

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 175/MP/2016

Coram:

Shri A.K. Singhal, Member

Shri A.S. Bakshi, Member

Dr. M.K. Iyer, Member

Date of Order: 13th March, 2018

In the matter of

Petition under Section 79 of the Electricity Act, 2003 read with statutory framework governing procurement of power through competitive bidding and Article 13.2(b) of the Power Purchase Agreement dated 7.8.2007 executed between Sasan Power Limited and the Procurers for compensation due to Change in Law impacting revenues and costs during the Operating Period.

And

In the matter of

Sasan Power Limited
Reliance Power Limited. 3rd Floor,
Reliance Energy Centre,
Santa Cruz East, Mumbai

.....**Petitioner**

Vs

1. MP Power Management Company Limited
Shakti Bhawan, Jabalpur-482 008.
2. Paschimanchal Vidyut Vitran Nigam Limited
Victoria Park', Meerut-250 001.
3. Purvanchal Vidyut Vitran Nigam Limited
Hydel Colony, Bhikaripur,
Post-DLW, Varanasi-221 004.
4. Madhyanchal Vidyut Vitran Nigam Limited
4A- Gokhale Marg, Lucknow- 226 001.
5. Dakshinanchal Vidyut Vitran Nigam Limited
220kV, Vidyut Sub-Station,

Mathura Agra By-Pass Road,
Sikandra, Agra-282 007.

6. Ajmer Vidyut Vitran Nigam Limited
400 kV GSS Building (Ground Floor), Ajmer Road,
Heerapura, Jaipur
7. Jaipur Vidyut Vitran Nigam Limited
400 kV GSS Building (Ground Floor),
Ajmer Road, Heerapura, Jaipur
8. Jodhpur Vidyut Vitran Nigam Limited
400 kV GSS Building (Ground Floor),
Ajmer Road, Heerapura, Jaipur
9. Tata Power Delhi Distribution Limited
Grid Sub-Station Building, Hudson Lines,
Kingsway Camp, New Delhi -110 009
10. BSES Rajdhani Power Limited
BSES Bhawan, Nehru Place,
New Delhi-110 019
11. BSES Yamuna Power Limited
Shakti Kiran Building,
Karkardooma, Delhi-110 092
12. Punjab State Power Corporation Limited
The Mall, Patiala-147 001
13. Haryana Power Purchase Centre
Shakti Bhawan, Sector-6,
Panchkula (Haryana)-134 109
14. Uttarakhand Power Corporation Limited
Urja Bhawan, Kanwali Road,
Dehradun- 248001

.... Respondents

Parties Present:

1. Shri Vishrov Mukherjee, Advocate, SPL
2. Ms. Raveena Dhamija, Advocate, SPL
3. Shri Yashwavi Kant, Advocate, SPL
4. Shri G. Umopathy, Advocate, MPPMCL
5. Shri Aditya Singh, Advocate, MPPMCL
6. Shri Naveen Kohli, MPPMCL

7. Ms. Ranjitha Ramachandran, Advocate, Prayas, Rajasthan Discoms and HPPC.
8. Ms. Anushree Bardhan, Advocate, Prayas, Rajasthan Discoms and HPPC.
9. Shri Rajeev Srivastava, Advocate, UP Discoms
10. Ms. Gargi Srivastava, Advocate, UP Discoms
11. Ms. Garima Srivastava, Advocate, UP Discoms
12. Shri Pratyush, TPDDL
13. Ms. Vashudha Sen, TPDDL
14. Ms. Sreevita Ghosh, TPDDL

ORDER

The Petitioner, Sasan Power Limited, has set up a 4000 MW super critical Ultra Mega Power Project based on linked captive coal mine at Sasan, District, Singrauli, in the State of Madhya Pradesh (hereinafter referred to as "Sasan UMPP").

2. The Petitioner has filed the present petition under clauses (b) and (f) of sub-section (1) of Section 79 of the Electricity Act, 2003 (hereinafter referred to as 'Act') read with Article 13 of the Power Purchase Agreement dated 7.8.2007 and Paragraph 5.17 of the Competitive Bidding Guidelines seeking the following reliefs under Change in Law during the operating period :

(a) Levy of service tax on services provided by Government and Local Authorities to the Petitioner with effect from 1.4.2016; and

(b) Imposition of additional obligation on coal/lignite based thermal power plants by Ministry of Environment and Forest (MoEF) requiring them to incur partial/total cost of transportation of fly ash generated at the plants to various industries utilizing the same with effect from 25.1.2016.

3. The Petitioner has submitted that in accordance with Article 13.3 of the PPA, the Petitioner notified the procurers on 11.7.2016 about the above stated events amounting

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

“(a) Declare that the events set out in Paragraphs 13 to 18 and Paragraphs 20-24 of this petition above as Change in Law events impacting revenues and costs during the Operating Period for which the Petitioner may be compensated in terms of Article 13 of the PPA;

(b) Restore the Petitioner to the same economic position by permitting the Petitioner to raise Supplementary Bills, in terms of Article 13.4.2 of the PPA as per actual cost incurred by the Petitioner on monthly basis on account of Change in Law events;

(c) In the interim, permit recovery of cost being incurred from the above notification dates till the order is passed by the Commission along with carrying cost/interest for the period between payment by the Petitioner (including *pendent lite*) and reimbursement thereof by the Respondents on provisional basis.”

4. Notices were issued to the Respondents to file their replies to the petition. Replies to the petition have been filed by MP Power Management Company Limited (MPPMCL) vide its affidavit dated 20.2.2017, Haryana Power Purchase Centre (HPCC) vide affidavit dated 7.3.2017, Rajasthan Distribution Companies (AVVNL/JVVNL/JVVNL) vide affidavit dated 10.2.2017 and Distribution Companies of Uttar Pradesh (PVVNL/ MVVNL/DVVNL) vide their affidavit dated 16.2.2017, Punjab State Power Corporation Limited (PSPCL) vide affidavit dated 29.8.2017, Tata Power Delhi Distribution Limited (TPDDL) vide affidavit dated 29.8.2017. The Petitioner has filed rejoinders to the replies of the Respondents.

5. During the last hearing on 11.1.2018, learned counsel for the Petitioner submitted that as on the cut-off date, there was no service tax on the services provided by the Government. With effect from 1.4.2016, Service tax is being levied on services being provided by the Government and local authorities to business entities including the Petitioner in terms of Ministry of Finance notification dated 18.2.2016. Therefore, the Petitioner is liable to pay the service tax on various services rendered by the Government and local authorities such as Coal, Forest department, police, MPGATVSA, etc. and the same amounts to Change in law. Learned counsel for the Petitioner further submitted that the Commission vide orders dated 19.12.2017 in Petition No.229/MP/2017 and 101/MP/2017 has allowed additional cost towards Fly-ash transportation as a change in law event. In conformity of the said orders the Petitioner has undertaken competitive bidding for transportation of fly-ash. Therefore, imposition of service tax and additional obligation imposed on bearing transportation costs of fly-ash be declared as change in law event.

6. Learned counsels for Prayas Energy, HPPC and Rajasthan Discoms have submitted as under:

a) The list of services as submitted by the Petitioner except Royalty is exempted from the payment of service tax. For certain services, the Petitioner has not provided the detail regarding MPGATVSA, Mine Closure charges, Salary paid to the Police, etc. Further, the support services provided by the Government were already under the ambit of Service Tax and therefore, there cannot be any change in law for the imposition of service tax on the support services.

b) Royalty is not a fee for the service provided by the Government and therefore, is not subject to service tax. In the case of Mineral Area Development Authority vs. Steel Authority of India & Ors [(2011) 4 SCC], the Hon'ble Supreme Court has referred the matter to the Nine Judge Bench to consider whether Royalty determined under Mines and Minerals Act is in the nature of tax. Therefore, service tax is not payable on Royalty.

c) The Commission's order dated 19.12.2017 in Petition No. 101/MP/2017 and 229/MP/2017 (DB Power Case) is not applicable in the present case as the Petitioner was required to submit an action plan for 100% ash utilization of fly ash under Environmental clearance given to it. Therefore, the Petitioner was already under the obligation to ensure utilization of the fly ash and there is no additional impact of change in law.

7. Learned counsel for Punjab State Power Corporation Limited (PSPCL) submitted that in the list of services provided by the Petitioner, the Petitioner has also included the items which are exempted from the payment of service tax. The Petitioner is also availing CENVAT credit in certain services which have not been disclosed by it.

