CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 112/MP/2015

Coram:
Shri Gireesh B. Pradhan, Chairperson
Shri A.K. Singhal, Member
Shri A.S. Bakshi, Member
Dr. M.K. Iyer, Member

Date of Order: 7th of April, 2017

In the matter of
Petition under Section 79 of the Electricity Act, 2003 read with statutory framework governing procurement of power through competitive bidding and Article 13.2 (b) of the Power Purchase Agreement dated 7.8.2007 executed between GMR Kamalanga Energy Limited and Bihar State Power (Holding) Company Limited for compensation due to change in law impacting revenues and costs during the operating period.

And
In the matter of

1. GMR-Kamalanga Energy Limited
New Shakti Bhawan,
Building No. 302- New Uddan Bawan,
Opposite Terminal- 3,
Indira Gandhi International Airport,
New Delhi- 110037

2. GMR Energy Ltd.
New Shakti Bhawan,
Building No. 302- New Uddan Bawan,
Opposite Terminal- 3,
Indira Gandhi International Airport,
New Delhi- 110037

.....Petitioners

Vs

1. Bihar State Power (Holding) Company Limited
1st Floor, Vidyut Bhawan,
Bailey Road, Patna 800001

2. Prayas Energy Limited
Unit III A & B, Devgiri

Kothrud Industrial area
Kothrud, Pune 411038

.....Respondents

Parties Present:

Shri Amit Kapoor, Advocate, GMR
Shri Vishrov Mukerjee, Advocate, GMR
Shri Rohit Venkat, Advocate, GMR
Shri Madhup Singhal, GMR
Shri R.B. Sharma, Advocate, BSP(H)CL
Shri M.G. Ramachandra, Advocate, Prayas Energy Group
Ms. Ranjitha Ramachandran, Advocate, Prayas Energy Group
Ms. Anushree Bardhan, Advocate, Prayas Energy Group

ORDER

GMR Kamalanga Energy Limited (Petitioner No.1) was incorporated as a public limited company under the Companies Act, 1956 as a subsidiary of GMR Energy Limited (Petitioner No. 2) to set up a 1400 MW Thermal Power Project (hereinafter referred to as the "Power Project") at village Kamalanga, District Dhenkanal in the State of Odisha. The Power Project comprises of two stages - the first stage having three units of 350 MW each and the second stage having one unit of 350 MW. Stage 1 of the Power Project has been accorded Mega Power Project status by the Ministry of Power, Government of India on 1.2.2012.

2. Petitioner No.1, GMR Kamalanga Energy Limited (GKEL), entered into the following long-term PPAs for supply of power from the Power Project:

(a) Supply of 350 MW gross power (Stage 1: 262.5 MW and Stage 2: 87.5 MW) to Grid Corporation of Odisha Limited (GRIDCO) in terms of PPA dated 28.9.2006 (as amended on 4.1.2011 with delivery point as Odisha STU

interconnection point).The supply of power in terms of the GRIDCO PPA commenced from 30.4.2013.

(b) Supply of 282 MW gross power (260 MW net of auxiliary consumption) to Bihar State Electricity Board in terms of PPA dated 9.11.2011, with delivery point as the Bihar STU interconnection point. The supply of power commenced from 1.9.2014.

(c) Supply of 350 MW gross power (300 MW net of transmission losses and auxiliary consumption) to Haryana Discoms based on the competitive bidding through back to back arrangements:

(i) The PPAs dated 7.8.2008 entered into between PTC India Limited and Haryana Discoms with delivery point as Haryana STU bus bar;

(ii) Back to back PPA dated 12.3.2009 between GMR Energy Limited (holding company of GKEL) and PTC India Limited.

3. The Petitioners in the original petition have sought the following reliefs under Change in Law during the operating period:

(a) Increase in the rate of royalty on coal pursuant to Notification No. 349 (E) dated 10.5.2012 issued by the Ministry of Coal, Government of India.

(b) Increase in Clean Energy Cess by the Government of India in the Finance Act, 2010 with effect from 1.4.2010 in terms of Notification No. 3/2010 dated 22.6.2010 issued by the Ministry of Finance, Government of India

and its subsequent Circular No.D.O.F.No.334/15/2014-TRU dated 10th July 2014 and Circular No. D.O.F.No.334/5/2015 dated 28th February, 2015.

(c) Increase in Excise Duty on Coal by the Central Government w.e.f. 17.3.2012 videD.O.F.No.334/3/2012-TRU and inclusion of Royalty and Stowing Excise Duty in the assessable value for calculation of Excise Duty on Coal w.e.f. 1st March 2013.

(d) Change in Source of Coal from Mahanadi Coalfields Limited (MCL) to Eastern Coalfields Limited (ECL)

(e) Change in coal transportation from Rail mode to Road mode by MCL

(f) Add-on premium on the MoC notified price of coal supplies under tapering linkage.

(g) Increase in Service Tax from 12.36% to 14% and Levy of Swatch Bharat Cess 2% (new levy)

(h) Change in law events impacting freight charges.

(i) Increase in VAT levied on coal by Government of Odisha through Notification SRO No. 126 of 2012 dated 30.3.2012.

(j) Increase in MAT rate.

The petitioner has submitted the summary of the change in law events as under:

S. No	Event	Date of Occurrence of Change in Law Event	As on bid date 4.4.2011	As on power supply start date 1.9.2014
1	Royalty on Coal	10.5.2012	Rs. 55/- + (5% of ROM price of coal)	14% of ROM price of coal
2	Clean Energy Cess	11.7.2014	Rs. 50 per tonne	Rs. 100 per tonne further, increased to Rs. 200 per ton w.e.f. 1.3.2015
3	Excise Duty	1.3.2013	5% on (ROM price + surface transportation + sizing charges)	6% on (ROM price + surface transportation + sizing charges + Royalty + Stowing Excise Duty)
4	Part change in source of Coal from MCL to ECL	26.2.2014	550 MW tapering linkage from MCL	200 MW tapering linkage from MCL 350 MW tapering linkage from ECL
5	Change in coal transportation mode	October, 2014	MCL coal - 100% by rail mode	MCL coal - 70% by rail mode & 30% by road mode
6	Premium on tapering linkage coal cost	28.8.2013		Add-on premium of notified price of coal
7	Freight charges			
7.1	Busy Season Surcharge	18.9.2013	5%	15%
7.2	Development Surcharge	15.10.2011	2%	5%
7.3	Service Tax on coal transportation	26.9.2012	0%	2%
8	VAT on coal	1.4.2012	4%	5%
9	Levy of Swatch Bharat Cess		0%	2%
10	Delay in operationalization of Captive coal mines and its subsequent Cancellation by the Supreme Court.	24.9.2014	Captive Coal mine allocation was valid	Cancelled by Supreme court by order dated 24.09.2014

In addition to above Change in law events the Petitioners vide affidavit dated 2.2.2016 have claimed two more events under Change in law, viz. Contribution to National Mineral Exploration trust and Electricity duty on Auxiliary consumption.

4. The Petitioners have submitted that the events of Change in Law have financial impact on the cost and revenue of the Petitioners during the operating period for which the Petitioners are entitled to be compensated in terms of Article 13 of the PPA. Accordingly, the Petitioners have filed the present petition with the following prayers:

> "(a) Declare that each of the items set out in Paragraphs 20 to 68 above are a Change in Law impacting revenues and costs during the Operating Period for which the Petitioners must be compensated in terms of Article 10 of the Bihar PPA; and
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> (b) Restore the Petitioners to the same economic condition prior to occurrence of the Changes in Law by permitting the Petitioners to raise Supplementary Bills in terms of Article 10.3 of the Bihar PPA as per the computations set out in hereinabove or through a suitable mechanism to compensate the Petitioners as and when the financial impact of the respective Changes in Law and Force Majeure event arise, either jointly or severally."

5. The petition was admitted and notices were issued to the respondent and Prayas Energy Group (Prayas) to file their replies to the petition. Replies to the petition have been filed by Prayas vide affidavit dated 11.3.2016 and Bihar State Power (Holding) Company Limited vide affidavit dated 18.5.2016. The Petitioners have filed their rejoinder to the replies of the respondents.

6. The Petitioners were directed to file the information with regard to (i) Quantification of claims under various heads from the commencement of supply of power to the beneficiaries/Procurers, (ii) Copy of all notifications in support of change in law events, (iii) If the increase in the cost is more than 1% of LC amount in a contract year, furnish detailed computation with regard to increase in cost more than 1% of LC amount in a contract year, namely 2014-15 and 2015-16. The petitioner vide its affidavit dated 2.2.2016has filed the information called for.

Jurisdictional Issue

7. The Petitioners have submitted that the Commission in its order dated 16.12.2014 in Petition No. 79/MP/2013 and Petition No. 81/MP/2013 –GMR-Kamalanga Energy Limited and Another v. Dakshin Haryana Bijli Vitran Nigam Limited and Others, for the same Generating Station held that it is an inter-State generating station having a Composite Scheme for the supply of electricity in terms of Section 79 (1)(f) of the Act. The Petitioners have also submitted that the Commission, during the course of hearing in Petition No. 79/MP/2013, directed that the respondents in the present Petition be impleaded since they are beneficiaries of the Generating Station and any decision on the issue of Jurisdiction would also affect the respondents in the present case. Therefore, the respondents in the present Petition were made parties to the proceedings in Petition No. 79 and 81 of 2013 for the same generating station on the issue of Jurisdiction of the Commission. The Commission in order dated 16.12.2013 in Petition No. 79 and 81 of 2013 decided the issue of jurisdiction of the Commission to regulate the tariff of GKEL under Section 79(1) (b) of the Act as under:

> "33. To sum up, it is held that supply of electricity by the petitioner to the States of Odisha, Haryana and Bihar is under the composite scheme for generation and sale of electricity in more than one State. Accordingly, this Commission has power to regulate the tariff of the generating station of the petitioner under clause (b) of sub-section (1) of Section 79 of the Electricity Act, 2003. As a corollary it follows that the powers of adjudication of the claims and disputes involving force majeure and Change in Law events under the PPAs is vested in this Commission.
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> 34. In view of the above discussion, the petitions are maintainable."

