

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 157/MP/2015

Coram:

**Shri Gireesh B. Pradhan, Chairperson
Shri A. K. Singhal, Member
Shri A.S. Bakshi, Member
Dr. M.K. Iyer, Member**

Date of Order: 17th of March, 2017

In the matter of

Petition under Section 79 (1)(b) of the Electricity Act, 2003 read with Article 13.2(b) of the Power Purchase Agreement dated 22.4.2007 (as amended from time to time) seeking adjustment of tariff for increase/ decrease in revenues/ costs of Coastal Gujarat Power Limited due to 'Change in Law' during the Operating Period for the Financial Years 2011-12, 2012-13 and 2013-14.

And

In the matter of

Coastal Gujarat Power Limited
C/o Tata Power Company Ltd.
34, Sant Tuka Ram Road, Carnac Bunder,
Mumbai-400021

..... **Petitioner**

Versus

1. Gujarat Urja Vikas Nigam Ltd.,
Sardar Patel Vidyut Bhavan, Race Course
Vadodara-390007, Gujarat
2. Maharashtra State Electricity Distribution Company Ltd.,
4th Floor, Prakashgad, Plot No. G-9
Bandra (East), Mumbai-400051, Maharashtra
3. Ajmer Vidyut Vitran Nigam Ltd.,
Hathi Bhata, Old Power House
Ajmer, Rajasthan
4. Jaipur Vidyut Vitran Nigam Ltd.,
Vidyut Bawan, Janpath
Jaipur, Rajasthan
5. Jodhpur Vidyut Vitran Nigam Ltd.,
New Power House, Industrial Area,
Jodhpur, Rajasthan

6. Punjab state Power Corporation Limited
PP & R, Shed T-1, Thermal Design,
Patiala-147001

7. Uttar Haryana Bijli Vitran Nigam Limited
Vidyut Sadan, Plot No. C-16, Sector-6
Panchkula-134112, Haryana

8. Dakshin Haryana Bijli Vitran Nigam Limited
Vidyut Nagar, Vidyut Sadan,
Hissar, Haryana-125005

.....**Respondents**

ORDER

The petitioner, Coastal Gujarat Power Limited, a subsidiary of Tata Power Company Ltd. has set up a 4000 MW Ultra Mega Power Project at Mundra in the State of Gujarat (Mundra UMPP) based on imported coal after Tata Power Company Ltd. was selected as the successful bidder based on the competitive bidding carried out in accordance with Section 63 of the Electricity Act, 2003 (2003 Act). The tariff of the Mundra UMPP has been adopted by this Commission under Section 63 of the 2003 Act vide order dated 19.9.2007 in Petition No.18/2007.

2. The petitioner has entered into a PPA dated 22.4.2007 with the distribution companies in the States of Gujarat, Maharashtra, Rajasthan, Punjab and Haryana for supply of 3800 MW from Mundra UMPP for a period of 25 years, namely Gujarat Urja Vikas Nigam Limited, Maharashtra State Electricity Distribution Company Limited, Ajmer Vidyut Vitran Nigam Limited, Jaipur Vidyut Vitran Nigam Limited, Jodhpur Vidyut Vitran Nigam Limited, Punjab State Power Corporation Limited and Haryana Power Generation Corporation Limited (collectively referred to as "Procurers"). Subsequently, the petitioner and the Procurers have entered into a

Supplemental PPA on 31.7.2008 for advancement of the Scheduled Commercial Operation Dates (SCOD) in terms of Article 3.1.2 (iv) of the PPA as per the following details:

S. No.	Unit	Scheduled Commercial operation date	Revised Scheduled Commercial Operation date
1	First	22.8.2012	30.9.2011
2	Second	22.2.2013	31.3.2012
3	Third	22.8.2013	31.7.2012
4	Fourth	22.2.2014	30.11.2012
5	Fifth	22.8.2014	31.3.2013

3. The petitioner has filed the present petition under section 79(1)(b) of the Electricity Act, read with Article 13 of the PPA and Paragraph 4.7 of the Competitive Bidding Guidelines seeking the following reliefs under 'Change in Law' events during the Operating Period.

(a) Levy of Clean Energy Cess by the Government of India in the Finance Act, 2010 with effect from 1.7.2010 in terms of Notification No. 354/72/2010-Clean Energy Cess dated 24.6.2010 issued by the Ministry of Finance, Government of India.

(b) Changes in Customs Duty on Imported coal (Customs Duty "BCD" and Countervailing Duty "CVD")

(c) Reduction in Excise Duty with effect from 1.3.2008 and 17.3.2012 in terms of Notification No. 2/2008-Central Excise dated 1.3.2008 and Notification No. 18/2012-Central Excise dated 17.3.2012 respectively issued by the Ministry of Finance, Government of India.

(d) Reduction in Central Sales Tax Rate Duty with effect from 1.4.2007 and 1.6.2008 in terms of Notification No. 34/135/2005-ST dated 29.3.2007 and Notification No. 28/11/2007-ST dated 30.5.2008 respectively issued by the Ministry of Finance, Government of India.

(e) Increase in the Gujarat Value Added Tax Rate with effect from 1.4.2008 pursuant to Gujarat Value Added Tax (Amendment) Act, 2008.

(f) Increase in the rate of Service Tax pursuant to Notification No. 32/2007-Service Tax dated 22.5.2007 and Notification No. 7/2008-Service Tax dated 1.3.2008 issued by the Ministry of Coal, Government of India.

(g) Levy of Green Cess in terms of Gujarat Green Cess Act, 2011 and the Gujarat Green Cess Rules, 2011 with effect from 28.7.2011.

(h) Additional conditions imposed by the Ministry of Environment and Forests, Government of India pursuant to Corrigendum dated 26.4.2011 which amended the earlier approval letters dated 2.3.2007 (Environmental Clearance) and 5.4.2007 (amendment to Environmental Clearance dated 2.3.2007) issued by MoEF.

4. The petitioner has submitted that the details of financial impact on the Project on account of the aforesaid events as under:

Sr. No.	Change in Law Event (Operation Phase)	Impact in the Operating Period in FY 2011-12 and FY 2012-13 (Rs. crore)	Impact in the Operating Period in FY 2013-14 (Rs. crore)	Basis of computation of CIL impact	Basis of allocation of CIL impact amongst Procurers
1.	Levy of Clean Energy Cess on imported coal	29.64	59.27	Actual consumption	Scheduled Energy
2.	Change in Basic Customs Duty and Countervailing Duty on imported coal	(6.93)	(117.82)	Actual consumption	Scheduled Energy
3.	Change in Excise Duty	(1.54)	(1.00)	Actual Purchases	Allocated Contracted Capacity
4.	Change in Central Sales Tax	(0.05)	(0.50)	Actual Purchases	Allocated Contracted Capacity
5.	Change in Gujarat Value Added tax	1.22	0.27	Actual Purchases	Allocated Contracted Capacity
6.	Increase in Service tax	0.13	0.39	Actual Purchases	Allocated Contracted Capacity
7.	Levy of Green Cess	0.55	-	On Gross generation	Scheduled Energy
8.	Additional Condition imposed by MoEF	Nil	10.41	Actual Spent	Allocated Contracted Capacity
	Year- wise total impact (Rs. in crore)	23.02	(48.98)		Payable
	Total Impact (in crores)			(25.96)~Reduction in Tariff	

5. The petitioner has submitted that in accordance with Article 13.3 of the PPA, the petitioner notified the procurers on 11.7.2011, 26.2.2013, 8.3.2013, 12.3.2013 and 28.3.2013 about the above stated events amounting to "Change in Law" affecting the revenues/cost of the petitioner during the operating period.

