CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 131/MP/2016

Coram:

Shri A.K. Singhal, Member
Shri A.S. Bakshi, Member
Dr. M.K. Iyer, Member

Date of Order: 21st February, 2018

In the matter of

Petition under Section 79 of Electricity Act, 2003 read with statutory framework governing procurement of power through competitive bidding and (a) Article 10 of the PPA dated 9.11.2011 between GMR Kamalanga Energy Ltd and Bihar State Electricity Board and (b) Article 13 of the PPA dated 12.3.2009 between GMR Energy Ltd. (on behalf of GMR Kamalanga Energy Ltd) and PTC India Ltd with back to back PPA between PTC India Ltd and Haryana Distribution companies, for compensation due to Change in Law and to evolve a mechanism for grant of an appropriate adjustment/ compensation to offset financial/ commercial impact of change in law during the Operating Period

And

In the matter of

1. GMR-Kamalanga Energy Limited,
Skip House, 25/1 Museum Road,
Bangalore-560 025

2. GMR Energy Limited
Skip House, 25/1 Museum Road
Bangalore – 5600025 **……Petitioners**

Vs.

1. Dakshin Haryana Bijli Vitran Nigam Limited
Vidyut Nagar, Hissar, Haryana

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

3. Haryana Power Generation Corporation Limited
Urja Bhawan, C-7, Sector 6,
Panchkula Haryana.

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

5. Bihar State Power (Holding) Company Ltd
Vidyut Bhawan, Bailey Road,
Patna – 800001

6. Bihar State Power Generation Company Ltd
Vidyut Bhawan, Bailey Road,
Patna – 800001

7. South Bihar Power Distribution Company Ltd
Vidyut Bhawan, Bailey Road,
Patna- 800001

8. North Bihar Power Distribution Company Ltd
Vidyut Bhawan, Bailey Road,
Patna- 800001 **…….Respondents**

Parties Present:

Shri Amit Kapur, Advocate, GKEL
Shri Vishrov Mukherjee, Advocate, GKEL
Ms. Raveena Dhamija, Advocate, GKEL
Shri Yashaswi Kant, Advocate, GKEL
Ms. Ranjitha Ramachandran, Advocate, Prayas
Shri G. Umapathy, Advocate, UHBVN & DHBVN
Shri Aditya Singh, Advocate, UHBVN & DHBVN
Shri Ashish Anand Bernard, Advocate, PTC India Ltd
Shri R.B. Sharma, Advocate, BSP (H) CL

ORDER

GMR Kamalanga Energy Limited (Petitioner No.1) was incorporated as a public limited company under the Companies Act, 1956 as a subsidiary of GMR Energy Limited (Petitioner No. 2) to set up a 1400 MW Thermal Power Project (hereinafter referred to as the "Power Project") at village Kamalanga, District Dhenkanal in the State of Odisha. The Power Project comprises of two stages - the first stage having three units of 350 MW each and the second stage having one unit of 350 MW. Stage 1 of the Power Project has been accorded Mega Power Project status by the Ministry of Power, Government of India on 1.2.2012.

2. Petitioner No.1, GMR Kamalanga Energy Limited (GKEL), entered into the following long-term PPAs for supply of power from the Power Project:

(a) Supply of 350 MW gross power (Stage 1: 262.5 MW and Stage 2: 87.5 MW) to Grid Corporation of Odisha Limited (GRIDCO) in terms of PPA dated 28.9.2006 (as amended on 4.1.2011 with delivery point as Odisha STU Order interconnection point).The supply of power in terms of the GRIDCO PPA commenced from 30.4.2013.

(b) Supply of 282 MW gross power (260 MW net of auxiliary consumption) to Bihar State Electricity Board in terms of PPA dated 9.11.2011, with delivery point as the Bihar STU interconnection point. The supply of power commenced from 1.9.2014.

(c) Supply of 350 MW gross power (300 MW net of transmission losses and auxiliary consumption) to Haryana Discoms based on the competitive bidding through back to back arrangements:

(i) The PPAs dated 7.8.2008 entered into between PTC India Limited and Haryana Discoms with delivery point as Haryana STU bus bar;

(ii) Back to back PPA dated 12.3.2009 between GMR Energy Limited (holding company of GKEL) and PTC India Limited.

3. The Petitioners in the original petition have sought the following reliefs under Change in Law in respect of Haryana PPAs and Bihar PPAs during the operating period:

(a) Increase in Crushing/Sizing Charges pursuant to CIL notifications dated 12.12.2007, 15.10.2009 and 16.12.2013 (Haryana PPA) and 15.10.2009 and 16.12.2013 (Bihar PPA)

(b) Increase in Surface Transportation Charges pursuant to various notifications issued by Ministry of Coal, GoI/ Coal India Ltd vide notifications dated 12.12.2007, 15.10.2009 & 13.11.2013 (Haryana PPA) and 15.10.2009 & 13.11.2013(Bihar PPA)

(c) Levy of charges for transportation of ash by Ministry of Environment, Forest and Climate Change, GoI vide Notification No. 225 dated 25.01.2016 and the State Pollution Control Board of Odisha communication dated 20.01.2015

(d) Increase in Electricity duty on Auxiliary Consumption by Government of Odisha vide Notification No. 1387 dated 01.10.2015 (Haryana PPA)

(e) Increase on account of contribution to Water Conservation Fund (WCF) vide resolution dated 18.05.2015 passed by Water Department, Government of Odisha implemented vide Notification Nos. 1545 dated 03.11.2015 (Haryana PPA) and Notification dated 7.11.2015 (Bihar PPA).

(f) Imposition of charges towards National Mineral Exploration Trust (NMET) and District Mineral Foundation (DMF) pursuant to amendments in Mines and Minerals (Development and Regulation) (Amendment) Act, 2015 dated 26.3.2015 and Notification SECL/BSP/S&M/1936 of CIL dated 13.11.2015(Haryana PPA)

(g) Levy of 0.5% Swachh Bharat Cess by Government of India vide Finance Act, 2015 and Government of India notification dated 06.11.2015 (Haryana PPA)

(b) Levy of 0.5% Krishi Kalyan Cess by Government of India vide Finance Act 2016.

4. Accordingly, the impact of the above Change in Law events estimated on monthly and annualized basis, under the Haryana PPAs and Bihar PPA, tabulated by the Petitioner is as under:

For Haryana PPAs

S. No.	Change in Law events	Monthly impact *(₹ in crore)*	Annualized impact* *(₹ in crore)*
1	Crushing/ sizing Charges (for 100 MM lot size)	0.52	6.10
2	Surface transportation charges	0.37	4.33
3	Levy of charges for transportation of ash	0.72	8.43
4	Electricity duty on Auxiliary Consumption	0.155	1.82
5	Contribution to Water Conservation Fund (WCF)	0.42	5.00
6	National Mineral Exploration Trust (NMET) Charges	0.029	0.34
7	District Mineral Foundation (DMF) Charges	0.44	5.12
8	Swachh Bharat Cess	0.0051	0.0598
9	Krishi Kalyan Cess	0.0051	0.0598
	Total	**2.65**	**31.32**

For Bihar PPAs

S. No.	Change in Law events	Monthly impact *(₹ in crore)*	Annualized impact* *(₹ in crore)*
1	Crushing/ sizing Charges (for 100 MM lot size)	0.21	2.50
2	Surface transportation charges	0.15	1.81
3	Levy of charges for transportation of ash	0.62	7.31
4	Contribution to Water Conservation Fund (WCF)	0.34	4.03
5	Krishi Kalyan Cess	0.0044	0.052
	Total	**1.33**	**15.70**

** Annualized Impact is estimated. Actual impact may vary based on actual coal quantity, coal quality, and actual energy scheduled for respective PPA.*

5. The Petitioners have submitted that the events of Change in Law have significant adverse financial impact on the costs and revenue of the Petitioners during the operating period for which the Petitioners are entitled to be compensated in terms of Article 10 of the Haryana PPA and Article 13 of the Bihar PPA respectively. Accordingly, the Petitioners have filed the present petition with the following prayers:

> "(a) *Declare that the items set out in Paragraphs 48 to 94 (of the petition) as Change in Law events during the Operating Period which have led to an increase in the costs during the operating period of the Project;*

(b) Evolve a suitable compensatory mechanism to compensate the Petitioner for the impact on costs during the operating period of the Project and restore the Petitioner to the same economic condition prior to occurrence of the events set out in paragraphs above;

(c) Grant interest/carrying cost for any delay in reimbursement by the Respondents;"

6. The Petition was admitted and notices were issued to the respondents and M/s Prayas Energy Group (Prayas) with directions to file their replies to the petition. Pursuant to the hearing of the Petition on 13.7.2017, the Petitioner was directed vide ROP to submit additional information on the following with copy to the respondents and Prayas.

(i) Details of fly ash generation corresponding to energy supplied to all the long term beneficiaries separately for the claim period till 31.3.2017, along with quantum of ash transported up to 100 km distance and beyond 100 Km (up to 300 Km) and rate of ash transportation cost.

(ii) Whether the Petitioner has awarded the contract for transportation of ash through competitive bidding or through negotiation route. If the contract has been awarded through competitive bidding, submit the copy of agreement along with the rate of transportation cost and if the contract has been awarded through negotiation route, justify that the price considered was competitive, along with a copy of agreement.

(iii) Actual fly ash transportation cost paid for transportation of fly ash beyond 100 Km (up to 300 Km) as per MoEF notification dated 25.1.2016 duly certified by Auditor for the claim period till 31.3.2017.

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

(v) Whether the Petitioner is maintaining a separate account for revenue earned from sale of ash as per the notification of MOEF. If yes, furnish the total revenue accumulated and the expenditure incurred from the same account till date. If not, the reason for not maintaining such separate account.

7. Replies to the Petition have been filed by Respondents 1 to 3 (DHBVNL, UHBVNL & HPGCL) vide affidavit dated 17.7.2017, Respondents 5, 7 & 8 (BSPHCL, SBPDCL & NBPDCL) vide affidavit dated 2.2.2017, PTC vide affidavit dated 31.1.2017 and Prayas vide affidavit dated 16.8.2017. The Petitioners have filed their rejoinder to the said replies of the Respondents & Prayas. Thereafter, the matter was heard on 20.12.2017 and the Commission reserved its order in the Petition.

Maintainability

8. The Petitioners in their Petition have submitted that it has a composite scheme for generation and sale of power to more than one State and hence the Commission has the jurisdiction to adjudicate the present matter under Section 79(1)(b) read with Section 79(1)(f) of the Act in terms of the Full Bench judgment dated 7.4.2016 of the Appellate Tribunal for Electricity (Tribunal) in Appeal No. 100 of 2013 (UHBVNL & anr V CERC & ors).

