

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No: 116/MP/2018

Coram:

**Shri P.K. Pujari, Chairperson
Dr. M.K. Iyer, Member
Shri I.S. Jha, Member**

Date of Order: 25th of September, 2019

In the matter of

Petition under Section 79(1)(b) and 79 (1)(f) of the Electricity Act, 2003 for claiming compensation on account of events pertaining to change in law as per the terms of Power Purchase Agreement dated 1.11.2013 (PTC-PPA) executed between the Petitioner and the Respondent No. 5 and as per the terms of the back to back Power Purchase Agreement executed by PTC with Jaipur Vidyut Vitran Nigam Limited ("JVNL"), Ajmer Vidyut Vitran Nigam Limited ("AVNL"), Jodhpur Vidyut Vitran Nigam Limited ("JdVNL") [hereinafter referred to as the "RVPN PPA"] dated 01.11.2013.

And

In the matter of

Maruti Clean Coal and Power Limited
7th Floor, Office Tower, Ambiance Mall,
NH-8, Guargaon-122 002

.....Petitioner

Vs

1. Jaipur Vidyut Vitran Nigam Limited
Vidyut Bhawan, Jyoti Nagar
Near New Vidhan Sabha Bhawan
Jaipur-302 005 (Rajasthan)
2. Ajmer Vidyut Vitran Nigam Limited
Vidyut Bhawan, Makarwali Road,
Panchsheel Nagar, Ajmer-305 004
(Rajasthan)
3. Jodhpur Vidyut Vitran Nigam Limited
New Power House, Industrial Area,
Jodhpur-342 003 (Rajasthan)
4. Rajasthan Urja Vikas Nigam Limited
Vidyut Bhawan, Janpath, Jaipur-302 005
(Rajasthan)
5. PTC India Limited
2nd Floor, NBCC Tower 15,



Bhikaji Cama Place,
New Delhi-II0066

6. Chhattisgarh State Power Trading Co. Ltd.
2nd Floor, Vidyut Sewa Bhawan
Dangania, Raipur-492 DB, Chhattisgarh

7. Chhattisgarh State Power Distribution Co. Ltd.
Vidyut Sewa Bhawan
Dangania, Raipur-492 013, Chhattisgarh

... Respondents

Parties Present:

Shri Matrugupta Mishra, Advocate, MCCPL
Ms. Ankita Bafna, Advocate, MCCPL
Ms. Swapna Seshadri, Advocate, Rajasthan Discoms
Shri Ashwin Ramanathan, Advocate, Rajasthan Discoms
Shri Aashish Anand Bernard, Advocate, PTC India
Shri Paramhans Sahani, Advocate, PTC India

ORDER

The Petitioner, Maruti Clean Coal and Power Limited, has filed the present Petition under Section 79(1)(b) and 79 (1)(f) of the Electricity Act, 2003 (hereinafter referred to as “the Act”) for seeking compensation on account of change in law events in terms of Power Purchase Agreement dated 1.11.2013 (PTC-PPA) executed between the Petitioner and the Respondent No. 5, PTC India Ltd. and in terms of the back-to-back Power Purchase Agreement executed by PTC with Respondents 1 to 3, namely, Jaipur Vidyut Vitran Nigam Limited (“JVVNL”), Ajmer Vidyut Vitran Nigam Limited (“AVVNL”), Jodhpur Vidyut Vitran Nigam Limited (“JdVVNL”) [hereinafter referred to as the “RVPN-PPA”] dated 1.11.2013.

Background

2. The Petitioner has set up a 1x300 MW coal based thermal power project (hereinafter referred to as ‘the generating station’) located at Korba, in the State of Chhattisgarh. The Petitioner and the Respondent No. 5, PTC India Ltd. (hereinafter



referred to as “PTC”) entered into a Power Purchase Agreement on 1.11.2013 for supply of 250 MW Round the Clock (RTC) power for a period of twenty-five years from the Scheduled Delivery Date of the project, for onward sale on long term basis. The aforesaid PPA was executed on the understanding that the Respondent No. 5, PTC had executed a Power Purchase Agreement dated 1.11.2013 with the Respondents 1, 2 and 3 for sale and supply of aggregated contracted capacity of 250 MW to the Respondents 1, 2 and 3 from the generating station. RVPN-PPA was executed pursuant to a Competitive Bidding Process initiated by the Respondent No. 4 (Erstwhile Rajasthan Rajya Vidyut Prasaran Nigam Limited) through issuance of a Request for Proposal (RFP) for procurement of power on long term basis under a Case-I bidding process for meeting the Respondent’s base load power requirements.

3. The Petitioner has submitted that as per the provisions of the RVPN-PPA, the source of generation and supply of power is through the generating station of the Petitioner, and as such any increase in the cost of generation of electricity incurred by the Petitioner for the purpose of supply of electricity to the Respondents 1, 2 and 3 shall be paid by them in terms of the provisions contained under Article 10 of the RVPN-PPA.

4. The Petitioner has submitted that as per Article 10.2 of the RVPN-PPA, the principle behind determining the consequence/ compensation on account of Change in Law event is to reconstitute the affected party (in the present case, the Petitioner) to the same economic position as if the said Change in Law event(s) had not occurred, in order to neutralize the effect of the changed circumstances which were not present on the cut-off date, and as such the said changes could not have been factored at the time of submission of the bid. Further, the above provision empowers the parties



to immune themselves from the adverse economic impact which may ensue out of changed legal regime affecting the operation of the project qua supply of power under the RVPN-PPA. The Petitioner has entered into the following long-term PPAs for supply of power from the generating station:

PPA	Parties	Procurer	Quantum	Tenure
1.11.2013	i. Petitioner and PTC; and ii. PTC and Respondents 1, 2 and 3, namely Jaipur Vidyut Vitran Nigam Limited, Ajmer Vidyut Vitran Nigam Limited and Jodhpur Vidyut Vitran Nigam Limited.	Respondents 1, 2 and 3, namely Jaipur Vidyut Vitran Nigam Limited, Ajmer Vidyut Vitran Nigam Limited and Jodhpur Vidyut Vitran Nigam Limited	250 MW	25 years
9.12.2013	Petitioner and Respondents 6 and 7, namely Chhattisgarh State Power Trading Co. Ltd. and Chhattisgarh State Power Distribution Co. Ltd.	Respondent No. 7, Chhattisgarh State Power Distribution Co. Ltd	15 MW	Co-terminus With Plant Life

5. In the present Petition, the Petitioner has sought compensation on account of the following change in law events in order to restore the Petitioner to the same economic position as if the events had not occurred.

I. Increase in coal cost on account of change in law events

- a) Royalty on Coal;
- b) Service Tax on Royalty of Coal;
- c) Increase in Niryatkar;
- d) Increase in Environment Cess / Paryavaran Upkar;
- e) Change in Infrastructure Development Cess/Vikas Upkar;
- f) Change in Clean Energy Cess/Clean Environment Cess and Introduction of Goods and Services Tax, 2017;
- g) Change in Forest Tax;
- h) Change in the components of Central Excise Duty;
- i) Increase/ Change in Entry Tax on account of changes in the individual components of such Tax;



- j) Increase/ Change in Value Added Tax (VAT) on account of changes in individual components of such Tax;
- k) Increase in sizing and crushing charges;
- l) Increase in Coal Surface Transportation charge;
- m) Increase in base price of coal;

II. Increase in cost on account of change in law events pertaining to Rail Transportation of domestic coal supplied by Coal India Limited and its subsidiaries.

- a) Increase in base freight of coal transportation by Rail;
- b) Levy of Busy Season Charges and Levy of Development Surcharge;
- c) Increase in Service Tax Rate, Imposition of Swachh Bharat Cess and Krishi Kalyan Cess;

III. Increase in rate of Electricity Duty imposed on auxiliary consumption.

IV. Increase in coal cost due to reduction in supply of coal by Coal India Limited and its subsidiaries.

V. Increase in Minimum Alternative Tax (MAT) rate.

VI. Increase in Works Contracts Service Tax rate.

VII. Increase in Consent Fee.

VIII. Introduction of Evacuation Facility charges.

IX. Additional cost towards Fly Ash Transportation.

X. Additional Capital Expenditure on account of Amendment in Environment Norms.

XI. Increase/ Change in Prices of Diesel.

XII. Structural Impact of GST.

XIII. Carrying cost.

6. The chronological dates of events with regard to the RVPN-PPA are as under:

Power Supply to	RVPN (250 MW)
Cut-off date	11.9.2012
Date of submission of bid	18.9.2012
PPA executed on	1.11.2013
Start of supply of power	From 30.11.2016 for 45 MW and from 1.4.2017 for 250 MW



7. The Petitioner has submitted that during the period commencing from 30.11.2016 to 31.12.2017, it has incurred additional expenses of Rs. 6580.64 lakh in generating and supplying power to Rajasthan Discoms under the PPA due to the Change in Law events. The Petitioner has computed the impact on account of the Change in Law events as under:

Sl. No.	Change in Law Events	Financial Impact (in Rs. lakh)	
		30.11.2016 to 31.3.2017	1.4.2017 to 31.12.2017
1.	Change in Royalty on Coal	118.59	405.58
2.	Change in Niryatkar	(1.38)	(1.52)
3.	Change in Environment Cess/ Paryavaran Upkar	4.93	15.97
4.	Change in Infrastructure Development Cess/ Vikas Upkar	4.93	15.97
5.	Change in Clean Energy Cess/ Clean Environment Cess and Introduction of Goods and Service Tax, 2017	690.78	2256.56
6.	Change in Forest Tax	—	4.91
7.	Change in components of Central Excise Duty	40.46	(212.24)
8.	Change in Entry Tax on account of changes in individual components of such tax	12.29	(40.96)
9.	Change in Value Added Tax (VAT)/GST on account of changes in individual components of such Tax	62.08	35.58
10.	Change in Sizing and Crushing charges	35.53	121.65
11.	Change in base price of the Coal	35.53	499.37
12.	Change in Rate of Electricity Duty imposed on auxiliary consumption	20.33	267.88
13.	Change in coal cost due to reduction in supply of coal by Coal India Limited and its subsidiaries	-	1900.25
14.	Change in Consent Fee	-	5.83
15.	Change due to Introduction of Evacuation Facility Charges	—	21.47
16.	Change in Coal Surface Transportation Charges	—	49.58
	TOTAL	1228.18	5352.46

8. The Petitioner vide affidavit dated 6.5.2019 has submitted the revised 'Change in Law' events along with the financial impact till 31.3.2019 as under:



S N	Change in Law Events	Financial Impact (Rs. in lakh)			
		30.11.2016 to 31.3.2017	1.4.2017 to 31.3.2018	1.4.2018 to 31.3.2019	Total
1	Change in Royalty on Coal	118.59	641.15	655.88	1,415.62
2	Change in Niryat kar	(1.38)	4.14	(4.44)	(1.69)
3	Change in Environment Cess/ Paryavaran Upkar	4.93	20.90	18.85	44.69
4	Change in Infrastructure Development Cess/ Vikas Upkar	4.93	20.90	18.85	44.69
5	Change in Clean Energy Cess/ Clean Environment Cess and Introduction of Goods and Service Tax, 2017	690.78	3,139.58	2,654.98	6,485.35
6	Change in Forest Tax	-	7.89	1.11	8.99
7	Change in components of Central Excise Duty	40.46	(343.25)	(344.88)	(647.68)
8	Change in Entry Tax on account of changes in individual components of such tax	12.29	(68.04)	(71.79)	(127.53)
9	Change in Value Added Tax (VAT)/ GST on account of changes in individual components of such Tax and certain other charges/ taxes	62.08	61.21	69.10	192.39
10	Change in Sizing and Crushing charges	35.53	198.28	192.59	426.39
11	Change in Rate of Electricity Duty imposed on auxiliary consumption	20.33	370.91	333.64	724.88
12	Change in coal cost due to reduction in supply of coal by Coal India Limited and its subsidiaries	-	2,157.12	2,284.69	4,441.81
13	Change in Consent Fee	-	4.90	5.83	10.74
14	Change due to Introduction of Evacuation Facility Charges	-	141.08	379.28	520.37
15	Change in Coal Surface Transportation Charges	-	114.16	207.25	321.41
	TOTAL	988.56	6,470.94	6,400.93	3,860.43

9. The Petitioner has further submitted that with respect to the following change in law events, the Petitioner is in the process of ascertaining the actual financial impact on the cost of generation:

S. No.	Change in Law Events
1.	Increase in Minimum Alternative Tax (MAT) rate
2.	Increase in Service Tax rate
3.	Increase in Work Contract Service Tax Rate
4.	Additional Cost towards Fly Ash Transportation
5.	Additional Capital Expenditure on account of Amendment in Environment Norms
6.	Increase/ Change in Prices of Diesel
7.	Structural Impact of GST



10. Further, apart from the above claims, the Petitioner has submitted the following change in law events which has occurred after the cut-off date but at present no expenditure has been incurred by the Petitioner till the date of filing of the Petition:

S. No.	Change in Law Events
1.	Service Tax on Royalty of Coal
2.	Increase in base freight of coal transportation by Rail
3.	Dynamic Pricing Policy- Levy of Busy Season Charges and Levy of Development surcharge
4.	Increase in Service Tax Rate and Imposition of Swachh Bharat Cess and Krishi Kalyan Cess

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

12. Against the above background, the Petitioner has made the following prayers:

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

(b) Direct the Respondent Nos. 1 to 3 and 5 to make payment of Rs. 65.80 Crs to the Petitioner towards the additional expenditure incurred by the Petitioner on account of the said Change in Law events, in supplying power to the Respondent Nos. 1, 2 and 3 through Respondent No. 5 under the PPAs dated 01.11.2013 along with interest @ 1.25% per month from the date(s) on which the said amount(s) became due to the Petitioner till the actual realization of the same;

(c) Direct the Respondents to continue to make payments accrued in favour of the Petitioner on account of Change in Law events enumerated in the Petition from 01.01.2018 up to the effect of the said Change in Law events;

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

(e) In the interim, direct the Respondents to make payment of Rs. 59.22 Crs i.e. 90% of the already incurred amount by the Petitioner from 30.11.2016 to



31.12.2017 towards supply of power to the Respondents in order to ease the cash flow constraints faced by the Petitioner; and

(f) grant liberty to the Petitioner to raise any other change in law claim not covered in the present petition, at a later stage.”

13. The Petition was admitted on 25.7.2018 and notice was issued to the Respondents to file their replies. The Petitioner vide ROP was directed to file the following information:

- (a) Copy of the PPA entered into with Chhattisgarh State Power Trading Co. Ltd. (CSPTCL)/ Chhattisgarh State Power Distribution Co. Ltd. (CSPDCL);
- (b) Whether any Change in Law events reducing the cost have occurred during construction and operation period;
- (c) Date of Commissioning of the generating station;
- (d) Date of start of power supply to Rajasthan Discoms and CSPDCL;
- (e) Documentary evidence for increase in impact of Niryat Kar, VAT and Structural impact of GST;
- (f) Copy of Gazette Notifications/ Statutory documents with respect to increase in Service Tax, Swachh Bharat Cess, Krishi Kalyan Cess, Clean Energy Cess, Entry Tax and Evacuation Facility Charges;
- (g) Services for which increase in Service Tax has been claimed by the Petitioner and its total impact; and
- (h) Letter from competent authority of Central Excise Department regarding inclusion/ addition of components in the assessable value of coal for the calculation of Excise Duty.

14. The Petitioner vide its affidavit dated 13.8.2018 has filed the information called for.

15. Reply to the Petition has been filed by Rajasthan Urja Vikas Nigam Limited (RUVNL), for and on behalf of Respondents 1 to 4, namely, Jaipur Vidyut Vitran



Nigam Limited, Ajmer Vidyut Vitran Nigam Limited and Jodhpur Vidyut Vitran Nigam Limited (hereinafter referred to as "the Rajasthan Discoms") vide affidavit dated 24.10.2018 and by PTC vide affidavit dated 27.9.2018. Rajasthan Discoms in their joint reply dated 24.10.2018, have submitted as under:

a) No claims at all are maintainable for any period prior to three years before filing of the present petition i.e. prior to 11.4.2015. Any claims for this period is barred by limitation in terms of the Judgment of the Hon'ble Supreme Court in AP Power Coordination Committee & Ors v M/s Lanco Kondapalli Power Ltd.& Qrs [(2016) 3 SCC 468].

b) The PPA being a binding contract between the parties, all claims of the parties have to be strictly in terms of the PPA and not contrary thereto. In fact, it is not even the case of the Petitioner that relief ought to be given de hors the provisions of the PPA. The claims pertaining to various impositions/ increase in rate of tax made by the Petitioner against Rajasthan Discoms are not admissible in terms of the PPA. As per 5th Bullet of Article 10 of the PPA the term "any change in tax or introduction of any tax" is circumscribed by the qualification "made applicable for supply of power by the Seller as per the terms of the agreement" which means that every change in tax or introduction of any tax is not covered under change in law, but that only such taxes that are on the transaction of supply of power by the seller is permissible.

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

d) Therefore, the definition of supply as defined in the Act is required to be used for the purpose of the fifth bullet in Article 10.1.1 of the PPA. The term supply in



Fifth Bullet of Article 10.1.1 - means sale of electricity. Therefore, what is covered in the PPA for Change in Law in respect of taxes is only tax for supply (sale) of electricity and not taxes for anything else.

e) The purchase of coal and transportation by Railways are commercial transactions. The price of coal charged by the coal companies and the Railway transportation charges charged by Indian Railways are contractual consideration for commercial services rendered and cannot fall within the meaning of 'Law' or 'Change in Law'. Allowing compensation to the Petitioner on account of these taxes or impositions would render the scheme of competitive bidding under Section 63 of the Act redundant. The Petitioner cannot be given benefit of events that it had to factor in while placing its bid.

f) Details of change in law events provided by the Petitioner in Para 14 are wrong and misconceived. The Petitioner cannot seek in-principle approval without showing any actual impact. In fact, the Petitioner has even claimed compensation on account of change in law events, which might not even be applicable to the Petitioner. The Petitioner has plainly stated that it is yet to ascertain the impact on account of these events. Such claims of the Petitioner ought to be rejected *in-limine*.

g) In a PPA signed pursuant to a competitive bidding scheme under Section 63 of the Act, it is settled that claims of the Petitioner can only be decided in terms of the PPA. Therefore, for the Petitioner to give an impression that any and all "recurring or non-recurring expenditure" has to be compensated for in terms of the Change in law clause is completely unjustified.

16. Rajasthan Discoms, in its additional reply dated 1.4.2019, have submitted as under:

a) The issue of limitation is applicable to the present Petition, and it is wrong and denied that relief for Change in Law is being sought by the under general regulatory powers of the Commission.

b) The Petitioner has not shown any financial impact for its claims. There could be no question of granting any in-principle approval at this pre-mature



stage as there would otherwise be no way for the Rajasthan Discoms to ascertain the genuineness of the claims. If in-principle approval (if at all) is to be granted to the Petitioner, no bills should be raised by the Petitioner on the Rajasthan Discoms without filing a separate application/ petition for computation of its claims.

c) Since the claims of the Petitioner are barred by limitation, no carrying cost should be admissible to the Petitioner as the delay is on account of the Petitioner. The claims as far back as the year 2013 notifications are being raised and relied upon by filing a Petition in the year 2018. This is a clear default on the part of the Petitioner and cannot be to the prejudice Rajasthan Discoms by asking them to pay interest/ carrying cost. The entire principle laid down by the Appellate Tribunal and the Hon'ble Supreme Court while granting carrying cost is the time value of money. In this case, the Petitioner itself does not value time and has chosen to file a much delayed Petition. Therefore, no carrying cost should be paid to the Petitioner.

17. PTC in its reply dated 27.9.2018 has submitted that PTC having a licence to trade in inter-State supply of electricity had entered into back to back agreements for purchase and sale of power. Therefore, the entire transaction was on back to back basis. The Commission may examine the issues as raised by the Petitioner in light of the applicable laws and Regulations.

