

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 189/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: 13th December, 2017

In the matter of

Petition filed under Section 79(1)(b) and (f) of the Electricity Act, 2003 read with Article 10 of the PPAs dated 29.6.2012 and 23.8.2013 for recovery of Additional Expenditure incurred due to the occurrence of various Change in Law events.

Jindal Power Limited
Tamnar– 496107, District Raigarh
Chhattisgarh

.....Petitioner

Vs

Tamil Nadu Generation and Distribution Company Limited
Nadippisai Pulavur, K.R. Ramasamy Maligai,
44-Anna Salai, Chennai – 600002
Tamil Nadu

.....Respondent

Parties Present:

Shri Venkatesh, Advocate, JPL
Shri Pratyush Singh, Advocate, JPL
Shri Shreshth Sharma, Advocate, JPL
Shri Siddharth Barik, JPL
Shri G. Umapathy, Advocate, TANGEDCO
Shri S. Vallinayagam, Advocate, TANGEDCO
Ms. M. Hemlata, TANGEDCO
Shri M.G. Ramachandran, Advocate, Prayas
Ms. Anushree Bardhan, Advocate, Prayas

ORDER

The Petitioner, Jindal Power Limited, has filed the present petition under Section 79(1)(b) and (f) of the Electricity Act, 2003 read with Article 10 of the PPA seeking certain reliefs under "Change in Law" events during the operating Period in respect of coal based Thermal Power Station in terms of the Power Purchase Agreements dated 29.6.2012 and 23.8.2013.

2. The Petitioner has set up a coal based Thermal Power Station at Tamnar, Raigarh district in the State of Chhattisgarh with an installed capacity of 1000 MW (4 X 250 MW) in Phase-I and 2400 MW (4 X 600 MW) in Phase-II totalling 3400 MW.

3. The Petitioner entered into the following Long Term/Medium Term PPAs for supply of power from the Power Project:-

- (a) Medium Term PPA dated 29.6.2012 entered into with the Respondent, Tamil Nadu Generation and Distribution Company Limited (TANGEDCO) for supply of 200 MW power for the period 1.9.2012 to 31.8.2017 (MT PPA).
- (b) Long Term PPA dated 23.8.2013 entered into with Respondent, TANGEDCO for supply of 400 MW RTC power for the period 1.2.2014 to 30.9.2028 (LT PPA).
- (c) In addition to the above two PPAs, the Petitioner has also entered into two Power Supply Agreements ('PSA') with Kerala State Electricity Board Limited ('KSEB') on 29.12.2014 for supply of 200 MW and 150 MW of

Power on Design, Build, Finance, Own and Operate (“DBFOO”) basis (KSEBL PPA).

4. The Petitioner has sought adjustment of tariff on account of the events of Change in Law affecting the Power Project during the Operating Period in order to restore the Petitioner to the same economic position as if the events have not occurred in terms of the MT PPA and LT PPA. The Petitioner has sought compensation for Change in Law during Operating Period on account of the following events which have impacted the cost and revenue of supply of power from the power project to the procurer:

Under the 200 MW MT PPA

- (i) Levy of Forest Tax
- (ii) Increase in rate of Royalty payable on Coal
- (iii) Increase in Clean Energy Cess
- (iv) Increase in ‘CGParyavaran Upkar’ and ‘CGVikas Upkar’
- (v) Change in Electricity Duty on Auxiliary Power Consumption
- (vi) Change in rate of Excise Duty
- (vii) Entry Tax
- (viii) Change in Value Added Tax (VAT)

Under the 400 MW LT PPA

- (i) Levy of Forest Tax
- (ii) Increase in rate of Royalty payable on Coal
- (iii) Increase in Clean Energy Cess
- (iv) Increase in ‘CG Paryavaran Upkar’ and ‘CG Vikas Upkar’

- (v) Change in Electricity Duty on Auxiliary Power Consumption
- (vi) Increase in rate of Service Tax on transportation of Coal
- (vii) Change in rate of Excise Duty
- (viii) Entry Tax
- (ix) Change in Value Added Tax (VAT)

5. The Petitioner has made the following prayers in the petition:

- (a) Direct the Respondent to make payment of the tariff adjustment at the rates arrived and as per the methodology indicated in the petition for the aforementioned change in law event from the date of commencement of power supply under the PPA;
- (b) Direct the Respondent to make payment at 95% of the rates indicated in the petition for the respective change in law items as an interim relief, during the pendency of this petition, subject to adjustment based on final approval;
- (c) Direct the Respondent to reimburse the carrying cost (interest) from the date of applicability of the respective change in law events claimed.
- (d) Pass such further order(s) as this Hon`ble Commission may deem just and proper in the fact and circumstances of the case and in the interest of justice.”

Background of the Case

6. The petitioner has submitted that the following facts have led to the filing of the present petition:

- (a) Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO) (‘hereinafter referred to as ‘Procurer’) issued a Request for Proposal (hereinafter referred to as the ‘RfP’) on 5.12.2011 for procurement of power for ‘Medium Term’ under Case I bidding procedure for meeting its base load power requirements in the

State of Tamil Nadu. The Petitioner participated in the bidding process and submitted its bid on 18.2.2012, which was the bid deadline. Pursuant to the submission of Bid, the Petitioner was declared as the successful bidder at a levelled tariff of Rs. 4.9165/kWh for supply of 200 MW RTC power. Thereafter, a Power Purchase Agreement ('PPA/MTPPA') was executed between the Petitioner and TANGEDCO on 29.6.2012 for the period from 1.9.2012 to 31.8.2017. The MTPPA postulated usage of domestic coal from captive mines as the primary fuel to be used for generating electricity. The MTPPA signed between the Petitioner and the Respondent and levelled tariff of Rs. 4.9165/Kwh quoted by the Petitioner was approved and adopted by the Tamil Nadu Electricity Regulatory Commission (hereinafter referred to as the 'TNERC') under Section 63 of the Electricity Act, 2003 vide order dated 17.4.2013 in P.P.A.P No. 7 of 2012.

(b) Subsequently, TANGEDCO issued another RfP on 21.12.2012 for procurement of 1000 MW \pm 20% RTC Power for 'Long Term' under case-I bidding procedure for meeting its base load power requirements in the State of Tamil Nadu. Pursuant to the submission of Bid, the Petitioner was declared as the successful bidder at a levelled tariff of Rs 4.91/Kwh per kWh for supplying 400 MW RTC power and another PPA (also referred to as "LTPPA") was executed between the Petitioner and TANGEDCO on 23.8.2013 for the period from 1.2.2014 to 30.9.2028 for supply of 400 MW RTC Power. This PPA postulated usage of domestic coal from linkage as the primary fuel to be used for generating electricity. The LTPPA signed between the Petitioner and the Respondent and levelled tariff of Rs. 4.91/kwh

quoted by the Petitioner was approved and adopted by TNERC under Section 63 of the Electricity Act, 2003 vide order dated 29.7.2016 in P.P.A.P No. 3 of 2014.

(c) In addition to the above two PPAs, the Petitioner has also entered into two Power Supply Agreements ('PSA') with Kerala State Electricity Board Limited ('KSEB') on 29.12.2014 for supply of 200 MW and 150 MW of Power on Design, Build, Finance, Own and Operate ('DBFOO') basis.

(d) In accordance with the Medium Term and Long Term PPAs, the Petitioner has served the Change in Law Notices to TANGEDCO on 5.4.2016 and 23.8.2016. Thereafter, the Petitioner filed the present petition seeking reliefs for the events of change in law in terms of the MT PPA and LT PPA during the Operating Period.

7. The petition was admitted on 9.5.2017 and notice was issued to the Respondent to file its reply. Reply to the petition has been filed by TANGEDCO.

8. TANGEDCO in its reply dated 28.6.2017 has submitted as under:

(a) Since, the tariff of the generating station was adopted by the State Commission under Section 63 of the Electricity Act, 2003, the provisions of Section 79(1)(b) are not applicable in the present case. Therefore, the petition is not maintainable and the Petitioner is not entitled to any of the reliefs prayed for in the petition.

(b) The claim of compensation under Article 10.1.1 “Change in Law” in the facts and circumstances of the case is a “force majeure” condition on TANGEDCO. The claim of new taxes, levies or charges is a burden on the consumers of the Respondent. On the one hand, the Electricity Act, 2003 provides for economic use of resources, safeguarding the interest of consumers of electricity and on the other hand, the imposition of taxes and levies affects the tariff to be paid by the consumers.

(c) The quoted tariff per unit of the Petitioner was made after taking into account all eventualities. TANGEDCO entered into the PPA taking into consideration the impact of the proposed tariff on its consumers. The escalable energy and capacity charge components, raise in duties and levies are taken care in CERC escalation percentage published once in 6 months.

(d) The clauses of PPA entered into between the Petitioner and TANGEDCO under the provisions of Contract Act is subject to the provisions of the Electricity Act, 2003. The Electricity Act envisages to safeguard the consumer’s interest and at the same time, recovery of the cost of electricity in a reasonable manner. The levies admittedly were not part of cost of electricity generation at the time of entering into PPA. The levies are due to various promulgations, ordinances and enactments of the State and Central Government which are subject to the provisions of the Electricity Act, 2003. The purpose of long term planning for procurement of electricity by the distribution licensees, keeping in view its

economic viability, would be rendered otiose if all additional costs are allowed to the generator which causes an undue burden on the consumers of TANGEDCO.

(e) Power available at the Indian Energy Exchange (IEX) is on an average of Rs 3.15 and varies from Rs.2.85 to Rs.3.49. The power under long term contract, which is Rs. 3.87, is costlier than the IEX power. If the levies pursuant to change in law are permitted, the cost of power contracted with generators pursuant to bidding will have no sanctity and the price per unit under the contract will keep on increasing on the coming of every new law imposing a tax or levy affecting the generation of electricity which will cause unforeseen, undue burden on the consumers of TANGEDCO.

(f) If the levies and taxes were permitted to be recovered from the beneficiaries, the entire purpose of entering into long term PPA with the generating stations under the competitive bidding process, will defeat the purpose of safeguarding public interest, for which it was envisaged.

(g) Increase in price per unit of electricity is beyond its control. Such an event results in a Force Majeure which TANGEDCO cannot factor in its financial planning and it disturbs its economic viability. In the circumstances, TANGEDCO becomes an affected party under Article 9.2 of the PPA which affects its performance of the terms of the PPA and reserves its right to invoke the provisions of Article 9 of the PPA.

(h) In the circumstances of the present case wherein the Petitioner has claimed taxes and levies pursuant to change in law having impacted its cost of generation, TANGEDCO is unable to fulfill its obligation to make payment as envisaged under Article 8 of the PPA. TANGEDCO could not factor the same in calculating its financial viability to perform its part of contract.

9. The Petitioner, vide its rejoinder dated 15.7.2017, has submitted as under:-

(a) The present petition is maintainable and this Commission will alone have jurisdiction to adjudicate the Change in Law dispute raised by the Petitioner under Section 79(1)(b) and (f) of the Act. In case of any dispute regarding the impact of any change in law, as in the present case, the decision of the Appropriate Commission shall apply. Since, the Petitioner's generating station has acquired the status of 'Composite Scheme' of generation, it *ipso facto* attracts the jurisdiction of this Commission. Therefore, any change in law that occurs and any dispute, which relates to tariff both can be resolved only before this Commission.

(b) The contention of the Respondent that any increase in duties and levies are covered in escalation index issued by the Commission and therefore, it cannot be allowed as Change in Law, is factually incorrect for the reason that the fuel price escalation rates notified by the Commission covers only the changes in price of fuel but not the changes in other taxes and levies or imposition of any

new taxes and levies. Secondly, the escalation rates notified by the Commission for transportation charges of coal covers only the variations in Basic Freight rates notified by the Railways and that the change in the rate of any taxes and levies or any new taxes and levies imposed by Railways are not considered by this Commission in the computation/notification of escalation rates for transportation charges of coal.

