

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 1/MP/2017

Coram:

Shri A.K. Singhal, Member

Shri A.S. Bakshi, Member

Dr. M.K. Iyer, Member

Date of Order: 16th March, 2018

In the matter of

Petition under Section 79 of Electricity Act, 2003 read with statutory framework governing procurement of power through competitive bidding and (a) Article 10 of the PPA dated 17.3.2010 between Maharashtra State Electricity Distribution Company Ltd and EMCO Energy Ltd (b) Article 10 of the PPA dated 21.3.2013 between Electricity Department of Union Territory of Dadra and Nagar Haveli and EMCO Energy Ltd and (c) Article 10 of the PPA dated 27.11.2013 between GMR Energy Trading Ltd and Tamil Nadu Generation and Distribution Corporation Ltd through EMCO Energy Ltd and to evolve a mechanism for grant of appropriate adjustment/ compensation to offset financial/ commercial impact of Change in law events during the Operating Period

And

In the matter of

GMR Warora Energy Limited
(formerly EMCO Energy Ltd)
701/704, 7th Floor, Naman Centre,
A-Wing, Bandra-Kurla Complex, Bandra
Mumbai-400051

.....Petitioner

Vs

1. Maharashtra State Electricity Distribution Company Ltd
Fifth Floor, Prakashgadh, Plot No. G-9
Anant Kanekar Marg, Bandra (East)
Mumbai-700051

2. Electricity Department,
Union Territory of Dadra and Nagar Haveli
Vidyut Bhavan, Opp. Secretariat,
Silvassa-396230, Dadra & Nagar Haveli

3. TamilNadu Generation and Distribution Corporation Limited
144, Anna Salai, NPKRR Maaligai,
Chennai-600002



4. GMR Energy Trading Limited
25/1, Skip House, Museum Road,
Bangalore-560025, Karnataka

..... Respondents

Parties Present:

Shri Amit Kapur, Advocate, GMRWEL
Shri Vishrov Mukherjee, Advocate, GMRWEL
Ms. Raveena Dhamija, Advocate, GMRWEL
Ms. Bhawya Solanki, Advocate, GMRWEL
Shri Yashaswi Kant, Advocate, GMRWEL
Ms. Ananya Sachdeva, MSEDCL
Ms. Swapna Seshadri, Advocate, DNH Distribution Co
Shri G. Umapathy, Advocate, TANGEDCO
Shri Vallinayagam, Advocate, TANGEDCO
Shri M.G.Ramachandran, Advocate, Prayas
Ms. Poorva Saigal, Advocate, Prayas

ORDER

GMR Warora Energy Limited (formerly EMCO Energy Ltd), the Petitioner herein, is a generating company, incorporated under the Companies Act, 1956, which has developed a 600 MW coal based Thermal Power Project (hereinafter referred to as the “Project”) in the Warora Taluka, District Chandrapur in the State of Maharashtra. The Project comprises of two units of 300 MW each. Unit-I of the Project was commissioned on 19.3.2013 and Unit-II was commissioned on 1.9.2013.

2. The Petitioner has entered into the following long-term PPAs for supply of power from the Project:

(a) Supply and sale of 200 MW to Maharashtra State Electricity Distribution Company Ltd (MSEDCL) in terms of PPA dated 17.3.2010. The cut-off date for this PPA is 31.7.2009. Supply of power in terms of the PPA commenced from **17.3.2014**.

(b) Supply and sale of 200 MW to Electricity Department, Union Territory of Dadra and Nagar Haveli (DNH Discom) in terms of PPA dated 21.3.2013. The cut-off date for this PPA is 1.6.2012. Supply of power in terms of the PPA commenced from **1.4.2013**.

(c) Supply and sale of 150 MW to Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO) through back to back arrangements as follows:



- (i) Power Sale Agreement (PSA) dated 1.3.2013 between GMR Energy Trading Limited (GMRETL) and the Petitioner based on which bid was submitted to TANGEDCO;
- (ii) PPA dated 27.11.2013 between GMRETL and TANGEDCO for supply of power from Petitioner to TANGEDCO. The cut-off date of this PPA is 27.2.2013. Tariff was adopted by TNERC vide its order dated 29.7.2016.
- (iii) PPA dated 3.5.2014 between Petitioner and GMRETL recording the terms and conditions in accordance with PPA between GMRETL and TANGEDCO. The supply of power under the PPA commenced on **22.10.2015**.

3. The Petitioner has sought for the following reliefs under Change in Law in respect of MSEDCL PPA, DNH PPA and TANGEDCO PPA during the Operating period:

MSEDCL PPA

(a) Increase in Rate of Value Added Tax (VAT) applicable on procurement of spares and equipment's vide Notification dated 10.3.2010 by the State Govt. of Maharashtra;

TANGEDCO PPA

(a) Change in Crushing/Sizing Charges pursuant to CIL notification dated 16.12.2013 and increase in NiryatKar charges on account of the same;

(b) Increase in Surface Transportation Charges pursuant to notification issued by Ministry of Coal, Gol/ Coal India Ltd vide notification dated 13.11.2013;

(c) Levy of Swachh Bharat Cess by Government of India vide Finance Act, 2015 and Government of India notification dated 06.11.2015;

(d) Increase in the rate of Clean Energy Cess pursuant to the Ministry of Finance GOI, Notification dated 20/2014 dated 11.7.2014, Notification dated 1/2015 dated 1.3.2015 and Notification 1/2016 dated 1.3.2016 and SECL Notifications dated 10.7.2014, 28.2.2015 and 29.2.2016;

(e) Increase in Busy Season Surcharge levied on Railway Freight vide Railway Circular No.24/2013 dated 18.9.2013;

(f) Change in Central Excise Duty on account of Inclusion of Royalty & Stowing Excise Duty amount in the assessable value vide Central Excise letter dated 5.3.2013;

(g) Changes in Fuel Supply Agreement and deviation from the New Coal Distribution Policy and its impact in the project;

(h) Increase in Minimum Alternate Tax (MAT) and Corporate Tax vide Finance Acts 2013-14, 2014-15, 2015-16 and 2016-17;

(i) Increase in Service Tax on Transportation of Coal vide Ministry of Finance Notification no.14/2015 dated 19.5.2015 effective from 1.6.2015;

(j) Increase in Working Capital



MSEDCL, DNH and TANGEDCO PPAs

- (a) Levy of charges for transportation of ash vide by Ministry of Environment, Forest and Climate Change, GOI vide Notification dated 14.9.199 and amendments dated 27.8.2003, 3.11.2009 and 25.01.2016;
- (b) Levy of Krishi Kalyan Cess by Government of India vide Finance Act, 2016, with effect from 1.6.2016;
- (c) Imposition of charges towards National Mineral Exploration Trust (NMET) and District Mineral Foundation (DMF) pursuant to amendments in Mines and Minerals (Development and Regulation) (Amendment) Act, 2015 dated 26.3.2015 and Notification SECL/BSP/S&M/1936 of SECL dated 13.11.2015;
- (d) Increase in the rate of Chattisgarh Paryavaran & Vikar Upakr vide notice of SECL dated 19.8.2015;
- (e) Increase in Central Excise Duty on account of NMET and DMF;
- (f) Levy of Coal & Coke Terminal Surcharge vide Railway Board, Ministry of Railways Circular dated 22.8.2016;
- (g) Increase in Countervailing Duty (CVD) and Excise Duty on Spares and Equipment's vide Central Excise notifications dated 27.2.2010 and 17.3.2012 and Ministry of Finance, GOI notification dated 16.3.2012 and Finance Act, 2015;
- (h) Increase in Service Tax on O&M contracts vide Finance Act Notification no 2/2012 dated 17.3.2012 effective from 1.4.2012 and Notification no 14/2015 dated 19.5.2015 effective from 1.6.2015;
- (i) Increase in Central State Tax due to Changes in law.

4. Accordingly, the estimated impact of the above Change in Law events estimated by the Petitioner till September, 2017 is ₹17.73 crore for MSEDCL PPA, ₹63.99 crore for TANGEDCO PPA and ₹12.02 crore for DNH PPA. The Petitioner has also submitted that the above impact of change in law events have been estimated based on actual data available as on date. It has further submitted that the actual impact at the end of the financial year would be revised based on the actual data for the year which would further include impact of MAT & Corporate Tax, Expenditure towards Ash disposal, Increase in CVD and ED for Spares and Equipments. The Petitioner has added that the impact of changes in law events affecting the respective PPAs has been given on normative basis, but would be claiming compensation based on actuals.



5. The Petitioner has submitted that the events of Change in Law have significant adverse financial impact on the costs and revenue of the Petitioner during the Operating period for which the Petitioner is entitled to be compensated in terms of Article 10 of the respective PPAs. Accordingly, the Petitioner has filed the present petition with the following main prayers:

“(a) Declare that the items set out in Paragraphs 3 (of the petition) as Change in Law events during the Operating Period which have led to an increase in the costs during the operating period of the Project;

(b) Evolve a suitable compensatory mechanism to compensate the Petitioner for the impact on costs during the operating period of the Project and restore the Petitioner to the same economic condition prior to occurrence of the events set out in paragraphs 56 to 183 (of the petition) above;

(c) Grant interest/carrying cost for any delay in reimbursement by the Respondents;”

6. The Petition was admitted and notices were issued to the Respondents and M/s Prayas Energy Group (Prayas) with directions to file their replies to the petition. Pursuant to the hearing of the Petition on 13.7.2017, the Petitioner was directed vide ROP to submit additional information on the following with copy to the Respondents and Prayas.

“(a) Details of Change in Law events occurred after the cut-off date which had reduced the cost during construction and operation period in all the 3 PPAs, namely MSEDCL, DNH and TANGEDCO.

(b) Year-wise impact of each event (from the date of commencement of supply of electricity or the date of Change in Law events, whichever is later) till 31.3.2017 in all the 3 PPAs separately for ten events in case of MSEDCL and DNH and 21 events in case of TANGEDCO along with the computation that the compensation claim is more than the threshold value as per Article 10 of the PPA.

(c) Copy of notification of the State Government/ State Government agency in case of increase in rate of Chhattisgarh Paryavaran and Vikas Upkar on Coal.

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

i. 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.



ii. 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, then copy of agreement must be furnished along with the rate of transportation cost and if the contract has been awarded through negotiation route, then justify the price considered was competitive, along with a copy of agreement.

iii. 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.

iv. Under which head of account, transportation expenditure is booked and whether cost of such transportation was being recovered in tariff.

v. Whether the Petitioner is maintaining a separate account for revenue earned from sale of ash as per the notification of MOEF. If yes, the total revenue accumulated and the expenditure incurred from the same account till date. If not, the reason for not maintaining such separate account.”

7. Replies to the Petition have been filed by Respondent, MSEDCL vide affidavit dated 9.6.2017, Respondent, DNH vide affidavit dated 12.7.2017, Prayas vide affidavit dated 22.8.2017 and the Respondent, TANGEDCO vide affidavit dated 6.12.2017. The Petitioner has filed its rejoinder to the said replies of the Respondents & Prayas. Thereafter, the matter was heard on 9.1.2018 and the Commission after directing the Petitioner to submit as to how the escalable rates notified by the Commission are applied while raising the bills on beneficiaries, reserved its order in the Petition. The Respondent, DNH vide affidavit dated 18.1.2018 has filed its written submissions in the matter. In compliance with the directions of the Commission in ROPs of the hearing dated 13.7.2017 and 9.1.2018, the Petitioner vide affidavits dated 23.8.2017 and 29.1.2018 has filed the additional information with copies to the Respondents and Prayas.

8. The Petitioner had filed Petition No. 8/MP/2014 claiming compensation on account of the impact of Force Majeure and Change in Law events during the Operation and Construction Period under the MSEDCL and DNH PPAs and the Commission by order dated 1.2.2017 had allowed/disallowed some of the claims of the Petitioner. Hence, the said



claims have not been considered in this order. The Petitioner in this Petition has furnished the estimated impact of the Change in Law events under the MSEDCL, DNH and TANGEDCO PPAs vide affidavit dated 23.8.2017 as under:

MSEDCL PPA

Sl no	Change in Law item	Impact (₹ in crore)				Total
		2013-14	2014-15	2015-16	2016-17	
1	Royalty	0.05	0.73	0.77	1.68	3.23
2	Clean Energy Cess	0.33	9.22	19.83	38.77	68.16
3	Service Tax On Coal	0.25	3.83	4.75	5.07	13.91
4	Swachh Bharat Cess	-	-	0.06	0.18	0.24
5	Central Excise Duty	0.39	5.38	5.75	6.48	17.99
6	National Mineral Exploration Trust	-	-	0.07	0.18	0.26
7	District Mineral Foundation	-	-	0.83	2.75	3.58
8	Impact on CST	0.04	0.62	0.62	1.39	2.68
9	Krishi Kalyan Cess	-	-	-	0.14	0.14
10	Coal and Coke Terminal charges	-	-	-	6.79	6.79
11	Chhattisgarh Parayavaran Upkar	-	-	0.09	0.20	0.30
12	Chhattisgarh Vikas Upkar	-	-	0.10	0.20	0.31
13	Coal pass-through	-	5.37	24.76	6.80	36.94
14	Expenditure towards Ash disposal	2.13	2.86	0.21	0.13	5.33
15	Increase in CVD & Excise duty on spares	0.01	0.19	0.81	0.19	1.20
16	Increase in Service tax on O & M contracts	0.02	0.16	0.48	0.51	1.17
	Total impact	3.23	28.36	59.15	71.48	162.23
	Already allowed (8/MP/2014)	1.02	19.15	31.17	52.18	103.53
	Total Claimed	2.20	9.21	27.98	19.30	58.70

DNH PPA

Sl no	Change in Law item	Impact (₹ in crore)				Total
		2013-14	2014-15	2015-16	2016-17	
1	Royalty	-	-	-	-	-
2	Clean Energy Cess	-	4.52	13.63	15.04	33.19
3	Service Tax on Coal	3.22	3.79	4.34	2.25	13.59
4	Swachh Bharat cess	-	-	0.05	0.08	0.13
5	Central Excise Duty	0.96	1.18	1.18	0.88	4.19
6	National Mineral Exploration Trust	-	-	0.08	0.08	0.16



7	District Mineral Foundation	-	0.40	1.60	1.22	3.21
8	Impact on CST	0.12	0.26	0.32	0.45	1.16
9	Krishi Kalyan Cess	-	-	-	0.06	0.06
10	Coal And Coke Terminal Charges	-	-	-	3.55	3.55
11	Chhattisgarh Parayavaran Upkar	-	-	0.08	0.09	0.17
12	Chhattisgarh Vikas Upkar	-	-	0.08	0.09	0.17
13	Coal pass-through	14.63	3.83	14.33	1.59	34.38
14	Expenditure towards Ash disposal	2.13	2.86	0.21	0.13	5.33
15	Increase in CVD & Excise duty on spares	0.13	0.19	0.81	0.19	1.33
16	Increase in Service tax on O & M contracts	0.21	0.16	0.48	0.51	1.36
	Total impact	21.40	17.19	37.17	26.21	101.98
	Already allowed (8/MP/2014)	4.17	9.49	19.20	18.25	51.10
	Total Claimed	17.23	7.71	17.97	7.97	50.88

TANGEDCO PPA

Sl no	Change in Law item	Impact (₹ in crore)		
		2015-16	2016-17	Total
1	Royalty	0.21	1.64	1.84
2	Clean Energy Cess	3.67	25.21	28.88
3	Service Tax On Coal	0.21	1.25	1.47
4	Swachh Bharat Cess	0.04	0.13	0.17
5	Central Excise Duty	0.33	1.50	1.83
6	Crushing/ Sizing charges	0.44	1.30	1.74
7	Surface Transportation charges	0.32	0.94	1.25
8	Impact on NiryatKar	0.07	0.47	0.54
9	National Mineral Exploration Trust	0.05	0.16	0.21
10	District Mineral Foundation	0.70	2.43	3.13
11	Impact on CST	0.15	0.89	1.04
12	Busy Season Surcharge	1.21	1.97	3.18
13	Development surcharge	0.27	0.83	1.10
12	Krishi Kalyan Cess	-	0.12	0.12
13	Coal and Coke Terminal charges	-	5.28	5.28
14	Chhattisgarh Parayavaran Upkar	0.06	0.18	0.24
15	Chhattisgarh Vikas Upkar	0.06	0.18	0.24
16	Coal pass-through	2.76	3.53	6.29
17	Expenditure towards Ash disposal	0.16	0.10	0.26
18	Increase in CVD & Excise duty on spares	0.23	0.14	0.37
19	Increase in Service tax on O & M contracts	0.15	0.38	0.54
	Total claimed	10.54	48.01	58.55



Maintainability

9. The Petitioner in the Petition has submitted that it has a composite scheme for generation and sale of power to more than one State (as stated in para 2 above) and hence the Commission has the jurisdiction to adjudicate the present matter.

10. MSEDCL in its reply affidavit dated 9.6.2017 has submitted that the present petition is without jurisdiction as the Appropriate Commission to adjudicate the petition would be the Maharashtra Electricity Regulatory Commission (MERC) in the light of section 64(5) of the 2003 Act. It has further submitted that the relief sought for is not maintainable as the same is not covered under the contractual arrangement between the parties. The said Respondent has also submitted that MSEDCL had entered into PPA with the Petitioner during 2010 and the MERC, which oversaw the procurement process, had adopted the tariff under Section 63 of the 2003 Act vide its order dated 28.12.2010 in Case No. 22/2010. It has submitted that the Petitioner had entered into PPA with DNH in the year 2012 and tariff for the same was adopted by the Joint Electricity Regulatory Commission (JERC) on 19.2.2013 in Petition No. 87/2012, wherein the Petitioner was a second Petitioner before the JERC as envisaged under Section 64(5) of the 2003 Act. Accordingly, the Respondent has submitted that the Petitioner having acquiesced to the jurisdiction of MERC and JERC as aforesaid, for the purpose of adoption of tariff and is thereby estopped from seeking the jurisdiction of this Commission for adjudication of the disputes with the respondents. The Respondent, TANGEDCO in its reply affidavit dated 6.12.2017 has referred to the judgment of the Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Ltd V Tarini Infrastructure Ltd & ors (2016) 8 SCC 743 and has submitted that the tariff was adopted by the State Commission under Section 63 of the 2003 Act and hence the provisions of Section 79(1)(b) are not



applicable to tariff adopted by the Commission under Section 86(1)(b) of the 2003 Act. Accordingly, the Respondent has submitted that the Petition filed by the Petitioner is not maintainable and the Petitioner is not entitled to any of the reliefs prayed for in the Petition.

11. The Petitioner in its rejoinder dated 17.8.2017 has submitted that it has a composite scheme for supply of power to more than one state, being Maharashtra, DNH and Tamil Nadu and consequently this Commission has the jurisdiction to adjudicate the disputes under Section 79(1)(b) read with Section 79(1)(f) of the 2003 Act. It has also pointed out that the Hon'ble Supreme Court in its judgment dated 11.4.2017 in Civil Appeal Nos. 5399-5400 of 2016 and batch titled Energy Watchdog Vs CERC & ors (2017 (4) SCALE 580), held that where the generation and sale of power takes place in more than one State, the same amounts to a composite scheme and the jurisdiction for the same lies with this Commission. Accordingly, the Petitioner has submitted that the issue of composite scheme is no longer *res integra* and stands settled and this Commission has the jurisdiction to adjudicate the disputes between the parties.

12. The matter has been examined. It is observed that the Respondents MSEDCL and DNH had raised the issue of jurisdiction of this Commission to adjudicate the dispute in Petition No. 8/MP/2014 filed by the Petitioner on the ground that the Petitioner does not have a composite scheme in terms of section 79(1)(b) of the 2003 Act and in the absence of a composite scheme, the adjudication of disputes raised in the petition falls within the jurisdiction of the respective State Commissions under clause 86(1)(f) of the 2003 Act. However, the Commission by interim order dated 15.10.2015 rejected the contentions of the said Respondents and held as under:



“12. In the present case, the Petitioner has directly executed PPAs for supply of power to the State of Maharashtra and Union Territory of DNH and PPA with Tamil Nadu through GMR Energy Trading Company Ltd. which are located in three different States. In the light of the above decision, there can be no doubt that the Petitioner has the composite scheme for generation and sale of electricity in more than one State and as such falls within the jurisdiction of this Commission under clause (b) of sub-section (1) of Section 79 of the Electricity Act. Therefore, any dispute on tariff related matters is to be adjudicated by this Commission or referred for arbitration under clause (f) of sub section(1) of Section 79 of the Electricity Act. Even in case of this generating station, the Commission has decided the issue of jurisdiction in order dated 17.9.2015 in Petition No.54/MP/2014 as under:

“27. In the present case, there is no dispute that the Petitioner has directly executed agreements for supply of power to the State of Maharashtra and Union Territory of DNH (which is a “State” as defined under the General Clauses Act).The Petitioner is also supplying power to the State of Tamil Nadu through GMR Energy Trading Company Ltd. In the light of the earlier decisions of this Commission noted above, there can be no doubt that the Petitioner has the composite scheme for generation and sale of electricity in more than one State and as such falls within the jurisdiction of this Commission under clause (b) of sub-section (1) of Section 79 of the Electricity Act. Therefore, any dispute on tariff related matters is to be adjudicated by this Commission or referred for arbitration under clause (f) of sub-section (1) of Section 79 of the Electricity Act.”

13. It is pertinent to mention that the subsequent orders dated 2.4.2013 and 21.2.2014 in Petition No. 155/MP/2012 have been challenged in appeal before the Hon’ble Appellate Tribunal for Electricity in which the issue of composite scheme has been raised. Therefore, we are deciding the issue of composite scheme in the present case in the light of our decisions quoted above, subject to the final decision by the Appellate Tribunal in the appeals.”

13. While so, the Full Bench of the Appellate Tribunal for Electricity (the Tribunal), in the some of the appeals (Appeal Nos. 100/2013 and 98/2014, Appeal Nos. 44/2014 and 74/2014 and other related appeals) filed by the discoms and Prayas dealt with the issue of composite scheme and had upheld the jurisdiction of the Central Commission under section 79(1)(b) of the 2003 Act, in its judgment dated 7.4.2016. The relevant portion of the judgment dated 7.4.2016 is extracted as under:

“120. We have already answered Issue No.3 in the affirmative and held that supply of power to more than one State from the same generating station of a generating company ipso facto, qualifies as a “Composite Scheme” to attract the jurisdiction of the Central Commission under Section 79 of the said Act. It is an admitted position that both GMR Energy and Adani Power are selling electricity in more than one State from their respective generating stations. Hence, we hold that so far as Adani Power and GMR Energy are concerned, there exists a ‘Composite Scheme’ for generation and sale of electricity in more than one State by a generating station of a generating company within the meaning of Section 79(1)(b) of the said Act for the Central Commission to exercise jurisdiction. Issue No.4 is accordingly answered in the affirmative.”



