

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No: 101/MP/2019**

**Coram:  
Shri P.K.Pujari, Chairperson  
Shri I.S. Jha, Member**

**Date of Order: 29 July, 2020**

**In the matter of**

Petition under Section 62(a) and 79(1)(a) of the Electricity Act, 2003 read with Regulation 8(3)(ii) and 8(7) of the CERC (Terms and Conditions of Tariff) Regulations, 2014 read with Regulation 111 of the CERC (Conduct of Business) Regulations, 1999 for recovery of additional expenditure incurred due to sharing of transportation cost of fly ash consequent to Ministry of Environment and Forest, Government of India Notification dated 25.01.2016 as 'Change in Law' Event.

**And**

**In the matter of**

Damodar Valley Corporation Ltd.  
DVC Towers, VIP Road,  
Kolkata-700052

**.....Petitioner**

**Vs**

1. BSES Yamuna Power Limited  
Shakti Kirna Building, Karkardooma  
New Delhi – 1100019
2. BSES Rajdhani Power Limited  
BSES Bhawan, Nehru Place,  
New Delhi – 110019
3. Tata Power Delhi Distribution Limited  
(Formerly Known as North Delhi Power Ltd)  
Grid Substation Building  
Hudson Lines, Kingsway Camp  
New Delhi -110009
4. Haryana Power Generation Corporation Limited  
Shakti Bhawan, Sector-6,  
Panchkula-134109
5. Punjab State Power Corporation Limited  
Inter State Building Shed no. TI-A  
Patiala-147001



6. Madhya Pradesh Power Management Company Limited  
Block no. 11, Ground Floor, Shakti Bhawan  
Vidyut Nagar, Rampur, Jabalpur-482008
7. West Bengal State Electricity Distribution Company Limited  
Vidyut Bhawan, Bidhannagar  
Block DJ, Sectort-II, Salt Lake City  
Kolkata-700091
8. Kerala State Electricity Board Limited  
VaidyuthiBhavanam,  
Pattom, Trivandrum – 695004
9. Bangalore Electricity Supply Company,  
K.R. Circle, Bangalore-506001, Karnataka
10. Mangalore Electricity Supply Company  
Paradigm Plaza, AB Shetty Circle, Mangalore-575001
11. Chamundeshwari Electricity Supply Corporation  
927, L J Avenue, GF, NewKantharajUrs Road,  
Saraswatipuram, Mysore-570009
12. Gulbarga Electricity Supply Corporation Station Road,  
Gulbarga, Karnataka-585102
13. Hubli Electricity Supply Company  
Navanagar, PB Road, Hubli, Karnataka- 580025
14. Jharkhand Urja Vikash Nigam Limited  
Doranda, Ranchi-834002
15. Haryana Power Purchase Centre  
2nd Floor, Shakti Bhawan, sector-6, Panchkulla,  
Haryana-134109
16. Tata Steel Limited  
PGP Works, General Office (W-175).  
Jamshedpur – 831001

..... Respondents

**Parties present:**

Shri S. Venkatesh, Advocate, DVC  
Shri Suhael Buttun, Advocate, DVC  
Shri Subrata Goshal, DVC  
Shri Rakesh Ranjan, DVC  
Shri S. P. Patra, DVC  
Shri Arijit Maitra, Advocate, BYPL and BRPL  
Ms. Megha Bajpeyi, BRPL  
Shri Anurag Naik, MPPMCL



## ORDER

The petitioner DVC is a generating company that was constituted under the provisions of the Damodar Valley Corporation Act, 1948. Apart from the business of generation of electricity, the Petitioner is also engaged in transmission, bulk/wholesale and retail sale of electricity to consumers in the Damodar valley. Tariff of generating stations of the Petitioner are being regulated by this Commission under Section 79(1)(a) of the Electricity Act, 2003.

2. On 25.1.2016, the Ministry of Forest, Environment & Climate Change, Government of India (MoEF&CC) issued an amendment (hereinafter referred to as the "2016 Fly Ash Notification 2016") to the Fly Ash Notification dated 14.9.1999 and inter-alia stipulated mainly as follows: -

(a) Cost of transportation of ash for road construction projects or for manufacturing of ash-based products or use as soil conditioner in agriculture activity within radius of 100 km of a coal-based thermal power plant shall be borne by such coal-based thermal power plant while cost of transportation beyond the radius of 100 km and up to 300 km shall be shared equally between the user and the coal based thermal power plant.

