

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 235/MP/2015**

**Coram:**

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

**Date of Order: 4<sup>th</sup> of May, 2017**

**In the matter of:**

Petition under Section 79 of the Electricity Act, 2003 read with Article 13 of the Power Purchase Agreements dated 2.2.2007 and 6.2.2007 executed by Adani Power Ltd. with Gujarat Urja Vikas Nigam Ltd. and the Power Purchase Agreements dated 7.8.2008 executed by Adani Power Ltd. with Uttar Haryana Bijli Vitran Nigam Limited/ Dakshin Haryana Bijli Vitran Nigam Limited during the operating period.

**And**

**In the matter of:**

Adani Power Limited  
"Adani House"  
Near Mithakhali Six Roads, Navarangpura  
Ahmedabad-380009

**...Petitioner**

Vs

1. Uttar Haryana Bijli Vitran Nigam Limited  
Shakti Bhawan, Sector 6  
Panchkula, Haryana- 134 109

2. Dakshin Haryana Bijli Vitran Nigam Limited  
VidyutSadan, Vidyut Nagar  
Hisar, Haryana-125005

3. Gujarat Urja Vikas Nigam Limited  
Sardar Patel Vidyut Bhavan,  
Race Course Circle, Vadodara – 390 007

**...Respondents**

**For Petitioner** : Shri Krishnan Venugopal, Senior Advocate, APL  
Ms.Poonam Verma, Advocate, APL  
Shri M.R. Krishna Rao, APL  
Shri Malav Deliwala, APL

**For Respondents** : Shri G. Umapathy, Advocate, Haryana Utilities  
Shri Anand K.Ganesan, Advocate, GUVNL  
Shri N.A. Patel, GUVNL

Shri S.K. Nair, GUVNL  
Shri Ravi Juneja, HPPC  
Shri Vikrant Saini, HPPC

**ORDER**

The present petition has been filed by Adani Power Ltd. (hereinafter referred to as the "Petitioner" or APL) seeking certain relief for Change in Law event as per Article 13 of the PPAs dated 2.2.2007, 6.2.2007 and 7.8.2008 during the operating period.

2. The Petitioner has set up a 4620 MW Thermal Power Plant (hereinafter "Mundra Power Project") within Special Economic Zone at Mundra, Gujarat consisting of four Units of 330 MW in Phase I and II, two Units of 660 MW in Phase III and three Units of 660 MW in Phase IV. The Petitioner has entered into the following long term Power Purchase Agreements ("PPAs") for supply of electricity from the generating station:

(a) PPA dated 2.2.2007 with Gujarat Urja (GUVNL) for supply of 1000 MW from Units 5 and 6. ("Gujarat Bid-2 PPA")

(b) PPA dated 6.2.2007 with Gujarat Urja(GUVNL) for supply of 1000 MW from Units 1 to 4. ("Gujarat Bid-1 PPA")

(c) PPAs dated 7.8.2008 with Uttar Haryana Bijli Vitran Nigam Ltd. and Dakshin Haryana Bijli Vitran Nigam Ltd. for supply of 1424 MW (712 MW each to UHBVNL and DHBVNL) from Units 7 to 9. ("Haryana PPA")

3. The details of Bid dead line and the cut-off date for the three PPAs are as under:-

<b>Particulars</b>	<b>Haryana Bid PPA dated 7.8.2008</b>	<b>Gujarat Bid – 2 PPA dated 2.2.2007</b>	<b>Gujarat Bid – 1 PPA dated 6.2.2007</b>
Bid Deadline	26.11.2007	2.1.2007	11.1.2007
Cut-Off Date (7 days prior to bid deadline)	19.11.2007	26.12.2006	4.1.2007

4. The Petitioner has submitted that due to withdrawal of exemption of all the duties under the Customs Act, 1962, the Customs Tariff Act, 1975, the Central Excise Act, 1944 and/or the Central Excise Tariff Act, 1985 w.e.f 1.4.2015 pursuant to Notification dated 6.4.2015 issued by Ministry of Commerce & Industry, the Petitioner is required to pay the following:

(a) Basic Custom Duty on import of coal. At present Basic Custom Duty on import of steam coal from Indonesia/AFTA countries is zero, whereas it is applicable for import from non-AFTA countries.

(b) Clean Energy Cess on import of coal.

(c) Countervailing Duty on import of coal (equal to Central Excise duty levied on similar goods produced in India).

(d) Duties under Customs Act, 1962, Customs Tariff Act, 1975, Central Excise Act, 1944 and/or Central Excise Tariff Act, 1985 on import/procurement of any other goods required for generation of electricity for supply under PPAs dated 2.2.2007, 6.2.2007 and 7.8.2008.

5. The Petitioner has also submitted an additional affidavit dated 10.3.2016 relating to withdrawal of Service Tax benefit by Ministry of Commerce and Industry vide its notification dated 16.2.2016 in respect of power plants approved prior to 27.2.2009 and located in a Special Economic Zone and increase in Clean Energy

Cess from ₹200/Tonne to ₹400/Tonne in terms of the provisions of change in law of the PPAs.

6. The Petitioner has submitted that these events have occurred after the cut-off date affecting the cost/revenue of the Petitioner for supply of power to the Procurers and are, therefore covered under Change in Law, entitling the Petitioner for compensation in terms of Article 13 of the PPAs. The Petitioner wrote to GUVNL raising supplementary invoices for the month of April, 2015 (for both Bid-01 and Bid-02 PPAs) for impact of the aforesaid Change in Law event. The Petitioner has also submitted that by raising the invoice dated 6.8.2015, APL notified GUVNL regarding the change in law event. On 10.8.2015, GUVNL replied that the invoices dated 6.8.2015 are not in line with orders of Gujarat Commission. On 7.8.2015, the Petitioner again wrote to GUVNL clarifying the event of change in law. The Petitioner notified the Haryana Utilities regarding change in law events by letter dated 1.9.2015 and raised the supplementary invoice on 2.9.2015 for the month of April 2015.

7. In the above background, the Petitioner has filed the present petition seeking following reliefs:

“(a) Declare that withdrawal of exemption from duties leviable under Customs Act, 1962, Customs Tariff Act, 1975, Central Excise Act, 1944 and/or Central Excise Tariff Act, 1985 w.e.f. 01.04.2015 as ‘Change in Law’.

(b) Direct the Respondents to make the payment of the compensation in accordance with the methodology as indicated in the petition for the aforementioned Change in Law event w.e.f. 01.04.2015.

(c) Direct the Respondents to pay in the interim 95% of the amount payable towards Change in Law during the pendency of Petition subject to adjustment based on final orders of Hon’ble Commission.

(d) Direct the Respondents to pay Late Payment Surcharge as applicable under the PPAs for the period of delay from the date of notification of Change in Law.

(e) 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.”

8. Haryana utilities in their reply filed on 7.1.2016 objected to the maintainability of the petition filed by the Petitioner on the premise that there is no composite scheme within the meaning of Section 79(1) (b) of the Electricity Act, 2003 and this Commission has no jurisdiction to decide the issues raised in the petition. Haryana Utilities have also submitted that they have elaborately stated the grounds challenging jurisdiction of this Commission in their reply dated 12.9.2014 in Petition No. 156 of 2014 filed by Petitioner seeking approval of certain events as Change in Law and requested the Commission to consider the same in this petition as well. GUVNL has also disputed the jurisdiction of the Commission in the reply filed on 18.1.2016 claiming that Appropriate Commission as per Gujarat PPAs is GERC and the terms and conditions of each PPA with Gujarat are different and distinct from each other and also from the PPA dated 7.8.2008 with Haryana utilities. GUVNL has also submitted that no other party is having long term share from Units supplying power under PPAs to GUVNL and there is no common availability and scheduling of power for the entire power project. The Petitioner in its rejoinders dated 10.6.2016 has submitted that the contention of Haryana Utilities and GUVNL on the issue of jurisdiction of this Hon'ble Commission is devoid of any merit and is barred by the principle of *res-judicata*. The Petitioner has submitted that the question of whether Adani Power has a Composite Scheme for generation and sale of electricity in more than one state or not has been conclusively decided by this Commission by Order dated 16.10.2012 passed in Petition No. 155/MP/2012 and Order dated 16.1.2013 passed in Review Petition No. 26 of 2012. The said decisions have also been followed by this Commission in its Orders dated 9.10.2015 and 13.10.2015 in the Petition No. 24/MP/2014 and 156/MP/2013 respectively. The Petitioner has

submitted that this Commission has held that Adani Power, being a generating company and having a composite scheme for generation and sale of electricity from Mundra Power Project in more than one state, is amenable to the jurisdiction of this Commission.

