

CENTRAL ELECTRICITY REGULATORY COMMISSION

NEW DELHI

Petition No. 72/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 9.11.2011 between GMR Kamalanga Energy Ltd. and Bihar State Electricity Board and (b) Article 13 of the PPA dated 12.3.2009 between GMR Energy Ltd. (on behalf of GMR Kamalanga Energy Limited) and PTC India Ltd. with back to back PPA between PTC India Ltd. and Haryana Distribution companies for compensation due to Change in Law.

1. GMR Kamalanga Energy Limited
New Shakti Bhawan,
Building No. 302 - New Uddan Bhawan,
Opposite Terminal- 3,
Indira Gandhi International Airport
New Delhi - 110037
2. GMR Energy Limited
Skip House, 25/1 Museum Road,
Bangalore – 560025

...Petitioners

Versus

1. Dakshin Haryana Bijli Vitran Nigam Limited
Vidyut Sadan, Vidyut Nagar,
Hissar, Haryana – 125005
2. Uttar Haryana Bijli Vitran Nigam Limited
Vidyut Sadan, Plot No.: C16, Sector-6,
Panchkula, Haryana – 134109
3. Haryana Power Generation Corporation Limited
C-7, Urja Bhawan, Sector 6,



Panchkula, Haryana – 143109

4. PTC India Limited
2nd Floor, NBCC Tower,
15 Bhikaji Cama Place, New Delhi – 110066
5. Bihar State Power (Holding) Company Limited
1st Floor, Vidyut Bhawan,
Bailey Road, Patna – 800001
6. Bihar State Power Generation Company Limited
1st Floor, Vidyut Bhawan,
Bailey Road, Patna – 800001
7. South Bihar Power Distribution Company Ltd.
Vidyut Bhawan, Bailey Road,
Patna – 800001
8. North Bihar Power Distribution Company Ltd.
Vidyut Bhawan, Bailey Road,
Patna – 800001

...Respondents

Parties Present: Shri Vishrov Mukerjee, Advocate, GMR
Ms. Raveena Dhamija, Advocate, GMR
Ms. Yashaswi, Advocate, GMR
Shri G. Umopathy, Advocate, HPPC
Shri Aditya Singh, Advocate, HPPC
Shri Ashish Anand Bernard, Advocate, PTC
Shri Paramhans, Advocate, PTC
Shri Vikrant Saini, HPPC

ORDER

GMR Kamalanga Energy Limited was incorporated as a public limited company under the Companies Act, 1956 as a subsidiary of GMR Energy Limited to set up a 1400 MW Thermal Power Project (hereinafter referred to as the “Power Project”) at village: Kamalanga, District: Dhenkanal in the State of Odisha. The Power Project comprises of two stages - the first stage having three units of 350 MW each and the second stage having one unit of 350 MW. Stage 1 of the Power Project has been accorded Mega Power Project status by Ministry of Power, Government of India on 1.2.2012.



2. (a) Respondent No. 1, Dakshin Haryana Bijli Vitran Nigam Limited (**DHBVNL**), is a distribution licensee operating in the State of Haryana.

(b) Respondent No. 2, Uttar Haryana Bijli Vitran Nigam Limited (**UHBVNL**), is a distribution licensee operating in the State of Haryana.

(c) Respondent No. 3, Haryana Power Generation Corporation Limited (**HPGCL**), is a corporation through whom Respondent No. 1 and Respondent No. 2 initiated the process for procurement of power from the Petitioner.

(d) Respondent No. 4, PTC India Limited, is an inter-State power trading company. The Petitioner No.1 (through its parent company GEL) had bid through Respondent No. 4 for the procurement process initiated for the Haryana Discoms.

(e) Respondent No. 5, Bihar State Power (Holding) Company Ltd. (**BSPHCL**) is successor in interest of Bihar State Electricity Board (BSEB). The Bihar PPA was transferred from BSEB to BSHPCCL pursuant to the Bihar State Electricity Reforms Transfer Scheme, 2012, wherein BSEB has been unbundled into five companies, i.e. Bihar State Power Company Limited (holding company), Bihar State Power Transmission Company, Bihar State Power Generation Company, South Bihar Power Distribution Company and North Bihar Power Distribution Company.

(f) Respondent No. 6, Bihar State Power Generation Company Ltd., is a wholly owned subsidiary of Bihar State Power (Holding) Company Ltd.

(g) Respondent No. 7, South Bihar Power Distribution Company Ltd., is a distribution licensee operating in the State of Bihar.

(h) Respondent No. 8, North Bihar Power Distribution Company Ltd., is a distribution licensee operating in the State of Bihar.



