

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 88/MP/2021

Coram:

Shri P.K. Pujari, Chairperson

Shri I.S Jha, Member

Shri Arun Goyal, Member

Shri P. K. Singh, Member

Date of Order: 9th February, 2022

In the matter of:

Petition under Sections 79(1)(b) and 79 (1)(f) of the Electricity Act, 2003 for claiming compensation due to levy of charges of transportation of fly ash as per the terms of Power Purchase Agreement dated 1.11.2013 (PTC-PPA) executed between the Petitioner and the Respondent No. 5 and as per the terms of the back to back Power Purchase Agreement executed by PTC with Jaipur Vidyut Vitran Nigam Limited, Ajmer Vidyut Vitran Nigam Limited, Jodhpur Vidyut Vitran Nigam Limited (RVPN-PPA) dated 1.11.2013 read with paragraphs 147 and 148 of the order dated 25.9.2019 passed by the Commission in Petition No.116/MP/2018.

And

In the matter of:

Maruti Clean Coal and Power Limited,
7th Floor, Office Tower,
Ambiance Mall, NH-8,
Guargaon-122 002

.....Petitioner

Vs

1. Jaipur Vidyut Vitran Nigam Limited,
Vidyut Bhawan, Jyoti Nagar,
Near New Vidhan Sabha Bhawan,
Jaipur-302 005 (Rajasthan)

2. Ajmer Vidyut Vitran Nigam Limited,
Vidyut Bhawan,
Makarwali Road, Panchsheel Nagar,
Ajmer-305 004 (Rajasthan)

3. Jodhpur Vidyut Vitran Nigam Limited,
New Power House, Industrial Area,
Jodhpur-342 003 (Rajasthan)

4. Rajasthan Urja Vikas Nigam Limited,
Vidyut Bhawan, Janpath,
Jaipur-302 005 (Rajasthan)

5. PTC India Limited,
2nd Floor, NBCC Tower 15,

Bhikaji Cama Place,
New Delhi-110 066

6. Chhattisgarh State Power Trading Company Limited,
2nd Floor, Vidyut Sewa Bhawan, Dangania,
Raipur-492, Chhattisgarh

7. Chhattisgarh State Power Distribution Company Limited,
Vidyut Sewa Bhawan, Dangania,
Raipur-492 013, Chhattisgarh

.....Respondents

Parties Present:

Shri Matrugupta Mishra, Advocate, MCCPL
Ms. Ritika Singhal, Advocate, MCCPL
Ms. Swapna Seshadri, Advocate, Rajasthan Discoms
Shri Anand K. Ganesan, Advocate, Rajasthan Discoms
Shri Ashwin Ramanathan, Advocate, Rajasthan Discoms

ORDER

The Petitioner, Maruti Clean Coal and Power Limited (MCCPL), has filed the present Petition under Section 79 of the Electricity Act, 2003 (hereinafter referred to as 'the Act') read with Competitive Bidding Guidelines issued by Government of India under Section 63 of the Act and Article 10 of the Power Purchase Agreement dated 1.11.2013 (in short, "PTC-PPA") executed between the Petitioner and the Respondent No. 5, PTC India Limited ('PTC') and in terms of the back-to-back Power Purchase Agreement dated 1.11.2013 (in short, "RVPN-PPA") executed by PTC with Respondents 1 to 3, namely, Jaipur Vidyut Vitran Nigam Limited, Ajmer Vidyut Vitran Nigam Limited, Jodhpur Vidyut Vitran Nigam Limited (these Respondents are hereinafter collectively referred to as "the Rajasthan Discoms") for compensation on account of charges paid towards transportation of fly ash in terms of Notification dated 25.1.2016 of Ministry of Environment, Forests & Climate Change, ('MoEF&CC'), Government of India.

Brief Background of the Case

2. The Petitioner has set up a 1x300 MW coal based thermal power project (hereinafter referred to as ‘the generating station’) located at Korba, in the State of Chhattisgarh. The Petitioner and the Respondent No. 5, PTC entered into PTC-PPA on 1.11.2013 for supply of 250 MW Round the Clock (RTC) power for a period of twenty-five years from the Scheduled Delivery Date of the project, for onward sale on long term basis. The aforesaid PPA was executed on the understanding that the Respondent No. 5, PTC had executed RVPN-PPA dated 1.11.2013 with the Rajasthan Discoms for sale and supply of aggregated contracted capacity of 250 MW to the Rajasthan Discoms from the generating station. RVPN-PPA was executed pursuant to a competitive bidding process initiated by the Respondent No. 4 (erstwhile Rajasthan Rajya Vidyut Prasaran Nigam Limited) through issuance of a Request for Proposal (RfP) for procurement of power on long term basis under Case-I bidding process for meeting the base load power requirements of the Rajasthan Discoms.