6. The petitioner has submitted that the events of Change in Law have financial impact on the cost and revenue of the petitioner during the operating period for which the petitioner is entitled to be compensated in terms of Article 13 of the PPA. Accordingly, the petitioner has filed the present petition with the following prayers:

"(a) Declare that each of the items set out in Paragraphs 67 to 106 above are a "Change in Law" impacting revenues and costs during the Operating period in FY 2011-12, FY 2012-13 and FY 2013-14;

(b) Declare that the petitioner is liable to pay a sum of Rs. 25,96,00,000 along with the carrying cost in terms of Article 13.4.2 of the PPA, as a result of reduction in overall cost during the operating period of the project due to the Change in Law events as set out in Paragraphs 67 to 106.

(c) Direct the Procurers to raise the Supplementary Bills for the sum of Rs. 25,96,00,000 along with the carrying cost;

(d) Pass any such other and further relief as this Hon`ble Commission deems just and proper in the nature and circumstances of the present case"

7. Notices were issued to the respondents to file their replies to the petition. Replies to the petition have been filed by Gujarat Urja Vikas Nigam Limited (GUVNL) vide its affidavit dated 17.8.2015, Rajasthan Distribution Companies (AVVNL/JVVNL/JdVVNL) vide affidavit dated 17.8.2015, Haryana Utilities (UHBVNL & DHBVNL) vide affidavit dated 27.8.2015, Punjab State Power Corporation Limited (PSPCL) vide its affidavit dated 10.9.2015, Maharashtra State Electricity Distribution Company Limited (MSEDCL) vide its affidavit dated 17.9.2015. The petitioner has filed its rejoinder to the replies of the respondents. The Commission also heard the

learned counsels for the petitioner and the respondents at length. After consideration of the submissions of the petitioner and respondents, the claims of the petitioner has been dealt with as under:

- (a) Compliance of the provisions of the PPA with regard to Notice under Change in Law;
- (b) Consideration of the claims under Change in Law on merit;
- (c) Carrying cost on the Change in law events allowed in this order;
- (d) Mechanism for processing and reimbursement of amount claimed under Change in Law.

A. Compliance with the provisions of notice for Change in Law events:

8. The claims of the petitioner in the present petition pertain to the Change in Law events during the operating period. Article 13.3 of the PPA envisages for notification of the Change in Law events to the Procurers as under:

“13.3 Notification of Change in Law

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

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

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

- (a) the Change in Law; and

(b) the effects on the Seller of the matters referred to in Article 13.2.”

9. The petitioner has submitted that consolidated notices were issued to all the procurers on 11.7.2011 for Clean Energy Cess, Countervailing Duty and additional condition by MoEF intimating them about the Change in Law for the Construction Phase, on 26.2.2013 for Gujarat Green Cess, Basic Customs Duty, Excise Duty intimating them about the Change in Law for the Operation period, on 8.3.2013 for revision in Countervailing Duty, on 12.3.2013 for approximate impact of Change in Law on the petitioner and 28.3.2013 for additional instance of change in law. In this regard, no response was received from the procurers.

10. We have considered the submissions of the petitioner. Under Article 13.3 of the PPA, the seller is required to give the notice about occurrence of Change in Law events as soon as reasonably practicable after becoming aware of such events. The petitioner gave notices dated 11.7.2011, 26.2.2013, 8.3.2013, 12.3.2013 and 28.3.2013, 11.7.2011, 26.2.2013, 8.3.2013, 12.3.2013 and 28.3.2013 to the procurers. In the said notices, the petitioner has brought out the occurrence of Change in Law events and apprised the procurers about the impact of such events. The procurers have not responded to the notices of the petitioner. Thereafter, the petitioner has filed the present petition. In our view, the requirement of Article 13.2 of the PPA has been complied with.

B. Consideration of the claims of the petitioner under change in law on merits.

11. The Petitioner has approached the Commission under Article 13 of the PPA read with Section 79 of the Act and Para 4.7 of the Competitive Bidding Guidelines for compensation of the cost incurred by the petitioner due to “Change in Law” during

the operating period. Section 79(1)(b) and (f) of the Electricity Act, 2003 provides as under:

“79 (1). The Central Commission shall discharge the following functions, namely,

(a)

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

.....

(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration”

As per the above provision, the Central Commission has the power to adjudicate the dispute involving a generating company covered under clause (b) of sub-section (1) of Section 79 of the Act i.e. a generating company having a composite scheme for generation and sale of electricity in more than one State. The generating station of the petitioner is an UMPP and is supplying power from the generating station to more than one State and therefore, any adjudication of the dispute regarding tariff falls within the jurisdiction of this Commission. Further, Para 5.17 of the Competitive Bidding Guidelines published by the Ministry of Power vide OM No. 23/11/2004-R&R (Vol-II) dated 19.1.2005 provides as under:

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

Appropriate Commission has been defined in the PPA dated 22.4.2007 between the petitioner and the procurers as “the Central Electricity Regulatory Commission constituted under the Electricity Act, 2003”. Therefore, under the provisions of the Competitive Bidding Guidelines, this Commission is the Appropriate

Commission for adjudication of tariff related dispute. Under Article 13.2.(b) of the PPA, the compensation for any increase/decrease in revenues or cost to the seller shall be determined and would be effective from such date, as decided by the Central Electricity Regulatory Commission whose decision shall be final and binding on both the parties. From the provisions of the Act, Competitive Bidding Guidelines and provisions of the PPA, it is clear that the increase/decrease in cost or revenue to the seller (the petitioner) shall be decided by this Commission.

12. The claims of the petitioner pertain to the operating period. The “Operating Period” has been defined in the PPA as under:

“Operating Period in relation to the Unit means the period from its COD and in relation to the Power Station the date by which all the Units achieve COD, until the expiry or earlier termination of this Agreement in accordance with Article 2 of this Agreement.”

The dates of commercial operation of the units of Mundra UMPP are as under:

S. No.	Unit	Date of commercial operation of the units
1	First	7.3.2012
2	Second	30.7.2012
3	Third	27.10.2012
4	Fourth	21.1.2013
5	Fifth	22.3.2013

13. The first unit of the generating station achieved COD on 7.3.2012 and the last unit of the generating station achieved COD on 22.3.2013. Therefore, the operating periods of the different units of the generating station will be considered from the respective dates of their commercial operation and the operation period of the generating station will be reckoned with effect from 22.3.2013.

14. Article 13 of the PPA between the petitioner and the procurers of Mundra UMPP provides Change in Law during the operating period as under:

"13. ARTICLE 13: "CHANGE IN LAW"

13.1 Definitions.

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

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

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

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

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

13.1.2 "Competent Court" means:

The Supreme Court or any High Court, or any tribunal or any similar judicial or quasi-judicial body in India that has jurisdiction to adjudicate upon issues relating to the Project.

13.2 Application and Principles for computing impact of Change in Law.

13.2 While determining the consequence of Change in Law under this Article 13, the Parties shall have due regard to the principle that the purpose of

compensating the Party affected by such Change in Law, is to restore through Monthly Tariff Payments, to the extent contemplated in this Article 13, the affected Party to the same economic position as if such Change in Law has not occurred.

(a) Construction Period

XX
 XXXXXX

(b) Operation Period

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

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

The terms ‘Law’ and ‘Indian Governmental Instrumentality’ have been defined in the PPA as under:

“Law” means 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 all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include all rules, regulations, decisions and orders of the Appropriate Commission”.

“Indian Governmental Instrumentality” means the GOI, Government of India, Government of States where the Procurers and Project are located and any ministry or department of or board, agency or other regulatory or quasi-judicial authority controlled by GOI or Government of States where the Procurers and Project are located and includes the Appropriate Commission”.