3. The Petitioner, GMR Kamalanga Energy Limited (GKEL), entered into the following long-term PPAs for supply of power from the Power Project:

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

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

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

(i) On 01.03.2007, HPGCL issued a Request for Proposal (“RFP”) for supply of 2000 MW power on long-term basis to the Haryana Discoms.

(ii) On 13.07.2007, the Board of Directors of GEL (the parent company of GKEL) passed a resolution authorizing inter alia the following:-

(a) PTC to sell upto 500 MW from the Project to HPGCL and to take all necessary steps in that regard including submission of bid, signing and execution of documents etc.

(b) Provision of a bank guarantee of Rs. 15 Crores to PTC so that PTC could issue a back-to-back bank guarantee to HPGCL.

(iii) On 31.10.2007, PTC and GEL (as the parent company of GKEL) entered into an agreement to sell 323 MW of power from the Project. The agreement records the understanding between PTC and GEL that PTC was submitting a bid pursuant to the RFP issued by HPGCL and the agreement had been entered into in order to enable PTC to participate in the bidding process.



(iv) On 23.11.2007, PTC submitted its bid to HPGCL. In the bid submitted by PTC, it was clearly indicated that the bid was for procurement of power from GKEL through GEL for sale to the Haryana Discoms. It was mentioned that the power would be supplied from Kamalanga Power Plant owned by GKEL. The board resolution dated 13.07.2007 passed by the board of GEL authorizing PTC to submit the bid to HPGCL on its behalf was enclosed with the bid.

(v) On 17.07.2008, the bid submitted by PTC for supply of 300 MW to the Haryana Discoms was accepted and it was declared as one of the successful bidders.

(vi) On 31.07.2008, Ld. Haryana Electricity Regulatory Commission ("Ld. Haryana Commission") adopted the tariff of the successful bidders including that of GKEL (through PTC) pursuant to Section 63 of the Electricity Act, 2003 ("the Act").

(vii) On 07.08.2008, separate PPAs were executed by PTC with the two Haryana Discoms, DHBVNL (Respondent No.1) and UHBVNL (Respondent No.2) (Haryana PPAs).

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

4. The Petitioner, GMR Kamalanga Energy Limited, has filed the present Petition with the following prayers:

- a) *Declare the aforesaid events, as Change in Laws events under the Haryana PPAs and Bihar PPA during the Operating Period;*
- b) *Evolve a suitable compensatory mechanism to compensate the Petitioners for the impact on costs during the operating period of the Project*



and restore the Petitioners to the same economic condition prior to occurrence of the Change in Law event; and

c) Grant interest/carrying cost for the change in law events.

5. 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 Petitioners in the pleadings and during the hearings

6. The Petitioner has submitted that as on the Cut-off Dates for the Haryana and Bihar PPAs, there was no levy of coal terminal surcharge. Subsequently, the Railway Board, Ministry of Railways levied Coal Terminal Surcharge at Rs. 55/tonne for both loading and unloading of coal (totalling to Rs.110/tonne) for distance beyond 100 Km, with immediate effect. Therefore, levy of Coal Terminal Surcharge is enactment of a new law and is covered by the change in law provisions of the respective PPAs.

7. The Petitioner has submitted that the Evacuation Facility Charges were not levied at the time of bid submission under the PPAs and, therefore, could not be taken into account by the Petitioner while submitting the bid. Therefore, the aforesaid levy is enactment of a new Law which falls under the first bullet of Change in Law provisions under the PPAs. Levy of Evacuation Facility Charge by Coal India Limited is over and above the base price of coal, therefore, cannot be taken into account by way of Escalation Indices published by the Commission.

8. The Petitioner has submitted that 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, which was enacted by the Parliament of India which come within the ambit of Indian Government Instrumentality under the PPAs. The levy of mandatory CSR expenditure has led to recurring expenditure for the Petitioner during the operating period and, therefore, is a change in law event.



9. The Petitioner has submitted that at the time of bid submission, no contribution towards CSR had to be made pursuant to the clearances. On 25.05.2010, the Petitioner was granted Environment clearance by the Ministry of Environment, Forests and Climate Change. The said environment clearance was subject to various conditions stipulated therein. One of the conditions mandated to the Petitioner to assign Rs. 12 crore for CSR and a recurring expenditure of Rs 2.5 Crore annually. Therefore, the imposition of new conditions in the environmental clearance amounts to change in law and the petitioner is entitled to be compensated for the same.

10. The Petitioner has further 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 in terms of which a tax of 18% is levied on services. The imposition of Goods and service tax has led to an increase in expenditure for the Petitioner. Therefore, the Petitioner is entitled to be compensated for imposition of goods and services tax.