3. The Petitioner had approached the Commission through Petition No. 116/MP/2018 seeking relief, *inter alia*, towards levy of charge for transportation of fly ash pursuant to the Notification dated 25.1.2016 issued by MoEF&CC under change in law provisions. The Commission in its order dated 25.9.2019 in Petition No. 116/MP/2018 *inter-alia* held that charges for transportation of fly ash is admissible under change in law and granted liberty to the Petitioner to approach the Commission along with documents for determination of compensation.

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

“a) *Hold and declare that the Petitioner is entitled to recover its cost Rs.2,75,98,211/- incurred towards transportation of fly ash and pond ash along*

with carrying cost and interest from the Respondent No. 5 through supplementary bills; and

b) Formulate a mechanism for compensating the Petitioner for all future expenditure incurred for transportation of fly ash.”

Submissions of the Petitioner

5. The Petitioner mainly has submitted the following:

(a) The Petitioner has complied with the conditions stipulated by the Commission in its order dated 25.9.2019 in Petition No. 116/MP/2018. On 12.3.2019, a meeting was held between the Petitioner and Adani Infra (India) Limited (In short 'AIIIL'), that is engaged in construction of NH 130 Bilaspur Pathrapalli Road, in which the Petitioner agreed to supply 12 lakh m³ pond fly ash and 0.45 lakh m³ fly ash in line with the schedule submitted by AIIIL. In the said meeting, AIIIL informed the Petitioner that fly ash is required to be transported in bulkers and pond ash shall be transported in dumpers with tarpaulin cover with cost of such transportation to be borne by the Petitioner which will be later dumped at location informed by AIIIL i.e. working site for section I and section II of Bilaspur-Pathrapali road project.

(b) Pursuant to the meeting held on 12.3.2019, the Petitioner invited bids to award the contract for transportation of fly ash and pond ash for distance between 20 km and 70 km from the generating station and issued tender notice along with tender documents inviting bids from the various vendors for transportation of fly ash by (i) bowser/ bulker, quantity 45,000 m³, distance 31-70 km with a completion period of 15 months, (ii) transportation of pond ash by open dumper but covered with tarpaulin or suitable means as per MoEF&CC notification, quantity 19,93,070 m³ (approximately), distance 20-66 km with a completion period of 12 months.

(c) In response to tender issued by the Petitioner, three bidders, namely, Sindhu Trade Links Limited (STLL), Chhattisgarh Earth Movers and Shree Infra submitted their bids. On 23.3.2019, the bids were opened and STLL emerged as the L1 bidder.

(d) AIIIL vide its email dated 23.3.2019 requested the Petitioner to start the supply of pond ash and provide details regarding modality of transportation to

be adopted by the Petitioner, name & contract details of transporter, number of trips per day and one point contact from the Petitioner for co-ordination purposes.

(e) Subsequently, the Petitioner vide its letter dated 25.3.2019 informed Chhattisgarh Environment Conservation Board that it is going to supply approximately 21 lakh cubic meter pond ash and approximately 0.45 lakh cubic meter fly ash to AILL pursuant to minutes of meeting held on 12.3.2019 for compliance of requirement of Notification issued by MoEF&CC and the said ash will be utilized for construction of NH 130 Bilaspur-Pathrapalli Road which is a Project of National Highway Authority of India (NHAI) and is being developed by AILL.

(f) On 29.3.2019, the Petitioner issued Letter of Intent to STLL for lifting (loading), transportation, dumping (unloading) of 21 lakh m³ fly ash from the Petitioner's generating station to different locations of NH-130 Bilaspur-Pathrapali Road Project.

(g) On 30.3.2019, the Petitioner issued a work order to STLL having provisions related to the scope of work, order values, taxes and duties, payment terms, penalty and time schedule of work.

(h) AILL, vide its certificate dated 28.9.2020, certified the details of quantum of fly ash and pond ash supplied by the Petitioner during the financial year 2019-20 for the purpose of construction of Bilaspar-Patgrapali Cement Concrete Road and Flyovers embankment (NH-130 of NHAI) and the details of supplied quantum are as under:

Sr. No.	Period (in month)	Quantity of fly ash supplied (m³)
1.	March 2019, April 2019 and May, 2019	28,649.60
2.	June, 2019	24,641.82
3.	July, 2019	33,302.29
4.	August, 2019	21,799.46
5.	September, 2019	6,504.93
6.	January, 2020	5,180.97

(i) The Petitioner has placed on record independent auditor certificate dated 10.10.2020 issued by Nagar Goal & Chawla, Chartered Accountants for expenditure incurred towards transportation of fly ash of Rs.2,75,98,211/-

during the period from March, 2019 to January, 2020 for utilization towards construction of Bilaspur-Patrapali Cement concrete road and Flyovers Embarkment (N-130 of NHAI).

