CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 141/MP/2016

Coram:
Shri Gireesh. B. Pradhan, Chairperson
Shri A.K.Singhal, Member
Shri A.S. Bakshi, Member
Dr. M.K. Iyer, Member

Date of Order: 31st August, 2017

In the matter of

Petition under Section 79 of the Electricity Act, 2003 read with Articles 13 and 17 of the PPA dated 22.4.2007 seeking increase in tariff as a result of increase in capital cost of the Mundra UMPP due to Change in Law events during the Construction period.

And

In the matter of

Coastal Gujarat Power Limited
34, Sant Tuka Ram Road
Carnac Bunder, Mumbai-400 021 **.....Petitioner**

Vs

1) Gujarat Urja Vikas Nigam Limited
Sardar Patel Vidyut Bhawan
Race Course, Vadodara-390 007, Gujarat

2) Maharashtra State Electricity Distribution Company Limited
4th Floor, Prakashgad, Plot No. G-9
Bandra (East), Mumbai-400 051, Maharashtra

3) Ajmer Vidyut Vitaran Nigam Limited
Hathi Bhata, Old Power House
Ajmer, Rajasthan

4) Jaipur Vidyut Vitaran Nigam Limited
Vidyut Bhawan, Janpath
Jaipur, Rajasthan

5) Jodhpur Vidyut Vitaran Nigam Limited
New Power House, Industrial Area
Jodhpur, Rajasthan

6) Punjab State Power Corporation Limited
PP&R, Shed T-1, Thermal Design,
Patiala – 147001, Punjab

7) Uttar Haryana Bijli Vitran Nigam Limited
Vidyut Sadan, Plot No. C-16, Sector 6,
Panchkula – 134112, Haryana

8) Dakshin Haryana Bijli Vitran Nigam Limited
Vidyut Nagar, Vidyut Sadan,
Hissar – 125005, Haryana **...Respondents**

Parties Present:

Shri Amit Kapur, Advocate, CGPL
Shri Abhishek Munot, Advocate, CGPL
Shri Malcolm Desai, Advocate, CGPL
Shri Bijay Mohanti, CGPL
Shri M.G.Ramachandran, Advocate, GUVNL & Rajasthan Discoms
Ms. Ranjitha Ramachandran, Advocate, GUVNL & Rajasthan Discoms
Ms. Swapna Seshadri, Advocate, PSPCL and Haryana Discoms
Ms. Taruna Ahuja, Rajasthan Discoms
Shri S.K. Jain, Rajasthan Discoms

ORDER

The Petitioner, Coastal Gujarat Power Limited, has filed the present petition under Section 79(1)(b) of the Electricity Act, 2003 read with Article 13 of the PPA and Paragraph 4.7 of the Competitive Bidding Guidelines seeking certain reliefs under "Change in Law" events during the Construction Period in respect of Mundra Ultra Mega Power Project (Mundra UMPP) in terms of the Power Purchase Agreement dated 22.4.2007.

2. The Petitioner, a subsidiary of Tata Power Company Ltd., has set up a 4000 MW Mundra UMPP in the State of Gujarat based on imported coal after Tata Power Company Ltd. was selected as the successful bidder through tariff based competitive bidding carried out in accordance with Section 63 of the Electricity Act, 2003 (2003 Act). The tariff of Mundra UMPP was adopted by this Commission vide order dated 19.9.2007 in Petition No.18/2007 under Section 63 of the 2003 Act. The Petitioner has entered into a PPA dated 22.4.2007 with the distribution companies in the States of Gujarat, Maharashtra, Rajasthan, Punjab and Haryana for supply of 3800 MW from Mundra UMPP for a period of 25 years, namely Gujarat Urja Vikas Nigam Limited, Maharashtra State Electricity Distribution Company Limited, Ajmer Vidyut Vitran Nigam Limited, Jaipur Vidyut Vitran Nigam Limited, Jodhpur Vidyut Vitran Nigam Limited, Punjab State Power Corporation Limited and Haryana Power Generation Corporation Limited (collectively referred to as "Procurers"). Subsequently, the Petitioner and the Procurers had entered into a Supplemental PPA on 31.7.2008 for advancement of the Scheduled Commercial Operation Dates (SCOD) in terms of Article 3.1.2 (iv) of the PPA.

3. All five units of the Mundra UMPP were commissioned as per the following dates:

Unit	Actual dates of Commercial operation
First	7.3.2012
Second	30.7.2012
Third	27.10.2012
Fourth	21.1.2013
Fifth	21.3.2013

4. The Petitioner has sought reliefs under "Change in Law" events during the Construction Period on the following counts:

(a) Difference in the actual cost of land acquired by Petitioner and the declared price of land as per PFC's letter dated 23.10.2016;

(b) Revenue from Sale of Infirm power as per the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 read with the Central Electricity Regulatory Commission (Unscheduled Interchange charges and related matters) Regulations, 2009;

(c) Levy of Green Energy Cess on imported Coal in the Finance Act, 2010 with effect from 1.7.2010 in terms of Notification No. 354/72/2010- TRU dated 24.6.2010 issued by the Ministry of Finance, Government of India;

(d) Changes in Customs Duty on imported Coal (Customs Duty "BCD" and Countervailing Duty "CVD")`

(e) Changes in Excise Duty on civil material including Steel & Cement and LDO & HFO etc., in terms of Notification No. 6/2006-Central Excise dated 1.3.2006&Notification No. 46/2008-Central Excise dated 14.8.2008 and Notification dated 2/2008-Central Excise dated 1.3.2008 & Notification No. 18/2012-Central Excise dated 17.3.2012, respectively issued by the Ministry of Finance, Government of India;

(f) Reduction in Central Sales Tax Rate with effect from 1.4.2007 and 1.6.2008 in terms of Notification No. 34/135/2005-ST dated 29.3.2007 and Notification No. 28/11/2007-ST dated 30.5.2008 respectively issued by the Ministry of Finance, Government of India;

(g) Increase in the Gujarat Value Added Tax Rate with effect from 1.4.2008 pursuant to Gujarat Value Added Tax (Amendment) Act, 2008;

(h) Increase in the rate of Service Tax pursuant to Notification No. 32/2007-Service Tax dated 22.5.2007 and Notification No. 7/2008-Service Tax dated 1.3.2008 issued by the Ministry of Coal, Government of India;

(i) Levy of Green Cess with effect from 28.7.2011 in terms of the Gujarat Green Cess Act, 2011 and the Gujarat Green Cess Rules, 2011;

(j) Additional conditions imposed by Ministry of Environment & Forests (MOE&F), GOI pursuant to Corrigendum dated 26.4.2011 which amended the earlier Environmental clearance dated 2.3.2007 and 5.4.2007 issued by MOE&F, GOI;

(k) Additional Stamp duty paid by CGPL on its Indenture of Mortgagee with the Security Trustee as per Circular No. Stamp/KPD/593/2202 dated 2.4.2007 issued by the Superintendent of Stamps, State of Gujarat and in terms of Order dated 3.12.2012 of the

Hon'ble High Court of Gujarat in Stamp Reference No.1/2011 and the Judgment of the Hon'ble Supreme Court of India dated 11.8.2015 in C.A. No. 6054/2015.

5. The Petitioner has submitted the financial impact of the aforesaid events of change in law accompanied by Auditor's Certificate as under:

Sl No	Change in Law events (During the Construction Period)	Financial Impact (₹ *in crore)*
1	Declared price of land	235.09
2	Adjustment of Revenue from Sale of Infirm Power	(-) 37.89
3	Levy Clean Energy Cess on imported coal	2.30
4	Changes in custom duty on imported coal	1.25
5	Changes in excise duty on civil material including Steel and Cement	51.67
6	Changes in excise duty on civil material including LDO and HFO	(-) 2.10
7	Reduction in central sales tax rate	(-) 35.80
8	Increase in Gujarat value added tax rate	7.48
9	Increase in rate of service tax	21.22
10	Levy of Green Cess	0.48
11	Additional conditions imposed by MoEF, GOI	24.60
12	Additional Stamp duty	1.36
	Total	**269.66**

6. The Petitioner has submitted that the events of Change in Law have financial impact on the cost and revenue of the Petitioner during the construction period for which the Petitioner is entitled to be compensated in terms of Article 13 of the PPA. Accordingly, the Petitioner has filed the present petition with the following prayers:

> (a) Hold and declare that each of the items set out in the petition (Table 1 at Para 10) constitutes Change in Law events, in terms of PPA, impacting capital costs of the project during the construction period;
>
> (b) Hold and declare that the capital cost of the project has increased to `269.66 crore along with carrying cost on account of Change in Law events during the construction period;
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> (c) Restitute the Petitioner to the same economic condition as if the said Change in Law had not occurred by increasing the Petitioner's non-escalable capacity charges as per formula prescribed in terms of the provisions of the PPA along with carrying cost;
>
> (d) Permit the Petitioner to raise supplementary bills in terms of the PPA to recover the aforesaid amounts/ tariff due and payable to the Petitioner; and
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> (e) Pass any such other and further reliefs as Commission deems fit and proper in the nature and circumstances of the present case.

7. Notices were issued to the respondents to file their replies to the petition. Replies to the petition have been filed by Rajasthan Discoms vide affidavit dated 16.11.2016, Gujarat Urja Vikas

Nigam Limited (GUVNL) vide its affidavit dated 24.11.2016, Maharashtra State Electricity Distribution Company Limited (MSEDCL) vide its affidavit dated 24.1.2017, Haryana Utilities (UHBVNL & DHBVNL) vide affidavit dated 23.2.2017 and Punjab State Power Corporation Limited (PSPCL) vide its affidavit dated 9.5.2017. The Petitioner has filed its rejoinder to the replies of the respondents. We now proceed to consider the submissions of the Petitioner and respondents in the subsequent paragraphs.

Notification of the Events of Change in Law

8. The claims of the Petitioner in the present petition pertain to the Change in Law events during the construction period. Article 13.3 of the PPA envisages for notification of the Change in Law events to the Procurers as under:

> *"13.3 Notification of Change in Law*
>
> *13.3.1 If the Seller is affected by a Change in Law in accordance with Article 13.2 and wishes to claim a Change in Law under this Article it shall give notice to the Procurer of such Change in Law as soon as reasonably practicable after becoming aware of the same or should reasonably have known of the Change in Law.*
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> *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 Procurers 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."*

9. In accordance with Article 13.3.1 of the PPA, the Petitioner notified to the procurers on 11.7.2011, 18.2.2015, 19.2.2015, 3.3.2015 and 22.7.2016 about the above stated events amounting to "Change in Law" affecting the revenues/cost of the Petitioner during the construction period. After issuance of notice by the Petitioner on 11.7.2011, GUVNL as the lead procurer requested the Petitioner to provide information/ documents as regards Change in Law claims and arrange for the site visit of the Auditor appointed by GUVNL. The Auditor after making a site visit had submitted the Auditor's Report on 8.9.2014. The Auditor has quantified the impact of Change in Law during the Construction Period as ₹247.65 crore as against the Petitioner's actual claim of

₹353.85 crore. GUVNL shared the Auditor's Report among all the Procurers and sought their views. Thereafter, the change in law events during the construction period was discussed in the Procurers meet held on 30.3.2015 at WRPC, Mumbai wherein, all the Procurers expressed the view that the Petitioner may approach the Commission for prudence check of the claim for change in law. It was also recorded in the Minutes of the Meeting that due to lack of consensus amongst the Procurers and Seller on the aforesaid issues, there is dispute which needs to be addressed under Article 17 of the PPA. However, on 15.4.2015, GUVNL, the lead procurer submitted that since no consensus was arrived at between the Procurers and Petitioner on the issue of Change in Law events during the construction period, the Petitioner may take appropriate action in terms of the PPA. Also, the notice of the Petitioner dated 22.7.2016, raising an additional change in law claim (during construction period) on account of additional cost paid towards deficit stamp duty in terms of the judgment dated 11.8.2015 of the Hon'ble Supreme Court in Civil Appeal No. 6054 of 2015 was rejected by GUVNL on 5.8.2016. Thereafter the Petitioner has filed the present petition. Therefore, in our view, the Petitioner has complied with the requirement of notice and prior consultation in terms of Article 13.3 of the PPA.

Consideration of the claims of the Petitioner under change in law on merits

10. The Petitioner has approached the Commission under Article 13 of the PPA read with Section 79 of the Act and Para 4.7 of the Competitive Bidding Guidelines for compensation of the cost incurred by the Petitioner due to "Change in Law" during the construction period. We have in our order dated 17.3.2017 in Petition No. 157/MP/2015 (CGPL vs. GUVNL & Others) had decided that the Commission has the jurisdiction to adjudicate the tariff related dispute and that the increase/ decrease in the cost or revenue to the seller (Petitioner) during the operation period shall be decided by the Commission in terms of the provisions of Section 79 (1) (b) & (f) of the Electricity Act, 2003, the Competitive Bidding Guidelines and the provisions of PPA. The relevant portion of the order is extracted as under:

> *"Appropriate Commission has been defined in the PPA dated 22.4.2007 between the Petitioner and the procurers as "the Central Electricity Regulatory Commission constituted under the Electricity Act, 2003". Therefore, under the provisions of the Competitive Bidding Guidelines, this Commission is the Appropriate Commission for adjudication of tariff related dispute. Under*

Article 13.2.(b) of the PPA, the compensation for any increase/decrease in revenues or cost to the seller shall be determined and would be effective from such date, as decided by the Central Electricity Regulatory Commission whose decision shall be final and binding on both the parties. From the provisions of the Act, Competitive Bidding Guidelines and provisions of the PPA, it is clear that the increase/decrease in cost or revenue to the seller (the Petitioner) shall be decided by this Commission."

11. The claims of the Petitioner pertain to the Construction period. The Construction period as defined in the PPA is as under:

"Construction period means the period from (and including) the date upon which the construction contractor is instructed or required to commence work under the construction contract upto(but not including) the commercial operation date of the Unit in relation to a Unit and of all the Units in relation to the power station".

12. As submitted by the Petitioner, the construction work of the project commenced on 11.10.2007 and the first unit was declared under commercial operation on 7.3.2012 and the last unit (Unit-V) was declared on commercial operation on 22.3.2013. Therefore, the Construction period shall be reckoned from 11.10.2007 till 21.3.2013.

13. Article 13 of the PPA between the Petitioner and the Procurers of Mundra UMPP provides for Change in Law as under:

"13. ARTICLE 13: "CHANGE IN LAW"

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

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

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

but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI Charges or frequency intervals by an Appropriate Commission.

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

13.1.2 "Competent Court" means:

The Supreme Court or any High Court, or any tribunal or any similar judicial or quasi-judicial body in India that has jurisdiction to adjudicate upon issues relating to the Project.

13.2 Application and Principles for computing impact of Change in Law.

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

(a) Construction Period As a result of any "Change in Law", the impact of increase/decrease of Capital Cost of the Project in the Tariff shall be governed by the formula given below:

For every cumulative increase/decrease of each Rupees Fifty crore (Rs. 50 crore) in the Capital Cost over the term of this Agreement, the increase/ decrease in Non Escalable Capacity Charges shall amount to zero point two six seven (0.267%) of the Non Escalable Capacity Charges. Provided that the Seller provides to the procurers documentary proof of such increase/decrease in Capital Cost for establishing the impact of such "Change in Law". In case of Dispute, Article 17 shall apply.

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

(b)Operation Period

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14. The Appellate Tribunal for Electricity in its judgment dated 19.4.2017 in Appeal No. 161/2015 (Sasan Power Ltd V CERC & others) and Appeal No. 205/2015 (Haryana Power Centre V Sasan Power Ltd & others) had examined as to whether the qualification "which results in any cost of or revenue from the business of selling electricity by the Seller to the Procurers in terms of the agreement" is applicable to Article 13.1.1(i) and (ii) or to Article 13.1.1(iii) only. After detailed analysis the Tribunal held as under:

"16. But, the important question is whether the qualification "which results in any change in any cost of or revenue from the business of selling electricity by the sellers to the Procurers" applies to Article 13.1.1(i) and (ii) or whether it applies to only Article 13.1.1(iii). In other words, the question is whether the Appellant can claim compensation for occurrence of Change in law events only if the increase or decrease in tax rates pursuant to the Finance Act, 2012, or various modifications issued by the Government covered by Article 13.1.1(i) results in any change in cost or revenue from the Appellant's business of selling electricity. The CERC has taken a view that this qualification is attached to Article 13.1.1(i) and (ii) also. We are inclined to agree with the said view. We will state the reasons why we have come to this conclusion.

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19…..Thus, mere coming into force of an enactment, amendment, modification, repeal etc. in law or change in interpretation by the competent court is not be considered as change in law under Article 13.1.1 unless it results in any change in any cost or revenue from the business of selling electricity."

15. Thus, the expenditure incurred in terms of Article 13.1.1 (i) to (iii) if they have resulted in any change in any cost or revenue from the business of selling electricity and the expenditure incurred in terms of Article 13.1.1(iv) shall be admissible under Change in Law.