11. The Petitioner has submitted that the Ministry of Railways through its notification incorporated the Busy Season Surcharge (BSS) and Development Surcharge (DS) in the base freight. The rate of base freight, BSS and DS have changed upwards by Notification of Ministry of Railways and the same comes within the ambit of change in law under the Haryana PPA.

12. The Petitioner has submitted that it is entitled to carrying cost under the respective PPAs which provides for restoration of the affected party to the same economic position, which will also entail payment of carrying costs. The carrying costs are in the nature of compensation for money denied at the appropriate time, as in the nature of compensation in terms of the PPAs. Failure to do so would defeat the underlying principle of restitution and render the Change in Law clauses in the PPAs otiose. The Article 10 of the Bihar PPA and Article 13 of the Haryana PPA of the



PPAs accords plenary powers to this Commission to determine the compensation to be awarded.

13. The petitioner has submitted the following statement as to applicability of the change in law events in respect of the Haryana and Bihar PPA:

Sl. No.	Change in Law Event	Applicability	
		BIHAR PPA	HARYANA PPA
1.	Levy of Coal Terminal Surcharge pursuant to Circular No.TCR/1078/2015/07 dated 22.08.2016.	Yes	Yes
2	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
3	Expenditure towards CSR activities pursuant to the Companies Act, 2013 and the Environment Clearance dated 05.12.2011	Yes	Yes
4	Increase in service tax on O&M contracts pursuant to Finance Acts (2009,2012 and 2015) and Ministry of Finance Notifications dated 24.02.2009, 17.03.2012 and 19.05.2015.	Yes	Yes
5	Levy of GST on O&M Contracts pursuant to the Goods and Service Tax Act, 2017	Yes	Yes
6	Inclusion of BSS and DS in base freight pursuant to circular No. TCR/1078/2015/07 dated 09.01.2018	-	Yes

14. The petitioner has submitted the statements with regard to Haryana PPA and Bihar PPA claiming the impact of the change in law due to the events as under:

Haryana PPA

S. No.	Change in Law Item	Monthly Impact * (Rs. Cr.)	Annualized Impact* (Rs. Cr.)
1	Coal Terminal Surcharge	1.37	16.49
2	Evacuation facility Charges	0.62	7.5
3	Expenditure towards CSR as per Companies Act, 2013	As per actuals	As per actuals
4	Expenditure towards CSR as per Environment Clearance	As per actuals	As per actuals
5	Increase in service tax on O&M contracts	0.02	0.21
6	Levy of GST on O&M Contracts	0.06	0.70
7	Inclusion of BSS and DS in Base Freight	0.43	5.12
8.	Carrying Cost	As may be	As may be



S. No.	Change in Law Item	Monthly Impact * (Rs. Cr.)	Annualized Impact* (Rs. Cr.)
		determined	determined
	Total	2.50	30.02

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

Bihar PPA

S. No.	Change in Law Item	Monthly Impact * (Rs. Cr.)	Annualized Impact* (Rs. Cr.)
1	Coal Terminal Surcharge	1.27	15.19
2	Evacuation facility Charges	0.58	6.90
3	Expenditure towards CSR as per Companies Act, 2013	As per actuals	As per actuals
4	Expenditure towards CSR as per Environment Clearance	As per actuals	As per actuals
5	Increase in service tax on O&M contracts	0.03	0.31
6	Levy of GST on O&M Contracts	0.05	0.56
7.	Carrying Cost	As may be determined	As may be determined
	Total	1.93	22.96

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

15. The petitioner has submitted that in case of the Haryana PPA, the value towards Letter of Credit is Rs. 42 Crores and due to this 1% of the value of Letter of Credit in aggregate for the contract year comes to Rs. 5.04 Cr. (1% x 42 x 12). It has been submitted that the Change in Law claims are more than the threshold amount in terms of Article 13.2 (b) of the PPA as shown below.

Particulars	Amount (Rs. Cr.)
Change in Law Claims Corresponding to this petition	30.02
Claims Pending in Petition 131/MP/2016	29.12
Total Claims	57.33
LC Amount (for FY 2017-18)	42.0
1% of LC Amount in Aggregate	5.04



16. The petitioner has submitted that in case of the Bihar PPA the value towards Letter of Credit is Rs. 39 Crores and due to this 1% of the value of Letter of Credit in aggregate for the contract year comes to Rs. 4.7 Cr. (1% x 39 x 12). It has been submitted that the change in law claims are more than the threshold amount in terms of Article 10.3.2 of the PPA as shown below:

Particulars	Amount (Rs. Cr.)
Change in Law Claims Corresponding to this petition	22.96
Claims Pending in Petition 131/MP/2016	15.6
Total Claims	38.21
LC Amount (for FY 2017-18)	39.0
1% of LC Amount in Aggregate	4.7

