

CENTRAL ELECTRICITY REGULATORY COMMISSION

NEW DELHI

Petition No: 101/MP/2017

Coram:

Shri Gireesh B. Pradhan, Chairperson

Shri A.K. Singhal, Member

Shri A.S. Bakshi, Member

Dr. M.K. Iyer, Member

Date of Order: 19th of December, 2017

In the matter of

Petition under Section 79(1) (b) read with Section 79(1) (f) of the Electricity Act, 2003 inter alia seeking compensation on account of occurrence of 'Change in Law events' and/or Force Majeure events relating to Power Purchase Agreements both dated 01.11.2013 entered into between the Petitioner and the Respondents.

And

In the matter of

DB Power Ltd.
Office Block 1A, 5th Floor.
Corporate Block, DB City Park,
DB City, Arera Hills,
Opposite MP Nagar, Zone-I,
Bhopal-4620 16

.....Petitioner

Vs

1. PTC India Limited
2nd Floor, NBCC Tower,
15 Bhikaji Cama Place, New Delhi
2. Rajasthan Urja Vikas Nigam Limited (RUVNL)
Vidyut Bhawan, Janpath
Jyoti Nagar, Jaipur,
Jaipur, RAJASTHAN – 302005
3. Jaipur Vidyut Vitran Nigam Limited
Vidyut Bhawan, Jyoti Nagar,
Near New Vidhan Sabha Bhawan,
Jaipur, RAJASTHAN – 302005



4. Ajmer Vidyut Vitran Nigam Limited
Vidyut Bhawan, Makarwali Road,
Panchsheel Nagar, Ajmer
RAJASTHAN – 305004
5. Jodhpur Vidyut Vitran Nigam Limited
New Power House,
Industrial Area,
Jodhpur, RAJASTHAN – 342003
6. Prayas (Energy Group)
Prayas (Energy Group) unit II A & B, Devgiri,
Joshi Railway Muesum Lane,
Kothrud Industrial Area, Kothrud
Pune, Maharastra-411038
7. Tamil Nadu Generation and Distribution Corporation Limited
6th Floor, Eastern Wing
144, Anna Salai,
Chennai-600002,
Tamil Nadu

... Respondents

Parties Present:

1. Shri Sitiesh Mukherjee, Advocate, TPCIL
2. Shri Deepak Khurana, Advocate, D.B. Power
3. Shri Tejasu Anand, Advocate, D.B. Power
4. Shri Aashish Anand Bernad, Advocate, PTC India
5. Shri S. Vallinayagam, Advocate, TANGEDCO
6. Shri G. Umapathy, Advocate, TANGEDCO
7. Ms. Swapna Seshadri, Advocate, Rajasthan Discoms
8. Shri M.G. Ramachandran, Advocate, Prayas
9. Ms. Ranjitha Ramachandran, Advocate, Prayas
10. Ms. Anushree Bardhan, Advocate, Prayas

ORDER

The Petitioner, DB Power Limited, has filed the present petition seeking compensation on account of change in law and force majeure events as per the provisions of the PPA dated 01.11.2013 entered into between PTC India Limited ("PTC/Respondent No.1") and Respondent No. 3, 4 & 5 (collectively called 'Rajasthan Discoms' along with Respondent No. 2) for supply of power from the Petitioner's plant through Agreement to sell dated 01.11.2013 between PTC and the Petitioner.



2. The Petitioner has set up a 1200 MW (2x600 MW) coal based Thermal Power Station (hereinafter referred to as the 'generating station') at village Badadraha, District Janjgir Champa in the State of Chhattisgarh.

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

Unit	Date of commercial operation of the units
I (600 MW)	3.11.2014
II (600 MW)	26.3.2016

Background of the Case:

4. In the year 2012, the Respondent No. 3, 4, & 5, Jaipur Vidyut Vitran Nigam Limited (JVVNL), Ajmer Vidyut Vitran Nigam Limited (AVVNL) and Jodhpur Vidyut Vitran Nigam Limited (JdVVNL) through Rajasthan Rajya Vidyut Prasaran Nigam Ltd. (RRVPNL), invited a bid for supply of power on long term basis through tariff based competitive bidding process under Case-1 bidding procedure for meeting the Respondent's base load power requirements. In this regard RRVPNL issued a Request for Procurement ('RFP') document dated 28.05.2012. The Bid Deadline was 18.09.2012. Pursuant to the bidding process, the Petitioner was selected as the seller for sale and supply of electricity for aggregate contracted capacity of 410 MW to the Respondent No.3, 4, & 5. However, the Rajasthan Electricity Regulatory Commission (RERC), vide its order dated 22.07.2015 reduced the quantum of power to be procured under the PPA from 410 MW to 250 MW. The petitioner has challenged the said order of RERC dated 22.07.2015 and the same is pending adjudication in the Hon'ble APTEL (Appeal No.235/2015). The present petition is filed by the petitioner seeking compensation on account of change in law and/or Force Majeure events in respect of 250 MW only. The petitioner has requested this



Commission to pass an order in the event of the petitioner succeeding in its appeal pending before APTEL.

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

(a) Supply of 5% of the net power generated from the said Power Plant to the State of Chhattisgarh at the energy (variable) charges in lieu of assistance provided by the State of Chhattisgarh in obtaining applicable clearances/ approvals and incentives to the Project as per applicable Industrial Policy, etc. in terms of the Implementation Agreement dated 6.8.2009.

(b) Supply of 250 MW of power to the Respondent No. 2, 3, 4 & 5 from its Power Plant since 30.11.2016 in terms of the PPA on long term basis in terms of the following back to back arrangement:

- (i) The Agreement to sell dated 01.11.2013 between PTC India Limited ("PTC/Respondent No.1") and the Petitioner;
- (ii) The Power Purchase Agreement dated 01.11.2013 between PTC India Limited and Respondent No. 3, 4 & 5 for supply of power from the Petitioner to Respondent No.3, 4 & 5. The Cut-off date for this PPA is 11.09.2012;

The supply under Rajasthan PPA has become effective from 30.11.2016.

(c) Long Term PPA dated 19.8.2013 entered into with Tamil Nadu Generation and Distribution Company Limited (TANGEDCO) for supply of 208 MW RTC Power. The supply under this PPA has become effective from 1.8.2015.



6. The back to back PPA executed on 1.11.2013 by the Petitioner & Respondent no. 1 and the Respondent No. 3, 4, & 5 for supply of power is through domestic coal and linkage coal from South Eastern Coalfields Limited ('SECL'). The PPA came into effect from the date of its execution i.e. from 1.11.2013. The Petitioner is required to supply power at the Delivery point i.e. STU interface in Rajasthan. The Petitioner has been supplying power to the Respondent from its Power Plant since 30.11.2016 in terms of Article 4.1.1 of the PPA.

7. The Chronological dates of events with regard to TANGEDCO PPA and Rajasthan Dicoms PPA are as under:

Power Supply to	TANGEDCO (208 MW)	Rajasthan Dicoms (Initially 410 MW but reduced to 250 MW by RERC)
Cut-off date	27.2.2013	11.9.2012
Bid Submission date	6.3.2013	18.9.2012
PPA/ PSA executed on	19.8.2013	1.11.2013
Start of supply of power	1.8.2015	30.11.2016

8. The Petitioner has sought adjustment of tariff on account of the events of Change in Law and Force Majeure events after 11.9.2012 affecting the power project during the Operating Period in order to restore the Petitioner to the same economic position as if the events have not occurred in terms of Rajasthan PPA. The Petitioner has sought compensation for Change in Law and Force Majeure events during the Operating period on account of the following events which have impacted the cost and revenue of supply of power from the power project to the procure:

- (a) Increase in Royalty Rate on Coal
- (b) Increase in sizing charges on Coal
- (c) Increase in Surface Transportation Charges
- (d) Increase in Forest Tax
- (e) Increase in Chhattisgarh Environment Cess/Chhattisgarh Environment Tax



- (f) Increase in Chhattisgarh Industrial Development Cess/Chhattisgarh Development Tax
- (g) Revision in rate of Central Excise Duty on account of addition in components
- (h) Increase in Clean Energy Cess
- (i) Increase in Busy Season Charges on transportation of coal by rail
- (j) Levy of Coal Terminal Surcharge for traffic of coal for the distance beyond 100 km
- (k) Withdrawal of short Lead concession in charging of freight for all tariff including coal booked upto 100 km
- (l) Increase in Service Tax on transportation of coal by rail and road
- (m) Consequent increase in Value Added tax/CST, Entry Tax, Development Surcharge and Niryatkar
- (n) Additional cost towards Fly Ash Transportation
- (o) Increase in rate of Chhattisgarh Electricity Duty
- (p) Additional Capital Expenditure on account of Amendment in Environment Norms
- (q) Additional cost due to reduction in supply of coal from SECL

9. The Petitioner has submitted that during the period commencing from 30.11.2016 upto 31.3.2017, it has incurred additional expenses of Rs. 24.40 crore in generating and supplying power to Rajasthan Discoms under the PPA due to the Change in Law and Force Majeure events. The Petitioner has submitted that as per the provisions of the PPA, the Petitioner is entitled to payment of additional cost already incurred as well as to additional cost which shall be incurred in future due to occurrence of the Force Majeure events. The petitioner has computed the impact on account of the Change in Law Events as under:

S. No.	Events	Claimed under	Financial impact
1	Increase in Royalty Rate on Coal	Change in law & Force Majeure	Rs. 2.34 crore
2	Increase in Sizing Charges on Coal	Change in law & Force Majeure	Rs. 0.65 crore
3	Increase in Surface Transportation Charges	Change in law & Force Majeure	Rs. 0.24 crore



S. No.	Events	Claimed under	Financial impact
4	Increase in Forest Tax	Change in law & Force Majeure	Rs. 0.03 crore
5	Increase in Chhattisgarh Environment Cess/ Chhattisgarh Environment Tax	Change in law & Force Majeure	Rs 0.08 crore
6	Increase in Chhattisgarh Industrial Development Cess/ Chhattisgarh Development Tax	Change in law & Force Majeure	Rs 0.08 crore
7	Revision/addition of components in assessing the Central Excise Duty	Change in law & Force Majeure	Rs 0.81 crore
8	Increase in Clean Energy Cess	Change in law & Force Majeure	Rs 12.50 crores
9	Increase in Busy Season Charges on transportation of coal by rail	Change in law & Force Majeure	Rs. 0.29 crore
10	Levy of Coal Terminal Surcharge for traffic of coal for the distance beyond 100 Km	Change in law & Force Majeure	Rs. 0.09 crore
11	Withdrawal of short lead concession in charging of freight for all tariff including coal booked upto 100 Km	Change in law & Force Majeure	Rs. 0.35 crore
12	Introduction and Enhancement of Service Tax on transportation of coal by rail and road	Change in law & Force Majeure	Rs. 0.32 crore
13	Consequent increase in Value Added Tax / CST, Entry Tax, Development Surcharge and Niryatkar	Change in law & Force Majeure	Rs 1.28 crores
14	Additional cost towards Fly Ash Transportation	Change in law & Force Majeure	Rs. 1.17 crores
15	Levy of Chhattisgarh Electricity Duty	Change in law & Force Majeure	Rs. 1.93 crore
16	Additional Capital Expenditure on account of Amendment in Environment Norms	Change in law & Force Majeure	Petitioner is in the process of analysing the impact and will claim once analysed
17	Additional cost due to reduction in supply of coal from SECL	Change in law & Force Majeure	Rs. 2.26 crores
Total			Rs. 24.40 crores



10. The Petitioner has submitted that it is supplying power in more than one State. Therefore, the Commission has jurisdiction to adjudicate the present matter under Section 79(1)(b) read with Section 79(1)(f) of the Electricity Act, 2003.

11. Against the above background, the Petitioner has filed the present petition with the following prayers:-

“(a) Declare that the events enumerated in the Petition constitute Change in Law & Force Majeure events as per the provisions of the PPAs and that the Petitioner is entitled to be restored to the same economic condition prior to occurrence of the said Changes in Law & Force Majeure events;

(b) Direct the Respondent to make payment of Rs. 24.40 Cr. to the Petitioner towards the additional expenditure incurred by the Petitioner on account of the said Change in Law & Force Majeure events, in supplying power to the Respondent under the PPA from 30.11.2016 to 31.03.2017 along with interest @ 1.25% per month from the date(s) on which the said amount(s) became due to the Petitioner till the actual realization of the same;

(c) Direct the Respondents to continue to make payments accrued in favor of the Petitioner on account of Change in Law & Force Majeure events enumerated in the Petition from 01.04.2017 up to the effect of the said Change in Law & Force Majeure events;

(d) Declare and/hold that the Petitioner is entitled to tariff over and above the tariff under the PPAs on account of the events enumerated in the Petition;

(e) In the interim pending final adjudication of the present Petition, direct the Respondents to make payment of Rs. 21.96 crores i.e. 90% of the already incurred amount by the Petitioner from 30.11.2016 to 31.03.2017 towards supply of power to the Respondents in order to ease the cash crunch faced by the Petitioner;”

12. The Petition was admitted on 15.6.2017 and notices were issued to the Respondents and Prayas Energy Group (Prayas) to file their replies to the petition. Replies to the petition have been filed by the Respondent (Rajasthan Discoms) vide affidavits dated 12.9.2017 and Prayas vide affidavit dated. 25.09.2017 & 25.11.2017. The Petitioner has filed its rejoinders to the said replies.



13. Rajasthan Discoms, vide its reply dated 12.9.2017, has submitted as under:

(a) Rajasthan Electricity Regulatory Commission vide its order dated 22.07.2015 has adopted the tariff under section 63 of the EA 2003 and approved only 250 MW of the Petitioner's plant. Hence, no claim can be made by the Petitioner beyond the same.

(b) Under Article 10 - Change in Law clause — 5th Bullet, the term "*any change in tax or introduction of any tax*" is circumscribed by the qualification "*made applicable for supply of power by the Seller as per the terms of the agreement*" which means that every change in tax or introduction of any tax is not covered under change in law, but only such taxes that are on the transaction of supply of power by the seller is to be permissible. PPA is a binding contract between the parties and all claims of the parties have to be strictly in terms of the PPA and not contrary thereto. In terms of Article 10 of the PPA as cited above, it is evident that not every imposition or change in tax is to be recognized as Change in Law, but only wherein there is a change in tax or imposition of tax "for supply of power".

(c) It is a well settled principle of interpretation that when the term tax is provided as a specific provision in the Change in Law clause, it naturally follows that the other provisions in the Change in Law clause do not deal with taxes but other aspects of Change in Law clause. The Change in Law on account of taxes and duties are specifically to be governed by the last bullet under Article 10.1.1 of the PPA. Any other interpretation to include imposition of taxes and duties apart from that on supply of electricity under the other bullets of Article 10.1 would render the last bullet meaningless, which is against the basic principles of interpretation.



(d) Any increase in price only on account of statutory levy of tax on supply of electricity is covered by the Change in Law clause. No increase of any nature on account of contractual and commercial arrangements of the Petitioner including with Railways etc. can be covered under the Change in Law clause.

(e) The Petitioner has also relied on Article 9.1, 9.3 & 9.7.1 of the PPAs which deal with Force Majeure and the available relief for the same. It is the case of the Petitioner that the events cited by it apart from being change in law are also force majeure. Without prejudice to the fact that these events do not amount to Force Majeure, it is stated that there is no question of allowing any increased cost on account of alleged force majeure in terms of the PPA. It is now well settled that there can be no cost escalation claim made on account of Force Majeure reasons. No cost escalation can be granted to the Petitioner on account of the alleged Force Majeure Events. The intent of the Force Majeure clause is not to give any monetary compensation to the Petitioner. Further, the events cited by the Petitioner are not Force Majeure by any stretch of imagination. This has been settled by the Supreme Court in Energy Watchdog vs CERC & Ors (2017) SCC Online SC 378.

(f) Petitioner cannot use the present proceedings to get by way of change in law issues which would have been to the benefit of the Petitioner by way of escalable tariff in the competitive bidding process. Events forming part of the escalable formula, the same can by no means be included in Change in Law, which would only amount to double payment. The commercial decision of escalable charges is on the bidders and the same amount cannot be included in the Change in Law formula.

(g) PPA has been executed pursuant to a competitive bidding process under Section 63 of the Electricity Act, 2003. The entire risk of the costs and expenses in the generation



and supply of electricity is that of the Petitioner, except for those specifically provided for in the PPA.

14. The Petitioner, vide its rejoinder to the reply filed by Rajasthan Discoms has submitted as under:

(a) Although the total power under the executed PPA is 410 MW, however, the Rajasthan Electricity Regulatory Commission reduced the quantum to 250 MW on an application filed by the procurer. The present Petition pertains to only 250 MW currently being supplied to Rajasthan Discoms through PTC. In the present Petition, the Petitioner has not raised a claim in respect of 160 MW Power which is the subject matter of the Appeal No. 235/2015 pending before the Appellate Tribunal. The only submission being made by the Petitioner in this regard is that in the event Petitioner succeeds in the said Appeal and consequently the quantum of power supply under the PPAs increases, the basis and methodology of the reliefs that may be granted by this Commission for 250 MW may also be made applicable to increased quantum.

(b) The contention of the Respondent that Article 10 is applicable only where there is a change in tax or imposition of tax "for supply of power", which is covered by the last bullet of Article 10.1.1 and therefore the claims being raised in the present Petition being not on account of change in tax or imposition of tax for supply of power are not maintainable under Article 10.

(c) Interpretation placed on Article 10 - Change in Law Clause of the PPA, by the Respondents is fallacious and misconceived. This interpretation has already been rejected by the Commission in a number of cases including but not limited to order dated



01.02.2017 in Petition No. 8/MP/2014- EMCO Energy Limited v. Maharashtra State Electricity Distribution Company Limited.

15. Prayas Energy Group (Prayas), vide its reply dated 25.9.2017, has submitted as under:
- (a) Supply of power does not include all activities of the generator incidental to generation of power such as procurement of inputs, etc. Taxes on supply of power are taxes on sale of power by the generator to the procurer. The term 'supply' is defined in the Electricity Act, 2003 under Section 2 (70) specifically as sale of power.
- (b) The Commission vide order dated 1.2.2017 in Petition No. 8/MP/2014 and 7.4.2017 in Petition No. 112/MP/2016 has allowed taxes other than those on supply of power as Change in Law and the said order has been challenged before the APTEL vide Appeal No. 1476 of 2017. Similar issue is also pending before the APTEL. Only the impact of change in tax rate is to be considered as change in law and any increase due to increase in commercial charges cannot be included.
- (c) Article 9.3 of the PPA defines Force Majeure and is the controlling part which sets out the scope and extent of force majeure agreed to between the parties. Article 9.4 of the PPA provides for exclusions from force majeure, even if an event is a force majeure under Article 9.3, it will still be excluded from being considered so for the purpose of the PPA, if it falls within the scope of any of the specified exclusions. The term 'Prevented' used in Article 9.3 has a definitive meaning, namely that the generator is not in a position to perform. Any increase in price of coal neither prevents nor delays the performance of the obligation. Any impact of the increase in price on the economic viability of the PPA is a commercial risk undertaken by the Petitioner.



(d) Article 9.3 does not use the expression “hindered”. The term hindered is used only in Article 9.7 in the context of available relief and more particularly in the context of giving advance amount to service interest on loan to the lenders when the performance of the obligations is partly prevented as envisaged in Article 9.7(d) onwards. It will therefore not be appropriate to interpret Article 9.3 of the PPA which uses the expression “prevented” as meaning hindered and giving the expression prevented a wider meaning than what flows as a natural meaning. If the Central Government/parties had intended to cover hindered to have wider scope of the controlling part in Article 9.3, they would have specified so in Article 9.3 of the PPA. The performance of the obligations by the Petitioner cannot be said to have been prevented or even hindered taking the colour from the word prevented within the scope of Article 9.3. The obligations could still be performed by petitioner albeit at higher cost.

