

**CENTRAL ELECTRICITY REGULATORY COMMISSION**

**Petition No. 21/MP/2013**

**Coram:**

**Shri Gireesh B. Pradhan, Chairperson**

**Shri M. Deena Dayalan, Member**

**Shri A.K. Singhal, Member**

**Date of Hearing: 6.5.2014**

**Date of Order : 4.2.2015**

**In the matter of:**

Petition under Section 79 of the Electricity Act, 2003 read with statutory framework governing procurement of power through competitive bidding and Article 13 and 17 of the Power Purchase Agreement dated 7.8.2007 executed between Sasan Power Limited and the Procurers for compensation due to "Change in Law" during the Construction Period

**And**

**In the matter of:**

Sasan Power Limited  
C/o Reliance Power Limited  
Reliance Energy Centre, Santa Cruz East  
Mumbai

..... **Petitioner**

**Vs**

1. MP Power Management Company Limited  
Shakti Bhawan  
Jabalpur-482008  
Madhya Pradesh
2. Paschimanchal Vidyut Vitran Nigam Limited  
Victoria Park  
Meerut-250001  
Uttar Pradesh
3. Purvanchal Vidyut Vitran Nigam Limited  
Hydel Colony, Bhikaripur  
Post-DLW, Varanasi-221004  
Uttar Pradesh
4. Madhyanchal Vidyut Vitran Nigam Limited  
4A-Gokhale Marg



Lucknow-226001  
Uttar Pradesh

5. Dakshinanchal Vidyut Vitran Nigam Limited  
220 kV Vidyut Sub- Station  
Mathura Agra By- Pass Road  
Sikandara, Agra-282007  
Uttar Pradesh
6. Ajmer Vidyut Vitran Nigam Limited  
Hathi Bhata, City Power House  
Ajmer-305001  
Rajasthan
7. Jaipur Vidyut Vitran Nigam Limited  
Vidyut Bhawan  
Jaipur-302005  
Rajasthan
8. Jodhpur Vidyut Vitran Nigam Limited  
New Power House  
Industrial Area  
Jodhpur-342003  
Rajasthan
9. Tata Power Delhi Distribution Limited  
Grid Sub- Station Building  
Hudson Lines  
Kingsway Camp  
New Delhi-110009
10. BSES Rajdhani Power Limited  
BSES Bhawan  
Nehru Place  
New Delhi-110019
11. BSES Yamuna Power Limited  
Shakti Kiran Building  
Karkardooma  
Delhi-110096
12. Punjab State Power Corporation Limited  
The Mall  
Patiala-147001  
Punjab

13. Haryana Power Purchase Centre  
Room No.239  
Shakti Bhawan, Sector 6  
Panchkula-134109  
Haryana
14. Uttarakhand Power Corporation Limited  
Urja Bhawan  
Kanwali Road  
Dehradun-248001  
Uttarakhand

**.....Respondents**

For the Petitioner:

Shri J.J Bhatt, Senior Advocate, SPL  
Shri Vishrov Mukherjee, Advocate, SPL  
Ms. Ritika Arora, Advocate, SPL  
Shri P. Venkatarao, SPL  
Shri Arun Dhillon, SPL  
Shri N. K. Deo, SPL  
Shri Raj Verma, SPL  
Shri Sandeep S. Mysetty, SPL  
Shri Mayank Gupta, SPL  
Shri Srikant, SPL  
Shri Vivek Kejriwal, SPL  
Shri R.S. Johri, SPL

For the Respondents:

Shri G. Umapathy, Advocate, MPPMC  
Shri M.G. Ramachandran, Advocate, HPPC  
Shri Poorva Saigal, Advocate, HPPC  
Shri Apoorve Karole, Advocate, HPPC  
Shri Padamjit Singh, PSPCL  
Shri T.P.S Bawa, PSPCL  
Ms. Shobana Masters, Advocate, BRPL and  
BYPL  
Shri Himanshu Chauhan, BRPL  
Shri Alok Shankar, Advocate, TPDDL  
Shri S.S. Barpanda, NLDC  
Ms. Jyoti Prasad, NLDC

**ORDER**

The petitioner, Sasan Power Limited is a special purpose vehicle (hereinafter referred to as “SPV”) which was incorporated by M/s Power Finance Corporation

Limited (hereinafter referred to as "PFC"), the nodal agency of Government of India for implementation of its Ultra Mega Power Project initiative on 10.2.2006 for the development and implementation of a coal fired, ultra mega power project based on linked captive coal mine using super-critical technology with an installed capacity of 4000 MW (plus/minus 10%) and a contracted capacity of 3722.4 MW (hereinafter referred to as "Contracted Capacity") at Sasan, District Singrauli, Madhya Pradesh (hereinafter referred to as "Sasan UMPP"). The project was conceived by Government of India to be implemented by a developer to be selected through tariff based international competitive bidding process.

2. Based on the competitive bidding carried out by Power Finance Corporation as the Bid Process Coordinator, Reliance Power Limited (hereinafter referred to as "RPower") having quoted the lowest bid was declared as successful bidder for execution of the project. Accordingly, Letter of Intent (LoI) was issued to RPower on 1.8.2007 which was accepted. Consequently, in terms of the provisions of the Request for Proposal (RfP), RPower acquired 100% shareholding of the SPV on 7.8.2007. A Power Purchase Agreement (hereinafter referred to as "PPA") dated 7.8.2007 was executed between the petitioner and 14 procurers who are the distribution companies in the State of Madhya Pradesh, Uttar Pradesh, Rajasthan, Punjab, Haryana, Uttarakhand and Delhi. On 15.10.2008 a Supplemental Power Purchase Agreement (SPPA) was entered into between the petitioner and the procurers primarily to pre-pone the scheduled date of commercial operation (CODs) of the various units of the Project. In the Joint Monitoring Committee meeting held on 17.9.2010, the date of commercial operation of the various units of the project was revised by mutual consent. The dates

of commercial operation of various units of Sasan UMPP as per the PPA and the SPPA are as under:-

S. No.	Unit	COD as per PPA	COD as per SPPA
1	First	7.5.2013	31.12.2011
2	Second	7.12.2013	31.3.2012
3	Third	7.7.2014	30.6.2012
4	Fourth	7.2.2015	30.9.2012
5	Fifth	7.9.2015	31.12.2012
6	Sixth	7.4.2016	31.3.2013

According to the petitioner, the COD of the first unit at the time of filing of the petition was expected to be achieved by 31.3.2013, subject to the completion of procurer's conditions subsequent and other obligations as set out in the PPA.

3. The petitioner has filed the present petition under Section 79(1) (b) and 79(1) (f) of the Electricity Act, 2003 (hereinafter "2003 Act"), Article 13 read with Article 17 of the PPA read with Paragraph 5.17 of the Competitive Bidding Guidelines and Regulations 82, 92 and 113 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999.

4. The petitioner has submitted that the following "Change in Law" have occurred during the construction period of the project which has caused the capital cost of the project to increase substantially:

- (a) Increase in declared price of land for the project which includes the land for the Power Station, the Moher, Moher-Amlohri Extension and Chhatrasal captive coal blocks;

(b) Increase in cost of implementation of Resettlement & Rehabilitation Plan (R&R Plan) for the Moher, Moher-Amlohri Extension and Chhatrasal captive coal blocks;

(c) Increase in cost of Geological Reports for the Moher, Moher-Amlohri Extension and Chhatrasal captive coal blocks;

(d) Increase in cost of compensatory afforestation for the Moher, Moher-Amlohri Extension and Chhatrasal captive coal blocks;

(e) Increase in cost of Water Intake system due to an incorrect assessment of conditions in the original report supplied to the bidders at the RFP stage;

(f) Levy of excise duty on cement and steel used in the Project; and

(g) Levy of Customs Duty on mining equipment imported for the Project.

5. The petitioner has submitted that the aggregate financial impact on the Project on account of the aforesaid events of “Change in Law” is about ₹1330 Crore as per the details given below:

(Amount in ₹ crore)

Sl. No.	Items	Estimated by procurer/ declared price of land	Current estimate	Increase in expenditure	Expenditure till date	Expenditure to be incurred	Expenses made (Diff. from initial estimates) for first four Units only
1	Power station (Power Plant + Ash dyke + Water Pipeline + Land –Power Station)	190.70	193.20	2.5	164.7	28.5	0.00
	R&R Power Station + Fuel Transportation System	170.0	170.0	0	94.5	75.5	0.00
	<b>Sub Total</b>	<b>360.7</b>	<b>363.2</b>	<b>2.5</b>	<b>259.2</b>	<b>104.0</b>	<b>0.00</b>
2	Moher & Moher –						

	Amlohri Extension coal block						
	Land – Moher & Moher –Amlohri Extension	85.3	296.0	210.7	215.8	80.2	87.0
	Compensatory afforestation Moher & Moher –Amlohri	21.5	84.8	60.3	84.8	0.0	42.2
	R&R Moher & Moher –Amlohri Extension	45.0	59.0	14.0	17.1	41.9	0.00
	Geological Report Moher & Moher – Amlohri	14.5	16.1	1.6	16.1	0.0	1.1
	<b>Sub Total</b>	<b>166.3</b>	<b>455.9</b>	<b>286.6</b>	<b>333.8</b>	<b>122.1</b>	<b>130.3</b>
3	Chhatrasal Coal Block						
	Land – Chhatrasal	57.0	84.1	27.1	3.8	80.3	0.00
	Compensatory afforestation	13.3	260.7	247.4	0.0	260.7	0.00
	R&R Chhatrasal	30.0	30.0	0.0	0.0	30.0	0.00
	Geological Report Chhatrasal Report	4.5	8.9	4.4	8.9	0.0	2.9
	<b>Sub Total Chhatrasal Coal Block</b>	<b>104.8</b>	<b>383.7</b>	<b>278.9</b>	<b>12.7</b>	<b>371.0</b>	<b>2.9</b>
	<b>Afforestation, GR and R&amp;R (Total)</b>	<b>631.8</b>	<b>1202.8</b>	<b>568</b>	<b>605.7</b>	<b>597.1</b>	<b>133.2</b>
4	Excise duty on Cement and Steel	0.0	75.9	75.9	58.3	17.6	38.9
5	Custom duty on mining equipments	0.0	531.0	531.0	382.3	148.17	255.2
6	Water intake system	92.0	244.0	152.0	185.0	59.0	62.0
	<b>Total</b>	<b>723.8</b>	<b>2053.7</b>	<b>1326.9</b>	<b>1231.3</b>	<b>821.9</b>	<b>489.3</b>

6. The petitioner has submitted that the compensation mechanism provided in Article 13.2(a) of the PPA will not be sufficient to reconstitute the petitioner to the same economic condition as if the aforesaid “Change in Law” had not occurred. Therefore, there is an urgent need to restore the Project economics through a suitable mechanism that takes into account the full financial impact of changes discussed hereinafter which have had a substantial financial impact on the Capital Cost of the Project.