Submissions of the Respondents in the pleadings and during the hearings

17. Haryana discoms vide affidavit dated 29.10.18 has submitted as under:

a) As regards Busy Season Surcharge and Development Charge, the Commission vide order dated 3.2.2016 in Petition No. 79/MP/2016 had held that these are not covered under change in law. Hence, no compensation is payable.

b) As regards Coal Terminal Surcharge (CTS) and Evacuation Facility Surcharge (EFC) being based on circular issued by Ministry of Railways, the same may not be allowed since arrangement of fuel including transportation etc. is the sole responsibility of the generator.

c) The expenditure towards CSR activities pursuant to the Companies Act, 2013 and EC dated 5.12.2011 are to be borne by the profit earned by the generator and cannot be passed on the consumers.

d) The increase in service tax on O&M contracts pursuant to Ministry of Finance notifications dated 24.2.2009, 17.3.2012 & 19.5.2015 can not be change in law as the support services provided by the Govt. were already



taxable prior to the cut-off date. The Petitioner has also not submitted any particulars in this regard.

e) The levy of GST on O&M contract is not permissible as a comprehensive levy of GST has come into force from 2017. However, the Petitioner may be directed to place on record requisite claims with supporting documents to see the extent of GST to be considered under change in law.

f) The base freight rate claimed by virtue of Ministry of Railway circular dated 9.1.2018 do not fall under change in law and therefore, Busy Season surcharge and development surcharge pursuant to Ministry of Railway circular may not be allowed as change in law.

18. The respondent No. 4, PTC vide affidavit dated 1.11.2018 has submitted that the Commission may examine the issues raised in the petition and pass appropriate orders as per applicable laws and Regulations.

Submissions of the Petitioners in Rejoinder

19. The Petitioner vide rejoinder affidavit dated 28.11.2018 has submitted as under:

a) The Notification/ Circulars issued by Indian Govt. instrumentality would fall within the scope of law defined under the Haryana PPA. The same may be allowed in terms of the judgments of the Tribunal dated 14.8.2018 in Appeal No. 119 of 2016 (Adani Power Ltd vs RERC & ors) and 14.8.2018 in Appeal No. 111 of 2017 & 290 of 2017 (GMR Warora Energy Ltd. vs CERC).

b) The petitioner is entitled to be compensated for levy of Coal Terminal Surcharge (CTS) in terms of judgment dated 19.4.2017 in Appeal No. 161 of 2015 (SPL vs CERC & ors).



- c) As regards Evacuation Facility Charges (EFC), the notification dated 19.12.2017 issued by CIL falls within the ambit of law in terms of the judgments of Tribunal in Adani case and GMR case as referred above.
- d) Expenditure towards CSR pursuant to companies Act, 2013 was effective after the cut-off date. The said law was enacted by the Parliament of India which falls within the ambit of Indian Government instrumentality.
- e) The mandatory expenditure towards CSR is pursuant to Environment Clearance (EC) granted by the MOEFCC and the same falls within the ambit of Indian Govt. instrumentality. CSR cost under EC is recurring in nature and required to be incurred irrespective of whether the Petitioner makes profit or not.
- f) The Petitioner had taken into account the taxes and duties existing on the cut-off date. The increase in service tax was pursuant to the Finance Acts and Ministry of Finance notifications and was effective after the cut-off dates of the PPAs. Service tax was allowed to the Petitioner vide order dated 7.3.2016 in Petition No. 81/MP/2013 pertaining to the construction period, the present claim pertains to operating period.
- g) As regards levy of GST on O&M contracts, the Commission had held GST to be a change in law event in its order dated 14.3.2018 in Petition No. 13/SM/2017.
- h) Busy Season Surcharge and Development Surcharge are change in law events since the increase in base freight is pursuant to circular dated 9.1.2018 issued by Railway Board. The Tribunal in the Adani case has held that the circulars issued by Railway Board qualify as law.
- i) In terms of the judgment dated 13.4.2018 in appeal No. 210 of 2017, carrying cost ought to be allowed by this Commission.



Issues

20. From the submissions of the parties, the 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 respective PPAs?
- Issue No. 4** Mechanism for compensation on account of Change in Law during the operational period.

21. 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 respective PPAs with regard to notice has been complied with?

22. The claims of the Petitioner in the present petition pertain to the Change in Law events during the Operating period. Relevant Article of the PPAs is extracted as under:

Bihar PPA

“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.”*



Haryana PPA

“13.3 Notification of Change in Law

13.3.1. If the Seller is affected by a Change in Law in accordance with Article 13.2 and wishes to claim a Change in Law under this Article, it shall give notice to the Procurer of such Change in Law as soon as reasonably practicable after becoming aware of the same or should reasonably have known of the Change in Law.