Hearing dated 13.7.2021

6. The matter was admitted on 13.7.2021 and notice was issued to the Respondents. The Commission vide Record for Proceedings directed the Petitioner to furnish the following details/ information on affidavit:

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

7. No reply was filed by the Respondents. However, in compliance to the aforesaid direction of the Commission, the Petitioner vide its affidavit dated 30.7.2021 has filed the information called for along with various supporting documents. In the said affidavit, the Petitioner has mainly submitted as under:

- (a) the certificate dated 30.6.2021 issued by AILL indicating that it has not paid any cost to the Petitioner towards fly ash and its transportation;
- (b) month-wise calculation of fly ash supplied to AILL for construction of road and table showing quantum of fly ash supplied to users;

(c) copy of minutes of meeting dated 12.3.2019 signed between the Petitioner and AIL for providing fly ash and pond ash to the latter;

(d) since it has not sold fly ash to any user and it has not generated any revenue, the Petitioner has not maintained any separate account for recording revenue from sale of fly ash.

Hearing dated 21.12.2021

8. The matter was heard through video conferencing on 21.12.2021. During the course of hearing, the learned counsel for the Petitioner objected to the request made by the learned counsel for the Rajasthan Discoms to file reply to the Petition and submitted that despite notice having been issued on 13.7.2021, the Respondents have failed to file the reply. The learned counsel submitted that the present Petition has been filed for determination of compensation on account of expenditure incurred towards transportation of fly ash along with carrying cost in terms of liberty granted by the Commission in order dated 25.9.2019 in Petition No. 116/MP/2018, wherein the Commission has held that additional cost towards transportation of fly ash pursuant to Notification of Ministry of Environment, Forest and Climate Change dated 25.1.2016 is admissible under Change in Law. The learned counsel further submitted that the Petitioner has already furnished all requisite details in terms of the order dated 25.9.2019, and accordingly, the Commission may pass an appropriate order. The learned counsel added that the Petitioner is facing severe financial difficulties and has already incurred an expenditure of approximately Rs.50 crore towards transportation of fly ash.

9. Considering the submissions made by the learned counsel for the parties, the Commission directed the Respondents, Rajasthan Discoms to file their reply within two weeks with copy to the Petitioner, who may file its rejoinder thereon, if any, within two weeks thereafter. Accordingly, order was reserved in the matter.

Reply of the Respondents

10. Rajasthan Discoms, vide their joint reply dated 3.1.2022, have submitted as under:

(a) The Rajasthan Discoms have challenged the Commission's order dated 25.9.2019 before the Appellate Tribunal for Electricity (APTEL) by way of Appeal No. 248 of 2020 which is pending adjudication.

(b) The Petitioner has not clearly disclosed the arrangement for utilization and transportation of fly ash prior to 12.3.2019. However, the claim of the Petitioner is only from March 2019 onwards.

(c) The Petitioner ought to clearly disclose the arrangement for utilization and transportation of fly ash as was being done since 25.1.2016. In case, the fly ash was being sold by the Petitioner or transportation was being arranged by the procurer of fly ash, such benefit ought to be passed on to the Respondents. Moreover, the Petitioner is required to establish its prudence in changing such an arrangement.

(d) The Petitioner has relied upon certain minutes of meeting held with AILL wherein the parties have agreed for such supply. However, there seems to be no formal agreement to supply fly ash to AILL. Further, it is not possible to believe that as a commercial entity, the Petitioner is supplying fly ash to AILL out of goodness of its heart and without any compensation for the same.

(e) There is no averment regarding efforts/ actions taken by the Petitioner for sale of fly ash by a transparent bidding process.

(f) The Petitioner cannot claim any relief for transportation of fly ash, in case it has not been prudent in arranging its affairs i.e. having not made any efforts for selling fly ash which is a marketable product.

(g) While the arrangement with AILL seems to be through a negotiated route wherein it is supplying fly ash free of cost, even for utilization of fly ash, the Petitioner could have well issued a competitive bidding wherein the users of fly ash could have participated and some revenue could have been generated.

It is admitted position that notification of MoEF&CC allows the generator to sell fly ash to the users agencies.

(h) Pursuant to issuance of tender for transportation of fly ash between 20 km and 70 km from its generating station, three bidders participated in the bid and the Petitioner has selected Sindhu Trade Links Limited for transportation of fly ash for 15 months. The Commission considering other generators, who are placed similarly as the Petitioner, may take a holistic view in regard to issue of fly ash disposal.

(i) The Petitioner is not entitled to carrying costs. Carrying cost would only arise if the costs were incurred prior to the order of the Commission. In the present case, there can be no question of any carrying cost being allowed, when the cost has been incurred only subsequent to the order of the Commission.

Rejoinder of the Petitioner to the reply of Rajasthan Discoms

11. In its rejoinder dated 6.1.2022 to the reply filed by the Rajasthan Discoms, the Petitioner has additionally submitted as under:

(a) AILL vide its certificate dated 28.9.2020 has certified the quantum of fly ash and pond ash supplied by the Petitioner during the period from March 2019 to January 2020. Further, AILL vide its certificate dated 15.12.2021 has also certified that it has not paid any amount to the Petitioner towards supply of fly ash, pond ash and transportation of fly ash. Since no fly ash was sold to any user, the Petitioner has not generated any revenue from such sale.

