

CENTRAL ELECTRICITY REGULATORY COMMISSION

NEW DELHI

Petition No.71/MP/2018

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

Date of Order: 02.04.2019

In the matter of

Petition under Section 79 of the Electricity Act, 2003 read with statutory framework governing procurement of power through competitive bidding ("Competitive Bidding Guidelines") and Article 10 of the PPA dated 17.3.2010 between Maharashtra State Electricity Distribution Company Limited and EMCO Energy, PPA dated 21.3.2013 with Electricity Department of Union Territory of Dadra and Nagar Haveli and EMCO Energy, PPA dated 27.11.2013 between GMR Energy Trading Limited and the Tamil Nadu Generation and Distribution Corporation Limited through EMCO Energy Limited for compensation due to Change in Law.

And in the matter of

GMR Warora Energy Limited
701/704, 7th Floor, Naman Centre, A-Wing,
BKC (Bandra Kurla Complex), Bandra
Mumbai - 400051

...Petitioner

Versus

1. Maharashtra State Electricity Distribution Company Limited
Fifth Floor, Prakashgad, Plot No. G-9,
Anant Kanekar Marg, Bandra (East)
Mumbai – 400051.

2. Electricity Department, Union Territory of Dadra & Nagar Haveli,
Vidyut Bhavan, Opposite Secretariat,
Silvassa, Dadra and Nagar Haveli – 396230.

3. Tamil Nadu Generation and Distribution Corporation Limited
144, Anna Salai, NPKRR Maaliogai,
Chennai-600002.



4. GMR Energy Trading Limited
25/2 Skip House, Museum Road,
Bangalore – 560025.

... Respondents

For Petitioner:

Shri Vishrov Mukerjee, Advocate, GMR
Ms. Raveena Dhamija, Advocate, GMR
Ms. Yashaswi, Advocate, GMR

For Respondents:

Shri Varun Pathak, Advocate, MSEDCL
Shri S. Vallinayagam, Advocate, TANGEDCO
Shri Anand K.Ganesan, Advocate, DNH
Shri Ashwin Ramanathan, Advocate, DNH

ORDER

The Petitioner, GMR Warora Energy Limited (GWEL) (formerly known as EMCO Energy limited (EMCO) is a generating company which has developed a coal based thermal power plant with an installed capacity of 600 MW in the Warora Taluka, District Chandrapur in the State of Maharashtra (the "Project"). The Project comprises of two units of 300 MW each. Unit 1 of the Project was commissioned on 19.03.2013 and Unit 2 was commissioned on 01.09.2013.

2. (a) The Respondent No.1, Maharashtra State Electricity Distribution Company Limited (MSEDCL) is a distribution Licensee operating in the State of Maharashtra.

(b) The Respondent No. 2, Electricity Department, Union Territory of Dadra & Nagar Haveli (now known as DNH Power Distribution Company Limited) is a distribution licensee operating in the Union Territory of Dadra and Nagar Haveli.



(c) The Respondent No. 3, Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO) is a Generation and Distribution Corporation operating in the State of Tamil Nadu.

(d) The Respondent No. 4, GMR Energy Trading Limited (GETL) is a trading licensee trading in electricity in Indian power market. It is an intermediary in the back-to-back arrangement between Respondent No.3 and the Petitioner.

Background

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

(a) Supply and sale of 200 MW of power on long term basis in terms of the Power Purchase Agreement dated 17.03.2010 with Respondent No. 1, MSEDCL ("**MSEDCL PPA**"). The cut-off date for the MSEDCL PPA is 31.07.2009. The supply of power commenced on 17.03.2014 (MSEDCL PPA Operating Period).

(b) Supply and sale of 200 MW of power on long term basis in terms of the Power Purchase Agreement dated 21.03.2013 with Respondent No. 2, DNH ("**DNH PPA**"). The Cut-off date for the DNH PPA is 01.06.2012. Supply of power commenced from 01.04.2013 (DNH PPA Operating Period); and

(c) Supply and sale of 150 MW of power on long term basis to the Respondent No. 3, TANGEDCO in terms of the following back to back arrangement (**TANGEDCO PPA**):

(i) the Agreement to sell dated 01.03.2013 between GETL (Respondent No.4) and the Petitioner on the basis of which GETL had submitted its bid to TANGEDCO;

(ii) Power Purchase Agreement dated 27.11.2013 between GETL and TANGEDCO for supply of power from the Petitioner to TANGEDCO. The cut-off date for the TANGEDCO PPA is 27.02.2013; and



(iii) PPA dated 03.05.2014 between the Petitioner and GETL through the Petitioner recording the terms and conditions in accordance with the PPA between TANGEDCO and GETL. The supply of power commenced on 22.10.2015 (TANGEDCO PPA Operating Period).

4. The Petitioner has filed the present petition under Section 79 of the Electricity Act, 2003 read with statutory framework governing procurement of power through competitive bidding ("Competitive Bidding Guidelines") and (a) Article 10 of the PPA dated 17.03.2010 between MSEDCL and EMCO Energy Limited; (b) Article 10 of the PPA dated 21.03.2013 between Electricity Department of Union Territory of Dadra and Nagar Haveli and EMCO Energy Limited and (c) Article 10 of the PPA dated 27.11.2013 between GETL and TANGEDCO through EMCO Energy Limited to seek adjustment in the tariff structure to compensate GWEL on account of the following change in law event which has impacted the Project during the Operating Period:

S. No.	Change in Law Event	Applicability		
		MSEDCL PPA	DNH PPA	TANGEDCO PPA
1	Levy of Evacuation Facilities Charges pursuant to Notification No. CIL:S&M:GM(F)/Pricing/2017/ 1005 dated 19.12.2017 issued by Coal India Ltd.	Yes	Yes	Yes
2	Expenditure towards CSR activities pursuant to the Companies Act, 2013.	Yes	Yes	Yes
3	Expenditure towards CSR activities pursuant to the Environment Clearance dated 25.10.2010.	Yes	No	No
4	Levy of GST on O&M Contracts pursuant to the Central Goods and Service Tax Act, 2017.	Yes	Yes	Yes

5. Accordingly, the impact of the above Change in Law events estimated by the Petitioner is as follows:



S. No.	Change in Law Item	For MSEDCL PPA		For DNH PPA		For TANGEDCO PPA	
		Monthly Impact * (Rs. Cr.)	Annualized Impact* (Rs. Cr.)	Monthly Impact * (Rs. Cr.)	Annualized Impact* (Rs. Cr.)	Monthly Impact * (Rs. Cr.)	Annualized Impact* (Rs. Cr.)
1	Evacuation Facility Charges	0.03	5.1	0.03	5.1	0.036	4
2	Expenditure towards CSR as per Companies Act, 2013	As per actuals	As per actuals	As per actuals	As per actuals	As per actuals	As per actuals
3	Expenditure towards CSR as per Environment Clearance	As per actuals	As per actuals	Not Applicable	Not Applicable	Not Applicable	Not Applicable
4	Levy of GST on O&M Contracts	0.05	0.60	0.04	0.44	0.03	0.33
5.	Carrying cost	As may be determined					
	Total	0.08	5.7	0.07	5.54	0.066	4.33

