

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 169/MP/2016

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

Date of order: 16th of September, 2019

In the matter of:

Petition under Section 79(1)(b) and (f) of the Electricity Act, 2003 for adjudication of claims towards Compensation arising out of Change in Law and consequential reliefs as per provisions of the PPA dated 31.7.2012 between KSK Mahanadi Power Company Limited and the distribution licensees of erstwhile State of Andhra Pradesh during the operation period.

And

In the matter of:

KSK Mahanadi Power Company Limited
8-2-293/82/A/431/A, Road No. 22
Jubilee Hills, Hyderabad – 500 033
Andhra Pradesh, India

.....**Petitioner**

Vs

1. Eastern Power Distribution Company of Andhra Pradesh Limited
P & T Colony, Seethammadhara
Visakhapatnam – 530 013
2. Southern Power Distribution Company of Andhra Pradesh Limited
D. No.19-13-65/A, Srinivasapuram
Tiruchanoor Road, Tirupati – 517 503
3. Southern Power Distribution Company of Telangana Limited
Formerly Central Power Distribution Company of Andhra Pradesh Limited
6-1-50, Corporate Office, Mint Compound
Hyderabad – 500 063
4. Northern Power Distribution Company of Telangana Limited
Formerly Northern Power Distribution Company of Andhra Pradesh Limited
H. No. 2-5-31/2, Corporate Office, Nakkalagutta
Hanamkonda, Warangal – 506 004

.....**Respondents**



Parties Present:-

For Petitioner : Ms. Swapna Seshadri, Advocate, KSK Mahanadi
Shri Amal Nair, Advocate, KSK Mahanadi

For Respondents : Shri S. Vallinayagam, Advocate, AP Discoms
Ms. S. Amali, Advocate, AP Discoms
Shri Nishant, Advocate, Telangana Discoms
Shri Rakesh K. Sharma, Telangana Discoms

ORDER

The Petitioner, KSK Mahanadi Power Company Limited, is a generating company as defined in Section 2(28) of the Electricity Act, 2003 (hereinafter referred to as the Act) and is in process of establishing 3600 MW (6x600 MW) coal based Thermal Power Project ("Project") at District Akaltara in the State of Chhattisgarh. Unit 1 and 2 of the Project have achieved the commercial operation on 13.8.2013 and 25.8.2014 respectively and the balance units are at various stages of the construction and commissioning.

2. The Respondents 1 to 4 are the distribution licensees in the undivided State of Andhra Pradesh. Upon bifurcation of the erstwhile State of Andhra Pradesh, new State of Telangana was formed and two of the distribution licensees, Respondents 3 and 4 were renamed as Southern Power Distribution Company of Telangana Limited and Northern Power Distribution Company of Telangana Limited.

3. The Petitioner has entered into PPAs for supply of power from the generating station as under:

(a) PPA dated 31.7.2012 between the Petitioner and the distribution licensees of erstwhile undivided State of Andhra Pradesh for supply of 400 MW power from 16.6.2013 to 15.6.2016. However, pursuant to bifurcation of the State of Andhra Pradesh, the aforesaid capacity was allocated as under:



(i) 215.56 MW capacity to distribution licensees of State of Telangana, Respondents 3 & 4 (hereinafter referred to as the “Telangana Discoms”); and

(ii) 184.44 MW capacity to distribution licensees of the new State of Andhra Pradesh, Respondents 1 & 2 (hereinafter referred to as the “AP Discoms”).

(b) PPA dated 18.10.2013 between the Petitioner and the Government of Chhattisgarh for supply of 5%/7.5% of the net power (gross power minus the auxiliary consumption) under the host State obligations.

(c) PPA dated 27.11.2013 between the Petitioner and Tamil Nadu Generation and Distribution Corporation (TANGEDCO).

(d) PPA dated 26.2.2014 between the Petitioner and the distribution licensees of Uttar Pradesh (UP Discoms).

4. In the present petition, the Petitioner has sought adjustment of tariff on account of the Change in Law events affecting the Project during the Operation Period in terms of PPA dated 31.7.2012 on account of the following events:-

(a) Levy of Clean Energy Cess by the Government of India under the Finance Act, 2010 with effect from 1.4.2010 in terms of Notification No. 03/2010-Clean Energy Cess dated 22.6.2010 issued by Ministry of Finance, Government of India and consequential Notifications by SECL dated 11.7.2014, 28.2.2015 and 29.2.2016.

(b) Imposition of Excise Duty on coal by the Central Government in the Finance Act, 2012 with effect from 1.4.2012 vide Notification dated 28.5.2012 with respect to Section 141 of Finance Act, 2012, SECL Notification dated 8.3.2013 including Royalty and SED and other taxes in assessable value for payment of excise duty and SECL Notification 28.2.2015.

(c) Revision of Chhattisgarh Paryavaran Upkar (Environment Cess) vide SECL Notification dated 19.8.2015.



- (d) Revision of Chhattisgarh Vikas Upkar (Infrastructure Development Cess) vide SECL Notification dated 19.8.2015.
- (e) Levy and revision of Electricity Duty on Auxiliary consumption vide Notification dated 1.8.2013 and subsequent Retail tariff orders thereto.
- (f) Imposition of contribution to National Mineral Exploration Trust and District Mineral Foundation vide SECL Notification dated 14.11.2015.
- (g) Revision in rate of Service Tax vide Finance Bill 2015 dated 28.2.2015 and Swachh Bharat Cess, Krishi Kalyan Cess etc. by Railway Ministry Notification dated 27.5.2015 and 12.11.2015.
- (h) Revision of Busy Season Surcharge on coal transportation vide Railways Notification dated 18.9.2013 and 20.7.2015.
- (i) Revision in rate of Sizing charges and Surface transportation levies vide CIL Notification dated 13.11.2013 and 14.11.2013.
- (j) Increase in Minimum Alternate Tax Rates introduced in the Finance Act, 2012 with effect from 1.4.2012.
- (k) Increase in the rate of royalty on coal pursuant to Notification No 349 (E) dated 10.5.2012 issued by the Ministry of Coal, Government of India, Levies of Forest tax on coal vide SECL Notification dated 16.9.2015.

5. The Petitioner has submitted that the bid deadline was 4.6.2012 and any Change in Law event after 28.5.2012 (seven days prior to the bid deadline) resulting in addition recurring or non-recurring expenditure incurred by the Petitioner falls within the ambit of Change in Law. Accordingly, the impact of Change in Law events affecting the economic position during the operation period as tabulated by the Petitioner for financial years 2013-14, 2014-15, 2015-16 and 2016-17 submitted vide affidavit dated 21.6.2017 is as under:

Sl. No	Change in Law	As on 28.5.2012	Current Rate	Impact for 2013-14	Impact for 2014-15	Impact for 2015-16	Impact for 2016-17
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1.	Clean Energy Cess on Coal	Rs.50/Tonne	Rs.400/Tonne		9,14,87,526	32,01,99,555	45,30,73,883
2.	Excise Duty Changes	6.18%	6%	2,27,26,223	4,16,81,829	4,56,17,334	3,95,87,135
3.	Change in Chhattisgarh Infrastructure Development Cess	Rs. 5/Tonne	Rs.7.5/Tonne			40,73,961	32,36,242
4	Change in Chhattisgarh Environment Cess	Rs.5/Tonne	Rs.7.5/Tonne			40,73,961	32,36,242
5	Electricity Duty on Auxiliary Consumption	NIL	15% of Tariff applicable	13,83,07,306	26,13,69,411	24,84,03,792	12,60,03,985
6	Effect on Royalty	-	-	2,90,27,516	5,00,14,010	5,47,32,419	5,44,12,384
7	Effect on Terminal Tax	-	-	4,28,729	7,78,790	8,52,262	8,23,922
6	Introduction of Tax for contribution to be made to the National Mineral Exploration Trust	NIL	2% of Royalty paid			27,60,332	34,07,986
8	Introduction of Tax for contribution to be made to the District Mineral Foundation	NIL	30% of Royalty paid		1,91,68,375	6,89,62,848	5,11,19,789
9	Levy of Service Tax & Swachh Bharat Cess, Krishi Kalyan Cess on Total Freight by Rail/ Road Transport	-	-		2,44,273	38,84,536	65,97,384
10	Change in the Busy Season Surcharge on transportation of coal through Railways	10% of Basic freight Rate	15% of Basic freight Rate		65,87,729	81,23,179	53,95,280
11	Change in Surface Transportation Cost and Coal sizing	3-10 km- Rs.44/Tonne; 10-20 km- Rs.77/Tonne + Sizing - Rs.61/tonne	3-10 km- Rs.57/Tonne; 10-20 km- Rs.116/Tonne+ Sizing - Rs.79/tonne	1,58,67,156	5,53,72,654	6,05,96,607	4,01,29,401
12	Effect of the above changes on VAT	-	-	1,39,07,146	3,10,95,179	4,81,17,164	5,24,03,187
13	Effect of the above changes on Entry Tax	-	-	27,53,890	61,57,461	95,28,151	1,03,76,869
	Total			22,30,17,966	56,39,57,236	87,99,26,099	84,98,03,689

6. The Petitioner has submitted that Change in Law events have significant financial impact on the costs and revenue of the Petitioner during the Operation Period for which the Petitioner is entitled to be compensated in terms of Article 10 of PPA. Accordingly, the Petitioner has filed the present Petition with the following prayers:

“(a) Hold and declare that the events listed enumerated above constitute change in law impacting revenues and costs for which the Petitioner must be entitled to additional payments under the procurer PPA;

(b) Determine the impact of the change in law situation under the procurer PPA and carry out necessary tariff adjustment to give effect to such economic impact; and further issue necessary directions to the Respondents to pay such adjusted tariff in terms of the PPA;



(c) Allow the Petitioner to raise supplementary bills on the Respondents for the arrears of amounts finally allowed by this Hon'ble Commission towards change in law from the date of change in law notification till the final disposal of the present Petition;

(d) Allow to the Petitioner carrying cost on the recovered amounts of adjusted tariff from the date of change in law notification till the date of actual payment at a rate equivalent to the bank rate; and

(e) Restore the Petitioner to the same economic condition prior to the occurrence of the change in law by permitting the Petition and the amounts as per the computations set out in hereinabove or through a suitable mechanism to compensate the Petitioners as and when the financial impact of the change in law arose;"

7. The Petition along with other similar matters filed by the Petitioner was heard on 15.11.2016 and notice was issued to the Respondents. The Respondents 3 and 4, vide their joint affidavit dated 24.7.2017 have raised preliminary objections to the Petition and the Petitioner filed its rejoinder vide affidavit dated 9.2.2018.

