

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 39/MP/2019

Coram:

Shri P.K.Pujari, Chairperson

Dr. M.K.Iyer, Member

Shri I.S.Jha, Member

Date of Order: 18th December, 2019

In matter of

Petition under Section 79 of the Electricity Act, 2003 read with PPA dated 21.3.2013 for (i) resolution of bill dispute (ii) recovery of amounts due to GMR pursuant to supplementary bill raised; and (iii) implementation of the Commission Order dated 1.2.2017 in Petition No. 8/MP/2014, Order dated 14.3.2018 in Petition No.13/SM/2017, Order dated 16.3.2018 in Petition No. 1/MP/2017 and Order dated 15.11.2018 in Petition No. 88/MP/2018.

And

In the matter of

GMR Warora Energy Limited
701/704, 7th floor, Naman Center, A-Wing
BKC (Bandra-Kurla Complex), Bandra
Mumbai- 400051

.....Petitioner

Vs

DNH Power Distribution Corporation Limited
Vidyut Bhavan, Opposite Secretariat, Silvassa
Dadra and Nagar Haveli- 396230

.....Respondent

Parties present:

Shri Vishrov Mukerjee, Advocate, GMRWEL

Shri Yashaswi Kant, Advocate, GMRWEL

Ms. Swapna Seshadri, Advocate, DNH

Shri Ashwin Ramanathan, Advocate, DNH

ORDER

Background

GMR Warora Energy Limited, 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. The Petitioner entered into longterm/medium-term arrangements for supply of electricity to the States of Maharashtra (200 MW), Tamil Nadu (150 MW) and Dadra and Nagar Haveli (DNH) (200 MW). The supply of electricity to the State of Maharashtra is at a levelised tariff of ₹2.897 per unit and to the Union Territory of Dadra and Nagar Haveli at a levelised tariff of ₹4.618 per unit. The tariff in both the cases was discovered through the process of competitive bidding and was subsequently adopted by the Maharashtra State Electricity Regulatory Commission (MERC) and the Joint Electricity Regulatory Commission respectively. The Petitioner has executed Power Purchase Agreement (PPA) with the Respondent No 1, Maharashtra State Electricity Distribution Company Ltd (MSEDCL) on 17.3.2010 and PPA dated 21.3.2013 with the Respondent No 2, Electricity Department, Dadra and Nagar Haveli (DNH) for supply of power to the Union Territory of Dadra and Nagar Haveli. The supply of power to the State of Tamil Nadu is stated to be a sale through GMR Energy Trading Limited. The scheduled delivery date under the MSEDCL-PPA was 17.3.2014 and the bid deadline was 7.8.2009. Similarly, the bid-deadline for DNH-PPA was 8.6.2012. Accordingly, the cut-off date for MSEDCL PPA is 31.7.2009 and cut-off date for DNH PPA is 1.6.2012.

2. Petition No. 8/MP/2014 was filed by the Petitioner seeking compensation for various change in law events in terms of MSEDCL PPA & DNH PPA which impacted the Project during the construction period and operating period. The Commission vide its order dated 1.2.2017 had allowed/ disallowed some of the claims regarding change in law events in respect of the DNH PPA as under:



SI No	Parameters	DNH PPA
1.	Excise Duty on Coal subject to the observation regarding Excisable value (Para 69)	Allowed
2.	Change in Royalty	Allowed
3.	Clean Energy Cess	Allowed
4.	Busy Season Surcharge	Not Allowed
5.	Development Surcharge	Not Applicable
6.	Service tax on Coal Transportation	Allowed
7.	Swachh Bharat Cess	Allowed
8.	Sizing Charges	Not Allowed
9.	Surface Transportation Charges	Not Allowed
10.	Niryat Kar Tax	Not allowed but liberty granted
11.	Shortfall in Linkage Coal	Not allowed but liberty granted
12.	Shift from UHV based pricing to GCV	Not Applicable
13.	Increase in working capital requirement	Not Allowed
14.	Change in MAT rate	Not Allowed
15.	MOEF notification on coal quality	Not Allowed
Note: In case of 'Not applicable', the change in law event has occurred prior to the cut-off date		

3. Aggrieved by order dated 1.2.2017, the Petitioner filed Appeal No. 111 of 2017 before Appellate Tribunal for Electricity ('the Tribunal') on the change in law events which were disallowed by the Commission as above. Similarly, the respondent, DNH had filed Appeal No. 290 of 2017 before the Tribunal challenging the order dated 1.2.2017 in respect of the change in law events allowed and compensation granted to the Petitioner. The Tribunal by its common judgment dated 14.8.2018, while rejecting the appeal filed by the Respondent, partly allowed the appeal filed by the Petitioner and remanded the matter to the Commission to pass consequential orders on the following issues:

- (a) Increase in Busy Season Surcharge & Development Surcharge on coal transportation;
- (b) Shortfall in linkage coal due to changes in New Coal Distribution Policy (NCDP) issued by Ministry of Coal;
- (c) MOEFCC Notification dated 11.7.2012 on coal quality; and
- (d) Carrying Cost.

4. Petition No. 284/MP/2018 was filed by the Petitioner in terms of the aforesaid judgment of the Tribunal and the Commission vide its order dated



16.5.2019 had implemented the directions contained in the said judgment of the Tribunal.

5. Petition No. 1/MP/2017 was filed by the Petitioner seeking compensation in respect of various change in law events in terms of the MSEDCL PPA, DNH PPA and TANGEDCO PPA which impacted the Project during the Operating period. By Commission's order dated 16.3.2018, the following change in law events were allowed / disallowed in respect of the DNH PPA:

DNH PPA	
Transportation of fly ash	Allowed in-principle. Liberty granted
Levy of Krishi Kalyan Cess	Allowed
Charges towards NMET and DMF	Allowed
Chhattisgarh Pariyavaran & Vikas Upakr	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

6. The relevant portion of the Commission's order dated 16.3.2018 is extracted as under:

"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.."

xxx

7. Petition No. 13/SM/2017 was *suo motu* initiated by the Commission for assessing the impact of abolition of Clean Energy Cess, pursuant to the introduction of Goods & Service Tax (GST) and levy of GST Compensation cess impacting the generation projects with effect from 1.7.2017, as a change in law



event, which included the Project of the Petitioner. By order dated 14.3.2018, it was held that the introduction of IGST, GST on transportation of coal by rail, the GST compensation cess and the subsuming of certain other taxes and duties were change in law events. The relevant portion of the order is extracted hereunder:

“35. Accordingly, we direct the beneficiaries/ procurers to pay the GST compensation cess @ Rs 400/ MT to the generating companies w.e.f 01.07.2017 on the basis of the auditors certificate regarding the actual coal consumed for supply of power to the beneficiaries on basis of Para 28 and 31. In order to balance the interests of the generators as well as discoms/beneficiary States, the introduction of GST and subsuming/abolition of specific taxes, duties, cess etc. in the GST is in the nature of change in law events. We direct that the details thereof should be worked out between generators and discoms/beneficiary States. The generators should furnish the requisite details backed by auditor certificate and relevant documents to the discoms/ beneficiary States in this regard and refund the amount which is payable to the Discoms/ Beneficiaries as a result of subsuming of various indirect taxes in the Central and State GST. In case of any dispute on any of the taxes, duties and cess, the respondents have liberty to approach this Commission.”

8. Against the above order, the Respondent DNH filed Appeal No. 131/2019 before the Tribunal challenging the payment of ₹400/- per MT as GST compensation cess and the same was dismissed vide its judgment dated 3.3.2019. However, no opinion was expressed by the Tribunal on the issue of deduction of Railway Terminal Surcharge (RTS)/ Coal Terminal Surcharge (CTS) by the Respondent from the bills raised by the Petitioner.

9. Petition No. 88/MP/2018 was filed by the Petitioner seeking confirmation that the operational parameters, namely the (i) Auxiliary Power Consumption ('APC'), Station Heat Rate ('SHR') and Gross Calorific Value ('GCV') considered for calculation of compensation on account of change in law events allowed vide Commission's order dated 1.2.2017 in Petition No. 8/MP/2014 to the Petitioner, is to be considered on actuals. The Petitioner had also sought confirmation that the levy of Service Tax & Swachh Bharat Cess on Coal Transportation allowed in the



said order is on all components as per rail invoice. The said Petition was disposed of vide Commission's order dated 15.11.2018.

10. The Petitioner has submitted that in terms of the aforesaid orders, it had raised the following supplementary bills for payment by Respondent, DNH:

Sl. no	Date of Supplementary bill	Period	Due Date	Amount (in ₹)
1	27.2.2017	2013-14	29.3.2017	25814.386
2	27.2.2017	2014- 15	29.3.2017	81605781
3	27.2.2017	2015-16	29.3.2017	206909048
4	27.2.2017	2016-17 (up to December, 2016)	29.3.2017	120288171
5	29.3.2017	January, 2017 to February, 2017	28.4.2017	21069145
6	29.4.2017	March, 2017	29.5.2017	25830515
7	25.5.2017	April, 2017	24.6.2017	26899551
8	22.6.2017	May, 2017	22.7.2017	32590054
9	20.7.2017	June,2017	19.8.2017	27380994
10	7.2.2018	April, 2013 to June, 2017	9.3.2018	27579860
11	15.3.2018	July, 2017 to January, 2018	14.4.2018	206049836
12	23.3.2018	April, 2013 to January, 2018	22.4.2018	87752246
13	30.4.2018	February to March, 2018	30.5.2018	59839941
14	31.5.2018	April, 2018	30.6.2018	34602284
15	29.6.2018	May, 2018	29.7.2018	38594858
16	8.8.2018	June, 2018	7.9.2018	34667372
17	28.8.2018	April, 2013 to June, 2018	27.9.2018	60025840
18	5.9.2018	July, 2018	5.10.2018	17171140
19	10.10.2018	August, 2018	9.11.2018	22327307
20	9.11.2018	September, 2018	9.12.2018	13255815
21	12.12.2018	October, 2018	11.1.2019	21487562
22	11.1.2019	November, 2018	10.2.2019	22486453
Total				1214228159

11. The Petitioner has also submitted that pursuant to the Commission's order dated 15.11.2018 in Petition No. 88/MP/2018, the supplementary bills raised till the month of September, 2018, for compensation towards the change in law events allowed would require revision by way of adjustments towards SHR and APC. The Petitioner has also submitted that a sum of ₹1.32 crore would be deducted from the supplementary bills raised by the Petitioner on change in law for taxes and



duties. Accordingly, the Petitioner has also submitted that out of the total invoiced claim for ₹1214228159/- after all adjustments, the Respondent DNH has made payment of only ₹670324302/- towards Supplementary bills and a sum of ₹530733425/- (till November, 2018) is legally due and payable by the Respondent to the Petitioner. In the above background, the Petitioner has filed the present Petition and has sought the following reliefs:

- (a) *Direct DNH to pay the outstanding amount of ₹53,07,33,435/- in terms of Supplementary Bills raised till November, 2018.*
- (b) *Direct DNH to comply with the 8/MP/2014 Order, 1/MP/2017 Order, 13/SM/2017 Order & 88/MP/2018 Order and Judgment dated 14.8.2018;*
- (c) *Award the costs of these proceedings in favour of the Petitioner and against DNH.*

Submission of the Petitioner

12. The Petitioner in the Petition has submitted the following;

(a) The Respondent DNH vide its letter dated 2.8.2018 informed the Petitioner that it was unable to verify the claims of the Petitioner on the ground that there was no documentary evidence for actual payment of service tax on transportation of coal, Clean Energy cess, NMET, DMF etc. All supplementary invoices raised by the Petitioner were rejected by the Respondent stating that the Petitioner had not passed on the benefit of taxes/duties (CST, Stowing Excise duty and reduction on account of RTS) not passed on. DNH also stated that BSS and DS ought not to be considered for purpose of determination of GST on transportation of coal as they have not been allowed as change in law and the coal consumed for actual generation ought to have been considered for the purpose of computation of service tax on transportation of coal. Accordingly, DNH submitted that the Petitioner has not raised the bills properly as it has not followed the methodology as per order of the Commission and proper calculation.

