

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 16/MP/2016

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 February, 2017

In the matter of

Petition under Section 79 of the Electricity Act, 2003 read with statutory framework governing procurement of power through competitive bidding and Article 13 of the Power Purchase Agreement dated 7.8.2007 executed between Sasan Power Limited and the procurers for compensation due to change in law impacting revenues and costs during the operating period.

And

In the matter of

Sasan Power Limited
Reliance Power Ltd. 3rd Floor,
Reliance Energy Centre,
Santa Cruz East, Mumbai

..... **Petitioner**

Vs

1. MP Power Management Company Ltd.
Shakti Bhawan, Jabalpur-482 008.
2. Paschimanchal Vidyut Vitran Nigam Ltd.
Victoria Park, Meerut-250 001.
3. Purvanchal Vidyut Vitran Nigam Ltd.
Hydel Colony, Bhikaripur, Post-DLW, Varanasi-221 004.
4. Madhyanchal Vidyut Vitran Nigam Ltd.
4A-Gokhale Marg, Lucknow-226 001.
5. Dakshinanchal Vidyut Vitran Nigam Ltd.
220kV, Vidyut Sub-Station,
Mathura Agra By-Pass Road,

Sikandra, Agra-282 007.

6. Ajmer Vidyut Vitran Nigam Ltd.
400 kV GSS Building (Ground Floor), Ajmer Road,
Heerapura, Jaipur
7. Jaipur Vidyut Vitran Nigam Ltd.
400 kV GSS Building (Ground Floor), Ajmer Road,
Heerapura, Jaipur
8. Jodhpur Vidyut Vitran Nigam Ltd.,
400 kV GSS Building (Ground Floor), Ajmer Road,
Heerapura, Jaipur
9. Tata Power Delhi Distribution Ltd.,
Grid Sub-Station Building, Hudson Lines, Kingsway camp,
New Delhi-110 009.
10. BSES Rajdhani Power Ltd.,
BSES Bhawan, Nehru Place,
New Delhi-110 019.
11. BSES Yamuna Power Ltd.,
Shakti Kiran Building, Karkardooma,
Delhi-110 092.
12. Punjab State Power Corporation Ltd.,
The Mall, Patiala-147 001.
13. Haryana Power Purchase Centre,
Shakti Bhawan, Sector-6,
Panchkula (Haryana)-134 109.
14. Uttarakhand Power Corporation Ltd.,
Urja Bhawan, Kanwali Road,
Dehradun-248 001.

.....Respondents

For the Petitioner : Shri Sanjay Sen, Sr. Advocate, SPL
Shri Vishrov Mukerjee, Advocate, SPL
Shri Janmali M, Advocate, SPL,
Shri Mayank Gupta, SPL,
Shri G. Umaphathy, Advocate, MPPMCL

For the Respondents Ms. Ranjitha Ramachandran, Advocate, HPPCL
Ms. Poorva Saigal, Advocate, HPPCL
Shri Anand K. Ganesan, Advocate, Rajasthan Discom

ORDER

The petitioner, Sasan Power Limited, has set up a 4000 MW super critical Ultra Mega power Project based on linked captive coal mine at Sasan, District: Singauli, in the State of Madhya Pradesh (hereinafter referred to as "Sasan UMPP").

2. The petitioner has filed the present petition under clauses (b) and (f) of sub-section (1) of Section 79 of the Electricity Act, 2003 (hereinafter "2003 Act") read with Article 13 read of the Power Purchase Agreement dated 7.8.2007 and Paragraph 5.17 of the Competitive Bidding Guidelines seeking the following reliefs under 'Change in Law' during the operating period:

- (a) Levy of Forest Transit Fee by the Government of Madhya Pradesh under the Madhya Pradesh Transit (Forest Produce) Rules, 2000;
- (b) Imposition of a new condition in the Environmental clearance dated 30.6.2015.
- (c) Establishment of the District Mineral Foundation and National Mineral Exploration Trust in terms Section 9B and 9C of the Mines and Minerals (Contribution to District Mineral Foundation) Rules, 2015;
- (d) Imposition of levy equivalent to 2% of the royalty to be paid to the National Mineral Exploration Trust in terms of Section 9C of the MMDR Act read with Rule 7 (3) of the National Mineral Exploration Trust Rules, 2015.