8. MP Power Management Co. Ltd. (MPPMCL) vide its written submission dated 29.1.2018 has submitted that the Petitioner's obligation and subsequent expenditure to comply with the legal environmental safeguards and procedures cannot be treated as change in law events and are outside the purview of Article 13 of the PPA. The financial bid with the quoted tariff per Kwh for the entire 25 years of the PPA was submitted which includes the charges payable to various authorities as per the laws prevalent on

the cut-off date which is seven days prior to bid deadline. MPPMCL has further submitted as under:

(a) Imposition of service tax on services by Government and local authorities:

The claim for change in law under this head is untenable since the support services provided by the Government were taxable prior to the cut-off date and CENVAT credit can only be availed in respect of services provided by Government and local authorities wherein proof of the same has not been furnished by the Petitioner. The Petitioner is bound by the undertaking and subsequent clauses of the contract prior to submitting its bid in terms of Article 2.7.2. Therefore, the liability and onus of determination of the applicability of service tax as well as examination of the merits of the claim made by the appropriate authorities and subsequent action to be taken, falls on them entirely and thus, cannot be shifted upon the procurers under change in law events.

(b) Royalty is not a fee for services provided by the Government. The issue whether Royalty is in the nature of tax or not is pending before the Hon'ble Supreme Court and therefore, at present the question of service tax on royalty does not arise. The Petitioner is entitled to CENVAT credit which would reduce the impact of the tax liability which is also required to be considered. Further, quantum of Coal to be considered is actual coal consumed or the normative coal requirements as per normative or bid

assumed parameters of auxiliary consumptions and station heat rate whichever is lower.

(c) With regard to MPGATSVVA, the Petitioner has failed to furnish the details towards the charges claimed to be taxable or mention the provision(s) under which such payment is chargeable. The Notification dated 13.4.2016 exempts the services provided by the Panchayat and therefore, not subject to service tax.

(d) The contributions to District Mineral Foundation (DMF) and National Mineral Exploration Trust (NMET) cannot be construed as being subjected to service tax. Such contributions towards rehabilitation and resettlement are undertaken for the interest and benefit of persons and areas affected by mining operation as well as exploration of minerals and therefore, cannot be legitimately considered as fees for any service provided by the Government. Such contributions are not made to the Government, but to the respective Foundation(s) and Trust(s). The Notification referred to by the Petitioner is only inclusive of royalty payable on extracted coal and not the contributions to DMF and NMET which are in addition to royalty. The Petitioner is entitled to CENVAT credit which has to be taken into consideration while considering such impact, along with the actual coal consumed or coal required as per normative parameters, whichever is lower.

(e) If transit fees are being considered as consideration for services provided by the Government, then the transit fees are commercial consideration payable

by the Petitioner for procuring inputs for the power project and therefore, any levy or revision cannot be considered as Change in Law. The Hon`ble High court of Madhya Pradesh vide order dated 14.5.2007 has set aside the levy of transit fees. Therefore, the issue is pending and would be subject to the decision of the Hon`ble Supreme Court.

- (f) The mine closure is the responsibility of the Petitioner who is required to formulate the Plan, providing for protective measures including reclamation and rehabilitation works to be carried out. The Commission vide order dated 30.3.2015 in Petition No. 6/MP/2013 had held that the Petitioner was expected to take into account the expenditure on mine closure plant at the time of submission of the bid. The expenditure incurred by the leaseholder under the progressive mine closure plant for rehabilitation would be deducted from the financial assurance required to be furnished. Therefore, the financial assurance paid by the Petitioner to Mining Department is not consideration paid to the Government for any services and therefore, not subject to service tax.
- (g) The court fees paid to any court, including the Commission is not subject to service tax. As per Section 65B (44) (c) of the Finance Act, 1994, there is a specific exclusion of the same, which can easily be determined from the definition of services i.e. 'fees taken in any court or tribunal established under any law for the time being in force'.

- (h) The service tax, if any, payable on charges paid to WRLDC is not due to the imposition of service tax on Government or local authority as claimed by the Petitioner. WRLDC, which is part of POSOCO, is a wholly owned subsidiary of PGCIL and is a Government Company under Section 65 (26A) of Finance Act, 1994. Therefore, the definition of "Government" does not include any entity, whether created by a statute or otherwise, the accounts of which are not required to be kept in accordance with Article 150 of the Constitution or the rule made thereunder.
- (i) With regard to salary payment of Police, the Petitioner has not provided any provision of law under which the payment is made or the purpose for which charges are paid.
- (j) With regard to payment to Forest Department for Right of Way, the Petitioner has not provided any details of the purpose of charges claimed to be taxable or the provisions under which such payments are to be made.
- (k) With regard to inspection charges for Coal Controller, the Petitioner has not submitted any details of the purpose of charges claimed to be taxable or the provision under which such payment are to be made. In absence of the above information, the claim is liable to be rejected.
- (l) With regard to land registration charges, the Petitioner has submitted that the services provided by the Government by way of registration required under the law are exempted as per entry 58 of the Notification No. 25/2012 dated

20.6.2012 as amended by Notification dated 13.4.2016. Therefore, the land registration charges are exempted from service tax. Since, the Petitioner has not submitted the details of the land acquired or registered and duration of period of such acquisition and the reason for delay in such registration have not been furnished, the claim on this account is liable to be rejected.

- (m) The Petitioner has not provided the details of the directions of PWD or the need for operation of lift which is unrelated to the revenue and the cost of the business of selling electricity and therefore not covered under Article 13 of the PPA. The inspection charges, if any payable are exempted from Service tax.
- (n) With regard to renewal charges to Pollution Control Board, the Petitioner has submitted that the charges for certification relates to protection or safety of public at large (including environment related permissions, etc.) are exempted from liability of service tax under Entry 58 of the Notification No.25/2012 dated 20.6.2012.
- (o) With regard to miscellaneous charges for licences, permissions, etc. the Petitioner has submitted that these claims are to be examined by the procurers and the Commission for determination of any liability under the PPA.
- (p) The Petitioner has not specified the purpose and reasons for spectrum fees to be paid by the Petitioner and whether the same is related to revenue or cost of business of selling electricity therefore, no relief can be considered.

- (q) With regard to environment monitoring charges, the Petitioner has not provided any details or the purpose for such charges and provisions under which payment is to be made. Since, the charges relates to environment the same are exempted under Entry 58 of Notification No. 25/2012 dated 20.6.2012 as amended by Notification dated 13.4.2016.
- (r) Annual inspection fee by Electricity Department under Weight and Measure Act and Weight Bridge Stamping and certification by legal metrology under Weight and Measure Act do not relate to the business of selling electricity.
- (s) With regard to transportation of fly ash MPPMCL has submitted as under:
- (i) This claim is based on the amendment as per Notification dated 25.5.2015 for consideration as change in law, the tax as prevailing as on cut-off date as well as the obligations pre-existing are significant. If such obligation already existed and the further condition imposed through the amendment is mere crystallization or quantification of the obligation, the same would not be tantamount to change in law.
 - (ii) As per the Notification dated 14.9.1999, thermal plants are required to make available fly-ash, without any consideration and further required to facilitate availability of land as well as access to the ash lifting area for promoting and setting up of ash based production units in the proximity. Therefore, under the pre-existing obligations, the thermal

power plants were required to ensure utilization of ash generated by it in the various activities.

- (iii) As per the Ministry of finance Notification dated 25.1.2016, the cost of transportation of ash for road construction projects or for manufacturing of ash based projects or use as soil conditioner in agricultural activity within a radius of 100 Kms. 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 100 Kms. and upto 300 Kms. shall be shared equally between the user and the coal or lignite based thermal power plants. The procurers have no role with regard to the business of ash between its user and the generator. Accordingly, any burden on the issue of cost of transportation can be settled between its users and the Petitioner. Therefore, it is the responsibility of the generator since September, 1999 to achieve ash utilization level of 100% in a phased manner.
- (t) The Petitioner is claiming relief during operating period and in the event of the Commission allowing the same, or to be limited to the relief under Article 13.2(b). The Commission may adopt prudence check on the expenditure claimed and only after such prudence check if any amount is found to be payable, it has to be considered whether the same exceeds 1% of the aggregate letter of credit in terms of the PPA.

Analysis and Decision

9. We have considered the submissions of the Petitioner and the respondents and perused documents on record. The following issues arise for our consideration:

- (a) Whether the provisions of the PPA with regard to notice for Change in Law has been complied with?
- (b) Whether the claims of the Petitioner are admissible under Change in Law?
- (c) Mechanism for processing and reimbursement of admitted claims under Change in Law.

The above issues have been dealt with hereinafter.

Issue No.1: Whether the provisions of the PPA with regard to notice for Change in Law has been complied with?

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

“13.3 Notification of Change in Law

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

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

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

(a) the Change in Law; and

(b) the effects on the Seller of the matters referred to in Article 13.2.”

