CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No.156/MP/2014

Coram:

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

Date of Order : 6th February 2017

In the matter of:

Petition under Section 79 of the Electricity Act, 2003 read with Article 13 ("Change in Law") of the Power Purchase Agreements ("PPAs") dated 07.08.2008 executed between Uttar Haryana Bijli Vitran Nigam Limited/ Dakshin Haryana Bijli Vitran Nigam Limited and Adani Power Limited.

And
In the matter of:

Adani Power Limited
"Adani House"
Near Mithakhali Six Roads, Navarangpura
Ahmedabad-380009 …**Petitioner**

Vs

1. Uttar Haryana Bijli Vitran Nigam Limited
   Having its Registered Office at
   Shakti Bhawan, Sector 6
   Panchkula, Haryana– 134 109

2. Dakshin Haryana Bijli Vitran Nigam Limited
   Having its Registered Office at
   Vidyut Sadan, Vidyut Nagar
   Hisar, Haryana-125005 **… Respondents**

For Petitioner	:	Shri Krishnan Venugopal, Sr. Advocate for APL Shri Akshat Jain, Advocate for APL Ms. Poonam Varma, Advocate for APL Shri Gaurav Dudeja, Advocate for APL Shri M.R. Krishna Rao, Representative, APL
For Respondents	:	Shri M.G. Ramachandran, Advocate for Respondents

ORDER

Adani Power Ltd. (hereinafter referred to as the "Petitioner" or APL) has filed the present petition seeking directions to the Haryana Utilities to pay compensation on account of certain events of Change in Law in terms of Article 13 of the PPAs dated 7.8.2008. According to the petitioner, these events have adverse financial impact on the cost/revenue of the petitioner at which electricity is supplied to the Procurers and the petitioner through the present petition is seeking restitution/restoration to the same economic position as if the Change in Law events have not occurred.

2. The petitioner has set up a 4620 MW Thermal Power Plant (hereinafter referred to as "Mundra Power Project") within Special Economic Zone at Mundra, Gujarat consisting of four Units of 330 MW in Phase I and II, two Units of 660 MW in Phase III and three Units of 660 MW in Phase IV. In response to the Request for Qualification and Request for Proposal invited by the Haryana Power Generation Company Limited, the petitioner submitted the bids for supply of 1424 MW of power from Units 7,8 and 9 (Phase IV) of the Mundra Power Project. After being declared as the successful bidder, the petitioner entered into two separate long term PPAs dated 7.8.2008 with Uttar Haryana Bidyut Vitran Nigam Limited (UHBVNL) and Dakshin Haryana Bidyut Vitran Nigam Limited

(DHBVNL) for supply of 712 MW each at a levelised tariff of Rs.2.94 per unit.

3. The petitioner has submitted that the last date for submission of the bids was 26.11.2007. The cut-off date for the purpose of change in law under Article 13 of the PPAs is 7 days prior to bid deadline which works out to 19.11.2007. The petitioner has submitted that 18 events have occurred after the cut-off date affecting the cost/revenue of the petitioner for supply of power to the Procurers and are therefore covered under Change in Law, entitling the petitioner for compensation in terms of Article 13 of the PPAs. The Events of Change in Law are enumerated as under:

(i) Installation of Flue Gas De-sulphurizer (FGD) as per Environment Clearance granted by Ministry of Environment and Forests:

(ii) Levy of customs duty on electricity removed from Special Economic Zone to Domestic Tariff Area;

(iii) Green Energy Cess levied on generation of electricity;

(iv) Change in rate of Royalty payable on domestic coal;

(v) Increase in sizing charges of the coal;

(vi) Increase in surface Transportation Charges

(vii) Levy of Central Excise Duty on domestic coal;

(viii) Levy of Clean Energy Cess on domestic coal;

(ix) Increase in Busy Season Surcharge on transportation of coal by Indian Railways.

(x) Increase in Development Surcharge levied on transportation of Coal by Indian Railways.

(xi) Levy of Service Tax on transportation of goods by Indian Railways.

(xii) New Coal Pricing mechanism based on GCV of domestic coal by CIL;

(xiii) Increase in Sizing Charges of coal charged by Coal India Ltd.;

(xiv) Increase in Surface Transportation Charges charged by Coal India Ltd.;

(xv) Levy of Minimum Alternate Tax on power plants situated in SEZ under sub-section (6) of section 115JB of Income Tax Act, 1961.

(xvi) Imposition of Swachh Bharat Cess at 0.5% of the value of taxable services by section 119 of the Finance Act, 2015 with effect from 15.11.2015;

(xvii) Payment to National Mineral Exploration Trust;

(xviii) Payment to District Mineral Funds in terms of Mines and Minerals (Contribution to District Mineral Foundation) Rules, 2015;

4. The petitioner has assessed the impact of Change in Law Events on per unit cost of tariff for the month of March 2014 as 0.439 paise per unit. The petitioner has submitted that during the 8th Co-ordination Committee Meeting held between the petitioner and the Procurers on 3.9.2012, it was mutually agreed that the representatives of the petitioner and HPPC shall jointly study the impact of Change in Law events. The petitioner has submitted that pursuant to the said meeting, the petitioner's representative has explained every Change in Law event to HPPC. Further, the petitioner has submitted that in terms of Article 13 of the PPA, the petitioner had

notified the Change in Law events to the Procurer's representative HPPC by letters dated 4.9.2012, 21.2.2013, 21.3.2013, 24.12.2013 and 18.1.2014. The petitioner has submitted that pursuant to the directions of the Commission in order dated 2.4.2013 in Petition No.155/MP/2012, the Committee while recommending compensatory tariff had taken into consideration certain Change in Law events such as change in royalty rate, clean energy cess, central excise duty, change from UHV to GCV based pricing system, class change for trainload movement, increase in busy season surcharge, increase in development surcharge, levy of service tax on railway freight; and increase in auxiliary consumption due to installation of FGD etc. The petitioner has submitted that pursuant to submission of the said report, the respondents filed affidavit dated 4.10.2013 providing their in-principle consent to the Committee report subject to certain suggestions and did not raise any objection to the Change in Law events included in the Committee report. The petitioner has further submitted that the Commission in its order dated 21.2.2014 in Petition No.155/MP/2012, directed the petitioner to approach the Utilities under the provisions of the PPAs for compensation on account of Change in Law and approach the Commission if the matter was not amicably settled. The petitioner raised the bills towards compensation on account of Change in Law vide its letter dated 14.4.2014 and 12.5.2014 for the months of March, 2014 and April, 2014 respectively and issued reminders vide letters dated 19.5.2014 and 2.6.2014. The respondents vide their letter dated 5.6.2014 directed the petitioner to attend a meeting on 10.6.2014 to discuss the petitioner's claim on Change in Law. The petitioner has submitted that it attended the meeting and presented its claims but no response was received from the respondents. The petitioner subsequently raised the claims for the

months of May 2014 and for the period from 7.8.2012 to 28.2.2014 vide its letters dated 11.6.2014 and 21.6.2014 respectively. The respondents vide their letter dated 8.7.2014 denied the claims of the petitioner under Change in Law on the ground that the petitioner was not correct to claim settlement of issues pertaining to Change in Law without following the process specified in the PPA.

5. In the above background, the petitioner has filed the present petition seeking relief for the following prayers:

> *"(a) Declare that the Subsequent Events as mentioned above are events of 'Change in Law',*
>
> *(b) Direct the Respondents to make the payment of the compensation in accordance with the methodology as indicated in the petition for the aforementioned Change in Law events from the date of commencement of power supply under the respective PPA's till the date of order.*
>
> *(c) Direct the Respondents to pay in the interim 95% of the amount payable towards Change in Law from the date of commencement of supply till date subject to adjustment based on final orders of Hon'ble Commission.*
>
> *(d) Direct the Respondents to pay Late Payment Surcharge as applicable under the PPAs for the period of delay from the date of notification of Change in Law.*
>
> *(e) Direct the Respondents to make payment for the future claims of Change in Law events mentioned in this petition at applicable rates prevailing from time to time as per the methodology approved and in accordance with the terms and conditions of the PPA.*
>
> *(f) Pass such further order(s) as this Hon'ble Commission may deem just and proper in the fact and circumstances of the case and in the Interest of Justice."*

6. Haryana Utilities in their reply dated 10.9.2014 have submitted that the petitioner is wrongly claiming jurisdiction of this Commission under Section 79(1)(b) of the Act when the claims raised by the petitioner are only in respect of Haryana Utilities and are

therefore not under a composite scheme for generation and sale of electricity in two States. Relying on Clause 2.4 of the Competitive Bidding Guidelines notified by the Central Government under Section 63 of the Electricity Act, 2003, the respondents have further submitted that the Commission's jurisdiction is envisaged under section 79(1)(b) for combined procurement process and not for individual procurement by the States. The respondents by relying on the judgement of the Appellate Tribunal dated 23.11.2006 in Appeal No.228 of 2006 and 230 of 2005 (M/s PTC India Limited Vs. Central Electricity Regulatory Commission and Others) and judgement dated 4.9.2012 in Appeal No.94 of 2012 (BSES Rajdhani Power Limited Vs. Delhi Electricity Regulatory Commission) have submitted that there is no uniformity of tariff amongst the two sets of PPAs (PPAs signed with GUVNL and PPAs signed with Haryana Utilities); the bidding process for procurement of power in two States were approved by different State Commissions at different points of time; the generating units for sale of electricity for Haryana are Units 7,8 and 9 which are separate and independent of Units 1 to 6 for sale of electricity to Gujarat; and tariff can always be determined and adopted separately for each of the generating units. The respondents have submitted that there exists no Composite Scheme so as to attract the jurisdiction of the Commission. The petitioner in its rejoinder dated 19.11.2014 has submitted that the Commission in orders dated 16.10.2012 in Petition No.155/MP/2012 and order dated 16.1.2013 in Review Petition No. 26 of 2012 has conclusively held that the petitioner being a generating company and having a composite scheme for generation and sale of electricity in more than one State is amenable to the jurisdiction of the Commission. The petitioner has submitted that the respondents having not filed appeal against the orders of the Commission

dated 16.10.2012 and 16.1.2013 have allowed the orders to attain finality and therefore are barred from re-agitating the issue of Composite Scheme and/or jurisdiction of this Commission to adjudicate the disputes raised in the present petition. The petitioner has submitted that the contention of the respondents that generation and sale of electricity from Units 7, 8 and 9 is independent of generation and supply of electricity to any other State deserves to be dismissed as any issue arising from the petitioner's Mundra Power Plant after issue of the order dated 16.10.2012 requires to be decided by this Commission. The petitioner has submitted that reference by the respondents to combined bidding process under clause 2.4 of the Competitive Bidding Guidelines is irrelevant as the jurisdiction of the Commission under section 79(1)(b) cannot be controlled by Competitive Bidding Guidelines. The petitioner has also submitted that the judgment dated 23.11.2006 in Appeal Nos. 228 and 230 of 2006 and judgment dated 4.9.2012 in Appeal No. 94 of 2012 are not applicable in the case of the petitioner.

7. On merit, Haryana Utilities have submitted that a reading of the definition of law and Change in Law provisions in the PPAs lead to the following implications and inferences:

(a) Law is a defined term in the PPAs which includes laws, statutes, ordinances, regulations, notifications, codes and rules and does not include any decision of the Government or by Government Companies or Departments such as Indian Railways undertaking commercial activities. The second part of the definition of the term 'Law' referring to decisions and orders of the Appropriate Commissions and not the decision of the Indian Government Instrumentality.

(b) The scope and application of sub-clauses (i), (ii) and (iii) are circumscribed by specific qualification contained in the provision after the word 'Seller' appearing after sub-clause (iii), namely, "which results in any cost or revenue from the business of selling electricity by the Seller to the Procurer under the terms of this Agreement." Therefore, mere enactment of any law or change in the interpretation of any law or change in the consent, approvals, licences etc. will not amount to Change in Law unless it has a direct impact on any cost of revenue from the business of selling electricity by the Seller under the terms of the PPAs.

(c) Article 13.2 of the PPAs deal with the purpose, namely, to restore the affected party to the same economic position as if such change in law has not occurred. During the construction period, the impact is restricted to increase or decrease of capital cost of the project while during the operating period, it is restricted to increase or decrease in the revenues or cost to the Seller.

(d) The provisions of Article 13.1.1 read with Article 13.2 are clear, namely, that for getting any relief under the head 'Change in Law', there has to be necessarily an impact on any cost or revenue from the business of selling electricity by the Seller to the Procurer under the terms of the PPAs.

(e) The provisions of Article 13.1.1 indicate that there has to be a change from the existing law. In other words, it has to be proved that the law had brought about a change to the existing law after the cut-off date having an adverse or favourable implications. The burden of establishing that such change in law has occurred in the revised law with reference to the pre-existing position

is on the petitioner.

(f) The change in the interpretation of law recognized as change in law is on the basis that there existed an interpretation of law by a competent authority as at the time of cut-off date i.e. 7 days prior to the bid deadline and this interpretation was specifically changed subsequent to the cut-off date. The clarifications issued by the Government Authorities on interpretation that the existing law is the same does not amount to Change in Law.

(g) The claims of the petitioner include various items which are not in pursuance to statutory levy on the cost of or revenue from the business of selling electricity as envisaged in Article 13.1.1 of the PPAs. These claims are essentially price or consideration paid by the petitioner to coal companies or railways pursuant to contractual or commercial arrangements. 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 contractual price and are not as a result of change in law. These include royalty rate of coal, sizing charges, surface transportation charges, excise duty reimbursement on domestic coal, adjustment of price of coal based on GCV or related to supply of coal by the coal company, busy season surcharge, development surcharge, reimbursement of service tax on freight, change in classification of coal for transportation charges, fuel adjustment component in railway freight etc.

(h) The petitioner has not disclosed the elements where there is decrease in cost and therefore, the net impact needs to be determined after considering both the increase and decrease.

8. The petitioner in its rejoinder has submitted that all the events claimed by the petitioner fall within the contours of Change in Law under Article 13 of the PPAs. The petitioner has further submitted that there has been no decrease on the cost due to Change in Law in the business of selling electricity to Haryana Utilities.

9. Learned counsel for the petitioner submitted during the hearing that after the cut-off date (i.e.19.11.2007), 18 events of Change in Law have occurred which are covered in the petition. Out of them, change in law events such as Royalty on Coal, Clean Energy Cess, Central Excise Duty and Service Tax have been already recognized and approved by the Commission as change in law events in the orders passed in the petitions filed by GMR Kamalanga and Sasan Power Limited.In respect of levy of Green Energy Cess, learned counsel for the petitioner submitted that the Hon`ble Gujarat High Court vide its judgment dated 21.1.2013 declared the Green Cess Act of the Government of Gujarat as void and presently, appeal against the said judgement is pending before the Hon'ble Supreme Court. By an interim order dated 3.7.2013, the Hon'ble Supreme Court stayed the operation of the judgment and directed the Govt. of Gujarat not to enforce the demand of payment of Green Cess during pendency of SLPs. Learned counsel submitted that as of now, the petitioner is not paying Green Energy Cess and therefore, the petitioner prays for in-principle approval of Green Energy Cess as a Change in Law event which would enable the petitioner to get reimbursement as and when the Cess becomes payable. As regards the increase in Busy Season Surcharge and Development Surcharge by Railways, learned counsel for the petitioner submitted that the petitioner is not asking for allowing the increase in Busy Season

Surcharge or Development Surcharge amounts corresponding to increase in basic freight but the additional impact consequent to increase in Busy Season Surcharge rate from 5% to 15% and Development Surcharge Rate from 2% to 5% which qualify as change in law and need to be passed on to the Procurers. Learned counsel further submitted that effective MAT applicable is 20.9605%, which includes MAT rate of 18.5% along with surcharge of 10% and education cess of 2% along with higher education cess of 1%. The increase in MAT rate would result in change of economic position of the petitioner and hence this qualifies as Change in Law. Learned counsel for the petitioner submitted that the petitioner has incurred expenditure of Rs. 646.22 crore to install FGD pursuant to the condition imposed in Environment Clearance dated 20.5.2010. While the environmental clearances granted for Units 1 to 6 did not require installation of FGD, the environment clearance granted for Units 7, 8 and 9 of the Mundra Power Project stipulated for installation of FGD. Since the requirement of FGD has been imposed vide environment clearance dated 20.5.2010 which is after the bid deadline, it qualifies as change in law. On the issue of National Mineral Exploration Trust and District Mineral Fund, learned Senior counsel submitted that in terms of the Change in Law provisions in the PPA, these events qualify as Change in Law events. These events are nothing but part of royalty on coal which has already been allowed by the Commission vide its order dated 3.2.2016 in Petition No. 79/MP/2013. Learned Senior counsel for the petitioner submitted that impact of change in law for March 2014 due to the afore mentioned change in law events amounted to Rs.0.439/kWh and it would keep on changing from month to month.

