CENTRAL ELECTRICITY REGULATORY COMMISSION

NEW DELHI

Petition No: 229/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: 19th of December, 2017

In the matter of

Petition under Section 79(1) (b) read with Section 79(1) (f) of the Electricity Act, 2003 inter alia seeking compensation on account of occurrence of 'Change in Law events' and/or Force Majeure events relating to Power Purchase Agreement dated 19.8.2013 entered into between the Petitioner and the Respondent.

And

In the matter of

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

.....Petitioner

Vs

1. Tamil Nadu Generation and Distribution Corporation Limited
6th Floor, Eastern Wing
144, Anna Salai,
Chennai-600002,
Tamil Nadu.

2. Prayas (Energy Group)
Prayas (Energy Group) Unit II A& B,Devgiri,
Joshi Railway Museum Lane,
Kothrud Industrial Area,Kothrud
Pune, Maharastra-411038

3. Rajasthan Urja Vikas Nigam Limited (RUVNL)

VidyutBhawan, Janpath Jyoti Nagar, Jaipur,
Jaipur,Rajasthan – 302005.

4. PTC India Limited
2nd Floor, NBCC Tower,
15 Bhikaji Cama Place, New Delhi. **... Respondents**

Parties Present:

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

ORDER

The Petitioner, DB Power Limited, has filed the present petition seeking compensation on account of change in law and force majeure events as per the provisions of the PPA dated 19.8.2013 entered into between the petitioner and Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO).

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

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

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

Background of the Case:

4. In the year 2012, TANGEDCO, invited a bid for supply of power on long term basis through tariff based competitive bidding process under Case-1 bidding procedure for meeting its base load power requirements. In this regard, TANGEDCO issued a Request for Procurement ('RFP') dated 21.12.2012. The Bid Deadline date was 6.3.2013. Pursuant to the bidding process, the Petitioner was selected by TANGEDCO for sale and supply of electricity for aggregate contracted capacity of 208 MW to TANGEDCO. The Petitioner entered into the following long-term PPAs for supply of power from the Power Project:

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

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

(c) Long Term PPA dated 1.11.2013 entered into with Rajasthan Discoms for supply of 250 MW RTC power. The supply under this PPA has become effective from 30.11.2016.

5. The PPA executed on 19.8.2013 between the Petitioner and TANGEDCO for supply of 208 MW power is through linkage coal from South Eastern Coalfields Limited ('SECL'). The PPA came into effect from the date of its execution i.e. from 19.8.2013. As per the PPA, the Petitioner is required to supply power at the Delivery point which is the periphery of TANGEDCO and TANGEDCO is under a corresponding obligation to evacuate the power

from the said delivery point. The Petitioner has been supplying power to TANGEDCO from its generating station since 1.8.2015 in terms of Article 4.1.1 of the PPA.

6. The Chronological dates of events with regards to TANGEDCO PPA and Rajasthan DISCOMS PPA are as under:

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

7. The Petitioner has sought adjustment of tariff on account of Change in Law and Force Majeure events after 27.2.2013 affecting the power project during the Operating Period in order to restore the Petitioner to the same economic position as if the events have not occurred in terms of TANGEDCO PPA. The Petitioner has sought compensation for Change in Law and Force Majeure events during the Operating period on account of the following events which have impacted the cost and revenue of supply of power from the power project to the procurer:

(a) Increase in Royalty Rate on Coal
(b) Increase in sizing charges on Coal
(c) Increase in Surface Transportation Charges
(d) Increase in Forest Tax
(e) Increase in Chhattisgarh Environment Cess/Chhattisgarh Environment Tax
(f) Increase in Chhattisgarh Industrial Development Cess/Chhatisgarh Development Tax
(g) Revision in rate of Central Excise Duty on account of addition in components
(h) Increase in Clean Energy Cess
(i) Increase in Busy Season Charges on transportation of coal by rail
(j) Levy of Coal Terminal Surcharge for traffic of coal for the distance beyond 100 km

(k) Withdrawal of short Lead concession in charging of freight for all tariff including coal booked upto 100 km

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

(m) Consequent increase in Value Added tax/CST, Entry Tax, Development Surcharge and Niryatkar

(n) Additional cost towards Fly Ash Transportation

(o) Increase in rate of Chhattisgarh Electricity Duty

8. The Petitioner has submitted that during the period commencing from 1.8.2015 upto 31.7.2016, it has incurred additional expenses of Rs. 90.31 crore in generating and supplying power to TANGEDCO under the PPA due to the Change in Law and Force Majeure events. The Petitioner has submitted that as per the provisions of the PPA, the Petitioner is entitled to payment of additional cost already incurred as well as to additional cost which shall be incurred in future due to occurrence of the Force Majeure events. The petitioner has computed the impact on account of the Change in Law Events as under:

S. No.	Events	Claimed under	Financial impact (Rs. in crore)
1	Increase in Royalty Rate on Coal	Change in law and Force Majeure	8.91
2	Increase in Sizing Charges on Coal	Change in law and Force Majeure	2.04
3	Increase in Surface Transportation Charges	Change in law and Force Majeure	0.4
4	Increase in Forest Tax	Change in law and Force Majeure	0.01
5	Increase in Chhattisgarh Environment Cess/ Chhattisgarh Environment Tax	Change in law & Force Majeure	0.23
6	Increase in Chhattisgarh Industrial Development Cess/ Chhattisgarh Development Tax	Change in law & Force Majeure	0.23

S. No.	Events	Claimed under	Financial impact (Rs. in crore)
7	Revision in rate of Central Excise Duty on account of addition in components	Change in law & Force Majeure	3.26
8	Increase in Clean Energy Cess	Change in law & Force Majeure	28.12
9	Increase in Busy Season Charges on transportation of coal by rail	Change in law & Force Majeure	0.55
10	Levy of Coal Terminal Surcharge for traffic of coal for the distance beyond 100 Km	Change in law & Force Majeure	NIL until 31.07.2016 as these charges have been levied from 31.07.2016
11	Withdrawal of short lead concession in charging of freight for all tariff including coal booked upto 100 Km	Change in law & Force Majeure	1.26
12	Increase in Service Tax on transportation of coal by rail and road	Change in law & Force Majeure	0.63
13	Consequent increase in Value Added Tax / CST, Entry Tax, Development Surcharge and Niryatkar	Change in law & Force Majeure	3.85
14	Additional cost towards Fly Ash Transportation	Change in law & Force Majeure	4.36
15	Increase in rate of Chhattisgarh Electricity Duty	Change in law & Force Majeure	6.61
16	Additional cost due to reduction in supply of coal from SECL	Change in law & Force Majeure	29.84
Total			**90.30**

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

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

> "(a) Declare that the events enumerated in Paras 6 and 7 of the Petition constitute Change in Law events as per the provisions of the PPA and that the Petitioner is entitled to be restored to the same economic condition prior to occurrence of the said Changes in Law events;
>
> (b) Direct the Respondent to make payment of Rs. 90.31 Cr. to the Petitioner towards the additional expenditure incurred by the Petitioner on account of the said Change in Law events, in supplying power to the Respondent under the PPA from 01.08.2015 to 31.07.2016 along with interest @ 1.25% per month from the date(s) on which the said amount(s) became due to the Petitioner till the actual realization of the same;
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> (c) Direct the Respondent to continue to make payments accrued in favor of the Petitioner on account of Change in Law events enumerated in Paras 6 and 7 of the Petition from 01.08.2016 up till the effect of the said Change in Law events or validity of the PPA;
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> (d) Without prejudice and strictly in alternative to prayer (a) to (c), declare that the events enumerated in Paras 6 and 7 of the Petition constitute Force Majeure events as per the provisions of the PPA and that the Petitioner is entitled to be restored to the same economic condition prior to occurrence of the said Force Majeure events;
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> (e) Direct the Respondent to make payment of Rs. 90.31 Cr. or any other amount determined to be due and payable to the Petitioner towards the additional costs/expenditure incurred by the Petitioner on account for the said Force Majeure events, in supplying power to the Respondent under the PPA from 01.08.2015 to 31.07.2016 on account of aforementioned Force Majeure events along with interest @ 1.25% per month from the date(s) on which the said amount became due to the Petitioner till the actual realization of the same;
>
> (f) Direct the Respondent to continue to make payments accrued in favor of the Petitioner on account of Force Majeure events enumerated in Paras 6 and 7 of the Petition from 01.08.2016 uptill the effect of the said Force Majeure events or validity of the PPA;
>
> (g) Without prejudice and strictly in alternative to prayer (a) to (f), declare that the Petitioner is entitled to compensatory tariff over and above the tariff under the PPA on account of the events enumerated in Paras 6 and 7 of the Petition;
>
> (h) Direct the Respondent to pay an amount of Rs 90.31 Cr. as a consequence to prayer (g) above and further direct the Respondent to continue to make payments accrued in favour of the Petitioner on account of factors enumerated in Paras 6 and 7 of the Petition as a consequence to prayer (g) above;

(i) In the interim, pending final adjudication of the present Petition, direct the Respondent to make payment of Rs. 81.28 Cr. i.e.90% of the already incurred amount by the Petitioner from 01.08.2015 to 31.07.2016 towards supply of power to the Respondent in order to ease the cash crunch faced by the Petitioner."

11. The Petition was admitted on 8.12.2016 and notices were issued to the Respondents and Prayas Energy Group (Prayas) to file their replies to the petition. Replies to the petition have been filed by TANGEDCO vide affidavits dated 28.6.2017 and 23.9.2017 and Prayas vide affidavit dated. 25.9.2017. The Petitioner has filed its rejoinders to the said replies.

12. TANGEDCO, vide its reply dated 28.6.2017, has submitted as under:

(a) The tariff was adopted by the State Commission under Section 63 of the Electricity Act, 2003. There is no statutory determination of tariff by the State Commission. The provisions of Section 79(1)(b) are not applicable to tariff adopted by the Commission under Section 86(1)(b), which was determined through transparent process of bidding. Since, Section 79 (1)(b) and (f) of the Act deals with determination and regulation of tariff determined under Section 62 and not under Section 63 of the Electricity Act, 2003. Thus, the Petition is not maintainable.

(b) The PPA entered into with the Petitioner was subsequent to competitive bidding and the tariff was adopted by Tamil Nadu Electricity Regulatory Commission (TNERC) under Section 63 of the Act. The quoted tariff per unit of the Petitioner was made after taking into account all eventualities. TANGEDCO entered into the PPA taking into consideration the impact of the proposed tariff on its consumers. The escalable energy charge components, raise in duties and levies are taken care in CERC escalation percentage published once in 6 months vide Commission`s Notification No. EO/2/2016 dated 6.10.2016.

(c) The clauses of PPA entered into between the Petitioner and TANGEDCO under the provisions of Contract Act, 1956 are subject to the provisions of the Act. The Act envisages to safeguard the consumer’s interest and at the same time, recovery of the cost of electricity in a reasonable manner. The levies admittedly were not part of cost of electricity generation at the time of entering into the PPA. The levies are due to various promulgations, ordinances and enactments of the State and Central Government which are subject to the provisions of the Act. The purpose of long term planning for procurement of electricity by distribution licensees, keeping in view its economic viability, would be rendered otiose if all additional costs are allowed to the generator which causes an undue burden on the consumers of TANGEDCO.

(d) Article 2.4.1.1 (B) (xi) of the RFP provides that the bidder shall take into account all costs including capital and operating costs, statutory taxes, levies, duties while quoting such tariff and it also includes any applicable transmission costs and transmission losses from the generation source up to the Interconnection point. Therefore, the Petitioner is not entitled for any relief as prayed in the petition. Availability of the inputs necessary for supply of power shall be ensured by the seller and all costs involved in procuring the inputs (including statutory taxes, duties, levies thereof) at the plant location must be reflected in the quoted tariff.

(e) In pursuance to clause 5.6 (vi) of the Ministry of Power Notification on “Guidelines for determination of Tariff bidding process for procurement of power by Distribution Licensees” dated 19.1.2005 as amended from time to time, the Commission notifies the escalation rates for the purpose of payment for procurement of power by Distribution Licensees as per the PPA entered into under the guidelines. The interest of the generators is taken care of by the said indices.

(f) The power available at the IEX is on an average of Rs. 3.04 paise and varies from Rs. 2.50 to Rs. 3.00. The power under long term contract, which is Rs. 3.95 paise, is costlier than the IEX power. If the levies pursuant to change in law are permitted, the cost of power contracted with generators pursuant to bidding will have no sanctity and the price per unit under the contract will keep on increasing on the coming of every new law imposing a tax or levy affecting the generation of electricity which will cause unforeseen, undue burden on the consumers of TANGEDCO.

(g) Under Case 1 bidding, it is the responsibility of the project developer to arrange for coal and the project developer is merely required to indicate the coal linkage in its bid in support of it being a serious bidder to supply on sustained basis. The procurer does not take any responsibility in so far as fuel is concerned. Therefore, TANGEDCO is responsible only to the extent of payment of charges in accordance with the PPA for power supplied to it.

13. The Petitioner, vide its rejoinder to the reply filed by TANGEDCO has submitted as under:

(a) The tariff has been adopted by the State Commission under Section 63 of the Act and not under Section 86(1)(b) of the Act. It is again erroneous on the part of TANGEDCO to contend that Section 79(1)(b) and (f) deal with determination and regulation of tariff determined under Section 62 and not to tariff discovered under Section 63.

(b) The escalation percentage/index published by this Commission does not take into consideration the increase in the expenditure being incurred by the Petitioner in generation and supply of power on account of change in law and force majeure events under the PPA and as set out in the petition.

(c) The Act provides for protecting and safeguarding the interest of the generators and taking measures conducive to development of electricity industry. Therefore, interest of both the consumer as well as the generator is paramount. The claims of the Petitioner on account of increase in the expenditure for generation and supply of electricity due to change in law/force majeure events are within the confines of the PPA executed between the parties and therefore, the petitioner is entitled to the said claims.

(d) Clause 2.4.1.1 (B) (xi) of the RfP has no application to the present case as the said provision does not and cannot envisage and pertain to any change in the taxes, levies and duties occurring after the relevant date i.e. after seven days prior to the bid submission date.

(e) The Hon'ble Supreme Court in its judgment dated 11.4.2017 in Civil Appeal Nos. 5399-5400 of 2016 (Energy Watchdog Vs. Central Electricity Regulatory Commission and Others) has held that the MOC notification dated 26/31.7.2013 reducing the quantity of coal to be supplied under the FSA amounts to change in law. The effect of the notification is also captured in the revised tariff policy dated 28.1.2016.