11. The Petitioner has submitted that a consolidated notice was issued to all the Procurers on 11.7.2016 regarding the ‘Change in Law’ events which have affected the cost or revenue of the project during the operating period. In this regard, no response was received from the Procurers.

12. We have considered the submission of the Petitioner. Under Article 13.3 of the PPA, the Petitioner is required to give notice about occurrence of Change in Law events as soon as reasonably practicable after being aware of such events. The Petitioner gave notices dated 11.7.2016 to the Procurers about the Change in Law events and apprised the Procurers about the impact of such events. The Procurers have not responded to the notices of the Petitioner. Thereafter, the Petitioner has filed the present petition. In our view, the Petitioner has complied with the requirement of notice under Article 13.2 of the PPA.

Issue No.2: Whether the claims of the Petitioner are admissible under Change in Law ?

13. The Petitioner has approached the Commission under Article 13 of the PPA read with Section 79 of the Act and Para 5.17 of the Competitive Bidding Guidelines for compensation of the cost incurred by the Petitioner due to “Change in Law” during the operating period. Section 79(1)(b) and (f) of the Act provides as under:

“79 (1). The Central Commission shall discharge the following functions, namely,

(a)

(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State.

(c)

(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration”

As per the above provision, the Central Commission has the power to adjudicate the dispute involving a generating company covered under clause (b) of sub-section (1) of Section 79 of the Act i.e. a generating company having a composite scheme for generation and sale of electricity in more than one State. The generating station of the Petitioner is an UMPP and is supplying power from the generating station to more than one State and therefore, any adjudications of the dispute regarding tariff falls within the jurisdiction of this Commission. Further, Para 5.17 of the Competitive Bidding Guidelines published by the Ministry of Power vide OM No. 23/11/2004-R&R (Vol-II) dated 19.1.2005 provides as under:

“5.17 Where any dispute arises claiming any change in or regarding determination of the tariff or any tariff related matters, or which partly or wholly could result in change in tariff, such dispute shall be adjudicated by the Appropriate Commission”

Appropriate Commission has been defined in the PPA dated 7.8.2007 between the Petitioner and the Procurers as “the Central Electricity Regulatory Commission constituted under the Electricity Act, 2003”. Therefore, under the provisions of the

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

14. The claims of the Petitioner pertain to the operating period. The “Operating Period” has been defined in the PPA as under:

“Operating Period in relation to the Unit means the period from its COD and in relation to the Power Station the date by which all the Units achieve COD, until the expiry or earlier termination of this Agreement in accordance with Article 2 of this Agreement.

15. The dates of commercial operation of the units of Sasan UMPP are as under:

Unit	Date of commercial operation of the units
First	16.8.2013
Second	28.1.2014
Third	12.4.2014
Fourth	27.5.2014
Fifth	26.12.2014
Sixth	27.3.2015

16. The first unit of the generating station achieved COD on 16.8.2013 and the last unit of the generating station achieved COD on 27.3.2015. Therefore, the operating periods of the different units of the generating station will be considered from the

respective dates of their commercial operation and the operating period of the generating station will be reckoned with effect from 27.3.2015.

17. Article 13 of the PPA between the Petitioner and the Procurers of Sasan UMPP provides for Change in Law during the Operating Period as under:

“13.1.1 “Change in Law” means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline: (i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law or (ii) a change in interpretation of any Law by a Competent Court of law, tribunal or Indian Governmental Instrumentality provided such Court of law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation or (iii) change in any consents, approvals or licences available or obtained for the Project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer under the terms of this Agreement or (iv) any change in the (a) the Declared Price of Land for the Projector (b) the cost of implementation of the resettlement and rehabilitation package of the land for the project mentioned in the RFP or (c) the cost of implementing Environmental Management Plan for the Power Station mentioned in the RFP ;or (d) the cost of implementing compensatory afforestation for the Coal Mine, indicated under the RFP and the PPA;

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

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

4.1.2 "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.

4.2 While determining the consequence of Change in Law under this Article 13, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through Monthly Tariff Payments, to the extent contemplated in this Article

13, the affected Party to the same economic position as if such Change in Law has not occurred.

(a) Construction Period

x x x x x x x x x x x x x x x x

(b) Operating 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.”

The terms ‘Law’ and ‘Indian Governmental Instrumentality’ have been defined in the PPA as under:

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

“Indian Governmental Instrumentality” means the Government of India (GOI), Government of State where the procurers and project are located 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”.

18. A combined reading of the above provisions would reveal that this Commission has the jurisdiction to adjudicate upon the disputes between the Petitioner and Procurers 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 as under:

- 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 licences available or obtained for the project, otherwise than the default of the seller.
- d) Such changes (as mentioned in (a) to (c) above) result in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer under the Agreement.
- e) The purpose of compensating the Party affected by Change in Law is to restore through Monthly Tariff Payments, to the extent contemplated in this Article 13, the affected Party to the same economic position as if such “Change in Law” has not occurred.
- f) The adjustment in monthly tariff payment shall be effective from the date of (i) adoption, promulgation, amendment, re-enactment or repeal of the law or change in law or (ii) the date of order/judgment of the Competent Court or Tribunal or Indian Government Instrumentality if the Change in Law is on account of change in interpretation of Law.

g) The compensation for any increase/decrease in revenues or cost to the Seller shall be determined and effective from such date, as decided by the Central Commission.

h) The compensation shall be payable only if and for increase/decrease in revenues or cost to the Petitioner is in excess of an amount equivalent to 1 % of Letter of Credit in aggregate for a Contract Year.”

19. The Petitioner has raised claims under Change in Law in respect of two events, namely, levy of service tax on services provided by Government and Local Authorities and imposition of additional obligation on coal/lignite based thermal power plants by MoEF requiring the Petitioner to incur partial/total cost of transportation of fly ash generated at the plants to various industries utilizing the same with effect from 25.1.2016. Keeping in view the broad principles discussed in para 18 above, we proceed to deal with the claims of the Petitioner under Change in Law during the Operating Period.

(I.) Levy of service tax on services provided by Government and Local Authorities to the Petitioner with effect from 1.4.2016:

20. The Petitioner has submitted that service tax was introduced by Finance Act, 1994 which specified a list of services on which service tax is levied. As on cut-off date i.e. 21.7.2007, services provided by the Government and local authorities to the Petitioner were not taxable. The Ministry of Finance, Government of India vide Notification No 5/2015 dated 1.3.2015 amended the Rule 2 (1)(d)(i)(E) of Service Tax Rules, 1994 and omitted the word ‘support ‘ from ‘support services’. Therefore, brought

all the services provided by the Government and the local authorities within the ambit of Service Tax. The amendment was made effective from 1.4.2016 vide Notification No.17/2016 dated 1.3.2016. Further, on 14.5.2015, the Ministry of Finance notified Finance Act, 2015 and amended clause (a) of sub section (1) of Section 66 D of Finance Act, 1994 and replaced 'support services' with 'any services'. The amendment was made effective from 1.4.2016 vide Notification No. 6/2016 dated 18.2.2016 issued by Ministry of Finance, Government of India. The Petitioner has further submitted that the Ministry of Finance vide Circular No. 192/02/2016- Service Tax dated 13.4.2016 has clarified as under:

- a) Any service provided by the Government and Local Authority to a business entity is taxable.
- b) Any activity undertaken by Government and Local Authority against a consideration constitutes a service and amount charged for such service is liable to service tax.
- c) This is irrespective of whether such services are statutory or mandatory in nature.
- d) Taxes, duties and cess have been kept out of the purview of service tax.