18. The Petitioner vide rejoinders dated 20.11.2018 and 5.6.2019 to the replies of Respondents dated 24.10.2018 and 1.4.2019 respectively has mainly submitted as under:

a) Since the Respondents do not have sufficient basis for objecting to the claims of the Petitioner, they are resorting to misleading this Commission by unnecessarily trying to cover the present case under a judgment of Supreme Court in the case of AP Power co-ordination Committee Vs M/s Lanco Kondapalli Power Limited [(2016) 3SSC] on limitation, which even prima facie has no application, due to the set of facts being distinct and separate which



are not applicable in the present case in any manner whatsoever. Therefore, the issue of limitation raised by the Respondents is liable to be rejected at the threshold.

b) The Respondents have failed to consider the fact that the generation, transmission, delivery and consumption of power are simultaneous. Therefore, the applicable taxes on inputs for generation of power can be construed to be taxes on supply of power.

c) The change in law cases are in the nature of claim of revenue, which is a natural corollary or a consequential effect of a change that has occurred leading to increase in the cost of generation and decrease in the generation of revenue. Therefore, bringing such arguments for the sake of argument only is tantamount to creating unnecessary impediments in the operation of generating assets. It is a matter of fact that the generating companies are subjected to huge financial constraints due to change in law and its impact on the day to day operation of the generating assets.

d) The Petitioner in support of its claims of various 'Change in Law' events has furnished the outcomes of various decided cases by CERC and APTEL on the same 'Change in Law' events.

e) The Respondents have entirely misconstrued the principle of limitation, its applicability and the provisions enshrined under Article 10 of the PPA. The cut-off date which is 7 days prior to the bid deadline, is 11.9.2012. The PPAs are executed on 1.11.2013. The Petitioner achieved COD on 31.7.2015 whereas, the supply to the Respondents have started on 30.11.2016 for 45 MW and the entire contracted quantum of 250 MW was supplied w.e.f. 1.4.2017. Therefore, the claims which have been made are very much within the period of 3 years from the date of 30.11.2016 since upon supplying power to the Respondents, the Petitioner started incurring the increased cost and Article 10 was triggered. A change in law event might have occurred in the year 2012 after the cut-off date. But the limitation period for the same so far as change in law is concerned cannot be computed from the date of change in law, when the PPA is executed on 1.11.2013 and power started being supplied with effect from 30.11.2016.



Analysis and Decision

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

- (1) Whether the Commission has the jurisdiction to adjudicate the dispute with regard to Change in law?**
- (2) Whether the claims of the Petitioner are barred by limitation?**
- (3) Whether the provisions of the PPA with regard to notice have been complied with?**
- (4) What is the scope of Change in law in the PPA?**
- (5) Whether compensation claims are admissible under Change in Law?
And**
- (6) Mechanism for processing and reimbursement of admitted claims under Change in Law.**

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

20. The chronological dates of events with regard to the Rajasthan PPA are as under:

Power Supply to	Rajasthan Discoms (250 MW)
Cut-off date	11.9.2012
Date of submission of bid	18.9.2012
PPA executed on	1.11.2013
Start of supply of power	From 30.11.2016 for 45 MW and from 1.4.2017 for 250 MW

Issue No. 1: Whether the Commission has the jurisdiction to adjudicate the dispute with regard to Change in law?

21. The Petitioner has submitted that this Commission has the exclusive jurisdiction to entertain the present Petition and to provide the reliefs as sought for hereunder. The Petitioner's power plant is situated in the State of Chhattisgarh, and is selling power to more than one State in as much as it has PPAs on back to back



basis with the Rajasthan Discoms in the State of Rajasthan and the Respondents 6 and 7 in the State of Chhattisgarh. Therefore, the Petitioner in terms of Section 79(1)(b) of the Act has a composite scheme for generation and sale of electricity in more than one State.

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

PPA	Parties	Procurer	Quantum	Tenure
1.11.2013	i. Petitioner and PTC; and ii. PTC and Respondents 1, 2 and 3, namely Jaipur Vidyut Vitran Nigam Limited, Ajmer Vidyut Vitran Nigam Limited and Jodhpur Vidyut Vitran Nigam Limited.	Respondents 1, 2 and 3, namely Jaipur Vidyut Vitran Nigam Limited, Ajmer Vidyut Vitran Nigam Limited and Jodhpur Vidyut Vitran Nigam Limited	250 MW	25 years
9.12.2013	Petitioner and Respondents 6 and 7, namely Chhattisgarh State Power Trading Co. Ltd. and Chhattisgarh State Power Distribution Co. Ltd.	Respondent No. 7, Chhattisgarh State Power Distribution Co. Ltd	15 MW	Co-terminus With Plant Life

23. The Respondents have not raised objection with regard to jurisdiction to decide the disputes. The Petitioner has submitted that in terms of Section 79(1)(b) of the Act, the generating station has a composite scheme for generation and sale of electricity in more than one State. Accordingly, it has argued that this Commission has the jurisdiction to adjudicate the disputes in respect of the generating station. It is noticed that the project of the Petitioner is located in the State of Chhattisgarh and the Petitioner has entered into PPA on 1.11.2013 for supply of 250 MW power to the Rajasthan Discoms through back to back arrangement based on PPA dated 1.11.2013 with PTC, the trading licensee. The Petitioner has also entered into PPA for supply of 15 MW power to the Chhattisgarh Discoms based on PPA dated 9.12.2013. Sub-section (b) of Section 79(1) of the Act provides that this 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. The Hon'ble Supreme Court vide its judgment dated 11.4.2017 in Civil Appeals titled Energy Watchdog v CERC & ors (2017 (4) SCALE 580) while upholding the jurisdiction of this Commission for regulating the tariff of projects which meet the composite scheme, has explained the term 'composite scheme' as under:

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

....

24. Even otherwise, the expression used in Section 79(1)(b) is that generating companies must enter into or otherwise have a "composite scheme". This makes it clear that the expression "composite scheme" does not have some special meaning – it is enough that generating companies have, in any manner, a scheme for generation and sale of electricity which must be in more than one State."

24. Since the Petitioner is supplying power to more than one State through PPA/ back to back arrangements, its generating station has a 'composite scheme' for generation and sale of power to more than one State. Hence, in the light of the decision of the Hon'ble Supreme Court in Energy Watchdog case, we are of the considered view that this Commission has the jurisdiction to regulate the tariff of the



Project of the Petitioner and thereby adjudicate the disputes raised in the present Petition in terms of Section 79(1)(b) read with Section 79(1)(f) of the Act.

Issue No. 2: Whether the Petitioner's claim is barred by limitation?

25. Rajasthan Discoms, in their written submissions dated 1.4.2019, have submitted as under:

(a) The present Petition has been filed on 11.4.2018 under Section 79(1)(f) of the Act for adjudication of change in law events for period from 30.11.2016 to 31.3.2017 and 1.4.2017 to 31.12.2017, but for justifying the change in law is relying on several notifications of a much prior date which are barred by limitation.

(b) As per the judgment of the Hon`ble Supreme Court in the case of AP Power Coordination Committee and others Vs. Lanco Kondapalli Power Ltd and other [(2016)3SCC 468] limitation period of three years would apply in adjudication proceeding initiated under Section 86(1)(f) of the Act.

(c) The Petitioner itself has filed the present Petition under Section 79(1)(f) of the Act seeking for exercise of adjudicatory functions of this Commission.

(d) For the purpose of getting relief on account of change in law, an adjudication on the admissibility of Change in Law is necessarily required by this Commission because the Commission not only determines the compensation for change in law but also decides from which date such compensation would be applicable. The decision of this Commission is final and binding on the parties subject to statutory appeals provided in law. This being the case, it is not possible that relief to the Petitioner will be pursuant to adjudication but the limitation will not apply.

(e) The Petitioner is the *dominuous litus* and chooses to file the Petition seeking relief. The Relief contemplated under the PPA for change in law is itself through adjudication by this Commission substituting the power of the Civil Court/ Arbitrator. It is not that parties by exchange of notice and acceptance can agree to give compensation for change in law. This Commission alone



can adjudicate and declare events to be change in law and thereafter adjudicate the compensation for the same. Therefore, the only function being performed by this Commission is adjudication under Section 79(1)(f) of the Act and no regulatory function under Section 79(1)(b) of the Act.

(f) It is an admitted position that any relief that can be granted, can only be in terms of the PPA, and not *de hors* the provisions therein, and it is for this reason that the Petitioner in the Petition has relied on the terms of the PPA, and not merely on regulatory powers under Section 79(1)(b) of the Act.

(g) The validity of the claims of the Petitioner are required to be considered within the scope of Article 10 of the PPA dealing with Change in Law, read with the definition of the term 'Law' and 'Indian Government Instrumentality'. Therefore, the Commission certainly has to adjudicate upon the admissibility of the Change in Law events in terms of the PPA.

(h) This Commission while adjudicating the claims of the Petitioner under Section 79(1)(f) cannot give relief beyond the PPA or make a new contract for the parties. This being the case whatever applies to an arbitrator/ civil court/ adjudicator for limitation will equally apply to this Commission also. The Judgment of the Supreme Court in Lanco Case applies on all four corners to the present matter.

26. The Petitioner, vide its written submissions dated 6.5.2019, has submitted as under:

(a) The contention of the Respondents that since the Petition has been filed under Section 79(1)(f) and hence, the same is purely adjudicatory in nature and, therefore, limitation period will be applicable, is mis-founded and contrary to the settled principles of law. The Hon'ble Supreme Court in the case of J. Kumaradasan Nair v. Iric Sohan, [(2009) 12 SCC 175] has observed as under

"18. It is also now a well-settled principle of law that mentioning of a wrong provision or non-mentioning of any provision of law would, by itself, be not sufficient to take away the jurisdiction of a court if it is otherwise vested in it in law. While exercising its power, the court will merely consider whether it has the source to exercise such power or not. The court will not apply the beneficent provisions like Sections 5 and 14 of the Limitation Act in a pedantic manner. When the provisions are meant to apply and in fact found to be applicable to the



facts and circumstances of a case, in our opinion, there is no reason as to why the court will refuse to apply the same only because a wrong provision has been mentioned. In a case of this nature, sub-section (2) of Section 14 of the Limitation Act per se may not be applicable, but, as indicated hereinbefore, the principles thereof would be applicable for the purpose of condonation of delay in terms of Section 5 thereof.”

(b) In the light of the above judgement, the argument of the Respondents that since the Petitioner has referred to Section 79(1)(f) of the Act makes the nature of the Petition an adjudicatory one, does not hold any basis. The Petition has to be read in its entirety, in order to arrive at the ascertainment of the nature of the Petition. The present Petition is a change in law Petition whereby certain events of change in law has occurred which translated into increase in the expenditure of the Petitioner/ generator, which was non-existing at the time of submission of the bid. Therefore, a provision is created under the PPA which equitably ensures that there will be adjustment in tariff after being satisfied that there has been a change in law which increase the expenditure and decrease the revenue of the generator. Further, as per Article 10.2.1 of the PPA, the restoration of the Petitioner shall only happen through monthly tariff payments. Therefore, this petition is in respect of tariff adjustment payment on account of change in law, which is falling within the regulatory regime of this Commission and the reliefs are directly and substantially affecting the tariff at which power is being supplied by the Petitioner to the Respondents.

(c) In the light of the above read with the relevant paras of the judgment of the Hon'ble Supreme Court in the case of APPCC & Ors. vs. M/s Lanco Kondapalli Power Ltd. & Ors., no limitation period shall be applicable since the same is not a matter of pure adjudication of disputes.

(d) The Respondents have entirely misconstrued the principle of limitation, its applicability and the provisions enshrined under Article 10 of the PPA. Article 10 of the PPA will trigger on the fulfilment of 2 eventualities, namely, occurrence of a change in law event after 7 days prior to the bid deadline; and such change in law event must result into additional recurring/ non-recurring expenditure by the seller or any income to the seller.

(e) As per Article 10.3.3, the seller is required to demonstrate before this



Commission documentary proof of such increase/ decrease in cost of the power station or revenue/ expense for establishing impact of such change in law.

(f) The cut off which is 7 days prior to the bid deadline, is 11.9.2012. The PPAs are executed on 1.11.2013. A change in law event might have occurred in the year 2012 after the cut-off date. But the limitation period for the same so far as change in law is concerned cannot be computed from the date of change in law, when the PPA is executed on 1.11.2013 and power started being supplied on 30.11.2016.

(g) A cause of action under Article 10 of the PPA can only come into existence when a seller incurs a cost which is increasing its expenditure as a consequence of a change in law event that has occurred, which might have occurred on a date which is more than 3 years, but such event is bound to have occurred after the cut-off date. Therefore, the entire argument raised by the Respondents is based on mis-construction of law as well as considering change in law event as the sole cause of action without realizing the 2nd ingredient of applicability of the change in law as contemplated in Article 10.1.1 of the PPA. If the arguments advanced by the Respondents are accepted, then the change in law clause of the PPA would either become inoperative or unenforceable.

(h) The Petitioner issued change in law notice dated 26.6.2017 to the Respondent No. 5/ PTC, with copy marked to Respondents 1 to 3, on account of various change in law events in terms of Article 10 of the RVPN-PPA. In addition to the change in law notice dated 26.6.2017, the Petitioner issued another change in law notice on 5.1.2018 to the Respondent No. 5 with a copy marked to Respondents 1 to 3 for claiming compensation on account of the events as mentioned therein which have occurred subsequent to the cut-off date.

27. We have considered the submissions of the Petitioner and the Respondents. The Act is a special statute which does not provide for any period of limitation for



adjudication of claims by this Commission. Though no period of limitation has been prescribed in the Act for filing the Petition for adjudication of the disputes, the Hon`ble Supreme Court in Andhra Pradesh Power Co-ordination Committee Vs. Lanco Kondapalli Power Limited [(2016) 3SCC 468] held that the claims coming for adjudication before the Commission cannot be entertained or allowed if otherwise the same is not recoverable in a regular suit on account of law of limitation. Relevant extract of the said judgment is as under:

“30...In the absence of any provision in the Electricity Act creating a new right upon a claimant to claim even monies barred by law of limitation, or taking away a right of the other side to take a lawful defence of limitation, we are persuaded to hold that in the light of nature of judicial power conferred on the Commission, claims coming for adjudication before it cannot be entertained or allowed if it is found legally not recoverable in a regular suit or any other regular proceeding such as arbitration, on account of law of limitation. We have taken this view not only because it appears to be more just but also because unlike labour laws and the Industrial Disputes Act, the Electricity Act has no peculiar philosophy or inherent underlying reasons requiring adherence to a contrary view.”

28. In the light of the above judgment, the limitation period prescribed for money claims in the Limitation Act, 1963 i.e. 3 years will be applicable for filing the application before the Commission. In the present case, the cut-off date, which is 7 days prior to the bid deadline, is 11.9.2012. The PPAs have been executed on 1.11.2013. The Petitioner achieved COD on 31.7.2015, whereas, the supply of power to the Respondents started on 30.11.2016 for 45 MW and the entire contracted quantum of 250 MW was supplied w.e.f. 1.4.2017. The Petitioner has filed the present Petition on 11.4.2018. Therefore, the claims which have been made are very much within the period of 3 years from the date of 30.11.2016, since, upon supplying power to the Respondents, the Petitioner started incurring the increased cost and Article 10 was triggered. Therefore, the claims of the Petitioner are not barred by limitation and accordingly, contention of the Respondents in this regard is rejected.



Issue No. 3: Whether the provisions of the PPA with regard to notice have been complied with?

29. The claim of the Petitioner in the present Petition pertains to Change in law events related to the PPA dated 1.11.2013. The cut-off date for consideration of any claim for change in law, namely 7 days before the bid deadline, is 11.9.2012. Article 10.4 of the PPA between Rajasthan Discoms and the Seller (PTC India Ltd.) envisages for notification of Change in Law events, respectively to the Procurer. Article 10.4 of the Rajasthan Discoms 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.”

30. The Petitioner has submitted that change in law notice was issued on 26.6.2017 to the Respondent No. 5, PTC, with copy to the Rajasthan Discoms on account of various change in law events in terms of Article 10 of the RVPN-PPA. In addition to the change in law notice dated 26.6.2017, the Petitioner issued another change in law notice on 5.1.2018 to the Respondent No. 5 with copy to Respondents 1 to 3 for claiming compensation on account of the events as mentioned therein which have occurred subsequent to the cut-off date.



31. We have considered the submissions of the Petitioner. Under Article 10.4 of the PPA, the Petitioner is required to give notice about occurrence of Change in Law events as soon as reasonably practicable after being aware of such events. The Petitioner has given notices dated 26.6.2017 and 5.1.2018 to Rajasthan Discoms and PTC indicating the events under Change in Law. In the said notices, the Petitioner has apprised the Respondents about the occurrence of Change in Law events and the impact of such events on tariff. Neither Rajasthan Discoms nor PTC has responded to the claim made by the Petitioner. In view of the above, it is inferred that the Petitioner has complied with the requirement of notice under clause 10.4 of the PPA.

Issue No. 4: What is the scope of Change in law in the PPA?

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

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

- the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law.*
- a change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law.*
- the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier*
- a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the Seller;*



• any change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of this Agreement.

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

10.3 Relief for Change in Law

10.3.1 Not Used

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.”

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

“14.3 Dispute Resolution

14.3.1 Dispute Resolution by the Appropriate Commission

14.3.1.1

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

(b) Where SERC is the Appropriate Commission, all disputes between the Procurers and the Seller shall be referred to SERC.



14.3.1.2 The obligations of the Procurers under this Agreement towards the Seller shall not be affected in any manner by reason of inter-se disputes amongst the Procurers.”

34. A combined reading of the above provisions reveals that for the events broadly covered under Change in Law, this Commission has the jurisdiction to adjudicate upon the dispute between the Petitioner and Rajasthan Discoms. These events are:

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



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

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

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

“shall mean the Government of India, Governments of State(s) of Rajasthan, Delhi and Chhattisgarh 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(s);.”

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

35. The Respondents have submitted that claims pertaining to various imposition/increase in rate of tax made by the Petitioner are not admissible in terms of Article 10 of the PPA which provides that any change in tax or introduction of any tax is



circumscribed by the qualification made applicable for supply of power by the seller as per the terms of the Agreement. *Per contra*, the Petitioner has submitted that the Respondents have failed to consider the fact that the generation, transmission delivery and consumption of power are simultaneous. Therefore, the applicable taxes on inputs for generation of power can be construed to be taxes on supply of power.

36. We have considered the submissions made by the Petitioner and the Respondents. We have noticed that “enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any law” is covered under Change in law if this result in additional recurring/ non-recurring expenditure by the seller or any income to the seller. Further, this issue was considered by the Appellate Tribunal in its judgment dated 14.8.2018 in Appeal No. 119 of 2016 (M/s. Adani Power Rajasthan Ltd. Vs. Rajasthan Rajya Vidyut Vitran Nigam Limited) where a similar issue arose for interpretation in the context of PPA for generation and sale of electricity by a generating company to distribution companies. The relevant portion of the said judgment is extracted as under:

“11. (c) Before discussing the issues there is a need to address a common issue raised by the Discoms related to allowance of tax under Change in Law in terms of the PPA. According to the Discoms that as per the 5th bullet of the Article 10.1.1 of the PPA change in tax or introduction of any new tax is only applicable to supply of power which also means sale of power if definition of supply is taken in terms of the Act. The Discoms have contended that if there is specific provision dealing with the tax under Change in Law then other provisions of Change in Law Article are not allowed to deal with the tax and as such no other tax implications are allowed to be covered under Change in Law under the PPA. The Discoms have also relied on some judgements of Hon`ble Supreme Court on this issue. We have gone through the said judgements and we observe that according to the judgements relied by the Discoms, the taxes nce dealt in a particular clause of a contract then there is no scope for considering taxes under other clauses of a contract.

(d) APRL has submitted that the generator undertakes many activities to ensure supply of power to the Discoms. APRL has relied on the judgement of Hon`ble Supreme Court in case of State of A.P. v. NTPC (2002) 5 SCC 203 wherein it has been held that the production (generation), transmission, delivery and consumption are simultaneous, almost instantaneous. According to the said judgement, the applicable taxes on inputs for generation of power can be construed to be taxes on supply of power. APRL has further contended that if the contention of the Discoms is accepted then the Change in



Law provision would be applicable during the Operating Period and the applicability of the said provision will become redundant during Construction Period. There is some strength in the contention of APRL as there will be no applicability of Change in Law provisions if there are changes in tax/duties/levies etc. rates or imposition of new tax/duties/levies etc. during Construction Period and on input costs related to power generation.

(e) APRL has further contended that the reliance of the Discoms on the maxim "expressumfacitcessaretactium" xpressumfacitcessaretactiumtumfacitthe reliance of the Discoms on the maxim „expressumfacitng Construction Period and on in Hon`ble Supreme Court in case of Assistant Collector of Central Excise Calcutta Division v. National Tobacco Company of India Ltd. (1972) 2 SCC 560 has held that the rule of prohibition by necessary implication could be applied only where a specified procedure is laid down for performance of duty or where there is an express prohibition.

(f) The Discoms have also reproduced the definition of Change in Law under different PPAs under Section 63 of the Act. We have gone through the said provisions and we find that the other provisions of the PPA are similar to that in the other PPAs under Section 63 of the Act except the fifth bullet which is additional specifically covering tax on supply of power. The judgements of the Hon`ble Supreme Court relied upon by the Discoms were under different context and could not be equated to the scheme of power procurement by Discoms under Section 63 of the Act which is based on guidelines issued by Gol under different scenarios wherein the treatment of taxes depends upon the specific conditions of the RFP and tariff quotes by the bidders.

(g) In view of our discussions as above and after duly considering the earlier judgements of this Tribunal, we are of the considered opinion that any change in tax/levies/ duties etc. or application of new tax/levies/ duties etc. on supply of power covers the taxes on inputs required for such generation and supply of power to the Discoms."