14. Prayas Energy Group (Prayas), vide its reply dated 25.9.2017, has submitted as under:

(a) Supply of power does not include all activities of the generator incidental to generation of power such as procurement of inputs, etc. Taxes on supply of power are taxes on sale of power by the generator to the procurer. The term 'supply' is defined in the Electricity Act, 2003 under Section 2 (70) specifically as sale of power.

(b) The Commission vide order dated 1.2.2017 in Petition No. 8/MP/2014 and 7.4.2017 in Petition No. 112/MP/2016 has allowed taxes other than those on supply of power as Change in Law and the said order has been challenged before the APTEL vide Appeal No. 1476 of 2017. Similar issue is also pending before the APTEL. Only the impact of change in tax rate

is to be considered as change in law and any increase due to increase in commercial charges cannot be included.

(c) Article 9.3 of the PPA defines Force Majeure and is the controlling part which sets out the scope and extent of force majeure agreed to between the parties. Article 9.4 of the PPA provides for exclusions from force majeure, even if an event is a force majeure under Article 9.3, it will still be excluded from being considered so for the purpose of the PPA, if it falls within the scope of any of the specified exclusions. The term 'Prevented' used in Article 9.3 has a definitive meaning, namely that the generator is not in a position to perform. Any increase in price of coal neither prevents nor delays the performance of the obligation. Any impact of the increase in price on the economic viability of the PPA is a commercial risk undertaken by the Petitioner.

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

(e) The amount becomes due only after decision of the Commission and raising of Supplementary Bill by the Petitioner in accordance with Article 10.5.2. There is no delayed

payment surcharge for any amount until such bill is raised and thereafter, any surcharge is as per Article 8 of the PPA.

15. The Petitioner, vide RoP for the hearings dated 9.5.2017 and 27.7.2017, was directed to file the following information:

a) Details of % of ash utilization such as brick manufacturing, road construction projects and soil conditioner in agriculture activity, etc.

b) The methodology/ procedure followed for disposal of ash. Is there a laid downs ystem for disposal of ash? If so, the same needs to be provided;

c) Details of ash transportation, ash transportation cost, income from sale of ash, agency to whom ash was sold, etc. in the format given under Annexure-A attached with this ROP;

d) Under which head of account, transportation expenditure is booked and whether cost of such transportation was being recovered in tariff;

e) Whether the petitioner is maintaining a separate account for revenue earned from sale of ash as per the notification of MoEF. If yes, the total revenue accumulated and the expenditure incurred from the same account till date. If not, the reason for not maintaining such separate account; and

f) The impact of ash utilization on land acquisition for Ash Dyke, its maintenance cost (O&M) including consumption of water, capital expenditure, etc.

g) Copy of contract agreements with the agencies who have taken ash from the power plant from 30.11.2016 to 31.3.2017 along with the copy of Expression of Interests invited by the Petitioner for transportation of fly ash;

h) Detailed justification of the difference in the rate of ash transportation cost submitted by the Petitioner in both the Petitions, whereas the agencies off-taking the ash and the distance of supply of ash from power plant are the same.

16. The Petitioner, vide its affidavits dated 26.7.2017 and 4.9.2017, has filed the information called for.

17. During the course of hearing, learned counsel for Prayas submitted that with respect to certain claims, the Petitioner has not annexed the appropriate Notifications and in respect of

additional cost incurred due to reduction in supply of coal, the petitioner has annexed the Notifications by Coal India Subsidiary and not the actual law. Learned counsel for Rajasthan Discoms submitted that the PPA originally entered into between the Petitioner and the Rajasthan Discoms was of 410 MW, which the Rajasthan Electricity Regulatory Commission vide order dated 22.7.2015 reduced to 250 MW and no claim can be made by the Petitioner beyond the same to be passed on to Rajasthan Discoms. Learned counsel further submitted that the Petitioner has filed an Appeal against the said order which is pending before the APTEL. Learned counsel submitted that the Petitioner has not provided any actual data of shortage in supply of linkage coal and the Petitioner should produce the details of the coal actually supplied by SECL to the Petitioner on month to month basis. Learned counsel for TANGEDCO submitted that under the provisions of RfP and PPA, the Petitioner had factored in the capital and operating cost including all taxes, levies and duties in the quoted tariff for supply of power. With regard to Capacity and Energy charges, the petitioner has quoted non-escalable components for capacity and energy apart from escalable components. Therefore, the Petitioner has assumed all risks with regard to the operating cost of the project. As per Article 15.18.1 of the PPA, the seller shall bear and pay all statutory taxes, duties, levies and cess levied on the seller, contractors or their employees, that are required to be paid by the seller as per the law in relation to the execution of the agreement and for supplying power as per the terms of this Agreement. As per Article 15.18.2, the procurer shall be indemnified and held harmless by the seller against any claims that may be made against procurer in relation to the matters set out in Article 15.18.1. Therefore, the PPA absolves the procurer from all future tax, duties, cess which the seller will be liable to pay while supplying power to the procurer.

18. The Petitioner vide RoP for the hearing dated 27.9.2017 was directed to file the following information along with the relevant Notifications in respect of Change in Law events claimed

by the Petitioner and the information sought by Prayas in Para 76 of its reply dated 25.9.2017:

a) Certificate from SECL regarding availability of quantum of coal for dispatch to the petitioner and actual supply of coal during the affected period i.e. from 1.8.2015 to 31.3.2017.

b) Detailed note on order booking and delivery of coal clearly bringing out making requisition/requirement of coal to the fuel supplier, consent of the fuel supplier for quantum of coal/allotment of rakes and specific indent and offer made to railway for supply of coal and actual supply of coal on daily basis. The petitioner should also furnish the details of one year data for 2016-17 on monthly basis in terms of the Annexure annexed with the RoP.

c) Copy of the Notice inviting tender along with the detailed Terms and Conditions invited by the petitioner for lifting of Fly Ash and Transportation/Disposal of Fly Ash.

d) Copy of the documents and the detailed quotation quoted by the agencies showing their interest for participation in the respective EoI for lifting of Fly Ash & Transportation /Disposal of Fly Ash.

19. The Petitioner, vide its affidavits dated 27.10.2017 and 2.11.2017 has filed the information called for. The Petitioner and TANGEDCO have filed written submissions which have been dealt with in succeeding paragraphs.

Analysis and Decision :

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

(a) Whether the Commission has the jurisdiction to adjudicate the dispute between the Petitioner and the Respondents with regard to change in law and force majeure events. ?

(b) What is the scope of Change in law and force majeure events under the PPA?

(c) Whether compensation claims are admissible under Change in Law and/or Force Majeure in the PPA?

(e) Mechanism for processing and reimbursement of admitted claims under Change in Law and/or Force Majeure.

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

21. The chronological dates of events with regard to TANGEDCO PPA are as under:

Power Supply to	TANGEDCO (208 MW)
Cut-off date	27.2.2013
Bid Submission date	6.3.2013
PPA/ PSA executed on	19.8.2013
Start of supply of power	1.8.2015

Issue No.1: Whether the Commission has the jurisdiction to adjudicate the dispute between the Petitioner and the Respondents with regard to change in law and force majeure events?

22**.** The Petitioner has submitted that in terms of Section 79 (1) (b) and (f) of the Act, the Commission has the jurisdiction to regulate the tariff of the generating company which has entered into or otherwise has a composite scheme for generation and sale of electricity to more than one State. The Petitioner has submitted that it is a generating company within the meaning of Section 2(28) of the Electricity Act, 2003 and is supplying 208 MW power to TANGEDCO in the State of Tamil Nadu under the PPA from the State of Chhattisgarh besides supplying 5% of the net generated power i.e. to the State of Chhattisgarh under Clause 3.1 (ii) of the Implementation Agreement dated 6.8.2009 entered into between the Petitioner and the State of Chhattisgarh. The Petitioner has submitted that it also has entered into a PPA dated 1.11.2013 with Rajasthan Discoms for supply of power from the generating station situated in the State of Chhattisgarh. Therefore, the Commission has jurisdiction to adjudicate the present matter under Section 79(1)(b) read with Section 79(1)(f) of the Act. The Petitioner has placed its reliance on the judgment of the Hon'ble Supreme Court dated 11.4.2017 in Civil Appeals Nos. 5399-5400 of 2016 [Energy Watchdog and other Vs. CERC and others]. The Petitioner has submitted that the various changes in law and force majeure events claimed by the Petitioner in the present petition pertaining to TANGEDCO PPA and

with regard to Rajasthan PPA, a separate petition has been filed to claim various change in law and force majeure events.

23. TANGEDCO has submitted that in the present case, the tariff was adopted by the State Commissions under Section 63 of the Electricity Act, 2003. There is no statutory determination of tariff by the State Commission. The provisions of Section 79(1) (b) are not applicable to tariff adopted by the Commission under Section 86(1)(b), which under Section 86 (1)(b), was determined through transparent process of bidding. Therefore, the petition is not maintainable under Section 79 (1)(b) and (f) of the Act. TANGEDCO has further submitted that the PPA entered with the Petitioner was subsequent to competitive bidding and the tariff was adopted by Tamil Nadu Electricity Regulatory Commission (TNERC) under Section 63 of the Act.

24. We have considered the submissions of the Petitioner and TANGEDCO. In addition to TANGEDCO, the Petitioner has entered into an Implementation Agreement dated 6.8.2009 with the State of Chhattisgarh for supply of 5% of the net generating power and has also entered into a Long Term PPA dated 1.11.2013 with Rajasthan Discoms for supply of 250 MW RTC power. The Hon`ble Supreme Court vide its judgment dated 11.4.2017 in Civil Appeal Nos. 5399-5400 of 2016 (Energy Watchdog Vs. Central Electricity Regulatory Commission) has held that if a generating company is having a scheme for generation and sale of electricity in more than one State, then it is enough to construe that the generating company is having composite scheme. The Relevant portion of said judgment is extracted as under:

> "22. The scheme that emerges from these Sections is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79 (1) itself in sub-sections (c), (d) and (e) speaks of inter-State transmission and inter-State

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

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

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

25. The claims of the Petitioner in the present petition pertain to Change in law and/ or Force Majeure events related to the TANGEDCO PPA dated 19.8.2013. Article 10.4 and Article 9.5 of the PPA envisages for notification of Change in Law and Force Majeure events, respectively to the Procurer. Article 10.4 and Article 9.5 are extracted as under:

"10.4 Notification of Change in Law

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

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

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

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

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

9**.5 Notification of Force Majeure Event**

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

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

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

26. The Petitioner has submitted that it informed TANGEDCO about the occurrence of events under Change in Law and/or Force Majeure and their impact on the supply of power in terms of the PPA. The Petitioner has issued the following notices to TANGEDCO:

(a) Notice dated 17.12.2015 regarding change in Law events for Rate of Royalty, Sizing Charges, Surface Transportation Charges, Forest Tax, Chhatisgarh Development Tax, Chhattisgarh environment tax, Excise Duty, Application of Excise Duty, Clean Energy Cess

on Coal, Busy Season Surcharge, Service Tax on Transportation by Rail, Electricity Duty, VAT, Entry Tax and Development Surcharge.

(b) Notice dated 17.3.2016 regarding Increase in Clean Energy Cess and short Supply of Coal under Fuel Supply Agreement.

(c) Notice dated 6.7.2016 regarding Change in Service Tax.

(d) Notice dated 13.9.2016 regarding force majeure event on account of additional expenditure on account of new emission standards as per MoEF Notification dated 7.12.2015, increase in Service Tax for road transportation, reduction in abatement for road transportation, additional payment of CST, additional payment of NiryatKar, additional fly ash disposal cost, withdrawal of short lead concession in charging of freight for all tariff and levy of coal terminal surcharge.

27. We have considered the submissions of the Petitioner. Under Article 10.4 of the PPA, the Petitioner is required to give notice about occurrence of Change in Law events as soon as reasonably practicable after being aware of such events which occurred after 27.2.2013 (i.e. 7 days prior to the Bid deadline date). The Petitioner has given notices dated 17.12.2015, 17.3.2016, 6.7.2016 and 13.9.2016 to TANGEDCO indicating the above Change in law events. Further, the events under Force Majeure (Article 9.5 of the PPA) have been indicated by the Petitioner only in its letter dated 13.9.2016. In the said notices, the Petitioner has apprised TANGEDCO about the occurrence of Change in Law and/or Force Majeure events and the impact of such events on tariff. TANGEDCO has not responded to such notices of the Petitioner. In view of the above, it can be inferred that Petitioner has complied with the requirement of notice under Articles 9.5 and 10.4 of the PPA.

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

28. The claims of the Petitioner are with respect to events under Change in Law and Force Majeure under Article 10 and 9 of the PPA. Article 10 of the PPA respectively between the

Petitioner and TANGEDCO deals with events of Change in Law during the operating period and is extracted for reference as under:

> "10.1.1 "Change in Law" means the occurrence of any of the following events after the Cut - off date, which is seven (7) days prior to the Bid Deadline resulting into any additional recurring/ non-recurring expenditure by the Seller or any income to the Seller:-
>
> • The enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law.
>
> • A change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law.
>
> • The imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier
>
> • a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the Seller;
>
> • Any change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of this Agreement.
>
> but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI Charges or frequency intervals by an Appropriate Commission or (iii) any change on account of regulatory measures by the Appropriate Commission including calculation of Availability.
>
> 10.3 Relief for Change in Law
> ************
> 10.3.2 During Operating Period
>
> The compensation for any decrease in revenue or increase in expenses to the Seller shall be payable only if the decrease in revenue or increase in expenses of the Seller is in excess of an amount equivalent to 1% of the value of the Letter of Credit in aggregate for the relevant Contract Year.
>
> 10.3.3 For any claims made under Article 10.3.1 and 10.3.2 above, the Seller shall provide to the Procurer and the Appropriate Commission documentary proof of such increase /decrease in cost of the Power Station or revenue/expense for establishing the impact of such Change in Law.
>
> 10.3.4 The decision of the Appropriate Commission, with regards to the determination of the compensation mentioned above in Articles 10.3.1 and 10.3.2, and the date from which such compensation shall become effective, shall be final and binding on both the Parties subject to right of appeal provided under applicable Law."