8. The matter was admitted by the Commission vide ROP dated 15.2.2019 and the Parties were directed to file their replies on merits. The Respondents No. 3 and 4, Telangana Discoms filed their reply on merits vide affidavit dated 8.3.2019. The Respondents No. 1 and 2, AP Discoms have jointly filed their written submission on 13.6.2019. The Petitioner filed its rejoinder/ written submissions to the replies filed by the Respondents on 12.6.2016 and 25.7.2019. The issues raised by the Respondents including on the maintainability of the Petition and the rejoinder of the Petitioner are discussed in the succeeding paragraphs of this order.

Maintainability

9. The Petitioner has submitted that it has a 'composite scheme' for generation and sale of power to more than one State and hence the Commission has jurisdiction to adjudicate the present matter under Section 79(1)(b) read with Section



79(1)(f) of the Act in terms of the Full Bench judgment dated 7.4.2016 of the Appellate Tribunal for Electricity (APTEL) in Appeal No. 100 of 2013 in the matter of Uttar Haryana Bijli Vitran Nigam Limited v. Central Electricity Regulatory Commission & Ors.

10. *Per contra*, the Respondents, Telangana Discoms in their preliminary reply dated 24.7.2017 have submitted that the Petitioner has also filed similar Petition claiming the amount under the Change in Law before the Telangana State Electricity Regulatory Commission (TSERC). The Respondents have further submitted that the issue of jurisdiction of the State Electricity Regulatory Commission is pending before the Hon'ble High Court of Judicature at Hyderabad in WP No. 19894 of 2015, WP No. 7965 of 2016, WP No. 14254 of 2016 and WP No. 22850 of 2016. The Respondents have stated that pursuant the judgment of Hon'ble Supreme Court in Energy Watchdog Case, various developers had filed the transfer petitions before the Hon'ble Supreme Court to transfer the above mentioned Writ Petitions, praying to pass similar orders as passed in Energy Watchdog matter. However, the Hon'ble Supreme Court vide its order dated 20.4.2017 declined the request of the developers/ generators and dismissed the transfer Petitions with direction to the Hon'ble High Court of Andhra Pradesh and Telangana to dispose of the said Writ Petition within a period of six months. The Respondents have submitted that the judgment of the Hon'ble Supreme Court in Energy Watchdog case is not applicable to the present case as the principle set out by Hon'ble Supreme Court is with respect to Section 79 of the Act.



11. The Petitioner, in its rejoinder dated 9.2.2018 has submitted that the issue of jurisdiction primarily arose in the case of generators who are located in the erstwhile undivided State of Andhra Pradesh and supplying power to the distribution licensees in that State as pursuant to bifurcation, the said generators are supplying power to two States (new State of Telangana and new State of Andhra Pradesh) and issue arose as to the jurisdiction of the Regulatory Commission. According to the Petitioner, the Petitioner's generating station is located in the State of Chhattisgarh and had the PPA dated 31.7.2012 for supply of electricity to the distribution licensees of undivided State of Andhra Pradesh, which pursuant to the bifurcations of the State had been supplying power to the distribution licensees of Andhra Pradesh and Telangana. The Petitioner has stated that the PPA dated 31.7.2012 entered into with the distribution licensees of the undivided State of Andhra Pradesh (which got bifurcated to new States of Telangana and Andhra Pradesh) had expired on 15.6.2016 and is no longer in existence. However, the Petitioner is presently supplying the entire power to the Discoms of the new State of Andhra Pradesh pursuant to the extension of the PPA and no supply is made to the State of Telangana. The Petitioner has submitted that it has not filed Writ Petition or any other proceedings before the Hon'ble High Court for the States of Telangana and Andhra Pradesh at Hyderabad on the issue of jurisdiction of the State Commissions vis-a-vis the Central Commission and the matter before the Hon'ble High Court is on the issue of jurisdiction qua the generators who were within the then undivided State of Andhra Pradesh and their status under the provisions of the Andhra Pradesh Reorganization Act, 2014 for the State of Andhra Pradesh. The Petitioner has submitted that as per the judgment of the Hon'ble Supreme Court dated 11.4.2017 in Energy Watchdog v. CERC & Ors. case, the supply of power by the Petitioner from



the State of Chhattisgarh to the State of Andhra Pradesh and other States would involve inter-State supply and is within the exclusive jurisdiction of the Central Commission to adjudicate the dispute in the present Petition.

12. We have examined the matter. The Petitioner has entered into separate PPAs with the Discoms of three States, namely, distribution licensees of Tamil Nadu, Uttar Pradesh and erstwhile Andhra Pradesh (which was subsequently bifurcated into Telangana and residuary Andhra Pradesh and the PPA entered into with the Discoms of erstwhile Andhra Pradesh was allocated to Discoms of Telangana and residuary Andhra Pradesh) for supply of power at different points in time and for different quantum. The tariff agreed to under the said PPAs have been adopted by respective State Electricity Regulatory Commissions (SERCs). Sub-section (b) of Section 79(1) of the Act provides that Central Commission shall regulate the tariff of generating company, if such generating company enters into or otherwise have a composite scheme for generation and sale of electricity in more than one State. The Hon'ble Supreme Court vide its judgment dated 11.4.2017 in Civil Appeals titled Energy Watchdog v. CERC & Ors. [(2017 (4) SCALE 580)] while upholding the jurisdiction of this Commission for regulating the tariff of projects which meet the composite scheme, has explained the term 'composite scheme' as under:

“22. The scheme that emerges from these Sections is that whenever there is inter- State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79(1) itself in sub-sections (c), (d) and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression “within the State” in sub-clauses (a), (b), and (d), and “intra-state” in sub-clause(c). This being the case, it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission. The State Commission’s jurisdiction is only where generation and supply takes place



within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. What is important to remember is that if we were to accept the argument on behalf of the appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being the case, we are constrained to observe that the expression “composite scheme” does not mean anything more than a scheme for generation and sale of electricity in more than one State.”

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, whose tariff has been adopted under Section 63 of the Act. In the light of the decision of the Hon'ble Supreme Court in Energy Watchdog case dealing with the jurisdiction of the Central Commission in case of composite scheme for supply of electricity to more than one State, we are of the view that this Commission has the jurisdiction to regulate the tariff of the Project of the Petitioner under Section 79(1)(b) of the Act and adjudicate the disputes raised in the present Petition.

Issues on merit

13. After consideration of the submissions of the Petitioner and the Respondents, the claim of the Petitioner has been dealt with as under:

- (i) Whether the provisions of the PPA dated 31.7.2012 with regard to notice have been complied with?**
- (ii) What is the scope of Change in Law in the PPA dated 31.7.2012?**
- (iii) Whether the compensation claims are admissible under Change in Law in the PPA dated 31.7.2012?**
- (iv) Mechanism for processing and reimbursing of admitted claimed under Change in Law.**



Issue No. 1: Whether the provisions of the PPA dated 31.7.2012 with regard to notice have been complied with?

14. The claims of the Petitioner in the Petition pertain to Change in Law events during the Operation Period. Article 10.4 of the 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(s) of such Change in Law as soon as reasonably practicable after becoming aware of the same or should reasonable 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(s) 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(s) contained herein shall be material.

Provided that in case the Seller has not provided such notice, the Procurer(s) 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 effect on the Seller.*

15. The Petitioner has submitted that it has issued Notices to the Respondents on 28.3.2014 and 12.7.2016 in accordance with the aforesaid Article informing about Change in Law events and their effects. The Respondents have submitted that in terms of the PPA, the Petitioner, at first, has to give notice intimating the Change in Law and to lay its claim under Article 10.3.3 with requisite documentary evidence for increase/ decrease in revenue. However, the Petitioner has directly submitted the supplementary bills on 12.7.2016 claiming compensation under the Change in Law.

16. As per Article 10.4.2 of the PPA, the Petitioner is required to give notice about occurrence of Change in Law events as soon as practicable after being aware of such events. The Petitioner has given notice regarding the events of Change in Law covered in the instant Petition on 12.7.2016 appraising the Respondents about the



occurrence of Change in Law events and the impact of such events. However, no reply was received from the Respondents.

17. Thus, in our view, the requirements of Article 10.4.2 of the PPA as regards notice have been complied with by the Petitioner.

Issue No.2: What is the scope of Change in Law in the PPA dated 31.7.2012?

18. The Petitioner has approached the Commission under Article 10 of the PPA read with Section 79 of the Act for adjustment/ compensation to offset the financial/ commercial impact of Change in Law during the Operating Period.

19. Article 10 of the PPA dated 31.7.2012 deals with the events of Change in Law and the same is extracted as under:

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

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

but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI Charges



or frequency intervals by an Appropriate Commission or (iii) any change on account of regulatory measures by the Appropriate Commission including calculation of Availability.

10.2 Application and Principles for computing impact of Change in Law

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

10.3 Relief for Change in Law

10.3.2 During Operating Period:

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

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

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

20. The term “Law” defined in the said PPA is extracted 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;

21. The term “Indian Governmental Instrumentality” has been defined in the PPA as under:

“Indian Governmental Instrumentality” shall mean the Government of India, Governments of State(s) of Andhra Pradesh and any ministry, department, board, authority, agency, corporation, commission under the direct or indirect control of Government of India or any of the above state Government(s) or both, any political sub-division of any of them including any court or Appropriate Commission(s) or tribunal or judicial or quasi-judicial body in India, but excluding the Seller and the Procurer.”



22. A combined reading of the above provisions in the PPA would reveal that the Commission has the jurisdiction to adjudicate upon the disputes between the Petitioner and the Respondents with regard to 'Change in Law' events which occur after the cut-off date (seven days prior to the bid deadline). The events broadly covered under 'Change in Law' are as under:

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

(b) Any change in interpretation or application of any Law by an Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent court of Law;

(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 except due any default of the seller.