(b) Coal-based thermal power plants shall, within radius of 300 km, bear the entire cost of transportation of ash to the site of road construction projects under Pradhan Mantri Gramin Sadak Yojna and asset creation programmes of the Government involving construction of buildings, roads, dams and embankments.

(c) Subject to the rules made under the Environment (Protection) Act, 1986, reclamation of sea shall be permissible method of utilization of fly ash and coal or lignite based thermal power plants located in coastal districts shall support, assist or directly engage into construction of shore line protection measures.

(d) Coal-based thermal power plants shall comply with the above provisions in addition to 100% utilization of fly ash generated by them before 31<sup>st</sup> December, 2017.



3. On 28.1.2016, the Ministry of Power, Government of India issued the National Tariff Policy, 2016 that inter-alia stipulated as follows: -

*“h) Multi Year Tariff*

...

*4) Uncontrollable costs should be recovered speedily to ensure that future consumers are not burdened with past costs. Uncontrollable costs would include (but not limited to) fuel costs, costs on account of inflation, taxes and cess, variations in power purchase unit costs including on account of adverse natural events.”*

4. Pursuant to the 2016 Fly Ash Notification, the Petitioner in the present petition, is seeking a declaration from the Commission that the issuance of the 2016 Fly Ash Notification is a ‘Change in Law’ event under Regulation 8(3)(ii) of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 (hereinafter referred to as the “2014 Tariff Regulations”) The Petitioner has also sought to recover the expenditure on account of compliance with the 2016 Fly Ash Notification through monthly bills from the beneficiaries of the Petitioner’s generating stations.

**Submissions of the Petitioner**

5. The Petitioner has submitted that various generating stations for which the Petitioner has filed the present Petition are hereinbelow:-

<b>S.No.</b>	<b>Generating Station</b>	<b>Beneficiaries</b>
1.	Bokaro Thermal Power Station (1 X 210 MW; 1 X 500 MW)	i) West Bengal State Electricity Distribution Company Limited ii) Jharkhand Urja Vikash Nigam Limited iii) Punjab State Power Corporation Limited
2.	Durgapur Thermal Power Station (1X 210 MW)	i) West Bengal State Electricity Distribution Company Limited ii) Jharkhand Urja Vikash Nigam Limited



3.	Chandrapura Thermal Power Station  (1 X 130 MW, 2 X 250 MW)	<ul style="list-style-type: none"> <li>i) West Bengal State Electricity Distribution Company Limited</li> <li>ii) Jharkhand Urja Vikash Nigam Limited</li> <li>iii) Madhya Pradesh Power Management Company Limited</li> <li>iv) Tata Power Delhi Distribution Limited</li> <li>v) BSES Rajdhani Power Limited.</li> <li>vi) BSES Yamuna Power Limited</li> </ul>
4.	Mejia Thermal Power Station  (4 X 210 MW; 2 X250 MW; 2 X 500 MW)	<ul style="list-style-type: none"> <li>i) West Bengal State Electricity Distribution Company Limited</li> <li>ii) Jharkhand Urja Vikash Nigam Limited</li> <li>iii) BSES Yamuna Power Limited</li> <li>iv) Tata Steel Limited</li> <li>v) Haryana Power Purchase Centre</li> <li>vi) Bangalore Electricity Supply Company</li> <li>vii) Chamundeshwari Electricity Supply Corporation</li> <li>viii) Gulbarga Electricity Supply Corporation Station Road</li> <li>ix) Hubli Electricity Supply Company</li> <li>x) Mangalore Electricity Supply Company</li> <li>xi) Kerala State Electricity Board Limited</li> </ul>
5.	Durgapur Steel Thermal Power Station	<ul style="list-style-type: none"> <li>i) Punjab State Power Corporation Limited</li> <li>ii) Tata Steel Limited</li> </ul>
6.	Koderma Thermal Power Station	<ul style="list-style-type: none"> <li>i) Haryana Power Purchase Centre</li> <li>ii) Jharkhand Urja Vikash Nigam Limited</li> <li>iii) Bangalore Electricity Supply Company</li> <li>iv) Chamundeshwari Electricity Supply Corporation</li> <li>v) Gulbarga Electricity Supply Corporation Station Road</li> <li>vi) Hubli Electricity Supply Company</li> <li>vii) Mangalore Electricity Supply Company</li> </ul>
7.	Raghunathpur Thermal Power Station	<ul style="list-style-type: none"> <li>i) West Bengal State Electricity Distribution Company Limited</li> <li>ii) Kerala State Electricity Board Limited</li> <li>iii) Punjab State Power Corporation Limited</li> </ul>