(c) Escalation rates notified by the Commission, which are being issued since the inception i.e., prior to bidding and presently also, consider only the changes in price of fuel and basic railway freight rates for the purpose of escalation index. No other cost elements, such as increase in Clean Energy Cess, Royalty on Coal, Entry Tax, Excise Duty, Forest Tax or Value Added Tax, etc. are considered by the Commission in the computation/notification of escalation rates. Therefore, the Petitioner had quoted the tariff by assuming that any future change in the applicable taxes and levies are not part of inflation and any changes in such taxes and levies would be covered and compensated under the provision of the PPA (Change in Law).

(d) The Petitioner is only claiming the additional impact in cost of generation consequent to increase in the rates of the above Change in Law items after the cut-off date. Under the competitive bidding PPAs, the bidders expect to recover any increase in cost either through escalation rates being approved by the Commission every six months or through Change in Law.

(e) As per the RfP, the bidder is required to bear in mind the prevailing rules/regulations, statutory taxes, levies and duties at the time of submission of bid. Accordingly, at the time of submission of bid, the Petitioner had examined the costs as involved on the date of such bidding for the purposes of *inter alia* procuring inputs for generation of power and the then existing statutory taxes, levies and duties along with CERC escalation index and thereafter, quoted such tariff. At no point of time, it can be inferred that the tariff was to include the possibility of all such levies and taxes which may arise in future. Such an interpretation (being clearly an after-thought) is not only illogical but unworkable as well. Further, in a bid out project, an increase in base price of coal cannot be sought as the same is factored into the bid at the time of submission of bid. However, change in rate of any applicable taxes and levies or imposition of any new taxes and levies, which was not considered/contemplated under the bidder tariff at the time of submission of the bid and which has an impact on the generator is an event, which squarely falls within the definition of 'Change in Law'.

(f) It was impossible for the Petitioner to contemplate imposition of any new taxes and levies at the time of the bidding since it did not even exist at that time. The Petitioner placed the bid taking into account the rates of the taxes and levies prevailing at that time. Therefore, the Petitioner is entitled for reimbursement of costs increased consequent to change in rates of Clean Energy Cess, Royalty on Coal, Entry Tax, Excise Duty, Forest Tax, Value Added Tax and Electricity Duty

as the impact in cost of generation due to such changes either upwards or downwards deserves to be covered under Article 10 of the PPA.

(g) As per the National Tariff Policy as amended on 28.1.2016, after award of bids, if there is any change in domestic duties, levies, cess and taxes imposed by the Central Government, State Government/Union Territories or by any Government Instrumentality leading to corresponding changes in the cost, the same may be treated as "Change in Law" and may unless provided otherwise in PPA, be allowed as pass through subject to approval of Appropriate Commission. Therefore, the increase in taxes and levies are Change in Law events.

(g) The Hon'ble Supreme Court vide its Judgment dated 11.4.2017 in Civil Appeal Nos. 5399-5400 of 2016 [Energy Watchdog vs. CERC and others) has held that Force Majeure clause contained in the Power Purchase Agreements is a standard clause and it will apply only when the performance under the contract is hindered by an unforeseen event. The Hon'ble Supreme Court further held that for 'Force Majeure' to be attracted, there must be something, which partly prevented/hindered the performance of the obligation under the contract and merely because the agreement had become onerous to perform will not be treated as force majeure event. Rise in the Tariff on account of 'Change in Law' event will not hinder the performance of the obligation by TANGEDCO under the PPA entered between the parties. Therefore, TANGEDCO cannot be absolved of performing its part of the contract for the very good reason that when they entered into the PPA, this was an eventuality well known to TANGEDCO and

such Change in Law events in the current regulatory scheme is not a concept which is alien to TANGEDCO either. Even doctrine of frustration will not be applicable to the present case as the fundamental basis of the PPA remains unaltered.

(h) When TANGEDCO entered into the PPA with the Petitioner, it was well aware about the concept of Change in Law and that such provision existed in the 'Model PPA' issued by the Ministry of Power for procurement of power through tariff based competitive bidding process (Section 63). Moreover, even the Competitive Bidding Guidelines provide that any change in law impacting cost or revenue from the business of selling electricity shall be adjusted separately. The Change in Law provision embraced in the PPA envisage to set right the affected party against the additional recurring /non- recurring expenditure resulting due to any event. Further, once, the same is allowed as Change in Law event by a Regulatory Commission and if the said event results into any additional recurring/ non- recurring expenditure, the same needs to be compensated by way of adjustment in tariff.

10. During the course of hearing on 8.8.2017, learned counsel for TANGEDCO submitted that the Petitioner is supplying power to TANGEDCO in the State of Tamil Nadu and to Kerala State Electricity Board (KSEBL) in the State of Kerala. Learned counsel further submitted that since the petitioner is supplying power to more than one State from the same generating station and has acquired the status of 'Composite Scheme' to attract the jurisdiction of the Commission under Section 79 (1)(b) and (f) of

the Electricity Act, 2003, therefore, in the interest of justice, KSEBL should be impleaded as a party to the petition. Learned counsel for the petitioner objected to the impleadment of KSEBL as a party to the petition and submitted that the disputes involved in the present petition are with regard to change in law events claimed under the TANGEDCO PPA whereas the same events are allowed as a pass through under the PPA with KSEBL, therefore, KSEBL should not be impleaded as a party to the petition. Learned counsel further submitted that the PPAs entered with TANGEDCO are based on Case I model PPA while the PSA entered with KSEBL is based on "DBFOO" model PSA. The various Change in Law events claimed by the petitioner in the present petition are all coal impositions which are covered under Article 10 (Change in Law) of TANGEDCO PPAs whereas in terms of the PSA entered with KSEBL, the increase/decrease in taxes and duties applicable on supply of power is a direct pass through to the procurer of the power under the PSA. Therefore, KSEBL has not been impleaded as a party to the petition.

11. Learned counsel for Prayas submitted that certain claims have already been decided by the Commission and that change in rate of tax is a Change in Law event but change in assessable value is not a change in law and therefore, shall not be allowed. No reply has been filed by Prayas.

12. TANGEDCO, vide its written submissions dated 14.9.2017, has submitted as under:

(a) With regard to the medium term PPA entered on 29.6.2012 for 5 years, the same came to an end on 31.8.2017. The tariff as on 31.08.2017 was Rs. 4.8913 per unit. TNERC vide order dated 31.7.2017 in MP No.5/2017 extended and approved the Medium term PPA at a negotiated price at Rs 3.50 per unit for the period from 1.9.2017 to 31.8.2019. The Petitioner who had supplied power under Medium Term PPA at the rate of Rs.4.8913 up to 31.8.2017 had proposed to supply at the rate of Rs.3.50 per unit from the same generating station in Chhattisgarh (Jindal Stage 1) for extended PPA from 1.9.2017 to 31.8.2019. Therefore, the question of any compensation on account of Change in Law is not tenable.

(b) The Petitioner is also supplying power from the same project (Jindal Stage 2) to the Kerala State under Long Term PPA, which is based on Design, Built, Finance, Own and Operate (DBFOO) where the entire expenses are pass through and the petitioner is getting Rs.0.3055 per unit more from TANGEDCO as compared to KSEB, which is the Energy Charge at actual.

(c) The Petitioner from the same generating station in Chhattisgarh is supplying power to the State of Kerala, where the entire charge is pass through, is supplying power at Rs. 3.850 (Energy and Capacity Charge) as on August 2017 whereas in the long term PPA for a period of 15 years, TANGEDCO is already paying Rs. 3.9155 (Energy and Capacity Charge) which is more by Rs.0.0655 when compared to tariff rate of Kerala [Rs.3.9155-Rs.3.8500].

Therefore, the Petitioner's claim on account of Change in Law under Long Term PPA is liable to be rejected.

(d) With regard to Medium Term PPA, the Petitioner has quoted Escalable Energy charge only. However, in Long Term PPA, Escalable Energy and Escalable inland transportation Energy components have been quoted. All these components are inclusive of taxes, duties, levies, etc. The Escalation Index is applied on escalable components of quoted tariff based on the CERC escalation rate issued from time to time. The escalable component of Energy Charge, Transportation, etc., is escalated as per escalation rate notified by CERC. While escalating the escalable components of quoted tariff, the statutory tax, duties, levies inbuilt in the quoted tariff are also getting escalated in addition to the coal price. Therefore, the financial impact is taken care of by applying Escalation Index not only to coal but also on the said charges on transportation, taxes and cess i.e. the composite Energy Charge quoted in the bid is being revised from time to time. This is because the petitioner quoted Energy charge, which is inclusive of statutory taxes, levies, duties, cess, etc. in its bid document and the same is being escalated as per the escalation index of CERC from time to time. The components other than base price of the coal are also being escalated from the bid date by virtue of escalation mechanism, the question of claim of Change in Law on account of Change in taxes, levies, duties etc. does not arise.

(e) As per Article 10.2 of the PPA, the principle behind determining the consequence/compensation on account of Change in Law event is for restitution

of the affected party to the economic position as if the Change in Law had not occurred. In other words, to neutralise the effect of the changed circumstances which were not present when the petitioner submitted the bid and as such changes could not have been factored in the said bid. The Escalation index of this Commission has sufficiently taken care of the Change in Law as far as the Energy charges in respect of which the Petitioner is seeking compensation. The Petitioner has not brought on record anything to even suggest that it had incurred loss after applying the Escalation Index of this Commission.

(f) As per Article 15.18 dealing with Taxes and Duties, the seller is required to pay all taxes, duties and cess for supplying power as per the terms of this agreement and shall indemnify the procurer; hold him harmless against any claim that may be made against the procurer in relation to the matter set out in Article 15.18.1. In other words, the PPA absolves the procurer from all future tax, duties, cess which the seller would be liable to pay while supplying power to the procurer. In view of above, the present petition deserves to be dismissed by this Commission.

13. The Petitioner, vide its written submissions dated 4.10.2017, has submitted as under:

(a) Once it is established that the increase in cost of supply is on account of Change in Law, TANGEDCO is obligated to reimburse such cost to the Petitioner by way of adjustment in tariff. Merely, because the Petitioner is supplying power from the same generating station (i.e., Jindal Stage I & II) to a different Licensee

and under a different PPA at a cheaper tariff, cannot absolve the obligation of TANGEDCO accrued under the PPAs dated 29.6.2012 and 23.8.2013. Supply of power by the Petitioner at a cheaper tariff under a different contract cannot be the legal basis for not performing its contractual promise under the said PPA, especially when the Petitioner has performed its contractual obligation to the fullest. The said contention of TANGEDCO is not only legally untenable, but is also against the regulatory principles of the sector *per se*.

(b) Seeking shelter through a negotiated agreement between a third party and the Petitioner as against TANGEDCO and the Petitioner in different time and circumstances cannot be the basis of disallowing the expense already incurred on behalf of the Petitioner. The subject matter of the other PPAs will not discharge TANGEDCO from performing its obligations under the PPAs dated 29.6.2012 and 23.8.2013.

(c) The Commission can only exercise its regulatory powers for a Section 63 PPA when the PPA or the Competitive Bidding Guidelines does not cover such a scenario. However, the general regulatory powers under Section 79(1)(b) of the Electricity Act can only be applied in a situation where there are no guidelines issued by the Central Government or where the guidelines do not deal with a given situation. However, in the present case the CBG as well as the PPAs recognize the concept of Change in Law and provides for appropriate remedy on account of Change in Law.

