

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 172/MP/2016**

**Coram:**

**Shri P.K.Pujari, Chairperson  
Dr.M.K. Iyer, Member**

**Date of Order:5<sup>th</sup> November, 2018**

**In the matter of**

Petition under Section 62(a) and 79(1)(a) of the Electricity Act, 2003 read with Regulation 8(3)(ii) and 8 (7) of the CERC (Terms and Conditions of Tariff) Regulations, 2014 read with Regulation 111 of the CERC (Conduct of Business) Regulations, 1999 for recovery of additional expenditure incurred due to sharing of fly ash transportation cost consequent to the Ministry of Environment and Forest, Government of India notification dated 25.1.2016 as a 'Change in Law' event.

**And**

**In the matter of**

NTPC Ltd  
NTPC Bhawan,  
Core-7, SCOPE Complex,  
7, Institutional Area, Lodhi Road,  
New Delhi-110003

**.....Petitioner**

**Vs**

1. Uttar Pradesh Power Corporation Ltd.  
Shakti Bhawan, 14, Ashok Marg, Lucknow.
2. Jaipur VidyutVitran Nigam Ltd.  
VidyutBhawan, Janpath,  
Jaipur-302005
3. Ajmer VidyulVitran Nigam Ltd.  
VidyutBhawan, Panchsheel Nagar,  
Makarwali Road,Ajmer- 305004
4. Jodhpur VidyutVitran Nigam Ltd.  
New Power House, Industrial Area,  
Jodhpur-342003
5. Tata Power Delhi Distribution Limited,  
NDPL House, Hudson Lines, Kingsway Camp  
Delhi-110009



6. BSES Rajdhani Power Limited,  
BSES Bhawan, 2<sup>nd</sup> Floor, B-Block,  
Behind Nehru Place Bus Terminal,  
Nehru Place, New Delhi - 110019
7. BSES Yamuna Power Limited,  
2nd Floor, B Block, Shakti Kiran Building,  
Near Karkardooma Court, New Delhi-110092
8. Haryana Power Purchase Centre,  
Shakti Bhawan, Energy Exchange,  
Room No. 446, Top Floor, Sector-6,  
Panchkula- 134 109
9. Punjab State Power Corporation Limited,  
The Mall, Patiala-147001
10. Himachal Pradesh State Electricity Board,  
VidyutBhawan, Kumar House Complex Building II,  
Shimla-171004
11. Power Development Department, Govt, of J&K,  
SLDC Building, 1st Floor, Gladani Power House,  
Narwal, Jammu -190 009
12. Power Department  
Union Territory of Chandigarh,  
Sector 9-D, UT, Chandigarh-160019
13. Uttarakhand Power Corporation Limited,  
UrjaBhawan, Kanwali Road,  
Near BalliWalaChowk, Dehradun -248001
14. Madhya Pradesh Power Management Company Limited  
Block No-11, Ground floor, Shakti Bhawan,  
Vidhyut Nagar, Rampur, Jabalpur-482008
15. Maharashtra State Electricity Distribution Company Limited  
Prakashgad, 4th Floor, Bandra (East),  
Mumbai-400051
16. Gujarat UrjaVikas Nigam limited  
VidhyutBhawan, Race Course,  
Vadodara - 390 007
17. Chhattisgarh State Power Distribution Company Limited  
P.O Sunder Nagar, Dangania, Raipur-492013,
18. Goa Electricity Department (ED),  
Govt, of Goa Aquem Alto,  
Margao, Goa - 403601



19. Electricity Department, Administration of Daman and Diu  
Plot No. 35, OI DC Complex, Near Fire Station,  
Somnath, Daman -396210

20. Electricity Department  
Dadar and Nagar Haveli  
66kV, Aml i Ind. Estate,  
Silvassa- 396230

21. West Bengal State Electricity Distribution Company Ltd,  
VidyutBhawan, Bidhan Hagar,  
Block DJ, Sector-II, Salt Lake City,  
Kolkata-700 091

22. Bihar State Electricity Board,  
VidyutBhawan,  
Bailey Road, Patna-800021

23. Jharkhand State Electricity Board,  
In front of Main Secretariat, Doranda,  
Ranchi-834002

24. GRIDCO Ltd.  
Janpath, Bhubaneswar-751 022

25. Power Department, Govt, of Sikkim,  
Through its Secretary, Kaji Road,  
Gangtok-737101

26. Eastern Power Distribution Company Ltd.  
P&T Colony, Seethmmadhara,  
Vishakapatnam, Andhra Pradesh-530013

27. Southern Power Distribution Company Ltd.  
SrinivassaKalyana Mandapam Backside,  
Tiruchanoor Road, KesavayanaGunta,  
Tirupati-517501

28. Northern Power Distribution Company lid.  
Opp. NIT Petrol Pump, Chaitanapuri,  
Warangal-506004

29. Central Power Distribution Company Ltd.  
Mint Compound, Hyderabad-500063

30. Electricity Department, Govt, of Pondicherry,  
137, Nethaji Subhash Chandra Bose Salai,  
Pondicherry - 605 001

31. Tamil Nadu Generation and Distribution Corporation Ltd.  
NPKRRMaaligai, 144, Anna Salai,  
Chennai-600 002



32. Kerala State Electricity Board  
VaidyuthiBhavanam,  
Pattom, Trivandrum - 695004

33. Bangalore Electricity Supply Company,  
K.R. Circle, Bangalore-506001, Karnataka

34. Mangalore Electricity Supply Company  
Paradigm Plaza, AB Shetty Circle, Mangalore-575001

35. Chamundeshwari Electricity Supply Corporation  
#927, L J Avenue, GF, NewKantharajUrs Road,  
Saraswatipuram, Mysore-570009

