

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 174/MP/2020**

**Coram:**

**Shri P.K. Pujari, Chairperson**

**Shri I.S Jha, Member**

**Shri Arun Goyal, Member**

**Shri P. K. Singh, Member**

**Date of Order: 22<sup>nd</sup> October, 2021**

**In the matter of:**

Petition under Section 79 of the Electricity Act, 2003 read with statutory framework governing procurement of power through competitive bidding ('Competitive Bidding Guidelines') and Article 10 of the Power Purchase Agreements dated 17.3.2010, 21.3.2013 and 27.11.2013 executed between GMR Warora Energy Limited and the Distribution Companies in the States of Maharashtra, Dadra and Nagar Haveli and Tamil Nadu respectively for compensation due to levy of charges for transportation of fly ash.

**And**

**In the matter of:**

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

**....Petitioner**

**Vs**

1. Maharashtra State Electricity Distribution Company Limited,  
5<sup>th</sup> Floor, Prakashgadh, Plot No. G-9,  
Anant Kanekar Marg, Bandra (East),  
Mumbai- 400 051

2. Electricity Department of Union Territory of Dadra and Nagar Haveli,  
Vidhyut Bhavan, Opp. Secretariat, Silvassa,  
Dadra and Nagar Haveli - 396230

3. Tamil Nadu Generation and Distribution Corporation Limited,  
144, Anna Salai, NPKRR Maaligai,  
Chennai

4. GMR Energy Trading Limited,  
25/1, Skip House, Museum Road, Bangalore – 560 025,  
Karnataka.

**....Respondents**

**Parties Present:** Shri Vishrov Mukerjee, Advocate, GWEL  
Shri Anand K. Ganesan, Advocate, DNHPDCL

## **ORDER**

The Petitioner, GMR Warora Energy Limited (GWEL), has filed the present Petition under Section 79 of the Electricity Act, 2003 (hereinafter referred to as 'the Act') read with Competitive Bidding Guidelines issued by Government of India under Section 63 of the Act and Article 10 of the Power Purchase Agreements ('PPAs') dated 17.3.2010, 21.3.2013 and 27.11.2013 executed between GMR Warora Energy Limited and the Distribution Companies of Maharashtra, Dadra and Nagar Haveli and Tamil Nadu, respectively, for compensation on account of charges paid towards transportation of fly ash in terms of Notification dated 25.1.2016 of Ministry of Environment, Forests & Climate Change, ('MoEF&CC'), Government of India.

### **Brief Background of the Case**

2. The Petitioner has set up a coal-based thermal power plant (hereinafter referred to as 'the Project') with an installed capacity of 600 MW in Warora Taluka, District Chandrapur in the State of Maharashtra. The Project comprises of two units of 300 MW each. Unit #1 of the Project was commissioned on 19.3.2013 and Unit # 2 was commissioned on 1.9.2013.

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

a) Supply and sale of 200 MW to Respondent No. 1 i.e. Maharashtra State Electricity Distribution Company Ltd (MSEDCL) in terms of PPA dated 17.3.2010 (in short, 'the MSEDCL PPA'). The cut-off date for the MSEDCL PPA is 31.7.2009. Supply of power in terms of the MSEDCL PPA commenced from 17.3.2014.

b) Supply and sale of 200 MW to Respondent No. 2 i.e. Electricity Department, Union Territory of Dadra and Nagar Haveli ('DNH') in terms of PPA dated 21.3.2013 (in short, 'the DNH PPA'). The cut-off date for the DNH

PPA is 1.6.2012. Supply of power in terms of the DNH PPA commenced from 1.4.2013.

c) Supply and sale of 150 MW to Respondent No. 3 i.e. Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO) through back to back arrangements as follows:

1. Power Sale Agreement (PSA) dated 1.3.2013 between Respondent No. 4 i.e. GMR Energy Trading Limited (GMRETL) and the Petitioner based on which bid was submitted to TANGEDCO;

2. PPA dated 27.11.2013 (in short, 'the TANGEDCO PPA') between GMRETL and TANGEDCO for supply of power from the Project of the Petitioner to TANGEDCO. The cut-off date of this PPA is 27.2.2013. Tariff was adopted by Tamil Nadu Electricity Regulatory Commission vide its order dated 29.7.2016; and

3. PPA dated 3.5.2014 between the Petitioner and GMRETL recording the terms and conditions in accordance with PPA between GMRETL and TANGEDCO. The supply of power under the PPA commenced on 22.10.2015.

4. The Petitioner had approached the Commission through Petition No. 1/MP/2017 seeking relief, *inter alia*, towards levy of charge for transportation of fly ash pursuant to the Notification dated 25.1.2016 issued by Ministry of Environment, Forest and Climate Change under change in law provisions of the PPA. The Commission in its order dated 16.3.2018 in Petition No. 1/MP/2017 *inter-alia* held that the levy of charges for transportation of fly ash is in-principle admissible under change in law and granted liberty to the Petitioner to approach the Commission along with documents to analyze the case for determination of compensation.

5. Against the above background, the Petitioner has filed the present Petition with the following prayers:

"a) Grant compensation as set out in paragraphs above including carrying cost and interest thereon in future;

b) Evolve a mechanism for compensating the Petitioner for all future expenditure incurred for transportation of fly ash along with carrying cost; and

c) Restore the Petitioner to the same economic position in terms of Article 10 of the PPAs"

## **Submissions of the Petitioner**

6. The Petitioner has submitted the following:

(a) The Petitioner has complied with the conditions stipulated by this Commission in its order dated 16.3.2018 in Petition No. 1/MP/2017. On 22.12.2018, the Petitioner invited bids for awarding the contract for transportation of fly ash vide Tender No. GWEL/ASH-TRPL/18-19/01. Four vendors participated in the bidding process and negotiations were held with the short-listed bidders. Pursuant thereto, Avantta Infra Private Limited (In short, 'Avantta') was selected as the successful bidder and was issued Letter of Intent ('LoI') dated 7.4.2019. Thereafter, an agreement for transportation of fly ash was executed between the Petitioner and Avantta on 15.4.2019.

(b) Fly ash being transported through Avantta is being supplied to Ashtech (India) Private Limited (in short, 'Ashtech') for utilization in road construction projects being undertaken by Megha Engineering & Infrastructure Limited (MEIL). In this regard, a copy of letter dated 22.4.2019 from Avantta to Ashtech regarding supply of fly ash from GWEL to MEIL for road construction and the end-user certificate issued by MEIL dated 3.7.2019 stating that fly ash had been received from GWEL for road construction have also been furnished.

(c) The Petitioner has also entered into contract with various cement manufacturers, viz. Ultra Tech Cement Limited, ACC Limited, Ambuja Cement Limited and Manikgarh Cement Limited. As per prevalent industry practice, cement manufacturers engage their own transporters for purposes of transportation of fly ash and as such cement manufacturers do not participate in any competitive bidding process for transportation of fly ash. However, the cost incurred by the Petitioner towards transportation of fly ash to cement manufacturers for utilization of fly ash is substantially lower than the transportation cost incurred for transporting fly ash for use in road construction projects. The comparative table of the transportation cost is as under:

Sr. No.	Particulars of the Vendor	Distance/ lead (km)	Minimum quantity to be lifted (MT/month)	Rate of transportation cost (Rs./MT)
1.	Avantta Infra Pvt. Limited	98		594
2.	Manikgarh Cement Limited	90	Average Lifting up to 300	105
			Average Lifting above 300	120
3.	Ultra Tech Cement Limited	90	Average Lifting up to 300	105
			Average Lifting above 300	120
4.	ACC Limited	50	Up to 500	120
			Up to 1000	130
			Above 1000	140
5.	Ambuja Cement Limited	85	Up to 500	120
			Up to 1000	130
			Above 1000	140

(d) The Commission in its order dated 3.12.2019 in Petition No. 213/MP/2018 (DB Power Ltd. vs. PTC India Ltd. and others) has already acknowledged the fact that cement manufacturers, as an industry, make their own arrangement for transportation of fly ash and do not participate in bidding process. Further, as the cost of transportation negotiated with the cement manufacturers is substantially lower than the transportation cost discovered through the competitive bidding process for transportation and utilization of fly ash in road construction projects, the Commission in the said order has allowed reimbursement of the cost of transportation to cement manufacturers through negotiated route.

(e) In terms of the arrangement entered into with parties, Avantta, Manikgarh Cement Limited, Ultratech Cement Limited, ACC Limited and Ambuja Cement Limited raised invoices for transportation of fly ash made available to them by the Petitioner. For the period from 3.5.2019 to 31.8.2019, the Petitioner has incurred Rs. 2,47,97,176/- towards cost of transportation of fly ash.

(f) The invoices raised by Avantta, Manikgarh Cement Limited, Ultratech Cement Limited, ACC Limited and Ambuja Cement Limited towards cost of transportation of fly ash have been duly audited by the auditors vide certificate dated 4.11.2019. Further, Avantta, Manikgarh Cement Limited, Ultra Tech

Cement Limited, ACC Limited and Ambuja Cement Limited have also issued end-use certificates confirming the use of fly ash being made available by the Petitioner.

(g) Till 31.8.2019, no revenue has been generated from sale of fly ash.

(h) The Petitioner has complied with the conditions stipulated by the Commission in its order dated 16.3.2018 including following a transparent and competitive bidding process for awarding the contract for transportation of fly ash.