9. The learned counsel for the Respondents (Bihar State Power Companies) submitted that the Petition is not maintainable as the parties had earlier invoked the jurisdiction of the State Commission and filed petitions namely (a) adoption of tariff by the State Commission vide order dated 27.11.2012 in Case No. 6/2012 and (b) Pre-ponement of supply of power from the Project vide State Commission's order dated 24.7.2014 in Case No.14/2014. Accordingly, he submitted that the invocation of the jurisdiction of the Central Commission is not in accordance with the provisions of Section 64(5) of the Electricity Act, 2003 (the 2003 Act). The learned counsel further stated that the judgment of the Full Bench of the Tribunal while holding that the Petitioner has a composite scheme had not dealt with a situation when an application is made by the parties intending to undertake such inter-State supply, to be determined under Section 64(5) of the 2003 Act. Accordingly, the learned counsel has prayed that the issue of jurisdiction may be decided by the Commission before considering the claims/issues raised by the Petitioner on merits.

10. In response, the Petitioner has clarified that the submissions of the Respondents, Bihar State Power Companies is incorrect. The Petitioner has pointed out that the Respondent, BSPHCL had invoked the jurisdiction of the BERC (State Commission) by

filing Case No. 6/2012 for adoption of tariff under Section 63 of the 2003 Act and Case No. 14/2014 for Pre-ponement of supply of 260 MW power from the Project contracted for long term which was decided vide orders dated 27.11.2012 and 24.7.2014 respectively. It has further submitted that in accordance with the Full Bench judgment of the Tribunal, Section 64(5) has no application to the present case as the said section is applicable only with respect to tariff determination under Section 62 and not for competitively bid tariff adopted under Section 63 of the 2003 Act. The Petitioner in its written submissions dated 8.1.2018 has submitted that the Commission in its order dated 7.4.2017 in Petition No. 112/MP/2015 has held that it has the jurisdiction to regulate the tariff of the Petitioners and the same has not been challenged by the said Respondents. It has further stated that the Hon'ble Supreme Court in Civil Appeal Nos. 5399-5400/2016 (Energy Watchdog V CERC &ors) had decided vide judgment dated 11.4.2017 that the generating station of the Petitioner has a composite scheme for generation and supply of power and hence the jurisdiction for the same lies with the Central Commission. Accordingly, the Petitioner has submitted that since the issue of jurisdiction of the Petitioner has attained finality, the averments of the Respondents, Bihar State Power Companies are barred by the Principles of res-judicata.

11. The submissions have been considered. The Petitioner has entered into PPAs with the discoms of the three States at different points in time and for different quantum. The PPA with GRIDCO for supply of 262.5 MW of power was initially executed by the Petitioner on 28.9.2006. Later on revised PPA was entered into on 4.1.2011 for supply of power from Stage II of the Project having capacity of 350 MW. PTC signed agreements dated 7.8.2008 with the Haryana utilities and also signed the PPA dated 12.3.2009 with the Petitioner as a back-to-back arrangement for supply of power. On 9.11.2011, the petitioner entered into PPA with Bihar State Electricity Board for supply of 282 MW gross

power at Bihar STU bus-bar interconnection point. The tariff agreed to under the said PPA was adopted by Bihar Electricity Regulatory Commission on 27.11.2012.

12. The question as to (a) whether the supply of power by the Petitioner to the three states of Odisha, Haryana and Bihar is under the composite scheme for generation and supply in more than one state and (b) whether this Commission has the jurisdiction to regulate the tariff of the generating station of the Petitioner under Section 79(1)(b) of the 2003 Act had been a subject matter for consideration of this Commission in various proceedings as narrated in the subsequent paragraphs and the Commission in its orders had decided the jurisdiction in its favour which had been affirmed by the higher courts.

13. Petition Nos 79/MP/2013 & 81/MP/2013 were filed by the Petitioners before this Commission seeking compensation due to Force Majeure events and Change in law events in respect of Haryana PPAs dated 7.8.2009/12.3.2009 during the Operating period and Construction period respectively. In this Petition, GRIDCO had submitted that since the PPAs were entered into at different points of time, there exists no composite scheme for generation and sale of power by the Petitioner in more than one state and the Central Commission had no jurisdiction to adjudicate the matter. Referring to the Commission's order dated 19.10.2012 in Petition No. 155/MP/2012 (Adani Power Ltd v UHBVNL &ors), this Commission by order dated 16.12.2013 held that the composite scheme can be entered into by the generating company at any stage subsequently and the jurisdiction gets vested in this Commission as and when the generating company enters into a composite scheme. Accordingly, the Commission decided the issue of jurisdiction in the said order dated 16.12.2013 as under:

> *"33. To sum up, it is held that supply of electricity by the petitioner to the States of Odisha, Haryana and Bihar is under the composite scheme for generation and sale of electricity in more than one State. Accordingly, this Commission has power to regulate the tariff of the generating station of the petitioner under clause (b) of sub-section (1) of Section 79 of the Electricity Act, 2003. As a corollary it follows*

that the powers of adjudication of the claims and disputes involving force majeure and Change in Law events under the PPAs is vested in this Commission.

34. In view of the above discussion, the petitions are maintainable"

14. Thereafter, in Petition No. 77/GT/2013 filed by the Petitioner No.1 before this Commission for determination of tariff under Section 62 of the 2003 Act, in respect of supply of 262.5 MW (25% of 1050 MW) power to GRIDCO for the period from 1.4.2013 to 31.3.2014, the issue of jurisdiction of the Central Commission was raised by GRIDCO. However, the Commission by interim order dated 3.1.2014 rejected the contention of GRIDCO and thereby upheld the jurisdiction of the Commission. The relevant portion of the order dated 3.1.2014 regarding jurisdiction is extracted hereunder:

"9. In view of the above findings, the present petition for determination of final tariff is amenable to the jurisdiction of the Commission and as such the petition is maintainable. The petition shall be taken up for hearing on 11.3.2014….."

15. Against the Commission's orders dated 16.12.2013 and 3.1.2014 as above, the Haryana discoms and GRIDCO filed Appeal No. 44/2014 and Appeal No. 74/2014 respectively before the Tribunal on the issue of jurisdictionof the Commission. These appeals were clubbed by the Tribunal and were disposed of vide judgment dated 7.4.2016 upholding the jurisdiction of the Central Commission. The relevant portion of the judgment of the Tribunal dated 7.4.2016 is extracted as under:

"120. We have already answered Issue No.3 in the affirmative and held that supply of power to more than one State from the same generating station of a generating company ipso facto, qualifies as a "Composite Scheme" to attract the jurisdiction of the Central Commission under Section 79 of the said Act. It is an admitted position that both GMR Energy and Adani Power are selling electricity in more than one State from their respective generating stations. Hence, we hold that so far as Adani Power and GMR Energy are concerned, there exists a 'Composite Scheme' for generation and sale of electricity in more than one State by a generating station of a generating company within the meaning of Section 79(1)(b) of the said Act for the Central Commission to exercise jurisdiction. Issue No.4 is accordingly answered in the affirmative."

16. Against the judgment of the Tribunal dated 7.4.2016, the utilities of Haryana, M/s Prayas Energy group and GRIDCO filed Civil Appeals (C.A. Nos. 5399-5400/2016, 5415/2016) before the Hon'ble Supreme Court. However, the Bihar discoms did not prefer any appeals against the orders of the Commission or the judgment of the Tribunal dated 7.4.2016.

17. During the pendency of the aforesaid appeals before the Tribunal, the Petitioners had filed Petition No.112/MP/2015 before this Commission claiming compensation due to Change in law impacting revenues and costs during the operating period in terms of Article 13.2(b) of the Bihar PPA dated 7.8.2007. The Commission by order dated 7.4.2017 disposed of the said Petition upholding the jurisdiction of the Commission to regulate the tariff of the generating station in terms of Section 79(1)(b) read with Section 79(1)(f) of the 2003 Act and accordingly decided the claims of the Petitioner on merits. The relevant portion of the order dated 7.4.2017 on the issue of jurisdiction is as under:

> *"……..In the light of the judgment of the Appellate Tribunal, we reiterate that this Commission has the jurisdiction to regulate the tariff of the power project of the Petitioners. It is pertinent to mention that GRIDCO and Haryana Utilities have filed Civil Appeal before the Supreme Court challenging the jurisdiction of the Commission to regulate the tariff of the Petitioners. Therefore, our decision in this order shall be subject to the final outcome of the Civil Appeals on the issue of jurisdiction."*

18. Thereafter, the Hon'ble Supreme Court vide its judgment dated 11.4.2017 in the said Civil Appeals titled Energy Watchdog v CERC & ors (2017 (4) SCALE 580 rejected the contentions of the Respondents as regards jurisdiction of this Commission and held that the generating station of the Petitioner has a composite scheme for generation and sale of power to more than one State and the jurisdiction for the same lies with this Commission. The relevant portion of the judgment dated 11.4.2017 is extracted hereunder:

"22….. 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. 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.

…

26. Another important facet of dealing with this argument is that the tariff policy dated 6th June, 2006 is the statutory policy which is enunciated under Section 3 of the Electricity Act. The amendment of 28th January, 2016 throws considerable light on the expression "composite scheme", which has been defined for the first time as follows:

"5.11 (j) Composite Scheme: Sub-section (b) of Section 79(1) of the Act provides that Central Commission shall regulate the tariff of generating company, if such generating company enters into or otherwise have a composite scheme for generation and sale of electricity in more than one State.

Explanation: The composite scheme as specific under section 79(1) of the Act shall mean a scheme by a generating company for generation and sale of electricity in more than one State, having signed long-term or medium-term PPA prior to the date of commercial operation of the project (the COD of the last unit of the project will be deemed to be the date of commercial operation of the project) for sale of at least 10% of the capacity of the project to a distribution licensee outside the State in which such project is located."

27. That this definition is an important aid to the construction of Section 79(1)(b) cannot be doubted and, according to us, correctly brings out the meaning of this expression as meaning nothing more than a scheme by a generating company for generation and sale of electricity in more than one State."