9. With regard to levy of Basic Customs Duty on imported coal, Haryana Utilities in their reply dated 7.1.2016 have submitted that Mundra Phase IV was the identified source of generation under the PPAs for supply to Haryana Utilities. Though RfP documents for the process under consideration did not require specifying prevailing duties, taxes and levies, it was mandatory for the bidder to quote tariff considering such applicable duty/taxes/levies. Accordingly, the Haryana Discoms have requested the Commission to ascertain applicability of basic custom duty on imported coal at the time of bid and accordingly consider allowing the change in law. As regards Clean Energy Cess on imported coal, Haryana Utilities have submitted that at the time of submission of the bid, there was no Clean Energy Cess on coal and Government of India had introduced Clean Energy Cess in the Finance Act, 2010 which was after the due date. However, the Petitioner was expected to factor such risk in the bid. The Clean Energy Cess is levied only on the production of coal and not on the business of generation and sale of electricity. Haryana Utilities have further submitted that if the Commission allows Clean Energy Cess as a Change in Law, the impact shall be restricted in proportion to the quantum of imported coal used to comply with the obligation for supply of power to the Respondents in terms of the Petitioner's affidavit dated 8.5.2015 filed in Case No. 98 of 2014 before the Hon'ble APTEL. As regards levy of Countervailing Duty on imported coal, Haryana Utilities have submitted that though the RfP documents for the process under consideration did not require specifying prevailing duties, taxes and levies, it was

mandatory for the bidder to quote tariff considering applicable duty / taxes/ levies at state periphery. Accordingly, Haryana Utilities have requested the Commission to ascertain applicability of countervailing duty on imported coal at the time of bid and allow change in law to the extent of imported fuel used for the obligation for supply of power to Haryana as submitted in affidavit dated 8.5.2015. As regards levy of duties under Customs Act, 1962, Customs Tariff Act, 1975, Central Excise Act, 1944 and/or Central Excise Tariff Act, 1985 on import/ procurement of any other goods, Haryana Utilities have submitted that in the Case-I bidding the quoted tariff consists of Fixed Charges and Energy Charges and the successful bidder had agreed to supply the power on the above charges. In the fixed charges, all the components (Viz. including RoE, Interest on Loan, Depreciation, Interest on working, capital, O&M Costs, Cost of Secondary Fuel etc.) of tariff had already been envisaged while quoting the Fixed Charge under Case-I bidding. The Change in Law issue, for the same will not arise as all the O&M charges for 25 years should have been considered and factored while quoting the bid.

10. On merit, GUVNL in its reply dated 18.1.2016 has submitted, with respect to PPAs dated 6.2.2007 and 2.2.2007 that the claim of change in law should be allowed only in terms of the Article 13 of the PPA and no other claim should be admissible. As regards Clean Energy Cess, GUVNL has submitted that the Petitioner has not challenged the methodology and parameters adopted by GERC in its order dated 21.10.2011 in the Petition No. 1080/2010 and order dated 7.1.2013 in the Petition No. 1210/2011 filed by the Petitioner, while approving the Clean Energy Cess at ₹50/Tonne based on notification issued by Department of Revenue, Ministry of Finance. Therefore, the Gujarat Commission order has attained finality and based on the same methodology, the impact of Clean Energy Cess at ₹200/Tonne on

proportionate basis would work out to ₹0.0888/Kwh. Therefore, the impact of Clean Energy Cess should not go beyond ₹0.0888/kWh. As regards the Basic Customs Duty on imported coal, GUVNL has submitted that the admitted position is that there is no such levy on coal imported from Indonesia from whom it is being presently procured. In the circumstances, there cannot be any academic consideration of the issue if there is no impact.

11. The Petitioner has filed rejoinders dated 10.3.2016 to the replies of the respondents. The Petitioner vide its affidavit dated 10.3.2016 in response to Haryana Utilities reply has submitted that the Commission may approve the mechanism for compensation to be provided to Petitioner for the Change in Laws and the actual compensation may differ from month to month depending on actual quantity of domestic as well as imported coal used by the Petitioner. The Petitioner has submitted that it was exempted from all the duties as on the cut-off dates. Accordingly, Basic Custom Duty and Countervailing Duty on the imported coal, applicable to the Petitioner, at the time of the bid was zero. Levy of Basic Custom Duty and Countervailing Duty is a change in law event under Article 13 of the PPA. As regards the contention of Haryana Discoms that Clean Energy Cess is levied only on the production of coal and not on the business of generation or sale of electricity, the Petitioner has submitted that the Clean Energy Cess is a duty payable on coal which is the raw material required for generation of electricity and clearly impact the cost of generation. The Petitioner has further submitted that subsequent to the filing of the petition, the Clean Energy Cess has been increased to ₹400/Tonne. As regards the contention of Haryana Discoms that the quoted tariff consists of Fixed Charges and Energy Charges and the change in law issue for the fixed charge will not arise as all the O&M charges for 25 years were considered and factored while



quoting the bid, the Petitioner has submitted that the bidder quotes the bid on the basis of duties, taxes and other levies applicable as on date of bidding and the bidder has no means of knowing what change will occur in future. Any subsequent variation in taxes, duties and other levies which increases the cost or reduces the revenue of the Seller/Generating Company, whether it affects the Energy Charges or Fixed Charges, is covered within the scope of Change in law. The Petitioner has further submitted that increase in Operation and Maintenance expenses of Mundra power plant due to levy of taxes, duties and other levies increases the cost or reduces revenue from the business of generating and selling electricity by the Petitioner to Haryana Utilities in the Operation Period. The Petitioner has further submitted that clause 2.7.2.4 of the RFP quoted by Haryana Utilities in their reply does not cast any responsibility on the Bidder to take into account future changes in taxes, levies or costs on account of change in law. The Petitioner vide affidavit dated 10.3.2016 has submitted that GUVNL's submission that impact of Change in Law to be passed is restricted to Change in Law to cover taxes/surcharges/cess/levy or similar charges (i) on Water, (ii) on Primary fuel, (iii) on generation and sale of electricity, (iv) on consent/compliances pertaining to Environment is wrong and denied. The Petitioner has further submitted that Clause 4.7 of the Competitive Bidding Guidelines does not restrict impact of change in law only to changes on water, on Primary Fuel, etc., and any variation in taxes, duties and other levies which increases the cost or reduces the revenue of the Seller/Generating Company, whether' it affects the cost of consumables and spares or primary fuel, is covered within the meaning of Change in Law. As regards the submission by GUVNL that there is an exemption from payment of education cess and higher education cess on goods to which clean energy cess is applicable, the Petitioner has submitted that Ld.

Gujarat Commission while passing order dated 21.10.2011 did not take into consideration Education Cess and Higher Education Cess since the same was not applicable on clean energy Cess when the order was passed by Ld. Gujarat Commission. Further, the Petitioner has submitted that the Notification Nos. 28 and 29 of 2010 dated 22.6.2010 have been rescinded by the Govt. of India by Notification No. 17 of 2015 dated 1.3.2015. Therefore, Education Cess and Higher Education Cess is applicable to goods on which clean energy cess is applicable. The Petitioner has submitted that the Clean Energy Cess cannot be restricted to ₹0.888/Unit since pursuant to filing of the petition; the Clean Energy Cess has been increased to ₹400/Tonne. The Petitioner has also relied on the parameters/principles considered by CERC for determination of compensatory tariff and requested the Commission to determine the per Unit impact of the levy of Clean Energy Cess and other change in law events under the PPA dated 6.2.2007 by considering operational parameters as per CERC norms. As regards GUVNL's submission that Basic Customs Duty is not levied on imported coal from Indonesia, the Petitioner has submitted that at present Basic Custom Duty on import of steam coal from Indonesia/AFTA Countries is zero, whereas it is applicable for import from non AFTA countries.

12. Learned senior counsel for the petitioner submitted during the hearing that the Mundra TPS was exempted from duties under Customs Act, 1962, Customs Tariff Act, 1975, Central Excise Act, 1944 and/or Central Excise Tariff Act, 1985; and from Service Tax on taxable service provided to the Petitioner to carry on the authorized operations in a Special Economic Zone as on the cut-off dates of the respective PPAs. Learned senior counsel further submitted that on 6.4.2015, Ministry of Commerce and Industry issued two notifications withdrawing 2012 Guidelines and restoring 2009 Guidelines, w.e.f. 1.4.2015 and stipulating that those power plants

which are presently situated in processing areas in a Special Economic Zone shall be demarcated as a non-processing area and no operation and maintenance benefits available to units in SEZ would now be available for such plants. The effect of Notifications dated 6.4.2015 was that the exemption of all the duties under Customs Act, 1962, Customs Tariff Act, 1975, Central Excise Act, 1944 and/or Central Excise Tariff Act, 1985 on goods imported/procured by the Petitioner for authorized operations in a SEZ was withdrawn w.e.f.1.4.2015. Learned senior counsel also submitted that the Ministry of Commerce and Industry vide its Notification dated 16.2.2016 had also withdrawn the exemption from service tax on units located in SEZ which the Petitioner was entitled to as on the cut-off date. Learned Senior Counsel for the Petitioner stated that while submitting the bid, the Petitioner was aware that the project would be located in the Special Economic Zone at Mundra, Gujarat and had factored all the concessions/ benefits of the SEZ while quoting the tariff. Learned senior counsel also clarified that GUVNL was aware about the SEZ status of the Petitioner as admitted by GUVNL in the order annexed with GUVNL's reply and the issue was duly considered by Gujarat Electricity Regulatory Commission in its order dated 21.10.2011 in Petition No. 1080/2011.