10. Learned counsel for Haryana Utilities conceded that Clean Energy Cess, Royalty and Central Excise Duty are covered under Change-in-Law as already decided by the Commission in other cases and hence, the Haryana Utilities have no objection for interim payment or to finally allow the above events as change in law with the same methodology of recovery which the Commission has allowed in Sasan and GMR cases on the basis of normative SHR. Learned counsel for Haryana utilities further submitted that Swachh Bharat Cess is a new imposition and if the petitioner could show that there is link between the Swachh Bharat Cess and the cost/revenue of the petitioner from the business of selling electricity to the procurers and if the petitioner has already paid such cess for generation of power, then the Commission may consider it under change in law. As regards FGD, learned counsel for Haryana utilities submitted that the approval for Phase-III of Mundra Power Project was given by MoEF under EIA notification dated 14.9.2006 subject to compliance with specific and general conditions. One of the conditions is the installation of FGD for Phase-III units. Since the approval has been issued under the EIA notification dated 14.9.2006 which was prior to the bid deadline, the said expenditure cannot be covered under change in law. Learned counsel for Haryana Utilities further submitted that the impact of the amendments to MMDR Act, 1957 has to be considered as against the existing obligations of the leaseholder to contribute for interest and benefit of persons and areas affected by mining related operations, etc. To the extent that the contribution in pursuance to amendments reduce the obligations of the leaseholders or otherwise contribute to their benefit, there is no impact of the introduction of the amendments to MMDR Act.

11. After hearing the learned counsel for the petitioner and respondents on each of the events of Change in Law claimed in this petition, the petitioner was directed to submit clarifications and detailed submissions on the issues relating to surcharge levied by Railways, payment to National Mineral Exploration Funds and District Mineral Funds, levy of Minimum Alternate Tax on power plant located in SEZ, entitlement of carrying cost, entitlement of FGD under Change in Law and Swachh Bharat Cess. The petitioner vide its written note dated 17.5.2016 has filed the clarifications/submissions on these aspects. Haryana Utilities have filed their submissions vide their affidavit dated 30.5.2016. The submissions of the petitioner and Haryana Utilities have been considered while dealing with the individual items of Change in Law events.

Analysis and Decision

12. On consideration of the facts on record and arguments during the hearing of the petition, the following issues arise for our consideration:

(a) Jurisdiction of the Commission to adjudicate the dispute relating to Change in Law under the PPAs between the Petitioner and Haryana Utilities;

(b) Notices to the Respondents for the events of Change in Law in terms of the PPAS;

(c) Consideration of the various events of Change in Law in terms of the provisions of the PPAs;

(d) Mechanism for processing and reimbursement for Change in Law events.

Issue No.1: Jurisdiction of the Commission to adjudicate the dispute between the Petitioner and the Respondents with regard to events of Change in Law

13. A preliminary issue regarding jurisdiction of the Commission has been raised by Haryana Utilities to deal with the Change in Law Events arising out of the PPAs dated 7.8.2008. According to Haryana Utilities, the appropriate forum for adjudication of dispute relating to Change in Law is the Haryana Electricity Regulatory Commission since the claims are confined to PPAs with Haryana Utilities only. It is pertinent to mention that the Commission in its order dated 16.10.2012 had held that the petitioner has a composite scheme in respect of the Mundra Power Project since it is supplying power to more than one State. The Review Petition on the said issue filed by Haryana Utilities was dismissed vide order dated 16.1.2013. Even though Haryana Utilities did not challenge the orders dated 16.10.2012 and 16.1.2013 passed by this Commission, the Appellate Tribunal in the judgement dated 7.4.2016 in Appeal Nos.100 of 2013 and 98 of 2014 and other related appeals decided that interim orders dated 16.10.2012 and 16.1.2013 can be challenged alongwith the final order dated 21.2.2014 passed in Petition No.155/MP/2012. As regards the jurisdiction of the Central Commission under section 79(1)(b) of the Act, the Appellate Tribunal held as under:

> "107. The Central Commission's jurisdiction under clause (b) of sub-section (1) of Section 79 of the said Act is attracted the moment the generating company executes PPAs to supply electricity to be generated by it to more than one State or it undertakes actual supply to more than one State under some other binding arrangement. The submission that the above interpretation would lead to floating jurisdiction is misconceived. Once the jurisdiction vests in the Central Commission in the aforesaid manner, it generally continues with the Central Commission and the question of floating jurisdiction does not arise. The jurisdiction over a generating company is required to be considered at the time of filing of petition. It is the date of institution of proceedings which is material when jurisdictional condition precedents are evaluated.

108. It must be stated here that the Composite Scheme may come into existence at any time, whether in the beginning or at a later stage as Section 79(1)(b) does not put any limitation of time. No such limitation can therefore be imposed by this Tribunal."

As regards the reliance by the Respondents on the judgments of the Appellate Tribunal in Appeal No.228 of 2006 and 230 of 2005 (M/s PTC India Limited v. Central Electricity Regulatory Commission and Others) and Appeal No. 94 of 2012 (BSES Rajdhani Power Limited Vs. Delhi Electricity Regulatory Commission), the Appellate Tribunal observed as under:

"114. The plain language of Section 79(1)(b) persuades us not to accept the submissions of the Procurers based on PTC India (I) and BSES Rajdhani that Section 79(1)(b) is attracted only when there is uniformity of tariff and common terms and conditions of generation and sale. Section 79(1)(b) of the said Act enables the Central Commission to regulate tariff of generating companies other than those owned or controlled by the Central Government, if such generating companies enter into or otherwise have a Composite Scheme for generation and sale of electricity in more than one State. This provision does not even remotely refer to uniform tariff or uniform terms and conditions of supply of electricity. It is, therefore, not possible to incorporate any words in this Section. The courts cannot add any words to the statute. This would amount to usurping the function of the legislature.

115. In view of the above, it is not possible for us to read common tariff and common terms and conditions in Section 79(1)(b) of the said Act.

117. In the circumstances, we are of the view that PTC India(I) and BSES Rajdhani do not lay down the correct law so far as they hold that "uniform tariff amongst more than one State beneficiary" and "common terms and conditions" for supply of electricity in more than one State are the requisites of the Composite Scheme as envisaged under Section 79(1)(b) of the said Act……."

14. The Appellate Tribunal in para 118 and 120 of the judgement has decided the issue of jurisdiction in respect of Mundra Power Project of the Petitioner as under: -

"118. In view of the above discussion, we hold that the supply of power to more than one State from the same generating station of a generating company, ipso facto, qualifies as 'Composite Scheme' to attract the jurisdiction of the Central Commission under Section 79 of the said Act. ***Accordingly, Issue No. 3 is***

answered in the affirmative.

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 fact, 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 decision of the Appellate Tribunal as quoted above, it is conclusively established that Mundra Power Project of the petitioner has a Composite Scheme for generation and supply of electricity in more than one State and in terms of Section 79(1)(b) of the Act, Mundra Power Project of the petitioner is amenable to the jurisdiction of the Central Commission. Consequently, any dispute arising out of the PPAs of the petitioner with the GUVNL and Haryana Utilities or any other Utility with whom the petitioner shall enter into PPA in future for supply of power from Mundra Power Project shall be adjudicated by this Commission in terms of Section 79(1)(f) of the Electricity Act, 2003 and the relevant provisions of the respective PPAs.

Issue No.2 : Notices to the Respondents for the events of Change in Law in terms of the PPAs;

15. The Petitioner's claims in the present petition pertain to Change in Law. For consideration of the disputes relating to Change in Law, it is necessary that the petitioner has to give notice to the Procurers in terms of Article 13.3 of the PPA. Article 13.3 is extracted as under:

"13.3 Notification of Change in Law

13.3.1 If the Seller is affected by a Change in Law in accordance with Article 13.2and wishes to claim relief for such a Change in Law under this Article, 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.

13.3.2 Notwithstanding Article 13.3.1, the Seller shall be obliged to serve a notice to the procurer under this Article 13.3.2 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.

13.3.3 Any notice served pursuant to this Article 13.3.2 shall provide, amongst other things, precise details of:

(a) the "Change in Law"; and
(b) the effects on the Seller of the matters referred to in Article 13.2"

16. The petitioner has submitted that it has duly informed the respondents about the events of Change in Law and their impact vide following notices.

(a) Notice dated 4.9.2012 regarding Change in law events for Levy of Customs Duty on Electricity exported out of SEZ to DTA, Clean Energy Cess on Coal, Green Energy Cess, Imposition of Minimum Alternate Tax on Units/ Developer in SEZ, Service Tax including Education Cess and Higher Education Cess on Total Freight on Transportation of Goods by Railways, Imposition of Central Excise Duty with education cess for domestic Coal, Installation of FGD as per Environment Clearance granted by the Ministry of Environment and Forests and Change in Royalty Rate on Coal in accordance with Article 13 of the PPA.

(b) Notice dated 21.2.2013 regarding Change in Law events for Increase in Busy Season Surcharge, Increase in Rate of Work Contract Tax, Levy of Works

Contract Tax on Free Issue Material, Change in Pricing Mechanism of Domestic Coal from Useful Heat Value (UHV) based pricing mechanism to Gross Calorific Value (GCV) based pricing mechanism, Increase in Development Surcharge on Coal Freight and Change in Class for Coal for Railway Freight including indicative impact of all the change in law notified till then.

(c) Notice dated 21.3.2013 regarding change in law events for Fuel Adjustment Component, Inclusion of Stowing Excise Duty and Royalty for Calculation of Central Excise Duty.

(d) Notice dated 24.12.2013 regarding change in law events for Levy of Busy Season Surcharge by Indian Railways, Increase in surface transportation charges and Increase in sizing charges for Coal.

(e) Notice dated 18.1.2014 regarding change in law events for Levy of Busy Season Surcharge by Indian Railways, Increase in surface transportation charges and Increase in sizing charges for Coal.

(f) Notice dated 14.4.2014 regarding first claim for "Change In law" events.

(g) Notices dated 12.5.2014 and 19.5.2015 requesting the respondents to make the payments on account of Change in law.

17. Haryana Utilities vide their letter dated 8.7.2014 have rejected the claims of the petitioner on the ground that the remedies have to be pursued before the Appropriate Commission and claims under change in law are contentious issues which need to be

adjudicated by the Appropriate Commission. Relevant paras of the said letter are extracted as under:

> *"2. In regard to the above, we refer to the provisions contained in Article 13.2 of the Power Purchase Agreement. The impact of Change in Law with reference to the operating period as dealt in Article 13.2 (b) of the Power Purchase Agreement provides for a decision to be made by the Appropriate Commission on the aspect of Change in Law, the date from which such Changes in Law to be given effect to including determination of the quantum of increase/decrease in the tariff consequent to the claims of Changes in Law accepted by the Appropriate Commission.*
>
> *3. In view of the above, it is not correct on the part of Adani Power to claim settlement of issues on the Change in Law without following the process specified in Article 13.2 and suggestions made of consequences as contained in the letter dated 19th June, 2014 are unwarranted.*
>
> *4. Without prejudice to the above, the claims of Adani Power contained in the letter dated 21st February, 2013 are also not acceptable. There are claims such as Green Energy Cess, Minimum Alternative Tax, Contractual Charges payable to Railways, Inland Surface transportation, Royalty to Coal India Limited etc. which are not on account of the Changes in Law within the meaning of Article 13 of the Power Purchase Agreement or otherwise presently there is no obligation of Haryana Utilities to pay. These are contentious issues which need adjudication by the Appropriate Commission. Haryana Utilities will place the response to each of the claims during the proceedings before the Appropriate Commission.*
>
> *5. In the circumstances mentioned above, we place on record that Adani Power need to take appropriate steps before the Appropriate Commission in regard to the above aspects. Pending the final decision in the above matter by the concerned Forums. It cannot be said that the Haryana Utilities have not complied with the provisions of the Power Purchase Agreement or had not discharged their obligations assumed under the Power Purchase Agreement."*

18. It is clearly apparent from the letter of Haryana Utilities that the claims under Change in Law need to be adjudicated by the Appropriate Commission. It has been settled by the Full Bench Judgement of the Appellate Tribunal that this Commission is the Appropriate Commission to regulate the tariff under section 79(1)(b) of the Act and to adjudicate the dispute under Section 79(1)(f) of the Act between the petitioner and the Procurers of power from Mundra Power Project of the petitioner. Considering the correspondences between the petitioner and the Haryana Utilities with regard to the

claims for Change in Law, we are of the view that the requirements of Article 13.2 of the PPAs have been complied with.

Issue No.3 :Consideration of the various events of Change in Law in terms of the provisions of the PPAs

19. The claims of the petitioner are with respect to events under Change in Law under Article 13 of the PPAs which occurred after the cut-off date i.e.19.11.2008. Article 13 of the PPAs between the petitioner and Haryana Utilities is extracted as under:

"13 ARTICLE 13 CHANGE IN LAW

13.1 Definitions

In this Article 13, the following terms shall have the following meanings:

13. 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:

(i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law or (ii) a change in interpretation of any Law by a Competent Court of law, tribunal or Indian Governmental Instrumentality provided such Court of law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation or (iii) change in any consents, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer under 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.

Provided that if Government of India does not extend the income tax holiday for power generation projects under Section 80 IA of the Income Tax Act, upto the Scheduled Commercial Operation Date of the Power Station, such non-extension shall be deemed to be a Change in Law (applicable only in case the Seller envisaging supply from the Project awarded the status of "Mega Power Project" by Government of India).

13.1.2 "Competent Court" means:

The Supreme Court or any High Court, or any tribunal or any similar judicial or quasi-judicial body in India that has jurisdiction to adjudicate upon issues

relating to the Project.

13.2 Application and Principles for computing impact of Change in Law

While determining the consequence of Change in Law under this Article 13, 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 Payments, to the extent contemplated in this Article 13, the affected party to the same economic position as if such Change in Law has not occurred.

a) ***Construction Period***

As a result of any Change in Law, the impact of increase/decrease of Capital Cost of the Project in the Tariff shall be governed by the formula given below:

For every cumulative increase/decrease of each Rs. 8,90.000.00 (Rupees eight crore ninety lakh only) Rupees of the Contracted Capacity in the Capital Cost over the term of this Agreement. the increase/decrease in Quoted Capacity Charges shall be an amount equal to zero point two two seven (0.227%) percent of the Quoted Capacity Charges. Provided that the Seller provides to the Procurer documentary proof of such increase/decrease in Capital Cost for establishing the impact of such Change in Law. In case of Dispute, Article 17 shall apply.

It is clarified that the above mentioned compensation shall be payable to either Party, only with effect from the date on which the total increase/decrease exceeds amount of Rs. 8,90,000,00 (Rupees eight crore ninety lakh only)

b) ***Operation Period***

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

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

Further, the terms "Law" and "Indian Government Instrumentalities" have been defined in the PPAs as under:

"Law means 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 all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include all rules, regulations, decisions and orders of the Appropriate Commission".

"Indian Governmental Instrumentality" means the Government of India (GOI), Government of Haryana and any Ministry, department, body corporate, Board, agency, or other authority of GOI or Government of the State where the Project is located and includes the Appropriate Commission".

20. A combined reading of the above provisions would reveal that this Commission has the jurisdiction to adjudicate upon the disputes between the Generating Company and Procurer(s) with regard to "Change in Law" which occur after the date which is seven days prior to the bid deadline ("cut-off date"). 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) Any change in any consents or approvals or licences available or obtained for the project, otherwise than the default of the seller.

d) Such changes (as mentioned in (a) to (c) above) result in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer under the Agreement.

e) The purpose of compensating the party affected by Change in Law is to restore through Monthly Tariff Payments, to the extent contemplated in this Article 13, the affected party to the same economic position as if such "Change in Law" has not occurred.

f) The adjustment in monthly tariff payment shall be effective from the date of (i) adoption, promulgation, amendment, re-enactment or repeal of the law or

change in law or (ii) the date of order/judgement of the Competent Court or Tribunal or Indian Government Instrumentality if the Change in Law is on account of change in interpretation of Law.

21. Keeping in view, the above broad principles, we proceed to deal with the claims of the petitioner under Change in Law.

(I) Change in rate of Royalty

22. The petitioner has submitted that as on the cut-off date, the notified rate of royalty on domestic coal was Rs. 55 + 5% of the basic price per tonne as per the Notification No. GSR No. 522(E) dated 1.8.2007. Government of India issued Notification No. G.S.R. 349(E) dated 10.5.2012 under Section 9 of the Mines and Minerals (Development and Regulation) Act, 1957 and increased the rate of royalty on Coal to 14% ad-valorem on the price of coal. The petitioner has submitted that as per the Coal Supply Agreement between Adani Power Limited and Mahanadi Coalfield Limited, statutory dues including royalty on coal is payable by Adani Power. The petitioner has submitted that amendment to the Second Schedule of the Mines and Minerals (Development and Regulation) Act, 1957 is an event of change in law having taken place after the cut-off date and the petitioner is entitled to be compensated as it affects the cost of production of electricity for supply to the Haryana Utilities.