(d) The Petitioner while submitting its bid and quoting the tariff under the competitive bidding process, is required to quote the breakup of tariff consisting of various components, namely capacity charge, energy charge and transportation charges. The Petitioner is further free to quote each component of tariff under escalable or non-escalable heads. The escalable component quoted by the generator is subjected to application of escalation index published by the Commission for factoring in any increase/decrease under the corresponding head. Therefore, the escalation index is applied only on the escalable components of the quoted tariff.

(e) As per the Ministry of Power (MOP) guidelines qua determination of tariff by bidding process, this Commission issues notification for the applicable discount rate, escalation rate for coal/gas and inflation rate, every six months, for the purpose of bid evaluation and payment. The escalation rate for domestic coal is computed based on the data of WPI for Non-Coking coal. The WPI data considered is based on the index notified by the Ministry of Commerce and Industry. Further, the escalation for inland transportation charges for coal is computed based on the data on coal freight rates. The data used for these indexes is collected from the Ministry of Railways. The fuel/coal price escalation rate notified by the Commission cover only the changes in price of fuel but does not cover the changes in other taxes and levies or imposition of any new taxes and levies.

(f) It is only Basic Freight Rate and changes in price of fuel that have been considered by the Commission for computing and notifying escalation rates. Therefore, the Petitioner had quoted the tariff by assuming that any future change in the applicable taxes and levies are not part of inflation and any changes in such taxes and levies would be covered and compensated under Change in Law clause of the PPA. Had there been no change in law events, escalation index would have taken care of Energy Charge and Transportation Charge as it covers the increase in base price. However, Change in law events do not affect the base price of coal, it affects the landed price of the coal.

(g) In terms of Clause 2.4.1.1 (B) (xi) of the RfP, the bidder is required to bear in mind the prevailing rules/regulations, statutory taxes, levies and duties at the time of submission of the bid. Accordingly, the Petitioner had examined the costs as involved on the date of such bidding for the purposes of inter alia procuring inputs for generation of power and the then existing statutory taxes, levies and duties along with CERC escalation index and thereafter, quoted such tariff.

(h) Since, Article 15.18 of the PPA does not specifically deal with the rights and obligations of the parties to the PPA, it cannot override the special provision regarding 'Change in Law' enunciated by Article 10 of the PPA. The Change in Law provision embraced in Article 10 of the PPA envisage to set right the affected party against the additional recurring/non-recurring expenditure resulting due to any event occurring after the cut-off date (i.e., seven days prior to the bid deadline). Further, once, the same is allowed as change in Law event by a

Regulatory Commission and if the said event results into any additional recurring/non-recurring expenditure, the same needs to be compensated by way of adjustment in tariff.

(i) While interpreting a contract, the court cannot place emphasis on an isolated provision divorced from the context and unrelated to the other provisions, which govern contractual obligations. The duty of the court is to read the contract as a whole in order to understand the business meaning, which the parties attributed to their obligations. In the present case, if Article 15.18 is interpreted in a way that TANGEDCO is exempted from payment of all future tax, duties and cess, which the Petitioner has to pay with regards to supply of power, then Article 10 of the PPA dealing with Change in Law will be rendered otiose and redundant and there would be absolutely no purpose of having the Change in Law clause under the PPA at all. Therefore, such an interpretation of Article 15.18 is liable to be rejected. When there is a specific clause dealing with a particular situation, then the general clause has to be read as dealing with aspects excluding such specific clause/provision. Therefore, in the present case, the payment of any future tax, duties and cess by TANGEDCO has to be considered only under Article 10 of the PPAs and not under Article 15.18 of the PPA.

14. The Petitioner has submitted the summary of financial impact of Change in Law events as under:

Details OF PPAs with TANGEDCO

PPA	PPA DATE	BID DEADLINE	CUT-OFF-DATE (7 days prior to bid-deadline)
MTPPA (1.9.2012 to 31.8.2017)	29.6.2012	18.2.2012	11.2.2012
LTPPA (1.2.2014 to 30.9.2028)	23.8.2013	6.3.2013	27.2.2013

Change in Law impact during under MT PPA and LT PPA (From commencement of PPA till August 2017)

(Rs. in crore)

S. No.	Parameter	MT PPA	LT PPA
1	Clean Energy Cess	43.35	135.75
2	Electricity Duty on Auxiliary Power	20.72	26.11
3	Change in Royalty	5.52	15.21
4	Chattisgarh Paryavaran Evam Vikas Upkar	0.64	1.13
5	Excise Duty	0.34	0.90
6	Entry Tax	0.45	1.39
7	Value Added Tax	4.81	10.50
8	Forest Tax	*	*
9	Service Tax		0.04
	Total Financial Impact as on 31.8.2017	75.82	191.04

*The impact of Forest Tax is presently not being computed in the MT PPA and LT PPA. The Petitioner craves the liberty to approach the Commission as and when the said impact is quantified.

Analysis and Decision:

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

- a) Whether the Commission has the jurisdiction to adjudicate the dispute between the Petitioner and the Respondent with regard to Change in Law events?
- b) Whether the provisions of the PPAs with regard to notice have been complied with?

- c) What is the scope of Change in Law in the PPAs?
- d) Whether compensation claims are admissible under Change in Law in the PPAs?
- e) Mechanism for processing and reimbursement of admitted claims under Change in Law?

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

Issue No. 1: Whether the Commission has the jurisdiction to adjudicate the dispute between the Petitioner and the Respondent with regard to Change in Law events.

16. The Petitioner has submitted that in terms of Section 79(1)(b) and (f) of the Electricity Act, 2003, this Commission has jurisdiction to regulate the tariff of the generating company which has entered into or otherwise has a composite scheme for generation and sale of electricity in more than one State. Since, the Petitioner is an inter-State generating station having a composite scheme for supply of power to more than one State, this Commission has jurisdiction to entertain the claims in relation to change in Law under Section 79(1)(f) of the Act. The Petitioner has submitted that in the light of the judgment of the Hon'ble Appellate Tribunal for Electricity ('APTEL') dated 7.4.2016 in Appeal No. 10016 of 2014 (UHBVNL &Ors. Vs. CERC & Ors).

17. The Respondent has submitted that the present petition seeking revision of tariff on the ground that taxes and levies pursuant to change in law have impacted its cost of generation is not maintainable and deserves to be rejected at the outset. The Respondent has further submitted that since, Section 79 (1)(b) and (f) deals with

determination and regulation of tariff determined under Section 62 and not under Section 63 of the Electricity Act, 2003, the petition is not maintainable and the Petitioner is not entitled to any of the reliefs as prayed for in the petition.

18. The Petitioner has submitted that Section 63 of the Act starts with a non-obstante clause but such non-obstante clause under Section 63 only covers Section 62 and nothing else. The Petitioner has submitted that Section 63 does not use the expression “notwithstanding anything contained in this Act”, but only states, “notwithstanding anything contained in Section 62”. Therefore, the provisions of Section 61 and Section 79 among such other become limited in any manner or redundant for the issues/ instances where Section 63 of the Act applies. It is a settled principle of law that all Sections of an Act have to be harmoniously construed and not interpreted in a manner which in-fact give it a meaning which is plausible, just and purposeful. The analogy of the Respondent is not just legally flawed but in-fact stresses on limiting the legal remedies in law available to the Petitioner, which certainly is neither the scheme of the Act nor the legal position applicable to the present scenario. Therefore, it can be said that Section 79 is the source of power to determine tariffs and/or modify such determination even in cases where Section 63 of the Act applies. The Petitioner has submitted that since the Petitioner’s generating company has acquired the status of ‘Composite Scheme’ of generation, it *ipso facto* attracts the jurisdiction of this Commission. In view thereof any change in law that occurs and any dispute, which relates to tariffs can both be resolved only before this Commission.

19. We have considered the submissions of the Petitioner and the Respondent. In addition to TANGEDCO, the Petitioner has entered into two Power Supply Agreements ('PSA') with Kerala State Electricity Board Limited ('KSEBL') on 29.12.2014 for supply of 200 MW and 150 MW of Power on Design, Build, Finance, Own and Operate ("DBFOO") basis. The Petitioner has submitted that the various Change in Law events claimed by the petitioner in the present petition are all coal impositions which are covered under Article 10 of TANGEDCO PPAs whereas in terms of the PSA entered with KSEBL, the increase/decrease in taxes and duties applicable on supply of power is a direct pass through to the procurer of the power under the PSA.

20. The Hon'ble Supreme Court vide its judgment dated 11.4.2017 in Appeal Nos. 5399-5400 of 2016 (Energy Watchdog Vs Central Electricity Regulatory Commission), has held that if a generating company is having a scheme for generation and sale of electricity in more than one State, then it is enough to construe that the generating company is having composite scheme. Relevant portion of said judgment dated 11.4.2017 is extracted as under:

"22. The scheme that emerges from these Sections is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79 (1) itself in sub-sections (c), (d) and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression "within the State" in sub-clauses (a), (b) and (d) and "intra-state" in sub-clause (c). This being the case, it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission. The State Commission's jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central

Commission becomes the appropriate Commission under the Act. What is important to remember is that if we were to accept the argument on behalf of the appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being the case, we are constrained to observe that the expression “composite scheme” does not mean anything more than a scheme for generation and sale of electricity in more than one State.”

In the present case, the Petitioner has executed PPAs for supply of power to the States of Tamil Nadu and Kerala which are located in two different States. Therefore, the Petitioner has the composite scheme for generation and sale of electricity in more than one State and as such falls within the jurisdiction of this Commission under clause (b) of sub-section (1) of Section 79 of the Electricity Act, 2003. Therefore, any dispute on tariff related matters is to be adjudicated by this Commission under clause (f) of sub-section (1) of Section 79 of the Electricity Act.

Issue No. 2: Whether the Provisions of the PPA with regard to notice has been complied with?

21. The claims of the Petitioner in the present petition pertain to the Change in Law events during the operating period. Article 10.4 of the LT PPA and MTPPA envisages for notification of the Change in Law to the procurer. Article 10.4 of the LT PPA and MTPPA is extracted as under:

“10.4 Notification of Change in Law

10.4.1 If the Seller is affected by a Change in Law in accordance with Article 10.1 and the Seller wishes to claim relief for such a Change in Law under this Article 10, 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.

10.4.2 Notwithstanding Article 10.4.1, the Seller shall be obliged to serve a notice to all Procurers under this Article 10.4.2, even if it is beneficially affected by a Change in Law. Without prejudice to the factor of materiality or other provisions contained in this Agreement, the obligation to inform the Procurer contained herein shall be material.

Provided that in case the Seller has not provided such notice, the Procurer shall have the right to issue such notice to the Seller.

10.4.3 Any notice served pursuant to this Article 10.4.2 shall provide, amongst other things, precise details of:

- (a) the "Change in Law"; and
- (b) the effects on the Seller"

22. The Petitioner has submitted that it informed the Respondent about the occurrence of events of Change in Law and their impact on the supply of power in terms of the PPAs. The Petitioner has submitted that in accordance with the PPA, it has informed the Respondent about Change in Law events on 5.4.2016 and 23.8.2016 under both the Medium Term and Long Term PPAs. In respect of Change in Law events under the LT PPA, the Petitioner has issued the following notices to the Respondent:

- (a) Notice dated 5.4.2016: Notification of Change in Law and associated impact on Jindal Power Limited (JPL) -Clean Energy Cess, Electricity Duty and Royalty on Coal.
- (b) Notice dated 23.8.2016: Notification of Change in Law and associated impact on Jindal Power Limited (JPL) -Clean Energy Cess, Electricity Duty on Auxiliary Consumption, Royalty on Coal, Chhattisgarh Paryavaran Evam Vikas Upkar, Excise Duty, Entry Tax, VAT and Service Tax.