37. Therefore, as per the above judgment, "any change in tax/ levies/ duties, etc. or application of new tax/ levies/ duties etc. on supply of power covers the taxes on inputs required for such generation and supply of power to the Discoms". Similarly, any change in taxes or introduction of any tax covers the inputs required for supply of power by the seller. The generating station has been established by the Petitioner for the purposes of supply of power to the various procurers with whom the Petitioner has entered into the PPA. The Petitioner cannot supply power without establishing the generating station that in turn requires paying statutory taxes and duties on the material, equipment and services. Therefore, all expenditures incurred for establishing the generating station go towards providing supply of power to the Procurers. If recurring or non-recurring expenditure is required to be incurred by the



Petitioner on account of occurrences of events covered under Article 10.1.1 of the PPA, then such expenditure will be admissible under change in law to the Petitioner as they are necessary input costs for supply of power. One of the events covered under change in law is 'any change in tax or introduction of tax made application for supply of power by the seller as per the terms of this Agreement'. In our view, last bullet under Article 10.1.1 which provides for 'the change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of this Agreement' cannot be read in isolation and has to be read harmoniously with the provision that such occurrences should have the effect of 'resulting into any recurring or non-recurring expenditure by the Seller or any income to the Seller'. Therefore, the contention of the Respondents is not sustainable.

Issue No. 5: Whether compensation claims are admissible under Change in Law?

38. In the light of above, we proceed to deal with the claims of the Petitioner under Change in Law during the Operating Period .

I. Increase in coal cost on account of change in law events

(a) Royalty on Coal

39. The Petitioner has submitted that as on cut-off date i.e. 17.9.2012, the rate of royalty on coal fixed by the Ministry of Coal, Government of India ("MoC"), vide Notification No. G.S.R. 349 (E) dated 10.5.2012, was @14% of the base price of coal. Subsequently, MoC vide its notification No. G.S.R. 792(E), dated 20.10.2015 issued under the provisions of Mines and Minerals (Development and Regulation) Act 1957, enacted Mines and Minerals (Contribution to District Mineral Foundation) Rules, 2015 and under Rule 2(b) of the above Rules, imposed 30% additional levy on



the royalty payable in terms of the notification dated 10.5.2012. Subsequently, MoC vide its notification No. G.S.R 837 (E) dated 31.8.2016, amended the above notification dated 20.10.2015 whereby the above additional levy was made operative on a retrospective basis from 12.1.2015. Further, South Eastern Coalfields Ltd. (SECL) vide its notification no. SECL/BSP/S&M/1936 dated 13.11.2015 imposed an additional 2% levy over and above the already imposed 14% royalty on the base price towards National Mineral Exploration Trust. The Petitioner has further stated that the above notifications pertaining to base price of coal, royalty and additional levy are Change in Law events within the meaning of Article 10 of the PPA which needs to be taken into consideration for computing the amount required to be ascertained by this Commission for compensating the Petitioner on account of the consequences of the occurrence of Change in Law events. The impact of the above change in law events are elucidated as under:

Sl. No.	Particulars	Description	As on 17.9.2012 Rs/tonne	Current Rate Rs/tonne
1	Basic Price	Base price of Coal as per CIL	640	810
2	Royalty 14% on Basic Price	14% on Basic Price	89.6	113.4
3	Royalty (2%)-NMET	2% of the Royalty as per S. No. 2	NA	2.27
4	Royalty (30%)-DMF	30% of the Royalty as per S. No. 2	NA	34.02

40. The Respondents have submitted that the levy of charges towards NMET and DMF are not covered under change in law qua the Petitioner, as the Petitioner is not a mining lease holder, and is as such not liable for such payment. *Per Contra*, the Petitioner has submitted that change in Royalty on coal is a statutory payment to be made by the generator and the same has been introduced after the cut-off date, by an Act of Parliament, therefore, the same is a change in law event.



41. We have considered the submissions of the Petitioner and the Respondents.

Regarding the admissibility of additional levy for the DMF and the NMET, the issue was examined by the Commission in order dated 17.2.2017 in Petition No. 16/MP/2016 as under:

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

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

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

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

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

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

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

Section 9C provides as under:

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

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



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

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

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

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

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

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

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

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



date and therefore, they fulfill the conditions of change in law. Accordingly, the expenditure on this account has been allowed under Change in Law.

42. In our view, the case of the Petitioner is covered under the above order of the Commission. Therefore, the levy @2% royalty on National Mineral Exploration Trust and @30% of the royalty for contribution to the District Mineral Foundations is admissible to the Petitioner under Change in Law. However, there is increase in base price of the coal from Rs. 640/MT to Rs. 810/MT. In terms of the judgment of the Appellate Tribunal in Appeal No. 288 of 2013 (M/s Wardha Power Company Ltd Vs. Reliance Infrastructure Ltd & another), compensation under change in law cannot be connected to the coal price computed for the quoted energy charges. The Appellate Tribunal has held that change in law shall be computed with reference to the actual price of coal paid by the developer. Accordingly, the compensation on account of contribution to DMF and NMET shall be done with reference to the royalty calculated on the actual price of coal. The Petitioner shall furnish copies of the payment made, supported by Auditor certificate, while claiming the expenditure under Change in Law. The reimbursement on account of contribution to National Mineral Exploration Trust and District Mineral Foundations shall be on the basis of actual payments made to appropriate authorities and shall be restricted to the amount of coal consumed for supplying scheduled energy to the Procurer. It is clarified that the Petitioner shall be entitled to recover compensation on account of payment to National Mineral Exploration Trust and payment to District Mineral Foundation in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the Tariff Regulations notified by the Commission or at actual, whichever is lower, for supply of electricity to Rajasthan discoms. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of payment to National Mineral Exploration



Trust and Payment to District Mineral Foundations. The Petitioner and Rajasthan Discoms are directed to carry out reconciliation on account of these claims on annual basis.

(b) Service Tax on Royalty of Coal

43. The Petitioner has submitted that Government of India, through its notification, imposed service tax on the royalty payable on coal. The above position was further made clear by virtue of a clarification issued by the Government of India vide Circular No.192/02/2016-Service Tax dated 13.4.2016 to the effect that service tax will be payable on royalty on coal w.e.f. 1.4.2016. The Petitioner has further stated that the above notifications pertaining to service tax on royalty of coal fall under Change in Law events within the meaning of Article 10 of the RVPN-PPA which needs to be taken into consideration for computing the amount required to be ascertained by this Commission for compensating the Petitioner on account of the consequences of the occurrence of Change in Law events. The Petitioner has submitted that no expenditure has been incurred by the Petitioner till the date of filing the petition. However, the said change in law event has occurred after the cut-off date. The Petitioner has requested the Commission to allow the same since the increased expenditure on account of the same is likely to be incurred in future.

44. The Respondents have submitted that since the Petitioner has not incurred any expense on account of this event, there can be no in-principle approval without actually demonstrating that actual expense has been incurred. *Per Contra*, the Petitioner has submitted that since levy of service tax on royalty has an impact on the cost of coal and the cost of generation of power for supply to the Respondents, service tax on royalty would be covered under change in law.



45. We have considered the submissions made by the Petitioner and the Respondents. Regarding the claim of service tax on royalty of coal, the Commission has examined and dealt with this issue in detail vide order dated 18.4.2018 in Petition No. 18/MP/2017 and has observed as under:

“37. We have considered the submissions of the parties. The Petitioner has submitted that the notifications pertaining to service tax on royalty qualifies as Change in Law event within the meaning of Article 10 of the KSEB PPA. The respondents have submitted that Royalty is not a fee for the service provided by the Government and therefore, is not subject to service tax. Perusal of S.No. 6 in the Notification issued by the Ministry of Finance, Government of India vide Circular Number 192/02/2016-Service Tax dated 13.4.2016 reveals that services in nature of allocation of natural resources by Government other than those allotted to individual farmers would be leviable to Service Tax. Since, coal is a national resource which is allocated by Government to the mine lease holder for which royalty is paid, service tax can be levied on royalty. As regards the contention of Prayas that royalty is a tax, we are of the view that the said issue is sub-judice before a nine judge Bench of the Hon’ble Supreme Court. In the absence of any clarity, we are of the view that service tax imposed on royalty on coal shall be reimbursable under change in law. As regards the contention of Prayas that the Petitioner should avail CENVAT, the Petitioner has clarified that power is an exempted good and therefore, no CENVAT credit is available on exempted goods in accordance with CENVAT Rules. Since, the Petitioner is not availing benefit under CENVAT, the Petitioner is entitled for relief on service tax on royalty of coal.

38. Further, the Commission vide its order dated 13.3.2018 in Petition No. 175/MP/2016 has allowed the service tax paid on royalty as a Change in law. The Commission in that order has observed as under:

“31. The Ministry of Finance, Government of India vide Notification No. 5/2015 dated 1.3.2015 amended the Rule 2 (1)(d)(i)(E) of Service Tax Rules, 1994 to the extent that it omitted the word “support” from support services”. Therefore, all the services provided by the Government and local authorities have come within the ambit of Service Tax. The said Notification has been issued after the cut-off date i.e. 21.7.2007. Since, levy of service tax on royalty has an impact on the cost of coal and the cost of generation of power for supply to the respondents, service tax on royalty will be covered under change in law. Further, Krishi Kalyan Cess and Swachh Bharat Cess as part of service tax shall be admissible under change in law.

32. The Petitioner has submitted that it has paid Service Tax of Rs 31.695 crore on royalty. However, the Petitioner has not placed on record any document in support of his claim towards service tax paid on royalty. The Petitioner is directed to furnish along with its monthly bill the proof of payment duly certified by the Auditor. It is clarified that the Petitioner shall be entitled to recover on account of service tax on royalty in proportion to the actual coal consumed corresponding to the scheduled generation for supply of electricity to the respondents. 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 royalty on coal.”

39. The decision is applicable in case of the Petitioner. The Petitioner has submitted that it has paid Service Tax of Rs 1.69 crore on royalty for the period from 1.3.2015 to



28.2.2017. However, the Petitioner has not placed on record any document in support of his claim towards service tax paid on royalty. The Petitioner is directed to furnish along with its monthly bill the proof of payment duly certified by the Auditor. It is clarified that the Petitioner shall be entitled to recover on account of service tax on royalty in proportion to the coal consumed corresponding to the scheduled generation at the normative parameters as per the applicable Tariff Regulations of the Commission or actual, whichever is lower, for supply of electricity to KSEB. 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 royalty on coal.

46. The above decision of the Commission is also applicable in case of the Petitioner and, therefore, 'Service Tax on Royalty of Coal' is allowed under Change in law for the instant Petition. However, the Petitioner has submitted that no expenditure has been incurred by the Petitioner till the date of filing the Petition. Therefore, for any future claims, the Petitioner is directed to furnish the proof of payment along with its monthly bill duly certified by the Auditor. It is clarified that the Petitioner shall be entitled to recover compensation on account of service tax on royalty in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the Tariff Regulations notified by the Commission or at actual, whichever is lower, for supply of electricity to the respondents. 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 royalty on coal.

(c) Increase Niryat kar in

47. The Petitioner has submitted that Niryat kar is levied on the summation of the base price of coal, sizing charges and crushing charges. The above levy is collected from the Petitioner and other consumers of coal and the fund so collected are deposited with the Municipal Corporation, Korba, Chhattisgarh. The office of Municipal Corporation, Korba vide its letter dated 23.4.2005 imposed Niryat kar



@0.2% of the summation of the base price of coal and sizing and crushing charge. Though there has been no change in the rate at which the aforesaid Niryat kar is levied, however with the increase of base price as well as sizing and crushing charge on account of Change in Law events, there has been an increase in the Niryat kar imposed upon the Petitioner. The Petitioner has claimed levy of Niryat Kar of Rs. 1.38 lakh from 30.11.2016 to 31.03.2017 and Rs. 1.52 lakh from 1.4.2017 to 31.12.2017.

48. The Respondents have submitted that there is no increase in the rate of Niryat kar and the Petitioner is only claiming a consequential increase on account of increase in base price of coal and sizing and crushing charges. In response, the Petitioner has submitted that Niryat kar is levied on the summation of base price and Sizing and Crushing charges and the same is collected from the Petitioner and other consumers of coal and the fund so collected are deposited with the Municipal Corporation, Korba, Chhattisgarh.

49. The Commission vide ROP of hearing dated 25.7.2018 directed the Petitioner to submit documentary evidence for increase in impact of Niryat Kar. The Petitioner vide its affidavit dated 13.8.2018 has submitted that there is a decrease of Rs. 1.38 lakh in impact of Niryat Kar during the period 30.11.2016 to 31.03.2017 and Rs 1.52 lakh during the period 1..2017 to 31.12.2017. There has been decrease in the overall impact of Niryat Kar during both the periods as mentioned above and as such, no documentary evidence for increase is required to be enclosed. Further, the Petitioner has also taken into account such decrease in the cost which details has been given in para 14 of the Petition.



50. We have gone through the submissions made by the Petitioner vide its affidavit dated 13.8.2018. Niryat Kar is being levied @0.2% on the summation of the base price of coal and sizing and crushing charge and deposited with the Municipal Corporation, Korba, Chhattisgarh based on the Municipal Corporation, Korba letter dated 23.4.2005. On Perusal of the documents available on record, it has been observed that neither there has been any increase in the prevailing rate of Niryat Kar after the cut-off date (i.e. 11.9.2012) nor any government authority/ statutory body has brought any kind of notification/ amendment to the prevailing circular of NiryatKar. The only premise of the Petitioner to claim this event under Change in law is due to the increase in base price of coal and sizing and crushing charge which has increased the overall impact of Niryat Kar being levied on the Petitioner. On basis of the documents provided we are not inclined to grant relief to the Petitioner on this event as change in law event.

51. Therefore, in the light of above decision, the claim of the Petitioner for relief under change in Law on account of increase in Niryat Kar as per Article 10 of the PPA is not admissible and accordingly, disallowed. However, the Petitioner is granted liberty to approach the Commission with proper documents in this regard.

**(d) Increase in Environment Cess/ Paryavaran Upkar
and
(e) Change in Infrastructure Development Cess/ Vikas Upkar**

52. The Petitioner has submitted that as on cut-off date i.e. 11.9.2012, the Government of Chhattisgarh under Section 4 read with Schedule II of the Chhattisgarh (Adhosanrachna Vikas Evam Paryavaran) Upkar Adhiniyam, 2005, imposed Environment Cess @Rs. 5 per MT on annual dispatch of coal. Subsequently, SECL vide its letter dated 19.8.2015 increased the Environment Cess from Rs. 5 per MT to Rs. 7.50 per MT w.e.f. 16.6.2015. This increase in



Chhattisgarh Paryavaran Evam Vikas Upkar notified by SECL was based on the decision of Govt. of Chhattisgarh which was subsequently published in the Notification No. 469 dated 18.9.2015 issued by Govt. of Chhattisgarh. The Petitioner has submitted that enhancement of Environment Cess on dispatches of coal/ lifting of coal from Rs. 5 per MT to Rs. 7.5 per MT is a Change in Law event within the meaning of Article 10 of the PPA. The Petitioner has claimed Rs. 4.93 lakh from 30.11.2016 to 31.3.2017 and Rs.15.79 lakh for the period from 1.4.2017 to 31.12.2017 on account of levy of Environment Cess/ Paryavaran Upkar.

53. The Petitioner has submitted that as on cut-off date i.e. 11.9.2012, there was Infrastructure Development Cess of Rs. 5 on each MT of annual dispatch of coal levied by Government of Chhattisgarh under Section 3 read with Schedule I of the Chhattisgarh (Adhosanrachna Vikas Evam Paryavaran) Upkar Adhiniyam, 2005,. Subsequently, Government of Chhattisgarh revised the Infrastructure Development Cess from Rs. 5 per MT to Rs. 7.50 per MT of coal dispatched w.e.f. 16.6.2015. SECL vide its letter dated 19.8.2015 informed the Petitioner regarding revision in the Infrastructure Development Cess. The Petitioner has submitted that enhancement of Infrastructure Development Cess on dispatches of coal/ lifting of coal from Rs. 5 per MT to Rs. 7.5 per MT is a Change in Law event within the meaning of Article 10 of the PPA. The Petitioner has claimed of Rs. 4.93 lakh from 30.11.2016 to 31.0.2017 and Rs.15.79 lakh for the period from 1.4.2017 to 31.12.2017 on account of levy of Infrastructure Development Cess/ Vikas Upkar.

54. We have considered the submissions of the Petitioner. The Commission has already allowed increase in Environment Cess/ Paryavaran Upkar and Change in Infrastructure Development Cess/ Vikas Upkar as change in law events in its order dated 19.12.2017 in Petition No. 229/MP/2016, order dated 19.12.2017 in Petition



No. 101/MP/2017, order dated 18.4.2018 in Petition No. 18/MP/2017 and order dated 27.4.2018 in Petition No. 126/MP/2016. The Commission in these Orders has observed as under:

“.....Since, the Infrastructure development cess and Environment Cess has been imposed by Act of Chhattisgarh State, i.e. Chhattisgarh legislature, it fulfils the conditions of Change in Law event under Article 10 of PPA. Accordingly, the Petitioner is entitled for the expenditure incurred on this account.....”

55. In light of the above decision of the Commission, the Petitioner is entitled for the expenditure incurred on this account. The Petitioner is directed to furnish a certificate from an Auditor certifying the expenses in this regard to Rajasthan Discoms for claiming the expenditure under Change in Law. The Petitioner shall be entitled to recover on account of Infrastructure Development Cess and Environment Cess in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of electricity to the procurers. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of Infrastructure Development Cess and Environment Cess.

(f) Change in Clean Energy Cess/ Clean Environment Cess and Introduction of Goods and Services Tax, 2017

56. The Petitioner has submitted that as on cut-off date i.e. 11.9.2012, Clean Energy Cess was levied on coal @ Rs. 50 per MT w.e.f. 1.7.2010 vide notification No. SECL/BSP/S&M/779 dated 30.6.2010. Subsequently, Ministry of Finance, Government of India vide its Notification No. 1/2015 dated 1.3.2015, increased the rate of Clean Energy Cess from Rs. 50 per MT to Rs. 200 per MT. SECL vide its notice dated 29.2.2016 communicated that Clean Energy Cess, renamed as Clean Environment Cess has been increased to Rs. 400 per MT w.e.f. 1.3.2016, which is



after the cut-off date, and the said component was applicable till 30.6.2017. The Petitioner has submitted that the above charges are in the nature of tax incurred by the Petitioner qua the purposes of supply of power to the distribution licensee, and as such fall within the definition of change in law. The Petitioner has claimed Rs. 690.78 lakh from 30.11.2016 to 31.3.2017 and Rs. 2256.56 lakh from 1.4.2017 to 31.12.2017 on account of increase in Clean Energy Cess/ Clean Environment Cess on coal.

57. The Petitioner has further stated that post the advent of Goods and Services Tax, a new enactment has been notified in the name of Taxation Laws Amendment Act, 2017, which abolished the Clean Energy Cess/ Clean Environment Cess w.e.f. 1.7.2017. However, the levy of cess still continues under a new enactment in the name of Goods and Services Tax (Compensation to States) Act, 2017 at the rate of Rs. 400/- per MT of coal. Therefore, the financial impact on the Petitioner is same and it continues to bear the charges under a new notification.

58. We have considered the submissions of the Petitioner. Clean Energy Cess on coal has been introduced through the Finance Act, 2010 and is being modified through subsequent Finance Acts. The Clean Energy Cess/ Clean Environment Cess applicable at the different points of time are as under:

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

59. It is noticed that Clean Energy Cess was introduced by the Government of India through the Finance Act, 2010 which was prior to the cut-off date in case of



RVPN-PPA. As on the cut-off date i.e. 11.9.2012, Clean Energy Cess was applicable at the rate of Rs. 50/MT. The issue of Clean Energy Cess as a Change in Law event has been considered by the Commission in order dated 30.3.2015 in Petition No. 6/MP/2013. Thereafter, the Commission vide order dated 1.2.2017 in Petition No. 8/MP/2014 (EMCO Energy Ltd Vs MSEDCL & ors) had allowed the increase in clean energy cess as change in law event. Subsequently, the Commission vide order dated 19.12.2017 in Petition No. 101/MP/2017, order dated 19.12.2017 in Petition No. 229/MP/2016, order dated 16.3.2018 in Petition No. 1/MP/2017, order dated 18.4.2018 in Petition No. 18/MP/2017, order dated 27.4.2018 in Petition No. 126/MP/2016 and order dated 22.6.2018 in Petition No. 171/MP/2016 had considered the issue of Clean Energy Cess as a Change in Law event and had allowed the same. The relevant portion of the Commission's order dated 16.3.2018 in Petition No. 1/MP/2017 is extracted as under:

“50. The above decision is applicable in the case of the Petitioner. Therefore, the levy of Clean energy cess on coal is admissible to the Petitioner as a Change in Law event under Article 10 of the TANGEDCO PPA. Accordingly, the Petitioner is entitled to recover Clean energy cess from TANGEDCO as per applicable rate of Clean energy cess in proportion to the coal consumed for generation and supply of electricity to TANGEDCO.....”