23. The respondents in their reply have submitted that change in royalty rate of coal cannot be taken as an increase in the cost of generation of electricity within the meaning of Article 13.1 of the PPAs. The respondents have submitted that the royalty is payable by the Coal Mining Company where the coal mining operation is within the

territory of India and there is no liability on the part of Adani Power to pay the royalty. The respondents have further submitted that the Bidding Documents clearly stipulate the obligations of the petitioner to arrange for the coal and the petitioner was given the choice to use any coal, imported coal or domestic coal as it considered appropriate. Since the petitioner submitted the bid proposing the use of imported coal and attached the MoU signed with foreign suppliers, namely, M/s Kowa Company and M/s Coal Orbis, the petitioner cannot claim the change in royalty payable by the coal supplier to the Government under Change in Law. The petitioner in its rejoinder has submitted that as per Article 3.1.2 (iv) of the PPAs, execution of Fuel Supply Agreement is a condition subsequent and in terms thereof, the petitioner has entered into a Fuel Supply Agreement with Mahanadi Coalfields Limited. The petitioner has submitted that the royalty paid by the petitioner to Mahanadi Coalfield is not a commercial arrangement as the same is paid at the rate of royalty imposed by Ministry of Coal in exercise of powers under Mines and Minerals (Development and Regulation) Act, 1957. The petitioner has submitted that royalty charged by the Ministry of Coal is also reflected as a separate item in the invoices raised by Mahanadi Coalfield Limited.

24. During the hearing, learned Senior Counsel for the petitioner submitted that the Commission has allowed the change in royalty of coal as change in law in order dated 3.2.2016 in Petition No. 79/MP/2013 (GMR Kamalanga Energy Limited Vs. DHBVNL & Others) and order dated 19.2.2016 in Petition No. 153/MP/2015 (Sasan Power Limited Vs MP Power Management Company Limited). Learned counsel for the respondents submitted that the change in royalty on coal may be allowed under Change in Law as it is covered under earlier decisions of the Commission.

25. We have considered the submissions of the petitioner and the respondents. The Appellate Tribunal for Electricity in its Full Bench Judgement dated 7.4.2016 has clearly observed that the bid of Adani Power was based on the blend of the domestic and imported coal in the ratio of 70:30. Further, the Appellate Tribunal has observed that in terms of the Fuel Supply Agreement between the petitioner and Mahanadi Coalfield, a quantity of 6.405 MTPPA of coal was to be supplied to the petitioner corresponding to 70% of coal required for generation of 1980 MW of power. Therefore, the contention of the respondents that the petitioner had the option of supplying power entirely based on imported coal from Units 7, 8 and 9 of Mundra Power Project is overruled. As regards considering the change in rate of royalty on coal as an event under change in law, we notice that the rates of royalty on coal were notified on 1.8.2007 by making amendment to the Second Schedule of Mines and Minerals (Development and Regulation) Act, 1957 which was prior to the cut-off date of 19.11.2007. The said rates were changed on 10.5.2012 by the Government of India by making amendment to the Second Schedule of the Mines and Minerals (Development and Regulation) Act, 1957 which is after the cut-off date. The Commission vide order dated 3.2.2016 in Petition No. 79/MP/2013 considered the issue of change in rate of royalty on coal as an event of Change in Law under the PPA between GMR Kamalanga Limited and Haryana Utilities. Relevant portion of the said order dated 3.2.2016 is extracted 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…….

Therefore, as per the above judgement, the seller is required to be allowed the compensation on account of change in law on the actual price of coal in order to restore economic position of the seller at the same level as if change in has not occurred. Accordingly, we hold that GKEL shall be entitled for compensation @ 14% ad valorem price of coal per tonne as reflected in the invoice excluding taxes, duties and levies which shall be reduced by Rs.55 plus 5% of the ad valorem price of coal excluding taxes, duties and cess. In case the rate of Royalty is reduced from 14% or Rs.55 plus 5%,GKEL shall compensate for the reduction in cost of coal based on above principles."

26. The petitioner's case is covered under the above decision. Therefore, change in rate of royalty on coal is admissible to the petitioner as a change in law event under Article 13 of the Haryana PPAs. Accordingly, in respect of coal supplied by Mahanadi Coalfield Limited and consumed by the petitioner for supply of power to Haryana Utilities, the Petitioner is entitled for compensation @ 14% ad valorem price of coal per tonne as reflected in the invoices excluding taxes, duties and levies which shall be reduced by Rs.55 plus 5% of the ad valorem price of coal excluding taxes, duties and cess. In case the rate of Royalty is reduced from 14% or Rs.55 plus 5%, the petitioner shall compensate for the reduction in cost of coal based on the above principles

(II) Levy of Central Excise Duty on domestic coal

27. The petitioner has submitted that as on the cut-off date of 19.11.2007, no Central Excise Duty was leviable on coal. By Finance Act, 2011 dated 8.4.2011, excise duty at the rate of 5% was levied on purchase of coal and by Finance Act, 2012, rate of excise duty was increased from 5% to 6%. The petitioner has submitted that after including 2% education cess and 1% higher education cess, the net central excise duty applicable on coal was 6.18%. The petitioner has further submitted that by Notifications Nos. 14 and

15 of 2015 dated 1.3.2015, Ministry of Finance, Govt. of India has exempted all goods falling within First Schedule to Central Excise Tariff Act, 1985 (which also includes coal) from whole of Education Cess and Secondary and Higher Education Cess and accordingly, the applicable Central Excise Duty is 6% w.e.f. 01.03.2015.

28. The petitioner has submitted that till February 2013, Mahanadi Coalfield Limited was not including the stowing excise duty and royalty while assessing the value of Central Excise Duty. From March 2013 onwards, Mahanadi Coalfield Limited started including the stowing excise duty and royalty for calculating the assessable value for computation/levy of Central Excise Duty on coal. In this connection, the petitioner has placed on record, a copy of the South Eastern Coalfield Ltd's letter dated 8.3.2013. The petitioner has further submitted that in view of the interim order passed by the Odisha High Court, Mahanadi Coalfield is not including the royalty and stowing excise duty while arriving at the assessable value of coal with effect from 4.4.2013. The petitioner has submitted that it may be allowed to recover the Central Excise Duty after taking into account the royalty and stowing excise duty subject to the final decision of the Hon'ble High Court of Odisha.

29. The respondents in their reply have submitted that any increase or decrease in the price payable by the petitioner as the procurer of coal to the coal mining company on account of any change brought about by the coal company including taxes and duties payable cannot be treated as an increase in the cost of generation within the meaning of Article 13.1.1 of the PPAs. The respondents have further submitted that since the petitioner is not paying the central excise duty on account of Mahanadi

Coalfield Limited not claiming the said amount on account of the pendency of the proceedings before the Hon'ble High Court of Odisha, the petitioner cannot make any claim against Haryana Utilities on account of change in law in respect of Central Excise Duty. The petitioner in its rejoinder has submitted that levy of Central Excise Duty on coal is not on account of change brought about by the Coal Companies but on account of the enactment of Finance Act, 2011 and Finance Act, 2012. The petitioner has further submitted that Central Excise Duty being an indirect tax is being collected by the coal company and passed on to the Central Government. The petitioner has also submitted that the petitioner has been paying the Central Excise Duty on coal as is evident from the invoices raised by Mahanadi Coalfield Limited. The petitioner has submitted that in view of the interim order of the Hon'ble High Court of Odisha, Mahanadi Coalfield Limited is not including the stowing excise duty and royalty while calculating the Central Excise Duty and accordingly, the petitioner is paying Central Excise Duty on Basic Price + Sizing Charges + Surface Transportation.

30. Learned Senior Counsel for the petitioner submitted during the hearing that this Commission has allowed Central Excise Duty on coal in order dated 30.3.2015 in Petition No. 6/MP/2013 (Sasan Power Limited Vs. MP Power Management Company Limited) and Order dated 3.2.2016 in Petition No.79/MP/2013 (GMR Kamalanga Energy Limited Vs. DHBVNL & Others). Learned Counsel for the respondents submitted that the change in Central Excise Duty on coal may be allowed under Change in Law as it is covered under earlier decisions of the Commission, subject to the methodology approved by this Commission in case of Sasan Power Limited.

31. We have considered the submissions of the petitioner and the respondents. The Commission vide order dated 30.3.2015 in Petition No. 6/MP/2015 considered the issue of excise duty on coal as change in law event under the PPA. The relevant portion of the said order dated 30.3.2015 is extracted as under:

> "36. After taking into consideration the submissions made by both the parties, we are of the view that there was no excise duty on coal at the time of submission of the bid. The petitioner cannot be expected to factor in the bid a duty which was not in existence. Through the Finance Act, 2012, excise duty has been levied at the rate of 6% of the determined price of coal for captive use. Moreover, excise duty on coal adds to the input cost for generation of electricity. In our view, excise duty on coal is covered under Article 13.1.1(i) of the PPA and fulfils the requirement of "Change in Law".

32. Central Excise Duty on coal at the rate of 5% was introduced through the Finance Act, 2011. Central Excise Duty was increased from 5% to 6% through the Finance Act, 2012 to 6% with 2% education cess and 1% higher education cess. Further, vide Notification dated 14 and 15 of 2015, education cess and higher education cess have been exempted on coal, thereby having net applicable Central Excise Duty of 6%. Since the Central Excise Duty have been introduced and revised through Acts of Parliament after the cut-off date and have an impact on the cost of production of electricity for supply to Haryana Utilities, the same is covered under Change in Law and the Petitioner is entitled to compensation on that account. However, Central Excise Duty is levied on the assessable value. In the light of the Circular dated 8.3.2013 of South Eastern Coalfield Ltd, Mahanadi Coalfield raised the invoices by including the royalty and stowing excise duty in the assessable value of coal. However, on account of stay granted by Hon'ble High Court of Odisha, Mahanadi Coalfield is not including the royalty and stowing excise duty in the assessable value of coal. The petitioner has submitted

that since it is an interim order of the High Court, it may be allowed to recover the Central Excise Duty after taking into account the royalty and staying excise duty subject to final decision of the Hon'ble High Court. In our view, the letter dated 8.3.2013 of South Eastern Coalfield Ltd cannot be considered as change in law and therefore, while calculating the assessable value of coal, royalty and stowing excise duty cannot be considered. However, the petitioner is directed to seek clarification from Mahanadi Coalfield Limited/Coal India Limited as to whether inclusion of royalty and stowing excise duty in the assessable value of coal is pursuant to any Act of Parliament or any decision by the Indian Government Instrumentality and place the same on record. It is further noted that on account of interim stay by Hon'ble High Court of Odisha, Mahanadi Coalfield is not including royalty and stowing excise duty in the assessable value of coal for the purpose of Central Excise Duty. Accordingly, the Petitioner shall be entitled for compensation on account of Central Excise Duty on Coal based on the assessable value of coal which does not include royalty and stowing excise duty. If the High Court of Odisha finally allows the royalty and stowing excise duty to be included in the assessable value of coal for the purpose of calculating Central Excise Duty, the same shall be placed before the Commission through an appropriate application for further consideration.

(III) Levy of Clean Energy Cess

33. The petitioner has submitted that as on the cut-off date, there was no Clean Energy Cess on coal. The petitioner has submitted that 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 named as Clean Environment Cess and increased to Rs.400 per tonne which was to come into effect from 1.3.2016. The petitioner has submitted that it be compensated for Clean Energy Cess as it has been introduced after the cut-off date and has an impact on the cost of generation of electricity for supply to the Haryana Utilities.

34. The respondents in their reply have submitted that increase or decrease in coal price cannot constitute change in law or otherwise an increase in the cost or revenue from the business of selling electricity by the seller to the procurers as provided in Article 13.1.1 of the PPAs. The petitioner in its rejoinder has submitted that Clean Energy Cess is a duty payable on coal which is the raw material required for generation of electricity and therefore, it is a cost from the business of selling electricity. The petitioner has submitted that Maharashtra Electricity Regulatory Commission in its order in Case No.67 of 2011 (JSW Vs. MSEDCL) has held that Clean Energy Cess is covered under Change in Law.

35. Learned Senior Counsel during the hearing submitted that the Clean Energy Cess has been allowed under Change in Law by this Commission in the order dated 30.3.2015 in Petition No.6/MP/2013 (Sasan Power Limited Vs MP Power Management Company Limited) and in the order dated 3.2.2016 in Petition No. 79/MP/2013 (GMR Kamalanga Energy Limited Vs DHBVNL & Others). Learned counsel for the respondents submitted that the levy of Clean Energy Cess on coal may be allowed under Change in Law as it is covered under earlier decisions of the Commission, subject to the methodology given by the Commission in case of Sasan Power Limited.

36. We have considered the submissions of the petitioner and the respondents. Clean Energy Cess on coal has been introduced through the Finance Act, 2010 and is being modified through subsequent Finance Acts. 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

37. Clean Energy Cess was introduced through the Acts of Parliament after the cut-off date of 19.11.2007. Therefore, it is covered under Change in Law. The issue of clean energy cess as a Change in Law event has been considered by the Commission in Order dated 30.3.2015 in Petition No. 6/MP/2013. Relevant portion of said order dated 30.3.2015 is extracted as under:

> "33. We have considered the submissions made by both petitioner and the respondents on the clean energy cess. The clean energy cess on coal was introduced by the Government of India through the Finance Act, 2010 for the first time which is after the due date i.e. seven days prior to the bid deadline. Since there was no clean energy cess on the date of submission of the bid, the petitioner could not be expected to factor in the impact of such cess in the bid. Moreover, clean energy cess adds to the input cost of production of electricity. Therefore, the claim is covered under Article 13.1.1(i) of the PPA and consequently the liabilities shall be borne by the procurers…."

38. In the light of the above decision, we hold that compensation for levy of clean energy cess on coal or increase in the rate of the cess is admissible to the petitioner as Change in Law event under Article 13 of the Haryana PPAs. Accordingly, the petitioner is entitled to recover clean energy cess from the Haryana Utilities in proportion to the coal consumed for generation and supply of electricity to Haryana Discoms.

(IV) Levy of customs duty on energy removed from Special Economic Zone to Domestic Tariff Area as imposed by Section 60 of the Finance Act, 2010

39. The petitioner has submitted that as on cut-off date (19.11.2007), there was no Customs Duty applicable on the export of electricity from Special Economic Zone (SEZ) area to the Domestic Tariff Area (DTA). The petitioner has further submitted that under Section 60 of the Finance Act, 2010 read with the Schedule thereof, customs duty at 16% was imposed on energy removed from SEZ to DTA with effect from 26.6.2009. Further, by Notification No. 26 of 2012 dated 18.04.2012, Government of India, Ministry of Finance amended the Notification dated 12 of 2012 dated 17.3.2012 and exempted the customs duty leviable on electrical energy removed from SEZ to DTA over and above Rs.0.03 per unit which worked out to Rs. 0.0309 per unit after taking into account 2% education cess and 1% higher secondary education cess. The petitioner has worked out the per unit impact on tariff on account of levy of customs duty on energy

removed from the SEZ to DTA for the month of March 2013 as Rs.0.032/kWh.

40. The respondents in their reply have submitted that the competitive bidding process pursuant to which the petitioner was selected was a Case 1 bidding where no project site was stipulated and in so far as Haryana Utilities are concerned, the project could be established in any area whether inside or outside the SEZ. The respondents have submitted that the petitioner was always aware that energy would have to be supplied at Haryana periphery which cannot be considered in any manner to be part of energy supplied to SEZ. The respondents have submitted that the notifications dated 17.3.2012 and 18.4.2012 were issued to clarify the position with retrospective effect that the sale of energy to domestic area would not be considered as a sale of energy in the SEZ area. This was done as there was misuse of the custom notification giving benefit of custom duty exemption to SEZ and accordingly, amendment was made with retrospective effect with a provision for recovery of the amount which has been paid or claimed by the Project Developers. The respondents have submitted that the retrospective amendment to the notification cannot be treated as a Change in Law within a meaning of Article 13 of the PPA and accordingly, no claim for any customs duty can be entertained under the Change in Law provision.

41. The respondents have submitted that the petitioner was required to pass on the reduction in tariff on account of decrease in the Standard Rate of Basic Customs Duty (BCD) on imported coal. The respondents have submitted that as on the bid deadline, the applicable BCD was 5% which was reduced to 0% after the cut-off date vide Notification No. 12/2012 issued by Ministry of Finance, Government of India. The

respondents have submitted that the impact of reduction of BCD from 5% to 0% has to be worked out as per the guaranteed performance parameters of Turbine Heat Rate, Boiler Efficiency etc. and applicable gross calorific value of coal.

42. The petitioner in its rejoinder has submitted that in the Bid dated 23.11.2007 submitted by Adani Power, it was clearly mentioned that the petitioner would supply power to the Haryana Utilities from Mundra Power Project, Phase IV which is located in SEZ. The petitioner has further submitted that Schedule 12A of the PPA clearly mentions that contracted capacity would be provided from Phase IV of the Mundra Power Project. The petitioner has submitted that Haryana Utilities are procuring power at a cheap rate due to the plant being located in the SEZ. The petitioner has submitted that Haryana Utilities at this stage cannot avoid their responsibility to pay revised tariff due to Change in Law event. The petitioner has denied that Notifications dated 17.3.2012 and 18.4.2012 were issued to clarify the position with retrospective effect that sale of energy to DTA would not be considered as sale of energy in SEZ area. The petitioner has submitted that customs duty on removal of electricity from SEZ to DTA was introduced by Section 60 of the Finance Act, 2010 read with Second Schedule thereof with effect from 26.9.2009. By Notification No. 91 of 2010 dated 6.9.2010, customs duty for energy removed from the SEZ to DTA was reduced to Rs.0.10 per unit for plants using imported coal and to Nil for plants using domestic coal. While by Notification No.12 of 2012 dated 17.3.2012, customs duty levied on energy removed from SEZ to DTA was retained as per Notification dated 6.9.2010, by Notification No. 26 of 2012 dated 18.4.2012, customs duty leviable over and above Rs.0.03 per unit was

exempted irrespective of usage of domestic or imported coal. The petitioner has submitted that the Notifications dated 17.3.2012 and 18.4.2012 revised the customs duty leviable on removal of energy from SEZ to DTA. As regards the submission of Haryana Utilities for adjustment of reduction in Basic Custom Duty against tariff, the petitioner has submitted that the reduction in the Basic Custom Duty on imported coal has no applicability to the Mundra Power Project of the petitioner since it is located in SEZ.