3. The petitioner has computed the impact on account of the Change in Law Events as under:

Period	Claims
Levy of forest transit fee on coal produced	Approximately Rs. 14 crore/annum based on the production schedule as per approved mining plan.
Environmental clearance @ Rs.5/tonne of coal produced effective from 30.6.2015	Rs. 10.0 crore/annum based on the production schedule as per approved mining plan.
Creation of District Mineral Foundation Trust (under Section 9B of MMDR Act.)	Rs. 72.2 crore (approx)
Creation of National Mineral Exploration Trust under Section 9C of MMDR Act.)	Rs. 4.8 crore (approx)

4. The petitioner has submitted that in accordance with Article 13.3 of the PPA, the Petitioner notified the procurers on 24.9.2015 and 23.10.2015 about the above stated events amounting to Change in Law' affecting the revenue/cost of the petitioner during the operating period.

5. 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 the events set out in Paragraphs 16 to 57 above are a "Change in Law" impacting revenues and costs during the Operating period for which the petitioner and/or the Procurers may be compensated in terms of Article 13 of the PAA;

(b) Restore the Petitioner and/or the Procurers to the same economic condition prior to occurrence of the Changes in Law by permitting the Petitioner to raise Supplementary Bills in terms of Article 13.4.2 of the PPA as per the computations set out in Paragraphs 58 to 63 above to compensate the Petitioner and/or the Procurers as and when the financial impact of the respective Changes in Law arise, either jointly or severally; and/or

(c) Permit petitioner to provisionally recover 90% of amount paid to support operations of the UMPP as the levy of the transit fee is statutory in nature and being incurred by SPL.

(d) Award carrying cost/interest for the period between payment by the petitioner (including *pendent lite*) and reimbursement thereof by the Respondents.”

6. Notices were issued to the respondents to file their replies to the petition. Replies to the petition have been filed by MP Power Management Company Limited (MPPMCL) vide its affidavit dated 18.3.2016, Haryana Power Purchase Centre (HPCC) vide affidavit dated 11.4.2016, Rajasthan Distribution Companies (AVVNL/JVVNL/JdVVNL) vide affidavit dated 1.4.2016 and Distribution Companies of Uttar Pradesh (PVVNL/MVVNL/DVVNL) vide their affidavit dated 7.6.2016. The Petitioner has filed its rejoinder to the replies of the Respondents. The Commission has also heard the learned senior counsel for the Petitioner and learned counsel for the Respondents at length. After consideration of the submissions of the Petitioner and Respondents, the claims of the Petitioner have 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 admitted claims under Change in Law.

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

7. 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 Procurer shall have the right to issue such notice to the Seller.

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

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

8. The petitioner has submitted that a consolidated notice was issued to all the procurers on 24.9.2015 and 23.10.2015 regarding the Change in Law events that took place during the period between the cut-off date and the start of the operating period which would affect the cost or revenue of the project during the operating period. In this regard, no response was received from the procurers. HPCC has submitted that the petitioner should have given notices for change in law events to the Procurers as soon as reasonably practicable. The petitioner has submitted that issue of levy of transit fee

was discussed in the meeting held on 4.4.2014 with the Procurers and subsequent meetings we well. The petitioner was forced by DFO to pay transit fee under protest to ensure uninterrupted supply of coal to the project and accordingly, issued notice dated 24.9.2015 to the procurers.

9. We have considered the submission of the petitioner. Under Article 13.3 of the PPA, the Petitioner is required to give the notice about occurrence of Change in Law events as soon as reasonably practicable after being aware of such events. The Petitioner has stated that the issue of transit fee was discussed in the meeting held with the Procurers on 4.4.2014 and thereafter. The Petitioner gave notices dated 24.9.2015 and 23.10.2015 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 merit

10. The Petitioner has approached the Commission under Article 13 of the PPA read with Section 79 of the Act and Para 5.17 of the Competitive Guidelines for compensation of the cost incurred by the petitioner due to “Change in Law” during the operating period. Section 79(1)(b) and (f) of the Act 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 adjudications 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 7.8.2007 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 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.

11. 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.”

12. The dates of commercial operation of the units of Sasan UMPP are as under:

Unit	Date of commercial operation of the units
First	16.8.2013
Second	28.1.2014
Third	12.4.2014
Fourth	27.5.2014
Fifth	26.12.2014
Sixth	27.3.2015

13. The first unit of the generating station achieved COD on 16.8.2013 and the last unit of the generating station achieved COD on 27.3.2015. 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 operating period of the generating station will be reckoned with effect from 27.3.2015.