(e) The amount becomes due only after decision of the Commission and raising of Supplementary Bill by the Petitioner in accordance with Article 10.5.2. There is no delayed payment surcharge for any amount until such bill is raised and thereafter, any surcharge is as per Article 8 of the PPA.

16. The Petitioner, vide RoP for the hearings dated 15.6.2017 and 27.7.2017, was directed to file the following information:

- a) Whether any change in law events reducing the cost have occurred during construction and operation period;
- b) Submit the copy of the Gazette notification increasing the forest tax/ Chhattisgarh Environment Cess/Chhattisgarh Environment tax and Chhattisgarh Industrial Development Cess/Chhattisgarh Development tax;
- c) Claim towards Fly Ash Transportation during the period from 30.11.2016 to 31.3.2017 is related only to the energy supplied to RUVNL and not to all the long term beneficiaries. Submit details of fly ash generation corresponding to energy supplied to all RUVNL



during the period from 30.11.2016 to 31.3.2017, along with quantum of ash transported up to 100 km distance and beyond 100 km (up to 300km) and rate of ash transportation cost.

- d) Revenue earned and cost incurred towards transportation from supplying as up to 100 km distance and beyond 100 km (upto 300 km).
- e) Whether the petitioner has awarded the contract for transportation of ash through competitive bidding or through negotiation route. If the contract has been awarded through competitive bidding, then, submit copy of agreement along with the rate of transportation cost. If the contract has been awarded through negotiation route, then justify how can the price considered was competitive.
- f) Actual fly ash transportation cost paid from 30.11.2016 (supply date to RUVNL) to 31.3.2017 duly certified by the auditor.
- g) Under which head of account, transportation expenditure is booked and whether cost of such transportation was being recovered in tariff.
- h) Whether the Petitioner is maintaining a separate account for revenue earned from sale of ash as per the notification of MoEF. If yes, the total revenue accumulated and the expenditure incurred from the same account till date. If not, the reason for not maintaining such separate account;
- i) Submit the following information with regard to additional cost due to reduction in supply of coal from SECL:
 - i. Total Power tied-up in MW by the Petitioner for long term Beneficiaries from the period from 30.11.2016 (supply date to RUVNL) to 31.3.2017.
 - ii. Break-up of coal received from difference sources viz. linkage coal, coal purchased from e-auction, imported coal, etc. during the period from 30.11.2016 (supply date to RUVNL) to 31.3.2017.
 - iii. Coal requirement for schedule generation and actual generation in respect of long term PPA during the period from 30.11.2016 to 31.3.2017.
 - iv. Quantum of power generated by the Petitioner based on the linkage coal received from SECL and quantum of power supplied to all the long term beneficiaries on daily basis during the period from 30.11.2016 to 31.3.2017.
- j) Copy of contract agreements with the agencies who have taken ash from the power plant from 30.11.2016 to 31.3.2017 along with the copy of Expression of Interests invited by the Petitioner for transportation of fly ash;



k) Detailed justification of the difference in the rate of ash transportation cost submitted by the Petitioner in both the Petitions (101/MP/2017 & 229/MP/2016), whereas the agencies off-taking the ash and the distance of supply of ash from power plant are the same.

17. The Petitioner, vide its affidavits dated 24.7.2017 and 4.9.2017, has filed the information called for.

18. During the course of hearing, learned counsel for Prayas submitted that with respect to certain claims, the Petitioner has not annexed the appropriate Notifications and in respect of additional cost incurred due to reduction in supply of coal, the petitioner has annexed the Notifications by Coal India Subsidiary and not the actual law. Learned counsel for Rajasthan Discoms submitted that the PPA originally entered into between the Petitioner and the Rajasthan Discoms was of 410 MW, which the Rajasthan Electricity Regulatory Commission vide order dated 22.7.2015 reduced to 250 MW and no claim can be made by the Petitioner beyond the same to be passed on to Rajasthan Discoms. Learned counsel further submitted that the Petitioner has filed an Appeal against the said order which is pending before the APTEL. Learned counsel submitted that the Petitioner has not provided any actual data of shortage in supply of linkage coal and the Petitioner should produce the details of the coal actually supplied by SECL to the Petitioner on month to month basis. Learned counsel for TANGEDCO submitted that under the provisions of RfP and PPA, the Petitioner had factored in the capital and operating cost including all taxes, levies and duties in the quoted tariff for supply of power. With regard to Capacity and Energy charges, the petitioner has quoted non-escalable components for capacity and energy apart from escalable components. Therefore, the Petitioner has assumed all risks with regard to the operating cost of the project. As per Article 15.18.1 of the PPA, the seller shall bear and pay all statutory taxes, duties, levies and cess levied on the seller, contractors or their employees, that are required to be paid by the seller as per the law in relation to the execution of the agreement and for supplying power as per the terms of this



Agreement. As per Article 15.18.2, the procurer shall be indemnified and held harmless by the seller against any claims that may be made against procurer in relation to the matters set out in Article 15.18.1. Therefore, the PPA absolves the procurer from all future tax, duties, cess which the seller will be liable to pay while supplying power to the procurer.

19. The Petitioner vide RoP for the hearing dated 27.9.2017 was directed to file the following information along with the relevant Notifications in respect of Change in Law events claimed by the Petitioner and the information sought by Prayas in Para 76 of its reply dated 25.9.2017:

- a) Certificate from SECL regarding availability of quantum of coal for dispatch to the petitioner and actual supply of coal during the affected period i.e. from 30.11.2016 to 31.3.2017.
- b) Detail note on order booking and delivery of coal clearly bringing out making requisition/requirement of coal to the fuel supplier, consent of the fuel supplier for quantum of coal/allotment of rakes and specific indent and offer made to railway for supply of coal and actual supply of coal on daily basis. The petitioner should also furnish the details of one year data for 2016-17 on monthly basis in terms of the Annexure annexed with the RoP.
- c) Copy of the Notice inviting tender along with the detailed Terms and Conditions invited by the petitioner for lifting of Fly Ash and Transportation/Disposal of Fly Ash.
- d) Copy of the documents and the detailed quotation quoted by the agencies showing their interest for participation in the respective EoI for lifting of Fly Ash & Transportation /Disposal of Fly Ash.

20. The Petitioner, vide its affidavits dated 26.10.2017, 01.11.2017 and 2.11.2017 has filed the information called for.

21. Prayas Energy Group (Prayas), vide affidavit dated 25.11.2017, has filed additional submission based on the rejoinder & replies to RoP filed by the petitioner. The Petitioner vide affidavit dt. 11.12.2017 has filed the reply to the additional submissions made by Prayas. The



Petitioner and Rajasthan Discoms have filed written submissions which have been dealt with in succeeding paragraphs.

Analysis and Decision :

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

- (a) Whether the Commission has the jurisdiction to adjudicate the dispute between the Petitioner and the Respondents with regard to change in law and force majeure events?
- (b) What is the scope of Change in law and force majeure events under the PPA?
- (c) Whether compensation claims are admissible under Change in Law and/or Force Majeure in the PPA?
- (e) Mechanism for processing and reimbursement of admitted claims under Change in Law and/or Force Majeure.

The above issues have been dealt with in the succeeding paragraphs.

23. The chronological dates of events with regard to Rajasthan Discoms PPA are as under:

Power Supply to	Rajasthan Discoms (Initially 410 MW but reduced to 250 MW by RERC vide order dt. 22.07.2015)
Cut-off date	11.09.2012
Bid Submission date	18.09.2012
PPA/ PSA executed on	01.11.2013
Start of supply of power	30.11.2016

Issue No1: Whether the Commission has the jurisdiction to adjudicate the dispute between the Petitioner and the Respondents with regard to change in law and force majeure events?

24. The Petitioner has submitted that in terms of Section 79 (1) (b) and (f) of the Act, the Commission has the jurisdiction to regulate the tariff of the generating company which has entered into or otherwise has a composite scheme for generation and sale of electricity to more than one State. The Petitioner has submitted that it is a generating company within the meaning



of Section 2(28) of the Electricity Act, 2003 and is supplying 250 MW electricity to the Respondents in the State of Rajasthan under the PPAs from the State of Chhattisgarh besides supplying 5% of the Net generated power to the State of Chhattisgarh under Clause 3.1(ii) of the Implementation Agreement dated 06.08.2009 entered into between the Petitioner and the State of Chhattisgarh. Further, the Petitioner is also supplying 208 MW of power to Tamil Nadu Discom. As such evidently the Petitioner is supplying power in more than one state and is engaged under a composite scheme for supply of power to more than one state. Therefore, the Commission has jurisdiction to adjudicate the present matter under Section 79(1)(b) read with Section 79(1)(f) of the Act. The Petitioner has placed its reliance on the judgment of the Hon'ble Supreme Court dated 11.4.2017 in Civil Appeals Nos. 5399-5400 of 2016 [Energy Watchdog and other Vs. CERC and others]. The Petitioner has submitted that the various changes in law and force majeure events claimed by the Petitioner in the present petition pertains to Rajasthan Discoms PPA and with regard to TANGEDCO PPA, a separate petition has been filed to claim various change in law and force majeure events.

25. We have considered the submissions of the Petitioner. In addition to Rajasthan Discoms, the Petitioner has entered into an Implementation Agreement dated 6.8.2009 with the State of Chhattisgarh for supply of 5% of the net generating power and has also entered into a Long Term PPA dated 19.08.2013 with TANGEDCO for supply of 208 MW RTC power. The Hon'ble Supreme Court vide its judgment dated 11.4.2017 in Civil Appeal Nos. 5399-5400 of 2016 (Energy Watchdog Vs. Central Electricity Regulatory Commission) has held that if a generating company is having a scheme for generation and sale of electricity in more than one State, then it is enough to construe that the generating company is having composite scheme. The Relevant portion of said judgment is extracted as under:

“22. The scheme that emerges from these Sections is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or



the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79 (1) itself in sub-sections (c), (d) and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression “within the State” in sub-clauses (a), (b) and (d) and “intra-state” in sub-clause (c). This being the case, it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission. The State Commission’s jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. What is important to remember is that if we were to accept the argument on behalf of the appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being the case, we are constrained to observe that the expression “composite scheme” does not mean anything more than a scheme for generation and sale of electricity in more than one State.”

In the present case, the Petitioner has executed PPAs for supply of power to the States of Rajasthan and Tamil Nadu which are two different States. Therefore, the Petitioner has the composite scheme for generation and sale of electricity is in more than one State and as such falls within the jurisdiction of this Commission under clause (b) of sub-section (1) of Section 79 of the Electricity Act, 2003. Therefore, any dispute on tariff related matters is to be adjudicated by this Commission under clause (f) of sub-section (1) of Section 79 of the Electricity Act.

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

26. The claim of the Petitioner in the present petition pertains to Change in law and/ or Force Majeure events related to the PPA/ PSA dt. 01.11.2013. The cut-off date for consideration of any claim for change in law, namely 7 days before the bid deadline, is 11.09.2012. Article 10.4 and Article 9.5 of the PPA between Procurers (JVVNL), (AVVNL), (JdVVNL) and Seller PTC India Ltd. envisages for notification of Change in Law & Force Majeure events, respectively to the Procurer. Article 10.4 and Article 9.5 are extracted as under:



“10.4 Notification of Change in Law

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

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

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

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

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

9.5 Notification of Force Majeure Event

9.5.1 The Affected Party shall give notice to the other Party of any event of Force Majeure as soon as reasonably practicable, but not later than seven (7) days after the date on which such Party knew or should reasonably have known of the commencement of the event of Force Majeure. If an event of Force Majeure results in a breakdown of communications rendering it unreasonable to give notice within the applicable time limit specified herein, then the Party claiming Force Majeure shall give such notice as soon as reasonably practicable after reinstatement of communications, but not later than one (1) day after such reinstatement.

Provided that such notice shall be a pre-condition to the Affected Party's entitlement to claim relief under this Agreement. Such notice shall include full particulars of the event of Force Majeure, its effects on the Party claiming relief and the remedial measures proposed. The Affected Party shall give the other Party regular (and not less than monthly) reports on the progress of those remedial measures and such other Information as the other Party may reasonably request about the Force Majeure Event.

9.5.2 The Affected Party shall give notice to the other party of (i) the cessation of the relevant event of Force Majeure; and (ii) the cessation of the effects of such event of Force Majeure on the performance of its rights or obligations under this Agreement, as soon as practicable after becoming aware of each of these cessations.”



27. The Petitioner has submitted that it informed Rajasthan Discoms about the occurrence of events under Change in Law and/or Force Majeure and their impact on the supply of power in terms of the PPA vide notice ref no. DBPL/PSR/PTC-RJ/CL/394 dated 29.03.2017.

28. We have considered the submissions of the Petitioner. Under Article 10.4 of the PPA, the Petitioner is required to give notice about occurrence of Change in Law events as soon as reasonably practicable after being aware of such events which occurred after 11.09.2012 (i.e. 7 days prior to the Bid deadline date). The Petitioner has given notices dated 29.03.2017 to the Respondents No. 1, 2, 3, 4 & 5 indicating the above events under Force Majeure & Change in Law. In the said notices, the Petitioner has apprised the Respondents about the occurrence of Change in Law and/or Force Majeure events and the impact of such events on tariff. Rajasthan Discoms have not responded to such notices of the Petitioner. In view of the above, it can be inferred that Petitioner has complied with the requirement of notice under Articles 9.5 and 10.4 of the PPA.

Issue No.3: What is the scope of Change in law and force majeure events under the PPA.

29. The claims of the Petitioner are with respect to events under Change in Law and Force Majeure under Article 9 and 10 of the PPA. Article 10 of the PPA between the Petitioner/ PTC and Rajasthan Discoms deals with events of Change in Law during the operating period and is extracted for reference as under:

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

- The enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law.
- A change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law.



- The imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier
- a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the Seller;
- Any change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of this Agreement.

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

10.3 Relief for Change in Law

10.3.2 During Operating Period

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

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

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

Further, Article 14 of the PPAs provides that in case of dispute between the parties arising out of claim made by any party for any change in or determination of tariff or any matter relating to tariff. The said Article is extracted as under:

“14.3 Dispute Resolution

14.3.1 Dispute Resolution by the Appropriate Commission

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



30. A combined reading of the above provisions would reveal that the Commission has the jurisdiction to adjudicate upon the dispute between the Petitioner and Rajasthan Discoms with regard to Change in Law which occur after the cut-off date which is seven days prior the bid deadline. The events broadly covered under Change in Law are following:

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



The term “Law” has been defined under Article 1.1 of the PPA as under:-

“Law” shall mean in relation to this Agreement, all laws including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and shall further include without limitation all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include without limitation all rules, regulations, decisions and orders of the Appropriate Commission.”

The term “Indian Governmental Instrumentality” is also defined in Article 1.1 as under:

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

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

31. Further, Article 9 of the PPA deals with Force Majeure events and is extracted as under:

“ARTICLE 9: FORCE MAJEURE

9.1 Definition

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

9.2 Affected Party



9.2.1 An affected Party means the Procurer or the Seller whose performance has been affected by an event of Force Majeure.

9.2.3 An event of Force Majeure affecting the CTU/ STU or any other agent of the Seller, which has affected the transmission facilities from the Power Station to the Delivery Point, shall be deemed to be an event of Force Majeure affecting Seller.

9.2.4 Any event of Force Majeure affecting the performance of the Seller's contractors shall be deemed to be an event of Force Majeure affecting Seller only if the Force Majeure event is affecting and resulting in:

- a) late delivery of plant, machinery, equipment, materials, spare parts, Fuel, water or consumables for the Power Station; or
- b) a delay in the performance of any of the "Seller's" contractors.

9.2.5 Similarly, any event of Force Majeure affecting the performance of the Procurer's contractor for setting up or operating Interconnection Facilities shall be deemed to be an event of Force Majeure affecting Procurer only if the Force Majeure event is resulting in a delay in the performance of Procurer's contractors.

9.3 Force Majeure

9.3.1 A 'Force Majeure' means any event or circumstance or combination of events and circumstances including those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:

Any restriction imposed by PGCIL in scheduling of power due to breakdown of transmission /grid constraint shall be treated as force Majeure without any liability on either side (Non availability of open access is treated as Force Majeure)

i Natural Force Majeure Events:

Act of God, including, but not limited to lightning, drought, fire and explosion, earthquake, volcanic, eruption, landslide, flood, cyclone, typhoon, tornado, or exceptionally adverse weather conditions which are in excess of the statistical measures for the last hundred(100) years.

ii Non- Natural Force Majeure Events:

1. Direct: Non-Natural Force Majeure Events attributable to the Procurer(s)

(a) Nationalization or compulsory acquisition by any Indian Governmental Instrumentality (under the state Government(s) of the procurer(s) or the Central Government of India) of any material assets or rights of the Seller; or

(b) The unlawful, unreasonable or discriminatory revocation of, or refusal to renew, any Consent required by the Seller or any of the Sellers contractors to perform their obligations under the project documents or any unlawful, unreasonable or discriminatory refusal to grant any other consent required for the development/operation of the power station, provided, that a competent court of law declares the revocation or refusal to be unlawful, unreasonable and discriminatory and strikes the same down.



(c) Any other unlawful, unreasonable or discriminatory action on the part of an Indian Governmental Instrumentality (under the state Government(s) of the procurer(s) or the Central Government of India) which is directed against the supply of power by the seller to the procurer(s), provided that a competent court of law declares the action to be unlawful, unreasonable and discriminatory and strikes the same down.

2. Direct: Non-Natural Force Majeure Events not attributable to the Procurer(s)
.....
.....

3. Indirect: Non- Natural Force Majeure Events

(a) Any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action; or

(b) Radioactive contamination or ionizing radiation originating from a source in India or resulting from another Indirect Non Natural Force Majeure Event excluding circumstances where the source or cause of contamination or radiation is brought or has been brought into or near site by the Affected party or those employed or engaged by the Affected Party.

(c) Industry wide strikes and labor disturbances having a nationwide impact in India.

9.4 Force Majeure Exclusions

9.4.1 Force Majeure shall not include (i) any event or circumstance which is within the reasonable control of the Parties and (ii) the following conditions, except to the extent that they are consequences of an event of Force Majeure:

a. Unavailability, late delivery, or changes in cost of the plant, machinery, equipment, materials, spare parts, Fuel or consumables for the Power Station;

b. Delay in the performance of any contractor, sub-contractor or their agents excluding the conditions as mentioned in Article 9.2;

c. Non-performance resulting from normal wear and tear typically experienced in power generation materials and equipment;

d. Strikes or labour disturbance at the facilities of the Affected Party;

e. Insufficiency of finances or funds or the agreement becoming onerous to perform; and

f. Non-performance caused by, or connected with, the Affected Party's:

i. Negligent or intentional acts, errors or omissions;

ii. Failure to comply with an Indian Law; or

iii. Breach of, or default under this Agreement or any other RFP

Documents.

9.5 ...

9.6.....

9.7 Available Relief for a Force Majeure Event

9.7.1 Subject to this Article 9:



(a) no Party shall be in breach of its obligations pursuant to this Agreement except to the extent that the performance of its obligations was prevented, hindered or delayed due to a Force Majeure Event;

(b) every Party shall be entitled to claim relief in relation to a Force Majeure Event in regard to its obligations, including but not limited to those specified under Article 4.7;

(c).....”