14. Thereafter, the Commission, by order dated 1.2.2017 in Petition No. 8/MP/2014 rejected the objections of the said respondents and Prayas, with regard to existence of a composite scheme in case of the Petitioner and in line with the full Bench judgment of the Tribunal held that that the Petitioner has a composite scheme for generation and supply of electricity in more than one State and the jurisdiction of the Commission for adjudication of dispute under Section 79 (1)(f) of the 2003 Act was attracted. The relevant portion is extracted hereunder:

“14. In view of the above decision of the Appellate Tribunal, the objections of Prayas with regard to existence of a composite scheme in case of the Petitioner cannot be sustained.

15. It is pertinent to mention that the Commission in order dated 15.10.2016 while holding the existence of composite scheme in case of the Petitioner had made it subject to outcome of the appeals filed against the Commission's order dated 2.4.2013 and 21.2.2014 in Adani case. In the light of the Full Bench judgment, it is reiterated that the Petitioner has a composite scheme for generation and supply of electricity in more than one State and the jurisdiction of the Commission for adjudication of dispute under Section 79 (1)(f) of the Act is attracted in this case. Learned Counsel for MSEDCL sought to distinguish the Full Bench judgment with regard to jurisdiction in Adani Case from the present case. In our view, the Full Bench judgment lays down the law with regard to interpretation of Composite Scheme under Section 79 (1) (b) of the Act and the case of the generating station of the Petitioner is fully covered under the Full Bench judgment.”

15. Against the aforesaid judgment of the Tribunal dated 7.4.2016, the utilities of Haryana, GRIDCO and other parties including Prayas had filed Civil Appeals (C.A. Nos 5399-5400/2016, 5415/2016 and related appeals) before the Hon'ble Supreme Court. The Hon'ble Supreme Court vide its judgment dated 11.4.2017 in the said Civil Appeals titled Energy Watchdog v CERC & ors (2017 (4) SCALE 580) had rejected the contentions of these Respondents with regard to the jurisdiction of this Commission and held that where generation and sale of power takes place in more than one State, the same amounts to a composite scheme and the jurisdiction for the same lies with the Central Commission. The relevant portion of the judgment dated 11.4.2017 is extracted here under:



“22..... On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being the case, we are constrained to observe that the expression “composite scheme” does not mean anything more than a scheme for generation and sale of electricity in more than one State.

...

26. Another important facet of dealing with this argument is that the tariff policy dated 6th June, 2006 is the statutory policy which is enunciated under Section 3 of the Electricity Act. The amendment of 28th January, 2016 throws considerable light on the expression “composite scheme”, which has been defined for the first time as follows:

“5.11 (j) Composite Scheme: Sub-section (b) of Section 79(1) of the Act provides that Central Commission shall regulate the tariff of generating company, if such generating company enters into or otherwise have a composite scheme for generation and sale of electricity in more than one State.

Explanation: The composite scheme as specific under section 79(1) of the Act shall mean a scheme by a generating company for generation and sale of electricity in more than one State, having signed long-term or medium-term PPA prior to the date of commercial operation of the project (the COD of the last unit of the project will be deemed to be the date of commercial operation of the project) for sale of at least 10% of the capacity of the project to a distribution licensee outside the State in which such project is located.”

27. That this definition is an important aid to the construction of Section 79(1)(b) cannot be doubted and, according to us, correctly brings out the meaning of this expression as meaning nothing more than a scheme by a generating company for generation and sale of electricity in more than one State.”

16. In the light of the decision of the Hon'ble Supreme Court, this Commission has the jurisdiction to regulate the tariff of the Project of the Petitioner under Section 79 (1) (b) of the 2003 Act and to adjudicate the disputes in terms of Section 79 (1) (f) of the 2003 Act.

17. The Respondents, MSEDCL and DNH have submitted that the present petition is without jurisdiction in the light of section 64(5) of the 2003 Act. In this regard, Section 64(5) of the 2003 Act provides as under:

“64(5) Notwithstanding anything contained in Part X, the tariff for any inter-state supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor”.



18. This provision clarifies that the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity shall be the Appropriate Commission based on the application of the parties concerned even in cases involving inter-state supply. In our view, Section 64(5) has no application in cases of tariff discovered under competitively bidding process and adopted by the Commission under Section 63 of the 2003 Act. As Section 64 provides for the procedure for determination of tariff under Section 62, the Section 64(5) would be applicable only in respect of determination of tariff under Section 62 of the 2003 Act. Further, the submission of the Respondent, MSEDCL that the parties had invoked the jurisdiction of MERC and JERC and hence the jurisdiction of the Central Commission is not in conformity with Section 64(5) is not tenable as these Petitions (Case No. 22/2010 before MERC and Petition No. 87/2012 before JERC) were filed by the said Respondents for adoption of tariff for supply of power from the Project of the Petitioner. By no stretch of imagination can these petitions be construed as joint application by the parties under Section 64(5) invoking the jurisdiction of the State Commission. Moreover, the issue of jurisdiction was neither raised by the said respondents nor decided by the State Commission in these petitions. It is observed that the Hon'ble Supreme Court in the 'Energy Watchdog case' while analyzing the expression 'composite scheme' under Section 79(1)(b) had also examined the Section 64(5) of the 2003 Act and had upheld the jurisdiction of the Commission in its judgment dated 11.4.2017. The relevant portion of the judgment is extracted as under:

“Section 64(5) has been relied upon by the Appellant as an indicator that the State Commission has jurisdiction even in cases where tariff for inter-State supply is involved. This provision begins with a non-obstante clause which would indicate that in all cases involving inter- State supply, transmission, or wheeling of electricity, the Central Commission alone has jurisdiction. In fact this further supports the case of the Respondents. Section 64(5) can only apply if, the jurisdiction otherwise being with the Central Commission alone, by application of the parties concerned, jurisdiction is to be given to the State Commission having jurisdiction in respect of the licensee who intends to



distribute and make payment for electricity. We, therefore, hold that the Central Commission had the necessary jurisdiction to embark upon the issues raised in the present cases.”

19. The jurisdiction of the Central Commission to regulate the tariff of the generating station having composite scheme under Section 79 (1) (b) of the 2003 Act having been affirmed by the Hon’ble Supreme Court in its judgment as above, the Petition filed by the Petitioner is maintainable. Thus, the issue of jurisdiction having been settled in favour of this Commission in terms of the above orders/judgments, the same cannot be unsettled by the Respondent, MSEDCL by once again raising issues on jurisdiction, on extraneous grounds. Accordingly, the submissions of the Respondents, MSEDCL stands rejected. As regard the submission of the Respondent that that the relief sought for by the Petitioner is not maintainable as the same is not covered under the contractual arrangement between the parties, it is noticed that the Respondent, MSEDCL on 3.2.2016 had acknowledged the change in law events and had not disputed that the change in law events are covered under Article 10 of the PPA. In view of this, the contention of the said Respondent is not maintainable.

20. The Respondent, TANGEDCO has referred to the judgment of the Hon’ble Supreme Court in Tarini Infrastructure case and has submitted that tariff was adopted by the State Commission. In our considered view, the judgment of the Hon’ble Supreme Court in ‘Tarini Infrastructure case’ is not applicable to the present case. In ‘Tarini Infrastructure case’, the Hon’ble Supreme Court had affirmed the judgment of the Tribunal holding that the State Commission has the power to re-determine of tariff of the distribution licensee incorporated in the PPA under Section 86(1)(b) of the 2003 Act. However, in the present case, the Hon’ble Supreme Court while interpreting the term ‘composite scheme’ under Section 79(1)(b) of the 2003 Act held that this Commission has the jurisdiction to regulate



the tariff of generating stations having a composite scheme for generation and sale of power to more than one state, whose tariff has been adopted under Section 63 of the 2003 Act. The Petitioner has entered into PPAs with MSEDCL, DNH and TANGEDCO and therefore has a composite scheme for generation and sale of power to more than one State. Accordingly, in the light of the judgment of the Hon'ble Supreme Court in Energy Watchdog case, we hold that the Commission has the jurisdiction to regulate the tariff of the generating station of the Petitioner. The Petition is therefore maintainable.

Issues on merit

21. After consideration of the submissions of the Petitioner, Prayas and the Respondents, the claim of the Petitioner has been dealt with as under:

(a) Whether the provisions of PPAs with regard to notice have been complied with?

(b) What is the scope of change in law in the PPAs?

(c) Whether compensation claims are admissible under Change in law in the PPAs?

(d) Mechanism for processing and reimbursement of admitted claims under Change in law.

Issue No.1: Whether the provisions of the PPAs with regard to notice has been complied with?

22. The claims of the Petitioner in the present petition pertain to the Change in Law events during the Operating period. Article 10.4 of the PPAs is extracted as under:

“10.4 Notification of Change in Law

10.4.1. If the Seller is affected by a Change in Law in accordance with Article 10.1 and the Seller wishes to claim relief for such a Change in Law under this Article 10, it shall give notice to the Procurer of such Change in Law as soon as reasonably practicable after becoming aware of the same or should reasonably have known of the Change in Law.

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

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



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

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

23. The Petitioners have submitted that respondents were duly informed about the events of Change in Law in respect of PPAs and their impact vide following notices:

MSEDCL PPA

- a) Notice dated 4.3.2016 vide letter ref: GWEL/MSEDCL/2016/49
- b) Notice dated 18.8.2016 vide letter ref: GWEL/MSEDCL/2016/177
- c) Notice dated 13.9.2016 vide letter ref: GWEL/MSEDCL/2016/198
- d) Notice dated 8.11.2016 vide letter ref: GWEL/MSEDCL/2016/233

DNH PPA

- a) Notice dated 4.3.2016 vide letter ref: GWEL/DNH/2016/50
- b) Notice dated 18.8.2016 vide letter ref: GWEL/DNH/2016/178
- c) Notice dated 13.9.2016 vide letter ref: GWEL/DNH/2016/199
- d) Notice dated 8.11.2016 vide letter ref: GWEL/DNH/2016/234

TANGEDCO PPA

- a) Notices dated 10.3.2016 & 31.3.2016 vide letter ref: GWEL/TANGEDCO/2016/69 & 77
- b) Notice dated 19.8.2016 vide letter ref: GWEL/TANGEDCO/2016/176
- c) Notice dated 13.9.2016 vide letter ref: GWEL/TANGEDCO/2016/200
- d) Notice dated 8.11.2016 vide letter ref: GWEL/TANGEDCO/2016/235

24. Under Article 10.4.2 of the above said PPAs, the Petitioner is required to give notice about occurrence of change in law events as soon as practicable after being aware of such events. The Petitioner has given notices as stated above to the Procurers indicating the above change in law events. In the said notices, the Petitioner has appraised the Procurers about the occurrence of change in law events and the impact of such events on tariff. None of the Procurers had raised issues with regard to such notices of Change in law by the Petitioner. Thereafter, the Petitioner has filed the present Petition. In our view, the requirements of Article 10.4.2 of the said PPAs have been complied with by the Petitioner.



Issue No. 2: Scope of change in law in the PPAs

25. The Petitioner has approached this Commission under Article 10 of the respective PPAs read with section 79 of the 2003 Act for adjustment / compensation to offset the financial / commercial impact of change in law during the Operating period.

26. Article 10 of the PPAs deals with the events of Change in law. Since the provisions under all the PPAs (MSEDCL, DNH & TANGEDCO) are similar, Article 10 of the MSEDCL PPA is extracted as under:

“10.1.1 "Change in Law" means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline resulting into any additional recurring/ non-recurring expenditure by the Seller or any income to the Seller:

- the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;
- a change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;
- the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;
- change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the Seller;
- any change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of this Agreement.

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

10.2 Application and Principles for computing impact of Change in Law

10.2.1 While determining the consequence of Change in Law under this Article 10, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through monthly Tariff Payment, to the extent contemplated in this Article 10, the affected Party to the same economic position as if such Change in Law has not occurred.

10.3 Relief for Change in Law



10.3.2 During Operating Period:

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

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

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

27. The terms “Law” defined in all the said PPAs are similar and is extracted as under:

“Law shall mean 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 without limitation all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include without limitation all rules, regulations, decisions and orders of the Appropriate Commission;

28. The term “Indian Governmental Instrumentality” has been defined in the PPAs as under:

MSEDCL PPA

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

DNH PPA

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



TANGEDCO PPA

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

29. A combined reading of the above provisions in the PPAs would reveal that the Commission has the jurisdiction to adjudicate upon the disputes between the Petitioner and the Respondents with regard to ‘Change in Law’ events which occur after the date and which is seven days prior to the bid deadline. 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) Imposition of a requirement for obtaining any consents, clearances and permits which was not required earlier.
- (d) Any change in the terms and conditions or inclusion of new terms and conditions prescribed for obtaining any consents, clearances and permits otherwise than the default of the seller.
- (e) Any change in the tax or introduction of any tax made applicable for supply of power by the Petitioner as per terms of the Agreement.
- (f) Such Changes result in additional recurring and non-recurring expenditure by the seller or any income to the seller.
- (g) The purpose of compensating the Party affected by such Change in Law is to restore through Monthly Tariff Payments, to the extent contemplated in this Article 10, the affected Party to the same economic position as if such “Change in Law” has not occurred.
- (h) The Petitioner shall provide to the Procurer and the Appropriate Commission documentary proof of such increase /decrease in cost of the Power Station or revenue/expense for establishing the impact of such Change in Law;
- (i) The decision of the Commission with regard to the determination of Compensation and the date from which such Compensation shall become effective shall be final and



binding on both the parties, subject to right of approval provided under Electricity Act,2003.

(j) The compensation shall be payable for any decrease in revenue or increase in expenses to the seller(Petitioner)is in excess of an amount equivalent to 1% ofthe value of the Letter of Credit in aggregate for the relevant Contract Year.

Issue No.3: Whether Compensation claims are admissible under Change in Law in the MSEDCL, DNH and TANGEDCO PPAs?

30. The Bid-deadline and the cut-off dates in respect of the said PPAs are as under:

	MSEDCL PPA	DNH PPA	TANGEDCO PPA
Bid deadline date	7.8.2009	8.6.2012	6.3.2013
Cut-off date	31.7.2009	1.6.2012	27.2.2013

31. The Petitioner has raised claims under Change in Law in respect of events during the Operating period, namely Increase in crushing/sizing charges, Increase in Surface Transportation charges, Levy of charges for transportation of ash, Increase in Busy Season Surcharge on Railway Freight, Imposition of charges towards National Mineral Exploration Trust (NMET) and District Mineral Foundation (DMF), Levy of Coal and Coke Terminal Charges, Levy of Swachh Bharat Cess, Levy of Krishi Kalyan Cess, Increase in Excise Duty on Coal, Change in rate of Countervailing Duty (CVD) for procurement of spares, Change in service tax on O&M contracts, Change in rate of Excise Duty for procurement of spares and equipment, Increase in Working Capital, Amendment to New Coal Distribution Policy, Increase in Chhattisgarh Paryavaran and Vikas Upkar on Coal, Increase in MAT &Corporate Tax, Increase in Clean Energy Cess, Increase in Royalty on Coal, Increase in CST, Increase in Niryat Kar, Increase in VAT. Keeping in view the broad principles as discussed above, we proceed to deal with the claim of the Petitioner under Change in Law during the Operating Period.



Change in Law claims pertaining to MSEDCL PPA

A. Increase in the Rate of Value Added Tax applicable on Procurement of spares and equipment

32. The Petitioner has submitted that as on the cut-off date (31.7.2009), the Value Added Tax (VAT) levied on goods was 4%. Subsequently, VAT was increased to 5% vide Notification no VAT-1510/CR47/Taxation dated 10.3.2010 issued by the Govt. of Maharashtra, which led to the increase in the cost of procurement of spare parts. Accordingly, the Petitioner has submitted that the increase in VAT which has led to increase in the procurement cost of spares during the operating period constitutes a change in law as the Notification was issued on 10.3.2010, which was after the cut-off date. The Petitioner has also pointed out that the increase in VAT had been allowed as a change in law event by this Commission in order dated 7.4.2017 in Petition No. 112/MP/2015 (GMRKEL & anr V BSPHCL &ors).

33. MSEDCL has submitted that the charges with respect to VAT are neither newly introduced or increased based on the notification from the Central Government/State Govt. and even otherwise are not passed on to the respondent. It has also stated that the Commission in Order dated 30.3.2015 in Petition No.6/MP/2013 and Order dated 17.3.2017 in Petition No. 157/MP/2015 had not allowed increase in VAT. Accordingly, the Respondent has submitted that the claim of the Petitioner on account of change in law may not be allowed. Prayas has pointed out that taxes other than tax on supply of power cannot be considered as change in law under Article 10 of the PPA. It has submitted that the Petitioner had claimed increase in VAT in Petition No. 8/MP/2014 for MSEDCL and the Commission had directed the Petitioner to furnish various claims. Since the Petitioner had failed to do so and had merely raised the same claim, it may not be considered.



34. In response, the Petitioner has pointed out that the Commission in its order dated 7.4.2017 in Petition No. 112/MP/2015 (GMRKEL V BSPHCL & ors) had allowed the increase in VAT as a change in law event. It has also stated that the Tribunal had allowed the increase in VAT in its judgment dated 19.4.2017 in Appeal No. 161/2015 (Sasan Power Ltd V CERC & ors). It has further submitted that compensation for VAT will be claimed on actuals and the same has been placed on record vide affidavit dated 18.8.2017.

35. The matter has been considered. The Govt. of Maharashtra in exercise of the powers conferred under section 9(1) of the Maharashtra Value Added Tax, 2002 has amended 'Schedule A' and 'Schedule C' of the said Act, whereby the rate of VAT has been increased from 4% to 5% with effect from 1.4.2010. It is observed that the Commission in Petition No. 112/MP/2015 (GMRKEL & anr V BSPHCL & ors) had considered the claim of the Petitioners therein for increase in VAT on sale of Coal by notification of the Govt. of Orissa and by order dated 7.4.2017 had allowed the same as under:

“64. We have considered the submissions of the Petitioners and Prayas. The matter was considered in Petition No. 8/MP/2014 and the Commission in order dated 1.2.2017 in the said petition has decided as under:

“48. We are of the view that in terms of MSEDCL PPA, change in tax or introduction of any tax applicable for supply of power has been recognized as change in law. Accordingly, change in Work Contract Tax, Value Added Tax and Central Sales Tax which has resulted in reduction in capital cost shall be passed on to MSEDCL.”

In the last bullet under Article 10.1.1 of the Bihar PPA, any change in tax or introduction of any tax made applicable for supply of power has been recognized as Change in Law. This provision is akin to a corresponding provision in the PPA between MSEDCL and EMCO. Since change in the rate of VAT on the sale of coal has been incurred from 4% as on cut-off date to 5% vide notification of the Government of Odisha dated 30.3.2012 and the said change has resulted in recurring expenditure by the Petitioners for generation and supply of power to the BSHPCL, the said change is covered under Change in Law”.

36. Similarly, the Appellate Tribunal had considered the impact of increase in VAT by the Madhya Pradesh Government and had allowed the same vide judgment dated 19.4.2017 and had observed as under:



“46. Having regard to the nature of Excise Duty and Central Sales Tax and VAT which have an impact on the cost of or revenue from the business of generation and sale of electricity, in our opinion, the same should be allowed as Change in Law event.”

37. In accordance with the above decisions, the claim of the Petitioner for increase in VAT which led to the increase in the cost of procurement of spare parts has resulted in recurring expenditure by the Petitioner for generation and supply of power to MSEDCL. Accordingly, the claim of the Petitioner for VAT on spares procured during the operating period is admissible under Change in Law and is accordingly allowed. However, the Petitioner has not placed on record the details of spares and equipment on which VAT as per the Maharashtra Act has been levied and whether such spares and equipment have been recommended by the OEM. The Petitioner is directed to furnish the details of spares and equipment supported by the Auditors certificate to the Procurers while claiming the relief under change in law for change in VAT.

Change in Law pertaining to TANGEDCO PPA

(a) Change in Crushing/Sizing Charges & Increase in Niryat Kar charges due to change in law affecting sizing charges and Surface Transportation Charges

Crushing/Sizing Charges

38. The Petitioner has submitted that as on the cut-off date for the TANGEDCO PPA (27.2.2013), the prevailing crushing/sizing charges, where the top size of coal was limited to 100 mm was ₹61/tonne. Subsequently, the crushing/sizing charges of coal were increased to ₹79/MT, vide Notification dated 16.12.2013 issued by the Coal India Ltd (CIL). The crushing/sizing charges of coal was further increased to ₹87/tonne vide Notification dated 31.8.2017 of CIL. Accordingly, the Petitioner has submitted that the change in crushing/sizing charges which was introduced by Notification of CIL has led to additional recurring expenditure after the cut-off date and falls within the scope of Change in Law.



Increase in Niryat Kar charges

39. The Petitioner has submitted that SECL levies Niryat Kar @0.2% on coal value plus crushing/sizing charges. Thus, increase in crushing/sizing charges has led to increase in Niryat Kar charges payable to SECL. Accordingly, the Petitioner has submitted that change in charges towards Niryat Kar is also a change in law event.

Surface Transportation Charges

40. The Petitioner has submitted that as on the cut-off date, the surface transportation charges for transportation of coal for a distance between 3 to 10 km from mine to loading point was ₹44/tonne. Subsequently, the surface transportation charges of coal was increased to ₹57/tonne vide CIL Notification dated 13.11.2013. The said charges have further increased to ₹87/tonne vide SECL Notification dated 15.12.2017. Accordingly, the Petitioner has submitted that the increase in surface transportation charges subsequent to the cut-off date constitute a Change in Law event and the same may be allowed by the Commission. The Petitioner has pointed out that the claim for increase in crushing/sizing charges which was rejected by the Commission in order dated 1.2.2017 in Petition No. 8/MP/2014 (EMCO Energy Ltd/GMR WEL Vs MSEDCL & ors) may be reconsidered in the light of the judgment of the Tribunal dated 19.4.2017 in Sasan case.