14. Article 13 of the PPA between the Petitioner and the Procurers of Sasan UMPP provides Change in Law during the Operating Period as under:

“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 licences 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 (c) 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 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

(b) Operating 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 Government of India (GOI), Government of Haryana and any Ministry, department, body corporate, Board, agency, or other authority of GOI or Government of the State where the Project is 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 occur after the date which is seven days prior to the bid deadline ("cut-off date"). 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) 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 it in aggregate for a Contract Year.”

16. The Petitioner has raised claims under Change in Law in respect of three events, namely, levy of Forest Transit Fee by the Government of Madhya Pradesh (GoMP) under the Madhya Pradesh Transit (Forest Produce) Rules, 2000; imposition of a new condition in the Environmental Clearance dated 30.6.2015 for expansion of the Moher and Moher-Amlohri Extension Block; and payment to National Mineral Exploration Trust and Payment to District Mineral Fund. 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 Forest Transit Fee by the Government of Madhya Pradesh (GoMP) under the Madhya Pradesh Transit (Forest Produce) Rules, 2000:

17. The Petitioner has submitted that pursuant to the Madhya Pradesh Transit (Forest Produce) Rules, 2000, the Government of Madhya Pradesh vide its notification dated 28.5.2001 levied a transit fee of Rs. 7 per metric tonne on various minerals including coal produced from forest land and dispatched. Aggrieved by the said notification, Northern Coalfields, South Eastern Coal fields, NTPC, Hindalco, Century Textiles and others filed Writ Petitions before the Hon`ble High Court of Madhya Pradesh at Jabalpur challenging the levy of Transit Fee. The Hon`ble High Court in the judgment dated 14.5.2007 declared GoMP's Notification dated 28.5.2001 *ultra vires* and directed GoMP to refund the amount collected as Transit Fees. The bid deadline for Sasan UMPP was 28.7.2007 and the cut-off date for the purpose of change in law was 21.7.2007. The Petitioner has submitted that as on cut-off date, the GoMP Notification dated 28.5.2001 was not valid and therefore, there was no transit fee on the minerals from forest. Accordingly, the Petitioner did not factor the transit fee in its bid. GoMP filed a Special Leave Petition on 3.1.2008 before the Hon`ble Supreme Court challenging the judgement dated 14.5.2007. Hon`ble Supreme Court vide its order dated 7.3.2008 stayed the said judgment dated 14.5.2007 and clubbed the SLPs filed by GoMP with similar appeals arising from the judgement in respect of State of Uttar Pradesh. According to the petitioner, since the Moher Coal Block is situated on forest land, the

Divisional Forest Office, Singrauli levied the transit fee on coal being dispatched from Moher Coal Block. Therefore, Rs. 14.0 crore per annum shall be payable by the distribution companies based on the production schedule as per the approved mining plan. On 22.4.2013 followed by letter dated 27.5.2013, DFO vide its letter dated 22.4.2013, directed the petitioner to provide details of coal despatched and transit fee deposited, and to pay the transit fee within 7 days. The petitioner vide its letters dated 21.5.2013 and 14.9.2013, informed the DFO that since the matter regarding levy of transit fee by Govt. of MP is *sub-judice* before the Hon'ble Supreme Court under Special Leave Petitions Nos. 11367/2007 and 11923/2009 and the Hon'ble Supreme Court had stayed the levy of transit fee by the Government of Uttar Pradesh, in a case involving similar facts and circumstances, not to levy transit fee till disposal of the appeals by Hon'ble Supreme Court. However, on 14.9.2013, to ensure supply of coal to the Project, the petitioner was compelled to pay transit Fee "under protest" to ensure uninterrupted coal supply. Therefore, the petitioner paid Rs. 1 lakh "under protest". Subsequently, the Hon'ble Supreme Court of India vide its interim order dated 29.10.2013 directed as under:

"(a) Government of Uttar Pradesh (GoUP) shall be free to recover transit fee for forest produce removed within the State of Uttar Pradesh at the rate stipulated in the 3rd Amendment to the UP Transit of Timber and Other Forest Produce Rules, 1978.

(b) Any recovery shall remain subject to the ultimate outcome of the petitions pending before the Hon'ble Supreme Court.

(c) In the event of writ petitioners/private parties succeed in their cases, the amount deposited/recovered from them shall be refunded to them with interest at the rate of 9% from the date of deposit till actual refund."