(b) Petitioner vide letter dated 6.8.2018 informed DNH that supplementary invoices raised were in line with the orders of the Commission and that it had submitted all required documents along with supplementary invoices. DNH was also informed that it had neither disputed the said invoices nor sought additional documents/clarification before the respective due dates. In terms of Article 8.6.1 of the DNH PPA, all invoices submitted by the Petitioner remain valid and are conclusive. Accordingly, the rejection of the



said invoices in terms of letter dated 2.8.2018 are legally and contractually untenable.

(c) The Petitioner requested DNH to release the outstanding supplementary invoice amount of ₹98.42 crore and also with proposal for waiver of LPS if payment of the claims towards order dated 14.3.2018 in Petition No. 13/SM/2017 was released by June month end. As no payment was forthcoming from DNH, the Petitioner vide letter dated 20.8.2018 highlighted the precarious financial condition owing to non-payment of supplementary invoices and requested DNH to make payment of ₹105.75 crore.

(d) Pursuant to the discussions between DNH and the Petitioner for payment of outstanding invoices, the Petitioner vide letter dated 21.9.2018 agreed to waive the LPS amount proportionate to the amount released on or before 28.9.2018. Owing to delay in release of payment, Petitioner vide letter dated 27.9.2018 extended its proposal for waiver of proportionate LPS in the event DNH released payment on or before 10.10.2018. The said offer of waiver of proportionate LPS was further extended to 15.10.2018 by the Petitioner. On 15.10.2018, DNH released payment of ₹62.05 crore for the period from April 2017 to July 2018 against a total claim of ₹108.45 crore, excluding the claim for BSS & DS amounting to ₹5.03 crore

(e) DNH vide its letter dated 16.10.2018 informed the Petitioner that claims were settled as per respective orders of the Commission and that the Petitioner had waived of its right to claim LPS. DNH also informed that (i) Clean Energy Cess/ GST Compensation cess, claimed by the Petitioner was ₹75.36 crore and the claim was settled at ₹63.61 crore on account of discrepancies, (ii) The actual service tax liability borne by Petitioner towards Service Tax on Transportation of coal including cess/GST on transportation had been considered. (iii) The Petitioner had performed the total calculation on normative basis and had failed to capture instances where levy of service tax is lower as through e-auction, (iv) Excise duty on coal/ GST on coal has been settled at 0.16 crore based on the discrepancies stated. (v) Commission vide its order dated in Petition No.1/MP/2017 had allowed levy of DMF and NMET as Change in law on the basis of actual payment and accordingly, out of a total claim of ₹9.53 crore, a sum of ₹4.97 crore had been settled, (vi) Out of the total claim of ₹1.18 crore for levy of CG Paryavaran Tax and Vikas Upkar Tax, an amount of ₹0.50 crore has been settled on account of discrepancies mentioned; and (vii) there is no order till date from this Commission on BSS & DS and therefore, any claim on this account cannot be allowed under the change in law.

(f) Petitioner vide its letter dated 16.11.2018 clarified that (i) DNH had released only 57.22% of the total amount and accordingly, an amount of



₹8,23,42,420 (57.22%), was waived off, out of the total LPS (ii) DNH was eligible to recover compensation for change in law on actual coal consumption for actual generation and therefore, SHR of 2100 kcal/kWh and GCV of 4150 kcal/kg have no relevance, (iii) the claim for allowed change in law events is based on the coal supply under linkage coal allocated to the Petitioner and hence additional/ reduced cost of alternate coal have no bearing on the computation, (iii) the amount of ₹5.76 crore paid towards DMF & NMET for January, 2015 to November, 2015 is based on notification dated 13.11.2015, whereas the same is to be considered for finalization of the claim of the Petitioner (iv) the reduction in 'RTS' is not tenable as the same was 'nil' at the time of bid cut-off date and hence no benefit is to be passed on; and (iv) DNH did not consider the payment of ₹5.03 crore by the Petitioner towards BSS & DS and hence the balance amount is required to be paid by DNH.

(g) DNH vide its letter dated 10.12.2018 informed the Petitioner that (i) the total claim by the Petitioner of ₹108.45 crore was overstated with regard to Order dated 15.11.2018 in Petition No. 88/MP/2018 as the Petitioner had two set of standards for raising bills to the different discoms in respect of APC, SHR and GCV and Service tax for rail transportation, which was allowed on actuals (ii) as per Coal India Limited (CIL) circular dated 13.11.2015, the contribution for NMET and DMF was from 14.8.2015 and 12.1.2015 respectively and the Petitioner had raised bills for both from 12.1.2015, thereby resulting in excess claim (iii) the RTS deductions were on account of Commission's order dated 14.3.2018 in Petition No. 13/SM/2017, whereas the BSS & DS were abolished from January 2018, which had resulted in direct benefit to the Petitioner and the same ought to be passed on to DNH. Accordingly, the Petitioner was required to revise the bills issued and DNH was not liable to make any LPS due to want of proof.

(h) Petitioner vide its letter dated 17.1.2019 clarified that (i) there is no difference of approach in the computation of compensation (ii) the measurement of GCV is on 'as received' basis and the Standard Operating Procedure (SOP) as certified by the National Accreditation Board for Testing and Calibration Laboratories (NABL) had been followed and there is no basis for considering the coal stock on normative basis to calculate the relief for change in law (iii) DNH's claim regarding benefit on post-GST period due to reduction in CTS is erroneous (iii) DNH is making deductions due to abolishment of BSS & DS; and (iv) though the Commission in its Order dated 26.11.2018 in Petition No. 284/MP/2018 had directed DNH to pay 75% of the compensation claimed for the shortfall in linkage coal, subject to adjustment, after issuance of the final order, DNH has not released any amount till date.

(i) From the above said correspondences between the Petitioner and DNH,



it is clear that DNH had not disputed its liability to pay shortfall in linkage coal and the amounts due to increase in taxes/duties/levies including GST. Therefore, the liability of the Respondent DNH to the said amounts stands accepted and admitted, without any limitation of liability.

(j) In terms of Article 8.6.1 of the PPA, if a party does not dispute the bills, such bill becomes conclusive. The Respondent DNH had disputed the bill only by its letter dated 16.10.2018, which was after the 30 days deadline envisaged under Article 8.6.2 of the PPA. As the bills raised by the Petitioner are conclusive and final, the DNH ought to pay the amount claimed by the Petitioner

(k) The reduction in the amounts by DNH towards various GST elements are without any legal or factual basis and is therefore contrary to the Commission's findings in order dated 15.11.2018 in Petition No. 88/MP/2018 as Respondent. It was held in the said order that the Petitioner had raised bills correctly and there was no requirement for normative coal stock of a month with a certain level of coal inventory. All the other beneficiaries have been billed at the same operating parameters in a composite manner.

(l) In respect of the claims towards contributions made to DMF and NMET, the DNH has made reduction based on coal quantity worked out considering SHR as 2320 kcal/kWh for 2013-14 and 2310 for 2014-15 onwards and GCV as per mean range of 4100-4300 kcal/kg. This reduction is contrary to the findings in Commission's order dated 15.11.2018 in Petition No. 88/MP/2018. The actual liability for DMF and NMET as per invoice issued by CIL has been considered, keeping in view the directions of this Commission and is not on normative basis. Moreover, the claims have been raised with effect from 12.1.2015, for which necessary documents were furnished, but the Respondent has considered the claim only with effect from 14.8.2015, which has no basis.

(m) The deductions made by DNH towards CST/ Stowing Excise Duty and RTS is legally untenable as RTS has not been subsumed under GST, but was withdrawn by the Ministry of Railways, GOI on 10.7.2017. It does not entitle DNH to make the claim as a change in law event, resulting in reduction of cost.

(n) Due to the non-payment of outstanding dues, as aforesaid, the Petitioner is facing acute financial distress and in terms of the RBI guidelines, the Project runs the risk of being declared as a Non-Performing Asset (NPA). The Commission may therefore pass directions on DNH in terms of the prayers as aforesaid.



13. The Petition was admitted on 16.4.2019 and notice was served on the respondent, with directions to the parties to complete pleadings in the Petition. Respondent, DNH vide affidavit dated 31.5.2019 has filed its reply and the Petitioner has filed its rejoinder to the same vide affidavit dated 30.7.2019.

Reply of Respondent, DNH

14. The Respondent, DNH vide its reply affidavit dated 31.5.2019 has made the following submissions:

(a) The Petitioner is only seeking to enforce its unilateral claims contrary to the approvals granted by the Commission and contrary to the amounts payable by the respondent to the Petitioner under the PPA.

(b) The issues in the petition relate to the change in law for the period from April, 2013 to November, 2018 in respect of change in law claims allowed by Commission's Order dated 1.2.2017 in Petition No. 8/MP/2014, Order dated 16.3.2018 in Petition No.1/MP/2017 and Order dated 16.3.2018 in Petition No.13/SM/2017. Out of the amount claimed by the Petitioner (₹121,42,28,156), DNH has processed the gross payment of ₹93,37,57,468/-. DNH is entitled to ₹24,86,52,707/- in terms of Commission's Order dated 16.3.2018 in Petition No. 13/SM/2017 and an amount of ₹68,51,04,761/- as detailed below:

	Particulars		Amount
	Amount Payable as per DNHPDCL for the period April 2013 to November-2018		93,37,57,468
Less:	Deduction on abolition of/ subsuming of		
a)	Central Sales Tax	3,41,31,482	
b)	Stowing Excise Duty	1,07,33,170	
c)	Coal Terminal Surcharge	11,80,64,870	
d)	BSS and DSS	8,57,23,185	
	Total Amounts recoverable by the Respondent		24,86,52,707
	Net Amount		68,51,04,761

(c) The amount of ₹68,51,04,761/- has been paid by DNH to the Petitioner and the details of payment and accounting has also been intimated to the Petitioner as under:



	Particular	Amount
1.	DNHPDCL letter dated 16/10/2018	62,04,93,485
2.	DNHPDCL letter dated 10/12/2018	1,32,44,871
3.	DNHPDCL letter dated 10/12/2018	3,65,85,947
4.	DNHPDCL letter dated 28/02/2019	1,47,80,458
	Total	68,51,04,761

(d) DNH is entitled to adjust the amount of ₹24,86,52,707/- in tariff on account of change in law in favour of DNH as directed by Commission in order dated 14.3.2018 in Petition No. 13/SM/2017. In terms of this order, the Petitioner is required to pass on the benefits on account of the introduction of GST, which has subsumed the taxes and duties. The Petitioner cannot refuse to pass on the benefit of change in law as directed by the Commission, when the Petitioner is taking the benefit of change in law.

(e) The change in law on account of BSS & DS claimed for ₹12,76,41,939/- for the period from April, 2013 to December, 2017. From January, 2018, the above two charges have been abolished. The APTEL had remanded the matter to the Commission to pass consequential orders, which was pending decision by the Commission, when the petition was filed. In terms of this, the amounts are payable only after the decision of the Commission and would be settled in terms of the determination of compensation by the Commission.

(f) The difference between the claim of the Petitioner for ₹121 crore and the gross payment settled by DNH for ₹93 crore works out to ₹28 crore. The said amount has been wrongly claimed by the Petitioner as the Commission in its orders dated 1.2.2017 and 16.3.2018 in Petition Nos 8/MP/2014 & 1/MP/2017, while allowing the claims for (a) Service Tax (including Swachh Bharat & Krishi Kalyan Cess) on Coal Transportation (b) Increase in Clean Energy Cess (c) Changes towards NMET & DMET (d) Changes towards Chattisgarh Paryavaran & Vikas Upkar (CGPVT) and (e) determining the assessable value of coal for the purpose of levy of excise duty, had mandated the Petitioner for submission of (i) proof of payment (ii) calculations duly certified by auditor; and (c) that the actual claims should be in proportion to the actual coal consumed corresponding to the scheduled generation for supply of electricity. The Petitioner has however not followed the said requirements.

