

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 208/MP/2018

Coram:

Shri P. K. Pujari, Chairperson

Dr. M.K. Iyer, Member

Shri I.S.Jha, Member

Date of Order: 6th January, 2020

In the matter of:

Amended Petition under Section 79(1)(b) read with Section 79(1)(f) of the Electricity Act, 2003 *inter alia* seeking compensation on account of 'Change in Law events' under Article 10 of the Power Purchase Agreement dated 19.08.2013 entered into between the Petitioner and the Respondents.

And

In the matter of:

D B Power Limited

Block 1A, 5th Floor,
Corporate Block, DB City Park,
DB City, Arera Hills,
Opp. MP Nagar, Zone I,
Bhopal – 462 016

.... Petitioner

Versus

Tamil Nadu Generation and Distribution Corporation Ltd.

6th Floor, Eastern Wing
144, Anna Salai
Chennai- 600 002
Tamil Nadu

.... Respondent

The following were present:

- (a) Shri Deepak Khurana, Advocate, DBPL.
- (b) Shri S. Vallinayagam, Advocate, TANGEDCO.

ORDER

The Petitioner, D. B. Power Limited has filed the present Petition under Section 79(1)(b) and 79(1)(f) of the Electricity Act, 2003 (hereinafter referred to as 'the Act') read with Article 10 of the Power Purchase Agreements (PPAs) dated 19.08.2013 entered into between Tamil Nadu Generation and Distribution Corporation Ltd. &



D.B. Power Limited the terms of which have been incorporated in the Power Purchase Agreement also dated 19.08.2013 executed between the Petitioner and Respondent.

2. The Petitioner has set up a 1200 MW (2×600 MW) coal based Thermal Power Project (hereinafter referred to as 'the generating station') at village Badadraha, District Janjgir Champa in the State of Chhattisgarh.

3. The dates of commercial operation of the units of the generating station of the Petitioner are as under:

Unit	Commercial Operation Date
I (600 MW)	3.11.2014
II (600 MW)	26.3.2016

Background of the Case

4. The Respondent invited a bid for supply of power on long term basis through tariff based competitive bidding process under Case-1 bidding procedure for meeting the Respondent's base load power requirements. In this regard the Respondent issue a Request for Proposal (RFP) document dated 21.02.2012. The Bid Deadline was 06.03.2013. Pursuant to the bidding process, the Petitioner was selected by the Respondent as the Seller for sale and supply of electricity for aggregated contracted capacity of 208 MW for a period of 15 years from the Scheduled Delivery Date.

5. The Petitioner has entered into the following other long-term PPAs for supply of power from the generating station:

- (a) Supply of 311 MW power from its generating station to Rajasthan Discoms through long term PPA and PSA both dated 1.11.2013 (with PTC India Ltd. as trader) under which the Petitioner is supplying 250 MW power.



(b) Supply 5% of the net generated power to the State of Chhattisgarh under the Power Purchase Agreement dated 5.10.2011 entered into between the Petitioner and Discoms of the State of Chhattisgarh.

6. The Petitioner has sought adjustment of tariff on account of events of Change in Law affecting the power project during the Operating Period in order to restore the Petitioner to the same economic position as if the change in law events had not occurred. The Petitioner had, initially, sought compensation for the following change in law events:

- (i) Additional Capital Expenditure on account of Amendment in Environment Norms;
- (ii) Revision/ addition of components in assessing the Central Excise Duty;
- (iii) Additional cost towards Fly Ash Transportation; and
- (iv) Levy of Evacuation Facility Charge.

7. However, subsequently during the course of hearing on 20.3.2019, learned counsel for the Petitioner sought permission to withdraw the prayer with regard to the approval of expenditure to be incurred on account of amendment in Environment Norms and installation of Flue Gas Desulphurisation (FGD) system (i.e. Additional Capital Expenditure on account of Amendment in Environment Norms) with liberty to approach the Commission at the appropriate stage in accordance with law. The prayer was allowed. Accordingly, the Petitioner filed an amended Petition seeking the following Change in Law events:

- (i) Revision/ addition of components in assessing the Central Excise Duty;
- (ii) Additional cost towards Fly Ash Transportation; and
- (iii) Levy of Evacuation Facility Charge.



8. Against the above background, the Petitioner, vide its amended Petition, has made the following prayers:

- (a) *Declare that the events specified in the present Petition are Change in Law events under the PPAs;*
- (b) *Allow the claims of Revision/addition of components in assessing the Central Excise Duty;*
- (c) *Allow the claim for additional cost towards Fly Ash Transportation;*
- (d) *Allow the claim on account of levy of Evacuation Facility Charge on dispatch of coal; and*
- (e) *Allow carrying cost in respect of the above claims made in prayers (b) to (d) from the date of incurring of additional amounts till the date of payment by the Respondent;*
- (f) *Pass such other and further order or orders as this Commission may deem fit and proper fit and proper under the facts and circumstances of the present case and in the interest of justice.*

9. The Petition was admitted on 17.9.2018 and notices were issued to the Respondents to file their replies to the Petition. Replies to the Petition have been filed by the Respondent on 18.1.2019. The Petitioner has filed rejoinders to the reply of Respondent on 2.5.2019. The submissions made by the Respondents in their reply and the Petitioner in its rejoinder have been dealt with in succeeding paragraphs.

Analysis and Decision

10. After going through the pleadings on record and submissions made during the hearing, the following issues arise for our consideration:

Issue No. 1: Whether the Commission has the jurisdiction to adjudicate the dispute between the Petitioner and the Respondents with regard to Change in Law events?

Issue No. 2: Whether the provisions of the PPA with regard to notice have been complied with?



Issue No. 3: What is the scope of Change in Law events under the PPA?

Issue No. 4: Whether compensation claims are admissible under Change in Law in the PPA?

Issue No. 5: Mechanism for processing and reimbursement of admitted claims under Change in Law.

Issue No. 1: Whether the Commission has the jurisdiction to adjudicate the dispute between the Petitioner and the Respondents with regard to Change in Law events?

11. The Petitioner has submitted that since it is a generating company within the meaning of Section 2(28) of the Act and is supplying power to more than one State i.e. the States of Rajasthan, Tamil Nadu and Chhattisgarh, it has a composite scheme for supply of power to more than one State. Accordingly, this Commission has jurisdiction to adjudicate the present matter under Section 79(1)(b) read with Section 79(1)(f) of the Act.

12. We have noted the submissions of the Petitioner. In addition to the PPAs dated 19.08.2013 for supply of power to the Respondent, the Petitioner is also supplying 250 MW power to the State of Rajasthan Discom through PTC under long-term PPA dated 1.11.2013 and 5% of net generated power to the State of Chhattisgarh in terms of the long-term PPA dated 5.10.2011. Thus, the Petitioner has a composite scheme for generation and sale of electricity in more than one State and as such falls within the jurisdiction of this Commission under clause (b) of sub-section (1) of Section 79 of the Act. Therefore, any dispute on tariff related matters is to be adjudicated by this Commission under clause (f) of sub-section (1) of Section 79 of the Act. Further, there is also no challenge to the exercise of jurisdiction by the Commission to adjudicate upon the present matter by the Respondents. Accordingly, we hold that this Commission has jurisdiction to deal with the present matter.



Issue No. 2: Whether the provisions of the PPA with regard to notice have been complied with?

13. The chronological dates of events with regard to Respondent- TANGEDCO are as under:

Power Supply to TANGEDCO	
Description	Dated
TANGEDCO RFP (Bid) issued	21.02.2012
Cut-off Date	27.02.2013
Bid Submission Date	06.03.2013
PPA executed on	19.08.2013
Start of Power Supply	01.08.2015

14. The claims of the Petitioner in the present Petition pertain to Change in Law events related to the PPAs dated 19.08.2013. The cut-off date for consideration of any claim for Change in Law is seven days prior to Bid Deadline i.e. 06.03.2013. Article 10.4 of the PPA executed between the between Petitioner and Respondent envisages for notification of Change in Law to the Procurers. Article 10.4 provides as under:

“10.4 Notification of Change in Law

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

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

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

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

(a) the Change in Law; and

(b) the effects on the Seller.”