		iv) Haryana Power Purchase Centre
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6. The Petitioner has submitted that the seven (7) coal-based thermal power plants of the Petitioner as above are presently producing about 9.658 million metric tonne (MT) of ash annually and this quantity is expected to reach about 12.555 millionMT per annum by 2020.

7. The Petitioner has submitted that from the year 2003-04 to 2017-18, total ash utilisation by the Petitioner was 74.06 million tonne against total production of 94.09 million MT, thus achieving ash utilization of around 79%. Presently, the areas of ash utilization mainly are low lying area development, industries, ash dyke raising, mine filling and road embankment construction.

8. The Petitioner has submitted that in order to achieve 100% ash utilization on sustainable basis and to comply with the 2016 Fly Ash Notification, its generating stations will have to incur additional expenditure for transportation of ash up to 300 km radius from the TPP (thermal power plants).

9. The Petitioner has submitted that in line with MoEF&CC Notification dated 3.11.2009, a separate account named "Ash Fund" is being maintained by the Petitioner, which includes revenue earned from sale of fly ash and expenditure towards promotion of ash utilization. Money from the Ash Fund is being sanctioned for development of infrastructure facilities, promotional/ facilitation activities etc. Therefore, fund available in the Ash Fund after deducting the already sanctioned fund is around Rs. 13.76 crores only upto 2017-18 which is inadequate for sharing of transportation cost of fly ash as mandated in the 2016 Fly Ash Notification.

10. The Petitioner has submitted that as per the estimate worked out based on the DSR rate 2016, DSR & DAR rate 2014 along with CPWD cost Index, the total



expenditure on transport subsidy will be around Rs. 971.44 crore/ annum for the Petitioner's generating stations, which is very high in comparison with the fund available in the Ash Fund and hence it needs to be compensated in terms of Regulation 8 of the 2014 Tariff Regulations.

11. The Petitioner has submitted that expenditure to comply with the 2016 Fly Ash Notification is a mandatory expenditure and cannot be met through the amount generated by sale of ash. Therefore, provisions of Regulation 8 of the 2014 Tariff Regulations gets attracted that provides for truing up due to uncontrollable parameters and that 'Change in Law' has been identified as an uncontrollable parameter under that Regulation.

12. The Petitioner has submitted that under Regulation 8 of the 2014 Tariff Regulations, there is a provision to pass on the expenditure incurred due to uncontrollable factors to the beneficiaries.

13. The Petitioner has submitted that in the instant Petition, it is seeking a declaration that the 2016 Fly Ash Notification be declared a 'Change in Law' event and that additional expenditure incurred on account of compliance with the 2016 Fly Ash Notification, be permitted to be billed and recovered additionally on actual basis from the beneficiaries.

14. Accordingly, the Petitioner has filed the instant Petition with the following prayers:-

- (a) *To take on record the MoEF&CC Notification dated 25.1.2016 and declare that the same is a 'Change in Law' event as stipulated under Regulation 8 of the CERC 2014 Tariff Regulations;*
- (b) *Allow the Petitioner Company to raise Monthly Bills for reimbursement of the additional expenditure for Fly Ash Transportation on monthly basis;*



- (c) *Permit additional expenditure to be billed and recovered additionally from the beneficiaries as reimbursement along with monthly bills;*
- (d) *Condone any inadvertent errors omissions/errors/shortcomings and permit the Petitioner to add/change/modify/alter these filings and make further submissions as may be required at a future date.*
- (e) *Pass such other order / orders, as may be deemed fit and proper in the facts and circumstances of the case.*

