

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 405/MP/2019**

**Coram:**

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

**Shri I.S. Jha, Member**

**Shri Arun Goyal, Member**

**Date of Order: 22<sup>nd</sup> March, 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 (a) Article 10 of the PPA dated 9.11.2011 between GMR Kamalanga Energy Limited and Bihar State Electricity Board and (b) Article 13 of the PPA dated 12.3.2009 between GMR Energy Limited (on behalf of GMR Kamalanga Energy Limited ) and PTC India Limited with back to back PPA between PTC India Ltd. and Haryana Distribution companies, for compensation due to Change in Law for compensation due to levy of charges for transportation of fly ash and evolving a mechanism for grant of appropriate adjustment/compensation to offset financial impact on account of levy of charges for transportation of fly ash and carrying cost.

**And**

**In the matter of**

1. GMR Kamalanga Energy Limited,  
New Shakti Bhawan,  
Building No. 302 – New Uddan Bhawan,  
Opposite Terminal – 3,  
Indira Gandhi International Airport,  
New Delhi – 110 037.

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

.....**Petitioners**

**Vs.**

1. Dakshin Haryana Bijli Vitran Nigam Limited  
Vidyut Nagar,  
Hissar, Haryana

2. Uttar Haryana Bijli Vitran Nigam Limited  
Vidyut Sadan, Plot No. C-16, Sector 6, Panchkula, Haryana

3. Haryana Power Generation Corporation Limited  
Urja Bhawan, C-7, Sector 6, Panchkula Haryana.

4. PTC India Limited  
2nd Floor, NBCC Tower,  
15, Bhikaji Cama Place, New Delhi

5. Bihar State Power (Holding) Company Ltd  
Vidyut Bhawan, Bailey Road,  
Patna – 800001

6. Bihar State Power Generation Company Ltd  
Vidyut Bhawan, Bailey Road, Patna – 800001

7. South Bihar Power Distribution Company Ltd  
Vidyut Bhawan, Bailey Road, Patna- 800001

8. North Bihar Power Distribution Company Ltd  
Vidyut Bhawan, Bailey Road, Patna- 800001

.....Respondents

**The following were present:**

Shri Vishrov Mukerjee, Advocate, GMR  
Shri Yashaswi Anand, Advocate, GMR  
Shri G. Umopathy, Advocate, Haryana Utilities  
Shri Manish Kumar Choudhary, Advocate, BSPHL

**ORDER**

The Petitioners, GMR Kamalanga Energy Limited and GMR Energy Limited, have jointly filed the present Petition seeking determination of compensation on account of expenditure incurred towards transportation of fly ash and grant of carrying cost along with the following prayers:

*“(a) Grant compensation by way of reimbursement of the expenses incurred by GKEL towards transportation of fly ash as set out in paragraphs above along with carrying cost thereon and direct Respondents to pay the same; and*

*(b) Devise a mechanism to enable GKEL to recover future expenditure incurred on transportation of fly ash pursuant to MoEF&CC notification dated 25.1.2016.”*

**Background of the case**

2. GMR Kamalanga Energy Limited (Petitioner No.1) was incorporated as a public limited company under the Companies Act, 1956 as a subsidiary of GMR

Energy Limited (Petitioner No. 2) to set up a 1400 MW Thermal Power Project (hereinafter referred to as the "Power Project") at village Kamalanga, District Dhenkanal in the State of Odisha. The Power Project comprises of two stages - the first stage having three units of 350 MW each and the second stage having one unit of 350 MW.

3. The Petitioners had approached the Commission through the Petition No. 131/MP/2016 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 (in short "MoEF&CC") under Change in Law provisions of the PPA. The Commission in its order dated 21.2.2018 in Petition No. 131/MP/2016 *inter-alia* held that the levy of charges for transportation of fly ash is admissible under Change in Law and granted liberty to the Petitioners to approach the Commission along with documents to analyse the case for determination of compensation. Pursuant to liberty granted by the Commission, the Petitioners have filed the present Petition.

4. The Petitioners have submitted that pursuant to fly ash made available to Ashech (India) Pvt. Ltd. and Samal Builders Pvt. Ltd., which in turn raised invoices of Rs. 14,23,01,808/- on the Petitioners for fly ash transportation for the period commencing from 13.8.2018 to 31.5.2019 and the same has been incurred by the Petitioner.

5. The matter was admitted on 14.1.2020. Reply to the Petition has been filed by the Respondents 1 to 3 on 7.2.2020 and the Petitioners have filed rejoinder thereof on 4.3.2020.

