CENTRAL ELECTRICITY REGULATORY COMMISSION

NEW DELHI

Petition No:118/MP/2018

Coram:

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

Date of Order: 12th of June, 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 25.7.2013 (PTC-PPA) executed between the Petitioner and the Respondent No. 6 and as per the terms of the back to back Power Purchase Agreement executed by PTC with Paschimanchal Vidyut Vitran Nigam Ltd ("PaVVNL"), Purvanchal Vidyut Vitran Nigam Ltd ("PuVVNL"), Madhyanchal Vidyut Vitran Nigam Ltd ("MVVNL"), Dakshinanchal Vidyut Vitran Nigam Ltd ("DVVNL") dated 25.7.2013.

And
In the matter of

TRN Energy Private Limited,
Balco Nagar,
Korba-495684
Chhattisgarh **.....Petitioner**

Vs

(1) Paschimanchal Vidyut Vitran Nigam Ltd.
UrjaBhawan, Victoria Park,
Meerut - 226001

(2) Purvanchal Vidyut Vitran Nigam Ltd
DLW, Bhikharipur,
Varanasi - 221004

(3) Madhyanchal Vidyut Vitran Nigam Ltd
4A, GokhaleMarg,
Lucknow - 226001

(4) Dakshinanchal Vidyut Vitran Nigam Ltd
UrjaBhawan, NH-2, (Agra - Delhi Bypass Road),
Sikandra, Agra – 282002

(5) Uttar Pradesh Power Corporation Limited

3rd Floor, Shakti BhawanExtn.,
14 - Ashok Marg, Lucknow-226 001
Uttar Pradesh

(6) PTC India Limited
2nd Floor, NBCC Tower 15,
BhikajiCama Place,
New Delhi-110066

(7) Chhattisgarh State Power Trading Co. Ltd.
2nd Floor, Vidyut SewaBhawan
Dangania, Raipur-492 013,
Chhattisgarh

(8) Chhattisgarh State Power Distribution Co. Ltd.
Vidyut SewaBhawan
Dangania, Raipur-492 013,
Chhattisgarh **... Respondents**

Parties Present:

1. Shri Ratan K. Singh, Advocate, TRN Energy
2. Shri SurajPrakash, Advocate, TRN Energy
3. Shri Rajiv Srivastava, Advocate for Respondents No. 1 to 5
4. Ms.GarimaSrivastava, Advocate for Respondents No. 1 to 5
5. Shri Ayush Singh, UPPCL
6. Shri AshishAnand Bernard, Advocate, PTC India
7. Shri ParamhansSahani, Advocate, PTC India

ORDER

The Petitioner,TRN Energy Private 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') read with Article 10 of the Power Purchase Agreement (PPA) dated 25.7.2013 [hereinafter referred to as "UPPCL-PPA"] executed between the Respondent No. 5 (UPPCL) and Respondent No. 6, PTC India Limited (hereinafter referred to as "PTC"), for supply of power from the Petitioner's plant, seeking certain reliefs under change in law during the operating period. The Petitioner has set up a 2x300 MW (600 MW) Thermal Power Project (hereinafter referred to as the 'Power Project') at Nawapara village District Raigarh, in the State of Chhattisgarh.

Background

2. On 25.7.2013, the Petitioner and PTC entered into a Power Purchase Agreement (hereinafter referred to as the PTC-PPA) for supply of 390 MW RTC (round the clock) power for a period of twenty-five years from the Scheduled Delivery Date of the project, for onward sale on long term basis. The PTC-PPA was executed on the understanding that PTC had executed a Power Purchase Agreement dated 25.7.2013 (UPPCL-PPA) with the Respondent Nos. 1, 2, 3 and 4 for sale and supply of aggregated contracted capacity of 390 MW to the Respondent Nos. 1, 2, 3 and 4 through the power plant of the Petitioner. The UPPCL-PPA was executed pursuant to a competitive bidding process initiated by the Respondent No. 5 (UPPCL) through issuance of a Request for Proposal (RFP) for procurement of 6000 MW power on long term basis for a period of 25 years under Case-1 bidding procedure. Hereinafter, except where the context requires otherwise, the UPPCL-PPA and the PTC-PPA shall jointly be referred to as the Petitioner-PPAs or simply as PPAs.

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

(a) Supply of 5% of the net power generated from the Power Plant to the State of Chhattisgarh at the energy (variable) charges in terms of the Long term Power Purchase Agreement dated 26.5.2015 on back-to-back basis with Chhattisgarh State Power Trading Company Ltd. (CSPTCL). The supply under this PPA has become effective from 17.9.2017.

(b) Supply of 390 MW RTC power to UP Discoms under back-to-back Long Term PPA dated 25.7.2013 under UPPCL-PPA through PTC. The supply under this PPA has become effective from 2.12.2016 for 150 MW and with effect from 17.5.2017 for the aggregate contracted capacity of 390 MW.

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

Event	**Date**
Cut-off date	17.9.2012
Date of submission of bid	24.9.2012
PPA executed on	25.7.2013

Start of supply of power	from 2.12.2016 for 150 MW from 17.5.2017 for 390 MW

5. The Petitioner has sought compensation for change in law events during the operating period on account of the following events which have impacted the cost and revenue for supply of power from the power project to the procurer:

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 Niryat kar

(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 due to Change in law events pertaining to Transportation of domestic coal

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

(b) Levy of Busy Season Charge and Levy of Development Surcharge

(c) Increase in Service Tax Rate and 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

(a) New Coal Distribution Policy 2013

(b) Change of allocation of Mines for supply of coal

V. Increase in Minimum Alternative Tax (MAT) rate

VI. Increase in Service Tax rate & Structural impact of GST

VII. Increase in Works Contract Service Tax rate

VIII. Increase in Consent Fee

IX. Introduction of Evacuation Facility Charges

X. Additional cost towards Fly Ash Transportation

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

XII. Increase/ change in prices of Diesel

6. The Petitioner has submitted that during the period commencing from 2.12.2016 to 31.12.2017, it has incurred additional expenses of Rs. 15,224.97 lakh in generating and supplying power to UP 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. Lakhs)	
		2.12.2016 to 31.3.2017	1.4.2017 to 31.12.2017
1.	Royalty on Coal	86.70	394.36
2.	Increase in Niryat kar	1.07	(1.59)
3.	Increase in Environment Cess/ Paryavaran Upkar	3.65	17.32
4.	Change in Infrastructure Development Cess/ Vikas Upkar	3.65	17.32
5.	Change in Clean Energy Cess/ Clean	511.22	2424.46

Sl. No.	Change in Law Events	Financial Impact (in Rs. Lakhs)	
		2.12.2016 to 31.3.2017	1.4.2017 to 31.12.2017
	Environment Cess and Introduction of Goods and Service Tax, 2017		
6.	Change in Forest Tax	_	18.77
7.	Change in the components of Central Excise Duty	29.75	(280.09)
8.	Increase/ Change in Entry Tax on account of changes in individual components of such tax	(3.03)	(61.71)
9.	Increase/ Change in Value Added Tax (VAT) on account of changes in individual components of such Tax	45.92	(0.57)
10.	Increase in Sizing and Crushing charges	26.29	125.87
11.	Increase in base price of the Coal	177.49	568.11
12.	Increase in Rate of Electricity Duty imposed on auxiliary consumption	49.04	271.24
13.	Increase in coal cost due to reduction in supply of coal by Coal India Limited and its subsidiaries	796.47	5603.13
14.	Increase in Consent Fee	1.90	5.10
15.	Introduction of Evacuation Facility Charges	_	27.70
16.	Increase in Transportation Charges on account of Change in Mine	726.90	3545.79
17.	Increase in Coal Surface Transportation Charges	_	92.74
	TOTAL	**2457.02**	**12767.95**

7. 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;

Sl. 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

8. Further, apart from the above claims, the Petitioner has submitted that the following change in law events have 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:

Sl. No.	**Change in Law Events**
1.	Service Tax on Royalty of Coal
2.	Increase in base freight of coal transportation by Rail
3.	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

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

10. Against the above background, the Petitioner has filed the present Petition with 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 4 and 6 to make payment of Rs. 152.25 Crores 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, 3 and 4 through Respondent No. 6 under the PPAs dated 25.07.2013 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 pending final adjudication of the present petition, direct the Respondents to make payment of Rs. 137.02 Crores i.e. 90% of the already incurred amount by the Petitioner from 02.12.2016 to 31.12.2017 towards supply of power to the Respondents in order to ease the cash flow constraints faced by the Petitioner;

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

(g) pass such other and further order or orders as this Hon'ble Commission deems appropriate under the facts and circumstances of the present case."

Submissions by Petitioner and Respondents

11. The Petition was admitted on 29.5.2018 and the Commission issued notice to the parties. The Commission directed the Petitioner to file certain information. In compliance with the directions of the Commission, the Petitioner vide its affidavits dated 26.6.2018 has filed the information called for. Replies to the Petition have been filed by the Respondent, UPPCL for and on behalf of Respondents No. 1 to 5 (discoms of UP) vide affidavit dated 16.8.2018 and PTC vide affidavit dated 7.8.2018. However, Respondent Nos. 7 & 8 have not filed its reply to the Petition. Respondent No. 5, UPPCL, in its reply dated 16.8.2018, has submitted that the present Petition is not maintainable on the following grounds:

(a) There is no contractual relationship between the Petitioner and the Respondents 1 to 5 (Discoms in State of UP). The tariff in respect of PTC was adopted by UPERC under Section 63 of Act thereby conferring jurisdiction upon UPERC with respect to the disputes.

(b) Article 14.1.1 of the PPA dated 25.7.2013, entered into between the Petitioner and PTC (PTC-PPA) provides that "*The parties herein understand that this PTC-PPA is being entered into to enable PTC fulfil its obligations under the Procurers-PPA for continuous and uninterrupted supply of power to Procurer(s) under the Procurers-PPA*."

(c) The obligations and liabilities as contained in the UPPCL-PPA are largely of a binding nature between the Petitioner and PTC in terms of the PTC-PPA entered into between the Petitioner and PTC. But vice-versa is not applicable to the parties in the UPPCL-PPA between the Respondent no. 1 to 4 and PTC. Thus, provisions of PTC-PPA are not binding upon the Respondent no. 1 to 4.

(d) The provisions as contained in Article 14.1.1 and Article 14.3.1.1(b) of the PPA are completely covered by Section 64(5) of the Act in terms of the judgment of the Hon'ble Supreme Court in Energy Watchdog case. The parties to the UPPCL-PPA dated 25.7.2013 had subjected themselves to the jurisdiction of UPERC which has adopted the tariff.

(e) In the present case, UPERC has adopted the tariff under Section 63 of the Act and parties are legally obliged to abide by the terms and conditions of the PPA which includes the jurisdiction of the Courts at Lucknow, in case of disputes between the Procurers and Sellers.

12. During the course of hearing dated 21.8.2018, learned counsel for UPPCL has also raised the issue of maintainability of this Petition. After hearing the parties, the Commission reserved the Order in the matter.

13. The Petitioner, vide its affidavits dated 7.9.2018, has submitted as under:

(a) The tariff in PPA was determined through competitive bidding process as per "Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees" issued by the Ministry of Power, Government of India under Section 63 of the Act. The tariff discovered through competitive bidding was adopted by UPERC under Section 63 of the Act and was agreed by the UP Discoms and PTC.