(i) As per Article 10 of the PPAs, the objective behind compensation for a change in law event is to restore the affected party to the same economic position as if change in law event had not occurred. The term 'to restore' should entail the Petitioner being compensated at actuals. The term 'to restore' will become redundant, if the compensation fails to take into account actual expenditure and does not "restore" the party claiming change in law to same economic position as if such change in law had not occurred. The said principle has been confirmed in terms of judgment of the Appellate Tribunal for Electricity ('APTEL') dated 13.4.2018 in Appeal No. 210 of 2017 and has been affirmed by the Hon'ble Supreme Court in Energy Watchdog Vs. CERC and Ors [(2017) 14 SCC 80].

(j) The Petitioner is also entitled to carrying cost associated with the transportation of fly ash, amounting to Rs. 6,74,782/- (as on 31.12.2019) on the fly ash transportation of Rs. 2,47,97,176/-.

### **Hearing dated 14.7.2020**

7. The matter was admitted for the hearing vide Record of Proceeding dated 14.7.2020 and notice was issued to the Respondents. TANGEDCO and DNH have filed their reply vide affidavits dated 6.8.2020 and 10.8.2020 respectively. The Petitioner has also filed its rejoinder vide affidavit dated 10.12.2020, to the reply filed by TANGEDCO and DNH.

## **Reply of the Respondents**

8. Respondent No. 3, TANGEDCO, vide its reply dated 6.8.2020, has submitted as under:

(a) Based on the Notification dated 25.1.2016 of MoEF&CC, this Commission in its order dated 19.12.2017 in Petition No. 101/MP/2017 has set out certain mandatory conditions to be followed for claiming cost of transportation of fly ash by generating companies.

(b) Reliance placed by the Petitioner on the order dated 3.12.2019 in Petition No. 213/MP/2018 to claim transportation charges for fly ash based on the 'negotiated route' is not tenable. The Petitioner cannot bypass the specific directions of this Commission in order dated 19.12.2017 in Petition No. 101/MP/2017. Also, the facts of the present case are different from those of Petition No. 213/MP/2018 and the Petitioner has not produced the agreements entered into under 'negotiated route'.

(c) Proceeds of sale of fly ash are required to be accounted for by the Petitioner and passed on to the beneficiaries.

(d) Environment Clearance dated 19.5.2008 for establishment of the Project, clearly states that fly ash shall be collected in dry form and its 100% utilisation shall be ensured from day one. Bottom ash shall be disposed in conventional slurry mode in the ash pond. The Petitioner has not produced any record to show that it has complied with the specific condition of Environment Clearance from Commercial Operation Date ('COD') of the Project. The Petitioner is bound to bring on record the amount of fly ash it had at the end of each year from COD, if it had not complied with the 100% utilisation condition.

(e) From the statement made in the Petition that it had not sold fly ash but has account of fly ash in its possession, it can be inferred that the Petitioner had accumulated fly ash over the years in violation of the conditions of Environment Clearance. The quantum of fly ash at the time of entering into 'negotiated route' contract with the cement companies cannot be for a quantum, more than fly ash generated during the said financial year. The accumulated quantum from COD, if any, has to be accounted for, as this has a direct impact

on the transportation cost incurred by the Petitioner. No details have been provided in this regard.

(f) As per the MoEF&CC Notification dated 25.1.2016, the cost of transportation of fly ash within a radius of hundred kilometers from the thermal plant is required to be borne by thermal plant and cost beyond one hundred kilometers and upto three hundred kilometers shall be shared between the user and the coal or lignite based thermal plant. It appears that the Petitioner is claiming compensation for the expenditure incurred for transporting fly ash within 100 km, which is not correct and is liable to be rejected.

(g) The Petitioner has claimed Rs.2,47,97,176/- towards expenditure incurred on transportation of fly ash generated from the Project. However, the Petitioner has not placed on record any document to show the compensation amount related to each respondent, their operational parameters to calculate the quantum of coal used for each PPA or quantum of fly ash generated with respect to each PPA.

(h) The Petitioner never informed TANGEDCO about the bidding process undertaken by it for awarding fly ash transportation contract as required under the terms and conditions of PPA. Also, no communication was made by the Petitioner indicating the price discovered through competitive bidding process for award of contract to transport fly ash to TANGEDCO.

(i) The Petitioner has also not placed on record any documents showing the revenue generated from sale of fly ash for the period prior to and after the MoEF&CC Notification dated 25.1.2016.

(j) The Petitioner is not entitled to any carrying costs. There is no provision in the PPA to allow carrying cost on the amount covered under change in law till its determination is done by the Commission. Terms and conditions of the PPA govern the parties. The liability for making payment of carrying cost arises only when the cost incurred is determined, supplementary invoice is raised and the due date lapses.



9. The Respondent No. 2, DNH vide its reply dated 10.8.2020, has mainly submitted as under:

(a) The order of the Commission dated 16.3.2018 in Petition No. 1/MP/2017 has been challenged by DNH before the APTEL in Appeal No. 350 of 2018, which currently pending adjudication.

(b) In the present case, despite the cost of transportation to cement companies being substantially lower, the Petitioner has entered into an agreement for transportation and utilization of fly ash for road construction project, wherein the cost discovered is substantially higher (by about 5 times). When the costs under negotiated routes are substantially lower, the Petitioner ought to have disposed of fly ash under most cost-efficient route. The cost efficiency of the individual agreements entered into between the Petitioner and cement companies should be examined by the Commission.

(c) In terms of the order of the Commission, the Petitioner is to adjust any revenue generated from sale of fly ash. However, the Petitioner has simply stated that no revenue has been generated from sale of fly ash. In this regard, there are two aspects which have to be looked at. Firstly, the Petitioner should transparently disclose what efforts it has made to sell fly ash (if at all). It cannot be that the Petitioner has sat idle in the hope that all costs would be allowed by the Commission without any effort by the Petitioner. Secondly, the data/invoices provided by the Petitioner are only for the period from 3.5.2019 to 31.8.2019. The Petitioner has not disclosed any information regarding sale for the prior period. The Commission may direct the Petitioner to provide all information in this regard.

(d) The Commission may, considering the other generators who are placed similarly as the Petitioner, take a holistic view in regard to the issue of fly ash disposal after looking at the prevalent rate of transportation of fly ash in case of other generators.

(e) The agreements and invoices placed on record by the Petitioner are pursuant to the order of the Commission dated 16.3.2018. The carrying cost would only arise if the costs were incurred by the Petitioner prior to the order of the Commission. Thus, in present case, the Petitioner is not entitled to any

carrying cost, as the costs have been incurred only subsequent to the order of the Commission. Also, the Petitioner has calculated carrying cost at the rate of 12.25%, which has no basis. Interest, if at all, has to be given at the cost of lending, or as per the Regulations framed by the Commission, whichever is lower.

**Rejoinder of the Petitioner to the reply filed by TANGEDCO and DNHPDCL**

10. In its rejoinder dated 10.12.2020 to the reply filed by TANGEDCO, the Petitioner has submitted as under:

(a) The Commission in its order dated 16.3.2018 has already held that levy of charges towards transportation of fly ash in terms of MoEF&CC Notification dated 25.1.2016 is a change in law event.

(b) The contention of TANGEDCO that the Petitioner cannot rely on the Commission's order dated 3.12.2019 in Petition No. 213/MP/2018 to bypass the directions of the Commission in order dated 16.3.2018 is wrong and misplaced. TANGEDCO cannot be permitted to indirectly challenge the order dated 3.12.2019 in Petition No. 213/MP/2018 in the present proceedings to deny relief to the Petitioner.

(c) TANGEDCO's contention that negotiated price with cement companies should not be considered, is also misplaced. The position qua cement companies and the fact that they do not enter into competitive bidding for transportation of fly ash, has been accepted by this Commission in the order dated 3.12.2019 in Petition No. 213/MP/2018. Further, the cost of transportation negotiated with the cement manufacturers is substantially lower than the transportation cost discovered through the competitive bidding process. In recognition of this, the Commission had allowed reimbursement of the cost of transportation to cement manufacturers through the negotiated route in said order dated 3.12.2019 in Petition No. 213/MP/2018.

(d) The Petitioner has complied with the requisite conditions laid down by the Commission in order dated 16.3.2018 in Petition No. 1/MP/2017. Also, The Petitioner was not required to inform TANGEDCO or any other Respondent qua

commencement of competitive bidding process and award to successful bidders.

(e) The compliance of conditions prescribed under the Environment Clearance is not relevant for adjudication of the present Petition which has been filed only for determination of compensation pursuant to a change in law already allowed by this Commission. The Petitioner has complied with the conditions specified in the Environment Clearance and utilised fly ash accordingly. The condition prescribed under the Environment Clearance was relevant only for determination of change in law and was duly considered by this Commission and allowed while passing order in the Petition No. 1/MP/2017. TANGEDCO cannot be permitted to re-open issues already decided by this Commission.

(f) TANGEDCO's contentions regarding the Petitioner's compliance with the Environment Clearance granted for the Project are misplaced. Prior to the MoEF&CC Notification dated 25.1.2016, the Petitioner was complying with the requirements set out in the Environment Clearance dated 19.5.2008. Subsequently, the Maharashtra Pollution Control Board has amended its consent to operate the Project and had instructed the Petitioner to comply with the MoEF&CC Notification dated 25.1.2016. Thereafter, the Petitioner has been complying with the MoEF&CC Notification dated 25.1.2016.