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

> "14.3 Dispute Resolution
>
> 14.3.1 Dispute Resolution by the Appropriate Commission
>
> 14.3.1.1 (a) Where any Dispute arising from a claim made by any Party for any change in or determination of the tariff or any matter related to tariff or claims made by any party which partly or wholly relate to any change in the Tariff or determination of any of such claims could result in change in the Tariff, shall be submitted to adjudication by the Appropriate Commission. Appeal against the decisions of the Appropriate Commission shall be made only as per the provisions of the Electricity Act, 2003, as amended from time to time."

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

(a) Any enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any law, or

(b) Any change in interpretation of any Law by a Competent Court of law, Tribunal or Indian Governmental Instrumentality acting as final authority under law for such interpretation, or

(c) Imposition of a requirement for obtaining any consents, clearances and permits which was not required earlier.

(d) Any change in the terms and conditions or inclusion of new terms and conditions prescribed for obtaining any consents, clearances and permits otherwise than the default of the settler.

(e) Any change in the tax or introduction of any tax made applicable for supply of power by the Petitioner to TANGEDCO.

(f) Such Changes (as mentioned in (a) to (c) above) result in additional recurring and non-recurring expenditure by the seller or any income to the seller.

(g) The purpose of compensating the Party affected by such Change in Law is to restore through Monthly Tariff Payments, to the extent contemplated in this Article 10, the affected Party to the same economic position as if such "Change in Law" has not occurred.

(h) The Appropriate Commission shall determine the compensation for any increase/decrease in revenue or cost to the Seller and effective date of such compensation which shall be final and binding on both the Petitioner and TANGEDCO, subject to right of approval provided under Electricity Act, 2003.

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

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

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

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

As per the above definition, law shall include (a) all laws including electricity laws in force in India; (b) any statute, ordinance, regulation, notification, code, rule or their interpretation by Government of India, Government of Tamil Nadu or Government of Chhattisgarh (since the project is located in Chhattisgarh) or any Ministry, Department, Board, Body corporate agency or other authority under such Governments; (c) all applicable rules, regulations, orders, notifications by a Government of India Instrumentality; and (d) all rules, regulations,

decisions and orders of the Appropriate Commission. If any of these laws affects the cost of generation or revenue from the business of selling electricity by the seller to the procurers, the same shall be considered as change in law to the extent it is contemplated under Article 10 of the PPA.

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

> “ARTICLE 9: FORCE MAJEURE
>
> 9.1 Definition
>
> 9.1.1 In this Article, the following terms shall have the following meanings:
>
> 9.2 Affected Party
>
> 9.2.1 An affected Party means the Procurer or the Seller whose performance has been affected by an event of Force Majeure.
>
> 9.2.3 An event of Force Majeure affecting the CTU/ STU or any other agent of the Seller, which has affected the transmission facilities from the Power Station to the Delivery Point, shall be deemed to be an event of Force Majeure affecting Seller.
>
> 9.2.4 Any event of Force Majeure affecting the performance of the Seller’s contractors shall be deemed to be an event of Force Majeure affecting Seller only if the Force Majeure event is affecting and resulting in:
>
> a) late delivery of plant, machinery, equipment, materials, spare parts, Fuel, water or consumables for the Power Station; or
>
> b) a delay in the performance of any of the “Seller’s” contractors.
>
> 9.2.5 Similarly, any event of Force Majeure affecting the performance of the Procurer’s contractor for setting up or operating Interconnection Facilities shall be deemed to bean event of Force Majeure affecting Procurer only if the Force Majeure event is resulting in a delay in the performance of Procurer’s contractors.
>
> 9.3 Force Majeure
>
> 9.3.1 A 'Force Majeure' means any event or circumstance or combination of events and circumstances including those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:
>
> Any restriction imposed by PGCIL in scheduling of power due to breakdown of transmission /grid constraint shall be treated as force Majeure without any liability on either side (Non availability of open access is treated as Force Majeure)
>
> i Natural Force Majeure Events:

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

ii Non- Natural Force Majeure Events:

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

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

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

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

2. Direct: Non-Natural Force Majeure Events not attributable to the Procurer(s)
……………………………………………………………………………
……………………………………………………………………………
3. Indirect: Non- Natural Force Majeure Events
(a) Any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action; or

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

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

9.4 Force Majeure Exclusions

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

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

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

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

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

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

f. Non-performance caused by, or connected with, the Affected Party's:
    i. Negligent or intentional acts, errors or omissions;
    ii. Failure to comply with an Indian Law; or
    iii. Breach of, or default under this Agreement or any other RFP Documents.

9.5 ...

9.6…..

9.7 Available Relief for a Force Majeure Event

9.7.1 Subject to this Article 9:

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

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

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

(a) The definition of force majeure is an inclusive one. Though, it enumerates certain events under the headings natural force majeure and non-natural force majeure, it can also include other events or circumstances which adversely affects or unduly delays the affected party to discharge its obligations under the PPA.

(b) The event or circumstance or combination of events or circumstances that wholly or partly prevents or unavoidably delays an affected party from the performance of its obligations under the PPA, and which are not within the reasonable control of the affected party and could not have been avoided if the affected party had taken reasonable care or complied with prudent utility practices shall qualify as force majeure events.

(c) An affected party can be either the seller or the procurers if the performance of their obligations under the PPA is affected by any of the force majeure events.

(d) Any event or circumstances which are within the reasonable control of the parties are included under force majeure exclusions except to the extent they are consequences of an event of force majeure.

As per Article 9.5 of the PPA, the affected party is required to give force majeure notice to the other party as soon as reasonably practicable and not later than 7 days after the date on which such party knew or should reasonably have known of the commencement of the event of Force Majeure. In the present petition, the Petitioner has claimed all the events under Change in Law as well as Force Majeure. Further, the Petitioner had served four notices regarding intimation of occurrence of events on TANGEDCO. Perusal of the notices reveals that out of four in the three letters dated 17.12.2015, 17.3.2016 and 6.7.2016, the Petitioner has no where intimated TANGEDCO about Force Majeure events. However, only in the letter dated 13.9.2016, the Petitioner has mentioned that the events also pertain to Force Majeure apart from Change in law. Therefore, the provision of Article 9.5 of the PPA is not complied with by the Petitioner in intimating the occurrence of Force Majeure events within 7 days to the other party. Moreover, increase in cost is not covered under any of the events enumerated under the headings "natural force majeure events" and "non natural force majeure events". Article 9.4.1 (e) of the PPA provides that "Insufficiency of finances or funds or the agreement becoming onerous to perform" shall not be considered as force majeure event unless there are consequence of an event of force majeure. It is noted that the events claimed by the Petitioner are not covered under Force Majeure as they have neither affected the seller in performing the obligations nor delayed its performance.

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

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

(A) <u>Increase in Royalty Rate on Coal</u>

33. The Petitioner has submitted that at the time of cut off date, i.e 27.2.2013, the rate of royalty payable was 14% ad-valorem on the price of coal. Subsequently, on 26.3.2015, the Government of India, Ministry of Coal amended 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 20.10.2015, Ministry of Mines issued the Mines and Minerals (Contribution to District Mineral Foundation) Rules, 2015 and as per Rules 2 of the said Rules, every holder of a mining lease or a prospecting licence-cum-mining lease was in addition, to the DMF required to pay , an amount at the rate of (a) 10% of the royalty paid in terms of second schedule to the Mines and Minerals (Development and Regulation) Act, 1957 in respect of mining lease, or as the case may be, prospecting licence-sum-mining lease granted on or after 12.1.2015, (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 lease granted before 12.1.2015. The Petitioner has submitted that South Eastern Coalfields Limited (SECL) vide its notice dated 13/14.11.2015 informed regarding implementation of "The Mines and Minerals (Development and Regulation) Amendment Act, 2015" and stated that Mines and Minerals (Development and Regulation) Amendment Act, 2015 was applicable to all dispatches/lifting.

34. The Petitioner has submitted that the above notifications pertaining to the royalty and additional levy are Change in Law events within the meaning of Article 10 of the PPA.

Accordingly, as per Article 10 of the PPA, the Petitioner needs to be compensated for increase in the cost of coal occasioned due to the said enhancement of the rate of royalty i.e., from 14% ad valorem on the price of coal to 18.48% ad valorem on the price of coal [14% existing royalty + 0.28% (2% of 14% existing royalty) + 4.20% (30% of 14% existing royalty) = 18.48%]. The Petitioner has claimed a compensation of Rs.8.91 crores on account of the increase in rate of royalty of coal from 1.8.2015 to 31.7.2016.

35. TANGEDCO has submitted that the as per clause 2.4.1.1(B) (xi) of the RFP, the quoted tariff is inclusive of all taxes, levies, duties, etc. TANGEDCO has submitted that as the Petitioner quoted escalable energy charge components, raise in duties and levies are taken care in CERC escalation percentage published once in 6 months. Prayas has submitted that the issue of royalty is to be considered with regard to whether the escalation index is inclusive of increase in royalty. The Petitioner had an option to quote escalable charges. Prayas has submitted that the issue whether Royalty is a tax or not is pending before the Hon'ble Supreme Court and has been referred to a nine judge bench in Mineral Area Development Authority v/s Steel Authority of India & Ors [reported in (2011) 4 SCC 450]. Therefore, the decision of the Commission is to be subject to the above.

36. The TANGEDCO has submitted that in terms of the RfP, the tariff is an all inclusive one and taxes or duties or levies or cess is covered under the RfP. Clause 2.4.1 (B) xi of the RfP provides as under:

> "xi. The quoted Tariff, as in format 4.10, shall be an inclusive Tariff up to the Interconnection Point and no exclusions shall be allowed. The Bidder shall take into account all cost including capital and operating costs, statutory taxes, levies duties while quoting such Tariff. It shall also include any applicable transmission costs and transmission losses from the generation source up to the Interconnection Point. Availability of the inputs necessary for supply of power shall be ensured by the Seller and all costs involved in procuring the inputs (including statutory taxes, duties, levies thereof) at the plant location must be reflected in the Quoted Tariff. Appropriate

transmission charges from the Injection Point to the Delivery Point as per Format 5.10 shall be added for Bid evaluation process."

37. TANGEDCO has submitted that as per Article 15.18.1, the seller is required to pay all statutory taxes, duties, levies and cess assessed/levied on the seller, etc. for supplying power as per the terms of this agreement.

38. The Appellate Tribunal for Electricity in its judgment dated 19.4.2017 in Appeal No. 161/2015 and Appeal No. 205/2015 has dealt with the issue as under:

> "44. It is true that according to the provisions of the RFP, the quoted tariff shall be inclusive one including statutory taxes, duties and levies. But the PPA gives express right to an affected party to claim Change in Law if the event qualifies thus in terms of Article 13. The RFP cannot override this right if an event qualifies as Change in Law. The Competitive Bidding Guidelines (Article 4.7 thereof has already been reproduced hereinabove) and the PPA have to be read together. If an event qualifies as a Change in Law event then the compensation must follow because otherwise Article 13 of the PPA will become redundant. But, this will of course depend on facts and circumstances of each case. Facts of each case will have to be carefully studies before granting such a relief. It is rightly pointed out that in Wardha Power Company Limited, this Tribunal has rejected the obligation to any escalable index or indexing of cost of fuel in order to determine the compensation due on account of Change in Law. Sasan will have to be compensated keeping in law in mind."

In view of the above, the obligation of TANGEDCO does not survive and the Petitioner is entailed for compensation for change in taxes, duties, cess, etc.

39. As regard the admissibility of royalty paid to the DMF and royalty paid to the NMET on merit, the issue was examined by the Commission vide order dated 17.2.2017 in Petition No. 16/MP/2016 as under:

> "32. We have considered the submissions of the Petitioner and the respondents. Through the Mines and Minerals (Development and Regulation) Amendment Act, 2015, the following provisions have been incorporated in the Mines and Minerals (Development and Regulation) Act, 1957:
>
> ''9B. District Mineral Foundation: (1) In any district affected by mining related operations, the State Government shall, by notification, establish a trust, as a non-profit body, to be called the District Mineral Foundation

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

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

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

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

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

Section 9C provides as under:

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

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

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

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

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

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

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

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

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

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

40. The above decision is applicable in case of the Petitioner. Therefore, the levy of @ 2% royalty on National Mineral Exploration Trust and @10% or 30% of the royalty of District Mineral Foundations, whichever is applicable, is admissible to the Petitioner as a Change in Law events. The Petitioner shall be required to furnish copies of the payment made supported by Auditor certificate while claiming the expenditure under Change in Law. It is further directed that the reimbursement on account of contribution to National Exploration Trust and District Mineral Foundations shall be on the basis of actual payments made to other appropriate authorities and shall be restricted to the amount of coal consumed for

supplying scheduled energy to the Procurer. It is clarified that the Petitioner shall be entitled to recover on account of payment of National Mineral Exploration Trust and Payment of District Mineral Fund in proportion to the actual coal consumed corresponding to the scheduled generation of supply of electricity to TANGEDCO. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of payment of National Mineral Exploration Trust and Payment of District Mineral Fund. The Petitioner and TANGEDCO are directed to carry out reconciliation on account of these claims annually.

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

(a) Increase in sizing charges

41. The Petitioner has submitted that at the time of cut off date, i.e. 27.2.2013, the sizing charges for (a) 200-250 mm of coal; (b) less than 100 mm of coal; and (c) less than 50 mm of coal through manual facilities or mechanical means were Rs. 39 per metric tonne, Rs. 61 per metric tonne, and Rs. 77 per metric tonne respectively. Subsequently, Coal India Limited vide its Price Notification No. CIL: S&M: GM (F): Pricing 2784 dated 16.12.2013 increased the sizing charges for (a) 200-250 mm of coal; (b) less than 100 mm of coal; and (c) less than 50 mm of coal through manual facilities or mechanical means to Rs. 51 per metric tonne, Rs. 79 per metric tonne and Rs. 100 per metric tonne respectively. The Petitioner has submitted that the increase in sizing charges of coal as stated above by Coal India Limited vide Price Notification dated 16.12.2013 is a Change in Law event occurring after 7 days prior to the bid submission date, within the meaning of Article 10.1 of the PPA. The Petitioner has claimed an amount of Rs. 2.04 crore on account of increase in rate of sizing charges of coal from 1.8.2015 to 31.7.2016

42. TANGEDCO has submitted that the petitioner is not entitled to claim this charge under "Change in Law". The said charge does not qualify to come under the "Change in Law" clause.