(e) Any change in the tax or introduction of any tax made applicable for supply of power by the Petitioner as per terms of the Agreement.

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

(f) 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.

(g) The Petitioner shall provide to the Procurer and the Appropriate Commission documentary proof of such increase /decrease in cost of the Power Station or revenue/expense for establishing the impact of such



Change in Law;

(h) The decision of the Commission with regard to the determination of Compensation and the date from which such Compensation shall become effective shall be final and binding on both the parties, subject to right of approval provided under Electricity Act, 2003.

(i) The compensation shall be payable for any decrease in revenue or increase in expenses to the seller (Petitioner) if the same is in excess of an amount equivalent to 1% of the value of the Standby Letter of Credit in the aggregate for the relevant Contract Year.

Issue No.3: Whether compensation claims are admissible under Change in Law in the PPA dated 31.7.2012?

23. The Bid deadline and the cut-off date in respect of the PPA dated 31.7.2012 against which Change in Law compensation has been claimed, are as under:

Bid Deadline Date	4.6.2012
Cut-off Date (Seven days prior to the Bid Deadline Date)	28.5.2012

24. The Petitioner has raised the claims under Change in Law during the Operating Period in respect of events, namely, levy of Clean Energy Cess on coal, imposition of Excise Duty on consumption of coal, Increase in Chhattisgarh Paryavaran and Vikas Upkaar (Environment and Infrastructure Development Cess), levy of Electricity Duty on Auxiliary Consumption, imposition of charges towards National Mineral Exploration Trust (NMET) and District Mineral Foundation (DMF), levy of Service Tax, Swachh Bharat Cess, Krishi Kalyan Cess on total freight by rail/road transport, change in Busy Season Surcharge on transportation of coal through Railways, Fly Ash Transportation, increase in Sizing Charges and Surface Transportation Charges, Change in Emission Norms and increase in MAT.



25. AP Discoms and Telangana Discoms have submitted that they have entered into Medium-term PPA i.e. for the period 3 years with the Petitioner based on the Standard Bidding Guidelines issued by Ministry of Power, Government of India (MoP) for Case 1 Bidding which has no pass-through mechanism and having become successful in the bid by quoting a tariff without taking into account the risk factors, the Petitioner cannot now seek to be compensated for the additional expenses under change in law after entering into the PPA. AP Discoms and Telangana Discoms have contended that as per Article 15.8.1 of the PPA, the Petitioner is required to bear and pay all the statutory taxes, duties, levies and cess assessed/ levied on it for execution of the agreement and supplying power as per the terms of the agreement. Further, in terms of Clauses 2.6.1 and 2.4.1.1 (B) (xi) of the RfP, the Bidder/ Petitioner was required to bid an all-inclusive tariff taking into account all costs including taxes, levies, duties and risks, contingencies and other circumstances which may influence or affect the supply of power. Instead, the Petitioner is seeking the relief/ compensation under Change in Law events on various counts even for the laws which were existing even prior to the bid submissions deadline.

26. *Per contra*, the Petitioner has submitted that merely because the Respondents have entered into a Medium-term PPA as per the Standard Guidelines issued by MoP for Case-1 Bidding, it does not mean the Petitioner is not entitled to claim of Change in Law in terms of Article 10 of the PPA. The Petitioner has submitted that the interpretation of Articles 15.18.1 and 15.18.2 by the Respondents is misconceived as these Articles by no stretch of imagination indicate that the Petitioner shall bear all statutory taxes, duties, levies and cess for all times to come.



Article 15.18.1 cannot be misread by the Respondents as to take away the substantive rights of the Petitioner under Article 10. Also, the indemnification referred to in Article 15.18.2 only relates to the statutory taxes, duties, levies and cess to be paid by the Petitioner as per law as on the cut-off date and not beyond. The Petitioner has submitted that the Commission has already dealt with similar argument and has rejected it in order dated 31.5.2018 in Petition No. 170/MP/2016. The Petitioner has stated that Clauses 2.6.1 and 2.4.1.1 (B) (xi) of RfP indicate that the bidder should have taken into account the existing laws, rules and risks, etc. However, the bidders cannot be expected to take into account any Change in Law events after the cut-off date. It is for the very reason that the Change in Law clause has been incorporated in the PPA along with the restitution principle of placing the seller at the same economic position as if the Change in Law had not occurred.

27. We have considered the submissions of the Petitioner and the Respondents. The Respondents have submitted that in terms of the RfP, the Petitioner/ Bidder was expected to take into account all costs, statutory taxes, levies, duties and also risks, contingencies and other circumstances which may influence or affect the supply of power while quoting the tariff. However, in our view, such an approach is not permissible in terms of the judgment of APTEL dated 10.4.2017 in Appeal No. 161 of 2015 & IA No. 259 of 2015 and Appeal No. 205 of 2015 which is extracted as under:

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



escalable index or indexing of cost of fuel in order to determine the compensation due on account of Change in Law. Sasan will have to be compensated keeping the law in mind.”

28. Further, the Respondents have referred to Article 15.18 of the PPA and have submitted that as per the said Article, the seller is required to pay all taxes, duties and cess for supplying power as per the terms of this agreement and shall indemnify the procurer; hold him harmless against any claim that may be made against the procurers in relation to the matter set out in Article 15.18.1. In other words, the PPA absolves the Respondents from all future tax, duties, cess which the seller would be liable to pay while supplying power to the procurer. Article 15.18 is extracted hereunder:

“15.18.1 The seller shall bear and promptly pay all statutory taxes, duties, levies and cess assist levied on the seller, contractors or their employees, that are required to be paid by the seller as per the Law in relation to the execution of the agreement and for supplying power as per the terms of this agreement.

15.18.2 Procurer shall be indemnified and held harmless by the seller against any claims that may be made against procurer in relation to the matters set out in article 15.18.1.

15.18.3 Procurer shall not be liable for any payment of taxes, duties, levies, cess whatsoever for discharging any obligation of the seller by the procurer on behalf of seller or its personnel provided the seller has consented in writing to procurer for such work which consent shall not be unreasonably withheld.”

29. The Commission had considered a similar matter in its order dated 31.5.2018 in Petition No. 170/MP/2016. Relevant extract from the order is as under:

“17.This Article refers to the liability of the seller to pay the taxes/ cess/ levies for execution of the project and the seller shall not be liable. However, this does not prevent the seller to seek reimbursement of taxes/ levies/ duties paid by it if the same expenditure is otherwise payable by the procurers in terms of the PPA. In the present case, if Article 15.18 is interpreted in a way that TANGEDCO is exempted from payment of all future tax, duties and cess, which the Petitioner has to pay with regards to supply of power, then Article 10 of the PPA dealing with Change in Law will be rendered otiose and redundant and there would be absolutely no purpose of having the Change in Law clause under the PPA at all. Therefore, such an interpretation of Article 15.18 is liable to be rejected. Article 15.18.1 provides that the seller shall bear all charges that are required to be paid by the seller for supply of power as per the terms of the agreement. There is no non-obstante clause in this Article which will prevent operation of Article 10 of the PPA. A harmonious construction of both Articles



reveals that while the taxes, cess, duties and levies, etc. shall be payable by the seller, the same to the extent permissible under Change in Law provision can be recovered from the procurers. Accordingly, the objection of TANGEDCO on this ground is also rejected.”

The above order is applicable in the instant case also. Therefore, contention of the Respondents is rejected.

30. AP Discoms have submitted that the Petitioner has given an undertaking that the Petitioner shall not claim any compensation towards the Change in Law event and hence, while examining the claims of the Petitioner in the instant Petition, the same has to be taken into account. Moreover, AP Discoms have submitted that the PPA dated 31.7.2012 was for the period of three years only and the said period ended on 15.6.2016. The PPA between the Respondents and the Petitioner was further extended for the period from 16.6.2016 to 31.3.2021, wherein the Petitioner has undertaken that it shall not claim any amount in addition to the tariff agreed, either on the ground of Change in law or otherwise including the consequences related to presidential directive. Hence, the claims of the Petitioner under Change in Law for this period should not be allowed.

31. *Per contra*, the Petitioner has submitted that it had initially entered into a PPA dated 31.7.2012 with Discoms of the erstwhile State of Andhra Pradesh for supply of power for three years i.e. till 15.6.2016. Subsequently, after bifurcation of the State, the Petitioner had sought for an extension of the PPA with the AP Discoms for the entire 400 MW (including the share of Telangana Discoms) for the period from 16.6.2016 to 31.3.2021. At the time of signing of the PPA for this subsequent period, an undertaking was given by the Petitioner that there shall not be any claims towards compensation for Change in Law compensation. However, this undertaking relates



to the PPA for supply of 400 MW power from 16.6.2016 to 31.3.2021 while the claims of Change in Law in the present Petition relate to the period up to 15.6.2016.

32. We have considered the submissions made by the parties. The relevant paragraphs of the undertaking dated 19.12.2014 given by the Petitioner to the AP Discoms as furnished on the records of the Petition are as under:

“Sub: M/s. KSK Mahanadi for supply of 400 MW power to the state of A.P, for the period from 16th June’ 2016 to 31st March’ 2021-furnishing an undertaking for Signing of “Agreement”.

.....

ii. Further, M/s. KSK Mahanadi agreed that there shall not be any claims by it in addition to tariff agreed, either on the ground of change in law or otherwise including the consequences related to presidential directive.”

33. The Petitioner in the above undertaking has stated that for supply of power from 16.6.2016 to 31.3.2021, there shall not be any claims by it in addition to the tariff agreed either on the ground of Change in Law or otherwise. The Petitioner has submitted that the claims raised in the present Petition pertain to period up to 15.6.2016 only. Therefore, in the instant petition, Change in Law under the PPA dated 31.7.2012 are being examined only for the period from cut-off date i.e. 28.5.2012 to 15.6.2016.