(g) The APTEL in its judgment dated 28.8.2020 in Appeal No. 21 of 2019 and Appeal No. 73 of 2019 in the case of Talwandi Sabo Power Limited v. PSERC & Ors. held that the Notification dated 7.12.2015 issued by the MoEF&CC prescribing installation of FGD is a change in law event, even though the Environment Clearance (before the cut-off date) stipulated space to be provided for FGD installation. The APTEL held that the MoEF&CC notification dated 7.12.2015 was issued after the cut-off date and that the Appellants could not have anticipated new emission norms in the future. The aforesaid ratio is squarely applicable in the present case. The requirement for fly ash utilization in the Environment Clearance does not have bearing on the costs incurred by the Petitioner for transportation of fly ash pursuant to the MoEF&CC Notification dated 25.1.2016 which has been held to be a change in

law event by this Commission. The Petitioner has also complied with the conditions specified in Environment Clearance and utilized the fly ash accordingly. However, there was no sale of fly ash and no revenue was generated.

(h) TANGEDCO's contention that the Petitioner has not provided the break-up of compensation vis-à-vis beneficiaries along with operational parameters is misplaced. As regards operational parameters, the Commission has already decided the said issue in terms of order dated 15.11.2018 in Petition No. 88/MP/2018 (*GMR Warora Energy Ltd. vs. MSEDCL & Ors*). Accordingly, the same would also apply in the present Petition. Further, the compensation will be pro-rated among all beneficiaries of the Project.

(i) TANGEDCO's contentions regarding prior period fly ash generation, utilisation and accumulation of quantum of fly ash is misplaced. The Petitioner has complied with all the conditions prescribed under the Environment Clearance and the MoEF&CC Notification and utilised fly ash accordingly. The quantum of fly ash was regularly reported to CEA and copies of letters issued to CEA reporting the fly ash generation and utilization data for the period from 2016-17 to 2019-20 have also been furnished.

(j) TANGEDCO's contention that the Petitioner cannot claim cost for transportation cost below 100 km is erroneous and ought to be rejected. MoEF&CC Notification dated 25.1.2016 directs that thermal power station will bear the entire cost of transportation of fly ash for a distance below 100 km, which has been held to be a change in law. Thus, the expenditure incurred for transportation of fly ash ought to be allowed.

(k) TANGEDCO's submission that the Petitioner cannot claim carrying cost as there is no provision for the same and that TANGEDCO is liable for payment only when cost is incurred and invoice raised, is misplaced. TANGEDCO has raised similar objections which have repeatedly been rejected by this Commission, the APTEL and the Hon'ble Supreme Court. The issue of carrying cost is no longer *res-integra* and has been decided by the Hon'ble Supreme Court in its judgment dated 25.2.2019 in Civil Appeal No. 5685 of 2018 in the case of *Uttar Haryana Bijli Vitran Nigam Ltd. & Anr. vs. Adani*

*Power Ltd. & Ors.* Further, Hon'ble Supreme Court held that the compensation must be from the date of the impact of the event of change in law and not from the date of Order granting compensation for change in law.

11. In its rejoinder dated 10.12.2020 to the reply filed by DNH, the Petitioner has submitted as under:

(a) Given the quantum of fly ash generated, it is not possible for the entire quantum to be supplied to only cement manufacturers. The Procurers cannot preclude the Petitioner from supplying fly ash to only a class of end users as long as the Petitioner has acted in a prudent manner and ensured compliance with the MoEF&CC Notification dated 25.1.2016 and the directions of this Commission vide order in the Petition No. 1/MP/2017.

(b) Till date, no revenue has been generated from sale of fly ash. The Petitioner has taken all possible steps to generate revenue from sale of fly ash. However, in terms of MoEF&CC Notification, only limited end-uses are permitted and at present there have been no offers to purchase the fly ash.

(c) The Commission vide Record of Proceedings for the hearing dated 13.7.2017 in Petition No. 1/MP/2017 had directed the Petitioner to provide, *inter alia*, details of fly ash utilization, etc. and in accordance thereof, the Petitioner had filed an affidavit dated 23.8.2017 before the Commission providing the requisite information. Therefore, DNH's contention that no data for the prior period has been provided is incorrect and ought to be rejected.

(d) In view of the settled position laid down in terms of judgment of Hon'ble Supreme Court dated 25.2.2019 in Civil Appeal No. 5685 of 2018 (*Uttar Haryana Bijli Vitran Nigam Ltd. & Anr. vs. Adani Power Ltd. & Ors.*), the Petitioner is entitled to carrying cost from the effective date of the change in law events. The same cannot be limited to the expenditure incurred prior to issuance of order dated 16.3.2018 in Petition No. 1/MP/2017. If such contention of DNH is accepted, it would amount to introduction of new terms into the PPA/insertion of an implied term, which is impermissible. In this regard, reliance has been placed on the decision of Hon'ble Supreme Court in the case of *Nabha Power Limited v. PSPCL* [reported as 2018 ELR (SC) 001].

## Hearing dated 13.7.2021

12. During the course of hearing on 13.7.2021, learned counsel for the Petitioner and the learned counsel for the Respondent No. 2, DNH reiterated the submissions made in their pleadings, which are not reproduced herein for the sake of brevity. After hearing the parties, the Petitioner was directed to furnish the following details/information on affidavit:

- (a) Certified copy of statement from the entities to whom fly ash has been supplied and utilized, to the effect that they have not paid any cost towards fly ash and its transportation to the Petitioner;
- (b) Details of quantum of fly ash supplied to each user for each month;
- (c) Copy of agreement pertaining to supply of fly ash executed with users of fly ash;
- (d) Whether the Petitioner has maintained separate account to record revenue generated from fly ash sales?; and
- (e) Action taken by the Petitioner for sale of fly ash along with documentary evidence.

13. In compliance to the aforesaid direction, the Petitioner vide its affidavit dated 29.7.2021 has filed the information called for along with various supporting documents. In the said affidavit, the Petitioner has submitted as under:

- (a) As to the points (a) and (b), the vendors to whom fly ash is supplied by the Petitioner can broadly be divided into two categories:

Category 1: Vendors with whom the Petitioner has executed Purchase Orders for supply and transportation of fly ash to the ultimate end-users, which includes, cement manufacturers and companies engaged in road/highway construction.

Category 2: End-users who directly purchase fly ash from the Petitioner. No transportation charges are incurred for such sale.

- (b) The Petitioner has furnished the quantities of fly ash supplied to each vendor in Category 1 along with cost incurred toward transportation for financial

year 2019-20 and financial year 2020-21 along with all invoices. For financial year 2019-20, the Petitioner has supplied a total quantum 2,37,322.50 MT fly ash to the Category 1 vendors and incurred a sum of Rs. 6,36,30,373.72/- (including GST) towards transportation of fly ash. For financial year 2020-21, the Petitioner has supplied a total quantum of 5,62,716.56 MT of fly ash to the Category 1 vendors and incurred a sum of Rs. 13,50,48,051.93/- (including GST) towards transportation of fly ash.

(c) The quantities of fly ash supplied by the Petitioner are also verified by end use certificates submitted by Category 1 vendors as furnished by the Petitioner. The end-use certificates stipulate that fly ash made available by the Petitioner has been utilized either for the purpose of road construction or for cement manufacturing. Pertinently, the end-users do not certify the transportation charges incurred by the Petitioner. Further, no payment was received from Category 1 vendors towards cost of fly ash. The aforesaid quantity of fly ash supplied and amounts incurred towards transportation charges have been certified by the Petitioner's auditors and copies of Statutory Auditor's Certificate for financial year 2019-20 and financial year 2020-21 have also been furnished.

(d) For financial years 2019-20 and 2020-21, the Petitioner had sold 4,393.53 MT (2,701.41 MT in financial year 2019-20 and 1,692.12 MT in financial year 2020-21) of fly ash to other vendors with whom Purchase Orders have not been executed. This includes vendors who directly procure fly ash from the Project and the Petitioner does not incur any transportation charges towards sale of such fly ash. The Petitioner has generated revenue of Rs.10.49 lakh (Rs. 1,28,918/- for financial year 2019-20 and Rs. 9,20,669/- for financial year 2020-21) from sale of fly ash to Category 2 vendors. The Petitioner has also furnished the relevant details along with invoices raised by it for sale of fly ash to such vendors and certification for the Petitioner's statutory auditor in this regard.

(e) As regards point (c), the Petitioner has executed the following purchase orders for supply and transportation of fly ash from its Project and has also furnished the copies the agreements/ purchase orders executed by the Petitioner:

Sr. No.	Date	Vendor	Scope of Work	Amount (Rs.)
1	28.5.2019	Avantta Infra Pvt. Ltd.	Ash transportation for road development at around 100 km range	3,68,53,907
2	23.8.2019	ACC Ltd.	Transportation of fly ash from GWEL's plant to cement plant	16,20,000
3	23.8.2019	Ambuja Cements Ltd.	Transportation of fly ash from GWEL's plant to cement plant	13,80,000
4	23.8.2019	Manikgarh Cement	Transportation of fly ash from GWEL's plant to cement plant	60,00,000
5	23.8.2019	Ultratech Cement Ltd.	Transportation of fly ash from GWEL's plant to cement plant	60,00,000
6	22.1.2020	Ashtech India Pvt. Ltd.	Transportation of fly ash from GWEL's plant for cement manufacturing and/or road construction	10,00,000

(f) As regards point (d), the Petitioner has received revenue of Rs.10.49 lakh from sale of 4,393.53 MT fly ash to the Category 2 vendors for financial year 2019-20 and financial year 2020-21 and such revenue is being maintained separately in its books.