16. The events broadly covered under Change in Law are 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 (as mentioned in (a) to (c) above) result in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer under the Agreement.

e) any change in the Declared Price of Land for the Project; or the cost of implementation of the resettlement and rehabilitation package of the land for the project mentioned in the RFP; or the cost of implementing Environmental Management Plan for the Power Station mentioned in the RFP; or the cost of implementing compensatory afforestation for the Coal Mine, indicated under the RFP and the PPA;

f) The purpose of compensating the Party affected by 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.

g) 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 Central Commission.

h) The compensation shall be payable only if and for increase/decrease in revenues or cost to the Petitioner is in excess of an amount equivalent to 1% of Letter of Credit in aggregate for a Contract Year.
i)The adjustment in monthly tariff payment shall be effective from the date of (i) adoption, promulgation, amendment, re-enactment or repeal of the law or change in law or (ii) the date of order/judgment of the Competent Court or Tribunal or Indian Government Instrumentality if the Change in Law is on account of change in interpretation of Law.

17. Keeping in view the broad principles discussed above, we proceed to deal with the claims of the Petitioner under Change in Law during the Construction Period:

Declared Price of Land

18. The Petitioner has submitted that the project site as identified in RFP and PPA was located in Kutch district of Gujarat and the proposed project site comprised approximately 2750 acres (i.e. 1113 hectares) excluding land for water pipeline corridor (intake and outfall channel). Out of the

proposed area of land, about 1250 acres (505.85 Ha) was identified for main Power Plant, 1000 acres (404.68 Ha) was identified for ash disposal/ dyke and 500 acres (202.34 Ha) was identified for housing colony. It has also submitted that as per Article 3.2.1A of the PPA, the procurers were obliged to handover the possession of land to the Petitioner for the power station, water intake pipeline and for fuel transportation systems (if applicable) within six months from the effective date (i.e. on or before 21.10.2007), but the same was not done by the procurers. The Petitioner has stated that pursuant to the issuance of RFP (July, 2006), a Detailed Project Report (DPR) was prepared by M/s. Tata Consultant Engineers Limited (a Consultant appointed by PFC) to present the details of the project which was shared by PFC with all bidders prior to the submission of the financial bid. Chapter-2 of the DPR specifies the land requirement for construction and development of the project. In addition to this, the DPR also contained provision for additional requirement of land for water intake/outfall channels. The DPR also specifies that the parameters furnished therein are illustrative only to demonstrate feasibility of the project and the actual parameters would be those finalized by the developer of the project. Accordingly, the details of land requirements for development of the project and associated infrastructure as per DPR are as under:

Facility	Area in Ha
Power plant	500
Ash disposal area	200
Colony	120
Water intake/ outfall channels	102
Total	**1092 (2750 acres)**

19. The Petitioner has submitted that it has setup the Power Plant and the associated infrastructure facilities [Land for construction and development of Power Plant inclusive of land for Ash disposal/ dyke as well as housing colony and water pipeline corridor (intake and outfall channels)] on a total area of 1400-26-12 Ha of land as under:

(a) 909-61-56 Ha of Government land for setting up Power Plant and associated infrastructure facilities;

(b) 130 HA of Forest land for setting up of Power Plant and associated infrastructure facilities;

(c) 51-62-81 Ha of Private Land for setting up of Power Plant and associated infrastructure facilities;

(d) 268-01-75 Ha of Salt Pans for setting up associated infrastructure facilities (outfall channel);

(e) 41 Ha for setting up associated infrastructure facilities (intake channel);

20. The Petitioner has also submitted that the various aspects of land acquisition were duly discussed/ deliberated in the various Joint Monitoring Committee meetings which were formed and convened to review and monitor the progress and activities of the project. The Petitioner has submitted that the Procurers were fully aware of the various aspects of land acquisition undertaken by the Petitioner and none of these aspects were objected to by the Procurers.

21. The Petitioner has submitted that PFC vide email dated 23.10.2006 addressed to the shortlisted bidders had communicated the indicative declared price of the land (Project Site) for Mundra UMPP as under:

(₹in crore)

	Declared Price
Power plant	28.68
Land for Water Pipe line Corridor (intake & outfall channel)	01.12
Total	**29.80**

22. The Petitioner has further submitted that PFC proposed to handover to the Petitioner approximately 1100 hectares of land (not including water intake/ outfall channel) at an indicative declared price of ₹29.80 crore for development of the Project and the associated infrastructure facilities. The Petitioner has also submitted that the project site was illustrative and was to be finalized by the developer of the Project considering the ground realities. It has stated that the indicative declared price was to be paid by the developer on handing over of the project site by the Procurers. The Petitioner has stated that the Procurers were required to handover the project site to the Petitioner within six months from the execution of the PPA (21.10.2007) as per Article 3.1.2A and as the same was not done, the Petitioner with the help of the State government/ Private individuals acquired the following land:

(*i) 1092 Ha of land for Power Plant and associated infrastructure facilities for ₹74.37 crore*

(ii) 268 Ha of land for water outfall channel at ₹80.52 crore, and

(iii) leased 41 Ha of land at an annual fees of ₹4.74 crore for a period of 30 years, with 10% increase in the annual fees every three years as per agreement.

23. The Petitioner has submitted that as against the indicative declared price of land for ₹29.80 crore {for approx 1100 hectares of land [excluding land for water pipeline corridor (intake/ outfall channel)] the Petitioner has paid an amount of ₹154.89 crore[for acquiring 1092 Ha for Power Plant and associated facilities, 268 Ha for Water outfall channel]. Further, the Petitioner would incur an amount of ₹110 crore (NPV as on 31.3.2016) for leasing of 41 Ha of land for Water intake channel. Out of the said amount of ₹110 crore, the Petitioner has submitted that it has already incurred an amount of ₹30.74 crore as on 31.3.2016.

A. Government Land acquired for Power Plant and associated infrastructural facilities

24. The Petitioner has submitted that for the construction and development of the Project and associated infrastructure facilities, the Petitioner has acquired 909-61-56 Ha of Government land for an amount of ₹46,58,24,322/- and the said cost includes conversion tax, establishment fees, measurement fees, land development charges, administrative charges and other charges as made applicable by the Government while allotting the said plots of land. In addition to this, the Petitioner has submitted that it has further incurred an amount of ₹1,71,89,716/- towards measurement fees, barbed wire fencing work, jungle cleaning and leveling, road making and jungle cutting.

B. Forest Land acquired for Power Plant and associated infrastructural facilities

25. The Petitioner has submitted that for the construction and development of the Project and associated infrastructure facilities, the Petitioner was also required to acquire 130 Ha of Forest land (within the identified project location) and for the said forest land, the Petitioner incurred a total cost of ₹15.04 crore, which includes ₹13,00,22,971/- [for acquiring 130 Ha forest land situated at Village Khandagra for Mundra UMPP (at the rate of 10 lac/Ha), Cost of compensatory afforestation of 130 Ha land, Expenditure on old plantation and Cost of Fuel Wood etc, as per Government of Gujarat, Revenue Department Resolution dated 17.7.2007], ₹13,00,000/- towards Cost of afforestation in lieu of forest land, an amount of ₹6,37,000/- towards Stamp duty and ₹67,63,000/- towards measurement fees, barbed wire fencing work, jungle clearing and leveling.

C. Private Land for Power Plant and associated infrastructural facilities

26. The Petitioner has submitted that for the construction and development of the Project and associated infrastructure facilities, the Petitioner has acquired 51-62-81 Ha of Private land (within the identified project location) for ₹11,02,50,724/-which comprise of the consideration paid towards Conveyance deed for land acquired from private parties, including stamp duty and registration.

D. Salt Pan Land acquired for Water outfall channel

27. The Petitioner has submitted that as per DPR, the estimated land requirement proposed for the water intake/discharged channel was 102 Ha. It has also submitted that the location of the outfall channel was not crystallized at the time PFC proposed the declared price of land (23.10.2006) as it was dependent on the location of the proposed port to be developed by Mundra Port and SEZ Ltd. The Petitioner has further submitted that MOE&F, GOI had granted Environmental Clearance to Mundra UMPP on 2.3.2007 and the same was subject to implementation of certain terms and conditions. One such condition stipulated by MOE&F was that the location of intake and outfall point and the mode of drawl of water required to be finalized prior to commencing work of the Project. The Petitioner has stated that in January, 2007 a study was conducted by the National Institute of Oceanography (NIO) on Rapid Marine Environmental Impact Assessment for Mundra UMPP and as per the report of the NIO in January, 2007, an outfall channel of 60 mts width excavated 1 mts below CD and approximately 3 Km length from creek mouth was suggested. Similarly, an intake channel of 80 mts width excavated to 3 mts below CD and approx 5.5. km in length in subtidal and intertidal stretch was proposed. The Petitioner has submitted that on 11.11.2008, application was made to the Government of Gujarat to seek possession of land for outfall channel measuring 235-64-15 Ha (Village Mota Khandagra) and 32-37-60 (Village Trigadi). This land identified for outfall channel was passing through Salt Pan Lands, which were already leased by the Government to Gujarat to Radha Swami Salt Works (141-64-15 Ha) and Balaji Salt Works (32-37-60). The Petitioner has also stated that since the Salt Pan lease holders were not willing to relinquish part of their leasehold rights over the land required for laying the water outfall channel, the Petitioner, for construction of water outfall channel, was required to

acquire the Salt Pan lands including those leased to Radha Swami Salt Works and Balaji Salt Works. Accordingly, the Petitioner on 29.11.2008 executed Memorandum of Understanding with Radha Swami Salt Works and Balaji Salt Works for Voluntary renunciation of their leasehold rights at a consideration of ₹8.55 lakh /acre and the total amount paid for surrendering their leasehold rights was ₹36,76,50,637/-.

28. The Petitioner has submitted that due to change in the discharge locations, NIO in February, 2009 suggested additional land requirement and the Petitioner by letter dated 13.1.2009 requested the Govt. of Gujarat for handing over approx 268 Ha of land for outfall channel. It has further submitted that as per report of HR Willing ford in September, 2009, the area required for channel increased by 57% of the original area planned by the Petitioner and this resulted in additional land requirement for outfall channel. The Petitioner by letter dated 2.11.2009 requested MOE&F to consider the above facts and grant amendment to the existing Environment Clearance. The Petitioner has stated that on 11.3.2010 and 15.7.2011, the Collector of Kutch allotted total land measuring 268-01-75 Ha [235-64-15 Ha (in Village Mota Khandagra) and 32-37-60 (in Village Trigadi)] to the Petitioner at a price of ₹4,37,54,352/- for acquiring land for outfall channel. The Petitioner has submitted that total consideration of ₹80,51,94,986/- was paid towards acquiring 268 Ha of land for outfall channel of Mundra UMPP.

E. Right of Way for Water intake Channel

29. The Petitioner has submitted that the estimated land requirement proposed in the DPR for water intake/outfall channels was 102 Ha and the location of the outfall channel was not crystallized at the time PFC proposed the declared price of land (23.10.2006). It has submitted that on 23.5.2007, an application was made to the District Collector, Bhuj for acquiring 1100 Ha of land for intake and outfall channel. The Petitioner has also submitted that on 11.7.2007, during the first JMC, the Revenue Department informed that the land identified by the Petitioner had already been allotted to Mundra Port Special Economic Zone Limited (MPSEZL) with a rider to allow the Petitioner Right of Way for 41 Ha for laying intake channels. As a result, the Petitioner was compelled to take up the matter of development of the intake channel with MPSEZL and on

22.10.2010, the Petitioner in order to ensure the timely availability of water through intake channel, executed an agreement with MPSEZL for operation and maintenance of sea water intake channel. The Petitioner has also submitted that as per the said agreement, the Petitioner is assured continuous and uninterrupted supply of 630000 cubic meter/hour of sea water for cooling of power plant, for a period of 30 years. Accordingly, the Petitioner has submitted that it was required to pay an annual fee of ₹4.74 crore considering the base year as 2010-11 with 10% increase every three years.

30. The Petitioner further has stated that on 3.7.2012, M/s Adani Ports & SEZ ('APSEZL') (*formerly MPSEZL*) wrote a letter stating that ₹4.74 crore was a lump sum amount negotiated between APSEZL and the Petitioner and the said amount was an annual payment towards lease for APSEZL land utilized by the Petitioner for development of water intake channel. The Petitioner has also submitted that it has undertaken the liability of annual payment for the entire tenure of the Agreement and the Net Present Value/Discounted Cash Flow of future cash flows is required to be considered towards impact of such Change in law incidence. The Petitioner has submitted the Auditor's Certificate and has stated that for paying lease rental for APSEZL land being used for water intake channel, it has incurred an amount of ₹25.08 crore (till 31.3.2015) (considering the annual fee of ₹4.74 crore with 10% increase in annual fee every 3 years, base year being 2010-11) towards land for development of the Project. The Petitioner has also submitted that this annual expenditure every year for the term of the PPA, in terms of the agreement executed with MPSEZL, ought to be reimbursed to the Petitioner by the Procurers, at its NPV. The NPV of such future cash flows works out to ₹110 crore as on 31.3.2016.

31. Based on the above, the Petitioner has submitted that it has incurred an amount of ₹159.89 crore towards acquisition/lease of land as against the indicative declared price of land for ₹29.80 crore for construction and development of the project and associated infrastructure facilities. In addition to this, the Petitioner has submitted that it would be incurring annual expenditure in terms of the agreement executed with MPSEZL, which ought to be reimbursed to the Petitioner by the procurers at its NPV (₹110 crore) as on 31.3.2016. As against this NPV, the Petitioner has

submitted that it has already incurred an amount of ₹30.74 crore as on 31.10.2016 (₹25.80 crore till 31.3.2015 and ₹5.85 crore in 2015-16). The Petitioner has stated that in terms of Article 13.1.1(iv) (a) of the PPA read with the definition of Declared Price of Land, any change in the Declared Price of Land for the project falls within the scope of Change in Law and therefore, change in the Declared Price of Land is a Change in Law event in terms of Article 13 of the PPA. The Petitioner has further submitted that it is burdened to the tune of ₹235.09 crore (264.89-29.80) as detailed below due to increase in the Declared Price of Land and is entitled to be compensated for the same.

Land Type	**Area (Hectares-Acres-Square meter)**	**Amount** *(₹in Crore)*
Government Land	909-61-56	48.30
Outfall Channel Land	268-01-75	80.52
Private Land	51-62-81	11.03
Sub-total (A)		**139.85**
Forest Land (B)	130-00-00	15.04
Total (C) = (A) + (B)		**154.89**
Net Present Value (as on 31.3.2016) of annual payment for intake channel (D)	41-00-00	110.00
Gross Claim (E) = (C) = (D)		**264.89**
Amount considered under Land heading at the time of Bid		29.89
Net Claim	**1400-26-12**	**235.09**

32. The Petitioner has also computed the financial impact on account of change in the declared price of land as under:-

> *"Impact of change in the declared price of land (in ₹) = Actual cost of land less Declared price of land as per the PFC's email dated 23.10.2006."*

Submission of Respondents

33. GUVNL in its reply has made the following submissions:

(i) The RFP had envisaged 2750 acres of land (1112.886 ha) which is also the Project site as per Schedule 1A of the PPA over which the Project was to be developed. The DPR had envisaged a total land of 1092 hectares (inclusive of water channels) which had also been identified.

(ii) As per Schedule 1A of the PPA, the land identified for the site is 1112.886 acres and therefore, Article 13 covers the change in price of this identified land and in particular, the land regarding water intake and outfall channels are not covered within the meaning of 'Site'.

(iii) Even as per RFP, the obligation of the Procurer is for identification of the Site (as per Annexure 5 to RFP) and issuance of notification and intimating declared price for such land. It has submitted that the Change in law under Article 13 is towards the cost/price of identified land and not for any change in area of land. Therefore, any land acquired in addition to 2750 acres cannot be considered for Change in law and the land for water intake and outfall channel are not part of the identified land and is not covered under Article 13 of the PPA.

(iv) The declared price of land is not ₹29.80 crore and as per e-mail of PFC dated 23.10.2006, the indicative declared price had also included ₹1.83 crore for land for MGR and ₹10 crore for R&R package. Since no MGR was built nor rehabilitation cost incurred, the total of ₹11.83 crore indicated in the declared price has not materialized and therefore this reduction in cost is a change in law within the meaning of Article 13.1.1.(iv) (a) &(b) respectively and the Petitioner may account for the above reduction in costs.

(v) The Petitioner has acquired 1092 Ha of land (identified land) at ₹74.37 crore as against the declared price (incl. rehabilitation costs) and this may be considered as Change in law subject to prudence check. The Declared Price of Land under Article 13 refers to cost of acquisition of land and does not include costs incurred by the Petitioner towards fencing, leveling, cutting of trees, road making and jungle cutting under Govt. land (₹1,71,89,716/-) and Forest Land (₹67,63,000/-) and accordingly, the total amount of ₹2,39,52,716/- has to be deducted from the costs incurred by the Petitioner.