13.3.2 Notwithstanding Article 13.3.1, the Seller shall be obliged to serve a notice to the Procurer under this Article 13.3.2, 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.

13.3.3 Any notice served pursuant to this Article 13.3.2 shall provide, amongst other things, precise details of:

(a) the Change in Law; and

(b) the effects on the seller of the matters referred to in Article 13.2”

23. 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:

BIHAR PPA

(i) On 25.10.2014, GKEL informed Bihar State Power (Holding) Company Ltd. about the increase in service tax from 10% to 12%.

(ii) On 16.03.2015, GKEL informed Bihar State Power (Holding) Company Ltd. regarding increase in service tax from 12.36% to 14%. GKEL further informed Bihar State Power (Holding) Company Ltd. about levy of Swachh Bharat Cess at the rate of 0.5% of the value of taxable services, leading to revision in effective rate of service tax from 14% to 14.5%.

(iii) On 26.04.2016, GKEL notified Bihar State Power (Holding) Company Ltd. about levy of Krishi Kalyan Cess at the rate of 0.5% of the value of taxable services, leading to revision in effective rate of service tax from 14.5% to 15%.



(iv) On 15.09.2016 GKEL duly notified Bihar State Power (Holding) Company Ltd. of change in law on account of levy of coal terminal surcharge by the Ministry of Railways, Government of India.

(v) On 11.01.2018 GKEL intimated Bihar State Power (Holding) Company Ltd. of the following Change in Law events: -

(a) Levy of Evacuation Facilities Charges;

(b) Mandatory expenditure towards Corporate Social Responsibility (“**CSR**”) pursuant to Companies Act, 2013 and Environment Clearance dated 05.12.2011 issued by Ministry of Environment and Forest (hereinafter referred to as “**MoEF**”).

(vi) On 03.02.2018 GKEL intimated Bihar State Power (Holding) Company Ltd. of the Inclusion of Busy Season Surcharge and Development Surcharge in Railway Base Freight Rate for transportation of coal and coke.

Haryana PPA

(i) On 16.03.2015, GKEL informed PTC regarding increase in service tax from 12.36% to 14%.

(ii) On 17.11.2015, GKEL notified PTC about levy of Swachh Bharat Cess at the rate of 0.5% of the value of taxable services, leading to revision in effective rate of service tax from 14% to 14.5%.

(iii) On 26.04.2016, GKEL notified PTC about levy of Krishi Kalyan Cess at the rate of 0.5% of the value of taxable services, leading to revision in effective rate of service tax from 14.5% to 15%.

(iv) On 15.09.2016 GKEL duly notified PTC of change in law on account of levy of coal terminal surcharge by the Ministry of Railways, Government of India.



(v) On 11.01.2018 GKEL intimated PTC of the following Change in Law events: -

- (a) Levy of Evacuation Facilities Charges;
- (b) Mandatory expenditure towards Corporate Social Responsibility (“**CSR**”) pursuant to Companies Act, 2013 and Environment Clearance dated 05.12.2011 issued by Ministry of Environment and Forest (hereinafter referred to as “**MoEF**”).

(vi) On 03.02.2018 GKEL intimated PTC of the following Change in Law events: -

- (a) Inclusion of Busy Season Surcharge and Development Surcharge in Railway Base Freight Rate for transportation of coal and coke; and
- (b) Levy of Goods and Service Tax on O&M contracts.

24. Based on the records submitted by the petitioner, we observe that the requirements mentioned in the respective PPAs have been complied with by the Petitioner. The Respondents have raised no objections in this regard.

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

25. The Petitioner has approached this Commission under Article 10 of Bihar PPA and Article 13 of the Haryana PPA 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.

26. Article 10 of Bihar PPA and Article 13 of the Haryana PPA deals with the events of ‘Change in Law’. The provisions of the respective PPAs are extracted as under:

Bihar PPA:

"ARTICLE 10: CHANGE IN LAW

10.1 Definitions



In this Article 10, the following terms shall have the following meanings:

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;*
- a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the Seller;*
- Any change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of this Agreement.*

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

10.2 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."

Haryana PPA

"13. ARTICLE 13: CHANGE IN LAW

13.1 Definitions.

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

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

- (i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law or (ii) a change in interpretation of any Law by a Competent Court of law, tribunal or Indian Governmental Instrumentality provided such Court of law, tribunal or Indian Governmental Instrumentality is final authority under*



law for such interpretation or (iii) change in any consents, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer under the terms of this Agreement;

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

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

...