7. The petitioner is stated to have taken up the matter with the procurers in its letter dated 15.12.2012 setting out the impact of the increase in the cost of the items set out in Para 5 of the petition on the capital cost of the project and exhorting the procurers to find out an amicable solution to revise the tariff to address the situation. A meeting of

the petitioner with the procurers was held on 29.12.2012 in order to discuss the issues raised by the petitioner in its letter dated 15.12.2012. The petitioner has submitted that instead of discussing the issues, the procurers have disputed the letter dated 15.12.2012 as a notice under Article 17.2.1 of the PPA. The petitioner in its letter dated 31.12.2012 wrote to the procurers confirming that the letter dated 15.12.2012 was in fact a notice under Article 17.2.1 of the PPA. The lead procurer, MP Power Management Company Limited (MPPMCL) in its letter dated 7.1.2013 wrote to the petitioner refusing to acknowledge the notice dated 15.12.2012 as a notice under Article 17.2.1 of the PPA and refuting the claims of the petitioner on hyper-technical grounds and requesting additional details pertaining to the claims. The petitioner in its letter dated 8.2.2013 provided the procurers the detailed computation and evidence of the increase in capital cost. The petitioner has submitted that the procurers have not responded to the issues raised by the petitioner in its letter dated 15.12.2012 and elaborated in the presentation made on 29.12.2012 and letter dated 8.2.2013. The petitioner has filed the present petition for resolution of the dispute that has arisen between the petitioner and the procurers in terms of the PPA.

8. In the petition, the petitioner has made the following prayers:-

(a) Declare certain events set out in Paragraph 5 of the petition as “Change in Law” during Construction Period and/ or changes which has led to an increase in the capital cost of the Project;

(b) Restitute the petitioner to the same economic condition as if the said “Change in Law” had not occurred and devise a mechanism by which the petitioner is



compensated for the aggregate financial impact and increase in capital cost on account of the “Change in Law”, as per details set out in Paragraph 113 of the petition; and

(c) Pass any such other and further relief as the Commission deems just and proper in the nature and circumstances of the present case.

9. At the initial hearing, the representative of PSPCL submitted that the petitioner has not followed the procedure set out in Article 17 of the PPA before approaching the Commission. Learned counsel for the petitioner submitted that the letter dated 15.12.2012 was a notice under Article 17 of the PPA and the lead procurer in its letter dated 7.1.2013 repudiated the claims of the petitioner. Learned counsel further submitted that a meeting was held on 27.2.2013 where the procurers did not even discuss the issues raised by the petitioner. Since 30 days period under the PPA has expired, the petition is not premature. After hearing the parties, the Commission directed the petitioner to make a concrete proposal of its claims to the procurers in terms of the PPA and directed the lead procurer to convene a meeting of procurers to discuss the proposal and file the outcome of the decision on affidavit. During the next hearing on 16.4.2013, it was informed that MPPMCL as the lead procurer convened a meeting of the procurers on 20.3.2013 to discuss the petitioner’s proposal and as per the minutes of the meeting, the dispute between the parties have remained unresolved. The Commission after hearing the learned counsel for the petitioner and the counsel and representatives of the procurers admitted the petition and directed the parties to file their replies and rejoinders.

10. Replies to the petition have been filed by MPPMCL, Haryana Power Purchase Centre (HPPC), Rajasthan Utilities (AVVNL/JVVNL/JdVVNL), Uttar Pradesh Power Corporation Limited (UPPCL), Punjab State Power Corporation Limited (PSPCL), Tata Power Delhi Distribution Company Limited (TPDDCL), BSES Rajdhani Power Limited (BRPL), and BSES Yamuna Power Limited (BYPL). The replies of the respondents are discussed in brief as under:

(a) The lead procurer, MPPMCL, in its affidavits dated 26.8.2013 and 18.10.2013 has submitted that unless the Commercial Operation Date (COD) is frozen, the impact on the tariff on account of "Change in Law" cannot be loaded to the respondents. During the construction period and before the Commercial Operation Date, the petitioner is not entitled to claim any tariff. MPPMCL has further submitted that all the items listed in the petition amount to "Change in Law" for which the petitioner is eligible for grant of relief as per Article 13 of the PPA, except as regards increase in cost of Geological Report for coal blocks and increase in cost of Water Intake System, which are not covered under "Change in Law" as defined in Article 13.1.1 of the PPA. MPPMCL has submitted that the compensation should be only as provided in accordance with Article 13.2 of the PPA. MPPMCL has submitted that the petitioner is required to disclose on affidavit the "Change in Law" beneficial to the petitioner subsequent to the cutoff date and account for such benefits.

(b) HPPC in its reply dated 3.6.2013 has submitted that the petitioner is entitled to claim for change in declared price of land for the project and cost of

implementation of the resettlement and rehabilitation package of the land for the project mentioned in the RFP. The petitioner is required to provide the correct and complete details for these items as on the commercial operation date with details of all increases and decreases. The coal mined from the linked mines is not exclusively utilized for Sasan UMPP and can be used by the petitioner for other projects. Therefore, the financial benefits derived by the petitioner from utilization of coal in its other projects should be taken into account to reduce the cost of acquisition of land and resettlement and rehabilitation. HPPC has submitted that the claims of the petitioner in para 5(a), (b), (c) and (d) read with para 40 to 64 of the petition should not be considered. As regards claim under para 5(e) regarding water intake system, HPPC has submitted that the bidders are required to make appropriate inquiry into the matter before bidding and in terms of the RFP and not on the basis of indicative information given by the bid process coordinators and hence this claim is not admissible under the "Change in Law". As regards the claim in para 5(f) regarding excise duty, HPPC has submitted that as on the bid deadline date of 21.7.2007, there was no exemption from the payment of excise duty and customs duty on the cement and steel used for construction of the power project and hence there was no question of the "Change in Law" leading to the withdrawal of any such exemption. As regards the claim in para 5(g) for custom duty on mining equipment, the Notification dated 1.3.2002 provided for customs duty exemption to the goods required for setting up a mega power project and the clarification of the Ministry of Power vide its communication dated 16.5.2011 that the exemption relate to only power equipment and not to mining equipment does

not amount to imposition of customs duty on mining equipment which was till then exempted. HPPC has requested for rejection of the claims of the petitioner.

(c) Ajmer Vidyut Vitran Nigam Ltd.(Respondent No. 6), Jaipur Vidyut Vitran Nigam Ltd. (Respondent No. 7), and Jodhpur Vidyut Vitran Nigam Ltd.(Respondent No. 8) in their common reply vide affidavit dated 2.5.2013 have submitted that the impact of increase/decrease in capital cost due to the "Change in Law" during construction period shall be governed in accordance with Article 13.2(a) of the PPA according to which for every cumulative increase/decrease of each Rupees Fifty crore (₹50 crore) in the capital cost over the terms of this Agreement, the increase/decrease in Non- Escalable Capacity Charges shall amount to zero point two six seven (0.267%) of the Non-Escalable Capacity Charges, provided that the seller provides to the procurers documentary proof of such increase/decrease in capital cost for establishing the impact of such "Change in Law". In case of dispute, Article 17 of the PPA shall apply. This compensation shall be payable to either Party, only with effect from the date on which the total increase/decrease exceeds amount of ₹50 crore. The petitioner, however, wants the Commission to devise a new mechanism to deal with such cases by deleting or amending the above clause. The respondents have submitted that any amendment in the PPA which is based on government approved Bidding guidelines, RFQ and RFP can be from prospective date and not from retrospective effect.

(d) U.P. Power Corporation Ltd. on behalf of Paschimanchal Vidyut Vitran Nigam Ltd. (Respondent No. 2), Purvanchal Vidyut Vitran Nigam Ltd. (Respondent No. 3), Madhyanchal Vidyut Vitran Nigam Ltd. (Respondent No. 4) and Dakshinanchal Vidyut Vitran Nigam Ltd. (Respondent No. 5) has vide affidavit dated 15.7.2013 submitted that the petitioner has mentioned that the total increase in capital cost during construction on account of the "Change in Law" is to the tune of ₹1330 crore as against the total cost of the project amounting to ₹19600 crore which translates into an increase of less than 10% of the project. It has been submitted that the PPA is a standard document published by the Government of India and Central Electricity Regulatory Commission can approve only the deviations from it. Therefore, all the contenders were aware about it and they have submitted their bids keeping in view the provisions of para 13 (a) of the PPA as well as the conditions contained in RFP. If at this stage special latitude is given to the petitioner by revising para 13(a) of the PPA to accommodate the entire amount of ₹1330 crore due to "Change in Law", it will amount to discrimination. UPPCL has further submitted that the petitioner and the Lead Procurer may be directed to interact with the Energy Department of Government of MP again for recommendation letter to import mining equipments which are part of Sasan UMPP Project under Nil Customs Duty as applicable to the other equipments of the project. UPPCL has submitted that the petitioner and the lead procurer may request the MP Government to approach Ministry of Power, Government of India to withdraw its OM dated 17.6.2011 and allow Nil Customs Duty for import of mining equipment for UMPP.

(e) PSPCL has submitted that as per the Report of CAG on Compulsory Afforestation in India (No.21 of 2013), the petitioner was to provide compulsory afforestation of 1384.96 hectare but was exempted through a certificate of Chief Secretary, MP Government which was found to be ineligible by CAG. PSPCL has submitted that in the light of the report of the CAG, it can be concluded that when RPL submitted its bid for Sasan, it must have taken into account the expenditure to be incurred for the compensatory afforestation. The MP Government through its Chief Secretary, at a later stage gave an exemption to the petitioner by which the cost of acquiring 1384.96 hectare of land was avoided. This represents an element of reduction in cost which is necessary to be taken into account while deliberating the claims of the petitioner. PSPCL has further submitted that CAG Report No.6 of 2012-13 has established that coal from Moher, Moher-Amlohri and Chhatrasal coal blocks was not dedicated exclusively to Sasan UMPP but it was additionally to be utilized for Chitrangi UMPP and sold at market rate to MP and UP. PSPCL has submitted that in the light of the CAG report, it would not be correct to claim the entire cost increases in respect of coal mine, land for the coal mine etc. entirely from the beneficiaries of Sasan UMPP.

(f) TPDDCL in its reply dated 8.5.2013 has submitted about the foreign exchange rate variation which is not relevant to this petition. Similarly, BYPL in its reply dated 31.5.2013 has submitted about the foreign exchange rate variation which is not relevant to this petition.

(g) BRPL in its reply dated 3.6.2013 has submitted that the claims made by

the petitioner be considered as the “Change in Law” events under the PPA and the petitioner’s grievance needs to be addressed at the earliest.

11. The petitioner has filed rejoinders to the replies of the respondents which will be adverted to wherever necessary while looking into the item wise claims of the petitioner. During the hearing on 18.7.2013, the petitioner was directed to quantify its claims. The petitioner vide its affidavit dated 26.8.2013 has filed the quantified claim as on 30.6.2013 as ₹1372.5 crore.