36. Gulbarga Electricity Supply Corporation Station Road,  
Gulbarga, Karnataka-585102

37. Hubli Electricity Supply Company Navanagar,  
PB Road, Hubli, Karnataka- 580025

38. Assam State Electricity Board  
BijuleeBhawan, Paltan Bazar,  
Guwahati- 781001

....Respondents

**Parties present:**

Shri S. Venkatesh, Advocate, NTPC  
ShriPratyush Singh, Advocate, NTPC  
ShriSandeepRajpurohit, Advocate, NTPC  
Shri R.B. Sharma, Advocate, BSEB & GRIDCO  
Ms.SwapnaSeshadri, Advocate, GUVNL  
Ms.ParichitaChowdhury, Advocate, GUVNL  
ShriAashishAnand Bernard, Advocate, MPPMCL  
ShriParamhans, Advocate, MPPMCL  
Shri S. Vallinayagam, Advocate, TANGEDCO

**ORDER**

The Petitioner, NTPC has filed this Petition seeking the following reliefs:

- (a) *To take on record the MOEF Notification dated 25.01.2016 and declare that the same is a 'Change in Law' event as stipulated under Regulation 8 of the CERC 2014 Tariff Regulations;*
- (b) *Allow the Petitioner Company to raise Monthly Bills for reimbursement of the additional expenditure for Fly Ash Transportation on monthly basis;*
- (c) *Permit additional expenditure to be billed and recovered additionally from the beneficiaries as reimbursement along with monthly bills;*
- (d) *Pass any such other and further reliefs as this Hon'ble Commission deems just and proper in the nature and circumstances of the present case.*



2. The Petitioner has generating stations/projects across the country and currently owns about 40000 MW coal fired thermal generating stations. The present petition is for seeking a declaration that the Government of India, Ministry of Environment, Forest & Climate Change (MOEFCC) Notification dated 25.1.2016 (hereinafter referred to as “the MOEFCC Notification”) is a ‘Change in Law’ event under Regulation 8 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 (hereinafter referred to as ‘the 2014 Tariff Regulations’) and also for permission to recover the said expenditure through monthly billing from the various beneficiaries of the generating stations of the Petitioner.

3. The Petitioner, in the Petition has made the following submissions:

(a) The Notification dated 25.1.2016 has been issued by MoEFCC under the statutory provisions of Environment (Protection) Act 1986 and hence the above said notification qualifies as ‘Law’. The said notification has changed the earlier position by putting an onerous condition on the Thermal Power Plant with regards to sharing of transportation cost with the users of Fly Ash. It has submitted that in view of the above the said Notification qualifies as an event of ‘Change in Law’.

(b) The objective of ‘Change in Law’ provision as per Regulation 8 of the 2014 Tariff Regulations is to ensure compensation to the party affected by such Change in law and to restore the affected party to the same economic position as if such Change in law has not occurred.

(c) The said ‘Change in Law’ event would lead to additional expenditure to be incurred by the Petitioner in respect of sharing of transportation cost of fly ash. The Commission while notifying the 2014 Tariff Regulations was cognizant that Change in Law events can impact a generator and therefore in its wisdom allowed the same to be tried up.

(d) The MOEFCC Notification dated 25.1.2016 has been issued under the statutory provisions of Environment (Protection) Act, 1986 which prescribes for sharing of transportation cost with the users of Fly Ash and is in the nature of a statutory expense being imposed upon the Petitioner, which is beyond the control of the Petitioner and hence the same must be a pass through. In terms of the observations of the APTEL in its judgment dated 15th



February 2011, in Appeal No. 173 of 2009, statutory expenses are uncontrollable factors and generators should be allowed for the pass through of cost on account of uncontrollable factors. The additional expenditure to be incurred by the Petitioner in respect of sharing of transportation cost of fly ash being an uncontrollable factor must be allowed as pass through.

(e) The National Tariff Policy, 2016 inter-alia provides that all uncontrollable costs should be recovered speedily to ensure that future consumers are not burdened with the past costs. Hence, the additional expenditure to be incurred by the Petitioner on account of the MoEFCC Notification dated 25.1.2016 may be allowed as a pass through.

(f) Regulation 8 (3) of the 2014 Tariff Regulations provides that 'Change in Law' is an uncontrollable factor, which will impact the generator and hence the same can be tried up by the Commission. The Constitution bench of the Hon'ble Supreme Court in its judgment in 'PTC India Limited Vs CERC & ors (2010) 4 SCC 603 had held that once a Commission notifies a Regulation it is bound by the terms of that Regulation.

(g) Regulation 8 (7) of the 2014 Tariff Regulations mandates that financial losses by a generating company on account of uncontrollable parameters shall be passed on to beneficiaries of the generating company. Therefore, in terms of the said Regulations the present adverse financial impact on the Petitioner Company on account of sharing of transportation charges of fly ash being an uncontrollable event, squarely falls under the provisions of Regulation 8(7) and the same ought to be passed on to the beneficiaries as sought by the Petitioner.

(h) Not allowing the Petitioner to bill and recover the additional expenditure incurred in respect of sharing of transportation cost of fly ash will lead to unjust, unfair and unlawful under-recovery of cost, which will adversely affect the viability of generating companies in the long run. The recovery of cost of generation is essential for the continued existence of generating companies.

(k) The Commission in its order dated 2.4.2013 in Petition No.155/MP/2012 (Adani Power Ltd vs Haryana Power Purchase Centre and ors) had held that the failure to ensure recovery of costs / capital will lead to a situation where the generating asset will become a stranded asset and the same is contrary to the objectives of the Electricity Act, 2003 ('the 2003 Act').

(l) The 2003 Act, the National Electricity Policy (Paras 5.5.1, 5.8.4, 5.8.5 and 5.8.7) and the Tariff Policy require that consumer interest is protected while ensuring financial viability and growth of the power sector. It has submitted that the twin objectives of financial viability/sustainability and consumer interest are the cornerstone of the electricity sector.



