL has tied up 892 MW of power through long term PPAs including supply to Haryana Discoms for which GKEL require approximately 4.5 MTPA per annum against which it has a firm linkage for 2.14 MTPA and tapering linkage for 2.38 MTPA for a limited period till the supply of coal from captive coal block which has been significantly delayed on account of non-receipt of Prospecting Licence from Government of Odisha. The petitioners have submitted that the project should be restored to the same economic condition as it would have been had the fundamental changes affecting availability of coal through linkages or from captive coal mines had not occurred. The petitioners have submitted that the Commission may devise a





mechanism to compensate GKEL for the increase in the cost for purchasing coal from sources other than linkage coal and coal from captive coal blocks on account of change in law events by way of deviation from NCDP and changes in policies of the Indian Government Instrumentalities in terms of allocation of coal.

43. Haryana Discoms have submitted that Haryana invited Case 1 bids where the GEL/PTC were one of the successful bidders. The essence of Case 1 bidding is that the bidder has to quote tariff including all factors at the State periphery. GEL/PTC ought to have factored all the issues at the time of Case 1 bidding participation and should not seek revision on any of the grounds. Haryana Discoms have further submitted that it is the duty of project developer to take care of all the issues faced by them and the procurers are only required to pay the agreed tariff on account of power received by them. During the hearing, learned counsel for Haryana Discoms submitted that the project was conceived based on domestic coal and the imported coal was never the basis for the project and any increase in cost on account of imported coal cannot be fastened to the procurers.

44. Learned counsel for the petitioners submitted during the hearing that as per the decision dated 21.6.2013 of Cabinet Committee on Economic Affairs, CEA issued directions to all generating companies to provide for imported coal blending facility due to shortage of domestic coal. The petitioners have placed reliance on the Commission's statutory advice dated 20.5.2013 to the Central Government recommending for allowing



the cost of imported coal being supplied by CIL and its subsidiaries as pass through under the Change in Law provisions of the PPA.

45. We have examined the submissions of the petitioners and the respondents. HPGCL invited bids for procurement of power. 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. Under both streams, the Transmission Charge of the intervening CTU network upto the Delivery Point (CTU-Haryana inter-connection) would not be part of capacity or Energy Charge and needed to be quoted separately. As per RfP, the bidder was required to indicate the progress/proof of in support of fuel arrangement through submission of copies of anyone or more of (a) linkage from fuel supplier; (b) Fuel Supply Agreement between bidder and Fuel Supplier; (c) Coal Block Allocation letter/in principle approval for allocation of captive coal block from Ministry of Coal; (d) Other details submitted by the Bidder subject to the acceptance by the Procurer as sufficient proof of demonstration of ability. The RfP further provided that the Bidder in the event of being the successful bidder would be required to show a firm fuel supply agreement/linkage by the time of conditions subsequent as mentioned in the PPA. Thus the requirement under the bidding conditions was that the bidder should be able to demonstrate its



ability to procure fuel for supply of power to Haryana Discoms in the event of being declared as a successful bidder.

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.

50. On account of inability of the Coal India Limited to meet the requirement of coal of power sector in respect of the projects likely to be commissioned by 31.3.2015, it was decided by the Cabinet Committee on Economic Affairs (CCEA) after taking into account the statutory advice of this Commission to the Central Govt. under Section 79 (3) of the Act, that considering the domestic coal availability and actual requirements, FSAs would be signed for domestic coal quantity of 65%, 67% and 75% of the ACQ for the remaining 4 years of 12<sup>th</sup> Five Year Plan and the balance FSA obligations would be met by import of coal by CIL or the IPPs themselves as per the guidelines issued by MOC. Relevant provisions of the decision of CCEA as conveyed vide letter dated 21.6.2013 are extracted as under:

“ (i) Coal India Ltd. (CIL) to sign Fuel Supply Agreements (FSA) for a total capacity of 78000 MW including cases of tapering linkage which are likely to be commissioned by



31.3.2015. Actual coal supplies would however commence when long term Power Purchase Agreements (PPAs) are tied up.

(ii) Taking into account the overall domestic availability and actual requirements, FSAs to be signed for domestic coal quantity of 65 percent, 67 percentage and 75 percentage of Annual Contracted Quantity (ACQ) for the remaining four years of the 12<sup>th</sup> Five Year Plan.