21. The Petitioner has submitted that on 14.5.2016, the Ministry of Finance, Government of India revised the service tax rate from 14.5% to 15%. The Petitioner has submitted the following indicative list of services wherein the Petitioner is liable to pay service tax on the services provided by the Government and Local Authorities:

S.No.	items	Relevant Act/ Authority	Authority: State/ Central/ Local	Description of service	Service Tax Paid @ 14.5% (in Rs lakh)	Service Tax applicable @ 15% (in Rs lakh)
1	Coal	Ministry of Coal	Royalty	State	8.7	3242
2	MPGATSV (Panchayat Dept)	MPGATSV Act	MPGATSV	State		1431
3	District Mineral Foundation (DMF)	Notification issued in FY 15-16 under 9B of the MMDR Act, 1957 as amended by the MMDR Amendment Act, 2015	Percentage of Royalty	State		1200
4	Forest Department	MP Forest Policy	Forest Transit Fees	State		189
5	Mining Department	Mines and Minerals Act,1957	Mine Closure Charges	State		75
6	National Mineral Exploration Trust (NMET)	Notification issued in FY 15-16 under NMET in terms of Section 9C of the MMDR Act read with Rule 7(3) of The NMET Rules, 2015	Percentage of Royalty	State		75
7	CERC	CERC Guidelines	Payment of fees for CERC	Central		56
8	WRLDC	PPA	WRLDC fees & charges	Central		30
9	Police	MP Police Depart- ment	Police salary payment	State		22
10	Forest Department	Mines and Minerals Act,1957	Payment to forest department for right of way	State		6
11	Coal Controller	Mines and Minerals Act,1957	Inspection Charges	Central		3
12	Land Officer	MP Land Acquisition Act	Land Registration Charges	State		2
13	Lift Inspector	Direction of PWD to operate lift	Lift Inspector	Central		2

S.No.	items	Relevant Act/ Authority	Authority: State/ Central/ Local	Description of service	Service Tax Paid @ 14.5% (in Rs lakh)	Service Tax applicable @ 15% (in Rs lakh)
14	Pollution Control Board	MP Environment Policy	Consent to Operate Renewal charges (Environment related)	State	0.6	2
15	Miscellaneous	Various departments	License, permission, grants rights, etc.	State		2
16	Spectrum Department	As per Information Technology Act,2002	Wireless spectrum usage fee	Central		1
17	MP Pollution Control Board	MP Environment Policy	Environment monitoring charges to MPPCB	State		1
18	Electricity Department	Weight and Measure Act	Annual Inspection Fee (Electrical, etc.)	State		1
19	Legal Metrology	Weight and Measure Act	Weigh Bridge Stamping & Certification	State		0
TOTAL					9.3	6340

22. The Petitioner has submitted that the Commission by order dated 7.3.2016 in Petition No 81/MP/2013 (GMR-Kamalanga Energy Limited v/s Dakshin Haryana Bijli Vitran Nigam Ltd) has allowed increase in Service tax as change in law. The Petitioner has further submitted that in terms of the revised Tariff Policy dated 28.1.2016 issued by the Ministry of Power, Government of India, increase in taxes and levies after award of bid are change in law events and allowed as pass-through. Therefore, the Petitioner is entitled to be compensated on account of levy of service tax on the services provided by the Government and Local authorities.

23. MPPMCL, HPPC, Rajasthan Discoms, PSPCL, UP Discoms, TPDDL have submitted that the Petitioner is entitled for compensation under Article 13 only for those expenditure which has been incurred. Therefore, the petition is premature and the Petitioner cannot seek an in-principle approval before any expenditure has been incurred. The Respondents have further submitted that support services provided by the Government were already under the ambit of Service Tax and therefore, there cannot be any change in law for the imposition of service tax on the support services. Further, the Petitioner may avail CENVAT credit in respect of services provided by the Government or local authority. The Respondents have submitted that the Petitioner, in the list of services provided by it, has also included the services which are specifically exempted from the liability of service tax.

24. The Petitioner has submitted that CENVAT credit cannot substitute the compensation that the Petitioner is entitled to in terms of Article 13 of the PPA. The compensation being claimed from the Procurers is net of any CENVAT credit utilized from the CENVAT credit taken on the payment made towards the service tax on services provided by the Government and local authorities. Therefore, impact (in Rs.) for a particular month= (Actual service tax paid by the Petitioner during the month on services provided by the Government and local authorities) less (Actual CENVAT credit utilized by the Petitioner during the particular month provided that such CENVAT credit is taken on the payment of service tax on services provided by the Government and local authorities by the Petitioner). The Petitioner has submitted that it has claimed compensation on account of Change in Law provision in the PPA. The Commission

vide its various orders has held that imposition as well as increase in service tax is a change in law event.

25. The Petitioner vide RoP dated 13.7.2017, was directed to submit the details of the service tax paid in each category from the date of Change in Law occurred and up to 31.3.2017. The Petitioner vide its affidavit dated 23.8.2017 has submitted the information called for. The Petitioner has submitted that it has incurred expenditure of Rs. 31.70 crore towards service tax for financial year 2016-17 as under:

Month	Total Royalty	Service Tax	Swwach Bharat Cess	Krishi Kalyan Cess	Total service tax
May, 2016	220,000,000	30,800,000	1,100,000	1,100,000	33,000,000
June, 2016	190,000,000	26,600,000	950,000	950,000	28,500,000
July, 2016	150,000,000	21,000,000	750,000	750,000	22,500,000
August, 2016	150,000,000	21,000,000	750,000	750,000	22,500,000
Sept, 2016	148,000,000	20,720,000	740,000	740,000	22,200,000
Oct, 2016	200,000,000	28,000,000	1,000,000	1,000,000	30,000,000
Nov, 2016	250,000,000	35,000,000	1,250,000	1,250,000	37,500,000
Dec, 2016	275,000,000	38,500,000	1,375,000	1,375,000	41,250,000
January, 2017	150,000,000	21,000,000	750,000	750,000	22,500,000
February, 2017	200,000,000	28,000,000	1,000,000	1,000,000	30,000,000
March, 2017	180,000,000	25,200,000	900,000	900,000	27,000,000
Total	2,113,000,000	295,820,000	10,565,000	10,565,000	316,950,000

(ii) Others:

S.No.	Service rendered by Govt./local Authorities in addition to Royalty Payments	Amount of service tax paid from April, 2016 till March, 2017 (Rs. in crore)
1.	Salary of Police Personal deployed in Sasan Police Station aid to Govt. of Madhya Pradesh	0.21
2.	Consent to operate-MPPCB	0.03
3.	Environmental Monitoring Charges-	0.10

	MPPCB	
4.	Lease Rent Payments	0.37
	Total	0.71

26. The Petitioner has submitted that it has paid service tax of Rs. 0.71 crore on heads other than Royalty payments between April, 2016 to March, 2017.

27. The Petitioner's claim for the declaration of imposition of service tax on various services provided by the Government and Local Authorities has been discussed as under:

A. Royalty

28. The respondents have submitted that Royalty is not a fee for the service provided by the Government and therefore, is not subject to service tax. Further, service tax cannot be levied on any tax levied by the State or Central Government. The respondents have submitted that the Hon'ble Supreme Court in Mineral Area Development Authority v Steel Authority of India & Ors [(2011) 4 SC] has referred the issue to Nine Judge Bench to decide whether Royalty is in nature of tax. Therefore, at present, no service tax is payable on royalty as the matter is *sub-judice* before the Hon'ble Supreme Court. The respondents have further submitted that if Royalty is considered as commercial consideration for allocation of right to use natural resources, then change in such commercial consideration cannot be considered for change in law. The Commission by its order dated 3.2.2016 in Petition No 79/MP/2013 (GMR Kamalanga Energy limited and Others versus Dakshin Haryana Bijli Vitran Nigam Limited) has held that revision in charges which are cost involved in procurement of coal

cannot be considered as change in law. The respondents have further submitted that the quantum of coal to be considered is actual coal consumed or the normative coal requirements as per normative or bid assumed parameters of auxiliary consumption and Station Heat rate, whichever is lower.

29. The Petitioner has submitted that Royalty is not treated as tax by the Government Authorities. Further, Royalty is also included in the assessable value of coal for the payment of excise duty which has also been clarified by the Superintendent, Central Excise, Singrauli, Madhya Pradesh by its letter dated 26.9.2016. The reliance placed by the respondents on the Commission's order dated 3.2.2016 in Petition No. 79/MP/2013 (GMR Kamalanga Energy limited and Others versus Dakshin Haryana Bijli Vitran Nigam Limited) is misplaced as the Commission's finding was limited to input costs and railway freight charges and was not made in the context of Royalty. Moreover, the Commission in its order dated 30.3.2015 in Petition No. 6/MP/2013 (Sasan Power limited versus MP Power Management Company Ltd) has already held that increase in royalty is a change in law event and therefore, any new imposition of tax on such royalty payment which leads to increase in expenditure qualifies as Change in law. Therefore, the Petitioner is entitled to be compensated for the same. The Petitioner has further submitted that bid documents and PPA do not provide normative parameters. Therefore, the impact of change in law events cannot be determined on the basis of normative parameters.