(b) Increase in surface Transportation charges

43. The Petitioner has submitted that at the time of cut-off date, the surface transportation charges of coal by the coal companies was Rs. 44 per tonne for a distance of more than 3 Kms but not more than 10 Kms from the loading point; and was Rs. 77 per tonne for a distance of more than 10 Kms but not more than 20 Kms from the loading point. Subsequently, Coal India Limited vide its Price Notification No. CIL: S&M: GM (F): Pricing 2340 dated 13.11.2013 increased the surface transportation charges for (a) for a distance of more than 3 Kms but not more than 10 Kms from the loading point; and (b) for a distance of more than 10 Kms but not more than 20 Kms from the loading point to Rs. 57 per tonne and Rs.116 per tonne respectively. The Petitioner has submitted that surface transportation charges of coal by the Coal India Limited vide Price Notification dated 13.11.2013 is a Change in Law event within the meaning of Article 10.1 of the PPA. The Petitioner has claimed an amount of Rs. 0.40 crore on account of increase in surface transportation charges of coal from 1.8.2015 to 31.7.2016.

44. TANGEDCO has submitted that the said charge does not qualify to come under the "Change in Law" clause. Further, CERC publishes Escalation Index of Inland transportation charges of domestic coal every six months considering coal freight rate. Variance in the freight rate is based on the factors attributable to the freight rate. These changes in the components have been taken care of by the Commission while publishing the Escalation Index. The allowance of additional costs under change in law may lead to duplication.

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

46. We have considered the submissions of the Petitioner and the respondents and perused the notifications issued by Coal India Ltd. with regard to Sizing Charges of coal and surface transportation charges. The objections of TANGEDCO have been dealt with in Para 36 to 38 above. The Petitioner has not placed on record any document to prove that these notifications have been issued pursuant to any Act of the Parliament. The Commission vide order dated1.2.2017 in Petition No. 8/MP/2014 has already dealt with the issue of Increase in sizing charges & surface transportation charges as under:-

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

by CIL from time to time. Sizing/crushing charges and transportation charges have been defined as under:-

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

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

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

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

(C) <u>Levy of Forest Transit Fee</u>

48. The Petitioner has submitted that as on cut off date i.e. 27.2.2013 the rate of forest tax/rate of transit forest produces on coal as per Chhattisgarh Transit Forest Produce Rules, 2001 was Rs. 7 per tonne under Chhattisgarh Transit Forest Produce Rules, 2001. Subsequently, the rate of forest tax/rate of transit forest produce on coal was revised by Forest Department, Government of Chhattisgarh from Rs. 7 per tonne to Rs. 15 per tonne vide Notification No. 06-02/2014/102 dated 30.6.2015. SECL, vide its notice No. SECL/BSP/S&M/1033 dated 16.9.2015, communicated to all concerned that on account of revision of rates of the forest tax on dispatches/lifting of coal in the Chhattisgarh Transit Forest Produce Rules, 2001, the forest tax on dispatches/lifting of coal has been enhanced from Rs. 7 per tonne to Rs. 15 per tonne. The petitioner has submitted that enhancement of the forest tax on dispatches of coal/lifting of coal from Rs. 7 per tonne to Rs. 15 per tonne is a Change in Law event within the meaning of Article 10.1.1 of the PPA. The Petitioner has

claimed an amount of Rs. 1 lakh on account of increase in levy of forest tax on coal from 1.8.2015 to 31.7.2016.

49. TANGEDCO has submitted that the Petitioner is not entitled to claim this expenditure under the head 'Change in Law'. These are State specific increase in various cess, which was not anticipated by the respondent. These cess and other revenues published by the State of Chhattisgarh had led to increase in the tariff agreed to between the Petitioner and the respondent to such an extent that it is not financially viable for the respondent to continue with the PPA. Prayas has submitted that the Petitioner has not produced the law. SECL's notice is not law since, SECL does not have the authority to impose any taxes. Infact, it is an implementation of the commercial terms between the Petitioner and SECL and cannot be considered as law. Therefore, n relief can be granted to the Petitioner in the absence of relevant information.

50. We have considered the submissions of the Petitioner and the Respondent. The Petitioner, vide its affidavit dated 26.10.2017 has placed on record, the Gazette notification issued by the appropriate authority/ body which also includes the Chhattisgarh State Govt. Notification with regard to increase in Forest transit fee. In exercise of the powers conferred by Section 76 read with Sections 41 and 42 of Indian Forest Act, 1927 (No. XVI of 1927), Chhattisgarh State Government issued rules for regulating transit of forest produce called the Chhattisgarh Transit (Forest Produce) Rules, 2001. Rule 3 of the Chhattisgarh Transit (Forest Produce) Rules, 2001 provides that no forest produce shall move into or outside the State or within the State of Chhattisgarh except in the manner as hereinafter provided without a transit pass in Form A, B, or C annexed to these rules. Rule 5 of the said Rules further provides that the State Government or an officer authorized by the State Government from time to time, shall fix the rate of fee for issue of transit pass as per the provisions of Rule 4. In

exercise of Rule 5 of the Chhattisgarh Transit (Forest Produce) Rules, 2001, Forest Department, Government of Chhattisgarh vide its Notification No. F-7-61/F.C/2001, dated 14.6.2002 fixed the fee of Rs. 7 per tonne for issue of transit pass for the transportation of corresponding forest produce, namely, lime stone, Dolomite, Fire clay, Manganese, Copper, Rock-phosphate, Pyro-phylite, Diaspore, Orchre, Bauxite, Calcite, Coal, Quartz, Silica Sand, Slate, Soap-stone, Iron-ore, Gold, Corundum and Tin ore. The Office of the Conservator of Forest, Bilaspur Circle, Chhattisgarh vide its letter dated 31.10.2012 informed SECL regarding realization of fees for transportation of mining from the forest land. The said letter is extracted as under:

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

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

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

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

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

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

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

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

Sd/-
Conservator of Forest,
Bilaspur Circle, Bilaspur

Subsequently, Forest Department, Government of Chhattisgarh vide its Notification No.06-02/2014/10.2 dated 30.6.2015 revised the fee from Rs. 7 per tonne to Rs. 15 per tonne. Relevant portion of the said notification dated 30.6.2015 is extracted as under:

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

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

S. No.	**Name of Forest Produce**	**Prescribed Fee**			
		Rs.	**Rs./Truck**	**Rs./Trolly**	**Rs./Bullockcart**
(1)	(2)	(3)	(4)	(5)	(6)
1.	Lime stone, Dolomite, Fire clay, Manganese, Copper, Rock-phosphate, Pyro-phyllite, Diaspore, Ochre, Bauxite, Calcite, Coal,	Rs. 15/- Per ton	-	-	-

	Quartz, Silica, Sand, Slate, Soap-stone, Iron-ore, Gold, Corundum and Tin ore				
2.	Flag stone, Granite, Marble, Concrete, Stone, Sand &Murrum	Rs. 10/- Per CMT	-	-	-
3.	Timber, Fuel & Bamboo	-	Rs. 230/- Per Truck or its part	Rs. 115/- Per Trolly or its part	Rs. 15/- Per Bullock cart or its part
4.	Minor Forest Produce (except specified Minor Forest produce)	-	Rs. 55/- Per Truck or its part	Rs. 25/- Per Tractor or its part	-

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

ANIL KUMAR SAHU, Secretary

51. As per the notification of Forest Department, Govt. of Chhattisgarh dated 14.6.2002, the transit fee for transportation of coal in the forest area was Rs. 7/ tonne. However, SECL vide its letter dated 9.11.2012 addressed to its Field Officers directed that the above transit fee to be compulsorily implemented with effect from 1.11.2012. Therefore, the transit fee of Rs. 7/ tone was already in existence as on the cut-off date of PPA. Only after issue of notification dated 30.6.2015 by the Forest Deptt. of Government of Chhattisgarh, the transit fee was increased for Rs. 15/ tonne. Under last bullet of Article 10.1.1.of the PPA, any change in taxes or introduction of tax made applicable for supply of power by the seller as per terms of the agreement shall be admissible under Change in Law. Therefore, change in the rate of forest transit fee shall be admissible under Change in Law. The Petitioner shall be entitled for enhancement of transit fee @ 8/ tone with effect from 30.6.2015. The Petitioner has not placed any document received from SECL regarding its liability to pay transit fee or the actual

payment of transit fee in accordance with letter dated 16.9.2015. The Petitioner shall share with the respondent all documents including the actual payment of transit fee made for the coal consumed for supply of electricity to the respondent duly supported by Auditor Certificate.

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

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

52. The Petitioner has submitted that as on cut off date i.e. 27.2.2013, the Chhattisgarh Environment cess was Rs. 5 per tonne. Subsequently, Government of Chhattisgarh vide its Notification No. 340 dated 16.6.2015 issued under Section 8 of Chhattisgarh Adhosanrancha Vikas Evam Paryavaran Upkar Adhiniyam, 2005, increased the environment cess to Rs. 7.50 per tonne. SECL vide its notice No. SECL/BSP/S&M/2015/1420 dated 19.8.2015 informed the Petitioner about enhancement of environment cess on dispatches of coal/lifting of coal from Rs. 5 per tonne to Rs. 7.5 per tonne. The Petitioner has submitted that the enhancement of environment cess on dispatches of coal/lifting of coal from Rs. 5 per tonne to Rs. 7.5 per tonne qualifies as Change in Law event within the meaning of Article 10.1.1 of the PPA. The Petitioner has claimed an amount of Rs. 0.23 crores on account of increase in levy of Chhattisgarh Environment Tax on coal from 1.8.2015 to 31.7.2016.

53. TANGEDCO, vide its affidavit dated 28.6.2017 has submitted that the TANGEDCO's bid dead line was 6.3.2013. The Notifications were issued before the due date. As per clause 2.4.1.1(B) of the RFP, the quoted tariff is inclusive of all taxes, levies, duties etc. As the petitioner has quoted escalable energy charge components, raise in duties and levies are taken care in the Commission’s escalation percentage published once in 6 months.

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

54. The Petitioner has submitted that as on cut off date i.e. 27.2.2013, the rate of Chhattisgarh Industrial Development Cess/ Chhattisgarh Vikas Upkar on lifting and dispatches of coal as per Section 3 read with Schedule-I of the Chhattisgarh (Adhosanrachna Vikas Evam Paryavaran) Upkar Adhiniyam, 2005 was Rs. 5 per tonne. The rate of Rs. 5 per tonne was enhanced to Rs. 7.5 per tonne. The Petitioner has submitted that SECL vide notice No. SECL/BSP/S&M/2015/ 1420 dated 19.8.2015 communicated the Petitioner about enhancement of the Chhattisgarh industrial development cess on dispatches of coal/lifting of coal from Rs. 5 per tonne to Rs. 7.5 per tonne and the same qualifies as Change in Law events in terms of Article 10.1.1 of the PPA. The Petitioner has submitted that due to the said increase in the rate of Chhattisgarh industrial development cess on lifting and dispatch of coal the cost of supply of power by the Petitioner to the Respondent under the PPA has increased. Therefore, the Petitioner needs to be compensated for it as per Article 10.3 read with Article 10.5 of the PPA. The Petitioner has claimed an amount of Rs. 0.23 crore on account of increase in levy of Chhattisgarh Industrial Development Cess on coal from 1.8.2015 to 31.7.2016.

55. TANGEDCO has submitted that the TANGEDCO's bid dead line was 6.3.2013. The Notifications were issued before the due date. As per RFP 2.4.1.1(B) (xi), the quoted tariff is inclusive of all taxes, levies, duties etc. As the petitioner has quoted escalable energy charge components, raise in duties and levies are taken care in CERC escalation percentage published once in 6 months. Prayas has submitted that the Petitioner has only annexed the notices from SECL for claiming change in law. SECL is not a competent authority to impose any cess and therefore, unless the Petitioner can produce the statute or law of a competent Government Authority increasing the rate of cess, the same cannot be allowed as change in law.

56. We have considered the submissions made by the Petitioner and the Respondent. The Petitioner vide affidavit dated 26.10.2017 has placed on record the Gazette notification issued by appropriate authority/ body which also includes the notification with regards to Increase in Chhattisgarh Environment Cess/ Chhattisgarh Environment Tax and Increase in Chhattisgarh Industrial Development Cess/ Chhattisgarh Development Tax. The objections of TANGEDCO has been dealt with in Para 36 to 38 above.

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

Preamble:

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

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

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

X xxx

Section 3-Infrastructure development cess

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

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

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

Section 4- Environment Cess

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

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

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

Section 7- Assessment and Collection of cess

(1) Cess levied under Section 3 and 4 of the Act shall be assessed in such manner as may prescribed.

(2) The cess levied under this act shall be collected as an arrear of land revenue and provision of the Chhattisgarh Land Revenue Code, 1959 (No. 20 of 1959) shall apply mutatis mutandis for such collection and recovery.

Section 8- Amendment of Schedules

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

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

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

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

Schedule I

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

Schedule II

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

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

Schedule I

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

Schedule II

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

By order and in the name of the Governor of Chhattisgarh

P.Nihalani, Joint Secretary"

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

(E) <u>Revision in rate of Central Excise Duty on account of addition in components</u>

59. The Petitioner has submitted that as on the cut-off date i.e.27.2.2013, the rate of Central Excise Duty @ 6.18% was applicable only on basic value of coal, crushing / sizing charges and surface transportation charges of coal as per the Central Excise Act, 1944. SECL, vide its notice No. SECL/BSP/S&M/Pricing/31/619 dated 19.3.2012, communicated to all concerned falling under SECL's jurisdiction that Rs. 6.18% shall be leviable as Central Excise Duty on dispatches/lifting of coal. Subsequently, SECL vide Notice No. SECL/BSP/S&M/RS/

619 dated 25.3.2013, communicated to all concerned that in addition to basic value of coal, surface transportation and sizing charges of coal, the Central Excise Duty shall be applicable on SILO charge, royalty, stowing excise duty, terminal tax, forest cess and Chhattisgarh Paryavaran and Vikas Upkar. The revision/addition of components like SILO charge, surface transportation charge, royalty, stowing excise duty, terminal tax, forest cess and Chhattisgarh Paryavaran and VikasUpkar in assessing the applicability of Central Excise Duty on coal other than basic value of coal and sizing charges of coal brought out by an amendment to the Central Excise Act, 1944. Further, SECL its Notice No. SECL/BSP/S&M/ 395 dated 28.2.2015 communicated to all concerned that on account of revision of rates in the Central Excise Act, 1944 on dispatches/lifting of coal, the Central Excise Duty on dispatches/lifting of coal has been revised from 6.18% to 6%. Earlier the said Duty was calculated on the summation of the base price of coal, surface transportation charge and sizing / crushing charge, whereas as per the SECL notice dated 25.3.2013, said Duty is now calculated on the summation of base price of coal, Crushing / Sizing Charge, SILO Charge, Surface Transportation Charge, Royalty including contribution towards NMET fund and DMF Stowing Excise Duty, Terminal Tax, Forest Cess and Chhattisgarh Paryavaran and VikasUpkar. Therefore, the downward revision of Excise Duty did not have any beneficial impact on the cost of the Petitioner, rather the Petitioner was subjected to additional expenditure pertaining to payment of Excise Duty, due to change in the underlying components on the basis of which, the said Excise Duty is imposed. The Petitioner has submitted that the addition of components like SILO charge, surface transportation charge, royalty, stowing excise duty, terminal tax, forest cess and Chhattisgarh Paryavaran and Vikas Upkar in assessing the incidence/applicability of Central Excise Duty on coal qualifies as Change in Law event under Article 10.1.1 of the PPA. The Petitioner has claimed Rs. 3.26 crore on account of revision/addition of component in assessing the Central Excise Duty from 1.8.2015 to 31.7.2016.