## **Reply of the Respondents**

6. The Respondents, Dakshin Haryana Bijli Vitran Nigam Limited, Uttar Haryana Bijli Vitran Nigam Limited and Haryana Power Generation Corporation Ltd. (collectively referred to as “the Haryana Discoms”) in their combined reply have submitted as under:

(a) The Petitioners have made a bald averment that no revenue has been generated from disposal of fly ash. Admittedly, fly ash is a raw material in production of cement and other products which has an immense value. As per MoEF&CC Notification dated 25.1.2016, the generator is required to meet the transportation cost within a radius of 100 km and only if it is beyond 100 km that the cost is required to be shared between the generator and the user. However, the Petitioners have not placed on record any information in this regard.

(b) As per the PPA, the cost of transportation of fly ash generated, if any, is required to be confined to the quantum of power supplied to the Respondents.

(c) As per Article 13.2 (b) of the PPA, compensation on account of Change in Law shall be payable only if increase in cost to the seller is in excess of an amount equivalent to one percent of Letter of Credit in aggregate for a contract year. However, the Petitioners have not demonstrated in the Petition that increase in cost to the Petitioners is in excess of an amount equivalent to one percent of LC.

(d) The Petitioners have set up Power Project in the State of Odisha and supplying power to three States, namely, Odisha, Bihar and Haryana. The delivery point for Haryana is STU bus bar and the quantum is 350 MW (-) auxiliary consumption). The quantum of fly ash is required to be correlated to the actual quantum of coal utilized for supply of power to the State of Haryana under the PPA. However, the Petitioners have failed to provide the apportionment of expenses in relation to claims of Haryana Utilities towards transportation of fly ash.

(e) The Petitioners cannot be allowed costs merely on the basis of an auditor certificate.

(f) No information of the distance from the power station to end user of fly ash has been provided in the Petition. From the invoices and the documents adduced, it is difficult to ascertain if the fly ash has been transported within 100 km radius or it has been transported in the 100-300 km radius. This information becomes material because should the fly ash be transported in the 100-300 km radius, the cost of transportation is required to be shared equally between the users and the generators.

(g) As per the Petitioner, only two bidders, namely, Astech India Pvt. Ltd. and Samal Builders Pvt. Ltd. participated in the bidding process and their bids

were accepted. However, it is not clear whether the bidding process conducted by the Petitioners was at all competitive and transparent.

(h) The Petitioners have not submitted the information regarding generation of any revenue. The Petitioners ought to demonstrate why no revenue has been generated from disposal of fly ash and that despite efforts by it, no revenue could be generated. The Petitioners are transporting fly ash to distance beyond 100-300 km from the Power Project and consequently passing the financial burden of the transportation on to the Respondents.

(i) As per the terms and conditions of the final allotment letter, since the responsibility of transportation is on the buyer of fly ash, the bidder itself is deemed to be responsible for payment of GST. However, the Petitioners have sought to pass on this liability to the Respondents.

(j) The Commission in its order dated 3.12.2019 in Petition No. 213/MP/2018 had observed that if COD of unit/generating station was declared before the MoEF&CC Notification dated 25.1.2016, any revenue generated/accumulated from fly ash sales ought to be adjusted from the relief granted. However, no details have been submitted by the Petitioners in this regard.

(k) The Petitioner's claim with regard to carrying cost is without any basis. The Petitioners have filed the details of the invoices along with the Petition which was filed on 25.10.2019 i.e. after a lapse of one year and eight months of the passing of the order. The question of award of carrying cost if at all be considered, the relevant date would be only from the date the claim has been made which is admittedly 25.10.2019. The Petitioners have estimated carrying cost for cost incurred as Rs. 68 lakh till 22.10.2019. The said claim is not payable since the reimbursement of transportation cost allegedly incurred by it, has been claimed for the first time in the Petition on 25.10.2019.

7. The Petitioners in their rejoinder dated 4.3.2020 has submitted as under:

(a) The Petitioners have complied with the conditions specified in order dated 19.12.2017 in Petition No. 101/MP/2017. On 2.7.2018, the Petitioners have issued open tender for awarding the contract for transportation of fly ash through Procure Tiger, a reputed e-procurement website. In response, two vendors participated in the bidding process. On 30.7.2018, bids were opened and after completion of evaluation on 7.8.2018, negotiations with both the successful bidders, namely, Ashtech India Pvt. Ltd. and Samal Builders Pvt. Ltd were held on 8.8.2018. Pursuant to discussion, on 8.8.2018 revised offer were submitted by both the bidders. Considering the value of the work, the Petitioners decided to equally split the quantity of fly ash between both the bidders and awarded the contract with the issuance of Letter of Intent to them on 9.8.2018. Therefore, the contention of Haryana Discoms that only because there were two bidders, the entire process was not competitive or transparent is ought to be rejected.