(b) The adoption of the tariff under Section 63 of the Act is different from the tariff order under Section 64 of the Act. Under Section 64 of the Act, the parties have option to approach the State Commission of the procurers' place, to issue the tariff order if the parties so agree. The case of the Petitioner is different as there is no tariff order under Section 64, but only adoption of the tariff under Section 63. In case of Section 64, it may be argued that the same State Commission which issued the tariff order can vary such order but in case of adoption of tariff there is no such provision under the Act and in case

of inter-State supply, the parties can approach the CERC to regulate and determine the tariff.

(c) Since in the instant case, the Petitioner is supplying power to more than one State, CERC has jurisdiction to exercise its power to regulate and determine the tariff in terms of the Hon`ble Supreme Court judgment in the case of Energy Watchdog v. CERC [(2017) 14 SCC]. Since, there is no tariff order of UPERC, this Commission has jurisdiction until parties jointly approach the UPERC to determine the tariff. This Commission in its order dated 19.12.2017 in Petition No. 229/MP/2016 (DB Power Ltd. v Tamil Nadu Generation and Distribution Corp Ltd &Ors.) at Paras 23 and 24 had held that in spite of adoption of tariff by the State Commission, CERC will have jurisdiction to regulate and determine the tariff.

(d) The Petitioner has filed the present Petition not only for determination of tariff but also for regulation of tariff. One of the claims raised by the Petitioner in the petition i.e. determination of tariff due to change in mine head of supplied coal are not covered by the regulations of the Central Government. For these matters also, this Commission has jurisdiction to determine and regulate the tariff under Section 79 of the Act as held by the Hon'ble Supreme Court at Para 20 of its judgment in the case of Energy Watchdog v. CERC, [(2017) 14 SCC]. The Petitioner has argued that since the Competitive Bidding Guidelines issued by the Central Government do not provide for a situation where the mine head for supplying coal gets changed, it is squarely covered by the aforesaid judgment of the Hon'ble Supreme Court.

(e) Since tariff is to be determined and regulated and the enhanced tariff would be payable by UP Discoms, apart from e Discoms, the UPPCL being the administrative head of the UP Discoms is a necessary party to the proceedings to regulate and determine the tariff. Notice for change in law was issued to PTC on 9 November 2017, and 5 January 2018, by the Petitioner in terms of the PPA. Therefore, the obligation to serve the notice on the Respondents has been fulfilled by the Petitioner. In the premises, this Commission has the jurisdiction to regulate and determine the tariff as per the powers vested in it by Section 79 of the Act. Accordingly, both the PPAs are to be read together.

14. The Respondent, UPPCL for and on behalf of Respondents 1 to 5 (Discoms of U.P) vide affidavit dated 22.10.2018 has submitted that that the Petitioner had submitted an affidavit before this Commission in Petition No. 77/MP/2018 for seeking to withdraw the said petition as it

seeks to contest its claims before State Commission i.e. UPERC. The Respondent also stated that the Petitioner has filed Petition No. 1341 of 2018 in UPERC wherein the Petitioner in its written submissions on Jurisdiction has stated that jurisdiction in relation to the disputes lies before the UPERC.Accordingly, the Respondents prayed to grant an opportunity to present their case prior to the finalization of the order by this Commission.

15. After consideration of the facts and circumstances of the matter, the matter was heard on 23.10.2018 wherein the UPPCL submitted that after reserving the order in the petition, certain new developments in UPERC with regard to the jurisdiction have come up and sought time to file its reply. UPPCL further requested to list the matter for hearing for which the Petitioner had no objection. Accordingly, the UPPCL was directed to file its reply in the matter.

16. UPPCL vide its affidavit dated 5.11.2018 has reiterated the submissions made on the issue of jurisdiction and on merit has submitted to disallow the claim of the Petitioner with regard to pass through of Coal Transportation Cost owing to Change of Allocation of Mines of Coal, Increase in Works Contract Service Tax Rate, Increase/ change in Prices of Diesel, Coal Sizing Charges and Surface Transportation Charges, Change in Electricity Duty on Auxiliary Consumption, Evacuation Facility Charges for dispatch of Coal by CIL and Increase in Cost due to Reduction in Supply of Coal by CIL and its Subsidiaries under Change in Law event in consideration of averments made in the counter affidavit.

17. The Petitioner in its rejoinder filed vide affidavit dated 16.11.2018 to the reply of UPPCL has reiterated the submissions made in the Petition and rejoinder.

18. During the course of hearing on 14.2.2019, learned counsel for the Petitioner submitted that the Petitioner has withdrawn the Petitions filed before UPERC.The Commission after

directing the parties to file their written submissions, reserved order in the Petition. In compliance with the above directions, only the Petitioner has filed its written submissions on 13.3.2019.

19. The Petitioner vide its written submission dated 12.3.2019 has referred to the judgment of the Hon`ble Supreme Court in the case of Energy Watchdog Vs. CERC and has submitted that this Commission has the jurisdiction to exercise its powers to regulate and determine the tariff. generally reiterated the facts submitted earlier in the matter.

Analysis and Decision

20. After consideration of the submissions of the Petitioner and the Respondents, UPPCL/UP Discoms, the following issues emerge for our consideration:

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

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

Issue No. 3: What is the scope of Change in law in the PPA?

Issue No. 4: Whether compensation claims are admissible under Change in Law?

Issue No. 5: What should be the mechanism for processing and reimbursement of admitted claims under Change in Law?

21. No other issue was pressed or claimed. We now discuss the issues and examine the claims of the Petitioner.

22. The chronological dates of events with regard to UPPCL-PPA are as under:

Power Supply to	**UPPCL under Long term (390 MW)**
Cut-off date	17.9.2012
Date of submission of bid	24.9.2012
PPA executed on	25.7.2013
Start of supply of power	a) from 2.12.2016 for 150 MW b) from 17.5.2017 for 390 MW

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

23. The Petitioner has submitted that it has a composite scheme for generation and sale of power in more than one State as contemplated in Section 79(1)(b) of the Act. The Petitioner has submitted that the project located in the State of Chhattisgarh is generating electricity and supplying power to the UPPCL/ UP Discoms through PTC, by virtue of the PTC-PPA dated 25.7.2013 and to the State of Chhattisgarh. Accordingly, in line with the judgment of the Hon`ble Supreme Court in Energy Watchdog Case [(2017)14 SCC 80], any dispute relating to tariff shall be under the jurisdiction of this Commission. Per contra, the Respondent, UPPCL has submitted that the UPPCL-PPA dated 25.7.2013 executed between the Discoms of UP and PTC was approved by the Uttar Pradesh Electricity Regulatory Commission (UPERC) and hence it has the jurisdiction to decide the present case. The Respondent has further submitted that since the UPPCL-PPA has been approved by UPERC, it is squarely covered by the provision as contained in Section 64(5) of the Act. Therefore, UPERC is the appropriate Commission to adjudicate upon issues arising out of the UPPCL-PPA.

24. We have considered the submissions of the parties. As stated in earlier part of this Order, the Petitioner is supplying power to the host State of Chhattisgarh (through CSPTCL) and to the Discoms of the State of UP/ UPPCL from its power project situated in State of Chhattisgarh. It is, therefore, evident that the Petitioner is supplying electricity to more than one State from the same generating station and such supply is governed by binding arrangements, namely the PPAs/ PSAs. Sub-section (b) of Section 79 (1) of the Act provides that the Central Commission shall regulate the tariff of a 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 in 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 generatingcompanies must enter into or otherwise have a "composite scheme". This makes it clear that the expression "composite scheme" does not have somespecial 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."

25. Thus, in terms of the above judgment, the Hon`ble Supreme Court while interpreting the term "composite scheme" under Section 79(1)(b) of the Act held that this Commission has the jurisdiction to regulate the tariff of generating stations having a composite scheme for generation and sale of power to more than one State. Since the Petitioner, TRN Energy is supplying power to multiple States through PPAs, 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, we are of the 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) & 79(1)(c) read with 79(1)(f) of the Act. Accordingly, contention of UPPCL/ UP Discoms that this Commission does not have jurisdiction, is rejected and hence, the Petition is maintainable.

26. The issue whether the supply of power by a generating company to a trading licensee and supply of the said power by the trading licensee to the distribution companies through back to back arrangement shall be subject to the regulatory jurisdiction of the Regulatory Commission arose for consideration in Appeal No.15/2011 (Lanco Power Limited v Haryana Electricity Regulatory Commission) before Appellate Tribunal for Electricity (APTEL) and in OMP 677 of 2011 [PTC India Limited Vs. Jaiprakash Power Ventures Ltd.] before Hon'ble High Court of Delhi. In Appeal No.15/2011 before APTEL, Lanco Power Limited had a PPA with PTC and PTC had a back to back PSA with Haryana Utilities. Lanco Power Limited raised a preliminary objection that since power was supplied by the generator to PTC which is a trader, the Haryana Electricity Regulatory Commission would not have jurisdiction to determine the tariff. The APTEL after considering the provisions of Sections 79, 86 and 66 of the Act, in its judgment dated 4.11.2011 has observed as under:

> *"21. So, the combined reading of the above provisions brings out the scheme of the Act. A trader is treated as an intermediary. When the trader deals with the distribution company for re-sale of electricity, he is doing so as a conduit between generating company and distribution licensee. When the trader is not functioning as merchant trader, i.e. without taking upon itself the financial and commercial risks but passing on the all the risks to the Purchaser under re-sale, then there is clearly a link between the ultimate distribution company and the generator with trader acting as only an intermediary linking company*
>
> *.....*
>
> *61. It cannot be debated that the whole scheme of the Act is that from the very generation of electricity to the ultimate consumption of electricity by the consumers is one interconnected transaction and is regulated at each level by the statutory Commissions in a manner so that the objective of the Act are fulfilled; the electricity industry is rationalized and also the interest of the consumer is protected. This whole scheme will be broken if the important link in the whole chain i.e. the sale from generator to a trading licensee is to be kept outside the regulatory purview of the Act. If such a plea of the Appellant is accepted, the same would result in the Act becoming completely ineffective and completely failing to serve the objective for which it was created.*

27. In OMP No. 677/2011 (PTC India Limited v Jaiprakash Power Ventures Limited), PTC had challenged the Arbitral Award dated 28.4.2011 in the dispute between PTC and Jaiprakash Power Ventures Limited under Section 34 of the Arbitration and Conciliation Act, 1996. One of the issues framed by the Hon'ble High Court of Delhi was whether the decision of the majority of

the Tribunal that CERC had no power to determine the tariff for electricity supplied by a generating company to a trading licensee suffered from patent illegality or was otherwise opposed to public policy. The Hon'ble High Court after examining the relevant provisions of the Act, the Statement of Reasons of the Act and the various decisions of the Hon'ble Supreme Court and Appellate Tribunal observed in its judgment dated 15.5.2012 as under:

"52. In order to examine the above issue, first the relevant portion of the SOR of the EA requires to be referred to. Paras 4(ix) and (x) of the SOR acknowledge that under the EA, trading in electricity was for the first time being recognized as a distinct activity. The said clauses read as under: "(ix) Trading as a distinct activity is being recognized with the safeguard of the Regulatory Commissions being authorised to fix ceilings on trading margins, if necessary. (x) Where there is direct commercial relationship between a consumer and a generating company or a trader the price of power would not be regulated and only transmission and wheeling charges with surcharge would be regulated."