(g) During the course of verification of the claims, it was evident that the Petitioner has not furnished any documentary evidence for actual payment of service tax on transportation of coal, Clean Energy Cess, NMET, DFM and CGPVT which has to be provided by the Petitioner in terms of the decision of the Commission. It is not only impossible to verify the claims of the Petitioner in the absence of details being provided, but the same is also contrary to the specific directions of the Commission



(h) DNH vide communication dated 2.8.2018 intimated the Petitioner to provide the necessary details to examine the claims for change in law compensation of the Petitioner in terms of the orders of the Commission. While the Petitioner by letter dated 28.8.2018 had provided the documents being coal invoices, in the railway receipts and other coal details, various discrepancies were evident from the data submitted by the Petitioner, as under.

Re: Higher coal consumption, which have impact on all the elements of change in law claim:

(i) During the course of evaluation of claims, it was noticed that there are significant differences in the parameters such as APC, SHR and GCV considered by the Petitioner for raising of change in law claims. This may be noticed on the basis of the following tables pertaining to the period from April, 2013 to July, 2018:

(a) In Petition No. 88/MP/2018, the Petitioner has submitted the actual APC of 8.25% for raising claims. However, in the compensation claims submitted to DNH, the following APC has been considered:

S. No.	Particulars	Months
1.	More than 10%	9
2.	More than 9%	26
3.	More than 8.25%	19
4.	8.25% or less	10

(b) In the same Petition, it has been accepted by the Petitioner that the claim for change in law for MSEDCL has been raised considering the SHR on monthly basis as 2320 kcal/kWh approx., wherein, in the claim submitted to DNH, the following parameters have been considered.

S. No.	Particulars	Months
1	More than 2600	4
2	More than 2500	3
3	More than 2400	3
4	More than 2320	27
5	2320 or less	27

(c) In the same Petition, the Petitioner had submitted that the claim for change in law for MSEDCL has been raised considering the actual GCV as received at station as 3800 kcal/kg, wherein, in the claim submitted to DNH, the following parameters have been considered:

S. No.	Particulars	Months
1	In the range of 3200 to 3299	6
2	In the range of 3300 to 3399	4
3	In the range of 3400 to 3499	7
4	In the range of 3500 to 3599	6
5	In the range of 3600 to 3699	4
6	In the range of 3600 to 3799	11
7	3800 or more	26



(d) While the GCV claims are required to be on 'as received' basis as directed by the Commission, there are no details whatsoever provided by the Petitioner. It is not understandable as to how there can be such variations in the operating parameters while claiming change in law. In view of this, DNH has considered (i) APC of 8.25% as accepted by Petitioner in Petition No.88/MP/2018 or lower actual value (ii) SHR of 2320 kcal/Kwh as accepted by Petitioner for 2013-14 and SHR of 2310 kcal/Kwh or lower value for the period 2014-19 as per order in Petition No. 88/MP/2018; and (iii) GCV of 4150 kcal/kg on account of non-furnishing of information by the Petitioner as explained hereunder:

(i) The coal quantity calculated for the electricity scheduled and the scheduled generation for DNH for the period April, 2013 to November, 2013 is as under:

S. No.	Particulars	Coal Consumption- GMR (MT)	Coal Consumption- DNH (MT)
1	FY 2013-14	7,13,765	5,92,285
2	FY 2014- 15	9,54,661	8,85,943
3	FY 2015- 16	9,66,636	8,46,733
4	FY 2016- 17	4,16,954	3,74,582
5	FY 2017- 18	8,49,904	7,77,498
6	April-18 to Nov-18	5,67,578	4,98,524
	Total	44,69,498	39,75,565
	Coal Consumption of GMR higher by DNH (MT)		4,93,933
	Coal Consumption higher in percentage term		12.42

(ii) Thus, there is difference of 12.42% in the coal consumption based on what is unilaterally claimed by the Petitioner, than the coal consumption worked out in terms of the orders of the Commission. In regard to GCV of 4150 kcal/kg, DNH has been constrained to take the mid value of the GCV of coal supplied, as the Petitioner has not given any other details of GCV of coal as required under the orders of the Commission. The Petitioner has also not provided the third party sampling of coal at the loading end, which would be the most authentic data having been certified by the third party.

(iii) Therefore without providing the details of GCV of coal as received, without even providing the third party sampling of coal loaded, there is no basis for the Petitioner to claim arbitrary figures as unilaterally claimed to be applied for computing change in law.

(iv) Though DNH had sought for details and documentary evidence of GCV of coal vide letters dated 10.12.2018 and 20.2.2019, no details have been furnished by the Petitioner.



Re: Other discrepancies

(j) During the period from Aril, 2013 to November, 2018, the Energy sold to various beneficiaries of the Petitioner (DNH, MSEDCL, TANGEDCO & others) is 18048.56 MUs. The year-wise coal consumption (plant site) as provided by the Petitioner for raising of bills in reference to the energy sold to various beneficiaries is 12414800 MT. Out of the coal consumption mentioned, the coal has been procured through open market (680673), E-auction WECL (382777), As-is-where-is (401914) and imported coal (447860) apart from linkage coal from SECL.

(k) In respect of E-auction WECL procured from Western Region, the same is eligible for lower service tax reimbursement as rail transportation charges is less. However, the Petitioner is claiming service tax on notional per tonne basis, hence eligible for higher service tax reimbursement, as compared to SECL linkage coal where service tax liability is lesser for the same quantity of coal transported. Moreover, the element of Chhattisgarh Paryavaran & Vikas Upkar is not applicable for the said coal quantity, but the same is being billed by the Petitioner. In respect of E-auction SECL, it is noticed that the service liability is lower the normal linkage coal

(l) In respect of Open market coal, the same has been procured from local sources and in these cases, it has been noticed that transportation has been made by means other than railway. Accordingly, the same is not eligible for service tax as transportation other than train cannot be verified. Further, alternate coal is procured from local sources and hence the same may not be subject matter of such transportation. Also, the other elements such as NMET, DMF, CPVU and excise assessable value cannot be paid on account of non-verification of payment. This also applicable in case of as-is-where-is imported coal.

(m) As the Petitioner does not have the details and evidence for the change in law claims made, it is seeking to follow notional basis for computation of change in law liability. This is contrary to the provisions of the PPA and the specific directions of the Commission.

(n) DNH has calculated change in law liability on the basis of actual amount paid towards the claim raised on account of service tax on transportation of coal, Clean Energy Cess, NMET, DFM and CGPVT on the basis of coal data and invoices submitted by the Petitioner. The methodology of claims made by the Petitioner is also erroneous.

(o) Any increase will not have any implication from the date of order as the generation company is required to maintain certain level of coal inventory. Keeping in view the norms of the Commission, a period of 30 days have been considered for settlement of claims. The difference of claim by a period of 30 days on account of all elements will result into settlement of claims raised by the Petitioner by an amount of ₹3.5 crore (average billing for the month April, 2018 to June, 2018)



(p) As regards DMF and NMET, the circular issued by Coal India Limited (CIL) dated 13.11.2015 clearly states that NMET is effective from 14.8.2015, whereas, the DMF is effective from 12.1.2015 and accordingly the same has been considered for payments. In relation to Excise Duty, the incremental rate has been derived including the royalty, whereas the same is not allowed by the Commission. Hence the claim of the Petitioner is overstated.

Accordingly, the Respondent DNH has submitted that there is no merit in the claims of the Petitioner and the same is liable to be dismissed with costs.

Rejoinder of Petitioner

15. The Petitioner in its rejoinder affidavit dated 30.7.2019 has made the following submissions:

A. DNH cannot unilaterally deduct amounts entitled to GWEL

(i) The Petitioner had raised supplementary bills in terms of Article 8 read with Article 10.5.2 of the DNH PPA claiming compensation for the change in law events allowed in terms of the Commission's order in the aforesaid Petitions. In case DNH wished to challenge the amounts claimed by the Petitioner in the supplementary bills, it ought to have disputed the bills within a period of 30 days from the receipt of such bills in terms of Article 8.6.2 of the PPA. Since DNH has failed to raise a dispute qua the supplementary bills raised within 30 days, the said bills ought to be deemed as conclusive in terms of Article 8.6.0 of the DNH PPA. Moreover, DNH has unilaterally deducted amounts from bills which is not permitted under the said PPA.

(ii) Even in terms of Article 8.3.3 of the PPA, DNH is only entitled to deduct the amounts required under law or amounts admitted as deductible by the Petitioner. Further, such deductions are capped at ₹5 crore in a contract year. Therefore, the deductions made by DNH are not only contrary to orders of this Commission but also the PPA.

B. GWEL is entitled to compensation on account of BSS and DS

(a) BS and DS were subsumed in basic freight charges from 15.1.2018. The Petitioner is entitled to compensation for increase in BSS and DS for the period prior to BSS and DS being subsumed in basic freight charges (till 14.1.2018). The APTEL in its judgment dated 14.8.2018 in Appeal No. 111/2017 (GWEL V CERC & ors) had held that the increase in BSS and DS are change in law events and had remanded the matter to the Commission only for consequential orders. Hence, DNH could not have deducted the amounts



pertaining to BSS & DS from the bills of the Petitioner. Moreover in terms of the order dated 16.5.2019 in Petition No. 284/MP/2018, this Commission has allowed the Petitioner to claim compensation for BSS & DS. Thus DNH ought to pay the Petitioner the amounts pertaining to BSS & DS in terms of the supplementary bills of the Petitioner

C. Supplementary bills raised by GWEL are correct and conclusive

(i) The contentions of DNH that the Petitioner had not furnished documentary evidence for actual payment of service tax on transportation of coal, Clean Energy Cess, NMET, DMF, CPVU and assessable value for excise duty and service tax and the discrepancies in data submitted with regard to APC, SHR and GCV are misplaced. DNH has adopted parameters from varying sources and in violation of the order in Petition No. 88/MP/2018 to deny payments to the Petitioner

(ii) The Petitioner was raising bills based on actual parameters, but after order in Petition No. 88/MP/2018, bills have been raised in accordance with the said order. Any difference in amounts accruing to the benefit of the Petitioner has been passed on to DNH. All the beneficiaries have been billed at the same operating parameters since the Petitioner is supplying power to all three beneficiaries in a composite manner. The parameters for power supplied to each of the procurers have been the same for each month.

(iii) The Petitioner has regularly shared Form-15 with DNH wherein 'as received GCV' of coal is mentioned and the same has been certified by the Auditor on month-to-month basis. The same is used for calculating coal consumption to determine the change in law impact. DNH has unilaterally and without any basis adopted the operational parameters to wrongly reduce the compensation payable to Petitioner.

(iv) DNH has adopted APC of 8.25% uniformly. However, subsequent to Commission's order in Petition No. 88/MP/2018, the Petitioner has raised invoices for APC on the basis of actual or normative, whichever is lower. DNH's adoption of 8.25% is misplaced. In case, DNH wished to dispute the consideration of APC at actuals, it ought to have challenged the order dated 15.11.2018 in the said Petition and having not done so, the same has attained finality vis-à-vis DNH.

(v) DNH has adopted SHR of 2320 kcal/kWh for 2013-14 and 2310 kcal/kWh or lower for 2014-19. For 2013-14, DNH had allegedly relied on the submissions made by the Petitioner in Petition No.88/MP/2018. However, for the period 2014-19, it had adopted the figure laid down by this Commission. The Commission in its order dated 15.11.2018 had directed SHR of 2355 kcal/Kwh for 2009-14 and hence DNH ought to have applied the said SHR for 2013-14 instead of unilaterally adopting values as per its convenience.



(vi) As regards GCV, the Petitioner had provided all documentary proof required by DNH. The Petitioner on 19.9.2018 (in response to DNH e-mail) had informed DNH that Form-15 showing details of opening stock, receipt, consumption and closing stock for the period from April, 2013 to July, 2018 was provided with e-mail. Report regarding GCV and SHR (duly certified by CA) were part of supplementary bills. Also, proof of payment for coal and railway freights for the month of April, 2017 on sample basis was provided and that the Petitioner had not considered any power supply from alternate sources of coal for change in law claims.