13. Learned counsel for Haryana Discoms submitted during the hearing held on 13.4.2015 that the Petitioner has filed an affidavit dated 8.5.2015 before the Hon'ble Appellate Tribunal in Appeal No. 98 of 2014 stating that it would utilize entire domestic coal under linkage for Units 7, 8 and 9 till the time the Petitioner executes any long term PPA or the Govt. of India permits the use of linkage coal for short term/medium term PPA or any change in government policy. Change in law for domestic coal shall be in accordance with the decision of the Commission in Petition No. 156/MP/2014. Learned counsel for GUVNL submitted that the Petitioner's claim

under change in law should be restricted to the items mentioned in Article 13 and no other claim is admissible including claim towards duty on import of consumables and spares.

14. The Commission in the Record of Proceedings for the hearing dated 10.12.2015 directed the Petitioner to file an affidavit to the following effects:

(a) At the time of bidding, Adani Power was aware that the project was going to be located in the Special Economic Zone.

(b) Adani Power has factored the concessions/benefits of the Special Economic Zone in the petition.

15. The Petitioner has replied to the queries of the Commission in its affidavit dated 18.1.2016. The submissions made by the Petitioner in the said affidavit are discussed briefly as under:-

(a) The Petitioner has filed the present petition in respect of the 4 long term Power Purchase Agreement executed by Adani Power for supply of power from its 4620 MW coal fired power plant situated in the Special Economic Zone at Mundra, namely:

(i) PPA dated 2.2.2007 with GUVNL for supply of 1000 MW from Unit 5 and 6 (Bid-02 PPA);

(ii) PPA dated 6.2.2007 with GUVNL for supply of 1000 MW from Units 1 to 4 (Bid-01 PPA); and

(iii) PPA dated 7.8.2008 with UHBVNL & DHBVNL for supply of 1424 MW from Unit 7 to 9 (Haryana PPAs).

(b) The Petitioner has given the following details with regard to the execution of the PPAs pursuant to the competitive bidding process:

	<b>Haryana PPA</b>	<b>Gujarat Bid-01 PPA</b>	<b>Gujarat Bid-02 PPA</b>
RfQ Date	25.5.2006	6.2.2006	1.2.2006
RfP Date	4.6.2007	26.6.2006	24.11.2006
Bid Date	24.11.2007	11.1.2007	2.1.2007
Bid Deadline	26.11.2007	11.1.2007*	2.1.2007
Cut-Off Date (7 days prior to bid deadline)	19.11.2007	4.1.2007	26.12.2006
LOI	17.7.2008 for 1311 MW & 1.8.2008 for 113 MW	12.1.2007	11.1.2007
PPA date	7.8.2008	6.2.2007	2.2.2007
PPA @ Levelised Tariff	₹2.94/Unit	₹2.89/Unit	₹2.35/Unit
Units of Mundra Power Plant	7 to 9 (Phase IV)	1 to 4 (Phase I and II)	5 to 6 (Phase III)

\*Original bid deadline was 11.9.2006, however, revised bids were sought from the bidders and last date for submission of revised bids was 30.11.2006. Thereafter, Adani Power submitted revised bid on 29.11.2006. On 11.1.2007, in a meeting between the parties, on request of Gujarat Urja, Adani Power further revised the levelised tariff to ₹2.890/Unit.

(c) Bid dated 24.11.2007 (Haryana PPA) clearly mentions location of proposed power plant at Mundra, Kutch, Gujarat. Ministry of Commerce and Industry, Government of India approved Adani Power as Co-Developer, under Section 2 (f) of SEZ Act, 2005, on 7.6.2006. Subsequently, on 19.12.2006, Ministry of Commerce and Industry, Government of India granted approval to Adani Power for setting up of sector specific Special Economic Zone for power sector. Therefore, while submitting the bid, Adani Power was aware that the project was going to be located in the Special Economic Zone at Mundra, Gujarat and had factored all the concessions/benefits of the SEZ while quoting the tariff.

(d) Bid dated 9.9.2006 (Gujarat Bid 1 PPA) as well as revised Bid dated 29.11.2006 clearly mentions location of proposed power plant at Mundra, Kutch, Gujarat. Thereafter, the tariff was further revised by Adani Power after the request of Gujarat Urja in meeting dated 11.1.2007. Ministry of Commerce and Industry, Government of India approved Adani Power as Co-Developer, under Section 2 (f) of SEZ Act, 2005, on 7.6.2006. Subsequently, on 19.12.2006, Ministry of Commerce and Industry, Government of India granted approval to Adani Power for setting up of sector specific Special Economic Zone for power sector. Therefore, while quoting the tariff, Adani Power was aware that the project was going to be located in the Special Economic Zone at Mundra, Gujarat and had factored all the concessions/benefits of the SEZ while quoting the tariff.

(e) In case of Bid dated 2.1.2007 (Gujarat Bid 2 PPA), Adani Power mentioned location of proposed Power Plant as Chhattisgarh with alternative project site at Mundra and quoted tariff remained the same for both locations. While providing Mundra as alternate site with the same tariff quoted in the bid, Adani Power had factored all the concessions/benefits of setting up power plant in SEZ. A supplementary PPA dated 18.4.2007 was executed between Adani Power and Gujarat Urja to change the Delivery Point to Mundra Thermal Power Project bus bar situated at Mundra, District, Kutch, Gujarat.

**Analysis and Decision:**

16. On consideration of the facts on record and arguments during the hearing of the petition, the following issues arise for our consideration:

- a) Jurisdiction of the Commission to adjudicate the dispute relating to Change in Law under the PPAs between the Petitioner and the respondents;**
- b) Notices to the Respondents for the events of Change in Law in terms of the PPAs;**
- c) Consideration of the various events of Change in Law claimed in terms of the provisions of the PPAs;**
- d) Mechanism for processing and reimbursement for Change in Law events.**

**Issue No.1: Jurisdiction of the Commission to adjudicate the dispute between the Petitioner and the Respondents with regard to events of Change in Law**

17. A preliminary issue has been raised by the Respondents, GUVNL and Haryana utilities, with regard to jurisdiction of the Commission to deal with the Change in Law events arising out of the PPAs dated 2.2.2007, 6.2.2007 and 7.8.2008. The Respondents have submitted that the appropriate forum for adjudication of dispute relating to Change in Law are the respective State Commissions. Haryana Utilities have also requested the Commission to consider detailed submission made with regard to jurisdiction of the Commission in their reply dated 12.9.2014 in Petition No. 156 of 2014 filed by the Petitioner before the Commission seeking approval of certain events as Change in Law. It is pertinent to mention that the Commission in its order dated 16.10.2012 in Petition No. 155/MP/2012 had held that the Petitioner has a composite scheme in respect of the Mundra Power Project since it is supplying power to more than one State. The

Review Petition on the said issue filed by Haryana Utilities was dismissed vide order dated 16.1.2013. The Appellate Tribunal in the judgement dated 7.4.2016 in Appeal Nos.100 of 2013 and 98 of 2014 and other related appeals decided that sale of power to more than one State from the same generating station of a generating company qualifies as a composite scheme to attract jurisdiction of the Central Commission under Section 79 of the Act and since Adani Power is selling electricity in more than one State from its generating station at Mundra, it has a composite scheme within the meaning of Section 79 (1) (b) of the Act for the Central Commission to exercise jurisdiction.

18. Hon'ble Supreme Court in its judgment dated 11.4.2017 in Civil Appeal Nos. 5399-5400 of 2016 (Energy Watchdog Vs. CERC) and other related appeals has held that Adani Power has a composite scheme for generation and sale of power from Mundra Power Project and the Central Commission has the necessary jurisdiction to adjudicate the issues pertaining to the said generating station.

19. In the light of the decision of the Hon'ble Supreme Court, this Commission has the jurisdiction to regulate the tariff of Mundra Power Project of the Petitioner under Section 79 (1) (b) of the Act and to adjudicate the disputes in terms of Section 79 (1) (f) of the Act.

**Issue No.2: Notices to the Respondents for the events of Change in Law in terms of the PPAs:**

20. The Petitioner's claims in the present petition pertain to Change in Law. For consideration of the disputes relating to Change in Law, it is necessary that the Petitioner has to give notice to the Procurers in terms of Article 13.3 of the PPA. Article 13.3 of Haryana PPAs is extracted as under:



### **“13.3 Notification of Change in Law**

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

13.3.2 Notwithstanding Article 13.3.1, the Seller shall be obliged to serve a notice to the procurer under this Article 13.3.2 if it is beneficially affected by a Change in Law. Without prejudice to the factor of materiality or other provisions contained in this Agreement, the obligation to inform the Procurer contained herein shall be material. Provided that in case the Seller has not provided such notice, the Procurer shall have the right to issue such notice to the Seller.