53. A careful reading of Clause 4(x) of the SOR shows that it talks of direct commercial relationship between (i) a consumer and a generating company; (ii) a consumer and a trader. In the chain of supply of electricity, it is possible that a generating company makes a direct supply to a consumer. Sometimes, a trader could also be an intermediary in the supply by the generating company to the consumer. Such supplies would not be regulated by the appropriate Commission. Where there is a direct transfer of electricity from either the generating company to the consumer or from a trader to the consumer then the tariff would not be subject to regulation. However, where a trader or trading licencee sells electricity to a distribution licensee which in turn supplies to the consumer, the tariff would be subject to regulation.

xxxxx

55. The words "supply of electricity by a generating company to a distribution licensee" occurring in Section 62 would, in the above context, envisage apart from a direct supply from a generating company to a distribution licensee, also a supply from a generating company to a trading licensee who in turn sells to a distribution licensee. The trader could intervene either in the supply by a generating company to a consumer or he could intervene in the supply by a generating company to the distribution licensee. The latter transaction would certainly form the subject matter of regulation by the appropriate Commission within the meaning of Section 62 read with Para 4 (x) of the SOR.

56. It appears inconceivable that where a trading licensee is selling to a distribution licensee and not directly to a consumer, the tariff for such a supply by the generating company to the trading licensee would not be amendable to the regulatory jurisdiction of CERC or SERC under Section 62 of the EA. An interpretation to the contrary would defeat the rights of the consumers which are intended to be protected by the CERC and SERCs. The only freedom was given to the direct commercial relationship between a generating company and consumer where presumably there would be bulk consumption by such consumer. However, in cases like the present one where the trader is selling electricity to a distribution licensee who is eventually selling or supplying electricity to the consumer, the tariff would necessarily have to be regulated. Otherwise, every generating company would route the sale of electricity through a trading licensee to evade the applicability of the regulatory framework EA."

xxxx

64. The Tribunal in the present case did not discuss the changed legal position as a result of the decisions of the APTEL subsequent to Gajendra Haldea and Lanco I in light of the altered decisions of the Supreme Court including the one in the GUVNL case. It went by only a literal and not a purposive and contextual interpretation of Section 62 EA. The majority of the Tribunal was, therefore, in error in holding that the transaction involving supply by a generating company to a trading licencee was outside the purview of regulation by the CERC under Section 79 (1) (f) read with Section 62 of the Act."

28. The above judgement was challenged before the Division Bench of the Hon'ble High Court of Delhi in FAO (OS) No. 244/2012 (Jaiprakash Power Venture Pvt Limited v PTC India Limited). Subsequently, the said FAO was withdrawn and there was no further challenge to the judgement dated 15.5.2012 in OMP No. 677/2011. The decision in the said OMP has attained finality which clearly provides that when power is supplied through a trading licensee to a distribution licensee for ultimate consumption of consumer, the tariff has to be regulated by the Regulatory Commissions. Since in the present case, electricity is supplied from the generating station of the Petitioner to the Discoms of UP through PTC based on back to back arrangements, such supply of power shall be subject to regulatory jurisdiction of this Commission, including adjudication of any disputes with reference to supply of such power and the tariff thereof.

29. APTEL in Lanco Power Ltd v Haryana Electricity Regulatory Commission has taken the view that when power is supplied to a trading licensee which has back to back arrangement for supply of the same power to the distribution licensees, the Appropriate Commission has the power to determine the tariff. The Hon'ble High Court of Delhi in PTC India Ltd v Jaiprakash Power Ventures Ltd has categorically held that when the trading licensee intervenes in the process of supply of electricity by a generating company to the distribution licensee, the transaction would be subject matter of regulation under Section 62 of the Act. In the context of JP Power Venture Ltd, the High Court has held that the transactions involving the supply of power by the generating company to PTC would be regulated by CERC since PTC is selling the power to the distribution licensees for eventual supply to the consumers. It is pertinent to mention that this Commission relying on the judgement of Hon'ble High Court had decided the jurisdiction of this Commission in case of supply of power by GMR Kamalanga Ltd to Haryana Utilities through PTC India Limited. The jurisdiction of the Commission was upheld by the Appellate Tribunal in its judgement dated 7.4.2016 against which GRIDCO filed Civil Appeal No.

5415/2016. The Hon'ble Supreme Court in its judgement dated 11.4.2017 in Energy Watchdog case upheld the jurisdiction of the Commission.

30. In the present case, the Petitioner has entered into PPA with PTC (PTC-PPA) for supply of power to the Respondent, Discoms of UP through back to back PPA (UPPCL-PPA) and accordingly, PTC has supplied power to the Discoms of UP. Therefore, in the light of the settled legal position and the factual matrix of the present case, we hold that the Petition filed by the Petitioner for adjudication of the disputes by this Commission with regard to 'Change in Law' claims is maintainable under Section 79(1)(b) read with section 79(1)(f) of the Act.

31. The Respondents, Discoms of UP have also contended that in terms of Article 14.1.1 of the UPPCL-PPA, any legal proceedings in respect of any matters, claims or disputes under the PPA shall be under the jurisdiction of the appropriate Courts in Lucknow and accordingly the UPERC only has the jurisdiction to adjudicate the disputes under the PPA. Article 14.3.1.1(a) provides for the following:

> *"Where CERC is the Appropriate Commission, any dispute arising from a claim made by any party for any change in or determination of 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 such claims could result in change in tariff, shall be subjected to adjudication by the Appropriate Commission….."*
>
> We notice that Article 14.3.1 provides for Dispute Resolution by the 'Appropriate Commission'.

32. As stated earlier, the generating station of the Petitioner has a composite scheme for supply of power in more than one State. Hence, the 'Appropriate Commission' in terms of Article 14.3.1.1(a) would be Central Commission to deal with any of the claims/ disputes raised by the Petitioner under the PPA dated 25.7.2013. The submissions of the Respondents, UP Discoms are, therefore, rejected.

33. The Respondents, Discoms of UP have referred to the findings of the Hon'ble Supreme Court in the Energy Watchdog judgment as regards Section 64(5) of the Act and have contended that the State Commission (UPERC) only has jurisdiction in the matter. Section 64(5) of the 2003 Act provides as under:

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

34. With regard to Section 64(5), the Hon'ble Supreme Court in its judgment dated 11.4.2017 had observed the following:

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

35. In our view, the findings of the Hon'ble Supreme Court on Section 64(5) do not in any manner support the argument of the said Respondents that the State Commission (UPERC) will have jurisdiction in matters relating to inter-State supply of power. In the above quoted Para, the Hon'ble Supreme Court has observed that the non-obstante clause in Section 64(5) clearly indicates that in case of inter-State supply, transmission and wheeling, the Central Commission alone has the jurisdiction. Notwithstanding the jurisdiction being with Central Commission, by application of the parties concerned, the jurisdiction can be given under Section 64(5) to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity. "By application of the parties concerned" would mean the parties to the inter-State supply in terms of Section 64(5) of the Act i.e. parties to the inter-State supply involving territories of two States. In the present case, the Petitioner has entered into PPA for generation and supply of power to more than one State i.e. State of UP and the State of

Chhattisgarh. Accordingly, in respect of the UPPCL-PPA dated 25.7.2013, the Respondent, Discoms of UP have invoked the jurisdiction of the State Commission (UPERC) for adoption of tariff in terms of the said PPA. By no stretch of imagination can the said Petition be construed as a joint application by parties under Section 64(5) for invoking the jurisdiction of the State Commission. In our considered view, Section 64(5) has no application in cases of tariff discovered under competitive bidding process and adopted by the Commission under Section 63 of the Act. In view of this, we find no merit in the submission of the Respondent Discoms of UP and accordingly the same is rejected.

36. Having rejected the objections of the Respondent Discoms of UP as above and having held that the Petition filed by the Petitioner is maintainable, we proceed to examine the issues raised by the Petitioner, on merits.

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

37. The claim of the Petitioner in the present petition pertains to Change in law events related to the Petitioner-PPAs (UPPCL-PPA and PTC-PPA) dated 25.7.2013. The cut-off date for consideration of any claim for change in law, namely 7 days before the bid deadline, is 17.9.2012 as the last date for bid submission was 24.9.2012. Article 10.4 of the UPPCL-PPA envisages notification of Change in Law events, respectively to the Procurer. Article 10.4 of the UPPCL-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."

38. The Petitioner has submitted that it informed Respondents about the occurrence of events under Change in Law which were not prevalent at the time of submission of bid and their impact on the supply of power in terms of the PPAs vide notice ref no. TRN/PTC/17-18/2651 dated 9.11.2017 and notice ref no. TRN/PTC/17-18/2700 dated 5.1.2018. None of the involved parties i.e. Respondent No. 1 to 6 has responded to Change in Law notices of the Petitioner. Therefore, the Petitioner is constrained to file the present petition.

39. We have considered the submissions of the Petitioner. Under Article 10.4 of the PPA, the Petitioner is required to give notice about occurrence of Change in Law events as soon as reasonably practicable after being aware of such events which occurred after 17.9.2012 (i.e. 7 days prior to the Bid deadline date). The Petitioner has given notices dated 9.11.2017 and 5.1.2018 to Respondent No. 1 to 6 indicating the events under Change in Law. In the said notices, the Petitioner has apprised Respondent No. 1 to 6 about the occurrence of Change in Law events and the impact of such events on tariff. *In toto*, neither UPPCL nor PTC has responded to the claim made by the Petitioner. In view of the above, it can be inferred that the Petitioner has complied with the requirement of notice under 10.4 of the PPA.

Issue No.3: What is the scope of Change in law in the PPA?

40. The claims of the Petitioner are with respect to events under Change in Law under Article 10 of the PPAs. Article 10 of the PPAs (PTC-PPA and UPPCL-PPA) 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 additionalrecurring/ 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 Sellershall be payable only if the decrease in revenue or increase in expenses of the Seller isin excess of an amount equivalent to 1% of the value of the Letter of Credit in aggregatefor the relevant Contract Year.

10.3.3 For any claims made under Article 10.3.1 and 10.3.2 above, the Seller shallprovide to the Procurer and the Appropriate Commission documentary proof of suchincrease /decrease in cost of the Power Station or revenue/expense for establishing theimpact of such Change in Law.

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

41. Article 14 of the PPAs provides for dispute resolution 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."

42. A combined reading of the above provisions would reveal the events broadly covered under Change in Law as under:

(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 UPPCL 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 UPPCL Discoms, subject to rights of appeal provided under the Act.

43. 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."

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

"Indian Governmental Instrumentality" shall mean the Government of India, Governments of state(s) of Uttar Pradesh, New 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 Governments or both, any political sub-division of any of them including any court or Appropriate Commissions or tribunal or judicial or quasi-judicial body in India but excluding the Seller and the Procurers."

45. As per the above definitions, 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 Uttar Pradesh, 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 PPAs.

