

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No.205/MP/2021

Coram:

Shri I.S. Jha, Member

Shri Arun Goyal, Member

Shri Pravas Kumar Singh, Member

Date of Order: 28th October, 2022

IN THE MATTER OF:

Petition for recovery of additional expenditure incurred due to Ash transportation charges consequent to Ministry of Environment and Forest & Climate Change, Government of India Notification dated 3.11.2009 and Notification dated 25.1.2016 on a recurring basis.

AND

IN THE MATTER OF

NTPC Ltd
NTPC Bhawan,
Core-7, SCOPE Complex,
7, Institutional Area, Lodhi Road,
New Delhi-110003

.....**Petitioner**

Vs

1. Uttar Pradesh Power Corporation Limited,
Shakti Bhawan, 14, Ashok Marg,
Lucknow.

2. Jaipur Vidyut Vitran Nigam Limited,
Vidyut Bhawan, Janpath,
Jaipur-302005

3. Ajmer Vidyut Vitran Nigam Limited,
Vidyut Bhawan, Panchsheel Nagar,
Makarwali Road, Ajmer- 305004

4. Jodhpur Vidyut Vitran Nigam Limited,
New Power House, Industrial Area,
Jodhpur-342003

5. Tata Power Delhi Distribution Limited,
NDPL House, Hudson Lines, Kingsway Camp
Delhi-110009

6. BSES Rajdhani Power Limited,



BSES Bhawan, 2nd Floor, B-Block, Nehru Place,
New Delhi – 110019

7. BSES Yamuna Power Limited,
2nd Floor, B Block, Shakti Kiran Building,
Near Karkardooma Court, New Delhi-110092

8. Haryana Power Purchase Centre,
Shakti Bhawan, Energy Exchange, Room No. 446,
Top Floor, Sector-6, Panchkula- 134109

9. Punjab State Power Corporation Limited,
The Mall, Patiala-147001

10. Himachal Pradesh State Electricity Board, Vidyut
Bhawan, Kumar House Complex Building-II Shimla-171004

11. Power Development Department,
Government of J&K, SLDC Building,
1st Floor, Gladani Power House, Narwal, Jammu
-190009

12. Power Department,
Union Territory of Chandigarh, Sector 9-D,
Chandigarh-160019

13. Uttarakhand Power Corporation Limited,
Urja Bhawan, Kanwali Road, Near Balli Wala Chowk,
Dehradun -248001

14. Madhya Pradesh Power Management Company Limited,
Block No-11, Ground floor, Shakti Bhawan,
Vidhyut Nagar, Rampur, Jabalpur-482008

15. Maharashtra State Electricity Distribution Company Limited
Prakashgad, 4th Floor, Bandra (East),
Mumbai- 400051

16. Gujarat Urja Vikas Nigam Limited,
Vidhyut Bhawan, Race Course,
Vadodara - 390 007

17. Chhattisgarh State Power Distribution Company Limited,
P.O Sunder Nagar, Dangania, Raipur-492013.

18. Goa Electricity Department,
Government of Goa, Aquem Alto,
Margao, Goa – 403601.



19. Electricity Department, Administration of Daman and Diu,
Plot No. 35, OI DC Complex, Near Fire Station, Somnath,
Daman -396210

20. Electricity Department,
Dadar and Nagar Haveli 66kV, AmlI Industrial Estate,
Silvassa- 396230

21. West Bengal State Electricity Distribution Company Ltd, Vidyut
Bhawan, Bidhan Hagar, Block DJ, Sector-II, Salt Lake City, Kolkata-700
091.

22. Bihar State Electricity Board,
Vidyut Bhawan, Bailey Road, Patna-800021

23. Jharkhand State Electricity Board,
Main Secretariat, Doranda, Ranchi-834002

24. GRIDCO Limited,
Janpath, Bhubaneswar-751 022

25. Power Department, Government of Sikkim,
Kaji Road, Gangtok-737101

26. Eastern Power Distribution Company Limited,
P&T Colony, Seethmmadhara, Vishakapatnam,
Andhra Pradesh-530013

27. Southern Power Distribution Company Limited,.
Srinivassa Kalyana Mandapam Backside, Tiruchanoor Road,
Kesavayanagunta, Tirupati-517501

28. Northern Power Distribution Company Limited,
Opp. NIT Petrol Pump, Chaitanapuri, Warangal-506004

29. Central Power Distribution Company Limited, Mint
Compound, Hyderabad-500063.

30. Government of Puducherry,
137, Netaji Subhash Chandra Bose Salai,
Puducherry - 605 001

31. Tamil Nadu Generation and Distribution Corporation Limited,
NPKRR Maaligai, 144, Anna Salai,
Chennai-600 002

32. Kerala State Electricity Board,
Vaidyuthi Bhavanam, Pattom,
Trivandrum – 695004

33. Bangalore Electricity Supply Company,
K.R. Circle, Bangalore-506001,
Karnataka

34. Mangalore Electricity Supply Company,



Paradigm Plaza, AB Shetty Circle,
Mangalore-575001

35. Chamundeshwari Electricity Supply Corporation,
927, L J Avenue, GF, New Kantharaj Urs Road,
Saraswaturam, Mysore-570009

36. Gulbarga Electricity Supply Corporation,
Station Road, Gulbarga, Karnataka-585102

37. Hubli Electricity Supply Company,
Navanagar, P.B Road, Hubli, Karnataka- 580025

38. Assam State Electricity Board,
Bijulee Bhawan, Paltan Bazar,
Guwahati- 781001

..... Respondents

Parties present:

Shri Venkatesh, Advocate, NTPC
Shri Ashutosh K. Srivastava, Advocate, NTPC
Shri Jatin Ghuliani, Advocate, NTPC
Shri Abhishek Nangia, Advocate, NTPC
Shri Anand Sagar Pandey, NTPC
Shri Manoj Kumar, NTPC
Shri Buddy A. Ranganadhan, Advocate, BPRL & MSEDCL
Shri Anupam Varma, Advocate, BPRL
Shri Rahul Kinra, Advocate, BPRL
Shri Aditya Ajay, Advocate, BPRL
Ms. Megha Bajpeyi, BPRL
Shri Aashish A. Bernard, Advocate, MPPMCL
Shri Anurag Naik, MPPMCL
Shri S. Vallinayagam, Advocate, TANGEDCO
Ms. B. Rajeswari, TANGEDCO
Ms. R. Ramalakshmi, TANGEDCO
Ms. R. Alamelu, TANGEDCO
Shri P.V. Dinesh, Advocate, KSEBL
Shri Shashwat Kumar, Advocate, BSPHCL
Shri Rahul Chouhan, Advocate, BSPHCL
Shri R.K. Mehta, Advocate, GRIDCO
Ms. Himanshi Andley, Advocate, GRIDCO
Shri Durga M Sahoo, GRIDCO
Shri Mahfooz Alam, GRIDCO
Shri Arunav Patnaik, Advocate, Karnataka Discoms
Ms. Bhabna Das, Advocate, Karnataka Discoms
Shri Anup Jain, Advocate, MSEDCL
Shri Akash Goel, Advocate, MSEDCL
Shri D.H. Agarwal, MSEDCL
Shri B.K. Saxena, UPPCL



ORDER

The Petitioner, NTPC has filed this petition seeking the following reliefs:

- (a) *Admit the present Petition;*
- (b) *Permit recovery of additional expenditure on account of ash transportation already incurred by the Petitioner upto 2020-21;*
- (c) *Allow the Petitioner to raise Monthly Bills for reimbursement of the additional expenditure for ash transportation for the remaining period of the control period FY 2019-24;*
- (d) *Pass such further Order(s) as this Hon'ble Commission may deem fit in the facts and circumstances of the case."*

2. The Petitioner, which is a central generating company, has filed this petition for recovery of additional expenditure on account of fly ash transportation charges for its generating stations for the 2019-24 tariff period under Section 79(1)(a) of the Act read with Regulation 76 and 77 of the 2019 Tariff Regulations. While the Petitioner has sought reimbursement of the Ash transportation expenditure incurred during 2019-20 and 2020-21, it has, for the future periods, sought reimbursement of the said expenditure, on a monthly basis, from the various beneficiaries of the generating stations of the Petitioner. In the interim, the Petitioner has also sought permission to raise monthly bills on the beneficiaries, to recover the ash transportation expenditure, which was incurred, during the pendency of the petition. Some of the Respondents herein raised issues on the 'admissibility' of the petition on various grounds and the Commission vide its order dated 27.5.2022 rejected the submissions of the Respondents and held that the Petition was maintainable. Accordingly, the Petition was admitted and the parties were directed to complete their pleadings on merits. The relevant portions of the order dated 27.5.2022 is extracted below:

Jurisdiction

24.... As Commission has the jurisdiction to regulate the tariff of the generating stations of the Petitioner, in terms of Section 79(1)(a) of the Act, the petition is maintainable, on this count.



Cause of action

26.....The Petitioner has also submitted that it has complied with the directions given in order dated 5.11.2018 in Petition No. 172/MP/2016 and the recovery of fly ash transportation charges are subject to truing up by the Commission. Further, the Commission in its order determining tariff of Ramagundam STPS, Stage-III, for the 2019-24 tariff period had taken a view that the issue of fly ash transportation charges claimed in the tariff petitions are to be governed by the decision of the Commission in this petition. In the light of the above submissions, we are of the considered view that the Petitioner has established a 'cause of action' for the Commission to adjudicate the reliefs sought for by the Petitioner and to pass orders, on merits. The Petition is therefore maintainable on this count.

Impermissibility under law

28. We notice that, in the present case, the Petitioner has only claimed the recovery of fly ash transportation charges incurred or to be incurred for the 2019-24 tariff period, in terms of its prayers in paragraph 1 above, subject to truing up and has not split any of its claims, as contended by the Respondents. Moreover, the claim of the Petitioner for fly ash transportation charges in some of the tariff petitions filed by the Petitioner for the 2019-24 tariff period, had already been disposed of with the observation that the recovery of the said charges, will be governed by the decision taken in this petition. This decision will also be applicable to the remaining tariff petitions in respect of some of the generating stations of the Petitioner, for the 2019-24 tariff period, which are pending. In view of this, the submissions of the Respondents are not acceptable. Therefore, the objection of the Respondents that the claim of the Petitioner is barred by the principles contained in Order 2 Rule 2 of CPC is rejected.

31.....Moreover, the recovery of fly ash transportation charges for the 2014-19 tariff period had been allowed by the Commission in some of its orders, based on prudence check of the data furnished by the Petitioner, in those petitions. But, in cases where the recovery of fly ash transportation charges has not been allowed for the 2014-19 tariff period, the Petitioner has been directed to approach the Commission by a separate petition, along with relevant data/information for consideration. Therefore, the objection of the Respondents that the claim of the Petitioner is barred by the principles of res judicata under Section 11 of the CPC is rejected. The Petition is therefore maintainable.'