13.3.3 Any notice served pursuant to this Article 13.3.2 shall provide, amongst other things, precise details of:

- (a) the “Change in Law”; and
- (b) the effects on the Seller of the matters referred to in Article 13.2”

No Article in Bid -01 PPAs for ‘Notification of Change in Law’

Article 13.3 of GUVNL Bid -02 PPAs is extracted as under:

### **“13.3 Notification of Change in Law**

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

13.3.2 Without prejudice to the factor of materiality or other provisions contained in this Agreement, the obligation to inform the Procurer contained herein shall be material. Provided that in case the Seller has not provided such notice, the Procurer shall have the right to issue such notice to the Seller.

13.3.3 Any notice served pursuant to this Article 13.3.2 shall provide, amongst other things, precise details of:

- (a) the “Change in Law”; and
- (b) the effects on the Seller of the matters referred to in Article 13.2.
- (c) the date of impact resulting from the occurrence of Article 13.1.1”

21. The Petitioner has submitted that it has duly informed the respondents about the events of Change in Law and their impact vide following notices.

- a) Notice dated 6.8.2015 to GUVNL raising supplementary invoices for the month of April, 2015 (for both Bid-01 and Bid-02 PPAs) for impact of the aforesaid Change in Law event namely withdrawal of exemption of duties under Customs Act, 1962, Customs Tariff Act, 1975, Central Excise Act, 1944 and/or Central Excise Tariff Act, 1985.
- b) Notice dated 7.10.2015 to GUVNL regarding the Change in Law event in response to GUVNL letter dated 10.8.2015.
- c) Notice dated 2.3.2016 to Haryana Utilities and GUVNL regarding increase in clean energy cess, Service Tax implication on power plants located in SEZ and introduction of *Krishi Kalyan Cess* under Finance Bill, 2006.
- d) Notice dated 1.9.2015 to Haryana Utilities regarding change in law events.

22. GUVNL vide its letter dated 10.8.2015 replied to the Petitioner that the invoices dated 6.8.2015 raised by the Petitioner are not in line with the order of GERC dated 21.10.2011 in Petition No. 1080 of 2011 and 7.1.2013 in Petition No. 1210 of 2010. The Petitioner in its letter dated 7.10.2015 has clarified that queries of GUVNL.

**Issue No.3: Consideration of the various events of Change in Law in terms of the provisions of the PPAs**

23. The claims of the Petitioner are with respect to events under Change in Law under Article 13 of the PPAs which occurred after the cut-off dates i.e.19.11.2007, 26.12.2006 and 4.1.2007 for Haryana and GUVNL PPAs respectively. Article 13 of the PPAs between the Petitioner and Haryana Utilities is extracted as under:

## “13. CHANGE IN LAW

### 13.1 Definitions

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

13. 1.1 "Change in Law" means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline:

(i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law or (ii) a change in interpretation of any Law by a Competent Court of law, tribunal or Indian Governmental Instrumentality provided such Court of law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation or (iii) change in any consents, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer under the terms of this Agreement;

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

Provided that if Government of India does not extend the income tax holiday for power generation projects under Section 80 IA of the Income Tax Act, upto the Scheduled Commercial Operation Date of the Power Station, such non-extension shall be deemed to be a Change in Law (applicable only in case the Seller envisaging supply from the Project awarded the status of "Mega Power Project" by Government of India).

#### **13.1.2 "Competent Court" means:**

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

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

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

#### **Operation Period**

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

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

Further, the terms “Law” and “Indian Government Instrumentalities” have been defined in the PPAs as under:

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

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

Article 13 of the Gujarat Bid - 1 PPA dated 6.2.2007 deals with Change in Law and is extracted for reference as under:

**“13.1 Definitions**

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

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

- i. the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any statute, decree, ordinance or other law, regulation, notice, circular, code, rule or direction by any Governmental Instrumentality or a change in its interpretation by a Competent Court of law, tribunal, government or statutory authority or any of the above regulations, taxes, duties charges, levies, etc., or
- ii. the imposition by any Governmental Instrumentality, which includes the Government of the State where the project is located, of any material *condition in connection with the issuance, renewal, modification, revocation or non-renewal (other than for cause) of any Consent after the date of this Agreement.*

*that in either of the above cases*

- a) *results in any change with respect to any tax or surcharge or cess levied or similar charges by the Competent Government on water, primary fuel used by the generating plant, the generation of electricity (leviable on the final output in the form of energy), sale of electricity and,*
- b) *relating to consents/compliance pertaining to environment results in any change in costs or revenue;*

**13.1.2 "Competent Court" means:** the Supreme Court of India or the Appellate Tribunal of Electricity or the High Court of Gujarat, or the Appropriate Commission.

## **13.2 Tariff Adjustment Payment for Change in Law**

13.2.1 The Seller shall have to move the Appropriate Commission to ascertain the impact of any Change in Law on the Seller's revenues and costs. The Seller shall be responsible for submission and resolution of petition for such Tariff Adjustment for Change in Law. If the Seller fails to move the Appropriate Commission, the Procurer may, at its option, take up the matter with the Appropriate Commission.

13.2.2 If a Change in Law results in the Seller's costs directly attributable to the Project being decreased or increased by one percent (1.0%) of the estimated revenue from the Electricity for the Contract Year (considering the tariff quoted in that Contract Year and the energy corresponding to 80% of the Contracted capacity and for the purpose of above calculations the quoted tariff will be as quoted by the Seller) for which such adjustment becomes applicable or more, during Operating Period, the Tariff Payment to the Seller shall be proportionately increased or decreased.

13.2.3. The Procurer or the Seller, as the case may be, shall provide the other Party with a certificate stating that the adjustment in the Tariff Payment is directly as a result of the Change in Law and shall provide supporting documents to substantiate the same and such certificate shall correctly reflect all increases or decreases till the date of such certificate.

13.2.4 The adjustment in Monthly Tariff Payment for reasons attributable to Article 13.2. shall be effective from:

- (i) the date of adoption, promulgation, amendment, re-enactment or repeal of the Law;
- (ii) the date of order/judgement of the Competent Court, if the Change in Law is on account of a change in interpretation of Law;
- (iii) the date of impact resulting from the occurrence of Article 13.1.1 (ii)

13.2.5 The Payment of Change in Law shall be claimed through Supplementary bill as mentioned in Article 11.8 for the period for which such Change in Law is applicable while the Monthly Bill for such periods have already been raised by the Seller. For other bills, payment for Change in Law shall be claimed as a separate component of the Monthly Bill.

Article 13 of the Gujarat Bid – 02 PPA dated 2.2.2007 deals with Change in Law and is extracted for reference as under:

### **“13. CHANGE IN LAW**

#### **13.1 Definitions**

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

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

- (i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law or (ii) a change in interpretation of any

Law by a Competent Court of Jaw, tribunal or Indian Governmental Instrumentality provided such Court of law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation or (iii) change in any consents, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer under the terms of this Agreement, or (iv) any change in the cost of implementing Environmental Management Plan for the Power Station;

but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the seller, or (ii) change in respect of UI Charges or frequency intervals by an appropriate Commission. Provided that if Government of India does not extend the income tax holiday for power generation projects under Section 80 IA of the Income Tax Act, upto the Scheduled Commercial Operation Date of the Power Station, such non-extension shall be deemed to be a Change in Law.

**13.1.2 "Competent Court" means:**

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

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

**b) Operation Period**

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

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

Further, the terms "Law" and "Indian Government Instrumentalities" have been defined in the PPAs as under:

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

“Indian Governmental Instrumentality” means the Government of India (GOI), Government of Gujarat, Government where the project is located and any ministry or, department of or, board, agency or other regulatory or quasi-judicial authority controlled by GOI or Government of Gujarat or Government where the Project is located and includes the Appropriate Commission”.

24. A combined reading of the above provisions would reveal that this Commission has the jurisdiction to adjudicate upon the disputes between the Generating Company and Procurer(s) with regard to “Change in Law” which occur after the date which is seven days prior to the bid deadline (“cut-off date”). 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, or
- (b) Any change in interpretation of any Law by a Competent Court of law, tribunal or Indian Governmental Instrumentality acting as final authority under law for such interpretation, or
- (c) Any change in any consents or approvals or licenses available or obtained for the project, otherwise than the default of the seller.
- (d) Such changes shall result in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer under the terms of this Agreement except as explained in sub-para (f) in respect of Gujarat PPA dated 2.2.20017 (Bid 2).
- (e) The purpose of compensating the Party affected by such Change in Law is to restore through Monthly Tariff Payments, to the extent contemplated in this Article 13, the affected Party to the same economic position as if such “Change in Law” has not occurred.

(f) In case of Gujarat PPA dated 6.2.2007 (Bid-1), the change in law should result in change with respect to any tax, surcharge or cess levied or similar charges by the competent Government on water, primary fuel used by the generating plant/generation of electricity (leviable on final output in the form of energy), sale of electricity. Further, in case of consent/compliance pertaining to environment, change in law should result in any change in cost or revenue.

(g) In case of Gujarat PPA dated 2.2.2007 (Bid-2), any change in the cost of implementing the Environment Management Plan in respect of the power station is included under change in law.

25. Keeping in view, the above broad principles, we proceed to deal with the claims of the Petitioner under Change in Law.