15. The Petitioner has submitted that it informed the Respondents, TANGEDCO about the occurrence of Change in Law events, namely, additional cost towards Fly Ash Transportation and revision/ addition of components in assessing the Central Excise Duty vide Notice No. Ref: DBPL/PSR/TN/226 dated 17.12.2015, Ref: DBPL/PSR/TN/CL/311 dated 13.09.2016 and in respect of levy of Evacuation Charge vide Notice No. Ref: DBPL/PSR/TN/CL/453 dated 14.3.2018.

16. We have considered the submissions of the Petitioner. Under Article 10.4 of the PPA, the Petitioner is required to give notice about occurrence of Change in Law events as soon as reasonably practicable after being aware of such events which occurred after 27.2.2013. The Petitioner had given notices dated 17.12.2015, 13.09.2016 and 14.3.2018 indicating the above events under Change in Law. In the said notices, the Petitioner had apprised the Respondents about the occurrence of Change in Law events and the impact of such events on tariff. Thus, in our view, the Petitioner has complied with the requirement of notice under Article 10.4 of the PPA.

Issue No. 3: What is the scope of Change in Law under the PPA?

17. The claims of the Petitioner are with respect to events under Change in Law under Article 10 of the PPA. Article 10 of the PPA between the Petitioner and Respondent deals with events of Change in Law during the Operating Period. Article 10 provides as under:

“10. CHANGE IN LAW

10.1 Definitions

In this Article 10, the following terms shall have the following meanings:

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



** the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;*

** a change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;*

** the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;*

** a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the Seller;*

** any change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of this Agreement.*

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

10.2 Application and Principles for computing impact of Change in Law

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

10.3 Relief for Change in Law

10.3.1 Not Used.

10.3.2 During Operating Period

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

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

10.3.4. The decision of the Appropriate Commission, with regards to the determination of the compensation mentioned above in Articles 10.3.1 and 10.3.2, and the date from



which such compensation shall become effective, shall be final and binding on both the Parties subject to right of appeal provided under applicable Law.

10.5 Tariff Adjustment Payment on account of Change in Law

10.5.1 Subject to Article 10.2, the adjustment in monthly Tariff Payment shall be effective from:

(i) the date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law; or

(ii) the date of order/ judgment of the Competent Court or tribunal or Indian Governmental Instrumentality, if the Change in Law is on account of a change in interpretation of Law.

10.5.2 The payment for Change in Law shall be through Supplementary Bill as mentioned in Article 8.8. However, in case of any change in Tariff by reason of Change in Law, as determined in accordance with this Agreement, the Monthly Invoice to be raised by the Seller after such change in Tariff shall appropriately reflect the changed Tariff.”

18. Further, Article 14.3 of the PPAs provides that in case of dispute between the parties arising out of claim made by any party for any change in or determination of tariff or any matter relating to tariff, the same shall be submitted to the Appropriate Commission for adjudication. The said Article is extracted as under:

“14.3 Dispute Resolution

14.3.1 Dispute Resolution by the Appropriate Commission

14.3.1.1 (a) Where any Dispute arising from a claim made by any Party for any change in or determination of the tariff or any matter related to tariff or claims made by any party which partly or wholly relate to any change in the Tariff or determination of any of such claims could result in change in the Tariff, shall be submitted to adjudication by the Appropriate Commission. Appeal against the decisions of the Appropriate Commission shall be made only as per the provisions of the Electricity Act, 2003, as amended from time to time.”

19. A combined reading of the above provisions would reveal that the Commission has the jurisdiction to adjudicate upon the dispute between the Petitioner and Respondent with regard to Change in Law events which occurred



after the cut-off date (i.e. seven days prior the bid deadline). The events broadly covered under Change in Law are following:

- (a) Any enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any law, or
- (b) Any change in interpretation of any Law by a Competent Court of law, Tribunal or Indian Governmental Instrumentality acting as final authority under law for such interpretation, or
- (c) Imposition of a requirement for obtaining any consents, clearances and permits which was not required earlier.
- (d) Any change in the terms and conditions or inclusion of new terms and conditions prescribed for obtaining any consents, clearances and permits otherwise than the default of the seller.
- (e) Any change in the tax or introduction of any tax made applicable for supply of power by the Petitioner to TANGEDCO.
- (f) Such changes (as mentioned in (a) to (e) above) result in additional recurred and non-recurring expenditure by the seller or any income to the seller.
- (g) The purpose of compensating the Party affected by such Change in Law is to restore through Monthly Tariff Payments, to the extent contemplated in this Article 10, the affected Party to the same economic position as if such 'Change in Law' has not occurred.
- (h) The compensation for any increase/decrease in revenue or cost to the seller shall be determined and made effective from such date, as decided by the Commission which shall be final and binding on both the Petitioner and TANGEDCO, subject to right of appeal provided under Electricity Act, 2003.

20. The terms "Law" and "Indian Governmental Instrumentality" have been defined under Article 1.1 of the PPA 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;

'Indian Governmental Instrumentality' shall mean the Government of India, Governments of state(s) of Rajasthan, Delhi and Chhattisgarh and any ministry, department, board, authority, agency, corporation, commission under the direct or indirect control of Government of India or any of the above state Government(s) or both, any political sub-division of any of them including any court or Appropriate Commission(s) or tribunal or judicial or quasi-judicial body in India excluding the Seller and the Procurer(s);

21. As per the above definition, law shall include (a) all laws including electricity laws in force in India; (b) any statute, ordinance, regulation, notification, code, rule or their interpretation by Government of India, Government of Rajasthan, Government of Delhi or Government of Chhattisgarh (since the project is located in Chhattisgarh) or any Ministry, Department, Board, Body corporate agency or other authority under such Governments; (c) all applicable rules, regulations, orders, notifications by a Government of India Instrumentality; and (d) all rules, regulations, decisions and orders of the Appropriate Commission. If any of these laws affects the cost of generation or revenue from the business of selling electricity by the seller to the procurers, the same shall be considered as Change in Law to the extent it is contemplated under Article 10 of the PPA.

Issue No. 4: Whether compensation claims are admissible under Change in Law events in the PPA?

(A) Revision/ addition of components in assessing the Central Excise Duty

22. The Petitioner has submitted that the Commission in its order dated 19.12.2017 in Petition No. 229/MP/2016 directed the Petitioner to approach the Appropriate Authority in the Central Excise Department for clarification and



confirmation that SILO charges, royalty, Stowing Excise Duty, Terminal tax, Forest Cess and Chhattisgarh Paryavaran and VikasUpkar are included in the excisable value of the coal for the purpose of calculating of Excise Duty on coal and granted liberty to the Petitioner approach the Commission for appropriate relief. In pursuance of the said direction in order dated 19.12.2017, the Petitioner vide its letter dated 30.1.2018 to the Assistant Commissioner of GST, Division Bilaspur, Chhattisgarh requested for clarification regarding the applicability of Excise Duty on the additional components such as the SILO charge, royalty, Stowing Excise Duty, Terminal tax, Forest Cess and Chhattisgarh Paryavaran and Vikas Upkar. The Petitioner has submitted that the Assistant Commissioner of GST, Division I, Vyapar Vihar, Bilaspur, Chhattisgarh vide its letter dated 20.2.2018, referred to the letter dated 12.2.2018 of Office of Superintendent/GST & CEX Range-I, Central Excise Bhavan, Vyapar Vihar, Bilaspur, Chhattisgarh and stated that the said letter is self-explanatory to answer the query of the Petitioner. The letter dated 12.2.2018 of the Office of Superintendent/GST & CEX Range-I, Central Excise Bhavan, VyaparVihar, Bilaspur, Chhattisgarh states that SECL had started paying Excise Duty on additional components like royalty, Stowing Excise Duty, Terminal tax, Forest Cess, Paryavaran, Vikas Upkar. It further states that the Notice demanding excise duty on all the above components has been confirmed by the Adjudicating Authority.