41. Prayas has submitted that the above said charges are payable to the coal company in view of the contractual arrangements and is the commercial consideration for procurement of coal. Hence, the same is not covered under Change in Law. It has also submitted that the Commission in its orders dated 1.2.2017 and 6.2.2017 in Petition Nos. 8/MP/2014 and 156/MP/2014 respectively had rejected the said claims and the same is applicable to the present case. In response, the Petitioner has submitted that the increase in the above



charges is pursuant to a Notification issued by an Indian Government Instrumentality and the said events satisfy the requirements of Article 10 of the PPA and fall within the ambit of Change in Law. It has also submitted that the periodic increase in the said charges is not included in the escalation indices issued by this Commission. It has further submitted that in the light of the judgment dated 12.9.2017 of the Tribunal in Appeal No. 288/2013 (Wardha Power Company Ltd Vs Reliance Infrastructure Ltd & anr) the escalable index/indexing of cost is not applicable in case of Change in Law wherein the impact of Change in Law is to be determined on actual basis. The Petitioner has added that it has filed Appeal No. 111 of 2017 against the order dated 1.2.2017 in Petition No. 8/MP/2014. Prayas in its additional submissions dated 24.1.2018 while reiterating its contentions above has stated that the decision of the Tribunal in Sasan case is not applicable as the Tribunal had held in its judgment that the Excise Duty, VAT and CST qualified as Change in Law under the PPA. There was no issue with regard to change in price or consideration payable by the Petitioner to coal companies/railways such as crushing/sizing charges or surface transportation charges or busy season surcharge for railways. As regards the question whether such charges are changes in law under the PPA, the Tribunal had specifically observed that the same would depend upon the facts and circumstances of each case and the facts of each case will have to be carefully studied before granting such relief. Prayas has further submitted that a distinction has to be drawn between rates and charges recovered by the Government for its commercial activities and taxes, levies, duties etc. imposed in exercise of the sovereign power. Referring to the decisions of the Hon'ble Supreme Court in Union of India & anr Vs Shri Ladulal Jain (1964 3 SCR 624) and Chairman, Railway Board & ors Vs Chandrima Das & ors (2000 2 SCC 465), the Respondent has stated that such commercial activities which are not related to sovereign power of the



Government do not cease to be a business. Merely because the commercial arrangement is with the Government would not make the charges paid a tax or a statutory levy. Thus, any charges paid for use of railway facilities are part of commercial activity of the Government and not a statutory levy in exercise of sovereign powers. Accordingly, Prayas has submitted that the claims of the Petitioner under this head may be disallowed.

42. The Respondent, TANGEDCO has submitted that the Petitioner is not entitled to claim the said charges as they do not fall within the scope of Change in Law. It has further submitted that the Central Commission publishes escalation index of Inland transportation charges of domestic coal every six months considering the coal freight rate. It has also stated that the variance in the freight rate is based on factors attributable to freight rate and these changes have been taken care of by the Commission by publishing the escalation index. Accordingly, it has submitted that the allowance of additional cost under Change in Law may lead to duplication.

43. We have examined the matter. The issue regarding the claim for increase in crushing/sizing charges and increase in surface transportation charges came up for consideration in Petition No. 8/MP/2014 (EMCO Energy Limited/GMR Warora Energy Limited v/s MSEDCL & ors). The Commission after considering the submissions of the parties therein by order dated 1.2.2017 decided as under:

“93. We have considered the submissions of the Petitioner and the respondents and perused the notifications issued by Coal India Ltd. with regard to Sizing Charges of coal and surface transportation charges. The Petitioner has not placed on record any document to prove that these notifications have been issued pursuant to any Act of the Parliament. On the other hand, a perusal of the Fuel Supply Agreement dated 22.2.2013 between the Petitioner and SECL shows that under Para 9.0, the delivery price of coal for coal supply pursuant to the Fuel Supply Agreement has been shown as the sum of basic price, other charges and statutory charges as applicable at the time of delivery of coal. Base price has been defined in relation to a declared grade of coal produced by the seller, the pit head price notified from time to time by CIL. Under Para 9.2 of the FSA, other charges include transportation charges, Sizing/crushing charges, rapid loading charges and any other charges as notified by



CIL from time to time. Sizing/crushing charges and transportation charges have been defined as under:-

“9.2.1 Transportation Charges: Where the coal is transported by the seller beyond the distance of 3(three) kms from Pithead to the Delivery Point, the Purchaser shall pay the transportation charges as notified by CIL/seller from time to time.

9.2.2 Sizing/Crushing Charges Where coal is crushed/sized for limiting the top-size to 250 mm or any other lower size, the purchaser shall pay sizing/crushing charges, as applicable and notified by CIL/seller from time to time.”

Therefore, the revision in sizing charges of coal and transportation charges by Coal India Limited from time to time is the result of contractual arrangement between the Petitioner and SECL in terms of the FSA dated 22.2.2013 and is not pursuant to any law as defined in the PPAs and therefore cannot be covered under Change in Law.”

44. The Petitioner has submitted that Coal India Limited which is a body corporate under Ministry of Coal, Government of India is an Indian Government Instrumentality and the notifications issued by Coal India Limited with regard to sizing charges / surface transportation charges is covered under the definition of law and any change in such charges is covered under Change in Law. This issue had been considered by the Commission in Petition No. 156/MP/2014 (Adani Power Limited v/s UHBVNL & ors), wherein the Commission vide order dated 6.2.2017 held as under:

“62. The Petitioner has submitted that Coal India Limited which is a body corporate under Ministry of Coal, Government of India is an Indian Government Instrumentality and the notifications issued by Coal India Limited with regard to sizing charges is covered under the definition of law and any change in such charges is covered under Change in Law. Indian Government Instrumentality has been defined in the PPAs as under:

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

Law has been defined in the PPAs to mean “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”. As per the definition of “Indian Governmental Instrumentality”, a body corporate under Government of India is an Indian Government Instrumentality. Coal India Limited which is a body corporate under the Government of India is a Governmental Instrumentality. However, all circulars or notifications issued by Coal India Limited shall not be included under Change



in Law. As per the definition of the term “law”, the notifications by the Indian Governmental Instrumentality shall be pursuant to any statute, ordinance, regulation, notification or code. In the present case, the increase in price of sizing charges issued by Coal India Limited is not pursuant to any statute or ordinance issued by the Parliament or any regulation, notification or code issued by the Government of India pursuant to such statute or ordinance. The notifications issued by Coal India Limited is pursuant to the terms of the FSA which enables CIL/seller to notify the sizing/crushing charges from time to time and is governed by commercial considerations. The Petitioner having agreed to pay such charges in terms of the FSA, which is a commercial arrangement between the Petitioner and Mahanadi Coalfield Limited, cannot seek reimbursement of the same under Change in Law.”

45. As regards the claim of the Petitioner for surface transportation charges as ‘Change in Law’ event, it is noticed that the said issue had already been decided by the Commission in its order dated 6.2.2017 in Petition No. 156/MP/2014. The relevant portion of the order is extracted as under:

“65..... As regards the submissions of the petitioner that the notifications regarding change in the rates of transportation charges have been issued by the Coal India Limited in its capacity as an Indian Governmental Instrumentality, we are of the view that the said contention cannot be sustained in the light of the detailed analysis made in para 62 of this order in respect of sizing charges. Accordingly, the claim of the petitioner for relief under Change in Law in respect of transportation charges by the Mahanadi Coalfield Limited has been disallowed.”

46. Considering the fact that the revision in crushing/sizing charges of coal and surface transportation charges by CIL from time to time is a result of contractual arrangement between the Petitioner and SECL in terms of the FSA and not pursuant to any law as defined in the PPA, the claim of the Petitioner cannot be covered under Change in Law. In line with above decisions of the Commission, the claim of the Petitioner for relief under Change in Law in respect of Sizing/Crushing charges of coal and Surface Transportation charges has not been allowed.

47. As regards increase in Niryat Kar charges payable to SECL, the Petitioner has not submitted the details regarding Niryat Kar, in the absence of which no view can be taken as regards its admissibility under change in law. Accordingly, the Petitioner is granted liberty



to claim this expenditure, if any, under change in law through an appropriate application with relevant details.

(b) Levy of Swachh Bharat Cess

48. The Petitioner has submitted that at as on the cut-off date, there was no levy of Swachh Bharat Cess. However, the Ministry of Finance, Government of India vide its Notification dated 6.11.2015 introduced Swachh Bharat Cess @ 0.5% of the value of all taxable services. The Petitioners have estimated the impact of Swachh Bharat Cess @ ₹0.37/tonne w.e.f 15.11.2015. It is submitted that as a result of levy of Swachh Bharat Cess as a component of Service Tax, the rate of Service Tax has increased from 14% to 14.5%.The Petitioner has further submitted that Swachh Bharat Cess is applicable on all taxable services for which service tax is levied. Accordingly, it has submitted that that the introduction of Swachh Bharat Cess is a change in law event during the operating period and may be allowed.

49. The Respondent, TANGEDCO has submitted that the bid deadline for TANGEDCO was 6.3.2013 and the Service Tax on erection services and civil works were enhanced through the Finance Act, 2012. It has submitted that the Service Tax is already in existence before the bid deadline and levy of Swachh Bharat Cess is an addition to Service Tax leviable on taxable services. It has further stated that the changes in taxes, duties and levies are taken care of by escalation indices published by this Commission once in six months. The Petitioner in its rejoinder has submitted that the Finance Act, 2012 has no bearing on Swachh Bharat Cess. It has also stated that the CERC escalation index does not take into account Swachh Bharat Cess.



50. Prayas has submitted that the Petitioner has claimed the increase in Service Tax but has not specified the service. It has further submitted that only the impact due to increase in rate of Service Tax is to be considered and any increase due to increase in freight rates cannot be included.

51. We have considered the submissions of the parties. The submissions of the Respondent, TANGEDCO that changes in taxes duties and levies are taken care of by escalation indices published by the Commission is not correct. The Tribunal in its judgment dated 12.9.2017 in Appeal No. 288/2013 (Wardha Power Company Ltd Vs Reliance Infrastructure Ltd & anr) had held that the escalable index/ indexing of cost is not applicable in case of Change in Law. Article 10 of the PPA expressly provides the Petitioner the right to claim compensation for change in law. The aforesaid position has been upheld by the Tribunal in its judgment dated 19.4.2017 in Appeal 161 of 2015 (Sasan Power Limited v CERC & ors). The relevant portion of the judgment dated 19.4.2017 is extracted hereunder:

“44. It is true that according to the provisions of the RFP, the quoted tariff shall be inclusive one including statutory taxes, duties and levies. But the PPA gives express right to an affected party to claim Change in Law if the event qualifies thus in terms of Article 13. The RFP cannot override this right if an event qualifies as a Change in Law. The Competitive Bidding Guidelines (Article 4.7 thereof has already been reproduced hereinabove) and the PPA have to be read together. If an event qualifies as a Change in Law event then the compensation must follow because otherwise Article 13 of the PPA will become redundant.”

52. As regards Swachh Bharat Cess, the Finance Act, 2016 (No. 28 of 2016) provides as under:

“119. (1) This Chapter shall come into force on such date as the Central Government may by notification in the Official Gazette appoint.

(2) There shall be levied and collected in accordance with the provisions of this Chapter, a cess to be called the Swachh Bharat Cess, as service tax on all or any of the taxable services at the rate of two per cent on the value of such services for the purposes of financing and promoting initiatives or for any other purpose relating thereto.



(3) The Swachh Bharat Cess leviable under sub-section (2) shall be in addition to any cess or service tax leviable on such taxable services under Chapter V of the Finance Act, 1994, or under any other law for the time being in force...”

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53. The Ministry of Finance, GOI vide Notification No. 22/2015 -Service Tax dated 6.11.2015 has notified that Swachh Bharat Cess shall come into force from 15.11.2015. It is noticed that as on cut-off date, there was no Swachh Bharat Cess and it was introduced by the Finance Act, 2015 and was implemented with effect from 15.11.2015. The issue of levy of Swachh Bharat Cess was considered by the Commission in Petition No. 112/MP/2015 as a Change in law event in respect of the Bihar PPA. The Commission, in line with the above decision had allowed the said claim by order dated 7.4.2017 and had observed as under:

“82. It is clarified that the Petitioners shall be entitled to recover on account of Swachh Bharat Cess, the service tax on transportation of coal required in proportion to the actual coal consumed corresponding to the scheduled generation for supply of electricity to BSPHCL. If actual generation is less than the scheduled generation, the coal consumed or actual generation shall be considered for the purpose of computation of impact of Swachh Bharat Cess. The Petitioners are directed to furnish along with their monthly bill, the proof of payment and computations duly certified by the auditor to the BSPHCL. The Petitioners and BSHPCL are directed to carry out reconciliation on account of these claims annually.”

54. Since Swachh Bharat Cess is applicable on all taxable services for which service tax is levied, these charges are allowable under Change in Law in terms of the judgment dated 12.9.2014 in Appeal No. 288/2013 (Wardha Power Vs. Reliance Infra). Accordingly, the Petitioner is allowed to recover on account of Swachh Bharat Cess, the service tax on all taxable services. Swachh Bharat Cess shall be admissible proportionate to the actual coal consumed corresponding to the scheduled generation for supply of electricity to TANGEDCO. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of Swachh Bharat Cess. The Petitioner is directed to furnish along with their monthly bill, the



proof of payment and computations duly certified by the auditor to TANGEDCO. The Petitioner and TANGEDCO are directed to carry out reconciliation on account of these claims annually.

(c) Increase in the rate of Clean Energy Cess

55. The Petitioner has submitted that as on the cut-off date (27.2.2013) the rate of Clean Energy Cess on lifting and dispatches of coal as per Section 83 read with Schedule 10 of the Finance Act, 2010 was ₹50 per tonne. This was notified vide notification No. 03 /2010-Clean Energy Cess, dated 22.6.2010 issued by the Department of Revenue, Ministry of Finance, Gol. However, by way of notification No. 1/2015-Clean Energy Cess dated 1.3.2015 the rate of Clean Energy Cess was enhanced from ₹50 per tonne to ₹200 per tonne by the Department of Revenue, Ministry of Finance, Gol. It is important to submit herein that the Clean Energy Cess was further enhanced from ₹200 per tonne to ₹400 per tonne with effect from 1.3.2016, which is evident from the notice bearing no. SEC/BSP/S&M/440 dated 29.2.2016 issued by SECL. It is submitted that the above notifications dated 1.3.2015 and 29.2.2016 make it clear that Department of Revenue, Gol has enhanced rate of Clean Energy Cess and is, therefore, a Change in Law event. Due to the said increase in the rate of Clean Energy Cess on lifting and dispatch of coal, the cost of supply of power by the Petitioner to the Respondent under the PPA has increased and thus the Petitioner needs to be compensated for it as per Article 10.3 read with Article 10.5 of the PPA. The claim of the Petitioner on account of increase in levy of Clean Energy Cess on coal for 2015-16 is ₹3.67 crore and for 2016-17 is ₹25.21 crore. Accordingly, the Petitioner has prayed that the notifications issued by SECL, in terms of the Finance Acts, after the cut-off date, fall within the Change in Law event under the TANGEDCO PPA and may be allowed.



56. The Respondent, TANGEDCO has submitted that the bid deadline for TANGEDCO was 6.3.2013 and the notification was issued prior to the said date. It has submitted that the changes in taxes, duties and levies are taken care by escalation indices published by the Central Commission once in six months. Prayas has submitted that the change in rate as notified by the Ministry of Finance, GOI and not SECL may be considered.

57. We have considered the submissions of the parties. The Clean energy cess applicable at difference points of time are as under:

S. No.	From	To	Applicable Clean Energy Cess (₹/tonne)
1.	1.7.2010	10.7.2014	50
2.	11.7.2014	28.2.2015	100
3.	1.3.2015	29.2.2016	200
4.	1.4.2016	30.6.2017	400

58. It is noticed that Clean energy cess was introduced by the Government of India through the Finance Act, 2010 which was prior to the cut-off date in case of TANGEDCO PPA. As on the cut-off date (27.2.2013), Clean energy cess was applicable at the rate of ₹50/tonne. It is noticed that Clean energy cess was introduced by Government of India and this cess has undergone various revisions from the year 2014 onwards. The issue of clean energy cess as a Change in Law event has been considered by the Commission in order dated 30.3.2015 in Petition No. 6/MP/2013. Thereafter, the Commission vide order dated 1.2.2017 in Petition No. 8/MP/2014 (EMCO Energy Ltd Vs MSEDCL & ors) had allowed the increase in Clean energy cess. Subsequently, the Commission vide order dated 19.12.2017 in Petition No. 101/MP/2017 (DB Power Ltd Vs PTC India Ltd & ors) had considered the issue of Clean energy cess as a Change in Law event and had allowed the said claim of the Petitioner. The relevant portion of the order is extracted as under:



“.....The above decision is applicable in case of the Petitioner. Therefore, levy of Clean Energy Cess on coal or increase in the rate of the cess is admissible to the Petitioner as Change in Law event under Article 10 of the PPA. Accordingly, the Petitioner is entitled to recover Clean Energy Cess from Rajasthan Discoms in proportion to the coal consumed for generation and supply of electricity to Rajasthan Discoms.”

59. The above decision is applicable in the case of the Petitioner. Therefore, the levy of Clean energy cess on coal is admissible to the Petitioner as a Change in Law event under Article 10 of the TANGEDCO PPA. Accordingly, the Petitioner is entitled to recover Clean energy cess from TANGEDCO as per applicable rate of Clean energy cess in proportion to the coal consumed for generation and supply of electricity to TANGEDCO. The applicable rate in case of TANGEDCO PPA shall be ₹100/tonne with effect from 11.7.2014, ₹200/tonne with effect 1.3.2015 and ₹400/tonne with effect from 1.4.2016. The Petitioner is directed to furnish along with its monthly bill the proof of payment and computations duly certified by the auditor to TANGEDCO. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of clean energy cess on coal. The Petitioner and TANGEDCO are directed to carry out reconciliation on account of these claims annually. It is pertinent to mention that the Clean energy cess has been abolished through Taxation Laws Amendment Act, 2017 with effect from 1.7.2017. Accordingly, the Change in Law in Clean energy cess has been allowed upto 30.6.2017.

(d) Increase in Busy Season Surcharge levied on Railway Freight

60. The Petitioner has submitted that the coal required for the project is being transported from SECL through Rail. The Petitioner has further submitted that the Ministry of Railways vide its letter dated 27.9.2012 had increased the busy season surcharge from 10% to 12% on normal tariff rate. Subsequently, vide circular No. 24 of 2013, the busy season surcharge was further increased to 15% with effect from 18.9.2013. It has submitted



that the entire amount paid by the Petitioner towards busy season surcharge over and above the base freight is not covered under CERC escalation rates. The Petitioner has pointed out that MERC in case No. 163 of 2014 dated 20.4.2015 had accepted the change in rate of busy season surcharge as a Change in Law event. Accordingly, the Petitioner has submitted that the change in busy season surcharge after the cut-off date may be allowed under Change in Law.

61. The Respondent, TANGEDCO has pointed out that the Commission in its order dated 3.2.2016 in Petition No. 79/2013 (GMR KEL Vs UHBVNL & ors) had disallowed the claim for increase in railway freight charges on account of busy season surcharge on the ground that these are in the nature of change in rates of freight charges levied by the Railway Board in exercise of its power under Sections 30 to 32 of the Railways Act, 1989. Accordingly, the Respondent has submitted that the Petitioner was expected to take into account the possible revision in the charges while quoting its bid. Prayas has submitted that freight charges payable to the Railways are commercial consideration and is a cost for procuring the input i.e. coal. Hence, the same is not covered under Change in Law. It has also pointed out that the Commission in its orders dated 1.2.2017 and 6.2.2017 in Petition Nos. 8/MP/2014 and 156/MP/2014 respectively had disallowed the above claim under Change in Law.

62. We have considered the submissions of the parties. It is observed that the issue as to whether the change in rates of busy season surcharge levied by Railway Board would qualify as Change in Law event was examined by the Commission in Petition No. 8/MP/2014 and the Commission by order dated 1.2.2017 had disallowed the same. Relevant portion of the said order is extracted as under:



“84. The Commission has in the order dated 3.2.2016 in Petition No. 79/MP/2013 has examined whether changes in the rates of busy season surcharge and development surcharge levied by Railway Board qualifies as Change in Law. Relevant para of the said order is extracted as under:

“60. We have considered the submission of the Petitioners. In our view, increase in the railway freight charges on account of development surcharge and busy season surcharge are in the nature of change in rates of freight charges levied by the Railway Board in exercise of its power under sections 30 to 32 of the Railways Act, 1989. The Petitioners were expected to take into account the possible revision in these charges while quoting the bid. As already stated, the Petitioners/PTC were expected in terms of Para 2.7.2.4 of the RfP to include in quoted tariff all costs involved in procuring the inputs. Since freight charges are a cost involved for procuring coal which is an input for generating power for supply to Haryana Discoms under the Haryana PPA, the Petitioners cannot claim any relief under change in law on account of revision in freight charges. Accordingly, the claim of the Petitioner on this account is disallowed.”

85. The Commission has taken the view in the above quoted order that increase in the railway freight charges on account of development surcharge and busy season surcharge are in the nature of change in rates of freight charges levied by the Railway Board in exercise of its power under sections 30 to 32 of the Railways Act, 1989 and the Petitioners in that case were expected to factor in these charges in the bid in terms of Clause 2.7.2.4 of the RfP and therefore, these charges are not covered under Change in Law. Section 30 of the Railways Act is extracted as under:

“30. Power to fix rates.-(1) The Central Government may, from time to time, by general or special order fix, for the carriage of passengers and goods, rates for the whole or any part of the railway and different rates may be fixed for different classes of goods and specify in such order the conditions subject to which such rates shall apply.

(2) The Central Government may, be a like order, fix the rates of any other charges incidental to or connected with such carriage including demurrage and wharfage for the whole or any part of the railway and specify in the order the conditions subject to which such rates shall apply.”

The above provisions enable the Railway Board to fix different charges for carriage of passengers and goods and any other charges incidental to or connected with such carriage. These provisions were existing before the cut-off date and the Petitioner was aware that the various charges levied by the Railway Board are subject to revision from time to time.

