CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 327/MP/2018
along with IA No.87/2018

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

Date of Order: 29th March, 2020

In the matter of

Petition under Section 79(1)(f) of the Electricity Act, 2003 for claiming compensation on account of occurrence of 'Change in Law' events as per Article 10.1.1 of the Case-1 long-term Power Purchase Agreement dated 27.11.2013 read with Addendum No.1 dated 20.12.2013 entered into between Dhariwal Infrastructure Limited and Tamil Nadu Generation and Distribution Corporation Limited thereby resulting into additional recurring/non-recurring expenditure by Dhariwal Infrastructure Limited for supply of 100 MW Contracted Capacity from Unit 2 of its 2×300 MW coal based thermal generating station located at Tadali, Chandrapur in the State of Maharashtra to Tamil Nadu Generation and Distribution Corporation Limited.

And
In the matter of

Dhariwal Infrastructure Limited
CESC House, Chowringhee Square,
Kolkata – 700 001, West Bengal **……..Petitioner**

Vs.

Tamil Nadu Generation and Distribution Corporation Limited
6th Floor, Eastern Wing,
144, Anna Salai, Chennai – 600 002. …….**Respondent**

The following were present:

Shri Sanjay Sen, Senior Advocate, Dhariwal Infra. Ltd.
Ms. Divya Chaturvedi, Advocate, Dhariwal Infra. Ltd.
Shri Saransh Shaw, Advocate, Dhariwal Infra. Ltd.
Ms. Sristhi Rai, Advocate, Dhariwal Infra. Ltd.
Shri Subir Saha, Dhariwal Infra. Ltd.
Shri Avik Chatterjee, Dhariwal Infra. Ltd.
Shri S. Vallinayagam, Advocate, TANGEDCO
Ms. Swapna Seshadri, Advocate, on behalf of Shri Rama Shankar Awasthi
Ms. Ritu Apurva, Advocate, on behalf of Shri Rama Shankar Awasthi

ORDER

The Petitioner, Dhariwal Infrastructure Limited, has filed the present Petition under Section 79(1)(f) of the Electricity Act, 2003 (hereinafter referred to as 'the Act') seeking compensation on account of Change in Law events in terms of Power Purchase Agreement dated 27.11.2013 read with Addendum No.1 dated 20.12.2013 entered into with the Respondent, Tamil Nadu Generation and Distribution Corporation Limited (hereinafter referred to as 'TANGEDCO'), for supply of 100 MW power from the Petitioners' generating station.

Background

2. The Petitioner has set up a 600 MW coal-based thermal generating station consisting of two units of 300 MW each (hereinafter referred to as 'the generating station') located at Tadali, Chandrapur in the State of Maharashtra. Unit-1 of the generating station, connected to the State Transmission Utility, achieved commercial operation on 11.2.2014 and Unit-2 of generating station, connected to Central Transmission Utility, achieved commercial operation on 2.8.2014.

3. Pursuant to the Case-1 competitive bidding conducted by the TANGEDCO, the Petitioner and TANGEDCO signed Power Purchase Agreement (hereinafter referred to as the 'TANGEDCO-PPA') dated 27.11.2013 for supply of 100 MW (net) capacity from Unit -2 of its generating station. The Petitioner and TANGEDCO also executed Addendum No.1 to the said PPA on 20.12.2013 which became an integral part of the TANGEDCO-PPA dated 27.11.2013. The TANGEDCO-PPA was approved by Tamil Nadu Electricity Regulatory Commission vide its order dated 29.7.2016 and consequently adopted the tariff discovered under the competitive bidding process under Section 63 of the Act.

4. The Petitioner has entered into following long-term Power Purchase Agreements ('PPAs') for supply of power from Unit-2 of the generating station:

(a) TANGEDCO-PPA dated 27.11.2013 read with Addendum No.1 dated 20.12.2013 between the Petitioner and TANGEDCO for supply of 100 MW for a period of fifteen (15) years. The supply under the PPA commenced from 16.12.2015.

(b) PPA dated 26.9.2014 between the Petitioner and Noida Power Company Limited, Uttar Pradesh (hereinafter referred to as 'NPCL') for supply of 170 MW (net) under Section 62 read with Section 64(5) of the Act. (hereinafter referred to as the 'NPCL PPA').

5. The Petitioner has submitted that under Article 10 read with Article 1 of the TANGEDCO-PPA, the Petitioner is entitled to be compensated on account of occurrence of Change in Law events thereby resulting into additional recurring/ non-recurring expenditure by the Petitioner. The Change in Law events have occurred after the cut-off date i.e. 27.2.2013 which is seven (7) days prior to bid deadline date of 6.3.2013.

6. The Petitioner has sought compensation on account of following Change in Law events during the Operating Period which have resulted into additional financial impact on the Petitioner for supply of power to TANGEDCO:

I. Increase in cost of coal on account of Change in Law events

(a) Contribution towards District Mineral Foundation and National Mineral Exploration Trust

(b) Increase in Coal Surface Transportation Charges

(c) Increase in Sizing Charges

(d) Increase in Clean Energy Cess/ Clean Environment Cess and Introduction of State Compensation Cess/ GST Compensation Cess

(e) Increase in Chhattisgarh Environment Cess and Vikas Upkar

(f) Change in the components for computation of Central Excise Duty leviable on Coal

(g) Introduction of IGST replacing Central Excise Duty w.e.f. 1.7.2017

(h) Use of Blended or Washed Coal with Ash Content not exceeding 34% with effect from 5.6.2016

(i) Additional Cost of sourcing alternate coal due to short supply under Fuel Supply Agreement

(j) Consequential increase in Royalty on coal.

(k) Introduction of Evacuation Facility Charges

(l) Increase in amount payable towards 'Niryat Kar'

(m) Increase in amount payable towards Central Sales Tax

II. Change in Law events pertaining to Transportation of Domestic coal supplied by Coal India Limited and its subsidiaries

(a) Increase in effective Rate of Service Tax levied on the Railway Freight

(b) Levy of Coal Terminal Surcharge at both loading and unloading terminal

(c) Dynamic Pricing Policy – Levy of Busy Season Charges

(d) Increase in amount payable towards the Development Surcharge

7. In addition, the Petitioner has sought liberty to approach the Commission at appropriate time for obtaining approval of increase in tariff on account all expenditure including (capital expenditure and operation expenses) pertaining to Emission Control System including Flue Gas Desulphurisation (FGD) Plant, as required pursuant to Ministry of Environment, Forest and Climate Change Environment Protection (Amendment) Rules, 2015 dated 7.12.2015 as presently the Petitioner is undertaking studies to identify the suitable technology for installation of EMS including FGD Plant and the associated ancillaries along with requirement of capital expenditure.

8. The Petitioner has submitted that after commencing the supply from 16.12.2015, it has incurred additional expenditure to the tune of Rs. 118.48 crore

including carrying cost for supply of power to TANGEDCO under the TANGEDCO-PPA due to Change in Law events. The Petitioner has computed the impact on account of the Change in Law events as under:

S. No.	Change in Law event	Financial Impact (₹ in crore)
I.	**Increase in cost of coal on account of Change in Law events (till 30.6.2018)**	
A.	Royalty on Coal: Contribution towards District Mineral Foundation and National Mineral Exploration Trust	4.96
B.	Increase in Surface Transportation Charges	2.78
C.	Increase in Sizing Charges	2.77
D.	Increase in Clean Energy Cess (later renamed as Clean Environment Cess and subsequently, as State Compensation Cess)	45.56
E.	Increase in Chhattisgarh Environment Cess and Infrastructure Development Cess	0.65
F.	Change in the Components for Computation of Central Excise Duty leviable on Coal	1.59
G.	Increase in Royalty on coal	3.38
H.	Increase in amount payable towards Niryat Kar	0.05
I.	Levy of Evacuation Facility Charges	1.48
J.	Increase in amount payable towards the Central Sales Tax	0.95
K.	Benefits to be passed on to TANGEDCO for implementation of GST	(0.63)
L.	Use of Blended or Washed Coal with Ash Content Not Exceeding 34% with effect from 05.06.2016 (till 31.3.2018)	4.85
M.	Additional Cost of sourcing alternate coal due to short supply of FSA Grade Coal from SECL (till 31.3.2018)	23.61
II.	**Increase in cost on account of Change in Law events pertaining to Transportation of Domestic coal supplied by CIL and its subsidiaries (till 30.06.2018)**	
A.	Increase in Service Tax on Railway Freight and Introduction of Goods & Service Tax on Transportation of Goods by Rail	1.65
B.	Levy of Coal Terminal Surcharge	5.31
C.	Levy of Busy Season Charges	2.44
D.	Increase in amount payable towards the Development Surcharge	0.06
III.	**Carrying Cost (till 30.6.2018)**	**17.03**
	TOTAL	**118.48**

9. In the above background, the Petitioner has filed the present Petition with the following prayers:

> *A. Declare and adopt the following Notification/ Pricing Notifications/ Rate/ Circulars/ Notices/ Orders/ Letters/ Statutes/ Rules/ Regulations as 'Change in Law' events within the meaning of Article 10 of the TANGEDCO PPA and allow Compensatory Tariff thereof:*

(a) Mines and Minerals (Contribution to District Mineral Foundation) Rules, 2015 being notified vide Notification No. G.S.R 792(E), dated 20.10.2015 with regard to Contribution towards District Mineral Foundation;

(b) Notification being SECL/BSP/S&M/1936 dated 13.11.2015 issued by SECL with regard to Contribution towards National Mineral Exploration Trust;

(c) Notification No. CIL:S&M:GM (F): Pricing: 2340 dated 13.11.2013 issued by CIL, SECL Notification No. SECL/BSP/GM(S&M)/2789 dated 14.11.2013 and Notification No. SECL/BSP/M&S/Pricing/17-18/2486 dated 15.11.2017 issued by SECL with regard to increase in Coal Surface Transportation;

(d) Price Notification No. CIL:S&M:GM(F): Pricing: 2784 dated 16.12.2013 and Price Notification No. CIL:S&M: GM(F): Pricing/2017/766 dated 31.08.2017 issued by CIL with regard to increase in Sizing Charges;

(e) Notice issued by SECL bearing (a) No. SECL/BSP/S&M/Sr. ES/Pricing/ 31/1605 dated 10.07.2014; (b) No. SECL/BSP/S&M/395 dated 28.02.2015 and (c) No. SECL/BSP/S&M/440 dated 29.02.2016 and MoF Notification (Ref. No.: D.O.F No. 334/8/2016-TRU)dated 29.02.2016 with regard to Increase in Clean Energy Cess renaming to Clean Environment Cess respectively;

(f) Notification No. SECL/BSP/S&M/17-18/1585 dated 26.07.2017 with regards to introduction of GST @5% while subsuming Central Excise Duty, Central Sales Tax and abolishing Stowing Excise Duty and introduction of State Compensation Cess@ Rs.400/Ton while abolishing Clean energy Cess (Clean Environment Cess);

(g) SECL letter Ref. No. SECL/BSP/S&M/2015/1420 dated 19.08.2015 increasing the rate of CG Paryavaran (C.G. Environment Cess) and "VikasUpkar" (Infrastructure Development Cess) from each @ Rs.5 per ton of coal extracted to each @ Rs.7.50 per ton of coal extracted;

(h) MoF Notification dated 01.03.2015 and 31.3.2015 revising the rate of Central Excise Duty & Letter (No.SECL/BSP/S&M/504) dated 08.03.2013 and Notice (No. SECL/BSP/S&M/RS/619) dated 25.03.2013 issued by SECL changing the components for computation of Central Excise Duty leviable on Coal thereby having an impact of net increase of Rs.21.31 per ton towards amount payable with respect to Central Excise Duty as at the end of June 2017 as compared to that prevalent on the Cut-off Date;

(i) Notification No. G.S.R 02(E) dated 02.01.2014 issued by the Ministry of Environment and Forests, Government of India containing a stipulation for use of Blended or Washed Coal with Ash Content not

exceeding 34% with effect from 05.06.2016 which has compelled the Petitioner to incur additional cost on account of washing the same to achieve the statutorily mandated coal with ash content not exceeding 34%;

(j) Office Memorandum/Notification dated 26.07.2013 issued by MoC and the letter dated 31.07.2013 issued by MoP;
(k) Notification No. CIL:S&M:GM(F)/Pricing 2017/ 1005 dated 19.12.2017 with regard to introduction of Evacuation Facility Charges;

(l) Corrigendum No.3 to Rates Circular No. 29 of 2012 dated 27.05.2015, Corrigendum No. 5 to Rates Circular No. 29 of 2012 dated 12.11.2015, Corrigendum No. 6 to Rates Circular No. 29 of 2012 dated 31.05.2016 with regard to increase in effective Rates of Service Tax levied on the Railway Freight and Rates Circular No. 19 of 2017 dated 30.06.2017 with regard to introduction of GST levied on the Railway Freight;

(m) Corrigendum No. 14 to the Rates Circular No. 08 of 2015 dated 22.08.2016 and Notification No. TCR/1078/2015/07 dated 06.07.2017 issued by the Railway Board functioning under the Ministry of Railways, Government of India with regard to levy of Coal Terminal Surcharge (CTS) at both loading and unloading terminal;

(n) Rate Circular No. 28 of 2012 dated 27.09.2012 issued by the Railway Board with regard to Dynamic Pricing Policy- levy of Busy Season Charges, copy of Rate Master Circular No. 24 of 2013 dated 18.09.2013 issued by the Railway Board pertaining to increase in rate of Dynamic Pricing Policy on levy of Busy Season Charges as well as the Copy of the Rate Master Circular No.01 of 2018 dated 09.01.2018 pertaining to withdrawal of Dynamic Pricing Policy on levy of Busy Season Charges and Development Surcharge;

(o) Rate Circular No. 38 of 2011 dated 12.10.2011 issued by the Railway Board with regard to the rate payable towards the Development Surcharge;

B. Direct the Respondent to make a payment of Rs.63.54 Crores to the Petitioner from the date of commencement of supply, i.e., 16.12.2015 till 30.06.2018 on account of increase in cost of coal on account of 'Change in Law' events and Rs. 28.46 Crores for the period 16.12.2015 to 31.03.2018 on account of supply of coal through washing route as well as supply of higher grades of coal/e-Auction coal.

C. Direct the Respondent to make a payment of Rs.9.45 Crores to the Petitioner from the date of commencement of supply, i.e.,16.12.2015 till 30.06.2018 on account of increase in cost of transportation of domestic coal supplied by CIL and its subsidiaries including SECL on account of 'Change in Law' events; and

D. Direct the Respondent to make a payment of Rs.17.03 Crores from the date of commencement of supply, i.e., 16.12.2015 till 30.06.2018 on account of carrying cost on the total amount stipulated in Prayers B to C; and

E. Direct the Respondent to continue to make payments accrued in favour of the Petitioner on account of 'Change in Law' events mentioned in Prayers B and C and also in terms of Prayer D, post the filing of the present Petition; and

F. Allow the Petitioner to approach this Commission at appropriate time for obtaining approval of increase in tariff on account of all expenditure including additional capital expenditure and operational expenses pertaining to ECS including FGD Plant under Change in Law event based on the provisions of TANGEDCO PPA, which may be required to be incurred in compliance with Amendment Rules notified by MoEFCC dated 07.12.2015 on revised environment norms for thermal power plants; and

G. Condone any inadvertent omission/errors/shortcomings and permit the Petitioner to add/change/modify/alter the present pleading/petition and may also grant leave to the Petitioner to make appropriate submissions at any future date in regard to the present proceedings;

IA No. 87/2018

10. The Petitioner has filed IA No. 87/2018 seeking interim direction to TANGEDCO for payment against various Change in Law claims made by the Petitioner. Relying upon the Ministry of Power's Notification dated 27.8.2018 issued under Section 107 of the Act, the Petitioner has submitted that since various Change in Law events claimed by it in the Petition already stand approved/ allowed as Change in Law events by this Commission as well as the Appellate Tribunal for Electricity (hereinafter referred to as the Appellate Tribunal), TANGEDCO may be directed to pay additional expenditure incurred by the Petitioner along with carrying cost during the pendency of the main Petition.

11. The Petition was admitted on 27.2.2019 and notice was issued to TANGEDCO to file its reply. During the course of hearing on 28.5.2019, learned counsel appearing on behalf of Shri Rama Shankar Awasthi, a consumer representative (hereinafter referred to as "Shri Awasthi") sought permission for being impleaded as party to the Petition. The Commission vide Record of Proceeding for

the hearing dated 28.5.2019 directed Shri Awasthi to participate in the proceedings and to file its submissions without being formally impleaded as a party to the Petition.