8. Haryana Discoms and Gridco filed Appeal Nos. 44/2014 and 74/2014 respectively, before the Appellate Tribunal for Electricity against the jurisdiction orders dated 16.12.2013 and 3.1.2014 respectively issued by this Commission. The Appellate

Tribunal in its full Bench judgment dated 7.4.2016 regarding jurisdiction issue, decided as under:

> "120. We have already answered Issue No.3 in the affirmative and held that supply of power to more than one State from the same generating station of a generating company ipso facto, qualifies as a 'Composite Scheme' to attract the jurisdiction of the Central Commission under Section 79 of the said Act. It is an admitted position that both GMR Energy and Adani Power are selling electricity in more than one State from their respective generating stations. **Hence, we hold that so far as Adani Power and GMR Energy are concerned, there exists a 'Composite Scheme' for generation and sale of electricity in more than one State by a generating station of a generating company within the meaning of Section 79(1)(b) of the said Act for the Central Commission to exercise jurisdiction. Issue No.4 is accordingly answered in the affirmative."**

In the light of the judgment of the Appellate Tribunal, we reiterate that this Commission has the jurisdiction to regulate the tariff of the power project of the Petitioners. It is pertinent to mention that GRIDCO and Haryana Utilities have filed Civil Appeal before the Supreme Court challenging the jurisdiction of the Commission to regulate the tariff of the Petitioners. Therefore, our decision in this order shall be subject to the final outcome of the Civil Appeals on the issue of jurisdiction.

Analysis issues on merit

9. The Commission heard the learned counsels for the Petitioners, BSPHCL and Prayas at length. After consideration of the submissions of the Petitioners, Prayas and the respondent, the claim of the Petitioners have been dealt with as under:

(a) Whether the provisions of the PPA with regard to notice have been complied with?

(b) What is the scope of change in law in the PPA?

(c) Whether compensation claims are admissible under Change in Law in the PPA?

(d) Mechanism for processing and reimbursement of admitted claims under Change in Law.

10. The above issues have been dealt with in the succeeding paragraphs.

Issue No. 1: Whether the provisions of the PPA with regard to notice has been complied with?

11. The claims of the Petitioners in the present petition pertain to the Change in Law events during the operating period. Article 10.4 of the Bihar PPA is extracted as under:

"10.4 Notification of Change in Law

10.4.1. If the Seller is affected by a Change in Law in accordance with Article 10.1 and the Seller wishes to claim relief for such a Change in Law under this Article 10, it shall give notice to the Procurer of such Change in Law as soon as reasonably practicable after becoming aware of the same or should reasonably have known of the Change in Law.

10.4.2 Notwithstanding Article 10.4.1, the Seller shall be obliged to serve a notice to the Procurer under this Article 10.4.2, even if it is beneficially affected by a Change in Law. Without prejudice to the factor of materiality or other provisions contained in this Agreement, the obligation to inform the Procurer contained herein shall be material.
Provided that in case the Seller has not provided such notice, the Procurer shall have the right to issue such notice to the Seller.

10.4.3 Any notice served pursuant to this Article 10.4.2 shall provide, amongst other things, precise details of:

(a) the Change in Law; and

(b) the effects on the Seller.

12. The Petitioners have submitted that respondents were duly informed about the events of Change in Law and their impact vide following notices:

(a) Notice dated 25.6.2012 vide letter Ref: GKEL/BBSR/PTC/12-13/2074.

(b) Notice dated 25.10.2014, vide letter Ref: KEL/BBSR/Bihar/PPA/201415/450.

(c) Notice dated 13.2.2015 vide letter Ref: GKEL/BBSR/Bihar/PPA/2014-15/4909.

(d) Notice dated 16.3.2015 vide letter Ref: GKEL/Bihar/2014-15/5041

13. Bihar State Power (Holding) Company Limited (BSPHCL) has submitted that since the Petitioners have not served it with the notice with regard to the claim for contribution towards National Mineral Exploration Trust and District Mineral Foundation, the same cannot be made part of the petition. The Petitioners in the rejoinder dated 13.6.2016 have filed the copy of the new notice dated 26.4.2016 vide letter Ref. GKEL/Bihar/PPA/2016-17/21 served on the respondent. The statement of the Petitioners has not been contravened by BSPHCL.

14. We have considered the submissions of the Petitioners and the respondents. Under Article 10.4.2 of the PPA, the Petitioners are required to give notice about concurrence of Change in Law events as soon as reasonably practicable after being aware of such events. The Petitioners have given notices dated 25.6.2012, 25.10.2014, 13.2.2015, 16.3.2015 and 26.4.2016 to the BSPHCL indicating the above Change in law events. In the said notices, the Petitioners have apprised the BSPHCL about the concurrence of Change in Law events and the impact of such events on tariff. The BSPHCL has not responded to such notices of the Petitioners. Thereafter, the Petitioners have filed the present petition. In our view, the requirement of Article 10.4.2 of the PPA has been complied with.

Issue No. 2: Scope of Change in Law in the Bihar PPA

15. The Petitioners have approached the Commission under Article 10 of the Bihar PPA read with Section 79 of the Act for compensation of the cost incurred by the Petitioners due to 'Change in Law' during the operating period. On 27.11.2012, the Bihar State Electricity Regulatory Commission ("BERC") vide its order dated 27.11.2012 in Case No. 6/2012 approved and adopted a levelised tariff of Rs. 3.69 / kWh under Section 63 of the Electricity Act, 2003. On 24.7.2014, BERC vide its further order dated 24.7.2014 in Case No. 14/2014 ("Advancement Order") granted the advancement in Scheduled Delivery Date through short term open access until long term open access is made available. Pursuant to the said Order, Scheduled Delivery Date was advanced to 1.9.2014 from the stipulated date of 9.11.2015 and the Petitioners have been supplying power to BSPHCL in a phased manner with effect from 1.9.2014. Therefore, the operating period of the unit of the generating station will be considered from the date of commencement of supply of power i.e. 1.9.2014.

16. The "Operating Period" has been defined in the PPA as under:

> "Operating Period shall mean the period commencing from the Delivery Date, until the Expiry Date or date of earlier termination of this Agreement in accordance with Article 2 of this Agreement."

17. Article 10 of the Bihar PPA provides Change in Law during the operating period as under:

> "10.1.1 "Change in Law" means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline resulting into any additional recurring/ non-recurring expenditure by the Seller or any income to the Seller:
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> - the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any

Law, including rules and regulations framed pursuant to such Law;

- a change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;

- the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the Seller;

- any change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of this Agreement.

but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI Charges or frequency intervals by an Appropriate Commission or (iii) any change on account of regulatory measures by the Appropriate Commission including calculation of Availability.

10.2 Application and Principles for computing impact of Change in Law

10.2.1 While determining the 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.

10.3 Relief for Change in Law

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10.3.2 During Operating Period

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

10.3.3 For any claims made under Article 10.3.1 and 10.3.2 above, the Seller shall provide to the Procurer and the Appropriate Commission documentary proof of such increase /decrease in cost of the Power Station or revenue/expense for establishing the impact of such Change in Law.

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

The terms "Law" and 'Indian Governmental Instrumentality' have been defined in Bihar PPA as under:

> 'Law' shall mean in relation to this Agreement, all laws including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and shall further include without limitation all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include without limitation all rules, regulations, decisions and orders of the Appropriate Commission;
>
> 'Indian Governmental Instrumentality' shall mean the Government of India, Government of Bihar, Government of Jharkhand and any ministry, department, board, authority, agency, corporation, commission under the direct or indirect control of Government of India or any of the above state Government(s) or both, any political sub-division of any of them including any court or Appropriate Commission(s) or tribunal or judicial or quasi-judicial body in India but excluding the Seller and the Procurer.'

18. A combined reading of the above provisions would reveal that the Commission has the jurisdiction to adjudicate upon the disputes between the Petitioners and the respondents with regard to "Change in Law" which occur after the date which is seven days prior to the bid deadline. The events broadly covered under Change in Law are following:

(a) Any enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any law, or

(b) Any change in interpretation of any Law by a Competent Court of law, Tribunal or Indian Governmental Instrumentality acting as final authority under law for such interpretation, or

(c) Imposition of a requirement for obtaining any consents, clearances and permits which was not required earlier.

(d) Any change in the terms and conditions or inclusion of new terms and conditions prescribed for obtaining any consents, clearances and permits otherwise than the default of the settler.

(e) Any change in the tax or introduction of any tax made applicable for supply of power by the Petitioners to BSPHCL.

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

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

(h) The Compensation for any increase/decrease in revenue or cost to the Seller shall be determined and made effective from such date, as decided by the Commission which shall be final and binding on both the Petitioners and BSPHCL, subject to right of approval provided under Electricity Act, 2003.

(i) The compensation shall be payable only if increase/decrease in revenues or cost to the Petitioners are in excess of an amount equivalent to 1% of Letter of Credit in aggregate for a Contract Year

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

19. The Petitioners have raised claims under Change in Law in respect of events during the operating period, namely Increase in Rate of Royalty, Levy of Clean Energy Cess, Increase in Excise Duty, Change in Coal transportation from Rail mode to Road mode by MCL, Premium on tapering linkage coal cost, Busy season Surcharge, development Surcharge, Service Tax on coal transportation, Vat on Coal, Levy of Swacch Bharat Cess, Delay in operationalization of Ramia Coal Mines and Increase in MAT rate. Keeping in view the broad principles discussed above, we proceed to deal with the claims of the petitioner under Change in Law during the Operating Period.

(A) Increase in the rate of royalty on coal

20. The Petitioners have submitted that at the time of submission of bid on 9.4.2011, the prevalent/notified rate of royalty on coal was `55+5% of ROM price per tonne which formed the basis of the winning bid submitted by the Petitioners. Subsequently, the Ministry of Coal, Government of India vide its Notification No. 349 (E) dated 10.5.2012 increased the rate of royalty on coal to an ad-valorem rate of 14% on price of coal. The Petitioners have submitted that as per the said notification, the ad valorem rate of 14% will be levied on the price of coal as reflected in the invoice excluding taxes, levies and other charges. The Run-of-the-Mine price of coal proposed to be procured for the power project is `660 per MT as per the Notification dated 27.5.2013 issued by Coal India Limited. The Petitioners in their submission dated 2.2.2016 have estimated impact of the royalty @ Rs. 4/MT from 1.9.2014. The Petitioners have suggested the following formula for calculation of financial impact on account of increase in rate of royalty:

Impact (In Rs.) = {Actual monthly royalty paid on coal purchased for entire power plant less [Quantity of coal in the month in metric ton (MT) purchased for the entire power plant x ROM price x (Rs.55 + 5%)]} x % share of Stage-I gross plant capacity in MW allocated for Bihar.

21. BSPHCL in its reply dated 18.5.2016 has submitted that Petitioners have claimed both royalty on coal and also inclusion of royalty in the assessable value for payment of excise duty on coal as events of Change in law. BSPHCL has submitted that CIL and its subsidiaries are considering the royalty and the change in royalty structure collected by the coal companies in the name of 'Royalty and Stowing Excise Duty', which are not in the nature of other taxes as part of the transaction value for the purposes of determining the assessable value for payment of Central Excise Duty. According to the BSPHCL, claim of royalty and change in royalty structure cannot be claimed as an event of change in law.