*** Estimates. Actual impact may vary based on actual coal quantity, coal quality, O&M Contract Amount and actual energy scheduled for respective PPA.**

Submissions of the Petitioners in the pleadings and during the hearings

6. The Petitioner has submitted that in case of MSEDCL, DNH and TANGEDCO PPAs the value towards the Letter of Credit for the F.Y. 2017-18 is Rs. 37.64 Cr., Rs. 55.55 Cr. and Rs.40.92 Cr respectively. Accordingly, 1% of the value of Letter of Credit in aggregate for the contract year comes to Rs. 4.52 Cr., Rs. 6.67 Cr. and Rs. 4.91 Cr. for MSEDCL, DNH and TANGEDCO PPAs respectively. (By using the formula: $1\% \times \text{Letter of credit amount} \times 12$). It is submitted that the Change in Law claims are more than the threshold amount in terms of Article 10.3.2 of the PPAs as shown below:

Particulars	For MSEDCL PPA	For DNH PPA	For TANGEDCO PPA
	Amount (Rs. Cr.)	Amount (Rs. Cr.)	Amount (Rs. Cr.)
Change in Law Claims Corresponding to this petition	5.7	5.54	4.33



Claims Pending in Petition 01/MP/2017	17.42	17.24	54.32
Total Claims	23.12	22.78	58.65
LC Amount (for FY 2017-18)	37.64	55.55	40.92
1% of LC Amount in Aggregate	4.52	6.67	4.91

7. The Petitioner has further submitted that the events of Change in Law have significant adverse financial impact on the costs and revenue of the Petitioner during the Operating period for which the Petitioner is entitled to be compensated in terms of Article 10 of the respective PPAs. Accordingly, the Petitioner has filed the present petition with the following prayers:

- “(a) Declare the aforesaid events, as Change in Laws events under the MSEDCL, DNH and TANGEDCO PPAs during the Operating Period;
(b) Evolve a suitable compensatory mechanism to compensate the Petitioner for the impact on costs during the operating period of the Project and restore the Petitioner to the same economic condition prior to occurrence of the Change in Law event set out in Paragraphs 46 to 51 (of the petition);
(c) Grant interest/ carrying cost for the aforesaid change in law events”*

8. The Petition was admitted and notices were issued to the Respondents with directions to file their replies to the petition. The hearing of the matter was held on 17.9.2018, 24.10.2018, & 8.1.2019.

Submissions of the Respondents in the pleadings and during the hearings

9. Replies to the Petition have been filed by Respondent, MSEDCL vide affidavit dated 10.07.2018 and Respondent, DNH vide affidavit dated 12.11.2018. The Petitioner has filed its rejoinder to the said replies of the Respondents. Thereafter, the matter was heard on 08.01.2019 and at the request of the learned counsels for DNH and TANGEDCO, the Commission granted time to file their written submissions, on or before 24.1.2019. The petitioner has also handed over its submission in the matter during the hearing. The Respondent, TANGEDCO vide affidavit dated 08.01.2019 and Respondent, DNH vide affidavit dated 02.02.2019 has filed its written submissions in the matter.



Issues

10. Following issues emerge for our consideration:

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

Issue No. 2 What is the scope of change in law in the PPAs?

Issue No. 3 Whether compensation claims are admissible under Change in law in the PPAs?

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

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

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

12. The claims of the Petitioner in the present petition pertain to the Change in Law events during the Operating period. Article 10.4 of the PPAs dealing with the issue of notice is extracted as under:

“10.4 Notification of Change in Law

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

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

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

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

- (a) the Change in Law; and*
- (b) the effects on the Seller.”*



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

MSEDCL PPA

- (i) Notice dated 11.01.2018 vide letter ref: GWEL/MSEDCL/2018/20 –
 - (a) Levy of Evacuation Facilities Charges
 - (b) Mandatory expenditure towards Corporate Social Responsibility ("CSR") pursuant to Companies Act, 2013 and Environment Clearance dated 25.05.2010 issued by Ministry of Environment, Forests and Climate Change.
- (ii) Notice dated 07.02.2018 vide letter ref: GWEL/MSEDCL/2018/46 –
 - (a) Imposition of Goods and Service Tax on O&M contracts (effective from 01.07.2017) pursuant to the enactment of the Central Goods and Service Tax Act, 2017.

DNH PPA

- (i) Notice dated 11.01.2018 vide letter ref: GWEL/DNH/2018/21 –
 - (a) Levy of Evacuation Facilities Charges
 - (b) Mandatory expenditure towards Corporate Social Responsibility ("CSR") pursuant to Companies Act, 2013 and Environment Clearance dated 25.05.2010 issued by Ministry of Environment, Forests and Climate Change.
- (ii) Notice dated 07.02.2018 vide letter ref: GWEL/DNH/2018/47 –
 - (a) Imposition of Goods and Service Tax on O&M contracts (effective from 01.07.2017) pursuant to the enactment of the Central Goods and Service Tax Act, 2017.

TANGEDCO PPA

- (i) Notice dated 11.01.2018 vide letter ref: GWEL/TANGEDCO/2018/22 –
 - (a) Levy of Evacuation Facilities Charges
 - (b) Mandatory expenditure towards Corporate Social Responsibility ("CSR") pursuant to Companies Act, 2013 and Environment Clearance



dated 25.05.2010 issued by Ministry of Environment, Forests and Climate Change.

- (ii) Notice dated 07.02.2018 vide letter ref: GWEL/TANGEDCO/2018/48 –
 - (a) Imposition of Goods and Service Tax on O&M contracts (effective from 01.07.2017) pursuant to the enactment of the Central Goods and Service Tax Act, 2017.

14. Under Article 10.4.2 of the above said PPAs, 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 notices as stated above to the Procurers indicating the above change in law events. In the said notices, the Petitioners have appraised the Procurers about the occurrence of change in law events and the impact of such events on tariff. None of the Procurers had raised issues with regard to such notices of change in law by the Petitioner. Thereafter, the Petitioner has filed the present Petition. In our view, the requirements of Article 10.4.2 of the said PPAs have been complied with by the Petitioner.