30. We have considered the submissions of the parties. The Petitioner has submitted that Royalty is not treated as tax by the Government Authorities. It is a service on which service tax is leviable. The respondents have submitted that Royalty is not a fee for the service provided by the Government and therefore, is not subject to service tax. The Commission has allowed royalty under Change in Law in Petition order dated 30.3.2015 in Petition No. 6/MP/2013 has held as under:

“28. Article 13.1.1 (iii) provides that the seller will be entitled for the benefits of “Change in Law” if there is “change in any consents or approvals or licences available or obtained for the project, otherwise than the default of the seller which results in any change in the cost of selling electricity by a seller to the procurers under the terms and conditions of the agreement.” Under the Mines and Minerals (Development and Regulations) Act, 1957(Mining Act), mining lease is granted for the purpose of undertaking mining operations. Under Section 4 of the Mining Act, no person shall undertake any mining operation in any area without a mining licence granted under the said Act. Section 9(2) of the Mining Act provides that the holder of a mining lease granted on or after the commencement of the said Act shall pay royalty in respect of the minerals removed or consumed by him or by his agent, employee, contractor or manager or sub-lessee from the leased area at the rate for the time being specified in the Second schedule in respect of that mineral. Section 9(3) of the Mining Act provides that the Central Government may by notification in the Official Gazette amend the Second Schedule so as to enhance or reduce the rate at which royalty shall be payable in respect of any mineral with effect from the date as may be specified in the notification. Therefore, royalty on coal is part of the terms and conditions of the mining lease to do mining in coal and any change in the amount of royalty amounts to change in the terms and conditions of mining lease. Moreover, enhancement of royalty results in increase in the input cost of coal which has a direct impact on the cost of generation of electricity. The total annual cost impact due to increase in the rate of royalty on coal from captive mines would be equal to the amount of coal actually produced in a particular year multiplied by the price of the particular grade of coal as notified by Coal India Limited for the particular year multiplied by 14% of the new royalty rate minus the royalty on that particular grade of coal at the time of bid submission. In our view, the change in royalty by Government of India falls within ambit of “Change in Law” in accordance with PPA.”

Thus, the holder of the mining lease is liable to pay royalty in respect of minerals removed or consumed for the leased area. Therefore, mining lease is a service accorded by the Govt. to the lease holder for which the lease holder is liable to pay the service charge in the form of royalty.

31. The Ministry of Finance, Government of India vide Notification No. 5/2015 dated 1.3.2015 amended the Rule 2 (1)(d)(i)(E) of Service Tax Rules, 1994 to the extent that it omitted the word 'support' from 'support services'. Therefore, all the services provided by the Government and local authorities have come within the ambit of Service Tax. The said Notification has been issued after the cut-off date i.e. 21.7.2007. Since, levy of service tax on royalty has an impact on the cost of coal and the cost of generation of power for supply to the respondents, service tax on royalty will be covered under change in law. Further, Krishi Kalyan Cess and Swachh Bharat Cess as part of service tax shall be admissible under change in law.

32. The Petitioner has submitted that it has paid Service Tax of Rs 31.695 crore on royalty. However, the Petitioner has not placed on record any document in support of his claim towards service tax paid on royalty. The Petitioner is directed to furnish along with its monthly bill the proof of payment duly certified by the Auditor. It is clarified that the Petitioner shall be entitled to recover on account of service tax on royalty in proportion to the actual coal consumed corresponding to the scheduled generation for supply of electricity to the respondents. 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 royalty on coal.

B. District Mineral Foundation (DMF) and National Mineral Exploration Trust (NMET)

33. The Petitioner has submitted that contribution towards National Mineral Exploration Trust and District Mineral Foundation are paid in relation to use of coal and

is liable to service tax. The Petitioner has submitted that the Commission in its order dated 6.2.2017 in Petition No 156/MP/2014 (Adani Power Limited Vs. Uttar Haryana Bijli Vitran Nigam Limited & Ors) has already allowed expenditure on account of contribution towards National Mineral Foundation and District Mineral Exploration Trust as change in law event.

34. The respondents have submitted that the contribution towards District Mineral Foundation and National Mineral Exploration Trust are in the nature of contribution towards rehabilitation and resettlement efforts and it is for the interest and benefit of persons and areas affected by the mining operations as well as exploration of minerals and cannot be considered as fees for any service provided by the Government. The contributions are not made to the Government but to the Trust. Therefore, such contributions are not liable to service tax. The respondents have further submitted that if such contributions are considered as consideration for service provided by the Government, then the same are the cost involved in procurement of the input and imposition or revision charges shall not be change in law as decided by the Commission by the order dated 16.2.2017 in the Petitioner's Petition No. 16/MP/2016.

35. We have considered the submissions of the parties. The Commission, vide order dated 17.2.2017 in Petition No. 16/MP/2017 (Sasan Power Limited Vs. M.P.Power Management Company Limited & Ors) has held as under

"33. It is noticed from the above provisions that through an amendment to Act of Parliament, National Mineral Exploration Trust and District Mineral Foundations have been sought to be established. National Mineral Exploration Trust shall be established as a non-profit body in the form of trust. The object of the Trust shall be to use the funds accrued to the Trust for the purposes of regional and detailed exploration in such

manner as may be prescribed by the Central Government. The District Mineral Foundations shall be established as non-profit body in the form of a trust. The object of the District Mineral Foundation shall be to work for the interest and benefit of persons, and areas affected by mining related operations in such manner as may be prescribed by the State Government. For running these trusts, the Amendment Act provided for payment of amounts in addition to the royalty by the holder of the mine lease or holder of prospective licence-cum-mining lease @ 2% of the royalty for National Mineral Exploration Trust and @10% to 30% of the royalty for District Mineral Foundations. These amounts collected are in the nature of compulsory exactions and therefore, partake the character tax. The Respondents have submitted that the payment or contribution to the National Exploration Trust and District Mineral Foundations are to be ade by the holder of a mining lease or holder of a prospective license-cum-mining lease and therefore, it should not be passed on to the Respondents. The Petitioner has submitted that the Petitioner is required to pay contribution at the prescribed rate to the National Exploration Trust and District Mineral Foundations in addition to royalty. The question therefore arises whether the contribution to National Exploration Trust and District Mineral Foundation Trust shall be borne by the lease-holder of the mines or shall be passed on to the procurers under change in law. It is pertinent to mention that royalty on coal imposed under Section 9 of the Mines and Minerals (Development and Regulation) Act, 1957 are payable by the holders of mining lease to the Government and the Commission has allowed the increase in royalty on coal under Change in Law in order dated 30.3.2015 in Petition No.6/MP/2013. Since the contributions to these funds are to be statutorily paid as a percentage of royalty, in addition to the royalty, they should be accorded the similar treatment. National Exploration Trust and District Mineral Foundations have been created through Act of the Parliament after the cut-off date and therefore, they fulfill the conditions of change in law.”

Since, the contributions to District Mineral Foundation and National Mineral Exploration Trust have already been allowed as change in law event, any imposition of service tax on these funds will qualify for the change in law. The Petitioner has not furnished any detail regarding service tax paid towards District Mineral Foundation and National Mineral Exploration Trust. The Petitioner shall submit the Audited Certificate as regard to actual payment towards DMF and NMET to the Procurers while claiming the same under Change in Law.

C. Madhya Pradesh Gramin Avsanrachna Tatha Sadak Vikas Adhiniyam (MPGATSVVA) :

36. The Petitioner has submitted that the payment towards Madhya Pradesh Gramin Avsanrachna Tatha Sadak Vikas Adhiniyam is included in the assessable value of coal for the excise duty which has been clarified by letter dated 26.9.2016 from the Superintendent, Central Excise, Singrauli, Madhya Pradesh. Therefore, any imposition of service tax on amount paid towards MPGATSVVA is to be reimbursed to the Petitioner.

37. The respondents have submitted that the Petitioner has not submitted any detail regarding its claimed to be taxable or the Section under which the payment is chargeable. Further, the levy under Section 3 of MPGATSVVA, 2005 is a tax and therefore, there cannot be service tax on such tax.

38. We have considered the submission of the parties. We have already decided in order dated 22.6.2017 in I.A. No. 55/2016 in Review Petition No. 19/RP/2016 (Sasan Power Limited Vs MP Power Management Company Limited) that MPGATSVVA is to be considered in excisable value of coal subject to the outcome of the proceedings before the Hon`ble Supreme Court. Relevant portion of said order dated 22.6.2017 is extracted as under:

“14. The issue whether stowing excise duty would be considered as a tax or not in terms of Section 4 of the Central Excise Act, 1944 does not appear to have been challenged before any court of law. The constitutional validity of forest transit fees imposed by the Government of Madhya Pradesh has been under challenge before the Hon`ble Supreme court and subject to final decision in the matter, the transit fee has been permitted to be levied. Considering the said fact, the Commission has allowed vide order dated 17.2.2017 in Petition No. 16/MP/2017 recovery of transit fee paid by the Applicant from the beneficiaries subject to final outcome of the appeals before the Supreme Court. MPGATSVVA has been upheld by the Hon`ble High court of Madhya Pradesh and is

presently under challenge before the Hon'ble Supreme Court. Thus, the constitutional validity of the royalty, transit fee and MPGATSVAs has been challenged before the Hon'ble Supreme Court. Further, the Commission is not the appropriate forum to decide whether the royalty or duty or fees are in the nature of tax or not. Central Excise Department has clarified that in terms of Section 4 of the Central Excise Act, they are included in the excisable value of the coal. Based on the clarification of the Central Excise Department, we allow royalty, stowing excise duty, transit fee and MPGATSVAs to be considered in excisable value of coal subject to the outcome of the proceedings before the Hon'ble Supreme Court. If it is decided that royalty, transit fee and MPGATSVAs are in the nature of taxes and therefore, cannot be included in the excisable value of coal, the Applicant shall take appropriate action to seek refund along with interest due as per law from the Central Excise Department and reimburse the same to the procurers along with interest, if it is received from the Central Excise Department."