86. Further, Para 2.6.1 of the Request for Proposal issued by MSEDCL as well as DNH provided as under:

“2.6.1 The Bidder shall make independent inquiry and satisfy itself with respect to all the required information, inputs, conditions and circumstances and factors that may have any effect on its Bid. Once the Bidder has submitted the Bid, the Bidder shall be deemed to have examined the laws and regulations in force in India, the grid conditions, and fixed its price taking into account all such relevant conditions and also the risks, contingencies and other circumstances which may influence or affect the supply of power. Accordingly, the Bidder acknowledges that, on being selected as Successful Bidder, it shall not be relieved from any of its obligations under the RFP documents nor shall be entitled to any extension of time for commencement of supply or financial compensation for any reason whatsoever.”



The freight charges are a cost involved for procuring coal which is an input for generating power for supply to MSEDCL and DNH under their respective PPAs and therefore, the Petitioner was expected to take into account the possible revisions in these charges while quoting the bid. Therefore, the change in the rates of busy season surcharge and development surcharge are not admissible under Change in Law. The Commission is of the view that non admissibility of busy season surcharge and development surcharge under change in law has been correctly decided in GMR case and in the light of the said decision and the reasons recorded above, the Petitioner cannot be granted relief under Change in Law on account of revision in the busy season surcharge and development surcharge by Railway Board.”

63. This issue was again considered by the Commission in Petition No. 101/MP/2017 (DB Power Vs PTC India Ltd. & ors) and in line with the above decision, the said claim was disallowed by the Commission vide order dated 19.12.2017. In the light of the above decisions, the Petitioner cannot be granted relief under Change in Law on account of the revision in the rates of Busy Season Surcharge by the Railway Board.

(e) Changes in Fuel Supply Agreement and deviation from the New Coal Distribution Policy and its impact in the project;

64. The Petitioner in the Petition has submitted that it had been granted coal linkage from SECL in terms of the following:-

(a) Letter of assurance dated 19.10.2006 for 1.327 MTPA of Grade-F coal from the Korba/Raigarh coal field of SECL.

(b) Letter of assurance dated 3.6.2010 for 1.3 MTPA of Grade-F coal from the Korba/Raigarh coal field of SECL.

65. The Petitioner had premised its bid on the aforesaid linkage. As per Schedule 5 of the TANGEDCO PPA the primary source of coal was domestic coal and the fuel source indicated was CIL linkage. On 18.10.2007, the Government of India issued the New Coal Distribution Policy (NCDP). Some of the salient features of the NCDP are:

(a) Power utilities including IPPs would be supplied 100% of the fuel quantity as per normative requirement.



(b) The linkage system was replaced by a system under which an enforceable LOA would be issued followed by an FSA.

(c) Since 100% of the normative requirement was to be provided, CIL was under an obligation to ensure that the same was met by importing coal if necessary.

d) The FSA would also be executed for 100% of the normative coal requirement.

66. The Petitioner has submitted that in terms of Para 2.2 of the NCDP quoted below, the existing linkage holders were assured supply of 100% of normative requirement. Paragraph 2.2 is as under:-

"100% of the quantity as per the normative requirement of the consumers would be considered for supply of coal, through Fuel Supply Agreement (FSA) by Coal India Limited (CIL) at fixed prices to be declared/notified by CIL The units/power plants, which are yet to be commissioned but whose coal requirements has already been assessed and accepted by Ministry of Coal and linkage/ Letter of Assurance (LOA) approved as well as future commitments would also be covered accordingly."

67. In furtherance of the LOAs, the Petitioner had entered into the following Coal Supply Agreements (FSA):

(a) The FSA for Unit-1 was signed on 22.2.2013 for 66.67% of the total Capacity (200 MW) for MSEDCL PPA, which was subsequently amended as under:

S. No.	Particular	Date	Coal Quantity (MTPA)	Capacity (MW)	PPA
1.	FSA Unit-I	22.2.2013	0.8658	200	MSEDCL-66.67%
2.	FSA Unit-I Addendum III	16.9.2013	0.95238	220	MSEDCL-73.26%
3.	FSA Unit-I Addendum VI	10.6.2014	1.3	300	MSEDCL-73.26% TANGEDCO-27.27%

(b) The FSA for Unit-2 was signed on 7.8.2013 for 50% of the total capacity and subsequently amended as under:-

S. No.	Particular	Date	Coal Quantity (MTPA)	Capacity (MW)	PPA
1.	FSA Unit-II	7.8.2013	0.65015	150	DNH-50%
2.	FSA Unit-II Addendum I	30.11.2013	0.715165	165	DNH-55%
3.	FSA Unit-II Addendum II	30.11.2013	0.952958	220	DNH-73.26%



68. The Petitioner has further stated that the addendums to the FSAs for capacity contracted to TANGEDCO were executed on 10.6.2014, after the Bid Deadline date. Therefore, as on the Bid Deadline date, there was an assurance of supply of coal up to 100% of the normative requirement. It is submitted that as per the FSA executed with SECL, shortfall in the level of delivery of the coal by CIL up to 65% of the Annual Contracted Quantity (ACQ) as applicable for domestic coal shall not be liable for penalty till 2014-15 which will get changed to 70% of ACQ in 2015-16 and 75% of ACQ in 2016-17.

69. The Petitioner has further submitted that as per clause 4.6.1 of FSA, even in case of coal mix of domestic plus imported coal, SECL has to pay penalty to the Procurer for delivery of coal below 80% of ACQ. No penalty is levied for under-supply of coal as long as the quantity supplied is at least 80%. In view of this, the Petitioner has submitted that as per the FSA, SECL may not supply ACQ of domestic coal required to maintain the normative plant availability of 85% as per PPAs. Under such circumstance, to meet the shortfall in coal supply and to fulfill the obligation of 85% normative plant availability under the PPA, the Petitioner will have to procure coal from alternate sources. The Petitioner has also submitted that the deviation from 100% assured supply of coal in terms of the annual contracted quantity and short supply of coal by SECL is a change in law event in terms of Article 10 of the TANGEDCO PPA. The Petitioner has further submitted that every instance of under delivery of assured quantity of coal by SECL gives rise to an event for which the Petitioner is entitled to be compensated. In other words, till the shortfall actually occurs, it is not possible for the Petitioner to assess whether there will be a shortfall and what will be the impact of such shortfall.



70. The Petitioner has stated that shortfall in linkage coal has been accepted as a change in law event in terms of the following:-

(a) Statutory advice issued by this Commission on 20.5.2013 to the Ministry of Power in which this Commission has observed the following:

(i) Due to shortage of coal, there is now a proposal to make Coal India supply imported coal on a cost plus basis to all power projects commissioned or to be commissioned during the period 1.4.2009 to 31.3.2015.

(ii) The inclusion of supply of imported coal on a cost plus basis is a change/deviation from the NCDP under which supply of coal is the full responsibility of CIL and its subsidiaries with whom the power companies entered into Fuel Supply Agreements (FSA).

(iii) In order to allow the additional cost of imported coal to be passed through, recourse may be taken to change in law provisions in the PPA.

(iv) However, the appropriate Commission will have to determine, on a case to case basis, whether the power companies are entitled to claim such pass-through in cost on account of imported coal.

(b) Resolution dated 21.6.2013 by the Cabinet Committee on Economic Affairs (CCEA) whereby the Committee approved a mechanism for coal supply to power producers. The relevant portion of the decision is extracted as under:

“(i) Coal India Ltd. (CIL) to sign Fuel Supply Agreements (FSA) for a total capacity of 78000 MW including cases of tapering linkage, which are likely to be commissioned by 31.03.2015. Actual coal supplies would however commence when long term Power Purchase Agreements (PPAs) are tied up.

(ii) Taking into account the overall domestic availability and actual requirements, FSAs to be signed for domestic coal quantity of 65 percent, 65 percent, 67 percent and 75 percent of Annual Contracted Quantity (ACQ) for the remaining four years of the 12th Five Year Plan.

(iii) To meet its balance FSA obligations, CIL may import coal and supply the same to the willing Thermal Power Plants (TPPs) on cost plus basis. TPPs may also import coal themselves. MoC to issue suitable instructions.

(iv) Higher cost of imported coal to be considered for pass through as per modalities suggested by CERC. MoC to issue suitable orders supplementing the New Coal Distribution Policy (NCDP). MoP to issue appropriate advisory to CERC/SERCs including modifications if any in the bidding guidelines to enable the appropriate Commissions to decide the pass through of higher cost of imported coal on case to case basis.



(v) Mechanism will be explored to supply coal subject to its availability to the TPPs with 4660 MW capacity and other similar cases which are not having any coal linkage but are likely to be commissioned by 31.03.2015, having long term PPAs and a high Bank exposure and without affecting the above decisions."

71. The Petitioner has stated that from the statutory advice issued by this Commission states that the supply of imported coal to make-up for the shortage in supplying of domestic coal may constitute change in law for which compensation may be granted under the provisions of the PPA, on a case-to-case basis. It is also evident from the Cabinet Committee's decision that:

(a) A mechanism is proposed to be devised which will amend/supplement the NCDP in order to include supply of imported coal on cost-plus basis.

(b) The guidelines will be issued by the Ministry of Power to enable the Regulatory Commissions to decide the issue of pass through of cost of imported coal.

72. The Petitioner has submitted that in terms of the above, the increase in price of coal being supplied by CIL to generators constitutes a change in law event under the TANGEDCO PPA. In this regard the Petitioner has pointed out that the Ministry of Coal, Government of India, vide office memorandum dated 26.7.2013 has notified the changes in the NCDP, as approved by CCEA in relation to coal supply for the next four years of 12th Plan. The relevant portion of the notification is as under:

"2. Government has now approved a revised arrangement for supply of coal to the identified Thermal Power Stations (TPPs) of 78,000 MW capacity commissioned or likely to be commissioned during the period from 01.04.2009 to 31.03.2015. Taking into account the overall domestic availability and the likely actual requirements of these TPPs, it has been decided that FSAs will be signed for the domestic coal quantity of 65%, 65%, 67% and 75% of ACQ for the remaining four years of the 12th Plan for the power plants having normal coal/linkages"

73. The Petitioner has further submitted that clause 6.1 of the Revised Tariff Policy-2016 provides that in case of shortage of linkage coal, the increased cost of alternate fuel shall be considered for being made a pass through by Appropriate Commission. The relevant portion of the Revised Tariff Policy is as under:-



"However, some of the competitively bid projects as per the guidelines dated 19th January, 2005 have experienced difficulties in getting the required quantity of coal from Coal India Limited (CIL). In case of reduced quantity of domestic coal supplied by CIL, vis-a-vis the assured quantity or quantity indicated in Letter of Assurance/FSA the cost of imported/market based e-auction coal procured for making up the shortfall, shall be considered for being made a pass through by Appropriate Commission on a case to case basis, as per advisory issued by Ministry of Power vide OM No. FU-12/2011-IPC (Vol-III) dated 31.7.2013."

74. The Petitioner has pointed out that this Commission in its order dated 3.2.2016 in Petition No. 79/MP/2013 had allowed shortfall in quantum of linkage coal as a pass through. It has stated that the Tribunal in its judgment dated 3.11.2016 in Appeal No.192 of 2016 (Vidarbha Industries Power Limited v. MERC & anr) had recognized that additional costs incurred on account of shortfall in domestic coal, may be allowed as pass through by the Appropriate Commission on a case to case basis, as provided in the Revised Tariff Policy, 2016.

75. The Petitioner has submitted that the observation with respect to change of policy not being change in law in the Full Bench Judgment of the Tribunal is not applicable in the present case, because the present case is factually different from that of Adani Power. Further, the capacity charges quoted during the time of bidding were based on assumption of full fixed charges recovery at 85% normative availability as stipulated in the TANGEDCO PPA. Schedule 4 of the TANGEDCO PPA is as under:

"iv) The full Capacity Charges shall be payable based on the Contracted Capacity at Normative Availability and Incentive shall be provided for Availability beyond eighty five (85%) percent as provided in this Schedule, In case of Availability being lower than the Normative Availability, the Capacity Charges shall be payable on proportionate basis in addition to the penalty to be paid by the Seller as provided in this Schedule."

76. The Petitioner has stated that as per the provisions of the TANGEDCO PPA, the reduction in availability of plant due to shortage of coal will result in the reduction in fixed cost recovery as well as penalty. In case, the Petitioner purchases coal from alternative



source including purchase of imported coal from CIL to maintain the availability, the same will increase the energy charge component of tariff. In the light of the above it is submitted that pass-through of cost of imported coal on account of short supply of domestic coal ought to be allowed as a change in law. The Petitioner has added that the full bench judgment of the Tribunal dated 7.4.2016 in Appeal Nos. 100 of 2013 and batch had been set aside by the Hon'ble Supreme Court in Energy Watchdog case wherein it was held that changes in NCDP and Revised Tariff Policy dated 28.1.2016 are Change in Law and the party affected must be restituted for the adverse effect. The Petitioner vide affidavit dated 18.8.2017 has enclosed copy of the judgment of the Hon'ble Supreme Court in Energy Watchdog case and has submitted that reduction in linkage coal on account of deviation in FSAs and from NCDP qualify as change in law events and the Petitioner ought to be compensated for the same. Accordingly, the Petitioner has prayed that it is entitled to be compensated for the expenditure involved in procuring coal from alternate sources to meet the shortfall.

77. The Respondent, TANGEDCO has submitted that under Case-I bidding, it is the responsibility of the Project Developer to arrange for coal and the Project Developer is merely required to indicate the coal linkage in its bid in support of it being a serious bidder to supply power on sustained basis. It has submitted that the Procurer does not take any responsibility in so far as fuel is concerned and therefore TANGEDCO is responsible only to the extent of payment of charges in accordance with the PPA for power supplied to them.

78. Prayas has submitted that the Hon'ble Supreme Court in Energy watchdog case had granted limited relief of Change in Law in respect of the change in Policy of the Government of India in the availability of the domestic coal from the coal companies



against the Letter of Assurance or FSA. The Hon'ble Supreme Court has relied on the Letter dated 31.7.2013 by the Ministry of Power and the Revised Tariff Policy 2016, which refers to reduced quantity or shortfall in quantity of domestic coal supplied by CIL, vis-a-vis the assured quantity or quantity indicated in Letter of Assurance/FSA. Thus, Prayas has submitted that if there is no valid letter of assurance or FSA prior to 31.7.2013, there can be no change in law. It has further submitted that the Hon'ble Supreme Court has dealt with the change in law when the coal linkage was granted for a specified quantum and subsequently under the Government Policy the Fuel Supply Agreement (FSA) is directed to be signed by the Coal Company for a lesser quantum or where FSA was signed for certain assured quantum which was not honoured. Prayas has submitted that the Petitioner had signed Fuel Supply Agreement with SECL dated 22.2.2013 for Unit- I and 7.8.2013 for Unit- II and the FSA for Unit- I is prior to change in law, which was in July, 2013. Moreover, the FSA signed prior to July, 2013 does not provide for assured quantum at 100% of domestic coal and further provides for supply of balance shortfall through import of coal and thus, the coal supplier shall endeavor to supply domestic coal from its sources and shall import the remaining quantity, if necessary. Prayas has further submitted that the Change in Policy in 2013 had no impact on the FSA of the Petitioner. In this regard, the relevant extracts of the amendment to NCDP states as under:

"2. Government has now approved a revised arrangement for supply of coal to the identified Thermal Power Stations (TPPs) of 78,000 MW capacity Commissioned or likely to be Commissioned during the period from 01.04.2009 to 31.03.2015. Taking into account the overall domestic availability and the likely actual requirements of these TPPs, it has been decided that FSAs will be signed for the domestic coal quantity of 65%, 65%, 67% and 75% of ACQ for the remaining four years of the 12th Plan for the power plants having normal coal linkages. Cases of tapering linkage would get coal supplies as per the Tapering Linkage Policy. To meet its balance FSA obligations towards the requirement of the said 78,000 MWTPPs, CIL may import coal and supply the same to the willing power plants on cost plus basis. Power plants may also directly import coal themselves, if they so opt, in which case, the FSA obligations on the part of CIL to the extent of import component would be deemed to have been discharged."



79. Prayas has stated that merely because the addition to the capacity in relation to TANGENDCO was after July, 2013 does not change the fact that the terms of the FSA were already existing and the quantity of domestic coal assured prior to the cut-off date and prior to change in law in 2013 was the same i.e. 65%. There is no significant change in the FSA that the Petitioner has signed and the modifications to the FSAs proposed as per the amendment to NCDP dated 26.7.2013. Therefore there is no impact of change in NCDP on the quantity of coal assured to the Petitioner under the FSA. It has submitted that the Petitioner has claimed Change in Law as Changes in the Fuel Supply agreement and therefore, the Petitioner is required to demonstrate the actual changes in the Fuel Supply Agreement, which as submitted hereinabove are nil. It has stated that the Petitioner has taken an inconsistent stand on normative availability as 85% and 80%. While in Para 113 of the Petition, the Petitioner has stated that the penalty under the PPA is for availability below 80%, however, in Paras 98 and 108 of the Petition, the Petitioner has stated 85% normative availability. However, the Petitioner has not furnished the PPA with TANGEDCO in the Petition. Without prejudice to the above, Prayas has stated that there is no change in the quantity of coal assured and the Petitioner has not demonstrated the actual shortage of domestic coal. Moreover, the policy discourse as well as trends in CIL production does not support the claim of shortage of coal.

80. Prayas has also stated that as per the data published by CIL regarding coal production and off-take from by its subsidiaries including SECL (the subsidiary from which Petitioner is importing coal), 95% of the production target has been achieved in January 2016 and the same has been 101% for SECL during the period of April 2015 to January 2016. So there seems no reason to assume either shortage in coal production or grade slippage in the coming years. It has also stated that the power supply had commenced on 21.10.2015



and, therefore, the Petitioner should be able to supply information on actual coal availability. Also, the Petitioner has not furnished complete details in regard to supply of coal by SECL and the Petitioner is required to submit the following information:

- (a) The actual availability of coal from SECL during the relevant period and a certificate from SECL in this regard. Further whether the Petitioner refused supply of coal, when available;
- (b) Efforts made by the Petitioner to procure the increased quantum of coal from SECL and action taken against SECL to get assured quantum of coal;
- (c) Month wise opening and closing stock of domestic coal;
- (d) Whether the total quantum of coal made available was sufficient for generation of electricity for supply to the extent of normative availability as per the PPAs;
- (e) Month-wise actual generation, actual domestic coal realization and actual coal import.

81. Accordingly, Prayas has submitted that without analyzing the above-mentioned data, it is not possible to comment on the need, extent and appropriateness of the compensation required, if any. In the absence of this information there might be concerns regarding the appropriateness of the compensation and whether it can lead to any undue enrichment for the project developer. Prayas has submitted that the relief, if applicable, can be considered only for period after July, 2013, i.e. after the said change in law events occurred, in the light of the judgment of the Hon'ble Supreme Court in the Energy Watchdog case wherein the Court had observed as under:

"...the change in law has only taken place only in 2013, which modifies the 2007 policy and to the extent that it does so, relief is available under the PPA itself to persons who source supply of coal from indigenous sources. It is to this limited extent that change in law is held in favour of the respondents."

82. Based on the above, Prayas has submitted that in case the change in law was prior to 2013 i.e. even for events in February, 2013 when FSA was entered into, then the same was prior to the cut-off date for TANGEDCO PPA (27.2.2013) and the change in policy cannot be



considered. Therefore, Prayas has submitted that the relief claimed by the Petitioner may not be allowed.

83. We have examined the submissions of the parties. The Petitioner has entered into PPAs for supply of power to the Respondents, MSEDCL, DNH and TANGEDCO based on the competitive bidding carried out under section 63 of the Act. The case of the Petitioner is that the annual contracted quantity of domestic coal assured in terms of the LOAs and FSAs between the Petitioner and SECL may not be supplied to the Petitioner due to short supply of domestic coal by CIL and its subsidiaries and the balance coal may have to be procured by the Petitioner from the alternative sources to supply electricity to the Respondents at 85% normative availability. The Petitioner has submitted that SECL may supply imported coal as part of its obligations under the FSA and in such cases, the cost of imported coal may be more than the cost of domestic coal. The Petitioner has submitted that in terms of the statutory advice of the Commission and the decision of the Cabinet Committee on Economic Affairs, the Commission may grant fuel cost as pass through for the balance quantity of coal either purchased by the Petitioner or through SECL.

84. The Hon'ble Supreme Court in its judgment dated 11.4.2017 in Civil Appeal Nos.5399-5400 of 2016 and others [Energy Watchdog Vs Central Electricity Regulatory Commission and others] has held that shortfall of domestic linkage coal is a change in law event.

Relevant portion of the said judgment is extracted as under:

“53. However, in so far as the applicability of clause 13 to a change in Indian law is concerned, the respondents are on firm ground. It will be seen that under clause 13.1.1 if there is a change in any consent, approval or licence available or obtained for the project, otherwise than for the default of the seller, which results in any change in any cost of the business of selling electricity, then the said seller will be governed under clause 13.1.1. It is clear from a reading of the Resolution dated 21st June, 2013, which resulted in the letter of 31st July, 2013, issued by the Ministry of Power, that the earlier coal distribution policy contained in the letter dated 18th March, 2007 stands modified as



the Government has now approved a revised arrangement for supply of coal. It has been decided that, seeing the overall domestic availability and the likely requirement of power projects, the power projects will only be entitled to a certain percentage of what was earlier allowable. This being the case, on 31st July, 2013, the following letter, which is set out in extenso states as follows:

* * * * *

Both the letter dated 31st July, 2013 and the revised tariff policy is statutory documents being issued under Section 3 of the Act and has the force of law. This being so, it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sources is cut down, the PPA read with these documents provides in clause 13.2 that while determining the consequences of change in law, 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, the affected party to the economic position as if such change in law has not occurred. Further, for the operation period of the PPA, compensation for any increase/decrease in cost to the seller shall be determined and be effective from such date as decided by the Central Electricity Regulation Commission....”

85. In view of the above judgment, the coal shortfall met through imported coal, e-auction and open market is allowable under change in Law.

86. The Commission in order dated 3.2.2016 in Petition No. 79/MP/2013 had observed that the compensation for shortage of coal has to be borne by all the beneficiaries on pro-rata basis as per their shares in power. Relevant portion of the said order is extracted as under:

“73.....(b) The additional cost incurred in a month due to shortage of linkage coal shall be computed on ex-bus scheduled energy and shall be pro-rated corresponding to the scheduled generation for Haryana Discoms as per methodology given in para 56 above.”

87. Therefore, in the light of the allocation of firm linkage coal for all three beneficiaries, the Petitioner shall apportion the firm linkage coal supplied to it on pro rata to all beneficiaries and the cost of procurement of coal from alternate sources will also be apportioned pro rata based on power supplied to these beneficiaries.