22. Prayas has submitted that the royalty is payable by the Coal Mining Company for coal mining operation and there is no liability on the part of Petitioners to pay any royalty and therefore, the same is not applicable on "supply of power by the seller" in terms of Article 10 of the PPA and cannot be construed to be a Change in Law. Prayas has further submitted the Commission's decision allowing increase in the rate of royalty in order dated 3.2.2016 in Petition No. 79/MP/2013 is based on the stipulation regarding the change in law covering the impact of any cost or revenue from the business of selling electricity by the seller under the terms of the agreement and distinguishable from the present case where Article 10 of the Bihar PPA is narrower and limited in its scope in that only tax on supply of power by the seller is to be considered as Change in Law. According to Prayas, since the increase in royalty shall be payable by the Coal

Mining Company and the Petitioners have no liability to pay the same and therefore, the expenditure cannot be admitted under Change in law.

23. We have considered the submissions made by the Petitioners, BSPHCL and Prayas. It is the position of Prayas that since there is no provision akin to the provision in Haryana PPA i.e. "the impact in any cost or revenue from the business of selling electricity by the seller" in the present PPA, the additional expenditure cannot be admitted in the present petition. We have noticed that "enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any law" is covered under Change in law if this result in additional recurring/ non-recurring expenditure by the seller or any income to the seller. Since the change in rate of royalty is on account of amendment to Second Schedule of the Mines and Minerals (Development and Regulations) Act, 1957, the expenditure will be admissible under the Change in law. The Commission has considered the issue of change in royalty, excise duty on coal vide order dated 3.2.2016 in Petition No.79/MP/2013 as under:

> "32. We have considered the submissions of the Petitioners and Haryana Discoms. As per the Notification No.349 (E) dated 10.5.2012 of Ministry of Coal, Government of India, the royalty on coal has been fixed as under:
>
> > "(1) Royalty on Coal: The rate of royalty on coal shall be @ 14% (Fourteen percent) ad-valorem on price of coal, as reflected in the invoice, excluding taxes, levies and other charges."

Through this notification dated 10.5.2012, Second Schedule of the Mines and Minerals (Development and Regulations) Act, 1957 has been amended. The Notification has been issued after 16.11.2007. As change in rate of royalty on coal has an impact on the cost of coal and hence, the cost of generation of power for supply to the Haryana Discoms, the change will be covered under change in law. The Petitioner will now be

required to pay the increased cost of coal including royalty on coal @ 14% ad-valoremon the price of coal as reflected in the invoice, excluding taxes, levies and other charges. The Petitioner has submitted that at the time of bid, the rate of royalty on coal wasRs.55 + 5% of the ROM price per tonne which formed the basis of its bid. The Petitioner has prayed that the difference between the rate of royalty on coal prevalent as on the date of submission of the bid and the rate of royalty on coal revised through the Notification dated 10.5.2012 may be allowed to the Petitioner on the ad valorem price of coal as reflected in the invoice excluding taxes, duties and levies. The Appellate Tribunal for Electricity in its judgement dated 12.9.2014 in Appeal No.288 of 2013 (M/s Wardha Power Company Limited Vs Reliance Infrastructure Limited &Another) has observed as under:

> "26. The price bid given by the Seller for fixed and variable charges both escalable and non-escalable is based on the Appellant`s perception of risks and estimates of expenditure at the time of submitting the bid. The energy charge as quoted in the bid may not match with the actual energy charge corresponding to the actual landed price of fuel. The seller in its bid has also not quoted the price of coal. Therefore, it is not correct to correlate the compensation on account of Change in Law due to change in cess/excise duty on coal, to the coal price computed from the quoted energy charges in the Financial bid and the heat rate and Gross Calorific value of Coal given in the bidding documents by the bidder for the purpose of establishing the coal requirement. The coal price so calculated will not be equal to the actual price of coal and therefore, compensation for Change in Law computed on such price of coal will not restore the economic position of the Seller to the same level as if such Change in Law has not occurred."

In the light of the above decision, the claim of the Petitioners has been examined. The Increase in Royalty was effected vide Notification dated 10.5.2012 which is after the cut-off date of 4.4.2011. The increase in royalty has resulted in additional recurring expenditure by the Petitioners for supply of power to BSPHCL. Therefore, we hold that the Petitioners shall be entitled for compensation for applicable ad valorem price of coal

per tonne as reflected in the invoice excluding taxes, duties and levies which shall be reduced by `55 plus 5% of the ad valorem price of coal excluding taxes, duties and cess. In case, the rate of Royalty is reduced from applicable ad valorem price or `55 plus 5%, the Petitioners shall compensate BSPHCL for the reduction in cost of coal based on above principles.

24. BSPHCL has submitted that since royalty is included in the assessable value of excise duty on coal, it cannot be separately admitted under Change in law. We are not in agreement with this line of reasoning. Royalty on Coal and Excise Duty on Coal are separate taxes imposed under the Acts of the Parliament and therefore, both needs to be examined separately with regard to their admissibility under the Change in law. Since, Royalty on Coal is imposed under the provisions of the Mines and Minerals (Development and Regulations) Act, 1957 and the change in the royalty has been brought about through a notification dated 10.5.2012, the same is admissible under Change in Law. On the other hand, CIL is also considering the royalty as part of the assessable value for determination of excise duty on coal. This aspect has been dealt with in the later part of this order.

25. The Petitioners are supplying power from the generating stations to Gridco and Haryana in addition to the BSPHCL based on the linkage coal and tampering linkage coal. Therefore, liability of BSPHCL for payment of royalty on coal shall be in proportion to the coal consumed for generation corresponding to schedule supply of power to BSPHCL. The Petitioners are directed to furnish along with its monthly bill the proof of payment to coal companies and computations duly certified by the auditor to BSPHCL.

It is clarified that the Petitioners shall be entitled to recover on account of royalty on coal in proportion to the actual coal consumed corresponding to the scheduled generation for supply of electricity to BSPHCL. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of royalty on coal. The Petitioners and BSPHCL are directed to carry out reconciliation on account of these claims annually.

(B) Increase of Clean Energy Cess:

26. The Petitioners have submitted that at the time of submission of the bid (4.4.2011), Clean Energy Cess was Rs. 50/ tonne and subsequently the Ministry of Finance, Government of India, vide Circular no. D.O.F.No.334/15/2014-TRU dated 10.7.2014 increased the levy of Clean Energy Cess to Rs. 100/ tone w.e.f. 11.7.2014 which was further increased to Rs. 200/ton vide Circular No. D.O.F. No. 334/5/2015 dated 28.2.2015 w.e.f.1.3.2015. The Petitioners in their submission dated 2.2.2016 have estimated the impact of the Clean Energy Cess @ Rs. 100/MT w.e.f 11.7.2014 and @ Rs. 200/MT w.e.f. **1**.3.2015 respectively. The Petitioners have suggested the following formula for calculation of financial impact on account of levy of Clean Energy Cess:

> Impact (in Rs.) = {Actual monthly clean energy cess on coal purchased for entire power plant less [Quantity of coal in the month of metric ton (MT) purchased for entire power plant x 50/-]} x% share of stage-I gross plant capacity in MW allocated to Bihar.

27. The Petitioners in their submission dated 2.2.2016 have placed on record the Notifications relating to Clean Energy Cess issued from time-to-time.

28. Prayas has submitted that change in law provision dealing with taxes and duties in the PPA are restrictive in nature. Since clean energy cess is not a tax on supply of power, it does not cover under Article 10.1.1 of the PPA.

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

Sr. No.	From	To	Applicable Clean Energy Cess (Rs./Tonne)
1.	22.6.2010	10.7.2014	50
2.	11.7.2014	28.2.2015	100
3.	1.3.2015	29.2.2016	200
4.	1.3.2016	Till date	400

30. Clean Energy Cess was introduced through the Acts of Parliament prior to the cut-off date of 4.4.2011 in respect of Bihar PPA. The effective rate of Clean Energy Cess from 22.6.2010 till its revision with effect from 11.7.2014 is Rs. 50/ Tonne. The Petitioners are expected to factor in the Clean Energy Cess of Rs. 50 in its bid. However, after the Bid Deadline, the Clean Energy Cess has been revised with effect from 11.7.2014, 1.3.2015 and 1.3.2016 and fixed at Rs. 100, Rs. 200 and Rs. 400 respectively. Since, the revised rates of Clean Energy Cess has been introduced through amendment to the relevant Finance Acts and the changes have been resulted in additional recurring expenditure by the Seller, we are of the view that the said changes are covered Change in Law in terms of Bullet 1 under Article 10.1.1 of Bihar PPA. The Petitioners shall be entitled for reimbursement of Clean Energy Cess @Rs. 50/Tonne from 1.3.2015 and @Rs. 350/Tonne with effect from 1.3.2016.

31. The Petitioners have been allocated firm linkage and tampering linkage for their generation project. Clean Energy Cess is uniformly applied for all sources of coal. Therefore, the Petitioners shall be entitled to recover on account of clean energy cess on coal in proportion to the actual coal consumed corresponding to the scheduled generation for supply of electricity to BSPHCL. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of clean energy cess on coal. The Petitioners are directed to furnish along with its monthly bill the proof of payment and computations duly certified by the auditor to BSPHCL. The Petitioners and BSPHCL are further directed to carry out reconciliation on account of these claims annually.

(C) Increase in Excise Duty on Coal

32. The Petitioners have submitted that at the time of submission of bid, the excise duty on coal was 5% on (ROM price + Surface transportation + sizing charges) which formed the basis of the winning bid. Subsequently, the Government of India vide Finance Act, 2012 levied excise duty @ 6% on the determined sale price of coal. The Petitioners have submitted that the estimated sale price of coal is Rs.898 per MT which covers Run of Mine (ROM) price of Rs.660 /MT, royalty, stowing excise duty, sizing charges, surface transportation and loading charge components. The Petitioners have placed on record the copy of Finance Act, 2012 levying excise duty on the determined sale price of coal and CIL Notification dated 5.3.2013 regarding inclusion of the royalty and stowing excise duty in the assessable value for calculation of excise on coal. The Petitioners have suggested the following formula for computation of financial impact on account of levy of excise duty:

> Impact (in Rs.) = {Actual monthly Excise Duty paid @ 6% on coal purchased for entire power plant less [monthly excise duty @5% on coal purchased for entire power plant) x (% share of Stage-I gross plant capacity in MW allocated to Bihar)

33. BSPHCL has submitted that the Petitioner has claimed both the Royalty on Coal and also the inclusion of Royalty amount in the assessable value for payment of Central Excise Duty on Coal as events of Change in Law. However, it is noted that the CIL and its subsidiaries are considering the royalty and the change in royalty structure, collected by the coal companies in the name of 'Royalty and Stowing Excise Duty' are not in the nature of other taxes and their value is required to be included in the value of coal and will form part of transaction value for the purposes of determining the assessable value for payment of Central Excise Duty. Under such circumstances, the claim of Royalty

and change in Royalty Structure cannot be claimed as an event of Change in Law. Accordingly, the claim of the Petitioners on this issue is liable to be rejected.