Other issues

"32. Some of Respondents have raised issues like (a) absence of a provision under the Tariff Regulations for recovery of additional O&M expenses over and above the normative values specified (b) failure of the Petitioner to comply with the procedure stipulated in order dated 5.11.2018 in Petition No. 172/MP/2016 (c) exercise of the 'power to relax' to be used sparingly and for cogent reasons (d) no provision for carrying cost etc., Since the Commission, after hearing the parties on 17.2.2022, has reserved its order on 'maintainability' of the petition, the issues raised on merits, have not been considered, in this order.

33. In view of the above discussions, we hold that the present petition filed by the Petitioner is maintainable. Accordingly, the petition is 'admitted' The Respondents are directed to file their replies on merits, on or before 16.6.2022, after serving copy to the Petitioner who shall file its rejoinders, by 27.6.2022.".

34. The Petition shall be listed for hearing 'on merits', in due course for which separate notice will be issued."



Reply of the Respondents

3. The Respondent BSPHCL vide affidavit dated 16.6.2022 has mainly submitted the following:

- (a) The Petitioner has failed to comply with the directions issued by this Commission in its order dated 5.11.2018 in Petition No.172/MP/2016. As per directions of the Commission in the said order, only actual additional expenditure incurred by the Petitioner towards the transportation of ash as per Ministry of Environment, Forest & Climate Change (MoEF&CC) Notification dated 25.1.2016 has been allowed under change in law. There has been neither any finding to substantiate that the Petitioner has actually incurred such expenses nor any determination of such expenses on a generic basis.
- (b) The directions issued in order dated 5.11.2018 was never challenged by the petitioner and hence, have attained finality. The Petitioner cannot circumvent the established legal position, whereby, the claims of the Petitioner can only be entertained on actuals, pursuant to prudence check, on a case to case basis, through true-up exercise. As the Petitioner has already filed station-wise tariff petitions for the same, the filing of the present petition is unnecessary and unwarranted.
- (c) There is no provision in the Tariff Regulations, which allow the reliefs claimed by the Petitioner. The tariff of particular station constitutes different components which are duly considered at the time of determination of tariff. It is in the nature of a bundle of charges and the components of the same cannot be recovered on a separate basis.
- (d) The claim relating to the cost of fly ash transportation has to be determined as an additional O&M expense on case-to-case basis, as per the procedure stipulated in the order dated 5.11.2018. Neither the procedure stipulated in the said order, nor the regulations issued by this Commission allow any claims, without actual quantification in respect of additional O&M expense, and hence, the Petitioner is not entitled to raise an invoice. The concept of carrying cost implies the restitution of the affected party back to its financial position, as if the change in law event has not occurred. This concept essentially provides a protection to the affected parties in competitively bid projects under Section 63 of the Electricity Act, 2003. However, there is no concept of restitution in projects developed under Section 62 of the said Act.
- (e) The Ministry of Power (MOP), Government of India (GOI) vide its Notification dated 22.9.2021 has laid down guidelines for utilization of fly ash and the detailed procedure for computation of ash transportation charges. It is evident that if the above guidelines are followed, a power plant is not necessarily required to incur any expenditure in disposing of the fly ash.
- (f) The MoEF&CC Notification dated 31.12.2021 does not make it strictly mandatory to supply fly ash and bear the transportation cost towards the same. If the Petitioner take a prudent approach towards disposal of fly ash, it may even be



able to avoid levy of transportation costs and instead even earn revenue towards selling of the fly ash. The Petitioner has to abide by the MOP Notification and cannot ask for pass through of ash transportation charges without prudence check by the Commission. Therefore, the prayer of the Petitioner that it may be permitted to raise monthly bills of ash transportation is not admissible and liable to be rejected

4. The Respondent BRPL vide reply affidavit dated 17.6.2022 has mainly submitted the following:

- (a) There is no material difference between the MoEF&CC notification dated 25.1.2016 and 31.12.2021 as (i) Liability of fly ash transportation has been casted upon the Petitioner since 25.1.2016 and there is no change to that effect (ii) Notifications are premised on the 'polluter pays' principle introduced firstly by notification 14.9.1999, which mandated ash utilization. The notification dated 25.1.2016 amended the earlier notification and the Petitioner was made liable to bear the fly ash transportation charges and nearly extended the timeline for 100% fly ash utilization by the Petitioner to 31.12.2017 (iii) Due to non-compliance with the timelines for 100% fly ash cultivation, the notification dated 31.12.2021 has extended the timelines prescribed earlier vide notification dated 25.1.2016. As such there is not change in the responsibility of the Petitioner to bear the fly ash transportation cost.
- (b) The Petitioner was admittedly aware of its obligation towards fly ash utilization and transportation and the notification dated 31.12.2021 only extended the timeline for carrying out such obligation. The Petitioner cannot claim the notification dated 31.12.2021 to be change in law event, when there has been no material change qua the responsibility of the Petitioner.
- (c) The Hon'ble Supreme Court vide its judgment dated 10.5.2022 in Civil Appeal No. 1692-1693 of 2020 (*M/s Aravali Power Company Pvt. Ltd. Vs Ved Prakash & anr and batch*) has directed MoEF&CC to revisit the parameters provided in the motivation dated 31.12.2021 and accordingly modify the same, taking into account the provisions of Hazardous and other wastes (Management and Trans boundary Moments) Rules, 2016.
- (d) Even if the Notification dated 31.12.2021 is considered as a change in law event, the MoEF&CC has to review the parameters set-out in the said notification in terms of the above directions of the Hon'ble Supreme Court and therefore, the claims of the Petitioner has to be reconsidered in view of the review by MoEF&CC.
- (e) The Petitioner reliance to order dated 5.11.2018 in Petition No.172/MP/2016 to suggest a change in law event in 2021 under the 2019 Tariff Regulations issued on 7.3.2019 for the events which are prior to the issuance of the 2019 Tariff Regulations is erroneous. Moreover, the notification dated 25.1.2016 which was declared as change in law event in context of the previous control period cannot be considered as change in law under the 2019-24 tariff period.
- (f) There is no provision under the 2019 Tariff Regulations which allows the recovery of the additional O&M expenses over and above the normative values



specified therein. Allowing the claims of the Petitioner for additional O&M expenses amounts to truing up of the normative O&M expenses specified under the 2019 Tariff Regulations, which is not permissible.

- (g) The draft 2019 Tariff Regulations did not include any provision for recovery of additional O&M expenses over and above the normative amounts. Also, the normative expenses specified under the 2019 Tariff Regulations were only after due consideration and analysis of the requirements of the various generating station for the 2019-24 tariff period. As such, the Commission had consciously not included any provision to allow the recovery of additional O&M expenses on ash transportation while specifying the 2019 Tariff Regulations.
- (h) The 2019 Tariff Regulations were not challenged by the Petitioner and therefore, it is not opened to the Petitioner to now seek additional O&M in the absence of any provision allowing such recovery. The prayer of the Petitioner, in effect, seeks the amendment of the 2019 Tariff Regulations which is not permissible (Commission's order dated 5.8.2018 in Petition No.215/MP/2018 was referred to).
- (i) The transportation cost of fly ash generated at the Petitioner's generating station are a consequence of the Petitioner's failure to achieve 100% ash utilization. The Petitioner is attempting to shift the burden of the consequence of its neglect of its statutory duties on the beneficiaries.
- (j) The exercise of the Power to Relax and Power to Remove difficulties is a judicial discretion and the same cannot be invoked to validate the Petitioner's non-compliance to the notification dated 14.9.1999 and 3.1.2009. the Hon'ble Supreme Court in *M.U Sinai vs Union of India and ors (1975 3 SCC 765)* has held that the power to remove difficulties must be exercised in a conditioned and restricted manner and such exercise of power shall not change the basic structure, schemes and essential provisions of the statute.

5. The Respondent TANGEDCO vide its reply affidavit dated 30.6.2022 has mainly submitted the following:

- (a) The Petitioner has only furnished a tabular column with detail of the ash sold and transportation charges incurred for the 24 generating stations, without any documentary evidence, as per the order dated 5.11.2018 in Petition No. 172/MP/2016, on a case to case basis, for each generating station.
- (b) The order dated 5.11.2018 only provides for the method to be adopted for making a claim in the tariff petition. In the absence of getting it determined after prudence check of the claim made by the Petitioner, in the tariff petitions filed and in the absence of any quantification of the claim in respect of the additional O&M charges incurred due to MoEF&CC notification, the Petitioner is not entitled to raise an invoice. The question of carrying cost does not warrant any consideration at all, as the prayer made is not in line with the regulations and has been sought under power to relax.
- (c) The MOP, GOI notifications dated 25.9.2021 and 22.2.2022, issued after



submissions of the petition have clearly formulated the procedure, to be adopted by generating station in fixing and claiming ash transportation charges. As per the directions has to have to follow certain steps in order to dispose fly ash and claim transportation cost. In view of this, the prayer for billing the beneficiaries directly in future is not feasible as the Petitioner has to certify that all steps were followed for disposal of fly ash. For the period after 31.12.2021, the Petitioner may be directed to follow the procedure laid down in the MOP notification dated 22.2.2022.

6. The Respondent, MSEDCL vide reply affidavit dated 6.7.2022, has submitted the following:

- (a) Since the parameters with respect to fly ash under the MoEF&CC notification 31.12.2021 has been put up for reconsideration, in terms of the judgment dated 10.5.2022 of the Hon'ble Supreme Court in M/s Aravali Power Co. Pvt. Ltd case, the present claims of the Petitioner cannot be looked into at this stage and any reliance on the said notification would be premature.
- (b) The Petitioner has only furnished a tabular column with detail of the ash sold and transportation charges incurred for the 24 generating stations, without any documentary evidence, as per the order dated 5.11.2018 in Petition No. 172/MP/2016, on a case to case basis, for each generating station.
- (c) Since the PPA does not provide this component in the formula for passing through the change in law claim, the claim of the Petitioner for payment will affect the cash flow of the Respondent as well. Without truing up of the generators claim, the prayers in the present petition may not be allowed.
- (d) The Commission may direct the Petitioner to follow the MOP guidelines dated 22.9.2021 and to abide by the MoEF&CC notifications dated 3.11.2009 & 25.1.2016 and directions contained in order dated 21.2.2018 in Petition No. 131/MP/2016 and order dated 22.3.2021 in Petition No.405/MP/2019 and submit all relevant data's, before raising the claim and pressing for the same in the present petition.
- (e) The Commission may direct the Petitioner to follow the mechanism for recovery of future expenditure, for transportation of ash, after adjusting the revenue earned from sale of Ash, in terms of the MOP guidelines dated 22.9.2021 and as specified by this Commission in order dated 22.3.2021 in Petition No.405/MP/2020.
- (f) The Petitioner's reliance to order dated 5.11.2018 seeking recovery of ash transportation on monthly basis, is misplaced, more so, in the absence of details of incurrence of actual additional expenditure. Also, the claim relating to cost of fly ash transportation has to be determined as an additional O&M expenses, on a case to case basis, for each generating station as per procedure stipulated in order dated 5.11.2018.
- (g) There is no provision under the 2019 Tariff Regulations to allow the recovery of additional O&M expenses over and above the normative expenses specified therein. It is settled law that this Commission, in the tariff determination



proceedings is bound by its own regulation (*judgment of Hon'ble Supreme Court in PTC vs CERC & ors (2010 4 SCC 603) was referred to*).