(vii) The Petitioner by letter dated 17.1.2019 had informed DNH that for measurement of GCV, the standard operating procedures had been followed. It was also informed that the laboratory is certified by the National Accreditation Board for Testing and Calibration Laboratories (NABL) and the as received GCV of coal mentioned in Form -15 is certified by Auditor on month-to-month basis.

(viii) The submission of DNH that it had adopted GCV of 4150 kcal/kg as the Petitioner did not furnish any information regarding GCV is denied. All supporting documents were provided by the Petitioner to DNH and in terms of the Commission's order, GCV has to be considered on 'as received' basis and there is no basis for DNH to consider the mid-point value of GCV as per invoices raised by CIL. In view of this, DNH's final calculation of quantity of coal to be considered for computing change in law is erroneous and contrary to Order dated 15.11.2018. The said order in Petition No.88/MP/2018 has not been challenged by DNH and has therefore attained finality.

(ix) The service tax rate is the same irrespective of the source of coal. Since the Petitioner is computing the impact of coal pass through considering the landed cost of linkage and alternate coal (which includes all elements including service tax), the difference in service tax is adequately captured in the computation.

(x) The Petitioner is entitled to raise Supplementary bills claiming compensation for the change in law events allowed from the date of occurrence of change in law in accordance with Article 10.5 of the PPA. The compensation so claimed has to be from the date when the Petitioner incurred the additional cost due to change in law event. Moreover, the Petitioner is claiming change in law based on actual impact and not notional imposition of taxes, duties and levies. The contention of DNH that a 30 day inventory be assumed is incorrect and is contrary to the judgment of the Hon'ble Supreme Court in Carrying Cost judgment.

(xi) The Petitioner has included royalty in the assessable value of coal to determine excise duty in term of the Commission's order dated 8.1.2018 in I.A. No.40/2017 in Petition No. 8/MP/2014. Accordingly, the Petitioner is



acting in compliance with the said order of the Commission.

(xii) DNH has wrongly deducted an amount of ₹14.07 crore from the Petitioner's invoices on account of abolition of Coal Terminal Surcharge (CTS). As on the cut-off date for DNH PPA, CTS was zero and accordingly, no benefit will accrue to DNH on account of withdrawal of CTS. In view of this, DNH could not have deducted an amount corresponding to CTS from the invoices of the Petitioner.

Accordingly, the Petitioner has reiterated that the submissions of the Respondent DNH may be rejected and the Petition may be allowed.

16. During the hearing on 29.8.2019, the learned counsel for the Petitioner circulated note of arguments and made detailed submissions in the matter in support of its prayer in the Petition. Similarly, the learned counsel for the Respondent DNH made extensive arguments reiterating the submissions made in its reply. The Commission, after granting time to the parties to file their written submissions, reserved its order in the Petition.

17. The Petitioner in its note of arguments has reiterated its submissions made in the Petition. However, the Petitioner (in addition to the bills/amounts detailed in the table under para 9 above), has submitted the details of supplementary bills/ amounts raised from 16.2.2019 to 5.8.2019, as under, for payment by the Respondent, DNH.

Sl. No (contd)	Date of Supplementary bill	Period	Due Date	Amount (in ₹)
Total amount (as per supplementary invoices dated 27.2.2017 to 11.1.2019) in the table under para 9 above)				1214228159
23	16.2.2019	December, 2018- January, 2019	18.3.2019	34667372
24	25.3.2019	February, 2019	24.4.2019	60025840
25	2.5.2019	March, 2019	1.6.2019	17171140
26	11.6.2019	April, 2019	11.7.2019	22327307
27	27.6.2019	May, 2019	27.7.2019	13255815
28	5.8.2019	June, 2019	4.9.2019	21487562
Total				1491375529



Written Submissions of Respondent DNH

18. The Respondent DNH has filed its written submissions vide affidavit dated 13.9.2019 and has reiterated the submissions made in its reply. In addition, the Respondent has submitted the following;

(i) The contentions of the Petitioner on the construction of Article 8 of the PPA are completely misconceived. The PPA is clear on the aspect of deductions to be made by the Procurer and there is no need for the Commission to devise a separate mechanism in deviation thereof. The PPA provides for comprehensive billing and payment under Article 8. While Article 8.1 provides for the general obligation of the Procurer to pay the seller monthly tariff payments on or before the due date, Article 8.2.2 further provides the procurer with safeguards to the extent that monthly bills shall be based on and shall include supporting data and documents. Therefore the seller cannot unilaterally raise bills without providing supporting data and documents.

(ii) Article 8.3 provides the manner of payment of monthly bills wherein Article 8.3.3 provides the circumstances under which deductions and set-offs can be made. Under Article 8.3.3(i), the Procurer is entitled to make deductions required by law and 'Law' has further been defined to include the orders of this Commission. Therefore, any orders of the Commission passing on amounts in favour of the Respondent amounts to 'law' and the Respondent is entitled to deduct amounts from the monthly invoices as allowed under such an order.

(iii) It is only under Article 8.3.3(ii) by which the Procurer claims an amount from the Seller that an invoice needs to be raised by the Procurer. The entire focus in Article 8.3.3(ii) is on admitted amounts which are raised in the form of an invoice by the Procurer and accepted by the Seller. Therefore, the deduction and set-offs which the Procurer can effect, pertain both under sub-clauses (i) & (ii). However, when the deduction/set-off is under sub-clause (ii), further safeguards have been added in the form of an invoice to be raised, the invoice to be acknowledged and further the deduction not exceeding ₹5 crore.

(iv) There is no such restriction of the deduction as required by law under Article 8.3.3(i). The intention is obvious, that if the seller has to pass on the amounts to the Procurer as required by law, there is an absolute right to the Procurer to deduct such amounts against the monthly tariffs. In the present case, the Commission in its order dated 14.3.2018 in Petition No. 13/SM/2017 had held that the introduction of GST has resulted in savings to the generators which ought to be passed on to the beneficiaries.

(v) The order dated 14.3.2018 was law on the date when the Petitioner raised its invoice claiming change in law for GST on 15.3.2018. Though the Petitioner



claimed the GST as a change in law, it did not comply with the terms of the order dated 14.3.2018 which required the Petitioner to pass on the benefits in reduction/subsuming of Central Excise duty, Central Sales Tax, Stowing Excise duty, RTS etc., DNH on the due date of the above bill, was within its right to make deductions, since the Petitioner was not complying with the order dated 14.3.2018 which is law covered by Article 8.3.3(i). The PPA does not require the Procurer to dispute bills when the deductions are as required by law.

(vi) As regards payment of compensation on account for BSS & DS, the same has been resolved by the parties.

19. Though the learned counsel for the Petitioner had filed written submissions vide affidavit dated 13.9.2019, it had mentioned the matter before the Commission on 27.9.2019 and submitted that certain inadvertent errors had crept in the said written submissions. He accordingly requested the Commission to permit the Petitioner to file its fresh written submissions. The learned counsel for the Respondent, DNH also requested time to file its response to the written submissions of the Petitioner. The Commission, while permitting the Petitioner to file its fresh written submissions, directed the matter to be listed for hearing. Accordingly, the Petitioner vide its affidavit dated 7.10.2019 and the Respondent, DNH vide its affidavit dated 24.10.2019 have filed their written submissions.

Additional Submissions of Petitioner

20. The Petitioner vide its affidavit dated 7.10.2019 has filed additional submissions and has mainly reiterated the submissions made in its Petition, the note of arguments and the rejoinder, as above. In addition, the Petitioner has annexed, on sample basis, the documentary proof comprising the invoices and service tax payment challan for the month of March 2015 and has submitted the following:

(i) The Petitioner discharges Service tax liability for transportation of coal by road under the Reverse Charge Mechanism. In terms of the Service Tax notifications, the amount of service tax payable for transportation of goods by



road is 12.36% of the invoice value with abatement of 75% (subsequently amended to 70% vide notification dated 1.3.2015). This abatement is applicable only if, goods transporter is registered as Goods Transport Agency (GTA) and for the Petitioner, the transporter is registered as GTA.

(ii) Service Tax is subsequently deposited vide Form G.A.R.7 which is a composite monthly form for service paid by the Petitioner, under all categories. Presently, service tax payment under reverse charge mechanism is made on monthly basis and is for all services including transportation of coal by road

(iii) Appeal No. 131 of 2019 filed by DNH against Commission's Order dated 14.3.2018 in Petition No. 13/SM/2017 was dismissed on 3.10.2019. Accordingly, the Commission may direct DNH to refund the amount wrongfully deducted qua the RTS/CTS amounting to ₹16.68 crore till May, 2019 and to stop deduction of the amounts towards RTS/CTS.

Additional Written Submissions of Respondent DNH

21. The Respondent, DNH vide its affidavit dated 24.10.2019 has filed additional written submissions and has submitted the following:

(a) The Petitioner was required to submit the details of service tax paid, as claimed under the change in law in terms of Commission's order dated 1.2.2017 in Petition No.8/MP/2014. However, the Petitioner has not given the details of service tax invoices and the service tax paid by the Petitioner.

(b) The Commission in the said order dated 1.2.2017 had allowed service tax liability on railway transportation on actuals. There was no such claim of road transportation nor was the same allowed. However, the Petitioner in its written submission has only given the details of coal transported by road and not railway transportation.

(c) The Petitioner has provided details of service tax only for one month. Further, the coal procured for April, 2013 and May, 2013 have only been given, on sample basis. It is evident from the coal invoices, the coal has been procured from Nagpur, which is within the vicinity of the generating station. The claim for aforesaid months was on notional basis, without the actual details.

(c) The Petitioner has not given details to substantiate its claims for GCV. It was in these circumstances that in the absence of details given, the mid value was taken for the time being. It is imperative that the Petitioner provides documentary proof and demonstrates how measurement of GCV is being done. No details have been provided regarding the standard operating procedures



being followed by the Petitioner. The Commission in its Order dated 25.1.2016 in Petition No. 283/GT/2014 had held that the samples ought to be collected from the loaded wagons at the generating station either manually or through the Hydraulic Auger, before the coal is unloaded. The Commission in its order in Petition No. 88/MP/2018 had allowed GCV measurement on 'as received' basis, considering the 2014 Tariff Regulations.

(e) The laboratory being certified by NABL has no relevance to the issue of how GCV is being measured on 'as received' basis. The certification is only of the laboratory and the equipment being used in it. However, there is no way to know at which point sampling is being done to measure GCV. The laboratory details does not provide for the point at which the sample is taken, the sampling methodology etc., No details were provided of third party sampling at the receiving end or even at the loading end so that at least it can be compared and seen whether the claims are plausible and within the acceptable range in the industry.

(f) The submission that Form-15 duly certified by auditor has been provided on month to month basis is misconceived since the auditor only certifies the figures and not the methodology for measurement of GCV, The auditor does not look into how the GCV is being measured, or at what point it is being measured. The auditor certified Form-15 does not in any manner certify the method being used for measuring the GCV of coal on 'as received' basis. All the auditor certificates are on a particular date, which establishes that the auditor does not witness the sampling & testing methodology.

(g) The Petitioner has also not provided any details of third sampling being done at the loading end. While the third party sampling is mandatory, the loss after this point is only transit loss which can be quantified.

(h) The deductions carried out towards RTS, the Petitioner at the time of hearing has submitted that the said issue is not being pressed in view of APTEL having reserved order on the same. The Commission in its order in Petition No.13/SM/2018 had recorded that RTS has been abolished. The test and consequence of the change in law is that the charges which the Petitioner was incurring prior to the abolition are to be passed on to the Respondent. Accordingly, there is no merit in the submissions of the Petitioner

22. The Petition was thereafter heard on 29.10.2019 and the Commission after hearing the learned counsel for the parties at length, reserved its order in the Petition. The submissions of the learned counsel for the Petitioner and the Respondent are mainly on the lines of the submissions made in their respective pleadings.