(g) As regards point (e), the Petitioner has made consistent and regular efforts to sell fly ash. As detailed above, the Petitioner has executed Purchase Order for supply and transportation of fly ash to various cement manufacturers such as ACC Cement Limited, Ambuja Cement Limited, Ultratech Cement Limited and Mainkgarh Cements Limited. The Petitioner has also executed Purchase Orders with companies such as Avantta and Ashtech involved in road and highway construction. The Petitioner has also sold 4,393.53 MT fly ash to the Category 2 vendors for financial year 2019-20 and financial year 2020-21 and received revenue of Rs.10.49 lakh from such sale. The Petitioner has also tied up with MSTC Limited for conducting e-auction sale of 8,00,000 MT of fly ash on 20.7.2021 and 21.7.2021. However, as informed by MSTC vide letter dated 23.7.2021, no bids were received for procuring fly ash.

### **Analysis and Decision**

14. We have considered the submissions of the Petitioner and the Respondents and perused documents available on record.



15. The Petitioner had approached the Commission through Petition No. 1/MP/2017 seeking declaration that the Notification dated 25.1.2016 issued by MoEF&CC, which mandates the thermal power plants to bear the cost of transportation of fly ash, is a change in law event within the meaning of Article 10 of PPAs. In that petition, the Petitioner had contended that MoEF&CC vide its Notification No. S.O. 254 (E) dated 25.1.2016 amended the Environment (Protection) Rules, 1986 and imposed additional cost towards fly ash transportation and mandated that thermal power plants need to bear the cost of transportation of ash and, thus, after 25.1.2016, the Petitioner was required to bear (a) transportation costs of fly ash to users undertaking the specified activities which are situated within 100 km of the Project; and (b) 50% of the transportation costs of fly ash to users undertaking the specified activities which are situated between 100 km and 300 km of the Project. By order dated 16.3.2018, the Commission held that the MoEF&CC Notification dated 25.1.2016 was a change in law event and that the expenditure claimed by the Petitioner on account of additional cost incurred towards fly ash transportation is *in-principle* admissible under change in law and that admissibility of such claims would be subject to certain conditions as indicated therein. Accordingly, the Commission granted liberty to the Petitioner to approach the Commission with required information/ documents so as to analyse the case for determination of compensation. Relevant portion of the order dated 16.3.2018 is extracted as under:

*“117. We have examined the submissions of the parties. As on cut-off dates for the MSEDCL, DNH and TANGEDCO PPAs, there was no direction with regard to utilization of fly ash under Environment (Protection) Act, 1986. Subsequently, Ministry of Environment and Forests, Govt. of India vide its Notification dated 3.11.2009 had issued directions regarding utilization of fly ash under the Environment (Protection) Act, 1986. The Ministry of Environment and Forests, Govt. of India vide Notification No. S.O.254 (E) dated 25.1.2016 has amended the Environment (Protection) Rules, 1986 and has imposed additional cost towards fly ash transportation. Relevant portion of said Rules is extracted as under:*

*“(10) The cost of transportation of ash for road construction or for manufacturing of ash based products or use as soil conditioner in agriculture activity within a*

*radius of hundred kilometers from a coal or lignite based power plant shall be borne by such coal or lignite based thermal power plant and cost of transportation beyond the radius of hundred kilometers and up to three hundred kilometers shall be shared between the user and the coal or lignite based thermal power plant equally.”*

118. *It is evident from the submissions of the Petitioner that it has not incurred any expenditure on account of transportation of fly ash and is only seeking an in-principle approval of the said claim. The question of levy of charges for transportation of fly ash as a „Change in Law” event was considered by the Commission in Petition No. 101/MP/2017 (DB Power Ltd v/s PTC India Ltd & ors) in terms of the amendment dated 25.1.2016 and the Commission by order dated 19.12.2017 disposed of the same as under:*

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

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

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

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

*d) Actual expenditure incurred as claimed should be duly certified by auditors and the same should be kept in possession so that it can be produced to the beneficiaries on demand. The Petitioner is granted liberty to approach the Commission with above documents to analyse the case for determination of compensation.”*

119. *In line with the above decision, the expenditure claim by the Petitioner is in-principle admissible under the Change in law and the admissibility of the said claim is subject to the conditions indicated in the said order (as quoted above). The Petitioner is granted liberty to approach the Commission with above documents to analyze the case for determination of compensation.”*

16. In terms of the liberty granted by the Commission in the aforesaid order, the Petitioner has filed the present Petition for determination of compensation on account of expenditure incurred towards transportation of fly ash and for computation of carrying cost thereon, furnishing various supporting documents and stating the compliance with the conditions stipulated by the Commission therein.

17. As regards condition (a) specified in the order dated 16.3.2018, the Petitioner has submitted that on 22.12.2018, the Petitioner invited bids for awarding the contract for transportation of fly ash by issuing an invitation to bid vide Tender No. GWEL/ASH-TRPT/18-19/01. In response, four bidders, namely, Vinod N. Maniyar, Scop Infrastructure & Co., Purva Construction and Avantta participated in the bid process and submitted their offers. Pursuant to negotiations with the shortlisted bidders, Avantta was selected as the successful bidder and was issued Lol dated 7.4.2019. Subsequently, on 15.4.2019, Agreement for transportation of fly ash was entered into between the Petitioner and Avantta. It has been submitted by the Petitioner that fly ash being made available to Avantta is being supplied to Ashtech (India) Private Limited ('Ashtech') for utilization of road construction projects being undertaken by Megha Engineering and Infrastructure Limited (MEIL). The Petitioner has also furnished the end-user certificate issued by MEIL dated 3.7.2019 stating that fly ash had been received from the Petitioner for road construction project.

18. Pursuant to the direction of the Commission vide Record of Proceedings for the hearing dated 13.7.2021, the Petitioner has also furnished additional details relating to total amount incurred by the Petitioner towards transportation of fly ash, invoices raised thereof, end-user certificates in support thereof, purchase orders issued and auditor certificates, etc. for financial year 2019-20 and financial year 2020-21.

19. We have considered the submissions made by the Petitioner and the various details/ documents furnished in support thereof. Perusal of the same reveals that the selection of Avantta has been done by the Petitioner by carrying out a bidding process and rates discovered in the bidding process have been brought down on the basis of further 'negotiation'. Pursuant thereto, Lol was issued to Avantta on

7.4.2019 and agreement was entered into on 15.4.2019. The Petitioner has also placed on record various Purchase Orders issued to Avantta for supply and transportation of fly ash from the Project. Brief statement of the invoices raised by Avantta on to the Petitioner, quantity of fly ash offtaken, and corresponding end-user details are as under:

Sl. No.	Vendors	Invoice No	Invoice Date	Quantity (MT)	Basic Amount (Rs.)	GST (Rs.)	Total Amount (Rs.)	End User Certificate
1	Avantta - NHAI Road Works	GMR/2019-20/001	16-08-2019	25767.88	1,49,99,998.31	7,49,999.92	1,57,49,998.22	MEIL dated 3.7.2019 for 30,300 MT
2	Avantta - NHAI Road Works	GMR/2019-20/003	26-10-2019	4,532.12	26,38,236.00	1,31,911.80	27,70,147.80	
3	Avantta - NHAI Road Works	GMR/2019-20/004	26-10-2019	17,915.33	1,01,31,767.00	5,06,588.35	1,06,38,355.35	(i) MEIL dated 24.10.2019 for 16,812 MT* (ii) APS Hydro Pvt. Ltd. dated 16.8.2019 for 694.71 MT
4	Avantta - NHAI Road Works	GMR/2019-20/005	26-10-2019	9,822.77	16,91,095.00	84,554.75	17,75,649.75	APS Hydro Pvt. Ltd. dated 7.11.2019 for 9822.99 MT
	<b>Total</b>			<b>58,038.10</b>	<b>2,94,61,096.31</b>	<b>14,73,054.82</b>	<b>3,09,34,151.12</b>	

[\* Mismatch in quantum supplied as per invoice and certified by end user - to tune of 406.81 MT]

20. The Petitioner has also furnished copy of the invoices mentioned in the above table for transportation charges as raised by Avantta along with the end user certificates issued by MEIL and APS Hydro Private Limited indicating the receipt of quantity of fly ash (in MT), distance and the end usage of the fly ash. As per the end user certificates, fly ash supplied to MEIL are used for road project works whereas it has been used by APS Hydro Private Limited for the purpose of road embankment works.

21. However, it is observed that the end user certificates issued by MEIL dated 3.7.2019 and 24.10.2019 indicate that fly ash from the Project has been received through Ashtech. In this regard, the Petitioner has submitted that fly ash being made

available to Avantta had been supplied to Ashtech for utilization in road construction projects by MEIL and in support thereof, a letter dated 22.4.2019 from Avantta to Ashtech regarding supply of fly ash from GWEL to MEIL for road construction has been placed on record. The relevant extract of the said letter is reproduced below:

“To

.....