- (h) The Commission in its wisdom did not include any provision to allow the recovery of additional O&M expenses on ash transportation, while specifying the 2019 Tariff Regulations. Accordingly, it not open to the Petitioner to seek additional O&M expenses in the absence of any provisions allowing such recovery.
- (i) In the absence of actual quantification, the Petitioner is not entitled to raise any invoice and therefore, consequently the question of liability of carrying cost also doesn't not arise. Moreover, the concept of carrying cost is not applicable to projects developed under Section 62 of the Electricity Act, 2003.
- (j) Directions in the MoEF&CC notification dated 25.1.2016 is the consequence of the failure of the Petitioner to attain the 100% ash utilization within the timelines stated in the notifications dated 14.9.1999 and 3.11.2009. Thus, the expenditure to be incurred is wholly attributable to the Petitioner due to its failure to comply with the said notifications.

Hearing dated 7.7.2022

7. During the hearing, the learned counsel for the Petitioner circulated note for arguments and mainly submitted as under:

(a) The reliefs sought by the Petitioner in the present petition is (i) within the contours of law (ii) not in derogation of the regulations notified by this Commission and (iii) the Commission has the powers to grant the said reliefs.

(b) The Commission vide its order dated 5.11.2018 in Petition No.172/MP/2016 has recognized the MOEF, GOI Notification dated 25.1.2016 as a 'change in law' event and allowed the recovery of fly ash transportation charges on account of such an event, on prudence check, during the 2014-19 tariff period.

(c) The Petitioner had originally claimed the expenditure for ash transportation for 2019-20 and 2020-21 in the tariff petitions filed for the 2019-24 tariff period. However due to pendency on account of Covid-19 pandemic, the Petitioner was facing severe under recovery of the expenditure and therefore, the present petition was filed in October, 2021, seeking reimbursement of the expenditure incurred during 2019-20 and 2020-21 and for the balance period, the recovery of such expenditure to be permitted on a monthly basis. The Commission in some of its orders related to the tariff petitions filed for the 2019-24 tariff period, has held that the reimbursement of charges towards fly ash transportation, shall be governed by the decision of the Commission in the present petition.

(d) The Commission in its order dated 28.5.2022, has held that the present petition is maintainable. The expenses on account of ash transportation being of recurring nature, has increased, on a year-to-year basis and has caused cash-flow problems to the Petitioner. MoEF&CC, GOI Notification on 31.12.2021 categorically prescribed that the expenditure incurred for meeting 100% Fly Ash utilization shall be considered as 'change in law'.



(e) The submission of Respondent BSPHCL that the tariff regulations notified by this Commission, do not permit the recovery of such expenditure, was considered at length and rejected by this Commission in para 23 of the order dated 28.5.2022. Similarly, the argument of the Respondents (TANGEDCO and BRPL) that fly ash utilisation is the sole responsibility of the Petitioner and since the Petitioner has defaulted in meeting such obligations (as per MOEF & CC notifications), the beneficiaries should not be saddled with the liability was also considered and rejected in the said order dated 28.5.2022;

(f) After filing this petition, the Petitioner has incurred a total expenditure of Rs 1440 crore during 2021-22. As on date, the total expenditure incurred by the Petitioner is Rs. 3092 crores up to 31.3.2022. and continues to incur expenditure on fly ash transportation, on a month on month basis. The gravity of the situation compelling the Petitioner to file the present petition has been accepted by this Commission in paras 26 and 28 of the order dated 28.5.2022;

(g) Though the 2014 Tariff Regulations did not provide for a mechanism to permit the recovery of fly ash transportation expenses as 'change in law', the Commission, after considering the difficulty faced by the Petitioner and in exercise of the regulatory power under section 79(1)(a) of the Act, had granted relief to the Petitioner for recovery of such expenditure as additional O&M expenses. (*judgment dated 15.3.2020 of the Hon'ble Supreme Court in PTC Ltd. vs. CERC was referred to*). As the 2019 Tariff Regulations also do not deal with recovery of the said expenditure, this Commission, in exercise of the power under section 79 (1)(a) can grant relief to the Petitioner, which is otherwise not envisaged under the Regulations, following the principles enshrined under section 61 of the Act.

(g) The mechanism for the monthly recovery of fly ash expenditure with annual reconciliation, put in place by the Commission in its order dated 22.3.2021 in Petition No. 405/MP/2019 (GKEL & anr v DHBVNL & ors) may be adopted in the present case of the Petitioner.

8. The representative of the Respondent UPPCL referred to its reply and pointed out that the Commission in its order dated 2.9.2021 in Petition No. 300/GT/2020 (tariff of Unchahar Thermal Power Station of the Petitioner) had not considered the fly ash transportation expenses as part of the O&M expenses. He also submitted that the same may be adopted in the present case, by allowing the recovery of fly ash transportation expenses, on an annual basis (instead of monthly basis) after adjusting the sale proceeds of fly ash. The representative also sought permission of the Commission, to file its written submissions in the matter.

9. The learned counsel for Respondent GRIDCO, while arguing that the reliefs claimed by the Petitioner are not admissible, mainly submitted as under:



(a) The prayer of the Petitioner for monthly recovery for fly ash transportation expenses was considered and rejected by this Commission in its order dated 5.11.2018 in Petition No. 172/MP/2016. The procedure and methodology for recovery of fly ash transportation expenses, is subject to prudence check of the information, only in a tariff petition in respect of each generating station, and not in the present petition.

(b) The Commission vide its order dated 5.11.2018 in Petition No.172/ MP/2016 had permitted the recovery of fly ash transportation expenses, in exercise of the regulatory power, for the 2014-19 tariff period. Despite this, the Commission, did not provide for any regulation/provision, for recovery of fly ash transportation expenditure, under the 2019 Tariff Regulations;

(c) The exercise of the 'power to relax' and 'power to remove difficulty' by this Commission, cannot be contrary to the Regulations (*judgment of the Hon'ble Supreme Court in M.U.Sinai v UOI & ors was referred to*).

(d) The Petitioner has failed to satisfy the conditions mentioned in order dated 5.11.2018 in Petition No.172/MP/2016 and therefore, no prudence check can be carried out. No steps have been taken by the Petitioner to comply with the MOEF & CC Notifications relating to the period from 1999 to 2016. In case 100% fly ash utilization is achieved in terms of the said notifications, no expenses would have been incurred towards fly ash transportation.

(e) The issue of consumers being burdened with carrying cost is misplaced and would arise only when the principal amount is admitted in terms of compliance to the MOEF&CC Notifications by the Petitioner;

(h) The Commission in its order dated 14.8.2021 in Petition No. 161/MP/2020 had not allowed the recovery of fly ash transportation charges for non-compliance of the conditions. Also, the monthly recovery of fly ash transportation expenses (with annual reconciliation) as allowed in order dated 22.3.2021 in Petition No. 405/MP/2021 was subject to the conditions to be satisfied by the Petitioner.

10. The learned counsel for the Respondent MPPMCL adopted the above submissions of the Respondent GRIDCO. He, however, submitted that the filing of the present petition, on the ground that the claims in respective tariff petitions were pending due to covid-19 pandemic, is not acceptable. The learned counsel also submitted that the 'power to relax' cannot be exercised to mitigate the hardship faced by the Petitioner. He further submitted that since the 2019 Tariff Regulations do not contain any provision for recovery of fly ash transportation expenses, the prayer of the Petitioner for relaxation, amounts to seeking 'mandamus'.

11. The learned counsel for the Respondent Delhi Discoms (BRPL & BYPL) adopted the



submissions made by the Respondents above. He also referred to the reply and submitted that since the Petitioner was aware of the MOEF&CC Notifications regarding fly ash transportation expenses, it should have sought for incorporation of a provision for allowing recovery of such expenses, while framing the 2019 Tariff Regulations. Having not done so, the prayer of the Petitioner seeking relaxation of the regulations, amounts to amendment of the regulations, which is not permissible. The learned counsel further submitted that the relief sought by the Petitioner does not fall within the ambit of Regulation 3(10) of the 2019 Tariff Regulations. He added that the MoEF&CC Notification dated 31.12.2021 only extended the timeline for carrying out obligations towards fly ash utilization and transportation by the Petitioner and therefore, the Petitioner cannot claim any subsequent Notification dated 31.12.2021 to be a Change in Law event, when there has been no material change, qua the responsibility of the Petitioner. The learned counsel sought permission of the Commission, to file its written submissions, in the matter.

12. The learned counsel for the Respondents Karnataka Escoms adopted the submissions made by the Respondents above. She, however added that power to relax/power to remove difficulty can only be exercised in case of difficulty in the implementation of the regulations and not due to difficulties faced by the Petitioner. The learned counsel also submitted that while the Petitioner, in its tariff petition (related to Kudgi STPS) has sought recovery of fly ash transportation expenses on a quarterly basis, it has sought recovery of the same expenses, on a monthly basis, in the present petition. The learned counsel sought permission of the Commission, to file its written submissions, in the matter.

13. The learned counsel for the Respondent TANGEDCO adopted the submissions of the above Respondents. He, however, submitted the following:

(a) The petition is bereft of particulars which are required to be furnished in compliance to the MoEF&CC Notifications dated 25.1.2016, 22.4.2021 and 31.12.2021. The MOP, GOI notification dated 22.2.2022 has clearly formulated the procedure to be adopted by generating stations in fixing and claiming of ash transportation charges. Hence, the Petitioner is required to certify that the procedure



mentioned in the said notification was followed along with details.

(b) No documents have been submitted to show that transparent competitive bidding procedure was conducted by the Petitioner and there are no details of the scheduled rates of the respective State Governments, as applicable for transportation of fly ash. No details of the actual additional expenditure incurred on ash transportation after 25.1.2016, duly certified by auditors, have been submitted. No document has been placed on record to show that the details of the revenue generated from fly ash sales are maintained in a separate account as per the MoEF&CC Notification.

(c) While the Petitioner has relied on the order dated 5.11.2018 in Petition No. 172/MP/2016, to contend that the MOEF &CC notification is a change in law, for grant of relief in the present case, it has not complied with the conditions laid down in the said order.