23. The Respondent, TANGEDCO vide reply dated 18.1.2019 have submitted that the claim made by the petitioner for revision/addition of components in assessing the Central Excise Duty is not maintainable. This issue has already been decided by this Commission in Petition No. 229/MP/2016.

24. The Petitioner vide its rejoinder dated 3.5.2019 to the reply of Respondent has submitted as under:



a) That the Commission order dated 19.12.2017, the Petitioner was directed to approach the appropriate authority in the Excise Department for clarification and if it was confirmed that SILO charges, royalty, stowing excise duty, terminal tax, forest cess and Chhattisgarh Paryavaran and Vikas Upkar are included in the excisable value of the coal for the purpose of calculating of excise duty on coal, the Petitioner was given liberty to approach the Commission for appropriate directions. Accordingly, the Petitioner sent a letter to the Assistant Commissioner of GST, Division I, Vyapar Vihar, Bilaspur, Chhattisgarh requesting for a clarification regarding the applicability of Excise Duty on the additional components such as the SILO charge, royalty, stowing excise duty, terminal tax, forest cess and Chhattisgarh Paryavaran and Vikas Upkar. It would be relevant to note herein that vide letter dated 12.02.2018, the Office of Superintendent/ GST & CEX Range-I, Central Excise Bhavan, Vyapar Vihar, Bilaspur stated that SECL had started paying Excise Duty on additional components like royalty, stowing excise duty, terminal tax, forest cess, Paryavaran Vikas Upkar. It further states that the Notice demanding excise duty on all the above components has been confirmed by the Adjudicating Authority. Thus, the clarification in terms of the Order dated 19.12.2017 was sought by the Petitioner and the position that emerges is that the additional components are included in the excisable value of the coal for the purpose of calculating of excise duty on coal. Consequently, the impact of the same ought to be considered and amount to be reimbursed to the Petitioner herein.

b) It is further relevant to note that the decision for inclusion of the above cited components in the assessable value of coal is made under Section 4 of the Central Excise Act, 1944. In terms of the provisions of the Central Excise Act,



1944, the price-cum-duty of excisable goods sold by the assessee shall be the price actually paid to him for the goods sold and the money value of additional considerations, flowing from the buyer to assessee in connection with the sale of such goods. Thus, all components indicated by SECL for the computation of assessable value of coal such as royalty, stowing excise duty, terminal tax, forest cess, Paryavaran, Vikas Upkar are in the nature of price-cum-duty and considered as part of the assessable value of coal. Thus, it is most humbly submitted that the revision/addition of components in assessing the Central Excise Duty is a Change in Law event within the meaning of Article 10 of the Power Purchase Agreement and merits allowance by this Commission.

25. We have considered the submissions made by the Petitioner and the Respondent. The Commission vide order dated 19.12.2017 in Petition No. 229/MP/2016 for the same parties has taken a view on the Central Excise Duty. The relevant extract of the order is below:

“61.....In our view, the notice dated 25.3.2015 issued by South Coal India Limited cannot be considered as Change in Law and therefore, while assuming the determined price of coal for the purpose of Central Excise Duty, royalty, stowing excise duty, transportation charges, sizing charges and other charges shall not be included. The excise duty shall be reimbursable on the base price of coal. As regards the inclusion of SILO charges, royalty, stowing excise duty, terminal tax, forest cess and Chhattisgarh Paryavaran and Vikas Upkar for determining excisable value of coal, the Petitioners are directed to approach the Appropriate Authority in the Central Excise Department for clarification and if it is confirmed that SILO charges, royalty, stowing excise duty, terminal tax, forest cess and Chhattisgarh Paryavaran and Vikas Upkar are included in the excisable value of the coal for the purpose of calculating of excise duty on coal, the Petitioners may approach the Commission for appropriate directions.”

26. We have noticed that “*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. Further, this issue was considered by the Appellate Tribunal in its judgment dated 14.8.2018 in Appeal No. 119 of 2016 (M/s. Adani Power



Rajasthan Ltd. Vs. Rajasthan Rajya Vidyut Vitran Nigam Limited) where a similar issue arose for interpretation in the context of PPA for generation and sale of electricity by a generating company to distribution companies. The relevant portion of the said judgment is extracted as under:

“11. (c) Before discussing the issues there is a need to address a common issue raised by the Discoms related to allowance of tax under Change in Law in terms of the PPA. According to the Discoms that as per the 5th bullet of the Article 10.1.1 of the PPA change in tax or introduction of any new tax is only applicable to supply of power which also means sale of power if definition of supply is taken in terms of the Act. The Discoms have contended that if there is specific provision dealing with the tax under Change in Law then other provisions of Change in Law Article are not allowed to deal with the tax and as such no other tax implications are allowed to be covered under Change in Law under the PPA. The Discoms have also relied on some judgements of Hon`ble Supreme Court on this issue. We have gone through the said judgements and we observe that according to the judgements relied by the Discoms, the taxes are dealt in a particular clause of a contract then there is no scope for considering taxes under other clauses of a contract.

(d) APRL has submitted that the generator undertakes many activities to ensure supply of power to the Discoms. APRL has relied on the judgement of Hon`ble Supreme Court in case of State of A.P. v. NTPC (2002) 5 SCC 203 wherein it has been held that the production (generation), transmission, delivery and consumption are simultaneous, almost instantaneous. According to the said judgement, the applicable taxes on inputs for generation of power can be construed to be taxes on supply of power. APRL has further contended that if the contention of the Discoms is accepted then the Change in Law provision would be applicable during the Operating Period and the applicability of the said provision will become redundant during Construction Period. There is some strength in the contention of APRL as there will be no applicability of Change in Law provisions if there are changes in tax/duties/levies etc. rates or imposition of new tax/duties/levies etc. during Construction Period and on input costs related to power generation.

(e) APRL has further contended that the reliance of the Discoms on the maxim “expressum facit cessare tactium” meaning when express inclusions are specified, anything which is not mentioned explicitly is excluded is misplaced as the Hon`ble Supreme Court in case of Assistant Collector of Central Excise Calcutta Division v. National Tobacco Company of India Ltd. (1972) 2 SCC 560 has held that the rule of prohibition by necessary implication could be applied only where a specified procedure is laid down for performance of duty or where there is an express prohibition.

(f) The Discoms have also reproduced the definition of Change in Law under different PPAs under Section 63 of the Act. We have gone through the said provisions and we find that the other provisions of the PPA are similar to that in the other PPAs under Section 63 of the Act except the fifth bullet which is additional specifically covering tax on supply of power. The judgements of the Hon`ble Supreme Court relied upon by the



Discoms were under different context and could not be equated to the scheme of power procurement by Discoms under Section 63 of the Act which is based on guidelines issued by GoI under different scenarios wherein the treatment of taxes depends upon the specific conditions of the RFP and tariff quotes by the bidders.

(g) In view of our discussions as above and after duly considering the earlier judgements of this Tribunal, we are of the considered opinion that any change in tax/levies/ duties etc. or application of new tax/levies/ duties etc. on supply of power covers the taxes on inputs required for such generation and supply of power to the Discoms.”