60. TANGEDCO has submitted that the bid dead line was 6.3.2013 and Notifications were issued before the due date. As per clause 2.4.1.1(B) (xi) of the RFP, the quoted tariff is inclusive of all taxes, levies, duties etc. TANGEDCO has submitted that as the Petitioner has quoted escalable energy charge components, raise in duties and levies are taken care in the Commission's escalation percentage published once in 6 months. Prayas has submitted that the rate of central excise duty on coal has reduced from 6.18% to 6%, which is a change in law. The reduction in excise duty on coal also results in reduction in entry tax, VAT, Nirayat Kar, etc which also has to be taken into account. Prayas has submitted that the Petitioner has claimed change in law with regard to change in incidence of tax and has relied upon the letter dated 25.3.2013 of SECL. Prayas has submitted that SECL is not legally empowered to interpret the Excise Act and therefore, the interpretation by SECL is not an interpretation of law under Article 10 of the PPA.

61. We have considered the submissions of the Petitioner and the Respondents. The objections of TANGEDCO have been dealt with in Para 36 to 38 above. The Petitioner has submitted that as on the cut-off date i.e on 27.2.2013, excise duty on basic value of coal, sizing charges and surface transpiration charges of coal was 6.18%. Subsequently, SECL vide its notice dated 28.2.2015 informed all concerned that on account of revision of rates of the Central Excise Act, 1944, on dispatches/lifting of coal, the Central Excise duty on dispatches/lifting of coal has been revised from 6.18% to 6%. Further, SECL vide its notice dated 25.3.2015 informed the Petitioner that in addition to basic values of coal, surface transportation and sizing charges of coal , the Central Excise duty shall be applicable on SILO charges, royalty, stowing excise duty, terminal tax, forest cess and Chhattisgarh Paryavaran and Vikas Upkar. The Commission vide order dated 7.4.2017 in Petition No.

112/MP/2015 has considered the issue of excise duty. The relevant portion of the said order dated 7.4.2017 is extracted as under:

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

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

(F) <u>Increase in Clean Energy Cess</u>

62. The Petitioner has submitted that as on the cut of date i.e 27.2.2013, the Clean Energy Cess on lifting and dispatches of coal was Rs. 50 per tonne. Subsequently, the Ministry of

Finance, Government of India by its Notification No. 1/2015 dated 1.3.2015, increased the rate of Clean Energy Cess from Rs. 50 per tonne to Rs. 200 per tonne. By clause 232 of the Finance Bill, 2016, clean energy cess has been named as Clean Environment Cess and has increased to Rs. 400 per tonne with effect from 1.3.2016. The Petitioner has submitted that it be compensated for clean energy cess as per Article 10.3 read with Article 10.5 of the PPA as it has been increased after the cut off date and has an impact on the cost of the generation of electricity for supply to TANGEDCO. The Petitioner has claimed an amount of Rs. 28.12 crore on account of increase in levy of Clean Energy Cess on coal from 1.8.2015 to 31.7.2016.

63. TANGEDCO has submitted that TANGEDCO's bid dead line was 6.3.2013 and G.O was issued before the due date. As per clause 4.1.1(B) (xi) of the RFP, the quoted tariff is inclusive of all taxes, levies, duties, etc. TANGEDCO has submitted that as the Petitioner has quoted escalable energy charge components, raise in duties and levies are taken care in the Commission’s escalation percentage published once in 6 months. The Petitioner has clarified that the quoted tariff only includes all taxes, duties and levies applicable at the time of submission of bid and not all future increase in taxes, duties and levies. The bidders cannot be expected to anticipate future decisions of any Ministry or a Government Instrumentality with regards to imposition of a new tax/levy or increases in any existing tax/levy at the time of submission of the bid. Therefore, the same is not factored in the tariff quoted by the bidder.

64. Prayas has submitted that without prejudice to the contention that the taxes other than tax on supply of power are not covered by Article 10 of the PPA. The Petitioner has only annexed the law relating to clean energy cess being Rs. 200 per tonne and has annexed the notices from SECL for claiming change in law. SECL is not a competent authority to impose any cess and therefore, unless the Petitioner can produce the statute or law of a competent

Government Authority increasing the rate of cess, the same cannot be allowed as change in law.

65. We have considered the submissions of the Petitioner, TANGEDCO and Prayas. The Petitioner vide its affidavit dated 26.10.2017 has placed on record the copy of the relevant notifications. The objections raised by TANGEDCO have been dealt with in Para 36 to 38 above. Clean Energy Cess on coal has been introduced through the Finance Act, 2010 and is being modified through subsequent Finance Acts. The Clean Energy Cess applicable at the different points of time is given the table below :

S. No.	From	To	Applicable Clean Energy Cess (Rs./Tonne)
1	1.7.2010	10.7.2014	50
2	11.7.2014	28.2.2015	100
3	1.3.2015	29.2.2016	200
4	1.3.2016	30.6.2017	400

66. As on the cut-off date i.e. 27.2.2013 , Clean Energy Cess was Rs. 50/tonne. With effect from 11.7.2014, it has been revised to Rs. 100/tonne, and thereafter to Rs. 200/tonne with effect from 1.3.2015 and Rs. 400/tonne wit heffect from 1.3.2016 till 30.6.2017. The Clean Energy Cess was increased through the Act of Parliament after the cut off date. Therefore, it covered under Change in Law. The issue of Clean Energy Cess as a Change in Law event has been considered by the Commission in order dated 7.4.2017 in Petition No. 112/MP/2015. Relevant portion of the said order dated 7.4.2017 is extracted as under:

"29. We have considered the submissions of the Petitioners and Prayas. Clean Energy Cess on domestic coal was introduced at the rate of Rs. 100 per tonne by Section 83 of the Finance Act, 2010. Further, the Ministry of Finance, Government of India by Notification No. 3 of 2010 dated 22.6.2010 exempted the Clean Energy Cess over and above Rs. 50 per tonne. By Notification No. 20 of 2014 dated 11.7.2014, Government of India rescinded the Notification No. 3 of 2010 and made Clean Energy Cess payable at the rate of Rs. 100 per tonne. By Section 166 of the Finance Act, 2015, Tenth Schedule of the Finance Act, 2010 was amended to increase the Clean Energy Cess to Rs. 300 per tonne. However, by Notification no. 1 of 2015 dated 1.3.2015, Government of India exempted the Clean Energy Cess over and above Rs. 200 per tonne. By Clause 232 of the Finance Bill, 2016,

Clean Energy Cess has been renamed as Clean Environment Cess and increased to Rs. 400 per tonne which came into effect from 1.3.2016. The Clean Energy Cess applicable at different points of time is given in the table below:

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

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

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

Period		**Applicable clean energy cess (Rs./ tonne)**	**Admissible clean energy cess under Change in law (Rs./ tonne)**
As on cut-off date i.e. 27.2.2013		50	0 (Petitioner has accounted Rs. 50/ tonne in its bid)
11.7.2014	28.2.2015	100	50
1.3.2015	29.2.2016	200	150 (Allowed w.e.f. 1.8.2015 i.e. start of supply of power to TANGEDCO)

Period		Applicable clean energy cess (Rs./ tonne)	Admissible clean energy cess under Change in law (Rs./ tonne)
1.3.2016	30.6.2017	400	350 (Allowed till 30.6.2017 as it has been abolished and GST comp. Cess is levied for which Commission is dealing in separate Petition No. 13/SM/2017)

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

68. It is pertinent to mention that the clean energy cess has been abolished through Taxation Laws Amendment Act, 2017 with effect from 1.7.2017. Therefore, the clean energy cess has been allowed upto 30.6.2017.

(G) <u>Increase in Busy Season Charges on transportation of coal by Rail</u>

69. The Petitioner has submitted that as on cut- off date i.e. 27.2.2013, the rate of Busy Season Charges on transportation of coal by rail during the busy season was 12% on the applicable base freight rates published in the Indian Railway Conference Association Goods Tariff Part-II. Subsequently, vide circular No. 24 of 2013, the rate of Busy Season Charges was increased to 15% with effect from 18.9.2013. The petitioner has submitted that there is

an increase in the Busy Season Charges after the Bid Deadline date due to revision of rate of Clean Energy Cess by the Railway Board, Ministry of Railway, and GoI leading to an increase in cost of supply of power by the Petitioner to TANGEDCO and therefore, the same amounts to Change in Law as per Article 10.1.1 read with Article 10.5 of the PPA. The Petitioner has submitted that the said increase is not within the direct or indirect reasonable control of the Petitioner and such events could not have been avoided by the Petitioner. The said event hinders and impairs the performance of obligations under the PPA's in as much as Petitioner is incurring additional cost on the purchase of coal for the generation of electricity from the project, therefore, it amounts to Force Majeure event within the meaning of Article 9.3 of the PPA.The Petitioner has claimed an amount of Rs. 0.55 crore on account of increase in levy of Busy Season Charges on transportation of coal by rail from 1.8.2015 to 31.7.2016.

70. TANGEDCO has submitted that the Commission vide order dated 3.2.2016 in Petition No. 79/2013 (GMR Kamalanga Vs. Haryana) held that increase in the railway freight charges on account of development surcharge and busy season surcharge is in the nature of change in rates of freight charges levied by the Railway Board in exercise of its power under Sections 30 to 32 of the Railways Act, 1989. The Petitioner was expected to take into account the possible revision in these charges while quoting the bid. TANGEDCO has submitted that as per clause 2.4.1.1(B) (xi) of the RFP, the bidder is required to reflect all costs involved in procuring the inputs including statutory taxes, duties and levies thereof in the quoted tariff. As the petitioner has quoted escalable components, variations in the freight charges are taken care off in the Commission's escalation percentage for inland transportation charges published once in 6 months for the purpose of payments. Prayas has submitted that the Commission in Petition Nos. 8/MP/2014 and 112/MP/2015 has held that busy season

surcharge is commercial consideration payable to the Railways and any increase in the rates or assessable value is not a change in law under Article 10 of the PPA.

71. The Commission has in the order dated 3.2.2016 in Petition No. 8/MP/2014 has examined whether change in the rates of busy season surcharge and development surcharge levied by Railway Board qualifies as Change in Law. Relevant para of the said order is extracted as under:

> "84. The Commission has in the order dated 3.2.2016 in Petition No. 79/MP/2013 has examined whether changes in the rates of busy season surcharge and development surcharge levied by Railway Board qualifies as Change in Law. Relevant para of the said order is extracted as under:
> "60. We have considered the submission of the Petitioners. In our view, increase in the railway freight charges on account of development surcharge and busy season surcharge are in the nature of change in rates of freight charges levied by the Railway Board in exercise of its power under sections 30 to 32 of the Railways Act, 1989. The Petitioners were expected to take into account the possible revision in these charges while quoting the bid. As already stated, the Petitioners/PTC were expected in terms of Para 2.7.2.4 of the RfP to include in quoted tariff all costs involved in procuring the inputs. Since freight charges are a cost involved for procuring coal which is an input for generating power for supply to Haryana Discoms under the Haryana PPA, the Petitioners cannot claim any relief under change in law on account of revision in freight charges. Accordingly, the claim of the Petitioner on this account is disallowed."
>
> 85. The Commission has taken the view in the above quoted order that increase in the railway freight charges on account of development surcharge and busy season surcharge are in the nature of change in rates of freight charges levied by the Railway Board in exercise of its power under sections 30 to 32 of the Railways Act, 1989 and the Petitioners in that case were expected to factor in these charges in the bid in terms of Clause 2.7.2.4 of the RfP and therefore, these charges are not covered under Change in Law. Section 30 of the Railways Act is extracted as under:
>
> "30. Power to fix rates.-(1) The Central Government may, from time to time, by general or special order fix, for the carriage of passengers and goods, rates for the whole or any part of the railway and different rates may be fixed for different classes of goods and specify in such order the conditions subject to which such rates shall apply.
>
> (2) The Central Government may, be a like order, fix the rates of any other charges incidental to or connected with such carriage including demurrage and wharfage for the whole or any part of the railway and specify in the order the conditions subject to which such rates shall apply."
>
> The above provisions enable the Railway Board to fix different charges for carriage of passengers and goods and any other charges incidental to or connected with such carriage. These provisions were existing before the cut-off date and the Petitioner was aware that the various charges levied by the Railway Board are subject to revision from time to time.

> 86. Further, Para 2.6.1 of the Request for Proposal issued by MSEDCL as well as DNH provided as under:
> "2.6.1 The Bidder shall make independent inquiry and satisfy itself with respect to all the required information, inputs, conditions and circumstances and factors that may have any effect on its Bid. Once the Bidder has submitted the Bid, the Bidder shall be deemed to have examined the laws and regulations in force in India, the grid conditions, and fixed its price taking into account all such relevant conditions and also the risks, contingencies and other circumstances which may influence or affect the supply of power. Accordingly, the Bidder acknowledges that, on being selected as Successful Bidder, it shall not be relieved from any of its obligations under the RFP documents nor shall be entitled to any extension of time for commencement of supply or financial compensation for any reason whatsoever."
>
> The freight charges are a cost involved for procuring coal which is an input for generating power for supply to MSEDCL and DNH under their respective PPAs and therefore, the Petitioner was expected to take into account the possible revisions in these charges while quoting the bid. Therefore, the change in the rates of busy season surcharge and development surcharge are not admissible under Change in Law. The Commission is of the view that non-admissibility of busy season surcharge and development surcharge under change in law has been correctly decided in GMR case and in the light of the said decision and the reasons recorded above, the Petitioner cannot be granted relief under Change in Law on account of revision in the busy season surcharge and development surcharge by Railway Board."