(vi) The land for Water Intake and Outfall Channel has not been identified and therefore, the change in price of this land cannot be considered under Change in law. Even otherwise, the Petitioner has acquired additional land than envisaged in the DPR which was a total of 1092 Ha, inclusive of land for water channels at 102 Ha, as admitted by the Petitioner. The DPR also notes that this land is more than required for the proposed plant and the acquisition of total 1400-26-12 Ha of land is without any justification. The additional land of 308-26-12 Ha acquired by the Petitioner is to its own account and cannot be passed on to the consumers under the guise of change in law.

(vii) The Petitioner has participated in the bid knowing fully well that the identified land is 2750 acres only and the change in law provision was for such land only. The JMC in its meeting held on 12.3.2010 had expressed concern that the land requirement of the Petitioner was on the higher side. Moreover, the requirement of additional land by the Petitioner should be justified and be subject to prudence check.

(viii) The Petitioner has not justified the increase in land for such water channels and has not enclosed the various reports referred to in the petition. The DPR had indicated the tentative location and detail of out fall structures which are indicative and the Petitioner was required to carry out its own due diligence and independent enquiry about the land. The Petitioner had applied for 268 Ha of land on 11.11.2008 for water outfall channel which is not part of the requirement identified by PFC and has not stated as to why there was such increased requirement of land on such date. It has pointed out that there has been no increase in land due to reports of NIO and HR Willing ford and the Petitioner has finally acquired only 268 Ha of land as it originally applied in November, 2008 i.e. prior to such reports.

(ix) The Environmental Clearance dated 5.4.2007 provided that the location of intake and outfall channels shall be finalized prior to the start of work and it is not clear as to how the discharge locations were changed in 2009. The engineering reasons for change in location are on account of the Petitioner who was required to fully inform itself about the land, site conditions etc., before the bid. The contention of Petitioner on acquisition of 97.66 Ha of land due to private owners' refusal to sell only part of land is incorrect. The Petitioner while stating that the land had been leased by the Govt of Gujarat to others admits that it is Government land. There is no question of private land owners. In any event, the Petitioner has not furnished any proof of the private owner's refusal to sell only part of land and has made a general statement.

(x) The Petitioner ought to have considered that out of the 268 Ha of land, the Govt. of Gujarat had leased part of land measuring 175 Ha of land to Radhaswami Salt Works and Balaji Salt works and this aspect ought to have been considered by the Petitioner at the time of finalization of outfall channel. The Petitioner chose to pay nearly 45% of the cost as amount paid to the Salt Pan lessees for surrendering their leasehold rights for acquisition of 268 Ha of land, which cannot be considered prudent and the Procurers cannot be liable for such additional costs.

(xi) The Petitioner had applied for 1100 Ha for use of only 41 Ha and for which right of way has been obtained as asked for by the Petitioner for 41 Ha for both intake and outflow channel. The amount claimed by the Petitioner as payable to MPSEZL is the annual fee for the facility which includes the Common facility and dedicated facility constructed by MPSEZL for the Petitioner. The ownership of land remains with the MSEZL and no land is transferred to the Petitioner. Article 13 covers the changes in declared price of land which is the cost at which land is transferred to the Petitioner.

(XII) The annual fee under the agreement is for use of the facility and not merely for right of way. Therefore the entire fee cannot be accounted for in the cost of land. The construction cost etc of the intake channel is not within the scope of Article 13 as it only covers the cost of land and not the cost of channels/facilities. The Petitioner is only entitled to claim the costs actually incurred and not which may be incurred in future. The payment of ₹4.74 crore by Petitioner cannot be considered as NPV and added to capital cost without the Petitioner incurring the same.

34. Similar submissions have been made by other Procurers namely, the Discoms of Rajasthan, the Discoms of Haryana (UHBVNL & DHBVNL), MSEDCL and Punjab State Power Corporation Ltd.

35. The Petitioner in its rejoinder affidavit dated 31.1.2017 has submitted that the proposed land requirement for construction/development of the Project was mentioned in the DPR and in addition to the land requirement in RFP, the DPR also proposed additional land for the project/infrastructural facilities (water intake/outfall channel) and therefore the land for water intake and outfall channel are part of identified land. The Petitioner has further submitted that the

proposed Project site was illustrative and was to be finalized by the developer considering the ground realities (as per RFP and DPR) and the indicative declared price was only the indicative price to be paid by the developer on handing over the Project site by the Procurers/PFC. Since the same was not done, the Petitioner with the help of the State Government/Private Individuals acquired additional land. The Petitioner has further submitted that it has implemented a Coal Conveying system instead of MGR system, thereby occupying corresponding land and relevant costs and the costs incurred towards fencing, leveling etc., were to bring the said asset (land) to its working condition for intended use and accordingly, these costs form an integral part of the total cost of land and therefore ought to be considered prudent as pass through. The Petitioner has reiterated that PFC in its email dated 23.10.2006 had only intimated the indicative price of land for the Power Plant, MGR system and water pipeline corridor and since no land was identified for the MGR system and Water pipeline corridor, PFC had only provided the indicative price, without identifying any land. The Petitioner has stated that no land had been identified for infrastructural facilities (including water systems) when RFP was issued and therefore any changes/increase in the area of land (especially for infrastructural facilities) for the Project ought to be considered under Change in law.

Analysis and Decision

36. We have examined the submissions of the Petitioner and the Respondents. The Request for Qualification (RFQ) was issued on 31.3.2006 and thereafter the Request for Proposal (RFP) was issued to shortlisted bidders on 22.6.2006 with the bid line as 22.11.2006. This was later extended till 7.12.2006. As per Clause 1.4 of the RFP, PFC is required to complete the following tasks:

> *(i) Site identification (already identified) as indicated in Annexure-5;*
>
> *(ii) Issue of Section 6 notification by Government of Gujarat under Land Acquisition Act will be completed at least 30 days prior to bid deadline. Intimation of declared price of land and intimation of the estimated costs of the draft resettlement and rehabilitation package, relating to land required for the Power station will also be given at least thirty days prior to bid deadline.*
>
> *xxxxx*
>
> *(v) Project Report including geo-technical study, typographical survey, area drainage study, socio-economic, EIA study (rapid) and hydrographic study would be made available at least ninety (90) days prior to bid deadline;*
>
> *xxxxx*

(vii) Indicative costs of the following;

(a) Land for Fuel transport system;

(b) Rehabilitation and resettlement for (a) above; and

shall be provided at least thirty (30) days prior to Bid deadline;

37. PFC appointed Tata Consulting Engineers Ltd for preparation of the Detailed Project Report (DPR) for the Project who submitted the DPR in July 2006. The DPR was shared with the prospective bidders. The purpose of sharing the DPR with the prospective bidders is that they take into account all expenditure relating to the power station while quoting the bid. Annexure 5 of the RFP which dealt with site details and site map gave the details of the land identified by the PFC for the project as under:

"About 2750 acres of land has been identified for the project covering villages of Tunda Wand, Khandagra and Nana Bhadia. Out of this, about 1250 acres of land has been identified for main plant, about 1000 acres for ash disposal/dyke and 500 acres for colony.

Further details are provided in the Project Report"

38. The DPR dated July, 2006 provides the following details regarding the proposed land for the development of the project:-

"7. The power plant would require an estimated land area of about 820 Ha (2050 acres) for its various facilities as below:-

a)	*Power plant*	*500 Ha (1250 acres)*
b)	*Ash disposal area*	*200 Ha (500 acres)*
c)	*Colony*	*120 Ha (300 acres)*

Depending upon the unit size and final layout, requirement of land would change.

8. The chosen site has adequate land area considering the above requirement. A total of 1092 Ha (2697 acres) of area has been identified for the above facilities. Most of the land at the site (705 Ha) belongs to Gujarat Government. However areas to the extent of 218 Ha and 169 Ha are in the possession of MSEZ and private parties respectively. Action has been initiated to acquire the identified land. The land being acquired for the project would be transferred to theproject developer along with clear titles and ownership.

The estimate land required for other project facilities/infrastructural facilities are as below:

a)	*Water intake/discharge corridors*	*:*	*102 Ha (once through system)*
		:	*13 Ha (re-circulating system)*
b)	*MGR System*	*:*	*125 Ha*
c)	*Roads*	*:*	*45 Ha"*

39. In terms of clauses 1.4(ii) and (vii)] of the RFP, PFC vide its email dated 23.10.2006 had communicated to the shortlisted bidders the indicative declared price of land for the Power station as ₹29.80 crore which comprised of ₹28.68 crore for Power Plant area and ₹1.12 crore for Water Pipe line Corridor (Intake and Outfall channel). The indicative price also included ₹1.83 crore for

MGR Land (Land other than portion of MPSEZL land) and ₹10 crore for R&R package. Therefore, the bidder, was expected to take into account the indicative price intimated by PFC in respect of those lands mentioned in the RFP and should have factored the cost of other lands not mentioned in the RFP, but included in the DPR or otherwise assessed by the bidders, while submitting the bid.

40. Tata Power was selected as a successful bidder with a levelised tariff of ₹2.26367/kWh and accordingly, Letter of Intent was issued on 28.12.2006. Subsequently on 22.4.2007, the Petitioner had entered into Power Purchase Agreements (PPA) with the Procurers of five states. Article 13.1.1(iv) (a) of the PPA recognizes change in law as "any Change in the (a) Declared Price of land for the Project or (b) Cost of implementation of the resettlement and rehabilitation package for the land for the Project mentioned in the RFP". Accordingly, any change in law under Article 13 is to be limited to the change in price for the identified land for the site as per PPA. Thus, the change in law contemplated under Article 13.1.1(iv)(a) of the PPA is towards cost/price of identified land, and not for any change in area of land.

41. Though the DPR had proposed a total land of 2697 acres (1092 Ha) for the Project as against the identified land of 2750 acres (1113 Ha) (in RFP read with PPA) for the Project, the Petitioner had acquired total land measuring 1400 Ha for the Power Plant and associated infrastructural facilities, including intake and outfall channels on the ground that the Project site was not handed over to the Petitioner within six months of the PPA in terms of Article 3.1.2A of the PPA. However, out of the total area of 1400 Ha of land acquired/leased by the Petitioner, area of 1092 Ha of land (approx) comprises of 909 Ha of Government land, 130 Ha of Forest Land and 51 Ha of Private Land towards the Power Plant and associated infrastructural Facilities and area of 309 Ha of land (approx) comprises of 268 Ha for Outfall channel and leased land of 41 Ha for intake Channel. According to the Petitioner, it has paid an amount of ₹154.89 crore (₹74.37 crore for 1092 Ha of land plus ₹80.52 crore for 268 Ha of land for Water outfall channel) and would incur an amount of ₹110 crore (NPV as on 31.3.2016) for leasing 41 Ha of land for water intake channel. The details of the land identified as per RFP & PPA, the DPR and the land acquired by the Petitioner is tabulated as under:

Facility	As per RFP read with PPA 1100 Ha (2750 acres)	As per DPR 1092 Ha (2697 acres)	Land acquired by Petitioner 1400 Ha (3459 acres)
Power Plant	500 Ha (1250 acres)	500 Ha (1250 acres)	1092 Ha (for Power Plant and associated facilities)
Ash Disposal area	400 Ha (1000 acres)	200 Ha (500 acres)	
Colony	200 Ha (500 acres)	120 Ha (300 acres)	
Water intake /Discharge corridors MGR system Roads	-	102 Ha (647 acres) 125 Ha 45 Ha	308 Ha (for outfall and intake channel)

Land for Power Plant and Associated facilities

42. As per Annexure 5 of the RFP read with Schedule 1A of the PPA, the land identified for the Project is 2750 acres (1100 Ha) which comprised of 1250 acres for Main Plant, 1000 acres for Ash disposal/dyke and 500 acres for colony. No provision was made in the RFP for land for water intake/outfall channel and MGR land. However, In terms of Clause 1.4 (ii) and (vii) of the RFP, PFC vide its e-mail dated 23.10.2006 had intimated to the bidders the indicative declared price of land for the Project which comprised of ₹28.68 crore for Power station, ₹1.12 crore for Water Pipeline corridor (intake and outfall channels) and an amount of ₹1.83 crore MGR land other than MPSEZL amounting to ₹1.83 crore. A tentative provision was also made for ₹10 crore towards R&R package. It is therefore evident that even though RFP did not identify the land for water intake channel, PFC had intimated the indicative price of land for water channel (outfall/intake channel). The Petitioner has submitted that the Project site was illustrative and was to be finalized by the developer considering the ground realities. It has also submitted that the declared price is the indicative price to be paid by the developer on handing over the project by the Procurers and since the same was not handed over within six months, the Petitioner has with the help of state Government/Private individuals had acquired/leased 3459 acres (1400 Ha) (approx) of land which comprised of 2697 acres (1092 Ha) of land for Power plant and associated facilities. The respondent has submitted that any land acquired in addition to 2750 acres (1100 Ha) as per RFP cannot be considered for change in law. The respondents have however submitted that the acquisition of 1092 Ha of identified land at ₹74.37 crore as against the declared price of ₹29.80 crore (including rehabilitation costs) may be considered as change in law subject to prudence

check. Under Article 13 of the PPA, any change in law is to be limited to the change in price for the identified land for the site as per PPA and cannot be considered for change in the area of land for the Project. We notice that as against the RFP identified land of 2750 acres (1100 Ha) for Power station with an indicative price of ₹28.68 crore, the Petitioner has acquired 2697 acres (1092 Ha) of land (910 Ha of Govt land for ₹48.30 crore plus 130 Ha of Forest Land for ₹15.04 crore plus 52 Ha of land for ₹11.03 crore) for Power Plant and associated infrastructural facilities for a total amount of ₹74.37 crore. Accordingly, in terms of Article 13.1.1(iv)(a) of the PPA and on prudence check, we are of the considered view that a change in law event has occurred due to change in the declared price of land acquired by the Petitioner for the Power station and associated infrastructural facilities. Thus, the difference between the indicative price and the actual price incurred by the Petitioner is considered as a change in law event and the Petitioner is entitled to be compensated for it. Thus, the financial impact on account of change in law in the declared price of land works out to ₹45.15 crore (1092/1100 x 74.37-28.68) and the Petitioner is entitled to recover the same from the Procurers.

Water Pipeline Corridor (Intake and Outfall channel)

43. As stated, the identified land of 2750 acres (1100 Ha) did not include land for intake and outfall channel. However, the PFC email dated 23.10.2006 had indicated the declared price of ₹29.80 crore for identified land 2750 acres (1100 Ha) towards Power plant and Water Pipeline Corridor (intake and outfall channel). The Petitioner has submitted that the identified land of 1100 Ha does not include land for water intake and outfall channel and hence the Petitioner with the help of the State Government /private Individuals had acquired 1092 Ha of land for Power Plant and associated facilities, 268 Ha of land for water outfall channel and 41 Ha of leased land at an annual fee of ₹4.74 for a period of 30 years. The respondents have submitted that the land for Water intake and outfall channel are not part of the identified land and is therefore not covered under Article 13 of the PPA. Admittedly, the RFP identified land of 2750 acres (1100 Ha) does not contain any provision of land for Water intake/outfall channel. However, the DPR in July, 2006 had proposed total land 252 acres (102 Ha) (approx) for Water outfall and intake channels out of the

total land of 2697 acres (1092 Ha) proposed for the Project. PFC had also given an indicative price of ₹1.12 crore for water channel corridor. In the absence of anything to the contrary, the indicative price of ₹1.12 crore was for acquiring 102 ha land for water intake and outfall channel. Against this, the Petitioner had acquired 764 acres (309 Ha) of land which comprised of 663 acres (268 Ha) of land for Water outfall channel and had leased 101 acres (41 Ha) of land for intake channel. Thus, against the DPR proposed land of 102 Ha for Water intake/outfall channel, the Petitioner had acquired total 309 Ha (268 Ha for Water outfall and leased 41 Ha for intake channel), which is admittedly more than the land envisaged under the DPR and cannot be passed on to the consumers under change in law. Accordingly, the lease of land of 41 Ha cannot fall within the change in law event under Article 13 of the PPA and will be to the account of the Petitioner. In our view, the PFC indicative declared price of ₹1.12 crore towards Land for Water Pipeline corridor (intake /outfall channel) is towards the DPR identified land of 102 Ha for Water outfall/intake channel. As change in law under Article 13.1.1(iv) (a) covers the change in the declared price of the identified land, we are inclined to restrict the acquisition of 268 Ha of land acquired by the Petitioner for water outfall channel for ₹80.52 crore to 102 Ha of land for water outfall/intake channel as per the DPR for ₹1.12 crore. Thus, there has been impact of change in the declared price of land and the Petitioner is entitled to be compensated for actual expenditure on acquisition of 102 Ha of land (out of 268 Ha) over and above the indicative price of ₹1.12.crore towards Water intake/outfall channel. Thus, the financial impact on account of change in law in the declared price of land for 102 Ha towards Water intake/outfall channel works out to ₹29.53 crore (102/268 x 80.52-1.12) and the Petitioner is entitled to recover the same from the Procurers.