19. Thereafter, in Appeal No. 45/2016 filed by GRIDCO before the Tribunal challenging the tariff order dated 12.11.2015 (in Petition No. 77/GT/2013) on various grounds, including the jurisdiction of this Commission, the Tribunal by its judgment dated 1.8.2017 upheld the jurisdiction of this Commission as under:

"13.(b) On Question No. 6 (a) i.e. Whether the Central Commission had the jurisdiction to entertain a petition for determination of Tariff under Section 79(1) (b) of the Electricity Act in the present case?, we observe that the Appellant has submitted that on this issue the Appellant had filed Appeal No. 74 of 2014 before this Tribunal. This Tribunal has upheld the jurisdiction of the Central Commission under Section 79 (1) (b) of the Electricity Act, 2003 for determination of tariff of the Station of Respondent No. 1. Further, the Appellant filed Appeal No. 5415 of 2016 before the Hon'ble Supreme Court against the judgement of this Tribunal. The Hon'ble Supreme Court vide judgment dated 11.4.2017 in the said Appeal also upheld the jurisdiction of the Central Commission for determination of tariff of the Station of Respondent No. 1. Accordingly, this issue is decided against the Appellant"

20. From the above orders of the Commission, the judgments of the Tribunal and the Hon'ble Supreme Court, it is evident that the generating station of the Petitioner has a composite scheme for generation and sale of power in more than one state within the meaning of Section 79(1)(b) of the 2003 Act and the Central Commission has the jurisdiction to regulate the tariff of the project of the Petitioners in terms of Section 79(1)(b) read with Section 79(1)(f) of the 2003 Act. The Respondents, Bihar State Power Companies having been party respondents in the proceedings before this Commission were at liberty to challenge the findings of this Commission before the superior courts in case it was aggrieved, but chose not to do so. Thus, the issue of jurisdiction having been settled in favour of this Commission in terms of the above orders/judgments, cannot be unsettled by the Bihar State Power Companies by once again raising issues on jurisdiction, on extraneous grounds. In the light of the decision of the Hon'ble Supreme Court, this Commission has the jurisdiction to regulate the tariff of the Project of the Petitioner under Section 79 (1) (b) of the 2003 Act and to adjudicate the disputes in terms of Section 79 (1) (f) of the 2003 Act.

21. The Bihar State Power Companies have submitted that the invocation of jurisdiction of this Commission is not in accordance with Section 64(5) of the 2003 Act as the parties had earlier invoked the jurisdiction of the State Commission. It has also submitted that the Full Bench judgment of the Tribunal dated 7.4.2016 and the judgment of the Hon'ble Supreme Court dated 11.4.2017 in Energy Watchdog case does not deal with the situation when an application is made by parties intending to undertake such inter-state supply to be determined under Section 64(5) of the 2003 Act. In response, the Petitioner has clarified that Section 64(5) is applicable only with respect to tariff determination under Section 62 and not for competitively bid tariff under Section 63 of the 2003 Act.

22. The matter has been examined. Section 64(5) of the 2003 Act provides as under:

> *"64(5) Notwithstanding anything contained in Part X, the tariff for any inter-state supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor".*

23. This provision clarifies that the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity shall be the Appropriate Commission based on the application of the parties concerned even in cases involving inter-state supply. In our view, Section 64(5) has no application in cases of tariff discovered under competitively bidding process and adopted by the Commission under Section 63 of the 2003 Act. As Section 64 provides for the procedure for determination of tariff under Section 62, the Section 64(5) would be applicable only in respect of determination of tariff under Section 62 of the 2003 Act. Further, the submission of the Bihar State Power Companies that the parties had invoked the jurisdiction of the State Commission and hence the jurisdiction of the Central Commission is not in conformity with Section 64(5) is not tenable and the same is contrary to the facts on record. It is noticed that the Bihar State Power Companies had invoked the jurisdiction of the State Commission and had filed Case No 6/2012 for adoption of tariff and Case No. 14/2014 for pre-ponement of supply of 260 MW power from the Project. By no stretch of imagination can these petitions be construed as joint application by the parties under Section 64(5) invoking the jurisdiction of the State Commission. Moreover, the issue of jurisdiction was neither raised by the said respondents nor decided by the State Commission in these petitions. The submission of these Respondents that the judgment of the Hon'ble Supreme Court in Energy Watchdog case does not deal with the situation under Section 64(5) is also not tenable and the same is contrary to records. It is observed that the Hon'ble Supreme

Court in the Energy Watchdog case while analyzing the expression 'composite scheme' under Section 79(1)(b) had also examined the Section 64(5) of the 2003 Act and had upheld the jurisdiction of the Commission in its judgment dated 11.4.2017. The relevant portion of the judgment is extracted as under:

> *"Section 64(5) has been relied upon by the Appellant as an indicator that the State Commission has jurisdiction even in cases where tariff for inter-State supply is involved. This provision begins with a non-obstante clause which would indicate that in all cases involving inter- State supply, transmission, or wheeling of electricity, the Central Commission alone has jurisdiction. In fact this further supports the case of the Respondents. Section 64(5) can only apply if, the jurisdiction otherwise being with the Central Commission alone, by application of the parties concerned, jurisdiction is to be given to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity. We, therefore, hold that the Central Commission had the necessary jurisdiction to embark upon the issues raised in the present cases."*

24. The jurisdiction of the Central Commission to regulate the tariff of the project of the Petitioner under Section 79 (1) (b) of the 2003 Act having been affirmed by the Hon'ble Supreme Court in its judgment as above, the Petition filed by the Petitioner is maintainable. Accordingly, the submissions of the Respondents, Bihar State Power Companies stands rejected.

Issues on merit

25. After consideration of the submissions of the Petitioners, M/s Prayas and the Respondents, the claim of the Petitioners have been dealt with as under:

(a) Whether the provisions of PPAs with regard to notice have been complied with?

(b) What is the scope of change in law in the PPAs?

(c)Whether compensation claims are admissible under Change in law in the PPAs?

(d) Mechanism for processing and reimbursement of admitted claims under Change in law.

Issue No.1: Whether the provisions of the PPA with regard to notice have been complied with?

26. The claims of the Petitioners in the present petition pertain to the Change in Law events during the operating period. Article 13.3.1 of the Haryana PPA is extracted as under:

> "13.3 Notification of Change in Law
>
> 13.3.1 If the Seller is affected by a Change in Law in accordance with Article 13.2 and wishes to claim a Change in Law under this Article, it shall give notice to the Procurer of such Change in Law as soon as reasonably practicable after becoming aware of the same or should reasonably have known of the Change in Law.
>
> 13.3.2 Without prejudice to the factor of materiality or other provisions contained in this Agreement, the obligation to inform the Procurer contained herein shall be material.
>
> Provided that in case the Seller has not provided such notice, the Procurer shall have the right to issue such notice to the Seller.
>
> 13.3.3 Any notice served pursuant to this Article 13.3.2 shall provide, amongst other things, precise details of:
>
> (a) the Change in Law; and
> (b) the effects on the Seller of the matters referred to in Article 13.2.

27. The Petitioner has submitted that it has duly informed the respondents about the events of Change in Law in respect of Haryana PPA and their impact vide following notices.

a) Notice dated 29.7.2015 vide letter ref: GKEL/BBSR/PTC/PPA/2015-16/5415
b) Notice dated 5.11.2015 vide letter ref: GKEL/PTC/2015-16/7032
c) Notice dated 17.11.2015 vide letter ref: GKEL/PTC/PPA/2015-16/7034
d) Notice dated 26.4.2016 vide letter ref: GKEL/PTC/PPA/2016-17/23
e) Notice dated 8.7.2016 vide letter ref: GKEL/PTC/PPA/2016-17/91

28. The claims of the Petitioners in the present petition pertain to the Change in Law events during the operating period. Article 10.4 of the Bihar PPA is 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.

29. The Petitioners have submitted that respondents were duly informed about the events of Change in Law in respect of Bihar PPA and their impact vide following notices:

a) Notice dated 28.7.2015 vide letter ref: GKEL/BBSR/Bihar/PPA/2015-16/4510
b) Notice dated 26.4.2016 vide letter ref: GKEL/Bihar/PPA/2016-17/21
c) Notice dated 8.7.2016 vide letter ref: GKEL/Bihar/PPA/2016-17/90

30. Under Article 13.3.1 of the Haryana PPA and Article 10.4.2 of the Bihar PPA, the Petitioners are required to give notice about occurrence of change in law events as soon as practicable after being aware of such events. The Petitioners have given notices as stated above to the Procurers indicating the above change in law events. In the said notices, Petitioners have appraised the procurers about the occurrence of change in law events and the impact of such events on tariff. None of the Procurers have responded or raised issues with regard to such notice of Change in law by the Petitioner. Thereafter, the Petitioners have filed the present Petition. In our view, the requirement of Articles 13.3.1 and 10.4.2 of the PPAs have been complied with by the Petitioner.

Issue No. 2: Scope of change in law in the Haryana & Bihar PPAs

31. The Petitioners have approached this Commission under Article 10 of the Bihar PPA / Article 13 of the Haryana PPA read with section 79 of the 2003 Act for adjustment / compensation to offset the financial / commercial impact of change in law during the Operating period.

32. Operating period has been defined in the Haryana PPA and Bihar PPA as under:

Haryana PPA

"Operating period shall mean in relation to the Unit means the period from its COD and in relation to the power station the date by which all units achieve COD, until the expiry or earlier termination of this agreement in accordance with Article 2 of this agreement.

Bihar PPA

"Operating Period shall mean the period commencing from the Delivery Date, until the Expiry Date or date of earlier termination of this Agreement in accordance with Article 2 of this Agreement."

33. Article 10 of the Bihar PPA provides Change in Law during the operating period as under:

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

10.2 Application and Principles for computing impact of Change in Law

10.2.1 While determining the consequence of Change in Law under this Article 10, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through monthly Tariff Payment, 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.

10.3 Relief for Change in Law

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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."

34. Article 13 of the Haryana PPA provides Change in Law during the operating period as under:

"13. CHANGE IN LAW

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

13. 1.1 "Change in Law" means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline:

(i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law or a change in interpretation of any Law by a Competent Court of law, tribunal or Indian Governmental Instrumentality provided such Court of law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation or (iii) change in any consents, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer under the terms of this Agreement;

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

Provided that if Government of India does not extend the income tax holiday for power generation projects under Section 80 IA of the Income Tax Act, upto the Scheduled Commercial Operation Date of the Power Station, such non-extension shall be deemed to be a Change in Law (applicable only in case the Seller envisaging supply from the Project awarded the status of "Mega Power Project" by Government of India).

13.1.2 "Competent Court" means:

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

13.2 Application and Principles for computing impact of Change in Law

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

Operation Period

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

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

35. The terms "Law" and "Indian Governmental Instrumentality" have been defined in Bihar 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;

"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 Government(s) or both, any political sub-division of any of them including any court or Appropriate Commission(s) or tribunal or judicial or quasi-judicial body in India but excluding the Seller and the Procurer."

36. The terms "Law" and "Indian Governmental Instrumentality" have been defined in Haryana 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 all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include all rules, regulations, decisions and orders of the Appropriate Commission;

"Indian Governmental Instrumentality" shall mean the Government of India, Government of Haryana, and any ministry, department, body corporate, Board, agency, or other authority of GOI or Government of the State where the project is located and includes the Appropriate Commission."

37. A combined reading of the above provisions in the PPAs would reveal that the Commission has the jurisdiction to adjudicate upon the disputes between the Petitioners and the Respondents with regard to 'Change in Law' events which occur after the date which is seven days prior to the bid deadline. The events broadly covered under 'Change in Law' are as under:

"Bihar PPA

(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 seller.