### **Analysis and Decision**

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

(a) What is the interpretation of “Change in Law” under the PPA?

(b) Whether the provisions of the PPA with regard to notice has been complied with?

(c) Whether the claims are premature?

(d) Examination of “Change in Law” on the various items submitted by the petitioner.

(e) Mechanism for processing and reimbursement of admitted claims under “Change in Law”.

## **A: Interpretation of provisions of “Change in Law” during the Construction Period**

13. The petitioner has approached the Commission under Articles 13 and 17 of the PPA read with Section 79 of the Act and Para 5.17 of the Competitive Guidelines for compensation of the cost incurred by the petitioner due to “Change in Law” during the construction period. Article 13 of the PPA which deals with “Change in Law” provides as under:-

### **"13. ARTICLE 13: “Change in Law”**

#### **13.1 Definitions.**

In this Article 13, the following terms shall have the following meanings:

13.1.1 **“Change in Law”** means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline:

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

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

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

#### **13.2 Application and Principles for computing impact of “Change in Law”**

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



extent contemplated in this Article 13, [the affected Party to the same economic position as if such “Change in Law” has not occurred.

(a) Construction Period

As a result of any “Change in Law”, the impact of increase/decrease of Capital Cost of the Project in the Tariff shall be governed by the formula given below:

For every cumulative increase/decrease of each Rupees Fifty crore (₹50 crore) in the Capital Cost over the term of this Agreement, the increase/decrease in Non Escalable Capacity Charges shall amount to zero point two six seven (0.267%) of the Non Escalable Capacity Charges. Provided that the Seller provides to the procurers documentary proof of such increase/decrease in Capital Cost for establishing the impact of such “Change in Law”. In case of Dispute, Article 17 shall apply. It is clarified that the above mentioned compensation shall be payable to either Party, only with effect from the date on which the total increase/decrease exceeds amount of ₹ Fifty (50) Crore.

(b) Operation Period

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

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

### 13.3 Notification of “Change in Law”

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

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

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

- (a) the “Change in Law”; and
- (b) the effects on the Seller of the matters referred to in Article 13.2.

**13.4 Tariff Adjustment Payment on account of “Change in Law”**

13.4.1 Subject to Article 13.2, 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 Government Instrumentality, if the “Change in Law” is on account of a change in interpretation of Law.

13.4.2 The payment for “Change in Law” shall be through supplementary bill as mentioned in Article 11.8. 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."

Article 17 provides as under:

"17.3.1 Where any dispute arises 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 or (a) (ii) relates to any matter agreed to be referred to the Appropriate Commission under Articles 4.7.1,13.2,18.1 or clause 10.1.3 of Schedule 17 hereof, such dispute 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.

The obligations of the procurers under this Agreement towards the seller shall not be affected in any manner by reason of inter-se disputes amongst the procurers."

Para 5.17 of the Competitive Bidding Guidelines provide as under:

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

Section 79(1) (b) and (f) provide as under:

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

.....  
(f) to adjudicate upon disputes involving generating companies or transmission licensee and to refer any dispute for arbitration."

14. A combined reading of the above provisions would reveal that this Commission

has the jurisdiction to adjudicate upon the disputes between the petitioner and the respondents with regard to “Change in Law” which occur after the date which is seven days prior to the bid deadline. The events broadly cover the following:

(a) Events occurring as a result of the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law;

(b) Events on account of a change in interpretation of any Law by a Competent Court of law, tribunal or Indian Governmental Instrumentality provided such Court of law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation;

(c) Events on account of change in any consents, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer under the terms of this Agreement;

(d) Events occurring on account of any change in the Declared Price of Land for the Project;

(e) Events occurring on account of any change in the cost of implementation of the resettlement and rehabilitation package of the land for the project mentioned in the RFP;

(f) Events occurring on account of any change in the cost of implementing Environmental Management Plan for the Power Station mentioned in the RFP;

(g) The cost of implementing compensatory afforestation for the Coal Mine, indicated under the RFP and the PPA;

(h) If the Tax Holiday under Section 80IA of the Income Tax Act, 1961 is not extended upto the scheduled commercial operation date of the generating station, then such non-extension shall be considered as “Change in Law”;

(i) It specifically excludes any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, and any change in respect of UI Charges or frequency intervals by an Appropriate Commission.

15. During the construction period, all such expenditures which contribute towards the capital cost of the project and which fulfill the conditions of Article 13.1.1 shall be admissible under “Change in Law” subject to the conditions laid down in the PPA.

**B: Compliance with the requirement of Issue of notice under the PPA**

16. As regards the notice under Article 13(3) of the PPA, the seller is obliged to notify the events of “Change in Law” both beneficial to him as well as to the procurers as they occur. There is considerable difference between the petitioner and respondents regarding the notice about the occurrence of “Change in Law”. However, to put the controversy at rest, the Commission had directed the petitioner to give a concrete proposal and also directed the lead procurer, namely, MPPMCL to convene a meeting to discuss the proposal and inform about the outcome of the discussion. The Commission was informed that the petitioner and the procurers discussed the issues raised in the petition in the meeting held on 20.3.2013. Though the procurers agreed

that the items are covered under "Change in Law" under Article 13 of the PPA and the petitioner is entitled for relief in accordance with the formula prescribed under Article 13.2(a) of the PPA, there was no consensus regarding the admissibility of items claimed and its quantum to be admitted. The said Minutes dated 20.3.2013 have been placed on record by the lead procurer, MPPMCL. Para 15 of the minutes of the meeting dated 20.3.2013 are extracted as under:

"15. Chairman summarized the discussions in respect of Petition No. 21/MP/2013 as follows:

- a. There is a consensus that all the items for which relief has been sought qualify as "Change in Law" as per provisions of PPA.
- b. There is admittedly a dispute as regards the eligibility of SPL in terms of quantum of compensation. Most of the Procurers, i.e., all except BRPL and BYPL, were of the firm view that the compensation should be as provided in the PPA. As against the same, SPL, as also BRPL and BYPL, were in favour of entire compensation. In this situation, CERC is the appropriate authority to adjudicate on the issue."

In our view, the parties having undertaken the exercise of mutual consultation have complied with the requirement of notice under Article 13(3) of the PPA.

**C: Whether the petition is pre-mature before the date of commercial operation of the unit(s) of Sasan UMPP?**

17. The procurers are insistent that the claims are premature as the date of commercial operation of first unit of Sasan UMPP has not been decided. The Commission in its order dated 8.8.2014 in Petition No.85/MP/2013 has decided the date of commercial operation of the first unit of Sasan UMPP as 16.8.2013. Therefore, the increase in tariff on account of "Change in Law" during the construction period which is being considered in this order would be admissible with effect from 16.8.2013 and the commercial

operation of other units of Sasan UMPP, subject to the conditions in Article 13(3) of the PPA.

**D: Consideration of the claims under “Change in Law” during Construction Period**

18. The petitioner has claimed the benefits of Change in Law during the construction period in respect of ten items which have been examined in the succeeding paragraphs:

**(I) Declared Price of Land for Power Station**

19. Change in the declared price of land is covered under “Change in Law”. The procurers have also agreed that this item of expenditure is admissible under “Change in Law”. The declared price of land for the Power Station was stated to be ₹190.677 crore. This has been verified from the communication dated 23.10.2006 from the representative of the procurers to the bidders. This included the power plant area, the fuel transport system land, the water pipeline corridor and the ash pipeline corridor. The actual cost of acquisition of land for the Power Station is expected to be approximately ₹193 crore. Out of this amount, a sum of about ₹160.6 crore has already been spent till 30.6.2013 on acquisition of 3316 acres of land as per the auditor certificate submitted vide affidavit dated 26.8.2013. The petitioner has submitted copies of the documents evidencing the actual expenditure incurred by the petitioner on acquisition of land for the Power Station. However, on examination it is found that certain documents provide for amount claimed by the petitioner but not the actual payments. It would be essential to have an auditor certificate certifying the actual expenditure as on COD of the Unit -3. In terms of the provision in the PPA, the increase in price of land for the power station from

the declared price of land shall be admissible under "Change in Law", and both procurers and the seller are in agreement on this point. However, it is noticed that the actual expenditure is still less than the declared price of land and, therefore, no relief can be granted to the petitioner on this account at this stage. However, the petitioner may furnish the audited account as on the date of commercial operation of the first unit/subsequent units of the generating station to the procurers and if the actual expenditure is more than the price declared at the time of bid, then the petitioner's claim would be considered, subject to the other provisions of the PPA.

**(II) Cost of implementation of the R&R Plan for the Power Station Land and Fuel Transportation system Land**

20. This item of expenditure is covered under "Change in Law" provided that the actual expenditure exceeds the indicative expenditure on account of implementation of the R&R expenditure for the project. The procurers have agreed that this item is covered under "Change in Law". As per the information provided to the bidders, the cost of implementation of the R&R Plan for the power plant area, the fuel transport system land, the water pipeline corridor and the ash pipeline corridor was estimated to be ₹170 crore. This has been verified from the communication dated 23.10.2006 from the representative of the procurers to the bidders. There is no change in the current estimate from the declared estimate. As per the Auditor Certificate furnished by the petitioner vide its affidavit 26.8.2013, the actual expenditure under this head as on 30.6.2013 is only ₹104.90 crore. As such there is no increase in the capital cost on this account at this stage.