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

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

72. The Petitioner has submitted that as on the cut-off date i.e 27.2.2013, no Coal Terminal Surcharge for tariff of coal for the distance beyond 100 Km was leviable/applicable. Subsequently, the Ministry of Railways, Railway Board vide its corrigendum No.14 to the Circular No. 8 of 2015 dated 22.8.2016, has started levying Coal Terminal Surcharge at the rate of Rs. 55 per metric tonne at both loading and unloading terminals for traffic of coal for the distance beyond 100 Km. Therefore, the levy of Coal Terminal Surcharge is an additional cost leading to increase in cost of supply of power by the Petitioner to TANGEDCO and therefore, the same amounts to Change in Law within the meaning of Article 10 of the PPA. The Petitioner has further submitted that the said increase is not within the direct or indirect reasonable control of the Petitioner and hinders and impairs the performance of obligations under the PPA's in as much as Petitioner is incurring additional cost on the purchase of coal

for the generation of electricity from the project and therefore, the same amounts to Force Majeure event within the meaning of Article 9.3 of the PPA. The Petitioner has not claimed any amount on account of the levy of additional Coal Terminal Surcharge for tariff of coal for the distance beyond 100 Km from up till 31.07.2016 as these charges have been levied from 22.8.2016. However, the Petitioner has submitted that it reserves the right to claim the same once additional cost is incurred in the subsequent period. The Petitioner has prayed for grant of in-principle approval for payment of the said charges by TANGEDCO.

73. TANGEDCO has submitted that the Petitioner is not entitled to claim the increase in freight of coal transport in a tariff which was agreed to under competitive bidding process and approved under section 63 of the Act. The impact of change in freight rate is being passed on through the escalation rate notified by the Commission once in 6 months and therefore, it would not be appropriate to once again allow the impact through provisions of "Change in Law". Prayas has submitted that the price or consideration payable by the Petitioner to coal companies is pursuant to a contractual or commercial arrangement between the Petitioner and the Coal Company and not as a result of change in law as envisaged in the PPA. The increase or decrease in such prices from time to time by such entities supplying coal or goods or providing services of transportation are part of the business aspects and are not a result of any change in law. The very fact that the coal prices were de-regulated demonstrates that the price of coal is a commercial price as opposed to a regulated price. Therefore, the changes in commercial prices of coal are part of the business risk undertaken by the Petitioner.

74. We have considered the submissions of the Petitioner, TANGEDCO and Prayas. It is noted that the Coal Terminal Surcharge on Coal Transportation has been brought by the Ministry of Railways as part of base freight charges at the rate of Rs. 55/ tonne at both

loading and unloading terminals for transportation of coal for the distance beyond 100 KM. This levy by the Ministry of Railways vide circular dated 22.8.2016 is in the nature of change in base freight charges. The Petitioner was expected to take into account the possible revision in these charges while quoting the bid. The Petitioner has already quoted an escalable component of energy charges and shall be compensated for any revision in base freight rate through Index for coal freight directly. Accordingly, the claim of the Petitioner on this account is disallowed.

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

75. The Petitioner has submitted that the generating station of the Petitioner is located within 90 Km of SECL mines. In accordance with the Ministry of Railways, GoI Rates instruction No. 11 of 2003 dated 27.3.2003, there had been freight concession of 10% for all traffic including coal booked upto 100 Km. This circular was in force as on 27.3.2013. Subsequently, the Ministry of Railways, GoI vide its Rate Circular No. 15 of 2014 dated 16.5.2014 withdrawn the aforementioned concession. Due to the above withdrawal, the Petitioner has been deprived of 10% rebate amounting to Rs. 20.56 per tonne, which is an additional monetary impact on account of the net expenditure of the Petitioner. The withdrawal of concession has led to incurring additional cost leading to increase in cost of supply of power by the Petitioner to TANGEDCO and therefore, amounts to Change in Law event within the meaning of Article 10of the PPA. The Petitioner has submitted that the said increase is not within the direct or indirect reasonable control of the Petitioner and could not have been avoided by the Petitioner, and hinders and impairs the performance of obligations under the PPA's in as much as Petitioner is incurring additional cost on the purchase of coal for the generation of electricity from the project and therefore, it also amounts to Force Majeure event within the meaning of Article 9.3 of the PPA. The Petitioner has claimed an amount of Rs. 1.26 crore on

account of the withdrawal of freight concession of 10% for all traffic including coal booked up to 100 Km from 1.8.2015 to 31.7.2016.

76. TANGEDCO has submitted that the Petitioner is not entitled to claim the withdrawal of lead concession of 10% for all traffic including coal booked up to 100 Km since the tariff was agreed to under competitive bidding process and approved under Section 63 of the Act. The impact of change in freight rate is being passed on through the escalation rate notified by the Commission once in 6 months and therefore, it would not be appropriate to once again allow the impact through provisions of “Change in Law”. Prayas has submitted that the Railways Act only authorises the Central Government to fix the rates from time to time not as a statutory levy but as may be considered appropriate for the Railways to discharge its commercial functions. The Railways, though a Government Department, is undertaking a commercial activity and not a sovereign activity in regard to transportation services and the charges paid to the Railways for transportation is a commercial arrangement by a generator entered into with the Railways. Therefore, withdrawal of concession is a commercial decision of Railways and the impact of such withdrawal on the price of input cannot be regarded as a change in law.

77. We have considered the submissions of the Petitioner and the respondents. It is noted that short lead concession in charging of freight was provided by the Ministry of Railways for freight concession of 10% for all traffic including coal booked up to 100 Km which was withdrawn by the Ministry of Railways vide its Rate Circular No. 15 of 2014 dated 16.5.2014. The Petitioner has not submitted the statutory documents/proof to substantiate its claim, in the absence of which we are not inclined to grant any relief in this regard. However, the Petitioner is granted liberty to claim this expenditure under Change in Law through an appropriate application along with all the required documents/details.

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

78. The Petitioner has submitted that as on the cut-off date i.e. 27.2.2013, the rate of service tax on transportation of coal was 12% and the Education Cess on the said Service Tax was 2% and Higher Education Cess on the said Service Tax was 1%. Therefore, the total applicable service tax was 12.36%. According to the Petitioner, Ministry of Finance, Government of India vide its Notification No. 14/2015 IST dated 20.5.2015 increased service tax from 12% to 14% overall, with effect from 1.6.2015. Subsequently, Government of India, Ministry of Finance, Department of Revenue vide its Notification No. 21/2015-Service Tax dated 6.11.2015 increased the service tax from 14% to 14.5% due to promulgation of provision relating to Swachh Bharat cess on taxable service. The rate of Service Tax was further increased from 14.5% to 15% by amending Section 66B of the Finance Act, 1994, vide Finance Act, 2016 by which Krishi Kalyan cess was imposed and Ministry of Finance, Department of Revenue vide its Notification No. 31/2016-Service Tax dated 26.5.2016 issued the notification in this regard. The Petitioner has submitted that abatement of 70% permitted on freight for the taxable commodities i.e. coal vide Notification No. 26 of 2012 dated 20.6.2012 issued by the Ministry of Finance, GoI is still continuing and resultantly the enhancement of Service Tax on transportation of coal is 4.2%, 4.35% and 4.5% from 3.708%. As such evidently, there is an increase in the service tax on the transportation of coal by rail and road due to revision of rate of Service Tax by the Ministry of Finance, GoI leading to increase in cost of supply of power by the Petitioner to the Respondent. The Petitioner has submitted that the enhancement of the Service Tax on transportation of coal by rail and road from 12% to 14% to 14.5 and then to 15% qualifies as Change in Law within the meaning of Article 10of the PPA. The Petitioner has submitted that the said increase is not within the direct or indirect reasonable control of the Petitioner and such events could not have been avoided by the Petitioner, the said event hinders and impairs the performance of

obligations under the PPA in as much as the Petitioner is incurring additional cost on the purchase of coal for the generation of electricity from the project. Therefore, the said event is a Force Majeure event within the meaning of Article 9.3 of the PPA. The Petitioner has claimed an amount of Rs. 0.63 crore on account of increase in levy of Service Tax on transportation of coal by rail from 1.8.2015 to 31.7.2016.

79. TANGEDCO has submitted that Service Tax was already in existence i.e. before the bid dead line of 6.3.2013 and increased in Service Tax on transportation of Coal by rail and road cannot be accounted under Change in Law. TANGEDCO has submitted that since as per clause 2.4.1.1(B) (xi) of RFP, the quoted tariff is inclusive of all taxes, levies, duties, etc., the claim of the Petitioner is liable to be rejected. Prayas has submitted that the increase in service tax is not pursuant to the Ministry of Railway Notifications but of Ministry of Finance. The Petitioner has not annexed the appropriate Notifications in this regard. In the absence of the submissions of the appropriate Notification, there cannot be any relief of Change in Law to the Petitioner.

80. We have considered the submissions of the Petitioner, TANGEDCO and Prayas. The Petitioner has placed on record the concerned notifications. The objections of TANGEDCO have been dealt within Para 36 to 38 above. The Commission in the order dated 1.2.2017 in Petition No. 8/MP/2014 has held that service tax on transportation of goods by Indian Railways qualifies as Change in Law. Relevant Para of the said order is extracted as under:

> "89. ... By Finance Act of 2006, though service tax on transportation of goods by rail was introduced, an exception was made in case of Government Railways. By Finance Act of 2009, this restriction was removed by providing that service tax is leviable "to any person by another person, in relation to transport of goods by rail in any manner". Therefore, transport of goods by Indian Railways became subject to service tax by Finance Act of 2009. Actual levy of service tax on transportation of goods by railways was exempted by Notification No. 33 of 2009 dated 1.9.2009. By Notification no. 26 of 2012 dated 20.6.2012, Ministry of Finance issued notification by exempting transport of goods by rail over and above 30% of the service tax chargeable with effect from 1.7.2012. By a Notification No. 43 of 2012 dated 2.7.2012, service tax on transportation of goods by Indian Railways was fully exempted till 30.9.2012. With effect from 1.10.2012, service tax on 30% of the transport of goods by rail is chargeable. Therefore, the basis of the service tax on transport of goods by Indian Railways

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

In the light of the above decision, the claim of the Petitioner for relief under Change in Law on account of service tax on transportation of goods by Indian Railways is admissible. Further, it is noted that w.e.f. 1.10.2012, service tax on 30% of the transport of goods by rail is chargeable which is before the cut-off date i.e. 27.02.2013. Therefore, the Petitioner has accounted for 30% of 12.36% i.e. 3.708% at the time of submission of Bid. However, Ministry of Finance has revised the rates of service tax from 12.36% to 14% then 14.5% & finally 15%. In view of the above, the Petitioner is eligible for the relief as suggested below;

Applicability date	**Rate of Service tax**	**Service tax on transportation of goods @ 30% of Service tax**	**Admissible rate of service tax under Change in law**
27.02.2013 (cut-off date)	12.36%	3.708%	0% (Petitioner has accounted 3.708% in its bid)
01.06.2015	14.00%	4.200%	0.492%
15.11.2015	14.50%	4.350%	0.642%
01.06.2016	15.00%	4.500%	0.792%

The Petitioner shall be entitled to recover on account of change in service tax on transportation of coal in proportion to the actual coal consumed, corresponding to the scheduled generation for supply of electricity to TANGEDCO. If the actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered

for the purpose of computation of impact of service tax on transportation of coal. The Petitioner is directed to furnish along with its monthly bill, the proof of payment and computations duly certified by the auditor to TANGEDCO. The Petitioner and TANGEDCO are further directed to carry out reconciliation on account of these claims annually.

(K) Consequent increase in Value Added Tax/CST, Entry Tax, Development Surcharge and Niryatkar

Value Added Tax/CST

81. The Petitioner has submitted that as on cut-off date i.e. 27.2.2013, the rate of Value Added Tax/ CST was 5% / 2% on the entire landed cost of coal purchased from SECL/MCL including all the above components, namely (a) Royalty on coal including contribution to NMET and MDF; (b) sizing charges of coal; (c) surface transportation charges of coal; (d) forest tax/rate of transit forest produce on coal; (e) environment cess/ Chhattisgarh Paryavaran Upkar; (f) industrial development cess/ Chhattisgarh Vikas Upkar; (g) Central Excise Duty; (h) Clean Energy Cess; i) entry tax (j) NiryatKar. Though the rate of Value Added Tax / CST remained unchanged, however, with the change in the rate at which the above said components are levied, as explained in the present petition there has been an overall impact on the net tax out flow qua Value Added tax / CST in contradistinction to what the Petitioner was liable to pay at the time of 7 days prior to Bid Deadline date. As such the same is covered under Article 10.1.1 of the PPA. The Petitioner has submitted that due to said increase in the Value Added Tax/CST on the landed cost of coal, the cost of supply of power by the Petitioner to TANGEDCO under the PPA has increased and thus the Petitioner needs to be compensated for it.

82. TANGEDCO has submitted the Commission vide order dated 3.2.2016 in Petition No.79/2013 (GMR Kamalanga v/s Haryana) did not allow change in VAT to be brought under “Change in Law”. Government of India, Ministry of Finance`s 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. Prayas has submitted that the change in price of coal is not a change in law and therefore, any consequential change in price of coal in the assessable value for levy of the tax and thereby quantum of tax is not a change in law. The quantum to be considered is only the increase due to the imposition of a tax and not due to any increase in the commercial price of coal, which may increase in the assessable value of coal. In this regard, Prayas has submitted that there is no change in the rate of nirayatkar, entry tax, VAT, CST etc. Since, the increase in price of coal is not a change in law, the consequential increase in tax is not a change in law either. Therefore, the Petitioner is required to submit in details the claim for change in assessable value to consider whether such change is due to change in law or change in price of coal. Prayas has submitted that development surcharge is commercial consideration payable to the Railways and any increase in the rates or assessable value is not a change in law under Article 10 of the PPA and the same has already been held by the Commission in Petition Nos. 8/MP/2014 and 112/MP/2015.