*ASHTECH (India) Pvt. Ltd.;*  
*Ashford Center, 9<sup>th</sup> Floor*  
*Opp. Peninsula Corporate Park*  
*Lower Parel (W), Mumbai – 400 013.*

*Subject: Transportation of Fly Ash from GMR Warora Energy Ltd. plant to Megha Engineering & Infrastructure Ltd. for road construction project*

*In Re:*

- (i) Agreement dated 15 April 2019 executed between Avantta Inra Pvt. Ltd. and GMR Warora Energy Limited for transportation of Fly Ash (GWEL Avantta Agreement)*
- (ii) Agreement between Ashtech (India) Pvt. Ltd. and Megha Engineering & Infrastructure Ltd. for supply of Fly Ash for Nagpur-Mumbai Expressway Project (ASHTECH-MEIL Agreement)*

*This is in reference to our discussion held on 18<sup>th</sup> and 19<sup>th</sup> April 2019, whereby you apprised us for ASHTECH-MEIL Agreement wherein ASHTECH was required to supply Fly Ash to MEIL for road construction projects. Accordingly, you requested use to consider the possibility of transporting Fly Ash collected by us from GMR Warora Energy Ltd. directly to MEIL on behalf of ASHTECH.*

*In this regard, we hereby convey our acceptance and confirm to supply the Fly Ash collected from GWEL plant to MEIL for use in road construction projects on the following terms and conditions contained in this Letter Agreement (“Agreement”):*

- 1. Scope of Work: AVANTTA shall be responsible for collecting and loading the Fly Ash generated from the GWEL Plant. The Fly Ash shall then be transported to the road construction project site identified by ASHTECH/MEIL*

....

- 3. Obligations of ASHTECH and AVANTTA under this Agreement:*

*Obligation of AVANTTA:*

*3.1 AVANTTA shall deploy, suitable and pollution free fly ash transportation system for collection, loading and transportation of Fly Ash from the GWEL Plant.....*

.....

*3.3 AVANTTA shall bear the cost of loading, unloading, transportation and other associated cost.*

*Obligation of ASHTECH*

*ASHTECH shall provide end use certificate and any other documents as may be required by GWEL/AVANTTA as proof of utilization of Fly Ash in the road construction project. Accordingly, AVANTTA shall raise invoices towards transportation cost directly to GWEL as per the terms of understanding between AVANTTA and GWEL....”*

22. We observe from the agreement between the parties that the duty of collection, loading and transportation of fly ash from the Project remained with Avantta, while Ashtech was required to provide end-use certificate as required by the Petitioner/ Avantta as proof of utilization of fly ash in the road construction project. Although the Petitioner has not provided any clarification for the need of requiring an intermediary, we note that the end-use certificate issued by MEIL specifically states that the fly ash has been received from the Project and that the invoices raised by Avantta on the Petitioner are in terms of the agreed rate (i.e. Rs.5.94/km × 98 km) between the Petitioner and Avantta. We also note that none of the Respondents have raised any issue in this regard. However, in order to ensure that there is no sale of fly ash for the financial gains as per agreement between Ashtech and MEIL for ash supplied from the Project, the Petitioner is also required to furnish a certification from the end-user in terms of the direction of the Commission vide Record of Proceedings for the hearing dated 13.7.2021 as discussed in the subsequent paragraphs of this order.

23. In the table submitted under paragraph 19, we note some discrepancies in the quantum of fly ash transported as in the invoice raised by Avantta vis-à-vis end-user certificates furnished by MEIL and APS Hydro Pvt. Ltd. For example, as per invoice No. GMR/2019-20/004, while Avantta has raised invoice for transportation of fly ash of 17,915.33 MT, end-user certificate from MEIL is for 16,812 MT and from APS Hydro Pvt. Ltd., it is for 694.71 MT against invoices totaling 17506.71 MT only. We do not find a need for going into details invoices and deem it necessary to direct the

Petitioner that for claiming compensation, the Petitioner shall ensure that quantity of ash for which invoices have been raised, corresponds to the quantity certified by the end-users in all cases.

24. In addition, the Petitioner vide affidavit dated 29.7.2021 has also placed on record the expenses incurred towards transportation of fly ash for financial years 2019-20 and 2020-21 in terms of Purchase Order dated 22.1.2020 issued to Ashtech. The Petitioner has placed on record various invoices raised by Ashtech towards transportation charges on the Petitioner indicating the distances, applicable charges, end-users and the quantity of fly ash in support thereof. The Petitioner has also furnished the end-user certificates of Agrawal Global Infratech Pvt. Ltd. (road project), T&T Infra Ltd. (embankment works), Vidya Infrabuilt Pvt. Ltd. (embankment work), OM Fly Ash Products (bricks making), Shree Bricks (bricks making), Uttam Bricks (bricks making), Tirupati Balaji Corp. (bricks making), Lakshmee Intelligent Technologies (bricks making), Mahalaxmi Fly Ash Bricks (bricks making), Uttam Bricks (bricks making), Vidhmaan Associates (bricks making) and SRK Constructions and Projects Pvt. Ltd. (embankment works) and MEIL (embankment works) indicating the distance as well as the quantity of fly ash supplied to.

25. We have perused the documents furnished by the Petitioner. Though the Petitioner has furnished the Purchase Order dated 22.1.2020 issued to Ashtech for transportation of fly ash from the Project to the destination of end-user(s) along with rates and terms and conditions thereof, the Petitioner has not provided any clarification regarding mode of selection of Ashtech. From the documents placed on record by the Petitioner, it is not clear as to whether the selection of Ashtech has been done by following the competitive bid process or not.

26. Also, perusal of the invoices raised by Ashtech reveals that certain invoices also include the transportation charges for supply of fly ash to certain end-users under the head "Quarry" (for e.g. Chandu Quarry, Temmuda Quarry, etc.). Neither the actual end usage appears to be clear nor end-user certificate from such end-users have been furnished by the Petitioner.

27. Thus, neither there is clarity as to whether the selection of Ashtech has been done by following the competitive bid process, nor there is clarity regarding the actual end usage as no end-user certificates have been furnished. Therefore, any claim of the Petitioner for reimbursement of expenditure incurred in terms of the invoices raised by Ashtech shall be subject to the Petitioner furnishing to the Respondents the details of competitive bidding process undertaken along with an undertaking to the effect that selection of Ashtech has been done following competitive bid process. Further, the Petitioner shall be entitled to be compensated for the expenditure incurred towards transportation of fly ash only to the extent of end usage specifically provided in the MoEF&CC Notification dated 25.1.2016 and only on providing end-user certificate from such end-users.

28. The Petitioner, vide Record of Proceedings for the hearing dated 13.7.2021, was directed to furnish copy of statement from the entities to whom fly ash has been supplied and utilized, to the effect that they have not paid any cost towards fly ash or its transportation to the Petitioner. The rationale behind such certification is to ensure that there is no double charging of transportation charges and/or collecting the charges for supply of fly ash by intermediary. In case of fly ash supplied to the cement manufacturers, this issue does not arise since the Petitioner has entered into direct agreement with end-user (cement manufactures) and agreement/ Lol specifically providing for the Petitioner supplying fly ash free of cost and bearing the



transportation charges of such fly ash. However, there being no direct relationship between the Petitioner and end-users involved in construction of road/ bricks, such certificate assumes importance.

29. Hence, we direct that the Petitioner, while claiming the compensation from the Respondents for the expenditure incurred towards transportation of fly ash, will furnish an undertaking of such end-user certifying that such user has not paid towards supply of fly ash or towards transportation of such fly ash from the Project. In case some payment has been received from supply of fly ash, such cost shall be deducted from compensation payable by the Respondents.

30. The Petitioner has submitted that it has also entered into contracts with various cement companies, namely, Ultratech Cement Limited, ACC Cement Limited, Ambuja Cement Limited and Mangikarh Cement Ltd. for the purpose of supplying fly ash for manufacturing cement. The Petitioner has submitted that as per prevalent industry practice, the cement companies engage their own transporters for the purposes of transportation of fly ash and they do not participate in competitive bidding process for transportation of fly ash. The Petitioner has submitted that the cost incurred by it towards transportation of fly ash for utilization in the manufacture of cement is substantially lower than the transportation cost incurred for transporting fly ash for use in road construction projects. Brief statement of invoices raised by the cement manufactures, quantity of fly ash oftaken and the end user certificate as furnished by the Petitioner are as under:

Sr.	Vendors	Invoice No	Invoice Date	Quantity (MT)	Basic Amount (Rs.)	GST (Rs.)	Total Amount (Rs.)	End User Certificate
1	Manikgarh Cement Ltd.	1900000001	31-07-2019	7105.26	8,52,631.20	1,53,473.62	10,06,104.82	Manikgarh Cement Unit –II dated 25.9.2019 for 16,963 MT*
2	Manikgarh Cement Ltd.	1900000002	11-09-2019	8597.42	10,31,690.40	1,85,704.27	12,17,394.67	
3	UltraTech Cement Ltd.	3170000429	11-09-2019	2030.08	2,43,609.60	43,849.73	2,87,459.33	Ultratech Cement dated 23.10.2019 for
	Ultratech	3170000429	11-09-2019	5426.96	6,51,235.20	1,17,222.34	7,68,457.54	