(b) Underlying principle of Article 13 of the PPA is to determine the consequences of the Change in Law and to compensate a party affected by a Change in Law event, such that the party is restored to the same economic

position as if such Change in Law had not occurred. The said principle was confirmed by the Hon`ble Supreme Court in its judgments dated 11.4.2017 25.2.2019 in Energy Watchdog Vs. CERC & others and Uttar Hayrana Bijli Vitran Nigam Ltd & Anr Vs. Adani Power Ltd & Others respectively. Given that levy of charges for transportation has been held to be Change in Law, the Petitioners are entitled to be compensated at actuals.

(c) The Petitioners have acted in a manner so as to minimize cost as higher cost would attract higher working capital requirement for which the Petitioners have to bear additional cost.

(d) In terms of clause 10 of MoEF&CC Notification dated 25.1.2016, the Commission vide Record of Proceedings for the hearing dated 14.1.2020 directed to GKEL to certify that only half of the transportation cost paid for transportation of fly ash to users (other than the road projects under PMGSY) beyond distance of 100 km has been claimed in the Petition. Since the Petitioners have submitted the information regarding details of the amount along with the distance of transportation of fly ash along with invoices filed along with the Petition, the contention raised by the Respondents in this regard is ought to be rejected.

(e) Since the Petitioners have complied with requirement specified in Article 13, in particular Article 13.2(b), (i.e. increase in cost being in excess of 1% of LC in aggregate for contract year) of the PPA, the Petitioners are seeking compensation for the entire cost incurred in transportation of fly ash paid by the Petitioner.

(f) As on date, no revenue has been generated from disposal of fly ash. There is a demand supply mismatch in the area where the Project is located. The Project is located in the belt wherein there are multiple sources of fly ash and end-user agencies/industries are few which resulted in less demand for fly ash. Therefore, since the Petitioners are required to comply with the MoEF&CC Notification mandating 100% utilization of fly ash, the Petitioners used to offer fly ash on free of cost basis.

(g) Hon`ble Supreme Court in its judgment dated 11.3.2019 in the case of Adani Power Ltd. Vs. Uttar Haryana Bijli Vitran Nigam Ltd has held that carrying cost is part of the compensation payable under Change in Law and payment of the same is to be from the date of the Change in Law event. In terms of the said judgment, (i) Article 13.2 of the PPA contains a restitutionary principle which provides that the party must be restored to the same economic position as if Change in Law did not take place, (ii) the affected party must be given the benefit of restitution as understood in civil law i.e. on the basis of actual expenditure incurred, and (iii) the compensation must be from the date of the impact of event of Change in Law and not from the date of order granting compensation for change in law.

8. The matter was heard on 27.8.2020 through video conferencing and order was reserved. On their request, the parties were permitted to file their written

submissions. The Petitioners were further directed to certify that enough efforts have been made to sell the fly ash produced from the Power Project to cement companies or other users who purchase fly ash for their use. The Petitioners were also directed to submit proof of efforts made in this regard, such as advertisement in newspapers/ website or any correspondence made with the nearby users such as cement companies for sale of fly ash generated from the power plant. The Petitioners vide their affidavit dated 19.2.2021 has submitted the information called for.

### **Analysis and Decision**

9. We have considered the submissions of the Petitioners and the Respondents and perused documents available on record.

10. The Petitioners had approached the Commission through Petition No. 131/MP/2016 seeking declaration that the Notification dated 25.1.2016 issued by MoEF&CC is a Change in Law event within the meaning of Article 10 of Bihar PPA and Article 13 of Haryana PPA. The Petitioners had contended that MoEF&CC vide its Notification No. S.O. 254 (E) dated 25.1.2016 has amended the Environment (Protection) Rules, 1986 and imposed additional cost towards fly ash transportation. The Petitioners had submitted that due to said increase in the cost of operation and maintenance of the Power Project, the cost of supply of power by the Petitioners to the Respondents under the PPAs had increased and, thus, the Petitioners need to be compensated as per Change in Law provisions of the PPAs. By order dated 21.2.2018 in Petition No. 131/MP/2016, the Commission held that the MoEF&CC Notification of 25.1.2016 was a Change in Law event and that the expenditure claimed by the Petitioners on account of additional cost incurred towards fly ash transportation is admissible under the Change in Law provisions of the PPAs. However, the Commission granted liberty to the Petitioners to approach the

Commission with required information/documents so as to analyse the case for determination of compensation. Relevant portion of the order dated 21.2.2018 is extracted as under:

*“76. We have examined the submissions of the parties. As on cut-off date, 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 issued the directions regarding utilization of fly ash under the Environment (Protection) Act, 1986. The Ministry of Environment and Forests, Govt. of India vide its Notification No. S.O. 254 (E) dated 25.1.2016 has amended the Environment (Protection) Rules, 1986 and imposed the 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.”*

*77. The Petitioners have submitted that they have not incurred any expenditure on account of transportation of fly ash and are seeking in-principle approval. 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 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.”*



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

11. Pursuant to the liberty granted by the Commission, the Petitioners have filed the present Petition seeking compensation by way of reimbursement of the expenses incurred towards transportation of fly ash along with carrying cost.