12. TANGEDCO and Shri Awasthi have filed their replies on 3.5.2019 and 7.6.2019 respectively and, *inter-alia*, objected to the maintainability of the present Petition. TANGEDCO mainly contended that since the NPCL-PPA is under Section 62 of the Act and TANGEDCO-PPA is under Section 63 of the Act, there is no composite scheme as the tariff therein are under two separate Sections of the Act. TANGEDCO has further contended that since the Petitioner has also filed a separate Petition seeking Change in Law compensation before Uttar Pradesh Electricity Regulatory Commission ('UPERC') in respect of the same unit of the generating station with respect to NPCL-PPA under Section 64(5) of the Act, the present Petition is not maintainable as compensation under Change in Law for same unit of the generating station cannot be determined by UPERC and CERC simultaneously. Shri Awasthi also objected to the maintainability of the Petition on the ground that there cannot be two separate proceedings in relation to Change in Law and other aspect of tariff from the same generating unit (Unit-2) before two different Commissions. Shri Awasthi submitted that in terms of judgment of Hon'ble Supreme Court in Energy Watchdog v. Central Electricity Regulatory Commission and Ors. [(2017 14 SCC 80], this Commission has exclusive jurisdiction to regulate the tariff of generating station having composite scheme for generation and sale of electricity in more than one State such as that of the Petitioner's under Section 79(1)(b) of the Act and that the exercise of jurisdiction by UPERC under Section 64(5) of the Act has been challenged before Appellate Tribunal of Electricity (Appellate Tribunal) in Appeal No. 185 of 2019, which is pending adjudication.

13. The Commission after taking into the consideration the submissions of the Petitioner, TANGEDCO and Shri Awasthi, on the maintainability of the Petition, in its order dated 1.7.2019 held that the present Petition is maintainable and that the Commission has the jurisdiction to adjudicate the disputes raised in the present Petition in terms of Section 79(1)(b) read with Section 79(1)(f) of the Act. The relevant portion of the said order dated 1.7.2019 is reproduced below:

> *"15. We have considered the submissions of the Petitioner, TANGEDCO and Shri Awasthi. The Petitioner has entered into separate PPAs with the TANGEDCO and NPCL for supply of power at different points in time and for different quantum. The PPA with TANGEDCO for supply of 100 MW was executed by the Petitioner on 27.11.2013. Later, Addendum No.1 dated 20.12.2013 was executed by the Petitioner. TNERC in its order dated 29.7.2016 approved the TANGEDCO PPA and adopted the tariff discovered through the competitive bidding process in terms of Section 63 of the Act. On 26.9.2014, the Petitioner executed PPA with NPCL for supply of 170 MW. UPERC vide its order dated 20.4.2016 approved the NPCL PPA. Subsequently, UPERC in its order dated 5.2.2019 in Petition No. 1235 of 2017 determined the tariff for 170 MW supply to NPCL. The jurisdiction of this Commission to regulate the tariff of the generating companies is derived from Section 79(1)(a) and (b) of the Act and it derives its power to adjudicate the dispute from Section 79(1)(f) of the Act. The said provisions are extracted as under:*
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> *16. Under Section 79(1)(b) of the Act, this Commission has the jurisdiction to regulate the tariff of generating companies other than those owned or controlled by the Central Government if those generating companies have composite scheme for generation and sale of electricity in more than one State. The Hon'ble Supreme Court in civil appeals titled Energy Watchdog v. CERC &Ors. [2017 (4) SCALE 580] has dealt with the issue of composite scheme under Section 79(1)(b) of the Act as under:*
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> > *"22. The scheme that emerges from these Sections is that whenever there is inter- State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79(1) itself in subsections (c), (d) and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression "within the State" in sub-clauses (a), (b), and (d), and "intra-state" in sub-clause(c). This being the case, it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission. The State Commission's jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. What is important to remember is that if we were to accept the argument on behalf of the appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being the case, we are*

constrained to observe that the expression "composite scheme" does not mean anything more than a scheme for generation and sale of electricity in more than one State."

17. As per the above findings of the Hon'ble Supreme Court, the moment generation and sale of electricity take place in more than one State, this Commission is the appropriate Commission under the Act. In the present case, as stated above, the Petitioner is supplying power to TANGEDCO in the State of Tamil Nadu and to NPCL in the State of Uttar Pradesh from its power project situated in State of Maharashtra. It has entered into long term PPA dated 27.11.2013 read with Addendum No. 1 dated 20.12.2013 for supplying power from its power plant to Distribution company in the State of Tamil Nadu i.e. TANGEDCO and PPA dated 26.9.2014 for supplying power to the Distribution company in the State of UP i.e. NPCL. It is, therefore, evident that the Petitioner is supplying electricity to more than one State from the same generating station and such supply is governed by separate binding arrangements, namely the PPAs. It is further seen that prior to entering into PPA with NPCL, the TANGEDCO had entered into PPA with the Petitioner on 27.11.2013 read with Addendum No. 1 dated 20.12.2013. The entire scheme of generation and supply of power, therefore, unmistakably indicates that the Petitioner has a composite scheme for generation and supply of power in more than one State.

18. Sub-section (b) of Section 79(1) of the Act provides that this Commission shall regulate the tariff of generating company, if such generating company enters into orotherwise have a composite scheme for generation and sale of electricity in more than one State. This provision is unconditional. We do not find any basis for argument of the Respondent as regards requirement that the tariff has to be determined only under Section 63 of the Act for this Section to be applicable. The Hon'ble Supreme Court has ruled in Energy Watchdog Case that the expression "composite scheme" does not mean anything more than a scheme for generation and sale of electricity in more than one State. It is a cardinal rule of interpretation that the court cannot add words to a statute or read words which are not there in it. The Hon'ble Supreme Court in the case of Shiv Shakti Co-operative Housing Society v. Swaraj Developers [(2003) 6 SCC 659], has observed as under:

(j) "It is a well settled principle in law that the Court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent."

19. It is also important to highlight here that similar to the instant case was the case of Adani Power Ltd. (hereinafter referred to as Adani) which had the arrangement to supply power to Gujarat alone prior to entering into PPAs with Haryana Utilities. In fact, GERC had not only adopted the tariff of generating station of Adani but it had also adjudicated certain change in law claims. After Adani approach this Commission pleading composite scheme on account as it was supplying power to GUVNL and Haryana Utilities, this Commission ruled that Adani"s case fulfils the requirement of Section 79 (1) (b) of the Act the moment it entered into PPAs with Haryana Utilities and the jurisdiction came to be vested in this Commission. The Hon'ble Supreme Court in Energy Watchdog case has upheld that Adani has a composite scheme for generation and sale of power in more than one State. Similar is the case with GMR Kamalanga which had a Section 62 PPA with GRIDCO for supply of power from its project in Odisha. Subsequently, GMR Kamalanga entered into Section 63 PPAs with Haryana (through PTC) and Bihar. This Commission held that GMR Kamalanga has a composite scheme for generation and supply of power in more than one State. The jurisdiction of this Commission in GMR Kamalanga case has also been upheld by the Hon'ble Supreme Court in Energy Watchdog case. Further, in Petition No.

289/MP/2018 (MB Power (Madhya Pradesh) Limited v. UPPCL &Ors.) where the Petitioner`s generating company has entered into separate PPAs both under Section 62 and Section 63 with different State Discoms, this Commission in its order dated 30.4.2019 has held that it is a case of 'composite scheme' for generation and sale of power to more than one State and thereby this Commission has the jurisdiction to adjudicate disputes under the PPAs. In view of this, the argument advanced by TANGEDCO that there is no composite scheme in the present case because the PPA with NPCL is under Section 62 of the Act whereas the PPA with TANGEDCO is under Section 63 of the Act has no merit and it cannot be accepted. For the same reason, TANGEDCO"s other objection of not making NPCL a party to the present petition is not sustainable.

20. Therefore, in light of the foregoing and as per the decision of the Hon'ble Supreme Court in Energy Watchdog Case, we are of the view that this Commission has the jurisdiction over the Petitioner's generating station and to thereby adjudicate the disputes raised in the present Petition in terms of Section 79(1)(b) read with Section 79(1)(f) of the Act. Accordingly, the Petition is maintainable.

…….

33. In light of above discussion, we hold that the present petition is maintainable before this Commission. We make it clear that this order is limited to determination of issue of the jurisdiction of this Commission and maintainability of the Petition before this Commission. We have not expressed any view on the merit of the issues raised in the Petition. Accordingly, the Respondent is directed to file its reply on merits, if not already filed, latest by 19.7.2019 with advance copy to the Petitioner who may file its rejoinder, if any, by 31.7.2019. No extension of time for completion of pleadings shall be permitted."

Accordingly, the issues of jurisdiction and maintainability of the Petition stand settled in terms of the above order of the Commission.

14. On merits, TANGEDCO, in its reply dated 3.5.2019, has mainly submitted as under:

(a) The Petitioner had sent Change in Law notice on 20.9.2016 with details of Change in law events which had occurred after the cut-off date. However, the Petitioner filed the present Petition claiming the compensation only on 11.10.2018 i.e. after a period of two years. Accordingly, the Petition suffers from delay and laches and is, therefore, liable to be dismissed.

(b) The Petitioner has not placed on record any supporting documents as to how the Petitioner quantified/ calculated its Change in Law claims or proof of payment supported by auditor's certificate. The Petitioner has also not placed on record the various components of energy charges quoted by it in its bid and as agreed under the PPA.

(c) In terms of Clause 2.4.1.1.B (xi) of RfP, the Petitioner was required to quote all-inclusive tariff including statutory taxes, duties and levies thereof. Since the quoted tariff by the Petitioner is inclusive of taxes, duties and levies, by virtue of application of CERC escalation indices on the quoted tariff, the tax components therein also get escalated. Accordingly, the Petitioner cannot avail the benefit of both, the escalation indices of CERC on energy charges and also the increase in/ introduction of taxes, levies and cess on energy charges after adjusting the quantum of escalation indices availed by it.

(d) In terms of Article 15 of the PPA, the Seller/ Petitioner is required to pay all the taxes, duties and cess for supplying power as per the terms of the agreement and also to indemnify the procurer, hold him harmless against any claim that may be made against the procurer in relation thereto.

(e) Prayer of the Petitioner seeking leave to approach the Commission at appropriate time on account of revision in environment norms is not maintainable under law.

15. In response to the submissions made by TANGEDCO on merits, the Petitioner, in its rejoinder dated 16.5.2019, has mainly submitted as under:

(a) The Petitioner had issued the Change in Law notice in terms of Article 10.4 of the PPA on 20.9.2016 detailing the various Change in Law events which had occurred after the cut-off date i.e. from 27.2.2013 to August 2016. The said notice/ letter was followed up by 9 reminders to TANGEDCO. However, in absence of any response thereof, the Petitioner once again issued revised Change in Law notice on 14.2.2018 (up to December 2017). On 28.9.2018, the Petitioner also brought to the notice of TANGEDCO, the Ministry of Power's direction to the Commission dated 27.8.2018 under Section 107 of the Act and various orders passed by the Commission/ Appellate Tribunal already allowing the Change in Law claims as raised by the Petitioner. Having chosen not to respond to such notices, TANGEDCO cannot raise the ground of delay and latches.

(b) The Petitioner has submitted the supporting documents for its Change in Law claims as well as break-up of the computation in support of its claims. Additional documents such as Auditor Certificates are provided to Procurers only before disbursement of funds.

(c) The fuel price escalation indices and the escalation indices for transportation charges as notified by the Commission only cater to and cover the change in base price of fuel and variance in the base freight rates respectively and do not cover the change in rate of any taxes and duties imposed thereon. Also, in terms of RfP, the Petitioner was required to factor the prevailing Rules/ Regulations, statutory taxes, levies and duties at the time of submission of bid. Any change in the rate of applicable taxes and duties or imposition of any new taxes and duties, which was not considered/ contemplated under the bid tariff, squarely falls within the Change in Law.

(d) Reliance on Article 15 of the PPA by TANGEDCO is misplaced and the Commission has already rejected similar contentions of TANGEDCO in earlier cases.

(e) As regards contention of TANGEDCO that the Petitioner cannot seek liberty to approach the Commission on account of revision in environment norms at appropriate time, it may be noted that the Commission vide its order dated 20.3.2017 in Petition No. 72/MP/2016 (Maithon Power Ltd. v. DVC and Ors.) and order dated 20.7.2018 in Petition No. 98/MP/2017 (NTPC v. UPPCL and Ors.) has already declared the amendment to emission norms (by Ministry of Environment, Forest and Climate Change) as Change in Law event. Since the Petitioner is presently exploring the optimum technology and the likely additional cost, it shall approach the Commission after arriving at a legitimate estimate for such capital expenditure for approval.

16. Shri Awasthi vide its written submissions on 27.1.2020 has mainly submitted as under:

(a) Apart from the present Petition, the Petitioner has also filed certain Petitions before UPERC seeking compensation for Change in Law as well as approval for procurement of additional coal in view of shortfall in coal from

SECL. While the Commission in its order dated 1.7.2019 has observed that the above fact has no relevance for deciding on the issue of maintainability, for deciding the Petition on merits, the Commission would have to take a holistic view considering the claims made by the Petitioner before UPERC and its impact on tariff for supply to both the States.

(b) Approval of UPERC to NPCL-PPA vide its order dated 20.4.2016 was on a condition that the entire coal available under Fuel Supply Agreement ('FSA') should be first utilized/ used for supply of power to NPCL and only the balance coal, if available, could be used for supply of power to others. Having accepted the said order, the Petitioner cannot take a stand that coal available under the FSA need not be used for supply to NPCL and may be apportioned based on the capacities tied up.

(c) The above condition as imposed by UPERC is not merely an interpretation being made by the objector but has been understood in the same way by even UPERC. It has been clearly indicated in UPERC's order dated 26.2.2019 in Petition No. 1318/2018 and Petition No. 1319/2018 filed by the Petitioner before UPERC, seeking approval for procuring additional coal.

(d) In the instant Petition, while seeking the compensation for shortfall in coal from SECL, the Petitioner has estimated the shortage of coal after apportioning the coal under the FSA in proportion of the contracted capacities tied up with NPCL and TANGEDCO. By claiming shortage of coal by apportioning the coal under FSA, the Petitioner is seeking to bypass the specific condition of approval given by UPERC.

(e) Supply of 187 MW and 100 MW to NPCL and TANGEDCO respectively being from the same Unit i.e. Unit-2, the coal shortage being claimed under the FSA will certainly not be for a particular PPA but will be qua the entire coal under the FSA.

(f) The Commission ought not to proceed with the present matter during the pendency of Appeal No. 150 of 2017 and Appeal No. 185 of 2019 filed by the objector before the Appellate Tribunal challenging the approval by UPERC qua NPCL-PPA and also the jurisdiction of UPERC.

17. The Petitioner in its rejoinder to the written submissions of Shri Awasthi dated 31.1.2020 has, mainly, submitted as under:

(a) Scope of determination of compensation on account of procurement of 'additional coal' and claims thereof under 'Change in Law' events before UPERC and that before this Commission are distinct and mutually exclusive. and the outcome of this Petition will have a bearing only on TANGEDCO and will not impact NPCL.

(b) FSA dated 8.3.2016 read with Addendum dated 30.6.2016 entered into by the Petitioner with SECL is for purchase of Annual Contracted Capacity (ACQ) of 8,90,461 MTPA coal corresponding to net contracted capacity of 170 MW under NPCL-PPA and ACQ of 5,23,809 MTPA coal corresponding to net contracted capacity of 100 MW under TANGEDCO-PPA.

(c) The objector has misinterpreted the direction of UPERC in the said order. The direction which reads *"it would be ensured by DIL that coal available under the FSA would be first utilized for supply of 187 MW to NPCL'* means the coal made available for supply to NPCL corresponding to the envisaged quantum of 8,90,461 MTPA as stipulated under the FSA. The direction of UPERC nowhere mandates the Petitioner to use the 'entire coal available under the FSA' i.e. the share of coal allocated for supply of power to TANGEDCO. Even otherwise, using coal allocated against one PPA cannot be used for supply of power against another PPA is also not possible under the provisions of FSA.

(d) Terms and conditions of FSA necessitate utilization of linkage coal supplied under the FSA for supply of power to respective contracted capacities. Accordingly, the Petitioner has always first utilized the allocated FSA grade coal for supply of power to NPCL based on the net contracted capacity (170 MW) in terms of the directions of UPERC in its order dated 20.4.2016. The same has also been deliberated before UPERC post the order dated 26.2.2019 as cited by the objector and UPERC vide its order dated 25.6.2019 in Petition No. 1438 of 2019 duly noted and acknowledged the coal allocation among the beneficiaries of the Petitioner under FSA read with Addendum.

(e) Proportionate allocation of linkage coal to specific long-term PPAs under FSA has been allowed and affirmed by this Commission in its order dated 20.3.2018 in Petition No. 105/MP/2017 (GMR Kamalanga Energy Limited v. Haryana Power Purchase Centre & Ors.) and order dated 3.6.2019 in Petition No. 156/MP/2018 (MB Power (Madhya Pradesh) Limited v. UPPCL and Ors.).