(iii) To meet its balance FSA obligations, CIL may import coal and supply the same to the willing Thermal Power Plants (TPPs) on cost plus basis. IPPs may also import coal themselves, MoC to issue suitable instructions.

(iv) Higher cost of imported coal to be considered for pass through as per modalities suggested by CERC. MoC to issue suitable orders supplementing the New Coal Distribution Policy (NCDP). MoP to issue appropriate advisory to CERC/SERCs including modifications if any in the bidding guidelines to enable the appropriate Commissions to decide the pass through of higher cost of imported coal on case to case basis.

(v) Mechanism will be explored to supply coal subject to its availability to the TPPs with 4660 MW capacity and other similar cases which are not having any coal linkage but are likely to be commissioned by 31.3.2015, having long term PPAs and a high Bank exposure and without effecting the above decision.”

51. Based on the decision of CCEA, Ministry of Power, Government of India vide its letter dated 31.7.2013 communicated the decision of the Central Government as under:

“After considering all aspects and the advice of CERC in this regard, Government has decided the following in June 2013:

(i) Taking into account the overall domestic availability and actual requirements, FSAs to be signed for domestic coal component for the levy of disincentive at the quantity of 65%, 67% and 75% of Annual Contracted Quantity (ACQ) for the remaining four years of the 12<sup>th</sup> plan.

(ii) To meet its balance FSA obligations, CIL may import coal and supply the same to the willing TPPs on cost plus basis. TPPs may also import coal themselves if they so opt.

(iii) Higher cost of imported coal to be considered for pass through as per modalities suggested by CERC.

3. Ministry of Coal vide letter dated 26<sup>th</sup> July 2013 has notified the changes in the New Coal Distribution Policy (NCDP) as approved by the CCEA in relation to the coal supply for the next four years of the 12<sup>th</sup> plan.



4. As per the decision of the Government, the higher cost of import/market based evacuation coal be considered for being made a pass through on a case to case basis by CERC/SERC to the extent of shortfall in the quantity indicated in the LoA/FSA and the CIL supply of domestic coal which would be minimum of 65%, 65% 67% and 75% of LoA for the remaining four years of the 12<sup>th</sup> plan for the already concluded PPAs based on tariff based competitive bidding.

5. The ERCs are advised to consider the request of individual power producers in this regard as per due process on a case to case basis in public interest. The Appropriate Commissions are requested to take immediate steps for the implementation of the above decision of the Government.”

52. As per above advisory of the Central Government, the higher cost of import/market based coal to the extent of shortfall in supply by CIL or its subsidiaries under the FSAs/LOAs in respect of the concluded PPAs on tariff based competitive bidding shall be considered in public interest as pass through on case to case basis by the Central Commission or the State Commissions as the case may be. It has been further stated in the said letter that the higher cost of imported coal shall be considered as pass through as per the modalities suggested by this Commission. It is pertinent to mention that the Commission in its statutory advice dated 20.5.2013 had advised that the Project Developers whose projects were commissioned or likely to be commissioned between 1.4.2009 and 31.3.2014 would have to approach the Appropriate Commission for claiming the impact of imported coal under change in law which would be decided on case to basis. The petitioner has signed the FSA with MCL on 26.3.2013. Therefore, the FSA was signed before the statutory advice. As per the FSA, there is no penalty for shortfall in delivery upto 65% for the years 2012-13, 2013-14 and 2014-15. As per the advisory, higher cost of imported coal and evacuation coal shall be made a pass through to the extent of shortfall in the quantity mentioned in





the LOA/FSA and CIL supplied coal which would be 65%, 65% , 67% and 75% of the LOA during the last four years of 12<sup>th</sup> Plan for already concluded PPAs.

53. The petitioners have submitted that GKEL have incurred an additional cost of Rs.46.10 crore in generation of power to the Haryana Discoms during the months of February, May to July, 2014 due to imported Coal and usage of Open market coal to mitigate the shortfall in the linkage coal and also due to transfer of certain quantum of tapering linkage from MCL to ECL. The petitioners vide affidavit dated 29.8.2014 have submitted the details of increase in the coal cost as under:

Shortfall in Linkage					
Particular	Unit	Feb-14	May-14	June-14	July-14
Sales	MU	132	182	195	177
Transmission Loss	%	2.95%	2.89%	2.92%	2.74%
Aux. Power	%	9.28%	9.38%	8.34%	9.28%
Gross Generation Actual	MU	150	206	220	200
Days in Month	No.	28	31	30	31
Contracted Capacity	MW	300	300	300	300
Gross Generation @ 80% PLF	MU	183	203	194	202
GHR	kCal/kWh	2,424	2,378	2,378	2,378

#### Monthly Linkage Coal quantity received

MCL	MT ( Metric Ton )	86,537	94,160	94,160	62,003
Tapering MCL	MT				11,588
Tapering ECL	MT				8,365

#### Net Coal available

MCL	MT	85,845	93,407	93,407	61,507
Tapering MCL	MT				11,495
Tapering ECL	MT				8,298



**As Received Basis GCV of Coal**

MCL	Kcal/kg	3595	3331	3589	3574
Tapering MCL	Kcal/kg				3574
Tapering ECL	Kcal/kg				4674

**Generation using Available Linkage Coal**

MCL	MU	127	131	141	92
Tapering MCL	MU				17
Tapering ECL	MU				16
		<b>127</b>	<b>131</b>	<b>141</b>	<b>126</b>

<b>Balance Generation</b>	MU	23	76	79	74
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**As Received Basis GCV of Coal**

Imported	Kcal/kg	4,185	4,110	4,054	3,876
Open Market	Kcal/kg	3,122	3,406	3,398	3,375

**Quantity of Coal**

Imported	MT	6,660	21,853	23,082	22,750
Open Market	MT	8,927	26,369	27,538	26,127

**Fuel Cost Quantity**

MCL	MT	85,845	93,407	93,407	61,507
Tapering MCL	MT	0	0	0	11,495
Tapering ECL	MT	0	0	0	8,298
Imported	MT	6,660	21,853	23,082	22,750
Open Market	MT	8,927	26,369	27,538	26,127

**Rate**

MCL	Rs./MT	1,198	1,209	1,207	1,264
Tapering MCL	Rs./MT				1,370
Tapering ECL	Rs./MT				4,641
Imported	Rs./MT	4,127	3,931	3,892	3,892
Open Market	Rs./MT	3,797	3,871	3,359	3,846



<b>Fuel Cost</b>	<b>Rs. Cr.</b>	<b>16</b>	<b>30</b>	<b>30</b>	<b>32</b>
Cost per Unit	Rs./ kWh	1.24	1.66	1.51	1.82
Tariff PTC/HPPC PPA	Rs./ kWh	0.904	0.904	0.904	0.904
<b>Total Loss per Unit</b>	<b>Rs./ kWh</b>	<b>0.34</b>	<b>0.75</b>	<b>0.61</b>	<b>0.91</b>
<b>Total Loss</b>	<b>Rs. Cr.</b>	<b>4.46</b>	<b>13.68</b>	<b>11.84</b>	<b>16.13</b>
<b>February, 2014 - July,2014 (4 months) claimed by Petitioner</b>	<b>Rs. 46.11 crore</b>				

54. Perusal of the above data reveals that the petitioner has considered gross generation required in February, May, June and July, 2014 after considering actual Auxiliary Power Consumption of 9.28%, 9.38%, 8.34% and 9.28% respectively and the transmission losses of about 2.95% to delivery power at Haryana STU inter-connection point. The petitioner in the months of February and May to July, 2014 has considered Gross Station Heat Rate as 2424 kCal / kWh and 2378kCal/ kWh as per 2009 Tariff Regulations and 2014 Tariff Regulations. It is noted that the petitioner has considered Net Coal available from linkage (firm and taper) after excluding transit losses of 0.8%. Based on these considerations, the petitioner has computed the actual generation from linkage coal and the balance generation for which coal from import and open market were used. Accordingly, the total fuel cost were arrived at in each month i.e. February, May, June and July, 2014 and the per unit fuel cost has been computed as Rs.1.24/ kWh, Rs.1.66 /kWh, Rs.1.51 /kWh and Rs.1.82 /kWh respectively by dividing the fuel cost by energy supplied to Haryana at delivery point. The difference between actual cost per unit and the cost quoted in the bid has been shown as loss incurred per unit.



55. We have considered the submission of the petitioners on the additional cost incurred on imported coal and open market coal procured due to shortage in linkage coal for Haryana generation during the months of February, 2014 and May to July, 2014. The following mechanism as given in para 56 below is devised to compute actual additional cost incurred in a month to procure imported coal and coal from open market to make up the deficit portion of coal actually received from linkage.