Subsequently, DFO vide its letters dated 9.12.2013 and 18.6.2014 directed the Petitioner to provide details of coal dispatched and transit fee paid. In response, the Petitioner vide its letter dated 10.7.2014, informed the DFO that since the petitioner is already paying royalty on coal in accordance with MMDR Act, transit fee is not applicable to it. However, the Petitioner “under protest” paid a sum of Rs. four lakh towards Transit Fee. DFO vide its letter dated 17.3.2015 informed the petitioner that since the petitioner has not paid the requisite amount of transit fee of Rs. 5.15 crore including interest @ 18% per annum, for the coal produced and despatched from Moher Coal Block till September 2014, its application requesting DFO to release of 83 hectares of forest land has been referred to higher officials for their guidance and action would be initiated accordingly. In response, the Petitioner vide its letter dated 20.5.2015, informed DFO that the transit fee is not applicable on coal despatched from Moher Coal Block as this coal was being transported through an overland conveyor. However, on 17.8.2015, the Petitioner deposited Rs. 4,36,16,107/- “under protest” towards transit fee. The Principal Chief Conservator of Forest, Land Management (PCCF, LM), GoMP vide its letter dated 15.10.2015 informed the Chief Conservator of the Forest, Rewa, with a copy to the petitioner that (a) If the Petitioner doesn't pay the requisite transit fee for a given month within two weeks of the next month, a penal interest at 18% would be charged for the delay, (b) The petitioner should immediately deposit transit fee till June 2015, (c) the petitioner should deposit Rs. 1 crore every month as advance for the transit fee for the next month and balance amount should be paid by the petitioner in the next month failing which penal interest at 18% would be charged for the delay, (d) 83 Ha of forest land would be handed over to the petitioner only once the petitioner deposits the transit Fee till June 2015 with interest. Accordingly, DFO vide its letter dated 9.11.2015 directed the petitioner to pay the transit fee till June 2015 with

interest. The Petitioner has submitted that since the imposition of transit fee has arisen after the cut-off date i.e. 21.7.2007, it amounts to change in law in terms of article 13.1.1 of the PPA. The transit fee amounts to approximately Rs. 14.45 crore till December 2015 and around Rs. 14.0 crore per annum at annual production of 20 MTPA and the Procurers are liable to reimburse the same to the petitioner in terms of article 13 of the PPA. The Petitioner has suggested the following formula for calculation of financial impact on account of levy of transit fee by GoMP:

Impact (In Rs.)= The entire amount that will be paid towards Transit Fee for the coal produced and dispatched from Moher Coal Block since the transit fee was not applicable as on the cut-off date i.e 7 days prior to the bid deadline of 28.7.2007.

18. MPPMCL and HPCC have submitted that the notification dated 28.5.2001 issued by the Govt. of Madhya Pradesh levying the transit fee for coal produced on forest land was set aside by the Hon'ble High Court of Madhya Pradesh. The petitioner cannot assume that the State cannot go in the second appeal. The Petitioner should have factored the said notification dated 28.5.2001 in its bidding. Therefore, the Petitioner's contention that prior to the cut-off date, the levy was held to be illegal and the subsequent stay of the judgment of Hon'ble High Court of Jabalpur by the Hon'ble Supreme Court by its interim order dated 7.3.2008 would fall within the definition of change in law, is wholly untenable. Further, MPPMCL and Rajasthan Utilities have submitted that as per the interim order of the Hon'ble Supreme Court, recovery of transit fee was only applicable to the State of UP and that too under the 3rd Amendment of the UP Transit of Timber and other Forest Produce Rules, 1978. In case of the State of MP, there is no interim order and therefore, the question of claiming any amounts as Change in Law under an interim order does not arise. MPPMCL has further submitted that as per Article 13 of the

PPA, only those decisions of the court are covered under change in law where such court of law is the final authority for such interpretation. In the present case, admittedly, the matter is still pending. The purpose behind the same is that the amounts paid under Change in Law should be final and not subject to change on account of a different decision taken by the courts. It is not a change in the statutory provisions, but only the interpretation of the same and such interpretation should achieve finality before it can be passed on in the Change in Law provision. Therefore, the question of claiming any amounts as a Change in Law under interim order does not arise.

19. The Petitioner has rebutted the contention of the Respondents and has submitted that as on the cut-off date, levy of transit fee was not applicable and the issue was not pending before the Supreme Court. However, subsequent to cut-off date i.e. 21.7.2007, GoMP filed SLP No. 6959 of 2008 and judgment of Hon`ble Jabalpur High Court was stayed by the Supreme Court vide order dated 7.3.2008. Consequent revival of the notification dated 28.5.2001 by the Supreme Court cannot be challenged further. Therefore, levy of forest transit fee qualifies as change in law in terms of Article 13.1.1. (ii) of the PPA. The petitioner was informed that 83 Ha of forest land critical for the current year`s mining plan would be handed over to the petitioner only once the transit fee is deposited by the petitioner. Accordingly, the petitioner has made payments towards transit fee under protest to ensure continued supply of coal for the project. The Supreme Court has permitted the Govt. of Madhya Pradesh to collect transit fee subject to the outcome of the decision in SLP No. 11367 of 2007 and batch matters.