12. As regards condition (a) in order dated 21.2.2018, the Petitioners have submitted that they issued an open tender/bid documents on 2.7.2018 for awarding the contract for transportation of fly ash through competitive bidding process through Procure Tiger, a reputed e-procurement portal. In response, two bidders, namely, Ashtech (India) Pvt. Ltd. and Samal Builders Pvt. Ltd. submitted their offers. Bids of above bidders were opened on 30.7.2018 and evaluation was completed on 7.8.2018. Pursuant to negotiations, revised offers were submitted by the bidders on 8.8.2018. Considering the value of work, the Petitioners decided to equally split the quantity of fly ash between both bidders and awarded the contract with the issuance of the Letter of Intent to them on 9.8.2018. The Petitioners have furnished the copies of the offers submitted by the successful bidders. Subsequently, Agreement/contract dated 11.8.2018 for transportation of fly ash was executed between the Petitioners and Ashtech (India) Pvt. Ltd. and Samal Builders Pvt. Ltd for twelve months. The Petitioners have placed on record the copies of agreements entered into between the Petitioners and successful bidders. The Petitioners have also placed on record the invoices raised by the both Ashtech (India) Pvt. Ltd. and Samal Builders Pvt. Ltd. who have off-taken ash from the Power Project from 13.8.2018 to 31.5.2019. As per Lols and Contract Agreements dated 11.8.2018, the Petitioners were required to pay Rs. 7,14,75,500/- exclusive of GST for transportation of fly ash to the contractor.

However, the final contract price payable as per the contract is the amount arrived at by multiplying the actual quantities executed of the BOQ items by the respective item rates as detailed in 'Price Schedule'.

13. With regard to conditions (b) and (c) of order dated 21.2.2018, the Petitioners have submitted that since they have not generated any revenue from fly ash before the issuance of MoEF&CC Notification dated 25.1.2016, the question of maintaining any separate account for revenue generated from fly ash sales does not arise.

14. As regards condition (d) of order dated 21.2.2018, the Petitioners have submitted copy of the Chartered Accountant certificate dated 18.6.2019 duly certifying the expenditure incurred towards fly ash.

15. Vide Record of Proceedings for the hearing dated 14.1.2020, the Petitioners were directed to certify that only half of the transportation cost paid for transportation of ash to users (other than the road projects under PMGSY) beyond distance of 100 km has been claimed in the Petition. In response, the Petitioners vide affidavit dated 14.2.2020 have submitted break-up of the amount claimed for distance up to 100 km and beyond along with invoices as under:

S. No.	Vendor Name	Invoice No.	Date of invoice	Period	Total bill amount in Rs. (as claimed in the Petition)	Bill amount for distance upto 100 km (in Rs.)	Bill amount for distance beyond 100 km (in Rs.)
	Ashtech India Pvt. Ltd.	SI/18190RI/00179	11.10.2018	13.8.2018 to 31.8.2018	13,60,763.50	10,11,287.7	3,49,475.8
2.	Ashtech India Pvt. Ltd.	SI/18190RI/00182	16.10.2018	13.8.2018 to 31.8.2018	55,88,303.20	55,88,303.20	-
3.	Ashtech India Pvt. Ltd.	SI/18190RI/00182	20.10.2018	1.9.2018 to 30.9.2018	13,13,401.30	8,04,4231.1	5,09,1702.2
4.	Ashtech India Pvt. Ltd.	SI/18190RI/00214	10.11.2018	1.9.2018 to 30.9.2018	30,96,018	30,96,018	-
5.	Ashtech India Pvt. Ltd.	SI/18190RI/00234	20.11.2018	1.10.2018 to 31.10.2018	65,85,446.30	55,62,836.3	10,22,610
6.	Ashtech India Pvt. Ltd.	SI/18190RI/00277	24.12.2018	1.11.2018 to 30.11.2018	55,31,757.90	45,78,169.95	9,53,587.05