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

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

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

(h) The Compensation for any increase/decrease in revenue or cost to the Seller shall be determined and made effective from such date, as decided by the Commission which shall be final and binding on both the parties, subject to right of approval provided under Electricity Act,2003.

(i) The compensation shall be payable only if increase/decrease in revenues or cost to the Petitioners are in excess of an amount equivalent to 1% of Letter of Credit in aggregate for a Contract Year.

Haryana PPA

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

Any change in any consents or approvals or licenses available or obtained for the project, otherwise than the default of the seller.

Such changes shall result in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer under the terms of this Agreement

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

The Compensation for any increase/decrease in revenue or cost to the Seller shall be determined and made effective from such date, as decided by the Commission which shall be final and binding on both the parties, subject to right of approval provided under Electricity Act, 2003.

The compensation shall be payable only if increase/decrease in revenues or cost to the Petitioners are in excess of an amount equivalent to 1% of Letter of Credit in aggregate for a Contract Year."

Issue No.3: Whether Compensation claims are admissible under Change in Law in the Haryana & Bihar PPAs?

38. The Petitioners have raised claims under Change in Law in respect of events during the operating period, namely Increase in crushing/sizing charges, Increase in Surface Transportation charges, Levy of charges for transportation of ash, Increase in Electricity duty on Auxiliary Consumption (Haryana PPA), Increase on account of contribution to Water Conservation Fund, Imposition of charges towards National Mineral Exploration Trust (NMET) and District Mineral Foundation (DMF) (Haryana PPA), Levy of Swachh Bharat Cess (Haryana PPA) and Levy of 0.5% Krishi Kalyan Cess. Keeping in view the broad principles discussed above, we proceed to deal with the claim of the Petitioners under Change in Law during the Operating Period.

Change in Law claims pertaining to Haryana PPA

A. Increase in Electricity duty on Auxiliary Power Consumption

39. The Petitioner has submitted that as on the cut-off date (17.11.2007), electricity duty on auxiliary power consumption was ₹0.20/kWh. Subsequently, the electricity duty was increased to `0.30/kWh vide Notification No. 1387 dated 1.10.2015 issued by the Energy Department, Government of Odisha. Accordingly, the Petitioners have submitted that the impact on account of increase in electricity duty on auxiliary power consumption is Rs 0.10/kWh. The Petitioners have further submitted that the increase in electricity duty which has led to increase in cost during the operating period constitutes a change in law as the Notification was issued on 1.10.2015, which was after the cut-off date.

40. The Haryana Utilities have submitted that the Petitioner has not given any standardized figures for computation of the increase in electricity duty and its impact on the change in law, if any. Accordingly, it has stated that the same could be only considered on such information being furnished by the Petitioner. In response, the Petitioner in its rejoinder has submitted that it has provided an estimate of the annual impact of increase in electricity duty and that the compensation would be based on the actual impact of the said change in law event. The Petitioner has also pointed out that the Commission in its order dated 30.12.2015 in Petition No. 118/MP/2015 (Sasan Power Ltd V MPPMCL &ors) had allowed compensation on account of increase in electricity duty on auxiliary power consumption under Change in law.

41. Prayas has submitted that with respect to the PPA with Bihar Utilities, the claim of the Petitioners for increase in electricity duty on auxiliary power consumption had been allowed by the Commission vide order dated 7.4.2017 in Petition No.112/MP/2015.

It has also stated that with regard to Haryana Utilities, the increase in electricity duty on auxiliary power consumption had been allowed in Commission's order dated 30.12.2015 in Petition No. 118/MP/2015. Accordingly, Prayas has submitted that the claim of the Petitioner may be considered subject to prudence check and the electricity duty on auxiliary power consumption is to be on normative or actual parameters whichever is lower, similar to Sasan Power Ltd.

42. We have considered the submissions of the Petitioners, Respondents and Prayas. The Commission in Petition No. 118/MP/2015 had examined the claim of increase in electricity duty on auxiliary power consumption by Sasan Power Ltd and had by order dated 30.12.2015 allowed the same. The relevant portion of the order is 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 `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 ` 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**."**

43. In line with the above decision, the Commission had considered the claim of the Petitioners for increase in electricity duty on auxiliary power consumption in respect of Bihar PPA in Petition No. 112/MP/2015 (GMRKEL & anr V BSPHCL & ors) and allowed the same vide order dated 7.4.2017. The relevant portion of the order is extracted hereunder:

"78. In exercise of the power given under Section 3 of the Orissa Electricity (Duty) Act, 1961, the Government of Odisha issued Notification No. 1387 dated 1.10.2015 increasing the electricity duty on Auxiliary Consumption from ₹0.20/kWh to ₹0.30 /kWh. The Commission in the order dated 30.12.2015 in Petition No. 118/MP/2015 has examined whether electricity duty on auxiliary consumption increased by Government of Odisha qualifies as Change in Law. Relevant paras of the said order are extracted as under.

xxx

79. In the light of the above decision as quoted above, the claim of the Petitioners for reimbursement on account of Increase in Electricity Duty on Auxiliary Consumption under Change in Law is admissible and is accordingly allowed"

44. In accordance with the above decisions, the claim of the Petitioners for reimbursement on account of Increase in Electricity Duty on Auxiliary Consumption under Change in Law is admissible and is accordingly allowed. The Petitioner has not claimed the electricity duty in respect of Bihar PPA as the said claim has been allowed in order dated 2.4.2015 in Petition No. 112/MP/2015.

B. Imposition of charges towards National Mineral Exploration Trust (NMET) and District Mineral Foundation (DMF)

45. The Petitioners have submitted that as on the cut-off date, there was no obligation to contribute towards the NMET and DMF. On 26.3.2015, the Government of India amended the Mines and Minerals (Development and Regulation) Act, 1957 (MMDR) and enacted the Mines and Minerals (Development and Regulation) Act, 2015 in which Section 9B (Creation of DMF) and Section 9C (Creation of NMET) were introduced. The MMDR Act was deemed to have come into effect from 12.1.2015. By notification dated 14.8.2015, the Ministry of Mines, GOI constituted the NMET. On 16.9.2015, the Ministry of Mines GOI, issued order directing the formation of DMF which also stated that the DMFs will be deemed to have come into existence with effect from 12.1.2015 i.e. the date of which MMDR came into force. Pursuant to MMDR Amendment Act, on 17.9.2015, the Ministry of Mines, GOI issued the Mines and Minerals (Contribution to District Mineral Foundation) Rules, 2015 and as per Rule 2 of the said Rules, every holder of a mining

lease or a prospecting license-cum-mining lease shall, in addition to the royalty, pay to the DMF, an amount at the rate of:

(a) 10% of the royalty paid in terms of the Second Schedule to the Mines and Minerals (Development and Regulation) Act, 1957, in respect of the mining lease or, as the case may be, prospecting license-cum-mining lease granted on or after 12.1.2015; and
b) 30% of the royalty paid in terms of the Second Schedule to the Mines and Minerals (Development and Regulation) Act, 1957, in respect of mining leases granted before 12.1.2015.

46. The Petitioners have further submitted that on 20.10.2015, the Ministry of Coal, GOI had revised the Mines and Minerals (Contribution to District Mineral Foundation) Rules, 2015 in respect of Coal, lignite and sand for stowing. It also stated that the amount to be paid to DMF will be calculated from the date of notification issued under Section 9(B)(1) of the MMDR Act, by the State Government establishing the DMF or the date of coming into force of the revised rules (20.10.2015). However, the order dated 16.9.2015 directing the State Governments to establish DMFs stated that DMFs will be deemed to have come into force from 12.1.2015. The Petitioner has submitted that on 13.11.2015, SECL issued notice for implementation of the MMDR Act inter alia stating that (a) contributions to NMET be made with effect from 14.8.2015 and (b) contributions to DMF be made with effect from 12.1.2015. Accordingly, the Petitioners have submitted that following levies are being included by Mahanadi Coalfields Ltd (MCL) in the invoices raised by it for supply of linkage coal to the Petitioners which in turn are being charged from the Petitioners.

(a)30% of the royalty to the DMF in terms of Section 9B of the MMDR Act read with Rule 2 of the Mines and Minerals (Contribution toDistrict Mineral Foundation) Rules, 2015; and

(b) 2% of the royalty to the NMET in terms of Section 9C of the MMDR Act read with Rule 7(3) of the NMET Rules, 2015

47. In the above backdrop, the Petitioners have submitted that the imposition of contributions towards NMET and DMF are based on the enactment of MMDR Act and the

issuance of various notifications and orders by the Ministry of Mines, GOI and therefore amounts to a Change in law, effective from the cut-off date of the Haryana PPAs. The Petitioners have also pointed out that the Commission had allowed the imposition of contributions towards NMET and DMF in its various orders in Petitions filed by Adani Power Ltd, Sasan Power Ltd including the claim of the Petitioners in respect of Bihar PPA.

48. The Haryana Utilities have submitted that the claim of the Petitioner towards DMF fund equivalent to levy of 2% of royalty on calculation of actual impact is not correct as it is totally based on assumed figures and actual impact cannot be considered on the bases of such assumed figures.

49. Prayas has submitted that the said amendments are statutory levy and partof royalty being paid. Since this is not a tax or levy on supply of power but on coal, the same is not covered under Article 10.1.1 and is not a Change in Law event under the PPA. Without prejudice to the above, it has submitted that the Commission has interpreted the Article 10.1.1 in the Petition No. 08/MP/2014 vide order dated 01.02.2017 and the said interpretation of Article 10.1.1 is pending before the Appellate Tribunal for Electricity (Tribunal). It has further submitted that the issue of whether Royalty is a tax or not is pending before the Hon'ble Supreme Court and has been referred to a nine judge bench in Mineral Area Development Authority vs. Steel Authority of India & ors reported in(2011) 4 SCC 450. Therefore, the decision of the Hon'ble Commission is subject to the above. Prayas has also submitted that Amendment to the MMDR Act has to be considered as against the existing obligation of the leaseholder to contribute for interest and benefit of the persons and for areas affected by mining related operation, the leaseholder has an obligation for rehabilitation and resettlement of the disputed persons as well as for protective measures for the affected

area. It has submitted that the quantum to be considered is only the increase due to the imposition of DMF and NMET and not due to any increase in the commercial price of coal. Therefore, increases in base price of coal or other commercial consideration is not a change in law. It is added that the quantum of coal to be considered should be based on the bid assumed parameters or normative parameters or actual parameters, whichever is lower.

50. We have considered the submissions of the Petitioners, Respondents and Prayas. 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 maybe 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 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."

"9C: National Mineral Exploration Trust:

(1) The Central Government shall, by notification, establish a Trust, as a nonprofit 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."