20. We have considered the submissions of the petitioner and the respondents. Government of Madhya Pradesh vide its notification dated 28.5.2001 levied a transit fee of Rs. 7 per metric tonne under the MP Transit (Forest Produce) Rules, 2000. In 2002, Northern Coalfields, South Eastern Coalfields, NTPC, Hindalco, Century Textiles and others filed challenged the said notification dated 28.5.2001 levying of transit fee before Hon`ble High Court of Madhya Pradesh at Jabalpur. Hon`ble High Court vide its judgment dated 14.5.2007 declared the said notification *ultra vires* and directed for refund the collected amount. The cut-off date in terms of the Change in Law provisions of the PPA is 21.7.2007. As on the cut-off date, the notification dated 28.5.2001 issued under MP Transit (Forest Produce) Rules, 2000 was held to be *ultra vires* and therefore, the Petitioner could not be expected to factor the transit fees in the bid. After the cut-off date, Govt. of MP on 3.1.2008 filed a Special Leave Petition before the Hon`ble Supreme Court challenging the judgement dated 14.5.2007. Subsequently, Hon`ble Supreme Court vide its interim order dated 7.3.2008 stayed the judgment of High Court dated 14.5.2007. However, in the case of UP, Hon`ble Supreme Court vide its interim order held that the Government of UP shall be free to recover transit fee for forest produce removed within the State of UP at the rate specified in the third Amendment to the UP Transit of Timber and other Forest Produce Rules, 1978. Based on the said interim order, DFO, Singrauli imposed the transit fee on coal being dispatched from Moher Coal Block. On 22.04.2013, the Divisional Forest Office, Singrauli vide its letters dated 22.4.2013 and 27.05.2013 directed the petitioner to provide details of coal despatched and deposit transit fee. In response, the petitioner vide its letters dated 21.5.2013 and 27.5.2013 informed the DFO that since the matter is *sub-judice* before the Supreme Court, he is not liable to pay transit fee. The Principal Chief Conservator of Forest, Land Management (PCCF, LM),

GoMP vide its letter dated 15.10.2015 directed that if the Petitioner would be liable for penalty for non-deposit of transit fee and further directed for deposit of advance fee for transit of coal.

21. Under Article 13.1.1.(ii) of the PPA, a change in interpretation of any Law by a Competent Court of law, tribunal or Indian Governmental Instrumentality after the cut-off date shall amount to change in law provided such Court of law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation. As a result of interpretation by Hon'ble High Court of MP, the notification dated 25.8.2001 levying the transit fee was set aside. Against the said order, appeal is lying before the Hon'ble Supreme Court and stay has been granted on the judgement of the Hon'ble High Court vide order dated 7.3.2008. As a result, the notification dated 28.5.2001 got revived. This has taken place after the cut-off date and therefore, the liability to pay the transit fees has arisen after the cut-off date. Therefore, we hold that liability of payment of transit fees is covered under Change in Law, subject to final decision of the Hon'ble Supreme Court upholding the notification of Government of Madhya Pradesh. The question is whether the Petitioner is entitled to recover the transit fees pending final decision of the Hon'ble Supreme Court. It is noted that interim permission has been granted by the Hon'ble Supreme Court in the batch of appeals filed by Government UP against the judgement of the Hon'ble High Court of Allahabad. The Government of Madhya Pradesh has been levying the transit fees on the basis of the interim order of the Hon'ble Supreme Court dated 29.10.2013 in case of UP appeals as the appeals filed by the GoMP have been tagged with the said appeals. Therefore, Hon'ble Supreme Court has made the recovery of transit fees during the interim period subject to the ultimate outcome of the petitions filed before it and has further directed that in the event of writ petitioners/private parties succeed in

their cases, the amount deposited/recovered from them shall be refunded to them with interest at the rate of 9% from the date of deposit till actual refund. In terms of the Supreme Court judgement, the Petitioner would get back the money paid to the Government of MP with interest if the judgement of the High Court of MP is upheld. The Petitioner is making payment of transit fee to the Government of MP in pursuance to the notification on transit fee and therefore, the Petitioner is entitled to recover the transit fee paid from the Procurers in proportion to their share in the contracted capacity based on scheduled generation of Sasan UMPP. This payment shall be subject to the final outcome of the appeals pending before the Supreme Court. If the judgement of the High Court is upheld, then the Petitioner shall refund the money collected on account of transit fees with 9% interest from the date of payment till the date of refund.