34. Accordingly, we now proceed to adjudicate the various Change in Law events claimed by the Petitioner.

(a) Increase in the rate of Clean Energy Cess on Coal

35. The Petitioner has submitted that as on cut-off date i.e. 28.5.2012, the rate of Clean Energy Cess was Rs.50/MT as per the Notification No. 3/2010-Clean Energy Cess dated 22.6.2010 issued by the Department of Revenue, Ministry of Finance, Government of India. The said rate was subsequently increased to Rs.100/MT as



intimated by SECL vide Notification dated 11.7.2014. Further, by Notification dated 28.2.2015, the rate of Clean Energy Cess was increased to Rs.200/MT and thereafter vide Notification dated 29.2.2016 it was enhanced to Rs.400/MT with effect from 1.3.2016. The claims of the Petitioner on account of increase in levy of Clean Energy Cess on coal for the financial years 2014-15, 2015-16 and 2016-17 are Rs. 9.14 crore, Rs. 32.01 crore and Rs. 45.30 crore respectively. The Petitioner has submitted that the said Notification of the Ministry of Finance, GOI, enhancing the rate of Clean Energy Cess after the cut-off date, are Change in Law event as per the Article 10.1.1 of the PPA and requested to allow the same.

36. AP Discoms and Telangana Discoms have submitted that the Clean Energy Cess is not on the business of generation or sale of electricity and is levied only on the production of coal. According to AP Discoms and Telangana Discoms, the Clean Energy Cess is not an event occurring after the bid cut-off date as it was prevailing/ existing at the time of the submission of bid and the Petitioner should have taken into account the possible revision while quoting the tariff in the bid.

37. We have considered the submissions of the parties. The Clean Energy Cess applicable at different points of time is as under:

From	To	Applicable Clean Energy Cess (Rs./MT)
1.7.2010	10.7.2014	50
11.7.2014	28.2.2015	100
1.3.2015	29.2.2016	200
1.3.2016	30.6.2017	400

38. It is noticed that the Clean Energy Cess was introduced by the Government of India through the Finance Act, 2010 which was prior to the cut-off date in the case of PPA dated 31.7.2012 with AP Discoms and Telangana Discoms. As on the cut-off



date i.e. 28.5.2012, Clean Energy Cess was applicable at the rate of Rs.50/MT. It is noticed that Clean Energy Cess was introduced by Government of India and has undergone various revisions from the year 2014 onwards. The Commission in various orders, namely, order dated 30.3.2015 in Petition No. 6/MP/2013 (Sasan Power Limited v. MPPMCL and Ors.), order dated 1.2.2017 in Petition No. 8/MP/2014 (EMCO Energy Limited v. MSEDCL & Ors.), order dated 19.12.2017 in Petition No. 101/MP/2017 (DB Power Limited v. PTC India Limited and Ors.), etc. has allowed the increase in Clean Energy Cess as Change in Law event. Moreover, the Commission in its orders dated 31.5.2018 and 22.6.2018 in Petition Nos. 170/MP/2016 and 171/MP/2016 filed by the Petitioner in respect of TANGEDCO PPA and UP PPA has considered the issue of Clean Energy Cess on coal as Change in law event in light of its earlier orders and had allowed the said claim of the Petitioner. The relevant portion of the order dated 31.5.2018 in Petition No. 170/MP/2016 is extracted as under:

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

39. The aforesaid decision is applicable in the case of the Petitioner. Therefore, the levy of Clean Energy Cess on coal is admissible to the Petitioner as a Change in Law event under Article 10 of the PPA. Accordingly, the Petitioner is entitled to recover the Clean Energy Cess from AP Discoms and Telangana Discoms from commencement of supply under the PPA till 15.6.2016 as per the applicable rate of Clean Energy Cess 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 at actual, whichever is lower, for generation and supply of electricity to the AP Discoms and Telangana 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 AP Discoms and Telangana Discoms for the purpose of Change in Law compensation computation shall be based on the relevant date 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-off date, per MT of coal consumed in the prescribed manner. The Petitioner is directed to furnish along with its supplementary bill, the proof of payment and computations duly certified by the auditor to AP and Telangana Discoms for claiming the expenditure under Change in Law.

(b) Change in the manner of computation of Excise Duty

40. The Petitioner has submitted that as on cut-off date i.e. 28.5.2012, the Central Excise Duty of 6.18% was applicable on the components of coal cost, namely, basic coal value, Crushing/ Sizing Charges and Surface Transportation charges. After 8.3.2013, SECL directed for inclusion of the components, namely 'royalty' and 'stowing excise duty' for imposition of Central Excise Duty, applicable retrospectively from 1.3.2011. The Petitioner has stated that on 25.3.2013, SECL issued public notice stating that the following components will be considered for assessing the Central Excise Duty:

- (a) Basic Coal Value
- (b) Crushing & Sizing charges
- (c) SILO Charge,
- (d) Surface Transportation charges



- (e) Royalty
- (f) Stowing Excise Duty
- (g) Terminal Tax,
- (h) Forest Cess,
- (i) CG Environment Cess and
- (j) CG Development Cess

41. The Petitioner has submitted that on 2.4.2013, SECL further communicated that vide Notification dated 2.4.2013, in addition to above components, 'Dumping charge' is also included as component for assessing the Central Excise Duty. The Petitioner has submitted that Excise duty can only be charged to the extent authorised by law and any change in the basis of computation by the competent authority will necessarily have to be compensated by way of change in law provisions in the PPA. Therefore, the aforesaid change in the manner of computation of excise duty results in 'Change in tax' and consequently a 'Change in Law' as per Article 10.1.1 of the PPA.

42. AP Discoms and Telangana Discoms have submitted that the Central Excise Duty was brought down from 6.18% to 6% vide notification dated 28.2.2015 and the same was not informed by the Petitioner to the Procurers. They have submitted that the Petitioner has not given the benefit of reduction of Excise Duty which it enjoyed due to the reduction in Excise Duty from 6.18% to 6%. The above reduction of the tax compensates the Petitioner for additional components added under computation of the central excise duty. Therefore, the Petitioner is not entitled for compensation due to change in excise duty. In response, the Petitioner has submitted that reduction in the rate of Excise Duty from 6.18% to 6% has already been factored in while making the claim under this head and although the rate of Excise Duty may



have gone down but the expenditure in this regard has been increased on account of change in manner of computation.

43. We have considered the submissions of the parties. As on the cut-off date, Excise Duty on coal was at the rate of 6.18% on the determined sale price of coal which admittedly formed the basis of the bid submitted by the Petitioner. By Notification dated 28.2.2015, Education Cess and Secondary & Higher Education Cess have been exempted on Excise Duty on coal, thereby leaving a net applicable Central Excise Duty of 6%. Since the change in Excise Duty has been introduced through an Act of Parliament and has impacted the expenditure of the seller, the same is covered under Change in law in terms of Article 10.1.1 of the PPA. Accordingly, AP Discoms and Telangana Discoms are entitled to the reimbursement of Excise Duty on coal. The Petitioner has furnished SECL Notice No. SECL/BSP/S&M/RS/619 dated 25.3.2013 which considers components like Crushing/Sizing Charges, Surface Transportation Charge, Royalty, Stowing Excise Duty etc., for assessing the excisable value of coal for determining Central Excise Duty. Since this letter has been issued by SECL after 28.5.2012 for payment of Excise Duty on coal, based on Notification of Ministry of Finance, GOI, the same shall be considered as Change in law. 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 themselves are allowed under Change in Law.

44. The Commission in its order dated 31.5.2018 in Petition No. 170/MP/2016 filed by the Petitioner with regard to TANGEDCO PPA has considered this issue and had allowed the said claim in line with its decision in order dated 16.3.2018 in Petition No. 1/MP/2017 in the matter of GMRWEL v. MSEDCL & Ors. as under:



“161. All components indicated by SECL for computation of assessable value of coal such as the value of coal, Stowing Excise Duty, contribution to National Mineral Exploration Trust and District Mineral Foundation, Sizing Charges, Surface Transportation Charge, Niryat Kar, Chhattisgarh Development Tax and Chhattisgarh Environment Tax (except royalty) are in the nature of “Price-cum- duty” and shall be considered as part of the assessable value of coal for the purpose of computation of Excise Duty. The Commission has not allowed the expenditure of Sizing Charges and Surface Transportation Charges under Change in Law. However, these charges have been allowed to be included in the assessable value of coal for the purpose of computation of Excise Duty. It is clarified that allowing these charges for inclusion in the assessable value for computation of Excise Duty shall not be construed that these charges are allowed under Change in Law.”

45. As regards ‘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 of India & Ors. v. Steel Authority of India & Ors. [2011 SCC 450]. Therefore, the claim of royalty in the assessable value of coal shall be subject to the decision of the Hon’ble Supreme Court in the concerned case.

46. The Petitioner shall be entitled to recover the Excise Duty from commencement of supply under the PPA till 15.6.2016 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 at actual, whichever is lower, for supply of electricity to the AP Discoms and Telangana 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 the Excise Duty. The Petitioner is directed to furnish along with its supplementary bill, the proof of payment and computations duly certified by the auditor to AP and Telangana Discoms for claiming the expenditure under Change in Law.



(c) Change in Chhattisgarh Infrastructure Development Cess and Chhattisgarh Environment Cess

47. The Petitioner has submitted that Chhattisgarh Infrastructure Development Cess and Environment Cess as applicable seven days prior to the bid deadline i.e. on 28.5.2012 was Rs. 5/MT. The Petitioner has submitted that in pursuance of the State Government's Notification, SECL vide Notice bearing No. SECL/BSP/S&M/2015/1420 dated 19.8.2015 had communicated to all concerned that the Environment and Infrastructure Development Cess/ Chhattisgarh Paryavaran Evam Vikas Upkar on dispatches/ lifting of coal has been increased from Rs. 5/MT to Rs. 7.50/MT with effect from 16.6.2015 in terms of the amendment of Section 4 and Schedule-2 of the Chhattisgarh (Adhosanrachna Vikas Evam Paryavaran) Upkar Adhiniyam, 2005. It has further submitted that the increase in the Environment Cess/ Infrastructure Development Cess on dispatches of coal/ lifting of coal from Rs.5/MT to Rs. 7.5/MT as stated above is a Change in law event within the meaning of Article 10.1.1 of the PPA.