23. Based on the submissions of the parties, the issues which emerge for consideration are as follows:

Issue No.(A): Whether the deductions made by Respondent DNH on the Supplementary bills raised by the Petitioner are in line with the observations of the Commission in its orders in Petition Nos.8/MP/2014,1/MP/2017,13/SM/2017 and 88/MP/2018: and

Issue No. (B): Whether the Respondent DNH is entitled to deduct the RTS/CTS from the bill raised by the Petitioner.

We now proceed to examine the aforesaid issues

Issue No.(A): Whether the deductions made by Respondent DNH on the Supplementary bills raised by the Petitioner are in line with the observations of the Commission in its orders in Petition Nos.8/MP/2014,1/MP/2017,13/SM/2017 and 88/MP/2018

24. Before proceeding, we deal with the Petitioner's submission that the Supplementary invoices raised by the Petitioner are conclusive, since the Respondent DNH had not disputed the invoices within 30 days. In support of this, the Petitioner has placed reliance on Articles 8.6.1 and 8.6.2 of the DNH PPA, to say that, if a party does not dispute a supplementary bill within 30 days, such bill becomes conclusive. It has also submitted that such dispute must be communicated by way of a 'bill dispute notice' containing specific details/information, as required under Article 8.6.2 of the PPA. The Petitioner has pointed out that the first supplementary bill was raised on 27.2.2017 and the Respondent DNH had disputed the bill only by a letter dated 16.10.2018, which is after the deadline imposed under Article 8.6.2 of the said PPA. The Petitioner has also stated that in view of the non-compliance by Respondent DNH to Article 8.6 of the PPA, the supplementary bills are to be considered as conclusive and final and therefore Respondent DNH ought to pay the entire amount claimed under the said supplementary bills. The Petitioner has further submitted that once bills are conclusive, in terms of Article 8.3.3 of the PPA, Respondent DNH is only entitled to



deduct amounts required under law or the amounts admitted as deductible by the Petitioner and the Respondent DNH cannot make deductions more than the limit of Rs.5 crore stipulated in a contract year. Accordingly, the Petitioner has stated that the deductions made by Respondent DNH are not only contrary to the orders of the Commission, but also the PPA.

25. Per contra, the Respondent DNH has submitted that the PPA is clear on the aspect of deductions to be made by the Procurer and there is no need for the Commission to devise a mechanism in deviation thereof. It has also submitted that the PPA provides for a comprehensive scheme relating to billing and payment under Article 8 of the PPA and for the purpose of deduction of monthly bills, Article 8.3 provides for a complete mechanism. Respondent DNH has stated that the only safeguard provided to the generator is under Article 8.6.9, which is for payment of average of the last three invoices (being the undisputed portion) by the Procurer to the generator. Respondent DNH has further stated that under Article 8.3.3(i), the Procurer is entitled to make deductions required by law and the term 'law' includes the orders of this Commission. Therefore, any order of the Commission passing on amounts in favour of the Respondent amounts to 'law' and the Respondent is entitled to deduct amounts from the monthly invoices as allowed under such order, in terms of Article 8.3.3(i). The Respondent DNH has contended that it is only in Article 8.3.3(i), by which the Procurer claims an amount from the Seller that an invoice needs to be raised by the Procurer and duly acknowledged by the Seller and not disputed within 30 days of such invoice. According to the Respondent, there is no such restriction of deduction as is required under 'law' under Article 8.3.3(i) and therefore, the deduction/set-off which the Procurer can affect pertain to both, under sub-clauses (i) and (ii) *albeit* when deduction set-off is under Article 8.3.3(ii), further safeguards have been



added in the form of, invoice to be raised, invoice to be acknowledged and further deduction not exceeding the capped amount. Referring to Commission's order dated 14.3.2018 in Petition No. 13/SM/2017, the Respondent DNH has submitted that the said order was 'law' on the date when the Petitioner raised its invoice claiming change in law for GST on 15.3.2018. It has submitted that since the Petitioner did not pass on the benefits in reduction/subsuming of CED, CST etc., the Respondent, on the due date of the above bill, was within its right to make deductions for not complying the order dated 14.3.2018, which is law covered by Article 8.3.3(i). The Respondent has however submitted that after subsequent discussions between the parties, the Petitioner started passing on the benefits of BSS & DS and had agreed to pass on the benefit of reduction in stowing excise duty and CST. Accordingly, the Respondent has submitted that there is no requirement for the Respondent DNH to raise bills for the amounts that the Commission had already decided to be passed on to it and the Respondent DNH is entitled to make deductions strictly in terms of Article 8.3.3(i) of the PPA.

Analysis and decision

26. The matter has been examined. Article 1.1 of the PPA defines the term 'Law' 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."

27. Article 8.3.3 (i) of the PPA provides as under:

"8.3 Payment of Monthly Bills

xxx

8.3.3 All payments required to be made under this agreement shall only include any deductions or set-off for:



(i) Deductions required by the Law; and

(ii) Amounts claimed by the Procurer from the Seller, through an invoice duly acknowledged by the Seller, to be payable by the Seller, and not disputed by the Seller within thirty (30) days of receipt of the said invoice and such deduction or set off shall be made to the extent of the amounts not disputed. It is clarified that the Procurer shall be entitled to claim any set

xxx

8.6.1 If a party does not dispute a Monthly Bill, provisional Bill or a Supplementary Bill raised by the other Party by the due date, such bill shall be taken as conclusive

8.6.2 If a party disputes the amount payable under a Monthly bill, Provisional Bill or a Supplementary Bill, as the case may be, that party shall, within thirty (30) days of receiving such bill, issue a notice ('the Bill dispute Notice') to the invoicing party setting out:

- i) the details of the dispute amount;*
- ii) its estimate of what the current amount should be; and*
- iii) all written material in support of its claim."*

28. The Petitioner has submitted that the first supplementary bill was raised on Respondent DNH on 27.2.2017 and the Respondent had disputed the bills only by way of letter dated 16.10.2018. Accordingly, the Petitioner has submitted that since the dispute was raised post the 30 day deadline under Article 8.6.2, the Supplementary bills are to be considered as conclusive and final and the Respondent DNH ought to pay the entire amount claimed. The Respondent has contended that the PPA provides for disputing a bill under Article 8.6 wherein, the only safeguard provided to the generator is under Article 8.6.9 which is for payment of average of last three invoices (being the undisputed portion) by the procurer to the generator. Accordingly, the Respondent has submitted that there is no question of either raising an invoice or issuing notice of dispute and the Respondent as entitled to deduct the amounts from the monthly invoices as the orders of the Commission passing on amounts in favour of the Respondent amounts to 'law' in terms of Article 8.3.3(i) of the PPA. This submission of the Respondent is not acceptable. Though the orders/decisions of the Commission fall within the definition of 'law' under Article 1.1 read with Article 8.3.3(i) of the PPA, the



Commission's order dated 14.3.2018 in Petition No.13/SM/2017 had not mandated the Respondent DNH to unilaterally deduct amounts from the monthly invoices raised by the Petitioner. The relevant portion of the said order is extracted hereunder:

“35. Accordingly, we direct the beneficiaries/ procurers to pay the GST compensation cess @ ₹400/ MT to the generating companies w.e.f 01.07.2017 on the basis of the auditors certificate regarding the actual coal consumed for supply of power to the beneficiaries on basis of Para 28 and 31. In order to balance the interests of the generators as well as discoms/beneficiary States, the introduction of GST and subsuming/abolition of specific taxes, duties, cess etc., in the GST is in the nature of change in law events. We direct that the details thereof should be worked out between generators and discoms/beneficiary States. The generators should furnish the requisite details backed by auditor certificate and relevant documents to the discoms/ beneficiary States in this regard and refund the amount which is payable to the Discoms/ Beneficiaries as a result of subsuming of various indirect taxes in the Central and State GST. In case of any dispute on any of the taxes, duties and cess, the respondents have liberty to approach this Commission.”

29. As evident from the above order, the Commission without quantifying the impact of change in law event had directed the parties to work out the details with regard to the abolition/ subsuming of certain taxes, cess & duties after the introduction of the GST and pass on the benefits thereof to the discoms. Nowhere has the Commission in the said order observed and/or directed the Respondent DNH to make any unilateral deduction of the amounts from the monthly invoices of the Petitioner. The Commission in the said order had granted liberty to the Respondent DNH to approach the Commission, in case of any dispute on any of the taxes, duties and cess. The Respondent without availing the liberty granted by this Commission has admittedly made unilateral deductions from the bills of the Petitioner. In our view, such arbitrary deduction of amounts by the Respondents, on the assumption that the amounts deducted by it correspond to benefits derived by the Petitioner, is arbitrary and is not in terms of the said order dated 14.3.2018. It is pertinent to mention that the Tribunal in its judgment dated 29.7.2019 in Appeal No.131/2019 (DNH V CERC & ors) filed by the Respondent



herein, while affirming the Commission's order dated 14.3.2018 had observed the following:

“xii. We are of the opinion that the order passed by the Central Commission is in order. The Appellant and the Respondent No.2 may work out the details and the impact and approach the Central Commission in case of any dispute regarding the amount of refund”

30. Nevertheless, the parties have submitted that the issue regarding passing on the benefits to the Respondent has been settled as per directions of the Tribunal dated 29.7.2019 in Appeal No. 131/2019. Hence, nothing survives for consideration on this issue.

31. The Respondent DNH had also deducted certain amounts from the Supplementary bills of the Petitioner on the ground that (i) the Petitioner has not furnished any documentary evidence for actual payment of Service tax on Coal Transportation, Increase in Clean Energy Cess, Changes towards NMET & DMF and Changes towards CGPVT, and (ii) Various discrepancies were noticed by it in the documents furnished by the Petitioner, namely, the coal invoices, the railway receipts and other coal details, thereby making it impossible for it to verify the claims, in terms of the Commission's orders in Petition Nos.8/MP/2014 and 1/MP/2017. Accordingly, the Respondent vide its letter dated 2.8.2018 has rejected the monthly supplementary invoices raised by the Petitioner for the period from February, 2017 to July, 2017 and from February, 2018 to April, 2018, (amounting to `69.02 crore). Similarly, the Respondent DNH, by its letter dated 16.10.2018 has disputed the Supplementary bills of the Petitioner and had settled the claims of the Petitioner after deducting the amounts calculated as per its methodology, in respect of the various change in law events allowed by the Commission. It is therefore evident that the bills raised by the Petitioner on 27.2.2017 were rejected by the Respondent DNH only on 2.8.2018 & 16.10.2018 on



the grounds stated above. The submission of the Respondent that it was entitled to make deductions, since the orders of the Commission were 'law' in terms of Article 1.1 is misconceived. The Commission while allowing the change in law events in the aforesaid Petitions had not quantified the impact of change in law, but had only laid down a compensation mechanism to be worked out by the parties. Thus, in case the Respondent DNH felt that the data furnished by the Petitioner was insufficient or if the bills contained discrepancies, it was at liberty to raise dispute or seek appropriate clarifications from the Commission, instead of making unilateral deductions from the bills. Be that as it may, we proceed to examine whether the unilateral deductions made by the Respondent DNH from the supplementary bills of the Petitioner are in line with the Commission's order, as stated in the subsequent paragraphs.

Station Heat Rate, Gross Calorific Value

32. Petition No.88/MP/2018 was filed by the Petitioner seeking amongst others, for a confirmation that the operational parameters namely, the SHR, GCV and APC are to be considered on actuals, for calculation of compensation due to the Petitioner on account of change in law events allowed vide order dated 1.2.2017.