27. Therefore, as per the above judgment, “*any change in tax/ levies/ duties, etc. or application of new tax/ levies/ duties etc. on supply of power covers the taxes on inputs required for such generation and supply of power to the Discoms*”. Similarly, any change in taxes or introduction of any tax covers the inputs required for supply of power by the seller. The generating station has been established by the Petitioner for the purposes of supply of power to the various procurers with whom the Petitioner has entered into PPAs. Therefore, all expenditures incurred for establishing the generating station go towards providing supply of power to the Procurers. If recurring or non-recurring expenditure is required to be incurred by the Petitioner on account of occurrences of events covered under Article 10.1.1 of the PPA, then such expenditure will be admissible under change in law to the Petitioner as they are necessary input costs for supply of power. In our view, last bullet under Article 10.1.1 which provides for “the change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of this Agreement” cannot be read in isolation and has to be read harmoniously with the provision that such occurrences should have the effect of “resulting into any recurring or non-recurring expenditure by the Seller or any income to the Seller”. Therefore, the contention of the Respondents is not sustainable.



28. The Petitioner have submitted that pursuant to the Commission's direction dated 19.12.2017, it approached the Assistant Commissioner of GST, Bilaspur, Chhattisgarh seeking clarification regarding the applicability of Excise Duty on the additional components such as the SILO charge, royalty, stowing excise duty, terminal tax, forest cess and Chhattisgarh Paryavaran and Vikas Upkar. In response, the Assistant Commissioner of GST, Bilaspur, Chhattisgarh vide its letter dated 20.02.2018 replied as under:

*"Sub: Applicability of Duty on additional components like Royalty, Stowing Excise Duty, Terminal Tax, Forest Cess, CG Paryavaran & Vikas Upkar - Reg
Please refer to your letter dtd.nil received in this office on 30.01.2018 on the above subject.*

2. In this regard please find enclosed a copy of letter C. No. CGST/R-I/MiscCorres/Bil/2017/336 dtd.12.02.2018 of Superintendent, CGST, Range-I, Bilaspur which is self-explanatory."

29. The letter of Superintendent, CGST and Excise, Range-I, Bilaspur, Chhattisgarh dated 12.2.2018 as relied upon by Assistant Commissioner reads as under:

"Sub:- Applicability of Excise Duty on additional components like Royalty, Stowing Excise duty, Terminal tax, Forest Cess, Paryavaran, Vikas upkar reg:-

Kindly refer to your letter F. No. IV(16) 30-05/Tech/MISC Report/01/17-18 dt 04.02.2018 on the above subject.

It is to submit that M/s SECL has started paying Excise duty on like Royalty, Stowing Excise duty, Terminal tax, Forest Cess, Paryavaran, Vikasupkar under protest after Show Cause Notice for non-payment of Excise Duty has been issued to them. The Show Cause Notice demanding duty on all the above charges has been confirmed by the Adjudicating Authority. M/s SECL has appealed against the OIO's. The appeal is pending for decision with CESTAT.

Yours faithfully,

Sd/-

Superintendent (CGST& Excise)

Range-I Bilaspur"



30. In the above letter, the Superintendent, CGST and Excise, Range –I, Bilaspur, Chhattisgarh has confirmed the payment of Excise Duty on ‘Royalty, Stowing Excise duty, Terminal tax, Forest Cess, Paryavaran, Vikasupkar’ by SECL albeit under protest and has stated that the Show Cause Notice demand Excise Duty on all the above charges has been confirmed by the Adjudicating Authority and subject to pending appeal before CESTAT.

31. Further, the Commission had considered the letters of similar nature as provided by the Office of the Assistant Commissioner, Custom and Central Excise Bilaspur, Chhattisgarh in case of GMR Warora Energy Limited in Petition No. 1/MP/2017 and by the Office of the Superintendent, Central Goods & Service Tax Range-III, Korba, Chhattisgarh in case of Bharat Aluminium Company Limited in Petition No. 18/MP/2017. Based on the letter received in case of GMR Warora Energy Limited, the Commission in its order dated 16.3.2018 in Petition No. 1/MP/2017 examined the provisions of Section 4 of the Central Excise Act, 1944 and held as under:

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

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



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

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

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

162. Accordingly, we allow all the charges given in the letter dated 23.3.2017 of the Superintendent (Tech.) Office of the Assistant Commissioner, Custom and Central Excise Bilaspur, Chhattisgarh for the purpose of inclusion in the assessable value of coal for computation of Excise Duty, subject to the condition with regard to Royalty. “

32. Based on the decision taken by the Commission in the above case, we allow all the components mentioned in the Notice of SECL dated 25.3.2015 for the purpose of inclusion in the assessable value of coal for computation of Central Excise Duty. However, it is clarified that allowing these charges for inclusion in the assessable value for computation of Central Excise Duty shall not be construed that these charges are allowed under Change in Law. Further, inclusion of Royalty is allowed subject to the pending adjudication before the Hon'ble Supreme Court as to whether royalty is in the nature of tax.

33. Accordingly, the Petitioner shall be entitled to recover the expenditure incurred towards change in Central Excise Duty due to change in components for the purpose of calculating Central Excise Duty from TANGEDCO in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of electricity to TANGEDCO. If the actual generation is less than the



scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of Central Excise Duty.

(B) Levy of Evacuation Facility Charge

34. The Petitioner has submitted that as per the CIL's price Notification No. CIL: S&M: GM (F): Pricing 2017/1005 dated 19.12.2017, a charge of Rs.50 per MT will be levied as 'evacuation facility charges' on all dispatch of coal w.e.f. 20.12.2017. The Petitioner has submitted that the notifications issued by the Coal India Limited are in effect the mandate/directive of the Central Government and are statutory in nature, covered under Change in Law in the PPA. The Petitioner has further submitted that in terms of Section 18 of the Mineral (Development and Regulation) Act, 1957, the Central Government is empowered to take necessary steps for systematic development of minerals (which includes coal). Therefore, the levy of Evacuation Facility Charge on dispatch of coal is, in effect, regulated by the Central Act. The Petitioner has submitted that CIL is a governmental instrumentality within the provisions of the PPA and the Evacuation Facility Charge on dispatch of coal is squarely covered under Article 10 of the PPA and is a Change in Law event. The Petitioner has submitted that Hon'ble Supreme Court in its judgment dated 11.4.2017 in the case of Energy Watchdog v. CERC and Ors. [2017 SCC Online SC 378] has also held that notifications and instructions, etc. issued under a statute have force of law. Accordingly, notifications/instruction issued by Coal India Limited qualifies as Change in Law.

35. The Respondent states that the claim on account of levy of Evacuation Facility Charge on dispatch of coal is not maintainable. As per the definition of "Indian Governmental Instrumentality", a body corporate under Government of India is an Indian Government Instrumentality. Coal India Limited is a body corporate



under the Government of India and a Governmental Instrumentality under the PPA. However, all circulars and notifications issued by Coal India Limited shall not be included under Change in Law. As per the term "Law", notifications by the Indian Governmental Instrumentality should be pursuant to any statute, ordinance, regulation or code. The decision of GM (M&S) Marketing & Sales is not an Act, Ordinance, Regulations or Code amounting to change in law. Coal India Limited took a commercial decision. DBPL has to deal with such commercial charges as per terms of FSA signed by it with Coal India Limited. Hence, introduction of Evacuation Change by Coal India cannot be treated as Change in Law under the PPAs of DBPL. The contract entered into by the generator is one under section 63 of Act, 2003 and not section 62.