Issue No. 2: What is the Scope of change in law in the PPAs?

15. The Petitioner has approached this Commission under Article 10 of the respective PPAs read with section 79 of the Electricity Act, 2003 for adjustment/ compensation to offset the financial/ commercial impact of change in law during the operating period.

16. Article 10 of the PPAs deals with the events of 'Change in Law'. The provisions under all the PPAs (MSEDCL, DNH & TANGEDCO) are similar. Article 10 of the MSEDCL PPA 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:

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.”

17. The terms “Law” defined in all the said PPAs are similar and 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.”

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

a. MSEDCL PPA

“Indian Governmental Instrumentality” shall mean the Government of India, Government of State(s) of Maharashtra, 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.”

b. DNH PPA

“Indian Governmental Instrumentality” shall mean the Government of India, Governments of States of Maharashtra and UT of Dadra and Nagar Haveli 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 subdivision 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.”

c. TANGEDCO PPA

“Indian Governmental Instrumentality” shall mean the Government of India, Governments of States of Tamil Nadu, Maharashtra and Karnataka, 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 subdivision 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.”

19. A combined reading of the above provisions in the PPAs reveal that events should have occurred after the date, which is seven days prior to the bid deadline. And 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 of any Law by a Competent Court of law, Tribunal or Indian Governmental Instrumentality acting as final authority under law for such interpretation, or

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

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

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

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

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

(h) The 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;

(i) 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.

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

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

20. The Bid-deadline and the cut-off dates in respect of the said PPAs are as under:

	MSEDCLPPA	DNH PPA	TANGEDCO PPA
Bid deadline date	7.8.2009	8.6.2012	6.3.2013
Cut-off date	31.7.2009	1.6.2012	27.2.2013

21. The Petitioner has raised claims under Change in Law in respect of events during the Operating period namely levy of Evacuation Facilities charges by Coal India Ltd., expenditure towards CSR activities pursuant to the Companies Act, 2013, levy of GST on O&M Contracts pursuant to the Central Goods and Service Tax Act, 2017 and expenditure towards CSR activities pursuant to the Environment Clearance dated 25.10.2010. Keeping in view the broad principles as discussed above, we proceed to deal with the claim of the Petitioner under Change in Law during the Operating Period.

A. Levy of Evacuation Facility Charges by Coal India Ltd.

22. Petitioner has submitted that, at the time of bid submission for the PPAs, there was no Evacuation Facility Charges being levied by the Coal India Limited (CIL). Subsequently, the Coal India Ltd. vide Notification CIL:S&M:GM(F)/Pricing/2017/1005 dated 19.12.2017, levied Evacuation Facility



Charges @ Rs 50/MT with effect from 20.12.2017 on all despatches of coal except dispatch through rapid loading arrangement. Accordingly, petitioner has submitted that the levy of Evacuation Facility Charges is a change in law event in terms of the following:

(a) The levy of evacuation facility charges is pursuant to a Notification issued by Coal India Ltd, which comes within the ambit of 'Law' under the PPAs.

(b) The Notification was issued by Coal India Ltd. which is a corporation that is under the control of Government of India, thus making it an Indian Government Instrumentality under the PPAs. In this regard it is submitted that as on 10.01.2018 Central Government holds 78.5% of shares in Coal India Limited.

(c) The aforesaid change in law event was effective after the Cut-Off Dates for the PPAs; and

(d) The aforesaid change in law event has led to additional expenditure in coal procurement cost for GWEL during the operating period.

23. MSEDCL vide affidavit dated 10.7.2018 has submitted that the Evacuation Facility Charges (EFC) are covered under other applicable charges in sub-section 9.2.4 of FSA. The conjoint reading of these FSA clauses makes it clear that the petitioner was aware that petitioner may have to pay any additional charges notified from time to time by CIL/ seller. Accordingly, the petitioner has quoted its rate during the bidding as it was clarified in the bid documents (RFP) at clause no 2.6. Hence, as this being the complete responsibility of the petitioner under FSA, EFC should not be approved and passed on to MSEDCL under Change in Law provision of PPA.

24. In response, petitioner vide its reply dated 8.11.2018, has submitted that the of MSEDCL's argument that Evacuation Facility Charges being the sole responsibility



of GWEL under the Fuel Supply Agreement (FSA) between GWEL and SECL and that it cannot be passed on to MSEDCL is contrary to various orders of this Commission wherein it has held increase in statutory charges such as rate of royalty on coal to be a change in law event.

25. DNH vide affidavit dated 12.11.2018 has pointed out that notification for levy of Evacuation Facility Charges by Coal India Limited is a commercial activity and is basically a realization of cost of extending facilities related to all dispatches of coal except when the coal is dispatched through rapid loading arrangement. The charges are in the nature of a contractual consideration for commercial services rendered and therefore, cannot fall within the meaning of 'Law' or 'Change in Law'. In addition, DNH vide written submission dated 2.2.2019 has submitted that the coal pricing has been de-regulated with effect from 01.01.2000 and it is only for the coal companies to set to the price of coal from time to time. The price is fixed by coal companies on the basis of market forces and any increase or decrease in such charges from time to time by CIL are a part of the contractual price and are not a result of any change in law. There is no statutory enactment or law applicable to these charges and, therefore, there is no change in law.

26. Petitioner vide its reply dated 29.11.2018 has submitted that Hon'ble Supreme Court in ***Kusum Ingots & Alloys v Union of India***, reported as (2004) 6 SCC 254, has held that executive instructions, devoid of any statutory backing would also be considered as 'law'. Additionally, in terms of these contentions, the distinction sought to be created between exercise of sovereign power and commercial function of the government is irrelevant to the determination of Change in Law. The Appellate Tribunal for Electricity ("Tribunal") has rejected the said contention in Judgment dated 14.08.2018 in Appeal No. 119 of 2016 titled Adani Power Rajasthan Limited vs. RERC & Ors. ("Adani Judgment"). Further, DNH's attempt to introduce implied terms into the PPA is impermissible in light of the findings of the Hon'ble Supreme Court in Nabha Power Limited v PSPCL ("Nabha Judgment") reported as (2018) 11 SCC 508 which held that unless there is a strict necessity, implied terms which were never contemplated by the parties cannot be read into a contract. Accordingly,



issuance of Notification by CIL levying Evacuation Facility Charges amounts to introduction of a new 'Law' and is squarely covered under Article 10.1.1 of the PPA.

27. TANGEDCO vide affidavit dated 8.1.2019 has made the following submissions:

(a) The claim made by the petitioner towards Evacuation Facility Charge on all dispatches is incorrect since these charges forms the part of basic charges of coal and the CERC escalation index takes care of the increase in such rate and hence the petitioner is not entitled to claim compensation.