(d) The Petitioner is under an obligation to submit station-wise claims, as each generating station will be different in respect to (i) the date of commercial operation (ii) variation in the technology used (iii) the quality of coal consumed and the potential of fly ash usage within the plant. Therefore, instead of a generic petition, the claims of the Petitioner may be considered on a case to case basis, for each generating station, separately.

14. The learned counsel for the Respondent MSEDCL and the Respondent Bihar Discoms adopted the submissions of the above Respondents and also prayed for liberty to file their written submissions. In response to the above, the learned counsel for the Petitioner made his rejoinder submissions, which are in line with the submissions made earlier.

15. The Commission, after hearing the parties, permitted the Petitioner to upload the note of arguments and also directed the Petitioner to file the following additional information:

(a) *Station wise and year wise audited details of Ash Utilisation Reserve Fund w.e.f. 3.11.2009 to 25.1.2016 and further till the end of the 2021-22, clearly showing all accruals and drawls from the said fund;*

(b) *Plant-wise details of income and expenses incurred against each sub head of ash utilisation (including quantities) as reported to CEA from 2019-20 onwards;*

(c) *Plant-wise detailed calculations for arriving at the amounts claimed for ash transportation giving details as per MOEF&CC Notifications and Commission's directions in order dated 5.11.2018 in Petition No. 172/MP/2016 namely:*

- (i) Distance (km);*
- (ii) Quantity (MT);*
- (iii) End user details (type, project etc);*
- (iv) Fly ash cost paid by the end user (if not on free of cost basis);*
- (v) Fly ash transportation cost borne by end user (as per MoEF&CC notifications);*
- (vi) End user certification for the quantity and distance;*
- (vii) Mode of transportation (Rail/Road/Others)*



(viii) Details of competitively awarded transportation contract rates, in case of road contracts (per km);

(ix) Prevailing Schedule of Rates for the respective years in that State etc.

(d) Plant wise plan for improving utilisation of fly ash and reducing cost of transportation of fly ash.

16. Accordingly, the Commission after directing the parties to complete pleadings in the matter, reserved its order in the petition. In compliance to the abovesaid directions, the Petitioner has filed the additional information vide its affidavit dated 1.8.2022. The Respondent, BRPL has filed its written submissions on 2.8.2022 and the Respondent, BSPHCL has filed its counter affidavit vide affidavit dated 10.8.2022, to the additional submissions of the Petitioner. The Petitioner has also filed its written submissions on 12.8.2022. The submissions of the Petitioner and Respondents, in their written submissions/counter affidavit, are mainly on the lines of their respective contentions in the petition/replies, and therefore, the same are not set out herein, for the sake of brevity. We now, based on the submissions of the parties and the documents available on record, proceed to examine the issues raised by the parties, in the subsequent paragraphs.

Analysis and Decision

17. Based on the submissions of the parties, the following issues emerge for consideration:

*(a) **Issue No. A:** Whether the Petitioner is entitled to seek additional cost towards fly ash transportation in terms of the MOEFCC Notifications dated 25.1.2016 and 31.12.2021?*

*(b) **Issue No. B:** Whether the Petitioner is entitled for reimbursement of the actual expenditure incurred on account of fly ash transportation for the period 2019-22 and thereafter for recovery of the same, by monthly billing from 2022 till 2024?*

Issue No. A: Whether the Petitioner is entitled to seek the additional cost towards fly ash transportation in terms of the MOEF&CC Notifications dated 25.1.2016 and 31.12.2021?

18. The Environment Protection Act, 1986 (herein referred to as "EP Act") was enacted by the Government of India on 23.5.1986 to provide for the protection and improvement of environment and for matters connected there with. Section 3(2)(v) of the EP Act provided



the power to the Central Government to take such measures which include the restriction of areas in which any industries, operations or processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards. Thereafter, on 19.11.1986 the Central Government notified the Environment (Protection) Rules, 1986. Rule 5(3)(d) provides that the Central Government shall impose prohibition or restriction on location of such industries and the carrying on of any process or operation in any area after considering the objections received against such notification. Thereafter, the Ministry of Environment and Forests, Govt. of India in exercise of its powers under Section 3(2)(v) and Section 5 of the EP Act, issued directions for 'Utilisation of fly ash from coal or lignite based thermal power plants' vide Notification dated 14.9.1999. The said Notification prescribed amongst others the mechanism for utilisation of fly ash generated from coal or lignite based Thermal Power Plants and the achieve the target of fly ash utilisation. However, the said notification did not contain any provision for sharing of the transportation cost with the users of fly ash. Thereafter, the Ministry of Environment, Forests and Climate Change, Govt. of India vide Notification No. S.O. 254 (E) dated 25.1.2016, in exercise of its powers under the EP Act and EP Rules, made certain amendments to the Fly Ash Notification 1999, and incorporated, amongst others, the following provisions:

“(8) Every coal or lignite based thermal power plants (including captive and or co-generating stations) shall, within three months from the date of notification, upload on their website the details of stock of each type of ash available with them and thereafter shall update the stock position at least once a Month.

(9) Every coal or lignite based thermal power plants shall install dedicated dry ash silos having separate access roads so as to ease the delivery of fly ash

(10) The cost of transportation of ash for road construction projects or for manufacturing of ash based products or use as soil conditioner in agriculture activity within a radius of hundred kilometres from a coal or lignite based thermal power plant shall be borne by such coal or lignite based thermal power plant and the cost of transportation beyond the radius of hundred kilometres and up to three hundred kilometres shall be shared equally between the user and the coal or lignite based thermal power plant.

(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.

(13) To ensure that the contractor of road construction utilizes the ash in the road, the Authority concerned for road construction shall link the payment of contractor with the certification of ash supply from the thermal power plants.

(14) The coal or lignite based thermal power plants shall within a radius of three hundred kilometres bear the entire cost of transportation of ash to the site of road construction projects under Pradhan Mantri Gramin Sadak Yojna and asset creation programmes of the Government involving construction of buildings, road, dams and embankments”.

19. The Petitioner had filed Petition No.172/MP/2016 before this Commission seeking the recovery of additional expenditure incurred due to fly ash transportation charges for the 2014-19 tariff period, pursuant to the MOEF&CC Notification dated 25.1.2016, as a ‘change in law event’ in terms of Regulation 8 of the 2014 Tariff Regulations. In the said case, the Petitioner had also sought the permission of the Commission to raise monthly bills for reimbursement of the said expenditure by the beneficiaries. The Commission vide its order dated 5.11.2018 recognized the MOEF&CC Notification dated 25.1.2016, as a ‘change in law’ event, allowed the recovery of the said expenditure and allowed the recovery of expenditure on such event, subject to prudence check of the claims of the Petitioner. The relevant portion of the order dated 5.11.2018 is extracted below:

“22. It is also noticed that the Committee constituted by the Commission to examine the technical issues with regard to ash utilization in the light of the MOEFCC Notification dated 25.1.2016 has in its report dated 16.5.2018 suggested that the expenditure towards fly ash transportation is admissible under change in law and may be considered in terms of the Commission’s order dated 19.12.2017 in Petition No. 101/MP/2016 (as stated above). 23. Based on the above discussion, we hold that the MOEFCC Notification dated 25.1.2016 which prescribes for sharing of the transportation cost by the coal and lignite based thermal power plants with the fly ash users is covered under Change in law in terms of Regulation 3(9)(ii) of the 2014 Tariff Regulations.

23. Based on the above discussion, we hold that the MOEFCC Notification dated 25.1.2016 which prescribes for sharing of the transportation cost by the coal and lignite based thermal power plants with the fly ash users is covered under Change in law in terms of Regulation 3(9)(ii) of the 2014 Tariff Regulations.

xxxx

31. Accordingly, we in exercise of the regulatory power hold that the actual additional expenditure incurred by the Petitioner towards transportation of ash in terms of the MOEFCC Notification is admissible under ‘Change in Law’ as additional O&M expenses. However, the admissibility of the claims is subject to prudence check of the following conditions on case to case basis for each station;

xxx



32. The Petitioner is granted liberty to approach the Commission at the time of revision of tariff of the generating stations based on truing-up exercise for the period 2014-19 in terms of Regulation 8 of the 2014 Tariff Regulations, along with all details / information, duly certified by auditor”

20. Accordingly, the Petitioner, in its petitions for truing-up of tariff for the 2014-19 tariff period, in respect of its generating stations, has placed on record the relevant information regarding fly ash transportation and the same are pending consideration of this Commission. During the pendency of these tariff petitions, the Petitioner, filed petitions for determination of tariff of its generating stations for the 2019-24 tariff period, in terms of the 2019 Tariff Regulations, wherein, a specific prayer was made for recovery of the fly ash transportation expenses incurred, directly from the beneficiaries. In some of the tariff petitions decided by the Commission for the 2014-19 tariff period, the fly ash transportation charges claimed by the Petitioner, were allowed, based on prudence check of the information furnished by the Petitioner. However, as the present petition was being heard on ‘admissibility’, the Commission, while determining tariff in some of the petitions filed by the Petitioner for the 2019-24 tariff period, disposed of the prayer of the Petitioner for recovery of fly ash transportation expenses, holding that the said expenses claimed shall be governed by the decision of the Commission, in this petition.

21. As stated, the Petitioner, in the present case has sought the recovery of additional expenditure towards fly ash transportation on account of change in law, on the ground that the Commission in its order dated 5.11.2018 in Petition No. 172/MP/2016 had already decided that the MOEF &CC Notification dated 25.1.2016, is a change in law event. It has therefore submitted that once the principle for the issue is decided, the natural sequitur is that any expenditure incurred on account of ash transportation ought to be allowed for recovery from the beneficiaries. The Petitioner has also submitted that the MOEF & CC Notification dated 31.12.2021 issued during the 2019-24 tariff period, has declared the statutory obligation of 100% fly ash utilization, as a change in law event in furtherance to the Notification dated 25.1.2016 and the same ought to be allowed as a pass through in tariff.



22. *Per contra*, the Respondent BRPL has submitted that there is no change in the responsibility of the Petitioner to bear the fly ash transportation cost in terms of the said notifications. It has also stated that the change in law event declared in order dated 5.11.2018 is in the context of the 2014-19 tariff period and cannot be considered as a change in law event under the 2019-24 tariff period. The Respondents MSEDCL and BRPL have submitted that the claim of the Petitioner has to be reviewed in the light of the directions passed by the Hon'ble Supreme Court its order dated 10.5.2022 in C.A. Nos. 1692-1693/2020. In response, the Petitioner has clarified that since the obligation for 100% fly ash utilization arises in furtherance of a statutory mandate vide notification dated 25.1.2016, the same ought to be allowed a pass through in tariff.