46. In the light of above and in view of the broad principles discussed above, we proceed to deal with the claims of the Petitioner under Change in Law during the Operating Period. Accordingly, based on the submissions and documents available on record, we proceed to examine the claim of the Petitioner as stated in the subsequent paragraphs.

Issue No.4: Whether compensation claims are admissible under Change in Law?

I. <u>Increase in coal cost on account of change in law events</u>

(A) <u>Royalty on Coal</u>

47. The Petitioner has submitted that as on cut-off date i.e. 17.9.2012, the rate of royalty on coal fixed by the Government of India ('GoI'), Ministry of Coal ("MoC"), vide Notification No. G.S.R. 349 (E) dated 10.5.2012, was @ 14% of the base price of coal. Subsequently, the Ministry of coal 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, Ministry of Coal 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. The above amount was imposed in addition to the royalty to be paid towards the District Mineral Foundation (DMF) of the district in which the mining operation is carried out. 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 (NMET). The Petitioner has further stated that the above notifications pertaining to base price of coal, royalty and additional levy fall under Change in Law events within the meaning of Article 10 of the Petitioner-PPAs 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 have been stated 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

48. We have considered the submissions made by the Petitioner. 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."

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

> "Amount of Contribution to be made to District Mineral Foundation.- Every holder of mining lease or a prospecting licence-cum-mining lease, in addition to royalty, pay to the District Mineral Foundation of the district in which mining operations are carried on, an amount at the rate of-
>
> (a) ten percent of the royalty paid in terms of the second schedule to the Mines and Minerals (Development and Regulation) Act, 1957 (57 of 1957)
>
> (herein referred to as the said Act) in respect of mining leases or, as the case may be, prospective licence-cum-mining lease granted on or after 12th January, 2015; and
>
> (b) thirty percent royalty paid in terms of the Second Schedule to the said Act in respect of mining leases granted before 12th January, 2015."

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

49. The case of the Petitioner is covered under the above order of the Commission. Therefore, the levy of royalty @2% on National Mineral Exploration Trust and royalty @30% 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 ₹640/MT to ₹810/MT. In terms of the judgment of APTEL 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. APTEL 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. It is clarified that the Petitioner shall be entitled to recover 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 applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of electricity to UP 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 change in law.

(B) <u>Service Tax on Royalty of Coal</u>

50. The Petitioner has submitted that Government of India 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 notifications pertaining to service tax on royalty of coal are covered under Change in Law events within the meaning of Article 10 of the PPAs 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. Since the said change in law event has occurred after the cut-off Date, the Petitioner has requested that the same may be allowed as the increased expenditure on account of the same is likely to be incurred in future.

51. We have considered the submissions made by the Petitioner. Regarding the claim of service tax on royalty of coal, the Commission has examined and dealt 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.

52. 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 it till the date of filing of 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 on account of service tax on royalty of coal 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 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) <u>Increase in Niryat kar</u>

53. 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. The Petitioner has submitted that 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, there has been an increase in the Niryat kar imposed upon the Petitioner. The Petitioner has submitted that the claim on account of levy of Niryat Kar from 2.12.2016 to 31.3.2017 is Rs. 1.07 lakh and the reduction in claim from 1.4.2017 to 31.12.2017 is Rs.1.59 lakh.

54. The Commission vide ROP of hearing dated 29.5.2018 directed the Petitioner to submit documentary evidence for increase in impact of Niryat kar. The Petitioner vide its affidavit dated 26.6.2018 has submitted the sample invoice dated 28.2.2017 (G11) of SECL under the corresponding Delivery Order wherein an amount of Rs. 4,107 has been charged over quantity of 2,310.26 MT of coal @0.2% of coal value and Sizing charges (coal value =Rs. 1,871,810 and Sizing Charges =Rs. 182,511). The Niryat kar rate works out to Rs. 1.778 per MT as compared to the bid date rate of Rs. 0.70 per MT.

55. We have gone through the submissions made by the Petitioner. 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, Chhattisgarh 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. 17.9.2012) nor any Indian Government Instrumentality has brought any kind of notification/ amendment to the prevailing circular of Niryat Kar.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.

56. 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 PPAs 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 Change in Infrastructure Development Cess.

(i) Increase in Environment Cess/ Paryavaran Upkar

57. The Petitioner has submitted that as on cut-off date i.e. 17.9.2012, the Government of Chhattisgarh under Section 4 read with Schedule II of the Chhattisgarh (Adhosanrachna Vikas Evam Paryavaran) Upkar Adhiniyam, 2005, imposed Environment Cess of Rs. 5 on each MT of annual dispatch of coal. The above rate vide SECL letter dated 19.08.2015 was subsequently increased from Rs. 5 per MT to Rs. 7.50 per MT which was imposed w.e.f. 16.6.2015. This increase in Chhattisgarh Paryavaran Upkar notified by SECL was based on the decision of Govt. of Chhattisgarh which was subsequently published in the Notification No. 469 dated 18.09.2015 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 PPAs.The Petitioner has claimed Rs. 3.65 lakh from 2.12.2016 to 31.3.2017 and Rs.17.32 lakh for the period from 1.4.2017 to 31.12.2017 on account of levy of Environment Cess/ Paryavaran Upkar.

(ii) Change in Infrastructure Development Cess

58. The Petitioner has submitted that as on cut-off date i.e. 17.9.2012, the Government of Chhattisgarh under Section 3 read with Schedule I of the Chhattisgarh (Adhosanrachna Vikas Evam Paryavaran) Upkar Adhiniyam, 2005, imposed Infrastructure Development Cess of Rs. 5 on each MT of annual dispatch of coal. However, w.e.f. 16.6.2015, which is after the Cut-off

date, the above Cess was revised to Rs. 7.50 per MT of coal dispatched. The revision in the Infrastructure Development Cess was communicated to the Petitioner vide letter dated 19.08.2015 issued by SECL. 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 PPAs. The Petitioner has claimed Rs. 3.65 lakh from 02.12.2016 to 31.03.2017 and Rs.17.32 lakh for the period from 01.04.2017 to 31.12.2017 on account of levy of Infrastructure Development Cess/ Vikas Upkar.

59. 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 as change in law events vide 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....."*

60. In light of the above decision of the Commission, the Petitioner is also entitled for reimbursement of the expenditure incurred on this account. The Petitioner is directed to furnish a certificate from the Auditor certifying the expenses in this regard to UPPCL/ UP Discoms for claiming the expenditure under Change in Law. It is clarified that the Petitioner shall be entitled to recover on account of Infrastructure Development Cess and Environment Cess in proportion to the 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.

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

61. The Petitioner has submitted that as on cut-off date i.e. 17.9.2012, 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 30.06.2010. 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 29.02.2016 communicated that Clean Energy Cess, re-named as Clean Environment Cess was 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 an amount of Rs. 511.22 lakh from 2.12.2016 to 31.3.2017 and Rs. 2424.46 lakh from 1.4.2017 to 31.12.2017 on account of increase in Clean Energy Cess on coal.

62. 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 aforementioned Clean Energy Cess w.e.f. 1.7.2017. However, the levy of cess still continues under the 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.

63. 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 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

64. 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 the Petitioner-PPAs. As on the cut-off date i.e. 17.9.2012, 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 Order date 7.4.2017 in Petition No. 112/MP/2015 (GKEL & anr vs BSPHCL & anr). The Commission vide order dated 1.2.2017 in Petition No. 8/MP/2014 (EMCO Energy Ltd Vs MSEDCL &ors) had allowed 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 7.4.2017 in Petition No. 112/MP/2015 (GKEL & anr vs BSPHCL & anr) is extracted as under:

"29. We have considered the submissions of the Petitioners and Prayas. Clean Energy Cess on domestic coal was introduced at the rate of Rs. 100 per tonne by Section 83 of the Finance Act, 2010. Further, the Ministry of Finance, Government of India by Notification No. 3 of 2010 dated 22.6.2010 exempted the Clean Energy Cess over and above Rs. 50 per tonne. By Notification No. 20 of 2014 dated 11.7.2014, Government of India rescinded the Notification No. 3 of 2010 and made Clean Energy Cess payable at the rate of Rs. 100 per tonne. By Section 166 of the Finance Act, 2015, Tenth Schedule of the Finance Act, 2010 was amended to increase the Clean Energy Cess to Rs. 300 per tonne. However, by Notification no. 1 of 2015 dated 1.3.2015, Government of India exempted the Clean Energy Cess over and above Rs. 200 per tonne. By Clause 232 of the Finance Bill, 2016, Clean Energy Cess has been renamed as Clean Environment Cess and increased to Rs. 400 per tonne which came into effect from 1.3.2016. The Clean Energy Cess applicable at different points of time is given in the table below:

From	To	Applicable Clean Energy Cess (Rs./tonne)
22.6.	10.7.	50

11.7.	28.2.	100
1.3.2	29.2	200
1.3.2	Till	400

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

65. The above decision is also applicable in the case of the Petitioner. Therefore, increase in Clean Energy Cess (later renamed as Clean Environment Cess) on coal is admissible to the Petitioner as a Change in Law event under Article 10 of the PPAs. Accordingly, the Petitioner is entitled to recover such increase in Clean Energy Cess from the UP Discoms as per applicable rate of Clean Energy Cess in proportion to the coal as per the parameters of the applicable Tariff Regulations of this Commission or coal actually consumed, whichever is lower, for generation and supply of electricity to UP Discoms. 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 in case of UP Discoms 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.

66. 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.

(F) Change in Forest Tax

67. The Petitioner has submitted that as on cut-off date i.e. 17.9.2012, there was no levy of Forest Tax. Thereafter, Forest Department of 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 an amount of Rs.18.77 lakhs from 1.4.2017 to 31.12.2017 on account of increase in levy of Forest Tax. 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 as stating that it did not meet the criteria under Change in Law. This decision of RERC was challenged before APTEL by Adani Power wherein APTEL in its judgment dated 14.08.2018 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 10.1.1 of 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."

68. As per the above decision of the APTEL, Forest Tax constitutes change in law event. No Forest Tax existed as on cut-off date of 17.9.2012. 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.

69. Accordingly, the Petitioner is entitled to recover such levy and subsequent increase in Forest Tax from the UP Discoms as per applicable rate(s) of Forest Tax based on the relevant date(s) in proportion to the coal as per the parameters of the applicable Tariff Regulations of this Commission or actually consumed whichever is lower, for generation and supply of electricity to UP 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 UP Discoms.

(G) <u>Change in the components of Central Excise Duty</u>

70. The Petitioner has submitted that as on cut-off date i.e. 17.9.2012, 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 Coalfields 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. 1.3.2015. SECL has intimated this 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 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 submitted that the claim on account of change in Central Excise Duty from 2.12.2016 to 31.3.2017 is Rs. 29.75 lakh and the reduction in claim from 1.4.2017 to 31.12.2017 is Rs. 280.09 lakh.

71. We have considered the submissions of the Petitioner and the relevant documents placed on record. Pursuant to the Commission's directions vide RoP dated 29.5.2018, 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 Central 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 25.6.2018 has clarified as under:

> *"Please refer your letter C. No. TRN/BSP/18/06/10079 dtd.14.6.2018 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. Niryatkar*
> *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."

72. 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.