Therefore, any imposition of tax on MPGATSVAs which increases excisable value of coal shall qualify for change in law. However, this is subject to the outcome of the pending proceedings before the Hon'ble Supreme Court as to whether MPGATSVAs shall be in the nature of tax. If it is considered as a tax, then no service tax thereon shall be payable. As per the affidavit of the Petitioner, no such tax has been paid on MPGATSVAs. Therefore, the Petitioner shall be eligible for reimbursement of service tax on MPGATSVAs, if it has actually paid service tax towards MPGATSVAs. The Petitioner shall submit the Audited Certificate with regard to actual payment of MPGATSVAs to the Procurers while claiming the same under Change in Law.

D. Forest Transit fee

39. The Petitioner has submitted that the transit fee is payable in relation to coal dispatched from the Petitioner's coal mine to the Petitioner's power plant and is also subject to service tax. Further, as per the Ministry of Finance, Government of India Notification dated 13.4.2016, the services in the nature of allocation of natural resources by Government/ Local authorities other than individual farmers are liable to service tax. The Petitioner has further submitted that Commission by its order dated 17.2.2017 in

the Petition No. 16/MP/2016 has already allowed the expenses on account of Forest Transit Fee. Therefore, the Petitioner is entitled to be compensated for the imposition of service tax.

40. The respondents have submitted that the transit fee is not liable to service tax as there is no service provided by the Government. The respondents have further submitted that if such contributions are considered as consideration for service provided by the Government, then the same are the cost involved in procurement of the input and imposition or revision charges shall not be covered under Change in Law.

41. We have considered the submissions of the parties. The Commission vide its order dated 22.6.2017 in Petition No. 19/RP/2016 has held that any imposition of service tax upon transit fee which increases the expenditure shall also qualify for change in law subject to the outcome of the proceeding before the Hon`ble Supreme Court. Relevant Portion of the said order is extracted as under:

“14. The issue whether stowing excise duty would be considered as a tax or not in terms of Section 4 of the Central Excise Act, 1944 does not appear to have been challenged before any court of law. The constitutional validity of forest transit fees imposed by the Government of Madhya Pradesh has been under challenge before the Hon`ble Supreme court and subject to final decision in the matter, the transit fee has been permitted to be levied. Considering the said fact, the Commission has allowed vide order dated 17.2.2017 in Petition No. 16/MP/2017 recovery of transit fee paid by the Applicant from the beneficiaries subject to final outcome of the appeals before the Supreme Court. MPGATSVAs have been upheld by the Hon`ble High court of Madhya Pradesh and is presently under challenge before the Hon`ble Supreme Court. Thus, the constitutional validity of the royalty, transit fee and MPGATSVAs has been challenged before the Hon`ble Supreme Court. Further, the Commission is not the appropriate forum to decide whether the royalty or duty or fees are in the nature of tax or not. Central Excise Department has clarified that in terms of Section 4 of the Central Excise Act, they are included in the excisable value of the coal. Based on the clarification of the Central Excise Department, we allow royalty, stowing excise duty, transit fee and MPGATSVAs to be considered in excisable value of coal subject to the outcome of the proceedings before the Hon`ble Supreme Court. If it is decided that royalty, transit fee and MPGATSVAs are in the nature of taxes and therefore, cannot be included in the excisable value of coal, the Applicant shall take appropriate action to seek refund along with interest due as per

law from the Central Excise Department and reimburse the same to the procurers along with interest, if it is received from the Central Excise Department.”

Therefore, any imposition of service tax upon forest transit fee which related to the input cost for generation and sale of power by the Petitioner to the Procures, shall qualify for change in law. However, this is subject to the outcome of the pending proceeding in the Hon`ble Supreme Court as to whether transit fee is in the nature of tax. The Petitioner has not furnished any detail regarding service tax paid towards transit fee. The Petitioner shall submit the Audited Certificate as regard to actual payment of MPGATSVVA to the Procurers while claiming the same under Change in Law.

E. Mine Closure Charges

42. The Petitioner has submitted that as per the Notification No 50011-01-2009 CPAM dated 11.1.2012 issued by Ministry of Coal, Government of India, relating to guidelines for the preparation of mine closure plan, the Petitioner is required to deposit Rs 6 lakh per hectare annually in an escrow account towards the Mine Closure Plan. The payment towards mine closure plan is escalated by 5% annually. Therefore, the imposition of service tax on such amount is a change in law.

43. The respondents have submitted that the Petitioner has not submitted any detail of charges claimed to be taxable or the Section under which the payment is chargeable. Further, the Commission in its order dated 30.3.2015 in Petition No 6/MP/2013 has already held that the mine closure is the responsibility of the Petitioner. It is the

responsibility of the Petitioner to formulate the Mine Closure Plan to provide for protective measures including reclamation and rehabilitation. Further, the financial assurance to be paid by the Petitioner is required to be furnished by the Petitioner for compliance by the leaseholder as contained in the Mine Closure Plan. The expenditure incurred under the progressive mine closure plan for rehabilitation is deducted from the financial assurance so furnished. Therefore, the financial assurance paid by the Petitioner to the Mining Department is not a consideration paid to the Government for any service availed.

44. We have considered the submissions of the parties. We have already held in order dated 30.3.2015 in Petition No 6/MP/2013 (Sasan Power Limited versus Madhya Pradesh Power Management Company Limited) that mine closure is the responsibility of the Petitioner. Further, the Appellate Tribunal for Electricity by its judgment dated 19.4.2017 in Appeal No. 161 of 2015 has upheld the Commission decision in this regard. In view of the above, imposition of service tax on the payment towards Mine Closure Plan shall be borne by the Petitioner and do not qualify as a change in law event under Article 13 of the PPA.

F. Fees Paid to CERC and charges payable to WRLDC:

45. The Petitioner has submitted that as per the Notification dated 13.4.2016 issued by Ministry of Finance, Government of India, any activity undertaken by the Government/local authority against the consideration constitutes a service and the charges for the performing such activities is liable to service tax. The Petitioner has

further submitted that the list provided by the Petitioner is only an indicative list and the compensation will be based on the actual amount paid duly supported by proof of payment.

46. The respondents have submitted that a fee paid to any court is not liable to Service Tax. Section 65B (44) of the Finance Act, 1994 specifically excludes from the definition of services “fees paid in any Court or Tribunal established under any law for the time being in force”. Further, the payment of fees to the Commission is consequence of filing of the petition which is exercise of option by the Petitioner and therefore, the Petitioner is required to bear all such expenses. The court fees paid is not related to revenue or costs of business of selling electricity and therefore, are not within the scope of change in law under Article 13 of the PPA. The respondents have further submitted that WRLDC is a part of Power System Operation Corporation Limited which is a wholly owned subsidiary of Power Grid Corporation of India Limited and is a Government Company, not Government. Therefore, no relief can be granted to the Petitioner.

47. We have considered the submissions of the parties. Article 13.1.1 provides that an event shall be change in law event, if such event results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer. In our view, fees paid to CERC and charges payable to WRLDC in which service tax has been imposed, are not related to the input cost for generation and sale of power by the Petitioner to the Procures and thus do not qualify as a change in law events under Article 13 of the PPA. Therefore, the claim on this count is rejected.

G. Land Registration Charges:

48. The Petitioner has not submitted any detail regarding the service tax paid towards land registration charges. The respondents have submitted that fees paid towards the land registration charges are not liable to Service Tax and is expressly exempted under Entry 58 of the Notification No 25/2012 dated 20.6.2012 amended by Notification dated 13.4.2016.

49. We have considered the submission of the parties. The Ministry of Finance, Govt. of India vide Notification No 25/2012 dated 20.6.2012 has, under Entry 58, expressly exempted the Services provided by Government or a local authority by way of registration required under any law for the time being in force. Therefore, the petitioner is not under any liability to pay service tax towards the land registration charges. Therefore, no relief can be granted to the Petitioner in this regard.