Sr.	Vendors	Invoice No	Invoice Date	Quantity (MT)	Basic Amount (Rs.)	GST (Rs.)	Total Amount (Rs.)	End User Certificate
4	Cement Ltd.							7457.04 MT
5	Ambuja cement Ltd.	2.716E+11	16-09-2019	3470.61	4,16,473.20	74,965.18	4,91,438.38	Ambuja Cement dated 26.10.2019 for 16755.78 MT
6	Ambuja cement Ltd.	2.716E+11	16-09-2019	5620.33	6,74,439.60	1,21,399.13	7,95,838.73	
7	Ambuja cement Ltd.	2.716E+11	09-10-2019	1411.14	1,83,448.20	33,020.68	2,16,468.88	
8	Ambuja cement Ltd.	2.716E+11	09-10-2019	6253.7	8,12,981.00	1,46,336.58	9,59,317.58	
9	ACC Cement Ltd.	2.706E+12	19-09-2019	4423.59	5,30,830.80	95,549.54	6,26,380.34	ACC Limited dated 22.10.2019 for 22,407.17 MT
10	ACC Cement Ltd.	2.706E+12	19-09-2019	6810.48	8,17,257.60	1,47,106.37	9,64,363.97	
11	ACC Cement Ltd.	2.706E+12	26-09-2019	11,173.10	14,52,503.00	2,61,450.54	17,13,953.54	
15	Ultra Tech Cement-I	3170000472	30-09-2019	831.67	99,800.40	17,964.07	1,17,764.47	Ultratech Cement dated 16.1.2020 for 16690.3 MT
16	Ultra Tech Cement-I	3170000548	07-11-2019	3,323.73	3,98,847.60	71,792.57	4,70,640.17	
17	Ultra Tech Cement-I	3410009164	05-12-2019	6,449.77	7,73,972.40	1,39,315.03	9,13,287.43	
18	Ultra Tech Cement-I	3170000813	06-01-2020	6,085.13	7,30,215.60	1,31,438.81	8,61,654.41	
19	Ultra Tech Cement-II	3170000840	14-01-2020	6,293.46	6,60,813.30	1,18,946.39	7,79,759.69	Ultratech Cement dated 22.1.2020 for 41,689.78 MT
20	Ultra Tech Cement-II	1900000005	10-11-2019	6,382.28	7,65,873.60	1,37,857.25	9,03,730.85	
21	Ultra Tech Cement-II	1900000006	10-12-2019	9,491.08	11,38,929.60	2,05,007.33	13,43,936.93	
22	Ultra Tech Cement-II	3170000894	10-01-2020	19,522.96	23,42,755.20	4,21,695.94	27,64,451.14	
23	Ultra Tech Cement-I	3170000974	07-02-2020	1,728.22	2,07,386.40	37,329.55	2,44,715.95	--
		<b>Total</b>		<b>1,22,430.97</b>	<b>1,47,85,693.9</b>	<b>26,61,424.92</b>	<b>1,74,47,118.82</b>	

[\* There is mismatch in the quantity supplied to as per invoice and certified by the End user]

31. However, against the aforesaid claims of the Petitioner, TANGEDCO has submitted that the Commission vide order dated 16.3.2018 in Petition No. 1/MP/2017 had laid out certain mandatory condition including award of fly ash transportation contract through a transparent competitive bidding process and, therefore, the claims of the Petitioner on the basis of negotiated route with cement companies cannot be allowed.

32. The Respondent, DNH, has submitted that cost of fly ash transportation of the cement companies (entered into under negotiated route) being substantially lower

than the cost of transportation, the Petitioner ought to have disposed of fly ash under the most-efficient route (i.e. through negotiated route).

33. *Per contra*, the Petitioner has submitted that the fact that as per the prevalent industry practice, the cement companies do not participate in the competitive bid process for transportation of fly ash, has been acknowledged by the Commission in its order dated 3.12.2019 in Petition No. 213/MP/2018 (DB Power Ltd. vs. PTC India Ltd. and others), wherein the Commission, after observing that the cost of transportation negotiated with cement companies being substantially lower than the transportation cost discovered in bid process, has allowed the reimbursement of the cost of transportation to the cement manufacturers through negotiated route. TANGEDCO cannot indirectly challenge the said order of the Commission in the present proceedings. The Petitioner has also submitted that the procurers cannot preclude the Petitioner from supplying fly ash to only a class of end users as long as the Petitioner has acted in a prudent manner and has complied with MoEF&CC Notification dated 25.1.2016 and directions of the Commission. It has been also submitted that given the quantum of fly ash that is required to be disposed, it is not possible for the entire quantum to be supplied to only one class of users.

34. We have considered the submissions made by the parties. The Petitioner has submitted that the issue of the cement companies not participating in the bid process for transportation of fly ash and consequently, allowing the costs incurred in respect of cement companies through negotiated route has been considered by the Commission in its order dated 3.12.2019 in Petition No. 213/MP/2018. The relevant extract of the order dated 3.12.2019 in Petition No. 213/MP/2018 is extracted as under:

“53 We observe that the Petitioner had invited bids for disposal of fly ash. While the non-cement companies submitted the bids and were selected on the basis

of such bids, the cement companies did not participate in the bids. Consequently, the Petitioner could not fulfill the requirement of the order of the Commission dated 19.12.2017 related to award of contract on basis of competitive bidding as regards to cement companies. The Petitioner has contended that since the cement companies as an industry do not participate in competitive bidding process but they make their arrangements for off-taking and transporting fly ash from the generating stations like that of the Petitioner, the Petitioner entered into arrangements with various cement companies for off take of fly ash from its generating station. The Petitioner negotiated with the cement companies and awarded the contracts accordingly. The Petitioner has submitted that the rate agreed in the agreements was further reduced and brought down at the time of actual payments.

54. The Petitioner has placed on record agreements dated 1.9.2014, 24.8.2015, 1.11.2015 entered into with cement companies, namely Ambuja Cements Limited, Shree Cement Limited, Emami Cement Limited respectively for transportation and disposal of ash and bill/ invoices/ debit notes, etc. Perusal of agreements reveals that the rate of transportation to the cement companies (decided through negotiations) is less than rate of transportation to the non-cement companies (arrived at through bidding process). We also note that the agreements entered into by the Petitioner with the cement companies were prior to the order of the Commission dated 19.12.2017 in Petition No. 101/MP/2017. Taking into account the Petitioner's contention that the cement companies as an industry do not participate in bids for transportation of fly ash, the fact that the rates are lower in case of cement companies compared to non-cement companies and that the agreements with cement companies were entered into prior to the order of the Commission, we are of the view that the objective of keeping the cost of transportation reasonable is fulfilled. In our opinion, therefore, the cost incurred in respect of cement companies through the negotiated route also needs to be allowed.

55. Accordingly, the Petitioner shall be entitled to recover transportation costs on account of fly ash disposal to cement companies also in compliance with notification of MoEF&CC dated 25.1.2016. To claim this expenditure, the Petitioner shall furnish a copy of all the agreements entered into with cement companies to the Rajasthan Discoms. The Petitioner shall also share copy of the bids floated for disposal of fly ash from its generating station and the list of bidders pursuant to the bid. These costs shall be recovered from the Rajasthan Discoms 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 Rajasthan Discoms. If the actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of transportation of fly ash. The Petitioner is directed to furnish along with its monthly regular and/or supplementary bill(s), computations duly certified by the auditor to Rajasthan Discoms. The Petitioner and the Rajasthan Discoms are directed to carry out reconciliation on account of these claims annually

56. We further direct that the Petitioner should keep on floating bids for disposal of fly ash at regular intervals and if the cement companies participate in those bids, the rates discovered therein shall be considered for reimbursement by the Rajasthan Discoms.”

35. Accordingly, in the present case also, admittedly the rates of transportation of fly ash to the cement manufacturers are substantially lower compared to the rate discovered for transportation of fly ash pursuant to the competitive bidding. This, in

our view, satisfies the objective of keeping the cost of transportation reasonable and limiting the change in law impact on the beneficiaries. In fact, the Respondent, DNH itself has argued that the cost under negotiated route being substantially lower, the Petitioner ought to have disposed of fly ash under this route. Hence, contention of TANGEDCO that the Petitioner cannot be permitted to claim transportation charges for fly ash based on negotiated route deserves to be rejected.

36. Moreover, as rightly pointed out by the Petitioner, while the Petitioner cannot be mandated to supply fly ash only to a class of end-users and off-take of fly ash by the cement manufacturers is on the basis of their demand, we tend to agree with the submission of the Respondent, DNH inasmuch as the Petitioner should explore, as far as possible, and exhaust the avenues of supplying fly ash, which are most cost-efficient.

37. TANGEDCO has also contended that as per the Environment Clearance dated 19.5.2008 for the Project, the Petitioner is required to collect fly ash in dry form and to ensure its 100% utilisation. TANGEDCO has submitted that no document has been placed on record by the Petitioner indicating its compliance with the aforesaid conditions and in its absence, it can be inferred that the Petitioner has accumulated fly ash over the years and under the 'negotiated route' with the cement companies, it is now disposing of more fly ash (accumulated fly ash) than fly ash generated during the year, leading to an adverse financial impact on the Respondent.

38. *Per contra*, the Petitioner has submitted that the compliance of the conditions prescribed in the Environment Clearance is not relevant for the present Petition as the instant Petition only seeks determination of the compensation pursuant to change in law, already allowed by the Commission. The Petitioner has complied with the conditions specified in the Environment Clearance and has utilised fly ash

accordingly. However, there was no sale of fly ash and no revenue generated. Also, the requirement of fly ash utilisation in the Environment Clearance does not have bearing on the costs incurred by the Petitioner for transportation of fly ash pursuant to the MoEF&CC Notification dated 25.1.2016. The contention of TANGEDCO regarding generation, utilisation and accumulation of fly ash for prior period is misplaced since the Petitioner has been reporting quantum of fly ash generation and utilisation data to CEA for the period from financial year 2016-17 to financial year 2019-20.