(b) Since no stay has been granted by APTEL on the Commission`s order dated 25.9.2019, the order is still valid and applicable.

(c) The Petitioner is claiming compensation for transportation of fly-ash only from March 2019. Further, this is not a condition precedent, set by the Commission, for recognition of transportation of fly ash as Change in Law event.

(d) From the issuance of MoEF&CC Notification dated 25.1.2016, the Petitioner was utilizing fly-ash in reclamation of low-lying areas, construction of

ash bricks and remaining quantum was being stored at ash-dyke, located at the Petitioner's generating station. Despite best efforts, the Petitioner was unable to find any method to sell fly-ash and earn revenue from it.

(e) The Minutes of Meeting was executed/ signed by both the Petitioner and AIL after due consultations and as such amounts to a binding agreement. AIL vide its letter dated 28.3.2019 had sent Minutes of Meeting dated 12.3.2019 to the Project Director, NHAI, for off-take of fly ash for construction of the project. The binding nature of the Minutes of Meeting, thus, cannot be questioned merely because it is not in the format of a formal agreement.

(f) Since the MoEF&CC Notification mandates 100% utilization of fly ash, the Petitioner has offered its fly ash on free of cost basis to AIL and has not received any amount for supply of fly ash to AIL.

(g) The Petitioner's generating station is located in Korba along with several other thermal power plants. Therefore, there is a huge demand supply gap with supply of fly ash outstripping its demand. As such, there is no demand for fly ash generated in this area, even if made available free of cost. The Petitioner has made best efforts for disposal of fly ash, but due to lack of demand, it has been unable to sell the same. The Petitioner published NIT No. MCCPL/RFP/Sale of Ash/2021/04 dated 5.10.2021 and dated 6.10.2021, in regional Newspapers, namely in Hari Bhoomi, Hitavada and Nai Duniya, respectively for sale of ash. However, no expression of interest was received by the Petitioner. Thereafter, the Petitioner again published NIT on 26.10.2021 in Newspaper, Desh Bandhu, for supply of fly ash free of cost. However, no response was received to the Petitioner's offer to supply fly ash free of cost.

(h) The Petitioner undertakes to keep making best efforts for sale of fly ash. Further, if any revenue is generated from sale of fly ash in future, the Petitioner would account for the same and inform the Respondents and the Commission in this regard.

(k) The Commission in paragraph 40 of the order dated 22.3.2021 in Petition No. 405/MP/2019 has already held that thermal power generators, such as the Petitioner, are eligible for carrying cost from the date of payment of transportation of fly-ash, by such thermal power generators, till the actual

payment of the same is made by distribution licensees to the thermal power generator. Therefore, the Petitioner is entitled to carrying cost in terms of the provisions of the PPA and the orders passed by the Commission.

Analysis and Decision

12. We have considered the submissions of the Petitioner and the Respondents, Rajasthan Discoms and perused documents available on record.

13. The Petitioner had approached the Commission through Petition No. 116/MP/2018 seeking declaration that the Notification dated 25.1.2016 issued by MoEF&CC, which mandates the thermal power plants to bear the cost of transportation of fly ash, is a change in law event within the meaning of Article 10 of PPAs. In that petition, the Petitioner had contended that MoEF&CC vide its Notification No. S.O. 254 (E) dated 25.1.2016 amended the Environment (Protection) Rules, 1986 and imposed additional cost towards fly ash transportation and mandated that thermal power plants need to bear the cost of transportation of fly ash and, thus, after 25.1.2016, the Petitioner was required to bear (a) transportation cost of fly ash to users undertaking the specified activities which are situated within 100 km of the generating station; and (b) 50% of the transportation costs of fly ash to users undertaking the specified activities which are situated between 100 km and 300 km of the generating station. By order dated 25.9.2019, the Commission held that the MoEF&CC Notification dated 25.1.2016 was a change in law event and that the expenditure claimed by the Petitioner on account of additional cost incurred towards fly ash transportation is *in-principle* admissible under change in law and that admissibility of such claims would be subject to certain conditions as indicated therein. Accordingly, the Commission granted liberty to the Petitioner to approach the Commission with required information/ documents so as to adjudicate the case

for determination of compensation. Relevant portion of the order dated 25.9.2019 in

Petition No. 116/MP/2018 is extracted as under:

“147. We have considered the submissions of the Petitioner and the Respondents. Similar issue has been considered by the Commission in its order dated 19.12.2017 in Petition No. 229/MP/2016 wherein the Commission has observed as under:

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

- a) Award of fly ash transportation contract through a transparent competitive bidding procedure so that a reasonable and competitive price for transportation of ash/ Metric Tonne is discovered;*
- b) Any revenue generated/ accumulated from fly ash sales, if CoD of units/ station was declared before the MoEF notification dated 25.01.2016 shall also be adjusted from the relief so granted;*
- c) Revenue generated from fly ash sales must be maintained in a separate account as per the MoEF notification and;*
- d) Actual expenditure incurred as claimed should be duly certified by auditors and the same should be kept in possession so that it can be produced to the beneficiaries on demand.*

The Petitioner is granted liberty to approach the Commission with above documents to analyse the case for determination of compensation.