51. 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 (as quoted in para 44 above) that will be made to the District Mineral Foundation. It is noticed from these provisions that through an amendment to the Act of Parliament, National Mineral Exploration Trust and District Mineral Foundations have been 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 provides for payment of amounts in addition to the royalty by the holder of the mine lease or holder of prospective license-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 of tax.

52. It is observed that the charges towards NMET and DMF had been claimed by the Petitioners in Petition No. 112/MP/2015 as a Change in law event in respect of the Bihar PPA. The Commission after considering the submissions of the respondents therein and taking into account the provisions of the MMDR Act had allowed the claim of the Petitioners by order dated 7.4.2017. The relevant portion of the order is extracted hereunder:

> "74. We have considered the submissions of the Petitioners and Prayas. There is no denying the fact that these contributions are statutory levies. Under the provisions of the FSA between the Petitioners and Mahanadi Coalfield Limited, the Petitioners are required to pay all statutory taxes, levy, cess or fees in addition to the base price of coal, sizing/crushing charges and transportation charges. Therefore, in terms of the FSA, Mahanadi Coalfield Limited is entitled to pass on these taxes or levies to the purchaser of coal. The question therefore arises whether the liability for taxes and levies shall be borne by the purchaser of coal or shall be passed on to the procurers. 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 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 the 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. The Petitioners shall be entitled to recover the same corresponding to the scheduled generation for supply of electricity to BSPHCL. 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 taxon transportation of coal. The Petitioners are directed to furnish along with its monthly bill, the proof of payment and computations duly certified by the auditor to BSPHCL. The Petitioners and BSPHCL are further directed to carry out reconciliation on account of these claims annually."

53. It is noticed that the Commission in its order dated 17.2.2017 in Petition No. 16/MP/2016 (Sasan Power Ltd V MPPMCL &ors) had dealt with the similar claim of the Petitioner therein and had allowed the said claim under Change in law. In accordance with these decisions, the expenditure on this account claimed by the Petitioners herein

has been allowed. In order to take care of the concern of the Procurers, the Petitioners are directed to ensure that payment to these funds does not relieve the Petitioners from any of its existing liability which the Petitioners are either required to meet out of the bid tariff or any expenditure allowed under Change in Law earlier. The Petitioners are directed to furnish along with its monthly bill, the proof of payment and computations duly certified by the auditor to Haryana Utilities for claiming the expenditure under Change in Law. It is further directed that the reimbursement on account of contribution to NMET and DMF shall be on the basis of actual payments made to other appropriate authorities and shall be restricted to the amount of coal consumed for supplying scheduled energy to the Procurers. Needless to say, that the above decision is subject to the final outcome of the appeal pending before the Tribunal.

(C) Levy of Swachh Bharat Cess

54. The Petitioners have submitted that as on the cut-off date, there was no levy of Swachh Bharat Cess. However, the Ministry of Finance, Government of India vide its Notification dated 6.11.2015 introduced Swachh Bharat Cess @5% of the value of all taxable services. The Petitioners have estimated the impact of Swachh Bharat Cess @ ₹0.37/tonne w.e.f 15.11.2015. It is submitted that as a result of levy of Swachh Bharat Cess as a component of Service Tax, the rate of Service Tax has increased from 14% to 14.5%.The Petitioner has further submitted that Swachh Bharat Cess is applicable on all taxable services for which service tax is levied inter alia transportation of coal. Accordingly, it has submitted that that the introduction of Swachh Bharat Cess is a change in law event during the operating period and may be allowed.

55. The Haryana Utilities have submitted that a perusal of the Art 13 of the PPA clearly envisages and establishes that the primary functioning of the Petitioner is to engage in the business of generation and sale of electricity as stipulated under the terms

of the Agreement. The levy of Swachh Bharat Cess is part of the CSR of the Company and cannot be claimed as part of compensation due to change in law. Prayas has submitted that the Swachh Bharat cess can be considered as Change in Law if the Petitioner can show the link between the cess and the income / expenditure of the Petitioner. Prayas has pointed out that the Petitioner has claimed that the imposition has increased the service tax but has not specified the service. It has further submitted that only the impact due to increase in rate of service tax is to be considered and any change due to increase in freight rates cannot be included. Therefore, the alleged increase/levy in Rail freight, Busy Season Surcharge, Development Surcharge resulting in the increase in service tax cannot be considered. The Petitioners in its rejoinder to the above submissions has clarified that the Commission in its order dated 1.2.2017 in Petition No.8/MP /2014 and Order dated 6.2.2017 in Petition No. 156/MP / 2014 had held that the levy of Swachh Bharat Cess is a change in law event.It has further clarified that the contention of Prayas that the Petitioners have not specified the service on which Swachh Bharat Cess is applicable is misleading. It has pointed out that the aforesaid will impact cost of coal which has a direct impact on the cost of generation, as held by this Commission in order dated 30.3.2015 in Petition No. 6/MP /2013 which has attained finality.

56. We have considered the submissions of the parties. It is noticed that as on cut-off date, there was no Swachh Bharat Cess and it was introduced by the Finance Act, 2015 and was implemented with effect from 15.11.2015. The issue of Swachh Bharat Cess as a Change in Law event has been considered by the Commission in order dated 1.2.2017 in Petition No. 8/MP/2014. Relevant portion of the said order is extracted as under:

> "91. We have considered the submissions of the Petitioner and the Respondents. As on cut-off date in case of both PPAs, there was no Swachh Bharat Cess. It was introduced by the Finance Act, 2015 and was implemented with effect from 15.11.2015. Therefore, it

is a new enactment which has come into effect subsequent to cut-off dates. In our view, Swachh Bharat Cess on the service tax paid on transportation of coal is admissible under Change in Law..."

57. It is observed that the levy of Swachh Bharat Cess had been claimed by the Petitioners in Petition No. 112/MP/2015 as a Change in law event in respect of the Bihar PPA. The Commission, after considering the submissions of the respondents therein, had in line with the above decision allowed the claim of the Petitioners by order dated 7.4.2017 and had observed as under:

"82. It is clarified that the Petitioners shall be entitled to recover on account of Swachh Bharat Cess, the service tax on transportation of coal required in proportion to the actual coal consumed corresponding to the scheduled generation for supply of electricity to BSPHCL. If actual generation is less than the scheduled generation, the coal consumed or actual generation shall be considered for the purpose of computation of impact of Swachh Bharat Cess. The Petitioners are directed to furnish along with their monthly bill, the proof of payment and computations duly certified by the auditor to the BSPHCL. The Petitioners and BSHPCL are directed to carry out reconciliation on account of these claims annually."

58. Accordingly, the Petitioners are entitled to relief under Change in Law on account of Swachh Bharat Cess in case of Haryana PPA. The Petitioner has claimed Swachh Bharat Cess on the service tax imposed on rail freight, development surcharge and Busy Season Surcharge. Though the Commission has not allowed rail freight, Busy Season Surcharge and development surcharge under change in law; however, the service tax on the incremental cost of these charges are allowable under Change in Law in terms of the judgment of the Appellate Tribunal dated 12.9.2014 in Appeal No. 288/2013 (Wardha Power Vs. Reliance Infra). Accordingly, Swachh Bharat Cess shall be computed on the incremental amount of service tax on account of the change in ratio of rail freight, Busy Season Surcharge and Development Surcharge. Swachh Bharat Cess shall be admissible proportionate to the actual coal consumed corresponding to the scheduled generation for supply of electricity to Haryana Utilities. 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 Swachh Bharat Cess. The Petitioners are directed to furnish along with their monthly bill, the proof of payment and computations duly certified by the auditor to the Haryana Utilities. The Petitioners and Haryana Utilities are directed to carry out reconciliation on account of these claims annually.

Change in Law claims pertaining to Haryana and Bihar PPA

(D) Increase in Crushing/Sizing and Surface Transportation charges

Crushing/Sizing charges

59. The Petitioner has submitted that as on the cut-off date in case of Haryana PPA (17.11.2007), the prevailing crushing/sizing charges, where the top size of coal was limited to 100 mm was ₹41/tonne. It has also submitted that as on the cut-off date in case of Bihar PPA (28.3.2011), the prevailing crushing/sizing charges were ₹61/MT.It has submitted that subsequent to the cut-off dates, there has been an increase in the crushing/sizing charges as under:-

(a) ₹55/ tonne vide notification dated 12.12.2007 applicable to Haryana PPAs
(b) ₹61/ tonne vide notification dated 15.10.2009 applicable to Haryana PPAs; and
(c) ₹79/MT vide CIL notification dated 16.12.2013 applicable to Haryana and Bihar PPAs.

60. Accordingly, the Petitioners have submitted that the impact on account of increase in sizing charges under the Haryana PPAs is ₹38/tonne and under the Bihar PPA is ₹18/tonne from 17.12.2013.

Surface Transportation charges

61. The Petitioners have also submitted that the prevailing Surface transportation charges for transportation of coal from mine to loading point between 3 to 10 kms as on the cut-off date in respect of the Haryana PPA (17.11.2007) was ₹30 /Tonne and as on the cut-off date in respect of the Bihar PPA (28.3.2011) was ₹44/tonne. It has submitted

that subsequent to the cut-off dates, there has been an increase in the Surface transportation charges of coal, as under:

(a) ₹40/tonne (3-10 kms) vide notification dated 12.12.2007 applicable to Haryana PPAs.
(b) ₹44/tonne (3-10 Kms) vide notification dated 15.10.2009 applicable to Haryana PPAs.
(c) ₹57/tonne (3-10 Kms) vide CIL notification dated 13.11.2013applicable to Haryana and Bihar PPAs.

62. Accordingly, the Petitioners have submitted that the impact on account of increase in Surface transportation charges under the Haryana PPA and Bihar PPAs are ₹27/ tonne and ₹13/ tonne respectively.

63. The Petitioners have submitted that the increase in crushing/sizing charges constitutes a change in law event under the Haryana and Bihar PPAs as the CIL notifications came into effect after the cut-off date.

64. Haryana Utilities have submitted that the contention of Petitioners that the increase in pricing of crushing/sizing charges levied by the CIL to the tune of ₹38/tonne in respect of the Haryana PPA would constitute a change in Law is wholly untenable and unsustainable. It has stated that the increase in crushing charges by way of Notification issued by CIL does not satisfy the test of Article 13 of the PPA since these notifications do not amount to any change in law but are in nature of the decisions by CIL in its day to day functioning relating to the pricing of their product. The said respondent has also stated that it would not tantamount to any change in law as claimed by the Petitioners. It has added that in a highly competitive and free market, these changes are common and it does not amount to any change in the policy decision of the Government. Accordingly, it has submitted that the Petitioners are not entitled to the claim on account of increase in crushing/sizing charges.