II. Modifications in the conditions of the Environmental Clearance (EC) issued for expansion of Moher and Moher Extension Coal Block

22. The petitioner has submitted that on 4.6.2008, Ministry of Coal approved the mining plan of Moher Coal Block which envisaged the creation of overburden dump. On the basis of the approved mining plan, Ministry of Environment and Forests vide its letter dated 10.12.2008 granted environmental clearance for the Moher Coal Block for 12 MTPA (normative) with a peak production capacity of 16 MTPA of coal. According to the petitioner, there were no provisions/conditions regarding re-handling of overburden at the end of mining operations in the environment clearance. Subsequently, Ministry of Coal vide its letter dated 2.3.2009 approved the revised mining plan of Moher Coal Block for peak annual output of 20 MT. The petitioner applied to MoEF on 25.2.2014 for approval of expansion under Section 7(ii) of the EIA notification, 2006 of the production capacity of Moher Coal Block. The proposal of

expansion was considered in the 15th EAC meeting and the 25th EAC Meeting. Ministry of Environment, Forest and Climate Change vide its letter dated 30.6.2015 granted approval for expansion of Moher Coal Block from 12 MTPA (normative) to 15 MTPA (normative) and 16 MTPA (Peak) to 20 MTPA (Peak) and imposed two conditions, namely (a) The OB shall be completely re-handled at the end of the mining and the area shall be backfilled up to the ground level and covered with about a meter thick Top soil, and(ii) The CSR cost should be Rs. 5 per tonne of coal produced which should be adjusted as per annual inflation.

23. The petitioner has submitted that currently it is not incurring any costs on account of the re-handling of the OB and is only incurring costs on account of the CSR costs. According to the petitioner, the imposition of Rs. 5 per tonne of coal produced (which should be adjusted as per annual inflation) towards CSR Cost pursuant to the revised EC dated 30.6.2015 will increase current operating cost to the tune of Rs. 10 core per annum based on the production schedule as per approved mining plan and is set to increase annually based on inflation.

24. The Petitioner has submitted that the imposition of new conditions in the environment clearance amounts to change in law and the Petitioner is entitled to be compensated for the same. The Petitioner has suggested the following formula for the same:

Impact (In Rs.)= The entire amount that will be paid towards CSR cost and re-handling of OB at the end of mining pursuant to the new imposition under the revised Environmental Clearance dated 30.6.2015 for coal produced and from Moher Coal Block since no such levy was applicable as on the cut-off date i.e.7 days prior to the bid deadline of 28.7.2007.

25. MPPMCL has submitted that the imposition of cost as CSR does not fall under Article 13.1.1 of the PPA. The liabilities of CSR which is a social obligation statutorily provided cannot be considered for compensation for change in law. The purpose of CSR is to make

commercial entities contribute to the development of the society and to take some responsibility in nation building by contributing to social causes. The liability of the CSR is out of the profit of the company. HPPC has submitted that the petitioner's claim for change in law is to be premised on existing law or policy as on cut-off date and any condition imposed by the environmental authority for grant of EC would not qualify as change in law. HPPC has submitted that since, CSR is the obligation of the specific corporation and is not related to the cost or revenue of business of selling electricity, the petitioner is not entitled for adjustment for the expenditure on CSR. Accordingly, expenses towards CSR cannot be passed on the procurers. HPCC has further submitted that condition of overburden/back filling of area with top soil, cannot be considered a change in law on account of the Commission's order dated 30.3.2015 in Petition No. 6/MP/2013. UPPCL has submitted that any cost incurred by the petitioner towards its CSR liability is required to be charged on the profits of the company in order to comply with the legal requirement under Section 135 (5) of the Companies Act, 2013 for discharging its corporate social responsibility.