34. Prayas has submitted that duties in the present PPA are restrictive in nature and excise duty is not a tax on supply of power and therefore, does not fall within the scope of Article 10.1 of the PPA.

35. We have considered the submissions of the Petitioners, BSPHCL and Prayas. Central Excise Duty on coal at the rate of 5% per tonne was introduced through the Finance Act, 2011. As on the cut-off date, excise duty on coal was at the rate of 5% on the determined sale price of coal which admittedly formed the basis of the bid submitted by the Petitioners. Government of India on the basis of the Finance Act, 2012 levied excise duty on coal @6% on the determined sale price of coal with 2% education cess and 1% higher education cess. Vide Notification dated 14 and 15 of 2009, education cess and higher education cess have been exempted on excise duty on coal, thereby leaving a net applicable Central Excise Duty of 6%. Since the change in excise duty has been introduced through an Act of Parliament and has the impact on the recurring expenditure by the seller, the same is covered under Change in Law in terms of Bullet (1) under Article 10.1.1 of Bihar PPA. Accordingly, the Petitioners are entitled to reimbursement of excise duty on coal @1%.

36. The Petitioners have submitted that the extracted sale price is Rs. 898/MT which covers Royalty, Stowing Excise Duty, Sizing Charges, Surface Transportation and Loading Charges in terms of the Notification of Coal India Limited dated 5.3.2013. In our view, the letter dated 5.3.2013 issued by Coal India Limited cannot be considered

as Change in Law and therefore, while assuming the determined price of coal for the purpose of Central Excise Duty, royalty, stowing excise duty, transportation charges, sizing charges and other charges shall not be included. The excise duty shall be reimbursable on the base price of coal. As regards the inclusion of royalty and stowing excise duty and other charges for determining excisable value of coal, the Petitioners are directed to approach the Appropriate Authority in the Central Excise Department for clarification and if it is confirmed that royalty and stowing excise duty are included in the excisable value of the coal for the purpose of calculating of excise duty on coal, the Petitioners may approach the Commission for appropriate directions.

37. It is clarified that BSPHCL shall be liable to make payment in proportion to the actual coal consumed subject to ceiling of coal consumed corresponding to scheduled generation for supply of electricity. GKEL and BSPHCL are directed to carry out reconciliation on account of these claims annually. In case of any reduction in excise duty on coal, GKEL shall compensate BSPHCL on the basis of the above principles. GKEL is directed to furnish along with its monthly bill, the proof of payment and computations duly certified by the auditor to the BSPHCL.

(D) Changes in the Fuel Supply Agreement and deviation from New Coal Distribution Policy on the project.

38. The Petitioners have submitted that the power project was conceived on the basis of domestic coal from linkage till the captive coal mine becomes operational and thereafter 100% fuel requirement for Bihar PPA was to be sourced there from. Thereafter, there have been substantial changes in the coal Policy and availability and

cancellation of the captive coal block pursuant to the judgment of the Supreme Court dated 25.8.2014 which has affected the project economics.

39. The Petitioners have submitted that on 17.2.2012, the Ministry of Coal advised CIL that the power utilities which have been commissioned after 31.3.2009, CIL should enter into FSAs with those power utilities which have long term PPAs with the distribution companies. The Petitioners have submitted that a new model FSA was issued by CIL on 19.4.2012 which substantially altered the terms and conditions of the NCDP. The Petitioners have submitted that the new FSA issued by CIL has a cascading effect on the project such as (i) the requirement of procurement of imported coal and consequent design changes in project become a *sine quoa non* in light of CEA letter dated 19.4.2011 and the FSA (ii)reduction in the assured quantity from 100% of the normative requirement to 65% of the annual contracted quantity meant that GKEL was required to tie up other sources of coal either through CIL or on its own, (iii) the stipulation that the quantity of coal to be supplied would only be to the extent of the percentage covered under long term PPAs with distribution companies meaning thereby that GKEL would not be supplied coal from the percentage of generation it is going to sell outside the long term PPAs with distribution companies. The Petitioners have submitted that deviations from NCDP, the stipulations in model FSA and the Commission`s statutory advice to Ministry of Power are a result of the decision of the Government of India particularly, the Ministry of Coal and signifies change in policy of the Government of India and therefore, is covered under Change in Law.

40. The Petitioners have submitted that the Ministry of Coal vide its letter dated 16.1.2014 addressed to CIL recognizing the delays faced by certain allottees in operationalizing the allocated coal mines on account of the Go-no-Go Policy to the Government of India, directed CIL to extend the tapering linkage for thermal power plants with tapering linkages where the mine development has been affected on account of the above policy. CIL vide its letter dated 26.2.2014 informed ECL, MCL and SECL to transfer certain allocated capacities from MCL/SECL to ECL. So far as GKEL`s tapering linkage was concerned, a quantity of 1.517 MTPA was transferred from MCL to ECL and balance quantity left with MCL was 0.0857 MTPA. The Petitioners have submitted the details of fuel supply arrangements as under:

Particulars	Date of Signing	Coal Company	LOA Capacity (MW)	ACQ (Operative PPA in MW)	ACQ (MTPA)
FSA based on Firm LoA (2.14 MTPA)					
Firm FSA	26.3.2013	MCL	500	425	1.819
Amendment to reflect 10% more coal for APC and transmission loss	13.11.2013	MCL	500	467.5	2.0009
FSA based on Tapering LoA (2.384 MTPA)					
Tapering FSA	28.8.2013	MCL	550	151.25	0.6556
Amendments	20.5.2014	MCL	200	55	0.238399
	29.5.2014	ECL	350	96.25	0.294525
	1.9.2014	ECL	350	98.63	0.626535

41. The Petitioners have submitted that since the change in the tapering linkage granted to GKEL was pursuant to the decisions of the Government of India and Coal India Limited, it amounts to a change in the consents, permits and approvals granted to GKEL for the Project. Therefore, in computing the increase in cost of fuel, the Commission should take the increase in price of coal on account of transfer of tapering

linkage from MCL to ECL into account. The Petitioners have further submitted that at the time of submission of the bid, GKEL has considered coal sourcing from MCL mines. However, Coal India Limited, vide its notification No. CIL/CMO/47252 (New Pol)/157dated 26.02.2014 transferred the part quantity equivalent to 350MW power from MCL to ECL. The distance from source of the coal to power project is increased from 35km to more than 600km. The quality of fuel changes from 'F' Grade to higher Grade and the cost is much higher in heat value terms, which will lead to increase in Fuel Cost of Generation for GKEL

42. The Petitioners have also submitted that a captive coal block Rampia was allocated to the Petitioners which could not be operationalized due to delay in obtaining the Prospecting Licence and the matter was pending before the Government of Odisha. In the meanwhile, as a result of the de-allocation order issued by the Supreme Court on 24.9.2014, the allocation of captive coal block has been cancelled. The Petitioner has submitted that cancellation of coal block pursuant to the Supreme Court order amounts to Change in Law.

43. With regard to Short Supply of Linkage Coal, BSPHCL has submitted that as per the PPA, arranging fuel by entering into FSA is an obligation which has to be discharged by the petitioner. However, unavailability, late delivery, or changes in cost of the fuel have been excluded from the Force Majeure. Therefore, inclusion of the aforesaid policy in change in law would be contrary to the fundamental basis/ premise of the PPA. The Change in Policy of the Government of India governing coal allocation (New Coal Distribution Policy, 2007 to Model FSA dated November, 2012) has not been

included in the definition of Change in Law. In light of the "Full Bench Judgment" of APTEL dated 7.4.2016 on this issue, the claim of the petitioner is without any substance and is liable to be rejected. With regard to delay in Operationalization of Rampia Coal Mines, BSPHCL has submitted that having quoted the tariff considering coal availability from linkage and its own captive coal blocks, the Petitioners failed to operationalize their own captive coal blocks which were subsequently cancelled by the Hon`ble Supreme Court. It is not understood as to how the failure of petitioner to operationalize his own coal blocks can be an event of Change in Law for the purposes of the claiming relief? The claim for relief furnished by the Petitioners on this account is without any basis as they are responsible for the delay in development of coal blocks. The Petitioners have also claimed the delay in grant of prospecting license for coal blocks under Force Majeure, i.e. delay, for which no notice was issued and thus no Force Majeure event can be presumed as per PPA. With regard to the increase in cost due to tapering linkage coal, BSPHCL has submitted that the question of change in policy of the Government cannot be stretched to the definition of 'Change in Law' as per Full Bench Judgment of the Appellate Tribunal. The possibility of rise in prices of fuel, raw material, etc. is always there and is known to the businessmen and it is anticipated that they take calculated risks and enter into contracts and normally they cannot avoid contractual obligations. Therefore, there is no substance in the claim and is liable to be rejected.

44. With regard to the statutory advice rendered by the Commission to the Ministry of Power regarding impact of tariff on the concluded PPAs and the need for securing fuel supply for various projects, BSPHCL has submitted that the Commission has advised

the Government to modify the bidding guidelines under Section 63 of the Electricity Act 2003 to enlarge scope of regulatory intervention to take care of such situations arising from 'Change in policy of the sovereign Government'. This shows that while advising the Government, the Commission was not sure of the advice without amending the bidding documents and subsequently the PPA. In the absence of such amendment, this contention of the petitioner lacks credence. The Full Bench Judgment of the Appellate Tribunal clearly ruled that it is not possible to stretch the definition of the term 'Change in Law' to include Change in Policy.

45. Prayas in its reply dated 11.3.2016 has submitted as under:

(a) The bid submitted by the Petitioners as referred in the petition refers to the LOAs by MCL without any specific dates and captive coal block allocation. Therefore, the contention of the Petitioners that the fuel for the project was to be sourced through coal linkage till the captive coal mines became operational is misleading and erroneous. Schedule 5 of the PPA specifies Fuel Source as only Coal India Ltd Coal linkage (at Page 148) though under name of CIL subsidiary or location, there is a reference to the Rampia Coal Mine. The Coal Linkages from MCL are dated 25.7.2008 for 2.14 MTPA (for 500 MW) and dated 8.7.2009 for tapering linkage of 2.384 MTPA (for 550 MW). Therefore, the coal linkage dated 25.7.2008 is not linked to the allocation of Rampia Coal Mine and is sufficient for the contracted capacity of the PPA with Bihar Utility.