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

14. In terms of the liberty granted by the Commission in the aforesaid order, the Petitioner has filed the present Petition for determination of compensation on account of expenditure incurred towards transportation of fly ash and for computation of carrying cost thereon, furnishing various supporting documents and stating that it has complied with the conditions stipulated by the Commission therein. Therefore, having already held in the order dated 25.9.2019 that the MoEF&CC Notification dated 25.1.2016 is a change in law event and that the expenditure claimed by the

Petitioner on account of additional cost incurred towards fly ash transportation is *in-principle* admissible under change in law subject to compliance of certain conditions, the only issue before this Commission is whether the Petitioner has complied with the said conditions and determination of the quantum of compensation.

15. As regards condition (a) specified in the order dated 25.9.2019, the Petitioner has submitted that on 15.3.2019, the Petitioner invited bids for awarding the contract for transportation of fly ash by issuing an invitation to bid vide Tender No. NIT No. MCCPL-300/ASH/TRANSPORTATION/NHAI/2018-2019/12. In response, three bidders, namely, Sindhu Trade Links Limited, Chhattisgarh Earth Movers and Shree Infra participated in the bid process and submitted their offers. On 23.3.2019, bids were opened and STLL emerged as L1 bidder. On 29.3.2019, the Petitioner issued Letter of Intent to successful bidder, namely STLL for lifting (loading) transportation, dumping (unloading) of 21 lakh m³ of pond ash and 0.45 lakh m³ of fly ash from the generating station to different location of NH-130.

16. Pursuant to the direction of the Commission vide Record of Proceedings for the hearing dated 13.7.2021, the Petitioner has furnished certificate dated 30.6.2021 issued by AILL stating that it has not paid any cost to the Petitioner towards fly ash/ pond ash and transportation of fly ash in terms of Guidelines issued by MoEF&CC.

17. It is noticed that in the meeting held on 12.3.2019 between the Petitioner and AILL, the Petitioner agreed to supply 21 lakh m³ of pond ash and 0.45 lakh m³ of fly ash for construction of NH 130 Bilaspur-Pathrapali Road being developed by AILL. Based on the meeting, the Petitioner invited bids for awarding the contract for transportation of fly ash and pond ash for a distance between 20 km and 70 km from its generating station. Perusal of the same reveals that the selection of L1 bidder (STLL) has been done by the Petitioner after carrying out a bidding process.

Pursuant thereto, Lol was issued by the Petitioner to STLL on 29.3.2019 and agreement was entered into on 30.3.2019. The Petitioner has also placed on record work order issued to STLL on 30.3.2019 for supply and transportation of fly ash from the generating station. The work order mentions the tentative quantity to be transported by STLL along with the rate for completion of work and the order value.

18. Vide Record of Proceedings for the hearing dated 13.7.2021, the Petitioner was directed to submit details of quantum of fly ash supplied to each user for each month. The Petitioner vide affidavit dated 30.7.2021 has submitted month-wise quantity of fly ash supplied to AILL as under:

Sr. No.	Period	Quantity (m ³)	Quantity (MT)
1.	March 2019, April 2019, May 2019	28694.60	-
2.	June 2019	2461.82	-
3.	July 2019	33302.29	-
4.	August 2019	21799.46	-
5.	September 2019	6504.93	-
6.	January 2020	5180.97	-
	Sub-total A	120079.07	
7.	September 2020	11861.83	13937.65
8.	October 2020	52886.56	62141.71
9.	November 2020	38835.85	45632.12
10.	December 2020	4455.08	5234.72
11.	January 2021	33606.20	39487.28
12.	February 2021	35690.43	41936.26
13.	March 2021	23632.80	23812.31
14.	April 2021	20265.80	23812.31
15.	May 2021	17614.68	20697.25
	Subtotal-B	238848.58	280647.03
	Grant total (A+B)	358927.65	421739.99

19. Though the Petitioner has not furnished user certificate issued by STLL stating that fly ash had been received from the Petitioner for road construction project/ national highway, it has furnished certificates dated 28.9.2020 and 30.6.2021, issued by AILL, certifying the details of quantum of fly ash and pond ash supplied by the Petitioner for the purpose of construction of Bilaspur-Pathrapali Cement Concrete Road and Flyovers embankment.