36. The Petitioner in its rejoinder mainly submitted as under:

- a) The Respondent has admitted that Coal India Limited is a Government Instrumentality. It is settled law that Government Instrumentalities which carry out business falling under various Ministries and Department of both Government of India and State Government are the creations of Government of India, Parliament and State Assembly by making enactments and therefore their formations/notifications have force of law. Thus, the averment of the Respondent that circulars/ notifications passed by the Government Instrumentality shall not be included in Change in Law, is contrary to the established legal principles and is thus, erroneous and misconceived. It is further pertinent to mention that the notification/ circular passed by the Coal India Limited is the decision of the Government and not any of its employee/ officer, as averred by the Respondent. As brought out above, the levy of any



charge pursuant to a notification of the Government Instrumentality can by no stretch of imagination be considered as a mere commercial arrangement. It would be further relevant to note that the Fuel Supply Agreement does not provide for or contemplate any levy of evacuation charges and thus, cannot be considered as a commercial charge under the FSA.

- b) It has been further averred by the Respondent that the contract entered into between the generator is one under Section 63 of the Act and not in Section 62. In this regard, it is submitted that the above purported distinction is wholly irrelevant for the purposes of determining the claim under this head. The claims raised by the Petitioner under the present Petition are raised in terms of Article 10 of the PPA. It is further an admitted position that the Evacuation Charges are levied pursuant to the notification dated 19.12.2017 issued by the Coal India Limited, which is a government instrumentality. It is further an admitted position that the subsequent introduction of evacuation facility charge has an adverse financial impact on the Petitioner. Thus, the levy of Evacuation Facility Charge is a Change in Law event within the meaning of Article 10 of the PPA and thus, deserves to be allowed by this Commission.

37. We have considered the submissions of the Petitioner and the Respondent and have perused the price Notification dated 19.12.2017 issued by Coal India Limited with regard to levy of the Evacuation Facility Charges. The Petitioner has submitted that Coal India Limited is an Indian Government Instrumentality and the notification issued by Coal India Limited with regard to Evacuation Facility Charges is covered under the definition of Law and any change in such charges is covered under the Change in Law. On the other hand, TANGEDCO has submitted that the



said notification does not amount to “Law” under the PPA as it is not statutory in nature and has been issued under the commercial activities undertaken by the Government Company and not in the exercise of sovereign power.

38. We note that the issue of levy of Evacuation Facility Charges by CIL has been dealt with by the Commission in its order dated 2.4.2019 in Petition No. 72/MP/2018 and the Commission has allowed levy of Evacuation Facility Charges by CIL as Change in Law event. The relevant portion of the said order dated 2.4.2019 is extracted as under:

“42. We have considered the submission made by the Petitioner. We notice that as on the cut-off date of the respective PPAs there was no Evacuation Facility Charges levied by CIL and subsequently Coal India Ltd. vide its price notification no CIL:S&M:GM(F)/Pricing/2017/1005 dated 19.12.2017 notified the levy of 'evacuation facility charges' at the rate of Rs.50/MT on coal. The Tribunal vide its judgement dated 21.12.2018 had concluded that "departments, corporations/ companies like Coal India Limited or Indian Railways formed under different Statutes are Indian Government Instrumentality". In view of the submissions of the Petitioner and in view of the said judgment, we note that the Evacuation Facilities Charges are levied pursuant to notification issued by CIL which is an Indian Governmental Instrumentality in terms of the PPAs. The Evacuation Facility Charges were not possible to be envisaged at the time of bid submission by the Petitioner and its subsequent introduction has an adverse financial impact on the Petitioner which is one of the requirements of claiming relief for change in law event. We further note that the Tribunal in the case of Sasan Power Ltd. V. CERC [2017 ELR(APTEL)508] has held that as long as the conditions of Change in law are satisfied, the affected party will be entitled to relief. In the present case, the introduction of Evacuation Facility Charges satisfies the criteria of change in law events as contained in the respective PPAs. Further, Evacuation Facilities Charges is not part of the escalation index for coal notified by this Commission. Hence, we are of the view that introduction of Evacuation Facility Charges beyond cut-off date of the respective PPAs is admissible to the Petitioner as a change in law event.

43. Accordingly, the Petitioner is entitled to recover the Evacuation Facility Charges as per applicable rates in proportion to the coal as per the parameters of the applicable Tariff Regulations of the Commission or coal actually consumed whichever is lower, for generation and supply of electricity to the discoms concerned. As on cut-off dates of the Bihar and Haryana PPAs, Evacuation Facilities Charges were Nil. Thereafter, the applicable rates of Evacuation Facilities Charges shall be used based on the relevant date/s. The Petitioner is directed to furnish along with its monthly regular and/or supplementary bill(s) and computations duly certified by the auditor to the discoms



concerned. The Petitioner and the discoms concerned are directed to carry out reconciliation on account of these claims annually.”

39. The above decision of the Commission is also applicable in the present case. CIL being an Indian Government Instrumentality, its Notification dated 19.12.2017 with respect to levy of Evacuation Facility Charges on coal price constitutes Change in Law event in terms of Article 10 of the PPAs. Further, the Evacuation Facility Charges is not a part of the escalation index notified by this Commission periodically. Therefore, the introduction of Evacuation Facility Charges by CIL beyond the cut-off date is admissible to the Petitioner as Change in Law.

40. Accordingly, the Petitioner shall be entitled to recover Evacuation Facility Charges from the TANGEDCO in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of electricity to TANGEDCO. If the actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of Evacuation Facility Charges. The Petitioner is directed to furnish along with its monthly regular and/or supplementary bill(s), computations duly certified by the auditor to TANGEDCO. The Petitioner and the TANGEDCO are directed to carry out reconciliation on account of these claims annually.

(C) Additional cost towards fly ash transportation

41. The Petitioner has submitted that pursuant to the liberty granted vide order of the Commission dated 19.12.2017 in Petition No. 229/MP/2016, it has approached



the Commission seeking compensation on account of additional cost towards fly ash transportation along with information and documents as sought by the Commission. The Petitioner has submitted that the Commission in the aforesaid order had declared that additional cost incurred on fly ash transportation on account of MoEF&CC Notification dated 25.1.2016 is a change in law event within the meaning of Article 10 of the PPA and, therefore, the Petitioner ought to be compensated under Article 10 of the PPA in respect of the expenditure incurred by it.

42. The Respondents, TANGEDCO vide its reply has mainly submitted as under:

- a) The claim for additional cost towards Fly Ash Transportation in the petition is not maintainable because the petitioner did not award the fly ash transportation contract through a transparent competitive bidding procedure. The petitioner never informed the answering respondent of the bidding process undertaken by it for awarding fly ash transportation contract. No communication indicating the price discovered through competitive bidding process for award of contract to transport fly ash made to the answering respondent is brought on record by the petitioner in the present petition. No document to show that the revenue generated from fly ash sales is maintained by the petitioner is brought on record by the petitioner for the period after 25.01.2016. This notification came into effect 10 months prior to the filing of Petition No. 229/MP/2016 dated 07.11.2016. The petitioner claims to have floated tender for awarding contract to transport fly ash on 05.12.2015, 29.04.2016 and 11.03.2017 but document was brought on record by the Petitioner in Petition No. 229/MP/2016.
- b) The petitioner does not qualify for the claim of fly ash transportation. Orders in Petition No. 229/MP/2016 were passed on 19/12/2017. The petitioner cannot



bring on record the documents, which were in its possession when it made a claim in 229/MP/2016 in the present Petition. Even in a revision petition, a petitioner cannot bring on record documents which it had in its possession but did not produce the same at the time of making a claim in the original petition. The petitioner cannot be permitted to file the previously existing documents, in a fresh petition under section 79 of Electricity Act, 2003, when the issue has been decided finally by orders dated 19/12/2017. The liberty granted by this Commission cannot be availed to make a claim on the basis of documents which the petitioner admittedly had in its possession prior to and after the notification of 25.01.2016, when the same were not filed in Petition No. 229/MP/2016 on 07.11.2016. Such a claim is not permitted under law citing the liberty granted by this Commission.