32. A combined reading of the above provisions would reveal that the following may be inferred from the above definition of force majeure under the PPA:

- (a) The definition of force majeure is an inclusive one. Though, it enumerates certain events under the headings natural force majeure and non-natural force majeure, it can also include other events or circumstances which adversely affects or unduly delays the affected party to discharge its obligations under the PPA.
- (b) The event or circumstance or combination of events or circumstances that wholly or partly prevents or unavoidably delays an affected party from the performance of its obligations under the PPA, and which are not within the reasonable control of the affected party and could not have been avoided if the affected party had taken reasonable care or complied with prudent utility practices shall qualify as force majeure events.
- (c) An affected party can be either the seller or the procurers if the performance of their obligations under the PPA is affected by any of the force majeure events.
- (d) Any event or circumstances which are within the reasonable control of the parties are included under force majeure exclusions except to the extent they are consequences of an event of force majeure.



As per Article 9.5 of the PPA, the affected party is required to give force majeure notice to the other party as soon as reasonably practicable and not later than 7 days after the date on which such party knew or should reasonably have known of the commencement of the event of Force Majeure. In the present petition, the Petitioner has claimed all the events under Change in Law as well as Force Majeure and served notice on 29.03.2017 to the Respondents No. 1, 2, 3, 4 & 5 regarding intimation of occurrence of events. Perusal of the notices reveals that the provision of Article 9.5 of the PPA is not complied with by the Petitioner in intimating the occurrence of Force Majeure events within 7 days to the other party. Further, increase in cost is not covered under any of the events enumerated under the headings “natural force majeure events” and “non natural force majeure events”. Article 9.4.1 (e) of the PPA provides that “Insufficiency of finances or funds or the agreement becoming onerous to perform” shall not be considered as force majeure event unless there consequence of an event of force majeure. It is noted that the events claimed by the Petitioner are not covered under Force Majeure as they have neither affected the seller in performing the obligations nor delayed its performance.

33. In the light of above and in view of the broad principles discussed above, we proceed to deal with the claims of the Petitioner under Change in Law during the Operating Period. Therefore, the Petitioner claims under force majeure events are not being considered.

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

(A) Increase in Royalty Rate on Coal

34. The Petitioner has submitted that the rate of royalty on coal as on 11.09.2012 fixed by the Government of India ('GoI'), Ministry of Coal ("MoC"), vide notification no. G.S.R. 349 (E) dated 10.05.2012, was 14% ad-valorem on the price of coal. Subsequently, after 11.09.2012, the Mines and Minerals (Development and Regulation) Act, 1957 was amended by the Mines &



Minerals (Development and Regulation) Amendment Act, 2015. As per Section 9C of the said amended Act, an additional royalty of 2% on the existing royalty of 14% royalty is to be levied in terms of the Second Schedule to the Mines & Minerals (Development and Regulation) Amendment Act, 2015 w.e.f. 14.08.2015 as per the notification dated 14.08.2015 of Ministry of Mines, towards contribution to the National Minerals Exploration Trust. Further, the Ministry of Mines vide its notification being G.S.R. 792(E), dated 20.10.2015 issued under the provision of the Mines and Minerals (Development and Regulation) Act, 1957 framed Mines and Minerals (Contribution to District Mineral Foundation) Rules, 2015. Under Rule 2(b) of the said Rules, an additional royalty of 30% on the existing royalty of 14% royalty is to be levied in terms of the Second Schedule to the Mines & Minerals (Development and Regulation) Amendment Act, 2015 w.e.f. 12.01.2015 towards contribution to District Mineral Foundation. Based on the notification dated 17.09.2015 of the Ministry of Mines, vide notice No. SECL/BSP/S&M/1936 dated 13/14.11.2015, SECL informed about the increase in the royalty on coal from 14% ad valorem on the price of coal to 18.48% ad valorem on the price of coal which, the petitioner, vide notice bearing no. DBPL/PSR/PTC-RJ/CL/394 dated 29.03.2017 had informed all the Respondents.

35. The Petitioner has submitted that the above notifications pertaining to the royalty and additional levy are Change in Law events within the meaning of Article 10 of the PPA. Accordingly, as per Article 10 of the PPA, the Petitioner needs to be compensated for increase in the cost of coal occasioned due to the said enhancement of the rate of royalty i.e., from 14% ad valorem on the price of coal to 18.48% ad valorem on the price of coal [14% existing royalty + 2% of 14% existing royalty = 0.28% + 30% of 14% existing royalty = 4.20% = 18.48%]. Further, the said increase is not within the direct or indirect reasonable control of the petitioner and such events could not have been avoided by the petitioner, the said event hinders and impairs the performance of obligations under the PPA's in as much as petitioner is incurring additional cost



on the purchase of coal for the generation of electricity from the project. Therefore, the above said event is a Force Majeure event within the meaning of Article 9.3 of the PPA's. The claim of the Petitioner on account of increase in rate of royalty of coal from 30.11.2016 to 31.03.2017 is Rs. 2.34 crores.

36. The Respondent i.e. distribution companies in the state of Rajasthan have submitted in its reply vide affidavit dated 12.09.2017 that the claim of the petitioner towards National Mineral Exploration Trust and District Mineral Foundation are not covered under change in law. Further, the event cited by the petitioner is not a force Majeure and the intent of the force Majeure clause is not to give monetary compensation.

37. The Respondent No. 6, Prayas vide its affidavit dated 25.09.2017 has submitted that there is no change in the rate of royalty being 14% under Section 9 of the MMDR Act, 1957 since the cut off date. There is an imposition by way of amendments levying charges for District Mineral Foundation and National Mineral Exploration Trust. These are part of royalty being paid. Since this is not a tax or levy on supply of power but on coal, the same is not covered under Article 1 0.1.1 and is not a Change in Law. Further, the issue of whether Royalty is a tax or not is pending before the Hon'ble Supreme Court and has been referred to a nine judge bench in Mineral Area Development Authority v/s Steel Authority of India & Ors reported in (2011) 4 SCC 450. Therefore the decision of the Hon'ble Commission is to be subject to the above.

38. We have considered the submissions made by the Petitioner and the Respondents. Regarding the admissibility of royalty paid to the DMF and royalty paid to the NMET on merit,



the issue was examined by the Commission vide order dated 17.2.2017 in Petition No. 16/MP/2016 as under:

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

“9B. District Mineral Foundation: (1) In any district affected by mining related operations, the State Government shall, by notification, establish a trust, as a non-profit body, to be called the District Mineral Foundation

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

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

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

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

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

Section 9C provides as under:

“9C: National Mineral Exploration Trust: (1) The Central Government shall, by notification, establish a Trust, as a non-profit body, to be called the National Mineral Exploration Trust.

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

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

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



33. The Central Government in exercise of powers under sub-section 9B of the Mines and Minerals (Development and Regulation) Act, 1957 has notified the Mines and Minerals (Contribution to District Mineral Foundation) Rules, 2015 prescribing the amount of contribution that will be made to the District Mineral Foundation as under:

“Amount of Contribution to be made to District Mineral Foundation.- Every holder of mining lease or a prospecting licence-cum-mining lease, in addition to royalty, pay to the District Mineral Foundation of the district in which mining operations are carried on, an amount at the rate of-

(a) ten percent of the royalty paid in terms of the second schedule to the Mines and Minerals (Development and Regulation) Act, 1957 (57 of 1957)

(herein referred to as the said Act) in respect of mining leases or, as the case may be, prospective licence-cum-mining lease granted on or after 12th January, 2015; and

(b) thirty percent royalty paid in terms of the Second Schedule to the said Act in respect of mining leases granted before 12th January, 2015.”

It is noticed from the above provisions that through an amendment to Act of Parliament, National Mineral Exploration Trust and District Mineral Foundations have been sought to be established. National Mineral Exploration Trust shall be established as a non-profit body in the form of trust. The object of the Trust shall be to use the funds accrued to the Trust for the purposes of regional and detailed exploration in such manner as may be prescribed by the Central Government. The District Mineral Foundations shall be established as non-profit body in the form of a trust. The object of the District Mineral Foundation shall be to work for the interest and benefit of persons, and areas affected by mining related operations in such manner as may be prescribed by the State Government. For running these trusts, the Amendment Act provided for payment of amounts in addition to the royalty by the holder of the mine lease or holder of prospective licence-cum-mining lease @ 2% of the royalty for National Mineral Exploration Trust and @10% to 30% of the royalty for District Mineral Foundations. These amounts collected are in the nature of compulsory exactions and therefore, partake the character tax. The Respondents have submitted that the payment or contribution to the National Exploration Trust and District Mineral Foundations are to be made by the holder of a mining lease or holder of a prospective license-cum-mining lease and therefore, it should not be passed on to the Respondents. The Petitioner has submitted that the Petitioner is required to pay contribution at the prescribed rate to the National Exploration Trust and District Mineral Foundations in addition to royalty. The question therefore arises whether the contribution to National Exploration Trust and District Mineral Foundation Trust shall be borne by the lease-holder of the mines or shall be passed on to the procurers under change in law. It is pertinent to mention that royalty on coal imposed under Section 9 of the Mines and Minerals (Development and Regulation) Act, 1957 are payable by the holders of mining lease to the Government and the Commission has allowed the increase in royalty on coal under Change in Law in order dated 30.3.2015 in Petition No.6/MP/2013. Since the contributions to these funds are to be statutorily paid as a percentage of royalty, in addition to the royalty, they should be accorded the similar treatment. National Exploration Trust and District Mineral Foundations have been created through Act of the Parliament after the cut-off date and therefore, they fulfill the conditions of change in law. Accordingly, the expenditure on this account has been allowed under Change in Law.

39. The above decision is applicable in case of the Petitioner. Therefore, the levy of @ 2% royalty on National Mineral Exploration Trust and @10% or 30% of the royalty of District Mineral Foundations, whichever is applicable, is admissible to the Petitioner as a Change in Law events.



The Petitioner shall be required to furnish copies of the payment made supported by Auditor certificate while claiming the expenditure under Change in Law. It is further directed that the reimbursement on account of contribution to National Exploration Trust and District Mineral Foundations shall be on the basis of actual payments made to other appropriate authorities and shall be restricted to the amount of coal consumed for supplying scheduled energy to the Procurer. It is clarified that the Petitioner shall be entitled to recover on account of payment of National Mineral Exploration Trust and Payment of District Mineral Fund in proportion to the actual coal consumed corresponding to the scheduled generation of supply of electricity to Rajasthan discoms. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of payment of National Mineral Exploration Trust and Payment of District Mineral Fund. The Petitioner and Rajasthan discoms are directed to carry out reconciliation on account of these claims annually.

(B) Increase in Sizing Charges and Surface Transportation charges by Coal India Limited

(a) Increase in sizing charges

40. The petitioner has submitted that as per the Price Notification No. CIL: S&M: GM (F): Pricing 1907 dated 26.02.2011 issued by Coal India Limited, the sizing charges for (a) 200-250 mm of coal; (b) less than 100 mm of coal; and (c) less than 50 mm of coal through manual facilities or mechanical means were Rs. 39 per metric tonne, Rs. 61 per metric tonne, and Rs. 77 per metric tonne respectively. However, by virtue of another Price Notification bearing no. CIL: S&M: GM (F): Pricing 2784 dated 16.12.2013 issued by Coal India Limited, the said sizing charges for (a) 200-250 mm of coal; (b) less than 100 mm of coal; and (c) less than 50 mm of coal through manual facilities or mechanical means were increased to Rs. 51 per metric tonne, Rs. 79 per metric tonne and Rs. 100 per metric tonne respectively. The increase in sizing



charges of coal as stated above by Coal India Limited vide Price Notification dated 16.12.2013 is a Change in Law event occurring after 7 days prior to the bid submission date, within the meaning of Article 10.1 of the PPA. Due to the said increase in the rate of sizing charges of coal the cost of generation of power by the Petitioner to the Respondent under the PPA has increased and thus the Petitioner needs to be compensated for it as per Article 10.3 read with Article 10.5 of the PPA. Further, the said increase is not within the direct or indirect reasonable control of the petitioner and such events could not have been avoided by the petitioner, the said event hinders and impairs the performance of obligations under the PPA's in as much as petitioner is incurring additional cost on the purchase of coal for the generation of electricity from the project. Therefore, the above said event is a Force Majeure event within the meaning of Article 9.3 of the PPA's. The claim of the Petitioner on account of increase in rate of sizing charges of coal from 30.11.2016 to 31.03.2017 is Rs. 0.65 crore.

41. The Respondent i.e. Discoms of Rajasthan States vide its affidavit dated 12.09.2017 have submitted that the claim of the petitioner towards sizing charges on coal is erroneous and without any merit. The price notification of CIL may increase or decrease and these do not amount to a change in law. And also, the event cited by the petitioner is not a Force Majeure.

(b) Increase in surface Transportation charges

42. The Petitioner has submitted that the surface transportation charges of coal by the coal companies as on 11.09.2012 fixed by Coal India Limited, vide Price Notification No. CIL: S&M: GM (F): Pricing 1907 dated 26.02.2011, was Rs 44 per tonne for a distance of more than 3 Kms but not more than 10 Kms from the loading point; and was Rs. 77 per tonne for a distance of more than 10 Kms but not more than 20 Kms from the loading point. However, by virtue of another Price Notification bearing no. CIL: S&M: GM (F): Pricing 2340 dated 13.11.2013, which is 7 days prior to the bid submission date, issued by Coal India Limited the surface



transportation charges (a) for a distance of more than 3 Kms but not more than 10 Kms from the loading point; and (b) for a distance of more than 10 Kms but not more than 20 Kms from the loading point was enhanced to Rs. 57 per tonne and Rs.116 per tonne respectively. Surface transportation charges of coal by the Coal India Limited vide Price Notification dated 13.11.2013 is a Change in Law event within the meaning of Article 10.1 of the PPA. Due to the increase in the rate of surface transportation charges of coal the cost of supply of power by the Petitioner to the Respondent under the PPA has increased and thus the Petitioner needs to be compensated for it as per Article 10.3 read with Article 10.5 of the PPA. Further, the said increase is not within the direct or indirect reasonable control of the petitioner and such events could not have been avoided by the petitioner, the said event hinders and impairs the performance of obligations under the PPA's in as much as petitioner is incurring additional cost on the purchase of coal for the generation of electricity from the project. Therefore, the above said event is a Force Majeure event within the meaning of Article 9.3 of the PPA's. The claim of the Petitioner on account of increase in surface transportation charges of coal from 30.11.2016 to 31.03.2017 is Rs. 0.24 crore.

43. The Respondent i.e. Discoms of Rajasthan State vide its affidavit dated 12.09.2017 have submitted that the claim of the petitioner towards surface transportation charges is an issue between coal company and the petitioner and this is by no means a statutory levy hence cannot be admitted under change in law. Further, the event cited by the petitioner is not a Force Majeure and also the intent of Force Majeure clause is not to give any monetary compensation to the petitioner.

44. Prayas has submitted that the price or consideration payable by the Petitioner to coal companies are pursuant to a contractual or commercial arrangement between the Petitioner and the Coal Company and not as a result of change in law as envisaged in the PPA. The increase



or decrease in such prices from time to time by such entities supplying coal or goods or providing services of transportation are part of the business aspects and are not a result of any change in law. The very fact that the coal prices were de-regulated demonstrates that the price of coal is a commercial price as opposed to a regulated price. Therefore, the changes in commercial prices of coal are part of the business risk undertaken by the Petitioner. Further, by seeking compensation for the increase in price of coal or transport of coal, the Petitioner is seeking to negate the purpose of a competitive bid under Section 63 of the Act. The Petitioner is seeking in effect to abandon the quoted energy charges and consider the fuel charges as a pass through which cannot be permitted.

45. We have considered the submissions of the parties and perused the notifications issued by Coal India Ltd. with regard to Sizing Charges of coal and surface transportation charges. The Petitioner has not placed on record any document to prove that these notifications have been issued pursuant to any Act of the Parliament. The Commission vide order dated 1.2.2017 in Petition No. 8/MP/2014 has already dealt with the issue of Increase in sizing charges & surface transportation charges as under:-

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

“9.2.1 Transportation Charges:

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

9.2.2 Sizing/Crushing Charges



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

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

46. In the light of above decision, the claim of the Petitioner for relief under change in Law on account of increase in sizing charges on coal and increase in surface transportation charges under Change in law as per Article 10 of the PPA is not admissible and accordingly disallowed.

(C) Levy of Forest Transit Fee

47. The Petitioner has submitted that as on 11.09.2012, the rate of forest tax/rate of transit forest produces on coal as per Chhattisgarh Transit Forest Produce Rules, 2001 was Rs. 7 per tonne. Subsequently, the said Rules were amended and the rate of forest tax/rate of transit forest produce on coal was amended/ revised from Rs. 7 per tonne to Rs. 15 per tonne. SECL, vide its notice bearing no. SECL/BSP/S&M/Fin/SA/2540 dated 09.11.2012, had communicated to the Area Sales Managers of all the areas falling under SECL's jurisdiction that Rs. 7 per tonne shall be the forest tax on dispatches/lifting of coal. However, by way of another notice bearing SECL/BSP/S&M/1033 dated 16.09.2015 SECL has communicated to all concerned that on account of revision of rates of the forest tax on dispatches/lifting of coal in the Chhattisgarh Transit Forest Produce Rules, 2001 the forest tax on dispatches/lifting of coal has been enhanced from Rs. 7 per tonne to Rs. 15 per tonne. As such by way of the notification dated 16.09.2015 SECL implemented the said amendment/revision of rates of the forest tax on dispatches/lifting of coal in the Chhattisgarh Transit Forest Produce Rules, 2001. The enhancement of the forest tax on dispatches of coal/lifting of coal from Rs. 7 per tonne to Rs. 15 per tonne is a Change in Law event within the meaning of Article 10.1.1 of the PPA, occurring 7 days prior to bid submission date. Due to the said increase in the rate of forest tax on coal, the



cost of supply of power by the Petitioner to the Respondent under the PPA has increased and thus the Petitioner needs to be compensated for it as per Article 10.3 read with Article 10.5 of the PPA. Further, the petitioner has also claimed the increase in Forest Tax under Force Majeure event within the meaning of Article 9.3 of the PPA. The claim of the Petitioner on account of increase in levy of forest tax on coal from 30.11.2016 to 31.03.2017 is Rs. 0.03 crore.

48. The Respondent i.e. Discoms of Rajasthan State vide its affidavit dated 12.09.2017 have submitted that any increase in price only on account of statutory levy of tax on supply of electricity is covered by change in law clause. No increase of any nature on account of contractual and commercial arrangements of the petitioner including with Railways or SECL etc. can be covered under change in law clause. Further, the respondents and ultimately, the consumers cannot be allowed to suffer from the outcome of a commercial arrangement between the petitioner and SECL. Hence, the claim of the petitioner towards Forest tax/rate of transit forest cannot be admitted under change in law. Further, the event cited by the petitioner is not a Force Majeure as the intent of Force Majeure clause is not to give any monetary compensation to the petitioner.

49. The Respondent No. 6, Prayas vide its affidavit dated 25.09.2017 has submitted that the Petitioner has not produced the law. The Notice of SECL is not the law since the SECL does not have the authority to impose any taxes. The Notice of SECL is an implementation of the commercial terms between the Petitioner and SECL and cannot be considered as law. Further the Petitioner has not produced the law as existing on the cut off date and SECL letter dated 09.11.2012 is subsequent to the cut off date. No relief can be granted to the Petitioner in the absence of relevant information.