26. We have considered the submissions of the petitioner and the respondents. On 4.6.2008, Ministry of Coal approved the mining plan for Moher Coal Block. Based on the said mining plan, on 10.12.2008, MoEF granted EC for the petitioner's Moher Coal Block. However, there were no provisions/conditions regarding re-handling of overburden at the end of mining operations. Even though the production capacity of the mine has increased, there is no increase in the volume of overburden being dumped externally. This aspect was noted in the revised approved mining plan, environmental impact assessment and environment management plan which were submitted for obtaining the environmental clearance for the

revised capacity to MoEF. It is noticed that the re-handling of overburden was never discussed in the 15th EAC meeting and the 25th EAC meeting when the petitioner's proposal for expansion of mine capacity of Moher Coal Block was deliberated upon. On 30.6.2015, MOEF granted approval for expansion of the petitioner's Moher Coal Block from 12 MPTA (normative) to 15 MPTA (normative) and 16 MPTA (Peak) to 20 MPTA (Peak) with the two new specific conditions which are extracted as under:

“xix. The OB shall be completely re-handled at the end of the mining and the area shall be backfilled up to the ground level and covered with about a meter thick top soil.

xxiii. The CSR cost should be Rs. 5 per Tonnes of Coal produced which should be adjusted as per annual inflation.”

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. It is noted that the additional conditions in the EC was for seeking an increase in the capacity from 16 MPTA to 20 MPTA subsequent to the cut-off date for application Change in Law provisions. However, for such increase claimed, additional conditions would not have been imposed. In our view, such additional conditions were not part of the EC dated 10.12.2008 dealing with the capacity of 16 MPTA and it were for increasing in the 20 MPTA capacity. 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. Schedule VII deals with the subjects which may be included by the companies in their corporate social responsibility policies. Ser No.(iv) of Schedule VII provides as under:

“(iv) ensuring environmental sustainability, ecological balance, protection of flora and fauna, animal welfare, agro forestry, conservation of natural resources and maintaining quality of soil, air and water.”

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.

28. As regards the condition regarding complete handling of the overburden and backfilling of the mines upto the ground level, we are of the view that this is part of the mine closure plan which was sanctioned to the Petitioner as the mine lease holder of Moher and Moher Amlori mines. In any case, the Petitioner has submitted that it is not incurring any cost on refilling of overburden.

III. Payment to National Mineral Exploration Trust and Payment to District Mineral Fund

29. The petitioner has submitted that as on cut-off date i.e. 21.7.2007, there was no provision for payment towards National Mineral Exploration Trust and/or District Mineral Fund. On 26.3.2015, the Government of India amended the Mines and Minerals (Development and Regulation) Act, 1957 through the Mines and Minerals (Development and Regulation) Act, 2015 in which Section 9B (Creation of DMF) and Section 9C (Creation of NMET) were introduced. Pursuant to MMDR Amendment Act, on 17.9.2015, Ministry of Mines issued the Mines and Minerals (Contribution to District Mineral Foundation) Rules, 2015 and as per Rule 2 of the said Rules, every holder of a mining lease or a prospecting licence-cum-mining lease shall, in addition to the royalty, paid to the DMF, on amount at the rate of (a) 10% of the royalty paid in terms of the Second Schedule to the Mines and Minerals (Development and Regulation) Act, 1957, in respect of the mining lease or, as the case may be, prospecting licence-cum mining lease granted on or after 12.1.2015; and (b) 30% of the royalty paid in terms of the Second Schedule to the Mines and Minerals (Development and Regulation) Act, 1957, in respect of mining leases granted before 12.1.2015. The petitioner has submitted that the Collector, Singrauli vide its letters dated 23.2.2015 and 15.2.2016 directed the petitioner to deposit an amount equivalent to 30% and 2% of the royalty being paid by it towards DMF

and NMET. The petitioner has submitted that the impact on account of payment towards DMF and NMET is Rs. 72.2 crore and Rs 4.8 crore respectively for the coal dispatched from Moher Coal Block as there is was no DMF and NMET applicable as on the cut of date i.e 7 days prior to the bid deadline i.e 28.7.2007.

30. MPPMCL and Distribution companies of the Rajasthan have submitted that the petitioner's claim for compensation for additional expenditure incurred on DMF and NMET ought not to be allowed as the Petitioner has not submitted any details in this regard. In the absence of complete details of the amounts to be incurred, the statutory basis and the details of assessment etc, the claim including whether it would falls within the purview of the Change in Law provision would arise. Since, the petitioner has given figures based on assumptions without furnishing any actual data, its claims should not be allowed. MPPMCL has further submitted that the formula given by the petitioner for calculation of actual impact is not correct as it is totally, based on assumed figures and actual impact cannot be considered on the bases of such assumed figures. The petitioner before claiming any amounts on royalty, should disclose as to whether any royalty being paid earlier is to be adjusted against the amounts payable or not. If any such amounts are to be adjusted or not to be paid as was applicable in the past, to such extent the benefit need to be passed on to the procurers. Such amounts can under no circumstances be claimed as Change in Law for increase in tariff.