56. The Energy Charge Rate (ECR) for Scheduled Generation at delivery point be computed in steps as shown below, considering SHR of 2378 kCal / kWh and Aux Consumption of 5.75%. Since, the formulation is for mitigating coal shortage, the Specific Oil Consumption has been considered as nil.

Step-1:

ECR Linkage coal<sub>(Delivery point)</sub> = ECR QUOTED

Step-2:

ECR Other coal<sub>(Delivery point)</sub> = {[2378 / Weighted Average GCV of other coal (i.e. imported + open market + tapering linkage)] x [Weighted Average Price of other coal (i.e. imported + open market + tapering linkage)] x [1/(1- Aux Consumption)] x [1/(1- Approved Transmission Losses)]}

Step-3:

ECR chargeable at delivery point = {(G x ECR at Step-1) + [ECR computed at Step-2 x (1-G)]}

Where,

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G = Generation achievable based on higher of minimum percentage as assured in relevant year as per NCDP or actual percentage of linkage coal received

Weighted Average GCV of other coal =

$$\frac{\{(GCV_{\text{Imported coal}} \times Qty_{\text{Imported coal}}) + (GCV_{\text{Tapering Linkage coal}} \times Qty_{\text{Tapering Linkage coal}}) + (GCV_{\text{Open market coal}} \times Qty_{\text{Open market coal}})\}}{\{Qty_{\text{Imported coal}} + Qty_{\text{Tapering Linkage coal}} + Qty_{\text{Open market coal}}\}}$$

Weighted Average Price of Other coal =

$$\frac{\{(Price_{\text{Imported coal}} \times Qty_{\text{Imported coal}}) + (Price_{\text{Tapering Linkage coal}} \times Qty_{\text{Tapering Linkage coal}}) + (Price_{\text{Open market coal}} \times Qty_{\text{Open market coal}})\}}{\{Qty_{\text{Imported coal}} + Qty_{\text{Tapering Linkage coal}} + Qty_{\text{Open market coal}}\}}$$

Compensation =  $\{(ECR \text{ as computed at Step-3- } ECR_{\text{Quoted}}) \times (\text{Scheduled Generation at delivery point})\}$

Note: 1) If the actual generation at delivery point is less than scheduled generation at delivery point, it will be restricted to actual generation at delivery point.

2) All facts, figures and computations in this regard should be duly certified by the auditor.

3) The coal consumed on month to month shall be duly certified by the auditor and the same shall be reconciled annually with the Opening Stock, coal received during the year, coal consumed during the year and the closing stock.

4) Total Generation Ex-bus and Scheduled generation Ex-bus on month to month basis as per the meters at the station switchyard bus shall be reconciled with the SCADA data of RLDC and Regional Energy Accounting of RPC/SLDC for the month.



**(E) Switch over from UHV method of coal pricing to GCV method of coal pricing:**

57. The petitioners have submitted that at the time of submission of the bid, the pricing of coal was based on the UHV method. GEKL had considered the prevalent UHV method of coal pricing which was Rs.400 per tonne for F grade run-of-mine coal (GCV band 3865 to 4324 kCal/kg). On 30.12.2011, GOI issued a Gazette Notification directing a switchover from UHV based pricing system to GCV based pricing system with effect from 1.1.2012. After the shift from UHV to GCV, ROM price of F grade coal with mid point GCV of 4095 kCal has increased from Rs.570 to Rs.640 per tonne. The petitioner has submitted that transfer of UHV regime to GCV regime was pursuant to the directions of the Government of India, resulting in an impact of Rs.70 per tonne and is clearly covered under change in law. The petitioner has submitted that the resultant impact of the above change is Rs.10.76 crore for a full year.