(m) The expenditure to be incurred by the Petitioner would be recovered from the beneficiaries based on actuals in a transparent manner. The Petitioner would be recovering the actual expenditure incurred during a financial year from the beneficiaries along with monthly bills in the same ratio as fixed charges. At the end of each financial year, certificate from the auditor would be submitted to beneficiaries' with regard to the expenditure incurred for the respective financial year.

(o) The 2014 Tariff Regulations notified by the Commission sets out the principles for determination and recovery of tariff for sale of electricity by the generating companies. However, Regulation 8 of the 2014 Tariff Regulations provide for true-up of tariff based on the controllable / uncontrollable parameters.

(p) The Petitioner's 18 coal based thermal power plants are producing about 60 million tonne (mt) of Ash annually and this quantity is expected to reach about 90 Mt per annum by 2020 with the commissioning of new projects / units of about 17440 MW.

(r) In the year 2015-16, five generating stations of the Petitioner namely, Dadri, Badarpur TPS, Tanda TPS, Talcher STPS and Unchahar TPS have achieved 100% ash utilization and two other generating stations viz., Mouda TPS and Ramagundam STPS have achieved more than 80% ash utilization. The other generating stations are achieving ash utilization between 9% to 43% only. Presently the areas of ash utilization mainly are low lying area development, industries, ash dyke raising, mine filling and road embankment construction.

(s) In order to achieve 100% ash utilization on sustainable basis and to comply with the Amended Fly Ash Notification, stations will have to incur additional expenditure for transportations of ash up to 300 km radius from the Thermal Power Plant for utilization of balance 65% ash in the area of road embankment construction, fly ash based building products manufacturing and PMGSY and other programmes of Govt of India as prescribed in MoEF Notification.

(t) In the case of NTPC, presently fly ash is being issued for a price at Dadri, Badarpur, Unchahar, Kahalgaon, Tanda, Ramagaundam, Farakka and Sipat generating stations. At other generating stations, fly ash is being issued free of cost to all users. The fund created by sale of Fly Ash is being kept in separate account as per MoEF guidelines. As per the MoEFCC guidelines, budget from ash fund is being sanctioned for development of infrastructures/ facilities, promotional / facilitation activities etc. Therefore, the fund available in Ash Fund after deducting the already sanctioned fund for promotion of ash utilization is around ₹258 crore which can be used for sharing of transportation cost of fly ash as mandated in MoEFCC Notification.



(u) As per the estimation worked out based on the DSR rate 2014, the Petitioner's total expenditure on transport subsidy will be ₹2957 crore/ annum (approx.) which is very high in comparison with the fund available in ash fund and hence needs to be compensated in terms of Regulation 8 of the 2014 Tariff Regulations.

Accordingly, the Petitioner has submitted that the reliefs sought for in the Petition may be allowed.

4. The Petition was admitted on 3.11.2016 and notices were issued to the respondents with directions to complete pleadings in the matter. The Respondents, UPPCL, GRIDCO, BRPL, TANGEDCO and GUVNL have filed their replies and the Petitioner has filed its rejoinder to the same. Subsequently, during the hearing on 20.7.2017, the Commission constituted a 'Committee' comprising of the Chief (Engineering), CERC and Chief (Finance), CERC to examine the technical issues involved with regard to ash utilization in the light of the MOEFCC Notification dated 25.1.2016 and submit a report after holding meetings with the representatives of the Petitioner and the Respondents. After deliberations on 9.8.2017, the Committee requested the Petitioner and the Respondents, MSEDCL and GRIDCO to furnish the following information for the periods 1999-03, 2004-09, 2010-16 and from 2016 to till date:

i) *Station-wise details of percentage of ash utilization such as for brick manufacturing for road construction projects, for soil conditioner in agricultural activities, etc. since 14.9.1999.*

ii) *Station-wise quantum of ash generated, ash utilized and ash accumulated at generating stations since 14.9.1999.*

iii) *Station-wise details of expenditure incurred on ash utilization and where it is booked.*

iv) *Station-wise revenue earned from the sale of Ash/ash products and how it is accounted for.*

v) *Station-wise expenditure on transportation of ash utilization or ash transported by NTPC to its own brick manufacturing plant or use for road or building etc. and where it was booked in accounts.*





5. The Petitioner vide its letter dated 20.9.2017 had furnished information with respect to ash generation, ash utilization, revenue earned, from sale of ash station-wise and year-wise since 1999 to 2017-18. The Respondents, MSEDCL and GRIDCO did not however furnish any details in respect of their generating stations with regard to ash production, ash utilization, revenue earned through sale of ash etc. Accordingly, the Committee submitted its report on 16.5.2018 with the following recommendations:

*“The Committee recommends that the following information in respect of following aspects may be furnished by NTPC separately for consideration of the Commission to take an appropriate view.*

*a) The company's Ash disposal policy and accounting policy in this regard.*

*b) Whether the cost in respect of ash disposal is being claimed as part of O&M, if so, the details thereof.*

*c) Whether the capital cost allowed for Ash Dyke and disposal of ash in ash dyke is covered under the provisions of the circular dated 25.01 .2016 and will be treated as part of 100% disposal of ash.*

*d) Whether Ash mound created in Dadri should be treated as Ash disposal or not”*

6. The report of the Committee dated 16.5.2018 was posted in the website of the Commission for comments and copies of the same were served on the parties. No comments were received from the respondents on the said report. However, the Petitioner vide affidavit dated 31.7.2018 furnished its reply on the report dated 16.5.2018. Thereafter, the matter was heard on 21.8.2018 and the Commission after directing the parties to file written submissions, reserved its orders in the Petition. The Petitioner and the Respondents, GUVNL and MPPMCL have filed their written submissions.

7. Since order in the Petition could not be passed prior to one Member of the Commission who heard the matter, demitting office, the Petition was listed for hearing on 23.10.2018. During the hearing, the learned counsels for the Petitioner and the Respondents submitted that since the Commission had already heard the



matter and issued detailed ROP, no further arguments were required and order may be passed based on the submissions of the parties and the documents available on record. Accordingly, the Commission reserved its order in the Petition.