(f) The objector has challenged UPERC's order dated 20.4.2016 as well the multi-year tariff order dated 5.2.2019 before the Appellate Tribunal by way of Appeal No. 150 of 2017 and Appeal No. 185 of 2019 respectively. However, no stay has been granted by the Appellate Tribunal thereon. Hence, requesting for adjournment of the current proceedings on basis of these appeals is untenable. Also, such contention of the objector has already been rejected by the Commission in its order dated 1.7.2019.

18. The Petition was heard on 25.2.2020. During the course of hearing, learned counsel for TANGEDCO referring to the Commission's order dated 1.7.2019 and judgment of Hon'ble Supreme Court in Energy Watchdog case submitted that scope of Section 64(5) of the Act is limited to the determination of tariff. However, as far as the adjudication of dispute is concerned, the same necessarily lies before this Commission as the Petitioner is involved in inter-State sale of power in more than one State. Accordingly, the Petitioner is required to implead NPCL as party to the present Petition. The adjudication of Change in Law disputes in respect of both the PPAs i.e. NPCL-PPA and TANGEDCO-PPA has to be done together and cannot be agitated separately before two different forums. Learned counsel further submitted that as far as various Change in Law events which have already been allowed by the Commission and the Appellate Tribunal, the Respondent has nothing to add thereon.

19. In its rebuttal, learned senior counsel for the Petitioner submitted that TANGEDCO is re-agitating the issue on maintainability of the Petition that has

already been decided by the Commission in its order dated 1.7.2019. Learned senior counsel further submitted that the Petitioner and NPCL had approached UPERC under Section 64(5) of the Act in respect of NPCL-PPA, as per direction of UPERC and the exercise of jurisdiction under Section 64(5) of the Act by UPERC is already under challenge before the Appellate Tribunal in appeal filed by objector, Shri Awasthi.

20. The Commission vide Record of Proceeding for hearing dated 25.2.2020 had allowed TANGEDCO to file its written submission by 6.3.2020 and the Petitioner to file its response thereof by 13.3.2020 and order was reserved in Petition. However, no written submission has been filed by TANGEDCO pursuant to the above direction.

Analysis and Decision

21. The issues of jurisdiction and maintainability of the present Petition are already settled in terms of the Commission's order dated 1.7.2019 and, therefore, we are not going again into these issues in the present order. Accordingly, after consideration of the submissions of the Petitioner, TANGEDCO and Shri Awasthi, the following issues emerge for our consideration:

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

Issue No. 2: What is the scope of Change in Law in the Power Purchase Agreement?

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

Issue No. 4: What should be the mechanism for processing and reimbursement of admitted claims under Change in Law?

We now proceed to discuss the above issues and examine the claims of the Petitioner.

22. The chronology of event with regard to TANGEDCO-PPA are as under:

Power supply to	TANGEDCO – 100 MW (net) for the period of 15 years
Cut-off date	27.2.2013
Bid Deadline	6.3.2013
PPA executed on	27.11.2013 read with Addendum No.1 dated 20.12.2013
Start of supply of power	16.12.2015

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

23. The claims of the Petitioner in the present Petition pertain to Change in Law events related to the TANGEDCO-PPA dated 27.11.2013 read with Addendum No.1 dated 20.12.2013. Article 10.4 of the PPA deals with the issue of notification of an event of Change in Law and the same 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 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) Change in Law; and
(b) the effects on the Seller …"

24. The Petitioner has submitted that in compliance to the Article 10.4 of the PPA, it issued Notice on 20.9.2016 to TANGEDCO along with details of all Change in Law events with all the relevant notifications/ notices/ orders/ letters/ statutes/ rules/ regulations impacting the economic position of the Petitioner and requesting

TANGEDCO to approve the recurring additional expenditure on account of such Change in Law events. The Petitioner also followed up the aforesaid notice by way of nine other reminders. However, TANGEDCO did not respond to any of the said letters.

25. *Per Contra*, TANGEDCO has contended that having given a Change in Law notice back in 20.9.2016, the Petitioner has filed the present Petition only on 11.10.2018 i.e. after a delay of about 2 years. Hence, the present Petition suffers from delay and latches and should be dismissed.

26. We have considered the submissions of the Petitioner and TANGEDCO. Under Article 10.4 of the PPA, the Petitioner is required to give notice about occurrence of Change in Law events as soon as reasonably practicable after being aware of such events i.e. Change in Law events which occurred after cut-off date of 27.2.2013. The Petitioner had given Change in law notice vide Letter No. MD:DIL:TANGEDCO:106 dated 20.9.2016 to TANGEDCO indicating the events under Change in Law upto August, 2016 and impact of such events on tariff. However, TANGEDCO did not respond to the claims of the Petitioner. The said Notice was followed up by the Petitioner through nine (9) reminders dated 28.10.2016, 7.12.2016, 30.1.2017, 29.3.2017, 26.5.2017, 5.7.2017, 11.8.2017, 14.9.2017 and 27.10.2017. Thereafter, the Petitioner issued revised Change in Law Notice on 14.2.2018 including the details of all Change in Law events beyond the cut-off date till December 2017 followed by reminders dated 9.7.2018 and 28.9.2018. Thus, it is clear that the Petitioner has complied with the requirement of notice under Article 10.4 of the PPA.

27. TANGEDCO has submitted that the Petition suffers from delays and laches and has submitted that the prayers of the Petitioner should not be considered. We note that commencement of supply of power under TANGEDCO-PPA began with effect from 16.12.2015. The Petitioner issued Change in Law notice in terms of Article 10.4 of the PPA on 20.9.2016 and was consistently followed up by the Petitioner with TANGEDCO. The Petitioner had also issued the revised Change in Law notice under Article 10.4 on 14.2.2018. However, it is the Respondent, TANGEDCO, which chose not to reply to any of the said notices/ reminders and accordingly, the Petitioner was constrained to file the present Petition. Hence, the contention of TANGEDCO that the present Petition suffers from delays and latches is not tenable and is accordingly rejected.

Issue No. 2: What is the scope of Change in Law in the Power Purchase Agreement?

28. The claims of the Petitioner are with respect to events under Change in Law under Article 10 of the PPA. The same is extracted as under:

10. 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 consequences of Change in Law under Article 10, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, it 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 the 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 Standby Letter of Credit in aggregate for the relevant Contract Year

10.3.3 For any claims made under Articles 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/expenses 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.

29. Article 14 of the PPA provides for dispute resolution arising out of claim made by any party for any change in or determination of tariff or any matter relating to tariff. The said Article is extracted as under:

14.3 Dispute Resolution

14.3.1 Dispute Resolution by the Appropriate Commission

14.3.1.1

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

b) Where SERC is appropriate commission, all disputes between the procurer and the seller shall be referred to SERC.

30. A combined reading of the above provisions reveal that the events covered under Change in Law are broadly 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, clearance 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 to TANGEDCO,

(f) Such Changes (as mentioned in (a) to (e) above) result in additional recurring and non-recurring expenditure by the seller or any income to the seller,

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

(h) The compensation for any increase/ decrease in revenue or cost to the seller shall be determined and made effective from such date as decided by the Commission which shall be final and binding on both the Petitioner and TANGEDCO, subject to the rights of appeal provided under the Act.

31. The terms 'Law' has been defied under Article 1.1 of the PPA as under:

"Law" shall mean in relation to this Agreement, all laws including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having

force of law and shall further include without limitation all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include without limitation all rules, regulations, decisions and orders of the Appropriate Commission.

32. The term 'Indian Governmental Instrumentality' has been defined in Article 1.1 of the PPA as under:

"Indian Governmental Instrumentality" shall mean the Government of India, Governments of state of Tamil Nadu, West Bengal and 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 or both , any political sub-division of any of them including any court or Appropriate Commission or tribunal or judicial or quasi-judicial body in India but excluding the Seller and the Procurer;

As per the above definition, law shall include (a) all laws including electricity laws in force in India; (b) any statute, ordinance, regulation, notification, code, rule or their interpretation by Government of India, Government of Tamil Nadu, West Bengal and Maharashtra or any Ministry, Department, Board, Body Corporate agency or other authority under such Government; (c) all applicable rules, regulations, orders, notifications by a Government of India Instrumentality; and (d) all rules, regulations, decisions and orders of the Appropriate Commission. If any of these laws affect the cost of generation or revenue from the business of selling electricity by the seller to the procurer, the same shall be considered as Change in Law to the extent it is contemplated under Article 10 of the PPA.

33. In light of the above and in view of the broad principles discussed above, we proceed to deal with the claims of the Petitioner under Change in Law during the Operating Period.

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

34. Based on the submissions and documents available on record, we proceed to examine the contentions of the parties and the claim of the Petitioner as stated in

the subsequent paragraphs. However, before dealing with specific claims of the Petitioner as regards Change in Law events, we would like to go into some preliminary objections raised by Shri Awasthi and TANGEDCO regarding claims of the Petitioner.

35. TANGEDCO has contended that in terms of Clause 2.4.1.1.B (xi) of RfP, the Petitioner was required to quote all-inclusive tariff including statutory taxes, duties and levies thereof. Since quoted tariff by the Petitioner is inclusive of taxes, duties and levies, by virtue of application of CERC escalation indices on the quoted tariff, the tax components therein also get escalated. Accordingly, the Petitioner cannot avail the benefit of both i.e. the escalation indices of CERC on energy charges and also claiming increase in/ introduction of taxes, levies and cess on energy charges under Change in Law provisions of the TANGEDCO-PPA.

36. In response, the Petitioner has submitted that the fuel price escalation indices and the escalation indices for transportation charges as notified by the Commission only cater to and cover the change in base price of fuel and variance in the base freight rates respectively but do not cover the change in rate of any taxes and duties imposed thereon. Also, in terms of RfP, the Petitioner was required to factor the impact of rules/ regulations, statutory taxes, levies and duties prevailing at the time of submission of bid. Any change in the rate of applicable taxes and duties or imposition of any new taxes and duties, which was not considered/ contemplated under the bid tariff squarely falls within Change in Law provisions under Article 10 of the PPA.

37. We have considered the submissions of the Petitioner and TANGEDCO. It is noted that similar contention raised by TANGEDCO has already been dealt with and

rejected by the Commission in its order dated 31.5.2018 in Petition No. 170/MP/2016 in the matter of KSK Mahanadi Power Company Limited v. TANGEDCO. The relevant portion of the order dated 31.5.2018 is reproduced below:

> *"15. We have examined the submission of the Petitioner and Respondent, TANGEDCO. The contention of the Respondent is that any increase in duties and levies are covered in escalation index issued by the Commission and therefore it cannot be allowed as Change in law. We are unable to accept this contention as such interpretation will render the provisions of Change in Law in the PPA redundant. Moreover, the escalation indices notified by this Commission consider only the changes in the basic price of fuel and basic railway freight rates and do not include any change in rates of taxes, duties and cess. The respondents have further argued that as per RFP, the bidder is expected to take into account all costs within statutory taxes, levies, duties while quoting the tariff and the since the quoted tariff includes taxes, duties and cess assumed at the time of bid, the successful bidder gets escalation on the taxes, duties and cess also. In our view such an approach, if accepted, will lead to reopening of the bid which is not permissible in terms of the judgment of the Appellate Tribunal dated 10.4.2017 in Appeal No. 161 of 2015 & IA No. 259 of 2015 and Appeal No. 205 of 2015 which is extracted as under:*
>
> > *"44. It is true that according to the provisions of the RFP, the quoted tariff shall be inclusive one including statutory taxes, duties and levies. But the PPA gives express right to an affected party to claim Change in Law if the event qualifies thus in terms of Article 13. The RFP cannot override this right if an event qualifies as a Change in Law. The Competitive Bidding Guidelines (Article 4.7 thereof has already been reproduced hereinabove) and the PPA have to be read together. If an event qualifies as a Change in Law event then the compensation must follow because otherwise Article 13 of the PPA will become redundant. But, this will of course depend on facts and circumstances of each case. Facts of each case will have to be carefully studies before granting such a relief. It is rightly pointed out that in Wardha Power Company Limited, this Tribunal has rejected the obligation of any escalable index or indexing of cost of fuel in order to determine the compensation due on account of Change in Law. Sasan will have to be compensated keeping the law in mind."*

Thus, the aforesaid contention raised by TANGEDCO stands covered by the above decision of the Commission and accordingly, the same is rejected.

38. TANGEDCO has further contended that in terms of Article 15 of the PPA, the Petitioner is required to pay all the taxes, duties and cess for supplying power as per the terms of the agreement and also to indemnify the procurer, hold it harmless against any claim that may be made against it.

39. The above contention of TANGEDCO has also been dealt with and rejected by the Commission in its order dated 31.5.2018 in Petition No.170/MP/2016. The relevant portion of the said order is reproduced below:

> *"16. The Respondent, TANGEDCO has also referred to Article 15.18 of the PPA and has submitted that as per the said Article the seller is required to pay all taxes, duties and cess for supplying power as per the terms of this agreement and shall indemnify the procurer; hold him harmless against any claim that may be made against the procurers in relation to the matter set out in Article 15.18.1. In other words, the PPA absolves the procurers from all future tax, duties, cess which the seller would be liable to pay while supplying power to the procurer. Article 15.18 dealing with Taxes and Duties are extracted hereunder:*
>
> *……*
>
> *17. This Article refers to the liability of the seller to pay the taxes/ cess/ levies for execution of the project and the seller shall not be liable. However, this does not prevent the seller to seek reimbursement of taxes/ levies/ duties paid by it if the same expenditure is otherwise payable by the procurers in terms of the PPA. In the present case, if Article 15.18 is interpreted in a way that TANGEDCO is exempted from payment of all future tax, duties and cess, which the Petitioner has to pay with regards to supply of power, then Article 10 of the PPA dealing with Change in Law will be rendered otiose and redundant and there would be absolutely no purpose of having the Change in Law clause under the PPA at all. Therefore, such an interpretation of Article 15.18 is liable to be rejected. Article 15.18.1 provides that the seller shall bear all charges that are required to be paid by the seller for supply of power as per the terms of the agreement. There is no non-obstante clause in this Article which will prevent operation of Article 10 of the PPA. A harmonious construction of both Articles reveals that while the taxes, cess, duties and levies, etc. shall be payable by the seller, the same to the extent permissible under Change in Law provision can be recovered from the procurers. Accordingly, the objection of TANGEDCO on this ground is also rejected.*

Accordingly, the aforesaid contention of the TANGEDCO is rejected.

40. During the course of hearing, learned counsel for TANGEDCO contended that the Petitioner is required to implead NPCL as party to the present Petition and that the adjudication of Change in Law disputes in respect of the both the PPAs i.e. NPCL-PPA and TANGEDCO-PPA has to be done together and not separately before two different forums. This request/ contention of TANGEDCO has already been rejected by the Commission, while addressing issue of jurisdiction/ maintainability in the present Petition, vide its order dated 1.7.2019. The relevant portion of the said order is extracted as under:

> *"19. It is also important to highlight here that similar to the instant case was the case of Adani Power Ltd. (hereinafter referred to as Adani) which had the arrangement to*

supply power to Gujarat alone prior to entering into PPAs with Haryana Utilities. In fact, GERC had not only adopted the tariff of generating station of Adani but it had also adjudicated certain change in law claims. After Adani approach this Commission pleading composite scheme on account as it was supplying power to GUVNL and Haryana Utilities, this Commission ruled that Adani's case fulfils the requirement of Section 79 (1) (b) of the Act the moment it entered into PPAs with Haryana Utilities and the jurisdiction came to be vested in this Commission. The Hon'ble Supreme Court in Energy Watchdog case has upheld that Adani has a composite scheme for generation and sale of power in more than one State. Similar is the case with GMR Kamalanga which had a Section 62 PPA with GRIDCO for supply of power from its project in Odisha. Subsequently, GMR Kamalanga entered into Section 63 PPAs with Haryana (through PTC) and Bihar. This Commission held that GMR Kamalanga has a composite scheme for generation and supply of power in more than one State. The jurisdiction of this Commission in GMR Kamalanga case has also been upheld by the Hon'ble Supreme Court in Energy Watchdog case. Further, in Petition No. 289/MP/2018 (MB Power (Madhya Pradesh) Limited v. UPPCL &Ors.) where the Petitioner`s generating company has entered into separate PPAs both under Section 62 and Section 63 with different State Discoms, this Commission in its order dated 30.4.2019 has held that it is a case of 'composite scheme' for generation and sale of power to more than one State and thereby this Commission has the jurisdiction to adjudicate disputes under the PPAs. In view of this, the argument advanced by TANGEDCO that there is no composite scheme in the present case because the PPA with NPCL is under Section 62 of the Act whereas the PPA with TANGEDCO is under Section 63 of the Act has no merit and it cannot be accepted. For the same reason, TANGEDCO's other objection of not making NPCL a party to the present petition is not sustainable."