(b) Dispatch charges are levied by Coal India Limited and the revision in dispatch/loading/unloading charges are the responsibility of the petitioner and SECL as FSA is signed between SECL and the petitioner.

(c) The price notification of CIL vide letter dated 19.12.2017 does not state any Act, Ordinance, Regulations or Code under which it has been issued and seems to be the charges imposed by coal India Ltd on commercial consideration rather than introduction of any tax. Hence introduction of Evacuation Charges by Coal India Ltd cannot be treated as Change in Law under the PPA.

(d) The responsibility of managing the cost of fuel is that of the bidder in tariff determined under section 63 of the Electricity Act, 2003. Bidder was aware of the fact that there is possibility of escalation of prices and taking into account the possible escalation of price of coal during the period of PPA, the bidder had fixed the cost of coal in the energy charges quoted by it in the tariff. The bidder does not disclose the cost of coal in the bid price. It is the composite "energy charge" which is quoted at the time of bidding, which includes the profit margin of the bidder (the capital and operating cost). In addition to the above, the bidder is given the benefit of escalation indices of CERC every six months, to increase the cost of coal proportionate to the portion of coal cost it had included in the "energy charges" quoted by it. In a tariff discovered under section 63 of the Electricity Act, 2003, it is the responsibility of the bidder to ensure that the



bid will keep it financially viable till the end of PPA. Procurement of fuel and its cost is never agreed to by the procurer either under the RFP or under the PPA.

28. We have considered the contentions and averments made in the submissions by the parties. The Petitioner has contended that the Coal India Limited, which is a corporation under the control of Government of India, is an Indian Government Instrumentality and the notifications issued by Coal India Limited with regard to levy of evacuation facility charges comes within the ambit of 'Law' under the PPAs and covered under Change in Law.

29. The Tribunal in its judgment dated 21.12.2018 in Appeal No. 193 of 2017 (GMR Kamalanga Energy Ltd. & Anr. vs CERC & Ors.) had held as under:

“26. In the present appeal, we are concerned with the notifications and circulars issued by Coal India Limited and Ministry of Railways which are nothing but Indian Governmental Instrumentalities. Whether such notifications / circulars are covered under the scope of law. So far as facts are concerned in terms of LOA dated 8-7-2009 for 2.384 MMT and LOA dated 25-7-2008 for 2.140 MT., GMR was allocated coal under these two LOAs. The two coal linkages have to be considered as grant of Government of India since FSAs can be pursuant to the aforesaid allocation.

27. Similar contentions were raised in Appeal No. 119 of 2016 and Appeal No. 277 of 2016. After referring to Articles 298 and 77 of the Constitution, this Tribunal rightly opined that Article 298 and 77 of the Constitution are complementary to each other as far as the scheme of carrying out the business / commercial activity by Government of India / State Government is concerned. The Corporations / companies which carry out business falling under various Ministries and Department of both Government of India and State Government are the creations of Government of India or creations of Parliament and State Assembly by making enactments. Their formations have force of law. The PPA in this case also defines the Indian Government Instrumentalities which includes all departments, corporations / companies like Coal India Limited or Indian Railways formed under different Statutes. Over and above this, various stipulations envisaged under RFP and PPA have to be considered before arriving at any event as a change in law event.

28. We do not find any reason to differ from the above opinion so far as the opinion of the Tribunal in Adani's case (Appeal Nos. 119 and 277 of 2016).

29. Therefore, the contention of the Respondents 2 & 3 that Corporations cannot be considered as executive bodies or Governmental instrumentalities to issue instructions cannot be accepted.”



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

31. Accordingly, the Petitioner is entitled to recover the Evacuation Facility Charges as per applicable rates in proportion to the coal as per the parameters of the applicable Tariff Regulations of the Commission or coal actually consumed whichever is lower, for generation and supply of electricity to the discoms concerned. As on cut-off dates of the PPAs, Evacuation Facilities Charges were Nil. Thereafter, the applicable rates of Evacuation Facilities Charges shall be used based on the relevant date/s. The Petitioner is directed to furnish along with its monthly regular and/or supplementary bill(s) and computations duly certified by the auditor to the discoms concerned. The Petitioner and the discoms concerned are directed to carry out reconciliation on account of these claims annually.



B. Expenditure towards Corporate Social Responsibility pursuant to Companies Act, 2013

32. The petitioner has submitted that at the time of bid submission for the PPAs there was no requirement for incurring expenditure towards Corporate Social Responsibility (CSR) under the Companies Act (1956). On 29.08.2013, the Parliament enacted the Companies Act, 2013 which mandates companies having net worth of Rs. 5,00,00,00,000 (Five Hundred Crore) or more, or turnover of Rs. 10,00,00,00,000 (One Thousand Crore) or more or a net profit of Rs.5,00,00,000 (Five Crore) or more during any financial year to: -

- (a) Frame a Board to formulate CSR Policy under Section 135;
- (b) Ensure that the company spends, in every financial year, at least two percent (2%) of the average net profits of the company made during the three immediately preceding financial years. (Section 135 of the Companies Act, 2013 came into force on 01.04.2014.)

33. The Petitioner has submitted that the obligation to incur expenditure on CSR activities pursuant to the enactment of Companies Act, 2013 is a Change in Law event in terms of the following: -

- (a) The mandatory expenditure towards CSR is pursuant to enactment of Companies Act 2013 notified by the Government of India which comes within the ambit of 'Law' under the PPAs.
- (b) The aforesaid Law was enacted by the Parliament of India which come within the ambit of Indian Government Instrumentality under the PPAs.
- (c) The aforesaid change was effective after the Cut-Off Dates for the PPAs; and



(d) The levy of mandatory CSR expenditure has led to recurring expenditure for GWEL during the operating period.

34. MSEDCL vide affidavit dated 10.7.2018 submitted that "Corporate social responsibility (CSR), is a form of corporate self-regulation integrated into a business model. CSR committee of the company should meet the said CSR out of their net profits and the same cannot be passed on to the procurer in the garb of change in law. The imposition of cost of CSR does not fall under Article 13 of PPA. The purpose of CSR is to make the commercial entities contributes to development of the society and to take some responsibility in nation building by contributing social cause. The liabilities of CSR is out of profit of company in order to comply with the legal requirement under section 135 (5) of Company Act, 2013.