60. The above decision is applicable in the case of the Petitioner. Therefore, the levy of Clean Energy Cess/ Clean Environment Cess on coal is admissible to the Petitioner as a Change in Law event under Article 10 of the RVPN-PPA. Accordingly, the Petitioner shall be entitled to recover it from Rajasthan Discoms in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of electricity to Rajasthan Discoms. If the actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of Clean



Energy Cess. As on the cut-off date, Clean Energy Cess was Rs. 50/MT which the Petitioner was expected to factor in the bid. Thereafter, the applicable rate of Clean Energy Cess/ Clean Environment Cess in case of RVPN-PPA for the purpose of change in law compensation computation shall be based on the relevant date/s on which changes in rate of Clean Energy Cess occurred. The change in law amount would be worked out, on the basis of the notified new rates less Rs. 50 as applicable as on cut of date, per MT of coal consumed in the prescribed manner.

61. It is pertinent to mention that the Clean Energy Cess has been abolished through Taxation Laws Amendment Act, 2017 with effect from 1.7.2017. Accordingly, the Change in Law in Clean Energy Cess has been allowed up to 30.6.2017. With effect from 1.7.2017, the Petitioner shall be entitled for GST Compensation Cess in terms of the Commission's order dated 14.3.2018 in Petition No. 13/SM/2017.

(g) Change in Forest Tax

62. The Petitioner has submitted that as on cut-off date i.e. 11.9.2012, there was no levy of Forest Tax. Thereafter, Forest Department, Government of Chhattisgarh vide its circular No. Rev/5568/20112 dated 31.10.2012 and Circular No. 3541/2531/2010/10-2 dated 6.10.2012 levied Forest Tax at the rate Rs. 7 per MT w.e.f. 1.11.2012. Subsequently, based on the Notification No. 06-02/2014/10.2 dated 30.6.2015 issued by Forest Department, Government of Chhattisgarh, SECL vide its Notification No. SECL/BSP/S&M/1788 dated 12.10.2015 revised the Forest Tax rates from Rs. 7 per MT to Rs. 15 per MT w.e.f. 1.7.2015. The Petitioner has submitted that the above enactment is in the nature of tax incurred by the Petitioner qua the purposes of supply of power to the distribution licensee, and as such fall within the definition of change in law and, therefore, the Petitioner is entitled for compensation on account of increase in the aforesaid component. The Petitioner has claimed



Rs.4.91 lakh from 1.4.2017 to 31.12.2017 on account of increase in levy of Forest Tax.

63. We have considered the submissions of the Petitioner. This issue has been dealt with by APTEL in Appeal No. 119 of 2016 and others (Adani Power Limited Vs. Rajasthan Electricity Regulatory Commission and others). In this matter, Rajasthan Electricity Regulatory Commission (RERC) in its impugned order dated 15.3.2016 had denied the levy of Forest Tax stating that it did not meet the criteria under Change in Law. This decision of RERC was challenged before APTEL by Adani Power Ltd. wherein APTEL in its judgment dated 14.8.2018 allowed the Forest Tax as change in law event. Relevant portion of said judgment is extracted as under:

“xxii. It is observed that the claim of APRL for the said fee at the rate of Rs. 7/ton has been levied based on Chhattisgarh Government, Forest Department letter dated 6.10.2012, under Chhattisgarh Transit (Forest Produce Rule) 2001 on coal mined and transported from SECL mines located in Forest area with effect from 1.11.2012. There was no such fee applicable as on cut-off date of the bid deadline. Accordingly, APRL could not have envisaged for factoring it in its bid. The levy of Forest Tax/Fee cannot be considered as a part of pricing mechanism for coal and hence it cannot form part of CERC Escalation Rates for coal. Accordingly, there has been increase in expenses related to coal due to such levy and the same falls under the category of first bullet of Article 10.1.1of the PPA read with the definitions of the ‘Law’ and ‘Indian Government Instrumentality’ under the PPA. This is also in line with the judgement of this Tribunal in Appeal No. 288 of 2013 as discussed above. Accordingly, the State Commission has not justified in rejecting the benefit claims of the APRL/Appellant.”

64. As per the above decision of the APTEL, Forest Tax constitutes change in law event. No Forest Tax was existed as on cut-off date of 11.9.2012. It was levied @Rs.7/MT on coal mined and transported from SECL mines located in forest area had been levied with effect from 1.11.2012 under Chhattisgarh Transit (Forest Produce) Rule, 2001 based on Chhattisgarh Government, Forest Department’s letter dated 6.10.2012. Further, in pursuance to Notification dated 30.6.2015 of Government of Chhattisgarh, this Forest Tax was revised from Rs. 7/MT to Rs. 15/MT of coal with effect from 1.7.2015. Accordingly, the Petitioner shall be entitled



to recover such levy and subsequent increase in Forest Tax from the Rajasthan Discoms in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of electricity to Rajasthan Discoms. If the actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of Forest Tax. The Petitioner is directed to furnish along with its monthly regular and/or supplementary bill(s), the computations duly certified by the auditor to Rajasthan Discoms.

(h) Change in the components of Central Excise Duty

65. The Petitioner has submitted that as on cut-off date i.e. 11.9.2012, the Central Excise Duty levied was 6.18% on the summation of the base price of coal, surface transportation charge and sizing and crushing charge on the basis of Notification No. SECL/BSP/S&M/Sr.ES/ 1253 dated 7.6.2012 issued by the South Eastern Coal Fields Ltd. However, by the notification dated 25.03.2013, being SECL/BSP/S&M/RS/619, the said Excise Duty is now calculated on the summation of Base Price of coal, Crushing and Sizing Charge, Surface Transportation Charge, Royalty, Contribution to National Exploration Mineral Trust and District Mineral Foundation, Niryat Kar, Stowing Excise Duty, Forest Tax and Chhattisgarh Paryavaran Evam Vikas Upkar. Further, the Finance Act, 2015, has removed the Education Cess and Higher Education Cess from Excise Duty w.e.f. 01.03.2015. SECL has intimated the same vide its Notification No. 395 dated 28.2.2015. However, the overall burden in terms of the amount payable by the Petitioner towards Central Excise Duty has been increased from Rs. 48.08 per MT to Rs. 72.27 per MT, on account of addition of incidents on which the said Duty is calculated upon.



Therefore, the Petitioner was subjected to additional expenditure pertaining to payment of Excise Duty, due to change in the underlying components on the basis of which, the said Excise Duty is imposed. The Petitioner has claimed Rs. 40.46 lakh from 30.11.2016 to 31.3.2017 and the reduction in claim from 1.4.2017 to 31.12.2017 amounting to Rs. 212.24 lakh towards Central Excise Duty.

66. We have considered the submission of the Petitioner and all the relevant documents placed on record. Pursuant to the Commission's directions vide RoP dated 25.7.2018, the Petitioner approached the Office of the Assistant Commissioner, CGST & Central Excise, Division Bilaspur, Chhattisgarh seeking clarification with regard to the components to be included in the assessable value of coal for computation of Excise Duty for the Period from 1.4.2012 to 30.6.2017. The Assistant Commissioner, Office of the Assistant Commissioner, CGST & Central Excise, Division Bilaspur, Chhattisgarh vide its letter dated 10.8.2018 has clarified as under:

"Please refer your letter C. No. TRN/BSP/18/06/10079 dtd. 1.8.2018 on the above subject.

2. *In this regard, it is to inform that as per Section 4 of Central Excise Act, 1944, for the period 1st April 2012 to 30th June 2017 following elements should be added for arriving the assessable value of coal for payment of Excise duty:*

- i. Value of Coal*
- ii. Royalty*
- iii. Stowing Excise Duty*
- iv. National Mineral Exploration Trust (NMET)*
- v. District mineral Foundation (DMT)*
- vi. Sizing Charge*
- vii. Surface Transportation Charge*
- viii. Niryat kar*
- ix. CG Development tax*
- x. CG Environment Tax*

3. *Further, it is to inform that M/s. South Eastern Coalfields Limited, Bilaspur had been paying Central Excise Duty on above considerations under protest after issuance of various show cause notices. The show cause notices have also been confirmed by the Adjudicating Authority."*

Section 4 of the Central Excise Duty, 1994 provides as under:



“Section 4. Valuation of excisable goods for purposes of charging of duty of excise. (1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall – (a) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value; (b) in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed. Explanation.- For the removal of doubts, it is hereby declared that the price-cum duty of the excisable goods sold by the assessee shall be the price actually paid to him for the goods sold and the money value of the additional consideration, if any, flowing directly or indirectly from the buyer to the assessee in connection with the sale of such goods, and such price-cum-duty, excluding sales tax and other taxes, if any, actually paid, shall be deemed to include the duty payable on such goods.

(2) The provisions of this section shall not apply in respect of any excisable goods for which a tariff value has been fixed under sub-section (2) of section 3.

(3) For the purpose of this section,- (a) "assesse" means the person who is liable to pay the duty of excise under this Act and includes his agent; (b) persons shall be deemed to be "related" if - (i) they are inter-connected undertakings; (ii) they are relatives; (iii) amongst them the buyer is a relative and a distributor of the assessee, or a sub-distributor of such distributor; or (iv) they are so associated that they have interest, directly or indirectly, in the business of each other.”

67. As per the above provisions of the Central Excise Act, 1944, the price-cum-duty of excisable goods sold by an assessee shall be the price actually paid to him for the goods sold and the money value of the additional consideration, if any, flowing directly or indirectly from the buyer to the assessee in connection with the sale of such goods. Such price-cum duty, excluding sales tax and other taxes, if any, actually paid, shall be deemed to include the duty payable on such goods.

68. The Office of the Assistant Commissioner, CGST & Central Excise, Division Bilaspur, Chhattisgarh has relied on Section 4 of the Central Excise Act, 1944 in support of the decision for inclusion of the above cited elements in the assessable value of coal. Similar letters were provided by the Office of the Assistant Commissioner, Custom and Central Excise Bilaspur, Chhattisgarh in case of GMR Warora Energy Limited in Petition No. 1/MP/2017 and by the Office of the Superintendent, Central Goods & Service Tax Range-III, Korba, Chhattisgarh in case



of Bharat Aluminium Company Limited in Petition No. 18/MP/2017. Based on the letter received in case of GMR Warora Energy Limited, the Commission vide its dated 16.3.2018 in Petition No. 1/MP/2017 has examined the provisions of Section 4 of the Central Excise Act, 1944 and held as under:

“....

160. As per the above provisions of the Central Excise Act, 1944, the price-cum duty of excisable goods sold by an assessee shall be the price actually paid to him for the goods sold and the money value of the additional consideration, if any, flowing directly or indirectly from the buyer to the assessee in connection with the sale of such goods. Such price-cum-duty, excluding sales tax and other taxes, if any, actually paid, shall be deemed to include the duty payable on such goods.

161. All components indicated by SECL for computation of assessable value of coal such as the value of coal, Stowing Excise Duty, contribution to National Mineral Exploration Trust and District Mineral Foundation, Sizing Charges, Surface Transportation Charge, Niryat Kar, Chhattisgarh Development Tax and Chhattisgarh Environment Tax (except royalty) are in the nature of “Price-cum-duty” and shall be considered as part of the assessable value of coal for the purpose of computation of Excise Duty. The Commission has not allowed the expenditure of Sizing Charges and Surface Transportation Charges under Change in Law. However, these charges have been allowed to be included in the assessable value of coal for the purpose of computation of Excise Duty. It is clarified that allowing these charges for inclusion in the assessable value for computation of Excise Duty shall not be construed that these charges are allowed under Change in Law. As regard Royalty, it is noted that the issue whether royalty determined under Section 9/15(3) of the Mines and Minerals (Development and Regulations) Act, 1957 is in the nature of tax is pending for consideration of a Nine Judges Bench of the Hon’ble Supreme court on a reference by Five Judges Bench of the Hon’ble Supreme Court in Mineral Area Development Authority and Others Vs. Steel Authority of India and Others (2011 SCC 450). The specific reference is as under:

“(a) Whether “royalty determined under Sections 9/15 (3) of the Mines and Minerals (Development and Regulation) Act, 1957 (67 of 1957, as amended) is in the nature of tax?”

Therefore, Royalty shall be included in the assessable value of coal subject to the decision of the Hon’ble Supreme Court.”

162. Accordingly, we allow all the charges given in the letter dated 23.3.2017 of the Superintendent (Tech.) Office of the Assistant Commissioner, Custom and Central Excise Bilaspur, Chhattisgarh for the purpose of inclusion in the assessable value of coal for computation of Excise Duty, subject to the condition with regard to Royalty. ”

69. Based on the decision taken by the Commission in the above case, we allow all the components mentioned by the Office of the Assistant Commissioner, CGST & Central Excise, Division Bilaspur, Chhattisgarh in its letter dated 10.8.2018 to be



included in the assessable value of coal for the purpose of computation of Excise Duty. However, it is clarified that allowing these charges for inclusion in the assessable value for computation of Excise Duty shall not be construed that these charges are allowed under Change in Law. Further, inclusion of Royalty is allowed subject to the pending adjudication before the Hon'ble Supreme Court as to whether royalty is in the nature of tax. The Office of the Assistant Commissioner, CGST & Central Excise, Division Bilaspur, Chhattisgarh has provided clarifications only for the period from 1.4.2012 to 30.6.2017 and the Petitioner has not placed any documents for the applicability of Central Excise Duty after the GST Regime (i.e. from 1.7.2017). Therefore, the claim shall only be allowed until 30.6.2017.

70. Accordingly, the Petitioner shall be entitled to recover the excise duty from Rajasthan Discoms in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of electricity to Rajasthan Discoms. If the actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of excise duty.

(i) Increase/ Change in Entry Tax on account of changes in the individual components of such Tax

71. The Petitioner has submitted that as on the cut-off date i.e. 11.9.2012, the Entry Tax was levied @2.5% on the summation of Base Price of coal, Crushing and Sizing Charge, Surface Transportation Charge, Royalty, Contribution to National Exploration Mineral Trust and District Mineral Foundation, Niryat Kar, Stowing Excise Duty, Forest Tax and Chhattisgarh Paryavaran Evam Vikas Upkar. As per the provisions of the Chhattisgarh Sthaniya Kshetra Me Mal Ke Pravesh Par Kar



Adhiniyam, 1976 (Entry Tax Act), the taxable goods are taxed on the purchase price of such goods at the time of entry of such goods into a local area. After the cut-off date, there has been no change in the rate at which such entry tax is levied. However, the base components or incidences on which such entry tax is computed, have undergone changes. Reference can be made of additional 2% levy on the royalty payable towards National Mineral Exploration trust and levy of additional 30% on Royalty under the Mines and Minerals (Contribution to District Mineral Foundation) Rules, 2015, which have invariably contributed towards a rise in the total exposure of the Petitioner towards Entry Tax quantum payable. The rates of Development Cess, Environment Cess and Sizing and Crushing Charges etc. have also changed after cut-off date, which needs to be reckoned while ascertaining the amount payable to the Petitioner under the provisions of change in law in the PPA. The Petitioner has submitted that the reduction in claim on account of levy of Entry Tax from 30.11.2016 to 31.03.2017 is Rs. 12.29 lakh and the reduction in claim from 1.4.2017 to 31.12.2017 is Rs. 40.96 lakh.

72. We have considered the submissions of the Petitioner. The Commission vide RoP dated 25.7.2018 had sought documentary proof with respect to increase in Entry Tax. However, the Petitioner in its reply vide affidavit dated 13.8.2018 has referred to the Annexure P24 attached to the Petition which is Chhattisgarh Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976 (Entry Tax Act). The Act does not specify any impedance of increase in Entry tax being borne by the Petitioner after the cut-off date. Therefore, in the absence of any documentary proof which shows that Entry Tax has been increased by any Statute, no view can be taken as regards the admissibility under Change in Law. However, the Petitioner is granted liberty to claim this expenditure under Change in Law through an appropriate application with



relevant details. Further, it has been observed that the Petitioner has claimed net reduction due to Entry Tax to the tune of Rs. 28.67 lakh (Rs. 12.29 lakh increase from 30.11.2016 to 31.3.2017 and Rs. 40.96 lakh decrease from 1.4.2017 to 31.12.2017). Accordingly, the Petitioner is directed to pass the benefits arising due to reduction in Entry Tax on the beneficiaries. This decision shall remain valid only till there is reduction due to Entry Tax.

(j) Increase/ Change in Value Added Tax (VAT) on account of changes in individual components of such Tax

73. The Petitioner has submitted that as on cut-off date i.e. 11.9.2012, VAT was levied at the rate of 5% on the summation of base price of coal, Royalty, Stowing Excise Duty, Surface Transportation Charge, Sizing and Crushing Charge, Niryat Kar, Infrastructure Development Cess, Forest tax, Environment Cess, Excise Duty, Clean Energy Cess and Entry Tax. Though, the rate of VAT remained unchanged, however, with the change in the rate at which the aforesaid components are levied, there has been an overall impact on the net tax out flow qua VAT in contradistinction to what the Petitioner was liable to pay at the Cut-off date. As such, the same is a Change in law event under Article 10 of Procurer(s) PPA. Further, w.e.f. 1.7.2017 due to introduction of GST, SECL is charging GST in place of VAT. The Petitioner has submitted that the claim on account of levy of VAT/ CGST from 30.11.2016 to 31.3.2017 is Rs. 62.08 lakh and claim from 1.4.2017 to 31.12.2017 is Rs. 35.58 lakh.

74. We have examined the matter. The Commission vide RoP of hearing dated 25.7.2018 had sought documentary evidence for increase in VAT. In reply, the Petitioner vide its affidavit dated 13.8.2018 has submitted the sample invoices raised by SECL to the Petitioner showing the levy of CGCT/ VAT @5% of total invoice value of coal. APTEL vide Judgment dated 19.4.2017 in Appeal No.161 of 2015 & IA No.



259 of 2015 and Appeal No. 205 of 2015 in Sasan Power Limited vs. CERC & Ors. has allowed VAT under Change in law. The observations of the APTEL as specified in Para 46 of the Judgment dated 19.4.2017 is quoted as under:

“46. Having regard to the nature of Excise Duty and Central Sales Tax and VAT which have an impact on the cost of or revenue from the business of generation and sale of electricity, in our opinion, the same should be allowed as Change in Law event.”

75. In the light of above decision, the claim of the Petitioner for relief on account of Increase/ Change in Value Added Tax (VAT) is admissible to the Petitioner as a Change in Law event under Article 10 of the RVPN-PPA. Accordingly, the Petitioner shall be entitled to recover the increase/ change in Value Added Tax (VAT) from the Rajasthan Discoms in proportion to the coal consumed Corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of electricity to Rajasthan Discoms. If the actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of VAT.

**(k) Increase in Sizing/ crushing Charges
and
(l) Increase in Coal Surface Transmission Charges**

76. The Petitioner has submitted that as per the Price Notification No. CIL/S&M/GM (F) /Pricing: 1907 dated 26.2.2011, it was provided that where the top size is being limited to any maximum limit within the range of 200 mm to 250 mm through manual facilities or mechanical means, a charge at the rate of Rs. 39 per MT will be levied and where the top size is being limited to 100 mm through manual facilities or mechanical means, a charge at the rate of Rs. 61 per MT will be levied. This was prevalent at the cut-off date. Subsequently, after the cut-off date, CIL issued Notification No. CIL/S&M/ GM(F)/ Pricing/ 2784 dated 16.12.2013, applicable with



effect from 0:00 Hrs of 17.12.2013 that has provided that if the top size of coal is being limited to any maximum limit within the range of 200 mm to 250 mm through manual facilities or mechanical means, a charge at the rate of Rs. 51 per MT will be levied and if the top size of coal is being limited to any maximum limit within the range of 100 mm through manual facilities or mechanical means, a charge at the rate of Rs. 79 per MT will be levied. Subsequent to the above notification, CIL vide price notification no. CIL/S&M/ GM(F)/ Pricing/ 2017/ 766 dated 31.8.2017, has further revised the rate to Rs. 56 per MT where the top size of coal is being limited to any maximum limit within the range of 250 mm through manual facilities or mechanical means, and Rs. 87 per MT where the top size of coal is being limited to any maximum limit within the range of 100 mm. The said rate was made applicable w.e.f. 1.9.2017. The Petitioner's claim on account of increase in levy of Sizing and Crushing charges from 30.11.2016 to 31.3.2017 is Rs. 35.53 lakh and from 1.4.2017 to 31.12.2017 is Rs.121.65 lakh.