(b) The total capacity under the above two linkages was 1050 MW which is more

than the total MW under contracted capacity to be supplied to States of Bihar, Odisha and Haryana. However, the Commission in order dated 3.2.2016 in Petition No. 79/MP/2013 (Kamalanga Energy Limited -v- Dakshin Haryana Bijli Vitran Nigam Ltd) has observed that the petitioner had allocated LoA dated 20.9.2007 for 500 MW for the Haryana PPA in addition to LoA dated 25.7.2008 as well as the captive coal block which has not been disclosed by the Petitioner in the present petition. The petitioner's allocation of coal from various linkages and captive coal block is unclear. In any event, it appears that the Petitioners have a total of 1000 MW from linkage coal which is sufficient for the supply of power to States of Bihar, Odisha and Haryana. The Commission has, in the above case, proceeded on the basis of the LoA dated 20.9.2007 related to Haryana PPA. The LoA dated 25.7.2008 for 500 MW can be related to Bihar PPA and is sufficient for the supply of power under the Bihar PPA.

(c) The Petitioners entered into PPA with BSPHCL under Case-1 bidding. The competitive bidding guidelines issued by the Ministry of Power define Case-1 as a type of bidding: "Where the location, technology, or fuel is not specified by the procurer". Therefore, it was the discretion of the Petitioners to decide on the location and the source of the fuel. Accordingly, the responsibility to tie-up and ensure adequate fuel supply is entirely with the bidder and the bidder has the option of passing through these costs, transparently at the time of bidding. Therefore, the developer of Case-1 project is free to change the fuel source at any point of time during the term of the contract.

(d) The Petitioners are claiming that the Coal Company under the FSA may not supply Annual Contracted Quantity (ACQ) of Domestic Coal and imported coal may be supplied to meet the shortfall in coal supply. The Petitioners have claimed that the shortfall in domestic coal supply is Change in law. To substantiate the change in law claims, the Petitioners have referred to and relied upon the CCEA approved mechanism for supply of coal to power producers dated February 2013, the amendment to New Coal Distribution Policy (NCDP) dated 26 July 2013 and the Commission's advice to MOP.

(e) The claim for change in law is premised on the existence of a law or policy which provided for assured quantum of domestic coal. There was no such law or policy at the cut-off date. Therefore, there is no impact of the policy or notifications requiring compensation for procurement of imported coal to meet the shortfall in domestic coal since the procurement of imported coal was already envisaged on cut-off date. The transient events relating to the increase in the price of coal due to the domestic shortage should have been anticipated and was, in fact, anticipated and cannot therefore, be considered as unprecedented.

46. We have considered the submissions of Petitioners and the Respondents. We do not accept the contention of the Petitioners that cancellation of the allocation of captive coal mines pursuant to the order of the Hon'ble Supreme Court amounts to Change in Law. The Commission vide order dated 1.2.2017 in Petition No. 8/MP/2014 has examined whether the Changes in the Fuel Supply Agreement and deviation from the

NCDP Policy qualify as Change in law. Relevant portion of the said order is extracted as under:

> "106. The Petitioner was selected to supply power to MSEDCL and DNH based on the competitive bidding carried out under Section 63 of the Act. The Appellate Tribunal for Electricity in its judgement dated 7.4.2016 in Appeal No.100 of 2013 and other related appeals have held as under:
>
> "163. In the ultimate analysis, we hold that the Central Commission has no regulatory powers under Section 79(1)(b) of the said Act to vary or modify the tariff or otherwise grant compensatory tariff to the generating companies in case of a tariff determined under a tariff based competitive bid process as per Section 63 of the said Act. If a case of Force Majeure or Change in Law is made out, relief provided under the PPA can be granted under the adjudicatory power. Accordingly, Issue No.5 is answered in the negative. We also hold that the Appropriate Commission, independent of Force Majeure and Change in Law provisions of PPAs, has no power to vary or modify the tariff or otherwise grant compensatory tariff to the generating companies in pursuance of the powers under Sections 61, 63 and 79 of the said Act and/or Clause 4.7 and 5.17 of the said Guidelines issued by the Central Government and/or Article 17.3 of the PPA and/or under the adjudicatory powers as per Section 79(1)(f) of the said Act. The adjudicatory powers available to the Appropriate Commission under Section 79(1)(f) of the said Act and Article 17.3 of the PPA can be used by the Appropriate Commission to give to the generator relief available under the PPA if a case of Force Majeure or Change in Law is made out under the PPA……."
>
> In the light of the above decision, the Commission can grant relief to the Petitioner if a case under Change in Law or Force Majeure is made out. The Petitioner has claimed relief under change in law as well as in the light of the statutory advice of the Commission, the decision of the Cabinet Committee on Economic Affairs and clause 6.1 of the Revised Tariff Policy. In the light of the decision of the Appellate Tribunal in Full Bench judgement, no relief can be granted outside the provisions of force majeure and change in law in the PPA. Consequently, the Commission cannot grant relief to the Petitioner in terms of the statutory advice by the Commission and advisory of the Government in the light of the decision of CCPA unless such provision is duly included in the PPAs. As regards whether change in NCDP amounts to change in law, the Appellate Tribunal has held as under:
>
> "188. It was also urged that change in policy would, under certain circumstances, be included in Change in Law. It is not possible to stretch the definition of the term „Change in Law" to include change in policy. We reject this submission.
>
> 190. In view of the above, we hold that Change in Law provided under Article 13 of the PPA or under Clause 4.7 of the said Guidelines issued by the Central Government as per Section 63 of the said Act should not be construed to include laws other than Indian Laws such as the Indonesian Law/Regulations prescribing the benchmark price for export of coal. Accordingly, we answer Issue No.10 in the negative. We also hold that in the facts and circumstances of the present case, the increase in price of coal on account of change in National Coal Distribution Policy linked to reduced availability of domestic

coal and/or promulgation of Indonesian Regulation do not constitute an event of Change in Law attracting Clause 4.7 of the said Guidelines read with Article 13 of the PPA. Issue No.11 is accordingly answered in the negative."

There is a clear-cut finding that the increase in price of coal on account of change in National Coal Distribution Policy linked to reduced availability of domestic coal does not constitute an event of Change in Law. Therefore, relief on account of higher purchase cost of coal due to reduced availability of domestic coal cannot be granted to the Petitioner under Change in Law....

107. The Appellate Tribunal has held that increase in prices on account of short supply of domestic coal constitute a force majeure event in terms of the PPA in case of Adani Power. Relevant excerpts of the judgement is extracted as under:

"303. In view of the above discussions, we hold that increase in the price of coal on account of the intervention by the Indonesian Regulations as also the non availability/ short supply of domestic coal in case of Adani Power constitute a Force Majeure Event in terms of the PPA "

Therefore, in the light of the judgement of the Appellate Tribunal, the Petitioner has got the opportunity to pursue the remedy of force majeure for the additional expenditure incurred by it on account of procurement of coal from alternative sources due to shortage in supply of domestic coal upto normative availability of 85% by SECL.

108. Since, force majeure has not been argued by the Petitioner as well as the Respondents and Prayas, it is considered appropriate to grant liberty to the Petitioner to file an appropriate application on the issue of shortage of domestic coal with all relevant details in terms of the provisions of force majeure under MSEDCL and DNH PPA."

In the light of the decision as quoted above, the claim of the Petitioners for Change in Source of Coal from MCL to ECL under Change in Law is not admissible and is accordingly disallowed. Petitioner is granted liberty to file an appropriate application on the issue of shortage of domestic coal in terms of the provision of the *force majeure* under Bihar PPA.

(E) Change in mode of coal transportation from MCL from Railway to Road Mode

47. The Petitioners have submitted that MCL vide its Notification Ref: MCL/SBP/GM(S&M)/Sectt/2014/1377 dated 29.9.2014 informed that all IPP's and CPP's whose plants are situated within a radius of 50 km from the nearest mine of MCL,

will get the rail entitlement for 70% of coal supplied and remaining 30% coal would be supplied by road mode, w.e.f. October 2014. The Petitioners have submitted that the conversion of the coal transportation from rail mode to road mode lead to increase in transportation and coal handling cost for the plants, which are designed for receipt of coal by rail mode. The Petitioners have submitted that GKEL quoted the escalable inland transportation charges considering the 100% transportation of coal through rail mode in line with the escalable index published by the Commission. However, CERC escalable index published for escalable inland transportation is for rail mode only.

48. Prayas has submitted as under:

(a) The arrangement of fuel including transportation of fuel is the responsibility of the Petitioners and no relief in this regard can be granted to the Petitioners. Transportation of coal is a contractual/commercial issue between the Petitioner and Coal India Limited/MCL and such issues are not change in law. The Commission vide order dated 16.12.2013 in Petition Nos. 79 and 81 of 2013 (GMR Kamalanga Energy Limited v. Dakshin Haryana Bijli Vitran Nigam Limited) had observed that change in rates of freight charges are a cost involved in procurement of coal which is an input for generating power and no relief can be claimed by the petitioner. Though the above decision was in regard to the railway freight rates, the principle is that change in price of transportation of coal is not a Change in Law.

(b) The claim of the Petitioners that the change in mode of transport from railway to road by way of Notification dated 29.9.2014 is a change in law is erroneous.

There was no assurance on part of MCL that the transportation was to be done through rail. The LoA dated 25.7.2008 does not provide that the coal shall be supplied through rail. In fact, Clauses 4.3, 4.11, 9.25 of the Model Fuel Supply Agreement dated July 2008 envisages supply of coal through rail or road. The Fuel Supply Agreement dated 26.3.2013 also recognizes the mode of transport as rail/road (Schedule I of the FSA at Page 376 Vol II). This Agreement was accepted by the Petitioners.

(c) The contention of the Petitioners that the CERC escalation index was for rail mode only is erroneous. The CERC Notification dated 31.3.2011 provides for escalation rate for inland transportation charges for coal as a percentage and does not specify either rail mode or road mode.

(d) The Petitioners have willingly and voluntarily assumed that the entire quantity of coal mentioned in the LoA would be supplied from MCL mines through railways. Such assumption, therefore, is clearly a commercial risk that has been knowingly and willingly taken by the Petitioners and no relief in this regard can be granted to the Petitioners.