### **Submissions of the Respondents**

8. The Respondent No.31, Tamil Nadu Generation and Distribution Corporation Ltd. (TANGEDCO) vide its affidavits dated 7.12.2016 and 1.9.2018 has mainly submitted the following:

(i) The claim of the Petitioner for admittance of the expenditure under 'Change in law' may be rejected and the Petitioner may be directed to meet the expenditure from the O & M expenses allowed under normative basis, if any.

ii) The Commission has accorded in principle approval for claiming the charges towards fly ash transportation on account of amendment to notification dated 25.01.2016 as Change in Law event but directed the petitioner to furnish certain documents with regard to disposal of the fly ash for examining the claim of DB Power Ltd.

iii) As per Commission's order in DB Power case, the contract for fly ash transportation has to be awarded through a transparent competitive bidding procedure so that a reasonable and competitive price for transportation of ash/ MT is discovered. The same conditions are applicable for the Petitioner in the instant Petition also and the expenditure over and above the income generated from sale of ash, is subject to prudent check by the Commission on station to station basis before passing on the expenditure to the beneficiaries.

9. The Respondent No.6, BRPL vide affidavit dated 12.1.2017 has mainly submitted that the contentions of the Petitioner that the MoEFCC Notification dated 25.1.2016 constitute a 'Change in Law' may be rejected and the Petitioner may not be permitted to raise the monthly bills for reimbursement of the alleged additional expenditure for fly ash transportation on monthly basis.



10. The Respondent No.1, UPPCL vide affidavit dated 6.3.2017 has submitted the following:

i) The MOEFCC notification dated 25.1.2016 is a consequence of failure of the petitioner to attain 100% Ash utilization within the time line prescribed in the MoEFCC notification dated 14.9.1999 despite huge money available from the sale of fly ash.

ii) The Petitioner has not provided any details as to how the petitioner has calculated the financial gain and losses on account of MoEFCC notification dated 25.1.2016. The Petitioner has not informed how the Ash Fund was utilized prior to the period 1999 and from 1999 to 2016.

iii) As per para 2(12) of the MOEFCC Notification dated 25.1.2016, the Petitioner is also mandated to promote, support and assist in setting up of ash based product manufacturing units in the vicinity of the petitioner generating stations so as to meet the requirement of bricks and other building construction materials.

vi) The assessment of power house wise fly ash, its disposal, creation of ash fund and sharing of transportation charges are such parameters that effect the tariff.

vii) The Commission may like to constitute a committee to be known as Fly Ash fact Finding Committee headed by a representative of CEA and other members one from each Region and the tenure of the Committee may be upto 31.3.2019.

Accordingly, the Respondent has contended that the Petitioner, without complying with the above stated statutory provision which envisage action to be taken by the Petitioner with the funds generated by sale of ash, has chosen the option of sharing the cost of transportation with the users of fly ash and thereby loading such transportation cost to the extent of ₹2957 crore/annum on the beneficiaries which clearly goes against the interest of the consumers.

11. The Respondent No.14, MPPMCL vide its affidavit dated 14.9.2018 has mainly submitted that the Petition may be rejected as it is arbitrary and has no legal basis. It has further submitted that the funds from Power System Development Fund and/or from Corporate Social Responsibility (CSR) may be deployed by the Petitioner for implementation of the said notification.



12. The Respondent No. 24, GRIDCO vide affidavit dated 10.1.2017 has mainly submitted that the Petitioner may not be permitted to raise the monthly bills for reimbursement of the alleged additional expenditure for Fly Ash Transportation on monthly basis so that the consumers are not burdened. Accordingly, it has prayed that the cost towards Fly Ash Transportation may not be permitted to be recovered.

13. The Respondent No. 16, GUVNL vide affidavit dated 27.1.2017 has mainly submitted that the 2014 Tariff Regulations do not in any manner permit the generating companies to recover the additional expenditure incurred by them without giving any details and even without following the provisions of the Regulations. It has further submitted that there is no transparency and clarity as to the expenditure being incurred by the Petitioner in respect of each of the generating stations. The respondent has added that the petitioner cannot seek to cross subsidise the beneficiaries of its power by simply bunching of the costs and passing it on to all the beneficiaries in the ratio of fixed charges. It has further stated that the petition may be dismissed as not maintainable since it is neither in accordance with the provisions of the Electricity Act, 2003 or the 2014 Tariff Regulations.

### **Rejoinder of the Petitioner**

14. In response to the above replies, the Petitioner has filed its rejoinders and has mainly submitted the following:

- i) Presently Fly Ash is being issued on price at NTPC Dadri, Badarpur, Unchahar, Kahalgaon, Tanda, Ramagaundam, Farakka and Sipat stations. At other stations fly ash is being issued free of cost to all users. The fund created by sale of Fly Ash is being kept in separate account as per MoEFCC guidelines. Further, budget from ash fund has been sanctioned for development of infrastructures/ facilities, promotional / facilitation activities etc. Therefore,



the fund available in Ash Fund after deducting the already sanctioned fund for promotion of ash utilization is around ₹258 crore, which can be used for sharing of transportation cost of fly ash as mandated by MoEFCC Notification. However, as per the estimation worked out based on the DSR rate 2014, Petitioner Company's total expenditure on transport subsidy if the 100% ash utilization is to take place will be around ₹2957 crore/annum which is very high in comparison with the fund available in ash fund.

ii) The MOEFCC Notification prescribes for sharing of transportation cost with the users of Fly Ash and is in the nature of a Statutory Expense being imposed upon the Petitioner, which is beyond the control of the Petitioner and hence the same may be a pass through.

iii) The O&M expense norms for the period 2014-19 are based on the actual O&M expenditure during the period 2008-09 to 2012-13 and while fixing the rate of O&M, the Commission had not considered the said MOEFCC Notification dated 25.1.2016, as it was issued subsequent to the notification of the 2014 Tariff Regulations.