In respect of MT PPA, the Petitioner has issued the following notices:

(c) Notice dated 5.4.2016: Notification of Change in Law and associated impact on Jindal Power Limited (JPL) -Clean Energy Cess, Electricity Duty and Royalty on Coal.

(d) Notice dated 23.8.2016: Notification of Change in Law and associated impact on Jindal Power Limited (JPL) -Clean Energy Cess, Electricity Duty on Auxiliary Consumption, Royalty on Coal, Chhattisgarh Paryavaran Evam Vikas Upkar, Excise Duty, Entry Tax and VAT.

23. From the above narration of facts, it is evident that the Petitioner has informed the Respondent of the events that occurred after execution of the PPAs, which according to the Petitioner, were the Change in Law events affecting the cost of generation of power or its revenue. In view of the above, it can be inferred that Petitioner has complied with the requirement of notice under Article 10.4 of the PPAs .

Issue No.3: What is the scope of Change in Law under the PPAs?

24. The claims of the petitioner are with respect to events under Change in Law under Article 10 of the PPAs which occurred after the cut-off date i.e.11.2.2012 and 27.2.2013. Article 10 of the LT PPA and MTPPA between the petitioner and TANGEDCO deals with events of Change in Law and is extracted for reference as under:

“10.1 Change in Law

In this article 10, following terms shall have the following meanings:

10.1.1 "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 resulting into any additional recurring/ non-recurring expenditure by the seller or any income to the seller:

- The enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such law;
- A change in the interpretation or application of any law by any Indian governmental instrumentality having the legal power to interpret or apply such law, or any competent court of law;
- The imposition of a requirement for obtaining any consents, clearances and permits which was not required earlier;
- A change in terms and conditions prescribed for obtaining any consents, clearances and permits or the inclusion of any new terms or conditions for obtaining such consents clearances and permits; except due to any default of the seller;
- Any change in tax or introduction of any tax made applicable for supply of power by the seller as per the terms of this agreement.

But shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the seller, or (ii) change in respect of UI charges or frequency intervals by an appropriate commission, or (iii) any change on account of regulatory measures by the appropriate commission including calculation of availability.

10.2 Application and principles for computing impact of Change in Law:

10.2.1 while determining the consequence of change in law under this article 10, 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 payment to the extent contemplated in this Article 10, the affected party to the same economic position as if such Change in Law has not occurred.

10.3.2 During Operating Period

The compensation for any decrease in revenue or increase in expenses to the seller shall be payable only if the decrease in revenue or increase in expenses to the seller is in excess of an amount equivalent to 1% of the value of the stand by letter of credit in aggregate for the relevant contract year.

10.3.3 For any claims made under Articles 10.3.1 and 10.3.2 above, the Seller shall provide to the Procurer and the Appropriate Commission documentary proof of such increase/decrease in cost of the Power Station or revenue/expense for establishing the impact of such Change in Law.

10.3.4 The decision of the Appropriate Commission, with regards to the determination of the compensation mentioned above in articles 10.3.1 and 10.3.2, and the date from which such compensation shall become effective, shall be final

and binding on both the Parties subject to right of appeal provided under applicable law.

10.5 Tariff Adjustment Payment on account of Change in Law.

10.5.1 Subject to Article 10.2, the adjustment in monthly Tariff Payment shall be effective from:

i. The date of adoption, promulgation, amendment, re-enactment or repeal of the law or Change in Law; or

ii. The date of order /judgement of the Competent Court or tribunal or Indian governmental instrumentality, if the Change in Law is on account of a change in interpretation of Law.

10.5.2 The payment for Change in Law shall be through Supplementary Bill as mentioned in Article 8.8. However, in case of any change in Tariff by reason of Change in Law as determined in accordance with this Agreement, the Monthly Invoice to be raised by the Seller after such change in Tariff shall appropriately reflect the changed Tariff”.

Further, Article 14 of the PPAs provides that in case of dispute between the parties arising out of claim made by any party for any change in or determination of tariff or any matter relating to tariff. The said Article is extracted as under:

“14.3 Dispute Resolution

14.3.1 Dispute Resolution by the Appropriate Commission

14.3.1.1 (a) Where any Dispute arising from a claim made by any Party for any change in or determination of the tariff or any matter related to tariff or claims made by any party which partly or wholly relate to any change in the Tariff or determination of any of such claims could result in change in the Tariff, shall be submitted to adjudication by the Appropriate Commission. Appeal against the decisions of the Appropriate Commission shall be made only as per the provisions of the Electricity Act, 2003, as amended from time to time.”

25. A combined reading of the above provisions would reveal that the Commission has the jurisdiction to adjudicate upon the disputes between the Petitioner and the Respondent with regard to “Change in Law” which occur after the cut- off date which is

seven days prior to the bid deadline. The events broadly covered under Change in Law are following:

- (a) Any enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law;
- (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) Imposition of a requirement for obtaining any consents, clearances and permits which was not required earlier.
- (d) A change in terms and conditions prescribed or inclusion of any new terms and conditions for obtaining consents, clearances and permits, except due to any default of the seller;
- (e) Any change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of the agreement.
- (f) Such Changes [as mentioned in (a) to (c) above] result in additional recurring and non-recurring expenditure by the seller or any income to the seller.
- (g) 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 10, the affected Party to the same economic position as if such “Change in Law” has not occurred.
- (h) The Appropriate Commission shall determine the compensation for any increase/decrease in revenue or cost to the Seller and effective date of

such compensation which shall be final and binding on both the parties, subject to rights of appeal provided under Electricity Act, 2003.

“Law” has been defined under Article 1.1 of the PPA as under:

“Law” shall mean in relation to this Agreement, all laws including Electricity Law in Force in India and any statute, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and shall further include without limitation all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include without limitation all rules, regulations, decisions and orders of the Appropriate Commission;

The term “Indian Government Instrumentality” is also defined in Article 1.1 as under

“Indian Governmental Instrumentality” shall mean the Government of India, Government of State(s) of Tamil Nadu, Chhattisgarh and any ministry, department, board, authority, agency, corporation, commission under the direct or indirect control of Government of India or any of the above state Government(s) or both, any political sub-division of any of them including any court or Appropriate Commission(s) or tribunal or judicial or quasi-judicial body in India but excluding the Seller and Procurer”.

As per the above definition, law shall include (a) all laws including electricity laws in force in India, (b) any statute, ordinance, regulation, notification, code, rule or their interpretation by Government of India, Government of Tamil Nadu or Government of Chhattisgarh (since the project is located in Chhattisgarh) by Ministry, Department, Board, body corporate agency or other authority under such Government(s); (c) all applicable rules, regulations, decisions and others of the Appropriate Commission. If any of these laws affects the cost of generation or revenue from the business of selling electricity by the seller to the procurer, the same shall be considered as Change in Law to the extent it is contemplated under Article 10 of the PPA.

Issue No. 4: Whether compensation claims are admissible under Change in Law in the PPAs.

26. The events of Change in Law should occur after seven days prior to the Bid Deadline. The Bid Deadline was 18.2.2012 and 6.3.2013 for MTPPA and LTPPA respectively. Therefore, the Change in Law Event should occur on or after 11.2.2012 and 27.2.2013. The individual claims of the Petitioner are discussed in the succeeding paragraphs.

(I) Levy of Forest Transit Fee

27. The Petitioner has submitted that as on the 'MT cut-off-date' of 11.2.2012, there was no Forest Tax on Coal. The Petitioner has submitted that the Forest Department, Government of Chhattisgarh levied a forest tax of Rs. 7 per tonne under Chhattisgarh Transit Forest Produce Rules, 2001. The Petitioner has submitted that rate of forest tax was revised by Forest Department, Government of Chhattisgarh from Rs. 7 per tonne to Rs. 15 per tonne vide Notification No.06-02/2014/10.2 dated 30.6.2015.

28. The Petitioner has submitted that at the time of 'LT Cut-off-date', Forest Tax on coal @ Rs. 7/Tonne was applicable. The Petitioner has submitted that rate of Forest Tax was revised by Forest Department, Government of Chhattisgarh from Rs. 7 per tonne to Rs. 15 per tonne vide Notification No.06-02/2014/10.2 dated 30.6.2015 which is applicable to all dispatches/lifting from 00:00 Hrs of 1.7.2015.

29. TANGEDCO has stated that the Petitioner is not entitled to claim this expenditure under the head 'change in law'. These are State specific increase in various cess, which was not anticipated by the beneficiaries located in the other States such as Tamil Nadu. These cess and other revenues published by the State of Chhattisgarh had led to increase in the tariff agreed to between the Petitioner and the Respondent to such an extent that it is not financially viable for the respondent to continue with the PPA.

30. We have considered the submissions of the Petitioner and the Respondent. In exercise of the powers conferred by Section 76 read with Sections 41 and 42 of Indian Forest Act, 1927 (No. XVI of 1927), Chhattisgarh State Government issued rules for regulating transit of forest produce called the Chhattisgarh Transit (Forest Produce) Rules, 2001. Rule 3 of the Chhattisgarh Transit (Forest Produce) Rules, 2001 provides that no forest produce shall move into or outside the State or within the State of Chhattisgarh except in the manner as hereinafter provided without a transit pass in Form A, B, or C annexed to these rules. Rule 5 of the said Rules further provides that the State Government or an officer authorized by the State Government from time to time, shall fix the rate of fee for issue of transit pass as per the provisions of Rule 4. In exercise of Rule 5 of the Chhattisgarh Transit (Forest Produce) Rules, 2001, Forest Department, Government of Chhattisgarh vide its Notification No. F-7-61/F.C/2001, dated 14.6.2002 fixed the fee of Rs. 7 per tonne for issue of transit pass for the transportation of corresponding forest produce, namely, lime stone, Dolomite, Fire clay, Manganese, Copper, Rock-phosphate, Pyro-phylite, Diaspore, Orchre, Bauxite, Calcite, Coal, Quartz, Silica Sand, Slate, Soap-stone, Iron-ore, Gold, Corundum and Tin ore.

The Office of the Conservator of Forest, Bilaspur Circle, Chhattisgarh vide its letter dated 31.10.2012 informed SECL regarding realization of fees for transportation of mining from the forest land. The said letter is extracted as under:

“On the above subject for issue of permission letter and fixation of fees for transportation of forest produce the Government of Chhattisgarh, Forest Department has issued Notification No./F-7-61/vs/2001 dated 14.06.2002 (Notification is enclosed in appendix-1). According to the above Notification for transportation of limestone, dolomite, fireclay, manganese, copper, rock-phosphate, Payree-phylite, Diyaspoore, Okar, Bauxite, Keslite, Coal, Clartz, Silica sand slate, soap stone, iron ore, gold, Korandum and tin ayaskRs. 7 pertonne and for transportation of flage stone, granite, marble, earth, stone, sand and murum before issue of permission letter rate of fee of Rs. 4/- per tonne is fixed. The above fee is to be realized on issue of transportation pass.

Under SECL such coal mines whose lease is sanctioned in the forest land, for transportation of coal excavated from there transportation passed in necessary. For this the following arrangement shall be applicable. The transportation of minerals excavated from the forest land shall be done in accordance with Chhattisgarh Transportation (Forest Produce) Rules, 2001. Under this rule for transportation of minerals excavated from the forest land transportation pass shall be issued.

(ii) On issue of transportation pass from the concerned body or person for issue of prescribed transportation permission letter prescribed fee shall be realized.

(iii) According to Section 4 (Kha) of the Chhattisgarh (Forest Produce) Rules 2001 that for issue of transportation passes to an officer of the body which receives mining lease can be authorised by the Divisional Forest Officer. Therefore, Divisional Forest Officer, under section 4 (Kha) of the Chhattisgarh (Forest Produce) Rules shall make necessary arrangement in the forest division area.