43. Learned Senior Counsel for the petitioner submitted during the hearing that learned Gujarat Electricity Regulatory Commission had allowed the customs duty on electricity exported from SEZ to DTA vide order dated 21.10.2011 in Petition No. 1080 of 2011 (Adani Power Vs. GUVNL). Learned counsel for Haryana Utilities submitted that the petitioner was earlier enjoying concession in customs duty for being located in the SEZ and levy of customs duty on removal of electricity from SEZ to DTA has merely withdrawn the said concession and therefore, this cannot be covered under Change in Law.

44. We have considered the submissions of the petitioner and the respondents. Domestic Tariff Area (DTA) has been defined in the section 2(h) of the Special Economic Zone Act, 2005 as the “whole of India except for Special Economic Zone (SEZ)”. Mundra Power Project of the Petitioner is located within the Special Economic Zone at Mundra. From Phase IV of the Project, power is being supplied to Haryana Utilities which is located in the Domestic Tariff Area. Prior to Finance Act, 2008, the customs tariff rate of duty on electrical energy was free. In the Finance Act, 2008,

customs tariff rate of Rs. 2000 per kWh on electrical energy (2716 00 00) was prescribed but the applied rate was maintained at Nil through an exemption. Through Section 60 of the Finance Act, 2010, two Notifications issued by Government of India in Ministry of Finance (Department of Revenue), namely, GSR No.118(E) dated 1.3.2002 and GSR No. 92(E) dated 1.3.2006 under Section 25 of the Customs Act, were amended with retrospective effect from 26.6.2009. In the said amendment, Ser No.573 (2716 00 00) provided for the standard rate of 16% on the electrical energy removed from the SEZ to DTA or non-processing areas of SEZ. Subsequently, vide Notification No.91/2010-Customs dated 6.9.2010, it was prescribed that the electrical energy removed from a power project of 1000 MW and above located in SEZ into DTA or non-processing area of SEZ would be as under:

(a) Using imported coal as fuel: Rs.100 per 1000 kWh;

(b) Using domestic coal as fuel : Rs.110 per 1000 kWh

However, in view of the changes made in the duty structure of coal, the rates were recalibrated vide Notification No. 26/2012 - Customs dated 18.4.2012 amending Notification No. 12/2012-Customs dated 17.3.2012, as under:

Ser No.	Chapter or heading No or Subheading No	Description of goods	Standard Rate	Additional Duty Rate	Condition No.
145	2716 00 00	Electrical Energy removed from a Special Economic Zone into Domestic Tariff Area or non-processing areas of Special Economic Zone		-	-

		(a) if removed from a power project of 1000 MW and above: (i) using imported coal as fuel (ii) using domestic coal as fuel	 Rs.30 per 1000 kWh Rs.30 per 1000 kWh		

In accordance with the above notification, customs duty on the electrical energy was being levied on the petitioner @ Rs.0.03 per unit which worked out to Rs. 0.0309 per unit after taking into account 2% education cess and 1% higher secondary education cess. Vide Notification No.9/2016 dated 16.2.2016, the customs duty on electricity removed from the SEZ to DTA has been revised as under:

Ser No of Notification 12/2012-Customs	Chapter or heading No or Subheading No	Description of goods	Standard Rate(Paisa per kWh)	Additional Duty Rate	Condition No.
146 A	2716 00 00	Electrical Energy supplied from Processing Area of SEZ to DTA, generated using- (a)Imported coal as fuel (d) Domestic coal as fuel	 40 65		
146(i)	2716 00 00	Electrical Energy supplied to DTA by power plants of 1000 MW or above, and granted	Nil	-	103*

		formal approval for setting up in SEZ prior to 27th February 2009			
* The power producer shall produce a certificate from the jurisdictional Developmental Commissioner in the Department of Commerce, Ministry of Commerce and Industry, that no benefit of customs duty and excise duty, as well as fuel transportation related service tax has been availed by the said power producer towards raw materials and consumables used in operation and maintenance of the power plant.					

45. From the above discussion, it emerges that as on the cut-off date of 19.11.2007, there was no duty on the electrical energy removed from SEZ to DTA. As per the bid documents, the petitioner was required to factor in all the taxes, cess, duties etc. in the bid. In the absence of any customs duty on the electrical energy removed from SEZ as on cut-off date, the petitioner could not be expected to factor the same. The Customs duty on electrical energy was introduced through the Finance Act, 2008 but the applied rate was maintained as Nil through an exemption. The Customs duty on electrical energy removed from SEZ was levied @ 16% through the Finance Act, 2010 and was given retrospective effect from 26.9.2009. Through the Notification No.91/2010-Customs dated 6.9.2010, the customs duty was prescribed as Rs.100 for 1000 kWh for projects using imported coal and Rs.110 for 1000 kWh for projects using domestic coal which was subsequently recalibrated to Rs.30 for 1000 kWh in case of use of imported coal as well as domestic coal vide Notification No. 26/2012-Customs dated 18.4.2012. The petitioner has been paying the customs duty on the electrical energy removed from Phase IV and supplied to Haryana Utilities @ Rs. 0.0309 per unit after taking into account 2% education cess and 1% higher secondary education cess since the date of commencement of supply. Vide Notification No.9/2016 dated 16.2.2016, the customs

duty on electrical energy removed from SEZ to DTA has been raised to Rs.40 and Rs.60 for projects using imported coal and domestic coal respectively. In respect of projects of 1000 MW and above, the customs duty is Nil subject to two conditions, namely, if the project developer been granted formal approval for setting up in SEZ prior to 27th February 2009; and if the jurisdictional Developmental Commissioner certifies that no benefit of customs duty and excise duty, as well as fuel transportation related service tax has been availed by the said power producer towards raw materials and consumables used in operation and maintenance of the power plant. Therefore, the customs duty on electrical energy removed from SEZ was introduced after the cut-off date through the Act of Parliament and the rates were being notified from time to timeby the Ministry of Finance (Department of Expenditure) and the Customs Department which are Indian Government Instrumentalities.

46. The petitioner has submitted that in respect of Phase I of the Mundra Power Project, Gujarat Electricity Regulatory Commission has allowed the customs duty imposed on the electricity removed from SEZ to DTA under Change in Law vide order dated 21.10.2011 in Petition No.1080/2011. We have gone through the said order. Para 8.8 of the said order is extracted as under:

> "We have carefully considered the submissions made by the parties. According to Article 13.1.1 of the PPA, any change in respect of (a) any tax or (ii) surcharge or (iii) cess levied or (iv) similar charges by the competent Government falls in the category of change in law. The levy of custom duty imposed by the Govt. of India as state in para 8.2 above, falls in the category of change in law as agreed between the parties in Article 13.1.1. Therefore, it is obligatory on the part of the respondent to give effect in the agreed tariff rate between the petitioner and respondent in the PPA made under the competitive bidding process of Bid No. 01/LTPP/2006. It has been admitted by both the parties that the Govt. of India vide Notification No. 25/2010 dated 27.2.2007 made an amendment in the earlier notification No. 21 of 2002 and introduced basic custom duty at 16% ad valorem

duty on electrical power removed from SEZ into Domestic Tariff area with retrospective effect from 26.6.2009, which was subsequently raised to Rs.1000 kWh or Rs.0.10 per kWh, vide G.O.I Notification No. 91/2010 dated 6.9.2010. It has also been established that the reference date for ascertaining any change in law is 4.1.2007, whereas in the present case the custom duty has been imposed w.e.f. 27.2.2007. As such imposition of this duty qualifies to be considered as "change in Law" and any consequential liabilities are to be borne by the respondent."

The above order has been rendered by the GERC in respect of Phase-I of the Mundra Power Project in the context of the PPA dated 6.2.2007 between the petitioner and Gujarat Urja Vikas Nigam Ltd. We have been informed that the said order has not been challenged and therefore, the order has attained finality. After it was established that the Mundra Power Project of the petitioner has a composite scheme for generation and supply of electricity in more than one State, the Commission came to exercise jurisdiction in respect of all units of the Project. Keeping in view the judicial propriety, we are of the view that the decision of the GERC in respect of Phase I of the Mundra Power Project should also be applicable in case of this phase of the project. Accordingly, the claim of the petitioner is allowed under Change in Law.

(V) Increase in Busy Season Surcharge on transportation of coal by Indian Railways and Increase in Development Surcharge levied on transportation of Coal by Indian Railways

47. The petitioner has submitted that as on cut-off date (i.e.19.11.2007), the busy season surcharge on transportation of coal through railways was 5% of basic freight as per Rate Circular No. 89 of 2007 dated 10.9.2007, which was increased to 10%, 12% and 15% of the basic freight vide circulars dated 12.10.2011, 27.9.2012 and 18.9.2013 respectively. As regards Development Surcharge, the petitioner has submitted that as on 19.11.2007, rate of Development Surcharge was 2% on the Normal Tariff Rate

(Basic Freight + Busy Season Surcharge + Other Charges) as per Rate Circular No. 58 of 2007 dated 29.5.2007. Rate of Development Surcharge was increased to 5% of the Normal Tariff Rate as per Ministry of Railway's Rate Circular dated 12.10.2011.

48. The respondents in their reply have submitted that the charges imposed by railways from time to time by way of increase or decrease are not in pursuance to any statutory declaration or levy. The respondents have further submitted that as per judgment of the Hon'ble Supreme Court in Union of India & Anr. Vs. Sri Ladulal Jain (1964) 6 SCR 624 running of Railways is a commercial activity and cannot be equated with the exercise of sovereign powers and accordingly changes in the cost and charges of the Railways cannot be considered under Change in Law.

49. During the hearing of the petition, learned counsel for the respondents submitted that the claim of the petitioner for busy season charges and development surcharge be disallowed in terms of the order of the Commission dated 3.2.2016 in Petition No. 79/MP/2013. The Learned Counsel for the petitioner during the hearing sought permission to place on record a written note for allowing change in the rate of the busy season surcharge and development surcharge as Change in Law. The Commission permitted the petitioner to submit written note on this aspect. The Petitioner in its written note has submitted that the Railways Rate Circulars under which the busy season surcharge and development surcharge are imposed have been issued by the Central Government in exercise of its power under section 30 of the Railways Act, 1989 and therefore, have force of law and are covered under Change in Law. The petitioner has relied upon the judgement of the Hon'ble Calcutta High Court dated 29.9.2014 in WP

No. 14656 of 2011 (Rashmi Metaliks Vs. UOI) and submitted that as per the said judgement, the Rates Circulars issued by the Railway Board have the force of law. The petitioner has submitted that Indian Railways is essentially a Government monopoly created by statute. The petitioner has further submitted that the busy season surcharge and development surcharge are not increased by the Indian Railways based on commercial decision by a service provider in a competitive market but are included in the Railway budget as policy measures for raising additional revenues for the development of the Railway network and cross-subsidizing the passenger fares etc. The petitioner has also submitted that the escalation rates notified by the Commission from time to time up to the date of submission of the bid by the Petitioner have never considered Busy Season Surcharge and Development Surcharge for the purposes of computing the escalation rates. These surcharges are covered under the definition of "Law" as these have been levied pursuant to the statutory powers given to Railways under the Railways Act, 1989 and therefore the Rate Circulars issued by Railways from time to time has the force of law. The petitioner has submitted that the judgment of the Supreme Court in Union of India Vs. Ladulal Jain relied upon by the Haryana Utilities is distinguishable and does not apply to the present case. The petitioner has submitted that the issue of developmental surcharge and busy season surcharge should be considered afresh as the order in the case of GMR in Petition No. 79/MP/2013 does not deal with the submissions made by the petitioner.

50. We have considered the submissions of both the parties in regard to the aforementioned Change in Law events. In the order dated 3.2.2016 in Petition No. 79/MP/2013, the Commission disallowed the change in rates of the Development

Surcharge and Busy Season Surcharge under change in law. The petitioner is seeking reconsideration of the said decision by the Commission by taking into consideration the submissions made by the petitioner. The first submission of the petitioner is that the Rates Circulars have been issued by the Railway Board in exercise of the powers vested under section 30 of the Railways Act, 1989 and therefore, have the force of law and any change in the rates shall amount to Change in Law. In this connection, the Petitioner has relied on the judgement of the Hon'ble High Court in its judgement in Rashmi Matalik Vs. UOI. Relevant findings/observations of the Hon'ble High Court is extracted as under:

> "The Rates Circulars issued by the Railway Board are of a different genre, which creates duties and obligations on the part of the consignor or consignee. Though termed as Circulars, these are actually Orders, as would be evident from Section 30 of the 1989 Act. These circulars have the force of law."

On the other hand, the respondents have relied on the judgement of the Hon'ble Supreme Court in UOI and Others Vs. Ladulal Jain in which it has been held that running of Railways is a commercial activity and it cannot be equated with the exercise of sovereign power. The respondents have pleaded that Busy Season Surcharge and Development Surcharge are not covered under Change in Law under Article 13 of the PPAs. These judgments have been rendered in the context of the facts of the respective cases and cannot be selectively applied in the present case where the issue is whether the change in rates of busy season surcharge and development surcharge levied by the Railways qualifies as Change in Law under Article 13 of the PPAs. The other argument of the petitioner is that the busy season surcharge and development surcharge have not been levied based on commercial consideration but as a result of policy decision by the

Government for raising additional revenues for development of railway network and cross-subsidizing the passenger fares etc. The Appellate Tribunal in the Full Bench Judgement dated 7.4.2016 has held that the definition of the term Change in Law cannot be stretched to include change in policy. Even if it is accepted that Rates Circulars have been issued pursuant to the policy decision of the Government, the same cannot be considered as Change in Law in the light of the decision of the Appellate Tribunal.

51. The Commission in the order dated 3.2.2016 in Petition No. 79/MP/2013 has examined whether changes in the rates of busy season surcharge and development surcharge levied by Railway Board qualifies as Change in Law. Relevant para of the said order is 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."

52. 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 the 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. Further, Para 2.7.2.4 of the Request for Proposal issued by Haryana Power Generation Corporation Limited provided as under:

> "The bidder shall take into account all costs including capital and operating costs, statutory taxes, duties, levies while quoting such tariff. Availability of inputs necessary for generation of power shall be ensured by the Bidder and all costs involved in procuring the inputs (including statutory taxes, duties, levies thereof) must be reflected in the quoted tariff."

The freight charges are a cost involved for procuring coal which is an input for generating power for supply to Haryana Utilities under the 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.

(VI) Levy of Service Tax on transportation of goods by Indian Railways

53. The petitioner has submitted that as on cut-off date (19.11.2007), no Service Tax was applicable on transportation of goods by rail including coal. The petitioner has submitted that by Rate Circular No.27 of 2012 dated 26.9.2012, Ministry of Railways notified that 12% service tax on 30% of the total fright would be charged from 1.10.2012. The petitioner has submitted that the effective service tax applicable on transport of goods from the railways would be 3.708% after including education cess of 2% and higher education cess of 1%. The respondents have submitted that service tax payable to Railways on transportation services are commercial contract consideration payable and are not cost of or revenue from the business of sale of electricity within the meaning of Article 13.1.1 of the PPAs. The petitioner in its rejoinder has refuted the submission of the respondents that service tax on railway freight is a contractual consideration. The petitioner has explained that as on cut-off date (i.e. 19.11.2007), there was no service tax on transportation by Railways. Vide Finance Act No. 2 of 2009, Section 65(105) of the Finance Act, 1994 was amended whereby Clause (zzzp) was substituted by “to any person, by any other person, in relation to transport of goods by rail, in any manner”. The petitioner has submitted that service tax on transportation of

goods was introduced for the first time through the Finance Act, 2009 which was after the cut-off date. By Notification No.33 of 2009 dated 1.9.2009, Ministry of Finance exempted the whole of service tax on transport of goods by Govt. Railways. By Notification No. 34 of 2012 dated 20.6.2012, Ministry of Finance reseilsed the notification no. 33 of 2009 w.e.f. 1.7.2012 and by notification no. 26 of 2012 dated 20.6.2012 Ministry of Finance exempted transport of goods by rail over and above 30% of the service tax chargeable w.e.f 1.7.2012. By subsequent Notification No. 43 of 2012 dated 2.7.2012, Ministry of Finance wholly exempted the service tax on transportation of goods by Indian railways till 30.9.2012. The petitioner has submitted that w.e.f. 1.12.2012 service tax to the extent of 30% chargeable on the transport of goods by Indian Railways is payable. The petitioner has submitted that in view of said notification Ministry of Railways has issued the Rate Circular No. 27 of 2012 dated 26.9.2012 imposing the service tax on 30% of total freight inclusive of all charges. Refuting the contention of the Haryana Utilities that levy of service tax does not increase in the cost of revenue from the business of electricity, the petitioner has submitted that the payment of service tax on transportation of coal result into higher cost of landed cost of coal thereby increasing the cost of generating electricity and accordingly it falls under change in law.