H. Renewal Charges to Pollution Control Board and Salary Payment to Police

50. The respondents have submitted that charges for the certification related to protection or safety of public at large are exempted from Service Tax under Entry 5. With regard to salary payment to Police, MPPMCL has submitted that the Petitioner has not provided any details of the law under which the payment is made or the purpose for which charges are paid.

51. The Petitioner vide affidavit dated 23.8.2017 has submitted that the Petitioner has paid Rs 0.21 crore as service tax towards the salary of Police personnel deployed in Sasan Police Station.

52. We have considered the submissions of the parties. Article 13.1.1 provides that an event shall be change in law event, if such event results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer. In our view, Renewal of consent to operate by Pollution Control Board is necessary for generation and sale of electricity to the Procures. Therefore, the service tax paid on the renewal of consent to operate by Pollution Control Board are covered under change in law. The Petitioner shall submit the Audited Certificate as regards actual payment of renewal of consent to operate by Pollution Control Board to the Procures while claiming the same under Change in Law. Salary payment to Police is not related to the input cost for generation and sale of power by the Petitioner to the Procures. Therefore, claim in this count is rejected.

I. Other Services:

53. The Petitioner has submitted that the petitioner is liable to pay service tax to others services also including Payment to Forest Department for Right of way, Inspection charges for coal controller, Lift Inspector, Miscellaneous charges for licences, permissions, etc, Charges related to Spectrum, Environment Monitoring Charges, Annual Inspection Fees by Electricity Department under Weights and

Measure Act, Weight Bridge Stamping and Certification by Legal Metrology under Weights and Measure Act.

54. The respondents have submitted that, the Petitioner has not provided any detail regarding Payment to Forest Department for Right of way, Inspection charges for Coal Controller, Lift Inspector, Environment Monitoring Charges, Miscellaneous Charges, Charges related to Spectrum and Annual Inspection Fee by Electricity Department under Weight and Measure Act. Therefore, in the absence of any detail, no relief can be granted to the Petitioner under these heads.

55. We have considered the submissions of the parties. The Petitioner has not submitted any details in respect of the above said services. The Petitioner has submitted that the list provided by the Petitioner is an indicative list and the compensation paid shall be based on the actual payment made. Article 13.1.1 provides that an event shall be change in law event, if such event results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer. In our view, the above services are not directly related to the generation and sale of electricity. Thus, these services does not qualify as change in law events under Article 13 of the PPA.

(II.) Additional Obligation imposed on the petitioner due to disposal of Fly Ash

56. The Petitioner has submitted that as on cut-off date i.e. 21.7.2007, there was no obligation to bear the cost of transportation of fly ash in terms of Notification dated 14.9.1999 of the Ministry of Environment, Forest and Climate Change (MoEFCC) along

with amendments dated 27.8.2003 and 3.11.2009. The Petitioner has submitted that MOEFCC issued Notification No. S.O.254 (E) dated 25.1.2016 amending the Notification dated 14.9.1999 whereby the Petitioner was required to bear the following:

(a) The transportation costs of fly ash to users undertaking the specified activities which are situated within 100 kms of the Project;

(b) 50% of the transportation costs of fly ash to users undertaking the specified activities which are situated between 100 and 300 kms of the Project.

57. The Petitioner has submitted that the cost of transportation of fly ash by road is approximately Rs. 5 tonNe/kms. The Petitioner has submitted that the annual impact on account of imposition of transportation cost for fly ash is expected to be Rs. 324 crore for average distance ranging between 270 kms to 280 kms (average distance of most of the consumers of fly ash from the Project). The Petitioner has submitted that obligation to bear the transportation cost is a new obligation which was not existed as on cut-off date. Therefore, the imposition of new obligation is a change in law event as the event has occurred after the cut-off date and will impact the cost during the operating period of the project. Further, the obligation to bear the transportation cost amounts to a change in consent and approval obtained for the project as the condition pertaining to disposal of fly ash were incorporated in the environmental clearance granted to the Petitioner.

58. MPPMCL, HPPC, Rajasthan Discoms, PSPCL have submitted for the event to be declared as change in law event, the law as prevailing on the cut-off date as well as

the obligations already existed for the Petitioner is considered. If the obligation already existed and the further condition imposed through the amendment is a mere crystallization of the obligation, the event cannot be a change in law event. The respondents have further submitted as under:

- a) As per notification dated 14.9.1999, the authority had sought to ensure utilization of fly ash generated from the thermal power plant. Therefore, the thermal power plants were required to make available fly ash without any consideration.
- b) Clause 2 of above notification was amended on 27.8.2003, inter alia, to substitute the opening part as 'Every coal or lignite based thermal power plant shall take the following steps to ensure the utilization of ash generated by it'.
- c) Amendments were made vide notification dated 03.11.2009 in which the responsibility of thermal power plants to supply fly ash free of cost was modified and the thermal power plants were allowed to sell fly ash to the user agencies subject to pond ash and 20% of dry ESP fly ash to be made available free of charge.
- d) Under the said notification, the amount collected from sale of fly ash by the thermal power plants was to be utilized only for development of infrastructure or facilities, promotion and facilitation of activities for use of fly ash until 100% fly ash utilization level is achieved and once it is achieved the

rest amount can be used for other development work. The above consideration can be used towards transportation of fly ash.

e) Under the Environment Clearance dated 23.11.2006, the Petitioner was required to submit an Action Plan for 100% utilization of fly ash within 9 years and such action plan would include the facilitating and providing infrastructure to make available fly ash to the users. Therefore, the Petitioner was already under the existing obligation to ensure the utilization of fly ash and there is no additional impact of change in law.

59. The Petitioner in its rejoinder has submitted that prior to notification dated 25.1.2016, various cements companies were purchasing the fly ash and they themselves were incurring the cost of transportation of fly ash. The additional obligation to bear the transportation cost of fly ash has been imposed upon by virtue of Notification dated 25.1.2016 issued by the MoEF and therefore, constitutes the Change in Law and the Petitioner is entitled to be compensated under Article 13.2 (b) of the PPA.

60. The Petitioner, vide RoP dated 13.7.2017, was directed to clarify and submit the following information:

a) Clarify the expenditure towards ash disposal with respect to the notification of Ministry of Environment and Forests (MoEF) dated 25.1.2016

b) Details of fly ash generation corresponding to energy supplied to all the long term beneficiaries separately for the claim period till 31.3.2017, along with quantum of ash transported up to 100 km distance and beyond 100 Km (up to 300 Km) and rate of ash transportation cost.

- c) Whether the Petitioner has awarded the contract for transportation of ash through competitive bidding or through negotiation route. If the contract has been awarded through competitive bidding, submit the copy of agreement along with the rate of transportation cost and if the contract has been awarded through negotiation route, justify that the price considered was competitive, along with a copy of agreement.
- d) Actual fly ash transportation cost paid for transportation of fly ash beyond 100 Km (up to 300 Km) as per MoEF notification duly certified by Auditor for the claim period till 31.3.2017.
- e) Under which head of account, transportation expenditure is booked and whether cost of such transportation was being recovered in tariff.
- f) Whether the Petitioner is maintaining a separate account for revenue earned from sale of ash as per the notification of MOEF. If yes, furnish the total revenue accumulated and the expenditure incurred from the same account till date. If not, the reason for not maintaining such separate account.

61. The Petitioner vide affidavit dated 23.8.2017 has submitted the information and has submitted as under:

- (a) With regard to expenditure towards ash disposal with respect to the notification of the Ministry of Environment and Forest dated 25.1.2016 and details of fly ash corresponding to energy supplied to all the long term beneficiaries, the Petitioner has submitted the details of generation of fly ash corresponding to the energy supplied to the beneficiaries. The Petitioner has submitted that at present, utilization of fly ash by the Petitioner is low. However, the Petitioner aims to achieve greater fly ash utilization in future and the Petitioner has been in discussion with the cement companies and road

construction companies for higher utilization of fly ash. The Petitioner has further submitted that it has also invited Expression of Interest (Eoi) on 18.2.2017 for setting up of fly ash based manufacturing facility in the vicinity of the Project but the same could not be processed as the petitioner did not get any response.

(b) With regard to award of the contract for transportation through competitive bidding or through negotiation route, the Petitioner has submitted that the petitioner had received an Eoi for the supply of fly ash generated from the project. Thereafter, an e-Auction was also carried out on 7.1.2017 and the Petitioner is also having a discussion with various cement companies for off take of fly ash from the project who have expressed interest for sharing of transportation charge of Rs 150 per MT for transportation of fly ash upto 300 Km from the project. However, a formal agreement in this regard is yet to be entered into.