7.	Ashtech India Pvt. Ltd.	SI/18190RI/00328	31.1.2019	1.12.2018 to 31.12.2018	73,31,524.85	73,31,524.85	-
8	Ashtech India Pvt. Ltd.	SI/18190RI/00356	12.2.2019	2.1.2019 to 31.1.2019	93,02,692.25	93,02,692.25	-
9.	Ashtech India Pvt. Ltd.	SI/18190RI/00427	18.3.2019	1.2.2019 to 28.2.2019	75,40,004.35	75,40,004.3	-
10.	Ashtech India Pvt. Ltd.	SI/18190RI/00474	31.3.2019	1.3.2019 to 31.3.2019	99,99,916.70	99,99,916.70	-
11.	Ashtech India Pvt. Ltd.	SI/19200RI/00038	30.5.2019	1.4.2019 to 30.4.2019	1,38,24,638	1,38,24,638	-
12	Ashtech India Pvt. Ltd.	SI/19200RI/00058	13.6.2019	1.5.2019 to 31.5.2019	1,16,01,691	1,16,01,691	-
					<b>Total</b>	<b>8,02,41,314.30</b>	<b>28,34,843.05</b>

S. No.	Vendor Name	Invoice No.	Date of invoice	Period	Total bill amount in Rs. (as claimed in the Petition)	Bill amount for distance upto 100 km (in Rs.)	Bill amount for distance beyond 100 km (in Rs.)
1.	Samal Builder Pvt. Ltd.	239	5.12.2018	13.8.2018 to 31.8.2018	12,47,958.20	12,47,958.20	-
2.	Samal Builder Pvt. Ltd.	240	5.12.2018	1.9.2018 to 30.9.2018	12,72,319.20	12,72,319.20	-
3.	Samal Builder Pvt. Ltd.	253	17.12.2018	1.10.2018 to 31.10.2018	16,69,011.40	16,69,011.40	-
4.	Samal Builder Pvt. Ltd.	297	25.1.2019	1.11.2018 to 30.11.2018	17,28,618.40	17,28,618.40	-
5.	Samal Builder Pvt. Ltd.	327	15.2.2019	1.12.2018 to 31.12.2018	19,74,817.10	19,74,817.10	-
6.	Samal Builder Pvt. Ltd.	341	28.2.2019	1.1.2019 to 31.1.2019	11,13,065.70	11,13,065.70	-
7.	Samal Builder Pvt. Ltd.	366	20.3.2019	1.2.2019 to 28.2.2019	91,16,477.90	91,16,477.90	-
8	Samal Builder Pvt. Ltd.	394	31.3.2019	1.3.2019 to 31.3.2019	1,24,74,763.60	1,24,74,763.60	-
9.	Samal Builder Pvt. Ltd.	18	30.4.2019	1.4.2019 to 30.4.2019	1,64,41,232.90	1,64,41,232.90	-
10	Samal Builder Pvt. Ltd.	60	13.6.2019	1.5.2019 to 31.5.2019	1,21,87,386.00	1,21,87,386.00	-
					<b>Total</b>	<b>5,92,25,650.40</b>	

16. The Respondents, Haryana Discoms have submitted that as per MoEF&CC Notification dated 25.1.2016, the generator is required to meet the full transportation cost within a radius of 100 km and when distance is beyond 100 km, the cost of transportation is required to be equally shared between the generator and the user of fly ash. The Respondents have further submitted that the Petitioners are transporting fly ash to distance beyond 100-300 km from the Power Project and consequently

passing the financial burden of the transportation of fly ash on to the Respondents. However, we note that the above submission of the Respondent is incorrect as nearly 98% of the total claim made by the Petitioners towards transportation cost is for transportation of fly ash within the distance of 100 km.

17. Haryana Discoms in their written submission dated 8.9.2020 have submitted that certain invoices for transportation are for construction firms as far as Ahmedabad, which is beyond 300 km range. Therefore, the same cannot be allowed. We do not agree with the said contention of the Respondents. Both the utilisation certificates that the Respondents have relied on belong to Kunal Structure (India) Pvt Ltd. Though the address mentioned on the letter head of the firm is located at Ahmedabad, it has been clearly stated in both the utilisation certificates that fly ash has been supplied to the site of Kunal Structure (India) Pvt Ltd. Apparently, the transportation contracts with both the firms is only for transportation distance of up to 150 km. The Petitioners may confirm the same to the Respondents.

18. The Respondents have also argued that since certain invoices do not indicate any details of distance and merely state the amount, only reasonable and prudent expenditure is allowable, and not the entire claim. It is observed that the Petitioners, vide their affidavit dated 14.2.2020 have submitted the copies of such invoices with details of distance and corresponding charges.