54. We have considered the submissions of the parties. As on the cut-off date, no service tax was leviable on the transportation of goods by the Indian Railways. 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 which is after the cut-off date. 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. 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 PPAs.

(VII) Levy of Green Energy Cess on Electricity Generated in Gujarat

55. The petitioner has submitted that as on cut-off date, no green cess was leviable on power generated in the State of Gujarat. Gujarat Green Cess Act, 2011 was enacted

on 30.3.2011 levying Green Cess on generation of electricity in the State of Gujarat. In exercise of the power vested under Section 20 of Gujarat Green Cess Act, 2011, Govt. of Gujarat framed Gujarat Green Cess Rules, 2011 specifying the rate of Green Cess applicable on generation of electricity at the rate of Rs. 0.02 per unit. The petitioner has submitted that the Green Cess was leviable w.e.f 28.7.2011. The petitioner has given a computation of Green Energy Cess for the month of March, 2014 and has also giving a formula for computation of Green Cess on month to month basis. The petitioner has submitted that the Hon'ble High Court of Gujarat vide its judgement dated 21.1.2013 in SCA No. 4690 of 2012 declared the Gujarat Green Cess Act, 2011 as ultra virus of the constitution of India. The said judgment was challenged before the Hon'ble Supreme Court by SLP No. 18493-18515 of 2013 (converted into Civil Appeal no. 5135-5157 of 2013 titled State of Gujarat and Others Vs. Reliance Industries Ltd. and Another). By an interim order dated 3.7.2013, the Hon'ble Supreme Court stayed the operation of the Judgment and directed that Govt. of Gujarat would determine the cess under Gujarat Green Cess Act, 2011 and raise demand on the respondent but the demand would not be enforced against the respondents until disposal of the appeals. The petitioner has submitted that though the petitioner is not paying a Green Cess in view of the stay order of the Hon'ble Supreme Court, the petitioner has prayed for approval of change in law on account of levy of Green Cess as well as the methodology propose for calculating the impact of such Change in Law and for permission to recover the same from the respondents subject to the final outcome of the Civil Appeal pending with the Hon'ble Supreme Court.

56. The respondents have denied that the petitioner should be allowed to claim and recover the Green Energy Cess at this stage subject to appropriation or return at a later stage based on the decision of the Supreme Court. The respondents have further submitted that since there is no compulsory collection of the Green Cess as per the Gujarat Green Cess Act, 2011, the petitioner is not entitled to claim adjustment for the said cess at present. The respondents have further submitted if and when the Hon'ble Supreme Court decides the matter in favour of Govt. of Gujarat and upholds the Gujarat Green Cess Act, 2011 the petitioner can raise the issue for consideration of the Commission on merit.

57. We have considered the submissions of the petitioner and the respondents. The Gujarat Energy Cess Act, 2011 and Gujarat Green Cess Rules have been set aside by the Hon`ble Gujarat High Court vide judgment dated 21.1.2013. The said judgment has been challenged before the Hon'ble Supreme Court in Civil Appeal No. 5135-5157 of 2013. The Hon'ble Supreme Court vide order dated 3.7.2013 has directed as under:

> *"During the pendency of the Appeals the operation of the impugned judgment of the High Court shall remain stayed.*
>
> *It will be open to the appellants to determine the cess under the Gujarat Green Cess Act, 2011 and raise demand on the respondents. However, such demand shall not be enforced against the respondents until disposal of the Appeals. Moreover, determination of such cess shall be subject to the final decision in the Appeals."*

The judgement of the Hon'ble Gujarat High Court setting aside the Gujarat Energy Cess

Act, 2011 has been stayed by the Hon'ble Supreme Court and Government of Gujarat has been permitted to determine the cess in accordance with the said Act and raise the demand but Government of Gujarat has been restrained to enforce the demand until disposal of the appeal. The petitioner has prayed for determination of the issue whether the cess levied under the Gujarat Energy Act is covered under Change in Law or not. The respondents have submitted that the petitioner may approach the Commission after the Green Energy Act, 2011 is upheld by the Hon'ble Supreme Court. The respondents have reserved their rights to raise appropriate objections at relevant time. In our view, since the respondents have not filed their objections on merit, it will not be appropriate to determine the issue whether the Green Cess under the Gujarat Green Energy Act, 2011 is admissible under Change in Law or not. Accordingly, we grant liberty to the petitioner to file appropriate application before the Commission for consideration of its claim with regard to the green cess if the demand for green cess is allowed to be enforced by the Hon'ble Supreme Court pending disposal of the appeal or after disposal of the appeal if the Gujarat Green Cess Act, 2011 is upheld by the Hon'ble Supreme Court.

(VIII) Increase in Sizing Charges of coal by Coal India Ltd.

58. The petitioner has submitted that Coal India Limited (CIL) or its subsidiaries charge sizing charges over and above the basic price of coal for limiting top size of coal. The petitioner has submitted that before the cut-off date (19.11.2007), sizing charges were applicable as per the CIL Notification No. CIL: GM (F):Pricing:289 dated 15.6.2004. The petitioner has submitted that after the cut-off date, sizing charges have

been increased vide notifications dated 12.12.2007, 15.10.2009 and 16.12.2013. The increase in sizing charges post the bid-deadline is tabulated as under:

Particular	Rates w.e.f. 17.06.2004 (Rs./ton) (Applicable as on cut-off date)	Rates w.e.f. 12.12.2007 (Rs./ton)	Rates w.e.f. 16.10.2009 (Rs./Ton)	Rate w.e.f. 16.12.2013 (Rs./Ton)
Within 200mm - 250 mm	20	35	39	**51**
Size limited to 100mm	41	55	61	**79**
Size limited to 50mm	62	70	77	**100**

The petitioner has submitted that the increase in sizing charges be allowed under Change in Law.

59. The respondents have submitted that sizing charges are commercial and contractual arrangements between the procurer of coal and Coal India Limited and therefore forms part of the price of coal which may change from time to time. The respondents have submitted that increase or decrease in the sizing of coal cannot be construed to be on account of any law much less change in law. The respondents have submitted that the notifications dated 15.6.2004, 12.12.2007, 15.10.2009 and 16.12.2013 are neither statutory notifications nor can be considered as law within the definition of law under the PPAs. The respondents have also submitted that the sizing charges variation to be paid to the coal supplier is not a change in the cost of generation of electricity within the meaning of Article 13.1 of the PPAs.

60. The petitioner in its rejoinder has submitted that Coal India Limited is a company

owned and controlled by the Govt. of India and Ministry of Coal exercises its authority with respect to the pricing of coal through Coal India Ltd. The petitioner has further submitted that the Coal India Ltd. is a body corporate under the provisions of the Companies Act 1956 and Companies Act 2013 and Coal India Ltd. being a body corporate of the Govt. of India falls within the definition of Indian Governmental Instrumentality. The definition of law includes any notification by an Indian Governmental Instrumentality and therefore the notification issued by the Coal India Ltd. falls within the change in law in Article 13.1.1(i) of the PPAs. The petitioner has submitted that Sizing Charges are not part of this price of coal and are shown as a separate line item in the bill raised by Coal India Ltd. or its subsidiaries.

61. We have considered the submissions of the petitioner and the respondents and perused the notifications issued by Coal India Ltd. with regard to Sizing Charges of coal. The petitioner has not placed on record any document to prove that these notifications have been issued pursuant to any Act of the Parliament. On the other hand, a perusal of the Fuel Supply Agreement dated 9.6.2012 between Mahanadi Coalfield Ltd and Adani Power Ltd shows that under Para 9.0, the delivery price of coal for coal supply pursuant to the Fuel Supply Agreement has been shown as the sum of basic price, other charges and statutory charges as applicable at the time of delivery of coal. Base price has been defined in relation to a declared grade of coal produced by the seller, the pit head price notified from time to time by CIL. Under Para 9.2 of the FSA, other charges include transportation charges, Sizing/crushing charges, rapid loading charges and any other charges as notified by CIL from time to time. Sizing/crushing charges has been defined as under:-

> "Where coal is crushed/sized for limiting the top-size to 250mm or any other lower size, the purchaser shall pay sizing/crushing charges, as applicable and notified by CIL/seller from time to time."

Therefore, the revision in sizing charges of coal by Coal India Limited from time to time is the result of contractual arrangement between the Petitioner and Mahanadi Coalfield Ltd in terms of the FSA dated 9.6.2012 and is not pursuant to any law as defined in the PPAs and therefore cannot be covered under Change in Law.

62. The petitioner has submitted that Coal India Limited which is a body corporate under Ministry of Coal, Government of India is an Indian Government Instrumentality and the notifications issued by Coal India Limited with regard to sizing charges is covered under the definition of law and any change in such charges is covered under Change in Law. Indian Government Instrumentality has been defined in the PPAs as under:

> "Indian Governmental Instrumentality means the Government of India (GOI), Government of Haryana and any ministry, department, body corporate, Board, agency or other authority of GOI or Government of the State where the Project is located and includes the Appropriate Commission."

Law has been defined in the PPAs to 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 all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include all rules, regulations, decisions and orders of the Appropriate Commission". As per the definition of "Indian Governmental

Instrumentality", a body corporate under Government of India is an Indian Government Instrumentality. Coal India Limited which is a body corporate under the Government of India is a Governmental Instrumentality. However, all circulars or notifications issued by Coal India Limited shall not be included under Change in Law. As per the definition of the term "law", the notifications by the Indian Governmental Instrumentality shall be pursuant to any statute, ordinance, regulation, notification or code. In the present case, the increase in price of sizing charges issued by Coal India Limited is not pursuant to any statute or ordinance issued by the Parliament or any regulation, notification or code issued by the Government of India pursuant to such statute or ordinance. The notifications issued by Coal India Limited is pursuant to the terms of the FSA which enables CIL/seller to notify the sizing/crushing charges from time to time and is governed by commercial considerations. The Petitioner having agreed to pay such charges in terms of the FSA, which is a commercial arrangement between the Petitioner and Mahanadi Coalfield Limited, cannot seek reimbursement of the same under Change in Law.

(IX) Increase in Surface Transportation Charges

63. The petitioner has submitted that as on cut-off date (19.11.2007), surface transportation charges by CIL and its subsidiaries for supply of coal were applicable as per the Price Notification No. CIL:GM (F):Pricing:289 dated 15.6.2004. The Petitioner has submitted that after the cut-off date, surface transportation charges have been increased by CIL on several occasions vide notifications dated 12.12.2007, 15.10.2009, 13.11.2013. The petitioner has tabulated the impact of increase in surface

transportation charges as under:

Distance Km	Rates w.e.f. 15.06.2004 (Rs./ton) (Applicable as on cut-off date)	Rates w.e.f. 12.12.2007 (Rs./ton)	Rate w.e.f 15.10.2009 (Rs./ton)	Rate w.e.f 14.11.2013(Rs./ton)
3 to 10	30	40	44	**57**
10 to 20	50	70	77	**116**

The petitioner has submitted that increase in surface transportation charges by Coal India Limited is covered under Change in Law and the petitioner should be compensated for the same.

64. The respondents have submitted that notifications dated 15.6.2004, 12.12.2007, 15.10.2009 and 13.11.2013 are statutory notifications or otherwise law as defined in Article 2 of the PPAs. The respondents have submitted that surface transportation charges are nothing but a contractual price arrangement between the petitioner and Coal India Limited and therefore, increase or decrease in surface transportation charges cannot be claimed to be on account of any Change in Law. The petitioner in its rejoinder has submitted that increase in the surface transportation charges are squarely covered under Change in Law since such increase is pursuant to notification of India Government Instrumentality.

65. We have considered the submissions of the petitioner and respondents. The petitioner has entered into a Fuel Supply Agreement dated 9.6.2012 with Mahanadi Coalfield Limited for supply of coal to Phase IV of the Mundra Power Project to meet the

contractual obligations under the PPAs with Haryana Utilities for supply of power. As per para 9.0 of the Fuel Supply Agreement, the delivery price of coal is the sum of basic price, other charges and statutory charges as applicable at the time of delivery of coal. Under Para 9.2 of the FSA, other charges include transportation charges as under:

> "Transportation Charges: Where coal is transported by the seller beyond the distance of three (3) kms from Pithead to the Delivery Point, the purchaser shall pay transportation charges as notified by CIL/seller from time to time."

Thus, under the FSA, the petitioner has agreed to pay the transportation price beyond the distance of 3 km from pithead to delivery point as notified by Coal India Limited from time to time. The transportation charges or its subsequent increase are on account of the commercial arrangement between the petitioner and Mahanadi Coalfield Limited and not on account of any event constituting change in law in terms of the Article 13 of the PPAs. As regards the submissions of the petitioner that the notifications regarding change in the rates of transportation charges have been issued by the Coal India Limited in its capacity as an Indian Governmental Instrumentality, we are of the view that the said contention cannot be sustained in the light of the detailed analysis made in para 62 of this order in respect of sizing charges. Accordingly, the claim of the petitioner for relief under Change in Law in respect of transportation charges by the Mahanadi Coalfield Limited has been disallowed.

(X) Change in pricing of coal from UHV to GCV basis

66. The petitioner has submitted that as on cut-off date (19.11.2007), price of coal charged by Coal India Limited was on the basis of Useful Heat Value (UHV). By the

Notification No. S.O. 2920 (E) dated 3012.2011, Ministry of Coal, Government of India in exercise of powers under Section 18 of Mines and Minerals (Development and Regulation) Act, 1957, switched over from the existing UHV based system of grading and pricing of coal to Gross Calorific Value (GCV) based system with effect from 1.1.2012. The petitioner has submitted that pursuant to the said notification, Coal India Limited has issued price notification No. CIL:S&M GM (F): Pricing 1813 dated 31.12.2011, thereby changing the pricing mechanism for domestic coal from UHV based pricing mechanism to GCV based pricing mechanism. The Petitioner has submitted that the Petitioner was issued the Letter of Assurance dated 25.6.2009 by CIL for supply of F grade coal (on UHV basis) and pursuant to the change in pricing mechanism, the petitioner was constrained to enter into FSA dated 9.6.2012 with MCL which stipulated supply of G10,G11,G12, G13 grade of coal (GCV basis). The petitioner has explained the difference between the basic price of coal immediately before switching from UHV to GCV and subsequent to switching as under:

Grade	Price post switching from UHV to GCV (Rs./ton)	Price of F grade coal before switching from UHV to GCV (Rs./ton)	Difference (Rs./ton)
G10	780	570	210
G11	640		70
G12	600		30
G13	550		-20

The petitioner has submitted that the impact of change in UHV to GCV price of coal depends on the grade of coal supplied by CIL. The petitioner has proposed a

methodology for calculation of increase in basic price of coal per ton on account of switchover from UHV to GCV based mechanism. The petitioner has prayed for compensation on account of the change in pricing mechanism of coal under Change in Law.

67. The respondents have submitted that Change in pricing mechanism from UHV to GCV is a contractual pricing arrangement between the petitioner and Coal India Limited and would not amount to Change in Law or change in the cost or revenue from the business of sale of electricity within the meaning of Article 13.1.1 of the PPAs. The petitioner in its rejoinder has submitted that Ministry of Coal, Government of India in exercise of its powers under Section 18 of Mines and Minerals (Development and Regulation) Act, 1957, read with Rule 3 of the Colliery Control Rules, 2004, vide notification dated 30.12.2011 switched over from the existing UHV based system of grading and pricing of coal to GCV based system with effect from 1.1.2012 and therefore, the said change is a Change in Law and not a contractual arrangement between the parties. The petitioner has submitted that it is required to be compensated for the same.

68. We have considered the submissions of the petitioner and the respondents. The petitioner has submitted that it was constrained to enter into the FSA with Coal India Limited which stipulated the supply of G10,G11,G12, G13 grade of coal (GCV basis) in place of F grade of coal (on UHV basis) as per the LOA. The petitioner has submitted that switchover from UHV system of grading of coal into GCV system of grading of coal has resulted in increase in the cost or revenue from sale of electricity to Haryana

Utilities, it is covered under Change in Law. On perusal of the Notification dated 30.12.2011, it is evident that the said notification has been issued by the Ministry of Coal under Government of India in exercise of powers under sub-section (1) and (2) of Section 18 of the Mines and Minerals (Development and Regulations) Act. 1957 read with Rule 3 of the Colliery Control Rules, 2004. Section 18 vests powers in the Central Government for conservation and development of minerals in the country and makes rules in that respect. Rule 3 of Colliery Control Rules, 2004 provides as under:

> "3 Categorisation of Coal. -The Central Government may, by notification in the Official Gazette, prescribe the classes, grades and sizes into which coal may be categorised and the specifications for each such class, grade or size of coal."