(c) With regard to actual fly ash transportation cost paid for transportation of fly ash beyond 100 Km (up to 300 Km), the Petitioner has submitted that the Petitioner has not incurred any cost towards the transportation of fly ash. However, the Petitioner is expected to incur cost of Rs 5.4/MT/Km for transportation of fly ash to the construction site of Singrauli Siddhi road and Rs 150 MT for the delivery of fly ash at the cement plant location (260 Kms) as per the transportation charges quote by the cement company.

(d) With regard to head of account, transportation expenditure booked and whether cost of such transportation was being recovered in tariff and whether the

Petitioner is maintaining a separate account for revenue earned from sale of ash as per the notification of MOEF, the Petitioner has submitted that transportation expenditure was not being recovered in tariff since there was no obligation on the Petitioner to incur such cost prior to the change in law event. The Petitioner has further submitted that the Petitioner is not maintaining separate accounts for the revenue earned as no revenue has been earned.

62. We have considered the submissions of the parties. As on cut-off date, there was no direction with regard to utilization of fly ash under Environment (Protection) Act, 1986. Subsequently, Ministry of Environment and Forests, Govt. of India vide its Notification dated 3.11.2009 issued the directions regarding utilization of fly ash under the Environment (Protection) Act, 1986. The Ministry of Environment and Forests, Govt. of India vide its Notification No. S.O. 254 (E) dated 25.1.2016 amended the Environment (Protection) Rules, 1986 and imposed the additional cost towards fly ash transportation. Relevant portion of said Rules is extracted as under:

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

63. The Petitioner has submitted that it has not incurred any expenditure on account of transportation of fly ash and is seeking approval to claim for reimbursement of expenditure incurred towards transportation of fly ash subject to such costs being actually incurred by the Petitioner. The Petitioner has submitted that as on date, it has

not incurred any cost towards transportation of fly ash. The question of levy of charges for transportation of fly ash as a 'Change in law event' was considered by the Commission in Petition No 101/MP/2017 (DB Power Ltd v/s PTC India & Ors) in terms of the amendment dated 25.1.2016. The relevant portion of order dated 19.12.2017 in Petition No. 101/MP/2017 is extracted as under:

“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. However, the admissibility of this claim is subject to the following conditions:

- a) Award of fly ash transportation contract through a transparent competitive bidding procedure so that a reasonable and competitive price for transportation of ash/ Metric Tonne is discovered;
- b) Any revenue generated/ accumulated from fly ash sales, if CoD of units/ station was declared before the MoEF notification dated 25.01.2016, shall also be adjusted from the relief so granted;
- c) Revenue generated from fly ash sales must be maintained in a separate account as per the MoEF notification, and;
- d) Actual expenditure incurred as claimed should be duly certified by auditors and the same should be kept in possession so that it can be produced to the beneficiaries on demand.

The Petitioner is granted liberty to approach the Commission with above documents to analyze the case for determination of compensation.”

64. In the light of the above order, the expenditure claimed by the Petitioner is admissible under change in law in-principle and the admissibility of the said claim is subject to the same condition as specified in the said order dated 19.12.2017 in Petition No. 101/MP/2017 (as quoted in Para 63 above). The Petitioner is granted liberty to

approach the Commission with above documents to analyze the case for determination of compensation.

Issue No. 4: Mechanism for compensation on account of Change in Law during the Operational period:

65. The Petitioner has submitted that the minimum value of Change in Law should be more than 1% of the Letter of Credit amount in a particular year. As per Article 11.4.1.1, the letter of credit amount for the first year could be equal to 1.1 times of the estimated average monthly billing based on normative availability and subsequent years, the letter of credit amount will be equal to 1.1 times of the average of the monthly tariff payments to the previous contract year plus the estimated monthly billing during the current year from any additional unit expected to be put on COD during that year on normative availability. The Petitioner has further submitted that the Petitioner may be permitted to claim from the Procurers compensation that would be equivalent to the financial impact of the change in law on the cost and revenue of the Petitioner. The Petitioner has further submitted as under:

(a) The peak tariff of the Project is approximately Rs. 1.32 per unit at 80% normative availability of the total capacity, the total units will be about 26,086 million units.

(b) Consequently, the average aggregate monthly bill based on the aforesaid normative availability will be Rs. 286.9 crore. The letter of credit amount which is 1.1 times the estimated average monthly billing based on normative availability is about Rs. 315.6 crore.

(c) As per Article 13.2 (b) of the PPA, the threshold amount beyond which compensation for change in law can be claimed is 1% of the aggregate letter of credit amount for a contract year which will amount to about 3.1 crore.

(d) Since the aggregate amount claimed for change in law is approximately Rs. 398 crore, it is more than the threshold amount prescribed under Article 13.2 of the PPA and the Petitioner is entitled to be compensated for the same.

66. Article 13.2 (b) of the PPA provides for the principle for commuting the impact of change in law during the operation period as under:

“Operation Period

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

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

The above provision enjoins upon the Commission to decide the effective date from which the compensation for increase/decrease in revenues or cost shall be admissible to the Petitioner. Moreover, the compensation shall be payable only if and for increase/decrease in revenues or cost to the seller in excess of an amount equivalent to 1% of the letter of credit in aggregate for contract year. In our view, the effect of change in law as provided in this order shall come into force from the date of commercial operation of the concerned unit/units of the generating stations or date of imposition of service tax whichever is later. The Commission has specified a mechanism considering

the fact that compensation of change in law shall be paid in subsequent year also. Accordingly, the following mechanism prescribed to be adopted for payment of compensation due to change in law events allowed as per Article 13.4.2 of the PPA in the subsequent years of a contract period:

- (a) Monthly change in law compensation payment shall be effective from the date of commencement of supply of electricity to the Procurers or from the date of change in law, whichever is later.
- (b) Imposition of Service Tax on Services by Government and Local Authorities shall be computed based on actual subject to ceiling of coal consumed corresponding to scheduled generation and shall be payable by the beneficiaries on Pro-rata basis on their respective share in the scheduled generation. If the actual generation is less than scheduled generation, it will be restricted to actual generation.
- (c) At the end of the year, the Petitioner shall reconcile the actual payment made towards change in law with the books of accounts duly audited and certified by statutory auditor and adjustment shall be made based on the energy scheduled by the Procurers during the year. The reconciliation statement duly certified by Auditor shall be kept in the possession by the Petitioner so that same could be produced on demand from Procurers/Beneficiaries is so desired.
- (d) For change in law items related to the operating period, the year-wise compensation henceforth shall be payable only if such increase in revenue or

cost to the petitioner is in excess of an amount equivalent to 1% of LC in aggregate for a contract year as per provision under Article 13.2(b) of the PPA.

(e) To approach the Commission every year for computation and allowance of compensation for such change in law is a time consuming process which results in time lag between the amount paid by Seller and actual reimbursement by the procurers which may result in payment of carrying cost for the amount actually paid by the petitioner. Accordingly, the mechanism prescribed above is to be adopted for payment of compensation due to change in law events allowed as per Article 13.2(b) of the PPA for the subsequent period as well.

67. The Commission has not computed the threshold value for eligibility of getting compensation due to Change in Law during Operation period. However, the Petitioner shall be eligible to get compensated if the impact due to Change in Law exceeds the threshold value as per Article 13.2(b) during Operation period. Accordingly, the compensation amount allowed shall be shared by the Procurers based on the scheduled energy.

Summary:

68. 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:

Change in Law events	Decision
(1) Levy of service tax on services provided by Government and Local Authorities	(a) Royalty: allowed subject to the decision of the Hon`ble Supreme Court as to whether royalty is a tax.

	<p>(b) MPGATSVA: allowed subject to decision of the Hon`ble Supreme Court as to whether MPGATSVA is in nature of tax,</p> <p>(c) DMF and NMET: allowed.</p> <p>(d) Forest Transit fee: allowed subject to decision of the Hon`ble Supreme Court.</p> <p>(e) Renewable charges to Pollution Control Board: allowed in-principle.</p> <p>(f) Mine Closure charges, Fees to CERC, Charges payable to WRLDC, Salary payment of Police, Payment to Forest Department for ROW, Inspection charges for Coal Controller, land registration charges, lift Inspector, Miscellaneous charges for licences, permissions, etc., Charges related to Spectrum, Environment monitoring charges, Annual Inspection fee by Electricity Department, Weigh Bridge stamping and certification by legal metrology are not allowed.</p>
(2) Additional cost towards Fly Ash Transportation	Admissible in-principle. However, liberty granted to approach the Commission with documents and evidence to determine transportation cost.

Change in Law allowed in Para 68 (1) above shall be applicable till 30.6.2017.

69. Petition No. 175/MP/2016 is disposed of in terms of the above.

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

sd/-
(A.S. Bakshi)
Member

sd/-
(A. K. Singhal)
Member