iv) CSR is core to the Petitioner's company philosophy and CSR has been an integral part of Petitioner's business of power generation and lighting up the lives of millions of Indians. The Petitioner Company has a separate CSR-Community Development Policy, which covers a vast gamut of activities starting from the grassroots level right up to the regional and national level including implementation of key programmes through 'NTPC Foundation'. As per Companies Act provisions, the target expenditure for CSR in 2015-2016 was ₹ 349.65 crore. However, the actual expenditure towards the CSR activities of the Petitioner was ₹491.80 crore, which is way above the target. Funds allocated towards the CSR are not sufficient to meet the exorbitant additional expenditure to be incurred by the Petitioner on account of sharing the cost of transportation with the users of fly ash. Therefore, the same needs to be allowed as a pass through.

v) The total quantum of ash generated at the Petitioner's coal based power station is estimated at 60 Million Tonne/annum (MT) and is expected to reach about 90 MT/annum by 2020 with the commissioning of new upcoming projects / units. The production of Fly Ash is very high in comparison to the demand of Fly Ash in the country. Even after the notification of the amended fly ash Notification, which provides substantial subsidy to the users of fly ash, the Petitioner has received request to transport only 1 MT (approx.) fly ash from its various power stations. Therefore, in such circumstances, it is not possible for the Petitioner to achieve 100% ash utilization.

15. The learned counsels for the Petitioner and the Respondents reiterated the above submissions during the hearing of the Petition on 3.11.2016 and



20.7.2017. The Petitioner vide affidavit dated 31.7.2018 has furnished its reply to the report of the Committee dated 16.5.2018 as under:

a) NTPC has comprehensive Ash Policy-15 for utilization of ash, the copy of the same along with the amendment issued vide circulars dated 28.04.2015, 18.01.2016 & 06.09.2017 are attached. The Ash Policy 2015 specifies the accounting policy for amount collected from sale of fly ash and fly ash based products.

b) As per existing Ash Policy, all activities relating to utilization of fly ash are being funded from Ash Sale fund created from sale of fly ash and fly ash based products. The list of such activities covered is given in the circular dated 25.03.2014 (Ash Policy, page no38-41). In regard to whether the expenditure is being claimed as part of O&M, it is submitted that while furnishing the actual O&M expenditure, the expenditure incurred towards ash utilization is separated out and not claimed in the actual O&M expenditure incurred.

c) The provisions of the circular dated 25.01.2016 stipulate only for bearing of transportation cost of ash by power plants within 100/300 km radius for use in road construction projects, for manufacture of ash based building products or use as soil conditioner in agriculture activity. The capital cost allowed for Ash Dyke and disposal of ash in the dyke is not covered under the provisions of the circular dated 25.01.2016. Further the ash disposed/ and stored in ash dyke is not considered as ash utilization.

d) For consideration of Ash Mound construction as Ash Utilization, MoP vide its Office Memorandum dated 24.08.2015 requested the Inter-Ministerial Committee (IMC) comprising of members from MoEF&CC, Ministry of Coal (MoC), CEA and IIT, Delhi to visit Dadri and submit their recommendations. Committee's recommendation had been submitted to MoEF& CC. MoEF& CC is yet to give their consent for considering ash mound construction as ash utilization.

16. The Petitioner and the Respondents (TANGEDCO & MPPCL) have filed their written submissions mainly on the lines argued during the hearing. We now proceed to examine the claim of the Petitioner in the subsequent paragraphs.

### **Analysis and Decision**



17. Based on the submissions of the parties, the following issues emerge for consideration:

(a) **Issue No.1:** Whether the MOEFCC Notification dated 25.1.2016 imposing the additional cost towards fly ash transportation amounts to Change in Law in terms of the provisions of the 2014 Tariff Regulations?

(b) **Issue No.2:** Whether the Commission should issue directions to the Petitioner for recovery of additional expenditure incurred on account of fly ash transportation by monthly billing?

**Issue No.1: Whether the MOEFCC Notification dated 25.1.2016 imposing the additional cost towards fly ash transportation amounts to Change in Law in terms of the provisions of the 2014 Tariff Regulations?**

18. The Environment Protection Act, 1986 (herein referred to as “EP Act”) was enacted by the Government of India on 23.5.1986 to provide for the protection and improvement of environment and for matters connected there with. Section 3(2)(v) of the EP Act provided the power to the Central Government to take such measures which include the restriction of areas in which any industries, operations or processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards. Thereafter, on 19.11.1986 the Central Government notified the Environment (Protection) Rules, 1986 (herein referred to as “EP Rules”). Rule 5(3)(d) provides that the Central Government shall impose prohibition or restriction on location of such industries and the carrying on of any process or operation in any area after considering the objections received against such notification. Thereafter, the Ministry of Environment and Forests, Govt. of India in exercise of its powers under Section 3(2)(v) and Section 5 of the EP Act, issued directions for ‘Utilisation of flyash from coal or lignite based thermal power plants’ vide Notification dated 14.9.1999 (herein referred to as the “Fly Ash Notification 1999”). The said Notification prescribed amongst others the mechanism for utilisation of fly ash generated from coal or lignite based Thermal Power Plants and the achieve the target of fly ash utilisation. However, the said



notification did not contain any provision for sharing of the transportation cost with the users of fly ash. Thereafter, the Ministry of Environment, Forests and Climate Change, Govt. of India vide Notification No. S.O. 254 (E) dated 25.1.2016 in exercise of its powers under the EP Act and EP Rules, made certain amendments to the Fly Ash Notification 1999 and incorporated, amongst others, the following provisions:

*“(8) Every coal or lignite based thermal power plants (including captive and or co-generating stations) shall, within three months from the date of notification, upload on their website the details of stock of each type of ash available with them and thereafter shall update the stock position at least once a Month.*