The Commission by order dated 15.11.2018 held as under:

SHR and GCV

"29. The submissions regarding SHR and GCV have been considered. The APTEL in its judgement dated 12.9.2014 in Appeal No. 288 of 2013 (M/s Wardha Power Company Limited V Reliance Infrastructure Limited & anr) has ruled that compensation under Change in Law cannot be correlated with the price of coal computed from the energy charge and the technical parameters like the Heat Rate and gross GCV of coal given in the bid documents for establishing the coal requirement. The relevant observations of APTEL are extracted as under:

"26. The price bid given by the Seller for fixed and variable charges both escalable and non-escalable is based on the Appellant's perception of risks and estimates of expenditure at the time of submitting the bid. The energy charge as quoted in the bid may not match with the actual energy charge corresponding to the actual landed price of fuel. The seller in its bid has also not quoted the price of coal. Therefore, it is not correct to co-relate the compensation on account of Change in Law due to change in cess/excise duty on coal, to the coal price computed from the quoted



energy charges in the Financial bid and the heat rate and Gross Calorific value of Coal given in the bidding documents by the bidder for the purpose of establishing the coal requirement. The coal price so calculated will not be equal to the actual price of coal and therefore, compensation for Change in Law computed on such price of coal will not restore the economic position of the Seller to the same level as if such Change in Law has not occurred.”

30. In the light of the above observations, the technical parameters such as Heat Rate and GCV of coal as per the bidding document cannot be considered for deciding the coal requirement for the purpose of calculating the relief under Change in law. Therefore, the submissions of the Respondent, MSEDCL to consider the bid parameters are not acceptable. The Respondent has also relied on MERC order with regard to GCV. As regards SHR, it was also suggested by MERC that net SHR as submitted in the bid or SHR norms specified for new thermal stations as per MYT Regulations, whichever is superior, shall be applicable. In our view, the decision in the said order has been given in the facts of the case and does not have any binding effect in case of the projects regulated by this Commission. Moreover, the SHR given in the bid are under test conditions and may vary from actual SHR. The Commission after extensive stakeholders' consultation has specified the SHR norms in the 2014 Tariff Regulations. Therefore, it would be appropriate to take SHR specified in the Regulations as a reference point instead of other parameters as suggested by MSEDCL.

31. In the present case, the Petitioner has considered SHR of 2355 kcal/Kwh whereas, the Respondent MSEDCL has considered the Design Heat Rate of 2211 kcal/kWh as submitted in the RFP. It is pertinent to mention that the CERC norms applicable for the period 2009-14 and 2014-19 do not provide the norms for 300 MW units, but provide for a degradation factor of 6.5% and 4.5% respectively towards Heat Rate over and above the Design Heat Rate. As the Design Heat Rate is 2211 kcal/kWh, the gross Heat Rate works out to 2355 kcal/kWh (2211×1.065) and 2310 kcal/kWh (2211×1.045) for the period 2009-14 and 2014-19 respectively. Accordingly, we direct that the SHR of 2355 kcal/kWh during the period 2009-14 and 2310 kcal/kwh during the period 2014-19 or the actual SHR whichever is lower, shall be considered for calculating the coal consumption for the purpose of compensation under change in law. The Petitioner and the Respondent MSEDCL are directed to carry out reconciliation on account of these claims annually.”

32. In case of GCV, the Respondent has submitted that it should be mid value of GCV band which should be applied on GCV measured on 'as billed' basis. In our view, on account of the grade slippage of the coal supplied by CIL, it would not be appropriate to consider GCV on 'as billed' basis. In the 2014 Tariff Regulations of the Commission, the measurement of GCV has been specified as on 'as received' basis. Therefore, it will be appropriate if the GCV on 'as received' basis is considered for computation of compensation for Change in law.”

SHR

33. The Petitioner has submitted that the Commission in the aforesaid order, while rejecting the contention of MSEDCL to consider SHR as per bid document, had directed the consideration of SHR of 2335 kcal/kWh for 2009-14 and 2310 kcal/kWh for 2014-19 or actual SHR, whichever is lower, for calculating the coal



consumption coal for the purpose of compensation under change in law. However, the Petitioner has submitted that the Respondent DNH has adopted the SHR of 2320 kcal/kWh for 2013-14 and 2310 kcal/kWh for 2014-19, allegedly relying on the submissions made by the Petitioner in Petition No. 88/MP/2018. The Petitioner has pointed out that the Respondent DNH, while on the one hand has unilaterally adopted the SHR of 2320 kcal/kWh for 2013-14 (based on the Petitioner's submission in 88/MP/2018) to wrongfully reduce the compensation payable to the Petitioner, it had adopted the SHR of 2310 kcal/kWh for 2014-19 (in terms of Commission's order dated 15.11.2018). Based on this, the Petitioner has submitted that the Respondent ought to have applied the SHR of 2355 kcal/kWh or at actuals, whichever is lower, for 2013-14, as per directions of the Commission in its order dated 15.11.2018, for calculating the coal consumption for the purpose of compensation under change in law.

34. The Respondent DNH has submitted that the Petitioner in its submission in Petition No. 88/MP/2018 had accepted the claim for change in law in respect of MSEDCL PPA, considering the SHR of 2320 kcal/Kwh, on monthly basis, whereas, in the claim submitted to the Respondent herein, the following parameters have been considered:

Particulars- SHR	Months
More than 2600	4
More than 2500	3
More than 2400	3
More than 2320	27
2320 or less	27

35. The Respondent while pointing out that out of the total 64 months, the SHR for 27 months remained 2320 or less for the change in law, has submitted that the Petitioner is adopting two set of standards for raising the bill to different discoms for the same size/pattern of the plant. Accordingly, the Respondent DNH has



submitted that SHR of 2320 kcal/kWh, as accepted by the Petitioner for 2013-14 or lower value, as per order dated 15.11.2018, was considered for settlement of claims of Petitioner. The Respondent has also submitted that there is a difference of 12.42% in the coal consumption based on what is unilaterally claimed by the Petitioner, than the coal consumption worked out in terms of the Commission's order. The Petitioner has reiterated that the Respondent ought to have applied the SHR of 2355 kcal/kWh or actuals, whichever is lower, for 2013-14.

36. We have examined the submissions. Admittedly, in the present case, the SHR of 2320 kcal/kWh for 2013-14 was adopted by the Respondent DNH and certain amounts were unilaterally deducted from the bills of the Petitioner in respect of the compensation claims. The Commission in its order dated 15.11.2018 had allowed the SHR of 2355 kcal/kWh for 2009-14 and 2310 kcal/kwh for 2014-19 or actual SHR, whichever is lower, for purpose of calculation of compensation. Hence, there was no reason for the Respondent to adopt the SHR of 2320 kcal/kWh on the ground that the SHR was 2320 kcal/kWh or less for 27 months (out of 64 months). The actual SHR values vary from month on month and the same has been duly certified by auditor. Hence, the Respondent was mandated to adopt the SHR of 2355 kcal/Kwh or actuals, whichever is lower, while considering the compensation claims, instead of adopting the SHR of 2320 kcal/kWh and unilaterally make deductions from the bills of the Petitioner. The submission of the Respondent that there has been discrepancy in the bills of the Petitioner as regards SHR is therefore misconceived. In our view, the adoption of SHR of 2320 kcal/kWh by the Respondent DNH for 2013-14 is therefore contrary to the Commission's order dated 15.11.2018. In case the Respondent felt that the SHR values adopted by the Petitioner were different, it was at liberty to seek



clarification from the Commission on this issue. Therefore, the adoption of the SHR of 2320 kcal/kWh and the unilateral deduction thereof from the bills of the Petitioner is untenable. We therefore direct the Respondent DNH to consider the SHR as 2355 kcal/kWh or actuals, whichever is lower, for the period 2013-14 and revise the calculations, while working out the compensation payable to the Petitioner and refund the amounts deducted on this count.

GCV

37. The Petitioner has submitted that in terms of the Commission's order dated 15.11.2018 in Petition No. 88/MP/2018, GCV to be considered for calculating the quantity of coal ought to be on 'as received' basis. It has also submitted that the Respondent DNH had adopted the GCV of 4150 kcal/kg by considering the midpoint value of GCV as per invoices raised by Coal India, apparently on the ground that the Petitioner had not furnished any information regarding the GCV. The Petitioner has further submitted that all supporting documents were provided to the Respondent including Form-15 wherein 'as received' GCV of coal has been certified by auditor on month-to-month basis. Accordingly, the Petitioner has submitted that the GCV of 4150 kcal/kg as adopted by the Respondent is erroneous and contrary to the Commission's order dated 15.11.2018.

38. The Respondent DNH has submitted that in Petition No.88/MP/2018, the Petitioner had submitted the change in law claim under MSEDCL PPA considering the actual GCV as received at station as 3800 kcal/kg, whereas in the Petition submitted under DNH PPA, the GCV for 38 months (out of the 64 months) remain in the range of 3200 to 3799 for change in law claim. It has therefore submitted that the Petitioner is following two set of standards for raising the bills for different discoms for same size/pattern of the plant. The Respondent has further submitted



that it had requested the measurement basis of GCV along with technical documentation, for which no concrete reply has been furnished by Petitioner. The Respondent has stated that GCV as mentioned in Form-15 is also not acceptable as the information about the place/time of measurement, process of measurement and technical certification cannot be drawn. It has stated that in the absence of such details, the bills have been processed and settled in a reasonable manner. In response, the Petitioner has stated that all details sought by the Respondent were part of the supplementary bills raised by the petitioner and were being shared in the format specified by the Respondent. The Petitioner has also clarified that Form-15 showing the opening stock, receipt, consumption and closing stock for the period of April, 2013 to July, 2018, along with auditor certificate was provided along with the bills including by e-mail to the Respondent. It was further clarified by the Petitioner that for measurement of GCV on 'as received' basis, the standard operating procedures have been followed and that the laboratory is certified by the National Accreditation Board for Testing and Calibration Laboratories (NABL). The Petitioner has pointed out that the 'as received' GCV of coal is mentioned in Form-15 and is certified by Auditor on month-to month basis. Accordingly, the Petitioner has submitted that there is no basis for the Respondent DNH to consider the mid-point value of GCV as per invoices raised by Coal India Ltd.

39. We have examined the matter. As stated, the Commission in its order dated 15.11.2018 had directed that GCV on 'as received' basis is to be considered for the computation of compensation for Change in law. In accordance with this, the Petitioner had shared 'Form-15' with the Respondent, showing details of the opening stock, receipt, consumption and closing stock for the period of April, 2013 till July, 2018 along with auditor certificate. In response to the e-mail dated



12.9.2018 of the Respondent, the Petitioner vide its e-mail dated 19.9.2018 has stated that the details sought by Respondent are also being shared in the format specified by the Respondent. Subsequently, in response to the Respondent's letter dated 10.12.2018 that standard operating procedures had not been followed, the Petitioner by its letter dated 17.1.2019 has clarified that for measurement of 'as received' GCV at plant unloading end, standard operating procedures were followed for measurement of coal quality parameters, including GCV at plant unloading end. The Petitioner had also informed that the laboratory at GWEL is certified by NABL and based on the same, 'as received' GCV of coal mentioned in Form-15 and certified by auditor on month to month basis, was considered to work out the compensation due to impact of change in law. In addition, the Petitioner had furnished the Coal & Transportation invoices to the Respondent. Despite this, the Respondent has considered the mid-point value and adopted the GCV of 4150 kcal/kg, as per invoices raised by CIL, on the ground that the information required had not been furnished by the Petitioner. In our view, placing reliance on the Petitioner's submission in Petition No.88/MP/2018 and adopting a mid-point GCV value is erroneous. It is pertinent to mention that the consideration of mid-point GCV value on 'as billed' basis (4150 kcal/kg) by MSEDCL to work out compensation was rejected by the Commission in its order dated 15.11.2018 in Petition No. 88/MP/2018 wherein, the Commission had directed the consideration of GCV on 'as received' basis. The Petitioner, in terms of this order, has furnished to the Petitioner the details in Form-15, duly certified by auditor, on month to month basis, the measurement of coal quality parameters, including GCV at the plant unloading end certified by the NABL accredited laboratory in line with the Standard operating Procedures, for computation of compensation due to change in law. The Petitioner has also submitted that all beneficiaries of the Petitioner have



been billed at the same operating parameters. The Commission having considered and rejected the contention for mid-point value of GCV, it would not be prudent for the Respondent, DNH, who was also a party in the said Petition, to consider the mid-point value GCV of 4150 kcal/kg (4100-4300) for working out the compensation. The objections raised by the Respondent to justify the deduction from the bills of the Petitioner are baseless. Even otherwise, in case the information furnished by the Petitioner was insufficient or if it was felt that the Petitioner had not adopted standard operating procedures, the Respondent was at liberty to approach this Commission seeking clarification on this issue. The deduction of certain amounts claiming discrepancy between the parameters in MSEDCL case and DNH parameters and to state that no information was furnished by the Petitioner is arbitrary. The unilateral deduction made by the Respondent DNH from the bills of the Petitioner by adopting the mid-point GCV value is therefore contrary to the Commission's order dated 15.11.2018. In this background, we direct the Respondent to revise the calculations considering GCV on 'as received' basis for computation of coal consumption for working out the compensation payable to the Petitioner.