65. Bihar State Power Companies have submitted that the Petitioners have not filed the copy of the notification published in any gazette of the Central or State Government. It has stated that the documents of ClL (Marketing Division) filed by the Petitioners indicate that this is a price notified by the ClL of their product which is indicative of the fact that ClL is carrying out its commercial activity by changing their pricing and such fluctuation either in crushing /sizing charges or in transport prices, is a normal feature in free market conditions. The respondent has further stated that the CIL does not have powers for enactment which may constitute 'Change in Law' and they can merely change the pricing of their product. Accordingly, it has submitted that the claim of the Petitioner is liable to be rejected.

66. Prayas has submitted that the charges are payable to the coal company in view of the contractual arrangements and is the commercial consideration for procurement of coal. Thus, the same is not covered under Change in Law. It has also stated that Commission has disallowed the said claim in its orders dated 1.2.2017 and 6.2.2017 in Petition No.08/MP/2014 and 156/MP/2014 respectively and the decision in these orders would squarely apply to the present case.

67. In response to the above submissions, the Petitioners have submitted that the increase in cost on account of change in crushing/sizing charges and increase in surface transportation charges are not on account of market forces but on account of a change in law event. Accordingly, the Petitioners are entitled to compensation for the same in terms of Article 13 of the Haryana PPAs. It has further submitted that the periodic increase in crushing/ sizing charges and increase in surface transportation charges are not included in the escalation indices issued by this Commission. It has pointed out that in light of the judgment of the Tribunal dated 12.09.2014 in Appeal No. 288 of 2013 (Wardha Power Company Limited v Reliance Infrastructure Limited & anr) escalable

index/ indexing of cost is not applicable in case of change in law, wherein the impact of change in law is to be determined on actual basis. It has stated that since the change in crushing/sizing changes and transportation charges of coal was brought about by notifications issued by CIL which is an Indian Governmental Instrumentality, the same constitutes a change in law, and cannot be regarded as a fluctuation in price on account of free market conditions. It has submitted that the order dated 1.2.2017 in Petition No. 8/MP/2014 has been challenged in Appeal 111 of 2017 and the same has been admitted by the Tribunal on 25.5.2017.

68. We have examined the matter. The issue regarding the claim for increase in crushing/sizing charges and increase in surface transportation charges came up for consideration in Petition No. 8/MP/2014 (EMCO Energy Limited/GMR Warora Energy Limited v/s MSEDCL & ors). The Commission after considering the submissions of the parties therein by order dated 1.2.2017 decided as under:

> "93.We have considered the submissions of the Petitioner and the respondents andperused 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 250 mm 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."

69. The Petitioner has submitted that Coal India Limited which is a body corporate under Ministry of Coal, Government of India is an Indian Government Instrumentality and the notifications issued by Coal India Limited with regard to sizing charges / surface transportation charges is covered under the definition of law and any change in such charges is covered under Change in Law. This issue had been considered by the Commission in Petition No. 156/MP/2014 (Adani Power Limited v/s UHBVNL & ors), wherein the Commission vide order dated 6.2.2017 held as under:

"62. The Petitioner has submitted that Coal India Limited which is a body corporate under Ministry of Coal, Government of India is an Indian Government Instrumentality and the notifications issued by Coal India Limited with regard to sizing charges is covered under the definition of law and any change in such charges is covered under Change in Law. Indian Government Instrumentality has been defined in the PPAs as under:

> "Indian Governmental Instrumentality means the Government of India (GOI), Government of Haryana and any ministry, department, body corporate, Board, agency or other authority of GOI or Government of the State where the Project is located and includes the Appropriate Commission."

Law has been defined in the PPAs to 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 all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include all rules, regulations, decisions and orders of the Appropriate Commission". As per the definition of "Indian Governmental Instrumentality", a body corporate under Government of India is an Indian Government Instrumentality. Coal India Limited which is a body corporate under the Government of India is a Governmental Instrumentality. However, all circulars or notifications issued by Coal India Limited shall not be included under Change in Law. As per the definition of the term "law", the notifications by the Indian Governmental Instrumentality shall be pursuant to any statute, ordinance, regulation, notification or code. In the present case, the increase in price of sizing charges issued by Coal India Limited is not pursuant to any statute or ordinance issued by the Parliament or any regulation, notification or code issued by the Government of India pursuant to such statute or ordinance. The notifications issued by Coal India Limited is pursuant to the terms of the FSA which enables CIL/seller to notify the sizing/crushing charges from time to time and is governed by commercial considerations. The Petitioner having agreed to pay such charges in terms of the FSA, which is a commercial arrangement between the Petitioner and Mahanadi Coalfield Limited, cannot seek reimbursement of the same under Change in Law."

70. As regards the claim of the Petitioners for surface transportation charges as 'Change in Law' event, it is noticed that the said issue had already been decided by the Commission in its order dated 6.2.2017 in Petition No. 156/MP/2014. The relevant portion of the order is extracted as under:

> "65…… As regards the submissions of the petitioner that the notifications regarding change in the rates of transportation charges have been issued by the Coal India Limited in its capacity as an Indian Governmental Instrumentality, we are of the view that the said contention cannot be sustained in the light of the detailed analysis made in para 62 of this order in respect of sizing charges. Accordingly, the claim of the petitioner for relief under Change in Law in respect of transportation charges by the Mahanadi Coalfield Limited has been disallowed."

71. In line with the above decisions, the claim of the Petitioner for relief under 'Change in Law' in respect of sizing / crushing charges of coal and surface transportation charges with regard to Haryana & Bihar PPAs is disallowed.

(E) Levy of charges for transportation of fly ash

72. The Petitioners have submitted that as on the cut-off dates under the Haryana and Bihar PPAs, there was no obligation on coal / lignite based thermal power plants to bear transportation cost / provide transportation subsidy to entities off- taking fly ash in terms of notification dated 14.9.1999 of the Ministry of Environment, Forests and Climate Change (MoEFCC) along with amendments dated 2.8.2003 and 3.11.2009. It has further submitted that subsequently on 20.1.2015, the State Pollution Control Board of Odisha (SPCB) issued Letter No. 1314 to the Petitioners stating that the thermal power plants with generation capacity more than 100 MW were required to provide free transport of fly ash upto 100 km radius or provide a subsidy of Rs. 150/tonne of fly ash to all the fly ash brick, tile or other fly ash based construction materials manufacturing units and for use in road making. The Petitioners have further submitted that MoEFCC issued Notification No. 225 dated 25.1.2016 amending the notification dated 14.9.1999 whereby the Petitioner was required to bear the following:

(a) The transportation costs of fly ash to users undertaking the specified activities which are situated within 100 kms of the Project

(b) 50% of the transportation costs of fly ash to users undertaking the specified activities which are situated between100 and 300 kms of the Project.

73. The Petitioners have submitted that the impact on account of imposition of transportation cost for fly ash under the Haryana and Bihar PPAs is Rs. 150/tonne of ash being disposed. It has proposed that the allocation of expenditure towards ash disposal among the PPAs for a particular month may be calculated in proportion to the contracted capacity of energy scheduled under the PPAs. The Petitioners have further submitted that at present, it has not incurred any expenditure on account of transportation of fly ash and is only seeking an in-principle approval since it is likely that it would incur expenditure on this count in line with the MoEFCC notification dated 25.1.2016 and the directions of SPCB. The Petitioners have also submitted that there has been no sale of fly ash from the project since the MoEFCC notification. It has further submitted that the accounts for all ash utilization related expenses under the head "Ash utilization" and any revenue realized from ash disposal / utilization would be accounted for separately as per the MoEFCC notification and would be grouped under the head 'other income' in the books of accounts of the Petitioners. The Petitioners have stated that the cost of transportation of fly ash was not being recovered in the tariff as there was no obligation on the Petitioner to incur such cost.

74. Bihar State Power Companies have submitted that the MoEFCC had been endeavoring the 100% utilization of fly ash since 1999. The notification dated 14.9.1999 amended till 2009 stipulates that all coal based thermal power stations must achieve 100% target of ash utilization from the date of issue of notification and all new coal based thermal power stations or expansion units to achieve 100% ash utilization within four years from the date of commissioning. It has stated that the notification dated

25.1.2016 stipulates that the coal or lignite based thermal power plants shall comply with the provisions of the notification in addition to the 100% utilization of fly ash generated before 31.12.2017. The Respondents have stated that the Petitioners are able to make ash utilization and various cement companies are off-taking the fly ash being generated at the project and they are bearing the transportation cost. Thus, it has submitted that the question of transportation of fly ash does not arise as no fly ash is available at the generating station. Accordingly, it has prayed that the claim of the Petitioners may be rejected. Similar submissions have been made by the Haryana Utilities.

75. Prayas has submitted that under the pre-existing obligations, the thermal power plants were required to ensure the utilization of ash generated by it in various activities. It has further submitted that in so far as the Bihar PPAs, the notifications dated 14.9.1999, 27.8.2003 and 3.11.2009 were pre-existing as on the cut-off date. With regard to Haryana PPAs, the notifications dated 14.9.1999 and 27.8.2003 were pre-existing as on the cut-off date. It was therefore incumbent for the bidders to have factored the cost in the bid. It has also stated that the Environment Clearance and Consents may also provide for obligations on fly ash utilization and the Petitioner was required to obtain these clearances and consents and the conditions therein also exist as regards obligations of the Petitioner and those cannot be claimed as 'Change in Law'. The Petitioner could be directed to furnish all such consents and clearances to ascertain the obligations existing prior to the letter of SPCB or the amendment dated 25.1.2016. It has also submitted that there was existing obligations on the Petitioner regarding fly ash as on the cut-off date and as per the Environment Clearance and consents of the Petitioner prior to the amendment. Accordingly, it has submitted that the increase in obligations due to letter of SPCB or amendment dated 25.1.2016 is to be considered with

respect to Bihar PPA. With regard to Haryana PPA, Prayas has submitted that the increase in obligation due to letter of SPCB or amendment dated 25.1.2016 is to be considered and the Petitioner is 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. Prayas has added the quantum of fly ash and coal utilized is to be on normative or bid assumed parameters or actual parameters, whichever is lower and the cost is required to be subject to the prudence check of this Commission.

76. We have examined the submissions of the parties. 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 utilization 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 has 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."

77. The Petitioners have submitted that they have not incurred any expenditure on account of transportation of fly ash and are seeking in-principle approval. The question of levy of charges for transportation of fly ash as a 'Change in Law' event was considered by the Commission in Petition No. 101/MP/2017 (DB Power Ltd v/s PTC India

Ltd &ors) in terms of the amendment dated 25.1.2016 and the Commission by order dated 19.12.2017 disposed the same as under:

> "106. As per Article 10.1.1 of the PPA, any enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any law is covered under Change in law if this results in additional recurring/ non-recurring expenditure by the seller or any income to the seller. Since, the additional cost towards fly ash transportation is on account of amendment to the Notification dated 25.1.2016 issued by the Ministry of Environment and Forests, Govt. of India, the expenditure is admissible under the Change in law in principle. However, the admissibility of this claim is subject to the following conditions:
>
> a) Award of fly ash transportation contract through a transparent competitive bidding procedure so that a reasonable and competitive price for transportation of ash/ Metric Tonne is discovered;
>
> b) Any revenue generated/ accumulated from fly ash sales, if CoD of units/ station was declared before the MoEF notification dated 25.01.2016, shall also be adjusted from the relief so granted;
>
> c) Revenue generated from fly ash sales must be maintained in a separate account as per the MoEF notification; and
>
> d) Actual expenditure incurred as claimed should be duly certified by auditors and the same should be kept in possession so that it can be produced to the beneficiaries on demand.
>
> The Petitioner is granted liberty to approach the Commission with above documents to analyse the case for determination of compensation."