44. It is further noticed that the Petitioner has claimed total cost amounting to ₹2,39,52,716/- (₹1,71,89,716/- for Government land and ₹67,63,000/- for Forest Land) towards measurement fees, barbed wire fencing work, jungle cleaning leveling etc. In our view, the declared price of land under Article 13 refers to the cost of acquisition of land to be transferred to the Petitioner and does not include miscellaneous costs incurred by the Petitioner. Accordingly, we hold that the total cost of

₹2,39,52,716/- do not fall within the scope of change in law under Article 13 and cannot be passed on the Procurers.

MGR Land/Road

45. It is observed that PFC vide email dated 23.10.2006 has indicated an amount of ₹1.83 crore for MGR Land and a nominal provision of ₹10 crore as estimate cost of draft R&R package. The respondents have submitted that the since the said cost had neither materialized (as no MGR was built nor Rehabilitation incurred) nor claimed by the Petitioner in declared price of land or rehabilitation, the said amounts shall be reduced from the declared price as they fall within the meaning of Article 13.1.1(iv) (a) and (b) respectively. In response, the Petitioner has submitted that though the Procurers were required to intimate the declared price of land and the estimate cost of R&R package relating to the land atleast thirty days prior to the bid deadline, PFC in its email had only intimated the indicative price of land for Power Plant, MGR and Water Pipeline corridor, without identifying any land for MGR and water pipeline. Even though the RFP do not envisage any land for MGR and Roads, the DPR had proposed 125 Ha land for MGR land and 45 Ha land for Roads. However, the 45 Ha of land towards Road does form part of the 1092 Ha of land acquired by the Petitioner towards Power station and associated infrastructural facilities and allowed under change in law in this order. The PFC indicative price of ₹29.80 crore towards Land for Power station and Water Pipeline Corridor (Intake/outfall channel) do not include price for MGR land amounting to ₹1.83 crore. Since PFC had given the indicative price of ₹1.83 crore for MGR, the Petitioner was expected to factor the same in the bid. Considering the fact that MGR has not materialized, the amount of ₹1.83 crore shall be reduced from the claims of the Petitioner.

46. It is clarified that wherever the indicative prices have not been indicated by PFC, the bidder is expected to factor the cost of such expenditure in the bid including cost for additional land that the bidder decides to acquire for the plant. Therefore, the relief under Change in Law has been confined to the change in declared price of land for Power station, for which PFC had intimated the indicative price, prior to the submission of financial bid. Based on this, the total amount of ₹70.45

crore (45.15 + 29.53 –2.40 –1.83) is allowed under Change in law and is accordingly recoverable by the Petitioner.

Adjustment of Revenue from Sale of infirm power

47. The Petitioner has submitted that as on the cut-off date, any sale of infirm power by generating company was governed by Regulation 19 of the CERC (Terms and Conditions of Tariff) Regulations, 2004 (2004 Tariff Regulations) and accordingly any revenue (other than recovery of fuel cost) earned by the generating company from sale of infirm power was to be adjusted against the capital cost. The Petitioner has also submitted that the Commission has notified the CERC (Terms and Conditions of Tariff) Regulations, 2009 (2009 Tariff Regulations) applicable for the period from 1.4.2009 to 31.3.2014 in terms of which the sale of infirm power was to be accounted as "Unscheduled Interchange" (UI) and was to be paid from the regional or State UI Pool Account at the applicable frequency linked UI rate. It has also submitted that the Commission on 30.3.2009 has notified the CERC (Unscheduled Interchange Charges and Related Matters) Regulations, 2009 (UI Regulations, 2009) under which the Petitioner is entitled to UI charges for infirm power in the grid. Therefore, it has submitted that the promulgation of the 2009 Tariff Regulations and the UI Regulations, 2009 are a change in law event in terms of Article 13 of the PPA. The Petitioner has further submitted that as per PPA, the Procurers had the option to purchase infirm power at the rate of energy charges but since the nature of injection was unscheduled, the Procurers could not exercise the option for purchasing infirm power. The Petitioner has also stated that since generation pertains to the construction period, the total amount recoverable as UI charges in excess of energy charges payable by the Procurers, is required to be passed on to the Procurers in terms of Article 13.1.1 (i) of the PPA. The Petitioner has further submitted that it has earned an amount of ₹138.42 crore towards UI charges for Infirm Power injected into the grid for all the units during the period from 7.1.2012 to 31.3.2013 and the total energy charges corresponding to such infirm power is ₹100.53 crore. Accordingly, it has submitted that an amount of ₹37.89 crore, in excess of energy charges corresponding to infirm power has been recovered which is required to

be passed on to the Procurers. The Petitioner has suggested the following formula for calculation of financial impact on account of change in the revenue from sale of infirm power as under:-

> *"Impact of sale/ injection of Infirm Power (in Rs.) = UI revenue received towards the Infirm power injected into the grid less Energy charges payable by the procurers as per the terms of the PPA corresponding to the infirm power injection during the same period."*

Submission of Respondents

48. GUVNL has submitted that the sale of infirm power is to be considered for reduction in capital cost as per the relevant regulations. The respondent has also submitted that the Petitioner is required to demonstrate the calculation for the amount to be passed on, including the energy charges and the exchange rate considered by the Petitioner for each month. The respondent has submitted that the impact on various charges regarding coal for construction period can be considered only for coal consumed in generation of infirm power and only if the revenue from sale of infirm power to be passed on is more than such costs. GUVNL has stated that if the charges recovered by the Petitioner for infirm power are not sufficient to cover the costs, the same cannot be passed on to the Procurers and there cannot be double counting of such costs. Similar submissions have been made by other Procurers namely, the Discoms of Rajasthan, the Discoms of Haryana (UHBVNL & DHBVNL), MSEDCL and Punjab State Power Corporation Ltd. These respondents have submitted that it appears from the Auditors certificate that the calculation of energy charges is higher than provided in Schedule 11 thereby reducing the net revenue to be passed on to the consumers.

49. The Petitioner by rejoinder affidavit dated 31.1.2017 has submitted that the regulations are applicable only for projects where tariff is determined under Section 62 of the Electricity Act, 2003 and where tariff has been adopted under Section 63 of the Act, the PPA provides for treatment of revenue from the sale of infirm power and the claim of the Petitioner is in line with Article 11 of the PPA. The Petitioner has also submitted that the rate of realization from the sale of infirm power are as per prevailing Unscheduled Interchange (UI) Regulations and based on weekly statement issued by WRPC for each 15 min block. The Petitioner has further submitted that the amount realized through sale of infirm power in excess (or shortfall) of Energy Charges (for the

corresponding month) is also required to be included in Change in Law. In other words, it has stated that if UI realization against sale of infirm power is more than the corresponding monthly tariff calculated under schedule 7 of the PPA, the Petitioner is liable to restitute the Procurers for such differential amounts and if the realization against sale of infirm power is less, the Procurers are liable to restitute the Petitioner for such differential amount. Accordingly, the Petitioner has submitted that it has rightly computed the amount of `37.89 crore (as Change in Law impact) to be refunded to the Procurers.

Analysis and decision

50. The Petitioner has submitted that the Change in law event has occurred with the promulgation of the 2004 Tariff Regulations and the 2009 Tariff Regulations by the Commission and in terms of these Regulations, the revenue earned from sale of infirm power is adjustable against the capital cost. However, in response to the submissions of the respondent, GUVNL that sale of infirm power is to be reduced from the capital cost, the Petitioner vide rejoinder dated 31.1.2017 has submitted that the Tariff Regulations are applicable only in respect of Projects whose tariff is determined under Section 62 of the Electricity Act, 2003 and not where tariff is adopted under Section 63 of the said Act. The Petitioner has also submitted that it has earned UI charges amounting to ₹37.89 in excess of energy charges towards infirm power from its units during the period from 7.1.2012 to 31.3.2013 and the said claim is in line with Article 11 of the PPA. The details of the revenue earned from sale of infirm power by the Petitioner for the period 2011-12 and 2012-13 as per statutory auditors certificate is as under:

(in ₹)

Year	Infirm Power injected in Grid (MUs)	Infirm Power revenue received towards infirm power injected into grid	Energy Charges payable by procurers as per terms of PPA corresponding to infirm power injection	Difference
2011-12	216.71	485866962	315224162	170642800
2012-13	448.18	898367789	690091977	208275812
Total	**664.90**	**1384234751**	**1005316139**	**378918612**

51. The Petitioner has submitted that since the nature of injection was unscheduled, the Procurers' could not exercise their option for purchasing infirm Power. The Petitioner has submitted

that the amount realized through sale of infirm power in excess (or shortfall) of energy charges for the corresponding month is payable by the Procurers. GUVNL has submitted that if the revenue from sale of infirm power is more than the cost of generation of such infirm power, then the excess revenue should be passed on to the procurers, but if the revenue earned from sale of infirm power is less than the cost, then the same should not be passed on to the Procurers.

52. We have considered the submissions of the Petitioner and Procurers. The Petitioner has stated that the Tariff Regulations are not applicable in this case as the tariff has been discovered through competitive bidding under section 63 of the Act. Simultaneously, the Petitioner has claimed that the Tariff Regulations amount to Change in law and hence excess or shortfall, on account of injection of infirm power shall be construed as Change in law. First of all, the Tariff Regulations specified by the Commission in terms of Section 62 of the Act are not applicable to the Project of the Petitioner whose tariff has been discovered through competitive bidding in terms of Section 63 of the Act. Accordingly, it is clarified that if the Tariff Regulations are not applicable to competitive bid projects, then the Tariff Regulations cannot also be construed as Change in law. Further, the injection of infirm power is governed by the provisions of Regulation 8(8) of the Connectivity Regulations read with the UI Regulations as the injection of infirm power has taken place after 1.1.2010, when Connectivity Regulations came into force. Both Regulations deal with injection of infirm power prior to COD and the rate of payment of infirm power. These Regulations do not deal with how the generator shall apply the revenue earned from sale of infirm power. Therefore, the sale of infirm power and application of sale proceeds from infirm power shall be decided in accordance with the provisions of the PPA.

53. In respect of costs incurred in synchronization, commissioning and commercial operation, Article 6.4 of the PPA provides as under:

> "*Costs incurred*
>
> *The Seller expressly agrees that all costs incurred by him in synchronizing, connecting, commissioning and/or testing or retesting a unit shall be solely and completely to his account and the Procurer's or Procurers' liability shall not exceed the amount of the Energy Charges payable for such power output, as set out in Schedule 7"*

54. It is clear from the above, that all costs incurred towards synchronization, commissioning, testing/retesting shall be borne by the Petitioner and the Procurers liability shall not exceed the Energy charges payable by them for the power output.

55. Article 11.1 of the PPA provides as under:

> "*11. Billing and Payment*
>
> *11.1 General*
>
> *From the COD of the first unit, Procurers shall pay the Seller the Monthly Tariff Payment, on or before the Due date, comprising of tariff for every Contract year, determined in accordance with this Article and Sxchedule7. All Tariff payments by Procurers shall be in Indian Rupees.*
>
> *Provided however, if any of the Procurers avails of any Electrical output from the Seller prior to the Commercial operation Date (Infirm Power) of the Unit, then such Procurer shall be liable to pay only Energy Charges (as applicable for the Contract year in which infirm Power is supplied or next Contract year in case no Energy Charges are mentioned in such Contract Year), for infirm Power generated by such Unit. The quantum of Infirm Power generated by units synchronized but not have been put on COD shall be computed from the energy accounting and audit meters installed at the Power Station as per Central Electricity Authority (installation and operation of meters) Regulations, 2006 as amended from time to time."*

56. From the above, it emerges that all expenditure on account of synchronization, commissioning, testing/retesting shall be to the account of the Petitioner and the Procurers liability shall not exceed the energy charges, if the Procurers avail electrical output before the COD. In other words, if the Procurers do not avail infirm power, they have no liability to bear either te shortfall or excess in revenue from sale of infirm power. In the present case, the Procurers have admittedly not availed the infirm power and therefore, they have no liability to pay the Energy charges. As per Article 6.4 of the PPA, all costs incurred prior to the COD for commissioning and testing shall be borne by the Petitioner.

57. It is observed from the Auditors certificate dated 29.3.2016 that the Petitioner has consumed 446477 tonnes of coal during the construction period as summarized under:

	2011-12	**2012-13**
Coal consumed	182172	6017860
Less: Coal consumed in generation of power	30180	5723375
Coal consumed during trial run and capitalized (net)	151992	294485
Total (in tonnes)	**446477**	

58. Thus, against the total quantum of 446477 tonnes of coal consumed during the Construction period, the Petitioner has earned revenue of ₹138.43 crore (other than recovery of fuel cost) from the sale of infirm power. It is however noticed that for the total quantum of coal consumed during the Construction period (2011-12 and 2012-13), the Petitioner has claimed expenditure towards the levy of Clean Energy Cess @ ₹50/ tonne on imported coal and consequentially the levy of Educational cess (2%) and Secondary and higher educational cess @ 1% on Clean Energy cess (₹1.50 / tonne) amounting to ₹2.30 crore as Change in law event during the construction period. It is further noticed that the Petitioner has claimed Basic Customs Duty and Countervailing Duty amounting to ₹1.25 crore as Change in law event during the construction period based on the Notification of the Ministry of Finance (MOF). In our view, any impact on charges/levies on account of Change in law, in respect of the quantum of coal consumed (446477 tonnes) during the Construction period is payable by the Petitioner and the Procurers cannot be made liable for payment of these charges/levies, as no infirm power has been availed by the Procurers during the Construction period.

Levy of Clean Energy Cess on Imported Coal

59. The Petitioner has submitted that there has been no levy of Clean Energy Cess on coal, lignite and peat as on the cut-off date of the generating station. However, the MOF,GOI has introduced Clean Energy Cess in the Finance Act, 2010, whereby a statutory cess of ₹100 per ton has been levied on coal, lignite and peat which was subsequently reduced to ₹50/ tonne vide notification dated 24.6.2010.The Petitioner has submitted that from the date of COD of Unit-I, the Petitioner has been additionally burdened on account of levy of Clean Energy Cess to the extent of ₹51.50 per ton (inclusive of Educational Cess of 2% and Secondary and Higher Educational Cess of 1%) payable on the quantum of coal used by it for generation of infirm power. The Petitioner has submitted that it has consumed 446477 tonnes of coal during the construction period and has been burdened with an amount of ₹2.30 crore during the construction period. The Petitioner has suggested the following formula for calculation of financial impact on account of levy clean energy cess by the Government of India, Ministry of Finance:

"Impact (in ₹) = Rate of Clean Energy Cess (Inclusive of Educational cess of 2% and Secondary and Higher Educational Cess of 1%) per ton [₹/ton] x Actual Quantum of Coal Consumed [Ton] during construction period."

Submission of Respondents

60. GUVNL has submitted that levy of Clean Energy Cess may be considered as Change in law during the construction period and is only to be considered for coal consumed in generation of infirm power. It has also submitted that the Petitioner has not furnished the detailed calculations and has not provided proof of actual payment. It has also stated that since the Clean Energy cess is a cess on quantum of coal irrespective of GCV, the impact of levy on the same should be considered on actual quantum of coal subject to a ceiling on the quantum based on this GCV. Further, the Petitioner is required to certify that the quantum so arrived after consumption of coal (calculated on the basis of opening stock, coal received and closing stock) used in the plants or units under construction was not diverted to any other plant of the Petitioner/Tata Power. GUVNL has pointed out that the Notification dated 24.6.2010 under the Finance Act with regard to Clean Energy cess do not provide for Education and Higher Education cess claimed by the Petitioner and hence the rate of ₹51.50 per ton is wrong. GUVNL has added that the Commission in its orders dated 30.3.2015 in Petition No. 6/MP/2013 and 3.2.2016 in Petition No. 79/MP/2013 has considered the clean energy cess only at ₹50 per ton. Similar submissions have been made by the Discoms of Rajasthan, the Discoms of Haryana (UHBVNL &DHBVNL) and Punjab State Power Corporation Ltd. MSEDCL has submitted that the Clean energy cess is to be given to the Petitioner whenever Procurers have purchased power from the Petitioner in the construction period. It has further submitted that the levy of clean energy cess is only to be considered for coal consumption for a period of three months (date of synchronization of units till the date of COD). MSEDCL has also stated that the calculation of coal required for generation of power in the constriction period is to be provided by the Petitioner along with the actual bills for purchase of coal for generation of such infirm power. MSEDCL has further submitted that the quantum of coal should be calculated on the basis of GCV and SHR as provided in the bid so that any operational inefficiency of the generators are not passed on to the Procurers by way of change in law.