48. AP Discoms and Telangana Discoms have submitted that Cess under this head relates to the transaction between the coal supply company and the generators in terms of agreement between them and the Respondents/ Procurers are in no way connected to these charges. They have further submitted that Procurers are not concerned with the place of generation of power and are only concerned with the supply of power. Since these charges were in existence prior to bid deadline, the Petitioner was expected to take into account such charges. In response, the Petitioner has submitted that the Commission has already allowed increase in these charges as Change in Law events in its various orders. Moreover, AP Discoms and



Telangana Discoms cannot take a position that the PPA does not provide for a liability out of the FSA to be passed on to the Respondents. So long as the test laid down in Article 10 stands satisfied, the generator is entitled to relief under Change in Law. The Petitioner has submitted that though the Cess was in existence prior to bid deadline, a Change In law has occurred due to change in rates of Cess post the cut-off date.

49. We have considered the submissions of the parties. The Commission has already allowed the increase in Environment Cess/ Paryavaran Upkar and Infrastructure Development Cess/ Vikas Upkar as Change in Law event in its various orders, namely, order dated 19.12.2017 in Petition No. 229/MP/2016, order dated 19.2.2017 in Petition No. 101/MP/2017, order dated 18.4.2018 in Petition No. 18/MP/2017, order dated 27.4.2018 in Petition No. 126/MP/2016 etc. Moreover, the Commission in its order dated 31.5.2018 in Petition No. 170/MP/2016 and order dated 22.6.2018 in Petition No. 171/MP/2016 has also allowed this claim of the Petitioner in respect of the TANGEDCO PPA and UP PPA. The relevant observation of the Commission in this regard is reproduced below:

“It is noted that as on the cut of date, the rate of Infrastructure development cess and environmental cess was Rs.5 on each tonne of annual dispatch of mineral. Government of Chhattisgarh vide its Notification dated 18.9.2015 revised the Infrastructure development cess and Environment Cess from Rs. 5/MT to Rs. 7.50/MT which is applicable for all SECL coal despatches from 16.6.2015 which has an impact on the cost of generation of electricity for supply to Rajasthan Discoms. 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.”

50. In light of the above decisions of the Commission, the increase in the rate of Chhattisgarh Paryavaran Upkar and Vikas Upkar is admissible as a Change in Law event in the present case also under Article 10 of the PPA. The Petitioner is directed



to furnish a certificate from the Auditor certifying the expenses in this regard to the Respondents for claiming the expenditure under the 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 schedule generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for the supply of electricity to AP Discoms and Telangana 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 Infrastructure Development Cess and Environment Cess.

(d) Levy of Chhattisgarh Electricity Duty on Auxiliary Consumption

51. The Petitioner has submitted that under the provisions of Madhya Pradesh Electricity Duty Act, 1949 including amendments thereto, which has been adopted by the State of Chhattisgarh, no levy on Auxiliary Consumption was provided for. It has submitted that the Govt. of Chhattisgarh vide Chhattisgarh Electricity Duty (Amendment) Act, 2013 dated 1.8.2013 imposed levy on 'own consumption' at the rate of 15% of the tariff applicable on all the electricity consumed by the generating company, captive generating plant and producer for their auxiliary consumption and for their own consumption. As per retail tariff order for 2012-13, the applicable Discom tariff was Rs. 3.7/unit and for 2015-16, the applicable Discom tariff was Rs. 6.65/unit. The Petitioner has submitted that any change in the Discom tariff under any order of the Chhattisgarh State Electricity Regulatory Commission (CSERC) has an immediate effect on per unit rate of Electricity Duty and consequently has a direct financial impact on the cost of supply of electricity by the Petitioner. Accordingly, the



Petitioner has submitted that since Electricity Duty has been increased pursuant to the Chhattisgarh Electricity Duty (Amendment) Act, 2013 read with the tariff order of CSERC, it qualifies as a Change in law event in terms of the Article 10.1.1 of the PPA and the Petitioner needs to be compensated for the same.

52. AP Discoms and Telangana Discoms have submitted that the payment of Electricity Duty on Auxiliary Consumption is the obligation of the Petitioner. They have further submitted that the phrase duty levied 'for their own consumption' itself shows that it is the duty payable by the Petitioner for its own consumption and cannot be claimed under Change in Law. In response, the Petitioner has submitted that the Commission has already allowed the levy of Electricity Duty on Auxiliary Consumption as Change in Law event in its various orders. Moreover, the phrase 'for their own consumption' only indicates that the duty is related to auxiliary consumption and in order to generate and supply electricity to AP Discoms and Telangana Discoms, the plant of the Petitioner will have certain auxiliary consumption. The increase in this duty clearly falls under the Change in Law event in terms of Article 10 of the PPA and the Petitioner is entitled for the for the same.

53. We have considered the submissions of the parties. The Petitioner has claimed increased in Electricity Duty on Auxiliary Consumption of the Plant. We note that the Commission has already examined this issue in the order dated 30.12.2015 in Petition No. 118/MP/2015 (Sasan Power Limited v. MPPMCL and Ors.) and in order dated 19.12.2017 in Petition No. 101/MP/2017 (DB Power Ltd. v. PTC & Ors). and has allowed the increase in Electricity Duty on Auxiliary Consumption under Change in Law. Moreover, the Commission in its order dated 28.6.2018 in the Petition No. 171/MP/2016 filed by the Petitioner has also dealt with this issue in the



case of the Petitioner with respect to UP PPA. The relevant paragraph of the said order is extracted as under:

“54. As per Section 3 of the Chhattisgarh Electricity Duty (Amendment) Act, 1995, the applicable rate of electricity duty was 8% of the prevailing discom tariff on electricity consumed for the power plant auxiliaries. The Government of Chhattisgarh vide Chhattisgarh Electricity Duty (Amendment) Act, 2013 dated 1.8.2013 had increased the Electricity Duty on power consumed by the generating station. Therefore, as per Section 3 (1) of the Chhattisgarh Electricity Duty (Amendment) Act, 2013, the Petitioner is required to pay 15% of the discom tariff on electricity duty for the electricity consumed by it or auxiliary consumption of the plant. The Petitioner has however submitted that the Industrial Policy of Chhattisgarh, 2009-14 was applicable for the period 1.11.2009 to 31.10.2014, during the period when the bids were submitted i.e cut-off date (17.9.2012) and there was exemption from electricity duty payment on auxiliary consumption eligible for a period of 5 years from the date of commercial operation. Accordingly, units were eligible for exemption from payment of electricity duty on auxiliary consumption since the COD of Unit-I is 13.8.2013 and Unit-II is 26.8.2014. It is however noticed that the Chhattisgarh Industrial Policy, 2009-2014, provides that the benefit of the electricity duty which was provided under the Industrial Policy, 2004 was to be continued to the Projects on the commencement of commercial production and such benefits shall be available only till 31.10.2010. Even otherwise, unless there is a specific exemption from the payment of such electricity duty by the State Government, the Petitioner cannot presume that electricity duty is not payable. In any event, as on the cut-off date of the bid (17.9.2012), there was no exemption from payment of the electricity duty by the Petitioner in relation to the generating station. Hence, the Petitioner was expected to factor the applicable Electricity Duty on auxiliary consumption at the rate of 8% on the applicable discom tariff at the time of submission of the bid. In this background, we are of the view that electricity duty @ 8% of the prevailing discom tariff was payable as on the cut-off date. Also, the increase in Electricity Duty on Auxiliary Consumption from 8% on the prevailing discom tariff as on the cut-off date to 15% of the prevailing discom tariff in terms of the State Government Notification dated 1.8.2013 is admissible under Change in Law, subject to the outcome of the decision of the Hon'ble Chhattisgarh High Court. The Petitioner is directed to furnish the monthly bill along with the proof of payment of Electricity Duty and computations duly certified by the Auditors. For the purpose of assuming auxiliary consumption, the parameters as per the applicable Tariff Regulation of the Commission or actual auxiliary consumption, whichever is lower, shall be considered. If there will be any downward revision of electricity duty below 8% of the applicable tariff of the discom, the benefits thereof shall be passed on to the UP discoms.

54. The aforesaid decision of the Commission squarely applies to the present case. Hence, the Petitioner shall be entitled to recover on account of increase in Electricity Duty from 8% on the prevailing Discom tariff as on the cut-off date to 15% of the prevailing Discom tariff in terms of the State Government Notification dated 1.8.2013. The Petitioner is directed to furnish along with its supplementary bill, the proof of payment and computations duly certified by the auditor to the Respondents.



For the purpose of assuming auxiliary consumption, the parameters as per the applicable Tariff Regulations of the Commission or actual auxiliary consumption, whichever is lower, shall be considered. It is clarified that if any change in the rate of Electricity Duty has benefitted the Petitioner, the same needs to be passed on to the Respondents. The Petitioner is directed to furnish along with its supplementary bill, the proof of payment and computations duly certified by the auditor to AP Discoms and Telangana Discoms for claiming the expenditure under Change in Law.

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

55. The Petitioner has submitted that at the time of bidding, there was no tax in respect of contribution to be made to the NMET and DMF. However, after Notification of the Mines and Minerals Development and Regulations (Amendment) Act, 2015 which had come into effect from 12.1.2015, the Ministry of Mines, GOI constituted NMET and DMF vide Notifications dated 14.8.2015 and 16.9.2015 respectively. The Petitioner has submitted that the Mines and Minerals Development and Regulations (Amendment) Act, 2015 is applicable to all dispatches/ lifting as detailed below:

National Mineral Exploration Trust

(i) An amount of contribution is to be made to the NMET with effect from 14.8.2015 as per notification dated 14.8.2015 of Ministry of Mines. The rate of tax will be 2% of the Royalty paid in terms of the Second Schedule to the said Act.

(ii) As per Rule 7(3) of the NMET Rules, 2015, the aforementioned amount of 2% towards NMET along with Royalty to the State Govt. is to be remitted immediately.

District Mineral Foundation

(i) An amount of contribution is to be made to the DMF Trust with effect from 12.1.2015 as per notification dated 17.9.2015 of Ministry of



Mines, wherein it is indicated as under:

(a) 10% of the Royalty paid in terms of the Second Schedule to the Mines & Minerals (Development and Regulation) Act, 1957 in respect of the mining lease or as the case may be prospecting licence cum mining lease granted on or after 12.1.2015.

(b) 30% of the Royalty paid in terms of the Second Schedule to the Act in respect of mining lease granted before 12.1.2015.