41. Shri Awasthi has primarily contended that approval of UPERC to NPCL-PPA vide its order dated 20.4.2016 was on a condition that the entire coal available under Fuel Supply Agreement ('FSA') should be first utilized/ used for supply to NPCL and only the balance coal, if available, can be used for supply to others. In the instant Petition, *inter-alia*, while seeking the compensation for shortfall in coal from SECL, the Petitioner has estimated the shortage of coal after apportioning the coal under the FSA in proportion of the contracted capacities tied up with NPCL and TANGEDCO bypassing the specific condition of approval given by UPERC.

42. In response, the Petitioner has submitted that objector, Shri Awasthi has misinterpreted the direction of UPERC in the said order. In terms of FSA dated 8.3.2016 read with Addendum dated 30.6.2016 entered into with SECL, Annual Contracted Capacity (ACQ) of 8,90,461 MTPA coal corresponding to net contracted

capacity of 170 MW under NPCL-PPA and 5,23,809 MTPA coal corresponding to net contracted capacity of 100 MW under TANGEDCO-PPA have been allocated. The said terms of FSA necessitate the utilization of linkage coal supplied under the FSA for supply of power to the respective contracted capacities. Accordingly, the Petitioner has always first utilized the allocated FSA grade coal for supply of power to NPCL based on the net contracted capacity (170 MW) in terms of the directions of UPERC in its order dated 20.4.2016.

43. We have considered the submissions made by the Petitioner and Shri Awasthi. To understand the allocation of ACQ of coal to the Unit -2 of the Petitioner's generating station, we consider it necessary to refer to the FSA between the Petitioner and the coal company (SECL). The addendum to FSA dated 30.6.2016 is extracted as under:

> *"Whereas, a Coal Supply Agreement (FSA) dated 08.03.2016 was signed between South Eastern Coalfields Limited (Seller) and Dhariwal Infrastructure Ltd. (formerly known as Dhariwal Infrastructure Pvt. Ltd. (Purchaser) for Unit-2, IPP, 1×300 MW [Revised from 1×330 MW], Additional Capacity, situated at Tadali Growth Centre of MIDC, 8th KM on Chandrapur-Nagpur Highway, Chandrapur, Maharashtra of the Purchaser.*
>
> *Whereas, Purchaser has requested for revision/enhancement in ACQ on account of change in percentage of PPA(s) in terms of clause 4.1.1 of the FSA, including grossing up of supplies on account of transmission loss and auxiliary consumption.*
>
> *The existing and revised percentage of PPA(s) is given below:*

Sr. No.	PPA Particulars			Existing percentage	Revised percentage	10% Grossing up, if applicable	Total PPA percentage including Grossing up	Proportionate ACQ (In tonnes
	DISCOM	Date	Contracted Capacity (in MW)					
1	Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO)	PPA dated 27.11.2013 Addendum dated 20.12.2013	100 out of 273	36.63%	Nil	Not applicable as PPA is inclusive of auxiliary consumption & transmission loss	36.63%	5,23,809
2	Noida Power Company Ltd. (NPCL)	26.09.2014	170 out of 273	Nil	62.27%	Not applicable as PPA is inclusive of auxiliary	62.27%	8,90,461

						consumption & transmission loss		
Total								**14,14,270**

Now, therefore, it is hereby further agreed that ACQ under FSA dated 08.03.2016 including grossing up in terms of clause 4.1.1 of FSA stands revised from 5,23,809 tpa to 14,14,270 tpa. (5,23,809tpa – TANGEDCO + 8,90,461 tpa – NPCL). The revised ACQ shall be effective from the beginning of next quarter i.e. 01.07.2016."

44. From the above provisions of the FSA, it is clear that the Petitioner has been allocated ACQ of coal to the tune of 5,23,809 MT per annum corresponding to its 100 MW PPA with TANGEDCO and ACQ of coal to the tune of 8,90,461~~/-~~ MT per annum corresponding to its 170 MW PPA with NPCL. Accordingly, it is beyond doubt that coal received under the FSA has to be utilized as indicated in the FSA read with its addendum. Also, any claim as regards cost of procurement of coal from alternate sources to meet shortfall in supply of linkage coal, if any, has to be dealt with as per FSA of respective PPAs. However, Shri Awasthi has submitted that the above methodology of allocation would amount to violation of the UPERC's direction in order dated 20.4.2016 while approving the NPCL-PPA. The relevant extract of the order dated 20.4.2016, relied upon by Shri Awasthi is reproduced below:

"4. In view of above, the Commission allows that in case of any shortfall in the quantity of coal supply from the domestic linkage from SECL, DIL and NPCL in consent may approach to the Commission for prior approval of procurement of fuel from alternative sources. However, it would be ensured by DIL that coal available under FSA would first be utilised for supply of 187 MW to NPCL."

45. We note from this order of UPERC that DIL (the Petitioner herein) has been directed to ensure that 'coal available under FSA' would be first utilized for supply of contracted capacity to NPCL. 'Coal available under FSA' can only mean coal allocated to the Petitioner for supply of power to NPCL cannot mean entire allocation of coal (including that to TANGEDCO) to the Petitioner as contended by Shri Awasthi. We have already observed that FSA of the Petitioner with SECL has clear provisions of allocation of coal for NPCL (170 MW) and TANGEDCO (100 MW).

46. Another order of UPERC dated 25.6.2019 in Petition No. 1438/2019 has been referred to by the parties. We note that Petition No. 1438/2019 was filed by the Petitioner before UPERC, *inter-alia*, seeking in-principle approval of procurement and use of additional coal in case of shortfall of FSA grade coal for supply under NPCL-PPA. The relevant portion of the UPERC's order dated 25.6.2019 is extracted as under:

> *"5. Upon the query of the commission that in terms of its order dated 20.04.2016 DIL has to ensure that the coal available under the FSA would first be utilized for supply of contracting capacity i.e. 170 MW net (187 MW gross) to NPCL, Senior advocate Shri Sanjay Sen stated the following:-*
>
> *"The Petitioner/DIL had applied for coal linkage from SECL, a subsidiary of CIL for sourcing coal for Unit-2 of its Generating Station, SECL had on 06.06.2009 issued the Letter of Assurance ("LoA") in favour of the Petitioner/DIL with approved quantum of Coal of 14,30,000 MTPA. The Petitioner/ DIL had executed the FSA on 08.03.2016 and Addendum No. 1 on 30.06.2016 with SECL for supply of ACQ of 8,90,461 MTPA Coal corresponding to the Contracted Capacity for supply of power to the Respondent/NPCL under the long term PPA and also, 5,23,809 MTPA Coal corresponding to the Contracted Capacity for supply of 100 MW power to TANGEDCO under a Case-1 long term PPA.*
>
> *It was further submitted by Mr. Sanjay Sen, Senior Advocate that the total quantum of coal supplied by SECL under the FSA is allocated to NPCL, the Respondent and TANGEDCO in proportion to the contracted capacity out of the net capacity of the unit under the two separate PPAs, through two separate FSAs"*
>
> *It was observed by the Commission that under the FSA for supply of power to NPLC/Respondent, the total ACQ relating to PPA with NPC/Respondent is 8,90,461 MTPA and in other FSA for supply of power to TANGEDCO, the ACQ relating to PPA with TANGEDCO is 5,23,809 MTPA."*

We observe that UPERC in the above order, has taken a note of proportionate allocation of coal to NPCL and TANGEDCO under the FSA.

47. In view of the above orders of UPERC and categorical provisions of the FSA dated 8.3.2016 read with Addendum dated 30.6.2016 allocating specific ACQ of coal for respective PPAs, we are not inclined to accept the contention of Shri Awasthi on this count.

48. Shri Awasthi in his written submission has contended that the Commission ought not to proceed with the present matter during the pendency of Appeal No. 150 of 2017 and Appeal No. 185 of 2019 filed by the objector before the Appellate Tribunal wherein he has challenged the approval by UPERC qua NPCL-PPA and also the jurisdiction of UPERC. This contention has already been rejected by the Commission in order dated 1.7.2019, the relevant portion of which is reproduced below:

> *30. Shri Awasthi has stated that the issue of jurisdiction is pending before the APTEL in Appeal No. 185 of 2019 filed by it, where the precise issue of whether the Petitioner can approach UPERC under Section 64(5) has been raised. Shri Awasthi has requested to adjourn the present proceedings till the disposal of the said appeal by APTEL.*
>
> *……..*
>
> *32. It is noted that the present Petition has been filed for claiming compensation towards certain change in law events in terms of Article 10.1.1 of the TANGEDCO PPA dated 27.11.2013 read with Addendum No. 1 dated 20.12.2013 for supply of 100 MW contracted capacity to TANGEDCO from Unit-2 of the generating station. Since no Appeal is pending before APTEL against the supply of 100 MW of power to TANGEDCO under the TANGEDCO PPA, the contention of Shri Awasthi to adjourn the present Petition is not sustainable.*

49. Having dealt with preliminary objections, we now proceed to deal with the claims of the Petitioner under Change in Law during the Operating Period.

I. Increase in cost of coal on account of 'Change in Law' events

(a) Contribution towards District Mineral Foundation and National Mineral Exploration Trust

50. The Petitioner has submitted that subsequent to the cut-off date i.e. 27.2.2013, Ministry of Coal, Government of India vide its Notification No. 792(E) dated 20.10.2015, issued under the Mines and Minerals (Contribution to District Mineral Foundation) Rules, 2015 (DMF Rules) read with Notification No. 715(E) dated 17.9.2015 issued by Ministry of Coal under Section 9B(6) of the Mines and Minerals (Development and Regulation) Act, 1957, (MMDR Act, 1957) has imposed

an additional levy of 30% of the royalty towards District Mineral Foundation of the district in which mining operation is being carried out.

51. Further, under Section 9C (2), (3) & (4) and Section 13 of the MMDR Act, 1957, the National Mineral Exploration Trust Rules, 2015 (NMET Rules, 2015) has been framed. Rule 7(3) of the NMET Rules, 2015 provides that the holder of the mining lease and prospecting licence-cum-mining lease shall make payment for contribution to NMET under Section 9C(4) of the MMDR Act, 1957 to the State Government simultaneously with the payment of royalty. In this context, SECL, vide its Notice No. SECL/BSP/S&M/1936 dated 13.11.2015, has imposed an additional 2% on the royalty payable towards NMET. The Petitioner has submitted that the additional expenditures incurred by the Petitioner due to above levies are Change in Law events and there is net increase of Rs.40.11/MT and Rs.2.67/MT of coal on account of contribution towards DMF and NMET respectively.

52. We have considered the submissions made by the Petitioner. The issue of admissibility of additional levy towards DMF and NMET as Change in Law in events was examined by the Commission in its order dated 17.2.2017 in Petition No. 16/MP/2016 as under:

> *"32. We have considered the submissions of the Petitioner and the respondents. Through the Mines and Mineral (Development and Regulation) Amendment Act, 2015, the following provisions have been incorporated in the Mines and Minerals (Development and Regulation) Act, 1957:*
>
> > *"9B. District Mineral Foundation : (1) In any district affected by mining related operations, the State Government shall, by notification, establish a trust, as a non-profit body, to be called District Mineral Foundation.*
> >
> > *(2) The object of the District Mineral Foundation shall be to work for the interest and benefit of persons, and areas affected by mining related operation in such manner as may be prescribed by the State Government.*
> >
> > *(3) The composition and functions of the District Mineral Foundation shall be such as may be prescribed by the State Government.*

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

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

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

Section 9C provides as under:

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

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

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

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

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

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

(a) ten percent of the royalty paid in terms of the second Schedule to the Mines and Minerals (Development and Regulation) Act, 1957 (57 of 1957) (herein referred to as the said Act) in respect of mining leases or, as the case may be, prospective licence-cum-mining lease granted on or after 12th January, 2015; and

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

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

53. The Petitioner's case is covered under the above order of the Commission. Therefore, additional levy of royalty @2% towards NMET and @30% towards DMF is admissible under Change in Law. Therefore, the Petitioner shall be entitled to recover on account of payment to NMET and DMF in proportion to the coal consumed corresponding to schedule generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of power to TANGEDCO. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of Change in Law. The Petitioner shall furnish to

TANGEDCO, the details of payments made, supported by Auditor's Certificate, while claiming the expenditure and TANGEDCO shall reimburse on the basis of actual payments. The Petitioner and TANGEDCO are directed to carry out reconciliation on account of these claims on annual basis.

(b) Increase in Coal Surface Transportation Charges, and
(c) Increase in Sizing Charges

54. The Petitioner has submitted that as on cut-off date i.e. 27.2.2013, the applicable Surface Transportation Charges, in terms of Coal India Limited (CIL) circular No. CIL:S&M:GM(F):Pricing :235 dated 27.5.2013 was Rs. 44/MT for coal which was being transported for more than 3 km but not more than 10 km. Thereafter, CIL vide its Notification No. CIL:S&M:GM(F):Pricing: 2340 dated 13.11.2013 increased the Surface Transportation Charges for the above category to Rs.57/MT w.e.f. 00.00 hrs of 14.11.2013. Subsequently, the Surface Transportation Charges has been further increased to Rs. 87/MT by SECL through its Notification dated 15.11.2017 w.e.f. 00.00 hrs. of 5.11.2017.

55. The Petitioner has further submitted that as on cut-off date, the applicable Sizing Charges for coal which is less than 100 mm, was Rs.61/MT in terms of CIL Price Notification No. CIL:S&M:GM(F):Pricing: 1907 dated 26.2.2011. However, subsequent to the cut-off date, CIL vide its Price Notification No. CIL:S&M:GM(F):Pricing: 2784 dated 16.12.2013 revised the Sizing Charges applicable for the coal which is less than 100 mm to Rs. 79/MT that is applicable w.e.f. 00.00 hrs of 17.12.2013. Subsequently, the Sizing Charges for the above category of coal has been further increased to Rs. 87/MT by CIL through its Price Notification No. CIL:S&M:GM(F):Pricing/2017/766 dated 31.8.2017 that is applicable w.e.f. 00.00 hrs of 1.9.2017.

56. Issues pertaining to Sizing Charges and Surface Transportation Charges has been dealt with by the Commission in its earlier orders. The Commission in its order dated 1.2.2017 in Petition No. 8/MP/2014, while dealing with the issue of increase in Sizing and Crushing Charges and Surface Transportation Charges observed as under:

> *"93. We have considered the submission of the Petitioner and the respondent and perused the notifications issued by Coal India Ltd. with regard to Sizing Charges of coal and surface transportation charges. The Petitioner has not placed on record any document to prove that these notifications have been issued pursuant to any Act of the Parliament. On the other hand, a perusal of the Fuel Supply Agreement dated 22.2.2013 between the Petitioner and SECL shows that under para 9.0, the delivery price of coal for supply pursuant to Fuel Supply Agreement has been shown as the sum of basic price, other charges and statutory charges as applicable at the time of delivery of coal. Base price has been defined in relation to a declared grade of coal produced by the seller, the pit head price notified from time to time by CIL. Under Para 9.2 of the FSA, other charges include transportation charges, Sizing/crushing charges, rapid loading charges and any other charges as notified by CIL from time to time. Sizing/crushing charges and transportation charges have been defined as under:-*
>
> *"9.2.1 Transportation Charges: Where the coal is transported by the seller beyond the distance of 3 (three) kms from Pithead to Delivery Point, the Purchase shall pay the transportation charges as notified by CIL/seller from time to time.*
>
> *9.2.2 Sizing/Crushing Charges: Where coal is crushed/sized for limiting the top-size to 250 mm or any other lower size, the purchaser shall pay sizing/crushing charges as applicable and notified by CIL/seller from time to time.*
>
> *Therefore, the revision in sizing charges of coal and transportation charges by Coal India Limited from time to time is the result of contractual arrangement between the Petitioner and SECL in terms of the FSA dated 22.2.2013 and is not pursuant to any law as defined in the PPAs and therefore cannot be covered under Change in Law."*

57. The Appellate Tribunal vide its judgment dated 14.8.2018 in Appeal No. 111 of 2017 has upheld the Commission's order dated 1.2.2017 in Petition No. 8/MP/2014 pertaining to treatment of Sizing and Crushing Charge and Surface Transportation Charge as Change in Law events. Relevant portion of the Appellate Tribunal's judgment dated 14.8.2018 in Appeal No. 111 of 2017, in the matter of GMR Warora Energy Limited v. Central Electricity Regulatory Commission and Ors., is extracted as under:

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

Sizing Charges:

"11. A

xvii. ..... The State Commission based on the order of CERC has held that increase in Sizing Charges for Coal is part of the methodology for the calculation of the cost of coal decided by CIL and merely CIL being Indian Government Instrumentality the change in method of charging made by it for coal pricing does not qualify for Change in Law event and
dismissed the claim of APRL

xviii. APRL has contended that the GoI under Sub Section 3 of the CC Rules, 2004 (notified under MMDR Act) has the power to categorise the coal including its classes, grades and sizes and the specifications for each such class, grade or size of coal and hence any change in sizing charges of coal by CIL an Indian Government Instrumentality qualifies for Change in Law event.