### **(III) Declared Price of Land for Moher and Moher-Amlohri Extension Captive Coal Blocks**

21. Project has been defined in the PPA as “the Power Station and the Captive Coal Mine(s) undertaken for design, financing, engineering, procurement, construction, operation, maintenance, repair, refurbishment, development and insurance by the Seller in accordance with the terms and conditions of this Agreement.” Therefore, captive coal mines are part of the project and any change in the declared price of coal mines would be covered under the “Change in Law”. In the PPA, ‘captive coal mine’ has been defined as “the captive coal mines as described in Schedule 1A and associated fuel transportation system upto the power house”. In Schedule IA, it has been provided that “coal blocks (mines) in Singrauli area with reserves of about 700-800 million tons will be allocated as captive coal block (mines) for this project. The project will require the development of a coal mine with production of 18-20 million tons per annum (MTPA)”. The petitioner has been allocated Moher and Moher-Amlohiri coal mines. As the expected coal production from these mines were found to be less than the coal required by the generating station, Chhatrasal coal mine was also allotted to Sasan Power Limited. The allocation of coal mines including coal blocks were examined by the Hon’ble Supreme Court in Writ Petition (Crl.) No. 120 of 2012 and other related Writ Petitions (Civil). Hon’ble Supreme Court in their order dated 5.9.2014 have held that “the allotment of three coal blocks in Annexure-1 is not disturbed and they are Moher and Moher Amlohiri Extension allocated to Sasan Power Ltd. (UMPP) and Tasra (allotted to Steel Authority of India Ltd. (SAIL), a Central Government public sector undertaking not having any joint venture)”. Therefore, the Moher and Moher-Amlohiri



coal mines remain part of the project of Sasan UMPP and any change in the declared price of land will be covered under the "Change in Law". The declared Price of Land for the Moher Coal Block and the Moher-Amlohri Extension Coal Block are ₹57.29 crore and ₹28 crore respectively as per the auditors' certificate submitted vide affidavit dated 26.8.2013. Since these two coal blocks are contiguous, forming part of the same land bank, the actual cost of the two coal blocks has been combined. This fact has been verified from the communication dated 23.10.2006 from the representative of the procurers to the bidders. The actual price of land for the Moher and Moher-Amlohri Extension Coal Blocks is estimated to be around ₹296 crore. As per the Auditor's Certificate as on 30.6.2013 submitted vide affidavit dated 26.8.2013, an expenditure of ₹229.19 crore (₹145.83 crore for cost of land excluding forest land and ₹83.36 crore forest land) has already been spent. In terms of the definition of project in the PPA, the increase in price of land for the mine, which is also part of land for the power project, from the declared price of land shall be admissible under "Change in Law". The actual expenditure of ₹229.19 crore as stated by the petitioner has exceeded the declared price of land of ₹85.30 crore and therefore, qualifies under "Change in Law". However, the respondents have submitted that the coal mined from the captive mines is not being used exclusively for the Sasan UMPP alone, and the petitioner is utilizing the coal for other power stations of the petitioner. The petitioner in reply to the submission of HPPC has submitted that Sasan UMPP is an integral project and captive coal mines are an integral part of Sasan UMPP. PSPCL in its affidavit dated 17.10.2013 has quoted from the CAG Report No. 6 of 2013 and in para 5.1.(vi) of the Report, it has been mentioned that EGOM in its meeting dated 14.8.2008 recommended to Ministry of Coal to allow

RPL the use of the surplus coal from blocks allotted to Sasan UMPP subject to the following undertaking:

"Incremental coal quantity would be determined based on the Mine Plan approved by Ministry of Coal, GoI. The 3960 MW Sasan UMPP will always have the first right and overriding priority over all coal produced from the allotted blocks and the allottee shall always ensure that the generation from the UMPP for the entire contracted period will not be allowed to be affected by utilization of incremental coal by other projects of the Group. Any loss in generation in the awarded UMPP at Sasan shall only be on account of genuine reasons such as maintenance, repairs etc. End use of coal from these blocks would be restricted to power generation. The power generated by utilizing incremental coal from these captive coal blocks would be sold through tariff based competitive bidding."

The petitioner has not filed any rejoinder to the reply of PSPCL. It is therefore necessary that the petitioner should file all documents regarding the permission to use the coal from the captive coal mines in other projects of the petitioner including any other commercial use, the actual extraction of coal, the quantity of coal used in other projects of the petitioner, quantum of coal to be extracted during the term of the PPA i.e. 25 years or beyond in order that the Commission can take a view in this matter regarding the adjustment of cost of the mines. At this stage, we are of the view that only the relevant increase in the cost could be loaded to the Sasan UMPP in due consideration of relevant factors, such as quantum and price of coal supplies to different projects etc. We direct the petitioner to submit the requisite details in this regard to the Commission with copy to the procurers duly certified by the auditors as on the COD of respective units apart from the required information regarding use of coals from these mines in other projects or commercial use and the quantum of coal to be extracted during the term of the PPA i.e. 25 years and beyond.

**(IV) Cost of Implementation of Compensatory Afforestation for Moher and Moher-Amlohri Extension Block Coal Blocks**

22. In terms of clause 13.1.1 (iv) (d) of the PPA, "Change in Law" *inter-alia* includes the cost of implementing compensatory afforestation for the Coal Mines indicated under the RFP and the PPA. Accordingly, the increase in price of compensatory afforestation from the declared price for the Moher and Moher-Amlohri coal mines are admissible under "Change in Law". The estimated cost of implementation of compensatory afforestation for the Moher Coal Block and the Moher-Amlohri Extension Coal Block was ₹14.90 crore and ₹6.60 crore respectively. This has been verified from the communication dated 23.10.2006 from the representation of the procurers to the bidders. The actual cost of implementation of compensatory afforestation for the Moher and Moher-Amlohri Extension Coal Blocks as submitted in the petition is ₹84.80 crore. Therefore, the cost of implementation of compensatory afforestation for the Moher and Moher-Amlohri Extension Coal Blocks has exceeded the estimates, by ₹63.30 crore. The petitioner has submitted copies of the documents evidencing the actual expenditure incurred by the Petitioner on acquisition of land for compensatory afforestation. However, on examination it is found that certain documents provide for amount claimed by the petitioner but not the details of actual payments. It would be necessary to have an auditor certificate certifying the actual expenditure as on COD of the Unit 3 and other unit(s) where CODs have been declared. Moreover, the Commission has no information about the coal mined from the captive mine and its use exclusively for the Sasan power generating station and utilized for supplying power from the other power stations of the petitioner. Therefore, only the proportionate increase in the cost

attributable to the coal requirement of Sasan UMPP can be loaded to the Sasan power project in due consideration of relevant factors such as quantum of coal supply and price of coal supplies to different projects, quantum of coal to be extracted during the term of PPA and beyond, etc. We direct the petitioner to furnish the requisite details in this regard duly certified by the auditors as on the COD of respective units to the Commission with copy to the procurers for arriving at the exact cost on account of Compensatory afforestation.

23. PSPCL relying on the report of CAG No. 6 of 2013 has submitted that the petitioner must have taken into account in its bid the expenditure to be incurred on acquiring land for compulsory afforestation. However, at a later stage, MP Government through its Chief Secretary gave an exemption to SPL by which the cost of acquiring 1384.96 hectare was avoided. This amounts to reduction in cost which needs to be taken into account. The petitioner has not submitted its response in this regard. However, the petitioner is stated to have spent ₹84.80 crore on compulsory afforestation and it is presumed that this figure must have taken into account the exemption accorded by the State Government under which the petitioner was not required to acquire land for compulsory afforestation. Therefore, we direct the petitioner to clarify that actual expenditure on compensatory afforestation does not include the expenditure for acquiring 1384.96 hectares of land which was exempted from being acquired on the basis of the certificate issued by Chief Secretary, Government of MP.

**(V) Increase in Cost of Geological Report for Moher and Moher-Amlohri Extension Block Coal Blocks**

24. The indicative cost of Geological Report for the Moher Coal Block and the Moher-Amlohri Extension Coal Block was ₹8.50 crore and ₹6 crore respectively, as verified from the communication dated 23.10.2006 from the representative of the procurers to the bidders. The actual cost of Geological Report for the Moher Coal Block and Moher-Amlohri Extension Coal Block is ₹16.06 crore. Therefore, the cost of Geological Report for the Moher and Moher-Amlohri Extension Coal Blocks has exceeded the estimates, by ₹1.56 crore. In terms of clause 13.1.1 (iv) (d) of the PPA, "Change in Law" *inter-alia* includes the cost of implementing compensatory afforestation for the Coal Mine, indicated under the RFP and the PPA. Accordingly, the increase in cost of geological reports of the mines is not covered by provisions in respect of "Change in Law", even though this increase in the cost of geological report was based on the estimates provided by the CMPDIL. The petitioner being aware that the cost of geological reports of mines being indicative in nature and being not covered under "Change in Law" under Article 13 should have factored the possible escalation while quoting the bid. In this connection, para 2.7.2.1 of the RfP document provides as under:

"2.7.2.1 The Bidder shall make independent enquiry and satisfy itself with respect to all the required information, inputs, conditions and circumstances and factors that may have any effect on his Bid. In assessing the Bid, it is deemed that the Bidder has inspected and examined the site conditions of roads, bridges, ports etc. for unloading and/or transporting heavy pieces of material and has based its design, equipment size and fixed its price taking into account all such relevant conditions and also the risks, contingencies and other circumstances which may influence or affect supply of power."

Further para 4 of the RfP document provides that the pricing and other details given in the bidding documents are by way of information only and it was for the bidders

to conduct independent enquiry and verify the details and information. Para 4 are extracted as under:

“4. While the RFP has been prepared in good faith, neither the Procurers, Authorized Representative and Power Finance Corporation (PFC) nor their directors or employees or advisors/consultants make any representation or warranty, express or implied, or accept any responsibility or liability, whatsoever, in respect of any statements or omission herein, or the accuracy, completeness or reliability of information contained herein, and shall incur no liability under any law, statute, rules or regulations as to the accuracy, reliability or completeness of this RFP, even if any loss or damage is caused to the Bidder by any act or omission on their part.”

Therefore, it is the responsibility of petitioner to verify the actual geological area to be surveyed and quote the cost of Geological Survey factoring in the appropriate escalation so that a realistic cost is reflected in the bid. The petitioner having failed to do so, the increase in cost on account of this head is not admissible.

#### **(VI) Cost of Implementation of the R&R Plan for Moher and Moher-Amlohri Extension Coal Blocks**

25. In terms of clause 13.1.1 (iv) (d) of the PPA, “Change in Law” *inter-alia* includes the cost of implementing compensatory afforestation for the Coal Mine, indicated under the RFP and the PPA. Accordingly, the increase in cost of implementation of the R&R Plan for Moher and Moher-Amlohri Extension Coal Blocks shall be admissible under “Change in Law”. As per the indicative costs provided to the bidders, the cost of implementation of the R&R Plan for the Moher Coal Block and the Moher-Amlohri Extension Coal Block are ₹30 crore and ₹15 crore respectively, aggregating to ₹45 crore. This has been verified from the communication dated 23.10.2006 from the representative of the procurers to the bidders. As against indicated cost of ₹45 crore, the actual cost of implementation of the R&R Plan for the Moher and Moher-Amlohri

Extension Coal Blocks is estimated to be ₹59 crore. However, the actual expenditure as on 30.6.2013 is only ₹30.74 crore and as such has not yet exceeded the declared price. Therefore, the petitioner is not entitled for any relief at this stage. Moreover, the coal mined from the captive mine is not being used exclusively for the Sasan generating station alone and is supplying power to the other power stations of the petitioner. Therefore, only the relevant increase in the cost could be loaded to the Sasan power projects in due consideration of relevant factors such as quantum of coal supply and price of coal supplies to different projects, quantum of coal to be extracted during the term of PPA and beyond, etc. We direct the petitioner to furnish the following details in this regard duly certified by the auditors as on the COD of respective Units:

- (a) Quantum of coal approved with calorific value of coal in the coal mine plan along with copy of the approved plan for the captive mine of the project;
- (b) Quantum of coal with calorific value of coal required to generate the contracted capacity of electricity from Sasan UMPP assumed in the bid;
- (c) Quantum of coal sold to other projects with project-wise details, calorific value of coal and the cost price and sale price of coal; and
- (d) Sale price of electricity in the other projects where the coal from the captive mines of Sasan UMPP is used, clearly indicating the energy charge therein.