Section 18 of Mines and Minerals (Development and Regulations) Act, 1957 and Rule 3 of the Colliery Control Rules, 2004 do not vest any power in the Central Government to fix the price of coal. Under the said provisions, the Central Government has the power to prescribe the classes, grades and sizes into which coals can be categorized and the specification for such class, grade or size of coal. Accordingly, the Ministry of Coal, Government of India issued the Notification dated 30.12.2011 for change from the UHV system of grading of coal to the GCV system of grading of coal. Coal India Limited has prescribed different categories of non-coking coal based on GCV of coal. Coal India Limited has adjusted the price of coal according to their GCV values. Therefore, change in the grades of coal supplied to the petitioner on account of the change in the system of grading from UHV to GCV cannot be considered as Change in Law affecting the cost or revenue from the business of selling electricity to the Haryana Utilities. On account of Change in Law it is pertinent to mention that under the FSA, base price of coal has been defined "in relation to a declared grade of coal, produced by the seller, the pit

head price notified from time to time by CIL". In other words, the petitioner has agreed to pay the base price of coal as determined by Coal India Limited from time to time, irrespective of the basis for such determination. In our view, price of coal notified by Coal India Limited vide its notification dated 31.12.2011 based on the GCV of coal cannot be considered as Change in Law. The Commission also dealt with the same issue in order dated 3.2.2016 in Petition No. 79/MP/2013 as under:

> *"58. We have considered the submissions of the petitioner. Prior to 1.1.2000, the Central Government under Section 4 of the Colliery Control Order, 1945, was empowered to fix the grade-wise and colliery-wise prices of coal. Subsequently, based on the recommendations of Bureau of Industrial Costs and Prices (BICP), Government of India decided to de-regulate the prices of all grades of coking coal and A, B, and C grades of non-coking coal from 22.3.1996. Subsequently, based on the recommendation of the Committee on Integrated Coal Policy, the Government of India decided to de-regulate the prices of soft coke, hard coke and D grade of non-coking coal with effect from 12.3.97. The Government also decided to allow CIL and SCCL to fix prices of E, F and G grades of non-coking coal once in every six months by updating the cost indices as per the escalation formula contained in the 1987 report of the BICP and on 13.3.1997, necessary instructions were issued to CIL and SCCL in this regard. The pricing of coal was fully deregulated after the Colliery Control Order, 2000 notified on 1.1.2000 in supersession of the Colliery Control Order, 1945. Under the Colliery Control Order, 2000 the Central Government has no power to fix the prices of coal. Therefore, the prices of coal from CIL and its subsidiaries were market based. Only the pricing methodology was UHV basis at the time of bid submission which was switched over to GCV based pricing w.e.f. 1.1.2012 vide Govt. of India notification dated 30.12.2011. In our view, any decision affecting the price of inputs for generating electricity including coal cannot be covered under Change in Law except the statutory taxes, levies and duties having an impact on the cost of or revenue from the supply of electricity to the procurers. As already noted, para 2.7.2.4 of the RfP required the bidders to reflect all costs involved in procuring the inputs (including statutory taxes, duties and levies thereof) in the quoted tariff. Moreover, the petitioner has quoted stream 1 tariff consisting of non-escalable capacity charges and non-escalable energy charges, thereby taking all risks of price escalation in inputs including coal. Therefore, change from UHV to GCV based pricing cannot be covered under change in law. Hon`ble Appellate Tribunal For Electricity in the judgment dated 12.9.2014 in Appeal No. 288 of 2013 has observed as under:*
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> > *"According to the bidding documents, the Appellant is not entitled to any increase in energy charges on account of increase in base price of fuel.*

However, the impact on account of change in the expenditure due to Change in Law has to be allowed as per the actuals subject to verification of proof submitted by the Appellant."

In the light of above judgement also, the change in the base price of fuel on account of switchover from the UHV method to GCV method of coal pricing is not admissible under change in law."

The above decision is applicable in the present case also. Therefore, the claim of the petitioner for relief under Change in Law on account of change in pricing mechanism from UHV to GCV is not admissible and is accordingly rejected.

(XI) Change in class from 140 to 150 for Railway freight for coal for trainload movement

69. The petitioner has submitted that as on cut-off date (19.11.2007), the freight applicable to transportation of coal by Railways was the rate applicable to Class 140 of the railway freight Schedule. The Ministry of Railways, Govt. of India by Rate Circular No. 70 of 2008 dated 28.11.2008 prescribed that freight rates applicable to transportation of coal by railways would be the rate applicable to class 150 of Railways Freight Schedule. By Rates Circular No. 8 of 2015 dated 16.3.2015, class of coal has been further changed from 150 to 145 with effect from 1.4.2015. The change in classification of coal for Trainload Movement by Railways is an outcome of a Rate Circular. The Petitioner has submitted that changes in the Rate Circular are covered under Change Law and the Petitioner needs to be compensated for such Change in Law. The petitioner has suggested a methodology for calculation and payment of compensation payable for a month on account of increase in freight of transportation of coal due to change in the class from 140 to 150. The respondents in their replies have denied that charges revised by Railways amount to Change in Law. The petitioner in its

rejoinder has submitted that change in classification of coal from Class 140 to 150 by Ministry of Railways is pursuant to Section 31 of the Railways Act, 1989 and the same has resulted in steep increase in cost of landed coal and hence is covered under Change in Law.

70. We have considered the submissions of the petitioner and respondents. As on the cut-off date, the classification of coal for trainload movement was Class 140. By Rate Circular No. 70 of 2008 dated 28.11.2008, classification of coal was revised from Class-140 to Class-150 and by Rates Circular No. 8 of 2015 dated 16.3.2015, it has been further revised to class 145. The petitioner has submitted that since the Rate Circulars have been issued under section 31 of the Railways Act, 1989, it is covered under Change in Law. In our view, Rate Circulars issued by Ministry of Railways under section 31 of the Railways Act, 1989 cannot be considered as change in law as it is a common knowledge that Ministry of Railways has been empowered to fix the rates from time to time and any person availing the services of Railways is expected factor in such change in charges in the bid. It is further noted that the Escalation Index notified by the Commission which uses Base Freight Rate linked to the class of goods, includes the impact of change in class for railway freight for coal from 140 to 150/145. Therefore, the impact of change in freight rate due to change in freight class is being passed on through the escalation rates notified by the Commission from time to time. It is pertinent to mention that the escalation index notified by the Commission aims at taking care of the escalations arising out of the market forces. Since the change of class of railway freight is included in the computation of escalation rates, this cannot be treated as

Change in Law as per Article 13 of the PPA and accordingly, the petitioner's claim in this regard has been disallowed.

(XII) Levy of Minimum Alternate Tax on power plants situated in SEZ

71. The petitioner has submitted that as on cut-off date (19.11.2007), the power plants situated in SEZ were exempted from paying the Minimum Alternate Tax ("MAT") under Sub-section (6) of Section 115JB of the Income Tax Act, 1961. The MAT was imposed on the power plants situated in SEZ vide Finance Act, 2010 with effect from 1.4.2012. With effect from 1.4.2013, MAT rate has increased from 18% to 18.5% of the book profits (i.e. 20.0075% of the book profits including 5% surcharge, 2% education cess and 1% higher education cess). The petitioner has submitted that for the Financial Year 2013-14, surcharge on MAT has been increased from 5% to 10% leading to an effective MAT rate of 20.9605%. The petitioner has calculated the impact of levy of MAT for the month of March 2014 as Rs.0.0988/kwh. The petitioner has also suggested a formula for calculation of the impact of levy of MAT on monthly basis.

72. The respondents have submitted that for invoking the Change in Law as per Article 13.1.1, there has to be a resulting effect in the cost of or revenue from business of selling electricity by the petitioner to the Haryana Utilities under the PPAs. The respondents have submitted that the tax on income including MAT or income tax has nothing to do with the cost or revenue from the business of selling electricity. The respondents have submitted that the tax is post revenue of the business and it is on the operating profit or net profit, as the case may be, of the business. The respondents

have submitted that imposition of MAT or tax on income or any increase or decrease in the tax on income cannot be construed as Change in Law for the purpose of Article 13.1 of the PPAs. The Respondents have relied on judgments in Molins of India Limited Vs. C.I.T (Cal) {[1983] Vol 144 ITR 317} and Sundram Industries Limited Vs. C.I.T (Mad) {(1986) Vol 159 ITR 646} in support of the contention that tax is not a cost or revenue. The respondents have further submitted that in case of PPAs entered into in pursuance of a competitive bidding under section 63 of the Act, the tariff is per unit tariff allowed on the electricity generated and supplied. There is no separate element of Return on Equity or reasonable return and all elements are factored in the bid price itself. The respondents have also relied on the order dated 7.1.2003 passed by the Gujarat Electricity Regulatory Commission (GERC) in Petition No.1210 of 2012 in which learned GERC has held that in terms of Article 13 of the PPA, MAT or increase/decrease in MAT is not required to be adjusted in tariff.

73. The petitioner in its rejoinder has submitted that MAT is levied under section 115JB of the Income Tax Act, 1961 on the book profit of the company. As on the cut-off date, power plants situated in SEZ were exempted from paying MAT under sub-section (6) of Section 115JB of the Income Tax Act, 1961. By Finance Act, 2011, MAT was imposed on power plants situated in SEZ at the rate of 18.5% per annum with effect from 1.4.2012. The petitioner has submitted that levy of MAT will lead to increase in cost of the petitioner in the year in which it becomes payable based on the book profits of the petitioner. It has been further submitted that the judgments of Calcutta and Madras High Courts and the order of GERC are not relevant for the purpose of determining the claims of the petitioner in the present petition. The petitioner has

submitted that as per para 6 of AS 16 issued by the Institute of Chartered Accountants, the tax expense arising on account of payment of MAT should be charged on the gross amount, in a normal way, to the profit and loss account in the year of payment of MAT and therefore, MAT being a tax expense is being charged as cost/expense to the statement of profit or loss account. The petitioner has submitted that for a corporate organization, its final profit/loss is calculated after tax deductions and to derive the same, all costs including tax have to be deducted from the revenue. The petitioner has submitted that MAT is a part of cost of supply of power and hence any change in the rate of MAT has to be compensated by the respondents in the form of tariff adjustment so that tariff is reflective of cost of supply enabling generation business to be conducted on commercial principles. The petitioner in its written note dated 16.5.2016 has submitted that in terms of AS-22, taxes are considered as expenses and would come under the cost of the project and any change in taxes would have a bearing on the project economics and therefore, the petitioner should be compensated for the same. The petitioner has relied upon the judgment of the Supreme Court in Sumitomo Heavy Industries Limited Vs. ONGC Limited {(2010) 11 SCC 296}, the judgments of the Appellate Tribunal in Appeal No. 39 of 2010 {Jaiprakash Hydro Power Limited Vs. Himachal Pradesh State Electricity Regulatory Commission & Another, in Appeal No. 113 of 2012 {Andhra Pradesh Power Coordination Committee Vs. APERC and Appeal No. 330 of 2013 {Bangalore Electricity Supply Company Limited Vs. Tata Power} in support of the contention that change in MAT rate amounts to change in law.

74. We have considered the submissions of the petitioner and respondents. The petitioner has submitted that as on cut-off date, power plants located in SEZ were

exempted from paying MAT under sub-section (6) of the Income Tax Act, 1961. By Finance Act, 2011, MAT was imposed on the power plants located in SEZ. At present, MAT of 18.5% is applicable alongwith surcharge of 10% and education cess of 2% and higher education cess of 1%. According to the petitioner, imposition of MAT on SEZ after the cut-off date and revision of MAT rate from year to year are covered under Change in Law. The respondents have submitted that MAT is imposed post revenue of the business and therefore, does not have impact on the cost of or revenue from the business of supplying electricity. We have to consider first the history of MAT in order to understand whether MAT has an impact on the cost of or revenue from the business of supply of electricity by the petitioner. Minimum Alternative Tax (MAT) was introduced by inserting Section 115JA through the Finance Act, 1996 with effect from 1.4.1997 in order to widen the tax net by bringing more and more tax payers under the umbrella of direct tax system of the country. Section 115JB was introduced through the Finance Act, 2000 with effect from 1.4.2001 under which a company is liable to pay the MAT in respect of any previous year relating to assessment year commencing on or after 1.4.2001 if the normal income tax payable by such company in the previous year is less than 7.5% of its book profit which was deemed to be the income of the company and such company was liable to pay income-tax at the rate of 7.5%. Sub-section (1) of Section 115JB of the Income Tax Act, 1961 after enactment of the Finance Act, 2000, provides as under:

> "115JB (1) Notwithstanding anything contained in any other provisions of this Act, where in case of an assessee, being a company, the income tax, payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after 1st Day of April 2001 is less than seven and one-half percent of its book profit, such book profit shall be deemed to be the total income of the assesse and the tax payable by the

assesse on such total income shall be the amount of income tax at the rate of seven and one-half percent."

Sub-section (6) was introduced through the Finance Act, 2004 as under:

"(6) The provisions of this section shall not apply to the income accrued or arising on or after the 1st day of April, 2005 from any business carried on, or services rendered, by an entrepreneur or a Developer, in a Unit or Special Economic Zone, as the case may be."

The MAT rate was revised from time to time. Through the Finance Act, 2011, the MAT rate was leviable at the rate of 18.5% with effect from 1.4.2012 and the exemption available to the units located in SEZ was withdrawn. The proviso under sub-section (6) of Section 115JB reads as under:

"Provided that the provisions of this sub-section shall cease to have effect in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 2012."

It is clear from the above that MAT is a tax on the income of the assesse and is payable where the normal income tax by such company in the previous year is less than the prescribed percentage (18.5% with effect from 1.4.2012) of its book profit which is deemed to be the total income of the company. In other words, MAT is payable by the petitioner with effect from 1.12.2012 if its taxable income payable during the year 2011-12 is less than 18.5% of its book profit which is deemed be the total income of the petitioner. The income tax which is payable on the book profit of the company which is deemed to be the income of the company cannot be said to affect the cost of or revenue from the business of selling electricity. Therefore, the withdrawal of exemption of MAT to the developers located in SEZ with effect from 1.4.2012 or change in the rate of MAT

cannot be considered as change in law as MAT is levied on book profit of the previous year which is deemed to be the income of the company and it does not result in change in the cost of or revenue from the business of selling electricity.

75. The Commission is in agreement with the finding of the learned GERC with respect to MAT in order dated 7.1.2013 in Petition No. 1210 of 2012. The Commission in order dated 30.3.2015 in Petition No. 6/MP/2013 has also considered whether change in MAT rate will amount to Change in Law and came to the following conclusion:

> *"46. We have considered the submission of the petitioner and the respondents. Thequestion 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. Theincome 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."*

76. The Commission has gone through the judgments relied upon by the petitioner. The judgement of the Hon'ble Supreme Court in Sumitomo Heavy Industries Limited Vs. ONGC deals with the issue whether there was any nexus between the payment of income tax made by the contractor Sumitomo to sub-contractor (M/s McDermott

International Inc or MII) and the responsibility of ONGC to reimburse the same to Sumitomo. The Hon'ble Supreme Court after taking note of the fact that Sumitomo had entered into a back to back contract with MII with the knowledge of ONGC, and as per the General Conditions of the Agreement between Sumitomo and ONGC, ONGC had taken up the income tax liability of Sumitomo, and Sumitomo has made payment of income tax of MII, the Hon'ble Supreme Court held that ONGC is liable reimburse to Sumitomo the income tax paid by Sumitomo to MII. In the said case, ONGC had taken up the responsibility of income tax liability of Sumitomo whereas in the present case there is no provision in the PPAs that the Haryana Utilities have taken up the responsibility of MAT liability of the Petitioner. The present case is clearly distinguishable from the case of Sumitomo Heavy Industries Limited Vs. ONGC. The Petitioner's reliance on three judgments of the Appellate Tribunal is misplaced. In Jaiprakash Hydro Power Limited Vs. HPERC & Another, the tariff was determined by the State Commission under Section 62 of the Act and in terms of the PPA between Jaiprakash Hydro and HPSEB, Jaiprakash Hydro was entitled for reimbursement of income tax. The issue arose whether Jaiprakash was entitled for reimbursement of MAT during tax holidays. The Appellate Tribunal held that Section 115JB has been introduced through an amendment of the Income Tax Act, 1961 and the said amendment fell under the Change in Law in terms of para 20.21 of the PPA and Jaiprakash Hydro is entitled for reimbursement of MAT during tax holiday. In Andhra Pradesh Power Purchase Committee Vs APERC & Others, the issue was whether Lanco Kondapali was entitled for reimbursement of MAT while it was availing tax holiday under Section 80I of the Income Tax Act, 1961. In the light of the decision in

Jaiprakash Hydro Case, the Appellate Tribunal held that Lanco Kondapali was entitled for reimbursement of MAT during tax holiday and income tax after expiry of tax holiday. In our view, both these judgments do not deal with the case of change in law in the context of the PPA entered into as a result of competitive bidding under section 63 of the Act.

77. In view of the above discussion, the Commission is of the view that withdrawal of the exemption of non-applicability of MAT in respect of the Developer located in SEZ with effect from 1.4.2012 or change in MAT rate cannot be covered under Change in Law and accordingly, the claim of the petitioner has been disallowed.

(XIII) Inclusion of Fuel Adjustment Component in Railway Freight

78. The petitioner has submitted that in Railways Budget for 2013-14, Fuel Adjustment Component was introduced, linking tariff revision with movement in cost of fuel with effect from 1.4.2013. The petitioner has submitted that pursuant to Railway Budget for the Financial Year 2013-14, Railway Board vide the Rate Circular No.6 of 2013 revised the freight rates for transportation of goods. Accordingly, freight of Rs. 364.50 per ton was revised to Rs. 392.00/ton for transportation of coal to Dhamra port, Odisha and freight of Rs. 283.20/ton was revised to Rs. 304.7/ton for transportation of coal to Paradip port, Odisha. This event is also an outcome of Rate Circular, which has force of law and hence needs to be compensated.