35. In response, petitioner vide its reply dated 8.11.2018 has submitted that the MSEDCL has contended that CSR policy functions as a self-regulatory mechanism and is aimed at encouraging companies to make a positive impact. The contention that expenditure on CSR has to be met from the profits of the Company and cannot be passed on to the consumers is erroneous. The purpose of introduction of the requirement to incur expenditure towards CSR activities has no bearing on whether the same constitutes a change in law event. Since the cost towards CSR activities is booked as expenditure in the financial accounts, the obligation to incur expenditure on CSR activities has led to change in recurring or non-recurring expenditure. Thus, levy of mandatory CSR expenditure qualifies as Change in Law event under Article 10 of the MSEDCL PPA.

36. DNH vide affidavit dated 12.11.2018 has pointed out that the Commission has disallowed the CSR expense under Section 135 of the Companies Act, 2013 as a Change in Law event in a number of its orders. DNH has pointed to the Order dated 17.02.2017 passed by the Commission in Petition No. 16/MP /2016 in this regard. DNH submitted that CSR is a process with the aim to embrace responsibility for the company's actions and encourage a positive impact through its activities on the



environment, consumers, employees, communities, stakeholders and all other members of the public sphere who may also be considered as stakeholders. Therefore, it is an amount which is to be paid from the profits. By claiming a compensation for expenditure made towards CSR as a Change in Law event, the Petitioner is essentially seeking to pass down the costs to the consumers for whom the Petitioner is supposed to undertake CSR in the first place. Such claims, are not in the spirit of law, and therefore ought to be disallowed.

37. Petitioner vide its reply dated 29.11.2018 has submitted that the reliance placed by DNH on Order dated 17.02.2017 in Petition No. 16/MP/2016 titled **Sasan Power Ltd. v. M.P Power Management Company Ltd. & Ors.** is misplaced. The order dated 17.02.2017 has been challenged vide Appeal No. 116 of 2017 and is pending adjudication before the Hon'ble Tribunal. In any event, the aforesaid Order is not applicable in the present case as the PPA provisions in case of Sasan Power Ltd. and GWEL are different. This Commission has in the Order dated 17.02.2017 held that the expenditure on CSR stipulated in the Environment Clearance cannot be allowed under the change in law provisions since the same have been made under the Companies Act, 2013 to be met out of the net profit of the Company. It is submitted that obligation to incur expenditure on CSR activities in terms of the Environment Clearance has no co-relation with statutory obligation mandated under the provisions of Section 135 of the Companies Act, 2013. Further DNH's contention that such expenses would need to be expended out of the Petitioner's net profit is contrary to the express condition of the Environment Clearance.

38. TANGEDCO vide affidavit dated 8.1.2019 has made the following submissions:

(a) CSR expenses are meant for the welfare of public by way of providing education, health camps, expenditure on environmental sustainability etc.

(b) As per Article 10 of PPA, the seller is entitled to get compensation on change in law events only if there is any change in cost of or revenue on selling electricity to the procurer. But the expenses incurred towards CSR activities are to be met out of the profits of the generating company. These expenses are



meant for the public at large and cannot be passed on to the consumers and it has no relation with the revenue or cost of producing or selling electricity and hence cannot be considered as change in law event under Article 10 of the PPA.

(c) Expenses on CSR activities are in the nature of fulfilment of statutory duty by the petitioner out of the profit of the company. If these expenses are passed on to the consumers, it would defeat the provisions of the Companies Act, 2013. Therefore, the claim of the petitioner has to be disallowed by the Commission.

39. We have considered the submissions of the Petitioner and the respondents.

Section 135 of the Companies Act, 2013 provides as under:

“—135. Corporate Social Responsibility— (1) Every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during any financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director.

(2) The Board's report under sub-section (3) of section 134 shall disclose the composition of the Corporate Social Responsibility Committee.

(3) The Corporate Social Responsibility Committee shall,—

(a) Formulate and recommend to the Board, a Corporate Social Responsibility Policy which shall indicate the activities to be undertaken by the company as specified in Schedule VII;

(b) recommend the amount of expenditure to be incurred on the activities referred to in clause (a); and

(c) monitor the Corporate Social Responsibility Policy of the company from time to time

(4) The Board of every company referred to in sub-section (1) shall,—

(a) after taking into account the recommendations made by the Corporate Social Responsibility Committee, approve the Corporate Social Responsibility Policy for the company and disclose contents of such Policy in its report and also place it on the company's website, if any, in such manner as may be prescribed; and

(b) ensure that the activities as are included in Corporate Social Responsibility Policy of the company are undertaken by the company.

(5) The Board of every company referred to in sub-section (1), shall ensure that the company spends, in every financial year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy:



Provided that the company shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for Corporate Social Responsibility activities:

Provided further that if the company fails to spend such amount, the Board shall, in its report made under clause (o) of sub-section (3) of section 134, specify the reasons for not spending the amount.

Explanation. For the purposes of this section-average net profit shall be calculated in accordance with the provisions of section 198.”

40. As per the above provision, any company with a net worth of Rupees five hundred crore or more or turnover of Rupees one thousand crore or more or net profit of Rupees five crore or more is required to constitute a Social Corporate Responsibility Committee of the Board consisting of three directors to formulate and recommend to the Board, a Corporate Social Responsibility Policy which shall indicate the activities to be undertaken by the company as specified in Schedule VII. As per sub-section (5) of Section 135 of the Companies Act, 2013, the Board of the Company shall ensure that the Company spends, in every financial year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy.

41. The obligation under Section 135 of the Companies Act, 2013 is on the net profit of the company. This obligation does not affect in any manner, the cost or revenue from the business of selling electricity.

42. A similar issue has been considered by the Commission in its order dated 17.2.2017 in Petition No. 16/MP/2016 where in the Commission has not considered expenditure incurred towards CSR on environment clearance under change in law. The relevant portion of the said order is extracted as under:

“27....Thus corporate social responsibility also includes expenditure on ensuring environmental sustainability, ecological balance and conservation of natural resources and maintaining quality of soil, air and water. MoEF has prescribed that the CSR cost should be Rs. 5 per Tonne of Coal produced which should be adjusted as per annual inflation. As per sub-section (5) of section 135 of the Companies Act, 2013, the Board of the Company shall ensure that the Company spends, in every financial year, at least two per cent of the average net profits of the company made



during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy. Therefore, the Corporate Social Responsibility Committee of the Petitioner`s company should consider and include the expenditure on account of condition (xxiii) of the environmental clearance in the Corporate Social Responsibility Policy of the company and meet the expenditure out of the net profits of the company. In our view, this expenditure cannot be allowed under Change in Law as the environment clearance has specifically classified as CSR cost for which provisions have been made in the Companies Act, 2013 to be met out of the net profit of the company.”