Analysis and Decision

61. We have considered the submissions of the parties. The Clean Energy Cess on coal was introduced by the GOI 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. In the Auditor statement enclosed by the Petitioner the impact of the clean energy cess on imported coal consumed by the Petitioner during the construction period is as under:

	Quantity (MT)	
	2011-12	**2012-13**
Opening stock of coal at Mundra plant as at 1.4.2011	-	-
Opening stock coal in transit as at 1.4.2011	-	-
Total	**-**	823281
Add:		
Coal received during the year	-	-
Less: opening stock in transit as at 1.4.2011	-	-
Add: closing stock in transit as at 31.3.2012	-	-
Coal received (net)	1005453	6188606
Less:	-	-
Closing stock at Mundra plant as at 31.3.2012	-	-
Closing stock in transit as at 31.3.2012	-	-
Total	**823281**	**994027**
Coal consumed	182172	6017860
Less: coal consumed in the generation of power	30180	5723375
Coal consumed during trial run and capitalized (net)	151992	294485
Clean energy cess paid @ ₹50.00 per metric tonne of coal consumed	-	-
Education cess @ 2% (₹)	-	-
Higher educational cess @ 1% (₹)	-	-
Total	**7827588**	**15165978**
Clean energy cess payable on coal quantity consumed (net of capitalization) at the rate prevailing on 7.12.2006 (bid deadline) @ ₹ Nil	-	-
Difference	**7827588**	**15165978**

62. Thus, the total amount of ₹22993566 (i.e ₹2.30 crore) has been incurred by the Petitioner as input cost of the coal consumed (446477 tonnes) for production of infirm power during the construction period. In other words, the levy of Clean Energy Cess has impacted the Petitioner with an additional amount during the construction period. This in our view is a Change in law event and is covered under Article 13.1.1(i) of the PPA. However, considering the fact that the rate of Clean Energy cess levied is in proportion to the quantum of coal consumed (446447 tonnes) for generation of infirm power, we hold that the Procurers are not liable to compensate the Petitioner

on account of this change in law event. We have in para 58 above held that the expenditure on account of levy of Clean Energy Cess has to be met by the Petitioner from the revenue of ₹138.43 crore earned from the sale of infirm power during the Construction period. We direct accordingly.

Change in rate of Basic Customs Duty and introduction of Countervailing Duty on imported coal

63. The Petitioner has submitted that as on the cut-off date, Notification No. 44/2004-Customs issued by the Ministry of Finance was in operation for import of coal and accordingly Tata Power had envisaged the Basic Customs Duty at the rate of 5% and no countervailing duty was levied on imported coal. The Petitioner has further submitted that the Government of India vide Finance Act, 2011, which came into effect from 1.3.2011 introduced 5% Countervailing duty on Steam Coal. Further, the Government of India, Ministry of Finance vide its Notification No. 46/2011- Customs dated 1.6.2011 reduced the Basic Customs Duty payable on steam coal from 5% to 3% which was further reduced by the Ministry of Finance vide Notification No. 12/2012-Customs dated 17.3.2012 from 3% to 0% and Countervailing Duty on steam coal from 5% to 1%. The Petitioner has further submitted that the Ministry of Finance vide Notification No. 64/2012 dated 31.12.2012 which came into effect from 1.1.2013 amended the Notification No. 46/2011-Customs dated 1.6.2011 and reduced the Basic Customs Duty on Steam Coal from 3% to 0%, if such steam coal was procured from an ASEAN country. Further, the Ministry of Finance vide Notification No. 12/2013-Customs dated 1.3.2013 revised the Basic Customs Duty on Steam Coal from 0% to 2% (if imported from non-ASEAN countries) and the Countervailing duty on steam coal from 1% to 2%. The Petitioner has further stated that Government of India through Finance Act, 2007 levied a Secondary and Higher Educational Cess at the rate of 1% on aggregate duty of customs levied and collected by the Central Government.

64. The Petitioner has submitted that as per the provisions of Custom Tariff Act, 1963, the coal has been categorized into three types, namely Anthracite, Bituminous coal and Steam coal. However, the Commissioner of Customs, Kutch, vide its Show Cause Notice dated 19.6.2013 and its order dated 5.2.2014 held that the Petitioner has wrongly classified Bituminous Coal as Steam

Coal, thereby not paying any Basic Customs Duty and has only paid Countervailing Duty of 1% though the Petitioner was liable to pay the Basic Customs Duty of 3%/5% and Countervailing Duty of 5%/6%. Accordingly, the Commissioner of Customs raised the demand of ₹66,77,75,612/- and for penalty along with an interest in terms of Section 18(3) and 28AA of the Customs Act, 1963 towards the non-payment of Basic Customs Duty and Countervailing Duty. As against this demand, the Petitioner has paid an amount of ₹52,45,47,908 under protest. Aggrieved by this order, the Petitioner has stated that it has filed an appeal before the Central, Excise and Service Tax Appellate Tribunal challenging the Commissioner of Customs order dated 5.2.2014, challenging the classification of the said coal as Bituminous Coal instead of Steam Coal and the said appeal is pending adjudication.

65. The Petitioner has submitted that as a result of the Change in Law events above for both Steam and Bituminous Coal, the cumulative impact on the cost of the Petitioner for the construction period is ₹1.25 crore which is receivable to the Petitioner. This amount is inclusive of the amount paid against the shipments under transit at the end of the financial year, for which duty has been paid before the end of the Financial Year and also the amount paid under protest by the Petitioner due to wrong classification of Steam coal as Bituminous coal. The Petitioner has also made a refund application on 24.2.2014 as regards the additional Countervailing Duty paid, amounting to ₹51,91,76,552 which was paid under protest and upon the insistence of the customs authorities as they had taken a view that the Petitioner cannot simultaneously avail benefit under two notifications on the import of the same goods. The Petitioner has submitted that the said refund application is premised on Circular No. 41/2013 issued by the Ministry of Finance, Department of Revenue, whereby it has been clarified that an importer while availing Basic Customs Duty exemption on steam coal under the Notification No. 46/2011-Customs, can simultaneously avail the concessional Countervailing Duty at 2% under Notification No. 12/2012-Customs.

> *"Impact (in ₹) = [Increase/Decrease in the Basic Customs Duty and Countervailing Duty (inclusive of Secondary and Higher Education Cess) for the actual purchase of coal [₹/Ton] X Actual Quantum of Coal consumed during pre-COD period subject to adjustment in opening stock] [Ton]."*

Submission of Respondents

66. GUVNL has submitted that the change in Basic Custom Duty and Countervailing Duty may be considered as Change in Law only on the coal consumed for generation of infirm power. It has also submitted that the Petitioner has not provided detailed calculation on the quantum of coal consumed and the duties applicable at various times. GUVNL has also stated that the certificate from the Auditor furnished by the Petitioner does not demonstrate the calculations. GUVNL has also pointed out that the custom duty on import of coal from Indonesia was 'nil' and hence the Commission may accordingly disallow the Custom Duty on coal procured from countries other than Indonesia. GUVNL has added that the benefit of reduction in Custom Duty may be passed on to the Procurers as Education cess was applicable on the cut-off date. Similar submissions have been made by the Discoms of Rajasthan, the Discoms of Haryana (UHBVNL & DHBVNL) and Punjab State Power Corporation Ltd. MSEDCL has submitted that the impact of Change in Law has to be considered only if the Petitioner has procured the coal of Indonesia and Change in Law would be calculated on the quantum of Indonesian coal used for the purpose of generation of infirm power.

Analysis and Decision

67. We have considered the submissions of the parties. As on the cut-off date, i.e. 30.11.2006, the applicable Basic Customs Duty was 5% and there was no Countervailing Duty. Countervailing duty is the additional duty on customs duty equivalent to Central excise duty levied on similar goods produced in India. The Petitioner has submitted that the changes in Customs duty and levy of Secondary and Higher Education Cess due to enactment of Finance Act and/ or notifications constitute Change in law events. It has also stated that the reduction in basic Customs duty and introduction of countervailing customs duty would reduce and increase the cost of the project and capital cost respectively. It is noted that no such levy was applicable as on the date which was seven days prior to the bid deadline. The changes in Basic Customs Duty and Countervailing Customs Duty in case of Steam coal and Bituminous coal for the Construction period in terms of the notification are summarized as under:

Period	ASEAN or Non-ASEAN countries	Duty payable on cut- off date	Customs duty payable during the construction period	
			Bituminous coal	Steam coal
Cut-off date to 31.5.2011	ASEAN	5% (Notification No. 44/2004- Customs dated 28.2.2004	5% (Notification No. 44/2004- Customs dated 28.2.2004	5% (Notification No. 44/2004- Customs dated 28.2.2004
	Non- ASEAN		5% (Notification No. 44/2004- Customs dated 28.2.2004	5% (Notification No. 44/2004- Customs dated 28.2.2004
1.6.2011 to 16.3.2012	ASEAN		3% (Notification No. 46/2011- Customs dated 1.6.2011	3% (Notification No. 46/2011- Customs dated 1.6.2011
	Non- ASEAN		5% (Notification No. 44/2004- Customs dated 28.2.2004	5% (Notification No. 44/2004- Customs dated 28.2.2004
17.3.2012 to 31.12.2012	ASEAN		3% (Notification No. 46/2011- Customs dated 1.6.2011	0% (Notification No. 12/2012- Customs dated 17.3.2012
	Non- ASEAN		5% (Notification No. 44/2004- Customs dated 28.2.2004	0% (Notification No. 12/2012- Customs dated 17.3.2012
1.1.2013 to 28.2.2013	ASEAN		0% (Notification No. 64/2012- Customs dated 31.12.2012	0% (Notification No. 12/2012- Customs dated 17.3.2012 or, (Notification No. 64/2012- Customs dated 31.12.2012
	Non- ASEAN		5% (Notification No. 44/2004- Customs dated 28.2.2004	0% (Notification No. 12/2012- Customs dated 17.3.2012
1.3.2013 to 21.3.2013	ASEAN		2% (Notification No. 12/2013- Customs dated 1.3.2013	0% (Notification No. 64/2012- Customs dated 31.12.2012
	Non- ASEAN		2% (Notification No. 12/2013- Customs dated 1.3.2013	2% (Notification No. 12/2013- Customs dated 1.3.2013

68. It is evident from the above that the reduction in basic Customs duty and the introduction of Countervailing Customs Duty has impacted the Petitioner with an additional amount as above, during the Construction period. This in our view is a Change in law event and is covered under Article 13.1.1(i) of the PPA. However, as stated earlier, the Petitioner has consumed 446477 tonnes of Steam and Bituminous coal during the Construction period and has also earned a revenue of ₹138.43 crore towards Sale of infirm power. Considering the fact that the imposition of Basic Customs Duty and levy of Secondary and Higher Education Cess amounting to ₹1.25 crore is in proportion to the quantum of coal consumed (446477 tonnes) the generation of infirm power, during the construction period, the Procurers' are not liable to compensate the Petitioner for the said Change in law event. As stated in para 58 above, the expenditure towards Basic Customs

Duty and Countervailing Customs Duty are to be meted by the Petitioner from the revenue of ₹138.43 crore earned from the Sale of infirm power during the Construction period. We direct accordingly.

Change in Excise Duty on Civil Materials

A. Change in payment of Excise Duty on Civil Materials including Steel and Cement

69. The Petitioner has submitted that as on the cut-off date Excise Duty was exempted on all goods required for the construction of the project secured by international competitive bidding in terms of the Ministry of Finance Notification No. 6 of 2006-Central Excise dated 1.3.2006 and accordingly the impact of the Notification was considered while submitting the bid. The Petitioner has also submitted that based on the Ministry of Finance Notification No. 46/2008 dated 14.8.2008, no Excise Duty was payable for any goods required for setting up of the project based on super critical (coal-thermal) technology with installed capacity of 3960 MW or above from which power procurement has been tied up through tariff based competitive bidding. The Petitioner has also submitted that it had procured material for construction of the project and paid a sum of ₹51.67 crore as Excise Duty on civil material required for construction. The said amount was paid with the understanding that the Petitioner would be able to claim refund of the said amount paid towards Excise Duty. It has further submitted that the claim of the Petitioner seeking refund of excise duty paid on the purchase of civil materials including steel and cement was rejected by the Ministry of Commerce and Industry, Directorate General of Foreign Trade (DGFT). The Petitioner by letter dated 14.7.2010 sought clarifications on the availability of deemed export benefits for supply of civil material like cement and steel to Mega Power Projects. The Petitioner has submitted that the DGFT letter dated 28.10.2010 clarified that deemed exports were not available for supply of civil materials like cement and steel for mega- power project and accordingly the Petitioner is not entitled to get any benefit of the notification dated 1.3.2006. The Petitioner has therefore submitted that DGFT letter dated 28.10.2010 constitutes a Change in Law event in terms of Article 13 of the PPA as the Petitioner has been burdened with an amount of ₹51.67 crore during the construction

period by way of additional Excise Duty which was not considered by the Petitioner at the time of the bid as on the cut-off date.

B. Changes in payment of Excise Duty on Civil Material in case of LDO and HFO

70. The Petitioner has submitted that at the time of submission of bid, the excise duty applicable on the spares and consumables was 16.32% (inclusive of Educational cess of 2% and exclusive of Secondary and Higher Secondary cess of 1%). However, the Ministry of Finance, vide its Notification No. 2/2008-CE dated 1.3.2008 reduced the rate of excise duty payable on the plant, machineries, spares and consumables from 16% to 14% which was further reduced vide Notification No. 18/2012-CE dated 17.3.2012 from 14% to 12%.The Petitioner has submitted that the Government of India, Ministry of Finance vide the Finance Act, 2007, levied a secondary and higher educational cess at the rate of 1% on aggregate duty of excise levied and collected by the Central Government. The Petitioner has submitted that from the commencement of the COD of Unit 1, the Petitioner has benefitted to the extent of reduction of 4.08% on excise duty leviable on fuel oil, spares and consumables and burdened with the levy of Secondary and Higher Education Cess of 1% due to the reduction in Excise duty payable by the Petitioner during the construction period. It has further submitted that the net impact on account of the above is that the Petitioner has benefitted to the extent of 3.96% on the goods consumed during the construction period. As a result of this, the Petitioner has stated that it has benefitted to the tune of ₹2.09 crore due to overall reduction in Excise Duty which is payable by the Petitioner to the Procurer. The Petitioner has suggested the following formula for the same:-

> *"Impact of reduction in Excise Duty (in ₹) = Excise Duty paid by the Petitioner during the Construction Period (inclusive of Education Cess and Secondary and Higher Education Cess) [₹] less Excise Duty payable by the Petitioner at the rate prevailing on the Cut-off date (inclusive of Education Cess) [₹]"*

Submission of Respondents

71. As regards Excise Duty on Civil materials (including steel and cement) GUVNL has submitted that there is no Change in Law and that there was no law on cut-off date which provided for exemption for goods supplied to the Power Projects selected under competitive bidding. It has

stated that the exemption under Notification dated 1.3.2006 is for goods supplied against international competitive bidding i.e. when goods are procured through international competitive bidding and does not refer to goods supplied to a project selected under competitive bidding. GUVNL has also pointed out that the Petitioner has not made the claim that the goods for the Power Projects were supplied against international competitive bidding. GUVNL has also stated that an introduction of a new item into Schedule I Item 91 A cannot be considered as a clarification but is only a Change in Law event which occurred after the cut-off date by which the goods supplied to the project are exempt from Excise Duty. GUVNL has submitted that the reduction in cost due to such exemption may be passed on to the procurers in term of Article 13 of the PPA. It has further submitted that the Petitioner has not shown that the Civil Materials such as steel and cement are exempted under the Custom Tariff Act and the exemptions under this Act does not apply to steel or cement and therefore such Civil Materials were in any event not exempted on the cut-off date. GUVNL has further pointed out that the letter dated 28.10.2010/2011 issued by the DGFT is merely a clarification of the existing provision and not a Change in Law or Change in Interpretation. Also, the letter written by DGFT in response to the Petitioner's letter is not a declaration of law or Change in Interpretation of law, by a Competent Authority. GUVNL has stated that the Petitioner cannot make assumptions on law and there has to be an existing interpretation of law by the Competent Authority which has modified or changed.

72. As regards Excise Duty in case of LDO & HFO, GUVNL has stated that the changes in rates may be considered as Change in Law, but the Petitioner is required to give detailed calculations in a tabular form to verify the accuracy of calculations. Moreover, the Petitioner is required to certify that there is no other benefit accruing to the Petitioner. Similar submissions have been made by the Discoms of Rajasthan, the Discoms of Haryana (UHBVNL & DHBVNL) and Punjab State Power Corporation Ltd. MSEDCL has submitted that the Petitioner may be directed to submit relevant documents/details for purchase of materials along with all correspondences with the Excise Department to establish the Change in Law. It has also submitted that the methodology to estimate additional charges due to Change in Law needs to be approved by the Commission after

prudence check with regard to the details of material, cost of material and actual payments made by the Petitioner to the Excise Department.