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

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

Accordingly, this issue is decided against APRL.

Transportation Charges:

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

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

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

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

58. In line with the above decisions of the Commission and the Appellate Tribunal, claim of the Petitioner for relief under 'Change in Law' in respect of Sizing Charges and Surface Transportation Charges of coal is disallowed.

(d) Increase in Clean Energy Cess

59. The Petitioner has submitted that as on cut-off date i.e. 27.2.2013, Clean Energy Cess was levied @Rs.50/MT in terms of Notification No. 3/2010 – Clean Energy Cess dated 22.6.2010 issued by Ministry of Finance, Government of India. Subsequently, vide amendments to Finance Act, Clean Energy Cess was increased to Rs. 100/MT w.e.f. 11.7.2014, to Rs.200/MT w.e.f. 1.3.2015 and to Rs.400/MT w.e.f. 1.3.2016. The Petitioner has submitted that the above increase in Clean Energy Cess was intimated to the Petitioner by SECL vide its notices dated 10.7.2014, 28.2.2015 and 29.2.2016 respectively.

60. The Petitioner has further submitted that after the introduction of Goods and Service Tax (GST) with effect from 1.7.2017, Clean Energy Cess has been abolished and GST Compensation Cess/ State Compensation Cess is being levied

@Rs. 400/MT on quantum of coal procured. The Commission has in its order dated 14.3.2018 in Petition No. 13/SM/2017 has already recognized the introduction of GST Compensation Cess w.e.f. 1.7.2017 as Change in Law. Accordingly, the State Compensation Cess levied under Goods and Services Tax (Compensation to States) Act, 2017, being concordant to GST Compensation Cess, constitutes Change in Law event.

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

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

It is noticed that Clean Energy Cess was introduced by Government of India through the Finance Act, 2010 which was prior to the cut-off date in case of TANGEDCO PPA. As on cut-off date i.e. 27.2.2013, Clean Energy Cess was applicable at the rate of Rs. 50/MT. The issue of Clean Energy Cess as a Change in law event has been considered by the Commission in order dated 7.4.2017 in Petition No. 112/MP/2015 in the case of GMR Kamalanga Energy Limited and Anr. v. Bihar State Power Holding Company Limited and Anr. Subsequently, the Commission in its order dated 19.12.2017 in Petition No. 101/MP/2017, in order dated 19.12.2017 in Petition No. 229/MP2016, in order dated 16.3.2018 in Petition No. 1/MP/2017 and other orders has considered increase in Clean Energy Cess as Change in Law event and has allowed the same. Relevant portion of the

Commission's order dated 7.4.2017 in Petition No. 112/MP/2015 is extracted as under:

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

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

Clean Energy Cess was introduced through the Acts of Parliament prior to the cut-off date of4.4.2011 in respect of Bihar PPA. The effective rate of Clean Energy Cess from 22.6.2010 till its revision with effect from 11.7.2014 is Rs. 50/ Tonne. The Petitioners are expected to factor in the Clean Energy Cess of Rs. 50 in its bid. However, after the Bid Deadline, the Clean Energy Cess has been revised with effect from 11.7.2014, 1.3.2015 and 1.3.2016 and fixed at Rs. 100, Rs. 200 and Rs. 400 respectively. Since, the revised rates of Clean Energy Cess has been introduced through amendment to the relevant Finance Acts and the changes have been resulted in additional recurring expenditure by the Seller, we are of the view that the said changes are covered Change in Law in terms of Bullet 1 under Article 10.1.1 of Bihar PPA. The Petitioners shall be entitled for reimbursement of Clean Energy Cess @Rs. 50/Tonne from 1.3.2015 and @Rs. 350/Tonne with effect from 1.3.2016."

62. The above decision is also applicable in the case of the Petitioner. Therefore, increase in Clean Energy Cess (later renamed as Clean Environment Cess) on coal is admissible to the Petitioner as a Change in Law event (up to 30.6.2017) under Article 10 of the PPA. Accordingly, the Petitioner is entitled to recover increase in Clean Energy Cess from TANGEDCO as per applicable rate of Clean Energy Cess in proportion to the coal consumed corresponding to schedule generation at normative parameters as per the applicable Tariff Regulation of the Commission or

at actual, whichever is lower, for supply of power to TANGEDCO. As on the cut-off date, Clean Energy Cess was levied at Rs. 50/MT and the Petitioner was expected to factor the same in the bid. Thereafter, the applicable rate of Clean Energy Cess in case of TANGEDCO-PPA for the purpose of Change in Law compensation computation shall be based on the relevant date/s on which changes in rate of Clean Energy Cess occurred. The Change in Law amount would be worked out, on the basis of the notified new rates less Rs. 50/MT as applicable as on cut-off date, per MT of coal consumed in the prescribed manner. The Petitioner shall furnish to TANGEDCO, the details of payments made, supported by Auditor's Certificate, while claiming the expenditure and TANGEDCO shall reimburse on the basis of actual payments made. The Petitioner and TANGEDCO are directed to carry out reconciliation on account of these claims on annual basis.

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

(e) Increase in Chhattisgarh Environment Cess (Paryavaran Upkar) and Infrastructure Development Cess (Vikas Upkar)

64. The Petitioner has submitted that as on cut-off date i.e. 27.2.2013, the Chhattisgarh Environment Cess (Paryavaran Upkar) and Infrastructure Development Cess (Vikas Upkar), as levied by the State Government of Chhattisgarh in terms of Sections 3 and 4 read with Schedule I and II of the Chhattisgarh (Adhosanrachna Vikas Evam Paryavaran) Upkar Adhiniyam, 2005, were Rs. 5/MT each on the coal

extracted. However, subsequent to the cut-off date, both the above Cess were revised to Rs.7.50/MT of coal extracted w.e.f. 00.00 hrs of 16.6.2015 as intimated by SECL vide its letter dated SECL/BSP/S&M/2015/1420 dated 19.8.2015.

65. We have considered the submission of the Petitioner. The Commission has already allowed increase in Chhattisgarh Environment Cess/ Paryavaran Upkar and Infrastructure Development Cess/ Vikas Upkar as Change in Law events in order dated 19.12.2017 in Petition No. 229/MP/2016, in order dated 19.12.2017 in Petition No. 101/MP/2017, in order dated 18.4.2018 in Petition No. 18/MP/2017 and other orders. The relevant extract of the Commission's observation in these orders is reproduced as under:

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

66. In light of the above decision of the Commission, the Petitioner is entitled to reimbursement of the expenditure incurred on this account. The Petitioner shall be entitled to recover on account of Chhattisgarh Infrastructure Development Cess (Vikas Upkar) and Chhattisgarh Environment Cess (Paryavaran Upkar) in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of electricity to TANGEDCO. If actual generation is less that the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of Infrastructure Development Cess and Environment Cess. The Petitioner shall furnish to TANGEDCO, the details of payments made, supported by Auditor's Certificate, while claiming the expenditure and TANGEDCO shall reimburse on the basis of actual payments made. The

Petitioner and TANGEDCO are directed to carry out reconciliation on account of these claims on annual basis.

(f) Change in the components for computation of Central Excise Duty leviable on Coal, and
(g) Introduction of IGST replacing Central Excise Duty w.e.f. 1.7.2017

67. The Petitioner has submitted that subsequent to cut-off date, Ministry of Finance, Government of India, vide its Notification No. 14/2015 dated 1.3.2015 read with Notification No. 15/2015 dated 31.3.2015, has revised the applicable rate of Central Excise Duty from 6.18% to 6%. However, the overall impact in terms of money payable towards Central Excise Duty has increased on account of addition of incidents on which Central Excise Duty was calculated upon. The Petitioner has submitted that as on cut-off date, the Central Excise Duty was calculated on the summation of the Base Price of Coal, Surface Transportation Charges and Sizing/ Crushing Charges. However, subsequently, SECL vide its letter No. SECL/BSP/S&M/504 dated 8.3.2013 informed that the Royalty and Stowing Excise Duty shall also be included for the purpose of arriving at assessable value for levy of Central Excise Duty w.e.f. 1.3.2013. Further, SECI vide its Notice No. SECL/BSP/S&M/RS/619 dated 25.3.2013 also introduced certain new components to be included for computation of Central Excise Duty and accordingly, the Central Excise Duty is now calculated on summation of Base Price of Coal, Crushing and Sizing Charge, SILO Charge, Surface Transportation Charge, Royalty, Stowing Excise Duty, Terminal Tax, Forest Cess and Chhattisgarh Paryavaran Evam Vikas Upkar. The Petitioner has submitted that there has been a net increase of Rs.21.31/MT in Central Excise Duty at the end of June 2017 as compared to the rate prevalent on the cut-off date.

68. The Petitioner has further submitted that with effect from 1.7.2017, under the GST regime, the Central Excise Duty as levied earlier has been subsumed into the GST and the Petitioner is required to pay IGST on the procured value of coal @ 5% instead of Central Excise Duty. The enactment of IGST and its levy @ 5% along with absorption of taxes such as Central Excise Duty, Central Sales Tax and Stowing Excise Duty has already been recognized by the Commission in its order dated 14.3.2018 in Petition No. 13/SM/2017.

69. We have considered the submission of the Petitioner. The Petitioner has submitted that as on the cut-off date i.e. on 27.2.2013, Central Excise Duty was levied on basic value of coal, Sizing Charges and Surface Transportation Charges of coal @ 6.18%. Subsequently, vide Notification No. 14/2015 dated 1.3.2015 read with Notification No. 15/2015 dated 31.3.2015, the Central Excise duty on dispatches/ lifting of coal was revised from 6.18% to 6%. Further, SECL vide its notice dated 25.3.2015 informed the Petitioner that in addition to basic values of coal, surface transportation and sizing charges of coal, the Central Excise duty shall be applicable on SILO charges, royalty, stowing excise duty, terminal tax, forest cess and Chhattisgarh Paryavaran and Vikas Upkar.

70. The Commission has in earlier orders considered the issue of Central Excise Duty as Change in Law; relevant extract from order dated 12.6.2019 in Petition No. 118/MP/2018 (TRN Energy Pvt. Ltd. Vs. Paschimanchal Vidyut Vitran Nigam Ltd. & Ors.) is reproduced hereunder:

> "71. *We have considered the submissions of the Petitioner and the relevant documents placed on record. Pursuant to the Commission's directions vide RoP dated 29.5.2018, the Petitioner approached the Office of the Assistant Commissioner, CGST & Central Excise, Division Bilaspur, Chhattisgarh seeking clarification with regard to the components to be included in the assessable value of coal for computation of Central Excise Duty for the Period from 1.4.2012 to 30.6.2017. The Assistant Commissioner, Office of the Assistant Commissioner, CGST & Central Excise, Division Bilaspur, Chhattisgarh vide its letter dated 25.6.2018 has clarified as under:*

"Please refer your letter C. No. TRN/BSP/18/06/10079 dtd.14.6.2018 on the above subject.

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

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

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

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

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

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

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

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

73. The Office of the Assistant Commissioner, CGST & Central Excise, Division Bilaspur, Chhattisgarh has relied on Section 4 of the Central Excise Act, 1944 in support of the decision for inclusion of the above cited elements in the assessable value of coal. Similar letters were provided by the Office of the Assistant Commissioner, Custom and Central Excise Bilaspur, Chhattisgarh in case of GMR Warora Energy Limited in Petition No. 1/MP/2017 and by the Office of the Superintendent, Central Goods & Service Tax Range-III, Korba, Chhattisgarh in case of Bharat Aluminium Company Limited in Petition No. 18/MP/2017. Based on the letter received in case of GMR Warora Energy Limited, the Commission vide its dated 16.3.2018 in Petition No. 1/MP/2017 had examined the provisions of Section 4 of the Central Excise Act, 1944 and held as under:

> *"....*
>
> *160. As per the above provisions of the Central Excise Act, 1944, the price-cum duty of excisable goods sold by an assesse shall be the price actually paid to him for the goods sold and the money value of the additional consideration, if any, flowing directly or indirectly from the buyer to the assesse in connection with the sale of such goods. Such price-cum-duty, excluding sales tax and other taxes, if any, actually paid, shall be deemed to include the duty payable on such goods.*
>
> *161. All components indicated by SECL for computation of assessable value of coal such as the value of coal, Stowing Excise Duty, contribution to National Mineral Exploration Trust and District Mineral Foundation, Sizing Charges, Surface Transportation Charge, NiryatKar, Chhattisgarh Development Tax and Chhattisgarh Environment Tax (except royalty) are in the nature of "Price-cum-duty" and shall be considered as part of the assessable value of coal for the purpose of computation of Excise Duty. The Commission has not allowed the expenditure of Sizing Charges and Surface Transportation Charges under Change in Law. However, these charges have been allowed to be included in the assessable value of coal for the purpose of computation of Excise Duty. It is clarified that allowing these charges for inclusion in the assessable value for computation of Excise Duty shall not be construed that these charges are allowed under Change in Law. As regard Royalty, it is noted that the issue whether royalty determined under Section 9/15(3) of the Mines and Minerals (Development and Regulations) Act, 1957 is in the nature of tax is pending for consideration of a Nine Judges Bench of the Hon'ble Supreme court on a reference by Five Judges Bench of the Hon'ble Supreme Court in Mineral Area Development Authority and Others Vs. Steel Authority of India and Others (2011 SCC 450). The specific reference is as under:*
>
> > *"(a) Whether "royalty determined under Sections 9/15 (3) of the Mines and Minerals (Development and Regulation) Act, 1957 (67 of 1957, as amended) is in the nature of tax?"*
> >
> > *Therefore, Royalty shall be included in the assessable value of coal subject to the decision of the Hon'ble Supreme Court."*
>
> *162. Accordingly, we allow all the charges given in the letter dated 23.3.2017 of the Superintendent (Tech.) Office of the Assistant Commissioner, Custom and Central Excise Bilaspur, Chhattisgarh for the purpose of inclusion in the assessable value of coal for computation of Excise Duty, subject to the condition with regard to Royalty."*

74. The above decision is applicable in case of the Petitioner also. We, therefore, allow all the components mentioned by the Office of the Assistant Commissioner, CGST &

Central Excise, Division Bilaspur, Chhattisgarh in its letter dated 25.6.2018 to be included in the assessable value of coal for the purpose of computation of Excise Duty. However, it is clarified that allowing these charges for inclusion in the assessable value for computation of Excise Duty shall not be construed that these charges are allowed under Change in Law. Further, inclusion of Royalty is allowed subject to the pending adjudication before the Hon'ble Supreme Court regarding whether royalty is in the nature of tax. The Office of the Assistant Commissioner, CGST & Central Excise, Division Bilaspur, Chhattisgarh has provided clarifications only for the period from 1.4.2012 to 30.6.2017 and the petitioner has not placed any documents for the applicability of Central Excise Duty after the GST Regime (i.e. from 1.7.2017). Therefore, the claim shall only be allowed until 30.6.2017. The Petitioner shall be entitled to recover the Excise Duty in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of electricity to the respondents. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of Excise Duty."

71. The above decision is applicable in the instant case of the Petitioner also. We, therefore, allow the components mentioned by the Office of the Assistant Commissioner, CGST & Central Excise, Division Bilaspur, Chhattisgarh to be included in the assessable value of coal for the purpose of computation of Central Excise Duty. As noted in the above order, inclusion of Royalty is allowed subject to the pending adjudication before the Hon'ble Supreme Court regarding whether royalty is in the nature of tax. The Petitioner has further submitted that with effect from 1.7.2017, the Central Excise Duty as levied earlier has been subsumed into the GST. Therefore, the claim is allowed only until 30.6.2017.

72. The Petitioner shall be entitled to recover additional expenditure on account of Central Excise Duty in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of electricity to TANGEDCO. If actual generation is less that the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of Central Excise Duty. The Petitioner shall furnish to TANGEDCO, the details of payments made, supported by Auditor's Certificate, while

claiming the expenditure and TANGEDCO shall reimburse on the basis of actual payments made. The Petitioner and TANGEDCO are directed to carry out reconciliation on account of these claims on annual basis.