26. The Petitioner has approached the Commission for approval of Change in Law in respect of (a) Basic Custom Duty on import of coal; (b) Clean Energy Cess on import of coal; (c) Countervailing Duty on import of coal; (d) Duties under Customs Act, 1962, Customs Tariff Act, 1975, Central Excise Act, 1944 and Central Excise Tariff Act 1985 on import/procurement of any other goods; and (e) withdrawal of exemption from Service Tax. The main plank of argument of the Petitioner is that as on the bid deadline, the project was exempt from all these taxes/duties/cess and accordingly, while quoting the bid, the Petitioner had factored the same in the bid. After the issue of Notification dated 6.4.2015 by Ministry of Commerce and Industry, the Petitioner has become liable to pay the charges and accordingly, has claimed these additional expenditure under Change in Law.



27. The Petitioner has set up the Mundra Power Project in the Special Economic Zone at Mundra. Accordingly, the project of the Petitioner is governed by the provisions of the Special Economic Zone Act, 2005. Ministry of Commerce and Industry, Government of India approved the Petitioner as Co-Developer under Section 2 (f) of the SEZ Act vide letter dated 7.6.2006. By a subsequent letter dated 19.12.2006, Ministry of Commerce and Industry, Government of India granted approval to the Petitioner for setting up sector specific Special Economic Zone for power sector. The project details mentioned in the approval letter is as under:

“To set up a sector specific Special Economic Zone for power sector for supply of power to SEZs, EOUs in Gujarat and other SEZs, EOUs and others.”

Thus, the Power Project was meant for supply of power to the SEZs and EOUs in Gujarat and other States. On 14.6.2007, Office of the Development Commissioner, Ministry of Commerce and Industry, Government of India passed an order under Section 6 of the SEZ Act where under the area identified by Adani Power for setting up a power plant was demarcated as Processing Area.

28. Section 26 of the Special Economic Zone Act, 2005 deals with the exemptions, drawbacks and concessions available to the developers setting up this business within the Special Economic Zone. Section 26 of the Special Economic Zone Act, 2005 provides as under:

“26. Exemptions, drawbacks and concessions to every Developer and entrepreneur.

(1) Subject to the provisions of sub-section (2), every Developer and the entrepreneur shall be entitled to the following exemptions, drawbacks and concessions, namely:—

(a) exemption from any duty of customs, under the Customs Act, 1962 (52 of 1962) or the Customs Tariff Act, 1975 (51 of 1975) or any other law for the time being in force, on goods imported into, or service provided in, a Special Economic Zone or a Unit, to carry on the authorised operations by the Developer or entrepreneur;

(b) exemption from any duty of customs, under the Customs Act, 1962 (52 of 1962) or the Customs Tariff Act, 1975 (51 of 1975) or any other law for the time being in force, on goods exported from, or services provided, from a Special Economic Zone or from a Unit, to any place outside India;

(c) exemption from any duty of excise, under the Central Excise Act, 1944 (1 of 1944) or the Central Tariff Act, 1985 (5 of 1986) or any other law for the time being in force, on goods brought from Domestic Tariff Area to a Special Economic Zone or Unit, to carry on the authorised operations by the Developer or entrepreneur;

(d) drawback or such other benefits as may be admissible from time to time on goods brought or services provided from the Domestic Tariff Area into a Special Economic Zone or Unit or services provided in a Special Economic Zone or Unit by the service providers located outside India to carry on the authorised operations by the Developer or entrepreneur;

(e) exemption from service tax under Chapter V of the Finance Act, 1994 (32 of 1994) on taxable services provided to a Developer or Unit to carry on the authorised operations in a Special Economic Zone;

(f) exemption from the securities transaction tax leviable under section 98 of the Finance (No. 2) Act, 2004 (23 of 2004) in case the taxable securities transactions are entered into by a non-resident through the International Financial Services Centre;

(g) exemption from the levy of taxes on the sale or purchase of goods other than newspapers under the Central Sales Tax Act, 1956 (74 of 1956) if such goods are meant to carry on the authorised operations by the Developer or entrepreneur.

(2) The Central Government may prescribe the manner in which, and the terms and conditions subject to which, the exemptions, concessions, drawback or other benefits shall be granted to the Developer or entrepreneur under sub-section (1).”

29. Under the above provisions, certain exemptions, drawbacks and concessions are available to the project developers setting up of power plants in SEZ to carry on the authorised operations by the developer or entrepreneur. They include (a) exemption from duty on customs under the Customs Act, 1962 and the Customs Tariff Act, 1975 on goods imported into or services provided in a Special Economic Zone or unit thereof; (b) exemption from any duty of customs under the Customs Act, 1962 or Customs Tariff Act, 1975 on goods exported from or any service provided from Special Economic Zone or unit thereof to any place outside India; (c) exemption from any duty of excise under the Central Excise Act, 1944 or Central Excise Tariff Act, 1985 on goods brought from Domestic Tariff Area to a Special Economic Zone or units; (d) drawback or such other benefits on goods brought or services provided

from Domestic Tariff Area into the Special Economic Zone or units thereof or services provided in a special economic zone or units thereof by service provider located outside India; (e) exemption from service tax under the Finance Act, 1994 on taxable services; and (f) exemption from the levy of taxes on sale or purchase of goods other than newspapers under the Central Sales Tax, 1956. In terms of Section 26 (1) of the Special Economic Zone Act, 2005, Adani Power as a Project Developer of power plant in SEZ is entitled for the following benefits:

- (i) Any duty leviable under Custom Act, 1962, Customs Tariff Act, 1975, Central Excise Act, 1944 or Central Excise Tariff Act, 1985 and Central Sales Tax Act on goods imported/procured for authorised operation by the Project Developer;
- (ii) Service tax on taxable services provided to the Project Developer to carry on authorised operation in the SEZ.

30. Sub-section 2 of Section 26 of the SEZ Act vests power in the Central Government to prescribe the manner in which and terms and conditions subject to which the exemptions, concessions, drawback or other benefits shall be granted to the Project Developer in SEZ under sub-section (1). Therefore, the Nodal Ministry, namely, the Ministry of Commerce and Industry, Government of India can vary the terms and conditions of exemptions, concessions, drawback or other benefits to the project developer within SEZ.

31. The Ministry of Commerce and Industry, Government of India issued guidelines on 27.2.2009 under Section 26 (2) of SEZ Act in respect of power plant

set up by developer/do-developer within the SEZ. The relevant provisions of the 2009 guidelines are extracted as under:

“(i) Power plant set up by developer/Co-developer

A power plant to be set up by developer/co-developer in an SEZ as part of infrastructure facility will be in the non-processing area of SEZ and will be entitled to fiscal benefits only for its initial setting up and no fiscal benefit would be admissible for its operation maintenance in terms of Rule 27(3) of the SEZ Rules. There will be no obligation to achieve positive Net Foreign Exchange Earning (NFE) for such power plants.

Constituents to whom it can supply power

Such a power plant can supply power to other facilities located in the non processing area of the same SEZ/facilities located in the non processing area of other SEZs, SEZ units located in the processing area of the same SEZ/SEZ units located in the processing area in other SEZs, facilities located in the processing area of the same SEZ/facilities located in the processing area of other SEZs and also Domestic Tariff Area (DTA).”

As per the above notification, the power plant as the infrastructural facility will be in the non-processing area of SEZ and shall be governed by the following terms and conditions:

- (a) The Power Plant will be entitled for fiscal benefits only for its initial setting up;
- (b) No fiscal benefits would be admissible for its operation and maintenance;
- (c) The Project Developer will have no obligation to achieve positive Net Foreign Exchange Earning (NFE) for such power plants;
- (d) Area of supply of power includes (i) other facilities located in the non-processing area of the same SEZ/facilities located in the non-processing areas of other SEZs; (ii) SEZ units located in the processing area of the same SEZ/SEZ units located in the processing areas of other SEZs; (iii) facilities located in the areas of same SEZs or facilities located in the processing areas of other SEZs; and (iv) Domestic Tariff Area.

32. In supersession of the notification dated 27.2.2009, the Ministry of Commerce and Industry, Government of India issued guidelines for power generation, transmission and distribution in SEZ vide notification dated 21.3.2012. The following provisions were made in the above guidelines with respect to the power plant set up by developer /co-developer:

“(i) A power plant can be set up by developer(s)/co-developer(s) in a SEZ, as part of infrastructure facility in the processing area or non-processing area of SEZ. Such a power plant set up in the processing area will be entitled to all benefits available to developers/co-developers, including fiscal benefits under Section 26 of the SEZ Act, 2005 including benefits for initial setting up, duty free imports of raw materials, components and consumables for operation and maintenance of power plant and generation of power. Similarly all obligations and responsibilities of a developer/co-developer under the Act and Rules etc shall be applicable. There will be no obligation to achieve positive Net Foreign Exchange Earning (NFE) for such power plants. However, a power plant to be set up by developer/ co-developer in an SEZ as part of infrastructure facility in the non processing area of SEZ will be entitled to fiscal benefits only for its initial setting up and no fiscal benefit would be admissible for its operation and maintenance in terms of Rule 27(3) of the SEZ Rules. There will be no obligation to achieve positive Net Foreign Exchange Earning (NFE) for such power plants”

The above guidelines made a distinction between a power plant set up in processing area and power plant set up in a non-processing area. A power plant set up in the processing area is entitled to all benefits available to developers/co-developers, including fiscal benefits under Section 26 of the SEZ Act for initial set up and duty free inputs of raw materials, components and consumables for maintenance and operation of power plant and generation of power. All obligations and responsibilities of a developer except the obligation to achieve NFE are applicable to such developers. However, a power plant set up in the non-processing area was entitled to fiscal benefits under Section 26 on initial setting up and it was not entitled for fiscal benefits for operation and maintenance.