31. HPCC has submitted that Amendment to MMDR Act has to be considered as against the existing obligation of the leaseholder to contribute for interest and benefit of the persons and for areas affected by mining related operation. HPCC has submitted that the leaseholders

have an obligation for rehabilitation and resettlement of the disputed persons as well as for protective measures for affected area. Distribution companies of UP have submitted that the petitioner cannot claim the amount without furnishing the proof of actual royalty paid by the petitioner under MMDR Act on the basis of which Rs. 72.2 crore has been worked out towards DMF and Rs. 4.8 crore has been calculated to be the amount payable to NMET.

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. In order to take care of the concern of the Procurers, the Petitioner is directed to ensure that payment to these funds does not relieve the Petitioner from any of its existing liability which the Petitioner is either required to meet out of the bid tariff or any expenditure allowed under Change in Law earlier. The Petitioner shall be required to furnish a certificate in this regard to the Procurers which 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 Procurers.

IV. Carrying cost:

34. The learned senior counsel for the petitioner requested that the petitioner should be allowed interest/carrying cost for the expenditure incurred on account of delay in recovery of amount already paid towards Change in Law events so that its economic position is restored. The respondents have submitted that there is no provision for carrying cost in the PPA. In support of this contention, the Respondents have relied upon the judgement in the case of National Thermal Power Corporation Ltd v. Madhya Pradesh State Electricity Board Ltd &Ors. [(2011) 15 SCC 580] wherein in the claim of the DISCOM for interest on over-paid amount was rejected by the Hon'ble Supreme Court. 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.

Mechanism for compensation on account of Changes in Law during Operation Period

35. 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 and 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 be put on COD during that year on normative availability. The petitioner has further submitted that the petitioner may be permitted to claim from the procurer's compensation that would be equivalent to the financial impact of the change in law on the cost

and revenue of the petitioner. The Petitioner has further submitted as under:

(a) The peak tariff of the project is approximately Rs 1.32 per unit. At 80% Normative Availability of total capacity, the total units will be about 26,086 million units.

(b) Consequently, the average aggregate monthly bill based on the aforesaid Normative Availability will be Rs. 286.9 crore. The Letter of Credit amount which is 1.1 times the estimated average monthly billing based on Normative Availability is about Rs. 315.6 crore.

(c) As per Article 13.2 (b) of the PPA, the threshold amount beyond which compensation for change in law can be claimed is 1% of the aggregate letter of credit amount for a Contract year which will amount to about Rs. 3.1 crore.

(d) Since the aggregate amount claimed for Changes in Law is approximately Rs 101 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.

36. 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 revenues or cost shall be admissible to the petitioner. Moreover, the compensation shall be payable only if and for 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. 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/units of the generating stations. 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 prescribed to be adopted for payment of compensation due to Change in Law events allowed as per Article 13.4.2 of 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 procurers or from the date of Change in Law, whichever is later.

(b) The imposition of new conditions in Environmental clearance and National Mineral Exploration Trust and District Mineral Foundation shall be computed based on actual subject to ceiling of coal consumed corresponding to scheduled generation and shall be payable by the beneficiaries on pro-rata based on their respective share in the scheduled 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 the Procurers during the year. The reconciliation statement duly certified by Auditor shall be kept in possession by the petitioner so that 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 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 13.2 (b) of the PPA for the subsequent period as well.

37. The Commission has not computed the threshold value for eligibility of getting compensation due to Change in Law during Operation period. However, the petitioner shall be eligible to get compensated if the impact due to Change in Law exceeds the threshold value as per Article 13.2(b) during Operation period. Accordingly, the compensation amount allowed shall be shared by the Procurers based on the

scheduled energy.

Summary:

38. 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 events during Operating Period	Decision
Levy of Forest Transit Fee by the Government of Madhya Pradesh.	Allowed, subject to conditions in para 21 of this order
Imposition of a new condition in the Environmental Clearance	Not Allowed
Payment to National Mineral Exploration Trust	Allowed
Payment to District Mineral Foundation	Allowed
Carrying cost	Not Allowed

39. This order disposes of Petition No. 16/MP/2016.

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

sd/-
(A. S. Bakshi)
Member

sd/-
(A. K. Singhal)
Member

sd/-
(Gireesh B. Pradhan)
Chairperson