50. We have considered the submissions of the Petitioner, Rajasthan Discom & Prayas. The Petitioner vide its affidavit dated 26.10.2017 has placed on record the Gazette notification issued by the appropriate authority/ body which also includes the Chhattisgarh State Govt. Notification with regard to increase in Forest transit fee. In exercise of the powers conferred by Section 76 read with Sections 41 and 42 of Indian Forest Act, 1927 (No. XVI of 1927), Chhattisgarh State Government issued rules for regulating transit of forest produce called the Chhattisgarh Transit (Forest Produce) Rules, 2001. Rule 3 of the Chhattisgarh Transit (Forest Produce) Rules, 2001 provides that no forest produce shall move into or outside the State or within the State of Chhattisgarh except in the manner as provided in the Rules without a transit pass in Form A, B or C annexed to these rules. Rule 5 of the said Rules further provides that the State Government or an officer authorized by the State Government from time to time, shall fix the rate of fee for issue of transit pass as per the provisions of Rule 4. In exercise of Rule 5 of the Chhattisgarh Transit (Forest Produce) Rules, 2001, Forest Department, Government of Chhattisgarh vide its Notification No. F-7-61/F.C/2001, dated 14.6.2002 fixed the fee of Rs. 7 per tonne for issue of transit pass for the transportation of corresponding forest produce, namely, lime stone, Dolomite, Fire clay, Manganese, Copper, Rock-phosphate, Pyro-phylite, Diaspore, Orchre, Bauxite, Calcite, Coal, Quartz, Silica Sand, Slate, Soap-stone, Iron-ore, Gold, Corundum and Tin ore. The Office of the Conservator of Forest, Bilaspur Circle, Chhattisgarh vide its letter dated 31.10.2012 informed SECL regarding realization of fees for transportation of mining from the forest land. The said letter is extracted as under:

“On the above subject for issue of permission letter and fixation of fees for transportation of forest produce the Government of Chhattisgarh, Forest Department has issued Notification No./F-7-61/vs/2001 dated 14.06.2002 (Notification is enclosed in appendix-1). According to the above Notification for transportation of limestone, dolomite, fireclay, manganese, copper, rock-phosphate, Payree-phylite, Diyaspore, Okar, Bauxite, Keslite, Coal, Clartz, Silica sand slate, soap stone, iron ore, gold, Korandum and tin ayaskRs. 7 per tonne and for transportation of flage stone, granite, marble, earth, stone, sand and murum before issue of permission letter rate of fee of Rs. 4/- per tonne is fixed. The above fee is to be realized on issue of transportation pass.



Under SECL such coal mines whose lease is sanctioned in the forest land, for transportation of coal excavated from there transportation passed in necessary. For this the following arrangement shall be applicable. The transportation of minerals excavated from the forest land shall be done in accordance with Chhattisgarh Transportation (Forest Produce) Rules, 2001. Under this rule for transportation of minerals excavated from the forest land transportation pass shall be issued.

(ii) On issue of transportation pass from the concerned body or person for issue of prescribed transportation permission letter prescribed fee shall be realized.

(iii) According to Section 4 (Kha) of the Chhattisgarh (Forest Produce) Rules 2001 that for issue of transportation passes to an officer of the body which receives mining lease can be authorised by the Divisional Forest Officer. Therefore, Divisional Forest Officer, under section 4 (Kha) of the Chhattisgarh (Forest Produce) Rules shall make necessary arrangement in the forest division area.

(iv) For issue of pass for transportation of forest produce Chhattisgarh Transportation (Forest Produce) Rules 2001 shall be complied with and according to Section 6 of the above rule the transportation pass shall be issued as per form shown in Format "Ka".

(v) Every month the Forest Divisional Officer shall examine the passes issued to the authorized body and on the basis of requirement books of transportation passes shall be issued from the level of Forest division to the prescribed Authority. But before issue of transit pass books it shall be ensured by the Forest Divisional Officer that the counter foil and record of transportation fees are regularly deposited/submitted in the forest division.

(vi) For transportation of the excavated minerals from the forest land for issue of permission letter arrangement for receiving fee and issue of transportation form shall compulsorily be implemented in all the areas.

Please issue necessary instructions under SECL to the In-charge of all coal mining area in this regard from your level. In this regard for coordination the divisional forest officers have been issued necessary instructions. Arrangement for issue of transportation passes in the mine of SECL from 01.11.2012 be compulsorily implemented. Please ensure this.

Sd/-
Conservator of Forest,
Bilaspur Circle, Bilaspur

Subsequently, Forest Department, Government of Chhattisgarh vide its Notification No.06-02/2014/10.2 dated 30.6.2015 revised the fee from Rs. 7 per tonne to Rs. 15 per tonne.

Relevant portion of the said notification dated 30.6.2015 is extracted as under:

"Forest Department
Ministry, Mahanadi Bhawan, New Raipur
Dated: 30th June 2015



No. 06-02/2014/10-2- In exercise of the powers conferred by Rule 5 of the Chhattisgarh Transit (Forest Produce) Rules, 2001 and in supersession of this department's Notification No. F-7-61/F.C/2001. Dated 14th June 2002, the State Government, hereby, fixes the fee as mentioned in column (3), (4), (5) and (6) of Table below respectively to be recovered for issue of transit pass for the transportation of corresponding forest produce as mentioned in column number (2) of the said Table, as under:

S.No.	Name of Forest Produce	Prescribed Fee			
		Rs.	Rs./Truck	Rs./Trolley	Rs./Bullock cart
(1)	(2)	(3)	(4)	(5)	(6)
1.	Lime stone, Dolomite, Fire clay, Manganese, Copper, Rock-phosphate, Pyrophyllite, Diaspore, Ochre, Bauxite, Calcite, Coal, Quartz, Silica, Sand, Slate, Soapstone, Iron-ore, Gold, Corundum and Tin ore	Rs. 15/- Per ton	-	-	-
2.	Flag stone, Granite, Marble, Concrete, Stone, Sand & Murrum	Rs. 10/- Per CMT	-	-	-
3.	Timber, Fuel & Bamboo	-	Rs. 230/- Per Truck or its part	Rs. 115/- Per Trolley or its part	Rs. 15/- Per Bullock cart or its part
4.	Minor Forest Produce (except specified Minor Forest produce)	-	Rs. 55/- Per Truck or its part	Rs. 25/- Per Tractor or its part	-

By order and in the name of the Governor of Chhattisgarh,

ANIL KUMAR SAHU, Secretary

51. As per the notification of Forest Department, Govt. of Chhattisgarh dated 14.6.2002, the transit fee for transportation of coal in the forest area was Rs. 7/ tonne. However, SECL vide its letter dated 9.11.2012 addressed to its Field Officers directed that the above transit fee to be compulsorily implemented with effect from 1.11.2012. Therefore, the transit fee of Rs. 7/ tonne was already in existence as on the cut-off date of PPA. Only after issue of notification dated 30.6.2015 by the Forest Deptt. of Government of Chhattisgarh, the transit fee was increased for



Rs. 15/ tonne. Under last bullet of Article 10.1.1.of the PPA, any change in taxes or introduction of tax made applicable for supply of power by the seller as per terms of the agreement shall be admissible under Change in Law. Therefore, change in the rate of forest transit fee shall be admissible under Change in Law. The Petitioner shall be entitled for enhancement of transit fee @ 8/ tone with effect from 30.6.2015. The Petitioner has not placed any document received from SECL regarding its liability to pay transit fee or the actual payment of transit fee in accordance with letter dated 16.9.2015. The Petitioner shall share with the respondent all documents including the actual payment of transit fee made for the coal consumed for supply of electricity to the respondent duly supported by Auditor Certificate.

(D) Increase in Chhattisgarh Environment Cess/ Chhattisgarh Environment Tax and Increase in Chhattisgarh Industrial Development Cess/ Chhattisgarh Development Tax.

(a) Increase in Chhattisgarh Environment Cess/ Chhattisgarh Environment Tax

52. The Petitioner has submitted that as on cut-off date i.e. 11.09.2012, the rate of environment cess/ Chhattisgarh Paryavaran Upkar on lifting and dispatches of coal as per Section 4 read with Schedule-II of the Chhattisgarh (Adhoshanrachna Vikas Evam Paryavaran) Upkar Adhiniyam, 2005 was Rs. 5 per tonne. The Petitioner in its notice bearing no. SECL/BSP/S&M/2015/1420 vide dated 19.08.2015, SECL communicated to all concerned that the environment cess/ Chhattisgarh Paryavaran Upkar on dispatches/lifting of coal has been enhanced from Rs. 5 per tonne to Rs. 7.50 per tonne as per the amendment of Section 4 and Schedule-II of the Chhattisgarh (Adhoshanrachna Vikas Evam Paryavaran) Upkar Adhiniyam, 2005. The enhancement of environment cess on dispatches of coal/lifting of coal from Rs. 5 per tonne to Rs. 7.5 per tonne as stated above is a Change in Law event within the meaning of Article 10.1.1 of the PPA. Due to the increase in the rate of environment cess on lifting and dispatch of coal the cost of supply of power by the Petitioner to the Respondent under the PPA has increased and thus the Petitioner needs to be compensated for it as per Article 10.3 read



with Article 10.5 of the PPA. . Further, the said increase is not within the direct or indirect reasonable control of the petitioner and such events could not have been avoided by the petitioner, the said event hinders and impairs the performance of obligations under the PPA's in as much as petitioner is incurring additional cost on the purchase of coal for the generation of electricity from the project. Therefore, the above said event is a Force Majeure event within the meaning of Article 9.3 of the PPA's. The claim of the Petitioner on account of increase in levy of Chhattisgarh Environment Tax on coal from 30.11.2016 to 31.03.2017 is Rs. 0.08 crores.

53. The Respondents i.e. Discoms of Rajasthan State vide its affidavit dated 12.09.2017 have submitted that said increase in Chhattisgarh Environment cess, cannot be claimed under change in law in view of the fact that any increase in price only on account of statutory levy of tax on supply of electricity is covered by change in law clause. No increase of any nature on account of contractual and commercial arrangements of the petitioner can be covered under change in law clause. Further, the respondents and ultimately, the consumers cannot be allowed to suffer from the outcome of a commercial arrangement between the petitioner and SECL. Hence, the claim of the petitioner towards increase in Chhattisgarh Environment cess cannot be admitted under change in law. Further, the event cited by the petitioner is not a Force Majeure as the intent of Force Majeure clause is not to give any monetary compensation to the petitioner.

(b) Increase in Chhattisgarh Industrial Development Cess/ Chhattisgarh Development Tax

54. The Petitioner has submitted that as on 11.09.2012, the rate of Chhattisgarh Industrial development cess/ Chhattisgarh Vikas Upkar on lifting and dispatches of coal as per Section 3 read with Schedule-I of the Chhattisgarh (Adhosaanrachna Vikas Evam Paryavaran) Upkar Adhiniyam, 2005 was Rs. 5 per tonne. The rate of Rs. 5 per tonne was enhanced to Rs. 7.5 per tonne. The revision in the rate was communicated to the Petitioner vide notice bearing no.



SECL/BSP/S&M/2015/1420 dated 19.08.2015 by the SECL. The enhancement of the Chhattisgarh Industrial development cess on dispatches of coal/lifting of coal from Rs. 5 per tonne to Rs. 7.5 per tonne as stated above is a Change in Law within the meaning of Article 10.1.1 of the PPA. Due to the increase in the rate of Chhattisgarh industrial development cess on lifting and dispatch of coal, the cost of supply of power by the Petitioner to the Respondent under the PPA has increased and thus the Petitioner needs to be compensated for it as per Article 10.3 read with Article 10.5 of the PPA. . Further, the said increase is not within the direct or indirect reasonable control of the petitioner and such events could not have been avoided by the petitioner, the said event hinders and impairs the performance of obligations under the PPA's in as much as petitioner is incurring additional cost on the purchase of coal for the generation of electricity from the project. Therefore, the above said event is a Force Majeure event within the meaning of Article 9.3 of the PPA's. The claim of the Petitioner on account of increase in levy of Chhattisgarh Industrial Development Cess on coal from 30.11.2016 to 31.03.2017 is Rs. 0.08 crores.

55. The Respondents i.e. Discoms of Rajasthan State vide its affidavit dated 12.09.2017 have submitted that said increase in Chhattisgarh Industrial development cess, cannot be claimed under change in law in view of the fact that any increase in price only on account of statutory levy of tax on supply of electricity is covered by change in law clause. No increase of any nature on account of contractual and commercial arrangements of the petitioner can be covered under change in law clause. The petitioner has further submitted that, the respondents and ultimately, the consumers cannot be allowed to suffer from the outcome of a commercial arrangement between the petitioner and SECL. Hence, the claim of the petitioner towards increase in Chhattisgarh Industrial development cess cannot be admitted under change in law. Further, the event cited by the petitioner is not a Force Majeure as the intent of Force Majeure clause is not to give any monetary compensation to the petitioner.



56. With regards to both these charges (Increase in Chhattisgarh Environment Cess/ Chhattisgarh Environment Tax and Increase in Chhattisgarh Industrial Development Cess/ Chhattisgarh Development Tax), the Respondent No. 6, Prayas vide its affidavit dated 25.09.2017 has submitted that the Petitioner has only annexed the notices from SECL for claiming change in law. SECL is not a competent authority to impose any cess and therefore unless the Petitioner can produce the statute or law of a competent Government Authority increasing the rate of cess, the same cannot be allowed as change in law.

57. We have considered the submissions made by the Petitioner, Rajasthan Discom & Prayas. The Petitioner vide affidavit dated 26.10.2017 has placed on record the Gazette notification issued by appropriate authority/ body which also includes the notification with regards to Increase in Chhattisgarh Environment Cess/ Chhattisgarh Environment Tax and Increase in Chhattisgarh Industrial Development Cess/ Chhattisgarh Development Tax.

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

Preamble:

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

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

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

X xxx

Section 3-Infrastructure development cess



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

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

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

Section 4- Environment Cess

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

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

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

Section 7- Assessment and Collection of cess

- (1) Cess levied under Section 3 and 4 of the Act shall be assessed in such manner as may prescribed.
- (2) The cess levied under this act shall be collected as an arrear of land revenue and provision of the Chhattisgarh Land Revenue Code, 1959 (No. 20 of 1959) shall apply mutatis mutandis for such collection and recovery.

Section 8- Amendment of Schedules

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

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

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

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

Schedule I



S. No.	Classification of Land	Rate of Development Cess
1.	On land covered under coal and iron ore mining leases	Rupee 5 on each tonne of annual dispatch of mineral
2.	On land covered under mining leases other than (1) above	5 percent of the amount of royalty payable annually
3.	On land other than land covered under (1) and (2) above	5 percent of the amount of land revenue or rent, as the case may be, payable annually

Schedule II

S. No.	Classification of Land	Rate of Environment Cess
3.	On land covered under coal and iron ore mining leases	Rupee 5 on each tonne of annual dispatch of mineral
4.	On land covered under mining leases other than (1) above	5 percent of the amount of royalty payable annually
3.	On land other than land covered under (1) and (2) above	5 percent of the amount of land revenue or rent, as the case may be, payable annually

Subsequently, Government of Chhattisgarh, in exercise of the powers conferred under sub-Section (1) of Section 8 of the Chhattisgarh (Adhosaanrachna Vikas Evam Paryavaran) Upkar Adhiniyam, 2005 amended the Schedule I and Schedule II imposing the Development cess and environmental cess vide Notification No. 469 dated 18.9.2015 as under:

Schedule I

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

Schedule II

S. No.	Classification of Land	Rate of Environment Cess
3.	On land covered under coal, iron ore, lime stone, bauxite and dolomite mining leases	Rupee 7.50 on each tonne of annual dispatch of mineral



4.	On land covered under mining leases other than (1) above	7.50 percent of the amount of royalty payable annually
3.	On land other than land covered under (1) and (2) above	7.50 percent of the amount of land revenue or rent, as the case may be, payable annually

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

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

(E) Revision in rate of Central Excise Duty on account of addition in components

60. The Petitioner has submitted that as on 11.09.2012, the rate of Central Excise Duty @ 6.18% was applicable only on basic value of coal, crushing / sizing charges and surface transportation charges of coal as per Central Excise Act, 1944. SECL, vide its notice bearing no.



SECL/BSP/S&M/Pricing/31/619 dated 19.03.2012, had communicated to all concerned falling under SECL's jurisdiction that 6.18% shall be the Central Excise Duty on dispatches/lifting of coal. Further, vide notice bearing no. SECL/BSP/S&M/RS/619 dated 25.03.2013, SECL has communicated to all concerned that in addition to basic value of coal, surface transportation and sizing charges of coal, the Central Excise Duty shall be applicable on SILO charge, royalty, stowing excise duty, terminal tax, forest cess and Chhattisgarh Paryavaran and Vikas Upkar. The revision/addition of components like SILO charge, surface transportation charge, royalty, stowing excise duty, terminal tax, forest cess and Chhattisgarh Paryavaran and Vikas Upkar in assessing the applicability of Central Excise Duty on coal other than basic value of coal and sizing charges of coal brought out by an amendment to the Central Excise Act, 1944. However, by another notice bearing no. SECL/BSP/S&M/ 395 dated 28.02.2015 SECL has communicated to all concerned that on account of revision of rates of the Central Excise Act, 1944 on dispatches/lifting of coal, the Central Excise Duty on dispatches/lifting of coal has been revised from 6.18% to 6%. Though, vide said notification dated 28.02.2015, the rate of Central Excise Duty was reduced, however the overall burden in terms of the amount of money payable by the Petitioner towards Central Excise Duty had increased, on account of addition of elements / incidents on which the said Duty is calculated upon. Earlier the said Duty was calculated on the summation of the base price of coal, surface transportation charge and sizing / crushing charge, whereas after the notification dated 25.03.2013, being SECL/BSP/ S&M/ RS/619, the said Duty is now calculated on the summation of base price of coal, Crushing / Sizing Charge, SILO Charge, Surface Transportation Charge, Royalty including contribution towards NMET fund and DMF Stowing Excise Duty, Terminal Tax, Forest Cess and Chhattisgarh Paryavaran and Vikas Upkar. Therefore, the downward revision of Excise Duty did not have any beneficial impact on the cost to the Petitioner, rather the Petitioner was subjected to additional expenditure pertaining to payment of Excise Duty, due to change in the underlying components on the basis of which, the said Excise Duty is imposed. The change of components were effected after the



cut-off date and the revision in the Excise Duty took place with effect from 01.03.2015. The addition of components like SILO charge, surface transportation charge, royalty, stowing excise duty, terminal tax, forest cess and Chhattisgarh Paryavaran and Vikas Upkar in assessing the incidence/applicability of Central Excise Duty on coal as stated above is a Change in Law event within the meaning of Article 10.1.1 of the PPA. Due to the addition of components like SILO charge, surface transportation charge, royalty, stowing excise duty, terminal tax, forest cess and Chhattisgarh Paryavaran and Vikas Upkar in assessing the Central Excise Duty on coal, the cost of supply of power by the Petitioner to the Respondent has increased and thus the tariff paid to the Petitioner for supply of power to the Respondent needs to be revised as per Article 10.3 read with Article 10.5 of the PPA. The claim of the Petitioner on account of revision/addition of component in assessing the Central Excise Duty from 30.11.2016 to 31.03.2017 is Rs. 0.81 crores.

61. The Respondents i.e. Discoms of Rajasthan State vide its affidavit dated 12.09.2017 have submitted that increase in cost due to revision/addition of components in assessing the Central Excise Duty is erroneous and without any merit. Increase in price cannot be claimed under change in law. The respondents have further submitted that, price notification is not statutory levy on the petitioner, which may increase or decrease. The said increase is on account of commercial arrangements of the petitioner and not because of any statutory levy and cannot be covered under change in law clause. Further, the event cited by the petitioner is not a Force Majeure as the intent of Force Majeure clause is not to give any monetary compensation to the petitioner.

62. The Respondent No. 6, Prayas vide its affidavit dated 25.09.2017 has submitted that the rate of central excise duty on coal has reduced from 6.18% to 6%, which is a change in law in favour of the Procurer. The reduction in excise duty on coal also results in reduction in entry tax,



VAT, Nirayat Kar etc which also has to be taken into account. The Petitioner has claimed change in law with regard to change in incidence of tax and has relied on letter dated 25.03.2013 of SECL. It is submitted that SECL is not legally empowered to interpret the Excise Act and therefore interpretation by SECL is not an interpretation of law under Article 10. The competent authority to interpret and apply the law are the excise authorities and there is no such interpretation by the said authorities.