20. The Respondents have submitted that the Petitioner ought to clearly disclose the arrangement for utilization and transportation of fly ash as was being done since 25.1.2016. In case the fly ash was being sold by the Petitioner or transportation was being arranged by the procurer of fly ash, such benefit ought to be passed on to the Respondents.

21. Per contra, the Petitioner has submitted that it is claiming compensation for transportation of fly-ash only from March 2019 and this is not a condition precedent, set by the Commission, for recognition of transportation of fly-ash as change in law event. The Petitioner has submitted that from the issuance of MoEF&CC Notification dated 25.1.2016, the Petitioner was utilizing fly-ash in reclamation of low-lying areas, construction of ash bricks and the remaining quantum was being stored at ash-dyke, located at the Petitioner's generating station. However, despite best efforts, the Petitioner was unable to find any method to sell fly-ash and earn revenue from it. The Petitioner vide its affidavit 30.7.2021 has informed that it is not receiving any payment from AILL for supply of fly ash. The Petitioner started supplying fly ash as a last resort when it was unable to find any avenue for selling it. Since the MoEF&CC Notification mandates 100% utilization of fly ash, the Petitioner has offered fly-ash from the generating station on free of cost basis to AILL and has not received any amount for supply of fly ash to AILL.

22. The Respondents have also contended that the Petitioner has relied upon certain minutes of meeting held with AILL wherein the parties have agreed for supply of fly ash/ pond ash. However, no formal agreement to supply fly ash to AILL has been placed on record by the Petitioner. Further, it is not possible to believe that as a commercial entity, the Petitioner is supplying fly ash to AILL out of goodwill and without any compensation for the same. *Per contra*, the Petitioner has submitted that

the Minutes of Meeting were executed/ signed by both the Petitioner and AILL after due consultations and as such it amounts to a binding agreement and the said Minutes of Meeting were also sent by AILL to the Project Director, NHAI vide its letter dated 28.3.2019 in which AILL referred to the Minutes of Meeting as an agreement entered into with the Petitioner for off-take of fly ash for construction of the NHAI project.

23. We have considered the submissions made by the parties. We are satisfied that the Petitioner has complied with clause (a) of paragraph 147 of order dated 25.9.2019 in Petition No. 116/MP/2018 in so far as awarding contract for transportation of fly ash through competitive bidding process is concerned. At the same time, since the transportation charges incurred by the Petitioner in terms of MoEF&CC Notification dated 25.1.2016 is ultimately being passed onto the Respondents under the change in law provisions, we find some persuasive value in the submissions of the Respondents as regards revenue generated from sale of fly ash and, accordingly, we have incorporated a suitable direction to the Petitioner in the subsequent paragraphs of this order.

24. With regard to conditions stipulated in (b) and (c) of paragraph 147 of the order dated 25.9.2019 read with the directions in the ROP dated 13.7.2021, the Petitioner vide its affidavit dated 30.7.2021 (at paragraph 5) has submitted that since it has not sold fly ash to any user and, hence, not generated any revenue, the Petitioner has not maintained any separate account for recording revenue from sale of fly ash.

25. The Petitioner has submitted that it had published NIT on 5.10.2021 and 6.10.2021 in regional newspapers being Hari Bhoomi, Hitavada and Nai Duniya, for sale of fly ash. However, no expression of interest was received by the Petitioner.

The Petitioner has further published another NIT on 26.10.2021 in Desh Bandhu for supply of fly ash free of cost, still there were no takers. The Petitioner has further submitted that since the generating station is located in Korba with several other thermal power plants, the supply of fly ash far outstrips demand. Due to this, the Petitioner, despite repeated attempts, has been unable to sell fly ash. The Petitioner has undertaken to keep trying to sell fly ash profitably and keep the Respondents informed about the same.

26. The Petitioner has submitted Independent Auditor Certificate dated 10.10.2020 on calculation of fly ash transportation expense incurred by the Petitioner during the period from March 2019 to January 2020 for utilization of fly ash towards construction of NH 130. The certificate reflects an amount of Rs.2,75,98,211/- incurred on account of fly ash transportation cost. It has also been certified that the Petitioner has paid GST on RCM (Reverse Charge Mechanism) basis amounting to Rs.2,14,226/- for FY 2019-20. It has been noted that fly ash has been utilised for construction of NH road embankment.

27. The Ministry of Environment and Forests, Government of India vide its Notification No. S.O. 254 (E) dated 25.1.2016 imposed additional cost towards fly ash transportation on thermal power plants as under:

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

28. In terms of the above-quoted Notification of MoEF&CC, the Petitioner shall be entitled to receive full amount paid to STLL for fly ash transported within a radius of 100 km along with GST. It is noticed that fly ash has been transported for distance between 20 km to 79 km of the generating station.