### **Submissions of the Respondents**

15. The Respondent No.6, Madhya Pradesh Power Management Company Limited (MPPMCL) vide its affidavit dated 2.8.2019 has submitted that the 2016 Fly Ash Notification was issued on 25.1.2016 while the petitioner is seeking relief by filing a petition vide affidavit dated 18.3.2019 i.e. after a period of more than three years. Thus, this Petition appears to be an afterthought on part of the Petitioner for claiming reimbursement of these expenses from beneficiaries. Further, the Respondent has submitted that the prayers made by the petitioner are not maintainable as the Petitioner cannot be allowed to take advantage of alleged "Change in Law" event and be put in a beneficial position than that prior to occurrence of such event.

### **Rejoinder of the Petitioner**

16. In response to the reply of MPPMCL, the Petitioner vide its rejoinder dated 13.9.2019 has reiterated its contentions made in the main Petition.

17. The Petitioner in its rejoinder has submitted that the application of the 2016 Fly Ash Notification is not restricted to the Petitioner, rather it applies to every coal-based TPP in the country including independent power producers (IPPs). MoEF&CC has notified the 2016 Fly Ash Notification in terms of mandate under Article 48A and 51A(g) of the Constitution of India, which casts a fundamental duty upon the State to protect, improve and preserve the environment.





18. The Petitioner has submitted that it is supplying dry fly ash (DFA) to the bricks/ blocks manufacturers free of cost and DFA in turn is sold to the agencies, traders and cement manufacturers. Further, ash from ash pond is also being utilised in filling abandoned mines, stone queries and low lying areas. Moreover, the Petitioner has also executed a Memorandum of Understanding with National Highway Authority of India (“NHAI”) for supplying of ash from ash pond from Chandrapura Thermal Power Station (“CTPS”) and Bokaro Thermal Power Station (“BTPS”) for road construction projects of NHAI. The Petitioner has already made expenditure towards development of infrastructure or facilities promotion and facilitation activities for use of fly ash. In line with MoEF&CC Notification dated 3.11.2009, separate account named “Ash Fund” is being maintained by the Petitioner, which includes revenue earned from sale of fly ash and expenditure towards promotion of ash utilization.

19. The Petition was heard on 27.2.2020 and the Commission vide ROP of the hearing directed the Petitioner to furnish the details of actual expenditure incurred towards ash transportation from 25.1.2016 to 31.3.2019 for each plant and reconciliation of its claim with the 2016 Fly Ash Notification in the prescribed format.

20. In response, the Petitioner vide affidavit dated 3.7.2020 has submitted the details for all its coal-based thermal power plants in the prescribed format and submitted that it has not claimed any expense related to ash evacuation as per the 2016 Fly Ash Notification.

### **Analysis and Decision**

21. After consideration of the submissions of the parties, the following issues emerge for consideration of the Commission:

#### **(a) Issue No.1: Is the Petition barred by limitation?**



**(b) Issue No.2: Whether the 2016 Fly Ash Notification dated 25.1.2016 is a Change in Law event in terms of the provisions of the 2014 Tariff Regulations?**

**(c) Issue No.3: Whether the Commission should allow the Petitioner to recover additional expenditure incurred on account of fly ash transportation through monthly billing?**

**Issue No.1: Is the Petition barred by limitation?**

22. The Respondent MPPMCL has submitted that the 2016 Fly Ash Notification was issued on 25.1.2016 while the petitioner is seeking relief by filing a petition vide affidavit dated 18.3.2019 i.e. after a period of more than three years. The Respondent has submitted that this Petition appears to be an afterthought on part of the Petitioner for claiming reimbursement of these expenses from beneficiaries.