(iv) For issue of pass for transportation of forest produce Chhattisgarh Transportation (Forest Produce) Rules 2001 shall be complied with and according to Section 6 of the above rule the transportation pass shall be issued as per form shown in Format “Ka”.

(v) Every month the Forest Divisional Officer shall examine the passes issued to the authorized body and on the basis of requirement books of transportation passes shall be issued from the level of Forest division to the prescribed Authority. But before issue of transit pass books it shall be ensured by the Forest

Divisional Officer that the counter foil and record of transportation fees are regularly deposited/submitted in the forest division.

(vi) For transportation of the excavated minerals from the forest land for issue of permission letter arrangement for receiving fee and issue of transportation form shall compulsorily be implemented in all the areas.

Please issue necessary instructions under SECL to the In-charge of all coal mining area in this regard from your level. In this regard for coordination the divisional forest officers have been issued necessary instructions. Arrangement for issue of transportation passes in the mine of SECL from 01.11.2012 be compulsorily implemented. Please ensure this.

Sd/
Conservator of Forest,
Bilaspur Circle, Bilaspur

Subsequently, Forest Department, Government of Chhattisgarh vide its Notification No.06-02/2014/10.2 dated 30.6.2015 revised the fee from Rs. 7 per tonne to Rs. 15 per tonne. Relevant portion of the said notification dated 30.6.2015 is extracted as under:

“Forest Department
Ministry, Mahanadi Bhawan, New Raipur
Dated: 30th June 2015

No. 06-02/2014/10-2- In exercise of the powers conferred by Rule 5 of the Chhattisgarh Transit (Forest Produce) Rules, 2001 and in supersession of this department's Notification No. F-7-61/F.C/2001. Dated 14th June 2002, the State Government, hereby, fixes the fee as mentioned in column (3), (4), (5) and (6) of Table below respectively to be recovered for issue of transit pass for the transportation of corresponding forest produce as mentioned in column number (2) of the said Table, as under:

TABLE

S. No	Name of Forest Produce	Prescribed Fee			
		Rs.	Rs./Truck	Rs./Trolley	Rs./Bullockcart
(1)	(2)	(3)	(4)	(5)	(6)
1.	Lime stone, Dolomite,	Rs. 15/-	-	-	-

	Fire clay, Manganese, Copper, Rock-phosphate, Pyro-phyllite, Diaspore, Ochre, Bauxite, Calcite, Coal, Quartz, Silica, Sand, Slate, Soap-stone, Iron-ore, Gold, Corundum and Tin ore	Per ton			
2.	Flag stone, Granite, Marble, Concrete, Stone, Sand & Murrum	Rs. 10/- Per CMT	-	-	-
3.	Timber, Fuel & Bamboo	-	Rs. 230/- Per Truck or its part	Rs. 115/- Per Trolley or its part	Rs. 15/- Per Bullock cart or its part
4.	Minor Forest Produce (except specified Minor Forest produce)	-	Rs. 55/- Per Truck or its part	Rs. 25/- Per Tractor or its part	-

By order and in the name of the Governor of Chhattisgarh,
ANIL KUMAR SAHU, Secretary

31. As per the notification of Forest Department, Govt. of Chhattisgarh dated 14.6.2002, the transit fee for transportation of coal in the forest area was Rs. 7/ tone. However, SECL vide its letter dated 31.10.2012 addressed to its Field Officers directed that the above transit fee to be compulsorily implemented with effect from 1.11.2012. Therefore, the transit fee of Rs. 7/ tone was already in existence as on the cut-off date of both MT PPA and LT PPA. Only after issue of notification dated 30.6.2015 by the Forest Deptt. of Government of Chhattisgarh, the transit fee was increased for Rs. 15/ tone. Under last bullet of Article 10.1.1.of the PPA, any change in taxes or introduction of tax made applicable for supply of power by the seller as per terms of the agreement shall be admissible under Change in Law. Therefore, change in the rate of forest transit fee shall be admissible under Change in Law. The Petitioner shall be entitled for

enhancement of transit fee @ 8/ tone with effect from 30.6.2015. The Petitioner has not placed any document received from SEPL regarding its liability to pay transit fee or the actual payment of transit fee in accordance with letter dated 16.9.2015. The Petitioner shall share with the respondent all documents including the actual payment of transit fee made for the coal consumed for supply of electricity to the respondent duly supported by Auditor Certificate.

(II) Payment of National Mineral Exploration Trust and Payment of District Mineral Fund:

32. The Petitioner has submitted that at the time of 'MT Cut-off-date' and 'LT Cut-off-date', the rate of Royalty payable on coal was 14%. Subsequently, Government of India, Ministry of Coal, issued Notification No. G.S.R. 349(E) dated 10.05.2012 under Section 9 of the Mines and Minerals (Development and Regulation) Act, 1957 increasing the rate of royalty on coal to an ad-valorem rate of 14% on price of coal. On 26.3.2015, the Government of India amended the Mines and Minerals (Development and Regulation) Act, 1957 through the Mines and Minerals (Development and Regulation) Act, 2015 in which Section 9B (Creation of DMF) and Section 9C (Creation of NMET) were introduced. Pursuant to MMDR Amendment Act, on 20.10.2015, Ministry of Mines issued the Mines and Minerals (Contribution to District Mineral Foundation) Rules, 2015 and as per Rule 2 of the said Rules, every holder of a mining lease or a prospecting licence-cum-mining lease shall, in addition to pay the royalty, paid to the DMF, on amount at the rate of (a) 10% of the royalty paid in terms of the Second Schedule to the Mines and the Minerals (Development and Regulation) Act, 1957, in respect of mining

lease or, as the case may be, prospecting licence-cum-mining lease granted on or after 12.1.2015, and (b) 30% of the royalty paid in terms of the Second Schedule to the Mines and Minerals (Development and Regulation) Act, 1957, in respect of mining lease granted before 12.1.2015. The Petitioner has submitted that South Eastern Coalfields Limited vide its notice dated 13/14.11.2015 informed regarding implementation of “The Mines and Minerals (Development and Regulation) Amendment Act, 2015” and stated that Mines and Minerals (Development and Regulation) Amendment Act, 2015 is applicable to all dispatches/lifting.

33. The Petitioner has submitted the details of royalty on coal as under:

Rate of Royalty						
S. No.	contribution	Applicable from	to	Rate	Royalty (Rs./tonne)	Increase after bid date
1.	District Mineral Foundation	12.6.2015	Till date	30% on royalty	14% on CIL notified price of Rs. 660/Tonne=92.40	30% x 92.40=27.72
	National Mineral Exploration Trust	14.8.2015	Till date	2% on royalty		2% x 92.40=1.84

Effective Royalty from 14.8.2015= 14% x CIL notified price+30%x14% CIL notified price +2%x CIL notified price =14% x CIL notified price +4.2% x CIL notified price +0.28% x CIL notified price=18.48X CIL notified price.

34. The Respondent has submitted that TANGEDCO's bid dead line was 6.3.2013. As per clause 2.4.1.1(B) (xi) of the RfP, the quoted tariff is inclusive of all taxes, levies, duties etc. The Respondents has submitted that as the Petitioner quoted escalable energy and capacity charge components, raise in duties and levies are taken care in CERC escalation percentage published once in 6 months. According to the Petitioner, the bidder cannot be expected to anticipate future decisions of any Ministry or a

Government Instrumentality with regards to imposition of a new tax/levy or increases in any existing tax/levy at the time of the submission of the bid. Therefore, the same is not factored in the tariff quoted by the bidder. The commercial risk, which the bidder assumes is that of normal inflation over the then prevalent taxes and levies and the tariff is quoted considering the then existing rate of taxes and levies. The Petitioner has argued that as per clause 6.2 (4) of the National Tariff Policy as amended on 28.1.2016, after award of bids, if there is any change in domestic duties, levies, cess and taxes imposed by the Central Government, State Government/Union Territories or by any Government instrumentality leading to the corresponding changes in the cost, the same shall be treated as Change in Law and may unless provided otherwise in the PPA, be allowed as pass through subject to approval of Appropriate Commission.

35. TANGEDCO has submitted that in terms of the RfP, the tariff is an all inclusive one and taxes or duties or levies or cess are covered under the RfP. Clause 2.4.1 (B) xi of the RfP provides as under:

“xi. The quoted Tariff, as in format 4.10, shall be an inclusive Tariff up to the Interconnection Point and no exclusions shall be allowed. The Bidder shall take into account all cost including capital and operating costs, statutory taxes, levies duties while quoting such Tariff. It shall also include any applicable transmission costs and transmission losses from the generation source up to the Interconnection Point. Availability of the inputs necessary for supply of power shall be ensured by the Seller and all costs involved in procuring the inputs (including statutory taxes, duties, levies thereof) at the plant location must be reflected in the Quoted Tariff. Appropriate transmission charges from the Injection Point to the Delivery Point as per Format 5.10 shall be added for Bid evaluation process.”

In other PPAs, similar provisions exist and in such cases, change in rate of taxes, or duties or cess occurring after the cut-off date, the relief under the Change in Law has been allowed. Further, Article 10.1.1 of the PPA recognizes any change in tax or introduction of any tax made applicable for supply of power by the seller. Accordingly, the objection of TANGEDCO is rejected.

36. TANGEDCO has submitted as per Article 15.18.1, the seller is required to pay all statutory taxes, duties, levies and cess assessed/levied on the seller, etc. for supplying power as per the terms of this agreement.

37. Article 15.18.1 provides that the seller shall bear all charges that are required to be paid by the seller for supply of power as per the terms of the agreement. There is no non-obstruction clause in this Article which will prevent operation of Article 10 of the PPA. A harmonious construction of both Articles reveals that while the taxes, cess, duties and levies, etc. shall be payable by the seller, the same to the extent permissible under Change in Law provision can be recovered from the procures. Accordingly, the objection of TANGEDCO is rejected.

38. As regard the admissibility of royalty paid to the DMF and royalty paid to the NMET on merit the issue was examined by the Commission vide order dated 17.2.2017 in Petition No. 16/MP/2016 as under:

“32. We have considered the submissions of the Petitioner and the respondents. Through the Mines and Minerals (Development and Regulation) Amendment Act,

2015, the following provisions have been incorporated in the Mines and Minerals (Development and Regulation) Act, 1957:

“9B. District Mineral Foundation: (1) In any district affected by mining related operations, the State Government shall, by notification, establish a trust, as a non-profit body, to be called the District Mineral Foundation

(2) The object of the District Mineral Foundation shall be to work for the interest and benefit of persons, and areas affected by mining related operation in such manner as may be prescribed by the State Government.

(3) The composition and functions of the District Mineral Foundation shall be such as may be prescribed by the State Government.

(4) The State Government while making rules under sub-section (2) and (3) shall be guided by the provisions contained in Article 244 read with Fifth and Sixth Schedules to the Constitution relating to administration of the Scheduled Areas and Tribal Area and the Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996 and the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006.

(5) The holder of mining lease or a prospecting licence-cum-mining lease granted on or after the date of commencement of the Mines and Minerals (Development and Regulation) Amendment Act, 2015, shall in addition to the royalty, pay to the District Mineral Foundation of the district in which the mining operation are carried on, an amount which is equivalent to such percentage of the royalty paid in terms of the Second Schedule, not exceeding one-third of such royalty, as may be prescribed by the Central Government.

(6) The holder of mining lease granted before the date of commencement of the Mines and Mineral (Development and Regulation) Amendment Act, 2015, shall, in addition to the royalty, pay to the District Mineral Foundation of the district in which the mining operations are carried on, an amount not exceeding and royalty paid in terms of the Second Schedule in such manner and subject to the categorization of the mining leases and the amounts payable by the various categories of leaseholders, as may be prescribed by the Central Government.”