Analysis and Decision

73. We have considered the submission of the Petitioner and the respondents. It is observed that the Petitioner had considered the impact of the Notification dated 1.3.2006 while submitting the bids on the premise that Excise Duty was exempted on all goods required for the construction of the project secured by International competitive bidding. Schedule-I Item-91 of the Notification No. 6/2006 dated 1.3.2006 provides as under:

"All goods supplied against International Competitive Bidding"

74. From the statutory auditor certificate enclosed by the Petitioner for the said years, it is observed that ED paid by the Petitioner are on the basis of invoices raised by the vendors mainly for oil consumed and exclude ED paid on Steel and Cement purchased for the project as it was considered under ICB. In our view, the Petitioner has misconstrued the Notification dated 1.3.2006 as existing as on the cut-off date and has made its claim as a change in law event. It is clear from the above Schedule-I that the exemption from Excise Duty is for goods which were procured through International Competitive Bidding (ICB) and does not refer to goods supplied to a Project selected under competitive bidding. The Petitioner has not claimed that the goods to the power project were supplied against International Competitive Bidding. As pointed out by the respondent, GUVNL, the Petitioner has not shown that the Civil Materials such as steel and Cement are exempted under Customs Tariff Act as satisfaction of the Condition no. 19 of Schedule-I Item 91 of Notification dated 1.3.2006. Thus, there was no law as on the cut-off date which provided for exemption of goods being supplied to the project selected under competitive bidding. The Notification for exemption from excise Duty for Mega Power Project was issued on 14.8.2008 which is much after the due date, i.e. seven days prior to the bid deadline. In other words, there was no occasion for the Petitioner to take into account such exemption, if any, while quoting the bid. DGFT vide its letter dated 28.10.2010 addressed to the Petitioner has clarified as under:

"Please refer to your letter dated 14.7.2010 seeking clarification on the above mentioned subject. It is informed that Deemed exports are not available for supply of civil materials like cement and steel to mega power projects"

75. The submission of the Petitioner that the Letter dated 28.10.2010 of DGFT is a Change in law event is not acceptable, since the said letter of DGFT stating that the deemed export benefits were not available for supply of civil materials is only a clarification of the existing provision, in response to the letter of the Petitioner dated 14.7.2010. This cannot be construed as a change in law or change in interpretation. Even otherwise, the letter of DGFT to the Petitioner is not a declaration of law so as to claim relief under Change in law. In the above background, we hold that the payment of Excise Duty towards Civil materials such as Steel and Cement cannot be considered as a Change in law event in terms of Article 13.1.1.(i) of the PPA and hence cannot be passed on to the Procurers. Accordingly, the relief sought by the Petitioner on this ground is disallowed.

Excise Duty in case of LDO and HFO

76. As regards the reduction of Excise Duty for LDO and HFO, the Petitioner has submitted that it has benefitted to the tune of ₹2.09 crore due to overall reduction in Excise Duty and is payable by the Petitioner to the Procurers. It is noticed from the Auditor's certificate enclosed by the Petitioner that Excise Duty has been paid on the basis of invoices raised by the vendors mainly for oil consumed and exclude Excise Duty paid on steel and cement purchased for the construction of the project. The details of the Excise Duty paid and the value of duty payable by the Petitioner, as furnished for the years 2010-11, 2011-12 and 2012-13 are as under:

2010-11			
Total assessable value of ED (₹) (2)	**Total ED and taxes paid on expenditure (3)**	**Value of ED payable at the rate prevailing on 7.12.2006 (Bid deadline) (4)**	**Difference (5= 3-4)**
159042940	22933992	25955808	3021816
2011-12			
936795047	135085846	152884952	17799106
2012-13			
5001141	721165	816186	95022

77. As on the cut-off date (30.11.2006), the applicable Excise duty on LDO and HFO was 16.32% (inclusive of Educational cess of 2%) which was considered in the bid by the Petitioner. In exercise of the powers conferred by sub-section (1) of section 5-A of the Central Excise Act, 1944, Ministry of Finance issued Notification No. 2/2008 dated 1.3.2008 reducing the ED payable on LDO, HFO Plant & Machinery, Spares and Consumables from 16% to 14% with effect from 1.3.2008 and vide Notification No. 18/2012 dated 17.3.2012, the Excise duty payable on Spares and Consumables was further reduced from 14% to 12%. With the Finance Act, 2007 coming into effect from 1.4.2007, a new Cess called the "Secondary and Higher Education cess" of 1% was levied (on aggregate of all duties of excise and customs) over and above the Education cess which was in existence and considered by the Petitioner. The said reduction in ED from 16% to 12% and the imposition of Secondary and Higher Education Cess at 1% as claimed by the Petitioner have occurred after the cut-off date and have a net impact of 3.96% on the goods consumed during the construction period. Since these changes have occurred after the cut-off date, the Petitioner cannot be expected to factor the same in the bid. Therefore, the reduction in ED by Indian Govt. Instrumentality pursuant to the powers vested under the Act of Parliament is admissible as Change in law under Article 13.1.1(i) of the PPA. Accordingly, the benefit of ₹2.09 crore to the Petitioner due to overall reduction in Excise duty is payable to the Procurers through adjustment in tariff proportionate to their contracted capacity. The Petitioner is directed to give detailed calculations in a tabular form to the Respondents to verify the accuracy of calculations in respect of the said amounts prior to such adjustment.

Reduction in Central Sales Tax

78. The Petitioner has submitted that as on the cut-off date, the Central Sales Tax applicable was 4%. However, the Ministry of Finance vide Notification No. 1/2007- CST-ST dated 29.3.2007 reduced the Central Sales Tax from 4% to 3% which came into effect from 1.4.2007 and further reduced vide Notification No. 1/2008-CST-ST dated 30.5.2008 from 3% to 2% which came into effect from 1.6.2008. The Petitioner has submitted that it has benefitted to the tune of ₹35.80 crore during the construction period on account of reduction in the rate of CST and the same ought to be

passed on to the procurers in terms of the provisions of the PPA. The Petitioner has suggested the following formula in this regard:-

> *"Impact (in ₹) = Central Sales Tax payable by the Petitioner on the material procured during the Construction Period less Central Sales Tax payable at the rate prevailing on the Cut-Off date."*

Submission of Respondents

79. GUVNL has submitted that the change in rates of CST may be considered as Change in law and the Petitioner is required to give detailed calculations to enable the respondents to verify the accuracy of the calculations. It has also requested that the Petitioner may be directed to certify that there is no other benefit accruing to the Petitioner. Similar submissions has been made by the discoms of Rajasthan, the discoms of Haryana (UHBVNL & DHBVNL) and Punjab State Power Corporation Ltd. MSEDCL has submitted that in the absence of detailed calculations showing the financial impact on account of reduction in CST rate, it is not possible to validate the impact of such reduction.

Analysis and Decision

80. We have examined the submission of the parties. The Petitioner has placed on record the Statutory Auditor's Certificate, certifying that the additional amount is payable by the Petitioner to the Procurers on account of reduction in CST during the Construction period. The details of the CST paid and the Value of tax payable for the Project during the years 2007-08 to 2012-13 as furnished by the Petitioner are as under:

Total assessable value (₹) (1)	Total taxes and duty paid on expenditure (2)	Value of duty payable at the rate prevailing on 7.12.2006 (Bid deadline) (3)	Difference (4= 3-2)
2007-08			
4165936	117552	166367	(49086)
2008-09			
2169129131	44723978	86765165	(42041187)
2009-10			
3429876489	68597530	137195060	(68597530)
2010-11			
6532864049	130657281	261314562	(130657281)
2011-12			
3906754348	78135087	156270174	(78135087)
2012-13			
1552223143	31032816	62054024	(31021209)

81. It is observed from the statutory auditors certificate that the CST paid by the Petitioner are on the basis of invoices raised by the vendors mainly for steel, cement etc., for construction of the Project. The rate of CST at 4% which was factored by the Petitioner at the time of submission of the bid (4%) had been reduced to 3% with effect from 1.4.2007 as per Notification dated 29.3.2007 and to 2% as per Notification dated 30.5.2008, based on which a benefit of ₹35.80 crore was made by the Petitioner during the Construction period. Since these changes have occurred after the cut-off date, the Petitioner cannot be expected to factor the same in the bid. Therefore, the reduction in CST by Indian Govt. Instrumentality pursuant to the powers vested under the Act of Parliament is admissible as change in law under Article 13.1.1(i) of the PPA. Accordingly, the benefit of ₹35.80 crore to the Petitioner due to overall reduction in CST is payable to the Procurers through adjustment in tariff proportionate to their contracted capacity. The Petitioner is directed to give detailed calculations in a tabular form to the Respondents to verify the accuracy of calculations in respect of the said amounts prior to such adjustment.

Increase in Gujarat Value Added Tax Rates

82. The Petitioner has submitted that at the time of bidding, the Value Added Tax payable on fuel oil, plant and machinery and spares in the State of Gujarat was 4% or 12.50% depending on the category in which the consumables fall into under the Gujarat Value Added Tax (GVAT), 2003. However, it has submitted that the Government of Gujarat in the year 2008 amended the Gujarat Value Added Tax Act, 2003 and increased the rate of Value Added Tax on Fuel Oil, Plant and Machinery to 5% and Spares to 15%. The Petitioner has submitted that since the increase in the rate of VAT is pursuant to the amendments to the Gujarat Value Added Tax (Amendment) Act, 2008 by the State Government of Gujarat, the same is covered under Change in law for which the Petitioner should be compensated. The Petitioner has also submitted that it has been additionally burdened to the extent of increased Gujarat Value Added Tax of 1% or 2.5% as the case may be, which has become payable on fuel oil, consumables and spares purchased by the Petitioner during the Construction period. As a result, the Petitioner has submitted that it has been burdened with an additional amount of ₹7.48 crore during the construction period which ought to be received from the

Procurers in terms of the provisions of the PPA. The Petitioner has suggested the following formula to compute the financial impact:-

> *"Impact (in ₹) = Gujarat Value added Tax payable on Fuel Oil, Consumables and spares procured during the Construction period [Rs.] less Gujarat Value Added Tax payable by the Petitioner at the rate prevailing on the Cut-Off date [Rs.]"*

Submission of Respondents

83. GUVNL has submitted that the Petitioner is required to give full details of the goods and services considered for calculation of impact and proof of payment and a prudence check is to be undertaken as to the necessity and reasonableness of the procurement of goods and services. Similar submissions have been made by the Discoms of Rajasthan, the Discoms of Haryana (UHBVNL & DHBVNL) and Punjab State Power Corporation Ltd. MSEDCL has submitted that the details of tax paid may be furnished for prudence check of the Commission.

Analysis and Decision

84. We have examined the submission of the parties. The Petitioner has submitted the Statutory Auditor's Certificate issued by its Auditors certifying the additional amount payable by the Procurers to the Petitioner on account of increase in Gujarat Value Added Tax for the construction period. Accordingly, the details of the CST paid and the Value of tax payable for the Project for the years 2007-08 to 2012-13 as furnished by the Petitioner are as under:

Total assessable value (Rs) (1)	Total taxes and duty paid on expenditure (2)	Value of duty payable at the rate prevailing on 7.12.2006 (Bid deadline) (3)	Difference (4= 3-2)
2007-08			
4165936	117552	166367	(49086)
2008-09			
2169129131	44723978	86765165	(42041187)
2009-10			
3429876489	68597530	137195060	(68597530)
2010-11			
6532864049	130657281	261314562	(130657281)
2011-12			
3906754348	78135087	156270174	(78135087)
2012-13			
1552223143	31032816	62054024	(31021209)

85. The Petitioner has submitted that the GVAT considered in its bid as on the cut-off date payable for fuel oil, plant and machinery and spares in the State of Gujarat was 4% to 12.50% depending on the category under the Gujarat Value Added Tax, 2003, which was later amended by the Gujarat Value Added Tax (Amendment) Act, 2008 with effect from 1.4.2008. According to this, the Govt. of Gujarat has increased the Value Added Tax from 4% to 5% for fuel oil, plant and machinery and spares and for residual class from 12.50% to 15%. It is observed from the Auditors certificate that the GVAT paid by the Petitioner are on the basis of invoices raised by the vendors for expenditure incurred towards the construction of the Project. Since the amendment, modification etc., of any statute, rules etc, fall within the scope of Change in law in terms of Article 13.1.1(a) of the PPA, the increase in GVAT constitute a change in law event in terms of the PPA. It is pertinent to mention that the impact of increase in VAT rate was not allowed as Change in law event by order of the Commission dated 30.3.2015 in Petition No. 6/MP/2013 wherein the Commission observed 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."*

86. The finding of the Commission disallowing the claim for reimbursement of VAT was challenged by Sasan Power Ltd. before the Appellate Tribunal for Electricity in Appeal No. 161 of 2015 and the Tribunal by its judgment dated 19.4.2017 decided as under:

> *"43……..So far as VAT is concerned, it is levied on procurement of materials by the seller. Therefore, it affects the cost of business of generation and sale of electricity. Hence, the CERC has erred in disallowing increase in VAT by the Madhya Pradesh Government.*
>
> *46. Having regard to the nature of Excise Duty and Central Sales Tax and VAT which have an impact on the cost of or revenue from the business of generation and sale of electricity, in our opinion, the same should be allowed as Change in Law event."*

87. In the light of above decision, the impact of ₹7.48 crore on the Petitioner on account of revision in the rate of Gujarat VAT during the Construction period is admissible under Change in

Law and is therefore allowed. The Petitioner is however directed to submit detailed calculations in a tabular form to the Respondents to verify the accuracy of calculations in respect of the said claim.

Increase in Rate of Service Tax on Works Contract

88. The Petitioner has submitted that as on the cut-off date, Service tax was applicable at the rate of 12%. It has also submitted that by Finance Act, 2006, Works contract was brought within the ambit of Service Tax and Service tax of 12% was imposed on service component/ elements of Works Contract after eliminating the supply component and thereby effectively considered 2% of Service tax on Works Contract at the time of bid. The Petitioner has further submitted that the Ministry of Finance, Government of India vide Notification No. 32/2007 dated 22.5.2007 introduced "Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 which became effective from 1.6.2007 and levied service tax at the rate of 2% on Works Contract. The Petitioner has submitted that the Government of India, Department of Revenue (Tax Research Unit), vide Notification No. 7/2008 dated 1.3.2008 increased the rate of service tax from 2% to 4%. The Petitioner has further submitted that the Government of India, Ministry of Finance through the Finance Act, 2007, levied a Secondary and Higher Educational Cess at the rate of 1% on aggregate duty of Service Tax levied and collected by the Central Government. The Petitioner has submitted that it has been additionally burdened by increase in (a) Service Tax at the rate of 2% and 1% of Secondary and Higher Education Cess for services utilized during the period from 1.6.2007 to 31.2.2008 and (b) Service Tax at the rate of 4% and 1% of Secondary and Higher Education Cess for services utilized during the period from 1.3.2008 to 21.3.2013. The Petitioner has further submitted that the increase in Service Tax and Levy of Secondary and Higher Education Cess has resulted in additional burden to the tune of ₹21.22 crore for services utilized by the Petitioner during the construction period towards capital expenditure. Accordingly, it has stated that the Petitioner is entitled to be compensated to the above said amount by recovery from the Procurers. The Petitioner has suggested the following formula to consider the financial impact in this regard:

"Impact (in ₹) = Service Tax payable by the Petitioner during the Construction Period (inclusive of Education Cess and Secondary and Higher Education Cess) [₹] less Service Tax payable by the Petitioner at the rate prevailing on the Cut-off Date (inclusive of Education Cess) [₹]"

Submission of the Respondents

89. GUVNL has submitted that the changes in Service Tax may be considered as Change in law. However, the Petitioner is required to establish that there has been change, as the service tax on works contract was existing as on the cut-off date as admitted by the Petitioner itself though no notification has been annexed. It has also submitted that the notification dated 22.5.2007 was not a new levy but an option given to the person to pay tax of 2% of gross instead of 12% of the service component. GUVNL has submitted that such option need not be exercised unless the exercise of option is beneficial to the person liable to pay tax. If the option is not exercised then the status quo was existing on the cut-off date and there will be no change in law within the scope of Article 13 of the PPA. GUVNL has stated that there is discharge of service tax at 12% by exercising the option, and therefore the benefit of 12% is to be passed on to the Procurers / respondents by the Petitioner. It has also submitted that the Petitioner is required to disclose the implications of service tax both under 12% of service component and 2% /4% of gross amount as well as the notification under the Finance Act, 2006. GUVNL has stated that in case of any net increase, the same cannot be passed on to the Procurers, since the increase has resulted due to exercise of an option by the Petitioner to its contractors and is not mandated by law. Similar submissions have been made by the Discoms of Rajasthan, the Discoms of Haryana (UHBVNL & DHBVNL) and Punjab State Power Corporation Ltd. MSEDCL has submitted that the details of tax paid under this head may be furnished for prudence check of the Commission.