43. The above decision is applicable in the present case too. Based on the above discussions, we are of the considered view that the expenses towards CSR activities are in the nature of the fulfilment of statutory duty by the Petitioner out of the profit of the company as per the provisions of the Companies Act, 2013. Therefore, the claim of the Petitioner for relief under change in law on account of imposition of Mandate of Corporate Social Responsibility is not admissible and accordingly disallowed.

C. Levy of GST on O&M Contracts

44. The petitioner has submitted that at the time of bid submissions for the PPAs there was no Goods and Service Tax. Subsequently, the Parliament introduced the Central Goods and Services Tax Act, 2017 (“CGST Act”) in terms of which a tax of 18% is levied on services. Imposition of Goods and Services Tax constitutes a change in law event in terms of the following and GWEL is entitled to be compensated for imposition of goods and services tax: -

(a) The imposition of Goods and Services Tax was introduced by way of CGST Act which falls within the definition of Law under the PPAs.

(b) CGST Act was introduced by the Parliament which comes within the ambit of Indian Government Instrumentality under the PPAs.

(c) The CGST Act came into effect after the Cut-off Date for the PPAs.

(d) The imposition of Goods and service tax has led to an increase in expenditure for GWEL.



45. MSEDCL, vide affidavit dated 10.7.2018, has opposed the applicability of Change in Law Provisions on O&M expenses and submitted the following:

(a) The presence of an express provision in the Request for Proposal (hereinafter referred to as RFP) that mandates a bidder to consider all operating costs while quoting the bid proves that every expense cannot be passed on to the Procurers under the pretext of Change in Law. Expenses that are in the nature of Operation and Maintenance is assumed to be included by the bidder in the quoted bid.

(b) Bidder had the option of quoting the tariff under escalable or Non-escalable component for both Energy as well as Fixed charges (capacity charges). These escalable charges are linked with CERC Index. The petitioner has submitted the quoted tariff under both the components i.e. escalable and non-escalable in both the charges i.e. Capacity and Energy. Hence the escalation due to change in GST on O & M expenditure is being taken care under this provision.

(c) MSEDCL submits that MERC vide order dated 23.08.2017 in Petition no. 117 /2016 filed by JSW has also held that the O & M cost components are subsumed in the rate offered by Appellant and only JSW knows the extent and weightage in the internal computation underlined in the bid.

46. In response, petitioner vide its reply dated 8.11.2018 submitted that the imposition of goods and services tax was introduced by way of Central Goods and Services Tax Act, 2017 ("CGST Act") which falls within the definition of Law under the PPAs. CERC has previously disallowed service tax on O& M contracts in Order dated 16.03.2018 in Petition 1/MP/2017. This order is under challenge in Appeal No. 163 of 2018. The petitioner further submitted the following:

(a) At the time of bid submission, GWEL factored in the then prevalent Service Tax in its bid in terms of the provisions of the RFP. However, GWEL



cannot be expected to envisage change in rate of Service Tax or introduction of GST at the time of bid submission.

(b) Outsourcing of O&M activities is an established industry practice and is followed by public and private developers, considering factors like cost economics, expertise and efficiency.

(c) While outsourcing O & M may be a commercial decision, imposition of taxes and duties constitute a change in law event and GWEL is entitled to be compensated. It has submitted that the contention that a generating company is disentitled for change in law compensation arising out of commercial arrangements has been rejected in judgment dated 14.08.2018 in Appeal No. 119 of 2016 titled Adani Power Rajasthan Ltd. v. RERC &Ors. and the GMR Warora Judgment. In view of the same, GST on O & M contracts qualifies as a change in law event for which GWEL is entitled to compensation.

47. DNH vide affidavit dated 12.11.2018 has submitted that the issue of GST impact has been dealt by this Commission in its Order dated 14.03.2018 in Petition No.13/SM/2017 wherein the Commission has dealt with the issue of GST and has decided the wholesome impact of GST. In the Order dated 14.03.2018, GST on O&M Contracts has not been provided as a Change in Law event by this Commission. DNH has further submitted that GST is not a tax on supply of power and therefore no compensation can be allowed to the Petitioner for its impact. DNH has pointed that the Petitioner has not provided any details pertaining to the O&M contracts and it is the Petitioner which is responsible for operating and maintaining the generating station and it is not clear as to the transaction on which GST has been imposed. If the Petitioner itself is operating and maintaining the generating station, there can be no question of levy of GST on the same. If the Petitioner has chosen to subcontract the O&M activities, this is a commercial decision of the Petitioner, this is not a change in law qua the 'supply of power', Such tariff impact cannot be passed on to the consumers. Therefore, the claims under this issue are liable to be disallowed.



48. Petitioner vide its reply dated 29.11.2018 has submitted the following:

(a) GWEL is only required to take into account and examine operating costs, taxes, laws and regulations in force in India at the time of the Cut Off. In case an event qualifies as a change in law event in terms of Article 10 of the DNH PPA, then GWEL is entitled to compensation for the same. The Hon'ble Tribunal has held in the Sasan Power judgment that the RFP cannot override PPA in case an event qualifies as change in law and that compensation must follow.

(b) Outsourcing of O&M activities is an established and common industry practice and is followed by public and private developers, considering factors like cost economics, expertise and efficiency.

(c) DNH's submission that this Commission did not provide GST on O&M contracts as a Change in Law event in Order dated 14.03.2018 is incorrect. This Commission in Order dated 14.03.2018 held that the introduction of GST and subsuming / abolition of specific taxes, duties cess, etc. under GST is a Change in Law event.

(d) DNH's contention that GST is not a tax on supply of power and, therefore, no compensation can be allowed to GWEL is erroneous. It is submitted that the abovementioned condition has been specifically rejected by the Tribunal in the Adani judgment and the GMR Warora judgment (which deals with the same PPA between DNH and GWEL).

(e) Therefore, GWEL ought to be compensated for such Change in Law events in terms of the Article 10 of the DNH PPA.

49. We have heard the parties and considered the submissions made in the pleadings and during hearing. The Petitioner has submitted that the imposition of Goods and Service Tax constitutes a change in law event and has led to an increase



in expenditure. Therefore, the Petitioner has prayed that it is entitled to claim compensation. This Commission has in the order dated 16.03.2018 in 1/MP/2017 held that:

“The Petitioner has claimed increase in Service Tax on O&M contracts based on the Notifications dated 17.3.2012 and 19.5.2015 (in respect of MSEDCL PPA), Notification dated 19.5.2015 (in respect of DNH and TANGEDCO PPAs) in addition to the levy of Swachh Bharat cess and Krishi Kalyan Cess on such services. The Petitioner has not submitted any information of the contracts affected by service tax. Even otherwise, the decision to carry out operation & maintenance through any other agency is a commercial decision and any increase in expenditure on this count cannot be considered as a change in law. In our view, it is the responsibility of the Petitioner to operate the generating station and any increase in service tax on O&M contracts cannot fall within the scope of change in law. Hence, the relief sought for by the Petitioner under this head is not allowed.”