15. A combined reading of the above provisions would reveal that this Commission has the jurisdiction to adjudicate upon the disputes between the Petitioner and Procurers with regard to “Change in Law” which occurs after the date which is seven days prior to the bid deadline (“cut-off date”) i.e after 30.11.2006. The events broadly covered under Change in Law are the 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) Any change in any consents or approvals or licences available or obtained for the project, otherwise than the default of the seller.
- d) Such changes (as mentioned in (a) to (c) above) result in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer under the Agreement.
- e) The purpose of compensating the Party affected by Change in Law is to restore through Monthly Tariff Payments, to the extent contemplated in this Article 13, the affected Party to the same economic position as if such "Change in Law" has not occurred.
- f) The adjustment in monthly tariff payment shall be effective from the date of (i) adoption, promulgation, amendment, re-enactment or repeal of the law or change in law or (ii) the date of order/judgement of the Competent Court or Tribunal or Indian Government Instrumentality if the Change in Law is on account of change in interpretation of Law.
- g) The compensation for any increase/decrease in revenues or cost to the Seller shall be determined and effective from such date, as decided by the Central Commission.
- h) The compensation shall be payable only if and for increase/decrease in revenues or cost to the Petitioner is in excess of an amount equivalent to 1% of Letter of Credit in aggregate for a Contract Year."

16. The petitioner has raised claims under Change in Law in respect of eight events, namely, Levy of Clean Energy Cess on imported coal, Changes in Customs Duty on imported coal (basic customs duty and Countervailing duty), Reduction in Excise Duty, Reduction in Central Sales Tax rate, Increase in the Gujarat Value Added tax rate, Levy of Clean Cess and additional conditions imposed by the Government of India, Ministry of Environment and Forests with regard to CSR activities. Keeping in view the broad principles discussed in Para 15 above, we proceed to deal with the claims of the petitioner under Change in Law during the Operating Period:

I. Levy of Clean Energy Cess on imported Coal

17. The petitioner has submitted that as on the cut-off date, there was no levy of Clean Energy Cess on coal, lignite and peat. However, the Government of India, Ministry of Finance has introduced Clean Energy Cess in the Finance Act, 2010, whereby a statutory cess of Rs.100 per ton has been levied on coal, lignite and peat. Subsequently, the Ministry of Finance vide its Notification dated 24.6.2010 reduced the cess to Rs. 50 per ton. The petitioner has submitted that from the date of COD of Unit 1, the petitioner has been additionally burdened on account of levy of Clean Energy Cess to the extent of Rs. 51.50 per ton (inclusive of Educational Cess of 2% and Secondary and Higher Educational Cess of 1%) payable on the import of coal by the petitioner. The petitioner has submitted that the actual impact of the levy of clean energy cess is that the petitioner has been burdened with an additional amount of Rs. 29,64,00,000 in Financial Years 2011-12 and Financial Years 2012-13 and Rs. 59,27,00,000 for the Financial Year 2013-14. The petitioner has

suggested the following formula for calculation of financial impact on account of levy of clean energy cess by the Government of India, Ministry of Finance:

$$\text{Impact (in Rs)} = \text{Rate of Clean Energy Cess (Inclusive of Educational cess of 2\% and Secondary and Higher Educational Cess of 1\%) per ton [Rs/ton]} \times \text{Actual Quantum of Coal Consumed [Ton]}.$$

18. MSEDCL has submitted that as per the Notification dated 24.6.2010, the clean energy cess imposed by the Government of India is Rupees 50/- per ton of imported coal and not Rupees 51.50 per ton of imported coal, as has been contended by the petitioner as the petitioner did not refer to the Notification No. 28/2010-CE and 29/2010-CE dated 22.6.2010. The said notifications have been issued to exempt such goods from education cess and higher education cess respectively. As a result, the aggregate rate of cess would be Rs. 50 per ton. MSEDCL has submitted that the claim of Clean Energy Cess on imported coal to the tune of Rs. 89,91,99,000/- is incorrect as the petitioner arrived into the amount by applying the rate of Rs. 51.50 per ton.

19. We have considered the submissions of the petitioner and MSEDCL. The clean energy cess on coal was introduced by the Government of India through the Finance Act, 2010 for the first time which is after the due date i.e. seven days prior to the bid deadline. Since there was no clean energy cess on the date of submission of the bid, the petitioner could not be expected to factor in the impact of such cess in the bid. The issue of clean energy cess as a Change in Law event has been considered by the Commission in the order dated 30.3.2015 in Petition No. 6/MP/2013. Relevant portion of the said order dated 30.3.2015 is extracted as under:

“33. We have considered the submissions made by both petitioner and the respondents on the clean energy cess. The clean energy cess on coal was introduced by the Government of India through the Finance Act, 2010 for the first time which is after the due date i.e. seven days prior to the bid deadline. Since there

was no clean energy cess on the date of submission of the bid, the petitioner could not be expected to factor in the impact of such cess in the bid. Moreover, clean energy cess adds to the input cost of production of electricity. Therefore, the claim is covered under Article 13.1.1(i) of the PPA and consequently the liabilities shall be borne by the procurers....”

20. The above decision is applicable in case of the petitioner. Therefore, levy of clean energy cess on coal is admissible as a change in law event under Article 13 of the PPA. Further, we find force in the submissions of the petitioner that it is liable to be compensated for the additional expenditure incurred due to levy of clean energy cess, since it was not payable at the time of bid deadline. Accordingly, the petitioner is entitled to recover the additional generating cost on account of clean energy cess from the Procurers as per applicable rate of clean energy cess in proportion to the coal consumed for generation and supply of electricity to the procurers. The respondents are directed to compensate the petitioner for the cost incurred at different points of time in accordance with the applicable rates of the Clean Energy Cess at that point of time. MSEDCL has submitted that the clean energy cess imposed by the Government of India is Rs. 50/- per ton of imported coal and not Rupees 51.50 per ton of imported coal. The Petitioner is directed to furnish along with its monthly bill, the proof of payment and computations duly certified by the auditor to procurers. It is clarified that the petitioner shall be entitled to recover clean energy cess on coal in proportion to the actual coal consumed in accordance with the parameters as decided by the Commission in Para 82 (d) of the order dated 6.12.2015 in Petition No. 159/MP/2012 corresponding to the scheduled generation for 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 clean energy cess on coal. The petitioner

and the procurers are directed to carry out reconciliation on account of these claims annually.

II. Change in standard rate of basic Custom Duty and Countervailing Duty on imported coal:

21. The petitioner has submitted that as on the cut-off date, Notification No. 44/2004-Customs issued by the Ministry of Finance was in operation for import of coal and accordingly Tata Power had envisaged the Basic Customs Duty at the rate of 5% and no countervailing duty was levied on imported coal. The petitioner has further submitted that the Government of India vide Finance Act, 2011, which came into effect from 1.3.2011 introduced 5% Countervailing duty on Steam Coal. Further, the Government of India, Ministry of Finance vide its Notification No. 46/2011-Customs dated 1.6.2011 reduced the Basic Customs Duty payable on steam coal from 5% to 3% which was further reduced by the Ministry of Finance vide Notification No. 12/2012-Customs dated 17.3.2012 from 3% to 0% and Countervailing Duty on steam coal from 5% to 1%. The petitioner has further submitted that the Ministry of Finance vide Notification No. 64/2012 dated 31.12.2012 which came into effect from 1.1.2013 amended the Notification No. 46/2011-Customs dated 1.6.2011 and reduced the Basic Customs Duty on Steam Coal from 3% to 0%, if such steam coal was procured from an ASEAN country. Further, the Ministry of Finance vide Notification No. 12/2013-Customs dated 1.3.2013 revised the Basic Customs Duty on Steam Coal from 0% to 2% (if imported from non-ASEAN countries) and the Countervailing duty on steam coal from 1% to 2%. The petitioner has further stated that Government of India through Finance Act, 2007 levied a Secondary and Higher Educational Cess at the rate of 1% on aggregate duty of customs levied and collected by the Central Government.