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

Entry Tax

84. The Petitioner has submitted that as on the cut of date i.e. 27.2.2013, the rate of Entry Tax was 1% on the entire landed cost of coal purchased from SECL including all the above

components, namely i.e. (a) levy royalty on coal including contribution to NMET and MDF; (b) levy of sizing charges of coal; (c) levy of surface transportation charges of coal; (d) levy of forest tax/rate of transit forest produce on coal; (e) levy of environment cess/ Chhattisgarh Paryavaran Upkar; (f) levy of industrial development cess/ Chhattisgarh Vikas Upkar; (g) levy of Central Excise Duty; (h) levy of Clean Energy Cess; (i) levy of Busy Season Charges on transportation of coal by rail; (j) levy of service tax. The Petitioner has submitted that though the rate of Entry Tax remained unchanged, however, with the change in the rate at which the above said components or incidences on which such Entry Tax is levied, there has been an overall impact on the net tax out flow qua Entry Tax in contradistinction to what the Petitioner was liable to pay at the time of 7 days prior to Bid Deadline date and therefore, qualifies as Change in Law as defined in Article 10 of the PPA.

85. TANGEDCO has submitted that the Petitioner is not entitled to claim Entry Tax under the head 'change in law'. These are State specific increases in various cess, which was not anticipated by TANGEDCO. These cess and other revenues published by the State of Chhattisgarh had led to an increase in the tariff agreed to between the Petitioner and TANGEDCO to such an extent that it is not financially viable for the TANGEDCO to continue with the PPA.

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

<u>Development Surcharge</u>

87. The Petitioner has submitted that as on the cut- off date 27.2.2013, the rate of Development Surcharge was 5% on the freight of transportation of coal by rail including all the above named components i.e. (a) increase in busy season surcharge, (b) Discount on rail freight for distance travelled up to 90 KM, and (c) increase in base rail freight. The Petitioner has submitted that though the rate of Development Surcharge remained unchanged, however, with the change in the rate at which the above said components or incidences on which such Development surcharge is levied, there has been an overall impact on the net out flow qua Development surcharge in contradistinction to what the Petitioner was liable to pay at the time of 7 days prior to submission of bid and therefore, the same qualifies as Change in Law as per Article 10 of the PPA.

88. TANGEDCO has submitted that development surcharge is levied on the freight of transportation of coal by rail including busy season surcharge, increase in base rail freight and discount on rail freight for a distance up to 90 Km. Changes in the above components have impact on the development surcharge.

89. We have considered the submissions of the Petitioner and the respondents. According to the Petitioner, as on the cut-off date i.e 27.2.2013, the rate of development surcharge was 5% on the freight of transportation of coal by rail including increased in busy season surcharge, discount on rail freight for distance travelled upto 90 km and increase in base rail freight. The Petitioner has submitted that though the rate of development surcharge remained unchanged, however, with the change in the rate of the above said components, there has been an overall impact on the net out flow qua Development surcharge. The Petitioner has submitted that change in rate of development surcharge qualifies as Change in Law events in terms of Article 10.1.1 of the PPA.

90. We have considered the submissions of the Petitioner and the Respondents. The Commission has in the order dated 3.2.2016 in Petition No. 79/MP/2013 has disallowed the rates of development surcharge levied by Railway Board as Change in Law event. Relevant para of the said order is extracted as under:

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

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

Niryatkar

91. The Petitioner has submitted that Niryatkar is levied on the summation of the base price of coal and sizing and crushing charges which is collected from the Petitioner and other consumers of coal and the fund so collected is deposited with the Municipal Corporation, Korba Chhattisgarh. The Petitioner has submitted that the office of the Municipal Corporation, Korba, vide its letter dated 23.4.2005 imposed Niryatkar at the rate of 0.2% of the summation of the base price of coal and sizing and crushing charges of coal. The Petitioner has submitted that the increase of base price as well as sizing and crushing charges qualifies as change in law events in terms of Article 10 of the PPA. The Petitioner has submitted that the said increase is not within the direct or indirect reasonable control of the petitioner and such events could not have been avoided by the petitioner, the said event hinders and impairs the performance of obligations under the PPA in as much as the Petitioner is incurring additional

cost on the purchase of coal for the generation of electricity from the project, therefore, the same qualifies as Force Majeure event in terms of Article 9.3 of the PPA. The petitioner has claimed an amount of Rs. 3.85 crore on account of consequent increase in Value Added Tax/CST, Entry Tax, Niryatkar and Development Surcharge from 1.8.2015 to 31.7.2016.

92. TANGEDCO has submitted that the notification of Nagar Palika Nigam, Korba, Chhattisgarh dated 23.4.2005 relate to increase in export price. TANGEDCO has submitted that as per clause 2.4.1.1 (B) (xi) of the RFP, the quoted tariff is inclusive of all taxes, duties and levies, etc. 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. The impact of change in freight rate is being passed on through the escalation rate notified by the Commission once in 6 months and therefore, the "Change in Law" in this respect is not admissible.

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

(L) Additional cost towards Fly Ash Transportation

94. The Petitioner has submitted that as on the cut-off date i.e. 27.2.2013, the Petitioner was not required to incur any additional cost towards fly ash transportation. Subsequently, the Ministry of Environment and Forest ('MoEF') vide its notification dated 25.1.2016, amended the previous notification dated 3.11.2009 regarding Fly Ash Management Rules. The Petitioner has submitted that additional cost towards fly ash transportation imposed by the

Ministry of Environment and Forest qualifies as Change in Law event in terms of Article 10.1.1 of the PPA. The Petitioner has claimed an amount of Rs. 4.36 crore on account of consequent increase in disposal cost of Fly Ash from 25.1.2016 to 31.7.2016.

95. TANGEDCO has submitted that the impact of change in freight rate is being passed on through the escalation rate notified by the Commission once in 6 months and therefore, it would not be appropriate to once again allow the impact through provisions of "Change in Law". Prayas has submitted that there were existing obligations of the Petitioner regarding fly ash as on cut- off date and as per the Environment Clearance and Consents of the Petitioner prior to the amendment. Therefore, only the increase in obligation due to the amendment dated 25.1.2016 is to be considered and the Petitioner be required to demonstrate the increase in expenditure due to such amendment as against the existing obligation. It is incorrect to assume that the Petitioner was not incurring any expenditure prior to the Amendment.

96. We have considered the submissions of the Petitioner and the respondents and perused the documents on record. The petitioner vide its affidavits dated 20.6.2017 and 4.9.2017 has submitted the details regarding expenditure towards Fly Ash Transportation along with revenue earned and the contract agreement with agencies who have procured ash from the plant . The petitioner has also submitted the copies of bills, debit notes/ or invoices. As on cut-off date, there was no direction with regard to utilization of fly ash under Environment (Protection) Act, 1986. Subsequently, Ministry of Environment and Forests, Govt. of India vide its Notification dated 3.11.2009 issued the directions regarding utilisation of fly ash under the Environment (Protection) Act, 1986. The Ministry of Environment and Forests, Govt. of India vide its Notification No. S.O. 254(E) dated 25.1.2016 amended the Environment

(Protection) Rules, 1986 and imposed the additional cost towards fly ash transportation. Relevant portion of said Rules is extracted as under:

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

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

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

b) Any revenue generated/ accumulated from fly ash sales, if CoD of units/ station was declared before the MoEF notification dated 25.01.2016 shall also be adjusted from the relief so granted;

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

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

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

(M) Increase in rate of Chhattisgarh Electricity Duty

98. The Petitioner has submitted that as on the cut-off date i.e. 27.2.2013, the Electricity Duty was not applicable. Subsequently, the Government of Chhattisgarh vide Chhattisgarh Electricity Duty (Amendment) Act, 2013 increased the electricity duty on power consumed by the generating station. Therefore, as per Section 3 (1) of the Chhattisgarh Electricity Duty (Amendment) Act, 2013, Petitioner is required to pay 15% of the Discoms tariff on electricity duty. The petitioner has submitted that the Chhattisgarh Electricity Duty has been made applicable to the category of Petitioner's power plant vide the tariff order passed by Chhattisgarh Electricity Regulatory Commission (CSERC) and the tariff applicable to the Petitioner's power plant (HV-2 11 kV and 33 kV) is Rs. 4.5 per kWh and therefore 15% of the Chhattisgarh Electricity Duty is levied on Rs. 4.5 per kWh since August, 2015. The Petitioner has submitted that since electricity duty has been increased pursuant to the Chhattisgarh Electricity Duty (Amendment) Act, 2013, it qualifies as change in law events in terms of Article 10.1.1 of the PPA and the Petitioner needs to be compensated for the same. The Petitioner has submitted that said increase is not within the direct or indirect reasonable control of the petitioner and such events could not have been avoided by the Petitioner, the said event hinders and impairs the performance of obligations under the PPA in as much as the petitioner is incurring additional cost on the purchase of coal for the generation of electricity from the project. Therefore, the above said event is a Force Majeure event within the meaning of Article 9.3 of the PPA. The Petitioner has claimed Rs. 6.61 crore calculated @ Rs 4.5/kWh on account of increase in Chhattisgarh Electricity Duty from 1.8.2015 to 31.7.2016. The Petitioner has submitted that it is contesting the applicability of rates of Electricity Duty being levied on it which as per authorities is in excess of Rs 6/kWh. In case, a demand is raised on the Petitioner on this account or any liability arises in this regard, the Petitioner reserves its right to claim corresponding compensation under the PPA.

99. TANGEDCO has submitted that the Petitioner is relying on the notifications of Chhattisgarh Electricity Duty Act, 1949 and Chhattisgarh Electricity Duty Amendment Act, 2013 and these amendments were in existence even before the bid dead line of 6.3.2013. As per clause 2.4.1.1(B) (xi) of the RFP, the quoted tariff is inclusive of all taxes, levies, duties etc. TANGEDCO has submitted that the Petitioner has quoted escalable energy charge components, raise in duties and levies are taken care in the Commission's escalation percentage published once in 6 months. Prayas has submitted that amendment in 2013 in the Electricity Duty Act also provides for electricity duty on the electricity consumed in the State. This is in keeping with the Entry No. 53 in Schedule VII of Constitution of India which provides for 'taxation on consumption or sale of Power' under the State List. Therefore, the Chhattisgarh Act is applicable only to power consumed within the State. In the present matter, the power is being supplied to the Respondents in the State of Tamil Nadu and therefore, the Electricity Duty as applicable in Chhattisgarh is not relevant for such supply. Prayas has submitted that it is clear from the Chhattisgarh Electricity Duty Act,1949 and Chhattisgarh Electricity Duty (Amendment) Act, 2013, the Electricity Duty was existing on the cut-off date and the Petitioner is required to demonstrate how the Electricity Duty was not applicable as on cut -off date. Prayas has submitted that in Petition No. 101/MP/2017, the Petitioner has filed an Amendment in 2016 which has resulted in reduction in the Electricity Duty as clear from the recitals of the Notification. The Petitioner has not produced the said notification in the present petition. Any reduction in Electricity Duty, would in fact be on the account of the Procurers, particularly, the State of Chhattisgarh where in fact, power is being supplied.

100. We have considered the submissions of the parties. The Petitioner vide its affidavit dated. 2.11.2017 has submitted that Electricity Duty under the Chhattisgarh Electricity Duty Act, 1949 was 8% on applicable tariff of Rs 3.5/kWh as on the cut-off dates for TANGEDCO

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

101. The objections of TANGEDCO have been dealt with in Para 36 to 38 above. The Commission vide order dated 30.12.2015 in Petition No. 118/MP/2015 has decided that the event of electricity duty on auxiliary consumption increased by the State Govt. qualifies as Change in Law. Relevant Paras of the said order are extracted as under:

> "37. ....The increase in electricity duty and energy development cess on sale of power to Madhya Pradesh shall be payable by the Discoms of Madhya Pradesh in proportion to the share of MP in the scheduled generation. The increase in electricity duty and energy development cess on auxiliary power consumption of station and coal mine shall be payable by all beneficiaries/procurers of the station. Apart from the above, the Beneficiaries/procurers will get back or adjust an amount of Rs. 22 crore annually with effect from 1.8.2014 in proportion to their shares in the contracted capacity.
>
> 38. The increase in electricity duty and energy development cess on sale of power to Madhya Pradesh shall be payable by the distribution companies of Madhya Pradesh in Proportion to the share of Madhya Pradesh in the scheduled generation. The increase in electricity duty and energy development cess on auxiliary power consumption of the generating station and coal mine shall be payable by all the beneficiaries/procurers of the generation station. In addition, the petitioner shall refund Rs. 22 crore annually to the beneficiaries with effect from 1.8.2014 in proportion to their share in the contracted capacity or shall adjusted in their bills."

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

102. The Petitioner is directed to furnish the monthly bill along with the proof of payment of Electricity Duty and computations duly certified by the Auditors. If any change in rate of Electricity duty has benefitted the Petitioner, then, the same needs to be passed on to TANGEDCO.

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

103. The Petitioner has submitted that the tariff agreed under the PPA for the supply of power by the Petitioner to TANGEDCO was based on the specified assured linkage quantity of fuel from SECL. In this regard, it is an admitted position that the entire supply of power by the Petitioner was premised on linkage coal of 2.497 million tonne per annum by SECL. As on 27.2.2013, the Petitioner was entitled to receive 100% coal i.e. 2.497 million tonne per annum for generating power from its generating station, which is evident from the Letter of Assurance dated 15.6.2009 issued by SECL and the Fuel Supply Agreement dated 29.8.2013 entered into between SECL and the Petitioner. However, Ministry of Coal (MoC), vide its office memorandum dated 26.7.2013, decided that fuel supply agreements will be signed for the domestic coal quantity of 65%, 65%, 67% and 75% of annual coal quantity for the remaining four years of the 12th plan for the power plants having normal linkages on account of non-availability of domestic coal. Vide the said office memorandum/notification/order, MoC also decided that to meet its obligations under the fuel supply agreement of making available the balance quantity of coal, the Coal India Limited (CIL) may import coal and supply the same to the willing power plants on cost plus basis. Alternatively, MoC in the said notice decided that power plants may also directly import coal themselves, in which case, the fuel supply obligations on part of CIL/SECL to the extent of import component would be deemed to have been discharged.