## **(VII) Declared Price of Land for Chhatrasal Captive Coal Block**

26. As per the estimates provided to the bidders, the declared price of land for the Chhatrasal coal block was ₹57 crore, as verified from the communication dated 23.10.2006 from the representative of the procurers to the bidders. The Ministry of Environment and Forest has accorded Stage-I Forest Clearance for the Chhatrasal Coal Block vide letter dated 23.11.2012. In accordance with the conditions in the Stage-I Forest Clearance, price of land for the Chhatrasal coal block is estimated to be around ₹84 crore, out of which ₹80 crore is for the forest land, assuming a NPV of ₹8.30 lakh/ hectare and ₹4 crore for private land and government land. A sum of ₹3.81 crore as per the auditor's certificate furnished vide affidavit dated 26.8.2013 has already been paid to the Government of Madhya Pradesh towards the government land forming part of the Chhatrasal Coal Block. It would be necessary to have an auditor certificate certifying the actual expenditure as on COD of the Unit 3. In terms of clause 13.1.1 (iv) (a) of the PPA, "Change in Law" *inter-alia* includes - the Declared Price of Land for the Project. Accordingly, the increase in price of land for the mine which is also part of land for the power project is admissible under "Change in Law". The actual expenditure of ₹3.81 crore as stated by the petitioner is less than the declared price of ₹57 crore and hence any relief under this head cannot be granted at this stage. However, the coal mined from the captive mine is not being used exclusively for the Sasan generating station alone and is supplying coal to the other power stations of the petitioner. Therefore, only the relevant increase in the cost could be loaded to the Sasan power projects in due consideration of relevant factors such as quantum of coal supply and price of coal supplies to different projects, quantum of coal to be extracted during the term of PPA



and beyond. We direct the petitioner to furnish the requisite details indicated below in this regard duly certified by the auditors as on the COD of respective units to the procurers for arriving at the final cost:

- (a) Quantum of coal approved with calorific value of coal in the coal mine plan along with copy of the approved plan for the captive mine of the project;
- (b) Quantum of coal with calorific value of coal required to generate the contracted capacity of electricity from Sasan UMPP assumed in the bid;
- (c) Quantum of coal sold to other projects with project-wise details, calorific value of coal and the cost price and sale price of coal; and
- (d) Sale price of electricity in the other projects where the coal from the captive mines of Sasan UMPP is used, clearly indicating the energy charge therein.

#### **(VIII) Cost of Implementation of Compensatory Afforestation for Chhatrasal Coal Block**

27. The indicative cost of implementation of compensatory afforestation for the Chhatrasal Coal Block was ₹13.30 crore, as verified from the communication dated 23.10.2006 from the representative of the procurers to the bidders. In accordance with the conditions in Stage I forest clearance granted by Ministry of Environment and Forest, the cost of implementation of compensatory afforestation for the Chhatrasal Coal Block is expected to be ₹260.70 crore (assuming ₹9 lakh/hectare for revenue land in lieu of forest land to be diverted and ₹9 lakh/hectare towards cost of afforestation of double the area of forest land proposed to be diverted). No expenditure has been

incurred against this item. Therefore, no relief is being granted at this stage. However, in terms of clause 13.1.1 (iv) (d) of the PPA, "Change in Law" *inter-alia* includes - the cost of implementing compensatory afforestation for the Coal Mine indicated under the RFP and the PPA. Accordingly, the increase in price of compensatory afforestation for the mine is admissible under "Change in Law" and may be claimed by the petitioner after incurring the expenditure. However, the coal mined from the captive mine is not being used exclusively for the Sasan generating station alone and is supplying coal to the other power stations of the petitioner. Therefore, only the relevant increase in the cost can be loaded to the Sasan power projects in due consideration of relevant factors such as quantum of coal supply and price of coal supplies to different projects, quantum of coal to be extracted during the term of PPA and beyond, etc. We direct the petitioner to furnish the requisite details in this regard duly certified by the auditors as on the COD of respective units:

- (a) Quantum of coal approved with calorific value of coal in the coal mine plan along with copy of the approved plan for the captive mine of the project;
- (b) Quantum of coal with calorific value of coal required to generate the contracted capacity of electricity from Sasan UMPP assumed in the bid;
- (c) Quantum of coal sold to other projects with project-wise details, calorific value of coal and the cost price and sale price of coal; and
- (d) Sale price of electricity in the other projects where the coal from the captive mines of Sasan UMPP is used, clearly indicating the energy charge therein.

### **(IX) Increase in cost of Geological Report for Chhatrasal Block**

28. The indicative cost of Geological Report for the Chhatrasal Coal Block is ₹4.50 crore, as verified from the communication dated 23.10.2006 from the representative of the procurers to the bidders. The actual cost of the Geological Report for the Chhatrasal Coal Block is ₹8.92 crore. Therefore, the cost of Geological report for the Chhatrasal Coal Block has exceeded the estimates, by ₹4.42 crore. The petitioner has incurred the whole amount of ₹8.90 crore. In terms of clause 13.1.1 (iv) (d) of the PPA, "Change in Law" *inter-alia* includes - the cost of implementing compensatory afforestation for the Coal Mine, indicated under the RFP and the PPA. Accordingly, the increase in cost of geological reports of the mines is not covered by provisions in respect of "Change in Law", even though this increase in the cost of geological report based on the estimates provided by the CMPDIL. For the reasons recorded in para 24 of this order, the expenditure under this head is not included under "Change in Law" and is therefore, disallowed.

### **(X) Increase in cost of implementation of the R&R Plan for the Chhatrasal Coal Block**

29. The indicative cost of implementation of the R&R Plan for the Chhatrasal Coal Block is ₹30 crore. As land for Chhatrasal Coal Block is yet to be handed over by the procurers, cost of implementation of R&R Plan for Chhatrasal Coal Block is estimated to be the same as provided at the time of bidding. In terms of clause 13.1.1 (iv) (d) of the PPA, "Change in Law" *inter-alia* includes - the cost of implementing compensatory afforestation for the Coal Mine, indicated under the RFP and the PPA. Accordingly,

increase in cost of implementation of the R&R Plan for coal mine is admissible under "Change in Law". However, no expenditure has been incurred and therefore, no relief can be granted to the petitioner on this account at this stage. Further, the coal mined from the captive mine is not being used exclusively for the Sasan generating station alone. Therefore, only the relevant increase in the cost can be loaded to the Sasan power projects in due consideration of relevant factors such as quantum of coal supply and price of coal supplies to different projects, quantum of coal to be extracted during the term of the PPA and beyond, etc. We direct the petitioner to furnish the requisite details in this regard as indicated below duly certified by the auditors as on the COD of respective units:

- (a) Quantum of coal approved with calorific value of coal in the coal mine plan along with copy of the approved plan for the captive mine of the project;
- (b) Quantum of coal with calorific value of coal required to generate the contracted capacity of electricity from Sasan UMPP assumed in the bid;
- (c) Quantum of coal sold to other projects with project-wise details, calorific value of coal and the cost price and sale price of coal; and
- (d) Sale price of electricity in the other projects where the coal from the captive mines of Sasan UMPP is used, clearly indicating the energy charge therein.

## **(XI) Increase in cost of Water intake System**

30. The petitioner has submitted that as per Clause 1.4(v) of RFP for Sasan UMPP, the Procurers through the Authorized Representative had to provide water intake study report. WAPCOS (a premier Government of India agency) was appointed to conduct the water intake study. WAPCOS, as the expert agency identified the water intake pump house location and the pipeline route from the intake pump house to the power plant in its Report. This report was made available to all the bidders before bid submission so that the bidders could factor in the cost of the water intake system in preparation of their financial bid i.e. the tariff at which power would be supplied to the Procurers. The total estimated cost for the construction of water intake system for the location and route indicated in the report by WAPCOS was estimated to be approximately ₹92 Crore. After RPower acquired the project, WAPCOS was appointed to confirm the technical feasibility as part of detailed engineering exercise. During this process, it was discovered that the water intake location as finalized by WAPCOS before the bidding was not an appropriate location and does not ensure reliable supply of water to the power plant. It was also found that the water intake at the original location indicated by WAPCOS in the pre-bid report would have resulted in shutdown of power plant for a considerable period during the lean season. Thereafter, WAPCOS conducted detailed bathymetric studies and recommended a new location for water intake, which was 23 km from the power plant as against 12.5 km initially indicated at the time of bidding (original location). It was highlighted that new location would ensure reliable water supply to the power plant. Due to increase in distance, submergence area along the route and construction time, there has been considerable increase in cost of the water

intake system as per following details (Annexure P-26 of the petition) and as per the earlier report of WAPCOS:-

<b>S. No.</b>	<b>Cost Item</b>	<b>As per earlier WAPCOS Report</b>	<b>Current estimate</b>
		(₹ Crore)	(₹ Crore)
1	Cost of Pump House	21.00	62.97
2	Cost of Bridge	10.50	
3	Supply of Pipe line	30.50	73.91
4	Laying of pipe line	16.70	57.97
5	Mechanical	10.20	20.32
6	Electrical	3.50	4.02
7	Dredging for Pump House		25.13
8	<b>Total</b>	<b>92.40</b>	<b>244.32</b>

31. MPPMCL has submitted that it is an expense incurred by the petitioner but is not covered under “Change in Law” under Article 13.1.1 of the PPA. However, it is concluded that the cost has been incurred by the petitioner and exceeds the estimates given by the procurer's authorized representative prior to bid submission. HPCC has submitted that the price and other details given in the bidding document were by way of information and it was for the bidders to conduct independent enquiry and verify the information and details. There is no misrepresentation by the procurers or by the Bid Process Coordinators at the time of bidding in relation to water intake for the project. In view of the specific disclaimer and the requirement to conduct independent enquiry, the petitioner was required to make appropriate enquiries into the matter before bidding and the bidders were not entitled to proceed only on the basis indicative information given by the Bid Process Coordinator.

32. We have considered the submission of the petitioner and respondent. As against the indicative cost of ₹92.40 crore, the cost for the construction of water system for the

new location is ₹244 crore out of the aforesaid amount, a sum of ₹185 crore has already been incurred and balance of ₹59 crore is to be spent. The estimated increase in cost of the water intake system due to the change in location of the water intake system is ₹152 crore. The petitioner has submitted that since this increase is directly attributable to the error in the WAPCOS report provided to the bidders at the pre-bid stage, the petitioner is required to be compensated for the same.