39. We have considered the submissions made by the parties. The Commission in its order dated 16.3.2018 in Petition No. 1/MP/2017 has already recognized that the MoEF&CC Notification dated 25.1.2016 has imposed additional costs towards fly ash transportation to be borne by the coal/ lignite base thermal power plants and, therefore, the expenditure incurred by the Petitioner towards transportation of fly ash on account of the aforesaid notification is in-principle admissible under change in law. Further, the Petitioner was granted liberty to approach the Commission with the specified documents to analyse its case for determination of compensation. Hence, the scope of the present Petition is limited to the determination of the compensation to the Petitioner on account of expenditure incurred towards transportation of fly ash. Hence, the issue of examination of the conditions of the Environment Clearance issued to the Petitioner, at this stage, is not relevant. The condition of Environment Clearance mandating the Petitioner for utilizations of fly ash cannot preclude the Petitioner from claiming the change in law relief in terms of subsequent MoEF&CC Notification dated 25.1.2016, which mandates the coal/lignite generating plants to bear the cost of transportation of fly ash. Further, as to the apprehensions of TANGEDCO regarding prior period fly ash being disposed of by the Petitioner under negotiated route to the cement companies, we have perused the fly ash generation

and utilisation data as furnished by the Petitioner to CEA. The data indicates that the Petitioner has been able to utilise fly ash generated during the year on most occasions. TANGEDCO has not placed on record any documents to substantiate its apprehensions. Hence, we do not find any force in the apprehensions of the Respondent, TANGEDCO in this regard.

40. TANGEDCO has further contended that since all fly ash is being transported to various end users within distance of 100 km, the Petitioner's claims for compensation towards such expenditure are not admissible. TANGEDCO has submitted that in terms of the MoEF&CC Notification dated 25.1.2016, such transportation costs are required to be borne by the coal/ lignite based thermal power plant. However, the said contention of TANGEDCO is, in our view, misconceived. As already noted above, the said issue has been discussed and decided upon by the Commission in its order dated 16.3.2018 in Petition No. 1/MP/2017, wherein the Commission has recognized MoEF&CC Notification dated 25.1.2016 imposing additional costs towards fly ash transportation to be borne by the coal/ lignite base power plant after the cut-off date of the respective PPAs. Hence, the said contention of TANGEDCO deserves to be rejected.

41. TANGEDCO has also submitted that the Petitioner had neither informed TANGEDCO about the bidding process undertaken by the Petitioner for awarding the fly ash transportation contracted as required under the terms of the PPA nor shared any communication indicating the price discovered in the bid process. *Per contra*, the Petitioner has submitted that present Petition has been filed after complying with the requisite conditions as specified by the Commission vide its order dated 16.3.2018 in Petition No. 1/MP/2017 and that there was no condition which

required the Petitioner to inform TANGEDCO qua commencement of competitive bid process and award to the successful bidder.

42. We have considered the submissions made by the parties. Since the transportation charges incurred by the Petitioner in terms of MoEF&CC Notification dated 25.1.2016 is ultimately being passed onto the Respondents under the change in law provisions, we find some persuasive value in the submissions of TANGEDCO and, accordingly, have incorporated a suitable direction to the Petitioner in the subsequent paragraphs of this order.

43. With regard to conditions (b) and (c) of paragraph 118 of the order dated 16.3.2018, the Petitioner has submitted that it had not generated any revenue from the sale of fly ash. The Respondents have submitted that the Petitioner cannot simply state that no revenue has been generated from the sale of fly ash. The Petitioner ought to disclose what efforts it has made to sell the fly ash.

44. However, subsequently the Petitioner vide affidavit dated 29.7.2021 has submitted that there have been also certain end-users (Category 2 at paragraph 13(a) of this order) who have directly purchased fly ash from the Petitioner and no transportation charges have been incurred for such sale. It has been submitted that for financial year 2019-20 and financial year 2020-21, the Petitioner has additionally sold 4,393.53 MT of fly ash to the other vendors and has generated revenue of Rs. 10.49 lakh, which has been certified by the Petitioner's statutory auditor. The details of the revenue generated by the Petitioner towards sale of fly ash as submitted by the Petitioner are as follows:

- (a) During the financial year 2019-20, the Petitioner sold 2,701.41 MT of fly ash and received a sum of Rs. 1,28,918/- from such sale as under:



S. No.	Customer Name	Invoice Number	Invoice Date	Qty. (MT)	Basic Amount (Rs.)	GST (Rs.)	Total (Rs.)	TCS (Rs.)	Total Amt. (Rs.)
1	Akash Enterprises	650001020	27-01-20	863.10	38,840	1,942	40,781	408	41,189
2		650001050	13-02-20	133.39	6,003	300	6,303	63	6,366
3		650001065	28-02-20	809.98	36,449	1,822	38,272	383	38,654
4		650001073	05-03-20	617.48	27,787	1,389	29,176	292	29,468
5		650001088	16-03-20	277.46	12,486	624	13,110	131	13,241
	Total			2,701.41	1,21,563	6,078	1,27,642	1,276	1,28,918

(b) During financial year 2020-21, the Petitioner sold 1,692.12 MT of fly ash and received a sum of Rs. 9,20,669/- from such sale as under:

S. No.	Customer Name	Invoice Number	Posting Date	Qty. in MT	Basic Value (Rs.)	GST (Rs.)	Total (Rs.)	TCS (Rs.)	Total Amt. (Rs.)
1	Akash Enterprises	650001120	13-04-20	305.29	13,738	687	14,425	144	14,569
2	Akash Enterprises	650001150	19-05-20	35.46	4,936	247	5,183	52	5,235
3	Akash Enterprises	650001162	10-06-20	27.74	66,182	3,309	69,491	695	70,186
4	Akash Enterprises	650001167	17-06-20	28.34	1,08,203	5,410	1,13,613	1,136	1,14,749
5	Vidhata Enterprises	650001169	19-06-20	231.92	10,436	522	10,958	110	11,068
6	Akash Enterprises	650001173	24-06-20	29.10	50,859	2,543	53,402	534	53,936
7	Vidhata Enterprises	650001174	24-06-20	30.69	9,473	474	9,946	99	10,046
8	Tirupati Hitech Infra	650001175	25-06-20	32.49	5,378	269	5,646	56	5,703
9	Akash Enterprises	650001181	02-07-20	18.96	95,235	4,762	99,997	1,000	1,00,997
10	Maharashtra Flyash Bricks & Allied	650001186	02-07-20	27.26	36,993	1,850	38,843	388	39,231
11	Om Sai Trading Company	650001184	02-07-20	20.73	20,920	1,046	21,966	220	22,186
12	Tirupati Hitech Infra	650001185	02-07-20	25.80	30,380	1,519	31,899	319	32,218
13	Vidhata Enterprises	650001183	02-07-20	30.80	31,334	1,567	32,900	329	33,229
14	Parshwa Enterprise	650001191	09-07-20	24.64	10,330	517	10,847	108	10,955
15	Akash Enterprises	650001196	17-07-20	27.65	63,983	3,199	67,182	672	67,854
16	Maharashtra Flyash Bricks & Allied	650001199	17-07-20	29.44	57,883	2,894	60,777	608	61,385
17	Om Sai Trading Company	650001198	17-07-20	26.36	3,193	160	3,353	34	3,386
18	Parshwa Enterprise	650001200	17-07-20	61.48	3,381	169	3,550	36	3,586
19	Tirupati Hitech Infra	650001197	17-07-20	19.84	69,211	3,461	72,671	727	73,398
20	Vidhata Enterprises	650001195	17-07-20	37.18	36,368	1,818	38,186	382	38,568
21	Akash Enterprises	650001211	05-08-20	24.18	69,444	3,472	72,916	729	73,645
22	Maharashtra Flyash Bricks & Allied	650001208	05-08-20	25.36	22,749	1,137	23,887	239	24,125
23	Radhey Enterprises	650001209	05-08-20	17.64	10,683	534	11,217	112	11,330
24	Tirupati Hitech Infra	650001210	05-08-20	21.34	3,477	174	3,651	37	3,687
25	Vidhata Enterprises	650001212	05-08-20	311.34	17,124	856	17,980	180	18,160
26	Akash Enterprises	650001220	20-08-20	68.07	3,744	187	3,931	39	3,970
27	Maharashtra Flyash Bricks & Allied	650001222	20-08-20	16.56	5,004	250	5,254	53	5,307
28	Vidhata Enterprises	650001221	20-08-20	136.46	7,505	375	7,881	79	7,959
	Total			1,692.12	8,68,147	43,407	9,11,554	9,116	9,20,669

45. The Petitioner has also mentioned that the revenue generated from the sale of fly ash is being maintained separately in its books as follows:

GL Number	GL Name	Remarks
4000060004	Sale Of Other Materials / Scrap-Others	Ash sale

46. Further, in response to query of the Commission regarding action taken by the Petitioner for sale of fly ash along with supporting documents, the Petitioner vide its affidavit dated 29.7.2021 has submitted that the Petitioner has made consistent and regular efforts to sell fly ash. It has also submitted that it had tied up with MSTC Limited for conducting e-auction for sale of 8,00,000 MT of fly ash on 20.7.2021 and 21.7.2021. However, as informed by MSTC Limited vide letter dated 23.7.2021, no bids were received for procuring fly ash.

47. We have considered the submissions made by the Petitioner. It appears that pursuant to filing of the Petition, the Petitioner has been able to sell some fly ash to various vendors and has been able to generate revenue thereof. In addition, the Petitioner has also submitted that it had tied up with MSTC Limited for conducting e-auction for sale of 8 lakh MT of fly ash on 20.7.2021 and 21.7.2021. However, no bids were received in this regard. In our view, the Petitioner has made efforts to sell the fly ash and has in fact been able to sell fly ash and generate revenue thereof for financial year 2019-20 and financial year 2020-21. However, the Petitioner shall continue to make efforts towards sale of fly ash by floating tenders for such sale. The Petitioner shall also keep the Respondents informed with its efforts towards sale of fly ash including copy of the bids floated for disposal of fly ash from the Project and outcome of the efforts made.