58. We have considered the submissions of the petitioner. Prior to 1.1.2000, the Central Government under Section 4 of the Colliery Control Order, 1945, was empowered to fix the grade-wise and colliery-wise prices of coal. Subsequently, based on the recommendations of Bureau of Industrial Costs and Prices (BICP), Government of India decided to de-regulate the prices of all grades of coking coal and A, B, and C grades of non-coking coal from 22.3.1996. Subsequently, based on the recommendation of the Committee on Integrated Coal Policy, the Government of India decided to de-regulate the prices of soft coke, hard coke and D grade of non-coking coal with effect from 12.3.97. The Government also decided to allow CIL and SCCL to fix



prices of E, F and G grades of non-coking coal once in every six months by updating the cost indices as per the escalation formula contained in the 1987 report of the BICP and on 13.3.1997, necessary instructions were issued to CIL and SCCL in this regard. The pricing of coal was fully deregulated after the Colliery Control Order, 2000 notified on 1.1.2000 in supersession of the Colliery Control Order, 1945. Under the Colliery Control Order, 2000 the Central Government has no power to fix the prices of coal. Therefore, the prices of coal from CIL and its subsidiaries were market based. Only the pricing methodology was UHV basis at the time of bid submission which was switched over to GCV based pricing w.e.f. 1.1.2012 vide Govt. of India notification dated 30.12.2011. In our view, any decision affecting the price of inputs for generating electricity including coal cannot be covered under Change in Law except the statutory taxes, levies and duties having an impact on the cost of or revenue from the supply of electricity to the procurers. As already noted, para 2.7.2.4 of the RfP required the bidders to reflect all costs involved in procuring the inputs (including statutory taxes, duties and levies thereof) in the quoted tariff. Moreover, the petitioner has quoted stream 1 tariff consisting of non-escalable capacity charges and non-escalable energy charges, thereby taking all risks of price escalation in inputs including coal. Therefore, change from UHV to GCV based pricing cannot be covered under change in law. Hon`ble Appellate Tribunal For Electricity in the judgment dated 12.9.2014 in Appeal No. 288 of 2013 has observed as under:

“According to the bidding documents, the Appellant is not entitled to any increase in energy charges on account of increase in base price of fuel. However, the impact on account of change in the expenditure due to Change in Law has to be allowed as per the actuals subject to verification of proof submitted by the Appellant.”



In the light of above judgement also, the change in the base price of fuel on account of switchover from the UHV method to GCV method of coal pricing is not admissible under change in law.

**(F) Busy Season Surcharge and Development Surcharge on Coal Transportation:**

59. The petitioners have submitted that the coal required for the project is supplied from MCL which is transported through rail. The petitioners have submitted that certain events have occurred which have led to the increase in rail freight charges. The petitioner have further submitted that Ministry of Railways vide its letter dated 12.10.2011 increased the development surcharge on (normal tariff rate+ busy season surcharge) from 2% to 5%. The petitioners have submitted that Ministry of Railways vide its letter dated 25.3.2013 increased the busy season surcharge from 5% to 12% on normal tariff rate. The petitioners have submitted that entire amount paid by the petitioner towards Busy Season Surcharge and Development Surcharge on Coal Transportation needs to be reimbursed. The petitioners have submitted that with effect from 1.10.2012, Service Tax at the rate of 3.708% (12.36% with an abatement of 70%) has been levied on the transport of goods through rail. The petitioners have submitted that the increase in freight charges are a direct result of the decision of the Ministry of Railways and Ministry of Finance and therefore, the same amounts to Change in Law.





60. We have considered the submission of the petitioners. In our view, increase in the railway freight charges on account of development surcharge and busy season surcharge are in the nature of change in rates of freight charges levied by the Railway Board in exercise of its power under sections 30 to 32 of the Railways Act, 1989. The petitioners were expected to take into account the possible revision in these charges while quoting the bid. As already stated, the petitioners/PTC were expected in terms of para 2.7.2.4 of the RfP to include in quoted tariff all costs involved in procuring the inputs. Since freight charges are a cost involved for procuring coal which is an input for generating power for supply to Haryana Discoms under the Haryana PPA, the petitioners cannot claim any relief under change in law on account of revision in freight charges. Accordingly, the claim of the petitioner on this account is disallowed.

**(G) Increase in Minimum Alternate Tax (MAT):**

61. The petitioner has submitted that MAT rate has been increased from 11.33% to 20.01% in the Finance Act, 2012. The petitioner has submitted that the change in the rate of MAT should be adjusted by the procurers through supplementary bills on a quarterly basis on the basis of its accounts.