63. We have considered the submissions of the Petitioner, Rajasthan Discom & Prayas. The Petitioner has submitted that as on the cut-off date i.e on 11.09.2012, excise duty on basic value of coal, sizing charges and surface transpiration charges of coal was 6.18%. Subsequently, SECL vide its notice dated 28.2.2015 informed all concerned that on account of revision of rates of the Central Excise Act, 1944, on dispatches/lifting of coal, the Central Excise duty on dispatches/lifting of coal has been revised from 6.18% to 6%. Further, SECL vide its notice dated 25.3.2015 informed the Petitioner that in addition to basic values of coal, surface transportation and sizing charges of coal, the Central Excise duty shall be applicable on SILO charges, royalty, stowing excise duty, terminal tax, forest cess and Chhattisgarh Paryavaran and Vikas Upkar. The Commission vide order dated 7.4.2017 in Petition No. 112/MP/2015 has considered the issue of excise duty. The relevant portion of the said order dated 7.4.2017 is extracted as under:

“The Petitioners have submitted that the extracted sale price is Rs. 898/MT which covers Royalty, Stowing Excise Duty, Sizing Charges, Surface Transportation and Loading Charges in terms of the Notification of Coal India Limited dated 5.3.2013. In our view, the letter dated 5.3.2013 issued by Coal India Limited cannot be considered as Change in Law and therefore, while assuming the determined price of coal for the purpose of Central Excise Duty, royalty, stowing excise duty, transportation charges, sizing charges and other charges shall not be included. The excise duty shall be reimbursable on the base price of coal. As regards the inclusion of royalty and stowing excise duty and other charges for determining excisable value of coal, the Petitioners are directed to approach the Appropriate Authority in the Central Excise Department for clarification and if it is confirmed that royalty and stowing excise duty are included in the excisable value of the coal for the purpose of calculating of excise duty on coal, the Petitioners may approach the Commission for appropriate directions.”



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

(F) Increase in Clean Energy Cess

64. The Petitioner has submitted that as on cut-off date i.e. 11.09.2012, the rate of Clean Energy Cess on lifting and dispatches of coal as per Section-83 read with Schedule 10 of the Finance Act, 2010 was Rs.50 per tonne. This was notified vide notification bearing no. 03 /2010-Clean Energy Cess, dated 22.06.2010 issued by the Department of Revenue, Ministry of Finance, Gol. However, by way of notification No. 1/2015-Clean Energy Cess dated 01.03.2015 the rate of Clean Energy Cess was enhanced from Rs. 50 per tonne to Rs. 200 per tonne by the Department of Revenue, Ministry of Finance, Gol. It is important to submit herein that the Clean Energy Cess was further enhanced from Rs. 200 per tonne to Rs. 400 per tonne with effect from 01.03.2016, which is evident from the notice bearing no. SEC/BSP/S&M/440 dated 29.02.2016 issued by SECL. It is submitted that the above notifications dated 01.03.2015 and 29.02.2016 make it clear that Department of Revenue, Gol has enhanced rate of Clean Energy Cess and is, therefore, a Change in Law event. Due to the said increase in the rate of Clean Energy Cess on lifting and dispatch of coal, the cost of supply of power by the Petitioner to the Respondent



under the PPA has increased and thus the Petitioner needs to be compensated for it as per Article 10.3 read with Article 10.5 of the PPA. The claim of the Petitioner on account of increase in levy of Clean Energy Cess on coal from 30.11.2016 to 31.03.2017 is Rs 12.50 crores.

65. The Respondents i.e. Discoms of Rajasthan State vide its affidavit dated 12.09.2017 have submitted that when the term tax is provided as a specific provision in the change in law clause, it naturally follows that the other provisions in change in law clause do not deal with taxes but other aspects of change in law. Further, the event cited by the petitioner is not a Force Majeure event as the intent of Force Majeure clause is not to give to any monetary compensation to the petitioner.

66. The Respondent No. 6, Prayas vide its affidavit dated 25.09.2017 has submitted that the taxes other than tax on supply of power are not covered by Article 10 of the PPA. The Petitioner has not annexed the law relating to increase in clean energy cess. Further the Petitioner has only annexed the notices from SECL for claiming change in law. SECL is not a competent authority to impose any cess and therefore unless the Petitioner can produce the statute or law of a competent Government Authority increasing the rate of cess, the same cannot be allowed as change in law.

67. We have considered the submissions of the Petitioner, Rajasthan Discoms and Prayas. The Petitioner vide its affidavit dated 26.10.2017 has placed on record the copy of the relevant notifications. Clean Energy Cess on coal has been introduced through the Finance Act, 2010 and is being modified through subsequent Finance Acts. The Clean Energy Cess applicable at the different points of time is given the table below.

S. No.	From	To	Applicable Clean Energy Cess (Rs./Tonne)
1	1.7.2010	10.7.2014	50



2	11.7.2014	28.2.2015	100
3	1.3.2015	29.2.2016	200
4	1.3.2016	30.6.2017	400

68. As on the cut-off date i.e. 11.09.2012, Clean Energy Cess was Rs. 50/ tonne. With effect from 11.7.2014, it has been revised to Rs. 100/ tonne, and thereafter to Rs. 200/ tonne with effect from 1.3.2015 and Rs. 400/ tonne with effect from 1.3.2016 till 30.6.2017. The Clean Energy Cess was increased through the Act of Parliament after the cut off date. Therefore, it covered under Change in Law. The issue of Clean Energy Cess as a Change in Law event has been considered by the Commission in order dated 7.4.2017 in Petition No. 112/MP/2015. Relevant portion of the said order dated 7.4.2017 is extracted as under:

“29. We have considered the submissions of the Petitioners and Prayas. Clean Energy Cess on domestic coal was introduced at the rate of Rs. 100 per tonne by Section 83 of the Finance Act, 2010. Further, the Ministry of Finance, Government of India by Notification No. 3 of 2010 dated 22.6.2010 exempted the Clean Energy Cess over and above Rs. 50 per tonne. By Notification No. 20 of 2014 dated 11.7.2014, Government of India rescinded the Notification No. 3 of 2010 and made Clean Energy Cess payable at the rate of Rs. 100 per tonne. By Section 166 of the Finance Act, 2015, Tenth Schedule of the Finance Act, 2010 was amended to increase the Clean Energy Cess to Rs. 300 per tonne. However, by Notification no. 1 of 2015 dated 1.3.2015, Government of India exempted the Clean Energy Cess over and above Rs. 200 per tonne. By Clause 232 of the Finance Bill, 2016, Clean Energy Cess has been renamed as Clean Environment Cess and increased to Rs. 400 per tonne which came into effect from 1.3.2016. The Clean Energy Cess applicable at different points of time is given in the table below:

S.No	From	To	Applicable Clean Energy Cess (Rs./Tonne)
1	22.6.2010	10.7.2014	50
2	11.7.2014	28.2.2015	100
3	1.3.2015	29.2.2016	200
4	1.3.2016	Till date	400

30. Clean Energy Cess was introduced through the Acts of Parliament prior to the cut-off date of 4.4.2011 in respect of Bihar PPA. The effective rate of Clean Energy Cess from 22.6.2010 till its revision with effect from 11.7.2014 is Rs. 50/ Tonne. The Petitioners are expected to factor in the Clean Energy Cess of Rs. 50 in its bid. However, after the Bid Deadline, the Clean Energy Cess has been revised with effect from 11.7.2014, 1.3.2015 and 1.3.2016 and fixed at Rs. 100, Rs. 200 and Rs. 400 respectively. Since, the revised rates of Clean Energy Cess has been introduced through amendment to the relevant Finance Acts and the changes have been resulted in additional recurring expenditure by the Seller, we are of the view that the said changes are covered Change in Law in terms of Bullet 1 under Article 10.1.1 of Bihar PPA. The Petitioners shall be entitled for reimbursement of Clean Energy Cess @Rs. 50/Tonne from 1.3.2015 and @Rs. 350/Tonne with effect from 1.3.2016.”



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

Period		Applicable clean energy cess (Rs./ tonne)	Admissible claim of clean energy cess under Change in law (Rs./ tonne)
As on cut-off date i.e. 11.09.2012		50	0 (Petitioner has accounted Rs. 50/ tonne in its bid)
11.7.2014	28.2.2015	100	50
01.3.2015	29.2.2016	200	150
1.3.2016	30.6.2017	400	350 (Allowed from 30.11.2016 i.e. start of supply of power to Rajasthan Discoms till 30.6.2017 as it has been abolished and GST comp. Cess is levied for which Commission is dealing in separate petition no. 13/SM/2017)

69. The Petitioner has been allocated firm linkage and tapering linkage for its generation project. Clean Energy Cess is uniformly applied for all sources of coal. Therefore, the Petitioner shall be entitled to recover on account of clean energy cess on coal in proportion to the actual coal consumed corresponding to the scheduled generation for supply of electricity to Rajasthan Discoms. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of clean energy cess on coal. The Petitioner is directed to furnish, along with its monthly bill, the proof of payment and computations duly certified by the auditor to Rajasthan Discoms. The Petitioner



and Rajasthan Discoms are further directed to carry out reconciliation on account of these claims annually.

70. It is pertinent to mention that the clean energy cess has been abolished through Taxation Laws Amendment Act, 2017 with effect from 1.7.2017. Accordingly, the change in law on clean energy cess has been allowed upto 30.6.2017.

(G) Increase in Busy Season Surcharge on transportation of coal by Rail

71. The Petitioner has submitted that as on cut-off date i.e. 11.09.2012, the rate of Busy Season Surcharge on transportation of coal by rail during the busy season was 10% on the applicable base freight rates published in the Indian Railway Conference Association Goods Tariff Part-II, which is evident from the rates circular no.TCR/1078/2008/11 dated 12.10.2011 issued by the Railway Board, Ministry Of Railway, GOI. However, by way of rate circular no.28 of 2012 dated 27.09.2012, the rate of Busy Season Surcharge was enhanced from 10% to 12%. Further, vide rates circular no. 24 of 2013 dated 18.09.2013 the rate of Clean Energy Cess was enhanced from 12% to 15% on the applicable base freight rates published in the Indian Railway Conference Association Goods Tariff Part-II issued by the Railway Board, Ministry of Railway, GoI. The guidelines governing the said enhancement of Busy Season Surcharge amongst other charges were issued in a consolidated manner in the form of Rate Master Circular/Dynamic Pricing Policy/2015/0 dated 20.07.2015. As such evidently there is an increase in the Busy Season Surcharge after the cut-off date due to revision of rate of Clean Energy Cess by the Railway Board, Ministry of Railway, GoI leading to increase in cost of supply of power by the Petitioner to the Respondent. The enhancement of Busy Season Surcharge, on transportation of coal by rail during the busy season vide rate circular dated 18.09.2013 is a Change in Law event within the meaning of Article 10.1.1 of the PPA. Due to the said increase in the rate of Busy Season Surcharge on transportation of coal by rail during the busy season, the cost of



supply of power by the Petitioner to the Respondent under the PPA has increased and thus the Petitioner needs to be compensated for it as per Article 10.3 read with Article 10.5 of the PPA. Further, the said increase is not within the direct or indirect reasonable control of the petitioner and such events could not have been avoided by the petitioner, the said event hinders and impairs the performance of obligations under the PPA's in as much as petitioner is incurring additional cost on the purchase of coal for the generation of electricity from the project. Therefore, the increase in Busy Season Surcharge is a Force Majeure event within the meaning of Article 9.3 of the PPA's. The claim of the Petitioner on account of increase in levy of Busy Season Surcharge on transportation of coal by rail from 30.11.2016 to 31.03.2017 is Rs. 0.29 crores.

72. The Respondents i.e. Discoms of Rajasthan State vide its affidavit dated 12.09.2017 have submitted that increase in cost due to Busy Season Surcharge on transportation of coal is erroneous and without any merit. The price notification by the Railways or Coal India Limited cannot be construed as change in law. The respondents have further submitted that, price notification is not statutory levy on the petitioner, which may increase or decrease.

73. The Respondent No. 6, Prayas vide its affidavit dated 25.09.2017, has submitted that Busy Season Surcharge are commercial consideration payable to the Railways and any increase in the rates or assessable value is not a change in law under Article 10 of the PPA. This has already been held by the Central Commission in 8/MP/2014 and 112/MP/2015.

74. We have considered the submissions of the Petitioner, Rajasthan Discom & Prayas. The Commission in the order dated 3.2.2016 in Petition No. 8/MP/2014 has examined whether change in the rates of busy season surcharge and development surcharge levied by Railway Board qualifies as Change in Law. Relevant para of the said order is extracted as under:



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

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

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

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

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

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

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

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



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

In light of the above decision, the Petitioner cannot be granted relief under Change in Law on account of revision in the Busy Season Surcharge by Railway Board.

(H) Levy of Coal Terminal Surcharge for traffic of coal for the distance beyond 100 Km

75. The Petitioner has submitted that as on cut-off date i.e. 11.09.2012, no Coal Terminal Surcharge for tariff of coal for the distance beyond 100 Km was leviable/ applicable. However, by way of corrigendum no.14 to Rates Circular no. 8 of 2015 dated 22.08.2016 the Ministry of Railways, Railway Board has started levying Coal Terminal Surcharge at the rate of Rs. 55 per metric tonne at both loading and unloading terminals for traffic of coal for the distance beyond 100 Km. As such, evidently the levy of Coal Terminal Surcharge is an additional cost leading to increase in cost of supply of power by the Petitioner to the Respondent. The levy of additional Coal Terminal Surcharge for tariff of coal for the distance beyond 100 Km by circular dated 22.08.2016 is a Change in Law event within the meaning of Article 10.1.1 of the PPA. Due to the said additional levy of Coal Terminal Surcharge for tariff of coal for the distance beyond 100 Km, the cost of supply of power by the Petitioner to the Respondent under the PPA has increased and thus the Petitioner needs to be compensated for it as per Article 10.3 read with Article 10.5 of the PPA. Further, the said increase is not within the direct or indirect reasonable control of the petitioner and such events could not have been avoided by the petitioner, the said event hinders and impairs the performance of obligations under the PPA's in as much as petitioner is incurring additional cost on the purchase of coal for the generation of electricity from the project. Therefore, the above said event is a Force Majeure event within the meaning of



Article 9.3 of the PPA's. The claim of the Petitioner on account of the levy of additional Coal Terminal Surcharge for tariff of coal for the distance beyond 100 Km from 30.11.2016 to 31.03.2017 is Rs.09 Crore.

76. The Respondents i.e. Discoms of Rajasthan State vide its affidavit dated 12.09.2017 have submitted that levy of coal terminal surcharge is not covered under change in law. The price notification by the Railways or Coal India Limited cannot be construed as change in law. The respondents have further submitted that, price notification is not statutory levy on the petitioner, which may increase or decrease. Further, the event cited by the petitioner is not a Force Majeure as the intent of Force Majeure clause is not to give any monetary compensation to the petitioner.

77. The Respondent No. 6, Prayas vide its affidavit dated 25.09.2017 has submitted that the price or consideration payable by the Petitioner to coal companies are pursuant to a contractual or commercial arrangement between the Petitioner and the Coal Company and not as a result of change in law as envisaged in the PPA. The increase or decrease in such prices from time to time by such entities supplying coal or goods or providing services of transportation are part of the business aspects and are not a result of any change in law. The very fact that the coal prices were de-regulated demonstrates that the price of coal is a commercial price as opposed to a regulated price. Therefore, the changes in commercial prices of coal are part of the business risk undertaken by the Petitioner.

78. We have considered the submissions of the Petitioner, Rajasthan Discoms and Prayas. It is noted that the Coal Terminal Surcharge on Coal Transportation has been brought by the Ministry of Railways as part of base freight charges at the rate of Rs. 55/ tonne at both loading and unloading terminals for transportation of coal for the distance beyond 100 KM. This levy by the Ministry of Railways vide circular dated 22.8.2016 is in the nature of change in base freight



charges. The Petitioner was expected to take into account the possible revision in these charges while quoting the bid. The Petitioner has already quoted an escalable component of energy charges in the bid and is compensated for any revision in base freight rate through changes in Escalation Index notified by the Commission for coal freight directly. Accordingly, the claim of the Petitioner on this account is disallowed.

(l) Withdrawal of short lead concession in charging of freight for all tariff including coal booked up to 100 Km.

79. The Petitioner has submitted that the Power plant of the Petitioner is located within 90 Km of some of the SECL mines. In accordance with the Ministry of Railways, Gol notification no TCR/1078/2003/1 dated 27.03.2003 (Rates instruction No. 11 of 2003) there had been freight concession varying between 50% -10% for all traffic including coal booked up to 100 Km. This notification was in force as on 11.09.2012. However, the Ministry of Railways, Gol had withdrawn the aforementioned concession vide notification no. TCR/1078/20 14/06 dated 16.05.2014 (Rate Circular No 15 of 2014). Due to the above withdrawal, the Petitioner has been deprived of 50%-10% rebate, which is an additional monetary impact on account of the net expenditure of the Petitioner. The withdrawal of concession has led to incurring additional cost leading to increase in cost of supply of power by the Petitioner to the Respondent. The above events relating to withdrawal of freight concession of 50%-10% for all traffic including coal booked up to 100 Km is a Change in Law event within the meaning of Article 10.1.1 of the PPA. Due to the said withdrawal of freight concession, the cost of supply of power by the Petitioner to the Respondent under the PPA has increased and thus the Petitioner needs to be compensated for it as per Article 10.3 read with Article 10.5 of the PPA. Further, the said increase is not within the direct or indirect reasonable control of the petitioner and such events could not have been avoided by the petitioner, the said event hinders and impairs the performance of obligations under the PPA's in as much as petitioner is incurring additional cost on the purchase of coal for



the generation of electricity from the project. Therefore, the above said event is a Force Majeure event within the meaning of Article 9.3 of the PPA's. The claim of the Petitioner on account of the withdrawal of freight concession of 50%-10% for all traffic including coal booked up to 100 Km from 30.11.2016 to 31.03.2017 is Rs.0.35 Cr.

80. The Respondents i.e. Discoms of Rajasthan State vide its affidavit dated 12.09.2017 have denied that the cost impact for withdrawal of concession on freight charges is covered under change in law. The price notification by the Railways or Coal India Limited cannot be construed as change in law. The respondents have further submitted that, such withdrawal of concession by the railway board is not statutory levy on the petitioner, which may increase or decrease. Further, the event cited by the petitioner is not a Force Majeure as the intent of Force Majeure clause is not to give any monetary compensation to the petitioner.

81. The Respondent No. 6, Prayas vide its affidavit dated 25.09.2017 has submitted that the Railways Act only authorises the Central Government to fix the rates from time to time not as a statutory levy but as may be considered appropriate for the Railways to discharge its commercial functions. The Railways, though a Government Department, is undertaking a commercial activity and not a sovereign activity in regard to transportation services and the charges paid to the Railways for transportation is a commercial arrangement by a generator entered into with the Railways. Therefore, withdrawal of concession is a commercial decision of Railways and the impact of such withdrawal on the price of input cannot be regarded as a change in law.

82. We have considered the submissions of the Petitioner and the respondents. It is noted that short lead concession in charging of freight was provided by the Ministry of Railways for freight concession of 10% for all traffic including coal booked up to 100 Km which was withdrawn by the Ministry of Railways vide its Rate Circular No. 15 of 2014 dated 16.5.2014.



The Petitioner has not submitted the statutory documents/proof to substantiate its claim, in the absence of which we are not inclined to grant any relief in this regard. However, the Petitioner is granted liberty to claim this expenditure under Change in Law through an appropriate application along with the required documents.