22. The petitioner has submitted that as per the provisions of Custom Tariff Act, 1963, the coal has been categorised into three types, namely Anthracite, Bituminous coal and Steam coal. However, the Commissioner of Customs, Kutch, vide its Show Cause Notice dated 19.6.2013 and its order dated 5.2.2014 held that the petitioner has wrongly classified Bituminous Coal as Steam Coal, thereby not paying any Basic Customs Duty and has only paid Countervailing Duty of 1% though the petitioner was liable to pay the Basic Customs Duty of 3%/5% and Countervailing Duty of 5%/6%. Accordingly, the Commissioner of Customs raised the demand of Rs. 66,77,75,612 and for penalty along with an interest in terms of Section 18(3) and 28AA of the Customs Act, 1963 towards the non-payment of Basic Customs Duty and Countervailing Duty. As against this demand, the petitioner has paid an amount of Rs. 52,45,47,908 under protest. Aggrieved by this order, the petitioner has stated that it has filed an appeal before the Central, Excise and Service Tax Appellate Tribunal challenging the Commissioner of Customs order dated 5.2.2014, challenging the classification of the said coal as Bituminous Coal instead of Steam Coal and the said appeal is pending adjudication.

23. The petitioner has submitted that the cumulative impact on the cost of the petitioner for Financial Years 2011-12 and 2012-13 is Rs. 6,93,00,000 (minus) and for Financial Year 2013-14 is Rs. 117,82,00,000 (minus). This amount is inclusive of the amount paid against the shipments under transit at the end of the Financial Year, for which duty has been paid before the end of the Financial Year and also the amount paid under protest by the petitioner due to wrong classification of steam coal as bituminous coal. The petitioner has also made a refund application on 24.2.2014

as regards the additional Countervailing Duty paid, amounting to Rs. 51,91,76,552 which was paid under protest and upon the insistence of the customs authorities as they had taken a view that the petitioner cannot simultaneously avail benefit under two notifications on the import of the same goods. The petitioner has submitted that the said refund application is premised on Circular No. 41/2013 issued by the Ministry of Finance, Department of Revenue, whereby it has been clarified that an importer while availing Basic Customs Duty exemption on steam coal under the Notification No. 46/2011-Customs, can simultaneously avail the concessional Countervailing Duty at 2% under Notification No. 12/2012-Customs. The petitioner has also stated that the cumulative impact of the Change in Law in Basic Customs duty and Countervailing Duty on Steam Coal and Bituminous Coal does not include payment of Rs. 51,91,76,552 claimed as refund by the petitioner in terms of the clarification issued by the Ministry of Finance by its Circular No. 41/2013-Customs. The petitioner has suggested the following formula for the same:

“Impact (in Rs) = [Increase/Decrease in the Basic Customs Duty and Countervailing Duty (inclusive of Secondary and Higher Education Cess) for the actual purchase of coal [Rs/Ton] X Actual Quantum of Coal consumed subject to adjustment in opening stock] [Ton] LESS claim made by the Petitioner, on this account, under Change in Law for the construction period as verified by the auditor appointed by the lead procurer.

24. MSEDCL has submitted that since, there was a substantial reduction or NIL Customs Duty on various types of coal, such benefits out of reduction in duty shall have to be passed on to the procurers and the petitioner may be directed to produce all such documents in this regard to ascertain correct and true quantity of imported coal and consequently the amount of duty saved. It has been further submitted that the procurer's would not be liable to pay any Penalty or Interest either paid or that will be paid in the

future by the petitioner. Any penalty or interest will have to be borne solely by the petitioner.

25. We have considered the submissions of the parties. As on the cut-off date, i.e. 30.11.2006, the applicable Basic Customs Duty was 5% and there was no Countervailing Duty. Countervailing duty is the additional duty on customs duty equivalent to Central excise duty levied on similar goods produced in India. It is noted that no such levy was applicable as on the date which was seven days prior to the bid deadline. The Government of India, Ministry of Finance through the Finance Act, 2011 introduced 5% Countervailing Duty on Steam Coal. The Ministry of Finance, vide its Notification No. 46/2011-Customs dated 1.6.2011 reduced the Basic Customs Duty on Steam Coal from 5% to 3% which was further reduced vide Notification No. 12/2012-Customs dated 17.3.2012 from 3% to 0% and Countervailing Duty on Steam Coal from 5% to 1%. Subsequently, Government of India, Ministry of Finance vide Notification No. 64/2012-Customs dated 31.12.2012 amending the Notification No. 46/2011-Customs dated 1.6.2011 reduced the Basic Customs duty on Steam Coal from 3% to 0%, if such steam Coal was procured from an ASEAN country. The Ministry of Finance vide Notification No. 12/2013-Customs dated 1.3.2013 revised the Basic Customs Duty on Steam Coal from 0% to 2% if imported from non-ASEAN countries and Countervailing Duty on steam coal from 1% to 2%. Government of India, Ministry of Finance vide Finance Act, 2007 levied a Secondary and Higher Educational Cess at the rate of 1% on aggregate duty of customs levied and collected by the Central Government. In a similar case, the issue of countervailing duty on coal has been considered by the Commission in order dated 2.2.2017 in Petition No. 8/MP/2014. Relevant portion of the said order dated 2.2.2017 is extracted as under

“38. Since the impact of revision of CVD is on the capital cost, it is a non-recurring expenditure. Further, it is a change in tax which affects the tariff quoted by the Petitioner since the Petitioner has quoted an all-inclusive tariff including taxes, duties and levies. Therefore, the expenditure is covered under Change in Law and the Petitioner is entitled to relief proportionate to the contracted capacity with MSEDCL.”

26. The above decision is applicable in case of countervailing duty on imported coal. Therefore, levy of countervailing duty on coal is admissible as a Change in Law event under Article 13 as it has been made applicable after more than seven days prior to the bid deadline subject to the final outcome of the pending proceedings before the Central, Excise and Service Tax Appellate Tribunal.

27. The Petitioner is directed to furnish along with its monthly bill, the proof of payment of duty and computations duly certified by the auditor to the procurers. The Petitioner shall be entitled to recover custom duty and CVD on imported coal in proportion to the actual coal consumed corresponding to the scheduled generation for supply of electricity to the Procurers. If actual generation is less than the scheduled generation, the coal consumed in accordance with the parameters as decided by the Commission in Para 82 (d) of the order dated 6.12.2016 in Petition No.159/MP/2012 for actual generation shall be considered for the purpose of computation of impact of custom duty and CVD on coal. The Petitioner and the procurers are directed to carry out reconciliation on account of these claims annually.

III. Reduction in Excise Duty:

28. The petitioner has submitted that at the time of submission of bid, the excise duty applicable on the spares and consumables was 16.32% (inclusive of Educational Cess of 2% and exclusive of Secondary and Higher Secondary Cess of 1%). However, the Ministry of Finance, vide its Notification No. 2/2008-CE dated 1.3.2008 reduced the rate of excise duty payable on the plant, machineries, spares

and consumables from 16% to 14% which was further reduced vide Notification No. 18/2012-CE dated 17.3.2012 from 14% to 12%.The petitioner has submitted that the Government of India, Ministry of Finance vide the Finance Act, 2007, levied a secondary and higher educational cess at the rate of 1% on aggregate duty of excise levied and collected by the Central Government. The petitioner has submitted that from the commencement of the COD of Unit 1, the petitioner has benefitted to the extent of reduction of 4.08% on excise duty leviable on fuel oil, spares and consumables and burdened with the levy of Secondary and Higher education Cess of 1% due to the reduction in excise duty payable by the petitioner during the Operating Period in financial years 2011-12, 2012-13 and 2013-14. The petitioner has submitted that the impact on the petitioner on account of reduction in excise duty on the purchases made by it towards fuel oil, various spares and consumables is Rs.1,54,00,000 (minus) during the Operation period in Financial Years 2012-13 and Rs.1,00,00,000 (minus) during the Financial Years 2013-14.The petitioner has suggested the following formula for the same:

“Impact (in Rs) = Excise Duty payable by the petitioner during the Operation Period (inclusive of Education Cess and Secondary and Higher Education Cess) [Rs.] less Excise Duty payable by the petitioner at the rate prevailing on the Cut-off date (inclusive of Education Cess) [Rs.]