43. The Petitioner vide its rejoinder dated 2.5.2019 has submitted mainly the following:

a) The averments of the Respondent apart from being baseless and misconceived are in fact contrary to documents on record. In this regard, it is reiterated that various agencies that have off-taken fly ash from Petitioner's Plant can be segregated into Cement Plant/companies and Non-Cement Plant/companies. It would be apposite to mention herein that as a matter of practice and because this market is governed and dictated by the buyer, the cement companies as an industry do not participate in the competitive bidding process but they make their own arrangement for off taking and transporting fly ash from Plants like that of the Petitioner. The supplier (Petitioner in this case) supplies fly ash to the cement companies and subsidizes the transport cost. A part of the transport cost is then reimbursed by the supplier to the cement company. The transporters are appointed



by the cement companies themselves and all negotiations with regards to the price are also done by the cement companies themselves. In line with the practice followed by the cement plants, the Petitioner, while continuing with the negotiations, entered into individual agreements with various cement companies for off take of fly ash from Petitioner's plant. After a lot of persuasion and negotiation, the price agreed in the agreements was further reduced and brought down at the time of actual payments. Pursuant to the negotiations as above, debit notes, bills and/or invoices were raised by the cement companies who have off taken ash from power plant from 30.11.2016 to 31.03.2017. The Petitioner has already placed on record all the documents, to substantiate the above claim.

b) The Petitioner also initiated competitive bidding process by issuing public notices inviting offers from eligible transporters for transportation and disposal of fly ash from Petitioner's Plant to other locations. That in pursuance of the above public notices inviting offers, various non-cement companies approached the Petitioner herein with their respective offers. The Petitioner has provided a detailed summary of the total ash transportation cost along with the present Petition. In view of the above, the averment of the Respondent that the Petitioner has not awarded the fly ash transportation through competitive bidding is wholly incorrect and contrary to the documents on record. It is submitted that the order passed by this Commission in Petition No. 229/MP/2016 does not stipulate any requirement for the Petitioner to inform the Respondent about bidding process undertaken by it and/or to send any communication indicating the price discovered through competitive bidding process for award of contract. Even the terms of the PPA do not contain any such condition. Even otherwise, the contention of the Respondent that the Petitioner ought to have given such notices is irrational and impractical, apart from being erroneous



according to the MOEF&CC notification dated 25.01.2016. It is reiterated that the Petitioner has not generated any revenue from sale of fly ash before the MoEF&CC notification dated 25.01.2016. Therefore, the question of maintaining any separate account for the revenue generated from fly ash sales does not arise. In any event, the Petitioner has not generated any revenue from fly ash sales after 25.01.2016.

c) The Commission vide order dated 19.12.2017 in Petition No. 229/MP/2016 records that "*The Petitioner is granted liberty to approach the Commission with above documents to analyse the case for determination of compensation*". Thus, the documents filed on behalf of the Petitioner are pursuant to the liberty granted by this Commission. Without Prejudice to the above, the averment of the Respondent is even otherwise factually wrong as the expression of interest/ public notice dated 29.04.2016 and 11.03.2017 were filed by the Petitioner along with its Affidavit dated 04.09.2017, filed pursuant to the Order of this Commission on 27.07.2017. It is reiterated that all the documents filed along with the Petition are pursuant to the liberty granted by this Commission. It is further submitted that the liberty granted by this Commission is not conditional and thus, the averments of the Respondent are erroneous and misconceived. Without Prejudice to the above, it is submitted that the assertion of the Respondent with respect to the non-filing of documents existing prior to the filling of the Petition is vague and baseless. Even otherwise, the Petitioner can file documents along with a fresh Petition. Thus, it is submitted that the claim for compensation of additional cost towards fly ash transportation is a Change in Law event within the meaning of Article 10 of the Power Purchase Agreement and merits allowance by this Commission

44. We have examined the submissions made by the Petitioner and the TANGEDCO.



The Petitioner had approached the Commission seeking declaration that the amendment of notification dated 3.11.2009 vide notification dated 25.01.2016 by MoEF&CC is a Change in Law event within the meaning of Article 10.1.1 of the PPA. The Petitioner had submitted that due to said increase in the cost of operation and maintenance, the cost of supply of power by the Petitioner to the Respondent under the PPA had increased and thus the Petitioner needs to be compensated as per Article 10.3 read with Article 10.5 of the PPA. While granting in-principle approval to the additional cost towards fly ash transportation on account of Notification dated 25.1.2016, the Commission in its order dated 19.12.2017 in Petition No. 229/MP/2016, granted liberty to the Petitioner to approach the Commission with certain information/documents to analyse the case for determination of compensation. Relevant portion of the order dated 19.12.2017 is extracted as under:

“105. We have considered the submissions of the Petitioner, and the Respondent and perused the documents on record. The petitioner vide its affidavits dated 20.06.2017 and 4.9.2017 has submitted the details regarding expenditure towards Fly Ash Transportation along with revenue earned and the contract agreement with agencies who have procured ash from the plant . The petitioner has also submitted the copies of bills, debit notes/ or invoices. As on cut-off date, there was no direction with regard to utilization of fly ash under Environment (Protection) Act, 1986. Subsequently, Ministry of Environment and Forests, Govt. of India vide its Notification dated 3.11.2009 issued the directions regarding utilisation of fly ash under the Environment (Protection) Act, 1986. The Ministry of Environment and Forests, Govt. of India vide its Notification No. S.O. 254(E) dated 25.1.2016 amended the Environment (Protection) Rules, 1986 and imposed the additional cost towards fly ash transportation.

Relevant portion of said Rules is extracted as under:

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



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

a) Award of fly ash transportation contract through a transparent competitive bidding procedure so that a reasonable and competitive price for transportation of ash/Metric Tonne is discovered;

b) Any revenue generated/accumulated from fly ash sales, if CoD of units/ station was declared before the MoEF notification dated 25.1.2016, shall be adjusted from the relief so granted;

c) Revenue generated from fly ash sales must be maintained in a separate account as per the MoEF notification; and

d) Actual expenditure incurred as claimed should be duly certified by auditors and the same should be kept in possession so that it can be produced to the beneficiaries on demand.”

45. As regards condition (a) above in our order dated 19.12.2017, the Petitioner has submitted that various agencies that have off-taken fly ash from the Petitioner's generating station can be divided into two groups; cement companies and non-cement companies. Petitioner has further submitted that as a matter of practice, the cement companies do not participate in competitive bidding process but they make their own arrangement for off-taking and transporting fly ash from generating stations like that of the Petitioner. In line with the practice followed by the cement companies, the Petitioner entered into individual agreements with various cement companies for off-take of fly ash from its generating station. The Petitioner has contended that after initial persuasions and negotiations, the rates agreed in the agreements were further reduced and brought down at the time of actual payments. The Petitioner has placed on record the copies of various agreements entered into between the Petitioner and cement companies. The Petitioner has also placed on record the various debit notes, bills and/or invoices



raised by the cement companies who have off-taken ash from the generating stations from 30.11.2016 to 31.3.2017.

46. The Petitioner has further submitted that it had initiated competitive bidding process by issuing public notice inviting offers from eligible transporters for transportation and disposal of fly ash from its generating station. In response, various non-cement companies approached the Petitioner with their respective offers and after negotiating with them, they were awarded contracts for transportation and disposal of fly ash. The Petitioner has furnished the copies of the offers submitted by non-cement companies and a summary of total ash transportation cost for the period of 25.1.2016 to 31.3.2017 as incurred by it.

47. With regard to conditions (b) and (c) above of our order dated 19.12.2017, the Petitioner has submitted that units of its generating station have achieved COD on 3.11.2014 and 26.3.2016 respectively and the Petitioner has started supplying power to TANGEDCO w.e.f. 1.8.2015 and to Rajasthan Discoms through PTC w.e.f. 30.11.2016. According to the Petitioner, since it has not generated any revenue from sale of fly ash before the issuance of MoEF&CC Notification dated 25.1.2016, the question of maintaining any separate account for revenue generated from fly ash sales does not arise.