50. A similar issue has been considered by the Commission in its order dated 9.10.2018 in Petition No. 188/MP/2017 & Ors. wherein the Commission has already dealt with the ‘Change in Law’ events due to enactment of the “GST Laws” including “Operations and Maintenance” stage. The relevant portion of the said order is reproduced here below:

“361. The Commission is of the view that the recurring expenses referred to in Article 12 of the PPA includes activities like salary, tax expenses, estimated maintenance costs, and monthly income from leases etc. It is apparent that GST will apply in case of outsourcing of the “Operation and Maintenance” services to a third party (if any). The Petitioner has themselves submitted that “the O&M of their projects are being carried out not by a third party but the Petitioner’s parent entity which was also the entity which successfully bid for the Project, and incorporated the Petitioners in terms of the provisions of the relevant RfS document. Accordingly, the award of O&M contract is not equivalent to an award to a third-party vendor, as has been contended erroneously by NTPC, and hence NTPC’s reliance on this Commission’s decision in GMR Warora Energy Limited v. MSEDCL and Ors., Petition No.1/MP/2017 is misplaced.” The Commission is of the view that outsourcing of the Operation and Maintenance” services is not the requirement of the PPA/ bidding documents. The concept of the outsourcing is neither included expressly in the PPA nor it is included implicitly in the Article 12 of the PPA. It is a pure commercial decision of the Petitioners taken for its own advantage and any increase in cost including on account of taxes etc. in the event the Petitioners choose to employ the services of other agencies, cannot increase the liability for the Respondents. Therefore, the Commission holds that claim of the Petitioners on account of additional tax burden on operation and maintenance expenses (if any), is not maintainable.”



51. The Petitioner has not submitted any information of the contracts affected by Goods and Service Tax. Even otherwise, the decision to carry out operation & maintenance through any other agency is a commercial decision and any increase in expenditure on this count cannot be considered as a change in law.

52. Therefore, in our considered view, it is the responsibility of the Petitioner to operate the generating station and any increase in service tax on O&M contracts cannot fall within the scope of change in law. Hence, the relief sought for by the Petitioner under this head cannot be allowed and is hence rejected.

D. Expenditure towards Corporate Social Responsibility pursuant to Environment Clearance issued to GWEL (MSEDCL PPA)

53. The Petitioner has submitted that at the time of bid submission for the MSEDCL PPA, no contribution towards CSR had to be made pursuant to the clearances. The Petitioner was granted Environment clearance by the Ministry of Environment, Forests and Climate Change, Government of India for the Project on 25.5.2010 wherein one of the conditions was to assign Rs. 12 Crores for CSR and a recurring expenditure of Rs 2.5 Crore annually. The Petitioner has submitted that the provisions stipulated in the environment clearance are mandatory, the non-fulfilment of which could result in revocation of the clearance. The Petitioner has submitted that the obligation to incur expenditure on CSR activities pursuant to the Environment Clearance is a Change in Law event and the Petitioner is entitled for compensation under Article 10 of the MSEDCL PPA on account of the same.

54. MSEDCL vide affidavit dated 10.7.2018 submitted that it is not promulgation or amendment in Law by an Indian Government Instrumentality but it is one of the conditions which is to be satisfied by M/S GMR Warora Energy Ltd. Hence the contention of petitioner that a condition imposed by the Environment Clearance is change in law is incorrect and misconceived.



55. In response, petitioner vide its reply dated 8.11.2018 has inter alia submitted as under:

(a) Imposition of condition of CSR as part of the Environment Clearance is imposition of a new condition and as such qualifies as change in law.

(b) This Commission has in the Order dated 17.02.2017 held that the expenditure on CSR stipulated in the Environment Clearance cannot be allowed under the change in law provisions since the same have been made under the Companies Act, 2013 to be met out of the net profit of the Company. It is submitted that obligation to incur expenditure on CSR activities in terms of the Environment Clearance has no co-relation with statutory obligation mandated under the provisions of Section 135 of the Companies Act, 2013. Further MSEDCL's contention that such expenses would need to be expended out of the Petitioner's net profit is contrary to the express condition of the Environment Clearance. Without prejudice to the foregoing, CSR cost under the Environment Clearance is recurring in nature and is required to be incurred irrespective of the fact that GWEL is making profit or not.

56. A similar issue has been considered by the Commission in its Order dated 17.2.2017 in Petition No. 16/MP/2016 where in the Commission has not considered expenditure incurred towards CSR on environment clearance as a change in law event. The relevant portion of the said order is extracted as under:

“27....Thus corporate social responsibility also includes expenditure on ensuring environmental sustainability, ecological balance and conservation of natural resources and maintaining quality of soil, air and water. MoEF has prescribed that the CSR cost should be Rs. 5 per Tonne of Coal produced which should be adjusted as per annual inflation. As per sub-section (5) of section 135 of the Companies Act, 2013, the Board of the Company shall ensure that the Company spends, in every financial year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy. Therefore, the Corporate Social Responsibility Committee of the Petitioner's company should consider and include the expenditure on account of condition (xxiii) of the environmental clearance in the Corporate Social Responsibility Policy of the company and meet the expenditure out of the net profits



of the company. In our view, this expenditure cannot be allowed under Change in Law as the environment clearance has specifically classified as CSR cost for which provisions have been made in the Companies Act, 2013 to be met out of the net profit of the company.”

57. Upon considering the contentions of the parties, we are of the view that the Order dated 17.02.2017 passed by this Commission in Petition No. 16/MP/2016 holds good in this case also and hence the claim preferred by the petitioner cannot be allowed.

E. Carrying Cost

58. The Petitioner has submitted that though there is no concept of return on equity and interest on working capital in competitively bid tariff, the increase in costs due change in law events have indirect bearing on them. The Petitioner has submitted that it had factored in interest on working capital and return on equity based on the costs prevalent at the time of bid. The Petitioner has further submitted that with the increase in the costs due to the change in law events stated above, the working capital requirement has also increased compared to what was prevalent at the time of bid. Thus, the Petitioner has submitted that in accordance with the Article 10 of the PPAs, it is entitled to interest on incremental working capital at normative interest rate to put the Petitioner to the same economic position as if change in law event had not occurred.