29. MSEDCL has submitted that the petitioner has spelt out about the notifications and has furnished the calculations without the audited balance sheet. MSEDCL has submitted that the benefits arising out of the reduction in excise duty shall be passed on to the procurers. MSEDCL has further submitted that in the absence of all such true accounts with documents, the benefits accrued to the petitioner cannot be treated as the final amount that shall have to be passed on to the procurer and has direct impact on the consumers at large. The petitioner vide its

additional affidavit dated 2.9.2015, has placed on record the Statutory Auditor's Certificates issued by Statutory Auditors, Deloitte Haskins and Sells LLP quantifying the impact of each Change in Law events mentioned in the petition on the cost/revenue of the project. The petitioner has submitted that the bare perusal of the Statutory Auditor's Certificates would show that the cumulative impact of all the Change in Law events on the petitioner is Rs. (-) 26.76 crore i.e. the petitioner is liable to refund of Rs.26.76 crore to the procurers for financial years 2011-12 to 2013-14.

30. We have considered the submissions of the petitioner and MSEDCL. As on the cut-off date, i.e. 30.11.2006, the applicable excise duty was 16.32% (inclusive of Educational Cess of 2% and exclusive of Secondary and Higher Secondary Cess of 1%). The Ministry of Finance, vide Notification No. 2/2008-CE dated 1.3.2008 reduced the rate of excise duty payable on the plant, machineries, spares and consumables from 16% to 14% which was further reduced vide Notification No. 18/2012-CE dated 17.3.2012 from 14% to 12%. At the time of submission of bid, the petitioner has factored the excise duty on the spares and consumables levied by Government of India at the rate of 16% which was part of quoted tariff of the generating station. Accordingly, all beneficiaries/procurers are paying for the claim through tariff. Since the Government of India, Ministry of Finance vide its notifications has reduced the excise duty on fuel oil, spares and consumables, it will have implication by way of reduction of the tariff annually. Therefore the petitioner must refund the amount to beneficiaries/procurers in proportion to their shares in the contracted capacity with effect from 1.3.2008 and 17.3.2012 as per the Ministry of Finance's notifications or the date of commercial operation of the first unit whichever is later or adjust in their bills.

IV. Reduction in Central Sales Tax

31. The petitioner has submitted that as on the cut-off date, the Central Sales Tax applicable was 4%. However, the Ministry of Finance vide Notification No. 1/2007-CST-ST dated 29.3.2007 reduced the Central Sales Tax from 4% to 3% which came into effect from 1.4.2007 and further reduced vide Notification No. 1/2008-CST-ST dated 30.5.2008 from 3% to 2% which came into effect from 1.6.2008. The petitioner has submitted that it has been benefitted by the overall reduction of Central Sales Tax of 2% payable on sales of goods and services for the operating period to the tune of Rs. five lakh for the years 2011 to 2013 and fifty lakh for the year 2013-14 which ought to be passed on to the procurers in terms of the provisions of the PPA. The petitioner has suggested the following formula in this regard:

“Impact (in Rs) = Central Sales Tax payable by the petitioner on the material procured during the Operation Period less Central Sales Tax payable at the rate payable on the Cut-Off date.

32. MSEDCL has submitted that the petitioner has spelt out about the notifications and has furnished the calculations without the audited balance sheet. MSEDCL has submitted that the benefits arising out of the reduction in aforesaid taxes shall be passed on to the procurers. MSEDCL has further submitted that in the absence of all such true accounts with documents, the benefits accrued to the petitioner cannot be treated as the final amount that shall have to be passed on to the procurers and has direct impact on the consumers at large.

33. The petitioner in its additional affidavit dated 2.9.2015 has placed on record the Statutory Auditor's Certificates issued by its Statutory Auditors. The petitioner

has submitted that as per the auditor certificate, the petitioner is liable to pay Rs. 26.76 crore to the procurers for the years 2011-12 to 2013-14.

34. We have considered the submissions of the petitioner and MSEDCL. As on the cut-off date (i.e. 30.11.2006), the applicable Central Sales Tax was 4%. The Ministry of Finance, vide Notification No. 1/2007-CST dated 29.3.2007 reduced the Central Sales Tax from 4% to 3% and vide Notification No. 1/2008-CST dated 30.5.2008 further reduced the Central Sales Tax payable from 3% to 2%. The said changes from 4% to 3% and from 3% to 2% claimed by the petitioner have occurred after the cut-off date and have an impact on the cost of generation during the operating period. At the time of submission of bid, the petitioner has factored the Central Sales Tax levied by Government of India at rate of 4% which was part of quoted tariff of the generating station. Accordingly, all beneficiaries/procurers are paying for the claim through tariff. Since the Government of India, Ministry of Finance vide its notifications dated 29.3.2007 and 30.5.2008 has reduced the Central Sales Tax, it will have implication by way of reduction of the tariff annually. Therefore, the petitioner must refund the amount to beneficiaries/procurers in proportion to their share in the contracted capacity with effect from 1.4.2007 and 1.6.2008 as per the Ministry of Finance`s notifications or adjust in their bills.

V. Increase in Gujarat Value Added Tax

35. The petitioner has submitted that at the time of bidding, the Value Added Tax payable on fuel oil, plant and machinery and spares in the State of Gujarat was 4% or 12.50% depending on the category in which the consumables fall into under the Gujarat Value Added Tax (GVAT), 2003. However, Government of Gujarat in the year 2008 amended the Gujarat Value Added Tax Act, 2003 and increased the rate

of value added tax on fuel oil, plant and machinery and spares to 5% and 15% respectively. The petitioner has submitted that since increase in the rate of VAT is pursuant to the amendments of Gujarat Value Added Tax (Amendment) Act, 2008 by the Government of Gujarat, the same is covered under change in law for which the petitioner should be compensated. The petitioner has suggested the following formula to compute the financial impact:

“Impact (in Rs) = Gujarat Value added Tax payable on Fuel Oil, Consumables and spares procured during the Operation period [Rs.] less Gujarat Value Added Tax payable by the petitioner at the rate prevailing on the Cut-Off date [Rs.]

36. MSEDCL has submitted that by the Gujarat Value Added Tax (Amendment) Act, 2008, amendment has been made in the Principal Act. In Section 9 of the Principal Act, sub-sections (5) and (6) have been added. MSEDCL has further submitted that sub-section (5) refers to liability to pay tax on purchase of taxable goods, sale of which is zero rated under Section 5A and the goods so purchased by him, then such dealer shall be liable to pay Purchase Tax. Further, Sub-section (6) refers to additional Tax under Section 9(1), (2), (3), (4) or (5) in respect of purchase of goods of Schedule-II items. Items at serial Nos. 25, 46B, 48A, 49A, 51A and 87 in Schedule-II attracts 2.5% additional tax and rest of the items of Schedule-II attracts 1% additional tax. MSEDCL has submitted that the petitioner is liable to substantiate that it is covered under Section 9 read with the defining clause and also shall be liable to justify that the goods purchased are falling under category spelt out under Section 9(6). MSEDCL has stated that the details and quantities of purchase of fuel oil, plant and machinery and spares shall have to be substantiated by the petitioner with documentary evidence and a thorough discussion with the participation of all the concerned requires to be undertaken.