Analysis and Decision

90. We have examined the submissions of the parties. The Petitioner has furnished the Statutory Auditors certificate certifying the additional amount paid on account of the increase in Service Tax during the construction period as under:

Total assessable value (Rs) (1)	Total taxes and duty paid on expenditure (2)	Value of duty payable at the rate prevailing on 7.12.2006 (Bid deadline) (3)	Difference (4= 3-2)
2007-08			
26078153	2840004	2679443	160560
2008-09			
3310588227	204121429	156714575	47406854
2009-10			
7101966431	484268756	411366045	72932710
2010-11			
6967680475	452183069	419348379	32834690
2011-12			
6967680475	452183069	419348379	32834690
2012-13			
3330223735	240285273	200120960	40164312

91. It is noticed that the Service tax of 12% was imposed on service component/ elements of Works Contract, thereby effectively considering 2% of service tax on Works Contract at the time of the bid. This has been considered by the Petitioner as on the cut-off date (30.11.2006). Thus, the notification dated 22.5.2007 of the Ministry of Finance giving options to the persons by paying an amount equal to 2% of the gross amount charged for the Works Contract, instead of paying service tax at the rate specified under the Finance Act, 1994 is not a new levy but an option given to the person to pay 2% of the gross instead of 12% of the service component. Thus, in our view, the exercise of option by the Petitioner, which is beneficial to the person liable to pay tax, cannot therefore be termed as a Change in law event falling within the scope of Article 13 of the PPA. Similarly, the increase of Service tax to 4% as per Notification dated 1.3.2008 is also an option to the person to discharge his tax liability. Since the increase in Service tax has resulted due to exercise of an option by the Petitioner, the impact of the same cannot be passed on to the Procurers. In this background, the claim of the Petitioner during the Construction period is not allowed.

Levy of Green Cess

92. The Petitioner has submitted that as on cut-off date, no Green Cess was leviable on the power generated in the State of Gujarat. The Gujarat Green Cess Act, 2011 was enacted on 30.3.2011 levying Green Cess on generation of electricity in the State of Gujarat. In exercise of the

power vested under Section 20 of Gujarat Green Cess Act, 2011, the Govt. of Gujarat framed Gujarat Green Cess Rules, 2011 specifying the rate of Green Cess applicable on generation of electricity at the rate of ₹0.02 per unit. The Petitioner has submitted that the Green Cess was leviable w.e.f 28.7.2011. The Petitioner has submitted that the Hon'ble High Court of Gujarat had set aside the levy of Green Cess imposed by the Gujarat Green Cess Act, 2011 as *ultra vires* and directed the refund of the Cess already paid and whose burden has not been passed on to the consumers shall be refunded with a simple interest rate of 8% p.a after three months of collection till actual payment. It has further submitted that the judgment was challenged by the State of Gujarat before the Hon'ble Supreme Court by SLP No. 18493-18515 of 2013 (converted into Civil Appeal no. 5135-5157 of 2013 titled State of Gujarat and Others Vs. Reliance Industries Ltd. and Another) and by an interim order dated 3.7.2013, the Hon'ble Supreme Court directed that the Govt. of Gujarat would determine the Cess under the Gujarat Green Cess Act, 2011 and accordingly, would raise demand on the respondents but the demand would not be enforced against the respondents until disposal of the appeals. Pursuant to the directions of the Gujarat High Court and the Hon'ble Supreme Court, the Petitioner has submitted that it has applied for refund of ₹₹1,11,37,360/- i.e ₹1,03,21,176 of Cess paid plus interest of ₹816184/- (at the rate of 8%) towards the unlawful recovery of Green Cess by the State of Gujarat for the period between January, 2012 to April, 2012. The Petitioner has submitted that from 8.1.2012 to 31.3.2012, the Project has generated 239.86 MUs from all its units which were under commissioning and after April, 2012 no Green Cess was paid pursuant to the order of the Gujarat High Court. The Petitioner has further stated that it has paid ₹47,97,000 towards Green Energy Cess for the electricity generated from 8.1.2012 to 31.3.2012 from all its units during the construction period. The Petitioner has submitted that the said amount has not been refunded by the Government of Gujarat to the Petitioner and has accordingly not been passed on to the consumers. It has also stated that the Government of Gujarat has not raised any demand on account of Green Cess in terms of the order dated 3.7.2013 passed by the Hon'ble Supreme Court. The Petitioner has submitted that it may become liable to pay Green Cess for the electricity generated from April, 2012 to 21.3.2013 by all its units which were under commissioning and has prayed for permission to make its claims for

such adjustments subject to the final outcome of the Civil Appeal pending before the Hon'ble Supreme Court. The Petitioner has also undertaken to refund the amount of compensation received from the Procurers towards Change in Law due to introduction of Green Cess, if the amount paid by the Petitioner is refunded by the Government of Gujarat.

Submissions of the Respondents

93. GUVNL has submitted that the levy of Green Cess cannot be considered as Change in Law. It has further submitted that on an appeal by the Government of Gujarat before the Hon'ble Supreme Court, the appeal has been admitted by the Court. GUVNL has further submitted that since there is no compulsory collection of the Green cess as per the said Act, the Petitioner is not entitled to claim adjustment for the said cess at present. It has also stated that if and when the Hon'ble Supreme Court decides the matter in favour of the Govt. of Gujarat and upholds the Gujarat Green Cess Act, 2011, the Petitioner can raise the issue for consideration before the Commission on merits. Similar submissions have been made by the Discoms of Rajasthan, the Discoms of Haryana (UHBVNL & DHBVNL), MSEDCL and Punjab State Power Corporation Ltd.

Analysis and decision

94. We have considered the submissions of the Petitioner and the respondents. The Petitioner has submitted that due to promulgation of Gujarat Green Energy Cess Act, 2011 and the Gujarat Green Energy Cess Rules, 2011 it has been burdened to the tune of 2 paisa per unit of the electricity generated by the units during the Construction period and is therefore entitled to be compensated under Change in law as per Article 13.1.1(a) of the PPA. The respondents have stated that if and when the Hon'ble Supreme Court decides the matter in favour of the Govt. of Gujarat and upholds the Gujarat Green Cess Act, 2011, the Petitioner can raise the issue for consideration before the Commission on merits. The claim of the Petitioner is twofold, one relating to the period from 8.1.2012 to 31.3.2012 and another for the period from April 2012 to 31.3.2013. While the Petitioner has sought the refund of Rs 4797000/- paid towards Green Energy Cess paid for the period from 8.1.2012 to 31.3.2012, pursuant to the interim order of the Hon'ble Supreme Court, it has also sought permission to make its claim for liability towards Green Cess payable for

the period from April, 2012 to 31.3.2013, subject to final outcome of the appeal pending before the Hon'ble Supreme Court. The Green Energy cess as per Gujarat Green Cess Act, 2011 is not payable at present and would be payable only after the said Act is upheld by the Hon'ble Supreme Court in the said appeal. However, the question for consideration in the present case is whether the Procurers are liable to reimburse the Green Cess amount paid/payable by the Petitioner in respect of the coal consumed for generation of infirm power during the construction period. We have in para 58 of this order decided that the impact on charges/levies on account of change in law in respect of quantum of coal consumed during the construction period is payable by the Petitioner and the Procurers cannot be made liable, as they have not availed/opted for the infirm power. Accordingly, the Procurers are not liable to reimburse the Green Energy Cess paid for the period from 8.1.2012 to 31.3.2012 and payable for the period from April, 2012 to 31.3.2013 and the Petitioner should meet the expenditure from the revenue of ₹138.43 crore earned by the Petitioner from the sale of infirm power during the construction period.

Additional Conditions imposed by the Ministry of Environment and Forest (MOE&F), GOI

95. The Petitioner has submitted that it was the obligation of the Procurers to obtain Environmental Clearance prior to the cut-off date as evident from Recital B read with definition of 'Ínitial Consent' and Part I of Schedule 2 and Clause 1.4(iiii) of the RFP. It has also stated that the Environment Clearance (EC) for the Project was obtained on 2.3.2007 (after the cut-off date) and all conditions imposed by MOE&F, GOI after the cut-off date constitutes Change in law. It has submitted that the EC dated 2.3.2007 was further amended by Corrigendum dated 5.4.2007. The Petitioner has further stated that the EC on 26.4.2011 amended the approval letters dated 2.3.2007 and 5.4.2007, which *inter-alia* imposed additional condition on the Petitioner to earmark an amount of ₹72 crore as one time capital cost towards CSR activity and further directed the Petitioner to earmark an additional sum of ₹14.40 crore per annum as a recurring expenditure towards CSR activity. The Petitioner has submitted that the said conditions were not known before the cut-off date and was not considered by it while quoting the tariff in its bid. The Petitioner has pointed out that in affidavit dated 19.11.2015 filed in Petition No. 157/MP/2015 (Change in law during operation

period) it has submitted that the additional expenditure incurred by the Petitioner towards one time capital cost towards CSR activities constitute a Change in Law in terms of the provisions of the PPA. It has further submitted that the imposition of conditions relating to CSR has no nexus with the increase in installed capacity since conditions relating to CSR activities are mentioned in para 3 (as against para 2 for increase in installed capacity) which does not refer to increase in installed / generation capacity and there have been instances whereby MOE&F has granted EC to thermal power projects for increasing installed capacity without relating to CSR expenditure. It has also stated that the condition imposing additional expenditure towards CSR activities was in the context of Petitioner seeking an increase in installed capacity from 4000 MW to 4150 MW even though there was no increase in the contracted capacity. The Petitioner has further stated that the amount of CSR expenditure of ₹24.60 crore towards one time capital cost towards CSR activities incurred by the Petitioner is pursuant to the Corrigendum dated 26.4.2011 and is not incurred in terms of the provisions of the Companies Act, 2013 and rules and regulations made there under. Accordingly, the Petitioner has submitted that the additional expenditure incurred towards one time capital cost towards CSR activities constitutes a Change in law in terms of the provisions of the PPA and the Petitioner is entitled to be compensated and restored to the same economic position and such condition was not imposed in the Environment Clearance dated 2.3.2007.

Submissions of Respondents

96. GUVNL has submitted that the PPA provides for initial consents to be made available to the Seller on the date of execution of the Agreement and the RFP envisages the Environmental Clearance prior to the issuance of Letter of Intent. Thus, there is no obligation on the Procurer to procure Environmental Clearance on the cut-off date. The respondent has further submitted that as per Environmental Clearance dated 2.3.2007, the total land requirement including land for MGR system and Intake and Outfall channel was 1242 Ha whereas the Petitioner has claimed the use of 1400 Ha, which is a violation of the Environmental Clearance if the above condition has not been modified. The respondent has also stated that the additional condition to undertake CSR was not part of the EC dated 2.3.2007 dealing with the capacity of the project of 4000 MW. The respondent

has pointed out that the bid was submitted by Tata Power Ltd based on such capacity of 4000 MW offering the Procurers a contracted capacity of 3800 MW and the Environmental clearance dated 26.4.2011 imposing additional condition including the need to discharge CSR was in the context of Petitioner seeking increase in the capacity from 4000 MW to 4150 MW. GUVNL has further submitted that CSR is the responsibility of the Petitioner and has nothing to do with the business of selling electricity by the seller to the Procurer under the PPA. Similar submissions have been made by the Discoms of Rajasthan, the Discoms of Haryana (UHBVNL & DHBVNL), MSEDCL and Punjab State Power Corporation Ltd.

97. In its rejoinder dated 31.1.2017, the Petitioner has submitted that CSR obligation imposed vide Corrigendum dated 26.4.2011 issued by MoEF, GOI is completely distinct and independent of the CSR obligation imposed by Companies (Corporate Social Responsibility Policy) Rules, 2014. It has also submitted that the CSR obligation imposed in the said Corrigendum dated 26.4.2011 bears a direct impact on costs/ revenues of/from the Petitioner's operations. The Petitioner has submitted that it is required to comply with CSR obligation stipulated in the said corrigendum whether or not the Petitioner is making net profits, whereas, under the CSR Rules, CSR obligation is required to be discharged when a company is making net profits. The Petitioner has further submitted that the additional condition (earmarking for CSR activities) are mentioned in para 3 which does not refer to increase in installed/generation capacity. The Petitioner has also stated that the additional condition is applicable to the entire project cost which includes the cost of generating the capacity contracted by the Procurers and not only the cost of the increased capacity. The Petitioner has clarified that there is no increase in net generation capacity or additional saleable capacity from the Plant and/or the contracted capacity (3800 MW) as identified in the PPA. The Petitioner has pointed out that the excess energy generated by the increase in installed capacity of the Plant is being used only for auxiliary consumption. Accordingly, the Petitioner has prayed that the additional expenditure incurred towards one time capital cost towards CSR activities constitutes a Change in law in terms of the provisions of the PPA.

Analysis and Decision

98. It is the case of the Petitioner that corrigendum issued vide MOEF letter dated 26.4.2011 to the earlier approvals vide letters dated 2.3.2007 and dated 5.4.2007 which imposed additional condition on the Petitioner to earmark ₹72 crore as one time capital cost towards CSR and additional cost of ₹14.40 crore per annum as recurring expenditure towards CSR are the expenditures which have arisen after the bid deadline and therefore, they constitute change in law in terms of Article 13.1.1 (iii) of the PPA (i.e. any change in consent/approval or license available or obtained for the project). The Respondents have submitted that the bid was submitted by Tata Power based on capacity of 4000 MW and contracted capacity of 3800 MW whereas the additional condition has been imposed by MOEF in the context of increase in the installed capacity from 4000 MW to 4150 MW. The Petitioner has placed on record an affidavit dated 18.11.2015 filed in Petition No.157/MP/2015 (regarding compensation for Change in Law during operating period)explaining the expenditure on CSR imposed by MOEF. In the said affidavit, the Petitioner has submitted that increase in the installed capacity of Mundra UMPP from 4000 MW to 4150 MW has no nexus with the imposition of additional condition regarding expenditure on CSR. The Petitioner has submitted that the conditions imposed by MOEF with regard to increase in installed capacity has been provided in para 2 of the Corrigendum dated 26.4.2011 whereas the additional conditions have been prescribed under para 3 which does not refer to increase in installed capacity. The Petitioner has submitted that the additional condition is applicable to the entire project cost which includes the cost of generating the capacity contracted by the Procurers and not only on the cost of increased capacity. The Petitioner has also given a list of 8 other project developers in whose cases one time capital expenditure on CSR has been made a condition for environment clearances.

99. We have considered the submissions of the Petitioner and Respondents. Para 1.4(iii) of the RFP in respect of Mundra UMPP provides that the Procurers through their authorized representative shall obtain the necessary environmental, coastal regulation zone and forest clearance for the power station, prior to the issue of the Letter of Intent. However, Recital B of the PPA dated 22.4.2007 provides as under:

"B. The Procurers, through their Authorised Representative, have completed the initial studies as contained in the Project Report; and obtained Initial Consents required for the Project which are set out in Part 1 of Schedule 2 and have been made available to the Seller on the date of execution of this Agreement, except Forest Clearance for the Power Station and Coastal Regulation Zone Clearance. These clearances are being expedited and are expected shortly. Position of clearances which are not available and consequences will be received on July 31, 2007."

100. Initial Consents as listed in Schedule 2 Part 1 of the PPA consist of (a) Necessary Environmental and forest clearances for the Power Station; and (b) Coastal Regulation Zone Clearance. It is evident from the Recital B above that as on the date of execution of the PPA on 22.4.2007, Forest Clearance for the Power Station and Coastal Regulation Zone Clearance were not made available to the Petitioner. Environment Clearance dated 2.3.2007 and its corrigendum dated 5.4.2007 were obtained by the Coastal Gujarat Power Limited as the SPV under Power Finance Corporation which acted as the authorized representative of the Procurers during the process of bidding. In condition (xxiv) under para 3 of the Environment Clearance, the unit configuration has been provided as under:

"(xxiv) The proposed configuration of the project (5X800 MW) could be changed provided that the total capacity of the power plant shall not exceed 4000 MW and no individual unit shall be less than 500 MW."

101. Thus, the Environmental Clearance dated 2.3.2007 envisaged project configuration of 5X800 MW, though it provided that the unit size can be changed but no unit shall be less than 500 MW. There was no change to this condition in the corrigendum dated 5.4.2007. It is pertinent to mention that para 6 of the Environment Clearance dated 2.3.2007 contained the following provision:

"6. In case of any deviation or alteration in the proposed project from that submitted to the Ministry for clearance, a fresh reference shall be made to the Ministry to assess the adequacy of the condition(s) imposed and to incorporate additional environmental protection measures required, if any."

102. Thus, for any deviation or alteration of the proposed project already approved, MOEF may impose any additional environmental protection measures, if considered necessary.

103. The PPA was entered into between Tata Power Limited and the Procurers on 22.4.2007 and CGPL was fully acquired by Tata Power. After transfer of the SPV, the Petitioner took up the

matter with the Ministry of Environment vide its letters No. AK/MOEF/0209/2009/132 dated 2.9.2009, No. AK/MOEF/0211/2009/136 dated 2.11.2009 and AK/MOEF/1111/2010/176 and AK/MOEF/0903/195 dated 9.3.2011. In response to these letters, MOEF issued a corrigendum dated 26.4.2011 to letter dated 2.3.2007. In the corrigendum dated 26.4.2011, the following changes in para 2 of the earlier environmental clearance dated 2.3.2007 have been made:

(a) The project capacity has been increased from 4000 MW to 4150 MW.

(b) MGR system has been deleted and the land required for MGR system is to be converted into Green Belt.