*(9) Every coal or lignite based thermal power plants shall install dedicated dry ash silos having separate access roads so as to ease the delivery of fly ash.*

*(10) The cost of transportation of ash for road construction projects or for manufacturing of ash based products or use as soil conditioner in agriculture activity within a radius of hundred kilometres from a coal or lignite based thermal power plant shall be borne by such coal or lignite based thermal power plant and the cost of transportation beyond the radius of hundred kilometres and up to three hundred kilometres shall be shared equally between the user and the coal or lignite based thermal power plant.*

*(11) The coal or lignite based thermal power plants shall promote, adopt and set up (financial and other associated infrastructure) the ash based product manufacturing facilities within their premises or in the vicinity of their premises so as to reduce the transportation of ash.*

*(12) The coal or lignite based thermal power plants in the vicinity of the cities shall promote, support and assist in setting up of ash based product manufacturing units so as to meet the requirements of bricks and other building construction materials and also to reduce the transportation.*

*(13) To ensure that the contractor of road construction utilizes the ash in the road, the Authority concerned for road construction shall link the payment of contractor with the certification of ash supply from the thermal power plants.*

*(14) The coal or lignite based thermal power plants shall within a radius of three hundred kilometres bear the entire cost of transportation of ash to the site of road construction projects under Pradhan Mantri Gramin Sadak Yojna and asset creation programmes of the Government involving construction of buildings, road, dams and embankments”.*

19. As stated, the Petitioner has sought for a declaration that the MoEFCC Notification dated 25.1.2016 which imposes additional expenditure towards fly ash transportation is a 'Change in Law' event under the provisions of the 2014 Tariff





Regulations. This has been objected to by most of the Respondents herein. Change in Law has been defined in Regulation 3(9) of the 2014 Tariff Regulations as under:

*“3(9) “Change In Law” means occurrence of any of the following events:*

*(a) enactment, bringing into effect or promulgation of any new Indian law; or*

*(b) adoption, amendment, modification, repeal or re-enactment of any existing Indian law; or*

*(c) change in interpretation or application of any Indian law by a competent court, Tribunal or Indian Governmental Instrumentality which is the final authority under law for such interpretation or application; or*

*(d) change by any competent statutory authority in any condition or covenant of any consent or clearances or approval or license available or obtained for the project; or*

*(e) coming into force or change in any bilateral or multilateral agreement/treaty between the Government of India and any other Sovereign Government having implication for the generating station or the transmission system regulated under these Regulations.”*

20. As per the above definition, “adoption, amendment, modification, repeal or reenactment of any existing Indian Law” is covered under Change in Law. The Environment (Protection) Rules, 1986 have been notified by the Central Government in exercise of the power vested under sections 6 and 25 of the Environment Protection Act, 1986. Rule 3 of the Environment (Protection) Rules provides for Standards for emissions or discharge of environmental pollutants. Since, the additional cost towards fly ash transportation imposed by MOEFCC Notification dated 25.1.2016 is on account of amendment to the Fly Ash Notification 1999 issued by the Ministry of Environment and Forests, Govt. of India, the said notification dated 25.1.2016 amounts to Change in Law and the expenditure is admissible under change in law in principle. The amendments notified are mandatory in nature and are to be complied with within a stipulated timeframe.

21. It is pertinent to mention that the issue of compensation under Change in law for incurring additional cost towards fly ash transportation in terms of the MOEFCC Notification dated 25.1.2016 in respect of the project whose tariff was discovered



under competitive bidding process (in terms of Section 63 of the 2003 Act) came in for consideration by the Commission in Petition No.101/MP/2017 filed by DB Power Ltd. In the said case, the Commission after examining the provisions relating to change in law under Article 10 of the PPA, by order dated 19.12.2017 held that the additional cost towards fly ash transportation is on account of amendment to the Notification dated 25.1.2016 issued by the Ministry of Environment and Forests, Govt. of India and the expenditure is admissible under the Change in law in principle. The relevant portion of the order is extracted hereunder:

*“106. As per Article 10.1.1 of the PPA, any enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any law is covered under Change in law if this results in additional recurring/ non-recurring expenditure by the seller or any income to the seller. Since, the additional cost towards fly ash transportation is on account of amendment to the Notification dated 25.1.2016 issued by the Ministry of Environment and Forests, Govt. of India, the expenditure is admissible under the Change in law in principle.*

22. It is also noticed that the Committee constituted by the Commission to examine the technical issues with regard to ash utilization in the light of the MOEFCC Notification dated 25.1.2016 has in its report dated 16.5.2018 suggested that the expenditure towards fly ash transportation is admissible under change in law and may be considered in terms of the Commission’s order dated 19.12.2017 in Petition No. 101/MP/2016 (as stated above).

23. Based on the above discussion, we hold that the MOEFCC Notification dated 25.1.2016 which prescribes for sharing of the transportation cost by the coal and lignite based thermal power plants with the fly ash users is covered under Change in law in terms of Regulation 3(9)(ii) of the 2014 Tariff Regulations.

**Issue No.2: Whether the Commission should issue directions to the Petitioner for recovery of additional expenditure incurred on account of fly ash transportation by monthly billing?**

24. The Petitioner has submitted that as per MOEF guidelines, budget from ash fund is being sanctioned for development of infrastructures/ facilities,



promotional/facilitation activities etc. Therefore the fund available in Ash fund after deducting the already sanctioned fund for promotion of ash utilisation is around ₹258 crore which can be used for sharing of transportation of fly ash as mandated under the MOEFCC Notification. The Petitioner has further submitted that based on the DSR rate 2014, the total expenditure on transport subsidy will be ₹2957 crore /annum which is high in comparison with the fund available in ash fund and hence needs to be compensated in terms of Regulation 8 of the 2014 Tariff Regulations. The Petitioner has stated that since the expenditure has been mandated under the MOEFCC Notification and cannot be met from the ash fund generated due to sale of ash, Regulation 8 gets attracted wherein the Commission has provided for truing-up of tariff due to uncontrollable parameter in which 'change in law' has been identified as an uncontrollable parameter. Accordingly, the Petitioner has prayed that the additional expenditure incurred in respect of sharing of transportation cost of fly ash due to MOEFCC Notification over and above the amount accumulated in ash fund through sale of ash at certain generating stations, be permitted to be billed and recovered additionally on actual basis from the beneficiaries as an additional component under Revenue expenditure from the Respondents. The Respondents have submitted that the Petitioner himself is responsible for the imprudence shown in the implementation of the Flt ash notification 1999 and its amendments thereof and hence the prayer for recovery of the additional expenditure is without any substance and may not be permitted on consumer's interest.