(h) Introduction of GST

73. The Commission in its order dated 14.3.2018 in Petition No. 13/SM/2017 had *inter-alia* held that the introduction of GST w.e.f. 1.7.2017 and subsuming/ abolition of specific taxes and duties, etc. in the GST is a Change in Law event. The Commission in the above Petition vide order dated 14.3.2018 decided as under:

> *"32. At the same time GST and IGST were also introduced from 01.07.2017 and some of the taxes, duties and levies were abolished or subsumed therein. The Commission through the instant petition tried to ascertain the impact of the same on the generators and discoms/beneficiary States by seeking detailed submissions from all concerned.*
>
> *33. It has been observed that some of the generators and discoms have submitted the calculations of impact of change in law. These calculations show varying impact of such changes on different generators and discoms on various dates. The impact worked out by the discoms was different from that submitted by the generators. Further, the generators have also not submitted a clear declaration as called for that there are no other taxes, duties, cess etc., which have been reduced or abolished or subsumed. From the forgoing, the Commission feels that due to varied nature of such taxes, duties and cess etc. that have been subsumed/ reduced, it is not possible to quantify in a generic manner, the impact of change in law for all the generators.*
>
> *34. Hence, we are of the opinion that introduction of GST and subsuming/ abolition of such taxes, duties and levies has resulted in some savings for the generators having generation based on domestic coal and the same needs to be passed to the discoms/ beneficiary States. Since, these are change in law events beneficial to the procurers, the same needs to be passed on to the procurers by the generators.*
>
> *35. Accordingly, we direct the beneficiaries/ procurers to pay the GST compensation cess @ Rs 400/ MT to the generating companies w.e.f 01.07.2017 on the basis of the auditors certificate regarding the actual coal consumed for supply of power to the beneficiaries on basis of Para 28 and 31. In order to balance the interests of the generators as well as discoms/beneficiary States, the introduction of GST and subsuming/abolition of specific taxes, duties, cess etc. in the GST is in the nature of change in law events. We direct that the details thereof should be worked outbetween generators and discoms/beneficiary States. The generators should furnish the requisite details backed by auditor certificate and relevant documents to the discoms/ beneficiary States in this regard and refund the amount which is payable to the Discoms/ Beneficiaries as a result of subsuming of various indirect taxes in the Central and State GST. In case of any dispute on any of the taxes, duties and cess, the respondents have liberty to approach this Commission."*

The above decision of the Commission is also applicable in the present case of the Petitioner.

(i) Use of Blended or Washed Coal with Ash Content not exceeding 34% with effect from 5.6.2016.

74. The Petitioner has submitted that coal for its generating station, located in the State of Maharashtra, is being procured from the State of Chhattisgarh i.e. from a distance of about 700 km and the same being reflected in the PPA, TANGEDCO is aware of the said fact. Ministry of Environment, Forest and Climate Change (MoEFCC), Government of India, on 2.1.2014 i.e. subsequent to the cut-off date, has notified the Environment (Protection) Amendment Rules, 2014 under Section 3(2) and Section 25 of the Environment Protection Act, 1986 amending the Rule 3(8) to provide that with effect from 5.6.2016, coal-based thermal power plants with installed capacity of 100 MW or above and located between 500-749 km from the pit-head, shall be supplied with and shall use raw or blended or beneficiated coal with ash content not exceeding thirty four percent (34 %), on quarterly average basis. The Petitioner has submitted that this notification of MoEFCC is a Change in Law event in terms of the PPA and prayed that it may be compensated in terms of provisions of Article 12 of the PPA. The Petitioner has submitted that the Petitioner has used 80,777 MT and 67,447 MT of washed coal in the year FY 2016-17 and FY 2017-18 respectively for supply of power to TANGEDCO. A portion of the ROM coal received from SECL was washed to achieve the statutorily mandated limit of ash content of 34%.

75. We have considered the submission of the Petitioner. The issue as to whether the MoEFCC Notification on coal quality dated 2.1.2014 amounts to Change in Law event or not was considered by the Commission in its order dated 1.2.2017 in

Petition No. 8/MP/2014 in the matter of GMR Warora Energy Limited v. Maharashtra State Electricity Distribution Company Limited and Ors. The relevant portion of the said order is reproduced as under:

> *"99. We have considered the submissions of the Petitioner and the respondent. As per notification issued by MoEF dated 11.7.2012, all the thermal power plants are required to use coal with GCV not less than 4000 Kcal/kg and an ash content not exceeding 34%. The Fuel Supply Agreement for MSEDCL was signed with SECL on 22.2.2013 and addendum was issued on 16.9.2013. Fuel Supply Agreement for ED DNH was signed with SECL on 7.8.2013 and addendum was issued on 30.11.2013. Therefore, the Petitioner was aware of the situation of using coal of GCV more than 4000kCal/kg and ash content less than 34%. Accordingly, the Petitioner should have included the coal quality/ grade of coal with GCV more than 4000kCal/kg and ash content less than 34%. Therefore, this event cannot be said to be a Change in Law. Under the circumstances, the Petitioner should have complied with provisions of notification of MOEF for using coal of GCV of 4000 kCal/kg of more and ash content less than 34%. The Petitioner should have approached the coal companies/coal supplier for supply of coal with above parameters so that the same could have been taken up in the FSA. From the submission of the Petitioner, it appears that the Petitioner has not made any efforts to avail the coal of required quality as per the MOEF notification. In the light of these facts, we are not inclined to allow this event as a change in law."*

76. The aforesaid order was challenged by the Petitioner therein before the Appellate Tribunal in Appeal No. 111 of 2017 wherein the Appellate Tribunal vide its judgment dated 14.8.2018 set aside the aforesaid finding of the Commission and held as under:

> *"xxx. We hold that in terms of the PPA the Change in Law event is to be treated with respect to the cut-off date and the present issue is required to be dealt accordingly….*
>
> *xxxi. We observe that that on face of it the notification issued by MOEF being IGI is a Change in Law event falling under second bullet of the Article 10.1.1 of the PPA. The Central Commission has also not denied as a Change in Law event. The Central Commission has erred in linking it with signing of the FSA after issuance of the MOEF notification instead of cut-off date. The issue is to be seen in light of the premise on which the bid was based and the changes made after the cut-off date by MOEF. This issue is required to be analysed in detail by the Central Commission based on the contentions of the parties to arrive at a justified compensation, if any to GWEL considering the MOEF notification as a Change in Law event."*

77. Accordingly, the Commission, in view of the above direction of the Appellate Tribunal and considering the submission of the Petitioner and Respondents therein, passed the order on 16.5.2019 and observed as under:

> *63. We have considered the matter. Before amendment, Rule 3(8) of the Environment (Protection) Rules, 1986 provided that a Thermal Power Plant located beyond 1000*

kms from the pit-head, or in an urban area or a sensitive or critically polluted area irrespective of its distance from the pithead, except for a pit-head Plant, shall use raw or blended or beneficiated coal with an ash content not exceeding 34% on an annual average basis. On 2.1.2014, MoEFCC amended Rule 3(8) by way of the Environment (Protection) Amendment Rules, 2014 which reads as follows:

> *"(8) With effect from the date specified hereunder, the following coal based thermal power plants shall be supplied with, and shall use, raw or blended or beneficiated coal with ash content not exceeding thirty-four per cent, on quarterly average basis, namely :-*
>
> *(a) a stand-alone thermal power plant (of any capacity), or a captive thermal power plant of installed capacity of 100 MW or above, located beyond 1000 kilometres from the pithead or, in an urban area or an ecologically sensitive area or a critically polluted industrial area, irrespective of its distance from the pit-head, except a pit-head power plant, with immediate effect;*
>
> *(b) a stand-alone thermal power plant (of any capacity), or a captive thermal power plant of installed capacity of 100 MW or above, located between 750 - 1000 kilometres from the pit-head, with effect from the 1st day of January, 2015;*
>
> *(c) a stand-alone thermal power plant (of any capacity), or a captive thermal power plant of installed capacity of 100 MW or above, located between 500-749 kilometres from the pit-head, with effect from the 5th day of June, 2016:…"*

64. The Petitioner has contended that its plant is located at a distance exceeding 500 kms (i.e. 650 Kms) from the pit-head and is, therefore, covered by Rule 3(8) (c) of the amended Rules (i.e., Power Plant between 500-749 kms from the pit-head). Hence, it is required to use raw or blended or beneficiated coal with ash content not exceeding 34% on quarterly average basis with effect from 5.6.2016. However, MSEDCL has submitted that an option was available with the Petitioner to install Circulating Fluidized Bed Combustion or Atmosphere Fluidized Bed Combustion or Integrated Gasification Cycle Technology or any other clean technology to avail exemption from such coal quality requirement. This submission of MSEDCL is not acceptable since the plant of the Petitioner was at an advance stage of construction at the time the draft rules were notified and the Petitioner having made a choice of design of its plant, was not in a position to change the technology. Also, by the time the amended rules were notified, both the units had achieved COD.

65. The cut-off date with regard to MSEDCL PPA is 31.7.2009 and that for DNH PPA is 1.6.2012. The amendment to the Environment (Protection) Rules, 1986 was effected after the cut-off date by an Indian Governmental Instrumentality under the provisions of the Environment (Protection) Act. Hence, the MoEFCC notification is a change in law event and the Petitioner is entitled for relief on this count. The Tribunal in its judgment has directed that "the issue is to be seen in light of the premise on which the bid was based and the changes made after the cut-off date by MOEF". The Tribunal has also directed that this issue is required to be analyzed in detail by the Commission based on the contentions of the parties to arrive at a justified compensation, if any to GWEL considering the MOEF notification as a Change in Law event.

66. The Petitioner has stated that its generating station is located at a distance of 650 kms from the pit-head and, is, therefore, covered by the provisions of Rule 3(8)(c) of the Environment (Protection) Amendment Rules 2014. In this background, we hold that the Petitioner is entitled for compensation under change in law in terms of Article 10.1.1 of the PPA with effect from 5.6.2016. As regards the impact of high GCV coal supply and washery coal claimed by the Petitioner, we notice that the said claim has

not been supported with relevant details. In the absence of details, we are not inclined to consider the claim of the Petitioner towards expenditure incurred in compliance with the aforesaid notification. The Petitioner is however granted liberty to approach the Commission with all relevant particulars and the same will be considered in accordance with law.

78. The aforesaid order is also applicable in the present case. The Petitioner has stated that its generating station, located at Tadali, Chandrapur in the State of Maharashtra is at a distance of about 700 km from the pit-head and is, therefore, covered by the provisions of Rule 3(8)(c) of the Environment (Protection) Amendment Rules, 2014. The cut-off date in respect of TANGEDCO-PPA is 27.2.2013 and accordingly, the Petitioner is, in-principle, entitled for compensation under Change in Law in terms of Article 10.1.1 of the PPA with effect from 5.6.2016. However, apart from aforesaid MoEFCC Notification and simpliciter claim of Rs. 4.85 crore towards washing of coal, the Petitioner has not furnished any details. In absence of such details, we are not inclined to consider the claim of the Petitioner towards expenditure incurred in compliance with the aforesaid Notification. The Petitioner is, however, granted liberty to approach the Commission with all relevant details and the same will be considered in accordance with law.

(j) Additional Cost of sourcing alternate coal due to short supply of FSA Grade Coal from SECL

79. The Petitioner has submitted that the tariff agreed under TANGEDCO-PPA was based on the specified assured quantity of fuel from South Eastern Coalfields Limited. As per the Fuel Supply Agreement (FSA) executed between the Petitioner and SECL dated 8.3.2016, the Annual Contracted Quantity (ACQ) on FSA grade coal (coal of Grades 10, 11 and 12 only) is 5,23,809 MT. As on cut-off date, the Petitioner was entitled to receive the entire ACQ of coal under the Letter of Assurance (LoA) dated 6.6.20109 for supply of 100 MW power from its generating station to TANGEDCO.

80. However, Ministry of Coal (MoC), Government of India, vide its Office Memorandum dated 26.7.2013, amended the New Coal Distribution Policy (NCDP) wherein it was decided that the Fuel Supply Agreement will be signed for assured domestic coal quantity of only 65%, 65%, 67% and 75% of ACQ for remaining four years of the 12th Five-Year Plan for the power plants having normal linkages. The said Memorandum also provided that to meet its obligation under the FSA as regards making available the balance quantity of coal from alternate sources, CIL may supply the same to willing power plants on cost plus basis or alternatively, the power plants may directly import coal, in which case, FSA obligation on part of CIL/SECL to the extent of imported coal would be deemed to have been discharged.

81. The aforesaid Office Memorandum of Ministry of Coal was also followed by a letter of Ministry of Power dated 31.3.2017 addressed to this Commission and the State Electricity Regulatory Commissions, which, *inter-alia*, provided that the higher cost of imported/ market-based coal be considered for being made a pass through by the Commission to the extent of shortfall in the quantity indicated in the LoA/FSA.

82. In light of the Office Memorandum dated 26.7.2013 issued by MoC, the supply of FSA grade coal to the Petitioner was not corresponding to the ACQ levels and only part of the total required quantity from SECL was received for supply of power to TANGEDCO under the PPA. Hence, the Petitioner was constrained to procure the balance coal from SECL i.e. coal of grades G3, G6, G7, G8 (High grade coal) instead of FSA grade coal and also from e-auction/ open market leading to additional cost which was not within the direct or indirect control of the Petitioner. This condition continued for the period beyond 31.3.2017 as is evident from Notification No. 23011/15/2016-CPD/CLD dated 22.5.2017 (Shakti Scheme) of Ministry of Coal.

83. The Petitioner has submitted that on account of procurement of high-grade coal from SECL, the Petitioner has incurred an additional cost of Rs.14.93 crore from 16.12.2015 till 31.3.2018. It has submitted that it has also incurred an expenditure of Rs. 8.68 crore for procurement of e-Auction/ open market coal from 16.12.2015 till 31.3.2018 to meet the deficit in coal supply.

84. The Petitioner has further submitted that modification in NCDP vide its letter dated 26.7.2013 by Ministry of Coal, Government of India is a Change in Law event as has already been held by the Hon'ble Supreme Court in its judgment dated 11.4.2017 in Civil Appeal Nos. 5399-5400 of 2016 in the case of Energy Watchdog v. Central Electricity Regulatory Commission and Ors. and has been implemented by this Commission in subsequent orders.

85. We have examined the submissions of the Petitioner. The Petitioner's case is that linkage coal to the Petitioner was reduced and the Petitioner started receiving only part of the total allocated quantity (under FSA) from SECL for supply of power to TANGEDCO under the TANGEDCO-PPA. According to the Petitioner, as a result of the reduced supply of quantum of linkage coal, it was constrained to procure balance coal from SECL (higher grade) and through e-auction/ open market purchases, the cost whereof was much more than the linkage coal.

86. The chronology of events with regard to bid submission/ cut-off date, execution of FSA under TANGEDCO-PPA are as under:

S. No.	Particulars	Date of Event	
1	NCDP issued by MoC	18.10.2007	
2	LoA issued by SECL	6.6.2009	14,30,000 MT per annum
3	Cut-off date for TANGEDCO PPA	27.2.2013	
4	Bid Submission date for TANGEDCO PPA	6.3.2013	

5	Amendment to NCDP by MoC	26.7.2013	
6	PPA executed with TANGEDCO	27.11.2013 Read with Addendum No.1 signed on 20.12.2013	
7	Start of supply of power to TANGEDCO	16.12.2015	
8	FSA executed with SECL	8.3.2016	5,23,809 MT (for 100 MW out of 273 MW-TANGEDCO PPA)
9	Amendment to FSA	30.6.2016	5,23,809 MT (for 100 MW out of 273 MW-TANGEDCO PPA) 8,90,461 MT (for 170 MW out of 273 MW - NPCL PPA)

87. On 18.10.2007, Government of India had issued the New Coal Distribution Policy (NCDP 2007). In terms of Para 2.2 of the NCDP 2007, the existing linkage holders were assured supply of 100% of normative requirement. Paragraph 2.2 is extracted as under: -

> *"100% of the quantity as per the normative requirement of the consumers would be considered for supply of coal, through Fuel Supply Agreement (FSA) by Coal India Limited (CIL) at fixed prices to be declared/notified by CIL The units/power plants, which are yet to be commissioned but whose coal requirements has already been assessed and accepted by Ministry of Coal and linkage/ Letter of Assurance (LOA) approved as well as future commitments would also be covered accordingly."*

88. On account of shortage of coal, Ministry of Coal, Government of India vide its O.M. dated 26.7.2013 (referred to as "NCDP 2013") modified the ACQ for last four years of the Five-Year Plan for power plants having normal coal linkage. Relevant provisions of O.M. dated 26.7.2013 (NCDP 2013) are extracted as under:

> *"2. Government has now approved a revised arrangement for supply of coal to the identified Thermal Power Stations (TPPs) of 78,000 MW capacity commissioned or likely to be commissioned during the period from 1.4.2009 to 31.3.2015. Taking into account the overall domestic availability and the likely actual requirement of these TPPs, it has been decided that FSAs will be signed for the domestic coal quantity of 65%, 65%, 67% and 75% of the ACQ for the remaining four years of the 12th plan for the power plants having normal coal linkage."*

Thus, the above OM modified the trigger level for penalty for domestic coal supply by reducing ACQ from 100% in NCDP 2007 to 65%, 65%, 67% and 75% in NCDP 2013.