23. We have considered the submissions of the parties. Change in Law has been defined in Regulation 3(9) of the 2014 Tariff Regulations, applicable for the period 2014-19, as under:

"3(9) "Change in Law" means occurrence of any of the following events:

(a) enactment, bringing into effect or promulgation of any new Indian law; or

(b) adoption, amendment, modification, repeal or re-enactment of any existing Indian law; or

(c) change in interpretation or application of any Indian law by a competent court, Tribunal or Indian Governmental Instrumentality which is the final authority under law for such interpretation or application; or

(d) change by any competent statutory authority in any condition or covenant of any consent or clearances or approval or license available or obtained for the project; or

(e) coming into force or change in any bilateral or multilateral agreement/treaty between the Government of India and any other Sovereign Government having implication for the generating station or the transmission system regulated under these Regulations."

24. Similar definition has been provided for 'change in law' under Regulation 3(10) of the 2019 Tariff Regulations, applicable for the period 2019-24. As per the said definition, 'adoption, amendment, modification, repeal or re-enactment of any existing Indian Law' is covered under change in law. The Environment (Protection) Rules, 1986 have been notified by the Central Government in exercise of the power vested under sections 6 and 25 of the



Environment Protection Act, 1986. Rule 3 of the Environment (Protection) Rules provides for Standards for emissions or discharge of environmental pollutants. The Commission vide its order dated 5.11.2018 in Petition No.172/MP/2016, had decided that since the additional cost towards fly ash transportation imposed by MOEF&CC Notification dated 25.1.2016, is on account of amendment to the Fly Ash Notification, 1999, issued by the MOEF, GOI, the said notification dated 25.1.2016 amounts to a 'change in law' and as such, the expenditure was held admissible under change in law- Even if the MOEF& CC Notification dated 25.1.2016 cannot be construed as a 'change in law' event during the 2019-24 tariff period, nevertheless, the Petitioner is required to comply with the provisions of these regulations relating to fly ash transportation, during this period. In other words, there is a continuing obligation on the part of the Petitioner, to comply with the said notification, during the 2019-24 tariff period. Further, it is observed that MOEF &CC, as amendment to notification dated 25.1.2016, issued notification dated 31.12.2021, casting a statutory obligation on the Petitioner, for 100% ash utilization, as under:

*“A. Responsibilities of thermal power plants to dispose fly ash and bottom ash-
Xxx*

(10) Statutory obligation of 100 percent utilization of ash shall be treated as change in law, wherever applicable.”

25.Thus, the MOEF & CC notifications dated 25.1.2016 and 31.12.2021, has created an absolute obligation on the Petitioner, for timely disposal of fly ash. In other words, while the notification dated 25.1.2016 (which was declared as a change in law event during the period 2014-19), was necessarily required to be complied by the Petitioner during the period from 1.4.2019 till 30.12.2021, the issuance of notification dated 31.12.2021, was also required to be complied by the Petitioner from 31.12.2021 till 31.3.2024, as the same is a change in law event in terms of the above provision. Though the Respondents MSEDCL and BRPL have submitted that the notification dated 31.12.2021 is required to be reviewed in terms of the order dated 10.5.2022 of the Hon'ble Supreme Court, we notice that the said notification is still valid and subsisting. In this background, we hold that



the Petitioner is entitled to seek additional cost towards fly ash transportation charges during the period 2019-24, in terms of compliance to MOEF&CC Notification dated 25.1.2016 and as a change in law in terms of the MOEF&CC Notification dated 31.12.2021.

RE:-No provision under the 2019 Tariff Regulations

26. Further, some of the Respondents namely, UPPCL, MPPMCL, TANGECO, BRPL, GRIDCO, KSEBL, MSEDCL, BSPHCL and Karnataka Escoms have submitted that there is no provision under the 2019 Tariff Regulations to permit the recovery of additional O&M expenditure, over and above the normative O&M expenses, specified thereunder. These Respondents have also submitted that the Commission, while framing the 2019 Tariff Regulations, after stakeholder consultation process, proceeded in its wisdom not to include any provision for recovery of such additional expenses in the said regulations. These Respondents have also submitted that the recovery of additional O&M expenses separately, on a monthly basis, is nothing but a particular component of tariff and can't be recovered separately, as the same needs to be considered at the time of tariff determination. It has also been contended that in case, the Commission allows the claims of the Petitioner, for additional O&M expenses, the same would mean undertaking truing-up of the normative O&M expenses specified under the 2019 Tariff Regulations, which is not permissible. Accordingly, these Respondents have submitted that the claims of the Petitioner, is liable to be dismissed. *Per contra*, the Petitioner has clarified that the fly ash transportation charges, though claimed under additional O&M expenses, has been claimed separately, as the said expenses are essential to prevent under recovery and that the deferment of this cost would lead to accumulation of carrying cost, which can be prevented only if recovery of the said expenses is done on a monthly basis, The Petitioner has also pointed out that despite the fact that fly ash transportation charges were not included in the 2014 Tariff Regulations, this Commission vide its order dated 5.11.2018, had allowed the said expenditure under



Regulation 3(9)(b) of the 2014 Tariff Regulations. It has further stated that in the absence of appropriate provision under the 2014 tariff Regulations for claiming fly ash transportation cost, this Commission, in the said order, had exercised its regulatory powers to allow the said cost under change in law. Accordingly, the Petitioner has stated that, if the Commission by way of an order, has taken a particular view under the 2014 Tariff Regulations, there exists no reason as to why the similar view ought not to be taken in the 2019 Tariff Regulations, as in the present case, the expenditure has not been included in the normative O&M expenses. Placing reliance on the APTEL judgment dated 21.3.2018 in Appeal Nos. 107 & 117/2015 (HPPC v HERC) and judgment dated 20.9.2012 in Appeal No. 189/2011 (TPCL v JSERC), the Petitioner has submitted that 'power to relax' can be invoked, if the Regulations, in any manner, cause hardship to a party in peculiar facts and circumstances.

27. The submissions have been considered. It is noticed that in Petition No.172/MP/ 2016, filed by the Petitioner seeking recovery of the fly ash transportation cost during the period 2014-19, some of the Respondents therein, had contended that the 2014 tariff Regulations do not permit the recovery of such expenditure and therefore the claim of the Petitioner is not maintainable. Placing reliance on the judgment of the Hon'ble Supreme Court in PTC India Limited v CERC & ors [(2010) 4 SCC 603], the Commission, vide order dated 5.11.2018, rejected the said contention of the Respondents and in exercise of the regulatory power, held that the actual additional expenditure incurred by the Petitioner towards transportation of fly ash in terms of the MOEFCC Notification dated 25.1.2016 is admissible under 'change in law' as additional O&M expenses. In the present case, the Petitioner has sought the recovery of fly ash transportation cost, on monthly basis, in terms of Section 61(b), (c) and (d) of the 2003 Act and in terms of the power vested with the Commission under Section 79(1)(a) of the Act. We have, in this order, decided that the Petitioner is entitled to seek the sharing of transportation cost of fly ash for compliance with the



MOEF&CC Notification dated 25.1.2016 and under change in law in terms of MOEF&CC notification dated 31.12.2021 as per Regulation 3(10)(b) of the 2019 Tariff Regulations. Change in law has been provided in the 2019 Tariff Regulations in the context of additional capitalization of the expenditure incurred/projected to be incurred by the generating company. The relief under 'change in law or compliance with the existing law' has been provided under additional capital expenditure in terms of Regulations 24, 25 and 26 of the 2019 Tariff Regulations. Relevant provisions of these Regulations are extracted as under:

"24. Additional Capitalization within the original scope and upto the cut-off date

(1) The additional capital expenditure in respect of new project or an existing project incurred or projected to be incurred on the following counts within the original scope of work, after the date of commercial operation and upto the cut-off date, may be admitted by the Commission, subject to prudence check:

Xxxxx

(e) Change in law or compliance of any existing law.

25. Additional Capitalization within the original scope and after the cut-off date

(1) The additional capital expenditure incurred or projected to be incurred in respect of an existing project or a new project or an existing project on the following counts within the original scope of work and after the cut-off date, may be admitted by the Commission, subject to prudence check:

Xxxx

(b) Change in law or compliance of any existing law.

26. Additional Capitalization beyond the original scope

(1) The additional capital expenditure incurred or projected to be incurred in respect of an existing project or a new project or an existing project on the following counts within the original scope of work and after the cut-off date, may be admitted by the Commission, subject to prudence check:

Xxxx

(b) Change in law or compliance of any existing law.

28. Thus, in case of an existing project or a new project, the additional capital expenditure on account of 'change in law or compliance with any existing law' is allowed. However, the additional expenditure towards transportation of fly ash from the generating station to the place of users is an expenditure of a revenue nature. We do not agree with the submissions of the Respondents that since the Commission in its wisdom did not include any provision for recovery of such additional expenses in the 2019 Tariff Regulations, the claim of the



Petitioner is not maintainable. In our view, the absence of a corresponding provision under the 2019 Tariff Regulations for allowing the additional revenue expenses /expenses of O&M nature under 'change in law or compliance with the existing law', cannot render the power of the Commission nugatory, as the word 'regulate' under Section 79(1)(a) of the 2003 Act, is wide enough to confer power on the Commission, to deal with the given situation. To reiterate, the Hon'ble Supreme Court in PTC India Limited v CERC & ors., has held that regulatory power can be exercised only when there is no provision in the regulations framed under section 178 of the Act. The relevant observations of the Hon'ble Supreme Court are extracted as under:

"40. As stated above, the 2003 Act has been enacted in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 as it mandates establishment of an independent and transparent Regulatory Commission entrusted with wide ranging responsibilities and objectives inter alia including protection of the consumers of electricity. Accordingly, the Central Commission is set up under Section 76(1) to exercise the powers conferred on, and in discharge of the functions assigned to, it under the Act. On reading Sections 76(1) and 79(1) one finds that Central Commission is empowered to take measures/steps in discharge of the functions enumerated in Section 79(1) like to regulate the tariff of generating companies, to regulate the inter-State transmission of electricity, to determine tariff for inter-State transmission of electricity, to issue licenses, to adjudicate upon disputes, to levy fees, to specify the Grid Code, to fix the trading margin in inter-State trading of electricity, if considered necessary, etc.. These measures, which the Central Commission is empowered to take, have got to be in conformity with the regulations under Section 178, wherever such regulations are applicable. Measures under Section 79(1), therefore, have got to be in conformity with the regulations under Section 178. To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a pre-condition to the Central Commission taking any steps/measures under Section 79(1). As stated, if there is a regulation, then the measure under Section 79(1) has to be in conformity with such regulation under Section 178....."

29. It is pertinent to mention that the Commission while fixing the O&M expense norms for the 2019-24 tariff period, had not considered/included the expenses incurred on account of transportation of fly ash. Accordingly, we, in exercise of the regulatory power under section 79(1)(a) of the Act, hold that the additional expenditure incurred by the Petitioner towards fly ash transportation cost for the period 2019-24, is admissible as additional O&M expenses, as the same is in terms of the MOEF&CC notifications dated 25.1.2016 and 31.12.2021, as stated in para 25 above.