33. On 6.4.2015, the Ministry of Commerce and Industry, Government of India issued two notifications under which guidelines issued vide letter dated 21.3.2012

were withdrawn and guidelines issued vide letter dated 27.2.2009 were restored. It was further clarified in the said letter that the power plants which are situated in the processing area of SEZ, would be demarcated as non-processing area and no operation and maintenance benefits would be available to such power plants.

34. The Ministry of Commerce and Industry, Government of India in supersession of all previous guidelines, issued guidelines dated 16.2.2016 clarifying the position of the power plants located in SEZ as under:

“(i) A power plant, including non-conventional energy power plant, to be set up by developer/co-developer in an SEZ as part of infrastructure facility will be in the Non-Processing Area of SEZ only, and will be entitled to fiscal benefits only for its initial setting up and no fiscal benefit would be admissible for its operation and maintenance. There will be no obligation to achieve positive Net Foreign Exchange (NFE) for such power plants, Such a power plant can supply power to DTA after meeting the power requirement of the SEZ subject to payment of custom duty as determined by DoR keeping in view the duty foregone on initial setting up of the power plant.

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(vi) Those Power Plants in SEZs which were approved prior to 27.02.2009, and subject to issue of Power Guidelines and provisions of SEZ Act & Rules, either as an infrastructure facility by Developer/Co-developer or as a unit in the processing Area, will be permitted to operate. It is relevant that during period of installation of such plants, duty benefits on capital investment of mega power plants were available under the then prevalent policy guidelines even in the DTA area.

Henceforth, such power plants will be allowed O&M benefits only with regard to the average monthly power supplied to entities within the same SEZ during the preceding year. Henceforth, no O&M benefits including service tax exemption will be allowed for power supplied to DTA/other SEZs/EOUs from such power plants. The surplus power generated in such power plants may be transferred to DTA, without payment of duty, keeping in consideration of the fact that no duty free benefits on raw materials, consumables, etc. have been availed for generation of such power. However, those power plants not having the capacity of the mega power plant, as given in DoR Notification No. 21/2002-Customs dated 01.03.2002, will be required to pay duty for sale in DTA, on account of duty free import of capital goods, as determined by DoR”.

35. As per the above guidelines, the power plant developed by project developer and co-developer will be in the non-processing area of SEZ only. Such power plants can supply power to the Domestic Tariff Area (DTA) after meeting the power requirements of SEZ subject to payment of custom duty, other duties and service

tax. Such power plants are entitled to O & M benefits only with regard to average monthly power supplied to entities within the same SEZ. However, no O & M benefits including service tax exemption are allowed for power supplied to DTA. DTA has been defined in the SEZ Act as “whole of India (including the territorial waters and continental shelf) but does not include the areas of the Special Economic Zone”. This provision in the Guidelines is in consonance with Rule 27 (3) of the Special Economic Zone Rules, 2006 which provides as under:

“27 (3) The import of duty free material for setting up educational institutions, hospitals, hotels, residential and/or business complex, leisure and entertainment facilities or any other facilities in the non-processing area of the Special Economic Zone shall be as approved by the Board and import of no duty free material shall be permitted for operation and maintenance of such facilities.”

Therefore, the Petitioner who is supplying power to GUVNL and Haryana Utilities shall be covered under the supply of power to DTA and shall not be entitled to O & M benefits including service tax exemption. It is pertinent to mention that under Section 26 of the SEZ Act, the Petitioner was entitled to benefits of duty and tax exemption during the construction as well as operation period. However, guidelines have been issued on 27.2.2009, 21.3.2012, 6.4.2015 and 16.2.2016 varying the manner and terms and conditions of benefits granted to the project developer setting up the power plant in the SEZ under Section 26 (2) of SEZ Act. The question for consideration is whether these guidelines shall be construed as Change in Law in terms of the PPAs entered into by the Petitioner with Gujarat and Haryana. In our considered view, Section 26 (1) permitted the duty exemption only for carrying out an authorised operation by the developer or entrepreneurs in the SEZ. The authorised operation as per the Ministry of Commerce and Industry letter dated 19.12.2016 is “to set up a sector specific Special Economic Zone for power

sector for supply of power to SEZs, EOUs in Gujarat or other SEZs, EOUs and others". Here, the word "others" will take colour from the words preceding it and will refer to other units engaged in "export" of goods and cannot cover the DTA. Supply of power from the generating station set up within the SEZ to the DTA can only be in variation of the terms and conditions of permission by Government of India, Ministry of Commerce and Industry. The Petitioner was aware from the very beginning that the duty concessions/exemptions are available for supply of power to SEZ or EOU or other exporting zones only, and not to the DTA. The Petitioner quoted the bids and was selected for supply of power to Gujarat and Haryana in the year 2007 and 2008 respectively. In other words, the Petitioner while quoting the bid to supply power from the power plant located in SEZ to the DTA was aware that there is provision under Section 26 (2) of the SEZ Act empowering the Central Government to prescribe the manner and terms and conditions under which the exemption, concessions, drawbacks and other benefits would be granted to the Project Developer. Once, the Project Developer decides to supply power to the DTA, it was expected of him to factor the taxes and duties prevailing as on the cut-off date while quoting the bid. The notification dated 27.2.2009 only gave effect to Section 26 (2) of the SEZ Act which was already prevailing in the statute book as on the bid deadline. The subsequent notifications, particularly, notification dated 6.4.2015 restored the applicability of the notification dated 27.2.2009. The notification dated 16.2.2016 further clarified the entitlement of power plant located in non-SEZ area. In our view, the notifications dated 27.2.2009, 21.3.2012, 5.4.2015 and 16.2.2016 which have been issued by Ministry of Commerce and Industry would not amount to Change in Law in terms of the PPAs as these notifications have been issued to give effect to the provisions of SEZ Act, 2005. However, the change in rates of custom duty,



excise duty, withholding tax and service tax on taxable services which have been imposed pursuant to the Acts passed by the Parliament shall be covered under Change in Law. As regards the Green Energy Cess, it was imposed after the cut-off date and satisfied the requirements of Change in Law. Accordingly, the Petitioner shall therefore be entitled for reimbursement of custom duty, excise duty on import/procurement of any other goods and service tax on the spares and consumables payable by it from 1.4.2015 on account of the withdrawal of exemption to the power plants located in the SEZ by the Ministry of Commercial and Industry only to the extent of difference in the duty or tax as on the cut off date and as prevailing as on 1.4.2015 and thereafter.

36. Next we proceed to deal with individual claims of the petitioner.

**(i) Levy of Basic Customs Duty on imported coal**

37. The Petitioner has submitted that after the Notifications dated 6.4.2015 issued by the Ministry of Commerce and Industry, Basic Custom Duty has become payable with effect from 1.4.2015 on coal imported by Adani Power for generating electricity for Mundra Power Plant. The Petitioner has also submitted that although Basic Custom Duty on import of steam coal from Indonesia/AFTA countries is currently zero, it is payable for coal imported from non AFTA countries.

38. Haryana Utilities have submitted that though RfP documents for the process under consideration did not require specifying prevailing duties, taxes and levies, it was mandatory for the bidder to quote tariff considering such applicable duty / taxes/ levies. Therefore, the Commission may ascertain applicability of basic custom duty on imported coal at the time of bid and accordingly consider allowing the change in law. GUVNL, on the other hand, submitted that there is no such levy on coal from

Indonesia from where it is being presently procured and hence there cannot be any academic consideration of the issue without there being any such impact.

39. We have considered the submissions of the parties. The Petitioner had entered into a consolidated Coal Supply Agreement (CSA) dated 26.7.2010 for supply of coal in Phase-1, Phase-2 and Phase-IV of the PPA by importing coal from Indonesia. Based on the said CSA dated 26.7.2010, the Petitioner had claimed relief on account of force majeure arising out of the promulgation of Indonesian Regulations in Petition No. 155/MP/2012. The Appellate Tribunal for Electricity in its judgment dated 7.4.2016 had ruled that the Petitioner was affected by force majeure on account of Indonesian Regulations. The Commission in its order dated 6.12.2016 in Petition No. 155/MP/2012 implemented the judgment of the Appellate Tribunal and granted relief to the Petitioner on import of coal from Indonesia consequent to the promulgation of Indonesian Regulations. The judgment of the Appellate Tribunal dated 7.4.2016 and the order of the Commission dated 6.12.2016 have been set aside by the Hon'ble Supreme Court in its judgement dated 11.4.2017 in Civil Appeal No. 5399-5400 of 2016 and related appeals. Hon'ble Supreme Court decided the issue of force majeure as under:

“45. We are, therefore, of the view that neither was the fundamental basis of the contract dislodged nor was any frustrating event, except for a rise in the price of coal, excluded by Clause 12.4, pointed out. Alternative modes of performance were available, albeit at a higher price. This does not lead to the contract, as a whole, being frustrated. Consequently, we are of the view that neither Clause 12.3 nor 12.7, referable to Section 32 of the Contract Act, will apply so as to enable the grant of compensatory tariff to the respondents.