89. Therefore, as per NCDP 2013, the minimum domestic coal supply quantity has been reduced from the assured 100% to 65%, 65%, 67% and 75% of ACQ respectively for the remaining four years of the 12th plan i.e. for the years 2013-14 to 2016-17. Accordingly, Ministry of Power, Government of India (MoP) issued letter dated 31.7.2013 and advised the Electricity Regulatory Commissions as under:

> *"4. As per decision of the Government, the higher cost of import/market based e-auction coal be considered for being made a pass through on a case to case basis by CERC/SERC to the extent of shortfall in the quantity indicated in the LoA/FSA and the CIL supply of domestic coal which would be minimum of 65%, 65%, 67% and 75% of LOA for the remaining four years of the12th Plan for the already concluded PPAs based on tariff based competitive bidding.*
>
> *5. The ERCs are advised to consider the request of individual power producers in this regard as per due process on a case to case basis in public interest. The Appropriate Commissions are requested to take immediate steps for the implementation of the above decision of the Government."*

90. Further, the Revised Tariff Policy, 2016 made specific provisions regarding pass through of the cost of imported coal/ market-based e-auction coal for meeting the shortfall between the assured quantity/ quantity indicated as ACQ in the LOA/ FSA and reduced quantity of coal supplied by CIL. Relevant provisions of the Tariff Policy (Para 6.1) are extracted as under:

> *"However, some of the competitively bid projects as per the guidelines dated 19th January, 2005 have experienced difficulties in getting the required quantity of coal from Coal India Limited (CIL). In case of reduced quantity of domestic coal supplied by CIL, vis-à-vis the assured quantity or quantity indicated in Letter of Assurance/FSA the cost of imported/market based e-auction coal procured for making up the shortfall, shall be considered for being made a pass through by Appropriate Commission on a case to case basis, as per advisory issued by Ministry of Power vide OMNO.FU-12/2011-IPC(Vol-III) dated 31.7.2013."*

91. The MoP letter dated 31.7.2013 and the Revised Tariff Policy, 2016 have been held by the Hon'ble Supreme Court in the Energy Watchdog case as having the force of law and these read in context with Article 10 of the PPAs, constitute Change in Law. The relevant portion of the judgment is extracted hereunder:

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

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

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

"43. xxxx. As per the judgment in Energy Watchdog case, any change in the assurance of supply of coal by amendment to NCDP, 2007 is a change in law for which relief can be claimed by the Seller and the party affected by change in law is entitled to be compensated (through monthly tariff payments) so as to restore it to the same economic position as if such change in law has not occurred. Both NCDP, 2013 and the Shakti Scheme have been issued by the Ministry of Coal and both alter the assurances provided in the NCDP, 2007. The Shakti Scheme issued by Ministry of Coal on 22.5.2017 (which is after the cut-off dates) provides as under:-

"xxxx

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

(i) FSA may be signed with the pending LoA holders after ensuring that the plants are commissioned, respective milestones met, all specified conditions of the LoA fulfilled within specified timeframe and where nothing adverse is detected against the LoA holders. The outer time limit within which the power

plant of LoA holders must be commissioned for consideration of FSA shall be 31.03.2022, failing which LoA would stand cancelled. Coal supply to these capacities may be at 75% of ACQ. The coal supply to these capacities may be increased in future based on coal availability.

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

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

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

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

xxxx"

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

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

*46. In addition, Paragraph (A)(iii) of the Shakti Scheme provides that "The coal supply to these capacities may be increased in future based on c*oal availability." Thus, the said scheme, as *in case of NCDP 2013, recognizes that availability of coal is not commensurate with the demand and that once coal availability increases, the supply to*

these capacities of power plants may be increased. A combined reading of the provisions of the Shakti Scheme as regards the old regime of LoA-FSA holders leaves no room for doubt that Paragraph (A) of the Shakti Scheme extends the provisions of NCDP 2013 beyond 31.3.2017.

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

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

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

93. Since the Petitioner's generating station is also covered in the capacity totalling 68,000 MW, the above cited decision of this Commission is squarely applicable in the instant case of the Petitioner. Thus, the Petitioner is entitled for relief, to be restored to the same economic position, under change in law in terms of Article 10.2.1 of the PPA for the period till shortfall continues including the period

covered by NCDP 2013 and subsequently continued by SHAKTI Scheme beyond 31.3.2017. The Petitioner has submitted that as a result of the reduced supply of quantum of FSA Grade Coal (G10, G11 & G12 grades of coal by rail as stipulated in the FSA), the Petitioner was constrained to procure non-FSA Grade coal i.e. 'High Grade'/ 'As is where is' coal from SECL and also to procure coal from e-auction/ open market, the cost whereof is much more than the FSA Grade coal. Accordingly, we are of the view that the Petitioner is entitled to receive compensation under Change in Law provisions of the PPA for purchase of non-FSA Grade coal from SECL and from e-auction/ open market for supply of power to TANGEDCO under PPA. As regards computing the shortfall of quantum of coal under FSA in respect of the TANGEDCO-PPA, as noted in preceding paragraphs, the same shall be done in terms of the provisions of the FSA.

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

> *"33. …The compensation available under the FSA from MCL for the shortfall in supply below 80% of ACQ is not sufficient to put the Petitioner in the same economic position as if the Change in Law event has not occurred. In the light of the provisions of Article 13.2 of the PPAs dated 7.8.2008 and the observations of the Hon`ble Supreme Court in Energy Watchdog Case, the actual shortfall in supply of domestic coal with reference to the ACQ quantum under the FSA needs to be considered.*
>
> *34. …As per the above provisions, the Petitioner is entitled to compensation for any shortfall in supply of coal by CIL vis-a-vis the quantity indicated in LOA/FSA. Hence, the Petitioner is entitled to compensation for any shortfall in the supply of coal with respect to the quantity indicated in the FSA i.e. 64.05 lakh tonnes."*

95. The above decision of the Commission shall be applicable in the present case also. It is, however, made clear that any compensation paid by the Coal Company to

the Petitioner for shortfall in supply of FSA Grade coal shall be adjusted from the claim for compensation under change in law allowed in this order.

96. In light of the above, we approve the following methodology duly incorporating all decisions of the Commission in this matter. This methodology, as already stated above, would be applicable for all period/s covering before (under NCDP 2013) and after 31.3.2017 (as extended by Shakti Scheme):

Step - 1: ECR Linkage Coal $_{(Delivery\ point)}$ = ECR Quoted

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

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

Where,

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

GSHR = Normative Gross Station Heat Rate as worked out on the basis of applicable CERC Regulations or actual, whichever is lower;

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

Weighted Average GCV of Other Coal (to be computed in line with applicable CERC Regulation) = {(GCV $_{imported}$ x Qty $_{imported}$) + (GCV $_{e\text{-}auction}$ x Qty $_{e\text{-}auction}$) + (GCV $_{others\#}$ x Qty $_{others\#}$) / (Qty $_{imported}$ + Qty $_{e\text{-}auction}$ + Qty $_{others\#}$)};

And

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

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

Note:

1) If the actual generation at delivery point is less than scheduled generation at delivery point, it will be restricted to actual generation at delivery point.
2) All facts, figures and computations in this regard should be duly certified by the auditor.

3) The coal consumed on month to month shall be duly certified by the auditor and the same shall be reconciled annually with the Opening Stock, coal received during the year, coal consumed during the year and the closing stock.
4) Total Generation Ex-bus and Scheduled generation Ex-bus on month to month basis as per the meters at the station switchyard bus shall be reconciled with the relevant/SCADA data of RLDC and/or Regional Energy Accounting of RPC/ RLDC for the month.
5) Other# implies coal procured through open market including but not limited to additional coal supplied by SECL (over and above regular FSA Grade coal) through rail / road transportation mode, etc.

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

(k) Consequential increase in Royalty

98. The Petitioner has submitted that royalty is levied @14% on the base price of coal and while there is no change in the rate of royalty, the Petitioner is required to pay higher amount than what was payable as on cut-off date due to increase in the base price of coal. The Petitioner has submitted that it is incurring the additional expenditure of Rs.44.10/MT of coal towards amount payable with respect to royalty as at the end of June 2018 as compared to that prevalent on the cut-off date.

99. We have examined the submission of the Petitioner. Admittedly, there has no change in the royalty prevailing as on cut-off date and thereafter. The claim of the

Petitioner is that since the base price of coal on which the royalty is levied, has been increased, the Petitioner is required to pay higher royalty than what was payable as on cut-off date. Also, the Petitioner has failed to point out any Change in Law in respect of rate of royalty payable on the base price of coal and in absence thereof, the claim of the Petitioner for compensation on account of additional expenditure towards consequential increase in Royalty is not admissible.

(l) Introduction of Evacuation Facility Charges by Coal India Limited

100. The Petitioner has submitted as on cut-off date, no Evacuation Facility Charges was levied by Coal India Limited. However, subsequently, on 19.12.2017, Coal India Limited, vide its Price Notification No. CIL:S&M:GM(F)/Pricing 2017/1005 dated 19.12.2017, has introduced the Evacuation Facility Charges @ Rs. 50/MT on all despatches of coal except that through rapid loading arrangement w.e.f. 00.00 hrs of 20.12.2017.

101. We have considered the submission of the Petitioner. The issue as to whether the levy of Evacuation Facility Charges by CIL/its subsidiaries is Change in Law event has been considered by the Commission in its order dated 2.4.2019 in Petition No.71//MP/2018 in the case of GMR Warora Energy Limited v. Maharashtra State Electricity Distribution Company Limited and Ors. The relevant portion of the Commission's observation in this regard is reproduced below:

> *"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 judgment dated 21.12.2018 had concluded that "departments, corporations/companies like Coal India Limited or Indian Railways formed under different Statutes are Indian Governmental Instrumentality". In view of the submissions of the Petitioner and in view of the said judgment, we note that the Evacuation Facility 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 Facility Charges is not part of the escalation index for coal notified by this Commission. Hence, we are of the view that the introduction of Evacuation Facility Charges beyond cut-off date of the respective PPAs is admissible to the Petitioner as a change in law event."

102. The above decision of the Commission is also applicable in the present case of the Petitioner. Accordingly, the Petitioner is entitled to recover Evacuation Facility Charges from TANGEDCO as per the applicable rates in proportion to coal consumed corresponding to schedule generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of power to TANGEDCO. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of Change in Law. The Petitioner is directed to furnish along with its monthly regular and/or supplementary bill(s), computation duly certified by the Auditors to TANGEDCO. The Petitioner and TANGEDCO are directed to carry out reconciliation on account of these claims on annual basis.

(m) Increase in amount payable towards 'Niryat Kar'

103. The Petitioner has submitted that Niryat Kar is levied @0.2% on the summation of the base price of coal and Sizing and Crushing Charges. The Petitioner has submitted that while there is no change in the rate at which the Niryat Kar is levied, there is an increase in Niryat Kar imposed upon the Petitioner on account of increase in base price of Coal as well as Sizing and Crushing Charges on account of Change in Law events. Accordingly, the Petitioner is incurring the additional recurring expenditure toward Niryat Kar to tune of Rs.0.68/MT of coal as in the end of June 2018 as compared to that prevalent on the cut-off date.

104. We have considered the submission made by the Petitioner. Admittedly, as on the cut-off date and as well as subsequent thereto, Niryat Kar is being levied @0.2% on the summation of the base price of coal and Sizing and Crushing Charges. Neither has there been any increase in the prevailing rate of Niryat Kar after the cut-off date (i.e.27.2.2013) nor any Indian Government Instrumentality has brought any kind of Notification/ amendment to the prevailing circular of Niryat Kar. The only premise of the Petitioner to claim this event under Change in law is due to the increase in base price of coal and Sizing and Crushing Charge which has increased the overall impact of Niryat Kar being levied on the Petitioner. On basis of the documents provided we are not inclined to grant relief to the Petitioner on this event as Change in Law event.

105. Therefore, the claim of the Petitioner for relief under Change in Law on account of increase in Niryat Kar as per Article 10 of the PPAs is not admissible and accordingly, disallowed. However, the Petitioner is granted liberty to approach the Commission with all relevant/ proper documents in this regard.

(n) Increase in amount payable towards the Central Sales Tax

106. The Petitioner has submitted that as on cut-off date, Central Sales Tax (CST) was levied @ 2% on the summation of base price of coal, Royalty, Stowing Excise Duty, Surface Transportation Charges, Sizing and Crushing Charges, Niryat Kar, Infrastructure Development Cess, Forest Tax, Environment Cess, Central Excise Duty, Clean Energy Cess and Entry Tax. The Petitioner has submitted that while the rate of CST has remained unchanged, however, due revision in the applicable rates of the aforesaid components, there has been an overall impact on the net tax outflow qua CST as compared to what the Petitioner was liable to pay on the cut-off date.

The Petitioner has submitted that due to the above, there has been a net increase of Rs.12.76/MT of coal towards amount payable with respect to CST at the end of June 2017 as compared to that prevalent on the cut-off date.

107. The Petitioner has further submitted that upon the introduction of GST regime w.e.f. 1.7.2017, CST has been subsumed into GST. Accordingly, the Petitioner is required to pay tax on the procured value of coal @ 5% instead of CST levied earlier @ 2% along with other applicable taxes like ST and Stowing Excise Duty. The Commission in its order dated 14.3.2018 has recognized the enactment of IGST and its levy @ 5% along with absorption of taxes such as Central Excise Duty, Central Sales Tax and Stowing Excise Duty.

108. We have examined the matter. The Appellate Tribunal, in its judgment dated 19.4.2017 in Appeal No.161 of 2015 & IA No. 259 of 2015 and Appeal No. 205 of 2015 in Sasan Power Limited vs. CERC & Ors. in respect of Excise Duty, Central Sales Tax and VAT has observed as under:

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

109. In the light of above decision, the claim of the Petitioner for relief on account of increase in Central Sales Tax is admissible as a Change in Law event under Article 10 of the TANGEDCO-PPA. Accordingly, the Petitioner shall be entitled to recover the increase/ change in Central Sales Tax from TANGEDCO in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of electricity to TANGEDCO. If the actual generation is less than the scheduled generation, the coal consumed for actual generation shall be

considered for the purpose of computation of impact of Central Sales Tax. The Petitioner is directed to furnish along with its monthly regular and/or supplementary bill(s), the computations duly certified by the auditor to TANGEDCO. The Petitioner and TANGEDCO are directed to carry out reconciliation on account of these claims on annual basis.

II. Increase in cost of transportation of domestic coal supplied by Coal India Limited and its subsidiaries, including SECL, on account of Change in Law events

(a) Increase in effective Rate of Service Tax levied on the Railway Freight

110. The Petitioner has submitted that as on cut-off date, the effective Service Tax on Railway Freight was being levied at 3.708%. However, subsequent to cut-off date, the effective Service Tax rate was revised to 4.2% w.e.f. 1.6.2015 due to increase in base Service Tax from 12% to 14%. Thereafter, the effective Service Tax on the Railway Freight has been revised to 4.35% w.e.f. 15.11.2015 due to introduction of Swachh Bharat Cess @ 0.5% and to 4.50% w.e.f. 1.6.2016 due to introduction of Krishi Kalyan Cess @ 0.5%. The Petitioner has submitted that the w.e.f. 1.7.2017 i.e. after introduction of GST laws, the effective Service Tax has become 5% as communicated by the Railway Board vide its Rates Circular No. 19 of 2017 dated 30.6.2017.

111. The Petitioner has submitted that various Rate Circulars intimating increase in effective Rate of Service Tax as changed by the Ministry of Finance, Government of India from time to time, fall within the meaning of ‘Change in Law’ under Article 10 of the PPA. The Petitioner has submitted that there has been a net increase of Rs. 17.06/MT on account of change in Service Tax rates at the end of June 2018 as compared to that prevalent on the cut-off date.