(b) *Operation Period*

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

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

27. The terms "Law" defined in 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"

28. The term "Indian Governmental Instrumentality" has been defined in the PPAs as under:

Bihar PPA

"Indian Government 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 the 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 Procurer.”

Haryana PPA

“the Government of India (GOI), Government of Haryana and any ministry, department, body corporate, Board, agency or other authority of GOI or Government of the State where the Project is located and includes the Appropriate Commission.”

29. 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 to 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 respective PPAs

Levy of Coal Terminal Surcharge (CTS) pursuant to Railway Board, Ministry of Railways circular dated 22.8.2016

30. The Commission in its Order dated 15.11.2018 in Petition No. 88/MP/2018 (GMRWEL vs MSEDCL & ors) has held as under:

“It is further pertinent to mention that Busy Season Surcharge and Development Surcharge was separately shown as component of basic freight charges and with effect from 15.1.2018, the Ministry of Railways, GOI vide its Notification No. TCR/1078/2015/07 dated 9.1.2018 has subsumed the Busy Season Surcharge and Development Surcharge under the freight charges. Accordingly, Service Tax and GST shall be applicable as under:

a) *Service Tax shall be applicable on Busy Season Surcharge and Development Surcharge, in addition to basic freight charges, till 30.6.2017;*



- b) *With effect from 1.7.2017, GST shall be applicable on Busy Season Surcharge and Development Surcharge, in addition to basic freight charges, till 14.1.2018;*
- c) With effect from 15.1.2018, GST shall be applicable on the freight charges as Busy Season Surcharge and Development Surcharge have been subsumed;
- d) GST shall be applicable to (b) and (c) above in accordance with our Order dated 14.3.2018 in Petition No. 13/SM/2017.

As regards the Coal Terminal Surcharge, the same is imposed by the Ministry of Railways, GOI. This surcharge is akin to the Busy Season Surcharge and Development Surcharge. The Petitioner had not claimed Coal Terminal Surcharge as a change in law event in Petition No. 8/MP/2017. Since Service tax or GST is imposed on Coal Terminal Surcharge by an Act of the Parliament, the same shall be covered under Change in law. Accordingly, the Petitioner is entitled to recover the Service Tax and GST on Coal Terminal Surcharge as stated in para 22 above."

31. The above Order is applicable in the present case also. In line with the above Order, the petitioners shall be entitled to claim Coal Terminal Surcharge as change in law events for the duration that these charges have been levied i.e. from 22.8.2016 to 9.7.2017. Thereafter, CTS has been subsumed in the base freight by the Railways.

32. Accordingly, the Petitioner is entitled to recover the Coal Terminal Surcharge from the Respondents as per applicable rates in proportion to the coal as per the parameters of the applicable Tariff Regulations of the Commission or actually consumed whichever is lower, for generation and supply of electricity to the discoms concerned. As on cut-off dates of the Bihar and Haryana PPAs, Coal Terminal Surcharge was nil. Thereafter, the applicable rates of Coal Terminal Surcharge shall be paid 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.

Busy Season Surcharge and Development Surcharge

33. The Petitioner has submitted that the Ministry of Railways has, vide circular No. TCR/1078/2015/07 dated 09.01.2018 effective from 15.01.2018, incorporated Busy Season Surcharge (BSS) and Development Surcharge (DS) in the base freight. The Petitioner has also stated that the rate of base freight, BSS and DS have changed upwards by Notification of Ministry of Railways and the same comes within the ambit of change in law under the Haryana PPA.

34. The Petitioner has submitted the following details of Base freight, BSS and DS existing at the cut-off date, prior to the issue of notification dated 9.1.2018 (when BSS and DS were subsumed in the base freight by the Ministry of Railways) and post notification dated 9.1.2018:

(In Rs. Per MT)

Sl. No.		At the cut-off date of Haryana PPA (a)	As on 8.1.2018 (Prior to notification dated 9.1.2018) (b)	Post Notification dated 09.01.2018 (c)
1	Base Freight	125.1	164.5	198.7
2	BSS	6.26	24.68	Subsumed
3	DS	2.36	9.46	Subsumed
	Total	133.98	198.63	198.7

35. Let us first consider the BSS and DS and see if they qualify as change in law events. The Petitioner has submitted that on the cut-off date, sum of BSS and DS was equal to Rs.9/MT (6.26+2.36) which increased to Rs. 34/MT (24.68+9.46). The increase in BSS and DS since the cut-off date was Rs. 25/MT which has been claimed by the Petitioner under change in law provisions.