(J) Increase in Service Tax transportation of coal by rail and road

83. The Petitioner has submitted that as on 11.09.2012, the rate of service tax on transportation of coal as per the provisions of the Finance Act, 2010 was 12% and the Education Cess on the said Service Tax was 2% and Higher Education Cess on the said Service Tax was 1%. As such the total applicable service tax was 12.36%. Vide Notification no. 26 of 2012 dated 20.06.2012 issued by the Ministry of Finance, Gol an abatement of 70% on rail and 75% on road has been permitted on freight for the taxable commodities i.e. coal and as such the Service Tax on transportation of coal by rail and road was 3.708% (Abatement at 70% of applicable 12.36% of Service Tax) on the total freight inclusive of all charges on coal as per the provisions of the Finance Act, 2010, which is evident from the rate circular no. 29 of 2012 dated 28.09.2012 issued by the Railway Board, Ministry of Railway, Gol. By way of notification bearing no. 14/2015-ST, dated 19.05.2015 issued by the Ministry of Finance, Gol the rate of service tax was enhanced from 12% to 14% due to promulgation of some of the provisions of the Finance Act, 2015. By notification bearing no. 21/2015-Service Tax dated 06.11.2015 issued by the Ministry of Finance, Gol, the rate of service tax was further enhanced from 14% to 14.5% due to promulgation of provision relating to Swachh Bharat cess on taxable service. The rate of Service Tax was further increased from 14.5% to 15% by way of notification bearing no. 31/2016-Service Tax dated 26.05.2016 issued by the Ministry of Finance, Gol. The revision of rate of service tax was due to promulgation of provision relating to Krishi Kalyan cess on taxable service. The abatement of 70% permitted on freight for the taxable commodities i.e. coal vide notification no. 26 of 2012 dated 20.06.2012 issued by the Ministry of Finance, Gol is still



continuing and resultantly the enhancement of Service Tax on transportation of coal is 4.2%, 4.35% and 4.5% from 3.708%. As such evidently there is an increase in the service tax on the transportation of coal by rail and road due to revision of rate of Service Tax by the Ministry of Finance, GoI leading to increase in cost of supply of power by the Petitioner to the Respondent. The enhancement of the Service Tax on transportation of coal by rail and road from 12% to 14% to 14.5% and then to 15% as stated above is a Change in Law within the meaning of Article 10.1.1 of the PPA. Due to the said increase in the Service Tax on the transportation of coal by rail and road, the cost of supply of power by the Petitioner to the Respondent under the PPA has increased and thus the Petitioner needs to be compensated for it as per Article 10.3 read with Article 10.5 of the PPA. The increase in Service Tax on transportation of coal by rail and road vide notifications dated 19.05.2015, 06.11.2015 and 26.05.2016 are Change in Law events within the meaning of Article 10.1.1 of the PPA. Due to the said increase in the rate of Service Tax on transportation of coal by rail, the cost of supply of power by the Petitioner to the Respondent under the PPA has increased and thus the Petitioner needs to be compensated for it as per Article 10.3 read with Article 10.5 of the PPA. Further, the said increase is not within the direct or indirect reasonable control of the petitioner and such events could not have been avoided by the petitioner, the said event hinders and impairs the performance of obligations under the PPA's in as much as petitioner is incurring additional cost on the purchase of coal for the generation of electricity from the project. Therefore, the above said event is a Force Majeure event within the meaning of Article 9.3 of the PPA's. The claim of the Petitioner on account of levy and increase in Service Tax on transportation of coal by road and rail from 30.11.2016 to 31.03.2017 is Rs.0.32 Cr.

84. The Respondents i.e. Discoms of Rajasthan State vide its affidavit dated 12.09.2017 have stated that the service tax on the transportation of coal should not be covered under change in law. The said tax does not constitute a tax on supply of power and therefore, the



reimbursement of such tax is not by virtue of statutory provisions, but under the terms of the contract. The respondents and the beneficiaries cannot be allowed to suffer as a result of a commercial arrangement between the petitioner and railways. Further, the event cited by the petitioner is not a Force Majeure as the intent of Force Majeure clause is not to give any monetary compensation to the petitioner.

85. The Respondent No. 6, Prayas vide its affidavit dated 25.09.2017 has submitted that the increase in service tax is not pursuant to the Ministry of Railway Notifications but Ministry of Finance. The Petitioner has not annexed the appropriate Notifications. The Annexure P25 is a Notification rescinding the Notification dated 24.02.2009; however the Petitioner has not annexed the said Notification dated 24.02.2009. Further the Annexure P-26 refers to an option granted for liability of krishi kalyan cess. In case, such option results in any benefit or reduction of liability of service tax of the Petitioner, the said benefits is to be passed on to the Procurers and consumers. In the absence of the submissions of the appropriate Notification, there cannot be any relief of Change in Law to the Petitioner.

86. We have considered the submissions of the Petitioner, Rajasthan Discoms and Prayas. The Petitioner has placed on record the concerned notifications. The Commission in the order dated 1.2.2017 in Petition No. 8/MP/2014 has held that service tax on transportation of goods by Indian Railways qualifies as Change in Law. Relevant Para of the said order is extracted as under:

“89. ... By Finance Act of 2006, though service tax on transportation of goods by rail was introduced, an exception was made in case of Government Railways. By Finance Act of 2009, this restriction was removed by providing that service tax is leviable “to any person by another person, in relation to transport of goods by rail in any manner”. Therefore, transport of goods by Indian Railways became subject to service tax by Finance Act of 2009. Actual levy of service tax on transportation of goods by railways was exempted by Notification No. 33 of 2009 dated 1.9.2009. By Notification no. 26 of 2012 dated 20.6.2012, Ministry of Finance issued notification by exempting transport of goods by rail over and above 30% of the service



tax chargeable with effect from 1.7.2012. By a Notification No. 43 of 2012 dated 2.7.2012, service tax on transportation of goods by Indian Railways was fully exempted till 30.9.2012. With effect from 1.10.2012, service tax on 30% of the transport of goods by rail is chargeable. Therefore, the basis of the service tax on transport of goods by Indian Railways is traceable to the Finance Act of 2009 which was enacted after the cut-off date in case of MSEDCL PPA. The rate Circular No. 27 of 2012 dated 26.9.2012 issued by Railway Board implemented the provisions of the Finance Act, 2009 at the ground level. In our view, since the imposition of service tax on transport of goods by Indian Railways is on the basis of the Finance Act, 2009 which has come into force after the cut-off date, the expenditure incurred by the Petitioner on payment of service tax on transport of goods by the Indian Railways is covered under change in law and the Petitioner is entitled for compensation in terms of the MSEDCL PPA. As on cut-off date in case of DNH PPA (i.e.1.6.2012), the service tax was on transportation of goods by Railways was in existence but was under exemption. Therefore, as on cut-off date in case of DNH PPA, the Petitioner could not have factored service tax on transportation of goods by Indian Railways which was under exemption. With effect from 1.10.2012, service tax on 30% of the transport of goods by rail became chargeable. This date being after the cut-off date in case of DNH PPA, the same shall be admissible under DNH PPA. Subsequent changes in service tax shall be admissible under change in law.”

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

Applicability date	Rate of Service tax	Service tax on transportation of goods @ 30% of Service tax	Admissible rate of service tax under Change in law
11.09.2012 (cut-off date)	12.36%	0.00%	0% (Petitioner has accounted 0.00% in its bid)
1.10.2012	12.36%	3.708%	3.708%
01.06.2015	14.00%	4.200%	4.20%
15.11.2015	14.50%	4.350%	4.35%
01.06.2016	15.00%	4.500%	4.50%



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

(K) Value Added Tax/CST

87. The Petitioner has submitted that as on cut-off date i.e. 11.09.2012, the rate of Value Added Tax/ CST was 5% / 2% on the entire landed cost of coal purchased from SECL/MCL including all the above named components i.e. (a) levy of royalty on coal including contribution to NMET and MDF; (b) levy of sizing charges of coal; (c) levy of surface transportation charges of coal; (d) levy of forest tax/rate of transit forest produce on coal; (e) levy of environment cess/ Chhattisgarh Paryavaran Upkar; (f) levy of industrial development cess/ Chhattisgarh Vikas Upkar; (g) levy of Central Excise Duty; (h) levy of Clean Energy Cess; i) levy of entry tax (j) levy of Niryat Kar. Though the rate of Value Added Tax / CST remained unchanged, there have been changes in the rate at which the above said components on which VAT/CST are levied. This has led to an overall impact on the net tax out flow qua Value Added tax / CST in contradistinction to what the Petitioner was liable to pay at the time of cut-off date. As such the same is covered under Article 10.1.1 of the PPA. Due to the said increase in the Value Added Tax/CST on the landed cost of coal the cost of supply of power by the Petitioner to the Respondent under the PPA has increased and thus the Petitioner needs to be compensated for it.



88. The Respondents i.e. Discoms of Rajasthan State vide its affidavit dated 12.09.2017 have denied that the increase in Value Added Tax/CST could not have been covered under change in law. The said increase in Value Added Tax/CST is with regard to the other change in law events mentioned above and this claim is only consequential on the main claims made by the petitioner. Therefore, there cannot be any question of passing on the implication when the principal claims itself are disputed and not payable.

89. We have considered the submissions of the Petitioner and the Respondents. It is noted that the Petitioner has not submitted required documents in support of its claim including the State whose VAT is applicable in this case. Therefore, we are not inclined to grant any relief at this stage in absence of statutory/required documents. Therefore, the Petitioner claim on this aspect is rejected. However, the Petitioner is granted liberty to approach the Commission for appropriate relief along with all required documents.

(L) Entry Tax

90. The Petitioner has submitted that as on the cut of date i.e. 11.09.2012, the rate of Entry Tax was 1% on the entire landed cost of coal purchased from SECL including all the above named components i.e. (a) levy royalty on coal including contribution to NMET and MDF; (b) levy of sizing charges of coal; (c) levy of surface transportation charges of coal; (d) levy of forest tax/rate of transit forest produce on coal; (e) levy of environment cess/ Chhattisgarh Paryavaran Upkar; (f) levy of industrial development cess/ Chhattisgarh Vikas Upkar; (g) levy of Central Excise Duty; (h) levy of Clean Energy Cess; (i) levy of Busy Season Charges on transportation of coal by rail; (j) levy of service tax. Though the rate of Entry Tax remained unchanged, there have been changes in the rate at which the above said components or incidences on which such Entry Tax is levied. This has led to an overall impact on the net tax out flow qua Entry Tax in contradistinction to what the Petitioner was liable to pay at the time of cut-off date. As such



the same is covered within the meaning of Change in Law as defined in Article 10.1.1 of the PPA. Due to the said increase in the Entry Tax on the landed cost of coal, the cost of supply of power by the Petitioner to the Respondent under the PPA has increased and thus the Petitioner needs to be compensated for it.

91. The Respondents i.e. Discoms of Rajasthan State vide its affidavit dated 12.09.2017 have denied that the increase in Entry Tax could not have been covered under change in law. The said increase in Entry Tax is with regard to the other change in law events mentioned above and this claim is only consequential on the main claims made by the petitioner. Therefore, there cannot be any question of passing on the implication when the principal claims itself are disputed and not payable.

92. We have considered the submissions of the Petitioner and the Respondent. It is noted that that the Petitioner has not submitted documents in support of its claim in the absence of which no view can be taken as regards the admissibility under Change in Law. However, the Petitioner is granted liberty to claim this expenditure under Change in Law through an appropriate application with relevant details.

(M) Development Surcharge

93. The Petitioner has submitted that as on the cut- off date i.e. 11.09.2012, the rate of Development Surcharge was 5% on the freight of transportation of coal by rail including all the above named components i.e. (a) increase in busy season surcharge (b) Discount on rail freight for distance travelled up to 90 KM and (c) increase in base rail freight. Though the rate of Development Surcharge remained unchanged, there have been changes in the rate at which the above said components or incidences on which such Development surcharge is levied. This has led to an overall impact on the net out flow qua Development surcharge in contradistinction



to what the Petitioner was liable to pay at the time of cut-off date. As such the same is covered within the meaning of Change in Law as defined in Article 10.1.1 of the PPA. Due to the said increase in the Development Surcharge on the freight of transportation of coal, the cost of supply of power by the Petitioner to the Respondent under the PPA has increased and thus the Petitioner needs to be compensated for it.

94. The Respondents i.e. Discoms of Rajasthan State vide its affidavit dated 12.09.2017 have denied that the increase in Development Surcharge could not have been covered under change in law. The said increase in Development Surcharge are with regard to the other change in law events mentioned above and this claim is only consequential on the main claims made by the petitioner. Therefore, there cannot be any question of passing on the implication when the principal claims itself are disputed and not payable.

95. The Respondent No. 6, Prayas vide its affidavit dated 25.09.2017 has submitted that development surcharge is commercial consideration payable to the Railways and any increase in the rates or assessable value is not a change in law under Article 10 of the PPA. This has already been held by the Central Commission in Petition Nos. 8/MP/2014 and 112/MP/2015.

96. We have considered the submissions of the Petitioner, Rajasthan Discom & Prayas. According to the Petitioner, as on the cut-off date i.e 11.09.2012, the rate of development surcharge was 5% on the freight of transportation of coal by rail including increased in busy season surcharge, discount on rail freight for distance travelled upto 90 km and increase in base rail freight. The Petitioner has submitted that though the rate of development surcharge remained unchanged, however, with the change in the rate of the above said components, there has been an overall impact on the net out flow qua Development surcharge. The Petitioner has



submitted that change in rate of development surcharge qualifies as Change in Law events in terms of Article 10.1.1 of the PPA.

97. The Commission in the order dated 3.2.2016 in Petition No. 79/MP/2013 has disallowed the rates of development surcharge levied by Railway Board as Change in Law event. Relevant para of the said order is extracted as under:

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

In the light of the above decision, the Petitioner cannot be granted relief under Change in Law on account of revision in development surcharge by Railway Board. Accordingly, the claim is not allowed as a Change in law event.

(N) Niryatkar

98. The Petitioner has submitted that Niryatkar is levied on the summation of the base price of coal and sizing and crushing charges. The above levy is collected from the Petitioner and other consumers of coal and the fund so collected are deposited with the Municipal Corporation, Korba, Chhattisgarh. The office of the Municipal Corporation, Korba, vide its letter dated 23.04.2005 imposed Niryatkar at the rate of 0.2% of the summation of the base price of coal and sizing and crushing charges of coal. Though there has been no change in the rate at which aforesaid Niryatkar is levied, however with the increase of base price as well as sizing and crushing charges on account of Change in Law events enumerated hereinabove there has been an increase in the Niryatkar imposed upon the Petitioner. Further, the said increase is not within the direct or indirect reasonable control of the petitioner and such events could not have been



avoided by the petitioner. The said event hinders and impairs the performance of obligations under the PPA's in as much as petitioner is incurring additional cost on the purchase of coal for the generation of electricity from the project. Therefore, the above said event is a Force Majeure event within the meaning of Article 9.3 of the PPA's. The claim of the Petitioner on account of increase in Value Added Tax/CST, Entry Tax, Niryatkar and Development Surcharge from 30.11.2016 to 31.03.2017 is Rs.1.28 crore.

99. The Respondents i.e. Discoms of Rajasthan State vide its affidavit dated 12.09.2017 have denied that the increase in Niryatkar could not have been covered under change in law. The said increase in Niryatkar is with regard to the other change in law events mentioned above and this claim is only consequential on the main claims made by the petitioner. Therefore, there cannot be any question of passing on the implication when the principal claims itself are disputed and not payable.

100. We have considered the submissions of the Petitioner and the Respondents. It is noted that the Petitioner neither submitted the details regarding levy of Niryatkar nor any Gazetted Notification issued by any Govt. body/ statutory authority regarding levy of NiryatKar on components apart from base price of coal. In the absence of this no view can be taken as regards the admissibility under change in law. Accordingly, the Petitioner is granted liberty to claim this expenditure under change in law through an appropriate application with relevant details.

(O) Additional cost towards Fly Ash Transportation

101. The Petitioner has submitted that as on 11.09.2012, the Petitioner was not required to incur any additional cost towards fly ash transportation. However, vide notification dated 25.01.2016 the Ministry of Environment of Forest ('MoEF') amended the previous notification



dated 03.11.2009 regarding Fly Ash Management Rules. The relevant portion of the amendment is as follows: -

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

102. The amendment of notification dated 03.11.2009 vide notification dated 21.01.2016 is a Change in Law event within the meaning of Article 10.1.1 of the PPA. Due to the said increase in the cost of operation and maintenance, the cost of supply of power by the Petitioner to the Respondent under the PPA has increased and thus the Petitioner needs to be compensated for it as per Article 10.3 read with Article 10.5 of the PPA. Further, the said increase is not within the direct or indirect reasonable control of the petitioner and such events could not have been avoided by the petitioner, the said event hinders and impairs the performance of obligations under the PPA's in as much as petitioner is incurring additional cost on the purchase of coal for the generation of electricity from the project. Therefore, the above said event is a Force Majeure event within the meaning of Article 9.3 of the PPA's. The claim of the Petitioner on account of consequent increase in disposal cost of Fly Ash from 30.11.2016 to 31.03.2017 is Rs.1.17 crore.

103. The Respondents i.e. Discoms of Rajasthan State vide its affidavit dated 12.09.2017 have denied that the obligation already existed and further condition imposed through the amendment is mere crystallization or quantification of the obligation and cannot be covered under change in law. Even prior to 2016 amendment, the cost of transportation of fly ash was being born by the generators. The respondents have further submitted the observations as under:-



- (a) As per notification dated 14.09.1999, the authority had sought to ensure utilization of fly ash generated from the thermal power plant. Therefore, the thermal power plants were required to make available fly ash without any consideration.
- (b) Clause 2 of above notification was amended on 27.08.2003, interalia, to substitute the opening part as “Every coal or lignite based thermal power plant shall take the following steps to ensure the utilization of ash generated by it, namely.”
- (c) Further, amendments were made vide notification dated 03.11.2009 in which the responsibility of thermal power plants to supply fly ash free of cost was modified and the thermal power plants were allowed to sell fly ash to the user agencies subject to pond ash and 20% of dry ESP fly ash to be made available free of charge.
- (d) Further, under this notification, the amount collected from sale of fly ash by the thermal power plants was to be utilized only for development of infrastructure or facilities, promotion and facilitation of activities for use of fly ash until 100% fly ash utilisation level is achieved and once it is achieved the rest amount can be used for other development works.

104. The Respondent No. 6, Prayas vide its affidavit dated 25.09.2017 has submitted that there were existing obligations of the Petitioner regarding fly ash as on cut off date and as per the Environment Clearance and Consents of the Petitioner prior to the Amendment. Therefore, only the increase in obligation due to the Amendment dated 25.01.2016 is to be considered and the Petitioner be required to demonstrate the increase in expenditure due to such amendment as against the existing obligation. It is incorrect to assume that the Petitioner was not incurring any expenditure prior to the Amendment.

105. We have considered the submissions of the Petitioner, Rajasthan Discom & Prayas and perused the documents on record. The petitioner vide its affidavits dated 24.07.2017 and 4.9.2017 has submitted the details regarding expenditure towards Fly Ash Transportation along



with revenue earned and the contract agreement with agencies who have procured ash from the plant. The petitioner has also submitted the copies of bills, debit notes/ or invoices. As on cut-off date, there was no direction with regard to utilization of fly ash under Environment (Protection) Act, 1986. Subsequently, Ministry of Environment and Forests, Govt. of India vide its Notification dated 3.11.2009 issued the directions regarding utilisation of fly ash under the Environment (Protection) Act, 1986. The Ministry of Environment and Forests, Govt. of India vide its Notification No. S.O. 254 (E) dated 25.1.2016 amended the Environment (Protection) Rules, 1986 and imposed the additional cost towards fly ash transportation. Relevant portion of said Rules is extracted as under:

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

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

- a) Award of fly ash transportation contract through a transparent competitive bidding procedure so that a reasonable and competitive price for transportation of ash/ Metric Tonne is discovered;
- b) Any revenue generated/ accumulated from fly ash sales, if CoD of units/ station was declared before the MoEF notification dated 25.01.2016, shall also be adjusted from the relief so granted;



- c) Revenue generated from fly ash sales must be maintained in a separate account as per the MoEF notification and;
- d) Actual expenditure incurred as claimed should be duly certified by auditors and the same should be kept in possession so that it can be produced to the beneficiaries on demand.