77. The Petitioner has submitted that as per the Price Notification No CIL/S&M/GM (F) /Pricing: 1907 dated 26.2.2011, prevalent at the cut-off date, Surface Transportation Charge applicable as on 1. 1.2012 was Rs. 77 per MT. Thereafter, CIL vide its notification being Notification No. CIL/S&M/GM(F)/ Pricing/2340 dated 13.11.2013, which is after Cut-off Date (11.9.2012), increased the Surface Transportation Charges to Rs. 116 per MT, which was made applicable from 0:00 Hrs of 14.11.2013. Subsequently, SECL vide its notification bearing Notification No. SECL/BSP/M&S/Pricing/17-18/2486 dated 15.11.2017, increased the surface transportation charges to Rs. 87 per MT for distance between 3-10 Km Category and introduced Surface Transport Charges of Rs. 27/MT for distance between 0-3 Km.



The Petitioner's claim on account of increase in Coal Surface Transportation charges from 1.4.2017 to 31.12.2017 is Rs. 49.58 lakh.

78. The Respondents have submitted that the price notifications are not a statutory levy on the Petitioner and it is well settled that no increase of any nature on account of contractual and commercial arrangements of the Petitioner including with Railways, etc. can be covered under change in law clause of the PPA.

79. We have considered the submissions of the Petitioner and the Respondents, and perused the notifications issued by Coal India Ltd with regard to Sizing Charges of coal and Surface Transportation Charges. The Commission vide order dated 1.2.2017 in Petition No. 8/MP/2014 has already dealt with the issue of increase in Sizing Charges and Surface Transportation Charges as under:-

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

"9.2.1 Transportation Charges:

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

9.2.2 Sizing/Crushing Charges

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

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



80. APTEL vide its Judgment dated 14.8.2018 in Appeal No. 111 of 2017 & IA No. 450 of 2018 (GMR Warora case) has upheld the Commission's order dated 1.2.2017 in Petition No. 8/MP/2014 pertaining to increase in Sizing and Crushing Charge and Surface Transportation Charges. The relevant portion of APTEL judgement dated 14.8.2018 in Appeal No. 111 of 2017 (GMR Warora Energy Limited versus CERC &Ors) is extracted as under:

“xv. The present case is also similar to the case as in the Adani Judgement. The provisions of the RFP are also similar. Accordingly, in view of our decision Adani Judgement as reproduced above we are of the considered opinion that there is no merit in the contentions of GWEL on the issues of change in sizing charges of coal and surface transportation charges.

Accordingly, these issues are answered against GWEL/Appellant and we do not find any error on the face of record in the findings recorded by the Central Commission on these issues.”

81. In the light of above decision, the claim of the Petitioner for relief under change in Law on account of increase in Sizing Charges on coal and increase in Surface Transportation Charges under change in law as per Article 10 of the PPA are not admissible and accordingly, disallowed.

(m) Increase in base price of coal

82. The Petitioner has submitted that as per the RVPN PPA, the Petitioner was under obligation to procure domestic coal for the purposes of supply of power to the supply of power to the Respondent No. 4 through Respondent No. 5 who in turn is supplying power to Respondents 1, 2, and 3. Accordingly, the Petitioner has been procuring domestic coal, of grades G10 to G12, from CIL and its subsidiaries from time to time. At the time of submission of bid, the base price of coal as notified by Coal India Ltd. (CIL) vide notification no. CIL/S&M/GM(F)/ pricing/1965 dated 31.01.2012, was as follows:



GCV Band	Price notified vide notification dated 31.1.2012 (Rs. Per MT)
G10	780.00
G11	640.00
G12	600.00

83. However, pursuant to a subsequent price notification issued after cut-off date, being Notification No. CIL: S&M:GM (F): pricing 235 dated 27.5.2013, the revised base price of coal was as follows:

GCV Band	Price notified vide notification dated 27.5.2013 (Rs. per MT)
G10	860.00
G11	700.00
G12	660.00

84. In furtherance to above, the base price of coal was revised vide Notification No.- 01:CIL: S&M:GM(F)/Pricing 2016/294 dated 29.5.2016, issued by Coal India Limited. The notification came into effect from 30.5.2016. The revised base price of coal was as follows:

GCV Band	Price notified vide notification dated 29.5.2016 (Rs. Per MT)
G10	980.00
G11	810.00
G12	760.00

85. The net claim of the Petitioner on account of increase in base price of coal after accounting the increase allowed through CERC Escalation Index is Rs. 239.64 lakh from 30.11.2016 to 31.3.2017 and is Rs. 499.37 lakh from 1.4.2017 to 31.12.2017.

86. The Respondents have submitted that the Petitioner cannot generally seek relief under change in law clause plainly for the reason that there is an increase in



recurring expenditure. The escalation clause in the PPA is provided specifically for this purpose. The principle of restitution provided in the change in law clause cannot be used to provide relief for an event that is expressly covered under the escalation clause i.e. schedule 6 of the PPA. *Per contra*, the Petitioner has submitted that as per the PPA, the Petitioner was under obligation to procure domestic coal for the purposes of supply of power to the Respondent No. 4 through PTC who in turn is supplying power to the Rajasthan Discoms. Accordingly, the Petitioner has been procuring domestic coal from CIL and its subsidiaries from time to time. Therefore, the Petitioner is entitled for compensation on account of revision of base price of coal by Coal India Limited. The Petitioner has stated that net claim on account of increase in base price of coal after accounting for the increase allowed through CERC Escalation Index is Rs. 177.49 lakh from 2.12.2016 to 31.3.2017 and is Rs. 568.11 lakh from 1.4.2017 to 31.12.2017. It has requested that the same may be allowed as change in law.

87. We have examined the matter. The Petitioner has submitted that base price of coal was increased after the cut-off date i.e. 11.9.2012 pursuant to Price Notifications issued by the Coal India Limited from time to time. Clause 9.1 of the FSA dated 28.8.2013 which defines the Base Price of coal has been extracted as under:

“9.1 Base Price

The Purchaser shall pay the Base Price of Coal in accordance with the provisions of this Agreement. It is expressly clarified that the Base Price in relation to the Indigenous coal and Imported Coal shall be notified/ declared by the Seller/ CIL, as the case may be from time to time.

88. As per above clause, base price of indigenous coal is required to be notified/ declared by Seller/ CIL from time to time and the procurer/ Petitioner has agreed to the same. Therefore, CIL/ SECL notification(s) issued from time to time increasing base price of coal is a change in contracted price of coal based on FSA and is not



covered under Change in law. In the light of the above decision, the increase in base price of coal does not constitute a Change in law as the same is through a commercial agreement between the Petitioner and South Eastern Coalfields Limited. every bidder is expected to quote escalable/ non-escalable component in its bid taking into account the Escalation Index to be notified by the Commission from time to time. Therefore, the Petitioner was expected to quote such components taking into account the possible revision in these charges while quoting the bid. We agree to the contention of the Respondents that on one hand being compensated through the Escalation Index (as per escalable component of quoted tariff) and also separately through change in law would amount to double compensation and the same cannot be allowed. Accordingly, the claim of the Petitioner on this account is disallowed.

90. In the light of the above decision, the increase in base price of coal does not constitute a Change in law event. The Petitioner having quoted an escalable component of energy charges, is compensated for any revision in base price of coal through Escalation Index notified by the Commission.

II. Increase in cost on account of change in law events pertaining to Rail Transportation of Domestic coal supplied by Coal India Limited and its subsidiaries

(a) Increase in base Freight of Coal Transportation by Rail

91. The Petitioner has submitted that after the cut-off date, the freight was increased to Rs. 205.6/MT in accordance with Rate Circular No. 8 of 2015 issued by the Ministry of Railways, Government of India dated 16.3.2015. As such, there is an increase of Rs. 55.4/MT post the bid submission date. The Petitioner has submitted that at present, no expenditure has been incurred by the Petitioner till the date of filing of the petition. However, the said change in law event has occurred after the



cut-off date and therefore, the same ought to be principally allowed since the increased expenditure on account of the same is likely to be incurred in future.

92. We have considered the submissions of the Petitioner. As on the cut-off date i.e. 11.9.2012, the base freight rate was applicable at Rs. 150.20/MT on the basis of Ministry of Railway's Rate Circular No. 7 of 2012 dated 5.3.2012. Subsequently, on 16.3.2015, Ministry of Railway vide Rate Circular No. 8 of 2015 revised the rates from Rs. 150.20/MT to Rs. 205.60/MT. The Commission vide order dated 6.2.2017 in Petition No. 156/MP/2014 has already dealt with the issue of increase in base freight rate by the Railways. The relevant portion of the said order dated 6.2.2017 is extracted as under:

"70. We have considered the submissions of the petitioner and respondents. As on the cut-off date, the classification of coal for trainload movement was Class 140. By Rate Circular No. 70 of 2008 dated 28.11.2008, classification of coal was revised from Class-140 to Class-150 and by Rates Circular No. 8 of 2015 dated 16.3.2015, it has been further revised to class 145. The petitioner has submitted that since the Rate Circulars have been issued under section 31 of the Railways Act, 1989, it is covered under Change in Law. In our view, Rate Circulars issued by Ministry of Railways under section 31 of the Railways Act, 1989 cannot be considered as change in law as it is a common knowledge that Ministry of Railways has been empowered to fix the rates from time to time and any person availing the services of Railways is expected factor in such change in charges in the bid. It is further noted that the Escalation Index notified by the Commission which uses Base Freight Rate linked to the class of goods, includes the impact of change in class for railway freight for coal from 140 to 150/145. Therefore, the impact of change in freight rate due to change in freight class is being passed on through the escalation rates notified by the Commission from time to time. It is pertinent to mention that the escalation index notified by the Commission aims at taking care of the escalations arising out of the market forces. Since the change of class of railway freight is included in the computation of escalation rates, this cannot be treated as Change in Law as per Article 13 of the PPA and accordingly, the petitioner's claim in this regard has been disallowed."

93. In the light of above decision, the claim of the Petitioner for relief under change in Law on account of increase in base freight rate by the Railways under Change in law as per Article 10 of the PPA is not admissible and accordingly disallowed.



(b) Levy of Busy Season Charges and Development Surcharge

94. The Petitioner has submitted that after the cut-off date, the basic Railway freight got increased by Rs. 55.4/MT. In addition, Railway Board vide Notification dated 20.7.2015 has increased Busy Season Surcharge from 12% to 15%. The net increase of “Dynamic Pricing Policy – Levy of Busy Season Charge” has been Rs. 9.61/MT. Busy Season Surcharge is imposed on base freight rate. The final amount after Busy Season Surcharge on the base freight rate amounts to normal tariff rate. Further, Development Charge is leviable at the rate of 5% on Normal Tariff Rate. Therefore, even in the absence of any change of rate at which Development Charge is imposed, but due to rise in the base freight rate and Busy Season Surcharges, there has been a net increase of Rs. 3.25/MT in Development Charge.

95. The Respondents have submitted that price notifications are not a statutory levy on the Petitioner and it is well settled that no increase of any nature on account of contractual and commercial arrangement of the Petitioner including with Railways, etc. can be covered under the change in law clause of the PPA. The Petitioner has submitted that Development Charge and Busy Season Surcharge has been levied/ increased/ changed by Indian Railways in exercise of powers conferred under Sections 30, 31, and 32 of the Railways Act, 1989. Since the same is a statutory change, the benefit of the same is to be passed to the Petitioner.

96. We have examined the matter. The issue as to whether Busy Season Surcharge and Development Charge levied by Railway Board qualify as a Change in Law event has been decided by the APTEL vide its Judgment dated 14.8.2018 in Appeal No. 111 of 2017 & IA No. 450 of 2018 (GMR Warora case). APTEL in the



Judgment dated 14.8.2018 has allowed Change in law on account of increase in Busy Season Surcharge and Development Charge and has observed as under:

“xi...This Tribunal has concluded that the circulars issued by MOR have force of law. CERC escalation rate notifications cover only basic freight and other prevailing charges were to be factored in by APRL at the time of bidding. Accordingly any change in such surcharges/levy of new surcharge was to be treated as Change in Law event requiring compensation to be paid to APRL.

xii. In view of the decision of this Tribunal as above which is squarely applicable to the present case, we are of the considered opinion that GWEL is entitled for compensation arising out of change in Busy Season Surcharge and Development Surcharge by the Railways under Change in Law. The Development Surcharge is not applicable in DNH PPA.

Accordingly, these issues are decided in favour of GWEL.”

97. In the light of above decision, the claim of the Petitioner for relief on account of increase in Busy Season Surcharge and Development Charge is admissible as a Change in Law event under Article 10 of the PPA. The Petitioner shall be entitled to recover the increase in Busy Season Surcharge and Development Charge in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations notified or at actual, whichever is lower, for supply of electricity to the Rajasthan Discoms. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of increase in Busy Season Surcharge and Development Charge. The Petitioner is directed to furnish along with its monthly bill, the proof of payment and computations duly certified by the auditor to RVPNL Discoms.

(c) Increase in Service Tax Rate and Imposition of Swachh Bharat cess and Krishi Kalyan Cess

98. The Petitioner has submitted that the Service Tax rate has increased from 3.708% to 4.2% after cut-off date, vide Ministry of Railways Notification No. TCR/



1078/2015/15 dated 27.5.2015 (Corrigendum No. 3 to Circular No. 29 of 2012). Further, Ministry of Railways imposed Swachh Bharat Cess at the rate 0.5% on the value of taxable services vide Service Tax Notification Nos. 21 and 22 dated 06.11.2015. Subsequently, the Government of India vide another Notification No. 31/2016 dated 26.5.2016 introduced the levy of Krishi Kalyan Cess at the rate of 0.5% which was made applicable from 1.6.2016. Since the aforesaid increase in Service Tax Rate and imposition of Swachh Bharat cess and Krishi Kalyan Cess on Railway freight, have occurred after the cut-off date, the said events squarely fall within the purview of the principles enshrined under the provisions of Article 10 of the PPA. The Petitioner has submitted that no expenditure has been incurred till the date of filing of the Petition. However, the said change in law event has occurred after the cut-off date and, therefore, the same ought to be principally allowed since the increased expenditure on account of the same is likely to be incurred in future.

99. The Respondents have submitted that the Petitioner has not incurred any expenditure on account of these events. Therefore, there can be no in-principle approval without actually demonstrating actual expense being incurred. In response, the Petitioner has submitted that since the Government of India had introduced the Krishi Kalyan Cess and Swachh Bharat Cess after the cut-off date, the Petitioner is entitled for relief under Article 10 of the PPA.

100. We have considered the submissions of the Petitioner and the Respondents. Swachh Bharat Cess and Krishi Kalyan Cess have been imposed by an Act of Parliament. Section 119(2) and 119(3) of the Finance Act, 2015 provide as under:

“119 (2). There shall be levied and collected in accordance with the provisions of this Chapter, a cess to be called the Swachh Bharat Cess, as service tax on all or any of the taxable services at the rate of two percent, on the value of such services for the purposes of financing and promoting Swachh Bharat initiative or for any other purpose relating thereto.



119 (3). *The Swachh Bharat Cess leviable under sub-section (2) shall be in addition to any cess or service tax leviable to such taxable services under Chapter V of the Finance Act, 1994 or under any other law for the time being in force.*”

Further, Section 161(2) and 161(3) of the Finance Act, 2016 provide as under:

“161 (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 percent, 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 to such taxable service under Chapter V of the Finance Act, 1994, or under any other law for the time being in force.”

101. Therefore, Swachh Bharat Cess and Krishi Kalyan Cess are service tax on taxable service and have been introduced through an Act of Parliament and is therefore, covered under change in law. The Commission has already allowed Swachh Bharat Cess and Krishi Kalyan Cess as change in law events vide order dated 1.2.2017 in Petition No. 8/MP/2014, order dated 6.2.2017 in Petition No. 156/MP/2014 and order dated 7.4.2017 in Petition No. 112/MP/2015.

102. The Commission in the order dated 1.2.2017 in Petition No. 8/MP/2014 has dealt with the issue of service tax on transportation of goods by Indian Railways and accordingly, allowed the event under Change in law. Relevant portion of the said order dated 1.2.2017 is extracted as under:

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



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

103. By Ministry of Finance 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. Therefore, as on cut-off date i.e. 11.9.2012 in case of the PPAs, the service tax on transportation of goods by Railways was under exemption. Accordingly, the Petitioner could not have factored Service Tax on transportation of goods by Indian Railways at the time of submission of the bid. However, with effect from 1.10.2012, Service Tax on 30% of the transport of goods by rail became chargeable. Therefore, the Petitioner has accounted for 30% of 12.36% i.e. 3.708% after the cut-off date. The Ministry of Finance, Department of Revenue vide its Notification No. 14/2015-Service Tax dated 19.5.2015 has revised the rates of service tax from 12.36% to 14% which was further revised vide Notification No. 21/2015-Service Tax dated 6.11.2015 to 14.5%. Subsequently, Ministry of Finance, Department of Revenue vide notification No. 27/2016-Service Tax dated 26.5.2016 revised the rate of service tax from 14.5% to 15%. In view of the above, the Petitioner is entitled for the following relief:

Applicability date	Rate of Service tax	Service tax on transportation of goods @ 30% of Service tax	Admissible rate of service tax under Change in law
11.9.2012 (cut-off date)	12.36%	0	0
1.10.2012	12.36%	3.708%	0



1.06.2015	14.00%	4.200%	0.492%
15.11.2015	14.50%	4.350%	0.642%
1.6.2016 (till 30.6.2017)	15.00%	4.500%	0.692%

104. The Commission in its order dated 14.3.2018 in Petition No. 13/SM/2017 has already held that Service Tax, Swachh Bharat Cess and Krishi Kalyan Cess have been subsumed in GST w.e.f. 1.7.2017, and the same is a Change in Law event. Accordingly, the Petitioner shall be entitled to recover the Swachh Bharat Cess and Krishi Kalyan Cess in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, supply of power to Rajasthan Discoms. If the actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of Swachh Bharat Cess and Krishi Kalyan Cess. The Petitioner is directed to furnish along with its monthly, regular and/or supplementary bill(s), the computations duly certified by the auditor to Rajasthan Discoms.

III. Increase in Rate of Electricity Duty imposed on Auxiliary Consumption

105. The Petitioner has submitted that the Government of Chhattisgarh imposed Electricity Duty on auxiliary consumption of power by the generating station of the Petitioner. The Electricity Duty on auxiliary consumption was levied at the rate of 8% of Discom's applicable Tariff in accordance with Electricity Duty (Amendment) Act Notification dated 4.4.1995. Thereafter, as per the Chhattisgarh Electricity Duty (Amendment) Act, 2013 dated 1.8.2013, the Electricity Duty is applicable on the electricity consumed by generating company, captive generating plant & producer for their auxiliary consumption and for their own consumption @ 15% of the tariff which would have been applicable if the electricity is supplied by the Distribution Licensee.



Subsequently, the Government of Chhattisgarh vide its Notification No. 2519/F29/01/2016/13/2/ED dated 12.8.2016 revised the rate of Electricity Duty from 15% to 10% w.e.f 1.4.2016. The change in Discom's tariff/average cost of supply and the rate of electricity duty is as below:

Electricity Duty Tariff Rates

S.No.	Period	Tariff for Electricity Duty	Electricity Duty Rate	Electricity Duty Rs./unit
1	2007 to April 11	3.20	8%	0.26
2	April 11 to May 12	3.70	8%	0.30
3	May 12 to July 13	5.40	8%	0.43
4	August 13 to June 14	5.40	15%	0.81
5	June 14 to May 15	5.90	15%	0.89
6	June 15 to March 16	6.65	15%	1.00
7	April 16 to March 17	6.04	10%	0.60
8	April 17 to March 18	6.41	10%	0.64

106. The Petitioner has submitted that as such the said change in the rate of Electricity Duty on auxiliary consumption has resulted in an additional financial impact on the Petitioner and is a change in law event within the meaning of Article 10 of the PPA. The claim of the Petitioner on account of increase in levy of Electricity duty on auxiliary consumption from 30.11.2016 to 31.03.2017 is Rs. 20.33 lakh and from 1.4.2017 to 31.12.2017 is Rs. 267.88 lakh.

107. We have considered the submissions of the Petitioner. The Petitioner has submitted that Electricity Duty under the Chhattisgarh Electricity Duty Act, 1949 was 8% on applicable tariff of Rs 5.40/kWh as on the cut-off date (i.e. 11.9.2012). This was enhanced to 15% by way of an amendment to the Act which was carried out by Chhattisgarh Electricity Duty (Amendment) Act, 2013. The Tariff applicable on Electricity Duty also keeps on changing based on the tariff orders passed by Chhattisgarh State Electricity Regulatory Commission (CSERC). Subsequently, the



Electricity Duty was reduced to 10% of applicable tariff by Chhattisgarh Electricity Duty (Amendment) Act, 2016. The Petitioner has submitted that the per unit impact for Electricity Duty on Auxiliary Consumption has increased from Rs. 0.43/ kWh as on the cut-off date to Rs. 0.64/ kWh for the period from April 2017 to march 2018.