78. In line with the above order, the expenditure claim by the Petitioners are admissible under the Change in law in-principle and the admissibility of the said claim is subject to the conditions indicated in the said order*(as quoted above)*. The Petitioners are granted liberty to approach the Commission with above documents to analyze the case for determination of compensation.

(F) Increase in expenditure on account of contribution to Water Conservation Fund

79. The Petitioners have submitted that water allocated to the project is 30 cusec. It has submitted that the Govt. of Odisha vide Notification No. 1545 dated 3.11.2015 approved the resolution dated 18.5.2015 mandating industries to contribute ₹2.5 crore / cusec of water allocated to industries drawing more than or equal to 1 cusec of water in

five equal installments in the next five years. Accordingly, the Petitioners have submitted that it is required to pay ₹15 crore per year aggregating to ₹75 crore in five years. It has further submitted that as on the cut-off dates for Haryana and Bihar PPAs, there was no obligation to pay the aforesaid amounts. The Petitioners have further stated that the Commission in its order dated 19.2.2016 in Petition No. 153/MP/2015 had disallowed water charges on the ground that the same were part of operating costs. The reasoning of the Commission in the said order have been impliedly overruled by the Tribunal in its judgment dated 19.4.2017 in Appeal No. 161 of 2015 (Sasan Power Ltd v/s CERC & ors). The Petitioners have further submitted that the charges towards Water Conservation Fund (WCF) is a new levy to be paid in five equal installments and it would attract penalty and interest in case of default as per the Odisha Irrigation (Amendments) Rules, 2010 and hence these additional charges are not in the nature of CSR obligation. The impact on account of imposition of charges towards WCF under the Haryana PPA is Rs5.00crore per year and under the Bihar PPA is ₹4.03 crore per year. Accordingly, it has prayed that the increase in cost / recurring expenditure may be allowed under Change in Law.

80. Haryana Utilities have submitted that the notification dated 3.11.2015 mandating payment to WCF is to undertake activities for social benefits and therefore it is in nature of CSR. The claim of the Petitioners that it amounts to change in consents and conditions for approval are totally misplaced and the compensation amounting to ₹5.00 crore/ year is unjustified since it is part of the CSR of the Company.

81. Bihar State Power Companies have submitted that the Petitioners have claimed one time contribution to WCF in terms of the said notification to cope with the scarcity of water in the State of Odisha. It has pointed out that there is no provision under Article

10 of the Bihar PPA dated 9.11.2011 to claim such contribution. As this is a social responsibility as stated in the notification, the WCF may be met from the CSR funds of the Petitioners. Accordingly, the proportionate claim amounting to ₹4.03/ year is without any substance.

82. Prayas has submitted that the Commission in order dated 19.2.2016 in Petition No. 153/MP/2015 had held that the increase in water charges are not covered under Change in Law and had further disallowed one time water allocation fee. It has submitted that in the present case, the contribution to WCF is also a one-time payment (though in installments) for allocation of water and therefore may not be considered. Without prejudice to this, Prayas has stated that if the levy is to be considered as a statutory levy in the form of tax, then the change in law clause is to be limited to tax on supply of power. It has pointed out that the Commission in its orders dated 17.3.2017 and 17.2.2017 in Petition Nos. 157/MP/2015 and 16/MP/2016 had held that when there was no consent prior to the cut-off dates, any condition imposed cannot be construed as Change in Law.

83. We have considered the submissions of the parties. It is noticed that the Govt. of Odisha, based on the recommendations of the Water Resources Board had approved the proposal for creation of WCF on 5.8.2013. It was decided that a corpus fund will be created by way of receipt of one-time contribution at ₹2.50 crore/ cusec of water allocated to the industries which will be utilized for construction of different water conservation projects. Based on this, the Department of Water Resources, Govt. of Odisha vide Resolution No. 11011/WR, Bhubaneswar dated 18.5.2015 had issued guidelines for constitution, administration and utilization of WCF. Thereafter, by resolution dated 3.11.2015, the State Govt. approved that the industries shall contribute

₹2.50 crore/ cusec of water allocated to the industries drawing more than or equal to 1 cusec of water in five equal installments in coming five years. The said resolution also provides as under:

> "……The industries shall enter into an agreement for the purpose of drawal of water each year before which contributions to WCF shall be paid. Such deposits shall be made at the time of drawal of agreement for new industries and for the existing industries at the time of renewal of agreement or within three months of issue of the date of notification by Department of Water Resources whichever is earlier. Such contribution towards Water Conservation fund (WCF) shall be made from beginning with the current financial year. No interest shall be charged on these five installments. However, any default in payment of the annual installments in time shall attract penalty and interest as per Odisha Irrigation (Amendment) Rules, 2010."

84. It is evident from the above that contribution to WCF is required to be made at the time of drawal of agreement for new projects and at time of renewal of agreement for existing projects or within three months of the issue of said notifications, whichever is earlier. Default in payment shall attract the penalty and interest. It is however noticed that the Petitioner has not placed on record the copy of the existing agreement for drawal of power, the renewed agreement, the demand raised by the Department of Water Resources, Government of Odisha pursuant to the Resolution dated 3.11.2015, the actual payment made by the Petitioner etc. which are considered necessary to examine the claims of the Petitioner in proper perspective. It has come to our notice that the said resolution has been challenged by six companies including two generators, namely, Bhushan Power & Steel Limited, Jindal Steel & Power Limited in the High Court of Odisha and the Hon'ble High court has stayed the demands issued against these companies. It is not known whether the Petitioner has also approached the High Court, and if so, the status of the case. The Petitioners are granted liberty to approach the Commission with all relevant documents including the Water Agreements entered into by them with the Government of Odisha, the demand for contribution to WCF received from Government of Odisha and the actual payments made duly supported by Auditors

Certificate and the present status of the court cases filed by Bhushan Power Steel Limited and Jindal Steel & Power Limited.

(G) Levy of Krishi Kalyan cess

85. The Petitioners have submitted that as on the cut-off dates for the Haryana and Bihar PPAs, there was no levy of Krishi Kalyan Cess. The Petitioner has submitted that the Krishi Kalyan Cess at the rate of 0.5% of the value of taxable services with effect from 1.6.2016 (i.e. after the cut-off date) was introduced vide Section 116 of Finance Act 2016 which has increased the rate of service tax from 14.5% to 15%.The Petitioner has submitted that the impact on account of Krishi Kalyan Cess is ₹0.37/tonne of coal.

86. Bihar State Power Companies have submitted that the claim of the Petitioners may not be allowed as it is not covered under Change in law under Article 10 of the PPA. Haryana Utilities have submitted that the imposition of Krishi Kalyan Cess form part of CSR of the company and cannot be claimed as part of compensation from the cess. Prayas has submitted that the levy of Krishi Kalyan Cess can be considered as Change in Law if the Petitioners can show the link between the cess and the income / expenditure of the Petitioners. It has pointed out that the claim of the Petitioners that the imposition of Krishi Kalyan Cess has increased the service tax is not supported by any details of the specific service. Prayas has further submitted that only the impact due to increase in rate of service tax is to be considered and any increase due to freight rates or other commercial charges cannot be included. It has also stated that any increase / levy in rail freight, Busy Season surcharge, Development surcharge resulting in increase in service tax cannot be considered.

87. We have examined the matter. The Commission had examined the issue of Service Tax on transportation of goods by Indian Railways in order dated 6.2.2017 in Petition No. 156/MP/2014 as under:

> "54. We have considered the submissions of the parties. As on the cut-off date, no service tax was leviable on the transportation of goods by the Indian Railways. 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 which is after the cut-off date. 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. 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 PPAs."

Therefore, service Tax on transportation of goods by Railways is payable.

88. The Petitioner's claim pertains to the reimbursement of Krishi Kalyan Cess levied on Rail Freight, Busy Season Surcharge and Development Surcharge charged by Railways for transportation of coal. As regards Krishi Kalyan Cess, the Finance Act, 2016 (No. 28 of 2016) provides as under:

> "161. (1) This Chapter shall come into force on the 1st day of June, 2016.
>
> (2) There shall be levied and collected in accordance with the provisions of this Chapter, a cess to be called the Krishi Kalyan Cess, as service tax on all or any of the taxable services at the rate of 0.5 per cent. on the value of such services for the purposes of financing and promoting initiatives to improve agriculture or for any other purpose relating thereto.
>
> (3) The Krishi Kalyan Cess leviable under sub-section (2) shall be in addition to any cess or service tax leviable on such taxable services under Chapter V of the Finance Act, 1994, or under any other law for the time being in force.
>
> (4) The proceeds of the Krishi Kalyan Cess levied under sub-section (2) shall first be credited to the Consolidated Fund of India and the Central Government may, after due

appropriation made by Parliament by law in this behalf, utilise such sums of money of the Krishi Kalyan Cess for such purposes specified in sub-section (2), as it may consider necessary.

(5) The provisions of Chapter V of the Finance Act, 1994 and the rules made thereunder, including those relating to refunds and exemptions from tax, interest and imposition of penalty shall, as far as may be, apply in relation to the levy and collection of the Krishi Kalyan Cess on taxable services, as they apply in relation to the levy and collection of tax on such taxable services under the said Chapter or the rules made thereunder, as the case may be."

89. Under the Haryana PPA, the enactment or coming into effect of any law resulting in change in any cost or revenue from the business of selling electricity is admissible under Change in Law. Similarly, under Bihar PPA, the enactment or coming into effect of any law resulting into additional recurring or non-recurring expenditure to the Seller is covered under Change in Law. Since, Krishi Kalyan Cess was imposed on service tax through an Act of Parliament and has the result of additional expenditure to the Petitioners for generation and supply of electricity to Procurers, it is covered under Change in Law. The Petitioner has claimed Krishi Kalyan Cess on the service tax imposed on rail freights, development surcharge and Busy Season Surcharge. Though these charges have not been allowed under Change in Law, the service tax imposed on the incremental cost of these charges are allowable under Change in Law in terms of the judgment dated 12.9.2014 in Appeal No. 288/2013 (Wardha Power Vs. Reliance Infra). Accordingly, Krishi Kalyan Cess shall be computed on the incremental amount of service tax on account of the change in rail freight, Busy Season Surcharge and Development Surcharge. Krishi Kalyan Cess shall be admissible to the actual coal consumed corresponding to the scheduled generation for supply of electricity to Haryana Utilities. 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 Swachh Bharat Cess. The Petitioners are directed to furnish along with their monthly bill, the proof of payment and computations duly certified by the auditor to the Haryana

Utilities. The Petitioners and Haryana Utilities are directed to carry out reconciliation on account of these claims annually. However, the Petitioners have not indicated the items on which service tax is applicable and corresponding rates of service tax on which Krishi Kalyan Cess is leviable.