23. The Petitioner is seeking a declaratory relief that the MOEFCC Notification dated 25.1.2016 constitutes Change in Law under the 2014 Tariff Regulations and hence, expenditure incurred on account fly ash transportation for meeting the conditions imposed on the thermal power plants of the Petitioner should be allowed as pass through in tariff. -Hon'ble Supreme Court in the matter of Andhra Pradesh Power Corporation Committee and Others Vs Lanco Kondapalli Power Ltd and Others [2016(3)SCC468] has held that "in the absence of any provision in the Electricity Act creating a new right upon a claimant to claim even monies barred by law of limitation or taking away a right of the other side to take a lawful defence of limitation, we are persuaded to hold that in the light of the nature of judicial power conferred on the Commission, claims coming for adjudication before it cannot be entertained or allowed if it is found legally not recoverable in a regular suit or any other regular proceedings such as arbitration, on account of limitation." In the light of the said judgement, the Limitation Act is applicable in the case of the proceedings or claims before the Commission. Part III of the Limitation Act, 1963 deals with suits relating to declaration. The limitation period for instituting the suit to obtain any other declararion is three years from the date when the right to sue first accrues. The first accrual of right to sue



in the declaratory suit relating to the MOEFCC Notification would occur when the Petitioner incurs expenditure pursuant to the said notification for which it becomes entitled to claim in an appropriate proceedings before the Commission. The Petitioner in Annexure 4 to the Petition has indicated the estimated expenditure under the MOEFCC Notification dated 25.1.2016 as under:

<b>Sl. No.</b>	<b>Year/Period</b>	<b>Total Expenditure (Rs.)</b>
<b>1</b>	25.1.2016 to 31.3.2016	36,20,87,939
<b>2</b>	2016-17	1,59,13,40,559
<b>3</b>	2017-18	1,13,04,51,560
<b>4</b>	April 2018 to November 2018	58,99,55,551

The Petitioner has not indicated the exact date when the expenditure pursuant to the notification was first incurred. However, the Petitioner has indicated that expenditure has been incurred between 25.1.2016 and 31.3.2016. The Petitioner could have approached the Commission for a declaratory relief alongwith prayer for reimbursement of expenditure incurred during 2015-16 on transportation of ash after the audited certifate is available as on 31.3.2016. Therefore the right to sue first accrues to the Petitioner on or after 1.4.2016 when the audited certificate of expenditure for the year could be got prepared by the Petitioner. Therefore, the limitation period of 3 years would count from 1.4.2016. The Petition has been filed on 18.3.2019 which is within a period of three years counted from 1.4.2016. In our view, the petition is not barred by limitation.



**Issue No. 2: Whether the 2016 Fly Ash Notification dated 25.1.2016 is a Change in Law event in terms of the provisions of the 2014 Tariff Regulations?**

24. The issue regarding the declaration of 2016 Fly Ash Notification as an event of change in law has been dealt with by the Commission in the matter of NTPC vs Othrs in Petition No. 172/MP/2016 vide order dated 5.11.2018, the relevant extract of which is as under:

*“18. The Environment Protection Act, 1986 (herein referred to as “EP Act”) was enacted by the Government of India on 23.5.1986 to provide for the protection and improvement of environment and for matters connected there with. Section 3(2)(v) of the EP Act provided the power to the Central Government to take such measures which include the restriction of areas in which any industries, operations or processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards. Thereafter, on 19.11.1986 the Central Government notified the Environment (Protection) Rules, 1986 (herein referred to as “EP Rules”). Rule 5(3)(d) provides that the Central Government shall impose prohibition or restriction on location of such industries and the carrying on of any process or operation in any area after considering the objections received against such notification. Thereafter, the Ministry of Environment and Forests, Govt. of India in exercise of its powers under Section 3(2)(v) and Section 5 of the EP Act, issued directions for “Utilisation of flyash from coal or lignite based thermal power plants” vide Notification dated 14.9.1999 (herein referred to as the “Fly Ash Notification 1999”). The said Notification prescribed amongst others the mechanism for utilisation of fly ash generated from coal or lignite based Thermal Power Plants and the achieve the target of fly ash utilisation. However, the said notification did not contain any provision for sharing of the transportation cost with the users of fly ash. Thereafter, the Ministry of Environment, Forests and Climate Change, Govt. of India vide Notification No. S.O. 254 (E) dated 25.1.2016 in exercise of its powers under the EP Act and EP Rules, made certain amendments to the Fly Ash Notification 1999 and incorporated, amongst others, the following provisions:*