56. In the above backdrop, the Petitioner has enclosed letter of SECL bearing No. SECL/13SP/S&Iv/1936 dated 13/14 November, 2015 and has submitted that the contribution to be made to DMF and NMET in terms of the Mines and Minerals Development and Regulations (Amendment) Act, 2015 is Change in law as per Article 10.1.1 of the PPA.

57. AP Discoms and Telangana Discoms have submitted that the above tax is applicable for a holder of a mining lease or a prospecting license-cum-mining lease who has to pay the same to the Mineral Exploration Trust. This tax is part of the FSA entered between the mining company and the generator and the contribution made is a part of coal business which is not linked to the business of sale of electricity. Thus, the same cannot be loaded on the end consumers of the power. In response, the Petitioner has submitted that the contentions of the Respondents that the tax contribution towards NMET and DMF are part of FSA already stands rejected by the Commission in order dated 22.6.2018 in Petition No. 171/MP/2016.

58. We have considered the submissions of the parties. On 26.3.2015, the Government of India amended the Mines and Minerals (Development and Regulation) Act, 1957 (MMDR) and enacted the Mines and Minerals (Development and Regulation) Act, 2015 in which Section 9B (Creation of DMF) and Section 9C (Creation of NMET) were introduced. The MMDR Act was deemed to have come into



effect from 12.1.2015. By notification dated 14.8.2015, the Ministry of Mines, GOI constituted the NMET. On 16.9.2015, the Ministry of Mines, GOI, issued order directing the formation of DMF which also stated that the DMFs will be deemed to have come into existence with effect from 12.1.2015 i.e. the date of which MMDR came into force. Pursuant to MMDR Amendment Act, on 17.9.2015, the Ministry of Mines, GOI issued the Mines and Minerals (Contribution to District Mineral Foundation) Rules, 2015. On 20.10.2015, the Ministry of Coal, GOI revised the Mines and Minerals (Contribution to District Mineral Foundation) Rules, 2015 in respect of coal, lignite and sand for stowing. It also stated that the amount to be paid to DMF will be calculated from the date of notification issued under Section 9(B)(1) of the MMDR Act, by the State Government establishing the DMF or the date of coming into force of the revised rules (20.10.2015). However, the order dated 16.9.2015 directing the State Governments to establish DMFs stated that DMFs was deemed to have come into force from 12.1.2015. The Petitioner has submitted that SECL issued notice dated 13/14.11.2015, for implementation of the MMDR Act *inter alia* stating that (a) contributions to NMET be made with effect from 14.8.2015 and (b) contributions to DMF be made with effect from 12.1.2015. Through the Mines and Minerals (Development and Regulation) Amendment Act, 2015, the following provisions have been incorporated in the Mines and Minerals (Development and Regulation) Act, 1957:

“9B. District Mineral Foundation:

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

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

(3) The composition and functions of the District Mineral Foundation shall be such as



may be prescribed by the State Government.

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

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

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

“9C: National Mineral Exploration Trust:

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

59. The Central Government in exercise of the 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. It is noticed from these provisions that through an amendment to the Act of Parliament, National Mineral Exploration Trust and District Mineral Foundations



have been established. For running NMET and DMF, the Amendment Act provides for payment of amounts, in addition to the royalty by the holder of the mine lease or holder of prospective license-cum-mining lease, @2% of the Royalty for National Mineral Exploration Trust and @10% to 30% of the Royalty for District Mineral Foundations. These amounts collected are in the nature of compulsory exactions and, therefore, partake the character of tax.

60. It is observed that the charges towards NMET and DMF as claimed by the Petitioners in Petition No. 112/MP/2015 (GMR Kamalanga Energy Limited v. BSPHCL & Anr.) as a Change in law event was considered by the Commission and the Commission after taking into account the provisions of the MMDR Act, by order dated 7.4.2017 allowed the said claim of the Petitioner. The relevant portion of the order dated 7.4.2017 is extracted hereunder:

“74. We have considered the submissions of the Petitioners and Prayas. There is no denying the fact that these contributions are statutory levies. Under the provisions of the FSA between the Petitioners and Mahanadi Coalfield Limited, the Petitioners are required to pay all statutory taxes, levy, cess or fees in addition to the base price of coal, sizing/crushing charges and transportation charges. Therefore, in terms of the FSA, Mahanadi Coalfield Limited is entitled to pass on these taxes or levies to the purchaser of coal. The question therefore arises whether the liability for taxes and levies shall be borne by the purchaser of coal or shall be passed on to the procurers. It is pertinent to mention that royalty on coal imposed under Section 9 of the Mines and Minerals (Development and Regulation) Act, 1957 are payable by the holders of mining lease to the Government Since the contributions to these funds are to be statutorily paid as a percentage of royalty, in addition to the royalty, they should be accorded the similar treatment. National Exploration Trust and District Mineral Foundations have been created through the Act of the Parliament after the cut-off date and therefore, they fulfill the conditions of Change in Law. Accordingly, the expenditure on this account has been allowed under Change in Law. The Petitioners shall be entitled to recover the same corresponding to the scheduled generation for supply of electricity to BSPHCL. If the actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of service tax on transportation of coal. The Petitioners are directed to furnish along with its monthly bill, the proof of payment and computations duly certified by the auditor to BSPHCL. The Petitioners and BSPHCL are further directed to carry out reconciliation on account of these claims annually.”



61. It is noticed that similar claims in Petition No. 16/MP/2016 (Sasan Power Ltd v. MPPMCL & Ors.) and in Petition No. 1/MP/2017 (GMR Warora Energy Limited v. MSEDL & others) were dealt with by the Commission and by orders dated 17.2.2017 and 16.3.2018 respectively, the Commission had allowed the said claims under Change in Law. Furthermore, similar claim of the Petitioner in respect of TANGEDCO PPA and UP PPA was dealt with and allowed by the Commission in Petitions 170/MP/2016 and 171/MP/2016 respectively. In accordance with these decisions, the expenditure on this account claimed by the Petitioner herein is allowed. The Petitioner is directed to furnish along with its supplementary bill, the proof of payment and computations duly certified by the auditor to AP Discoms and Telangana Discoms for claiming the expenditure under Change in Law. It is clarified that the Petitioner shall be entitled to recover on account of payment to National Mineral Exploration and District Mineral Foundation in proportion to the coal consumed corresponding to the schedule generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of electricity to AP Discoms and Telangana 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.

(f) Levy of Service Tax and Swachh Bharat Cess, Krishi Kalyan Cess on total freight by rail

62. The Petitioner has submitted that as on the cut-off date i.e. 28.5.2012, the applicable Service tax was 12.36% as per Ministry of Finance, Government of India Notification No. 43/2012-Service tax dated 2.7.2012. Thereafter, vide notification No. 14/2015-Service tax dated 19.5.2015 the Service tax was increased to 14% from 1.6.2015, thereby increasing the Service tax on rail freight to 4.2%. The



Petitioner has submitted that the Ministry of Finance, GOI vide its Notification No.21/2015- Service tax dated 6.11.2015 increased Service tax to 14.50% after inclusion of 0.5% Swachh Bharat Cess. The Petitioner has further submitted that Ministry of Finance, GOI vide Notification dated 26.5.2016 has introduced 0.5% Krishi Kalyan Cess with effect from 1.6.2016 thereby increasing the rate of Service Tax from 14.5% to 15%. The Petitioner has submitted that the said increase in Service Tax squarely falls under Article 10.1.1 of the PPA and qualifies as a Change in law event, for which the Petitioner is entitled to be compensated.

63. AP Discoms and Telangana Discoms have submitted that since service tax was in existence prior to the bid deadline and the distribution of electricity by a distribution utility comes under negative list of service tax holders, such taxes cannot be levied on the Procurers. *Per contra*, the Petitioner has submitted that the distribution of electricity may come under the negative list of Service tax holders which is a decision of tax authorities on the levy of Service Tax on distribution of electricity. However, the Change in Law claimed in the Petition is the changes in Service Tax, Swachh Bharat Cess, Krishi Kalyan Cess on the freight by Railways.

64. We have considered the submissions of the parties. 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.”

65. 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.”

66. Therefore, Swachh Bharat Cess and Krishi Kalyan Cess are Service Taxes on taxable service and have been introduced through an Act of Parliament and are, therefore, covered under Change in Law. The Commission has already allowed Swachh Bharat Cess and Krishi Kalyan Cess as Change in Law events in order dated 1.2.2017 in Petition No. 8/MP/2014 (EMCO Energy Limited v. MSEDCL and Anr.), order dated 6.2.2017 in Petition No. 156/MP/2014 (APL v. UHBVNL & Anr.) and in order dated 7.4.2017 in Petition No. 112/MP/2015 (GMR Kamalanga Energy Limited v. Bihar State Power (Holding) Company Limited and Anr.)

67. As regards Service Tax on transportation of goods by Railways, the Commission in its order dated 1.2.2017 in Petition No. 8/MP/2014 has held that Service tax on transportation of goods by Indian Railways qualifies as Change in Law. Relevant 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 Order in Petition No. 126/MP/2016 alongwith I.A. No. 29/2016 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.”

68. Moreover, similar claim of the Petitioner in respect of TANGEDCO PPA and UP PPA was also dealt with and allowed by the Commission in Petitions No. 170/MP/2016 and 171/MP/2016.

69. In the light of the above decision, the claim of the Petitioner for relief under Change in law on account of Service Tax on railway freight by Indian Railways is admissible. 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. Thus, as on cut-off date i.e. 28.5.2012, the Service tax on transportation of goods by Railways was under exemption. Further, it is noted that w.e.f. 1.10.2012, Service tax on 30% of the transport of goods by rail is chargeable and the Petitioner has accounted for 30% of 12.36% i.e. 3.708% at the time of submission of bid. However, 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
28.5.2012 (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%

70. The Petitioner shall be entitled to recover on account of change in Service tax on transportation of coal through Railways in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of this Commission or actual, whichever is lower, for supply of electricity to AP Discoms and Telangana 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 service tax on transportation of coal. The Petitioner is directed to furnish along with its supplementary bill, the proof of payment and computations duly certified by the auditor to AP Discoms and Telangana Discoms.