Auxiliary Power Consumption

40. The Petitioner has submitted that subsequent to the Commission's order dated 15.11.2018 in Petition No. 88/MP/2018, the Petitioner has raised invoices for APC on the basis of actual or normative, whichever is lower. It has however submitted that the Respondent DNH has adopted the APC as 8.25% uniformly based on the Petitioner's submissions in Petition No. 88/MP/2018. The Petitioner while pointing out that the APC of 8.25% submitted in the said petition was an approximate figure, it has submitted that in case the Respondent wished to



dispute the consideration of APC at actuals, it ought to have challenged the order dated 15.11.2018 and since it has not done so, the said order had attained finality. Accordingly, the Petitioner has submitted that the adoption of 8.25% by Respondent DNH is misplaced and ought to be rejected. The Respondent vide its letter dated 10.12.2018 while pointing out that out of the total 64 months, the APC for 10 months remain 8.25% or less for the change in law, has submitted that the Petitioner is adopting two set of standards for raising the bill to different discoms for the same size/pattern of the plant. Accordingly, the Respondent has submitted that there are material discrepancies in the claim for the period April 2013 till July, 2018, as the APC taken by the Petitioner in its supplementary bills is inconsistent and varies from the Petitioners submission of 8.25% APC made in Petition No.88/MP/2018. The Petitioner has however reiterated that all beneficiaries have been billed at the same operating parameters since it is supplying power to all three beneficiaries.

41. The matter has been examined. As regards the claim of the Petitioner for APC in Petition No.88/MP/2018, the Commission vide its order dated 15.1.2018 held as under:

“26. The Petitioner has computed claims based on actual APC whereas MSEDCL has considered it as ‘nil’. However, the Petitioner during the hearing of the Petition on 17.9.2018 has submitted that the Respondent has commenced making payments based on actual APC and therefore this issue is not pressed. In view of this, the relief sought for by the Petitioner has not been considered in this order.”

42. It is evident from the submissions of the Respondent that it had uniformly applied the APC rate of 8.25%, taking into consideration the claim of the Petitioner as 8.25% for APC in Petition No.88/MP/2018 and that during a period of 10 months (out of 64 months) from April, 2013 to July, 2018, the APC claim of the Petitioner was 8.25% or less. This methodology adopted by the Petitioner and the unilateral



deduction thereof from the bills of the Petitioner, is in our view, arbitrary and untenable. The normative APC as per the norms specified by the Commission for the period 2009-14 is 9.00% and hence, the Respondent was mandated to consider APC on actuals or normative, whichever is less, on month to month basis, for the purpose of computing the claim on actual coal consumption. The adoption of the uniform APC rate of 8.25% for both the periods for computing the claim is arbitrary and the unilateral deduction made thereof from the bills of the Petitioner is untenable. The Petitioner is therefore entitled for compensation considering the normative APC of 9.00% or actuals, whichever is less.

National Mineral Exploration Trust (NMET) & District Mineral Foundation (DMF)

43. The Petitioner, in Petition No. 1/MP/2017, had claimed 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 cut-off date of the said PPAs.

“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.”

44. The Petitioner has submitted that the claims towards NMET and DMT have been raised with effect from 12.1.2015 for which necessary documents were provided to the Respondents DNH. It has submitted that the Respondent has



wrongly prorated and has made the claim effective from 14.8.2015. In response to the letter dated 16.10.2018 of the Respondent, the Petitioner vide its letter dated 16.11.2018 had annexed proof of payment and had clarified that in addition to the NMT & DMF amount paid as per invoices, the Petitioner had paid Rs.5.76 crore towards NMT & DMF for the period from January, 2015 to November, 2015 on retrospective effect, based on notification dated 13.11.2015 and accordingly requested the Respondent to finalize the said claim. Thereafter, in response to the letter of the Respondent dated 16.11.2018 stating that the Petitioner had not furnished proof of payment of NMT & DMF for the retrospective period, the Petitioner vide its letter dated 17.1.2019 while referring to the Mines and Minerals (Development and Regulation) Amendment Act, 2015 which came into effect from 12.1.2015, submitted that NMT is effective from 12.1.2015 and payment proof for the same from January, 2015 onwards along with invoices received from SECL had been submitted. Accordingly, the Petitioner has prayed that the Commission may be directed to consider the same for computation of the impact of change in law.

41. The Respondent DNH has submitted that the circular issued by CIL dated 13.11.2015 clearly states that NMT is effective from 14.8.2015, whereas DMF is effective from 12.1.2015 and accordingly, the same has been considered for release of payments. The Respondent has pointed out that the Petitioner seeking compensation for both DMF & NMT from 12.1.2015 is wrong. Similar stand has been taken by the Respondent in its written submissions.

45. We have considered the matter. It is noticed that the Government of India on 26.3.2015, 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 NMT)



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. Thereafter, on 20.10.2015, the Ministry of Coal, GOI 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. Subsequently, on 13.11.2015, SECL had issued notice for implementation of the MMDR Act inter alia stating that (a) contributions to NMET to be made with effect from 14.8.2015 and (b) contributions to DMF is made with effect from 12.1.2015. Since NMET contributions are payable with effect from



14.8.2015, the contention of the Petitioner that the same has come into effect from 12.1.2015 has no merit. As contended by Respondent, NMET is payable only with effect from 14.8.2015 and not with retrospective effect from 12.1.2015, as in the case of DMF. We therefore find no reason to permit the claim of the Petitioner for NMET contribution payment with retrospective effect from 12.1.2015, for the purpose of calculation of the impact of change in law.

Coal Inventory

46. The Petitioner has submitted that the Respondent DNH's consideration of one month coal stock for change in law computation is wholly erroneous and is without any basis. The Petitioner has also submitted that there is no requirement either in the DNH PPA or in the Commission's order dated 15.11.2018 which mandates such a requirement for normative coal stock of a month. The Petitioner has further submitted that it is entitled to raise supplementary bills claiming compensation for the change in law events from the date of occurrence of change in law in accordance with Article 10.5 of the PPA. Per contra, the Respondent DNH has submitted that any claim for change in law on price of coal or normative basis will not have implication from the date of order as the generation companies are required to maintain certain levels of coal inventory. It has submitted that keeping in view the norms of this Commission for non-pit head station, a period of 30 days was considered for settlement of claims and the difference of claim by this period on account of all elements will result into the settlement of claims raised by the Petitioner by an amount of ₹3.5 crore (average billing for the month of April, 2018 to June, 2018).

47. The submissions have been considered. It is pertinent to mention that there is no concept of interest on working capital in competitively bid tariff and the



bidders are required to quote all inclusive tariff. Also, the provisions of the PPA or the orders of the Commission do not mandate the requirement of maintaining one month coal stock as inventory. Article 10.5 of the PPA provides that the Petitioner would be entitled to raise supplementary bills claiming compensation for the change in law events allowed from the date of occurrence of change in law. The underlying principle of change in law is to determine the consequence of change in law and to compensate the affected party (herein Petitioner) such that the party is restored to the same economic position as if such change in law had not occurred. Such compensation claimed has to be from the date when the Petitioner had incurred the additional cost due to the change in law event. Therefore, the submission of the Respondent for consideration of normative coal stock of one month, in terms of the norms specified by this Commission, for change in law computation deserve no merit for consideration. The APTEL in its judgment dated 14.8.2018 in Appeal No. 111 of 2017 (GMR Warora Energy Limited v. CERC & ors) had held that if there is a provision in the PPAs for restoration of the Sellers to the same economic position as if no Change in Law event has occurred, the Sellers are eligible for carrying cost for such allowed Change in Law event(s) from the effective date of Change in Law event until the same is allowed by the appropriate authority by an order/judgment. The Hon'ble Supreme Court in Civil Appeal No. 5865 of 2018 and 6190 of 2018 vide its judgment dated 25.2.2019 has held as under:

"10. A reading of Article 13 as a whole, therefore, leads to the position that subject to restitutionary principles contained in Article 13.2, the adjustment in monthly tariff payment, in the facts of the present case, has to be from the date of the withdrawal of exemption which was done by administrative orders dated 06.04.2015 and 16.02.2016. The present case, therefore, falls within Article 13.4.1(1). This being the case, it is clear that the adjustment in monthly tariff payment has to be effected from the date on which the exemptions given were withdrawn. This being the case, monthly invoices to be raised by the seller after such change in tariff are to appropriately reflect the changed tariff. On the facts of the present case, it is clear that the respondents were entitled to adjustment in their monthly tariff



payment from the date on which the exemption notifications became effective. This being the case, the restitutionary principle contained in Article 13.2 would kick in for the simple reason that it is only after the order dated 04.05.2017 that the CERC held that the respondents were entitled to claim added costs on account of change in law w.e.f 01.04.2015. This being the case, it would be fallacious to say that the respondents would be claiming this restitutionary amount on some general principle of equity outside the PPA. Since it is clear that this amount of carrying cost is only relatable to Article 13 of the PPA, we find no reason to interfere with the judgment of the Appellate Tribunal....

16 .. . There can be no doubt from this judgment that the restitutionary principle contained in Clause 13.2 must always be kept in mind even when compensation for increase/decrease in cost is determined by the CERC.”

48. The Commission in its order dated 1.2.2017 in Petition No.8/MP/2014 had held as under:

“121. ...To approach the Commission every year for computation and allowance of compensation for such Change in Law is a time consuming process which results in time lag between the amount paid by Seller and actual reimbursement by the Procurers. Accordingly, the following mechanism prescribed to be adopted for payment of compensation due to Change in Law events allowed and summarized as under in terms of Article 10.3.2 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 respondents or from the date of Change in Law, whichever is later.

(b) xxx

(c) xxx.”

49. Thus, the Petitioner is entitled to claim compensation from the period when the change in law event came into force. Accordingly, the methodology adopted by Respondent DNH working out the difference of claim by a period of 30 days for all elements and deduction of amounts thereof from the supplementary bills of the Petitioner is unjust and arbitrary.

Service Tax liability

50. The Petitioner has submitted that it discharges service tax liability for transportation of coal by road under the reverse charge mechanism as per the applicable service tax notifications, where the amount of service tax payable for transportation of goods by road is 12.36% of the invoice value with abatement of



75% (subsequently amended by 70%) The Petitioner has further submitted that service tax payment under reverse charge mechanism is made on monthly basis and is for all services including transportation of coal by road. The Petitioner has stated that service tax rate is the same irrespective of the source of coal and since the Petitioner is computing the impact of coal pass through considering the landed cost of linkage and alternate coal (which includes all elements including service tax), the difference in service tax is adequately captured in the computation. Per contra, the Respondent DNH has submitted that it had made deductions for the reason that the Petitioner in its bills had not shown the actual service tax implication on the coal sourced from various sources and had sought to calculate Service tax on transportation of coal on notional per tonne basis, stating that service tax implication is the same irrespective of the source of coal. It has further submitted that in certain cases of open marker coal, transportation has been made by means other than railways. The Respondent has pointed out that invoices and receipts furnished by the Petitioner would reveal that the Petitioner is not disclosing the actual service liability and the methodology used by the Petitioner is contrary to the provisions of the PPA and the specific directions of the Commission. The Respondent in its written submission has referred to Commission's order dated 1.2.2017 in Petition No. 8/MP/2014 and has submitted that the claim of the Petitioner was for service tax on railway transportation and there was no claim on road transportation nor the same was allowed. Accordingly, the Respondent has submitted that due to lack of supporting details, the claim of the Petitioner is liable to be rejected.