Section 9C provides as under:

“9C: National Mineral Exploration Trust: (1) The Central Government shall, by notification, establish a Trust, as a non-profit body, to be called the National Mineral Exploration Trust.

(2) The object of the Trust shall be to use the funds accrued to the Trust for the purposes of regional and detailed exploration in such manner as may be prescribed by the Central Government.

(3) The composition and function of the Trust shall be such as may be prescribed by the Central Government.

(4) The holder of a mining lease or a prospecting licence-cum-mining lease shall pay to the Trust, a sum equivalent to two percent of the royalty paid in terms of the Second Schedule, in such manner as may be prescribed by the Central Government.”

33. The Central Government in exercise of powers under sub-section 9B of the Mines and Minerals (Development and Regulation) Act, 1957 has notified the Mines and Minerals (Contribution to District Mineral Foundation) Rules, 2015 prescribing the amount of contribution that will be made to the District Mineral Foundation as under:

“Amount of Contribution to be made to District Mineral Foundation.- Every holder of mining lease or a prospecting licence-cum-mining lease, in addition to royalty, pay to the District Mineral Foundation of the district in which mining operations are carried on, an amount at the rate of-

(a) ten percent of the royalty paid in terms of the second schedule to the Mines and Minerals (Development and Regulation) Act, 1957 (57 of 1957) (herein referred to as the said Act) in respect of mining leases or, as the case may be, prospective licence-cum-mining lease granted on or after 12th January, 2015; and

(b) thirty percent royalty paid in terms of the Second Schedule to the said Act in respect of mining leases granted before 12th January, 2015.”

It is noticed from the above provisions that through an amendment to Act of Parliament, National Mineral Exploration Trust and District Mineral Foundations have been sought to be established. National Mineral Exploration Trust shall be established as a non-profit body in the form of trust. The object of the Trust shall be to use the funds accrued to the Trust for the purposes of regional and detailed exploration in such manner as may be prescribed by the Central Government. The District Mineral Foundations shall be established as non-profit body in the form of a trust. The object of the District Mineral Foundation shall be to work for the interest and benefit of persons, and areas affected by mining related operations in such manner as may be prescribed by the State Government. For running these trusts, the Amendment Act provided for payment of amounts in addition to the royalty by the holder of the mine lease or holder of prospective

licence-cum-mining lease @ 2% of the royalty for National Mineral Exploration Trust and @10% to 30% of the royalty for District Mineral Foundations. These amounts collected are in the nature of compulsory exactions and therefore, partake the character tax. The Respondents have submitted that the payment or contribution to the National Exploration Trust and District Mineral Foundations are to be made by the holder of a mining lease or holder of a prospective license-cum-mining lease and therefore, it should not be passed on to the Respondents. The Petitioner has submitted that the Petitioner is required to pay contribution at the prescribed rate to the National Exploration Trust and District Mineral Foundations in addition to royalty. The question therefore arises whether the contribution to National Exploration Trust and District Mineral Foundation Trust shall be borne by the lease-holder of the mines or shall be passed on to the procurers under change in law. It is pertinent to mention that royalty on coal imposed under Section 9 of the Mines and Minerals (Development and Regulation) Act, 1957 are payable by the holders of mining lease to the Government and the Commission has allowed the increase in royalty on coal under Change in Law in order dated 30.3.2015 in Petition No.6/MP/2013. Since the contributions to these funds are to be statutorily paid as a percentage of royalty, in addition to the royalty, they should be accorded the similar treatment. National Exploration Trust and District Mineral Foundations have been created through Act of the Parliament after the cut-off date and therefore, they fulfill the conditions of change in law. Accordingly, the expenditure on this account has been allowed under Change in Law.

39. The above decision is applicable in case of the Petitioner. Therefore, the levy of @ 2% royalty on National Mineral Exploration Trust and @10% or 30% of the royalty of District Mineral Foundations, whichever is applicable, is admissible to the Petitioner as a Change in Law events. The Petitioner shall be required to furnish copies of the payment made supported by Auditor certificate while claiming the expenditure under Change in Law. It is further directed that the reimbursement on account of contribution to National Exploration Trust and District Mineral Foundations shall be on the basis of actual payments made to other appropriate authorities and shall be restricted to the amount of coal consumed for supplying scheduled energy to the Procurer. It is clarified that the Petitioner shall be entitled to recover on account of payment of National Mineral Exploration Trust and Payment of District Mineral Fund in proportion to the actual coal

consumed corresponding to the scheduled generation of supply of electricity to TANGEDCO. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of payment of National Mineral Exploration Trust and Payment of District Mineral Fund. The Petitioner and TANGEDCO are directed to carry out reconciliation on account of these claims annually.

(III) Levy of Clean Energy Cess

40. The Petitioner has submitted that as on the 'MT Cut-off-date' and 'LT Cut-off-date', Clean Energy Cess on Coal was Rs.50/tonne. The Petitioner has submitted that the Ministry of Finance, Government of India by Notification No. 3 of 2010 dated 22.6.2010 exempted the clean Energy Cess over and above Rs. 50 per tonne. By Notification No. 20 of 2014 dated 11.7.2014, Government of India rescinded the Notification No. 3 of 2010 and made Clean Energy Cess payable at the rate of Rs. 100 per tonne. By Section 166 of the Finance Act, 2015, Tenth Schedule of the Finance Act, 2010 was amended to increase the Clean Energy Cess to Rs. 300 per tonne. However, by Notification No. 1 of 2015 dated 1.3.2015, Government of India exempted the Clean Energy Cess over and above Rs. 200 per tonne. By clause 232 of the Finance Bill, 2016, Clean Energy Cess has been named as Clean Environment Cess and has increased to Rs. 400 per tonne which came into effect from 1.3.2016. The Petitioner has submitted that it be compensated for Clean Energy Cess as it has been increased after the cut-off date and has an impact on the cost of generation of electricity for supply to the Respondent.

41. The Respondent has submitted that TANGEDCO's bid dead line was 6.3.2013. The G.O was issued before the due date. As per clause 2.4.1.1(B) (xi) of the RfP, the quoted tariff is inclusive of all taxes, levies, duties, etc. The Respondent has stated that as the petitioner has quoted escalable capacity and energy charge components, raise in duties and levies are taken care in CERC escalation percentage published once in 6 months. The Petitioner has clarified that the quoted tariff only includes all taxes, duties and levies applicable at the time of bid submission and not all future increase in taxes, duties and levies. The bidders cannot be expected to anticipate future decisions of any Ministry or a Government Instrumentality with regards to imposition of a new tax/levy or increases in any existing tax/levy at the time of submission of bid. Therefore, the same is not factored in the tariff quoted by the bidder. The Petitioner has further submitted that the escalation rates notified by the Commission, which are being issued since the inception i.e., prior to bidding and presently also, consider only the changes in price of fuel and basic railway freight rates for the purpose of escalation index. Increase in taxes and duties and imposition of any new tax and duty is not covered under the escalation index. The Petitioner has submitted that the Central Electricity Regulatory Commission in its order dated 30.3.2015 in Petition No.6/MP/2013 and Maharashtra Electricity Regulatory Commission in its order in Case No. 67 of 2011 (JSW Vs. MSEDCL) have held that Clean Energy Cess is covered under Change in Law.

42. We have considered the submissions of the Petitioner and the Respondent. The objections raised by the Respondent have been dealt with in Para 35 above. Clean Energy Cess on coal has been introduced through the Finance Act, 2010 and is being

modified through subsequent Finance Acts. The Clean Energy Cess applicable at different points of time is given in the table below:

S. No.	From	To	Applicable Clean Energy Cess (Rs./Tonne)
1	1.7.2010	10.7.2014	50
2	11.7.2014	28.2.2015	100
3	1.3.2015	29.2.2016	200
4	1.3.2016	30.6.2017	400

43. The cut-off date for MT PPA is 11.2.2012 and LT PPA is 27.2.2013. As on the cut-off date, clean energy cess was Rs. 50/ tone. With effect from 11.7.2014, it has been revised to Rs.100/ tone, and thereafter to Rs. 200/ tone with effect from 1.3.2015 and Rs. 400/tone with effect from 1.3.2016 till 30.6.2017. The clean energy cess was increased through the Act of Parliament after the cut-off date. Therefore, it covered under Change in Law. The issue of clean energy cess as a Change in Law event has been considered by the Commission in order dated 30.3.2015 in Petition No. 6/MP/2013. Relevant portion of said order dated 30.3.2015 is extracted as under:

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

The above decision is applicable in case of the Petitioner. Therefore, levy of clean energy cess on coal or increase in the rate of the cess is admissible to the Petitioner as Change in Law event under Article 10 of the LT PPA and MT PPA. Accordingly, the Petitioner is entitled to recover clean energy cess from the Respondent

in proportion to the coal consumed for generation and supply of electricity to TANGEDCO. The applicable rate shall be as under:

	Period of supply of power		Applicable clean energy cess			Admissible clean energy cess		
	From	To	11.7.2014 to 28.2.2015	1.3.2015 to 29.2.2016	1.3.2016 to 30.6.2017	11.7.2014 to 28.2.2015	1.3.2015 to 29.2.2016	1.3.2016 to 30.6.2017
LT PPA	1.5.2014	30.9.2028	100	200	400	50	150	350
MT PPA	1.6.2013	31.8.2017	100	200	400	50	150	350

44. The Petitioner is directed to furnish along with its monthly bill the proof of payment and computations duly certified by the auditors. It is clarified that the Petitioner shall be entitled to recover on account of clean energy cess on coal in proportion to the actual coal consumed corresponding to the scheduled generation of supply of electricity to TANGEDCO. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of clean energy cess on coal. The Petitioner and TANGEDCO are directed to carry out reconciliation on account of these claims annually.

45. It is pertinent to mention that the clean energy cess has been abolished through Taxation Laws Amendment Act, 2017 with effect from 1.7.2017. A cess, namely GST Compensation Cess @ ₹400 per metric tonne on coal and lignite has been introduced through Goods and Services (Compensation to States) Act, 2017 to be leviable from 1.7.2017. The GST Compensation Cess has not been considered in the present case and will be decided in the light of decision in Petition No. 13/SM/2017 and other related petitions.

(IV) Increase in 'CG PARYAVARAN UPKAR' AND 'CG VIKAS UPKAR'

46. The Petitioner has submitted that at the time of 'MT Cut-off-date' and 'LT Cut-off-date', the environment cess under CG Paryavaran Upkar was Rs. 5/tonne. Subsequently, Government of Chhattisgarh vide Notification No. 340 dated 16.6.2015 issued under Section 8 of Chhattisgarh Adhoshanrachna Vikas Evam Paryavaran Upkar Adhiniyam, 2005, increased the Environment Cess to Rs. 7.50/ton. The Petitioner has submitted that South Eastern Coalfields Limited vide its notice dated 19.8.2015 informed about increasing of environment cess to Rs. 7.50/Tonne and about its applicability to the Petitioner. The Petitioner has submitted that since, then Chhattisgarh Vikas Upkar and Paryavaran Upkar has been increased pursuant to the Notification issued by the Government of Chhattisgarh and the same qualifies as Change in Law event in terms of Article 10.1.1 of the PPA. Therefore, the Petitioner needs to be compensated for the same.