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

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

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

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



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

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

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

19. As stated, the Petitioner has sought for a declaration that the MoEFCC Notification dated 25.1.2016 which imposes additional expenditure towards fly ash transportation is a 'Change in Law' event under the provisions of the 2014 Tariff Regulations. This has been objected to by most of the Respondents herein. Change in Law has been defined in Regulation 3(9) of the 2014 Tariff Regulations as under:

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

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

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

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

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

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

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

21. It is pertinent to mention that the issue of compensation under Change in law for incurring additional cost towards fly ash transportation in terms of the MOEFCC Notification dated 25.1.2016 in respect of the project whose tariff was discovered under competitive bidding process (in terms of Section 63 of the 2003 Act) came in for consideration by the Commission in Petition No.101/MP/2017 filed by DB Power Ltd. In the said case, the Commission after examining the provisions relating to change in law under Article 10 of the PPA, by order dated 19.12.2017 held that the



*additional cost towards fly ash transportation is on account of amendment to the Notification dated 25.1.2016 issued by the Ministry of Environment and Forests, Govt. of India and the expenditure is admissible under the Change in law in principle. The relevant portion of the order is extracted hereunder:*

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

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

25. In terms of the above order of the Commission in Petition No. 172/MP/2016, the 2016 Fly Ash Notification is an event of Change in law in terms of Regulation 3(9)(ii) of the 2014 Tariff Regulations.

**Issue No.3: Whether the Commission should allow the Petitioner to recover additional expenditure incurred on account of fly ash transportation through monthly billing?**

26. The Petitioner has submitted that as per MOEF&CC guidelines of 2009, budget from Ash Fund is being utilized for development of infrastructure facilities, promotional/ facilitation activities etc. Therefore, the fund available in Ash Fund after deducting the already sanctioned fund for promotion of ash utilization is inadequate for meeting the requirements of the 2016 Fly Ash Notification. The Petitioner has further submitted that as per its estimation on basis of various cost indices, the total expenditure on transport to comply with provisions of the 2016 Fly Ash Notification will be around Rs. 971.44 crore/ annum which is very high in comparison with the fund available in Ash Fund and hence, the Petitioner needs to be compensated for change in law in terms of Regulation 8 of the 2014 Tariff Regulations. The Petitioner has further submitted that, Regulation 8 of the 2014 Tariff Regulations, provides for passing on the expenditure incurred due to uncontrollable factors on to the beneficiaries and that a change in law





event has been identified as an uncontrollable factor. Accordingly, the Petitioner in the instant Petition has prayed that it may be permitted to be bill and recover the additional amount on actual basis from the beneficiaries as an additional component under revenue expenditure from the Respondents.

27. The Respondent MPPMCL has submitted that the Petitioner is solely responsible for financial burden on account of issuance of the 2016 Fly Ash Notification. Had the petitioner complied with the provisions of the provisions of the 1999 Fly Ash Notification (that mandated 100% ash utilization), it would have not required further capital expenditure for ash handling system i.e. ash dyke, ash bund etc.

28. The Petitioner, in response, has submitted that it is supplying dry fly ash (DFA) to the bricks/ blocks manufacturers free of cost and DFA in turn is sold to the agencies, traders and cement manufacturers. Further, ash from ash pond is also being utilised in filling abandoned mines, stone queries and low lying areas. It has also informed that it has also executed an MoU with NHAI for supplying of ash from ash pond of its coal-based thermal power plants. In line with MoEF&CC Notification dated 3.11.2009, separate account named "Ash Fund" is being maintained by the Petitioner, which includes revenue earned from sale of fly ash and expenditure towards promotion of ash utilization.

29. The Petitioner, in response to the direction of the Commission, vide affidavit dated 3.7.2020 has submitted the information/ details with respect to ash transportation, revenue earned from sale of ash station-wise and year-wise from 25.1.2016 to 31.3.2019 as under:

<b>Station</b>	<b>Ash supplied or transported to</b>	<b>Quantum of supply of ash from plant MT</b>	<b>Income from ash sales (Rs.)</b>	<b>Total transportation cost incurred (Rs.)</b>
Durgapur Thermal	Cement Plant	53915.49	170373	