59. MSEDCL vide affidavit dated 10.7.2018 submitted that that there is no provision in the PPA to allow carrying cost on the amount covered under Change in law till its determination by the Commission. It has submitted that as per PPA article 10.4, unless Commission approves the Change in Law, Procurer cannot make the payments to the generator. Thus, MSEDCL submits that unless the distribution licensee knows which Change in Law is to be paid, it is not possible to make payment purely on the basis of notification. Hence, payment of carrying cost even



though there is delay in approval or without knowledge / approval of Commission is unlawful.

60. In response, petitioner vide its reply dated 8.11.2018 has submitted that the Tribunal in the judgment dated 13.04.2018 in Appeal 210 of 2017 titled Adani Power Ltd. v. CERC ("Adani Carrying Cost Judgment") has recognized the concept of restitution and allowed carrying costs in respect of the allowed change in law events. Pursuant to the Adani Carrying Cost Judgment, this Commission has in the Order dated 17.09.2018 in Petition No.235/MP/2015 allowed carrying cost at the actual interest rate of 10.89%.

61. DNH vide affidavit dated 12.11.2018 has pointed out that this issue has already been decided by this Commission against the Petitioner in the Order dated 01.02.2017 in Petition No. 8/MP/2014 and Order dated 16.03.2018 in Petition No. 1/MP/2017. Petitioner vide its reply dated 29.11.2018 has submitted that that the Hon'ble Tribunal in the judgment dated 13.04.2018 in Appeal 210 of 2017 titled Adani Power Ltd. v. CERC ("Adani Carrying Cost Judgment") has recognized the concept of restitution and allowed carrying costs in respect of the allowed change in law events. Pursuant to the Adani Carrying Cost Judgment, this Commission has in the Order dated 17.09.2018 in Petition No. 235/MP/2015 allowed carrying cost at the actual interest rate of 10.89%. The Petitioner further submitted that Carrying cost is the interest cost incurred by GWEL from the Effective Date of the Change in Law event till approval of the said event by the Appropriate Authority and Interest on working capital is similar to carrying cost towards additional interest being incurred by GWEL on incremental working capital w.r.t. the Cut-Off Date, which GWEL could not be expected to factor in at the time of placing the bid.

62. As regards carrying cost and restitution principle, the Tribunal in its judgment dated 13.4.2018 in Appeal No. 210 of 2017 (Adani Power Ltd vs CERC) had observed 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 than 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.”

63. Pursuant to the above judgment, this Commission has in the Order dated 17.09.2018 in Petition No.235/MP/2015 allowed carrying cost at the actual interest rate of 10.89%. The relevant portion of the said order is extracted as under:

21. Therefore, the Petitioner is entitled for carrying cost from effective date of change in law till the date of this order on the change in law events approved by the Commission in terms of provisions of Bid-02 and Haryana PPAs which mandate restoration of the affected party to the same economic position as if the change in law has not occurred.

22. The Petitioner has sought carrying cost at the actual interest rate of 10.89% for the period from April, 2015 to March, 2018 supported with Auditor’s Certificate. The Petitioner has also submitted that the actual interest rate claimed is cheaper as compared to SBI Base Rate + 350 basis points being considered by the Commission as working capital interest rate under Tariff Regulations as well as Late Payment



Surcharge (LPS) of SBAR + 2% under the PPAs. GUVNL contended the claim of the Petitioner in terms of the decision of the Commission's order in IA No. 57/2017 in Petition No. 97/MP/2017 where interim relief was granted subject to refund of excess amount to Haryana Utilities, if any, based on final order @ 9% interest.

23.....

24.....

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."

64. Subsequently, the Hon'ble Supreme Court in Civil Appeal No. 5865 of 2018 and 6190 of 2018 vide Judgment dated 25.2.2019 has upheld the aforesaid decision of the Appellate Tribunal. Relevant portion of the Judgment of the Hon'ble Supreme Court is 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(1). 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."



65. The relevant provision of the PPAs as regards restoration to the same economic position is as under:

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

66. In view of the provisions of the PPA, the principles of restitution and the above judgment of the Hon'ble Supreme Court, the Petitioner is eligible for carrying cost arising out of approved Change in Law events. The principles adopted by this Commission in the Order dated 17.09.2018 in Petition No.235/MP/2015 shall be applicable in the instant case too. The Petitioner shall be paid carrying cost arising out of approved Change in Law events till the actual payment to the Petitioner at the actual rate of interest paid by the Petitioner in raising the funds duly certified by the auditor, or the Bank Rate as defined in the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014, or the rate of late payment surcharge as defined in the PPA, whichever is lowest.

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

67. Article 10 of the PPAs deals with the events of 'Change in Law'. The provisions under all the PPAs (MSEDCL, DNH & TANGEDCO) are similar. Articles 10.2, 10.3 and 10.5 of the PPA provides for the principle for computing the impact of change in law and the relevant provisions of MSEDCL PPA is extracted as under:

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

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 Procurers 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."

10.5 Tariff Adjustment Payment on account of Change in Law

10.5.1 Subject to Article 10.2, the adjustment in monthly Tariff Payment shall be effective from:

- (i) the date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law; or*
- (ii) the date of order / judgment of the Competent Court or tribunal or Indian Governmental Instrumentality, if the Change in Law is on account of a change in interpretation of Law."*

68. 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.

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

70. The Article 10 the PPAs provide 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 of cost shall be admissible to the Petitioner. Moreover, the compensation shall be payable only if the increase/ decrease in revenues or cost to the seller is in excess of an amount equivalent to 1% of the letter of credit in aggregate for contract year. In our view, the effect of change in law as approved in this order shall come into force from the date of commencement of supply of electricity to the Procurers or from the date of occurrence of Change in Law event, whichever is later. We have specified a mechanism, in the following paragraphs, considering the fact that compensation for change in law events allowed as per PPA shall be paid in subsequent years of the contract period:

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

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

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

(d) Approaching the Commission every year for allowance of compensation for such Change in Law is a time-consuming process. Accordingly, the mechanism prescribed above may be adopted for payment of compensation due to change in Law events allowed as per PPA for the subsequent period as well.



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

71. The summary of decision under “Change in Law” events allowed during the Operating period (after the cut-off dates of the respective PPAs) are as under:

Change in Law Events			
	MSEDCL PPA	DNH PPA	TANGEDCO PPA
Evacuation Facility Charges	Allowed	Allowed	Allowed
Expenditure towards CSR as per Companies Act, 2013	Not Allowed	Not Allowed	Not Allowed
Expenditure towards CSR as per Environment Clearance	Not Allowed	Not Applicable	Not Applicable
Levy of GST on O&M Contracts	Not Allowed	Not Allowed	Not Allowed
Carrying cost	Allowed	Allowed	Allowed

72. This order disposes of Petition No. 71/MP//2018.

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

sd/-
(P.K. Pujari)
Chairperson