73. 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 Limitedin 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 had 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 assesse 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 assesse 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, NiryatKar, 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."*

74. The above decision is applicable in case of the Petitioner also. We, therefore, allow all the components mentioned by the Office of the Assistant Commissioner, CGST & Central Excise, Division Bilaspur, Chhattisgarh in its letter dated 25.6.2018 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 regarding 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. The Petitioner shall be entitled to recover the Excise 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 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 Excise Duty.

(H) <u>Increase/ Change in Entry Tax on account of changes in the individual components of such Tax</u>

75. The Petitioner has submitted that as on the cut-off date i.e. 17.9.2012, 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, has 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 2.12.2016 to 31.3.2017 is Rs. 3.03 lakh and the reduction in claim from 1.4.2017 to 31.12.2017 is Rs.61.71 lakh.

76. We have considered the submissions of the Petitioner. The Commission vide RoP dated 29.5.2018 directed the Petitioner to submit documentary proof with respect to increase in Entry Tax. However, the Petitioner in its affidavit dated 26.6.2018 has referred to the Annexure P23 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 incidence 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.

77. Further, it has been observed that the Petitioner has claimed reduction due to Entry tax to the tune of Rs. 64.74 lakh (Rs. 3.03 lakh from 2.12.2016 to 31.3.2017 and Rs. 61.71 lakh from 1.4.2017 to 31.12.2017). Accordingly, it is directed that the benefits arising due to reduction in Entry tax shall be passed on to the beneficiaries.

(I) <u>Increase/ Change in Value Added Tax (VAT) on account of changes in individual components of such Tax</u>

78. The Petitioner has submitted that as on cut-off date i.e. 17.9.2012, 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, with the change in the rate at which the aforesaid components are levied, there has been an overall impact on the net tax outflow 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 the PPAs. The Petitioner has submitted that 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 2.12.2016 to 31.3.2017 is Rs. 45.92 lakh and the reduction in claim from 1.4.2017 to 31.12.2017 is Rs. 0.57 lakh.

79. We have examined the matter. The Commission vide RoP of hearing dated 29.5.2018 directed the Petitioner to place on record the documentary evidence for increase in VAT. The Petitioner vide its affidavit dated 26.6.2018 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 the case of 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."*

80. 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 PPAs. The Petitioner shall be entitled to recover increase/ change in Value Added Tax (VAT) 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 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 Value Added Tax (VAT).

(J) Increase in Sizing/ crushing Charges and Surface Transportation Charges by Coal India Limited

(i) Increase in Sizing/ Crushing charges

81. 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 00:00 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 31.08.2017, 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 2.12.2016 to 31.3.2017 is Rs. 26.29 lakhs and from 1.4.2017 to 31.12.2017 is Rs.125.87 lakhs.

(ii) Increase in Surface Transportation Charges

82. The Petitioner has submitted that according to Price Notification no CIL/S&M/GM (F) /Pricing:1907 dated 26.02.2011, prevalent at the Cut-off Date, Surface Transportation Charge applicable as on 01.01.2012 was Rs. 77/MT. Thereafter, CIL vide Notification No. CIL/S&M/GM(F)/ Pricing/2340 dated 13.11.2013, which is after Cut-off Date, increased the Surface Transportation Charges to Rs. 116/MT, which was made applicable from 00:00 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 Surface Transportation Charges to Rs. 87/MT for distance between 3-10 km Category and introduced Surface Transport Charges @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.92.74 lakh.

83. The Respondent, UPPCL/UP Discoms in their reply dated 20.10.2018 has submitted that since the Petitioner has not placed on record the documents to prove that the notifications increasing Sizing Charges of coal and Surface Transportation Charges, have been issued pursuant to any Act of Parliament, these charges are not admissible under Change in law.

84. The issue pertaining to Sizing and Crushing Charges has been dealt by this Commission earlier in various Petitions. The Commission vide order dated 1.2.2017 in Petition No. 8/MP/2014 has already dealt with the issue of increase in Sizing and Crushing 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 dated22.2.2013 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 to250 mm or any other lower size, the purchaser shall pay sizing/crushing charges, as applicable and notified by CIL/seller from time to time."*

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

85. APTEL vide its judgment dated 14.8.2018 in Appeal No. 111 of 2017 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 portions of APTEL judgement dated 14.8.2018 in Appeal No. 111 of 17 (GMR Warora Energy Limited versus CERC &Ors) is extracted as under:

xiv. We consider that similar issues have been decided by this Tribunal in the Adani Judgement. In our opinion the findings of this Tribunal in the said judgement are directly applicable to the instant case. The relevant portion from the said judgement is reproduced below:

Sizing Charges:
"11. A

xvii. ..... The State Commission based on the order of CERC has held that increase in Sizing Charges for Coal is part of the methodology for the calculation of the cost of coal decided by CIL and merely CIL being Indian Government Instrumentality the change in method of charging made by it for coal pricing does not qualify for Change in Law event and dismissed the claim of APRL xviii. APRL has contended that the GoI under Sub Section 3 of the CC Rules, 2004 (notified under MMDR Act) has the power to categorise the coal including its classes, grades and sizes and the specifications for each such class, grade or size of coal and hence any change in sizing charges of coal by CIL an Indian Government Instrumentality qualifies for Change in Law event.

We observe that GoI under the said Rules have power to categorise the coal including its classes, grades and sizes and the specifications for each such class, grade or size of coal. Here the case is not that the GoI have changed the sizing of coal under the said Rules, the case is that CIL has changed the sizing charges for coal for sizes, which already existed as specified by the GoI. The change in sizing charges of coal by CIL is part of coal pricing mechanism. Further, in terms of the RFP, APRL was required to quote an all-inclusive tariff

including coal costs in escalable/ non-escalable components based on the risks perceived by APRL. Accordingly, this contention of APRL is misplaced.

xxiv. We have gone through the Schedule 8 (Quoted Tariff) of the PPA executed between the Discoms and APRL. After careful perusal of the same we find that the tariff quoted by APRL comprises of Non- escalable and escalable components of tariff elements viz. Capacity Charges, Energy Charges and Inland In view of our discussions as above, perusal of the Impugned Order and the order of the CERC quoted by the State Commission and the judgement of this Tribunal quoted by CERC, we are of the considered opinion that any change in sizing charges for coal must be reflected in the price of coal charged by CIL and gets covered in the CERC Escalation Rates for coal. We agree to the findings of the State Commission.

Accordingly, this issue is decided against APRL.

Transportation Charges :

xxiv.We have gone through the Schedule 8 (Quoted Tariff) of the PPA executed between the Discoms and APRL. After careful perusal of the same we find that the tariff quoted by APRL comprises of Non- escalable and escalable components of tariff elements viz. Capacity Charges, Energy Charges and Inland Transportation Charges. There is no separate component surface transportation charges either in the bid or in the standard bidding documents. We observe that APRL was supposed to consider all the cost inputs for generation of power in its bid as per the RFP. It is presumed that the surface transportation charges charged by CIL forms part of cost of coal and it was the responsibility of APRL consider the same in its bid appropriately.

xxv. In view of the above, we are of the considered opinion that any change in surface transportation charges must have been taken care by APRL in its quoted tariff appropriately. Accordingly, the contention of APRL that the increase in transportation charges which forms part of coal cost by an Indian Government Instrumentality i.e. CIL would be covered under Change in Law provision of PPA is misplaced. Accordingly, we do not find any infirmity in the decision of the State Commission on this issue.

Hence, this issue is answered against APRL/Appellant."

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."

86. In line with the above decisions of the Commission and APTEL, the claim of the Petitioner for relief under "Change in Law" in respect of Sizing/ Crushing Charges and Surface Transportation Charges of coal, is disallowed.

(K) Increase in base price of coal

87. The Petitioner has submitted that as per the PPAs, the Petitioner was under obligation to procure domestic coal for the purposes of supply of power to UPPCL/ UP Discoms through PTC. Accordingly, the Petitioner has been procuring domestic coal, of grades G10 to G12, from CIL and its subsidiaries from time to time. The Petitioner has submitted that 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 31.01.2012 (Rs. per/ tonne)
G10	780.00
G11	640.00
G12	600.00

88. However, pursuant to a subsequent price notification issued after Cut-off date, being Notification No. CIL: S&M:GM (F): pricing 235 dated 27.05.2013, the revised base price of coal was as follows:

GCV Band	Price notified vide notification dated 27.05.2013 (Rs. per/ tonne)
G10	860.00
G11	700.00
G12	660.00

89. Further, the base price of coal was revised vide Notification No.- 01:CIL: S&M:GM(F)/Pricing 2016/294 dated 29.05.2016. The notification came into effect from 30.05.2016. The revised base price of coal was as follows:

GCV Band	Price notified vide notification dated 29.05.2016 (Rs. per/ tonne)
G10	980.00
G11	810.00
G12	760.00

90. The Petitioner has submitted that net claim on account of increase in base price of coal after accounting 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.

91. We have examined the matter. The Petitioner has submitted that base price of coal was increased after the cut-off date i.e. 17.9.2012 pursuant to price notifications issued by the Coal India Limited from time to time. To ascertain the claim, FSA executed with SECL by the Petitioner on dated 23.11.2013 for supply of coal needs to be examined whether the increase in base price of coal falls under Change in law. Clause 9.1 of the FSA defines the Base Price of coal 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.*

92. 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 on 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.

The Petitioner has already quoted an escalable component of energy charges and is compensated for any revision in base price of coal through Escalation Index notified by the Commission. The Petitioner has stated that net claim on account of increase in base price of coal after accounting 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. The Escalation Index notified by the Commission is based on a methodology and does not take into account case of specific generating stations. Every bidder through competitive bidding process 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 take into account the possible revision in these charges while quoting the bid. Accordingly, the claim of the Petitioner on this account is disallowed.

II. Increase in cost due to Change in law events pertaining to Transportation of domestic coal

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

93. The Petitioner has submitted that after the cut-off date, Ministry of Railways, Government of India vide its Rate Circular No. 8 of 2015 dated 16.3.2015 increased freight from Rs. 150.20/MT to Rs. 205.6/MT. Therefore, there is an increase of Rs. 55.4/MT post the cut-off date. The Petitioner has submitted that 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.

94. We have considered the submissions of the Petitioner. As on the cut-off date i.e. 17.9.2012, 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 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."

95. 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) <u>Levy of Busy Season Charges and Levy of Development Surcharge</u>

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

97. We have examined the matter. The Busy Season Surcharge and Development Surcharge levied by Railway Board have been allowed as a Change in Law events by APTEL vide its Judgment dated 14.8.2018 in Appeal No. 111 of 2017 & IA No. 450 of 2018 (GMR Warora case). APTEL in its Judgment dated 14.8.2018 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."

98. In the light of above decision of APTEL, the claim of the Petitioner for relief on account of increase in Busy Season Surcharge and Development Surcharge is admissible as a Change in Law event under Article 10 of the PPAs. The Petitioner shall be entitled to recover the increase in Busy Season Surcharge and Development Surcharge 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 UP 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 Surcharge. The Petitioner is directed to furnish along with its monthly bill, the proof of payment and computations duly certified by the auditor to UPPCL Discoms.