36. The Appellate Tribunal in its judgment dated 14.8.2018 in Appeal No. 111 of 2017 and judgment dated 14.8.2018 in Appeal No. 119 of 2016 has held that busy season surcharge and development surcharge by Railways are change in law events. The relevant portion of the judgment dated 14.8.2018 in Appeal No. 111/2017 is extracted as under:



“xi. At the outset we observe that similar issues have been decided by this Tribunal in its judgement dated 14.8.2018 in Appeal Nos. 119 & 277 of 2016 in case of Adani Power Ltd. v. RERC &Ors. (‘Adani Judgement’). In our opinion the said findings of this Tribunal are directly applicable to the instant case. The relevant portion from the said judgement is reproduced below:

“11. A. xiii. From the above discussions it is clear that the Circulars issued by MoR regarding Busy Season Surcharge, Development Surcharge and Port Congestion Charges which have bearing on costs of the Kawai Project of APRL have force of law.

xvi. From the above discussions it is clear that the CERC escalation index for transportation covers only the basic freight charges. The Bidder was required to suitably incorporate the other taxes, duties, levies etc. existing at the time of bidding. The Bidder cannot envisage any changes happening regarding taxes, levies, duties etc. in future date. As such, any increase in surcharges or imposition of new surcharge after the cut-off date i.e. 30.7.2009 in the present case cannot be said to be covered under CERC Escalation Rates for Transportation Charges, which is indexed for basic freight rate only. Accordingly, any such change by Indian Governmental Instrumentality herein Indian Railways has to be necessarily considered under Change in Law event and need to be passed on to APRL. In terms of the PPA, such changes in the surcharges and levy of new Port Congestion Surcharge which does not exist at the time of cut-off date falls under 1st bullet of Article 10.1.1 of the PPA read with the definitions of the ‘Law’ and ‘Indian Government Instrumentality’ under the PPA.

According these issues are decided in favour of APRL.”

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

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

37. Further, subsequent to the judgment of the Appellate Tribunal, the Commission in its Order dated 15.11.2018 in Petition No. 88/MP/2018 (GMRWEL vs MSEDCL & ors) had held as under:

“20. It is further noticed that the Tribunal vide its judgment dated 14.8.2018 in Appeal No.111/2017 had allowed compensation to the Petitioner on account of the change in Busy Season Surcharge and Development Surcharge by Railways under Change In Law. The relevant portion of the judgment is extracted as under:



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

21. In terms of the judgment of the Tribunal, Busy Season Surcharge and Development Surcharge are covered under change in law and therefore, MSEDCL can no more take the technical objection for payment of Service tax on Busy Season Surcharge and Development Surcharge. Therefore, the Petitioner shall be entitled for Busy Season Surcharge and Development Surcharge till 30.6.2017. It is pertinent to mention that Service Tax was applicable till 30.6.2017 and thereafter, it has been subsumed under GST. Hence, with effect from 1.7.2017, the Petitioner shall be entitled for GST on Busy Season Surcharge and Development Surcharge.”

38. In line with the above judgments of the Tribunal and Order of the Commission, increase in Busy Season Surcharge and Development Surcharge as compared with the rate prevailing on the cut-off date in respective PPAs qualify as change in law events and Petitioner is entitled to claim the same till the time these charges were subsumed in the base freight i.e. up to 14.1.2018.

39. The Petitioner has also argued that subsequent to subsuming of BSS and DS in the base freight, the base freight has gone up. It has prayed for pass through of this cost as change in law. We note that increase in base freight due to inclusion of BSS and DS, is in the nature of change (increase) in rates of freight charges levied by the Railways and all such changes in base freight are taken care of with the six-monthly escalation index notifications published from time to time by this Commission. The Petitioner was expected to quote escalable and non-escalable capacity/ energy charges while participating in the bid and it has quoted it accordingly. Any increase in freight is taken care of through the escalation index and cannot be claimed separately as it would tantamount to double claim. Therefore, the increase in base freight due to inclusion of BSS and DS or due to any other reason is not admissible under Change in Law.



Levy of Evacuation Facility Charges by CIL

40. 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.

41. 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.”

42. We have considered the submission made by the Petitioner. We notice that as on the cut-off date of the respective PPAs there was no Evacuation Facility Charges levied by CIL and subsequently Coal India Ltd. vide its price notification no.



CIL:S&M:GM(F)/Pricing/2017/1005 dated 19.12.2017 notified the levy of 'evacuation facility charges' at the rate of Rs. 50/MT on coal. The Tribunal vide its judgement dated 21.12.2018 had concluded that "*departments, corporations/ companies like Coal India Limited or Indian Railways formed under different Statutes are Indian Government Instrumentality*". In view of the submissions of the Petitioner and in view of the said judgment, we note that the Evacuation Facilities Charges are levied pursuant to notification issued by CIL which is an Indian Governmental Instrumentality in terms of the PPAs. The Evacuation Facility Charges were not possible to be envisaged at the time of bid submission by the Petitioner and its subsequent introduction has an adverse financial impact on the Petitioner which is one of the requirements of claiming relief for change in law event. We further note that the Tribunal in the case of Sasan Power Ltd. V. CERC[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.