37. The petitioner vide its affidavit dated 14.10.2015 has submitted that the GVAT Act is an indirect tax which is levied on the sale of goods and services within the State of Gujarat. GVAT being an indirect tax, is collected by an intermediary from the end consumer of the goods. The economic burden of such tax is ultimately borne by the end consumer. Thereafter, the intermediary files the tax return and forwards the tax proceeds to the government. In the present case, the economic impact of the GVAT is imposed on the petitioner while tax is paid by the dealer from whom the goods are purchased by the petitioner. The petitioner has also submitted that the preamble read with Section 3 of the GVAT Act provides for collection of tax on addition of value of the goods which are sold within the State of Gujarat. The petitioner has submitted that it is purchasing goods from other registered dealers and bears the economic impact of such indirect taxes. Any increase in the rate of GVAT due to the amendment to GVAT Act, ultimately increases the economic liability of the petitioner, being the end consumer of such goods.

38. We have considered the submissions of the petitioner and MSEDCL. The Commission vide order dated 30.3.2015 in Petition No. 6/MP/2013 did not allow the increase in VAT. Relevant portion of the said order is extracted as under:

“49. We have considered the submissions made by the petitioner and the respondents. Government of India, Ministry of Finance Notification dated 17.3.2012 notifying the change in excise duty, Notification dated 30.5.2008 notifying the change in rate of Central Sales Tax and Madhya Pradesh VAT (Amendment) Act, 2010 notifying the changes in VAT rates are not covered under “Change in Law”. The quoted tariff according to provisions of Para 2.7.1.4.3 of the RFP shall be an inclusive one including statutory taxes, duties and levies. Therefore, the petitioner was expected to take into account all cost including capital cost and operating cost, statutory taxes, duties levies while quoting tariff in the bid. Therefore, the “Change in Law” in this respect is not admissible.”

39. In the light of the decision as quoted above, the claim of the petitioner for reimbursement of the impact on account of revision in Gujarat VAT rate under

change in law is not admissible and is accordingly disallowed. The decision of the Commission disallowing claim of the Petitioner for reimbursement of VAT has been challenged by Sasan Power Ltd. in the Appellate Tribunal for Electricity in Appeal No. 161 of 2015. Our decision in Para 38 above shall be subject to the final outcome of the appeal on this point.

VI. Increase in rate of Service Tax

40. The petitioner has submitted that at the time of submission of bid, there was no service tax on Works Contract Service. However, the Ministry of Finance, Government of India vide Notification No. 32/2007 dated 22.5.2007 introduced "Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 which became effective from 1.6.2007 and levied service tax at the rate of 2% on Works Contract Service. The petitioner has submitted that the Government of India, Department of Revenue (Tax Research Unit), vide Notification No. 7/2008 dated 1.3.2008 increased the rate of service tax from 2% to 4%. The petitioner has further submitted that the Government of India, Ministry of Finance through the Finance Act, 2007, levied a Secondary and Higher Educational Cess at the rate of 1% on aggregate duty of Service Tax levied and collected by the Central Government. The petitioner has submitted that the actual impact on account of increase in Service Tax and additional levy of Secondary and Higher Education Cess is Rs. 13 lakh and Rs. 39 lakh during the years 2011-12 and 2013-14 respectively. The petitioner has submitted that since the Unit 1 was operational only for seven days during Financial Years 2011-12, the impact of change in service tax during the said period was not considered. The petitioner has suggested the following formula to consider the financial impact in this regard:

“Impact (in Rs) = Service Tax payable by the petitioner during the Operation Period (inclusive of Education Cess and Secondary and Higher Education Cess) [Rs] less Service Tax payable by the petitioner at the rate prevailing on the Cut-off Date (inclusive of Education Cess) [Rs.]

41. MSEDCL has submitted that the Government of India Notification dated 22.7.2007 is applicable to Work Contract Services in relation to execution of Work Contract referred to sub-clause (zzzza) of clause (105) of Section 65 of the Finance Act, 1994, whereas, under the Finance Act, 2007 there is no reference of applicability of secondary and higher education cess in respect of Works Contract referred to in sub-clause (zzzza) of Clause 105 of Section 65 of Finance Act, 1994. The contention of the petitioner that as on the date of Power Purchase Agreement, petitioner was not liable to pay tax on Work Contract Services, is contrary to the provisions spelt out under Service Tax Rules, 2007.

42. The petitioner in its affidavit dated 14.10.2015 has submitted that the Service Tax was applicable at the rate of 12% and by the Finance Act, 2006, the Works Contract was brought within the ambit of Service Tax by which a Service Tax of 2% was imposed on the service component of the Works Contract after eliminating the supply component. Subsequently, the Ministry of Finance vide Notification No. 32/2007-Service dated 22.5.2007 introduced “Works Contract (Composition Scheme for payment of Service Tax) Rules, 2007, which became effective from 1.6.2007 and by the said notification, an option was given to the persons who were liable to pay service tax in relation to Works Contract to discharge its liability of paying Service Tax, instead of paying service tax at the rate specified in Section 66 of the Finance Act, 1994, by paying an amount equivalent to 2% of the gross amount charged for the works contract. Subsequently, the Department of Revenue vide Notification No.

7/2008-Service dated 1.3.2008 amended Rule 3(1) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 and increased the Service Tax from 2% to 4% on works contract service. The petitioner has further submitted that by the Finance Act, 2007, a Secondary and Higher Educational Cess has been levied at the rate of 1% on aggregate duty of Service tax levied and collected by the Central Government. The petitioner vide affidavit dated 2.9.2015 has placed on record the Statutory Auditor's Certificates impacting Change in Law due on account of increase in Service Tax.

43. We have considered the submissions of the petitioner and MSEDCL. As on the cut-off date of 30.11.2006, there was no service tax on Works Contract Service. As per the bid documents, the petitioner was required to factor in all the taxes, cess, duties etc. in the bid. In the absence of service tax on Works Contract Service as on cut-off date, the petitioner could not be expected to factor the same while quoting the tariff. The service tax on works contract service was introduced through the Finance Act, 1994 and levied by the Ministry of Finance, Department of Revenue vide Notification No. 32/2007-Service Tax dated 22.5.2007 at the rate of 2% under Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 issued under Section 93 and 94 of the Finance Act, 1994. Subsequently, Government of India, Ministry of Finance, Department of Revenue (Tax Research Unit) vide Notification No. 7/2008-Service Tax dated 1.3.2008 increased service tax on works contract service from 2% to 4%. Government of India, Ministry of Finance through Finance Act, 2007 levied a Secondary and High Educational Cess at the rate of 1% on aggregate duty of service tax levied and collected by the Central Government. The petitioner has been paying service tax on work contract service at the rate of 4% and 1% of Secondary and Higher Education Cess to the tune of Rs.13 lakh and Rs.

39 lakh for the years 2012-13 and 2013-14 respectively since the effective date of the notifications. Therefore, the service tax on works contract service and levy of Secondary and Higher Education cess were introduced after the cut-off date through the Act of Parliament and the rates were being notified from time to time by Ministry of Finance (Department of Revenue) and Department of Revenue (Tax Research Unit) which are Indian Government Instrumentalities. Accordingly, the claim of the petitioner is allowed under Change in Law. The petitioner shall submit to the beneficiaries the auditor certificate based on the service tax paid on the service component of the works contract after obtaining all relevant documents from the contractor on annual basis.