108. The Commission vide order dated 30.12.2015 in Petition No. 118/MP/2015 has decided that the event of Electricity Duty on Auxiliary Consumption increased by the State Govt. qualifies as Change in Law. Relevant Paragraphs of the said order are extracted as under:

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

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

109. In light of the decision as quoted above, the claim of the Petitioner for reimbursement on account of increase in Electricity Duty on Auxiliary Consumption from 8% on applicable tariff as on cut-off date is allowed under Change in Law. The Petitioner shall be entitled to recover on account of increase in Electricity Duty in proportion to the coal consumed, corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of electricity to Rajasthan Discoms. If the actual generation is less than the scheduled generation, the coal consumed for



actual generation shall be considered for the purpose of computation of impact of Electricity Duty. The Petitioner is directed to furnish along with its monthly bill, the proof of payment and computations duly certified by the auditor to RVNL Discoms. The Petitioner and Rajasthan Discoms are further directed to carry out reconciliation on account of these claims annually. If any change in rate of Electricity duty has benefitted the Petitioner, then the same needs to be passed on to Rajasthan Discoms.

IV. Increase in Coal Cost due to Reduction in supply of coal by Coal India Limited and its subsidiaries

110. The Petitioner has submitted that as per the Letter of Assurance (LOA) dated 26.10.2010, SECL had assured the Petitioner for supply of 100% of the normative requirement of coal. Thereafter, MoC (Ministry of Coal, Government of India) vide its notification dated 26.7.2013, amended the New Coal Distribution Policy, 2007 (NCDP 2007) thereby reducing the quantum of supply as assured under the LOA issued in favour of the Petitioner. The said amendment to the NCDP 2007 on 26.7.2013 (NCDP 2013) has in fact regularized/ institutionalized the reduction of supply of coal, particularly the provisions of the Fuel Supply Agreement (FSA) dated 28.8.2013. Further, Ministry of Power, Government of India also endorsed the changes as above vide its letter dated 31.7.2013. Due to the change in NCDP 2007, the Petitioner is constrained to procure the remaining quantum of coal from other sources to meet its contractual obligation of supplying power to the level of normative requirement. The said change in the NCDP 2007 has increased the cost of generation of power due to increase in coal cost which is being sourced through other sources. The said change qualifies as an event of change in law and as such the Petitioner is entitled to claim



any such additional cost incurred by the Petitioner on account of any such event as provided under Article 10 of the PPA.

111. The Petitioner has further stated that the quantum of coal required to be purchased from alternate sources at higher price is not compensated by CIL. Such increase in coal cost has increased the cost of generation and has a direct impact on the revenue of the Petitioner. The Petitioner has relied upon the Commission's order dated 19.12.2017 in Petition No. 101/MP/2017 whereby the said event was allowed under change in law. Therefore, the Petitioner has requested the Commission to refer and rely on the said formula as devised in the said order based on actual quantity of coal supplied by SECL against the supply of scheduled energy to the Respondents No. 1 to 4. The Petitioner is entitled to recover compensation for the shortage of domestic linkage coal under Change in law due to revision in NCDP on 26.7.2013, which is falling short to generate electricity upto normative requirement of 85% compared to assured quantum at 85% availability/ PLF as per NCDP, 2007. The Petitioner's claim on account of increase in coal cost due to shortage in supply of coal by CIL and its subsidiaries from 1.4.2017 to 31.12.2017 is Rs.1900.25 lakh.

112. The Respondents, Rajasthan Discoms vide their joint reply dated 24.10.2018 have submitted that the Petitioner has not shown clearly as to how the NCDP 2013 has reduced the quantum of coal supply. The Petitioner must first clarify as to what was the actual ACQ in the contract between the Petitioner and SECL. Once the ACQ details are available, the Petitioner should also be directed to produce the details of the coal actually supplied by SECL to the Petitioner on month on month basis. According to Rajasthan Discoms, the Petitioner should submit details of the total power tied up by the Petitioner under Long Term PPAs, and also the break-up of coal



actually received from different sources viz. linkage coal, coal purchased from e-auction, imported coal etc. The Petitioner has simply made a claim for Rs. 1900.25 lakh without actually showing any reduction of coal supply.

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

114. The Petitioner is supplying power to two State Discoms viz. CSPDCL of Chhattisgarh (5% of the net generated power) through Implementation Agreement dated 9.12.2013, and Rajasthan Discoms (250 MW) under long term PPA on the basis of case-I bidding. The chronological dates of events with regard to bid submission/ cut-off date, execution of FSA under the long term PPA with Rajasthan PPA are as under:

S. No.	Particulars	Date of Event	Remarks
1	NCDP issued by MoC	18.10.2007	IPPs to be supplied 100% of the quantity as per their normative requirement under FSA
2	LOA issued by SECL	26.10.2010	13,00,300 tonnes per annum
3	Cut-off date for Rajasthan Discoms PPA	11.9.2012	
4	Bid Submission date for Rajasthan Discoms PPA	18.9.2012	
5	PPA/ PSA executed with Rajasthan Discoms	1.11.2013	250 MW



6	Amendment in NCDP by MoC	26.7.2013	For the remaining 4 years of 12th five year plan, coal supply shall be 65%, 65%, 67% & 75% of ACQ
7	FSA executed with SECL	28.8.2013	13,00,300 tonnes per annum
8	Addendum to FSA with SECL	30.9.2016	12,68,962 tonnes per annum
9	Start of supply of power to Rajasthan Discoms	30.11.2016	From 30.11.2016 for 45 MW and from 1.4.2017 for 250 MW

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

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

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



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

117. Perusal of LoA dated 26.10.2010 and FSA dated 28.8.2013 reveals that assured quantum is 1.3003 MTPA for the Petitioner’ plant having capacity of 300 MW. Further, in addendum to FSA dated 30.9.2016, the proportionate Annual Contracted Quantum (ACQ) has been mentioned as 12,03,947 TPA corresponding to the Rajasthan Discoms PPA (250 MW) and 65,015 TPA corresponding to the CSTPL PPA (15 MW). The Petitioner had assured quantity of coal at the time of submission of bid i.e. on 11.9.2012 for supply of power to Rajasthan Discoms. Subsequently, due to revision in quantum of coal under NCDP 2013, the ACQ was reduced to 75% for the year 2016-17. The Petitioner has supplied only 45 MW from 30.11.2016 to 31.3.2017 and 250 MW with effect from 1.4.2017. Since NCDP 2013 was valid until 31.3.2017, the compensation on account of shortfall in coal shall be payable to the Petitioner for the supply of 45 MW for the period from 30.11.2016 to 31.3.2017 in terms of NCDP 2013.

118. As regards continuance of treatment of coal shortfall beyond 31.3.2017, the Commission in its order dated 16.5.2019 in Petition No. 8/MP/2014 and Petition No. 284/MP/2018 in the case of GMR Warora Energy Limited versus MSEDCL and DNH has decided as under:

"43. xxxx. As per the judgment in Energy Watchdog case, any change in the assurance of supply of coal by amendment to NCDP, 2007 is a change in law for which relief can be claimed by the Seller and the party affected by change in law is entitled to be compensated (through monthly tariff payments) so as to restore it to the same economic position as if such change in law has not occurred. Both NCDP, 2013 and



the Shakti Scheme have been issued by the Ministry of Coal and both alter the assurances provided in the NCDP, 2007. The Shakti Scheme issued by Ministry of Coal on 22.5.2017 (which is after the cut-off dates) provides as under:-

“xxxx

(A) Under the old regime of LoA-FSA:

(i) FSA may be signed with the pending LoA holders after ensuring that the plants are commissioned, respective milestones met, all specified conditions of the LoA fulfilled within specified timeframe and where nothing adverse is detected against the LoA holders. The outer time limit within which the power plant of LoA holders must be commissioned for consideration of FSA shall be 31.03.2022, failing which LoA would stand cancelled. Coal supply to these capacities may be at 75% of ACQ. The coal supply to these capacities may be increased in future based on coal availability.

(ii) The 583 pending applications for LoA need not be considered and may be closed.

(iii) The capacities totaling about 68,000 MW as per the decision of CCEA dated 21.6.2013 would continue to get coal at 75% of ACQ even beyond 31.3.2017. The coal supply to these capacities may be increased in future based on coal availability.

(iv) About 19,000 MW capacities out of the 68,000 MW could not be commissioned by 31.3.2015, Coal supply to these capacities may be allowed at 75% of ACQ against FSA provided these plants are commissioned within 31.3.2022. The coal supply to these capacities may be increased in future based on coal availability.

(v) Actual coal supply to power plants shall be to the extent of long-term PPAs with DISCOM/State Designated Agencies (SDAs) and medium term PPAs to be concluded in future against bids to be invited by DISCOMs as per bidding guidelines issued by Ministry of Power. With these, the old regime of LoA-FSA would come to finality and fade away.

xxxx”

44. As stated, the NCDP 2013 as well as the Shakti Scheme have been notified by the Ministry of Coal, Government of India being an Indian Government Instrumentality in terms of the provisions of the respective PPAs. From the provisions of the Shakti Scheme, we observe that Paragraph (A) of the Scheme deals with cases of old regime of LoA-FSA covering about 68,000 MW. Paragraph (A)(iii) mentions about the decision of CCEA dated 21.6.2013; that the LoA-FSA holders would continue to get coal at 75% of ACQ; that this 75% would be the limit even beyond 31.3.2017; and that the coal supply to these capacities may be increased in future based on coal availability.

45. NCDP 2013 was issued consequent upon approval of CCEA on 21.6.2013. As per NCDP 2013, the revised assured coal allocation was 65%, 65%, 67% and 75% of ACQ for the years 2013-14, 2014-15, 2015-16 and 2016-17 respectively. Paragraph (A)(iii) of the Shakti Scheme (quoted above) deals with capacities totalling about 68,000 MW as per the decision of CCEA dated 21.6.2013 which would continue to get coal at 75% of ACQ even beyond 31.3.2017. The capacity of the generating station of the Petitioner falls within the said 68000 MW capacity covered by the decision of CCEA. Moreover, through Shakti Scheme, coal is continued to be made available at 75% of ACQ for the period after 31.3.2017. This percentage (75%) of coal allocation after 31.3.2017 is in continuation of the percentage coal allocation assured in the year 2016-17 of NCDP 2013. In other words, the phrase “the capacities totalling 68,000 MW as per decision of the CCEA dated 21.6.2013 would continue to get coal at 75% of ACQ even beyond



31.3.2017” in Paragraph(A)(iii) of the Shakti Scheme would imply that the said scheme is in continuation of the decision in NCDP, 2013.

46. In addition, Paragraph (A)(iii) of the Shakti Scheme provides that “The coal supply to these capacities may be increased in future based on coal availability.” Thus, the said scheme, as in case of NCDP 2013, recognizes that availability of coal is not commensurate with the demand and that once coal availability increases, the supply to these capacities of power plants may be increased. A combined reading of the provisions of the Shakti Scheme as regards the old regime of LoA-FSA holders leaves no room for doubt that Paragraph (A) of the Shakti Scheme extends the provisions of NCDP 2013 beyond 31.3.2017.

47. In our considered view, the shortfall in supply of coal is a continuous cause of action and the Shakti Scheme acknowledges and recognizes such shortfall with reference to NCDP, 2013. In the above background, consideration of relief on account of shortfall in supply of coal beyond 31.3.2017 falls within the ambit and scope of remand by the Tribunal. Accordingly, we proceed to examine the relief sought for by Petitioner on account of change in law for shortfall in supply of coal for the period beyond 31.3.2017.

48. As mentioned in Paragraph A(iii) of the Shakti Scheme, the Petitioner will continue to get only 75% of ACQ for its FSA signed under old regime, till improvement happens in coal availability. Such shortage of coal linkage allocation needs to be seen with respect to assurance of 100% normative coal requirement for its power station under NCDP 2007 which was prevailing at the time of cut-off date. Accordingly, in our view, the Petitioner needs to be compensated for shortfall of coal on account of reduction in coal supply allocation under Shakti Policy beyond 31.3.2017, as against 100% normative requirement assured under NCDP 2007. There can be no difference in the treatment for the period before 31.3.2017 and after that.

49. Under the PPAs, an event arising from the actions of an authority covered within the definition of „Indian Governmental Instrumentality” would be covered within the definition of ‘Change in Law’. “Indian Government Instrumentality” as defined under the PPA includes any Ministry of the Government of India. The Ministry of Coal being a Ministry under the Government of India satisfies the requirement of „an Indian Government Instrumentality” under the PPAs. Further, in terms of provisions of the respective PPAs and as decided in the Energy Watchdog case by the Hon^{ble} Supreme Court, if there is a change in any consent, approval or license available or obtained for the generation Project, which results in a change in the cost of generation and supply of the contracted power, it would be governed by the Change in Law provisions of the PPAs. Accordingly, any change in the assurance of supply of coal by amendment to the NCDP 2007 (that was applicable at the bid cut-off date) is a Change in Law for which relief can be claimed by the Seller. We have already held above that through the Shakti scheme, the Ministry of Coal has extended the applicability of provisions of NCDP 2013 beyond 31.3.2017. As Shakti Scheme has been notified by an Indian Government Instrumentality on 22.5.2017, which is after the cut-off date under the PPAs executed by the Petitioner, we hold that the notification of the Shakti Scheme constitutes a Change in Law event under the PPAs and the Petitioner is entitled to be compensated, so as to restore it to the same economic position, as if such change in law had not occurred.”



119. The Petitioner plant is covered in the capacity totalling 68,000 MW under Shakti scheme. Therefore, the above decision of this Commission is applicable in the instant case also. The Petitioner shall provide documentary proof to the Rajasthan discoms to this effect before raising any claim. Accordingly, the Petitioner is entitled for relief under change in law in terms of Article 10 of the PPAs for the period till shortfall continues beyond 31.3.2017.

120. As regards shortfall in supply vis-à-vis quantum assured in NCDP, the matter was considered by the Commission in its order dated 31.5.2018 in Petition No. 97/MP/2017. Relevant extract of the Order is as under:

"33. According to Prayas, change in law is applicable only for the shortage of supply up to 65%, 65%, 67% and 75% of the ACQ during the years 2013-14, 2014-15, 2015-16 and 2016-17 respectively and actual supply of coal lower than these percentages is the subject matter of commercial contract with MCL under the FSA for which the Petitioner needs to seek compensation from MCL and the Procurers should not be burdened with such extra cost. In our view, the contention of Prayas is not correct. As per para 4.6 of the FSA, MCL is liable to pay compensation for the "failed quantity" (i.e. shortfall in supply of coal below 80% of the ACQ) at the rate of 0.01% calculated on the basis of the single average of base price as per schedule III of the FSA. Moreover, this provision is applicable after a period of three years from the date of signing of the FSA. In other words, the Petitioner is not entitled for compensation till 8.6.2015 (FSA being signed on 9.6.2012). Therefore, the compensation payable under the FSA for supply of coal for capacity lower than 65%, 65%, 67% and 75% for the years 2013-14, 2014-15, 2015-16 and 2016-17 respectively of the ACQ is too meagre to meet the expenditure for procurement of coal from alternate sources or through import. In this connection, Article 13.2 of the PPAs dated 7.8.2008 provides for the following principles of computing change in law:

"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."

Further, the relevant observations of the Hon'ble Supreme Court in the judgment dated 11.4.2017 in Energy Watchdog Case are extracted as under:

"53.....This being so, it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sources is cut down, the PPA read with these documents provides in clause 13.2 that while determining the consequences of change in law, parties shall have due regard to the principle that the purpose of compensating the party affected by



such change in law is to restore, through monthly tariff payments, the affected party to the economic position as if such change in law has not occurred."

The compensation available under the FSA from MCL for the shortfall in supply below 80% of ACQ is not sufficient to put the Petitioner in the same economic position as if the Change in Law event has not occurred. In the light of the provisions of Article 13.2 of the PPAs dated 7.8.2008 and the observations of the Hon`ble Supreme Court in Energy Watchdog Case, the actual shortfall in supply of domestic coal with reference to the ACQ quantum under the FSA needs to be considered.

34. Hon`ble Supreme Court has in this particular matter declared that the Tariff Policy being issued under Section 3 of the Act has the force of law. Para 6.1 of the Tariff Policy reads as under:

"Notwithstanding anything done or any action taken or purported to have been done or taken under the provisions of the Tariff Policy notified on 6th January, 2006 and amendments made thereunder, shall, in so far as it is not inconsistent with this Policy, be deemed to have been done or taken under provisions of this revised policy.

Clause 6.1 states:

6.1 Procurement of Power

As stipulated in para 5.1, power procurement for future requirements should be through a transparent competitive bidding mechanism using the guidelines issued by the Central Government from time to time. These guidelines provide for procurement of electricity separately for base load requirements and for peak load requirements. This would facilitate setting up of generation capacities specifically for meeting such requirements.

However, some of the competitively bid projects as per the guidelines dated 19th January, 2005 have experienced difficulties in getting the required quantity of coal from Coal India Limited (CIL). In case of reduced quantity of domestic coal supplied by CIL, vis-à-vis the assured quantity or quantity indicated in Letter of Assurance/FSA the cost of imported/market based e-auction coal procured for making up the shortfall, shall be considered for being made a pass through by Appropriate Commission on a case to case basis, as per advisory issued by Ministry of Power vide OM NO.FU-12/2011-IPC (Vol-III) dated 31.7.2013."

As per the above provisions, the Petitioner is entitled to compensation for any shortfall in supply of coal by CIL vis-a-vis the quantity indicated in LOA/FSA. Hence, the Petitioner is entitled to compensation for any shortfall in the supply of coal with respect to the quantity indicated in the FSA i.e. 64.05 lakh tonnes."

121. The above decision of the Commission shall also be applicable in the present case. The formulation to be adopted for computation of compensation due to coal shortage is given as under:

Step - 1: ECR Linkage Coal (Delivery point) = ECR Quoted



Step - 2: ECR Other Coal (Delivery point) = $\{[GSHR / \text{Weighted Average GCV of Other Coal (i.e. imported + e-auction + others\#)}] \times [\text{Weighted Average Price of Other Coal (i.e. imported + e-auction + others\#)}] \times [1 / (1 - \text{Aux Consumption})] \times [1 / (1 - \text{Applicable Transmission Losses})]\}$

Step - 3: ECR Chargeable (Delivery point) = $\{(G \times \text{ECR at Step - 1}) + [\text{ECR computed at Step - 2} \times (1 - G)]\}$

Where,

G = % Generation achievable based on Actual Linkage Coal as received;

GSHR = Normative Gross Station Heat Rate as worked out on the basis of applicable CERC

Regulations or actual, whichever is lower;

Auxiliary Consumption = Normative auxiliary consumption as per applicable CERC Regulations or actual, whichever is lower;

Weighted Average GCV of Other Coal (to be computed in line with applicable CERC

Regulation) = $\{(GCV_{\text{imported}} \times Qty_{\text{imported}}) + (GCV_{\text{e-auction}} \times Qty_{\text{e-auction}}) + (GCV_{\text{others\#}} \times Qty_{\text{others\#}})\}$

$/ (Qty_{\text{imported}} + Qty_{\text{e-auction}} + Qty_{\text{others\#}})$;

And

Weighted Average Price of Other Coal = $\{(Price_{\text{imported}} \times Qty_{\text{imported}}) + (Price_{\text{e-auction}} \times Qty_{\text{e-auction}}) + (Price_{\text{others\#}} \times Qty_{\text{others\#}}) / (Qty_{\text{imported}} + Qty_{\text{e-auction}} + Qty_{\text{others\#}})\}$

Step - 4: Compensation = $\{(\text{ECR as computed at Step - 3} \text{ minus ECR Quoted}) \times \text{Scheduled Generation at Delivery Point}\}$.

Note:

- 1) If the actual generation at delivery point is less than scheduled generation at delivery point, it will be restricted to actual generation at delivery point.
- 2) All facts, figures and computations in this regard should be duly certified by the auditor.
- 3) The coal consumed on month to month shall be duly certified by the auditor and the same shall be reconciled annually with the Opening Stock, coal received during the year, coal consumed during the year and the closing stock.



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

5) Others# implies "Coal procured through open market.

122. The Petitioner shall be compensated on account of coal shortage corresponding to scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of electricity to Rajasthan Discoms. The Petitioner is directed to furnish along with its monthly regular and/or supplementary bill(s), the computations duly certified by the auditor to Rajasthan Discoms. The Petitioner and Rajasthan Discoms are directed to carry out reconciliation on account of these claims annually. It is, however, made clear that any compensation paid by the Coal Company to the Petitioner for shortfall in supply of domestic coal shall be adjusted from the claim for compensation under change in law allowed in this order.

V. Increase in Minimum Alternative Tax (MAT) rate

123. The Petitioner has submitted that the applicable MAT rate as on the cut-off date was 18.5%. Further, the applicable Surcharge was 5% where the total income exceeds Rs. one crore, Education Cess was 2% and Secondary and Higher Education Cess was 1%. Subsequently, by virtue of the enactment of The Finance Act, 2017, the said Surcharge was increased to 7% where the total income exceeds Rs. one crore but does not exceeds Rs. ten crore, and 12% where the total income exceeds Rs. ten crore, thereby increasing the liability of the Petitioner pertaining to MAT. The Petitioner has further submitted that the Petitioner is in the process of ascertaining the actual financial impact on the cost of generation due to the above



change in law event. Since, this event has occurred after the cut-off date, the Petitioner has requested the Commission to allow this event under change in law as per the provisions of Article 10 of the PPA.