Issue No. B: Whether the Petitioner is entitled for the reimbursement of the actual expenditure incurred on account of fly ash transportation for the period 2019-22 and thereafter for recovery of the same, by monthly billing from 2022 till 20224;

30. Some of the Respondents have submitted that the reliance placed by the Petitioner, in order dated 5.11.2018 in Petition No. 172/MP/2016 is erroneous. The Respondents BRPL, TANGEDCO and MSEDCL have submitted that even assuming that the notification dated 31.12.2021 is a change in law event, the claims of the Petitioner would still be untenable, as the Petitioner has failed to provide any information/documentary proof, as directed by this Commission in the said order dated 5.11.2018, for enabling prudence check. The Respondents BSPHCL, MSEDCL and KSEB have pointed out that the actual expenditure on account of transportation of fly ash is admissible under change in law as additional O&M expenses, subject to prudence check, on a case to case basis, for each generating station, with liberty to approach at the time of truing up of tariff. *Per contra*, the Petitioner has clarified that, it has, in compliance with the directions in order dated 5.11.2018 submitted all relevant documents /information in the truing up petitions for the 2014-19 tariff period and also in the additional affidavits filed in respect of the tariff petitions for the 2019-24 tariff period. It has been further stated that it has vide additional submissions dated 3.8.2022, filed the required information as sought by the Commissions vide ROP dated 7.7.2022. Also, the Petitioner, while pointing out that it has sought the reimbursement of fly ash transportation charges for the period 2019-22 and for the balance period (2022-24) to be recovered on monthly basis, on self-certification, has submitted that since the fly ash transportation charges are recurring in nature, the recovery of the said expenditure from the beneficiaries, will get accumulated and therefore, attract carrying cost.

31. We have examined the matter. It is observed that in order dated 5.11.2018, the Commission, in exercise of its regulatory powers, had held that the actual additional expenditure incurred by the Petitioner during the 2014-19 tariff period, towards



transportation of fly ash, in terms of the MOEF&CC Notification dated 25.1.2016, was admissible under 'change in law' as additional O&M expenses. However, in the said order, it was observed that the admissibility of the claims of the Petitioner, was subject to prudence check of the following conditions, on a case to case basis, for each generating station:

- a) *Award of fly ash transportation contract through a transparent competitive bidding procedure. Alternatively, the schedule rates of the respective State Governments, as applicable for transportation of fly ash.*
- b) *Details of the actual additional expenditure incurred on Ash transportation after 25.1.2016, duly certified by auditors.*
- c) *Details of the Revenue generated from sale of fly ash/ fly ash products and the expenditure incurred towards Ash utilization up to 25.1.2016 and from 25.1.2016 to till date, separately.*
- d) *Revenue generated from fly Ash sales maintained in a separate account as per the MoEF notification.*

32. In terms of the above, the Petitioner was granted liberty to approach the Commission, at the time of revision of tariff of the generating stations, based on truing-up exercise, for the 2014-19 tariff period, in terms of Regulation 8 of the 2014 Tariff Regulations, along with all details / information, duly certified by auditor. In compliance to the above, the Petitioner had filed the relevant information/documents, and the Commission, after prudence check of these documents /information, had allowed the ash transportation charges, in some of the generating stations of the Petitioner, for the 2014-19 tariff period. However, in cases where the recovery of fly ash transportation charges was not allowed for the 2014-19 tariff period, the Petitioner has been directed to approach the Commission by a separate petition, along with relevant data/ information for consideration. In our considered view, the Petitioner's reliance to the Commission's order dated 5.11.2018, is only for the recovery of the fly ash transportation charges for the 2019-24 tariff period, as a change in law event, subject to prudence check. The compliance or otherwise of the additional information sought from the Petitioner, in the order dated 5.11.2018, relating to the fly ash transportation cost claimed by the Petitioner, for the 2014-19 tariff period, cannot be the basis for the Respondents, to negate the claims of the Petitioner for the 2019-24 tariff period. Nevertheless, we notice,



that the Petitioner vide its affidavit dated 1.8.2022, has, in compliance to the directions of this Commission, furnished the additional information sought vide ROP dated 7.7.2022, in support of its prayer seeking reimbursement of ash transportation charges for the period 2019-22, which is subject to prudence check, and has also undertaken to furnish the relevant information, for the balance period (2022-24), at the end of the tariff control period. In the light of the above, the submissions of the Respondents that the claims of the Petitioner for the 2019-24 tariff period are in-admissible, is not acceptable.

33. The Petitioner has submitted that at the time of filing the petition, the accounts for 2019-20 and 2020-21 were finalized and submitted and accordingly, a prayer was made for reimbursement of actual ash transportation expenses for the said years. It has, however, submitted that subsequently, during the course of the proceedings in the present petition, the accounts for 2021-22 was finalized and details of the expenses incurred for the said year, has been submitted. Based on this, the Petitioner has submitted that the Commission may direct the beneficiaries to reimburse the actual ash transportation expenses incurred during the period 2019-22 and to further direct the beneficiaries to reimburse the said charges on a monthly basis, for the future period.

34. The Petitioner, in response to the directions of the Commission vide ROP of the hearing dated 7.7.2022, has, vide affidavit dated 1.8.2022 (filed on 3.8.2022) furnished the additional information, as sought by the Commission (as in para 15 above) along with the station wise claim for ash transportation charges for the period 2019-22. According to the Petitioner, the total expenditure incurred by the Petitioner towards transportation of fly ash is to the tune of Rs. 3097 crore upto 31.3.2022 and it continues to incur the said expenditure on a month to month basis. The admissibility of the claims for the period 2019-22 are examined in the subsequent paragraphs.

35. As stated, the Petitioner has placed on record the station-wise and year-wise audited



details of Ash Utilization Reserve Fund w.e.f. 3.11.2009 to 24.1.2016 and further, from 25.1.2016 till 31.3.2022. The Petitioner has also furnished the following details:

- a) Data for quantity of Plant-wise ash utilization as submitted to Central Electricity Authority (CEA).
- b) The data (Plant-wise and sub-head wise) as reported to CEA by the Petitioner for ash utilization for 2021-22.
- c) 'Plant-wise details of income against relevant sub-head of ash utilization (including quantities) and Plant-wise details of expenses (as claimed in instant Petition) against relevant sub-head of ash utilization (including quantities) for the 2019-20, 2020-21 and 2021-22..
- d) The Plant-wise detailed calculations for arriving at the expenditure incurred for ash transportation giving details as per MOEF&CC Notifications and Commission's directions in order dated 5.11.2018 in Petition No. 172/MP/2016 with respect to the years 2019-20, 2020-21 and 2021-22.
- e) xxx
- f) The details of ash transportation expenses incurred for 2019-20 and 2020-21
- g) The ash utilization infrastructure in Sipat STPS and Simhadri STPS has been funded from ash sale proceeds and accordingly station wise claim for ash transportation expenses for 2019-20, 2020-21 and 2021-22 has been provided.

36. The Petitioner has also submitted that it has been incurring the fly ash transportation expenditure in a recurring manner to the tune of Rs. 652 crore in 2019–20, Rs. 1004 crore in 2020–21 and Rs. 1440 crore in 2021-22. The Petitioner has also submitted the auditor certificates of the Ash transportation charges incurred by it along with the ash sale proceeds received during the relevant periods, in support of its claim for ash transportation charges, after adjusting the ash sale proceeds and end user certificates. Based on the auditor certificates submitted by the Petitioner, the station-wise Ash transportation charges claimed is as under:

Sl. No	Name of the Generating Station	Ash transportation Charges claimed (Rs in lakh)		
		2019-20	2020-21	2021-22
1	Singrauli Super Thermal Power Stations	0.00	6194.71	3441.27
2	Rihand Super Thermal Power Station	0.00	3125.20	7229.05
3	Unchahar Thermal Power Station	7486.43	14489.11	10363.48
4	Tanda Thermal Power Station	5732.44	0.00	9511.77
5	Korba Super Thermal Power Project	0.00	585.01	1396.61
6	Vindhyachal Super Thermal Power Project	0.00	2071.18	5872.97



7	Sipat Super Thermal Power Project	638.39	3832.75	3820.43
8	Farakka Super Thermal Power Project	21918.76	20265.11	28288.72
9	Kahalgaon Super Thermal Power Project	0.00	11303.56	21260.40
10	Talcher Super Thermal Power Project	7563.45	19106.50	19771.12
11	Talcher TPS	15.56	9.44	0.00
12	Barh Thermal Power Plant	0.00	0.00	1839.79
13	Ramagundam Super Thermal Power	0.00	0.00	2036.97
14	Simhadri Thermal Power Project	15291.23	7491.47	9449.58
15	Mauda Super Thermal Power Station	6524.83	3799.14	5883.51
16	Lara STPP	1.96	8214.75	5705.07
17	Gadarwara Super Thermal Power Plant	0.00	0.00	128.19
18	Darlipalli Super Thermal Power Plant	0.00	0.00	8044.13
	Total	65173.05	100487.93	144043.06

37. Further, as regard with the adjustment of revenue earned through sale of fly ash, Commission at para no. 26 of the order dated 5.11.2018 in petition no 172/MP/2016 has observed as under:

“26. Based on the details submitted by the Petitioner in the tables A & B above, the Committee in its report dated 16.5.2018 has observed the following:

“It could be observed from above tables A& B that the % age of ash utilization in NTPC stations has remained in the range of about 40% to 60% during the period 2009- 2017 and the average % age of ash utilization during the period 2009-17 has been about 50%. The average fly ash utilization had remained about 43% during the period 1999- 2017. Further it is observed that the % age of ash issued to Cement Ind. & other is 21.63% (Cement 15.13% and others 6.50%) of the total ash produced by NTPC. As per the directives of MOEF notification dated 25.1.2016 and for that matter NTPC has to incur transportation expenditure. NTPC has earned revenue of `474.20 Cr. from 2009- 10 to 2014-15 as given below. As per Para 6 of MOEF Notification no. 2804 (E) dated 03.11.09, this revenue can only be utilised for promoting fly ash utilisation, hence part of transportation expenditure, as above can be met from this revenue.” “



38. On perusal of the details submitted by the Petitioner, it is noticed that the Petitioner has claimed ash transport expenses for the period 2016-17 to 2021-22 considering the sale of ash and related expenditure w.e.f. 25.1.2016 to 31.3.2022. In this regard, it is to mention that, for the 2014-19 tariff period, the Commission had in principle permitted the recovery of ash transportation expenditure vide its order dated 5.11.2018 in Petition No.172/MP/2016 under change in law. Based on this, the claims of the Petitioner for fly ash transportation expenses, in some of the truing-up of tariff petitions for the period 2014-19 were allowed on prudence check. In the present case, the actual expenses generating plant wise claimed by the Petitioner for the period from 2019-20 to 2021-22 after accounting for the revenue earned through sale of Ash Generating Station wise, as per the audited data submitted by the Petitioner, is as under:

(Rs. In Lakh)

Name of the Generating Station		2019-20	2020-21	2021-22	Net Charges allowed for the period 2019-20 to 2021-22
Singrauli STPS	Ash transportation charges incurred (a)	0.00	6194.71	3441.27	9635.98
	Expenditure met out of Ash sale fund (b)	0.00	0.00	0.00	0.00
	Net Expenditure allowed (c) =(a)-(b)	0.00	6194.71	3441.27	9635.98
Rihand STPS	Ash transportation charges incurred (a)	11.90	3364.53	7229.05	10605.48
	Expenditure met out of Ash sale fund (b)	11.90	239.32	0.00	251.22
	Net Expenditure allowed (c) =(a)-(b)	0.00	3125.21	7229.05	10354.26
Unchahar TPS	Ash transportation charges incurred (a)	8926.42	15817.35	11831.86	36575.63
	Expenditure met out of Ash sale fund (b)	1439.99	1328.24	1468.37	4236.60
	Net Expenditure allowed (c) =(a)-(b)	7486.43	14489.11	10363.49	32339.03
Tanda TPS	Ash transportation charges incurred (a)	8916.32	474.06	15494.43	24884.81
	Expenditure met out of Ash sale fund (b)	3183.87	474.06	5982.67	9640.60
	Net Expenditure allowed (c) =(a)-(b)	5732.45	0.00	9511.76	15244.21
Korba STPS	Ash transportation charges incurred (a)	0.00	784.00	1441.61	2225.61
	Expenditure met out of Ash sale fund (b)	0.00	198.99	45.00	243.99
	Net Expenditure allowed (c) =(a)-(b)	0.00	585.01	1396.61	1981.62
Vindhyachal STPS	Ash transportation charges incurred (a)	153.97	2442.27	6073.48	8669.72
	Expenditure met out of Ash sale fund (b)	153.97	371.09	200.51	725.57
	Net Expenditure allowed (c) =(a)-(b)	0.00	2071.18	5872.97	7944.15
Sipat STPS	Ash transportation charges claimed (a)	638.39	3832.75	3944.23	8415.37



	Ash Fund Utilization for Assets during the period (b)	252.38	32.50	6.21	291.09
	Ash sale during the period (c)	252.38	32.50	130.01	414.89
	Net Expenditure allowed (d) =(a)+(b)-(c)	638.39	3832.75	3820.43	8291.57
Farakka STPS	Ash transportation charges incurred (a)	25303.56	21699.23	29584.82	76587.61
	Expenditure met out of Ash sale fund (b)	3384.79	1434.12	1296.11	6115.02
	Net Expenditure allowed (c) =(a)-(b)	21918.77	20265.11	28288.71	70472.59
Kahalgaon STPS	Ash transportation charges incurred (a)	3355.10	15011.72	23373.36	41740.18
	Expenditure met out of Ash sale fund (b)	3355.10	3708.16	2112.97	9176.23
	Net Expenditure allowed (c) =(a)-(b)	0.00	11303.56	21260.39	32563.95
Talcher STPS	Ash transportation charges incurred (a)	7563.45	19106.50	19771.12	46441.07
	Expenditure met out of Ash sale fund (b)	0.00	0.00	0.00	0.00
	Net Expenditure allowed (c) =(a)-(b)	7563.45	19106.50	19771.12	46441.07
Talcher TPS	Ash transportation charges incurred (a)	15.56	9.44	0.00	25.00
	Expenditure met out of Ash sale fund (b)	0.00	0.00	0.00	0.00
	Net Expenditure allowed (c) =(a)-(b)	15.56	9.44	0.00	25.00
Barh TPS	Ash transportation charges incurred (a)	0.00	0.00	3183.29	3183.29
	Expenditure met out of Ash sale fund (b)	0.00	0.00	1343.51	1343.51
	Net Expenditure allowed (c) =(a)-(b)	0.00	0.00	1839.78	1839.78
Ramagundam STPS	Ash transportation Charges incurred (a)	0.00	29.80	4858.42	4888.22
	Expenditure met out of Ash sale fund (b)	0.00	29.80	2821.45	2851.25
	Net Expenditure allowed (c) =(a)-(b)	0.00	0.00	2036.97	2036.97
Simhadri TPS	Ash transportation charges claimed (a)	15291.23	7491.47	9449.58	32232.28
	Ash Fund Utilization for Assets during the period (b)	163.69	76.00	131.29	370.98
	Ash sale during the period (c)	163.69	76.00	131.29	370.98
	Net Expenditure allowed (d) =(a)+(b)-(c)	15291.23	7491.47	9449.58	32232.28
Mauda STPS	Ash transportation charges incurred (a)	6561.04	3824.72	5913.83	16299.59
	Expenditure met out of Ash sale fund (b)	36.21	25.58	30.32	92.11
	Net Expenditure allowed (c) =(a)-(b)	6524.83	3799.14	5883.51	16207.48
Lara STPP	Ash transportation charges incurred (a)	1.96	8319.75	5823.57	14145.28
	Expenditure met out of Ash sale fund (b)	0.00	105.00	118.50	223.50
	Net Expenditure allowed (c) =(a)-(b)	1.96	8214.75	5705.07	13921.78
Gadarwara STPS	Ash transportation charges incurred (a)	0.00	0.00	136.26	136.26
	Expenditure met out of Ash sale fund (b)	0.00	0.00	8.07	8.07
	Net Expenditure allowed (c) =(a)-(b)	0.00	0.00	128.19	128.19
Darlipalli STPS	Ash transportation charges incurred (a)	0.00	0.00	8044.13	8044.13
	Expenditure met out of Ash sale fund (b)	0.00	0.00	0.00	0.00
	Net Expenditure allowed (c) =(a)-(b)	0.00	0.00	8044.13	8044.13
	Total Net Charges allowed after adjusting the available revenue generated from sale of Ash	65173.07	100487.94	144043.03	309704.04

39. Petitioner has furnished the details of the distance to which fly ash has been transported from the generating station, schedule rates applicable for transportation of fly



ash, as notified by the State Governments along with details, including Auditor certified accounts. These documents have been examined and accordingly, the total fly ash transportation expenditure allowed to the Petitioner generating station wise for the period 2019-22 is as per the table in para 38 above totalling to Rs.309704.03 lakh and the same shall be recovered from the beneficiaries of the respective generating stations in 6 (six) equal monthly installments. However, the Petitioner is directed to submit details regarding award of transportation contracts, distance to which fly ash has been transported along with duly reconciled statements of expenditure incurred on ash transportation at the time of filing petitions for truing up of tariff for the 2019-24 tariff period of the generating stations.

Monthly billing

40. As stated, the Petitioner has sought the reimbursement of the actual fly ash transportation charges for the years 2019-20, 2020-21 and 2021-22 under change in law and for the balance period (2022-24), it has prayed for the billing and recovery of the said expenses, on a monthly basis, based on self-certification. Per contra, the Respondents have submitted that the Commission in its order dated 5.11.2018 had deemed it fit not to grant the recovery of monthly billing of the additional expenditure incurred on account of fly ash transportation. They have also submitted that the Petitioner cannot shift the burden on the beneficiaries to bear the expenses towards ash transportation due to its failure to comply with the MOEF &CC notifications dated 25.1.2016 and 31.12.2021. Accordingly, the Respondents have prayed that the cost towards Fly ash transportation, may not be permitted to be recovered.

41. The matter has been examined. It is noticed that the Petitioner in Petition No.172/MP/2016 had sought the permission of the Commission to recover the fly ash transportation expenses, through monthly billing, from the various beneficiaries of the generating stations of the Petitioner. However, the Commission vide its order dated



5.11.2018, while observing that the admissibility of the claims of the Petitioner are subject to prudence check of the additional information to be filed by the Petitioner, granted liberty to claim the same at the time of truing up of tariff of the generating stations of the Petitioner (see para 19 above). Though the prayer of the Petitioner for monthly billing of the expenses was not specifically rejected by order dated 5.11.2018, the non-consideration of the said prayer, therein, appear to be only on account of the fact that the said petition was being disposed of during the fag end of the control period 2014-19, and that the Petitioner was entitled to file truing-up petitions in respect of its generating stations for the period 2014-19, in terms of Regulation 8(1) of the 2014 Tariff Regulations. This is not so in the present case. In the present case, though the Petitioner had claimed the recovery of fly ash expenditure in all petitions for determination of tariff for the period 2019-24, it has, considering the Covid-19 pandemic and the delay in the recovery of the said expenditure from tariff petitions, and the cash flow problems, has filed the present petition also with a prayer for interim relief. Accordingly, the claims of the Petitioner in the tariff petitions was not considered and was made subject to the final decision in this petition. Since the Petitioner has been incurring the said expenditure, which is subject to adjustment at the time of truing-up of tariff of the generating stations of the Petitioner, for the period 2019-24, no prejudice will be caused to the Respondents herein, by allowing the monthly billing, as prayed for.

42. Further, the Petitioner has relied upon the Commission's order dated 22.3.2021 in Petition No. 405/MP/2019 (GKEL & anr v DHBVNL & ors) to submit that the issue of monthly recovery and procedure for recovery of cost is no more res integra, as the Commission, has put in place a robust mechanism of monthly recovery with annual reconciliation. It has been objected to by some of the Respondents stating that there is no similarity in the present petition and the order dated 22.3.2021 towards recovery of the expenditure. This submission of the Respondents is also not acceptable. Though the order dated 22.3.2021 relate to the recovery of expenditure incurred on transportation of fly ash



by the Petitioner therein (whose project is covered under Section 63 of the Act), pursuant to the MoEF&CC Notification dated 25.1.2016, the same would be applicable to the present case of the Petitioner (whose project is covered under Section 62 of the Act), as in the said case, the notification dated 25.1.2016, was declared as 'change in law event' and the recovery of the charges for transportation of fly ash was found to be admissible.

43. In the light of the above discussion and keeping in view that the Petitioner is entitled for recovery of fly ash transportation charges, under change in law, as additional O&M expenses, we permit the provisional billing at 90% of the fly ash transportation charges incurred by the Petitioner, in respect of its generating stations, for the balance period (i.e. 2022-24), on a monthly basis, based on self -certification, and the beneficiaries shall pay the same accordingly. This is, however, subject to prudence check of the claims, at the time of truing-up of tariff for the period 2019-24, in respect of the generating stations of the Petitioner, in terms of Regulation 13 of the 2019 Tariff Regulations.