19. In compliance with the direction of the Commission, the Petitioners have awarded contract for transportation of fly ash through competitive bidding process. The Petitioners have submitted Chartered Accountant certificate dated 18.6.2019 for the amount of Rs. 14,23,01,808/- incurred on account of fly ash transportation cost. It has also been certified that the Petitioners have paid GST on RCM (Reverse Charge

Mechanism) basis amounting to Rs 71,15,090/- till 31.5.2019. The Petitioners have submitted the invoices raised by Ashtech (India) Pvt. Ltd. and Samal Builder Pvt. Ltd. wherein distance-wise charges are clearly stated. As regards payment of GST, the Petitioners have also submitted copies of payment challan for the period from August 2018 to May 2019 along with sample calculation for the month of May 2019 for GST calculation. The Petitioners have also submitted the end user certificates issued by agencies for utilisation of fly ash. It is noted that fly ash has been utilised for brick/block manufacturing, cement manufacturing and construction of NH road embankment. We are satisfied with the detailed information submitted by the Petitioner.

20. The Ministry of Environment and Forests, Govt. of India vide its Notification No. S.O. 254 (E) dated 25.1.2016 imposed additional cost towards fly ash transportation on thermal power plants 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.”*

21. Accordingly, the Petitioners shall be entitled to receive full amount paid to Ashtech (India) Pvt. Ltd and Samal Builder Pvt. Ltd. for fly ash transported within a radius of 100 km along with GST. As regards claim towards fly ash transported for distance beyond 100 km (and up to 300 km), the Petitioners vide their affidavit dated 14.2.2020 have submitted that they have claimed Rs 28,34,843.05. From the invoices submitted by the Petitioner, we observe that the Petitioners have claimed full cost of Rs 28,34,843.05 incurred towards transportation of fly ash beyond 100 km. As per MoEF&CC notification dated 25.1.2016, cost of transportation beyond the radius of 100 km and up to 300 km shall be shared between the user and the coal or

lignite based thermal power plant equally. Accordingly, the Petitioners shall be entitled to receive only 50% of the claimed amount from the Respondent Discoms.

22. To claim this expenditure, the Petitioners shall furnish a copy of agreements entered into with transporters, Ashtech (India) Pvt. Ltd and Samal Builder Pvt. Ltd., 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 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 Petitioners are directed to furnish along with its monthly regular and/or supplementary bill(s), computations duly certified by the auditor to the Respondent Discoms. The Petitioners and the Respondent Discoms are directed to carry out reconciliation on account of these claims annually.

23. The Respondents have submitted that the Petitioners have not furnished the information regarding generation of revenue and the Petitioners ought to demonstrate why no revenue has been generated from disposal of fly ash and that despite efforts by it, no revenue could be generated. Haryana Discoms in their written submission dated 8.9.2020 have stated that there is a highly competitive market for fly ash and it appears that no attempt whatsoever was made to generate revenue from the sale of fly ash when admittedly the same generates immense value. They have also submitted that as directed by the Commission in DB Power case vide order dated 19.12.2017 in Petition No. 101/MP/2017, since CoD of the units/station was declared before the MoEFC&C Notification dated 25.1.2016, any

revenue generated/ accumulated from fly ash sales ought to be adjusted from the relief granted. Haryana Discoms have relied on the report on Third Party Audit on Fly Ash Generation & Utilization from thermal power plants (TTPs) in Odisha for 2016-17 submitted to State pollution Board, Bhubaneswar on 1.8.2018. As per table I, around 68% of fly ash is utilized for the TPPs selected for audit.

24. Vide Record of Proceedings for the hearing 27.8.2020, the Petitioners were directed to submit the following information/clarification:

(a) Certify that enough efforts have been made to sell fly ash produced from the generating station to cement companies or other users who purchase fly ash for their use; and

(b) Proof of efforts made such as advertisement in newspapers/ website or any correspondence made with the nearby users such as cement companies for sale of fly ash generated from the Power Plant.

25. In response, the Petitioners vide affidavit dated 19.2.2021 have submitted that since the Power Project is located in an area wherein there are multiple sources of fly ash and end-user agencies/ industries are few and supply of fly ash outstrips its demand. It has been submitted by the Petitioners that in order to comply with the MoEF&CC notification mandating 100% utilization of fly ash, it used to offer fly ash on free of cost basis. Therefore, despite the Petitioner`s efforts to sell fly ash, there are no buyers willing to purchase fly ash generated from the Power Project. The Petitioners have submitted that it has acted in a prudent manner and has taken all possible steps for selling fly ash from the Project. According to the Petitioner, identifying buyers for fly ash and selling fly ash to them is in its interest. However, despite its efforts, sale of fly ash has not been possible due to demand-supply mismatch. The Petitioners have submitted that MSTC Limited vide its letter dated 2.11.2018 informed the Petitioners that the auction for disposal of fly ash from the

Petitioner`s Project (conducted twice) did not attract any participation. The Petitioners have submitted that in future if any revenue is generated from sale of fly ash, the Petitioners would account for the revenue generated from such sale and comply with the directions of this Commission in Petition No. 131/MP/2016. The Petitioners have undertaken that they will evaluate opportunities to sell fly ash as and when such opportunities arise.