49. We have considered the submissions of the Petitioners and Prayas and perused the notification issued by MCL with regard to change in mode of coal transportation from Railway to Road Mode. The Petitioners have not placed on record any document to prove that the above notification has been issued pursuant to any Act of the Parliament. On the other hand, a perusal of the Schedule 1 of the FSA dated 26.3.2013 between the petitioner and MCL shows the mode of transport of coal as Rail/Road. Clause 4.11.1

and 4.11.2 of the FSA provides for supply of coal transportation by both Rail and Road. Therefore, FSA provides for an alternative mode of transportation by road. Since, the change in transportation mode flows from the contractual arrangement between the Petitioners and the Coal India Limited, the same cannot be covered under Change in Law.

(F) Add-on Premium Price on the notified price of coal supplied under tapering linkage holders:

50. The Petitioners have submitted that CIL is charging the add-on premium price on the notified price of coal for supplies under tapering linkage holders.

51. Prayas has submitted that in any event, the price paid for coal is a contractual price and any change in the price of coal cannot be considered as Change in Law and no relief in this regard can be granted to the Petitioners. The issue of change in price of coal has already been considered by the Commission in GMR Kamalinga Energy Limited Vs. Dakshin Haryana Bijli Vitran Nigam Limited (order dated 16.12.2013 in Petition Nos. 79 and 81of 2013). Prayas has submitted that in the absence of proof regarding expenditure incurred in this regard, the petitioner`s claim is liable to be rejected.

52. We have considered the submissions of the Petitioners and Prayas. The Petitioners have not placed on record any document with regard to add on procurers price on the notified price of coal for supplies under tampering linkage holders nor have explained as to how the said event can be considered under change in law in terms of Article 10.1.1 of the Bihar PPA. In any case, it appears that premium charged by the

coal company for the add-on price on the notified price of coal is the result of contractual arrangement between the Petitioners and the MCL and therefore cannot be recovered under Change in Law.

(G) Increase in cost of Railway Freight on account of Development Surcharge by Ministry of Railway and Busy Season Surcharge

53. The Petitioners have submitted that the coal required for the project is supplied from MCL which is transported through Railway. The Petitioners have further submitted that the Central Government vide its circular dated 12.10.2011 increased the development surcharge on (normal tariff rate + busy season surcharge) from 2% to 5%. The Petitioners have placed on record, copy of the circular dated 12.10.2011 imposing surcharge. The Petitioners have suggested the following formula for calculation of financial impact on account of levy of development surcharge:

> **Impact (In Rs.)** = [The development surcharge amount actually levied for coal transport for entire plant less 2% X (base freight rate in Rs/MT + busy season surcharge in Rs/MT) X Coal transported for entire plant] X (% share of Stage-1 Gross Plant Capacity in MW allocated for Bihar Discoms)

54. The Petitioners have submitted that the Ministry of Railway vide its circular No. TCR/1078/2008/11 dated 18.9.2013 increased the busy season surcharge from 5% to 15% on normal tariff rate (**Annexure P28 of the Paper Book**). The Petitioners have suggested the following formula for calculation of financial impact on account of increased busy season surcharge:

Impact (In Rs.) = (The busy season surcharge amount actually levied for coal transport for entire plant less 5% X base freight rate in Rs/MT X Coal transported for entire plant) X (% share of Stage-1 Gross Plant Capacity in MW allocated for Bihar Discoms)

55. Prayas has submitted that the charges imposed by railways from time to time by way of increase or decrease are not in pursuance of any statutory declaration or levy. The Hon`ble Supreme Court in Union of India & Anr vs. Sri Ladulal Jain (1964) 3 SCR 624 has held that running of Railways is a commercial activity and it cannot be equated with the exercise of sovereign powers. Prayas has submitted that the above charges are pursuant to a contractual or commercial arrangement with regard to procurement of inputs. The increase or decrease in such prices from time to time by such entities supplying coal or goods or providing services of transportation are part of the contractual price and are not a result of any Change in Law.

56. We have considered the submissions of the Petitioners and Prayas. The Commission in the order dated 1.2.2016 in Petition No. 8/MP/2014 has examined whether changes in the rates of busy season surcharge and development surcharge levied by Railway Board qualify as Change in Law. Relevant portions of the said order are extracted as under:

> "60. We have considered the submission of the Petitioners. In our view, increase in the railway freight charges on account of development surcharge and busy season surcharge are in the nature of change in rates of freight charges levied by the Railway Board in exercise of its power under sections 30 to 32 of the Railways Act, 1989. The Petitioners were expected to take into account the possible revision in these charges while quoting the bid. As already stated, the Petitioners/PTC were expected in terms of para 2.7.2.4 of the RfP to include in quoted tariff all costs involved in procuring the inputs. Since freight charges are a cost involved for procuring coal which is an input for generating power for supply to Haryana Discoms under the Haryana PPA, the Petitioners cannot claim any relief under change in law on account of revision in freight charges. Accordingly, the claim of the Petitioner on this account is disallowed."

85. The Commission has taken the view in the above quoted order that increase in the railway freight charges on account of development surcharge and busy season surcharge are in the nature of change in rates of freight charges levied by the Railway Board in exercise of its power under sections 30 to 32 of the Railways Act, 1989 and the Petitioners in that case were expected to factor in these charges in the bid in terms of Clause 2.7.2.4 of the RfP and therefore, these charges are not covered under Change in Law.

Section 30 of the Railways Act is extracted as under:

> "30. Power to fix rates.-(1) The Central Government may, from time to time, by general or special order fix, for the carriage of passengers and goods, rates for the whole or any part of the railway and different rates may be fixed for different classes of goods and specify in such order the conditions subject to which such rates shall apply.
>
> (2) The Central Government may, be a like order, fix the rates of any other charges incidental to or connected with such carriage including demurrage and wharfage for the whole or any part of the railway and specify in the order the conditions subject to which such rates shall apply."

The above provisions enable the Railway Board to fix different charges for carriage of passengers and goods and any other charges incidental to or connected with such carriage. These provisions were existing before the cut-off date and the Petitioner was aware that the various charges levied by the Railway Board are subject to revision from time to time.

86. Further, Para 2.6.1 of the Request for Proposal issued by MSEDCL as well as DNH provided as under:

> "2.6.1 The Bidder shall make independent inquiry and satisfy itself with respect to all the required information, inputs, conditions and circumstances and factors that may have any effect on its Bid. Once the Bidder has submitted the Bid, the Bidder shall be deemed to have examined the laws and regulations in force in India, the grid conditions, and fixed its price taking into account all such relevant conditions and also the risks, contingencies and other circumstances which may influence or affect the supply of power. Accordingly, the Bidder acknowledges that, on being selected as Successful Bidder, it shall not be relieved from any of its obligations under the RFP documents nor shall be entitled to any extension of time for commencement of supply or financial compensation for any reason whatsoever."

The freight charges are a cost involved for procuring coal which is an input for generating power for supply to MSEDCL and DNH under their respective PPAs and therefore, the Petitioner was expected to take into account the possible revisions in these charges while quoting the bid. Therefore, the change in the rates of busy season surcharge and development surcharge are not admissible under Change in Law. The Commission is of the view that non-admissibility of busy season surcharge and development surcharge under change in law has been correctly decided in GMR case and in the light of the said decision and the reasons recorded above, the Petitioner

cannot be granted relief under Change in Law on account of revision in the busy season surcharge and development surcharge by Railway Board"

57. In light of the above decision, the claim of the Petitioners for relief under Change in Law on account of revision in the Busy Season Surcharge and Development Surcharge by Railway Board is not admissible and is accordingly disallowed.

(H) Increase in Service Tax on transport of goods by Indian Railways:

58. The Petitioners have submitted that at the time of bid submission on 4.4.2011, there was no service tax imposed on transportation of goods by Indian Railways. With effect from 1.10.2012, service tax at the rate of 3.708% (12.36% with an abetment of 70%) has been imposed on the transportation of goods by Indian Railways. The Petitioners have suggested the following formula for calculation of financial impact on account of increased service tax on transportation of goods by the Indian Railways:

> **Impact (In Rs.)** = The service tax amount actually levied on coal transported for entire plant X % share of Stage-1 Gross Plant Capacity in MW allocated for Bihar discoms

59. Prayas in its reply has submitted that changes in cost and charges viz. Service Tax on transportation of goods by Indian Railways are not covered under Change in Law. These charges are pursuant to contractual arrangement with regard to procurement of inputs. Prayas has further submitted that increase or decrease in such prices from time to time by such entities supplying coal or goods or providing services of transportation are part of the contractual price and are not a result of any change in law.

60. The Commission in the order dated 1.2.2017 in Petition No. 8/MP/2014 has examined whether service tax on transportation of goods by Indian Railways qualifies as Change in Law. Relevant para of the said order is extracted as under:

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

61. In the light of the above decision, the claim of the Petitioners for relief under Change in Law on account of service tax on transportation of goods by Indian Railways is admissible. The Petitioners shall be entitled to recover on account of change in service tax on transportation of coal in proportion to the actual coal consumed, corresponding to the scheduled generation for supply of electricity to BSPHCL. If the actual generation is less than the scheduled generation, the coal consumed for actual

generation shall be considered for the purpose of computation of impact of service tax on transportation of coal. The Petitioners are directed to furnish along with its monthly bill, the proof of payment and computations duly certified by the auditor to BSPHCL. The Petitioners and BSPHCL are further directed to carry out reconciliation on account of these claims annually.

(I) Increase in Value Added Tax Rate:

62. The Petitioners have submitted that at the time of bidding, the rate of Value Added Tax (VAT) in Odisha was 4%. However, Government of Orissa, vide its Notification dated 3.3.2012 increased the rate of VAT on sale of coal to 5%. The Petitioners have submitted that since increase in the rate of VAT is pursuant to a notification issued by Government of Odisha, the same is covered under change in law for which GKEL should be compensated. The Petitioners have suggested the following formula for calculation of financial impact on account of increase of VAT:

> Impact (in Rs) = (The VAT amount actually paid on coal for entire plant less VAT paid on coal procured for the Project @ 4% which was the prevailing rate of VAT at the time of submission of the bid) X (% share of Stage-1 Gross Plant Capacity in MW allocated for Bihar discoms)

63. Prayas has submitted that every change in law cannot be considered as Change in Law as per Article 10 of the PPA. Article 10.1.1 specifies tax on supply of power as Change in Law. Merely because the taxes and duties may affect the financials of the project does not render them Change in Law within the meaning of the PPA. Unless the tax is directly affecting the *'Supply of power',* the same cannot be construed to be a Change in Law within the meaning of Article 10.