51. The matter has been examined. It is evident from the above submissions that the Respondent has made deductions from the bills of the Petitioner due to lack of



supporting details of the actual service tax implication on the coal sourced from various sources. It is observed from the Commission's order dated 1.2.2017 that the Petitioner was entitled to service tax after the cut-off date as a change in law event. The Petitioner was also directed to furnish along with its monthly bill, the proof of payment of service tax on transportation of coal by rail and the computations duly certified by auditor, to the Respondent. The relevant portion of the order is extracted hereunder:

“89.....With effect from 1.10.2012, service tax on 30% of the transport of goods by rail became chargeable. This date being after the cut-off date in case of DNH PPA, the same shall be admissible under DNH PPA. Subsequent changes in service tax shall be admissible under change in law. The Petitioner is directed to furnish along with its monthly bill the proof of payment and computations duly certified by the auditor to the MSEDCL and DNH. 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 MSEDCL and DNH. 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, MSEDCL and DNH are directed to carry out reconciliation on account of these claims annually.”

52. In terms of the above order, the Petitioner is 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. Accordingly, we direct that the amounts claimed by the Petitioner shall be payable by the Respondent, subject to the production of documentary proof of the service tax invoices and the actual service tax on all components, paid by the Petitioner.

Inclusion of Royalty in Excise duty computation

53. The Petitioner has submitted that it had included 'Royalty' in the assessable value of coal to determine the Excise duty in compliance with the directions of the Commission in order dated 8.1.2018 in I.A. No.40/2017 in Petition No. 8/MP/2014. It has however submitted that the Respondent DNH has denied payment of Excise duty to the Petitioner on the ground that incremental increase in rate due to



increase in royalty was disallowed by the Commission. The Petitioner while pointing out that APTEL in its judgment had reaffirmed the Commission's order in petition No.8/MP/2014 has submitted that the deductions made by the Respondent on this count is without merit and ought to be rejected. The respondent DNH has submitted that the claim of the Petitioner is overstated and royalty was not allowed by the Commission for the purpose of change in law and hence cannot be included in the assessable value of coal for computing Excise duty.

54. We have examined the matter. The Petitioner had filed Petition No. 8/MP/2014 seeking compensation of the cost incurred by it due to change in law events. The Commission after considering the submissions of the parties, vide its order dated 1.2.2017 in Petition No. 8/MP/2014 had directed the Petitioner to approach the appropriate authority in the Central Excise Department to seek clarification regarding the inclusion of Royalty and Stowing Excise Duty and other charges for determining the assessable value of coal and approach the Commission for appropriate directions. Relevant portion of the said order is extracted as under:

“70. The levy of excise duty on coal through the Finance Act, 2012 was introduced which was after the cut-off date and has impact on the cost of generation of power for supply to MSEDCL. The Petitioner cannot be expected to factor in the bid the Excise Duty on coal which was not in existence as on cut-off date. Therefore, levy of excise duty on coal are covered under change in law. Accordingly, the Petitioner is entitled to be compensated through adjustment in tariff on account of excise duty on coal in case of MSEDCL PPA. In case of DNH PPA, the cut-off date was 1.6.2012 and accordingly, the change in the rate of excise duty after the said date (i.e. Notification dated 5.3.2013) will be admissible in case of DNH PPA. The excise duty shall be reimbursable on the base price of coal. As regards the inclusion of royalty and stowing excise duty and other charges for determining excisable value of coal, the Petitioner is directed to approach the Appropriate Authority in the Central Excise Department for clarification and if it is confirmed that royalty and stowing excise duty are included in the excisable value of the coal for the purpose of calculating of excise duty on coal, the Petitioner may approach the Commission for appropriate directions.”



55. Pursuant to the liberty granted in the above order dated 1.2.2017 the Petitioner had filed I.A. No. 40/2017 in Petition No.8/MP/2014 and had sought the approval of the Commission to include Basic Price, Sizing Charges, Royalty, Stowing Excise Duty, National Mineral Exploration Trust, District Mineral Foundation, Stowing Excise Duty, Surface Transportation Charges, Chhattisgarh Paryavaran Upkar, Chhattisgarh Vikas Upkar, NiryatKar, Assessable value of Central Excise Duty and Central Excise Duty for the purpose of arriving at assessable value in calculating excise duty on coal. The Commission by its order dated 8.1.2018 held as under:

“8. 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.

9. 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 and Electricity Department, Dadra and Nagar Haveli.



56. Also, the APTEL in its judgment dated 14.8.2018 in Appeal No. 111 and 290/2017 had held as under:

xi. xxxxx

The Central Commission based on its decision in earlier order wherein the judgement of this Tribunal was also considered has held that the change in Royalty after the cut-off date has impact on cost of generation of power and has to be considered under Change in Law irrespective of the quote made by the Bidder in its tariff bid.

xii. We have allowed claims similar to the change in Royalty resulting in impact on cost of power generation to GWEL under Change in Law. On similar premise we are of the opinion that there is no legal infirmity in the order of the Central Commission on this issue.”

In view of the above decision, the contentions of the Respondent stand rejected and the deductions, if any, made by the Respondent on this count also stand rejected.

BSS and DS

57. The parties have submitted that the issues with regard to compensation claims/adjustments on account of BSS and DS have been settled by the parties. Hence, the same has not been discussed in this order.

Railway Terminal Surcharge / Coal Terminal Surcharge

58. The Petitioner has submitted that the Railway Terminal Surcharge (RTS) was ‘nil’ at the time of bid-cut-off date and the same was introduced on 22.8.2016 and withdrawn on 10.7.2017. The Petitioner vide its letter dated 16.11.2018 has however submitted that the reduction of ₹8.83 crore on account of reduction in RTS is not tenable, as no benefit is to be passed on to the Respondent. It has also submitted that withdrawal of tax imposed after the cut-off date extinguishes the liability of the procurer to reimburse such tax after the withdrawal date and it does not entitle the Respondent to claim such withdrawal as a change in law event resulting in reduction in cost. The Petitioner has added that it had not raised any invoice for the same and therefore the reduction of the amounts is incorrect. The



Respondent has submitted that in terms of the Commission's order in Petition No.13/SM/2017, savings on account of indirect taxes/duties/cess subsumed in GST were required to be passed on to the Respondent. It has further contended that RTS deduction has been made on account of the Commission's order dated 14.3.2018 in Petition No.13/SM/2017 that held that RTS has been abolished.

59. During the hearing of the hearing of the Petition on 29.8.2019, the learned counsel for the Petitioner did not press for hearing on this issue, since APTEL in Appeal No. 131/2019 filed by the Respondent, had reserved its orders on this issue. Pointing out to this, the learned counsel for the Respondent in its written submissions dated 13.9.2019 has submitted that since the parties have argued this issue in detail in Appeal No. 131/2019 filed by the Respondent, it would not be proper for the Commission to give any decision on this issue, at the stage of pendency before APTEL.

60. Thereafter, APTEL vide its judgment dated 3.10.2019 in Appeal No. 131/2019 disposed of this issue as under:

“xv) We have heard both the Appellant and Respondent No.2 on the issue of deduction of Railway Terminal Surcharges by the Appellant from the bills raised by the Respondent No.2. Since the matter is pending before the Central Commission and the matter has been heard and the order has been kept reserved therefore we are not expressing any opinion on the subject at present.”

61. Pursuant to the above judgment, the Petitioner vide its written submissions dated 7.10.2019 prayed for a direction on Respondent DNH to (i) Refund the wrongly withheld RTS /CTS amounts for ₹16.68 crore till May, 2019; and (ii) stop deducting the amounts towards RTS/CTS. The Respondent in its written submissions dated 24.10.2019 has submitted that the test and the consequence of change in law is that the charges which the Petitioner was incurring prior to the



abolition is to be passed on to the Respondent. Accordingly, it has contended that there is no merit in the contentions of the Petitioner.

62. The matter has been considered. The cut-off date under the DNH PPA is 1.6.2012. The Railway Board, Ministry of Railways vide its Circular No.TCR/I078/2015/07 dated 22.8.2016, had imposed a Coal Terminal Surcharge at ₹55/tonne for both loading and unloading of coal (totalling to ₹110/tonne) for a distance beyond 100 kms, with immediate effect. However, by Circular dated 6.7.2017, the Railway Board had withdrawn the imposition of RTS with effect from 10.7.2017. Thereafter, the Commission vide its order dated 16.3.2018 in Petition No. 1/MP/2017 had rejected the prayer of the Petitioner to consider the levy of Terminal charges by Railways as a change in law event. The relevant portion of the order is extracted hereunder:

“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.”

63. In our view, the withdrawal of RTS by the Ministry of Railways on 10.7.2017 coupled with the rejection of the Petitioner’s prayer to allow the levy of RTS as a change in law event in the Commission’s order dated 16.3.2018, had extinguished



the liability of the Respondent DNH to make pay the same after the said date. It is also noticed that the Petitioner had not raised any invoice towards levy of RTS on the Respondent. It has also passed on the benefits due to subsuming of taxes & duties under GST. Moreover, the taxes and duties, which have been subsumed under GST have been set out in the Taxation Laws (Amendment) Act, 2017, wherein RTS/CTS do not form part of the same. In the above background, there is no reason for the Respondent to unilaterally deduct the aforesaid amounts from the supplementary bills of the Petitioner, on the ground that surcharge had been subsumed by GST. Also, there is no finding of the Commission in its order dated 14.3.2018 that RTS had been subsumed under GST. Accordingly, the submissions of the Respondent that it was entitled to unilaterally deduct the amounts towards RTS from the bills of the Petitioner deserve no merit for consideration. The Respondent is therefore directed not to deduct the amounts towards RTS/CTS from the bills of the Petitioner, in future. The Respondent DNH is however directed to refund the amounts already withheld towards RTS/CTS to the Petitioner. The prayer of the Petitioner is disposed of in terms of the above.

Late Payment Surcharge

64. It is noticed that the Petitioner had raised Supplementary bills amounting to ₹149.14 crore for the period from 2013-14 till June, 2019 and the Respondent DNH while making payments to the Petitioner had made unilateral deduction of certain amounts from the said bills. We have in this order decided that the unilateral deduction of bills by the Respondent from the supplementary bills raised by the Petitioner (except for NMET & DMF) is not in consonance with the orders of the Commission mentioned therein. It is noticed from records that the Petitioner had offered the waiver of LPS vide its letter dated 21.9.2018 proportionate to the



amount released by the Respondent on or before 10.10.2018. This offer was extended to payments made before 10.10.2018 and further extended to 15.10.2018. It is however noticed that despite this, certain amounts to which the Petitioner was entitled to in terms of the Commission's order as aforesaid, was not paid by the Respondent and had made unilateral deductions from the bills. Also, from the letter dated 21.9.2018 of the Petitioner, it is evident that the proposal for waiver of LPS was a one-time settlement offered by the Petitioner for timely debt servicing. The Petitioner in the Petition has prayed for direction on the Respondent to make payment of the outstanding amount of ₹54 crore (approx.). Accordingly, we direct the Respondent to make refund/adjust the amounts deducted from the bills of the Petitioner, after reconciliation, within 60 days from the date of this order along with Late Payment Surcharge, applicable in terms of Article 8.3.5 & 8.8.3 of the DNH PPA related to payment of amounts under a monthly tariff bill and supplementary bill.

65. Petition No. 39/MP/2019 is disposed of in terms of the above.

Sd/-
(I.S.Jha)
Member

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

Sd/-
(P.K.Pujari)
Chairperson