47. The Respondent has submitted that TANGEDCO's bid dead line was 6.3.2013. As per clause 2.4.1.1(B) (xi) of the RfP, the quoted tariff is inclusive of all taxes, levies, duties etc. The Respondent has submitted that as the Petitioner quoted escalable energy and capacity charge components, raise in duties and levies are taken care in CERC escalation percentage published once in 6 months. The Respondent has further submitted that since, CG Paryavaran Evam Vikas Upkar was applicable even eight years prior to the bid deadline, the same doesn't qualifies as Change in Law. The Petitioner has clarified that the quoted tariff only includes all taxes, duties and levies applicable at the time of bid submission and not all future increase in taxes, duties and

levies. The bidders cannot be expected to anticipate future decisions of any Ministry or a Government Instrumentality with regards to imposition of a new tax/levy or increases in any existing tax/levy at the time of submission of bid. Therefore, the same is not factored in the tariff quoted by the bidder. The Petitioner has further submitted that the escalation rates notified by the Commission, which are being issued since the inception i.e., prior to bidding and presently also, consider only the changes in price of fuel and basic railway freight rates for the purpose of escalation index. Increase in taxes and duties and imposition of any new tax and duty is not covered under the escalation index.

48. We have considered the submissions of the Petitioner and the Respondent. The objections of the Respondent have been dealt with in Para 35 above. Chhattisgarh (Adhoshanrachna Vikas Evam Paryavaran) Upkar Adhiniyam, 2005 provides for levy of cess on land for raising funds to implement infrastructure development projects and environmental improvement projects. The relevant portion of said Act is extracted as under:

Preamble:

An Act to provide for levy of cess on land for raising funds to implement infrastructure development projects and environment improvement projects.

Whereas it is expedient to provide for additional resources for augmenting the development activities and improvement of environment in the State.

Be it enacted by the Chhattisgarh Legislature in the fifty sixth year of the Republic of India as follows:-

X xxx

Section 3-Infrastructure development cess

(1) On and from the date of commencement of this Act, there shall be levied and collected an infrastructure development cess on all lands on which land revenue or rent by whatever name called is levied.

Provided that Infrastructure development cess shall not be levied on land which for the time being is exempt from payment of land revenue or rent, as the case may be.

- (2) The Infrastructure development cess shall be levied at the rate specified in Schedule-I.

Section 4- Environment Cess

- (1) On and from the commencement of this Act, there shall be levied and collected an environment cess on all lands on which land revenue or rent, by whatever name called, levied:

Provided that environment cess shall not be levied on land which for the time being is exempt from payment of land revenue or rent, as the case may be.

- (2) The environment cess shall be levied at the rate specified in Schedule-II.

Section 7- Assessment and Collection of cess

- (1) Cess levied under Section 3 and 4 of the Act shall be assessed in such manner as may prescribed.

- (2) The cess levied under this act shall be collected as an arrear of land revenue and provision of the Chhattisgarh Land Revenue Code, 1959 (No. 20 of 1959) shall apply mutatis mutandis for such collection and recovery.

Section 8- Amendment of Schedules

- (1) The State Government may, by a notification to be published in the Official Gazette, amend any Schedule to this Act for revising the rate of any cess;

Provided that the rate of any cess shall not be revised more than once in any consecutive period of three years:

Provided further that the rate of any cess shall not be increased by more than fifty percent of the existing rate by any notification to be issued under this sub-section.

- (2) Every notification issued under sub section (1) shall be laid immediately before the Legislature Assembly of the State if it is in session, and if it is not in session, in the session immediately following the date of such notification.

Schedule I

S. No.	Classification of Land	Rate of Development Cess
1.	On land covered under coal and iron	Rupee 5 on each tonne of

	ore mining leases	annual dispatch of mineral
2.	On land covered under mining leases other than (1) above	5 percent of the amount of royalty payable annually
3.	On land other than land covered under (1) and (2) above	5 percent of the amount of land revenue or rent, as the case may be, payable annually

Schedule II

S. No.	Classification of Land	Rate of Environment Cess
3.	On land covered under coal and iron ore mining leases	Rupee 5 on each tonne of annual dispatch of mineral
4.	On land covered under mining leases other than (1) above	5 percent of the amount of royalty payable annually
3.	On land other than land covered under (1) and (2) above	5 percent of the amount of land revenue or rent, as the case may be, payable annually

Subsequently, Government of Chhattisgarh, in exercise of the powers conferred under sub-Section (1) of Section 8 of the Chhattisgarh (Adhosanrachna Vikas Evam Paryavaran) Upkar Adhinyam, 2005 amended the Schedule I and Schedule II imposing the Development cess and environmental cess vide Notification No. 469 dated 18.9.2015 as under:

Schedule I

S. No.	Classification of Land	Rate of Environment Cess
1.	On land covered under coal, iron ore, lime stone, bauxite and dolomite mining leases	Rupee 7.50 on each tonne of annual dispatch of mineral
2.	On land covered under mining leases other than 1 above	7.50 percent of the amount of royalty payable annually
3.	On land other than land covered under (1) and (2) above	7.50 percent of the amount of land revenue or rent, as the case may be, payable annually

Schedule II

S. No.	Classification of Land	Rate of Environment Cess
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3.	On land covered under coal, iron ore, lime stone, bauxite and dolomite mining leases	Rupee 7.50 on each tonne of annual dispatch of mineral
4.	On land covered under mining leases other than (1) above	7.50 percent of the amount of royalty payable annually
3.	On land other than land covered under (1) and (2) above	7.50 percent of the amount of land revenue or rent, as the case may be, payable annually

By order and in the name of the Governor of Chhattisgarh
P.Nihalani, Joint Secretary”

49. It is noted that as on the cut of date, the rate of environmental cess was Rs. 5 on each tonne of annual dispatch of mineral. Government of Chhattisgarh vide its Notification dated 19.8.2015 revised the Environment Cess from Rs. 5/MT to Rs. 7.50/MT which is applicable for all SECL coal despatches from 16.6.2015 which has an impact on the cost of generation of electricity for supply to TANGEDCO. Since, the Environment Cess has been imposed by Act of Chhattisgarh State, i.e. Chhattisgarh legislature, it fulfills the conditions of Change in Law event under Article 10 of the LT and MT PPAs. Accordingly, the Petitioner is entitled for the expenditure incurred on this account. The Petitioner is directed to furnish a certificate from an Auditor certifying the expenses in this regard to TANGEDCO for claiming the expenditure under Change in Law. It is clarified that the Petitioner shall be entitled to recover on account of CG Paryavaran Upkar and CG Vikas Upkar in proportion to the actual coal consumed corresponding to the scheduled generation of supply of electricity to the procurers. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of CG Paryavaran Upkar and CG Vikas Upkar. The Petitioner and TANGEDCO are directed to carry out reconciliation on account of these claims annually.

(V) Increase in electricity duty on the Auxiliary Power Consumption

50. The Petitioner has submitted that as per Section 3 of the Chhattisgarh Electricity Duty (Amendment) Act, 1995, the applicable rate of electricity duty was 8% of the prevailing Discom tariff on electricity consumer for the power plant auxiliaries. Therefore, as on the 'MT cut-off-date' and 'LT cut-off-date', the applicable rate of Electricity Duty, was 8%. The Petitioner has submitted that the Government of Chhattisgarh vide Chhattisgarh Electricity Duty (Amendment) Act, 2013 dated 1.8.2013 increased the Electricity Duty on power consumed by the generating station. Therefore, as per Section 3 (1) of the Chhattisgarh Electricity Duty (Amendment) Act, 2013, the Petitioner is required to pay 15% of the Discom tariff on electricity duty for the electricity consumed by it or auxiliary consumption of the plant.

51. The Petitioner has submitted the details of instances of changes in electricity duty and the applicable tariff as under:

Electricity Duty on Auxiliary consumption					
From	To	Electricity duty rate	Applicable Tariff (Rs. Kwh)	Electricity duty (C)=(A)x(B) Rs./Kwh	Increase from bid date)(Rs. /kWh) on auxiliary consumption D=[(C)-0.296]
Bid Date	31.5.2013	8%	3.700	0.296	0.000
1.6.2013	31.6.2013	15%	3.700	0.555	0.259
1.7.2014	31.5.2015	15%	4.000	0.600	0.304
1.6.2015	31.3.2016	15%	6.650	0.998	0.402
1.4.2016	Till date	15%	6.040	0.906	0.610

52. The Petitioner has submitted that since electricity duty has been increased pursuant to the Chhattisgarh Electricity Duty (Amendment) Act, 2013, it qualifies as

Change in Law event in terms of Article 10.1.1 of the PPA and the Petitioner needs to be compensated for the same. The Petitioner has submitted that the Commission vide order dated 30.12.2015 in Petition No. 118/MP/2017 (Sasan Power Limited Vs. MPPMCL) has held that the increase in electricity duty is payable by the beneficiaries to the Petitioner on the scheduled generation. The Petitioner has submitted that per unit impact due to increase in electricity duty on auxiliary power consumption for MT PPA and LTPPA is worked out to 6 paise and 5 paise respectively.

53. The Respondent has submitted that amendments were in existence even before the bid dead line of 6.3.2013. As per clause 2.4.1.1(B) (xi) of the RfP, the quoted tariff is inclusive of all taxes, levies, duties, etc. The Respondent has submitted that as the Petitioner has quoted escalable capacity and energy charge components, raise in duties and levies are taken care in CERC escalation percentage published once in 6 months. The Petitioner has clarified that the quoted tariff only includes all taxes, duties and levies applicable at the time of bid submission and not all future increase in taxes, duties and levies. The bidders cannot be expected to anticipate future decisions of any Ministry or a Government Instrumentality with regards to imposition of a new tax/levy or increases in any existing tax/levy at the time of submission of bid. Therefore, the same is not factored in the tariff quoted by the bidder. The Petitioner has further submitted that the escalation rates notified by the Commission, which are being issued since the inception i.e., prior to bidding and presently also, consider only the changes in price of fuel and basic railway freight rates for the purpose of escalation index. Increase in taxes

and duties and imposition of any new tax and duty is not covered under the escalation index.

54. We have considered the submissions of the Petitioner and the Respondent. The objections of the Respondent have been dealt with in Para 35 above. The Petitioner has claimed increase in electricity duty in the auxiliary power consumption of the plant. Sub-section (1) (c) of Section (3) of the Chhattisgarh Electricity Duty (Amendment) Act, 2013 provides as under:

“(1) Subject to the exceptions specified in Section 3A,-

(c) Every Captive Generating Plant, Generating Company and Producer shall pay every month to the State Government, in the prescribed time and manner, duty calculated at the rates specified in Part-C of the Schedule on the units of electricity consumed or used as the case may be, by it or auxiliary consumption of the plant or supplied directly to its employees or units of electricity sold or supplied to the consumers during the preceding months.

PART-C
[See Section 3 (1) (c)]

S.No.	Consumer Category	Consumed electricity (In units)	Rate of Duty
19.	For the electricity consumed by Generating Company, Captive Generating Plant and Producer for their auxiliary consumption and for their own consumption.	On self consumed units including auxiliary consumptions	15 percent of the tariff which would have been applicable if the electricity is supplied by the distribution licensee.

Note: 4. The Electricity Duty shall be calculated on the basis of actual percentage of tariff in a month. As far as fraction of 50 paise is concerned, 50 paise and above shall be rounded off to the next higher rupee and less than 50 paise shall be ignored.”

As per the above provision, the generating company is required to pay electricity duty at the rate specified on the electricity sold or supplied to the consumer within the State of Chhattisgarh or for self consumption.

55. The Commission in the order dated 30.12.2015 in Petition No. 118/MP/2015 has examined whether electricity duty on auxiliary consumption increased by the State Government qualifies as Change in Law. Relevant paras of the said order dated 30.10.2016 are extracted as under:

“37. The increase in electricity duty and energy development cess on sale of power to Madhya Pradesh shall be payable by the Discoms of Madhya Pradesh in proportion to the share of MP in the scheduled generation. The increase in electricity duty and energy development cess on auxiliary power consumption of station and coal mine shall be payable by all beneficiaries/procurers of the station. Apart from the above, the beneficiaries/procurers will get back or adjust an amount of ` 22 crore annually with effect from 1.8.2014 in proportion to their shares in the contracted capacity

38. The increase in electricity duty and energy development cess on sale of power to Madhya Pradesh shall be payable by the distribution companies of Madhya Pradesh in proportion to the share of Madhya Pradesh in the scheduled generation. The increase in electricity duty and energy development cess on auxiliary power consumption of the generating station and coal mine shall be payable by all the beneficiaries/procurers of the generation station. In addition, the petitioner shall refund ` 22 crore annually to the beneficiaries with effect from 1.8.2014 in proportion to their share in the contracted capacity or shall adjusted in their bills.”