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

> "After considering all aspects and the advice of CERC in this regard, the Government has decided the following in June, 2013:
>
> (a) Taking into account the overall domestic availability and actual requirements, FSAs to be signed for domestic coal component for the levy of disincentive at the

quantity of 65%, 65%, 67% and 75% of Annual Contracted Quantity (ACQ) for the remaining four years of the 12th Plan.

(b) To meet its balance FSA obligations, CIL may import coal and supply the same to the willing Thermal power plants on cost plus basis. Thermal power plants may also import coal themselves if they so opt.

(c) Higher cost of imported coal to be considered for pass through as per modalities suggested by CERC.

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

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

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

105. The Petitioner has submitted that, in light of the office memorandum/notification dated 26.7.2013 issued by MoC, the supply of linkage coal to the Petitioner was reduced and the Petitioner started receiving only part of the total required quantity from SECL for the purpose of supply of power to TANGEDCO under the PPA. The Petitioner has further submitted that as a result of the reduced supply of quantum of linkage coal, the Petitioner was constrained to procure balance coal from e-auction / open market, the cost whereof is much more than the linkage coal, therefore, said notification/order dated 26.7.2013 and letter/order dated 31.7.2013 are qualifies as Change in Law within the meaning of Article 10.1.1 of the PPA and the Petitioner is entitled to be compensated for the same. The Petitioner has submitted that said the reduction of supply of linkage coal by SECL and consequent procurement of balance coal is not within the direct or indirect reasonable control

of the petitioner and such events could not have been avoided by the Petitioner, the said event hinders and impairs the performance of obligations under the PPA in as much as petitioner is incurring additional cost on the purchase of coal for the generation of electricity from the project, therefore, said event is a Force Majeure event within the meaning of Article 9.3 of the PPA. The Petitioner has claimed an amount of Rs. 29.84 crore on account of increase in cost of procurement of balance coal through e-auction from 1.8.2015 to 31.7.2016.

106. TANGEDCO has submitted that under Case 1 bidding, it is the responsibility of the project developer to arrange for coal and the project developer is merely required to indicate the coal linkage in its bid in support of it being a serious bidder to supply power on sustained basis. The procurer does not take any responsibility in so far as the fuel is concerned. Therefore, TANGEDCO is responsible only to the extent of payment of charges in accordance with the PPAs for the power supplied to them. TANGEDCO has further submitted that the Escalation index of this Commission has sufficiently taken care of the energy charges in respect of which the Petitioner is seeking compensation on account of Change in Law. The petitioner has not brought on record anything to even suggest that it had incurred loss even after applying the Escalation Index of this Commission.

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

Quantum of shortage at reference GCV =

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

Where;

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

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

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

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

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

S. No.	Particulars	Date of Event	Remarks
1	NCDP issued by MoC	18.10.2007	IPPs to be supplied 100% of the quantity as per their normative requirement under FSA
2	LOA issued by SECL	15.6.2009	24,97,000 tonnes per annum
3	Cut-off date for Raj. Discom	11.9.2012	
4	Bid Submission date for Raj. Discom	18.9.2012	
5	Cut-off date for TANGEDCO	27.2.2013	

S. No.	Particulars	Date of Event	Remarks
6	Bid Submission date for TANGEDCO	6.3.2013	
7	Amendment in NCDP by MoC	26.7.2013	For the remaining 4 years of 12th five year plan, coal supply shall be 65%, 65%, 67% & 75% of ACQ
8	PPA/ PSA executed with TANGEDCO on	19.8.2013	208 MW
9	FSA executed with SECL on	29.8.2013	24,97,000 tonnes per annum
10	PPA/ PSA executed with Raj. Discom through PTC on	1.11.2013	Initially 410 MW but reduced to 250 MW by RERC vide its order dated 22.7.2015
11	Start of supply of power to TANGEDCO	1.8.2015	
12	Start of supply of power to Raj. Discom	30.11.2016	

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

> "53. However, in so far as the applicability of clause 13 to a change in Indian law is concerned, the respondents are on firm ground. It will be seen that under clause 13.1.1 if there is a change in any consent, approval or licence available or obtained for the project, otherwise than for the default of the seller, which results in any change in any cost of the business of selling electricity, then the said seller will be governed under clause 13.1.1. It is clear from a reading of the Resolution dated 21st June, 2013, which resulted in the letter of 31st July, 2013, issued by the Ministry of Power, that the earlier coal distribution policy contained in the letter dated 18th March, 2007 stands modified as the Government has now approved a revised arrangement for supply of coal. It has been decided that, seeing the overall domestic availability and the likely requirement of power projects, the power projects will only be entitled to a certain percentage of what was earlier allowable. This being the case, on 31st July, 2013, the following letter, which is set out in exten so states as follows ……
>
> Both the letter dated 31st July, 2013 and the revised tariff policy is statutory documents being issued under Section 3 of the Act and have the force of law. This being so, it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sources is cut down, the PPA read with these documents provides in clause 13.2 that while determining the consequences of change in law, parties shall have due regard to the principle that the purpose of compensating the party affected by such change in law is to restore, through monthly tariff

> payments, the affected party to the economic position as if such change in law has not occurred. Further, for the operation period of the PPA, compensation for any increase/decrease in cost to the seller shall be determined and be effective from such date as decided by the Central Electricity Regulation Commission. This being the case, we are of the view that though change in Indonesian law would not qualify as a change in law under the guidelines read with the PPA, change in Indian law certainly would."

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

112. It is noted from LoA dated 15.6.2009 that assured quantum is 2.49 MTPA for 1200 MW DB power plant. However, in the FSA dated 29.8.2013, Annual Contracted Quantum (ACQ) has not been mentioned, only original LoA quantum of 2.497 MTPA has been indicated against installed capacity of 600 MW of Unit-I. Therefore, LoA quantity of 2.497 MTPA is for 600 MW capacity from Unit-I and the Petitioner had assured quantity of coal at the time of submission for TANGEDCO bid. However, from the date of supply of power to TANGEDCO i.e. 1.8.2015, the Petitioner is not receiving adequate linkage coal as was assured in LoA and subsequently in the FSA dated 29.8.2013. Accordingly, the petitioner is eligible to get relief for the shortage of domestic linkage coal as a Change in law as NCDP 2013 came after the LoA dated 15.6.2009 and submission of TANGEDCO bid dated 6.3.2013.

113. To determine the shortage of linkage coal compared to the assured supply of quantum by SECL for TANGEDCO PPA, the computation is as under:

Particulars	Unit	Quantity

Particulars	Unit	Quantity
Coal linkage assured in LoA corresponding to 600 MW	MTPA	2.497
Coal linkage provided against FSA by SECL for 208 MW (221 MW gross) of TANGEDCO PPA	MTPA	0.920 (=2.497*221/600)
Assured quantum to be supplied by SECL at 85% normative PLF	MTPA	0.782 (=0.85* 0.920)

114. The Petitioner vide its affidavit dated 1.11.2017 has submitted the details of linkage coal actually supplied by SECL during the FY 2015-16 and FY 2016-17 as under:

in tonnes

Period of Supplies	Rail	Road	Total
July 2015 to March 2016 (FY 2015-16)	3,10,240	11,600	3,21,840
April 2016 to March 2017 (FY 2016-17)	8,93,510	1,52,530	10,46,040

115. Further, the Petitioner vide its affidavit dated 24.7.2017 in Petition No. 101/MP/2017 has submitted the details of linkage coal corresponding to Rajasthan power generation actually supplied by SECL during FY 2016-17 as 2,85,444 tonnes.

116. On the basis of above data, the linkage coal consumed for generation of TANGEDCO power during the FY 2015-16 and FY 2016-17 is as under:

Period of Supplies	Coal supplied by SECL for TANGEDCO generation (tonnes)
FY 2015-16	3,21,840
FY 2016-17	7,60,596

117. In view of the above, the actual shortfall for FY 2015-16 and FY 2016-17 that has to be met through e-auction/ imported coal by the Petitioner for generation of TANGEDCO power up to the level of 85% normative capacity is as under:

in tonnes

Period of Supplies	coal supplied by SECL for TANGEDCO generation	Assured quantum to be supplied by SECL at 85% normative capacity	Shortfall Quantity

in tonnes

Period of Supplies	coal supplied by SECL for TANGEDCO generation	Assured quantum to be supplied by SECL at 85% normative capacity	Shortfall Quantity
a	b	c	d=c-b
FY 2015-16	3,21,840	7,82,000	4,60,160
FY 2016-17	7,60,596	7,82,000	21,404

118. This computation of shortfall in coal supply by SECL is only for the illustration purpose and it is found that there is shortfall in actual coal supply compared to coal required for generation of upto 85% PLF. The Petitioner has claimed Rs. 29.84 crores for the period 01.08.2015 to 31.07.2016. However, the petitioner has only furnished the actual generation corresponding to TANGEDCO share during the period from November 2016 to March 2017 and has not furnished the scheduled generation based on the data furnished by NRLDC/ NLDC. In the absence of same, we could not verify the claim sought by the petitioner and direct the parties to compute the shortfall in coal supply by SECL on the basis of minimum of scheduled generation (capped at 85% as per normative) or actual generation. For the computation of the same, the formulation for calculation of compensation is provided in the subsequent paragraphs.

Operational Parameters considered for Computation of relief

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

kCal/ kWh & 2250 kCal/ kWh respectively. Accordingly, for the purpose of computation of coal consumption, SHR of 2250 kCal/ kWh provided by the Petitioner in the Schedule 10 of the PPA is reasonable to be considered.

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

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

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

Further, the formulation for calculation of compensation shall be as per the Energy Charge Rate (ECR) for Scheduled Generation at delivery point computed in steps as shown below.

Step-1:

ECR Linkage coal (Delivery point) = ECR QUOTED

Step-2:

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

Step-3:

ECR chargeable at delivery point = {(G x ECR at Step-1) + [ECR computed at Step-2 x (1-G)]}

Where,

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

Weighted Average GCV of other coal =

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

Weighted Average Price of Other coal =

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

Compensation = {(ECR as computed at Step-3- ECR_{Quoted}) x (Scheduled Generation at delivery point)}

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

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

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

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

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

(O) Carrying Cost

121. The Petitioner in its prayer at Para (e) has sought a direction to the Respondent to pay carrying out (interest @ 1.25% per month) from the date of applicability of the respective change in law events on account of delay in recovery of amount already paid towards Change in Law events so that its economic position is restored. In our view, there is no provision in the PPA to allow carrying cost on the amount covered under Change in Law till its determination by the Commission. The issue has been decided in order dated 17.6.2017 in Petition No. 16/MP/2016. Accordingly, the claim of the Petitioner is rejected.

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

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

123. The Petitioner has submitted that the above levies, changes, revisions and enactments are directly affecting the Petitioner, i.e. the expenses of the Petitioner/Seller, by more than 1% of the value of the Standby Letter of Credit (LC) in aggregate for the relevant Contract Year. Therefore, 1% of the Letter of Credit value in aggregate for the contract year comes to Rs. 66 lakh. The Petitioner has submitted that since the aggregate amount claimed for “Change in Law” during the year 2015-16 i.e. from August, 2015 to July, 2016 works out to be Rs. 90.31 crore, which is more than 1% of the LC amount. It is more than the threshold amount prescribed under Article 10.3.2 of the PPA and the Petitioner is entitled to be compensated for the same.

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

> “10.3.2 During Operating Period
>
> The compensation for any decrease in revenue or increase in expenses to the Seller shall be payable only if the decrease in revenue or increase in expenses of the Seller is in excess of an amount equivalent to 1% of the value of the Letter of Credit in aggregate for the relevant Contract Year.
>
> 10.3.4 The decision of the Appropriate Commission, with regards to the determination of the compensation mentioned above in Articles 10.3.1 and 10.3.2, and the date from which such

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

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

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

(b) Increase in royalty on coal, Forest Tax, CG Environment cess, CG Industrial Development cess, clean energy cess, service tax on transportation of coal and Electricity Duty shall be computed based on coal consumed on the basis of SHR of 2250 kCal/ kWh and AUX of 5.25% corresponding to scheduled generation and shall be payable by the beneficiaries on pro-rata based on their respective share in the scheduled generation. If the actual generation is less than scheduled generation, it will be restricted to actual generation.

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

(d) For Change in Law items related to the operating period, the year-wise compensation henceforth shall be payable only if such increase in revenue or cost to the Petitioner is in excess of an amount equivalent to 1% of LC in aggregate for a contract year as per provision under 10.3.2 of the PPA.

(e) Approaching the Commission every year for allowance of compensation for such Change in Law is a time consuming process which results in time lag between the amount paid by Seller and actual reimbursement by the Procurers which may result in payment of carrying cost for the amount actually paid by the Petitioner. Accordingly, the mechanism prescribed above is to be adopted for payment of compensation due to Change in Law events allowed as per Article 10.3.2 of the PPA for the subsequent period as well.

(f) We are not going to compute the threshold value for eligibility of getting compensation due to Change in Law during Operation period. However, the Petitioner shall be eligible to receive compensation if the impact due to Change in Law exceeds the threshold value as per Article 10.3.2 during Operation period. Accordingly, the compensation amount allowed shall be shared by the TANGEDCO based on the scheduled energy. Year-wise compensation henceforth shall be payable only if such

increase in revenue or cost to the Petitioner is in excess of an amount equivalent to 1% of LC in aggregate for a contract year as per provision under Article 10.3.2 of the PPA.

Summary of Decision:

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

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

S.No. No.	Change in Law events	Decision
	transportation of coal by rail and road	
13	Consequent increase in Value Added Tax / CST, Entry Tax and Niryatkar	Not allowed on account of want of relevant documents. Liberty granted to approach the Commission with relevant documents
	Development Surcharge	Not allowed
14	Additional cost towards Fly Ash Transportation	Admissible in-principle. However, to approach the Commission with documents and evidence to determine transportation cost as per para 94 above.
15	Levy of Chhattisgarh Electricity Duty	Allowed
16	Additional cost due to reduction in supply of coal from SECL	Allowed
17	Carrying Cost	Not Allowed

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

127. Petition No. 229/MP/2016 is disposed of in terms of above.

Sd/-	sd/-	sd/-	sd/-
(Dr. M.K.Iyer)	**(A. S. Bakshi)**	**(A. K. Singhal)**	**(Gireesh B. Pradhan)**
Member	**Member**	**Member**	**Chairperson**