(g) Busy Season Surcharge on transportation of coal

71. The Petitioner has submitted that Ministry of Railway vide Circular No. 38/2011 dated 12.10.2011 had fixed the rate of Busy Season Surcharge at 10% and subsequently under the rate Circular No. 24/2013 dated 18.9.2013, the base freight rate was fixed at 15%. The Petitioner has further submitted that the rate circulars issued by the Railway Board, Ministry of Railways is a charge under



Section 30 of the Railways Act, 1989 and is fixed from time to time with the previous approval of the Central Government. The specification of statutory charges by the Ministry of Railway is a statutory exercise in accordance with the powers conferred under Section 30 of the Railways Act, 1989. Accordingly, the Petitioner has submitted that the increase of Busy Season Surcharge on transportation of coal by rail during the busy season vide rate Circular dated 18.9.2013 is a Change in law event within the meaning of Article 10.1.1 of the PPA.

72. AP Discoms and Telangana Discoms have submitted that it is a normal commercial practice whereby such Surcharges are collected for certain months during which the goods are transported. Such surcharge is seasonal in nature and the rate varies according to the season. Moreover, the Commission in its order dated 31.5.2018 in Petition No. 170/MP/2016 referring to its earlier order dated 3.2.2016 in Petition No. 8/MP/2014 has rejected the claim of the Petitioner therein. The same principle applies to the instant case and accordingly, such charges are to be disallowed. *Per contra*, the Petitioner has submitted that reliance placed by the AP Discoms and Telangana Discoms on the Commission's orders dated 31.5.2018 and 3.2.2016 is misplaced. APTEL in its Judgment dated 14.8.2018 in Appeal No. 119 of 2016 in the matter of Adani Power Limited v. RERC & Ors. has held that the increase in Busy Season Surcharge on transportation of coal through railways is a Change in Law event. The orders being relied on by the Respondents are prior to the above decision of APTEL.

73. We have considered the submission of the parties. The Commission in its order dated 3.2.2016 in Petition No. 8/MP/2014 had examined as to whether the change in the rate of Busy Season Surcharge and Development Surcharge levied by



the Railway Board qualifies as Change in Law and had rejected the claim of the Petitioner therein. However, the APTEL in the judgment dated 14.8.2018 in Appeal No. 111 of 2017 preferred against the said order of the Commission observed as under:

“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.

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.”

74. In the aforesaid decision, APTEL has held that the circulars issued by Ministry of Railways have force of law and since the escalation rates notified by the Commission only covers the basic freight while the other prevailing charges were to be factored by the generators, any change in such surcharge/ levy of surcharge qualifies as Change in Law. Accordingly, the claim of the Petitioner for relief on account of increase in Busy Season Surcharge is admissible as Change in Law event under Article 10 of the PPA. The Petitioner shall be entitled to recover the increase in Busy Season 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 AP and Telangana 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. The Petitioner is directed to furnish along with its supplementary bill, the



proof of payment and computations duly certified by the auditor to the AP Discoms and Telangana Discoms.

(h) Coal Sizing Charges and Surface Transportation Charges

75. The Petitioner has submitted that coal mines were nationalized and brought under State control by the Coal Mines Nationalisation Act, 1973 and accordingly, the GOI has the supervening control over all activities relating to coal mining, development and distribution. The Petitioner has also submitted that the distribution of coal is completely under the control of the Central Government which exercises control over the Coal India Ltd through Ministry of Coal. The Petitioner has also submitted that Coal India Limited is an Indian Government Instrumentality as defined under the Procurement PPA and is under the direct control of Ministry of Coal which holds 70% (approx.) of shares of CIL. It has stated that coal distribution and its price fixation are completely under the control of Ministry of Coal and CIL issues notifications from time to time to specify the Coal Sizing Charges. Referring to the judgments of the Hon'ble Supreme Court in Sri Sitaram Sugar Company v. UOI (1990) 3 SCC 223 and Jayantilal A L Shodan v. F. N. Rana & Co (AIR 1964 SC 648), the Petitioner has submitted that the fixation of Coal Sizing Charges/ Surface Transportation Charges by CIL is a legislative function and the notifications so issued, constitute 'law' within the meaning of the provisions of the PPA and any change in such charges is covered under Change in Law.

76. The Petitioner has submitted that the prevailing Coal Sizing Charges as on the cut-off date (28.5.2012), where the top size of coal was limited to 100 mm as per CIL Notification No. CIL:S&M:GM (F):Pricing:1965 dated 31.1.2012 was Rs.61/MT (excluding impact of taxes and duties). Subsequently, this was revised by CIL to



Rs.79/MT (excluding impact of taxes and duties) as per CIL Notification No CIL:S&M:GM(F):Pricing:2784 dated 16.12.2013. The Petitioner has further submitted that the Surface transportation charges as on the cut-off date, as per CIL Notification No. CIL:S&M:GM(F):Pricing:1907 dated 26.12.2011 (for distance between 3 to 10 km from mine to loading point was Rs. 44/MT) was subsequently revised to Rs.57/MT vide CIL Notification No.CIL:S&M:GM(F):Pricing:2340 dated 13.11.2013. Accordingly, the Petitioner has submitted that the changes in Coal Sizing Charges and Surface Transportation Charges subsequent to the cut-off date constitute a Change in the applicable law by the Government instrumentality and, therefore, falls within the ambit of Change in Law as defined in Article 10.1.1 of the PPA.

77. AP Discoms and Telangana Discoms have submitted that these charges are as a result of the contractual arrangement between the generator and the coal supplying companies in terms of the FSA signed between them. Hence, the Petitioner cannot claim the charges under this head from the procurers. Moreover, the Commission in its order dated 31.5.2018 in Petition No. 170/MP/2018 referring to the Petition No. 156/MP/2014 and Petition No. 8/MP/2014 had rejected the claim of the Petitioner therein and the same applied to the present case and accordingly, these charges are to be disallowed. *Per contra*, The Petitioner has submitted that though the order of the Commission in Petition No. 8/MP/2014 has been upheld by APTEL through its judgment dated 14.8.2018 in Appeal No. 119 of 2016, an Appeal against this judgment is pending before the Hon'ble Supreme Court on this issue and therefore, there is no finality on the issue. The Petitioner has also submitted that the Commission in the recent order dated 2.4.2019 in Petition No. 71/MP/2018 has allowed the levy of Evacuation Facility Charges levied by Coal India Limited as a



Change in Law and the very same principle is applicable to change in Coal Sizing Charges and Surface Transportation Charges as both charges are levied by Coal India Limited which is Indian Governmental Instrumentality as defined under the PPA. Therefore, the claim on this count is admissible.

78. We have considered the submissions of the parties. We note that the issue as to whether the increase in Coal Sizing Charges and increase in Surface Transportation Charges qualifies as Change in Law had come up for the consideration of the Commission in Petition No. 8/MP/2014 in the matter of EMCO Energy Limited/ GMR Warora Energy Limited v. MSEDCL & Ors. wherein the Commission in order dated 1.2.2017 had observed as under:

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

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

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

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



79. Further, the APTEL has also upheld the aforesaid decision of the Commission disallowing the increase in Sizing Charges and increase in Surface Transport Charges as Change in Law in its judgment dated 14.8.2017 in Appeal No. 111 of 2017 filed against order dated 1.2.2017. The relevant paragraphs of the said judgment are 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 Gol 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 Gol 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 Gol 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 Gol. 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.”

80. In view of the above decision of the Commission and APTEL, the claim of the Petitioner for relief under Change in Law in respect of Coal Sizing Charges and Surface Transportation Charges are not allowed.

(i) Fly Ash Transportation

81. The Petitioner has submitted that the Ministry of Environment and Forests (MOE&F) Govt. of India vide its Notification dated 3.11.2009 had issued directions regarding utilization of fly ash under the Environment (Protection) Act, 1986. The MOE&F vide Notification No. S.O.254 (E) dated 25.1.2016 had amended the



Environment (Protection) Rules, 1986 and has imposed additional cost towards fly ash transportation. The Petitioner has submitted that the above will have significant effect on the Operation and Maintenance (O&M) costs in respect of fly ash disposal. The Petitioner has submitted that since the notification issued by MOE&F recently has an impact on the cost of the Petitioner, it may be permitted to file additional submissions in regard to cost implications under the present PPA with the Respondents.

82. AP Discoms and Telangana Discoms have submitted that the Petitioner has not shown any costs actually incurred by it under this head. Moreover, the existing Notification being of the year 2009, the Petitioner should have quoted the bid price taking the Notification into consideration. The Petitioner has also misrepresented the word “shared between user” as the word ‘user’ represents the one who uses the fly ash but not the one who procures power. The revenue from the sale of the fly ash has not been shared with the beneficiaries/ procurers of the generating company. If the same is being retained by the generating company, the taxes and the other levies during the said transport may have to be recovered from the revenues being obtained. *Per contra*, the Petitioner has submitted that it is seeking only an in-principle approval at this stage and will approach the Commission with all issues related to the actual fly ash transportation. The Petitioner has submitted that the Commission in its order dated 19.12.2017 in Petition No. 101/MP/2017 in case of DB Power Ltd. v. PTC India Limited & Ors. has granted in-principle approval to DB Power on this issue and granted liberty to approach the Commission with details of expenditure on this account. The Commission in its order dated 22.6.2018 in Petition



No. 171/MP/2016 has given the same dispensation to the Petitioner with regard its PPA with UP Discoms.

83. We have examined the submissions of the parties. The Ministry of Environment and Forests, Govt. of India vide its Notification dated 3.11.2009 had issued directions regarding utilization of fly ash under the Environment (Protection) Act, 1986. The Ministry of Environment and Forests, Govt. of India vide Notification No. S.O.254 (E) dated 25.1.2016 has amended the Environment (Protection) Rules, 1986 and has imposed additional cost towards fly ash transportation. Relevant portion of said Rules is extracted as under:

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

84. It is evident from the submissions that the Petitioner has not incurred any expenditure on account of transportation of fly ash and is only seeking in-principle approval of the said claim. The question of levy of charges for transportation of fly ash as a ‘Change in Law’ event had come up for consideration before the Commission in Petition No. 101/MP/2017 in the matter of DB Power Ltd v/s PTC India Ltd & Ors. in terms of the MoE&F amendment dated 25.1.2016 and the Commission by order dated 19.12.2017 disposed of the same as under:

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



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

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

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

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

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

85. In line with the above order, the expenditure claimed by the Petitioner is admissible under the Change in Law during the existence of the PPA, if any, subject to the conditions indicated in the said order (as quoted above). The Petitioner is granted liberty to approach the Commission with above documents to analyse the case for determination of compensation.