The Petitioner is granted liberty to approach the Commission with above documents to analyse the case for determination of compensation.

(P) Increase in rate of Chhattisgarh Electricity Duty

107. The Petitioner has submitted that as on cut-off date i.e. 11.09.2012, the Electricity Duty as per the Section 3(1) (c) of the Chhattisgarh Electricity Duty Act, 1949 was not applicable. The said Chhattisgarh Electricity Duty has been notified as 10% by way of amendment of Section 3(1) (c) of the Chhattisgarh Electricity Duty Act, 1949 which was carried out by way of the Chhattisgarh Electricity Duty (Amendment) Act, 2016. That by a tariff order passed by CSERC, the Chhattisgarh Electricity Duty has been made applicable to the category of Petitioner's power plant. In this regard, it is relevant to submit that the tariff applicable to the power plant of the Petitioner is Rs. 6.04 per kWh and therefore 10% of the Chhattisgarh Electricity Duty is levied on Rs. 6.04 per kWh of auxiliary. As such evidently an increase of 10% in the Chhattisgarh Electricity Duty after the cut-off date due to revision of rate in Chhattisgarh Electricity Duty has led to increase in cost of supply of power by the Petitioner to the Respondents. The additional levy of 10% of the Chhattisgarh Electricity Duty on the tariff applicable to the Petitioner's power plant due to the amendment of the Chhattisgarh Electricity Duty Act, 1949 is a Change in Law event within the meaning of Article 10.1.1 of the PPA. Due to the said increase in the Chhattisgarh Electricity Duty on the tariff applicable to the power plant of the Petitioner cost of supply of power by the Petitioner to the Respondent under the PPA has increased and thus the Petitioner needs to be compensated for it as per Article 10.3 read with Article 10.5 of the PPA. Further, the said increase is not within the direct or indirect reasonable control of the petitioner and such events could not have been avoided by the petitioner, the said event hinders and



impairs the performance of obligations under the PPA's in as much as petitioner is incurring additional cost on the purchase of coal for the generation of electricity from the project. Therefore, the above said event is a Force Majeure event within the meaning of Article 9.3 of the PPA's. The claim of the Petitioner on account of levy of Chhattisgarh Electricity Duty from 30.11.2016 to 31.03.2017 is Rs. 1.93 crore calculated @ 10% of Rs 6.04 /-kWh of auxiliary. It may be noted that the Petitioner is contesting the applicability of rates of Electricity Duty being levied on the Petitioner. In case, a demand is raised on the Petitioner on this account or any liability arises in this regard, the Petitioner reserves its right to claim corresponding compensation under the PPAs at an appropriate stage.

108. The Respondents i.e. Discoms of Rajasthan State vide its affidavit dated 12.09.2017 have submitted that the Chattisgarh Electricity Duty (Amendment) Act, 2013 clearly provides for an Electricity duty payable for Auxiliary consumption under section 3(1)(c), and the case of the petitioner is self contradictory as the petitioner in its submissions stated that there was no electricity duty payable prior to 2016 amendment. The respondents have further submitted that there is no clarity on the claim of the petitioner.

109. The Respondent No. 6, Prayas vide its affidavit dated 25.09.2017 has submitted that amendment in 2013 in the Chhattisgarh Electricity Duty Act also provides for electricity duty on the electricity consumed in the State. This is in keeping with the Entry No. 53 in Schedule VII of Constitution of India which provides for 'taxation on consumption or sale of Power' under the State List. Therefore, the Chhattisgarh Act is applicable only to power consumed within the State. In the present matter, the power is being supplied to the Respondents in the State of Rajasthan and therefore, the Electricity Duty as applicable in Chhattisgarh is not relevant for such supply. Prayas has further submitted that it is clear from the Chhattisgarh Electricity Duty Act, 1949 and Chhattisgarh Electricity Duty (Amendment) Act, 2013, the Electricity Duty did exist



as on the cut-off date and the Petitioner is required to demonstrate how the Electricity Duty was not applicable as on cut -off date.

110. We have considered the submissions of the Petitioner, Rajasthan Discom & Prayas. The Petitioner vide its affidavit dated. 2.11.2017 has submitted that Electricity Duty under the Chhattisgarh Electricity Duty Act, 1949 was 8% on applicable tariff of Rs 3.5/kWh as on the cut-off dates for TANGEDCO and Rajasthan PPAs. This was enhanced to 15% by way of an amendment to the Act which was carried out by Chhattisgarh Electricity Duty (Amendment) Act, 2013. The Petitioner has submitted that the applicable tariff was also enhanced from Rs 3.5/kWh to Rs 4.5/kWh vide the tariff order passed by CSERC for the year 2015-16. However, the Electricity Department of the State of Chhattisgarh has taken the tariff applicable for the purpose of calculating the electricity duty in excess Rs 6/kWh. Subsequently, the Electricity Duty was reduced to 10% of applicable tariff by Chhattisgarh Electricity Duty (Amendment) Act, 2016. The Petitioner has submitted that it is exempted from payment of Electricity Duty as on the cut-off dates and therefore, did not include the same in the tariffs quoted by it for TANGEDCO and Rajasthan PPAs. However, after the cut-off dates, the Petitioner received demand from the Electricity Department, Govt. of Chhattisgarh for Electricity Duty and while paying the same under protest, has challenged the levy of Electricity Duty before the Hon'ble Chhattisgarh High Court. The Petitioner has also challenged the stand taken by Electricity Department applying tariff in excess of Rs 6/kWh for calculating the electricity duty. However, without prejudice to the above and presuming, without admitting, that the Petitioner was not exempted from payment of electricity duty. Since, the Electricity Duty at 8% of Rs 3.5/kWh was applicable as on cut off dates, the Petitioner is entitled to the increase from 8% of Rs 3.5/kWh to 15% of Rs 4.5 kWh (which was effected by the amendment and CSERC order referred to hereinabove) and thereafter, considering the reduction in the year 2016 by the amendment made in the year 2016, the Petitioner is entitled to increase from 8% of 3.5/kWh to 10% of 4.5/kWh.



111. The Commission vide order dated 30.12.2015 in Petition No. 118/MP/2015 has decided that the event of electricity duty on auxiliary consumption increased by the State Govt. qualifies as Change in Law. Relevant Paras of the said order are extracted as under:

“37.The increase in electricity duty and energy development cess on sale of power to Madhya Pradesh shall be payable by the Discoms of Madhya Pradesh in proportion to the share of MP in the scheduled generation. The increase in electricity duty and energy development cess on auxiliary power consumption of station and coal mine shall be payable by all beneficiaries/procurers of the station. Apart from the above, the Beneficiaries/procurers will get back or adjust an amount of Rs. 22 crore annually with effect from 1.8.2014 in proportion to their shares in the contracted capacity.

38. The increase in electricity duty and energy development cess on sale of power to Madhya Pradesh shall be payable by the distribution companies of Madhya Pradesh in Proportion to the share of Madhya Pradesh in the scheduled generation. The increase in electricity duty and energy development cess on auxiliary power consumption of the generating station and coal mine shall be payable by all the beneficiaries/procurers of the generation station. In addition, the petitioner shall refund Rs. 22 crore annually to the beneficiaries with effect from 1.8.2014 in proportion to their share in the contracted capacity or shall adjusted in their bills.”

In the light of the decision as quoted above, the claim of the Petitioner for reimbursement on account of increase in electricity duty under Change in law is admissible. It is noted that in the present case, the Petitioner has submitted that as on cut-off date, Electricity Duty was applicable at the rate of 8% on applicable tariff of Rs. 3.5/kWh but the Petitioner presumed that it was exempted from payment of the same due to which it has not been accounted for in the PPA. The exact reason of such presumption for exemption has not been submitted by the Petitioner. In this background, we are of the view that 8% of electricity duty was payable on applicable tariff as on the cut-off date. Therefore, the increase in electricity duty on auxiliary consumption from 8% on applicability tariff as on cut-off date is allowed under Change in Law subject to the outcome of the decision of the Hon'ble Chhattisgarh High Court.

112. The Petitioner is directed to furnish the monthly bill along with the proof of payment of Electricity Duty and computations duly certified by the Auditors. If any change in rate of



Electricity duty has benefitted the Petitioner, then, the same needs to be passed on to Rajasthan Discoms.

(Q) Additional Capital Expenditure on account of Amendment in Environment Norms

113. The petitioner has submitted that, the Government of India, Ministry of Environment, Forest and Climate Change (MoEFC) vide its notification no. S.O.3305 (E) dated 07.12.2015 notified the Environment (Protection) Amendment Rules, 2015 (Amendment Rules, 2015) amending/ introducing the standards for emission of environmental pollutants to be followed by the thermal power plants. By the said Amendment Rules, all the existing thermal power plants, including that of the Petitioner, are required to meet the modified / new norms within a period of two (2) years from the date of the notification. By the said amendment, MoEFC has:

- a) *Directed all thermal power plants with Once Through Cooling ("OTC") to install Cooling Tower ("CT");*
- b) *Directed all existing CT based plants to reduce water consumption up to the limit prescribed therein;*
- c) *Revised emission parameters of Particulate Matter ("PM"); and*
- d) *Introduced new parameters qua Sulphur dioxide (SO₂), Oxides of Nitrogen (NO_x) and Mercury (Hg).*

114. The Petitioner's plant is compliant with the new limits prescribed by MoEFC for Particulate Matter (PM). However, the additional cost required for modifying the Plant towards meeting the norms prescribed by MoEFC for Water Consumption, Sulphur dioxide (SO₂), Oxides of Nitrogen (NO_x) and Mercury (Hg) is a Change in Law event within the meaning of Article 10.1.1 of the PPAs. Due to the said incidence of the additional cost the cost of supply of power by the Petitioner to the Respondents under the PPAs will increase and thus the Petitioner needs to be compensated for it as per Article 10.3 read with Article 10.5 of the PPAs. Further, the said increase is not within the direct or indirect reasonable control of the petitioner and such events could not have been avoided by the petitioner, the said event hinders and impairs the performance of obligations under the PPA's in as much as petitioner is incurring additional cost



on the purchase of coal for the generation of electricity from the project. Therefore, the above said event is a Force Majeure event within the meaning of Article 9.3 of the PPA's. The Petitioner is in the process of estimating, analysing the impact of the above and the total cost to be incurred for modification of the Plant and thereafter take further steps in the matter.

115. The Respondents i.e. Discoms of Rajasthan State vide its affidavit dated 12.09.2017 have submitted that the petitioner has not furnished the details regarding the existing norms, details of actual emission of PM, SO₂, NO_x, Hg. Further the respondents have submitted that, it will not be possible for them to comment unless the petitioner provides the aforesaid information.

116. The Respondent No. 6, Prayas vide its affidavit dated 25.09.2017 has submitted that the compensation is payable under Article 10 only after the expenditure has been incurred and therefore the Petition is premature at this stage. There is no provision in the PPA for in principle approval before the expenditure has incurred. Further, it is submitted that the Petitioner has claimed the amendment in Environment (Protection) Rules as Change in Law but has neither annexed the said new norms nor provided the existing obligations of the Petitioner prior to such amendment. For the change in law, the law as prevailing on the cut-off date for the Petitioner is to be considered, including the requirement for various consents and clearances to be obtained and the conditions imposed therein. The Petitioner was aware, as on cut-off date, that the project required to obtain various consents and clearances and the Environment Authorities were entitled to impose conditions for such clearances and conditions. Therefore, to the extent that the Petitioner was already subject to the said conditions, there is no change in law. The Amendment is to be considered as a Change in Law only to the extent that it imposes new conditions or makes the existing conditions more stringent. Accordingly, the Petitioner is required to produce all Clearances and Consents given to the Petitioner's project and specify



the conditions/ standards as applicable to the Petitioner prior to the Amendment to enable the Commission to consider the aspect of change in law. Similarly, the Petitioner is required to place on record the standards prescribed under Environment Protection Rules, 1986; Central Pollution Control Board; and Chhattisgarh Pollution Control Board under Air (Prevention and Control of Pollution) Act, 1981 as on cut-off date. Further the effect of any change in law subsequent to the cut-off date is restricted to incremental cost or additional expenditure on installation or up-gradation of the plant and equipment to be installed by reason of change in law over and above the expenditure which was in any event required to be incurred even in the absence of such change in law and not for the entire capital expenditure.

117. Replying to the Prayas averments, Petitioner vide affidavit dt. 02.11.2017 has submitted that the Petitioner is only seeking an in-principle approval of this Commission for the said Change in Law.

118. We have considered the submissions of the petitioner and respondents. The Petitioner has submitted that the Petitioner's plant is compliant with the new limits prescribed by MoEFC for Particulate Matter (PM). However, the petitioner is seeking in-principle approval under Change in law for the additional cost required for modification in the Plant towards meeting the norms prescribed by MoEFC for Water Consumption, Sulphur dioxide (SO₂), Oxides of Nitrogen (NO_x) and Mercury (Hg).

119. We have noted that MoEFC vide notification dt. 07.12.2015 has amended the standards for emission of environmental pollutants to be followed by thermal power plants. The norms prevailing for PM, SO₂, NO_x and Hg were made more stringent through the said MoEFC notification dated 07.12.2015. The amended norms are specified as under;



Table 2: Standards (in mg/Nm³)

	PM	SO ₂	NO _x	Mercury
Current standards	150-350	none	none	none
New standards				
Units installed till 2003	100	<500 MW—600 >=500 MW—200	600	>=500 MW—0.03
Units installed between 2004 and 2016	50	<500 MW—600 >=500 MW—200	300	0.03
Units installed after Jan 2017	30	100	100	0.03

120. Under first bullet of Article 10.1.1 of the PPA it has been mentioned that “*enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any law, including rules and regulations framed pursuant to such law*” have been considered as a event under Change in law. MoEFC through the amendment to the Environmental Protection (1986) Act has made it mandatory for all the thermal power plants to comply and operate within the specified limits. The issue regarding implementation of revised environmental norms and allowing such cost under Change in Law are generic issues which will be considered separately. Liberty is granted to the Petitioner to file a separate petition in this regard.

(R) Compensation on account of additional cost due to reduction in supply of coal from SECL

121. The petitioner has submitted that, the tariff agreed under the PPAs for the supply of power by the Petitioner to the Respondents was based on the specified assured linkage quantity of fuel from SECL. In this regard, it is an admitted position that the generation of power currently being supplied by the Petitioner to the Respondents was premised on linkage coal from SECL. The supply of linkage coal was assured by SECL issuance of Letter of Assurance dated 15.06.2009. Thus as on 11.09.2012 (i.e. 7 days prior to the Bid Deadline date) the Petitioner was entitled to receive 100% coal for generating power from its power plant. The



quantity of coal assured under the LOA dated 15.06.2009 was stipulated in the Fuel Supply Agreement signed between the Petitioner and the SECL on 29.08.2013. However, MoC (Ministry of Coal), vide its office memorandum dated 26.07.2013, decided that fuel supply agreements will be signed for the domestic coal quantity of 65%, 65%, 67% and 75% of annual coal quantity for the remaining four years of the 12th plan for the power plants having normal linkages on account of non-availability of domestic coal. Vide the said office memorandum/ notification/ order, MoC also decided that to meet its obligations under the fuel supply agreement of making available the balance quantity of coal, the Coal India Limited/CIL may import coal and supply the same to the willing power plants on cost plus basis. Alternatively, MoC in the said notice decided that power plants may also directly import coal themselves, in which case, the fuel supply obligations on part of CIL/SECL to the extent of import component would be deemed to have been discharged.

122. The Petitioner has submitted that MoC issued an office memorandum/notification dated 26.7.2013 which was followed by a letter issued by the Ministry of Power (MoP) dated 31.7.2013 to the Commission and other State Regulatory Commissions. As per the said letter, MoP communicated the following decisions of the Government of India:

“After considering all aspects and the advice of CERC in this regard, the Government has decided the following in June, 2013:

- (a) Taking into account the overall domestic availability and actual requirements, FSAs to be signed for domestic coal component for the levy of disincentive at the quantity of 65%, 65%, 67% and 75% of Annual Contracted Quantity (ACQ) for the remaining four years of the 12th Plan.
- (b) To meet its balance FSA obligations, CIL may import coal and supply the same to the willing Thermal power plants on cost plus basis. Thermal power plants may also import coal themselves if they so opt.
- (c) Higher cost of imported coal to be considered for pass through as per modalities suggested by CERC.



3. Ministry of Coal vide letter dated 26th July 2013 has notified the changes in the New Coal Distribution Policy (NCDP) as approved by the CCEA in relation to the coal supply for the next four years of the 12th plan.

4. As per the decision of the Government, the higher cost of import/market based evacuation coal be considered for being made a pass through on a case to case basis by CERC/SERC to the extent of shortfall in the quantity indicated in the LoA/FSA and the CIL supply of domestic coal which would be minimum of 65%, 65% 67% and 75% of LoA for the remaining four years of the 12th plan for the already concluded PPAs based on tariff based competitive bidding.

5. The ERCs are advised to consider the request of individual power producers in this regard as per due process on a case to case basis in public interest. The Appropriate Commissions are requested to take immediate steps for the implementation of the above decision of the Government.”

123. The petitioner has submitted that, in light of the above referred office memorandum/notification dated 26.07.2013 issued by MoC the supply of linkage coal to the Petitioner was reduced and the Petitioner started receiving only part of the total required quantity from SECL for the purpose of supply of power to the Respondents under the PPAs. It is further submitted that as a result of the reduced supply of quantum of linkage coal, the Petitioner was constrained to procure balance coal from e-auction / open market, the cost whereof is much more than the linkage coal. Hence, the above referred events i.e. the said notification/order dated 26.07.2013 and letter/order dated 31.07.2013 are Change in Law within the meaning of Article 10.1.1 of the PPA and the Petitioner is entitled to be compensated since the reduction of supply of linkage coal has occurred after 11.09.2012 (i.e. 7 days prior to Bid Deadline date i.e., 06.03.2013). Due to the said reduction in the quantum of linkage coal the Petitioner has to procure balance quantum of coal from e-auction at much higher price than the price of linkage coal under the Fuel Supply Agreement dated 29.08.2013. Consequently, the cost of supply of power by the Petitioner to the Respondents under the PPAs has increased and thus the Petitioner needs to be compensated for it as per Article 10.3 read with Article 10.5 of the PPAs. Further, the said reduction of supply of linkage coal by SECL and consequent procurement of balance coal is not within the direct or indirect reasonable control of the petitioner and such events could not have been avoided by the petitioner, the said event hinders



and impairs the performance of obligations under the PPA's in as much as petitioner is incurring additional cost on the purchase of coal for the generation of electricity from the project. Therefore, the above said event is a Force Majeure event within the meaning of Article 9.3 of the PPA's. The claim of the Petitioner on account of increase in cost of procurement of balance coal through e-auction from 30.11.2016 to 31.03.2017 is Rs 2.26 crores.

124. The Respondents i.e. Discoms of Rajasthan State vide its affidavit dated 12.09.2017 have submitted that there is no shortage of coal qua the Petitioner's generating plant. It is submitted that the Petitioner has not provided any actual data of shortage in supply of linkage coal. It is only after the shortage is ascertained that the Petitioner may claim compensation. The PPA originally entered into between the Petitioner and the Respondents (Rajasthan Discoms) was of 410 MW, which the State Commission vide Order dated 22.07.2015 reduced to 250 MW. In view of this, it is submitted that the Petitioner must first clarify as to what was the actual ACQ in the contract between the Petitioner & SECL.