In the light of the decision as quoted above, the claim of the Petitioner for reimbursement on account of Increase in Electricity Duty on Auxiliary Consumption under Change in Law is admissible and the Petitioner is entitled to recover increase in electricity duty on the scheduled generation or actual paid, whichever is lower, from the Respondent subject to production of a certificate from an auditor certifying expenditure on account of Electricity Duty on Auxiliary consumption.

(VI) Levy of Excise Duty

56. The Petitioner has submitted that since excise duty is Payable on Royalty on Coal and Chhattisgarh Paryavaran Evam Vikas Upkar, it qualifies as Change in Law event. The Petitioner has submitted that the per tonne impact of increase in excise duty for MTPPA and LTAAP is Rs. 9.19 and Rs. 9.05 which translates to 0.14 paise per unit

57. We have considered the submissions of the Petitioner and the Respondent. It is noted that the Petitioner has not submitted required documents with regard to payment of excise duty on coal supplied by Auditors Certificate to substantiate its claim. Therefore, we are not inclined to grant relief in absence of documents and proper pleadings. However, the Petitioner is granted liberty to approach the Commission for appropriate relief along with all required documents.

(VII) Levy of Entry Tax

58. The Petitioner has submitted that Entry Tax is Payable on Royalty on Coal, Excise Duty, Clean Energy Cess and Chhattisgarh Paryavaran Evam Vikas Upkar. Therefore, increase in the aforesaid would also impact the total Entry Tax payable by the Petitioner. The Petitioner has submitted that Entry Tax qualifies as Change in law event as increase in Entry Tax payable falls squarely within Article 10.1.1 of the PPA.

59. We have considered the submissions of the Petitioner and the Respondent. It is noted that the Petitioner has not submitted details and documents in support of its claim in the absence of the which no view can be taken as regards the admissibility under Change in Law. Accordingly, the Petitioner is granted liberty to claim this expenditure under Change in Law through an appropriate application with relevant details.

(VIII) Levy of Value Added Tax

60. The Petitioner has submitted that Value Added Tax (VAT) is Payable on Royalty on Coal, Excise Duty, Entry Tax, Energy Cess and Chhattisgarh Paryavaran Evam Vikas Upkar. Therefore, increase in the aforesaid would also impact the total VAT payable by the Petitioner. The Petitioner has submitted that VAT payable qualifies as Change in law event in terms of Article 10.1.1 of the PPA. The Petitioner has submitted the Hon'ble Appellate Tribunal for Electricity vide its judgment dated 19.4.2017 in Appeal No. 161 of 2015 [Sasan Power Limited vs. CERC & Ors] has allowed increase in Value Added Tax as Change in Law event. The Petitioner has further submitted that MERC has allowed VAT in Petition No. 39 of 2012 [Wardha Power Ltd Vs R-Infra].

61. We have considered the submissions of the Petitioner and the Respondent. It is noted that the Petitioner has not submitted required documents in support of its claim including the State whose VAT is applicable in this case. Therefore, we are not inclined to grant any relief at this stage in absence of statutory/required documents. Therefore, the Petitioner claim on this aspect is rejected. However, the Petitioner is granted to liberty to approach the Commission for appropriate relief along with all required documents.

(IX) Service Tax

62. The Petitioner has submitted that as on the cut-off date of LT PPA, i.e. 27.2.2013, the applicable service Tax was 12.36%. Thereafter, the Government of India, Ministry of Finance, vide Notification No. 14/2015-service tax dated 19.5.2015

increased the service tax to 14% from 1.6.2015. The Petitioner has submitted that the Government of India, Ministry of Finance vide its Notification No. 22/2015 dated 6.11.2015 increased service tax to 14.50% after inclusion of 0.5% Swachh Bharat Cess. The Petitioner has submitted that the Government of India, Ministry of Finance vide its Notification No. 31/2016 dated 26.5.2016 has removed the Swachh Bharat Cess w.e.f from 1.6.2016 and has introduced 1% of the Krishi Kalyan Cess making the applicable Service Tax to be 15%. The Petitioner has stated that the increase in Service Tax squarely falls under Article 10.1.1 of the PPA and qualify as a 'Change in Law' event for which the Petitioner is entitled to be compensated. The Petitioner has submitted that impact due to increase in service tax is 0.72 paise per unit.

63. The Respondent has submitted that the Commission vide order dated 7.3.2016 in Petition No. 81/MP/2013 has held that Change in Law includes any enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any law and law has been defined as any law including Electricity Laws in force in India. The service tax on erection services and civil works were enhanced through the Finance Act, 2012 which is after bid deadline. The Respondent has submitted that Service Tax was already in existence even before the bid dead line of 6.3.2013 and levy of Swachh Bharat Cess is in addition to Service Tax leviable on taxable services. The Respondent has submitted that as per Article 2.4.1.1(B) (xi) of the RfP, the quoted tariff is inclusive of all taxes, levies, duties etc., the claim of the petitioner is liable to be rejected. The objections of the Respondent have been dealt with in Para 35 above

64. Service tax is levied at varying rates on different services. As per the PPA, Any change in tax or introduction of any tax made applicable for supply of power by the seller as per the terms of the agreement is covered under change in law.’ Therefore, the change in tax or inclusion of any tax should be relatable to the supply of power by the seller to the procurer. The Petitioner has not indicated the items on which service tax is applicable and rate of tax. In the absence of the relevant information, no view can be taken as regards the admissibility under change in law. Accordingly, the Petitioner is granted liberty to claim this expenditure under change in law through an appropriate application with relevant details.

(X) Carrying Cost:

65. The Petitioner in its prayer at Para 57 (c) has sought a direction the Respondent to pay carrying out (interest) from the date of applicability of the respective change in law events on account of delay in recovery of amount already paid towards Change in Law events so that its economic position is restored. 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 17.2.2017 in Petition No. 16/MP/2016. Accordingly, the claim of the petitioner is rejected.

Issue No. 4: The mechanism of payment of Changes in Law compensation

66. The Petitioner has submitted that the minimum value of “Change in Law” should be more than 1% of the Letter of Credit amount in a particular year. As per Article 10.3.2

of MT and LT PPAs, the letter of credit amount for first year would be equal to 1.1 times of the estimated average monthly billing based on normative availability and for subsequent years, the letter of credit amount will be equal to 1.1 times of the average of the monthly tariff payments of the previous contract year plus the estimated monthly billing during the current year from any additional units expected to be put on COD during that year on normative availability.

67. Article 10.3.2 and 10.3.4 of the PPAs provides for the principle for computing the impact of change in law during the operation period as under:

“10.3.2 The compensation for any decrease in revenue or increase in expenses to the Seller shall be payable only if the decrease in revenue or increase in expenses of the Seller is the excess of an amount equivalent to 1% of the value of the Stand by Letter of Credit in aggregate for the relevant Contract Year.

10.3.4 The decision of the Appropriate Commission, with regards to the determination of the compensation mentioned above in Article 10.3.1 and 10.3.2, and the date from which such compensation shall become effective, shall be final and binding on both the Parties subject to right of appeal provided under applicable law.”

68. The above provision enjoins on the Commission to decide the effective date from which the compensation for increase/decrease revenues or cost shall be admissible to the Petitioner. Moreover, the compensation shall be payable only if and for increase/decrease in revenue cost to the seller in excess of an amount equivalent to 1% of the letter of credit in aggregate for contract year. In our view, the effect of change in law as approved in this order shall come into force from the date of commercial operation of the concerned unit/unit of the generating stations. The Commission has specified a mechanism considering the fact that compensation of change in law shall be paid in subsequent contract years also. Accordingly, the following mechanism

prescribed to be adopted for payment of compensation due to Change in Law events allowed as per Article 10.2.1 of the PPAs in the subsequent years of the contracted period :

(a) Monthly change in law compensation payment shall be effective from the date of commencement of supply of electricity to the procurer or from the date of Change in Law, whichever is later.

(b) Increase in forest transit fee, payment of National Mineral Exploration Trust and Payment of District Mineral Fund, levy of clean energy cess, Chhattisgarh Paryavaran Upkar evam Vikas Upkar and Electricity Duty on Auxiliary Consumption shall be computed based on actual subject to ceiling of coal consumed corresponding to scheduled generation and shall be payable by the beneficiary on pro-rata based on its share in the scheduled generation.

(c) At the end of the year, the Petitioner shall reconcile the actual payment made towards change in law with the books of accounts duly audited and certified by an auditor and adjustment shall be made based on the energy scheduled by the procure during the year. The reconciliation statement duly certified by an Auditor shall be kept in possession by the Petitioner so that same could be produced on demand from Procurers/ beneficiaries, if so desired.

(d) For Change in Law items related to the operating period, the year-wise compensation henceforth shall be payable only if such increase in revenue or

cost to the Petitioner is in excess of an amount equivalent to 1% of LC in aggregate for a contract year as per provision under 10.3.2 of the PPAs of MT and LT.

(e) Approaching the Commission every year for allowance of compensation for such Change in Law is a time consuming process which results in time lag between the amount paid by Seller and actual reimbursement by the Procurers which may result in payment of carrying cost for the amount actually paid by the Petitioner. Accordingly, the mechanism prescribed above is to be adopted for payment of compensation due to Change in Law events allowed as per Article 10.3.2 of the PPAs for the subsequent period as well.

69. The Commission has not computed the threshold value of eligibility of getting compensation due to Change in Law during operating period. However, the Petitioner shall be eligible to get compensated if the impact due to Change in Law exceeds the threshold value as per Article 10.3.2 of the PPAs during operating period. Accordingly, the compensation amount allowed shall be shared by the Procurer based on the scheduled energy.

Summary:

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

S.No.	Parameter	MT PPA	LT PPA
1	Levy of Forest Transit Fee	Allowed in terms of para 31	Allowed in terms of para 31

2	Payment of National Mineral Exploration Trust and Payment of District Mineral Fund	Allowed in terms of para 39	Allowed in terms of para 39
3	Levy of Clean Energy Cess	Allowed upto 30.6.2017 or the last date of supply of power as per the PPA whichever is earlier (Para 43, 44 & 45)	Allowed upto 30.6.2017 or the last date of supply of power as per the PPA whichever is earlier (Para 43, 44, and 45)
4	Levy of Electricity duty of Auxiliary Consumption	Allowed in terms of para 55	Allowed in terms of para 55
5	Levy of Chhattisgarh Paryavaran Upkar evam Vikas Upkar	Allowed as per para 49	Allowed as per para 49
6	Levy of Excise Duty on coal	Not allowed on account of want of relevant documents	Not allowed on account of want of relevant documents
7	Levy of Entry Tax on coal	Not allowed on account of want of relevant documents	Not allowed on account of want of relevant documents
8	Levy of Service Tax including Swachh Bharat Cess on Coal Transportation	-	Not allowed on account of want of relevant documents
9.	Levy of VAT	Not allowed on account of want of relevant documents	Not allowed on account of want of relevant documents
10.	Carrying cost	Not Allowed	Not Allowed

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

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

Sd/-
(A.S. Bakshi)
Member

Sd/-
(A.K. Singhal)
Member

Sd/-
(Gireesh B.Pradhan)
Chairperson