44. We direct that the fly ash transportation cost incurred by the Petitioner, shall be recovered, in proportion to the coal consumed corresponding to the scheduled generation at normative parameters in accordance with the 2019 Tariff Regulations or at actuals, whichever is lower, for the 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 also directed to carry out reconciliation in respect of the claims, annually and the same is subject to truing-up, in terms of Regulation 13 of the 2019 Tariff Regulations.



Carrying cost

45. The Petitioner has submitted that it is entitled to carrying cost from the day the expenses have been incurred, but not have been recovered. Referring to the judgment of the Hon'ble Supreme Court in UHBVN v Adani Power & ors [2019 (5) SCC 325], the Petitioner has contended that it is entitled to carrying cost from the beneficiaries and any deferment shall have a time value of money attached to it. It has further submitted that the prayer for monthly recovery of fly ash transportation expense will prevent the burden of carrying cost/interest on the beneficiaries and delay in recovery could lead to carrying cost in terms of Regulation 13 of the 2019 Tariff Regulations. *Per contra*, some of the Respondents have contended that the concept of carrying cost does not arise, in as much as, the additional O&M expenses cannot be determined in isolation of other components as claimed in the tariff petition.

46. The matter has been considered. As stated, the Petitioner, in this order, has been granted the relief for recovery of fly ash transportation expenditure for the period 2019-22 and for monthly billing of such charges for the period 2022-24 (based on self-certification), in exercise of the regulatory powers under Section 79(1)(a) of the Act. Also, the monthly billing of the charges incurred for the period 2022-24 is subject to truing up in terms of Regulation 13 of the 2019 Tariff Regulations. It is however observed that in respect of the claim of the Petitioner for recovery of fly ash transportation charges for the period 2014-19, the Commission, had, in exercise of the regulatory powers, allowed the reimbursement of the said expenses in 6 (six) monthly installments, to some of the generating stations, after prudent check. The Petitioner has claimed carrying cost in respect of fly ash transportation charges for the period 2019-24, placing reliance on the judgment of the Hon'ble Supreme Court in UHBVN v Adani Power case. In this case, the Hon'ble Supreme Court has observed that since the funds arranged by the developer are based on interest rate framework followed by scheduled commercial banks, the affected developer ought to be



compensated in the same way. The relevant portion of the said judgment is extracted hereinbelow:

“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.”

47. In line with the above decision and since the Petitioner has been permitted to recover the fly ash transportation cost as ‘additional O&M expenses’, for the period 2019-24, in exercise of the regulatory powers under Section 79(1)(a) of the Act, we permit the recovery of these charges, along with carrying cost, at the rate of interest as specified, in terms of Regulation 10 (7) of the 2019 Tariff Regulations.

Failure of the Petitioner to comply with the notifications

48. Some of the Respondents have submitted that the additional expenditure incurred by the Petitioner is wholly attributable to the Petitioner due to their failure to comply with the MOEF & CC notifications issued under the Environment Protection Act. They have also submitted that the Petitioner is attempting to shift the burden on the beneficiaries to bear the expenses towards ash transportation which are clearly due to the failure of the Petitioner to comply with the said notifications, which is against the interest of the consumers’ and therefore, the claims are liable to be rejected. Also, few Respondents have submitted that the MOEF&CC notification dated 25.1.2016, is the consequence of failure of the Petitioner to attain 100% fly ash utilization within the time lines stated in the notifications dated



14.9.2009 and 3.11.2009. Accordingly, these Respondents have submitted that the claims of the Petitioner may be rejected. *Per contra*, the Petitioner has clarified that while the MOEF & CC notification dated 3.11.2009, does not provide for any provision for sharing of transportation cost with the users, the notification dated 25.1.2016 mandate the bearing of ash transportation charges by coal/lignite based thermal generating stations. It has also submitted that the issue of non-utilization of fly ash in terms of the said notification, raised by some of the beneficiaries, were disregarded by the commission in its order dated 5.11.2018, and therefore, the same issue cannot be agitated again, as it would be barred by the principles of *res judicata*. The Petitioner has also pointed out that the compliance of environmental norms including MOEF&CC notification dated 25.1.2016 is a subject matter of the Environment Protection Act, and in case of violation of any of terms and conditions prescribed thereunder, action for non-compliance would have been taken by the appropriate authorities under the said Act.

49. The matter has been considered. The contention of the Respondents that the notification dated 25.1.2016 is on account of the failure of the Petitioner to attain 100% fly ash utilization within the timelines stated in the earlier notifications and therefore, the burden has been shifted on the beneficiaries to bear the said expenses, is misconceived and is not acceptable. It is noticed that though the notification dated 3.11.2009 allowed the sale of fly ash by the generating stations to the user agencies and also mandated the generating stations to utilize 100% ash in a phased manner, it did not provide for any provision for sharing of transportation cost with the users of fly ash. As rightly contended by the Petitioner, any non-compliance to the terms and conditions prescribed under the EP Act or the notification thereunder, would have invited action against the Petitioner for non-compliance, by the appropriate authorities. The Petitioner has submitted that it would follow the procedure laid down in the notifications. Be that as it may, it is noticed that the Petitioner, in response to the directions of the Commission vide ROP dated 7.7.2022, has,



vide its affidavit dated 1.8.2022, detailed the measures and initiatives implemented and explored, across all its generating stations for improving the utilization of fly ash and reducing cost of transportation of fly ash. In our view, the prayer of the Petitioner, in the present petition, is for the recovery of additional expenditure incurred towards fly ash transportation, in terms of the MOEF&CC notifications dated 25.1.2016 and 31.12.2021, and once the principle, that the said expenditure is 'admissible' as additional O&M expenses has been decided, the Petitioner is entitled to recover the same from the beneficiaries.

Others

50. Some of the Respondents like BSPHCL, TANGEDCO and MSEDCL have submitted that fly ash transportation charges can be claimed only after fulfilment of the conditions laid down in the Ministry of Power notifications dated 25.9.2021 and 22.2.2022. According to the Respondents, the Petitioner, in terms of the said notifications, has to follow the steps namely (i) The power plant shall first attempt to sell fly ash by a transparent bidding process (ii) if some quantity is left un-bided, then the station can attempt to give free of cost, if the user agency is willing to bear the transportation cost and (ii) in case of non-fulfillment of the above conditions, then only the thermal power plant shall bear the cost of transportation of fly ash to be provided free to eligible projects. As regards the recovery of transportation cost, in terms of the said notifications, the (i) said cost shall be discovered on competitive bidding basis only (ii) thermal power plants shall prepare a panel of transportation agencies ever year based on competitive bidding for transportation in slabs of 50 km, which may be used for the period (ii) the thermal power plants shall call for bids well in advance so that the transportation panel is in place as soon as the previous panel expires and (iv) and fly ash will be offered to end users on competing demand basis. Accordingly, these Respondents have submitted that the Petitioner may be directed to follow the above said procedure laid down in the said notifications. *Per contra*, the Petitioner while pointing out that the said notifications are prospective in nature, has submitted that it would follow the



procedure laid down in these notifications. It has, however, submitted that the present petition is not for the determination of procedures that must be followed, but solely for timely recovery of the expenses incurred on account of fly ash transportation to avoid any financial implication on the stakeholders involved.

51. The submissions have been considered. As stated in para 15 above, the Commission vide ROP of the hearing dated 7.7.2022, had directed the Petitioner, to submit, amongst others, '*the plant-wise plan for improving utilization of fly ash and reducing the cost of transportation of fly ash*'. In response, the Petitioner vide affidavit dated 1.8.2022, has submitted that it is implementing and exploring a number of measures and initiatives across all its plants to improve utilization of fly ash and reduce the cost of transportation of fly ash, as detailed below:

- (a) Exploring further tie-ups for dry fly ash/ pond ash utilization with nearby Cement Industries, Traders, Brick Manufacturers, Tile manufacturers;
- (b) Serving notice to Mines authorities for allocation of abandoned mines as per provision of MoEF&CC Notification dated 31.12.2021.
- (c) Planning for utilization of pond ash in Road, embankment construction, shoreline protection measures, etc. as per provision of MoEF&CC Notification dated 31.12.2021.
- (d) Continued Ash Utilization process as per stipulations of MOP advisory:
 - Auction of Ash through Open and transparent bidding process
 - Inviting Expression of Interest from User agencies for balance of Ash after auction process for free issue free of cost and transportation to be borne by User agencies
 - Inviting EoI for free of cost issue of ash while also bearing part or full transportation cost for Pond Ash / Dry Fly ash / Bottom Ash for eligible projects.
- (e) Allocating Pond ash / dry fly ash invariably through a transparent bidding process to achieve rates even below SOR of State wherever possible. Pond ash / dry fly ash is being offered to bidders through a process on competing demand basis i.e. priority is given to bidders who offer the highest price for Ash and thereafter to the bidders who seek minimum support for transportation cost;
- (f) Survey and follow up with concerned authorities for development of low-lying area as per provisions of MoEF&CC notification dated 31.12.2021;
- (g) Developing facilities for enhancing Ash Utilization viz. installation of Ash Bagging machine, Hydrobins, Ash brick Plant, Dry Ash Extraction System (DAES),



creation of storage space and direct Ash loading facility from Ash Silos to Railway wagons for bulk transportation of Ash at cheap transportation rates;

- (h) Use of Pond ash in raising/buttressing of ash dyke to enhance dyke capacity;
- (i) Efforts are being made for utilization of ash through New Initiatives viz. LWA (Light Weight Aggregate), GPC Road (Geopolymer concrete road), Ash Bricks & tiles, Fly ash-based sand, pond ash foam concrete blocks, ash to sand plant, etc. In-house research activities are being carried out and Pilot projects are being taken up to establish new products;
- (j) Going for BIS certification of Brick plant which will allow selling of bricks in open market resulting into higher revenue as well as higher ash utilization;
- (k) Exploring utilization of Pond / fly Ash in Stone Quarries available near to station;
- (l) Auctioning/sale of Bottom ash as substitute of sand in market;
- (m) Improving efficiency of Dry Ash Extraction System;
- (n) Construction of all-weather RCC Road to Ash Dyke resulting into enhanced ash disposal;
- (o) Maximizing availability & supply of fly ash from silos thereby minimizing the ash being sent to ash dyke resulting into reduced transportation cost;
- (p) Exploring export of ash; and
- (q) Awareness creation by advertisements and workshops for use of ash/ash-based products.

52. Accordingly, we direct the Petitioner to ensure the strict compliance of the notifications issued by the statutory authority and implement measures to improve the utilization of fly ash in all its thermal generating stations, thereby reducing the cost of fly ash transportation. The Petitioner is further advised to indicate its plan to improve the utilization of fly ash, on its website, to provide information to prospective users of fly ash.

53. Petition No.205/MP/2021 is disposed of in terms of the above discussion and findings.

**Sd/
(Pravas Kumar Singh)
Member**

**Sd/
(Arun Goyal)
Member**

**Sd/
(I.S Jha)
Member**