(C) <u>Increase in Service Tax Rate and Imposition of Swachh Bharat Cess and Krishi Kalyan Cess on Railway freight</u>

99. 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 6.11.2015. Subsequently, the Government of India vide 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, they squarely fall within the purview of the principles enshrined under the provisions of Section 10 of the PPAs. 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. The Respondents have not filed its specific comments on this issue

100. We have considered the submissions of the Petitioner. Swachh Bharat Cess and Krishi Kalyan Cess have been imposed by an Act of Parliament on the taxable services at the rate of 0.5%. Section 119 (2) and (3) of the Finance Act, 2015 provides 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 (3) of the Finance Act, 2016 provides 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 its order dated 1.2.2017 in Petition No. 8/MP/2014 has dealt 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. 17.9.2012 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**
17.9.2012 (cut-off date)	12.36%		
1.10.2012	12.36%	3.708%	0%
1.6.2015	14.00%	4.200%	0.492%
15.11.2015	14.50%	4.350%	0.642%
1.6.2016	15.00%	4.500%	0.792%

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, and the same is a Change in Law event. Accordingly, the Petitioner shall be entitled to recover the above mentioned increase in Service Tax on transportation of coal from the UP Discoms as per applicable rate of Service Tax in proportion to the coal as per the parameters of the applicable Tariff Regulations of this Commission or on coal actually consumed, whichever is lower, for generation and supply of electricity to UP 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 UP 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 04.04.1995. Thereafter, as per the Chhattisgarh Electricity Duty (Amendment) Act, 2013 dated 01.08.2013, 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 12.08.2016 revised the rate of Electricity Duty from 15% to 10% w.e.f. 01.04.2016. 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 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 PPAs. The claim of the Petitioner on account of increase in levy of Electricity Duty on auxiliary consumption from 2.12.2016 to 31.3.2017 is Rs. 49.04 lakhs and from 1.4.2017 to 31.12.2017 is Rs. 271.24 lakhs.

107. The Respondents, UPPCL and UP Discoms have submitted that as on cut-off date, 15% MP electricity duty was in force which was subsequently reduced from 15% to 10% by the Government of Madhya Pradesh vide its Notification dated 1.4.2016. Therefore, the consequential benefits should be passed on the beneficiaries. The Respondents have further submitted that Discom tariff is reviewed annually and same was known to the Petitioner as on cut-off date. The Respondents have submitted that the Petitioner has not furnished

documentary proof regarding actual payment of Electricity Duty to the Government of Chhattisgarh and details of the calculations towards such electricity duty payable.

108. We have considered the submissions of the Petitioner and the Respondents. 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. 17.9.2012). 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 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 increase in 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.

109. 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 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."*

110. In the light of the decision 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 UPPCL/ UP 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 UPPCL Discoms. If any change in rate of Electricity Duty has benefitted the Petitioner, then the same needs to be passed on to the UP Discoms.

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

(A) New Coal Distribution Policy, 2013

111. The Petitioner has submitted that as per the Letter of Assurance (LOA) dated 3.7.2009, SECL had assured the Petitioner for supply of 100% of the normative requirement of coal. Thereafter, MoC vide a notification dated 26.7.2013, amended the New Coal Distribution Policy, 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 26.07.2013 has in fact regularized/ institutionalized the reduction of supply of coal, particularly the provisions of the Fuel Supply Agreement (FSA) dated 23.11.2013 and its amendment dated 28.06.2017. Further, Ministry of Power also endorsed the changes as above vide its letter dated 31.07.2013. 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 Petitioner has

submitted that 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 PPAs.

112. 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 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 Respondent No. 1 to 5 to recover compensation for the shortage of domestic linkage coal under Change in law due to revision in NCDP on 26.07.2013, which is falling short to generate electricity up to normative requirement of 85% compared to assured quantum at 85% availability/ PLF as per NCDP, 2007.

113. The Respondents have submitted that the Petitioner has not provided actual data of shortage in supply of linkage coal. It is only after the shortage is ascertained that the Petitioner may claim compensation. The Respondents have submitted that the actual generation has been significantly lower than the normative PLF of 85%. The Petitioner has not obtained any prior approval from the Procurer respondents toward purchase of coal outside the scope of linkage FSA coal. The Petitioner ought to have submitted a detailed break-up of the linkage coal received by it onerous to its various long term contracts and should demonstrate that the linkage coal should have been first utilized for meeting the PPA obligations with the Respondents in the instant case. The Respondents have submitted that the Commission in its order dated 19.12.2017 in Petition No.101/MP/2017 had approved a formulation for calculation for

compensation for shortfall of linkage coal. Such claims are not allowable as there is no shortage of coal.

114. The Petitioner vide its rejoinder dated 18.12.2018 has submitted that it has been allocated coal linkage for its long terms PPAs obligations. Since, the Petitioner is supplying power to other procurers apart from the Respondent, under long terms PPAs, the Petitioner utilizes the linkage coal as allocated to specific long term PPA under FSA. Therefore, the contention of the Respondents that the entire linkage coal available to the Petitioner under FSA ought to be utilized first for the PPA obligations with the Respondents is not correct. The methodology adopted by the Petitioner has also been upheld by the Commission in its order dated 20.3.2018 in Petition No. 105/MP/2017. The Petitioner has submitted that the Commission in its order dated 31.5.2018 in Petition No. 97/MP/2017 has upheld that the compensation on account of coal shortage is required to be worked out for the entire actual coal shortage and is not to be restricted to 65%, 65%, 67% and 75% of the ACQ during the years 2013-14, 2014-15, 2015-16 and 2016-17 onwards. Therefore, compensation on account of coal shortage is to be worked out for the entire actual coal shortage without imposing any restrictions in terms of any % of the ACQ. The Petitioner has submitted the details of increase in coal shortage due to reduction in supply of coal by CIL.

115. The Petitioner in its submission dated 12.3.2019 has further submitted that methodology for claiming compensation on account of domestic coal shortage under NCDP for supply of power to Procurers adopted by the Commission in its order dated 31.5.2018 in Petition No. 97/MP/2017, may be meted out to the Petitioner in the present matter and compensation on account of coal shortage is to be worked out for the entire actual coal shortage without imposing any restrictions in terms of any % of the ACQ and the Computation of relief due to shortage of domestic coal under Change in Law. According to the Petitioner, for computation of quantity of coal, the GCV as received of coal at the thermal generation station is required to be considered

along with the ground loss of the coal suffered by the Petitioner since the Commission, in Petition No. 97/MP/2017 while arriving at the actual cost of generation using alternate coal to mitigate domestic coal shortage, quantity of alternate coal, had considered along with the landed price of the alternate coal as certified by the Statutory Auditor. Learned counsel for the Petitioner during the hearing argued that it has procured coal through washery, e-auction, open market etc. and the same may be considered for pass through under change in law.

116. We have examined the submissions of the Petitioner and the Respondents. The Petitioner's case 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 PPAs. 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.

117. The Petitioner is supplying power to two State Discoms viz. CSPDCL of Chhattisgarh (5% of the net generated power) through Implementation Agreement dated 26.5.2015 and UPPCL Discoms (390 MW) under long term PPA dated 25.7.2013. The chronological dates of events with regard to bid submission/ cut-off date, execution of FSA under the long term PPA with UPPCL 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	3.7.2009	26,01,000 tonnes per annum
3	Cut-off date for UPPCL-PPA	17.9.2012	
4	Bid Submission date for UPPCL-PPA	24.9.2012	
5	PPA/ PSA executed with UP Discoms	25.7.2013	390 MW

S. No.	Particulars	Date of Event	Remarks
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 on	23.11.2013	26,01,000 tonnes per annum
8	Start of supply of power to UPPCL Discoms	2.12.2016	from 2.12.2016 for 150 MW and from 17.5.2017 for 390 MW

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

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

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

In the light of the above judgment, the claim of the Petitioner is admissible under Change in Law which eventually has occurred from 26.7.2013 and accordingly, the relief, if any, shall be granted from 26.7.2013 till 31.3.2017. However, the issue which needs to be considered as to whether the Petitioner was affected on account of non-availability/ short supply of linkage coal, if yes, 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”.

119. Perusal of LoA dated 3.7.2009 reveals that assured quantum is 2.601 MTPA for the Petitioner’s plant of capacity of 600 MW. However, in the FSA dated 23.11.2013, Annual Contracted Quantum (ACQ) has not been mentioned, only original LoA quantum of 2.601 MTPA has been indicated. Therefore, the Petitioner had assured quantity of coal at the time of submission of bid i.e. on 24.09.2012 for supply of power to UP Discoms. Subsequently, due to revision in quantum of coal under NCDP 2013, the ACQ was reduced to 75% for the year 2016-17. Since the Petitioner has only supplied 150 MW in the FY 2016-17 and also the NCDP 2013 was valid until 31.3.2017, the compensation on account of shortfall in coal shall be considered only for the supply of 150 MW for the period from 2.12.2016 to 31.3.2017. Accordingly, the Petitioner is eligible to get relief for the shortage of domestic linkage coal under Change in law due to revision in NCDP on 26.7.2013**.**

120. Now to determine the actual impact due to cut down in supply of domestic coal by SECL, we require to know the actual requirement of coal during FY 2016-17 onwards and the actual quantity of coal supplied by SECL. Since, the Petitioner has not provided the details of linkage coal actually received from SECL during FY 2016-17 onwards corresponding to UPPCL power generation, it would be difficult to predict whether there was shortfall in actual. In the absence of the necessary documents, we are giving the formulation for calculation of compensation as per the Energy Charge Rate (ECR) for Scheduled Generation at delivery point. However, the

compensation shall be paid by the Respondents only if the actual coal received is less than the assured quantum of coal specified in the LoA or the quantum of coal required to generate minimum of scheduled generation or actual generation, whichever is lower. We are of the view that the present matter is adjudicated based on its merits which vary from case to case basis. The normative parameters considered by the Petitioner and approved in this order are based on the normative parameters specified in the applicable Tariff Regulations of this Commission. The Commission after extensive stakeholders" consultation has specified the normative parameters like SHR and Auxiliary Energy Consumption, etc. in the Tariff Regulations. Therefore, it would be appropriate to consider the normative parameters specified in the applicable Tariff Regulations of this Commission as a reference point instead of parameters suggested by UPPCL/ UP Discoms. The formulation to be adopted for computation of compensation due to coal shortage has been given as under:

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

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

Step - 3: ECR Chargeable (Delivery point) = {(G x ECR at Step - 1) + [ECR computed at Step - 2 x (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 imported x Qty imported) +(GCV e-auction x Qty e-auction)+(GCV others# x Qtyothers#) / (Qty imported + Qty e-auction + Qty others#)};

And

Weighted Average Price of Other Coal = {(Price $_{imported}$ x Qty $_{imported}$) + (Price $_{e\text{-}auction}$ x Qty $_{eauction}$) + (Price $_{others\#}$ x Qty $_{others\#}$) / (Qty $_{imported}$ + Qty $_{e\text{-}auction}$ + Qty $_{others\#}$)}

Step - 4: Compensation = {(ECR as computed at Step - 3 *minus* ECR Quoted) x Scheduled Generation at Delivery Point}.

Note:

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

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

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

4) Total Generation Ex-bus and Scheduled generation Ex-bus on month to 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) Other# implies "Coal procured through open market including but not limited to additional coal supplied by SECL (over and above regular linkage coal) through rail / road transportation mode (viz. "as-is-where-is" basis coal, coal through washery circuit, beyond trigger level coal, additional coal, etc.)"