125. Prayas has requested the Commission to seek certain information in this regard which was sought by the Commission vide RoP for the hearing dated 27.9.2017. Prayas has specified the computation of shortage quantum of coal as under:

Quantum of shortage at reference GCV =

{Minimum of (AQ_{NPLF} or QA_{PLF}) – Maximum of (NCDP specified quan. or Actual offered quan. of coal)}

Where;

AQ_{NPLF} refers to actual quantum of coal required for generation at normative PLF (85%) considered as assured quantum as per LOA/FSA at reference GCV prior to NCDP
or

QA_{PLF} refers to quantum of coal required at the actual PLF achieved by the generator at reference GCV.



126. The Petitioner vide affidavit dated 1.11.2017 has submitted the details pertaining to the information sought by the Commission regarding shortage of coal.

127. We have examined the submissions of the Petitioner and the respondents. The case of the Petitioner is that linkage coal to the Petitioner was reduced and the Petitioner started receiving only part of the total required quantity from SECL for the purpose of supply of power to the Respondents under the PPA. According to the Petitioner, as a result of the reduced supply of quantum of linkage coal, it was constrained to procure balance coal from e-auction/open market, the cost whereof is much more than the linkage coal.

128. The Petitioner is supplying power to three State Discoms viz. CSPDCL of Chhattisgarh (5% of the net generated power) through Implementation Agreement dated 6.8.2009, TANGEDCO (208 MW) and Rajasthan Discoms (250 MW) under long term PPA on the basis of case-I bidding. The chronological dates of events with regard to bid submission/ cut-off date, execution of FSA under the long term PPA with SECL, TANGEDCO PPA and Rajasthan PPA etc. are as under:

S. No.	Particulars	Date of Event	Remarks
1	NCDP issued by MoC	18.10.2007	IPPs to be supplied 100% of the quantity as per their normative requirement under FSA
2	LOA issued by SECL	15.6.2009	24,97,000 tonnes per annum
3	Cut-off date for Raj. Discom	11.9.2012	
4	Bid Submission date for Raj. Discom	18.9.2012	
5	Cut-off date for TANGEDCO	27.2.2013	
6	Bid Submission date for TANGEDCO	6.3.2013	
7	Amendment in NCDP by MoC	26.7.2013	For the remaining 4 years of 12th five year plan, coal supply shall be 65%, 65%, 67% & 75% of ACQ



S. No.	Particulars	Date of Event	Remarks
8	PPA/ PSA executed with TANGEDCO on	19.8.2013	208 MW
9	FSA executed with SECL on	29.8.2013	24,97,000 tonnes per annum
10	PPA/ PSA executed with Raj. Discom through PTC on	1.11.2013	Initially 410 MW but reduced to 250 MW by RERC vide its order dated 22.7.2015
11	Start of supply of power to TANGEDCO	1.8.2015	
12	Start of supply of power to Raj. Discom	30.11.2016	

129. The Hon'ble Supreme Court vide its judgment dated 11.4.2017 in Civil Appeal Nos.5399-5400 of 2016 (Energy Watchdog Vs. Central Electricity Regulatory Commission and Others) has held that the modification of the New Coal Distribution Policy (NCDP), issued by the Ministry of Coal, Government of India vide its letter dated 26.7.2013 amounts to a change in Indian law and would be covered by the 'change in law' clause in the PPA. The Relevant portion of the said judgment dated 11.4.2017 is extracted as under:

"53. However, in so far as the applicability of clause 13 to a change in Indian law is concerned, the respondents are on firm ground. It will be seen that under clause 13.1.1 if there is a change in any consent, approval or licence available or obtained for the project, otherwise than for the default of the seller, which results in any change in any cost of the business of selling electricity, then the said seller will be governed under clause 13.1.1. It is clear from a reading of the Resolution dated 21st June, 2013, which resulted in the letter of 31st July, 2013, issued by the Ministry of Power, that the earlier coal distribution policy contained in the letter dated 18th March, 2007 stands modified as the Government has now approved a revised arrangement for supply of coal. It has been decided that, seeing the overall domestic availability and the likely requirement of power projects, the power projects will only be entitled to a certain percentage of what was earlier allowable. This being the case, on 31st July, 2013, the following letter, which is set out in exten so states as follows

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



view that though change in Indonesian law would not qualify as a change in law under the guidelines read with the PPA, change in Indian law certainly would.”

In the light of the above judgment, the claim of the Petitioner is admissible under Change in Law which eventually has occurred from 26.7.2013 and accordingly, the relief, if any, shall be granted from 26.7.2013. However, what needs to be considered is the extent to which the Petitioner was affected on account of non-availability/short supply of linkage coal and the relief to be given for such shortfall is to be determined as per clause 10.2 of the PPA i.e. “Application and Principles for computing impact of Change in Law”.

130. From LoA dated 15.06.2009, it is observed that assured quantum is 2.497 MTPA for the DB power plant of capacity of 1200 MW. However, in the FSA dated 29.08.2013, Annual Contracted Quantum (ACQ) has not been mentioned, only original LoA quantum of 2.497 MTPA has been indicated against installed capacity of 600 MW of Unit-I. Therefore, LoA quantity of 2.497 MTPA is for 600 MW capacity from Unit-I and the petitioner had assured quantity of coal at the time of bid submission on 18.09.2012 for supply to Rajasthan Discoms. Subsequently, due to revision in quantum of coal under NCDP, 2013, the ACQ was reduced to 75% for the year 2016-17. The shortfall in the assured coal supply based on NCDP 2007 compared to revised NCDP of 2013 is tabulated below;

Particulars	Unit		Quantity
Coal linkage assured in LoA dt. 15.06.2009	MTPA	a	2.497
Coal linkage provided in FSA dt. 29.08.2013 for 600 MW capacity of Unit-I based on PPA signed/ to be signed	MTPA	b	2.497
Coal linkage provided by SECL on pro-rata basis for 250 MW (266 MW gross) based on Raj. discom PPA	MTPA	$c=b*266/600$	1.107
Assured quantum to be supplied by SECL at 85% availability/ PLF for Rajasthan PPA as per NCDP 2007	MTPA	$d=c*0.85$	0.941



Particulars	Unit		Quantity
Revised assured supply of coal as per NCDP 2013 @ 75% of ACQ	MTPA	$e=c*0.75$	0.830
Difference between NCDP, 2007 & NCDP, 2013	MTPA	$f=d-e$	0.111

Accordingly, the petitioner is eligible to get relief for the shortage of domestic linkage coal under Change in law due to revision in NCDP on dated 26.07.2013 which is not sufficient to generate electricity upto normative requirement of 85% compared to assured quantum at 85% availability/ PLF as per NCDP, 2007.

131. Now to determine the actual impact due to cut down in supply of domestic coal by SECL, we require to know the actual requirement of coal during FY 2016-17 and the actual quantity of coal supplied by SECL. The Petitioner vide affidavit dated 24.07.2017 has submitted the details of linkage coal corresponding to Rajasthan power generation actually supplied by SECL during FY 2016-17 as 2,85,444 tonnes. However, the Petitioner has not provided the detailed computation to arrive at the actual shortage of coal and in the absence of same, we have computed the actual shortage of domestic coal as discussed below;

Operational Parameters considered for Computation of relief

132. **Station Heat Rate:** The Petitioner is having 2 sub-critical units of 600 MW each. In the instant petition, the Petitioner has not provided Design Heat Rate and the Gross Station Heat Rate (which is based on the Design Heat Rate). However, in the Schedule 10 of the PPA i.e. Documents of selected bid, the Expected SHR has been mentioned as 2250 kCal/ kWh in the computation of coal consumption. In absence of Design Heat Rate, the Expected SHR has been compared with the ceiling Design Heat Rate as per Tariff Regulations 2009 & Tariff Regulations 2014 for sub-critical units of 600 MW at pressure Rating of 170 Kg/ cm² & Temperature of 537/565 °C using sub-Bituminous Indian Coal as 2276 kCal/ kWh & 2250 kCal/ kWh respectively. Accordingly, for the purpose of computation of coal consumption, SHR of 2250



kCal/ kWh provided by the petitioner in the Schedule 10 of the PPA is reasonable to be considered.

Aux. Consumption specified by the petitioner in the instant petition is 6.00%. The existing norm for Aux. Consumption for 500 MW & above unit size is 5.25%, therefore, AUX of 5.25% shall be considered for the computation of compensation.

PLF/ normative availability is 85% (as per PPA)

Specific Oil Consumption has been considered as Nil, since the formulation is for mitigating coal shortage, only.

133. Based on the **operational parameters**, the Annual coal requirement for 175 MW & 250 MW at normative PLF of 85% has been computed as under;

Particulars	Unit		2016-17 (Supply started w.e.f. 30.11.2016)	
			30.11.2016 to 26.03.2017 (117 days)	27.03.2017 to 31.03.2017 (5 days)
Contracted capacity (Rajasthan Discom @ Rajasthan Periphery)	MW	a	175.00	250.00
Gross power (after considering PoC Inj. losses of 1.38% & PoC Wd losses of 3.65%) as per 4 th to 10 th Dec Week	MW	$b = a / [(1 - 1.38\%) (1 - 3.65\%)]$	184.17	263.10
Gross power (after considering AUX Consumption @ 5.25%)	MW	$c = b / (1 - 5.25\%)$	194.38	277.68
Annual Gross generation	MU	$d = c * 8760 * 0.85 /$	1447.32	2067.60



Particulars	Unit		2016-17 (Supply started w.e.f. 30.11.2016)	
			30.11.2016 to 26.03.2017 (117 days)	27.03.2017 to 31.03.2017 (5 days)
corresponding to 85% availability		(10 ³)		
Weighted Avg. GCV as submitted by the petitioner (Dec'16 to Mar'17)	kCal/ Kg	e	3642.5	3519
Station Heat Rate	kCal/ kWh	f	2250	2250
Sp. Coal Consumption	kg/ kWh	$g=f/e$	0.618	0.639
Annual normative Coal requirement corresponding to 85% availability	MTPA	$h=g*d/1000$	0.894	1.322
Actual Coal requirement corresponding to 85% availability during the supply period	MT	$l=h*No. of days/365$	0.287	0.018

134. In view of the above, the actual Coal requirement corresponding to 85% normative PLF during the claim period (30.11.2016 to 31.03.2017) is 3,05,000 tonnes (2,87,000 + 18,000). However, SECL has only supplied 2,85,444 tonnes for generation of power corresponding to Rajasthan discoms. Therefore, we are of the view that there is shortfall in actual supply of coal by SECL compared to coal required for generation of upto 85% PLF during FY 2016-17 and thus the shortfall has to be met through e-auction/ imported coal by the petitioner. The shortfall works out to be;

in tonnes



Period of Supplies	coal supplied by SECL for Rajasthan generation	Actual Coal requirement corresponding to 85% availability during the claim period (30.11.2016 to 31.03.2017)	Shortfall Quantity
a	b	c	d=c-b
FY 2016-17	2,85,444	3,05,000	19,566

135. This computation of shortfall in coal supply by SECL is only for the illustration purpose and it is found that there is shortfall in actual coal supply compared to coal required for generation of upto 85% PLF. The Petitioner has claimed Rs. 2.26 crores for the period 30.11.2016 to 31.03.2017. However, the petitioner has only furnished the actual generation corresponding to Rajasthan share for the claim period and has not furnished the scheduled generation based on the data furnished by NRLDC/ NLDC. In the absence of same, we could not verify the claim sought by the petitioner and direct the parties to compute the shortfall in coal supply by SECL on the basis of minimum of scheduled generation (capped at 85% as per normative) or actual generation. For the computation of the same, the formulation for calculation of compensation shall be as per the Energy Charge Rate (ECR) for Scheduled Generation at delivery point as shown below.

Step-1:

ECR Linkage coal (Delivery point) = ECR QUOTED

Step-2:

ECR Other coal (Delivery point) = {[2250 / Weighted Average GCV of other coal (i.e. imported + open market + tapering linkage)] x [Weighted Average Price of other coal (i.e. imported + open market + tapering linkage)] x [1/(1- Aux Consumption)] x [1/(1- Approved Transmission Losses)]}

Step-3:



ECR chargeable at delivery point = $\{(G \times \text{ECR at Step-1}) + [\text{ECR computed at Step-2} \times (1-G)]\}$

Where,

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

Weighted Average GCV of other coal =

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

Weighted Average Price of Other coal =

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

Compensation = $\{(\text{ECR as computed at Step-3- ECR}_{\text{Quoted}}) \times (\text{Scheduled Generation at delivery point})\}$

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

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

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

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

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

(P) Carrying Cost

136. The Petitioner in its prayer at Para (b) has sought a direction to the Respondent to pay carrying out (interest @ 1.25% per month) from the date of applicability of the respective change in law events on account of delay in recovery of amount already paid towards Change in



Law events so that its economic position is restored. In our view, there is no provision in the PPA to allow carrying cost on the amount covered under Change in Law till its determination by the Commission. The issue has been decided in order dated 17.6.2017 in Petition No. 16/MP/2016. Accordingly, the claim of the Petitioner is rejected.

Issue No. 4: The mechanism for compensation on account of Changes in Law during the operation period:

137. The Petitioner has submitted that the minimum value of “Change in Law” should be more than 1% of the Letter of Credit amount in a particular year. As per Article 10.3.2 of the PPA, the letter of credit amount for first year would be equal to 1.1 times of the estimated average monthly billing based on normative availability and for subsequent years, the letter of credit amount will be equal to 1.1 times of the average of the monthly tariff payments of the previous contract year plus the estimated monthly billing during the current billing during the current year from any additional units expected to be put on COD during that year on normative availability.

138. The Petitioner has submitted that the above levies, changes, revisions and enactments are directly affecting the Petitioner, i.e. the expenses of the Petitioner/Seller, by more than 1% of the value of the Standby Letter of Credit (LC) in aggregate for the relevant Contract Year. Therefore, 1% of the Letter of Credit value in aggregate for the contract year comes to Rs. 70 lakhs. The Petitioner has submitted that since the aggregate amount claimed for “Change in Law” during year 2016-17 i.e. from 30.11.2016 to 31.03.2017 works out to Rs. 24.40 crores, which is more than 1% of the LC amount, it is more than the threshold amount prescribed under Article 10.3.2 of the PPA and the Petitioner is entitled to be compensated for the same.

139. Articles 10.3.2 and 10.3.4 of the PPA provides for the principle for computing the impact of change in law during the operating period as under:



“10.3.2 During Operating Period

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

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

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

- (a) Monthly change in law compensation payment shall be effective from the date of commencement of supply of electricity to the respondent or from the date of Change in Law, whichever is later.
- (b) Increase in royalty on coal, Forest Tax, CG Environment cess, CG Industrial Development cess, clean energy cess, service tax on transportation of coal and Electricity Duty shall be computed based on coal consumed on the basis of SHR of 2250 kCal/ kWh and AUX of 5.25% corresponding to scheduled generation and shall be payable by the beneficiaries on pro-rata based on their respective share in the scheduled



generation. If the actual generation is less than scheduled generation, it will be restricted to actual generation.

- (c) At the end of the year, the Petitioner shall reconcile the actual payment made towards change in law with the books of accounts duly audited and certified by statutory auditor and adjustment shall be made based on the energy scheduled by Rajasthan Discoms during the year. The reconciliation statement duly certified by the Auditor shall be kept in possession by the Petitioner so that same could be produced on demand from Procurers/beneficiaries.
- (d) For Change in Law items related to the operating period, the year-wise compensation henceforth shall be payable only if such increase in revenue or cost to the Petitioner is in excess of an amount equivalent to 1% of LC in aggregate for a contract year as per provision under 10.3.2 of the PPA.
- (e) Approaching the Commission every year for allowance of compensation for such Change in Law is a time consuming process which results in time lag between the amount paid by Seller and actual reimbursement by the Procurers which may result in payment of carrying cost for the amount actually paid by the Petitioner. Accordingly, the mechanism prescribed above is to be adopted for payment of compensation due to Change in Law events allowed as per Article 10.3.2 of the PPA for the subsequent period as well.
- (f) We are not going to compute the threshold value for eligibility of getting compensation due to Change in Law during Operation period. However, the Petitioner shall be eligible to receive compensation if the impact due to Change in Law exceeds the threshold value as per Article 10.3.2 during Operation period. Accordingly, the compensation amount



allowed shall be shared by the Rajasthan Discoms based on the scheduled energy. Year-wise compensation henceforth shall be payable only if such increase in revenue or cost to the Petitioner is in excess of an amount equivalent to 1% of LC in aggregate for a contract year as per provision under Article 10.3.2 of the PPA.

Summary of Decision:

140. Based on the above analysis and decisions, the summary of our decision under the Change in Law during the operating period of the project is as under:

S.No.	Change in Law events	Decision
1	Increase in Royalty Rate on Coal	Allowed
2	Increase in Sizing Charges on Coal	Not Allowed
3	Increase in Surface Transportation Charges	Not Allowed
4	Increase in Forest transit fee	Allowed
5	Increase in Chhattisgarh Environment Cess/ Chhattisgarh Environment Tax	Allowed
6	Increase in Chhattisgarh Industrial Development/ Cess/ Chhattisgarh Development	Allowed
7	Revision/addition of components in assessing the Central Excise Duty	Liberty granted to approach the Commission with relevant information from the Central Excise Department
8	Increase in Clean Energy Cess	Allowed upto 30.6.2017
9	Increase in Busy Season Surcharge on transportation of coal by rail	Not Allowed
10	Levy of Coal Terminal Surcharge for traffic of coal for the distance beyond 100 Km	Not Allowed
11	Withdrawal of short lead concession in charging of freight for all tariff including coal booked upto 100 Km	Not allowed on account of want of relevant documents. Liberty granted to approach the Commission with relevant documents.
12	Introduction and Enhancement of Service Tax on transportation of coal by rail and road	Allowed



S.No.	Change in Law events	Decision
13	Consequent increase in Value Added Tax / CST, Entry Tax, Development Surcharge and Niryatkar	
	Increase in Value Added Tax / CST	Not allowed on account of want of relevant documents. Liberty granted to approach the Commission with relevant documents.
	Entry Tax	Not allowed on account of want of relevant documents. Liberty granted to approach the Commission with relevant documents.
	Development Surcharge	Not allowed
	Niryatkar	Not allowed on account of want of relevant documents. Liberty granted to approach the Commission with relevant information.
14	Additional cost towards Fly Ash Transportation	Admissible in-principle. However, to approach the Commission with documents and evidence to determine transportation cost as per para 106 above.
15	Levy of Chhattisgarh Electricity Duty	Allowed
16	Additional Capital Expenditure on account of Amendment in Environment Norms	Liberty granted to approach the Commission separately.
17	Additional cost due to reduction in supply of coal from	Allowed



S.No.	Change in Law events	Decision
	SECL	
18	Carrying Cost	Not Allowed

141. The Petitioner was awarded the bid for sale and supply of electricity for aggregate contracted capacity of 410 MW to the Rajasthan discoms. However, Rajasthan Electricity Regulatory Commission, vide its order dated 22.07.2015 has reduced the quantum of power to be procured under the PPA from 410 MW to 250 MW. The petitioner has challenged the said order dated 22.07.2015 and the same is pending adjudication in the Hon'ble APTEL (Appeal No.235/2015). In the event, if the petitioner succeeds in its appeal pending before APTEL, the petitioner is allowed to avail the proportionate compensation due to Change in Law as per above observation of the Commission.

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

143. Petition No. 101/MP/2017 is disposed of in terms of above.

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

Sd/-
(A. S. Bakshi)
Member

Sd/-
(A. K. Singhal)
Member

Sd/-
(Gireesh B. Pradhan)
Chairperson