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



Expenditure towards CSR activities pursuant to Companies Act, 2013 and Environmental Clearance dated 5.12.2011

44. The Commission in Petition No. 16/MP/2016 has dealt with a similar issue wherein the Commission has not considered expenditure incurred towards CSR on environment clearance under change in law. The relevant portion of the order dated 17.2.2017 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.”

45. Accordingly, expenditure towards CSR activities is not considered as change in law in terms of the above order and is, therefore, disallowed.

Increase in Service Tax on O&M contracts pursuant to Finance Act vide MoF notification dated 24.2.2009, 17.3.2012 & 19.5.2015 & levy of GST on O&M contracts pursuant to GST Act, 2017

46. The Commission vide order dated 16.3.2018 in Petition No. 1/MP/2017 had decided as under:

“150. The matter has been examined. 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.”

47. 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.”

48. It is observed that the Service tax has been subsumed in GST with effect from 1.7.2017. Since Service Tax on O&M contracts was disallowed by the Commission in the said order, seeking GST on O&M contracts has no merit in terms of the above order.

Carrying Cost

49. The Petitioner has submitted that Article 10 of the Bihar PPA and Article 13 of the Haryana PPA provides for restoration of the affected party to the same economic position, which will also entail payment of carrying costs which is in the nature of



compensation for money denied at the appropriate time, as held by the Appellate Tribunal in the Judgment dated 20.12.2012 in Appeal No. 150 and batch appeals titled SLS Power Ltd vs. Andhra Pradesh Electricity Regulatory Commission (SLS case). The Petitioner has submitted that carrying cost being in the nature of compensation in terms of the Article 10 of the Bihar PPA and Article 13 of the Haryana PPA, failure to do so would defeat the underlying principle of restitution and render the Change in Law clauses in the PPAs otiose. The Petitioner has further submitted that the Article 10 of the Bihar PPA and Article 13 of the Haryana PPA of the PPAs accords plenary powers to this Commission to determine the compensation to be awarded.

50. 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.”

51. 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.”

52. 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."

53. The provision of the PPA related to restoration of the Petitioner to the same economic position is as under:

Bihar PPA

"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."

Haryana PPA

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

54. In view of the provisions of the PPAs, the principles of restitution and the above judgment of the Hon'ble Supreme Court, we are of the considered view that the Petitioner is eligible for carrying cost arising out of approved Change in Law events. 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 eligible for claiming 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 funds duly certified by the auditor or the Bank Rate defined in the



Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014, or the rate of Late Payment Surcharge provided for in the PPA, whichever is lowest.

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

55. Relevant Articles of the Haryana PPA and Bihar PPA which provides for the principle for computing the impact of change in law are extracted as under:

Bihar PPA

"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."



Haryana PPA

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

b) Operation Period

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

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

13.4 Tariff Adjustment Payment on account of Change in Law

13.4.1 Subject to Article 13.2, 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/judgement 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.

13.4.2 The payment for Changes in Law shall be through supplementary bill as mentioned in Article 11.8. However, in case of any change in Tariff by reason of Change in Law, as determined in accordance with this Agreement, the Monthly Invoice to be raised by the Seller after such change in Tariff shall appropriately reflect the changed Tariff.”

56. 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.

57. 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.

58. The Article 10 of Bihar PPA and Article 13 of Haryana PPA 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 revenues or cost shall be admissible to the Petitioner. Moreover, the compensation shall be payable only if the increase/decrease in revenues or cost to the seller is in excess of an amount equivalent to 1% of the letter of credit in aggregate for contract year. In our view, the effect of change in law as approved in this order shall come into force from the date of 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 the provisions of the PPA, the compensation amount allowed shall be shared by the procurers based on the scheduled energy.

Summary

59. The summary of decisions 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		
	Haryana PPA	Bihar PPA
Coal Terminal Surcharge	Allowed	Allowed
Evacuation Facilities Charges	Allowed	Allowed
Expenditure towards CSR activities as per Companies Act, 2013	Not Allowed	Not Allowed
Expenditure towards CSR activities as Environment Clearance	Not Allowed	Not Allowed
Increase in service tax on O&M contracts	Not Allowed	Not Allowed
GST on O&M Contracts	Not Allowed	Not Allowed
BSS and DS	Allowed	Not Applicable
Carrying Cost	Allowed	Allowed

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

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

Sd/-
(P.K. Pujari)
Chairperson