104. Further, under para 3 of the letter dated 2.3.2007, Condition (xxiv) was changed as under:

> *"(xxiv) The proposed generation capacity of the project could be increased only by way of adoption of waste heat recovery and entailing no additional coal and water consumption. The generation capacity thus obtained taking waste heat recovery into account shall however not exceed 4150 MW and configuration of units may be accordingly adopted at 5 x830 MW".*

105. Thus, the change in project capacity from 4000 MW to 4150 MW and change of unit configuration from 800 MW to 830 MW were agreed to by the MOEF subject to the condition that such increase should only be by way of adoption of waste heat recovery and entailing no additional coal and water consumption.

106. By corrigendum dated 26.4.2011, certain new conditions [(xxxiii) to (xxxvii)] were added under para 3 of the Environment Clearance dated 2.3.2007. Conditions (xxxvi) and (xxxvii) which pertain to CSR activities are extracted as under:

> *"xxxvi) An amount of Rs.72.0 crores shall be earmarked as one time capital cost for CSR programme. Subsequently, a recurring expenditure of Rs.14.40 crores per annum shall be earmarked as recurring expenditure for CSR activities. Details of the activities to be undertaken shall be submitted within one month along with road map for implementation.*
>
> *xxxvii) It shall be ensured that an in-built monitoring mechanism for the schemes identified under CSR activities are in place and annual social audit shall be got done from the nearest government institute of repute of the region. The project proponent shall also submit the status of implementation of the scheme from time to time"*

107. The above conditions require that the Petitioner would have to incur a capital expenditure of ₹72crore on CSR and ₹14.40 crore per annum as recurring expenditure on CSR. If we read para 3 of the Environment Clearance letter dated 2.3.2007 with the Conditions (xxxvi) and (xxxvii) of

Corrigendum dated 26.4.2011, it becomes abundantly clear that on account of alteration or deviation in the proposed project already approved by MOEF (in this case change of installed capacity from 4000 MW to 4150 MW and unit configuration from 800 MW to 830 MW), MOEF has imposed the additional environment protection measures in the form of expenditure on CSR. We are therefore unable to agree with the Petitioner that para 2 of the Corrigendum letter dated 26.4.2011 has no relation with para 3 of the said letter. In fact, the additional conditions imposed are a logical consequence of change in the project capacity already approved by MOEF. Further, the perusal of condition (xxxiv) of Corrigendum dated 26.4.2011 reveals that increase in generation capacity has been permitted from 4000 MW to 4150 MW by way of waste heat recovery without involving use of additional coal or additional water consumption. The submission of the Petitioner in this regard which has been taken note of by the Commission in order dated 22.2.2014 in Petition No.159/MP/2012 is that the Petitioner has changed the design from Steam Boiler Feed Pump assumed at the time of bid to Motor Driven Boiler Feed Pump which has resulted in higher auxiliary consumption. The Petitioner in its affidavit dated 18.11.2015 in Petition No.157/MP/2015 (Annexure P-112) has submitted that the increase in installed capacity of Mundra UMPP is being used only for auxiliary consumption and there is neither any additional saleable capacity from Mundra UMPP nor any change in contracted capacity post increase in installed capacity. Therefore, the change in unit configuration and increase in installed capacity by the Petitioner which has been permitted by MOEF on the request of the Petitioner are primarily for the purpose of meeting the auxiliary consumption of Motor Driven Boiler Feed Pump for efficient operation of the plant and lower cost of generation. Considered in this perspective, it cannot be said that condition in the Corrigendum dated 26.4.2011 for earmarking expenditure of ₹72 crore on capital cost for CSR and ₹14.20 crore per annum as recurring expenditure towards CSR is covered under Article 13.1.1 (iii) of the PPA. The said condition in revised consent/approval for the project is not on account of any change in the policy of MOEF but on account of the alteration in the project capacity sought by the Petitioner from 4000 MW to 4150 MW and granted by MOEF in modification of the approved environmental clearance dated 2.3.2007.

108. There is an additional reason as to why expenditure on this account will not be admissible. The Petitioner in para 10(b) of the affidavit dated 18.11.2015 filed in Petition No. 157/MP/2015 has submitted as under:

> "(b) The imposition of Additional Condition by MOEF has no nexus with the increase in installed capacity of Mundra UMPP. On the other hand, the condition relating to CSR expenditure imposed by MOEF, is linked to the Project Cost [approximately one time expenditure of 0.4% of the Project Cost and thereafter a recurring annual expenditure (approximately one fifth of the one-time expenditure considering the life cycle of the construction period of the Project as five years) during the life of the Project]. The additional condition imposed by MOEF has also been linked to the Petitioner's Project Cost (approximately Rs.18000 crores)(i.e. one time expenditure of Rs.72 crores and recurring expenditure of Rs.14.4 crores. I also say that there has been no increase in the Project Cost due to increase in capacity of the Mundra UMPP from 4000 MW to 4150 MW."

109. The Petitioner has submitted that earmarking of ₹72 crore as capital cost for CSR and ₹14.40 crore recurring expenditure is based on the capital cost of the project of ₹18000 crore. The Petitioner has also submitted that there is no increase in the project cost due to increase in the capacity of Mundra UMPP. A perusal of Environmental Clearance dated 2.3.2007 reveals that in para 2, it has been clearly mentioned that the project cost is ₹18000 crore including ₹200 crore for the environment protection measure. Since the project cost of ₹18000 crore includes ₹200 crore for environmental protection measure, the Petitioner should meet the expenditure on capital cost on CSR out of ₹ 200 crore earmarked for environmental protection measure. During the operation period, the Commission had already decided in order dated 17.3.2017 in Petition No.157/MP/2015 that the recurring expenditure on CSR shall be met by the Petitioner from its profits in terms of the provisions of the Companies Act, 2013.

Additional Stamp Duty

110. The Petitioner has submitted that as on the cut-off date it was envisaged that the Stamp duty payable by the Petitioner on the "Indenture of Mortgage for Delayed after Assets Deed", in favour of its lenders would be in terms of Article 6 and 36 of Schedule of the Bombay Stamp Act i.e. a "simple mortgage" as was the practice followed by various other entities (developers/ banks/ financial institutions) at the relevant point. The provisions of the Bombay Stamp Act were amended

by the Govt. of Gujarat (Gujarat Stamp Act) with effect from 1.4.2007 wherein it was indicated in section 5 as under:

> *"Different transactions have been included in addition to other points in section-5 of the Act. For, different matters/ transactions/ dealing for mortgage sale, etc by the different institutions/ persons/ company in common deed, the stamp duty valued of total amount on every separate deed as per the provision of section-5 of the Act."*

111. The Petitioner has submitted that on 6.10.2009, a Mortgage Deed was executed between the Petitioner and the State Bank of India as the appointed Security Trustee acting on behalf of 13 lenders and accordingly, the Petitioner had paid Stamp Duty of ₹421000/- on the Mortgage deed. The Petitioner had also submitted that on 5.11.2009 the Deputy Collector issued Show cause Notice to the Petitioner calling upon it to pay the Deficit Stamp Duty of ₹50,41,600/-, in the light of the fact that there were various mortgage transactions executed by different institutions and total duty on different deeds would be levied. As the revision application filed by the Petitioner was confirmed by the Chief Controlling Revenue Authority by order dated 28.3.2011, the Petitioner filed an application for referring the matter to the Gujarat High Court under section 54 (I-A) of the Bombay Stamp Act. Thereafter, the Gujarat HC vide order dated 3.1.2012 in Reference no. 1 of 2011 held that the Petitioner was not required to pay the deficit Stamp duty of ₹5041600, while observing that the stamp duty is payable on instruments and not on transactions. On an appeal filed before the Hon'ble Supreme Court by the Revenue Authority, the Court on 11.8.2015 in Civil Appeal No. 6054 of 2015 set aside the judgment of the High Court dated 3.12.2012 and held that the mortgage created under an indenture in favour of a common security trustee acting for the benefit of different lenders, should be treated as several distinct matters and therefore should be stamped per lender. Accordingly, the Court directed that the Petitioner was liable to pay deficit Stamp duty together with interest, as directed by the Revenue Authorities. The Petitioner has submitted that in terms of the above order, it was constrained to make payment of ₹13,60,4768/- towards deficit Stamp Duty and the same has a direct impact on the capital cost of the Project after the cut-off date. The Petitioner has submitted that it has issued notice on change in law on 22.7.2016 (in addition to change in law notice dated 11.7.2011) intimating the respondents of the change in law event on account of additional cost pay towards deficit Stamp duty in terms of the

Hon'ble SC judgment dated 11.8.2015. The Petitioner has submitted that GUVNL vide letter dated 5.8.2016 has rejected the Petitioner's change in law claim during the Construction period towards payment of deficit Stamp duty. Accordingly, the Petitioner has submitted that the burden of deficit stamp duty along with interest is liable to be compensated to the Petitioner by the Procurers.

Submission of the Respondents

112. GUVNL has submitted that change in Stamp Duty with regard to the Mortgage Deeds is not covered under Article 13 of the PPA. The respondent has also stated that the Mortgage Deeds and the Stamp Duty payable on the same are not related to "business of selling electricity" and is the responsibility of the Petitioner for financing arrangements. GUVNL has also stated that the Petitioner is required to demonstrate that the law as existing as on the cut-off date did not provide for Stamp Duty of aggregate amount for an instrument comprising of several distinct matters. It has also submitted that even as per law existing as on cut-off date, the Stamp Duty for different transactions through one document was considered on aggregate basis. Thus, according to the respondent, there has been no change in law and merely because the Petitioner had interpreted the law in one way which was not accepted by the authorities does not mean that there is change in interpretation of law. The respondent has stated that in the present case, the mortgage to several lenders are also distinct matters and therefore the law as on cut- off date also required that stamp duty would be aggregate. Similar submissions have been made by other Procurers namely, the Discoms of Rajasthan, the Discoms of Haryana (UHBVNL & DHBVNL), MSEDCL and Punjab State Power Corporation Ltd. In its rejoinder dated 31.1.2017, the Petitioner has mainly reiterated the submissions made in the petition. It has also submitted that the Petitioner at the time of the bid had rightly considered and followed the practice which was also upheld by the Hon'ble HC. The Petitioner has also submitted that it is liable to pay deficit Stamp duty together with interest as directed by the authorities in terms of the judgment of the Hon'ble SC and accordingly the change in interpretation after the cut-off date for payment of stamp duty is a change in law.

Analysis and Decision

113. We have considered the submission of the parties. The Petitioner while quoting tariff in its bid had envisaged that the Stamp duty payable on Indenture of Mortgage in favor of lenders would be in terms of a 'simple mortgage' in accordance with Article 6 and 36 of the Bombay Stamp Act, 1958. Pursuant to the amendment of the Bombay Stamp Act by the Govt of Gujarat on 1.4.2007, the Petitioner has executed a mortgage deed on 6.10.2009 and had paid the Stamp duty of ₹421000/-. It is observed that the Petitioner had quoted tariff in its bid based on its own interpretation of the existing provisions of law and has not demonstrated that the law existing as on the cut-off date did not provide for Stamp duty of aggregate amount for an instrument comprising of several distinct matters. In the absence of any interpretation by a competent authority of law existing as on the cut-off date, it cannot, in our view, be said that there has been a change in interpretation of law subsequently. Even though the practice adopted by the Petitioner for payment of stamp duty on indenture of mortgage deed as per the Bombay Stamp Act, as on the cut-off date, was upheld by the High Court of Gujarat vide its order dated 3.12.201, observing that the Petitioner was not required to pay deficit stamp duty of ₹50,41,600/-, the same has been set aside by the Hon'ble SC vide its judgment dated 11.8.2015 holding that the mortgage created under an indenture in favor of a common security trustee acting for the benefit of different lenders should be treated as several distinct matters. In our considered view, the judgment of the Hon'ble SC is an interpretation of the law existing as on the cut-off date and the same cannot be construed as a Change in law as the additional stamp duty has been paid by the Petitioner on its own interpretation of the law. Even otherwise, Stamp duty on indenture of mortgage is levied when the project developer avails loan for the project and gives the project as collateral security for the said loan. Being a competitively bid Project, the Equity and Loan portfolio are entirely to the account of the Petitioner and all expenditure towards Stamp duty, financing charges, etc should have been included. In this background, the payment of ₹13604768/- towards deficit stamp duty along with interest based on the judgment of the Hon'ble SC reversing the findings of the Gujarat HC cannot

be passed on to the Procurers under Change in law. Accordingly, we hold that the Petitioner is not entitled to any relief on this count and the claim of the Petitioner is disallowed.

Carrying Cost

114. The Petitioner has submitted that it has filed its claims before the Procurers vide notice dated 11.7.2011 seeking restitution to the same economic condition as if the Change in Law had not occurred, but the dispute was raised by the Procurers belatedly on 30.3.2015. Accordingly, the Petitioner has submitted that it is entitled to carrying cost (at prevalent rates) as there was delay on the part of the Procurers to raise a dispute. GUVNL has submitted that there is no provision for carrying cost/interest in the PPA for compensation in Change in Law. The Respondent has also stated that can be no interest until the final amount is crystallized and the Petitioner raises a supplementary bill accordingly. Similar submissions have been made by other Procurers namely, the Discoms of Rajasthan, the Discoms of Haryana (UHBVNL & DHBVNL) and Punjab State Power Corporation Ltd.

Analysis and Decision

115. The issue of carrying cost had been decided by the Commission in order dated 16.2.2017 in Review Petition No. 1/RP/2016 in Petition No. 402/MP/2015.In line with the decision in order dated 16.2.2017, similar claim of the Petitioner seeking compensation due to Change in Law events during Operation Period in Petition No. 157/MP/2015 has been rejected by order dated 17.3.2017. The relevant portion of the order is extracted hereunder:-

> *"53. The Petitioner has pleaded in the prayer clause of the petition that the procurers should be permitted to raise the Supplementary Bills for the sum of ₹25,96,00,000 along with the carrying cost in terms of Article 13.4.2 of the PPA. In our view, there is no provision in the PPA to allow carrying cost on the amount covered under change in law till its determination by the Commission. The issue has been decided in order dated 16.2.2017 in Review Petition No. 1/RP/2016 in Petition No. 402/MP/2015. Accordingly, the claim of the Petitioner is rejected."*

116. In line with the above decision, the claim of the Petitioner for carrying cost is rejected.

Mechanism for compensation on account of Changes in Law: Construction period

117. Article 13.2 of the PPA provides as under:

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

(a) Construction Period

As a result of any "Change in Law", the impact of increase/decrease of Capital Cost of the Project in the Tariff shall be governed by the formula given below:

For every cumulative increase/decrease of each Rupees Fifty crore (`50 crore) in the Capital Cost over the term of this Agreement, the increase/decrease in Non Escalable Capacity Charges shall amount to zero point two six seven (0.267%) of the Non Escalable Capacity Charges.

Provided that the Seller provides to the procurers documentary proof of such increase/decrease in Capital Cost for establishing the impact of such "Change in Law". In case of Dispute, Article 17 shall apply. It is clarified that the above mentioned compensation shall be payable to either Party, only with effect from the date on which the total increase/decrease exceeds amount of ` Fifty (50) Crore."

118. Thus, as per the above provisions, the Petitioner is entitled for compensation at the rate of 0.267% of the non-escalable capacity charges for every cumulative increase/decrease in capital cost for an amount of ₹50 crore over the terms of the agreement. In the light of the change in law events during the construction period allowed in this order, the Petitioner shall calculate the compensation in terms of Article 13.2(a) of the PPA with the Procurers and if the cumulative increase in the capital cost crosses the threshold limit then the Petitioner shall be entitled for reimbursement in the form of increase in non-escalable capacity charges from the Procurers.

119. Based on the above analysis and decision, the summary of our decision under change in law during the Construction period of the project is as under:

Change in Law	Decision
Declared Price of Land	Allowed in terms of para 43 of this order
Adjustment of Revenue from Sale of infirm Power during construction period	Not allowed in terms of para 58 of the order
Levy of Clean Energy Cess on coal consumed for generation of infirm power	Not allowed
Changes in Basic Customs Duty and Countervailing duty on imported coal consumed for generation of infirm power	Not allowed
Changes in Excise Duty on Civil Materials during the Construction period	
(i) Steel & Cement	Not allowed
(ii) LDO & HFO	Allowed

Reduction in Central Sales Tax during the Construction period	Allowed
Increase in Gujarat Value Added Tax during the Construction period	Allowed
Increase in rate of Service Tax on Works Contract during the construction period	Not Allowed
Levy of Green Cess on coal consumed during construction period	
(i) 8.1.2012 to 31.3.2012	At present not payable in terms of the interim directions of the Hon'ble Supreme Court. If paid/ payable, the same shall be adjusted against the revenue earned from sale of infirm power.
(ii) April, 2012 to 31.3.2013	
Additional conditions imposed by MOE&F towards expenditure on CSR activity during construction period	Not Allowed
Additional Stamp Duty paid on Indenture of Mortgage	Not allowed
Carrying cost	Not allowed

120. Petition No. 141/MP/2016 is disposed of in terms of the above directions.

Sd/-	***Sd/-***	***Sd/-***	***Sd/-***
(Dr. M. K. Iyer)	**(A.S. Bakshi)**	**(A. K. Singhal)**	**(Gireesh B. Pradhan)**
Member	**Member**	**Member**	**Chairperson**