48. As per the MoEF&CC Notification, the coal or lignite based thermal power plants are required to promote, adopt/ support, assist the fly ash based products manufacturing facilities in its premises/ vicinity in order to reduce the transportation of ash. The relevant extract of the said Notification is reproduced below:

*“(11) The coal or lignite based thermal power plants shall promote, adopt and set up (financial and other associated infrastructure) the ash based product manufacturing facilities within their premises or in the vicinity of their premises so as to reduce the transportation of ash.*

*(12) The coal or lignite based thermal power plants in the vicinity of the cities shall promote, support and assist in setting up of ash based product manufacturing units so as to meet the requirements of bricks and other building construction materials and also to reduce the transportation.”*

49. Accordingly, in terms of the aforesaid notification, the Petitioner will also endeavour to fulfil its obligations of promoting the fly ash based product manufacturing as provided for.

50. Further, in compliance with the condition (d) of paragraph 118 of the order dated 16.3.2018, the Petitioner has submitted copy of statutory auditor certificates indicating the quantity of fly ash supplied and amount incurred towards its transportation for financial year 2019-20 and financial year 2020-21 and the revenue generated from sale of fly ash for financial year 2019-20 and financial year 2020-21.

51. In view of the above discussion, the Petitioner shall be entitled to compensation for the expenditure incurred towards transportation of fly ash subject to the following:

(a) The Petitioner shall furnish undertaking from the end users (except for cement manufacturers) to the effect that they have paid neither towards supply of fly ash nor towards transportation of fly ash as far as fly ash received from the thermal project is concerned.

(b) The Petitioner shall furnish undertaking from the end users to the effect that fly ash received from the Petitioner’s thermal project has been used within 100 km of the thermal project for the end use specified by the MoEF&CC.

(c) The Petitioner shall ensure that the quantity of fly ash for which invoices towards transportation have been raised corresponds to the quantity certified by the end-users in their certificates. For this purpose, the Petitioner shall furnish all the relevant details to the Respondents.

(d) For claiming compensation towards the transportation charges paid to Ashtech, the Petitioner shall furnish details along with an undertaking that its selection has been done through a competitive bidding process.

(e) The Petitioner shall not be entitled to claim any compensation towards transportation charges for transporting fly ash to the end user/ usage other than the permissible end usage in terms of MoEF&CC Notification dated 25.1.2016.

(f) Revenue received from the sale of fly ash shall be adjusted against the transportation charges incurred by the Petitioner.

52. Further, the above compensation shall be recovered from the Respondents 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 respective Discoms. If the actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of transportation of fly ash.

53. The Petitioner is directed to furnish along with its monthly regular and/or supplementary bill(s), computations duly certified by the auditor to the Respondents. The Petitioner and the Respondents are directed to carry out reconciliation on account of these claims annually. In addition, the Petitioner is to abide by the directions issued by the Ministry of Power vide its letter No. 9/7/2011-S.Th.(Vol. IV) dated 22<sup>nd</sup> September, 2021 for 'Supply of Fly ash to the end users by the power plants to increase fly ash utilization'. Further, the Petitioner will endeavour to fulfil its obligations of promoting the fly ash based product manufacturing as provided for in the MoEF&CC's Notification.

## Carrying Cost

54. The Petitioner has submitted that as per Article 10 of the PPA, the Petitioner is entitled to be compensated in such a way that it is restored through monthly tariff payment to the same economic position as if such change in law had not occurred. The Petitioner has submitted that the term 'economic position' does not limit itself to a simple correlation of increased expenditure and a corresponding compensation amount and includes compensation in terms of carrying costs incurred on account of change in law event. It has been submitted by the Petitioner that carrying cost is compensation for time value of money and it is different from interest. Therefore, the Petitioner is entitled to be compensated and restored to the same economic position as if such change in law events had not occurred.

55. The Respondent, TANGEDCO has submitted that there is no provision in the PPA to allow carrying cost on the amount covered under change in law till its determination by the Commission and that the liability for making payment of carrying cost arises only when the cost incurred is determined, supplementary invoice is raised and the due date lapses. The Respondent, DNH has submitted that the agreements and invoices placed on record by the Petitioner are pursuant to the order of the Commission dated 16.3.2018 in Petition No. 1/MP/2017 and that the entitlement of carrying cost would only arise if the costs were incurred prior to the said order of the Commission. It has also been submitted that the Petitioner has claimed the carrying cost @ 12.25% without any basis.

56. *Per contra*, the Petitioner has submitted that the issue of carrying cost is no longer *res-integra* and has been decided by the Hon'ble Supreme Court in its judgment dated 25.2.2019 in Civil Appeal No. 5685 of 2018 [Uttar Haryana Bijli Vitran Nigam Ltd. & Anr. v. Adani Power Ltd. & Ors., (2019) 5 SCC 325], wherein it

has been held that the compensation must be from the date of impact of the event of change in law and not from the date of order granting compensation for change in law. It has been submitted that if the contention of the Respondent, DNH are accepted, it would amount to introduction of new term into the PPA/ insertion of an implied term, which is impermissible. It has also been submitted that the rate of carrying cost has been considered by the Petitioner at the average interest rate for working capital cost. However, the Petitioner will accept and apply the rate of carrying cost as determined by the Commission.

57. We have considered the submissions of the parties. The issue of applicability of carrying cost is no longer *res-integra*. The APTEL in its judgment dated 13.4.2018 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. As pointed out by the Central Commission that the Appellant is only eligible for surcharge if the payment is not made in time by the Respondent Nos. 2 to 4 after raising of the supplementary bill arising out of approved Change in Law event and in PPA there is no compensation mechanism for payment of interest or carrying cost for the period from when Change in Law becomes operational till the date of its approval by the Central Commission. 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..."*

58. The aforesaid judgment of the APTEL was challenged before the Hon'ble Supreme Court wherein the Hon'ble Supreme Court vide its judgment dated 25.2.2019 in Civil Appeal No.5865 of 2018 with Civil Appeal No.6190 of 2018 (Uttar Haryana Bijili Vitran Nigam Limited & Anr. v. 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."*

59. Article 10.2 of the PPAs provides as under:

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

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

60. In view of the provisions of the PPAs, the principles of restitution and the aforesaid 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 date of making the actual payment till the date of issue of this order. The Commission in its order dated 17.9.2018 in Petition No. 235/MP/2015 (AP(M)L v. UHBVNL & Ors.) had decided the issue of carrying cost as under:

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

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

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

*26. The Petitioner shall 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 be entitled for late payment surcharge on the outstanding amount.”*

61. In line with above order of the Commission, in the instant case, the Petitioner shall be eligible for carrying cost at the actual rate of interest paid by the Petitioner for arranging funds (supported by Auditor`s Certificate) or the rate of interest on working capital as per applicable CERC Tariff Regulations or the late payment surcharge rate as per the PPA, whichever is the lowest. Once a supplementary bill is raised by the Petitioner in terms of this order, the provision of Late Payment Surcharge in the PPA would kick in if the payment is not made by the Respondents.



### **Mechanism for recovery of future expenditure for transportation of fly ash**

62. The Petitioner has also prayed to devise a mechanism to enable it to recover future expenditure incurred on transportation of fly ash pursuant to MoEF&CC Notification dated 25.1.2016.

63. We have considered the submission of the Petitioner. As to devising of the mechanism to recover the expenditure incurred towards transportation of fly ash in future, the Petitioner will continue to comply with the conditions specified by the Commission in paragraph 51 of this order. The Petitioner will also ensure the following:

(a) Abide by the directions issued by the Ministry of Power vide its letter No. 9/7/2011-S.Th.(Vol. IV) dated 22<sup>nd</sup> September, 2021 for 'Supply of Fly ash to the end users by the power plants to increase fly ash utilization'.

(b) Fly ash transportation shall be done to the end-users at a distance specified under Clause 10 of the MoEF&CC Notification dated 25.1.2016.

(c) The transportation cost wherever required to be borne as per provisions of MOEF&CC Notification by the power plant, shall be discovered through competitive bidding process and in no case can be higher than the scheduled rates of the respective State Governments for transportation of fly ash, if any.

(d) The actual expenditure incurred as claimed shall be duly certified by the auditors, to be produced before the beneficiaries/ procurers on demand.

(e) While claiming the expenditure, the Petitioner shall furnish a copy of agreements entered into with the transporters of fly ash to the Respondents, along with invoices and tax challans. These costs shall be recovered from the Respondents 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 respective procurers. 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 transportation of fly ash. The Petitioner is directed to furnish along with its monthly regular and/or supplementary bill(s), computations duly certified by the auditors to the Respondents. The Petitioner and the Respondents are directed to carry out reconciliation towards these claims annually.

(f) The Petitioner shall be entitled to claim compensation supported with all relevant documents like taxes and duties paid supported by Auditor Certificate, after the expenditures allowed under change in law during operating period (including the reliefs allowed for operating period earlier) exceeds 1% of the value of Letter of Credit in aggregate.

64. In light of the above discussion, the Petition No. 174/MP/2020 is disposed of.

Sd/-  
**(P. K. Singh)**  
**Member**

sd/-  
**(Arun Goyal)**  
**Member**

sd/-  
**(I. S. Jha)**  
**Member**

sd/-  
**(P. K. Pujari)**  
**Chairperson**