Station	Ash supplied or transported to	Quantum of supply of ash from plant MT	Income from ash sales (Rs.)	Total transportation cost incurred (Rs.)
Power Station	Mine filling (ECL)	549016.01		101623733
Mejia Thermal Power Station	Cement/Non cement Plant	3607314	29711185	
	Mine filling (ECL)	7993277		2476826116
Koderma Steel Thermal Power Station	Cement/Non cement Plant	1906015	81247258	
	Low lying area development/ Mine filling	1578035.23		253361674
Durgapur Steel Thermal Power Station	Cement/Non cement Plant	2949208	196487001	
	Low lying area development	820179		41168792
Chandrapura Thermal Power Station	Cement/Non cement Plant	154812	1005246	
	Mine filling	5211556.28		714780126
Bokaro Thermal Power Station	Cement/Non cement Plant	2914	761787	
	Low lying area development/Mine filling	2484672		345703391
<b>TOTAL</b>		<b>27310914.01*</b>	<b>309382850</b>	<b>3933463832</b>

\*The quantum is inclusive of transportation to cement plant/non cement plants and mine filling/development in low lying areas.

30. The Petitioner, in this petition, has not claimed any expenses related to ash evacuation as per the 2016 Fly Ash Notification. Ash evacuation has taken place from its power plants within a distance of 100 km for the purpose of mine back-filling or low lying area development and entire transport cost for such ash evacuation is to be borne by the coal-based thermal power plant. The Petitioner has further submitted that it is only seeking in-principle approval and would claim expenditure for fly ash transportation (as per the 2016 Fly Ash Notification) in accordance with the order passed by this Commission in the present Petition.

31. Similar issue was considered by the Commission in Petition No. 172/MP/2016 wherein the Commission by order dated 5.11.2018 decided as under:





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

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

- i) Force Majeure;*
- ii) Change in Law; and*
- iii) Primary Fuel Cost.”*

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

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

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

*“14. Additional Capitalisation and De-Capitalisation*

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

*Xxxxx*

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

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

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

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

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

*30. Existing generating project has been defined as a “project” which has been declared under commercial operation on a date prior to 1.4.2014 and new project has been defined as the project achieving COD or anticipated to be achieving COD on or after 1.4.2014. In all these situations, additional capital expenditure on “change in law or compliance with any existing law” is allowed. However, the expenditure towards transportation of fly ash from the generating station to the place of users is an expenditure of a revenue nature. There is no corresponding provision under the 2014 Tariff Regulations for allowing the revenue expenses /expenses of O&M nature under “Change in Law”. It is pertinent to mention that the Hon’ble Supreme Court in PTC India*



*Limited V CERC & ors {(2010) 4 SCC 603}, had held that regulatory power can be exercised only when there is no provision in the regulations framed under section 178 of the Act. The relevant observations of the Hon'ble Supreme Court are extracted as under:*

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

*31. Accordingly, we in exercise of the regulatory power hold that the actual additional expenditure incurred by the Petitioner towards transportation of ash in terms of the MOEFCC Notification is admissible under “Change in Law” as additional O&M expenses. However, the admissibility of the claims is subject to prudence check of the following conditions/ details on case to case basis for each station:*

*(a) Award of fly ash transportation contract has been effected through a transparent competitive bidding procedure. Alternatively, the schedule rates of the respective State Governments, as applicable for transportation of fly ash.*

*(b) Details of the actual additional expenditure incurred on Ash transportation after 25.1.2016, duly certified by auditors.*

*(c) Details of the Revenue generated from sale of fly ash/fly ash products and the expenditure incurred towards Ash utilisation up to 25.1.2016 and from 25.1.2016 to till date, separately.*

*(d) Revenue generated from fly Ash sales maintained in a separate account as per the MoEF notification.”*

32. The issue in the instant petition is similar to the above case. Therefore, in line with the above order and in exercise of the regulatory power of the Commission, the Petitioner is granted liberty to approach the Commission at the time of revision of tariff of the generating stations based on true up exercise of each generating station for the period 2014-19 in terms of Regulation 8 of the 2014 Tariff Regulations along with



all details/ information as indicated in paragraph 31 of the above order dated 5.11.2018, duly certified by auditor.

33. Petition No. 101/MP/2019 is disposed of as above.

**Sd/-  
(I.S. Jha)  
Member**

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