88. The Energy Charge Rate (ECR) for Scheduled Generation at delivery point be computed in steps as shown below, considering bid assumed SHR or normative SHR as per CERC 2009-14 Tariff Regulations whichever is lower and Bid assumed AEC or normative AEC as per CERC



2009-14 Tariff Regulations whichever is lower. Since, the formulation is for mitigating coal shortage, the Specific Oil Consumption has been considered as nil.

Step-1:

ECR Linkage coal (Delivery point) = ECR QUOTED

Step-2:

ECR Other coal (Delivery point) = {[SHR / Weighted Average GCV of other coal (i.e. imported + open market + tapering linkage)] x [Weighted Average Price of other coal (i.e. imported + open market + tapering linkage)] x [1/(1- Aux Consumption)] x [1/(1- Approved Transmission Losses)]}

Step-3:

ECR chargeable at delivery point = {(G x ECR at Step-1) + [ECR computed at Step-2 x (1-G)]}

Where,

G = Generation achievable based on higher of minimum percentage as assured in relevant year as per NCDP or actual percentage of linkage coal received

Weighted Average GCV of other coal =

$$\frac{\{(GCV_{\text{Imported coal}} \times Qty_{\text{Imported coal}}) + (GCV_{\text{TaperingLinkage coal}} \times Qty_{\text{TaperingLinkage coal}}) + (GCV_{\text{Open market coal}} \times Qty_{\text{Open market coal}})\}}{\{Qty_{\text{Imported coal}} + Qty_{\text{TaperingLinkage coal}} + Qty_{\text{Open market coal}}\}}$$

Weighted Average Price of Other coal =

$$\frac{\{(Price_{\text{Imported coal}} \times Qty_{\text{Imported coal}}) + (Price_{\text{Tapering Linkage coal}} \times Qty_{\text{Tapering Linkage coal}}) + (Price_{\text{Open market coal}} \times Qty_{\text{Open market coal}})\}}{\{Qty_{\text{Imported coal}} + Qty_{\text{TaperingLinkage coal}} + Qty_{\text{Open market coal}}\}}$$

Compensation = {(ECR as computed at Step-3- ECR_{Quoted}) x (Scheduled Generation at delivery point)}

Note: 1) If the actual generation at delivery point is less than scheduled generation at delivery point, it will be restricted to actual generation at delivery point.

2) All facts, figures and computations in this regard should be duly certified by the auditor.

3) The coal consumed on month to month shall be duly certified by the auditor and the same shall be reconciled annually with the Opening Stock, coal received during the year, coal consumed during the year and the closing stock.

4) Total Generation Ex-bus and Scheduled generation Ex-bus on month to month basis as per the meters at the station switchyard bus shall be reconciled with the SCADA data of RLDC and Regional Energy Accounting of RPC/ SLDC for the month.

5) Any compensation paid by CIL or its subsidiaries to the petitioner for shortfall in supply of coal than the minimum/ threshold quantity as per FSA has to be adjusted from the year-wise relief claimed by the petitioner from the respondent.



(f) Increase in Minimum Alternate Tax (MAT) and Corporate Tax

89. The Petitioner has submitted that as on the cut-off date of TANGEDCO PPA, the effective rate of Minimum Alternate Tax (MAT) (including surcharge and Cess) was 20.01% and effective rate of Corporate Tax was 32.45%. Subsequently, the effective MAT rate has been revised to 20.96% vide Finance Act, 2013-14 and 2014-15 and later revised to 21.34% vide Finance Act, 2015-16 and 2016-17. The Petitioner has further submitted that the effective rate of Corporate Tax has been increased after the respective cut-off date to 33.99% vide Finance Act, 2013-14 and 2014-15 and later revised to 34.61% vide Finance Act, 2015-16 and 2016-17. The impact on account of increase in MAT and Corporate Tax as submitted by the Petitioner is as under:-

Minimum Alternative Tax	Rate for 2012-13	Rate for 2013-14 & 2014-15	Rate for 2015-16 & 2016-17
Basic Rate	18.50%	18.50%	18.50%
Surcharge	5%	10%	12%
Education Cess	2%	2%	2%
Secondary & Higher Education Cess	1%	1%	1%
Effective Rate	20.01%	20.96%	21.34%
Corporate Tax Rate	Rate for 2012-13	Rate for 2013-14 & 2014-15	Rate for 2015-16 & 2016-17
Basic Rate	30.00%	30.00%	30.00%
Surcharge	5%	10%	12%
Education Cess	2%	2%	2%
Secondary & Higher Education Cess	1%	1%	1%
Effective Rate	32.45%	33.99%	34.61%

90. The Petitioner has stated that the change in the effective Income Tax Rates i.e. MAT rate and Corporate Tax Rate due to change in Surcharge has a direct impact on the non escalable capacity charge and therefore, the Petitioner is entitled to claim compensation for the same. The Petitioner has also submitted that Clause 6.2 of the Tariff Policy is intended to be effective from the date of award of the bid. It clarifies the scope and



amplitude of Change in Law provisions with reference to change in taxes. The Petitioner has further submitted that in terms of the judgment of the Hon'ble Supreme Court in Energy Watchdog case, the tariff policy issued under Section 3 of the 2003 Act has the force of law.

91. The Petitioner has also submitted that the Indian Accounting Standard (AS) notified by the Ministry of Corporate Affairs, GOI set out the guidelines that Indian Companies need to follow for preparation of book of accounts. It has submitted that MAT is levied on the book profits of the company regardless of whether the company has taxable profits under the Income Tax Act and since MAT is a cost being imposed on the company, the Petitioner should be compensated in terms of Article 10 of the PPA. The Petitioner has stated that the balance sheet as well as P&L account of a company has to be prepared in accordance with the AS as mandated by Sections 129 and 133 of the Companies Act, 2013 and there is no exemption for electricity generating companies from this requirement. The definition of tax expenses in AS-22 refers to the aggregate of current tax and deferred tax in Para 4.3. The current tax is the amount of Income Tax that is determined to be payable on the taxable income for accounting period. If there is a loss, it is treated as 'tax loss'. Therefore, the Petitioner has submitted that the fact that the liability for Income Tax as well as MAT is treated as a tax expense would indicate that an increase/decrease in Income Tax/MAT rates comes within the purview of Change in Law as defined in Article 10 of the PPA. The Petitioner has referred to the judgment of the Hon'ble Supreme Court in JK Industries Ltd Vs UOI and ors (2007 13 SCC 673) (JK Industries case) and has submitted that taxes on income are considered as expenses incurred by the company in earning revenues. Accordingly, it has stated that the Petitioner has deployed capital to set up the project and the tax rate is a key element in determining the cost of capital. As such, a purposive



interpretation needs to be given to Article 10 to ensure that the objective of restoration to the same economic position is maintained.

92. The Petitioner has submitted that MERC in its order dated 25.3.2015 in Case No. 173 of 2013 had allowed MAT as a Change in Law placing reliance on the judgment of the Tribunal in Jaiprakash Hydro Power Ltd V HPERC &ors in Appeal No. 39/2010 (2011 ELR APTEL 1639), wherein it was held that introduction of MAT rates amounts to change in law. It has further submitted that the ratio of the judgment in Sasan case on the issue of MAT ought not to be applied in the present case since the same is under challenge before the Hon'ble Supreme Court. It has further stated that the Hon'ble Supreme Court in Energy Watchdog case confirmed that Article 13.1.1(i) and (iii) are different instances of change in law and ought to be read as being distinct from each other. The Petitioner has further stated that the change in law clause in case of TANGEDCO PPA provides for 'any change in tax or introduction of tax made applicable for supply of power by the Seller as per terms of this agreement' as opposed to the PPA in case of Sasan Power Ltd. The Petitioner has reiterated that the expression 'for supply of power' makes it evident that the taxable event is not limited to the act of supply and includes taxes on all elements necessary for generating and supply of power.

93. The Respondent, TANGEDCO has submitted that all amendments of law will not be covered under 'change in law' under Article 13.1.1(i) unless it is shown that such amendments result in change in cost of or revenue from the business of selling electricity by the seller to the procurer under the terms of the agreement. Accordingly, it has submitted that any increase or decrease in the tax on income or minimum alternate tax cannot be construed as change in law for the purpose of Article 13.1 of the PPA. While



pointing out that the pass through of MAT or income tax in case of tariff determination under Section 62 is by virtue of specific provisions under the Tariff Regulations, it has stated that such a provision is absent in case of tariff discovered through competitive bidding where the bidder is required to quote an all inclusive tariff including the statutory taxes and cess. Thus, the Respondent has submitted that change in rate of Income tax/MAT cannot be construed as change in law for the purpose of Article 13.1 of the PPA and the claim is liable to be rejected.

94. Prayas has pointed out that the Commission in its order dated 1.2.2017 in Petition No. 8/MP/2014 had disallowed MAT as a change in law event. It has further submitted that the Tribunal vide its judgment dated 19.4.2017 in Appeal No. 161/2015 had upheld the disallowance of MAT in case of Sasan case wherein, it had considered and rejected the contention on AS and other judgments raised by the Petitioner in this Petition. Prayas has further submitted that the judgment of the Hon'ble Supreme Court in Energy Watchdog case is not applicable as the issue of application of the qualification was not an issue before the said Court nor was there any argument on the said issue. Referring to the judgments of the Hon'ble Supreme Court in Arnit Das V State of Bihar (2000 5 SCC 488) and State of Haryana V Ranbir (2006 5 SCC 167), Prayas has stated that it is well settled that a decision without a conscious consideration of an issue is not a *ratio decidendi*. Prayas has stated that Income tax such as MAT and Corporate Tax are on application of profits of the Company and have nothing to do with expenditure or income of the Company and is therefore not covered under Change in law under the PPA. It has added that there cannot be any consideration of changes in Income Tax as change in law in PPA entered into through competitive bidding process under Section 63 of the 2003 Act. The Petitioner in its rejoinder has reiterated the submissions made in the Petition.



95. We have considered the submission of the Petitioner. It is observed that the claim of the Petitioner for change in effective MAT in respect of MSEDCL and DNH PPA during the construction period was considered by the Commission in Petition No. 8/MP/2014 and by order dated 1.2.2017 the Commission had disallowed the said claim. The relevant portion of the order is extracted as under:

“65. We have considered the submission of the Petitioner. The similar issue has been considered by the Commission in its order dated 30.3.2015 in Petition No. 6/MP/2013 where in the Commission has not considered MAT under change in law. The relevant portion of the said order is extracted as under:

“46. We have considered the submission of the Petitioner and the respondents. The question for consideration is whether the Finance Act, 2012 changing the rate of income tax and minimum alternate tax are covered under Article 13.1.1(i) of the PPA. The income tax rates are changed from time to time through various Finance Acts and therefore, therefore they will be considered as amendment of the existing laws on income tax. However, all amendments of law will not be covered under “Change in Law” under Article 13.1.1(i) unless it is shown that such amendments result in change in the cost of or revenue from the business of selling electricity by the seller to the procurers under the terms of the agreement..... Accordingly, any increase or decrease in the tax on income or minimum alternate tax cannot be construed as “Change in Law” for the purpose of Article 13.1 of the PPA. In the case of tariff determination based on capital cost under Section 62 of the Electricity Act, 2003, one of the components specifically allowed as tariff is tax on income. The pass through of minimum alternate tax or income tax in case of tariff determination under section 62 is by virtue of the specific provision in the Tariff Regulations which require the beneficiaries to bear the tax on the income at the hand of the generating company from the core business of generation and supply of electricity. Such a provision is distinctly absent in case of tariff discovered through competitive bidding where the bidder is required to quote an all-inclusive tariff including the statutory taxes and cesses. Thus, the change in rate of income tax or minimum alternate tax cannot be construed as “Change in Law” for the purpose of Article 13.1 of the PPA.”

96. It is noticed that the order of the Commission dated 30.3.2015 (Sasan Power Ltd v MPPMCL &ors) disallowing the claim of change in Income Tax rate from 33.99% to 32.45% and MAT rate from 11.33% to 20.01% based on the Finance Act, 2012 as a change in law event under the provisions of Article 13.1.1 of the PPA was examined by the Tribunal in Appeal No. 161/2015 (Sasan case) and the Tribunal by its judgment dated 19.4.2017 had disallowed the same. The relevant portion of the judgment is extracted under:



“28. Thus, when a tax on income is paid by the company, it cannot be said that a part of the income of the company was received for and on behalf of the Revenue. The Income Tax is charged upon the profits; the thing which is taxed is the profit that is made. Profit has to be ascertained first and Income Tax being a part of profits - namely, such part as the Revenue is entitled to take, is to be deducted from profits. When the net gains of the business determined after making all permissible deductions, are taxed, the deduction to meet such taxes cannot be deducted. Income Tax is not allowed as a deduction in making assessment of income. Income Tax or MAT are not part of the expenses of the company incurred for the purpose of carrying on the business and earning profits. Income Tax and MAT are post profit. Income Tax and MAT are the application of the profits when made. Income Tax and MAT are not an expenditure laid out for the purpose of the business of the company.

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“40.....In view of the above, the CERC’s finding that changes in Income Tax or increase in MAT are not Changes in Law must be confirmed and is accordingly confirmed.”

97. In the said judgment, the Tribunal had considered and rejected the contentions on Accounting Standards and other judgments, which has also been raised by the Petitioner herein in the present Petition. The Petitioner has submitted that the decision of the Tribunal in the Sasan case on the issue of MAT ought not to be made applicable since the same has been challenged before the Hon’ble Supreme Court. The Petitioner has also submitted that the Hon’ble Supreme Court has in the Energy Watchdog case confirmed that Article 13.1.1(i), (ii) and (iii) are different instances of change in law and ought to be read as distinct from each other. It has stated that TANGEDCO PPA provides for “*any change in tax or introduction of tax made applicable for supply of power by the Seller as per terms of this Agreement*” as opposed to the PPAs in case of Sasan Power Ltd. The Petitioner has added that the expression ‘for supply of power’ makes it evident that the taxable event is not limited to the act of supply and includes taxes on all elements necessary for generating and supply of power.

98. We do not agree with the above submissions of the Petitioner. Firstly, there is no stay on the operation of the judgment of the Tribunal dated 19.4.2017 by the Hon’ble Supreme Court in the appeal filed by the Petitioner. Secondly, the Tribunal in its judgment dated



19.4.2017 had examined the Article 13.1 of the PPA and had rejected the prayer for change in law on the issue of MAT. The relevant portions are extracted hereunder:

“16. The Appellant’s case is that due to Change in Law events, such as, change in Income Tax rate, increase in MAT rate, etc., there is a financial impact on the costs and revenues of the Appellant during operating period for which the Appellant is entitled to be compensated as per Article 13 of the PPA. The Appellant’s grievance is about the implication of the Finance Act, 2012 and the various notifications issued by the Government. Undoubtedly, the Finance Act or the various notifications relied upon by the Appellant are covered by Article 13.1.1(i) of the PPA. But, the important question is whether the qualification “which results in any change in any cost of or revenue from the business A-161.15 & A-205.15 46 of selling electricity by the Sellers to the Procurers” applies to Article 13.1.1(i) and (ii) or whether it applies to only Article 13.1.1(iii). In other words, the question is whether the Appellant can claim compensation for occurrence of Change in Law events only if the increase or decrease in tax rates pursuant to the Finance Act, 2012, or various notifications issued by the Government covered by Article 13.1.1(i) results in any change in cost or revenue from the Appellant’s business of selling electricity. The CERC has taken a view that this qualification is attached to Article 13.1.1(i) and (ii) also. We are inclined to agree with the said view. We will state the reasons why we have come to this conclusion.

17. If it is assumed for a moment that this qualification is only attached to Article 13.1.1(iii), then the natural corollary will be that only changes in consents, approvals, licensees will become Change in Law events if they result in change in any cost of or revenue from the business of selling electricity leaving out the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal of any law contemplated in Article 13.1.1(i) or a change in the interpretation of any law by a A-161.15 & A-205.15 47 competent court of law, tribunal or Indian Government Instrumentality contemplated in Article 13.1.1(ii). This would result in an absurd situation. It would mean that for situations contemplated in Article 13.1.1(i) and (ii), there is no requirement of their resulting in any change in any cost of or revenue from the business of selling electricity. Relief would be granted for a Change in Law which has no impact on the change in any cost of or revenue from the business of selling electricity. Such an incongruous interpretation must be avoided.

18. This interpretation is also supported by Article 13.2(b) of the PPA which under the head “Operation Period” deals with the impact of Change in Law and inter alia provides that compensation to be paid to the Seller for any increase / decrease in revenue or cost on account of Change in Law shall be determined by the CERC. Thus, in any event, for Change in Law in “Operating Period” which is the issue in the instant appeal, the impact provided for is compensation for any increase in revenue or cost to the seller. Thus, assuming as per the interpretation of Sasan that Article 13.1.1(i) or (ii) need not relate to revenue or A-161.15 & A-205.15 48 cost of business of selling electricity, under Article 13.2(b), the impact of compensation is limited to such revenues or costs.

19. Mr. Ramachandran, learned counsel for HPCC, drawing support from the reasoning of Gujarat Electricity Regulatory Commission in its Order dated 07/01/2013 in Petition No.1210 of 2012 submitted that though the four sub-clauses (i) to (iv) are separated by “or”, there is no comma before the word “or” preceding sub-clauses (ii) and (iii), whereas the word “or” preceding sub-clause (iv) has a comma before it and this indicates that the first three sub-clauses are under one category and the last is a different category. We are inclined to agree with him. Thus, mere coming into force of an enactment, amendment, modification, repeal,



etc. in law or change in interpretation by the competent court is not to be considered as a Change in Law under Article 13.1.1 unless it results in any change in any cost or revenue from the business of selling electricity.”

99. The Petitioner has referred to the observations of the Hon’ble Supreme Court in its judgment in Energy Watchdog case (as quoted below) and has submitted that the Court has confirmed that Article 13.1(i), (ii) and (iii) are different instances of change in law and ought to be read as distinct from each other.

“Even otherwise, from a reading of clause 13, it is clear that clause 13.1.1 is in four different parts. The first part speaks of enacted laws; the second speaks of interpretation of such laws by Courts or other instrumentalities; the third speaks of changes in consents, approvals or licences which result in change in cost of the business of selling electricity; and the fourth refers to any change in the declared law of the land for the project, cost of implementation of re-settlement and rehabilitation or cost of implementing the environmental management plan..”

100. The main plank of argument of the Petitioner is that as per the Supreme Court judgment in Energy Watchdog case, all parts of clause 13.1.1 of the PPA are different from each other and therefore, the third part which reads as ‘changes in consents, approvals or licences which result in change in cost of the business of selling electricity’ shall not be applicable to the first two parts. Accordingly, changes which result in changes in cost of business of selling electricity shall not be necessary consideration for allowing relief on account of any change in enacted law. In our considered view, the Hon’ble Supreme court has not dealt with this aspect and there is no finding to this effect. Hence, the reliance on the said judgment by the Petitioner is misconceived.

101. The Petitioner has relied upon the last bullet of Article 10.1.1 of the PPA viz., “*any change in tax or introduction of tax made applicable for supply of power by the Seller as per terms of this Agreement*” and has argued that the said claim includes generation and supply of power. This submission of the Petitioner is also not acceptable. In our view, the



Corporate Tax and MAT are not applicable on generation and supply of power by the generator to the Procurers, but only on the profit of the generator.

102. In the above background and in light of the judgment of the Tribunal in Sasan case affirming the order of the Commission disallowing MAT & Corporate Tax, the claim of the Petitioner for relief under change in law in this Petition is disallowed.

(g) Increase in Service Tax on Transportation of Coal

103. The Petitioner has submitted that as on the cut-off date for TANGEDCO PPA, the applicable Service Tax was 12.36%. It has further submitted that the applicable Service Tax increased from 12.36% to 14% vide Finance Act, 2015 effective from 1.6.2015 by Ministry of Finance Notification No.14/2015 dated 19.5.2015. Accordingly, the Petitioner has submitted that the change in Service Tax after the cut-off date based on the Finance Notification dated 19.5.2015 is a change in law event. The Petitioner has further pointed out that the Commission in some of its orders pertaining to change in law had allowed the said claims of the Petitioners therein and the same may be allowed in the present case.

104. The Respondent, TANGEDCO has submitted that service tax was already in existence before the bid deadline of 6.3.2013 and hence the increase in Service Tax on transportation of coal by rail and road cannot be accounted under Change in law. It has also submitted that changes in taxes, duties and levies are taken care by escalation indices published by the Commission once in six months. The Petitioner vide its affidavit dated 29.1.2018 has referred to the judgment dated 22.9.2014 of the Tribunal in Appeal No. 288/2013 and has submitted that the Seller ought to be compensated on the basis of actual expenditure incurred. It has further stated that the escalation index only takes into account the base price and not taxes duties and levies imposed on goods and services. Prayas has submitted



that only the impact due to increase in the rate of service tax is to be considered and any increase in freight rates cannot be included.

105. The matter has been examined. It is observed that the Commission in its order dated 1.2.2017 in Petition No. 8/MP/2014 had held that the Service tax on transportation of goods by Indian Railways qualifies as Change in law. Similar decision was taken by the Commission in its orders dated 6.2.2017 and 7.4.2017 in Petition Nos. 156/MP/2014 and 112/MP/2015. It is further noticed that the imposition of Service Tax on transportation of coal by rail and road was held to be a Change in law event by this Commission in order dated 19.12.2017 in Petition No.101/MP/2017. The relevant portion of the order is extracted as under:

“86.....In the light of the above decision, the claim of the Petitioner for relief under Change in Law on account of service tax on transportation of goods by Indian Railways is admissible. Further, it is noted that w.e.f. 1.10.2012, service tax on 30% of the transport of goods by rail is chargeable which is after the cut-off date i.e. 11.09.2012. Therefore, the Petitioner has not accounted for this levy at the time of submission of Bid. In view of the above, the Petitioner is eligible for the relief as suggested below:

xxxxxxx

The Petitioner shall be entitled to recover on account of change in service tax on transportation of coal in proportion to the actual coal consumed, corresponding to the scheduled generation for supply of electricity to Rajasthan Discoms. If the 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 service tax on transportation of coal. The Petitioner is directed to furnish along with its monthly bill, the proof of payment and computations duly certified by the auditor to Rajasthan Discoms. The Petitioner and Rajasthan Discoms are further directed to carry out reconciliation on account of these claims annually”

106. In line with the above decisions and considering the fact the imposition of service tax on transportation of goods is on the basis of the Finance Act, 2015(14/2015) which has come into force after the cut-off date, the expenditure incurred by the Petitioner on payment of service tax on transport of goods is covered under Change in law and the Petitioner is entitled for compensation in terms of the TANGEDCO PPA. The Petitioner is directed to furnish along with its monthly bill the proof of payment and computations duly



certified by the auditor to TANGEDCO. It is clarified that the Petitioner shall be entitled to recover on account of change in service tax on transportation of coal in proportion to the actual coal consumed corresponding to the scheduled generation for supply of electricity to TANGEDCO. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of service tax on transportation of coal. The Petitioner and TANGEDCO are directed to carry out reconciliation on account of these claims annually.