In the light of the above judgment, the Petitioner is required to meet its contractual obligations by processing coal from any source. Therefore, the Petitioner shall be entitled for relief of custom duty on the entire quantum of imported coal irrespective of the source of import. At present, import of coal from AFTA countries

(Indonesia included) is not subject to custom duty. Therefore, the Petitioner shall be entitled for reimbursement of customs duty on coal imported from non AFTA countries on the differential in the rate of custom duty prevailing as on the bid deadline in each of the PPAs and the prevailing custom duty as on 1.4.2015 or thereafter.

**(ii) Levy of Clean Energy Cess on imported coal**

40. The Petitioner has submitted that at the time of submission of the bid, there was no Clean Energy cess on coal. However, after the Notification dated 6.4.2015 issued by the Ministry of Commerce and Industry, Clean Energy Cess of ₹200/Tonne is being levied on coal imported by Adani Power as it is a duty payable under Custom Tariff Act, 1975. Thereafter, Tenth Schedule to the Finance Act, 2010 was amended to increase Clean Energy Cess to ₹300/Tonne w.e.f. 1.4.2015. However, by Notification No. 1 of 2015, Government of India exempted the Clean Energy Cess over and above ₹200/Tonne. The Petitioner has submitted that subsequent to the filing of the Petition, the Clean Energy Cess has been increased to ₹400/Tonne. By Notification No. 1 of 2016 dated 1.3.2016, Government of India rescinded Notification No. 1 of 2015 (by which Clean Energy Cess over and above ₹200/Tonne was exempted). Government of India issued a communication dated 29.2.2016 informing that rate of Clean Energy Cess has been increased to ₹400/Tonne.

41. Haryana Discoms have submitted that at the time of submission of the bid, there was no Clean Energy Cess on coal and Government of India introduced Clean Energy Cess in the Finance Act, 2010 which was admittedly after the cut-off date. However, the Petitioner was expected to factor such risk in the bid. The Clean Energy Cess is levied only on the production of coal and not on the business of

generation and sale of electricity. Haryana Discoms have further submitted that in case, the Commission allows the levy of Clean Energy Cess to be considered a Change in Law event, the impact shall be restricted in proportion to the quantum of coal used for generation of contracted capacity of power.

42. GUVNL has submitted that the Petitioner has not challenged the methodology and parameters adopted by GERC in its order dated 21.10.2011 in Petition No. 1080/2010 filed by the Petitioner, while approving the Clean Energy Cess based on Department of Revenue, Ministry of Finance Notification at ₹50/Tonne. Therefore, the Gujarat Commission order has attained finality and based on the same methodology, the impact of Clean Energy Cess at ₹200/Tonne on proportionate basis would work out to ₹0.0888/kWh. Therefore, the impact of Clean Energy Cess should not go beyond ₹0.0888/kWh.

43. We have examined the submissions of the Petitioner and the respondents. It is noticed that the clean energy cess was introduced by Government of India through the Finance Act, 2010 which was after bid deadline of the Haryana PPAs and GUVNL PPA. The Clean Energy Cess was also subsequently revised by the Government of India. The details of Clean Energy Cess were applicable at different parts of India are as under:-

<b>Sr. No.</b>	<b>From</b>	<b>To</b>	<b>Applicable Clean Energy Cess (₹/Tonne)</b>
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.	1.4.2016	Till date	400

On the bid deadline of each of the PPAs, there was no Clean Energy Cess and therefore, the Petitioner could not be expected to factor in the impact of such

cess in the bids. Moreover, the imposition of Clean Energy Cess adds to the cost of import for generation of electricity for supply to GUVNL and Haryana Utilities. Therefore, Clean Energy Cess is covered under Article 13.1.1 (i) of Haryana PPA and Gujarat Bid 2 PPA and Article 13.1.1 (i) (a) of Gujarat Bid 2 PPA. The Petitioner is entitled to recover the expenditure incurred on payment of clean energy cess from Haryana Discoms and GUVNL as per applicable rates of clean energy cess prevailing at different point of time. The Petitioner is directed to furnish along with its monthly bill the proof of payment and computations duly certified by the auditor to Haryana Utilities and GUVNL. The Petitioner shall be entitled to recover clean energy cess on coal in proportion to the actual coal consumed corresponding to the scheduled generation for supply of electricity to Haryana Discoms and GUVNL. 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, Haryana Discoms and GUVNL are directed to carry out reconciliation on account of these claims annually.

44. GUVNL vide its affidavit dated 18.1.2016 has submitted that in terms of the Notification No. 28/2010-CE and 29/2010-CE of Department of Revenue, Ministry of Finance dated 22.6.2010, there is an exemption from payment of education cess and higher education cess on goods on which clean energy cess is applicable. GUVNL has submitted that GERC in its order dated 21.10.2011 has considered this aspect and not allowed the education cess and higher education cess over clean energy cess, which has not been challenged by the Petitioner and therefore, has attained finality. The Petitioner vide its rejoinder dated 10.3.2016 has submitted that Notification No. 28 and 29 of 2010 as referred by GUVNL have been rescinded by the Government of India vide Notification No. 17 of 2015 dated 1.3.2015 and

therefore, education cess and higher education cess is applicable to goods on which clean energy cess is applicable. We have perused the submissions of the Petitioner and the respondents. When the matter was decided by GERC, education cess and higher education cess were not applicable on clean energy cess in terms of the Notification Nos. 28 and 29 of 2010. After the Notification No. 17 of 2015 on 1.3.2015, education cess and higher education cess have become applicable. We are of the view that the Petitioner shall be entitled for reimbursement of education cess and higher education cess on clean energy cess with effect from 1.3.2015.

**(iii) Levy of Countervailing Duty on imported coal**

45. The Petitioner has submitted that after the notifications dated 6.4.2015 issued by Ministry of Commerce and Industry, Countervailing Duty (equal to Central Excise duty) of 2% of the assessed value of coal (net 2.06% after including 2% Education Cess and 1% higher education cess) is being levied on Adani Power for import of coal from Indonesia. Countervailing Duty is being levied on Adani Power since the same is a duty payable under Custom Tariff Act, 1975. It was further submitted that the Countervailing Duty for import of Coal from non AFTA countries is also 2% of the assessed value of the goods.

46. The respondents have submitted that though the RfP documents for the process under consideration did not require specifying prevailing duties, taxes and levies; it was mandatory for the bidder to quote tariff considering applicable duty/taxes/levies at state periphery. The respondents have urged the Commission to ascertain applicability of countervailing duty on imported coal at the time of bid and accordingly allow change in law to the extent that imported fuel was used to

discharge the obligation for supply of power. The Petitioner is directed to submit all proofs of payments made for the claims to be admitted by this Commission.

47. We have considered the submission of the parties. Countervailing duty is the additional duty on customs duty equivalent to Central excise duty levied on similar goods produced in India. It is noted that no such levy was applicable as on the date of bid guidelines. Countervailing duty was imposed @1% with effect from 1.2.2011 and @2% with effect from 1.2.2013. Therefore, the same will be covered under Change in Law and the Petitioner shall be entitled for reimbursement of the same.

48. The Petitioner is directed to furnish along with its monthly bill, the proof of payment of duty and computations duly certified by the auditor to Haryana Discoms and GUVNL. The Petitioner shall be entitled to recover CVD on coal in proportion to the actual coal consumed corresponding to the scheduled generation for supply of electricity to Haryana Discoms and GUVNL. 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 CVD on coal. The Petitioner, Haryana Discoms and GUVNL are directed to carry out reconciliation on account of these claims annually.

**(iv) Levy of duties under Customs Act, 1962, Customs Tariff Act, 1975, Central Excise Act, 1944 and Central Excise Tariff Act, 1985 on import/procurement of any other goods.**

**&**

**(v) Withdrawal of exemption from Service Tax.**

49. The Petitioner has submitted that after the Notifications dated 6.4.2015 issued by Ministry of Commerce and Industry, duties under Customs Act, 1962, Customs Tariff Act, 1975, Central Excise Act, 1944 and/or Central Excise Tariff Act, 1985 and

Service Tax under Finance Act on import/procurement of any goods (other than coal) required for generation of electricity for supply under PPAs dated 2.2.2007, 6.2.2007 and 7.8.2008 have also become payable. The Petitioner has submitted that the quantum of impact due to above duties becoming payable on such spares/consumables would be proportionately allocated to only those PPAs for which spares/ consumables have been imported/procured. Further, the impact of duty paid for import/ procurement of such spare/consumables shall be calculated by the Petitioner for the PPAs on the basis of gross contracted capacity from the installed capacity.