62. We have considered the submission of the petitioner. The similar issue has been considered by the Commission in its order dated 30.3.2015 in Petition No. 6/MP/2013 where in the Commission not considered it under change in law. The relevant portion of the said order is extracted as under:



“46. We have considered the submission of the petitioner and the respondents. The question for consideration is whether the Finance Act, 2012 changing the rate of income tax and minimum alternate tax are covered under Article 13.1.1(i) of the PPA. The income tax rates are changed from time to time through various Finance Acts and therefore, therefore they will be considered as amendment of the existing laws on income tax. However, all amendments of law will not be covered under “Change in Law” under Article 13.1.1(i) unless it is shown that such amendments result in change in the cost of or revenue from the business of selling electricity by the seller to the procurers under the terms of the agreement..... Accordingly, any increase or decrease in the tax on income or minimum alternate tax cannot be construed as “Change in Law” for the purpose of Article 13.1 of the PPA. In the case of tariff determination based on capital cost under Section 62 of the Electricity Act, 2003, one of the components specifically allowed as tariff is tax on income. The pass through of minimum alternate tax or income tax in case of tariff determination under section 62 is by virtue of the specific provision in the Tariff Regulations which require the beneficiaries to bear the tax on the income at the hand of the generating company from the core business of generation and supply of electricity. Such a provision is distinctly absent in case of tariff discovered through competitive bidding where the bidder is required to quote an all inclusive tariff including the statutory taxes and cesses. Thus, the change in rate of income tax or minimum alternate tax cannot be construed as “Change in Law” for the purpose of Article 13.1 of the PPA.”

63. In the light of the above decision, the claim of the petitioner for relief under change in law on account of increase in MAT rate is not admissible and is accordingly disallowed.

**(H) Increase in Value Added Tax Rate:**

64. The petitioners have submitted that at the time of bidding, the rate of value added tax (VAT) in Odisha was 4%. However, Government of Odisha, vide notification dated 3.3.2012 increased the rate of value added tax on sale of coal to 5%. The petitioners have submitted that since increase in the rate of VAT is pursuant to a notification issued by Government of Odisha, the same is covered under change in law for which GKEL should be compensated.



65. We have considered the submission of the petitioners. The Commission vide order dated 30.3.2015 in Petition No. 6/MP/2013 did not allow the increase in VAT.

Relevant portion of the said order is extracted as under:

“49. We have considered the submissions made by the petitioner and the respondents. Government of India, Ministry of Finance Notification dated 17.3.2012 notifying the change in excise duty, Notification dated 30.5.2008 notifying the change in rate of Central Sales Tax and Madhya Pradesh VAT (Amendment) Act, 2010 notifying the changes in VAT rates are not covered under “Change in Law”. The quoted tariff according to provisions of Para 2.7.1.4.3 of the RFP shall be an inclusive one including statutory taxes, duties and levies. Therefore, the petitioner was expected to take into account all cost including capital cost and operating cost, statutory taxes, duties levies while quoting tariff in the bid. Therefore, the “Change in Law” in this respect is not admissible.”

66. In the light of the decision as quoted above, the claim of the petitioners for reimbursement of the impact on account of revision in VAT rate under change in law is not admissible and is accordingly disallowed.

**(h) Increase in Water charges:**

67. The petitioners have submitted that at the time of bid submission, water charges for water utilized for commercial purpose was Rs.0.44 per 1000 litres. Subsequently, Revenue and Disaster Management Department, Government of Odisha vide notification dated 1.10.2010 has increased the water charges from Rs.0.44 to Rs.3.40 per 1000 litres for consumption upto 5 cusecs and to Rs.4.50 per 1000 litres for consumption of more than 5 cusecs. The petitioners have submitted that actual impact on account of increase in water charges would depend on actual consumption of water for the power project. The petitioners have submitted that since the increase in water charges is pursuant to an



amendment to the Odisha Irrigation Rules by the Government of Odisha, the same qualifies under change in law.

68. The petitioner has computed month-wise increase in water charges based on the increase of Rs.015 /unit and the gross generation required for supply of actual sold out energy to Haryana as under :

<b>Parameter</b>	<b>At the time of Bid</b>	<b>Actual</b>	<b>Increase</b>
Water Charges	Rs.0.44/ Cu.m.	Rs.4.5/ Cu.m	Rs.0.015/ Unit

The petitioner has submitted the details of month-wise increase in the water charges as under:

		<b>Feb-14</b>	<b>May-14</b>	<b>Jun-14</b>	<b>Jul-14</b>	<b>Total</b>
<b>Water Charges</b>	Rs.	2194080	3011702	3205643	2921392	<b>11332817</b>
						<b>Rs.1.13 crore</b>