VII. Levy of Green Cess

44. The petitioner has submitted that as on cut-off date, no green cess was leviable on power generated in the State of Gujarat. Gujarat Green Cess Act, 2011 was enacted on 30.3.2011 levying Green Cess on generation of electricity in the State of Gujarat. In exercise of the power vested under Section 20 of Gujarat Green Cess Act, 2011, Govt. of Gujarat framed Gujarat Green Cess Rules, 2011 specifying the rate of Green Cess applicable on generation of electricity at the rate of Rs. 0.02 per unit. The petitioner has submitted that the Green Cess was leviable w.e.f 28.7.2011. The petitioner has submitted that the Hon'ble High Court of Gujarat vide its judgement dated 23.1.2013 in SCA No. 4690 of 2012 declared the Gujarat Green Cess Act, 2011 as *ultra vires* of the Constitution of India. The said judgment was challenged before the Hon'ble Supreme Court by SLP No. 18493-18515 of 2013 (converted into Civil Appeal no. 5135-5157 of 2013 titled State of Gujarat and Others Vs. Reliance Industries Ltd. and Another). By an interim order dated 3.7.2013, the

Hon'ble Supreme Court stayed the operation of the judgment and directed that Govt. of Gujarat would determine the cess under Gujarat Green Cess Act, 2011 and accordingly, would raise demand on the respondents but the demand would not be enforced against the respondents until disposal of the appeals. Pursuant to the directions of the Gujarat High court and the Hon'ble Supreme Court, the petitioner has applied for the refund of Rs.1,03,21,176. Out of the said amount of Rs. 1,03,21,176, the petitioner has claimed a sum of Rs. 47,97,000 towards the Green Energy Cess paid by it under the Change in Law during the construction period payable by the Government of Gujarat. The petitioner has submitted that the balance amount of Rs. 55,24,176 is being claimed by it in the present petition, which has not been passed on the consumers. The petitioner has submitted that it has incurred an expenditure of Rs.55,24,176 till April 2012 on account of Green Cess and the Government of Gujarat has not raised any demand on account of green Cess in terms of the order dated 3.7.2013 passed by the Supreme Court. The petitioner has prayed for approval of change in law on account of levy of Green Cess and for permission to recover the same from the respondents subject to the final outcome of the Civil Appeal pending with the Hon'ble Supreme Court.

45. The respondents have denied that the petitioner should be allowed to claim and recover the Green Energy Cess at this stage subject to appropriation or return at a later stage based on the decision of the Supreme Court. The respondents have further submitted that since there is no compulsory collection of the Green Cess as per the Gujarat Green Cess Act, 2011, the petitioner is not entitled to claim adjustment for the said cess at present. The respondents have further submitted that if and when the Hon'ble Supreme Court decides the matter in favour of the Govt. of

Gujarat and upholds the Gujarat Green Cess Act, 2011, the petitioner can raise the issue for consideration before the Commission on merits.

46. We have considered the submissions of the petitioner and the respondents. A similar issue has been considered by the Commission in its order dated 6.2.2017 in Petition No. 156/MP/2014 wherein the Commission did not allow the Green Cess pending disposal of the appeal before the Hon'ble Supreme Court. Relevant portion of the said order is extracted as under:

"57. We have considered the submissions of the petitioner and the respondents. The Gujarat Energy Cess Act, 2011 and Gujarat Green Cess Rules have been set aside by the Hon'ble Gujarat High Court vide judgment dated 21.1.2013. The said judgment has been challenged before the Hon'ble Supreme Court in Civil Appeal No. 5135-5157 of 2013. The Hon'ble Supreme Court vide order dated 3.7.2013 has directed as under:

"During the pendency of the Appeals the operation of the impugned judgment of the High Court shall remain stayed.

It will be open to the appellants to determine the cess under the Gujarat Green Cess Act, 2011 and raise demand on the respondents. However, such demand shall not be enforced against the respondents until disposal of the Appeals. Moreover, determination of such cess shall be subject to the final decision in the Appeals."

The judgement of the Hon'ble Gujarat High Court setting aside the Gujarat Energy Cess Act, 2011 has been stayed by the Hon'ble Supreme Court and Government of Gujarat has been permitted to determine the cess in accordance with the said Act and raise the demand but Government of Gujarat has been restrained to enforce the demand until disposal of the appeal. The petitioner has prayed for determination of the issue whether the cess levied under the Gujarat Energy Act is covered under Change in Law or not. The respondents have submitted that the petitioner may approach the Commission after the Green Energy Act, 2011 is upheld by the Hon'ble Supreme Court. The respondents have reserved their rights to raise appropriate objections at relevant time. In our view, since the respondents have not filed their objections on merit, it will not be appropriate to determine the issue whether the Green Cess under the Gujarat Green Energy Act, 2011 is admissible under Change in Law or not. Accordingly, we grant liberty to the petitioner to file appropriate application before the Commission for consideration of its claim with regard to the green cess if the demand for green cess is allowed to be enforced by the Hon'ble Supreme Court pending disposal of the appeal or after disposal of the appeal if the Gujarat Green Cess Act, 2011 is upheld by the Hon'ble Supreme Court."

47. In the light of the above decision, the claim of the petitioner for relief under change in law on account of levy of green cess is not admissible at this stage. However, the petitioner is granted liberty to file appropriate application before the Commission for consideration of its claim with regard to the green cess if the demand for green cess is allowed to be enforced by the Hon'ble Supreme Court pending disposal of the appeal or after disposal of the appeal if the Gujarat Green Cess Act, 2011 is upheld by the Hon'ble Supreme Court.

VIII. Additional Conditions imposed by the Ministry of Environment and Forest

48. The petitioner has submitted that as on the cut-off date, there was no condition prescribed by the MoEF to earmark and incur expenditure towards CSR activities. Subsequently, on 26.4.2011, MoEF issued a Corrigendum amending its earlier approval letters dated 2.3.2007 (Environmental clearance) and 5.4.2007 (amendment to Environmental Clearance). The petitioner has submitted that by the said Corrigendum, the petitioner was required to earmark as recurring expenditure, an amount of Rs.14,40,00,000 annually towards CSR activities. This was not the case as on the cut-off date. The petitioner has further submitted that for the financial year 2013-14, it has paid Rs.10,41,00,000 as the expenditure incurred for the financial years 2011-12 and 2012-13 has been claimed by the petitioner in the Change in Law during the construction phase, accordingly, the same has not been claimed under the present petition. The petitioner has submitted that the imposition of new conditions in the environmental clearance amounts to change in law and the petitioner is entitled to be compensated for the same.

49. The respondents have submitted that it was not part of the environmental clearance dated 2.3.2007 dealing with the capacity of coastal power project of 4000 MW. The petitioner cannot claim adjustment of the amount of Rs. 10.41 crore alleged to have been spent on Corporate Social Responsibility activities. This is for the reason that there was a necessity to take an environmental clearance at the time of submission of bid. There was no environmental clearance obtained prior to the cut-off date relevant to the bid date. Accordingly, any condition imposed by the environmental authority for the grant of environmental clearance would not qualify as a Change in Law event. Moreover, the Corporate Social Responsibility is to be discharged in accordance with the provisions of the Companies Act, 2013 on the net revenue after appropriation to the profit and loss account and it has nothing to do with the cost or revenue from the business of selling electricity by the seller to the procurer under the PPA. The respondents have further submitted that the petitioner has given certain details of CSR expenditure along with alleged amount spent but no audited report has been placed, as required under condition (xxxvii), wherein, the Ministry *inter-alia* made it mandatory that all such CSR expenditure shall be audited by social audit from the nearest Government Institute of repute in the region and also shall be liable to submit the status of implementation.