(h) Increase in Working Capital

107. The Petitioner has submitted that though there is no concept of return on equity and interest on working capital in competitively bid tariff, the increase in costs due to change in law events have indirect bearing on them. It has submitted that these components are integral to the all-inclusive tariff bid. The Petitioner has submitted that it had factored in interest on working capital and return on equity based on the costs prevalent at the time of bid. The Petitioner has further submitted that with the increase in the costs due to the change in law events above, the working capital requirement has also increased than what was prevalent at the time of bid. Thus, the Petitioner has submitted that in accordance with the Article 10 of the TANGEDCO PPA, it is entitled to interest on incremental working capital at normative interest rate to put the Petitioner to the same economic position as if change in law.

108. The Respondent, TANGEDCO has submitted that as per RFP 2.4.1.1(B), the bidder shall take into account all charges including capital and operating charges, statutory taxes, levies, duties while quoting such tariff. Prayas has submitted that the Petitioner has entered into the PPAs based on competitive bidding process under Section 63 of the 2003 Act and there is no concept of interest on working capital. It has also submitted that the



bidders are required to quote an all-inclusive tariff and there can be no consideration of any separate element of tariff. Prayas has therefore submitted that there cannot be any consideration of the change in working capital as Change in Law. It has pointed out that the Commission vide order dated 1.2.2017 in Petition No. 8/MP/2014 had disallowed the cost claimed by the Petitioner in respect of MSEDCL & DNH PPAs.

109. The matter has been examined. This issue was considered by the Commission in Petition No.8/MP/2014 and the Commission by order dated 1.2.2017 had rejected the claim of the Petitioner for interest on working capital due to increase in the costs due to the change in law events above. The relevant portion of the order is extracted under:

“109. The Petitioner has submitted that change in law events will have an impact on the interest on working capital due to increase in investment in value of coal stock including alternate coal, imported coal sourced at significantly higher cost. This will have an impact on interest on working capital resulting from Change in Law event and the Petitioner is eligible for tariff relief on account of increase in working capital in such a manner that it is restored to the same economic position as before such change. In this connection it is clarified that there is no concept of interest on working capital in competitively bid tariff and the bidders are required to quote all inclusive tariff. The claim on this account is rejected under Change in Law.”

In line with the above decision, the claim of the Petitioner under Change in Law is rejected.

Change in Law claims pertaining to MSEDCL, DNH & TANGEDCO PPAs

(a) Levy of charges for Transportation of Ash

110. The Petitioner has submitted that the Ministry of Environment & Forests, GOI vide Notification dated 14.9.1999 had directed inter alia that coal/lignite based thermal power plants were required to make available fly ash to industries for the purpose of manufacturing ash based products such as cement, construction of roads etc. It has also submitted that the Ministry of Environment & Forests, GOI vide Notification No. 225 dated 25.1.2016 had amended the notification dated 14.9.1999 and has mandated that the



thermal power plants need to bear the cost of transportation of ash. The Petitioner has further submitted that prior to the notification dated 25.1.2016, various cement companies were off-taking the fly ash generated at the Project and were bearing the transportation cost for fly ash. However, after 25.1.2016, the Petitioner is required to bear:

- (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.

111. The Petitioner has further submitted that the Maharashtra Pollution Control Board (MPCB) vide its letter dated 8.8.2016 has amended its consent to operate conditions of Coal Based Thermal Power Plant mandating the compliance with the fly ash notification dated 25.1.2016. The Petitioner has stated that in terms of the Ministry of Environment & Forests, GOI notifications in force as on the cut-off date, the obligation was limited to utilization of fly ash and the Petitioner was free to decide the manner of utilization. It has further stated that the mandatory requirement of bearing the cost of transportation of fly ash by notification dated 25.1.2016 and consequent modification of consent to operate by MPCB is a change in law event. The Petitioner has pointed out that it has submitted the details regarding transportation of fly ash vide affidavit dated 18.8.2017. The Petitioner has also stated that there has been no sale of fly ash from the project since the Ministry of Environment & Forests, GOI notification dated 25.1.2016 but it is maintaining a separate account for booking the revenue from sale of fly ash. It has further submitted that the cost of transportation of fly ash was not being recovered in the tariff as there was no obligation on the Petitioner to incur such cost.



112. MSEDCL in its reply affidavit dated 9.6.2017 has submitted that the Petitioner was aware before the cut-off date that the availability and utilization of fly ash was the responsibility of the Petitioner and the amendment dated 25.1.2016 does not alter/change this responsibility. It has further submitted that the amendment dated 25.1.2016 grants cost of transportation to the Petitioner to the extent of 50% from the end user of fly ash and accordingly, the Petitioner ought to grant relief to the consumers of MSEDCL and not to claim any relief on this count. It has also stated that the Petition is bereft of details of the amounts realized by the Petitioner from the sale of fly ash/coal rejects and accordingly the claim ought to be rejected. The Respondent has stated that the Petitioner has not provided any details as to how the Petitioner has calculated the financial gain and losses on account of MOE&F Notification dated 25.1.2016. It has further stated that the Petitioner is mandated to promote, support and assist in setting up of ash based product manufacturing units within the vicinity of the generating station so as to meet the requirements of bricks and other building construction materials. Accordingly, the Respondent has submitted that the Petitioner without complying with the above has chosen the option of sharing the cost of transportation with the users of fly ash and thereby loading the cost on the beneficiaries.

113. The Respondent, TANGEDCO has submitted that the impact of change in freight rate is being passed on through escalation rate notified by the Commission once in 6 months and therefore it would not be appropriate to allow the impact through provisions of change in law. Prayas has submitted that for change in law, the law as prevailing on the cut-off date as well as the obligations already existing for the Petitioner is to be considered. If the obligation already existed and the further condition imposed is mere crystallization or quantification of the obligation, the same is not a change in law. Referring to the MOE&F Notification dated 14.9.1999 and amendment dated 27.8.2003, Prayas has pointed out that



under the pre-existing obligations, the thermal power plants were required to ensure the utilization of ash generated in various activities. It has also stated that in terms of the MOE&F Notification dated 3.11.2009, there was change in law in favour of the Petitioner with regard to MSEDCL PPA in as much as the sale of fly ash for consideration would increase the revenue of the Petitioner. Prayas has further stated that the above notification which provided for target achievement of fly ash utilization was pre-existing as on the cut-off dates of DNH and TANGEDCO PPA and it was therefore incumbent on the bidders to have factored the cost in the bid. It has stated that the Petitioner may be directed to furnish all such consents and clearances to ascertain the obligations existing prior to the MOE&F notification dated 25.1.2016. Prayas has added that only the increase in obligation due to notification dated 25.1.2016 is to be considered and the Petitioner is required to demonstrate the increase in expenditure due to such amendment as against the existing obligation. It has further stated that the quantum of fly ash and coal utilized is to be on normative or bid assumed parameters or as per actual whichever is lower and the cost of transportation is subject to prudence check. Similar submission has been made by the Respondent, DNH vide its reply affidavit dated 12.7.2017.

114. As regards the claim on levy for charges towards transportation of fly ash, the Commission vide ROP of the hearing dated 13.7.2017 had directed the petitioner to submit the following additional information;

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

i. 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.

ii. 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, then copy of agreement must be furnished along with the rate of transportation cost and if the contract has been awarded through negotiation route, then justify the price considered was competitive, along with a copy of agreement.

iii. 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.

iv. Under which head of account, transportation expenditure is booked and whether cost of such transportation was being recovered in tariff.

v. Whether the Petitioner is maintaining a separate account for revenue earned from sale of ash as per the notification of MOEF. If yes, the total revenue accumulated and the expenditure incurred from the same account till date. If not, the reason for not maintaining such separate account.”

115. In response, the Petitioner vide its affidavit dated 23.8.2017 has submitted the details of fly ash generated and the corresponding transportation cost for the years 2013-14, 2014-15, 2015-16, 2016-17 duly audited, as under.

	Fly Ash generated (MT)	Bottom Ash generated (MT)	Total Ash generated (MT)	Total Ash disposed /Utilised (MT)	Transportation Cost 0-100 km (₹)	Sale value Cenosphere (₹)
2013-14	254516	63629	318145	152459	205100	Nil
2014-15	802776	200694	1003470	345086	2348171	430500
2015-16	1110137	277535	1387672	643500	9652779	1146600*
2016-17	1151198	287800	1438998	1220208	34348847	Nil

*includes Rs 1080600/- sales pertaining to the year 2015-16, however was provided for in the books during the year 2016-17.
Also, sale of Cenosphere was booked as scrap in the accounts

116. The Petitioner has clarified that at present, it is providing ash free of cost to parties like brick and tile manufacturers. It has further stated that the Odisha Pollution Control Board has mandated that generating companies should provide free transportation of fly ash upto 100 kms or give a subsidy of ₹150/MT of fly ash. The Petitioner has also submitted that it has not incurred any expenditure on account of transportation of fly ash and is only seeking an in-principle approval since it is likely that it would incur expenditure on this count in line with the MOE&F Notification dated 25.1.2016 and directions of the Odisha



Pollution Control Board. It has submitted that the accounts for all ash utilization related expenses under the head “Ash utilization” and any revenue realized from ash disposal / utilization would be accounted for separately as per the MoEFCC notification and would be grouped under the head ‘other income’ in the books of accounts of the Petitioners. The Petitioner has stated that the cost of transportation of fly ash was not being recovered in the tariff as there was no obligation on the Petitioner to incur such cost.

117. We have examined the submissions of the parties. As on cut-off dates for the MSEDCL, DNH and TANGEDCO PPAs, 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 had issued directions regarding utilization of fly ash under the Environment (Protection) Act, 1986. The Ministry of Environment and Forests, Govt. of India vide Notification No. S.O.254 (E) dated 25.1.2016 has amended the Environment (Protection) Rules, 1986 and has imposed 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.”

118. It is evident from the submissions of the Petitioner that it has not incurred any expenditure on account of transportation of fly ash and is only seeking an in-principle approval of the said claim. 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 Ltd & ors) in terms of the amendment dated 25.1.2016 and the Commission by order dated 19.12.2017 disposed of the same 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 analyse the case for determination of compensation.”

119. In line with the above decision, the expenditure claim by the Petitioner is in-principle admissible under the Change in law and the admissibility of the said claim is subject to the conditions indicated in the said order (*as quoted above*). The Petitioner is granted liberty to approach the Commission with above documents to analyze the case for determination of compensation.

(b) Levy of Krishi Kalyan Cess

120. The Petitioner has submitted that as on the cut-off dates for the MSEDCL, DNH and TANGEDCO PPAs, there was no levy of Krishi Kalyan Cess. It has stated that the Krishi Kalyan Cess at the rate of 0.5% of the value of taxable services with effect from 1.6.2016 was introduced vide section 161 of Finance Act 2016. It has further stated that the credit of the said cess paid on input services shall be allowed to be used for payment of the



proposed cess on the service provided by a service provider. It has further stated that Krishi Kalyan Cess is applicable on all taxable services for which service tax is levied viz., transportation of coal. The Petitioner has further submitted that the levy of Krishi Kalyan Cess has ultimately increased the rate of service tax from 14.5% to 15%. Accordingly, it has submitted that the imposition of Krishi Kalyan Cess as a Change in Law event and the impact on account of such imposition may be allowed.

121. MSEDCL has submitted that the levy of Krishi Kalyan Cess as Change in law needs prudence check with regard to efficiency parameters like Coal consumption, SHR, Auxiliary Consumption etc, of the generation plant. DNH has submitted that the levy of Krishi Kalyan Cess is not tax on 'supply of power' as contemplated under Article 10.1.1 of the PPA and only such taxes that are on the transaction of supply of power by the seller is to be permissible under change in law. TANGEDCO has submitted that Krishi Kalyan Cess would be applicable over and above the Swachh Bharat Cess and Service Tax and is applicable on Goods and Services where service taxes are collected by the Central Government. Accordingly, it has submitted that it has nothing to do with the generation of electricity. Prayas has submitted that the claim of the Petitioner that the imposition of Krishi Kalyan Cess has increased the service tax is not supported by any details of the specific service. It has further submitted that only the impact due to increase in rate of service tax is to be considered and any increase due to freight rates or other commercial charges cannot be included.

122. We have examined the matter. The Commission had examined the issue of Service Tax on transportation of goods by Indian Railways in order dated 6.2.2017 in Petition No. 156/MP/2014 as under:



“54. We have considered the submissions of the parties. As on the cut-off date, no service tax was leviable on the transportation of goods by the Indian Railways. By Finance Act of 2006, though service tax on transportation of goods by rail was introduced, an exception was made in case of Government Railways. By Finance Act of 2009, this restriction was removed by providing that service tax is leviable “to any person by another person, in relation to transport of goods by rail in any manner”. Therefore, transport of goods by Indian Railways became subject to service tax by Finance Act of 2009 which is after the cut-off date. Actual levy of service tax on transportation of goods by railways was exempted by Notification No. 33 of 2009 dated 1.9.2009. By Notification no. 26 of 2012 dated 20.6.2012, Ministry of Finance issued notification by exempting transport of goods by rail over and above 30% of the service tax chargeable with effect from 1.7.2012. By a Notification No. 43 of 2012 dated 2.7.2012, service tax on transportation of goods by Indian Railways was fully exempted till 30.9.2012. With effect from 1.10.2012, service tax on 30% of the transport of goods by rail is chargeable. Therefore, the basis of the service tax on transport of goods by Indian Railways is traceable to the Finance Act of 2009 which was enacted after the cut- off date. The rate Circular No. 27 of 2012 dated 26.9.2012 issued by Railway Board implemented the provisions of the Finance Act 2009 at the ground level. In our view, since the imposition of service tax on transport of goods by Indian Railways is on the basis of the Finance Act 2009 which has come into force after the cut-off date, the expenditure incurred by the petitioner on payment of service tax on transport of goods by the Indian Railways is covered under change in law and the petitioner is entitled for compensation in terms of the PPAs.”

Therefore, service Tax on transportation of goods by Railways is payable.

123. The Petitioner’s claim pertains to the reimbursement of Krishi Kalyan Cess levied on transportation of Coal by Railways. As regards Krishi Kalyan Cess, the Finance Act, 2016 (No. 28 of 2016) provides as under:

“161. (1) This Chapter shall come into force on the 1st day of June, 2016.

(2) There shall be levied and collected in accordance with the provisions of this Chapter, a cess to be called the Krishi Kalyan Cess, as service tax on all or any of the taxable services at the rate of 0.5 per cent on the value of such services for the purposes of financing and promoting initiatives to improve agriculture or for any other purpose relating thereto.

(3) The Krishi Kalyan Cess leviable under sub-section (2) shall be in addition to any cess or service tax leviable on such taxable services under Chapter V of the Finance Act, 1994, or under any other law for the time being in force.

(4) The proceeds of the Krishi Kalyan Cess levied under sub-section (2) shall first be credited to the Consolidated Fund of India and the Central Government may, after due appropriation made by Parliament by law in this behalf, utilise such sums of money of the Krishi Kalyan Cess for such purposes specified in sub-section (2), as it may consider necessary.

(5) The provisions of Chapter V of the Finance Act, 1994 and the rules made thereunder, including those relating to refunds and exemptions from tax, interest and imposition of penalty shall, as far as may be, apply in relation to the levy and collection of the Krishi



Kalyan Cess on taxable services, as they apply in relation to the levy and collection of tax on such taxable services under the said Chapter or the rules made thereunder, as the case may be.”

124. As per Article 10.1.1 of the MSEDCL, DNH and TANGEDCO PPAs, any change in tax or introduction of any tax made applicable for supply of power by the seller as per the terms of the agreement is covered under change in law. Similarly, any change in consents, approval or licenses available which results in change in any cost or revenue from the business of selling electricity by the Petitioners to MSEDCL, DNH and TANGEDCO is covered under Change in law. Since Krishi Kalyan Cess was imposed on service tax through an Act of Parliament and has the result of additional expenditure to the Petitioners for generation and supply of electricity to Procurers, it is covered under Change in Law. The Petitioner has claimed Krishi Kalyan Cess on the service tax imposed on transportation of coal. We have in this order allowed under Change in Law, the Service Tax imposed on transportation of coal. Since Krishi Kalyan Cess is applicable on all taxable services for which service tax is levied, these charges are allowable under Change in Law in terms of the judgment dated 12.9.2014 in Appeal No. 288/2013 (Wardha Power Vs. Reliance Infra). Accordingly, Krishi Kalyan Cess shall be computed on the incremental amount of service tax on account of transportation of coal. Krishi Kalyan Cess shall be admissible to the actual coal consumed corresponding to the scheduled generation for supply of electricity to MSEDCL, DNH and TANGEDCO. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of Krishi Kalyan Cess. The Petitioners are directed to furnish along with their monthly bill, the proof of payment and computations duly certified by the auditor to MSEDCL, DNH and TANGEDCO. The Petitioners and MSEDCL, DNH and TANGEDCO are directed to carry out reconciliation on account of these claims annually.



(c) Imposition of charges towards National Mineral Exploration Trust (NMET) and District Mineral Foundation (DMF)

125. The Petitioner has submitted that that as on the cut-off dates for MSEDCL, DNH and TANGEDCO PPAs, there was no obligation to contribute towards the NMET and DMF. On 26.3.2015, the Government of India amended the Mines and Minerals (Development and Regulation) Act, 1957 (MMDR) and enacted the Mines and Minerals (Development and Regulation) Act, 2015 in which Section 9B (Creation of DMF) and Section 9C (Creation of NMET) were introduced. The MMDR Act was deemed to have come into effect from 12.1.2015. By Notification dated 14.8.2015, the Ministry of Mines, GOI constituted the NMET. On 16.9.2015, the Ministry of Mines, GOI, issued order directing the formation of DMF which also stated that the DMFs will be deemed to have come into existence with effect from 12.1.2015 i.e. the date of which MMDR came into force. Pursuant to MMDR Amendment Act, on 17.9.2015, the Ministry of Mines, GOI issued the Mines and Minerals (Contribution to District Mineral Foundation) Rules, 2015 and as per Rule 2 of the said Rules, every holder of a mining lease or a prospecting license-cum-mining lease shall, in addition to the royalty, paid to the DMF, on amount at the rate of:

- (a) 10% of the royalty paid in terms of the Second Schedule to the Mines and Minerals (Development and Regulation) Act, 1957, in respect of the mining lease or, as the case may be, prospecting license-cum-mining lease granted on or after 12.1.2015; and
- b) 30% of the royalty paid in terms of the Second Schedule to the Mines and Minerals (Development and Regulation) Act, 1957, in respect of mining leases granted before 12.1.2015.

126. The Petitioner has submitted that on 20.10.2015, the Ministry of Coal, GOI had revised the Mines and Minerals (Contribution to District Mineral Foundation) Rules, 2015 in respect of Coal, lignite and sand for stowing. It also stated that the amount to be paid to DMF will be calculated from the date of notification issued under Section 9(B)(1) of the



MMDR Act, by the State Government establishing the DMF or the date of coming into force of the revised rules (20.10.2015). However, the order dated 16.9.2015 directing the State Governments to establish DMFs stated that DMFs will be deemed to have come into force from 12.1.2015. The Petitioner has submitted that on 13.11.2015, SECL issued notice for implementation of the MMDR Act inter alia stating that (a) contributions to NMET be made with effect from 14.8.2015 and (b) contributions to DMF be made with effect from 12.1.2015. Accordingly, the Petitioner has submitted that following levies are being included by Mahanadi Coalfields Ltd (MCL) in the invoices raised by it for supply of linkage coal to the Petitioner which in turn is being charged from the Petitioner.

(a) 30% of the royalty to the DMF in terms of Section 9B of the MMDR Act read with Rule 2 of the Mines and Minerals (Contribution to District Mineral Foundation) Rules, 2015; and

(b) 2% of the royalty to the NMET in terms of Section 9C of the MMDR Act read with Rule 7(3) of the NMET Rules, 2015

127. In the above backdrop, the Petitioner has submitted that the imposition of contributions towards NMET and DMF raised by SECL are based on the enactment of MMDR Act and the issuance of various notifications and orders by the Ministry of Mines, GOI and therefore amounts to a Change in law, effective from the cut-off date of the said PPAs.

128. MSEDL has submitted that NMET and DMF are the result of contractual arrangements between the Petitioner and SECL in terms of the FSA and is not in pursuance to any law as defined in the PPAs and cannot therefore be covered under change in law. DNH has submitted that the payment or contribution to NMET and DMF are to be made by the holder of a mining lease or holder of a prospective license-cum-mining lease and therefore should not be passed on to the consumers. It has submitted that any additional recurring/non-recurring expenditure to the petitioner is not due to change in law, but a result of the FSA



entered into between the Petitioner and SECL and such allowance would amount to passing of inefficiencies of the Petitioner. TANGEDCO has submitted that NMET and DMF are in existence before the bid deadline of 6.3.2013 and increase in charges cannot be accounted for under change in law. Prayas has submitted that the said amendments are statutory levy and part of royalty being paid. Since this is not a tax or levy on supply of power but on coal, the same is not covered under Article 10.1.1 and is not a Change in Law event under the PPA. Without prejudice to the above, it has submitted that the Commission has interpreted the Article 10.1.1 in the Petition No. 8/MP/2014 vide order dated 1.2.2017 and appeal against the said interpretation of Article 10.1.1 is pending before the Appellate Tribunal for Electricity (Tribunal). It has further submitted that the issue of whether Royalty is a tax or not is pending before the Hon'ble Supreme Court and has been referred to a nine judge bench in Mineral Area Development Authority v. Steel Authority of India & ors reported in(2011) 4 SCC 450. Therefore, the decision of the Commission is subject to the above. Prayas has also submitted that Amendment to the MMDR Act has to be considered as against the existing obligation of the leaseholder to contribute for interest and benefit of the persons and for areas affected by mining related operation, the leaseholder has an obligation for rehabilitation and resettlement of the disputed persons as well as for protective measures for the affected area. The Petitioner in its rejoinder has reiterated the submissions made in the Petition. It has, however, clarified that the contributions towards NMET and DMF are different from Royalty since royalty is applied on the base price of coal and is a separate levy.