121. Accordingly, the Petitioner be compensated on account of coal shortage to be worked out in accordance with the parameters of the applicable Tariff Regulations of this Commission for the entire actual coal shortage without imposing any restrictions in terms of any % of the ACQ. The Petitioner is directed to furnish along with its monthly regular and/or supplementary bill(s), the computations duly certified by the auditor to UP Discoms. The Petitioner and UP Discoms are directed to carry out reconciliation on account of these claims annually.

122. As regards continuance of treatment of coal shortfall beyond 31.3.2017, this Commission vide 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-FDA 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."

123. Since the Petitioner's plant is also covered in the capacity totalling 68000 MW, the above decision of this Commission is applicable in the instant case also. Thus, the Petitioner is entitled for relief, to be restored to the same economic position, under change in law in terms of Article

10 of the PPAs for the period till shortfall continues including the period covered by NCDP 2013 and subsequently continued by SHAKTI Scheme beyond 31.3.2017. In the light of the above Order of the Commission dated 16.5.2019, the claim of the Petitioner is admissible under Change in Law.

124. Further, the Commission in its order dated 31.5.2018 in Petition No. 97/MP/2017 & I.A No. 21 of 2018 had held that the compensation on account of coal shortage is required to be worked out for the entire actual coal shortage and is not be restricted to 65%, 65%, 67% and 75% of the ACQ during the years 2013-14, 2014-15, 2015-16 and 2016-17 respectively. The relevant portion of the said order dated 31.5.2018 is extracted as under:

> *"33. …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. …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."*

The above decision of the Commission shall also be applicable in the present case. 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.

(B) <u>Change of allocation of Mines for supply of coal</u>

125. The Petitioner has submitted that as per the bid submitted by the Petitioner, the distance from the mine to the Power Plant was quoted as 15 km considering allocation of fuel linkage from nearest SECL mines. However, the allocation of mines for supply of linkage coal varies from time to time and the allocation of linkage also takes place from Gevra/ Dipika mines in

Korba area which are located at distance of 120-150 Kms, as a result of which the transportation charges have increased from mines to the Thermal Power Plant. The Petitioner has further submitted that the supply of coal is governed by the provisions of Fuel Supply Agreement signed with CIL subsidiaries wherein the allocation of coal from various coalfields is the prerogative of CIL subsidiary and the Petitioner is made to sign such FSA by CIL without any negotiations since CIL is a dominant player and has monopoly in the supply of coal to any party. The Petitioner had envisaged that the supply of coal would be made by CIL from the nearest mines and therefore the increased cost incurred on this account is due to Change in Law/ Force Majeure. The Petitioner's claim on account of increase in Transportation Charges of coal due to above stated reasons from 2.12.2016 to 31.3.2017 is Rs. 726.90 lakh and from 1.4.2017 to 31.12.2017 is Rs. 3545.79 lakh.

126. The Petitioner, vide its affidavits dated 7.9.2018, has further submitted that at the time of bidding the Petitioner had a Letter of Assurance from SECL dated 3.7.2009, for the grant of Fuel Supply Agreement to the Petitioner. The distance of the fuel source as 15 km is also mentioned in PPA under the head 'Details of Primary Fuel'. This requirement of citing the distance of coal source is as per the Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees (the "Guidelines"). The actual distance of the coal mine from where the coal is dispatched by Coal India Limited is situated at a distance of more than 160 km. The Petitioner has further submitted that if the same is not accepted by the Commission under Change in law, then the Commission in exercise of power given under Section 79 of the Act, may regulate and determine the tariff for the reasons other than change in law. The Guidelines do not provide for the situation when the distance of fuel source is changed or is different from the one mentioned in PPA. The Petitioner has submitted that the distance is much more than initially contemplated and is causing huge expenditure to the Petitioner which cannot be covered by the inland transportation index as the index does not cover escalation based on

change in distance of fuel source. The difference in distance between the distance of coal mine as mentioned in PPA and the actual coal mine from where the fuel is supplied by Coal India Limited is more than 160 Kms. This additional cost has not been reimbursed to the Petitioner and the UP Discoms are taking benefit at the cost of the Petitioner. The difference in inland transportation cost is too wide and it will be prejudicial to the Petitioner if the increased cost is not passed on to the Petitioner.

125. The Petitioner has further submitted that as the change in distance of the fuel source is not covered by the Guidelines, the Commission may kindly regulate the tariff so that the Petitioner is compensated for the increased cost of production. The Petitioner was to be supplied coal from a distance of 15 km from the operational mines of the Coal India Limited. However, Coal India Limited chose to actually supply it from the coal mine situated at a distance of more than 160 km. The additional cost of inland transportation is much more than what was initially contemplated and the Petitioner has no control over the situation.

128. The Respondents have submitted that the Petitioner has not submitted any documentary evidence rationalising for considering the distance of 15 km between the coal mines and the power plant. As per the PPA, the Petitioner is obligated to arrange for fuel. Since existing provisions of the FSA have not been changed, it cannot be a ground for change in law. The Petitioner is obligated to bear the transportation cost from the coal mine to the power plant irrespective of the distance. The Respondents have submitted that since the escalation index in respect of inland railway transportation is from 0-125 km, the claim of increase from 15 km to 125 km is anyways subsumed in the escalation index notified by the Commission. Therefore, additional claim is not allowable.

129. We have examined the matter. It is noted that the Petitioner has not submitted proper documents in support of its claim. Therefore, in the absence of relevant documents, no view can

be taken as regards the admissibility under change in law. However, the Petitioner is granted liberty to approach the Commission through an appropriate application with relevant details.

V. Increase in Minimum Alternative Tax (MAT) rate

130. 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 on 31.03.2017, 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 PPAs.

131. 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."

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

VI. Increase in Service Tax rate and structural impact of GST

133. The Petitioner has submitted that applicable Service tax as on the cut-off date was 12%, which along with education cess of 1% and higher education cess of 2% on service tax was 12.36%. The said rate of 12.36% was applicable by virtue of the notification no. 162/13/2012-ST dated 06.07.2012. Further, the Service Tax rate was revised and increased to 14% (inclusive of Education cess of 1% and Higher Education cess of 2%) with effect from 01.06.2015 vide notification No. 14/2015 dated 19.05.2015. In addition to the above, the Government of India vide its Notification No. 22/2015 dated 6.11.2015 introduced the levy of Swachh Bharat Cess at the rate 0.5% and the same was applicable from 15.11.2015. Further, 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 this event has occurred after the cut-off date, therefore, the petitioner has requested the Commission to allow this event under change in law as per the provisions of Article 10 of the PPAs. The Petitioner has further submitted that implementation of GST has brought in an additional dimension and various components of GST are undergoing changes. The Petitioner has requested the Commission to consider the impact due to GST under Change in law.

134. The Commission vide RoP of hearing dated 29.5.2018 directed the Petitioner to furnish the details of Services for which increase in Service Tax & structural impact of GST has been claimed by it and its total impact. In reply, the Petitioner vide its affidavit dated 26.6.2018 has submitted that for the operations of plant, the Petitioner has incurred various expenses on Ash

disposal/ re-handling charges; Insurance; Legal and professional fees; Rent, Repair, running and maintenance of P&M; Repair, running and maintenance- others; Security expenses; Finance expenses; Travelling and conveyance and Miscellaneous expenses. The Petitioner has submitted that as on the cut-off date, the applicable Service tax along with the education cess was 12.36% which was increased to 15% during the period 2.12.2016 to 30.6.2017. Further with the introduction of Goods and Service Tax, the actual outgo on account of tax increased since the GST rate is increased to 18% as against 15% under Service Tax regime and for Services covered under abatement Scheme, the GST rate is 5% as against 4.94% under Service Tax Regime. The total impact of increase in service tax rates and higher tax rates under GST are Rs. 696,702/- and Rs. 12,070,477/- for the period 2.12.2016 to 31.3.2017 and 1.4.2017 to 31.12.2017 respectively.

135. We have considered the submission made by the Petitioner. Similar case of Levy of Service tax on different services has been dealt by the Commission in order dated 21.2.2018 in Petition No. 121/MP/2017 (Coastal Gujarat Power Limited) wherein the Commission has rejected those services which have not impacted and are not directly related to the input cost for generation and sale of power by the Petitioner to the procurer. The Commission in that order at Para 33 has observed as under:

> *"33.....Therefore, Swachh Bharat Cess @ 2% is a service tax leviable on taxable service and has been introduced through the Act of Parliament and hence is covered under change in law. The Commission has already allowed Swachh Bharat 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. The Commission had directed the Petitioner to submit the taxable service on which Swachh Bharat Cess has been levied. The Petitioner has given list of 24 taxable services as extracted in Para 32 of this order. We have examined the taxable service and find that only 4 services at Sr. No. 1, 18, 21 and 23 are directly related to the input cost for generation and sale of power by the Petitioner to the procurer. Accordingly, Swachh Bharat Cess at the rate of 0.5% is allowed on the following services:-*
>
> *(a) Transportation of goods by a vessel from a place outside India to the first customs landing station in India- Ocean Freight on coal received at Mundra.*
>
> *(b) Port Service- Fixed Port Handling charges and Permission Charges on usage of intake channel.*

(c) Technical Testing & Analysis Agency- Coal analysis charges and coal stock yard sampling & analysis and Drinking Water sampling and analysis.

(d) Transport of goods by road- Hiring utility vehicle for material transportation and transportation charges on LDO, various equipment sent for repairing.

The Petitioner shall submit the Audited Certificate as regard to actual payment of Swachh Bharat Cess to the Procurers while claiming the same under Change in Law."

136. Based on the above decision taken by the Commission in order dated 21.2.2018 in Petition No. 121/MP/2017, the services specified by the Petitioner vide its affidavit dated 26.6.2018 on which service tax is being levied has been examined and found that only the services related to 'Ash disposal/ re-handling charges' is directly related to the input cost for generation and sale of power by the Petitioner to the procurer and, therefore, the service tax & GST on 'Ash disposal/ re-handling charges' service is accordingly allowed. Other services except 'Miscellaneous expenses' are in the nature of O&M expenses and the same needs to be borne by the Petitioner through quoted Capacity Charges.

137. Further, with regards to the services of 'Miscellaneous expenses', the Petitioner is granted liberty to approach the Commission with details of services included in the 'Miscellaneous expenses'. The petitioner shall furnish copies of the payment made, supported by Auditor certificate, while claiming the expenditure under Change in Law.

VII. Increase in Works Contract Service Tax rate

138. 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 17.03.2012. 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.

139. Subsequently the Government of India vide its Notification No. 11/2014 dated 11.07.2014, merged 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. The Petitioner has submitted that since this event has occurred after the cut-off date, the same may be allowed under change in law as per the provisions of Article 10 of the PPAs.

140. 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 17.03.2012. 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."

141. The Commission has disallowed the Works Contracts Service Tax rate in the above referred 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. However, to ascertain the claim of Works Contracts Service Tax rate in the instant case, we have to go through all the notifications issued by the Department of Revenue, Ministry of Finance in this regard. 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 Actas 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."

142. 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 17.03.2012 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 17.03.2012 as applicable on the cut-off date. However, it is 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' enacted through the Government of India Ministry of Finance (Department of Revenue) Notification 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. Henceforth, 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."