48. As regards condition (d) above of our order dated 19.12.2017, the Petitioner has undertaken to keep in its possession the certificates of auditors duly certifying the expenditure incurred toward fly ash to be produced before the beneficiaries on demand.

49. On the other hand, the Respondents, TANGEDCO have submitted that since



fly ash disposal has not been carried out through the competitive bidding route and that it has been done through negotiated route, the Petitioner is not entitled for additional cost towards fly ash transportation. The Respondents have submitted that in terms of the Commission's order dated 19.12.2017 in Petition No. 229/MP/2016, the admissibility of the claim regarding fly ash transportation was subject to the condition that the Petitioner shall ensure "*award of fly ash transportation contract through a transparent competitive bidding procedure so that a reasonable and competitive price for transportation of ash/Metric Tonne is discovered*".

50. We observe that the Petitioner had invited bids for disposal of fly ash. While the non-cement companies submitted the bids and were selected on the basis of such bids, the cement companies did not participate in the bids. Consequently, the Petitioner could not fulfil the requirement of the order of the Commission dated 19.12.2017 related to award of contract on basis of competitive bidding as regards to cement companies. The Petitioner has contended that since the cement companies as an industry do not participate in competitive bidding process but they make their arrangements for off-taking and transporting fly ash from the generating stations like that of the Petitioner, the Petitioner entered into arrangements with various cement companies for off take of fly ash from its generating station. The Petitioner negotiated with the cement companies and awarded the contracts accordingly. The Petitioner has submitted that the rate agreed in the agreements was further reduced and brought down at the time of actual payments.

51. The Petitioner has placed on record agreements dated 1.9.2014, 24.8.2015, 1.11.2015 entered into with cement companies, namely Ambuja Cements Limited, Shree Cement Limited, Emami Cement Limited respectively for transportation and

disposal of ash and bill/ invoices/ debit notes, etc. Perusal of agreements reveals that the rate of transportation to the cement companies (decided through negotiations) is less than rate of transportation to the non-cement companies (arrived at through bidding process). We also note that the agreements entered into by the Petitioner with the cement companies were prior to the order of the Commission dated 19.12.2017 in Petition No. 229/MP/2016. Taking into account the Petitioner's contention that the cement companies as an industry do not participate in bids for transportation of fly ash, the fact that the rates are lower in case of cement companies compared to non-cement companies and that the agreements with cement companies were entered into prior to the order of the Commission, we are of the view that the objective of keeping the cost of transportation reasonable is fulfilled. In our opinion, therefore, the cost incurred in respect of non-cement companies through the negotiated route also needs to be allowed.

52. Accordingly, the Petitioner shall be entitled to recover transportation costs on account of fly ash disposal to cement companies and non-cement also in compliance with notification of MoEF&CC dated 25.1.2016. To claim this expenditure, the Petitioner shall furnish a copy of all the agreements entered into with cement and non-cement companies to the TANGEDCO. The Petitioner shall also share copy of the bids floated for disposal of fly ash from its generating station and the list of bidders pursuant to the bid. These costs shall be recovered from the TANGEDCO in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of electricity to TANGEDCO. If the actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of transportation of fly



ash. The Petitioner is directed to furnish along with its monthly regular and/or supplementary bill(s), computations duly certified by the auditor to TANGEDCO. The Petitioner and the TANGEDCO are directed to carry out reconciliation on account of these claims annually.

53. We further direct that the Petitioner should keep on floating bids for disposal of fly ash at regular intervals and if the cement and non-cement companies participate in those bids, the rates discovered therein shall be considered for reimbursement by the TANGEDCO.

(D) Carrying Cost

54. The Petitioner in its submission has sought that it is entitled to carrying cost/ interest on all additional amounts in respect to Central Excise Duty, Fly Ash Transportation Cost, Levy of Evacuation Facility Charge from the date of applicability of the respective Change in Law events on account of delay in recovery of amount already paid so that its economic position is restored. The relief under Article 10 of the PPA necessarily includes carrying cost as Article 10 stipulates that the affected party is to be restored to the same economic position as if such Change in Law had not occurred. Carrying cost is in the nature of compensation of time value of funds deployed on account of Change in Law events and in case carrying cost is not awarded, the affected party would not be restored to the same economic position.

55. The Respondent, TANGEDCO in its reply states that the petitioner is not entitled to any carrying costs in respect of the above claims made in prayers (b) to (d) from the date of incurring of additional amounts till the date of payment by the Respondent. There is no provision in the PPA to allow carrying cost on the amount covered under Change in Law till its determination by the Commission. The issue of



carrying cost was not claimed by the petitioner in Petition No. 229/MP/2016. A claim which was neither claimed nor granted by this Commission cannot be sought for by the petitioner

56. The Petitioner in its rejoinder to the reply of Respondent submitted that the provision 10.5.1 of the PPA would make it abundantly clear that the adjustment in monthly tariff payment on account of change in law shall be effected from the date in change in law. The above clause is an in-built restitutionary principle which compensates the party affected by such change in law and which must restore, through monthly tariff payments, the affected party to the same economic position as if such change in law has not occurred. Thus, the Petitioner is entitled to the carrying cost from the date of the occurrence of the Change in Law event till the date, the actual payments are made. The Respondent's averment that the Petitioner has not prayed for carrying cost in its Petition No. 229/MP/2016 is factually incorrect. the prayer made by the Petitioner is extracted herein below:

"b. Direct the Respondent to make payment of Rs. 90.31 crores to the Petitioner towards the additional expenditure incurred by the Petitioner on account of the said Change in Law events, in supplying power to the Respondent under the PPA from 01.08.2015 to 31.07.2016 along with interest @ 1.25% per month from the date(s) on which the said amount(s) became due to the Petitioner till the actual realization of the same."

57. Thus, the Petitioner had prayed for interest/ carrying cost in its Petition No. 229/MP/2016 and thus, the averment of the Respondent is factually incorrect and misleading. In any event, the rejection of carrying cost in Petition No. 229/MP/2016 with respect to certain change in law events, in no event precludes the Petitioner to claim change in law events in the present Petition. The Hon'ble Appellate Tribunal has already held in similar matters that carrying cost in the PPAs (Section 63) is payable to the generators.

58. We have considered the submissions of the Petitioner and the TANGEDCO. The Petitioner has submitted that it should be restored to the same economic position in terms of Article 10.2.1 as if the Change in Law event had not occurred. APTEL in its judgment dated 13.4.2018 in Appeal No.210/2017 (APL v CERC &ors) has allowed the carrying cost on the claim under change in law and held as under:

“ix. In the present case we observe that from the effective date of Change in Law the Appellant is subjected to incur additional expenses in the form of arranging for working capital to cater the requirement of impact of Change in Law event in addition to the expenses made due to Change in Law. As per the provisions of the PPA the Appellant is required to make application before the Central Commission for approval of the Change in Law and its consequences. There is always time lag between the happening of Change in Law event till its approval by the Central Commission and this time lag may be substantial.....We also observe that this Tribunal in SLS case after considering time value of the money has held that in case of re-determination of tariff the interest by a way of compensation is payable for the period for which tariff is re-determined till the date of such re-determination of the tariff. In the present case after perusal of the PPAs, we find that the impact of Change in Law event is to be passed on to the Respondent Nos. 2 to 4 by way of tariff adjustment payment as per Article 13.4 of the PPA

.....From the above it can be seen that the impact of Change in Law is to be done in the form of adjustment to the tariff. To our mind such adjustment in the tariff is nothing less than re-determination of the existing tariff.

x. Further, the provisions of Article 13.2 i.e. restoring the Appellant to the same economic position as if Change in Law has not occurred is in consonance with the principle of ‘restitution’ i.e. restoration of some specific thing to its rightful status. Hence, in view of the provisions of the PPA, the principle of restitution and judgement of the Hon’ble Supreme Court in case of Indian Council for Enviro-Legal Action vs. Union of India &Ors., we are of the considered opinion that the Appellant is eligible for Carrying Cost arising out of approval of the Change in Law events from the effective date of Change in Law till the approval of the said event by appropriate authority. It is also observed that the Gujarat Bid-01 PPA have no provision for restoration to the same economic position as if Change in Law has not occurred. Accordingly, this decision of allowing Carrying Cost will not be applicable to the Gujarat Bid-01 PPA.

xi. Accordingly, this issue is decided in favour of the Appellant in respect of above mentioned PPAs other than Gujarat Bid –01 PPA.”