69. As already noted, the petitioners have quoted Stream 1 tariff consisting of non-escalable capacity charges and non-escalable energy charges. As per para 2.7.2.4 of the RfP, the petitioners were required to take into account all costs including capital and operating cost in the quoted tariff. Water is in the nature of an input for generation of electricity and water charges are cost for procurement of the input and are part of operating cost for running the power plant for generation of power. Therefore, the petitioners were expected to factor the possible escalation on account of water charges especially when the petitioner has quoted non-escalable capacity and energy charges for the entire period of tariff. Moreover, the petitioners were expected to factor in all possible revisions in water



charges in their bid as the petitioners were aware that under the Odisha Irrigation Act, 1959, Government of Odisha is empowered to revise the rates of water charges from time to time and the petitioners have chosen not to quote any escalable element in tariff to take care of such revision. Therefore, revision in the rates of water charges is not covered under change in law and accordingly, the claim of the petitioners on this count is rejected.

### **Miscellaneous**

70. In para 30 of the petition, the petitioners have submitted that Change in Law events will have an impact on the interest on working capital and return on equity on incremental working capital and margin money for such working capital resulting from the above mentioned change in law events. The effect of the same shall be ascertained once the Operating Period commences and the petitioners reserve the right to claim the increase in interest on working capital and return on equity on incremental working capital and margin money. In this connection it is clarified that there is no concept of return on equity or interest on working capital in competitively bid tariff and the bidders are required to quote all inclusive tariff. It is further clarified that if any such application is made, the same shall be considered strictly in terms of the provisions of the Haryana PPA.

### **Issue No. 3: The mechanism for compensation on account of Changes in Law during the operation period:**

71. The petitioners have submitted that the minimum value of "Change in Law" should be more than 1% of the Letter of Credit amount in a particular year. As per Article 11.4.1.1, the letter of credit amount for first year would be equal to 1.1 times of

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the estimated average monthly billing based on normative availability and for subsequent years, the letter of credit amount will be equal to 1.1 times of the average of the monthly tariff payments of the previous contract year plus the estimated monthly billing during the current year from any additional units expected to be put on COD during that year on normative availability. The petitioners have submitted that the tariff of the power project for the first year is Rs.2.142 per unit. At 80% normative availability of total capacity, the total units sold in the first year would be 1584 MU (assuming COD of 1<sup>st</sup> Unit and 2<sup>nd</sup> Unit as 1.4.2013 and 30.6.2013 respectively. Consequently, the average monthly bill based on the aforesaid Normative Availability would be 37.01 crore. The letter of credit amount which is 1.1% of the average aggregate monthly billing based on Normative Availability is about Rs.40.71 crore. As per Article 13.2(b) of the Haryana PPA, the threshold amount beyond which compensation for change in law can be claimed is 1% of the aggregate letter of credit amount for a contract year which will amount to about Rs.40.71 lakh. The petitioners have submitted that since the aggregate amount claimed for "Change in Law" is about Rs.40.71crore, it is more than the threshold amount prescribed under Article 13.2 (b) of the PPA and the petitioner is entitled to be compensated for the same. The petitioners have further submitted that GKEL may be permitted to claim compensation from the procurers that would be equivalent to the financial impact on the "Change in Law" on the cost and revenue of GKEL. The petitioners have further submitted that in certain items covered under "Change in Law" like minimum alternate tax and fuel cost on account of deviation for NCDP for which the financial impact can only be ascertained once the accounts. GKEL



are audited and in that cost GKEL will quantify the impact of the “Change in Law” on the basis of its audit account on its annual basis.

72. Article 13.2(b) of the PPA provides for the principles for computing impact of “Change in Law” during the operation period as under:

*“(b) Operation Period*

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

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

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 is in excess of an amount equivalent to 1% of the letter of credit in aggregate for contract year. Accordingly, the following is considered:

(a) Considering the date of commercial operation of the Unit-1, Unit-2 and Unit-3 as on 30.4.2013, 12.11.2013 and 25.3.2014 respectively, the first contract year is the financial year 2013-14. On the basis of 80% normative availability of Unit-1, Unit-2 and Unit-3 from respective CODs, total units generated would be 3477.6 MUs in the contract year 2013-14. The quoted tariff for the first contract year as per Schedule 9 of Haryana PPA is Rs.2.098/kWh (Rs.1.194 capacity charge and Rs.0.094 energy charge). Accordingly, average billing for the contract year 2013-14(for 11 months) based on generation corresponding to normative



availability (80%) of 3477.6 MUs @ Rs.2.098/kWh works out to Rs.583.68 crore. The monthly average billing based on normative availability of 80% works out to Rs.53.06 crore (Rs. 583.68/11).