143. As such, it can be said that as on cut-off date i.e. 17.9.2012, 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.

144. Thereafter, Department of Revenue, Ministry of Finance vide its Notification No. 11/2014 dated 11.07.2014, 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 only 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. 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 claim on this aspect is disallowed. However, the Petitioner is granted liberty to approach the Commission for appropriate relief along with all required documents.

VIII. Increase in Consent Fee

145. 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. 10,00,000/- (Rs. Ten Lakh) for industries having investment of more than Rs. 2,500 crore but less than Rs. 5,000 crore. The Petitioner's claim on account of increase in Consent Fee from 2.12.2016 to 31.3.2017 is Rs. 1.90 lakhs and from 1.4.2017 to 31.12.2017 is Rs. 5.10 lakhs.

146. We have considered the submissions made by the Petitioner. 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). The Chhattisgarh Government 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 has also introduced two categories above the category of "More than Rs.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. 10,00,000/- (Rs. ten lakh) for industries having investment of more than Rs. 2,500 crore but less than Rs. 5,000 crore.

147. 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 UP 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.

IX. Introduction of Evacuation Facility Charges

148. 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/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 20.12.2017 to 31.12.2017 is Rs.27.70 lakh.

149. The Respondents have submitted that levy of Evacuation Facility Charges is not covered under change in law. The price notification by the Railways or CIL cannot be construed as change in law. The Respondents have further submitted that the price or consideration payable by the Petitioner to coal companies is pursuant to a contractual or commercial arrangement between the Petitioner and the coal company and not as a result of change in law as envisaged in the PPA.

150. We have considered the submissions of the Petitioner and the Respondents. The Commission in its order dated 2.4.2019 in Petition No. 71/MP/2018 (GMRWEL vs MSEDCL &ors) has held as under:

"30. 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 [2017 ELR(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."

151. 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 PPA. Further these Evacuation Facility Charges is not a part of the escalation index notified by this Commission periodically. Therefore, introduction of Evacuation Facility Charges by CIL beyond the cut-off date is admissible to the Petitioner as a Change in Law.

152. Accordingly, the Petitioner is entitled to recover such Evacuation Facility Charges from the UP Discoms as per applicable rates of Evacuation Facility Charges in proportion to the coal as per the parameters of the applicable Tariff Regulations of this Commission or coal actually consumed whichever is lower, for generation and supply of electricity to UP Discoms. The Petitioner is directed to furnish along with its monthly regular and/or supplementary bill(s), computations duly certified by the auditor to UP Discoms.

X. Additional cost towards Fly Ash Transportation

153. 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, the Ministry of Environment, Forests 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 03.11.2009 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."*

154. The Petitioner has further submitted that the amendment of notification dated 03.11.2009 vide notification dated 25.01.2016 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.

155. We have considered the submissions of the Petitioner. 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."

156. 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.

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

157. The Petitioner has submitted that the Government of India, Ministry of Environment, Forest and Climate Change (MoEFCC) vide its notification no. S.0.3305 (E) dated 07.12.2015 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:

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

158. 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 (NOx) and Mercury (Hg) is an additional expenditure which is a Change in Law event within the meaning of Article 10 of the PPAs. 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.

159. 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 to 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:

(a) That plant shall install/ retrofit Electrostatic Precipitators (ESP) in Unit-2 so as to comply PM emission limit immediately.

(b) That plant shall install FGD by March 31, 2020 in unit-2 so as to comply S02 emission limit.

(c) That plant shall take immediate measure like installation of low NOx burners, providing Over Fire Air (OFA) etc. and achieve progressive reduction so as to comply NOx emission limit by the year 2022.

160. We have considered the submissions of the Petitioner. The Commission has dealt the issue of 'Additional capital expenditure on account of amendment in Environment Norms' in its order dated 17.9.2018 in Petition No. 77/MP/2016 (CGPL case). 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 are 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."

161. 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 CGPL 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.

XII. Increase/ change in prices of Diesel

162. The Petitioner has submitted that diesel vehicles are used for the purpose of transportation of coal. According to the Petitioner, 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 the purpose of supply under the PPAs. 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 PPAs. The Petitioner has submitted that it is in the process of ascertaining the actual financial impact on the cost of generation due to the above change in law event.

163. The Respondents have submitted that bid tariff of the Petitioner included an escalable component towards inland transportation of coal which is linked with CERC escalation indices notified every six months. Therefore, any increase in diesel prices is not admissible as change in law.

164. We have considered the submissions made by the Petitioner and the Respondents. 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 PPAs. Further, the diesel prices are decided by the Oil Companies from time to time based on the international market prices.

165. 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 PPAs is not admissible and accordingly, disallowed.

XIII. Carrying Cost

166. The Petitioner in its prayer at Para (b) has sought a direction to the Respondent to pay carrying cost (interest @1.25% per month) from the date of applicability of the respective change in law events on account of delay in recovery of amount already paid towards Change in Law events so that its economic position is restored.

167. We have considered the submission 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. APTEL 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:

"ix. 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.....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 then re-determination of the existing tariff.

x. 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. It is also observed that the Gujarat Bid-01 PPA have no provision for restoration to the same economic position as if Change in Law has not occurred. Accordingly, this decision of allowing Carrying Cost will not be applicable to the Gujarat Bid-01 PPA.

xi. Accordingly, this issue is decided in favour of the Appellant in respect of above mentioned PPAs other than Gujarat Bid – 01 PPA."

168. 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:

169. 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 Article10, the affected party to the same economic position as if such Change in Law has not occurred."

170. In view of the provisions of the PPA, the principles of restitution and the recent 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.

171. 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 fo rsuch 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 pe rthe Tariff Regulations of the Commission and late payment surcharge as per the PPA as under: -

Period	*Actual interest rate paid by the Petitioner*	*Working capital interest rate as per CERC Regulations*	*LPS Rate as per the PPA*
2015-16	*10.68%*	*13.04%*	*16.29%*
2016-17	*10.95%*	*12.97%*	*16.04%*
2017-18	*10.97%*	*12.43%*	*15.68%*

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 workout 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."

172. 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 the

applicable CERC Tariff Regulations or the Late Payment Surcharge Rate as per the PPA, whichever is the lowest.

Issue No. 5: What should be the mechanism for processing and reimbursement of admitted claims under Change in Law?

173. The Petitioner *has submitted that the minimum value of "Change in Law" should be more than 1% of the Letter of Credit in aggregate for the relevant contract year. As per Article 8.4 of the PPA, the letter of credit amount for first year would be equal to 1.1 times of the estimated average monthly billing based on normative availability and for subsequent years, the letter of credit amount will be equa*l to 1.1 times of the monthly tariff payments of the previous contract year. The value of 1% of the letter of credit in aggregate on the basis of power supplied for the period 2.12.2016 to 31.3.2017 comes to Rs. 25 lakhs and for the period 1.4.2017 to 31.12.2017 comes to Rs. 51.1 lakhs.

174. The Petitioner has submitted that the above levies, changes, revisions and enactments are directly affecting the Petitioner, i.e. the expenses of the Petitioner/ Seller, by more than 1% of the value of the Standby Letter of Credit (LC) in aggregate for the relevant Contract Year. The Petitioner has further submitted that since the aggregate amount claimed for "Change in Law" for the period from 2.12.2016 to 31.3.2017 works out to Rs. 24.57 crores and for the period from 1.4.2017 to 31.12.2017 works out to Rs. 127.68 crores, which is more than 1% of the LC amount for the respective period and as such the same is more than the threshold amount prescribed under Article 10.3.2 of the PPA, and therefore, the Petitioner is entitled to be compensated for the same.

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

"10.3.2 During Operating Period

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

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

176. In our view, the Petitioner is entitled to charge the compensation on account of Change in Law during the Operating Period as per the mechanism provided in the PPA and no separate mechanism is required to be prescribed.

177. However, it is clarified that the Petitioners shall be entitled to claim the compensation after the expenditures allowed under Change in Law during operating period (including the reliefs allowed for operating period, if any) exceeds 1% of the value of Letter of Credit in aggregate and for this purpose the Petitioner shall furnish all the relevant documents like taxes and duties paid supported by Auditor Certificate.

178. The Article 10 of the PPAs provide for the principle for computing the impact of change in law during the operating period. These provisions 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. 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(s) of the generating stations or from the date of Change in Law, whichever is later. Approaching the Commission every year for allowance of compensation for such Change in Law is a time-consuming process, which may result in payment of carrying cost, we have, therefore, specified a mechanism, in the following paragraphs, considering the fact that compensation for change in law events allowed as per PPA shall be paid in subsequent years of the contract 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) 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 procurers 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.

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

(d) If the Petitioner is eligible to receive compensation for Change in Law as per the provisions of the PPA, the compensation amount allowed shall be shared by the procurers based on the scheduled energy.

Summary of Decision:

179. Based on the above analysis and decisions, the summary of our decisions 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**	
1	Royalty on Coal	Allowed
2	Service Tax on Royalty of Coal	Allowed
3	Increase in Niryat kar	Not Allowed (liberty granted)
4	Increase in Environment Cess/ Paryavaran Upkar	Allowed
5	Change in Infrastructure Development Cess	Allowed
6	Change in Clean Energy Cess	Allowed
7	Change in Forest Tax	Allowed
8	Change in the components of Central Excise Duty	Allowed for all components

S.No.	Change in Law events	Decision
		mentioned in letter dated 25.6.2018 by Office of Asstt. Commissioner. However, royalty is subject to outcome of decision of Hon'ble Supreme Court.
9	Increase/ Change in Entry Tax on account of changes in the individual components of such Tax	Not Allowed (liberty granted)
10	Increase/ Change in Value Added Tax (VAT) on account of changes in individual components of such Tax	Allowed
11	Increase in Sizing and Crushing charges	Not Allowed
12	Increase in Coal Surface Transportation Charge	Not Allowed
13	Increase in base price of coal	Not Allowed
II.	**Increase in cost due to Change in law events pertaining to Transportation of domestic coal**	
1	Increase in base Freight of Coal Transportation by Rail	Not Allowed
2	Levy of Busy Season Charges & Levy of Development Surcharge	Allowed
3	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**	
1	NCDP 2013	Allowed
2	Change of allocation of Mines for supply of coal	Not allowed on account of want of relevant documents. Liberty granted to approach the Commission with relevant documents.
V.	**Increase in Minimum Alternative Tax (MAT) rate**	Not Allowed
VI.	**Increase in Service Tax rate & structural impact of GST**	Allowed for limited services as per Para 136 and 137 of this order
VII.	**Increase in Works Contract Service Tax rate**	Not Allowed (liberty granted)
VIII.	**Increase in Consent Fee**	Allowed
IX.	**Introduction of Evacuation Facility Charges**	Allowed
X.	**Additional cost towards Fly Ash Transportation**	Liberty granted
XI.	**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
XII.	**Increase/ change in prices of Diesel**	Not Allowed
XIII.	**Carrying cost**	Allowed

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

181. Petition No. 118/MP/2018 is disposed of in terms of above.

Sd/-	Sd/-	Sd/-
(I.S. Jha)	**(Dr. M.K. Iyer)**	**(P.K. Pujari)**
Member	**Member**	**Chairperson**