29. As regards condition (d) of paragraph 147 of order dated 25.9.2019, the Petitioner has submitted the copy of the Chartered Accountant certificate dated 10.10.2020 duly certifying the expenditure incurred towards the quantity of fly ash supplied and amount incurred towards its transportation for the financial year 2019-20, which are extracted as under:

**Bill-wise details of ash transportation and loading charges
for construction of NHAI (NH-130)**

Sr. No.	Invoice Number	Invoice date	Period	Vendor Name	Trips	Quantity	Rate	Amount (Rs.)	GST (Rs.)	Total Amount (Rs.)
1.	CGLR1920MCP-0001	1.7.2019	March, April & May, 2019	Sindhu Trade Links Limited	-	28,293.94	10	282,939.00	50,930	333,869.00
2.	CGTP2020MCP-0002	1.7.2019	March, April & May, 2019	Sindhu Trade Links Limited	751	19,980.93	170	3,396,758.00	-	3,396,758.00
					189	5,335.02	245	1,307,080.00		1,307,080.00
					113	2,977.99	270	804,057.00	-	804,057.00
					5	118.06	375	44,273.00	-	44,273.00
					12	237.60	225	53,460.00	-	53,460.00
3.	CGLR1920MCP-0002	1.8.2019	June, 2019	Sindhu Trade Links Limited		24,259.23	10	242,592.00	43,666.00	286,258.00
4.	CCTP2020MCP-0003	1.8.2019	June, 2019	Sindhu Trade Links Limited	284	7,467.42	170	1,269,461.00	-	1,269,461.00
					596	15,709.45	245	3,848,815.00	-	3,848,815.00
					30	792.50	270	213,975.00	-	213,975.00
					11	289.86	195	56,523.00	-	56,523.00
					8	217.25	375	81,469.00	-	81,469.00
					6	165.34	225	37,202.00	-	37,202.00
5.	CGLR1920MCP-0003	1.9.2019	July, 2019	Sindhu Trade Links Limited		32,995.48	10	329,955.00	59,392.00	389,347.00
6.	CGTP2020MCP-0005	1.9.2019	July, 2019	Sindhu Trade Links Limited	186	4,926.52	170	837,508.00	-	837,508.00
					509	13,442.38	245	3,293,383.00	-	3,293,383.00
					220	5,809.91	270	1,568,676.00	-	1,568,676.00
					333	8,816.67	220	1,939,667.00	-	1,939,667.00
					5	115.32	375	43,245.00	-	43,245.00
					8	191.49	225	43,085.00	-	43,085.00
7.	CGLR1920MCP-0004	1.9.2019	August, 2019	Sindhu Trade Links Limited		21,780.04	10	217,800.00	39,204.00	257,004.00
8.	CGTP2020MCP-0006	1.9.2019	August, 2019	Sindhu Trade Links Limited	175	4,824.59	170	820,180.00	-	820,180.00
					68	1,905.07	245	466,742.00	-	466,742.00
					172	4,805.29	270	1,297,428.00	-	1,297,428.00
					281	7,807.96	220	1,717,751.00	-	1,717,751.00
					38	1,065.95	295	314,455.00	-	314,455.00
					49	1,371.18	195	267,380.00	-	267,380.00
					1	19.42	225	4,370.00	-	4,370.00
9.	CGLR1920MCP-0005	1.10.2019	September, 2019	Sindhu Trade Links Limited		6504.93	10	65,049.00	11,708.00	76,757.00
10.	CGTP2020MCP	1.10.2019	September, 2019	Sindhu Trade Links Limited	20	559.60	145	81,142.00	-	81,142.00
					50	1402.19	245	343,537.00	-	343,537.00
					93	2608.53	270	704,303.00	-	704,303.00
					54	1514.14	220	333,111.00	-	333,111.00
					15	420.47	295	124,039.00	-	124,039.00

11.	CGLR1920MCP-0008	1.2.2020	January, 2020	Sindhu Trade Links Limited		5,180.97	10	51,810.00	9326.00	61,136.00
12.	CGTP2020MCP-0021	1.2.2020	January, 2020	Sindhu Trade Links Limited	185	5,180.97	170	880,765.00	-	880,765.00
								27,383.985.00	214,226.00	27,598,211.00

30. In view of the above discussion, the Petitioner shall be entitled to compensation for the expenditure incurred towards transportation of fly ash. Further, the above compensation shall be recovered from the Respondents in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of electricity to the respective Discoms. If the actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of transportation of fly ash.

31. The Petitioner is directed to furnish along with its monthly regular and/or supplementary bill(s), computations duly certified by the auditor to the Respondents. The Petitioner and the Respondents are directed to carry out reconciliation on account of these claims annually. Further, the Petitioner shall continue its endeavour to fulfill its obligations of promoting the fly ash based product manufacturing as provided in the MoEF&CC Notification.