59. The aforesaid judgment of the Appellate Tribunal was challenged before the Hon’ble Supreme Court wherein the Hon’ble Supreme Court vide its judgment dated 25.2.2019 in Civil Appeal No. 5865 of 2018 and 6190 of 2018 (Uttar Haryana Bijli Vitran Nigam limited & Anr. Vs. Adani Power Ltd & Ors.) has upheld the directions of



payment of carrying cost to the generator on the principles of restitution and 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(i). 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.”

60. Article 10.2 of the PPA dated 19.08.2013 between Petitioner and Respondent in the instant Petition provides as under:

“10.2 Application and Principles for computing impact of Change in Law

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

61. In view of the provisions of the PPA, the principles of restitution and the above judgment of the Hon'ble Supreme Court, we are of the considered view that the Petitioner is eligible for carrying cost arising out of approved Change in Law events from the effective date of Change in Law till the actual payment to the Petitioner. Once supplementary bills are raised by the Petitioner in terms of this order, the provisions of Late Payment Surcharge in the PPA would kick in if the payment is not made by the Respondents within due date.



62. The Commission in its Order dated 17.09.2018 in Petition No.235/MP/2015 (AP(M)L vs UHBVNL & Ors.) has decided the issue of carrying cost as under: .

“24.After the bills are received by the Petitioner from the concerned authorities with regard to the imposition of new taxes ,duties and cess, etc. or change in rates of existing taxes, duties and cess, etc., the Petitioner is required to make payment within a stipulated period. Therefore, the Petitioner has to arrange funds for such payments. The Petitioner has given the rates at which it arranged funds during the relevant period. The Petitioner has compared the same with the interest rates of IWC as per the Tariff Regulations of the Commission and late payment surcharge as per the PPA as under: -

<i>Period</i>	<i>Actual interest rate paid by the Petitioner</i>	<i>Working capital interest rate as per CERC Regulations</i>	<i>LPS Rate as per the PPA</i>
<i>2015-16</i>	<i>10.68%</i>	<i>13.04%</i>	<i>16.29%</i>
<i>2016-17</i>	<i>10.95%</i>	<i>12.97%</i>	<i>16.04%</i>
<i>2017-18</i>	<i>10.97%</i>	<i>12.43%</i>	<i>15.68%</i>

25. It is noted that the rates at which the Petitioner raised funds is lower than the interest rate of the working capital worked out as per the Regulations of the Commission during the relevant period and the LPS as per the PPA. Since, the actual interest rate paid by the Petitioner is lower, the same is accepted as the carrying cost for the payment of the claims under Change in Law.

26.The Petitioner shall work out the Change in Law claims and carrying cost in terms of this order. As regards the carrying cost, the same shall cover the period starting with the date when the actual payments were made to the authorities till the date of issue of this order. The Petitioner shall raise the bill in terms of the PPA supported by the calculation sheet and Auditor's Certificate within a period of 15 days from the date of this order. Incase, delay in payment is beyond 30 days from the date of raising of bills, the Petitioner shall be titled for late payment surcharge on the outstanding amount.”

63. In line with above order of the Commission, in the instant case, the Petitioner shall be eligible for carrying cost at the actual interest rate paid by the Petitioner for arranging funds (supported by Auditor's Certificate) or the Rate of Interest on Working Capital as per the applicable CERC Tariff Regulations or the Late Payment Surcharge Rate as per the PPA, whichever is the lowest.

Issue No. 5: Mechanism for processing and reimbursing of admitted claimed under Change in Law.

64. The Petitioner has submitted that the above levies, changes, revisions and enactments are directly affecting the Petitioner, i.e. the expense of the Petitioner, is



by more than 1% of the value of the Standby Letter of Credit (LC)[Rs. 70 lacs] in aggregate for the relevant Contract Year. Thus, the Petitioner fulfils the condition laid down in Article 10.23.2 of the PPA for claiming the additional cost/expenses incurred by the Petitioner in supplying power to the Respondent under the PPA.

65. Article 10.3.2, 10.3.3 and 10.3.4 of the PPA provides for the principle for computing the impact of Change in Law during the operating period as under:

10.3.2 During Operating Period

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

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

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

66. 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.

67. However, it is clarified that the Petitioners shall be entitled to claim the compensation after the expenditures allowed under Change in Law during operating period (including the reliefs allowed for operating period, if any) exceeds 1% of the value of Letter of Credit in aggregate and for this purpose the Petitioner shall furnish all the relevant documents like taxes and duties paid supported by Auditor Certificate.



68. The Article 10 of the PPAs provide for the principle for computing the impact of change in law during the operating period. These provisions enjoins upon the Commission to decide the effective date from which the compensation for increase/decrease in revenues or of cost shall be admissible to the Petitioner. In our view, the effect of change in law as approved in this order shall come into force from the date of commencement of supply of electricity to the Procurers or from the date of occurrence of Change in Law event, whichever is later. Approaching the Commission every year for allowance of compensation for such Change in Law is a time-consuming process, which may result in payment of carrying cost, we have, therefore, specified a mechanism, in the following paragraphs, considering the fact that compensation for change in law events allowed as per PPA shall be paid in subsequent years of the contract period:

(a) Monthly change in law compensation payment shall be effective from the date of commencement of supply of electricity to the respondent or from the date of Change in Law, whichever is later.

(b) At the end of the year, the Petitioner shall reconcile the actual payment made towards change in law with the books of accounts duly audited and certified by statutory auditor and adjustment shall be made based on the energy scheduled by procurers during the year. The reconciliation statement duly certified by the Auditor shall be kept in possession by the Petitioner so that same could be produced on demand from Procurers/ beneficiaries.

(c) For Change in Law events related to the operating period, the year-wise compensation henceforth shall be payable only if such increase in revenue or cost to the Petitioner is in excess of an amount equivalent to 1% of LC in aggregate for a contract year as per provision of the PPA.

(d) If the Petitioner is eligible to receive compensation for Change in Law as per the provisions of the PPA, the compensation amount allowed shall be shared by the procurers based on the scheduled energy.



Summary of Decision

69. Based on the above analysis and decision, the summary of our decisions under the Change in Law during the Operating Period of the project is as under:

Sr. No.	Change in Law event	Decision
1	Revision/ addition of components in assessing the Central Excise Duty	Allowed
2	Levy of Evacuation Facility Charges	Allowed
3	Additional cost towards fly ash transportation	Allowed
4	Carrying Cost	Allowed

70. The Petitioner is directed to ensure that it always has a composite scheme for generation and sale of electricity in more than one State in terms of Section 79(1)(b) of the Act for this order to remain valid.

71. Petition No. 208/MP/2018 is disposed of in terms of above.

sd/-

(I.S.Jha)
Member

sd/-

(Dr. M.K. Iyer)
Member

sd/-

(P.K. Pujari)
Chairperson