Issue No. 4: Mechanism for compensation on account of Change in Law during the Operational period

90. Article 13.2 (b) of the Haryana PPA provides as under:

> **"Operation Period**
>
> As a result of Change in Law, the compensation for any increase/ decrease in revenues or cost to the Seller shall be determined and effective from such date, as decided by the Appropriate Commission whose decision shall be final and binding on both the Parties, subject to rights of appeal provided under applicable Law.
>
> Provided that the above mentioned compensation shall be payable only if and for increase/decrease in revenues or cost to the Seller is in excess of an amount equivalent to 1% of Letter of Credit in aggregate for a Contract Year."

91. Article 10.3.2 and 10.3.4 of the Bihar PPA provide 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."

92. The Petitioners have submitted that in case of Haryana PPAs, the value towards Letter of Credit is ₹29.50 crore. Therefore, 1% of the value of Letter of Credit in aggregate for the contract year comes to ₹3.54 crore (1% x 29.5 x 12). The estimated 'change in law' claims for the year 2016-17 as submitted by the Petitioners are as under:

	Amount (₹ in crore)
Billing in 2015-16	322
LC Amount (1.1% of the average monthly billing)	29.5
1% of LC amount in aggregate for a Contract Year	3.54
Change in Law claimed	**31.32**

Accordingly, the Petitioners have submitted that the change in law claims is more than the threshold amount prescribed under Article 13.2 (b) of the Haryana PPA and the Petitioners are entitled to be compensated for the same.

93. The Petitioners have submitted that in case of Bihar PPA, the value towards Letter of Credit is ₹43.30 crore. Therefore, 1% of the value of Letter of Credit in aggregate for the contract year comes to ₹5.19 crore (1% x 43.3 x 12). The estimated 'change in law' claims for the year 2016-17 as submitted by the Petitioners are as under.

	Amount (₹ in Crore)
Billing in 2015-16	472
LC Amount (1.1% of the average monthly billing)	43.3
1% of LC amount in aggregate for a Contract Year	5.19
Change in Law Claimed	**15.70**

Accordingly, the Petitioners have submitted that the change in law claims is more than the threshold amount prescribed under Article 10.3.2 of the Bihar PPA and the Petitioners are entitled to be compensated for the same.

94. Bihar State Power Companies have submitted that the determination of compensation on account of change in law during the operation period is final and binding on the parties and as such evolving a suitable compensatory mechanism to compensate for the impact even of estimated costs is also not permissible. It has further submitted that the Petitioner has not filed the document indicating increase in expenses to the seller in excess of the amount equivalent of 1% of the value of Letter of Credit in aggregate for the relevant contract year as per Article 10.3.2 of the Bihar PPA. In the

absence of any document, the claim of the Petitioner cannot be entertained. In response, the Petitioners have clarified that in terms of Article 10.3.2 of the Bihar PPA, it has submitted the sample invoices raised by MCL in addition to notifications issued by Governmental instrumentalities in support of its change in law claims. The Petitioners have stated that it has submitted the estimated impact of the Change in Law events and in case the Commission desires, it will place the detailed cost impact analysis on record. Accordingly, it has submitted that the relief prayed for cannot be denied on the ground that the impacts given in the Petition are estimates.

95. In our view, the Petitioners are entitled to charge the compensation on account of Change in Law during the Operating Period as per the mechanism provided in the PPA and no separate mechanism is required to be prescribed. It is clarified that the Petitioners shall be entitled to claim compensation with all relevant documents like taxes and duties paid supported by Auditor Certificate after the expenditures allowed under Change in Law during operating period (including the reliefs allowed for operating period earlier) exceeds 1% of the value of Letter of Credit in aggregate.

Carrying Cost

96. The Petitioner has submitted that as per Article 10 of the PPA, while determining the consequence of change in law, the affected party shall be restored to the same economic position as if such change in law had not occurred. Accordingly, the Petitioner is entitled for compensation for the carrying costs for the payments made by it. In support of its contention, the Petitioner has relied upon the judgments in SLS Power Ltd. Vs Andhra Pradesh Electricity Regulatory Commission, North Delhi Power Ltd Vs. DERC [(2010) ELR (APTEL) 0891] and Tata Power Company Ltd. Vs. Maharashtra Electricity Regulatory Commission [(2011) ELR (APTEL) 336] and has submitted that principle of recovery of carrying cost/time value of money is an established principle of regulatory

jurisprudence. The Petitioner has submitted that the Petitioner is entitled to carrying cost being in the nature of compensation in terms of Article 10 of the PPAs and failure to do so would defeat the underlying principle of restitution and render the change in law articles otiose. It has further submitted that the said Articles are restitutive provisions and thus ought to be given a wide interpretation. It has also submitted that Article 10 of the PPAs accord plenary powers to this Commission to determine the compensation to be awarded. Referring to the judgment of the Tribunal in Wardha's case, the Petitioner has submitted that the said judgment has recognized the principle that in order to restore the affected party to the same economic position, compensation for change in law claims has to be such, as to reimburse the affected party for the expense actually incurred. Thus, according to the Petitioner will include expenditure attributable towards carrying costs.

97. We have examined the matter. The first ground in support of carrying cost is that the Petitioner should be restored to the same economic position in terms of Article 10.2.1 as if the Change in Law had not occurred. Article 10.2.1 of the PPA is extracted as under:

> "10.2.1 While determining the consequence of Change in Law under this Article 10, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through Monthly Tariff Payments, to the extent contemplated in this Article 10, the affected Party to the same economic position as if such Change in Law has not occurred."

The above provision lays down that the consequence of change in law shall have due regard to the principle that the affected party shall be restored to the same economic position as if such change in law had not occurred. This means that all legitimate cost on account of the Change in Law shall be allowed. The payment for the relief under change in law shall be through Monthly Tariff Payments and to the extent contemplated in Article 10. Article 10 of the PPA provides for relief for change in law

separately for the construction period and the operating period. In this case, the Petitioner had approached for change in law during the operating period. Article 10.3.4 of the PPA provides as under:

> "10.3.2 During Operation 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.
> xxx
>
> 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 the right of appeal provided under the applicable law."

As per the above provisions, the Commission has not only to decide the compensation for any increase or decrease in revenues or cost to the Seller (in this case the Petitioner) but also to decide the effective date from which it shall be paid. Further, the compensation on account of change in law shall be payable only if the increase or decrease in revenue or cost to the seller is in excess of an amount equivalent to 1% of letter of credit in aggregate for the relevant contract year. As per the above provisions, the claims under change in law shall be crystalized after its determination by the Commission in accordance with the provisions of the PPA. Before crystallization of the claims, the Procurers have no liability to pay. Correspondingly, the Procurers cannot be saddled with the carrying cost for the period prior to the crystallization of the claims.

98. The Commission has in the order dated 6.2.2017 in Petition No. 156/MP/2015 has decided that in the absence of provisions in the PPAs regarding carrying cost, the prayer of the petitioner to grant carrying cost on the principle of restitution from the date of occurrence of the Change in Law events till the date of raising of the claims or invoices cannot be allowed. Similarly, the submissions of the Petitioner on this issue was considered by the Commission in Petition No.1/RP/2016 in Petition No.402/MP/2016

(Sasan Power Ltd V MPPMCL & ors) and the prayer for carrying cost had been rejected vide order dated 16.2.2017. Subsequently, this issue was examined and rejected by the Commission vide its order dated 19.12.2017 in Petition No. 101/MP/2017 (DB Power Ltd V PTC India Ltd & ors). In the light of the above decisions, the Petitioner is not entitled to carrying cost on account of the payments made towards additional obligations.

Other submissions

99. Prayas has submitted that with effect from 1.7.2017, Goods and Services Tax (GST) has been introduced and the impact of GST leading to increase or decrease on account of Change in Law needs to be worked out. It has also pointed out that the Government has abolished various cesses including Clean Energy Cess, Swachh Bharat Cess and Krishi Kalyan Cess, which may also be considered. Accordingly, it has prayed that the Petitioner may be directed to submit information in regard to claims under this head with supporting documents. With regard to the mechanism for Change in Law, Prayas has submitted that most of the taxes and cess are subsumed in GST with effect from 1.7.2017. Therefore, the Petitioner may be directed to submit the information regarding the actual expenditure on account of taxes until 30.6.2017 and the Commission may calculate the actual impact. In response, the Petitioner has submitted that the claims in the present Petition relate to a period prior to 1.7.2017. It has further submitted that the Petitioner would be making submissions with regards to the impact of introduction of GST in Petition No. 13/SM/2017 (*suo motu*) and in case the Commission desires that information regarding GST be placed on record, the Petitioner would be obliged to submit the same.

100. The Commission in order to facilitate the settlement of the dues arising on account of the introduction of GST and GST Compensation Cess has initiated a suo motu Petition 13/SM/2017 to hear the generating companies and the Procurers and decide the

issues. All concerned parties including the Petitioner have been directed to file relevant information. The Commission will take the appropriate view as considered necessary with regard to the quantum of GST that would be admissible under Change in Law, keeping in view the rates of taxes prevailing as on the cut-off date of the respective generating companies which have been subsumed in the GST.

Summary

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

Sr. No.	Change in Law events	Decision	
		BIHAR PPA	**HARYANA PPA**
1	Increase in Electricity duty on Auxiliary Consumption.	Allowed in Petition No. 112/MP/2015	Allowed
2	Imposition of charges towards NMET and DMF	-do-	Allowed
3	Levy of 0.5% Swachh Bharat Cess	-do-	Allowed
4	Increase in Crushing/Sizing Charges	Not allowed	
5.	Increase in Surface Transportation Charges	Not allowed	
6	Levy of charges for transportation of ash	Allowed in-principle. Liberty granted as per para 78 of the order	
7	Contribution to Water Conservation Fund	Liberty granted as per para 84 of the order to approach the Commission with all details.	
8	Levy of 0.5% Krishi Kalyan Cess	Allowed	

102. With the above, the Petition is disposed of.

Sd/-	***Sd/-***	***Sd/-***
(Dr. M.K. Iyer)	**(A. S. Bakshi)**	**(A.K. Singhal)**
Member	**Member**	**Member**