25. The Petitioner, in response to the request of the Committee to submit certain additional information (as in para 4 above) by affidavit dated 20.9.2017 has submitted the information/details with respect to ash generation, ash utilisation, revenue earned from sale of ash station-wise and year-wise since the year 1999 till



2017-18. Accordingly, the total Ash generation from all generating stations of the Petitioner, the ash utilized in different forms from 1999 to 2017-18 and the revenue earned by selling Ash /Ash products from 2009-10 to 2017-18, as tabulated by the Petitioner are as under:

(A) Details of fly ash generation, utilization and storage in pond for all the generating stations from 1999 to 2017-18 (up to June 2017)

Actual usage - April, 1999 to June,2017( <i>figures in lakh tonnes</i> )			
Total Ash production in NTPC	Total Ash utilization	Percentage (%) Ash utilization	Ash disposed to pond
<b>7784.87</b>	<b>3405.77</b>	<b>43.75</b>	<b>4379.14</b>

(B) Ash Utilization for the period 2009-17

<i>(figures in lakh tonnes)</i>											
Year	Ash Produced	Land Development	Issued to Cement & other industries	Ash Dyke Raising	Bricks	Roads /rail embankment	Mine filling	Others	Total Ash Utilized	% Ash utilised	Ash disposed to Pond
2009-10	462.19	78.43	108.52	35.15	1.03	13.41	11.28	28.26	276.08	59.73	186.12
2010-11	472.05	63.86	98.79	36.14	0.79	14.77	11.8	34.14	260.28	55.14	211.77
2011-12	500.5	68.74	90.63	42.2	0.96	17.97	11.68	43.13	275.31	55.01	225.19
2012-13	562.88	40.9	107.41	86.01	1.27	18.46	13.35	42.3	309.7	55.02	253.18
2013-14	578.26	24.71	71.87	75.43	22.95	7.22	18.04	33.51	253.74	43.88	324.51
2014-15	591.53	6.49	67.73	67.61	28.03	8.13	20.89	34.91	233.79	39.52	357.74
2015-16	588.28	14.37	58.25	68.58	37.96	6.26	24.15	33.66	243.23	41.35	345.05
2016-17	584.6	29.72	53.37	80.98	42.51	30.24	26.55	32.33	295.69	50.58	288.91
Total	4340.29	327.22	656.57	492.1	135.5	116.46	137.74	282.24	2147.82	400.23	2192.47
%age	100.00	7.54	15.13	11.34	3.12	2.68	3.17	6.50	49.49	50.00	50.51

(C) Revenue earned by selling Ash from 2009-15

<i>(₹incrore)</i>					
2009-10	2010-11	2011-12	2012-13	2013-14	2014-15
13.20	58.00	84.30	108.80	122.50	87.40



(D) Ash sale details for the period from 1.1.2015 to 31.8.2017 (station/year-wise)

Stations	2014-15 (1.1.2015 to 31.3.2015)		2015-16 (1.4.2015 to 31.3.2016)		2016-17 (1.4.2016 to 31.3.2017)		2017-18 (1.4.2017 to 31.8.2017)	
	Qty sold (in LMT)	Revenue (₹ in crore)	Qty sold (in LMT)	Revenue (₹ in crore)	Qty sold (in LMT)	Revenue (₹ in crore)	Qty sold (in LMT)	Revenue (₹ in crore)
Badarpur	0.64	1.69	2.37	9.96	1.80	9.25	0.80	4.61
Dadri	3.38	14.48	12.44	58.31	10.67	50.06	4.54	20.63
Farakka	1.13	1.46	1.49	6.17	2.61	6.09	1.28	2.60
Unchahar	2.70	4.74	11.38	21.27	10.09	19.64	4.32	8.21
Kahalgaon	1.21	1.45	6.53	8.66	6.53	11.29	1.63	2.82
Mouda	-	-	-	-	3.00	0.33	0.82	0.08
Ramagundam	2.14	1.56	9.96	7.55	8.12	6.21	1.33	1.01
Sipat	-	-	1.00	0.05	4.58	0.28	1.77	0.18
Tanda	0.83	0.83	3.88	5.23	3.30	8.77	1.45	7.42
<b>Total</b>	<b>12.03</b>	<b>26.21</b>	<b>49.04</b>	<b>117.21</b>	<b>50.70</b>	<b>111.91</b>	<b>17.95</b>	<b>456</b>

26. Based on the details submitted by the Petitioner in the tables A & B above, the Committee in its report dated 16.5.2018 has observed the following:

*“It could be observed from above tables A & B that the % age of ash utilization in NTPC stations has remained in the range of about 40% to 60% during the period 2009-2017 and the average % age of ash utilization during the period 2009-17 has been about 50%. The average fly ash utilization had remained about 43% during the period 1999-2017. Further it is observed that the % age of ash issued to Cement Ind. & other is 21.63% (Cement 15.13% and others 6.50%) of the total ash produced by NTPC. As per the directives of MOEF notification dated 25.1.2016 and for that matter NTPC has to incur transportation expenditure. NTPC has earned revenue of ₹474.20 Cr. from 2009-10 to 2014-15 as given below. As per Para 6 of MOEF Notification no. 2804 (E) dated 03.11.09, this revenue can only be utilised for promoting fly ash utilisation, hence part of transportation expenditure, as above can be met from this revenue.”*