Carrying Cost

32. The Petitioner has prayed for carrying cost and interest from the Respondent No. 5 through supplementary bills.

33. We have considered the submissions of the Petitioner. The issue of applicability of carrying cost is no longer *res-integra*. The APTEL in its judgment dated 13.4.2018 in Appeal No. 210/2017 (Adani Power Limited v. Central Electricity Regulatory Commission & Ors.) has allowed the carrying cost on the claim under change in law and held as under:

“ix. In the present case we observe that from the effective date of Change in Law the Appellant is subjected to incur additional expenses in the form of arranging for working capital to cater the requirement of impact of Change in Law event in addition to the expenses made due to Change in Law. As per the provisions of the PPA the Appellant is required to make application before the Central Commission for approval of the Change in Law and its consequences. There is always time lag between the happening of Change in Law event till its approval by the Central Commission and this time lag may be substantial. As pointed out by the Central Commission that the Appellant is only eligible for surcharge if the payment is not made in time by the Respondent Nos. 2 to 4 after raising of the supplementary bill arising out of approved Change in Law event and in PPA there is no compensation mechanism for payment of interest or carrying cost for the period from when Change in Law becomes operational till the date of its approval by the Central Commission. We also observe that this Tribunal in SLS case after considering time value of the money has held that in case of re-determination of tariff the interest by a way of compensation is payable for the period for which tariff is re-determined till the date of such re-determination of the tariff. In the present case after perusal of the PPAs we find that the impact of Change in Law event is to be passed on to the Respondent Nos. 2 to 4 by way of tariff adjustment payment as per Article 13.4 of the PPA.

.....From the above it can be seen that the impact of Change in Law is to be done in the form of adjustment to the tariff. To our mind such adjustment in the tariff is nothing less than re-determination of the existing tariff.

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

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

“10. A reading of Article 13 as a whole, therefore, leads to the position that subject to restitutionary principles contained in Article 13.2, the adjustment in monthly tariff payment, in the facts of the present case, has to be from the date of the withdrawal of exemption which was done by administrative orders dated 06.04.2015 and 16.02.2016. The present case, therefore, falls within Article 13.4.1(i). This being the case, it is clear that the adjustment in monthly tariff payment has to be effected from the date on which the exemptions given were withdrawn. This being the case,

monthly invoices to be raised by the seller after such change in tariff are to appropriately reflect the changed tariff. On the facts of the present case, it is clear that the respondents were entitled to adjustment in their monthly tariff payment from the date on which the exemption notifications became effective. This being the case, the restitutionary principle contained in Article 13.2 would kick in for the simple reason that it is only after the order dated 04.05.2017 that the CERC held that the respondents were entitled to claim added costs on account of change in law w.e.f. 01.04.2015. This being the case, it would be fallacious to say that the respondents would be claiming this restitutionary amount on some general principle of equity outside the PPA. Since it is clear that this amount of carrying cost is only relatable to Article 13 of the PPA, we find no reason to interfere with the judgment of the Appellate Tribunal ...

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

35. Article 10.2 of the PPA provides as under:

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

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

36. In view of the provisions of the PPA, the principles of restitution and the aforesaid judgment of the Hon`ble Supreme Court, we are of the considered view that the Petitioner is eligible for carrying cost arising out of approved change in law events from the date of making the actual payment till the date of issue of this order. The Commission in its order dated 17.9.2018 in Petition No. 235/MP/2015 (AP(M)L v. UHBVNL & Ors.) had decided the issue of carrying cost as under:

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

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

25. It is noted that the rates at which the Petitioner raised funds is lower than the interest rate of the working capital worked out as per the Regulations of the

Commission during the relevant period and the LPS as per the PPA. Since, the actual interest rate paid by the Petitioner is lower, the same is accepted as the carrying cost for the payment of the claims under Change in Law.

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

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

Mechanism for recovery of future expenditure for transportation of fly ash

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

39. Since any mechanism devised for recovery of future expenditure for transportation of fly ash shall have to be applicable to all coal based generating stations, we are of the considered opinion that the same cannot be dealt with in this petition, as a wider stakeholders consultations is required.

40. However, we direct that:

(a) The Petitioner shall abide by the directions issued and conditions stipulated by the Ministry of Power vide its letter No. 9/7/2011-S.Th.(Vol. IV) dated 22nd September, 2021 for 'Supply of Fly ash to the end users by the power plants to increase fly ash utilization';

(b) The Petitioner shall supply fly ash transportation to the specified end-users at a distance specified under Clause 10 of the MoEF&CC Notification dated 25.1.2016; and

(c) The Petitioner shall comply with the conditions stipulated by the Commission in its order dated 19.12.2017 in Petition No. 229/MP/2016 and reiterated in the order dated 25.9.2019 in Petition No. 116/MP/2018.

41. In light of the above findings and discussions and with the directions to the Petitioner as stated in paragraph 40 above, the Petition No. 88/MP/2021 is disposed of.

Sd/-
(P. K. Singh)
Member

sd/-
(Arun Goyal)
Member

sd/-
(I. S. Jha)
Member

sd/-
(P. K. Pujari)
Chairperson