33. In our view, the claim is not covered under any of the provisions of Article 13.1.1 of the PPA. The petitioner being aware that the cost of water intake system being indicative in nature and being not covered under the “Change in Law” under Article 13 should have informed itself fully with the actual site conditions before preparing the bid and accordingly factored the possible estimates of water intake system while quoting the bid instead of relying on the indicative cost. In this connection, para 2.7.2.1 of the RfP document provides as under:

“2.7.2.1 The Bidder shall make independent enquiry and satisfy itself with respect to all the required information, inputs, conditions and circumstances and factors that may have any effect on his Bid. In assessing the Bid, it is deemed that the Bidder has inspected and examined the site conditions of roads, bridges, ports etc. for unloading and/or transporting heavy pieces of material and has based its design, equipment size and fixed its price taking into account all such relevant conditions and also the risks, contingencies and other circumstances which may influence or affect supply of power.”

Further para 4 of the RfP document provides that the pricing and other details given in the bidding documents are by way of information only and it was for the bidders to conduct independent enquiry and verify the details and information. Para 4 are extracted as under:

“4. While the RFP has been prepared in good faith, neither the Procurers, Authorised Representative and Power Finance Corporation (PFC) nor their directors or

employees or advisors/consultants make any representation or warranty, express or implied, or accept any responsibility or liability, whatsoever, in respect of any statements or omission herein, or the accuracy, completeness or reliability of information contained herein, and shall incur no liability under any law, statute, rules or regulations as to the accuracy, reliability or completeness of this RFP, even if any loss or damage is caused to the Bidder by any act or omission on their part.”

Therefore, it is the responsibility of the petitioner to verify the suitability of the location of water intake and ensure reliable water supply for the power plant and workout the relevant approximate cost of water intake system independently and factor in the estimates in the bid so that a realistic cost is reflected in the bid. The petitioner having failed to do so, the increase in cost on account of this head is not admissible.

#### **(XII) Increase in cost due to Imposition of Excise Duty on Cement and Steel**

34. The petitioner has submitted that Sasan UMPP was accorded in-principle mega power project status by the Ministry of Power vide its letter no. F. No. 12/18/2006-P&P dated 20.10.2006. The final certificate was issued on 21.9.2007. Mega power projects are eligible for nil excise duty and accordingly, no excise duty was considered for the purposes of tariff quoted for the Project. The petitioner further submitted that Notification No. 46/2008 issued by the Ministry of Finance, Government of India clarified the position that UMPPs were granted exemption from payment of excise duty on goods required for setting up UMPPs. The petitioner had also applied for exemption vide application dated 11.1.2010. HPPC has submitted that the petitioner has to first place on record a specific Notification of the Government of India providing for such exemption under Mega Power Status for construction materials for the power project such as cement and steel. In the absence of such notification as at the time of cut-off date, namely 7 days prior to the



bidding, there was no exemption under Mega Power Project status for cement and steel to be used for construction.

35. The petitioner has submitted that Ministry of Finance, Government of India vide Notification No.46/2008 has given exemption from payment of excise duty on goods required for setting up of UMPP. The petitioner had applied for exemption from excise duty on 11.1.2010 which included excise duty on cement and steel. Notification No.46/2008 is extracted as under:

New Delhi, the 14<sup>th</sup> August, 2008

**Notification No. 46/2008-Central Excise**

G.S.R. (E).- In exercise of the powers conferred by sub-section (1) of Section 5A of the Central Excise Act, 1944 (1 of 1944), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby makes the following further amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 6/2006-Central Excise, dated the 1<sup>st</sup> March, 2006 which was published in the Gazette of India, Extraordinary vide number G.S.R. 96(E) of the same date, namely:-  
In the said notification,-

(A) in the Table, after S. No. 91 and the entries relating thereto, the following S. No. and entries shall be inserted, namely:-

(1)	(2)	(3)	(4)	(5)
"91A.	Any chapter	Goods required for setting up of an ultra mega power project based on super-critical coal-thermal technology, with installed capacity of 3960MW or above, from which power procurement has been tied up through tariff based competitive bidding.	Nil	26";

(B) in the Annexure, after condition No. 25 and the entries relating thereto, the following condition shall be inserted, namely:-

Condition No	Conditions
"26	If,- (a) such goods are exempted from the duties of customs leviable under the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and the additional



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duty leviable under Section 3 of the said Customs Tariff Act when imported into India;

(b) an officer not below the rank of Chief Engineer in the Central Electricity Authority certifies that the said goods are required for the setting up of the said ultra mega power project under Government of India initiative, indicating the quantity, description, and specifications thereof; and

(c) the Chief executive officer of the project furnishes an undertaking to the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, having jurisdiction, to the effect that-

- i. the said goods will be used only in the said project and not for any other use; and
  - ii. in the event of non compliance of sub-clause (i) above, the project developer will pay the duty which would have been leviable at the time of clearance of goods, but for this exemption.”.
- 

[F. No. 354/104/2003-TRU (Pt. II)]  
(G.G.Pai)

Under Secretary to the Government of India.

Subsequently Government of India in the Finance Act, 2011 has clarified as under:

"M.3 The benefit of exemption available on Ultra Mega Power Projects is being extended for development of facilities such as Ash disposal system including ash dyke, water intake including treatment and storage facilities and coal transportation, both inside and also outside the power plant's designated except the township.

M.4 It is being clarified that the Cement & steel going into construction activity of the power project are not eligible for the benefit of customs duty and excise duty exemptions and that the special power cables connecting generators and right up to the transformer within the power generation plant would be eligible for the benefits of the said exemptions".

36. Under Article 13.1.1 of the PPA, for the "Change in Law" to be applicable, the enactment, adoption, promulgation, amendment or modification of any law should have taken place at any time after the due date which is seven days prior to the bid dead line. In this case, the original bid deadline was 7.12.2006 and the revised bid deadline was 28.7.2007 and the due date would be counted from seven days prior to the bid deadline. The notification for exemption from excise duty for ultra mega power project was issued on 14.8.2008 which much after the due date. In other words, there was no occasion for

RPower to take into account such exemption while quoting the bid. As a consequence, subsequent clarification in the Finance Act, 2011 would not constitute the “Change in Law”. Accordingly, the relief sought on this ground is disallowed.

### **(XIII) Imposition of Customs Duty on Mining Equipment imported for the Project**

37. The petitioner has submitted that the UMPP Policy envisages domestic coal based UMPPs as integrated projects where power station and captive coal mines are treated as an integrated unit. This is also recognized in the PPA as well as other project documents like the RFQ and the RFP. The petitioner has further submitted that as per Notification 21 of 2002-Customs dated 1.3.2002 issued by the Ministry of Finance, Government of India, no customs duty will be levied on goods imported for setting up a mega power project. Sasan UMPP was accorded in-principle mega power project status as per Ministry of Power’s letter No. F. No. 12/18/2006-P&P dated 20.10.2006. The final certificate was issued on 21.9.2007. Sasan UMPP is an integrated power project with captive coal mines viz. Moher, Moher Amlohri Extension and Chhatrasal Coal Blocks. The captive coal mines allocated for Sasan UMPP form an integral and essential part of the Project and any equipment imported in relation to the captive coal mines would therefore be treated as goods imported for setting up the Project. The petitioner was required to import mining equipment for setting up the captive coal mines from which coal would be sourced for the Project, since the required mining equipments were not available in India. The petitioner has submitted that mega power projects are exempted from Customs Duty in terms of Notification No.49/2006. The petitioner has also submitted that the revised policy guidelines issued by Government of India, Ministry of Power vide its letter No. A-

118/2003-IPC dated 2.8.2006 has stated that an inter-State thermal power plant of a capacity of 1000 MW or more is eligible for grant of mega power status. On 5.5.2011, the petitioner applied to the Energy Department, Government of Madhya Pradesh for recommendation letter to import mining equipments for Sasan UMPP under nil customs duty as is applicable for the other equipments such as power plants of the Project. This application was premised on Notification 21 of 2002-Customs issued by Ministry of Finance. However, vide Office Memorandum dated 17.6.2011, the Ministry of Power intimated that the exemption for customs duty for UMPPs is given only with respect to power equipment. Based on Ministry of Power's Office Memorandum dated 17.6.2011, the Energy Department, Government of Madhya Pradesh declined to issue the recommendation letter which was required by the petitioner to claim nil customs duty. In view of the refusal by Energy Department, Government of Madhya Pradesh and in the interest of the Project and power consumers, the petitioner had to seek recommendation letter from Energy Department, Government of Madhya Pradesh to import mining equipments at project import rate of 20.94%, which is now reduced to 16.85% with effect from 17.3.2012. The petitioner has submitted that the decision of the Ministry of Power detailed in its office memorandum dated 17.06.2011 and refusal by Energy Department, Government of Madhya Pradesh to provide recommendation letter to import mining equipments for Sasan UMPP under nil custom duty amounts to a "Change in Law" under Article 13.1 of the PPA and the petitioner is entitled to be compensated for the same. Out of ₹531 crore estimated to be paid as customs duty on mining equipments, the petitioner has so far paid a total amount of ₹361.47 crore on mining equipments imported for Sasan UMPP.

38. HPPC has submitted that there was no exemption from customs duty for the mining equipment as on the cut-off date (21.7.2007, i.e. 7 days prior to the bid deadline) with reference to the bid submitted by the petitioner. As on the cut-off date customs duty was payable on the mining equipment. The Notification dated 1.3.2002 provides for customs duty exemption to the goods required for setting up of mega power project as specified therein. The communication dated 16.5.2011 issued by Ministry of Power does not either interpret the provisions of Customs Act or otherwise impose customs duty for the first time on the mining equipment. It clarified the position already existing. The petitioner in its affidavit dated 24.10.2013 has clarified that as per the mega power policy, import of capital goods would be free from levy of customs duty. Further, project has been defined in the PPA to include power station and captive coal mines. Therefore, the equipment required for coal mining is an integral part of the project and is included in setting up of the project.

39. The learned senior counsel for the petitioner further submitted that the withdrawal of exemption from payment of customs duty in the Union Budget which was later included in the Finance Act, 2012 amounts to "Change in Law" as defined under Article 13.1 of the PPA. Notification 21 of 2012-Customs issued by the Ministry of Finance, Government of India, has granted 100% exemption from the custom duty to goods required for setting up of any mega power project. Since the mines are an integral part of the project, it is entitled for exemption from custom duty on import of equipments required for operation of the mines. However, Ministry of Power vide its Office Memorandum dated 17.6.2011 intimated the Government of Madhya Pradesh that the exemption from custom duty for UMPP is given only with respect to the power

equipments. The decision of the Ministry of Power which results in denial of custom duty exemption on the mine equipments amounts to "Change in Law" under Article 13.1 of the PPA, for which the petitioner needs to be compensated.