124. We have considered the submissions of the Petitioner. Similar issue has been considered by the Commission in its order dated 30.3.2015 in Petition No.6/MP/2013 where the Commission has not considered MAT under Change in Law. The relevant portion of the said order is extracted as under:

“46. We have considered the submission of the Petitioner and the respondents. The question for consideration is whether the Finance Act, 2012 changing the rate of income tax and minimum alternate tax are covered under Article 13.1.1(i) of the PPA. The income tax rates are changed from time to time through various Finance Acts and therefore, therefore they will be considered as amendment of the existing laws on income tax. However, all amendments of law will not be covered under “Change in Law” under Article 13.1.1(i) unless it is shown that such amendments result in change in the cost of or revenue from the business of selling electricity by the seller to the procurers under the terms of the agreement..... Accordingly, any increase or decrease in the tax on income or minimum alternate tax cannot be construed as “Change in Law” for the purpose of Article 13.1 of the PPA. In the case of tariff determination based on capital cost under Section 62 of the Electricity Act, 2003, one of the components specifically allowed as tariff is tax on income. The pass through of minimum alternate tax or income tax in case of tariff determination under section 62 is by virtue of the specific provision in the Tariff Regulations which require the beneficiaries to bear the tax on the income at the hand of the generating company from the core business of generation and supply of electricity. Such a provision is distinctly absent in case of tariff discovered through competitive bidding where the bidder is required to quote an all-inclusive tariff including the statutory taxes and cesses. Thus, the change in rate of income tax or minimum alternate tax cannot be construed as “Change in Law” for the purpose of Article 13.1 of the PPA.”

125. In the light of the above decision, the claim of the Petitioner for relief under Change in Law on account of increase in MAT rate is not admissible and accordingly disallowed.

VI. Increase in Works Contract Service Tax rate

126. The Petitioner has submitted that the applicable Works Contracts Service Tax rate as on the cut-off date was 4.8% as per the Notification No. 10/2012-Service Tax



dated 17.3.2012. The Work Contracts Service Tax was payable in the manner as mentioned below:

- a) In case of Works contract entered into for execution of original work, on 40% of total amount charged for the works contract and
- b) On 70% of the total amount charged for the works contract of maintenance or repair or reconditioning w.e.f. 01.07.2012 and
- c) In case of other work contract not covered in (a) or (b) above, service tax was applicable on 60% of the total amount charged for works contract.

127. The Petitioner has submitted that subsequently the Government of India vide its Notification No. 11/2014 dated 11.7.2014, merged together category (b) and (c) as mentioned above and service tax was made payable on 70% of the total amount charged for works contracts. Such increase in Works Contracts Service Tax has increased the cost of generation and has direct impact on the expenditure to be incurred towards generation of electricity by the Petitioner. The Petitioner has further submitted that the Petitioner is in the process of ascertaining the actual financial impact on the cost of generation due to the above change in law event. Since, this event has occurred after the cut-off date, the petitioner has requested the Commission to allow this event under change in law as per the provisions of Article 10 of the PPA.

128. The Respondents have submitted that the Petitioner cannot possibly claim any compensation for change in law, without even ascertaining whether the said change in law event actually impacts the Petitioner or not. The Petitioner has submitted that increase in Works Contracts Service Tax has increased the cost of generation and has direct impact on the expenditure to be incurred towards generation of electricity by the Petitioner.



129. We have examined the matter. The Petitioner has submitted that the applicable Works Contracts Service Tax rate as on the cut-off date was 4.8% as per the Notification No. 10/2012-Service Tax dated 17.3.2012. It has been found that the Petitioner has not placed on record all the necessary and relevant documents in regards of its claim. However, the Commission vide its order dated 31.10.2017 in Review Petition No. 22/RP/2017 in Petition No. 157/MP/2015 (CGPL case) has dealt with the issue of Works Contracts Service Tax rate. The Commission in that order has observed as under:

“15. Based on the above discussions, there exists sufficient reasons to review the impugned order dated 17.3.2017 with regard to the decision to allow the Service Tax on Works Contract services under Change in Law as claimed by the respondent, CGPL. Considering the fact that the increase in Service tax has resulted due to exercise of an option by the Petitioner, we in line with the decision of the Commission dated 31.8.2017 in Petition No. 141/MP/2016, review the decision in para 43 of the order dated 17.3.2017 as under:

“43. It is noticed that the Service tax of 12% was imposed on service component/ elements of Works Contract, thereby effectively considering 2% of service tax on Works Contract at the time of the bid. This has been considered by the Petitioner as on the cut-off date (30.11.2006). Thus, the notification dated 22.5.2007 of the Ministry of Finance giving options to the persons by paying an amount equal to 2% of the gross amount charged for the Works Contract, instead of paying service tax at the rate specified under the Finance Act, 1994 is not a new levy but an option given to the person to pay 2% of the gross instead of 12% of the service component. Thus, in our view, the exercise of option by the Petitioner, which is beneficial to the person liable to pay tax, cannot therefore be termed as a Change in law event falling within the scope of Article 13 of the PPA. Similarly, the increase of Service tax to 4% as per Notification dated 1.3.2008 is also an option to the person to discharge his tax liability. Since the increase in Service tax has resulted due to exercise of an option by the Petitioner, the impact of the same cannot be passed on to the Procurers. In this background, the claim of the Petitioner during the Operating period is not allowed.”

Accordingly, the Respondent shall not be entitled for service tax on works contract under change in law. The impugned order dated 17.3.2017 shall stand modified to this extent.”

130. The Commission has disallowed the Works Contracts Service Tax rate in the above referred CGPL case due to exercise of option by the Petitioner in the payment of service tax applicable on contracts, which is beneficial to the person liable to pay tax. To analyse the instant case, we note that the Department of Revenue, Ministry of



Finance vide its Notification No. 32/2007 dated 22.5.2007 has defined the 'Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007', which has provided an option to the persons by paying an amount equal to 2% of the gross amount charged for the Works Contract, instead of paying the service tax on the value of service portion of contract at the rate specified in Section 66 of the Act as determined by Rule 2A of the 'Service Tax (Determination of Value) Rules, 2006'. Sub-Rule (1) of Rule 3 of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 has been extracted as under:

"3. (1) Notwithstanding anything contained in section 67 of the Act and rule 2A of the Service (Determination of Value) Rules, 2006, the person liable to pay service tax in relation to works contract service shall have the option to discharge his service tax liability on the works contract service provided or to be provided, instead of paying service tax at the rate specified in section 66 of the Act, by paying an amount equivalent to two per cent of the gross amount charged for the works contract.

Explanation.- For the purposes of this rule, gross amount charged for the works contract shall not include Value Added Tax (VAT) or sales tax, as the case may be, paid on transfer of property in goods involved in the execution of the said works contract."

131. Thereafter, the 'Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007' has been amended vide Notification No. 7/2008-Service Tax dated 1.3.2008, whereby the tax rate of 2% has been revised to 4% which was an option to the persons by paying it on the gross amount charged for the Works Contract. Subsequently, the tax rate has been further revised to 4.8% vide Notification No. 10/2012-Service Tax dated 17.3.2012 which came into effect from 1.4.2012. The Petitioner has placed reliance of the tax rate mentioned in Notification No. 10/2012-Service Tax dated 17.3.2012 as applicable on the cut-off date. However, it has been noticed that Department of Revenue, Ministry of Finance vide Notification No. 35/2012 - Service Tax dated 20.6.2012 had rescinded the 'Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007' specified by the notification of the Government of India, in the Ministry of Finance (Department of



Revenue) No. 32/ 2007 – Service Tax, dated the 22nd May, 2007. And, this had come into effect from 1.7.2012, which effectively means that the option provided by the Ministry of Finance to the persons by paying an amount equal to 4.8% of the gross amount charged for the Works Contract ceased to exist from 1.7.2012. It was provided that w.e.f. 1.7.2012, the Rule 2A of the 'Service Tax (Determination of Value) Rules, 2006' will only be applicable for the payment of service tax on the Works Contract. The Rule 2A of the 'Service Tax (Determination of Value) Rules, 2006' provides as under:

"2A. Determination of value of service portion in the execution of a works contract.-

Subject to the provisions of section 67, the value of service portion in the execution of a works contract , referred to in clause (h) of section 66E of the Act, shall be determined in the following manner, namely:-

(i) Value of service portion in the execution of a works contract shall be equivalent to the gross amount charged for the works contract less the value of property in goods transferred in the execution of the said works contract.

Explanation.- For the purposes of this clause,-

(a) gross amount charged for the works contract shall not include value added tax or sales tax, as the case may be, paid or payable, if any, on transfer of property in goods involved in the execution of the said works contract;

(b) value of works contract service shall include, -

- (i) labour charges for execution of the works;*
- (ii) amount paid to a sub-contractor for labour and services;*
- (iii) charges for planning, designing and architect's fees;*
- (iv) charges for obtaining on hire or otherwise, machinery and tools used for the execution of the works contract;*
- (v) cost of consumables such as water, electricity, fuel used in the execution of the works contract;*
- (vi) cost of establishment of the contractor relatable to supply of labour and services;*
- (vii) other similar expenses relatable to supply of labour and services; and*
- (viii) profit earned by the service provider relatable to supply of labour and services;*

(c) Where value added tax or sales tax has been paid or payable on the actual value of property in goods transferred in the execution of the works contract, then, such value adopted for the purposes of payment of value added tax or sales tax, shall be taken as the value of property in goods transferred in the execution of the said works contract for determination of the value of service portion in the execution of works contract under this clause.



(ii) Where the value has not been determined under clause (i), the person liable to pay tax on the service portion involved in the execution of the works contract shall determine the service tax payable in the following manner, namely:-

(A) in case of works contracts entered into for execution of original works, service tax shall be payable on forty per cent of the total amount charged for the works contract;

(B) in case of works contract entered into for maintenance or repair or reconditioning or restoration or servicing of any goods, service tax shall be payable on seventy percent of the total amount charged for the works contract;

(C) in case of other works contracts, not covered under sub-clauses (A) and (B), including maintenance, repair, completion and finishing services such as glazing, plastering, floor and wall tiling, installation of electrical fittings of an immovable property , service tax shall be payable on sixty per cent. of the total amount charged for the works contract;

Explanation 1. - For the purposes of this rule,-

(a) "original works" means-

(i) all new constructions;

(ii) all types of additions and alterations to abandoned or damaged structures on land that are required to make them workable;

(iii) erection, commissioning or installation of plant, machinery or equipment or structures, whether pre-fabricated or otherwise;

(d) "total amount" means the sum total of the gross amount charged for the works contract and the fair market value of all goods and services supplied in or in relation to the execution of the works contract, whether or not supplied under the same contract or any other contract, after deducting-

(i) the amount charged for such goods or services, if any; and

(ii) the value added tax or sales tax, if any, levied thereon:

Provided that the fair market value of goods and services so supplied may be determined in accordance with the generally accepted accounting principles.

Explanation 2.--For the removal of doubts, it is clarified that the provider of taxable service shall not take CENVAT credit of duties or cess paid on any inputs, used in or in relation to the said works contract, under the provisions of CENVAT Credit Rules, 2004."

132. Thus, as on cut-off date i.e. 11.9.2012, the Petitioner was liable to pay the service tax on the works contract as per the Rule 2A of the 'Service Tax (Determination of Value) Rules, 2006' as amended from time to time, which was payable in the manner specified as below:



- (A) In case of Works contract entered into for execution of original work, on 40% of total amount charged for the works contract and
- (B) On 70% of the total amount charged for the works contract of maintenance or repair or reconditioning w.e.f. 01.07.2012 and
- (C) In case of other work contract not covered in (a) or (b) above, service tax was applicable on 60% of the total amount charged for works contract.

133. Thereafter, Department of Revenue, Ministry of Finance vide its Notification No. 11/2014 dated 11.7.2014, merged together category (B) and (C) and service tax was made payable on 70% of the total amount charged for works contracts. As such, there is no change in the value of service portion of works contract entered into for execution of original work on which the service tax is being paid. However, after merging the category (B) and (C), there is change in the value of service portion of works contract to the tune of 10% (i.e. due to merging of (C) with (B), the service tax on works under (C) was also made 70% of the total amount charged) for the work contracts which are neither falling under original work nor under contract of maintenance or repair or reconditioning. Therefore, such change of rate in case of works contract under category (C) fall under the category of Change in law as per Article 10 of the PPA. Since, the Petitioner has neither specified any details of the work contract entered into under category (C) existing as on cut-off date nor any documentary evidence in this regard. Therefore, we are not inclined to grant any relief at this stage. Accordingly, the Petitioner's claim on this aspect is disallowed. However, the Petitioner is granted liberty to approach the Commission for appropriate relief along with all required documents.

VII. Increase in Consent Fee

134. The Petitioner has submitted that the applicable annual renewal fee as on the cut-off date was Rs. 2,50,000/- (Rs. Two Lakh Fifty Thousand) for industries having



an investment of more than Rs. 1,000 Crore. The said renewal fee, vide Notification No. F1- 20/2016/32 dated 06.10.2016, was subsequently increased to Rs. 6,50,000/- (Rs. Six Lakh fifty thousand) for industries having investment of more than Rs. 1,000 crore but less than Rs. 2,500 crore. The Petitioner has not claimed any amount for the period from 30.11.2016 to 31.3.2017 and Rs. 5.83 lakh from 1.4.2017 to 31.12.2017s on account of increase in Consent fee.

135. The Respondents have submitted that Consent fee being a basic requirement to maintain the generating station, is to be factored in by the Petitioner while setting up its generating station. The Consent fee has no relation whatsoever with any supply of power to the Rajasthan Discoms. Per contra, the Petitioner has submitted that since the Consent fee has been increased by the Government of Chhattisgarh after the cut-off date, the same squarely falls within the definition of change in law as per the PPA.

136. We have considered the submissions made by the Petitioner and the Respondents. On Perusal of the documents placed on record by the Petitioner, it has been noticed that the Consent Fee is being levied by the Chhattisgarh Government through the Water (Prevention and Control of Pollution) (Consent) Chhattisgarh Rules, 1975 in exercise of the powers conferred by Section 64 of the Water (Prevention and Control of Pollution) Act, 1974 (No. 6.of 1974). As on the cut-off date, the Consent Fee being paid by the Petitioner was Rs. 2.5 lakh for industries having an investment of more than Rs. 1,000 crore (being the highest category specified for industries based on the investment). Government of Chhattisgarh vide its Notification No. F1- 20/2016/32 dated 6.10.2016 has amended the Water (Prevention and Control of Pollution) (Consent) Chhattisgarh Rules, 1975 and also introduced two categories above the category of "More than Rupees 1000 crore but



less than Rs 2500 crore” based on the investment. The Petitioner in its submission has specified that the Consent Fee being levied after the amendment is Rs. 6,50,000/- (Rs. Six Lakh Fifty Thousand) for industries having investment of more than Rs. 1,000 crore but less than Rs. 2,500 crore.

137. Since the amendment brought out by the Chhattisgarh Government vide its Notification dated 6.10.2016 is after the cut-off date, the Consent Fee revision falls under the category of Change in law as per the Article 10 of the PPAs. Accordingly, the compensation on account of revision in Consent Fee should be reimbursed by Rajasthan Discoms in the monthly bill on pro-rata basis. The Petitioner shall furnish copies of the payment made, supported by Auditor certificate, while claiming the expenditure under Change in Law.

VIII. Introduction of Evacuation Facility Charges

138. The Petitioner has submitted that Coal India Ltd. vide its price notification no. CIL:S&M:GM(F)/Pricing/2017/1005 dated 19.12.2017 notified the levy of 'Evacuation Facility Charges' at the rate of Rs. 50 per MT to be levied on all despatches except despatch through rapid loading arrangement. The said charge is applicable on the procurement of coal by the Petitioner for the purpose of generating electricity. The levy of the said charges has been made effective from 20.12.2017, which is after the cut-off date. Levy of the said Evacuation Facility Charge has increased the cost of generation of electricity. The Petitioner's claim on account of introduction and levy of Evacuation Facility Charges for the period from 20.12.2017 to 31.12.2017 is Rs. 21.47 lakh.

139. The Respondents have submitted that the price notification by the Railways or Coal India Limited is by no stretch of imagination a change in law. The price



notifications may increase or decrease the prices but these do not amount to a change in law under the PPA.

140. We have considered the submissions of the Petitioner and perused the price notification dated 19.12.2017 issued by Coal India Ltd. with regard to levy of Evacuation Facility Charges. The Petitioner has submitted that Coal India Limited is an Indian Government Instrumentality and the notifications issued by Coal India Limited with regard to Evacuation Facility Charges is covered under the definition of law and any change in such charges is covered under Change in Law.

141. The issue of levy of Evacuation Facility Charges by CIL has been dealt with by the Commission in its order dated 2.4.2019 in Petition 72/MP/2018 and the Commission has allowed such levy of Coal Evacuation Facility charges by CIL as Change in Law event. The relevant portion of the said order dated 2.4.2019 is extracted as under:

"42. We have considered the submission made by the Petitioner. We notice that as on the cut-off date of the respective PPAs there was no Evacuation Facility Charges levied by CIL and subsequently Coal India Ltd. vide its price notification no CIL:S&M:GM(F)/Pricing/2017/1005 dated 19.12.2017 notified the levy of 'evacuation facility charges' at the rate of Rs.50/MT on coal. The Tribunal vide its judgement dated 21.12.2018 had concluded that "departments, corporations/ companies like Coal India Limited or Indian Railways formed under different Statutes are Indian Government Instrumentality". In view of the submissions of the Petitioner and in view of the said judgment, we note that the Evacuation Facilities Charges are levied pursuant to notification issued by CIL which is an Indian Governmental Instrumentality in terms of the PPAs. The Evacuation Facility Charges were not possible to be envisaged at the time of bid submission by the Petitioner and its subsequent introduction has an adverse financial impact on the Petitioner which is one of the requirements of claiming relief for change in law event. We further note that the Tribunal in the case of Sasan Power Ltd. V. CERC [2017ELR(APTEL)508] has held that as long as the conditions of Change in law are satisfied, the affected party will be entitled to relief. In the present case, the introduction of Evacuation Facility Charges satisfies the criteria of change in law events as contained in the respective PPAs. Further, Evacuation Facilities Charges is not part of the escalation index for coal notified by this Commission. Hence, we are of the view that introduction of Evacuation Facility Charges beyond cut-off date of the respective PPAs is admissible to the Petitioner as a change in law event.

43. Accordingly, the Petitioner is entitled to recover the Evacuation Facility Charges as per applicable rates in proportion to the coal as per the parameters of the applicable Tariff Regulations of the Commission or coal actually consumed whichever is lower, for



generation and supply of electricity to the discoms concerned. As on cut-off dates of the Bihar and Haryana PPAs, Evacuation Facilities Charges were Nil. Thereafter, the applicable rates of Evacuation Facilities Charges shall be used based on the relevant date/s. The Petitioner is directed to furnish along with its monthly regular and/or supplementary bill(s) and computations duly certified by the auditor to the discoms concerned. The Petitioner and the discoms concerned are directed to carry out reconciliation on account of these claims annually.”

142. The above decision of the Commission is also applicable in the present case. CIL being an Indian Government Instrumentality, its notification dated 19.12.2017 with respect to levy of Evacuation Facility Charges on coal price constitutes Change in Law in terms of Article 10 of the PPAs. Further these Evacuation Facility Charges is not a part of the escalation index notified by this Commission periodically. Hence, introduction of Evacuation Facility Charges by CIL beyond the cut-off date is admissible to the Petitioner as a Change in Law.

143. Accordingly, the Petitioner shall be entitled to recover such Evacuation Facility Charges from the Rajasthan Discoms in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of electricity to Rajasthan Discoms. If the actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of Evacuation Facility. The Petitioner is directed to furnish along with its monthly regular and/or supplementary bill(s), computations duly certified by the auditor to Rajasthan Discoms. The Petitioner and Rajasthan Discoms are directed to carry out reconciliation on account of these claims annually.

IX. Additional cost towards Fly Ash Transportation

144. The Petitioner has submitted that as on the cut-off date, it was not required to incur any additional cost towards the fly ash transportation. However, the Ministry of



Environment, Forest and Climate Change (MoEFCC) vide its Notification No. S.O. 254 (E) dated 25.01.2016 amended the Environment (Protection) Rules, 1986 thereby amending its previous notification dated 3.11.2009 and imposed the additional cost towards fly ash transportation. The relevant portion of the amendment is 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."

145. The Petitioner has further submitted that the amendment of notification dated 3.11.2009 vide notification dated 25.1.2016 is a Change in Law event within the meaning of Article 10 of the PPA. Due to the said increase, the cost of supply of power under the PPA has increased. The Petitioner is in the process of ascertaining the actual financial impact on the cost of generation due to the above change in law event.