27. We have examined the matter. The main contention of the Petitioner is that the additional expenditure incurred in respect of sharing of transportation cost of fly ash due to MOEFCC Notification be permitted to be billed and recovered additionally on actual basis as revenue expenditure from the Respondents in terms of Regulation 8 of the 2014 Tariff Regulations. Regulation 8(3) of the 2014 Tariff Regulations provides as under:

*“8(3) The Commission shall carry out truing up of tariff of generating station based on the performance of following Uncontrollable parameters:*

*i) Force Majeure;*



- ii) *Change in Law; and*
- iii) *Primary Fuel Cost.*

28. Regulation 8(7) of the 2014 Tariff Regulations is extracted as hereunder:

*“8(7) The financial gains and losses by a generating company or the transmission licensee, as the case may be, on account of uncontrollable parameters shall be passed on to beneficiaries of the generating company or to the long term transmission customers/DICs of transmission system, as the case may be.*

29. Clauses (3) and (7) of Regulation 8 pertain to truing-up of tariff after considering the impact of uncontrollable factors in the nature of Change in law and Force Majeure. Therefore, Change in law has been provided in these regulations in the context of additional capitalization of the expenditure incurred/projected to be incurred by the generating company. We have in this order decided that the MOEFCC Notification imposing the sharing of transportation cost of fly ash is covered under “Change in law” in terms of Regulation 3(9)(ii) of the 2014 Tariff Regulations. The relief under Change in Law is provided under additional capital expenditure in terms of Regulation 14 of the 2014 Tariff Regulations. Relevant provisions of Regulation 14 are extracted as under:

*“14. Additional Capitalisation and De-Capitalisation*

*(1) The capital expenditure, in respect of new project or an existing project incurred or projected to be incurred on the following counts within the original scope of work, after the date of commercial operation and upto the cut-off date, may be admitted by the Commission, subject to prudence check:*

Xxxxx

*(v) Change in law or compliance of any existing law.*

*(2) The capital expenditure, incurred or projected to be incurred in respect of the new project on the following counts after the cut-off date, may be admitted by the Commission, subject to prudence check:*

*(ii) Change in law or compliance of any existing law.*

*(3) The capital expenditure, in respect of existing generating station or the transmission system including communication system, incurred or projected to be incurred on the following counts after the cut-off date, may be admitted by the Commission, subject to prudence check:*

*(ii) Change in law or compliance of any existing law.”*

30. Existing generating project has been defined as a “project” which has been declared under commercial operation on a date prior to 1.4.2014 and new project



has been defined as the project achieving COD or anticipated to be achieving COD on or after 1.4.2014. In all these situations, additional capital expenditure on “change in law or compliance with any existing law” is allowed. However, the expenditure towards transportation of fly ash from the generating station to the place of users is an expenditure of a revenue nature. There is no corresponding provision under the 2014 Tariff Regulations for allowing the revenue expenses / expenses of O&M nature under ‘Change in Law’. It is pertinent to mention that the Hon’ble Supreme Court in PTC India Limited V CERC &ors{(2010) 4 SCC 603}, had held that regulatory power can be exercised only when there is no provision in the regulations framed under section 178 of the Act. The relevant observations of the Hon’ble Supreme Court are extracted as under:

*“40. As stated above, the 2003 Act has been enacted in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 as it mandates establishment of an independent and transparent Regulatory Commission entrusted with wide ranging responsibilities and objectives inter alia including protection of the consumers of electricity. Accordingly, the Central Commission is set up under Section 76(1) to exercise the powers conferred on, and in discharge of the functions assigned to, it under the Act. On reading Sections 76(1) and 79(1) one finds that Central Commission is empowered to take measures/steps in discharge of the functions enumerated in Section 79(1) like to regulate the tariff of generating companies, to regulate the inter-State transmission of electricity, to determine tariff for inter-State transmission of electricity, to issue licenses, to adjudicate upon disputes, to levy fees, to specify the Grid Code, to fix the trading margin in inter-State trading of electricity, if considered necessary, etc.. These measures, which the Central Commission is empowered to take, have got to be in conformity with the regulations under Section 178, wherever such regulations are applicable. Measures under Section 79(1), therefore, have got to be in conformity with the regulations under Section 178. To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a pre-condition to the Central Commission taking any steps/measures under Section 79(1). As stated, if there is a regulation, then the measure under Section 79(1) has to be in conformity with such regulation under Section 178.....”*

31. Accordingly, we in exercise of the regulatory power hold that the actual additional expenditure incurred by the Petitioner towards transportation of ash in terms of the MOEFCC Notification is admissible under ‘Change in Law’ as additional



O&M expenses. However, the admissibility of the claims is subject to prudence check of the following conditions on case to case basis for each station:

- a) Award of fly ash transportation contract through a transparent competitive bidding procedure. Alternatively, the schedule rates of the respective State Governments, as applicable for transportation of fly ash.
- b) Details of the actual additional expenditure incurred on Ash transportation after 25.1.2016, duly certified by auditors.
- c) Details of the Revenue generated from sale of fly ash/ fly ash products and the expenditure incurred towards Ash utilisation up to 25.1.2016 and from 25.1.2016 to till date, separately.
- d) Revenue generated from fly Ash sales maintained in a separate account as per the MoEF notification.

32. The Petitioner is granted liberty to approach the Commission at the time of revision of tariff of the generating stations based on true-up exercise for the period 2014-19 in terms of Regulation 8 of the 2014 Tariff Regulations along with all details / information, duly certified by auditor.

33. Petition No. 172/MP/2016 is disposed of as above.

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

*-Sd/-*  
(P. K. Pujari)  
Chairperson