40. We have considered the submission of the petitioner and respondents. The Notification No.49/2006 provides as under:

Notification No. 49/2006-Customs

In exercise of the powers conferred by sub-section (1) of Section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby makes the following further amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 21/2002-Customs, dated the 1st March, 2002, which was published in the Gazette of India, Extraordinary vide number G.S.R. 118(E), dated the 1st March, 2002, namely:-

In the said notification, -

(I) in the Table, against S.No.400, for the entry in column (3), the following entry shall be substituted, namely:-

“Goods required for setting up of any Mega Power Project, so certified by an officer not below the rank of a Joint Secretary to the Government of India in the Ministry of Power, that is to say-

(a) an inter-state thermal power plant of a capacity of 700MW or more, located in the States of Jammu and Kashmir, Sikkim, Arunachal Pradesh, Assam, Meghalaya, Manipur, Mizoram, Nagaland and Tripura; or

(b) an inter-state thermal power plant of a capacity of 1000MW or more, located in States other than those specified in clause (a) above; or

(c) an inter-state hydel power plant of a capacity of 350MW or more, located in the States of Jammu and Kashmir, Sikkim, Arunachal Pradesh, Assam, Meghalaya, Manipur, Mizoram, Nagaland and Tripura; or

(d) an inter-state hydel power plant of a capacity of 500MW or more, located in States other than those specified in clause (c) above”;

(II) in the Annexure, in Condition No. 86, for sub-clauses (ii) and (iii) of clause (a), the following shall be substituted, namely:-

“(ii) the power purchasing State undertakes, in principle, to privatize distribution in all cities, in that State, each of which has a population of more than one million, within a period to be fixed by the Ministry of Power.”.

[F.No. 354/104/2003-TRU]

It is noticed that the revised policy guidelines issued by Government of India, Ministry of Power vide its letter No. A-118/2003-IPC dated 2.8.2006 has stated that an inter-State thermal power plant of a capacity of 1000 MW or more is eligible for grant of mega power status. It further states as under:

“Zero Customs Duty: In terms of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 21/2002-Customs dated 1.3.2002 read together with No. 49/2006-Customs dated 26.5.2006, the import of capital equipment would be free of customs duty for these projects.”

41. It is to be considered whether under the notification as stated above, mining equipments were exempted from customs duty. General Exemption No.122 under the Customs Notification No.21/2002 as amended from time to time contains the list of items which are exempted from customs duty. It is observed that Notification 21 of 2002-Customs clearly demarcates the power projects and mining projects separately. It is seen that at Ser No.399 of the list, coal mining projects are liable to pay customs duty. Ser No. 400 only exempts the mega power project from payment of customs duty and there is no mention that it includes captive power plants. Therefore, it cannot be said that as on the cut-off date, there was exemption on mining equipment and the petitioner had taken into consideration such exemption while quoting the bids. Nothing has been produced in the petition which could indicate that any such impression was given by the procurers or their representative prior to bidding. In view of the foregoing discussion, the submission of the petitioner that the decision of the Ministry of Power detailed in its office memorandum dated 17.06.2011 and refusal by Energy Department, Government of Madhya Pradesh to provide recommendation letter to import mining equipments for Sasan UMPP under nil custom duty amounts to a "Change in Law"

under Article 13.1 of the PPA and the petitioner is entitled to be compensated for the same is not acceptable and hence no compensation would be available in this regard.

42. Summary of our decision with regard to various claims of the petitioner is given in the table as under:

(₹. In Crore)							
S.No.	Items	Estimated/approximate cost at the time of bid	Current estimate	Increase in expenditure	Expenditure incurred (as per Auditor Certificate till 30.6.2013)	Expenditure to be incurred	Decision of the Commission
1	Power station (Power plant + ash dyke + water pipeline + land-power station)	190.70	193.20	2.50	160.60	32.60	Admissible under "Change in Law", subject to actual increase in cost with reference to estimated cost (vide para 19)
	R&R plan for Power Station land + Fuel Transportation System land	170.00	170.00	0.00	104.90	65.10	Admissible under Change in Law. However, actual expenditure is within the estimated cost. No relief available (vide para 20)
	<b>Sub Total</b>	<b>360.70</b>	<b>363.20</b>	<b>2.50</b>	<b>265.50</b>	<b>97.70</b>	
2	Moher & Moher - Amlohri Extension coal block						
	Cost of Land including Forest land - Moher & Moher -Amlohri Extension	85.30	296.00	210.70	229.19	66.81	Admissible under "Change in Law" @ (vide para 21)
	Cost of implementation of Compensatory afforestation Moher & Moher -Amlohri Extension Coal blocks	21.50	84.80	63.30	124.11**		Admissible Under Change in Law@ (vide para 22 & 23)
	Increase in cost of Geological Report for Moher & Moher -Amlohri Extension coal	14.50	16.10	1.60	16.10	0.00	Not admissible under Change in Law (vide para 24)



	blocks						
	Cost of implementation of R&R plan Moher & Moher –Amlohri Extension coal blocks	45.00	59.00	14.00	30.74	28.26	Admissible under “Change in Law” @ (vide para 25)
	<b>Sub Total</b>	<b>166.30</b>	<b>455.90</b>	<b>289.60</b>	<b>400.14</b>	<b>95.07</b>	
3	Chhatrasal captive Coal Block						
	Increase in price of Land – Chhatrasal Coal block	57.00	84.10	27.10	3.81	80.29	Admissible under Change in Law @ (vide para 26)
	Increase in cost of implementation of Compensatory afforestation	13.30	260.70	247.40	0.00	260.70	Admissible under Change in Law @ (vide para 27)
	Increase in cost of Geological Report – Chhatrasal coal blocks	4.50	8.90	4.40	8.90	0.00	Not admissible @ (vide para 28)
	Increase in cost of implementation of R&R plan – Chhatrasal coal blocks	30.00	30.00	0.00	0.00	30.00	Admissible under Change in Law @ (vide para 29)
	<b>Sub Total</b>	<b>104.80</b>	<b>383.70</b>	<b>278.90</b>	<b>12.71</b>	<b>370.99</b>	
(A)	<b>Total of Afforestation Declared price, GR, R&amp;R of land (1+2+3)</b>	<b>631.8</b>	<b>1202.8</b>	<b>571.0</b>	<b>678.35</b>	<b>563.76</b>	
4	Water intake system	92.00	244.00	152.00	257.69		Not admissible @ (vide para 30-33)
5	Increase in cost due to Excise duty on Cement and Steel	0.00	75.90	75.90	53.38		Not admissible under “Change in Law” @ (vide para 34-36)
6	Custom duty on mining equipments	0.00	531.00	531.00	383.14		Not admissible under “Change in Law” @ (vide para 37-41)
(B)	<b>Total of water intake, custom &amp; excise duty</b>	<b>92.0</b>	<b>850.90</b>	<b>758.90</b>	<b>694.21</b>	<b>0.00</b>	
	<b>Grant Total (A + B)</b>	<b>723.8</b>	<b>2053.7</b>	<b>1329.9</b>	<b>1372.56</b>	<b>563.76</b>	

Note. \*\* Expenditure of ₹124.11 Crore incurred on compensatory afforestation of Moher & Moher –Amlohri has been computed from the total expenditure incurred on land + afforestation of ₹353.30 as certified by the auditor.

@ Subject to prudence check based on the information to be submitted as per the directions in this order.



**E: Mechanism for reimbursement of expenditure admissible under “Change in Law”**

43. The petitioner has submitted that as per Article 13.2.(a) of the PPA, the petitioner is entitled to be compensated as a result of “Change in Law” for every cumulative increase/decrease of ₹50 crore in the capital cost in the non-escalable capacity charges at the rate of 0.267% of the non-escalable capacity charges. The petitioner has submitted that the mechanism provided under the PPA is not sufficient to compensate the petitioner to the same economic position as the petitioner would only be able to recover ₹169 crore as against its claim of ₹1330 crore. The petitioner has prayed that the Commission may in exercise of its regulatory power under Section 79(1) (b) of the Act devise a mechanism to grant relief to the petitioner to restore the petitioner to the same economic position as if the “Change in Law” has not occurred. During the hearing of the petition on 10.10.2013, learned senior counsel submitted that Article 13.2 contemplates to cover the entire Article 13 and is not confined to Article 13.2 only. Article 13.2 is an indicative formula and if the relief is less, compared to the actual expenditure, then the Commission can compensate the petitioner in terms of its power under Article 13 of the PPA and regulatory power of the Commission.

44. The respondents have opposed the prayer of the petitioner. Learned counsel for MPPMCL submitted that while the petitioner has claimed compensation of ₹1330 crore, provision of increase in capacity charge being 0.267% of the non-escalable capacity charge under the PPA, the allowable compensation would only be ₹169 crore. Had the petitioner sought 100% compensation while submitting the bid, it would have been seen as a major technical deviation and the bid would not have been considered in the first

place. MPPMCL has submitted that the petitioner is seeking relief beyond the scope of the PPA. HPPC has submitted that petitioner's request to the Commission to exercise the overriding powers under Section 79(1)(b) read with Section 61 of the Act to give compensatory tariff over and above the scope of the "Change in Law" provision contained in the PPA is devoid of any merit and the claim of the petitioner needs to be determined in terms of the PPA, particularly when the PPA was entered into pursuant to a tariff based competitive bidding process as per the Standard Bidding Documents and Guidelines issued by the Central Government and further taken note of by the Commission. HPPC has further submitted that the decision of the Commission in the order dated 2.4.2013 in Petition No.155/MP/2012 is distinguishable from the present case as the Commission was dealing with the impact of Indonesian Regulations in that case and not in regard to other terms relating to any claim for increase in the cost or revenue.

45. The petitioner in its affidavit dated 10.12.2014 has brought on record the judgment of the Appellate Tribunal for Electricity dated 12.9.2014 in Appeal No. 288 of 2013 (M/s Wardha Power Company Limited Vs. Reliance Infrastructure Limited & Another). The petitioner relying on the judgment of the Appellate Tribunal has submitted that the intent of "Change in Law" provision in the PPA is to restore the seller to the same economic position as if such Change in Law has not occurred. Therefore, the petitioner should be compensated for the entire quantum found admissible under "Change in Law" during the construction period. The petitioner has submitted that the compensation mechanism provided in Article 13.2 (a) of the PPA will not be sufficient to reconstitute the petitioner to the same economic position as if the aforesaid "Change in

Law” had not occurred. According to the petitioner, by applying the mechanism provided in Article 13.2 (a) of the PPA, the petitioner will be able to recover only about 13% of additional cost incurred over the term of the project i.e. 25 years, which are on account of reasons beyond its control. On the contrary, had the petitioner quoted higher capacity charges, the petitioner would have recovered more than 100% of the additional cost based on this formula. Therefore, the formula is flawed and defeats the fundamental principle of the PPA that the petitioner should be restored to the same economic position. The petitioner has relied upon the judgment of the Hon'ble Supreme Court in DLF Universal Limited Vs. Director, Town and Country Planning Department, Government of Haryana {(2010) 14 SCC 1} and has contended that as per the said judgment, a contract should be interpreted according to its purpose and the intention of the parties and since the intention of parties as evidenced from opening para of Article 13.2(a) is to restore the affected party to the same economic position as if Change in Law has not occurred, the petitioner should be allowed the full effect of the Change in Law. The petitioner has further submitted that the latest Standard Bidding Document issued by Ministry of Power, Government of India has done away with such formula as provided in Article 13(2) (a) of the PPA. The petitioner has also submitted that the Commission has the power under Section 79(1) (b) of the Act to grant compensatory tariff and therefore, there is a need to devise a mechanism which will address the issues and restore the petitioner to the same economic position as if the said “Change in Law” had not occurred.