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

> *"119 (2). There shall be levied and collected in accordance with the provisions of this Chapter, a cess to be called the Swachh Bharat Cess, as service tax on all or any of the taxable services at the rate of two percent, on the value of such services for the purposes of financing and promoting Swachh Bharat initiative or for any other purpose relating thereto.*
>
> *119 (3). The Swachh Bharat Cess leviable under sub-section (2) shall be in addition to any cess or service tax leviable to such taxable services under Chapter V of the Finance Act, 1994 or under any other law for the time being in force."*

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

> *"161 (2). There shall be levied and collected in accordance with the provisions of this Chapter, a cess to be called the Krishi Kalyan Cess, as service tax on all or any of the taxable services at the rate of 0.5 percent, on the value of such services for the purposes of financing and promoting initiatives to improve agriculture or for any other purpose relating thereto.*
>
> *(3) The Krishi Kalyan Cess leviable under sub-section (2) shall be in addition to any cess or service tax leviable to such taxable service under Chapter V of the Finance Act, 1994 or under any other law for the time being in force."*

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

114. The Commission in its order dated 1.2.2017 in Petition No. 8/MP/2014 has dealt with the issue of Service Tax on transportation of goods by Indian Railways and accordingly, allowed the event under Change in Law. The relevant portion of the order dated 1.2.2017 is extracted as under:

"89…… By Finance Act of 2006, though service tax on transportation of goods by rail was introduced, an exception was made in case of Government Railways. By Finance Act of 2009, this restriction was removed by providing that service tax is leviable "to any person by another person, in relation to transport of goods by rail in any manner". Therefore, transport of goods by Indian Railways became subject to service tax by Finance Act of 2009. Actual levy of service tax on transportation of goods by railways was exempted by Notification No. 33 of 2009 dated 1.9.2009. By Notification no. 26 of 2012 dated 20.6.2012, Ministry of Finance issued notification by exempting transport of goods by rail over and above 30% of the service tax chargeable with effect from 1.7.2012. By a Notification No. 43 of 2012 dated 2.7.2012, service tax on transportation of goods by Indian Railways was fully exempted till 30.9.2012. With effect from 1.10.2012, service tax on 30% of the transport of goods by rail is chargeable. Therefore, the basis of the service tax on transport of goods by Indian Railways is traceable to the Finance Act of 2009 which was enacted after the cut-off date in case of MSEDCL PPA. The rate Circular No. 27 of 2012 dated 26.9.2012 issued by Railway Board implemented the provisions of the Finance Act, 2009 at the ground level. In our view, since the imposition of service tax on transport of goods by Indian Railways is on the basis of the Finance Act, 2009 which has come into force after the cut-off date, the expenditure incurred by the Petitioner on payment of service tax on transport of goods by the Indian Railways is covered under change in law and the Petitioner is entitled for compensation in terms of the MSEDCL PPA. As on cut-off date in case of DNH PPA (i.e. 1.6.2012), the service tax on transportation of goods by Railways was in existence but was under exemption. Therefore, as on cut-off date in case of DNH PPA, the Petitioner could not have factored service tax on transportation of goods by Indian Railways which was under exemption. With effect from 1.10.2012, service tax on 30% of the transport of goods by rail became chargeable. This date being after the cut-off date in case of DNH PPA, the same shall be admissible under DNH PPA. Subsequent changes in service tax shall be admissible under change in law."

115. By Ministry of Finance Notification No. 43 of 2012 dated 2.7.2012, Service Tax on transportation of goods by Indian Railways was fully exempted till 30.9.2012. Thereafter, with effect from 1.10.2012, Service Tax on 30% of the transport of goods became chargeable. Therefore, as on the cut-off date (i.e. 27/2/2013), the Petitioner has, in its bid, accounted Service Tax for 30% of 12.36% i.e. 3.708%. Ministry of Finance, Department of Revenue vide its Notification No.14/2015-Service Tax dated 19.5.2015 has revised the rates of Service Tax from 12.36% to 14%, which was further revised vide Notification No.21/2015-Service Tax dated 6.11.2015 to 14.5%. Subsequently, Ministry of Finance, Department of Revenue vide Notification No. 27/2016-Service Tax dated 26.5.2016 revised the rate of Service Tax from 14.5% to 15%. In view of the above, the Petitioner is entitled for the following relief:

Applicability	Rate of Service	Service Tax on	Admissible rate of

Date	Tax	Transportation of goods @ 30% of Service Tax	Service Tax under Change in Law
27.2.2013	12.36%	3.708%	0
1.6.2015	14.00%	4.200%	0.492%
15.11.2015	14.50%	4.350%	0.642%
1.6.2016 (till 30.6.2017)	15.00%	4.500%	0.692%

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

(b) Levy of Coal Terminal Surcharge at both loading and unloading terminal

117. The Petitioner has submitted that the Railway Board, under aegis of the Ministry of Railways, Government of India, vide its Corrigendum No.14 to the Rates Circular No. 08 of 2015 dated 22.8.2016, had levied the Coal Terminal Surcharge on coal transportation through Indian Railways at both loading and unloading terminal beyond 100 km. The Petitioner has submitted that the Coal Terminal Surcharge has

been subsequently withdrawn by Notification No. TCR/1078/2015/07 dated 6.7.2017 with effect from 10.7.2017. The Petitioner has submitted that Coal Terminal Surcharge was introduced after the cut-off date and is, therefore, a Change in Law event and has prayed for compensation on account of additional expenditure incurred toward Coal Terminal Surcharge from 22.8.2016 to 9.7.2017.

118. We have considered the submissions of the Petitioner. The Appellate Tribunal in its judgment dated 14.8.2018 in Appeal No. 119 of 2016 & IA Nos. 668 & 674 of 2016 has held that the circulars issued by Ministry of Railways (MoR) have a force of law. The relevant portion of the said judgment dated 14.8.2018 is extracted as under:

> *"xiii. From the above it is crystal 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.*

119. In pursuance to the above judgement of the Appellate Tribunal, the Commission in its order dated 2.4.2019 in Petition No. 72/MP/2018 has considered levy of Coal Terminal Surcharge by Indian Railways as a Change in Law event. The relevant portion of the said order dated 2.4.2019 is extracted as under:

> *"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".*

120. The above decision of the Commission is also applicable in the present case. As on cut-off date, i.e. 27.2.2013, there was no Coal Terminal Surcharge on transportation of coal. Subsequently, Ministry of Railways vide its circular dated 22.8.2016, levied Coal Terminal Surcharge of Rs. 110/MT (Rs. 55/MT on each terminal) on transportation of coal with effect from 22.8.2016. The same was

subsequently withdrawn with effect from 10.7.2017 vide Ministry of Railways circular dated 6.7.2017. Accordingly, the Petitioner is entitled to recover Coal Terminal Surcharge from TANGEDCO as per applicable rate in proportion to the coal as per the parameters of the applicable Tariff Regulations of this Commission or coal actually consumed whichever is lower, for generation and supply of electricity to TANGEDCO. The Petitioner is directed to furnish along with its monthly regular and/or supplementary bill(s), the computations in this regard duly certified by the Auditor to TANGEDCO. The Petitioner and TANGEDCO are directed to carry out reconciliation on account of these claims annually.

(c) Levy of Busy Season Surcharge, and
(d) Increase in amount payable toward Development Surcharge

121. The Petitioner has submitted that as on cut-off date, the Busy Season Surcharge, as levied by Railway Board under the aegis of Ministry of Railway, was 12% on the Base Freight Charges. However, after the cut-off date, the Railway Board vide its Rate Circular No. 24 of 2013 dated 18.9.2013 revised the Busy Season Surcharge to 15%. The Petitioner has submitted that the Busy Season Surcharge has been subsequently withdrawn by the Railway Board vide its Rate Master Circular No. 1 of 2018 dated 9.1.2018 that is applicable w.e.f. 15.1.2018. However, on account levy of Busy Season Surcharge, there has been net increase of Rs.46.91/MT up to 14.1.2018 as compared to that prevalent on the cut-off date.

122. The Petitioner has submitted that Railway Board vide its Rate Circular No. 38 of 2011 dated 12.10.2011 had been levying Development Surcharge @ 5% on all goods traffic including transportation of coal. The same was subsequently withdrawn vide Rate Mater Circular No.1 of 2018 dated 9.1.2018 that was applicable w.e.f. 15.1.2018. Though the rate of Development Surcharge remained unchanged during

the above period, due to rise in the Base Freight Charges of coal and Busy Season Charges, there has been a net increase of Rs.14.74/MT of coal transported through railways towards amount payable with respect to Development Surcharge as at the end of 14.1.2018 as compared to that prevalent on the cut-off date.

123. We have examined the matter. Busy Season Surcharge and Development Surcharge levied by Railway Board have been allowed as Change in Law events by Appellate Tribunal vide its judgment dated 14.8.2018 in Appeal No. 111 of 2017 & IA No. 450 of 2018. The relevant observation of the Appellate Tribunal in the said judgment is reproduced below:

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

124. In light of above decision of Appellate Tribunal, the claim of the Petitioner for relief on account of increase in Busy Season Surcharge and Development Surcharge is admissible as Change in Law event under Article 10 of the PPA. The Petitioner shall be entitled to recover the increase in Busy Season Surcharge and Development Surcharge in proportion to the coal consumed corresponding to the schedule generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of electricity to TANGEDCO. If actual generation is less than the schedule generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of increase in Busy Season Surcharge and Development

Surcharge. The Petitioner is directed to furnish along with its monthly bill, the proof of payment and computation duly certified by the auditor to TANGEDCO. The Petitioner and TANGEDCO are directed to carry out reconciliation on account of these claims on annual basis.

125. The Petitioner has sought liberty to approach the Commission at appropriate time for obtaining approval of increase in tariff on account of all expenditure including (capital expenditure and operation expenses) pertaining to Emission Control System including Flue Gas Desulphurisation (FGD) Plant, as required pursuant to Ministry of Environment, Forest and Climate Change Environment Protection (Amendment) Rules, 2015 dated 7.12.2015. The Petitioner has submitted that it is presently exploring the optimum technology and the likely additional cost. In absence of any documents by the Petitioner, the Commission is not in a position to take a view on these issues. The Petitioner may approach the Commission with relevant documents and claims of the Petitioner shall be examined in accordance with law.

III. Carrying Cost

126. The Petitioner, in the present Petition has claimed carrying cost from the date of applicability of the respective Change in Law events till the date of payment so that in terms of provisions of Article 10.2.1 of the PPA, the Petitioner is restored to the same economic position as if the Change in Law had not occurred. Such term “economic position” relates to the compensation for money denied at appropriate time and therefore should include compensation in terms of carrying costs incurred with respect to the Change in Law events. The Petitioner has submitted that the principle of carrying cost has been well established in various judgments of the Hon'ble Supreme Court and the Appellate Tribunal.

127. We have considered the submissions of the Petitioner. The Appellate Tribunal in its judgment dated 13.04.2018 in Appeal No. 210/2017 (Adani Power Limited v. Central Electricity Regulatory Commission & Ors.) has allowed the carrying cost on the claim under change in law and held as under:

> *"ix. In the present case we observe that from the effective date of Change in Law the Appellant is subjected to incur additional expenses in the form of arranging for working capital to cater the requirement of impact of Change in Law event in addition to the expenses made due to Change in Law. As per the provisions of the PPA the Appellant is required to make application before the Central Commission for approval of the Change in Law and its consequences. There is always time lag between the happening of Change in Law event till its approval by the Central Commission and this time lag may be substantial.....We also observe that this Tribunal in SLS case after considering time value of the money has held that in case of re-determination of tariff the interest by a way of compensation is payable for the period for which tariff is re-determined till the date of such re-determination of the tariff. In the present case after perusal of the PPAs, we find that the impact of Change in Law event is to be passed on to the Respondent Nos. 2 to 4 by way of tariff adjustment payment as per Article 13.4 of the PPA*
>
> *.....From the above it can be seen that the impact of Change in Law is to be done in the form of adjustment to the tariff. To our mind such adjustment in the tariff is nothing less then re-determination of the existing tariff.*
>
> *x. Further, the provisions of Article 13.2 i.e. restoring the Appellant to the same economic position as if Change in Law has not occurred is in consonance with the principle of "restitution" i.e. restoration of some specific thing to its rightful status. Hence, in view of the provisions of the PPA, the principle of restitution and judgement of the Hon'ble Supreme Court in case of Indian Council for Enviro-Legal Action vs. Union of India &Ors., we are of the considered opinion that the Appellant is eligible for Carrying Cost arising out of approval of the Change in Law events from the effective date of Change in Law till the approval of the said event by appropriate authority. It is also observed that the Gujarat Bid-01 PPA have no provision for restoration to the same economic position as if Change in Law has not occurred. Accordingly, this decision of allowing Carrying Cost will not be applicable to the Gujarat Bid-01 PPA.*
>
> *xi. Accordingly, this issue is decided in favour of the Appellant in respect of above mentioned PPAs other than Gujarat Bid –01 PPA."*

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

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

*****

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

129. Article 10.2 of the TANGEDCO-PPA dated 27.11.2013 read with Addendum no. 1 dated 20.12.2013 provides as under:

*"**10.2 Application and Principles for computing impact of Change in Law***

10.2.1 While determining the consequences of Change in Law under Article 10, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, it 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."

130. In view of the provisions of the PPA, 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 from the effective date of Change in Law till the actual payment to the Petitioner. Once supplementary bills are raised by the Petitioner in terms of this order, the provisions of Late Payment Surcharge in the PPA would kick in if the payment is not made by TANGEDCO within due date.

131. The Commission in its Order dated 17.9.2018 in Petition No.235/MP/2015 (AP(M)L vs UHBVNL &Ors.) has decided the issue of carrying cost as under:

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

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

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

26.The Petitioner shall work out the Change in Law claims and carrying cost in terms of this order. As regards the carrying cost, the same shall cover the period starting with the date when the actual payments were made to the authorities till the date of issue of this order. The Petitioner shall raise the bill in terms of the PPA supported by the calculation sheet and Auditor's Certificate within a period of 15 days from the date of this order. In case, delay in payment is beyond 30 days from the date of raising of bills, the Petitioner shall been titled for late payment surcharge on the outstanding amount."

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

Issue No. 4: What should be the mechanism for processing and reimbursement of admitted claims under Change in Law?

133. The Petitioner has submitted that the levies, changes, revisions and enactments claimed under Change in Law in this Petition are directly affecting the expenses of the Petitioner. The amount claimed is more than 1% of the value of the Standby Letter of Credit (LC) [in aggregate for the relevant Contract Year] and thus, it fulfils the condition laid down in Article 10.3.2 of the PPA for claiming the

additional cost/expenses incurred by the Petitioner in supplying power to TANGEDCO under the PPA.

134. Article 10.3.2, 10.3.3 and 10.3.4 of the PPA provide for the principle for computing the impact of Change in Law during the operating period as under:

> *"10.3.2 During Operating Period*
>
> *The compensation for any decrease in revenue or increase in expenses to the Seller shall be payable only if the decrease in revenue or increase in expenses of the Seller is in excess of an amount equivalent to 1% of the value of the Standby Letter of Credit in aggregate for the relevant Contract Year.*
>
> *10.3.3 For any claims made under Articles 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."*

135. 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.

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

137. Article 10 of the PPA provides for the principle for computing the impact of change in law during the operating period. These provisions enjoin upon the Commission to decide the effective date from which the compensation for increase/

decrease in revenues or of cost shall be admissible to the Petitioner. In our view, the effect of change in law as approved in this order shall come into force from the date of commencement of supply of electricity to the Procurer or from the date of occurrence of Change in Law event, whichever is later. Approaching the Commission every year for allowance of compensation for such Change in Law is a time-consuming process, which may result in payment of carrying cost. We have, therefore, specified a mechanism, in the following paragraphs, considering the fact that compensation for change in law events allowed as per PPA shall be paid in subsequent years of the contract period:

(a) Monthly change in law compensation payment shall be effective from the date of commencement of supply of electricity to TANGEDCO 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 procurer 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 the Procurer.

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

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

(e) The mechanism prescribed above is to be adopted for payment of compensation due to Change in Law events allowed as per Article 10.3.2 of the PPA for the subsequent period as well.

Summary of Decisions

138. Summary of our decisions under the Change in Law during the operating period of the Project is as under:

S. No.	Change in Law event	Decision
I.	**Increase in cost of coal on account of Change in Law events**	
A.	Contribution towards District Mineral Foundation and National Mineral Exploration Trust	Allowed
B.	Increase in Surface Transportation Charges	Not Allowed
C.	Increase in Sizing Charges	Not Allowed
D.	Increase in Clean Energy Cess	Allowed
E.	Increase in Chhattisgarh Environment Cess and Infrastructure Development Cess	Allowed
F.	Change in the Components for Computation of Central Excise Duty leviable on Coal	Allowed
G.	Benefits to be passed on to TANGEDCO for implementation of GST	Allowed
H.	Use of Blended or Washed Coal with Ash Content Not Exceeding 34% with effect from 5.6.2016	Liberty is granted to approach the Commission along with relevant documents
I.	Additional Cost of sourcing alternate coal due to short supply of FSA Grade Coal from SECL	Allowed
J.	Increase in Royalty on Coal	Not allowed
K.	Levy of Evacuation Facility Charges	Allowed
L.	Increase in amount payable towards Niryat Kar	Liberty is granted to approach the Commission along with relevant documents
M.	Increase in amount payable towards the Central Sales Tax	Allowed
II.	**Increase in cost of transportation of domestic coal supplied by Coal India Limited and its subsidiaries, including SECL, on account of Change in Law events**	
A.	Increase in Service Tax on Railway Freight	Allowed
B.	Levy of Coal Terminal Surcharge	Allowed
C.	Levy of Busy Season Charges	Allowed
D.	Increase in amount payable towards the Development Surcharge	Allowed
III.	**Carrying Cost**	Allowed

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

140. Petition No. 327/MP/2018 and IA No. 87 of 2018 are disposed of in terms of above order.

Sd/-	sd/-
(I.S.Jha)	**(P.K.Pujari)**
Member	**Chairperson**