(j) Change in Emission Norms

86. The Petitioner has submitted that the Ministry of Environment, Forest and Climate Change (MOE&F), GOI vide Notification dated 7.12.2015 has revised the emission norms to be maintained by the Power plants. It has also submitted that these revised norms will have to be implemented within two years from the date of publication of the said notification by the operating power plants like the Petitioner and very large investments will have to be made by the Petitioner in order to meet these standards. The Petitioner has submitted that the above results into Change in Law as per Article 10.1.1 of the PPA and has sought permission to file additional submissions in regard to cost implications under the present PPA with AP Discoms and Telangana Discoms.



87. AP Discoms and Telangana Discoms have submitted that all Thermal Stations are obligated to fulfil these norms. Therefore, the Petitioner cannot claim charges under this head as Change in Law. Further, as per the Notification, the Petitioner is obligated to meet the modified or amended norms within a period of two years from the date of Notification i.e. 7.12.2015. The PPA with the Respondents expired on 15.6.2016 and the Petitioner has not submitted the required documents regarding the works executed during the contractual period with AP Discoms and Telangana Discoms. *Per contra*, the Petitioner has submitted that PPA entered into with AP Discoms dated 31.7.2012 has been renewed till 31.3.2021. The Petitioner has submitted that at present, it is only seeking an in-principle approval that the MoE&F Notification dated 7.12.2015 is a Change in Law. The actual technological installation, recovery, change in technical parameters, etc. will only be at the stage of implementation for which a separate Petition would be filed before the Commission.

88. We have noted the submissions made by the parties. The issue of 'Additional Capital Expenditure on account of amendments to Environment Norms' has been examined by the Commission in order dated 17.9.2018 in Petition No. 77/MP/2018 in case of Coastal Gujarat Power Limited and several other petitions, wherein the Commission has considered the same as Change in Law and granted liberty to approach the Commission for subsequent relief. However, in the present case, the PPA dated 31.7.2012 executed between the parties has already expired on 15.6.2016 and the Petitioner has stated that it has not incurred any expenditure on this count. Therefore, claim of the Petitioner in this regard is not admissible.

(k) Minimum Alternate Tax



89. The Petitioner has submitted that Minimum Alternate Tax (MAT) rate on the cut-off date was 18.5%. It has also submitted that the applicable surcharge was to the tune of 5%, Education Cess at 2% and Secondary and Higher Education cess at 1% and thereby the applicable MAT rate was 20.00775%. It has further submitted that the surcharge has been increased from 10% to 12% and thereby the MAT liability has been increased to 21.342%. Accordingly, the Petitioner has submitted that the above has resulted in change in law as per Article 10.1.1 of the PPA and the Petitioner shall approach the Commission at the appropriate time for relief under this head. It has stated that the Petitioner has not paid any MAT as MAT is payable on book profits as on March, 2016 and the Petitioner does not have any book profits. However, the same might be paid in future.

90. The Respondents, AP Discoms and Telangana Discoms have submitted that the Commission in its order dated 31.5.2018 in Petition No. 170/MP/2016 referring to the order dated 30.3.2015 in Petition No. 6/MP/2013, which was upheld by the APTEL in its judgment dated 19.4.2017 in Appeal No. 161/2015 has disallowed the claim of the Petitioner. The said order squarely applies to the present case and hence the claims under this head are liable to be rejected. In response, the Petitioner has submitted that the effect of the term increase/ decrease in cost/ revenue has to be understood in terms of spirit of Article 10 i.e. restoration to the same economic position. The change in rate of MAT has an effect on the cost or revenue of the project. Also, Article 10 of the PPA being beneficial provision, has to be given liberal interpretation to mean any change which ultimately affects the company financially so far as the generation business is concerned and is required to be compensated/ adjusted. The judgment of APTEL dated 19.4.2017 in case of Sasan Power has not



attained finality and an appeal against the same is pending before the Hon'ble Supreme Court.

91. We have noted the submissions of the parties. Though the Petitioner has not sought any relief under this head, it has however placed reliance on the judgments of the APTEL and has reserved its rights to claim the same in future under change in law in terms of Article 10.1 of the PPA. We note that issue as to whether change in MAT rate qualifies for Change in Law event or not has already been already and stands disallowed by Commission in order dated 30.3.2015 in Petition No. 6/MP/2013. The relevant portion of the 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.”

92. It is further noticed that the above order of the Commission disallowing the claim of change in Income tax rate from 33.99% to 32.45% and MAT rate from 11.33% to 20.01% based on the Finance Act, 2012 as a Change in Law event under the provisions of Article 13.1.1 of the PPA was examined by the APTEL in Appeal



No. 161/2015 and the APTEL by its judgment dated 19.4.2017 had upheld the order of this Commission. The relevant portion of the judgment is extracted as under:

“28. Thus, when a tax on income is paid by the company, it cannot be said that a part of the income of the company was received for and on behalf of the Revenue. The Income Tax is charged upon the profits; the thing which is taxed is the profit that is made. Profit has to be ascertained first and Income Tax being a part of profits – namely, such part as the Revenue is entitled to take, is to be deducted from profits. When the net gains of the business determined after making all permissible deductions, are taxed, the deduction to meet such taxes cannot be deducted. Income Tax is not allowed as a deduction in making assessment of income. Income Tax or MAT are not part of the expenses of the company incurred for the purpose of carrying on the business and earning profits. Income Tax and MAT are post profit. Income Tax and MAT are the application of the profits when made. Income Tax and MAT are not an expenditure laid out for the purpose of the business of the company.

“40.....In view of the above, the CERC’s finding that changes in Income Tax or increase in MAT are not Changes in Law must be confirmed and is accordingly confirmed.”

93. In line with the above decision, the claim of the Petitioner to allow MAT as Change in Law is not permissible.

(I) Carrying Cost

94. The Petitioner has submitted that it is entitled to carrying cost/ interest on all additional amounts incurred/ paid till date on account of Change in law in terms of the judgment dated 12.9.2014 of the APTEL in Appeal No. 288 of 2013 (Wardha Power Co Ltd v Reliance Infrastructure Ltd & Anr) and has submitted that relief under Article 10 of the PPA necessarily includes carrying cost. It has also submitted that Article 10 stipulates that the affected party is to be restored to the same economic position as if such change in law had not occurred. According to the Petitioner, the restoration of the Petitioner to the same economic position would necessarily mean that the liability of the procurers with regard to Change in law gets crystallised simultaneously with the Petitioner’s liability with effect from the occurrence of change in law event/ payment by the Petitioner in relation to the same.



It has added that carrying cost is in the nature of compensation of time value of funds deployed on account of change in law events and in case carrying cost is not awarded, the affected party would not be restored to the same economic position.

95. 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 in the matter of APL vs. 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.”

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

10. A reading of Article 13 as a whole, therefore, leads to the position that subject to restitutionary principles contained in Article 13.2, the adjustment in monthly tariff payment, in the facts of the present case, has to be from the date of the withdrawal of exemption which was done by administrative orders dated 06.04.2015 and 16.02.2016. The present case, therefore, falls within Article 13.4.1(i). This being the case, it is clear that the adjustment in monthly tariff payment has to be effected from the date on which the exemptions given were withdrawn. This being the case, monthly invoices to be raised by the seller after such change in tariff are to appropriately reflect the changed tariff. On the facts of the present case, it is clear that the respondents were entitled to adjustment in their monthly tariff payment from the date on which the exemption notifications became effective. This being the case, the restitutionary principle contained in Article 13.2 would kick in for the simple reason that it is only after the order dated 04.05.2017 that the CERC held that the respondents were entitled to claim added costs on account of change in law w.e.f. 01.04.2015. This being the case, it would be fallacious to say that the respondents would be claiming this restitutionary amount on some general principle of equity outside the PPA. Since it is clear that this amount of carrying cost is only relatable to Article 13 of the PPA, we find no reason to interfere with the judgment of the Appellate Tribunal.

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

97. Article 10.2.1 of the PPA provides as under:

“10.2.1. While determining the consequences of Change in Law under this Article 10, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through monthly Tariff Payment, to the extent contemplated in this Article 10, the affected party to the same economic position as if such Change in Law has not occurred.”



98. In view of the provisions of the PPA, the principles of restitution and the recent judgment of 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 bills is raised by the Petitioner in terms of this order, the provisions of Late Payment Surcharge in the PPA would kick in if the payment is not made by the Respondents within due date.

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

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

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

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

26. The Petitioner shall 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."



100. 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. 4 : Mechanism for processing and reimbursing of admitted claimed under Change in Law

101. 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.”

102. 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.

103. However, it is clarified that the Petitioner 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.



104. The Article 10 of the PPA provides for the principle for computing the impact of change in law during the operating period. These provisions enjoin 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 commencement of supply or from the date of Change in Law, whichever is later.

Summary of Decision

105. Based on the above analysis and decision, the summary of our decision under the Change in Law during the Operating Period is as under:

S. No.	Change in Law event	Decision
1	Increase in the rate of Clean Energy Cess on Coal	Allowed
2	Change in the manner of computation of Excise Duty	Allowed
3	Change in Chhattisgarh Infrastructure Development Cess and Chhattisgarh Environment Cess	Allowed
4	Levy of Chhattisgarh Electricity Duty on Auxiliary Consumption	Allowed
5	Imposition of charges towards National Mineral Exploration Trust (NMET) and District Mineral Foundation (DMF)	Allowed
6	Levy of Service Tax and Swachh Bharat Cess, Krishi Kalyan Cess on total freight by rail	Allowed
7	Busy Season Surcharge on transportation of coal	Allowed
8	Coal Sizing Charges and Surface Transportation Charges	Not Allowed
9	Fly Ash Transportation	Liberty granted
10	Change in Emission Norms	Not allowed
11	Minimum Alternate Tax	Not Allowed
12	Carrying Cost	Allowed

106. 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.

107. Petition No. 169/MP/2016 is disposed of in terms of above.

Sd/-
(I.S.Jha)
Member

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

sd/-
(P.K. Pujari)
Chairperson