64. We have considered the submissions of the Petitioners and Prayas. The matter was considered in Petition No. 8/MP/2014 and the Commission in order dated 1.2.2017 in the said petition has decided as under:

> "48. We are of the view that in terms of MSEDCL PPA, change in tax or introduction of any tax applicable for supply of power has been recognised as change in law. Accordingly, change in Work Contract Tax, Value Added Tax and Central Sales Tax which has resulted in reduction in capital cost shall be passed on to MSEDCL."

In the last bullet under Article 10.1.1 of the Bihar PPA, any change in tax or introduction of any tax made applicable for supply of power has been recognized as Change in Law. This provision is akin to a corresponding provision in the PPA between MSEDCL and EMCO. Since change in the rate of VAT on the sale of coal has been incurred from 4% as on cut-off date to 5% vide notification of the Government of Odisha dated 30.3.2012 and the said change has resulted in recurring expenditure by the Petitioners for generation and supply of power to the BSHPCL, the said change is covered under Change in Law.

(J) Increase in Minimum Alternate Tax rate:

65. The Petitioners have submitted that at the time of submission of bid, the Minimum Alternate Tax (MAT) was 11.33%. However, MAT has been increased from 11.33% to 20.01% in the Finance Act, 2012. The Petitioners have submitted that the change in the rate of MAT should be adjusted by the procurer through supplementary bills on a quarterly basis on the basis of its accounts. The Petitioners have suggested the following formula for calculation of financial impact on account of increase of MAT:

> **Impact (in Rs)** = (Actual Minimum Alternate Tax paid for the quarter) less (Minimum Alternate Tax for the quarter @ 11.33% which was the prevailing rate of minimum

alternate tax at the time of submission of the bid) X (% share of gross plant capacity in MW allocated for BSHPCL)

66. Prayas has submitted that the tax on income including MAT or income tax has nothing to do with the cost of revenue from the business of selling electricity. Since, the tax rate is post revenue of the business and levied on the operation profit or book profit, the Petitioners are not entitled to increase in MAT.

67. We have considered the submissions of the Petitioners and Prayas. The similar issue has been considered by the Commission in its order dated 30.3.2015 in Petition No.6/MP/2013 where the Commission has not considered MAT under Change in Law. The relevant portion of the said order is extracted as under:

> "46. We have considered the submission of the Petitioner and the respondents. The question for consideration is whether the Finance Act, 2012 changing the rate of income tax and minimum alternate tax are covered under Article 13.1.1(i) of the PPA. The income tax rates are changed from time to time through various Finance Acts and therefore, therefore they will be considered as amendment of the existing laws on income tax. However, all amendments of law will not be covered under "Change in Law" under Article 13.1.1(i) unless it is shown that such amendments result in change in the cost of or revenue from the business of selling electricity by the seller to the procurers under the terms of the agreement…… Accordingly, any increase or decrease in the tax on income or minimum alternate tax cannot be construed as "Change in Law" for the purpose of Article 13.1 of the PPA. In the case of tariff determination based on capital cost under Section 62 of the Electricity Act, 2003, one of the components specifically allowed as tariff is tax on income. The pass through of minimum alternate tax or income tax in case of tariff determination under section 62 is by virtue of the specific provision in the Tariff Regulations which require the beneficiaries to bear the tax on the income at the hand of the generating company from the core business of generation and supply of electricity. Such a provision is distinctly absent in case of tariff discovered through competitive bidding where the bidder is required to quote an all-inclusive tariff including the statutory taxes and cesses. Thus, the change in rate of income tax or minimum alternate tax cannot be construed as "Change in Law" for the purpose of Article 13.1 of the PPA."

68. In the light of the above decision, the claim of the Petitioners for relief under Change in Law on account of Increase in MAT rate is not admissible and is accordingly, disallowed.

(K) Contribution to National Mineral Exploration Trust and District Mineral Foundation:

69. The Petitioners have submitted that as on the cut off date, there was no provision for payment to be made to National Mineral Exploration Trust and/or District Mineral Fund. On 26.3.2015, the Government of India amended the Mines and Minerals (Development and Regulation) Act, 1957 and enacted the Mines and Minerals (Development and Regulation) Act, 2015 in which Section 9B (Creation of DMF) and Section 9C (Creation of NMET) were introduced. Pursuant to MMDR Amendment Act, on 17.9.2015, the Ministry of Mines issued the Mines and Minerals (Contribution to District Mineral Foundation) Rules, 2015 and as per Rule 2 of the said Rules, every holder of a mining lease or a prospecting licence-cum-mining lease shall, in addition to the royalty, paid to the DMF, on amount at the rate of (a) 10% of the royalty paid in terms of the Second Schedule to the Mines and Minerals (Development and Regulation) Act, 1957, in respect of the mining lease or, as the case may be, prospecting licence-cum mining lease granted on or after 12.1.2015; and (b) 30% of the royalty paid in terms of the Second Schedule to the Mines and Minerals (Development and Regulation) Act, 1957, in respect of mining leases granted before 12.1.2015.

70. Prayas in its reply dated 11.3.2016 has submitted that the said amendments are statutory levy and part of royalty being paid. Since this is not a tax or levy on supply of power but on coal, the same is not covered under Article 10.1.1 and is not a Change in Law. Prayas has further submitted that Amendment to MMDR Act has to be considered as against the existing obligation of the leaseholder to contribute for interest and benefit of the persons and for areas affected by mining

related operation, the leaseholder has an obligation for rehabilitation and resettlement of the disputed persons as well as for protective measures for the affected area.

71. We have considered the submissions of the Petitioner and Prayas. Through the Mines and Minerals (Development and Regulation) Amendment Act, 2015, the following provisions have been incorporated in the Mines and Minerals (Development and Regulation) Act, 1957:

> "9B. District Mineral Foundation:
>
> (1) In any district affected by mining related operations, the State Government shall, by notification, establish a trust, as a non-profit body, to be called the District Mineral Foundation.
>
> (2)The object of the District Mineral Foundation shall be to work for the interest and benefit of persons, and areas affected by mining related operation in such manner as may be prescribed by the State Government.
>
> (3) The composition and functions of the District Mineral Foundation shall be such as may be prescribed by the State Government.
>
> (4)The State Government while making rules under sub-section (2) and (3) shall be guided by the provisions contained in article 244 read with Fifth and Sixth Schedules to the Constitution relating to administration of the Scheduled Areas and Tribal Area and the Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996 and the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006.
>
> (5)The holder of mining lease or a prospecting licence-cum-mining lease granted on or after the date of commencement of the Mines and Minerals (Development and Regulation) Amendment Act, 2015, shall in addition to the royalty, pay to the District Mineral Foundation of the district in which the mining operation are carried on, an amount which is equivalent to such percentage of the royalty paid in terms of the Second Schedule, not exceeding one-third of such royalty, as may be prescribed by the Central Government.
> (6)The holder of mining lease granted before the date of commencement of the Mines and Mineral (Development and Regulation) Amendment Act, 2015, shall, in addition to the royalty, pay to the District Mineral Foundation of the district in which the mining operations are carried on, an amount not exceeding royalty paid in terms of the Second Schedule in such manner and subject to the categorization of the mining leases and the amounts payable by the various categories of leaseholders, as may be prescribed by the Central Government."

"9C: National Mineral Exploration Trust:

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

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

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

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

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

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

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

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

73. It is noticed from the above provisions that through an amendment to the Act of Parliament, National Mineral Exploration Trust and District Mineral Foundations have been sought to be established. National Mineral Exploration Trust shall be established as a non-profit body in the form of trust. The object of the Trust shall be to use the funds accrued to the Trust for the purposes of regional and detailed exploration in such

manner as may be prescribed by the Central Government. The District Mineral Foundations shall be established as non-profit body in the form of a trust. The object of the District Mineral Foundation shall be to work for the interest and benefit of persons, and areas affected by mining related operations in such manner as may be prescribed by the State Government. For running these trusts, the Amendment Act provides for payment of amounts in addition to the royalty by the holder of the mine lease or holder of prospective licence-cum-mining lease @ 2% of the royalty for National Mineral Exploration Trust and @10% to 30% of the royalty for District Mineral Foundations. These amounts collected are in the nature of compulsory exactions and therefore, partake the character tax. Prayas has submitted that the payment or contribution to the National Exploration Trust and District Mineral Foundations are to be made by the holder of a mining lease or holder of a prospective license-cum-mining lease and therefore, it should not be passed on to the respondents.

74. We have considered the submissions of the Petitioners and Prayas. There is no denying the fact that these contributions are statutory levies. Under the provisions of the FSA between the Petitioners and Mahanadi Coalfield Limited, the Petitioners are required to pay all statutory taxes, levy, cess or fees in addition to the base price of coal, sizing/crushing charges and transportation charges. Therefore, in terms of the FSA, Mahanadi Coalfield Limited is entitled to pass on these taxes or levies to the purchaser of coal. The question therefore arises whether the liability for taxes and levies shall be borne by the purchaser of coal or shall be passed on to the procurers. It is pertinent to mention that royalty on coal imposed under Section 9 of the Mines and Minerals (Development and Regulation) Act, 1957 are payable by the holders of mining

lease to the Government Since the contributions to these funds are to be statutorily paid as a percentage of royalty, in addition to the royalty, they should be accorded the similar treatment. National Exploration Trust and District Mineral Foundations have been created through the Act of the Parliament after the cut-off date and therefore, they fulfil the conditions of Change in Law. Accordingly, the expenditure on this account has been allowed under Change in Law. The Petitioners shall be entitled to recover the same corresponding to the scheduled generation for supply of electricity to BSPHCL. If the actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of service tax on transportation of coal. The Petitioners are directed to furnish along with its monthly bill, the proof of payment and computations duly certified by the auditor to BSPHCL. The Petitioners and BSPHCL are further directed to carry out reconciliation on account of these claims annually.

(L) Electricity Duty on Auxiliary Consumption:

75. The Petitioners in their affidavit dated 2.2.2016 have submitted that the Government of Odisha vide its Notification No. 1387 dated 1.10.2015 increased the electricity duty on Auxiliary Consumption from Rs. 0.20/kWh to Rs. 0.30 /kWh resulting into the incremental impact of Rs. 0.10/kWh on the actual Auxiliary Consumption. The Petitioners have placed on record the Notification issued by the Government of Odisha dated 1.10.2015.

76. Prayas in its reply dated 11.3.2016 has submitted thatElectricity Duty is not a tax on supply of power. Auxiliary consumption is an input for generation of electricity

and is not supply of power to Bihar Utility. Therefore, the electricity duty on such an input does not fall within Article 10.1.1 of the PPA.