129. We have considered the submissions of the parties. Through the Mines and Minerals (Development and Regulation) Amendment Act, 2015, the following provisions have been incorporated in the Mines and Minerals (Development and Regulation) Act, 1957:



“9B. District Mineral Foundation:

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

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

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

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

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

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

“9C: National Mineral Exploration Trust:

(1) The Central Government shall, by notification, establish a Trust, as a nonprofit body, to be called the National Mineral Exploration Trust.

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

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

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



130. The Central Government in exercise of powers under sub-section 9B of the Mines and Minerals (Development and Regulation) Act, 1957 has notified the Mines and Minerals (Contribution to District Mineral Foundation) Rules, 2015 prescribing the amount of contribution that will be made to the District Mineral Foundation. It is noticed from these provisions that through an amendment to the 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 provides for payment of amounts in addition to the royalty by the holder of the mine lease or holder of prospective license-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 of tax.

131. It is observed that the charges towards NMET and DMF as a Change in law event was considered by the Commission in Petition No. 112/MP/2015 and the Commission after considering the submissions of the respondents therein and taking into account the provisions of the MMDR Act had allowed the claim by its order dated 7.4.2017. The relevant portion of the order is extracted hereunder:



“74. We have considered the submissions of the Petitioners and Prayas. There is no denying the fact that these contributions are statutory levies. Under the provisions of the FSA between the Petitioners and Mahanadi Coalfield Limited, the Petitioners are required to pay all statutory taxes, levy, cess or fees in addition to the base price of coal, sizing/crushing charges and transportation charges. Therefore, in terms of the FSA, Mahanadi Coalfield Limited is entitled to pass on these taxes or levies to the purchaser of coal. The question therefore arises whether the liability for taxes and levies shall be borne by the purchaser of coal or shall be passed on to the procurers. 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. 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 the Act of the Parliament after the cut-off date and therefore, they fulfill the conditions of Change in Law. Accordingly, the expenditure on this account has been allowed under Change in Law. The Petitioners shall be entitled to recover the same corresponding to the scheduled generation for supply of electricity to BSPHCL. If the 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 service tax on transportation of coal. The Petitioners are directed to furnish along with its monthly bill, the proof of payment and computations duly certified by the auditor to BSPHCL. The Petitioners and BSPHCL are further directed to carry out reconciliation on account of these claims annually.”

132. Similar claim was considered by the Commission in Petition No. 16/MP/2016 (Sasan Power Ltd V MPPMCL & ors) and the Commission by order dated 17.2.2017 had allowed the said claim under Change in law. In accordance with these decisions, the expenditure on this account claimed by the Petitioner has been allowed. However, in order to take care of the concern of the Procurers, the Petitioner is directed to ensure that the payment to these funds does not relieve the Petitioner from any of its existing liability which the Petitioner is required to meet out of the bid tariff or any expenditure allowed under Change in Law earlier. The Petitioner is also directed to furnish along with its monthly bill, the proof of payment and computations duly certified by the auditor to the State Utilities for claiming the expenditure under Change in Law. It is further directed that the reimbursement on account of contribution to NMET and DMF shall be on the basis of actual payments made to the appropriate authorities and shall be restricted to the amount of coal consumed for



supplying scheduled energy to the Procurers. Needless to say, that the above decision is subject to the final outcome of the appeal pending before the Tribunal.

(d) Increase in the rate of Chattisgarh Paryavaran &Vikas Upkar

133. The Petitioner has submitted that as on the cut-off dates under the respective PPAs, SECL was imposing Chattisgarh Paryavaran & Vikas Upkar at ₹5/tonne of coal. Subsequently, the rate of Chhattisgarh Paryavaran & Vikas Upkar was increased to ₹7.5/tonne vide Notice No. SECL/BSP /S&M/2015/1420 dated 19.8.2015 issued by the South Eastern Coal Fields Ltd which was made retrospectively applicable to all dispatches/lifting from 16.6.2015 vide SECL Note No. SECL/BSP /YPS-Note/2015/2548 dated 4.8.2015. Accordingly, the Notification of SECL increasing the Chattisgarh Paryavaran & Vikas Upkar from ₹5/tonne to ₹7.5/tonne with effect from 16.6.2015, which is after the cut-off dates, is a change in law event and the Petitioner is required to be compensated for the said increase. The Petitioner has added that the Commission in some of its orders viz. Orders dated 19.12.2017 in Petition No.229/MP/2016 & Petition No.101/MP/2017 and Order dated 13.12.2017 in Petition No.189/MP/2016 had allowed the increase in Chattisgarh Paryavaran & Vikas Upkar to be a change in law event and hence the same may be allowed in the present case.

134. MSEDCL has submitted that the State Government of Chhattisgarh had promulgated Chattisgarh (Adhoshanrachna Vikas Evam Paryavaran) Upkar Adhiniyam, 2005 for the purpose to provide levy of cess on land for raising funds to implement infrastructure development projects and environment improvement projects. It has submitted that since tariff is discovered through Case-I bidding process, it is the responsibility of the bidder to arrange for fuel and MSEDCL is only a user. The Respondent has therefore submitted that the revision of charges by SECL from time to time is a result of contractual agreement between



the Petitioner and SECL in terms of the FSA dated 22.2.2013 and is not in pursuance to any law as defined in the PPAs and cannot be covered under change in law. Similar submissions have been made by the Respondent, DNH. Respondent, TANGEDCO, vide its affidavit dated 28.6.2017 has submitted that the TANGEDCO's bid dead line was 6.3.2013 and the notifications were issued before the due date. As per clause 2.4.1.1(B) of the RFP, the quoted tariff is inclusive of all taxes, levies, duties etc. As the petitioner has quoted escalable energy charge components, raise in duties and levies are taken care in the Commission's escalation percentage published once in 6 months. Prayas has submitted that the petitioner has not submitted any law by any Government authority for such imposition and SECL is not authorized to impose tax or statutory levy. Accordingly, it has submitted that any increase in charges is based on contractual arrangement and are not change in law as held by the Commission in the case of crushing/sizing charges for coal.

135. The matter has been examined. The Commission vide ROP of the hearing dated 13.7.2017 had directed the Petitioner to file copy of the notification of the State Government/State Government agency in justification for the increase in the rate of Chattisgarh Paryavaran & Vikas Upkar. In compliance with the said directions, the Petitioner vide affidavit dated 23.8.2017 has furnished the Gazette Notification No. 340 dated 16.6.2015 issued by the State Government of Chhattisgarh amending Schedules I & II of the Chattisgarh (Adhoshanrachna Vikas Evam Paryavaran) Upkar Adhiniyam, 2005.

136. Chhattisgarh (Adhoshanrachna Vikas Evam Paryavaran) Upkar Adhiniyam, 2005 provides for the levy of cess on land for raising funds to implement infrastructure development projects and environmental improvement projects. The relevant portion of said Act is extracted as under:



“Preamble:

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

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

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

xxx

Section 3-Infrastructure development cess

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

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

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

Section 4- Environment Cess

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

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

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

Section 7- Assessment and Collection of cess

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

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

Section 8- Amendment of Schedules

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

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

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

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



137. Subsequently, Government of Chhattisgarh, in exercise of the powers conferred under sub-Section (1) of Section 8 of the Chhattisgarh (Adhosanrachna Vikas Evam Paryavaran) Upkar Adhiniyam, 2005 amended the Schedule I and Schedule II imposing the Development cess and Environmental cess vide Notification No. 340 dated 16.6.2015 as under:

Schedule I

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

Schedule II

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

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

138. The issue of Chattisgarh Paryavaran & Vikas Upkar as a change in law event had been considered in Petition No.101/MP/2017 (DB Power V PTC India Ltd & ors) and the Commission, after examining the provisions of the Chhattisgarh (Adhosanrachna Vikas Evam Paryavaran) Upkar Adhiniyam, 2005 and its amendment thereof, by order dated 19.12.2017 allowed the said claim. The relevant portion of the order dated 19.12.2017 is extracted hereunder:



“59. It is noted that as on the cut of date, the rate of Infrastructure development cess and environmental cess was Rs.5 on each tonne of annual dispatch of mineral. Government of Chhattisgarh vide its Notification dated 18.9.2015 revised the Infrastructure development cess and Environment Cess from Rs. 5/MT to Rs. 7.50/MT which is applicable for all SECL coal despatches from 16.6.2015 which has an impact on the cost of generation of electricity for supply to Rajasthan Discoms. Since, the Infrastructure development cess and Environment Cess has been imposed by Act of Chhattisgarh State, i.e. Chhattisgarh legislature, it fulfils the conditions of Change in Law event under Article 10 of PPA. Accordingly, the Petitioner is entitled for the expenditure incurred on this account. The Petitioner is directed to furnish a certificate from an Auditor certifying the expenses in this regard to Rajasthan Discoms for claiming the expenditure under Change in Law. It is clarified that the Petitioner shall be entitled to recover on account of Infrastructure development cess and environment cess in proportion to the actual coal consumed corresponding to the scheduled generation of supply of electricity to the procurers. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of Infrastructure development cess and environment cess. The Petitioner and Rajasthan Discoms are directed to carry out reconciliation on account of these claims annually.”

139. The above decision is applicable in the case of the Petitioner. Therefore, the increase in the rate of Chhattisgarh Paryavaran & Vikas Upkar is admissible to the Petitioner as a change in law event under Article 10 of the PPA. The Petitioner is directed to furnish a certificate from an Auditor certifying the expenses in this regard to the Respondent discoms for claiming the expenditure under Change in Law. It is clarified that the Petitioner shall be entitled to recover on account of Infrastructure development cess and environment cess in proportion to the actual coal consumed corresponding to the scheduled generation of supply of electricity to the procurers. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of Infrastructure development cess and environment cess. The Petitioner and the Discoms (MSEDCL, DNH and TANGEDCO) are directed to carry out reconciliation on account of these claims annually.

(e) Levy of Coal & Coke Terminal Surcharge

140. The Petitioner has submitted that as on the cut-off dates of the MSEDCLPPA, DNH PPA and TANGEDCO PPA, there was no levy of Coal and Coke terminal surcharge.



Subsequently, the Railway Board, Ministry of Railways vide Circular No. TCR/I078/2015/07 dated 22.08.2016, had imposed a Coal Terminal Surcharge at ₹55/tonne for both loading and unloading of coal (totalling to ₹110 /tonne) for distance beyond 100kms, with immediate effect. Accordingly, the Petitioner has submitted that the Coal Terminal Surcharge introduced by way of Railway Circular and effective after the cut-of date is a change in law event. The Petitioner has pointed out that the MERC in its order dated 18.10.2017 in Case No. 38/2016 had allowed the said surcharge as a change in law event.

141. MSEDCL has submitted that the claim of the Petitioner is not covered under change in law. It has pointed out that the Ministry of Railways had issued a fresh corrigendum dated 24.8.2016 whereby coal and coke terminal charge is levied on coal freight falling under class 145 A for the distance beyond 100 kms. MSEDCL has further submitted that as per bid document, PPA and FSA, the responsibility of arrangement of fuel and transportation of fuel lies with the bidder and hence the Coal and Coke terminal charge on coal freight is on account of bidder. DNH has submitted that the levy of Coal and Coke terminal charge is not a statutory levy and any increase on account of contractual and commercial arrangements of the Petitioner including Railways cannot be covered under change in law. TANGEDCO has submitted that the Petitioner is not entitled to claim the increase in freight of coal transport in tariff which was agreed to under competitive bidding process and approved under Section 63 of the 2003 Act. It has further submitted that the impact of change in freight rate is being passed on through the escalation rate notified by this Commission every six months and therefore it would not be appropriate to allow the impact under change in law. Prayas has submitted that Coal and Coke terminal surcharge is a commercial consideration paid by the Petitioner to Railways for transport of coal ie., the cost of procuring the input and similar to the Busy Season Surcharge hence, the same may be



disallowed. In its rejoinder, the Petitioner has objected to the above submissions and has stated that these charges are not based on commercial arrangements and has been introduced by way of Railway Circulars, which have the force of law.

142. The matter has been examined. The issue of levy of Coal Terminal surcharge for traffic of coal for the distance beyond 100 kms was examined by the Commission in Petition No. 101/MP/2017 and the Commission by order dated 19.12.2017 had held that the relief cannot be granted under change in law. The relevant portion of the order is extracted hereunder:

“78. We have considered the submissions of the Petitioner, Rajasthan Discoms and Prayas. It is noted that the Coal Terminal Surcharge on Coal Transportation has been brought by the Ministry of Railways as part of base freight charges at the rate of Rs. 55/ tonne at both loading and unloading terminals for transportation of coal for the distance beyond 100 KM. This levy by the Ministry of Railways vide circular dated 22.8.2016 is in the nature of change in base freight charges. The Petitioner was expected to take into account the possible revision in these charges while quoting the bid. The Petitioner has already quoted an escalable component of energy charges in the bid and is compensated for any revision in base freight rate through changes in Escalation Index notified by the Commission for coal freight directly. Accordingly, the claim of the Petitioner on this account is disallowed”

In the light of the above decision, the Petitioner cannot be granted relief under change in law on account of the levy of Coal and Coke Terminal surcharge by the Railways.

(f) Increase in Countervailing Duty and Excise Duty on Spares and Equipment

143. The Petitioner has submitted that as on the cut-of dates, the applicable Countervailing Duty (CVD) on import of spares and Excise Duty on domestic equipment was 8% and 12% respectively. It has further submitted that the CVD increased (i) from 8% to 10% vide Notification no. 6/2010 of Central Excise dated 27.2.2010 (ii) from 10% to 12% vide Notification No. 18/2012 Central Excise dated 17.3.2012 and Notification No. D.O.F. No 334/3/2012/TRU dated 16.3.2012 issued by the MOF, GOI; and (iii) from 12% to 12.5% vide



Finance Act, 2015 (Notification No.20/2015 dated 14.5.2015) with effect from 1.4.2015. The petitioner has also submitted that in terms of the Customs Duty Act, 1975, the applicable rate of CVD i.e, additional duty of customs is equal to Excise duty. It has also pointed out that the Commission in its order dated 5.5.2017 in Petition No. 235/MP/2015 had held that the change in CVD is a change in law event. Accordingly, the Petitioner has submitted that the Notifications issued by the MOF, GOI are a change in law event and the claim may be allowed in the present case.

144. MSEDCL has submitted that the increase in CVD and ED on Spares and Equipment cannot be covered under change in law. DNH has submitted that the Petitioner has not specified any actual expenditure on import of spares and domestic equipment and the list of spares has also not been furnished by the Petitioner. Therefore, the relief claimed under this head cannot be granted. TANGEDCO has submitted that the notifications were issued prior to the bid deadline date and the same can be taken care by escalation indices published by this Commission once in 6 months. Prayas has submitted that the Petitioner had claimed CVD in Petition No. 8/MP/2014 wherein, it was held that it related to the construction period. However, the Petitioner has also claimed the change in law for DNH and TANGEDCO PPAs in addition to MSEDCL PPA on the basis of increase from 12% to 12.5% vide Finance Act, 2015. Prayas has further stated that since the construction period of MSEDCL, DNH and TANGEDCO had ended on 17.3.2014, 1.4.2013 and 22.10.2015 respectively and since two units of the Petitioner were declared under commercial operation only on 19.3.2013 and 1.9.2013, the impact of Finance Act, 2015 on taxes and duties were not clear and the Petitioner had also not clarified the same. In response, the Petitioner has reiterated its submissions made in the Petition.



145. We have considered the submissions of the parties. The Commission in order dated 4.5.2017 in Petition No. 235/MP/2015 (APL V UHBVNL & ors) had decided as under:

“35.....Accordingly, the Petitioner shall therefore be entitled for reimbursement of custom duty, excise duty on import/procurement of any other goods and service tax on the spares and consumables payable by it from 1.4.2015 on account of the withdrawal of exemption to the power plants located in the SEZ by the Ministry of Commercial and Industry only to the extent of difference in the duty or tax as on the cut-off date and as prevailing as on 1.4.2015 and thereafter..”

146. As on the cut-off date of the MSEDCL PPA (31.7.2009), the applicable ED was 8% as per MOF, GOI notification dated 9.7.2004. However, this was increased to 10% vide Central excise Notification No. 6/2010 dated 27.2.2010 and from 10% to 12% vide Notification No. 18/2012 dated 17.3.2012. It is noticed that the claim of the petitioner for increase in ED as a change in law event in respect of MSEDCL PPA based on the Notifications dated 27.2.2010 and 17.3.2012 were considered by the Commission in Petition No. 8/MP/2014 and the same was allowed vide order dated 1.2.2017 during the construction period. The relevant portion of the order is extracted as under:

“41. We have considered the submission of the Petitioner, MSEDCL and Prayas. As on the cut-off date(i.e. 31.7.2009), the applicable excise duty was 8% as per the Ministry of Finance Notification No. 29/2004-Central Excise dated 9.7.2004 notified as GSR 420 (E),dated 9.7.2004. In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944, Ministry of Finance issued Notification No.6/2010 increasing the excise duty from 8% to 10% and vide Notification No.18/2012 dated 17.3.2012, excise duty has been increased to 12%. The said changes from 8% to 10% and from 10% to 12% claimed by the Petitioner have occurred after the cut-off date and have an impact on the cost during construction period. Since these changes have occurred after the cut-off date, the Petitioner cannot be expected to factor the same in the bid submitted to MSEDCL. Therefore, these increases in excise duty by Indian Government Instrumentality pursuant to the powers vested under Acts of the Parliament are admissible as Change in Law under Article 10 of the MSEDCL PPA. Accordingly, the Petitioner is entitled to be compensated through adjustment in tariff on account of excise duty proportionate to the contracted capacity with MSEDCL.”

147. As on the cut-off dates in respect of DNH PPA (1.6.2012) and TANGEDCO PPA (27.2.2013), the applicable ED was 12% as per MOF, GOI notification dated 17.3.2012. In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act,



1944, Ministry of Finance issued Notification No.20/2015 increasing the excise duty from 12% to 12.5%.The said changes in ED from 12% to 12.5% claimed by the Petitioner have occurred after the cut-off dates in respect of MSEDCL, DNH and TANGEDCO PPAs and have an impact on the cost during the operation period. Since these changes have occurred after the cut-off dates, the Petitioner cannot be expected to factor the same in the bid submitted to MSEDCL. Therefore, these increases in excise duty by Indian Government Instrumentality pursuant to the powers vested under Acts of the Parliament are admissible as Change in Law under Article 10 of the MSEDCL PPA. Accordingly, the Petitioner is entitled to be compensated through adjustment in tariff on account of excise duty proportionate to the contracted capacity with the respective discoms.

(g) Increase in Service Tax on O&M contracts

148. The Petitioner has submitted that as on the cut-off dates for MSEDCL PPA the applicable rate of service tax was 10.30%. It has also submitted that the applicable service tax increased (a) from 10.30 % to 12.36 % effective from 1.4.2012 vide MOF, GOI Notification No. 02/2012 dated 17.3.2012 under the Finance Act, 2012 and (b) from 12.36% to 14% effective from 1.6.2015 vide MOF, GOI Notification No. 14 of 2015 dated 19.5.2015 under the Finance Act, 2012. It has further submitted that as on the cut-off dates for the DNH PPA and the TANGEDCO PPA the applicable rate of service tax was 12.36%. It has also submitted that with the introduction of Swachh Bharat Cess @0.5% (to be applicable from 15.11.2015) vide section 119 of Chapter VI of the Finance Act,2015, by MOF, GOI vide Notification No. 22/ 2015 dated 6.11.2015, the effective Service Tax rate has become 14.5%. The Petitioner has stated that with the introduction of Krishi Kalyan Cess at the rate of 0.5% of the value ofthe taxable services in terms of Section161 of the Finance Act, 2016, with effect from 1.6.2016, the rate of Service Tax increased from 14.5% to 15%. Thus, the



resultant rate of Service Tax is now 15% w.e.f from 1.6.2016. Accordingly, the Petitioner has submitted that the levy of Swachh Bharat Cess and Krishi Kalyan Cess is a change in law event and is ought to be compensated for the increase in Service Tax applicable to O&M contracts.

149. The Respondents, MSEDCL, DNH and TANGEDCO have objected to the claim of the Petitioner and have submitted that the said claim is not covered under the change in law. Prayas has submitted that the Petitioner has not submitted any information of the contracts affected by Service Tax. It has also submitted that it is the responsibility of the petitioner to operate the generating units and in case it carries out operation and maintenance through other person, it is a commercial decision of the Petitioner and any increase in expenditure based on commercial decision cannot be considered as change in law. In response, the petitioner has stated that service tax was levied on all types of service contracts irrespective of the contractor and the increase in service tax on O&M contracts was not on account of a commercial decision by the Petitioner.

150. The matter has been examined. The Petitioner has claimed increase in Service Tax on O&M contracts based on the Notifications dated 17.3.2012 and 19.5.2015 (in respect of MSEDCL PPA), Notification dated 19.5.2015 (in respect of DNH and TANGEDCO PPAs) in addition to the levy of Swachh Bharat cess and Krishi Kalyan Cess on such services. The Petitioner has not submitted any information of the contracts affected by service tax. Even otherwise, the decision to carry out operation & maintenance through any other agency is a commercial decision and any increase in expenditure on this count cannot be considered as a change in law. In our view, it is the responsibility of the Petitioner to operate the generating station and any increase in service tax on O&M contracts cannot fall within the



scope of change in law. Hence, the relief sought for by the Petitioner under this head is not allowed.

(h) Increase in Central Sales Tax due to change in law

151. The Petitioner has submitted that Central Sales Tax is applicable @ 2% on the total sum of coal value which includes levies and payments towards NMET and DMF, Clean Energy Cess, Chhattisgarh Prayavaran & Vikas Upkar, Sizing charges, Surface Transportation charges and Royalty. It has submitted that the amount payable on account of CST has increased due to change in law events as above. Accordingly, the Petitioner has submitted that the aforesaid change in law events constitutes a change in law in terms of Article 10 of the PPA and the Petitioner is entitled for compensation.