46. We have considered the submission of the petitioner and respondents including the affidavit dated 10.12.2014 placed on record by the petitioner. Article 13.2(a) of the PPA provides as under:

"13.2 Application and principles for computing the impact of "Change in Law": While determining the consequence of "Change in Law" under this Article 13, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such "Change in Law", is to restore through Monthly Tariff Payments, to the extent contemplated in this Article 13, the affected Party to the same economic position as if such "Change in Law" has not occurred.

(a) Construction Period

As a result of any "Change in Law", the impact of increase/decrease of Capital Cost of the Project in the Tariff shall be governed by the formula given below:

For every cumulative increase/decrease of each Rupees Fifty crore (₹50 crore) in the Capital Cost over the term of this Agreement, the increase/decrease in Non Escalable Capacity Charges shall amount to zero point two six seven (0.267%) of the Non Escalable Capacity Charges. Provided that the Seller provides to the procurers documentary proof of such increase/decrease in Capital Cost for establishing the impact of such "Change in Law". In case of Dispute, Article 17 shall apply. It is clarified that the above mentioned compensation shall be payable to either Party, only with effect from the date on which the total increase/decrease exceeds amount of ₹ Fifty (50) Crore."

Thus as per the above provisions, the petitioner is entitled for compensation at the rate of 0.267% of the non-escalable capacity charges for every cumulative increase/decrease in capital cost for an amount of ₹50 crore over the terms of the agreement. Capital Cost has been defined in the PPA as under:

"Capital Cost shall have the meaning ascribed thereto under ABT or the Grid Code means the lower of the following:

(a) Actual capital cost of the Project on a relevant date which shall not be later than the Commercial Operation Date of the Power Station, as certified by the auditors appointed jointly by the Seller and Procurers (jointly); or

(b) Total project cost of the Project as set forth in the Financing Agreements,

Provided that Capital Cost shall always exclude cost overruns arising due to Seller Event of Default, or costs due to events for which compensation has been received by Seller from the Procurers or Insurers or Third Parties;

Provided further that the Capital cost in relation to a Unit shall be the total Project Cost allocated in proportion to the Contracted Capacity of the said Unit."

Thus the capital cost of the project has to be reckoned in either of the two ways i.e. on the basis of the actual capital cost as on the date of the commercial operation of the power station or the total Project cost of the project as set forth in the Financing Agreement whichever is lower. Commercial Operation Date and Financing Agreement have been defined in the PPA as under:

"Commercial Operation Date" means, in relation to a Unit, the date one day after the date when each of the Procurers receives a Final Test Certificate of the Independent Engineer as per the provisions of Article 6.3.1 and in relation to the Power Station shall mean the date by which such Final Test Certificates as per Article 6.3.1 are received by the Procurers for all the Units."

"Financing Agreements" means all the loan agreements, letters of credit and other documents relating to the financing of the Project on or before the COD of the Power Station, as may be amended, modified, refinanced or replaced from time to time, but without in anyway increasing the liabilities of the Procurers therein"

From the reading of the above provisions, it emerges that the relief under Article 13(2) (a) can be granted only if the additional cost on account of "Change in Law" exceeds the capital cost by ₹50 crore or more. Capital Cost of the project has to be ascertained from the lower of the capital cost determined after the commercial operation date of all the units of the generating station or the Financing Agreement of the project. In the absence of these documents, the capital cost of the project and the increase in the capital cost on account of Change in Law cannot be determined. Accordingly, we direct the petitioner to place on record the actual capital cost of the project as on the commercial operation date of the last unit of Sasan UMPP duly certified by the Statutory

Auditor and capital cost as set forth in the Financing Agreement duly supported by all relevant documents after the commissioning of the generating station.

47. As regards the relief for Change in Law allowed as 0.267% of the non-escalable capacity charges for every increase of ₹50 crore in the capital cost, the petitioner has termed the said formula as flawed. It is pertinent to mention that the petitioner had quoted the tariff after being acquainted with and having satisfied with the similar provisions in the draft PPA accompanying the RFP and therefore, the petitioner was expected to take all factors including the mechanism for calculation of compensation under "Change in Law" into consideration while quoting the bid. Therefore, the petitioner at this stage cannot term the relevant provisions in the PPA as flawed on the ground that similar provision is absent in the Model Standard Bidding Documents issued by Ministry of Power. The petitioner has argued that had it quoted higher capacity charges, then the petitioner would have recovered more than 100% of the additional cost based on the formula given in Article 13(2) (a) of the PPA. In our view, there was no embargo on the petitioner to quote the non-escalable capacity charges in a realistic manner so as to cover the full compensation for the increase in cost on account of Change in Law. The petitioner has relied upon the following extract of the judgment of the Hon'ble Supreme Court in case of DLF Universal Limited Vs. Director, Town and Country Planning Department, Government of Haryana:

"13. It is a settled principle in law that a contract is interpreted according to its purpose. The purpose of a contract is the interests, objectives, values, policy that the contract is designed to actualize. It comprises the joint intent of the parties. Every such contract express the autonomy of the contractual parties' private will. It creates reasonable, legally protected expectations between the parties and reliance on its results. Consistent with the character of purposive interpretation, the court is required to determine the ultimate purpose of the contract primarily by the joint intent of the parties at the time the contract so

formed. It is not the intent of a single party, it is the joint intent of both the parties and the joint intent of the parties is to be discovered from the entirety of the contract and the circumstances surrounding its formation."

In our view, the above judgment does not advance the case of the petitioner as the provisions of the PPA are clear that the compensation will be admissible to the extent contemplated under Article 13 which includes the provision that the compensation shall be equal to 0.267% of the non-escalable capacity charges. The petitioner and procurers have entered into the PPA on exercise of their free will and after having understood the contents of the PPA. Therefore, the compensation cannot be granted by devising a mechanism which is different from the formula given in Article 13.2(a) of the PPA.

48. The petitioner has also relied upon the judgment of the Appellate Tribunal dated 12.9.2014 in Appeal No.288/2013 (M/s Wardha Power Company Limited Vs. Reliance Infrastructure Limited & Another). On perusal of the said judgment, it is noticed that the facts of the said case are distinguishable from the present case. In that case, the issue was whether the petitioner was entitled to tax on the prevalent price of coal or on the base price of coal assumed at the time of bid. The Appellate Tribunal after going through the provisions of the PPA came to the conclusion that there is no co-relation between the compensation on account of Change in Law due to change in cess/excise duty on coal and the coal price computed from the quoted energy charges in the financial bids. Accordingly, the Appellate Tribunal held that cess/excise duty is payable to the seller would be on the basis of the prevailing price of coal. In the present case, there are specific provisions in the PPA which allows compensation on account of Change in Law on certain identified items during the construction period if the actual



cost exceeds the indicative cost provided by the procurers at the time of submission of the bid. Secondly, the decision of the Appellate Tribunal is with reference to the claims during operating period where there is no upper ceiling on the compensation to be allowed whereas in the present case, there is a ceiling of 0.267% of the non-escalable charges for every increase of ₹50 crore in the capital cost. The judgment of the Appellate Tribunal does not address the issue whether compensation can be granted during the construction period by ignoring the express provisions regarding the formula for compensation in the PPA. As regards the submission of the petitioner praying for a mechanism akin to the compensatory tariff as granted in the order dated 2.4.2013 in Petition No.155/MP/2012, it is clarified that the Commission exercised its power under Section 79(1) (b) of the Act to grant relief to the petitioner therein as there was no provision in the PPA to cater to an extraordinary situation arising out of the promulgation of Indonesian Regulations. In the present case there is a specific formula given in the PPA for grant of relief during construction period. The petitioner has admittedly stated in the additional affidavit that had it quoted higher non-escalable capacity charge, it would have recovered the full impact of additional capital cost on account of Change in Law as per the formula. It is therefore apparent that the main reason for non-recovery of the capital cost fully is attributable to the low non-escalable capacity charges and not on account of any flaw in the formula. In our view, the compensation is subject to the limitation provided under Article 13.2(a) of the PPA and the Commission cannot allow the relief prayed for by ignoring or deviating from the said specific provision.

49. **Summary of our decisions:**

(a) At the instance of the Commission, the seller and procurers held a meeting on 20.3.2013 to consider the claims of the petitioner under Change in Law. In the meeting, both seller and procurers agreed that the dispute needs adjudication by the Commission. The seller and procurers having conferred with regard to the claims under the PPA and having not been able to settle the dispute amicably, the dispute has arisen for adjudication of the Commission. Therefore, the requirement of notice and prior consultation between the parties in terms of Article 13(3) of the PPA has been fulfilled in the case.

(b) The Commission in its order dated 8.8.2014 in Petition No.85/MP/2013 has decided the date of commercial operation (COD) of the first unit of Sasan UMPP as 16.8.2013. Accordingly, the increase in tariff on account of “Change in Law” during the ‘**construction period**’ which is being considered in this order would be recoverable with effect from 16.8.2013 in respect of Unit 3 and from the respective dates of commercial operation in respect of other units.

(c) The petitioner is entitled to relief under Change in Law under different heads as summarized in para 42 of this order subject to other provisions of the PPA, and conditions laid down in this order at appropriate paragraphs.

(d) The petitioner shall file through a separate petition (i) all relevant documents including the audited capital cost as on the commercial operation of the respective units and the last unit of the generating station, (ii) Financing Agreements including the

capital cost as per the Financing Agreement, (iii) documents as sought under various items allowed under Change in Law, (iv) all relevant documents with regard to the decision for utilization of coal from the captive mines in other projects of the petitioner, (v) the actual quantum of coal extracted from the mines and the actual quantum of coal utilized separately for Sasan UMPP, for other projects of the petitioner and for commercial purposes, if any, (vi) information regarding coal sought in para 25, 26, 27 and 29 of the order and (vii) any other relevant information.

(e) This information is required to decide the exact quantum of compensation admissible under “Change in Law”.

(f) The petitioner is entitled to relief under Change in Law strictly in accordance with Article 13.2(a) of the PPA.

50. The petitioner had filed IA No.24/2013 for provisional increase in tariff of Sasan UMPP on account of Change in Law as per the computation submitted along with the said IA pending final disposal of the petition. In view of our decision in this order, the IA has become infructuous and is accordingly disposed of.

51. Petition No. 21/MP/2013 is disposed of in terms of our above directions.

**sd/-**  
**(A. K. Singhal)**  
**Member**

**sd/-**  
**(M. Deena Dayalan)**  
**Member**

**sd/-**  
**(Gireesh B. Pradhan)**  
**Chairperson**