50. The Petitioner vide its affidavit dated 10.3.2016 has submitted that it was exempted from Service Tax on taxable service provided to Adani Power to carry on the authorized operations in a Special Economic Zone as on the respective cut-off dates.

51. In the light of our decision in para 35 of this order, the Petitioner shall be entitled for reimbursement of the impact of duties under the Customs Act, 1962, Customs Tariff Act, 1975, Central Excise Act, 1944 and Central Excise Tariff Act, 1985 to the extent of differential between the rates prevailing as on the cut-off date and the rates prevailing as on 1.4.2015 or thereafter. As regards the Service Tax, certain services were included in the list of taxable services as on the cut-off date and the rates have been revised after the cut-off date. There are other services which have been included in the list of taxable services only after the cut-off date. Therefore, in respect of the taxable services as on the cut-off date, the Petitioner shall be entitled to the differential rate of service tax prevailing as on cut-off date and as on 1.4.2015 or thereafter. In respect of services which are not included in the list



of specified non-taxable services after the cut-off date, the Petitioner shall be entitled for reimbursement of the service tax at the rate prevailing on or after 1.4.2015. This will be applicable in case of bid 2 PPA with GUVNL and PPAs with Haryana Utilities.

52. GUVNL has submitted that for the Bid-1 PPA dated 6.2.2007, the impact of Change in Law is restricted to Change in Law to cover taxes/ surcharge/ cess/ levy or similar charges on (1) water (2) primary fuel used by the generating plant (3) on generation of electricity leviable on the final output in the form of energy and (4) sale of electricity. GUVNL has submitted that Change in Law shall not be applicable in any other transaction.

53. In view of the specific provisions in Bid 1 PPA with GUVNL dated 6.2.2007, the Petitioner shall not be entitled to reimbursement of impact of levy of duties under Customs Act, 1962, Customs Tariff Act, 1975, Central Excise Act, 1944 and Central Excise Tariff Act, 1985 on impact/procurement of goods and service tax on the taxable services for supply of power to GUVNL under the said PPA.

#### **Operating parameters for calculation of relief under Change in Law**

54. GUVNL vide its affidavit dated 13.5.2016 has submitted that the Petitioner is bound by the norms and parameters submitted by the Petitioner and adopted for the purpose of granting relief in terms of the Change in Law by the GERC in its orders dated 21.10.2011 and 7.1.2013 in Petition Nos. 1080 of 2011 and 1210 of 2012 respectively. *Per contra*, the Petitioner has submitted that Station Heat Rate and Auxiliary Consumption be considered as per the CERC norms. We have considered the submissions of the Petitioner and GUVNL. We have gone through the said order and noticed that the Petitioner had claimed Clean Energy Cess by considering Gross

Station Heat Rate of 2150.28 kCal/kg and net Gross Station Heat Rate of 2324.62 kCal/kWh after accounting for the Auxiliary Power Consumption of 7.5%. GERC after considering the submission of GUVNL has allowed the Clean Energy Cess @₹0.0221/kWh on the basis of the Station Heat Rate of 2150.27 kCal/kWh and auxiliary consumption of 6.5%. This order has not been challenged and the Petitioner has been claiming the relief for Change in Law on account of Clean Energy Cess on the basis of the said order. The Commission considers it appropriate to take the Gross Station Heat Rate of 2150.27 kCal/kWh for the purpose of calculating the relief in case of Gujarat PPA as well for the imported coal component under Haryana PPA. However, for the domestic coal component, Gross Station Heat Rate of 2230 kCal/kWh has been considered as per the bid assumption submitted by the Petitioner in its affidavits dated 1.2.2013 and 4.8.2016. In case of Haryana PPAs, SHR has been taken as 2206 kCal/kWh considering the blending of domestic and imported coal in the ratio of 70:30. In view of the above, in case of Gujarat PPA, the petitioner is entitled to take the GSHR of 2150 kCal/kWh and in case of Haryana PPAs, GSHR of 2206 kCal/kWh is allowed for the purpose of calculating the relief.

**(vi) Carrying Cost**

55. The Petitioner has sought a direction to the respondents to pay late payment surcharge as applicable under the PPAs for the period of delay from the date of notification of Change in Law. The respondents have submitted that since there is no provision for late payment surcharge in Article 13 relating to change in law, the same cannot be granted to the Petitioner *de hors* the PPA.

56. The Commission has in the order dated 6.2.2017 in Petition No. 156/MP/2015 has decided that “in the absence of provisions in the PPAs regarding carrying cost, the prayer of the petitioner to grant carrying cost on the principle of restitution from the date of occurrence of the Change in Law events till the date of raising of the claims or invoices cannot be allowed.”

57. The prayer of the Petitioner for carrying cost in the present petition is disposed of accordingly.

**Issue No. 4: Mechanism for processing and reimbursement for Change in Law events**

58. The Petitioner has submitted that the aforesaid Change in Law events have resulted in increase in Petitioner’s cost of supply of electricity by more than 1% of the value of the Letter of Credit and hence the Change in Law compensation for the operating period shall be payable to the Petitioner as per Article 13 of the PPAs in general. In support of its claim, the Petitioner had submitted that for PPA dated 6.2.2007, the value of Letter of Credit furnished by Respondent No. 3 is ₹163.87 crore and the impact of Change in Law event (withdrawal of exemptions under Section 26 of SEZ Act) for the month of September, 2015 is 9.91 crore. In respect of PPA dated 2.2.2007, the value of Letter of Credit furnished by Respondent No.3 is Rs 150.6 crore and the impact of Change in Law event (withdrawal of exemptions under Section 26 of SEZ Act) for the month of September, 2015 alone is ₹10.52 crore. For the PPA with respondents 1 & 2 dated 7.8.2008, the value of LC is ₹285.44 crore and the impact of Change in Law events claimed under this petition for the month of September 2015 is ₹8.62 crore. It is clear that the condition for claiming the change in law impact which has to be more than 1% of value of Letter of Credit is satisfied.

59. The compensation on account of Change in Law shall be recovered by the Petitioner from the procurers as per the following mechanism:

(a) Monthly change in law compensation payment shall be effective from the date of commencement of supply of electricity to Respondents or from the date of application of the Change in Law events in case of the Petitioner whichever is later.

(b) Change in Law claims related to coal such as Basic Custom Duty, Countervailing Duty and Clean Energy Cess along with education cess and higher education cess, as applicable, shall be payable based on actual cost subject to ceiling of coal consumed corresponding to scheduled generation and shall be payable by the beneficiaries on pro-rata based on their respective share in the scheduled generation. In case of reduction in Basic Custom Duty below the rate prevalent as on the bid deadline, the petitioner shall compensate the procurers on the basis of above principles.

(c) Change in Law compensation towards customs and central excise duties on spares, consumables and other goods as approved in this order shall be proportionately allocated on the basis of gross contracted capacity of the PPA to the installed capacity of the respective phase or phases, as the case may be, for which the spares/consumables has been procured. However, no compensation on account of Change in Law of these duties shall be admissible for spares and consumables under Bid 1 PPA dated 6.2.2007 with GUVNL.

(d) In respect of services which were subject to Service Tax as on the bid deadlines of Bid 2 PPA with GUVNL and PPAs with Haryana Utilities, Service Tax on such services shall be admissible at the rate of differential between service tax prevalent as on bid deadlines and service tax prevalent as on 1.4.2015 or thereafter. In respect of services which become taxable for Service Tax after the bid deadlines of the Bid 2 PPA with GUVNL and PPAs with Haryana Utilities, the Petitioner shall be entitled for reimbursement of service tax at the prevailing rate as on 1.4.2015 or thereafter. In respect of Bid 1 PPA with GUVNL, the Petitioner shall not be entitled to any relief under Change in Law for the taxable services availed for generation of electricity for supply to GUVNL in view of the specific provisions in the said PPA.

(e) 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 statutory auditor and adjustment shall be made based on the energy scheduled by the beneficiaries during the year. The reconciliation statement duly certified by the Auditor shall be kept in possession by the petitioner so that it could be produced on demand from the procurers/ beneficiaries.

(f) 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 Article 13 of the PPA.

(g) 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. Accordingly, the mechanism prescribed above shall be adopted for payment of compensation due to Change in Law events allowed in this order for the subsequent period as well.

**Summary of our findings:**

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

<b>S. No.</b>	<b>Components</b>	<b>Change in Law Event</b>
1.	Levy of Basic Customs Duty on imported coal (Non-AFTA countries)	Allowed
2.	Levy of Clean Energy Cess on imported coal	Allowed
3.	Levy of Countervailing Duty on imported coal	Allowed
4.	Levy of duties under Customs Act, 1962, Customs Tariff Act, 1975, Central Excise Act, 1944 and/or Central Excise Tariff Act, 1985 on import/ procurement of any other goods	Allowed as per para 51 (except for Bid 1 PPA dated 6.2.2007 with GUVNL)
5.	Withdrawal of Exemption from Service Tax	Allowed as per para 51 (except for Bid 1 PPA dated 6.2.2007 with GUVNL)
6.	Carrying cost	Not allowed

61. The 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**