146. The Respondents have submitted that even prior to 2016 amendment, the cost of transportation of fly ash was being borne by the generators. MOEFCC vide its notification dated 25.1.2016, while amending the notification dated 3.11.2009 provided that beyond 100 km and up to 300 km, the cost of transportation shall now be borne by both the generator and the user. Therefore, in essence the said notification is actually in favour of the Petitioner as prior to this, the Petitioner had to bear the whole transportation cost regardless of the distance. Per contra, the Petitioner has submitted that as on the cut-off date, the Petitioner was not required to incur any additional cost towards the fly ash transportation. However, MOEFCC, by amending the notification dated 3.11.2009, vide its notification dated 25.1.2016



imposed the additional cost towards fly ash transportation. The said amendment is a change in law event within the meaning of Article 10 of the PPA.

147. We have considered the submissions of the Petitioner and the Respondents. Similar issue has been considered by the Commission in its order dated 19.12.2017 in Petition No. 229/MP/2016 wherein the Commission has observed as under:

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

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

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

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

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

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

148. In line with the above order, the expenditure claim by the Petitioner is admissible under the Change in law and the admissibility of the said claim is subject to the conditions indicated in the said order (as quoted above). The Petitioner is granted liberty to approach this Commission with above documents to analyse the case for determination of compensation.



X. Additional capital expenditure on account of amendment in Environment Norms

149. The Petitioner has submitted that the Government of India, Ministry of Environment, Forest and Climate Change (MoEFCC) vide its notification No. S.O.3305 (E) dated 7.12.2015 notified the Environment (Protection) Amendment Rules, 2015 (Amendment Rules, 2015) thereby amending/ introducing the standards for emission of environmental pollutants to be followed by the thermal power plants. By way of the said Amendment Rules, all the existing thermal power plants, including that of the Petitioner, are required to meet the modified/ new norms within a period of two (2) years from the date of the notification. As per the said amendment, the Ministry of Environment, Forest and Climate Change has:

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

150. The Petitioner has submitted that the additional cost required for modifying the Plant towards meeting the norms prescribed by MoEFCC for Water Consumption, Sulphur dioxide (SO₂), Oxides of Nitrogen (NO_x) and Mercury (Hg) is an additional expenditure which is a Change in Law event within the meaning of Article 10 of the PPA. The Petitioner is in the process of ascertaining the actual financial impact on the cost of generation due to the above change in law event.

151. The Petitioner has further submitted that pursuant to the aforesaid notification, the Central Pollution Control Board (CPCB) has issued a letter dated 11.12.2017 bearing reference B-33014/07/2017-18/IPC-II/TPP/15850, wherein directions have been issued upon the Petitioner to comply with the said notification issued by Ministry



of Environment, Forest and Climate Change. By way of the aforesaid letter dated 11.12.2017, CPCB has directed the Petitioner to comply with the following:

- (i) That plant shall install/ retrofit Electrostatic Precipitators (ESP) in Unit-2 so as to comply PM emission limit immediately.
- (ii) That plant shall install FGD by March 31, 2020 in unit-2 so as to comply SO₂ emission limit.
- (iii) That plant shall take immediate measure like installation of low NO_x burners, providing Over Fire Air (OFA) etc. and achieve progressive reduction so as to comply NO_x emission limit by the year 2022.

152. The Respondents have submitted that the claim of the Petitioner is completely bereft of details. The Petitioner is first required to file certain information enumerated in para 140 of the reply.

153. We have considered the submissions of the Petitioner and the Respondents. The Commission has dealt the issue of 'Additional capital expenditure on account of amendment in Environment Norms' in order dated 17.9.2018 in Petition No. 77/MP/2016. The Summary of the Commission's decisions in that order is quoted as under:

"Summary of our Decisions

49. Summary of our decisions in this order is as under:

(a) MoEFCC Notifications, 2015 prescribing the revised environmental norms in respect of thermal Power plants which has been issued after the cut-off date of Mundra UMPP are in the nature of Change in Law in terms of the PPA dated 22.4.2007 and the MoP directions issued under Section 107 of the Act.

(b) The Petitioner has given notice regarding Change in Law arising out of MoEFCC Notification in terms of the PPA.

(c) The Petitioner is required to take steps to implement revised norms in respect of Sulphur Dioxide, Nitrogen Oxide and water consumption. The Petitioner has taken up the matter with MoEFCC for exemption from implementing the norms for water consumption and therefore, the implementation of the norms of water consumption shall be dependent on the decision of MoEFCC in this regard.

(d) Mundra UMPP meets the norms prescribed in MoEFCC Notification, 2015 with regard to particulate matters and mercury and accordingly, the Petitioner has not claimed the relief under Change in Law.

(e) The Commission has directed CEA vide its order dated 22.7.2018 in Petition No. 98/MP/2017 to prepare guidelines specifying the suitable technology for each plant and



operational parameters such as auxiliary consumption, Station Heat Rate, O&M expenses, norms of consumption of water, lime stones etc. for implementation of revised environmental norms. The Petitioner shall implement the revised norms as per the MoEFCC Notification, 2015 in consultation with CEA.

(f) There is no provision for in-principle approval in the PPA. However, the Commission has decided that MoEFCC Notification, 2015 is in the nature of Change in Law. Accordingly, the Petitioner shall approach the Commission for determination of increase in cost or/and revenue expenditure on account of implementation of revised norms in accordance with the Guidelines to be issued by CEA and the mode of recovery of the same through monthly tariff.

154. The above decision is also applicable in the instant case. The event of “Additional capital expenditure on account of amendment in Environment Norms” is a Change in law event as decided by this Commission in the above case. Accordingly, the Petitioner is directed to implement the revised norms in consultation with CEA and approach this Commission for determination of increase in cost and/or revenue expenditure on account of implementation of revised norms in accordance with the Guidelines to be issued by CEA and the mode of recovery of the same through monthly tariff.

XI. Increase/ change in prices of Diesel

155. The Petitioner has submitted that diesel vehicles are used for the purpose of transportation of coal. It is stated that there has been an increase in the price of diesel which has increased the cost for transportation of coal thereby resulting in an increase in the expenditure of the Petitioner for the purpose of generating electricity for supply under the PPA. As such the increase in the price of diesel has led to an additional expenditure incurred by the Petitioner and the same is a change in law event within the meaning of Article 10 of the PPA. The Petitioner is in the process of ascertaining the actual financial impact on the cost of generation due to the above change in law event.



156. We have considered the submissions made by the Petitioner. The Petitioner is claiming increase in the price of diesel used in the vehicles for the purpose of transportation of coal. The Petitioner has not placed on record any document to prove that the increase in the price of diesel used in the vehicles for the purpose of transportation of coal has been issued pursuant to any Indian Government Instrumentality as provided under Article 10 of the PPA. Further, the diesel prices are decided by the oil companies from time to time based on the international market prices.

157. Accordingly, the claim of the Petitioner for relief under change in Law on account of increase in the price of diesel as per Article 10 of the PPA is not admissible and accordingly, disallowed.

XII. Structural impact of GST:

158. The Petitioner has submitted that implementation of GST has brought in an additional dimension and various components of GST are undergoing changes. The Petitioner has submitted that it is in the process of ascertaining the actual financial impact on the cost of generation due to GST and the Petitioner reserves its right to provide the same at a later stage. However, the said change in law event has occurred after the cut-off date and the same is applicable on the Petitioner. Therefore, it would be in the interest of parties that the Commission allows the said event as change in law in order to avoid multiplicity of proceedings.

159. The Respondents have submitted that the Petitioner cannot possibly claim any compensation for change in law, without even ascertaining whether the said change in law, namely GST actually impacts the Petitioner or not. The Petitioner cannot be



allowed to claim any change in law event in-principle, when the Petitioner is not even clear on the impact of such change in law.

160. We have considered the submissions of the Petitioner and the Respondents. The Petitioner has not ascertained the actual financial impact on the cost of generation due to change in law events. In the absence of required information, we are not in a position to take a view in this regard. However, the Petitioner is granted liberty to approach the Commission along with required documents/ information.

XIII. Carrying Cost:

161. The Petitioner, in the present Petition has also claimed carrying cost from the date of applicability of the respective change in law events till the date of payment on account of delay in recovery of amount already paid towards Change in Law events so that its economic position is restored. The petitioner has submitted that it is a settled position of law that whenever a payment is deferred or delayed, then carrying cost is payable along with the deferred payment. The principle of carrying cost has been well established in various judgments of the Hon'ble Supreme Court and the Hon'ble Appellate Tribunal for Electricity (APTEL). The carrying cost is the compensation for time value of money or the monies denied at the appropriate time and paid after a lapse of time.

162. The Petitioner has also submitted that the Petitioner shall be entitled to receive carrying cost/ interest on the tariff adjustment from the time specified in Article 10.5 of the PPA based on the principles of restitution. As per Article 10 of the PPA, this Commission has the power to determine compensation on account of Change in Law event and restore the affected party to the same economic position as if the Change in Law did not occur. This would necessarily entail compensation in respect of



carrying cost. The Petitioner has submitted that it is entitled to claim carrying cost at the Bank Rate as defined in Regulation 3(5) of the Tariff Regulations, 2014 or actual applicable interest rate on working capital incurred by the Petitioner during the relevant period, whichever is lower.

163. The Respondents have submitted that the simple reading of the Petition shows that claims based on notifications as far back as the year 2013 are being raised and relied upon by filing a Petition in the year 2018. Therefore, this is a clear default on the part of the Petitioner and cannot be to the prejudice of the Respondents by asking them to pay interest/ carrying cost.

164. We have considered the submissions of the Petitioner and the Respondents. According to the Respondents, since the Petitioner`s claims are barred by limitation, no carrying cost should be admissible to the Petitioner to the extent of delay on account of the Petitioner. The Petitioner has submitted 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. The Appellate Tribunal in its judgment dated 13.4.2018 in Appeal No. 210/2017 (APL v CERC &ors) has allowed the carrying cost on the claim under change in law and held as under:

“In the present case we observe that from the effective date of Change in Law the Appellant is subjected to incur additional expenses in the form of arranging for working capital to cater the requirement of impact of Change in Law event in addition to the expenses made due to Change in Law. As per the provisions of the PPA the Appellant is required to make application before the Central Commission for approval of the Change in Law and its consequences. There is always time lag between the happening of Change in Law event till its approval by the Central Commission and this time lag may be substantial. As pointed out by the Central Commission that the Appellant is only eligible for surcharge if the payment is not made in time by the Respondent Nos. 2 to 4 after raising of the supplementary bill arising out of approved Change in Law event and in PPA there is no compensation mechanism for payment of interest or carrying cost for the period from when Change in Law becomes operational till the date of its approval by the Central Commission. We also observe that this Tribunal in SLS case after considering time value of the money has held that in case of re-determination of tariff the interest by a way of compensation is payable for the period for which tariff is re-determined till the date of such re-determination of the tariff. In the present case



after perusal of the PPAs we find that the impact of Change in Law event is to be passed on to the Respondent Nos. 2 to 4 by way of tariff adjustment payment as per Article 13.4 of the PPA...

From the above it can be seen that the impact of Change in Law is to be done in the form of adjustment to the tariff. To our mind such adjustment in the tariff is nothing less than re-determination of the existing tariff.

Further, the provisions of Article 13.2 i.e. restoring the Appellant to the same economic position as if Change in Law has not occurred is in consonance with the principle of 'restitution' i.e. restoration of some specific thing to its rightful status. Hence, in view of the provisions of the PPA, the principle of restitution and judgement of the Hon'ble Supreme Court in case of Indian Council for Enviro-Legal Action vs. Union of India &Ors., we are of the considered opinion that the Appellant is eligible for Carrying Cost arising out of approval of the Change in Law events from the effective date of Change in Law till the approval of the said event by appropriate authority..."

165. The aforesaid judgment of the Appellate Tribunal was challenged before the Hon'ble Supreme Court wherein the Hon'ble Supreme Court vide its judgment dated 25.2.2019 in Civil Appeal No. 5865 of 2018 with Civil Appeal No. 6190 of 2018 (Uttar Haryana Bijili Vitran Nigam Limited & Anr. Vs. Adani Power Ltd. & Ors.) has upheld the directions of payment of carrying cost to the generator on the principles of restitution and held as under:

"10. A reading of Article 13 as a whole, therefore, leads to the position that subject to restitutionary principles contained in Article 13.2, the adjustment in monthly tariff payment, in the facts of the present case, has to be from the date of the withdrawal of exemption which was done by administrative orders dated 06.04.2015 and 16.02.2016. The present case, therefore, falls within Article 13.4.1(i). This being the case, it is clear that the adjustment in monthly tariff payment has to be effected from the date on which the exemptions given were withdrawn.

This being the case, monthly invoices to be raised by the seller after such change in tariff are to appropriately reflect the changed tariff. On the facts of the present case, it is clear that the respondents were entitled to adjustment in their monthly tariff payment from the date on which the exemption notifications became effective. This being the case, the restitutionary principle contained in Article 13.2 would kick in for the simple reason that it is only after the order dated 04.05.2017 that the CERC held that the respondents were entitled to claim added costs on account of change in law w.e.f. 01.04.2015. This being the case, it would be fallacious to say that the respondents would be claiming this restitutionary amount on some general principle of equity outside the PPA. Since it is clear that this amount of carrying cost is only relatable to Article 13 of the PPA, we find no reason to interfere with the judgment of the Appellate Tribunal...

16...There can be no doubt from this judgment that the restitutionary principle contained in Clause 13.2 must always be kept in mind even when compensation for increase/decrease in cost is determined by the CERC."



166. Article 10.2.1 of the PPA provides as under:

“10.2.1. While determining the consequences 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.”

167. In view of the provisions of the PPA, the principles of restitution and the aforesaid judgment of the Hon`ble Supreme Court, we are of the considered view that the Petitioner is eligible for carrying cost arising out of approved Change in Law events from the effective date of Change in Law till the actual payment to the Petitioner. Once a supplementary bill is raised by the Petitioner in terms of this Order, the provisions of Late Payment Surcharge in the PPAs would kick in if payment is not made by the Respondents within due date.

168. The Commission in its order dated 17.9.2018 in Petition No. 235/MP/2015 [AP(M)L v UHBVNL & ors] had decided the issue of carrying cost as under:

“24. After the bills are received by the Petitioner from the concerned authorities with regard to the imposition of new taxes, duties and cess, etc. or change in rates of existing taxes, duties and cess, etc., the Petitioner is required to make payment within a stipulated period. Therefore, the Petitioner has to arrange funds for such payments. The Petitioner has given the rates at which it arranged funds during the relevant period. The Petitioner has compared the same with the interest rates of IWC as per the Tariff Regulations of the Commission and late payment surcharge as per the PPA as under:-

<i>Period</i>	<i>Actual interest rate paid by the Petitioner</i>	<i>Working capital interest rate as per CERC Regulations</i>	<i>LPS Rate as per the PPA</i>
<i>2015-16</i>	<i>10.68%</i>	<i>13.04%</i>	<i>16.29%</i>
<i>2016-17</i>	<i>10.95%</i>	<i>12.79%</i>	<i>16.04%</i>
<i>2017-18</i>	<i>10.97%</i>	<i>12.43%</i>	<i>15.68%</i>

25. It is noted that the rates at which the Petitioner raised funds is lower than the interest rate of the working capital worked out as per the Regulations of the Commission during the relevant period and the LPS as per the PPA. Since, the actual interest rate paid by the Petitioner is lower, the same is accepted as the carrying cost for the payment of the claims under Change in Law.

26. The Petitioner shall work out the Change in Law claims and carrying cost in terms of this order. As regards the carrying cost, the same shall cover the period starting with the date when the actual payments were made to the authorities till the date of issue of this order. The Petitioner shall raise the bill in terms of the PPA



supported by the calculation sheet and Auditor's Certificate within a period of 15 days from the date of this order. In case, delay in payment is beyond 30 days from the date of raising of bills, the Petitioner shall be entitled for late payment surcharge on the outstanding amount."

169. In line with above order of the Commission, in the instant case, the Petitioner shall be eligible for carrying cost at the actual interest rate paid by the Petitioner for arranging funds (supported by Auditor's Certificate) or the Rate of Interest on Working Capital rate as per applicable CERC Tariff Regulations or the Late Payment Surcharge Rate as per the PPA, whichever is the least.

Issue No. 6: Mechanism for processing and reimbursement of admitted claims under Change in Law.

170. The Petitioner has submitted that as per Article 10.3.2 of the PPA, the minimum value of "Change in Law" should be more than 1% of the Letter of Credit in aggregate for the relevant contract year. The Petitioner has further submitted that the above levies, changes, revisions and enactments are directly affecting the Petitioner i.e. the expenses of the Petitioner/ Seller, by more than 1% of the value of stand by letter of credit in aggregate for the relevant contract year. The value of 1% of the letter of credit in aggregate on the basis of power supplied for the period 30.11.2016 to 31.3.2017 comes to Rs. 9.7 lakh and for the period 1.4.2017 to 31.12.2017 comes to Rs. 50 lakh. It has further submitted that the aggregate amount claimed for "Change in Law" for the period from 30.11.2016 to 31.03.2017 works out to Rs. 12.28 crore and for the period from 1.4.2017 to 31.12.2017 works out to Rs. 53.52 crore. This is more than 1% of the LC amount for the respective period and as such more than the threshold amount prescribed under Article 10.3.2 of the PPA. Therefore, the Petitioner is entitled to be compensated for the same.



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

“10.3.2 During Operating Period

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

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

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

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

(b) Increase in Royalty on coal, Service tax on Royalty of coal, CG Environment cess, CG Infrastructure Development cess, Clean Energy cess,



Forest Tax, VAT, change in Central Excise Duty on the assessable value of coal and increase in Service Tax Rate & imposition of Swachh Bharat cess & Krishi Kalyan Cess on Railway freight shall be computed based on coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of electricity to Rajasthan Discoms. If the actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of change in law events.

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

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

(e) We are not going to compute the threshold value for eligibility of getting compensation due to Change in Law during Operation period. However, the



Petitioner shall be eligible to receive compensation if the impact due to Change in Law exceeds the threshold value as per Article 10.3.2 during Operation period. Accordingly, the compensation amount allowed shall be shared by Rajasthan Discoms based on the scheduled energy. Year-wise compensation henceforth shall be payable only if such increase in revenue or cost to the Petitioner is in excess of an amount equivalent to 1% of LC in aggregate for a contract year as per provision under Article 10.3.2 of the PPAs.

Summary of Decision

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

S.No	Change in Law events	Decision
I.	Increase in coal cost on account of change in law events	
a.	Royalty on Coal	Allowed
b.	Service Tax on Royalty of Coal	Allowed
c.	Increase in Niryat kar	Not Allowed but liberty granted
d.	Increase in Environment Cess and Paryavaran Upkar and	Allowed
e.	Change in Infrastructure Development Cess/ vikas upkar	Allowed
f.	Change in Clean Energy Cess/ clean environment cess and GST	Allowed
g.	Change in Forest Tax	Allowed
h.	Change in the components of Central Excise Duty	Allowed
i.	Increase/ Change in Entry Tax on account of changes in the individual components of such Tax	Not Allowed but granted liberty
j.	Increase/ Change in Value Added Tax (VAT) on account of changes in individual components of such Tax	Allowed
k.	Increase in sizing and crushing charges	Not Allowed
l.	Increase in Coal Surface Transportation charge	Not Allowed
m.	Increase in base price of coal	Not Allowed
II.	Increase in cost of on account of change in law pertaining to rail transportation of domestic coal supplied by CIL and its subsidiaries	
a.	Increase in base Freight of Coal Transportation	Not Allowed



S.No	Change in Law events	Decision
	by Rail	
b.	Levy of Busy Season Charges and Levy of Development Surcharge	Allowed
c.	Increase in Service Tax Rate and imposition of Swachh Bharat cess and Krishi Kalyan Cess	Allowed
III.	Increase in Rate of Electricity Duty imposed on Auxiliary Consumption	Allowed
IV.	Increase in Coal Cost due to Reduction in supply of coal by Coal India Limited and its subsidiaries	Allowed
V.	Increase in Minimum Alternative Tax (MAT) rate	Not Allowed
VI.	Increase in Works Contract Service Tax rate	Not Allowed but granted liberty
VII.	Increase in Consent Fee	Allowed
VIII.	Introduction of Evacuation Facility Charges	Allowed
IX.	Additional cost towards Fly Ash Transportation	Liberty granted to approach the Commission with necessary documents
X.	Additional capital expenditure on account of amendment in Environment Norms	Directed to implement the revised norms in consultation with CEA and approach the Commission at a later stage
XI.	Increase/ change in prices of Diesel	Not Allowed
XII	Impact of GST	Liberty granted to approach the Commission with necessary documents
XIII.	Carrying cost	Allowed

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

175. Petition No. 116/MP/2018 is disposed of in terms of above.

Sd/-
(I.S. Jha)
Member

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

Sd/-
(P.K. Pujari)
Chairperson