79. The respondents have submitted that pricing arrangement and increase or decrease in the railway transportation charges cannot be construed as Change in Law.

The respondents have submitted that these are contractual arrangements between the petitioner and Railways and the petitioner is not entitled to any compensation on account of inclusion of fuel adjustment component in railway freight.

80. We have considered the submissions of the parties. We have already observed that the Rate circulars issued by Railway Board from time to time in exercise of its power under Section 31 of the Railways Act, 1989 cannot be covered under Change in Law. Accordingly, the Rate Circular 6 of 2013 dated 22.3.2013 revising the freight rates for transportation cannot be considered as Change in Law. It is noted that the Escalation Index notified by the Commission does take into consideration the impact of change in railway freight and therefore, the impact of such change is taken care of through escalation index. The Commission is of the view that revision in freight rates on account of change in cost of fuel is not covered under Change in Law and accordingly, the claim has been disallowed.

(XIV) Imposition of Swachh Bharat Cess on the value of taxable services

81. The petitioner has submitted that as on the cut-off date, there was no Swachh Bharat Cess. The petitioner has submitted that by Section 119 of the Finance Act, 2015, Parliament levied Swachh Bharat Cess as Service Tax on all or any of the taxable services at the rate of two percent, By Notification of 21 of 2015 dated 6.11.2015, Section 119 of the Finance Act, 2015 came into effect from 15.11.2015. By Notification No. 22 of 2015, Government of India exempted Swachh Bharat Cess over and above 0.5%. The petitioner has submitted that post levy of Swachh Bharat Cess, the Ministry of Railways has issued Corrigendum No. 5 to Rate Circular No. 29 of 2012, thereby

revising Service Tax from 4.20% to 4.35% w.e.f. 15.11.2015. The increase in Service Tax has increased the overall cost of generation of electricity. The respondents have submitted that it is a new imposition and if the petitioner could show that the petitioner has paid such cess for generation of power and it falls within the meaning of Change in Law as per Article 13 of the PPA, the same may be considered by the Commission.

82. We have considered the submissions of the petitioner and the respondents. As on cut-off date, 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 date. The petitioner vide its written submissions dated 17.5.2016 has placed on record the copies of Railway Receipts reflecting payments made towards Swachh Bharat Cess. We have considered Service Tax on transportation of coal as a Change in Law event in para 54 of this order. As Swachh Bharat Cess increases the net Service Tax payable by the petitioner, the impact of Swachh Bharat Cess has been allowed under Change in Law.

(XV) Payment to National Mineral Exploration Trust and Payment to District Mineral Fund

83. The petitioner has submitted that the Mines and Minerals (Development and Regulation) Act, 1957 has been amended by the Mines and Minerals (Development and Regulation) Amendment Act, 2015 (Amendment Act), inserting Section 9B and 9C under which District Mineral Foundation and National Mineral Exploration Trust have been created, The petitioner has submitted that Section 9B(6) of the Amendment Act provides that the holder of a mining lease granted before the date of amendment is

liable to pay to the District Mineral Foundation, in addition to royalty, an amount not exceeding the royalty, as may be prescribed by the Central Government. Further, under Section 9C(4), the holder of the mining lease shall pay to the National Mineral Exploration Trust, a sum equivalent to 2% of the royalty in such manner as may be prescribed by the Central Government. Government of India notified the National Mineral Trust Rules, 2015 on 23.8.2015 and the Mines and Minerals (Contribution to District Mineral Foundation) Rules, 2015 on 17.9.2015. As per the said Rules, 10% of the royalty in respect of mining lease granted on or after 12.1.2015 and 30% of the royalty in respect of mining lease granted before 12.1.2015 shall be payable to District Mineral Foundation.

84. The petitioner has submitted that as on cut-off date (19.11.2007), there were no provisions for payments to be made to National Mineral Exploration Trust and/or District Mineral Fund. After the amendment, CIL is paying these charges and in turn passing on these charges as percentage of royalty to the petitioner. It has been submitted that imposition of the said charges is covered under Article 13 of the PPAs. The petitioner has submitted that there is no difference between increases in cess, excise duty or royalty on coal on the one hand and the surcharge of 2% on royalty to be paid to National Mineral Exploration Trust and surcharge of 10% to 30% on royalty in respect of mining leases granted before or after 12.1.2015 to be paid to the District Mineral Foundation. The petitioner has submitted that Hon'ble Supreme Court in CIT Vs. McDowell and Co. Limited {(2009) 10 SCC 755} has held that tax, duty, cess or fee fall within the genus 'taxation' viz. compulsory exaction in the exercise of State's power of

taxation where levy and collection is duly authorized by law as distinct from the amount payable as consideration under the contract. The petitioner has submitted that since these surcharges are mandated by the newly introduced statutory provisions in Sections 9B(4) and 9C(6) of the MMDR Act, the petitioner needs to be compensated for the same.

85. The respondents have submitted that that these events are not covered under Change in Law as the petitioner is not a mining lease-holder and as such, the Petitioner is not liable for such payment. The respondents have submitted that even assuming that the above events are considered as Change in Law, the impact of the amendments to MMDR Act, 1957 has to be considered as against the existing obligations of the leaseholder to contribute for interest and benefit of persons and areas affected by mining related operations, etc. The leaseholders have an obligation for rehabilitation and resettlement of the displaced persons as well as for protective measures for affected areas and their restoration, reclamation and rehabilitation. The Mineral Conservation and Development Rules, 1998 recognize the responsibility of the holder of the mining lease to ensure protective measures for environment and control of pollution and restoration, reclamation and rehabilitation of lands affected by mining. Further, the Rehabilitation and Resettlement Policy, 2008 issued by Coal India Limited as existing on the cut-off date provided for compensation and rehabilitation efforts to be made by the CIL subsidiaries. This is in conformity with the Rehabilitation and Resettlement Policy, 2007 issued by Department of Land Resources. Therefore, the creation of District Mineral Foundation with the same objective would reduce such obligations of the leaseholders and therefore, there is no impact of the introduction of the

amendments on the petitioner.

86. We have considered the submissions of the petitioner and the respondents. 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. (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 operations 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-sections (2) and (3)shall be guided by the provisions contained in article 244 read with Fifth and Sixth Schedule to the Constitution relating to administration of the Scheduled Areas and Tribal Areas 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 a 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 operations 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 a mining lease granted before 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 operations are carried on, an amount not exceeding the royalty paid in terms of the Second Schedule in such manner and subject to the categorisation of the mining leases and the amounts payable by the various categories of lease holders, as may be prescribed by the Central Government.

9C. (1) The Central Government shall, by notification, establish a Trust, as anon-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 functions 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 per cent of the royalty paid in terms of the Second Schedule, in such manner as may be prescribed by the Central Government.".

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 12thJanuary, 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."

It is noticed from the above provisions that through an amendment to 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 provided 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. The respondents have 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. The petitioner has submitted that the Coal India Limited raises the bills at the prescribed rate on the petitioner for contribution to the National Exploration Trust and District Mineral Foundations in addition to royalty. We have considered the submission. There is no denying the fact that these contributions are statutory levy. Under the provisions of the FSA between the Petitioner and Mahanadi Coalfield Limited, the petitioner is required to pay all statutory taxes, levy, cess or fees in addition to 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 but any change in royalty of coal has been allowed under change in law. 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 Act of the Parliament after the cut-off date and therefore, they fulfill the conditions of change in law. Accordingly, the expenditure on this account has been allowed under Change in Law.

(XVI) Installation of Flue Gas De-sulphurizer (FGD) as per Environment Clearance dated 20.5.2010

87. The petitioner has submitted Ministry of Environment & Forests (MoEF) accorded Environment Clearance (EC) dated 20.5.2010 to the Petitioner for expansion of Mundra Power Project on the condition that the Petitioner would install Flue Gas De-sulphurizer (FGD). The petitioner has submitted that due to installation of FGD, the Petitioner has incurred the capital cost of Rs.646.22 crore, auxiliary power consumption has increased resulting in increase in per unit capital cost and the petitioner is incurring additional operating expenses for running the FGD. The petitioner has submitted the auditor's certificate certifying the cost of FGD.

90. The petitioner has submitted that as on cut-off date (i.e.19.11.2007), there was no condition or stipulation requiring the petitioner for installing and operating FGD for Phase III (Units 7 to 9) of the Mundra Power Project. The petitioner has submitted that the condition to install the FGD was imposed for the first time by the Environment Clearance dated 20.5.2010 which date is after the submission of the bids and execution of the PPAs. The petitioner has submitted that the EC granted by the MoEF vide its

letter dated 13.8.2007 for Phase I (3x330 MW) and the EC granted for the Phase II (2x330 MW + 2x660 MW) did not contain any stipulation regarding installation of FGD and therefore, the petitioner could not have envisaged the imposition of FGD for Phase III (3x660 MW).

91. The petitioner has submitted that at the time of bid submission, MoEF Notification dated 11.4.1994 was in force. MoEF in exercise of powers conferred under Sections 6 and 25 of the Environment (Protection) Act, 1986 revised the National Ambient Air Quality Standards to be maintained vide Notification no. G.S.R. 826 (E) dated 16.11.2009. Further, Central Pollution Control Board in exercise of its power under Section 16(2)(h) of Air (Prevention and Control of Pollution) Act, 1981 issued Notification No. B29016/20/90/PCI-I dated 18.11.2009 prescribing the revised the National Ambient Air Quality Standards. The petitioner has submitted that installation of FGD was pursuant to revision in National Ambient Air Quality Standard and therefore, installation of FGD falls within the definition of Change in Law under Article 13 of the PPAs.

92. In response to the directions of the Commission, the petitioner in its written notehas submitted that as per MoEF Circulars on classification of industries, Thermal Power Plants form part of the industries under Red category of Industries i.e. industries which are heavily polluting. The Mundra Power Project of the petitioner falls under industrial, residential, rural and other areas. The petitioner has also placed on record the result of the environment impact assessment (with and without FGD) after implementation of the Mundra Power Project. The petitioner has submitted that from the results it emerges

that without FGD the SO_2 level was well within the National Ambient Air Quality Standard notified by MoEF vide Notification dated 11.4.1994, and due to revision of standards vide MoEF Notification dated 16.11.2009, the condition to install FGD in Environmental Clearance dated 20.5.2010 was imposed. Since the Notification dated 16.11.2009 was subsequent to the cut-off date, it qualifies as Change in Law in terms of Article 13 of the PPA.

93. Haryana Utilities have denied that installation of FGD is covered under Change in Law due to following reasons:

(a) The Environment Clearance dated 13.8.2007 granted for Phase I had a condition that the space provision shall be made for installation of FGD of requisite efficiency of removal of SO_2, if required at later stage. Therefore, the petitioner was aware that it may be required to install FGD at a later stage. This was prior to the Bid Deadline Date for Haryana Utilities and prior to the notification of the new Air Quality Standards. In the judgment dated 21.1.2013 in Appeal No. 105 of 2011 (M/s JSW Energy Limited Vs. Maharashtra State Electricity Distribution Company Limited), the Appellate Tribunal has held that the condition of installation of FGD at a later stage in the Environment Clearance meant that the generator was aware of the requirement of FGD and there is no Change in Law because of a subsequent confirmation on installation of FGD.

(b) The petitioner had not obtained the Environment Clearance for Units 7 to 9 on the cut-off date and therefore, there can be no claim for change in consents as there was no existing consent on cut-off date. The petitioner was fully aware that it was required to obtain all relevant consents, including Environmental Consent for

operation of power station. The petitioner was also aware that while granting the environmental clearance under the provisions of the Environmental Laws, the authorities are entitled to impose such conditions as they consider appropriate for allowing establishment of the generating units. The Environmental Laws remained the same as on the Cut-off Date (19.11.2007) and there has been no change in the provisions of the Law relating to environment. Accordingly, it cannot be considered as a subsequent Change in Law within the meaning of Article 13.1.1 of the Power Purchase Agreements or that the effect is to be given in terms of Article 13.2(a) of the Power Purchase Agreement.

(c) The Environmental Law as was existing at the relevant time did not say that FGD shall not be required to be installed. The prevalent law was that the petitioner shall be required to undertake all such things as may be directed by the Environment Authorities as per the provisions of Environment Protection Act, 1986 read with EIA notification dated 14.9.2006. As per Para 2.7.2.4 of the RFP and Articles 4.4.1 and 5.4 of the PPA, it is the obligation of the petitioner to apply for and obtain all environmental clearance for establishing, operation and maintenance of the project.

(d) The petitioner has sought to draw a relation between conditions of Environment Clearance and Air Quality Standards by claiming that the requirement of installation of FGD was in pursuance of the Notifications dated 16.11.2009 and 18.11.2009 regarding National Ambient Air Quality Standards. However, the petitioner has not submitted any document or evidence that the installation of

FGD is related to such Standards. The Environment Laws on the Bid Deadline date envisaged the imposition of conditions as deemed necessary by the Ministry of Environment and Forests and the same is not restricted by either existing Air Quality Standards or any other standards. Such conditions are imposed on the basis of the environment impact assessment carried out in the proposed site. Such proposed site was the choice of the petitioner and therefore, any environmental conditions imposed due to the choice of site cannot be considered as Change in law.

(e) The petitioner has merely submitted the EIA data without any supporting documents. Further, even as per the data submitted by the petitioner, the resultant ground level concentration in Wandh area was 102.5 ug/m3 without FGD which is higher than the Annual Average under the National Ambient Air Quality Standards as per the Notification dated 11.4.1994 and is sufficiently close to 24 hourly standards of 120 ug/m3. In such cases, even as per the 1994 standards, the Ministry of Environment and Forests could have imposed the condition of installation of FGD. The assumptions made by the petitioner that the condition was only due to the new Standards are baseless.

(f) There cannot be any consideration of auxiliary consumption or other operating expenditure on account of the installation of the FGD. These tariff elements were not to be considered separately in a quoted tariff in pursuance of a Competitive Bidding Process. The Petitioner had quoted non-escalable capacity charges and therefore, is not entitled to any such claim for additional expenditure.

(g) The tariff was decided as per the provisions of Section 63 of the Electricity Act and not on the basis of individual tariff elements such as auxiliary consumption, O&M expenditure, operating expenditure etc. It is not open to Adani Power now to go on the normative auxiliary consumption with or without FGD when it is not known as to the basis on which Adani Power had given the quoted non-escalable capacity charges in the bid submitted.

94. We have considered the submissions of the petitioner and the respondents. The petitioner is supplying power to the respondents from Units 7, 8 and 9 of Mundra Power Project. The cut-off date for submission of the bids was 19.11.2007. The petitioner was issued LoI to supply 1424 MW of power at Haryana periphery and the PPAS were signed on 7.8.2008. The petitioner applied for environment clearance in September, 2008 and was granted environment clearance vide MOE&F letter dated 20.5.2010. Relevant extract of the environment clearance provides as under:

> "2 It has been noted that the proposal is for expansion by addition of 3x660 MW (Phase III) Super critical Technology Coal Based TPP. Environmental Clearance for Phase I (2x330 MW) and Phase II (2x330 + 2x660 MW) were accorded o 13.8.2007 and 21.10.2008 respectively. Land required for Phase III will be 198.20 ha. FGD shall be installed in Phase III units.
>
> 4. Based on the information submitted by you, the Ministry of Environment and Forests hereby accords environmental clearance to the above project under the provisions of EIA notification dated September 14, 2006, subject to the compliance of the following Specific and General Conditions:
>
> (xiii) FGD shall be provided for Phase III units."

The petitioner has submitted that the requirement for FGD being a requirement under Environment Laws after the cut-off date, the same expenditure is admissible under Change in Law. The petitioner has claimed that Environment Clearance was granted to the petitioner for Phase I and Phase II which did not contain any stipulation for installation of FGD and therefore, the petitioner could not have envisaged the installation of FGD. The respondents have contested the contention of the petitioner on the ground that the petitioner was aware that it might be required to install FGD at a later stage which was prior to the bid deadline date for Haryana Utilities and prior to notification of the new Air Quality Standards. The respondents have submitted that the issue of installation of FGD being considered as a Change in Law was considered by the Appellate Tribunal in order dated 21.1.2013 in Appeal No.105 of 2011 (M/s JSW Energy Limited Vs. Maharashtra Electricity Distribution Company Limited & Another) in which the Appellate Tribunal held that the condition of FGD at a later stage meant that the generator was aware of the requirement of FGD and there is no change in law because of a subsequent confirmation on the installation of FGD. The respondents have submitted that installation of FGD was envisaged for 2x330 MW (Phase I) of the Mundra Power Project and the petitioner cannot be allowed to contend that it could not have envisaged installation of FGD for Units 7, 8 and 9 of the Project.