50. The petitioner in its rejoinder affidavit dated 9.10.2015 has submitted that CSR obligation imposed in the Corrigendum dated 26.4.2011 issued by MoEF is completely distinct and independent of the CSR obligation imposed by Companies (Corporate Social Responsibility Policy) Rules, 2014. The CSR obligation imposed in the said Corrigendum bears a direct impact on costs/revenues of/from the petitioner's operations. The petitioner has submitted that it is required to comply with

CSR obligation stipulated in the said corrigendum whether or not the petitioner is making net profits, whereas, under the CSR Rules, CSR obligation is required to be discharged when a company is making net profits.

51. We have considered the submissions of the petitioner and the respondents. A similar issue has been considered by the Commission in its order dated 17.2.2017 in Petition No. 16/MP/2016 where in the Commission has not considered conditions specified in EC under change in law. The relevant portion of the said order is extracted as under:

“27. The petitioner was required under law to obtain EC for operating the project and comply with the conditions specified therein which is also recognized in Article 5.5 of the PPA which provides that it is the responsibility of the petitioner for maintaining/reviewing the initial consents and for fulfilling all obligations specified therein. Schedule 2 of the PPA defines initial consents to include necessary environmental and forest clearance for the power station. Since There was no EC obtained prior to the cut-off date relevant to the bid date, any condition imposed by the environmental authority for the grant of EC would not qualify as a change in law...Section 135 of the Companies Act, 2013 provides as under:

“135. Corporate Social Responsibility— (1) Every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during any financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director.

(2) The Board's report under sub-section (3) of section 134 shall disclose the composition of the Corporate Social Responsibility Committee.

(3) The Corporate Social Responsibility Committee shall,—

(a) formulate and recommend to the Board, a Corporate Social Responsibility Policy which shall indicate the activities to be undertaken by the company as specified in Schedule VII;

(b) recommend the amount of expenditure to be incurred on the activities referred to in clause (a); and

(c) monitor the Corporate Social Responsibility Policy of the company from time to time.

(4) The Board of every company referred to in sub-section (1) shall,—

(a) after taking into account the recommendations made by the Corporate Social Responsibility Committee, approve the Corporate Social Responsibility Policy for the company and disclose contents of such Policy in its report and also place it on the company's website, if any, in such manner as may be prescribed; and

(b) ensure that the activities as are included in Corporate Social Responsibility Policy of the company are undertaken by the company.

(5) The Board of every company referred to in sub-section (1), shall ensure that the company spends, in every financial year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy:

Provided that the company shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for Corporate Social Responsibility activities:

Provided further that if the company fails to spend such amount, the Board shall, in its report made under clause (o) of sub-section (3) of section 134, specify the reasons for not spending the amount.

Explanation.— For the purposes of this section —average net profitll shall be calculated in accordance with the provisions of section 198.”

As per the above provision, any company with a networth of Rupees five hundred crore or more or turnover of Rupees one thousand crore or more or net profit of Rupees five crore or more is required to constitute a Social Corporate Responsibility Committee of the Board consisting of three directors to formulate and recommend to the Board, a Corporate Social Responsibility Policy which shall indicate the activities to be undertaken by the company as specified in Schedule VII....

Thus corporate social responsibility also includes expenditure on ensuring environmental sustainability, ecological balance and conservation of natural resources and maintaining quality of soil, air and water. MoEF has prescribed that the CSR cost should be Rs. 5 per Tonne of Coal produced which should be adjusted as per annual inflation. As per sub-section (5) of section 135 of the Companies Act, 2013, the Board of the Company shall ensure that the Company spends, in every financial year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy. Therefore, the Corporate Social Responsibility Committee of the Petitioner`s company should consider and include the expenditure on account of condition (xxiii) of the environmental clearance in the Corporate Social Responsibility Policy of the company and meet the expenditure out of the net profits of the company. In our view, this expenditure cannot be allowed under Change in Law as the environment clearance has specifically classified as CSR cost for which

provisions have been made in the Companies Act, 2013 to be met out of the net profit of the company.”

52. In the light of the above decision, the claim of the petitioner for relief under change in law on account of imposition of new conditions by the MoEF is not admissible and is accordingly disallowed.

(C) Carrying cost

53. The petitioner has pleaded in the prayer clause of the petition that the procurers should be permitted to raise the Supplementary Bills for the sum of Rs. 25,96,00,000 along with the carrying cost in terms of Article 13.4.2 of the PPA. 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 16.2.2017 in Review Petition No. 1/RP/2016 in Petition No. 402/MP/2015. Accordingly, the claim of the petitioner is rejected.

(D)The mechanism for compensation on account of Changes in Law during the operation period.

54. 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 11.4.1.1, 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. During 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 year from any additional units expected to ACHIEVE be put on COD during that year on normative availability. The petitioner

has submitted that amount of Letter of Credit upon commissioning of all five units of the plant was Rs. 606.2538 crore and 1% of aggregated letter of credit is about Rs. 6.0625 crore. Since, the aggregate amount claimed for "Change in Law" is about Rs. 25,96,00,000 crore, it is more than the threshold amount prescribed under Article 13.2 (b) of the PPA and the petitioner is entitled to be compensated for the same. The Petitioner has further submitted that it may be permitted to claim from the procurers, compensation that would be equivalent to the financial impact of the "Change in Law" on the cost and revenue of the petitioner.

55. Article 13.2 (b) of the PPA provides for the principle for commuting the impact of "Change in Law" during the operation period as under:-

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

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

The above provision enjoins on the Commission to decide the effective date from which the compensation for increase/decrease in 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 in excess of an amount equivalent to 1% of the letter of credit in aggregate for contract year. The Commission has specified a mechanism considering the fact that compensation of change in law shall be paid in subsequent contract years also. Accordingly, the following mechanism is prescribed to be adopted for payment of compensation due

to change in law events allowed as per Article 13.4.2 of the PPA in the subsequent years of contracted period:

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

(b) The increase in clean energy cess, customs duty, excise duty on coal, Central Sales tax and service tax shall be computed based on actual payment subject to ceiling of coal consumed corresponding to scheduled generation and shall be payable by the beneficiaries pro-rata based on their respective share in the scheduled generation. In case of reduction of clean energy cess, custom duty, sale tax and excise duty on coal, the Petitioner shall compensate the procurers on the basis of above principle.

(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 the Procurers during the year. The reconciliation statement duly certified by Auditor shall be retained by the Petitioner so that the same could be produced on demand from Procurers/ beneficiaries, if so desired.

(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 Article 13.2(b) of the PPA.

(e) To approach the Commission every year for computation and allowance of compensation for such change in law event which has been determined in this order is a time consuming process which results in time lag between the amount paid by Seller and actual reimbursement by the Procurers. Accordingly, the mechanism prescribed above is to be adopted for payment of compensation due to change in law events allowed as per Article 13.2 (b) of the PPA for the subsequent period as well.

56. The Commission has not made computation of the threshold value based on the claims for Change in Law allowed in this order. The Petitioner shall calculate the threshold value as per Article 13.2 (b) of the PPA and if the impact due to Change in Law exceeds the threshold value, the Petitioner shall be entitled to raise the supplementary bills as per the PPA.

Summary

57. 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:

Change in Law Event	Decision
Levy of Clean Energy Cess on imported coal	Allowed
Change in Basic Customs Duty and Countervailing Duty on imported coal	Allowed subject to outcome of pending proceedings before the Central, Excise and Service Tax Appellate Tribunal
Reduction in Excise Duty	Allowed
Reduction in Central Sales Tax	Allowed
Increase in Gujarat Value Added tax	Not Allowed

Increase in Service tax	Allowed
Levy of Green Cess	Not Allowed
Additional Condition imposed by MoEF	Not allowed
Carrying Cost	Not allowed

58. The present Petition is disposed of in terms of the above.

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

sd/-
(A.S. Bakshi)
Member

sd/-
(A. K. Singhal)
Member

sd/-
(Gireesh B. Pradhan)
Chairperson