26. In our view, as per the audit report submitted by the Respondents, there are number of Thermal Power Plants in the area and fly ash is available in abundance. However, we direct the Petitioners to keep on floating tenders for sale of fly ash. The Petitioners shall keep the Respondents informed with their efforts towards sale of fly ash including copy of the bids floated for disposal of fly ash from the Power Project and outcome of the efforts made. Any revenue generated from fly ash sales shall be adjusted from the relief to be granted in future.

27. The Respondents have further submitted that compensation on account of Change in Law shall be payable only if increase in cost to the seller is in excess of an amount equivalent to 1% of Letter of Credit in aggregate for a contract year. However, the Petitioners have not demonstrated in the Petition that increase in cost to the Petitioners is in excess of an amount equivalent to 1% of LC. According to the Haryana Discoms, without establishing that the increase in cost is in excess of 1% of letter of credit, the question of entitlement to compensation on account of Change in Law does not arise and prudence check in this regard may be required before granting relief to the Petitioner.

28. Article 13.2(b) of the Haryana PPA provides as under:

***“Operation Period***



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

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

29. Articles 10.3.2 and 10.3.4 of the Bihar PPA provide as under:

*"10.3.2 During Operating Period*

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

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

30. In our view, the Petitioners are entitled to 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. It is clarified that the Petitioners shall be entitled to claim compensation accompanied with all relevant documents like taxes and duties paid supported by Auditor Certificate after the expenditure allowed under Change in Law during operating period exceeds 1% of the value of Letter of Credit in aggregate.

31. As regards claim of GST, the Respondents have submitted that as per terms and conditions of the final allotment letter, since the responsibility of transportation is on the buyer of fly ash, the bidders are deemed to be responsible for the payment of GST. However, in the instant case, the Petitioners are passing GST liability on the Respondents.

32. The Petitioners have submitted that the amount incurred by it is exclusive of Rs. 71,15,090/- (till 31.5.2019) being the GST amount paid by the Petitioners under

Reverse Charge Mechanism as per Notification No. 13/2017-Central Tax (Rate) dated 28.6.2017. In terms of Notification No. 11/2017-Central Tax (Rate) dated 28.6.2017, the rate of GST payable at the service recipient (i.e. the Petitioner, in the instant case) is @2.5% on the value of the services. In addition to the Central GST, Odisha State GST @2.5% of the value of services is also to be paid as per Notification No. 305/2017 dated 29.6.2017. The Petitioners have submitted that GST liability incurred and discharged by it for the period from August 2018 to May 2019 for the expenses incurred towards transportation of fly ash qua Asthech (India) Pvt. Ltd. and Samal Builders Pvt. Ltd. is Rs. 71,15,090/-. GST for each month is computed under all categories, namely, forward and reverse charge basis, for all the vendors (including those engaged in transportation of fly ash) engaged by the Petitioners on the invoice value raised by all such vendors.

33. We do not find merit in the submission of the Respondents for the fact that Lols issued to both the transporting companies state that GST will be applicable extra at prevailing rates. The Chartered Accountant vide its certificate dated 18.6.2019 has also certified that the Petitioners have incurred Rs. 71,15,090/- on account of GST paid on RCM basis till 31.5.2019. Therefore, the Petitioners shall be entitled to compensation towards GST paid under the contract. However, we want to clarify that the Petitioners shall be entitled to 100% compensation towards GST paid on the transportation cost incurred for transportation of ash up to a distance of 100 km and 50% compensation towards GST paid on the transportation cost incurred for transportation of ash beyond a distance of 100 km.

### **Carrying Cost**

34. The Petitioners have submitted that it is entitled to carrying cost/ interest on all additional amounts in respect of the above claims incurred/ paid till date, on account

of Change in Law. The relief under Article 10 of the PPA necessarily includes carrying cost as Article 10 stipulates that the affected party is to be restored to the same economic position as if such Change in Law had not occurred. Carrying cost is in the nature of compensation of time value of funds deployed on account of Change in Law events and in case carrying cost is not awarded, the affected party would not be restored to the same economic position.