95. The petitioner has made huge investment on FGD in order to comply with the conditions laid down in the environment clearance dated 20.5.2010. In order to consider the claims of the petitioner under Change in Law for compensation for the installation and operation of FGD in Phase III of the Mundra Power Project, the following information/documents are considered relevant:

(a) Copy of the application made to MoEF for environment Clearance for Phase III of the Mundra Power Project;

(b) Copy of the Terms of Reference issued by MoEF for phase – I, II & III prior to grant of environment clearance;

(c) Copies of the Minutes of the Expert Appraisal Committee in connection with the application of the Petitioner for Environment Clearance for phase - III;

(d) Copy of the Financial Closure indicating the expenditure on different heads in respect of Phase III of Mundra Power Project;

(e) The petitioner was granted environmental clearance for Phase I of the project on 13.8.2007 and or Phase II of the project on 21.10.2008. One of the conditions of environment clearance is that "separate funds should be allocated for implementation of Environmental Protection measures alongwith item-wise break-up. These cost should be included as part of the project cost. The funds earmarked for the environmental measures should not be diverted for other purposes and year-wise expenditure should be reported to the Ministry." The Petitioner shall place on record the year-wise expenditure submitted to MoEF in compliance with the environmental clearance dated 13.8.2007 and 21.10.2008.

(f) Any other information considered relevant for the purpose of consideration of the claim for FGD under Change in Law.

96. The petitioner is granted liberty to submit the claim for FGD through a separate application including the information sought in terms of para 95 above.

(XVII) Increase in Auxiliary Consumption due to FGD Installation affecting Capacity Charges & Additional Operating Expenditure on FGD

97. The petitioner has submitted that the installation of FGD has resulted in the higher auxiliary consumption. This has lead to blockage of capacity required for generating additional auxiliary consumption which thereby impacts per unit capacity charges. The petitioner has furnished per unit impact of Rs.0.023 on capacity charges in the month of March, 2014 due to additional auxiliary consumption. The petitioner has submitted that installation of FGD has also resulted in higher expected operating expenses of Rs.48 crore/annum. The respondents have opposed the above claims on the ground that since the expenditure on FGD is not admissible under Change in Law, the expenditure on auxiliary consumption on account of FGD and the operating expenses are not admissible under Change in Law.

98. The petitioner has been granted liberty to approach the Commission through a separate application alongwith certain relevant information/documents. The issue of auxiliary consumption and operating expenses will be considered while considering the claim of FGD in the light of the submissions to be made by the petitioner.

(XIX) Carrying Cost

99. The petitioner in prayer at Para 82 (d) has sought a direction to the respondents to pay late payment surcharge as applicable under the PPAs for the period of delay from the date of notification of Change in Law. In the written note, the petitioner has submitted that non-grant of carrying cost is contrary to Article 13 of the PPA which mandates that the petitioner is to be restored the same economic position as if change

in law did not take place. The petitioner has submitted that it had to incur the cost due to Change in Law events from the dates such events came into force resulting in cash out flow for the petitioner from such dates. The petitioner has submitted that the above cost incurred by the petitioner would get reimbursed once the events due to which such cost have arisen are approved to be change in law event by the Commission. The petitioner has submitted that since the petitioner is already incurring the cost, the petitioner is burden with additional working capital interest till it gets reimburse by the procurers and the procurers would stand to get benefit as the cash out flow to them is differ till such time and there will be saving interest cost to that extend. The petitioner has submitted that it is entitled to carrying cost for the alternate arrangement being made to pay the additional cost due to change in law till it gets reimburse by the respondents. The petitioner has relied upon the judgement of the Supreme Court in South Eastern Coal Fields Ltd. Vs State of MP {(2003) 8 SCC 648}, judgments by the Appellate Tribunal dated 20.12.2012 in SLS Power Ltd. Vs. Andhra Pradesh Electricity Regulatory Commission, judgment in North Delhi Power Ltd. Vs. DERC and judgement in TATA Power Co. Ltd. Vs Maharashtra Electricity Regulatory Commission.

100. The respondents have submitted that since there is no provision for late payment surcharge in Article 13 relating to change in law the same cannot be granted to the petitioner de hors the PPA. The respondents have further submitted that the Appellate Tribunal in the full bench judgement dated 7.4.2016 has held that in cases of competitive bidding the relive has to granted as per the PPA. Therefore, the claim of interest/ carrying cost/ late payment surcharge *de hors* PPA cannot be permitted. The respondents have submitted that the petitioner's reliance on Article 13.2 of the PPA is

misconceived since Article 13.2 provides for restoration to the extend contemplated in Article 13. There is no provision for carrying cost in the PPA and the principle of restoration the same economic position would not entitled to claim relief which is not otherwise provided for in the PPA. The respondents have further submitted that Article 13.2 provides for compensation from the date decided by the Appropriate Commission and therefore, until the decision of the Commission, there can be no payment by the Haryana Utilities to the petitioner. Further, Article 13 provides for recovery of change in law through supplementary bills and the PPA provides for late payment surcharge in respect of such bills. As regards the judgment sited by the petitioner, the respondents have submitted that the said judgements were not in the context of competitive bidding process where the PPA has specifically contemplated for change in law. The respondents have also distinguished the judgement of Supreme Court in South Eastern Coal Fields Ltd. Vs. State of MP from the present case on the ground that in that case liability had already been crystallised but payment was made by SECL after the hike in royalty was upheld. In that circumstances, the State Govt. claimed interest for the period of delay which was upheld by the Supreme Court. The respondents have submitted that in the present case, there are no liabilities on Haryana Utilities until the decision of the Commission allowing the claim for Change in Law and computing/ crystallising the impact of such change in law. The respondents have further submitted that the Hon'ble Supreme Court in National Thermal Power Corporation Limited Vs. Madhya Pradesh State Electricity Board {(2011) 15 SCC 580} wherein the Hon'ble Supreme Court has denied interest in the absence of any provision for interest.

101. We have considered the submissions of the petitioner and the respondents. The petitioner is claiming carrying cost on the ground that the petitioner is incurring cost due to change in law events from the date such events came into force resulting in cash outflow for the petitioner from such dates. The petitioner has submitted that under change in law provisions in the PPAs, the petitioner is to be restored to the same economic position as if the Change in Law has not occurred and therefore, the petitioner would not be put to the same economic condition unless the carrying cost is allowed. The respondents have submitted that in terms of Article 13 of the PPAs, carrying cost in the form of late payment surcharge is payable after the claims are crystallised and bills are raised.

102. Article 13.2 of the PPAs provides as under:

> "13.2 Application and Principles for computing impact of change in law: While determining the consequence of change in law under this Article 13, 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 Payments, to the extent contemplated in this Article 13, the affected Party to the same economic position as if such change in law has not occurred."

Article 13.4 which deals with tariff adjustment payment on account of change in law is extracted as under:

> " 13.4 Tariff Adjustment Payment on account of Change in law
>
> 13.4.1 Subject to Article 13.2, the adjustment in Monthly Tariff Payment shall be effective from:
>
> (i) the date of adoption, promulgation, amendment, re-enactment or repeal of the law or change in law; or
>
> (ii) the date of order/judgement of the Competent Court or tribunal or Indian Governmental Instrumentality, if the change in law is on account of a change in interpretation of law.

13.4.2 The payment for changes in law shall be through supplementary bill as mentioned in Article 11.8. However, in case of any change in Tariff by reason of change in law, as determined in accordance with this Agreement, the Monthly Invoice to be raised by the Seller after such change in tariff shall appropriately reflect the changed Tariff."

The above provisions do not provide for payment of carrying cost from the date the additional cost was incurred on account of change in law till the date of determination of the change in law events by the Commission. After determination of change in law events, the petitioner shall be required to claim payment on account of the change in law through the supplementary bill raised in accordance with Article 11.8 of the PPA. Article 11.8 of the PPA provides that either party may raise a supplementary bill for payment on account of Change in Law and the bills shall be paid by the other party. Article 11.8.3 provides that "in the event of delay in payment of a supplementary bill by either party beyond one month from the date of billing, a late payment surcharge shall be payable at same terms applicable to the Monthly Bill in Article 11.3.4." From the above provisions, it emerges that late payment surcharge is payable only if the payment of supplementary bill by either party beyond one month from the date of billing is delayed. There is no provision in the PPAs to grant carrying cost from the date of incurring the expenditure under Change in Law.

103. The petitioner has relied upon the judgment of the Hon'ble Supreme Court in South Eastern Coalfields Limited Vs. State of Madhya Pradesh {(2003) 8 SCC 648} and has submitted that there is a specific provision in the PPAs for determination of compensation so as to restore the affected party to the same economic position and therefore, in the light of the judgment, the petitioner is entitled to carrying cost. The

relevant excerpts of the said judgement are extracted as under:

> "21. Interest is also payable in equity in certain circumstances. The rule in equity is that interest is payable even in the absence of any agreement or custom to that effect though subject, of course, to a contrary agreement (See Chitty on Contracts, 1999 Edn., Vol.II, Para 38-248 at p.712). Interest in equity has been held to be payable on the market rate even though the deed contains no mention of interest. Applicability of the rule to award interest in equity is attracted on the existence of a state of circumstances being established which justify the exercise of such equitable jurisdiction and such circumstances can be many.
>
> ……..
>
> 24. We are therefore of the opinion that in the absence of there being a prohibition either in law or in the contract entered into between the two parties, there is no reason as to why the Coalfields should not be compensated by payment of interest."

The respondents have submitted that the above decision has been distinguished by the Hon'ble Supreme Court in National Thermal Power Limited Vs. Madhya Pradesh State Electricity Board Limited {(2011) 15 SCC 580} wherein it has been held that no liability was payable by NTPC to the Electricity Boards after determination of the final tariff which was in excess of the provisional tariff charged by NTPC. The relevant excerpts of the judgement are extracted as under:

> "24. The counsel for the Electricity Boards laid stress on the judgment of this Court in South Eastern Coalfields Ltd. Vs. State of M.P. and others reported in [2003(8) SCC 648] wherein this Court had held that a party finally found to be entitled to a relief in terms of money, would be entitled to be compensated by the award of interest which would also be payable in equity. In this matter, the appellants were operating coal mines in the State of Madhya Pradesh. The Central Government enhanced the royalty payable on coal, and the State Government was entitled to recover the same from the appellant who would pass on the burden to their purchasers. The appellant, however, challenged the hike in royalty in the High Court of M.P. inititially an interim order was passed and subsequently the notification was quashed. On appeal, the order of the High Court was set-aside. Subsequently, the State Government claimed interest from the appellant at the rate of 24% per annum in regard to the period when the enhanced royalty was delayed. The appellant passed on this claim to their

consumers who challenged the same and succeeded in the High Court in reducing the interest from 24% to 12%. While dismissing the appeal filed by the appellant, this Court held that the interest would be payable even in equity and on the basis of the principle of restitution which is recognized in Section 144 of the Code of Civil Procedure.

25. In this connection, it is material to note that the claim in South Eastern Coalfields was essentially covered under Section 61 of the Sale of Goods Act, 1930, and the interest by way of damages was payable as per this statutory provision itself. The liability had been crystallized and the interest had become payable because of the failure to pay the amount as per the liability. Besides, there was nothing in the agreement between the parties to the contrary on the issue of grant of interest. In the present matter, we have the second proviso to Regulation 79 (2) of 1999(supra) which permitted the generating company to continue to change the existing tariff for such period as may be specified in the notification by the Commission, and the notifications permitted continuation of the existing tariff as on 31.3.2011, unit the final tariff was determined. There was no provision for payment of interest therein. The very fact the interest came to be provided subsequently by a notification under the Regulations of 2004 is also indicative of a contrary situation in the present matter, viz that interest was not payable earlier."

Hon'ble Supreme Court has noted that in South Eastern Coalfield case, the claim was essentially covered under the Sale of Goods Act, 1930 and interest by way of damages was payable as per the statutory provisions itself. The Hon'ble Supreme Court has further noted that in South Eastern Coalfield case, the liability was crystallised after the enhancement of royalty by the State Government and interest became payable because of failure to pay the amount as per the liability. The facts of present case are distinguishable from SECL case. In terms of the PPAs between the petitioner and Haryana Utilities, there is no provision in the PPAs for payment of carrying cost for the period from the date the Change in Law events came into force till the date of approval of the Change in Law events by the Commission. Moreover, the liability for payment of compensation for Change in Law events gets crystallised after approval by the

Commission and becomes payable. If there is delay in payment of the compensation on account of change in law by the respondents after determination by the Commission, then the interest is payable in terms of Article 11.8.3 of the PPAs. In our view, the judgement of the Hon'ble Supreme Court in the case South Eastern Coalfield is not applicable in the case of the petitioner.

104. The petitioner has relied upon the judgement of the Appellate Tribunal for Electricity dated 20.12.2012 in Appeal No. 150 of 2012 and other related appeals (SLS Power Limited Vs. Andhra Pradesh Electricity Regulatory Commission). In the said case, the Appellate Tribunal held as under:

> "The principle of carrying cost has been well established in the various judgments of the Tribunal. The carrying cost is the compensation for time value of money or the monies denied at the appropriate time and paid after a lapse of time. Therefore, the developers are entitled to interest on the differential amount due to them as a consequence of re-determination of tariff by the State Commission on the principles laid down in this judgment. We do not accept the contention of the licensees that they should not be penalized with interest. The carrying cost is not a penal charge if the interest rate is fixed according to commercial principles. It is only a compensation for the money denied at the appropriate time."

In the above case, the tariff was determined by the APERC which was subsequently directed by the Appellate Tribunal to be re-determined and in that context, the Appellate Tribunal directed that the developers are entitled to interest on the differential amount due to them as a consequence of re-determination of tariff by the State Commission on the principle laid down in the said judgment. The facts of the present case are different from the facts of the case in SLS Power Ltd., as there is no re-determination of tariff in the present case. The petitioner has also relied on the judgment of the Appellate Tribunal in Appeal No. 265, 266 and 267 of 2006 (North Delhi Power Ltd. Vs DERC). In

that case, the Appellate Tribunal noted that "MYT Regulations provide for a carrying cost and, therefore, the contention of the State Commission that MYT Regulations do not provide for carrying cost is not tenable." In the present case, there is neither any regulation nor there is any provision in the PPAs for granting carrying cost on the change of law events from the date of their actual occurrence till the date of raising the claims or invoices on the basis of the change in law events as approved by the Commission. The petitioner has further relied on the judgment of the Appellate Tribunal in Tata Power Co. Ltd. Vs. Maharashtra State Electricity Regulatory Commission. In the said judgement, the Appellate Tribunal has laid down certain principles for entitlement to carrying cost such as (a) where the expenditure is accepted but recovery is deferred e.g. interest on regulatory assets; (b) claim not approved within a reasonable time; and (c) disallowed by the State Commission but subsequently allowed by the Superior authority. The case of the petitioner is covered under none of the principles as noted above.

105. In view of the above discussion, the Commission is of the view that in the absence of provisions in the PPAs regarding carrying cost, the prayer of the petitioner to grant carrying cost on the principle of restitution from the date of occurrence of the Change in Law events till the date of raising of the claims or invoices cannot be allowed.

(XX) Mechanism of Payment of Change in Law Compensation

106. The compensation on account of change in law shall be recovered by the petitioner from the procurers as per the following mechanism: -

(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) The increase in royalty on coal, clean energy cess, excise duty on coal, National Mineral Exploration Trust, District Mineral Foundation and service tax (which also includes Swachh Bharat Cess) shall be computed based on actual subject to ceiling of 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. In case of reduction in royalty on coal, clean energy cess and excise duty on coal, the petitioner shall compensate the procurers on the basis of above principle.

(c) The compensation for customs duty payable on energy removed from SEZ to DTA would be Rs.0.0309/kWh on the scheduled energy to Haryana at ex-bus of the Mundra power plant for the month**.**

(d) 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 the Haryana during the year. The reconciliation statement duly certified by Auditor shall be kept in possession by the petitioner so that same could be produced on demand from Procurers/ beneficiaries.

(e) 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 13.2(b) of the PPA.

(f) 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 13.4.2 of PPA for the subsequent period as well.

Summary

107. 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:

Change in Law Event	Decision
Change in Rate of Royalty on Coal	Allowed
Levy of Central Excise Duty subject to directions in para 32 of the order	Allowed
Levy of Clean Energy Cess	Allowed
Levy of Customs Duty on energy removed from SEZ to DTA	Allowed
Increase in Busy Season Surcharge on transportation of coal	Not Allowed
Increase in Development Surcharge on transportation of coal	Not Allowed
Levy of Service Tax on transportation of coal	Allowed
Levy of Green Energy Cess in Gujarat	Liberty granted to approach after Hon`ble Supreme Court's Decision
Increase in Sizing Charges of coal	Not Allowed
Increase in Surface Transportation	Not Allowed

Change in Law Event	Decision
Change in pricing of coal from UHV to GCV basis	Not Allowed
Change in class from 140 to 150 for Railway freight for coal for trainload movement	Not Allowed
Levy of Minimum Alternate Tax on plants situated in SEZ	Not Allowed
Linking railway tariff revision with movement in cost of fuel	Not Allowed
Imposition of Swachh Bharat Cess	Allowed
Payment to National Mineral Exploration Trust	Allowed
Payment to District Mineral Foundation	Allowed
Installation of FGD as per Environmental clearance dated 20.5.2010 Auxiliary consumption due to FGD installation affecting capacity charges Additional operating expenditure on FGD	Not decided and liberty granted
Carrying cost	Not allowed

108. The present Petition is disposed of in terms of the above.

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