152. MSEDCL has submitted that the claim of the Petitioner is not maintainable. DNH has submitted that since none of the claims made by the Petitioner amounts to change in law, there can be no question of passing on the CST when the principal claims itself are disputable and not payable. TANGEDCO has submitted that the notifications were issued prior to the bid deadline date and the same can be taken care by escalation indices published by this Commission once in 6 months. Prayas has submitted that taxes other than tax on supply of power cannot be considered as Change in law within the meaning of Article 10. It has submitted that SECL has no authority to levy Taxes and if so, the same is a commercial consideration and not a tax. Prayas has further submitted that the Petitioner has not sought change in law due to any increase in rate of Sales Tax but due to increase in assessable amount. It has also submitted that if the change in assessable amount is due to a change in law, then the same may be considered, but if the change in assessable amount is due to increase in price such as sizing charges etc, the same cannot be considered



153. The matter has been examined. The Petitioner has submitted that the contribution towards NMET and DMF, Clean Energy Cess, CG Prayavaran & Vikas Upakr, Sizing charges, Surface Transportation charges and Royalty constitute change in law events and hence the increase of CST on account of the aforesaid change in law events constitutes a change in law event and the Petitioner is entitled to claim compensation. In other words, though the rate of CST remained unchanged, there has been changes in the rate of different charges on which CST is levied. The Petitioner has not submitted any document to show that Central Sales Tax is applicable towards NMET and DMF, Clean Energy Cess, CG Prayavaran & Vikas Upkar, Sizing charges, Surface Transportation charges and Royalty. In the absence of the necessary documents, it is not possible to take a view on the claim of the Petitioner. Therefore, the claim of the Petitioner on this count is rejected. However, the Petitioner is granted liberty to approach the Commission for appropriate relief along with all required documents.

(i) Change in Central Excise Duty amount in the assessable value of Coal

154. The Petitioner has submitted that as on the cut-off date, the Central Excise Duty was not calculated on Royalty and stowing duty by CIL subsidiaries. It has submitted that subsequently, CIL vide letter No. CIL/C-3(A)/Central Excise dated 5.3.2013 has advised its coal producing subsidiaries to consider Royalty and stowing Excise Duty for the purpose of arriving at the assessable value of coal for levy of Central Excise Duty in all coal sales bills from 1.3.2013 and to discharge the past Central Excise Duty liability for the period 1.3.2011 to 28.2.2013. The Petitioner has further submitted that the increase in Central Excise Duty on account of inclusion of royalty and stowing charges has been allowed by this Commission as a Change in Law event in Petition No. 79/MP/2013. Accordingly, the Petitioner has



submitted that the Notification dated 5.3.2013 issued by CIL, effective after the cut-off date may be allowed under Change in Law.

155. The Respondent, TANGEDCO has submitted that the bid deadline for TANGEDCO PPA was 6.3.2013 and the notification was issued prior to the said date. It has submitted that the changes in taxes, duties and levies are taken care by escalation indices published by the Central Commission once in six months. Prayas has submitted that the Petitioner is not claiming a change in rate of Excise Duty but change in assessable value and hence the letter dated 5.3.2013 by CIL is not a Change in Law or statute. It has also submitted that there is no change in Central Excise Act or Rules or Notifications thereto in relation to assessable value. Prayas has further stated that SECL is not legally empowered to interpret the Excise Act and therefore interpretation by SECL is not an interpretation under Article 10 of the PPA. Referring to the judgment of the Tribunal dated 4.7.2015 in Appeal No. 32 of 2015 and batch, Prayas has stated that merely because some projects got the benefit on assessable account on coal does not mean that there is an interpretation of the Excise Act. Accordingly, it has submitted that there is no Change in Law.

156. The Petitioner in its rejoinder dated 18.9.2017 has submitted that in terms of the Commissions' order dated 1.2.2017 in Petition No. 8/MP/2014 directing the Petitioner to approach the appropriate authority to seek clarification regarding the components of assessable value for the purpose of calculation of ED on coal, the Petitioner, on 20.3.2017 had sought written clarification from the Office of the Assistant Commissioner, Custom and Central Excise, Bilaspur on the same. It has also submitted that the said authority on 23.3.2017 has clarified to the Petitioner that in terms of Section 4 of the Central Excise Act, 1944, following elements shall be added for arriving at the assessable value of coal for payment of Excise Duty.



- (a) Value of coal
- (b) Royalty
- (c) Stowing Excise Duty
- (d) National Mineral Exploration Trust
- (e) District Mineral Foundation
- (f) Sizing Charge
- (g) Surface Transportation Charge
- (h) NiryatKar
- (i) CG Development Tax; and
- (j) CG Environment Tax

157. The Petitioner has enclosed the copy of the clarification letter dated 23.3.2017 issued by the said authority. The Petitioner has further submitted that the Commission in its order dated 22.6.2017 in IA No. 55 of 2016 in Review Petition No. 19/2016 (in Petition No. 153/MP/2015) had allowed the royalty and stowing Excise Duty to be considered in excisable value of coal subject to the outcome of the proceedings before the Hon'ble Supreme Court. The Petitioner has submitted that failure to include the amounts pertaining to the above components in assessable value of coal would lead to imposition of interest and penalty as per the Central Excise Duty Act, 1944. Accordingly, it has prayed that the claim may be allowed.

158. We have considered the submissions of the Petitioner and perused the documents on record. Pursuant to the Commission's directions, the Applicant approached the Office of the Assistant Commissioner, Custom and Central Excise Bilaspur, Chhattisgarh seeking clarification with regard to the components to be included in the assessable value of coal for computation of Excise Duty. The Superintendent (Tech.), Office of the Assistant Commissioner, Custom and Central Excise Bilaspur, Chhattisgarh vide its letter dated 23.3.2017 has given the following clarification:

“Please refer to your letter No. Nil dated 20.3.2017 seeking clarification therein whether royalty and Stowing Excise Duty elements are to be added or not in the assessable value of coal.



In this connection, it is to inform you that as per Section 4 of Central Excise Act, 1944, following elements shall be added for arriving the assessable of coal for payment of Excise Duty:

- (i) Value of Coal
- (ii) Royalty
- (iii) Stowing Excise Duty
- (iv) National Mineral Exploration Trust (NMET)
- (v) District Mineral foundation (DMT)
- (vi) Sizing charge
- (vii) Surface transportation charge
- (viii) NiryatKar
- (ix) CG Development tax
- (x) CG Environment tax

Further, it is to inform you that M/s South Eastern Coalfields Limited, Bilaspur had obtained Centralized Registration No.AADC5206EEM032 a under Rule 9 of Central Excise Rules, 2002 for production and clearance goods „Coal“ falling under Chapter Heading No. 27011920 of Central Excise Tariff Act, 1985 and as per Section 4 of Central Excise Act, 1944 is paying Central Excise Duty and Clean Energy Cess under Clean Energy Cess Rules, 2010.”

159. The Office of the Assistant Commissioner, Custom and Central Excise Bilaspur, Chhattisgarh has relied on Section 4 of the Central Excise Act, 1944 in support of the decision for inclusion of the above cited elements in the assessable value of coal. Section 4 of the Central Excise Act, 1994 provides as under:

“Section 4.Valuation of excisable goods for purposes of charging of duty of excise.

(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall -

(a) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value;

(b) in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed.

Explanation.- For the removal of doubts, it is hereby declared that the price-cum duty of the excisable goods sold by the assessee shall be the price actually paid to him for the goods sold and the money value of the additional consideration, if any, flowing directly or indirectly from the buyer to the assessee in connection with the sale of such goods, and such price-cum-duty, excluding sales tax and other taxes, if any, actually paid, shall be deemed to include the duty payable on such goods.



(2) The provisions of this section shall not apply in respect of any excisable goods for which a tariff value has been fixed under sub-section (2) of section 3.

(3) For the purpose of this section,-

(a) "assesse" means the person who is liable to pay the duty of excise under this Act and includes his agent;

(b) persons shall be deemed to be "related" if -

(i) they are inter-connected undertakings;

(ii) they are relatives;

(iii) amongst them the buyer is a relative and a distributor of the assessee, or a sub-distributor of such distributor; or

(iv) they are so associated that they have interest, directly or indirectly, in the business of each other."

160. As per the above provisions of the Central Excise Act, 1944, the price-cum duty of excisable goods sold by an assessee shall be the price actually paid to him for the goods sold and the money value of the additional consideration, if any, flowing directly or indirectly from the buyer to the assessee in connection with the sale of such goods. Such price-cum-duty, excluding sales tax and other taxes, if any, actually paid, shall be deemed to include the duty payable on such goods.

161. All components indicated by SECL for computation of assessable value of coal such as the value of coal, Stowing Excise Duty, contribution to National Mineral Exploration Trust and District Mineral Foundation, Sizing Charges, Surface Transportation Charge, Niryat Kar, Chhattisgarh Development Tax and Chhattisgarh Environment Tax (except royalty) are in the nature of "Price-cum- duty" and shall be considered as part of the assessable value of coal for the purpose of computation of Excise Duty. The Commission has not allowed the expenditure of Sizing Charges and Surface Transportation Charges under Change in Law. However, these charges have been allowed to be included in the assessable value of coal for the purpose of computation of Excise Duty. It is clarified that allowing these charges for



inclusion in the assessable value for computation of Excise Duty shall not be construed that these charges are allowed under Change in Law. As regard Royalty, it is noted that the issue whether royalty determined under Section 9/15(3) of the Mines and Minerals (Development and Regulations) Act, 1957 is in the nature of tax is pending for consideration of a Nine Judges Bench of the Hon'ble Supreme court on a reference by Five Judges Bench of the Hon'ble Supreme Court in Mineral Area Development Authority and Others Vs. Steel Authority of India and Others (2011 SCC 450). The specific reference is as under:

“(a) Whether “royalty determined under Sections 9/15 (3) of the Mines and Minerals (Development and Regulation) Act, 1957 (67 of 1957, as amended) is in the nature of tax?”

Therefore, Royalty shall be included in the assessable value of coal subject to the decision of the Hon'ble Supreme Court.

162. Accordingly, we allow all the charges given in the letter dated 23.3.2017 of the Superintendent (Tech.) Office of the Assistant Commissioner, Custom and Central Excise Bilaspur, Chhattisgarh for the purpose of inclusion in the assessable value of coal for computation of Excise Duty, subject to the condition with regard to Royalty. It is clarified that the Petitioner shall be entitled to recover the Excise Duty in proportion to the actual coal consumed corresponding to the scheduled generation or actual generation, whichever is less, for supply of electricity to MSEDCL, DNH and TANGEDCO.

Carrying cost

163. The Petitioner has submitted that as per Article 10 of the PPAs, while determining the consequence of change in law, the affected party shall be restored to the same economic position as if such change in law had not occurred. Accordingly, the Petitioner is entitled for compensation for the carrying costs for the payments made by it. In support of its contention, the Petitioner has relied upon the judgments in SLS Power Ltd. Vs Andhra Pradesh Electricity Regulatory Commission, North Delhi Power Ltd Vs. DERC [(2010) ELR



(APTEL) 0891] and Tata Power Company Ltd. Vs. Maharashtra Electricity Regulatory Commission [(2011) ELR (APTEL) 336] and has submitted that principle of recovery of carrying cost/time value of money is an established principle of regulatory jurisprudence. The Petitioner has submitted that the Petitioner is entitled to carrying cost being in the nature of compensation in terms of Article 10 of the PPAs and failure to do so would defeat the underlying principle of restitution and render the change in law articles otiose. It has further submitted that the said Articles are restitutive provisions and thus ought to be given a wide interpretation. It has also submitted that Article 10 of the PPAs accord plenary powers to this Commission to determine the compensation to be awarded. Referring to the judgment of the Tribunal in Wardha's case, the Petitioner has submitted that the said judgment has recognized the principle that in order to restore the affected party to the same economic position, compensation for change in law claims has to be such, as to reimburse the affected party for the expense actually incurred. Thus, according to the Petitioner, consequence of change in law will include expenditure attributable towards carrying costs.

164. We have examined the matter. The first ground in support of carrying cost is that the Petitioner should be restored to the same economic position in terms of Article 10.2.1 as if the Change in Law had not occurred. Article 10.2.1 of the PPAs is extracted as under:

“10.2.1 While determining the consequence of Change in Law under this Article 10, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through Monthly Tariff Payments, to the extent contemplated in this Article 10, the affected Party to the same economic position as if such Change in Law has not occurred.”

165. The above provision lays down that the consequence of change in law shall have due regard to the principle that the affected party shall be restored to the same economic position as if such change in law had not occurred. This means that all legitimate cost on



account of the Change in Law shall be allowed. The payment for the relief under change in law shall be through Monthly Tariff Payments and to the extent contemplated in Article 10. Article 10 of the PPA provides for relief for change in law separately for the construction period and the operating period. In this case, the Petitioner had approached for change in law during the operating period. Article 10.3.4 of the PPA provides as under:

“10.3.2 During Operation Period

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

xxx

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

166. As per the above provisions, the Commission has not only to decide the compensation for any increase or decrease in revenues or cost to the Seller (in this case the Petitioner) but also to decide the effective date from which it shall be paid. Further, the compensation on account of change in law shall be payable only if the increase or decrease in revenue or cost to the seller is in excess of an amount equivalent to 1% of letter of credit in aggregate for the relevant contract year. As per the above provisions, the claims under change in law shall be crystalized after its determination by the Commission in accordance with the provisions of the PPA. Before crystallization of the claims, the Procurers have no liability to pay. Correspondingly, the Procurers cannot be saddled with the carrying cost for the period prior to the crystallization of the claims.

167. The Commission has in the order dated 6.2.2017 in Petition No. 156/MP/2015 has decided that in the absence of provisions in the PPAs regarding carrying cost, the prayer of the petitioner to grant carrying cost on the principle of restitution from the date of



occurrence of the Change in Law events till the date of raising of the claims or invoices cannot be allowed. Similarly, the submissions of the Petitioner on this issue was considered by the Commission in Petition No.1/RP/2016 in Petition No.402/MP/2016 (Sasan Power Ltd V MPPMCL & ors) and the prayer for carrying cost had been rejected vide order dated 16.2.2017. Subsequently, this issue was examined and rejected by the Commission vide its order dated 19.12.2017 in Petition No. 101/MP/2017 (DB Power Ltd V PTC India Ltd & ors). In the light of the above decisions, the Petitioner is not entitled to carrying cost on account of the payments made towards additional obligations.

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

168. The Petitioner vide affidavit dated 23.8.2017 has submitted that in case of MSEDCL PPA, the value towards Letter of Credit and the Aggregate value of the ‘change in law’ claims for period 2013-14 to 2016-17 as under:

	2013-14	2014-15	2015-16	2016-17
LC amount (₹ in crore)	3.19 <i>(first contract year)</i>	38.34	34.69	37.13
1% of LC amount (₹ in crore)	0.03	0.38	0.34	0.37
Aggregate value of Change in law claim	1.06	25.15	57.66	70.65

Accordingly, the Petitioner has submitted that the change in law claims is more than the threshold amount prescribed under Article 10.3.2 (b) of the MSEDCL PPA and the Petitioner is entitled to be compensated for the same.

169. The Petitioner vide affidavit dated 23.8.2017 has submitted that in case of DNH PPA, the value towards Letter of Credit and the Aggregate value of the ‘change in law’ claims for period 2013-14 to 2016-17 as under:



	2013-14	2014-15	2015-16	2016-17
LC amount (₹ in crore)	45	45	45	62.6
1% of LC amount (₹ in crore)	0.45	0.45	0.45	0.62
Aggregate value of Change in law claim	18.93	13.98	35.67	25.38

Accordingly, the Petitioner has submitted that the change in law claims is more than the threshold amount prescribed under Article 10.3.2 (b) of the DNH PPA and the Petitioner is entitled to be compensated for the same.

170. The Petitioner vide affidavit dated 23.8.2017 has submitted that in case of TANGEDCO PPA, the value towards Letter of Credit and the Aggregate value of the 'change in law' claims for period 2015-16 & 2016-17 as under:

	2015-16	2016-17
LC amount (₹ in crore)	15.53 <i>(first contract year)</i>	31.06
1% of LC amount (₹ in crore)	0.15	0.31
Aggregate value of Change in law claim	10.54	48.01

Accordingly, the Petitioner has submitted that the change in law claims is more than the threshold amount prescribed under Article 10.3.2 (b) of the TANGEDCO PPA and the Petitioner is entitled to be compensated for the same.

171. In our view, the Petitioner is entitled to charge the compensation on account of Change in Law during the Operating Period as per the mechanism provided in the PPA and no separate mechanism is required to be prescribed. It is clarified that the Petitioners shall be entitled to claim compensation with all relevant documents like taxes and duties paid supported by Auditor Certificate after the expenditures allowed under Change in Law during operating period (including the reliefs allowed for operating period earlier) exceeds 1% of the value of Letter of Credit in aggregate.



172. As stated, Articles 10.3.2 and 10.3.4 of the said PPAs provide for the principle for computing the impact of change in law during the operating period. These provisions enjoin upon the Commission to decide the effective date from which the compensation for increase/decrease revenues or cost shall be admissible to the Petitioner. Moreover, the compensation shall be payable only if the increase/ decrease in revenues or cost to the seller is in excess of an amount equivalent to 1% of the letter of credit in aggregate for contract year. In our view, the effect of change in law as approved in this order shall come into force from the date of commercial operation of the concerned unit/unit of the generating stations. We have specified a mechanism considering the fact that compensation of change in law shall be paid in subsequent contract years also. Accordingly, the following mechanism prescribed to be adopted for payment of compensation due to Change in Law events allowed as per Article 10.2.1 of the PPA in the subsequent years of the contracted period:

- (a) Monthly change in law compensation payment shall be effective from the date of commencement of supply of electricity to the respondent or from the date of Change in Law, whichever is later.
- (b) Levy of Swachh Bharat Cess, clean energy cess, service tax on transportation of coal, Change in FSA and deviation from NCDP, CG Environment cess, CG Industrial Development cess, and Change in Central Excise Duty on the assessable value of coal shall be computed based on coal consumed on the basis of normative SHR and normative AEC (minimum of bid assumed parameters or parameters as per CERC 2009-14 Tariff Regulations) corresponding to scheduled generation and shall be payable by the beneficiaries on pro-rata based 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 procurers during the year. The reconciliation statement duly certified by the Auditor shall be kept in possession by the Petitioner so that same could be produced on demand from Procurers/ beneficiaries.



- (d) For Change in Law items related to the operating period, the year-wise compensation henceforth shall be payable only if such increase in revenue or cost to the Petitioner is in excess of an amount equivalent to 1% of LC in aggregate for a contract year as per provision under 10.3.2 of the PPA.
- (e) Approaching the Commission every year for allowance of compensation for such Change in Law is a time consuming process which results in time lag between the amount paid by Seller and actual reimbursement by the Procurers which may result in payment of carrying cost for the amount actually paid by the Petitioner. Accordingly, the mechanism prescribed above is to be adopted for payment of compensation due to Change in Law events allowed as per Article 10.3.2 of the PPA for the subsequent period as well.
- (f) We are not going to compute the threshold value for eligibility of getting compensation due to Change in Law during Operation period. However, the Petitioner shall be eligible to receive compensation if the impact due to Change in Law exceeds the threshold value as per Article 10.3.2 during Operation period. Accordingly, the compensation amount allowed shall be shared by the procurers based on the scheduled energy. 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 10.3.2 of the PPA.

Other submissions

173. Prayas has submitted that with effect from 1.7.2017, Goods and Services Tax (GST) has been introduced and the impact of GST leading to increase or decrease on account of Change in Law needs to be worked out. It has also pointed out that the Government has abolished various cesses including Clean Energy Cess, Swachh Bharat Cess and Krishi Kalyan Cess, which may also be considered. Accordingly, it has prayed that the Petitioner may be directed to submit information in regard to claims under this head with supporting documents. With regard to the mechanism for Change in Law, Prayas has submitted that most of the taxes and cess are subsumed in GST with effect from 1.7.2017. Therefore, the Petitioner may be directed to submit the information regarding the actual expenditure on account of taxes until 30.6.2017 and the Commission may calculate the actual impact. In



response, the Petitioner has submitted that the claims in the present Petition relate to a period prior to 1.7.2017. It has further submitted that the Petitioner would be making submissions with regards to the impact of introduction of GST in Petition No. 13/SM/2017 (*suo motu*) and in case the Commission desires that information regarding GST be placed on record, the Petitioner would be obliged to submit the same.

174. The Commission in order to facilitate the settlement of the dues arising on account of the introduction of GST and GST Compensation Cess has initiated a suo motu Petition 13/SM/2017 to hear the generating companies and the Procurers and to decide the issues. All concerned parties including the Petitioner have been directed to file relevant information. The Commission will take the appropriate view with regard to the quantum of GST that would be admissible under Change in Law, keeping in view the rates of taxes prevailing as on the cut-off date of the respective generating companies which have been subsumed in the GST.

Summary

175. Based on the above analysis and decisions, the summary of our decision under ‘Change in Law’ events allowed during the Operating period (after the cut-off dates of the respective PPAs) are as under:

Change in Law events	
MSEDCL PPA	
VAT on procurement of Spares and equipments	Allowed
TANGEDCO PPA	
Crushing/Sizing charges	Not allowed
Surface Transportation charges	Not allowed
Niryat Kar	Not allowed. Liberty granted
Swachh Bharat Cess	Allowed
Clean Energy Cess	Allowed till 30.6.2017
Busy Season Surcharge	Not allowed



Change in FSA and deviation from NCDP	Allowed
MAT & Corporate Tax	Not allowed
Service Tax on transportation of Coal	Allowed
Increase in Working Capital	Not allowed
MSEDCL, DNH AND TANGEDCO PPA	
Transportation of fly ash	Allowed in-principle. Liberty granted
Krishi Kalyan Cess	Allowed
Charges towards NMET and DMF	Allowed
Chhattisgarh Paryavaran & Vikas Upkar	Allowed
Coal Terminal Surcharge	Not allowed
Countervailing Duty and ED on spares and equipment's	Allowed
Service Tax on O&M contracts	Not Allowed
Central Sales Tax	Not allowed. Liberty granted.
Central Excise Duty on assessable value of coal	Allowed
Carrying Cost	Not allowed

176. With the above, the Petition is disposed of.

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

Sd/-
(A. S. Bakshi)
Member

Sd/-
(A.K. Singhal)
Member