77. We have considered the submissions of the petitioner and Prayas. Section 3 of the Orissa Electricity (Duty) Act, 1961 provides as under:

> "3. Electricity duty on energy supplied to consumers:
>
> (1) There shall be levied and paid to the State Government with effect from the 1st day of April, 1992, a duty (hereinafter referred to as the electricity duty), at such rate, not exceeding twenty-five paise per unit as the State Government may, by notification from time to time, specify on the energy consumed by
>
> (a) a consumer;
> (b) a consumer in respect of energy supplied to him, free of cost, by a licensee or Board, or by any person or licensee other than the Board who generates such energy;
>
> (c) a licensee or Board in its own premises;
>
> (d) any person, not being a licensee or Board, who generates such energy for his own use or consumption: Provided that
>
> (i) different rates of electricity duty may be levied for different categories of consumer or consumption; and
> ii) where energy consumed is billed by the Board on the basis of evaluated energy consumption.
>
> (5) The State Government, by notification, subject to such Conditions, as they may impose, exempt any industry levied under Section 3 on the energy consumer or any other person shall be payable by and be collected and recovered from the consumer or such person in the manner hereinafter provided"

78. In exercise of the power given under Section 3 of the Orissa Electricity (Duty) Act, 1961, the Government of Odisha issued Notification No. 1387 dated 1.10.2015 increasing the electricity duty on Auxiliary Consumption from Rs. 0.20/kWh to Rs. 0.30 /kWh. The Commission in the order dated 30.12.2015 in Petition No. 118/MP/2015 has examined whether electricity duty on auxiliary consumption increased by Government of

Odisha qualifies as Change in Law. Relevant paras of the said order are extracted as under:

> "37. The increase in electricity duty and energy development cess on sale of power to Madhya Pradesh shall be payable by the Discoms of Madhya Pradesh in proportion to the share of MP in the scheduled generation. The increase in electricity duty and energy development cess on auxiliary power consumption of station and coal mine shall be payable by all beneficiaries/procurers of the station. Apart from the above, the beneficiaries/procurers will get back or adjust an amount of ` 22 crore annually with effect from 1.8.2014 in proportion to their shares in the contracted capacity
>
> 38. The increase in electricity duty and energy development cess on sale of power to Madhya Pradesh shall be payable by the distribution companies of Madhya Pradesh in proportion to the share of Madhya Pradesh in the scheduled generation. The increase in electricity duty and energy development cess on auxiliary power consumption of the generating station and coal mine shall be payable by all the beneficiaries/procurers of the generation station. In addition, the petitioner shall refund ` 22 crore annually to the beneficiaries with effect from 1.8.2014 in proportion to their share in the contracted capacity or shall adjusted in their bills**."**

79. In the light of the above decision as quoted above, the claim of the Petitioners for reimbursement on account of Increase in Electricity Duty on Auxiliary Consumption under Change in Law is admissible and is accordingly allowed.

(M) Levy of Swachh Bharat Cess

80. The Petitioners vide affidavit dated 2.2.2016 have submitted that at the time of filing of the petition, there was no levy of Swachh Bharat Cess. However, subsequent to the filing of the petition, the Ministry of Finance, Government of India vide its Notification dated 6.11.2015 levied Swachh Bharat Cess @5%. The Petitioners in their submission dated 2.2.2016 have estimated the impact of Swachh Bharat Cess @ Rs. 1/MT w.e.f 15.11.2015.

81. We have considered the submissions of the petitioner. It is noticed that as on cut-off date, there was no Swachh Bharat Cess and it was introduced by the Finance Act,

2015 and was implemented with effect from 15.11.2015. The issue of Swachh Bharat Cess as a Change in Law event has been considered by the Commission in order dated 1.2.2017 in Petition No. 8/MP/2014. Relevant portion of the said order dated 30.3.2016 is extracted as under:

> "91. We have considered the submissions of the Petitioner and the Respondents. As on cut-off date in case of both PPAs, there was no Swachh Bharat Cess. It was introduced by the Finance Act, 2015 and was implemented with effect from 15.11.2015. Therefore, it is a new enactment which has come into effect subsequent to cut-off dates. In our view, Swachh Bharat Cess on the service tax paid on transportation of coal is admissible under Change in Law..."

82. It is clarified that the Petitioners shall be entitled to recover on account of Swachh Bharat Cess, the service tax on transportation of coal required in proportion to the actual coal consumed corresponding to the scheduled generation for supply of electricity to BSPHCL. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of Swachh Bharat Cess. The Petitioners are directed to furnish along with their monthly bill, the proof of payment and computations duly certified by the auditor to the BSPHCL. The Petitioners and BSHPCL are directed to carry out reconciliation on account of these claims annually.

Issue No. 4: The mechanism for compensation on account of Changes in Law during the operation period:

83. The Petitioners have submitted that the minimum value of "Change in Law" should be more than 1% of the Letter of Credit amount in a particular year. As per Article 10.3.2 of the PPA, the letter of credit amount for first year would be equal to 1.1 times of the estimated average monthly billing based on normative availability and for subsequent years, the letter of credit amount will be equal to 1.1 times of the average of

the monthly tariff payments of the previous contract year plus the estimated monthly billing during the current billing during the current year from any additional units expected to be put on COD during that year on normative availability.

84. The Petitioners have submitted that the Letter of Credit value towards Bihar PPA is Rs. 39.99 crore. Therefore, 1% of the Letter of Credit value in aggregate for the contract year comes to Rs. 4.79 crore. The Petitioners have submitted that since the aggregate amount claimed for "Change in Law" during financial year 2014-15 is about Rs. 15 crore and Rs.57.5 crore towards change in taxes and coal cost pass through respectively and during financial year 2015-16 is about Rs. 22 crore and Rs.74.3 crore towards change in taxes and coal cost pass through respectively, it is more than the threshold amount prescribed under Article 10.3.2 of the PPA and the Petitioners are entitled to be compensated for the same.

85. Article 10.3.2 and 10.3.4 of the PPA provide as under:

> "10.3.2 During Operating Period
>
> The compensation for any decrease in revenue or increase in expenses to the Seller shall be payable only if the decrease in revenue or increase in expenses of the Seller is in excess of an amount equivalent to 1% of the value of the Letter of Credit in aggregate for the relevant Contract Year.
>
> 10.3.4 The decision of the Appropriate Commission, with regards to the determination of the compensation mentioned above in Articles 10.3.1 and 10.3.2, and the date from which such compensation shall become effective, shall be final and binding on both the Parties subject to right of appeal provided under applicable Law."

86. The Commission has devised a mechanism considering the fact that compensation for such Change in Law shall be paid in subsequent contract years also. To approach the Commission every year for computation and allowance of

compensation for such Change in Law is a time consuming process which results in time lag between the amount paid by Seller and actual reimbursement by the Procurers. Accordingly, the following mechanism is prescribed to be adopted for payment of compensation due to Change in Law events allowed and is summarized as under in terms of Article 10.3.2 of the PPA in the subsequent years of the contracted period:

(a) Monthly change in law compensation payment shall be effective from the date of commencement of supply of electricity to the respondents or from the date of Change in Law, whichever is later.

(b) Increase in royalty on coal, clean energy cess, excise duty on coal and service tax on transportation of coal and Swachh Bharat Cess shall be computed based on coal consumed corresponding to scheduled generation and shall be payable by the beneficiaries on pro-rata based on their respective share in the scheduled generation. If the actual generation is less than scheduled generation, it will be restricted to actual generation.

(c) At the end of the year, the Petitioner shall reconcile the actual payment made towards change in law with the books of accounts duly audited and certified by statutory auditor and adjustment shall be made based on the energy scheduled by BSPHCL during the year. The reconciliation statement duly certified by the Auditor shall be kept in possession by the Petitioner so that same could be produced on demand from Procurers/ beneficiaries.

(d) For Change in Law items related to the operating period, the year-wise compensation henceforth shall be payable only if such increase in revenue or cost to the Petitioner is in excess of an amount equivalent to 1% of LC in aggregate for a contract year as per provision under 10.3.2 of the PPA.

(e) Approaching the Commission every year for allowance of compensation for such Change in Law is a time consuming process which results in time lag between the amount paid by Seller and actual reimbursement by the Procurers which may result in payment of carrying cost for the amount actually paid by the Petitioner. Accordingly, the mechanism prescribed above is to be adopted for payment of compensation due to Change in Law events allowed as per Article 10.3.2 of the PPA for the subsequent period as well.

(f) We are not going to compute the threshold value for eligibility of getting compensation due to Change in Law during Operation period. However, the Petitioner shall be eligible to receive compensation if the impact due to Change in Law exceeds the threshold value as per Article 10.3.2 during Operation period. Accordingly, the compensation amount allowed shall be shared by the BSPHCL based on the scheduled energy. Year-wise compensation henceforth shall be payable only if such increase in revenue or cost to the Petitioner is in excess of an amount equivalent to 1% of LC in aggregate for a contract year as per provision under Article 10.3.2 of the PPA.

Summary

87. Based on the above analysis and decisions, the summary of our decision under the Change in Law during the operating period of the project is as under:

S. No.	Change in Law event	Decision
a	Change in Rate of Royalty on Coal	Allowed
b	Clean Energy Cess	Allowed
c	Change in Excise Duty on Coal and Inclusion of Royalty and SED on Excise Duty	Allowed to the extent mentioned in para 36 of the order
d	Changes in the Fuel Supply Agreement and deviation from New Coal Distribution Policy on the project i. Change in Source of Coal from MCL to ECL ii. Deviation from NDCP	Not Allowed
e	Change in coal transportation from Rail mode to Road mode by MCL	Not allowed
f	Add-on premium on the MoC notified price of coal supplies under tapering linkage	Not Allowed
g	Railway freight on account of Development Surcharge by Ministry of Railway and Busy Season Surcharge	Not Allowed
h	Increase in Service Tax on transport of goods by Indian Railways	Allowed
i	Increase in VAT Rate	Allowed
j	Increase in Minimum Alternate Tax Rate	Not allowed
k	Contribution to National Mineral Exploration Trust and District Mineral Foundation	Allowed
l	Electricity Duty on Auxiliary Consumption	Allowed
m	Swachh Bharat Cess	Allowed

88. With the above, the petition is disposed of.

sd/-	**sd/-**	**sd/-**	**sd/-**
(Dr. MK. Iyer)	**(A. S. Bakshi)**	**(A.K. Singhal)**	**(Gireesh B. Pradhan)**
Member	**Member**	**Member**	**Chairperson**