35. The Respondents have submitted that the Petitioners are seeking compensation for the period from 11.12.2018 to 13.6.2019 which is without any basis. The Petitioners have filed the details of invoices in the present Petition after a lapse of one year and 8 months of the passing of order. The Petitioners have not incurred any expenditure from 21.2.2018 to 10.12.2018. The question of award of carrying cost if at all to be considered, the relevant data would be only from the date the claim has been made which is admittedly 25.10.2019. Therefore, the carrying cost has to be reckoned from the said date only. The Respondents have further submitted that the amount claimed towards carrying cost is not payable since the reimbursement of transportation cost allegedly incurred by it, has been claimed for the first time in the Petition on 25.10.2019.

36. *Per contra*, the Petitioners have submitted that as per Article 13.2 of the PPA, the Petitioners are 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 Petitioners have further submitted that Article 10.5 of the PPA shows that the adjustment in monthly Tariff Payment shall be effective from the date of Change in Law. As per the law laid down by the Hon`ble Supreme Court, the Petitioners are entitled to payment of carrying cost from the effective date of Change in Law events. The Commission in its order dated 11.3.2019 in Petition No.

249/MP/2018 had granted carrying cost for the expenditure incurred by the affected party from the date of the event of Change in Law. Therefore, the Petitioners are entitled to compensation from the date of payment pursuant to the Change in Law event.

37. We have considered the submissions of the Petitioners and the Respondents. APTEL in its judgment dated 13.4.2018 in Appeal No. 210 of 2017 in the matter of 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 than re- determination of the existing tariff.*

*x. Further, the provisions of Article 13.2 i.e. restoring the Appellant to the same economic position as if Change in Law has not occurred is in consonance with the principle of „restitution“ i.e. restoration of some specific thing to its rightful status. Hence, in view of the provisions of the PPA, the principle of restitution and judgement of the Hon’ble Supreme Court in case of Indian Council for Enviro-Legal Action vs. Union of India &Ors., we are of the considered opinion that the Appellant is eligible for Carrying Cost arising out of approval of the Change in Law events from the effective date of Change in Law till the approval of the said event by appropriate authority. It is also observed that the Gujarat Bid-01 PPA have no provision for restoration to the same economic position as if Change in Law has not occurred. Accordingly, this decision of allowing Carrying Cost will not be applicable to the Gujarat Bid-01 PPA.*

*xi. Accordingly, this issue is decided in favour of the Appellant in respect of above mentioned PPAs other than Gujarat Bid – 01 PPA.”*

38. The aforesaid judgment of 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 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.”*

39. Article 10.2.1 of the PPA provides as under:

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

40. In view of the provisions of the PPA, the principles of restitution and the judgment of Hon'ble Supreme Court, we are of the considered view that the Petitioners are eligible for carrying cost arising out of approved Change in Law event from the date of payment of transportation cost for transportation of fly ash by the Petitioners till the actual payment of the same by the Respondents to the Petitioners.

Once a supplementary bill is raised by the Petitioners in terms of this order, the provisions of Late Payment Surcharge in the PPA would kick in if the payment is not made by the Respondents within the Due Date.

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

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

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

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

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

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

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

43. The Petitioners have 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. We have considered the submission of the Petitioner.

The Petitioners are directed to follow the general procedure enumerated as under:

(a) 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.

(b) Claim shall be admissible subject to the following conditions:

(i) Regular efforts being made to sell the fly ash;

(ii) Revenue generated from the sale of fly ash shall be maintained in a separate account as per MoEF&CC Notification dated 25.1.2016;

(iii) The contract for transportation of fly ash shall be awarded through a transparent competitive bidding process;

(iv) The rates at which fly ash transportation contracts are awarded are should in no case be higher than the scheduled rates of the respective State Governments for transportation of fly ash, if any.

(v) Any revenue generated from the sale of fly ash shall be adjusted against the relief so granted;

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

(c) To claim the expenditure, the Petitioners shall furnish a copy of agreements entered into with the fly ash transporters 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 Petitioners are directed to furnish along with its monthly regular and/or supplementary bill(s), computations duly certified by the auditors to the Respondents. The Petitioners and the Respondents are directed to carry out reconciliation towards these claims annually.

(d) The Petitioners 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.

### **Summary of Decision**

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

<b>Sr. No.</b>	<b>Change in Law event</b>	<b>Decision</b>
1	Transportation of fly ash and GST	Allowed in terms of paragraph 30 (subject to pro-rata basis for distance as per paragraph 21 and for GST as per paragraph 33)
2	Carrying cost	Allowed in terms of paragraph 40

45. The Petitioners are 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 effective.

46. Petition No. 405/MP/2019 is disposed of in terms of the above.

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

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

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