(b) As per Article 11.4.1.1 of the Haryana PPA, the letter of credit for the first contract year shall be equal to 1.1 times of the estimated average monthly billing based on normative availability. The monthly letter of credit during 2013-14 works out to Rs.58.37 crore. Further, as per Article 13.2 (b) of the Haryana PPA, the increase /decrease in revenues or cost to the seller has to be in excess of the current equivalent to 1% of letter of credit in aggregate for a contract year. Accordingly, the letter of credit in aggregate for 2013-14 is Rs.700.40 crore. The threshold amount for admissibility of compensation during Operating Period is equivalent to 1% of the Letter of Credit for the contract year i.e. Rs.7 crore.

(c) During the year 2014-15, considering the generation from Unit-1, Unit-2 and Unit-3, total units generated would be 7884.0 MU. The quoted tariff for the contract year 2014-15 is Rs.2.098 /kWh. The average monthly bill based on normative availability of 80%, @ Rs.2.098/ kWh for 12 months works out to Rs.1323.25 crore. Average monthly bill works out to Rs.110.27 crore. Letter of Credit amount @ 1.1 times of the estimated average monthly billing based on Normative Availability works out to Rs.121.30 crore. The letter of credit in aggregate for 2014-15 is Rs.1455.58 crore and 1% of the aggregate letter of credit amount for contract year 2014-15 would be about Rs.14.55 crore.





(d) The petitioner has claimed total compensation of Rs.57.20 crore for the months of February, May, June and July of 2014. The petitioner has not given details of compensation separately for financial year 2013-14 and 2014-15. However, it is observed that compensation during financial year 2013-14 and 2014-15 is more than the threshold amount of Rs.7 crore and Rs.14.55 crore during 2013-14 and 2014-15 respectively. Accordingly, the compensation amount allowed in the year 2013-14 and 2014-15 shall be shared by the Haryana Discoms based on the scheduled energy. Year-wise compensation henceforth shall be payable only if such increase in revenue or cost to the petitioner is in excess of an amount equivalent to 1% of LC in aggregate for a contract year as per provision under 13.2(b) of the PPA.

73. The Commission has devised a mechanism considering the fact that compensation for such Change in Law shall be paid in subsequent contract years also. To approach the Commission 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. Accordingly, the following mechanism prescribed to be adopted for payment of compensation due to Change in Law events allowed and summarized in the next para as per Article 13.4.2 of PPA in the subsequent years of the contracted period:



(a) Monthly compensation payment shall be effective from the date of start of supply of electricity to Haryana or from the date of Change in Law whichever is later.

(b) The additional coal cost incurred in a month due to shortage of linkage coal shall be computed on ex-bus scheduled energy and shall be pro-rated corresponding to the scheduled generation for Haryana Discoms as per methodology given on para 56 above.

(c) Excise duty, levy of environmental cess and increase in royalty on coal, shall be computed based on the coal consumed corresponding to the schedule energy and pro-rated corresponding to the scheduled generation for Haryana Discoms based on the contracted capacity.

(d) At the end of the year, the petitioner shall reconcile the actual payment made towards additional coal, excise duty and environmental cess and due to 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 the Haryana during the year. The reconciliation statement duly certified by Auditor shall be kept in possession by the petitioner so that same could be produced on demand from Procurers/ beneficiaries.



**Summary:**

74. Based on the above analysis and decisions, the summary of our decision under the Change in Law during the operating period of the project is as under:

<b>Components</b>	<b>Change in Law Event</b>
Royalty on Coal	Allowed
Levy of Clean Energy Cess	Allowed
Excise Duty on Coal	Allowed
Shift from UHV based pricing to GCV based pricing	Not Allowed
Shortfall in the quantum of Linkage coal	Allowed
<b>Railway Freight Charges</b> (i) Busy Season Surcharge & (ii) Development Charge on coal	Not Allowed
VAT and MAT	Not Allowed
Increase in Water Charges	Not Allowed

75. The present petition is disposed of in terms of the above.

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

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

